

GHANA COMMERCIAL AGRICULTURE PROJECT

Recommendations for Large-Scale Land-Based Investment in Ghana

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PREFACE

This report was produced in tandem with two other project documents that aim to facilitate socially responsible land investment practices: a set of Community/Investor Guidelines for Large-Scale Land Transactions and a Model Lease Agreement for Commercial Agriculture. These documents identify specific actions and steps to be employed by communities, investors, and government officials to realize sound investment practices in Ghana. The three documents should be used together.

The report was prepared for the Ghana Commercial Agriculture Project of the Ministry of Agriculture by John Tiah Bugri, Jennifer Duncan, Leslie Hannay, Michael Lufkin, and Eric Yeboah under a consultancy implemented by Landesa, a US-based international non-governmental organisation that partners with governments of developing countries to improve the legal framework governing land, with the primary goal of improving land tenure security, especially for the rural poor. The authors wish to acknowledge the following for their contributions to the report: Kendall Beckett, Reem Gaafar, Mina Manuchehri, Margaret McClung, Charles Mutasa, Megan Olson, and Matthew Van Deren of Landesa; consultants William Botchway and Mohammed Saani Iddrisu; the entire Ghana Commercial Agriculture team; and the many people in Ghana who generously shared with us their time and thoughts during our research interviews.

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ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
AGRA	Alliance for a Green Revolution
CFS	Committee On World Food Security
CLMC	Community Land Management Committee
CLS	Customary Land Secretariat
CSO	Civil Society Organization
EPA	Environmental Protection Agency
ESIA	Environmental And Social Impact Assessment
FASDEP	Food And Agriculture Sector Development Policy
FDI	Foreign Direct Investment
GCAP	Ghana Commercial Agriculture Project
GCAP RFP	Ghana Commercial Agriculture Project - Request For Proposal
GDP	Gross Domestic Product
GIDA	Ghana Irrigation Development Authority
GIPC	Ghana Investment Promotion Centre
GoG	Government of Ghana
IFAD	International Fund For Agriculture Development
IFC	International Finance Corporation
ITFC	Integrated Tamale Fruit Company
KNUST	Kwame Nkrumah University Of Science And Technology
LAP (I and II)	Land Administration Project
LSLBI	Large-Scale Land-Based Investment
MLA	Model Lease Agreement
MoFA	Ministry of Food And Agriculture
MOU	Memorandum of Understanding
NADeF	Newmont Ahafo Development Foundation
NGO	Non-Governmental Organization
OASL	Office of the Administrator of Stool Lands
OMOA	Organic Mango Outgrowers' Association
PDF	Project Development Facility
PPP	Public-Private Partnership
RAI	Responsible Agriculture Investments
RSB	Roundtable on Sustainable Biomaterials
SADA	Savannah Accelerated Development Authority
TCPD	Town And Country Planning Department
USAID	United States Agency For International Development
USD	United States Dollars
VGs	Voluntary Guidelines

CONTENTS

ABBREVIATIONS AND ACRONYMS	iii
EXECUTIVE SUMMARY	viii
1 INTRODUCTION	1
1.1 Towards socially responsible investment practices	3
1.2 Purpose, objectives, and structure of report	3
2 GHANA’S LEGAL, POLICY, AND INSTITUTIONAL FRAMEWORK FOR COMMERCIAL AGRICULTURAL LEASING	4
2.1 International guidelines and norms for responsible agricultural investment	4
2.2 Ghanaian policy and legal framework for large-scale land investments	5
2.2.1 Overview	5
2.2.2 Challenges	8
2.2.3 Recommendations for strengthening the policy, legal, and regulatory framework for LSLBI	12
2.3 Customary institutions relevant to large-scale land investments in Ghana	13
2.3.1 Overview	13
2.3.2 Challenges	16
2.3.3 Recommendations for strengthening the customary institutional framework for LSLBI	17
2.4 Issues related to the state institutional framework for large-scale land investments in Ghana	18
2.4.1 Overview	18
2.4.2 Challenges	18
2.4.3 Recommendations for strengthening the state institutional framework for LSLBI	19
3 REALIZING SUCCESSFUL AND COMMERCIAL FARMLAND INVESTMENT WITH WIDESPREAD SOCIAL AND ECONOMIC BENEFITS	21
3.1 Bridging the gap in expectations and perspectives on commercial agricultural investments between customary communities and investors	21
3.1.1 Overview	21
3.1.2 Recommendations for closing the gap in expectations between communities and investors	22
3.2 Clarifying processes by which investors identify the correct customary landholding entities	24
3.2.1 Overview	24
3.2.2 Recommendations to ensure that potential investors meet the correct landholding authorities	25

3.3	Obtaining and retaining a social license to operate	25
3.3.1	Overview	25
3.3.2	Recommendation to investors for fostering and maintaining a social license	27
3.4	Improving the capacity of local communities and governments to negotiate commercial agricultural leases on an even playing field with investors	29
3.4.1	Overview	29
	Recommendations	30
3.4.2	for increasing the capacity of local communities to negotiate on an even playing field with investors	32
3.5	Developing community processes for land-related investment decisions that are inclusive, transparent, and accountable	32
3.5.1	Overview	32
3.5.2	Consolidated power within the customary hierarchy constrains accountability and trust of leaders	34
3.5.3	Recommendations for ensuring inclusive and accountable decision-making processes	34
3.6	Ensuring that social and environmental impact assessments are conducted in accordance with Ghanaian law and international best practices	34
3.6.1	Overview	36
3.6.2	Recommendations for ensuring that ESIA's are conducted in accordance with Ghanaian law and international best practices	37
3.7	Ensuring that women's land rights are protected and that women share in the benefits of commercial agricultural investment	37
3.7.1	Overview	38
3.7.2	Decision-making and consultation	38
3.7.3	Assessing women's rights to ensure adequate and fair compensation and mitigation	39
3.7.4	Recommendations for advancing women's land-related rights and benefits	41
3.8	Ensuring that benefits to communities constitute a fair exchange for the loss of a primary asset of production	41
3.8.1	Overview	42
3.8.2	"Benefits" versus "compensation"	44
3.8.3	Recommendations for helping communities to negotiate sound business deals	46
3.9	Creating equitable benefit-sharing mechanisms within the community	46
3.9.1	Overview	46
3.9.2	Recommendations for intra-community sharing of benefits and proceeds	47
3.10	Addressing claims to state lands where compulsory acquisition was not fully documented and/or compensated	48
3.10.1	Overview	48
3.10.2	Recommendations for mitigating land conflicts	49
3.11	Exploring new ways to deal with land fragmentation	50
3.11.1	Overview	50

3.11.2	Recommendations for addressing excessive land fragmentation	52
3.12	Ensuring that systems are in place for monitoring and enforcing the agreement	52
3.12.1	Overview	52
3.12.2	Recommendations to ensure better monitoring and enforcement of agreements	53
4	INNOVATIVE MODELS FOR INCLUSIVE COMMERCIAL AGRICULTURAL INVESTMENT	55
4.1	Innovations in investment structure and payment terms for land	55
4.1.1	Traditional method: Fixed-sum payment for the land	55
4.1.2	Innovation: Revenue-sharing models	56
4.1.3	Innovation: Compensation as a share of equity in the investment	60
4.1.4	Innovation: Hybrid schemes that combine fixed-payment leases with either an equity or revenue share from the venture	64
4.1.5	Conclusions and recommendations for innovative payment structures for long-term lease of land	65
4.2	Innovations in outgrower and contract farming models in Ghana	66
4.2.1	Introduction	66
4.2.2	Innovative experiences and examples in Ghana	67
4.2.3	Conclusions and recommendations for positive innovations in outgrower and contract farming models	70
5	CONCLUSION	72
	APPENDIX 1: METHODOLOGY	74
	APPENDIX 2: LIST OF PRIMARY LEGISLATIVE INSTRUMENTS RELEVANT TO MODEL LEASE AND COMMUNITY/INVESTOR GUIDELINES	82
	APPENDIX 3: DESCRIPTION OF PRIMARY LEGISLATIVE INSTRUMENTS RELEVANT TO MODEL LEASE AND COMMUNITY/INVESTOR GUIDELINES	83
	APPENDIX 4: CASE LAW ON THE RIGHTS OF USUFRUCT AND ALLODIAL TITLEHOLDERS	90
	APPENDIX 5: KEY INSTITUTIONS RELEVANT TO LARGE-SCALE LAND INVESTMENTS IN GHANA	92
	REFERENCES	95

BOXES

Box S.1: Twelve recommendations for realizing successful commercial farmland investment vii

Box 2.1: Land tenure overview for Ghana

Box 2.2: Ghana Lands Commission Guidelines for considering large-scale land transactions for agricultural and other purposes

Box 2.3: Legal labyrinth for securing a land transaction

Box 3.1: Examples of actions investors have taken to engage proactively with local communities

Box 3.2: Investor actions can either hinder or help development of community trust and a social license over time

Box 3.3: The role of the investor in building community capacity

Box 3.4: Guidelines for resettlement

Box 3.5: Best practices for inclusive investment: Rio Tinto, International Mining Corporation

Box 3.6: Community development plans

Box 3.7: Newmont Ghana Gold Limited and the Newmont Ahafo Development Foundation

Box 4.1: Case Study: The Fievie community and GADCO: Sogakope, Volta Region

Box 4.2: Community-investor joint ventures (“land-for-equity” schemes) in South Africa

EXECUTIVE SUMMARY

The Government of Ghana (GoG), pursuing commercial agricultural investment as a means to further national development, has engaged the World Bank and USAID in the Ghana Commercial Agriculture Project (GCAP). GCAP aims to facilitate increased access to land, private sector finance, and input and output markets through engaging smallholder farmers in public-private commercial agriculture partnerships in the Accra plains and the Savannah Accelerated Development Authority (SADA) zone.

While greater commercial investment in agricultural land can bring economic benefits—such as higher incomes, improved economic growth and export earnings, additional food crops for local consumption, and new sources of government and community revenues from land leases—such investment can also pose significant risks for the men and women living in communities affected by land acquisitions.

Recognizing these risks, GCAP commissioned consultants to provide it and other stakeholders with practical recommendations, examples of innovative practices, and concrete tools for improving commercial agriculture investment outcomes in a manner that results in social, economic, and environmental benefits for investors and affected communities. The present report is the outcome of a desktop review of relevant issues, as well as extensive field research across the seven regions (Northern, Upper East, Upper West, Brong Ahafo, Greater Accra, Eastern, and Volta) that fall under the mandate of GCAP.

The report provides a contextual backdrop for two accompanying documents that aim to facilitate socially responsible land investment practices: a Model Lease Agreement (MLA) and a set of Community/Investor Guidelines (Guidelines). The MLA is an annotated commercial land lease that provides prospective contracting parties with a range of terms and conditions that are grounded in local and international best practices for responsible and sustainable commercial agricultural investment. The Guidelines offer information aimed at building the capacity of local communities around commercial land investment processes and best practices so that they are better prepared to engage and negotiate with potential investors, state agencies, and other relevant stakeholders.

The three documents should be used together, since the MLA and Guidelines can best be understood and used in the context of the issues and recommendations provided in this report. These recommendations, and a related discussion of innovations in payment schemes and outgrower/contract farming arrangements, help to identify and explore best practices for large-scale investment in land.

Legal, policy, and institutional framework for commercial agricultural leasing

Ghana's legal, policy, and institutional framework governing commercial agricultural investment contains gaps and inconsistencies that create a number of impediments to efficient, equitable, and socially inclusive investment.

Challenges include the following:

An incomplete policy framework for commercial agriculture.

Ghana lacks a comprehensive policy guiding large-scale land-based investment (LSLBI) or leasing. Without a national-level policy, the laws, regulations, and practices affecting different aspects of LSLBI lack continuity and direction, and institutions lack coordination.

Complex and contradictory legal and regulatory framework

Complexities, contradictions, and gaps in the law undermine clear institutional coordination and the establishment of transparent procedures for investors to obtain rights to land.

Insecure land rights for rural smallholders

The formal codified law merely recognizes but does not formalize the traditional protections afforded usufructuary rights and does not provide for the registration of these rights. As demands for land increase, these gaps in the legal framework for formalizing all customary land rights leave many customary users vulnerable to disenfranchisement.¹

Insufficient legal and regulatory safeguards for existing land users and occupants. The current laws and regulations on compulsory acquisition do not provide sufficient safeguards for users and occupants of customary lands and have led to confusion and conflict in regard to the state's claims to vast parcels of land in areas slated for large-scale land-based investment.

Lack of coordination among state agencies in regard to land governance

Overlapping agency mandates and functions cause frustration, drive up costs, and contribute to a sense of instability among investors and landholders seeking to comply with current laws and regulations and to formalize land transactions.

Insufficient institutional, financial and human resources capacity for agencies charged with governing land transactions and leases. Land-related state agencies generally lack the technical expertise and/or institutional capacity to help communities and investors construct, monitor, and enforce mutually beneficial LSLBI.

A land registration process that is difficult and not sufficiently clear

This contributes to the lack of registered customary land in Ghana, which presents a major challenge to ensuring land rights security for both communities and investors.

The nature of customary land governance in Ghana, both within stool/skin lands and clan/family lands² also presents a number of challenges for successful LSLBI. The lack of standardized rules between customary communities—and the fact that rules are seldom written or readily available to the investor—can be a significant impediment to commercial investment. As a result, investors face a steep learning curve in understanding how to deal with any new landholding community, requiring a significant up-front effort to understand local customs, expectations, and rules in potential project areas. Likewise, the shift away from traditional notions of chiefs' roles, as custodians, to the increasingly common view that the chief is the owner of the land, poses a serious threat to the land rights of customary farmers in the context of increased large-scale investment and resulting demand for customary lands.

The exclusion of significant portions of the population—including women and youth—from

¹Under Ghana's customary tenure systems, agricultural land is generally either under the control of land-owning families, with most decisions made by the family heads and their elders (Greater Accra Region, Upper West and Upper East Regions, Volta Region, and Krobo and Akwapim areas of Eastern Region), or is stool or skin land (Ashanti, Brong Ahafo, Eastern, Central and Western Regions, Northern Region and Akyem and Kwahu areas of Eastern Region). For more information on these systems see Section 2.3 below.

²For definitions of these terms see Box 2.1: Land Tenure Overview for Ghana.

decision-making processes regarding land also creates a significant risk of negative social and economic impacts from investments. Nor are necessary protections in place for settler and migrant farmers, who may simply be evicted from the land they farm without notice or compensation.

Twelve recommendations for realizing successful commercial farmland investment

The legal, policy, and institutional backdrop sets the stage for discussion of twelve specific issues and recommendations related to commercially successful and socially and environmentally sustainable investments. These recommendations do not directly address or resolve the structural issues identified above, but they point to practical steps that companies, communities, and state agencies can take toward better investments in light of the political, legal, and institutional status quo. The report supports these recommendations, as summarized in Box S.1, with observations and case studies about current practices by investors, communities, and government actors, and identifies specific actions that can be taken to support equitable and economically viable land transactions.

Box S.1. Twelve Recommendations for Realizing Successful Commercial Farmland Investment

1. Bridge the gap in expectations and perspectives on commercial agricultural investments between customary communities and investors.

Communities and investors tend to have very different perspectives on the nature and purpose of land, social expectations of all community members and visitors, and the role of written documents in agreements over land. This gap in perspectives on such important issues is one of the main reasons for the failure of many land-based investments to date in Ghana.

2. Clarify processes by which investors identify the correct customary landholding entities.

The range of modes by which investors approach customary groups and a lack of clarity about the rules, procedures, and requirements for investors seeking land may also contribute to uneven protections for communities.

3. Obtain and retain a social license to operate.

“Social license” generally refers to a local community’s acceptance or approval of a company’s project or ongoing presence in an area, and it is increasingly recognized as a prerequisite to a successful investment. The development of social license goes beyond compliance with legal and regulatory obligations and requires investors’ sustained attention to build and maintain the trust of host communities.

4. Improve the capacity of local communities and governments to negotiate commercial agricultural leases on an even playing field with investors.

If long-term agreements are to reflect the mutually agreed-upon interests of the contracting parties, both sides must understand the content and implications of such an agreement and have the capacity and opportunity to consider and negotiate for acceptable terms. Many traditional authorities in Ghana lack the legal and technical capacity and the familiarity with such land transactions to adequately represent the interests of their communities and successfully negotiate an equitable lease agreement.

5. Develop community processes for land-related investment decisions that are inclusive, transparent and foster accountability.

As a result of the limited consultation of community members and the consolidated power

structures found in many customary areas in Ghana, communities tend to lack a sense of shared benefit and interest in investments. Participatory and democratic processes around investment decision-making and benefit sharing can improve the relations between the investor and the community, increasing the likelihood of success.

6. Ensure that social and environmental impact assessments are conducted in accordance with Ghanaian law and international best practices.

The development of impact assessments must involve the affected communities, be completed before entering into a lease agreement, and be shared broadly with the affected communities.

7. Ensure that women's land rights are protected and that women and youth share in the benefits of commercial agricultural investment.

Ensuring that both women and men participate in, and benefit from, commercial land transactions is a critical challenge for investors seeking to engage responsibly in socially acceptable and equitable land investments. The state, investors, and communities can take a number of steps to overcome these challenges in order to ensure that women's land rights are protected and that women and youth share in the benefits of commercial agricultural investment.

8. Ensure that benefits to communities constitute a fair exchange for the loss of a primary asset of production.

In exchange for their land, communities need to receive assets that will allow them to be equally, or more, well-off than they were prior to the investment—for the short, medium, and long term. The best payment schemes will therefore be those that provide broad-based, long-term food security and income-generating potential for the community.

9. Create equitable benefit-sharing mechanisms within the community.

The failure to develop equitable benefit-sharing mechanisms within communities can lead to severe negative impacts—both economic and social—for those in the community who have lost their present or future access to land. Successfully negotiating a good deal with the investor for payments and benefits is only the first step for the community. Whether, and to what extent, the community as a whole realizes these benefits will depend on whether the community has established open and transparent channels for receiving and distributing investment-related revenues.

10. Address claims to state lands where compulsory acquisition was not fully documented and/or compensated.

Private investors interested in leasing state-acquired areas often walk into a complex land rights situation due to the fact that the official land acquisition processes, undertaken decades ago, were seldom finalized. The state, investors, and communities can take a number of steps to mitigate conflicts related to land that is claimed by the state but is also subject to claims and/or occupation by customary communities. It is important that any potential investment on what is formally considered state land take account of people occupying this area and involve them in the decision-making processes to the fullest extent possible.

11. Explore new ways to deal with land fragmentation.

Fragmentation of land holdings in the proposed GCAP project areas is one of the most challenging issues for investors seeking large areas of contiguous lands. Some best practices are emerging to address fragmentation in an investment context, which GCAP could further explore and promote.

12. Ensure that systems are in place for monitoring and enforcing the lease agreement.

The long-term sustainability and success of land transactions between investors and communities ultimately depends on each party living up to its obligations and responsibilities in the lease agreement. Many of the problems and conflicts that investors and communities have experienced, both in Ghana and across Africa, are the result of a failure to develop and implement effective mechanisms to monitor and enforce timely performance of the lease agreement.

Inclusive models and innovations for commercial agriculture investment

The report also identifies emerging innovative practices, related to payment models and outgrower and contract farming that aim to deliver more inclusive and equitable investment benefits.

Payment models: fixed price leases, revenue sharing, and land for equity

- **Fixed price.** In the past, most investors in Ghana and throughout Africa have paid a fixed price-up front or in periodic instalments - to community leaders for the right to lease land. While fixed-price lease arrangements provide a number of advantages to communities vis-à-vis revenue or equity-sharing arrangements, including predictability and simplicity, they may limit the amount of compensation available to communities. A lump sum payment made up front is among the riskiest practices for both investors and communities, because proceeds will likely be exhausted long before the lifetime of the investment expires.
- **Revenue-sharing.** Revenue-sharing models provide another approach to structuring payment. In comparison to fixed-price leases, revenue-sharing allows the community to benefit at a higher level from—and in proportion to—the success of the venture. An approach based on sharing some percentage of gross revenues is also much less risky for the community than equity sharing, in that it is easier to monitor and depends on fewer external factors. However, revenue-sharing entails more risk to communities than fixed-price payments, because income depends on a number of external variables. Whether and at what level the community receives payment would therefore depend on factors outside its control, such as crop failure, a drop in market prices, or company mismanagement.
- **Land for equity.** A community/investor joint venture, which would usually involve the exchange of the community's land for the company's equity, provides another way for the parties to share in both the risk and benefits of the investment. While a land-for-equity approach carries potential benefits for the community landholders, in that it allows the community to capture some percentage of the increased value of the investment over time, it also assigns high levels of risk to the community, which could result in catastrophic loss if the community trades its land rights for a share in a company that performs poorly or fails.

Outgrower and contract farming

Outgrower and contracting farming schemes are at the heart of GCAP's investment model, and have become prominent throughout Ghana. Outgrower and contract farmer schemes hold the potential to catalyse smallholder farmers within investment communities, allowing investors to reap the benefits from efficient and highly motivated production, while at the same time removing key constraints on smallholder farmers related to operating credit and secure markets. These approaches do not always generate positive outcomes, however, and the structure, management, and land-rights implications of the venture are critical to achieving

sustainable benefits. Through case studies, the report explores the potential benefits to contract and outgrower farmer schemes in Ghana, as well as potential detriments and risks.



INTRODUCTION

Interest by foreign and domestic investors in acquiring farmland in Ghana appears to have grown significantly over the last several years. Demand for investment in agricultural land is fuelled by the food needs of a growing global population, commodity price fluctuations, and new targets for biofuel production. Though very little information is available about the scale and nature of investments since 2003 (Bugri and Coulibaly 2012), and the exact amount of farmland that has been acquired by investors is not known, between 773,358 and 2,172,440 hectares are estimated to have been acquired for agricultural production (Land Matrix Global Observatory 2014; Deininger and others 2011). Data from the Ghana Investment Promotion Centre (GIPC) for 2003-09 show that in the 78 registered agricultural projects, foreign direct investment (FDI) inflows amounted to USD13.5 billion, of which USD322.7 million (2.4 percent) went into agriculture.

Ghana's political stability, access to markets in the United States and Europe, and significant quantities of arable land suitable for a diverse range of commodities have further encouraged private sector interest in investment in the country's agricultural sector. In a survey conducted in 2008 for Ghana, 35 percent of the multinational enterprises covered pointed to Ghana's macroeconomic and political stability as the most important factors influencing their decision to locate in the country. Other reasons given were market size, potential for growth, and Ghana's natural and physical resource endowments (Aryeetey and Udry 2010). The country is estimated to have 23,583,900 hectares of land, 57 percent of which are assessed to be suitable for agriculture. As of 2009, an estimated 54 percent of agricultural land was under cultivation, implying the existence of unused land for large-scale agricultural investments (Ahwoi 2010).

Agriculture is a key driver of the Ghanaian economy, contributing 23 percent of GDP and accounting for just over 43 percent of national employment, with smallholder farmers responsible for 80 percent of all agricultural production (Ministry of Food and Agriculture 2013). The Government of Ghana (GoG), like other national governments in Sub-Saharan Africa, has embraced the modernization of the agricultural sector as a key development priority, and is actively targeting interventions aimed at increasing commercial agriculture investment under a national strategy known as the Food and Agriculture Sector Development Policy II (FASDEP II) of the Ministry of Food and Agriculture.

At the centre of this effort is the Ghana Commercial Agriculture Project (GCAP), a joint project of the GoG, World Bank, and USAID. GCAP aims to support agricultural modernization efforts through the development of an enabling environment for commercial agricultural investment in the Accra Plains and the Savannah Accelerated Development Authority (SADA) zone.

While the pursuit of greater commercial investment in agricultural land can bring economic benefits such as increased incomes, improved economic growth and export earnings, additional food crops for local consumption, and new sources of government and community revenues from land leases, such investment can also pose significant risks for the men and women living in communities affected by these acquisitions (Schut, Slingerland, and Locke 2010).

^a This section is excerpted in part from Gaafar, Lufkin, and Duncan 2013: 7-8.

The risks posed by commercial agricultural investments have been well documented in Ghana and across the entire global South (Cotula and others 2009; Deininger and others 2011; German and others 2011). They include: displacement of local populations from the agricultural lands that they rely on for their livelihoods; conversion of lands from production of staple crops to export crops and a corresponding reduction in local food security; inadequate consultation with affected communities; insufficient compensation and/or failure to fairly and equitably distribute compensation and benefits derived from commercial investments; and negative environmental impacts. For example Tsikata and Yaro (2011) warn that in the context of Ghana's lack of self-sufficiency in food crop production, large-scale land acquisition for the production of export crops could deepen food insecurity. Others have pointed to the real land-governance challenges that these processes raise (German and others 2011). These challenges are generally long-standing in nature, while at the same time evolving in character and intensity in view of new economic, demographic, and environmental pressures on land (Bugri 2012b).

Given the concerns raised by many in relation to land acquisitions, there has been growing discussion about models of agricultural investment that involve collaborating with local farmers, rather than acquiring large areas of land (see for instance Vermeulen and Cotula 2010). Ghana has long-standing experience with company-farmer partnerships, and some of this experience has been discussed in the literature (see, Amanor 2001; Ruf 2009).

Risks associated with commercial land investments are not limited to those endured by affected communities. In fact, mounting evidence from across Africa shows that land acquisition and tenure-related risks can threaten the viability of commercial land investments for investors. Such risks can lead to lengthy and unexpected delays, unanticipated costs and misunderstandings, and even conflict over expectations and obligations between the contracting parties and affected communities (Munden Project 2012; Polack, Cotula, and Côte 2013). On the positive side, proactive community engagement can yield long-term financial gains to the investor.³

As GCAP moves forward in promoting commercial investment in Ghana's agricultural lands, its challenge will be to create an enabling environment that facilitates a socially responsible, environmentally sustainable, and economically rewarding tenure regime for investors, landowners, and affected communities. This is no small task and will require a significant commitment of political will, technical expertise, and financial resources.

Commercial agricultural land investment in Ghana takes many forms, and the investors involved in these deals can be foreign, domestic, or some combination of both. This report and its accompanying tools do not distinguish among types of investors. Foreign and domestic investors may pose different challenges when it comes to promoting socially responsible dealings with communities (e.g. foreign investors should rise to government attention sooner because they need to register with the Ghana Investment Promotion Centre (GIPC), while governments may not be aware of domestic investors until the point at which they attempt to register their lease).

The tools and recommendations included in this report may be used to improve all forms of investment. While all the tools are important to the promotion of sustainable and responsible land investments, efforts to improve the Ghanaian legal and policy framework and to enhance the capacity of local communities will most likely provide the best protections, regardless of whether the investor is foreign, domestic, or some combination of both.

³ The International Finance Commission (IFC) and Deloitte, along with the Multilateral Sustainable Community Development Fund (MIGA) and Rio Tinto, have recently developed the Financial Valuation Tool for Sustainability of Investments, in order to quantify benefits to a company (in terms of monetary payoff and risk mitigation) from positive social and environmental investments in communities affected by large-scale natural resource exploitation (IFC and Deloitte 2013). Newmont (Ghana) is among those companies that have piloted use of the Financial Valuation Tool.

1.1 Towards socially responsible investment practices

In recognition of the importance of and need for socially responsible investment practices, governments, international organizations, businesses, and civil society in the last decade have developed a number of principles and guidelines in an effort to ensure that land-based investments in developing countries do not infringe on the rights or damage the livelihoods of local people. Perhaps the best known product of these efforts is the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests (VGs), which were developed by the UN Food and Agriculture Organization (FAO) and officially endorsed by the Committee on World Food Security in 2012. In addition to principles and guidance developed at the global level, some countries including Ghana have developed policies and guidance for large-scale land acquisitions. The Lands Commission's Guidelines for Considering Large Scale Land Transaction for Agriculture and Other Purposes (Lands Commission Guidelines) seek to, among other things, protect the interests of local communities and ensure that large land transactions conform to international best practices.

While these international principles and guidelines are well intentioned, their efficacy, efficiency, and ethicality remain uncertain given their voluntary nature and the lack of practical guidance available to investors and communities to implement the principles on the ground, given the unique issues and risks that local contexts present.

This raises the need to examine the issues of land-based investments in the context of the political ecology of the country. The question of who gains access to land and on what terms can only be understood by seeing how control over land is embedded within the broader pattern of social relations, and how issues of ownership, voice, risk, and reward can be handled in an inclusive manner.

1.2 Purpose, objectives, and structure of report

This report seeks to provide GCAP and other stakeholders involved in commercial agricultural investment in Ghana with practical recommendations, examples of innovative practices, and links to concrete tools to facilitate implementation of international principles and guidelines like the UN Food and Agriculture Organization's Voluntary Guidelines. The authors thereby hope to promote successful investment outcomes that result in social, economic, and environmental benefits for investors and affected communities alike.

The report is organised as follows. Section 2 describes the legal, policy, and institutional framework for commercial agriculture investment in Ghana; it points out some of the structural challenges and impediments that investors, landowners, and affected communities confront in realizing successful commercial farmland investment, and makes recommendations for how to address these. Section 3 presents the findings of field research conducted by the project team across seven regions. For twelve key issues, it offers specific recommendations for actions that investors and communities can take to support equitable and economically viable land transactions. Section 4 identifies innovative practices emerging within Ghana, as well as in other countries, that aim to deliver more inclusive and equitable investment models. Section 5 concludes. Appendix 1 outlines the research methodology employed and lists the meetings held in Ghana for the purposes of the study.

GHANA'S LEGAL, POLICY, AND INSTITUTIONAL FRAMEWORK FOR COMMERCIAL AGRICULTURAL LEASING

This section of the report presents a concise synthesis of relevant policies, laws, and institutions in Ghana. Since much has been written on land laws and governance in Ghana in the context of LSLBI⁴, the intent here is simply to provide background information for understanding the context of LSLBI in Ghana, setting the stage for discussing issues and recommendations related to investments. The section begins with a brief overview of the international policy framework for responsible land-based investment, before discussing relevant Ghanaian policy, laws, and institutions.

2.1 International guidelines and norms for responsible agricultural investment⁵

Over the past few years, governments, investors, donors, and financiers have developed a number of tools intended to improve commercial investment and land acquisition practices in Africa, Asia, and Latin America. The purpose of these tools, whether geared toward governments or the private sector, is to reduce land tenure risks for both communities and investors in the context of large-scale commercial land transactions. The tools comprise voluntary international guidelines adopted by sovereign states, as well as IFC/World Bank guidelines applicable to projects financed by these institutions, and industry-specific standards intended to foster best private sector practices.

- International standards and principles for responsible investment geared toward governments and the private sector. These include the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGs) (geared toward government action and unanimously endorsed by the UN Committee on World Food Security (CFS) in 2012). A number of leading food and beverage companies, including Cargill, Coca-Cola, and Nestle, have agreed to support the VGs. The CFS is also finalizing the Principles for Responsible Agricultural Investments (RAI), scheduled for adoption by the General Assembly in October 2014. The RAI, geared toward private sector actions, include a principle focused on land tenure (along with rights to fisheries, forests, and water).
- International Finance Corporation (IFC) Performance Standards on Social and Environmental Sustainability. In January 2012, the IFC, as the equity investment arm of the World Bank, began applying environmental and social performance standards to the projects it funds. These include Performance Standard 1 on assessment of impacts, and Performance Standard 5 on land acquisition and involuntary resettlement, which establish detailed requirements on community engagement, negotiation with holders of land rights, grievance mechanisms, and compensation for displaced peoples. Many large multinational banks, including Bank of America, Barclays, Citigroup, Crédit Suisse, JP Morgan, Société Générale, and Wells Fargo now apply the IFC's sustainability framework (or the parallel Equator Principles for

⁴ See GCAP 2011b: 19 ff; 2011c: 22 ff; 2011d; 2011a; 2013: xi, x, and 27 ff; and 2014a. Other recent reports on land governance in Ghana in the context of LSLBI include Schoneveld and German 2014; De Wit and Norfolk 2014; and Tsikata and Yaro 2011.

⁵ This section is derived in part from Vhugen 2014.

⁶ Bonsucro is a trade group of 189 companies involved in any aspect of the sugar production and supply chain, including Coca-Cola, Nestlé, Pepsi, Syngenta, and Cargill.

private banks) to their own loan portfolios (Vhugen 2014).

- Private industry instruments and standards for self-regulation. In recent years, private trade groups in the agro-energy industry have adopted instruments for regulating the behaviour of group members in regard to LSLBI. In 2012, for example, the Roundtable on Sustainable Biomaterials (RSB) adopted Guidelines for Land Rights (“Respecting Rights, Identifying Risks, Avoiding Disputes, and Resolving Existing Ones and Acquiring Lands through Free, Prior, and Informed Consent”), and Food Security Guidelines. These are among the most detailed of the industry standards, establishing strong safeguards for rural peoples’ land rights. Another example is the Bonsucro Production Standard, which seeks to mitigate social and environmental harm related to sugar cane production.⁶ The Bonsucro standard has incorporated measurable targets and indicators (such as demonstration of “clear title to land in accordance with national practice and law”) for mitigating negative effects of sugar cane production.

2.2 Ghanaian policy and legal framework for large-scale land investments

2.2.1 Overview

This section discusses key issues in Ghana’s current framework that are relevant to commercial agricultural investments in land. A list of relevant legal instruments, with descriptions of those with the most influence on land investments, is provided in Appendices 2 and 3.

Box 2.1 Land Tenure Overview for Ghana

Land categories

Ghana has a number of tenure arrangements that include state and vested lands, stool/skin lands, clan/family lands, and private lands.

- State lands: Lands held by the state include those obtained through vesting and those compulsorily acquired (primarily under the State Lands Act of 1962). The state owns approximately 20 percent of the land in Ghana. As noted above, some of the land considered to have been acquired by the state within GCAP project areas was never fully and properly acquired, raising issues as to the land rights within these areas.
- Vested lands: Vested lands are subject to split ownership between the state and customary communities. The state manages them (holding authority to sell, lease, and collect rents from them) as a trustee for the benefit of the customary community from which the lands were taken. Transfer of the land rights to the state occurs pursuant to the Land Administration Act of 1962. Within the study area for this report, Brong Ahafo is the region with significant incidence of vested lands.
- Stool/skin lands: The Constitution establishes the legal basis for stool/skin landownership. Article 267(1) provides “All Stool lands in Ghana shall vest in the appropriate Stool on behalf of and in trust for the subjects of the Stool in accordance with customary law and usage.” Rights with Stool lands are distinguished between those related to those who first cleared the land in the area (indigenes) and those who have come later (strangers, settlers, or migrants). The government has a significant degree of administrative

authority over stool/skin lands, including the ability to collect a ground rent.

- Clan/family lands: Land rights vest in the head of the family, and customary rules govern the exercise of these rights. The state has limited authority over clan and family lands, and does not have the authority to collect a ground rent.
- Private lands: Lands held in private title—not common in the country and in project areas.

Tenure types^a

The land tenure framework, outlined in the 1999 National Land Policy, includes several categories of land interest. These include: allodial, common law freehold, customary freehold, customary tenancy, leasehold, and other lesser interests in the land. Several of these interests may exist on the same land parcel (GOG National Land Policy 1999; Bugri 2012a).

- Allodial title: Allodial title is absolute permanent title from which all other interests in land derive. Customary lands are held under allodial title, with the title vested in stools, skins, clans, or families. These entities hold the land in trust for the community (GoG National Land Policy 1999; USAID 2011: 7).
- Customary freehold (usufruct): Customary freehold, also called customary usufruct, refers to use rights over customary land held by individuals or groups within the allodial title-holding community. Usufruct rights may be acquired directly, through an express grant from the allodial community, or implicitly, through the occupation of vacant land. The land continues to be legally owned by the allodial titleholder, although traditionally the allodial owner did not have the authority to transfer the land without the consent of the holder of the [usufructuary] interest. Usufructuary interests are not limited in duration and, in many communities, may be transferred to successors of the original interest-holder. Holders can forfeit their title by refusing to perform customary services, attempting to deny the ownership of the allodial titleholder or abandonment of the land. Usufructuary interests are not currently registrable in Ghana, although the National Land Policy recognizes customary freehold rights as legitimate (GOG National Land Policy 1999; Bugri 2012a; Sarpong 2006).
- Community's common property rights: Customary communities often hold some rights in common, such as the rights to secondary forest products (such as shea nuts, fuel wood or wild mushrooms), grazing areas and water.
- Common law freehold: Private land in Ghana is held under common law freehold. Freehold title derives from an express freehold grant by an allodial rights holder. Freehold land exists mainly in areas where chiefs made grants of customary land to private individuals prior to the 1992 constitutional ban on the creation of freehold interests on stool and skin land. It appears that freehold interests may only be created on family and clan land under the current legal framework (Kasanga and Kotey 2001; USAID 2011; Christina Bobobee, personal communication 2013).
- Leasehold: Leaseholds are time-bound interests in land. Both allodial and freehold titleholders can grant leaseholds to individuals. Leasehold agreements with non-Ghanaians are constitutionally limited to a term of no more than 50 years (USAID 2011; Government of Ghana 1992).
- Customary tenancy: Customary tenancy refers to a type of contractual agreement

between landholders and farmers in which the farmer is allowed to farm on some portion of the landholder's land, usually in exchange for payment or a share of the farm output, although in some cases the farm itself will be shared. The most common arrangements are abunu and abusa. Under an abunu arrangement, the farmer provides one-half of the harvest to the landlord, while under an abusa arrangement the landlord receives one-third of the crops. Abunu arrangements are becoming more common, to the detriment of sharecroppers (Bugri 2012a; Sarpong 2006; Ubink and Quan 2008).

Ghana's complex legal and institutional framework for land governance is being streamlined under the guidance of the National Land Policy 1999 and Land Administration Project (LAP I and II). The laws most relevant to commercial agricultural land investment are:

- The Constitution of the Republic of Ghana 1992
- The State Lands Act 1962, Act 125 and Amendments
- The Administration of Land Act 1962, Act 123 and Amendments
- The Lands Commission Act 2008, Act 767
- Land Title Registration Act 1986, PNDCL 152 and Regulations 1986 LI 1341
- The Conveyancing Decree 1973 (N.R.C.D. 175)
- Farmlands (Protection) Act 1962 (Act 107)
- The Limitations Act 1972
- The Environmental Protection Agency Act 1994, the Environmental Assessment Regulations 1999
- Office of the Administrator of Stool Lands Act 1994, Act 481
- GIPC Act 2013
- Companies Act 1963
- Alternative Dispute Resolution Act 2010

In addition to the laws listed above, relevant policy instruments include the National Land Policy, the Forest and Wildlife Policy, the National Environmental Policy and Action Plan, the Food and Agricultural Sector Development Policy (FASDEP II 2007), the Public-Private Partnership Policy (see description in Appendix 3) and the Lands Commission's Guidelines for Considering Large-Scale Land Transactions for Agricultural and other Purposes.

Another important component of the existing legal framework is the prevailing customary laws and usages, recognized under the Ghanaian Constitution as a valid legal regime.

The resulting legal environment for land governance is therefore pluralistic, consisting of

enacted legislations and the various customary tenure regimes that are found across Ghana.

The Government of Ghana (GoG) has recognized that large-scale agricultural investments pose challenges and potential threats to traditional communities. To protect the interests of local communities and promote transparent and sustainable development and investment policies, the Lands Commission has developed Guidelines for Considering Large-Scale Land Transactions for Agriculture and Other Purposes (Box 2.2). These Guidelines represent a significant achievement in promoting more consultative and socially responsible investment, but they likely do not go far enough to ensure that communities are meaningfully informed about proposed investments, broadly and adequately consulted, and receive fair and equitable benefits from the project. For example, the Guidelines: (1) only technically require one community hearing on the proposed transaction and it is recommended that this hearing be held after a preliminary agreement has been reached between the Grantee and the Grantor; (2) do not address the key issue of how to ensure adequate participation of women and youth into the hearing process; (3) contemplate that the environmental impact statement be conducted after the grant has been concluded, which effectively deprives communities of key information that is necessary to make an informed decision on whether to accept the project; and (4) are silent on the issue of benefit sharing within communities.

Box 2.2. Ghana Lands Commission Guidelines for Considering Large-Scale Land Transactions for Agricultural and Other Purposes

The Guidelines cover considerations and recommendations for the land acquisition process such as:

- The timing and details of required forums and consultations with the local community, including:
 - The purpose of the forum;
 - The financing and facilitation of the meeting/s;
 - The required participants and issues to be considered at the forum; and
 - The dissemination of information to stakeholders and the public on the outcome.
- The process for the Regional Lands Officer to review the proposed transaction;
- Environmental impact assessments;
- Requirement that transactions exceeding 1,000 acres be reviewed by the National Land Commission; and
- Legal requirements related to the terms of years and land size that may be granted.

2.2.2 Challenges

Gaps and inconsistencies within Ghana’s legal and policy framework for commercial agricultural investment in land create a number of impediments to efficient, equitable, and socially inclusive investment.

2.2.2.1 Incomplete policy framework for commercial agricultural investment

Ghana lacks a comprehensive policy guiding LSLBI or leasing. Without a national-level policy, the laws, regulations, and practices affecting different aspects of LSLBI lack continuity and direction, and the institutions lack coordination. The Lands Commission Guidelines could form the basis of such a policy but would first need to be expanded upon and thoroughly vetted by stakeholders through a broadly consultative and participatory process.

2.2.2.2 Complex and contradictory legal and regulatory framework

Complexities, contradictions, and gaps in the law undermine clear institutional coordination and the establishment of transparent procedures for investors to obtain rights to land (Box 2.2). The legal and regulatory mandate for state agencies relevant to LSLBI does not create clear lines of authority and responsibility among government actors, hampering the effectiveness and efficiency of state administration, facilitation, and regulation of investments. There is no single overarching set of legal and regulatory instructions to guide LSLBI, nor is there a single agency in charge.⁷ Such support and clarity is needed given the difficulty that both investors and customary landholders face in understanding and negotiating Ghana's complex legal and regulatory framework governing land acquisition and investment.

Box 2.3. Legal Labyrinth for Securing a Land Transaction

Reviewing the legally mandated steps for securing a land transaction helps to demonstrate the difficulties investors face. The Conveyancing Decree of 1973 requires transactions of customary land for periods of three years or more to be documented, and only transactions that are registered (under the Lands Registry Act of 1962 or the Land Title Registration Act of 1986) are legally enforceable. However, in order to register a land transaction, a party must first comply with a number of legislative instruments, which may include the Chieftaincy Act (to determine capacity to grant); the Local Government Act (to verify conformity with planning and other regulations); the Environmental Protection Agency Act (to ensure minimization of negative social and environmental impacts); the Mining and Minerals Act (to determine whether any mineral concessions apply to the land in question); and the State Lands Act (to determine whether the land is subject to past acquisitions by the state). Ghana's Land Administration Project (LAP) II is working with the Lands Commission to streamline the process for registering a lease. However, progress remains slow, and investors report that inscrutable and time-consuming procedures involving multiple trips and payments to multiple divisions within the Commission are the norm (GCAP 2013: 79).

2.2.2.3 Insecure land rights for rural smallholders

The third impediment to efficient and equitable land investments in Ghana is that the majority of smallholders lack secure rights to their land. The ambiguous legal nature of land rights for customary users (usufructuary rights holders) in both stool/skin and family lands is perhaps the greatest source of vulnerability of customary land users in the context of commercial land-

⁷Though the GIPC was created to provide a one-stop-shop for investors in Ghana and is a potential source of support to investors, in practice the agency is one option among many that investors, government stakeholders and communities look to for guidance and support in the land acquisition process.

based investments in Ghana. Customary lands are held under allodial title: the title vests in stools, skins, clans or families, with a designated individual such as a chief, family head or other traditional leader often responsible for managing the land in-line with customs. Although traditionally customary land tenure systems have protected usufructuary rights fairly well, the formal codified law merely recognizes but does not formalize these traditional protections and does not provide for the registration of usufructuary rights.⁸ As demands for land increase, these gaps in the legal framework for formalizing all customary land rights leave many customary users vulnerable to disenfranchisement and provide an opportunity for chiefs and family heads to sell out customary rights to a third party investor.⁹ Customary leaders have opposed efforts to register usufructuary interests (e.g. under LAP I and LAP II) in recent years, arguing that this would compromise the authority of chiefs and family heads to control the land.

Without statutory recognition of their rights, customary users lack tenure security, having limited opportunities for redress if traditional leaders overstep their traditional authority (Bugri 2012a; Sarpong 2006). And investors, as outsiders, are often ill-equipped to independently identify or verify who holds usufructuary rights on any given parcel of land. When land transactions for investment purposes affect peoples' physical homes, forcing resettlement, the people displaced are typically offered some level of compensation from the customary authority and/or investor. However, this generally applies only to residential plots, and compensation is rarely paid when people are forced to abandon land they have been farming.¹⁰ When farmland is affected, customary users are seldom offered any compensation and are rather expected to find new land somewhere else to farm. This land may or may not be readily available, or be as productive as the land taken or at a convenient location for the farmer. Women often lose the most when the land they farm is leased out to an investor, especially in areas (such as peri-urban zones) where land is increasingly scarce. In this setting, women can seldom find available land close to their home, and so they often must travel at length to lease in land from a neighbouring chief.

Migrant and settler farmers have still fewer rights than indigenous land users under the law; as they are considered guests on the land, through permission of the customary leader. They lack any legal claim to the land vis-à-vis the allodial title holder even if they have been there for decades or, as is true in some cases, generations. So despite studies acknowledging this as a problem,¹¹ the law does not offer protection for these farmers should the customary leader decide to lease out the land used by migrant and settler farmers to a third-party investor. This poses a potentially serious problem in many cases, however, as these migrant and settler farmers

⁸Some degree of legal protection for usufructuary rights can be found in a number of legal instruments, including: (1) the Constitution (providing in Article 36(8) that customary leaders carry a fiduciary obligation to their communities over land within their jurisdiction, and are accountable to their communities in this regard); (2) the National Land Policy (generally recognizing the right of customary freehold or usufruct); (3) the 1973 Conveyancing Decree (requiring transactions involving customary lands to be in writing); and (4) a long history of case law established by the High Court in favour of usufructuary interests vis-à-vis allodial title holders in the context of transactions. See Appendix 4 for additional information.

⁹The team's research findings are reinforced by Alden-Wily and Hammond 2001; Ubink 2006; and Ubink and Quan 2008.

¹⁰In many cases, occupation and development of the land by the third party lessee is scheduled for the post-harvest season, so as to limit disruption to the current growing season or harvest for customary users.

¹¹Examples include recommendations contained in the report of The Asare Committee of Enquiry into the Problems of Settler Farmers in the Western Region – Sefwi –Wiawso District (1988) and the Report of the Committee on Tenant/Settler Farmers on a Study of Problems of Landlords and Tenant/Settler Farmers in Sefwi Wiawso and Juabeso-Bia Districts (1999).

⁹GCAP Diagnostic Review of Landownership and Land Rights in the Accra Plains (2011), p. 15 ff.; GCAP Draft Strategy for the Prevention and Resolution of Outstanding Legal Issues and Disputes on Land in the Accra Plains (2014).

¹³According to the State Lands Act, 1962 (Act 125), section 1, the state may assume title to the land upon publication of the official notice of acquisition. This action extinguishes all other rights to the land, even when compensation is outstanding. The date of the notice of publication also serves as the date for determining values to the land, crops, improvements, and other compensable factors. This can be important, especially when the state delays payment for a number of years, as values may increase substantially over time. Duncan, Gaafar, and Lufkin 2013: 46.

are often among the most successful Ghanaian farmers within a community. Unless they are able to secure a formal lease to their land, their rights remain highly insecure in the context of larger-scale commercial interest in customary lands.¹²

When an investor acquires customary land without the awareness and consent of usufructuary rights holders, the investor's right to that land lacks social validity: in such a case, the investor has no social license to operate in that community. Conflict often ensues in such a circumstance, causing significant difficulties and costs for investors and traditional leaders.

2.2.2.4 Insufficient legal and regulatory safeguards for existing land users and occupants vis-à-vis the state's claims to land

The current laws and regulations on compulsory acquisition fail to provide sufficient safeguards for users and occupants of customary lands and have led to confusion and conflict in regard to the state's claims to vast parcels of land in areas slated for LSLBI. The Constitution's broad justification for the state's use of compulsory acquisition (to include "the development or utilization of property in such a manner as to promote the public benefit") has allowed the state to acquire land for private business development in the past and has been "prone to abuse" (Larbi 2008: 5, citing Kotey 2002). Such historical overreach on the part of the government in taking land has made many Ghanaians wary of any state action to acquire land, and tensions over land run high in areas where state acquisitions were mishandled. Though the 1992 Constitution has limited the broad justification of the state's use of its power of compulsory acquisition, this has done little to alleviate the mistrust of affected communities over compulsory land acquisitions by the state.

Perhaps most importantly, the practice has been that the state compensates only the allodial title holder for lost rights to land (though land users must be compensated for "disturbances" such as lost crops) (Larbi 2008: 12; see also State Lands Act 1962). It is rare that anyone other than the allodial title holder receives any payment at all for land taken by the state. In the Accra Plains, this means that even where the state has paid compensation in the past for areas it has acquired through executive instruments, these payments have been made to the chiefs and clan leaders. Usufructuary rights holders—the vast majority of people who use and farm on family lands—do not appear to have been aware these payments were made, and received no direct compensation or benefit in exchange for their loss of land (GCAP 2011a: 17).

Within GCAP project areas such as the Kpong Irrigation Project and Asutuare Project areas, this "contributes to the tensions where GIDA is accused of handing out indigenous people's lands to strangers and migrants for farming purposes, thereby leaving them impoverished" (GCAP 2011a: 17).

Furthermore, although the Constitution requires "prompt payment of fair and adequate compensation," there is no legal requirement for the state to make payment prior to occupation. In fact, payment is often delayed over the course of many years (GCAP 2011a: 38, 40; Larbi 2008; Adu Gyamfi 2012: 200).¹³ According to a 2008 report, the state had only fully acquired (by issuing executive instruments) 20.4 percent of the land that it had taken/occupied (Larbi 2008: 10). This means that landholders are not even able to submit claims for compensation on nearly 80 percent of the land taken by the state, as claims for compensation cannot be made until an Executive Instrument has been issued (Larbi 2008: 10). This has significant historical and contemporary repercussions in Ghana and in GCAP project areas, as many communities

reject the state's claim to have acquired land in the past.

In sum, due to shortcomings in the legal framework for compulsory acquisition in Ghana, and in implementation of the framework:

- Compulsory acquisition has been used, and in some cases abused, for the purpose of private business development, fostering land-rights insecurity among customary right-holders;
- The law does not require compensation to usufructuary holders for loss of their land rights, fostering insecurity for smallholder farmers, encroachment onto “acquired” areas by displaced farmers, and tension between communities and the state (as well as investors who benefit from these acquisitions); and
- The law does not require payment prior to occupation, leading to long overdue payments and a situation in which the state has not paid compensation on nearly 80 percent of the land it has occupied or “taken” in the past.
- As a result, conflicts are common over state land that is currently occupied by communities with outstanding claims to those lands, particularly in the Accra Plains (see GCAP 2014a and 2011c).

2.2.3 Recommendations for strengthening the policy, legal, and regulatory framework for LSLBI

- (1) Develop and adopt a national policy framework for LSLBI, building from the Lands Commission's Guidelines for Large-scale Land Acquisitions.
- (2) Develop and adopt a national land law containing a comprehensive land tenure framework that would underlie land-based investment. In the process of adopting a new national land law, derogate or amend laws and provisions of laws that conflict with the new law. The law should clearly define the rights and responsibilities associated with customary forms of tenure.
- (3) Consider including protections in the new land law for usufructuary rights holders on stool/skin lands vis-à-vis the authority of allodial rights holders to transact the land. These could be both procedural (e.g., requirement to provide notice) and also substantive (e.g., requirement to provide compensation, and/or prohibition on certain kinds of transactions). Include channels for fair and timely dispute resolution accessible by usufructuary rights holders.
- (4) In drafting the National Land Bill and updating the National Land Policy, include support for gender-equitable land rights, including requirements that customary authorities comply with the Constitution and enforce basic rights.
- (5) Develop a national land use policy that creates a philosophical and institutional framework for the environmentally and socially responsible use of land resources in Ghana. This policy should encourage a participatory approach to land use planning and the creation of simplified planning mechanisms.
- (6) Develop a comprehensive national land use planning law, based on the principles of the

national land use policy, that embodies participatory land use planning by local-level communities (going beyond land schemes currently used to a more holistic development planning approach).

- (7) Reconsider adoption of the draft bill on spousal property rights, which would establish a clear legal framework for joint spousal rights as related to community property/land.
- (8) Consider an amendment to the Environmental Protection Agency Act, 1994 (Act 490) and the Environmental Assessment Regulations of 1999 (LI1652) requiring environmental impact assessments to be completed and shared with any affected communities prior to the signing of a lease or any long-term investment contract.
- (9) Conduct a review of existing laws and regulations related to compulsory acquisition, and revise these as needed to ensure their consistency with the Constitution, each other, and international best practices.
- (10) Consider—through inclusion in the new national land bill and amendments to existing legislation (such as the State Land Act)—requiring that any relevant stakeholders, including both women and men usufructuary holders, be fully compensated for the loss of their interests in the land when the state compulsorily acquires land for an investment purpose. Require also that any compensation for such acquisitions be made prior to the occupation of the land by the state (or the investor). In addition, consider amendments to the legal and institutional framework for compulsory acquisition that would narrow the definition of “public purpose” so that it does not include direct private investment, and consider further separation of land acquisition and land valuation functions, which are currently held within the same institution (National Lands Commission).
- (11) Consider adopting a national resettlement policy in line with best international practices (including IFC/World Bank Guidelines), that would apply to smallholder farmers (and others) on stool land who are displaced through compulsory acquisitions.¹⁴

2.3 Customary institutions relevant to large-scale land investments in Ghana

2.3.1 Overview

Customary land governance systems in Ghana vary from region to region, and within regions as well. Most land within the seven regions covered in this report is held by stools/skins (as in the Northern Region and Upper East, parts of Brong Ahafo and Eastern Region), by clans/families (Upper West, Volta, Eastern, and Greater Accra), or as vested lands (parts of Brong Ahafo). This section describes the main social and institutional features of each of these tenure arrangements.

2.3.1.1 Stool/skin lands

Within stool and skin lands, chiefs hold allodial title. They have a great deal of authority over the allocation and revocation of rights to farmers and are increasingly viewed as landowners rather than as custodians of the land for the benefit of their community. Each customary

¹⁴For more information on the World Bank Resettlement Policy, see Box 3.4.

kingdom has a hierarchy of chiefs, including the overlord, paramount chiefs, divisional chiefs, and sub-divisional chiefs. While the overlord is considered the ultimate “owner” of the land (or holder of allodial title), other chiefs in the hierarchy (such as divisional chiefs) have authority to manage and control land and its proceeds. However, they do so in a representative capacity. Key decisions such as those affecting a grant must be authorized by a paramount chief. In some areas (such as Kumasi and Yendi) such authorization must come from the Overlord. In the absence of such consent from the paramountcy or the overlord, the state institutions will consider the purported grant to be defective and will thus refuse request to register such transaction.

Councils of elders are also important to land transactions, because they serve as advisors to the chief and sometimes share in revenues earned from the land. Approval by the traditional council is required by law for transactions involving stool land (Chieftancy Act, 2008 (Act 759), Section 45). In many communities, a stranger seeking land is expected to approach an elder first, who will then lead the stranger to the chief. Also, upon hearing from a potential investor who is interested in land within his jurisdiction, a chief will often appoint one or more elders to work with the investor in locating a suitable parcel.

Tendanas or earth priests, traditionally had an important role on stool and skin lands, holding spiritual authority over the land. Interviews in the three northern regions indicate that the role of the tendana is declining in most communities in favour of increased authority of the chief(s) over the land (see also Kasanga and Kotey 2001).

Customary land secretariats were created under LAP I and II to serve a land administration function for the customary authorities. They are established under the paramount chiefs and serve as an institutional bridge between the customary authorities and the land sector agencies. They currently exist in 57 landowning communities throughout the country.

Important aspects of stool and skin land in GCAP project areas include:

- (1) Chiefs’ relationship to the land has shifted markedly from a custodial to an ownership perspective in recent years.
- (2) Customary land users have little knowledge about or influence over decisions by the chief regarding transactions of the community’s land, even when directly affected.
- (3) Women and youth are particularly excluded or hugely underrepresented in decision-making processes about land. In areas of increasing demand for land, such as peri-urban areas around Tamale, customary users who lose their land to investment are not compensated and have nowhere else to farm within the boundaries of their communities but must rather farm land outside the jurisdiction as strangers, paying tribute to the relevant authorities.
- (4) In these cases, women appear to be among those who most readily lose their land and who have to travel the farthest to find new land.
- (5) Smallholder farmers who are migrants or strangers have weaker tenure rights than do indigenes.
- (6) Secondary use rights to communal goods, such as economic tree nuts, provide an essential stream of revenue for women within stool and skin communities.
- (7) Many communities in the three northern regions did not have experience with LSLBI or

leases.

2.3.1.2 Family and clan lands

Where land is governed by clans and families, allodial title is vested in the head of the family, who manages the land and controls revenues from lands transacted out to commercial farmers. Depending on the clan or family, however, the family head may have to consult a number of sub-families (or clan/family “gates”) before arriving at any decision involving the disposition of the family’s land. Interviewees generally reported that the family head would need to share information and consult with any sub-families who would be directly affected by a proposed transaction. In this sense, decision making related to land investments appears to be more decentralized and democratic in clan/family regimes as compared to stool/skin regimes. The chief’s role within clan and family lands is much less pronounced than it is within stool and skin lands. Interviews in the Accra Plains and in Upper West found that a family head may advise his chief of a transaction but does not ultimately need approval by the chief to conclude the transaction nor generally share revenues from the land with the chief. In some cases, chiefs have been instrumental in helping to organize family heads within their jurisdiction to aggregate lands for investment. In Brong Ahafo, the land is mostly vested land, with chiefs playing a largely political role. In such areas, the Lands Commission grants leases to investors on behalf of the government.

Important aspects of clan and family lands in GCAP project areas include:

- (1) Clan or family members generally may not sell rights to land to anyone outside of their clan or family, but they may be able to transfer derivative rights, or inter vivos rights.
- (2) In the Upper West region, the trend is for family lands to break apart into smaller holdings by nuclear families. This means the number of family heads who are authorized to approve land transfers is always increasing, and this introduces additional difficulty to the Lands Commission in scrutinizing land transfers.
- (3) In Accra Plains, approximately 60 percent of the GCAP project area is land owned by customary-land-owning families (GCAP 2011c: 7).
- (4) Relationships within these families/clans are patrilineal.
- (5) The relationship between clans and the families that comprise them is different in each of the traditional communities. In some cases, the clan head holds the right to allocate and revoke rights, but in other cases lands are highly divided among families, which hold strong rights in a manner closely resembling private ownership.
- (6) Disputes regarding family land boundaries are pervasive within the project areas. This can have a significant impact on investments. Brazil Agro Business in the Volta Region is a case in point; the company reported having spent USD2 million on land acquisition and preparation, only to find that the land was entangled in land disputes. The company ultimately decided to walk away from its investment in that parcel of land.¹⁵

¹⁵Interview with Brazil Agro Business, 16 June, 2014. Notes on file with the authors.

¹⁶Among the activities undertaken under LAP I was the ascertainment of customary law, which assessed land and family practices in the customary communities supported by CLSs in order to streamline the establishment of CLSs. Under LAP II,

2.3.2 Challenges

The nature of customary land governance in Ghana, within both stool/skin lands and clan/family lands, presents a number of challenges for large-scale land investors.

- The lack of standardized rules between customary communities—and the fact that these rules are seldom written or readily available to the investor—can be a significant impediment to commercial investment.¹⁶ As a result, investors face a steep learning curve in understanding how to deal with any new landholding community, requiring a significant up-front effort to understand local customs, expectations, and rules in potential project areas. This is especially difficult for investors who seek to acquire parcels of land that span several different customary jurisdictions.

In stool/skin lands, the shift away from traditional notions of chiefs' role as custodial, to the increasingly common view that the chief is the owner of the land, poses a serious threat to the land rights of customary farmers in the context of increased LSLBI and resulting demand for customary lands. Historically, customary leaders in Ghana were expected to act as custodians of the land and resources for their community, stewarding these resources for the long-term wellbeing of community members alive today and those yet unborn. This perspective is captured in case law under the High Court, as summarized in Appendix 4. However, over time and with rising commercial land values, the custodial role of traditional leaders has eroded. Increasingly, chiefs have adopted a new “landowning” perspective, not in keeping with traditional norms of custodianship. This contemporary interpretation of custom has the increasingly common result that the community's most valuable resource and source of livelihood is treated as a personal asset, with many chiefs leasing long-term rights to the land without seeking input from, or sharing payments with, those who occupy and farm the lands (Duncan, Gaafar, and Lufkin 2013: 10). As a result of this practice, occupants and farmers within customary tracts of land slated for commercial agricultural investment have often lost access to critical livelihood resources without any compensation. Even in cases where the land subject to a transaction is not currently farmed or used by community members, the community as a whole loses future access to its land without any say in the process or payment from it.

- For investors, the practice of dealing only with a chief or family head has proven highly risky, because it does not foster the threshold level of social license from the broader community that is needed to support the investment over time. Thus, investments may be subject to covert or overt sabotage by community members who have been marginalized from the decision-making process and, in many cases, displaced from the land they have farmed.
- Women are excluded from decision-making processes regarding land, creating a significant risk of negative social and economic impacts from investments. Though in some communities in Ghana women leaders have some influence over land-related decisions, women do not participate in customary land decision making or consultation. Their limited input into decisions over community land is especially worrisome because such decisions often have a disproportionately profound impact on women. Because women's rights to land tend to derive from their relationships with, or permission granted from, men, women have fewer options than men when they are deprived of their land. As a result, land transfers can have

rules for 50 traditional areas will be recorded in coordination with the Law Reform Commission, with the ultimate aim of providing a shared understanding of customary rules that will support the responsive drafting of the Lands Bill.

a significant negative effect on women (Minkah-Premo and Dowuona-Hammond 2004).

- Exclusion of youth from decision-making processes around land undermines the development of social license and increases risks to the community and investor. Within the seven regions visited, young people are seldom part of the traditional decision-making groups (such as councils of elders) that advise the chief in regard to land disposition. Youth are similarly excluded from decision making in regard to family lands, as young people may have their own nuclear family but have not yet risen to the level of family patriarch. In parts of the country where fertile land is in high demand and fragmentation of holdings is increasing over time and generations, youth are facing serious scarcity in customary lands that may be available to them to support their own families. Because young people are left out of political processes and decision making about land, they are often among those who oppose investments, both during and after the negotiation processes. A number of investors underscored this point in discussions with the team.¹⁷ Targeted efforts to benefit young people by including them in outgrower programs and farm employment have met with some success.
- Necessary protections are not in place for settler and migrant farmers. As stated above, neither formal legal systems nor customary systems offer safeguards for settler and migrant farmers, who may simply be evicted from the land they farm without notice or compensation. This is especially significant in areas of high land scarcity.
- Fragmentation of land into individual private parcels may pose risks for investors and customary rights holders; this is more pronounced in areas such as the Upper West Region where land is exclusively held along family lines. In the Upper West, increased commercialization of land has created a push for further fragmentation of family lands into plots held by nuclear families.¹⁸ Nuclear families are demanding to separate their own plots from the family land and register their ownership of these plots, especially in peri-urban areas. This trend has fostered disputes with family heads and among nuclear families and created a risky land-tenure environment for third-party investors.

2.3.3 Recommendations for strengthening the customary institutional framework for LSLBI

- (1) Continue and build on efforts under Land Administration Projects (LAP) I and II to systematically ascertain and document customary law regarding land, especially in areas most likely to attract LSLBI. Foster discussions within houses of chiefs and other forums for customary leaders on the issues related to allocation and access to land by community members—both women and men—in areas of rapid growth and increased demands for land.
- (2) Conduct outreach to chiefs and elders on the 2012 large-scale land acquisition guidelines, regulations on compulsory acquisition, and other relevant laws and policies relating to land tenure.

¹⁷Interviews with GADCO, Integrated Tamale Fruit Company, and Prairie Volta Ltd., June, 2014. Notes on file with the authors.

¹⁸Interview with Regional Lands Commission, Wa, 9 June, 2014. Notes on file with the authors.

- (3) Improve awareness among customary communities of usufructuary rights (e.g., the right to non-alienation of land by a customary leader), as established in customary tradition and in common law (see Appendix 4, “Case Law on the Rights of Usufruct and Allodial Title Holders”).
- (4) Foster discussion among customary leadership and customary land secretariats (CLSs) on how to record land rights for those currently holding usufructuary rights within the community, entailing some sort of limited systematic recording. Consider ways to strengthen security for those who are not fully included in decision-making processes (and who typically have less secure rights), including women, youth, and migrant farmers. Start with a survey of existing best practices. Encourage CLSs to adopt a policy to record land rights for multiple heads of household, entailing joint recording for spouse.
- (5) Encourage transparency in pricing for customary lands so that all interested stakeholders have access to information on market rates, and prices are more consistent and less dependent on individual purchasers’ social standing and negotiating ability. CLSs can be instrumental in this.
- (6) Provide for a rigorous training and outreach program to disseminate GCAP’s MLA and Guidelines among customary authorities, (as well as district and regional-level land sector agencies, NGOs, and other stakeholders).

2.4 Issues related to the state institutional framework for large-scale land investments in Ghana

2.4.1 Overview

The state institutional framework relevant to commercial land investment in Ghana encompasses national, regional, and district-level agencies.¹⁹ The most relevant of these are briefly described in Appendix 5.

2.4.2 Challenges

The framework has a number of shortcomings that impede the efficiency, success, and equity of current and potential agricultural investments.

- Coordination among the Lands Commission, OASL, district assemblies, the Town and Country Planning Department, GIPC, and SADA is lacking, especially at the regional level.²⁰ Investors, landholders, and many land sector officials reported that it is unclear to them whether the GIPC, the Ministry of Agriculture, the Lands Commission, or the district

¹⁹Information in this section draws on GCAP Environmental and Social Management Framework Report (2011: 95-96), and Duncan, Gaafar, and Lufkin (2013: 7-8).

²⁰This is not always the case, however, as should be noted by the apparently supportive and collaborative relationship between the Lands Commission and OASL in Eastern Region.

²¹Officials from LAP II reported that a pilot “one stop shop” for Lands Commission transactions is soon to open in Koforidua. Interview with Kofi Abakah Blankson, LAP II Coordinator and Sarah Antwi-Boasia, LAP II Gender Officer, 20 June, 2014. Notes on file with the authors.

or municipal director is the first point of entry and appropriate agency to guide investors through the land acquisition process. Officials from several agencies reported that theirs is the correct first point of entry for land-based investors, and within the Lands Commission, investors and land holders must still deal separately with the separate divisions (e.g., if the lease is for stool or family lands, the parties would have to work separately with the Valuation, Survey and Mapping, and Registration Divisions), despite efforts under the 2008 National Lands Commission Act to bring all of these functions under one unified umbrella.

- Overlapping agency mandates and functions cause frustration, drive up costs, and contribute to a sense of instability among investors and landholders seeking to comply with current laws and regulations and formalize land transactions. Investors reported a wide range of approaches and experiences in working with state agencies; no two investors followed precisely the same steps in seeking state agency support in their initial approach to investment in Ghana. All investors interviewed reported difficulties in dealings with state agencies, pointing to a lack of clarity in the necessary steps to identify suitable land for investment, assure clear title to the land, negotiate and register a lease and determine up-front the cost of taxes and fees that must be paid to the government.
- Agencies charged with governing land transactions and leases lack institutional, financial, and human resources capacity. In the majority of interviews, officials told the team that limited resources hindered their ability to fulfil their mandate. Capacity issues include lack of staff trained in commercial agriculture and business negotiations, limited presence at the regional and district levels (e.g., for the Lands Commission) and lack of transportation.
- Nearly all the investors and commercial farmers interviewed, and a wide range of landholders (as well as land sector agency officials), reported difficulties registering a lease with the Lands Commission. Specifically, these stakeholders reported that the Lands Commission made demands for unofficial payments, required the investor to make numerous visits to various Commission offices, and generally enforced an excessively bureaucratic registration process.²¹ Lands Commission offices generally do not publicly post a list of the required steps—and associated fees—for registration (although officers in Upper West and Eastern regions said that they were in the process of doing so). These impediments contribute to the lack of registered customary land in Ghana, which presents a major challenge to ensuring land rights security for both communities and investors.
- Land sector officials are sometimes subject to political interference by those of high political rank who prioritize investment over formalizing and supporting local communities' rights to commercially valuable land. Thus, officials may be pressured to “streamline” regulatory procedures in order to fast-track an investment approval.

2.4.3 Recommendations for strengthening the state institutional framework for LSLBI

- (1) Map, in detail, the institutional framework for LSLBI, including all required investor check-points with various agencies. Based on this information, work to clarify and streamline the processes and procedures that investors—both domestic and international—are required to use.
- (2) Implement the Lands Commission’s existing guidelines on large-scale land acquisitions.
- (3) Consider forming a national gender task force on land, reporting to the Lands Commission

(Duncan, Gaafar, and Lufkin 2013: Appendix 5).

- (4) Establish under law a new community support and advisory unit to provide needed support services to customary communities in regard to LSLBI.
- (5) Adopt (or better promote) clear regulations/guidelines on the process and fees required for registering a lease with the Lands Commission. Require that these guidelines, with a fee schedule and timelines for each procedure, be prominently posted in the offices of the Lands Commission and all state land agencies.
- (6) Execute LAP II plans to pilot and then scale up a “one-stop shop” approach for land registration.
- (7) Consider making information on existing registered farmland leases publicly available.
- (8) Pursue plans to establish a land bank system, which could be an efficient way to collect and catalogue information on lands available for investment throughout the country. This recommendation should be pursued with caution, making certain to highlight participatory practices for gathering information (for more information, see Losamills Consult 2014).
- (9) Provide for a rigorous training and outreach program to disseminate GCAP’s MLA and Guidelines among district and regional-level land sector agencies. Conduct “training of the trainers” within state land sector agencies, so that these trainers can work directly with rural communities to build capacity in regard to large-scale investments.

REALIZING SUCCESSFUL AND COMMERCIAL FARMLAND INVESTMENT WITH WIDESPREAD SOCIAL AND ECONOMIC BENEFITS

This section discusses the key findings from field and desk research undertaken in support of the development of the GCAP Model Lease Agreement and Guidelines. The findings are organized around twelve key issues. For each issue, observations about current practices by investors, communities, and government actors are presented, followed by recommendations for specific actions that can be taken to support equitable and economically viable land transactions. Where applicable, relevant case studies provide examples of good practices observed in Ghana and elsewhere.

3.1 Bridging the gap in expectations and perspectives on commercial agricultural investments between customary communities and investors

3.1.1 Overview

Communities and investors tend to have very different perspectives on the nature and purpose of land, the social expectations of all community members and visitors, and the role of written documents in agreements over land. This gap in perspectives on such important issues is one of the main reasons for the failure of many land-based investments to date in Ghana. Most foreign investors (and some Ghanaian investors) view land as a commodity that can be exclusively held over long periods of time; from their perspective a written document may constitute the whole of an agreement and may be enforced throughout the lifespan of the investment. By contrast, from the community perspective, land serves multiple purposes and is not considered to be merely a transferable asset. For many communities, deals are more fluid; a written document is important but may not exhaust all the social or economic expectations of the investor.

Communities expect investors to participate fruitfully in community activities, supporting the community and helping out where possible for as long as the investor is present in the area. Investors who do not demonstrate some interest in or commitment to the wellbeing of the community are seen as “cold” or “uncaring.” Unknowingly, by going no further than complying with the explicit terms of a land-lease agreement, they have violated a social compact. This is a common source of ill will towards investors on the part of communities, and in some cases has had negative consequences for the sustainability and the returns of investments. By the same token, investors express frustration that communities are dissatisfied when the investor complies with—or even exceeds—the legal and contractual requirements related to an investment.

Exacerbating this challenge is the fact that communities rarely articulate their expectations clearly to investors, because community expectations around land transactions are culturally derived norms and are traditionally tacitly understood by each party. The research team heard of no instance in which these community norms and expectations were written out and shared with the investor prior to finalizing the agreement. The unspoken nature of communities’ expectations leads to misunderstandings. For example, a common source of conflict is misaligned expectations over leased land that is lying idle. Commonly, customary rules permit strangers to acquire a usufructuary right to land, but this right is contingent on their making productive use of the

land.²² According to many community members and investors, conflict frequently arises when community members encroach on land that an investor has leased; community members believe that they are within their rights to re-enter the unused part of the land to make use of the idle land, while investors view such activities as trespass on land to which they have leased exclusive rights. Such misaligned expectations about the benefits, impacts, and nature of land-use changes accompanying land leases contribute to conflicts between investors and communities.

3.1.2 Recommendations for closing the gap in expectations between communities and investors

- (1) Communities could work, over time, to identify and record their land governance rules, which in turn could be shared with investors. This would help to mitigate confusion both among community members in the context of LSLBI and also between the community and the investor.²³ (For additional information see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment.)
- (2) The government or NGOs could facilitate training on the MLA and Guidelines for both communities and investors. Creating a shared set of expectations about the process, content, and meaning of agricultural leases is a principal aim of the Guidelines and MLA. These tools explain to each party the specific terms and key questions and issues to consider. Training would further explain to stakeholders how to approach the investment process and how to anticipate, evaluate, and mitigate potential risks. (For additional information see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment and Phase 2: Initial Engagement between Community and Investor.)
- (3) Parties could allow for flexibility in the lease to accommodate unforeseen and emerging issues over the course of long-term agreements. Given the long lease terms and large parcels involved in many leases for commercial agricultural land, building in flexibility is important to ensuring that an agreement supports a sustainable and successful arrangement. Force majeure clauses are commonly included in commercial contracts to protect parties from unforeseeable events that significantly diverge from the assumptions upon which a contract was initially signed. Flexibility can also be built in to community benefit arrangements to ensure that the benefits in question still match the needs and interests of the community, while investors may want to consider linking benefits paid to revenues and/or profitability of the venture. (For additional information see Guidelines, Phase 4: Negotiating and Consent and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 3: Location of Leased Land, Section 6: Financial Compensation, Section 7: Non-Monetary Benefits, Section 8: Other Forms of Compensation, Section 18: Periodic Review and Section 20: Force Majeure.) The community and investor, working together, should establish a robust communications strategy for the negotiation process and for the lifetime of the lease. Where mismatched expectations about the scale, pace and benefits coming from an investment give rise to a breakdown in community-investor relations, clear communication by investors from the outset about the planned sequence, activities and modes of exchanging information and engaging with communities could greatly reduce tensions over land transactions. A communications strategy will provide leaders and affected communities with the opportunity to evaluate and discuss an investor's proposed business model. (For additional information see Guidelines, Phase

²² Also note that under Ghanaian law, when land has been acquired for the purpose of farming, failure to farm that land for a period of eight years results in the extinguishment of the title. Farm Lands (Protection) Act, 1962, Section 1. It is unclear whether and to what extent this law is enforced, however.

²³ For a presentation on processes for recording community by-laws for land and natural resource rights, see Knight 2013.

2: Initial Engagement between Community and Investor.) The communication strategy should include specific mechanisms for both external communications (e.g., between parties, government, key stakeholders, general public, etc.) and internal communications for sharing information and communicating with the affected community/ies itself.

- (4) The investor should take steps up front to learn about and understand customary norms and expectations of the community. As outsiders entering into transactions for a culturally imbued commodity, investors only stand to gain by making efforts to learn about the local context and expectations. Indeed, investors have a responsibility to ensure that they are abiding by local customs, and they are uniquely placed to develop an approach to land acquisition that supports communities' rights and brings about more equitable, socially inclusive gains for communities (De Wit and Norfolk 2014). (For additional information see Guidelines, Phase 2: Initial Engagement between Community and Investor and Phase 4: Negotiation and Consent; and Model Lease Section 9: Communications between Parties and Affected Communities.)
- (5) An NGO could support local communities in their interactions and negotiations with investors. By playing an intermediary role, such NGOs could help communities and investors find a common point of understanding from which to build a mutually beneficial agreement. (For more information see Guidelines, Phase 5: Monitoring and Enforcement of the Agreement.)
- (6) The investor should employ community engagement personnel who are based in the community throughout the lifespan of the investment, a best practice adopted by African Atlantic, GADCO, Prairie Volta Ltd. and other investments visited by the research team. (For more information see Guidelines, Phase 5: Monitoring and Enforcement of the Agreement.)

Box 3.1: Examples of actions investors have taken to engage proactively with local communities

- In the Northern Region, WienCo Ghana Ltd., in undertaking its due diligence and planning processes, commissioned consultants to carry out a land tenure assessment and develop a roadmap for accessing land. The approach included: assessing formal rights, legal requirements and current land use and management practices; developing options for socially and economically sustainable benefit sharing; and considering mitigation measures for potential risks to women and other potentially vulnerable groups (De Wit and Norfolk, 2014).
- In the Afram Plains, Africa Atlantic partnered with a well-respected member of the local community to ensure that the local customs and expectations were a part of the approach to land acquisition from the outset. Additionally, the company employs a dedicated staff person as a community outreach and engagement liaison.
- In the Volta Region, VegPro hired an NGO to ensure that the local customs and expectations were a part of the approach to land acquisition from the outset. Additionally, the NGO carried out due diligence on landownership and was responsible for negotiating land lease terms with the local community. The company also hired a dedicated staff person to serve as community liaison officer in charge of visiting and ascertaining concerns of the communities and facilitating two-way communication between community

members and the company.

- Similarly, in the Northern Region, Integrated Tamale Fruit Company (ITFC) used a foreign NGO to help facilitate its negotiations with communities and farmers. The NGO helped ITFC to understand the communities and, as a result, the company has a positive relationship with the communities. Alternatively, some investors have successfully cultivated community interactions through a staff person dedicated to community engagement.

3.2 Clarifying processes by which investors identify the correct customary landholding entities

3.2.1 Overview

The range of modes by which investors approach customary groups, combined with a lack of clarity about the rules, procedures, and requirements for investors seeking land, may also contribute to uneven protections for communities. Though the GIPC was created to provide a one-stop-shop for investors in Ghana and is a potential source of support to investors, in practice investors seek out land through a variety of different avenues, many of which bypass the GIPC altogether. This poses a challenge to creating centralized solutions for safeguarding communities and facilitating government regulation of investments.

Investors seeking to engage with communities and landholders can face significant challenges in understanding which community, and which traditional authorities, to approach. Specific customary rules for accessing land vary significantly among customary groups. Given this variation, it is unclear that a central entity such as the GIPC would be able to provide the needed guidance to investors to identify suitable land and the relevant community leaders and representatives that should be consulted. Though each community visited during this study expressed an expectation that an investor should negotiate with a chief, tendana, or family head, the particular mode of engagement—and even the specific individuals and groups that should be included in such a consultation—varies significantly from place to place. For example, in the Upper East Region, the process for acquiring virgin land would include approaching the chief or tendana (depending on the location), who would then identify the relevant family who controls the land in question.²⁴ This is similar to an expectation in the Northern Region that the chief should always be consulted, though sometimes there is also an expectation that the community elders are also consulted. By contrast, elsewhere in the Upper East Region, the expectation is that an investor would first approach the community members, who would then direct the investor to the appropriate leaders (either the tendana or the chief) or family head. The chief and tendana would then call the elders to meet and discuss the proposed transaction, and any necessary rites will be performed.²⁵

Also, in areas where land is in dispute between two or more customary communities, investors face particular challenges in determining with whom to begin negotiations. AgDevCo noted this sort of challenge related to a proposed land acquisition and investment in the Northern Region, where the customary community identified by the authorities and through historical documentation as the proper allodial titleholder did not represent the community currently

²⁴Interview with OASL Bolgatanga, 9 June, 2014. Notes on file with the authors.

²⁵Interview with MOFA Bolgatanga, 9 June, 2014. Notes on file with the authors.

occupying the land and claiming it as its own.²⁶ It was only after negotiations had begun that AgDevCo realized that the land was in dispute and that it needed to enter negotiations and discussions with the customary leaders from both communities claiming title. While an investor must verify any recorded claims to land through on-the-ground investigation, determining who appears to be physically in control of the land is also not, in itself, enough. As noted in an interview by the Director of Public and Vested Lands Division of the Lands Commission, “The investor should never trust physical presence (who is on the land) as an indication of who holds the recognized rights to it.”²⁷ Rather, it is incumbent on the investor to investigate any existing claims and determine who holds the allodial title and approval authority within the customary chain of command.

3.2.2 Recommendations to ensure that potential investors meet the correct landholding authorities

- (1) Customary land secretariats could document and publicize guidelines for land acquisition in their areas and OASL could collate these for ease of reference by investors at the national level, creating a sort of national directory of local land acquisition procedures and practices.
- (2) Investors must investigate any recorded information on land rights in a given area (e.g., through the Lands Commission and the courts), as well as information provided by those living and/or physically present in the proposed project areas. (For more information see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment; and MLA, Section 1: Parties and Recitals.)
- (3) Prior to engaging with any community, an investor should learn and understand the customary hierarchy of authority over land pertaining to that particular community. (For more information see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment and Phase 2: Initial Engagement between Community and Investor; and MLA, Section 1: Parties and Recitals.)

3.3 Obtaining and retaining a social license to operate

3.3.1 Overview

For an investment to succeed over time, the investor must foster strong reciprocal relationships with community members. “Social license” generally refers to a local community’s acceptance or approval of a company’s project or ongoing presence in an area, and is increasingly recognized as a prerequisite to development. The development of social license goes beyond compliance with legal and regulatory obligations and requires sustained attention by investors to build and maintain the trust of host communities. Though intangible and informal, social license can nevertheless be realized through a consistent and sustained set of actions centred on timely and effective communication, meaningful dialogue, and ethical and responsible behaviour.

Many investors have learned the hard way how important this social license is in the context of customary landholdings in Ghana. Investors who run afoul of community norms and expectations have encountered problems such as encroachment, unanticipated demands for

²⁶Interview with AgDevCo, 22 June, 2014. Notes on file with the authors.

²⁷Interview with K. Owusu Poku, Esq., Director of the Public and Vested Lands Division of the Lands Commission, Accra, 12 June, 2014. Notes on file with the authors.

increased payments beyond the initially agreed-upon lease amount (often by those who did not benefit directly from a deal, such as successor chiefs) and sabotage from groups who feel they have been excluded from decision-making processes and/or investment benefits.²⁸ Even when the land in question officially belongs to the state, it is usually in the investor's interest to develop positive relationships with any communities who occupy the lands and/or have active claims to the land, in order to reduce conflicts and create a stable investment environment. The basis of a company's social license is providing legitimate benefits to communities in exchange for the immediate and significant cost of giving up a principal asset of production, livelihood source, and cultural attribute. These benefits should be widely distributed and long-term to ensure that the benefits of an investment outweigh the costs at the local level.

An effective mix of benefits might likely include both monetary and non-monetary compensation, both broadly distributed within the community. Monetary compensation should be distributed through a transparent funding mechanism to ensure distribution to a broad range of community stakeholders. Periodic payments are much more effective than a lump-sum payment in fostering a social license. Other forms of monetary compensation could be based on a revenue-sharing agreement that delivers proceeds to the community over the lifetime of the investment. Monetary compensation might also include payment by the investor into a community development fund, managed by the community development committee or some similar entity for the benefit of the entire community. Non-monetary benefits might include inclusion of local farmers in outgrower or contract farmer schemes, direct employment opportunities for local people with the new company, or improved access roads to the community.

Building on a solid package of compensation and benefits, investors can gain social capital with the community through thoughtful, informed engagement over time. Because acquiring social license means accommodating local customs and integrating into local communities, there is no single set of actions or activities that will guarantee that an investor is well received in a community: the specific context, conditions, needs and customs vary considerably from place to place. These regional and cultural differences require a flexible and responsive approach from the outset of a prospective investment in order to support a strategy to acquire and maintain social license.

Box 3.2: Investor actions can either hinder or help develop community trust and a social license over time

Fostering a social license requires investors to anticipate stumbling blocks over the course of the investment, to develop a strong communications protocol with the community and to focus intentionally on building trust among a broad range of community stakeholders. Two examples from field research highlight the importance of developing responsive arrangements that are realistic from a logistical and economic standpoint, while building in flexibility to ensure that changing realities on both sides of the deal can be addressed over the course of the investment.

In the Northern Region, ITFC set out to ensure that local communities were consulted and that promised benefit-sharing arrangements matched the needs of the communities in which they were operating. To ensure that this was done appropriately, ITFC brought in an

28 Interviews with African Atlantic, GADCO, Prairie Volta Ltd., and AgDevCo. June, 2014. In some cases, violence and arson attacks on established farmers have been recorded as recounted by Dr. Apaanga, bush doctor, Farming Ltd, Kintampo, Interview 17 June, 2014. Notes on file with the authors.

NGO to assist with the community negotiations. The resulting agreement included plans for schools, electrification and housing for affected communities. However, due to lower than expected yields for the first several years of the company's operations, it has struggled to meet these commitments. ITFC did not build in any flexibility or contingency arrangements to accommodate a zero-profit situation, and is now in the position of having to renegotiate with the community and chief over the very specific promises it made.

In the Accra Plains, VegPro acquired land from a community and promised jobs for local individuals. The company has fulfilled its promises, and is working to expand its operations further. However, the number of people whose land was affected far exceeds the number of jobs available. At the same time, the General Manager struggles to find locals willing to fill the positions that the company has to offer. The result is a situation in which some community members complain that they have received nothing in exchange for their land. These community members are not aware of any benefits to others, and expressed an altogether negative view of the company. Thus, though the investor is fulfilling the terms of the community benefit agreement, some affected communities express resentment towards the company. Such a situation strongly indicates that community benefits should include a range of development initiatives, investment in public infrastructure and education, and other activities in order to ensure that a broad range of beneficiaries are impacted. It also suggests that a broad public awareness and communications strategy will help investors to establish and support good relations with communities.

3.3.2 Recommendations to investors for fostering and maintaining a social license

- (1) Structure the investment so that the consideration package includes clear benefits that will have a broad impact for the entire community (specifically including youth and women), will last over the long term (preferably as long as the lifetime of the investment) and are highly visible. (For more information see Guidelines, Phase 4: Negotiation and Consent; and MLA, Section 6: Financial Compensation, Section 7: Non-Monetary Benefits and Section 8: Other Forms of Compensation.)
- (2) Ensure participatory community engagement in the negotiation process. Communities must be able to choose their own representatives, who should operate transparently and communicate openly with all community members. Investors should understand and accommodate customary decision-making processes, and they should insist upon inclusion of all community members as a core principle for investor-community interactions and negotiations. Inclusive consultations with the community are a means of developing and sustaining relationships between companies and host communities. When community leaders negotiate investment agreements without adequately consulting the broader community, they risk alienating local communities and creating opposition to the investment. Such opposition can increase political, financial, and reputational risks for the company and ultimately can derail an investment. In such a case, both the community and the investor lose out. Early and consistent consultation with communities helps to limit these risks. By engaging with communities before making decisions, leaders can secure support for the investment and companies can incorporate local knowledge into the design of the investment plan. To be effective, community consultations must secure the participation of a broad cross-section of the affected community. Community members should understand investment plans and likely impacts and should have an opportunity to express their consent through consensus decision-making. Ensuring that women meaningfully participate and are consulted may be especially challenging in many communities, where decisions about land are typically thought to be men's domain, and

women are seen as having few rights to land and little authority to speak on community matters. Securing the participation of youth in community consultation and decision making is equally critical. Because youth are often left out of political processes and decision-making about land, they are often among those who oppose investments, both during and after the negotiation processes. (For more information see Guidelines, Phase 2: Initial Engagement Between Community and Investor, Phase 3: Impact Assessments, Phase 4: Negotiation and Consent; and MLA, Section 10: Community Land Management Committee, Section 13: Availability of Information, Records and Reports, Section 14: Environmental and Natural Resource Management and Implementation, Section 21: Notices, and Annex 2 Conditions Precedent to Entering Into Lease Agreement.)

(3) Consider developing a memorandum of understanding (MOU) with communities to establish clear ground rules and expectations for the negotiation and contracting process. Once an investor has begun the process of leasing land, it is important to establish clear expectations and a mutual understanding about the process and participants in the contract development process. An MOU can be a useful tool to ensure that each side of the transaction is well protected and well informed about the intent and process ahead and that the community members and other relevant stakeholders are explicitly included from the outset. Such an MOU could include:

- a. A promise by each party to negotiate in good faith;
- b. A commitment to conduct participatory land use and social impact assessments;
- c. A description of the participatory and consultative process for the ensuing contract development;
- d. A commitment by investor and community members to clear, open and timely communication; and
- e. A clear indication of who pays for each stage of the process, including technical assistance needs identified in the community needs assessment.

(For more information see Guidelines, Phase 2: Initial Engagement between Community and Investor; and MLA, Annex 2: Conditions Precedent to Entering into Lease Agreement.)

(4) Invest in community engagement personnel in order to:

- a. Learn about customary norms and expectations of the community;
- b. Understand the identity of key stakeholders (including those who may be marginalized from social/political processes within community) and determine how to build relationships with them;
- c. Work to build open communication pathways with community members; and
- d. Ensure that all community members—including women and others within the community who tend not to have a voice in community decision making—are active participants in and beneficiaries of the company’s engagement and programming.

(For more information see Guidelines, Phase 2: Initial Engagement between Community and Investor; and MLA, Section 10: Community Land Management Committee, Section 13: Availability of Information, Records and Reports and Section 21: Notices.)

- (5) Ensure that signing of the agreement is witnessed by as many people as possible within the community to establish a strong community memory/oral history of the event. The lease agreement itself could include additional lines for representatives within the community including women, elders, youth and other identified groups, to sign as witnesses to the contract. (For more information see Guidelines, Phase 4: Negotiation and Consent; and MLA, Section 24: Signatures and Witnesses.)
- (6) Agree to periodic payments over time, rather than a lump sum that is unlikely to yield benefits for community leaders or members over the lifetime of the investment. (For more information see MLA, Section 6: Financial Compensation.)
- (7) Governments could facilitate stakeholder mapping in regions targeted for commercial agricultural investment, and should provide a regulatory framework that directs companies to engage responsibly with communities and stakeholders. (For more information see Guidelines, Phase 3: Impact Assessments.)

3.4 Improving the capacity of local communities and governments to negotiate commercial agricultural leases on an even playing field with investors

3.4.1 Overview

A key requirement for ensuring that long-term agreements reflect the mutually agreed upon interests of the contracting parties is that both sides understand the content and implications of such an agreement, and have the capacity and opportunity to consider and negotiate for acceptable terms. Though there are notable exceptions, many traditional authorities in Ghana lack the legal and technical capacity and the familiarity with such land transactions to adequately represent the interests of their communities, and to successfully negotiate an equitable lease agreement. By contrast, many investors are sophisticated negotiators with ample legal and other support—including support from government officials. Indeed, pressure from government officials anxious to attract investment has in some cases led to deals that heavily favour the investor, being signed in haste and in secret.

Though traditional authorities play a central role in negotiations with investors seeking access to customary land, they are often ill-equipped to do so, and they may view a prospective investment as an opportunity for personal gain. One study found that traditional authorities in Ghana have most often negotiated directly with investors, to whom they have been “exceptionally responsive and accommodating” (German and others 2011: 27). Though the Constitution (1992 Constitution, Ch. 22) assigns to these traditional authorities a clear fiduciary duty to the communities that they represent, in practice there is scant evidence that the communities are consulted to determine whether the allocation is in the best interests of the people (German and others 2011: 27). This shortcoming on the part of customary leaders in Ghana may be attributable in part to their limited legal literacy and inexperience with commercial investments in agricultural land, as well as to a lack of clearly defined usufructuary land rights and general accountability mechanisms within the formal and customary frameworks.

Customary leaders across the northern and southern regions confirmed explicitly that they lack the technical capacity to effectively negotiate large transactions with investors—a capacity gap that is reflected in the kinds of deals that have been struck in the past. One chief in the Northern

Region was reported to have signed a 50-year lease with Biofuel Africa for 38,000 hectares in exchange for less than 5 Ghana cedis per hectare annually (Nyari n.d.). In the case of Solar Harvest, also in the Northern Region, a paramount chief leased out 10,847 hectares (26,803 acres) of land for an initial 25-year lease period, renewable for 25 more years, at the price of 2 Ghana cedis per acre (Bugri 2012b: 19).²⁹

Although the education level of customary leaders is generally rising, and many chiefs and family heads now have university degrees (and often post-graduate degrees), this does not necessarily mean that they have the specific skills required to negotiate effectively with commercial investors.³⁰ Customary leaders specifically reported the need for increased access to technical assistance in law, surveying, and review of business plans. Leaders interviewed by the Team expressed a keen interest in understanding more thoroughly the range of options available in negotiating different provisions of a lease and were eager to have a model lease document that could serve as a guide for this. However, a written document will be only the first step, as a thorough understanding of options and opportunities (as well as the ability to negotiate these into binding agreements) will require training and professional assistance.

It should be noted, however, that examples of very sophisticated negotiators among traditional leadership do exist; in each region studied, the research Team found several examples of investments in which land deals were negotiated with the assistance of legal counsel. These leaders affirmed the need for improved capacity among their peers, and they acknowledged that they were the exception rather than the rule among leaders in their respective regions.

3.4.2 Recommendations for increasing the capacity of local communities to negotiate on an even playing field with investors

- (1) Train communities in the commercial value of land, alternative lease payment schemes, the importance of receiving economically viable assets in exchange for land and other topics central to striking a good deal with investors. Overall, comments from all stakeholders interviewed for this study strongly support the conclusion that community members and leaders are generally unprepared for investments of the scale and duration that are contemplated by the GCAP project and Ghana’s development strategy. Communities would be better prepared to assess the costs and benefits of proposed investments if they had a foundational understanding of the contemporary land market and clear examples of investments and payment arrangements that have resulted in positive gains for communities in the short, mid, and long-term. This could be facilitated by adequately exposing traditional authorities and other stakeholders to the content and application of the MLA and Guidelines. (See Guidelines, Phase 1: Preparing for Commercial Agricultural Investment.)
- (2) Facilitate information sharing between communities in Ghana regarding best practices on commercial agricultural leases. (See Guidelines, Phase 1: Preparing for Commercial Agricultural Investment.)
- (3) Increase community access to professional services such as those of lawyers, surveyors, and land valuers, and business professionals/auditors capable of reviewing business

²⁹In both cases, issues regarding accountability—in addition to capacity—were also reportedly at play. In the case of Biofuel Africa, the chief reportedly took the entire rental payment for himself, allocating nothing to displaced communities. In the case of Solar Harvest, the paramount chief reportedly kept the bulk of the compensation, paying a little to selected division chiefs. Communities, however, did not receive any of this compensation (Bugri 2012b: 19).

³⁰In fact, those customary leaders holding advanced degrees were among those who underscored their need for greater access to professional assistance in the context of investments.

plans and conducting due diligence on potential investors. (For more information see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment.) One important question is how to fund this access to technical assistance over time without invoking conflicts of interest. Direct payment by the investor is perhaps the most financially viable option but is also fraught with potential conflicts of interest. Another option is for the government to provide services³¹, perhaps supported through investment-related taxes or a pooled investment fund. State-sponsored assistance could be organized through an existing entity (such as district assemblies, the Lands Commission, OASL, CLSs, or the GIPC). Another possibility would be to establish local Agricultural Investment Assistance Centres (Vhugen and others 2014: 6). NGOs could also serve as a source of professional services and other support to communities around LSLBI; this would be advantageous in offering a higher level of objectivity and transparency. Perhaps NGOs developing this expertise could be jointly funded by donors, the government and/or investors.

Box 3.3: The role of the investor in building community capacity

A principal challenge in undertaking equitable and inclusive negotiations for land is communities' limited capacity to engage in negotiations. Though there are notable exceptions, rural communities in Ghana are generally not organized in such a way as to ensure that all community members have a voice and can participate in making decisions over land use. Indeed, the strongly hierarchical customary tenure skin and stool systems, and the individualized ownership found in the family tenure systems, are alike in that individuals outside of leadership (e.g., family heads, chiefs, elders, or tendanas) tend not to have a say in land use planning or allocation. Some communities and individuals consulted expressed reluctance to put agreements about land in writing. Given these traditional systems, communities are often ill-prepared to participate in group consultations over land allocation of large parcels of land for periods of time as long as 50 years.

Investors who take meaningful community engagement seriously should consider that they will likely need to play a role in building communities' capacity to participate in discussions over land in such a way as to ensure that the interests and rights of all are considered.

In some cases, community engagement of this kind will exceed the formal requirements under Ghanaian law. Nonetheless, there are many examples of such investments that ultimately failed because the investor had not sufficiently engaged with communities. In some cases, friction between investors and communities is caused not by unfavourable terms in a contract but by communities' and leaders' misunderstanding of the terms that the contract contains. It is important for communities to understand what roles, rights and responsibilities the contract establishes for communities, investors and other stakeholders. Such an understanding will help to temper unrealistic expectations on the part of communities for what the investor can and will do; it may also help communities to hold their own leaders to account for disbursing benefits to communities as intended in the contract.

Considering that these agreements are often for terms of as long as 50 years, the long-term social and economic development potential will be far greater if a serious effort is made to build communities' capacity to actively participate in decisions affecting their development.

³¹The Lands Commission reportedly plans to hire three lawyers to help communities negotiate leases, which could be an important step toward supporting communities.

Continued dependence and limited development benefits are more likely to result where communities are treated as passive bystanders to the economic use and development of their land.

3.5 Developing community processes for land-related investment decisions that are inclusive, transparent, and accountable

3.5.1 Overview

Under customary tenure systems, agricultural land is generally either under the control of land-owning families, with most decisions made by the family heads and their elders (Greater Accra Region, Upper West and Upper East Regions, Volta Region, and Krobo and Akwapim areas of Eastern Region), or is stool or skin land (Ashanti, Brong Ahafo, Eastern, Central and Western regions, Northern Region, and Akyem and Kwahu areas of the Eastern Region).³² Though these different systems vary significantly, they are similar in that the increasing market for land is driving a shift in attitudes about traditional feudal social relations and the rights and obligations of allodial rights holders. Traditionally, family heads were bound to uphold communal principles of landownership, but family heads are now increasingly observed to “reinvent custom” to enable them to transact in land as outright owners of the land (Tsikata and Yaro 2011). Similarly, in Northern Ghana, tendanas traditionally played a role in land management, but in many areas, any influence that they may have had has given way to the authority of the paramount chiefs, who now exercise nearly absolute control over the land. The 1992 Constitution has legitimized this process of privatization by returning land in Northern Ghana to the control of customary landowners (Id).

3.5.2 Consolidated power within the customary hierarchy constrains accountability and trust of leaders

Power dynamics and traditional structures vary considerably among customary groups in Ghana, with significant regional variation in basic tenure systems and customary land governance institutions. Even so, among nearly all customary groups encountered in this study, hierarchical power structures and consolidated decision making authority pose a major obstacle to communities’ ability to participate in and benefit from land-related decisions. Traditionally, notions of chiefs’ custodial role over land may have balanced this consolidated system of authority, but this study found that many discussants expressed mistrust of their leaders, particularly concerning payments and other benefits resulting from land transactions. This attitude was generally echoed by community members and government officials, and it was reinforced by leaders themselves, who expressed a sense of personal entitlement to land revenues without a sense of shared entitlement on the part of communities (see German and others 2011: 29; Kasanga and Kotey 2001; Alden-Wily and Hammond 2001; Ubink and Quan 2008).

This consolidation of leaders’ power is often exacerbated by investors’ tendency to engage—at least initially—through private meetings with a single leader or the traditional council. Broader consultations or sharing of information with a community is rare. Farmers interviewed expressed little confidence or trust in chiefs, who they say should not be allowed to handle money that is supposed to benefit the communities. This lack of trust poses a serious challenge to investors seeking to respect the customary structures while also fulfilling their commitments to respect

³²In Parts of Eastern Region, some land has also been alienated into freehold, particularly in Akyem areas.

the land rights of individuals and communities affected by their investments.

There are, however, some good practices and examples to be found in all of the regions under the current study, and at least some stakeholders adamantly expressed the view that chiefs act, or should ideally act as custodians of the land. For example, one divisional chief in the Northern Region espouses an “open governance” approach, meaning that if he were to be approached by an investor, he would have a duty to talk to the current users of the land and also consult with his superiors within the traditional hierarchy. This chief relies on a management committee of elders that helps him to make decisions about land use.³³

Generally, communities are not consulted and their consent is not seen to be required for a leader to make decisions about agricultural land. Rather, communities may be informed about an agreement or an investor through various channels. In some traditional areas, there is an expectation that the family heads will be consulted, though at least in the north it remains the norm that the chief will have the ultimate decision-making authority about whether to proceed with an investment or not. For family lands, this decision rests with the family head, and the Team found no evidence to suggest that these heads of family are (or feel) obligated to consult with others in their clan or family, or with those potentially affected by the investment.

Where community forums had been held prior to a lease agreement being signed, communities expressed doubts about the utility of providing input, stating that they felt the decision had already been made and that the forum was a mere formality. In more than one community, individuals stated that the contract terms in the final agreement were radically different from the terms that the community had requested—and to which the leaders had agreed—during a supposedly inclusive consultation.

This issue is especially critical for women, who do not generally participate in community decision making and who are seen as having no interest in or authority over land transactions. Even when an investor does engage with a community, unless a specific effort is made to ensure that women are present and are actively participating and heard during such consultations, women are nearly certain to be excluded. As women in one group interviewed in the Northern Region stated, they were resigned to accept whatever decision had been taken by the traditional authorities, because “women have no say over land business.” A similar situation exists for youth, who are also typically excluded from traditional decision-making structures (such as councils of elders) that advise the chief in regard to land disposition.

These traditional norms pose a challenge to investors seeking to have meaningful consultation with, and seeking consent from, communities that will be affected by a proposed investment. Such investors face a responsibility to insist upon such a consultative and inclusive process, even if this is not entirely in keeping with customary practices. Government agencies also have an important role to play in regard to consultations required for compliance with regulatory assessments. Consultations in this context provide an opportunity for the state to support best practices for meaningful, inclusive, two-way communication between the investor and the community.

As a result of the limited consultation of community members and the consolidated power structures found in many customary areas in Ghana, communities tend to lack a sense of shared benefit and interest in investments. Benefits from investments generally reach only a few elite or well-connected community members, while the majority of individuals in each affected

³³Interview with Jenapken Divisional Chief, 6 June, 2014. Notes on file with the authors.

community lose rather than gain. Such uneven sharing of benefits increases the likelihood that tensions will develop between communities and investors, with negative repercussions on the success of investments and the well-being of communities.

3.5.3 Recommendations for ensuring inclusive and accountable decision-making processes

- (1) The company should introduce and reinforce more participatory and democratic processes around its investment, which will, in turn, secure longer-term benefits—such as harmony with the community and investment security. This would include, e.g. participatory consultation and decision-making processes on how the land will be used for investment. The investor may also want to suggest or insist that revenues from the investment to the community be channelled through a transparent fund overseen by a representative community board that meets periodically to determine for what purposes funds will be withdrawn (see for instance, the model used in the Fievie/GADCO agreement in Sogakope, Volta Region, as described in Box 4.1 below). The company may also want to ensure that a transparent and predetermined agreement has been made within the community for how any revenues from the investment will be allocated among various stakeholders. (For more information, see Guidelines, Phase 2: Initial Engagement between Community and Investor; and MLA, Section 10: Community Land Management Committee and Section 24: Signatures and Witnesses.)
- (2) Companies and communities should follow the Guidelines regarding the inclusion of women and youth, holding community forums and establishing a communications strategy (for more information, see Guidelines, Phase 2: Initial Engagement between Community and Investor; and MLA, Section 9: Communications between Parties and Affected Communities and Annex 2: Conditions Precedent to Entering Into Lease Agreement).
- (3) Companies should ensure that comprehensive social, economic, and environmental impact studies are conducted and shared widely with the community. (For more information, see Guidelines, Phase 2: Initial Engagement between Community and Investor, Phase 3: Impact Assessments and Phase 4: Monitoring and Enforcement of the Agreement; and MLA, Section 9: Communications between Parties and Affected Communities, Section 13: Availability of Information, Records and Reports, Section 14: Environmental and Natural Resource Management and Implementation and Annex 2: Conditions Precedent to Entering Into Lease Agreement.)

3.6 Ensuring that social and environmental impact assessments are conducted in accordance with Ghanaian law and international best practices

3.6.1 Overview

Impact assessment is the process of identifying, evaluating, and mitigating the anticipated environmental and social impacts of a proposed project or development before major decisions are taken and commitments made. The purpose of impact assessments is for the investor and host communities to understand the environmental and social impacts and consequences of projects and to share this information with decision makers, regulatory agencies, and the general public so that an informed decision can be made as to whether or not to proceed with a project, whether the project should be modified or whether mitigation measures will be required.

Several stakeholders interviewed as part of this study expressed concern that the impact assessment process did not produce information that accurately and adequately assessed the social and environmental impacts of projects.³⁴ This deficiency was attributed to a number of factors including lack of capacity on the part of the Environmental Protection Agency, lack of commitment by the investor to retain qualified and competent experts to conduct the assessments, and the general sentiment that impact assessments were viewed as a “box to check” in the investment process.³⁵ Likewise, the study revealed that often communities were not included in the impact assessment process—either as participants in the design and development of the studies or as recipients of information and findings of completed assessments. Finally, concern was voiced that even when impact assessments are conducted, their findings are rarely, if ever, shared with the community before decisions are made about whether or not to enter into the leases—thereby denying the community critical information necessary to make an informed decision about the investment.³⁶ This concern is not surprising given that Ghana’s Environmental Assessment Regulations do not expressly require the completion of an impact assessment before a lease is signed. It highlights a key area where the national law falls short of international best practice.

For impact assessments to serve their intended purpose within the context of large-scale land transactions, and to meet international best practices, they must be:

- Designed and developed with the involvement of impacted communities. Including the general public and affected communities—including marginal groups (migrants), women and youth—in the development of impact assessments provides a valuable source of information on key impacts, potential mitigation measures, and possible alternatives and public issues of concern. It is also a way to establish communication lines, facilitate trust, and ensure that projects meet citizens’ needs.
- Completed prior to entering into the lease agreement. To be effective in informing communities of their options, impact assessments must be completed before any decision is made as to whether to enter into the lease agreement.
- Shared broadly with the affected communities. The sharing of the impact assessments with affected communities prior to entering into the lease is an essential element of informed consent. Communities that lack information about the social and environmental impacts of the projects cannot be said to be “informed” and they therefore lack the ability to consent. Because men and women community members often access information in different ways, it is important to share information about assessments in a way that is equally accessible to all community members.³⁷

³⁴Interview with Rashid Zakariah, Director, UrbanNet, Tamale, June, 2014. Interview with Louis de Bruno Austin, Project Manager, Integrated Tamale Fruit Company. Notes on file with the authors.

³⁵Interview with Yussif Sulemana, Zasilari Ecological Farms Project, Nasia Valley, June, 2014. Notes on file with the authors.

³⁶Interview with Julius Ameku, GADCO Community Coordinator and Manager of Copa Connect. 16 June, 2014. Notes on file with the authors.

³⁷One example of an inclusive consultation method was employed by Kibi Goldfields Ltd. When preparing to commence its operations, the company had to conduct public engagements to meet EPA certification conditions. To this end, company representatives met separately with the traditional leaders, men, women, youth and the district assembly. Such an approach helps to ensure that existing cultural and social inhibitions do not suppress the voice of any stakeholder in the deliberative process. The company also held a joint meeting with all community stakeholders but this was effectively to validate findings rather than for discoveries. Interview with John Degle, Environmental Compliance and Enforcement Division of the Environmental Protection Agency, Accra, 2 July, 2014. Notes on file with the authors.

3.6.2 Recommendations for ensuring that ESIA's are conducted in accordance with Ghanaian law and international best practices

- (1) Investors should conduct a stakeholder mapping exercise to identify all potentially affected communities, organizations, groups and individuals at the very beginning of the assessment process (for more information, see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment; and MLA, Section 1: Parties and Recitals and Section 10: Community Land Management Committee).
- (2) The investor and the community should meet early in the investment process and agree on an engagement plan that stipulates how communities will be involved at each phase of the impact assessment process (for more information, see Guidelines, Phase 2: Initial Engagement between Community and Investor; and MLA, Section 9: Communications between Parties and Affected Communities).
- (3) Investors should provide financial support to communities to retain independent technical experts that can provide assistance to the communities throughout the assessment process (for more information, see Guidelines, Phase 3: Impact Assessments).
- (4) Communities should identify a structure or point of contact for communicating with the investor during the impact assessment process (for more information, see Guidelines, Phase 2: Initial Engagement between Community and Investor; and MLA, Section 9: Communications between Parties and Affected Communities).
- (5) Communities should develop an inclusive process for broadly sharing information received from the investor with the community (for more information, see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment, Phase 2: Initial Engagement between Community and Investor and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 10: Community Land Management Committee).
- (6) In addition to social and environmental assessments more generally, the investor must develop a Resettlement Action Plan (RAP) if there is any possibility of displacing people from land that they are using or occupying. The RAP should incorporate principles embodied in the World Bank Resettlement Policy (Box 3.4).

Box 3.4: Guidelines for resettlement

Whenever displacement of people who are using or occupying land is contemplated in the context of an investment, the parties to the agreement should follow the principles embodied in the World Bank’s Involuntary Resettlement Policy (Op. 4.12, 2001). A Resettlement Action Plan should be prepared by the investor prior to the lease/investment agreement, describing exactly how the investor (together with the state and affected communities) will adhere to these best practice guidelines.

Guiding principles include:

- Involuntary resettlement should be avoided whenever possible.
- If deemed unavoidable, resettlement should be designed in the form of sustainable development programs, providing displaced people with a fair share of the benefits from the project that caused the displacement.
- Any resettlement program must restore or improve the level of livelihood and standard of living of the displaced people to pre-displacement levels or levels existing at the start of the project, whichever are higher.
- If the displacement occurs on agricultural land, alternative land of equivalent value (in terms of agricultural productivity, location, etc.) must be offered.
- Care must be taken to ensure that needs of vulnerable groups—including women and children—are met.
- People to be displaced must be involved in the resettlement process, including meaningful consultation and participation in planning and implementing the resettlement programs.

Source: World Bank 2001.

3.7 Ensuring that women’s land rights are protected and that women share in the benefits of commercial agricultural investment

3.7.1 Overview

Ensuring that both women and men participate in and benefit from commercial land transactions is a critical challenge for investors seeking to engage responsibly in socially acceptable and equitable land investments. Though men tend to be the owners of land in Ghana, women are key agents of agricultural production, contributing to the cultivation of crops and farm activities and to the harvesting, storage, processing, and marketing of agricultural produce. It is estimated that 70 percent of farmers within the proposed project area in Accra Plains are women (GCAP 2011a: 33).³⁸ Crops normally cultivated by women play an important role in household food security and generate cash for buying household staple foods and necessities, and women contribute more than half of the food grown for household consumption (Oduro and others 2011: 37).

³⁸By one estimate (World Bank 2010: 53), nearly 50 percent of Ghana’s adult female population is employed in agriculture.

Because the rules and processes for acquiring, using, and making decisions about land often differ between women and men in Ghana, large-scale land deals can have vastly different impacts on women and men. These impacts can be both positive and negative. On the positive end, they can include access to new outgrower opportunities and direct employment; direct income from the investment; and support for community development projects like clinics, boreholes and access roads. On the negative end, impacts can include loss of access to and use of land to produce crops for household consumption and commercial sale; displacement and landlessness; loss of access to resources related to land, such as economic tree crops; and environmentally-related impacts, such as reduced water supply and quality and/or reduced air quality.

Though women have rights to land in most customary groups in Ghana, these rights are dependent on their relationship with a man; in contrast, men have land rights at birth due to their membership in a bloodline. Though customary norms in both matrilineal and patrilineal kin groups are supposed to ensure that women are not arbitrarily deprived of land, women in Ghana in practice tend to have insecure and inadequate access to land, because men exercise control over decisions concerning the allocation of resources both at home and in the public sphere (International Federation of Surveyors 2006; Ruenger 2006). As secondary rights holders, women generally have access to less land, their land tends to be of significantly lower quality and they have limited decision-making authority over the land that they access. This socioeconomic context for commercial agricultural investment in Ghana means that land deals are likely to have a significantly different impact on women and will hinder equitable and inclusive outcomes from LSLBI (Minkah-Premo and Dowuona-Hammond 2004).

3.7.2 Decision-making and consultation

Women tend not to have a strong role in community decision-making in Ghana, and they are typically not viewed as having a say over land-related matters, which are under the control of male traditional leaders and elders or heads of clans. Women's limited role in land-related decision making means that investors are likely to face challenges in ensuring that women are able to participate meaningfully in community consultations; in securing women's consent; and in adequately anticipating and avoiding or remediating risks to women that may arise as a consequence of a lease for land.

Furthermore, because women are not strongly represented within the customary governance structure, and are not generally well organized into women's advocacy groups, entry points for investors seeking to ensure that women participate in inclusive processes are limited.³⁹

3.7.3 Assessing women's rights to ensure adequate and fair compensation and mitigation

Because men and women tend to use land differently, and often have distinct yet important information to contribute concerning land use, community needs, and development priorities in an affected community, it is important to take steps to make sure that women are included and that their input is truly part of the investment process. One important challenge to realizing this aim is that assessments often fail to capture the full range of rights associated with a piece of land.

Such assessments tend to consider individual ownership rights to land, excluding usufruct and

³⁹One exception is the magasia, or queen mother, a traditional position that is increasingly common throughout northern Ghana. The queen mother's role varies from place to place, but generally it is left to her to deal with "women's issues." A queen mother may have some role in local governance but is not typically engaged in decision making about land.

secondary rights. Because women traditionally do not own land in much of Ghana, and are granted use rights and secondary access rights for non-agricultural activities such as collecting firewood and shea nuts, solely focusing on individual ownership rights means that the potential impacts of an investment upon women are often not considered, with the result that neither communities nor individuals are compensated for the loss of secondary rights. Particularly in some areas in the north, where shea nut collection and processing is a key strategy for staving off seasonal food scarcity, the loss of such a livelihood source is potentially devastating for women and their communities. Incorporating observation techniques into the assessment methodology, whereby the assessors base findings not just on interviews and written data but also on their own observations of physical land use patterns within the community, is important to ensuring that such secondary uses are fully captured in the findings.

Additionally, if an assessment does not consider the full spectrum of rights holders likely to be affected by the investment, women are likely to be excluded from both direct compensation and indirect benefits, and strategies to mitigate negative impacts may not provide adequate safeguards for women. Where direct compensation is paid, it is usually distributed to the head of household, typically a male family member; in such cases, women tend not to benefit, though their land and livelihood source has been taken.

3.7.4 Recommendations for advancing women’s land-related rights and benefits

The state, investors, and communities can take a number of steps to overcome these challenges in order to ensure that women’s land rights are protected and that women share in the benefits of commercial agricultural investment:

- (1) Build women’s capacity to participate. Both women and men may need special training and support to be able to participate in consultations and negotiations over land investment (for more information, see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment and Phase 2: Initial Engagement between Community and Investor). Given the challenges to women’s participation, particular attention should be paid to facilitating women’s active and meaningful engagement through each of the phases of the investment. For example, holding women-only meetings will enable women to discuss sensitive land issues among themselves before addressing these issues within the broader community consultation process. Civil society organizations—particularly women’s groups—and staff dedicated to community engagement can play a special role in facilitating the creation of inclusive women’s networks, and local government and customary institutions at the grassroots can include women-only meetings and opportunities to participate (for more information, see Guidelines, Phase 2: Initial Engagement between Community and Investor, Phase 3: Impact Assessments and Phase 4: Negotiation and Consent; and MLA, Section 9: Communications between Parties and Affected Communities, Section 10: Community Land Management Committee and Annex 2: Conditions Precedent to Entering Into Lease Agreement).
- (2) Recognize that the social and customary context of the land investment may affect the ease of collecting information about primary and secondary rights holders. Investors and the government should plan to engage with the community by sharing information from the very beginning of the project, bringing the social issues of women’s land rights—and the need for ensuring women’s active participation in the process—into the open. Communications and outreach efforts should address any social pressure on women not to participate (for more information, see Guidelines, Phase 3: Impact Assessments and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 9: Communications between Parties

and Affected Communities and Section 10: Community Land Management Committee).

- (3) Support women's active participation as representatives on the Community Land Management Committee (for more information, see Guidelines (all phases); and MLA, Section 10: Community Land Management Committee).
- (4) Consider benefit-sharing options that directly target women and reflect women's aspirations and preferences over the course of the lease period. Structure benefit-sharing consultations and identification processes in such a way as to ensure women's participation and voice. Women's ability to vote and influence decision-making on community activities is important given their often different priorities. While separate grant streams for women may also be considered, care should be taken not to segregate these activities—and therefore women themselves—from the projects or to use them as a means to exclude women from mainstream benefits. Ensuring that women equitably share in the benefits of a land investment may require direct, proactive measures such as quotas (for employment of community members) or other approaches. Be willing to listen to the community and push for change to the extent possible, understanding that achieving equality cannot always happen all at once. Understand the potential risks of forcing a social change that is not accepted within the community, and work to mitigate those risks to ensure that potentially positive efforts do not result in a negative impact on women. Seeking culturally appropriate solutions and investing in community-wide rights awareness and education efforts can support acceptance of benefit sharing targeting women (for more information, see Guidelines, Phase 4: Negotiation and Consent; and MLA, Section 6: Financial Compensation, Section 7: Non-Monetary Benefits, and Section 8: Other Forms of Compensation).
- (5) Design outreach efforts to reflect and address social norms, practices and perceptions that might impact the project objectives. The design should aim to do more than just raise participants' awareness and should equip participants with the knowledge they need to contribute to decisions about land investment (for more information, see Guidelines, Phase 2: Initial Engagement between Community and Investor; and MLA, Section 10: Community Land Management Committee and Annex 2: Conditions Precedent to Entering Into Lease Agreement).
- (6) Assess all rights and obligations attached to land for women and men. When documenting women's land rights within a community, an iterative process works best to ensure that the assessment fits the context of the community. It is important to make adjustments as needed to ensure that all rights holders are consulted (for more information, see Guidelines, Phase 2: Initial Engagement between Community and Investor, Phase 3: Impact Assessments and Phase 4: Negotiation and Consent; and MLA, Annex 2: Conditions Precedent to Entering into Lease Agreement).
- (7) Identify everyone whose behaviour, beliefs, perceptions, and actions could affect project outcomes, whether targeted by the project or not, and ensure that they are included in outreach efforts (for more information, see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment and Phase 2: Initial Engagement between Community and Investor; and MLA, Annex 2: Conditions Precedent to Entering into Lease Agreement).
- (8) Recognize the different social roles, power, interests and division of labour between all men and women when assessing impacts, to ensure that everyone who is affected is informed of and can participate in decisions that affect their lives and livelihoods (for more information,

see Guidelines, Phase 3: Impact Assessments, Phase 4: Negotiation and Consent and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Annex 2: Conditions Precedent to Entering Into Lease Agreement).

Box 3.5: Best practices for inclusive investment: Rio Tinto International Mining Corporation

In 2009, Rio Tinto worked with external partners to assess whether men and women benefited equally from its dealings with local communities. Embracing a commitment to ensure company activities did not worsen existing inequalities or create new issues, and striving “to achieve a gender balanced social license to operate,” the company worked to actively incorporate a gender lens into its project sites. It did so by undertaking baseline studies and community profiling to understand the cultural context and implications for men and women company target areas.

In Mongolia, Rio Tinto’s Community Engagement Program interviewed women individually through household surveys in order to overcome cultural barriers to women’s participation in group meetings. As a result, it was able to learn that company activities would have a potentially greater impact on women than on men. Because women are responsible for dairy production in that community, they had significant concerns that Rio Tinto had no plan to preserve pasture land for grazing. By seeking out women’s input and concerns specifically, and in a way that increased the likelihood that they would participate openly, Rio Tinto was able to alter its approach accordingly.

Rio Tinto has taken similar steps in many other international projects that have positively influenced its relationship with community members. These efforts to engage beyond the community leadership level demonstrate one way to protect communities while pursuing mutually beneficial commercial activities.

Source: Rio Tinto company website, accessed 2014.

3.8 Ensuring that benefits to communities constitute a fair exchange for the loss of a primary asset of production

3.8.1 Overview

In exchange for giving up its primary asset of production and livelihood, a community should seek long-term, sustainable, and equitable economic benefits and income-generating opportunities. Land is a pivotal resource for rural communities in Ghana. For many rural Ghanaians it is the sole source of subsistence and income. Particularly in the north, agriculture accounts for more than 90 percent of household incomes and employs more than 70 percent of the population (Nyari n.d.). Living conditions are worst in the Ghana’s north: an estimated 65-88 percent of people across the three northern regions are exposed to severe poverty (IFAD 2012). Yakubu (2011) estimated that more than 1.2 million Ghanaians are food insecure, and of these, 59 percent of live in the three northern regions (34 percent in Upper West, 15 percent in Upper East, and 10 percent in Northern). Northern Ghana has been described by Bugri (2008) and others as an area faced with poor and declining agricultural production, increasing environmental degradation, and rising rates of migration among the youth to the southern regions of Ghana in search of sustainable livelihoods. Even as food vulnerability has improved in the southern regions in recent years, it has worsened in the arid north (Hirsch 2014). These statistics indicate that the already bad situation could be aggravated in communities that do not receive adequate compensation for the land.

Given the central importance of land to the prosperity and basic survival of rural communities, alienation of agricultural land constitutes a significant shift in communities' prospects for livelihoods and income. Commercial agricultural leases tend to have long lease terms of 50 years or more. Many communities in Ghana have traded long-term rights to their land to investors for a lump sum cash payment and/or for the promise of other benefits such as social services and employment in related facilities. Even if these promises are fulfilled (often they are not), they do not yield as much economic gain to the community as would have been realised through productive use of the land leased out. Many such deals appear to have been made by community leaders without due consideration of the likely economic and social impact of the loss of the community's land assets.

While some communities have been unable to optimize productive use of their land assets in the past, the Team noted that many commercially viable small-to-medium sized farmers are emerging within Ghana, raising the demand for land within customary communities. Furthermore, even those who cannot farm land efficiently may depend on it for their livelihood and a small household income, critical to sustenance and family livelihood. Also, as noted above, many community members—and especially women—may also rely economically on other natural resources associated with the land.⁴⁰ For example, for women and children in areas of the north losing access to shea nuts can mean financial ruin; it also undermines the potential for communities to increase their incomes through improved shea nut harvesting and processing systems.

When a community leases its land to an investor, forfeiting its own current and potential future uses of the land, it ought to receive in return a viable economic asset with long-term income-generating capacity for the community as a whole. Although social services such as schools, clinics, and boreholes are important, they will not generate income for the community in most cases. And employment offers by companies seldom benefit more than a handful of people in the community, so do not serve to replace the value of land as an economic asset of production. In exchange for their land, communities need to receive assets that will allow them to be equally or more well-off than they were prior to the investment—for the short, medium, and long-term. The best payment scheme will therefore be one that provides broad-based, long-term food security and income-generating potential for the community.

3.8.2 “Benefits” versus “compensation”

The word “benefits” has been used to describe a wide range of promises, commitments, potential impacts, and payment terms related to LSLBI. In the past, investors have often paid very low amounts for land because of the range of non-monetary benefits to the community that are promised to flow from the investment. This may include social benefits such as school and clinic support or community water supply (such as those that should be included in a community development plan (CDP)) or employment for community members on a nucleus farm or processing facility, or income to community members from participation in outgrower arrangements. It has also often been the case, however, that these promised benefits from an investment are: (1) provided as a substitute for a binding compensation package; (2) not aligned with a more comprehensive community development plan (see discussion below); and (3) not included in a written lease agreement. The community thus lacks any assured way to realize or enforce these benefits if (as has often been the case) they do not materialize as promised.

⁴⁰Interview with the Paramount Chief of Gwollu, Upper West Region, 10 June, 2014. Notes on file with the authors.

The following points about benefits and compensation may be useful to communities and investors as they negotiate the terms of the final agreement:

- Payment, or compensation, should be considered as distinct from possible benefits that could accrue from an investment, such as jobs and outgrower opportunities. Payment can be either monetary or non-monetary.
- The community is giving up its land—the primary asset of production for most rural people—for the long term. In exchange, the community will in most cases want to seek a form of payment that will provide equal or greater food- and income-generating opportunities for current and future generations. While social goods such as clinics and schools are important, they cannot usually replace the productive value of land to community members.
 - Using monetary compensation to spark productive economic investment by the community: The structure of monetary compensation for a lease can help to facilitate long-term socioeconomic development in a community. The community could thus bargain for cash income from an investor that goes into a community fund for income-generating activities. Or the community could request payment from the investor in the form of a revenue- or equity share in value-added processing facilities related to the investment, which could also be channelled into a community development fund.
 - Using non-monetary compensation to spark productive economic investment by the community: Non-monetary compensation could include direct in-kind payment by the investor in the form of productive goods. For example, the investor could provide tractors to the community in partial payment for the lease, so that the community could plough its own fields and rent out services to neighbouring communities. Another idea is for the investor to pay for the construction and operation of a private school that would be open to community members for free and available to others outside the community on a fee basis. Payment could also be in the form of support for other livelihoods-oriented infrastructure as identified by the community. Some investors interviewed by the Team stated a preference for directly providing in-kind goods to the community rather than paying into a community development fund, noting greater efficiency in delivery and control over the process. Parties agreeing to this option, however, should be careful to ensure that in-kind goods align with community development goals, as reflected in the CDP.
- Compensation received as payment for a lease of the community’s land should be aimed at improving the wellbeing of the community as a whole, with an emphasis on people within the community who have lost land or opportunities as a result of the investment. It is particularly important to include women in community-based discussions about the type of benefit/payment to seek from the investment, and to ensure that women benefit equally in the outcome.
- The best agreements may incorporate several different kinds of compensation and benefits, such as periodic cash revenues going into a community development fund; an equity or revenue-share interest in a value-added processing facility; employment and training opportunities on a nucleus farm and in the associated processing facility; and an outgrower program providing opportunities for women, youth, and other community

members.

- Compensation and benefits discussed between the parties must be incorporated into the written lease agreement in order to be enforced. The lease must incorporate, at a minimum, the precise terms of compensation—both monetary and non-monetary. This written agreement should form the basis of the deal; it should be clearly specified which non-monetary aspects (such as clinics, tractors, boreholes) are considered a binding part of the compensation package. If the investor promises additional benefits outside of the direct compensation package, such as jobs or outgrower opportunities for community members, this should also be noted in writing, and will ideally incorporate required timelines and milestones.

3.8.3 Recommendations for helping communities to negotiate sound business deals

- (1) Train communities in the full range of payment options and benefits available in the negotiation process and the importance of receiving alternative long-term assets of production in exchange for rights to land. In determining which forms of consideration would be best, explore options that provide both a social and economic benefit to community members and a way to generate income from outside of the community (e.g., tractor services available for free or discount to community members and provided at a higher cost to those outside the community; boarding school available for free to community members and at a cost to those outside the community, etc.). (For more information, see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment and Phase 4: Negotiation and Consent; and MLA, Section 6: Financial Compensation, Section 7: Non-Monetary Benefits and Section 8: Other Forms of Compensation.)
- (2) Explore models wherein the community alienates the least amount of land possible, including models for sequential land development (wherein investor either acquires new parcels sequentially as needed, or it acquires a larger parcel to begin with but allows community members to continue farming on land until it is needed for development). Models in which community members retain the right to farm their choice of crops on some amount of land, and/or retain backyard or garden plots for household food production can be effective. Song Soma Ltd. and Antika Farms Ltd (in or near Wa, Upper West Region) have been experimenting with this model and emerging insights indicate that it could support more sustainable win-win arrangements over the long term. (For more information, see Guidelines, Phase 4: Negotiation and Consent and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 3: Location of Leased Land, Section 4: Term of Agreement, Section 5: Grant of Rights, Section 17: Subletting and Assignment of Rights and Section 18: Periodic Review.)
- (3) Explore models that allocate garden plots to women to support sustainable livelihood options and improved household food security (for more information, see Guidelines, Phase 3: Impact Assessments and Phase 4: Negotiation and Consent; and MLA, Section 7: Non-Monetary Benefits and Section 8: Other Forms of Compensation).
- (4) Explore models wherein the community obtains a significant share of revenues or assets from value-added facilities (e.g., mills and processing plants) in exchange for land. One example of this kind of community-investor equity share in a processing facility is Crispy Investments in South Africa (see footnote 70 below for further information).

- (5) Maximize outgrower model investments and benefits (see further discussion in Section 4 below), including models that contemplate use of a relatively small-sized nucleus farm (for more information, see Guidelines, Phase 4: Negotiation and Consent; and MLA, Section 6: Financial Compensation).
- (6) Create a participatory community development plan in order to guide any commitments from the investor related to community service projects (Box 3.6).
- (7) Consider structuring the lease agreement to allow for a rise in land values. This can be done by including language in the lease that requires periodic review and revision of rental rates. The review should occur at regular intervals in the lease term and should allow the parties the opportunity to negotiate a revised payment on their own but also account for the use of an independent expert in the event that the parties cannot reach agreement on a revised rate. (For more information, see MLA, Section 6: Financial Compensation, and Section 18: Periodic Review.)

Box 3.6: Community development plans (CDPs)

In the past, in exchange for the use of land and natural resources, investors have frequently made promises to impacted communities to deliver or support social development projects in the community. Often characterized as corporate social responsibility (CSR) projects, these promises have included commitments to build schools, health clinics, water boreholes, or other facilities. Many such projects and initiatives have been planned without community input and/or have not been coordinated with existing development initiatives and plans of key stakeholders such as local and regional government and NGOs. Many have performed poorly because they did not respond to real on-the-ground needs or have not been sustainable because they were not linked to supplies of key inputs (e.g. teachers for schools; drugs and doctors for medical clinics) or long-term maintenance plans.

CDPs offer a mechanism for communities to tailor the benefits from a land investment to the community's specific needs and to harmonize benefits with existing NGO and governmental initiatives and plans. The major goals of a CDP should be to: (1) improve the relationships and coordination between investors, communities, governments, civil society and other stakeholders, and (2) deliver sustainable and beneficial social and economic outcomes for communities.⁴¹ Best practice for the development of CDPs includes the following core principles⁴²:

CDPs must be developed in a participatory manner that includes representatives from across the entire community, including women and youth. Involving stakeholders (including local government and NGOs) in the identification of community needs will build local ownership of CDP components and outcomes. It can also ensure effective links to existing programs and development processes. Efforts should be made to engage all stakeholder groups, specifically including those that might normally not have a voice in the process.

CDPs should be developed early on in the investment process and definitely before entering into the lease agreement. The commitments made by an investor to affected communities are an essential element of the “deal” and to the determination as to whether the investor has earned a “social license” from the community. As such, it is important that the CDP developed early in the investment process and prior to entry of the lease agreement.

⁴¹ Mining Community Development Agreement Source Book, World Bank, 2012.

⁴² Mining Community Development Agreement Source Book, World Bank, 2012. The core principles are derived substantially from the Mining Community Development Agreement Source Book.

Projects and initiatives should be based on actual community needs and existing development plans. Where communities have already created social and economic development plans, the CDP should provide a vehicle for carrying out of these plans. Communities should consider seeking projects that provide income generating opportunities for current and future generations. While social benefits such as clinics and schools are important, they cannot replace the productive value of land to community members.

Investor commitments should complement existing government led programs and planning efforts. In order to prevent stranded assets and unsustainable projects, and to leverage existing projects and resources, the CDP negotiation process should include government stakeholders to coordinate CDP commitments with existing government plans and efforts.

Projects should be well planned, monitored, and evaluated. CDPs should contain sufficient detail on how projects will be managed, implemented, monitored and evaluated. The CDP should describe the roles and responsibilities of all stakeholders involved in the management and implementation process, including community institutions, government and civil society. A description of how decisions will be made throughout the term of the CDP should also be included and how the voices of community members will be represented in the decision-making process. Decision-making structures should include checks and balances to prevent corruption and abuse of power. A participatory monitoring framework should be included in the CDP.

Funding for projects and commitments identified in the CDP should be adequate to achieve stated goals and sustainable. The CDP should clarify the source and quantity of funds that are to be committed by the investor to the projects in the CDP. It should also identify the entity that is to receive the funds and the criteria for management and allocation of funds. Here again, having a system of checks and balances in place are recommended.

The CDP should include enforcement provisions and appropriate community grievance mechanisms. As noted further in the MLA, enforcement provisions and grievance mechanisms are essential elements of effective and responsive engagement with communities, and provision should be made for their inclusion in the CDP or the MLA itself.

Transparency and accountability are critical to gaining and maintaining community confidence. A successful CDP will support transparency, particularly with respect to the allocation and spending of funds. Regular auditing and reporting is also important and this information should be shared widely within the community.

The CDP should be incorporated by reference into the lease agreement. It is recommended that the CDP be incorporated into the lease agreement and that the CDP be subject to enforcement and dispute resolution provisions consistent with the requirement of the lease.

3.9 Creating equitable benefit-sharing mechanisms within the community

3.9.1 Overview

Even if community leaders are able to negotiate a robust payment package for a lease, this does not guarantee widespread community benefit. This section therefore looks more closely at how these benefits are shared within the community. The recent norm in Ghana has been for

customary leaders to retain payments for land for themselves, sometimes sharing them with elders or other chiefs within their hierarchy. This can lead to severe negative impacts—both economically and socially—for people in the community who have lost present or future access to land.

Even when there is an interest by customary leaders to share proceeds from a lease, questions arise as to what are the best benefit-sharing mechanisms and what form of community self-governance would be the most effective.

3.9.2 Recommendations for intra-community sharing of benefits and proceeds

Some best practices have begun to emerge from within Ghana and elsewhere, both in the land sector and also in forestry, wildlife management, and mining:

- (1) Set up the investment so that compensation and benefits are distributed broadly, and with sufficient control and accountability mechanisms to ensure transparent and equitable outcomes. One approach is to establish a community fund (Box 3.7), perhaps with oversight resting in a revenue management board that meets periodically (e.g., quarterly) to determine how funds should be spent (see the Fievie/GADCO model for a revenue management board, described in Box 4.1). Customary authorities and members of community land management committees (CLMCs) should be represented on the revenue management board, and, in some cases the community may decide to include a company representative on the board. It will be important to designate in advance the percentages of revenues to be allocated to customary authorities versus other community members. How this decision is reached will differ among communities; while the decision-making process would ideally incorporate input from a number of stakeholders (e.g., the CLMC), it will ultimately lie with the traditional authorities in almost every customary community. (For more information, see Guidelines, Phase 4: Negotiation and Consent and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 6: Financial Compensation, Section 7: Non-Monetary Benefits and Section 8: Other Forms of Compensation.)
- (2) Train the communities and investors in GCAP investment areas in GCAP MLA and Guidelines. Adhere to recommended processes set out in the Guidelines. (For more information, see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment.)
- (3) Consider developing a community land management committee prior to or in the early stages of a specific potential investment (for more information, see MLA, Section 10: Community Land Management Committee).

Box 3.7: Newmont Ghana Gold Limited and the Newmont Ahafo Development Foundation

Newmont Ahafo Development Foundation (NADeF) is a sustainable community development foundation established in 2008 through an agreement between Newmont Ghana Gold Ltd. and the Ahafo Social Responsibility Forum (represented by ten Ahafo Mine communities, local and regional government and civil society). The purpose of NADeF is to equitably distribute annual contributions from Newmont to support CDPs in the Ahafo Mines' area of operations.

Newmont reportedly contributes USD1 per ounce of gold produced and 1 percent of net profit from the Ahafo Mine to NADeF, and it also provides for the creation of an endowment fund (with a proportion of the funds earmarked as endowment funds over the life of the mine). NADeF uses funds to support the following key areas of development: human resource development, economic empowerment, provision of infrastructure, natural resources, cultural heritage, sports and social amenities.

Source: Newmont company website, accessed 2012.

3.10 Addressing claims to state lands where compulsory acquisition was not fully documented and/or compensated

3.10.1 Overview

In the Accra Plains, the state claims title to some 40 percent of the land targeted for GCAP development (GCAP 2011a, 2011c). However, official land acquisition processes for the land, undertaken decades ago, were seldom finalized (GCAP 2011c: 7; GCAP 2011a, Adu-Gyamfi 2012: 199-200). Customary communities continue to occupy much of this land and in many cases consider it to be their own.

Private investors interested in these state-acquired areas often walk into a complex land-rights situation. The area is rife with competing claims, whether or not the land has officially been acquired under an Executive Instrument (EI) issued by the state (GCAP 2014a).

Communities' official claims to the land may be latent until the investor arrives. These claims may end up in protracted litigations, as in the case of land acquired by Prairie Volta Ltd. The company acquired 1,250 hectares from the government that is the subject of a legal dispute, in which community landowners claimed that compensation was never paid when the land was taken nearly 50 years ago. The latent dispute over compensation came to the surface upon the arrival of the company. The government thus required that the company place USD 340,000 into a fund for compensation as a sort of lien, pending a court decision on the community's claim. Meanwhile, land invasion and intercropping by community members prevent the company from using some of its land, and armed police have become involved in routing the community members from the fields.⁴³

Investors and others interviewed by the Team confirmed reports that lands claimed by the state are usually occupied and farmed by customary communities. Even where the state has assured clear title, the investor still has to cope with the fact of occupation. Investors relayed to the Team a strong aversion to resettlement, and GCAP's official policy is that no person currently

⁴³Interview with Farm Manager at Prairie Volta Ltd., 17 June, 2014. Notes on file with the authors.

using land will be asked to leave unless provided with secure rights to an alternative plot of land.⁴⁴

In the Volta Irrigation District, attempts at development have been met with resistance by current occupiers, who have removed survey markers and otherwise attempted to impede development plans. Such disruptions are increasingly common in the region, where soaring interest in land acquisition is fuelling increasing tensions over land. GCAP has commissioned further studies of land disputes in the Accra Plains area, including potential channels for alternative dispute resolution. (For further discussion of land disputes in the Accra Plains, see GCAP 2014a.)

3.10.2 Recommendations for mitigating land conflicts

The state, investors, and communities can take a number of steps to mitigate conflicts related to land claimed by the state that is also subject to claims and/or occupation by customary communities:

- (1) The investor should conduct a thorough assessment of land tenure claims in the proposed project area prior to signing with the state. This should include an investigation with the Lands Commission into existing claims and court cases⁴⁵ affecting the project area, and also an on-the-ground assessment with various stakeholders within the customary community. (For more information, see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment and Phase 2: Initial Engagement between Community and Investor; and MLA, Section 1: Parties and Recitals and Annex 2: Conditions Precedent to Entering into Lease Agreement.)
- (2) The investor should seek to ensure all claims to the land are settled prior to signing a lease. This is not often done currently and may lead to a protracted negotiation process, but the up-front cost is worth paying according to a number of investors and officials.⁴⁶
- (3) The participatory processes discussed in this report for customary communities, and expressed throughout the MLA and Guidelines, would ideally apply equally to state land as they would to land recognized as belonging to customary communities. This is both out of fairness, in that many people occupying what are formally state lands may indeed have a valid claim to that land, and also out of practical concerns for mitigating conflicts related to the investment.
- (4) The investor, state, and community need to distinguish between payment to the community for unpaid claims related to past compulsory acquisition by the state and payment by the investor for a lease on the land for future use. Ideally, there should be two separate transactions: (a) the state should satisfy any outstanding claims to the communities, and (b) the investor should pay the state for the land leases. If these payments are combined,

⁴⁴See, e.g., GCAP Resettlement Framework Report (2011: 7: “A minimum principle will be that no person will be required or asked to relinquish land that they are currently using to accommodate an investment or associated activities (such as the establishment of associated infrastructure or land development for preparation of smallholder plots) without being provided secure tenure over alternative land of at least equivalent quality.” This GCAP policy reflects the World Bank Resettlement Policy, which should be utilized by both investors and the state in contemplating and/or implementing any activity that will lead to displacement.

⁴⁵Lands Commission officials reported that it is difficult for them to determine whether there are unresolved court cases related to a particular piece of land or a particular community. They said they needed a better and more efficient way to check into the nature of existing claims with the court.

⁴⁶Interviews with WienCo, ITFC, AgDevCo, Prairie Volta Ltd., and Avnash. June, 2014. See also interview with K. Owusu Poku, Esq., Director of Public and Vested Lands, Lands Commission, Accra, 12 June, 2014. Notes on file with the authors.

so that the investor ends up paying the community directly to satisfy the government's outstanding claims to the land, all three parties must be very clear what the purpose of this payment is and who ultimately owns the land (presumably the state). The purpose and terms of such agreement should be recorded in a written instrument and shared broadly among all relevant stakeholders. Despite what could be a higher level of convenience realized through direct investor payments to the community for past compensation owed by the state, this practice could create a great deal of confusion among current and future community members, and thus instability over time for the investment.

- (5) The Lands Commission should continue its efforts to survey state lands in the country, registering boundaries where title is clear and, where it is not clear, seeking to clear it (for more information, see Guidelines, Phase 1: Preparing for Commercial Agricultural Investment and Phase 2: Initial Engagement between Community and Investor).⁴⁷
- (6) The Lands Commission should also rigorously implement the current legal and regulatory procedural safeguards for any new compulsory acquisition (including notice, hearings, right to appeal compensation levels and delivery of prompt compensation). Note, however, that before executing this recommendation it may be necessary to conduct a short-term investigation of impediments and institutional capacity needs.

3.11 Exploring new ways to deal with land fragmentation

3.11.1 Overview

Fragmentation of land holdings in the proposed GCAP project areas is one of the most challenging issues for investors seeking large areas of contiguous land. Customary land holdings in the Accra Plains area are highly fragmented (GCAP 2011a). Fragmentation is also common in Upper West, where family lands are breaking down further into nuclear-family land holdings as the demand for land increases (e.g. around Wa and more populated towns).⁴⁸

Transaction costs for investors in highly fragmented areas of family land holdings may be prohibitive. First, for any single investment, investors must deal with multiple family heads, family cultures, and family expectations. Second, different family heads on contiguous parcels often do not agree about whether and on what terms to lease land. Disagreements may also arise among different sub-groups within families. Third, boundary disputes among families are common. In some cases, disputes between clan, families, or chieftaincies pre-date an investment and are well known at the time the investor enters the scene. In other cases, however, latent boundary disputes may arise at the point when an investor expresses interest in a particular area of land or even at a later point once dealings are underway or a deal has been finalized.⁴⁹

While the transaction costs of dealing in a family-land context may be steep for investors, and investors seem to look favourably to the chieftaincy land tenure structure that is prevalent in the north, family holdings may offer a level of protection for usufructuary rights holders. It appears

⁴⁷In order to proactively reduce the amount of conflict on State lands, the government should also seek to systematically ascertain and pay outstanding valid claims to compensation for lands taken by the government in the past.

⁴⁸Interview with the Regional Lands Commission, Wa, 9 June, 2014. Notes on file with the authors.

⁴⁹Such has been the experience of Prairie Volta Ltd., Brazil Agro Foods, and AgDevCo, among others. Interviews with company representatives, June, 2014. Notes on file with the authors. On boundary and jurisdictional disputes more generally, see GCAP Draft Strategy for the Prevention and Resolution of Outstanding Legal Issues and Disputes on Land in the Accra Plains, 2014; and GCAP Diagnostic Review of Landownership and Land Rights in the Accra Plains, December 2011: 36-8.

that the family land system in the south, though difficult for investors to negotiate, may foster more direct accountability by leaders to community (family) members and lend itself to a more decentralized power structure for land holdings. Social ties seem to bind families more tightly than skins and stools, increasing the chance that a family leader would be responsive to family members in decision-making related to land.

One possible approach to addressing family land fragmentation and associated challenges is for the state to acquire family land, consolidate it for large-scale investment, and transact directly with the investor. Though some of the investors interviewed favoured this approach,⁵⁰ most interviewees suggested that it would be a very bad idea, even if initially more expedient for the investor. They cited distrust of the government's capacity or willingness to conduct such deals transparently and to adequately compensate communities, especially given the history of mismanagement and inadequate or no compensation paid for land taken through compulsory acquisition. They also predicted that families and communities would reject attempts by the state to take their land and they questioned the political feasibility of any such approach.

Some best practices are emerging to address fragmentation in an investment context. One is for investors to choose an outgrower approach with at most a very small nucleus farm. In some cases the investor's role is limited to operating a value-added facility that draws from outgrower production; in other cases the investor may focus solely on providing operating services to the outgrowers (usually on credit that is to be repaid at harvest). The Ghanaian owner and operator of Song Soma Ltd., a medium-sized commercial farm on the outskirts of Wa in the Upper West Region, has developed a venture that supplies services to 4,500 hectares of outgrower farms, not directly associated with a nucleus farm.⁵¹ The investor has received some support through SADA, which has provided him with three tractors based on his success to date. The apparent success of this venture relative to other SADA outgrower schemes may hinge on an innovative, rigorous method of tracking inputs and outputs with every outgrower farmer, which has yielded a higher than average repayment rate (approximately 75 percent) at harvest time for the value of services provided up-front. Similar investments that rely primarily on outgrower service provision and less on the presence or size of a nucleus farm may circumvent many of the difficulties that land fragmentation presents without resorting to the compulsory acquisition and consolidation of land.

Another potential best practice can be found in the proactive efforts of a chief on family lands in the Volta Region, who demonstrated how strong leadership can serve the interests of the community at large while increasing the security and success of an investment. This chief sought out an investor, inquired as to the investor's land needs and business model, and then served as a mediator between 13 family heads whose land would be affected by the proposed investment. The chief resolved longstanding boundary issues between the family heads and helped the group to arrive at a set of terms that would be acceptable to the group. The resulting investment has been operational for more than eight years, and it has proceeded largely without conflicts within communities or among family heads.⁵²

LAP II is also helping to organize voluntary land consolidation among a group of allodial titleholders in Bolgatanga in the Upper East Region. Although LAP II does not plan to do this on a large, systematic scale due to the high costs of associated conflict-resolution efforts, it hopes to respond to individual cases like this on a demand-driven basis.⁵³

⁵⁰Interview with Avnash, Tamale, 6 June, 2014. Notes on file with the authors.

⁵¹Interview with Benjamin Boro, Owner and Manager of Song Soma Farm, Wa, 9 June, 2014. Notes on file with the authors.

⁵²Interview with Nene Abloh V and Nene Na Akakposom, Kpong, 18, June, 2014. Notes on file with the authors.

⁵³Interview with Kofi Abakah Blankson, LAP II Coordinator, and Sarah Antwi-Boasia, LAP II Gender Officer, 20 June, 2014.

3.11.2 Recommendations for addressing excessive land fragmentation

- (1) Explore types of investments that require little (or no) land for a nucleus farm. For example, investors could focus on value-added facilities and/or service provision for outgrower farmers. (See Guidelines, Phase 1: Preparing for Commercial Agricultural Investment and Phase 2: Initial Engagement between Community and Investor; and MLA, Section 3: Location of Leased Land, Section 4: Term of Agreement, Section 5: Grant of Rights and Section 7: Non-Monetary Benefits.)
- (2) Continue efforts under GCAP to develop a land directory or voluntary land bank. GCAP is currently considering developing a “land bank” mechanism that would match interested communities with available land to interested investors. Under this arrangement, willing landowners could nominate land to be kept in the “bank” together with relevant attribute information. The process of nomination and acceptance of land into the “bank” would be rigorously scrutinized to ensure that prospective investors can obtain up-to-date and reliable information about land that may be suitable for their specific needs. (See GCAP 2014b, and Losamills Consult 2014.)
- (3) Encourage families with contiguous land holdings to organize themselves, sorting out any boundary issues and agreeing on a total land area that they collectively agree to offer for investment. Ensure that a variety of stakeholders, including women, are represented in the group’s decision making, which could involve the formation of a land development committee such as that referred to above. Continue to offer state support (such as that offered by LAP II) on a demand-driven basis to communities interested in organizing contiguous holdings into an area viable for commercial farming. (See Guidelines, Phase 1: Preparing for Commercial Agricultural Investment.)

3.12 Ensuring that systems are in place for monitoring and enforcing the agreement

3.12.1 Overview

Communities and investors alike have expressed difficulty in monitoring and enforcing the performance of agreements once in place. First, it is very difficult for either side to monitor agreements that do not sufficiently include terms in writing. In some cases, agreements are not written, even for large tracts of land. For example, Brazil Agro Business relies on oral agreements with a local chief, who has promised to reserve land for the company to use once it is ready to expand operations. Though the viability of the investment model relies on the future availability of that land, the company does not make a practice of signing a written agreement until it is ready to clear and cultivate the land.⁵⁴

In other cases, a written agreement incorporates neither the promises made nor the expectations held by both sides. Unless community members understand the agreement to which they are subject, it will be more difficult for them to abide by, monitor, or enforce the agreement. But customary leaders do not generally share final provisions of the agreement with community members, who do not have access to a final written agreement. Limited education, language barriers, and illiteracy may further impede community members’ understanding of the terms of an agreement.

Notes on file with the authors.

⁵⁴Interview with Brazil Agro Business, 16 June, 2014. Notes on file with the authors.

Second, communities may not have access to effective dispute-resolution institutions when the investor breaches the contract or causes damage to the community. This can undermine the community's goodwill towards the investor, as well as any positive benefits the investor may have fostered. For example, a number of complaints have arisen in the Fievie community in regard to the GADCO investment, and do not appear to have been effectively addressed by the company or government. These include: (1) diversion of river/stream water flow away from some villages in order to construct irrigation canals, reducing the water available to the communities for a variety of uses and destroying traditional fish ponds; (2) contamination of the water supply in some villages through aerial crop spraying; and (3) destruction of trees and household crop production due to aerial spraying.⁵⁵ Although GADCO has worked with the Fievie community to establish a 21-person community management committee, in part for the purpose of identifying complaints when they arise, some community members feel that their complaints have not been efficiently addressed. Community members voiced frustration that they were unable to take their complaints to a higher level, lacking money and access to legal services they needed to file and defend a case in court.

Agreements containing profit or revenue-sharing components necessitate special considerations for monitoring. A community must be able to ensure the accuracy of profit and/or revenues recorded by the company and used as a basis for compensation. The GADCO/Fievie agreement contains safeguards toward this end that could be replicated. As part of the deal, GADCO gave the Fievie license to access its financial records. GADCO also invited Fievie appointees to enter and remain at the GADCO headquarters office, in order to observe business practices and provide for additional transparency with the community.⁵⁶ In equity-sharing arrangements, community representation on the company's board of directors will be important as a way to ensure joint decision-making authority and access to company records and information.

3.12.2 Recommendations to ensure better monitoring and enforcement of agreements

- (1) Record all agreements and all terms of the agreement in writing, and file copies with the community leadership, the District Assembly, and the investor. Share final provisions with the community in a format and language that is understandable and accessible by most people (including women). (See Guidelines, Phase 2: Initial Engagement between Community and Investor and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 9: Communications between Parties and Affected Communities, Section 13: Availability of Information, Records and Reports, and Section 21: Notices.)
- (2) During the initial stages of negotiation, parties should establish a grievance procedure that is open and accessible to community members. This could be captured in an MOU between the community and the investor. (See Guidelines, Phase 2: Initial Engagement between Community and Investor and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 16: Dispute Resolution and Community Grievance Mechanism, and Annex 2 Conditions Precedent to Entering into Lease Agreement.)
- (3) Investors and government stakeholders should advise communities and community members of their rights to lodge grievances under the Environmental Assessment Regulations of 1999. The regulations allow an aggrieved person to submit a complaint to

⁵⁵Reports in the community confirmed by research conducted by Odame Larbi, per interview with him in Accra on 20 June, 2014.

⁵⁶According to an interview with GADCO management, members from the Fievie initially took GADCO up on this, stationing themselves in the office, but before long the members ceased coming.

the Ministry protesting any action or decision taken by the EPA related to the development and approval of EIAs (see EAR of 1999, Sec. 27).

- (4) Within the terms of the written agreement, establish monitoring and grievance procedures for the lifetime of the investment. This could include an alternative dispute resolution (ADR) panel comprised of community and company representatives (and possibly the District or Municipal Director) for first recourse. (See Guidelines, Phase 2: Initial Engagement between Community and Investor, Phase 4: Negotiation and Consent, and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 16: Dispute Resolution and Community Grievance Mechanism, and Annex 2 Conditions Precedent to Entering Into Lease Agreement.)
- (5) Parties may want to begin with shorter-term leases and/or include renegotiation options in order to maintain greater control over performance (see Guidelines, Phase 4: Negotiation and Consent and Phase 5: Monitoring and Enforcement of the Agreement; and MLA, Section 3: Location of Leased Land, Section 4: Term of Agreement, and Section 5: Grant of Rights).
- (6) Over the longer term, the state (working with communities, investors, and NGOs) could develop legal and dispute resolution services as part of local agricultural investment assistance centres, funded through pooled resources by investors and/or governments.
- (7) The state and NGOs could work together to continue to improve access of community members to formal court systems.

INNOVATIVE MODELS FOR INCLUSIVE COMMERCIAL AGRICULTURAL INVESTMENT

Like many other countries in Africa, Asia, and Latin America, Ghana has developed a variety of innovative approaches to farmland investments in recent years. These mainly feature alternative payment schemes for land (e.g., trading land for equity or revenue shares in the investment), as well as outgrower models such as those promoted by GCAP. Private-public partnerships (PPPs), such as those found in Ghana’s many irrigation projects, are another important emerging mechanism for attracting private investment in agriculture but a detailed analysis of their risks, benefits, and special features is outside the scope of this report.

This section discusses innovative payment structures for long-term lease of land—including fixed-payment leases, revenue-sharing models, and investor/community joint ventures (land for equity arrangements)—and innovations in outgrower and contract farming models. Each subsection concludes with a review of advantages and disadvantages of the options discussed.

4.1 Innovations in investment structure and payment terms for land

This section explores the differences between traditional fixed-payment leases and innovative approaches such as basing payments on revenue sharing and community/investor joint ventures (discussed here as “land for equity” arrangements). For the most part, it addresses innovations in the type of consideration paid by the investor to the community as a whole for its land. Yet a critical question is how any revenues from the investment are distributed within the community; thus this section includes information, where available, on the mechanisms used for intra-community distribution.

4.1.1 Traditional method: Fixed-sum payment for the land

In the past, most investors in Ghana and throughout Africa made fixed up-front payments to community leaders for the right to lease land. In Ghana such payments are typically referred to as kola or “drink money”, even if the sum is effectively equivalent to the market value of the land. Sometimes deals have been made with only a nominal payment to the community, based on promises of future employment opportunities, outgrower benefits, or other investments in the community.

Experience shows that while fixed up-front payments offer a maximum level of assurance to the community that it will be paid in total for the lease price agreed upon, this form of compensation also has drawbacks for both communities and investors. First, in exchange for the security of having payment in the community’s pocket, the total amount of the compensation may be limited, and often does not incorporate the expected rise in the value of the land over time (especially for a long-term--e.g., 50-year--lease). For example, as noted in a recent report on land payment alternatives for the Government of Tanzania:

The longer the [lease] term the more difficult it is to set a fair lease rate that adequately captures the increasing value of land. As cities expand, land that is currently suitable for agriculture can become substantially more valuable as it is converted to peri-urban or even urban use. Climate change may substantially change the potential use of the land. A lease of 60 years or more is essentially a semi-permanent transfer of the right to use the land and provides much greater

risk to the community. Much shorter terms, perhaps with provisions for renewal on mutually agreeable terms, are preferable. (Vhugen and others 2014: 29).

Second, fixed payments made up-front very rarely trickle down to most community members, and are likely to leave future generations in the community with nothing in exchange for the loss of their land. In addition, such payments have proven highly risky for investors in Ghana, as investors report that successors to the leader in power at the time of the initial transaction often demand additional payments that the investor had not planned on or expected. Thus, such up-front payments do not foster an enduring social license from the community.

Increasingly, therefore, investors and communities in Ghana are agreeing to periodic fixed-price payments made over the term of the lease. The amounts of these payments are set in advance, and they are generally paid in increments of every one to five years. This has helped to foster a sense of fairness among successors in the community's leadership and fewer demands for additional payments, thereby increasing stability for the investor.

Fixed-price lease arrangements (when incorporating periodic payments) provide a number of advantages to communities as compared to revenue or equity-sharing arrangements (Vhugen and others 2014: 11; Nshala and others 2013: 31). They are more transparent, and are easier to understand, monitor, and enforce. Also, they offer a predictable income stream to the community that does not depend on the project's financial success. Finally, depending on the terms of periodic payments, the income stream can begin very soon after the agreement is finalized; payments are not delayed until the company realizes revenues or profits.

4.1.2 Innovation: Revenue-sharing models

Revenue-sharing models are another way to share both risks and potential benefits among communities and investors. In comparison to fixed-payment leases, revenue sharing is more risky to communities, because payments depend on successful farm management, including closely controlled costs, production, and sales. Whether and at what level the community receives payment would therefore depend on factors outside its control, such as crop failure, a drop in market price, or company mismanagement. This would usually not be the case with a fixed-payment lease. On the other hand, receiving a revenue share in lieu of (or in addition to) a fixed payment allows the community to benefit in proportion to the success of the venture. Often, this translates into a higher payment by communities. Communities considering revenue-sharing agreements will need the capacity to do due diligence assessments of potential investors, along with the capacity to monitor the agreement closely (which may require access to investor's financial records). The risk of transfer pricing mechanisms⁵⁷ that would reduce reported revenues is an important consideration as well, especially when the investor is a subsidiary of a larger parent corporation. Risks and monitoring costs increase if the payment is pegged to the company's net revenues rather than to gross revenues.

Unlike equity-sharing arrangements discussed below, revenue sharing does not allow communities to become part-owners of the investment, to access financial records, participate in management, or build up long-term value in the investment. However, revenue-sharing

⁵⁷Transfer pricing is generally defined as "The cost of a product sold by one part of a company to another part of a company." Small Business Chronicle 2014. Transfer pricing can be used to inflate the costs of a project in order to show lower overall profits, resulting in a lower payout to communities whose share is based on profits earned. It is critically important that communities are able to determine a fair price so that expenses are not unfairly inflated when one division of a company buys from another.

(especially when based on gross rather than net revenues) offers a good deal more security to communities than does equity sharing. Revenues are easier to calculate and monitor than profits; payments are likely to fluctuate less and begin much earlier in the lifetime of the investment; and the community avoids the potential liabilities associated with being a shareholder in a company that is not doing well or is failing to perform as anticipated.

The use of revenue-sharing agreements, spearheaded in Ghana with the GADCO/Fievie arrangement (Box 4.1) appears to be gaining favour among both communities and investors in Ghana.⁵⁸ A few agreements base the payments on net revenues (or profits). In Ghana the most prominent example of a profit-share arrangement is Kimminic Corporation, which has such an agreement with landowners in different plantations in Brong Ahafo, including Bredi, Abease, Yeji, and Dinkra. The landowning communities are entitled to 25 percent of the profits of this venture (Kimminic 2014).

Note that a profit or net revenue-sharing arrangement differs from an equity-sharing arrangement, wherein the community receives ownership shares in the venture. With a revenue-sharing arrangement, the community only receives a portion of the revenues or profit, and will not amass value over time in the company's equity.

Box 4.1: Case study: The Fievie Community and GADCO in Sogakope, Volta Region

GADCO Ltd. is a commercial rice producer seeking to grow and mill high-quality rice for sale to Ghana's burgeoning domestic market. It also seeks to integrate smallholder farmers into its production, thereby leveraging local farming expertise, reducing constraints related to land acquisition, and linking up smallholders to commercial value chains.

Land and the community

The GADCO nucleus farm and rice mill are located on Fievie Clan land, which is unique in its communal nature: no other clan in the area has similar communal holdings, according to the Fievie leadership. The Fievie had governed this communal land through a land management committee for many years prior to 2007, when GADCO first began operations in the area. The land management committee is composed of the Zikpuitor (similar to the prime minister of the Fievie), two representatives from each of the four clan gates, a representative from the District Assembly, a lawyer, an accountant, and a surveyor.

GADCO began production in 2007 on just 300 hectares, an amount that has grown to approximately 1,800 hectares over the past seven years. GADCO plans to expand its nucleus farm over time to 6,000 hectares. In exchange for the land, the Fievie community receives 2.5 percent of the gross revenues from the farm, scheduled to increase up to 5 percent over the course of the first five years. In addition, the Fievie leadership is negotiating with GADCO for an additional 5 percent of the gross revenue derived from each new 1,000 hectare area of expansion—they argue that this would work well as an incentives (royalty) structure. As part of the agreement with the Fievie community, GADCO agreed to share its financial records with the community and it invited Fievie representatives to work out of the GADCO headquarters offices to foster transparent dealings and a trustful relationship.

⁵⁸For example, Prairie Volta Ltd. has worked out a deal with the government and communities to pay 2.5 percent of gross revenues for a major farm expansion on to 10,500 hectares. Interview Prairie Volta Ltd. General Manager, 17 June, 2014. Notes on file with the authors.

Revenues are channelled to the community through a community fund, with oversight by a Revenue Management Board that meets quarterly to determine how funds should be spent. Revenues to date have been used to provide: electricity at the public junior high school, furniture for the public kindergarten, paying teachers' salaries, street lights, sponsoring annual festivals, and litigation defence for the community's territorial boundaries.^a GADCO allows community members to glean rice from the fields after harvest; an estimated 500 people take advantage of this, collecting the rice for home consumption and sale.

GADCO has registered a lease for 50 years with the Lands Commission. The agreement with GADCO was signed by the Zikpuitor and the paramount chief, as well as representatives from each of the four farm gates (The absence of any one of these would reportedly have rendered the agreement null in court).

Outgrowers

GADCO's outgrower operations are limited at this time to two groups of smallholder rice farms (about 320 farmers in total, of whom about 30 percent are women), located at considerable distance from the nucleus farm and not on Fievie lands. (One area of about 190 hectares is 37 kilometres away in Wetta; another area of about 137 hectares is 60-70 kilometres away in the Kpong Irrigation Project area.) GADCO provides inputs to the farmers (including ploughing, seeds, fertilizers, chemicals, combine harvester services, and extension services) at zero interest at the beginning of and throughout the season, and it deducts costs at the time of sale. It provides a guaranteed market for the rice paddy, which it mills and sells under a "Copa Connect" label (Wan 2014). GADCO plans to extend its outgrower operations over time to incorporate approximately 5,000 small farmers. According to GADCO management, the outgrowers produce about 6.5 tons/hectare annually (up from 4.5 tons/hectare before involvement in the GADCO outgrower program), grossing about 6,600 Ghana cedis per hectare and netting from 3,800 to 5,000 Ghana cedis after GADCO deducts the costs of inputs. The outgrowers are thus making better yields per hectare (in tonnage) than the nucleus farm by nearly 2 tons/hectare. The Copa Connect manager gave two reasons for this: (1) smaller amounts of land are easier for farmers to control, especially in regard to weeding, and (2) smallholders are more motivated when they grow on their own land. This was posited as being the primary reason for higher yields through the program: "People are proud to grow on their own land. They think 'this is my land, I am the owner and I need to make the most out of it.'"^b

GADCO manages its outgrower program through an overall Copa Connect director and assistant director, one sub-director for the rain-fed area in Wetta, and one for the area in Kpong Irrigation District.

The financial viability of the current outgrower arrangement has depended in part on agreements for subsidized (no interest) deals between GADCO and its input suppliers. However, these deals are winding down, and suppliers are asking GADCO for payment up front. GADCO is thus seeking additional grants, and it may need to begin charging a 10 percent service fee to outgrowers to cover training and administration costs.

Contract farmers

Beginning in 2013, GADCO also has a small (40 hectare) contract farm arrangement on its nucleus farm, which is intended to provide training opportunities for future outgrowers

from the Fievie community. The scheme prioritized applicants who had lost their land in the nucleus farm acquisition. A majority of the participants are women and youth. GADCO provides this 40-hectare scheme (called Fievie Connect) with inputs, including ploughing and soil preparation; seeds, fertilizers, and pesticides; water delivery; weed control; bird scaring; mechanized harvesting; and training in technical/scientific farming methods. It also provides a market for the rice paddy: the contract farmers agree to sell exclusively through GADCO, which sets its purchase price based on the open market sales price. GADCO deducts costs from rice sales amounts at harvest time; long-term costs of preparing the land to farm (it was marshy and unsuitable to farm before GADCO developed it) are spread out over a number of years, while the production costs are deducted each year. Last year the Fievie Connect farmers harvested 5.6 tons of rice paddy per hectare, significantly higher than the 4 tons/hectare average harvest on the nucleus farm. However, it is unclear what the net revenues were for the farmers after GADCO's cost deductions. For the last two seasons, the farmers have provided collective labour on the 40 hectares, but next year it will be divided into 40 plots and allocated to individual farmers. The plan for Fievie Connect is to reduce the services provided by GADCO each year, in order to prepare the participants to be independent outgrowers. Next season, for example, the company will not provide aerial spraying for the crops, but it will rather provide the chemicals to the farmers who must apply sprays themselves. By the following year, the participants will be responsible for many more of the activities, although GADCO will continue to provide training and monitoring.

There is no written agreement between the Fievie community, GADCO, or farmers participating in the Fievie Connect program.

Dispute resolution and contract enforcement

The people of Fievie have organized local area committees comprising 21 members in total to report complaints to GADCO. The company has a community affairs manager, who also serves as a program manager for Copa Connect. Although a number of stakeholders in the community have registered complaints with the company, they say that responses have been slow and ineffective, and they are not sure where else they can go to seek answers.

Issues include the following:

- This year, farmers in Copa Connect were concerned about not receiving promised combine harvester services at a critical point in the harvest. Heavy rains had made it difficult to run the combines on their farms, and it appeared to the farmers that GADCO had prioritized the use of the combines on its nucleus farm.
- Employees on the nucleus farm complain that their wages are low and their equipment (e.g., boots) insufficient.
- Community members report that water was diverted from their communities when GADCO built an elaborate system of irrigation canals from the river to its land, resulting in the loss of water to these communities and destruction of traditional fish ponds (some of these generations old).
- Community members report that aerial spraying has contaminated their water supply and damaged their (non-rice) crops.

- A number of Fievie youth originally protested the deal with GADCO, but tension has decreased now that the company has hired some of the youth as land guards on the farm.
- In early June this year, heavy rains prevented combines from harvesting rice on the nucleus farm, and GADCO anticipated a loss in profits as a result. GADCO expressed confidence that the Fievie leadership would be “reasonable” about this and not demand the full 2.5 percent of gross revenues owed to them under the lease agreement, given the loss to GADCO. The parties had yet to agree upon a deal.
- The environmental impact assessment (per the EPA Act) identified settler farmers who are not Fievie indigenes, but who, in some cases, have been on the land for generations, as being at risk from the expansion of GADCO farm operations. The company will pay for lost crops, but will not compensate settlers for replacement land as it considers this to be the Fievie community’s responsibility. However, the people of Fievie do not believe the settlers have a valid claim to replacement land or the cost of resettlement and report that they do not have the funds to support this.

Financing

GADCO derives its financing from a blend of private and social capital, including assistance from the World Bank, AgDevCo, the Syngenta Foundation for Sustainable Agriculture, and the Alliance for a Green Revolution in Africa. Whether GADCO’s model of outgrower and contract farming would be financially sustainable without this subsidized (“patient”) capital is not clear.^c

4.1.3 Innovation: Compensation as a share of equity in the investment

A community/investor joint venture, which would usually involve the exchange of the community’s land for the company’s equity, provides a way for the parties to share in both the risks and benefits of the investment.⁵⁹ The investor, who would in most cases be the majority shareholder, would likely contribute market access, technical expertise and capital, and would hold management responsibility for the venture. The community, in contributing land to the investment, would receive a minority equity interest in it. As a minority shareholder, the community would receive several benefits, including:

- A portion of any profits from the venture (usually through dividends dependent on the company’s financial performance);
- A share in the increased value of the venture over time;
- Input into management decisions, often through representation on the company’s board of directors; and

^a In interviews with participants in the Fievie Connect program, most interviewees said that they did not know how the revenues from GADCO had been used, and they did not know who made decisions about this. Interview 16 June, 2014.

^b Interview with Julius Ameku, GADCO Community Coordinator and Manager of Copa Connect, 16 June. Notes on file with the authors.

^c Field interviews with government, company, and community stakeholders. 16 June, 2014.

⁵⁹This section draws from Nshala and others 2013: 4 ff.; and Vhugen 2014: 14.

- Access to the companies' financial records.

Risks to the community, however, are considerable. These include:

- The community trades access to land (its primary source of income and livelihood) for equity in a company that may or may not perform well. If the company performs poorly, the community will receive little or no income;
- Dividends may take long to materialize: many agricultural ventures take upward of 15 years to turn a profit, but in the meantime the community has lost access to its land and has no income from the investment;
- Determining profits can be complex, and it is difficult for minority shareholders to monitor or enforce;
- As a minority shareholder, the community would have little say over management decisions to reduce declared profits, either through re-investment in the company or through transfer pricing techniques (that may prevail when the investor is a subsidiary of an international/multinational corporation);
- Setting up a good deal in the first place requires an advanced level of understanding of, and experience with, business and equity models, and the capacity to conduct in-depth due diligence on the viability of the investor's business plan. Most communities in Ghana currently lack this level of technical capacity and the means to access it.

Among African countries, South Africa has the most experience with land-for-equity models. Results have been mixed over the past 20 years, but most such ventures have failed due to factors unique to the South African setting and also due to fundamental challenges with a land-for-equity approach. Box 4.2 summarizes the history of land-for-equity schemes in South Africa.

Whether land for equity schemes are viable for communities in Ghana may well depend on the individual context of each deal. However, commentators in South Africa have identified a list of factors that would likely contribute to successful land-for-equity arrangements or that could contribute to increasing their success rate in the future:⁶⁰

- (1) Ensuring that all stakeholders are well informed about the rights and obligations of all actors, including management, shareholders, any outside investors and government.
- (2) Increasing the state's capacity to scrutinize business plans⁶¹ and to actively monitor performance of all parties to the agreement and enforce the agreement.⁶² The financial

⁶⁰See Lahiff 2007: 14; Knight 2003; Hall, Jacobs, and Lahiff 2003; interview on 27 August 2013 with management of Crispy Investments; interview on 23 August 2013 with Craig MacGillivray, CEO Solms-Delta, Cape Town, South Africa. Notes on file with Landesa.

⁶¹For a framework for financial analysis and review of a proposed land for equity arrangement, see Land Reform Credit Facility of the Department of Land Affairs, South Africa 2000.

⁶²In South Africa, a broad range of stakeholders have commented on how important it is for the government to play a proactive role in reviewing business plans and monitoring and enforcing farm equity arrangements. According to Terrance Fife, the former Western Cape Provincial Land Affairs Office Director, the government's absence in this regard was one of the reasons that schemes failed, especially from the perspective of the most vulnerable segments of the population. The government could more adequately help to support the negotiation and monitoring process, he said, by developing capacity and skills for reviewing equity scheme business plans, as well as in-depth knowledge of agri-business, marketing, etc. The government could help fill the role of an "honest broker," and could also offer mediation services for dispute resolution. The government could, in the first place, also help to create a vision for agricultural development to help to prioritize

viability and track record of potential investors should be verified before the land is transferred.

- (3) Increasing the state’s role in providing effective dispute-resolution mechanisms for all parties to a farmworker/management joint venture.
- (4) Providing a concentrated focus on training workers in management, corporate business, and marketing.
- (5) Communicating information on income and expenditures with all shareholders in a format that can be easily understood.
- (6) Providing ways for farmworkers and communities to settle on parts of the company’s land holdings that are not at the core of agricultural production—ensure secure secondary rights to this land, which should include opportunities to develop housing and garden plots.
- (7) Ensuring that workers retain credible control over at least some of the assets of the business over time (for example, workers could be accorded legal rights to a supply of water, etc.).
- (8) Initiating payment of dividends to workers beginning in the first year or two, even if this requires taking out a loan.
- (9) Establishing a strong outgrower component, rather than a purely plantation-style farm.
- (10) Developing schemes wherein farmworkers hold an equity share in value-added components of the business,⁶³ which are typically much more profitable than the farm itself.
- (11) Considering temporary restrictions on the sale of shares so as to prevent sudden outflow of capital on the part of investors.

Box 4.2: Community-Investor joint ventures (“land-for-equity” schemes) in South Africa

Land-for-equity schemes began in South Africa in the mid-1990s, when land reforms entitled farmworkers to a share in landownership. Two models developed: the farmworker equity and strategic partnership models.

investments. Interview by Jennifer Duncan and Hirut Girma with Terrance Fife, Cape Town, South Africa, 28 August 2013. Notes on file with Landesa.

⁶³One example of a South African scheme where farmworkers traded their land rights for equity in a value-added facility (rather than commercial farm) is Crispy Investments, associated with DuToit (a major South African fruit export company). In this case, farmworkers exchanged land grants they had received under the state’s land reform program in 2004 for an equity stake in the venture’s fruit cooling facility, rather than in the farm itself. This venture appears to have been successful, according to interviews primarily with farm management. It began to yield dividends in year one, in part because it had no debt and in part because the short-term profitability of a value-added facility is much higher than that of a commercial farm. Additional factors contributing to the success of this venture included: (1) highly experienced and skilled management, and skills training programs geared toward farmworkers; (2) mentorship from DuToit and ability to use its brand name on Crispy products; and (3) the venture’s rigorous financial controls. One point of ongoing tension between management and workers, however, is distribution of the annual dividends: workers think these should be much higher, but management defends its decisions to reinvest capital for the long-term viability of the company. Information on Crispy Investments is derived from interviews by Jennifer Duncan and Hirut Girma (Landesa) on 24 August, 2013 with Harold de Silva, board member and manager in the cooling division, Deon van Zyl, Estate Manager, Obri November, manager working under Deon van Zyl, Mac MacKenzie, Finance Manager, and Daléne Conradie, Human Resources manager for DuToit, Western Cape Province, South Africa. Notes on file with Landesa.

Farmworker equity schemes model. Under this model, individuals combined their land grants to trade them for an equity share in the commercial farm where they worked. The farmworkers thus lost their right to land under the reforms, but they gained access to an equity/profit share in the company that employed them.

Strategic partnership model. A second model was based on land rights provided to communities through restitution claims, whereby the state transferred to farmworkers the land rights to the farm on which they worked. Under this model, the communities traded long-term use rights to their newly restituted land for an equity share in the pre-existing commercial farm. The communities would thus own the land and an equity share in the venture and were usually represented on the board of directors. The venture usually paid the communities a land rental fee, as well as a profit share, and would provide skills training opportunities to community members (Lahiff 2002: 5-6; Davis and Lahiff 2011: 4).

With few exceptions, both land for equity models in South Africa—the farmworker equity schemes and the strategic partnership—failed. Vhugen and others (2014: 18-21) write that major problems included:

- Commercial farm business models in many cases were not viable or sustainable. In some cases, failing farms sought out the schemes as a last ditch effort to secure capital before falling into bankruptcy.
- Commercial farms did not inject capital into the ventures as had been expected.
- The state lacked capacity to review business plans, assist farmworkers in negotiating and/or monitoring contracts and enforce arrangements once they were in place.
- Dividends did not meet farmworker expectations: they were either very low or non-existent (Mohoebi 2011).
- Decision-making around profit shares became a frequent source of tension: managers often chose to reinvest any profit in the farm, while farmworkers often preferred to have profits distributed in the form of dividends.
- Farmworkers usually lacked information and training to understand the commercial and business aspects of the farm or the implications of their share ownership.
- Expected skills and knowledge transfers to farmworkers did not take place, and relationships between management and labour remained largely as they had been before the farmworkers were part farm-owners (Hall, Jacobs, and Lahiff 2003).
- In 2009, the new Minister of Rural Development and Land Reform in South Africa declared a moratorium on land-for-equity schemes, stating that they had become primarily a way to inject capital into businesses. However, the moratorium was lifted in 2011, with no analysis and no change in policy (Ministry of Rural Development and Land Reform, Republic of South Africa 2011).

Sources: Nshala and others 2013: 35; Vhugen and others 2014: 18-21.

Examples of land-for-equity schemes also exist in other African countries such as Tanzania, but

on a much more limited basis.⁶⁴ In Ghana, land-for-equity schemes are not very common. One example is Prairie Volta Ltd., where the government (including Ghana Commercial Bank) owns a total 60 percent share in the company, according to interviews with company management. The government's share is derived in part from its contribution of state-owned rice milling and company headquarter facilities, in addition to a 25-year lease on 1,250 hectares (with a 25-year renewal term). Ghana Commercial Bank also contributed USD1.2 million in cash and loans to the venture. The government has two representatives on the board of directors, and full access to all of the company's paperwork and records.⁶⁵

A land-for-equity approach does hold potential benefits for the community landholders, in that it allows the community to capture some percentage of the increased value of the investment over time. However it also assigns high levels of risk to the community, and could result in catastrophic loss if the community winds up trading its land rights for a share in a company that performs poorly or fails.

4.1.4 Innovation: Hybrid schemes that combine fixed-payment leases with either an equity or revenue share from the venture

Arrangements may combine aspects of several different payment methods. For example, a new commercial farm investment in Mozambique combines aspects of revenue sharing, equity sharing, and an outgrower farming arrangement.⁶⁶ While most LSLBI in Mozambique appears to be conducted through fixed-payment leases, at least some businesses have begun to adopt an equity or revenue share model.

For example, in the Maçia District, two community associations holding 50-year use rights to their land leased out the land to a company for sugarcane and sunflower farming for a 15-year renewable term.⁶⁷ According to the terms of the lease, the community will receive 10 percent of the net revenues from the 920 hectare farm. They will also contribute sugarcane and sunflowers grown on their own land, through an outgrower farming agreement. In addition, the community has a 200-hectare collective parcel for growing rice, and it has made a seven-year deal with the commercial farm to share profits equally from it; the company has agreed to clear the land and provide all necessary inputs. Importantly, each household in the community also has its own small plot for subsistence farming.

One approach that may work well in Ghana would be for parties to agree to a certain annual lease payment, which would be combined with some percentage of gross revenues. This scheme could be graduated over time, so that the fixed payment amount would diminish over the term of the lease while the percentage of revenues increased. This would allow for some risk-sharing between the community and the investor, but it would also provide a stable source of income to the community during the start-up years when revenues are likely to be low. The best method

⁶⁴The authors are aware of two land-for-equity investments in Tanzania. The first is Kilombero Sugar Company, in which the Government of Tanzania owns a 25% equity stake. The second is Kilombero Plantation Ltd., a commercial rice production and milling company, in which the parastatal Rugifi Basin Development Authority owns an 8.3% equity stake in exchange for both land and capital contributions. In both of these cases the investment has been on state-owned land, and the equity share agreement has been between the company and the state (or parastatal entity), rather than a landholding community.

⁶⁵Interview with General Manager of Prairie Volta Ltd on 17 June, 2014. Notes on file with authors. According to a news report, in 2008 the government gave the company assets of a former state grain company valued at USD8.2 million, in exchange for 3,000 ordinary shares in the company worth USD1 million, and a loan agreement for the additional USD7.2 million. As of May 2013, neither the shares nor the loan papers had reportedly been transferred to the government, although this may have happened since. The authors were unable to confirm this report with the company. GhanaWeb 2013.

⁶⁶This paragraph excerpted in part from Vhugen and others: 2.

⁶⁷Interview by Jennifer Duncan and Hirut Girma on September 1, 2013 with sugar-cane/ sunflower farm investor in Manzir, Maçia District, Mozambique; interviews on 2 September 2013 with landowners and members of Agropecuária de Manzir and Aquico de Manzir farmer associations, Maçia District. Notes on file with Landesa.

of compensation will depend on the specific terms of a deal and the needs of both parties. The important thing is for both parties to be equally aware of the range of choices and the related consequences.

4.1.5 Conclusions and recommendations for innovative payment structures for long-term lease of land

- (1) Optimal payment terms will vary according to the nature of the investment, the length of the lease, and both parties' financial needs and appetite for risk. For example, the best payment structure for a short-term lease (5-10 years) might well be a fixed-payment lease. For a longer-term proposition (50 years), investors and communities might want to explore revenue-sharing and other arrangements.
- (2) Fixed-payment leases offer the most transparent approach to payment, and they are most easily understood and monitored by a range of stakeholders within the community.
- (3) Hybrid solutions tailored to the specific needs of the parties may be the best approach, but they may require more business and financial acumen than is available to most communities.
- (4) If parties choose a fixed-payment lease option, structuring payments over time will help to ensure long-term community buy-in for the investment. Lump-sum payments made up-front will almost never be the best option for either party.
- (5) When considering revenue-sharing options, gross revenue is a more stable and less complex basis for payment than is net revenue, although both options could be explored. If parties choose an equity share option, the following steps can be taken to mitigate risks to the community as a minority shareholder (Vhugen and others 2014: 34-5):
 - a. Increase the community's capacity to review business proposals and monitor agreements. During the early negotiation stages, the community should be sure to conduct a due diligence investigation into the value of the venture, its management structure and incentives, and its governance framework.
 - b. In negotiating, the community should seek to protect its governance rights by: appointing one or more members to the board of directors; having representation in key corporate actions (e.g., through minority shareholder veto rights and quorum requirements); and establishing the ability to restrict certain stock transactions (e.g. through a right of first refusal) that would dilute or otherwise harm the value of the community's shares.
 - c. Consider mechanisms to ensure the community receives some level of stable and periodic compensation for its land in the interim period before the investment yields profits.
 - d. Consider retaining some portion of the land for communities to farm for subsistence and food security, in order to help balance out the risks associated with equity sharing.
 - e. Consider negotiating for a share in value-added processing facilities along with, or in

addition to, the agricultural production aspects of the venture.

- (6) Communities need access to professional technical assistance to help them understand the options available to them in negotiating payment structures with the investor.
- (7) Regardless of the terms of the compensation agreement, professional and objective commercial valuation of the land—including its expected increased value over the course of the lease—will be essential to ensuring that the parties receive an equitable deal that will endure the span of the lease term. Professional, objective valuation of the company’s assets and predicted revenue profit and revenue streams will be equally important in setting appropriate percentages of equity or gross/net revenues.
- (8) Whatever the terms of the compensation agreement between the investor and the community, the community must establish transparent and inclusive mechanisms for dispersing revenues it receives among community members.

4.2 Innovations in outgrower and contract farming models in Ghana

4.2.1 Introduction

Outgrower and contracting farming schemes are at the heart of GCAP’s approach to promoting and supporting investment and have become prominent throughout Ghana and Africa more generally as a means for commercial farm investors to expand production capacity with the minimum amount of land transfer possible (Box 4.3). While a thorough study of outgrower and contract farm models in Ghana is beyond the scope of this report⁶⁸, the aim here is to summarize innovative aspects of current outgrower and contract farming models in Ghana that could help to optimize inclusivity and sustainability in the GCAP expansion areas.

Box 4.3. Essential features of contract and outgrower farm models

Both contract and outgrower farm models are common in Ghana. They are distinct models, with different implications for land rights and access, despite the fact that the blanket term “outgrower farm” is often used for both.

In the present report, the term “outgrower farming” is used to describe a model wherein an investor (whether holding a nucleus farm or not) provides services and markets to independent smallholder farmers who farm on their own land, in exchange for a secure production supply and payment for services at the end of the time of harvest.

The term “contract farming” is used to describe a model in which an investor acquires and develops land, and then leases some part of the land back to community members, who farm it on a contract basis. In most cases the contract farmers work individually on small, demarcated plots on the developed commercial farmland. The commercial farm offers a range of services to the farmer, who repays at harvest time. The agreement usually includes an exclusivity provision, providing that the contract farmers must deliver produce to the commercial farm upon harvest.

The impact of a particular farm model on smallholders and communities will depend on the

⁶⁸For an international best-practice legal guide to outgrower farming, see International Institute for the Unification of Private Law (UNIDROIT) 2013.

local context, tenure system, leadership, biophysical characteristics, and demographic factors of the area. Each will entail particular risks and opportunities, with significant impacts on the real benefits to smallholder farmers and rural communities. Whether an investment will ultimately benefit host communities will depend in large part on how the investment model establishes the ownership, governance, and sharing of risks and benefits of the parties (Masaba and others 2014).

4.2.2 Innovative experiences and examples in Ghana

GADCO: The GADCO experience with both contract farmers and outgrowers is discussed in Section 3 and Box 4.1. GADCO is cited by many as having one of the most successful contract/outgrower farmer programs in Ghana, and is expected to grow from 320 to 5,000 participating farmers over the next few years. However, these components of the operation are very new (now in their second year), and it is difficult to evaluate what their lasting effects will be in terms of benefits and risks to the participating farmers and the financial sustainability of the model from the investor’s perspective.

Integrated Tamale Fruit Company (ITFC): ITFC is an organic mango farm based on an outgrower model. It offers a potentially promising example of an investment model that produces social and economic benefits for both the investor and local famers. ITFC operates in the Savelugu-Nanton District and is in the business of cultivating and processing certified organic mangoes primarily for the export market. The farm, which is a joint venture between Ghanaian and Dutch interests, consists of a relatively small company-owned plantation of approximately 150 hectares and an outgrower scheme that includes nearly 1,500 local famers. According to the farm manager, when the farm was established in 1999, the company viewed the outgrower component as both an element of its corporate social responsibility commitment to the local community and as a mechanism to avoid the lengthy and costly process of acquiring land.

The ITFC outgrower scheme was established in 2001. It operates as a contractual arrangement under which participating farmers receive an interest-free “in-kind” loan of inputs such as seeds, fertiliser, irrigation facilities, chemicals, ploughing, and technical assistanc. The company, in exchange, receives a consistent volume of certified organically grown mangoes. It requires outgrowers wishing to participate in the program to clear their own parcels of land, which must be at least one acre in size. Outgrowers must also pay a commitment fee of one bag of maize (or its cedi equivalent) to register. In return, the farmers receive an in-kind loan, which according to the company, has a value of approximately USD7,000.

The seedlings begin bearing fruit in three to four years, and until then the farmers do not have to repay the loan. At that point, they must give 30 percent of their net sales each year until the debt is paid off. All mangoes produced by the farmer must be sold to ITFC while the debt remains. However, once a farmer pays off the loan, he/she is free to sell to any buyer. The price per kilo paid by the company is the international price, which is confirmed by the farmers’ association. To determine net earnings, the company deducts certain costs from the international price for cleaning, packing, transport, and providing extension services.

According to the ITFC farm manager, the key to the farms’ success has been its transparency with smallholder farmers, and the presence of a very strong farmers’ association—the Organic Mango Outgrowers’ Association (OMOA)—that gives smallholders relatively strong bargaining power with the company. OMOA is independent from ITFC and has its own board

and elected officers that are responsible for negotiating the seasonal price of mangoes with ITFC management and serving as the intermediary between farmers and the company on all farm related issues that arise.

ITFC's outgrower model has very different implications for smallholder tenure security than does the plantation investment model. While it is not yet clear whether ITFC's net impact on smallholder farmers is positive or negative, the company's approach appears to hold much more promise for local farmers and communities than would a plantation farm approach. The group of farmers interviewed (all men, most of whom had been outgrowers for 11 years, said they were generally pleased with their participation as outgrowers, as they could clear approximately 1,000 Ghana cedis per acre, even after all of the pricing deductions noted above. This was double what they could make for other crops.

Prairie Volta, Ltd. and Prince Obeng: The general manager for Prairie Volta Ltd. and Prince Obeng, a Ghanaian commercial farmer and investor, have both espoused a model of contract farming whereby the investor pays up-front for land development and field preparation, then contracts with recent graduates from agricultural programs to farm the land in 150-to-200 hectare parcels. Some smaller portion of the land could be contracted out to experienced local farmers, who perhaps could farm up to 50 hectares. An additional area could be used as a training ground for less experienced local farmers, who could learn from both the graduate farmers and the experienced local farmers. In the case of Prairie Volta, priority in selecting these "inexperienced" farmers would go to high school and junior high school graduates and then to women.⁶⁹ Prairie Volta plans to dedicate a significant amount (3,000 hectares) of its new 10,500 hectare acquisition to the larger-scale, educated outgrowers.⁷⁰

Neither investor has yet implemented this new outgrower structure. Advantages could include efficiency in farm production as well as skills training for at least some local farmers. Detriments include the fact that local people would not be prioritized for the larger-scale outgrower opportunities, which could undercut overall benefits from the investment to the community and also contribute to tensions within the community against the investor and graduate farmers.

Masara N'Arziki. Masara N'Arziki, a farmers' association in the three northern regions, was founded in 2009 to provide members with credit, training, and a guaranteed market at the beginning of the farming season (Yara Ghana, n.d.). The association provides services up-front to the farmers, who in turn deliver crops (maize at first, expanding to cotton and soy in 2014) and repayment of up-front costs to the association at the end of the season. The support package to farmers includes "fertilizers, hybrid seeds, herbicides, insecticides, spraying equipment, innovative farm implements, and technical advisory and training services to farmers on credit" (Yara Ghana, n.d.). The association is able to establish bulk markets for the maize in advance because it is assured of a steady line of supply. Masara N'Arziki members produced a combined 100,000 metric tons of maize in 2013, and yields have increased by up to 400 percent annually for members. Realized loan repayment rates are around 95 percent (Agbenyega 2014). In 2014 an expected 18,000 farmers will participate in the program (Agbenyega 2014). Co-founders of the association include Yara Ghana Ltd. and Wienco Ghana Ltd.

Although Masara N'Arziki is not a private company, it is an example of an innovative approach to provide outgrower services to smallholder farmers using a financially sustainable model. The question is whether private investors would be interested in similar models, wherein they would supply services to smallholder farmers but without an associated nucleus farm. These

⁶⁹Interview with Prairie Volta general manager, 17 June, 2014. Notes on file with the authors.

⁷⁰Interview with Prince Obeng, 14 June, 2014, Accra. Notes on file with the authors.

services could include, in addition to the kind of support package offered by Masara N’Arziki, access to milling, canning, drying, or other processing facilities. Multiple investors commented to the Team that a certain size of nucleus farm is essential to ensuring a stable supply to support operation of a processing facility (such as a rice mill), especially in the initial years of production.⁷¹ In the face of significant challenges in acquiring stable land rights in the Ghanaian customary context (especially in the South), it might be fruitful for GCAP and investors to explore investment options that involve only a very small amount of land to be acquired for a nucleus farm (e.g., for seed production, a model farm, and/or a value-added facility), with maximum focus on service provision to outgrowers.

Ghana cocoa production: Although cocoa is not one of the target crops for GCAP investments, cocoa production in Ghana has developed an innovative and effective method for providing smallholder farmers with incentives, and lessons learned from this approach help to expand the range of possible approaches to outgrower farming for staple crops as well. Under the cocoa production model, smallholder farmers are guaranteed a market for their product and receive technical production assistance and other benefits to their communities, including a share in profits from the cocoa. The investor (in this case, the Ghana Cocoa Board), on the other hand, benefits from a stable supply of high quality products.

Cocoa production is managed by the Ghana Cocoa Board, whose mission is to “encourage and facilitate the production, processing and marketing of premium quality cocoa, coffee and shea nut in the most efficient and cost effective manner and maintain best mutual industrial relations with its workers” (Ghana Cocoa Board website). The Board, established by the Ghana Cocoa Board Act 1984, operates independently but under the authority and supervision of the Ministry of Finance. The Board purchases cocoa beans that meet quality standards from local producers and sells them to local and export markets. The Board also supports farmers through subsidized inputs and a number of programs aimed at increasing productivity, such as training on best agronomic practices and environmental preservation, and improving social welfare, including support to education, healthcare, and basic infrastructure in cocoa farming communities (Ghana Cocoa Board website).

Coupled with the Board’s efforts to ensure that farmers receive fair prices for their crops, these programs provide smallholder farmers with the opportunity and incentive to increase their production of high-quality cocoa beans. Surveys reveal steady increases in household labour on cocoa production, the application of fertilizer (both the proportion of households using it and the amount applied), and the use of insecticides, contributing to increased production levels (Overseas Development Institute (ODI) 2007).

The Ghanaian cocoa industry is thus ensured a steady supply of high-quality products, while local farmers are able to retain their land rights and share in the economic benefits of their labour. The cocoa sector in Ghana has grown considerably in the last decade and has contributed significantly to Ghana’s economic development. According to the Ghana Cocoa Board, the sector employs nearly 800,000 farm families across six regions in the southern half of the country – Ashanti, Brong-Ahafo, Central, Eastern, Western, and Volta – and contributes over \$2 billion in foreign exchange each year (Ghana Cocoa Board website). Poverty among cocoa farmers has seen a dramatic decrease since the early 1990s; their poverty rate is now significantly lower than the national average (ODI 2007). The superior performance of the cocoa sector relative to other crops can be explained in part by high world market prices in recent years, but government interventions and a steady increase in the share of profits retained

⁷¹Interviews with Antika, GADCO, Prairie Volta. June, 2014. Notes on file with the authors.

by cocoa producers have played a significant role as well, by creating incentives for farmers to increase the production of quality cocoa (ODI 2007).

4.2.3 Conclusions and recommendations for positive innovations in outgrower and contract farming models

Potential benefits to contract and outgrower farmer schemes in Ghana are many and include:

- Outgrower and contract farmer schemes hold the potential to catalyse smallholder farmers within investment communities, allowing investors to reap the benefits from efficient and highly motivated production, while at the same time removing key constraints to smallholder farmers related to operating credit and secure markets.
- These schemes may foster wider benefit-sharing within communities hosting large-scale land-based investments.
- An outgrower approach reduces the need for land acquisition by the investor, and thus also increases tenure security for smallholder farmers within customary systems (although this may not be true with contract farming models).

Potential detriments and risks include:

- A lack of transparent and equitable mechanisms for choosing outgrowers (and especially contract farmers) in the community can strengthen elite social/economic structures and a sense of exclusion.
- Farmers often lack capacity to negotiate agreements on an equal playing field with investors.
- Interest rates on credit received by farmers are extremely high and can significantly reduce any profits that a farmer may make.
- Contracts and terms with investors are often unclear and unavailable to farmers.
- Farmers lack the means to enforce contracts.
- Shifting from traditional farming crops and methods can risk the loss of indigenous seeds and local knowledge, and mono-cropping can expose farmers to fluctuations in domestic and international markets.
- Challenges for investors include high transaction costs related to a large number of participating farmers as well as risks to stability in the supply of high quality production (relative to the stability most commercial farmers attribute to production on a nucleus farm).

Recommendations for mitigating risks and realizing the highest level of benefits from contract

and outgrower farming schemes:

- (1) To reduce risks and costs associated with land acquisition for both local communities and investors, investors should tailor business plans, where possible, to maximizing outgrower components while minimizing the size of the nucleus farm.
- (2) When choosing a contract farming model, investors and communities must carefully weigh the advantage and disadvantages of importing more skilled farming operators versus participation by community members, especially when community members (including migrant/settler farmers) have been displaced for the purpose of developing the land slated for contract farming.
- (3) The investor, working closely with the community, should first conduct a comprehensive social and environmental impact study (as required under the EPA Act), and share this broadly among community stakeholders.
- (4) The investor and community leaders should make model agreements and best practices available to communities in the local language(s). Provisions should be reviewed closely with all participating farmers. It may be useful to reduce key terms to one page that could be posted/made available to farmers.
- (5) The government should support communities in accessing technical assistance (e.g., objective legal services) in negotiating agreements. The government could support the appointment of an independent business consultant to work with the investor and communities in developing their agreement.
- (6) The investor should publicly disclose basic contract terms and criteria for selecting contract farmers.
- (7) At the outset, the investor, community, and participating farmers should establish communications and monitoring protocol for the lifetime of the agreement.
- (8) The government, CSOs, and investors could encourage development of farmers' associations and unions to strengthen communities' bargaining position.⁷²
- (9) The government and CSOs, with support from donors, could facilitate sharing of information on best practices between outgrower and contract farmer groups throughout Ghana and/or within specific regions.
- (10) Investors and farmers' associations could seek ways for farmers to bring their indigenous farming/crop knowledge to their outgrower/contract farming operations.
- (11) The investor, community, and participating farmers ought to establish procedures to hear and address grievances in a timely and impartial manner.

⁷²However, the team heard reports that past efforts by MiDA and others to develop farmer associations met with mixed success. Efforts to develop these associations outside the context of any outgrower or contract farmer scheme, and without a specific and productive purpose, may be less successful.

CONCLUSION

Creating profitable and sustainable outcomes through large-scale investments in land requires diligence on the part of both investors and communities to develop and sustain a strong working relationship through the lifetime of the investment. In Ghana this challenge is complicated by political, legal, and institutional gaps in the framework for land and investment governance that produce impediments to efficient, equitable, and socially inclusive investment. Addressing these gaps will be critical to creating an enabling environment that naturally fosters the kind of investment that is beneficial for all parties involved.

Given that fully developing this kind of enabling environment will take some time in Ghana, there are a number of concrete steps and approaches that investors, communities, and government officials can take now to help foster successful ventures:

- (1) Bridge the gap in expectations and perspectives on commercial agricultural investments between customary communities and investors.
- (2) Clarify processes by which investors identify the correct customary landholding entities.
- (3) Obtain and retain a social license to operate.
- (4) Improve the capacity of local communities and governments to negotiate commercial agricultural leases on an even playing field with investors.
- (5) Develop community processes for land-related investment decisions that are inclusive and transparent, and that foster accountability.
- (6) Ensure that social and environmental impact assessments are conducted in accordance with Ghanaian law and international best practices.
- (7) Ensure that women's land rights are protected and that women share in the benefits of commercial agricultural investment.
- (8) Ensure that benefits to communities constitute a fair exchange for the loss of a primary asset of production.
- (9) Create equitable benefit-sharing mechanisms within the community.
- (10) Address claims to state lands where compulsory acquisition was not fully documented and/or compensated.
- (11) Explore new ways to deal with land fragmentation.
- (12) Ensure that systems are in place for monitoring and enforcing the lease agreement.

Innovations in outgrower and contract farming, as well as various types of lease payments, may help to more equally distribute the benefits from large investments between the investor and

the community and among community stakeholders. Farming arrangements incorporating a substantial outgrower component require the investor to acquire less land. Given the challenges associated with land acquisition in Ghana, investors may therefore want to explore outgrower options first. But for smallholder farmers, the implications for land rights security differ between outgrower arrangements and contract farming, and field research for this report indicated that some of the contract farming schemes being piloted in Ghana would displace local smallholders without any guarantee of their inclusion in the new contract farm scheme.

Innovations in payment schemes, such as revenue-sharing and equity-sharing agreements, are not widely used in Ghana, though a few investments have begun using—or are considering using—a payment model based on a percentage of the gross revenues. Determining equitable terms for each investment would require technical expertise by professional land valuers, as well as experts in commercial agricultural businesses, such as accountants and/or lawyers. Without access to these services, communities will almost never be able to bargain effectively with commercial investors or understand the range of payment options available to them for their land.

Findings in the this report will need to be refined and expanded upon as investors, communities, and government agencies utilize the MLA, the Guidelines, and the Ghana Lands Commission’s Guidelines for Large-Scale Land Acquisitions. So that customary communities, investors, and the state can build on lessons learned, it will be important to regularly collect and share information on new and emerging practices among stakeholders in Ghana. Establishing a multi-stakeholder forum at the national and/or regional levels could be one way to leverage successful practices and emerging trends for the good of all parties interested in profitable, sustainable land-based investment in Ghana.

APPENDIX 1: METHODOLOGY

Background research

The research for this report and the associated Model Lease Agreement (MLA) and Guidelines began with a detailed review of existing knowledge on landownership, the legal and institutional arrangements for commercial agricultural investments, and insights from other GCAP-related programs and activities. This provided a firm background to develop a matrix of stakeholders who were to be engaged in the field research in the seven regions covered by GCAP (Upper West, Upper East, Northern, Brong Ahafo, Eastern, Volta, and Greater Accra). The background literature survey helped to frame the scope and scale of the research and was the starting point for developing specific research questions for respective stakeholders.

Team composition

The field research team (“Team”) consisted of three lawyers from Landesa (Michael Lufkin, Jennifer Duncan, and Leslie Hannay), as well as John Bugri and Eric Yeboah from Kwame Nkrumah University of Science and Technology (KNUST). Mohammed Saani Iddrisu joined the Team as a logistics coordinator for the three northern regions, and William Botchway served as the logistics coordinator for the southern regions. The Team hired and worked with qualified local interpreters in each location.

Geographic approach

The Team conducted field research between the 2nd and 24th of June 2014, except that research for the Brong Ahafo Region was conducted between the 15th and 18th of July. After the inception meeting with the GCAP team on the 2nd of June, the Team began interviews with stakeholders in Accra. The Team departed for the Northern Region on the 4th of June and continued its engagement with stakeholders there until the 8th, when it split into two smaller groups assigned to each of the Upper regions. The Teams continued with the field research in these two regions until the 11th and returned to Accra on the same day. The Team interviewed stakeholders in Accra through the 14th. While in Accra (on the 13th), it met with GCAP for a mid-trip report and presented issues and options as ascertained through the field research to date. The Team refined its remaining field research in the Accra Plains based on feedback at this meeting and continued on to the Volta and Eastern regions on the 15th, returning to Accra on the 19th for final consultations and engagements with GCAP and other interested parties. The field research in the Brong Ahafo Region was carried out by Bugri and Yeboah between 15 and 18 July.

Range of stakeholder consultations

The Team engaged with a broad range of stakeholders including but not limited to investors, traditional authorities, state institutions, and agencies (such as the Lands Commission, Ghana Investment Promotion Centre, Ministries of Trade and Industry, Finance, Gender, and Justice, and the Environmental Protection Agency (EPA) among others), as well as financial institutions that have an interest in agricultural investment. Other stakeholders included NGOs, farmers and FBOs, community members (groups comprising men only, groups comprising women only, and some mixed groups), and local government officials.

Strategy for data collection

The Team used several strategies for collecting information, including individual interviews, focus group discussions, and documentary review. Adopting a flexible and iterative approach allowed the Team to incorporate important emerging insights into the study. The Team shared and discussed findings rigorously throughout the field research.

Analytically, the design and conduct of the field survey recognized the different phases of typical commercial agricultural investments—(1) the preparatory or pre-investment phase; (2) the initial engagement period between the community and the investor; (3) the assessment and consultation period; (4) the negotiation and consent phase; and (5) the monitoring and enforcement phase—each of which raised specific issues and challenges. The Team sought to identify the issues at each phase before exploring the way forward through a synthesis of local and international best practices.

Risks and qualifying factors

Research findings presented in this report are subject to several caveats:

- (1) In some interviews or group discussions, the attendance or nearby presence of an authority figure (such as a chief, elder, family head or government official) may have compromised the information provided by interviewees or discussants. The Team attempted to mitigate this risk by confirming key pieces of data through multiple means and sources, including individual interviews, wherever possible.
- (2) Although the Team's interpreters were of high quality, some precision is inevitably lost through interpretation. Also, in group interviews it is common for English speakers to dominate the conversation, posing a challenge to a two-way information flow and raising the risk of bias toward receiving inputs from those with higher levels of formal education—which could skew the Team's impressions and findings. The Team attempted to mitigate these challenges through multiple-source confirmation as noted in the point above, and by insisting on communication in the local language in group settings.
- (3) The Team had very little time in each of the seven regions, given its need to cover a wide geographic range. The Team followed an intensive schedule of meetings, including with representatives from multiple stakeholder groups (e.g., men and women farmers, customary authorities, investors, government officials) in each region. The Team also attempted to prioritize key GCAP investment sites for targeted research. However, the list of GCAP-related investments is extensive, and it was possible for the Team to visit only a sample of the total on the list in the time allotted. In addition, thorough research around each investment site required time to identify the full range of key stakeholders (which is seldom possible to do in advance), ample opportunities to cross-check information and, ideally, a chance to vet initial findings in a group setting with a variety of stakeholders. This full process could not be used in every setting given the project constraints. The Team did cross-check information as possible within time constraints and, in some cases, was able to verify certain points afterward through secondary research.

Table 1. Meetings conducted in Ghana in June-July 2014

Date	Organization/Group	Name and/or Position	Location
2 June	GCAP	Alabi Bortey and GCAP Team	Accra
2 June	Ghana Investment Promotion Centre	Augustine Otoo, Director, Investor Services; Richard Adjei, Principal Officer, Research and Business Development	Accra
3 June	Ministry of Finance	Kofi Atakli	Accra
3 June	USAID and World Bank	Brian Conklin, Dep. Office Director, Agriculture Team Leader (USAID); Dr. Fenton Sands, Sr. Food Security Officer (USAID); Ellis Naamwinkum Ekekpi, M&E Specialist (USAID); Johannes Georges Pius Jansen, Ghana Commercial Agriculture Team Lead (World Bank)	Accra
3 June	Ministry of Trade and Industry	Papa Bartels, Director – Logistics and Value Chain Division	Accra
3 June	Africa Atlantic	Kris Klokkenga, Managing Director	Accra
4 June	GIPC, Tamale Regional Office	Christopher Sedor, Senior Investment Promotion Officer	Tamale
4 June	Tamale Metropolitan Council	Director	Tamale
4 June	Gepkegu Traditional Authority	Gulkpe-Na (Chief of Tamale) and Elders	Tamale
5 June	Regional Lands Commission	Peter Osei-Wusu, Regional Lands Officer; Samuel Anini, LVD Head; John Larri, Lands Commission Lawyer	Tamale
5 June	Office of the Administrator of Stool Lands	Zakaria Kwasi Baffour, Anas Abdulai	Tamale
5 June	Ministry of Justice	Mr. Kudus (lawyer); Mr. Adam Abdul-Kudu, Accountant; Mr. Hafiz, and Mr. Godwin	Tamale

5 June	Ministry of Gender	I. B. S. Zakari-Saah, Director; Busura Alhassa, Deputy Director; and Jacob Ndego, Accountant	Tamale
5 June	Gepkegu Customary Land Secretariat	CLS Coordinator	Tamale
5 June	Peasant Farmers Association	Mohammed Adam Nashiru, Director	Tamale
5 June	UrbanNet	Rashid Zakariah, Director	Tamale
5 June	GCAP Zonal Office	Steven Debere, Zonal Coordinator; Mavis Yamoah, Zonal Administrator	Tamale
6 June	Jenapken Traditional Authorities	Jenapken Divisional Chief and elders	Jenapken, Northern Region
6 June	CARE – International	Agnes Lariba, Project Manager, Pathways Project	Tamale
6 June	Sugru Mboribuni Farmers Group,	Issifu Mahama, Chairman; Sulemana Zakari, Secretary	Tamale Region
6 June	Surumbuarabuni Farmers Group	Farmer group	Tamale Region
6 June	Kalariga Men Farmers Group	Farmer group	Kalariga
6 June	Agric Development Bank	Branch Manager	Tamale
6 June	Avnash Industries	Manish Shukla, General Manager, Edible Oil	Tamale
6 June	Bonzali Rural Bank	Paul Atsu Fiawou, General Manager	Tamale
6 June	Grassroots Sisterhood Foundation	Fati Alhassan, Director	Tamale
6 June	Tehisuma Women's Producers Association	Women members	Tamale
7 June	CARD	Naresh Shukra, Director	Tamale
7 June	Wienco Cotton	Patrick Dierreart, General Manager	Tamale
7 June	Integrated Tamale Fruit Company	Louis de Bruno Austin, Project Manager	Tamale
7 June	Savelugu Traditional Authorities	Yo-Na, Paramount Chief	Savelugu
7 June	Savelugu Customary Land Secretariat	Mr. Yoo, CLS Coordinator; Mr. Bagulana, sub-chief; Mssrs. Mustapha; Adam Yakubu; Abdul Rahamani Mohammed	Savelugu
7 June	Savelugu Traditional Authorities	Paramount Chief and Elders	Savelugu
7 June	Nyoglu Traditional Authorities	Village Chief and elders	Nyoglu
7 June	Women's Group at Nyoglu Village	Women Farmers	Nyoglu
7 June	Tuntiyah (Women's NGO)	Director	Tamale

9 June	Zasilari Ecological Farms Project (ZEFP)	Yussif Sulemana, Environmental Program Officer ; Founder and Executive Director	Walewale (Nasia Valley)
9 June	Ashibiri Self-Help Initiative	Sulemana Fatawu Nantomah	Nasia Valley
9 June	Pump is Life (local NGO)	Yussif Abdul-Rahaman, Team Leader	Nasia Valley
9 June	Sulemana Fatawa	Organic farmer	Nasia Valley
9 June	Tisuntaba Farmers Association	Mrs. Hajia Memunatu Mahama (Mango farmer)	Nasia Valley
9 June	Nasia Traditional Authority	Shirana, Nasia Town	Nasia Valley
9 June	Land Commission	Mr. Charles Agna, Head of Valuation Division; Mr. Eric Mwim, Head of Public and Vested Lands	Bolgatanga
9 June	Lands Commission	Lands Officer	Wa
9 June	Wa Traditional Authorities	Wa Head of Family	Wa
9 June	Song Soma	Local small-scale farmer	Wa
9 June	Antika Company Limited	Mr. Antika	Wa
9 June	MoFA, Wa Regional Office	Joe Falong, Regional Director	Wa
9 June	Municipal Assembly	Mr. Majeet, Land Officer	Wa
10 June	Tono Irrigation District, ICOUR,	Sebastian Begina, Deputy Managing Director	Tono
10 June	Tono Irrigation Farmers Cooperative Union (TIFCU)	Members and Executive Leadership	Tono
10 June	MoFa, Upper East Regional Office	Mavis Bulmua, Statistics, Research and Development Directory; Mr. Martin Aliibo, Monitoring and Evaluation Officer	Bolgatanga
10 June	Bolgatanga Municipal Assembly	Coordinating Director, Municipal Planning Officer	Bolgatanga
10 June	Tongo-Beo and Kumbosco Traditional Authorities	Tendana Tongo-Beo and Kumbosco	Bolgatanga Area
10 June	Office of the Administrator of Stool Lands (OASL)	John Larry Kwame, Assistant Stool Lands Officer	Bolgatanga
10 June	Gwollu Traditional Authorities	Kuoru Kuri-Buktia Limann, Attorney and Paramount Chief	Gwollu
10 June	Gwollu District Assembly	Issla Imoru, District Assembly Coordinator; Julius Aamagr, Director	Gwollu

10 June	MoFA, Sissala West District	Deputy Director	Gwollu
11 June	Savannah Accelerated Development Authority	Mr. Abbas Karibe Iyo	Tamale
11 June	Wamale Traditional Authorities	Wamale Division Chief	Wamale
11 June	Wamale Community Development Management Committee	Men and women Committee members	Wamale
11 June	Damongo Traditional Authorities	Paramount Chief	Damongo
11 June	Canteen Cashew Women Growers Association	Women's Group	Damongo
11 June	Damongo Customary Land Secretariat	Mark Lermu, Director	Damongo
11 June	Ministry of Gender	Alijata Haruna, District Officer	Damongo
12 June	Lands Commission - Damongo	Mr. K. Poku	Accra
12 June	Land Consultant	Dr I. B. Karikari, Formerly of LAP	Accra
12 June	CICOL	Lilian Bruce, Executive Director	Accra
13 June	Lands Commission	Stephen Kumado	Accra
13 June	World Bank	Jon Lindsay	Accra
13 June	Land Consultant and Judge	Rene Dogbe, Land Consultant Honourable Rebecca Sittie, High Court	Accra
14 June	Investor and Farmer	Prince Obeng, Nuts for Growth	Accra
16 June	GADCO Farms	Mr. Dats	Fievie
16 June	Fievie Traditional Authorities	Zikpuitor Awuku Atakli, Chiefs and Elders	Sogakope
16 June	GADCO, Women's Farmer Group	Women Farmers	Sogakope
16 June	GADCO, Men's Farmer Group	Male Farmers	Sogakope
16 June	GADCO Community Manager	Julius Ameku, GADCO Community Manager	Sogakope
16 June	South Tongu District Assembly	Mr. Mawuko, District Chief Executive; Mr. Philemon K. Tsekpo, Principal Development Planning Officer	Sogakope
16 June	Brazil Agro	Lidiane Jaconi, Managing Director	Kpenu
16 June	Mawuena Pepper Farmers Association (Men and women's groups)	Farmers' association members	Dabala
16 June	Weta Irrigation Scheme	Seth Dzokoto, David Ocloo, Agakpe Mawuku, Samson Amegashie and Philip Nonkyi	Weta

16 June	Weta Farmers' Cooperative	E.K. Boateng, Kojo Agbogle Botre, Ben Klemogo and Martin Damale	Weta
17 June	ACDI/VOCA-Ghana	Satch Avudzi, Regional Officer	Akuse
17 June	VegPro	Jagdish Patel, General Manager	Akuse
17 June	VegPro Women Farmers Group	Women Farmers	Akuse
17 June	Torgome Traditional Authorities	Togbe Odeotu II, Chief of Torgome; Togbe Boakye II, Sub- Chief; Togbe Dei II, Sub-Chief; John Awiah, Chief Linguist; Mama Adokua, Queen Mother; Cephas Dotse Amezogbe, Gen. Sec to Trad. Council; Christian Anaebo, Assemblyman	Torgorme
17 June	Prairie Volta Limited	Farm Manager	Aveyime
17 June	Farmer Groups (Women's Group, Men's Group, Migrant Famers)	Farmers	Aveyime
17 June	Battor Traditional Authorities	Paramount Chief and Elders	Battor
17 June	MoFA, Battor Office	Mr. Ahiable, Agric Director	Battor
17 June	MoFA, Sogakope Office	Mr. Nutekor, Agric Director	Sogakope
18 June	Asutuare Mango Farmers	Farmers	Asutuare
18 June	Asutuare Rice Farmers	Farmers	Asutuare
18 June	Kpong Irrigation Scheme, Ghana Irrigation Development Authority	Albert Swatson, GIDA Field Operations Manager; Mr. Aduah, Scheme Manager; Mr. Jonathan Mensah, Maintenance Manager	Kpong Irrigation Scheme Offices
18 June	Osudoku Cooperative Society (Women's Group)	Women Farmers	Kpong Irrigation Scheme
18 June	Men's Cooperative Group, Kpong Irrigation Scheme	Men Farmers	Kpong Irrigation Scheme
18 June	Kpong Traditional Authorities	Nene Abloh V; Nene Narh Akakposo	Kpong Irrigation Scheme Offices
19 June	Lands Commission	James Dadson, Arthur Edem Ametetwee, Michael Asomanin, Eunice Martey	Koforidua
19 June	MoFA Koforidua Regional Office	Dr Fred Twun and James Asante	Koforidua

19 June	Koforidua Municipal Assembly	Dr Kwaku Owusu Acheampong, Municipal Chief Executive	Koforidua
19 June	Krobodan (NGO)	Joshua Nyartey	Koforidua
19 June	GCAP Stakeholders Workshop	Numerous stakeholders	Mepe
20 June	Torgome Traditional Authorities	Clan/family heads	Torgorme
20 June	MoFA	Dr Evans Lawson, Municipal Director of Agric.	
20 June	Volta Regional Lands,	Francis Doe, Chairman	Accra
20 June	OASL	Mamme Ama, Regional Officer	Accra
20 June	Agribusiness in Sustainable Natural African Plant Products (ASNAPP) (grassroots agricultural NGO)	Julie Asante-Dartey	Accra
20 June	Ghana Irrigation Development Authority	Dr. Ben Nyamadi, CEO	Accra
20 June	Land Administration Project (LAP-2)	Kofi Abakah Blankson, Sarah Antwi-Boasia	Accra
20 June	Land Consultant	Dr. Odame Larbi	Accra
22 June	GCAP	Robert Abaane, Social Science Specialist	Accra
23 June	University of Ghana Centre for Gender Studies and Advocacy	Dzodzi Tsikata, Professor	Accra
23 June	AgDevCo	Tom Phillips, Ghana Country Manager	Accra
23 June	ADB Bank	Mr. Akobeng	Accra
15 July	Traditional Authorities, Fiapre	Chief of Fiapre and two Elders	Fiapre
16 July	Brong Ahafo Regional Lands Commission	Mabel Nyamadi, George Boateng, Christie Opoku and James Dadson	Sunyani
16 July	Municipal Assembly	Samuel Donkor, Municipal Coordinating Director	Sunyani
16 July	MoFA, Sunyani Office	Dr. Cyril Quist, Regional Director	Sunyani
16 July	Action Aid International	Programme Manager	Sunyani
17 July	Sky 3 Farms	Kwasi Bonde	Kintampo
17 July	Bush Dr Farming Ltd	Dr. Apaanga	Kintampo
17 July	Opportunity International Savings and Loans	Morris Bakang	Kintampo
17 July	World Vision International	Clement Yakubu	Kintampo
18 July	Kintampo Traditional Authorities	Nana Oguakro, Representative of Nkronza Paramount Chief	Kintampo
18 July	MoFA, Kintampo Office	Mr. Dennis, Municipal Director	Kintampo

Appendix 2:

LIST OF PRIMARY LEGISLATIVE INSTRUMENTS RELEVANT TO MODEL LEASE AND COMMUNITY/INVESTOR GUIDELINES

Policy, law, or regulatory instrument^a	Year in force
Administration of Lands Act (Act 123)	1962
Administration (Northern Territories) Ordinance (Cap 111)	1902
Alternative Dispute Resolution Act (Act 798)	2010
Chieftaincy Act (Act 759)	2008
Companies Act (Act 179)	1963
Concessions Act (Act 124)	1962
Concessions Ordinance (Cap 136) and Concessions (Amendment) Ordinance	1951
Conveyancing Act (NRCD 175)	1973
Constitution of the Republic of Ghana	1992
Environmental Protection Agency Act (Act 490)	1994
Farm Lands (Protection) Act (107)	1962
Forestry Commission Act (Act 453)	1993
Forests Ordinance (Cap 157)	1951
Forests Protection (Amendment) Act (PNDCL 142)	1986
Forest Protection Act (NRCD 243)	1974
Ghana Investment Promotion Centre Act (Act 865)	2013
Head of Family (Accountability) Act (PNDCL 114)	1985
Intestate Succession Act (PNDCL 111)	1985
Land and Native Rights Ordinance (Cap 147)	1927
Lands Commission Act (Act 767)	2008
Land Registry Act (Act 122)	1962
Lands (Statutory Wayleaves Act) (Act 186)	1983
Land Title Registration Act (PNDCL 152) and Land Title Regulation (LI 1241)	1986
Limitation Act (NRCD 54)	1972
Local Government Act (Act 462)	1993
Marriage Ordinance	1884
Marriage of Mohammedans Ordinance	1907
Minerals Commission Act (Act 450)	1993
Mining and Minerals Act (Act 703)	2006
Office of Administrator of Stool Lands (Act 481)	1994
Public Conveyancing Act (Act 302)	1965
Public Lands (Protection) Act (NRCD 240)	1974
State Lands Act (Act 125)	1962
Survey Act (Act 127)	1962
Water Resources Commission Act (Act 522)	1996

^a Information in this table is excerpted in part from GCAP 2013: xi, x.

Appendix 3:

DESCRIPTION OF PRIMARY LEGISLATIVE INSTRUMENTS RELEVANT TO MODEL LEASE AND COMMUNITY/INVESTOR GUIDELINES

Constitution of the Republic of Ghana, 2002

Ghana's Constitution establishes dual legal frameworks for the governance of land: formal and customary.

The Constitution vests all public lands in the President of Ghana, who holds them in trust for the Ghanaian people. Article 257, however, explicitly excludes from the category of public land those lands in the Northern, Upper East, and Upper West regions that were vested in the GoG at the time of the promulgation of the Constitution.⁷³ The article declares instead that such land will vest in the owner or appropriate skin. Article 267 vests stool lands in the appropriate stool, forbids the creation of any freehold interest in stool land, and establishes the Office of the Administrator of Stool Lands, which collects and disburses revenue from stool land. Under the Constitution, non citizens cannot gain a freehold interest over land, although they may lease land for a term of up to 50 years (GoG 1992; GOG 1994).

The Constitution allows for compulsory acquisition of property only where there is a clearly stated interest in defence, public safety, public morality, public health, and town and country planning, and it requires the prompt payment of fair and adequate compensation.⁷⁴ (Constitution, Art. 20 (1) and (2)). Land may not be compulsorily acquired unless the state demonstrates the necessity for the acquisition and any land so acquired must be used for the public interest or for the public purpose for which it was acquired (Id). The Constitution also grants the property owner or interest holder the right to access the High Court for a determination of the amount of compensation to which he or she is entitled, and requires resettlement of any displaced inhabitants (Id).

The Constitution also declares all persons equal before the law and prohibits discrimination on the basis of gender (Const., Art. 17).

Laws Related to Land and Environment

State Lands Act, 1962

The 1962 State Lands Act, which retained the provisions of the 1960 State Property and Contracts Act, currently governs compulsory acquisition and compensation.⁷⁵ The Act vests state property in the President, on behalf of the Republic and gives the President the power to compulsorily acquire land in Ghana. The Lands Commission is responsible for assessing the compensation to be paid to landowners. The Mining and Minerals Act, 2006, empowers the President to acquire or authorize the occupation and use of land where the land is required to secure the development or utilization of a mineral resource. The Act includes provisions for the compensation or resettlement of lawful occupiers of the land (Larbi and others 2004; Government of Ghana 1992; Government of Ghana 1962; Government of Ghana 2006).

⁷³This paragraph is excerpted in full from Gaafar, Lufkin, and Duncan 2013: 8.

⁷⁴This paragraph is excerpted in full from Duncan, Gaafar, and Lufkin 2013: 43.

⁷⁵This paragraph is excerpted in full from Gaafar, Lufkin, and Duncan 2013: 10.

The State Lands Act 1962 (Act 125) is the primary instrument used to facilitate land acquisitions by the State.⁷⁶ The Act requires that a notice of acquisition be served on persons with an interest in the land to be acquired, occupiers of the land, and the traditional authority in the area; and that the notice be affixed to the land and published in the local newspapers (State Lands Act, Section 2). The Act does not require that the notice contain any particulars other than to identify the land being acquired. Under article 258 of the Lands (Amendments) Act of 2000, persons with an interest in the land can submit claims for compensation but must do so within six months of publication of the notice, and compensation may be awarded in the form of the market value, the replacement value, the disturbance cost, or land of equivalent value (Id. Section 4). If there is a dispute over the compensation to be paid, the matter is referred to a tribunal (Id. Sections 3 and 4).

Lands Commission Act, 2008⁷⁷

The Lands Commission Act of 2008 formalized the merger of several major land sector agencies, namely the Survey Department, the Land Title Registry, the Land Valuation Board, and the Lands Commission Secretariat, into one body known as the Lands Commission, under the authority of the Ministry of Lands. The Commission is charged with a number of functions that impact the management and administration of customary lands, including but not limited to:

- Advising the government, local authorities, and traditional authorities on the policy framework for the development of particular areas of the country to ensure that the development of individual pieces of land is coordinated with the relevant development plan for the area concerned;
- Advising on, and assisting in the execution of a comprehensive program for the registration of title to land as well as registration of deeds and instruments affecting land throughout the country;
- Facilitating the acquisition of land on behalf of the government;
- Minimizing or eliminating, where possible, the sources of protracted land boundary disputes, conflicts, and litigations in order to bring their associated economic costs and socio-political upheavals under control; and
- Promoting community participation and public awareness at all levels in sustainable land management and development practices to ensure the highest and best use of land.

In carrying out these functions the Commission is expected to collaborate and coordinate with customary institutions responsible for the administration of stool, skin, family, or community-owned land.

Office of Administrator of Stool Lands Act, 1994⁷⁸

The Office of the Administrator of Stool Lands Act of 1994 provides the framework for the management of customary lands where allodial title is vested in the chief or other leader. The allodial landowner retains customary landownership but certain land management responsibilities, mainly financial, are administered by the state on behalf of the customary

⁷⁶This paragraph is excerpted in full from Duncan, Gaafar, and Lufkin 2013: 43.

⁷⁷This section is excerpted in full from Gaafar, Lufkin, and Duncan 2013: 9.

⁷⁸This section excerpted in full from Gaafar, Lufkin, and Duncan: 8-9.

owners. The Stool Lands Administrator is tasked with the establishment of a stool lands account for each stool, as well as the collection and disbursement of rents, dues, royalties, and other revenues from the stool land. Those revenues are distributed as follows:

- 10 percent to the Office of the Administrator to cover administrative expenses. Of the remaining funds:
- 25 percent to the stool through the traditional authorities for the maintenance of stool land;
- 20 percent to the traditional authorities; and
- 55 percent to the district authority that has authority over the area in which the stool land is located.

In addition to the revenue-related responsibilities, the Administrator is also required to consult with traditional authorities on matters related to the administration and development of stool land and is tasked with coordinating with traditional authorities, the Lands Commission, and other relevant government agencies in the creation of policy frameworks for the development and management of stool lands.

Land Title Registration Law, 1986 (PNDCL. 152) and Land Title Regulation, 1986 (L.I. 1241)

Ghana currently operates on both a deed and title registration system.⁷⁹ Efforts have been made since the 1980s to phase out deed registration and transition to a pure title registration system, but title registration remains limited to Kumasi and the Greater Accra Region. The Land Title Registration Act of 1986 establishes a Land Title Registry for the registration of titles and interests in land, and lays out the registry’s responsibilities and powers. The Act provides for registration of allodial title, usufruct/customary law freehold, common law freehold, leasehold, and customary tenancies. The Act also affirms the chief registrar’s right to compel registration of property. Registration of titles covering all interests in Ghana is an explicitly stated policy action under the National Land Policy.

Conveyancing Act, 1973

The Conveyancing Decree of 1973 requires that most conveyances involving customary lands be written and/or recorded if for more than a three-year period.⁸⁰ The Decree renders non-written transactions, unless categorically exempted, invalid.⁸¹ Although customary oral grants of land are exempted from the writing requirement, the Act requires that they be recorded and signed by the transferor, as per forms contained in the Act’s First Schedule.⁸²

Limitations Act, 1972⁸³

(1) No action shall be brought to recover any land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it, or if it first accrued to some person through whom he claims, to that person.

⁷⁹This section excerpted in full from Gaafar, Lufkin, and Duncan: 9.

⁸⁰Conveyancing Decree, 1973.

⁸¹Conveyancing Decree, 1973: sec 2.

⁸²Conveyancing Decree, 1973: secs. 4-5.

⁸³This section excerpted in full from Duncan, Gaafar, and Lufkin 2013: 13.

- (2) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (in this section referred to as “adverse possession”).
- (3) Where a right of action to recover land has accrued, and thereafter, before the right of action is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to accrue until the land is again taken into adverse possession.

Whether the right of adverse possession as established in the Limitation Act would apply to illicit occupants of public land in Ghana is not clear, although a recent case indicates that adverse possession may apply to public lands, provided it is uninterrupted.⁸⁴ The twelve-year statute of limitations for recovery of land, established by Section 10 of the Limitation Act, is not explicitly limited to private land. If adverse possession is in fact possible on public land, then it could possibly be utilized as a legal basis for formalizing these occupants’ rights to the land.

Environmental Protection Act, 1994, and Environmental Assessment Regulations, 1999

The Environmental Protection Act consolidates Ghana’s previously existing laws on the environment and establishes the EPA. The Agency is charged with advising the Minister on environmental policy, coordinating government activities regarding the environment and industrial waste management and ensuring compliance with EIA requirements, among many other functions (EPA 1994, Section 2). The Act also establishes a National Environment Fund for environmental education for the general public, research and investigations into the Agency’s functions, as well as for any other purposes determined appropriate by the Agency and Minister (Section 16-17).

The EPA has the authority to require any person to submit an EIA when it determines that the activity has, or is likely to have an adverse environmental impact (Section 12(1)). The Agency can also issue an enforcement notice requiring the person to take specific steps to reduce the environmental or health threat or cease the activity completely if necessary, and to fine or imprison violators of an enforcement notice (Section 13).

The Environmental Assessment Regulations 1999 (LI 1652) provide some protection for local communities. They require persons undertaking activities that are likely to have significant impacts on the environment to register with the EPA and obtain environmental permits before commencement of the activity. The Regulations also describe activities for which an environmental permit is always required. Such activities include the clearing of over 40 hectares of land for fruit or vegetable production; the clearing of over 40 hectares of community pasture; the clearing of any land in an environmentally sensitive area; and the management of forestland primarily for timber (Schedule I). In evaluating applications for permits, the EPA must consider the concerns of the general public, paying particular attention to the concerns of the immediate residents of the areas (Section 5(1(c))). The impact statement submitted by the applicant must also include: “(e) an identification of existing environmental conditions including social, economic and other aspects of major environmental concern; (f) information on potential, positive and negative impacts of the proposed undertaking from the environmental,

⁸⁴The Lands Commission recently won an appeal in a case revolving around family lands in Accra that were compulsorily acquired for airport expansion but were not utilized. The original owners took over on the basis adverse possession, and the court of first instance ruled in their favour. However, on appeal, it came to light that possession was interrupted, and thus, the appeal court reversed the decision of the earlier court. However, the case demonstrates that adverse possession may potentially be used as a basis for ownership, even on public land (email communication from Dr. John Tiah Bugri, 12 October, 2013).

social, economic and cultural aspects in relation to the different phases of development of the undertaking; (k) consultation with members of the public likely to be affected by the operations of the undertaking” (Section 12). It must also address any potential changes in social or cultural patterns as a result of the reduction of available resources (Section 14(1)(h)). In addition, the regulations require the EIA to be reviewed at a public hearing, with sufficient notice to residents. Recipients of a permit are required to submit an annual environmental report to maintain the license (Section 25), and any aggrieved person has the right to submit a written complaint to the Minister and have a panel convened to hear the complaint within 14 days (Section. 27).

Laws Related to Investment

Ghana Investment Promotion Centre Act, 2013

The GIPC Centre is a government agency established in 1994 through an Act of Parliament (Act 478) and is responsible for coordinating and monitoring all investment activities in Ghana. The 1994 GIPC Act was replaced on July 18, 2013 by Ghana Investment Promotion Centre Act, 2013 (Act 865) to reflect changing economic dynamics for Ghanaian enterprises. The new Act has a broader coverage in terms of entities required to register compared to the repealed GIPC Act 478. That is, the new Act 865 requires that all entities regardless of their capital, ownership structure or sector of operation register with the GIPC. Further, Act 865 extends the activities that are reserved solely for Ghanaians and increases the minimum capital requirements for entities with foreign participation.

The purpose of the GPIC is to encourage and promote investment in the country as well as champion the coordination and monitoring all investment activities. It was established to advise and support investors, and to be a hub for information on optimum business opportunities. The functions of GIPC are described in Appendix 5 below.

Companies Act, 1963

A company is the form of legal entity that investors usually prefer to establish. The Companies Code, 1963 (Act 179) provides for model regulations for the various types of permissible companies, the number of directors, the shareholding structure, the minimum capital requirements, company secretary, auditors, and the nature/business of the company.

Dispute Resolution under the Code: Section 324 of the Code suggests that the High Court is the reference point for seeking redress to any grievance or disagreement under the code. The traditional legal response to disputes between parties has been for lawyers to initiate the litigation process by filing a complaint or motion in court. (It takes an average of two years for a civil matter to be concluded in a typical High Court in Ghana. Process is held in open court and is confrontational or adversarial in nature; it lacks privacy and confidentiality.)

Alternative Dispute Resolution Act, 2010

This was passed in May 2010 to replace the Arbitration Act, 1961 (Act 38), which had become outdated and lagged behind contemporary arbitration and other Alternative Dispute Resolution (ADR) practices. The ADR Act has five parts, 138 sections, and five schedules: Part 1 constitutes Arbitration; Part 2 Mediation; Part 3, Customary Arbitration; Part 4, the Alternative Dispute Resolution Centre; and Part 5 Financial, Administrative, and Miscellaneous provisions.

Key provisions of the Act as related to LSLBI include:

- (1) Customary Arbitration (Section 89-91) may be important in Corporate Governance because of the prevalent land acquisition and land disputes problems between companies and traditional families that own the land in Ghana.
- (2) The Act defines mediation as the use of a neutral third party to resolve a dispute (see Section 66-68). It is considered “a nonbinding process in which the parties discuss their dispute with an impartial person who assists them to reach a resolution.” But Section 81 (3) of the ADR Act states that “where the parties sign the settlement agreement, the parties shall be deemed to have agreed that settlement shall be binding on the parties and persons claiming under them respectively.”
- (3) ADR will be incorporated into the District Courts, the Circuit Courts, and the High Courts.

Public-Private Partnership Policy, 2011

The PPP framework provides certainty to all stakeholders that the GoG is committed to partnering with the private sector to improve the quality, cost-effectiveness, and timely provision of public infrastructure and services in the country, taking advantage of the private sector’s delivery and project completion expertise and capabilities for the benefit of the people.

The PPP’s aim is to encourage and facilitate investment by the private sector by creating an enabling environment for PPPs—where value for money could be clearly demonstrated—as well as increase the availability of public infrastructure and services and improve the service quality and efficiency of projects. It is also to encourage and promote indigenous Ghanaian private sector participation in the delivery of public infrastructure and services.

Key provisions:

- The scope, guiding principles for PPPs including value for money, risk allocation, user ability to pay, customer rights, and environmental safeguards (pages 4-5) ;
- Establishing the Project Development Facility (PDF) for upstream PPP project preparation and transaction development (page 6);
- Spells out the critical role of the various ministries, departments, and agencies to be involved in the approval process of PPP projects (page 7);
- The provision for a clear separation of the roles of PPP advisory and PPP monitoring (pages 8-9);
- Risk-sharing and management framework (pages 11-12);
- Establishing the Viability Gap Scheme for supporting PPP projects that fall within the government’s national development agenda, and are economically and socially justified but not financially viable; and
- Establishing an infrastructure finance facility in recognition of the need for supporting commercial long-term financing in local currency to the private sector partners of PPPs.

Laws Related to Intra-Family Matters of Succession, Marriage, Separation, and Divorce⁸⁵

The legal framework governing family matters and inheritance is particularly relevant for women's and children's rights and access to land. The Marriage Ordinance of 1884 recognized only monogamous marriages and specified that wives and children recognized by the ordinance were entitled to two-thirds of the deceased man's estate. Conversely, the Marriage of Mohammedans Ordinance of 1907 allows for polygamous marriages and codifies a separate legal system for the governance of marriages of Muslims, who comprise approximately 16 percent of Ghana's population. From the 1960s through the 1980s, legislative reform was undertaken to bridge statutory and customary frameworks in the area of family and inheritance law by clarifying the status and rights of women and children and their access to ancestral land. The Head of Family (Accountability) Act requires the head of a family, or any other person with control over family property, to take and file an inventory of all such property; the Act also makes that person legally accountable for the property. The Intestate Succession Act of 1985 establishes specific protections for the rights of surviving spouses to marital property, although it does not apply to stool, skin, or family property. It also makes the unlawful interference with an entitled person's property rights a crime punishable by a fine and up to a year of imprisonment. A Property Rights of Spouses bill has been drafted but not yet adopted.

⁸⁵This section is derived in part from Duncan, Gaafar, and Lufkin 2013: 17.

Appendix 4:

CASE LAW ON THE RIGHTS OF USUFRUCT AND ALLODIAL TITLE HOLDERS

A long history of Ghanaian case law supports the rights of usufructuary holders within the customary system. This case law provides a legal foundation for the recognition and protection of the rights of usufructuary holders, even against actions by the allodial titleholder.

Validity of Rights

Ghana's courts have, in the past, recognized usufructuary rights over customary land as concrete property rights that cannot be easily extinguished by the allodial titleholder, although there is little, if any, case law on this issue subsequent to the passage of the 1992 Constitution.

- In *Lokko v. Konkofi* (1907), Renn. 450 (D.C. and F.C), it was established that a stool subject's usufructuary rights were concrete property rights which "[ripen] into full ownership."
- In *Kotei v. Asere Stool* (1961) GLR 492, this principle was upheld, with Lord Denning arguing that, "native law or custom in Ghana has progressed so far as to form the usufructuary right, once it has been reduced into possession, into an estate or interest in land which the subject can use and deal with as his own."

Scope of Rights

In many cases, holders of usufructuary rights are entitled to make decisions about the alienation of their land without interference from the allodial titleholder provided the alienation does not adversely impact the allodial titleholder.

- In *Thompson v. Mensah* (1957), 3 WALR 240, the court held that, "the usufructuary is regarded as the owner of the area of land reduced into his possession; he can alienate voluntarily to a fellow subject or involuntarily to a judgment creditor without the prior consent of the stool. There is practically no limitation over his right to alienate that usufructuary title."

Enforcement of Rights

Holders of usufructuary rights are entitled to seek legal relief for breaches of their rights, including breaches by the allodial titleholder such as trespass and eviction.

- In *Baidoo v. Osei and Owusu* (1957), 3 WALR 298, the court held that a subject of the stool can maintain a legal action against the stool in defence of his usufructuary title and may void dispositions to third parties made without his consent.
- In *BP West Africa Ltd v. Boateng* (1963), 1 GLR 232, a dispute between a usufructuary titleholder and the company that leased the land from the local council, the court held that the original grant of the usufruct right to the defendant was a perpetual right, terminable only in the case of abandonment, upon the extinction of the defendant's lineal successors, or through a claim by him adverse to the title of the grantor (the allodial titleholder).
- In *Joseph Nobert Peryagah v. Yadoo* (Suit No. 2f78, District Court Grade II, Lawra.

Delivered on 24 Sept. 1978), a dispute over the right of a family head to unilaterally decide to lease out family land, the court held that while the allodial title rests with the larger family, as represented by the family head, individual families held usufruct rights that could not be alienated without their consent.

- In a more recent case, *Amissah Anthony and 97 others v. Goldfields Ghana Ltd* (Suit no. CS. 47/97), a dispute between usufructuary holders and a company that had acquired mining rights in the area, the court encouraged the company to offer an acceptable settlement package to the affected villagers. They were not forcibly evicted, and only vacated their properties after a fair compensation package was agreed upon with the company.

Although case law generally supports the rights of usufructuary holders, allodial titleholders may extinguish usufruct rights in the interest of the broader community, although in those cases they should provide appropriate compensation to those affected. Court decisions in the cases of *Ohimen v. Adjei*, [(1957) 2 WALR 275]; *Mansu v. Abboye and Another*, [1982-83] GLR 1313] *Tawiah v. Gyampo* [1957, 3 WALR, 293] and *Amoabimaa v. Okvir* [1963 , GLR (SC)] emphasized that in such cases there is the need for greater cooperation between the stool and the usufruct and when the usufruct consents to giving up his or her land in the interest of the broader community, appropriate compensation such as alternative land and payment for any other financial losses must be considered.

Many chiefs today are unilaterally expropriating land without the consent—or in some cases even the knowledge—of usufruct holders, supposedly in the common interest, although in many cases the alienations bring little or no benefit to the majority of community members (Alden-Wily and Hammond, 2001; Ubink, 2006; Ubink and Quan, 2008). There is a disparity between the rights of usufructuary landholders in Ghanaian case law (and historical tradition) and their rights in practice today, which are increasingly ignored despite the customary and legal precedent protecting them.

Appendix 5:

KEY INSTITUTIONS RELEVANT TO LARGE-SCALE LAND INVESTMENTS IN GHANA

Ministry of Food and Agriculture (MoFA)

MoFA is the government agency housing GCAP and is responsible for coordinating stakeholders to ensure the project's success. MoFA also houses the Ghana Irrigation Development Authority (GIDA), which is charged with designing, developing, and implementing irrigation and drainage plans for year-round crop production in Ghana (MoFA website). GIDA has helped to identify and develop Ghana's 22 irrigation projects, including those within GCAP project areas such as the Kpong and Tono irrigation projects (Id). MoFA has a Land and Water Management Unit responsible for working closely with the EPA to implement policies and practices aimed at mitigating environmental impacts of agricultural development.

Lands Commission

The 2008 Lands Commission Act merged formerly separate land administration agencies into the Lands Commission, which now houses four divisions: the Land Registration Division; the Public and Vested Lands Management Division; the Survey and Mapping Division; and the Land Valuation Division. Among the most important functions of the Lands Commission for purposes of this report are the management of public lands (including the compulsory acquisition process), the management and control of vested land, and the registration of leases for stool land. The Lands Commission's Guidelines for Large-scale Land Acquisition, issued in 2012, established procedures aimed at encouraging transparent, equitable transactions of customary lands.

Office of the Administrator of Stool Lands (OASL)

The Office of the Administrator of Stool Lands Act of 1994 provides that the OASL will hold certain management responsibilities—mostly financial—for stool and skin land on behalf of the customary owners. The OASL has also been given a support/oversight function for the CLSs. The Stool Lands Administrator is tasked with the establishment of a lands account for each skin, as well as the collection and disbursement of rents, dues, royalties, and other revenues from the skin land. Ten percent of the collected revenue goes to the Office of the Administrator to cover administrative expenses. The remainder is distributed as follows:

- 25 percent to the stool through the traditional authorities for the maintenance of stool land;
- 20 percent to the traditional authorities; and
- 55 percent to the District Authority with authority over the area in which the stool land is located.

Environmental Protection Agency (EPA)

The EPA is responsible for implementing ESIA procedures established by the EPA Act of 1994. The EPA has offices in each of the country's ten regions, and it is directly related to GCAP through its permitting/approval authority for development projects.

Savannah Accelerated Development Authority (SADA)

SADA is an independent government agency with the mandate to create a broad development strategy for the north, in response (in part) to changing climate conditions (SADA website, accessed 2014). SADA covers a broad geographic area in the north, including the Northern Region, Upper East, Upper West, northern Brong Ahafo, and northern Volta. SADA's strategy revolves around broad-based development of the north in order to reduce disparities with the south, support for smallholders, and retaining a "Forested North and a Green North" (Savannah Accelerated Development Authority 2010: ix).

Ghana Investment Promotion Centre (GIPC)

Under the updated 2013 Ghana Investment Promotion Centre Act (Act 865), the GIPC's purpose is to encourage and promote investment in the country, as well as to lead the coordination and monitoring of all investment activities. To this end, the GIPC is to act as a "one stop shop" for providing information and optimum business opportunities to investors. Under the 2013 Act, all investment entities (regardless of their capital, ownership structure, or sector of operation) are required to register with the GIPC.

GIPC functions:

- Registers and keeps records of all enterprises [N.B. except mining and petroleum as per 1994, Act 478].
- The Act makes it mandatory for all enterprises to register with GIPC to enable it to coordinate all activities of investors in the country.
- Initiates and supports investment for both Ghanaians and non-Ghanaians.
- Encourages foreign investors to engage in large-scale value-added trading activities that would not interfere with activities of Ghanaian petty traders.
- Restricts foreigners (non-Ghanaians) to engage in retail and trading sectors of a capital amounting to no less than one million dollars in cash or goods. [The minimum initial investment for a foreign-owned company is USD500,000, up from USD50,000 prior to the passage of Act 865].
- Maintains a liaison between investors and ministries, government departments and agencies, institutional lenders, and other authorities concerned with investments.
- Provisions under the Act also include guarantees against expropriation, dispute settlement procedures, immigrant quotas that increase in proportion to the foreign paid-up capital (Article 30), and transferability of earnings.

Metropolitan, municipal, and district assemblies and the Town and Country Planning Department (TCDP)

The metropolitan, municipal, and district assemblies are the primary decentralized land management agencies. They hold management and planning authority over lands within their respective jurisdictions and are responsible for creating comprehensive plans, land use



schemes, and base maps (detailing physical features). They work closely with the customary authorities and also with TCPD (which reports to the Assembly) on the technical aspects of these goals. They also hold the authority to regulate land use and coordinate the formation and work of the Statutory Land Management Committee (the regulatory body of the Assembly for land governance), which includes representatives of the Lands Commission, TCPD, utility departments, EPA, customary authority (usually in the form of the CLS director), and surveyors. The Committee's role is to recommend to the Assembly whether applications for utilities, infrastructure, development, etc. should be approved. The Department's decentralized offices are housed under the district assemblies and carry out the assemblies' planning functions. TCPD is housed under the Ministry of Environment, Science, and Technology at the national level.

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