SOLAW TR05B

Land tenure issues in agricultural investment

SOLAW Background Thematic Report – TR05B

L. Cotula

International Institute for Environment and Development (IIED)

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Abbreviations and acronyms

EIA	Environmental impact assessment
EITI	Extractive Industry Transparency Initiative
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ESIA	Environmental and social impact assessment
FAO	The Food and Agriculture Organization of the United Nations
GAEZ	Global agro-ecological zones
GTZ	Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH
IFAD	United Nations International Fund for Agricultural Development
IFC	International Finance Corporation
IFPRI	International Food Policy Research Institute
IIED	International Institute for Environment and Development
ILO	International Labour Organization
NCR	Native Customary Rights
PDR	People's Democratic Republic
SOLAW	State of land and water
TIC	Tanzania Investment Centre

Executive summary

This report discusses the land tenure issues raised by agricultural investments in lower and middle-income countries. It was commissioned by the Food and Agriculture Organization of the United Nations (FAO) to inform FAO's first periodic flagship publication The State of Land and Water (SOLAW), on the global status of land and water resources. The report summarizes the findings from earlier collaborative research projects involving the International Institute for Environment and Development (IIED) and FAO. It includes a review of the implications of access to land and the spread of biofuels (Cotula *et al*., 2008); a multi-country quantitative and qualitative study on large-scale land acquisitions in Africa (Cotula *et al*., 2009); and a review of inclusive business models for structuring agricultural investments (Vermeulen and Cotula, 2010).

This report focuses on investments involving the acquisition of long-term land rights. These include outright land purchases, long-term leases and land allocations by government authorities through concessions, licenses or other instruments. This type of investment has become increasingly common over the past few years, has received extensive media attention and raises direct land tenure issues. Because of the central importance of land to the livelihoods, food security and social identity of many people, land-based investments raise particularly urgent land tenure issues. Given the large number and, in many cases, large scale of recently reported land acquisitions, the phenomenon can have major and lasting repercussions on the livelihoods and environments of many. In addition, agricultural investments that did not involve land acquisitions are touched upon.

The focus of this report does not entail an endorsement of land-based investments as the way to 'modernize' agriculture. Agricultural production can be undertaken by farms of various sizes and using different cultivation methods. In many parts of the world, family farmers have proved to be highly dynamic and responsive to market forces, and it should not be assumed that large-scale investment is the way to go. Also, large-scale agricultural investments can be structured in ways that provide an alternative to large plantations; particularly promising are those models that involve collaborative arrangements with local farmers, which are extensively discussed in Vermeulen and Cotula (2010).

Given the direct implications that large-scale land acquisitions have for the future of agriculture, and particularly for the balance between agribusiness and family farming, sensible policy in these matters can only be based on a shared strategic vision for the agricultural sector in a given country. Vigorous public debate involving key stakeholders, including farmer groups, is therefore vital to making good strategic choices. Where large-scale investment emerges as an element of national sustainable development strategies, addressing land tenure issues is key to getting the investment right.

Trends and drivers

Although exact quantitative assessments of the scale, geography, trends and players in large-scale land acquisitions for agricultural investments are not yet available, evidence suggests that investors are increasingly interested in agriculture. Quoting sources from the International Food Policy Research Institute (IFPRI), The Economist (2009) estimated that foreign investors had acquired or sought some 15–20 million ha of farmland in poorer countries between 2006 and 2009.

Beyond global estimates, evidence is emerging from studies conducted in a few countries in Africa and South Asia. The countries covered were selected based on media reports that suggested significant levels of activity were ongoing. For example, a study released last year by the IIED, the FAO and the United Nations International Fund for Agricultural Development (IFAD) (Cotula *et al*., 2009) found that in four African countries alone Ethiopia, Ghana, Madagascar and Mali, approved land acquisitions from 2004 to early 2009 totalling 2 million ha, including acquisitions by foreign investors for over 1.4 million ha. As a result of difficulties accessing data, the actual areas affected are likely to be larger; even more so if deals under negotiation are included.

This study also found that some approved deals are very large, including for example a land lease for 100 000 ha in Mali; though average areas are smaller (e.g. 22 000 ha in Mali and 7 500 ha in Ethiopia). Even for the very large deals production starts on a much smaller scale and expands over the, usually long, duration of the project. Many approved deals have not yet been implemented on the ground, partly because the deals are recent. Based on FAO definitions and estimates of land suitable for agriculture, these acquisitions account for relatively small shares of total land suitable for agriculture in any of the four countries; ranging from 0.6 percent in Mali to 2.3 percent in Madagascar. The scale of the phenomenon is sizeable, and investors' are most interested in higher-value land with higher fertility, greater irrigation potential, better infrastructure or proximity to markets. As a result, loss of even a small share of this land can have a major impact on local people (Cotula *et al*., 2009).

Other recent empirical studies from other parts of the world confirm that the scale of the phenomenon is significant. For example, a study by Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GTZ, 2010) documented the acquisition of about 1 000 000 ha of land in Cambodia between 1988 and 2006. This includes both agriculture and forestry projects. In Lao People's Democratic Republic (PDR), more than 415 000 ha have been acquired over the past few years in two provinces alone (GTZ, 2010).

While media reports have focused on acquisitions by Near East and Asian investors, evidence from these studies suggests that key investor countries are in Europe and Africa as well as the Gulf and South and East Asia (Cotula *et al*., 2009). Land acquisitions by domestic investors are also significant, however, and account for the majority of allocated land in Ethiopia (Cotula *et al*., 2009) and Cambodia (GTZ, 2010). Private sector deals account for the bulk of these acquisitions, though home country governments may play a major supportive role, providing diplomatic, financial and other support to private deals (Cotula *et al*., 2009). Media reports suggest that Sudan, Ethiopia, Madagascar, Mozambique and Tanzania are among the key recipients of land-based investments in Africa. Outside Africa, Southeast Asia (Cambodia, Laos, Philippines, Indonesia) and parts of Eastern Europe (e.g. Ukraine) are also significant recipient countries. While in recipient countries, such as Brazil and Argentina, private landholders may be significant providers of land. In Africa, governments dominate not least because they formally own all or much of the land in many African countries. The majority of the land acquisitions documented by Cotula *et al*. (2009), including 100 percent of the deals in Ethiopia and Mali, involved government allocation of long-term rights, rather than private transactions or outright purchases. Similar trends exist in parts of Southeast Asia (GTZ, 2010).

Several drivers underpin these processes, including business opportunities linked to expectations of rising agricultural commodity prices and land values, policy reforms in recipient countries and, in some investor countries, concern about food or energy security.

Risks and opportunities, central importance of addressing land tenure issues

In recipient countries, agricultural investments can create opportunities, as they may bring capital, know-how, jobs, market access and infrastructure development. Not every land lease is a 'land grab' as much depends on the terms of the lease. Large land deals do carry big risks as people may lose their land and livelihoods and investors may not deliver on their promises.

There is a perception that farmland is abundant in Africa. Drawing on statistics and satellite imagery, the Global agro-ecological zones (GAEZ) study (Fisher *et al*., 2002), which is one of the few available global datasets on land suitability and availability, suggests that reserves of cultivable land exist in Africa and Latin America. However, much of the data underpinning the GAEZ study dates back to the mid-1990s, dynamic changes such as land degradation are not fully factored in, and land used by shifting cultivation and pastoralism may be seriously underestimated (Roudart and Even, 2010). In much of Africa, most land is being used to varying degrees of intensity, or it is at least claimed, by local farmers, herders and gatherers. Yet these people often have no formal land rights as only between 2 and 10 percent of land in Africa is titled, and much of this concerns urban areas and middle- to large-scale landholdings (Deininger, 2003). Strong demographic growth, in many lower and middle-income countries, exacerbates competition for land and resources. Water may be a constraint and water use priority may prove a source of conflict.

As a result, it is likely that very large land deals may involve some degree of compression of existing rights, even if the intensity of current resource use may be low. Dealing with these situations fairly requires careful weighing of individual and societal interests. The gap between legality, whereby the government may own much if not all the land, and legitimacy – whereby local people feel the land they have used for generations is theirs – exposes local groups to the risk of dispossession and investors to local contestation. The fact that many land deals are being negotiated behind closed doors and without local consultation compounds these problems. The results can be very detrimental to local people, investors and host governments.

Therefore, investments involving support of local smallholders seem more promising than large-scale land acquisitions. Companies can work with smallholders in different ways. Some of them are well tested, such as contract farming, where local farmers cultivate land with support from the company, which then purchases produce at guaranteed prices. There is also growing experimentation with a wider range of models, such as joint ventures or land leases with local communities. Where properly implemented, these models can offer better opportunities to local farmers; though it must be remembered that these partnerships bring together players (agribusiness, local farmers) with very different negotiating power, and that sustained support to farmers groups is key to making these models work (Vermeulen and Cotula, 2010).

Properly addressing land tenure issues is a key part of minimizing these risks and seizing these opportunities, as it can protect local land rights, facilitate investors' access to genuinely available land, and create incentives for inclusive business models that share value (and leave land) with local farmers. These issues are explored in this report from the perspectives of three different stakeholders: local land users, the investor and the host government.

Local landholders

The extent to which local people have secure rights over their land is key both to protect people from arbitrary dispossession and to give them an asset they can use to negotiate. The nature of land rights held by local people varies considerably depending on the country. In countries where private land ownership is common, as in many parts of Latin America, local users may have full ownership rights over their land. Where land is nationalized, or where the acquisition of private land ownership is conditioned to inaccessible land registration procedures, as in much of Africa, rural people tend to enjoy use rights on land held by the state. These use rights are usually linked to productive land use. Coupled with lack of a clear legal definition of what constitutes 'productive use' and with the ensuing broad discretion of government officials, this may open the door to abuse and undermines the security of local land rights (Cotula *et al*., 2009).

Part of the problem lies in the often weak legal recognition of 'customary' rights, which are the entitlements through which most rural dwellers gain access to resources in much of Africa, in parts of Asia and in areas of Latin America inhabited by indigenous peoples. Some countries have taken steps to strengthen the protection of local land rights, including customary rights, even where land is state-owned or vested with the state in trust for the nation. In Africa, for instance, customary rights are protected, to varying degrees, under the legislation in force in Ghana, Mali, Mozambique, Tanzania and Uganda (Wily, 2003). The protection of customary rights has been strengthened in some Southeast Asian countries, for instance under the Indigenous Peoples' Land Rights Act in the Philippines. In some of these cases, legal protection is qualified by loopholes and undermined by unclear language, legislative gaps or limited political will.

Procedures for assessing the social and environmental impacts of a proposed investment project before project approval can provide valuable safeguards. Many countries require an environmental impact assessment (EIA) or environmental and social impact assessment (ESIA) to be carried out before the land transfer. However, in some cases, the criteria for approving or failing land deal applications based on the ESIA are not explicit, local consultation is minimal and the results of the assessments are not available for public scrutiny[1]. Local consultation may be required through processes other than ESIAs, as in Mozambique, where the implementation of this progressive legislation has faced important challenges; however better outcomes were possible if external organizations supported local people (Tanner and Baleira, 2006).

Virtually all countries around the world have legislation that enables governments to expropriate local land rights, if in the public interest. In exchange, governments are usually required to pay compensation and to respect certain procedures, based on the national constitution. In many lower- and middle-income countries, legislation allowing the compulsory acquisition of land in the public interest has been used to make land available not only for schools or hospitals but also for commercial investment projects, including agriculture. Such projects may be in the public interest because they may promote economic development and generate public revenues. The decision to take land on a compulsory basis for commercial projects requires a clear and demonstrable case that should be subject to thorough public scrutiny. Internationally recognized human rights and related safeguards are at stake, for instance concerning the right to property, the right to food and indigenous peoples' rights. Where investment projects affect indigenous and tribal peoples, international treaties (namely, the International Labour Organization (ILO) Convention No. 169 of 1989) and international best practice require governments and investors to seek the free, prior and informed consent of these groups.

The terms and conditions for expropriation are determined by national law and vary widely between countries. In many jurisdictions, where land is owned by the state, however, compensation is paid for loss of improvements (crops, trees, buildings), not for loss of land rights. Loss of other resources, such as water and forest resources, are rarely able to be compensated. Implementing compensation schemes is riddled with challenges, particularly in lower and middle-income countries. Levels of compensation are often seen as inadequate by the local population, and lack of formal land markets, owing to limited transferability of land rights, makes it more difficult to properly value land. There is growing experience with developing comprehensive and sophisticated arrangements to deal with compensation for loss of land rights and for any damage or disturbance suffered within the context of large natural resource investments, particularly in projects supported by multilateral development banks that have adopted specific policies in this regard (such as the International Finance Corporation (IFC) Performance Standard No. 5 on resettlement).

[1] Water withdrawal denotes the removal of water from a water source, such as groundwater, for use by humans. The water is subsequently returned some time later after it is used. The quality of the returned water may not be the same as when it was originally removed.

Local communities may use their land rights as a lever in direct negotiations with incoming investors. There is growing experience with joint ventures between the investor and local landholders, whereby the latter obtain an equity stake in the joint venture company in exchange for contributing land to the project. This experience is particularly advanced in countries where policy frameworks proactively promote them, such as in Malaysia and South Africa. These schemes are a good idea in theory, as they provide beneficiaries with a tangible commercial asset that can yield good dividends and increase in value over time. They have been criticized for the limited choice of options given to local farmers and the low dividends distributed to them (on South Africa, see Lahiff, 2007 and Greenburg, 2009; on Malaysia, see Majid-Cooke, 2002). Security of local land rights is particularly crucial in these various models, not only for providing local groups with an asset in negotiations with agribusiness, but also regarding the type of rights that local people have on their land, which can have profound implications for the business models they may be able to engage with.

Investors

For investors, key land tenure issues are likely to include: i) ease of access to land for investment; ii) nature of the land rights that can be acquired; and iii) safeguards against arbitrary deprivation of the land rights acquired. A recurring investor concern is that land access procedures, in many lower and middle-income countries, are perceived as long and cumbersome. To attract investment, some countries have taken steps to streamline these procedures. One-stop-shops and investment promotion agencies play a key role in this, ranging from accompanying investors in their dealings with other government agencies to more direct involvement in identifying and providing available land. Some countries have undertaken national inventories of available land and established databases accessible to incoming investors. In streamlining procedures and developing databases on land to guide incoming investors, it is very important that robust safeguards to protect local land rights are in place. This includes the proper recognition of all existing forms of resource use in any inventory exercise. Emphasis on quantitative investment targets for investment promotion agency officials also tends to encourage attracting investment as an end in itself, and to place the quality of the investment in second place.

The nature, scope, content and duration of the land rights that investors, particularly foreign investors, can acquire varies across countries. In some countries, land ownership is vested with the state, and land users (whether local people or incoming investors) can only acquire long-term land-use rights. Some countries treat domestic and foreign investors differently. Legislation allows nationals to acquire land ownership, but restricts foreign investors' acquisition of land, ownership or even long-term use rights (for example, in Cambodia, Ghana and Uganda). This is not just a 'developing country' issue because legislation in the United States, for instance, also regulates foreign land ownership. Where foreign ownership is restricted, key issues from the investor's perspective are likely to include the duration of the lease and the possibility of its renewal; the possibility of transferring the lease or of subleasing the land to third parties (and the conditions attached to this, such as government approvals); and the possibility of using the land leased as security for credit (namely to finance the investment project).

Once investors have acquired land rights, the protection of these rights from arbitrary interference is a fundamental tool to manage risk and shelter business interests. Ways to protect the land rights acquired by investors may be provided by national and international arrangements, including the booming number of international investment treaties and national legislation investment codes and sectoral laws. Experience suggests that even the most effective protection regimes achieve little against determined political will to revise the terms of the investment or even expropriate it altogether. The fact that land is a particularly emotive issue compounds this analysis. Evidence of the extent to which investment treaties do promote investment is mixed (for a review, see Sauvant and Sachs, 2009), and the formulation of some treaties has raised concerns that the policy space for host countries to take action in the public interest may be reduced (Mann *et al*., 2006). Ultimately, the best way to shelter the investment from contestation or arbitrary interference is to be able to show that it benefits the host country and the local population. Political risk is reduced in investments that involve privileged, long-term relationships with local suppliers, rather than (or in addition to) the acquisition of long-term land rights.

Government

The role of government in land relations varies substantially across countries, depending on political orientations and historical legacies. Providing systems for land administration and for reconciling competing land claims (of investors and of local land users, for example) is a recurring fundamental role. In many countries targeted for large-scale land acquisitions, governments play extensive roles, including owning much if not all the land.

Apart from their roles in facilitating investors' access to land, and safeguarding local rights, government agencies play a central role in ensuring that the country gets the best possible deal from incoming agricultural investment, particularly where land-based investments involve long-term government leases as in much of Africa and Southeast Asia. Some recent, very large investments seem unlikely to be economically viable, based on the historical track record of large-scale agriculture in sub-Saharan Africa (Wiggins, 2009). Host government capacity to carefully scrutinize investment proposals and investors' track-record is key.

In some recipient countries, donor support to government agencies responsible for scrutinizing investment proposals is leading to improvements in the quality of government scrutiny. Effective national regulation and skillful contract negotiation are key. For example, rather than uncritically endorsing large plantations, host governments can use policy incentives to promote inclusive business models that share value with local enterprises, including small-scale farmers, processors and service providers. In addition, recent experience of the renegotiation of agricultural concessions in Liberia shows the difference that investing in the government's capacity to negotiate can make (Kaul *et al*., 2009).

Land transfers involve a set of fees and other forms of compensation payable by the investor to those relinquishing their rights to occupy or use land during the lease period (or in perpetuity in the case of sales). Where land is owned by the state, as is typical in Africa, fees tend to flow to the national government. In some countries, national legislation requires that a proportion of project revenue is devolved to local government bodies in the project implementation area (for instance, in Ghana).

Public revenues, however, may be very low, as the explicit policy of an increasing number of African countries is to attract foreign investment through nominal rental fees, tax holidays, duty exemptions and other financial incentives. Governments consider the direct value of investment projects to come, not through direct financial gain, but rather through broader economic benefits, such as employment generation and infrastructure development[2]. Yet setting land fees at the appropriate level can generate public revenues and create incentives for investors to explore business models not involving land acquisitions, such as contract farming and joint ventures with local farmers. Calculating and collecting revenues from projects requires the technical ability to understand often complex contractual revenue-sharing provisions. In this regard, dedicated host government units with strong expertise and high-level political backing are key to collecting revenues, monitoring implementation and sanctioning noncompliance.

[2] Based on interviews with government officials undertaken by Cotula et al. (2009).

Where the investor acquires land from the host government (rather than a private party), checks and balances are crucial to ensure that government action maximizes the public interest. A key problem is that the negotiation of many recent land-based investments has been characterized by lack of transparency. This creates the breeding ground for corruption and for deals that are not in the best public interest. There are several possible mechanisms for increasing transparency. 'Freedom of information' legislation may allow the public to request access to information held by public bodies. For major investment projects, parliamentary approval of deals negotiated by the government can increase public scrutiny. Sectoral initiatives to promote transparency exist in some industries. For example, the Extractive Industry Transparency Initiative (EITI) was launched in 2002 to improve transparency of public revenues generated by extractive industry projects.

Conclusion

Trends and drivers in global agricultural investment suggest that investor interest in agriculture is likely to grow in the medium to longer term, particularly once the effects of the economic downturn (on global demand for agricultural commodities and on access to financing, for example) are eased.

Over time, growing agricultural investment may have profound implications for the future of world agriculture and food security, as it may signal a shift in the balance between agribusiness and family farming. In turn, these processes may directly impact landholdings. Should recent trends in large-scale land acquisitions continue, land distribution may become increasingly concentrated in parts of the world where it has traditionally been relatively diffuse. Conversely, addressing land tenure issues is key to seizing the opportunities and minimizing the risks involved in large-scale agricultural investments. This includes creating enabling conditions for investors to operate, concerning both the process for acquiring land rights and the content and protection of those rights once they are acquired. It includes establishing robust safeguards to make sure that existing land uses and claims are protected in the face of growing outside interest. Secure local land rights, and properly valued land resources, may create incentives for investors to collaborate with local landholders rather than acquire large areas of land. Governments can play a key role in mediating competing land rights and demands, through effective regulation and land administration systems and, where much land is state-owned and the government is directly involved in land deals, through transparent and inclusive management of public lands.

1. Introduction

This report discusses the land tenure issues raised by agricultural investments in lower and middle-income countries. It was commissioned by FAO to form FAO's first flagship periodic publication on the global status of land and water resources The State of Land and Water (SOLAW). This report summarizes findings from earlier collaborative research projects involving IIED and FAO, including: a literature review on the implications of access to land and the spread of biofuels (Cotula *et al*., 2008); a multi-country quantitative and qualitative study on large-scale land acquisitions in Africa (Cotula *et al*., 2009); and a review of more inclusive business models for structuring agricultural investments (Vermeulen and Cotula, 2010). The Cotula *et al*. (2009) study involved undertaking in-depth case studies in Mozambique and Tanzania, and carrying out national inventories of agricultural land acquisitions over 1 000 ha from 2004 to March 2009 in Ethiopia, Ghana, Madagascar and Mali. The inventories relied primarily on host government sources (such as investment promotion agencies, ministries for agriculture), cross-checked through multi-stakeholder interviews.

Two key concepts define the scope of this report. The first is land tenure, which is broadly defined as the arrangements through which people legitimately access, hold, use and transact land and participate in the benefits deriving from it. Land tenure involves often complex systems of rights, rules, institutions and processes. The focus on land tenure issues entails that other important aspects of agricultural investment are not covered in the report.

The second key concept that defines the scope of the report is agricultural investment. Investments in other sectors, such as mining or petroleum, also raise important land issues, as they may involve the taking of large areas; but they are outside the scope of this report. Agricultural investments can take many different forms. The focus here is on investments involving the acquisition of long-term land rights, including outright land purchases and long-term leases and land allocations by government authorities through concessions, licenses or other instruments. This type of investment has become increasingly common over the past few years, has received extensive media attention and raises direct land-tenure issues. Because of the central importance of land to the livelihoods, food security and social identity of many, land-based investments raise particularly urgent land tenure issues. Given the large number and, in many cases, large scale of recently reported land acquisitions, the phenomenon can have major and lasting repercussions for the livelihoods and environments of many. Agricultural investments not involving land acquisitions are also touched upon.

The focus of this report does not entail an endorsement of land-based investments as the way to 'modernize' agriculture. Agricultural production can be undertaken by farms of various sizes and using different cultivation methods. In many parts of the world, family farmers have proved to be highly dynamic and responsive to market forces, and it should not be assumed that large-scale investment is the way to go. Also, large-scale agricultural investments can be structured in ways that provide an alternative to large plantations; particularly promising are models involving collaborative arrangements with local farmers, which are extensively discussed in Vermeulen and Cotula (2010). Given the direct implications that large-scale land acquisitions have for the future of agriculture and particularly for the balance between agribusiness and family farming, sensible policy in these matters can only be based on a shared strategic vision for the agricultural sector in a given country. Vigorous public debate that involves key stakeholders, including farmer groups, is therefore vital to making good strategic choices. Where large-scale investment emerges as an element of national sustainable development strategies, addressing land tenure issues is key to getting the investment right.

Also, the lens through which this report examines agricultural investment is that of sustainable development – the careful and evolving balancing of social, environmental and economic considerations. From this perspective, attracting investment is not an end in itself, but a means to an end. The ultimate goal is to improve living conditions and enable people to have greater control over their lives, whilst protecting the environment. Therefore, offering safeguards to prospective investors to encourage them to invest is only part of the story, the other part is to establish proper safeguards to ensure that the investment contributes to pursuing that ultimate goal. This starting point has major implications for the analysis of land-tenure issues, which must discuss not only ways to facilitate access to land for incoming investors, but also safeguards for local land rights and mechanisms to ensure good governance in public decision-making.

The next Section briefly outlines trends and drivers behind much recent large-scale land acquisition (Section 2). The central part of the report (Section 3) discusses the main land tenure issues raised by land-based investments, which are analysed from the perspective of three sets of stakeholders: investors, local landholders and the host government. A short final section summarizes key findings and recommendations.

2. Trends and drivers

2.1 Scale and geography of the phenomenon

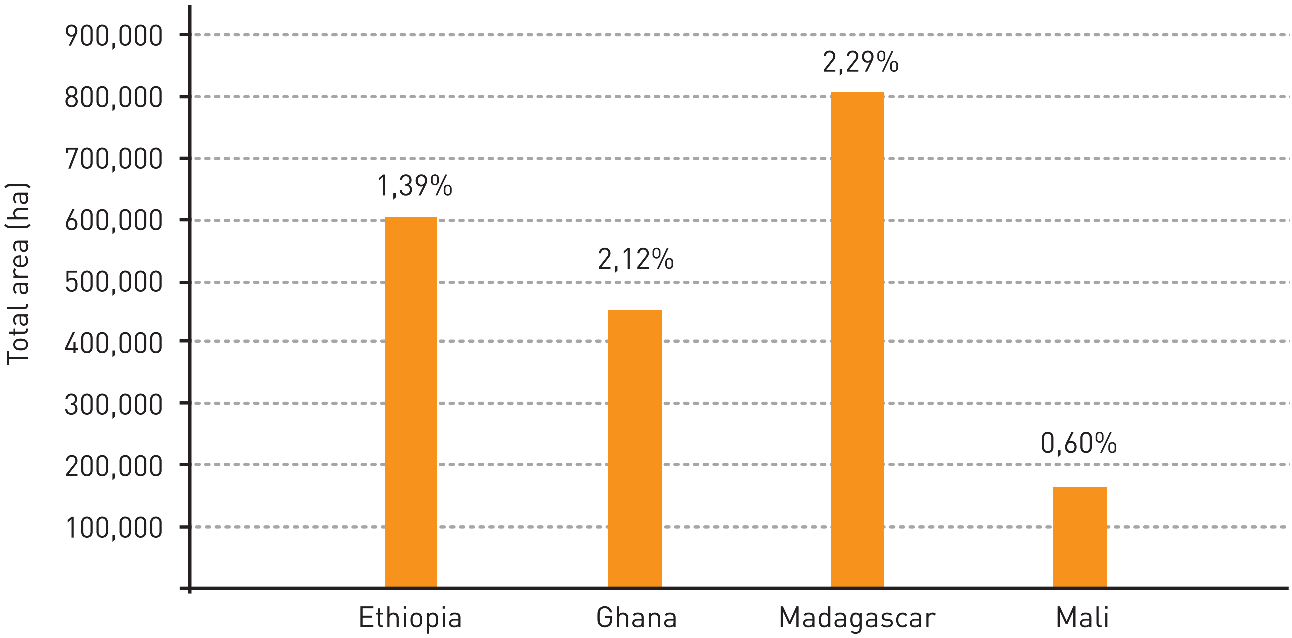
Exact quantitative assessments of the scale, geography, trends and players in large-scale land acquisitions for agricultural investments are not yet available. Some aggregate estimates of scale, based on media reports of land deals, are available. For instance, the IFPRI estimated that since 2006 between 15 to 20 million ha of farmland in developing countries have been acquired or are under negotiation (The Economist, 2009). Several other global estimates, based on media reports of land deals, have since been put forward. A high level of uncertainty, and the limited reliability of some media reports, means these figures must be treated with caution.

Beyond global estimates, empirical evidence is starting to emerge from studies conducted in a small number of countries in Africa and South Asia. The countries covered were usually selected for their relevance, i.e. based on media reports that suggested significant levels of activity were ongoing. These studies indicate significant levels of activity. For example, a study released last year by IIED, FAO and IFAD (Cotula *et al*., 2009) found that, in four African countries alone (Ethiopia, Ghana, Madagascar and Mali), approved land acquisitions from 2004 to early 2009 totalled 2 million ha, including acquisitions by foreign investors for over 1.4 million ha. Because of difficulties in accessing data, the actual areas affected are likely to be much larger; even more so if deals still under negotiation are included. For example, a recent study from Ghana found that a total of seventeen biofuel plantations had negotiated access to 1 075 000 ha of land, though none of the nine projects analysed by the study had obtained formal leasehold titles (Schoneveld *et al*., 2010).

In cumulative terms, land-based investment in these four countries has been growing steeply. In Mali, for example, a total of about 160 000 ha have been acquired between 2004 and early 2009, with a clear upward trend in allocated areas. In Mali, land acquisitions on this scale are unprecedented. Some other African countries present much greater allocated areas in absolute terms (for example, over 600 000 in Ethiopia); country datasets do not always show a net acceleration in allocated areas (Cotula *et al*., 2009).

Although these are large areas, approved deals account for relatively small shares of total land suitable for agriculture in any given country, based on FAO definitions and estimates of land suitable for agriculture. In the four countries covered by Cotula *et al*. (2009), these shares range from 0.6 percent in Mali to 2.3 percent in Madagascar. The scale of the phenomenon is nevertheless significant, and investors' interest tends to focus on higher-value land, in terms of higher fertility, greater irrigation potential, better infrastructure or proximity to markets. In Mali, for instance, where only a relatively small area of suitable land has been allocated, investor interest has focused on the more fertile lands of the Office du Niger area. As a result, loss of even a small share of these lands can have a major impact on local people.

FIGURE 1: ACQUIRED LAND IN FOUR AFRICAN COUNTRIES, JANUARY 2004-MARCH 2009



Source: Cotula et al. (2009).

Total area acquired by national and foreign investors, approved deals only (ha). Percentages indicate allocated area as a percentage of land suitable for rainfed crops in each country, based on FAO definitions and estimates of suitable land.

Single land acquisitions can be very large. Acquisitions documented by Cotula *et al*. (2009) include a 150 000 ha livestock project in Ethiopia and a 100 000 ha irrigation project in Mali. Even in these cases, production is starting on a much smaller scale, and is phased to full capacity over relatively long periods. In addition, the average size of projects over 1 000 ha are much smaller: in Ethiopia a mean of 7 500 ha (median 2 000 ha) and in Mali a mean of 22 000 ha (median 10 000 ha) (Cotula *et al*., 2009).

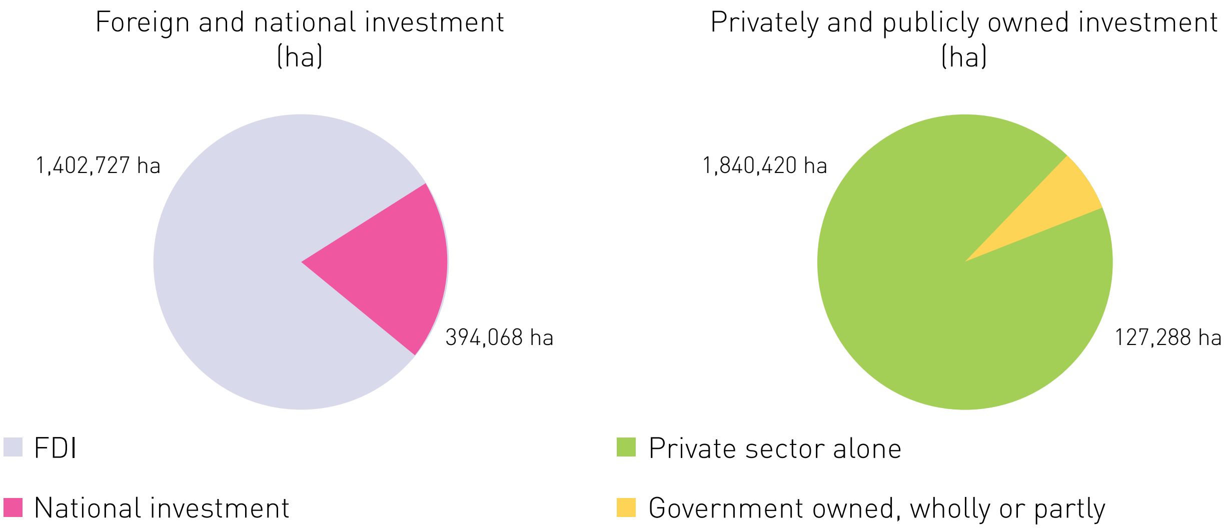
Other recent empirical studies, from other parts of the world, confirm that the scale of the phenomenon is significant. For example, a study by GTZ (2010) documented the acquisition of about 1 000 000 ha of land in Cambodia between 1988 and 2006. This includes both agriculture and forestry projects. In Lao PDR, more than 415 000 ha have been acquired over the past few years in two provinces alone (GTZ, 2010).

A careful analysis of this empirical evidence, and of the more credible media reports, indicates European, North American, Gulf, South Asian and East Asian countries as key sources of investment. While media reports have focused on acquisitions by Near East and East Asian investors, quantitative inventories of approved land acquisitions in Ethiopia, Ghana, Madagascar and Mali suggest that key investor countries are in Europe and Africa as well as the Gulf and South and East Asia (Cotula *et al*., 2009). China is the main country of origin for land-based, agricultural foreign direct investments in Cambodia and Lao PDR, followed by South Korea, Thailand, the United States and Vietnam (GTZ, 2010). Land acquisitions by domestic investors are significant, however. For example, nationals account for the majority of allocated area in Ethiopia (Cotula *et al*., 2009) and Cambodia (GTZ, 2010).

Media reports suggest that Sudan, Ethiopia, Madagascar, Mozambique and Tanzania are among the key recipients of land-based investments in Africa. Outside Africa, Southeast Asia (Cambodia, Laos, Philippines, Indonesia) and parts of Eastern Europe (e.g. Ukraine) are reported to be significant recipient countries. Argentina and Brazil are relevant countries in Latin America, though acquisitions on this continent may involve buying shares in companies that hold land, rather than acquiring land directly. Relative geographical and cultural proximity to some of the key investor countries appears to play a role in choices about project location, for example concerning a band of countries around the Gulf (Sudan, Pakistan, Central Asia). Similarly, the involvement of China in land deals seems particularly important in Southeast Asian countries such as Laos and Cambodia, where it focuses on crops such as rice and rubber (GTZ, 2010).

Private sector deals account for about 90 percent of allocated areas in Ethiopia, Ghana, Madagascar and Mali, with government-owned investments making up the remainder (Cotula *et al.*, 2009). The home country governments of investors may play a major supportive role, providing diplomatic, financial and other support to private deals, as will be discussed later. Equity participation in investment projects by home country governments through state-owned enterprises, development funds or sovereign wealth funds, may be gr owing and the picture may change if some major deals reported in the media as being negotiated do come to fruition.

FIGURE 2: INVESTOR PROFILE IN ETHIOPIA, GHANA, MADAGASCAR AND MALI, JANUARY 2004 – MARCH 2009, BY LAND AREA ACQUIRED



Source: Cotula et al. (2009)

In some countries targeted for investment in land, such as Brazil and Argentina, private landholders may be significant providers. In Africa governments dominate, not least because they formally own all or much of the land in many African countries. Given this legal context, in Africa government leases are the main source of land for prospective investors, including 100 percent of the deals in Ethiopia and Mali, ranging from short terms to 99 years (Cotula *et al.*, 2009). However, direct deals with customary chiefs are common in countries where traditional authorities have retained formal control over land, such as Ghana (Cotula *et al.*, 2009; Schonevel *et al.*, 2010). Similar trends, regarding the central role of government leases, exist in parts of Southeast Asia. According to GTZ (2010), for example, large-scale land acquisitions in Lao DPR and Cambodia involve long-term leases or concessions on state-owned land, with durations of up to 99 years.

2.2 Drivers

Several factors underpin the recent wave of land-based investments. Food security concerns in some investor countries, particularly in the Gulf, have been a key driver of government-backed investment. These concerns relate to both supply of and demand for food at national and global levels. On the supply side, bottlenecks and uncertainties are created by the diminishing agricultural production in some areas, linked to negative environmental externalities affecting soil quality and water supply. For example, until recently, extensive subsidies and water-intensive production made Saudi Arabia self-sufficient in wheat. However, imports resumed in 2007 and, following a recent policy change, wheat production will be phased out completely by 2016. Progressive depletion of nonrenewable fossil water in the country was a key factor in this shift (Woertz *et al*., 2008). Governments in countries heavily dependent on food imports, including both Gulf and East Asian states, have been questioning the capacity of global markets to provide food reliably at predictable prices.

On the demand side, population growth, increasing urbanization rates (which expand the share of the world's population that depends on food purchases) and changing diets (such as growth in meat consumption in industrializing countries) appear among the factors pushing up global food demand and are placing upward pressures on food prices in the longer term. Together with constraints in global food supply, with global demand for energy and agricultural commodities and with increasing technological capacity for higher yields and returns, these trends make agriculture an increasingly attractive investment option. Improved prospects for returns from agriculture encourage speculative investment in land, as prevailing prices of agricultural land seem cheap, particularly in Africa, and likely to rise.

Government policy also matters. Governments in some food importing countries, for instance in the Gulf, have created policy incentives for land acquisitions overseas as part of broader national food security strategies. For example, Saudi Arabia's 'King Abdullah Initiative for Saudi Agricultural Investment Abroad' supports agricultural investments by Saudi companies in countries with high agricultural potential, with a view to promoting food security[3].

Government-backed land acquisitions are driven by investment opportunities rather than food security concerns, however. For example, China adopted its 'Going Global' policy in 2004. The policy encourages Chinese firms to invest abroad, first to create business opportunities for Chinese firms abroad and second to secure access to non-food resources where Chinese demand outstrips domestic supply. A range of incentives such as tax breaks, credit, low-interest loans and customs preferences, allied to high-level diplomatic support, support the policy (Anderlini, 2008; and Xinhua News Agency, 2008).

Europe, in contrast, has lacked recent direct policies on foreign land acquisition for agriculture. The predominant policy driver for large-scale land investments has been the European Union renewable fuels target, which specifies that 10 percent of transport fuels be supplied by renewables by 2020. With the expectation that 80–90 percent of this target is likely to be met by biofuels, European firms have responded to the promise of a guaranteed market with widespread investment in production of biofuel feedstocks, not only in the European Union and Europe but more widely in Asia, Africa and South America. The United States Renewable Fuel Standard provides an equivalent mandate and set of financial incentives for United States firms, which are sourcing feedstock predominantly from the United States and Brazil. Such renewable fuel targets provide a commercial incentive for investment in biofuel feedstock production and associated land acquisition that would not be driven by market forces alone (Dufey *et al*., 2007).

[3] http://www.mofa.gov.sa/Detail.asp?InSectionID=3981&InNewsItemID=88796.

3. Key land tenure issues

In recipient countries, agricultural investment can create opportunities, as they may bring capital, know-how, jobs, market access and infrastructure development. Not every land lease is a 'land grab'; much depends on the terms of the lease. Large land deals do carry big risks – people may lose their land and livelihoods, investors may not deliver on their promises.

There is a perception that farmland is abundant in Africa. Drawing on statistics and satellite imagery, the GAEZ study (Fisher *et al.*, 2002), one of the few available global datasets on land suitability and availability, suggests that reserves of cultivable land do exist in Africa and Latin America. Much of the data underpinning the GAEZ dates back to the mid-1990s, dynamic changes such as land degradation are not fully factored in, and areas used by shifting cultivation and pastoralism may be seriously underestimated (Roudart and Even, 2010). In much of Africa, most land is already being used to varying degrees of intensity, or is at least claimed, by local farmers, herders and gatherers. Yet these people often have no formal land rights, only between 2 and 10 percent of land in Africa is titled, and much of this concerns urban areas and middle to large-scale landholdings (World Bank, 2003). Strong demographic growth in many lower and middle-income countries exacerbates competition for land and resources. Water may be a constraint, and priority in water use may prove a source of conflict.

As a result, very large land deals are likely to involve some degree of compression of existing rights, even if the intensity of current resource use may be low. Dealing with these situations fairly requires careful weighing of individual and societal interests. The gap between legality, whereby the government may own much if not all the land and legitimacy, whereby local people feel the land they have used for generations is theirs, exposes local groups to the risk of dispossession and investors to local contestation. The fact that many land deals are being negotiated behind closed doors and without local consultation compounds these problems. The results can be detrimental to local people, investors and host governments.

Therefore, investments that involve supporting local smallholders seem more promising than large-scale land acquisitions. Companies can work with smallholders in different ways. Some of them are well tested, such as contract farming, where local farmers cultivate land with support from the company, which then purchases produce at guaranteed prices. There is also growing experimentation with a wider range of models, such as joint ventures or land leases with local communities. Where properly implemented, these models can offer better opportunities to local farmers; though it must be remembered that these partnerships bring together players (agribusiness, local farmers) with very different negotiating power, and that sustained support to farmers groups is key to making these models work (Vermeulen and Cotula, 2010).

Agricultural investments that do not involve land acquisitions have less direct impact on local land access. For example, under contract farming and out-grower schemes, local farmers grow and deliver agricultural produce for specified quantity and quality at an agreed date. In exchange, the company provides upfront inputs, such as credit, seeds, fertilizers, pesticides and technical advice, all of which may be charged against the final purchase price; and agrees to buy the produce supplied, usually at a specified price. For example, the biodiesel company Diligent in Tanzania is sourcing jatropha from a network of small-scale farmers under loose contractual terms (Sulle and Nelson, 2009).

In the longer term, even agricultural investments that do not involve large land acquisitions may impact local land rights. For example, contract farming may bring about longer-term changes in access to land, as local elites may be better able to seize the opportunities created by the greater intensification and commercialization of agriculture and by the ensuing shifts in land-use patterns. This is problematic if exclusionary processes mean that benefits from these opportunities do not trickle down to the wider community in the longer term. Also, cash crops controlled by men may encroach upon lands previously used by women for food crops. Farming contracts are often with male household heads, and payments are made to men, even where it is women who do the bulk of the work. In a documented example, the introduction of contract farming for rice in an area previously used for sorghum, traditionally grown by women, led to conflict, which was solved through negotiations between husbands and wives (Eaton and Shepherd 2001).

Properly addressing land tenure issues is a key part of minimizing risks and seizing opportunities both for land-based investments and for agricultural investments that do not involve direct land acquisitions. It can help protect local land rights, facilitate investors' access to genuinely available land, and create incentives for inclusive business models that share value (and leave land) with local farmers. These issues are explored below from the viewpoints of three different stakeholders; local landholders, the investor and the host government. The term investor is used broadly and includes companies that run operational agricultural activities as well as their institutional investor backers.

3.1 Local landholders

The extent to which local people have secure rights over their land is key both to protect people from arbitrary dispossession and to give them an asset with which to negotiate. The ability of local landholders to influence public decision-making about incoming investment and about land use is crucial to ensuring that agricultural investments do not end up marginalizing weaker groups. While governments and their advisors are increasingly aware of the need to simplify the procedures by which investors gain access to land (an issue discussed in the next section), it is important that this simplification does not occur to the detriment of safeguards for local land rights. Building local support for the project is key to the project's longer-term success, and robust safeguards to protect local interests are a central instrument to building local support.

The nature of local land rights

The nature of the land rights held by local people varies considerably depending on the country. In countries where private land ownership is common, as in many parts of Latin America, local users may have full ownership rights over their land. Where land is nationalized, or where the acquisition of private land ownership is conditioned by inaccessible land registration procedures, as in much of Africa, rural people tend to enjoy use rights on land held by the state. These use rights may be conditioned to productive land use, for instance under mise en valeur requirements found in the legislation of much of Francophone Africa. Where productive land use is required, land management institutions may be mandated to monitor compliance and reallocate land to third parties if land is not deemed productively used. This legal regime, coupled with lack of clear legal definition of what constitutes 'productive use', and with the ensuing broad discretion of government officials, may open the door to abuse (Cotula *et al*., 2009). It therefore undermines the security of local land rights. This is particularly so for some groups whose resource use is not often considered productive because of widespread misconceptions – such as pastoralists (Hesse and Thébaud, 2006).

In some jurisdictions, part of the root cause of limited protection of local resource rights lies in the weak legal recognition of 'customary' rights, that entitle rural dwellers access to resources in much of Africa, in parts of Asia and in the areas of Latin America inhabited by indigenous peoples. In some jurisdictions, customary rights enjoy no legal protection. This includes some countries that emphasize state ownership and control, and some that endorse or promote private ownership. On the other hand, some countries have long protected customary land rights, as a result of historical legacies. For example, Ghana's Constitution specifically recognizes customary law as a source of law and regulates the role of customary chiefs in land administration.

Acknowledging the shortcomings of the law in protecting the interests of their rural majorities, some countries have recently taken steps to strengthen the protection of local land rights, including customary rights, even where land is state-owned or vested with the state in trust for the nation. In Africa, customary rights are protected, to varying degrees, under Mali's Land Code 2000, Mozambique's Land Act 1997, Tanzania's Land Act and Village Land Act 1999, and Uganda's Land Act 1998 (see Wily, 2003). The protection of customary rights has been strengthened in some Southeast Asian countries, such as under the Indigenous Peoples' Land Rights Act in the Philippines. In Cambodia, according to GTZ (2010) a new land law approved in 2001 aimed to accelerate land registration procedures and to improve tenure security.

Even in these cases, legal protection is often linked to 'productive use'. Also, although in some countries customary rights and rights based on state law enjoy the same legal status and protection (e.g. in Uganda and Tanzania), in others they are only protected as lesser forms of legal entitlement, which can be 'upgraded' into ownership by undertaking land registration (for example, under article 45 of Mali's Land Code 2000). In some countries, the actual legal protection granted to customary rights remains vague and incomplete, not least because of the lack of implementing regulations and of political will to apply existing rules.

Even where customary rights are recognized, significant threats come from within local groups, particularly from customary chiefs. In many parts of Africa, for example, chiefs are increasingly reinterpreting custom to claim 'ownership' over common resources they were traditionally responsible for managing on behalf of their community. These reinterpretations of customary law are strongly contested by local resource users; however in practice, customary mechanisms for the accountability of chiefs are not, or are no longer, working (e.g. on Ghana, see Ubink, 2007). This situation provides the breeding ground for the co-option of customary chiefs and local elites into strategic alliances with the central state and agribusiness, and makes local resource users vulnerable to dispossession. Recent research in Ghana has documented cases where customary chiefs reallocated land from local farmers to large biofuel plantations, with no local consultation nor formal compensation (Schoneveld *et al.*, 2010).

Safeguards for local land rights within large-scale agricultural investments

A first set of safeguards is provided by procedures for assessing the social and environmental impacts of a proposed investment before its approval. Many countries require an environmental impact assessment or an environmental and social impact assessment to be carried out before the land transfer. Such requirements exist in Cambodia, Mali and Mozambique, for example. In some countries, however, the criteria for approving or failing land deal applications on the basis of the ESIA are not explicit, and the results of these assessments are often not available for public scrutiny. ESIAs necessarily involve some interaction with local and affected people as the primary subjects of the social assessment.

In many cases this may be limited to a scientific study in which the subjects are passive respondents. In some countries, ESIA legislation requires consultation with communities, in other words eliciting and reporting their opinions as well as researching their socio-economic status, examples include Ethiopia and Madagascar (Vermeulen and Cotula, forthcoming). Several studies have documented cases of biofuel projects getting started without the required environmental permits (e.g. on Ghana, see Schoneveld *et al*., 2010; on Mozambique, see

Nhantumbo and Salomão, 2010). Consultation gives a voice to affected people within the process but does not confer any authority to veto or shape the terms of the investment – it is far short of consent.

Local consultation may be required through processes other than ESIAs. In Mozambique, for example, the Land Act 1997 requires prospecting investors to consult 'local communities' before receiving a land lease from the government. Local land-use rights are protected, regardless of whether they are formally registered, although there is a procedure to register collective landholdings. Overall, however, the implementation of this progressive legislation has fallen short of expectations, and some large-scale biofuel projects have been controversial. What is defined as community consultation may be confined to discussions with village elders, officials and elites. Indirectly affected communities, for example those affected by migration out of project areas, tend not to be included.

In addition, villagers tend not to receive full information on the proposed investments and the terms of land deals before formal consultation meetings with government agencies or companies. Records of meetings are often incomplete and vague about timeframes, targets and responsibilities. Agreements on social investment, benefit-sharing, guaranteed resource access or other arrangements between the community and the investor are generally not documented in formal documents or legally binding contracts (Nhantumbo and Salomão, 2010). In cases where external organizations supported local people, better outcomes and negotiations for community joint ventures in tourism are underway in several places (Tanner and Baleira, 2006).

Virtually all countries in the world have legislation that enables government to expropriate property if it is in the public interest to do so (McAuslan, 2010). In other words, governments can acquire land even without the consent of landholders. In exchange, governments are usually required to pay compensation and to respect certain procedures. The idea behind this is that if the government wants to build a school or a hospital, individual rights must be reconciled with the interests of the wider society. In many lower- and middle-income countries, legislation allowing the compulsory acquisition of land in the public interest has been used to make land available both for schools or hospitals and for commercial investment projects, including agriculture. Such projects may be in the public interest, in the sense that they may promote economic development and generate public revenues. In purely commercial ventures it is better practice to obtain the consent of local landholders through negotiations rather than compulsory takings. The decision to take land on a compulsory basis for commercial projects would require a clear and demonstrable case that should be subject to thorough public scrutiny.

In making these choices, it must be remembered that land takings can raise major human rights issues. The land and resource rights of affected communities, even when based on customary systems that have no legal recognition under national law, constitute 'property' protected by the human right to property. This right is internationally recognized by the Universal Declaration of Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights. The Inter-American Court of Human Rights, and more recently the African Commission on Human and Peoples' Rights, have specifically interpreted the right to property as protecting the collective rights customarily held by indigenous and tribal peoples over their ancestral territories – even without formal titles or legal recognition under national law[4].

Where people depend on natural resources for their food security, rights to these resources are also protected by the internationally recognized right to adequate food. At the very minimum, the right to food

[4] See for example the following cases decided by the Inter-American Court: Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Maya Indigenous Communities of the Toledo District v. Belize, Sawhoyamaxa Indigenous Community vs Paraguay and Saramaka People vs Suriname; and Endorois vs Kenya, decided by the African Commission on Human and Peoples' Rights.

arguably requires that any loss of natural resources, that negatively affects food security, must be offset by improvements in access to other livelihood assets such as income and off-farm employment. This means that those who lose out should have access to at least the same quantity and quality of food as before the intervention. Where investment projects affect indigenous and tribal peoples, international law requires governments and investors to seek the free, prior and informed consent of these groups. This principle is enshrined in the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the ILO (Convention No. 169). This Convention is legally binding in states where it has been ratified.

Where land is taken on a compulsory basis, compensation regimes and related procedural safeguards are key to safeguarding local interests. It must be recognized, however, that to many people no amount of money is adequate compensation. This is particularly the case where cash compensation would not enable affected communities to gain access to alternative land, for instance because of limited development of land markets. It is also the case where land has special cultural and spiritual values.

In many jurisdictions, where land is owned by the state, however, compensation is paid for loss of improvements (crops, trees, buildings) but not for loss of land rights. Loss of other resources, such as water and forest resources, are rarely able to be compensated. Implementing compensation schemes is riddled with challenges, particularly in lower and middle-income countries. Levels of compensation are often seen as inadequate by the local population, and lack of formal land markets, because the transferability of land rights is limited, makes it more difficult to properly value land. Conflicts concerning compensation mechanisms and amounts have been documented for some recent biofuels projects in Tanzania, for example (Sulle and Nelson, 2009).

There is growing experience with developing comprehensive and sophisticated arrangements to deal with compensation for loss of land rights and for any damage or disturbance suffered within the context of large natural resource investments, particularly for projects supported by multilateral development banks that have adopted specific policies in this regard (such as IFC Performance Standard No. 5 on Land Acquisition and Involuntary Resettlement[5]). For example, the Chad-Cameroon oil pipeline project involved sophisticated arrangements to compensate losses not compensable under national law, to top up compensation rates for compensable losses and to implement community- and regional-level compensation schemes[6]. However, making these regimes work in practice is a big challenge. For instance, major shortcomings in the implementation of the compensation plans for the Chad-Cameroon pipeline have been documented by civil society organizations in both Chad and Cameroon.

Local land rights as a lever to obtaining a stake in the project[7]

Local communities may be able to use their land rights as a lever in direct negotiations with incoming investors. In South Africa, for example, the paper and packaging company Mondi negotiated a land lease directly with a local community trust, as part of South Africa's land restitution programme. The lease allows the company to grow and own timber and to conduct commercial forestry operations on the community's land. In return, the community trust receives indexed and periodically reviewed fees as well as other benefits (SA Forestry, 2009). There is growing experience with joint ventures between the investor and local landholders, whereby the latter obtain an equity stake in the joint venture company in exchange for contributing land into the project. This option is more readily available in agriculture, where land is a particularly valuable asset, than in other

[5] http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards.

[6] The project's Environmental Management Plan, which includes the Cameroon Compensation Plan and the Chad Resettlement and Compensation Plan, is available at http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTREGINI/EXTCHADCAMPIPELINE/0,,contentMDK:21223592~menuPK:2091922~pagePK:64168445~piPK:64168309~theSitePK:843238~isCURL:Y,00.html.

[7] This section is based on Vermeulen and Cotula (2010).

sectors such as extractive industries. Experience with such joint ventures is particularly advanced in countries where policy frameworks proactively promote them, as in Malaysia and South Africa.

In Malaysia, the government introduced the Konsep Baru (New Concept) scheme in the mid-1990s as a strategy for rural land development on land under customary rights (Native Customary Rights, NCR) in the non-mainland areas of Malaysia (Sabah and Sarawak). A Konsep Baru arrangement is a three-way joint venture. A private plantation company, selected by the government, holds 60 percent. The plantation company does not need to buy land; it provides financial capital for the development of palm oil production. The local community that holds the NCR to the land is awarded a 30 percent share in the joint venture, representing their contributing land into the project. This share is held by a parastatal company in trust for the community. A Land Bank mechanism allows farmers to register their land in a bank as an asset. This enables the private company to use the land as a deposit to borrow money locally or abroad. Finally, the government, acting through the parastatal company, acts as trustee with power of attorney, and holds the remaining 10 percent. Land titles are issued to the joint venture for 60 years (Majid-Cooke, 2002).

Konsep Baru is an innovative way to promote joint ventures in which smallholders have a significant stake. There has been dissatisfaction with the Konsep Baru schemes, either for reasons of insufficient mechanisms for full consultation and fully informed, free consent from landowners (which ultimately are rooted in shortcomings of the land tenure system and its governance, rather than/as well as the behaviour of individual agribusiness companies); or because of inadequate returns or negative social and environmental impacts from the plantations. Some of these schemes have proved controversial, and local frustrations have resulted in numerous high-profile court cases against companies or against the government-owned parastatal. In March 2010, for example, the High Court of Miri District in the state of Sarawak declared leases of NCR lands 'null and void' because they had been issued by the state government in an unconstitutional manner[8].

Experience with joint ventures between agribusiness and local landholders has also emerged in South Africa, where the land reform programme (land restitution, land redistribution) has been shifting ownership from large landowners to community structures such as community trusts or common property associations. In this context, the South African government has encouraged joint ventures between land reform beneficiaries and agribusinesses. The rationale has been to maximize economic benefits to land beneficiaries by linking them directly to well-established, professional farm management companies.

The standard model was for government to pay for land that was then held by a community trust owned by the beneficiaries. Management of the farm was contracted out to an operating company. This was typically owned 49 percent by the former landowner (an agribusiness or individual commercial farmer) and 51 percent by the trust. A contract stipulated the terms for farm management and sharing of costs and benefits, usually with terms to gradually transfer technical and financial skills to the majority shareholders. The model provided a material incentive for effective farm management by the ex-owner along with three benefit streams to beneficiaries: dividends, land rental fees and wages for continued labour (Mayson, 2003; Lahiff, 2007; Greenburg, 2009).

The joint venture schemes pioneered in South Africa are a good idea in theory, as they provide beneficiaries with a tangible commercial asset that can yield good dividends and grow in value over time. As with Konsep Baru in Malaysia, they have been heavily criticized. In almost all cases the original commercial farmer or agribusiness has retained effective control over all business decisions. Of 88 shared equity agriculture schemes

[8] http://news.mongabay.com/2010/0401-sarawak_miri_court_ruling.html.

established in South Africa between 1996 and 2008, only nine have declared dividends. In one widely discussed case, the Levubu citrus estate in Limpopo province, the largest source of income for beneficiaries was not dividends or land rental but wages, paid at the same rates as on other commercial farms (Greenburg, 2009).

Models involving greater smallholder participation in the ownership of the business can expose smallholders to greater risks. Should the company go into liquidation, their land would come under threat; although much depends on the transferability of land rights under national law and on the political acceptability of foreclosure. On the Levubu citrus estate in South Africa, for example, the joint-venture company went into liquidation. As a result, the community lost the assets it had transferred to the company (mainly equipment). In this case, local land rights were sheltered as land was not directly contributed into the joint venture but rather leased to the company by the community[9].

Security of local land rights is particularly crucial in these various models. Secure rights over land provide local groups with an asset in negotiations with agribusiness. Also, the type of rights that local people have on their land can have profound implications for the business models they may be able to engage with. For example, at the heart of Mondi's community lease scheme in South Africa (SA Forestry, 2009) is the ability of the local community to lease out its land, an ability that is missing in several other countries, particularly where the land is nationalized or largely state owned. Proper land valuation is key in joint ventures. Indeed, equity shares are usually linked to the parties' contributions, and valuing these contributions correctly is key to getting the equity shares right. Yet assets such as land may be difficult to value, particularly if formal land markets are not fully developed.

3.2 Investors

For investors, key land tenure issues are likely to include:

- ease of accessing land for investment purposes;
- nature of the land rights that can be acquired; and
- safeguards against arbitrary deprivation of the land rights acquired.

Accessing land

Procedures for accessing land vary considerably across countries – in terms of steps, time and costs. Besides differences in technical aspects and levels of capacity, this diversity reflects broader differences in political orientation for issues such as foreign investment and the role of the private sector and of government regulation. For instance, in Mozambique all investment projects (whether foreign or national) require government approval (under the 1993 Regulation to the Investment Act), while in Ghana no such approval is required outside the mining and petroleum industries but foreign investors must register with the Ghana Investment Promotion Centre under the Ghana Investment Promotion Centre Act 1994[10].

Procedures vary depending on whether the land in question is publicly or privately owned. In the latter case, accessing land may involve a private transaction, though various forms of government control may still occur. Also, national legislation may empower the government to expropriate privately owned land

[9] Personal communication from a South African observer.
[10] Schoneveld et al., 2010 documented cases of agricultural investments that had not been properly registered.

for an investment project where doing so is in the public interest. As discussed above, the assumption that implementing an investment proposal automatically constitutes a 'public purpose' that triggers the application of legislation on compulsory takings is problematic; guidance from multilateral agencies such as the International Finance Corporation states that compulsory acquisitions should be minimized[11]. Where land is mainly owned by the state, investors tend to gain access to land based on long-term concessions or leases allocated by the government.

A recurring investor concern is that land access procedures in many lower and middle-income countries are seen as long and cumbersome. This issue emerged in several World Bank Doing Business reports, which identified cumbersome land access procedures as a significant constraint to business (World Bank, 2010). Based on Doing Business data, Table 1 summarizes the time and costs of registering property in different parts of the world. Registration is only one part of the process of acquiring land, which typically includes a wider set of procedures at various government agencies. Data presented in Table 1 masks significant variation within regions. Table 2 provides data for selected countries that have been reported in the media as having been affected by large-scale land acquisitions.

TABLE 1: **TIME AND COST TO REGISTER PROPERTY: REGIONS**

Average time (days)	Region	Average cost (as a percentage of property value)
25	OECD high income	4.4
98	East Asia and Pacific	3.8
38	Near East and North Africa	6.3
106	South Asia	5.6
74	Latin America and the Caribbean	5.6
62	Eastern Europe and Central Asia	1.9
81	Sub-Saharan Africa	9.8

Source: World Bank, 2010

TABLE 2: **TIME AND COST TO REGISTER PROPERTY: SELECTED COUNTRIES**

Average time (days)	Country (ranking in brackets)	Average cost (as a percentage of property value)
52	Argentina (115)	7.0
42	Brazil (120)	2.7
56	Cambodia (116)	4.4
41	Ethiopia (110)	2.2
40	Kazakhstan (31)	0.1
44	India (93)	7.4
135	Lao PDR (161)	4.1
74	Madagascar (152)	9.7

[11] IFC Performance Standard No.5 on Land Acquisitions and Involuntary Resettlement

TABLE 2: TIME AND COST TO REGISTER PROPERTY: SELECTED COUNTRIES (CONTINUE)		
Average time (days)	Country (ranking in brackets)	Average cost (as a percentage of property value)
29	Mali (99)	200
144	Malaysia (86)	26
42	Mozambique (151)	11.3
50	Pakistan (119)	7.2
37	Sudan (37)	3.0
73	Tanzania (145)	4.4

Source: World Bank, 2010

A particular issue that tends to affect the time and cost involved in acquiring land is the level of government responsible for approving the transaction. Everything else being equal, the higher the level of government, the more cumbersome the procedure. Yet governments may wish to retain control over transactions involving large tracts of land. One way to deal with this issue is to distribute responsibility for approving land allocations at different levels of government, based on the size of area. In Mozambique, for example, land legislation requires that land leases for up to 1 000 ha be approved by provincial governments, leases up to 10 000 ha by the Minister of Agriculture, and leases beyond 10 000 ha by the Council of Ministers. Lack of clarity about which level of government is responsible for a given transaction can create problems, however. For example, in Lao PDR two sets of sliding scales exist, based on area size and investment amount, and the combined application of these two sets of criteria creates confusion (GTZ, 2010).

Some countries have taken steps to streamline the administrative process that investors must go through to acquire land. One-stop-shops and investment promotion agencies play a key role in this; a role which varies significantly across countries. In countries such as Mali, Mozambique and Ghana, investment promotion agencies facilitate the acquisition of all necessary licenses, permits and authorizations. Their direct role in facilitating land access focuses on helping investors in their dealings with other agencies. In other countries, the investment promotion agency is mandated to play a more 'hands-on' role, for example in Tanzania, where the Tanzania Investment Centre (TIC) is responsible for identifying and providing land to investors, as well as with helping investors obtain all necessary permits. Land is vested with the TIC and then allocated by this to the investor on the basis of a derivative title. After the end of the investment project, the land reverts back to the TIC[12].

The ability of investment promotion agencies to promptly provide information to prospective investors about the nature, size and location of available land is seen as a key ingredient for effective investment promotion (Ortega and Griffin, 2009). Some countries have undertaken national inventories of available land and established databases accessible to incoming investors. In Tanzania, for example, the TIC has set up a 'land bank' and identified some 2.5 million ha as suitable for investment projects[13]. In Mozambique, following growing demand for land for biofuels the government carried out a land inventory covering the whole country to identify land potentially available for incoming investments. This exercise was concluded in early 2008 at a scale of 1:1 000 000. It indicated that the country has about 7 million ha available for allocation to land-based economic activities; a smaller area than was expected. As the scale of the mapping was too large to be useful, another inventory at a scale of 1:250 000 is being prepared (Nhantumbo and Salomão, 2010).

12 www.tic.co.tz.

13 www.tic.co.tz.

In undertaking national land inventories and developing databases to guide incoming investors, it is important that robust safeguards are in place to protect local land rights. This includes properly recognizing all existing forms of resource use in any inventory exercise. Concepts such as 'idle' land, which underpin inventory exercises, often reflect an assessment of the productivity rather than existence of resource uses. These terms are often applied not to unoccupied lands, but to land used in ways that are not perceived as 'productive' by the government. Perceptions about productivity may not necessarily be backed up by economic evidence (for instance, on pastoralism, see Hesse and Thébaud, 2006), and low-productivity uses may still play a crucial role in local livelihood and food security strategies.

Getting the incentive structures right is also important. Emphasis on quantitative investment targets for investment promotion agency officials tends to encourage attracting investment as an end in itself, and to place the quality of the investment second stage, including crucial issues such as social and environmental impacts, linkages with the wider local economy, the scale and quality of employment generated, or the amount and distribution of public revenues over time.

Nature of land rights

The nature, scope, content and duration of the land rights that investors, particularly foreign investors, can acquire varies across countries. This diversity reflects diverging political orientations regarding land tenure, particularly as to whether private land ownership is allowed, and whether non-citizens may gain access to it.

In some countries, land ownership is vested with the state, and land users (whether local people or incoming investors) can only acquire long-term land-use rights. For instance, land is nationalized in Ethiopia, Mozambique and Tanzania. In these cases, outright purchases are outlawed. Investors can only acquire land leases, usually from the government (which owns the land). Other African countries allow private land ownership, which may be acquired through land registration procedures (e.g. Mali). With some exceptions, private land ownership tends not to be widespread, even where it is formally recognized, particularly in rural areas. This is partly the result of the long and cumbersome procedures required to acquire it, particularly land registration.

As discussed above, World Bank estimates suggest that only a tiny percentage of land in Africa has been legally registered (Deininger, 2003). Similarly, the state owns much of the land in Cambodia and Lao PDR, and most land acquisitions there involve land concessions of up to 99 years granted by government authorities (GTZ, 2010). Where land ownership is restricted, key issues from the investor's perspective are likely to include the duration of the lease and the possibility of renewing it; the possibility of transferring the lease or of being able to sublease the land to third parties (and the conditions attached to this, such as government approvals); and the possibility of using the land leased as security for credit (namely to finance the investment project).

Some countries treat domestic and foreign investors differently: legislation allows nationals to acquire land ownership, but restricts foreign investors' acquisition of land ownership or even long-term use rights. Although some lower and middle-income countries have recently come under pressure to ease these restrictions, the regulation of foreign land ownership is not just a 'developing country' phenomenon. Thirty states in the United States have restricted foreign ownership, and the United States Agricultural Foreign Investment Disclosure Act 1978 requires foreigners to register acquisitions of areas larger than 10 acres (McAuslan, 2010). In lower and middle-income countries, restrictions on foreign ownership are rooted in the scars left by colonial history. Regulating foreigners' access to land ownership was seen as a way to avoid going back to the colonial experience (McAuslan, 2010).

Examples of restrictions on foreign ownership are provided by Cambodia, Ghana and Uganda. In Cambodia, national law restricts land ownership to Cambodian persons and companies; companies are deemed to be Cambodian if they are 51 percent held by Cambodian nationals (GTZ, 2010). Similarly, in Ghana, while nationals may own land, foreigners may not; they can only acquire land leases of up to 50 years (article 266 of the 1992 Constitution). Under Uganda's Land Act 1998 non-citizens may only be given land leases for up to 99 years, and are barred from acquiring freehold rights (Article 41).

Legislation may restrict certain forms of land use by non-nationals. Depending on the country context, the policy objective may be to prevent speculative land acquisitions, or to protect local producers. In Uganda, foreign investors may not acquire land for crop or animal production, but they may lease land for other purposes (Article 10 of the Investment Code Act). In Tanzania, foreigners may acquire land-use rights only for an investment project approved under the terms of the Tanzania Investment Act (Articles 19 and 20 of the Land Act 1999). In Namibia, the Agricultural (Commercial) Land Reform Act 1995 (Article 58) requires a government authorization for the acquisition of land ownership by foreign nationals; this authorization is conditioned, among other things, to the acquisition being for an investment eligible under investment legislation.

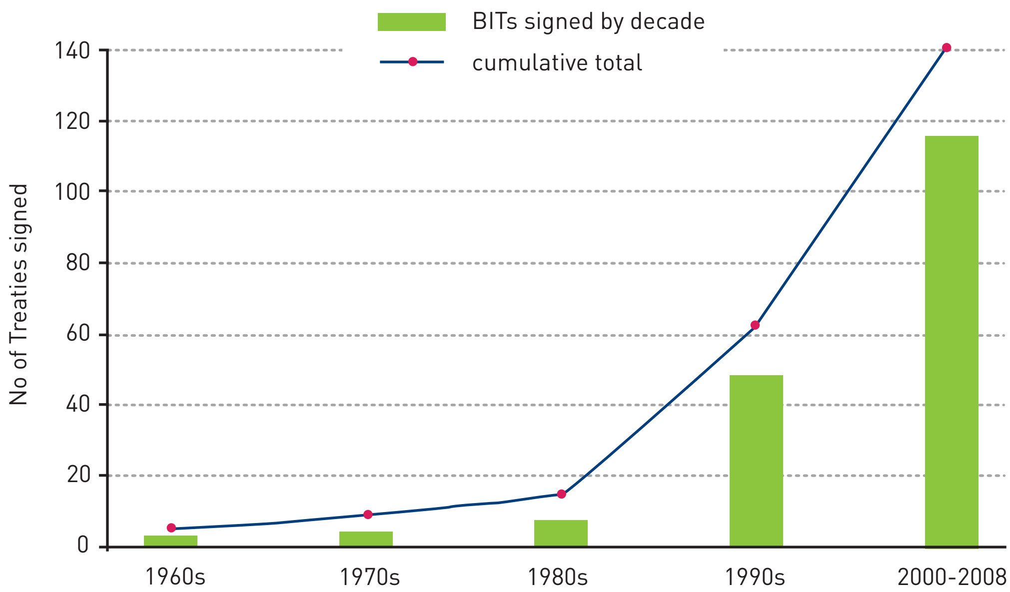
Protection of investors' land rights

To investors, the protection of their land rights from arbitrary interference is a fundamental tool to manage risk and shelter their business interests. By linking effort and reward, property rights protection reassures investors that they will be able to reap the benefits of their investment (World Bank, 2005). Once most of the investment is made (once the irrigation infrastructure is developed, for example), the investor effectively becomes a 'hostage' of the host state. The returns on investment depend on the successful implementation of the project over a long period. However, the investment may be negatively affected by adverse and possibly arbitrary host state action. It is not uncommon for newly elected governments to renegotiate large foreign contracts (Wälde and Kolo, 2001). This risk is particular acute given the high political and sociocultural value of land in much of rural Africa.

National and international arrangements provide ways to protect the land rights acquired by investors. For example, international investment treaties usually provide legal protection to investment by nationals of one state party in the other state. They typically define investment broadly, which would cover investment in agriculture including land acquisitions. Their provisions usually include safeguards against discrimination, expropriation and arbitrary treatment, provisions on profit repatriation and currency convertibility, and access to international arbitration as the mechanism to settle investment disputes.

Recent years have witnessed a boom in investment treaties. By the end of 2008, there were 2 676 investment treaties (UNCTAD, 2009), up from 440 in 1991 (UNCTAD, 1992). Figure 3 illustrates this trend for a sample of seven African countries affected by large-scale land acquisitions: Ethiopia, Ghana, Madagascar, Mali, Mozambique, Sudan and Tanzania (Cotula *et al.*, 2009). National constitutions (particularly provisions on the right to property), investment codes and sectoral legislation tend to protect the investor's land rights from arbitrary interference, and to require compensation for losses suffered. As for investment treaties, investment codes may enable investors to directly access investment arbitration to solve disputes.

FIGURE 3: NUMBER OF BILATERAL INVESTMENT TREATIES CONCLUDED BY SEVEN AFRICAN COUNTRIES, BY DECADE AND CUMULATIVE



Data source: UNCTAD World Investment Report online database

However, evidence of the extent to which investment treaties promote investment is mixed (for a review, see Sauvant and Sachs, 2009). The formulation of some treaties has raised concerns that the policy space for host countries to take action in the public interest may be reduced, as treaty norms restricting expropriation or requiring 'fair and equitable treatment' have been interpreted in very broad terms (Mann *et al*., 2006). Some controversial, treaty-based international arbitrations have seen investors challenge environmental or other public-purpose regulation adopted by host states[14]. Host governments need to be very careful about the full implications of what they are signing up to.

From the investor's perspective, the extent to which these protection mechanisms can be relied upon in practice varies considerably, depending on factors linked to governance and rule of law. Experience suggests that even the most effective protection regimes achieve little against a determined political will to revise the terms of the investment or even expropriate it altogether. This was illustrated by the wave of renegotiations affecting natural resource investments in Latin America, Asia and Africa, when commodity prices peaked in 2008. The strong emotive connotations of land to local populations make political risk particularly acute in agricultural investments that involve the acquisition of large areas of land.

Ultimately, the best way to shelter the investment from contestation or arbitrary interference is to be able to show that it benefits the host country and the local population. This is indispensable to creating local support for the project. In turn, this may have implications, to the extent to which the investment should involve the acquisition of land. Political risks would be reduced if investors were to favour business models that involve privileged, long-term relationships with local suppliers, rather than the acquisition of long-term land rights. Depending on the specific crop systems and local contexts, alternative business models may include properly structured contract farming, or joint ventures where local people contribute land in exchange for a stake in the project. If properly structured, these arrangements may provide both security of supplies and control over the value chain, and at the same time greater flexibility and limited exposure to political risk.

[14] See for example the cases Metalclad v. Mexico, Methanex v. United States, or Bywater v. Tanzania.

3.3 Government

The role of government in land relations varies substantially across countries, depending on political orientation and historical legacy. Providing systems for land administration and for reconciling competing land claims (of investors and of local land users, for example) is a recurring fundamental role. In many countries targeted for large-scale land acquisitions, governments play extensive roles, including owning much if not all the land. As discussed, land is nationalized in many countries such as Mozambique, Tanzania and Vietnam. In other jurisdictions private ownership can be acquired only through cumbersome and inaccessible procedures that prevent access to ownership for most of the rural population (see e.g. on Mali, Djiré, 2007). Given the centrality of the state in formal land tenure systems, the third set of land tenure issues that need to be discussed concerns the role of government and of public decision making.

Transparency and public oversight

Where the investor acquires land from the host government (rather than a private party), checks and balances are crucial to ensuring government action maximizes the public interest. Yet the Cotula *et al*. (2009) study found that lack of transparency in the negotiation of many land-based investments was a recurrent problem. Little reliable information exists about ongoing negotiation processes. Actual contracts between governments and investors are not public. Some data sources may be publicly accessible (e.g. in some countries, the national land registry), but usually only for limited data on completed deals. While details about individual land deals may need to be sheltered to protect commercial confidentiality, this lack of transparency is a major problem, as it creates the breeding ground for corruption and for deals that are not in the best public interest. Indeed, corruption emerged as a major challenge in some reported large-scale land deals, and there is anecdotal evidence of some host government officials holding equity participations in approved investment projects.

Increasing transparency through greater public access to information about the process and the deals themselves would increase public oversight and accountability. There are several possible mechanisms for doing this. 'Freedom of Information' legislation may allow the public to request access to information held by public bodies. For major investment projects, parliamentary approval of deals negotiated by the government can increase public scrutiny. Sectoral initiatives to promote transparency exist in some industries. For example, the EITI was launched in 2002 to improve transparency of public revenues generated by extractive industry projects (Goldwyn, 2008).

Not just any investment – promoting projects that benefit the local population

Besides their roles in safeguarding local rights and accompanying incoming investors (as discussed under **Local landholders** and **Investors**), government agencies can play an important role in ensuring the country gets the best possible deal from incoming investment. This role is central where investment projects are directly negotiated with the government, as in much of Africa and Southeast Asia. Some recent, large investments seem unlikely to be economically viable, based on the historical track record of large-scale agriculture in sub-Saharan Africa (Wiggins, 2009). The host government's capacity to carefully scrutinize investment proposals and investors' track-records is a first key step. In some recipient countries, donor support to government agencies responsible for scrutinizing investment proposals is leading to improvements in the quality of government scrutiny.

Effective national regulation and skillful contract negotiation are central. For example, rather than uncritically endorsing large plantations, host governments can use policy incentives to promote inclusive business models that share value with local enterprises, including small-scale farmers, processors and service providers. This may include equitably structured contract farming, and joint ventures where local people contribute land in exchange for a stake in the project. Indeed, there is growing experience with policies requiring investors to involve local farmers and small-scale businesses in the supply chain. New policy in Sierra Leone requires that 5 to 20 percent of the shares be held by Sierra Leoneans and the inclusion of out-grower schemes (MAFF, 2009). There is much experimentation with these models in countries where regulation has created strong incentives for business to work with local groups. In South Africa, for example, the land restitution process has started to bite in rural areas. As land changes hands from companies to local communities, companies are forced to work with communities to keep their business going (Lahiff, 2007). Land policy can be used as a lever for more inclusive models in a number of other ways. For example: secure land rights for local farmers would help avoid arbitrary dispossession and give farmers an asset with which to negotiate; while governments' giving away land virtually for free creates no incentives for investors to explore models alternative to land acquisitions.

In addition, recent experience of the renegotiation of agricultural concessions in Liberia shows the difference that investing in the government's capacity to negotiate can make. An independent evaluation of this renegotiation noted significant improvements, namely, an increase in public revenues, requirements to source labour, goods and services locally, and relocation of certain processing activities to the host country. Determined political will at the highest level, a clear negotiating strategy, a strong negotiating team within an influential government institution and world-class external legal and other advice were all crucial to this outcome (Kaul *et al*., 2009).

National laws may enable the government to withdraw land or resource rights if the investor does not comply with investment plans within a specified timeframe. Timeframes for compliance may be differentiated between national and foreign investors. For example, under Mozambique's Land Act 1997 land allocations are subject to compliance with the investment plan within two years for foreign investors or five years for nationals. In both cases, noncompliance would entail termination of the land lease, while compliance guarantees a definitive title for 50 years, renewable. In practice, however, provisions of this kind are rarely applied by governments, as political will may be lacking (particularly where government officials themselves are sitting on large land leases) and implementation raises challenges regarding government capacity to monitor and enforce legislation. In some countries, no government agency has a clear mandate for this; monitoring is carried out on an ad hoc basis, if at all; and there is no mandate for taking action on any inspection findings (Cotula *et al*., 2009). Cases do exist, where governments have withdrawn land from agricultural investments that failed to deliver on their promises, as illustrated by the recent cancellation of a land lease for a 30 000 ha biofuel project in Mozambique (Nhantumbo and Salomão, 2010).

Public revenues

Land transfers involve a set of fees and other forms of compensation payable by the investor to those relinquishing their rights to occupy or use land during the lease period (or in perpetuity in the case of sales). Where land is owned by the state, as is typical in Africa, formal lease payments and royalties tend to flow to the national government. These, however, may be very low, as the explicit policy of an increasing number of African countries is to attract foreign investment through nominal rental fees, tax holidays, duty exemptions and other financial incentives. Governments consider the direct value of investment projects to come, not through direct financial gain, but rather through broader economic benefits, such as employment generation and infrastructure development[15]. Yet setting land fees at the appropriate level can generate public revenues and create incentives for investors to explore business models that do not involve land acquisitions, such as contract farming and joint ventures with local farmers.

[15] Based on interviews with government officials undertaken by Cotula *et al*. (2009).

Calculating and collecting revenues from projects requires the technical ability to understand often complex contractual revenue-sharing provisions. In this regard, dedicated host government units with strong expertise and high-level political backing are key to collecting revenues, monitoring implementation and sanctioning noncompliance.

In some countries, national legislation requires that a proportion of project revenue is devolved to local government bodies in the project implementation area. In Ghana, for example, a sophisticated formula determines the distribution of land revenues among central and local government, customary chiefs and local landholders. The balance to strike in these cases is between ensuring that people who live in the project areas benefit from the investment, on the one hand; and enabling the central government to redistribute wealth nationally, including to more deprived and less resource-rich areas, on the other.

4. Conclusion

Trends and drivers in global agricultural investment suggest that investor interest in agriculture is likely to grow in the medium to longer term, particularly once the effects of the economic downturn (on global demand for agricultural commodities and on access to financing, for example) are eased. Over time, growing agricultural investment may have profound implications for the future of world agriculture and food security, as it may signal a shift in the balance between agribusiness and family farming. In turn, these processes may directly impact landholdings. Should recent trends in large-scale land acquisitions continue, land distribution may become increasingly concentrated in parts of the world where it has traditionally been relatively diffuse.

Conversely, addressing land tenure issues is key to seizing the opportunities and minimizing the risks involved in large-scale agricultural investments. This includes creating enabling conditions for investors to operate, concerning both the process for acquiring land rights and the content and protection of those rights once they are acquired. It also includes establishing robust safeguards to ensure that existing land uses and claims are protected in the face of growing outside interest. Governments can play a key role in mediating competing land rights and demands, through effective regulation and land administration systems and, where much land is state-owned and the government is directly involved in land deals, through transparent and inclusive management of public lands.

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