LARGE-SCALE COMMERCIAL INVESTMENTS IN LAND: SEEKING TO SECURE LAND TENURE AND IMPROVE LIVELIHOODS∗

Darryl Vhugen∗∗

I. Introduction

When food and energy prices rose sharply in 2007-2008, investment in agricultural land in land-rich, economically poor countries increased dramatically. The global financial crisis accelerated this trend as investors sought secure financial returns. Investors range from foreign governments and government-based institutions to corporate enterprises of various sizes and private investment funds. The investors seek access to land to satisfy demand for food and energy resources, to free themselves from dependence on world markets, and to maximize profits.

It is difficult to gain a comprehensive understanding of the nature and extent of large-scale investment in land or to assess its impact on the people in recipient countries. This is because agreements are rarely a matter of public record and often do not attract the attention of the media. Thus, the current volume of such investment, especially in specific countries, is unknown. However, the International Land Coalition has issued a report that identifies 948 deals involving 134 million hectares of African land.[1] Additionally, recent research documents at least 2.5 million hectares of land acquired (in parcels of 1,000 hectares or more) for agricultural investment in just five African countries: Ethiopia, Ghana, Madagascar, Mali, and Sudan.[2] The World Bank reports that applications from foreign investors for land in Mozambique exceed twice the amount of cultivable

∗ This report was originally prepared for a conference entitled "Subsistence Agriculture: Confronting Environmental Change and Social Justice," jointly organized by Haramaya University College of Law's Environmental Policy Center and Social Justice Center, April 23-25, 2010.

∗∗ Darryl Vhugen is a Senior Attorney and Land Tenure Specialist at Landesa (formerly the Rural Development Institute) in Seattle, WA, U.S.A. See www.landesa.org for more information.

1. WARD ANSEEUW ET AL., INT'L LAND COAL., LAND RIGHTS AND THE RUSH FOR LAND: FINDINGS OF THE GLOBAL COMMERCIAL PRESSURES ON LAND RESEARCH PROJECT 23 (2012).

2. LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 3-4 (2009), *available at* http://www.ifad.org/pub/land/land_grab.pdf.

land in that country.[3] Some nations have received applications from foreign investors, including informal applications, for more than half of their total cultivable land area.[4]

Ethiopia has been a very attractive place for large-scale investments in agricultural land. The government has welcomed such investments in recent years, offering huge parcels of land at very low lease rates. One report estimates that, by January 2011, the government had transferred 3,619,000 hectares of land to investors.[5] Reports from early 2010 suggested that the government planned to make available some 3 million hectares of land to investors in the next 3 years. This amounts to about 4 percent of all arable land in Ethiopia and about 20 percent of the total land area currently under cultivation.[6]

The growing foreign investment in land in developing countries raises high stakes. Large-scale investment can increase land productivity, improve access to technology, create jobs, diversify the local economy, increase local income, create market linkages, and attract complementary investment. The potential risks are equally significant: loss of smallholder farms, increased landlessness, further marginalization of the poor, conflict and social unrest, unsustainable resource use and environmental degradation. These risks can be mitigated by strengthening local land tenure security and the investment agreements that govern these projects.[7]

Land issues play a crucial role in the Ethiopian government's 2002 Sustainable Development and Poverty Reduction Program ("SDPRP"). A major focus of the SDPRP is agriculture, the source of livelihood for 85 percent of the population. The majority of those working in agriculture are

---

3. MICHAEL TAYLOR & TIM BENDING, INT'L LAND COAL., INCREASING COMMERCIAL PRESSURE ON LAND: BUILDING A COORDINATED RESPONSE (2009); Vera Songwe & Klaus Deininger, *Foreign Investment in Agricultural Production: Opportunities and Challenges*, AGRICULTURE & RURAL DEVELOPMENT NOTES: LAND POLICY AND ADMINISTRATION ISSUE 45 (World Bank), Jan. 2009, at 1.

4. U.N. Food & Agric. Org. [FAO], Int'l Fund for Agric. Dev. [IFAD], U.N. Conference on Trade & Dev. [UNCTAD], World Bank Group, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (Extended Version)* 1, (Jan. 25, 2010) [hereinafter *FAO Principles*].

5. Felix Horne, *Understanding Land Investment Deals in Africa: Country Report: Ethiopia* 18 (The Oakland Institute 2011).

6. Xan Rice, *Ethiopia—Country of the Silver Sickle—Offers Land Dirt Cheap to Farming Giants*, GUARDIAN, Jan. 15, 2010; Jason McLure, *Ethiopian Farms Lure Investor Farms as Workers Live in Poverty*, BLOOMBERG, Dec. 31, 2009. Another report suggests that 7 million hectares or more of land will be transferred to investors by 2015. DESSALEGN RAHMATO, FORUM FOR SOC. STUDIES, LAND TO INVESTORS: LARGE-SCALE LAND TRANSFERS IN ETHIOPIA 17 (2011), *available at* http://www.landgovernance.org/system/files/ Ethiopia_Rahmato_FSS_0.pdf.

7. Songwe & Deininger, *supra* note 3, at 1.

poor.[8]

This article considers the opportunities and challenges presented by large-scale investments in rural land. It provides an overview of the current investment trends in general, with a specific focus on Ethiopia. It evaluates the potential benefits and risks of commercial investment to local communities, emphasizing the effects on Ethiopian farmers. It notes the lack of any sound evidence that the recent spate of large investments in land have benefited the poor, and the need for in-depth research on the subject.

Section IV discusses a series of principles that can be used to guide such investments in hopes of creating a "win-win-win" outcome for the stakeholders typically affected: local communities, investors, and host-country governments. These principles seek to promote respect for existing land and resource rights, both formal and informal; food security in the host country; transparency and good governance; consultation and participation by all stakeholders; economically viable and responsible investments; social sustainability; and environmental sustainability.

Whether the land investments in Ethiopia to date, or those the government actively seeks for the future, can or will actually benefit the country's poor farmers or agricultural workers is subject to question. Section V offers specific suggestions to help position local communities and other stakeholders in Ethiopia to realize benefits from investment and reduce the risks to livelihoods, land, and other natural resources and the communities that depend on them.

II. Background

While the recent surge of large-scale investments in land in developing countries may seem to be a fairly recent phenomenon, such operations have a long history in many countries. During colonial times, foreign powers established large plantations in Asia, Africa, and Latin America. Using (and often terribly exploiting) local populations for labor, the plantations supplied investing countries with commodities such as sugar, coffee, bananas, cocoa, and rubber. Host country populations benefited little or not at all.

The most recent wave of foreign investment in land is distinguished from past periods of investment primarily by the size of the land acquisitions (some more than 300,000 hectares) and the extent to which food and energy security are the drivers of investment (versus presumed

8. Wibke Crewett & Benedikt Korf, *Ethiopia: Reforming Land Tenure*, 35 (116) REV. AFR. POL. ECON. 203 (2008).

economies of scale).[9] Commercial investments in agricultural land have been described as the "third wave of outsourcing," after manufacturing in China and services in India.[10] Key recipient countries include Cambodia, Sudan, Pakistan, Uganda, Madagascar, Mozambique, Brazil, Burma, Mali, Indonesia, Colombia, Tanzania, Ethiopia, Ghana, Guatemala, Senegal, and Turkey.[11]

Many investors have a strong preference for obtaining ownership rights because they obtain the highest level of control over the land and their investment, and are not vulnerable to renegotiation of lease terms. However, many African countries do not permit private land ownership, so most land purchases occur in Latin America and Eastern Europe. In Africa, the majority of land investments appear to take the form of leases ranging from short term to ninety-nine years and longer, with fifty years appearing to be a common lease term. In Ethiopia, all documented projects are for government leases with terms ranging from twenty-five to ninety-nine years. In Mali, the majority of the projects are fifty-year renewable leases. All projects reported in Ghana involve leases exceeding fifty years. Mozambican law limits leases to a maximum of fifty years, but the leases are renewable. Most investors lease land from the host country government or an agency of the host country government, although in some countries (such as Zambia) land can be leased out by customary chiefs and Land Commissions. Leases are preferred by investors (over outgrower schemes and contract farming) where investors cannot purchase land, land is abundant, and land development and infrastructure (e.g., irrigation) are necessary.[12]

A. Factors Driving Large-scale Land Investment Projects

The recent surge of investments in land appears to be driven by several factors, the most important of which relate to international food security and energy concerns. Assumptions of ongoing low food and energy prices were shaken by the food and oil price hikes of 2007 and 2008. Food security worries led investor governments to back investments in agricultural land by private investors. This trend is continuing.[13]

---

9. TAYLOR & BENDING, *supra* note 3, at 9.

10. McLure, *supra* note 6.

11. An extensive list of recent large-scale investments in agricultural land is contained in Joachim Von Braun & Ruth Meinzen-Dick, Int'l Food Policy Research Inst., *"Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities*, POLICY BRIEF 13 (Apr. 2009).

12. COTULA ET AL., *supra* note 2, at 3-4; Horne, *supra* note 5, at 30.

13. COTULA ET AL., *supra* note 2, at 4-5; Songwe & Deininger, *supra* note 3, at 1.

The global financial crisis also led private sector investors to seek new, potentially profitable investment options. Corporate and financial interests anticipate high rates of return for agricultural commodities and land as they have realized the potential in investing in agricultural production where large expanses of land can be accessed cheaply. As prices rise, companies previously engaged only in food processing and distribution are entering into production so as to avoid purchasing agricultural products from the world market.[14]

A third driver is demand for biofuels. Public and private investors have acquired agricultural land to grow jatropha and other biofuel crops to achieve energy security, climate change mitigation, rural development, and increased exports. The prospect of the return of higher fuel prices in the near term may cause investors to continue to seek agricultural land for this purpose, although food security concerns may dampen enthusiasm for this use.[15]

Other factors include increasing demand for nonfood agricultural commodities such as rubber and cotton, mining, tourism development opportunities, and the possibility of receiving carbon sequestration payments at some time in the future. Moreover, many host countries have adopted policy reforms, including investment incentives, that make investments more attractive than in the past.[16]

In Africa, these policy reforms often include making land available to investors at very low cost. African governments have offered very favorable lease terms, apparently based on a belief that this is necessary to attract private investment. Indeed, most investors reportedly are unwilling to invest without such terms, as they project that their investments otherwise would be unprofitable.[17] As a result, investors have often acquired land at minimal cost or sometimes no cost at all. The Ethiopian government, for example, appears to have concluded that leasing out land for free or at very low cost is justified by the benefits to the nation, including higher income tax receipts, job creation, and advancing a strategy to "build up capitalism,"[18] although there is considerable debate as to whether these benefits actually have been or will be realized. This may have prompted investors to acquire land not only for the value of the products that can be produced but also in order to benefit from the expected

14. COTULA ET AL., *supra* note 2, at 56-58; *FAO Principles*, *supra* note 4, at 1; McLure, *supra* note 6.

15. COTULA ET AL., *supra* note 2, at 54-55.

16. *Id.* at 57-59.

17. *FAO Principles*, *supra* note 4, at 10.

18. McLure, *supra* note 6.

increase in land values over time.[19]

B. Who Are the Investors?

Investors engaged in large-scale investments include private companies in the agri-food, biofuels, tourism, and mining industries; financial institutions, including private equity groups; governments and government-linked or state-owned enterprises; and individuals. Major investing countries are Saudi Arabia, Japan, China, India, Korea, Libya, Egypt, the Gulf States, the United States, Qatar, and the United Arab Emirates. Acquisitions by government-backed institutions (such as sovereign wealth funds) from China, South Korea, the Gulf States, and Libya have attracted much attention.[20]

While government or government-backed investors have been most prominent, there is evidence that participation by the private sector is increasing. Private investors from India feature most prominently in media reports of large land investments in Africa.[21] Also, while the majority of investors are foreign, domestic investors increasingly participate in these acquisitions. Foreign investors often invest in partnership with domestic entities, especially where foreigners may not legally acquire land. According to the World Bank, only 23 of the 406 investments in Ethiopia involve foreign investors.[22] Another report suggests that 95 percent of investors are domestic and have leased more than half of the land acquired by investors.[23]

C. Common Misconceptions Arising from Large Land Investments

Empirical and anecdotal research in recent years has revealed a number of common misconceptions arising from large-scale acquisitions of land in developing countries. Three are especially important to any attempt to understand the nature and impact of these investments.

1. <u>There is Abundant "Empty" Land Available in Africa</u>

Investors and host governments often argue that land made available for acquisition is empty, idle, unused, wasteland, or under-utilized. Rarely,

19. *Id*.; COTULA ET AL., *supra* note 2, at 57.

20. TAYLOR & BENDING, *supra* note 3, at 6.

21. *FAO Principles*, *supra* note 4, at 1; COTULA ET AL., *supra* note 2, at 4; TAYLOR & BENDING, *supra* note 3, at 6.

22. KLAUS DEININGER ET AL., WORLD BANK, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? 62 (2011).

23. Horne, *supra* note 5, at 23.

however, is productive land actually empty.[24] Local farmers may leave land fallow in order to improve productivity. Seemingly empty land may actually be used during certain times of the year by pastoralists or those engaged in hunting and gathering.

Even where land is currently underused and seems abundant, it is still likely to be claimed by somebody.

> Concepts such as "available," "idle" or "waste" land, used to justify land allocations to investors, therefore need critical analysis. . . . In Ethiopia, for example, all land allocations recorded at the national investment promotion agency are classified as involving "wastelands" with no pre-existing users. But this formal classification is open to question, in a country with a population of about 75 million, the vast majority of whom live in rural areas. Evidence collected by in-country research suggests that at least some of the lands allocated to investors in the Benishangul Gumuz and Afar regions were previously being used for shifting cultivation and dry-season grazing, respectively. . . .
>
> In other words, concepts such as "idle" land often reflect an assessment of the *productivity* rather than *existence* of resource uses: these terms are often applied not to unoccupied lands, but to lands used in ways that are not perceived as "productive" by government. . . . Low-productivity uses may still play a crucial role in local livelihood and food security strategies.[25]

Thus, claims by host governments, investors, and others that vast quantities of unused land are available may be subject to challenge.

2. <u>All Large-Scale Land Investments Are Actually "Land Grabs" that Violate Host Country Laws</u>

Another common misconception is that the investments discussed in this article always or usually violate local land laws. Actually, in most cases, land is acquired for these projects in ways that are consistent with local law. Most large-scale land leases are of state land, which is administered by government according to statute, including the right to lease it to tenants. "Where the customary rights of local land users are ignored, this is [often] a function of land legislation not recognizing customary use rights, rather than outright illegal allocation or acquisition."[26]

Harm to the rights of local occupiers of land can result from a dearth

---

24. TAYLOR & BENDING, *supra* note 3, at 7.
25. COTULA ET AL., *supra* note 2, at 62.
26. TAYLOR & BENDING, *supra* note 3, at 6-7.

of legislation that protects their rights. Alternatively, adequate laws may exist on the books but may not be implemented effectively.[27] In either case, land can be acquired in a way that is strictly legal while still displacing communities and disrupting smallholder farming.

3. <u>In Developing Countries, Large Farms Are More Efficient than Smallholder Farms</u>

Advocates of large acquisitions of agricultural land often argue that such projects are beneficial because large farms are more productive than small farms. However, "contrary to the conventional wisdom of casual observers, small family farms are almost always more productive than large farms in developing country settings. The few exceptions include cases of highly specialized machinery, livestock production, and certain plantation crops. . . ."[28] One study "found that large-scale export agriculture in Africa has succeeded only with plantation crops like sugar and tea or in ventures that were propped up by extreme government subsidies, during colonialism or during the apartheid era in South Africa."[29]

Economies of scale are more likely to be achieved elsewhere in the production chain. Thus, larger operations or cooperative arrangements among smallholders may be more efficient in accessing inputs and finance, or in processing, storing, and marketing their agricultural production.[30]

D. Large-scale Land Investment in Ethiopia

In recent years, the Ethiopian government has taken a number of steps to create a more investor-friendly environment. According to the Ethiopian Investment Commission ("EIC"), liberalization of the foreign trade regime has been a primary objective. Perhaps as a result of this emphasis, in 2010 Ethiopia improved its ranking in several categories in the World Bank Doing Business Report.[31]

The government seeks investment in large-scale commercial agricultural land development as part of its overall Agriculture Development-Led Industrialization ("ADLI") development strategy:

---

27. *Id.* at 7; COTULA ET AL., *supra* note 2, at 7.

28. Roy L. Prosterman, *Redistributing Land to Agricultural Laborers*, *in* ONE BILLION RISING: LAW, LAND AND THE ALLEVIATION OF GLOBAL POVERTY 107, 113 (Roy L. Prosterman et al., eds. 2007).

29. Andrew Rice, *Is There Such a Thing as Agro-Imperialism?*, N.Y. TIMES, Nov. 16, 2009, *available at* www.nytimes.com/2009/11/22/magazine/22land-t.html.

30. COTULA ET AL., *supra* note 2, at 85-86; Taylor & Bending, *supra* note 3, at 10.

31. Ethiopia added 29 points in the area of "Starting a Business," 9 points in the area of "Registering Property," and 9 points in the area of "Contract Enforceability." *See* WORLD BANK, DOING BUSINESS 2010: REFORMING THROUGH DIFFICULT TIMES 120 (2009).

By and large, the strategy of ADLI focuses primarily on agricultural development. This is to be attained through improvement of productivity in smallholdings, and expansion of large-scale farms particularly in the lowlands. ADLI foresees that agriculture would supply commodities for exports, domestic food supply and industrial output, and at the same time provide market for domestic manufactures.

Agriculture is the foundation of the country's food production. The smallholder sub-sector is in particular the major source of staple food production. Food security can be achieved basically by promoting smallholder development in a sustainable manner. In light of this, a special emphasis is placed on encouraging smallholder farmers to raise their productivity through various incentive packages (access to fertilizer, credits, etc.) and other supports.[32]

Specific goals of the strategy include "expand[ing] modern commercial farms" and "encourag[ing] private investors in agriculture and agri-business."[33] One Regional Investment Agency advertises: "Vast, fertile, irrigable land at low rent. Abundant water resources. Cheap labour. Warmest hospitality."[34]

The pace of large-scale commercial land investment, especially in the farming sector, has been rapid. Between 2004 and 2009, the World Bank noted the development of 406 commercial investment projects across five regions of Ethiopia, totaling 1.19 million hectares of land.[35] The four largest investment sectors since 2006 have been flori-horticulture, food, meat, and biofuels. All are export-oriented sectors.[36] Foreign direct investment in Ethiopia, much of it in the agribusiness sector, has climbed from US$135 million in 2000 to US$3.5 billion in 2008. The increase can be attributed to depreciation of the Ethiopian currency, global demand for food, and Ethiopia's investor-friendly policies.[37] There is no sign that the pace will slow anytime soon:

> Ethiopia‘s great land lease project is moved swiftly ahead. In an effort to introduce large-scale commercial farming to the country,

32. Ethiopian Investment Commission, http://www.ethiomarket.com/eic (select "Opportunities" tab, choose "Agriculture," then select "Policies & Strategies").

33. *Id*.

34. Mary Fitzgerald, *The New Breadbasket of the World?,* IRISH TIMES, Jan. 30, 2010, *available at* http://www.irishtimes.com/newspaper/weekend/2010/0130/1224263415739.html.

35. DEININGER ET AL., *supra* note 22, at 62.

36. LUCIE WEISSLEDER, ECOFAIR TRADE DIALOGUE DISCUSSION PAPER NO. 12, FOREIGN DIRECT INVESTMENT IN THE AGRICULTURAL SECTOR IN ETHIOPIA 13-14 (2009), *available at* http://www.boell.de/downloads/ecology/FDIs_Ethiopia_15_10_ 09_c_1.pdf.

37. *Id.* at 9-11.

> the government is offering up vast chunks of fertile farmland to local and foreign investors at almost giveaway rates. By 2013, 3m hectares[38] of idle land is expected to have been allotted—equivalent to more than one fifth of the current land under cultivation in the country.[39]

In virtually all cases, the investors are private companies. All documented projects are for government leases ranging from twenty-five to ninety-nine years.[40] Many of the investments since 2006 are still in the pre-implementation phase, where the investors have secured land but not yet moved into the implementation or operation phases.[41] According to the World Bank, only 20 percent of the investments in Sub-Saharan Africa have progressed to the farming stage.[42] Thus, there are few concrete examples of specific investments to analyze.

The government touts a number of recent land investments as foreign investment success stories:

> [A] French brewer group obtained permits and secured land for a brewery at Kombolcha (Amhara Regional State) in under one month. The plant has been operational for several years. An Ethio-Saudi joint venture registered and obtained 5000 hectares of land for irrigated agriculture in Gidabo (Oromiya Regional State) within a few weeks. It took a similarly short time for an Italian firm to register and get all the urban and rural land that it required in order to establish a ginnery and a cotton plantation in the north of the country (Amhara Regional State). What these examples indicate is the determination and capability of the government to respond expeditiously to foreign investors who choose to do business in Ethiopia.[43]

Other examples of recent large land investments in Ethiopia include:

Karuturi Global, Ltd, an Indian company, has leased nearly 800,000 hectares for corn, rice, and palm oil.[44] It is the largest foreign holding in Ethiopia.[45] The company maintains that its projects will create up to 20,000 new jobs and that it will contribute local infrastructure such as a

---

38. Three million hectares makes up about 4 percent of Ethiopia's arable land. McLure, *supra* note 6.

39. Rice, *supra* note 6.

40. COTULA ET AL., *supra* note 2, at 49-50, 77; Horne, *supra* note 5, at 30.

41. WEISSLEDER, *supra* note 36, at 10.

42. DEININGER ET AL., *supra* note 22, at xxxii.

43. Ethiopian Investment Commission, http://www.ethiomarket.com/eic (select "Ethiopia" tab, choose "Investment Climate," then select "Foreign Investment Regime").

44. Rice, *supra* note 6; Andrew Rice, *supra* note 29.

45. DESSALEGN, *supra* note 6, at 16.

new hospital, school, and day care centers. For the first six years of the lease, Karuturi pays no rent; thereafter it must pay 15 birr (less than US$1) per hectare per year for the balance of the fifty-year term. While the company states that it pays its workers at least the legal minimum wage, those wages are below the poverty limit established by the World Bank. Karuturi forecasts it will make an annual profit of US$100 million.[46]

Sheik Mohammed Al Amoudi, a Saudi Arabian investor, has made very substantial investments in Ethiopian land, mostly through domestic companies he controls. His investments include "mines, hotels and plantations on which he grows tea, coffee, rubber and jatropha . . . . Since the global price spike, he has been getting into the newly lucrative world food trade."[47] His company Saudi Star has a sixty-year lease to grow rice on 10,000 hectares of Ethiopian land. Some reports state that he pays no rent for the land, while others note that the lease rate is 158 birr (around US$9) per hectare.[48] In addition, one of Sheik Amoudi's Ethiopian companies previously announced plans to lease more than 1 million acres to satisfy Saudi demand for staple crop production. The Sheik's other companies are cultivating rice, vegetables, and fruit for export.[49]

Two Indian companies, Shapoorji Pallonji & Co. Ltd and Emami Biotech, have entered into agreements with the Ethiopian government to lease land for cultivating biofuel crops. The leases are for 50,000 and 40,000 hectares, respectively.[50] Flora EcoPower, a German company, leased more than 13,000 hectares in Ethiopia's Oromia state as part of a US$77 million biofuel production project.[51]

Despite all of these large-scale investments, Ethiopia's Prime Minister states that protection and development of the smallholder farmer is at the heart of Ethiopia's ADLI strategy: "Where there is unutilised land that could be used by commercial farmers, then it makes sense for us to encourage private-sector commercial farming to develop this land. . . . Where commercial farming is promoted at the expense of small-scale farming, we believe that would be a disaster."[52]

Unfortunately, there is insufficient evidence at this time to determine

---

46. McLure, *supra* note 6.

47. Andrew Rice, *supra* note 29.

48. Horne, *supra* note 5, at 32.

49. Andrew Rice, *supra* note 29.

50. Shutapa Paul, *Shapoorji, Ethiopia Ink 50,000ha Land Deal*, LIVEMINT, Mar. 11, 2010, a*vailable at* http://www.livemint.com/2010/03/10213215/Shapoorji-Ethiopia-ink-50000.html.

51. *Factbox-Foreign Forays into African Farming*, REUTERS, Mar. 20, 2009, a*vailable at* http://www.reuters.com/article/idUSLK10422520090320?sp=true.

52. Fitzgerald, *supra* note 34.

whether smallholder farmers have benefited from the nation's agricultural development strategy. However, there are strategies to prevent small farmers and other members of local communities from the "disaster" described by the Prime Minster. That is the subject of the remainder of this article.

III. Potential Benefits and Risks of Commercial Investments to Local Communities

The UN Food and Agriculture Organization ("FAO") and others have concluded that large-scale development projects can bring significant benefits to developing countries and their people. The World Bank, for one, has promoted substantial agricultural investment projects in sub-Saharan Africa as an important part of the region's poverty alleviation strategies.[53] Specific benefits are said to include modernization of agricultural production; stimulation of the rural economy; lower production costs and increased returns for farmers; technology transfers; employment creation; diversification of rural livelihoods; development of backward/forward linkages in agricultural industries; development of natural resources; infrastructure development (roads, schools, health centers, housing, ports, wells and water services, etc.); possible increases in food production for domestic markets; smallholder access to extension and financial services, inputs, and a reliable market; and increase in GDP growth and government revenue.[54]

However, the risks to local communities are enormous, including loss of rights to smallholder farms, communal land, forestland, and natural resources, especially for poor farmers and women; potential for increased food insecurity in the host country as land is devoted to food production for investing countries;[55] increased vulnerability to land degradation and depletion of water resources, elimination of forests, and loss of biological

---

53. *Awakening Africa's Sleeping Giant: Prospects for Commercial Agriculture in the Guinea Savannah Zone and Beyond* xv (Agriculture and Rural Development Unit, Sustainable Development Network, Africa Regional Office, The World Bank, Feb. 26, 2009), *available at* http://siteresources.worldbank.org/INTAFRICA/Resources/CCAA-synthesis-report0209.pdf.

54. *FAO Principles*, *supra* note 4, at 1; U.N. Food & Agric. Org. [FAO], *From Land Grab to Win-Win: Seizing the Opportunities of International Investments in Agriculture,* ECONOMIC AND SOCIAL PERSPECTIVES POLICY BRIEF 4, June 2009, at 2; S. HARALAMBOUS ET AL., INT'L FUND FOR AGRIC. DEV. [IFAD], THE GROWING DEMAND FOR LAND: RISKS AND OPPORTUNITIES FOR SMALLHOLDER FARMERS 8 (2009), *available at* http://www.ifad.org/events/gc/32/roundtables/2.pdf.

55. Some contracts attempt to reserve a percentage of food production for the host country, but many investors are seeking guarantees of 100 percent production for export, regardless of the situation in the host country.

diversity; a reduction over time in promised employment opportunities as mechanization increases; and increased potential for conflict as a result of land acquisitions, relocations, and restricted or reduced livelihood opportunities.[56]

The threat to land tenure security is especially dangerous. Providing secure rights to land is a critical component of poverty reduction.

> Land tenure determines access to the land and other natural resources upon which ultimately all livelihoods and human wealth, well-being and culture depend. . . . [T]he responsible governance of tenure can help to reduce hunger, alleviate poverty, support social and economic development, create wealth and enable cultural aspirations to be realized, as well as addressing issues such as the reform of public administration, corruption, environmental protection and climate change, and discrimination and gender inequality.[57]

The Heads of State of the countries of the African Union, including Ethiopia, recognize "the centrality of land to sustainable socio-economic growth, development and the security of the social, economic and cultural livelihoods of [their] people."[58] Accordingly, they have resolved to "ensure that land laws provide for equitable access to land and related resources among all land users."[59]

Unfortunately, some states do not always act in accordance with these declarations. In Ethiopia, for example, one third of expropriations benefitted private investments instead of the public.[60] The increasing demand from investors for farmland in developing countries is often met not through fair, voluntary transactions, but through government expropriation of the land being sought. These takings often violate the rights of those occupying the land, with heavy-handed expropriation, lack of due process, and little or no compensation. Local people usually have to resettle elsewhere, often causing a drastic disruption fraught with risks of impoverishment. The grievances of the displaced can threaten not only the

---

56. TAYLOR & BENDING, *supra* note 3, at 1; COTULA ET AL., *supra* note 2, at 5-6; HARALAMBOUS ET AL., *supra* note 54, at 6-8; MICHEL MERLET & CLARA JAMART, COMMERCIAL PRESSURES ON LAND WORLDWIDE: ISSUES AND CONCEPTUAL FRAMEWORK FOR ILC STUDY 5 (2009), a*vailable at* http://www.landcoalition. org/pdf/09_05_ Conceptual_framework_ENG.pdf.

57. PRIVATE SECTOR ASSESSMENT FOR THE VOLUNTARY GUIDELINES ON RESPONSIBLE GOVERNANCE OF TENURE OF LAND AND OTHER NATURAL RESOURCES 1 (2010), http://www.fig.net/news/news_2010/london_jan_2010/private_sector_assessment.pdf.

58. Declaration on Land Issues and Challenges in Africa, A.U. Doc. Assembly/AU/Decl.1(XIII) (Jul. 2009).

59. *Id.*

60. DEININGER ET AL., *supra* note 22, at 109.

stability of the investment project but the government itself.[61]

The African Development Bank has recognized the devastating impacts that can result from poorly managed expropriation of land:

> [I]nvoluntary resettlement . . . can cause a sudden break in social continuity and can result in impoverishment of the people who are relocated. The resettlement may provoke changes, which could dismantle settlement patterns and modes of production, disrupt social networks, cause environmental damage, and diminish people's sense of control over their lives. It can threaten their cultural identity and create profound health problems.[62]

It can be hard to get reliable figures for the number of people displaced by development projects in Africa. From 2004 through early 2009, nearly 2.5 million hectares of land were allocated to large investment projects (exceeding 1,000 hectares) in Ethiopia, Ghana, Madagascar, Mali, and Sudan. Mozambique has received applications from foreign investors for land exceeding twice the amount of cultivable land in the country, allocating 4 million hectares in total.[63] The governments of South Korea, Egypt, and the Gulf States have leased 1.5 million hectares of prime farmland in Sudan. Uganda has made 840,000 hectares available to Egypt.[64] Certainly hundreds of thousands, if not millions, of Africans have been affected by these projects.

In the face of this "scramble" for resources in Africa, "[t]he question to be asked is whether these foreign demands can be met while observing sustainability guidelines and without marginalizing the land rights of African communities."[65]

A. Land Tenure Defined

To evaluate the impact of large-scale land development projects on the land rights of African communities, it is useful to begin by defining the important terms.

---

61. RURAL DEV. INST. & ASIAN DEV. BANK, COMPENSATION AND VALUATION IN RESETTLEMENT: CAMBODIA, PEOPLE'S REPUBLIC OF CHINA, AND INDIA 1-2 (2007).

62. AFRICAN DEV. BANK & AFRICAN DEV. FUND, INVOLUNTARY RESETTLEMENT POLICY 1 (2003).

63. TAYLOR & BENDING, *supra* note 3, at 1; Songwe & Deininger, *supra* note 3, at 1; COTULA ET AL., *supra* note 2, at 4; Horand Knaup & Juliane Von Mittelstaedt, *The New Colonialism: Foreign Investors Snap Up African Farmland*, DER SPIEGEL, July 30, 2009, a*vailable at* www.spiegel.de/international/world/0,1518,639224,00.html.

64. Knaup & Von Mittelstaedt, *supra* note 63.

65. AFRICAN UNION ET AL., FRAMEWORK AND GUIDELINES ON LAND POLICY IN AFRICA: LAND POLICY IN AFRICA: A FRAMEWORK TO STRENGTHEN LAND RIGHTS, ENHANCE PRODUCTIVITY AND SECURE LIVELIHOODS 26-27 (2010).

> "Land tenure," simply put, is the relationship between people and land. That relationship is typically defined in terms of various "land rights" such as rights relating to possession, exclusion, use, transfer and enjoyment.
>
> . . .
>
> "Land tenure security" exists when an individual or group can confidently enjoy rights to a specific piece of land on a long-term basis, protected from dispossession by outside sources, and with the ability to reap the benefits of investments in the land, at least through use and, probably desirably in most settings, also through transfer of the land rights to others.[66]

Land tenure includes formal rights such as ownership rights acquired through purchase or inheritance and legally protected tenancies. Where such formal rights are recorded in land records or at least reflected in a written agreement, tenure security tends to be relatively strong. Tenure security is likely to be weak in the case of unrecorded ownership rights and oral tenancies.

Land tenure rights may also arise from customary law, which exists in many parts of Africa. Contrary to formal law, customary law usually applies to a self-identified group based on the group's traditions. Customary land tenure systems are

> . . . comprised of bundles of individual, family, sub-group and larger group rights and duties concerning a variety of natural resources. The community usually allocates residential and arable land to individuals or families, who most often hold them with strong and secure rights and cultivate them separately. Families and larger clusters of households sometimes also have preferential rights to common pool resources such as water sources or desirable grazing areas.[67]

Customary law is usually unwritten, may be unknown to outsiders and not recognized by formal law. It may even conflict with formal law.

There are two key differences between formal and customary land tenure systems. First, formal systems generally allow relatively unrestricted transferability of rights whereas customary systems often allow transfer only within the group. Second, formal systems usually give the possessor of land the right to exclude others. Ordinarily, customary systems are more inclusive and may involve, for example, shared rights to use land among families for different uses (such as seasonal cultivation and

---

66. Tim Hanstad et al., *Poverty, Law and Land Tenure Reform, in* ONE BILLION RISING, *supra* note 28, at 21.

67. *Id.* at 26-27.

grazing).[68]

B. Land Tenure Issues Arising from Large-Scale Land Investments

Development projects that transfer ownership or long-term use rights to the investor can undermine the formal or customary land rights of local rights holders. This can arise where (1) formal rights are ignored or taken without adequate compensation; or (2) customary law and formal law come into conflict, where formal law makes customary rights illegal or where the formal law legalizes land rights that are inconsistent with or not recognized by customary law.[69] The latter often occurs where the government considers the land to be state owned.

Commercial investment in formally recognized private land in host countries appears to be less common than investment in state-owned land. However, sales and leases involving privately owned land do occur, especially where an investor seeks to acquire a large parcel of land owned by multiple smallholders. Issues of free, prior, and informed consent, due process, and fair compensation arise prominently in such cases.[70]

Most large investment projects in Africa involve long-term leases of government-owned land.[71] The state often owns the largest tracts of land in African countries,[72] and it is often easier for investors to obtain rights to state land than through negotiations with multiple private landholders. The public nature of the land does not, however, eliminate the risk of adversely impacting the population. In many countries, state land is a resource relied on by households for generations, and their rights may be recognized by customary, if not formal, law.[73] Disputes over whether land is truly unused take front and center in such situations. Customarily recognized land tenure rights often become threatened, as those rights may be ignored or marginalized when land ownership or use rights are transferred to outside investors.

C. Land Tenure in Ethiopia

Over its long history, Ethiopia has had a variety of land tenure systems

---

68. *Id.* at 27-28.

69. *Id.* at 28.

70. MERLET & JAMART, *supra* note 56, at 9.

71. COTULA ET AL., *supra* note 2, at 6.

72. Indeed, some countries, such as Ethiopia and Mozambique, prohibit privately owned land altogether.

73. MERLET & JAMART, *supra* note 56, at 9.

and practices, from communally owned forests to quasi-private farmland. Due to the existence of many different customary land rights regimes in Ethiopia,[74] a detailed discussion of this history is beyond the scope of this article. Prior to 1975, land tenure practices fell into two broad categories: (1) the usufructuary "rist" system, which predominated in the north; and (2) a highly feudal system of private tenure rights which prevailed in the south.[75] Land "was concentrated in the hands of absentee landlords, tenure was highly insecure, arbitrary evictions were common, and many lands were underutilized. High inequality of land ownership reduced productivity and investment and led to political grievances and eventually overthrow of the imperial regime."[76]

Land laws adopted by the communist Derg regime and in the post-Derg era have generally "crowded out" many of the customary institutions and practices relating to the use and control of land.[77] Under the Derg regime, which governed Ethiopia from 1975 to 1991, rural Peasant Associations redistributed land to their members in equal portions. This collective decision-making is similar to the *rist* system that involved allocation of usufruct rights in land by a *rist* composed of elders. In any case, the communist regime was much more successful in redistributing land than it was in implementing widespread collectivization of farms, although the regime set up a voluntary program by which Peasant Associations could pool land and equipment and become Agriculture Producer Cooperatives. When the Derg regime fell and the current government came into power, the cooperatives were de-collectivized very rapidly. Against international expectations, however, the new government decided to maintain State ownership of all land.

1. Land Law

In Ethiopia, land law is set forth in the 1995 Constitution and by federal statutory law, with implementation of the laws reserved for regional administrative agencies. Land "is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange."[78] Individuals have the right to own and transfer

---

74. *See* Wibke Crewett et al., *Land Tenure in Ethiopia: Continuity and Change, Shifting Rulers, and the Quest for State Control* 2, Consultative Group on Int'l Agric. Research, Collective Action and Property Rights Working Paper No. 91, 2008).

75. Tesfaye Teklu, Land Scarcity, Tenure Change and Public Policy in the African Case of Ethiopia: Evidence on Efficacy and Unmet Demands for Land Rights 5 (2005).

76. Klaus Deininger et al., *Rural Land Certification in Ethiopia: Process, Initial Impact, and Implications for Other African Countries* 4-5 (2007), *available at* www.isnie.org/assets/files/papers2007/deininger.pdf [hereinafter Deininger et al., *Rural Land*].

77. *Id*. at 6.

78. CONSTITUTION, Art. 40(3) (1995) (Eth.).

private property (other than land) so long as it doesn't infringe on the rights of others, and the state guarantees private investors' usufruct rights.[79] Adult Ethiopian peasants have the right to be allocated land for farming by the state without payment.[80]

The Constitution explicitly ensures "the right of private investors to the use of land on the basis of payment arrangements established by law."[81] The state can "expropriate private property for public purposes" upon payment of adequate compensation.[82]

While the Constitution grants the federal government the power to enact laws to protect land and natural resources, it gives the states the authority to administer those laws.[83] The House of Peoples' Representatives (the lower house of Ethiopia's Parliamentary Assembly) is empowered to enact laws regarding use of land and natural resources that cross state or national borders.[84] An important early land law, Proclamation 89/1997, first defined the terms of Ethiopian land policy as it would be administered by the states.[85] The Proclamation allowed land to be leased and bequeathed, but with strict limitations. It prohibited the sale or exchange of land, but allowed the sale of improvements on land.[86] All land laws passed at the regional level were required to focus on peasant and nomad needs and to apply equally to men and women.[87]

Proclamation 89/1997 was superseded in July 2005 by Proclamation 456/2005.[88] This law includes a modest strengthening of landholders' rights while maintaining federal ownership of rural land. It allows for the lease and exchange of land, within strict limits, and confirms the right of inter-generational tenure transfer.[89] All of these rights are to be assured through land certificates issued by the government.[90]

---

79. Article 35 explicitly addresses women's property rights: "Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property." *Id.* Art. 35(7).

80. *Id.* Art. 40(4).

81. *Id.* Art. 40(6).

82. *Id*. Art. 40(8).

83. *Id*. Arts. 51(5), 52(2)(d).

84. *Id.* Art. 55(2)(a).

85. Federal Rural Land Administration Proc. No. 89/1997, FEDERAL NEGARIT GAZETA.

86. *Id.* arts. 4, 2(3).

87. *Id.* art. 6(1-2).

88. Rural Land Administration and Land Use Proc. No. 456/2005, FEDERAL NEGARIT GAZETA.

89. *Id.* arts. 8, 11.

90. *Id.* art. 6.

> The Regional States have adopted their own land laws. For example, Tigray issued its first land proclamation in 1997, Amhara in 2000, Oromiya in 2002 and SNNP in 2004. These laws imposed conditions on both rental and inheritance. Small farmers were given the right to rent out their land for two to five years and, if "modern" technology was used, for 15-20 years. A landholder is not allowed to rent out all of the holding and the lessee has to dwell in the area and engage only in farming. In Tigray, if a landholder rents out land and leaves the area for a period of two years or more, the land use rights are revoked and reallocated to landless applicants. Tigray and SNNP regions allow dependants to inherit land only if they live in the local rural locality. Small farmers are not allowed to mortgage their land but commercial farmers are allowed to do so.[91]

Ethiopia has no law protecting the land and water rights of pastoralists. Such rights, including customary rights to land and water, are usually ignored. Rules applied to pastoral areas are usually laws designed to govern arable land.[92]

2. Land Policy

Reforms in 2005 and regional land policies promulgated from 2000 to 2003 have moved Ethiopia closer to a system of private property rights. In 2003, Ethiopia began to implement a land certification program in most areas of the country. In the first years of the program, a majority of the rural lands in the country were registered at relatively low cost.[93]

These land titling projects supported the government's poverty reduction strategy, known as the Plan for Accelerated and Sustained Development to End Poverty ("PASDEP"). One of PASDEP's goals was to issue land certificates to 13 million landholders in the period 2006-2010.[94] By September 2010, more than 6.3 million land certificates had been issued.[95]

---

91. 3 INDEPENDENT REVIEW OF LAND ISSUES: EASTERN AND SOUTHERN AFRICA 12-13 (Martin Adams & Robin Palmer eds., 2007).

92. *Id*. at 13, 16.

93. Deininger et al., *Rural Land*, *supra* note 76, at 1, 5. This was followed in 2005 by the Ethiopian Land Tenure and Administration Project ("ELTAP") to help implement aspects of the 2005 reforms. ELTAP was implemented in Tigray, Oromia, Amhara, and SNNP and focused on five areas to strengthen rural land tenure rights. U.S. Agency for Int'l Dev. [USAID] & Ethiopian Ministry of Agric. and Rural Dev., Ethiopia: Land Tenure and Administration Program, http://eltap.net/page1.asp.

94. 3 INDEPENDENT REVIEW OF LAND ISSUES, *supra* note 91, at 15.

95. ETHIOPIAN MINISTRY OF AGRIC. AND RURAL DEV., ETHIOPIA'S AGRICULTURAL SECTOR POLICY AND INVESTMENT FRAMEWORK (PIF) 2010-2020 9 (2010), *available at* http://gafspfund.org/gafsp/sites/gafspfund.org/files/Documents/Ethiopia_5_of_6_CAADP_

An important element of Ethiopia's land policy as it relates to private investment is that the land must be taken from local landholders prior to its transfer to foreign investors. Doing so not only makes the investment process more timely and complex, but also makes it more difficult for local communities to be involved in the processes of selecting land for investment and negotiating and implementing any agreements that result.[96]

D. Uncertain Impact of Large-Scale Investments on Ethiopia's Poor

It is very difficult to assess the impact of large-scale land investments on Ethiopia's people, especially its smallholder farmers. This is primarily because little or no reliable data exists on the details of such investments in Ethiopia or elsewhere.[97] Moreover, many investment agreements are quite recent, thus making it too early to assess impacts. From the rather murky and incomplete reports that are available, however, one searches almost in vain for evidence that Ethiopians living in the areas where investment is taking place have benefited in ways consistent with the government's goal of promoting sustainable development of smallholder farms.

Ethiopia offers very favorable incentives to attract foreign investment in the country, especially its agricultural sectors. These incentives include income tax exemptions of up to eight years. However, the investment laws generally do not require investors to pursue their projects in ways consistent with sustainable development. For example, although environmental impact assessments are a required component of the project approval process, they are often waived.[98] Sustainable development measures are apparently left to each individual investment agreement.[99]

It is open to question whether relying on the terms of individual agreements provides sufficient protection. For example, while the Karuturi Company boasts that its investment will create 20,000 jobs, the jobs that have been created pay a wage below the World Bank's poverty limit.[100] The company did not consult with local communities on its investments. Thus far, promised community development initiatives have not been realized, although the projects began relatively recently.[101]

At least one of Sheik Amoudi's investments has brought computerized

---

Post_compact_Investment_Plan_(PIF)_0.pdf.

96. *FAO Principles*, *supra* note 4, at 5.

97. Von Braun & Meinzen-Dick, *supra* note 11, at 1; Rice, *supra* note 6; WEISSLEDER, *supra* note 36.

98. DEININGER ET AL., *supra* note 22, at 121.

99. WEISSLEDER, *supra* note 36, at 26.

100. McLure, *supra* note 6.

101. *Id.*

irrigation systems and other agricultural technology to Ethiopia.[102] However, the crops to be grown on the land are for export, thus raising food security concerns in a country with a history of famine and where millions experience chronic food shortages. While some observers suggest that Ethiopia would prevent food exports during a domestic food crisis, it is unclear whether the investment contracts with Sheik Amoudi or others include provisions to protect domestic food security. Moreover, employees of at least some of Sheik Amoudi's companies receive wages below the international poverty threshold. At least one report indicates that many farmers were displaced without compensation.[103]

IV. Principles for Responsible Investments in Land: Getting to "Win-Win-Win"

Anecdotal evidence suggests that investment projects that cause harm to local communities are less likely to be economically successful because the deleterious impact engenders opposition to the project. Negative media campaigns, sabotage, and violence can slow or halt production, distract project management, and force investors to spend profits on security and public relations. Experience from around the world indicates that the ultimate success of a development project often depends in part on the voluntary cooperation and support of those whose land rights are impaired.

In most projects there are three categories of stakeholders: the local community, the investors, and the host-country government. The question is whether the projects can be structured so that all stakeholders benefit—a "win-win-win" scenario.

A. The Development of Principles and Guidelines

Many organizations are conducting research, organizing seminars and engaging in consultations in an effort to establish a set of principles or guidelines intended to achieve the win-win-win outcome. Those working on the issue include multilateral and academic institutions, social movements and farmers' organizations, entities within the UN system, and advocacy and civil society organizations.[104] These organizations have produced a great many websites, research papers, databases, principles, and guidelines on the subject.[105] The proposed principles and guidelines seek

102. Andrew Rice, *supra* note 29.

103. *Id.*

104. TAYLOR & BENDING, *supra* note 3, at 4.

105. *Id*. at 4-5. For instance, over the last two years, FAO has held a series of workshops

to help stakeholders design and implement large-scale land investments that benefit all affected parties.

B. General Principles Applicable to Land Investments

In January 2010, FAO, the International Fund for Agricultural Development ("IFAD"), the UN Conference on Trade and Development ("UNCTAD"), and the World Bank released a set of "Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources."[106] This effort resulted in perhaps the most comprehensive and useful set of such principles to date. The seven basic principles are as follows:

1. Existing rights to land and associated natural resources are recognized and respected.
2. Investments do not jeopardize food security but rather strengthen it.
3. Processes for accessing land and other resources and then making associated investments are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment.
4. All those materially affected are consulted, and agreements from consultations are recorded and enforced.
5. Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value.
6. Investments generate desirable social and distributional impacts

---

with various stakeholders at locations around the world, with the aim of drafting a set of Voluntary Guidelines on the responsible governance of land tenure. FAO, Land Tenure: Voluntary Guidelines, www.fao.org/nr/tenure/voluntary-guidelines/en/. In 2009, the World Bank spearheaded the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources in collaboration with around twenty country partners. The Principles provide guidance for the public and private sectors on a responsible policy framework, and take into consideration the social, economic, and environmental impacts of large-scale land acquisitions. *FAO Principles*, *supra* note 4. The Principles for Responsible Investment in Farmland were developed by an investor initiative in partnership with the UN Environment Programme Finance Initiative and the UN Global Compact to guide institutional investors in engaging in responsible farmland investment policies and practices. The Principles for Responsible Investment, www.unpri.org/principles/. Twenty-six civil society organizations have formed a Working Group on Commercial Pressures on Land. Others working on the subject include the International Food Policy Research Institute, the Forest Dialogue and Forest Peoples Programme, and the International Land Coalition. MERLET & JAMART, *supra* note 56. The International Finance Corporation has created a handbook of good practices for companies doing business in emerging markets. INT'L FINANCE CORP., STAKEHOLDER ENGAGEMENT: A GOOD PRACTICE HANDBOOK FOR COMPANIES DOING BUSINESS IN EMERGING MARKETS (2007), *available at* www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pStakeholderEngagementFull/$FILE/IFCStakeholderEngagement.pdf.

106. *FAO Principles, supra* note 4.

and do not increase vulnerability.

7. Environmental impacts due to a project are quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them.[107]

In order to increase awareness of the principles and encourage public and private sector actors to implement them, the World Bank, FAO, UNCTAD and IFAD developed the "Knowledge Exchange Platform for Responsible Agro-Investment ("RAI")."[108] The Platform is a compilation of relevant data and information, lessons learned, and good practices, and is intended as a resource for donor agencies, civil society organizations, investors, academia and the media. It also creates analytical and operational tools for the practice of RAI. The organizations behind RAI now seek to develop a nonlegally binding, flexible mechanism for monitoring compliance with the principles.

C. Corporate Social Responsibility Principles

In addition to each nation's legal and regulatory framework and the guidelines proposed by multilateral bodies, separate standards of corporate social responsibility ("CSR") are applicable to commercial investment in land. While lacking the force of law, CSR guidelines are an expression of shared values and expectations of corporate conduct that can shape global opinion and national and regional policy. Many private corporations have adopted their own CSR policies to guide their corporate conduct. One example is Stora Enso, a large multinational wood products company based in Finland. The company's Code of Conduct begins with its commitment to compliance with local laws. Stora Enso's Principles for Social Responsibility include commitments to open transactions and community involvement, and a prohibition against corrupt practices. The company's Sustainability Policy expresses a corporate commitment to contribute to the well-being of the societies in which the company operates and to support social development.[109]

V. Guidelines to Get to Win-Win-Win

Several common themes run through the various proposed sets of principles and guidelines: (1) the need for investors to recognize and

---

107. *Id.* at 2, 6, 8, 10, 13, 16, 18.

108. *See* www.responsibleagroinvestment.org/rai/.

109. The company's policy documents can be found at www.storaenso.com/responsibility/our-approach/policies/Pages/Policies%20and%20principles.aspx.

respect the land rights of local communities; (2) the need for projects to be developed with the participation of local communities; (3) the desirability of investors dealing with communities directly; (4) the commitment of governments and investors to ensure that the investment will have a positive impact on local livelihoods, especially those of the poorest and most marginalized people; and (5) the critical importance of comprehensive agreements setting forth the rights and responsibilities of all parties.[110] These themes inform the following suggestions for managing large-scale land investments in Ethiopia and elsewhere.

In most cases, host country governments, at national or regional levels as appropriate, should ensure that investors comply with the following guidelines, although some guidelines (such as those on compulsory land acquisition) apply directly to government action. Civil society organizations can and should monitor and supplement government oversight and management of the agreements. For the foreseeable future, local communities in Ethiopia and elsewhere in Africa likely will lack the capacity and political strength to monitor compliance themselves. Therefore, most communities will require assistance to be able to participate in development projects in a meaningful fashion.

A. Recommendations for Governments

Overall, host country governments should seek to maximize economic benefits (including public revenues and nonrevenue benefits such as job creation) while minimizing the negative impacts (such as land takings or resource degradation) on the lives of those affected by large-scale investments. The key is to attract investments that are consistent with recognized principles of sustainable development[111] and create a reasonable balance between the interests of all parties. Acting in accordance with the following specific recommendations can help achieve these goals.

1. Strengthen the Overall Legal Framework

It is essential that governments review and strengthen the legal framework governing all aspects of land rights, land acquisitions, foreign investment, agricultural investment, and project design and execution. Governments should adopt policies that provide opportunities for the poor to access land and improve land tenure security throughout the country or

110. LORENZO COTULA, INT'L INST. FOR ENV'T & DEV. [IIED], INVESTMENT CONTRACTS AND SUSTAINABLE DEVELOPMENT: HOW TO MAKE CONTRACTS FOR FAIRER AND MORE SUSTAINABLE NATURAL RESOURCE INVESTMENTS 3 (2010), *available at* http://pubs.iied.org/17507IIED.html.

111. See *id.* at 8-9.

region, not just in response to investment opportunities. This should include a land registration system founded on a systematic recording of rights, rather than one that delineates rights only in response to specific investment proposals. Special attention should be given to ensuring that the legal framework adequately protects the rights of the poor and marginalized, including women. Where group rights come into play, "mechanisms are required to facilitate decision making and enforcement between groups, and to provide clarity as to who is authorized to enter into agreements on behalf of the group."[112]

2. Conduct Land Tenure Impact Assessments

Investment sites should be considered seriously only after an independent land tenure impact assessment has been conducted. This should (a) identify all land and natural resource uses; (b) determine the value of the land and natural resources to the community; and (c) identify the formal and customary land rights of all users. Governments should consider requiring investors to retain technically competent experts to undertake the inventory and assessments. The results should be provided to the local community, local government, and the prospective investor and should provide a basis for determining investment sites that can be sustainably developed in ways beneficial to all stakeholders.

3. Conduct Community Impact Assessments

Investors should also be required to conduct and share independent community impact assessments of each potential site. These should include the effect of the investment on (a) local livelihoods and the economy of local communities, including pastoralists or itinerant farmers; (b) the environment and natural resources; and (c) local food production and availability.

4. Clarify Desired Types of Investments and Evaluate Long-term Impacts

Governments should balance the goal of increased economic growth and productivity with an assessment of how gains will be achieved, the costs of the benefits, and how benefits will be shared. The design and implementation of the project should respect the environment, and not accelerate climate change, soil depletion, land degradation, or the exhaustion of water and other natural resources. Governments should rigorously assess each proposed project for economic viability, and

112. Songwe & Deininger, *supra* note 3, at 2. In their *Framework and Guidelines on Land Policy in Africa*, the member states of the African Union announced their commitment "to the formulation and operationalisation of sound land policies as a basis for sustainable human development that includes assuring social stability, maintaining economic growth and alleviating poverty and protecting natural resources from degradation and pollution." AFRICAN UNION ET AL., *supra* note 65, at 14.

evaluate potential investors to determine their long-term capacity to manage large-scale investments effectively and in a manner that is consistent with the state's objectives.

5. Structure Projects to Promote the Economic Growth of Local Communities

Strategies may include the involvement of smallholders through locally appropriate out-grower schemes, joint ventures, or other collaborative production models. Such components are designed to ensure that a larger portion of the value chain can be captured by the local communities (such as by the building of local processing plants). They also generate local employment, technology transfer, and creation of infrastructure. Many experts favor contract farming[113] as part of a win-win-win approach. Another option is investing in existing domestic agribusinesses, as the government of Qatar has done in Ethiopia.[114]

6. Design Projects to Recognize and Protect Existing Land Rights (Including Customary Rights)

Governments should promote investment that engages and partners with the local community and does not require the transfer of land rights (be they ownership, lease, or traditional use rights). Long-term land leases, quite common in Africa, are often perceived, perhaps rightly, as neocolonial in nature. Investors should be encouraged to invest in local people rather than their land.

Eviction of local communities should be reserved for the most exceptional circumstances. Takings should be carried out using a process that is fair, impartial, accessible, and transparent. The process should provide adequate compensation to those who are displaced, including those with both formal and informal rights to land. The valuation of rights and property must meet international standards.[115] In Ethiopia, land rights holders usually do not receive adequate compensation for land transferred to investors.[116]

7. Protect Food Security

Agreements should expressly address the potential impact of the project on food security and make appropriate provisions to protect against

113. Under such a scheme, the local farmers own or lease the land and supply the crop to the investor at fixed prices, while the foreign investors contribute the capital and technology. Senegal has successfully employed this model. Knaup & Von Mittelstaedt, *supra* note 63.

114. Andrew Rice, *supra* note 29.

115. For more comprehensive treatment of the subject of involuntary takings, *see generally* AFRICAN DEV. BANK & AFRICAN DEV. FUND, *supra* note 62; RURAL DEV. INST. & ASIAN DEV. BANK, *supra* note 61.

116. 3 INDEPENDENT REVIEW OF LAND ISSUES, *supra* note 91, at 16.

negative impacts, including potentially securing a percentage of any crops produced for local use. Host governments risk social unrest if food supplies to their people are uncertain.[117] Foreign exporters should not be permitted to export all production during a national food crisis.

Ethiopia is one of the world's largest recipients of food aid.[118] The nation is prone to drought and famine. Thus, ensuring that large-scale investments in land do not undermine food security is critically important to the Ethiopian people. At this time, it is difficult to determine how the government's policy of leasing out large swaths of arable land will enhance food security, especially in the absence of measures to protect the land from degradation and to avoid undermining water availability to small farmers. The link between these investment projects and improving the productivity of smallholder farms is not apparent.

8. Insist on FPIC

Investments that cause changes in land rights and use should only take place with the free, prior, and informed consent ("FPIC") of the affected local communities. Consultations and negotiations leading to investment agreements should be conducted transparently and with the genuine and meaningful participation of the local communities whose access and rights to land and other natural resources may be affected. Consultation should take place before the land is selected. Projects should be described with clarity in local languages and through local forums so that the components of agreements and projects, roles of local community members, and negotiated benefits and enforcement procedures are understood by all. Investment agreements should be made available to all parties to the agreement, any additional affected communities, and nongovernmental organizations ("NGOs") and civil society members working with the communities. Throughout the project, the project managers should deal directly with affected communities, rather than through a middleman or government agency. The project should be designed to include an investor/company ombudsman function for the community and an accessible process for receiving and resolving problems and claims.

9. Clearly Define Investor Obligations

The obligations of the investor must be defined in clear terms in the agreement and be enforceable without cost to the community, such as by the inclusion of predefined sanctions in cases of noncompliance. For this mechanism to be effective, independent and participatory, impact assessments should be required at predefined intervals.

117. Songwe & Deininger, *supra* note 3, at 1.

118. Jason McLure, *Food for Naught*, NEWSWEEK, Mar. 24, 2010, a*vailable at* http://www.newsweek.com/id/235385.

10. Develop Transparent Investment Procedures

Governments should adopt transparent rules outlining procedures for submitting investment proposals and the criteria for decision-making. As part of an overall improvement of land administration processes, governments should consider decentralizing and simplifying land acquisition procedures to reduce corruption and investment costs.[119] This should include criteria to identify land for potential investment.

11. Ensure Effective Monitoring, Evaluation, and Dispute Resolution

All projects should have mechanisms for independent monitoring and evaluation throughout their lifespan. There should be mandatory strong, accessible, transparent, speedy, and inexpensive mechanisms for resolution of disputes arising from land investments. Such mechanisms are as important to investors as to local communities.

B. Recommendations for Investors

Experience from the around the world indicates that the ultimate success of a development project depends in part on the voluntary cooperation and support of those whose property rights may be impaired. Projects that cause harm to local communities are less likely to be economically successful. When investment occurs without knowledge of local land rights and without genuine community participation, it may reduce economic opportunities for a community, limit or extinguish livelihood options, and increase landlessness and poverty, all of which engenders opposition to the project. Any impoverishment of property rights holders will impede the smooth execution of the project.

In addition to complying with the guidelines listed above, investors can improve the chance of financial success by following these recommendations despite the time and expense they may entail:

1. Protect Land Rights

In areas where land rights have not been formalized, the investor should take the initiative to work with government, civil society organizations, and local communities to ensure that individual and community rights are nonetheless protected through the course of the project. Doing so will reduce the likelihood of future opposition from those who might have been left out of the process.

2. Do What Is Right, Even If It Is Not Required

The laws of some countries may not meet international human rights standards, including principles of transparency and nondiscrimination. In those circumstances, investors should adhere to international standards and

119. Songwe & Deininger, *supra* note 3, at 3.

recognized CSR principles that are not explicitly prohibited by laws in the host country.

3. Have a Mutually Beneficial Exit Strategy

The project should be designed with an exit strategy in mind that is reviewed, approved by the community, and revisited and refined by the investor and the community throughout the project.

C. The Importance of Contracts

All large-scale investments should be governed by comprehensive, written contracts that clearly set forth all critical components of the agreement. Somewhat amazingly, some contracts allocating hundreds of thousands of hectares of prime land in Africa are only three pages long. These agreements contain basic terms relating to land rights and product cultivation, but rarely address important issues such as job creation, environmental protection, compliance with investment regulations, and other matters of crucial importance to local communities. The importance of good contracts cannot be overstated:

> If well designed and implemented, contracts can maximise the contribution of natural resource investment to sustainable development goals. But badly drafted or executed contracts may impose unfavourable terms on the host country often for long periods of time, sow the seeds of disputes and undermine the pursuit of policy goals like poverty reduction and environmental sustainability.[120]

D. Recommendations for Civil Society

Civil society organizations can play an important role in pursuit of the win-win-win result. Local communities need capacity building on evaluation of projects, investment agreement terms, farming models, environmental assessments, negotiation techniques, and dispute resolution. Civil society can provide training programs to help communities develop the ability to represent their interests in dealing with investors and government.

Civil society organizations can also provide legal support to those affected by investments so as to help facilitate better deals. They can promote greater government and investor transparency by creating and implementing systems to monitor land deals and promote information sharing.

---

120. LORENZO COTULA, INT'L INST. FOR ENV'T & DEV. [IIED], *supra* note 110, at 3.

VI. Conclusion

Large-scale investment in land has the potential to provide significant benefits to local communities, investors, and governments alike. However, the pressure imposed by commercial land investment exposes existing and often fundamental weaknesses in the land tenure systems in many developing countries. In much of the developing world, the majority of the population is rural and poor. They rely on subsistence farming on smallholdings or are landless and dependent on intermittent wage labor for their livelihoods. In many countries, those with access to land rarely have rights recognized by formal law, and their rights to natural resources such as water, forest products, and grazing land are increasingly threatened. If their land is taken for investment, they are unlikely to receive adequate compensation for the loss of their source of livelihood.[121]

It is too soon to tell whether Ethiopia's policy of promoting large-scale investment in land will ultimately benefit or harm smallholder farmers and the poor. The subject cries out for rigorous, in-depth field research. However, early reports of land being taken without compensation and payment of below-poverty line wages are cause for concern.

Still, adoption of and compliance with the principles described above can lead to a win-win-win outcome for all stakeholders. Doing so in Ethiopia would strongly support the government's expressed desire to avoid the "disaster" of promoting large-scale investment at the expense of small-scale farming. With careful planning and a strategic approach, investors, governments, and local communities can site, design, and implement projects in a manner that serves all interests, benefits rural communities, and leaves no one behind.

---

121. In a 2011 survey in three Ethiopian *kebeles*, all twenty-nine surveyed households reported not being compensated for their loss of grazing land. MESSELE FISSEHA, INT'L LAND COAL., A CASE STUDY OF THE BECHERA AGRICULTURAL DEVELOPMENT PROJECT, ETHIOPIA 18-20 (2011).