

# **Agricultural Investment Land Acquisition in Times of Emergency in Ethiopia: The Case of Land Delivery to Respond to COVID-19 in Amhara Region**

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## **Abstract**

*The outbreak of the COVID-19 crisis has been affecting the food and agricultural production sector. As part of responding this challenge, the Amhara region has issued a new Directive on the acquisition of land for agricultural investment. However, this measure is criticized for its incompatibility with the regular rural land and investment laws, and its inadequacy to deal with the land use rights of the local people. The purpose of this article was, thus, to examine the content of pandemic induced Directive on agricultural investment land acquisition modality in line with the regular rural land and investment laws, and impacts of the deviation made by the Directive from the regular laws on local land use rights. A doctrinal legal research method is employed to examine the stated purpose. The FDRE Constitution, rural land laws, investment laws, and other relevant legislations are used as primary data sources. A key informant interview has also been conducted with rural land investment experts working at BoLAU of the Amhara Region. Additionally, the existing body of literature in the form of policies, manuals, books, and articles in the area is scrutinized as secondary data sources. The paper argues that the Directive liberalizes existing land acquisition requirements and procedures through promoting irregularity, and recognizes easy and speedy processes of land acquisition for agricultural investment, which contributes to the trouble of local land use rights. Therefore, it is better to develop the agricultural investment land acquisition framework that keeps local land use rights in balance during emergency times. In so doing, the regional government has to provide a rule that empowers local land users and obliges investors to conduct EIA of the project to mitigate the future risk of the investment in agriculture.*

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## Introduction

The long-term transfer of large-scale agricultural land by states and non-state actors has received significant attention since the 2007-2008 global financial crisis.<sup>1</sup> The global drivers for acquisitions of land were “the sharp increase in food price, the crisis in western financial markets, fluctuation in fuel prices and carbon trade related to climate change.”<sup>2</sup> However, these were not determining factors for the expansion of large-scale land acquisitions in Ethiopia. Rather, the expansion was primarily driven by the development policy of the government.<sup>3</sup> Under the guise of development, the government was using investment in agriculture for an effective political control mechanism.<sup>4</sup> Among others, this politically maneuvered investment involved forcing the resettlement of rural communities.

In rural communities of Ethiopia, land is a valuable natural resource endowment in attaining socio-economic development and poverty reduction.<sup>5</sup> Land use right is a source to sustain livelihood. It is a factor of production, a source of water resources, settled agriculture, grazing pasture, collecting wood, beekeeping, and construction of identities of rural communities.<sup>6</sup> Property rights over land are not only the sources of economic production but also the basis of social relationships, the foundation of political power as well as environmental, cultural, and spiritual values.<sup>7</sup> Thus, access to secured land use right is an essential prerequisite for the realization of the right to an adequate standard of

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<sup>1</sup> Olivier De Schutter, The Green Rush: The Global Race for Farmland and the Rights of Land Users, *Harvard International Law Journal*, Vol. 52, (2011), p. 504.

<sup>2</sup> Muradu Abdo, State Policy and Law in Relation to Land Alienation in Ethiopia, PhD Dissertation, University of Warwick, School of Law, (2014), p. 220.

<sup>3</sup> Kirstian Toft, Are land deals unethical? The Ethics of large-scale land acquisitions in developing countries. *Journal of Agricultural and Environmental Ethics*, Springer, (2013), p. 15. Kerstin Nolte, Large-Scale Land Acquisitions in Sub-Saharan Africa: Determinants, Processes and Actors, PhD Dissertation, Universität Göttingen, (2014), p.7.

<sup>4</sup> Tsegaye Moreda, Large-scale land acquisitions, state authority and indigenous local communities: insights from Ethiopia, *Third World Quarterly*, Vol. 38(3), (2017), p. 699.

<sup>5</sup> Daniel Behailu and Getiso Detamo, Res Nullius vs. Res Communis in Matters of Communal Lands of Smallholder Farmers in Ethiopia, *MIZAN LAW REVIEW*, Vol. 12, No. 1, (2018), p.100.

<sup>6</sup> Francis Kariuki and Raphael Ngetich, Land Grabbing, Tenure Security and Livelihoods in Kenya, *African Journal of Legal Studies*, Vol. 9, (2016), pp. 85-86.

<sup>7</sup> FAO, Land and livelihoods: Making land rights real for India's rural poor. Livelihood Support Programme (LSP), an inter-departmental Programme for improving support for enhancing livelihoods of the rural poor, (2004), Pp. 1-2.

living<sup>8</sup> and a long-term path to prosperity.<sup>9</sup> While land rights are the sources of sustainable livelihood at individual and household level, investment in agricultural land can also support sustainable societal development and helps to meet growing food security needs at domestic, regional, and global levels.<sup>10</sup> As a result of the rise in global demand for food, different actors have started investment in agricultural land.<sup>11</sup> Evidencing this, investors in different localities approach the Ethiopian government to get agricultural land with an ever increased interest. Yet the government make agricultural land available for investors in the face of resistance and mounting grievances from local communities who contend to use this same land resource for their own investment in their own ways.<sup>12</sup>

Under such conditions, a significant amount of agricultural investment land was transferred to investors. However, after the Ethiopian government made an in-depth study on the acquisition of land in 2016, it has made a fundamental policy change towards large-scale agricultural investments. A study commissioned by the former Prime Minister of Ethiopia, Hailemariam Dessalegn, regarding Gambella commercial farming investment found out that among 623 investors who applied for bank loan to finance agricultural investment, 200 took the loan from the Ethiopian Development Bank.<sup>13</sup> Yet while the report shows all these investors took the loan, it was impossible to identify two of the investors whose name is missing from the list provided by the bank.

The report further indicates that a 4.96 Billion-Birr loan was provided to 200 investors, and the investors claimed to have started the investment activities. Yet their land development activities were grossly incompatible with the terms of the loan contract. Upon discovering these acts of the investors, in 2020, the Environment, Land Administration and Investment Bureau of the Benishangul Gumuz Region reported the cancellation of agricultural investment contracts of 54 investors. Currently, the government of Ethiopia is engaged in reclaiming agricultural investment land from investors because of their failure from attaining the intended promises.

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<sup>8</sup> Demelash Shiferaw, A Human Rights Approach to Access to Land and Land Dispossession: An Examination of Ethiopian Laws and Practices, *African Journal of Legal Studies*, Vol. 9, (2016), p.104.

<sup>9</sup> AGRA, Africa Agriculture Status Report: The Business of Smallholder Agriculture in Sub-Saharan Africa (Issue 5). Nairobi, Kenya: Alliance for a Green Revolution in Africa (AGRA). Issue No. 5, (2017), p.vi.

<sup>10</sup> Columbia Center on Sustainable Investment (CCSI), Annual Report, (2018), p.7.

<sup>11</sup> New alliance for food security and nutrition, Analytical Framework for Land-based investments in African Agriculture: Due diligence and risk management for land-based investments in agriculture, GrowAfrica, (2015), p.4.

<sup>12</sup> United Nations, Report of the Special Rapporteur on the right to food, (2010), p.6.

<sup>13</sup> Study report, Large-scale Agricultural investment, Gambella Region, May, 2016

Aimed these government moves, the global pandemic, COVID-19 came into the picture and a state of emergency has been in place across the country. Looking into the rural land laws of Ethiopia, one can observe that there are no established rules for the acquisition of investment land under emergency situations. Yet, currently, the government is interested and rationalizing the acquisition of investment land to improve agricultural food production as a way to easily recover from the pandemic crisis. As a result, the government of the Amhara region has issued a Directive to allocate agricultural investment land as a tool of combating food shortage expected to occur during and in post-pandemic period.<sup>14</sup> Nonetheless, the contents of the agricultural investment land acquisition Directive regarding the local land use rights are not closely examined yet. Thus, the major goal of this article is to examine the content of the pandemic-induced Directive on agricultural investment land acquisition in line with the regular rural land and investment laws, and impacts of the deviation made by the Directive from the regular laws on local land use rights.

Accordingly, doctrinal legal research method is employed to examine the Directive on land acquisition according to the regular rural land and investment laws. Both primary and secondary data sources are used to attain the objective of the investigation. As a primary data, the FDRE Constitution, rural land laws, investment laws, and other relevant legislations are critically examined. The authors have also interviewed key informant experts on rural land investment working at the Rural Land Administration and Use Bureau (hereafter, BoLAU) of the Amhara region. Besides, different policy documents, reports, relevant literature, newspapers, online sources, and journal articles are generated as secondary data. To address the stated issue, doctrinal analysis of rural land and investment laws is employed along with existing literature.

The article is structured as follows: the first section provides agricultural investment objectives and land use claims. The second section deals with experiences relating to the impacts and measures of the pandemic on agricultural investment land governance. The third section is devoted to examining the content and deviations of pandemic-induced Directive on agricultural investment land acquisition modality and its impact on local land use right in line with the regular rural land and investment laws. The last section provides a conclusion.

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<sup>14</sup> Amhara Region Acquisition of Agricultural Investment Land Law, Directive, 2020

## **1. Agricultural Investment Objectives and Land Use Claims**

The federal investment law in Ethiopia recognizes investments in different sectors and agricultural investment takes a special place in the legislation. The recognition is evident in the inclusion of the Ministry of Agriculture as a member of the investment board.<sup>15</sup> In this legislative document, the term “commercial agricultural investment” is defined as a capital investment of an investor to establish new large agricultural investment farms, ranches, and commercial plantation forests or for expansion or improvement of existing agricultural investment farms.<sup>16</sup> As such, the objective of agricultural investment is to improve the living standard of people by realizing rapid, inclusive, and sustainable economic and social development.<sup>17</sup> Further, it is meant to promote the national economy, employment opportunity, transfer of knowledge and skills, and increase foreign exchange earnings.<sup>18</sup>

The land needed for investment in agriculture holds a unique position at the heart of the economic, social, environmental, cultural, spiritual, and political life of communities with far-reaching meaning<sup>19</sup> and implication on local livelihood.<sup>20</sup> Particularly, the livelihood of the local people in rural Ethiopia depends on land through subsistence farming, small-scale mining, habitation, crop-growing, forest products, pastorals, and other social and political aspects.

Peoples rights over land resources in this country are found mainly within the context of property rights.<sup>21</sup> Property rights over land are not only the sources of economic production but also the basis of social relationships, the foundation of political power as well as environmental, cultural, and spiritual values or identities.<sup>22</sup> Secure land rights play a multi-dimensional role in the overall wellbeing of society,<sup>23</sup> and the realization of a range of human rights<sup>24</sup>.

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<sup>15</sup> Federal Investment Law, Proclamation No. 1180/2020, *Federal Negarit Gazette*, (2020), Article 33(1) & Article 51(1)

<sup>16</sup> Ethiopian Horticulture and Agricultural Investment Authority Establishment Council of Ministers Law, Regulation No. 396/2017, *Federal Negarit Gazette*, (2017), Article 2(3)

<sup>17</sup> Proclamation No. 1180/2020, *supra* note 14, preamble, Article.5

<sup>18</sup> *Id.*

<sup>19</sup> Achamyeleh Gashu and Tadesse Amsalu, Decentralised Rural Land Administration in Ethiopia: The Case of Amhara Region. Centre for Rural Studies, LBSNAA SAGE Publications, *Journal of Land and Rural Studies*, Vol. 6(1), (2017), p. 34.

<sup>20</sup> Marcello De Maria, Understanding Land in the Context of Large-Scale Land Acquisitions: A Brief History of Land in Economics, *Land Review*, Vol 8, (2019), p. 1.

<sup>21</sup> The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/ 1995, *Federal Negarit Gazette*, (1995), Article, 40.

<sup>22</sup> United Nations Economic and Social Council, Report of the United Nations High Commissioner for Human Rights of Land Issues, (2014), p.4. FAO, Land and livelihoods: Making land rights real for

Yet, looking into the FDRE Constitution and subordinate rural land laws, one could see that they do not clearly provide comprehensive dimensions of land resources. Rather, they dictate its ownership aspect, administration and acquisition modalities, and the scope of peasants, pastoralists, and investors' rights over land. Particularly, the Regional State laws of Ethiopia restrict the role of land to farming, grazing, cultivation, and forestry.<sup>25</sup> The remaining land-based livelihood activities do not receive due emphasis under the Constitution and subordinate rural land laws. For example, the rural land law of the Amhara region emphasizes the role of land in accommodating the living standards of farmers and semi-pastoralists concerning economic, social, and political development.<sup>26</sup> However, the law fails from recognizing the spiritual and cultural values of land for the local people.

Turning to the global picture, we could clearly see that agricultural investment policies prioritizes the economic benefits over the social and spiritual dimensions of land resources.<sup>27</sup> To this end, the UN Special Rapporteur on the right to food provides that land-based investment policies increased the pressure on land use right.<sup>28</sup> The competition among various uses of land has recently been increased by policies favoring the acquisition of lands for agricultural producers better connected to markets, which have been posing the risk for local land users to lose access to land on which they depend.<sup>29</sup> The local people had to compete with economically far stronger investors to use land which is a critical source of their livelihood.<sup>30</sup>

The situation in Ethiopia is not free of such risk and threats. Looking into the problems experienced by the communities in this country, one can trace the risk to the government's approach to regulate the rights of investors and local land users. As a preliminary step to initiate agricultural investment, the government is planning projects which require local land uses to be converted to investment in

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India's rural poor. Livelihood Support Programme (LSP), an inter-departmental Programme for improving support for enhancing livelihoods of the rural poor, (2004), pp.1-2.

<sup>23</sup> Brightman Gebremichael, Access to Rural Land Rights in the Post-1991 Ethiopia: Unconstitutional Policy Shift. *Journal of Land and Rural Studies*, Vol. 7, No. 1, (2019), p.11.

<sup>24</sup> Demelash Shiferaw, *supra* note 8.

<sup>25</sup> Proclamation No.1/ 1995, *supra* note 20, Article 40(4) & Article 40(5). The Revised Rural Land Administration and Use Determination law of Amhara National Regional State, Proclamation No. 252/2017, *Zikre hige*, (2017), preamble, Article 2(22) & Article 2(5). Federal Democratic Republic of Ethiopia Rural land administration and use Law, Proclamation No. 456/ 2005, *Federal Negarit Gazette*, (2005), Article 2(12), Article 2(13), & Article 5(1).

<sup>26</sup> Proclamation No. 252/2017, Preamble.

<sup>27</sup> United Nations, *supra* note 12, p. 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, P.6

agriculture,<sup>31</sup> and investors in agricultural projects compete with local and users for the production of food.<sup>32</sup> This leads to a competition of land use claims on the part of local land users.<sup>33</sup>

BoLAU has reported more than 216, 000 hectares of potential land for investment,<sup>34</sup> among which 154, 967 hectares are transferred to investors. The report also shows that 1366 investors are involving in agricultural investments. Yet to expand the volume of investment, the regional government has planned to allocate land for agricultural investment from different parts of the region.<sup>35</sup> More than Sixty-three thousand (63, 000) hectares of uncultivated free land are planned to be allocated in the time of the COVID-19 crisis for agricultural investment.<sup>36</sup> The data from BoLAU shows that more than forty-four thousand (44, 000) hectares of land are transferred to investors. Specifically, details of land planned to be allocated and allocated for agricultural investment is presented in the table below.

<b>Zone</b>	<b>Identified land in hectare</b>	<b>Allocated land in hectare</b>	<b>Duration/year</b>
West Gondar	23, 200.87	11,887.519	3
		1, 678	30
Central Gondar	7,090.87	2, 624	3
North Shewa	8, 426.989	3, 333.2278	3
		3, 790	30
Awi	23, 556	23,000	30
North Wollo	665.771	665.77	3
		80	30
South Wollo	-	299.16	30
East Gojjam	319	315.5	3
West Gojjam	-	140.0461	30
<b>Total</b>	<b>63, 259.5</b>	<b>44, 813.2229</b>	

*Source:* Data from BoLAU (Complied by the Authors)

Looking into the actions of the government, one could see some level of inconsistency with the stipulations in the Directive. Though the Directive provides the duration of the lease contract as three consecutive production period, the data found and a key informant interview reveals that the regional

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<sup>31</sup> FAO, Guidelines for Sustainable Large-Scale Land Deals in Africa, (2017), p. 14

<sup>32</sup> David Palmer, Szilard Fricska, Babette Wehrmann., Towards improved land governance, FAO, Land Tenure Working Paper 11, (2009), p.10.

<sup>33</sup> Id.

<sup>34</sup> Amhara Region, Rural Land Administration and Use Bureau, Office of Head, *agricultural investment land acquisition*, May 10, 2020

<sup>35</sup> BoLAU, Notice and list of identified land for Agricultural investment

<sup>36</sup> Amhara Region, Rural Land Administration and Use Bureau, Notice for public competition in tender, May, 2020.

government has transferred 28, 987.2061 hectares of land for thirty (30) years.<sup>37</sup> Under the cover of the pandemic crisis, the regional government has transferred huge tracts of land for the period referred to under regular rural land laws. The rural land law of the Amhara region sets the maximum lease period for agricultural investment land and provides the effect of the lease contract if concluded for more than the specified year. The law in the relevant section provides: “*the maximum lease year of rural land which will be used for agricultural investment shall be for 30 years and if more than 30 years, it is presumed as for 30 years.*”<sup>38</sup> This maximum period for the duration of an agricultural investment contract is also provided in Directive No.8/2019 of Provision and use of agricultural investment land.<sup>39</sup>

Therefore, we can observe that the government mixed up the rules in the Directive and the regular law and failed to respect the hierarchical relationship between the two. In principle, the regular law prevails over the Directive. Yet once the Directive contravening the regular law issued by the executive, the regional government tuned to the regular law rules to justify its action in allocating land to investors. This measure of the government complicates the rural land governance practices in the region. The deviation should have been fixed, the authors argue, by getting the pertinent regular law amended through the regional council, avoiding the Directive altogether. Finally, while enacting of rules for allocating land for emergency situations, the law making body should sufficiently reason out and justify the need for such laws beyond the regular law. The next section presents the global experience and insights on this issue.

## **2. Agricultural Investment Land Governance Experiences in Times of Emergency**

Though there is no single definition of what constitutes an emergency, it's possible to understand that the term refers an event of national implication, posing an actual or imminent and a serious threat to public safety or threatening the destruction of, or damage to property such as an outbreak of a quarantinable disease.<sup>40</sup> Emergency governance marks out institutional structures and

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<sup>37</sup> Interview with Nibret Abebe, Rural Land Investment Expert, Investors Monitoring and Support Directorate, Rural Land Administration and Use Buearu of Amhara Region, (4 November 2020)

<sup>38</sup> Proclamation No. 252/2017, *supra* note 24, Article 22/6/

<sup>39</sup> Amhara Region Provision and Use of Agricultural Investment Land Law, Directive No. 8/2019, (2019), Article 27/1/

<sup>40</sup> \_\_\_\_\_, Emergency powers, available at <https://www.parliament.nz/media/4058/43-ch-43-emergency-powers.pdf>, accessed on October 4 2020

processes that guide and restrain collective activities to influence or direct the course of events when dealing with risk issues.<sup>41</sup>

In an emergency situation, there is a danger that the government and other well-connected entities capitalize on the weakness in public supervision to strengthen their claims and engage in the unconventional embezzling of public interest including acquisition of land. This is the major challenge for agricultural investment land governance in a time of emergency.

The experience of different countries shows that re-writing, deregulation, or stopping the implementation of regular rural land and investment laws as well as avoiding the authorization requirements of land acquisition are the measures taken by governments in the time of the pandemic. This directly affects the land use rights of the local people. Particularly, local land-use rights pressure is coming from governments, posing a worrying future on economic drivers once the crisis subsides. Investment companies are also seeking to press ahead with investments to take advantage of the pandemic to avoid the usual authorization requirements.<sup>42</sup> As Cotula observes, governments and investors are using the era of the pandemic as an opportunity to seize lands and rewrite regulations. The governments are deregulating regular rural land and investment laws by using the pandemic as an opportunity to seize the land. As measures, some governments and companies are demanding local consultations with the local people to secure approval for land-based projects during the crisis, though, difficult to meaningfully engage them.

The report of the International Land Coalition (ILC) indicates that the COVID-19 pandemic crisis has stopped the implementation of regular rural land and investment laws, and processes.<sup>43</sup> Food security justification of governments paved the way to acquire agricultural investment land. As a result, governments and investors failed to observe the implementation of regular land and investment laws. ILC also states that the pandemic has shown the failure of governments to establish and implement robust legal frameworks and institutions for protecting local land use rights. Weak agricultural investment

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<sup>41</sup> Andreas Klinke and Ortwin Renn, *The Coming of Age of Risk Governance*, Risk Analysis, (2019), p, 2.

<sup>42</sup> Lorenzo Cotula, *Stopping land and policy grabs in the shadow of COVID-19*, International Institute for Environment and Development, 2020, available at <https://www.iied.org/stopping-land-policy-grabs-shadow-covid-19> accessed on 1 October 2020

<sup>43</sup> International Land Coalition, *How COVID-19 is affecting land rights in Africa*, Platforms struggle to support communities to secure their land rights and develop agriculture, 2020, available at <https://africa.landcoalition.org/en/newsroom/how-covid-19-affecting-land-rights-africa/> accessed on 8 September 2020

land governance system has paved the way for the action of the government in the time of the pandemic crisis. Instead of focusing on an inclusive farmland governance system, governments have prioritized the food sector and are seeking to increase agrarian production on land,<sup>44</sup> and pushing the pressures on land for their food security program through increasing agrarian production.<sup>45</sup> The ILC members and platform reported that the outbreak has disrupted land rights, which are vital in achieving inclusive economic growth, sustainable development, and local food security. The pandemic has ceased the implementation of land laws and regulations, and stopped processes that provide tenure security and protection of the local people in their quest for land use rights.<sup>46</sup>

Land use rights have a direct relationship with food security and the livelihood of the local people. Re-writing the regular land and investment laws, stopping their implementation as well as avoiding the regular land acquisition approval requirements in the time of the pandemic affects the land use rights of the local people, which directly affects food security and livelihood of the local people. In Nepal, for example, the local people depend on the country's agriculture sector to lead livelihood and food supply. As Jagat Deuji reports the experience of Nepal, the pandemic is putting the local people under tension.<sup>47</sup> In his findings, this researcher particularly predicts that a huge number of people will lose their livelihoods because of the impact of the pandemic and the country could slip into deep food insecurity. As a way to curb such impact, Jagat further suggested such measures as locating and distributing relief packages for the vulnerable people and empowering producers of commercial agriculture.

Yet another manifestation of the impact is its profound effect on agriculture and food market. According to various institutions such as FAO, the pandemic may cause reduced access to high-value foods, such as fruits and vegetables; higher food prices, especially for nutritious (perishable) foods; reduced food affordability, and accessibility. As the FAO policy brief indicates, "the COVID-19 pandemic is impacting not only food trade, food supply chains, and markets

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<sup>44</sup> Mark Paterson, African Land rights in the time of coronavirus, PLAAS, (2020), p, 5.

<sup>45</sup> Id., p, 8

<sup>46</sup> Isreal Bionyi, How Covid-19 is affecting land rights in Africa, (21 Apr 2020), available at <https://africa.landcoalition.org/en/newsroom/how-covid-19-affecting-land-rights-africa/>, (2020) accessed on 6 October 2020

<sup>47</sup> Jagat Deuja, Curbing the impacts of COVID-19 on Nepal's small-scale farmers and seizing opportunities for food system reform, International Institute for Environment and Development, 2020, available at <https://www.iied.org/curbing-impacts-covid-19-nepals-small-scale-farmers-seizing-opportunities-for-food-system-reform> accessed on 10 October 2020

but also the economy, livelihoods, and nutrition.”<sup>48</sup> Since the pandemic has put the local food system at risk of disturbance, FAO suggests transforming towards a sustainable food system as a solution to prevent hunger. Though the recommendation of FAO does not directly mention land, the sustainability of the food system depends on the protection and security of local land tenure rights.

In Sierra Leone, civil society organizations are assisting considerable number of local people in their negotiations with large-scale land investors in the time of crisis.<sup>49</sup> In Uganda, the worst impacts of rising contestation over land is mitigated by an established mechanism for supporting customary tenure.<sup>50</sup> In Namibia, investors are grabbing the land and the local people are abandoning their land because of the pandemic.<sup>51</sup>

According to agricultural investment land governance reports surveyed by Cotula in the time of the pandemic crisis, national elites in several countries are using the reduced space for oversight and accountability as an opportunity to seize and allocate lands.<sup>52</sup> Pandemic related States of emergency are further marginalizing the local communities and militarizing their territories not to oppose the acquisition of land for investment projects. Governments and companies are forcing rural communities through agribusiness projects on their lands.<sup>53</sup>

Furthermore, the pandemic makes activists not to mobilize the community to defend rights in the face of commercial pressures as a result of restricting campaigners and journalists on travel and gathering.<sup>54</sup> However, protesters in some countries such as Thailand succeeded in getting a public hearing of the creation of a special economic zone postponed because of community concerns about its impact on the environment and local livelihoods.<sup>55</sup> Also, in Brazil, environmentalists and parliamentarians delayed voting on a land bill that would make it possible for commercial farmers who encroached into Amazon forestlands to get title deeds.<sup>56</sup>

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<sup>48</sup> FAO policy brief, available at <http://www.fao.org/2019-ncov/resources/policy-briefs/en/>

<sup>49</sup> Mark Paterson, *supra* note 44, p, 6

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Lorenzo Cotula, *supra* note 42.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> LANDac, Netherlands Land Academy, Land Governance and the COVID-19 Crisis: Agenda for Knowledge and Action, (2020), available at <https://www.landgovernance.org/> accessed on 20 October 2020

<sup>56</sup> Lorenzo Cotula, *supra* note 42.

Still other sources such as LANDac, Netherlands Land Academy, in its report titled “Land Governance and the COVID-19 Crisis: Agenda for Knowledge and Action” revealed that the crises put land rights under pressure.<sup>57</sup> The report in its detailed account of the pandemic, indicated that loss of livelihood options, suspension of democratic controls, use of violence against environmental and human rights defenders, and closing of land administration services are the most worrying immediate effects from a land rights perspective. The manifestations of the pandemic in the Global South are increasing risks of resource grabbing and loss of assets and land access for the poor people.<sup>58</sup> The report confirms having pressures on land and impacts as a lack of due diligence in land-based investments, reduced quality of agricultural investment land governance. The report shows that governments of the Global South are exercising an increase in destructive capitalism and tempting to attract investments to finance the recovery from the crisis without observing the necessary due diligence. Since the pandemic is contributing to regular agricultural investment governance defects, the gains of two decades of investing in the governance of farmland acquisition for sustainable and equitable development are undone.<sup>59</sup>

In Ethiopia too, the pandemic damages the overall economy of the nation, employment, livelihoods, and future productivity.<sup>60</sup> It has been affecting the ability of the local people to produce food. To support the livelihood of the people in the time of the crisis, pressure on land as an agricultural resource have been grown.<sup>61</sup> The pandemic has an impact on rural communities that depend on land-based livelihoods.<sup>62</sup> It may raise the vulnerability of communities who have limited access to and insecure tenure of land because of the failure of observing the procedures and requirements of rural land and investment laws.

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<sup>57</sup> LANDac, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Ethiopian Lawyers Association, policy brief on the Ethiopian Public Health System and Possible Policy Responses, 2020.

<sup>61</sup> Mark Paterson, *supra* note 44.

<sup>62</sup> PLAAS Webinar: Covid-19 and African food security, (2020), available at <https://www.plaas.org.za/plaas-webinar-covid-19-and-african-food-security/>. The State of Food Security and Nutrition in the World Report, Transforming Food Systems for Affordable Healthy Diets, (2020), available at <http://www.ipsnews.net/2020/07/understanding-covid-19s-impact-on-food-security-and-nutrition/>

### 3. Land Acquisition Directive of Agricultural Investment in Amhara Region and Local Land Use Rights

#### 3.1. Land Transfer as an Emergency Power

As already mentioned above, there are no established principles or rules of land acquisition in cases of emergency in Ethiopia. In this regard, the FDRE Prime Minister in his meeting with heads of regional governments, pointed out the need to cultivate free land as a measure to ensure food security and agricultural production during and after the pandemic period.<sup>63</sup> In one of the relevant remarks in this meeting, the Prime Minister also noted that “uncultivated free land shall not be there” thereby giving a direction to heads of regional states to develop the land. It seems following this direction, the government of the Amhara region has issued a Directive to allocate uncultivated free land to agricultural investment in the time of crisis.<sup>64</sup>

With this backdrop on the initiation of the Directive, now let us examine its content through a constitutional lens. The FDRE Constitution empowers the Council of Ministers of the federal government to decree a State of emergency in case of “external invasion [occurrence of] natural disaster and an epidemic, a breakdown of law and order which endangers the constitutional order [and] cannot be controlled by the regular law enforcement agencies and personnel.”<sup>65</sup>

From the reading of the constitutional provision, one could clearly see that the occurrence of the natural disaster or epidemic can be a ground for States to declare a statewide state of emergency.<sup>66</sup> When the State of emergency is declared, the Constitution empowers the government to maintain public security.<sup>67</sup> The Concept of public security can be construed to include economic security in case of emergencies. Accordingly, the Federal government has declared a 5-month State of emergency and passed the law<sup>68</sup> to take measures of countering and mitigating the humanitarian, social, economic, and political damage being caused by the pandemic.<sup>69</sup>

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<sup>63</sup> As the Prime Minister disclosed the issue through social media.

<sup>64</sup> Directive, 2020, *infra* note 80

<sup>65</sup> Proclamation No.1/ 1995, *supra* note 21, Article 93/1/a

<sup>66</sup> *Id.*, Article 93(1)(b)

<sup>67</sup> *Id.*, Article 93/4/a

<sup>68</sup> State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact, Proclamation 3/2020, *Federal Negarit Gazette*, (2020)

<sup>69</sup> *Id.*, Preamble

Further, the Constitution recognizes nomenclature of the state, equality, freedom from slavery, protection against inhuman treatment and human trafficking, and the right to self-determination as non-derogable rights during a State of emergency.<sup>70</sup> Also, the State of Emergency Proclamation Implementation Regulation<sup>71</sup> issued by the Council of Ministers stipulates details of the suspension of rights and measures to counter and mitigate the humanitarian, social, economic, and political damage that could be caused by the pandemic.<sup>72</sup> As such, the State of Emergency Proclamation defines suspension of rights as a partial or full temporary derogation of rights stipulated under the FDRE Constitution.<sup>73</sup> The State of Emergency Proclamation implementation Regulation of Ethiopia permits taking possession of property in the course of the State of emergency to counter or control the spread of COVID-19 and mitigate its impact.<sup>74</sup>

Similarly, the COVID-19 regulation of Botswana allows taking of possession or control of the property on behalf of the republic as emergency power.<sup>75</sup> However, according to Botswana's regulation, the acquisition of land is not provided under the emergency power of the president and cannot be allowed during a State of emergency. The president authorizes the acquisition of any property other than land. In the case of Ethiopia, the COVID-19 State of emergency law is silent regarding whether the government has the power to authorize the acquisition of land.

As outlined earlier in this section, the FDRE Constitution recognizes the right to equality as a non-derogable right during a State of emergency. Equality before the law and equal protection of the law are the two essential elements of the right to equality under the Constitution. Equality before the law defines the absence of any privilege in favor of any individual and equal subjection of all citizens to the ordinary law. This implies that the Constitution of Ethiopia does not allow allocation of land by favoring investors and discriminating against the local people even in a time of State of emergency. Equal protection of the law also implies equality of treatment in similar circumstances both in privileges conferred and liabilities imposed. It also implies the claims of society itself and

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<sup>70</sup> Id., Article 4(2) c cum Proclamation No.1/ 1995, *supra* note 21, Article 93(4) c).

<sup>71</sup> State of Emergency Proclamation No. 3/2020 implementation Regulation, 2020,

<sup>72</sup> Proclamation 3/2020, *supra* note 67, Article 4/1 cum Article 4 of the Regulation

<sup>73</sup> Id., Article 2/5

<sup>74</sup> Emergency regulation, *supra* note 71, Article 4/15

<sup>75</sup> COVID-19 regulation of Botswana, Article 4

public interest to have absolute equality among all classes.<sup>76</sup> The equal protection clause prohibits discrimination by substantive and procedural laws, and the government is not allowed to enact land acquisition laws that violate the non-derogable right of equality during a State of emergency. However, the new Directive on the acquisition of agricultural investment land goes against the right to equality recognized in the Constitution as non-derogable right during a State of Emergency.

### **3.2. Rationalizing the Directive**

The governing laws with respect to agricultural investment and the rural land administration and use in Amhara National Regional State are Proclamation<sup>77</sup>, Regulation<sup>78</sup>, and Directive<sup>79</sup>. These laws provide, among others, why and how land can be transferred to farmers and investors. In the year 2020, the BoLAU has announced the existence of uncultivated free land subject to be allocated for agricultural investment<sup>80</sup> and issued a Directive on the acquisition of land for agricultural investment on May 11, 2020, as a measure of ensuring food security through agricultural production. The Directive aims to allocate uncultivated free land for crop production to interested investors for three consecutive production periods.<sup>81</sup> An interview with Nibret Abebe, a rural land investment expert in BoLAU also shows that the regional government has allocated more than 28,000 hectares of land for thirty (30) years. In its notice for tenders, the BoLAU stated:

*የእርሻ ወቅት እየደረሰ በመሆኑ በተያዘው የምርት ዘመን ከኮቪድ 19 ጋር በተያያዘ ምርትና ምርታማነት እንዲያቀንስ፣ ማምረት የሚችል የገጠር ኢንቨስትመንት መሬት ጾም እንዲያደር በክልሉ ውስጥ በተለያዩ ዞኖችና ወረዳዎች 195 ነጻ መሬት በድምሩ 60, 161 ሄክታር የኢንቨስትመንት መሬት ለማስተላለፍ ዝግጅት ጨርሰናል።*

Its translation reads:

Since the farming period is approaching and to prevent the reduction of productivity to COVID-19, more than 60, 161 hectares of uncultivated free land is identified and planned to be allocated for agricultural investment from different parts of the region (Translation mine).

<sup>76</sup> Sarath Mathilal, The Concept of Equality: Its Scope, Developments and International Legal Regime, *Journal of the Royal Asiatic Society of Sri Lanka*, New Series, Vol. 61, No.2, pp, 37-38, (2016)

<sup>77</sup> Proclamation. No 252/2017, *supra* note 25.

<sup>78</sup> The Revised Rural Land Administration and Use Law, Regulation No. 159/2018, *Zikre. Hig*, (2018).

<sup>79</sup> Amhara Region Rural land provision and use for investment, Directive No. 8/2019, 2019

<sup>80</sup> Amhara Region Acquisition of Agricultural Investment Land Law, Directive, 2020

<sup>81</sup> Id., preamble, Article 11

Thus, the major rationale for the identification and allocation of land for agricultural investment is to prevent the reduction of productivity to occur in the time of COVID-19. Hence, COVID-19 is the major triggering factor for the decision of the regional government to issue the land acquisition Directive. Furthermore, the difficulty of transferring all agricultural investment lands to investors following the regular rules of land allocation, prevention of the reduction of productivity, and production as a result of the failure of cultivating free lands, and enhancement of agricultural products are the purposes of the Directive.<sup>82</sup> To mitigate future periods of economic decline, the regional government seeks to avoid interruptions to investment approvals and likely hope to secure investment-related revenues.

However, the Directive does not mention COVID-19 as a factor that necessitates the issuance of the law. The authors nonetheless argue that the COVID crisis is the major triggering factor for the issuance of the land acquisition Directive. Firstly, an interview conducted with the Director of investors monitoring and support Directorate and rural land investment expert shows that COVID-19 as a triggering factor for the issuance of the Directive.<sup>83</sup> Clearly evidencing this, the Director remarked “*the Directive is issued because of COVID and issuing such kinds of Directive is not allowed in the normal situation*”. The rural land investment expert also added that “*COVID is the primary factor for the issuance of the Directive*”.

As outlined earlier in this section, the land acquisition requirements and procedures for agricultural investment recognized in the Directive were not expected under the normal course of things. In the normal course of things, the existing regular land acquisition laws, with details of requirements and procedures on the acquisition of land, are applicable for agricultural investment in the region. Therefore, issuing such Directives before the pandemic or during emergencies is against the requirements and procedures of regular laws on land acquisition for agricultural investment. Secondly, as stated in its notice for tender, the regional government has clearly stated COVID-19 as the major cause for the plan of allocating investment land through competition in the tender or lease system.

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<sup>82</sup> Id.

<sup>83</sup> Interview with Tigabu Belay, Investors Monitoring and Support Directorate Director, Rural Land Administration and Use Bureau of Amhara Region, (4 November 2020). Interview with Nibret Abebe, Rural Land Investment Expert, Investors Monitoring and Support Directorate, Rural Land Administration and Use Bureau of Amhara Region, (4 November 2020)

In addition, the press release of the BoLAU points out that some of the land identified for acquisition is available through evaluating the performance of investment and terminating the lease contract of investors who failed to develop land as per the terms of their contract.<sup>84</sup> It is important to note at this point that even though investments on farmland deals failed and the land is retaken, it did not go back to the previous local communities or new users of land, rather the government wants to replace the initial company with another without the knowledge of the local land users. As a result, failed investment projects have devastating impacts on the rights and interests of the local land users. As BoLAU reported in a press release, because of less development performance of 74 investors in the investment period of 2018/2019, 1802.5 hectares of land are entered into the land bank. Though the magnitude of the damage from this project is not made clear, one can imagine similar adverse effects on the rights of local communities and the economy of the country at large.

### **3.3. Competition Requirements for Investors**

The regular rural land and investment laws provide the competition requirements to acquire agricultural investment land. They include providing investment permits, project proposals, and environmental impact assessment. Specifically, the competition requirements of investors are provided under section 3.4. (competition process in tender) of the document. The Directive also sets out competition requirements for investors who want to participate in the process of land acquisition for agricultural investment. However, the requirements and procedures provided in the new Directive unduly liberalize and facilitates the acquisition of land for investment in agriculture.

As the Directives states, the requirements vary depending on investors (who are displaced and investing upon lease; who does not have land before; who have land before and investing in it; and who have not acquired land before).<sup>85</sup> The competition requirements for displaced investors and developing upon lease are the provision of bank statements and having farm equipment such as tractor and relevant farm types of machinery.<sup>86</sup> Apart from providing bank statements, having a higher amount of money is also taken into account for the investors.<sup>87</sup>

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<sup>84</sup> Amhara Region, Rural Land Administration and Use Bureau, Office of Head, Press release on agricultural investment land acquisition, May 19, 2020.

<sup>85</sup> Directive, 2020, *supra* note 80, Articles 1-11

<sup>86</sup> *Id.*, Article 1. Regarding the competition result, provision of bank statement is given 40%, providing higher amount of money will be given 40%, for those who provide more than 2 tractors 60% will be given, 2 tractors 50% will be given, 1 tractor 40% will be given.

<sup>87</sup> *Id.*

For investors who do not have land before, the requirements are the capacity to invest with farming tractors, other machinery, and sufficient capital.<sup>88</sup>

Investors who have land before and investing in it shall have relevant types of machinery and in cases where there is more than one competitor, the one who has less amount of land and with more than 50% of development performance prevails.<sup>89</sup> For investors who have not acquired land before, the requirement is providing bank statements that show the capacity to invest through renting of farming types of machinery.<sup>90</sup> The Directive also provides the competition of capable investors only in two lands,<sup>91</sup> a lot system as a way of identifying investors who have equal results,<sup>92</sup> and free service charge for investors.<sup>93</sup> The competition process of the Directive narrows the opportunity of the local people. The local people (farmers or youth) have given last chance only if investors could not fulfill the stated requirements.<sup>94</sup>

Finally, the Directive states that the winners of the competition are not obliged to provide investment permits, project proposals, and environmental impact assessment documents. They are required to provide only a renewed identity card and conclude a contract within 7 consecutive working days after the winner is announced by BoLAU.<sup>95</sup> If the first product period is not entered into development as per the contract, the BoLAU will terminate the contract without providing a warning before the end of the contract period.<sup>96</sup> As this juncture comes the ambiguity and contentious link between the acts of the authorities and the law. The evidence from the participants interviewed shows that the regional government has transferred huge tracts of land for thirty (30). Yet, the duration of the lease contract in the Directive is three consecutive product periods. Furthermore, a Directive makes a departure from the regular laws,<sup>97</sup> applicable for the provision and use of rural land for agricultural investment in terms of details of the requirements expected to be provided by investors. For example, as per the Directive, the land acquisition was applicable for contracts concluded

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<sup>88</sup> Id., Article 2

<sup>89</sup> Id., Article 3

<sup>90</sup> Id., Article 4

<sup>91</sup> Id., Article 5

<sup>92</sup> Id., Article. 6

<sup>93</sup> Id., Article 8

<sup>94</sup> Id., Article. 7

<sup>95</sup> Id., Article 10

<sup>96</sup> Id., Article 11

<sup>97</sup> Directive No. 8/2019, *supra* note 39.

up to July 7, 2020, and the public competition for investment land stayed on air for seven consecutive working days in April 2020.<sup>98</sup>

The requirements for competition in the acquisition of land for agricultural investment minimizes the burden of the government and favors investors to get land easily. Yet liberalizing the competition requirements and procedures of acquisition of land for agricultural investment have devastating impacts on the land use rights of the local people. Particularly, excluding investment permits, project proposals, and environmental impact assessment from the requirements and procedures negatively impacts the local land users. Also, through these, processes of land acquisition, largely favoring economically strong investors, the local people cannot play a significant role in agricultural investment. Finally, these host of deviations of the Directive and its effect on local communities requires further explorations. The next sections further characterizes the deviations in the Directive and the way the deviation affects the land use rights of communities.

### **3.4. Competition Process in Tender**

Land use rights of investors are transferred through lease contracts, a mechanism to acquire land for agricultural investment.<sup>99</sup> The law states that private investors have the right to acquire land in line with the land use plan from the regional government through a lease contract.<sup>100</sup> The acquisition of land commonly occurs between the government and the investor.<sup>101</sup> As such the pre-conditions provided in regular laws to conclude agricultural investment contracts are ascertaining whether the investor is the winner of the competition in the tender; confirming the provision of investment permit; safeguarding the provision of the acceptable project proposal document, and preparation of map with land size and location.<sup>102</sup> Rural land for agricultural investment is acquired through competition in the tender.<sup>103</sup> In other words, public competition in a tender is a means for private investors to acquire agricultural investment land.<sup>104</sup> An application presented by private investors for land acquisition is responded

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<sup>98</sup> Notice for public competition in tender, ANRS rural land administration and use bureau, May, 2020.

<sup>99</sup> Proclamation. No. 252/2017, *supra* note 25, Article. 22

<sup>100</sup> *Id.*, Article 10(5)

<sup>101</sup> Kaitlin Cordes and Anna Bulman, Corporate Agricultural Investment and the Right to Food: Addressing Disparate Protections and Promoting Rights-Consistent Outcomes, *20 UCLA J. INT'L L. & FOR. AFF.*, Vol. 87, (2016), p.92.

<sup>102</sup> Directive No. 8/2019, *supra* note 39, Article 25/1-6/

<sup>103</sup> Proclamation. No. 252/2017, *supra* note 25, Article 22/1,2/

<sup>104</sup> *Id.*, Article. 22/1/ and Regulation. No. 159/2018, *supra* note 78, Article 12/1/

by making a public competition between and among applicants.<sup>105</sup> Also, land to be used for investment is provided by conducting competition among statements of the project proposal as per the criteria laid down in the law and entered into a contract with the winner.<sup>106</sup>

The Rural Land Administration and Use Laws of the region sets out the preconditions for such competition in the tender for investors.<sup>107</sup> The preconditions, among others, require the investor to have the ability to process the product into the second-level output and generate additional assets therefrom. The promised significance and contribution of the project proposal submitted in benefiting the local community and favoring natural resource development and environmental protection are also requirements to compete in the tender. Further, the law considers the content of the project proposal in defining the investor's development capacity, readiness, experience, and interest to recruit trained professionals as a ground to recruit investors for the required purpose. Besides, the financial capacity of the investor to be supported by a bank statement and the number of job opportunities likely to be generated as the result of the project and the favorable working environment to be created for the employees thereof are into account in the evaluation of the application for competition in a tender.

As clearly outlined in this section, the contents of the project proposal including its significance to local people, its potential to support natural resource development and environmental protection, and investor's capacity are taken as the requirements to enter into competition in a tender for land acquisition. However, by disregarding the conditions, the new land acquisition Directive takes financial capacity supported by a bank statement as the only condition for competition in a tender to acquire agricultural investment land. As the head of BoLAU pointed out in a press release, potential investors are not required to provide the stated requirements of the competition in the tender. This lenient, unduly generous and capital favoring approach to land governance risks overriding of social responsibilities by the government and investors alike.

The occurrence of the COVID-19 crisis, the authors hold, has opened an opportunity for the BoLAU to allocate land for agricultural investment by rewriting the requirements and procedures of regular rural land and investment laws. Finally, it is important to note that, unless the BoLAU stops irregular

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<sup>105</sup> Id., Article 22/2/

<sup>106</sup> Regulation. No. 159/2018, *supra* note 78, Article 33/1/

<sup>107</sup> Id., Article. 12/2/ a-f cum Directive No. 8/2019, *supra* note 39, Article. 19(1-6)

reform of agricultural land and approval process, the investment companies may face resistance from the local people.

Turning to another important point in this connection, the regular law, in direct contrast to the Directive, gives weight to strict evaluation of the agricultural investment project submitted for competition and determines the mechanism to notify results of the competition in tender and grievance thereof.<sup>108</sup> Further, this law provides for how investors obtain information and submit investment project proposals.<sup>109</sup> Also, it has qualification requirements for investors,<sup>110</sup> clear rules for allocating agricultural investment land through competition,<sup>111</sup> and ways of announcing competition result and grievance hearing.<sup>112</sup>

Particularly, the relevant provision on investors right over such information obliges the institution to publicly notify potential investors with the necessary information regarding undeveloped free lands found in land banks. The public notice should include the area of land in a hectare, the purpose of the land with its exact location, the distance between the main road, and existing infrastructures in the land.<sup>113</sup> However, under the Directive, all these hosts of the rules, including the notification of obligation, are not regulating the rights and obligations of investors, suggesting that the Directive largely contravenes the regional law and the federal Constitution. The FDRE Constitution obliges governments at all levels to hold land resources, on behalf of the people, and to deploy them for their common benefit and development,<sup>114</sup> yet the government, in enacting and enforcing this Directive, is showing monopoly over land administration and seeking to allocate it without following the constitutionally enacted acquisition procedures.

### **3.5. Payment of Lease Price**

The FDRE Constitution, under article 40(6) provides for the right to access land for investors with payment arrangements. This constitutional provision obliges the government to ensure the land use rights of private investors based on payment without violating local land use rights. Based on this constitutional ground, lease of land through competition in tender is provided as a way of

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<sup>108</sup> Regulation. No. 159/2018, *supra* note 78, Article 12/5/

<sup>109</sup> Directive No. 8/2019, *supra* note 39, Article 4

<sup>110</sup> *Id.*, Article 5

<sup>111</sup> Regulation. No. 159/2018, *supra* note 78 cum Directive No. 8/2019, *supra* note 40.

<sup>112</sup> Directive No. 8/2019, *supra* note 40, Article 22

<sup>113</sup> *Id.*, Article 4 (1-4)

<sup>114</sup> Proclamation No.1/ 1995, *supra* note 21, Article 89/5,

acquiring land for investment in agriculture.<sup>115</sup> Lease as a modality of land acquisition is defined, under article 2(30) of Proc. No. 252/2017, as the operation in which any private investor takes rural land for a limited time to legally permitted service from the regional government. The lease contract, among others, grant the investor the right to mortgage the land for creditor institutions until the effective date of the contract to use.

Another important element in a lease contract is the payment arrangement. Since the investor cannot take the land free of charge unlike peasant and pastoralists, the lease payment is implemented through a lease contract concluded with the lessor. Lease payment is a source of revenue to realize the common interest and local development of the people through financing infrastructure, and creating job opportunities. However, the new Directive, under article 8, empowers the investors to acquire the land without paying its lease price.<sup>116</sup> Expressly exempting them from this payment, the Directive under the relevant section reads “...investors can acquire the land free of charge”. This is against the constitutional provision that allows investors to use land with the lease payment. The Constitution imposes an obligation upon the government to ensure the land rights of the investors based on a payment arrangement. The recognition of investors' land use right without payment of lease price indirectly and unfavorably affects the land use rights of the local people. As emphasized throughout this paper, under the cover of the pandemic, the regional government has transferred more than 28, 000 hectares of land for thirty (30) years and the investors are not expected to pay the lease price for the contract period.

### 3.6. Securing an Investment Permit

An investment permit is a condition to acquire land, to enter into an agricultural investment contract, and to invest in this country. The federal investment law set out this rule as a principle. Consistent with the federal legislation, the regulation of rural land administration and use of the Amhara region also provides an investment permit or license as a requirement to be recognized as an investor. Evidencing this, the regulation defines investor as “*any person who has obtained an investment license...*”.<sup>117</sup> Therefore, securing an investment permit is a prerequisite to conclude an agricultural investment contract at the regional level too.<sup>118</sup> One exception to this rule, particularly at the federal level, is the

<sup>115</sup> Directive, 2020, *supra* note 80, preamble

<sup>116</sup> Id., Article 8 “... investors can acquire the land free of charge.”

<sup>117</sup> Regulation No. 159/2018, *supra* note 78, Article 2(1) B

<sup>118</sup> Directive No. 8/2019, *supra* note 39, Article 25(1)

preferential treatment given to foreign nationals of Ethiopian origin treated as a domestic investor. These investors are exceptionally allowed to invest without acquiring an investment permit in areas not eligible for incentives, or, in areas eligible for incentives, by waiving their right to claim incentives.<sup>119</sup>

The investment permit is required to be issued by a competent, federal and regional investment organ,<sup>120</sup> and shall only be suspended or revoked by this same organ.<sup>121</sup> The federal investment law sets eligibility requirements as a precondition to obtain an investment permit.<sup>122</sup> An investment permit is only valid until the investor becomes operational and is issued with a business license to market its products. The permit is required to be renewed until the investor commences marketing his products and services. However, there shall be no need for renewal of investment permit after issuance of a business license. Finally, the law cautions that wrongful acts such as failure to submit accurate and timely information or project implementation report, presenting incorrect report, securing the permit fraudulently, submitting false information, using incompatible permit with the objective it issued, failure to renew the permit, failure to complete the project, and violation of investment laws would entail suspension of investment permit.<sup>123</sup>

Another important element related to this subject is the grounds for the revocation of an investment permit of the investor. The investment permit shall be revoked if the investor fails to commence investment project implementation of the project within two years of from the date of the issuance, and delayed the completion of the project by two years from the time that will be agreed with the competent investment organ. Moreover, the investment permit would be revoked if the investor fails to rectify the issue that caused the suspension of the investment permit within the time given voluntarily forsakes his investment activity, or misuses or illegally transfers to third-party investment incentives granted according to the pertinent laws.<sup>124</sup> However, the appropriate investment organ may renew the investment permit if it is convinced of the existence of sufficient cause prompting a delay in the commencement or completion of the project.<sup>125</sup>

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<sup>119</sup> Proclamation No. 1180/2020, *supra* note 15, Article 10(2)

<sup>120</sup> *Id.*, Article 2(16)

<sup>121</sup> *Id.*, Article 13(6)

<sup>122</sup> *Id.*, Article 10(1) a-e.

<sup>123</sup> *Id.*, Article 13 (1)

<sup>124</sup> *Id.*, Article 13 (3)

<sup>125</sup> *Id.*, Article 11(1-4)

Finally, the investment organ with competent authority shall notify the revocation measure it takes to all concerned bodies. Upon revocation of the investment permit, the investor shall immediately lose entitlement to all benefits.<sup>126</sup> An investor whose investment permit is revoked shall return all investment incentives he received to the Ministry of Revenues, the Ethiopian Customs Commission, the Ministry of Finance, and other pertinent organs within one month of the revocation.<sup>127</sup> The investors are also obliged to submit a quarterly progress report on the implementation of the investment projects to the appropriate investment organ; provide information concerning investment whenever requested by the appropriate investment organ.<sup>128</sup>

Looking into the Directive against the rules of the license set out in the federal law, one can see the substantial incongruity between the two. For example, even though, having an investment license is a condition to acquire investment land and to conclude the lease contract under the federal proclamation, the new Directive of land acquisition states that investors are not obliged to provide investment permits or licenses in the period. As a result, the regional government passed the conditional procedure that dictates investment permits as a requirement to obtain land. Therefore, investors can get land and enter into lease contracts without securing investment permits.

The rules surrounding the investment permit would inherently oblige and encourage investors to comply with reasonable claims of local people to protect the value of investment, to cover investment project damages by the insurer, to obtain loan and disclose any improvements, and to protect the investment from its removal. Yet, because of the exclusion of investment permits as a requirement to acquire land, the investment project may affect the interests of the local communities in varying forms.

### **3.7. Provision of Investment Project Proposal**

The investment project proposal is an expression of interest submitted by the investor. In this document, the investor is expected to detail the project site, crop, business model, and profile of the company including its historical performance, financial backing, growth potential, and promised future local contributions.<sup>129</sup> The government screens the project document to accept or to

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<sup>126</sup> *Id.*, Article 13 (4)

<sup>127</sup> *Id.*, Article 13 (5)

<sup>128</sup> *Id.*, Article 14(2)

<sup>129</sup> World Bank, *Screening prospective actors: Responsible agricultural investment*, (2019), p.3.

reject it in the end. A positively rated investment project largely demonstrates those elements the government expects to see in the complete business plan and ultimately in the investment contract.<sup>130</sup>

Such screening in fact requires a rigorous examination of myriads of issues related to the link between the proposed project and the national development plan, site suitability, and investor credibility.<sup>131</sup> As such the screening body examines the impact of the project proposal on sustainable development (such as job creation, tax revenue, human capital development, socio-economic spillovers, environmental protection), financial and operational sustainability, its alignment with the strategic national, regional, and local development plan and goals, the suitability of the site for the project, company past credit record, environmental management practice, capacity and expertise of the project.<sup>132</sup> The screening requires investors, apart from practically meeting these requirements, to incorporate clear descriptions of each in the document.<sup>133</sup>

Turning to the investment and rural land laws once again, one can observe that producing and submitting a project proposal is prerequisite to key moves along the route to acquire land and engage in investment activities. The project proposal is a primary condition to be recognized as an investor under rural land regulation of the Amhara region. Evidencing this, the regulation defines investor as “*any person who, having obtained an investment license, is capable of promoting the sector into the higher level by formulating a project plan....*”<sup>134</sup> Presenting this same document is a major requirement for competition in a tender.<sup>135</sup> Yet, ensuring the provision of an acceptable project proposal document is also provided as a pre-requisite to conclude the final contract.<sup>136</sup> The submitted project proposal is accepted through the evaluation of the technical committee established by the law.<sup>137</sup> This committees, operated by law at regional, zonal and woreda levels are responsible to ensure that investors have produced an investment project proposal before they move to the other steps of the investment processes.<sup>138</sup>

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<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> Id., P.4.

<sup>133</sup> Id.

<sup>134</sup> Regulation No. 159/2018, *supra* note 78, Article 2/1/B

<sup>135</sup> Id., Articles 12(2) a-f

<sup>136</sup> Directive No. 8/2019, *supra* note 39, Article 25/3/

<sup>137</sup> Id., Article. 15

<sup>138</sup> Id., Article. 16

While this stringent laws and administrative structures are in place to enforce the constitutionally founded land governance rules, the new Directive exempts investors from providing project proposal in the process of land acquisition, thereby preventing the constitutionally established committees from protecting the public interest. Having a project proposal would be important for communities to know the details of a specific investment project and its promises for transforming the local livelihood and economy. The investor, under the regular law, is expected to provide details on the sustainability of the investment, willingness of the local community on the project, and promised future local contributions including local employment opportunities. The promises of the investment project are also required to be provided in the proposal so that the concerned government organ can monitor the performance of the specific project as per the proposal. Further, the project proposal supports the local people to know the future benefits of the investment to them. All this would mean an important mechanism to contain the adverse effect of investment on local communities. Yet, the Directive closes this window of opportunity by disregarding the provision of the investment project proposal as a requirement for the acquisition of land. It is also difficult for the government to evaluate and monitor the performance of the investment project without having the project proposal.

### **3.8. Conducting Environmental Impact Assessment**

Environmental Impact Assessment (EIA) is one of the fundamental preconditions for an investment activity. The need for each activity is emphasized both in the policy and pertinent laws of the country. The Federal Environmental Impact Assessment Proclamation No. 299/2002, one of such laws, defines it as “*a method of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project.*”<sup>139</sup>

A close reading of this provision shows the government’s commitment to ensure that the positive or negative impacts of a project development need to be identified and evaluated prior to any investment activity. If the project has a negative impact after its assessment, alternative mitigation and management measures would be required. The law also provides the standards to evaluate the impact of the project. As such “the impact of a certain development project

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<sup>139</sup> Federal Environmental Impact Assessment Law, Proclamation No. 299/2002, *Federal Negarit Gazette*, (2002), Article 2(3)

needs to be assessed based on the size, location, nature, cumulative effect with other concurrent impacts or phenomena, trans-regional effect, duration, reversibility or irreversibility, or other related effects of the project.”<sup>140</sup> The EIA Directive No. 1/2017 of the Amhara region under article 4/4/ also defines it as the process of identification or mitigation of positive or negative environmental impacts of any project during its start, expansion, or termination.<sup>141</sup>

The global standard (for example, the European Investment Bank, EIA-code) requires “a proposed project to disclose the possible, probable, or certain effects of that project on the environment and the affected communities.”<sup>142</sup> The assessment is required to be inclusive, neutral, and adequately specific for the decision-makers to examine the potential environmental and social effects of the proposal.<sup>143</sup> Further, it should explore possible alternatives to the project that might maximize the benefits while minimizing the adverse impacts.<sup>144</sup> Finally, since EIA provides a structured opportunity for local communities to have their voice heard,<sup>145</sup> it need to be consulted with the local people.<sup>146</sup>

To hold investors accountable, the contents of the EIA need to be also transparent for the local people.<sup>147</sup> To this end, the federal environmental policy provides public consultation as an integral part of EIA.<sup>148</sup> International norms and principles, to which this country is a party, oblige the government to agree to the conduct of environmental and social impacts by investors.<sup>149</sup> The government should also consider how to ensure that impact assessments be integrated into contracts between investors and governments.<sup>150</sup> Investors are responsible to raise local awareness of specific environmental and social impacts on local people.<sup>151</sup> Failure to conduct EIA should amount to a material breach of contract and be a ground for termination.<sup>152</sup>

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<sup>140</sup> Id., Article 4(1)

<sup>141</sup> Amhara region Environmental Impact Assessment Law, Directive No. 1/ 2017, *Zikre. Hig.* (2017), Article 4/4/

<sup>142</sup> European Investment Bank, *Environmental and Social Standards*, (2018), p.2.

<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> World Bank, *Environmental impact assessment: Responsible agricultural investment*, (2019), p.2.

<sup>146</sup> Id.

<sup>147</sup> Id.

<sup>148</sup> *Environmental Policy of Ethiopia*, (1997), p.24. The Environmental Policy of Ethiopia is approved by the Council of Ministers in 1997.

<sup>149</sup> World Bank, *supra* note 145, P.4

<sup>150</sup> Id.

<sup>151</sup> Id., P.2.

<sup>152</sup> Id., P.4

The right of the Ethiopian people to a clean and healthy environment is among the overriding principles enshrined in the FDRE Constitution.<sup>153</sup> This principle applies to all legislative frameworks of the country. Improved living standards, sustainable development, participation, and consultation to projects affecting the local community are issues identified under the right to development in the FDRE Constitution.<sup>154</sup> As provided under the Environmental Policy of Ethiopia, any development project should conduct EIA.<sup>155</sup> The assessment is required to include physical, biological, social, ecological, economic, political, and cultural impacts and conditions on communities.<sup>156</sup>

Encouraging socially and environmentally responsible investment is one of the objectives of federal investment law.<sup>157</sup> The law imposes duty on the investor to observe social and environmental sustainability values. It states that all investors shall give due regard to social and environmental sustainability values including environmental protection standards and social inclusion objectives in carrying out their investment activities.<sup>158</sup> The federal EIA Proclamation No. 299/2002 was also issued to predict and manage the environmental effects of the proposed development activity and to achieve intended development, assessing future environmental impacts before the approval of the development project, and involving the public in the process of development decision making.<sup>159</sup> Consistent with the mission of the federal laws, the EIA Directive No. 1/2017 of the Amhara region provides ensuring environmental protection as one of the factors to bring sustainable development.<sup>160</sup> The law added that the environmental and social aspects of any development projects need to be assessed before its start.

The BoLAU of the region has no unlimited power to decide on issues relating to the environment, forest, wildlife protection, and development authority of the region. The latter is vested with the power of *regulating environmental issues including impact assessment of investment projects*. However, this institution excludes EIA from the mandatory preconditions of investment by enacting the new Directive on the acquisition of agricultural investment. Hence, the

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<sup>153</sup> Federal Democratic Republic of Ethiopia Environmental and Social Management Framework (ESMF), For Africa CDC Regional Investment Financing Program (ACRIFP) report. p. 45. Proclamation No. 1/1995, *supra* note 25, Articles. 44 and 92.

<sup>154</sup> Proclamation.No.1/1995, *supra* note 25, Article 43

<sup>155</sup> Environmental Policy of Ethiopia, *supra* note 148, P.24.

<sup>156</sup> *Id.*

<sup>157</sup> Proclamation. No.1180/2020, *supra* note 15, Article 5(8)

<sup>158</sup> *Id.*, Article 54(2)

<sup>159</sup> Proclamation. No. 299/2002, *supra* note 139, Preamble

<sup>160</sup> Directive No. 1/2017, *supra* note 141, Preamble

constitutionally protected interest of local land users outlined earlier would be affected.

Starting a certain investment project may have negative impact including loss of land, degradation of groundwater, the effect on land-use change, and a decrease in productivity of the land. These impacts of the investment project are identified by conducting EIA in advance to provide mechanisms to minimize the negative effects of the project. In the EIA, the investor is required to agree on the prevention and mitigation of environmental impacts caused by investment project inputs, activities, and products. If the investment project is not able to prevent and reduce the impacts, the EIA declaration obliges the investor to pay all compensation costs. Since the new Directive of land acquisition does not consider EIA, identifying the potential negative impacts of agricultural investment and providing its mitigation measures is not expected.

## **Conclusion**

With the aim of preventing the reduction of productivity in relation to the pandemic crisis, the regional government has issued an investment land acquisition Directive that prioritizes agricultural production. However, the Directive liberalizes existing land acquisition procedures and requirements to promote irregularity and recognizes easy processes. Regarding the process of a public competition in tender, payment of lease price, project proposal, investment permit, and impact assessment of the project, the Directive diverges and goes against with the land acquisition requirements and procedures of regular rural land and investments laws. The Directive seems to adversely affect the land use rights of the local people since it skips key requirements and procedures.

The acquisition of land for agricultural investment without following recognized conditions and procedures in the regular laws affects the local people who depend on land-based livelihood activities. Moreover, since the Directive does not oblige investors to provide project proposals and, environmental impact assessment, it is difficult to evaluate whether the investment project is contributing to boost productivity and local contributions. It is also problematic for the regional government to evaluate the success of the projects at the end of the investment period without having the stated requirements. As a response to emergencies and protecting local land-use rights, a sustainable land use policy need to be established. It is also better to put an effective and responsible regulatory mechanism of agricultural investment that provides a rule upon

investors to conduct an impact assessment and require them to share fruits of investment with the local people.