

# A TIME FOR CHANGE?

## Comments on Chad's draft Land Code



# Background



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# Acknowledgements



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## ACRONYMS:

<b>CFS:</b>	Committee on World Food Security
<b>EEMET:</b>	L'Entente des Eglises et Missions Evangeliques au Tchad – the Accord of Churches and Evangelical Missions in Chad
<b>IIED:</b>	International Institute for Environment and Development
<b>UN:</b>	United Nations
<b>VGGT:</b>	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security



# Executive Summary



The process to develop a new Land Code in Chad is a positive step forward: a unified text can help to ensure internal consistency and to make land law more accessible. The draft Code also improves, to a degree, the protection of certain customary rights. However, fundamental aspects of the draft Code reflect policy orientations that would need careful thinking through, including in light of international guidance and best practice. Addressing these issues would require a substantial overhaul of the current draft, rather than simply “tweaking” the wording of its existing provisions. Our comments and recommendations primarily focus on the overall structure of land ownership, management and administration systems, and on the protection of customary rights – which are the rights claimed by the vast majority of rural people in Chad. We also consider other key issues, including safeguards in compulsory land acquisition, the rights of pastoralists, gender, land-based investments and dispute resolution. Should a new law be adopted, resources for implementation, including capacity building, would need to be carefully budgeted for.

## Key messages and recommendations

### 1. Land administration

The draft Code reflects a highly centralised system of land ownership, management and administration. This system risks excluding most people from the means to document and protect their land rights, and fostering widespread tenure insecurity.

- **The draft Code should provide for low-cost, locally accessible arrangements to secure all legitimate land rights, including customary land rights.**

### 2. Customary rights

The draft Code considers customary rights as “temporary” rights. It conditions full legal protection to the existence of a land title, which converts customary rights into land ownership. In practice, this process is likely to be inaccessible for the vast majority of the population, effectively excluding most people from full legal protection. There is also ample evidence on the problems created by policies systematically to convert customary rights into private ownership, including dispossession of holders of “secondary” rights (e.g. women, youths, migrants)

- **The draft Code should provide effective protection for customary land rights, including those that are not formally registered, and effective means for documenting customary rights without necessarily converting them into private land ownership.**

### 3. Land acquisitions

The provisions of the draft Code regarding compulsory land acquisitions provide limited safeguards, particularly for holders of customary rights.

- **The draft Code should clearly define the public purposes for which the government may acquire land rights on a compulsory basis; apply the same safeguards to all compulsory land acquisitions, including acquisitions of customary land rights; develop compensation requirements that recognise the multiple livelihood contributions of land and resources, and that include future earnings; establish measures to ensure that affected stakeholders are given a voice throughout the process; and provide stakeholders the right to appeal expropriation decisions.**

### 4. Pastoral rights

The draft Code does not address pastoral rights. The framing of productive land use requirements is at odds with the seasonal nature of pastoral resource use, and makes pastoralists particularly vulnerable to dispossession. The draft Code also seems to assume a static form of land use that contrasts with the imperative of livestock mobility.

- **The draft Code should recognise pastoral land use as a valid form of productive land use; recognise the right to pastoral mobility, which constitutes a way to use pastoral resources in a rational and sustainable manner, and the use rights that pastoralists have on such resources; and establish systems for regulating the interface between herding and farming, including conflict prevention and management.**

### 5. Gender

The draft Code does not address gender.

- **The draft Code should include provisions on gender equality, including a clear statement of the principle of gender equality in land relations and arrangements to translate this principle into practice (e.g. spousal consent requirements or joint titling).**

### 6. Safeguards concerning land-based investments

The draft Code does not provide clear rules and safeguards for the allocation of land to commercial investments. It gives public authorities considerable discretion to determine the terms and conditions of the sale from the State's private domain.

- **The draft Code should tighten safeguards against abuse in investment processes, clearly setting out the circumstance in which the State may allocate land from its private domain and spelling out mandatory local consultation requirements.**

### 7. Dispute resolution

The draft Code only includes limited provisions on dispute resolution, e.g. relating to compulsory land acquisitions or land registration processes.

- **The draft Code should effectively tackle dispute settlement, including through promoting alternative dispute resolution before land disputes can be taken to court.**

# 1. Introduction



This short report summarises comments and recommendations on the draft *Code Domaniale et Foncier* of the Republic of Chad (the “draft Code”). We have reviewed the draft Code in its version as of January 2014. The review involved the legal analysis of the provisions of the draft Code, including in light of recent international trends in land legislation, and of the guidance provided by the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT).

The VGGT were endorsed in 2012 by the United Nations Committee on World Food Security (CFS) and supported by multiple other organisations, including the Francophone Assembly of Parliamentarians. They reflect the international consensus on best practice on land governance (see Box 1).

The analysis of international trends aims to highlight the diversity of legislative policy models beyond conventional approaches to land law making. The intention has not been to present “success stories”: national laws typically present both strengths and weaknesses, governments have often struggled to implement well-meaning reforms, and realities on the ground may vary greatly, even within the same country. But reference to international trends does illustrate the ways in which policy thinking that underpins land law reform has evolved in recent years. Priority is given to Francophone West African countries, though the report also refers to experience from other parts of sub-Saharan Africa.

In addition to an analysis of the draft Code in light of international trends, this note draws on earlier reports concerning the draft Code prepared by the Entente des Eglises et Missions Evangéliques au Tchad (EEMET) (2014) and by Tearfund (2015a). We also benefited from conversations with local and regional experts.

The process to develop a new Code is a positive step forward, particularly given that Chad’s existing land legislation was adopted in the 1960s and is now outdated (namely, Laws No. 23, 24 and 25 of 22 July 1967). The draft Code merges into one text the three existing laws dealing respectively with State-owned land; with private land ownership and customary rights; and with restrictions on land rights. A unified text can help to ensure internal consistency and to make land law more accessible. The draft Code also improves, to a degree, the protection of certain customary rights.

Nevertheless, several fundamental aspects of the draft Code reflect policy orientations that would need careful thinking through, including in light of international guidance and best practice. Addressing these issues would require a substantial overhaul of the current draft, rather than simply “tweaking” the wording of its existing provisions.

For this reason, our comments focus on the fundamental choices of legislative policy that underpin the draft Code. We would be happy to provide more specific comments on the language of (the latest version of) the draft Code at a later stage, if deemed useful.

Land law reform involves more than just passing a new law. Adequate resources for implementation, including capacity building, would need to be carefully budgeted for. In turn, legislative design should consider budget constraints, as different options may have different cost implications. It would therefore be advisable to develop plans and establish partnerships and alliances for implementation at an early stage, and even during the law-making process itself.

Our comments primarily focus on the overall structure of land ownership, management and administration systems, and on the protection of customary rights – which are the rights claimed by the vast majority of rural people in Chad. We also consider other key issues, including safeguards in compulsory land acquisition, the rights of pastoralists, gender, land-based investments and dispute resolution.

#### **Box 1. The Voluntary Guidelines on the Responsible Governance of Tenure**

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) are the first comprehensive global instrument that provides guidance to states and non-state actors on how to promote responsible governance of tenure of land.

The VGGT were unanimously endorsed on 11 May 2012 by the Committee on World Food Security (CFS), which is the top United Nations (UN) body in matters of food security, after two years of extensive consultations and one year of inter-governmental negotiations.

The VGGT call for the recognition and protection of all legitimate tenure rights. They explicitly state that customary tenure rights can constitute legitimate rights. The VGGT provide guidance on, among other things, land restitution, land redistribution, land tenure reform, agribusiness investments and land administration. Whilst not legally binding, parts of the VGGT reflect existing international law and they have received widespread expressions of high-level political support, including from the Francophone Assembly of Parliamentarians, the UN General Assembly, the G8 and the G20.



## 2. A centralised system of land ownership, management and administration



The draft Code confirms the application of the principle of *domanialité* (state ownership), whereby all unregistered land is owned by the State.<sup>1</sup> In practice, this affects most land in the country (USAID, 2010a).

We note potential inconsistencies in the draft Code: article 34 appears to state that the State's private domain only comprises land subject to a land title, whereas articles 6 and 36 indicate that unregistered land also forms part of such domain.

More fundamentally, the principle of *domanialité* has far-reaching consequences, because it means that the majority of landholders do not own the land they use or claim, and only have land use rights. Much depends on how these use rights are recognised and protected (see Section 3): if no adequate protection is provided, this legal regime can foster widespread tenure insecurity.

The principle of *domanialité* is a recurring feature of land legislation in Francophone Africa, partly reflecting a colonial legacy. But some countries have recently enacted legislation that abolishes or qualifies this principle – including Madagascar, Burkina Faso and Niger (see Box 2).

### **Box 2. Principle of *domanialité* in Madagascar, Burkina Faso and Niger**

In Madagascar, there was a presumption that all untitled land belonged to the state until 2005. The presumption was reversed by Law 2005-019 of 17 October 2005. Under this law, land is part of the State private domain only if the State is named in the title to this land or if the land is untitled and has been neither occupied nor appropriated (article 18). In other words, the state must now prove that the land forms part of its domain.

Likewise, in Niger, the Rural Code (Law No. 93-015 of 2 March 1993) states that in order for land to be deemed “vacant”, it is necessary to prove that no right of ownership has been established (article 11). Land can now be acquired in Niger through custom or “written law” (*droit écrit*) (article 8). A land owner is under an obligation to ensure the productive use of the land – failure to do so for three consecutive years could result in a third party being allowed to step in to use the land (articles 18 and 19).

The principle of *domanialité* also prevailed in Burkina Faso until Law No. 034 of 2009 on rural land tenure was adopted. Rural land is now split into three categories: i) the State's rural land domain; ii) local authorities' rural land domain; and, importantly, iii) private individual's rural land ownership (*patrimoine foncier rural des particuliers*) (article 5), which includes customary rights.

(Sources: Franchi et al, 2013; Teyssier, 2010; Comité Technique Foncier & Développement, 2014; Comité Technique Foncier & Développement, n.d.).

<sup>1</sup> See articles 6 and 36 of the draft Code. This principle is already applicable in Chad under Laws Nos. 23 and 24 of 22 July 1967.

The draft Code provides that the land in both the State's public domain and the State's private domain is to be managed by the central government (the *ministère en charge des domaines*).<sup>2</sup> This means that the State can, for instance, grant leases and concessions or sell land from its private domain,<sup>3</sup> and also fix the limits of the public domain.<sup>4</sup>

The draft Code does refer to private and public land domains held by decentralised local authorities (*collectivités territoriales décentralisées*).<sup>5</sup> The draft Code provides that the State "may" ("*peut*") transfer the management of the State's public domain to such authorities if it deems this to be in the public interest.<sup>6</sup> The State may also sell registered and unregistered land from its private domain to these local authorities.<sup>7</sup> However, it is unclear how much land would actually be transferred and therefore managed at the local level.

Further, the draft Code states that the land registrar (*conservateur de la propriété foncière*) will administer private land ownership. The registrar's role is prominent throughout the draft Code. Among other things, the registrar deals with land registration requests and manages the land register.<sup>8</sup> However the draft Code does not define who will exercise those functions, where the body will be located and whether it is anticipated that offices will be set up in each department or municipality.<sup>9</sup> We understand that the registrar is currently located in one of the ministries (USAID, 2010a).

Under the draft Code, the land management and administration structure would therefore remain highly centralised, as is currently the case (Comité Technique Foncier & Développement, 2009). A highly centralised land management and administration structure raises multiple issues about proximity of decision making to local landholders, and accessibility of the means to secure land rights. With regard to land registration, for example, many rural people are unlikely to be able to travel to the country's capital, or even to major regional centres, to register land (USAID, 2010a). Where procedures are costly and cumbersome, land registration may be inaccessible to many urban people too.

It is worth noting that, since the 1990s, several Francophone African countries have enacted reforms that decentralised responsibilities for land management and/or administration. Examples include Senegal, Madagascar, Burkina Faso and Niger, which have adopted decentralised procedures for example to allocate land certificates to customary rights holders (see Box 3).

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<sup>2</sup> Articles 26 and 49.

<sup>3</sup> See e.g. articles 36 and 37 of the draft Code.

<sup>4</sup> Article 16.

<sup>5</sup> Articles 5 and 56.

<sup>6</sup> Articles 21 and 57

<sup>7</sup> Article 60

<sup>8</sup> See article 78 of the draft Code

<sup>9</sup> The draft Code provides that the number of constituencies where a land registry will be established is to be determined by decree (article 82).

**Box 3. Decentralised land management and/or administration in Senegal, Madagascar, Burkina Faso and Niger**

In Senegal, elected rural councils have the power to allocate use rights to most land. Land allocations are subject to a productive use requirement. The councils may withdraw the land if this requirement is not fulfilled.

In Madagascar, Law No. 2006-31 of 2006 allows users of private untitled land to apply for a land certificate through a simplified procedure with the “land desk” (*“guichet foncier”*) of the relevant decentralised local authority.

In Burkina Faso, Law No. 034 of 2009 transferred land management and administration responsibilities from the central government to rural municipalities. Rural municipalities issue certificates of rural land tenure, which record customary land rights (articles 77 and 78). The Law also provides that land use, land management rules and grant of leases will be dealt with through land charters established by local committees following participatory processes (article 13). The committees consist of a wide range of stakeholders including representatives of customary authorities, rural producers, women, youths and representatives of the regional chambers of agriculture (article 16).

In Niger, the Rural Code provided for the establishment of department-, municipality- and community- level land commissions consisting of various stakeholders including customary authorities and representatives from farmers, women and rural youth. The land commissions deliver land certificates to recognise customary rights (article 121). They must be consulted on issues such as the determination of the productive use of a piece of land (article 120).

(Sources: USAID, 2010b; Franchi et al, 2013; Teyssier, 2010; Comité Technique Foncier & Développement, 2011; Comité Technique Foncier & Développement, 2014).

A more decentralised land ownership, management and administration system, including locally rooted, low-cost arrangements for securing all legitimate land rights, including customary land rights, could increase accessibility and therefore use of land legislation in Chad. For instance, in Madagascar, there has been a significant increase in the number of application for land certificates in municipalities which have set up local land desks (Teyssier, 2010). On the other hand, failure to establish accessible arrangements can effectively exclude the vast majority of the population from benefiting from the provisions of the new land code.

Moving towards a more decentralised model may involve reconsidering the presumption of *domanialité*, as was recently done in some other Francophone African countries (see Box 2). It would also involve establishing a low-cost, locally accessible rural land service, e.g. at the sub-prefecture level (Tearfund, 2015a), perhaps modelled on Madagascar’s *“guichet foncier”* (see Box 3). This would have budgetary implications that would need to be considered.

### 3. Improved but still weak protection of customary rights



The vast majority of the land in Chad is held under customary tenure systems (USAID, 2010a). As discussed, the VGGT call for States to recognise and protect all legitimate tenure rights, and specifically refer to customary rights as being legitimate tenure rights.

Compared to Chad's existing legislation, the draft Code improves the protection of certain customary land rights. For instance, customary rights no longer expire if they have not been "exercised" for 10 years;<sup>10</sup> unregistered land is no longer *presumed* to be "vacant";<sup>11</sup> and the draft Code now specifically refers to both collective and individual customary rights.<sup>12</sup>

However, there are problematic aspects in the treatment of customary rights in the draft Code. The draft Code provides that the people who, prior to its adoption, enjoyed customary rights on the national domain will continue to enjoy ("*continuent à en jouir*") such rights and may obtain land titles in accordance with the provisions of the draft Code.<sup>13</sup> This wording seems ambiguous and appears to suggest that customary rights only receive a "static" protection. For instance, it is unclear what would happen in case of inheritance, as the heirs cannot be said to have enjoyed customary rights at the time of the adoption of the law.

More fundamentally, the draft Code describes customary rights as "temporary" rights.<sup>14</sup> It conditions full legal protection to the existence of a land title, which converts customary rights into land ownership. Only at that point do land rights become final and indisputable ("*définitif et inattaquable*").<sup>15</sup> In practice, this process is likely to be inaccessible for the vast majority of the population, effectively excluding most people from full legal protection.

Importantly, a substantial body of evidence from diverse African countries highlights the significant problems that may be associated with converting customary land rights into private (and typically individual) land ownership. Despite much diversity, customary land tenure tends to involve nested systems of land rights, whereby multiple resource users hold diverse and overlapping rights to the same piece of land. Depending on context, a transition to private land ownership can dispossess multiple land rights holders, including women, pastoralists and youths. At scale, it can also flare up latent tensions and conflict.

The primary emphasis that the draft Code places on land titling and the conversion of customary land rights into ownership is at odds with this improved understanding of the dynamics of tenure security. It also contrasts with much experience from other parts of Africa with developing innovative ways to secure customary land rights without converting these rights into ownership (see Box 4).

<sup>10</sup> See article 16 of Law No. 24 of 22 July 1967 on land tenure and customary rights.

<sup>11</sup> See article 13 of Law No. 24 of 22 July 1967. The presumption is "subject to evidence to the contrary".

<sup>12</sup> Draft Code, article 69

<sup>13</sup> Article 9. See also article 24.

<sup>14</sup> Article 64(2)

<sup>15</sup> Articles 8, 9(2), 68 and 85. Article 66 also provides that private land ownership can be definitely established with a land title only.

In addition, the draft Code includes a number of requirements for customary rights to be registered and converted into ownership. “Occupiers” of land need to demonstrate productive land use (“*mise en valeur*”) of the land.<sup>16</sup> Further, the protection of customary rights is subject to the requirement that unregistered land be not “vacant” (*vacantes*),<sup>17</sup> and to a “permanent and evident fixture upon the ground” (*emprise permanente et évidente sur le sol*).<sup>18</sup> Land that is free from any actual occupancy belongs to the State’s public domain.<sup>19</sup> The draft Code does not however specify how the actual occupancy will be established and who will be responsible for doing so.

These requirements would effectively exclude rights over any land not having visible improvements on it, e.g. grazing and fallow land, land reserves, communal forests, and land used for foraging and wood collection. Depending on context, these forms of land use can account for the majority of customary landholdings. The draft Code therefore makes holders of these multiple rights vulnerable to dispossession. In agro-pastoral systems, lack of legal recognition of pastoral grazing and transhumance rights can foster conflict between farming and herding (see African Union, 2010, and further below).

It is worth pointing out that, in recent years, several African countries have adopted innovative approaches for recognising and protecting customary land rights. This includes:

- Recognising customary land rights and granting them the same legal status as rights allocated by government authorities (e.g. Mozambique’s Land Law of 1997, article 12; Tanzania Village’s Land Act of 1999, article 18(1));
- Protecting customary land rights even if they are not formally registered (e.g. Mozambique’s Land Law of 1997, articles 13 and 14; Tanzania’s Village Land Act of 1999, articles 4 and 14);
- Protecting collective as well as individual rights (e.g. Mozambique; Madagascar; Burkina Faso – see Box 4);
- Requiring gender equality and respect for human rights in customary land tenure systems (e.g. Mozambique’s Land Law of 1997);
- Protecting communal areas, customary rights of way and other shared use and access rights (e.g. Niger – see Boxes 4 and 5)

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<sup>16</sup> Article 64(2).

<sup>17</sup> Draft Code, article 69.

<sup>18</sup> Draft Code, article 71.

<sup>19</sup> Draft Code, article 75.



**Box 4. Recognition of customary rights in Madagascar, Burkina Faso and Niger**

In Madagascar, statutory rights now coexist with customary rights. Customary rights to occupied land are protected as “private untitled land” (Law No. 2005-019 of 17 October 2005). Holders of private untitled land have several options on how to secure their rights (2005 Law, article 21): they can follow a registration procedure to obtain a formal land title; alternatively, they can apply for a land certificate through a simplified procedure (see Box 3 above). In either case, the application can be made on an individual or collective basis (2005 Law, articles 22 and 35).

In Burkina Faso, Law No. 034 of 2009 recognised customary land rights. Rural municipalities issue certificates of rural land tenure which record customary land rights (articles 6 and 39). Applications can be made on an individual or collective basis (article 39). Those who hold such certificates can also apply for a formal land title if they wish (article 72).

In Niger the Rural Code specifically recognises customary rights as a source of land claims. Customary rights holders are granted “full and effective ownership” of their land, though in practice this primarily applies to agricultural land (see Box 5).

(Sources: Franchi et al, 2013; Teyssier, 2010; Comité Technique Foncier & Développement, 2014; Comité Technique Foncier & Développement, n.d.).

## 4. Strengthening safeguards in compulsory land acquisition



The draft Code provides that the State may acquire land on a compulsory basis if there is a public interest and subject to fair and prior compensation.<sup>20</sup> The requirements for a public interest and a fair and prior compensation seem broadly in line with the national Constitution.<sup>21</sup>

There are however a number of areas where the provisions of the draft Code could be improved, thereby potentially reducing disputes that can arise in relation to compulsory acquisitions. Those areas are as follows (FAO, 2009, and VGGT section 16):

- The draft Code should clearly define the public purposes for which the government may acquire land rights on a compulsory basis. At present the draft Code is silent on this important aspect. For instance, it is unclear whether a business purpose can amount to public interest.
- The draft Code includes separate procedures for the compulsory acquisition of registered land (land ownership) and unregistered land (customary land rights). The expropriation procedure seems to apply to the former; while for customary rights a much less detailed and stringent procedure is used ("*déguerpissement*"). The draft Code's provisions on *déguerpissement* do not specify how compensation will be determined, or the extent to which affected people may challenge relevant decisions.<sup>22</sup> It would be preferable to apply the same, more robust procedure and standards to all compulsory land acquisitions, particularly given that only a small share of land is understood to be held under private land ownership.
- Compensation requirements should consider not only the land and improvements to the land, but also the other resources gathered from the land that people may rely on for their livelihoods as well as the loss of future earnings (Tearfund, 2015a).
- The draft Code makes very limited provision on the participation and consultation of affected people in compulsory land acquisition. It merely mentions a "public inquiry".<sup>23</sup> The draft Code should establish measures to guarantee that affected stakeholders are given a voice throughout the process, including in the planning phase. Mandatory public hearings have been introduced in some other countries (e.g. South Africa, Promotion of Administrative Justice Act of 2000, section 4(2)(b)(i)(aa)).
- The draft Code is also vague on notice periods.<sup>24</sup> These requirements could be tightened up, for example mandating that notice is given to all potentially impacted peoples six to twelve months in advance of an anticipated project. To ensure that all affected people are aware of the project, notice should be publicised as widely as possible in relevant local languages.
- Article 107 of the draft Code prohibits any construction, planting or improvement on a tract of land following a declaration of public interest. This provision means that affected people would effectively be prevented from growing food on the land pending a (potentially lengthy) appeal process, with adverse consequences for their livelihoods (Tearfund, 2015a).

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<sup>20</sup> Articles 102 and 103.

<sup>21</sup> Article 41.

<sup>22</sup> Articles 121-123 and 128.

<sup>23</sup> Article 105. The draft Code states that the inquiry should last no less than one month and no more than four months. It is unclear how these expected durations were assessed.

<sup>24</sup> The draft only states that there should be "publicity sufficiently wide" so that affected people may assert their rights (article 105).

- The draft Code provides a procedure to challenge the amount of compensation,<sup>25</sup> but not to review the government's decision to declare that an acquisition is in the public interest.<sup>26</sup> While the government, as the elected representative of the people, is typically well placed to determine what constitutes the public purpose, courts can and in many jurisdictions do play a useful review role, including in relation to the existence of a public purpose, or compliance with procedural safeguards in declarations of public purpose.

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<sup>25</sup> Articles 110 and 111.

<sup>26</sup> Further to a public inquiry, the Cabinet may declare that an acquisition is in the public interest, state which land parcels are affected and declare that they are expropriated (draft Code, article 106). Oddly, the draft Code does not state that further to the public inquiry the Cabinet may declare that the acquisition is *not* in the public interest.

## 5. Upholding pastoral rights



In areas with limited and irregular rainfall and dispersed grazing resources, livestock mobility is a rational and important strategy to respond to changing environmental circumstances within and between years. Unlike farmers, pastoralists may not need exclusive land rights over a specific area. Rather, they need secure access to strategic resources at specified times, including water and dry season grazing, and effective rights of passage, for example through livestock corridors.

The draft Code does not include provisions in relation to pastoral rights. As discussed, the framing of productive land use requirements is at odds with the seasonal nature of pastoral resource use, and makes pastoralists particularly vulnerable to dispossession. The draft Code also seems to assume a static form of land use that contrasts with the imperative of livestock mobility. It does not address issues that may arise from livestock mobility and from the interface between herding and farming.

Some Francophone African countries have recently adopted legislation that, among other things: recognises pastoral land use as a valid form of productive land use (Niger, Rural Code, article 27, and Law No. 2010-29 of 20 May 2010 relating to pastoralism, article 2; Mali, Law No. 01-004 of 27 February 2001 on the pastoral charter of Mali, articles 49 to 51); recognises the need for pastoral mobility (Mali's Pastoral Charter, articles 1 and 4 to 6); recognises the use rights that pastoralists have on their resources (Niger's *terroir d'attache* – see Box 5); and establishes systems for regulating the interface between herding and farming, including conflict prevention and management (Mali's Pastoral Charter, articles 59 to 61; and Niger, Decree No. 2013-003 of 4 January 2013 determining the modalities of the operation of joint committees in charge of the conciliation in the resolution of disputes between farmers and pastoralists). The African Union has also called for the recognition and protection of the legitimate tenure rights of pastoralists (African Union, 2010).

### **Box 5. Pastoral rights in Niger**

Niger's Rural Code of 1993 and its subsequent implementing laws was the first piece of legislation in Sahel to recognise and regulate access and tenure rights over pastoral resources. This legislation broke new ground, though in practice implementation has been problematic (Tearfund, 2015b).

The legislation recognises pastoral mobility as a fundamental right and a rational way to use pastoral resources (Law No. 2010-29 of 20 May 2010 relating to pastoralism, article 3). The Rural Code i) recognises the pastoralists' general right to access natural resources (article 23); ii) includes cattle corridors in the public domain of the State or of local authorities; iii) recognises the priority rights of pastoralists over their *terroir d'attache*, which is the area where they spend most of the year, though third parties can access these resources in accordance with local customary rules (article 28 of the Rural Code and Law No. 2010-29 of 20 May 2010 relating to pastoralism, articles 11 and 12); iv) protects grazing land by setting up reserved land in the private domain of the State or of local authorities for strategic grazing and pastoral development (article 40).

However, practical challenges have affected implementation, and many pastoralists are unable to exercise priority use rights in their *terroir d'attache* (Tearfund, 2015b). In addition, local realities are evolving fast: emerging evidence suggests that this legislation does not provide suitable answers to the needs of less or non-mobile pastoralists; and distortions and opportunistic behaviour in implementation are fostering conflict between herders (Tearfund, personal communication).



## 6. Taking gender issues seriously



The draft Code does not address gender. The VGGT call for States to ensure that women and girls have equal tenure rights and access to land and forests independent of their civil and marital status.<sup>27</sup>

While women play an increasingly crucial role in agricultural production, under many customary systems women only have “secondary” land rights, accessing land through their husbands or male relatives. Customs that promote inequality are prohibited under Chad’s Constitution.<sup>28</sup> The national Constitution also provides that customary rules relating to marriage and succession only apply with the consent of all parties concerned, failing which national law applies.<sup>29</sup> However, whilst the Civil Code allows women to inherit land, in practice most women face real challenges in acquiring secure rights to land (USAID, 2010a).

To address these challenges, the recognition of customary rights, mentioned above, would need to establish safeguards to protect against intra-community discrimination, especially against women, thereby ensuring alignment with the national Constitution. Recent land legislation in other countries explicitly affirms the principle of gender equality (e.g. in Uganda), encourages joint land titling for couples, requires spousal consent for land transfers (e.g. Uganda) and promotes the recruitment of women in land management and administration bodies (e.g. in Burkina Faso and Niger).

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<sup>27</sup> VGGT, paragraph 3B.4.

<sup>28</sup> Constitution, article 157.

<sup>29</sup> Constitution, article 158.

## 7. Investments



The draft Code provides that private foreign investors may enter into leases or acquire land in Chad, without setting any restrictions save that they may not invest in border zones and the contracts must be signed off by the government.<sup>30</sup> The conditions for application will be determined in a decree.<sup>31</sup> As things stand, however, we do not know what the border zones are, and the government's approval of private foreign investment does not appear to be subject to any conditions.

Article 36 of the draft Code regulates the sale of land from the State's private domain. It states that the land may be sold under conditions and time limits which may vary depending on the land. Article 36 gives the State considerable discretion to determine the terms and conditions of the sale. In order to prevent any abuse, it would be preferable to detail the circumstances in which the State may or may not transfer land from its private domain.

In recent years, public action to attract more foreign investment in agriculture has backfired in many contexts, with many investments producing disappointing results and with much public contestation about "land grabbing". It is clear that governments interested in promoting private investment should focus on "quality" investment. Ultimately, it is the "quality" of an investment that determines whether the investment promotes, or undermines, inclusive sustainable development.

Some of the implications of this shift in perspective are outlined in section 12 of the VGGT, which deals with investments. These implications include establishing robust requirements for community consultation in the early stages of investment design; mandatory social as well as environmental impact assessments; mechanisms to ensure transparency of decision making; and a conducive legal framework for partnerships between investors and local landholders.

We have not reviewed the broader legal framework applicable to investments in Chad. Therefore, we cannot comment on how relevant issues, such as impact assessments, might be dealt with in other laws. However, the draft Code could include *renvois* to relevant legislation where applicable and include more specific provisions on issues that would be expected to fall within the remit of land legislation – for example, spelling out local consultation requirements for the allocation of land rights to investors. Land legislation in some other African countries does include such mandatory local consultation requirements (for instance, article 13(3) of Mozambique's Land Law of 1997).

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<sup>30</sup> Article 88.

<sup>31</sup> *Ibid.*

## 8. Dispute resolution



The draft Code only includes limited provisions on dispute resolution, e.g. in relation to compulsory land acquisitions (see section 4 above); to boundary disputes or the scope of rights granted in a land concession;<sup>32</sup> or where an affected party challenges a specific land registration process.<sup>33</sup> Specialised land courts do not appear to exist in Chad and it seems that, in practice, land disputes tend to be resolved locally by traditional leaders in accordance with customary law (USAID, 2010a).

In order for land disputes to be resolved effectively, and in order to manage court backlogs and avoid the escalation of conflicts, the draft Code could include provisions requiring parties to seek to resolve land disputes through alternative dispute resolution methods before going to courts. Traditional conciliatory dispute settlement methods could provide a relevant starting point for this, if deemed appropriate. Other countries including Burkina Faso and Niger have taken similar measures (Box 6).

### **Box 6. Decentralised and/or alternative land dispute mechanisms in Burkina Faso and Niger**

In Burkina Faso, the locally negotiated land charters, discussed above, can set up bodies and rules to resolve land disputes through conciliation. In this regard, the 2009 Law requires the State to set out preventative measures and provides that all land disputes must go through a conciliation procedure before being taken to the high court (articles 95 to 97).

In Niger, the Rural Code states that land disputes are to be resolved by the courts of general jurisdiction. But the code also requires that all such disputes be first referred to conciliation before local customary authorities (article 149).

(Sources: USAID, 2010b; Franchi et al, 2013; Teyssier, 2010; Comité Technique Foncier & Développement, 2014; Comité Technique Foncier & Développement, n.d.).

<sup>32</sup> See article 68 – but the draft Code does not give much detail apart from the fact that the dispute may result in the court ordering the registration of a tract of land.

<sup>33</sup> See article 86.

## 9. Summary of key issues and recommendations



### 1. Land administration

The draft Code reflects a highly centralised system of land ownership, management and administration. This system risks excluding most people from the means to document and protect their land rights, and fostering widespread tenure insecurity.

- **The draft Code should provide for low-cost, locally accessible arrangements to secure all legitimate land rights, including customary land rights.**

### 2. Customary rights

The draft Code considers customary rights as “temporary” rights. It conditions full legal protection to the existence of a land title, which converts customary rights into land ownership. In practice, this process is likely to be inaccessible for the vast majority of the population, effectively excluding most people from full legal protection. There is also ample evidence on the problems created by policies systematically to convert customary rights into private ownership, including dispossession of holders of “secondary” rights (e.g. women, youths, migrants)

- **The draft Code should provide effective protection for customary land rights, including those that are not formally registered, and effective means for documenting customary rights without necessarily converting them into private land ownership.**

### 3. Land acquisitions

The provisions of the draft Code regarding compulsory land acquisitions provide limited safeguards, particularly for holders of customary rights.

- **The draft Code should clearly define the public purposes for which the government may acquire land rights on a compulsory basis; apply the same safeguards to all compulsory land acquisitions, including acquisitions of customary land rights; develop compensation requirements that recognise the multiple livelihood contributions of land and resources, and that include future earnings; establish measures to ensure that affected stakeholders are given a voice throughout the process; and provide stakeholders the right to appeal expropriation decisions.**

#### 4. Pastoral rights

The draft Code does not address pastoral rights. The framing of productive land use requirements is at odds with the seasonal nature of pastoral resource use, and makes pastoralists particularly vulnerable to dispossession. The draft Code also seems to assume a static form of land use that contrasts with the imperative of livestock mobility.

- **The draft Code should recognise pastoral land use as a valid form of productive land use; recognise the right to pastoral mobility, which constitutes a way to use pastoral resources in a rational and sustainable manner, and the use rights that pastoralists have on such resources; and establish systems for regulating the interface between herding and farming, including conflict prevention and management.**

#### 5. Gender

The draft Code does not address gender.

- **The draft Code should include provisions on gender equality, including a clear statement of the principle of gender equality in land relations and arrangements to translate this principle into practice (e.g. spousal consent requirements or joint titling).**

#### 6. Safeguards concerning land-based investments

The draft Code does not provide clear rules and safeguards for the allocation of land to commercial investments. It gives public authorities considerable discretion to determine the terms and conditions of the sale from the State's private domain.

- **The draft Code should tighten safeguards against abuse in investment processes, clearly setting out the circumstance in which the State may allocate land from its private domain and spelling out mandatory local consultation requirements.**

#### 7. Dispute resolution

The draft Code only includes limited provisions on dispute resolution, e.g. relating to compulsory land acquisitions or land registration processes.

- **The draft Code should effectively tackle dispute settlement, including through promoting alternative dispute resolution before land disputes can be taken to court.**



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