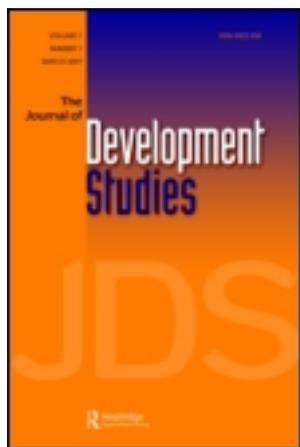


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Translating Legal Rights into Tenure Security: Lessons from the New Commercial Pressures on Land in Ghana

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Translating Legal Rights into Tenure Security: Lessons from the New Commercial Pressures on Land in Ghana

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ABSTRACT *Since the confluence of the food and oil price crises of the mid 2000s, Ghana has become a prime destination for large-scale farmland investments. While this trend could make valuable contributions to an ailing agricultural sector, the alienation of rural land for commercial ends could conversely have far-reaching implications for customary land rights. Through an analysis of the legislation protecting customary land rights and governing such the alienation of those rights and by contrasting this with practice, this article highlights some of the fundamental challenges in translating legal rights into tenure security in contemporary Ghana. It shows that despite the legal recognition of customary land rights, in practice customary land users are ultimately responsible for contesting infringements upon these rights. With traditional authorities able to capture substantial rents from the alienation process and government institutions offering scant oversight as a result of fragmented responsibilities, capacity constraints, and political disincentive, the protection of customary land rights is becoming increasingly contingent on community 'capacity to claim'. Since poor access to information, unrealistic expectations and deference to traditional authority tends to quell disputes over alienation, the limited mechanisms for protecting citizen access to resources gives reason to reconsider the importance of direct state involvement in the customary land domain.*

1. Introduction

Global trends such as rising food prices and demand for and policy commitments to alternative energy have over the preceding decade led to a rapid expansion in the scope and scale of transboundary investments in land for the cultivation of food and biofuel crops (Cotula, Vermeulen, Leonard, & Keeley, 2009; de Schutter, 2011). Despite an absence of comprehensive data, early evidence suggests that many of these investments have targeted sub-Saharan Africa (World Bank, 2011a). While, historically, the region has largely been neglected by foreign direct investment, it is becoming an increasingly attractive destination for farmland investments due to its relative abundance of cheap and agro-ecologically suitable land and its increasingly liberalised trade and investment regime (FAO, 2008; Schoneveld, 2011).

These growing commercial pressures on land, however, pose significant threats to customary land rights. In much of rural Africa, systems of collective ownership under customary, rather than statutory, law continue to govern claims to land and resources. While many African governments have implemented land reform programmes to extend legal recognition to customary land rights, customary claims are rarely afforded the same legal protection as formal property rights and remain susceptible to expropriation (German, Schoneveld, & Mwangi, 2013). With investment flows in Africa having become increasingly contingent on ease of access to land, strengthening customary rights and 'investment promotion' are threatening to become conflicting policy objectives. This tension raises very real challenges to sustaining land reform initiatives on the continent.

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Within sub-Saharan Africa, Ghana has become one of the primary recipients of large-scale farmland investment. It is estimated that since 2005 investors have gained access to more than 2 million hectares across the country, equivalent to between 91 and 99 per cent of the total area that is both agro-ecologically suitable and potentially available for agriculture (Schoneveld, 2013).¹ Since most suitable land is under other socially and economically valuable land uses, insufficiently regulated land use change in Ghana could have dire developmental implications. Only through the effective management of land acquisitions can these risks be minimised; for example, by ensuring investments target genuinely available land or by protecting the customary tenure rights and needs of existing land users.

This article offers insights into customary tenure security in Ghana in the context of rising commercial pressures on land resources and the effectiveness of existing governance mechanisms in preventing and mitigating the adverse impacts associated with dispossession. Ghanaian land laws are considered to be one of the most progressive in sub-Saharan Africa in providing customary rights legal recognition (Alden Wily, 2011); by bringing to light deficiencies in implementation we illustrate some of the fundamental challenges in translating legal land rights into tenure security. The article does this by analysing the legislation protecting customary land rights and governing large-scale farmland acquisitions and by contrasting legislation with actual land acquisition processes.

The following section will discuss the evolution of farmland investments in Ghana and their alignment with Ghana's policy aims. This is followed by an overview of the methodological approach. The next two sections profile findings from the analysis of the statutory underpinnings of customary rights protections and large-scale land acquisitions, and land acquisition processes in practice. The article concludes with a reflection on findings and implications for governance.

2. Background

2.1. Large-Scale Farmland Investment Trends in Ghana

The large-scale commercial plantation sector in Ghana has long been limited to only a dozen large-scale tree crops plantations, such as oil palm and rubber, and horticultural plantations, such as pineapple (Fold, 2008; Schoneveld, German, & Nukator, 2011). While in the early post-colonial era numerous large-scale state cereal farms were established in the northern transition area, these collapsed as a result of mismanagement and neoliberal reforms (Amanor and Pabi, 2007; Hill, 1977). Since 2005, however, Ghana has experienced an unprecedented expansion of capital commitment to the large-scale commercial plantation sector, with over 36 companies having each acquired land exceeding 2,000 ha for agriculture and forestry plantations, covering an estimated 2.05 million ha of land (Schoneveld, 2013).² Eighty-nine per cent of projects and 93 per cent of the area acquired can be attributed to companies where the majority shareholder/lead investor is based overseas (ibid). Eighty-one per cent of these projects were initiated in the period 2007–2009, at the height of the global oil and food price crisis. The global economic prospects for biofuels, particularly for the mandate-driven European markets, were ostensibly the key driver of investment (Figure 1). For example, 19 investments, the vast majority of European origin, exclusively target the production of biofuel feedstocks; Twelve of these target the cultivation of the drought-resistant, oilseed-bearing plant *Jatropha Curcas L.* (jatropha). A number of large plantations cultivating multi-use crops such as oil palm and sugarcane or jatropha in combination with cereal crops were also found to be targeting the biofuel end-market. The food crop investments, on average involving significantly smaller land areas, were predominantly targeting the cultivation of cereal crops such as rice and maize for domestic consumption.

At least 21 of the 36 large-scale plantation projects were documented in the forest–savannah transition zone that separates the semi-arid north from the humid tropical coastal areas (Figure 2). With a biannual rainfall regime, lower population density than the south and comparatively developed physical infrastructure, this area has proven to be of particular strategic interest to investors. Compared to the more developed and populous southern regions, this area offers more opportunities to acquire large contiguous areas of land at significantly lower costs (in part due to lesser developed land markets).

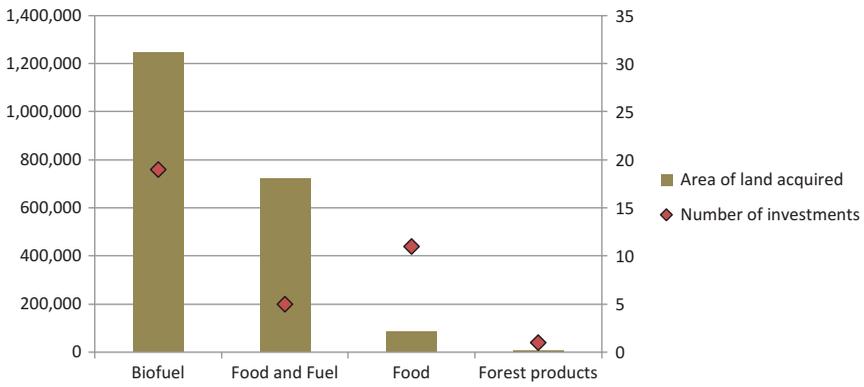


Figure 1. Sectoral composition of large-scale farmland investments in Ghana (2005–2012).
Source: Adapted from Schoneveld (2013).

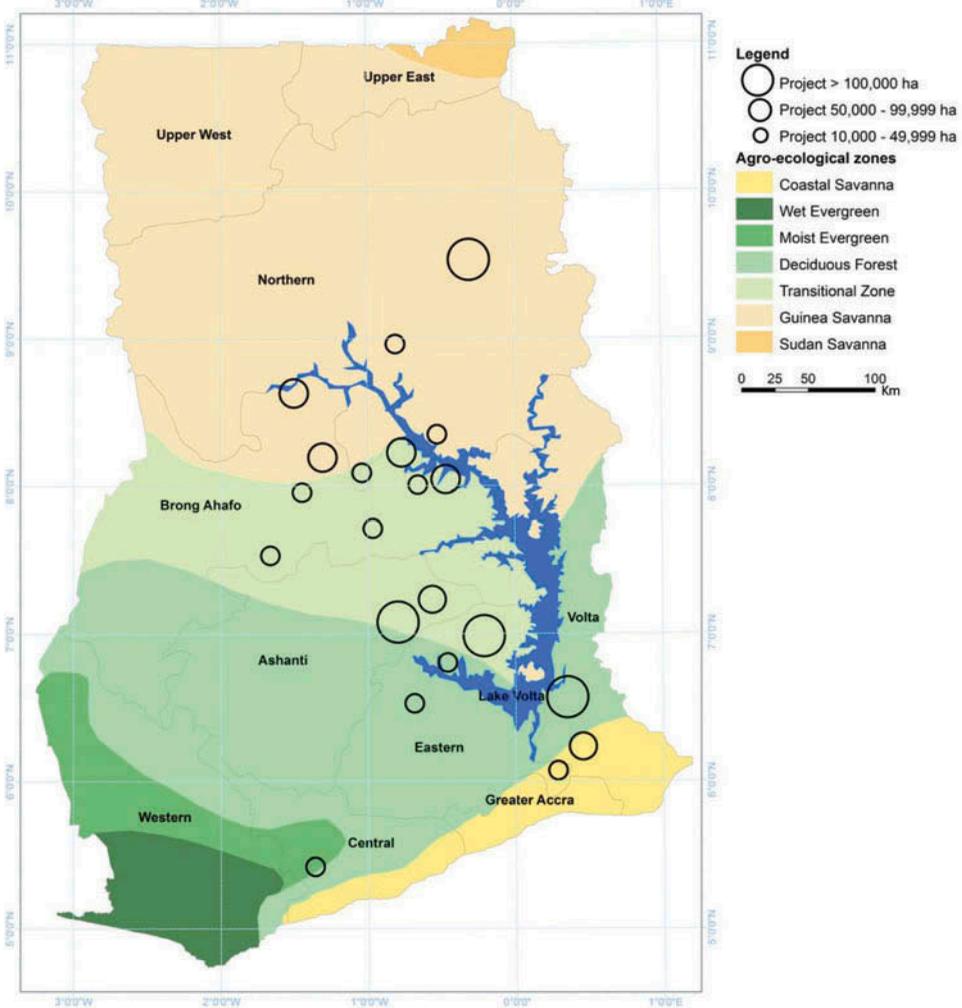


Figure 2. Distribution of land acquisitions for agriculture and forestry exceeding 10,000 ha since 2005.
Source: Authors' representation, based on raw data from Schoneveld (2013).

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2.2. Alignment with Policy Aims

The development of the agricultural sector, despite being the backbone of the Ghanaian economy, has been long hindered by low productivity, principally due to public underinvestment and limited smallholder access to inputs and markets (Benin, Mogues, Cudjoe, & Randriamamonjy, 2009; Seini, 2002). The agricultural sector accounts for 34 per cent of GDP and employs 55 per cent of the economically active population (derived from World Bank [2012]). From being a net food exporter in the 1970s, Ghana now depends on external markets to meet its consumption needs in numerous important staple crops such as rice, wheat and maize.

In recognition of the social and economic importance of modernising the agricultural sector, various strategies and policies have been adopted in recent years to address some of these structural issues. Ghana's Food and Agriculture Sector Development Policy (FASDEP II 2007) and the Growth and Poverty Reduction Strategy (GPRS II 2006–2009), for example, perceive the modernisation of the agricultural sector to be the basis for equitable economic growth and structural transformation. One of the key strategies to achieving this is enhancing market efficiency through the promotion of large-scale commercial farming and nucleus-outgrower schemes. Ghana's most recent national development plan, the Ghana Shared Growth and Development Agenda (GSGDA 2010–2013), further reinforces these commitments, reiterating the importance of private sector investments in modernising the agricultural sector. In support of these modernisation objectives the Ministry of Food and Agriculture (MoFA) launched the Ghana Commercial Agriculture Project (GCAP) in 2010, in collaboration with the World Bank and USAID, with 'the principal objective of improving the investment climate for agri-business' (MoFA, undated).³ The underlying assumption of these policies is that commercial farming projects will, in addition to improving national food security and the current account balance, engender valuable new horizontal and vertical linkages within the agricultural sector. This, it is argued, will contribute to smallholder productivity by enhancing access to markets and inputs and through knowledge spillovers.

The recent surge in farmland investments has therefore been generally well received by Ghanaian policy-makers. However, while the aforementioned policy objectives relate primarily to the production of traditional subsistence and cash crops, large numbers of investments are targeting the cultivation of non-food biofuel feedstocks such as jatropha or the biofuel end-market. Although during early sector development it was widely argued that jatropha would not compete with agricultural land (Ahiataku-Togobo and Twum Addo, 2007; Energy Commission, 2006), the government is increasingly cautioning for the threat of food versus fuel competition (Energy Commission 2010; National Development Planning Commission, 2011; personal communications, senior official from the Ministry of Energy, Accra, 2011; personal communications, senior official from the Environmental Protection Agency, Accra, 2011). Early evidence suggests that, by displacing smallholder production systems, jatropha cultivation may in some cases indeed reduce local output of food crops (Schoneveld et al., 2011). Despite this, the government, through the National Bioenergy Policy (Energy Commission, 2010), continues to formally encourage commercial biofuel feedstock cultivation, without specifying conditions under which such investments are viable. The Policy simply argues that such investment would enhance energy security, increase export earnings and 'provide an avenue to reduce poverty and wealth creation through employment generation' (Article 2.1). On this basis, biofuel investments, too, are very much in line with government policy aims.

3. Methodology

The following methodology was used to assess the legal underpinnings of large-scale land acquisition and the actual practices involved: a content analysis of key policies and legislation; key informant interviews with government agencies involved in land administration and investment promotion, with investors, and with local chiefs and authorities; and focus group discussion with project affected households (for example, those losing access to land resources). Interviews were held with a total of 28 government stakeholders, four companies and eight chiefs, and nine focus group discussions were

conducted. Focus group discussions consisted of, on average, 10 to 15 participants, involving both males and females.

Nine plantations were visited from six different companies, with each plantation ranging from 5,000 to 70,000 ha in size. Seven projects involved the cultivation of jatropha, one project the cultivation of sugarcane, and one the cultivation of maize. Furthermore, eight projects involved foreign investors and one project domestic investors. These were spread across four districts, namely Asante Akim North, Kintampo North, Nkoranza, and Pru, located within the forest–savannah transition zone – eight were located in Brong Ahafo and one in Ashanti. Land acquisition processes in Pru district, where five plantation sites were located, were studied in greater depth. These areas were selected due to their disproportionately high concentration of farmland acquisitions. Projects were identified through interviews with district and regional government stakeholders familiar with investment projects. With all projects still in their initial phases of implementation, specific site selection was based solely on the status of project development, so as to be able to capture early project impacts. Without biases in the site selection process, profiled cases are likely to be representative of projects within the forest–savannah transition zone. However, in coastal Ghana, due to comparatively high population densities, more developed land markets and land tenure systems based on family holdings (Kasanga & Kotey, 2001; Tsikata & Yaro, 2011), land acquisition processes in those regions may differ from our case studies.

The methodology for assessing the legal underpinnings of customary land rights and the process of large-scale land acquisition involved the development of a set of criteria to explore how the law supports different dimensions of customary rights in the negotiation process. These criteria are structured sequentially, following key stages in the ‘land acquisition process’ – from the underlying rules governing rights and who may hold them and land alienation procedures to project implementation and the status of land following project completion (see Table 1). These criteria closely mirror principles related to the protection of customary land rights of internationally recognised codes of conduct, notably the Voluntary Guidelines on Responsible Governance of Tenure (FAO, 2012) and the Principles on Responsible Agricultural Investment (RAI) (World Bank, FAO, UNCTAD, & IFAD, 2011).

Table 1. Overview of criteria

Criteria	Description
1. Types and duration of land rights afforded to investors	Nature of land rights that may be acquired by investors (for example, usufruct, leasehold or freehold) and conditions (for example, duration and renewability of these rights).
2. Provisions to protect customary rights	Legal provisions to protect customary rights – whether through formal titling or recognition of existing systems of land occupation and tenure, as well as mechanisms to ensure local rights to land and other natural resources are safeguarded during the negotiation process.
3. Mechanisms for guiding land allocation	Legal provisions for identifying suitable and/or available land for particular types of uses or that assist investors in acquiring land; areas that are off-limit for development.
4. Participation of customary land users	Legislated steps and processes through which customary rights holders are informed, consulted or given decision authority over land transfer and its terms. This includes three related sub-parameters.
5. Mechanisms for local representation	Legislation that specifies mechanisms for representation of ‘local communities’ or customary rights holders in the negotiation process.
6. The role of intermediaries	The legislated role of government agencies or other actors in regulating, mediating or facilitating the negotiation process.
7. Compensation mechanisms	Legal provisions that specify the level, type and distribution of compensation to be paid for land alienation.
8. Impact mitigation requirements	Legislation requiring project proponents to mitigate negative socioeconomic impacts of their investments.
9. Monitoring	Legislation requiring the monitoring of social impacts and, where stipulated, the social dimensions or indicators to be monitored.
10. Dispute resolution	Legally recognised mechanisms for recourse for aggrieved parties.
11. Changes in the status or classification of customary land	The legal status of land following the termination of investor land rights (for example, whether it reverts to customary tenure or becomes state land).

4. The Statutory Underpinnings for Large-Scale Farmland Acquisitions

Land ownership in Ghana can be classified into three broad categories: land under customary ownership (constituting 78% of the total land area); land controlled by the state (20% of the total land area); and the remaining land area (2% of the total land area) under some form of shared ownership (Deininger, 2003). While providing customary land with legal recognition, the Ghanaian Constitution of 1992 forbids its sale, only allowing for temporary alienation through leasehold titling. Customary land can only be reclassified to state land through the use of the state's right to eminent domain, which enables involuntary expropriation of customary land for a 'public purpose' (see Table 2 for a detailed overview of legal provisions and relevant legislation). Customary law freehold (or usufruct title) can be acquired by subgroups or individuals within their 'traditional area', typically by being the first to cultivate that land, through inheritance, or through allocation by a chief. However, only a fraction of individual landholdings are formally registered – those that are typically located in (peri-)urban areas or where so-called Customary Land Secretariats (CLS) have been established.⁴

A Traditional Council, comprised of the traditional area's paramount chief or king and his senior and divisional/village-level chiefs, administers land under customary ownership in accordance to customary law.⁵ These Councils, referred to in Ghana as the 'allodial title' holders, hold the ultimate right to retract user rights and reallocate and alienate land. The Traditional Council therefore holds the sole authority to negotiate with project developers over leasehold terms.⁶ Various statutory instruments have specified the conditions under which Traditional Councils are to administer (and therefore also alienate) their landholdings. The Constitution is most explicit in this regard, stipulating that Traditional Councils have the 'obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard' (Article 36.8). Although principles of free prior and informed consent (FPIC) are not enshrined explicitly in the Constitution or in Ghana's many land laws, the National Lands Policy of 1999, albeit in contrast to the laws lacking statutory force, does insist that 'no interest in or right over any land ... can be disposed of ... without consultation of the owner or occupier' (Article 4.3c).

Moreover, with the exception of compulsory land acquisitions by the state, there are no comprehensive legal provisions that guarantee the right to compensation for loss of livelihood, specify resettlement and rehabilitation procedures, or assign responsibilities to this effect. Although the Regional Lands Commission, a government agency charged with 'promot[ing] the judicious use of land by the society' (Article 4(a), Land Commission Act, 2008), has to approve and ultimately allocate the leasehold title to the investor, Ghanaian land laws fail to specify criteria for approval; they merely stipulate that the Regional Lands Commission should determine whether alienations are 'consistent with existing development plans' (Article 267(3), Constitution, 1992). Therefore, the Lands Commission does not have a mandate to advise on or ensure that the leasehold agreements between the developer and the Traditional Council provides for the equitable distribution of proceeds and adequately reflects the land's true economic value. However, in the case of objections over the titling, the Regional Lands Commission is required to bring the matter before an Adjudication Committee who is then charged with resolving the conflict.

When converting more than 40 ha of land, project proponents must conduct a detailed environmental impact assessment (EIA) through independent consultants, which, in addition to environmental factors, also requires that the potential social and economic implications of project development are assessed. The subsequent report is then to be published in local media. Should any persons raise concerns over the content of the report, a public hearing is to be held. Despite this, EIA-related laws fail to specify responsibilities of proponents towards customary land users. For example, while proponents are required to adopt impact mitigation strategies as part of their environmental management plans (EMP), unlike the EIA, they are not legally required to account for non-environmental impacts. When the Regional Environmental Protection Agency (EPA) carries out monitoring activities, it uses these EMPs to assess compliance.

While the EIA process does enable the government to have some influence over the nature of land use change, there are no national-level regulations or procedures that specify the type of land that can

Table 2. Legal provisions regulating farmland acquisitions

Parameter	Relevant legislation	Specific provisions
1. Types and duration of land rights afforded to investors	<ul style="list-style-type: none"> • Land Title Registration Law 1986 • Constitution 1992 	<ul style="list-style-type: none"> • Only leasehold titles for a period of up to 50 years for foreign investors and 99 years for domestic investors • Leases are renewable for the same period
2. Provisions to protect customary rights	<ul style="list-style-type: none"> • Land Title Registration Law 1986 • Administration of Lands Act 1962 • Constitution 1992 	<ul style="list-style-type: none"> • Customary tenure is recognised and governed by customary law • The Traditional Council has to approve the alienation of customary land and has fiduciary duties
3. Mechanisms for guiding land allocation	<ul style="list-style-type: none"> • Wildlife Reserves Regulations 1971 • Forest Ordinance 1927 • Ghana Investment Promotion Act 1994 • Savannah Accelerated Development Authority (SADA) Act 2010 	<ul style="list-style-type: none"> • Forest and wildlife reserves cannot be developed for agriculture • The GIPC can provide assistance and guidance to enterprise during project establishment • The Savannah Accelerated Development Authority (SADA) should assist agribusinesses in acquiring land
4. Participation of customary land users	<ul style="list-style-type: none"> • Environmental Assessment Regulations 1999 • (National Land Policy 1999) 	<ul style="list-style-type: none"> • A public hearing may be required if concerns are raised over the content of the EIA before an environmental permit is issued • (No interest in land belonging to an individual or family can be disposed of without consultation)
5. Mechanisms for local representation	<ul style="list-style-type: none"> • Constitution 1992 	<ul style="list-style-type: none"> • Besides deciding on the alienation, the Traditional Council is mandated to represent its constituents in negotiations, having fiduciary duties to administer land in a manner beneficial to its constituency
6. The role of intermediaries	<ul style="list-style-type: none"> • Constitution 1992 • Land Commission Act 2008 	<ul style="list-style-type: none"> • The Lands Commission is required to approve that the development is consistent with existing development plans before titling
7. Compensation mechanisms	<ul style="list-style-type: none"> • State Lands Act 1962 • Constitution 1992 • (National Land Policy 1999) 	<ul style="list-style-type: none"> • Only legislated for land acquisitions by the state, which should enable the replacement of land of equal value and suitability and ‘cover the cost of disturbance’ • Land revenues should be shared between the Traditional Council, Stool and District Assembly according to a constitutional formula • (For all types of land acquisitions, ‘provisions should be made for persons displaced’)
8. Impact mitigation requirements	<ul style="list-style-type: none"> • Environmental Assessment Regulations 1999 	<ul style="list-style-type: none"> • Aside from the above compensation mechanisms, impact mitigation requirements apply only to environmental issues and should be included in the EMP
9. Monitoring	<ul style="list-style-type: none"> • Environmental Protection Agency Act 1994 • Environmental Assessment Regulations 1999 	<ul style="list-style-type: none"> • The EPA is charged with ensuring ‘compliance with any laid down environmental impact assessment procedures in the planning and execution of development projects’ • Project proponents must produce an EMP to guide ‘self-regulation’ and submit an annual environmental report

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Table 2. (Continued)

Parameter	Relevant legislation	Specific provisions
10. Dispute resolution	<ul style="list-style-type: none"> • Environmental Assessment Regulations 1999 • Land Title Registration Regulation 1986 • Chieftaincy Act 2008 	<ul style="list-style-type: none"> • Aggrieved persons can issue complaints with: <ul style="list-style-type: none"> ◦ the EPA over issuance of environmental permits; ◦ with the Lands Commission over issuance of leasehold titles; ◦ and the House of Chiefs over chiefly misconduct
11. Changes in the status or classification of customary land	<ul style="list-style-type: none"> • Constitution 1992 • State Lands Act 1962 	<ul style="list-style-type: none"> • Customary land cannot be sold • It can only be reclassified to state land when acquired through the right to eminent domain

Note: Policies have, in contrast to the acts and regulations, no statutory force. They are distinguished by use of brackets.

be converted to plantation agriculture. The only restrictions are currently land within forest and wildlife reserves.

In addition to the opportunities to object during the land titling and EIA process, land users can also appeal to customary institutions and the judiciary. For example, in the case of chiefly misconduct (for example, not acting in the interests of the constituency, appropriation of funds), disputes can be brought before the House of Chiefs, which holds the sole power to ‘dethrone’ traditional authorities. On the basis of Article 36.8 of the Constitution, the judiciary, in theory, also has the authority to rule on cases involving community land disputes.

5. Evidence from Implementation

This section will trace the land acquisition process and highlight some of the issues that threaten the rights of customary land users.

5.1. Lack of External Guidance

Despite the rapidly rising interest from investors in Ghana's farmland, the Government of Ghana was not observed to have played an active role in enabling these land acquisitions. While the government can acquire land on behalf of investors through its right to eminent domain, at the time of research it had not used this right for any recent land acquisitions. According to the Lands Commission, due to past irregularities and unresolved disputes over compensation payments, the involuntary acquisition of land by the state for such purposes is politically contentious and, therefore, rarely done (Larbi, Antwi, & Olomolaiye, 2004; Personal communications, senior official of the Lands Commission, Accra, 2009). Although farmlands in practice can therefore only be acquired through voluntary transaction, in the context of GCAP the government planned to involuntarily acquire customary land for infrastructure development in the course of 2012 (MoFA, 2011). Of the 36 projects documented by Schoneveld (2013), only one project in the Volta Region involved the acquisition of state land, with the remainder acquiring land through Traditional Councils. Therefore, all of the nine land acquisitions profiled in our research originated from the customary land domain.

Although investors can obtain support from the state, typically through the Ghana Investment Promotion Centre (GIPC) which maintains a land bank to help identify suitable land and Traditional Councils willing to alienate land for investments, at none of our case studies did the government play a direct role in facilitating or mediating land acquisitions. All the investors initiated first contact with Traditional Councils in the areas of interest, in most cases with local business partners familiar with local protocol.

Traditional Councils subsequently negotiated directly with the investors on the terms and conditions for the leasehold contract. Although the government did facilitate access to 150,000 ha of land in southern Ghana for two high-profile jatropha investments (Personal communication, director of the GIPC, Accra, 2009), the GIPC claimed that it merely links investors to land owners and does not wish to interfere in the negotiation encounter, since these are ‘the affairs of the chiefs’. There was no evidence either of non-governmental organisations (NGO) being actively involved in the land acquisition process, as, for example, advisors or community representatives.

5.2. Elite Capture and Opacity of the Negotiation Encounter

While Traditional Councils have, as per the Constitution, fiduciary duties, in practice none of the land alienation cases demonstrated evidence of any consultations with the wider community to determine whether the allocation would be ‘in the benefit ... of the people’ (Republic of Ghana, 1992). At three plantations, communities only became aware of the projects when land clearing activities commenced, despite the divisional chiefs being responsible for communicating decisions of the Traditional Council to their community. In two cases in Pru District, divisional chiefs claimed also not to have been aware of pending land alienations, suggesting that hierarchies within the Traditional Council also come into play in the decision-making process. Here, it was argued that the paramount chief and his senior chiefs, who are typically councillors and spiritual leaders closely affiliated to the paramount chief, ultimately decide and negotiate on land alienations.

This apparent absence of intermediaries (and formal regulations promoting this) in the alienation process exposes the process to iniquitous and exploitative conduct. Investors may exploit the ignorance of the Traditional Council, as these may be unfamiliar with the true market of land, not attuned to potential long-term implications of alienation and easily swayed by ‘development’ prospects. For example, four Traditional Councils (for four separate plantations by two different companies covering 91,500 ha) entered into agreements with the investor to share between 25 per cent and 33 per cent of profits from jatropha seed sales. However, both companies established different limited-liability companies for cultivation and biodiesel refining. With such corporate structures and undifferentiated tax rates in the agricultural sector (with both agro-processing and cultivation activities being zero-rated in Ghana), companies can easily concentrate future profits within the refining business to circumvent pay-outs. Moreover, the tendency of Traditional Councils to put their faith in the good will of the investors poses risks. For example, according to a Traditional Council in Pru District, it made a verbal agreement with the investor to support the development of social and physical infrastructure in the traditional area’s communities and adopt preferential hiring policies. The investor did not live up to this agreement, with less than 20 per cent of employees originating from affected communities. The failure of the Traditional Council to contractualise these agreements illustrates well the lack of legal literacy of some Traditional Councils and the need for intermediaries to support Traditional Councils in negotiations.

While the Regional Lands Commission has the legal authority to decline investor applications for formal leasehold titles (for example, on grounds of inconsistency with district development plans or objections by the public), in practice it seldom exercises this authority. According to the Regional Lands Commission in Brong Ahafo, for example, an application is always approved once the paperwork is in order. Since employment generation, private capital formation, and agricultural modernisation objectives figure prominently in the district medium-term development plans (DMTDP) of all four districts, there are few grounds for the Lands Commission to reject acquisitions on the basis of development planning conflicts.⁷ Therefore, in practice the Lands Commission is not in a position to appraise or exert influence over the content of the contracts signed between Traditional Councils and investors.

Even in situations where official complaints against the land transfer are lodged with the Lands Commission, in practice the transfer and titling of land is seldom denied. In Brong Ahafo, for example, the Lands Commission claimed not to be aware of a single case in its institutional history where this has happened (Personal communications, director Regional Lands Commission, Sunyani, 2009). With

the Lands Commission typically based in the regional capitals, land conflicts playing out within the (more distant) districts often fail to reach them. In one case, for instance, it was observed that a number of complaints were lodged with the District Assembly in Pru District over involuntary resettlement for plantation development.⁸ However, none of these complaints were ever communicated to the Regional Lands Commission or referred to the courts, since the District Assembly ‘wants employment and therefore has to encourage the company’ and feels that issues related to negative impacts ‘should be left to the EPA’ (Personal communications, senior planning officer, Yeji, 2009). Instead, the District Assembly sought to placate these persons to prevent these issues from escalating and adversely affecting the investments.

Since 1988, the Ghanaian government has implemented a series of decentralisation reforms, which have gradually devolved administrative, fiscal, and planning responsibilities to local government. However, as recognised by Ghana’s latest decentralisation policy, limited popular participation, and pervasive capacity and resource constraints have to date undermined the effectiveness of district-level government as agents of local development (Crook, 2003; Kasanga 2002; MoFA 2011; Schiewer 1995). Since these new farmland investors have all made some promises of contributing to service delivery (particularly through investments in social and physical infrastructure), it is unsurprising that the District Assemblies profiled in this research were highly supportive of developments that alleviate some of their responsibilities. Moreover, considering the difficulties faced in raising adequate funds to invest in development projects amid pressure from central government, district revenues accruing from land alienation are much welcomed new income flows.⁹ As argued by Lentz (2006), the devolution of power in Ghana has also intensified special-interest politics. Despite difficulties in documenting such conflicts in this study, the rapid influx of investment capital undeniably creates new spaces for appropriating rents by local political elites.

Due to the various incentives created by these investments, local government has a tendency to be aligned more strongly with farmland investors than customary land users. These tendencies are arguably compounded by, what Ubink (2008) coins, the informal government ‘policy of non-interference’ in chieftaincy affairs. Although the post-colonial government made various attempts to rein in chiefly power through, for example, the removal of their right to political office by the Constitution, in the context of a decentralised governance structure they continue to wield, as ‘vote-brokers’, substantial political power (Belden, 2010; Berry 2009; Knierzinger, 2011; Ubink, 2008). As a result, many government institutions tend to be disinclined to become involved in chieftaincy matters, particularly land management, as can be observed by the limited intervention capacity of the Lands Commission and is evidenced by the limited progress made in reforming land laws to curtail the chiefly stronghold over land management. The director of the land administration project (LAP), for example, conceded that even the flagship CLS initiative was therefore entirely demand-driven. With many Traditional Councils disinclined to adopt land management structures that risk circumscribing their authority and control over land, after more than eight years of implementation, CLSs have only been established in 36 out of the more than 800 traditional areas in Ghana (World Bank, 2011b). As discussed by Tsikata and Yaro (2011), the boundaries between modern/state and customary elites are also often blurred, which could generate conflicts of interests. In one case, a village chief was observed to be employed within the district assembly, for example.

As a result of this lack of outside scrutiny, Traditional Councils are able to exploit negotiations for personal enrichment, rather than representing, in their role of fiduciaries, the interests of their constituency. For example, according to customary law, when the chief allocates land, the recipient presents a token of allegiance or ‘drink money’ for the chief’s consideration. While this customarily entails a bottle of alcohol, kola nuts and food products, it can also take the form of large cash payments. In this manner, ‘drink money’ is increasingly a way to put a socially acceptable label on what amounts to rent capture by traditional authorities (see also Blocher, 2006; Kasanga, Cochrane, King, & Roth, 1996).

Although by law all land revenues are to be reported to the Office of the Administrator of Stool Land (OASL) and divided along the constitutional formula, drink money falls into a grey area, since it is traditionally considered part of a social custom rather than income (Personal communications,

project director of the LAP, Accra, 2009; Personal communications, administrator of Stool Lands, Nkoranza, 2009). As also noted by Belden (2010) and Alden Wily and Hammond (2001), the nature of these payments is therefore rarely made public and claimed by the OASL. Consequently, there is arguably a risk that Traditional Councils may forego large annual rent payments, which are typically formalised as part of the land lease agreement, in favour of a more informal type of one-off contribution benefitting individual customary leaders.

With high levels of opacity surrounding the nature of negotiations and the payment of drink money, it proved impossible, despite efforts, to collect concrete evidence of these informal agreements. Community members, and in some cases the divisional chiefs, were frequently found to have had no knowledge of even the most basic provisions of the leasehold contracts, illustrating the lack of transparency of the land alienation process. In Kintampo North, where in contrast to the other districts the chieftaincy rotates between a number of eligible communities, the new paramount chief was unaware of the content of the contract the recently deceased chief signed for the alienation of 50,000 ha of land. It was argued that the traditional leadership of that community did not wish to disclose the contract's content for fear of having to portion up proceeds.

5.3. *Insufficient Consideration for Loss of Livelihood*

At the time of research, no Traditional Council had proposed direct compensation, nor promised to share future revenue flows.¹⁰ It is difficult to gauge the motives of Traditional Councils accurately and to speculate how well, and to what ends, future land revenues will be used, but there is undeniably considerable risk of elite capture and self-interest within existing (legal) structures of power and control. However, scepticism as to the benevolence of Traditional Councils appears to be endemic in the region, an attitude widely held by community members and government officials alike. One Traditional Council in Pru exhibited a marked sense of personal entitlement to land revenues: 'Many households neglect to pay their homage to us at the end of the season. The money from the company is far, far better.' Other researchers have made similar observations, particularly in relation to land alienations in the urban periphery (Alden Wily and Hammond, 2001; Kasanga and Kotey, 2001; Ubink and Quan, 2008; Wisborg, 2012).

Although the government in practice exerts little influence over the terms and conditions of land alienation and many Traditional Councils are disinclined to redistribute proceeds or extend support to project-affected households, in theory redress can be sought through participation in the EIA process. While communities are to be consulted in identifying the potential socioeconomic implications of project development, these consultations often take on the character of a public relations forum. According to two communities that participated in EIA-related engagement activities, discussions revolved primarily around the nature of developmental contributions (for example, schools, hospitals, roads, boreholes and employment), without providing adequate information of project implications. Although EPA staff were involved in initial site visits (for drafting the terms of reference for the EIA), they did not participate in community consultations, which only included company representatives and EIA consultants. Since independent government and civil society representatives were absent from these processes, communities were unable to gain a balanced view of the opportunities and risks of project development, and thereby suggest appropriate interventions.

Environmental regulations do, though, require that a public hearing of grievances be conducted by the EPA if that is requested after it publicises the EIA document. However, the sources through which the public is informed, typically the national press and the premises of the District Assemblies, are often inaccessible to communities. Moreover, due to the technical nature of the EIA, affected communities often lack the capacity to fully comprehend key issues raised in the report, which is further reinforced by the fact that the EIA report is not translated into local languages. As a result, affected communities appear very much unaware of the potential negative effects of project development, particularly related to loss of access to vital livelihood resources, which is a tangible concern at all nine projects. This implies that community concerns cannot be adequately incorporated into the EMP, which serves as the benchmark for EPA audits.

Potential implications of land alienation on rural livelihoods in the forest–savannah transition zone

The wholesale transfer of large contiguous areas of land for plantation monoculture in Ghana could have far-reaching implications for the livelihoods of those losing access to land and land resources. The potential severity of land use competition is illustrated by data from three of the nine case studies (Table 3). It shows that in these cases between 31.8 per cent and 53.0 per cent of land allocated for investment is part of the existing farming system –these areas are equivalent to the landholdings of between 1,631 and 2,654 households. As illustrated by the impact assessment of the Abease concession conducted by Schoneveld et al. (2011), the expropriation of farmland and other valuable livelihood resources, notable from forests, threatens, amongst other things, food security and income-generating capacity. Even though the forest–savannah transition zone is less populous than the south, since most suitable land is in some way part of the farming system, which tends to more extensive due to the practice of bush–fallow agriculture, most displaced households are typically unable to recover their landholdings; with access becoming increasingly contingent on quality of social relations and the capacity to engage in monetary transactions. With greater limitations in this respect, more marginalised community groups, such as women and migrants, were found to be disproportionately impacted by land expropriation and increases in resource scarcity.

Table 3. Extent of displacement of customary landholding in the forest–savannah transition zone

Traditional area	Total Concession Area (in ha) ^a	Area under cultivation (in ha) ^b	Total active landholdings (in ha) ^c	Proportion of concession area	Equivalent number of households ^d
Agogo	20,450	2,508	9,278	45.40%	2,039
Yeji	38,000	3,263	12,074	31.80%	2,654
Abease	14,000	2,359	7,419	53.00%	1,631

Notes: ^aConcession boundaries for Agogo and Yeji obtained from individual EIA reports; Abease concession boundaries based on verbal communications with company representatives and traditional authorities.

^bArea under cultivation derived from remote sensing analysis using Landsat MT satellite image (various dates).

^cTotal active land holdings include area under cultivation *and* area of land under fallow. This is based on the typical ratio of fallow to cultivated land of 2.7 in the forest-savanna transition zone, derived from Ardey Codjoe (2010).

^dNumber of households based on total average landholdings, including fallowed land, of 4.55 ha per households in the forest–savannah transition zone, derived from Chamberlin (2008).

Despite these shortcomings and lack of legal requirement, the two plantations (of the nine assessed in this research) for which an environmental permit had been obtained at the time of research had adopted strategies to mitigate social impacts in their EMP. Typical counteracting measures included: preferential hiring policies; designated farming areas within the leased land; and (temporary) subsidised access to agricultural inputs to enable agricultural intensification (since bush–fallow rotation is no longer feasible given land constraints).¹¹ Though by no means entailing comprehensive resettlement and rehabilitation measures, the inclusion of such interventions does illustrate the potential utility of the EIA process. However, with both projects still in their incipency, it could not be assessed how well and to what extent these measures have been implemented. As the EPA lacks the necessary human and financial resources to conduct regular and comprehensive monitoring activities, the inclusion of such measures in the EMP could serve to merely placate potential project opponents.¹²

5.4. Poor Inter-Institutional Coordination and Accountability

The integrity of the EIA process is, however, undermined more significantly by the ability to circumvent the process entirely. For example, five of the nine projects were found to be cultivating more than 40 ha of land without having conducted EIAs or having obtained environmental permits, as is required by environmental law. One company spokesperson argued that since most companies in the region are insufficiently capitalised, they can only start bearing the cost associated with the EIA process once they are sufficiently developed (Personal communications, managing director, Italian jatropha company, 2010). As in many other African countries, the jatropha companies in Ghana have little experience in the sector, are still in pursuit of additional investment, and are operating under highly uncertain conditions and assumptions.

Although district-level governments were in all these cases aware of the unapproved developments taking place in their respective districts, in the absence of formal coordination mechanisms and incentives they failed to liaise with regional and central government to ensure companies follow establishment procedures. Additionally, there are many incidences where biofuel companies were in the process of registering their land at the Lands Commission prior to having acquired the necessary environmental permits. In these situations, the Lands Commission does not appear to consult or inform the EPA, with both agencies acknowledging lack of formal or even informal forms of collaboration (Personal communications, director regional EPA, Sunyani, 2009; Personal communications, chief registrar, Sunyani, 2009). Such interaction could in theory be of significant mutual benefit, as this would provide an opportunity for the EPA to learn of large land-based investments and for the Lands Commission to learn of the potential adverse impacts of these land transfers in order to exert influence over the alienation process. Similarly, at the time of research only one of the nine companies was, as is required, registered with the GIPC which, as a centralised government agency, could play a pivotal role in fostering inter-institutional information flows (Approved agricultural investments, GIPC, 2009, unpublished; Personal communications, director of the GIPC, Accra, 2009). As a result of the limited cross accountabilities, the Regional EPA in Brong Ahafo claimed to only be aware of three of the eight projects researched in the region. However, even when it does encounter unapproved developments, the EPA is disinclined to take action. For example, in two cases in Brong Ahafo the EPA chose not to issue any stop orders, since, justified in similar fashion to district government, it 'did not wish to obstruct development' (Personal communications, director regional EPA, Sunyani, 2009). Rather than being fined for ignoring environmental regulations, one of the companies in Nkoranza which had planted more than 1,000 ha was merely told to stop their clear-felling practices and conduct an EIA for the remaining area of the land.

5.5. Limited Community Will and Capacity to Contest Rights Infringements

With traditional conflict resolution mechanisms and the various government institutions involved in the project establishment process rarely serving the interests of customary land users, the only alternative avenue for claiming rights is through the judiciary. Despite cases involving extensive displacement of customary land uses, no projects were formally contested before the courts, or the House of Chiefs for that matter. On the basis of community discussions, this appears to have a threefold cause: limited capacity among affected households to claim their legal rights; customary deference to chiefly authority; and high expectations of modernisation prospects. One land losing community asserted: 'Once Accra was a village. Look at it now. We will become like Accra.' With such positive, typically unrealistic, expectations of project development, numerous communities claimed that they therefore would be reluctant to deter investors by excessive demands.

As a result, consultations will in many cases fail to serve their intended purpose, and will likely only serve to further legitimise the land alienation process. Therefore, even if communities are well-informed of the potential threats to their livelihoods, in many cases investors will be able to exploit community desperation for development to negotiate favourable terms of alienation. While a number of Accra-based NGOs, such as Action Aid, Civil Society Coalition on Land (CICOL) and the

Development Institute, have publically campaigned against large-scale land alienation, at none of the nine plantations did such organisations provide any pre-alienation support to project-affected persons (for example, in supporting legal empowerment). Although this can in part be attributed to their lack of on-the-ground presence, it is also a result of the limited opportunity of outsiders to gain awareness of pending land alienations; this is due to the rather clandestine nature of the negotiation encounter.

Another obstacle to successful legal justice is in the ability to use customary law to make evidentiary claims against irregular land alienation. Since the paramount chief and affiliated elders are the custodians of tradition, they are well positioned to define what is ‘custom’ in order to construct rules in their own interest and thereby legitimate their land dealings. Because customary law is rarely codified – partly since there is benefit to be derived from ambiguity – it is therefore poorly integrated with the statutory law. While customary law is subordinate to statutory law, in practice in the Ghanaian courts it typically replaces statutes (Blocher, 2006; Woodman, 1996), providing significant ammunition to those who have authority to define customary rules.

6. Conclusion

This study has highlighted fundamental flaws both in the content of legal provisions relevant to the protection of customary land rights and in the implementation of those provisions. Although the Ghanaian legal system does recognise customary land rights, neglecting to sufficiently detail the nature of both individual and collective rights and the responsibilities and accountability structures of customary land management institutions enables local elites to capture rents from the alienation process at the expense of customary land users. In particular, the absence of principles of free, prior-informed consent and compensation requirements in extant land laws exposes customary land users to involuntary expropriation without adequate forms of redress. The excessive reliance on the EIA as a mechanism to place checks and balances on the alienation process further betrays the limitations of Ghanaian land laws in securing both formal and informal claims to land.

The nine case studies show that in practice the absence of legal mechanisms to protect usufruct rights causes the negotiating encounter to be decidedly opaque. Without any forms of intra-community consultations, traditional authorities fail to negotiate alienation terms that adequately address the needs and loss of access to vital livelihood resources of their constituency. Since the government tends to perceive customary land management as one in which citizens are responsible for holding their leaders to account on the basis of traditional practice, they play no role as intermediaries or provide any oversight in the alienation process. While political motives partly underlie this phenomenon, it too can be ascribed to a relatively invariant view held on the modernisation prospects of foreign investment; very much in line with government policy aims. Often hiding behind narrow institutional mandates, many government stakeholders failed as a result to act upon intransigencies by both investors and traditional authorities.

Issues of cross-accountability and communication among government agencies (for example, between the GIPC, Lands Commission and EPA) and with and between various levels of government (between central, regional and district government) further contributes to this lack of enforcement, particularly for potentially valuable tools such as the EIA. This is caused in particular by capacity constraints, fragmented responsibilities and perverse incentives. While the different functions and roles of these agencies could in theory be complementary, due to the absence of effective coordination mechanisms this potential is largely undermined. The decentralised governance structure in its current form, where the district governments have few enforcement mandates, have limited accountability to sectoral agencies and are increasingly required to raise their own funds, arguably weakens the responsiveness of the state to local development needs.

In conclusion, as a result of deficiencies in the regulatory regime and in the will and capacity to enforce the laws that provide rights to land, the Ghanaian state plays only a marginal role in ensuring that customary land users are protected from (the consequences of) land expropriation. With legal rights therefore rarely translating into tenure security and with few effective safeguards in place to

ensure traditional authorities and investors respect customary norms and basic principles of social justice, in practice the protection of citizen rights is solely the responsibility of the aggrieved. Considering limited capacities to claim these rights, unrealistic expectations of and deference to customary hierarchies, formal contestation, if any, will be retroactive in many cases, and will therefore only address issues of restitution, not ex ante participation. This raises very real challenges for ensuring communities are sufficiently empowered to claim their full bundle of rights within the confines of a legal system where these rights are afforded only limited protection. While this is arguably justification for greater direct involvement of the state in the customary land domain, prevailing institutional structures will serve to undermine any legal reforms to such effect. Rather than placing implicit faith in legislation, this suggests that equitable land management in Ghana is more fundamentally about realigning incentives and accountabilities. Therefore, greater emphasis should be placed on the development of innovative approaches that aim to reconcile conflicting interests.

Notes

1. Land considered 'potential available' includes all land that is not classified as forested or as cultivated. Cultivated land includes land that is fallowed for no more than five years. See Schoneveld (2013) for more methodological details.
2. Acquired land includes all land that involves the transfer of use or ownership rights. This includes land over which a leasehold is yet to be obtained but for which a contract has been formalised. Although some projects have failed, since customary rights to land have remained extinguished, these have been included.
3. The GCAP focuses initially on two projects; developing 11,000 ha of irrigated commercial agriculture on the Accra Plains; and modernising the agricultural sector in the northern savannah ecological zone of northern Ghana. For the latter project, the government established the Savannah Accelerated Development Authority (SADA) that is mandated to support and create an environment conducive to investment.
4. Under the World Bank-supported Land Administration Project (LAP) a number of traditional areas have, since 2003, established a CLS. These are tasked with registering individual claims to land, dispute resolution, and land use planning.
5. The kingdom of the paramount chief typically encompasses a population of 10,000–20,000, divided into a number of communities. The role of chief is normally inherited from being born into the royal family. While some ethnic groups in Ghana are patrilineal, the Akan, Ghana's largest ethnic group, practice matrilineal succession.
6. While it is beyond the scope and focus of this article to offer a full historical account of the evolution of 'traditional' institutions, it is worth noting that prevailing power structures are largely a product of British indirect rule. By vesting all land in the paramount chiefs – including those of subordinate stools – the colonial government not only sought to form more rational local government units, but also to exert greater control over land by fostering alliances with local elites. Since this typically conflicted with existing social relations and land management practices, the notion of what is 'customary' has been long contested. These issues have been well covered by Amanor (2008), Crook (1986), Gocking (1994), Nugent (1996), Rathbone (2000), and many others.
7. See budget statements on the website of the Ministry of Finance and Economic Planning for the strategic objectives of individual districts: <http://www.mofep.gov.gh/?q=highlights/130712>.
8. Pru District's capital, Yeji, is approximately 270 km along a partly paved road from the regional capital Sunyani, where the Regional Lands Commission is headquartered.
9. According to the Constitution, Article 267, land revenues are divided as follows: after deduction of a 10 per cent administration fee for the OASL, 25 per cent of the remaining sum is allocated to the Stool, 20 per cent to the Traditional Council, and 55 per cent to the relevant District Assembly.
10. Only one company offered to extend compensation directly to landholders, at a rate of 1 Ghanaian cedi per acre, equivalent to approximately US\$0.90 per acre at the time of alienation.
11. Information from the Environmental Impact Statement and provisional EMP of Scanfuel (21 August 2008) and Natural African Diesel (11 November 2008).
12. In Brong Ahafo, for example, only five technical staff were employed at the EPA for a region the size of the Netherlands.

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