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ENCE TO SOUTH AFRICA AND ETHIOPIA

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Table of Contents

ARTICLES

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

Darryl Vhugen 1

RIGHTS OF CITIZENS AND FOREIGN INVESTORS TO AGRICULTURAL LAND UNDER
THE LAND POLICY AND LAWS OF ETHIOPIA

Sefanit Mekonnen..... 31

THE ETHIOPIAN ENVIRONMENTAL REGIME VERSUS INTERNATIONAL
STANDARDS: POLICY, LEGAL, AND INSTITUTIONAL FRAMEWORKS

Mulugeta Getu43

ENVIRONMENTAL PERMITTING IN ETHIOPIA: NO RESTRAINT ON “UNSTOPPABLE
GROWTH”?

James Krueger, Aman K. Gebru, and Inku Asnake.....73

ENVIRONMENTAL IMPACT ASSESSMENT AND MONITORING UNDER ETHIOPIAN LAW

Tesfaye Abate Abebe103

THE POSSIBLE OVERLAP BETWEEN PLANT VARIETY PROTECTION AND PATENT:
APPROACHES IN AFRICA WITH PARTICULAR REFERENCE TO SOUTH AFRICA AND
ETHIOPIA

Sileshi Bedasie125

Message from the Dean

Dear Readers,

It is with great pleasure that I write this introduction to the inaugural edition of the Haramaya Law Review (HLR). This publication would not have come to fruition without the steadfast dedication and commitment to editorial excellence of the HLR editorial staff. I would like to express my heartfelt gratitude to Brooke Glass-O'Shea, HLR's Editor, for her diligence, earnestness, and most importantly, her passion for detailed and consistent editing. I would also like to thank Abdi Jibril and Sileshi Bedasie, HLR's new Assistant Editors, for adding their keen minds to our journal team. A special note of gratitude goes to Tom McCarthy of the University of California, Hastings College of the Law, who graciously offered his expertise in formatting, layout, and cover design; also, to the HU Publications Office for their invaluable guidance throughout the publication process.

I would also like to thank our group of external assessors—Abebe Mulatu, Solomon Bekure, Sallie Sanford, David Orange, Solomon Kebede, and Wondwossen Sintayehu—for their extremely insightful comments. Professor Belay Kassa, President of Haramaya University, deserves many thanks for his unwavering support and commitment. And, of course, I would like to thank the fantastic group of instructors and students we have at the Haramaya University College of Law. It is to them that this inaugural edition is dedicated. We will soon be celebrating the tenth anniversary of the founding of the College of Law, and we can only hope that the next ten years bring us just as much success as the previous ten.

Lastly, and perhaps most importantly, I would like to thank the individual authors for their valuable contributions to the intellectual conversation that is legal scholarship. Through their words, we can gain further insight into the legal complexities that increasingly mark our globalized world.

I hope you enjoy reading this first edition of the HLR as much as we enjoyed putting it together. We will be publishing the journal bi-annually, and we are confident that it will lend much to Ethiopian legal scholarship.

Sincerely yours,

Richard Wentzell
Dean, Haramaya University College of Law

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The Haramaya Law Review welcomes the submission of original and previously unpublished articles of interest to the Ethiopian legal community.

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

*Darryl Vhugen***

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

poor.⁸

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

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

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

II. Background

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

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

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

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

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

A. Factors Driving Large-scale Land Investment Projects

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

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

10. McLure, *supra* note 6.

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

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

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

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

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

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

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

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

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

16. *Id.* at 57-59.

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

18. McLure, *supra* note 6.

increase in land values over time.¹⁹

B. Who Are the Investors?

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

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

C. Common Misconceptions Arising from Large Land Investments

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

1. There is Abundant “Empty” Land Available in Africa

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

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

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

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

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

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

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

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

Concepts such as “available,” “idle” or “waste” land, used to justify land allocations to investors, therefore need critical analysis. . . . In Ethiopia, for example, all land allocations recorded at the national investment promotion agency are classified as involving “wastelands” with no pre-existing users. But this formal classification is open to question, in a country with a population of about 75 million, the vast majority of whom live in rural areas. Evidence collected by in-country research suggests that at least some of the lands allocated to investors in the Benishangul Gumuz and Afar regions were previously being used for shifting cultivation and dry-season grazing, respectively. . . .

In other words, concepts such as “idle” land often reflect an assessment of the *productivity* rather than *existence* of resource uses: these terms are often applied not to unoccupied lands, but to lands used in ways that are not perceived as “productive” by government. . . . Low-productivity uses may still play a crucial role in local livelihood and food security strategies.²⁵

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

2. All Large-Scale Land Investments Are Actually “Land Grabs” that Violate Host Country Laws

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

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

24. TAYLOR & BENDING, *supra* note 3, at 7.

25. COTULA ET AL., *supra* note 2, at 62.

26. TAYLOR & BENDING, *supra* note 3, at 6-7.

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

3. In Developing Countries, Large Farms Are More Efficient than Smallholder Farms

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

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

D. Large-scale Land Investment in Ethiopia

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

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

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

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

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

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

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

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

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

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

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

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

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

33. *Id.*

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

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

36. LUCIE WEISSLEDER, ECOFAIR TRADE DIALOGUE DISCUSSION PAPER NO. 12, FOREIGN DIRECT INVESTMENT IN THE AGRICULTURAL SECTOR IN ETHIOPIA 13-14 (2009), available at http://www.boell.de/downloads/ecology/FDIs_Ethiopia_15_10_09_c_1.pdf.

37. *Id.* at 9-11.

the government is offering up vast chunks of fertile farmland to local and foreign investors at almost giveaway rates. By 2013, 3m hectares³⁸ of idle land is expected to have been allotted—equivalent to more than one fifth of the current land under cultivation in the country.³⁹

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

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

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

Other examples of recent large land investments in Ethiopia include:

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

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

39. Rice, *supra* note 6.

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

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

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

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

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

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

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

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

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

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

Unfortunately, there is insufficient evidence at this time to determine

46. McLure, *supra* note 6.

47. Andrew Rice, *supra* note 29.

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

49. Andrew Rice, *supra* note 29.

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

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

52. Fitzgerald, *supra* note 34.

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

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

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

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

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

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

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

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

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

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

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

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

56. TAYLOR & BENDING, *supra* note 3, at 1; COTULA ET AL., *supra* note 2, at 5-6; HARALAMBOUS ET AL., *supra* note 54, at 6-8; MICHEL MERLET & CLARA JAMART, COMMERCIAL PRESSURES ON LAND WORLDWIDE: ISSUES AND CONCEPTUAL FRAMEWORK FOR ILC STUDY 5 (2009), available at http://www.landcoalition.org/pdf/09_05_Conceptual_framework_ENG.pdf.

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

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

59. *Id.*

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

stability of the investment project but the government itself.⁶¹

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

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

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

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

A. *Land Tenure Defined*

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

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

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

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

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

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

“Land tenure,” simply put, is the relationship between people and land. That relationship is typically defined in terms of various “land rights” such as rights relating to possession, exclusion, use, transfer and enjoyment.

...

“Land tenure security” exists when an individual or group can confidently enjoy rights to a specific piece of land on a long-term basis, protected from dispossession by outside sources, and with the ability to reap the benefits of investments in the land, at least through use and, probably desirably in most settings, also through transfer of the land rights to others.⁶⁶

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

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

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

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

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

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

67. *Id.* at 26-27.

grazing).⁶⁸

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

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

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

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

C. Land Tenure in Ethiopia

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

68. *Id.* at 27-28.

69. *Id.* at 28.

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

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

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

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

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

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

1. Land Law

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

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

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

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

77. *Id.* at 6.

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

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

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

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

Proclamation 89/1997 was superseded in July 2005 by Proclamation 456/2005.⁸⁸ This law includes a modest strengthening of landholders' rights while maintaining federal ownership of rural land. It allows for the lease and exchange of land, within strict limits, and confirms the right of inter-generational tenure transfer.⁸⁹ All of these rights are to be assured through land certificates issued by the government.⁹⁰

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

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

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

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

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

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

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

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

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

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

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

90. *Id.* art. 6.

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

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

2. Land Policy

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

These land titling projects supported the government’s poverty reduction strategy, known as the Plan for Accelerated and Sustained Development to End Poverty (“PASDEP”). One of PASDEP’s goals was to issue land certificates to 13 million landholders in the period 2006-2010.⁹⁴ By September 2010, more than 6.3 million land certificates had been issued.⁹⁵

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

92. *Id.* at 13, 16.

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

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

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

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

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

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

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

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

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

Post_compact_Investment_Plan_(PIF)_0.pdf.

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

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

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

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

100. McLure, *supra* note 6.

101. *Id.*

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

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

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

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

A. The Development of Principles and Guidelines

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

102. Andrew Rice, *supra* note 29.

103. *Id.*

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

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

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

B. General Principles Applicable to Land Investments

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

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

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

106. *FAO Principles*, *supra* note 4.

and do not increase vulnerability.

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

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

C. Corporate Social Responsibility Principles

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

V. Guidelines to Get to Win-Win-Win

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

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

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

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

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

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

A. Recommendations for Governments

Overall, host country governments should seek to maximize economic benefits (including public revenues and nonrevenue benefits such as job creation) while minimizing the negative impacts (such as land takings or resource degradation) on the lives of those affected by large-scale investments. The key is to attract investments that are consistent with recognized principles of sustainable development¹¹¹ and create a reasonable balance between the interests of all parties. Acting in accordance with the following specific recommendations can help achieve these goals.

1. Strengthen the Overall Legal Framework

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

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

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

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

2. Conduct Land Tenure Impact Assessments

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

3. Conduct Community Impact Assessments

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

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

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

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

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

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

Strategies may include the involvement of smallholders through locally appropriate out-grower schemes, joint ventures, or other collaborative production models. Such components are designed to ensure that a larger portion of the value chain can be captured by the local communities (such as by the building of local processing plants). They also generate local employment, technology transfer, and creation of infrastructure. Many experts favor contract farming¹¹³ as part of a win-win approach. Another option is investing in existing domestic agribusinesses, as the government of Qatar has done in Ethiopia.¹¹⁴

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

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

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

7. Protect Food Security

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

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

114. Andrew Rice, *supra* note 29.

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

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

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

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

8. Insist on FPIC

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

9. Clearly Define Investor Obligations

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

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

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

10. Develop Transparent Investment Procedures

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

11. Ensure Effective Monitoring, Evaluation, and Dispute Resolution

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

B. Recommendations for Investors

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

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

1. Protect Land Rights

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

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

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

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

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

3. Have a Mutually Beneficial Exit Strategy

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

C. The Importance of Contracts

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

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

D. Recommendations for Civil Society

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

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

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

VI. Conclusion

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

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

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

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

RIGHTS OF CITIZENS AND FOREIGN INVESTORS TO AGRICULTURAL LAND UNDER THE LAND POLICY AND LAWS OF ETHIOPIA

*Sefanit Mekonnen **

I. Introduction

Foreign Direct Investment (“FDI”) in Ethiopian agriculture has increased significantly in the last few years. This is attributable to the increasing interest of transnational companies in land investments, as well as the investor-friendly environment developed by the Ethiopian government through multiple reviews of national policy and legal frameworks.¹ The flow of investment and the acquisition of land by foreign investors pose both opportunities and threats for the country; hence, it is important for the Ethiopian government to devise and implement policy frameworks that maximize the opportunities and minimize the risks. This article aims to critically analyze the effectiveness of Ethiopia’s land and investment laws in safeguarding rural communities from the risks of agricultural FDI, with special attention to the increasing demand of transnational companies to invest in farmlands of developing countries.

II. Background to the Growing Demand for Land in Africa by Outside Investors

In the past few years, FDI in agricultural land of developing countries in general, and African countries in particular, has grown significantly.² In the period between 2005 and 2007, the overall yearly flow of FDI in Africa increased by nearly 80 percent, from US\$29 billion to US\$53 billion.³ In Ethiopia, FDI in the agricultural sector alone increased by around 600

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1. LUCIE WEISSLEDER, ECOFAIR TRADE DIALOGUE DISCUSSION PAPER No. 12, FOREIGN DIRECT INVESTMENT IN THE AGRICULTURAL SECTOR IN ETHIOPIA 10-18 (2009), *available at* http://www.boell.de/downloads/ecology/FDIs_Ethiopia_15_10_09_c_1.pdf.

2. GRAIN, BRIEFING, SEIZED: THE 2008 LAND GRAB FOR FOOD AND FINANCIAL SECURITY 2 (2008), *available at* www.grain.org/a/93.

3. WEISSLEDER, *supra* note 1, at 4.

percent between 2005 and 2008, reaching up to US\$3.5 billion per year.⁴ The global food and financial crises of 2008 contributed heavily to the rise in FDI in agricultural land of developing countries.⁵ The food crisis⁶ precipitated this sort of investment by triggering “food security” concerns in net food importing countries,⁷ motivating them to invest in other countries’ farmlands with the objective of outsourcing their domestic food production.⁸ The financial crisis, together with the expected increased value of food and land, encouraged agricultural FDI by broadening investors’ chances of making big profits out of such investments.⁹

The governments of many African countries have been welcoming foreign investors interested in their agricultural lands.¹⁰ Some African countries are even working hard to attract more FDI into the sector and to try to satisfy foreign investors’ demand for fertile agricultural land.¹¹ Ethiopia, for instance, has set policy frameworks to facilitate the creation of an investment-friendly environment in the country, providing incentives¹²

4. *Id.* at 10.

5. GRAIN, *supra* note 2, at 2-9.

6. When food prices increased in 2007/8, twenty-five food exporting countries put bans or restrictions on food exports so as to safeguard food security at home, exposing the vulnerabilities of food importing countries. *See* CARIN SMALLER & HOWARD MANN, INT’L INST. FOR SUSTAINABLE DEVELOPMENT, A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER 4 (2009), http://www.iisd.org/pdf/2009/thirst_for_distant_land.pdf.

7. Food importing countries include Bahrain, China, Egypt, India, Japan, Jordan, Kuwait, Libya, Malaysia, Qatar, South Korea, Saudi Arabia, and the United Arab Emirates. GRAIN, *supra* note 2, at 3.

8. *Id.* at 2.

9. *Id.* at 7-9.

10. “According to media reports, Sudan, Ethiopia, Madagascar, and Mozambique are among the key recipients of FDI in land in Africa.” LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 34 (2009), *available at* http://www.ifad.org/pub/land/land_grab.pdf.

11. DAVID HALLAM, INTERNATIONAL INVESTMENTS IN AGRICULTURAL PRODUCTION 4 (2009), <ftp://ftp.fao.org/docrep/fao/012/ak976e/ak976e00.pdf>.

12. Ethiopia has granted a five-year income tax exemption to all investors who engage in the production of agricultural products and export at least half (or supply 75 percent of their products to an exporter), extendable for up to seven years by the Investment Board “under special circumstances,” or even longer upon the decision of the Council of Ministers. An investor who exports less than 50 percent of his products is exempted from paying income tax for two years, extendable by five years. The government also frees such investors from paying customs duties while importing capital goods and construction materials that are necessary for establishing or upgrading their enterprises. Investors are allowed duty-free importation of spare parts and vehicles to be determined by the Investment Board depending on the type and nature of the investment. Council of Ministers Regulation to Amend the Investment Incentives and Investment Areas Reserved for Domestic Investors Reg. No. 146/2008, FEDERAL NEGARIT GAZETA, arts. 4, 5, 6, 8, 9.

and adopting mechanisms that enable foreign investors to easily lease agricultural land.¹³

The increased flow of agricultural FDI to African countries means that foreign investors' control of the continent's agricultural lands is also increasing. For example, over the period 2004-2009, foreign investors acquired a total of 2.49 million hectares¹⁴ of agricultural lands in five sub-Saharan African countries: Ethiopia, Ghana, Madagascar, Mali, and Sudan. Of these, 602,760 hectares were in Ethiopia.¹⁵ A study by Dessalegn Rahmato also indicates that close to a million hectares of Ethiopian land was transferred to foreign investors over the period 2003-2009, with an additional 500,000 hectares in the 2009-2010 period.¹⁶

GRAIN, a nongovernmental organization, describes the escalating acquisition of large-scale agricultural lands by foreigners, mainly in food-poor developing countries, as "land-grabbing."¹⁷ Such acquisitions are also sometimes described as "water grabs" when land is purchased or leased in order to obtain the water rights that come with it under domestic law or under the investment contract itself.¹⁸ Dessalegn defines global land grabbing as "the rush for commercial land in Africa and elsewhere by private and sovereign investors for the production and export of food crops as well as biofuels, in which the land deals involved stand to benefit the investors at the expense of host countries and their populations."¹⁹

Large-scale investment in African agricultural land by foreigners can bring opportunities and risks for African rural communities, the majority of whom are smallholder farmers. This sort of investment, if properly managed according to host countries' goals, could support agricultural development in host countries, for example, by creating employment opportunities and introducing new technology and know-how that boost productivity in the agricultural sector.²⁰ But such investment could also

13. WEISSLEDER, *supra* note 1, at 10-18.

14. This data does not include allocations below 1,000 hectares and pending land applications.

15. COTULA ET AL., *supra* note 10, at 41.

16. DESSALEGN RAHMATO, FORUM FOR SOC. STUDIES, LAND TO INVESTORS: LARGE-SCALE LAND TRANSFERS IN ETHIOPIA 12 (2011), *available at* http://www.landgovernance.org/system/files/Ethiopia_Rahmato_FSS_0.pdf.

17. GRAIN, *supra* note 2, at 1. "Land grabbing" is commonly used to describe the current upsurge in large-scale land deals, implying "accumulation of lands through illegal and/or illegitimate means." MICHAEL TAYLOR & TIM BENDING, INT'L LAND COALITION, INCREASING COMMERCIAL PRESSURE ON LAND: BUILDING A COORDINATED RESPONSE (2009).

18. SMALLER & MANN, *supra* note 6, at 3.

19. DESSALEGN, *supra* note 16, at 2.

20. S. HARALAMBOUS ET AL., INT'L FUND FOR AGRICULTURAL DEVELOPMENT [IFAD],

limit rural communities' access to agricultural land, displace them from the land on which they have built their livelihoods, expose them to food shortage problems, aggravate environmental problems through over-exploitation of land and water, and stimulate conflicts among rural communities.²¹ Therefore, host countries should follow approaches that enable them to maximize the opportunities and minimize the risks this sort of investment can bring for rural communities. Public policies play a key role in this respect.²²

III. Do Ethiopian Land Policy and Laws Protect Rural Communities from the Risks of Large-Scale Foreign Investment in Agriculture?

The remaining part of this article will analyze whether the land policy and laws of Ethiopia can protect farmers from the risks of agricultural FDI. Before that, however, we will briefly discuss the Ethiopian land policy and relevant laws.

A. General Overview of Ethiopian Land Policy and Laws

At present in Ethiopia, land is exclusively owned by the state.²³ When it proclaimed the ownership of land by the state in 1995, the Constitution also prohibited the sale or exchange of land.²⁴ Thus, the Constitution entitles people, both citizens and noncitizens of Ethiopia, only to land use rights.²⁵

Under the Constitution and the Rural Land Administration

THE GROWING DEMAND FOR LAND: RISKS AND OPPORTUNITIES FOR SMALLHOLDER FARMERS 8-9 (2009), <http://www.ifad.org/events/gc/32/roundtables/2.pdf>.

21. *Id.* at 6-8.

22. *Id.* at 9.

23. The government has indicated that the continuation of state ownership is in the interest of the poor as it allows a free plot of land for anyone who wishes to farm. *See* KLAUS DEININGER ET AL., *TENURE SECURITY AND LAND-RELATED INVESTMENT: EVIDENCE FROM ETHIOPIA* 9 (2003).

24. CONSTITUTION, Art. 40(3) (1995) (Ethiopia).

25. The Constitution allows only the federal government to pass laws in relation to utilization and conservation of land resources, while the mandate to administer land is given to the regional states. These are responsible for drafting detailed laws that facilitate the implementation of federal laws on land utilization and conservation. However, recently, the mandate to allocate land parcels larger than 5,000 hectares was transferred from the regional states to the Federal Ministry of Agriculture and Rural Development by delegation. *See* CONSTITUTION, Arts. 51(5), 52(2)(d) (1995).

Proclamation, peasants²⁶ and pastoralists²⁷ are entitled to access private as well as communal²⁸ land for free.²⁹ After gaining access, peasants and pastoralists can exercise use rights over their land for an unlimited period of time.³⁰ They can also transfer their land use rights to family members, either by inheritance or in the form of donation.³¹ Each holder of rural land is entitled to a land-holding certificate that indicates (among other things) the plot size, land use type and cover, level of fertility, and borders.³² Those who are given holding certificates can lease their land to other farmers or investors for a period to be determined by the land administration and land use laws of the respective regional states.³³ Peasants and pastoralists have a right not to be displaced from their lands except when the government requires the land for a “public purpose.”³⁴ When farmers’ land is required for a public purpose, the government must give advance written notice to the farmers, indicating the time when the land must be vacated and the amount of compensation to be paid.³⁵ In such cases, farmers will be compensated for the developments they have made on the land and for property acquired, or will be given another piece of land in substitute.³⁶

Private investors in general and foreign investors in particular may acquire land use rights in Ethiopia on the basis of legally allowed payment arrangements.³⁷ A foreign investor, as defined by the federal investment

26. A “peasant” is “a member of a rural community who has been given [a] rural land holding right and the livelihood of his family and himself is based on the income from the land.” Rural Land Administration and Land Use Proc. No. 456/2005, FEDERAL NEGARIT GAZETA, art. 2(7) [hereinafter Land Use Proc.].

27. A “pastoralist” is “a member of a rural community that raises cattle by holding rangeland and moving from one place to the other, and the livelihood of himself and his family is based on mainly on [sic] the produce from cattle.” *Id.* art. 2(8).

28. Communal land is allotted “by the government to local residents for common grazing, forestry and other social services.” *Id.* art. 2(12).

29. CONSTITUTION, Art. 40(4-5) (1995).

30. Land Use Proc., *supra* note 26, art. 7(1).

31. *Id.* arts. 8(5), 5(2).

32. *Id.* art. 6(3).

33. *Id.* art. 8(1).

34. *Id.* arts. 40(4-5), 40(8).

35. Expropriation of Landholdings for Public Purposes and Payment of Compensation Proc. No. 455/2005, FEDERAL NEGARIT GAZETA, art. 4(1) [hereinafter Expropriation Proc.].

36. If farmers are dispossessed by the federal government, the rate of compensation will be determined based on federal law; when the dispossession is by regional governments, compensation will be based on regional laws. *Id.* art. 7(3).

37. CONSTITUTION, Art. 40(6), (1995); Land Use Proc., *supra* note 26, art. 5(4)(a). A foreign investor who wants to engage in the Ethiopian agricultural sector should first get an investment permit before seeking to obtain land. *See* Investment Proc. No. 280/2002,

law, includes “a foreign[er] or enterprise owned by foreign nationals, having invested foreign capital in Ethiopia.”³⁸ Foreign investors who acquire land can transfer their land use rights to family members by inheritance.³⁹ They can also present their land use rights as collateral, unlike the peasants, semi-pastoral and pastoral farmers.⁴⁰ Once they obtain land, investors have a right not to be displaced until their lease contract expires, even if the land is required for a public purpose, unless the land is required for development activities to be undertaken by government.⁴¹ Investors can exercise the above rights so long as such exercise does not prejudice the land-holding rights of farmers or the land ownership rights of the state.⁴²

From the brief discussion above, readers may conclude that farmers in Ethiopia are fully protected from the risks of agricultural FDI. However, a critical analysis of the policy and laws in the section below suggests the contrary.

B. Critical Analysis

At present, acquisition of agricultural land in Ethiopia is less difficult for foreign investors than for regular Ethiopians.⁴³ Since the government has allowed investors to easily obtain agricultural land, many foreigners now hold large-scale agricultural lands in different regions of the country, with many others in process.⁴⁴ The lands that are transferred to foreign investors are larger in size than the lands acquired by Ethiopian investors.⁴⁵ It is expected that, by 2013, 3 million hectares of land (equal to more than one fifth of the country’s land under cultivation currently) will be allocated to foreigners.⁴⁶

At the same time, many Ethiopian peasants and semi-pastoralists have

FEDERAL NEGARIT GAZETA, arts. 12-15.

38. Investment Proc., *supra* note 37, art. 6.

39. Land Use Proc., *supra* note 26, art. 8(5).

40. *Id.* art. 8(4).

41. Expropriation Proc., *supra* note 35, art. 3(2).

42. CONSTITUTION, Art. 40(6) (1995); Land Use Proc., *supra* note 26, art. 5(4)(a).

43. DESSALEGN, *supra* note 16, at 2.

44. *Id.* at 12.

45. *Id.*

46. Xan Rice, *Ethiopia – Country of the Silver Sickle – Offers Land Dirt Cheap to Farming Giants*, GUARDIAN, Jan. 15, 2010, available at www.guardian.co.uk/world/2010/jan/15/ethiopia-sells-land-farming-giants.

only small plots of agricultural land, or none at all.⁴⁷ Research indicates that many young people in rural areas of the country work on farmlands of other people due to their inability to get access to farmland.⁴⁸ Inability to obtain farmland may also be a contributing factor for migration of people from rural to urban areas.⁴⁹

Though Article 40(6) of the Constitution is capable, theoretically, of protecting Ethiopian farmers from the risk FDI poses to their access to land,⁵⁰ it has not been actually protecting them. Allocating large-scale agricultural lands to foreign investors before first satisfying Ethiopian farmers' demand for agricultural land is contrary to the above constitutional provision, as well as the provision of the Rural Land Administration Proclamation requiring the government to give land allocation priority to farmers over private investors, both foreign and domestic.⁵¹ The concentration of lands acquired by investors in areas close to fresh water and markets is another indicator that priority is actually being given to foreign investors over local farmers.⁵² Priority should be given to farmers in such areas, because the law requires it and because it is more difficult for smallholder farmers to get water from distant areas and transport their products to market.

In addition to these priority issues, some of the lands that have been allocated to foreign investors were previously being used by farmers.⁵³ In other words, farmers have been evicted from their land so that it can be

47. The majority of peasants and semipastoral farmers in Ethiopia produce agricultural products on small pieces of land. In the year 2000, for example, 87.4 percent of rural households cultivated lands of less than 2 hectares, 64.5 percent cultivated lands of less than 1 hectare, and 40.6 percent cultivated lands equal to or less than 0.5 hectare. SAMUEL GEBRESELAASSIE, *FUTURE AGRICULTURES, LAND, LAND POLICY AND SMALLHOLDER AGRICULTURE IN ETHIOPIA 1* (2006), http://www.future-agricultures.org/pdf%20files/Briefing_land_policy_ethiopia.pdf.

48. FELEKE TADELE ET AL., *MIGRATION AND RURAL-URBAN LINKAGES IN ETHIOPIA: CASE STUDIES OF FIVE RURAL AND TWO URBAN SITES IN ADDIS ABABA, AMHARA, OROMIA AND SNNP REGIONS AND IMPLICATIONS FOR POLICY AND DEVELOPMENT PRACTICE* 29-42 (2006) available at http://www.wed-ethiopia.org/docs/Migration_160606_nopics.pdf.

49. *Id.*

50. The provision states, "Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law." CONSTITUTION, Art. 40(6) (1995).

51. Land Use Proc., *supra* note 26, art. 5(4)(a).

52. COTULA ET AL., *supra* note 10, at 43-47. A study conducted by the Oakland Institute also indicates that Ethiopian lands leased by investors are located "near major water sources" and "adjacent to road networks." OAKLAND INSTITUTE, *UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: COUNTRY REPORT: ETHIOPIA* 26 (2011).

53. COTULA ET AL., *supra* note 10, at 60, 90. See also DESSALEGN, *supra* note 16, at 5; OAKLAND INSTITUTE, *supra* note 52, at 1.

allocated to foreign investors. The law giving farmers a right not to be displaced except when their land is required for a public purpose cannot prevent these evictions, because the government defines “public purpose” broadly to include the engagement of foreign investors in agricultural activity.⁵⁴ The law also allows concerned government organs to use police to evict farmers who refuse to hand over their lands.⁵⁵ Furthermore, the absence of legal grounds to oppose land expropriations that are not in the interest of the public has provided space to arbitrarily expropriate farmers’ lands without any fear of legal action.

Though the government states that the lands allocated to foreign investors are “unused,” this claim is belied by the smallness of the farm plots of more than 85 percent of rural households, as well as the existence of many landless people in the rural areas of different regional states. The small size of lands cultivated by the majority of Ethiopian farmers is one of the factors contributing to low agricultural productivity and food shortages in the country.⁵⁶ The average farm size in Ethiopia generates only about 50 percent of the minimum income required for an average farm household to lead a life out of poverty.⁵⁷ If “unused” lands are available in the country, why not distribute them to the country’s citizens who have no or little land and are dependent on foreign aid for their food?⁵⁸ Even if unused land is available in the country, the allocation of large-scale agricultural land to foreign investors may still displace local farmers, since investors’ demand for land focuses on “higher value lands”⁵⁹ which are most likely being used by local farmers.⁶⁰

The land policy and laws of Ethiopia, as they exist now, do not

54. “‘Public purpose’ means the use of [land] defined as such by the decision of the appropriate body in conformity with [an] urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.” Expropriation of Landholdings for Public Purposes and Payment of Compensation Proc. No. 455/2005, FEDERAL NEGARIT GAZETA, art. 2(5).

55. *Id.* art. 4(5).

56. This is because it is difficult to employ advanced agricultural methods that enhance productivity on small-sized farm plots.

57. SAMUEL, *supra* note 47.

58. More than 45% of the Ethiopian population is food insecure. See FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA FOOD SECURITY COORDINATION BUREAU, FOOD SECURITY PROGRAMME: MONITORING AND EVALUATION PLAN i (2004), available at www.worldbank.org/afr/padi/M%26E_Plan.pdf.

59. “Higher value lands” include “those with greater irrigation potential or proximity to markets.” LORENZO COTULA & SONJA VERMEULEN, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, “LAND GRABS” IN AFRICA: CAN THE DEALS WORK FOR DEVELOPMENT? 2 (2009), <http://pubs.iied.org/pdfs/17069IIED.pdf>.

60. COTULA ET AL., *supra* note 10, at 62.

provide adequate protection to smallholder farmers from the biggest danger of agricultural FDI: displacing rural communities from the land on which they have built their livelihoods. The discussion above also shows that this sort of investment is being promoted while citizens' access to agricultural land is limited and farmers are being displaced from their lands. This has various impacts on the displaced farmers and their families, other smallholder farmers, and the food security and independence of the country.

1. Impact on Displaced Farmers and Their Families

As indicated above, the allocation of large-scale land to foreign investors may displace farmers from the lands on which they and their families depend for food and income. This can cause impoverishment and hunger for the farmers and their families. As food prices escalate, the compensation they obtain from the government may not be enough to enable them to buy sufficient food.⁶¹ In regions where land-holding certificates have not been issued, farmers who have been evicted from their lands have faced difficulties in obtaining any compensation.⁶² The loss of land also prevents traditional forms of land use for subsistence purposes, such as grazing animals and gathering fuel wood and medicinal plants.⁶³ Loss of land may force farmers to break the long-term social and historical attachments they have with the land.⁶⁴

Ethiopian law does not provide farmers who are evicted from their private lands adequate compensation for all the harms they may suffer as the result of their displacement. Such farmers will be compensated only for the "permanent improvements" they have made on the land, the property situated on the land, and the income they would have generated had they not been displaced.⁶⁵ The amount of compensation for the latter is equal to ten times the average annual income the farmers earned during the five years before the expropriation.⁶⁶ Subject to the availability of lands, the government may also give substitute land (along with a smaller amount of money) to the farmers.⁶⁷ This could go against the farmers' interests, as the law says nothing about the location of the land to be given as a substitute.

61. Many holders whose land has been alienated have complained that the compensation has been unfair and inadequate. See DESSALEGN, *supra* note 16, at 6.

62. See OAKLAND INSTITUTE, *supra* note 52, at 1.

63. See COTULA & VERMEULEN, *supra* note 59.

64. COTULA ET AL., *supra* note 10, at 90; OAKLAND INSTITUTE, *supra* note 52, at 38.

65. Expropriation of Landholdings for Public Purposes and Payment of Compensation Proc. No. 455/2005, FEDERAL NEGARIT GAZETA, arts. 7(1), 8(1).

66. *Id.* art. 8(1).

67. *Id.* art. 8(3).

In the absence of such specifications, the farmers might end up receiving land in a remote area where infrastructure is poor and/or public services are absent. The law does not provide any compensation to farmers from whom the right to use communal land is taken away and given to foreign investors.

Displaced farmers cannot buy farmland, as land cannot be sold or bought in Ethiopia, and job opportunities in the country are few, especially for farmers, the majority of whom are illiterate. Thus, after being displaced from their lands, farmers may have no choice other than to look for jobs on the farms of foreign investors to whom their land has been given. The absence of better alternative for farmers may allow investors to exploit the farmers' labor for low wages, as Ethiopia lacks labor legislation that is specifically designed to regulate employment relationship in agriculture businesses. Currently, the labor law of the country, Proclamation 377/2003, is being applied to govern the employment relationship between foreign investors in agriculture and their employees. However, the activities, environment, and working conditions of farm employees necessitate the promulgation of separate legislation to regulate employment relationships in agriculture.

2. Impact on Other Farmers

Foreigners' production of agricultural products that are also produced by Ethiopian smallholder farmers is sometimes disadvantageous for the latter. For example, Chinese investors recently acquired land in Ethiopia for the purpose of producing sesame.⁶⁸ The Chinese investors' production of sesame could decrease the need for Ethiopian sesame in China, especially if the investors can produce enough to fully or partially satisfy China's needs. This is especially disadvantageous for smallholder farmers, because it is likely to push the price of Ethiopian sesame down.⁶⁹

3. Impact on Food Security and National Sovereignty

Allocating land to foreign investors in a country dependent on foreign aid for food (and with a growing population)⁷⁰ might aggravate food shortage problems by decreasing the number of farmers producing food for domestic consumption. The production of food by foreign investors in Ethiopia does not guarantee the availability of food in the country's

68. GENET MERSHA, INTERNATIONAL AGRICULTURAL LAND DEALS AWARD ETHIOPIAN VIRGIN LANDS TO FOREIGN COMPANIES 12-13 (2009), *available at* <http://farmlandgrab.org/6843>.

69. *Id.*

70. The population of Ethiopia is expected to increase by more than 2 percent every year through 2025. U.N. DEP'T OF ECON. AND SOC. AFFAIRS, POPULATION DIV., WORLD URBANIZATION PROSPECTS: THE 2007 REVISION (HIGHLIGHTS) 135 (2007).

markets, because foreign companies are producing food either to ensure food security in their respective home countries or to generate high profits by exporting their products to different countries. To further aggravate the food security problem that might arise with the allocation of smallholder farmers' land to foreign investors, the investment law of Ethiopia encourages foreign investors to export the maximum possible amount of agricultural products produced in Ethiopia.⁷¹ If more and more lands are allocated to foreign investors, it could become difficult for the majority of the poor to feed themselves, as food will not be available to them for an affordable price, and the country could become dependent on foreign investors for food.

Adding to this problem, most of the planned investment projects are not operational. The great majority of investors who have obtained Ethiopian land have held the land idle. For example, one report indicates that only 5 percent of the lease areas awarded in the Benishangul region are currently being developed.⁷²

IV. Conclusion and Recommendations

The laws of Ethiopia, as they exist now, cannot safeguard farmers from losing their land. The constitutional provision ordering land allocation to investors to be made in a manner that does not limit rural communities' access to farmland is not being observed. The amount of compensation provided under the law for displaced farmers is not adequate, and displaced farmers without land-holding certificates are facing difficulties obtaining compensation (at least until the government verifies that they were holding the land previously). Furthermore, farmers are not getting compensation for the communal land expropriated from them. Though the food shortage problem in the country is not yet solved, the investment law encourages investors to export the maximum possible amount of their agricultural products. There are no strong laws to force investors to begin their operations in a reasonably short period of time; hence, lands which could otherwise have been cultivated are left idle, worsening the food shortage.

An investment that risks the livelihoods of rural farmers, who account for more than 80 percent of the rural households of Ethiopia, would bring more harm than benefit to the country's people. In a period when

71. See Council of Ministers Regulations on Investment Incentives and Investment Areas Reserved for Domestic Investors Reg. No. 84/2003, FEDERAL NEGARIT GAZETA, art. 4.

72. See OAKLAND INSTITUTE, *supra* note 52, at 19.

governments of many countries are demanding farmlands overseas to meet the food needs of their citizens, the least Ethiopia can do for its poor citizens is to let them use the farmland available in their own country without fear of losing it. For these reasons, this article recommends the following:

- 1) Article 40 of the Constitution should be taken into consideration when allocating land to investors. The government should satisfy citizens' demand for rural farmland before allocating land to foreign investors. Lands close to water sources and markets should be allocated to smallholder farmers before investors, as the latter are in a better position to find water sources and transport their products to market.
- 2) Article 2(5) of the Expropriation of Landholdings Proclamation (No. 455/2005) should be amended to redefine "public purpose" in a way that does not include expropriation of land for the purpose of allocating it to agricultural investors.
- 3) Strong legal measures and continuous follow-up mechanisms should be in place to force investors to begin operations in the shortest possible period of time after receiving land from the government.
- 4) Article 4 of the Investment Incentives Regulation (No. 84/2003), encouraging investors to export the maximum possible agricultural products, should be reviewed; investors should be given incentives to contribute to the reduction or elimination of food shortages by making their products available in local markets for a reasonable price.
- 5) Laws that specifically regulate employment relationships in agricultural businesses should be enacted.
- 6) Land-holding certificates should be issued to peasants and pastoralists who have not yet received them.

THE ETHIOPIAN ENVIRONMENTAL REGIME VERSUS INTERNATIONAL STANDARDS: POLICY, LEGAL, AND INSTITUTIONAL FRAMEWORKS

*Mulugeta Getu**

I. Introduction

Today, perhaps more than ever, the international community thinks and speaks the same language when it comes to protecting the planet from environmental degradation. Media outlets carry constant reports about environmental problems confronting the international community, such as climate change, desertification, threats to biodiversity, hazardous waste, and dwindling fish stocks, along with “pledges by the leaders of various states to do something about them.”¹ With the growth of global public concern about environmental issues over the last several decades, environmental legal norms have become increasingly internationalized and sophisticated in both national and international legal systems.² The result is “the emergence of a set of legal principles and norms regarding the environment, such that one can arguably describe it as a body of law.”³ At the national level, most jurisdictions now have environmental protection policies, laws, government departments, and independent agencies and public interest groups dedicated to environmental protection.

This article will try to analyze those national and international environmental legal regimes. Section II briefly looks at the development of international environmental protection regimes and the basic policies, values, and principles of the environmental movement. Section III will examine the important provisions of the Ethiopian Constitution, the

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1. DONALD K. ANTON, UNIVERSITY OF MICHIGAN LAW SCHOOL PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES, WORKING PAPER NO. 118, A BEGINNER’S GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW 10 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138463.

2. Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 *ECOLOGICAL L. Q.* 615, 615 (2009).

3. *Id.*

Environmental Policy of Ethiopia, and other government documents and compare them with widely accepted international standards. Finally, Section IV will provide concluding remarks and recommendations on how to improve Ethiopia's legal and institutional frameworks to best protect, preserve, restore, and sustainably use the natural environment.

II. International Environmental Laws and Institutions

A. History

The development of international environmental law, a relatively new addition to the corpus of international law, can be directly attributed to two factors: “(1) an enhanced awareness that the global environment is fragile, global environmental problems are immense, and human activities are damaging the environment at an accelerated pace; and (2) a growing realization that without concerted national, regional and international action the planet will continue to suffer further environmental degradation.”⁴ In addition, advances in science and technology⁵ and recent efforts at linking international environmental law with international trade law have helped us understand and appreciate the nature and scope of the challenge, and further tuned the regime.⁶

Historically speaking, perspectives on the importance of international environmental law have passed through three stages.⁷ At the first stage (late 19th century), laws were based on humankind's immediate self-interest and aimed at maximizing nature's resources in view of their exploitation.⁸ In the second stage of development (1970s), an intergenerational dimension of environmental instruments appeared to

4. Ved P. Nanda, *International Environmental Law and International Business Ventures*, in INTERNATIONAL ENVIRONMENTAL LAW FOR NATURAL RESOURCES PRACTITIONERS 4-1 30 (Rocky Mountain Mineral Law Foundation ed. 1997).

5. “Scientific uncertainties” have been the biggest challenges in almost all international environmental negotiations. But the precautionary principle advocates for prompt and proactive action even before scientific certainty exists. This is helping the ozone layer and climate change regimes, among others, to succeed. *Id.*

6. *Id.* Many recent environmental regimes do not seek to provide for rights and obligations, but rather to secure better compliance procedures and trade measures, or to integrate environmental policies with international trade.

7. Susan Emmenegger & Axel Tschentscher, *Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law*, 6 GEO. INT'L ENVTL. L. REV. 545, 552–68 (1994).

8. *Id.* This was intended to avoid conflict over resources. Early examples include agreements on rivers, exploitation of fish, and protection of migratory birds.

make the regime more complex.⁹ The contemporary and third phase of development brought a shift to a “non-anthropocentric paradigm and nature’s own right,” where the primary concern is ecological survival rather than human development or aspirations.¹⁰

Throughout these three stages, different international efforts have been made to develop the regime. Philippe Sands has categorized the evolution of international environmental law into four distinct periods.¹¹ The first (from the 19th century to 1945) was characterized by bilateral treaties addressing some components of the environment, and culminated with the establishment of the United Nations in 1945. During this stage, it was understood that exploitation of some natural resources (e.g., birds, fish, seals, rivers, and seas) requires limitation, as well as adoption of sound legal instruments.¹²

The second period was from 1945 to 1972. This period was generally characterized by the establishment of international environment-related institutions and the adoption of regional and global legal instruments addressing specific environmental subjects like wetlands, oil pollution, the marine environment, nuclear tests, and freshwater.¹³ In June 1972, the United Nations held the Stockholm Conference on the Human Environment, representing the first major international effort to comprehensively address worldwide environmental concerns and develop concrete action plans.¹⁴ The Conference adopted the celebrated Stockholm

9. *Id.* Before the 1970s, environmental resource protection was aimed at the needs of the existing generation. The 1970s saw the beginning of consideration of the interests of future generations.

10. *Id.* This is mostly advocated by biologists. Dr. Tewolde Berhan G. Egziabher, Director General of Ethiopia’s Environmental Protection Authority, has said that, as a biologist, he is uncomfortable with the eradication of the smallpox virus from the planet.

11. PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 25-69 (2d ed. 2003).

12. *Id.* Examples include the 1902 Convention to Protect Birds Useful to Agriculture, the 1900 Convention Destinée à Assurer la Conservation des Diverses Espèces Animales Vivant à l’Etat Sauvage en Afrique qui sont Utiles à l’Homme ou Inoffensive (seeking to ensure the conservation of wildlife in the African colonies of European states, including the use of trade restrictions on the export of certain skins and furs), and the 1909 Water Boundaries Treaty between the United States and Canada.

13. *Id.* at 33. Documents adopted during this period include the International Convention for the Prevention of Pollution of the Sea by Oil (May 12, 1954, 327 U.N.T.S. 3) and the Convention on Fishing and Conservation of Living Resources of the High Seas (Apr. 29, 1958, 559 U.N.T.S. 285). In addition, “[t]he United Nations Economic Commission for Europe promulgated harmonizing regulations on emissions from motor vehicles, and the Committee of Ministers of the Council of Europe adopted the first international act dealing with general aspects of air pollution.” *Id.* at 34.

14. See Nanda, *supra* note 4.

Declaration, comprising guiding principles that represent the first global consensus on the magnitude of the environmental problems that confront the world community,¹⁵ and an Action Plan for environmental management. Subsequently, the UN General Assembly established the United Nations Environment Programme (“UNEP”) to serve as a focal point for environmental action and coordination within the UN system, and to act as a catalyst for environmental action.¹⁶

Following the Stockholm Conference, the next twenty years witnessed the third period of evolution, during which the UN tried to coordinate actions on environmental issues. Many more international and regional treaties were adopted, and trading and consumption of some products were globally banned.¹⁷ In addition, large numbers of states enacted domestic environmental laws, and industrialized states began to provide technical and financial assistance to developing countries in their efforts to address environmental problems.¹⁸

The World Charter for Nature was adopted in 1982,¹⁹ followed in 1987 by the Report of the World Commission on Environment and Development (also known as the Brundtland Report, or *Our Common Future*), which reexamined environmental and development issues. The United Nations Conference on Environment and Development (“UNCED”), held in Rio de Janeiro in 1992 to mark the twentieth anniversary of the Stockholm Conference, inspired the negotiation, signing, and ratification of even more new conventions. Thus, UNCED adopted the Rio Declaration on Environment and Development,²⁰ Agenda 21 (a

15. The Stockholm Declaration contains 26 principles, an action plan consisting of 109 separate recommendations, and a resolution dealing with institutional and financial arrangements. Topics covered in the principles include Fundamental Human Rights, Management of Human Resources, The Relationship Between Development and the Environment, Planning and Demographic Policy, Science and Technology, State Responsibility, Respect for National Environmental Standards and the Need for State Cooperation, and The Threat of Nuclear Weapons to the Environment. Mark S. Blodgett et al., *A Primer On International Environmental Law: Sustainability as a Principle of International Law and Custom*, 15 ILSA J. Int'l & Comp. L. 15, 18-23 (2008).

16. G.A. Res. 2997, 27 U.N. GAOR, Supp. No. 30, at 43, U.N. Doc. A/8730 (1972). See also Nanda, *supra* note 4.

17. See SANDS, *supra* note 11, at 41.

18. See Nanda, *supra* note 4.

19. The 1982 World Charter for Nature is a nonbinding document adopted by the U.N. General Assembly that sets forth principles of conservation by which all human conduct affecting nature is to be guided and judged. It contains 25 principles. Blodgett et al., *supra* note 15, at 18; World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (Oct. 28, 1982).

20. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (vol. I) [hereinafter *Rio*

blueprint for managing the environment in the 21st century),²¹ the UN Framework Convention on Climate Change,²² the Convention on Biological Diversity,²³ and a statement of principles on forests.²⁴

The fourth and final stage (from 1992 to the present date) can be thought of as a period of integration of international environmental laws and an increased emphasis on compliance.²⁵ The 2002 Johannesburg Declaration (the result of the World Summit on Sustainable Development (“WSSD”) held in Johannesburg in September 2002) recognized environmental problems as a continued imperative issue and set a commitment for sustainable development. Environmental negotiations continue at different levels today, with a view toward creating better living environments and an emphasis on increased compliance with obligations.

The field of international environmental law, which is one of the most dynamic and growing fields of international law, is not, however, limited by these events.²⁶ By some estimates, there are more than 800 multilateral and bilateral agreements,²⁷ several key decisions by international tribunals and arbitral panels,²⁸ and also nonbinding “soft law” principles and concepts²⁹ comprising the

Declaration].

21. Agenda 21 sets the action plan for a global partnership for sustainable development. Agenda 21: Programme of Action for Sustainable Development, U.N. GAOR, 46th Sess., Agenda Item 21, U.N. Doc A/Conf.151/26 (1992) [hereinafter Agenda 21].

22. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter Climate Change Convention].

23. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter Biodiversity Convention].

24. Conference on Environment and Development, June 3-14, 1992, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. Doc. A/CONF.151/26 (vol. III).

25. SANDS, *supra* note 11, at 26, 50-51.

26. *See generally* BASIC DOCUMENTS ON INTERNATIONAL LAW AND THE ENVIRONMENT (P. Birnie & A. Boyle eds., 1995); Nanda, *supra* note 4; SANDS, *supra* note 11; PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT (1992).

27. *See* BASIC DOCUMENTS ON INTERNATIONAL LAW AND THE ENVIRONMENT, *supra* note 26, at xiii (Table of Major Treaties and Instruments). Between 1648 and 1978, more than 20,000 treaties of all varieties were concluded, filling more than 1,350 books. Their sheer volume demonstrates their importance in international relations.

28. Most famous among these are the Trail Smelter Arbitration (which found Canada responsible for environmental and agricultural damage in the United States caused by a Canadian smelter's sulfur dioxide emissions), the *River Oder* case (underlining the principle of due diligence in protecting the rights of other states in the international environmental arena), and the *Corfu Channel* case (promulgating the principle of equitable or reasonable utilization of shared resources). Blodgett et al., *supra* note 15, at 21-22.

29. *See generally* P. Dupuy, *Soft Law and the International Law of the Environment*, 12

international environmental law regime.³⁰ The following table shows only a few of the key environmental events and agreements that took place over the past century.

Major International Environmental Events and Agreements³¹

YEAR	AGREEMENT
1900	Convention for the Preservation of Animals, Birds and Fish in Africa
1909	International Congress for the Protection of Nature
1911	The North Pacific Fur Seal Treaty
1913	Consultative Commission of the International Protection of Nature
1940	Convention on Nature Protection and Wildlife Conservation in the Western Hemisphere
1946	International Convention for the Regulating of Whaling
1954	International Convention for the Prevention of Pollution of the Sea by Oil
1958	Convention on the High Seas (provisions on maritime pollution)
1959	Antarctic Treaty (banning weapons tests and dumping nuclear waste in the Antarctic)
1963	Partial Test Ban Treaty
1968	Biosphere Conference
1972	London Dumping Convention (ocean pollution)
1972	The UN Conference on the Human Environment (The Stockholm Conference)
1973	International Convention for the Prevention of Pollution from Ships
1975	Convention on International Trade in Endangered Species of Wild Fauna and Flora
1979	Geneva Convention on Long- Range Transboundary Air Pollution
1985	Vienna Convention for the Protection of the Ozone Layer
1987	Montreal Protocol on Substances that Deplete the Ozone Layer
1989	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
1992	UN Conference on Environment and Development (Rio Summit or Earth Summit)
1992	Convention on Biological Diversity

MICH. J. INT'L L. 420-35 (1991).

30. David Hunter, *The Role of Environmental Organizations in International Environmental Law*, in INTERNATIONAL ENVIRONMENTAL LAW FOR NATURAL RESOURCES PRACTITIONERS 5-1 21 (1997).

31. Taken from RICHARD J. PAYNE, GLOBAL ISSUES: POLITICS, ECONOMICS, AND CULTURE 257 (2007); see also Joeti L. Shrestha, International Environmental Law and Issues: A Report (March 7, 2008) (M.A. thesis, Lyceum of the Philippines University), <http://ssrn.com/abstract=1348442/>.

1992	UN Framework Convention on Climate Change
1994	UN Convention to Combat Desertification
1997	Kyoto Protocol to the UN Framework Convention on Climate Change
2001	Stockholm Convention on Persistent Organic Pollutants
2002	World Summit on Sustainable Development (Johannesburg Action Plan)

B. International Environmental Policies and Principles

The sources of international environmental law³² may be found in conventions and treaties, customary international laws,³³ general principles of law, judicial decisions and the writings of eminent scholars,³⁴ soft laws (declarations and resolutions), and *jus cogens*.³⁵ Within these sources, certain principles (emerging mainly from soft law instruments like declarations, international statements, and political resolutions) are starting to assert persuasive force and become standards by which to evaluate the effectiveness of environmental regimes.³⁶ Many of these principles are integrated into international treaties and national systems. As “soft law,” these principles are not binding on states unless they are incorporated into other binding instruments, but they have the following functions:

- a. Provide a framework for negotiating and implementing new or existing agreements;
- b. Provide rules of decision for resolving trans-boundary environmental disputes when there is no authoritative and binding source to resolve the dispute;
- c. Provide a framework for the development and convergence of national and sub-national environmental laws;
- d. Assist in the integration of international environmental law with other fields such as international trade and human rights;

32. See Anton, *supra* note 1; ALEXANDRE KISS & DINAH L. SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW 3-11 (2007), available at <http://ssrn.com/abstract=1013617/>.

33. See Viet Koester, *From Stockholm to Brundtland*, 20 ENV'TL POL'Y & L. 14, 17-18 (1990).

34. MAURICE SUNKIN ET AL., SOURCEBOOK ON ENVIRONMENTAL LAW 5 (2d ed. 2001).

35. *Jus cogens* is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

36. Yang & Percival, *supra* note 2, at 615.

- e. May be codified into a general covenant of international environmental law; and
- f. Are developing into (binding) customary international law.³⁷

Some of these principles governing international environmental relations are briefly discussed below.

1. State Sovereignty – recognizes states’ permanent sovereignty over the natural resources occurring within their territory. Accordingly, each state has the right to freely choose and develop its social, economic, and cultural systems.³⁸

2. Right to Development – addresses, principally, the claims of developing nations to control and enhance their own development, the right of all peoples to self-determination, and an individual’s right to enjoy a minimum quality of life.³⁹

3. Common Heritage of Humankind – recognizes resources outside of national jurisdiction like the high seas, the sea bed, Antarctica, outer space, and the outer atmosphere (e.g., ozone) as “global commons.” Accordingly, these resources should be exploited and managed in keeping with the principles of nonappropriation, international management, shared benefit, and peaceful purposes.⁴⁰

4. Common Concern of Humankind – holds that, due to the interdependent nature of ecology, humanity may have a collective interest in certain activities located wholly within state boundaries. Subjects like biodiversity and climate are considered to be common concerns of humankind, and states are expected to practice sound conservation and international

37. INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 469-471 (D. Hunter et al., eds., 2d ed. 2001).

38. See U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, prin. 21, U.N. Doc. A/Conf.48/14/Rev. 1 (1973) [hereinafter *Stockholm Declaration*]; *Rio Declaration*, *supra* note 20, prin. 2; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, 25 U.N. GAOR Supp. 18 122 (October 24, 1970).

39. See *Rio Declaration*, *supra* note 20, prin. 3; Declaration on the Right to Development, G.A. Res. 41/128, Annex, 41 U.N. GAOR Supp. No. 53 at 186, U.N. Doc. A/41/53 (Dec. 4, 1986); see also The Right to Development, G.A. Res. 55/108, U.N. Doc. A/RES/55/108 (March 13, 2001).

40. Several treaties have been signed to implement this principle, including the Convention Concerning the Protection of the World Cultural and Natural Heritage (Nov. 23, 1972, 1037 U.N.T.S. 151); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (January 27, 1967, 610 U.N.T.S. 205); Antarctic Treaty (Dec. 1, 1959, 402 U.N.T.S. 71); and Protocol on Environmental Protection to the Antarctic Treaty (Oct. 4, 1991, 30 I.L.M. 1455).

cooperation in these areas.⁴¹

5. Principle of Equity – refers to both *inter-generational equity* (the right of future generations to enjoy a fair share of Earth’s natural resources) and *intra-generational equity* (the right of all peoples within the current generation to enjoy fair access to resources). Hence, the principle requires natural resources to be exploited sustainably, avoiding any irreversible environmental damage.⁴²

6. Common but Differentiated Responsibilities – acknowledges that, while all states share a common responsibility to protect the environment and promote sustainable development, the nature of this responsibility will vary because of states’ different social, economic, and ecological situations. Equitable considerations require that developed countries bear more burdens in the protection of the environment than developing countries.⁴³

7. State Responsibility – holds states responsible for breaches of international duties assumed by consent, as well as all activities occurring within their jurisdiction.⁴⁴

8. Obligation Not to Cause Environmental Harm – obliges states not to cause harm to the interests of any other states. This principle is based on customary international law.⁴⁵

41. See Biodiversity Convention, *supra* note 23; Climate Change Convention, *supra* note 22; INT’L UNION FOR CONSERVATION OF NATURE, DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT (1995) [hereinafter IUCN COVENANT].

42. See *Stockholm Declaration*, *supra* note 38, prins. 1, 2; *Rio Declaration*, *supra* note 20, prin. 3; World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, U.N. Doc. A/42/427/Annex (Mar. 20, 1987); see also Historical Responsibility of States for the Preservation of Nature for Present and Future Generations, G.A. Res. 35/8, U.N. Doc. A/RES/35/8 (Oct. 30, 1980). Moreover, in the *Johannesburg Declaration on Sustainable Development*, states committed themselves to “building a humane, equitable and caring global society, cognizant of the need for human dignity for all.” (World Summit on Sustainable Development, Johannesburg, S. Afr., Sept. 2-4, 2002).

43. See *Rio Declaration*, *supra* note 20, prin. 7; Climate Change Convention, *supra* note 22, art. 3; Montreal Protocol on Substances that Deplete the Ozone Layer art. 5, Sept. 16, 1987, 1522 U.N.T.S. 3; Stockholm Convention on Persistent Organic Pollutants, Preamble, May 22, 2001, U.N. Doc. UNEP/POPS/CONF/2. This principle calls for developed states to provide financial and technical assistance and transfer of environmentally sound technologies to developing nations in order to help them protect the environment.

44. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration can be interpreted to support this principle. See also Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001); *Factory at Chorzow* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26); *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. Rep. 4 (Apr. 9).

45. See *Stockholm Declaration*, *supra* note 38, prin. 21; *Rio Declaration*, *supra* note 20,

9. The Principle of Pollution Prevention – similar to above, but emphasizes the need to anticipate environmental damage and act proactively to avoid or prevent it. This principle is based on the idea that environmental protection is best achieved by preventing environmental harm, rather than relying on remedies or compensation for such harm after it has occurred.⁴⁶

10. The Precautionary Principle – holds that incomplete scientific findings or lack of consensus regarding a particular threat should not prevent decision makers from taking anticipatory actions to prevent environmental harm. States should err on the side of caution, as scientific certainty often comes too late to design effective legal and policy responses to potential environmental threats.⁴⁷

11. The Polluter (or User) Pays Principle – holds that polluters and users of natural resources should bear the full environmental and social costs of their activities and internalize environmental externalities.⁴⁸

12. The Principle of Subsidiarity – proposes that decisions about the environment and resource utilization should be made at the lowest level of government or social organization where the issues can be effectively managed. This is presumed to increase consideration of local environmental conditions and the opinions of local people, who often bear the highest environmental cost of development decisions.⁴⁹

13. Good Neighborliness and the Duty to Cooperate – obliges states to cooperate with their neighbors, in accordance with binding international principles dating back 200 years.⁵⁰

prin. 2; Trail Smelter Arbitration, *supra* note 28; Corfu Channel, *supra* note 44; U.N. Environment Programme [UNEP], *Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States*, prin. 3 (1978); IUCN COVENANT, *supra* note 41, art.11.

46. See *Stockholm Declaration*, *supra* note 38, prin. 6; see also Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa art. 4(3)(f), Jan. 30, 1991, 30 I.L.M. 775 (requiring states to “strive to adopt and implement the preventive, precautionary approach to pollution problems”).

47. See, e.g., *Rio Declaration*, *supra* note 20, prin. 15; World Charter for Nature, *supra* note 19, prin. 11; Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, London, U.K., U.N. Doc. UNEP/OzL.Pro.2/3 (June 29, 1990).

48. *Rio Declaration*, *supra* note 20, prin. 16. See also Org. for Econ. Co-operation and Dev. [OECD], *Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies*, OECD Doc. C(72)128 (May 26, 1972); OECD, *Recommendation of the Council on the Implementation of the Polluter-Pays Principle*, OECD Doc. C(74)223 (Nov. 14, 1974).

49. See Agenda 21, *supra* note 21, para. 12.28, 12.37, and ch. 18.

50. See *Stockholm Declaration*, *supra* note 38, prin. 24; *Rio Declaration*, *supra* note 20,

14. Duties to Provide Prior Notification and to Consult in Good Faith – obliges states planning an activity to communicate all necessary information sufficiently in advance to potentially affected states so that the latter can prevent damage to their territories and consult with the acting state.⁵¹

15. Principle of Prior Informed Consent – requires prior consent from a state when another state wants to operate therein, and prior consent from indigenous communities about activities that affect them.⁵²

16. Duty to Assess Environmental Impacts – obliges states to undertake environmental impact assessments (“EIAs”) for proposed activities, and to integrate environmental issues into development planning.⁵³

17. Public Awareness and Participation – proposes that the public, affected communities, and nongovernmental actors should participate in environmental and developmental decisions that affect their interests or the interests they represent. This principle also includes the right of equal access to justice.^{54 55}

These principles may be subject to different interpretations as they are implemented. It is worth noting that the principles are not totally “soft law,” as many have found their way into binding treaties and conventions,

prin. 27. See also U.N. Charter art. 1, para. 3; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, 25 U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970).

51. See *Rio Declaration*, *supra* note 20, prin. 18, 19. See also OECD, *Recommendation of the Council on Principles Concerning Transfrontier Pollution*, OECD Doc. C(74)224 (Nov. 14, 1974); UNEP, *London Guidelines for the Exchange of Information on Chemicals in International Trade (Amended)*, Governing Council Decision 15/30, U.N. Doc. UNEP/GC. 15/12, Annex II, at 17 (May 25, 1989).

52. See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal art. 6(4), Mar. 22, 1989, 1673 U.N.T.S. 126; Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade [Rotterdam Convention], Sept. 10, 1998, 38 I.L.M. 1 (1999); Biodiversity Convention, *supra* note 23, art. 15(5); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

53. See *Rio Declaration*, *supra* note 20, prin. 17. See also Climate Change Convention, *supra* note 22, art. 4(1)(f); United Nations Convention on the Law of the Sea art. 206, Dec. 10, 1982, 1833 U.N.T.S. 397; World Charter for Nature, *supra* note 19, prin. 11(c).

54. *Rio Declaration*, *supra* note 20, prin. 10; Agenda 21, *supra* note 21, paras. 8, 23 (declaring that states must ensure broad public participation in initiatives for sustainable development, through access to information and access to justice); *Johannesburg Declaration*, *supra* note 42, para. 26 (“We recognize that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels.”).

55. These principles are discussed in INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 37, at 472-537. Other writers may use different categories or wordings to distinguish these principles.

or at least into customary international law. The following discussion will assess the extent to which these principles have influenced Ethiopian environmental frameworks.

III. Ethiopian Environmental Laws and Institutional Frameworks

A. Introduction

Ethiopia's urban environments are characterized by unplanned and unmanaged industrialization and urbanization, very high population, high density of housing and unplanned settlement, crowded market centers, poor infrastructure, and contamination from industrial effluents.⁵⁶ But rural areas suffer from more severe environmental problems like serious land degradation, loss of soil fertility, water pollution, and indoor air pollution.⁵⁷

1. Land – Soil erosion and degradation continue to be Ethiopia's most critical problems, despite soil and water conservation efforts throughout most mountainous parts of the country. According to European Commission Delegate Jonathan McKee, the core factors in this problem are lack of effective political commitment, lack of skilled government staff, population pressure, poor design and tenure problems, lack of a sense of ownership among farmers, and increased urbanization and industrialization.⁵⁸ Soil erosion has also been exacerbated by "[e]xtensive agricultural production . . . , the use of obsolete technology which is not environmentally friendly and overgrazing by the fast growing livestock population."⁵⁹

2. Water and Sanitation – Rural access to the water supply was estimated to be 34.5 percent at the end of 2005, according to a government report.⁶⁰

56. Fikremariam Tesfaye, *Ethiopia: Environmental Policy Implementation Still in Difficulty* – EPA, DAILY MONITOR (Ethiopia), March 13, 2009 (quoting Tekle Woldegerima, Deputy General Manager of the Addis Ababa Environmental Protection Authority), available at <http://allafrica.com/stories/200903130194.html>.

57. Most of these problems are common knowledge for ordinary Ethiopian citizens, but are briefly discussed here as background information. Writers who have explored these issues in depth include Jonathan McKee, an EC delegate to Ethiopia (JONATHAN MCKEE, EUROPEAN COMMISSION, ETHIOPIA: COUNTRY ENVIRONMENTAL PROFILE 17-48 (2007)) and Girma Kebede, an Ethiopian from Mount Holyoke College in the U.S., who describes the dreadful urban environmental situations in Ethiopia (GIRMA KEBEDE, LIVING WITH URBAN ENVIRONMENTAL HEALTH RISKS: THE CASE OF ETHIOPIA (2004)).

58. MCKEE, *supra* note 57.

59. MEDHIN ZEWDU, SUSTAINABLE DEVELOPMENT IN ETHIOPIA 6 (2002), available at www.worldsummit2002.org/texts/ethiopiaReport.rtf.

60. MINISTRY OF FINANCE AND ECONOMIC DEVELOPMENT (ETHIOPIA), A PLAN FOR

Moreover, the Ministry of Health (2006) has determined that fluoride contamination is a major problem, especially in the Rift Valley.⁶¹ Levels of water quality protection are very low from risks like sewers and latrines, animals, cracks in the pre-filters, and other pollutants. Despite recent efforts to promote hygiene and community mobilization, Ethiopia has the lowest level of sanitation coverage in the world—approximately 30 percent, with rural coverage estimated at only 7 percent.⁶² (A 2006 government report estimated coverage at 17.5 percent in rural and 50 percent in urban areas.)⁶³

3. Toxic Substances – Ethiopia is reported to be a toxic hotspot, with 2000 tons of obsolete pesticide deposits throughout the country.⁶⁴ This supply of inappropriate or surplus chemicals is the result of absent or incomplete labeling, lack of coordination between donors, and discrepancy between real and estimated needs. DDT especially has become a threat to human health due to losses, organized thefts from stock, and misuse by farmers.⁶⁵

4. Air – Emissions from vehicles (particularly older vehicles) and unregulated industry have caused a sharp decline in the air quality of the nation's capital.⁶⁶ Indoor air pollution is also a very serious issue, causing acute respiratory illnesses. The problem is especially severe for women and children due to household use of polluting traditional stoves and woody biomass (such as fuel wood, dung, and crop residues), which accounts for 95 percent of the energy supply.⁶⁷

5. Forests – The nation's forest cover has declined to only 4 percent of the total land area, despite a positive trend in recent years.⁶⁸ Causes include

ACCELERATED AND SUSTAINED DEVELOPMENT TO END POVERTY 127 (2005) [hereinafter PASDEP].

61. McKEE, *supra* note 57, at 20-23.

62. EMELIE DAHLBERG, ANDERS EKBOM, MENALE KASSIE, & MAHMUD YESUF, ETHIOPIA ENVIRONMENT AND CLIMATE ANALYSIS 6 (2008).

63. PASDEP, *supra* note 60, at 128.

64. According to the information obtained from the Ministry of Agriculture and Environmental Protection Authority, the existing 2,000 tons of wastes are awaiting shipment for its disposal in Europe. This is in addition to the 1,500 tons already disposed abroad.

65. With the cooperation of the U.N. Food and Agriculture Organization and other donors, the country has transported around 1,500 tons of obsolete pesticides for safe disposal or incineration. See McKEE, *supra* note 57, at 24. The Ministry of Health has currently prohibited the use of DDT for any purpose, though with stiff resistance from some parties having a large supply stock. Wudineh Zenebe, *Ethiopia: DDT Ban Forces Pesticide Co to Export Stockpile*, Addis Fortune, March 16, 2010, available at <http://allafrica.com/stories/201003160751.html>.

66. McKEE, *supra* note 57, at 24-26.

67. DAHLBERG, *supra* note 62, at 6.

68. This positive trend is partly due to the nationwide tree-planting campaign during the Ethiopian millennium and to natural regeneration practices, particularly in the northern part

population increase, unmanaged human activities, lack of a sense of ownership, government resettlement schemes, fire, and commercial farming.⁶⁹

6. Wetlands – The country’s wetlands (which are estimated to cover only 2 percent of the nation’s area) are threatened due to draining for agriculture, grazing, overexploitation, deforestation, siltation, soil erosion, land degradation, settlements, industrialization, and pollution.⁷⁰

7. Biodiversity – Ethiopia is one of the world’s most degraded biodiversity hotspots due to population increase, invasion of alien species, expansion of arable lands, and insufficient financial and political commitment. Parks, hunting areas, and wildlife reserve areas have been established throughout the country, but they are under severe threat.⁷¹

8. Natural and Cultural Heritage – Ethiopia’s rich natural and cultural heritage is threatened by neglect, decay, removal, and destruction, as well as the less visible and tangible impacts of changing sociocultural values, foreign ideas, and imported technologies.⁷²

Jonathan McKee has characterized the primary features of the Ethiopian environmental regime as the existence of established structures, institutions, and laws at the federal, regional, and sometimes *woreda* (district) and zonal levels; lack of capacity to effectively manage the environment; and donors’ inclination to mainstream environmental issues into the country’s major economic sectors without recognizing the urgency of Ethiopia’s environmental crisis.⁷³ Let us now take a look at Ethiopia’s cherished but toothless environmental legal frameworks.

B. The Constitution

Ethiopia’s Constitution incorporates a number of provisions relevant to the protection, sustainable use, and improvement of the country’s

of the country.

69. MCKEE, *supra* note 57, at 31-33.

70. *Id.* at 35.

71. Ethiopia is a center of origin for agricultural plant diversity (also called a Vavilovian center). However, loss of this genetic diversity is acute due to factors like “deforestation, expansion of investment activities, overgrazing, expansion of agricultural activities, poverty, and lack of appropriate policies that encourage conservation and management of biodiversity.” Medhin Zewdu, *supra* note 59, at 3, 6.

72. ENVIRONMENTAL POLICY OF ETHIOPIA 2 (1997), *available at* <http://www.epa.gov.et/Download/Proclamations/ENVIRONMENT%20POLICY%20OF%20ETHIOPIA.pdf> [hereinafter EPE].

73. MCKEE, *supra* note 57, at 10.

environment. Article 44 guarantees “the right to a clean and healthy environment,” while Article 43 pledges “the right . . . to sustainable development.”⁷⁴ Additionally, Articles 89 and 92 require national policy and government activities to be compatible with environmental health.⁷⁵ Article 89 further obliges the government to ensure sustainable development, work for the common benefit of the community, and promote the participation of the people, including women, in the creation of national development policies and programs. Moreover, according to Article 91, the government is duty-bound to protect and support cultures, traditions, natural endowments, and historical sites and objects.

The incorporation of these important provisions into the supreme law of the land has raised environmental issues to the level of fundamental human rights. However, effective implementation mechanisms (like laws, policies, and institutions) are needed to realize these rights. For example, the Constitution in many places underlines consultation and community participation as indispensable elements of development activities, but these still require subordinate legislation to put effective mechanisms in place. Such legislation should oblige government agencies to effectively reach out to the community, handle and respond to their concerns, communicate findings, and provide access to judicial review.

C. *Environmental Policy*

Like the Constitution, the Environmental Policy of Ethiopia (“EPE”)⁷⁶ prioritizes improving the well-being and quality of life of Ethiopians and the promotion of sustainable development.⁷⁷ One implementation strategy is the effective management of natural and environmental resources from the federal level down to the *woreda* and community levels. Another

74. CONSTITUTION, Arts. 43(1), 44(1) (1995) (Ethiopia).

75. Article 92(3) reads, “People have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly.”

76. The EPE was born out of the Conservation Strategy of Ethiopia (“CSE”) in 1997. CSE was initiated in 1989 and lasted 13 years, passing through three phases. “Phase I (1989-90) focused on identifying key environmental issues and developing a framework and process for the CSE. Phase II (1990-94) focused on developing an environmental policy, an institutional framework and an investment program. Phase III was devoted to the preparation of Regional Conservation Strategies (RCSs) in all regions.” Significant achievements of CSE include the formulation of EPE, establishment of the Environmental Protection Authority, building regional capacity, and pushing forward critical issues related to environmental protection and sustainable development. MCKEE, *supra* note 57, at 50-51.

77. EPE, *supra* note 72, sec. 2.1, at 3.

strategy envisaged within the Policy is to assign resource management to one organization and protection, regulation, and monitoring to another.⁷⁸

The EPE also discusses specific principles meant to guide development activities. Some of these are briefly discussed below, illuminating the links between international environmental principles and Ethiopian policy statements.⁷⁹

- a. Right to a Healthy Environment – as with the Constitution, the EPE guarantees every person’s right to live in a healthy environment.
- b. Community Participation and Decision-making – acquisition of power by communities to make their own decisions on matters affecting their lives and environment. Similar to the international *Principles of Subsidiarity, Public Awareness, and Participation*.
- c. Renewable and Nonrenewable Resources – use of renewable resources should be sustainable, while use of nonrenewable resources shall be minimized and, where possible, their availability should be extended (e.g., through recycling). This is the *Principle of Inter-Generational Equity*, and is related to the *Principle of Sustainable Use of Natural Resources*.
- d. Technology – adoption and dissemination of technologies that use resources efficiently, and support for communities and individuals to use and manage such technologies. This is also related to the *Principle of Sustainable Use of Natural Resources*.
- e. Precaution – “err on the side of caution when a compromise between short-term economic growth and long-term environmental protection is necessary,” this is the *Precautionary Principle*.
- f. Cost-Benefit Analysis – full environmental and social costs (or benefits forgone or lost) shall be incorporated into public and private sector planning, as well as accounting and pricing of resources. This is similar to the *Polluter (and User) Pays Principle*.
- g. Social Equity and Equality of Women – social equity shall be

78. The overall policy goal is to improve and enhance the health and quality of life of all Ethiopians and to promote sustainable social and economic development through the sound management and use of natural, human-made, and cultural resources and the environment as a whole so as to meet the needs of the present generation without compromising the ability of future generations to meet their own needs. *Id.*

79. This list is a summary of EPE, *supra* note 72, sec. 2.3, at 4-6. For easy reference and understanding, different provisions of the policy discussing related subjects have been included.

assured, particularly in resource use, and women shall be empowered and treated equally with men in all activities. This would be included in the *Principle of Intra-Generational Equity*.

- h. Environmental Assessment and Monitoring – regular, accurate assessment and monitoring of environmental conditions, along with publication of all data, in keeping with the *Duty to Assess Environmental Impacts*.
- i. Awareness and Information – increased awareness and understanding of environmental and resource issues, as in the *Principle of Public Awareness and Participation*.
- j. Land Security and Preservation of Species – uninterrupted access for people to their own land and resources, and recognition of other species’ right to exist. These are parts of the *Principle of Sustainable Use of Natural Resources*.

The EPE further stipulates detailed environmental policies for sectoral and cross-sectoral activities, together with implementation policies.⁸⁰ The original draft version, as an annex, also included draft interpretation guidelines, standards for specified industrial sectors, general standards for all other industrial effluents, standards for gaseous emissions, and standards for noise limits.⁸¹

In addition to the EPE, other sectoral policies have an indispensable role in the improvement of Ethiopia’s environmental quality. The Ethiopian Water Sector Policy⁸² and Ethiopian Water Sector Strategy⁸³ are good examples. The Water Policy provides specific policy directions for environmental and water resource protection and conservation; use and management of technology and engineering in the sector; water cost and

80. The sectoral matters for which detailed policies are described include soil husbandry and sustainable agriculture; forest, woodland, and tree resources; genetic, species, and ecosystem biodiversity; water, energy, and mineral resources; human settlement, urban development, and environmental health; control of hazardous materials and pollution from industrial wastes; atmospheric pollution and climate change; and cultural and natural heritage. Cross-sectoral matters include population, community participation, gender, environmental research, environmental education, environmental information systems, environmental economics, land use, and tenure and access rights to land and natural resources. EPE, *supra* note 72, at 6-25.

81. For some of these issues (e.g., industrial emissions), the Environmental Protection Authority issued binding standards late in 2008.

82. Ministry of Water Resources, Ethiopian Water Sector Policy (2001), <http://www.mowr.gov.et/> (click on “Download” to the left, then “1. Ethiopian Water Resources Management Policy”) [hereinafter Water Policy].

83. Ministry of Water Resources, Ethiopian Water Sector Strategy (2001), <http://www.mowr.gov.et/> (click on “Download” to the left, then “2. National Water Sector Strategy”) [hereinafter Water Strategy].

pricing; groundwater utilization; disaster, emergency, and public safety management; “equitable and reasonable” use of trans-boundary water; and participation of stakeholders in the sector.⁸⁴ The Water Strategy contains detailed guidelines for implementing the above policies, along with guidelines on the development of hydropower, guaranteeing water supply, sanitation, and exploitation of agricultural irrigation potentials.⁸⁵ These documents, on paper at least, try to strike a balance between resource development and conservation, but can have little effect without strong legislative and institutional regimes.

D. Environmental Laws

Many laws have been enacted and treaties adopted for the protection of different segments of the Ethiopian environment. Due to the large volume of these federal laws and treaties, this part will only list some of them instead of thoroughly discussing each one.⁸⁶

- a. Awash National Park Establishment Order No. 54/1969, Simien National Park Establishment Order No. 59/1970, and similar other establishment documents;
- b. Institute of Biodiversity Conservation and Research Establishment Proclamation No. 120/1998 (later renamed the Institute of Biodiversity Conservation by Proclamation No 381/2004);
- c. Water Resource Management Proclamation No. 197/2000;
- d. Public Health Proclamation No. 200/2000;
- e. Proclamation on the Establishment of Environmental Protection Organs No. 295/2002;
- f. Environmental Impact Assessment Proclamation No. 299/2002, Directive Issued to Determine Projects Subject to Environmental Impact Assessment (“EIA”) No. 2/ 2008, EIA Guideline Document (May 2000), EIA Procedural Guideline Series 1 (2003), Guideline Series Documents for Reviewing EIA Reports (2003), EIA Guidelines on Irrigation (2004) and on Pesticides (2004);
- g. Environmental Pollution Control Proclamation No. 300/2002, Regulation and Directives for Emission Standards of Selected

84. Water Policy, *supra* note 82, at 8-18.

85. Water Strategy, *supra* note 83, at 2-23.

86. Electronic copies of most of these laws are available on the websites of the House of Peoples’ Representatives (<http://www.ethiobar.net>) and Federal Supreme Court (<http://www.fsc.gov.et>), with printed copies available from Birhanena Selam Press. The laws are in order of issuance, from the earliest to the most recent.

- Industries (2008);
- h. Criminal Code of Ethiopia No. 414/2004 [penalizes pollution and related offenses];
 - i. Federal Rural Land Administration and Land Use Proclamation No. 456/2005;
 - j. Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006;
 - k. Solid Waste Management Proclamation No. 513/2007;
 - l. Development Conservation and Utilization of Wildlife Proclamation No. 541/2007;
 - m. Forest Conservation, Development and Utilization Proclamation No. 542/2007;
 - n. Radiation Protection Proclamation No. 571/2008;
 - o. Ethiopian Wildlife Development and Conservation Authority Establishment Proclamation No. 575/2008; and
 - p. Biosafety Proclamation No. 655/2009.

In addition to national laws, increasingly globalized environmental issues often require treaties to coordinate national efforts. These treaties are part of the Ethiopian environmental legal framework.⁸⁷ Between 1972 and the present, Ethiopia ratified many multilateral environmental agreements, including:

- The Convention on Biological Diversity;
- The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and Basel Ban Amendment;
- The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa;
- The International Treaty on Plant Genetic Resources for Food and Agriculture;
- The Convention on International Trade in Endangered Species of Wild Fauna and Flora;
- The United Nations Framework Convention on Climate Change and its Kyoto Protocol;
- The United Nations Convention to Combat Desertification in those

87. According to the Constitution, “All international agreements ratified by Ethiopia are an integral part of the law of the land.” Thus, there is no doubt that these environmental treaties are part of the national regime and can be effected by domestic laws, and the nation is duty-bound to observe the obligations assumed by such treaties. CONSTITUTION, Art. 9(4) (1995).

Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa;

- The Cartagena Protocol on Biosafety to the Convention on Biological Diversity;
- The Convention on Migratory Species and the African-Eurasian Waterbird Agreement;
- The Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer;
- The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and
- The Stockholm Convention on Persistent Organic Pollutants .

Administration of these treaties is, however, fragmented by various loosely coordinated federal sectoral offices. At the federal level, implementation of environmental treaties is the responsibility of the Environmental Protection Authority (“EPA”), the Ministry of Agriculture (“MoA”), the Ministry of Water and Energy, and the Ministry of Culture and Tourism.⁸⁸

E. Institutional Frameworks

Under the EPE, different agencies are assigned to “environmental and natural resource development and management activities on the one hand, and environmental protection, regulation and monitoring on the other.”⁸⁹ The EPA⁹⁰ is the leading federal environmental agency, with the objective of formulating policies, strategies, laws, and standards to ensure that social

88. Tewolde Berhan G/Egziabher, Director General of EPA, Lecture for Graduate Students of Alabama University: Global Trade and Environment and Issues of Particular Importance to Africa (May 7, 2009). EPA takes care of the UN Framework Convention on Climate Change and Kyoto Protocol, the Cartagena Protocol on Biosafety, the Bamako Convention, the Rotterdam Convention, the Stockholm Convention, and the Convention to Combat Desertification and Drought. The MoA is responsible for the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture. The Ministry of Water and Energy is delegated by EPA to follow the implementation of the Vienna Convention on the Protection of Ozone Layer and its Montreal Protocol. Lastly, the Ministry of Culture and Tourism is responsible for the Convention on Migratory Species, the Convention on the International Trade in Endangered Species of Wild Fauna and Flora and for the Agreement on African and Eurasian Water Birds. *Id.*

89. EPE, *supra* note 72, Section 5.1(e), at 27.

90. The EPA has two arms: the executive, headed by the Director General, and the policy-maker (known as the Environmental Council), which is composed of representatives and stakeholders from all regions.

and economic development activities sustainably enhance human welfare and the safety of the environment.⁹¹ In addition, EPA is responsible for evaluating the environmental impact assessment reports of federal and inter-regional projects, as well as auditing and regulating their implementation.⁹² EPA is also in charge of providing technical support for environmental management and protection to regional offices and sectoral institutions.⁹³

The proclamation that established the EPA also requires regional states to establish or designate their own regional environmental agencies (“REAs”). These REAs are responsible for coordinating the formulation, implementation, review, and revision of regional conservation strategies and for environmental monitoring, protection, and regulation.⁹⁴ In some regions, REAs have been established as parts of other agencies, while other regions’ REAs are separate institutions.⁹⁵ All regions and city administrations have established REAs except the Somali region, whose REA is continuously being restructured.⁹⁶ The REAs suffer from practical constraints. Some lack an approved conservation strategy to guide their environmental management, and where such strategies exist, they are limited in practical utility. In addition, structural instability (structural change, transfer of authority, conflict of interests between sectoral offices), under-staffing, and lack of experts are common across REAs.⁹⁷

In addition to the EPA and REAs, the Environmental Organ Establishment Proclamation mandated that “Sectoral Environmental Units” (“SEUs”) be established at every competent agency, with the responsibility of coordinating and following up activities in harmony with environmental laws and requirements.⁹⁸ The purpose of the SEUs is to ensure “that

91. Environmental Protection Organs Establishment Proc. No. 295/2002, FEDERAL NEGARIT GAZETA, art. 6.

92. *Id.* Projects that are neither subject to federal licensing, execution, or supervision nor likely to entail inter-regional impacts are within the jurisdiction of regional environmental agencies.

93. MELLESE DAMTIE & MESFIN BAYOU, MELCA MAHIBER, OVERVIEW OF ENVIRONMENTAL IMPACT ASSESSMENT IN ETHIOPIA: GAPS AND CHALLENGES 31(2008).

94. Environmental Protection Organs Establishment Proc. No. 295/2002, FEDERAL NEGARITGAZETA, art. 15.

95. MELLESE & MESFIN, *supra* note 93, at 32.

96. Independent environmental agencies have been established in the Dire Dawa and Addis Ababa administrations, while the REAs in Amhara, Tigray, SNNP, and Oromia are situated in the offices of Environmental Protection and Land Administration. Interview with Mohammed Ali, EPA (Apr. 16, 2010).

97. MCKEE, *supra* note 57, at 57.

98. Environmental Protection Organs Establishment Proc. No. 295/2002, FEDERAL NEGARIT GAZETA, art. 4.

environmental issues are addressed in development projects and public instruments initiated by government institutions.”⁹⁹ However, SEUs have only been established so far at the Ministry of Mines, Ministry of Agriculture, Ministry of Water and Energy, Ethiopian Roads Authority, and Ethiopian Electric Power Corporation, leaving most relevant federal agencies (as well as all regional ones) without environmental coordination.¹⁰⁰

In managing Ethiopia’s environment, government agencies share importance with private individuals, communities, and (to a lesser degree) companies. Before the enactment of the new law on civil organizations (which may shrink their quality of service, number, and capacity),¹⁰¹ such organizations in Ethiopia were maturing in their quality of service, geographical coverage, and creation of policy dialogue.¹⁰² Mohammed Ali of the EPA agrees that the role of nongovernmental organizations is increasing in both national and international environmental negotiation and implementation.¹⁰³ He notes that Forum for Environment, a local nongovernmental organization (“NGO”) active in environmental concerns, is a member of the EPA’s Environmental Council. In addition, EPA is working closely with other NGOs on various issues.¹⁰⁴

Some sectoral/ministry offices are also responsible for specific aspects of the administration of natural resources.¹⁰⁵ For example, the MoA is responsible for forest, soil, land, and wildlife resources; the Ministry of Mines is responsible for mineral resources; and the Ministry of Water and Energy is responsible for water and energy resources. The National Meteorological Agency, under the Ministry of Water and Energy, used to handle issues revolving around ozone layer protection until recent transfer of this task to the EPA, while the National Radiation Protection Authority, under the Ministry of Science and Technology, renders radiation protection services. The Institute of Biodiversity Conservation (“IBC”) is responsible for exploring, surveying, and ensuring conservation of the country’s

99. MELLESE & MESFIN, *supra* note 93, at 33.

100. Mohammed, *supra* note 96; *see also* MELLESE & MESFIN, *supra* note 93, at 33.

101. The law restricts indigenous non-governmental organizations to raising no more than 10 percent of their funds from abroad, and also limits the kinds of services provided by non-Ethiopian charities or associations. *See* Charities and Societies Proc. No. 621/2009, FEDERAL NEGARIT GAZETA.

102. McKEE, *supra* note 57, at 58.

103. Mohammed, *supra* note 96.

104. *Id.*

105. *See generally* Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proc. No. 471/2005, FEDERAL NEGARIT GAZETA (specifically defining the responsibilities of ministry offices and agencies).

biodiversity.¹⁰⁶

Despite these efforts, environmental protection in Ethiopia remains in its infancy due to a focus on short-term economic gain, lack of commitment, under-staffing and lack of capacity in many offices, lack of effective enforcement mechanisms, and loose coordination among responsible agencies. While there has been progress, it has been incommensurate with the nature and degree of threat that Ethiopia is experiencing.

F. Plan for Accelerated and Sustainable Development to End Poverty

As a cross-sectoral issue, environmental protection may be strongly influenced by government planning documents. An important example of this is the Plan for Accelerated and Sustainable Development to End Poverty (“PASDEP”), an economic planning document that guided the country’s activities during the period 2005-2010. Ethiopia launched PASDEP in 2005, building on its predecessor, the Sustainable Development and Poverty Reduction Program (SDPRP).¹⁰⁷ The objectives of PASDEP were to define the nation’s overall development strategy for five years (2005/06-2009/10), chart a course for eradicating poverty, and outline major programs and policies in each of the major sectors.¹⁰⁸ Specific emphasis was placed on increasing production, exploiting existing natural resources, research, market utilization, pest management, animal feed, health services, sustainable land and water use, and conservation.¹⁰⁹

On environmental issues, PASDEP enumerated six strategic goals toward the realization of environmentally sound development:

GOAL A: Ensure community-led environmental protection and the sustainable use of environmental resources for gender equity

106. Institute of Biodiversity Conservation and Research Establishment/ Amendment Proc. No. 381/2004, FEDERAL NEGARIT GAZETA.

107. PASDEP, *supra* note 60, at 1. The Sustainable Development and Poverty Reduction Program lasted for three years (2002/03-2004/05), providing overall guidance for the country’s development and a framework within which donor support could be coordinated. In environmental matters, there were some successes, especially in establishing environmental agencies and units at the federal and regional levels, and including environmental concerns in planning documents like the Safety Nets and the Resettlement Program. However, there has been a huge gap between policies and their implementation on the ground. See Mulugeta Getu, *Ethiopian Floriculture and its Impact on the Environment: Regulation, Supervision and Compliance*, 3.2 MIZAN L. REV. 240, 253 (2009).

108. PASDEP, *supra* note 60, at 1.

109. *Id.*

and improved livelihood[s];

GOAL B: Rehabilitate affected ecosystems;

GOAL C: Enhance capacity of ecosystems to deliver goods and services, particularly biomass for food, feed and household energy;

GOAL D: Remove adverse impacts of municipal waste;

GOAL E: Prevent environmental pollution; and

GOAL F: Ensure proactively the integration of environmental and ethical dictates especially mainstreaming gender equity in development.¹¹⁰

The plan's main implementation strategy was to empower the 125 *woredas* by increasing their capacity and developing and implementing their environmental management and sustainable livelihood plans.¹¹¹ PASDEP also called for Environmental Management Plans for the most polluting industries (textile, beverage, chemical, sugar, and cement factories, tanners), sound municipal waste management systems for sixty-two municipalities, review of EIAs for projects, establishment of a "national environmental management information and networking system," and encouragement of environmental awareness through student environmental clubs.¹¹²

Jonathan McKee has praised PASDEP's focus on pollution and solid waste management in urban areas, noting the rising importance in Ethiopia of urban growth and pollution issues.¹¹³ Nonetheless, he proposed "further fine-tuning" in the integration of agricultural growth and environmental issues: "For instance, it is unclear how the implementation of government enforced enclosure activities outlined in the agricultural strategy can be reconciled with the strategic goal . . . of ensuring community led environmental protection."¹¹⁴ Also, integrated pest management, a pillar of the earlier SDPRP, was omitted from PASDEP, which instead emphasized

110. *Id.* at 189-190.

111. The newly formulated Growth and Transformation Plan ("GTP") that replaced PASDEP to function for the years 2010/11 to 2014/15 reported that "[a] *woreda* environment management planning manual was prepared," with which about 1,450 environmental experts were trained. In addition, the GTP noted that 116 *woredas* out of the targeted 125 had prepared and implemented environmental management plans. MINISTRY OF FINANCE AND ECONOMIC DEVELOPMENT (ETHIOPIA), GROWTH AND TRANSFORMATION PLAN 18 (2010), <http://www.mofed.gov.et/English/Resources/Documents/GTP%20English2.pdf> [hereinafter GTP].

112. PASDEP, *supra* note 60, at 190-91. According to the GTP, twelve EIA manuals have been prepared, a dry waste management strategy and law have been issued, and sixty-five experts have been trained accordingly. GTP, *supra* note 111.

113. McKEE, *supra* note 57, at 68.

114. *Id.*

pest control through chemicals.¹¹⁵ McKee further questioned the proposed expansion of the floriculture and horticulture industries, given their heavy reliance on chemical fertilizers and pesticides.¹¹⁶

Overall, according to McKee, PASDEP prioritized economic growth and development while environmental and sustainability issues were “relegated into the background.”¹¹⁷ As a result, aggressive programs have been implemented in recent years without much consideration of their environmental impacts. Examples include clearing prime virgin forest for commercial farming, expanding the flower sector with uncontrolled chemical fertilizers and pesticide use,¹¹⁸ converting large wetland areas to commercial farms, and expanding sugarcane and other agro-fuel commercial farming in lowland areas without effective regulatory and policy frameworks.¹¹⁹

Like McKee, the Development Assistance Group Ethiopia (“DAG,” a consortium of donors including the World Bank and U.N. Development Programme) praised PASDEP’s urban agenda and mainstreaming of environmental sustainability.¹²⁰ The group’s assessment, however, found that PASDEP only weakly addressed issues such as institutional strengthening for long-term environmental management beyond EPA’s mandate, or the involvement of other sectors to ensure environmental sustainability.¹²¹ DAG also criticized PASDEP for its urban bias,¹²² for not addressing sustainable land management strategies consistently in various parts of the document, and for “[l]ack of strategic linkage to core poverty

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* Mulugeta, *supra* note 107 (discussing the impact of the floriculture sector and low levels of regulation).

119. McKee, *supra* note 57, at 68-69.

120. DEVELOPMENT ASSISTANCE GROUP, ETHIOPIA: A PLAN FOR ACCELERATED AND SUSTAINED DEVELOPMENT TO END POVERTY (PASDEP): COMMENTS FROM THE DEVELOPMENT ASSISTANCE GROUP 9(2006) [hereinafter DAG].

121. *Id.* at 9-10. DAG highly recommends “[c]ommitment of the sector ministries and agencies to integrate environment into their planning and implementation processes For this to happen, PASDEP should include actions such as enhancement of capacities of line ministries and their respective environmental units, regional environment bodies to ensure environment sustainability of development initiatives, and to identify and implement environment related investments that make an effective contribution towards delivering sector policies.” *Id.* at 50.

122. “Overall, the identified strategies in the environment component are focused on urban challenges, which only partially address key problems facing the rural population. For instance, consumption of fuel wood and charcoal, land degradation under the increasing population pressure, watershed management, climate change and biodiversity should be strategically addressed in the PASDEP.” *Id.* at 50.

generating factors, like poor land management.”¹²³ The assessment recommended that environmental strategies be more integrated with other core areas of PASDEP to ensure sustainability, and emphasized that in order to achieve the planned impact in the long run, there must be a proper implementation plan with clearly defined responsibilities and institutional capacity development.¹²⁴

PASDEP’s two-year progress was evaluated in 2008 by concerned groups, who found that good progress had been made in many respects, but that more needed to be done.¹²⁵ Paul Ackroyd, co-chair of DAG, suggested that addressing existing challenges will require stronger planning and management capacity, as well as enhanced implementation and coordination, at both the federal and regional levels.¹²⁶ This assessment suggests that development of the economic sector has been moving faster than the means to control and supervise it.

The Ethiopian government recently prepared a new version of PASDEP, the Growth and Transformation Plan (“GTP”).¹²⁷ Though it is too early to evaluate the GTP, mainstreaming of environmental standards into every development endeavor is still an issue. Furthermore, the document puts forward building a “green economy” as its only key environmental direction, and then only in relation to implementing adaptation or mitigation strategies to climate change,¹²⁸ making the new plan less environment-friendly than its predecessor.

IV. Conclusions and Recommendations

Environmental laws have been promulgated at the national and international levels to further two goals: preventing irreversible environmental damage and mandating the consideration of environmental values in all realms of private and commercial activity. International environmental laws have developed, with some agreements constituting

123. *Id.* at 49. “Land degradation is a major factor in Ethiopia contributing extensively to overall poverty, but is not currently addressed in the PASDEP.” *Id.* at 50.

124. *Id.* at 10, 49.

125. DEVELOPMENT ASSISTANCE GROUP, PASDEP ANNUAL PROGRESS REVIEW MEETING BRIEF SUMMARY (2008). Sufian Ahmed, the Ethiopian Minister of Finance and Economic Development, found that remaining challenges include structural problems, low levels of productivity, weak implementation capacity, low levels of external finance, unpredictability and transaction costs of aid, and the rising price of oil.

126. *Id.*

127. GTP, *supra* note 111.

128. *Id.* at 119-121.

enforceable laws on signatory parties, while others comprise nonbinding basic principles. Many environmental issues are now regulated internationally, including climate change, ozone depletion, biodiversity, movement of hazardous wastes, and toxic chemicals.

As part of the global community, Ethiopia has been an integral part of this movement. The country has become a party to most of the international treaties, adopted national policies and laws, and established institutions to enhance the quality of the environment. Nonetheless, “even though Ethiopia has approved good policies and [legislation] on paper, the implementation of measures for the protection of the environment is in great difficulty.”¹²⁹ This difficulty is likely the result of “a significant gap between the official commitments and objectives, and practices on the ground.”¹³⁰ Accordingly, the Ethiopian environmental regime may be characterized as a “rule-based approach,” with many constraints to implementation. Though the country’s environment has been deteriorating for many decades, some improvements have been made in soil protection and sanitation. In order to generate further improvements, the following areas deserve special attention.

A. Research and Awareness

There is a tremendous need for more environmental education and awareness, as many local environmental issues can only be effectively addressed by the people themselves.¹³¹ Research is also helpful in assessing and publicizing the gravity of environmental problems, developing adaptation methods for different problems, and updating scientific discoveries about technology or new threats.¹³²

B. Political Commitment

It is essential to mainstream and integrate environmental considerations into all national development plans, sectoral policies, and programs, as well as at the project level.¹³³ The past years have shown that

129. Fikremariam, *supra* note 56.

130. DAHLBERG ET AL., *supra* note 62, at 2.

131. *Id.* at 8.

132. POVERTY ACTION NETWORK OF CIVIL SOCIETY ORGANIZATIONS IN ETHIOPIA [PANE], WORKSHOP TO REVIEW THE IMPACT OF CLIMATE CHANGE ON PASDEP AND MDGS ASSESSMENT REPORT PROCEEDINGS 17-21 (2009) [hereinafter PANE].

133. *Id.*; see also DAHLBERG ET AL., *supra* note 62, at 8. Though the Constitution and

environmental degradation is the result of development activities that look only at short-term technical feasibilities and economic benefits; this problem remains in some sectors.¹³⁴

C. Institutional Strength/Capacity

Stronger institutions are needed, with extended mandates, experts, and resources in order to coordinate and supervise activities down to the community level.¹³⁵ This will involve building the capacity of environmental protection agencies and other stakeholders at both the federal and regional levels, actively involving all stakeholders at the grassroots level, and creating strategic alliances and partnerships among stakeholders.¹³⁶ Moreover, local NGOs and women must be supported and allowed full participation in all aspects of the development process, especially policy formulation, analysis, and monitoring and evaluation of impacts.¹³⁷

D. Legal Frameworks

The Ethiopian environmental regime is characterized by a rule-oriented approach with low enforcement capacity, but there are also legal lacunae in the implementation of policy documents. Legislative action must establish standards for different environmental concerns. For instance, legislation is needed to compel sectoral and financial institutions to coordinate with EPA and obtain environmental clearance before rendering relevant services, as well as to create standards for waste emissions by older factories and cars.

E. Coordination and Enhanced Participation

Governmental and nongovernmental actors and the donor community

national policies have highlighted the integration of environmental concerns into development activities, these have been generally disregarded due to a lack of awareness and commitment on the part of government officers.

134. MELCA MAHIBER & SHEKA FOREST ALLIANCE, ENVIRONMENTAL IMPACT ASSESSMENT: IMPLEMENTATION AND CHALLENGES 6-7 (2008), available at <http://www.melca-ethiopia.org/images/stories/Publication/Proceeding%20of%20EIA%20WS.pdf>.

135. PANE, *supra* note 132.

136. MELCA, *supra* note 134, at 17.

137. MEDHIN, *supra* note 59, at 26-27.

must collaborate and coordinate their activities to avoid duplication of efforts, achieve better results, and encourage the participation of different stakeholders in decision-making at all levels.¹³⁸

138. PANE, *supra* note 132. This also avoids power struggles in which different agencies and stakeholders all claim a mandate to control some environmental issue.

* * *

ENVIRONMENTAL PERMITTING IN ETHIOPIA: NO RESTRAINT ON “UNSTOPPABLE GROWTH?”

James Krueger, Aman K. Gebru,** and Inku Asnake****

I. Introduction

When rapid development threatens Ethiopians' environmental health, the people must decide whether the immediate economic benefits are worth the environmental damage. Many controversies flow from this one idea. Some optimists say that economic development “need not” harm the environment at all, or that environmental damage in fact will result from lack of development. Others ask what group of people should have the power to choose environment or development. The national legislature? The people most affected by the environmental damage? Or must we consider the perspectives of animals and plants as well, or the perspective of the earth itself, perhaps personified as “Gaia?” Still others want to know how environmental damage can be quantified so that a cost-benefit analysis is can be conducted.

All of these issues and more are crammed into the now-popular phrase “sustainable development.” First introduced in the World Commission on Environment and Development (“WCED”) report in 1987, sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹ The familiar definition appears also in the 1997 Environmental Policy of Ethiopia (“EPE”).² The definition has been

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1. World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, Introduction, ¶27, U.N. Doc. A/42/427/Annex (Aug. 4, 1987) [hereinafter WCED].

2. ENVIRONMENTAL POLICY OF ETHIOPIA, art. 2.1 (1997), available at <http://www.epa>.

criticized as being vague,³ and this is not surprising: all of the issues identified above cannot be resolved in an abstract definition. People must flesh out what sustainable development means to them through many tough decisions at the edges, at the point that development really means environmental damage. Perhaps most important is the clarity of the process by which the tough decisions are made.

This article argues that environmental permitting is one of those very important areas in environmental governance where the process of deciding between environment and development can be made clear. An environmental permit is a decision measuring an economic project against an explicit set of environmental criteria. The criteria are set in advance and form a definite lower limit of what is sustainable. If people do not like the decision on the permit, they can contest it at the relevant government agency, or in court, or politically through elections. At minimum, the people know what decision has been made.

The main thesis of this article is that international environmental ideals like “sustainable development” actually take the place of hard decisions and hide the government’s position on the right balance between environment and development. First is the question of whether “sustainable development” is used merely to please the international community. In Ethiopian environmental laws, the Amharic for “sustainable development” is actually “unstoppable growth,” or, in other words, *sustained* development.⁴ Thus, there is one meaning for English readers and another for Amharic readers, and in matters of interpretation it is the Amharic that is binding.⁵ The more important question is whether the people understand and decide upon minimum environmental standards that are more specific than the EPE’s guarantee of sustainable development or the Constitution’s rights to sustainable development⁶ and a clean and healthy environment.⁷

The grand rhetoric of international ideals is not sufficient to protect Ethiopia’s environment. The government must build on a national conversation about the needs and priorities of Ethiopian citizens. Such a

gov.et/Download/Proclamations/ENVIRONMENT%20POLICY%20OF%20ETHIOPIA.pdf [hereinafter EPE].

3. See e.g., David Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1, 3 (1998).

4. Different Amharic words are used in different legal documents for the English “sustainable development.”

5. CONSTITUTION, Art. 106 (1995) (Ethiopia).

6. *Id.* Art. 43(1).

7. *Id.* Art. 44.

conversation is only possible when the real choices between environment and development are made clear. An easy path to clarity is to give the Environmental Protection Authority (“EPA”) a straightforward permitting power, such that potentially polluting businesses cannot open or continue to operate without a permit directly from the EPA. The people may choose to have weaker environmental standards, or to give EPA some discretion to allow more pollution in cases where the economic benefits are particularly great, but at least the process would be clear. EPA would be directly accountable, rather than the current situation in which accountability is spread among the ministries, licensing agencies, EPA, and regional environmental agencies, allowing everyone to always point the finger somewhere else. Moreover, with clear permitting decisions that are publicly accessible, citizens would be more able to contribute to enforcement efforts through citizen suits.

II. Ethiopia’s Environmental Policy and Sustainable Development

Like most countries, Ethiopia adopted its current environmental laws under the influence of increased global environmental awareness that came in the wake of the Stockholm Conference in 1972, the WCED report in 1987, and the United Nations Conference on Environment and Development (“UNCED”) in 1992.⁸ The WCED and UNCED specifically called on donors to help developing countries establish the national legal infrastructure for environmental protection.⁹ Also, with the fall of many communist regimes in the early 1990s, new environmental laws became part of the international agenda for rebuilding communist countries and converting them to more capitalist economies.¹⁰

Even before the fall of Ethiopia’s communist government, the process

8. For a historical overview of international cooperation to solve environmental problem, see e.g., Nicholas A. Robinson, *Befogged Vision: International Environmental Governance a Decade After Rio*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 299 (2002); Paolo Galizzi, *From Stockholm to New York, Via Rio and Johannesburg: Has the Environment Lost Its Way on the Global Agenda?* 29 FORDHAM INT’L L. J. 952 (2006).

9. WCED, *supra* note 1, at 319; UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/Conf.151/6/Rev. 1 para 39.1(d) (1992). For more details about the role of international donors in fostering environmental laws in developing countries, see William Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 COLUM. J. ENVTL. L. 17, 22-25, 30 (2000).

10. The legal reform process in former communist countries in Eastern Europe is well documented. See UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, ENVIRONMENTAL POLICY IN TRANSITION: TEN YEARS OF UNECE ENVIRONMENTAL PERFORMANCE REVIEWS (2003).

of developing a National Conservation Strategy was begun with international help from the World Conservation Union (“IUCN”).¹¹ This process continued under the new government (of the Ethiopian Peoples’ Revolutionary Democratic Front, or EPRDF) as the Conservation Strategy of Ethiopia, culminating in a five-volume report and providing the initiative for major environmental actions like the establishment of the Environmental Protection Authority in 1995 (and reformation in 2002), the incorporation of environmental rights into the 1995 Constitution, and the passing of the sweeping cross-sector Environmental Policy of Ethiopia by the Council of Ministers in 1997.¹² Other environmental laws followed, including the Water Resources Management Proclamation in 2000 and the Environmental Pollution Control Proclamation and Environmental Impact Assessment Proclamation in 2002.

Although much of the initiative for Ethiopian environmental law came from international meetings and conversations and responded to scientific assessments of environmental health, the domestic policy situation is more complex. Ethiopia is not a passive receiver of international dictates, nor is it a micro-model of scientific debate about the environment that mirrors the international scientific debate. This can be seen in domestic laws and policies that apply sustainable development ideals. As Heinz Klug has remarked of transnational lawmaking, domestic policymakers often deploy international ideals to circumscribe the domestic policy debate, resulting in a dialectical interaction between international and local and producing “hybrid” rules.¹³

There is no question that Ethiopian environmental policy has been heavily influenced by international norms, particularly by the principle of sustainable development. The newly formed EPRDF government in 1992 sent representatives to the UNCED in Rio de Janeiro and came away energized to promote sustainable development.¹⁴ The IUCN has been encouraging sustainable development in Ethiopia and has provided funding

11. This started in 1989. See James Keeley & Ian Scoones, *Knowledge, Power and Politics: The Environmental Policy-Making Process in Ethiopia*, 38 J. OF MODERN AFRICAN STUDIES 89, 103 (2000).

12. See JONATHAN MCKEE, EUROPEAN COMMISSION, ETHIOPIA: COUNTRY ENVIRONMENTAL PROFILE 50 (2007).

13. Heinz Klug, *Hybrid(ity) Rules: Creating Local Law in a Globalized World* in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant G. Garth eds., 2002) (discussing how international ideals were brought to bear on domestic property rights in South Africa’s constitution-making process).

14. Keeley & Scoones, *supra* note 11, at 104.

and technical assistance for Ethiopia's National Conservation Strategy.¹⁵ The Environmental Policy of Ethiopia has as its overall goal "to promote sustainable social and economic development."¹⁶ The words "sustainable development" appear in many different environmental laws, including the Environmental Impact Assessment Proclamation and the Environmental Protection Organs Establishment Proclamation, as well as the Constitution, which guarantees the right to sustainable development in Article 43(1).

It is not fair to say, however, that the idea of sustainable development is imposed in a top-down manner by international bodies. In the first place, sustainable development came into popularity at the international level as a compromise between developed countries and developing countries, with developed countries generally favoring sustainability principles and developing countries generally favoring economic development. Developing country representatives to international conferences pointed out that their nation's poor are polluted by poverty, not industrial contaminants, and even accused rich Western countries of pushing an environmental agenda in order to slow their development.¹⁷ The tension between rich and poor countries over environmental protection was evident at Rio and subsequent conferences like the World Summit on Sustainable Development in 2002, and appeared again most recently at the 2009 Copenhagen Climate Conference.¹⁸ To the extent that representatives from developing countries (typically members of the political elite) truly represent developing country citizens, the idea of sustainable development must also reflect these citizens' concerns.

Sustainable development in any case is difficult for the international community to impose because it has an indefinite meaning. Many of the parties to the international compromise on sustainable development have an interest in keeping the meaning unclear so as to avoid binding environmental commitments. After Rio, international meetings on

15. *Id.*

16. EPE, *supra* note 2, art. 2.1.

17. Joao Augusto de Araujo Castro, *Environment and Development: The Case of the Developing Countries*, 26 INT'L ORD. 401 (1972).

18. See Galizzi, *supra* note 8, at 989. Notably, at the 2009 Copenhagen Climate Conference, a new subgroup of countries emerged, composed of Brazil, South Africa, India, and China. It appears that this subgroup, led perhaps by China, manipulated poorer countries into a blocking move that prevented the normal exchange between rich and poor countries—development assistance for environmental guarantees—from happening. See Joseph Curtin, *The Copenhagen Conference: How Should the EU Respond?*, INSTITUTE OF INTERNATIONAL AND EUROPEAN AFFAIRS 9 (2010). Although countries like China certainly have divergent interests from the rest of the developing country bloc, attempts to approach developing countries separately have been met by accusations from the Chinese of a "conspiracy to divide the developing world."

sustainable development have reiterated the importance of development but have diluted the sustainability aspect.¹⁹ Academics also have despaired of coming up with an agreed-upon definition for sustainable development.²⁰ Inevitably, the economic component of sustainable development is better defined than the environmental component. WCED stated that economic growth at a rate of 3 percent to 6 percent per year would be sustainable, but more vaguely that “sustainable development must not endanger the natural systems that support life on Earth.”²¹ Measurements of earth endangerment are various, contested, and generally clouded by the sweeping scope of the problem.

In Ethiopia, the Amharic words used in various laws to mean “sustainable development” are translated literally as unstoppable or continuous and ongoing growth. In other words, Ethiopians think of sustainable development as *sustained* development. The language of the Constitution makes clear that sustainable development in Ethiopia is about economic development. The Constitution has separate provisions for the “right to a clean and healthy environment”²² and the “right to improved living standards and to sustainable development,”²³ implying that sustainable development is about development and not about environmental health. It has been said of Ethiopia’s primary policy document on sustainable development, the Plan for Accelerated and Sustained Development to End Poverty (PASDEP, 2005-2010), that “[e]conomic development is the priority whilst . . . issues of environmental sustainability are relegated into the background.”²⁴

Although on a local level Ethiopians may prove to be excellent environmental stewards, there is little evidence of a pro-environmental preservationist movement. In part, this may be because rural Ethiopians do not value the “wild” environment apart from the managed environment of their farms and rural communities.²⁵ Pro-environmental sentiment comes

19. The definition of sustainable development coming out of the 2002 World Summit on Sustainable Development held in Johannesburg lacked any serious ecological commitment, and was thus a step away from the Rio definition. See Galizzi, *supra* note 8, at 991-993.

20. To put it succinctly: “Sustainable development means different things to different people.” JON M. CONRAD, *RESOURCE ECONOMICS* 166 (1999).

21. WCED, *supra* note 1, at 45.

22. CONSTITUTION, Art. 44(1) (1995).

23. *Id.* Art. 43(1).

24. MCKEE, *supra* note 12, at 7.

25. See Yohannes GebreMichael & Ann Waters-Bayer, *Trees are Our Backbone: Integrating Environment and Local Development in Tigray Region of Ethiopia*, IIED ISSUE PAPER NO. 145 at 2, 19 (2007).

from the concern for daily survival and not from the desire to preserve animals and wild places for their own sake. The problem of global warming is widely known and often invoked as an explanation for anomalous weather patterns, but many Ethiopians feel, perhaps rightly, that global warming is caused largely by actions in developed countries and that Ethiopians can do little about it.²⁶

The preservationist perspective does appear in official policy documents, but the government is more likely to follow the local nonpreservationist perspective when applying policy. The Environmental Policy contains commitments to preserve biodiversity,²⁷ support for a “conservation culture,”²⁸ and even a right of species to continue existing.²⁹ Moreover, Ethiopia has a national park system—the ideal for preservationists—that was established primarily under the emperor in the late 1960s and early 1970s in a top-down manner. However, the Ethiopian government has shown itself willing to compromise on conservation in parks in favor of economic interests. For example, the Ethiopian Investment Commission, after accidentally allocating land for a German biofuel project inside the Babilie Elephant Sanctuary, remedied the situation by changing the sanctuary boundaries.³⁰ Also, when it comes to environmental impact assessment, it is often foreign investors or foreign banks rather than the Ethiopian government insisting on impact statements from the EPA.³¹

When considering how Ethiopia uses “sustainable development,” then, it is necessary to distinguish between international and domestic audiences. Ethiopia uses the language of sustainable development to communicate to the international community its commitment to world ecological stability and, thus, to secure foreign aid. For the domestic audience, sustainable development represents the promise of a brighter future and a higher standard of living for Ethiopian citizens, and is almost synonymous with

26. Ethiopian farmers and pastoralists do their best to adapt to changing weather patterns, although they are ill-positioned to do so. See OXFAM, *THE RAIN DOESN'T COME ON TIME ANYMORE: POVERTY, VULNERABILITY, AND CLIMATE VARIABILITY IN ETHIOPIA* (April, 2010). Aside from certain changes in local forest management, Ethiopians cannot be expected to address the roots of global warming, and they see the problem as economic rather than environmental.

27. EPE, *supra* note 2, art. 2.2(a).

28. *Id.* art. 2.3(n).

29. *Id.* art. 2.3(q).

30. Yirmed Demeke & Negusu Aklilu, *Alarm Bell for Biofuel Development in Ethiopia: The Case of Babilie Elephant Sanctuary*, in *AGROFUEL DEVELOPMENT IN ETHIOPIA* (Tibebwa Heckett & Negusu Aklilu eds., 2008)

31. Interview with Environmental Protection Authority officials (June 2009).

steady economic growth. By using the term “sustainable development,” the government adds to its power and legitimacy, holding out the image of richer prospects and invoking the power of industrialized nations where the term originates. Ethiopian optimism about development is not, however, very useful in its legal applications. The very flexibility in the meaning of “sustainable development,” which is necessary in order to put the word to its various uses, makes any legal right or policy goal associated with it rather chimeric.

Environmental policy in Ethiopia has many additional layers of complexity. Keeley and Scoones, for example, identify three environmental policy discourses in Ethiopia: a Green Revolution discourse, an Environmental Rehabilitation discourse, and an emergent Participatory Natural Resource Management discourse.³² Both the Green Revolution discourse and the Environmental Rehabilitation discourse originate in science. The Green Revolution is the movement of technological advances in crop productivity from industrialized countries to developing countries. Environmental Rehabilitation responds to the scientific assessment of resource degradation, particularly relating to soil fertility. Within Ethiopia, these are modern perspectives which lead to uncomfortable juxtapositions of science with traditional ways of doing things, often with urban elites championing science and blaming “backwards” traditional practices for environmental problems. In theory, Participatory Natural Resource Management is the opposite of top-down policies that originate in international discourse and elite circles in Addis Ababa and filter down. Unfortunately, however, “participation” often relates more to attempts by national officials to build up legitimacy for programs than attempts to transfer real political power to local people.

The participatory management discourse highlights one of the overarching problems addressed by this article: How can governments consciously build support for environmental policies from the ground up? Often it appears that the international community is pushing for sustainability against the will of a great many poor people who just want development. Interestingly, Agenda 21 of the UNCED’s Rio Declaration called for “local Agenda 21s” that would build local community support for

32. Keeley & Scoones, *supra* note 11, at 90. Keeley and Scoones take a less explicit interest in “sustainable development” and do not address at all the way that international buzzwords like “sustainable development” are manipulated in local contexts. Apparently, some soil scientists took issue with Keeley and Scoones for treating hard data as an element of subjective discourse and for introducing unhelpful contradictions between environmental rehabilitation and local resource management. Jan Nyssen et al., *Environmental Policy in Ethiopia: A Rejoinder to Keeley and Scoones*, 42 J. OF MODERN AFRICAN STUDIES 137 (2004).

sustainable development.³³ With some naiveté, the international community expected local governments everywhere to organize conversations with local citizens about sustainable development. Sparking local conversations, not surprisingly, has been difficult.³⁴ Ethiopian law follows the idea of “local Agenda 21s” in that it requires all regional states to have “regional conservation strategies,”³⁵ but these have not led to widespread discussions about the sustainability of development projects. It has been reported that government officials look down on rural opinions and practices with regard to the environment, indicating that the direction of discourse is often top-down.³⁶

The starting point for local debate may be empowerment of local government, but this leads directly to another question, which is how to structure local government so that it can rally local support and produce positive environmental outcomes. Local management is difficult in the context of development decisions because the scale and power of local government often does not match the scale and power of regulated private parties. Lower level government officials do not have the political standing to challenge wealthy businessmen who may have better political connections at higher levels in the government.³⁷ In addition, local governments may compete for development projects, resulting in a race to deregulate in order to attract businesses. Sadly, decentralized management may be attractive to national governments simply because it puts the responsibility for unwanted decisions onto unqualified actors, allowing the national government to avoid difficult decisions. The Ethiopian government has decentralized many environmental permitting decisions to regional governments (including the two federal cities, Addis Ababa and

33. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, Ch. 28, U.N. Doc. A/CONF.151/26 (vol. I).

34. Local Agenda 21s arguably have been more successful in some developed countries, where a discourse about sustainable development fits culturally. For one example in Australia, see Ben Boer, *Institutionalizing Ecologically Sustainable Development: The Roles of National, State, and Local Governments in Translating Grand Strategy Into Action*, 31 WILLAMETTE L. REV. 307, 329 (1995). The U.S. and Canada also have had some limited success encouraging local discourse on sustainability. See Virginia MacLaren et al., *Engaging Local Communities in Environmental Protection with Competitiveness: Community Advisory Panels in Canada and the United States*, in SUSTAINABILITY, CIVIL SOCIETY AND INTERNATIONAL GOVERNANCE 31 (John J. Kirton & Peter I. Hajnal eds., 2006).

35. Environmental Protection Organs Establishment Proc. No. 295/2002, FEDERAL NEGARIT GAZETA, art. 15 [hereinafter EPO Proc.].

36. See GebreMichael & Waters-Bayer, *supra* note 25.

37. For example, one author has noted that Tigray’s Environmental Protection, Land Administration and Use Authority “has little political leverage to enforce environmental regulations, e.g. to oblige large-scale enterprises . . . to operate in an environmentally-friendly way.” GebreMichael & Waters-Bayer, *supra* note 25, at 8.

Dire Dawa) that simply lack the resources and expertise to evaluate environmental dangers. Local districts known as *woredas* are expected to handle certain development decisions directly—and have their own budget to do so—but devote very little of their small budgets to environmental projects, and do not coordinate at all with regional governments on preventive measures like pollution control.³⁸

In the APAP case, discussed below, the EPA argued at one point that it should not be responsible for the pollution of rivers because it was merely a coordinating organ for regional environmental agencies, and that the real responsibility for environmental protection fell on the shoulders of the regional agencies. This argument shows the dangers of the decentralization of responsibility, which can become simply the diffusion of responsibility.

III. Environmental Permitting in Ethiopia

The problems with Ethiopia's permitting process get to the heart of the difficulties and contradictions in Ethiopia's overarching policy of sustainable development. Environmental permitting is where environmental policy meets practice; it cannot be effective without a real commitment by government officials and without real leverage to make hard choices between environment and development. In Ethiopia, delays in implementing environmental permitting systems are apparent in several government offices and are not explained by simple lack of resources. In the few cases where environmental permitting has been implemented, the responsible offices lack the political will or bargaining power to make clear choices in favor of the environment and deny permits on the grounds of environmental harm. Instead, what prevails is a state of confusion in which it is not clear which office has control over the environmental decisions on the permit and, therefore, which office should take responsibility for implementing the environmental policy.

Permitting is the most basic form of government control over modern industry.³⁹ The phrase "environmental permitting" is meant here in the broadest sense possible, including any type of license or permit that has at

38. McKEE, *supra* note 12, at 56-58.

39. Most environmental laws incorporate some aspect of permitting. In the U.S., the Clean Water Act and Clean Air Act rely heavily on permitting, and the National Environmental Policy Act (and corresponding State Environmental Policy Acts), which can be invoked when a project proponent seeks any government permit, renders many permitting decisions subject to environmental impact assessment. In addition, permitting is the basis for all cap and trade programs.

least one environmental criterion. In Ethiopia, environmental permits are required for any discharge into water bodies,⁴⁰ for collection and disposal of solid or hazardous waste,⁴¹ for operating businesses that cause air or water pollution,⁴² and for starting a project or business that has environmental impacts and requires an impact statement. Permitting serves the function of registration as well as control, and provides the government with a record of potential threats to the environment and a starting point for inspections. The permitting process places the initial cost of gathering information and the burden of proof on the regulated party rather than the government, and therefore can be relatively inexpensive for the government to operate. Permits are also a great aid to government transparency, because they force public communications to and from the regulated party.

Surprisingly, the government environmental agencies in Ethiopia—the EPA and regional environmental agencies (“REAs”)—do very little of the environmental permitting. In fact, the EPA and REAs have legal authority only to issue permits for hazardous waste,⁴³ and, in practice, do not issue any permits or licenses at all. The EPA and REAs have the authority to conduct environmental impact assessments,⁴⁴ but this authority will be exercised only if a licensing authority (or a bank) refuses to go forward without EPA/REA approval. The Ministry of Water Resources has legal authority to issue permits for the discharge of waste into water resources⁴⁵ but also does not issue any such permits in practice. Instead, the Federal Investment Commission, the Ministry of Trade and Industry, and regional government bureaus⁴⁶ exercise permitting power over certain business

40. Ethiopian Water Resources Management Proc. No. 197/2000, FEDERAL NEGARIT GAZETA, art. 11(1)(d) [hereinafter WRM Proc.]; Ethiopian Water Resources Management Regulations, Council of Ministers Reg. No. 115/2005, FEDERAL NEGARIT GAZETA, art. 11(1) [hereinafter WRM Reg.].

41. Solid Waste Management Proc. No. 513/2007, FEDERAL NEGARIT GAZETA, art. 4(2); Environmental Pollution Control Proc. No. 300/2002, FEDERAL NEGARIT GAZETA, art. 4(1) [hereinafter EPC Proc.]. The Solid Waste Management Proclamation was issued in 2007, and it is not expected that urban administrations have taken steps yet to put their permitting systems in place. The administrations also have the additional responsibility of conducting environmental audits on existing disposal sites and ensuring that new sites undertake environmental impact assessment.

42. Prevention of Industrial Pollution Regulation, Council of Ministers Reg. No. 159/2008, FEDERAL NEGARIT GAZETA, art. 5 [hereinafter PIP Reg.].

43. EPC Proc., *supra* note 41, art. 4.

44. Environmental Impact Assessment Proc. No. 299/2002, FEDERAL NEGARIT GAZETA, art. 3(1) [hereinafter EIA Proc.].

45. WRM Reg., *supra* note 40, art. 11(1).

46. The regional governments, including Addis Ababa City Administration and the Dire Dawa Administrative Council, have separate divisions that handle business licenses and

activities and, through this permitting power, effectively decide whether or not to apply environmental criteria.

The history of pollution standards in Ethiopia shows how reluctant the government has been to act in this area. As early as 1995, the first proclamation establishing the EPA tasked the agency to set environmental standards.⁴⁷ In 2002, the Environmental Protection Organs Establishment Proclamation (reestablishing the EPA) again gave EPA the power and duty to set environmental standards,⁴⁸ and the Environmental Pollution Control Proclamation, also in 2002, more specifically called on the EPA to set standards for water, air, soil, noise, and waste management.⁴⁹ Nonbinding ambient “guidelines” for air, surface water, groundwater, and noise have been in place at the EPA since at least 2004. Nonetheless, the Environmental Council, the governing body of the EPA, did not pass binding standards until 2008, and even then restricted their purview to effluent air and water discharges.

The Environmental Council of the EPA—which failed for six years to have any of its regular meetings—finally met and passed standards in 2008 seemingly in response to a lawsuit waged by a nongovernmental organization (“NGO”), Action Professionals for the People (“APAP”). APAP sued the federal EPA in 2006, alleging in essence that the agency should have done something to prevent pollution to the Akaki and Mojo Rivers in the area near Addis Ababa.⁵⁰ The EPA argued that APAP had standing to sue only the polluter, not the EPA, but at that time no standards existed on which APAP could base its suit. Perhaps to forestall any greater judicial probing, EPA passed the standards in time for the Supreme Court’s assessment of the case in 2009. Of course, the EPA did not state its exact motive for enacting the standards when it did.

The same delays as those at the EPA have been apparent at the Ministry of Water Resources, which was first charged with establishing water quality standards in 1995.⁵¹ The 2000 Ethiopian Water Resources Management Proclamation again called for water quality standards, and prohibited discharges of pollution into water without a permit from the

investment permits.

47. Environmental Protection Authority Establishment Proc. No. 9/1995, FEDERAL NEGARIT GAZETA, art. 6(3).

48. EPO Proc., *supra* note 35, art. 6(7).

49. EPC Proc., *supra* note 41, art. 6(1).

50. Action Professionals Association for the People v. Environmental Protection Authority, Civil File No. 64902, Federal First Instance Court (2006).

51. Definition of Powers and Duties of the Executive Organs Proc. No. 4/1995, FEDERAL NEGARIT GAZETA, art. 17(9).

Ministry.⁵² The Proclamation explicitly anticipated a set of regulations that would lay out the details of the permitting process,⁵³ but these regulations were not issued until 2005. Unfortunately, although the regulations provide some detail on how a “Waste Water Discharge Permit” would be issued, they are premised on a set of water quality standards that do not exist and, furthermore, anticipate a directive that must be issued for the implementation of the waste water provision of the regulation.⁵⁴ Neither the standards nor the directive has yet been issued. Although the Ministry today engages in professional licensing and some construction permitting for water works projects, it does not issue permits for pollution discharges.⁵⁵ The Ministry of Water Resources exhibits the same pattern of delay on environmental protection as the EPA, waiting for a proclamation, then for a regulation, and then for a directive, in order to control pollution. This process should be compared with the process to set up professional licensing at the Ministry of Water Resources, which was outlined in the same proclamation of 2000 as pollution permits but was implemented more quickly and efficiently.

Presently, only two types of pollution standards have been adopted: effluent limits on certain water pollutants for a specified list of industries, and similar limits on certain air pollutants for a specified list of industries. There are no ambient standards for overall air and water quality, despite the fact that these are required by law, although it should be noted that ambient standards would present considerable costs in urban and regional planning, administrative coordination, and air and water testing.

For the two pollution control standards that have been approved by the EPA, there remain serious problems with enforcement and implementation. The primary role for the EPA and REAs under the Environmental Pollution Control Proclamation is to monitor and inspect polluting industries.⁵⁶ It has been argued, in fact, that the proclamation goes too far and provides too little oversight of Environmental Inspectors who, in enforcing the standards, may enter any place, question anyone, and inspect and seize any materials at the Inspector’s discretion.⁵⁷ While such powers are sweeping

52. WRM Proc., *supra* note 40, art. 11(1)(d); WRM Reg., *supra* note 40, art. 11(1).

53. WRM Proc., *supra* note 40, arts. 11(1)(d), 11(2), 13(1), 14(2), 28(2), 30.

54. WRM Reg., *supra* note 40, art. 12(2); interview with official at Ministry of Water Resources (July 2009).

55. Interview with official at Ministry of Water Resources (July 2009).

56. See EPC Proc., *supra* note 41, art. 8(1)(a).

57. *Id.* art. 8(1). For a more detailed analysis of the problem of Inspector oversight, see Khushal Vibhute, *Environmental Policy and Law of Ethiopia: A Policy Perspective*, 23 J. ETHIOPIAN L. 75, 97 (2008). Vibhute worries that “[the EPC Proclamation] gives an impression that the [Environmental Inspector], in the name of seeking compliance with the

in law, they are not so sweeping in practice. Unlike a licensing power, a monitoring power is rather expensive and difficult to exercise. The EPA or REA has to go to the industry in question with its own people, conduct its own inspections and tests, and confront powerful business interests head-on in the field. The agencies simply do not have the resources or political standing to do this, and in practice they have not done it.⁵⁸ As in most countries, the degree of environmental enforcement often depends more on political will than on the requirements of the law.⁵⁹

Along with the environmental standards, the Environmental Council simultaneously adopted the Prevention of Industrial Pollution (“PIP”) regulation that explained how the standards would be applied. Subsequently, in 2008, the EPA issued a directive identifying the eight categories of factories that fall under the regulation and thus are subject to the standards.⁶⁰ The regulation gave existing factories (in one of the eight categories) a maximum of five years to comply with the standards, with the expectation that the EPA (or appropriate REA) would oversee the process of transition. Specifically, existing factories are called on to undertake an environmental audit and implement an environmental management plan.⁶¹ Meanwhile, new factories will become operational without the direct oversight or approval of the EPA. The Ministry of Trade and Industry or regional bureaus are expected to catch noncompliant factories at the time they apply for business licenses. Theoretically, in order to obtain a business license, a factory must prove that it will meet the environmental standards and must continue to do so every year when it renews its license.⁶² This provides an opportunity to check environmental compliance

[environmental standards], is free to exercise his powers even in a capricious manner with impunity.” *Id.* at 98. The only explicit restraint on Environmental Inspectors in the EPC Proclamation is that they “exercise due diligence and impartiality in the discharge of their powers and duties.” EPC Proc., *supra* note 41, art. 7(2).

58. The EPA more or less admitted its failure to control pollution of the Akaki and Mojo Rivers in the APAP suit. General problems with monitoring and inspections were confirmed by interview with EPA officials.

59. This is equally true of developed countries. For instance, amid allegations of loose environmental oversight at the U.S. EPA under the administration of former President George W. Bush, one survey found that two-thirds of the staff scientists at the EPA reported political interference with their work. *Meddling at EPA? Activists Point to Survey: Two-Thirds of 1,586 EPA Scientists Polled Cite Interference*, UCS Reports, ASSOC. PRESS, Apr. 23, 2008.

60. EPA Directive No. 008/2008, on file at the EPA. Under the regulation, the EPA may choose to take action against a factory not identified by the directive if that factory poses a risk. PIP Reg., *supra* note 42, art. 4(5).

61. PIP Reg., *supra* note 42, art. 12(2).

62. Currently, a business must renew its business license annually. See Commercial Registration and Business Licensing Proc. No. 67/1997, FEDERAL NEGARIT GAZETA, art.

on a regular basis.

The “competent licensing agency” for issuing a business license may be the Investment Commission, the Ministry of Trade and Industry, or a bureau of the regional government, depending on the type of project, where it is located, and whether foreign investors are involved. In any case, none of these agencies has an environmental focus. Officials at these licensing agencies are hardly aware of environmental standards and EPA directives; they have no expertise or incentive to evaluate license applications for compliance with environmental standards. Accordingly, they do not actually apply environmental standards but rather defer to the EPA in expectation of future monitoring and enforcement.

Notably, the PIP regulation requires an environmental check only in the case of “business licenses,” not investment permits.⁶³ This changes the timing of things. An investment permit is needed at the planning stages of a project; a business license is not required until the start of operations. Presumably, the factory may be designed and built to pollute in excess of the standards, and not be reviewed until it is ready to start production. This is somewhat surprising, although it is expected that an environmental impact assessment would catch such an ill-designed factory at the planning stages. If not, it is hard to imagine that a business license would be denied based on environmental problems—typically problems of design—at the point when the factory has been built and is ready to start production. The review process in practice is more a matter of course, requiring a fee and validation of appropriate documents like the investment permit (if the applicant is a foreign national). The Investment Commission, which has its own authority to issue an initial business license to an investor (although not a renewal), requires only the application, fee, and a signed statement by the investor that he or she will respect the laws and directives of the land.⁶⁴

25(2).

63. See the definition of “competent licensing agency” in PIP Reg., *supra* note 42, art. 2(1). This is in contrast to the Environmental Impact Assessment Proclamation, which requires that the licensing agency check EIA compliance before issuing “an investment permit or a trade or an operating license for any project.” EIA Proc., *supra* note 44, art. 3(3).

64. The Investment Commission’s authority to issue business licenses is based on the Investment Proclamation. See Investment (Amendment) Proc. No. 375/2003, FEDERAL NEGARIT GAZETA, art. 24(5). Notably, this provision indicates that the Investment Commission need not bother with article 22(2) of the Commercial Registration and Business Licensing Proclamation, which potentially requires, as part of an application for a business license, some type of confirmation of environmental compliance from the appropriate government organ. In place of such confirmation, the Investment Commission requires the investor to sign “an undertaking to respect the relevant laws and directives of the land.” *Id.* art. 13 (adding article 24(5) to the original Investment Proclamation). Presumably, this was included in the Investment Proclamation in order to speed up the approval process for

Although the competent licensing agency has the main responsibility to deny a business license to an applicant who does not meet pollution control standards, the EPA has a separate power under the PIP regulations to vary or cancel existing business licenses of polluting industries.⁶⁵ This is a strange provision that allows the EPA (or regional environmental authority) to intercede between the licensing authority and the license holder, and in effect makes the license holder beholden to two different government agencies for the same license. It is hard to imagine the EPA exercising its authority to vary or cancel a license if to do so would offend the business licensing authority. In addition, this provision confuses the direct line of accountability, because each of the two concerned agencies can blame the other for any failure to regulate polluting industries. Moreover, the regulation essentially places the onus of monitoring and gathering evidence about pollution on the EPA, which must have this evidence to prove that the license should be varied or cancelled. At the time of application for the license, on the other hand, it is the applicant who provides the evidence that pollution will not exceed the requisite level.

Officials at the EPA expect that environmental impact assessment (“EIA”) laws will ensure that new factories comply with environmental standards. When it comes to the issue of new factories, most people, including officials at the licensing agencies, conflate EIA and pollution control. Although it might be more efficient to fold pollution control into the EIA process—at least for new factories—it must be kept in mind that at present EIA is a separate legal requirement that is itself difficult to enforce and is not set up formally to meet an explicit set of environmental standards. Officials at the Investment Commission are not even aware of the pollution standards and are certainly not applying these standards in practice. If the EIA process is to replace pollution control for new industries, this should be stated in the law and applied more rigorously by the licensing authority.

foreign investors and increase foreign direct investment. Nonetheless, it is a rather surprising provision for its seemingly arbitrary and unequal treatment of investors. A foreign applicant for a business license who goes through the Investment Commission may face fewer application requirements than a domestic applicant for the same license who goes through the Ministry of Trade and Industry or a regional bureau. The provision also runs contrary to every other law that attempts to place responsibility on the licensing authority for environmental protection.

65. PIP Reg., *supra* note 42, arts. 6, 7.

IV. Environmental Impact Assessment and the Ethiopian Investment Commission

Most pollution comes from new entrepreneurial undertakings, and the responsibility for encouraging and coordinating entrepreneurship in Ethiopia lies with the Ethiopian Investment Commission (“EIC”). In Ethiopia from 1992 to 2009, about 71.1 percent of all capital investment was approved through the EIC.⁶⁶ This indicates how important this one office is to the trajectory of economic development in Ethiopia. The EIC deals with foreign investors or Ethiopians working in partnership with foreign investors, and issues investment licenses and other permits so that projects can proceed. Permits for domestic investors will typically be obtained from regional bureaus, or may not even be required.⁶⁷ In some cases, as for example with mining projects, the project proponent will need a specific permit from another government agency like the Ministry of Mines and Energy, and this permit will also be conditioned on the proponent satisfying EIA requirements.

The EIC boasts of a one-stop shopping philosophy such that an investor can get government approval for a project through one office, the EIC.⁶⁸ This means that EIC must undertake to coordinate with all other Ethiopian government agencies on behalf of the investor to get the project approved, for example by contacting the appropriate regional government to secure land for the project. EIC itself takes over some of the responsibilities of other agencies, for example by issuing initial business permits and construction permits. By law, EIC must respond to applications for investment licenses within five days,⁶⁹ and publications by EIC tout its ability to deliver the investment permit within four hours.⁷⁰ In the period between 1992 and 2009, the EIC gave out a total of 44,669 investment licenses in various sectors, including agriculture, hunting, and forestry (9,715); construction (3,094); manufacturing (10,748); and mining

66. EIC database, accessed June 2009.

67. The EIC has jurisdiction over foreign investors and foreign and domestic partners, as well as domestic investors who want to be eligible for certain incentives. Investment Proc. No. 280/2002, FEDERAL NEGARIT GAZETA, art. 23. Regional bureaus are responsible for investment by domestic investors in their regions, although an investment permit may or may not be required depending on regional laws. *Id.* art. 23(3). Regional bureaus also handle business licenses for projects in their regions. Commercial Registration and Business Licensing Proc. No. 67/1997, FEDERAL NEGARIT GAZETA, art. 20(1).

68. Investment Proc. No. 280/2002, FEDERAL NEGARIT GAZETA, art. 24.

69. Investment (Amendment) Proc. No. 375/2003, FEDERAL NEGARIT GAZETA, art. 14(1).

70. INVESTMENT REVIEW, May 2009, on file at EIC.

and quarrying (189).⁷¹

One of the government agencies with which EIC is supposed to coordinate is the EPA. The EIC is required by law to ensure that EIA either is done or is not mandated for the particular project before approving an investment permit.⁷² According to the language of the EIA Proclamation, a project proponent must have “authorization” from the federal EPA or REA to start a project that requires EIA, and it is incumbent upon the licensing agency to contact the EPA or REA for this authorization before issuing an investment permit or business license. For EIC, the process of consulting EPA has been awkward and ultimately unsuccessful—not surprising considering that EIC wants to process investment applications efficiently and EIA takes a great deal of time. The EIC has asserted alternatively that the EPA takes too long to verify that a project meets EIA requirements, or that the EPA always approves the project thereby making consultation a waste of time.⁷³ Interestingly, it was proposed that EPA delegate its authority to review environmental impact statements to the EIC, but the EIC, perhaps wisely, refused.

At present, EIC no longer consults the EPA for authorization and argues that the new Investment Proclamation, by omitting any reference to EIA, somehow overrides the requirement in the EIA Proclamation to get EPA authorization before issuing an investment permit.⁷⁴ More troubling, the EIC has asserted repeatedly that it is the EPA’s responsibility to check for EIA compliance in the field after the investment permit has been approved. It is hard to understand this argument. The project may commence once the investment permit is issued, and the EIC itself may issue construction permits. Once construction starts, it is too late to do EIA. EIA only works if it is part of project planning. Because the EIC is

71. EIC database, accessed July 2009.

72. EIA Proc., *supra* note 44, art. 3(3).

73. Interview with EIC officials (June 2009).

74. The original Investment Proclamation specifically required undertaking EIA before issuing an investment permit. Investment Proc. No. 37/1996, FEDERAL NEGARIT GAZETA, art. 14(1). The new Investment Proclamation (No. 280/2002) repealed the earlier proclamation and omitted any reference to EIA. The Investment (Amendment) Proclamation (No. 373/2003) also did not add the EIA requirement. Nonetheless, the new proclamations do not relieve the EIC’s duty as stated in the EIA Proclamation to check for EIA, because, although the proclamation latest in time prevails, provisions of previous proclamations should be repealed or superseded by something more than mere implication. The EIC’s argument, though spurious, seems to provide enough doubt to buffer the EIC from pressure to observe the EIA Proclamation. Calls have been made to amend the Investment Proclamation so that it, too, includes a provision requiring the EIC to check with EPA before issuing a permit. Unfortunately, no legal requirement can make the EIA process proceed quickly, so it is unlikely that EIA can be reconciled with the expedited service requirements that form the backbone of investment policy in Ethiopia.

involved so much in approving and coordinating investments, its failure to check for environmental compliance has the potential to lead to some egregious results. For example, the EIC accidentally allowed a German company to start a biofuel project on land that was located inside a wildlife sanctuary.⁷⁵

Another notorious example of EIC's lack of environmental concern comes from the floriculture industry. Fertilizers and pesticides that are used to boost floriculture production are potentially harmful to human health and widely recognized as sources of pollution to soil, aquatic resources, and the atmosphere.⁷⁶ Despite this fact, EIC has given permits to at least 251 investors in this sector without checking for environmental impacts.⁷⁷ Additional investment licenses have been given out by regional investment bureaus (without checking for environmental impacts), including the Oromia Investment Bureau, which has given out approximately 3,491 hectares of land to the sector.⁷⁸

As with pollution standards, environmental impact assessment suffers from a lack of clear implementing guidelines. The EIA Proclamation anticipated two directives to guide EIA: A directive explaining which projects are subject to EIA,⁷⁹ and guidelines explaining how an Environmental Impact Study Report ("EISR") should be prepared and evaluated.⁸⁰ Although the EIA Proclamation was issued in 2002, it was not until 2008, at the first meeting of the Environmental Council of the EPA, that the Council approved a directive stating which industries are subject to EIA requirements.⁸¹ This is a major step forward, but it remains to be implemented through the Investment Commission and EPA. Regrettably, there are still no legal standards for what the EISR must contain. This is hard to understand, given that the EPA has had a comprehensive set of nonbinding draft guidelines for EISRs in almost every major industrial category since 2004.

75. See Demeke & Aklilu, *supra* note 30.

76. Mulugeta Getu, *Ethiopian Floriculture and Its Impact on the Environment: Regulation, Supervision and Compliance*, 3 MIZAN L. REV. 240, 243 (2009).

77. *Id.*

78. *Id.*

79. EIA Proc., *supra* note 44, art. 5(1).

80. *Id.* art. 8(3).

81. Environmental Protection Authority [EPA], A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Dir. No. 1/2008, on file at the EPA.

V. Environmental Controls at the Regional Level

Regional environmental authorities review EISRs from projects in their regions that do not have trans-regional effects and do not require federal permits or federal supervision.⁸² Unfortunately, the regional governments are even less prepared than the federal EPA to review EISRs with strict scrutiny, or to challenge government development projects or well-connected businessmen. Some regional governments have adopted regional EIA regulations based on the federal law, although in general the regional governments lag behind the federal government in implementing environmental policies. The Oromia regional government was reviewing its first draft EIA regulation in 2009. In 2006, the Addis Ababa city government enacted an EIA regulation very similar to the federal EIA Proclamation but, like the federal proclamation, the city regulation awaits directives that are necessary for proper implementation and proper review of EISRs.⁸³

Unlike the EIA Proclamation, the Environmental Pollution Control Proclamation does not explain the exact separation of duties between the federal EPA and the regional environmental authorities. Instead, it merely states that the regional government may adopt stricter environmental standards than the federal standards.⁸⁴ Even a project with cross-regional impact or a federal license requirement would have to meet the local standards of the region in which it is located. In such cases, the EPA and regional environmental authority probably would have overlapping responsibilities of inspection and enforcement, with the more stringent standards forming the baseline for both federal and regional agencies.⁸⁵ Decentralization is favored by the federal EPA, so it is unlikely that jurisdictional disputes would arise. The greater problem here is that the regional governments do not have the resources or the political clout to stand up to larger industrial operations. Also, without clearly defined roles for federal and regional authorities, the line of accountability to those authorities is confused.

Some regional governments have adopted their own pollution control

82. EIA Proc., *supra* note 44, art. 14(1).

83. Addis Ababa City Government Environmental Impact Assessment Regulations No. 21/2006.

84. EPC Proc., *supra* note 41, art. 6(4).

85. As an example of overlapping authority, the Addis Ababa pollution control regulation requests that applicants for pollution control permits bring their federal investment permit when they apply. Such an applicant would end up with both a federal and a regional permit.

regulations, but the regional governments usually lag behind the federal government here as well. For example, the Oromia regional government in 2009 was still reviewing the first draft of its pollution control regulation, modeled substantially on the federal law. The Addis Ababa city government first enacted pollution control regulations in 2007. The Addis Ababa regulations, once implemented, will be a major advance over the federal law, setting up a separate environmental pollution control permitting system and providing detailed rules that explain application and review procedures for these permits.⁸⁶ Unlike the federal EPA, which has direct control only over hazardous waste permits, the Addis Ababa EPA issues environmental permits itself and can force polluting industries to provide information about pollution at the time of permit application. In addition, the regulations provide that, in case the applicable environmental standards are not yet in place, the Addis Ababa environmental agency will use “environmental standards issued by the concerned international organizations.”⁸⁷ Despite such rigorous laws, it is expected that regional governments will have greater difficulty with implementation due to lack of funds, lack of expertise, small numbers of employees, and inability to challenge better-connected businessmen and the bigger agencies of the federal government.

VI. Citizen Suits to Enforce Pollution Limits

The alternative to government enforcement of standards is citizen enforcement of standards. The Environmental Pollution Control (“EPC”) Proclamation authorizes citizens to appeal directly to the courts to enforce environmental standards against polluting industries without having to show a “vested interest.”⁸⁸ Any citizen of Ethiopia, then, may bring a suit against a polluting industry. The idea is that the citizen steps into the shoes of the EPA to enforce the standards. Damages may include, in addition to the fines paid to the government and imprisonment, the full cost of restoring the environment “to the state in which the environment was prior to the infliction of the damage.”⁸⁹ If this is not possible, then the industry pays compensation to the victims of the pollution.⁹⁰ There is no explicit provision for compensating the citizen initiating the suit, who incurs the

86. See Addis Ababa City Government Environmental Pollution Control Regulations No. 25/2007.

87. *Id.* art. 5(2).

88. EPC Proc., *supra* note 41, art. 11.

89. *Id.* art. 17.

90. *Id.*

costs of litigation and pollution studies. This is a shortcoming of the law because it might prevent poor people from coming forward. Notably the APAP case, discussed below, was funded by APAP, an NGO with considerable resources and professional expertise. In any case, citizen enforcement has the potential to be very effective but remains deeply problematic for other reasons.

First, as the Supreme Court decided in the APAP case, citizens do not have standing to sue the EPA and can only proceed against the polluting industry directly. Action Professionals for the People (“APAP”) sued the EPA in 2006, alleging that EPA’s own studies, as well as other independent studies, demonstrated conclusively that the Akaki and Mojo Rivers were being severely polluted by industrial waste from various factories as well as by untreated waste from the city of Addis Ababa.⁹¹ The EPA’s response, in essence, was that because pollution standards had not yet been adopted, it was impossible to say that pollution had occurred. This argument was awkward for EPA, considering that it was the EPA’s failure to enact standards in the first place that had prevented APAP from suing the offending industries directly. The legal point on which EPA eventually succeeded was that APAP did not have standing to sue the EPA. This point was not entirely clear from the EPC Proclamation, which says merely that, if a person files a complaint with EPA about a polluter and is not satisfied with EPA’s response, that person can then “institute a court case.”⁹² Against whom? The Supreme Court decided that a citizen suit can only proceed against the polluter. In fact, this is probably the right decision from the standpoint of the legislature’s intent. The citizen suit provision in the EPC Proclamation waives the “vested interest” requirement initially for the purpose of facilitating citizen *complaints* to the EPA against polluters. Considering the current political environment and the shortage of government funds, it is unlikely that the legislature intended to open the door to litigation against EPA. In the end, APAP achieved a victory of sorts when the EPA finally enacted pollution standards. As will be seen, however, this does not mean that industries along the Akaki and Mojo Rivers will be forced to immediately comply with the standards.

91. Action Professionals Association for the People v. Environmental Protection Authority, Civil File No. 64902, Federal First Instance Court (2006). For a brief summary of the case, see Vibhute, *supra* note 57, at 95. Wondwossen Sintayehu of the EPA also produced a summary of the case at the pleading stage. WONDWOSSEN SINTAYEHU, ENVTL. PROT. AUTH., ACTION PROFESSIONALS’ ASSOCIATION FOR THE PEOPLE VS. ENVIRONMENTAL PROTECTION AUTHORITY: REPORT ON THE PUBLIC INTEREST LITIGATION CASE INSTITUTED AT THE FEDERAL FIRST INSTANCE COURT OF ETHIOPIA, *available at* www2.unitar.org/cwm/publications/cw/tw/tw10/written/gov/Ethiopia_Wondwossen_Sintayehu.pdf.

92. EPC Proc., *supra* note 41, art. 11(2).

If citizens cannot use the courts to compel EPA to take action, EPA will have complete discretion over whether to set pollution standards and whether to monitor the emissions of industries. When EPA delays and does not pass standards, or does not take enforcement actions on a case-by-case basis for particularly bad offences, or fails to conduct adequate inspections, then citizens have no recourse but to complain to the EPA and, if dissatisfied, appeal only up to the level of the head of the EPA, from which there apparently is no further appeal.⁹³ The solution to this problem is political: Citizens can still mobilize pressure on the national government, or, perhaps more appropriately in this case, on regional governments. Underlying these issues is a more pertinent issue: The EPA and the REAs are underfunded, and their activities can be curtailed through subtle pressures exerted by wealthy industries and investors.

With regard to the standards that have been passed, which presumably should afford citizens an opportunity to sue industries directly, there are yet many problems. To be effective at enforcement, citizens need to be informed about the standards. Under Ethiopian administrative law, “standards” are a species of “directive” and are not required to be published in the federal *Negarit Gazeta*, so they are not readily available to the public. Unless citizens go to the EPA and request specific information, they will not have the appropriate environmental standards in hand. This is not a problem for sophisticated actors like APAP operating out of Addis Ababa, but it is a problem for the average citizen.

Additional concerns have been raised that citizens need information about the activities of a particular factory in order to support a claim that a standard has been violated.⁹⁴ The standards are not ambient standards, which set acceptable amounts of pollution in air and water bodies, but rather are effluent standards that set limits on the amount of certain pollutants generated by a particular factory. Thus, it is not enough to show that a particular water body is polluted or that air in a particular area is polluted. Rather, citizens involved in a suit would have to test the effluent discharges of a particular factory. Typically, the amount of discharge is information to which only the factory and Environmental Inspectors have access. To solve this problem, the government could give citizens a right to EPA’s records or a right to get information directly from the polluting industry. To some degree, citizens already may access those records at the EPA that have been made public. This access is limited in practice, however, and in any case citizens cannot force the EPA to gather the

93. PIP Reg., *supra* note 42, art. 10(3).

94. *See* Vibhute, *supra* note 57, at 96.

necessary information and make it public, nor can they sue the EPA for failure to enforce the standards against a particular industry. A better solution is to give citizens direct access to information about the factory, either through court orders stemming from citizen suit litigation or through a public reporting process.

Interestingly, the Environmental Council deleted a provision of the Prevention of Industrial Pollution (“PIP”) Regulation that would have allowed “anybody” to get information about pollution directly from the concerned factory. It was decided that this information is the factory’s property, and that information including the environmental management plan, the report for the implementation of the PIP Regulation, and the information gathered through periodic supervisions and checkups would be available to the public at the EPA. The worry was that, if the public had a right to information, “expenses will be incurred by the information provider [and] unexpected outcomes might occur.”⁹⁵ This avoids the more important issue, which is why are not all reports submitted by the factory made as public as possible? The EPA could require factories to publish information about their pollution levels in a newspaper (or simply include all of this information on the permit itself and post the permit in a public place). The expenses of publishing this information are minimal. Under the PIP Regulation, every factory must submit an annual report relating to how it is meeting the pollution standards, but this report goes directly to the EPA rather than to the general public.⁹⁶

Citizen enforcement against industry is the ultimate type of government decentralization, at least of executive powers. Every citizen is a policeman. In the end, it would be numerous local and federal courts that would decide the matter of liability. This is an inviting scenario, and cost-effective for the government. Clearly, however, many administrative reforms are needed before citizen suits will work properly. Citizens need to have a public forum where pollution standards and EPA reports on polluting industries are accessible. One solution already mentioned is to change the directive so that EPA and REAs issue environmental permits. The permit itself could state the applicable pollution standards, and regular permit renewals would give EPA the opportunity to gather information from the industry without incurring all of the expenses of an on-site inspection. The industry would be required to report its pollution as part of the permit application. In addition, if EPA received many citizen complaints about one industry, the agency would be in a position to drag

95. Environmental Council First Ordinary Meeting Minutes (April 23, 2008).

96. PIP Reg., *supra* note 42, art. 11(2).

out the permitting process and collect more information. Once public, the information would provide the basis for a citizen suit.

VII. What Ethiopia's Permitting Process Says About Ethiopian Views of Sustainability

Perhaps the main question raised by Ethiopia's permitting process is, why is the Ethiopian government so eager to pass strong environmental policies and initiating laws and yet so reluctant to pass implementing laws and pollution standards? A variety of different actors in the Ethiopian government are ready to cooperate with foreign donors who want to contribute money toward stronger environmental policies. This includes government officials from members of the previous communist regime to the current workers at the EPA and Ministry of Water Resources. However, these same actors uniformly resist making strong decisions to implement environmental policies to stop environmental harms. This is not only true of the EPA and the Ministry of Water Resources, but also of the regional governments that have considerable discretion in implementing federal environmental policy at the regional level. Because this delaying pattern is so consistent, it is not likely that the problem is with a few lazy or corrupt government workers or a few powerful individuals with feelings of insidious anti-environmentalism.

It is instructive to compare environmental permitting with the permitting system being set up to regulate nongovernmental organizations ("NGOs") under the Charities and Societies Proclamation.⁹⁷ The Charities and Societies Proclamation was issued in 2009, and already the Charities and Societies Agency has been formed. Licensing of NGOs ("re-registration") has also commenced—by the end of 2009, 1,200 local and foreign NGOs had been licensed. In 2009, the same year the proclamation was issued, a draft directive was already under consideration. This shows what the government can accomplish in a short time if the political will is present.

Arguments about the difficulties of enforcing environmental laws are not entirely convincing. First, enforcement is not held up by lack of training or expertise. Environmental standards can be copied from other countries, and have been copied. Since 2004, the EPA has had its own set of nonbinding environmental quality standards and nonbinding EIA guidelines ready for adoption into law. These have not been adopted. Several studies have been done of pollution in the area around Addis

97. Charities and Societies Proc. No. 621/2009, FEDERAL NEGARIT GAZETA.

Ababa, particularly of pollution in the Akaki and Mojo Rivers, and it is apparent that the scientific expertise for these kinds of studies is available.

A more compelling explanation is the lack of government funds to support the personnel and infrastructure for environmental regulation over the long term. Adopting strong environmental policies is cheap and easy, especially if a foreign donor is contributing money for studies and policy development. On the other hand, maintaining a complex regulatory infrastructure staffed by experts is difficult and expensive.

Lack of funds is only a partial explanation, however, because it cannot account for the federal government's apparent reluctance to allow citizens to enforce environmental standards on their own through the courts.⁹⁸ Citizen enforcement is considerably less expensive than enforcement by regulatory agencies. If the regulatory agency does nothing but enact the standards, the citizens can at least bring suits against the worst offenders. Although lawsuits present some cost to the courts, the government could recoup these costs with fines and penalties, and, after the first few cases, the mere threat of litigation should be enough to keep offending industries in line without having to litigate every infraction.

Lack of funds also does not entirely explain the government's reluctance to implement EIA laws, as the expense of an environmental impact study report is borne by the project proponents.⁹⁹ Once project proponents learn that they must prepare a report, they hire an environmental consultant to do the technical work. It would be relatively easy to require that such consultants be licensed by the government,¹⁰⁰ and revocation of the license and criminal fines could be imposed on consultants for watering down reports or accepting bribes from proponents.¹⁰¹ The remaining expense to the government is for experts at the EPA who must review the reports. Although this expense cannot be avoided, it is considerably less than the expense of preparing the report, and requires only cross-checking rather than detailed investigative work.

The obvious explanation for the government's inaction on pollution is that the government is fearful of stifling economic development. This is a

98. Citizen suits may seem like a modern legislative innovation, but in fact very similar lawsuits were used under the common law of England and the U.S. before industrialization to control isolated cases of pollution. Citizens could sue for nuisance when pollution crossed onto their property and disturbed their use and enjoyment of their land.

99. EIA Proc., *supra* note 44, art. 7(3).

100. In fact, the EIA Proclamation hints that the EPA will issue standards for EIA consultants. *See id.* art. 7(2).

101. It is already a criminal offense to make misrepresentations in an environmental impact study report. *Id.* art. 18(2).

fear both of losing central control of economic planning and of scaring off investment by increasing the cost of business. These are fears shared by many citizens. In the first place, decentralized management of economic issues (citizen enforcement of pollution standards is a type of decentralized economic management) is a threat to the structure of any modernizing economy. Karl Polanyi has argued convincingly that economic development appears to be organic and from the ground up, but in fact is dependent on centralized coordination and the repression of various local and individual interests.¹⁰² It is dangerous from the perspective of government to create enforceable environmental rights, for example the right to be free from a specific amount of pollution, because rights are by their nature decentralized. The right could be asserted by one person against everyone else, even though everyone else has agreed to waive that environmental right in exchange for the economic benefits of polluting. The threat is not of a grassroots environmental movement, but rather of a small group of Ethiopian environmentalists holding hostage popular development plans by strictly imposing environmental standards.

The fear of scaring off investment comes from the perceived threat that other competing political jurisdictions will attract businesses more than Ethiopia. Competition among jurisdictions produces the well-known regulatory race to the bottom, in which jurisdictions reduce legal regulation of business more and more in order to become the most attractive suitor to business ventures. The race to the bottom is the inevitable effect of allowing expansive markets at a level higher than the scale of government. If a company can enter Ethiopia, employ Ethiopians, and generate revenues to be spent in Ethiopia, this gives the company a kind of power to negotiate terms with Ethiopia. Some companies can and do demand less environmental regulation.¹⁰³ Similarly, much like an international company vis-à-vis the national government, a national company may demand terms from local governments in exchange for jobs and growth brought to the locality.¹⁰⁴ The victims of pollution may agree to pollution as part of an unbalanced exchange, in which they receive some kind of employment or minor financial compensation. Alternatively, depending on the integrity of the local government, a national company may be allowed to pollute because the victims of this pollution are a small and politically

102. KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

103. On the other hand, some international companies may end up polluting less because of the demands placed on them by their international consumers. This is an effect that has nothing to do with environmental law (although EIA may play a small role) and everything to do with access to information and reports by the international press.

104. Harvey Molotch, *The City as a Growth Machine*, 82 *AMERICAN JOURNAL OF SOCIOLOGY* 309 (1976).

inconsequential group.

Discussions about sustainability in Ethiopia may be a superficial proxy for deeper concerns about resource distribution. That is, while it appears that people are talking about how to prevent pollution, they are in fact thinking about how the people who receive the benefits from economic development do not share these benefits with the people who suffer the environmental harms of economic development. If resource distribution is the popular concern in Ethiopia, then the government is right to focus on international aid concessions and redistribution of wealth within the country rather than on environmental laws that aspire to overall environmental health as measured by science. The permitting process could be changed to fit the Ethiopian context, for example by focusing on discreet payments from polluting industries—a kind of anticipatory tax on pollution. When businesses apply for permits, the government could assess likely pollution and increase the permit fee based on likely environmental harm and economic damage to local residents.

VIII. Conclusions and Further Considerations

Environmental laws in Ethiopia are meant to protect the productive capacity of the land. They include guarantees of an individual's right to access land, and they make promises to control the threats to natural resources from modern factories and from development. This is not just subterfuge. The Ethiopian government wants to protect the country's resources, but in a context in which economic development is an absolute imperative. The only available model for economic development, whether it comes from the U.S. or China, is to continue nationalization and internationalization of markets and preempt any calls for total redistribution of wealth with promises of general social protections like pollution prevention. It is perhaps assumed that, after development is well underway, the government will then have the time and resources to go back and make good on its promises of environmental health. To some extent this may be a real possibility, but at the same time it is prudent to confront the real environmental costs of development, the real distribution of these costs, and the real contradiction between meaningful local control and the imperatives of a nationalizing and internationalizing economy.

Real environmental protection may require a different kind of economy, and certainly will require environmental controls at the same scale as markets. Often it is assumed that the scale problem can be solved only by expanding environmental regulation to the international level, but an equally plausible solution is to reduce the scope and impact of markets

to national or local levels, or in other words to re-socialize markets. Along similar lines, real environmental protection requires decision-makers who recognize the environment (or distribution of environmental harms) as a problem. At present, important decision-makers in government are connected directly to industry or focused myopically on business and development. It is vague economic indicators, often short term, that weigh heavily on the minds of decision-makers everywhere, and not so much the indicators of environmental health. To change this, government decision-makers must be isolated from industrial elites in a purposeful manner.

How will local discussions about sustainability within Ethiopia help improve Ethiopia's natural environment? How will meaningful local discussions be achieved? Local discussions should not be held in the strait jacket of objective scientific discourse on "sustainability," but instead should focus attention on the real concerns of Ethiopian citizens, like resource distribution, that are the only hope for motivated political action on environmental issues. Scientific problem-solving is crucial to dealing with the world's environmental problems, but it does not substitute for political motivation. Neither is environmental science value-neutral. If science is controlled by urban elites, it may be used simply to further elite interests.

Many of the current environmental laws ought to be reformed, not because they are objectively bad laws, but because they pacify the citizenry with language invoking the power of science and the international community and offer vast promises that cannot be fulfilled. These reforms, though they may be initiated by elites in Addis Ababa, can at least serve to expose administrative decisions to greater (and wider) public scrutiny going forward. Some general suggestions from this article include (1) empowering the EPA and REAs to issue environmental permits; (2) providing a secure source of funding and stronger political standing for the EPA (for example, earmarked funds from foreign donors who want to contribute to global sustainability); (3) setting up definite links between the EPA and REAs so that EPA can assist REAs with expert advice and injection of funds when needed, and so that their respective responsibilities are clear; (4) making EPA and REAs the center for all environmental decision making, thus cleaning up the line of accountability so that citizens know which agency is responsible for which decision; (5) making EPA and REAs a place for public discussion and dissemination of information about pollution and other environmental risks; and (6) placing a positive duty on the EPA to provide information about polluters to citizens interested in citizen suits.

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ENVIRONMENTAL IMPACT ASSESSMENT AND MONITORING UNDER ETHIOPIAN LAW

*Tesfaye Abate Abebe**

I. Introduction

Production activities in any industry may “harm the environment through their damaging effects on air, water, soil and biodiversity.”¹ To protect the environment, it is imperative to conduct environmental impact assessment (“EIA”) of investment projects in order to identify their potential harms. Appropriate measures should be taken so as to avoid or lessen harms to the environment where the EIA indicates possible harms. In this way, EIA helps to enforce environmental standards and certification processes, which can potentially induce investors “to turn to more environmentally friendly production methods and practices.”² Monitoring the implementation of licensed projects is also essential to ensure that projects are implemented in accordance with the standards and conditions, and to make sure there are no circumstances that may have been unforeseen at the time of impact assessment.

In international and national laws, EIA is used as a tool to prevent environmental damage. At the international level, lending banks and bilateral aid agencies have made environmental impact assessment a requirement for lending money.³ In 1989, the World Bank issued an Operational Directive making EIA a standard requirement for all of its investment projects, so that borrowing countries are required to comply

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1. U.N. Conference on Trade & Dev. [UNCTAD], *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* 155, U.N. Doc. UNCTAD/WIR/2009 (2009).

2. *Id.* at 156.

3. BARRY SADLER, ENVIRONMENTAL ASSESSMENT IN A CHANGING WORLD: EVALUATING PRACTICE TO IMPROVE PERFORMANCE 25 (1996), available at http://www.iaia.org/publicdocuments/EIA/EAE/EAE_10E.PDF.

with this EIA Directive.⁴ In addition, the 1992 Rio Declaration on Environment and Development, under Principle 17, provides that “environmental impact assessment . . . shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment.”⁵ The European Community Council also enacted Directive 85/337 in June 1985, which requires EIA for proposed projects. European Community member countries adopted the Directive.⁶

At the national level, the United States was the first country to require EIA with the National Environmental Policy Act in 1970.⁷ Following in the footsteps of the U.S. in 1973 and 1974, Canada, Australia, and New Zealand adopted environmental impact assessment as well, and other industrialized and developing countries followed during the 1970s.⁸ Developing countries came to use the environmental impact assessment because of the requirements of the World Bank and other development banks and donors, as well as capacity building activities initiated in the wake of the Rio Declaration.⁹

Ethiopia enacted the Environmental Impact Assessment Proclamation in 2002, providing for EIA and monitoring.¹⁰ This Article mainly focuses on the issue of EIA and monitoring under Ethiopian law. Part II of the Article considers the definition and nature of EIA. Part III deals with the role of EIA in sustainable development. Part IV describes the purpose and scope of EIA. Part V discusses the body that prepares EIA reports. Part VI deals with the criteria that are used to determine whether a project requires an environmental impact assessment. Part VII considers the important elements of an EIA. Part VIII and Part IX address monitoring and enforcement mechanisms, respectively. Conclusions and recommendations

4. *Id.*

5. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, prin. 17, U.N. Doc. A/CONF.151/26 (vol. I).

6. SUSAN WOLF & ANNA WHITE, ENVIRONMENTAL LAW 344 (1995).

7. *Id.*; see also STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 76 (3d ed. 2004).

8. SADLER, *supra* note 3.

9. *Id.*

10. Environmental Impact Assessment Proc. No. 299/2002, FEDERAL NEGARIT GAZETA [hereinafter EIA Proc.]. Ethiopia adopted the 1992 Rio Declaration, and ratified the Convention on Biological Diversity (“CBD”) and United Nations Framework Convention on Climate Change in 1994. These may have contributed to the enactment of EIA law in Ethiopia, along with the 1997 Environmental Policy of Ethiopia and the proclamation establishing the Environmental Protection Authority. See ENVIRONMENTAL POLICY OF ETHIOPIA, art. 4.9 (1997), available at <http://www.epa.gov.et/Download/Proclamations/ENVIRONMENT%20POLICY%20OF%20ETHIOPIA.pdf>; Environmental Protection Authority Establishment Proc. No. 9/1995, FEDERAL NEGARIT GAZETA.

are given in Part X.

II. Definition and Nature of EIA

“Environmental impact assessment,” or sometimes simply “environmental assessment,”¹¹ refers to the determination of the environmental consequences of proposed projects or activities.¹² Collecting and assessing information is necessary to evaluate the effects of a proposed project or program.¹³ Such assessment is an important part of the “process of deciding whether or not a project should get permission or approval.”¹⁴

Under Ethiopian law, an impact is defined as “any change to the environment or to its component that may affect human health or safety, flora, fauna, soil, air, water, climate, natural or cultural heritage, other physical structure, or in general, subsequently alter environmental, social, economic or cultural conditions,”¹⁵ while EIA is defined as “the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument.”¹⁶ “Project” refers to “any new development activity under any category listed in any directive issued pursuant to [the EIA] proclamation, major expansion or alteration or any existing undertaking, or any resumption of work that had been discontinued.”¹⁷ Public instrument is “a policy, a strategy, a programme, a law or an international agreement.”¹⁸ So, for example, the government must conduct an EIA when crafting an agricultural policy or a development strategy, or ratifying an international agreement. This definition does not include the determination of whether or not a project should get permission, nor does it imply that a proposed project is rejected if it has a negative impact on the environment.

In other jurisdictions, laws distinguish between environmental impact assessment and strategic environmental assessment, which the Ethiopian law fails to do. “Strategic environmental assessment (SEA) is a process of

11. WOLF & WHITE, *supra* note 6, at 344.

12. RAVI JAIN, ENVIRONMENTAL ASSESSMENT 5 (2d ed. 2002).

13. See WOLF & WHITE, *supra* note 6, at 346.

14. *Id.*

15. EIA Proc., *supra* note 10, art. 2(4).

16. *Id.* art. 2(3).

17. *Id.* art. 2(8).

18. *Id.* art. 2(10).

prior examination and appraisal of policies,¹⁹ plans,²⁰ and [programs]²¹ and other higher level or pre-project initiatives²²—in other words, the application of the EIA process to policymaking. SEA is intended to address the causes of environmental problems at the policy level. SEA is increasingly used by international development cooperation agencies and partner governments to evaluate the potential impact of strategic development proposals and options.²³

The anticipatory nature of EIA distinguishes it from other environmental management tools.²⁴ “An EIA attempts to *predict* the likely environmental effects of a proposal and provide a basis for the developer and other decision makers to respond to this information.”²⁵ Under Ethiopian law, EIA “is used to predict and manage the environmental effects” of implementing proposed development activities.²⁶ This provides an opportunity for developers to use the information to improve their projects’ compliance with environmental standards.²⁷ In so doing, developers will improve the sustainability of their projects as well as their chances of obtaining project approval.

According to John Brady, of the Institute of Environmental Management and Assessment, “The term ‘predict’ suggests that there may be some uncertainty or some ‘guess work’ associated with EIA. This is certainly true, but experience with EIA and knowledge of environmental systems are usually sufficient to make reasoned estimates of the likely significant effects of proposals.”²⁸ This, in turn, may “indicate that some aspect of the proposal needs to change or that the precautionary principle should be applied and the proposal should not be developed any further.”²⁹

19. A policy may be defined as “a general course of action or proposed overall direction that a government is, or will be, pursuing and which guides ongoing decision making.” SADLER, *supra* note 3, at 140.

20. A plan is “a purposeful, forward-looking strategy or design, often with coordinated priorities, options, and measures, that elaborates and implements policy.” *Id.*

21. A program is “a coherent, organized agenda or schedule of commitments, proposals, instruments, and/or activities that elaborates and implements policy.” *Id.*

22. *Id.* at 13.

23. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], STRATEGIC ENVIRONMENTAL ASSESSMENT AND ECOSYSTEM SERVICES 24 (2008).

24. JOHN BRADY, INST. OF ENVTL. MGMT. & ASSESSMENT, ENVIRONMENTAL MANAGEMENT IN ORGANIZATIONS: THE IEMA HANDBOOK 187 (2004).

25. *Id.* (emphasis added).

26. EIA Proc., *supra* note 10, pmbl. para. 1.

27. BRADY, *supra* note 24.

28. *Id.*

29. *Id.*

Another distinguishing feature of EIA is its interdisciplinary nature. “Most EIA reports are prepared by a team of environmental specialists,” consisting of “at least one qualified environmental engineer, social scientist, biologist, and physical scientist.”³⁰ That is, the assessment involves a team of people “from a range of environmental and social science backgrounds relevant to the potential environmental impacts of the proposal.”³¹ In some countries, professionals from up to 15 different disciplines may participate for large and complex projects.³² In such a case, “the team of consultants is led and coordinated by an EIA project manager whose responsibilities include:

- ensuring that the EIA stays on schedule and on budget;
- providing quality control for the work provided by other members of the team;
- coordinating consultation with other stakeholders;
- working with the project design team to resolve environmental problems; and
- making sure that the report resulting from the EIA is coherent and defensible.”³³

III. EIA and Sustainable Development

The World Commission on Environment and Development (“WCED”), also known as the Brundtland Commission,³⁴ described “sustainable development” as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”³⁵ Sustainable development describes a process “in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs.”³⁶ Because EIA identifies and

30. BINDU N. LOHANI ET AL., ASIAN DEV. BANK, EIA FOR DEVELOPING COUNTRIES IN ASIA, ch. 11, 12 (1997).

31. BRADY, *supra* note 24, at 193.

32. *Id.* However, the selection of personnel differs from project to project “based on the components in the study area and the type and magnitude of project.” LOHANI, *supra* note 30, at 13.

33. BRADY, *supra* note 24, at 193.

34. After its chairperson, Gro Harlem Brundtland.

35. World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, Introduction, ¶27, U.N. Doc. A/42/427/Annex (Aug. 4, 1987).

36. *Id.* ¶30.

estimates the environmental impacts of development projects, it is linked to sustainable development. However, EIA alone cannot make development sustainable—it is only one of the important tools required for the job.³⁷

Investors today are wise to consider the principles of socially responsible investment (“SRI”), which attempts to create positive social change, minimize environmental damage, and incorporate religious or ethical beliefs into the investment process.³⁸ According to SRI, investors must look into environmental issues and risks on a short-term and long-term basis. If investors pollute the environment or fail to comply with environmental regulations, they may be held liable under civil or criminal law. In short, a company that does not account for the cost of its environmental impacts is a risk for its investors.³⁹ Companies that manage their environmental risks are at a comparative advantage, and may be differentiated from their competitors. They may be more likely to be chosen to operate in a community, and may find it easier to retain and attract employees.⁴⁰

In seeking to implement SRI, investors may use the precautionary principle and the prevention principle. The precautionary principle is about management of unknown risks to the environment. According to this principle, either anticipatory or preventive action is required where the implementation of a development project would result in environmental harm.⁴¹ The prevention principle allows measures to be taken to protect the environment at an early stage, because it is better to prevent harm than to repair it.⁴² Both the precautionary principle and the prevention principle require EIA. Sustainability recognizes that development inevitably imposes both internalities (unforeseen costs to the parties involved) and externalities (costs borne by a third party or the public, such as pollution), and EIA should help to identify the externalities. It can also explain which externalities can be avoided or mitigated, and how to do this.⁴³

37. INT’L INST. FOR ENV’T & DEV. [IIED], MODIFIED EIA AND INDICATORS OF SUSTAINABILITY: FIRST STEPS TOWARDS SUSTAINABILITY ANALYSIS 3-4 (1993).

38. *Id.* at 1.

39. *Id.* at 74.

40. *Id.* at 75.

41. *See* BRADY, *supra* note 24, at 35.

42. *Id.*

43. MARK STALLWORTHY, SUSTAINABILITY, LAND USE AND ENVIRONMENT: A LEGAL ANALYSIS 48 (2002).

IV. Purpose and Scope of EIA

One key purpose of EIA is to provide information to the decision-makers who determine whether a project should be implemented.⁴⁴ In other words, EIA is a decision-making tool for administrative bodies.⁴⁵ The immediate goal of EIA is to promote sound decision-making “by providing clear, well organised information on the environmental effects, risks, and consequences of development options and proposals.”⁴⁶ Moreover, EIA “is usually (but not universally) directed toward achieving or supporting ultimate goals of environmental protection and sustainable development.”⁴⁷ EIA also ensures that communities are informed of developments that may affect their environment prior to decisions being made,⁴⁸ thus enabling the public to participate in decision-making on environmental issues by communicating their opinions on proposals and their environmental effects. In the realm of business, EIA facilitates the incorporation of environmental considerations in business practice.⁴⁹

Generally, the primary and secondary purposes of EIA include:

- safeguarding valued ecological processes and heritage areas;
- avoiding irreversible and unacceptable loss and deterioration of natural capital;
- ensuring development is adjusted to the potentials and capacities of the resource base;
- optimizing natural resource use, conservation and management opportunities;
- protecting human health and community well being;
- addressing distributional concerns related to the disruption of people and traditional lifestyles;
- improving coordination among participating agencies and actions;
- fostering better designed and planned development projects, i.e., greener and more cost effective;
- empowering community development and building local capacity through public participation;
- instilling environmental values and accountabilities across a range of

44. BRADY, *supra* note 24, at 189.

45. STALLWORTHY, *supra* note 43, at 134.

46. SADLER, *supra* note 3, at 13.

47. *Id.* (emphasis removed).

48. BRADY, *supra* note 24, at 189.

49. JAIN, *supra* note 12, at 6.

institutions; and

- internalizing environmental costs and damages in industry consistent with the polluter pays principle.⁵⁰

In Ethiopia, the stated purpose of EIA is to ensure public participation in planning and decision-making on developments that may affect the public and the environment.⁵¹ In addition, EIA “serves to bring about administrative transparency and accountability.”⁵² The federal environmental policy also clearly indicates that EIA is intended to mitigate environmental risks and damage.⁵³ Finally, the Federal Environmental Protection Authority (“EPA”) states in its draft EIA guidelines that the purpose of EIA “is to generate sufficient information on significant impacts . . . to determine whether or under what conditions a project should proceed.”⁵⁴ These purposes need to be further defined and elaborated in order to bring them in line with the generally recognized purposes of EIA discussed above.

Determining the scope of an EIA is important because it helps to determine the relevant issues and evaluate an impact statement report accordingly.⁵⁵ “The purpose of EIA is to focus on the *significant* environmental effects of a development, not on all of the environmental effects that can be thought of.”⁵⁶ “Scoping” thus allows the time and resources allotted for the EIA to be directed to the most significant environmental effects.⁵⁷

The scoping process involves the project developer consulting the relevant authorities and deciding the key issues that the EIA needs to address.⁵⁸ “[R]easonable and practical alternatives are considered and discussed with the people who are likely to be affected by the proposed project. . . . A scoping report is written based on issues and concerns raised by stakeholders during the scoping exercise. This report forms the basis for

50. SADLER, *supra* note 3, at 14-15.

51. EIA Proc., *supra* note 10, pmbl. para. 4.

52. *Id.*

53. ENVIRONMENTAL POLICY OF ETHIOPIA, *supra* note 10, art. 4.9(d).

54. Environmental Protection Authority [EPA], *Environmental Impact Assessment Procedural Guideline Series 1*, 10 (2003). The guidelines are “still under development,” and have not been officially approved.

55. FERREY, *supra* note 7, at 102.

56. BRADY, *supra* note 24, at 194 (emphasis added).

57. *Id.* Scoping “ensures that EIAs are focused on the significant effects and do not involve unnecessary investigations that waste time and resources.” U.N. ENVIRONMENT PROGRAMME [UNEP], DESALINATION: RESOURCE AND GUIDANCE MANUAL FOR ENVIRONMENTAL IMPACT ASSESSMENTS 9 (2008).

58. WOLF & WHITE, *supra* note 6, at 352.

the Terms of Reference (ToR) . . . [which is] an agreed list that defines all the issues the EIA must address.”⁵⁹ Scoping should “identify [t]he appropriate boundaries for the EIA study, [i]mportant issues and concerns of the communities, [and] [e]ffects and cultural factors to be considered in the EIA.”⁶⁰ Ethiopia’s Environmental Policy requires that “social, socio-economic, political and cultural conditions” be considered in an EIA.⁶¹

V. Who Prepares an EIA?

In the United States, a person who proposes an action is required to prepare environmental documents and is called the “proponent” of the action.⁶² In other words, the person who is seeking permission for a project or development activity is responsible for carrying out the EIA.⁶³ Similarly, under Ethiopian law, the project proponent is responsible for undertaking an EIA.⁶⁴ The proponent is defined as the initiator of a project—an organ of government in the public sector or a person in the private sector.⁶⁵ According to the federal environmental policy, an EIA should be made “by the relevant sectoral ministries or departments, if in the public sector, and by the developer, if in the private sector.”⁶⁶ The underlying presumption is that the developer is the appropriate person to conduct an EIA and submit the information to the decision making agency.⁶⁷

In Ethiopia, every sectoral governmental body has the delegated authority to make decisions on proponents’ environmental impact statements. For example, licensing bodies like the Ministry of Trade and

59. Tari Dadiowei, *Environmental Impact Assessment and Sustainable Development in the Niger Delta: The Gbarain Oil Field Experience* 11 (Inst. of Int’l Studies, U.C. Berkeley, Niger Delta: Economies of Violence Working Paper No. 24, 2009). In Ethiopia, the EPA’s draft guidelines provide that the terms of reference should include “background to the proposal, setting the context of the problem, consideration of alternatives, institutional and public involvement, required information regarding project and location, etc, analysis of impacts, mitigation and monitoring, and conclusions and recommendations.” EPA, *supra* note 54.

60. Dadiowei, *supra* note 59. See also SADLER, *supra* note 3, at 113; EPA, *supra* note 54, at 9.

61. ENVIRONMENTAL POLICY OF ETHIOPIA, *supra* note 10, art. 4.9(j).

62. JAIN, *supra* note 12, at 7.

63. WOLF & WHITE, *supra* note 6, at 347.

64. EIA Proc., *supra* note 10, art. 7(1).

65. *Id.* art. 2(9).

66. ENVIRONMENTAL POLICY OF ETHIOPIA, *supra* note 10, art. 4.9(f).

67. STALLWORTHY, *supra* note 43, at 151.

Industry, Ministry of Transport and Communication, or Ministry of Mines and Energy are empowered to evaluate environmental impact statements.⁶⁸ However, there is a potential conflict of interest in having an agency review and approve the environmental implications of its own licensing decisions.

An EIA requires input from a multidisciplinary team of engineers and scientists representing disciplines related to the major potential environmental impacts. American environmental law requires “a systematic, interdisciplinary approach” to be used in preparing environmental documentation.⁶⁹ The applicant for a project license is required to submit much of the environmental information needed for documentation and analysis. The relevant government agency should help the applicant by outlining the types of information required. The agency granting the permit must make an independent evaluation of the environmental issues involved and must take full responsibility for the scope and content of the environmental documentation actually prepared.⁷⁰

In many jurisdictions, including Ethiopia, environmental consultants will prepare an EIA for the proponent. Because they are hired and paid by the proponent, consultants may be biased in favor of approving the project, believing that approval will lead to future work or other benefits. One way of addressing this problem is to require licensing of consultants. In Addis Ababa, twenty environmental consultants are registered and licensed to conduct EIAs. Most of them are environmentalists by profession.⁷¹ Out of these twenty consultants, eight are private limited companies, one consists of a group of consultants, and eleven are private individuals.⁷² However, there are no defined criteria to license consultants.⁷³ This is an indication of the poor coordination in this area.

It is possible to argue that it is not licensing of consultants but rigorous review that ensures the quality of an EIA. However, environmental agencies should at least maintain a register of environmental consultants so

68. This delegation was made as per the agreement reached by the 73rd Regular Meeting of the Council of Ministers held on Nov. 5, 2001 E.C.

69. National Environmental Policy Act, 42 U.S.C. § 4331 (1969) (U.S.).

70. JAIN, *supra* note 12, at 7.

71. Interview with Getachew Belachew, Environmental Impact Assessment Officer, Addis Ababa City Environmental Protection Authority, in Addis Ababa (Apr. 20, 2010). According to Getachew, these consultants might not be available even though they are licensed; it is difficult to get in touch with them when corrections are needed on the study reports.

72. Names of consultants and their addresses are posted on the door of the Environmental Impact Assessment Office of the Addis Ababa City Environmental Protection Authority.

73. Getachew, *supra* note 71.

that proponents can identify consultants who prepare honest and unbiased reports, are technically competent to carry out multidisciplinary work, and have the ability to work closely with a design team. Registering consultants would also help them to resist pressure from proponents.⁷⁴

After an environmental impact statement (“EIS”) is prepared, it should be reviewed before being submitted to the responsible agency. The review process can also “begin earlier and be used as a monitoring tool to ensure that progress is satisfactory and that the terms of reference are being followed.”⁷⁵ In countries such as Canada and Australia, an environmental agency is responsible for review, whereas in other countries, such as Italy and the Netherlands, permanent commissions have been established “for independent public review of EISs.”⁷⁶ In Addis Ababa, which seems to follow the Canadian system, review of an environmental impact statement requires seven professionals. Currently, however, there are only five: a soil chemist, an environmentalist, a sociologist and social anthropologist, a natural resource professional, and a chemical engineer.⁷⁷ These professionals could not possibly cover all interdisciplinary environmental issues. It is imperative, therefore, to add more professionals—for instance, a civil engineer and a sanitary engineer.⁷⁸

VI. Criteria to Determine When a Project Requires an EIA

It may not be cost-effective to require all types of projects to undergo environmental impact assessment. When must a proponent conduct an EIA? This is known as the “threshold” question. In answering such a question, government authorities make schedules of projects that require an EIA and those that do not. Projects “likely to have significant impact” should generally be subject to an EIA.⁷⁹

Ethiopian environmental law requires “[p]rojects likely to have negative impacts” to undergo environmental assessment,⁸⁰ in order to determine the nature and degree of such impacts. On the other hand,

74. Malcolm Hollick, *Who Should Prepare Environmental Impact Assessments?*, 8(3) ENVTL. MGMT. 191, 194 (1984).

75. SADLER, *supra* note 3, at 122.

76. *Id.*

77. Interview with Solomon Haile, Executor and Acting Coordinator of Environmental Impact, Addis Ababa City Environmental Protection Authority (March 31, 2010).

78. *Id.* Solomon comments that even though the team has been upgraded from two persons to five, it is still not sufficient to undertake environmental review.

79. FERREY, *supra* note 7, at 82.

80. EIA Proc., *supra* note 10, art. 5(2)(b).

projects that are not likely to have negative impacts do not require EIA.⁸¹ The EIA Proclamation, issued in 2002, authorized the Environmental Protection Authority to issue a directive stating which projects might have negative impacts and thus require EIA. Accordingly, the Authority issued Directive No. 1/2008. The directive does not include any criteria for determining which projects require EIA, but instead simply lists twenty-two types of projects that should be subject to EIA.⁸²

Some countries provide two schedules for environmental impact assessment. For example, British law has one schedule of projects that must undergo an EIA, and another schedule requiring EIA where there are likely to be significant environmental effects by virtue of factors such as the nature, size, or location of the project.⁸³

The Addis Ababa City Environmental Protection Authority has designated three types of projects: Those that require EIA are listed under Group A, those that require preliminary EIA under Group B, and those that do not require EIA under Group C. Group A lists 105 projects, divided into sixteen subgroups, that may have adverse and significant environmental impacts and need to pass through EIA.⁸⁴ However, among the 105 projects in Group A, only mining (basalt rock, red ash, clay, sand, loam, etc.) is subject to EIA in practice. Mining projects go through EIA because the license for such projects is given at the Authority in Addis Ababa.⁸⁵

Ethiopia's Investment Proclamation does not make EIA a requirement for obtaining an investment permit,⁸⁶ and in practice the Ethiopian Investment Authority grants investment permits without EIA as a requirement. However, the EIA Proclamation imposes a duty on any licensing agency to ensure that the relevant environmental agency has authorized implementation of a project *before* issuing an investment permit.⁸⁷ Authorization to implement a project should be granted by the environmental agency only after reviewing the EIS (where required) to

81. *Id.* art. 5(2)(a).

82. Environmental Protection Authority, *Directive Issued to Determine Projects Subject to Environmental Impact Assessment*, Dir. No. 1/2008.

83. WOLF & WHITE, *supra* note 6, at 347-48.

84. Addis Ababa City Environmental Protection Authority, *List of Projects Requiring Environmental Impact Assessment* (EIA). This list is for administrative use only. It has not been officially approved, and was not made according to the Federal EIA Proclamation. Getachew, *supra* note 71.

85. Solomon, *supra* note 77.

86. *See* Investment Proc. No. 280/2002, FEDERAL NEGARIT GAZETA, arts. 13-14; Investment (Amendment) Proc. No. 375/2003, FEDERAL NEGARIT GAZETA, art. 3(6-7).

87. EIA Proc., *supra* note 10, art. 3(3).

make sure the project will not cause harm to the environment.⁸⁸

VII. Important Elements in EIA

One essential element in the preparation of an EIA should be public participation and consultation. In the United Kingdom, for example, the relevant authority must notify the public of any proposed project requiring an EIA. The public will then have the opportunity to comment when the EIS is made available.⁸⁹ A reasonable number of copies of the EIS must be provided for sale to the public. (Unfortunately, some impact statements have been prohibitively priced, despite the fact that developers are only supposed to impose a reasonable charge.)⁹⁰ The proponent is required to publish a notice in a local newspaper and also to post notices at the project site with information about where and when the EIS can be inspected or purchased. The public has the right to communicate views and comments to the planning authority within twenty-one days of the publication of the EIS. Then, the planning authority must make a decision on the application within six weeks after receiving views and comments from the public.⁹¹

In India, when a proponent submits an application to the State Pollution Control Board, the Board will publish a notice for a public hearing in at least two newspapers widely circulated in the region around the project.⁹² One of the newspapers should be in the vernacular language of the region, so that local people can read and comment on it. The notice should invite the public's suggestions, views, comments, and objections within thirty days from the date of notice publication.⁹³ All persons can participate in the public hearing, including those likely to be affected by the implementation of the project, residents, environmental groups, and others. Everyone must be provided access to a copy of the Executive Summary of the project, for which they may have to pay a nominal charge.⁹⁴

In Ethiopia, there is no functional mechanism for ensuring public participation. Environmental impact studies are not made available to the public. The Addis Ababa City Environmental Protection Authority, for

88. *Id.* art. 9(2).

89. WOLF & WHITE, *supra* note 6, at 353-54.

90. *Id.*

91. *Id.* at 354.

92. S. SHANTHAKUMAR, S. SHANTHAKUMAR'S INTRODUCTION TO ENVIRONMENTAL LAW 181-182 (2005).

93. *Id.* at 182.

94. *Id.* at 184.

example, does not consult with the public because they believe that, since the implementation of a project will benefit the people, people will not object to it.⁹⁵ Ethiopian law requires the Federal Environmental Protection Authority (“EPA”) or relevant regional agency to “make any environmental impact study report accessible to the public and solicit comments on it,” and also to ensure that public comments are incorporated into the final report.⁹⁶ However, the law does not clearly indicate the procedures for doing this. The law also requires that “a brief statement summarizing the study in non-technical terms”⁹⁷ should be included with the study. This could give the public an opportunity to understand and comment on the EIS, if only they were allowed access to it. After evaluating an EIS, including “any public comments and expert opinions,” the appropriate environmental agency must decide on the project within fifteen working days.⁹⁸

Another essential element in EIA is the consideration of expert scientific opinion. EIA has elements of rigorous scientific experiments. It is necessary to analyze the project by taking water or soil samples, for instance. The study should also consider the impact of the project on air quality. In general, an EIA requires applying relevant scientific multi-disciplinary principles and use of experts from different fields such as civil engineering and biology.⁹⁹

Studying the impact of a project on air, water, soil, aesthetics, and other areas requires skills as well as science.¹⁰⁰ Under Ethiopian law, a proponent is obliged to ensure that the EIS is “prepared by experts” that meet any government-specified requirements.¹⁰¹ Also, an EIS must “contain sufficient information to enable the [Federal] Authority or the relevant regional environmental agency to determine whether and under what conditions the project shall proceed.”¹⁰²

The Federal Environmental Protection Authority is required to issue guidelines on “the elements necessary to prepare as well as evaluate an environmental impact study report.”¹⁰³ However there are still no guidelines in force. The EPA currently uses guidelines that have not been

95. Solomon, *supra* note 77.

96. EIA Proc., *supra* note 10, art. 15.

97. *Id.* art. 9(1).

98. *Id.* art. 9(2).

99. JAIN, *supra* note 12, at 8.

100. *Id.*

101. EIA Proc., *supra* note 10, art. 7(2).

102. *Id.* art. 8(1).

103. *Id.* art. 8(3).

officially approved.

Yet another important element of EIA is the consideration of alternatives to the proposed project or action. American law, for example, requires the direct, indirect, and cumulative environmental impacts of both the proposed project and alternatives to the project (action) to be identified and discussed.¹⁰⁴ “Alternatives” are different methods to accomplish the proposed action in less environmentally damaging ways.¹⁰⁵ One of the alternatives may be “no action,” or not pursuing the project or action at all. It is recognized that the “no action” alternative is always appropriate.¹⁰⁶

The Ethiopian EIA Proclamation recognizes the “no action” alternative by allowing the relevant environmental agency to “refuse implementation of the project if it is convinced that the negative impact cannot be [satisfactorily] avoided.”¹⁰⁷ This alternative is essential to protect the environment where the implementation of the project would result in inevitable environmental harm. If the agency believes that implementation of the project would affect the environment but “that the negative impacts can be effectively countered,” it may stipulate conditions to be fulfilled so as to eliminate or reduce the impacts.¹⁰⁸ In Addis Ababa, the EIA experts make sure that project proponents include mechanisms to mitigate pollution in their projects.¹⁰⁹

In general, successful EIA requires four basic procedural steps.¹¹⁰ The first step is to understand the proposed action: What is to be done? Where? What kinds of materials, labor, and/or resources are involved? Are there different ways to accomplish the original purpose? The second step is to gain a complete understanding of the affected environment at the site where the project will be implemented. Third is to envisage the implementation of the project and determine its possible impacts on the environment, quantifying these impacts whenever possible. Fourth, it is important to report the results of the study so that they may be used in the decision-making process.¹¹¹

The environmental impact report should include the following components:

104. FERREY, *supra* note 7, at 115.

105. *Id.* at 106.

106. *Id.* at 119.

107. EIA Proc., *supra* note 10, art. 9(2)(c).

108. *Id.* art. 9(2)(b).

109. Solomon, *supra* note 77.

110. See JAIN, *supra* note 12, at 5-6.

111. *Id.* at 6.

1. Nontechnical Executive Summary – “must describe each significant environmental issue and its resolution in sufficient detail so that the reader can understand its importance and scope, as well as the appropriateness of the approach taken to resolve it. . . . It must be able to stand alone as a document.”¹¹²
2. Introduction – identifies the project and the proponent, describes the project and its importance, and gives any other relevant background information.¹¹³
3. Legal and Institutional Frameworks – describes the relevant law(s) requiring EIA and the responsible authority.¹¹⁴
4. Description of the Project – should include the type of project, need for the project, its location, and a concise description of those aspects of the project likely to cause environmental effects.¹¹⁵
5. Description of the Environment – provides baseline data on the existing environment in which the project is intended to be implemented.¹¹⁶
6. Environmental Impacts and Mitigating Measures – explains the potential impacts of the project and appropriate remedies or measures for reducing or mitigating these impacts.¹¹⁷
7. Environmental Monitoring Program – spells out the budgets, procurement schedules, and administrative manpower needed to undertake environmental monitoring.¹¹⁸
8. Public Consultations – the results of stakeholder consultations carried out during the study, detailing the issues raised and proposals made.¹¹⁹
9. Decommissioning – describes the post-consultation decommissioning of various construction facilities that are not required during operation, like workers’ camps, workshops, lay-down areas, and access roads.
10. Summary and Conclusion – includes “a) the overall net gains which justify implementation of the project; b) explanation of how adverse

112. LOHANI, *supra* note 30, at 3.

113. *Id.*

114. *See, e.g.,* M.E.E.A. LTD., CONSULTING ENVIRONMENTAL ENGINEERS, ENVIRONMENTAL IMPACT ASSESSMENT REPORT: SOLID WASTE TREATMENT FACILITY IN AIN BAAL, CAZA OF TYRE, SOUTH LEBANON x-xi (2005), *available at* http://pdf.usaid.gov/pdf_docs/PNADG553.pdf.

115. *See id.* at xi-xii.

116. *See id.* at xiii-xiv.

117. *See id.* at xiv-xv.

118. LOHANI, *supra* note 30, at 9.

119. *See* M.E.E.A. LTD., *supra* note 114, at xi.

effects have been mitigated; c) explanation of use or destruction of irreplaceable components; and d) provisions for follow-up surveillance and monitoring.”¹²⁰

11. Annexes – “may include terms of reference for the EIA; abstracts or summaries of relevant background documents; tabular and graphical summaries of data; a list of contacts and meetings; and a list of data sources.”¹²¹

In Ethiopia, at minimum, an environmental impact study report should describe:

- a) the nature of the project, including the technology and processes to be used;
- b) the content and amount of pollutant that will be released during [implementation] as well as during operation;
- c) source and amount of energy required for operation;
- d) information on likely trans-regional impacts;
- e) characteristics and duration of all the estimated direct or indirect, positive or negative impacts;
- f) measures proposed to eliminate, minimize, or mitigate negative impacts;
- h) contingency plan in case of accident; and
- i) procedures of self auditing and monitoring during implementation and operation.¹²²

VIII. Follow-Up (Monitoring)

Alternatives or conditions for implementation may be imposed on a project as a result of EIA, but these will be meaningless unless there is compliance. Thus, follow-up (also called “monitoring”) is essential to ensure that the project is being implemented pursuant to the conditions. This may involve measures that ensure mitigation is implemented, or that impacts do not exceed a certain level. Follow-up helps to identify unanticipated changes in implementing the project, so follow-up activities are often implemented during the construction phase of a project.¹²³

120. LOHANI, *supra* note 30, at 11.

121. *Id.*

122. EIA Proc., *supra* note 10, art 8(2). Note that there are discrepancies between the Amharic and English versions of the article. Note also that there is no section (g) listed.

123. BRADY, *supra* note 24, at 196.

Ethiopian environmental policy requires follow-up activities “at specified intervals during project implementation” where these are called for in the EIS.¹²⁴ The appropriate environmental agency is generally required to “monitor the implementation of an authorized project in order to evaluate compliance with all commitments made by, and obligations imposed on[,] the proponent during authorization.”¹²⁵ If the proponent does not fulfill these obligations, the agency can order rectifying measures,¹²⁶ or can “suspend or cancel any authorization to implement a project.”¹²⁷ Where an unforeseen circumstance is realized only after submission of the EIS, the relevant environmental agency may order the EIA to be revised or redone so as to address the circumstance.¹²⁸

In practice, the Addis Ababa City Environmental Protection Authority monitors the projects for which it conducts EIA. The Authority conducts monitoring two to four times per year. Where there is a special suspicion, at least two follow-ups are made per year.¹²⁹ Where the proponent violates some conditions, the Authority orders the fulfillment of the conditions within a specified period of time. Then, the Authority goes to the project site to check compliance with conditions of implementation. So far, no one has been found in violation of the conditions. In one case, the Authority refused to renew a permit because the project was not environmentally friendly, particularly with regards to the graveyard of a church.

In Addis Ababa, environmental offices are established at the *kifle ketema* (sub-city) level. At least two experts work at each *kebele* in the city and monitor the implementation of EIA.¹³⁰ However, practice indicates that not every *kebele* is staffed with the required environmental experts, and no systematic scheme exists for monitoring projects.

IX. Enforcement Mechanisms and Incentives

The 2004 Criminal Code of Ethiopia makes it a crime to “implement a project on which an environmental impact assessment is required by law” without authorization from the relevant environmental authority, or to

124. ENVIRONMENTAL POLICY OF ETHIOPIA, *supra* note 10, art. 4.9(e).

125. EIA Proc., *supra* note 10, art. 12(1).

126. *Id.* art. 12(2).

127. *Id.* art. 12(3).

128. *Id.* art. 11.

129. Solomon, *supra* note 77.

130. *Id.*

make “false statements concerning such assessment.”¹³¹ Either act is punishable with up to a year in prison.¹³² In addition, the EIA Proclamation makes any violation of the Proclamation, or “any other relevant law or directive” an actionable offence.¹³³ The law goes on to specify liability for specific offenses: anyone who makes false statements in an EIS will be liable for 50,000-100,000 Ethiopian birr (“ETB”), while anyone who “fails to keep records or to fulfil conditions of authorization” will be liable for 10,000-20,000 ETB.¹³⁴ If the offender is a “juridical person” (company), “the manager who failed to exercise all due diligence” will be liable for 5,000-10,000 ETB on top of the other fines.¹³⁵ In addition to the given penalties, courts have the power to order the offender to restore (or otherwise compensate for) any environmental damage that has been caused.¹³⁶

Incentives are another way to encourage compliance with EIA requirements. The EIA Proclamation provides that environmental agencies may provide financial and technical support for “any environmental rehabilitation or pollution prevention or cleanup project.”¹³⁷ It is not clear what such support would cover, but the provision should be interpreted to at least cover EIA. However, the Environmental Protection Authority has no funds or budgetary provisions for the incentives.¹³⁸ What is more, there are no guidelines for implementing the incentive provision.¹³⁹ In order to encourage performance of EIA, it would be beneficial to widen the scope of available incentives to include tax exemptions/holidays and market access. Furthermore, the government could make EIA a criterion for renewing permits and allocating credit or land.

A broad right to standing is also helpful to the enforcement of EIA laws. The issue of standing can decide whether public interest environmental organizations have the right to “bring suits purely in the interests of protecting the environment.”¹⁴⁰ Standing can allow citizens to

131. CRIMINAL CODE art. 521 (Eth.).

132. *Id.*

133. EIA Proc., *supra* note 10, art. 18(1).

134. *Id.* art. 18(2-3).

135. *Id.* art. 18(4).

136. *Id.* art. 18(5).

137. *Id.* art. 16(2).

138. Solomon Kebede, *The Law and EIA Governance in Practice: EIA Proclamation 299/2002* (2006) (unpublished manuscript).

139. MELLESE DAMTIE & MESFIN BAYOU, MELCA MAHIBER, *OVERVIEW OF ENVIRONMENTAL IMPACT ASSESSMENT IN ETHIOPIA: GAPS AND CHALLENGES* 51 (2008).

140. See Tumai Murombo, *Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership Moved from the United States to South Africa?*, 6(2) LAW,

bring a complaint against an administrator for, e.g., failure to enforce an EIA law, or against an individual who violates EIA laws.¹⁴¹ Statutes may allow such suits in regular courts, or may establish a special environmental tribunal.

X. Conclusion and Recommendations

Ethiopian law requires an EIA for those projects that would adversely affect the environment. However, the directive issued by the Environmental Protection Authority does not provide clear criteria to determine exactly which projects should require EIA. Additionally, while a project proponent will likely need to hire environmental experts (consultancies) to undertake EIA, there is a shortage of experts in the field. Finally, because EIA requires additional costs to be expended by the investor, it may discourage investment unless incentives are provided to cover the costs. The law provides both penalties and incentives to encourage compliance, but these are not used.

After the EIA is completed, an environmental impact study report should be released, containing information about the nature of the project, content and amount of pollutant that will be released, and measures proposed to eliminate, minimize, or mitigate negative impacts. It should also contain procedures for auditing and monitoring during implementation and operation. The EIS should be made available to the public, and public comments should be received before a final decision is made. However, environmental impact reports are not available to the public in current Ethiopian practice.

Based on the findings of this article, the following are recommended:

- 1) The federal and regional environmental authorities should build up their professional capacities, so that they will have a sufficient number of professionals to review environmental impact studies;
- 2) The government should prepare trainings and other education so that there will be sufficient professionals to conduct EIA;
- 3) The EPA should issue a directive providing clear criteria to determine which projects require EIA;
- 4) The EPA should implement incentive mechanisms so as to encourage EIA;

ENV'T, & DEV. J. 163, 165 (2010).

141. See DINAH SHELTON & ALEXANDRE KISS, U.N. ENV'T PROGRAMME [UNEP], JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW 44 (2005).

- 5) The EIA Proclamation and the Investment Proclamation should be revised so as to ensure the performance of EIA;
- 6) The environmental agencies should ensure that environmental impact study reports are made available to the public for comment;
- 7) Persons should be answerable for violations of EIA law in criminal as well as civil courts;
- 8) Proper EIA guidelines should be approved and implemented;
- 9) The government should develop additional enforcement mechanisms;
- 10) Legislators should develop a list of strategic initiatives that are subject to SEA;
- 11) The contents of EIA reports should be improved;
- 12) The government should establish an environmental fund and tribunal;
and
- 13) The EPA should provide clear guidance on follow-ups for EIA and SEA.

* * *

THE POSSIBLE OVERLAP BETWEEN PLANT VARIETY PROTECTION AND PATENT: APPROACHES IN AFRICA WITH PARTICULAR REFERENCE TO SOUTH AFRICA AND ETHIOPIA*

*Sileshi Bedasie***

I. Introduction

The growth of intellectual property as a consequence of scientific and technological advancement has given rise to complex relationships among the various forms of intellectual property rights. As different forms of intellectual property rights have expanded, some have moved toward protecting the same or similar subject matters. Such is the case with patent and plant variety protection, which have experienced a growing overlap. This overlap can affect the right holders if the effective exploitation of a patent cannot be made without infringement of the plant breeders' rights and vice versa. Moreover, the possible overlap may adversely affect the interests of farmers, because patent protection does not recognize the farmers' privilege, typically granted by plant variety protection, to save and exchange seeds.

Plant variety protection has become an important issue since the adoption of the TRIPS Agreement on intellectual property rights in 1994. However, it remains a novelty for all but a few African countries, and constitutes a significant departure from the customary practice based on the free sharing of knowledge.¹ The TRIPS Agreement generally provides for the patentability of inventions in all fields of technology, and specifically

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1. Philippe Cullet, *Plant Variety Protection in Africa: Towards Compliance with the TRIPS Agreement*, 45 J. AFRICAN L. 97, 97 (2001).

calls for “protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.”² Member states of the TRIPS Agreement from Africa are under an obligation to comply with this mandate, though they may take any approach they wish. The most common means of implementation throughout the continent has been the adoption of the International Convention for the Protection of New Varieties of Plants (UPOV Convention), rather than “devising an alternative to monopoly rights.”³

So far, there is no uniform approach in the treatment of the possible overlap between patents and plant variety protection. In Africa, the relevant regional intellectual property organizations—the African Intellectual Property Organization (“OAPI”) and the African Regional Intellectual Property Organization (“ARIPO”)—have adopted different approaches. OAPI deals directly with plant variety protection, requiring members’ adherence to the 1991 version of the UPOV Convention, while ARIPO has not specifically addressed the issue of plant variety protection.⁴ The African Union’s model law dealing with access to biological resources and the rights of farmers and breeders rejects patents on life forms and “exclusive appropriation of any life form, including derivatives.”⁵ Unsurprisingly, different African countries employ diverse approaches to the relationship between patents and plant variety protection.

II. Approaches to the Protection of Plant Varieties

A. *The Approach in South Africa*

South Africa is one of the few African countries that had a plant variety protection regime in place prior to the adoption of the TRIPS Agreement.⁶ As a member of both the TRIPS Agreement and the UPOV Convention, South Africa has taken legislative measures to protect plant varieties in addition to protection of patents. Accordingly, the Plant

2. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27.3(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

3. Cullet, *supra* note 1, at 102.

4. *Id.* at 103.

5. *Id.* See also Org. of African Unity, African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000), available at http://www.opbw.org/nat_imp/model_laws/oau-model-law.pdf.

6. Cullet, *supra* note 1, at 104.

Breeders' Rights Act provides for protection of new varieties of plants, both conventionally bred and genetically modified.⁷ However, the Patents Act excludes patents for both plant and animal varieties.⁸ This exclusion does not extend to a variety developed through a microbiological process,⁹ such as plants modified through genetic engineering.¹⁰ Such a process, carried out with human intervention, is not considered to be an "essentially biological process," so its product could be the subject of both a patent and plant breeders' rights under the respective legislations.¹¹ This is also evident from the Genetically Modified Organisms Act of 1997.¹²

Apart from its legal regimes for the protection of plant varieties and patents, the country has also introduced the South African Biodiversity Act of 2004 in order to comply with its obligation under the 1992 Convention on Biological Diversity ("CBD"), to which it is a signatory.¹³ The Act provides a benefit-sharing mechanism under which a patent holder must ensure compensation to a person allowing access to an indigenous biological resource.¹⁴ This act, in contrast to the aforementioned Patents Act, seemingly implies the possible grant of a patent over biological plant material, which may still involve some aspects of a plant variety. Moreover, the grant of plant breeders' rights over the biological material is not excluded, implying a possible interface between the two systems of protection. This implication was confirmed by the 2005 amendment to the Patents Act, at least with regard to the protection of genetic resources.¹⁵ The benefit-sharing mechanism functions to regulate the possible competing interests of right holders and the community with a vested

7. Plant Breeders' Rights Act 15 of 1976 (amended 1980, 1981, 1983, 1986, 1996) (S. Afr.).

8. See Patents Act 57 of 1978 s. 25(4)(b) (amended 1979, 1983, 1986, 1988, 1996, 1997, 2001, 2002) (S. Afr.).

9. *Id.*

10. Genetic engineering is the process of inserting genetic information into the genomes of different plants; the traits or characteristics associated with the genes will be expressed in the plants. See ROBYN MERRY, GENETICALLY MODIFIED PLANTS: MAKING DUAL PROTECTION A PRIORITY (2009), available at <http://www.bowman.co.za/LawArticles/Law-Article~id~2132417435.asp>.

11. *Id.*

12. *Id.*

13. David Kaplan, *Intellectual Property Rights and Innovation in South Africa: A Framework*, in THE ECONOMICS OF INTELLECTUAL PROPERTY IN SOUTH AFRICA 1, 14 (2009)

14. *Id.*

15. See Patents Amendment Act 20 of 2005 s. 2 (S. Afr.) (indicating the possible grant of a patent on an invention "based on or derived from" genetic or biological resources). It is possible that a genetic resource (particularly a genetically modified one) to which a patent pertains may involve a plant variety developed through microbiological process.

interest in the genetic resource, but there exists no explicit approach for resolving the possible conflict between the holders of different intellectual property rights over the biological material. The benefit-sharing approach also fails to regulate cases where the interest of the users other than the community may be affected due to the overlap. Hence, the competing interests at stake are not only that of the respective right holders but also of the users.

B. The Approach in Ethiopia

Ethiopia is not a party to the TRIPS Agreement and is currently under no obligation to comply with its provisions, despite the country's application for accession to the WTO in 2003. Nevertheless, Ethiopia introduced legal regimes for the protection of patents and plant varieties in 1995 and 2005, respectively.¹⁶ Moreover, Ethiopia has ratified the African Union Model Law and the 1992 Convention on Biological Diversity ("CBD"), both of which deal with some aspects of plant variety in different contexts.¹⁷ It is important not to overlook the relevance of these legal regimes for the protection of plant varieties, which are a subset of the broader concept of all biological resources.¹⁸

Ethiopia's Patent Proclamation categorically excludes from patentability all plant varieties "or essentially biological processes for the production of plants."¹⁹ In so doing, the Proclamation theoretically avoids the possible extension of patent rights into the realm of plant variety protection. Furthermore, the law that protects plant varieties (under a *sui generis* system) does not explicitly indicate any possible relationship with the protection of patents under the patent legislation.²⁰ In this regard, the

16. A Proclamation Concerning Inventions, Minor Inventions and Industrial Designs Proc. No. 123/1995, NEGARIT GAZETA OF THE TRANSITIONAL GOVERNMENT OF ETHIOPIA [hereinafter Patent Proc.]; Plant Breeders' Right Proc. No. 481/2005, FEDERAL NEGARIT GAZETA [hereinafter Plant Breeders' Proc.].

17. Ethiopia ratified the CBD on July 4, 1994, and UPOV on October 2, 2005. The country has also ratified the International Treaty on Plant Genetic Resources for Food and Agriculture (2001).

18. Cullet, *supra* note 1, at 122.

19. Patent Proc., *supra* note 16, art. 4(1)(b). According to European law, "A process for the production of plants is essentially biological if it consists entirely of natural phenomena such as crossing or selection." Council Directive 98/44/EC, art. 2(2), The Legal Protection of Biotechnological Inventions, 1998 O.J. (L 213) 13 (EC) [hereinafter Biotech Directive].

20. See Plant Breeders' Proc., *supra* note 16. The provisions of the legislation reveal the protection of plant breeders' rights without any explicit mention of patent rights. This indicates the exclusive treatment of issues of plant variety protection, which is excluded from the scope of patentable inventions under the patent legislation.

issues of patent and plant variety protection are apparently regulated by two different, exclusive legal regimes. However, like its South African counterpart, the Ethiopian patent law's plant exclusion does not include micro-organisms and plant varieties produced through nonbiological or microbiological processes.²¹ Thus, genetically modified plants produced through a microbiological process may be subject to dual protection under patent and plant variety legislation.²²

In addition, the Proclamation on Access to Genetic Resources and Community Knowledge (implementing the CBD and other related treaties)²³ provides for the possible grant of a patent on protected biological resources, subject to authorization from the concerned authority and the sharing of benefits.²⁴ This envisages the possibility of overlapping rights, with a possible relationship between patent and plant variety in the context of protection of biological resources under a separate legislation. The rights may be created in particular over "derivative" biological materials, defined by the legislation to include plant varieties, chemicals, and proteins.²⁵ This suggests the possibility of both rights in the same derivative biological material, a situation apparently inconsistent with the exclusion under the patent legislation. However, the possibility is tenable only if the biological material exclusively or substantially constitutes a plant variety, which *as such* is not subject to utility patent protection. In other words, there is no categorical exclusion of the concurrent existence of patent and plant breeders' rights over the same biological material as long as the respective legal requirements are met. The question, then, is how the exploitation of the different rights (with different scopes of protection) can be regulated.

21. Unlike the corresponding provisions of the South African Patent Act, which are a verbatim copy of Article 27(3)(b) of the TRIPS Agreement, article 4(1)(b) of the Ethiopian Patent Proclamation does not expressly include or exclude the exceptions concerning micro-organisms or nonbiological and microbiological processes for the production of plants or animals. As long as they are not expressly excluded, they may be subject to patent rights and plant variety protection, despite the argument that the exclusion of plant variety may embrace micro-organisms as well. Moreover, the total exclusion from patent protection of micro-organisms or plants produced through microbiological or nonbiological processes is inconsistent with the TRIPS Agreement. Ethiopia will be required to remove the inconsistency following the finalization of its accession to the WTO.

22. See MERRY, *supra* note 10.

23. The relevant treaties ratified by Ethiopia include the International Treaty on Plant Genetic Resources for Food and Agriculture (ratified June 29, 2004); the Agreement for the Establishment of the Global Crop Diversity Trust (July 15, 2004); and the Cartagena Protocol on Biosafety (October 21, 2004).

24. Access to Genetic Resources and Community Knowledge, and Community Rights Proc. No. 482/2006, FEDERAL NEGARIT GAZETA, art. 17(12-15).

25. *Id.* art. 2(3).

There exists no single provision in the relevant laws that addresses this issue even implicitly. As the law stands now, it arguably appears that Ethiopia has adopted a “dual approach” in addressing the possible relationship between patent and plant variety protection over the same biological material. That is, both patent and plant breeders’ rights can be concurrently created over the same subject matter even if plant variety protection *as such* is excluded from the patent law regime. However, this possible overlap is left ungoverned. The issue may be contractually resolved between the right holders when it arises, but the contractual approach may fail to solve the problem if an agreement cannot be reached. This will hinder the effective exploitation of the respective rights by the right holders, which may result in costly litigation. It can also erode the incentives for innovation.

The concern may be even more critical where the possible overlap tends to limit the farmers’ privilege under plant variety protection. The current law for plant variety protection explicitly provides a farmers’ exemption, which encompasses the right to use, save, sell, and exchange the protected variety or propagating material²⁶ without paying compensation to the plant breeders. The only limitation to the exemption is that “farmers cannot sell farm-saved seed or propagating material . . . on [a] commercial scale.”²⁷ Patent protection, unlike plant variety protection, does not contain a farmers’ exemption.

Even though one may question the practical relevance of the issue from the current economic perspective of Ethiopia, it is likely to pose a challenge in the future. The relevant laws need to be proactive enough to accommodate future developments in the seed and biotechnology industries,²⁸ and to ensure predictability and legal certainty in order to

26. *See* Plant Breeders’ Proc., *supra* note 16, art. 6.

27. *Id.* art. 6(2).

28. The seed industry in Ethiopia is currently at its infant stage compared to those in the developed countries. The public Ethiopian Seed Enterprise “was virtually the sole producer of seeds in the formal seed sector” until 1990. Getenet Gebeyehu, General Manager, National Seed Industry Agency, Ethiopia, Keynote Address at the Workshop on Finance and Management of Small-Scale Seed Enterprises: The Role of Seed in Agriculture 3 (Oct. 26-30, 1998). The first National Seed Industry Policy (NSIP), announced in 1992, was followed by the establishment of the National Seed Industry Agency in 1993 and the enactment of seed legislation in 1997. The legislation “aims at regulating activities of the seed industry by protecting the interests of plant breeders, distributors and farmers.” *Id.* at 3-4. The government plays an active role in ensuring quality control for the seeds released to farmers. *Id.* at 4.

Regarding the biotechnology industry, there are only a few patents which have been granted in Ethiopia since the enactment of the patent law in 1995, and almost all of the patents owned by foreigners are unrelated to biotechnological inventions. However, this trend does not rule out future developments, especially with regard to protection of genetic resources in

promote investment in these areas. At present, Ethiopia has no developed seed or biotechnology industries as such that compete for plant variety and patent protection on food crops.²⁹ However, some cases involving food crops such as *teff* and barley have been recently identified indicating claims for protection by foreign companies.³⁰ These crops are extremely vital food sources in Ethiopia, and the grant of a patent over any gene forming part of the varieties would limit farmers' access to the seeds. Moreover, there is increasing foreign and domestic investment in the production of cash crops such as flowers, cotton, and fruits. It is thus possible that these agricultural products may be subject to various intellectual property rights, including patent and plant variety.

III. The "Interface Problem" and Possible Alternatives

A. *The Interface Between Patents and Plant Variety Protection*

Despite the existence of separate legal regimes for patent and plant variety protection in most countries, there remains a delicate issue of interface, mainly due to the absence of a clear delineation between the scopes of the relevant laws. This interface is evident from the approaches adopted by some jurisdictions. For instance, in the European Union, despite a directive on the protection of biotechnological inventions and the European Patent Convention ("EPC"), which theoretically exclude possible overlap, recent case law developed by the European Patent Office ("EPO") has confirmed a grant of patent over a claim consisting of plant varieties where no specific plant varieties were individually claimed.³¹ In the U.S., where plant patents are common in addition to plant variety protection, it is even more common than in other countries that a utility patent may

Ethiopia. At present, biotechnology research and development in Ethiopia appears to be negligible, and is largely confined to some governmental agencies, research institutions, and universities.

29. Most of the plant varieties identified in Ethiopia are largely the outcome of research conducted by a few research and academic institutions.

30. See generally GETACHEW MENGISTE, AFRICAN CTR. FOR TECH. STUDIES, BIOPROSPECTING IN ETHIOPIA: ENHANCING SCIENTIFIC AND TECHNOLOGICAL CAPACITY (2001).

31. The Enlarged Board of Appeal of EPO, in its decision on the *Novartis* case, has made clear the conformity of the new Rule 23c(b) EPC with Article 53(b) of the EPC, thereby indicating possible patentability of genetic inventions in animals and plants. See Joseph Straus, *Biotechnology and Patents*, 54 CHIMIA INT'L J. CHEMISTRY 293, 297 (2000).

embrace a plant variety, thereby giving rise to an interface problem.³²

The concurrent existence of two different rights over the same subject matter can pose challenges to the exploitation of the rights by the proprietors and the interests of users, given the temporary monopoly conferred by the systems. The overlap between the rights can lead to infringement suits between the different right holders or between right holders and users.³³ A conflict of the latter sort led to a recent case in Canada in which Monsanto, a multinational agricultural biotechnology company, filed suit against a farmer for infringement of its patent on glyphosate-resistant plant cells and genes, due to the farmer's use of seed containing the patented element.³⁴ Such conflicts may be especially problematic in Africa, where intellectual property systems are less developed and efficient than in the West.

Conflicts may also occur when plant variety protection is obtained over a plant variety and a patent is also granted over a certain genetic ingredient or biological material that forms part of the protected variety. For example, a biological material produced by an isolated and purified plant gene falls within the domain of patent protection as long as the isolated gene has a specific function worthy of protection.³⁵ Subsequently, the isolated plant gene may be inserted via recombinant DNA technology into a targeted plant, creating a new plant variety.³⁶ This new plant variety may thus incorporate patented biological material or involve the use of a patented technique,³⁷ creating an overlap between the patents involved and protection for the new plant variety.

Due to the different scopes of the rights,³⁸ the exploitation of such

32. See *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (U.S.). See also Mark D. Janis & Jay P. Kesan, *U.S. Plant Variety Protection: Sound and Fury . . . ?*, 39 HOUS. L. REV. 727, 728 (2002).

33. Infringement suits between right holders may be avoided in advance where cross-licensing is adopted.

34. See *Monsanto Canada, Inc. v. Schmeiser*, [2004] 1 S.C.R. 902 (Can.).

35. Patent protection for isolated and purified genes was confirmed in the U.S. in the landmark case of *Diamond v. Chakrabarty*, which opened the gate for the development of the biotechnology industry. 447 U.S. 303 (1980) (U.S.).

36. Surinder Kaur Verma, *Fitting Plant Variety Protection and Biotechnological Inventions in Agriculture Within the Intellectual Property Framework: Challenges for Developing Countries* 8, UNCTAD/ICTSD/HKU/IDRC Regional Dialogue on Intellectual Property Rights (IPRs), Innovation and Sustainable Development (Nov. 8–10, 2004), available at <http://www.iprsonline.org/resources/biotechnology.htm>.

37. See Barbara Fleck & Claire Baldock, *Intellectual Property Protection for Plant-Related Inventions in Europe*, 4 NATURE REVIEWS GENETICS 834, 836 (2003).

38. A patent generally entitles the owner to exclude third parties from making, using, or selling the invention under protection, while plant variety protection includes exclusive rights

patent rights will unavoidably infringe the right in the plant variety and vice versa, in particular where the respective rights are owned by different right holders.³⁹ Further, the scope of a patent over a new use of (or genetic material integral to) a certain plant variety is likely to embrace the whole, or a substantial part, of the protected variety. This scenario is growing more likely as patent and plant variety protection expand their scopes to include similar or the same subject matters, and biotechnological science continues to advance.

This possible conflict is unavoidable in virtually all jurisdictions unless the rights are exclusively regulated by separate laws. Nonetheless, the adoption of separate laws alone is not adequate to address the problems in practice. This can be discerned from the approaches adopted in Ethiopia and South Africa, which indicate the possibility of interface between the protection of patent and plant variety protection even where separate legal regimes are provided for the protection of the two subject matters. Because of this unavoidable overlap, even with separate laws, compulsory cross-licensing is a preferred approach in other jurisdictions such as the EU when the rights are held by different right holders.

There also exists a concern that the existence of overlapping rights with different scopes of protection can have an adverse impact on food security and sustainable agriculture in developing and least developed countries.⁴⁰ For instance, the limited exceptions to patent protection may hinder the farmers' right to use the protected material, even if they are entitled to a saved seed exemption under the plant variety protection law.⁴¹ Thus, farmers would be deprived of a privilege⁴² that is allowed under plant

of producing or reproducing the variety, conditioning the variety for propagation, sale or marketing of the variety, and exporting or importing. Moreover, plant variety protection includes broad exceptions (such as the farmers' privilege to save seeds) that are not available against patents, which are broader in scope of protection, with limited exceptions. *See, e.g.*, Patent Proc., *supra* note 16, arts. 22, 25; Plant Breeders' Proc., *supra* note 16, arts. 5-7.

39. *See* Fleck & Baldock, *supra* note 37.

40. This is particularly a concern for African countries whose economies are primarily based on agriculture, because farmers need free access to seeds in order to guarantee food security in such countries. For instance, "in Ethiopia, farmers contribute about 96 per cent of the annual seed requirement." Cullet, *supra* note 1, at 106.

41. This may occur where patented genetic material forms part of seeds, so that using or reusing such seeds would amount to infringement of the patent. There is no saved seed exemption under the Ethiopian patent law except in a limited case for acts done for non-commercial purposes. This exception does not include the right to sell or exchange the protected seeds to other farmers. Such an exemption exists under the EU Biotech Directive (Recital 47), while there is no exemption in the U.S. *See, e.g.*, *Monsanto Co. v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002) (U.S.).

42. The farmers' privilege to use, share, save, and sell a protected plant variety does not extend to acts committed for commercial purposes. In particular, farmers cannot sell farm-

variety protection but prohibited under patent protection (except in case of personal use for noncommercial purposes),⁴³ as long as the respective rights stem from the same subject matter. In other words, the broader limitations and exceptions to the protection of plant varieties⁴⁴ cannot be fully exploited without infringement of the concurrent utility patent (with a much broader scope of protection). This encumbrance can ultimately affect food security where the monopoly rights are created over food crops.

B. Possible Solutions to the Interface Problem

The intricate conflict of rights indicated above necessitates a clear solution. One approach, which is followed by the European Union, is partly based on a compulsory cross-licensing scheme for cases where the respective rights cannot be acquired or exploited without infringing each other.⁴⁵ This should not be confused with the benefit-sharing mechanisms adopted in South Africa and Ethiopia, which serve only to resolve the conflict of interests between right holders and the community that may arise in the context of biodiversity and genetic resource protection. This approach is typical in cases of patent rights over biological resources, for which the patent holder is obliged to share the derived benefits with the concerned community.⁴⁶ However, this does not address the interface between patent and plant variety protection in the course of their exploitation by the respective right holders. Nor do the existing laws in these countries provide for a European-style cross-licensing scheme.

Another approach—one that excludes the possible interface from the beginning—is a mutually exclusive system of protection under clearly delimited separate laws. This approach, as adopted in countries like South Africa and Ethiopia, theoretically avoids the possible overlap between patent and plant variety rights. However, these laws are not clear enough to avoid the problem in practice, taking into account possible future developments in patent and plant variety protection. The overlap problem may be avoided only when the subject matters to which the rights attach are

saved seeds or propagating material of a protected variety in the seed industry on a commercial scale. See, e.g., Plant Breeders' Proc., *supra* note 16, art. 6(2).

43. See Patent Proc., *supra* note 16, art. 25(1)(a).

44. See Janis & Kesan, *supra* note 32, at 751-52.

45. See Biotech Directive, *supra* note 19, art. 12.

46. It is important to note that the benefit sharing arrangement in South Africa is limited to the traditional knowledge contained in biodiversity, and does not extend to biological resources themselves. See Nadine Barron & Ed Couzens, *Intellectual Property Rights and Plant Variety Protection in South Africa: An International Perspective*, 16 J. ENVTL. L. 19, 40 (2004).

specifically and exclusively regulated. This may eventually entail the exclusion of one subject matter from being protected under the other legal regime except under its own category. Alternatively, the creation of a prior right may exclude the subsequent creation of another right.

Each of these solutions has its own merits and demerits, and each country's approach should be adapted to its own needs and economic realities so as to achieve the objectives envisaged by both systems. For instance, the exclusion of certain agricultural innovations from patent protection can avoid both the overlapping rights problem and the strong, broad monopoly rights inherent to patent protection which tend to limit farmers' access to the products. However, the exclusion will ultimately hamper the possible innovation in that sector which otherwise would be achieved via patent protection. A less intrusive approach short of total exclusion may be achieved by adapting the farmers' exemption under plant variety protection into the patent system. The existing exception under Ethiopian patent law does not apparently embrace the farmers' right to sell or exchange the protected product.⁴⁷ A limited approach that resembles the exemption under plant variety protection has already been adopted in some jurisdictions in the context of biotechnological inventions.⁴⁸

IV. Conclusion

The issue of overlap between plant variety and utility patent protection is becoming more critical than ever, with practical implications for the exploitation of the respective rights by different right holders. The diverse approaches adopted worldwide often pose an interface problem, impeding harmonious exploitation of the rights. Moreover, measures adopted by some countries to solve the problem are not clear and effective, and may hamper the protection and enforcement of the rights. This may largely affect developing and least developed African countries like Ethiopia, which strive hard to achieve sustainable food security and agricultural development. The problem may even raise concerns with regard to the mandates of member states to comply with the relevant international treaties.

A well-designed *sui generis* system of plant variety protection with a clearly delineated scope is much more apt than a dual protection system in

47. The primary exception to patent holders' rights under Ethiopian law is for "acts done for non-commercial purposes," which would (arguably) not include selling the patented products to other farmers. Patent Proc., *supra* note 16, art. 25(1)(a).

48. See Fleck & Baldock, *supra* note 37.

countries where agriculture is the backbone of the economy. For one thing, it is difficult to draw a bright line between the scopes of the different intellectual property rights, while it is much easier to provide for the clear, proper exclusion of certain subject matters from patent protection under the relevant patent law. Additionally, patents over a plant varieties have the potential of diminishing or even denying farmers' access to seeds or propagating material,⁴⁹ while this need not be the case in *sui generis* systems. The situation may be even more restrictive when the patent rights exist concurrently with plant variety protection over genetic resources.

Nevertheless, the mere adoption of a *sui generis* system may not necessarily rule out the possible overlap between the rights of different rights holders. Crafting a systematic approach such as compulsory cross-licensing into the relevant laws is imperative to ensure effective exploitation of the rights with a view to promoting innovation and sustainable economic development. To protect farmers, the farmers' exemption under plant variety protection can be provided in the patent law as well for certain important subject matters. In both cases, the approaches should be designed to achieve a balance among the competing interests and sustainable development.

49. See Phillip Cullet, *supra* note 1, at 108-09.

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