Between the legal and the legitimate:
Status of land governance in Madagascar

Key findings of the Land Governance Assessment Framework

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2012
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1 Introduction

Land governance is a way of analyzing the land management process in Madagascar and especially the process of implementing land policy. This overview describes, analyzes and establishes the status of land governance in Madagascar by examining the key areas selected in the context of the Land Governance Assessment Framework - LGAF. The document includes two parts: the first part addresses the LGAF thematic areas, with the main facts and analyses of the key indicators, and the second part presents the high priority policy recommendations to improve land governance in Madagascar.

The policy recommendations that conclude the document are based on expert opinion, but they have also been triangulated by opinions from panel members working on land issues from different backgrounds and who have helped score the different indicators and dimensions of the LGAF.

1.1 Methodology

The analyses are mainly based on the results of the LGAF process, which was conducted in Madagascar in 2011. The LGAF is designed to inform debate and identify concrete actions to improve the management of certain components of the country’s land policy. The countries in which the LGAF has been implemented should carry out a general review of all the subjects, and then identify the areas that they feel are important to improve. Concrete actions should be implemented, and alongside this, periodic monitoring needs to be conducted to measure the effectiveness of these activities using an operational, practical information system that will last into the medium term.

The implementation of the LGAF coincided with the evaluation period of the first phase (Act 1) of the tenure reform in Madagascar, which began in 2005. Thus, the LGAF has made it possible to address the evaluation from a different angle, that of governance. Technical support was largely provided by the Land Observatory (OF), the supporting institution for designing Malagasy land policy and steering the land reform. The Ministry of Land Use Planning and Decentralization (MATD) provided institutional support in implementing the LGAF. This steering of the process by the Land Observatory, an organization within the ministry in charge of land administration, has promoted the institutionalization and the ownership of the approach and has facilitated access to certain information held by the land administration.

The LGAF process has been favorably received and technically adopted as a self-evaluation tool of land governance by the sectors producing and using the information collected. One of the added values generated by the approach is the calling into question of the efficiency of managing some land issues that have been neglected or are routine procedures for administrative agencies (e.g. issuing a statement of legal situation, collecting lease payments on state land, requests for planning permits, etc.). In addition, it is now possible, in most cases, to obtain an objective, precise and consensual ranking thanks to the use of a closed system of ranking each indicator A, B, C, or D, which covers both qualitative and quantitative aspects. In the same way, the members of the evaluation panels come from different backgrounds involved in land governance (state administration, NGOs, civil society, territorial administration, academia, etc.), and this has made it possible to see the different perceptions of each indicator. This diversity shows the levels of knowledge, and thus the rich availability and opportunity for harmonization of information on land policy in Madagascar.

Madagascar has no functional information and monitoring systems in land sector institutions. The resulting absence or unreliable nature of the data needed for developing the background notes were a limiting factor. In order to overcome this constraint, some indicators had to use information taken from a specific research or through a one-off sampling. In addition, the use of the closed ranking has made it difficult to capture certain interesting qualitative components that were debated in the panel sessions. Some indicators are so multidimensional that they cannot be reduced to a single ranking.
2 Madagascar: some background

2.1 A mainly rural poor population

Madagascar is located in the Indian Ocean, and at 587,000 km² it is the fourth largest island in the world. According to the latest estimations, there are some 21 million inhabitants. Nearly one third of the population lives in towns, including over 10% concentrated in the capital Antananarivo (2.7 million). Despite this increase in urbanization, most active people work in the agricultural or rural sector. The farm sizes are small (on average 0.87 ha cultivated), and most of the land is used for rice production and intensive livestock production (MAEP 2004 - 2005).

<table>
<thead>
<tr>
<th>Indicators</th>
<th>Year of Reference</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total population (number)</td>
<td>2011^a</td>
<td>20,714,000</td>
</tr>
<tr>
<td>Annual demographic growth rate (% population)</td>
<td>2010^a</td>
<td>2.8</td>
</tr>
<tr>
<td>Life expectancy at birth (years)</td>
<td>2009^b</td>
<td>60.8</td>
</tr>
<tr>
<td>Literacy rate (% total, 15 – 24 years)</td>
<td>2008^c</td>
<td>64</td>
</tr>
<tr>
<td>Prevalence of HIV (% of the total population between 15 and 49 years old)</td>
<td>2009^b</td>
<td>0.2</td>
</tr>
<tr>
<td>Gross Domestic Product (million US$)</td>
<td>2010^a</td>
<td>9,132</td>
</tr>
<tr>
<td>Gross National Product (GNP) per inhabitant (US$)</td>
<td>2009^b</td>
<td>430</td>
</tr>
<tr>
<td>Stock of Direct Foreign Investments (million US$)</td>
<td>2009^c</td>
<td>3,900</td>
</tr>
</tbody>
</table>

Fig.1 Main macro-economic indicators for Madagascar^3

With a GDP per inhabitant estimated at $453 US in 2010, Madagascar is one of the poorest countries in the world. Some 53% of the GDP in 2010 came from mines, tourism and services. This revenue has decreased since the political crisis in 2009 and does not balance out the annual demographic growth of 2.7%. The GDP per inhabitant has dropped so that the 2012 level equals that of 2003 (World Bank Economic Update, 2012). Three quarters of the population live below the poverty line of $0.64 US per person per day to cover minimum food needs^4. This proportion increases to 82% of the population in rural areas (INSTAT, 2010).

2.2 Political context: from royalty to Republics

The island was organized in several small kingdoms when it was first inhabited, and from the 15th century it became dominated by a few large kingdoms. The Merina kingdom was one of the most powerful, and extended its reign through battles until it became the kingdom of Madagascar under King Radama 1st (1810 – 1828). The kingdom was colonized by France in 1896 and became independent in 1960. Three republics have succeeded each other, alternating between elections and dissolution (see Box 1). In March 2009, uprisings led by political opponents forced the then President Marc Ravalomanana to leave the country, giving place to a transition government led by Andry Rajoelina.

Box 1: Alternation between elections and dissolution

After the declaration of independence in 1960, the first Republic of President Philibert Tsiranana was deemed to be too much controlled by France and was overthrown by a popular movement in 1972 and became a military dictatorship (1972 – 1975). The second Republic, presided over by Didier Ratsiraka, had a “Marxist Socialist”

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^1 Almost 2.5 million households, i.e. 80 % of all households are involved in farming.
^2 Approximately 60 % of the cultivated surfaces are rice growing and there are 10 million cattle.
^4 The definition of poor applies to people whose daily intake of calories is under 2100, which in financial terms corresponds to the equivalent of 234 US$ per person per year (EPM, 2010).
3 The land context

3.1 History: the melting pot of legal and institutional pluralism

The kingdom was succeeded by new political and socio-cultural systems, each creating land rights and tenure systems. During the period of the monarchy (15th to 19th centuries), systems of traditional local rights were in place. Although the specific customary tenure systems and rights varied from one socio-cultural group to another, there were some constants in these tenure systems: (i) the notion of collective possession of land and communal right to space. With individualization being almost nonexistent; (ii) the right to land conferred by the value added\(^5\) by the first person to clear and work the land; (iii) no requirements by society of written proof for the recognition of these rights, for procedures for access or mechanisms of arbitration. A major change took place under the reign of Andrianampoinimerina (1787 – 1810) when the concept of *tanim-panjakana*\(^6\) was introduced: all land was declared the property of the king with the people having the right to use it.

Inspired by legal developments in Europe, the king introduced in 1881 the first civil code (*Code des 305 Articles*). The code included the rules of land access, introducing the notion of “personalized property”\(^7\). During colonization (1896 – 1960), in the *tanim-panjakana* the reference to the king’s property was changed into the property of the colonial state. In addition, the colonial government introduced the principle of state ownership of land and used this to enable European settlers to take over the land. The colonial government based the land administration on the Torrens system\(^8\), and nullified previous land rights. It also applied the “Wakefield system”\(^9\) which prescribed payment for land access, thereby generating resources for the colonial government (Delhorbe, 1900).

Ownership over a plot became legally recognized only after the state services had demarcated the boundaries, registered it in the land record and issued a land title. Thus, the State developed a system to create property particularly to serve French and other colonists, who became the largest group of owners of land titles or concession beneficiaries. The property system was scarcely used by Malagasy people. Only a few elite registered property. The State wanted to limit the further extension of customary occupation. The workers that settled around the colonial farms were subject to a mandatory collective land registration system set up by government. The land was registered as “*Réseves Indigènes*” which remained state land, or in the name of individuals in the case of “*cadastral operations*” (Boulmer, 1938; Raison, 1969).

After independence, the State land system was maintained. The Malgasy government tried to substitute local, customary land rights systems for formal land tenure systems. However, the system proposed for the adjudication of rights ignored the context in rural areas. As a result, holding land titles is a privilege of urban residents. In rural areas, customary tenure systems remain dominant although there is some private property (Blanc Jouvan, 1964; Ottino, 1998; Evers, 2002; Le Roy et al., 2006; Omrane, 2008; Muttenzer, 2010).

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5. This is translated by the terms *Solam–pangady*: the right acquired from clearing the land and *Maintimolaly*, the right acquired from fertilizing the land over a long period.

6. Tanim–panjakana: literally the lands of the king or prince.

7. Torrens title is a system of land title where a register of land holdings maintained by the state guarantees an indefeasible title to those included in the register. Land ownership is transferred through registration of title instead of using deeds.

8. Wakefield proposed for the colonies in Australia that all land throughout the colony be declared liable to a tax worth a percentage of the actual rent.
As a result, the “formal/legal” and “local-customary” tenure systems coexist. However, communities invented a system of their own to better document rights, partly by reproducing the formal administrative practices of written contracts and titles. This has resulted in the wide spread emergence of so-called “petits papiers” in many places as a first step toward formalizing rights (Jacoby and Minten, 2007; Teyssier et al., 2008). These “petits papiers” are a way of documenting transactions (inheritance, sales, rent) by simple deeds, or by using the receipt for land tax payment as evidence of occupation. Some of these deeds are signed and stamped by the chief of the Fokontany (the smallest administrative area) or the mayor. They have no strict legal value but can be used locally as a first piece of evidence in case of conflicts.

3.2 The 2005 land reform

In 2005, a land reform was launched to arrive at the legal recognition of the existing customary land tenure system and thus reconcile legality with the legitimacy of local practices. The aim was, as set out in a policy brief, “meeting the massive demand for land security, in a way that is accessible to the largest number, and at the least cost” (lettre de politique foncière or white paper on land policy). Subsequently, the Malagasy government, with the support of various development agencies, has made major efforts in the scope of the Programme National Foncier to improve formal tenure security. The three key components of the tenure reform are the reorganization of the legal framework, the land services modernization and the decentralization of land management. This is supplemented by the provision of training for people to deal with these innovations.

One of the major topics of debate during the legal reform was the principle of state ownership, which defines the state as owner of all untitled land and the state services as the only body responsible for managing them. The Act 2005-019 replaced the presumption of state ownership with the recognition of untitled private property (PPNT or propriété privée non – titrée) for the traditional occupants of untitled land (Teyssier et al., 2009).

A second major point of the reform is the decentralization of land management. The local governments can create a land office and have an accurate map of PPNT land onto which to record the legally recognized plots (“Plan Local d’occupation Foncière” or Local Land Occupancy maps – PLOF). At the request of occupants of a plot of untitled land (PPNT), and after a local recognition procedure to certify rights of property, the mayor can issue an individual or collective land certificate. The land certificate differs from a land title as it is based on social validation of existing land rights, and can only be issued with the affidavit of local people (neighbors, elders, village chiefs, the mayor). However, the certificate and the land title have the same attributes: both can be sold, transferred or mortgaged.

The third point is the modernization of the state land services. The central and regional services have been reorganized and now dispose of digitalized land documents (inventory, consolidation of archives, digitalization, etc.) that provide the data for digitalized land occupancy maps.

In Madagascar there are two official bodies with two systems for legalizing land management.

— The regional and central state land administration, which is in charge of delivering and managing titles and land registers (cadastres). There are 36 “circonscriptions foncières” in Madagascar, two thirds of which have digitalized their land information and have new equipment. But the effects in terms of organization and improvement of services to users have not met expectations. The evaluation carried out on the costs and lead times of issuing land titles has shown that there has been no significant improvement since 2006 (Comby et al., 2011; Cabinet BEST, 2011).

— The land offices at the local government level (guichet foncier communal), which are in charge of delivering and managing certificates.
<table>
<thead>
<tr>
<th>Categories</th>
<th>Tenures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public state land</td>
<td>Established public state land</td>
</tr>
<tr>
<td></td>
<td>Private occupation of public state land</td>
</tr>
<tr>
<td></td>
<td>Registration or certification on public state land</td>
</tr>
<tr>
<td>Private state land belonging to the state and administrations</td>
<td>Unregistered land belonging to the state or administrations (vacant land with no manager)</td>
</tr>
<tr>
<td></td>
<td>Traditional tenure on unregistered plots belonging to the state</td>
</tr>
<tr>
<td></td>
<td>Land registered in the name of the state</td>
</tr>
<tr>
<td></td>
<td>Individual or collective occupation of titled land in the name of state</td>
</tr>
<tr>
<td></td>
<td>National forests</td>
</tr>
<tr>
<td></td>
<td>Clearing and occupation of national forests</td>
</tr>
</tbody>
</table>

**Tenures and management of private property**

| Titled private property            | Formal tenure of titled land under effective registration               |
|                                   | Tenures on cadastral plots                                             |
|                                   | Tenures on land for which registration procedures are not complete     |
|                                   | Tenures on land for which the titles are not up to date, abandoned, not developed, occupied by other parties |
| Untitled private property (PPNT)   | Traditional customary tenure on non-certified PPNT                     |
|                                   | Tenure on PPNT with a formal land certificate                          |

**Tenures and management of land with specific status designated for farming**

| Colonization areas (PC)            | Traditional customary tenure on PCs                                    |
| Indigenes reserves                 | Traditional customary tenure on former Indigenous Reserves (RI)       |

**Tenures and management of land with specific status designated for farming**

| Areas of Rural Enhancement (AMVR)  | Formal tenures on AMVRs                                                |
|                                   | Traditional customary tenures on AMVRs                                 |
|                                   | ‘Illegal’ registrations in the AMVRs                                    |

**Tenures and management of land with specific status designated for farming**

| Areas for economic development     | Area of Land Planning (ZAF)                                            |
|                                   | Areas of Agricultural Investment (ZIA)                                  |
|                                   | Reserves for Tourism (RFT)                                             |

**Tenures and management of land with specific environmental status**

<table>
<thead>
<tr>
<th>Areas for development of management of natural resources</th>
<th>Land under contract of management transfer (GELOSE, GCF)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Areas subjected to a particular arrangement for the protection and management of natural and forestry resources</td>
<td>Protected Areas (AP)</td>
</tr>
<tr>
<td>Areas for development of management of natural resources</td>
<td>Reforestation Land Reserve (RFR)</td>
</tr>
<tr>
<td></td>
<td>Sites used as a support for the application of international agreements signed as part of the management of natural resources.</td>
</tr>
</tbody>
</table>

![Fig.2 Types of different land tenures in Madagascar](image)

### 3.3 The main institutions involved in land management

#### The public state institutions

**The state land administration**

- The state land administration is represented institutionally by the Ministry in charge of land and technically by the General Directorate of Land Administration (DGSF). It is in charge of the management of the Public state land (Act 2008 – 013) and the Private state land (Act 2008 – 014) and of titled and registered private property. It also designs land policy and its implementation. It is represented regionally by the Regional state land and topography administration and in each Administrative District by the 36 land administration divisions of state land and topography.
- It includes the Direction des Domaines et de la Propriété Foncière (directorate of state land and property), the Direction des Services Topographiques (directorate of topographical services), the Direction de la Réforme Foncière (directorate of land reform) and the Cellule de Coordination du Programme National Foncier (coordinating unit of the national program).

**The Land Observatory (OF)**

The OF was created in 2007 and attached to the Ministry in charge of land. It is in charge of producing and debating on information, analyses and discussion, in order to support the formulation of Malagasy land policy and steering of tenure reform.

**The other ministries**

Other ministries are also involved in land management, including the ministries of mining, tourism, agriculture,
<table>
<thead>
<tr>
<th><strong>justice, environment and forests, decentralization, etc.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Communes or local government</strong></td>
</tr>
<tr>
<td>As per Act 2006 - 031, the land offices of Communes have the power to manage Untitled Private Property, and to issue and change land certificates. Since 2006, the Communes also manage activities related to property taxation. They also have the remit to issue building permits, and if they have the correct tools, they deal with land use planning. The Chief of the Fokontany(^9) represents the State at the lowest level, and also takes part in land administration (participation in the certification process, land conflict resolution, etc.)</td>
</tr>
<tr>
<td><strong>Parastatals</strong></td>
</tr>
<tr>
<td>Parastatals are financially autonomous and generally financed by international funds. These include particularly the National Office of the Environment, organizations attached to land use planning, the Economic Development Board of Madagascar (receiving private investors), legal clinics or TranoAro2o (information on legal texts, conflict management) etc.</td>
</tr>
<tr>
<td><strong>Civil society</strong></td>
</tr>
<tr>
<td><strong>Traditional local authorities</strong></td>
</tr>
<tr>
<td>Traditional local authorities (local chiefs, elders, heads of clans, spiritual leaders) can intervene in validating rights, resolving conflicts, and also in the management of individual, family or collective inherited land. They intervene based on local traditional rules (called Dina) which were set down by the ancestors or adopted by a local assembly. They occupy an important place locally in the process of security of tenure. Because of this, <strong>people do not always use the mechanisms of legal recognition of rights</strong>. The Commissions of Local Recognition (CRL) that intervene in land certification are the point of contact between traditional authorities and local legal authorities.</td>
</tr>
<tr>
<td><strong>The platform Solidarité des Intervenants pour le Foncier (SIF) (Stakeholder solidarity for land tenure)</strong></td>
</tr>
<tr>
<td>This is a platform for defending the rights of small farmers and includes Farmers’ Associations and NGOs involved or intervening in land problems.</td>
</tr>
<tr>
<td><strong>Private organizations</strong></td>
</tr>
<tr>
<td><strong>Surveyors and solicitors</strong></td>
</tr>
<tr>
<td>These are professionals who help users as they secure their tenure or in their transactions. They are subject to the rules of their respective orders.</td>
</tr>
</tbody>
</table>

\(^9\)The **fokontany** is the lowest level of territorial administration. It is a subdivision of the commune, and the chief had administrative functions. He is elected by the population or designated by the mayor, and also often has an important function in the local/traditional system.
4 Analysis of Land Governance

In Madagascar, the LGAF addressed five major areas: (i) legal and institutional framework; (ii) land use planning, land management, and taxation; (iii) management of public land; (iv) public provision of land information; (v) dispute resolution and conflict management with optional modules for other topics (large scale land acquisition, forests, regularization of rights in urban areas).

4.1 The legal and institutional framework

The first thematic area deals with the recognition of a continuum of land rights and measures for enforcement of these rights, the clarity of mandates and practices of institutions involved in land management, and lastly the equity and non-discrimination of the governance processes.

4.1.1 Important advances in terms of legal recognition of land rights

Malagasy land legislation is based on the superposition of legal texts inherited from different historical periods (Ravelomanantsosa et al., 2012). The 2005 tenure reform began a major reorganization of legislation with a radical redefinition of the legal categories of land. The different juridical legal categories of land in Madagascar are now as follows:

- state-owned land is made up of:
  - the public state-owned land (lakes, river banks, public infrastructures, etc.);
  - private state-owned land including:
    - land titled in the name of the state
- unoccupied land known as “vacant and without management” which can be sold or leased, at the request of a private individual;
  - private property including:
    o titled and registered property,
    o untitled occupied property (PPNT) which can be certified at the request of the owners:
  - areas with particular status: including protected areas, areas of environmental protection, areas for agricultural or economic development (tourism, industry) and the large areas of collective pasture.

Since the tenure reform is still undergoing change, some juridical categories have not yet been reworked. This is the case particularly of land with a specific land use status. The official land use category can be very diverse (tourist reserves, protected areas) which on the ground may produce conflict between the official owner – often the state – and the occupants of the land. Also, work still needs to be done to update the different legislations within the corpus of land laws and on laws relating to other economic activities: mines, agriculture, tourism, etc.

While waiting for the new measures, the current laws legally recognize the rights of owners on titled land. And, importantly, the laws protect the land rights of individuals and communities in rural or urban settings on untitled and unregistered land (Andrianirina – Ratsialonana et al., 2011). However, traditional occupation is more often recognized in rural areas than in towns and cities. In urban settings, many plots exist that are titled and registered in the name of the state at the initiative of successive governments.

The notion of occupation is also a subject of debate. The essence of the law on certification was to legally confirm existing rights and not to create new rights. It offers local players the choice of validating or refusing the legitimacy of someone’s request for certification. Certain formulations in the law specify that all forms of appropriation are protected (including sacred land, and fallow land) but other formulations mention the obligation for making permanent improvements on the land. These demands for land improvement terms limit the possibility of recognizing collective tenure on pastoral grazing areas or places of worship.

The legislation recognizes local rights, but above all it provides tools for formalizing individual property or the property of a small group. The registration of a property in the name of a group requires the latter to be formalized and the members listed. These obligations do not meet the expectations or the characteristics of extended families or clans. Moreover, this land legislation, which is inherited from the past and not aligned with actual practice, does not recognize sharecropping (Order 74 – 021).

### 4.1.2 A double system of legal recognition of rights

Long term uncontested occupations/possessions are recognized and can be formalized. Since decentralization of land administration, holders of rights can ask for a legal registration of their rights by the certification process as long as the lands are untitled private property (PPNT). They apply to the local government land office of their commune. In November 2012, 458 communes had local government land offices and had issued about 80,000 land certificates over a period of 7 years. The average time taken to issue a certificate is one year and the cost is approximately $15 US. The total area certified is approximately 70,000 ha, which is 0.10% of the country or 3% of cultivated land (www.observatoire-foncier.mg).

Holders of rights can also request a title by going through the process of formal land rights registration on the condition that this is private state-owned land (rights obtained through acquisition or regularization of rights). They apply to the land administration. The number of requests for land titles does not exceed 20,000 per year. As for individual registrations, in 2006 the average time for issuing (a title) was estimated at 6 years, and the average cost was estimated at $507 US, and this has not been significantly improved (Best, 2011). The current problem is that these titles are not necessarily up to date.

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10 If this is not available locally, they can apply to the land administration.
11 Cadastre operations are attempts to secure property in a group, but they are expensive for the state (70 USD/ha), and none of them has been finished, leaving the owners in a gray area in terms of security.
4.1.3 New but still limited efforts for measures of legal recognition of rights

(i) Concerning plots held individually or by family The Land Observatory, in partnership with the CIRAD and the IRD carried out a representative survey over 9 communes with local government land offices, spread over 4 regions. For the whole of plots cultivated or occupied by households, the rights are mainly validated by being recognized by society and/or the use of “petits papiers”. In the communes in the survey: 60% of the household plots were secured by “petits papiers” and only 6% were legally registered, 5.6% by a certificate and 0.5% by a title. For these individual plots, or plots belonging to the immediate family, households apply for registration when the opportunity arises (when there are operations informing about certificates in the village) or when they feel particularly insecure in their land tenure. Land certification is available to all categories of people, whatever their level of wealth, education and distance from the village. However, the wealthier and better educated the household, the more likely they are to use “petits papiers” and then to apply for legalization through certificates or land titles. The move from “petits papiers” to certificates correlates with the level of wealth and education. (Burnod et al., 2012).

(ii) Concerning the collectively occupied land For pastures, wooded areas or reserves, the management and allocation of rights of use is managed at the level of the extended family, the clan or other larger social structures (Ottino, 1998; Muttenzer, 2010). These collective tenure systems are usually regulated and managed according to unwritten social rules (Dina) established and applied internally in the communities. The boundaries of the land and the various land rights are known locally but are very rarely mapped, validated in writing or legally registered (Fauroux et al., 2008).

(iii) Concerning the occupation of titled land or land with a specific status Households feel very insecure in terms of land tenure when they occupy lands that are already titled in the name of the state, titled to a third party or registered as land with a special status. These situations are very frequent in urban areas, in the most productive agricultural areas, tourist areas or protected areas. Technically, there are many legal measures for formalizing occupation12. In practice, these procedures are little used and when they are, they prove long, costly and sometimes discretionary. These situations are progressively dealt with by the “comité de revision des textes (law text revision committee) or in the framework of specialized committees (e.g. the committee for land and forests), structures set up as part of the land reform.

4.1.4 Restrictions on rights

Each institution that intervenes in land issues has defined restrictions on rights. In urban areas13, some communes have planning maps that limit residential areas and have rules for urban planning (the need for planning permission, minimum size of plots). In rural areas, the restrictions are mainly limited to protected areas or to special areas for irrigation and other forms of water management for agriculture.

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12 In order to regularize occupation of state land or private property abandoned by the legal owners, occupants can use, for example, “acquisitive prescriptions” or “regularizations of occupation” on condition that occupation has been long term and is not contested.
13 Order 60 – 146, Act 2008 – 014, Decree 63 – 192
On the whole, the restrictions are justified by technical, biological or hygiene arguments, but they are not systematically discussed and explained, and so are rarely adhered to and remain poorly enforced. The poor application of restrictions in urban and rural areas is due, among other things, to the distance and the lack of resources of the central government and to the lack of coherence between the laws and local practice (e.g. the use of forestry resources in areas that have been occupied and used for a long time by locals is prohibited). The communes, which have the legal competency to apply the law, have not always been empowered institutionally and technically to do so (e.g. managing planning permission).

4.1.5 Clear sharing by institutions of mandates and roles, but not of information

Different institutions (Ministry in charge of land use planning, land administration, ministries, parastatal agencies, regions) can intervene to manage land or natural resources and to resolve litigation. The attribution of authorities between these institutions is relatively clear. However, as in many countries, tensions can arise among Ministries or between the central government and the communes in the case of the development of a large project. This is the case, for example, when the government defines protected areas or allocates large areas to agricultural or mining investors. Each government entity wants to control the financial and material resources of the project and tries to reaffirm its authority during negotiations concerning these projects (Burnod et al, to be published).

These institutions, which want to manage their projects independently and are often faced with technical difficulties, do not systematically exchange land tenure information. For example, the land administration, mining and forestry services do not inform each other about the identity of land holders, the limits of protected areas or mining concessions, the issue of mining permits, etc. The information about the boundaries of protected areas and mining concessions exists but is not aggregated by the land administration services. In the same way, the land administration and the local government land offices do not communicate sufficiently to update maps (PLOF) and include the new titles and certificates in them. The result is that different rights encroach on each other, and this causes social conflicts and a rise in land litigation in the courts.

4.1.6 Efforts to make the design of land policy more participatory

The design of land policy is partly participatory. The Ministry in charge of land use planning, the project manager for the tenure reform, has used consultations (often funded by donors\(^\text{14}\)) and the creation of committees to make its implementation open to public participation. These committees, which mainly take place in the capital, are 1) the Committee for the Revision of Land Texts whose members are representatives of civil society and professional bodies, such as solicitors, 2) the Committee of Orientation and Monitoring of the land reforms, made up of representatives of various ministries, investors and civil society 3) the Land and Forestry Committee, and 4) the Technical Unit of Preparation of the “Lettre de politique foncière” (land policy white paper). The progress, results and impacts of the implementation of the reform are made transparent mainly through publications and workshops – conferences organized by the Land Observatory and the National Land Program - and the different points are debated during events organized by the La plateforme de Solidarité des Intervenants pour le Foncier (SIF - collaboration platform between development partners working in land tenure).

However, the formulation of land policy does not yet have any explicit equity goals for the securing of secondary rights; rights held by migrants, vulnerable groups, women; or access for landless households.

4.2 Land use planning and land taxation

The second theme is on land use planning (transparency in restrictions of use) and land taxation (transparency in the estimation of land value, effectiveness in identification and collection of property taxes).

\(^{14}\)At the initiative of civil society, the formulation of the land policy in 2005 began by a consultation of NGOs and famers’ organizations.
4.2.1 Urban planning: little benefit for the communes

Recent reforms have led to the legal, institutional and technical restructuring of land use planning\(^\text{15}\). In particular, there have been a series of official land use master plans created in Antananarivo and in other large cities\(^\text{16}\).

When drawing up a rural or urban land use plan, the legal measures require a consultation and a public validation of results. For example, an inter-ministerial circular\(^\text{17}\) makes it mandatory to have a commodo–incommode (convenient/inconvenient) enquiry, to publish planning projects in the villages, and to provide notebooks to the public for collecting any contesting opinions. But, in many cases, this public consultation and information is just a formality.

In many cases, strategic information on the change in land use only benefits land speculators. These speculators buy land very cheaply from isolated traditional or legal landowners and sell it at top prices (Ranaivoarimanana, 2011). The legislation\(^\text{18}\) specifies regulatory measures so that the state, and particularly the communes, can recover the property value gains (particularly when they are over 30% of the initial land value). But, in practice, the taxes (which can be up to 50 Euros per square meter) are rarely collected or not collected at all, and do not benefit the communities.

Apart from transport infrastructure and the development of commercial centers, land use plans are not used. Confronted with rural-urban migration and natural urban growth\(^\text{19}\), the cities and the nearby communes are not able to effectively designate areas for development, or to control the number and type of developments.

4.2.2 Poor incentives to build legally

The communes are the entity authorized to issue planning permits. But completing the paperwork involves 16 different stages and requires consulting different institutions, including the land administration and regional land use planning administration. According to the standards of the administrations, the total time taken should be between 124 – 132 days. In practice it takes 365 days for 40% of the requests for permits and much longer for others. The costs of planning permits are not within the means of most people. In Antananarivo, the fees in the commune are $5 US/m² of built area, and this is not counting the fees of other administrations.

The long delays and cost do not encourage people to request planning permits. So the percentage of informal dwellings for new constructions could be over 80%. In Antananarivo, only 580 requests for planning permits are filed and 230 are accepted per year. This is very low compared with the 15 000 to 20 000 new households who migrate to the capital every year. Also, the minimum surface area for dwellings is rarely adhered to. The large numbers of illegal developments cause conflicts (approximately 460 complaints are filed annually to the Urban District of Antananarivo by neighbors).

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\(^{15}\) Among others, there have been: urban planning concepts drawn up in 2004, the National Policy of Land Use Planning and the National Policy for Habitat adopted in 2006, and the National Concepts and Regional Concepts of Land Use Planning which should have been drawn up in 2009 were delayed by the political crisis and the new Code of Urbanism and Habitat is awaiting validation by Parliament.

\(^{16}\) Antananarivo and the surrounding communes have respectively an urban planning concept for the whole conurbation (PUDi–drawn up in 2004 and updated in 2011) and simplified urban planning concepts. Antsirabe, Mahajanga, Antsiranana and Fianarantsoa also have land use plans drawn up in 2011.

\(^{17}\) Interministerial Circular 98 – 001/MinATV/MDB/MI.

\(^{18}\) Order 62 – 023.

\(^{19}\) The population growth in Antananarivo, which has approximately 2.5 million inhabitants, is 4% per year (WorldBank, 2011).
4.2.3 Discretionary evaluation of the value of land and poor tax recovery

Since 2006, the communes have been in charge of land taxation and are the only ones to receive the payments\textsuperscript{20}. In practice, the communes have not received the means to develop these new opportunities. They cannot pay for agents to collect the information needed. Nor do they have any standardized means of calculating the values of land or apartment buildings. So the communes, and particularly the rural ones, set the property tax at a flat rate and not according to market price.

Further, information on land ownership is based on the declaration by occupiers or owners. This is only partially reliable, since the lack of monitoring and updating of the registers\textsuperscript{21} does not encourage taxpayers to make exhaustive declarations. It is thought that the information covers only 50 – 70% of taxpayer property and includes fairly unreliable data – such as, for example, the surface area of agricultural plots (FTHM, 2011). Lastly, the rate of tax collection is very low and is rarely more than 50%. In order to improve the identification and recovery, new experiments are being carried out that associate land, taxes and participatory budget management. In the 4 villages studied, this has made it possible to double the number of plots identified - from 2 500 to 5 000 (NGO EFA, 2012).

4.3 Management of state land

This theme deals with the transparent management of state land, and the justification and fairness of expropriation procedures.

4.3.1 Inefficient management of state-owned land

No inventory or monitoring of state land exists, not even for private state land for which transactions are possible\textsuperscript{22}. This is because no initiative has ever been taken to list state land\textsuperscript{23}. Even land with specific status, such as forestry reserves for example, has not been identified and listed to facilitate the monitoring. The only data available for state land administration is a list of 1,706 plots of land titled in the name of the state covering a surface area of 17,129 km\textsuperscript{2}. These titled plots only cover a surface area of 3% of the national surface area, which suggests that the number is under-estimated, given the proportions observed on the plans at local government land offices. Moreover, information on state land is not available to the public, whether or not it exists partially as lists or maps.

4.3.2 A lack of information on the allocation of state land

In order to allocate state land, the state can give the land freely, sell it or, if the land has been titled in name of the state, it can lease it\textsuperscript{24}.

Concerning the sale of state land, the divestment usually takes place as a private sale and the request generally comes from the purchaser. The rules stipulate that the first applicant has a right of priority\textsuperscript{25}. Despite this rule and because of the intervention of several institutions in land management, some state land administration agents continue to receive several requests for the same plot of land.

Sale by public auction or bids for tender are very rare and are only applied when there is litigation about the plot of land or overlaps of several requests. The land is theoretically sold to the highest bidder. The sale prices are not aligned with market prices. State land is sometimes sold at much lower than the market price. The price range applied does not take account of two criteria: 1) the location (urban or rural) and 2) the use of the land - agricultural or residential.

\textsuperscript{20} Taxation is precisely specified by legislation. Decree 3751/2006/ MEFB/MDAT and the General Tax Code (CGI), articles 10.01.07 and 10.02.06.

\textsuperscript{21} Most registers are over 5 years old.

\textsuperscript{22} Act 2008 – 014. Public state-owned land, governed by Act 2008 – 013, cannot be involved in transactions. Private state-owned land can be involved in transactions. Some state land can become respectively after registration or occupation, titled private property (PPT) or untitled private property (PPNT). On the contrary, other land can be handed back to the state due, for example, to lack of development (but these cases are rarer).

\textsuperscript{23} Particularly since the state, before 2005, was the owner of the majority of the country.

\textsuperscript{24} Act 2008 – 014 and decree of application 2010 – 233 (articles 24 to 41).

\textsuperscript{25} No further dossiers can be received for the plot in question as long as the first applicant has not officially retracted – within a limited time and on condition that the different fees and duties are paid.
Concerning the leases on the land titled in the name of the state, the total number is estimated at 420 for the whole of Madagascar for all types of use (agricultural investment, tourist reserve, salt production, etc.). Even if only the tourist leases are taken into account, this number seems to be underestimated. The rental dues (in m²/year) are one tenth of the estimated market value of the land but are not all paid. An evaluation carried out on a sample of leases has shown that for the period 2006-2011, the dues were paid for only half the leases (source: the department in charge of leases – DDSF). The low collection rate of dues is partly due to the absence of an up-to-date database on these contracts and the lack of resources for local follow-up.

Due to the lack of information and follow-up, the management of sales or leases on these plots is not supported by assessments of: (i) the price band that should be tailored to the project and the profile of the applicants and (ii) the resources that these allocations could generate – instead of the sometimes discretionary treatment of these decisions.

4.3.3 Lack of justification and compensation for expropriation procedures

According to the law, the only reasons for expropriation for legally recognized landowners or expulsion are reasons justified by a public use of the land, for building roads or public infrastructures, etc. In practice, more and more expropriations take place for the sake of private interests. The state has already used the procedure of declaring a public interest for projects with very high economic stakes which are more private than public, such as multinational mining companies (ilmenite, nickel or cobalt).

The law provides for compensation of all rights, whether or not they are legally registered, on condition that the rights are recognized by the Administrative Evaluation Commission. In practice, these measures are not always applied. First, only certain rights receive compensation, and often only those that give rise to visible occupation: habitation and cultivated land but not fallow land, land reserves or pasture. Second, for the rights that are not legally registered, the compensation generally concerns a partial value of the occupation (e.g. the value of the building or of the food crops on the land...). Furthermore, the losses are not always compensated fairly. Of the nine cases studied between 2005 and 2010, the compensations paid were on average only 30 to 65% of the calculated value of the losses. Since the law on expropriation dates from 1962, it must be updated and implemented taking account of the new measures on the presumption of ownership and the legal recognition of occupation (laws of 2005 and 2006).

4.4 Public access to land tenure information

This theme analyses the completeness and the transparency of tenure information (information on existing ownership and fees). It also deals with the cost effectiveness and the financial sustainability of land administration.

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26 Decree 2010 – 233 (article 57).
27 Order 62 – 023.
28 Articles 19 and 20 of Order 62 – 023.
4.4.1 Patchy and sometimes unreliable tenure information

There are three types of formal registration of land rights in Madagascar and each one has its system of conservation: individual land registration, cadastral operations, and the recent system of land certification. The information on these types of land is theoretically available. On the contrary, information on land that is occupied but not formalized does not exist.

For registration and cadastral operations, the land administration respectively uses the following registers: the land management record for recording land titles; and a cadastral matrix for property registered in the cadastre. The topographic services keep the different types of plans. Poor storage conditions and much handling of these paper documents have hastened their deterioration. According to estimations of the land administration, 12 to 15% of the plans have been destroyed and 25% of the land management records are missing. Moreover, the complexity of the process and the high cost of formal registration of changes have discouraged users from registering changes systematically. According to estimations, only one half of the land tenure information on titles and cadastral plots is up to date. The tenure reform has not yet been able to set up a legal and technical measure for recreating damaged documents.

For the tenure certificate, the local government land offices (together with the support units for tenure information which digitalize information when the land office has no computer) keep the information: (i) on the owner and the property in hard copy in the plot register and (ii) on the land use location in soft copy in software called PLOF (Plan Local d’Occupation Foncière – Local plan of land occupation). Because certification has only been introduced recently, the information on the certificates with land occupation is still almost 100% complete and accurate (internal communication – Directorate of the reform).

The legislation indicates that information should be accessible to the public for a property that is titled or recorded in the cadastre via the legal situation certificate (CSJ – certificat de situation juridique) that specifies, for example, the owner’s name, the surface area, the charges on the land, etc.). The legal cost of issuing a CSJ is between 50 cents and $3 US, and it should take on average one week (if the original register is not missing). The legislation also makes it possible to have public access to information on certified properties via the issue of a Certified Property Affidavit or by consulting the PLOF. The latter is free, and as long as an agent is present, it is immediate.

Box 4: The local government land office is frequently visited and appreciated for its free information

| It has been noted that 22% of households have been to the local government land offices in the first 2 or 3 years of existence. In comparison, only 4.6% of households have consulted the land administration which has existed for much longer. The local government land office offers a proximity service to people who had never had one previously: 4 out of 5 visitors had never before been able to or had the opportunity to consult a public institution in charge of tenure. Two thirds of people go to the land administration or the local government land office to ask for information about the legal situation of their plot, or about procedures or disputes. But whereas 74% of requests were satisfied at the land office, only 26% were satisfied at the land administration. This difference is partly explained by the fact that the information is free and the agent is available at the local government land office. Source: Observatory, IRD, Cirad cf. Burnod et al., 2012. |

4.4.2 High cost of changes and the fragility of tenure information

The legislation authorizes the transfer of titled property in different forms: inheritance, donation, sale, exchange, merger, etc. For all these transaction, the legal registration is supposed to: (i) be taxed by a registration fee in proportion to the market value of the land, at an amount of 6% at the tax center and 2% of the.

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29 These are individual or identifying plans for titles and cadastral plans for cadastral operations.
30 No less than five different institutions, which are geographically distant from each other, are involved in the formalization of mutations: the Commune, the administrative district, the District tax centre, the regional service of spatial planning, the independent surveyors, the topographical district and the state property district. The court is required to intervene when items are missing from tax districts.
31 Internal communication – Directorate of the reform.
at the land administration (inscription of the change); and (ii) get independent surveyors (whose minimum tariff is $60 US) to update the land plan. Then there are costs that depend on the nature of the transaction. For example, donation between living people and sales are subject to a tax on the increase in value of the property (IPVI) equivalent to 22% of the value of the land. In all, the registration fees can be more than 30% of the value of the land. Given these high costs for registering transactions, discretionary practices can develop, particularly at the tax office. Market price lists that are used to calculate the value of the land and the taxes are not displayed in public, and tax officers can negotiate the amounts to declare and pay themselves a commission. In this context, property owners are not encouraged to update their land titles. They protect their rights by falling back on “petits papiers”.

The fact that documents deteriorate and are not kept up to date means that present occupiers of land who claim to be owners are not fully protected against possible disputes or despoilment. The institutions in charge of land reform should do more to encourage updating data on titles and recording titled and certified property transfer.

4.5 Conflict management and resolution of land disputes
This theme deals with conflict management (identities and responsibilities of the institutions concerned). Tenure conflicts are one of the main social problems in Madagascar. The press tells of cases of conflict every week, but it is difficult to have an idea of the number and frequency of conflicts. The importance of the resolution of litigation lies in the public accessibility of the mechanisms of mediation and conflict resolution.

4.5.1 Different entities dealing with conflict management
Because there are several legal systems dealing with tenure, incorporating local rules and laws, several institutions are involved in resolving tenure disputes and conflicts.

Many conflicts are dealt with locally by traditional or administrative institutions. These traditional local authorities are clan or spiritual leaders, raiamandreny (notables or elders) and the fokonolona (local socio-political organization made up of people from the community). They can solve conflicts based on local rules (Dina), but their rulings only apply in the community concerned. The administrative representatives are the Fokontany Chiefs and the members of the Commune Council. The Fokontany Chief has a role as a mediator between parties and the traditional instances. He tries to resolve conflicts amicably and, if this fails, he sends the plaintiffs to the administrative bodies. The Commune Council can deliberate and give an arbitral sentence, which has legal weight. The representatives of these traditional and administrative local institutions are the same and/or they work regularly together. They can deal with disputes by using several legal options (local rules or laws). The Commission de Reconnaissance Locale (CRL - local recognition commission) created as part of the decentralization of tenure management, is an example. Its function is to attest to the rights of applicants for certificates at the local level, and so they are a type of reconciliation of traditional structures and local administrative institutions.

No national statistics exist to quantify what happens in the communes with respect to conflict. A survey carried out in 9 communes with a local government land office found that land conflicts only concerned 2% of plots, with large variations between communes (Burnod et al., 2012).

Box 5: The role of the commune council in judging tenure disputes
Certification generates or reactivates some conflicts: conflicts existed for 4.9% of certified plots (compared with 2% for other plots). This high rate is explained by the fact that owners are more likely to certify plots on which they feel insecure. But in most cases it was observed that obtaining the certificate also enabled conflict resolution (67% of conflicts). Thus the role of the commune council in providing certification enables conflict resolution and so only the most difficult or most contested cases go to court. Source: Land Observatory, IRD and Cirad (Burnod et al., 2012).

3It is important to take account of the difficulty in identifying conflicts during closed question surveys. Conflicts also cover a wide range of situations and degrees of gravity.
At the regional level, “cliniques juridiques” exist (TranoAroZo - legal clinics) which provide free advice and information to help people. But for the moment there are only six of these clinics in the country. Finally, the courts deal with the resolution of land conflicts. Less than one conflict in ten gets to court and often as a last resort due to the high cost of appearing and the rather complex procedures that are distant from local rules. In general, for rural populations, a local arrangement is better than a court case.

An implicit hierarchy exists between these different institutions of conflict resolution. The decisions made by local traditional authorities have very little recognition from the legal judiciary system. If one of the parties appeals to the administrative bodies, these decisions by traditional authorities can be overthrown and annulled. In the same way, the arbitral sentences formulated by the communal council can be annulled by the Court of First Instance.

4.5.2 A long delay for the resolution of tenure litigation in the courts

In many studies, it was reported that tenure litigation accounted for 60 to 80% of the cases brought to court. However, a recent study carried out by the Land Observatory for the period 2005 – 2010 has shown that tenure disputes for the Court of First Instance of Antananarivo only accounted for 23% of the civil cases recorded and for all the courts of Madagascar, 10.3% of affairs judged. However, these disputes can be particularly complex, and sometimes violence is involved, and several families can be involved in the same case, which requires many hearings. The lead times in resolving tenure disputes are particularly long. The average time is 407 days (between the registration of the dispute and the date the judgment is pronounced) and 10% of cases are only judged after two years. The longest times are reported for the big cities such as Antananarivo, Diégo, Toamasina and Mahajanga, where they are over 600 days (Andrianirina – Ratsialonana et al, 2012). This is due to:

— the high cost borne by the applicant for getting the magistrate to travel to the plot\textsuperscript{33}. And the case cannot be examined or judged until the magistrate has visited the plot;

— lack of human resources in the courts. Antananarivo has the largest court, but only 15 magistrates to examine approximately 4 500 civil cases annually. This would mean that each magistrate would have to deal with 300 disputes per year;

— the fact that land disputes are classified as depending on the parties, since each opposing party can request that the examination be prolonged so that they can bring further proof.

\textsuperscript{33} The fees are between 80 000 and 200 000 Ar (40 – 100 $US) per day.
4.6 Large scale land acquisition

This section deals with the acquisition of land rights for major investments for agriculture (food or biofuel production), livestock or forestry. Operations relating to mines or hydrocarbons are not included.

4.6.1 Management of requests for land and safeguarding land rights

According to current laws, the institutions in charge of managing land and regulating investments have well defined jurisdictions that do not overlap. In practice, however, they are often in opposition or in competition for the allocation of land (power struggles between the mayor, the head of district, head of region, the land administration, forestry commission, traditional authorities) (Andrianirina – Ratsialonana et al., 2010). As mentioned above, each institution wants the benefits of the resources arising from the economic project and tries to impose its own rules or to facilitate access to the land for investors without consulting the other institutions (Burnod et al., to be published). In order to limit this, the Ministry in charge of land brought out a circular to organize the different stages of the procedure and remind everyone of the authority of the central land administration.

Secondly, the land in question, due to the large areas involved, encroaches on occupied land with different uses and different legal statuses. It is estimated that over 75% of requests for large areas of land for agricultural projects are contested (WWF – PAD, 2011). Land intended for developing new protected areas poses similar problems of encroaching on occupied and titled land.

There are different components in this lack of compliance with land laws (Evers et al., 2011): (i) the technical difficulties related to the size of the areas; (ii) documents containing tenure information are not kept up to date; (iii) lack of information; (iv) the absence of determination or requirement to consult updated electronic documents; (v) lack of consultation of people with rights during visits to the plots; (vi) poor knowledge or deliberate ignorance of new tenure laws and, above all, (vii) the determination to see the agricultural project developed.

**Box 6: Reasons for conflicts related to large scale land acquisition**

(i) the encroachment of targeted areas for agricultural projects or protected areas on pasture land managed by groups of livestock raisers or on fields of smallholdings, which are supposed to be protected by the presumption of ownership;

(ii) encroachment of areas targeted for agricultural projects on land with specific status but not registered legally with the land administration: transfer of natural resource management to grassroots communities, protected areas, forestry reserves;

(iii) reasons other than the land itself, such as the way workers are recruited and the salary paid. The salaries offered can be higher than the rate applied in the region, which causes discontent among other operators.

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34 Translation figure: Number of Land disputes brought to the Court of First Instance in Antananarivo between 2005 and 2011 (Andrianirina – Ratsialonana et al., 2012)

35 Framework Act 2005 – 019

36 Circular 321-10/MATD/SG/DGSF, “Instructions concerning the procedure to follow when applying for a large tract of land”.
4.6.2 Very long lead times for approving investments

For agricultural (and mining) projects targeting large surface areas, the approval procedure is very long. The two final major steps in the process are obtaining a lease from the state and the environmental permit delivered by the National Office for the Environment (the ONE – Office nationale de l’environnement). In order to arrive at this point, the operator must go through a process containing no fewer than 15 steps. Out of the 32 real projects being investigated, for which applications were filed between 2006 and 2008, only 2 had obtained a lease contract from the state and an environmental permit in 2011.

4.6.3 Lack of fair mechanisms for sharing benefits

The legal texts list the different pieces of information that the investigator must provide to prove that the project is socially viable, will provide economic added value, and safeguards the environment. This is the information that should provide the conditions for granting or withholding the lease and the environmental permit. In practice, there are two limits. First, there is insufficient analysis of the technical proposal of the project (discussion on the infrastructures and rate of return on investment). In addition, the technical, financial and environmental information contained in the project dossiers and the environmental impact studies are kept confidential by the government agencies (MATD, EDBM, ONE) and are not made public. Second, the parastatal organizations (such as the ONE for example) and the ministries concerned (forestry, population, labor), do not have the resources to locally control the effective monitoring of the environmental mitigation measures and the social markers defined in the specifications of the lease and the environmental permit. In general, these organizations are only informed when social unrest or environmental damage is reported.

In general, the legislation is not explicit about mechanisms of fair sharing of profits, and there is no legal obligation to show this type of mechanism in the contracts.

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37 The main stages are: (i) registering the company; (ii) requesting a note of approval from the Council of Ministers for beginning to look for land; (iii) carrying out an impact study; (iv) the social acceptance of the request for land and the results of the impact study (v) the registration of the land in the name of the state; (vi) recording the lease; (vii) obtaining an environmental permit.

38 Particularly, the decree MECIE (99 – 954 modified 2004 – 167), the Act 2007 – 036 on investment and the circular 321-10/MATD/SG/DGSF concerning the procedure for requesting large surfaces of land.

39 This has already been seen in the case of demonstrations against agricultural projects (the Tozzi Green project in Ihorombe) or mining projects (Mainland in Manakara), or in the case of an environmental accident (leakage of toxic products in the Sheritt mine in Moramanga).
5 Policy recommendations

The LGAF analysis process was finalized by a feedback workshop, during which the results of the panels of experts were rendered, debated and validated by the different representatives of the institutions involved (state, civil society, investors). This workshop produced short and long-term recommendations to make concrete strategic and operational measures.

5.1 Enhance the responsibility of the state and decentralized administrations in protecting the rights of users and citizens

On principle, the state and decentralized administrations, through the public services, have the duty to protect citizens’ rights. This means that they need to guarantee lasting and up-to-date systems of preserving tenure information. In the short term, it would seem important to implement several measures to: (i) reconstitute missing data and update the data concerning titled and registered plots, (ii) devise a reliable digital archiving procedure for tenure information held in the local government land offices and land administration, (iii) encourage the registration of transactions (see below).

5.2 Ensure an accessible tax policy for land transactions

The taxation of land transactions is currently too high, at around 30% of the value of the land. This contributes to the low levels of legal registration of transactions, to people declaring less than the real value of land and to the corruption of employees at tax centers. Above all, it leads to a loss of tax revenue for the state and also to a divergence between real land occupation and records in the land registers, which is a source of insecurity and land disputes. Improved governance should propose measures to encourage the legal recording of transactions by decreasing the level of taxation on land transactions.

Land policy should include land taxation as an integral part of policy. Locally, land taxation can be a major opportunity for a move toward financial autonomy for communes.

5.3 Improve the fairness of land policy by promoting women’s rights

Current land policy already implicitly aims at fairness by recognizing the presumption of property for traditional tenures, by giving women access to formal security of rights, and by giving lower income households the opportunity to hold property documents thanks to the tenure certificate. These intentions should be described clearly in the “Lettre de Politique Foncière” (Land Policy Letter). The principle of equity should also appear in strategies and actions carried out at the grassroots level: accessible costs of certification are imperative, and systematic information about the possibility of registering a certificate or a land title in the name of the couple should be available.

5.4 Implement a program promoting communal land governance

The commune is by far the best level for establishing an open land governance system due to its prerogatives for managing (i) annual land taxation, (ii) plots with the status of untitled private property and land titled or given in the name of the commune, (iii) commissions on mining products, (iv) monitoring natural resource management and (v) issuing planning permits.

This vision should be reinforced by providing the communes with tools and technical skills for managing its land use planning. On a more practical level, systematically recording transactions and having a database of land occupation and the formal status of land would be a huge advantage for the communes for tax purposes. It would also enable the communes to protect the rights of occupants using mediation and legislation on lease contracts when these were requested by mining or agricultural investors. In this case, the Local Land Occupation Plan (PLOF) should be made available to all communes, or at least firstly to places with major mining potential or of potential interest to agricultural investors. This should be reinforced by solid training on legislation for the mayors and the technical agents.

The local government land offices are more accessible than the land administration because there is one in each commune and because the information is free. Because of this, they should be supported to
facilitate their different missions and, more generally, to take on the role of sharing information and conflict resolution.

Above and beyond what communes do currently, it would be useful to have discussions on the role of the communes in managing (i) contracts and secondary rights in sharecropping\(^4\), (ii) the decentralized monitoring of mining or farming investment project implementation and (iii) the taxation of land transactions.

5.5 Reorganizing the management of state land

The creation of an autonomous parastatal for identifying and managing state-owned land could enable a more transparent and efficient allocation of this land in line with the goals of public policy (land, agriculture, land use planning, etc.). This institution could define prices, the categories of divestible land, conditions of sale or lease, etc. In order to foster transparency and limit discretionary practices (such as inside information or nepotism) and corruption, the institution should be required to make public all information on the situation of available land and the conditions for allocation. In addition, the institution should be in charge of collecting property value gains.

For concessions of very large areas of land, information on progress with project implementation, the contents of the project proposal, the measures of environmental mitigation and the social projects announced should all be made public\(^4\). Another option for enhancing effective controlling of investments is by increasing local participation via decentralized monitoring. Approval procedures should be standardized to reduce the time required to complete them. Practically, it would be a move towards transparency if all the documents and the explanations of procedures were available for downloading from a website.

Generally speaking, the strategies for dealing with large-scale land investments could be integrated into a land or agricultural policy to provide a framework for specifying areas that can be allocated and are available for investors, eligible crops, mechanisms for risk and profit sharing, and above all, the priorities for securing and protecting local tenure rights.

5.6 Protecting rights in cases of expropriation

Next, the role and responsibilities of public institutions in protecting rights during the process of expropriation should be clear. The loss of rights to land should be justified in a transparent manner. When no alternative to expropriation is deemed possible, lost rights should be compensated fairly, as quickly as possible and for all eligible parties, even for those with no documents proving their ownership. Before negotiating the arrival of a mining company, an agricultural operator or an operator wanting to develop a large area of protected land, the commune, with the support of the local government land office or the land administration, should ensure that all land occupation or ownership is systematically recorded. The commune could also play a supporting role in negotiating and monitoring contracts exchanged between these operators and the landowners or occupants. Lastly, the protection of rights could also involve providing legal information and advice to local land holders (Andrianirina et al., 2012).

5.7 Harmonizing information exchange

The current legal framework governing land management in Madagascar is a result of the overlap and interaction of the different legal texts established since the colonial period. The current texts should be compiled and harmonized into a single Land Code. Above all, it will be important to move forward and deal with the legal gray areas surrounding the management of pasture, old land use status, delegated or secondary rights and unfinished cadastral operations.

The land question cuts across many areas and obviously needs to be dealt with in a multi-sectoral manner, and it will require institutional, technical and land use coordination. Legally and institutionally,

\(^{4}\)Sharecropping is not legally authorized but is widely practiced in rural areas. The absence of a formal contract introduces the risk of the sharecropper usurping the right of ownership after several years of work, and of the uncertainty of access to the land when the owner stops the agreement.

\(^{41}\)For this purpose the Land Observatory is devising a project called the Land Investment Observatory (OIF).
the creation of inter–ministerial committees, like a Land-Forestry Committee or a Forestry-Mines Committee, would be a major advantage to provide a framework for collaboration between the institutions and for making the texts consistent. Technically, a single land use information base should be created that brings together all spatial interventions produced by the various interventions. This database would provide information on the boundaries and the updating of different land use statuses: protected areas, a mining cadastral system, private state land, certified land, areas of economic planning. The scale of these databases should be left to expert opinion in each sector. Particularly for the land tenure sector, it will be imperative to implement a procedure for information exchange on certified plots and titled land, both in the state “cirkonscriptions foncières” and at the local government land office level.

Bibliography
Cabinet FTHM Conseils, 2009. « Analyse institutionnelle et politique pour l’amélioration de la fiscalité foncière et établissement de la situation de référence des recettes fiscales foncières communales ». MCA (Millennium Challenge Account)


Radert, S. 2008. « Economie politique de la décentralisation à Madagascar ». INCOMPLET


SAHA, Observatoire du Foncier, Sehatra Iombonana ho an’ny Fananan – tany (SIF), ONG EFA, ONG Hardi, FVTM. 2011. “Accès de la femme à la sécurisation foncière : propositions d’amélioration de la politique et des stratégies dans la réforme foncière”.


Annex 1 Translation of terms: Administrative and territorial organization of the Malagasy State (figure 3)

<table>
<thead>
<tr>
<th>Etat central</th>
<th>Central state</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pouvoir législatif</td>
<td>Legislative power</td>
</tr>
<tr>
<td>Pouvoir exécutif</td>
<td>Executive power</td>
</tr>
<tr>
<td>Pouvoir judiciaire</td>
<td>Judiciary power</td>
</tr>
<tr>
<td>Sénat</td>
<td>Senate</td>
</tr>
<tr>
<td>Président de la République</td>
<td>President of the Republic</td>
</tr>
<tr>
<td>Haute Courconstitutionelle</td>
<td>Constitutional High Court</td>
</tr>
<tr>
<td>Assemblée nationale</td>
<td>National Assembly</td>
</tr>
<tr>
<td>Premier Ministre</td>
<td>Prime Minister</td>
</tr>
<tr>
<td>MinistèreDécentralisation</td>
<td>Ministry of Decentralization</td>
</tr>
<tr>
<td>MinistèreIntérieur</td>
<td>Ministry of the Interior</td>
</tr>
<tr>
<td>AutresMinistères</td>
<td>Other Ministries</td>
</tr>
<tr>
<td>Région</td>
<td>Region</td>
</tr>
<tr>
<td>Function administrative et territoriale</td>
<td>Administrative and territorial function</td>
</tr>
<tr>
<td>Services techniques déconcentrés</td>
<td>Deconcentrated technical services</td>
</tr>
<tr>
<td>Direction Générale de l’Aménagement du Territoire</td>
<td>General Directorate for Land use Planning</td>
</tr>
<tr>
<td>Direction Régionale</td>
<td>Regional direction</td>
</tr>
<tr>
<td>Service Régional</td>
<td>Regional service</td>
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<tr>
<td>District</td>
<td>Administrative District</td>
</tr>
<tr>
<td>Fonction administrative</td>
<td>Administrative office</td>
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<tr>
<td>Contrôle de légalité des actes communaux</td>
<td>Controlling the legality of acts in the communes</td>
</tr>
<tr>
<td>Fonction technique</td>
<td>Technical office</td>
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<tr>
<td>Services techniques</td>
<td>Technical services</td>
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<tr>
<td>Circonscription</td>
<td>Land administration division</td>
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<tr>
<td>Commune</td>
<td>Local government</td>
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<tr>
<td>Services communaux décentralisés</td>
<td>Decentralized local government services</td>
</tr>
<tr>
<td>État-civil, fiscalité, guichet foncier</td>
<td>Civil status, taxes, local government land office</td>
</tr>
<tr>
<td>Arrondissement administratif</td>
<td>Administrative subdistrict</td>
</tr>
<tr>
<td>Authentification d’actes</td>
<td>Authentication of deeds</td>
</tr>
<tr>
<td>Echelon territoriale de base du système déconcentré</td>
<td>Smallest unit of deconcentrated system</td>
</tr>
</tbody>
</table>