

## *Enabling the Business of Agriculture 2019*

### **Data on safeguards for land rights\***

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\* The EBA team is thankful to the following experts for their comments: Astrid Maria Jakobs de Padua; Camille Bourguignon; Guo Li; Jonathan Mills Lindsay; Jorge A. Muñoz; Klaus W. Deininger; Linus Pott; Liz Alden Wily; Mika-Petteri Torhonen; Paul Scott Prettitore; Susanne M. Scheierling; Thea Hilhorst; Vincent Roquet; Wael Zakout.

## **Safeguarding land rights: A development priority**

Smallholder farmers play a critical role in feeding the world. Globally, a large portion of arable land is managed by small agribusinesses – about 500 million farms on less than 2 hectares – accounting for 80 percent of the food consumed in low-income countries.<sup>1</sup> To feed a growing population projected to reach 9 billion by 2050, secure land rights are key.<sup>2</sup> When land rights are secure, farmers invest labor and capital to improve soil, plant perennial crops, manage rangelands, and improve irrigation.<sup>3</sup>

Worldwide, approximately 2.5-3 billion rural dwellers farm on land which is held under customary tenure.<sup>4</sup> Under customary tenure, land is often not formally registered, and farmers gain access to land by virtue of their community membership. Customary land often lacks legal recognition, which makes it vulnerable to land grabbing and expropriation with poor or inappropriate compensation.<sup>5</sup>

Land tenure security can also be threatened on private property if governments arbitrarily dispossess farmers of their land. Particularly in countries with poor regulations and weak safeguards relating to expropriation procedures. Expropriation is an act of a government taking possession of private land to facilitate public works, for example to build schools or health facilities. Legal safeguards must ensure that expropriation is exceptional, nondiscriminatory, conducted in the public interest and accompanied by prompt, adequate and effective compensation.

With inappropriate safeguards, expropriation can be misused to corrupt ends or to exclusively benefit private interests with little to no public benefit.<sup>6</sup> Arbitrary expropriation can impose severe risks. It can reduce land tenure security, decrease investments in land, exacerbate political tensions and weaken public confidence in the rule of law.<sup>7</sup> When land is expropriated without adequate compensation, the livelihoods of entire communities are endangered. Farmers might lose their only form of subsistence, families might be displaced from their farms, and communities might be deprived of their cultural identity and societal networks.

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<sup>1</sup> Hazell et al. 2010; HLPE 2013; IFAD & UNEP 2013; Lowder et al. 2016

<sup>2</sup> Besley and Ghatak 2010

<sup>3</sup> Vermeulen and Cotula 2010

<sup>4</sup> Alden Wily 2018; Deininger 2003.

<sup>5</sup> Deininger 2003; Deininger and Byerlee 2011; Sitko et al. 2014.

<sup>6</sup> Tagliarino 2018.

<sup>7</sup> De Schutter 2011; FAO 2008; Lawry et al. 2015; Vermeulen and Cotula 2010.

## **What do the data cover?**

Customary land rights recognition and legal safeguards relating to expropriation procedures are crucial instruments for governments to protect land rights. Yet, globally comparable data is limited. *Enabling the Business of Agriculture* (EBA) 2019 contributes to filling this gap by presenting data on the recognition of customary land rights and procedural safeguards relating to expropriation procedures for 80 countries around the world. This data set records regulatory good practices outlined in expropriation laws, land acquisition acts, communal land rights acts, or customary land regulations.

The provisions covered are in line with recent recommendations by international organizations, including the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, the European Convention on Human Rights, or the Land Governance Assessment Framework, and the World Bank's Environmental and Social Framework. About 250 lawyers, academics, and experts were consulted to provide country-context and legal interpretation. The data do not cover implementation aspects or provide information on the *de facto* procedures and are current as of June 30, 2018. The full data set can be downloaded at <https://eba.worldbank.org/>.

## **Protecting customary land**

Much of global agricultural activity occurs on customary land and therefore deserves protection. In sub-Saharan Africa an estimated 80-90% of arable land is under customary tenure. While customary land can be held by individuals, ownership in communal tenure systems is usually vested in the community, tribe, group or extended family. Customary land is mostly allocated by customary authorities, such as indigenous leaders, chiefs or elders according to nonwritten rules and norms. Land acquisition, possession and transfer are regulated by complex, community-based rules and norms, which mostly only apply to community members. Customary land tenure is as much a social system as a legal code and has proven to be highly resilient, continuous and flexible. On customary land, land rights and land use practices are often invisible to outside observers.<sup>8</sup>

Customary land tenure was long regarded as a tenure system that functioned outside of statutory law. As a result, customary land was often considered public or government land, vested in the head of state. In instances where customary land is considered either state land or land that belongs

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<sup>8</sup> Lindsay et al. 2017

to the president, compensation paid when land is expropriated —if disbursed at all—might only be paid for improvements but not for the land itself.

While there are important nuances with respect to the extent of legal protection, 46 of the 80 countries covered provide for the recognition of customary land – as of June 2018. To varying degrees, customary land exists in almost every country. Most countries that do not legally recognize customary land do so either because it is not their priority as only a small fraction of the population resides on customary land or because it is difficult to find political consensus. Customary land reforms often take decades before a law is finally adopted. Exceptions are countries such as Senegal and Sierra Leone that have no legal recognition of customary land yet despite a sizeable amount of customary land.

In recent years, customary land protection has increased, particularly in Sub-Saharan Africa. Governments have started to acknowledge the importance of customary land and executed impactful land reforms that legally recognize customary land. An increasing number of countries have begun to improve their land legislation by introducing some degree of protection for customary land right holders via decentralized administration units or with procedures on how to register land. Registration of customary land is often presented as the panacea to improve land tenure security, prevent social conflicts and increase investments in land. However, it might also bring about or even exacerbate conflicts if not done fairly and equitably. Some countries have had major land reforms, enforcing specific legislation targeting customary land. Others included customary land provisions in their general land laws to reflect different tenure types.

**Table 1.** Recent reforms in safeguarding customary land rights

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**Afghanistan 2017** – Law on Land Acquisition

- In cases where communal land is expropriated, the law provides for the right to compensation for registered community land right holders.
- Specifically, individuals with informal deeds are eligible to receive in-kind compensation.

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**Kenya 2016** – Community Land Act

- Community land in Kenya is vested in the community.
- Recognizes customary tenure as a legitimate tenure system of communal land.
- Requires registration of communal land (Certificate of Title).
- Establishes an elected community land management committee that manages and administers registered community land.
- Communal land can be converted into private or public land if two-thirds of the community approves the conversion.
- Registered communities may use alternative dispute resolution mechanisms including traditional dispute resolution mechanisms.

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**Liberia 2018** – Land Rights Act<sup>9</sup>

- After four years of debate in the legislature, the law was signed into law in September 2018.
- The law enshrines communal land rights and allows communities to claim ownership by presenting evidence such as oral testimonies, maps, and signed agreements with neighbors.
- Provides for so-called tribal certificates of ownership.

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**Malawi 2016** – 10 land-related bills including Land Act; Customary Land Act; Registered Land (Amendment) Act

- Smallholder farmers in traditional land management areas (TLMAs) can get legal title to land.
- Land committees are responsible for managing all customary land in TLMAs.
- The Registered Land (Amendment) Act provides for title registration throughout the country for all land categories including customary estates.

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**Mali 2017** Agricultural Land Law

- Strengthens communal land tenure
- Provides that land under customary law cannot be conferred to state lands.
- Introduces the documentation of customary land by creating two types of title, customary land certificates (*attestation de detention coutumière*) and certificates of land possession (*attestation de possession foncière*).
- Customary land certificates aim at promoting legal stability; farmers and rural communities can use them to sell land, transmit land to their heirs, and use land as collateral for loans.
- Recognizes the right for rural communities to collectively own some lands, including spaces recognized as vital to the communities and their families.

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**Togo 2018** – Togo Land Code

- The new land code reconciles customary and statutory practices.
- It demands land to be formally titled before transfer of ownership.
- It is expected that the new law will help resolve many of the land-related conflicts.

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Source: *Enabling the Business of Agriculture* database.

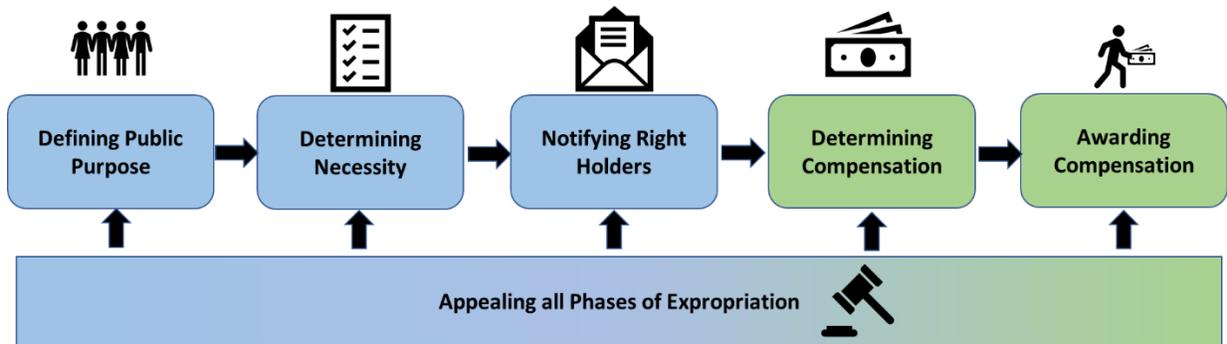
<sup>9</sup> The land rights act was signed into law after the EBA cut-off date. Therefore, it is not yet reflected in the data.

Despite increased legal protection of customary land, further progress is needed. Most expropriation laws do not differentiate tenure systems and do not outline the rights of customary land holders. Provisions on expropriation safeguards or how the compensation amount is determined on customary land aren't typically specified. Without appropriately and clearly accounting for customary land rights in the valuation method when determining the compensation amount, land occupants of customary land may not obtain a fair value for their land when expropriated.<sup>10</sup>

### Procedural safeguards and adequate compensation in expropriation procedures

The EBA data on procedural safeguards and adequate compensation in case of expropriation follow the phases that characterize a typical expropriation process (Figure 1). Different processes may apply during a state of emergency, such as in the case of a natural disaster. These are not covered in the data set. The regulatory practices covered by the data are summarized in Table 1.

**Figure 1.** Steps of the expropriation process and provisions covered by EBA data



<sup>10</sup> McDermott, Myers, and Augustinus 2018.

**Table 2.** Regulatory good practices on safeguards and compensation

Defining public purpose	<ul style="list-style-type: none"><li>• Comprehensive definition including a list of examples</li><li>• Limits to individual decision-making</li></ul>
Determining necessity	Pre-expropriation assessment through: <ul style="list-style-type: none"><li>• Proportionality test</li><li>• Evaluation</li><li>• Public hearing</li><li>• Consultation with the owner</li></ul>
Notifying right holders	<ul style="list-style-type: none"><li>• Public notification of affected parties</li><li>• Individual notification to affected parties</li></ul>
Allowing for appeal	Appeal mechanism against the: <ul style="list-style-type: none"><li>• Decision to acquire land</li><li>• Process of expropriation</li><li>• Compensation</li></ul>
Determining compensation	<ul style="list-style-type: none"><li>• Criteria for optional in-kind compensation</li><li>• Fair and independent valuation</li><li>• Consideration of nonmonetary factors</li><li>• Coverage of improvements (irrigation systems, buildings) and damages</li></ul>
Awarding compensation	Full disbursement before expropriation

Reforms on customary land typically imply entire new laws being adopted. Conversely, expropriation laws have often been in place for a long time and are only amended. Despite improving legal standards, many countries still fail to provide basic legal safeguards. This includes a clear definition of what constitutes public purpose, who is entitled to receive compensation, or how the compensation amount is determined. The data exhibits gaps between national frameworks and prevailing international norms and standards. These gaps can adversely affect farmers and communities and put them at severe social and economic risk.

**Table 3.** Recent legal developments in expropriation safeguards

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**Afghanistan 2017** – Law on Land Acquisition

- The new law requires pre-expropriation assessments such as studying and evaluating environmental and social impacts of the expropriation measure, and consulting with community of the area under expropriation regarding project implementation.
- The law provides that the owner and interested parties must be informed about the intend to expropriate, both publicly and individually.
- It outlines the compensation process that now considers nonmonetary values and the land valuation date.
- It allows owners to appeal the compensation amount.

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**Burkina Faso 2018** – Expropriation Law

- Burkina Faso strengthened landholders' rights by adopting a new law on expropriation which provides that in-kind compensation has to be of equal value.<sup>11</sup>
- The law outlines that the declaration of public utility can be appealed before an administrative judge.

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**Kenya 2016** – The Land Laws (Amendment) Act

- Kenya strengthened landholders' rights by introducing the necessity and proportionality principles to the expropriation process.
- The law also specifies the regulations on prior disbursement of the compensation amount, leaving less room for potential discretionary action.

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**Malawi 2016** – 10 land-related bills including Land Act; Lands Acquisition Amendment Act

- Malawi strengthened landholders' rights by adopting a series of new land-related laws which now include a participatory element in the expropriation procedure.
- The law provides that an independent authority determines the compensation amount.<sup>12</sup>
- In assessing compensation, nonmonetary aspects are now taken into consideration. As such, the law accounts for nonmonetary values when determining the compensation amount such as loss of occupational rights, of land, of business or of good will.<sup>13</sup>
- Unlike in the previous law, crops are no longer specifically considered, and only general improvements are compensated.<sup>14</sup>

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**Tunisia 2016** – Expropriation Law

- Tunisia strengthened landholders' rights by adopting a new law that provides a much more encompassing definition of what is considered public purpose compared to the old law.
- The law includes a participatory element when determining the necessity of the expropriation measure.
- The law now provides the option of in-kind compensation if it is in agreement with the owner.
- Nonmonetary values are considered when determining the compensation amount.

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Source: *Enabling the Business of Agriculture* database.

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<sup>11</sup> Loi No. 009-2018/AN du 3 mai 2018, Arts. 38, 39.

<sup>12</sup> Art. 10 (1), Lands Acquisition Amendment Act, 2017 (No. 9 of 2017).

<sup>13</sup> Art. 10 (2), Lands Acquisition Amendment Act, 2017 (No. 9 of 2017).

<sup>14</sup> Art. 10A (1)(d), Lands Acquisition Amendment Act, 2017 (No. 9 of 2017).

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