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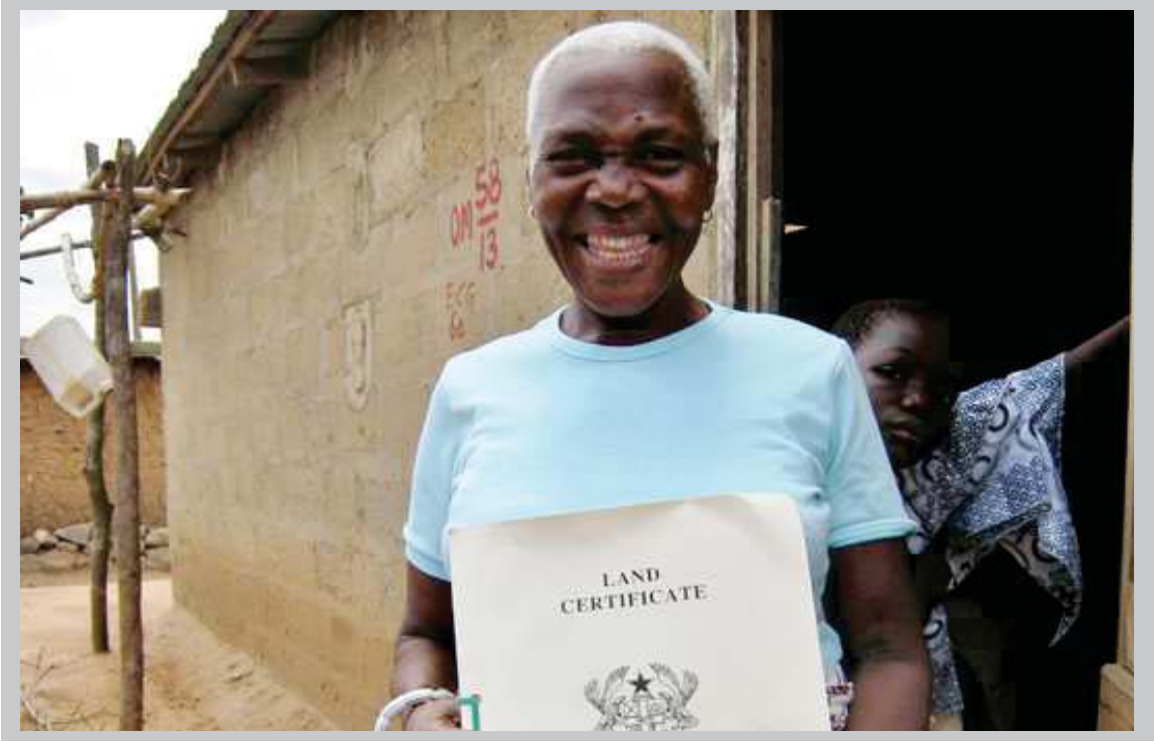

FINAL TRIP REPORT: GHANA LAND BILL ANALYSIS

**RESPECTFULLY SUBMITTED TO CHEMONICS,
GHANA FEED THE FUTURE
AGRICULTURE POLICY SUPPORT PROJECT**

**IN FULFILLMENT OF DELIVERABLE 2, SUB-248
UNDER AID-641-C-14-0001**

**BY LANDESA:
JENNIFER DUNCAN, BETH ROBERTS, MY-LAN DODD**

USAID
FROM THE AMERICAN PEOPLE

Landesa
Rural Development Institute

FINAL TRIP REPORT

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Cover photo: Comfort Davordzi holds the land title that was granted to her by officials in the Awutu Senya District of Ghana. The land title guarantees that she will enjoy secure rights to the land she farms. (Credit: Kelsey Jones-Casey / Landesa)

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ACRONYMS

AGRA	Alliance for a Green Revolution in Africa
APSP	Agriculture Policy Support Project
CLS	Customary Land Secretariat
COLANDEF	Community, Land and Development Foundation
FAO	Food and Agricultura Organization of the United Nations
FPIC	Free, Prior and Informed Consent
GCAP	Ghana Commercial Agricultural Project
GoG	Government of Ghana
IWAD	Integrated Water Management and Agricultural Development
KNUST	Kwame Nkrumah University of Science and Technology
NRCD	National Redemption Council Decree (NRCD)
LAP-1	Land Administration Project I
LAP II	Land Administration Project II
LGAF	Land Governance Assesment Framework
LRA	Land Registration Act
LSA	Land Sector Agency
LSLT	Large-scale Land Transactions
LSLBI	Large Scale Land-Based Investments
NGO	Non-Governmental Organization
NLP	National Land Policy
VGGT	Voluntary Guidelines Under Responsible Governance of Tenure

EXECUTIVE SUMMARY

The purpose of this consultancy was to provide support to the Government of Ghana (Land Administration Project—LAP II) in finalizing Draft Four of its Land Bill ("the Bill"), through offering perspective and information based on international best practices in land governance. To this end, the Lead Consultant worked with a team of people from Landesa to identify key issues in the Bill, as presented through background documents and discussions with the World Bank, and during Consultant's trip to Ghana from 30 May to 8 June, 2016.

The trip entailed meetings with members of the Core Drafting Group (a 6-member sub-set of the larger 22-person Land Bill Working Group), attendance at the Government's stakeholder consultations on the Bill in Tamale, two days of presentations to the Working Group in Accra, and interviews with COLANDEF (a leading land sector NGO in Ghana) and IWAD (a private sector land-based investor in Ghana). The Land Bill Working Group sessions on 6th and 7th June, 2016 provided an opportunity for the Consultant to present information on international best practices related to a number of thematic topics covered by the Bill. Primary topics of presentation, discussion and recommendation included the following:

1) Mitigating the risks of transaction-based registration/recording. Consultant discussed the risks of conveyance-based registration—in the absence of a systematic first registration—in that those who can't afford to acquire land or record/register what they already have may end up worse off and more vulnerable as land rights become formally recognized. This risk is indeed reflected in the functional reality of Customary Land Secretariat (CLS) operations in some parts of Ghana over the past decade: the CLSs in some areas charge relatively large amounts of money (upward of US$ 100) to record rights to a parcel of land, which has resulted in inequitable access to recording. While residential and commercial developers in growing township areas can afford to register their rights, small-scale farmers and other usufructuary rights holders cannot. The Group discussed the challenges related to systematic first registration/recording of land rights in Ghana, including both costs and political will among Traditional Authorities. Recommendations include seeking ways to reduce the costs of registration and recording rights to make these services more widely accessible, and to sensitize land rights holders as to the importance of registering/ recording their rights. Consultant provided information on low-cost registration systems in Rwanda and Ethiopia.

2) Addressing other concerns within the customary land rights framework. The Bill's treatment of customary land rights improved significantly in Draft Four. It could still be strengthened in a number of ways, however. The anti-discrimination provision in Clause 13 is ambiguous, suggesting that safeguards against discrimination would be subject to customary norms. This clause could be narrowed to ensure that constitutional safeguards against discrimination of protected classes apply even within customary systems. In Clause 20, the definition of "community" is unclear. At the request of the Working Group, Consultant provided comparative international information on how this term has been interpreted and applied in land law and practice. (Please see Annex B to this report.) Finally, the Bill makes

significant strides in defining the rights of usufructuary rights holders vis-à-vis allodial rights holders, by requiring that, prior to alienating usufructuary land rights, allodial rights holders must (1) have the consent of the usufructuary rights holders; and (2) provide compensation to the usufructuary, at a minimum of 25 percent of the value of the land. While these are important safeguards, it is recommended that the Working Group consider adjusting the "25 percent" upward to accurately reflect the value of the land to small-hold farmers, both as a source of livelihood and an intergenerational asset that confers economic stability and social status.

3) Enhancing transparency and accountability in land governance institutions. The Consultant noted that the Bill may not adequately address the historic and contemporary concerns of many stakeholders around improved transparency and accountability in land governance. Although the Bill does provide for penalties for officials who do not exercise professionalism in carrying out their duties, it falls short of addressing lack of transparency and corruption in a systematic way. Recommendations include mandating in the Bill (or requiring that this be included in forthcoming regulations) that all land sector agencies prominently and publicly post information about: (1) detailed steps necessary for any procedure (e.g., registration); (2) timelines for agency action in response to these steps; and (3) fees required.

4) More clearly articulating registration and recording options for land rights in Ghana. The Bill provides three different methods of registering and recording land rights in Ghana, but without making clear when each of these would apply, and what the relationship between the three types will be. It would be useful to add provisions to the Bill that would clarify the three types of registration/recording systems in Ghana: deed system, title system and customary recording system. The Consultant recommends adding to the Bill new provisions that would describe the legal effects of each system, the applicability of each system to different kinds of rights, and the relative weight of each type of registration/recording vis-à-vis the other types.

5) Expanding coverage for electronic registration and conveyancing. The Working Group expressed the need for information on electronic registration and conveyancing. Consultant provided the Group with extensive comparative information on both, based on international experience (see Annex B to this Report), and recommended that the Group add provisions to the Bill based on these comparative examples that will provide a more comprehensive and sustainable legal framework for electronic land administration systems.

6) Incorporating a more robust legal framework for Large-scale Land Transactions (LSLT). The provisions in the Bill related to LSLT are not comprehensive enough to address the key issues and challenges related to this subject matter in Ghana. The Consultant presented the Group with information about international best practices, as embedded in FAO's Voluntary Guidelines for Governance of Tenure and documents issued by the African Union's Land Policy Initiative. Consultant also provided written information to the Group, as requested, about the doctrine of Free, Prior and Informed Consent in international law and practice. (This information is included within Annex B to this report.) Recommendations include adding new provisions to the Bill to better frame and guide policy related to LSLT, and providing improved linkages to the government's Guidelines for Large-scale Land Transactions. An additional recommendation is to

reconsider the provision in the Bill that requires additional governmental scrutiny of any land transaction that is a minimum of 10 acres in size. The GoG will need to align the minimum size with that provided in the draft LSLT Guidelines (50 acres), and may want to consider a minimum size that varies in different parts of the country, depending on agricultural, socio-economic and tenure conditions.

7) Improving the compulsory acquisition sections of the Bill. Drafters have made significant improvements in Version Four of the Bill, as related to Compulsory Acquisition. However, several issues remain. First, the definition of "public purpose" is very broad, allowing the government to compulsorily take land from less efficient (and often poorer) rights holders for transfer to more efficient private sector users. The Consultant discussed the implications of this kind of broad authority on land rights security, particularly given the checkered history of public takings in Ghana, and recommended a narrower definition of "public purpose" that would reflect that found in the Constitution. Second, the Bill limits grounds for administrative appeal for Compulsory Acquisition to issues related to compensation. Expanding the scope of appeal to substantive matters, such as whether the acquisition was properly considered to be in the public interest, would help to ensure accountability and transparency. Third, the Bill does not require distribution of compensation to people within the household, which creates the risk that members of the household other than the person receiving payment (usually the male head of household) will not receive compensation. Fourth, in an issue closely related to compulsory acquisition, the Bill explicitly provides that informal occupants of public land have no rights to that land. This means that they would not be compensated upon eviction. This could be very problematic in Ghana, given the many conflicted claims of public land ownership and past takings. In many cases, customary groups have continued to occupy areas the government claims to have acquired decades ago. This provision in the Bill also runs contrary to international best practices, as espoused by the World Bank's Resettlement Policy. Recommendations include providing some form of limited compensable right to occupants of public lands. Finally, the Bill provides the State a number of procedural shortcuts for "temporary" occupation of land. However this temporary occupation may be for a lengthy period (up to 10 years and renewable to 20) and should be subject to the same procedural safeguards required for compulsory acquisition.

8) Defending and refining the Bill's coverage of women's land rights. One of the most significant improvements in Version Four of the Land Bill is the enhanced protection for spousal rights to land. The Bill requires that spouses' names be included when registering land acquired during marriage, and provides a presumption that any land acquired during a marriage by one spouse is co-owned by both spouses (even if only one name is registered). The Bill also requires spousal consent for transaction of any land acquired during a marriage. These provisions are very controversial in Ghana, and the Working Group requested additional information based on international best practices to support them in presentations to stakeholders and to Parliament. Consultant provided extensive information on this topic through an additional memo (attached to this report as Annex C). The Bill's coverage of women's land rights could be improved by adding specific guidance for spousal protections in polygamous marriage. Finally, the Bill should establish a clear compensable right to secondary uses of land, such as access to shea nuts, that are of high socio-economic value to women.

This report will first provide a brief description of the background to this consultancy, including a summary of the trip objectives, following with a description of the key issues discussed, as well as recommended options for the Working Group. Annex A provides a summary of recommendations. Annexes B and C contain much of the detailed information on comparative best practices provided to the Working Group, per requests from that Group during Consultant's stay in Ghana. The memoranda presented in these annexes were intended as a rapid, fairly informal means for the Consultant to respond to the Group's need for information quickly, so that it could be used in the Group's ongoing consultations on the Bill in June and July. Annex B comprises a memorandum from Consultant to the Group, with responses to specific requests from the group for information on: (1) definition of "community"; (2) low-cost comprehensive registration and titling systems in Rwanda and Ethiopia; (3) the doctrine of Free, Prior and Informed Consent (FPIC); and (4) electronic registration and conveyancing. Annex C contains a memorandum from the Consultant providing support for the spousal rights provisions in the Bill, as requested by the Group. Annex D contains a land investment case study based on the experience of the Integrated Water & Agricultural Development Ghana Ltd., and the Consultant's Power Point presentation to the Working Group comprises Annex E.

SECTION 1

BACKGROUND AND TRIP DESCRIPTION

The Land Bill in Ghana is the manifestation of reforms in the land sector that began with the implementation of the 1999 National Land Policy (NLP). Such reforms aim to address longstanding problems embedded in land sector activity and governance in Ghana, summarized in the NLP as follows:

> The policy seeks to address some of the fundamental problems associated with land management in the country. These include general indiscipline in the land market, characterised by land encroachments, multiple land sales, use of unapproved development schemes, haphazard development, indeterminate boundaries of customary-owned, resulting from lack of reliable maps and plans, compulsory acquisition by government of large tracts of land, which have not been utilised; a weak land administration system and conflicting land uses, such as, the activities of mining companies, which leave large tracts of land denuded as against farming, which is the mainstay of the rural economy, and the time-consuming land litigation, which have crowded out other cases in our courts.[1]

Since the adoption of the NLP, pressure on agricultural land in Ghana has markedly increased, particularly in areas of urban and township expansion, and large-scale commercial farm development. This has caused new stress on both customary and formal land governance systems, and has elevated tensions between different groups of land users in many parts of the country.

The Land Bill provides a critical opportunity to the Government of Ghana to address both historic and current challenges and issues in the land sector, with far-reaching repercussions on the nation's socio-economic development. The specific purpose of the Bill, according to the Lands Commission, is to "revise and consolidate the laws on land, with the view to harmonizing these laws to ensure sustainable land administration and management, effective land tenure and efficient surveying and mapping regimes and to provide for related matters."[2]

Landesa has engaged in land policy development in Ghana over the past several years. In 2013, Landesa worked with the Alliance for a Green Revolution in Africa (AGRA) and the Ghana Land Policy Action Node to develop and apply a risk assessment tool for land tenure security in Northern Region. Under the policy rubric of this project, Landesa also submitted detailed comments to LAP II and the GoG on Version Three of the Land Bill, based on Landesa's experience in Ghana and comparative experience in over 50 other countries in the world. In 2014, Landesa worked for the Ghana Commercial Agricultural Project (GCAP) to develop a Model Lease Agreement and Community/Investor Guidelines for large-scale land based

[1] Ministry of Land and Forestry. (1999). Foreward to the National Land Policy.
[2] Power Point Presesentation by the Core Group of the Land Bill Working Group, May 16, 2016.

investments. To this end, Landesa worked with a team from its US-based headquarters and with Ghanaian consultants, including Dr. John Bugri and Dr. Eric Yeboah from the Land Policy Department at Kwame Nkrumah University of Science and Technology (KNUST), to conduct field research in seven regions of Ghana, interviewing groups of farmers, local and national-level land sector officials, traditional authorities, investors, NGOs and others.

In June 2016, the USAID/ Ghana Feed the Future (Ft) Agriculture Policy Support Project (APSP), being implemented by Chemonics International, contracted Landesa to provide short-term technical assistance to the GoG's efforts to revise and finalize Draft Four of the Land Bill.

The contract provides the following substantive parameters for the Trip Report:

The Subcontractor will provide Jennifer Duncan as an expert consultant to advise the Ministry of Lands and Natural Resources in Accra, Ghana from on or about May 30, 2016 to on or about June 8, 2016. Following completion of this assignment, the Subcontractor will submit a draft trip report summarizing the work undertaken during the assignment, results of the assignment, and recommended next steps for the Land Administration Project in finalizing the draft of the land bill. The draft trip report will also include reference to international best practices and examples from the consultant's experience that would assist the Land Administration Project in finalizing the land bill.

Consultant submitted the draft trip report earlier in June, and incorporated feedback into this final version of the report.

Work undertaken during the Assignment included:

- Review of all background documents sent by GoG partners and otherwise collected by Landesa;
- Review and detailed mark-up of the Land Bill (Version Four);
- Meetings with Feed the Future Agriculture Policy Support Project leadership in Ghana (Walter Nuñez-Rodriguez, Chief of Party and Kwaku Owusu-Baah, Senior Policy Advisor);
- Meetings with members of the Government's Land Bill Working Group while in Ghana, and particularly with members of the Core Group (drafting team);
- Meetings with Nana Ama Yirrah of COLANDEF (leading land sector NGO) and Tom Durang, the Managing Director of Integrated Water & Agricultural Development Ghana Ltd;
- Travel with the GoG to Tamale and attendance at the northern area stakeholder consultation workshop on the Bill (31 May through 3 June);
- Presentation to the Working Group on 6-7 June (based on a Power Point Presentation, attached as Annex E)
- Rapid response to specific questions of the Working Group during the presentations and ensuing discussions (attached as Annexes B and C).

The Working Group was receptive to information presented by Consultant, and eager to learn more about specific areas as noted above. In some instances the Group agreed, during the presentation and discussion, to address specific recommendations through amendments to the Bill. A detailed description follows in the next section.

A final note: Many of our comments on the Bill overlap to some degree with comments recently submitted by the World Bank to the Working Group, in the form of in-country presentations and discussions, as well as a detailed mark-up of the Bill by Jonathan Lindsay. In our work we have endeavored to underline several of the Bank's recommendations, but also to focus on new issues that were not covered by the Bank, in order to maximize the usefulness of our contributions.

SECTION 2

KEY ISSUES AND RECOMMENDATIONS

1) RISKS OF TRANSACTION-BASED OR SPORADIC REGISTRATION AND RECORDING OF LAND RIGHTS.

Under the Bill, land rights would be registered (with deeds or titles) or recorded (within customary communities) sporadically, and usually in the context of transactions. However this approach to registering/recording land rights has proven to be inequitable both in other countries and in Ghana. From a global perspective, the high cost of land titling has forced many countries to establish a system of land titling on demand, and this has made land titles costlier and only available to the wealthy.[3] Therefore, there is substantial need for more low-cost, broad scale and egalitarian systems for land registration in low and middle-income countries.

In Ghana, concerns may be most acute within the system for customary recording of land. The experience of the Customary Land Secretariats (CLSs) to date has underlined risks associated with transaction-based recording. Based on Consultant's research in seven different regions of the country, CLSs often charge fees for recording that are upward of US$ 100, and prohibitively high for most small farmers and other traditional usufructuary rights holders. The CLSs have not generally attempted to record rights systematically within their jurisdictions, but rather attempt to record rights at the time of transaction.

The Bill provides a new legal basis for the CLSs, and assigns to them the role of taking an inventory of customary rights within their jurisdiction (see Clause 16[a-b]). But the costs of systematic, comprehensive inventorying or recording of customary rights, including usufructuary rights, would be prohibitive without some kind of a low-cost, highly efficient approach to customary recording.

The concern is that by establishing legal backing for the CLSs, but not providing a practical mechanism for recording rights systematically, CLSs will continue to record rights only based on transactions. This will create greater security for new investors (e.g., those who are investing in residential development in the expanding township areas). This is important, as it will likely continue to abate the problem with double sales, etc. that stifles investment. But it will not provide security to traditional low-income usufructuary rights holders such as small farmers. Most of these people will not be able to afford to have their rights recorded. Their rights will not only remain insecure, but they will become more so as demand for land goes up and chiefs continue to find high value in sales of farm land to developers and investors, who—unlike the farmers—will be able to record their rights. The Bill clarifies certain rights

[3]Bezu, Sosina and Holden, Stein. (2014). *Demand for Second-Stage Land Certification in Ethiopia: Evidence from Household Panel Data.* 194, internal citations omitted, available at: http://www.sciencedirect.com/science/article/pii/S0264837714001203

for usufructuary rights holders, but these new rights will be tenuous at best if they are not based on a recorded existing right. For example, it is not clear how a usufructuary rights holder would be able to assert their rights under Clause 48(19) (making alienation of any land by the allodial rights holder contingent on consent from and compensation to the relevant usufructuary rights holder[s]), if the rights of the usufructuaries are not recorded.

RECOMMENDATIONS:

- Clarify what it means for CLSs to "provide a catalogue of existing customary rights and interests in land" in Clause 16(b).
- Consider ways to significantly reduce costs of recording land parcels through CLSs, and to require in the law that fees by CLSs for recording remain low (e.g., at least not higher than the actual administrative costs required for recording). Models for reference include Rwanda, Ethiopia, and an innovative effort by the CLS in Wassa Akropong in Western Region, which started to systematically record rights using a low-cost method of grouping people into clusters by geographical area. The CLS grouped people into clusters by geographic area, mapped their land rights, document oral agreements, and delivered this in bulk to the Chief, thereby significantly decreasing costs of recording per household.[4]
- Mandate accessibility for registration to current customary rights holders (reduced fees, procedural safeguards, etc.).
- Provide safeguards for rights holders whose rights are not recorded, and add protections so that registration cannot be used as exclusive evidence of title that would deprive legitimate rights holders of their rights.

2) CONCERNS WITHIN THE CUSTOMARY LAND RIGHTS FRAMEWORK.

Draft Four of the Land Bill contains significant improvements over previous drafts in setting out a legal framework for customary land rights. Some of the tenure categories for customary land continue to be vague, however, and the Bill is highly oriented toward registration and conveyances of privately held land. However, the Consultant appreciates the delicate political balance drafters face in providing a clear legal framework for rights, on one hand, while respecting the autonomy of customary systems over land governance, on the other. Some overlap among customary rights categories is to be expected given the broad range of customary systems throughout the country. Also, drafters must be careful not to define customary rights so narrowly as to prevent or inhibit the natural evolution of customary rights over the course of time, so long as this does not come at the expense of those who are marginalized or vulnerable.

The Bill's treatment of customary rights could be strengthened in three specific ways. First, the anti-discrimination provision (Clause 13) needs to be tightened up if it is to have any real meaning.[5] As written, the Clause would not require customary authorities to comply with the Constitution (Article 17, containing an anti-

[4] Based on an interview with Nana Ama Yirrah, Founder of COLANDEF, in Accra on 30 June 2016.
[5] Clause 13 provides: A decision or practice in respect of land under customary tenure, whether the land is individually or communally held shall be in accordance with the customs,

discrimination mandate) if such discrimination was related to acquisition of interests in land. This exception would appear to undermine the purpose of the anti-discrimination clause in general, given that much of land governance within customary systems relates to the acquisition of land. It may also be considered unconstitutional.

Second, the Bill in Clause 20 provides a framework for customary communities to record areas reserved for common use. The utility of this clause is not immediately apparent. Is the purpose to motivate a more inclusive decision-making process around common areas by the "community"? If so, this is not clear in the clause. Additional clarification is needed on the definition of "community" and it what it means for a "community" to take the actions mentioned in the clause. The Working Group specifically requested international comparative information on how "community" is defined, which Consultant provided in the Memorandum included as Annex B to this report.

Third, the Bill provides in Clause 48(19)(b) that allodial title holders must compensate usufructuary rights holders at a minimum of 25 percent of the market value of the land. (Clause 48 also clarifies, in 19(b), that consent of the usufructuary rights holder is required before the allodial title holder may alienate the land.) While Clause 48(19)(b) sets out very important basic rights for usufructuaries, it also raises several concerns:

(1) The 25 percent amount seems far too low, given the lifelong loss of the productive value of the land upon which farm families depend. Increasingly in urban and township expansion areas, no additional land is available for allocation within the chieftancy/family land, so a family that loses its land may not be able to find any alternative way to farm.
(2) It is not clear whether this amount would be in place of, or in addition to, the allocation of a land plot in an alternative area within the chieftancy/family land. In some parts of the country, the Traditional Authorities customarily re-allocate land to a usufructuary when taking his/her farming plot for alternative use. This re-allocation is disruptive, and is often for a less-valuable parcel, that often requires further travel by the usufructuary. However, receiving new land of some kind is critical to the farmers. An important question is whether this provision might replace or undermine these types of traditional re-allocation practices. If so, the risks to women especially could be especially high: global evidence points to high risks to women and children associated with monetary compensation for farmland rights in the context of compulsory acquisition. The money is usually paid in lump sum to the head of the household, who is almost always a man, and there is no guarantee at all that any of this money will go toward the long-term benefit of the rest of the family.
(3) In a related point, some traditional authorities who take a usufructuary's farm land for the purpose of residential development have customarily allocated

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traditions and practices of the community concerned and a decision or practice which discriminates on grounds of

(a) gender, race, colour, religion, creed, and ethnic origin, *except as provided for under Customary Law in relation to acquisition of interests in land*, or
(b) social or economic status

in contravention of Article 17 of the Constitution is void. (Italics added.)

some portion of the new residential lots to the usufructuary. (For example, if 4-5 new residential plots will be built on the land, the Traditional Authority may give one of these to the usufructuary.) It is not clear whether the 25 percent minimum compensation value noted in this clause could be paid for in-kind, in such a fashion.

RECOMMENDATIONS:

- Delete the exception to anti-discrimination within customary systems for governance related to acquisition of lands in Clause 13(a).
- Clarify the purpose of Clause 20 on recording areas of common use, and the definition of "community" in the Bill.
- Consider raising the 25 percent minimum compensation value for usufructuary rights in Clause 48(19)(b). Evaluate the implications of this clause on possibly replacing traditional customary practices of compensating usufructuaries who lose land rights (e.g., replacement land or some equity share in new higher value use for the land).

3) ENHANCING TRANSPARENCY, ACCOUNTABILITY AND ACCESSIBILITY IN LAND GOVERNANCE INSTITUTIONS.[6]

The Land Bill seeks to "ensure sustainable land administration and management." Doing so will require directly addressing the primary concerns by stakeholders about past performance of land sector agencies, including lack of transparency, undue delays in service, demands for unofficial payments, and other forms of corruption. In order to encourage formal recordation/registration of existing land rights and the use of formal channels for transactions, which are vital to the creation of a sustainable system, land administration and management services must be accessible to the general population, including vulnerable groups. Complex, costly and inadequate land administration structures can frustrate investors and marginalize the poor or vulnerable by discouraging them from formalizing their rights.

While the Bill does provide for specific penalties for offenses by land sector officials (Clause 263), it could go much further in establishing a framework for transparent and accountable land sector services within public agencies. A more difficult question is how far the Bill can go in requiring safeguards within customary systems (e.g., for services provided by Customary Land Secretariats).

Cost is frequently cited as one of the primary constraints to land registration – it can create an insurmountable barrier for the poor, leading to unregistered transactions which can eventually compromise the integrity and effectiveness of land administration systems. Although informal fees drive up cost, formal fees are also an important factor. The cost of registration must be worth the benefit that comes with formalizing rights; if not, rights-holders are much more likely to participate in informal transactions. Formal fees should be kept low whenever possible in order to encourage recordation/formalization of rights and transactions and discourage informal transactions.

[6] This section excerpted in large part from Landesa's Commentary on Version Three of the Land Bill.

The Land Administration Project II has recognized the importance of this issue, as evidenced by the initiation of a review of all policies and legislation on fees and charges related to the land administration system in the country. A key objective of this review will be the recommendation of, "mechanisms to ensure that all land users (including women and other vulnerable groups) can afford access to land services, through a review of fee structures" (LAP II, 2013). The Bill should institutionalize such mechanisms, in part by limiting land administration fees. If possible, the fees may be subsidized by the State in order to drive down the cost to the public. Although the Bill imposes a limit on the fee for late registration, it does not put in place any limits on registration fees, survey fees, planning fees, valuation fees in cases of compulsory acquisition, and fees charged by the CLSs for services to the public.

Even where formal fees are minimized, there is a risk that informal fees will drive up the cost to such an extent that people abandon formal channels in favor of informal transactions. There are many fairly simple steps that can be taken to reduce corruption and limit informal costs associated with land administration. Requiring the posting of the official registration process and official fees prominently in land registration offices increases transparency and helps prevent individual officials from taking advantage of people's lack of awareness to inflate fees. Also, it should be required that receipts be issued at the time payment is made, and this requirement should be well-posted. Public lists of registration applications – which could include only the plots to be registered, in the interest of individual privacy – can also serve to limit opportunities for corruption by increasing transparency. Finally, performance standards or codes of conduct for public officials has been shown to improve service-delivery in many countries. Reviewing and consistently enforcing the current civil service code of ethics for land sector agency (LSA) officials would likely be effective.[7]

RECOMMENDATIONS:

- Require periodic implementation of the Land Governance Assessment Framework, a diagnostic tool developed by the World Bank to provide governments with an objective assessment of land governance in their countries, in order to monitor progress.[8]
- Consider adding a provision stating that fees associated with services to the public should not exceed the cost of doing service.
- Require the posting of official procedures and fees in all offices that provide services to the public.
- Consistently enforce the civil service code of ethics for state land sector officials who provide services to the public.

4) ARTICULATING REGISTRATION AND RECORDING OPTIONS FOR LAND RIGHTS IN GHANA.

[7] Bugri, John Tiah. (2012). *Final Report: Improving Land Sector Governance in Ghana. Implementation of the Land Governance Assessment Framework*. 182, available at: http://siteresources.worldbank.org/INTLGA/Resources/Ghana_Final_Report.pdf.

[8] Excerpted in large part from Duncan, Lufkin & Gaafar. (2013). *The Land Bill (Draft 3): Analysis and Policy Recommendations* (Report produced for the Land Access and Tenure Security Project), on file with Landesa.

The Land Bill provides for three different systems of land rights registration and recording in Ghana: title registration, deeds registration and customary land rights recording. However, the Bill does not reflect a clear vision or framework for how these registration/recording systems relate to one another. For example, it is not clear in the Bill that the titling system would only apply in particular titling districts, which causes confusion and overlap with deeds registration. The Bill does also not make explicit what the legal effects of rights recorded within customary systems will be relative to deeds or titles. (It appears that the first to register a title, and probably a deed, would win out over any less formally recorded right—but this needs to be made explicit if it is in fact the case.) It is also not clear whether customarily recorded rights can be transferred over time to formally registered deeds or titles. This version of the Bill contains some important improvements that help to bring deeds registration up to a par with title registration, requiring additional information, etc., which will eventually lend itself to a more efficient transfer of interests to a uniform title registration system.

RECOMMENDATIONS:

- Add an overarching provision specifying that there are three distinct systems for registration/recording in Ghana.
- Clarify the relationship between the three systems and rights registered under each. In particular, clarify *the* effects of recording a right with CLS, especially vis a vis a formal right.
- Provide clarification on whether CLS records will be merged with formal records, and how they will relate to them.

5) EXPANDING COVERAGE FOR ELECTRONIC REGISTRATION AND CONVEYANCING.

The provisions on electronic registration and conveyancing currently contained in the Bill provide an insufficient legal framework for the significant transition to digitalize land administration services. In response to the Working Group's request, Consultant provided significant additional information on this subject, included in Annex B to this Report. It did not seem appropriate to the Consultant to provide detailed recommendations for how to incorporate specific provisions to address electronic services at this time, due to the wide variety of models and approaches that should first be reviewed by the Working Group.

RECOMMENDATIONS:

- Review Annex B, pp. 36-42 for specific examples of e-registration and conveyancing in South Africa, Rwanda and the United Kingdom.
- Develop a legal framework for registration and conveyancing that covers both the submission of electronic documents and the authentication of these documents.
- Define the exact legal effects of an electronic conveyance (e.g., is it equivalent to a deed).
- Consider repeal of attestation requirements, as appropriate.

6) INCORPORATING A MORE ROBUST LEGAL FRAMEWORK FOR LARGE-SCALE LAND ACQUISITIONS.

The Bill could establish a much stronger and clearer framework for large-scale land based investment. Domestic frameworks relating to large-scale land based investment already exist, including the 1999 National Land Policy and the 2012 Lands Commission's Guidelines for Large Scale Land Transactions in Ghana, which the Commission has revised and is in the process of vetting. Drafters could integrate principles and perhaps key provisions of the revised Guidelines into the Bill to ensure that it harmonizes and therefore strengthens the current legal and policy framework for LSLT. The National Land Policy should be incorporated in the Bill through references to Free, Prior, and Informed Consent (FPIC) and other international standards.

The current draft of the Bill falls short of incorporating international best practices. The FAO's Voluntary Guidelines on Responsible Governance of Tenure,[9] the African Union's Guiding Principles on Large-Scale Land Based Investments,[10] and international guidance on FPIC all advocate for strong protections for communities and transparent processes in the context of acquisition by states and private actors. Provisions which specifically reference FPIC also apply to the recommendations that

REFERENCE TO FPIC AND OTHER PRINCIPLES FOR SOCIALLY RESPONSIBLE INVESTMENT IN THE LANDS COMMISSION'S REVISED GUIDELINES FOR LARGE SCALE LAND TRANSACTIONS IN GHANA

3.0 APPLICABILITY OF THE GUIDELINES

3.1 The Guidelines are applicable to land acquisitions of fifty (50) acres or 20.23 hectares or more for agriculture. Such acquisitions must take into consideration the underlisted conditions that, they are:

- **a. not in violation of human rights, particularly the rights of particularly the rights of women and other vulnerable groups;**
- **b. based on Free, Prior and Informed Consent (FPIC) of affected landowners and common land resource users;**
- **c. based on a thorough assessment of social, economic and environmental impacts, including the way they are gendered;**
- **d. based on transparent negotiations and contracts that specify clear and binding commitments about corporate social responsibilities, activities, employment and benefits-sharing between the investor and the communities; and**
- **e. based on consultative planning, independent oversight by a recognized body and meaningful participation by all stakeholders.**

[9] The FAO's 2012 Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security (endorsed by Ghana as member of UN General Assembly) incorporate FPIC principles and doctrine at Sections 3B.6, 9.9, and 12.7.
[10] Guiding Principles on Large Scale Land Based Investments in Africa. 13, available at: http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf

follow regarding compulsory acquisition. According to FPIC, a community's land cannot simply be compulsorily acquired by the government for large-scale land based investment. The government must negotiate with the community, seeking to garner its broad-based consent for the transaction and terms. The National Land Policy already includes a requirement for consultation with land owners and occupiers (NLP Section 4(3)(c)), and the Bill could align this commitment with international best practices. The revised Guidelines for Large Scale Land Transactions in Ghana likewise contain reference to FPIC, as referenced in the text box above.

The Bill needs to establish clearer institutional accountability mechanisms for land registration generally. This relates to LSLT in two ways. First, a clear and transparent process for screening investors, for which a single institution is accountable, would ensure that the interests of communities and investors alike are protected in the process, before the final stages of a transaction (registration) occur. Second, the current system of land registration in Ghana is a significant deterrent to land rights security, which hinders land-based investment (GCAP project interviews, on file with Consultant). Investor concerns include corruption and unofficial payments, unforeseen and numerous procedural steps that require visits to several different agencies and offices, lack of clarity about process and fees, and length of the registration process (which can extend up to seven years). The current version of the Bill does little to address these concerns. In addition, the LSLT Guidelines currently require investors to bear the entire cost of consultation, which inadequately addresses the widespread problem of corruption in LSAs. The Land Governance Assessment Framework report also found that communities were harmed when investors were not held accountable (LGAF at 9). Creating transparency for acquisition and registration processes will significantly reduce conflict and attract investment.

Neither the Bill nor the revised LSLT Guidelines in their current form sufficiently address these concerns. It is not sufficient to address these issues in the LSLT Guidelines, as they do not carry the force of law, and only apply to acquisitions of greater than 50 acres. Smaller-scale commercial investments would not be protected, and these investments are critical for encouraging domestic land-based investment

Finally, the mimimum size limit for triggering heightened scrutiny of a land-based transaction should be harmonized between the Bill (which currently provides for a 10 acre minimum) and the LSLT Guidelines (which currently provide for a 50 acre minimum). The Government may want to consider a minimum size that varies in different parts of the country, depending on agricultural, socio-economic and tenure conditions.

RECOMMENDATIONS:

- Incorporate provisions that reference existing domestic legal and policy framework.
- Incorporate reference to international best practices.
- Consider establishing a single institution responsible for administration of large-scale land based investments, and link the responsibilities of that institution to a transparent registration process.
- Consider adjusting the 10-acre minimum to account for different types of land and to harmonize the bill with the Guidelines for Large Scale Land Transactions in Ghana.

7) IMPROVING THE COMPULSORY ACQUISITION SECTIONS OF THE BILL.

Issues related to Compulsory Acquisition in the Bill pertain to (1) the State's power to compulsorily redistribute land from one private sector user to another, (2) the scope of appeals, (3) compensation practices and mechanisms, and (4) the State's power to "temporarily" occupy land.

The broad definition of "public purpose" in Clause 220 leaves room for the government to allocate land to private sector or public actors with little restriction, and is not counterbalanced by sufficient due process. Clause 220 reads:

> (1) The State may compulsorily acquire any land where the acquisition of that land is necessary
> (a) for a public purpose and in the interest of defence, public safety, public order, public morality, public health, town and country planning or resettlement; or
> (b) in order to secure the development or utilization of that land or other land in such a manner that promotes the public benefit.

Part (b) of Clause 220 arguably broadens the definition of "public purpose" beyond what was intended in the Constitution, which provides a definition very similar to that contained in Clause 220(a) of the Bill.[11] While this broad power may be valued as a route to economic growth, it runs contrary to internationally accepted definitions of public purpose, could undermine long term economic development by increasing levels of poverty among those displaced, and could lead to ongoing conflict between investors or agencies and the communities impacted by acquisition.[12] A narrowerer definition of "public purpose" that reflects the Constitution and international best practice is strongly recommended.

Administrative appeal for compulsory acquisition is currently limited to issues related to delay in compensation in Clause 248. However, since the Constitutional provision requiring compensation has often not been adhered to, and the purposes for which land has been acquired by the state have been an ongoing source of conflict, appeal provisions should be broader. The scope of appeal should include both due process and substantive matters, including whether the acquisition was properly considered to be in the public interest and the basis for or adequacy of resettlement offers. Including additional bases for and routes to appeal should be done in line with international standards.

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[11] Article 20 of the Constitution reads: "No property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied-

> **a.** the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit,.."

[12] FAO Acquisition. 6, available at: http://www.fao.org/3/a-i0506e.pdf

Clause 225 requires the government to establish an escrow account funded by a private investor who will be beneficiary/transferee of interests compulsorily acquired by the state. This clause underlines the assumption in the Bill that the government will acquire the land for the purpose of transferring it to a private investor. The Bill does not make clear that even if a private actor is involved in providing a public service,[13] compulsory acquisition is best used only for truly public purposes, such as roads, schools, or government offices. Requiring escrow accounts for compensation prior to government occupancy of the land would be appropriate to ensure prompt payment, and would be appropriate if the account were established by the government, using government funds. Investor-established escrow accounts for land that is already state owned are also international best practice, but should not be a mechanism for the state to use investor interest to justify acquisition.

The Bill does not currently provide for a mechanism to distribute compensation payments from a compulsory acquisition within the household. However compensating only the household head ignores the different ways women and men access and use land, and ignores the importance of food security, as women are frequently responsible for providing food for the household and will be disproportionately affected by resettlement. (perhaps in Clause 242) should thus make compensation explicitly due to all affected members of the household to ensure that the rights of women, youth, and other vulnerable groups are adequately protected.

The denial of any rights to compensation under Clause 223 by unlawful occupants of public land is contrary to international best practices and has the potential to incite conflict and deter investment.[14] There is legitimate concern that providing compensation to occupants of public land will incentivize squatters, but provisions could be crafted to limit new unlawful encroachment to a large extent. When land deemed by the government to be public land is leased out for investment, providing compensation for those who have historically occupied public lands has the following benefits:

(1) Avoiding litigation and violent conflict. Especially in the south, whole communities occupy lands that are claimed by the government to be public lands. Legal confusion about who officially owns the land is very high. The LGAF found that only 10% of the public land claimed in the Central Region had been paid for through compensation and was being occupied by the state.[15]

[13] FAO Acquisition. 11, available at: http://www.fao.org/3/a-i0506e.pdf

[14] Clause 223 reads: "Despite the provisions of the Limitation Act, 1972 (NRCD 54) and any other law, a person who unlawfully occupies public land does not acquire an interest in or right over that land by reason of the occupation." This issue does not strictly pertain to the discussion of Compulsory Acquisition, since it has to do with the treatment and compensation of people occupying what is already considered to be State-owned land. Authors have chosen to cover it within this section because that is where the Clause is located within the Bill and because of the close parallels with Compulsory Acquisition issues and concerns.

[15] LGAF. 229 reads: "…literature review on the legislative framework for expropriation was carried out and supported by a sample of 713 public land sites in the Central Region of Ghana that has been subject to a public lands inventory on a pilot basis under the Land Administration Project (LAP-1). The sample data revealed that a marginal 10% of lands expropriated are compensated for and the government currently occupies several sites without proper acquisition nor payment of compensation."

(2) Encouraging investment. Investors seek to avoid conflict, and unofficial occupants of investment areas may use protest when their livelihoods are threatened in the absence of clear legal recourse. Creating a legal framework for compensating those who have historically occupied the land would help to assure investors that the Government has a plan for addressing the occupancy issue.
(3) Increasing national food security. Offering livelihood replacement avoids increasing displaced communities' vulnerability.
(4) Aligning the Bill with international standards, including the World Bank Resettlement Policy, the Voluntary Guidelines, and the AU Guidelines.

Finally, Clause 258 grants broad powers to the State to temporarily occupy land held privately. This provision enables the government to side-step the due process provisions in the compulsory acquisition process, for uses up to 10 years (renewable to 20 years). This is a very long time period, and should be considered effectively a permanent takings of land. It should thus be subject to the same appeal, public consultation, and notice provisions established for compulsory acquisition, or processes and procedures should be added to clarify the distinction between temporary occupation and compulsory acquisition.

RECOMMENDATIONS:

- Define "public purpose" in accordance with comparative best practices, and in closer alignment with the Constitution. Consider deleting Clause 220(b).
- Strengthen due process in administrative appeals by broadening to include the purpose of the acquisition and resettlement as well as compensation.
- Require compensation of all members of all members (or at least adults) within a household.
- Compensate unofficial occupants of public land (within limits and with a focus on livelihood replacement).
- Revise the sections on temporary occupation in Clause 258 et seq. to increase safeguards and/or significantly reduce the amount of time allowable for a "temporary" occupation.

8) DEFENDING AND REFINING THE BILL'S COVERAGE OF WOMEN'S LAND RIGHTS.

Draft Four of the Bill contains significant improvements on protection of women's land rights relative to previous drafts. These come primarily in the form of increased safeguards for spouses in the context of land acquired during a marriage. The Bill requires that spouses' names be included when registering land acquired during marriage, and provides a presumption that any land acquired during a marriage by one spouse is co-owned by both spouses (even if only one name is registered). The Bill also requires spousal consent for transaction of any land acquired during a marriage. The Consultant recognizes that these provisions are controversial in Ghana, and at the request of the Working Group has provided extensive information on international evidence, practices and standards related to spousal land rights (contained in Annex C to this report). In addition, the following refinements to the Bill would strengthen gender equity and women's rights to land.

First, the clauses related to spousal rights do not provide direction for the context of polygamous marriage, which is common in Ghana. In Clause 36, for example, it is unclear whether the spousal registration requirements for land acquired during marriage would apply to one wife or to all wives. Similarily, in Clause 45 it is not clear whether one wife would need to provide consent to a conveyance of land acquired during a marriage, or whether all wives must do so. Without further specification, these provisions will cause high levels of confusion and conflict in implementation. Drafters could refer to the Property Rights of Spouses Bill, 2013, for guidance.[16]

Second, the Bill could further clarify the nature of the consequence if a conveyance is made without the requisite spousal consent. Will the transaction be voided? (In which case the burden falls largely on the transferee, whose only option is then to hold the transferor liable for damages, under clause 70.) Or would the transaction stand but the transferring spouse owe damages to the non-consenting spouse? (In which case this is very hard to enforce.) Or would the spouse rather need to seek indemnity against the Registrar, if some negligence could be proved as to verification of the transacting spouse's marital status?

In a related point, the Bill could provide further detail on verification of marital status (by either providing for this directly in the Bill or mandating that this be addressed in regulations). In the Bill as it stands, it is not clear how the Registrar and/or transferee would know and verify the marital status of the conveying party. In Consultant's experience in other countries, registration fraud related to spousal consent requirements is very common, and regulations/procedures must be crafted carefully to avoid this.

The Bill does not adequately provide safeguards for the loss of access to economic tree nuts (e.g., shea nuts) and other land-based resources that are of high socio-economic value to women, when this access is lost through a compulsory acquisition or a large-scale land acquisition. These resources often exist in the common areas owned by customary communities. Loss of access can have important negative consequences to women. Yet the law does not establish a compensable right to these kinds of "secondary" uses or customary access points. Tom Durang, Managing Director of the Integrated Water & Agricultural Development Ghana Ltd., a land-based investment in Northern Region, pointed to the need for legal clarity around this point in his interview with Consultant. (Please see Annex D to this report.) Such clarity could be provided for within the framework of Clause 20 (common areas), but should also be incorporated into the Bill's coverage of LSLT and compulsory

[16] The Property Rights of Spouses Bill, 2013, provides in Section 20:

(1) When a husband has more than one wife in a polygamous marriage, the ownership of the property shall be determined as follows:
(a) joint property acquired during the first marriage and before the second marriage was contracted is owned by the husband and first wife; and
(b) any joint property acquired after the second marriage is owned by the husband and the co-wives and the same principle is applicable to a subsequent marriage.

(2) Despite section 1(b), where it is clear either through agreement or the conduct of the parties of the polygamous marriage that each has separate matrimonial property, each wife owns that separate matrimonial property separately without the inclusion of the other wives.

acquisition. If the Bill at a minimum establishes the compensable right, details could also be provided for in forthcoming guidelines and regulations.

RECOMMENDATIONS:

- Provide additional details on spousal land rights in the context of polygamy, with possible reference to the Spousal Rights to Property Bill, 2013, for guidance.
- Provide additional details on verification of marital status upon registration or conveyance of land rights.
- In the context of valuing land lost for compulsory acquisition or large-scale land transactions, seek ways to capture and incorporate the value of secondary use rights to land-based resources (such as shea nuts) that are of high socio-economic value to women.
- Refer to Annex C for information in support of the Bill's current treatment of spousal rights.

ANNEX A. SUMMARY OF RECOMMENDATIONS

1) Risks of transaction-based or sporadic registration and recording of land rights

- Clarify what it means for CLSs to "provide a catalogue of existing customary rights and interests in land" in Clause 16(b).
- Consider ways to significantly reduce costs of recording land parcels through CLSs, and to require in the law that fees by CLSs for recording remain low (e.g., at least not higher than the actual administrative costs required for recording). Models for reference include Rwanda, Ethiopia, and an innovative effort by the CLS in Ulassa Akropong in Western Region, which started to systematically record rights using a low-cost method of grouping people into clusters by geographical area. The CLS grouped people into clusters by geographic area, mapped their land rights, document oral agreements, and delivered this in bulk to the Chief, thereby significantly decreasing costs of recording per household.
- Mandate accessibility for registration to current customary rights holders (reduced fees, procedural safeguards, etc.).
- Provide safeguards for rights holders whose rights are not recorded to protect from registration as exclusive evidence of title being used to deprive legitimate rights holders of their rights.

2) Concerns within the customary land rights framework

- Delete the exception to anti-discrimination within customary systems for governance related to acquisition of lands in Clause 13(a).
- Clarify the purpose of Clause 20 on recording areas of common use, and the definition of "community" in the Bill.
- Consider raising the 25 percent minimum compensation value for usufructuary rights in Clause 48(19)(b). Consider the implications of this clause on possibly replacing traditional customary practices of compensating usufructuaries who lose land rights (e.g., replacement land or some equity share in new higher value use for the land).

3) Enhancing transparency, accountability and accessibility in land governance institutions.[1]

- Require periodic implementation of the Land Governance Assessment Framework, a diagnostic tool developed by the World Bank to provide governments with an objective assessment of land governance in their countries, in order to monitor progress.[2]
- Consider adding a provision stating that fees associated with services to the public should not exceed the cost of doing service.

[1] This section excerpted in large part from Landesa's Commentary on Version Three of the Land Bill.
[2] From Landesa's commentary on Version Three of the Land Bill.

- Require the posting of official procedures and fees in all offices that provide services to the public.
- Consistently enforce the civil service code of ethics for state land sector officials who provide services to the public.

4**) Articulating registration and recording options for land rights in Ghana.**

- Add an overarching provision specifying that there are three distinct systems for registration/recording in Ghana.
- Clarify the relationship between the three systems and rights registered under each. In particular, clarify *the* effects of recording a right with CLS, especially vis a vis a formal right.
- Provide clarification on whether CLS records will be merged with formal records, and how they will relate to them.

5) Expanding coverage for electronic registration and conveyancing.

- Review Annex B, pp. 34-41 for specific examples of e-registration and conveyancing in South Africa, Rwanda and the UK.
- Develop a legal framework for registration and conveyancing that covers both the submission of electronic documents and the authentication of these documents.
- Define the exact legal effects of an electronic conveyance (e.g., is it equivalent to a deed).
- Consider repeal of attestation requirements, as appropriate.

6) Incorporating a more robust legal framework for Large-scale Land Acquisitions.

- Incorporate provisions that reference existing domestic legal and policy framework.
- Incorporate reference to international best practices.
- Consider establishing a single institution responsible for administration of LSLA, and link the responsibilities of that institution to a transparent registration process.
- Adjust the 10-acre minimum to account for different types of land and to harmonize the bill with the LSLA guidelines.

7) Improving the compulsory acquisition sections of the Bill.

- Define "public purpose" in accordance with comparative best practices, and in closer alignment with the Constitution. Consider deleting Clause 220(b).
- Strengthen due process in administrative appeals by broadening to include the purpose of the acquisition and resettlement as well as compensation.
- Require compensation of all members of all members (or at least adults) within a household.
- Compensate unofficial occupants of public land (within limits and with a focus on livelihood replacement).
- Revise the sections on temporary occupation in Clause 258 et seq. to increase safeguards and/or significantly reduce the amount of time allowable for a "temporary" occupation.

8) Defending and refining the Bill's coverage of women's land rights

- Provide additional details on spousal land rights in the context of polygamy.
- Provide additional details on verification of marital status upon registration or conveyance of land rights.
- In the context of valuing land lost for compulsory acquisition or large-scale land transactions, seek ways to capture and incorporate the value of secondary use rights to land-based resources (such as shea nuts) that are of high socio-economic value to women.
- Refer to Annex C for information in support of the Bill's current treatment of spousal rights.

ANNEX B. LANDESA MEMORANDUM TO WORKING GROUP ON 7 JUNE 2016:SUPPLEMENTAL INFORMATION REQUESTED BY WORKING GROUP MEMBERS AT 6 JUNE MEETING

Date: **7 June 2016**

To: **Ghana Land Administration Project and Land Bill Working Group**

From: **Landesa**
Jennifer Duncan (jend@landesa.org)
My-Lan Dodd (myland@landesa.org)
Beth Roberts (bethr@landesa.org)

Re: **Supplemental information requested by Working Group members at 6 June meeting**

This memorandum responds to the request to provide information and comparative examples on the following subject matter:

1) Legal definition of "community" in other countries, as pertains to land law.
2) Low-cost land registration programmes in Rwanda and Ethiopia, including specific information on geo-physical data requirements and site plans
3) Free Prior and Informed Consent (FPIC) guidelines in international law and practice, with specific focus on "consent" requirements
4) More detailed information on e-registration and e-conveyancing in international practice

The memorandum is not offered as a final deliverable (report) for Landesa's consultancy, but rather as a way to respond quickly and somewhat informally to the Working Group's questions arising in the 6 June meeting with Landesa.

PART 1: DEFINITION OF COMMUNITY[1]

I. Examples of laws specifying which groups will be considered "community"

[1] This Part excerpted in whole from Michael Lufkin and My-Lan Dodd (2013) Legislating Community Land Rights: A Technical Guide fro Drafting Community Land Legislation Based on Comparative Review of International Experience and Best Practices (Produced for the SECURE Project, USAID), at 44 et seq.

Southern Sudan. For instance, Southern Sudan's Land Policy Draft specifies that the Community Land Act will safeguard the principle of community land tenure, ensuring that "all qualified citizens who are bona fide members of families, clans or communities that hold land in trust for their members continue to have access to land as a fundamental right of their membership in the group or community" (GoSS 2011, Sec. 4.8). Southern Sudan's Land Act formalizes this by specifying that groups at the center of the "community tenure system" can be "a family, clan or a designated community leader" (GoSS 2009, Sec. 4).

Benin. Similarly, in Benin, "The investigation and certification [under the Law On the Regime of Rural Landholding]…is explicitly geared to include groups, communities, and especially family rights (See Arts. 3 & 5)" (Alden Wily 2012b, 4).

Uganda. In Uganda, the Land Act designates "communities" as those with indigenous affiliation enjoying communal land tenure. The law states, "'community' means an indigenous community of Uganda as provided for in the Third Schedule to the Constitution, or any clan or sub-clan of any such indigenous community communally occupying, using or managing land" (GoU 1998, Sec. 2).

II. Examples of laws defining "community" as holding common interests and shared rules

Liberia. An example definition of "community" that provides parameters based on both common interests and possible groups can be found in Liberia's Community Rights Law with Respect to Forest Lands, 2009. It defines "community" as "A self-identified and publicly or widely-recognized coherent social group or groups, who share common customs and traditions, irrespective of administrative and social sub-divisions, residing in a particular area of land over which members exercise jurisdiction, communally by agreement, custom, or law. A community may thus be a single village or town, or a group of villages or towns, or chiefdom" (Republic of Liberia [RoL] 2009, Sec. 1.3).

BOX 4.2: PAPUA GUINEA'S LAND GROUPS INCORPORATION ACT 1974

(3) Recognition shall not be refused to a group simply because–
(*a*) the members are part only of a customary group or are members of another incorporated land group; or
(*b*) the group includes persons who are not members of the primary customary group, if the Registrar is satisfied that those persons regard themselves, and are regarded by the others, as bound by the relevant customs of the primary customary group; or
(*c*) the group is made up of members of various customary groups, if the Registrar is satisfied that the group possesses common interests and coherence independently of the proposed recognition, and share or are prepared to share common customs, or a combination of those circumstances (Sec. 5).

Papua New Guinea. Papua New Guinea's Land Groups Incorporation Act, 1974 does not specify the type of groupings that make up a community, but rather recognizes legitimate groups as those who share—prior to the enactment of the law—common interest and a customary social arrangement. Specifically, a "community" is recognized as a community land group if the Registrar is satisfied that "(a) the member groups possess common interests and coherence independently of the proposed recognition, and share or are prepared to share

common customs; and (b) the association between the groups represent a customary form of organization" (Government of Papua New Guinea [GoPNG] 1974, Sec. 5(5)). The Act also stipulates when the Registrar shall refuse recognition of the community, namely, if he "is satisfied that the group characteristics are so temporary, evanescent or doubtful that the group does not have a corporate nature" (Ibid, Art. 5(4)). (See Box 4.2 for additional provisions regulating the integrity of land groups.)

South Africa. Similar to Papua New Guinea's law, South Africa's CLRA, 2004, defines community on the basis of shared land tenure rules. The law states that, "'community' means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group" (GoSS 2004, Sec. 1). However, as compared to Papua New Guinea, there are less quality assurance provisions to ensure the integrity of the communities recognized.

Interestingly, South Africa provides a good case study on the challenges of defining community in law and realizing this in practice. For instance, it has been observed that de facto rights to land derive not from "shared rules" but from established occupation and land use, and acceptance of this by neighbors. Further, "the nested characteristics of communal land rights within a hierarchy of neighborhoods, sub-villages, villages, wards and chieftainships makes the definition of community intrinsically difficult" (Kepe 1998).
Moreover, government and tribal authorities interpreted the CLRA definition of "community" to mean conglomerations of villages and wards with populations of ten and twenty thousand covered by Apartheid-era delineations (Cousins 2009, 13-14). As such, local communities aggregated under these "communities" fell "under the jurisdiction of chiefs and tribal authorities that they had no previous connection to, and whose authority they now contest, is not acknowledged" (Ibid). These discrepancies led the South African Constitutional Court to declare the CLRA unconstitutional in May 2010 (Rural Women's Movement 2010).

III "Community" Defined in the Context of Local Land-Based Interests

Mozambique and Southern Sudan. As a counterpoint, in Mozambique (Land Law, 1997) and Southern Sudan (Land Act, 2009), legal provisions not only specify sub-local groupings and common land-based interest of the community, but also limit legitimate communities to jurisdictions that are local or sub-local. Mozambique's law defines community as a "*local* community" which is composed of "a grouping of families and individuals, living in a territorial area that is at the level of a locality or smaller, which seeks to safeguard their common interests through the protection of areas for habitation or agricultural, whether cultivated or in lying fallow, forests, places of cultural importance, pastures, water sources and areas for expansion" (RoMZ 1997, Art. 1(1), emphasis added). Southern Sudan also uses this same definition of local community (See GoSS Land Act 2009, Sec. 4).

PART 2: LOW-COST REGISTRATION PROGRAMMES IN RWANDA AND ETHIOPIA

I. Framing the issue

The high cost of land titling has forced many countries to establish a system of land titling on demand, and this has made land titles costlier and only available to the wealthy. (Benjaminsen et al., 2009; Besley and Burgess, 2000; Cotula et al., 2004; Deininger, 2003). Therefore, there is substantial need for more low-cost, broad scale and egalitarian systems for land registration in low-income countries. In Honduras, the cost of land titling was estimated at 600 US$ per title (Lopez, 1996), while in Madagascar it has been estimated at 150 US$ per household under the conventional system of titling on demand (Jacoby and Minten, 2007). Burns et al. (2007) assessed the variation in costs across numerous countries and found average costs of between 20 and 55 US$ per parcel. Ayalew et al. (2011) provide an estimate of the costs of hiring private surveyors for titling on demand for urban land owners in Dar es Salaam, Tanzania of approximately 350 US$."(Bezu & Holden 2014, 194).

Rwanda is at the lower end of the range. In 2015, all 10.67 million land parcels were demarcated and entered through the Land Tenure Regularization (LTR) and entered in the land administration information system (LAIS) database. . . .These outcomes were achieved at a cost of US$65 per registered lease. (Hilhorst & Meunier 2015, 10).

The Ethiopian first stage land registration and certification system lies" at the very low end; "the cost of registration and certification was estimated to be approximately 1 US$ per farm plot or 3.5 US$ per household (Deininger et al., 2008)." (Bezu & Holden 2014, 194).

II. Comparative examples from Africa

A. Rwanda.

Background. "Rwanda is the only country in Africa that has succeeded in documenting all rights to land. In 2015, all 10.67 million land parcels were demarcated and entered through the Land Tenure Regularization (LTR) and entered in the land administration information system (LAIS) database. . . . Of these, 87 percent (9.1 million parcels) have full information on claimants. . . . These outcomes were achieved at a cost of US$65 per registered lease. As a result, Rwanda is ranked 12th globally on the "registering property" indicator of the World Bank's Doing Business index . . ." (Hilhorst & Meunier 2015, 10).

"The LTR achievement is attributable to 15 years of dedicated reform efforts, which started with a comprehensive review of Rwanda's policy legal and institutional framework, now regularly updated" (Hilhorst & Meunier 2015, 10).

"Following passage of the 2005 Organic Land Law, Rwanda embarked on an ambitious process to adjudicate and subsequently register rights to 10.5 million urban and rural land parcels in a participatory and cost-effective (US$6 per parcel) process over a period of three years. Success was contingent on" several factors, including " *a carefully crafted policy and legal framework that was constantly adjusted in light of*

new evidence including from contemporaneous evaluation . . ." (Hilhorst & Meunier 2015, 7)

Rwanda's Organic Land Law. "The OLL explicitly recognized customarily acquired land, but also makes compulsory first-time registration and recording of follow-up transfers. Land registration thus became mandatory, which required setting up a nationwide land registration system to enable the formalization of customary rights, the legal foundation for the LTR program." The OLL "established a unified legal and administrative tenure system and a national cadastral system, linked to a registry that records and guarantees the integrity of subsequent transactions." (Hilhorst & Meunier 2015, 12)

KEY LEGAL ASPECTS	RWANDA'S ORGANIC LAND LAW
Land law certifies land allocation or lease by issuing a certificate approving the land registration	Article 26: Certifying that the land has been allocated or leased on sustainable basis shall be indicated by a certificate approving the registration of land issued by registrar of land authentic deeds. The structure, powers and functioning of the registrar of land authentic deeds are determined by a Presidential order
Section 4: Land Registration	
Land law makes land registration mandatory.	Article 30: Registration of land a person owns is obligatory. The order of the Minister having Land in his or her attributions specifies the procedures through which land registration is carried out.
Land laws provides for the institutional capacity for systemic first registration by establishing decentralized government offices that are responsible for land registration.	Article 31: Without prejudice to specific laws relating to the exploitation and management of land in boundaries of Towns or Municipalities, there is hereby established a land bureau at the level of every district, town or municipality responsible for registration of land. An employee called the Land Officer shall direct the land bureau. The Land Officer shall keep land registers and issues certificates approving ownership of land. Regarding land issues, he or she holds the power of the public notary and in regard to administration, he or she is supervised by administration of town, municipality or district in which the land he or she is responsible to register is located. The structure of the registers mentioned in paragraph 3 of this article as well as other responsibilities and functioning of the land bureau are determined by the order of the Minister having Land in his or her attributions.
Land law defines what information shall be included in land certificates.l	Article 32: The following certificates shall accompany the letter of application to certify landlordship: 1° a detailed identity of the applicant, and of his or her spouse if married under the regime of community of property ; 2° brief description of the land, indicating particularly the area, where the land is located with reference to well known landmarks like roads, rivers, neighbours sharing boundaries ;

KEY LEGAL ASPECTS	RWANDA'S ORGANIC LAND LAW
	3° Any document certifying that the applicant is the person for whom the certificate is being sought, such as a certificate from the authorities, a certificate delivered to him or her by competent authorities at the time he or she was given the land or an official copy of a court's final decision.

Implementation of Land Registration Program in Rwanda

"The government's meager financial and human resources led to the selection of low-cost options that allowed working at scale. The government moved away from the conventional cadaster survey approach and opted to use general boundary principles and high-resolution aerial orthophotos to identify and mark parcels. Other innovations were to involve the community in adjudication and dispute mediation "and to work with para-surveyors (PSs). Rwanda also decided to digitalize all data and develop a central land information system." (Hilhorst & Meunier 2015, 12)

"The evaluation results [of the registration pilots] suggested that the LTR addressed key constraints to environmental protection, agricultural development, and female empowerment in Rwanda. It concluded that the program's positive impacts could be enhanced or potentially negative ones avoided by addressing areas where policy was unclear, ambiguous, or at variance with practice on the ground and by carefully and continuously monitoring performance in high-risk areas. Prominent among these areas were:

- rights of women who are not legally married;
- unaffordable fees to register subsequent transactions; and
- subdivision restrictions that the majority of landholders are unable to comply with.

The government immediately addressed the issue of informal marriage in the context of the LTR and successfully adjusted the LTR procedure (Ali et al. 2011)." (Hilhorst & Meunier 2015, 13).

Additionally, following on from the pilots, ministerial orders were developed, and then subsequently officially adopted. Specifically, Ministerial Order N° 002/2008 of 01/04/2008 determined the modalities of land Registration. From this manuals were developed to "describe[] in detail the procedures for implementation of the LTR by mobile teams in campaign-style . . . and were further enriched by extensive consultation, discussion, and debate with key stakeholders. (Hilhorst & Meunier 2015, 13).

B. Ethiopia's Low Cost Land Certification

- Deininger, Augustinus, Enemark, Munro-Faure, Innovations in Land Rights Recognition, Administration, and Governance, 2010: See Section 4.2 "Gender, Low-Cost Land Certification, and Land Rental Market Participation in Ethiopia, starting on page 149

- Deininger, Implementing Low-Cost Rural Land Certification: The Case of Ethiopia, 2008.
- Bezu & Holden, Demand for second-stage land certification in Ethiopia: Evidence from household panel data, 2014).

III. What kind of survey map/ site plan/ spatial or physical information is required?

Rwanda.

- "***Cell index map* and *field sheet* production**. *The cell boundary dataset is taken from the National Institute of Statistics of Rwanda (NISR) and overlaid onto the orthophoto image*. The Field Manager (FM) then walks the cell boundary with the Cell Executive Secretary. If necessary, the boundary is corrected. *Next, numbered rectangular polygons are arranged to cover the entire cell area with an overlap of 5 percent. Open-source software packages are used for batch printing of hard-copy maps from the orthophotos to make it easier for people to identify houses and pertinent features.*" (Hilhorst & Meunier 2015, 14).
- "**Demarcation and identification of disputed parcels**. The PS [trained para-surveyors] traces the parcel boundary on the field sheet, walking around the parcel with the claimant, neighbors, and the village leader. No boundary markers are placed. A unique parcel number (UPI) is given and annotated. The claimant then gets a Demarcation Receipt and is instructed to take it immediately to the Adjudication Committee to register a claim. This is the first occasion to pay the registration fee of RF 1,000 (RF 5,000 in Kigali). The boundary of the disputed parcel is demarcated and marked on the field sheet and referred to the Adjudication Committee, the village leader, or a special mediator for resolution. Disputes that are unresolved are entered into the dispute register and the parties are referred to a mediator or a court." (Id.).
- "**Data entry and checking.** Data from the claims register, dispute register, *field sheets*, claim receipt books, and dispute receipt books are entered sector by sector into the Land Tenure Regularisation Support System (LTRSS) database at the Zonal Office and checked for plausibility. (Id.).
- "**Parcel digitization** (parallel to step [above]). *Field sheets are scanned and then georeferenced* (in QGIS, another open-source software). Heads-up digitization of all parcel boundaries follows under their UPI and calculation of the area in m^2. Finally, a cell map is printed, with villages color-coded and parcels denoted by their UPI. (Id.).
- "**Objections and corrections (O&C).** O&C starts in all cells of a sector at the same time under the responsibility of the FM and lasts two weeks. All claimants can inspect the *cell maps* and their data for errors and omissions or dispute claims made by others. If necessary, changes can be made of every data point collected. The adjudication committee oversees this process." (Id.).
- "**Post-O&C parcel correction in the GIS, cadastral extract generation.** With all geometric data now corrected and confirmed, *an extract is generated for each parcel, showing the parcel and its adjacent neighbors*, with the UPI. (Id. At 15).

Ethiopia.

Legal Context:

- Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No 456/2005 (2005).
    - 6. Rural land Measurement, Registration and Holding Certificate. (1) The sizes of rural lands under the holdings of private persons, communities, governmental and non-governmental organizations shall be measured as appropriate using cultural and modern measurement equipment; their land use and level of fertility shall be registered as well in the data base center by the competent authorities established at all levels. (2) *Rural land holdings* described under Sub-Article 1 of this Article *shall be measured by the competent authority and shall be given cadastral maps showing their boundaries*. (3) Any holder of rural land shall be given holding certificate to be prepared by the competent authority and that indicates *size of the land, land use type and cover*, level of fertility and boarders, as well as the obligation and right of the holder.

Implementation Context:

- Ethiopia has implemented one of the largest, fastest and least expensive land registration and certification reforms in Africa. While there is evidence that this 'first-stage' land registration has had positive effects in terms of increased investment, land productivity and land rental market activities, the government is now piloting another round of land registration and certification that involves technically advanced land survey methods and computer registration. This 'second-stage' land registration differs from the registration system employed in the first round that used field markings in conjunction with neighbors' recollections to identify plot borders. (Bezu & Holden 2014, 193).[2]
- **First round of piloting.** "[T]he broad-scale first-stage land registration and certification involved the registration and demarcation of land plots using simple local technologies that required little training. The main sources for determining plot boundaries were field markings, in conjunction with the memories of the neighbors whose farm plots border those owned by the households in question. Measuring tapes and ropes were used to measure the farm plots. While the initial cost of this registration was extremely low (approximately 1 US$ per farm plot or less), its impact in improving tenure security has been significant, as evidenced by increased investment, land productivity and land rental market activity (Deininger et al., 2008, 2011; Holden et al., 2009, 2011a; Bezabih et al., 2012)." (Bezu & Holden 2014, 193).
- However, "the first-stage certification had limitations with respect to the maintenance and updating of land registration records. Ethiopia has begun

[2] Note: The "study revealed relatively low demand and willingness-to-pay (WTP) for second-stage certificates. The WTP also decreases significantly from 2007 to 2012. Our findings indicate that farmers do not believe that the second-stage certificate enhances tenure security relative to the first-stage certificate except in instances in which first-stage certification was poorly implemented. The demand for second-stage certificates appears to come primarily from governmental authorities, as it can provide a better basis for land administration and produce accessible public documentation of land-related affairs." (Bezu & Holden 2014, 193).

piloting and introducing a second stage land registration and certification in selected districts in the highland regions. (Id.)

Maps under first the 1st round of piloting.

- "The website of the Ethiopian Ministry of Agriculture (2013) describes the first-stage certification as "a process of providing "simple" temporary landholding certificates. . . Under Stage 1, *farmers receive temporary certificates with no geo-referencing or mapping of land parcels*" (MOA, 2013a)." (Bezu & Holden 2014, 196).
- The Ethiopian first-stage registration was able at to achieve high precision at a very low cost without mapping by adopting field demarcation and using neighbors as witnesses. (Bezu & Holden 2014, 195).
- Spatial/physical information. Plot measurement/size; land quality (Bezu & Holden 2014, 195).
- Certificates do not include maps of farms. (Bezu & Holden 2014, 195).
- Not a focus/requirement.
    - Ethiopia's "process was focused on . . . agricultural holdings"; however, this was done "to the detriment of common property resources and house plots" (Deininger 2008, 2).
    - "Although registration demarcates boundaries in the field, it does not create a graphical record and may thus fall behind expectations in terms of reducing boundary disputes." (Deininger 2008, 4).

Maps under first the 2nd round of piloting.

- The more permanent second-stage certificate, therefore, "seeks to rectify the weaknesses in the Stage 1 land certification, particularly the need to geo-reference and map individual parcels to avoid or minimize boundary disputes." (Bezu & Holden 2014, 196).
- "The new registration and certification system involves *registering the precise geographical locations and sizes of individual farm plots using technologies such as GPS, satellite imagery or orthography*. Farmers receive plot-level certificates with maps rather than a household-level certificate." (Bezu & Holden 2014, 193).
- "Second-stage registration is carried out by surveyors and registrars in the pilot districts. The surveyors and the registrars collaborate to take *GPS measurements, prepare temporary sketches in the field, prepare maps on a computer, and combine the plot level measurements with household information*. The second-stage plot level certificates are printed on water resistant paper and include (side by side) the names of both husband and wife, *the size of the plot, GPS coordinates, a map of the plot, a unique plot code and the plot code* and holder names *of the neighboring farms*." (Bezu & Holden 2014, 197)
- Example under various programs and/or regions in Ethiopia (Bezu & Holden 2014, 196-97):
    - USAID-funded ELTAP/ELAP program (the largest program, working in 24 districts (woredas) across the four large regions.). "*Cadastral surveying is performed using hand-held GPS devices, while the data were processed and stored on computers*" – with some indications that this method of land registration will be scaled up at national level for rural land registration (Wood et al., 2012). Handheld GPS devices are

not particularly expensive, with prices in the range of USD 200–USD 600, but their accuracy level is 5–15 m."

- "SIDA-funded project in Amhara used *total stations and precision GPS devices,* which are believed to be accurate to the millimeter but are highly expensive (USD 40,000) and require cars to transport from place to place (SARDP, 2010)." (Id.)
- "The Finland-funded REILA (Responsible & Innovative Land Administration) project is currently conducting trials in four Ethiopian Regions using *orthophotos* that are *produced from aerial photographs and satellite images*. One district is selected from each of the four regions for the trial. The estimated cost of the second-stage land registration scheme based on the imagery trial completed thus far is USD 8.5 per parcel" (Hailu and Harris, 2013).
- NOTE: "While there seems to be a consensus among implementers regarding the desirability of a new land certificate with plot maps and geo-referencing, it is unclear which of the land survey methods will eventually be adopted to register rural farmland at the national level. It may be possible that different regional states will adopt different land surveying methods or a combination of thereof depending on the type of landscape, the value of land and the precision required."
- In the region of Southern Nations, Nationalities and People (SNNP, "[t]he second-stage registration is performed using *hand-held GPS devices to measure the plot dimensions and computers to register the data*. Once the registration is completed, households are issued a single book listing all of their plots and containing the names of both the husband and wife as landholders. In addition, *separate maps are issued for each plot*.

PART 3: DOCTRINE OF FREE, PRIOR AND INFORMED CONSENT (FPIC)

I. Overview

"Free, prior and informed consent ("FPIC") is generally understood as the right of [indigenous] peoples to approve or reject proposed actions or projects that may affect them or their lands, territories or resources."[3]

Why FPIC? Failing to respect the rights of local communities causes violent conflict:

- Between and within communities
- Between communities and companies
- Between communities and the state

Revising national laws that are contrary to FPIC and other international human rights standards are in a government's best interest, and will help governments to gain benefits from investments, avoid reputational risks, and avoid civil conflict.

[3] Right2Respect.2011."Free, Prior and Informed Consent" under UNDRIP: What Does it Really Mean? http://www.right2respect.com/2011/06/%E2%80%98free-prior-and-informed-consent%E2%80%99-under-the-un-declaration-on-the-rights-of-indigenous-peoples-what-does-it-really-mean/.

"Failing to respect the rights of local communities to the full extent of their lands and to FPIC is the root cause of protracted and at times violent conflict between and within communities, with companies and with the State. Such conflicts present serious risks to the communities, but also to plantation companies, investors and to the RSPO itself. Initiatives to revise national laws which are contrary to international human rights standards and the right to FPIC is also in the State's best interests, placing them in a better position to gain the benefits from investments, to avoid reputational risks of being found in breach of international human rights law, to avoid civil conflict and to avoid investors choosing instead to invest in other countries where they feel their investments are more secure."[4]

II. Primary sources of international law on FPIC

- The International Bill of Rights (including Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, ILO's core conventions) address application of FPIC for project-affected peoples. Ghana is a signatory to the ICESCR,[5] the ICCPR,[6] and adopted the UNDRIP.[7]

- **UN Declaration on the Rights of Indigenous Peoples (6 articles)- Article 32(2):**

  "States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain FREE, PRIOR and INFORMED CONSENT prior to approval of any project affecting their land or territories."

- **UN Declaration on the Right to Development:**

  "Everyone has the right to development". The sustainability of development is connected with the ability of people to control their development objectives. Community participation in projects that affect them should be consistent with the principles underlying FPIC

III. FPIC is widely acknowledged best international practice for land acquisition and land-based investment

- FPIC plays a central role in the Large Scale Land Based Investment Principles of the African Union's Land Policy Initiative, which state, "These Guiding Principles highlight the importance of States agencies and investors securing

[4] Chao, Sophie Marie Hélène. FPP. 2012. Free, Prior and Informed Consent and Oil Palm Expansion in Southeast Asia From Principles to Practice. http://www.forestpeoples.org/sites/fpp/files/publication/2012/11/fpicoilpalmexpansionmedanconferencepapersophie-chao.pdf.
[5] ICESCR: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en
[6] ICCPR: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en
[7] http://www.un.org/press/en/2007/ga10612.doc.htm

the *prior* and *informed* participation and *consent* of communities in all aspects of LSLBI which can impact the rights and livelihood of communities."[8]

- The FAO's 2012 Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security (endorsed by Ghana as member of UN General Assembly) incorporate FPIC principles and doctrine at Sections 3B.6, 9.9, and 12.7.[9]

- Private sector financing institutions are increasingly requiring that companies they finance utilize FPIC standards. (International Finance Corporation adopted FPIC as a performance standard for lending in 2012. FPIC was formally incorporated into the Equator Principles for banking and lending institutions in 2013.

- Private sector companies in the extractives and food and beverage industries are increasingly endorsing FPIC as a standard for land-based investment. (e.g., Coca Cola publicly committed in 2013 to follow FPIC principles in all land-based investment (not just those involving indigenous communities.)

IV. Components of FPIC[10]

FREE

- Consent given voluntarily, absent of "coercion, intimidation or manipulation."
- Stakeholders determine process, timeline and decision-making structure;
- All community members are free to participate regardless of gender, age or standing.

PRIOR

- "Consent is sought sufficiently in advance of any authorization or commencement of activities."
- Sufficient time provided for communities to understand and analyze relevant information on proposed activities.
- Before activities begin, including preliminary project activities and procedures.
- Varies according to decision-making processes and customs of affected communities.

INFORMED

- Information should:
  - Be accessible, clear, consistent, accurate, constant, and transparent;

[8] Guiding Principles on Large Scale Land Based Investments in Africa (at 13): http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf

[9] See FAO Practice Manual: Respecting Free, Prior and Informed Consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition (2012), available at http://www.fao.org/3/a-i3496e.pdf.

[10] Except where noted, see Oxfam. 2010. Guide to Free, Prior and Informed Consent. http://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf.

  - Be delivered in appropriate language and culturally appropriate format (including radio, video, graphics, documentaries, photos, oral presentations);
  - Be objective, covering both the positive and negative potential of [project] activities and consequences of giving or withholding consent;
  - Be complete, covering the spectrum of potential social, financial, political, cultural, environmental impacts, including scientific information with access to original sources in appropriate language;
  - Be delivered by culturally appropriate personnel, in culturally appropriate locations, and include capacity building of indigenous or local trainers;
  - Be delivered with sufficient time to be understood and verified;
  - Reach the most remote, rural communities, women and the marginalized; and
  - Be provided on an ongoing and continuous basis throughout the FPIC process. (UN-REDD 2013, verbatim)[11]

- Communities must have access to independent information, not just information from the project developers or the government.
- Communities must also have access to experts on law and technical issues, if requested, to help make their decision.

CONSENT

- Consent refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected peoples or communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community (UN-REDD 2013, verbatim).
- Consent is:
  - A freely given decision that may be a "Yes" or a "No," including the option to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges;
  - A collective decision determined by the affected peoples (e.g. consensus, majority, etc.) in accordance with their own customs and traditions;
  - The expression of rights (to self-determination, lands, resources and territories, culture); and
  - Given or withheld in phases, for distinct stages or phases of [the project]. It is not a one-off process (UN-REDD 2013, verbatim).

- Consent should be sought and granted before permits are issued. "Although there is no official definition of this element, it is generally accepted as follows,"[it] should imply that consent has been *sought sufficiently*

[11] UN-REDD Programme. 2013. Guidelines on Free, Prior and Informed Consent. Link to pdf at http://www.un-redd.org/Launch_of_FPIC_Guidlines/tabid/105976/Default.aspx.

in advance of any authorization or commencement of activities . . ." (UN Economic and Social Council)[12]

- Consent may be withheld
  "Most importantly, respect for the right to FPIC requires on the part of companies a recognition that even where a comprehensive process has been undertaken, before signing an agreement, communities still have the right to say 'no' to [oil palm] development on their lands." (Chao, 2012)

- Gaining consent
  The engagement process will take account of existing social structures, leadership, and decision- making processes as well as social identities such as gender and age, and be cognisant of, inter alia:
  - Social norms and values that may limit women's participation in leadership roles and decision- making processes;
  - The need to protect and ensure the legal rights of indigenous women; and
  - Marginal or vulnerable groups' potentially limited realization of their economic and social rights as a consequence of poverty and limited access to economic resources, social services, or decision-making processes (IFC 2012).[13]

PART 4: E-REGISTRATION AND CONVEYANCING

I. General Overview

- "Developing a digital Land registration system requires re-engineering processes to enable e-submission of records and verifying the authenticity of such records. This requires changes at both technical as well as legal levels." (Tembo, Nkwae, and Kampamba 2014, 1)
- "Sandberg(2010) has indicated the main challenge in e-registration is the problem of identifying parties to transactions and the authentication of documents." (Tembo, Nkwae, and Kampamba 2014, 8). (See Dodd, Annex_Chart: Comparative experience of electronic registers and the paper produced for examples around authentication of documents).
- Computerizing land registration systems can occur in conjunction with or parallel to paper formats and processes. For example, this is the case in South Africa, Taiwan, Japan, France, Germany, England and Wales, and the Canadian provinces of British Columbia and Ontario. (See Dodd & Mitchell, Comparative experience of issuing land certificates in the context of increasingly computerized land registration systems; see also below for South African example). Electronic registration can take a variety of forms electronic entries of registration (e.g., uploading paper-based forms or populating electronic form), which can occur side-by-side with a paper-based entries.

[12] United Nations Economic and Social Council (2005). Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples. (E/C.19/2005/3), 12.
[13] "The Right to Decide: Free, Prior and Informed Consent in Ghana". Available at https://www.oxfamamerica.org/static/media/files/FPIC_in_Ghana_FINAL.pdf , at 30.

- System of private conveyancing is deeds registration (Mosert 2011, 94). "[A]part from preservation, computerisation of records", jurisdictions may want to so far as to develop systems to additionally allow from electronic transactions, also known as e-electronic conveyancing. (Tembo, Nkwae, and Kampamba 2014, 8).

II. Comparative Examples of Electronic Registration from Africa

A. South Africa's Electronic Registration of Land Deeds

Background. Plans for digitizing registration in South Africa have been slow. Initial research and recommendations were made in 2003. (Mosert 2011, 100). In 2009, the Government of South Africa (GoSA) approved a policy document to guide the electronic registration of deeds. It recommended the government follow the process of registering paper deeds and make changes to the Deeds Registration Act to permit an electronic process (as opposed to calling for more systematic changes). Following approval of the policy, planned to examine requirements and to revise the Deeds Registries Act and to draft an Electronic Deeds Registration Bill. (Id. at 93). In March of 2016, the GoSA published, and made available for public comment, the Deeds Registries Amendment Bill and Explanatory Memorandum. (Ghost Digest 2016). Significantly, the Bill provides provisions for establishing and maintaining an electronic deeds registration system. (Deeds Registries Amendment Bill 2016 and Explanatory Memorandum, 2016, s. 1B). The memorandum identified reasons South Africa needed an electronic system, a key one stemming from "the inability of the present registration infrastructure and resources to accommodate the increase in volume in respect of an anticipated 20 million land parcels of the government's land reform measures". (Id.)

Critical policy question.
Whether the legal changes providing for electronic registration will address points raised by the reform agenda around "*what* to register and *how* this should be done in the context of hitherto unregistered rights"; or, in the alternative, will the changes "merely reaffirm established perceptions of hierarchical notions of land rights" (Mosert 2011, 100, 102).

Some key legal aspects of registration and digitization of land-related information and evidence drawn from South Africa's Deed Registries Amendment Bill

The South African the Bill provides for:

- "an electronic deeds registration system;
- the electronic keeping of registers;
- the electronic lodgement of proof in paper and electronic form;
- the electronic issuing of deeds for information and judicial purposes only;
- the making of regulations in respect of electronic lodgement of deeds and documents and requirements relating to electronic or digital signatures;
- conveyancers to register as authorised users of the electronic deeds registration system;
- the electronic preparation of deeds and documents and the save -keeping and filing thereof by conveyancers." (Deeds Registries Amendment Bill 2016 and Explanatory Memorandum, 2016, Explanatory Memorandum, ¶. 1.4)

KEY LEGAL ASPECTS	SOUTH AFRICA'S DEED REGISTRIES AMENDMENT BILL, 2016
Legislation burdens the Registrar with the mandatory duty to establish and maintain an electronic deeds registration system in accordance with electronic communications/transactions legislation, including prescribing the necessary standards and procedures.	Section 1B. Electronic deeds registration system: "The chief registrar of deeds must, subject to the provisions of the Electronic Communications and Transactions Act, 2002, establish and maintain the electronic deeds registration system which utilises computer and any other electronic technology for the preparation, lodgement, execution and storing of deeds and documents registerable in terms of this Act or any other law. The Minister must prescribe— (a) standards for – (i) the operation of the electronic deeds registration system in deed registries; and (ii) the collection and storing of data . . . (b) procedures to be adopted and technological specification required for the electronic deeds registration system; and (c) other matters . . ."
Legislation may to need define new roles and processes to enable electronic registration system.	E.g., Section 15 permits conveyancers to be authorized users of the electronic deeds registration system. Section 20 allows land owners to authorize a conveyancer to electronically execute a deed of transfer.
Legislation must provide the formalities needed to operationalize an electronic deeds registration system.	E.g., Section 2. "Subject to … Electronic Transactions and Communications Act, 2002, each registrar [shall] must have a seal of office which [shall] must be signed and affixed electronically to all [deeds executed or attested by him and to all copies of deeds issued by him to serve in lieu of the original deeds] . . . "
Legislation must clearly state which registration requirements are not required for electronic registration.	E.g., Section 3 removes the reference to attestation of deeds.
Legislation must have provisions to coordinate electronic and paper-based formats (deeds, documents, proof).	E.g., Section 3 clarifies that a registry copy of a re-registered deed is considered the original deed. Section 4 allows for proof to be provided in paper or electronic form.

Note: For a Summary of the South Africa's Deed Registries Amendment Bill, 2016, provided in the Explanatory Memorandum, see Annex A.

Processual Aspects of E-registration

"South African registration system . . . allows for e-registration by requiring conveyancers to be registered as E-Deeds Registry usersand these are issued with encrypted passwords. The law has been amended to ensure that electronic signatures are admissible for this purpose. The system is able to automaticallyreceive draft e-deeds submitted by an authenticated conveyancer, validate them (i.e. check whether there are encumbrances, and check against the electronic database at Deeds), and compare property description with the Surveyor General's database. It then sends the validated draft deed to the examiners for examination who make notes electronically; the system allows the conveyancer to make electronic corrections if any and the Registrar can then electronically sign it off after all the necessarily payments have been done by the conveyancer. When the e-Deed is approved the Deeds Registry database is updated and information passed on to the Surveyor General's office and the local authority by the system. The Deed is then microfilmed for preservation.Bramate and Jones (2006) have discussed various methods of recording documents to be used for registration to include semi-automated methods using

scanned images of documents, to use of XML and finally to the use of XHTML which allows for data to be automatically checked, accepted or rejected and also allows for electronic signatures. The use of XHTML in e-registration in USA is said to be used mainly by mortgage insurance companies and loan services and has not fully permeated to general use owing to fears of security breaches. The authors also have in 2010 visited Lantmäteriet offices in Sweden which have developed a fully computerized land registration system. The Swedish property register has legal validity and is guaranteed by the state. All stakeholders such as banks, local authorities, tax authorities including the public can have access to the property register. Other methods invented to help address the challenges of security include the use of biometric signatures in which conveyancers and notaries can sign in through biometric signatures. The jury is still out in terms of how the biometric identification can be fully used for the purpose of e-registration. The requirement that all pages in a deed should be initialed for instance creates challenges in terms of ensuring that documents are really authenticated and agreed upon by all parties to an agreement. (Tembo, Nkwae, and Kampamba 2014, 8-9).

B. **Rwanda's Paper-Based Systematic First Registration with back-end Digitization of Data**

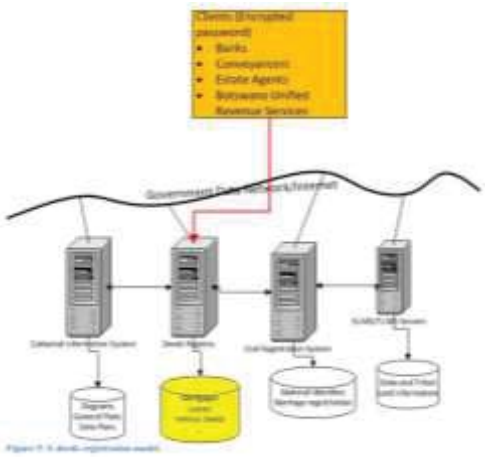
Rwanda conducted its systemic registration relying heavily on a paper-based format, including executing contracts and issuing land certificates. (See e.g., chart in Hilhorst & Meunier 2015, 14-15, which lists the steps for first registration, including denoting where paper-based formats were uses such as printing demarcated maps for display in villages, printing out registration information and verifying it against paper records, and issuing certificates). The land data was subsequently digitized and put in a central land information system, which was developed. (Hilhorst & Meunier 2015, 12). In other words, Rwanda's model did not use electronic registration but rather conduct systematic first registration using paper-based formats followed by a back-end digitization and centralization of the information in an electronic registry.

Process for digitization land data. "After completing the first registration, the [Rwanda Natural Resource Authority] RNRA migrated the IT infrastructure to a new platform, the LAIS" [Land Administration Information System which was the electronic land registry, which used a mix of commercial and open source software for data processing (Hilhorst & Meunier 2015, 16-7). The LAIS "combines a register with a cadaster and incorporates such functions as transfers, transactions, and mortgage registrations." (Hilhorst & Meunier 2015, 18). "The LAIS was upgraded to enable the integration of parcel spatial data with legal data. A manual on the new integrated system was developed and distributed across the country so that land users, banks, and other businesses can take advantage of its convenient features. The RNRA also made an inventory of land information data requirements in other agencies, organizations, and the private sector. This work is combined with exploring the use of protected internet routes to ease information sharing, improve service delivery, and develop a geoportal. The RNRA is working on further expanding these linkages and strengthening interoperability for other entities (courts, city planning authorities, tax authorities, ombudsmen, and the Ministry of Agriculture). Linking land data with tax maps is one of the priority actions." (Hilhorst & Meunier 2015, 18)

C. Botswana's Electronic Registration of Land Deeds

Background. In 2009, the Government of Botswana (GoB) worked to computerize land records under the Land Administration Processes and Capacity (LAPCAS) project. The project team reported the computerization of 180,000+ deeds (including Deeds of Transfer, Bonds, and diagrams) in 2012. (Tembo, Nkwae, and Kampamba 2014, 8). However, it has been noted that a key challenge is that Botwsana (as of 2014) did not allow for the submission of e-documents). (Id.).

Proposed Model for Botswana. In light deficiencies in the system support e-registration, looked to South Africa's legal system as an example. From this, they developed a proposed model for Botwana. See diagrams below (and note that while the models do not touch on the legal aspects of the system per se, they map out the technical model from which the legal aspects could be developed):



‘

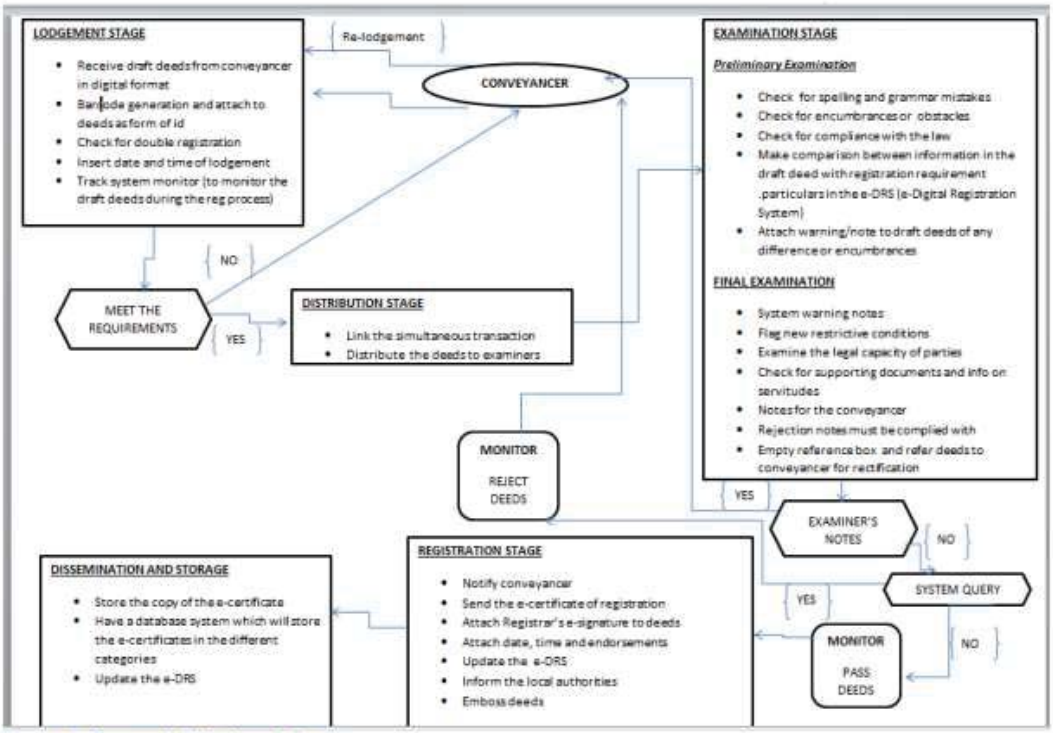


Figure 6: Proposed digital work flow

III. E-Conveyancing

As mentioned in the General Overview, e-registration is related to but different from e-conveyancing. Under an e-registration system records might be preserved or computerized. Jurisdiction might decide as a matter of policy to extend their e-registration systems and process to additional support electronic transactions, also known as e-electronic conveyancing. (Tembo, Nkwae, and Kampamba 2014, 8). For example, England and Wales have adopted the policy goal of full e-conveyancing but currently most transactions cannot be completed electronically (Law Commission/HM Land Registration 2001, at 2; Walker & Oie, 2014)

England and Wales, Land Registration Act (LRA), 2002

The LRA provides the “statutory provisions necessary for gradually introducing and regulating a system of electronic conveyancing.” (Mosert 2011, 97). After successful pilot projects in 2006 and 2007, the government “rolled out” its e-conveyancing process (Id.).

The e-conveyancing system:

- Eliminates the registration gap (i.e., the gap between finalizing the real property transaction and registering the property);
- “[G]radually makes registration compulsory”;
- Permits e-settlement of accounts; and
- Authorizes conveyancers to directly change the register, which requires “strict rules on secure electronic networking and regulated access” as well as early involvement by the Registry (Id., 97-98).

England and Wales, LRA's Part 8 on E-Conveyancing in Comparison with the Ghana Land Bill E-Conveyancing Provisions

Part 8 – E-Conveyancing: Articles 91-95 (see Annex B for provisions)

- Art. 91. Provides details on when a transaction can be governed by Part 8, the formalities that must be followed, and the effect of an e-conveyancing document.
  - Art. 91(1): Explains when the section on e-conveyancing applies. Namely, must meet the following specifications and conditions:
    - Art. 91(2) it is a disposition i) of a registered estate/charge, ii) of an interest subject of a notice in the register, or iii) which triggers the requirements of registration and
    - Art. 91(3) conditions:
      - Document provides for the time and date when it takes effect
      - Document has an e-signature
      - Each e-signature is certified and
      - Meets other which the rules may provide
  - 91(4) - (7): Explains the effect of a e-conveyancing doc
    - (4) its to be regarded as in writing and signed (and sealed) by those signified by the e-signature
    - (5) Such document to be regarded as a deed
    - (6) Above holds in the case of an agent acting for the principal
    - (7) Re how to handle notice: if notice is given through e-form in accordance w/the rules, it is regarded as given in writing
  - Art. 91(8): "purchaser's right to the execution of a conveyance" (per s. 75 Law of Property Act) made not to apply to documents governed by e-conveyancing provisions
  - Art. 91(10): E-signature and certification read in accordance w/Electronic Communications Act

- Arts. 92 & 93: Institutions/Structures for e-conveyancing:
  - Art. 92: allow registrar to provide for an e-communications network as needed for transactions involving registration that "are capable of being effected electronically"
  - Art. 95: Empowers registrar to take steps to secure providing for electronic settlement ("The registrar may take such steps as he thinks fit for the purpose of securing the provision of a system of electronic settlement in relation to transactions involving registration")

- Art. 93: Re **Power to require simultaneous registration in the case of conveyances**: disposition/K to make dispositions only has effect if made by means of an e-doc AND when doc purports to take effect is (a) e-communicated to registrar and (b) relevant registration requirements are met

ANNEX A. Summary of the South Africa's Deed Registries Amendment Bill, 2016, provided in the Explanatory Memorandum

SUMMARY OF BILL

The Bill provides for the amendment of the Act as follows:

- 4.1 The insertion of section 1A provides provisions pertaining to the establishment and maintaining of an electronic deeds registration system.
- 4.2 The amendment of section 2 provides for a seal of office to be electronically affixed to deeds and documents.
- 4.3 The amendment of section 3 provides for the deletion of reference to the 'attestation' of deeds. It further provides for the electronic keeping of registers and the maintaining of an efficient electronic deeds registration system and the electronic registered deeds registry copy of a deed to be deemed the original deed.
- 4.4 The amendment of section 4 provides for the electronic lodgement of proof in paper and electronic form and the electronic issuing of deeds for information and judicial purposes only.
- 4.5 The amendment of section 10 provides for the making of regulations in respect of electronic lodgement of deeds and documents, the enforcement of payment of fees, and requirements relating to electronic or digital signatures.
- 4.6 The amendment of sections 13, 15, 16A, 26, 27, 53, 91 and 92 provides for the deletion of reference to the `attestation' of deeds.
- 4.7 The amendment of section 15 provides for conveyancers to register as authorised users of the electronic deeds registration system, the electronic preparation of deeds and documents and the safe -keeping and filing thereof by conveyancers.
- 4.8 The amendment of sections 17, 27, 28, 31, 32, 33, 37, 40, 43, 44, 45, 46, 46A, 47, 64, 65, 68, 75, 76, 78, 82 and 87 provides for the deeds registry copy of a title deed, bond or other deed to be endorsed and for the client's copy of such title deed, bond or other deed not to be lodged for endorsement.
- 4.9 The amendment of section 18, 22, 40, 43A, 44, 46, 46A and 47 provides for deeds to contain reference to diagrams and general plans that have been approved under the Land Survey Act, 1997 and to provide for such diagrams and plans not to be lodged; It further provides for a member of Cabinet of an Executive council responsible for the administration of state land to apply for the issuing of a certificate of registered state title.
- 4.10 The amendment of section 20 provides for the electronic execution of a deed of transfer by a conveyancer upon authorization of the owner of the land.
- 4.11 The amendment of section 50 provides for mortgage bonds to be prepared in the prescribed form and to be electronically executed by the conveyancer upon authorization of the owner.
- 4.12 The amendment of section 61 provides for the registration of a notarial bond to be effective as registration for the whole republic.

ANNEX C. LANDESA MEMORANDUM TO WORKING GROUP ON 17 JUNE 2016: SUPPORT FOR THE SPOUSAL RIGHTS PROVISIONS OF THE LAND BILL (DRAFT FOUR)

To: Ghana Land Administration Project and Land Bill Working Group
From: Landesa
Date: 17 June 2016
Re: Support for the spousal rights provisions of the Land Bill (Draft Four)

The purpose of this memo is to provide members of the Land Bill Working Group with additional justification for the spousal rights provisions incorporated into Draft Four Land Bill. The memo contains five parts: (1) summary of spousal rights provisions in the Bill, (2) support for the provision from Ghana's Constitution, (3) social and economic benefits of secure women's land rights in Ghana, (4) support for the provisions from international law and best practice guidelines, and (5) international comparative information on joint tenure and joint title from Africa, Europe, the United States, Latin America, and Asia. The memo contains two annexes. The first comprises of an analytical framework for understanding spousal property rights. The second provides details about community property regimes in five states within the U.S.

1. Summary of provisions in the Land Bill

Spousal rights provisions in the Land Bill (Draft Four) include the following.

Cl 13: Anti-discrimination.

Cl 36(3): Land acquired during marriage to be prepared in the names of both spouses.

Cl 36(4): Conveyance on land prepared in the name of only one spouse during subsistence of marriage shall be presumed to be taken in the names of both spouses.

Cl 45(1): Sale, contract, transfer, lease, mortgage, or gift of land made during the subsistence of marriage by one spouse is void unless it is made with the written consent of the other spouse.

Cl 94(4-5): Application for registration of land acquired for valuable consideration during marriage shall be made in the joint names of both spouses.

Cl 121(7-8): Certificate shall have the names of the spouses to the marriage.

2. Ghanaian constitution

The spousal rights provisions in the Land Bill would serve to implement Ghana's constutitutional mandates on protection of spousal property in marriage, as set out in Article 22:

> (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
>
> (2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.
>
> (3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article –
>
> > (a) spouses shall have equal access to property jointly acquired during marriage;
> >
> > (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

3. SOCIAL AND ECONOMIC BENEFITS OF STRENGTHENING WOMEN'S LAND RIGHTS (WLR) IN GHANA

Approximately 90% of women in rural areas in Ghana depend on agriculture for their livelihoods.[1] This means that women's secure rights to land are particularly important for economic development in Ghana. Several current government policies aim to decrease poverty and increase food security, including the Medium Term Agriculture Sector Investment Plan (METASIP) and the Ghana Shared Growth and Development Agenda (GSGDA II). The policy most relevant to women's land rights is the Gender in Agriculture Development Strategy (GADS II), launched in January of this year by the Women in Agriculture Directorate (WIAD) under MoFA. This strategy aims to help Ghana's agricultural sector (where women make up 50% of the workforce) face current challenges, including climate change, soil degradation, and agro-processing efficiencies. "Enhancing access to land, information on land rights and tenure security" is one of the nine stated objectives of the strategy. Research has shown that strengthening women's land rights in Ghana can have a host of social and economic benefits. Some prominent examples include:

a. Strengthening land rights for women may reduce rural to urban migration of displaced women (LGAF at 68);
b. Women's agricultural productivity and income is greater when they are not involved in conflict over their land rights (USAID at 3);
c. Climate change mitigation efforts will be more effective if women's land rights are strengthened (METASIP 46-47; Landesa et al,

[1] Government of Ghana (2016). Report on the Launch of Gender in Agriculture Development Strategy II Document by the Ministry of Food and Agriculture on Wednesday, January 27, 2016. http://www.ghana.gov.gh/index.php/media-center/ministerial-reports/food-agriculture/2424-report-on-the-launch-of-gender-in-agriculture-development-strategy-ii-document-by-the-ministry-of-food-and-agriculture-on-wednesday-january-27-2016.

Women's Land Rights and Climate Change, at 4; OECD Working Paper, at 4);

d. Food security may improve; a 2006 study showed that when women own a greater proportion of farmland in Ghana, families allocate a greater proportion of their household budget to food (Landesa Issue Brief: Women's Secure Rights to Land, at 2);
e. Women's individual ownership of assets enables their economic empowerment and provides protection in the case of marital dissolution or abandonment (Ghana Demographic and Health Survey (GDHS) 2014, at 295);
f. Rates of domestic violence may decrease as women's empowerment is increased through land ownership (see infographic below, GDHS at 300);

The spousal rights provisions of the Bill will help to uphold women's rights and access to land, which can be at particular risk where land rights are being recorded or registered. International research shows that strengthening land rights for rural women can bring about benefits to both women and their households, including gains in income, health, education, and safety. The infographic below highlights some of these benefits.

4. INTERNATIONAL LAW AND BEST PRACTICES

a. International Treaties and Conventions

Ghana has ratified and is bound by several international and regional human rights treaties which explicitly uphold the land and property rights of women. Several of those provisions are listed in the box below.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Article 14 Rural Women
… 2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
(g) To have… equal treatment in land and agrarian reform as well as in land resettlement schemes;

Article 15 Equality under Law
2. States Parties…shall give women equal rights to … administer property.

Article 16 Marriage and family
1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:…(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

In its General Recommendation 21 interpreting the treaty, the CEDAW Committee clarified that "[t]he right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family."[2] It further stressed that "[i]n countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed."[3]

[2] CEDAW Committee, General Recommendation No. 21 (13th sess., 1994) Equality in marriage and family relations, para. 26; *see also*, CEDAW Committee, General recommendation No. 27 (47th sess., 2010) - Older women and protection of their human rights, para. 48 ("Laws and practices that negatively affect older women's rights to housing, land and property should be abolished. States parties should also protect older women against forced evictions and homelessness); para. 52 ("States parties must repeal all legislation that discriminates against older widows in respect of property and inheritance, and protect them from land grabbing.").
[3] CEDAW Committee, General Recommendation No. 21, para. 27.

International Covenant on Economic, Social, and Cultural Rights (ICESCR)

Article 11(1)
The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.
In General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, the Committee specifically "requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so."[4] In the context of food security, the Committee recognized the importance of "full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land…; [and] maintaining registries on rights in land (including forests)."[5] General Comment No. 7 on housing recognizes that women in particular "suffer disproportionately from the practice of forced eviction" including from land they till and inhabit, and "are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation."[6] In articulating state's duty to protect the family under Article 10.1, the Committee requires States parties "to ensure that women have equal rights to marital property and inheritance upon their husband's death."[7]

Protocol To The African Charter On Human And Peoples' Rights On The Rights Of Women In Africa (The Maputo Protocol)

Article 6 Marriage
States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: …
(e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
(j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

[4] CESCR Committee, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the covenant), at II(C)(28)
[5] CESCR Committee, General Comment No. 12: The right to adequate food (art. 11), at para. 26
[6] CESCR Committee, General Comment No. 7: The right to adequate housing (art. 11(1) of the Covenant): Forced evictions, at para. 10
[7] CESCR Committee, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the ICESCR), at para. II(C)(27)

Article 7 Separation, Divorce and Annulment of Marriage
States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that: …
(d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

Article 15 Right to Food Security
States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: (a) provide women with access to … land, and the means of producing nutritious food.

Article 19 Right to Sustainable Development
Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:…(c) promote women's access to and control over productive resources such as land and guarantee their right to property . . .

Article 21 Right to Inheritance
1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. …
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties . . .

In recognizing the critical importance of land rights, particularly for women, treaty bodies such as the Committee overseeing the International Covenant on Economic, Civil and Political Rights (CESCR) stressed that "the right of all to a secure place to live in peace and dignity, [includes] access to land as an entitlement."[8] State duty to gender equality – according to the CESCR – "requires that women have a right to own, use or otherwise control housing, *land* and property on an equal basis with men, and to access necessary resources to do so."[9] The Committee on the Elimination of All Forms of Discrimination Against Women's stressed that State parties (including Ghana) "should take all necessary measures… to achieve rural women's substantive equality in relation to land and natural resources" and "should eliminate discriminatory stereotypes including those that compromise the equal rights of rural women to land."[10]

b. International Best Practice Guidelines

International best practice guidelines provide support for spousal rights in the Land Bill. Guidelines from FAO and AU are provided below.

[8] CESCR Committee, General Comment No. 4: The right to adequate housing (art.11(1)), at para. 8(e).

[9] CESCR Committee, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), at para. 28.

[10] CEDAW, General recommendation No. 34: on the rights of rural women (March 4, 2016) at paras. 57, 23.

FAO's Voluntary Guidelines for Sustainable Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)

"States should ensure that women and girls have equal tenure rights and
access to land, fisheries and forests independent of their civil and marital status" (Article 3B.4)

"States should ensure that women and men enjoy the same rights in the newly recognized tenure rights, and that those rights are reflected in records." (Article 7.4)

States should promote joint titling in land registration.[11]

"Where informal tenure to land, fisheries and forests exists, States should acknowledge it in a manner that respects existing formal rights under national law and in ways that recognize the reality of the situation and promote social, economic and environmental well-being. States should promote policies and laws to provide recognition to such informal tenure. The process of establishing these policies and laws should be participatory, gender sensitive and strive to make provision for technical and legal support to affected communities and individuals." (Article 10.1)

African Union's Framework and Guidelines on Land Policy in Africa (2009)12

The Framework and Guidelines acknowledge gender inequalities underlying land policy and governance in Africa, and state:

"If law and policy are to redress gender imbalances in land holding and use, it is necessary to deconstruct, reconstruct and reconceptualise existing rules of property in land under both customary and statutory law in ways that strengthen women's access and control of land while respecting family and other social networks. This would also be consistent with commitments made by African states as evidenced in the AU's 2003 Maputo protocol... and the 2004 Solemn Declaration on

[11] FAO (2013) Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance in land tenure (VGGT implementation guide). Available at: http://www.fao.org/docrep/017/i3114e/i3114e.pdf.
[12] Available at http://www.uneca.org/sites/default/files/PublicationFiles/fg_on_land_policy_eng.pdf.

Gender Equality in Africa both of which call for action to address gender inequalities including women's unequal access to land." (pp. 8-9)

5. INTERNATIONAL COMPARATIVE INFORMATION ON JOINT TENURE AND JOINT TITLE [13]

- **From Africa**

Country	Form of compulsory joint tenure	Legal basis
Burkina Faso	• Partial community property in case of monogamy.[14] • Compulsory joint titling if monogamous marriage.	1997 Constitution Persons and Family Code of 1990**a**
Ethiopia	• Community property for property acquired after marriage. • Creates a presumption of common property for property registered in the name of one spouse. • Requires the consent of both spouses for transfers of common property. • Community property for consensual unions of more than 3 years.**b** • In some States, joint titling of land is mandatory.	Revised Family Code Proclamation No.213/2000 of 2000 Federal Proclamation No. 89/1997, Rural Land Administration Proclamation
Kenya*	• As result of recent laws, partial community of property is the default regime. Specifically, land acquired during a marriage for use and enjoyment of spouses is presumed to be joint property. • Spouses have equal rights to administering community property.[15] • Spousal consent required for transfers (including mortgage) of any matrimonial property.	Matrimonial Property Act of 2013 Land Registration Act of 2012

[13] Except where otherwise noted, rows in the table excerpted in full from Lastarria-Cornhiel, S. and Renee Giovarelli (2005). Shared Tenure Options for Women: A Global Overview (UN-Habitat Report), at 23.
[14] The World Bank Group (2016). Women, Business and the Law, http://wbl.worldbank.org/data/exploretopics/using-property.
[15] World Bank Group (2015). Women, Business and the Law 2016: Getting to Equal. Washington, DC: World Bank. doi:10.1596/978-1-4648-0677-3. License: Creative Commons Attribution CC BY 3.0 IGO. http://wbl.worldbank.org/~/media/WBG/WBL/Documents/Reports/2016/Women-Business-and-the-Law-2016.pdf, at 37.

Lesotho*	• Partial community of property is the default regime.[16] • Under this regime, title to real property allocated or acquired by either spouse is considered to be jointly acquired and jointly titled. • Spouses have equal powers to administer and dispose of joint assets.	Marriage Act of 1974 Legal Capacity of Married Persons Act of 2006 Land Act of 2010
Namibia*	• Full community of property is the default regime.[17] • Spouses under the community property regime have equal powers to administer and dispose of joint assets. • Spouses are prohibited from alienating, mortgaging, or burdening with a servitude joint real estate (or contracting to do these) without the consent of the other spouse (with some qualifications).	Married Persons Equality Act of 1996
Rwanda*	• Full community of property for spouses is the default regime.[18] • Elective regimes include full community of property, limited community of acquests, or separate property. Under community property, spouses elect a marriage settlement based on joint ownership of real property and personal property. Under limited community of acquests, spouses share their properties on the day of marriage as well as properties acquired during marriage. • Joint titling required. A spouse married under a community property regime must include the name of his or her spouse when applying to register household land. Joint title creates joint ownership.[19]	2003 Rwandan Constitution Law N° 22/99 of 12/11/1999 to supplement Book One of the Civil Code and to institute Part V regarding Matrimonial Regimes, Liberalities and Succession Rwanda Organic Land Law of 2005

[16] World Bank Group (2015), at 37; Social Institutions & Gender Index: Lesotho (2016), http://www.genderindex.org/country/lesotho.
[17] The World Bank Group (2016).
[18] *Id.*
[19] Aparna Polavarapu (2014). Procuring Meaningful Land Rights for the Women of Rwanda. http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1100&context=yhrdlj, at 19.

	• Dispositions that disadvantage the other spouse require the consent of that spouse.[20]	
Senegal*	• The presumptive regime under the Family Code for monogamous marriages is compulsory community property (while the default for polygamous marriages is separation of property).[21] • The original owner administers the marital property[22] but dispositions that disadvantage the other spouse require the consent of that spouse.[23]	Family Code
South Africa*	• Full community of property is the default regime.[24] • Spouses are prohibited from alienating, mortgaging, burdening with a servitude, or conferring any other real right in joint real estate (or contracting to do these) without the consent of the other spouse (with some qualifications).	Matrimonial Property Act of 1984
Tanzania*	• While separation of property is the default regime,[25] the Land Act affords compulsory joint tenure on marital land for all spouses.[26] Spousal co-occupancy right of family land is presumed. • Consent of both spouses is required to mortgage the matrimonial home.	Law of Marriage Land Act of 1999
Uganda*[27]	• While separation of property is the default regime, spouses have guaranteed secure occupancy on family land. • Spousal consent prior to entering into any land transaction concerning	Succession Act Land Act of 2004, as amended

[20] Hallward-Driemeier & Tazeen Hasan (2013). Empowering Women: Legal Rights and Economic Opportunities, at 73.
[21] The World Bank Group (2016); Hallward-Driemeier & Tazeen Hasan, at 37.
[22] The World Bank Group (2016).
[23] Hallward-Driemeier & Tazeen Hasan, at 73.
[24] World Bank Group (2015), at 69.
[25] The World Bank Group (2016).
[26] Siraj Sait & Shelter Branch (2007). Policy Makers Guide to Women's Land, Property and Housing Rights across the World. http://www.gltn.net/jdownloads/GLTN%20Documents/policy_makers_guide_gender_2007.pdf, at 23
[27] Leslie Hannay (2013) Women's Land Rights in Uganda. http://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-rights-in-Uganda.pdf, at 4; The World Bank Group (2016).

	land on which the spouse resides on and uses for sustenance.	
Zambia*	• Separation of property is the default regime[28] but compulsory joint tenure approaches have been adopted.*[29] For couples legally married under the Marriage Act, property belonging to either party and acquired during the marriage is treated as joint property, except for inherited property. The courts are required to distribute assets on an equitable basis with due regard to the facts of the case, and they have a wide margin of discretion. In practice, many men wish to keep their property separate and choose not to marry under the Act.	Law Reform (Married Women and Tortfeasors) Act of 1935 Marriage Act, Cap. 50

- **From Europe and the United States**

Country	Form of compulsory joint tenure	Legal basis
Belgium	Partial community property is the default regime for spouses.	Civil Code
France	• Community of property, with option to contract out. • Both spouses must sign for sale/lease of land. • Either spouse may dispose of community property represented by his/her earnings, after contributing to the household expenses. • Neither spouse may dispose of the "rights which assure the family's lodging and furniture" without the other spouse's consent.	Civil Code
Netherlands	Universal or full community property system, but each spouse has the right to administer and dispose of the assets that have been brought into the community.**b** • Disposal of the matrimonial home requires consent of both spouses. The same is true for establishing a	Civil Code

[28] The World Bank Group (2016).
[29] Siraj Sait & Shelter Branch, at 22.

	mortgage on the matrimonial home.*[30]	
Spain	• First country to adopt community property provisions in Civil Code. • Spouses may agree to a different property regime in the "articles of marriage," a contract between the married partners. • In some autonomous communities, regional law may apply, and community property may not be the default property regime.	Civil Code
United States (9 states only plus the U.S. Territory of Puerto Rico)*	• Community property regime in 9 states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin), excluding gift, inheritance, and an award for personal injury damages acquired by one spouse.[31] • All community property states but Texas[32] vest equal powers of management and disposition in each spouse. However, in these states, "one spouse alone may have enhanced powers when the other spouse leaves, disappears, or becomes incompetent to act as a property manager." • Both spouses must participate in and provide written consent to transactions when they involve land, household necessities, and other specified assets."*[33]	State Family Laws (See Annex B for a comparison of state law differences in the 9 community property states)

The Case Study of the United Kingdom
England and Wales. In England and Wales, there is no marital property regime and therefore no community of property. Instead, courts have wide

[30] Conseil des Notariats de l'Union Européenne (2012). Couples in Europe: The Law for Couples in the 27 EU Countries. http://www.coupleseurope.eu/en/netherlands/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide.

[31] *See also*, IRS, Part 25.18, Basic Principles of Community Property Law, https://www.irs.gov/irm/part25/irm_25-018-001.html.

[32] James R. Ratner (2011). Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal Equal. http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=3047&context=lalrev, at 24

[33] Roy Prosterman & Tim Hanstad (1999). Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia: A Comparative Perspective, at 260.

discretion to issue a large range of orders upon divorce, known as ancillary relief.[34] Under the the Matrimonial Causes Act of 1973, courts can re-allocate or sell property, can assign assets to a trust, can order lump sum payments, etc. Section 25 of the Act enumerates the matters over which courts have discretion, listing the welfare of minor children as the first consideration. The overriding objective of ancillary relief is to obtain fairness. The courts in *Miller v. Miller; McFarlane v. McFarlane* have interpreted fairness to arise in the following three areas: the needs of the parties and their children, compensation, and sharing assets.[35] The court states that "[e]ach party is *entitled* to a *fair* share of the available property."[36]

The legal concept of fair share upon dissolution of a marriage arises as a result of understanding the institution of marriage as a partnership of equals. The court in *Miller v. Miller; McFarlane v. McFarlane* acknowledged the precedent that the "husband and wife are now for all practical purposes equal partners in marriage," noting this view to be "recognised widely, if not universally."[37] The court explained its rationale as follows: "The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less."[38]

The case also seemed to provide that certain categories of property, such as property acquired before marriage, inheritance, gifts, and non-matrimonal assets, might be evaluated differently—although this distinction recedes the longer the marriage.[39]

In sum, while a partial community of property regime established by statute does not exist in England and Wales, the substantive prescriptions for equitable division of marital property in the event of divorce is provided by common law precedent and ensured by the courts.

Ireland. It is likewise the case that Ireland does not have community of property, but the division of property is premised on the principles set forth by common law legal precedent enunciated above (for details, see *Miller v. Miller; McFarlane v. McFarlane* [2006] UKHL 24).[40]

Scotland. In Scotland, there is a modified separate property system where "[t]he general rule [under the Family Law Act of 1985] is that marriage does not affect the ownership of property."[41] However, the rule is modified as follows:

[34] Conseil des Notariats de l'Union Européenne (2012).
[35] Conseil des Notariats de l'Union Européenne (2012).
[36] *Miller v. Miller* [2006] UKHL 24.
[37] *Id., citing R v R* [1992] 1 AC 599, 617.
[38] *Miller v. Miller* [2006] UKHL 24.
[39] Conseil des Notariats de l'Union Européenne (2012).
[40] Conseil des Notariats de l'Union Européenne (2012).
[41] Conseil des Notariats de l'Union Européenne (2012).

- A spouse has statutory occupancy rights in the matrimonial home, even if it is owned solely by the other spouse.
- There is a principle of fair sharing (which normally means equal sharing) of matrimonial property on divorce.
- A surviving spouse has certain protected rights on the death of the other and, on testacy, will often take the whole estate. [42]

In other words, Scotland adheres to equitable division of matrimonial property.[43]

- **From Latin America**

Country	Form of compulsory joint tenure	Legal basis
Latin American countries (except Costa Rica, El Salvador, Mexico, Nicaragua)	• Default regime is compulsory partial community of property, allowing exceptions, for example, for separate property by gift and inheritance. Profits derived from the separate property are deemed to be marital property.	Civil Codes
Bolivia*	• Partial community of property is the default regime.[44] • Property acquired through concession or adjudication by the state forms part of the common property of the couple.**a** • Disposition of community property requires the express consent of both spouses.	Family Code
Colombia*	• Deferred community of property is the default regime.[45] • Joint allocation, titling and registration of agricultural land to spouses and stable partners in Family Agricultural Units, as part of land reform programme.	Civil Code Law 28 of 1932 Law 160 of 1994
El Salvador*	• Default regime is full or universal (deferred)[46] common property (pooling	Family Code

[42] Conseil des Notariats de l'Union Européenne (2012).
[43] Conseil des Notariats de l'Union Européenne (2012).
[44] The World Bank Group (2016).
[45] *Id*.
[46] *Id*.

	of all property and rents from property either brought into the marriage or acquired during the marriage, including through inheritance).	
Honduras*	• The default regime it is now deferred community of property.[47] • Initially joint titling was optional but now it is mandatory for married couples as well as consensual couples.[48]	Civil Code
Nicaragua*	• Separate property regime is default regime[49] but community of property regime can be established by pre-nuptial agreement. • Provides for compulsory joint titling for couples, whether married or not, in land titling programmes.**d** • Titles issued in the name of the household head are considered as issued to both spouses/partners. • Civil Code recognises the husband as the head of the household (Art. 151).**e** • Women are recognised as direct beneficiaries of land reform, regardless of family status.**f**	Civil Code Law 870 Law 278 of 1997 Agrarian Reform Act of 1981

- **From Asia**

Country	Form of compulsory joint tenure	Legal basis
Laos	• Property acquired during marriage is jointly held and joint title is required. Customary law also supports co-ownership of land by marital couples.**b**	Family Law Property Law
Philippines*	• Full community of property regime is the default regime.[50] • Presumption is that if two people live together their land is jointly owned.**c** • Alienation requires the approval of both spouses.	Family Code **e** Comprehensive Agrarian Reform Law

[47] *Id*.
[48] Susana Lastarria-Cornhiel, Sonia Agurto, Jennifer Brown, & Sara Elisa Rosales (2003). Joint Titling in Nicaragua, Indonesia, and Honduras: Rapid Appraisal Synthesis. https://nelson.wisc.edu/ltc/docs/sl0301joi.pdf, at 4.
[49] The World Bank Group (2016).
[50] The World Bank Group (2016).

	• Even if one partner does not participate in the acquisition of property, s/he is deemed to have contributed jointly if s/he cared for and maintained the family and household.**d**	
Vietnam	• Partial community of property regime is the default regime. All land acquired during marriage is considered to be a common asset, unless separately inherited, gifted, or acquired through a transaction made with separate property. • Names of both wife and husband must be registered on the Land Use Rights Certificate.**f**	Revised Land Law of 2003 Law on Marriage and Family of 2001

ANNEX A

Analytical Framework for Marital Property Regimes

Legislating Equitable Marital Property Regimes as a Means to Secure Women's Rights to Marital Property.

Marital property regimes govern how property rights and management powers are allocated during marriage and at the time of marriage dissolution due to death, divorce, or separation. The type of marital property regime a jurisdiction adopts impacts how these allocations are made within the household.[82] A 2014 World Bank study identified a tight link between marital property regimes and women's land or housing ownership. [83] The legal structure of the regimes greatly impacts wealth distribution within the household, and women's secure property rights are a critical factor in women's well-being.[84]

Underlying Theory of Separation of Property Regimes.
"The theory underlying [separation of property, arising from common law models historically] is that each spouse is a separate individual with separate legal and property rights."
Source: IRS, Part 25.18, Basic Principles of Community Property Law.

In general, there are three types of marital property regimes: separation of property regimes, partial community of property regimes, and full community of property regimes. [85] (See end of Annex A for a typology of martial property regimes and their definitions.) In separation of property regimes, all property—whether acquired before or during the marriage—continues to be held separately by the spouse who acquired it. This separate allocation continues to hold upon death or divorce.[86] Although protection of women's property rights may be weak in any of the marital marital property regimes, this is particularly the case under separation of property regimes because wives lack legal claim to marital property upon divorce.[87]

By contrast, community of property regimes are joint property regimes under which spouses enjoy equal access to property and land during the marriage, and after marriage dissolution, joint property is divided equally between the spouses.[88] In partial community of property regimes, "[a]ssets acquired before marriage are regarded as the separate property of the acquiring spouse, and assets and income acquired after marriage, with a few exceptions specified by law, are

[82] World Bank Group (2015), at 13.
[83] *Id.* at 30.
[84] *Id.* at 30.
[85] Agnes R. Quisumbing et al. (2014). Gender in Agriculture: Closing the Knowledge Gap, at 120; World Bank Group (2015).
[86] World Bank Group (2015), at 52.
[87] Quisumbing et al., at 121.
[88] World Bank Group (2015), at 13, 52.

regarded as joint property of the couple."[89] (See Annex A for another variant.) In full community of property regimes, all property and income, regardless of when it was acquired, converts to joint property (except for a few exceptions). [90] Community of property regimes largely benefit women (so long as other laws do not counteract their positive effects). [91] The World Bank Group's 2015 study of 173 jurisdictions finds that 79 have established a (full or partial) community property regime as their default.[92]

Underlying Theory of Community of Property Regimes.
"The theory underlying community property is analogous to that of a partnership. Each spouse contributes labor (and in some states, capital) for the benefit of the community, and shares equally in the profits and income earned by the community. Thus, each spouse owns an automatic 50% interest in all community property, regardless of which spouse acquired the community property. Spouses may also hold separate property, which they solely own and control, but the law in the community property states does not favor this.
Source: IRS, Part 25.18, Basic Principles of Community Property Law.

As a matter of law and policy, a jurisdication can establish a default marital property regime. The default prescribes "the set of rules that apply to the ownership and management of property within marriage and when the marriage ends, when there is no prenuptial agreement."[93] UN Women recommends the "[l]egislation should provide for compulsory joint tenure as the default regime . . . when spouses marry."[94] Moreover, it also recommends that non-formal unions should be governed by compulsory joint tenure or co-ownership, which necessistes the repealer of default regimes based on optional joint tenure.[95]

Legislating Compulsory Joint Titling to Safeguard Equitable Division of Marital Property.

Women who seek joint titling for their marital property may reduce uncertainties around equitable division of maritial property. However, women are seldom in a position to demand it. Therefore, it is beneficial to have legal provisions requiring compulsory joint titling of marital property. UN Women recommends that when states "reform marital property systems, legislation should provide for compulsory joint titling of marital property, particularly in societies that bequeath land through the patrilineal side." Further, these reforms should extend compuslory joint titling to "where documentation or fee requirements hinder such

[89] *Id* at 52.
[90] *Id.*
[91] *Id.* at 13.
[92] *Id.*
[93] *Id.* at 52.
[94] UN Women (2012). Joint Tenure and Titling for Spouses. http://www.endvawnow.org/en/articles/771-joint-tenure-and-titling-for-spouses.html?next=772.
[95] *Id.*

registration."[96] Compulsory jointing titling provisions play a key role in helping women retain a share of the property in the event of marriage dissolution, be it from divorce, separation, or death.[97]

Typology of Marital Property Regime and Definitions

- The **default marital property regime** is the set of rules that apply to the ownership and management of property within marriage and when the marriage ends, when there is no prenuptial agreement. Default marital property regimes are classified as follows:
    - **Separation of property**: All assets and income acquired by the spouses both before they marry and during the marriage remain the separate property of the acquiring spouse. At the time of divorce or the death of one of the spouses, each spouse retains ownership of all assets and income brought to the marriage or acquired during marriage by that person and any value that has accrued to that property
    - **Partial community of property**: Assets acquired before marriage are regarded as the separate property of the acquiring spouse, and assets and income acquired after marriage, with a few exceptions specified by law, are regarded as joint property of the couple. This regime also applies to cases where assets acquired before marriage and assets acquired during marriage are regarded as the separate property of the acquiring spouse but the accrued value of the property acquired by any of the spouses is considered joint property. At the time of dissolution of the marriage by divorce or death, the joint property or its accrued value is divided equally between the spouses.
    - **Full community of property**: All assets and income whether brought into the marriage and acquired during the marriage, with a few exceptions specified by law, become the joint property of the couple. If the marriage is dissolved, all joint property is divided equally between the spouses.
    - **Deferred full or partial community of property**: The rules of full or partial community of property apply at the time the marriage is dissolved; until then, separation of property applies.
    - **Other**: This occurs in economies where the default property regime does not fit any of the four descriptions above.
    - **There is no default marital property regime**: This alternative applies in economies where the law requires the spouses to opt into the marital property regime of their choice—with legal alternatives provided—before or at the time of

[96] UN Women (2012).
[97] Hallward-Driemeier & Tazeen Hasan, at 147.

marriage. In economies where there is no default marital property regime, the most common regime is used instead.

Excerpted in full from World Bank Group (2015). Women, Business and the Law 2016: Getting to Equal. Washington, DC: World Bank. doi:10.1596/978-1-4648-0677-3. License: Creative Commons Attribution CC BY 3.0 IGO, 52.

ANNEX B

Comparison of State Law Differences in Community Property States[98]

Exhibit 25.18.1-1: Comparison of State Law Differences in Community Property States

	Arizona	California	Idaho	Louisiana	Nevada
1. When do spouses become subject to state community property laws?	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.
2. Does the state recognize common law marriage?	No, but it recognizes a common law marriage legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.	No, but it did until 1/1/96. It recognizes common law marriages established in Idaho before 1/1/96 or legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.
3. Does the state recognize some from of domestic partnership as an alternative to marriage?	No.	Yes.	No.	No.	Yes.
4. Does a domestic partnership under state law create community property rights and obligations?	Not applicable.	Yes.	Not applicable.	Not applicable.	Yes.
5. When does the community property regime terminate (causing subsequently acquired assets or future income to no longer be characterized as community property)?	Change of domicile, death, decree of divorce or decree of legal separation. Also, property acquired after a petition for dissolution or separation or annulment is separate property, if the petition results in a final decree.	Change of domicile, death of spouse, living separate and apart before dissolution with no present intent to resume marital relations and conduct evidencing a complete and final break in the marital relationship, legal separation or judgment of dissolution.	Change of domicile, death or decree of divorce.	Change of domicile, death or entry of a judgment of separation of property or judgment of divorce.	Change of domicile, death, decree of divorce or decree of legal separation.

[98] Charts excerpted in full from the IRS, Part 25.18, Basic Principles of Community Property Law, https://www.irs.gov/irm/part25/irm_25-018-001.html.

	Arizona	California	Idaho	Louisiana	Nevada
6. How is post marital income generated from separate property (e.g., rents, dividends, interest) characterized?	Separate property unless a portion is derived from CP time, effort and skills. If so, an allocation must be made.	Separate property unless a portion is derived from CP time effort and skills. If so, an allocation must be made.	Community property.	Community property.	Separate property unless derived from a spouse's labor or community property funds. If so, an allocation must be made.
7. How does the state characterize appreciation in the value of separate property?	Separate property. If a spouse's labor or community property funds are used to acquire or improve the asset, a right to reimbursement exists, but this does not change the character of the asset.	Separate property where appreciation is a "natural enhancement of SP" and spouse has expended a minimum of effort or effort has insignificant value. If spouse's labor or CP funds are used to acquire or improve the SP, a right of reimbursement exists, but does not change the character of the SP. A federal tax lien attaches to the right of reimbursement.	Separate property unless a portion is derived from community property. If so, an allocation must be made. A federal tax lien attaches to the right to reimbursement.	Separate property. If a spouse's labor or community property funds are used to acquire or improve the asset, a right to reimbursement exists, but this does not change the character of the asset.	Separate property unless derived from a spouse's labor or community property funds. If so, allocation or reimbursement issues must be dealt with. A federal tax lien attaches to the right to reimbursement.
8. How does the state characterize property taken by spouses under a deed reflecting that the property is held in joint tenancy?	Strong presumption that it is community property. To be a joint tenancy, deed should have language negating the possibility that it is held as community property.	The property is rebuttably presumed to be a joint tenancy. Factors rebutting the resumption include: If acquired during marriage, if acquired with CP funds, if parties knew the legal consequences of JT vs. CP, if loan proceeds deposited into CP account.	Community property unless there is clear and convincing evidence that the spouses intended to hold the property in joint tenancy rather than as community property. . Holding title in joint tenancy is not sufficient by itself to overcome CP presumption.	Community property.	The property is rebuttably presumed to be a joint tenancy.
9. How does the state characterize property taken by spouses under a deed reflecting that the property is held in tenancy in common?	Strong presumption that it is community property. To be a tenancy in common, deed should have language negating	The property is rebuttably presumed to be separate property. Very uncommon form of	As a tenancy in common, if deed uses specific language "as tenants in common." It may also create a tenancy in common if separate property of	Community property.	The property is presumed to be community property.

	Arizona	California	Idaho	Louisiana	Nevada
	the possibility that it is held as community property. Rare form of ownership between spouses.	ownership between spouses.	both spouses is used to acquire the property. Otherwise it is community property.		
10. Does a deed taken in the name of one spouse as sole and separate property create separate property?	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.
1. Does the state recognize pre or post marital property characterization agreements?	Yes.	Yes.	Yes.	Yes.	Yes.
12. What are the property characterization agreements called?	Premarital, post marital, prenuptial or postnuptial agreements,	Premarital, post-marital, prenuptial or postnuptial agreements.	Premarital agreements and marriage settlement agreements.	Matrimonial agreements. (but, post marital agreements require court approval).	Premarital or ante nuptial agreements or post marital contracts.
13. Are property characterizations agreements required to be in writing?	Premarital agreements must be in writing.	Premarital agreements must be in writing. Postmarital agreements need only be in writing if they involve real estate.	Agreements must be in writing.	Agreements must be in writing.	Agreements must be in writing to be effective against the Internal Revenue Service.
14. Are property characterization agreements valid against creditors?	Yes, but fraudulent conveyance statutes can be applied.	Yes. Premarital contracts before 1986 required to be recorded. After 1986, no need for recording to be valid. Premarital not subject to fraudulent conveyance laws. Post-marital need not be recorded, but are subject to fraudulent conveyance laws.	Yes, no notice is required.	Yes, but only if the agreement is recorded (As to real property, with parish registry where real property is located, and as to personal property, with parish registry where spouses domicile).	Yes, but case by case analysis required. Agreement must conform to required state law formalities, and terms of agreement must be mutually observed by parties. Fraudulent conveyance and nominee/alter ego laws can be applied.

	Arizona	California	Idaho	Louisiana	Nevada
15. What property is available to satisfy a premarital federal tax obligation assessed against only one spouse?	All separate property of liable spouse. Also, 100% of community property traceable to or contributed by the liable spouse and 50% of all other community property.	100% of all community property and all separate property of the liable spouse.	100% of all community property and all separate property of liable spouse.	100% of all community property and all separate property of liable spouse.	50% of community property and all separate property of liable spouse.
16. What property is available to satisfy a post marital federal tax obligation assessed against only one spouse?	100% of all community property and all separate property of the liable spouse.	100% of all community property and all separate property of the liable spouse.	100% of all community property and all separate property of liable spouse.	100% of all community property and all separate property of liable spouse.	100% of all community property and all separate property of liable spouse.

	New Mexico	Texas	Washington	Wisconsin*
1. When do spouses become subject to state community property laws?	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	On the determination date, which is the first day after marriage, both spouses domicile in Wisconsin and January 1, 1986 (the effective date of the Marital Property Act in Wisconsin).
2. Does the state recognize common law marriage?	No, but it recognizes a common law marriage legally established elsewhere.	Yes. To qualify, spouses must cohabit in Texas, agree to be married and represent that they are married. Parties to a common law marriage must obtain a divorce or annulment to terminate the marriage.	No, but it recognizes a common law marriage legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.
3. Does the state recognize some from of domestic partnership as an alternative to marriage?	No.	No.	Yes.	Yes.
4. Does a domestic partnership under state law create community property rights and obligations?	Not applicable.	Not applicable.	Yes.	No.
5. When does the community property regime terminate (causing subsequently acquired assets or future income to no	Change of domicile, death, decree of divorce or decree of legal separation. Upon separation, spouses may also ask court for	Change of domicile, death, decree of divorce or annulment.	Change of domicile, death or a separation that is intended to be permanent.	Change of domicile, death, decree of divorce or decree of legal separation or decree of separate maintenance.

	New Mexico	Texas	Washington	Wisconsin*
longer be characterized as community property)?	division of property, which may affect subsequently acquired property.			
6. How is post marital income generated from separate property (e.g., rents, dividends, interest) characterized?	Separate property unless derived from a spouse's labor or community property funds. If so, an allocation must be made.	Community property.	Separate property unless derived from a spouse's labor or community property funds. If so, an allocation must be made.	Marital (community) property.
7. How does the state characterize appreciation in the value of separate property?	Separate property. If a spouse's labor or community property funds are used to acquire or improve the asset, a right to reimbursement exists, but this does not change the character of the asset.	Separate property. If community property funds are used to acquire or improve the asset, when the marriage is terminated by death or divorce, a claim for economic contributions exists.	Separate property unless derived from a spouse's labor or community property funds. If so, allocation or reimbursement issues must be dealt with.	Market appreciation is individual (separate) property. Appreciation due to the efforts of either spouse or application of marital (community) property is marital (community) property.
8. How does the state characterize property taken by spouses under a deed reflecting that the property is held in joint tenancy?	Community property unless the deed also specifically designates it as separate property.	Depends on source of funds used to acquire property. Community property remains CP unless a written agreement to partition is first executed. Otherwise property is CP with a right of survivorship. Property purchased with separate funds may be held as joint tenants, with undivided 1/2 interest being separate property.	Community property unless there is a written agreement between the spouses which clearly evidences the spouses' intent to hold the property in joint tenancy rather than as CP. Holding title in joint tenancy is not sufficient by itself to overcome CP presumption.	Marital (community) property with right of survivorship, which in Wisconsin is called survivorship marital property, unless the deed was executed before 1/1/86. If the deed predates 1/1/86 it is a joint tenancy.
9. How does the state characterize property taken by spouses under a deed reflecting that the property is held in tenancy in common?	Community property unless the deed also specifically designates it as separate property.	Community property, unless a written agreement to partition is executed. Property purchased with separate and community funds is owned as tenants in common.	Community property unless there is clear and convincing evidence establishing the spouses' intent to hold the property in tenancy in common. Title in tenancy in common is not sufficient by itself to overcome CP presumption.	Marital (community) property unless the deed was executed before 1/1/86. If the deed predates 1/1/86, it is a tenancy in common.
10. Does a deed taken in the name of one spouse as sole and separate property create separate property?	Yes. The property is rebuttably presumed to be separate property.	Only if the deed also contains a recital that the consideration was paid from separate funds of that spouse. If so, the property is then presumed to be separate.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.

	New Mexico	Texas	Washington	Wisconsin*
11. Does the state recognize pre or post marital property characterization agreements?	Yes.	Yes.	Yes.	Yes.
12. What are the property characterization agreements called?	Premarital, post marital, prenuptial or postnuptial agreements,	Premarital and marital or post nuptial agreements.	Separate property agreements.	Marital property agreements.
13. Are property characterizations agreements required to be in writing?	An oral agreement will be recognized, but the claim of one will be strictly scrutinized.	Agreements must be in writing.	An oral agreement will be recognized, but the claim of one will be strictly scrutinized.	Marital property agreements must be in writing.
14. Are property characterization agreements valid against creditors?	Unknown. State law requires agreements to be in writing and be acknowledged. There is no case law on the effect of a valid agreement on creditors.	Yes, unless existing creditor's rights are intended to be defrauded by agreement.	Not against existing creditors.	If incurred after the determination date, no, unless creditor has actual notice of the agreement before the obligation is incurred. If incurred before the determination date, yes as to future income or property.
15. What property is available to satisfy a premarital federal tax obligation assessed against only one spouse?	50% of all community property and all separate property of liable spouse.	All separate property of liable spouse, 100% of joint management community property, 100% of liable spouse's sole management community property, and 50% of nonliable spouse's sole management community property. If a homestead is involved, contact counsel.	50% of community property and all separate property of liable spouse.	All individual (separate) property of the debtor spouse, 2. Half of marital (community) property and 3. all marital (community) property that would have been debtor spouse's individual (separate) property but for marital property law or the marriage.
16. What property is available to satisfy a post marital federal tax obligation assessed against only one spouse?	100% of community property and all separate property of liable spouse,	All separate property of liable spouse, 100% of joint management community property, 100% of liable spouse's sole management community property, and 50% of nonliable spouse's sole management community property. If a homestead is involved, contact counsel.	100% of community property and all separate property of liable spouse.	Assuming the obligation is incurred in the interest of the marriage and family, 100% of marital (community) property and all separate property of liable spouse.

*Wisconsin law refers to community property as "marital" property and separate property as "individual" property.

ANNEX D: INTEGRATED WATER & AGRICULTURAL DEVELOPMENT GHANA LTD. INVESTOR CASE STUDY

Integrated Water & Agricultural Development Ghana Ltd. (IWAD) is 100% owned by the African Tiger Holding Ltd and responsible for the implementation of the Silili – Kulpawn irrigation Project (SKIP) in Northern Ghana , together with its strategic partners i.e. Wienco Ghana Ltd., SADA , Wageningen University and Rebel International . IWAD is a private company and the SKIP is funded in part by the Dutch government as a flagship public-private partnership. Tom Durang, the Managing Director of IWAD Ghana Ltd, met with Walter Nuñez and Kwaku Owusu - Baahof the Feed the Future Agriculture Policy Support Project (APSP), and Jennifer Duncan of Landesa, on June 8, 2016, to discuss IWAD's experience with land rights for investment in Northern Region.

IWAD is developing a 400 ha irrigation scheme on an 800 ha of land in Yagaba, a very remote part of the Northern Region—about four hours by car north of Tamale—known as the "Overseas" area. In addition to the 400 ha that will be developed into an irrigated area, IWAD plans to provide support for conservation farming services to farmers in a broader area (of approximately 6,000 ha). Services will include provision of seeds (including those of local variety), rotation crops to support sustainable soils, and fencing. IWAD's investment in the 400 ha irrigated area required families farming on this area to relocate for one cropping season, during development of the irrigation grid. IWAD told relocated farmers that they could come back to farm under the developed irrigation area once established (note: of the 400 ha irrigation developed, 150 ha is reserved for the smallholder farmers). IWAD entered into an agreement with the three villages for the use of their land, which includes establishing a fund for community development.

Prior to beginning development, IWAD conducted an extensive land tenure study of the investment area. This helped IWAD to understand the customary systems, social hierarchies and tenure relationships, and Tom Durang considers this to have been an essential part of the due diligence process leading up the investment. IWAD also conducted a full hydraulic study, a soil and forest inventory, an environmental scoping and, at a later point in time, a formal Environmental Impact Assessment under Ghanaian law. Based on preliminary studies, IWAD identified an area of land suitable for the investment, then began negotiation processes with Traditional Authorities, beginning with the highest-level allodial title holder (the Nayiri, the King and overlord of the Mamprusi) and ending with the village-level sub-division

chiefs. They walked the land with the sub-division chiefs to identify parcels belonging to different land-owning families and tenants, and compensated them for being temporarily displaced from their land.

The land in the 800 ha estate is from three villages, all within the authority of one paramount chief. The land for the expansion conservation farming area of support to small farmers is within the authority of another paramount chief. The chiefs are brothers and have good relations, which has been a significant positive factor for the investment. IWAD asked the villages to conduct a participatory mapping exercise to determine the village boundaries, which raised historical conflicts. These were resolved by the chiefs and land holding families, who eventually presented a resolution to IWAD.

Two other conflicts have arisen. The first has to do with incursion of cattle into the project area. The second conflict has to do with Town and Country Planning Department (TCPD) from Tamale demanding at the final stage of the process to move the entire concession 1 km further to the East, to build a District Assembly facility on part of the agreed land leased to IWAD. This came as a surprise to IWAD, and did not seem to be coordinated in any way with Lands Commission authority or with the Traditional Authorities. IWAD eventually negotiated with the District Assembly to move the irrigation design (a 500 metre—rather than one kilometer—swath) and keep the concession border as initially agreed , in order to accommodate for a cattle corridor that would help to divert cattle off of the township land and IWAD's land. A new plot of land was negotiated with the traditional authorities for the new District Assembly facility outside the SKIP concession border.

Lessons learned and suggestions for improvements to the land rights framework in Ghana from an investor perspective:

1) Investors must be prepared for long-term investment ramp-up, and to invest significant time and resources into understanding and engaging with customary systems in relevant geographic areas. The long lead time is an impediment in attracting and leveraging capital, and it can be hard during this time period to avoid rumors and expectations in local communities about anticipated project development.

2) Investing in land in Ghana requires on-the-ground presence and the willingness and knowledge necessary to develop a strong social contract with customary communities in the project area. Investors need to engage at the correct level in the customary hierarchy, which means approaching the highest level allodial title holder. The next step is to work very closely with the lowest-level village (sub-division) chiefs, ensuring an open channel of communication that will keep messages channeling up to higher level chiefs. It is also important for investors to understand as much as possible about the local social/customary relationships in the investment area, such as the identity of the major land owning families. The pay-off for investors of nurturing good relationships with traditional authorities at each level is a strong mutual trust that creates a foundation for profitable long-term

investment. Tom Durang has a high level of confidence that IWAD's interests are aligned well with community interests, and will be protected well by community authorities. There has not been a single incident of theft of IWAD property to date.

3) Participatory mapping by local communities is an essential tool to clarify land rights in investment areas, and may expose conflicts that need to be resolved. Resolution can take time, and it is important for investors to encourage this process to move forward.

4) Obtaining a formal lease can take a very long period of time. Lands Commission procedures and community consultation processes were not very clear and needed to be repeated. It would be helpful if timelines for government action at each step were specified in the law (or regulations).

5) Town and Country Planning needs to be better linked to Traditional Authorities and to the Lands Commission, and investors need better guidance and instructions about how the government agencies work, including relationships between agencies, what the relevant points of contact should be, and what the steps should be in the event of a dispute.

6) Investors need to have a more robust participatory process for negotiation with communities (rather than, e.g., negotiating just with the chiefs). But they need guidance for how to do this, which should be written into the law/ Guidelines.

7) Compensation to community for loss of access to shea nut trees and other important economic trees should be better provided for in both customary and formal compensation guidelines and regulations.

ANNEX E: POWER POINT PRESENTATION TO THE LAND BILL WORKING GROUP ON 6-7 JUNE 2016

Land Bill Draft 4
Comments and Recommendations

Jennifer Duncan (with input from Beth Roberts and My-Lan Dodd)

Working Group Meeting, Accra

6 June 2016

Landesa

Background to Consultancy—Scope of Work

1. Mark-up of Bill
2. Specific issue areas
   - Emerging international Innovations in compulsory acquisition law.
   - Transparency and consultative mechanisms, particularly in the context of large-scale investments.
   - Legal aspects of electronic conveyancing and digitization of land-related information and evidence.
   - Institutional and procedural arrangements for governance of customary land, including common property resources.
   - Gender dimensions of land rights.
   - Other areas that the Working Group and Consultant may jointly decide would benefit from attention, including as needed, providing overall textual scrutiny of Draft 4 for consistency, identifying gaps, preparing commentary, developing materials for consultations on the Draft, etc.
3. Draft Trip Report (with issues, options and recommendations)
4. Final Trip Report (with issues, options and recommendations)

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Primary Issues: Overview

1. Customary rights
    1. Vision and mechanics for recording customary rights
    2. Role of CLSs--risks
    3. Rights of usufructuary—alienation
    4. Anti-discrimination—clause 13
    5. Common areas—purpose of clause 20
2. Transparency and accountability in land governance institutions
3. Formal registration
    1. Vision for deeds v. titles (or dual system)
    2. Allodial interests
    3. Other registration issues
4. Electronic conveyancing and registration
5. Legal framework for large-scale investment in land
6. Compulsory acquisition
7. Gender/ spousal provisions

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1. Customary rights

80% of Bill relates to transaction of private lands. But 80% of the land in the country is within customary communities. Does Bill create sufficient legal framework and safeguards for customary lands?

1. Vision and mechanics for recording customary rights
2. Role of CLSs-risks
3. Rights of usufructuary-alienation
4. Common areas-clause 20
5. Anti-discrimination clause 13

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Customary lands: recording rights and CLSs

1. Bill establishes legal framework for CLSs and recording of customary rights based on secondary transactions (and some oral grants—Cl 35)
2. But does it create framework/ vision for systematic and comprehensive registration/recording of customary rights? (Cl 16(b)—what does it mean to catalogue?)
    1. Political will?
    2. Practical mechanics of efficient, low-cost registration of customary land?
        1. Ulassa Akropong , Western Region
        2. RWANDA/ ETHIOPIA
3. If no comprehensive first recording, heightened vulnerability of those with non-recorded rights.
4. Legal meaning of recorded customary rights?
    1. Vis-à-vis registered rights?
    2. Vis-à-vis other customary rights?

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Customary Land Rights: Alienation

Cl 48(19): Allodial title holder cannot alienate usufruct land without (1) consent and (2) compensation.

Issues:

1. 25% appears too low
2. Could it be paid with in-kind equity?
3. Would it be in addition to, or instead of, customary re-allocation of land? Risk of undermining that customary practice to detriment of vulnerable?

Customary Land Rights: Common Areas

Clause 20:

A community may set aside or recognise one or more areas of land and water resources within the community for common use by the members of that community.

Purpose of the clause?

Does it fulfil purpose?

2. Transparency and accountability in land governance institutions

Improvements in the Bill? Penalties for misbehavior, disclosure of "drink money" payments, etc.

But does Bill address primary concerns of land-sector investors, large and small, about corruption and service-related challenges?

There is room for stronger coverage:

1. Call for regulations clearly stating step-by-step registration procedures, time limits, and fees
2. Mandate that these be posted prominently and distributed through the media, etc.
3. Increase public participation in compulsory acquisition processes
4. Consider establishment of ombudsman agency.

3. Registration

1. Titles and deeds
    1. Title sections apply only within titling districts?
    2. Conclusive proof of ownership/ indefeasible interests: how does this work given existence of deeds and customary interests?
    3. Mechanics for converting deeds to titles, bringing deed records into title registry?
2. Plan for registering allodial interests
    1. Within a given time frame?
    2. Systematic?
3. Other issues
    1. Accountability of Registrar—time limits, fees, procedures

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4. Electronic conveyancing (and registration)

Electronic conveyancing—considerations

1. Need to define exact legal effect of electronic conveyance (e.g., equivalent to a deed)
2. May need to repeal attestation requirements
3. Takes time to implement

E-conveyancing: international experience

England and Wales, Land Registration Act (LRA), 2002

- The LRA provides the "statutory provisions necessary for gradually introducing and regulating a system of electronic conveyancing." (Mosert 2011, 97). After successful pilot projects in 2006 and 2007, the government "rolled out" its e-conveyancing process (Id.).

The e-conveyancing system:

- Eliminates the registration gap (i.e., the gap between finalizing the real property transaction and registering the property);
- "[G]radually makes registration compulsory";
- Permits e-settlement of accounts; and
- Authorizes conveyancers to directly change the register, which requires "strict rules on secure electronic networking and regulated access" as well as early involvement by the Registry (Id., 97-98).

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E-registration/ digitalisation

Overview

1. "Developing a digital Land registration system requires re-engineering processes to enable e-submission of records and verifying the authenticity of such records. This requires changes at both technical as well as legal levels." (Tembo, Nkwae, and Kampamba 2014, 1)
2. Primary challenges= identifying parties, authenticating documents
3. Computerizing land registration systems can occur in conjunction with or parallel to paper formats and processes. See South Africa, Taiwan, Japan, France, Germany, England and Wales, and the Canadian provinces of British Columbia and Ontario. E- registration can take a variety of forms (e.g., uploading paper-based forms or populating electronic form), which can occur side-by-side with paper-based entries.

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E-registration/ digitalisation—South Africa

2016 South African Bill provides for:

- "an electronic deeds registration system;
- the electronic keeping of registers;
- the electronic lodgement of proof in paper and electronic form;
- the electronic issuing of deeds for information and judicial purposes only;
- the making of regulations in respect of electronic lodgement of deeds and documents and requirements relating to electronic or digital signatures;
- conveyancers to register as authorised users of the electronic deeds registration system;
- the electronic preparation of deeds and documents and the safe - keeping and filing thereof by conveyancers."

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5. Large-scale investments in land

1. Consider "land-based" framework
2. Overview of issues: LSAL in Ghana
3. Recommendations
    1. Incorporate reference to national framework/ guidelines
    2. Incorporate reference to international best practices
    3. Consider establishing and referring to single institution
    4. Consider adjusting the 10-acre minimum
    5. Address investor concerns related to accountability and transparency in land sector

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LSAL in Ghana

The Land Governance Assessment Framework identified the following LSAL issues in Ghana:

- Land deals done exclusively between investors and chiefs damages community livelihoods
- Environmental and social impact assessments are not carried out
- Companies do not fulfill CSR commitments
- Investors, government, and communities need clear guidance to follow in the LSLBI context

LSLBI in Ghana

Additional issues:

- Disadvantages caused by LSALf all disproportionately on vulnerable groups, including women and settlers
- The nature of rights to land use and ownership within customary tenure systems results in a lack of clarity for investors and a lack of recourse for people deprived of land because of LSAL

LSLBI: Existing Domestic Guidance

- Lands Commission Guidelines on Large Scale Land Acquisition
- Ghana Commercial Agriculture Project (GCAP)
  - Model Lease Agreement
  - Community/Investor Guidelines

LSLBI - Recommendations

- Include sections in Draft 4 of the bill to address LSLBI issues:
- **Reinforce existing domestic standards**
- Example language: "Investments in land, whether made by foreign, domestic, or government actors, must comply with existing domestic legislation, including permitting and environmental protection regulations, and must comply with guidance on LSLBI issued by government agencies."

LSLBI - Recommendations

- Reference and explicitly adopt international best practices
- Example language: "Investments in land, whether made by foreign, domestic, or government actors, must conform to international best practices, including Free, Prior and Informed Consent (FPIC), the African Union Guidance on LSLBI, and the Voluntary Guidelines on the Responsible Governance of Tenure."

LSLBI - Recommendations

- Establish a single government entity responsible for screening investors at the start of the LSLBI process
- Example language: "Investments in land, whether made by foreign, domestic, or government actors, must be registered with the Ghana Investment Promotion Centre. Any investment not registered will not be granted a license by any other government entity."

6. Compulsory Acquisition

1. Public purpose
2. Additional issues
3. Recommendations
    1. Compensate all members of household
    2. Compensate occupants of public land (within limits)
    3. Address "public purpose" breadth
    4. Strengthen access to justice--appeals

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Compulsory Acquisition—Public Purpose

- The VGGT urge states to clearly define the concept of expropriation for public purpose
- The definition of public purpose in the Bill is broader than that in the Const (Art. 20)
- Could Cl 220 (1)(b) be deleted?

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Compulsory Acquisition
Additional Issues

- The Constitutional provision requiring compensation has not been adhered to
- The Constitutional provision requiring that land be used for the stated acquisition purpose has not been adhered to
- Squatters on public lands should be compensated when their livelihoods are affected by an acquisition

Compulsory Acquisition Recommendations

- Mandate that compensation for compulsory acquisition be paid to all members of the household whose rights have been affected
- Example Language: "Compensation must be assessed in accordance with the results of an investigation that identifies all community members who will be affected by loss of land use, including women, children, and tenants."

Compulsory Acquisition Recommendations

- Increase access to justice by providing clear and accessible channels for appeal not just based on compensation, but also on the merits (e.g., as defined under Cl 220)

7. Gender

1. Issues outstanding in the Bill
    1. Section 13
    2. Spousal registration and consent for conveyances—polygamous context?
    3. Informal marriages
    4. Joint ownership v. tenancy in common
2. Defence/ justification for spousal rights provisions

Questions and Discussion

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