

Land Rights and Large Scale Agricultural Investments in Ethiopia
Dissertation

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Dedication

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Abbreviations

ACHPR	African Charter on Human and Peoples Rights
ADLI	Agricultural Development Led Industrialization
AEZ	Agricultural Economic Zone
AISD	Agricultural Investment Support Directorate
BITs	Bilateral Investment Treaties
CBE	Commercial Bank of Ethiopia
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CFS	Committee on World Food Security
CITES	Convention for the Control of the International Trade in Endangered Species of Wildlife
DBE	Development Bank of Ethiopia
EAILAA	Ethiopian Agricultural Investment Land Administration Agency
EDRI	Ethiopian Development Research Institute
EHPEA	Ethiopian Horticulture Producers and Exporters Association
EIA	Environmental Impact Assessment
EIC	Ethiopian Investment Commission
EITI	Extractive Industries Transparency Initiative
EMS	Environmental Management Systems

EPA	Environmental Protection Authority
EPRDF	Ethiopian Peoples’ Revolutionary Democratic Front
FAO	Food and Agriculture Organization of the United Nations
FDRE	Federal Democratic Republic of Ethiopia
FIAN	Food First Information and Action Network
FPIC	Free, Prior and Informed Consent
GDP	Growth Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Center for Settlement of Investment Disputes
ILO	International Labour Organization
IMF	International Monetary Fund
IPPA	Investment Protection and Promotion Treaties
KII	Key Informant Interviews
MoA	Ministry of Agriculture
PDRE	Peoples Democratic Republic of Ethiopia
PLIAF	Policy, Legal and Institutional Framework
PRAI	Principles of Responsible Agricultural Investment
RDPS	Rural Development Policy and Strategy
SNNPRS	Southern Nations, Nationalities and Peoples National Regional State
UDHR	Universal Declaration of Human Rights
UNCBD	Convention on Biological Diversity
UNCCD	United Nations Convention to Combat Desertification
UNCITRAL	United Nations Commission on International Trade Law
UNDG	United Nations Development Group

UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	United Nations Guiding Principles on Business and Human Rights
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure

CHAPTER ONE

INTRODUCTION

1. Background of the Study

The first decade of the 21st century marks the beginning of a new era of competition for land and natural resources.¹ Since 2008, the issue of large scale agricultural investments has attracted tremendous global attention.² The lease and purchase of land through transnational agreements assumed unprecedented scale. The increased level of large scale agricultural investments is one of the dramatic effects of the interconnected and mutually reinforcing finance, food, energy crisis.³ The Ethiopian Investment Proclamation defines the term “investment” as expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise or to expand or upgrade one that already exists.⁴ Agricultural investment is defined as enhancing production and productivity intended for supply to the market by undertaking modern agricultural activities with the support of improved and new technologies (including best seed, chemicals, hormones, machineries, electronics equipments, improved hand tools, etc) with improved utilization and increased number of workforce.⁵ Article 2(1) of the Ethiopian Agricultural Investment Land Administration Agency Establishment Regulation defines the term “agricultural investment” as a capital outlay by an investor to establish a new large scale agricultural investment or to expand or upgrade an existing agricultural investment.⁶ The same Regulation also defines “large scale agricultural investment land” as a stretched and adjacent agricultural investment land above 5,000 hectare or less but deemed feasible and administered by the federal government on the

¹Nadia Cuffaro and David Hallam, “Land Grabbing” in Developing Countries: Foreign Investors, Regulation and Codes of Conduct <<http://farmlandgrab.org/uploads/attachment/wp201103.pdf> > accessed 27 August 2013

² The allocation of land to investors in Ethiopia has been practiced since the second half of the 1990s. Nevertheless, many of the land allocated up until the end of 2002 was to local investors and the land allocated was smaller in size less than 500 hectares. Foreign investors started showing interest following the enactment of the generous investment proclamation (repealed Proclamation 280/2002) and the success of the floriculture business in European markets. The demand for land in Ethiopia increased sharply since 2008 by both domestic and foreign investors. The year 2008 saw more than one-third of the land allocated by regions in the ten year period.

³ *ibid*

⁴ Investment Proclamation 769/2012, Article 2(1)

⁵ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Challenges and Recommendations on Foreign Agricultural Investment (May 2014), p. 1, (*translation mine*)

⁶ Ethiopian Agricultural Investment Land Administration Agency Establishment Council of Ministers Regulation, Regulation 283/2013, *Federal Negarit Gazeta*, 19th Year No. 32, Article 2(1)

basis of power of delegation obtained from regional states.⁷ Likewise, the Regulation by the Council of Ministers on the Agricultural Investment Land Administration defines “Large arable lands” shall mean farm lands exceeding area of 5000 hectares that the Federal Government hands over from regions and administers the land for agricultural development.⁸

Agricultural investments involving large-scale land acquisitions are documented in different parts of the developing countries including Africa, Asia, Latin America and Eastern Europe. Nonetheless, most of the countries selling or leasing lands to foreign investors are low-income African countries. Africa is considered by investors as the most convenient place to secure arable land.

Ethiopia, a federal state comprised of nine ethnically-based regional states, is one of the least developed countries in Africa at the center of large-scale agricultural investments.⁹ In historical perspective, the attention given to private large scale agricultural investment in Ethiopia was low. Nevertheless, the number of investors engaged in agricultural investment increased since 1991 following the newly adopted policy of agricultural reform and privatization.¹⁰

The consideration of the overarching policy framework is necessary to clarify the motivations behind the promotion of large scale agricultural investments in Ethiopia as “*a land of unique opportunity*”. The Rural Development Policy and Strategy (RDPS) highlights the importance of agricultural investment using technology in areas endowed with land resources.¹¹ The agricultural policy of Ethiopia which has been in place since 1991 is mainly outlined in the Agricultural Development Led Industrialization (ADLI). The policy envisages realizing the vision of market led modern agriculture or market oriented agricultural development.¹² This

⁷ Ethiopian Agricultural Investment Land Administration Agency Establishment Council of Ministers Regulation, Regulation 283/2013, *Federal Negarit Gazeta*, 19th Year No. 32, Article 2(2)

⁸ Regulation by the Council of Ministers on the Agricultural Investment Land Administration, March 2010

⁹ Oakland Institute, FAQs on Indian Agricultural Investments in Ethiopia (February 2013) <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Ethiopia_India_FAQ.pdf> accessed 22 August 2013

¹⁰Ministry of Agriculture of Federal Democratic Republic of Ethiopia, Public Relations Bureau, Ethiopia: The Gifted Land of Agricultural Investment (2012, p. 2

¹¹ Ministry of Agriculture, The Organization of Ethiopian Agricultural Investment Land Administration Agency, April 2013, p.2

¹² Ministry of Agriculture of Federal Democratic Republic of Ethiopia, Public Relations Bureau, Ethiopia: The Gifted Land of Agricultural Investment (2012, p. 1-2

agricultural development strategy is described as dualist by promoting both the security of smallholder agriculture while at the same time promoting agricultural investments. The strategy views state ownership of land as an essential instrument for realizing rapid agricultural growth while at the same time recognizing usufruct rights for smallholders.¹³ In line with the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT), ADLI prioritizes sustainable productivity of small scale farm holdings. The strategy underscores the use of improved technologies and best practices to enhance the productivity of smallholder farmers who are deemed to be the principal source of agricultural growth.¹⁴ Nevertheless, the government has embarked upon large scale agricultural investment which is characterized to be the second development alternative for providing industrial inputs as well as earning foreign exchange.¹⁵ It is contended that as land is among the main resources available at the disposal of the country, it has to be used so as to transform the vision of the state into a middle-income country.¹⁶ To this effect, large scale agricultural investment is said to play a significant role alongside smallholder agriculture is amplified.¹⁷ The government refutes efforts to depict large scale agricultural investment as being antagonistic to smallholder cultivation.¹⁸

Consequently, the country has been actively promoting agricultural investment including that of large scale ones. Large scale agricultural investments in Ethiopia form part and parcel of the government commercialization push which is receptive to small, large, foreign and domestic, public or private investments.¹⁹ It has been said that the number of local and foreign investors who seek to invest in the area is on the increase.²⁰ Following the onset of commercial agriculture

¹³ Tom Lavers (2012) 'Land grab' as development strategy? The political economy of agricultural investment in Ethiopia, *Journal of Peasant Studies*, 39:1, 105-132

¹⁴ Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

¹⁵ Ministry of Agriculture of Federal Democratic Republic of Ethiopia, Public Relations Bureau, Ethiopia: The Gifted Land of Agricultural Investment (2012), p. 2

¹⁶ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Challenges and Recommendations on Foreign Agricultural Investment (May 2014), p. 1, (translation mine)

¹⁷ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Challenges and Recommendations on Foreign Agricultural Investment (May 2014), p. 1, (translation mine)

¹⁸ Interview with Dr. Workafes Woldetsadik, Ethiopian Agricultural Investment Land Administration Agency, May 28, 2014

¹⁹ *ibid*

²⁰ Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

in Ethiopia more than 11,773 local and foreign investors received investment licenses.²¹ In 2015, there are about 5,680 local and foreign investors in the sector.²² 5,583 of these are administered by the regional states, while the remaining 97 large scale agricultural investments are handled by Ethiopian Agricultural Investment Land Administration Agency.²³ At the federal level, 135 foreign, Diaspora and local investors have obtained their investment license and took possession of a combined land area of 498, 501 hectares.²⁴ At the regional level, close to 5240 investors have obtained their investment license and took possession of 1.73 million hectares of land.²⁵ Thus, about 5284 investors account for 2.2 million hectares of arable land on the basis of lease agreements concluded with the Ministry of Agriculture since 1992 as shown in the table below.²⁶ It is submitted that about 270 foreign investors including those foreign nationals of Ethiopian origin have been engaged in agricultural investment.²⁷ In particular, the year 2008 saw a paradigm shift since the government intensified the allocation of large tracts of land to national and foreign agricultural investors.²⁸ As shown in the table below, 2.2 million hectares of land has been transferred at the regional and federal levels to more than 9000 investors.²⁹

²¹ Ministry of Agriculture of Federal Democratic Republic of Ethiopia, Public Relations Bureau, Ethiopia: The Gifted Land of Agricultural Investment (2012), p. 7

²² Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015, available at < <http://addisfortune.net/columns/non-performing-agricultural-investments-get-the-axe/>>

²³ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

²⁴ Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

²⁵ Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

²⁶ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014), p. 1, (translation mine), Recently, these figures have increased to 2.3 million hectares of land. *See also Asefa Mideksa, Government Provides over 2.3 Million Hectares of Land for Investors in Agriculture, Ethiopian News Agency (ENA), 13 May 2015, available at < <http://www.ena.gov.et/en/index.php/economy/item/772-gov-t-provides-over-2-3-million-hectares-of-land-for-investors-in-agriculture>>*

²⁷ *Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Challenges and Recommendations on Foreign Agricultural Investment (May 2014), p. 1, (translation mine)*

²⁸ Felix Horne (2011), *Understanding Land Investment Deals in Africa: Ethiopia*, Oakland Institute <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Land_Investment_report.pdf> accessed 27 August 2013

²⁹ Ethiopian Agricultural Investment Land Administration Agency, *Special Plan for Facilitating the Development of Land Transferred to Investors*, August 2013, p.2

Table 1: List of Large Scale Agricultural Investors in Regional States in Ethiopia

List of Large Scale Agricultural Investors in Regional States in Ethiopia					
No.	Regions	No. of Projects	Land Transferred (ha.)	Capital Registered	Total No of Employment
1	Oromiya	929	458292.2	66775	736890
2.	Afar	48	22364.89	9045	86853
3.	Somali	15	9332.86	79	2236
4.	Benishangul	306	600253.9	2018666	76955
5.	SNNP	1408	311502.1	13093692	80123
6.	Amhara	1290	171771.89	20744	674508
7.	Dire Dawa	186	10819	678	17270
8.	Tigray	397	109318	2598	389169
9.	Addis Ababa	364	17420	2916	77877
10.	Gambella	304	399491	1624	79697
11.	Harare	37	7428.4	115	826
12.	Total	5, 284	2, 117, 994.24	15, 216, 932	2, 222, 404

Source: Ethiopian Agricultural Investment Land Administration Agency (EAILAA) (The Gifted Land of Agricultural Investment (2012))

On the other hand, a total land of 483, 070 hectares has been transferred to investors only at the federal level by the Ethiopian Agricultural Investment Land Administration Agency as shown in the table below. Although the figure stood at 578, 501 as shown in the table, the figure changed as a result of the cancellation of some seven large scale agricultural investment agreements by the Agency which resulted in the return of some of the land transferred. In late December 2015, the land size of returned investment land to the federal land bank stood at 90,431 hectares. Thus, the net total transferred land stands at 483, 070 hectares in December 2015. With the cancellation of the four contracts, the total number of investors has also reduced to 131 investors in December 2015. With the cancellation of the agreement concluded with Karuturi Agro Products which took possession of 100,000 hectares of land on 25th of December 2015 and with the concomitant

announcement by the Ethiopian Agricultural Investment Land Administration Agency that the company would lose 98,800 hectares of land, the size is likely to reduce even further.³⁰

³⁰ Fana Broadcasting Agency, Ethiopian Agricultural Investment land Agency Terminated Its Agreement with Karuturi, December 31, 2015, See also Berhanu Fekade and Wudinhe Zenebe, Government took over more than 98,000 hectares from Karuturi (The Reporter, 2 January 2016)

Table 2: Total Transferred Investment Land for (Foreign, Diaspora and Local Investors)

No.	Total Transferred Investment Land for (Foreign, Diaspora and Local Investors)			
1	Investment Land Transferred for Foreign Investors	Hectares (Ha)	No of Investors	Investment Capital in Million Birr (Ethiopian Currency)
	Gambella	241, 012	11	47,564
	Benishangul	82,377	6	2,217
	SNNPRS	31,000	4	1,673
	Somali	6,000	2	266
	Sub-Total 1	360,389	23	51, 720
2	Investment Land Transferred for Diaspora Investors			
	Benishangul	16,286	10	390
	SNNPRS	13,637	5	161
	Sub-Total 2	29,918	15	551
3	Investment Land Transferred for Local Investors			
	Gambela	31,800	35	667
	Benishangul	94,988	51	2,535
	Amhara	6,183	1	-
	SNNPRS	50,223	13	602
	Oromia	5,000	1	-
	Sub-Total 3	188,194	101	3,804
	Grand Total	578, 501	139	56,075

Source: Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Land Transfer Directorate (December 2015)

Table 3: Land Transferred by the Agency as of December 2015

1.	Number of cancelled investors	7
2.	Size of returned investment land to the Federal Land Bank	90,431
3.	Total transferred land	483,070
4.	Total number of investors	131

Source: Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Land Transfer Directorate (December 2015)

Makki attributes this surge in agricultural investments in Ethiopia to three major developments, namely the considerable growth in world market demand for land-derived commodities including food and biofuels, the expansion of the roads and communications infrastructure and the liberalization of Ethiopian investment codes.³¹

The principal objectives that the government aims to attain by pursuing this avenue include fiscal and non-fiscal. These include production of export crops and increasing the foreign earnings of the country, expansion of the production of crops needed for agro-industry, benefiting local communities by way of the construction of infrastructure and social assets including health posts, schools and access to potable water, provision of the opportunity for technology transfer and promotion of energy security.³²

Consequently, the country has earmarked large swathes of land for large scale agricultural purposes. Nevertheless, there is no accurate figure on the exact amount of land allocated for this purpose. Following the establishment of the federal land bank, estimates of the amount of land allocated for this purpose ranges from 3 million hectares to 5 million hectares of land.³³ 4.6 million hectares of land deemed to be suitable for agricultural investment has been identified

³¹Fouad Makki (2012): Power and Property: commercialization, enclosures, and the transformation of agrarian relations in Ethiopia, *Journal of Peasant Studies*, 39:1, 81-104

³² Dessalegn Rahmato, Land to Investors: Large Scale Land Transfers in Ethiopia
< http://www.landgovernance.org/system/files/Ethiopia_Rahmato_FSS_0.pdf > accessed 22 August 2013

³³ Rachel Nalepa, Land for Agricultural Development in the era of Land Grabbing: A spatial exploration of the “marginal lands” narrative in Contemporary Ethiopia
< <http://www.plaas.org.za/sites/default/files/publications-pdf/LDPI40Nalepa.pdf> > accessed 15 August 2013

from different regional states.³⁴ 3.77 million hectares of land which has been identified for this purpose has been deposited to the federal land bank.³⁵ Large tracts of land in Gambela, Benishangul-Gumuz, Southern Nations, Nationalities and Peoples National Regional State (SNNPRS) and other regional states has been transferred to large scale agricultural investors.³⁶ The Federal Land Bank is a mechanisms established by the Ministry of Agriculture for the purpose of proper administration and provision to the investors in need of investment land.³⁷ As indicated in the table below close to 3.7 million hectares of land has transferred from the regional governments to the Federal Ministry of Agriculture.³⁸

Table 4: Geographical Distribution of Investment Land Transferred to the Federal Land Bank

Region	Land Transferred (<i>ha</i>)
Benishangul-Gumuz	1, 149, 052
Gambela	1, 226,893
Oromia	1, 079, 866
Amhara	6183
Somali regional State	6000
SNNPRS	219,000
Total	3.77 million hectares

Source: Ethiopian Agricultural Investment Land Administration Agency (EAILAA) (2014)

As mentioned earlier, the Ethiopian Federation is comprised of nine regional states and two chartered cities. However, as can be seen from the table above, much of the land deposited in the federal land bank comes mainly from only few regional states. The actual scale of the land deals undertaken has not yet emerged primarily due to the lack of transparency and the secrecy surrounding these agricultural investment deals.³⁹ According to government figures in December

³⁴ Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

³⁵ Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

³⁶ *ibid*

³⁷ Ministry of Agriculture of Federal Democratic Republic of Ethiopia, Public Relations Bureau, Ethiopia: The Gifted Land of Agricultural Investment (2012), p. 8

³⁸ Ministry of Agriculture of Federal Democratic Republic of Ethiopia, Public Relations Bureau, Ethiopia: The Gifted Land of Agricultural Investment (2012), p. 8

³⁹ Makki (n 31)

2015, total land 498, 501 hectares of the land earmarked for these large scale agricultural investments have already been transferred through lease agreements concluded with qualified local, Diaspora and international investors.⁴⁰ Nevertheless, other reports suggest that investors were granted a much larger combined total land area.⁴¹

Both public and private companies are involved in agricultural investment in the country, including private individuals, national states and agro industrial complexes, although the majority of investors are private companies.⁴² Foreign-state owned or affiliated agricultural investments take place in the country.⁴³ Land is leased to foreign and domestic investors who wish to engage in agricultural investment for a period of years.⁴⁴ The land allocated for foreign investors is bigger than that of the land given to domestic investors.⁴⁵ It is contended that foreign investors are much more equipped than domestic counterparts in terms of capital and technology to justify the leasing of large scale agricultural lands to foreign investors.⁴⁶ As was shown by Oakland Institute, while large foreign land investments attract the attention of the media, as opposed to popular belief, many land deals in Ethiopia are in actual fact small-scale investors of local and Diaspora origin.⁴⁷ As shown on the table above, domestic investors account for the

⁴⁰ Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

⁴¹ Daniel and Mittal (2010) (Mis) Investment in agriculture: the role of international finance corporation in global land grabs. Oakland, CA: The Oakland Institute <<http://www.oaklandinstitute.org/misinvestment-agriculture-role-international-finance-corporation-global-land-grab>>accessed 29 August 2013

⁴² Lavers (n 13)

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ Rahmato (n 32)

⁴⁶ *ibid* (Foreign investors engaged in agricultural investment in Ethiopia hail from different countries. The foreign investors interested in land acquisition land can be categorized in to three groups. The first group of foreign investors is those which hail from states with insufficient agricultural land and water resources. These are states characterized by a high level of population pressure and strong economic growth. The states pursue a national food security strategy through outsourcing of food production to third countries. The second group of foreign investors hails from states with extremely limited land and water resources but with plenty of capital available due to abundant oil riches. These are states which are dependent on food imports and are also adversely affected by the volatility of the price of food and export ban and fluctuating food prices. The third group of foreign investors in Ethiopia is energy investors. They come from states in increasing demand for biomass to generate energy and fodder crops as agricultural raw materials destined for industrial use. The pattern also follows the south-south pattern observed elsewhere in Africa. However, with 35 companies, Indian investors prove to be the most aggressive. There are also pronouncements that as much as 1.8 million hectares of land earmarked for agricultural investments may be awarded to Indian Investors in the period lying ahead.(See Rahmato (n 32))

⁴⁷ Horne (n 28)

bulk of the capital as compared to foreign investors.⁴⁸ The small scale land transfers made largely to domestic investors are much bigger in number.

The giveaway rental fees, the long term lease periods, the access for credit and the generous package of investment incentives and tax inducements the country offers have made agricultural investment projects in Ethiopia lucrative.⁴⁹ The low amount of the land fee charged are one of the reasons why investors seek to get more land than they can manage and which they leave undeveloped.⁵⁰

Lavers argues that large-scale agricultural investments constitute one of the cornerstones of the development strategy pursued by the Ethiopian government.⁵¹ The government has actively promoted large scale agricultural investments as a pillar of national economic growth.⁵² Likewise, the poverty reduction strategy papers of the country have focused on attaining economic growth based on the commercialization of agriculture with strong impetus and leading role played by the private sector.⁵³

Various large scale agricultural investments are engaged in the production of peasant foods, wage foods, industrial inputs, export crops and bio-fuel crops.⁵⁴ The Ethiopian government has particularly focused on the vast low land areas and basins especially not inhabited by agro pastoralists for the expansion of large scale agricultural investments.⁵⁵ Thus, lands which are characterized to be “unused” lands in low-population areas in the country have been the focus of such investments particularly in Gambela, Benishangul-Gumuz, Oromia and Southern Nations, Nationalities and Peoples Regional (SNNPR) States.⁵⁶ According to the land cover inventory that the Ethiopian government prepared based on satellite imagery the area under cultivation by

⁴⁸ Makki (n 31)

⁴⁹ Rahmato (n 32)

⁵⁰ *ibid*

⁵¹ *ibid*

⁵² *ibid*

⁵³ Imeru Tamrat, *Governance of Large Scale Agricultural Investments in Africa: The Case of Ethiopia* (paper presented at the World Bank Conference on Land Policy and Administration) <<http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/tamrat.pdf>> accessed 16 August 2013

⁵⁴ Lavers (n 13)

⁵⁵ Ministry of Agriculture of Federal Democratic Republic of Ethiopia, Public Relations Bureau, Ethiopia: *The Gifted Land of Agricultural Investment* (2012) 2

⁵⁶ *ibid*

peasants, agro-pastoralists and others is said to be less than 20 percent of the total area of the country.⁵⁷ This figure is oftentimes used to justify the argument that there is plenty of “unused” land that can be handed over to investors.⁵⁸ Communal areas are particularly targeted for large scale agricultural investments as being “unused” and by extension *terra nullius*⁵⁹ despite patterns of pastoralism and shifting cultivation and strong constitutional basis for the protection of pastoralist thereof.⁶⁰

Nevertheless, Nalepa attempts to rebut the claim that the lands which are the subject of large scale agricultural investments in Ethiopia are “unused” and “degraded” by demonstrating the important roles they play by way of supporting local inhabitants.⁶¹

As Lavers noted, receiving countries of large scale agricultural investments like Ethiopia highlight the developmental roles that such investments could play including addressing food crisis and poverty, rural development, technology transfer, development of infrastructure, generating employment, earning foreign exchange and GDP growth.⁶² The Ethiopian government contends that agricultural investments are critical for allowing much needed foreign currency into the economy and they are also said to contribute to the long term food security by way of technology transfer to smallholder farmers.⁶³

However, the Oakland Institute submits that there is a large discrepancy between publicly stated positions, laws, policies, and procedures and what is actually happening on the ground.⁶⁴ It argues that commercial agricultural investments are likely to have the effect of increasing food insecurity on the local inhabitants living in the proximity of the areas.⁶⁵ The Oakland Institute also asserts that mechanisms are lacking to ensure that the said outcomes such as improved food security, transfer of technology, benefit sharing of these investments actually materialize.⁶⁶ In regard to procedures, the Oakland Institute contests observance of requirements of community

⁵⁷ Rahmato (n 32)

⁵⁸ *ibid*

⁵⁹ Makki (n 31)

⁶⁰ Horne (n 28)

⁶¹ Nalepa (n 28)

⁶² Lavers (n 13)

⁶³ Horne (n 28)

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ *ibid*

consultations, free, prior and informed consent (FPIC), environmental and impact assessments, payment of adequate compensation upon displacement and other procedural guarantees.⁶⁷ The Oakland Institute does not agree with the scenario of a “win win” situation for the stakeholders and the idea of “responsible agro-investments” guided by Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) or Principles of Responsible Agricultural Investment (PRAI).⁶⁸

Consequently, the issue of large scale agricultural investments in Ethiopia has led to various controversies as it has been doing elsewhere. Some of the controversies surrounding large scale agricultural investments in Ethiopia pertain to its impact on the ethnic federal system of the country, the shortcomings in terms of policy, legal and institutional framework, the adverse outcomes it has triggered on human rights of local host communities, social and cultural implications and on environmental sustainability.

The Ethiopian constitutional dispensation is based upon a federal structure which confers considerable autonomy to regional states in different matters including the administration of land.⁶⁹ In contrast, the federal government has taken measures aimed at the recentralization of portions of land in regional states with a view to expedite the process of approving large scale agricultural investments. The governance of large scale agricultural investments is increasingly criticized for running counter to the ethnic federal system of the country. Lavers argues that the recentralization of land allocation by the federal government in a bid to target the low population areas for large scale agricultural investments calls into question the ethnic federalism system of the country established to guarantee the autonomy and self-determination of ethnic groups.⁷⁰ Lavers explains that this re-centralization took place through the creation of the Agricultural Investment Support Directorate (AISD) within the Ministry of Agriculture in January 2009 to administer the allocation of rural land for investment purposes when such land exceeds 5000 hectares. Lavers argues that this is contrary to the Constitution which gives the administration of land to the ethnically-delineated regional states.⁷¹ The justification for divesting of the constitutional mandate from particularly the emerging states of the country is the need to

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ Article 52(2) (d) of the Constitution of the Federal Democratic Republic of Ethiopia

⁷⁰ Lavers (n 13)

⁷¹ *ibid*

expedite land allocation to investors and the request to delegate the allocation of investment land by the regions themselves.⁷² While the FDRE Constitution provides for mechanism whereby the federal government may delegate its mandate to regional states, it does not envisage a legal basis for the delegation of the mandates of regional states to the federal government. Thus, the constitutional basis of Agricultural Investment Support Directorate, which has currently transformed into Ethiopian Agricultural Investment Land Administration Agency (EAILAA) is said to be shaky.⁷³

Tamrat contended that the governance of large scale land acquisitions in Ethiopia is rife with many limitations and shortcomings in regard to the policy, legal and institutional framework (PLIAF).⁷⁴ His analysis of the governance of large scale agricultural investments in Ethiopia is revealing although his analysis is based upon World Bank indicators which have been widely criticized for not being in conformity with the Voluntary Guidelines on the Responsible Governance of Tenure.⁷⁵ Tamrat notes that only four out of the nine regional states in Ethiopia have already adopted their own land administration policies, laws and institutions.⁷⁶ The majority of large scale agricultural investments take place in these regions where there is no land certification process with limited exceptions.⁷⁷ In particular, he mentioned that some of the regional states which lack implementation policy, legal and institutional framework include Benishangul-Gumuz, Afar, Gambela, which are in actual fact the hotspots of large scale agricultural investments in the country.

In a similar manner, based upon his analysis of the governance of large scale agricultural investments pursuant to the controversial seven principles of responsible agricultural investments as outlined by international financial institutions, Stebek argues the need to address a variety of legal and institutional gaps.⁷⁸ He contends that the existing templates for the transfer of land for investments involving agricultural investments exhibits major shortcomings and needs to be

⁷²ibid

⁷³Tamrat (n 53)

⁷⁴ibid

⁷⁵Araya K. Araya and David T. Hofisi, The Ease of Doing Business and Land Grabbing: Critique of the Investing Across Borders Indicators <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=david_hofisi> accessed 16 August 2013

⁷⁶Tamrat (n 53)

⁷⁷Horne (n 28)

⁷⁸Elias N. Stebek, Between Land Grabs and Agricultural Investment: Land Rent Contracts with Foreign Investors and Ethiopia's Normative Setting in Focus, *Mizan Law Review*, Vol. 5 No.2 (2011)

rectified.⁷⁹ He states that the extensive and discretionary power vested in the executive powers in terms of dispossession and allocation of land without corresponding judicial checks and balances will curtail the land rights of the local communities.⁸⁰ He goes on to make the case that the constitutional mandate of the government over land not as ownership instead as stewardship.

Makki agrees with the spatially-divergent patterns of agricultural investments in Ethiopia along the lines of core-periphery differentiation.⁸¹ As was noted by Lavers, Makki also identifies the strategy of large-scale enclosures predominantly pursued in the lowland peripheries, although medium-scale commercialization is also noticeable in the highlands to a limited extent especially by way of horticulture cultivation.⁸² He draws attention to the displacement and dispossession of the subsistence sector in the lowland peripheries of the country by way of enclosures.⁸³ The primary justification for pursuing large scale agricultural investments in the lowland peripheries as opposed to the highlands is the alleged availability of abundant extensive “unused” and “empty” land in the former.⁸⁴ It is such spatially divergent patterns of land dispossession which trigger issues of discrimination of indigenous people and other communities in Ethiopia as was noted by the Oakland Institute study.⁸⁵ Makki argues that the shrinking of the commons as a result of the vast number of agricultural investments in the country has constrained the living strategies of the people.⁸⁶

The regions most preferred for large scale agricultural investments lack the requisite policy, legal and institutional framework in spite of the fact that the administration of land is vested upon them according to the constitutional dispensation. Consequently, Tamrat’s PLIAF assessment is focused only on those regional states which have adopted their land administration systems particularly Amhara, Tigray, Oromia, SNNPR states.⁸⁷ Tamrat’s inquires as to the form the governance of large scale agricultural investments may take in the absence of such implementation legislation in the regional states mentioned. The absence of implementing legislation also impedes the examination of the recognition of the individual and communal

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ Makki (n 31)

⁸² *ibid*

⁸³ *ibid*

⁸⁴ *ibid*

⁸⁵ Horne(n 28)

⁸⁶ Makki (n 31)

⁸⁷ Tamrat (n 53)

rights to land and their scope in the stated regional states. Tamrat further notes that the protection of the rights to land by way of demarcation and delineation appears to be limited also in the four regions with implementation legislation.⁸⁸ In addition to shortcomings in terms of the recognition of land rights, Tamrat also identified problems relating to the absence of land use plans, the protection, safeguarding, promotion of property rights to land and provision of access to justice and prevention of disputes relating to land rights.⁸⁹ Nonetheless, the basis of this World Bank commissioned assessment and its limited coverage do not give a complete picture of the governance of large scale agricultural investments in the country.⁹⁰ Tamrat argues the absence of clear and secure property rights as one of the impediments to investment in agricultural infrastructure and irrigation.⁹¹

Some studies have also highlighted the lack of consultation and participation with the local communities the latter coming to know about the fact the land they inhabited has been assigned to agricultural investment only when the bulldozers come.⁹² Alemu demonstrates the lack of community consultation, knowledge and FPIC based on the field work he conducted in sites of agricultural investments in Ethiopia.⁹³ For instance, Fisseha identifies the loss of community grazing land as the one of the main impacts of large scale agricultural investment in his study which focuses more on the Bechera agricultural development project in the Bako Plains in Ethiopia.⁹⁴ He establishes the lack of community consultation and grievance mechanisms by way of discussions he conducted with the local communities who in many cases are not even aware of the extent of the land leased to investors.⁹⁵

Large scale agricultural investments also reflect upon local security and peaceful co-existence. Studies conducted on agricultural investment projects demonstrate the likelihood of conflict with the local communities if such projects are not properly administered. As Dheressa has shown,

⁸⁸ibid

⁸⁹ibid

⁹⁰ibid

⁹¹ibid

⁹² Getnet Alemu, Rural Land Policy, Rural Land Transformation and Recent Trends in Large Scale Rural Land Acquisitions in Ethiopia, European Report on Development < http://erd-report.eu/erd/report_2011/documents/dev-11-001-11researchpapers_alemu.pdf > accessed 23 August 2013

⁹³ibid

⁹⁴ Messele Fisseha, A case Study of the Bechera Agricultural Development Project, Ethiopia <http://www.landcoalition.org/sites/default/files/publication/1021/EDC_Ethiopia_web_11.03.11.pdf> accessed 26 August 2013

⁹⁵ibid

this situation has led to instances of conflicts with the local administrative authorities.⁹⁶ Similarly, Fisseha has documented the resistance on the part of the representatives of communities which in some cases degenerated in to physical confrontation.⁹⁷ Conflicts also triggered by the fact that the land leased for investors are not clearly delineated and delimited and there are cases of accusations of investors encroaching upon the land area designated for them.⁹⁸ Local authorities attempt to justify their decision to lease the land to investors citing orders from higher authorities further indicating the opaque nature of these transactions.⁹⁹ The lack of efforts on the part of investors to bridge the gap with host communities is a clear indication of the lack of corporate social responsibility and social accountability.

Agricultural investments can be categorized among projects likely to entail major social, economic or environmental risks or opportunities. As a result, the management of such risks or opportunities should be an essential consideration for decision-makers. In the same vein, large scale agricultural investments in Ethiopia are said to have resulted in adverse impacts on food security, environmental sustainability, water resources, human rights of local communities and local social and cultural livelihoods. Some argue that the damage done as a result of large scale agricultural investments outweighs the benefits that they might have brought about.¹⁰⁰ The Oakland Institute argued that agricultural investments are not being undertaken in a manner that safeguards the social, environmental and food needs of impacted local populations.¹⁰¹ The Institute further contended that large scale agricultural investments as one of the areas of pervasive human rights violations in Ethiopia.¹⁰² As Makki notes increased commercialization and enclosures are generating profound and all-encompassing transformations to varying degrees in the country.¹⁰³

⁹⁶Desalegen Keba Dheressa, *The Socio-Economic and Environmental Impacts of Large Scale Agricultural Land Acquisitions on Local Livelihoods: A Case Study in BakoTibeWoreda of Oroia Region, Ethiopia* (2013) <<https://www.duo.uio.no/bitstream/handle/10852/35697/Dheressa-MasterxThesis.pdf?sequence=1>> accessed 23 August 2013

⁹⁷Fisseha (n 94)

⁹⁸ibid

⁹⁹ibid

¹⁰⁰ Rahmato (n 32)

¹⁰¹Horne (n 28)

¹⁰² Oakland Institute, *FAQs on Indian Agricultural Investments in Ethiopia* (February 2013)

¹⁰³Makki (n 6)

Studies on the impacts of agricultural investments have been carried out focusing particularly on some areas in the country. On the basis of the empirical evidence from two destinations where agricultural investments are taking place, namely Gambela Region and Bako Tibee *Woreda*, Rahmato concludes that the objectives that the Ethiopian government set out to achieve by giving the go-ahead for these projects have not materialized in reality.¹⁰⁴ Rahmato stated that the new agricultural system engendered by the agricultural investment program pursued by the Ethiopian government will give rise to far reaching dire socio-economic and political implications including environmental degradation, forced displacement and food insecurity.¹⁰⁵ He envisages a situation whereby large scale agricultural investments may pose a serious threat to the long-term sustainability of the rural economy, rural livelihoods and food security.¹⁰⁶ He submits that many of the large scale investors engaged in growing high value commodities for export and crops for bio-fuel as opposed to local consumption. Thus, he contends that this is likely to adversely affect the local food security.¹⁰⁷ Rahmato goes on to argue that the industrial forms of land management systems such as mono-cropping likely to be employed by capitalist investors driven by the desire to accumulate profit is not environmental friendly and could lead to the exhaustion and degradation of the land and the ecosystem.¹⁰⁸ He details the effects of agricultural investment deals shrouded in secrecy and lack of transparency and accountability in terms of eroding the confidence of the impacted communities.¹⁰⁹ Commenting on the content of agricultural investment deals, Rahmato states that they do not provide adequate safeguards, regulatory obligations and roadblocks and that concerned governmental institutions lack the requisite capacity for effective monitoring of the implementation of the investment projects.¹¹⁰

Despite government denial of displacement and dispossession of land, Dheresaa demonstrates the widespread nature of displacement based upon the empirical study he undertook in Bako Plains in Oromia region where almost all the respondents stated that they have lost their possession in part or in its entirety as a result of agricultural investments.¹¹¹ The benefits which accrued to the local communities by way of transfer of technology, increased crop production

¹⁰⁴ Rahmato (n 32)

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

¹⁰⁷ Rahmato (n 32)

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ Dheressa (n 96)

and supply, generation of employment and infrastructure development are shown to be meager and inconsequential.¹¹² On the contrary, investors have availed themselves of the indigenous knowledge for no consideration.¹¹³ Dheressa also highlights the lack of benefit sharing arrangement in large scale agricultural investment agreements while noting the absence of obligation to provide social services in the contracts.¹¹⁴ Fisseha also contends that the benefit that local communities derived from the agricultural investment is limited.¹¹⁵ Their findings mirror the conclusions of other related studies which also demonstrate the negative impacts of large scale agricultural investments on local livelihoods.¹¹⁶

Dheressa mentions the lack of coordination and collaboration among line ministries and concerned regional bodies which militates against the effective monitoring of the implementation of agricultural investment deals.¹¹⁷ He illustrates this by citing the fact that the pertinent wildlife conservation authority is not consulted while forests and vegetation is cleared to make way for these investments.¹¹⁸ These shortcomings are partly the outcome of the absence of legal guidance in the formulation and negotiation of agreements involving agricultural investments which are vague and overly simple.

Moreda also makes similar observations about the socio-economic and environmental implications of large scale agricultural investments in Ethiopia based on his study carried out in the Benishangul-Gumuz Regional state. His study reinforces the stark contrast between official statements about the benefits of these investments and what is actually taking place on the ground. In the same vein, Moreda documents the adverse impacts of large scale land acquisitions on local land use practices and land resources particularly land dispossessions and declining access to land.¹¹⁹

¹¹²ibid

¹¹³ibid

¹¹⁴ibid

¹¹⁵Fisseha (n 94)

¹¹⁶ Philip Baumgartner, Joachim von Braun, Degnet Abebaw, Marc Muller, Impacts of Large-Scale Land Investments on Income, Prices, and Employment: Empirical Analysis in Ethiopia

¹¹⁷Dheressa (n 96)

¹¹⁸ibid

¹¹⁹Tsegaye Moreda, Postponed Local Concerns? Implications of Land Acquisitions for Indigenous Local Communities in Benishangul-Gumuz Regional State, Ethiopia

<<http://www.plaas.org.za/sites/default/files/publications-pdf/LDP13Moreda.pdf>>

The water implications of large scale agricultural investments must also be taken into account while discussing the environmental impact. At times, land grabs are equated with water grabs.¹²⁰ Water implications of agricultural investments are of particular importance in the Ethiopian context as the country is at the watershed of the Nile River. The additional water use as a result of ongoing agricultural large scale investments constitutes a significant portion of the water resources of the country.¹²¹

The denial of access to land and these productive resources entails adverse impacts on the way of life of the local communities. As shown by the Oakland Institute, land is not a mere commodity it is rather a critical component of identity for Ethiopians.¹²² Thus, the loss of farmland, grazing land, lands of cultural and religious value amounts to loss of cultural identity.¹²³ This issue is of particular importance to indigenous people in Ethiopia whose territories have now become the most contested property domain in the country given the special relationship existing between these people and their lands.

Consequently, some of the large scale agricultural investment deals concluded by the Ethiopian government have been riddled with disputes primarily because of the fact that very few of the projects were actually operational and very limited size of the land allocated under actual development.¹²⁴ Such recriminations have led to repossessing of part or the land originally committed for the investments. There are indications that the Ethiopian government has not been able to achieve the developmental aspirations large scale agricultural investments were meant to bring about.¹²⁵ It is now widely and publicly admitted that two decades of effort to realize the developmental benefits from these agricultural investments did not materialize.¹²⁶ It is submitted

¹²⁰Deborah Bossio, TekleErkossa, YihunDile, Matthew McCartney and Franziska Killiches, Water Implications of Foreign Direct Investment in Ethiopia's Agricultural Sector, *Water Alternatives* 5(2):223-242

¹²¹ibid

¹²²Horne (n 28)

¹²³ibid

¹²⁴ Almost 8000 applications for land were approved from 1996 until the end of 2008 covering an aggregate land area to the tune of three million hectares. Nevertheless, the majority of the investors left the land idle and others made of the land for reasons different from the approved ones. Less than 20 percent of the approved projects had begun project implementation and operation. (Rahamato (n 32))

¹²⁵ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014), p. 1, (translation mine) *See also* Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

¹²⁶ Presentation by Mr. Abera Mulat, Director of the Ethiopian Agricultural Investment Land Administration Agency, National Mobilization Forum on Agricultural Investment, May 24-25, 2014

that large scale agricultural investors largely failed to develop the land they took expeditiously, to enhance production and productivity, to employ technology effectively, and to ensure the protection of the environment.¹²⁷ The bulk of the 483,000 hectares of land transferred through the lease agreements was not developed by the investors as was expected by the government. This has led to the reclaiming and repossessing of close to 300,000 hectares of land leaving 170,000 hectares of land currently under agricultural investments leases.¹²⁸ At the same time, studies conducted by the Ministry of Agriculture show that the benefits that ensued from the large-scale agricultural investments currently operating in the country is said to be lower than expected.¹²⁹

At present, the Ethiopian government appears to have realized that the high expectations from these investments have not been met as expected.¹³⁰ The country as a whole and the regional states where the large scale agricultural investors are in operation appear to have failed to materialize the developmental benefits they anticipated to obtain.¹³¹ The dismal performance of large scale agricultural investments in Ethiopia thus far has led to variation, revision and termination of some of the lease agreements. The weak implementation is attributed to the lack of capacity of the investors to develop the land that is transferred to them.¹³² Nevertheless, there are also allegations of the involvement of some of the investors in illegal practices, among others, the misuse of tax holiday and investment incentives.

Consequently, the government appears to be in the process of reassessing its policy of leasing large tracts of land to investors.¹³³ The dismal outcome of the deals appears to have triggered a rethink of the policy and procedures of land letting. The slow progress on the part of the investors has also led to the suspension of land provision as of March 2012. One of the major policy changes is that of not leasing more than 5000 hectares of land at one go with a possible

¹²⁷ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Challenges and Recommendations on Foreign Agricultural Investment (May 2014), p. 1, (*translation mine*)

¹²⁸ *ibid*

¹²⁹ *ibid*

¹³⁰ Fana Broadcasting Corporation (FBC), Procedures for the Transfer of Large Scale Commercial Agricultural Investments to be Amended (7 August 2013)

<http://www.fanabc.com/index.php?option=com_content&view=article&id=4865:2013-08-07-11-10-44&catid=103:2012-08-02-12-34-36&Itemid=235> accessed 22 August 2013

¹³¹ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Challenges and Recommendations on Foreign Agricultural Investment (May 2014), p. 4, (*translation mine*)

¹³² Dawit Endeshaw & Misganaw Getachew (n 23)

¹³³ *ibid*

extension.¹³⁴ The size of the tract of land leased for the investor is planned to be more incremental depending on the performance of the investor in question. The Ministry of Agriculture adopted a new Agricultural Investment Administration Plan which authorizes the reclaiming and repossession of land from the investors who default to develop the land leased to them.

Accordingly, the Ethiopian government has been engaged in the revision and variation of many of the lease agreements it concluded and also resorted to the termination of close to nine of the agreements with investors.¹³⁵ In regard to revision and variation, agreements involving large scale land acquisitions have been subject to renegotiation and standardization by the previous Agricultural Investment Support Directorate (AISD).¹³⁶ Allegations of non-performance of contractual obligations on the part of the government and investors have led to the revision of investment deals involving large agricultural investments as in the case of the agreements concluded with Indian multinationals such Karuturi Agro Products Plc. For instance, Karuturi Agro Products Plc. which took over 300, 000 hectares of land in 2010 was not able to develop barely 10% of the total area. This led to the revision of the lease agreement in January 2012 which reduced the total area to 100,000 hectares and also included a contractual clause requiring the development of the remaining tract of land within two years. Failing to develop the remaining plot within two years, Karutri Agro Products Plc. faces further reduction of the total area it took over to a possible 10,000 hectares.¹³⁷

In regard to termination, an area estimated to be 100,000 hectares of land has been repossessed by the government thus far upon the termination of large scale agricultural investment contracts with the nine companies.¹³⁸ In some cases the termination of the leases, as exemplified by the lease agreement with CLC Industries, leading to allegations of illegal contractual breaches by the government.

In spite of the above policy changes, it is evident that the practice of leasing out large-scale agricultural investments is likely to continue in Ethiopia. This is signaled by the recent

¹³⁴ *ibid*

¹³⁵ *ibid*

¹³⁶ Lavers (n 13)

¹³⁷ Yohannes Anberber, Investors Failing to Develop Agricultural Lands to be Divested (Addis Ababa, *The Reporter*, August 18, 2013) 1

¹³⁸ *ibid*

establishment of Ethiopian Agricultural Investment Land Administration Agency (EAILAA) which replaced the AISD following approval from the Council of Ministers.¹³⁹ The need to establish the EAILAA is prompted by the fact that the task of administering agricultural investment land is getting broader and too complicated to be handled by a Directorate only.¹⁴⁰ The EAILAA will also be in charge of administering the Agricultural Economic Zone (AEZ) that the government plans to introduce. Moreover, the second phase of Growth and Transformation Plan (2015-2020) of the country has highlighted these investments as a major source of economic growth and industrialization.¹⁴¹

The aforementioned developments clearly amplify the fact that the large scale agricultural investment policy, legislation and procedure are currently in influx calling for a thorough legal analysis of the ongoing legislative and institutional changes. The high profile revision and termination of agreements involving large scale agricultural investments has not been a subject of adequate legal analysis thus far. The magnitude and enormity of the size of the deals calls for a rigorous handling and analysis to fill the knowledge gap. There are only limited number of research undertaken on large scale agricultural investments in general and the human rights assessments and legal aspects of these investments in particular. Even if some of the studies undertaken on this issue recommend community consultation, transparency, participation, FPIC, they do not clarify what those terms mean in sufficient detail. It becomes necessary to undertake a comprehensive and detailed legal analysis of the federal and regional legal policy, legal and institutional framework of agricultural investments in Ethiopia primarily on the basis of recently adopted principles of responsible agricultural investments as elaborated in the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) and Principles of Responsible Agricultural Investments (PRAI) and their conformity with the human rights obligations undertaken by Ethiopia. Thus, this study is primarily informed by the liberal or pragmatic approach of responsible agricultural investments (rai) based on appropriate code of conduct as opposed to the neo-colonial approach.

¹³⁹ Muluken Yewondwossen, New Agriculture Agency to Govern Federal Investment (Addis Ababa, *The Capital*, 19 August 2013)

¹⁴⁰ *ibid*

¹⁴¹ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015, available at < <http://addisfortune.net/columns/non-performing-agricultural-investments-get-the-axe/>>

2. Thesis Statement

The main argument in this work can be described in the following statement: Agricultural investments in Ethiopia, particularly large scale ones, can be an effective vehicle for the achievement of desirable economic, social and environmental objectives only if the governance, processes, design and content of such investments is based upon pertinent human rights norms and specific international and continental standards and parameters on the responsible governance of agricultural investments.

3. Objectives of the Study and Research Questions

This study has three broader objectives. First, it seeks to investigate the normative framework for the realization of economic, social and environmental objectives of large scale agricultural investments. In relation to this objective, the study seeks to address the following questions:-

- i. What are the implications of international soft law principles as contained in the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT), draft Principles on Responsible Agricultural Investments (PRAI) on the governance of large scale agricultural investments?
- ii. What are the implications of human rights obligations on the governance of large scale agricultural investments?

The second broad objective of the study focuses on identifying the extent to which the implications of international and continental human rights norms and standards are reflected in national legislations of Ethiopia. With this objective in view, the study inquiries into the following questions:-

- i. Is the ongoing re-examination of international and continental law principles as regards land rights reflected in the Ethiopian land tenure legislations?
- ii. What are the measures being taken, if any, to harmonize emerging principles on the responsible agricultural investments into the Ethiopian domestic legal framework?
- iii. What are the institutional reforms, if any, undertaken for the responsible governance of large scale agricultural investments in Ethiopia?

Thirdly, the study will investigate the extent to which the norms and guidelines developed at international, continental and domestic levels reflected in actual practices involving the governance of large scale agricultural investments. With this objective in view, the study aims to address the following questions:-

- i. Are the actual processes and procedures upon the negotiation of agreements involving large scale agricultural investments based upon relevant principles of implementation?
- ii. Does the design of investment contracts and agreements involving large scale agricultural investments accommodate the economic, social and environmental objectives these investments are hoped to bring about?
- iii. What agreed upon mechanisms are in place, if any, to monitor the impact of large scale agricultural investments in terms of achieving the economic, social and environmental objectives?

4. Research Methodology

The thesis adopts a legal and human rights perspective in the examination of the governance of large scale land acquisitions in Ethiopia. In particular, international, regional and domestic human rights obligations of Ethiopia and international soft law principles would form the basis for the examination.

The approaches employed include descriptive, analytical as well as prescriptive. Descriptive approach is used to describe the phenomenon of large scale land acquisitions and its governance. Prescriptive approach will be used in the concluding chapters of the thesis to make proposals and recommendations for the improvement of existing governance of large scale land acquisitions in Ethiopia. The research is expository, evaluative and doctrinal to the extent it attempts to analyze international and domestic law on the issue of the responsibility of large scale agricultural investments. The work is primarily based on fundamental concepts and methods of public international law.

The materials used include both primary and secondary sources. Primary sources include relevant international and regional instruments on large scale agricultural investments. These include treaties as well as international soft law instruments. Domestic legislation including the

Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), subsidiary legislation, rules, regulations, directives, monitoring reports, policy documents, contracts and investment agreements relating to land tenure and the governance of large scale agricultural investments, and investment laws have been used. Pertinent judicial decisions of the African Commission on Human Rights have been analyzed. Judicial decision of other international and regional judicial and quasi-judicial bodies which have been endorsed by the African Commission on Human and Peoples Rights have also been employed. State reports of the Ethiopian government for UN charter-based and Treaty-based bodies have also been consulted. Secondary sources used include books, papers, reports, journal articles, newspaper articles and online sources. In addition document analysis, several key informant interviews (KII) have been conducted with experts working different aspects of large scale agricultural investments. Case analysis has been supplemented with examination of pertinent news items.

5. Significance of the Study

As large scale agricultural investments are primarily phenomenon which surged since the first decade of the 21st century, there are gaps in the law at international, regional and domestic levels. The surge in the phenomenon has manifested the inadequacies of existing legal and institutional framework at many levels to respond to the phenomenon.

On the contrary, large scale agricultural investments have been even further bolstered by legal niceties in international and domestic laws. In many ways, large scale agricultural investments tended to demonstrate how law can be deployed as instrument of misappropriation. Such legal niceties can be exemplified by the principle of effective occupation, a relic of international law to claim title over territory, and the transmutation of such legal concepts into domestic laws. This can also be further illustrated by concepts of non-recognition of customary tenure, traditional occupation, ownership, use or otherwise occupation of territory as a basis of title to lands. Legal niceties such as these have particularly led the lands and natural resources of particularly indigenous peoples and communities the most contested property domain described as a tinderbox apt to ignite. The facilitation of large scale agricultural investments by existing legal niceties in international and domestic laws has led to increased reexamination of these legal concepts. Thus, it is contended that some aspects of property law in general land law in particular in Ethiopia has been used as instruments of misappropriation.

The ongoing reexamination of international law in regard to large scale agricultural investments has triggered the elaboration of human rights standards and the emergence of new international soft law principles on the matter meriting analysis afresh. This inquiry would be of instrumental utility to determine what the law is (*de lege lata*) on the issue of large scale agricultural investments on the international plane, an issue which still remains to be murky in several ways.

These legislative developments can be illustrated by the adoption of UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the Voluntary Guidelines on the Responsible Governance of Tenure, the ongoing formulation of Principles of Responsible Agricultural Investments (PRAI) as well as the mushrooming of seminal case law on the land rights of indigenous peoples and other communities. The emergence of these new rules has the effect of internationalizing aspects of land governance which were traditionally deemed to fall within the purview of domestic laws *per se*. In this respect, the thesis affords the opportunity for a clearer and focused understanding and interpretation of these new rules and their implications on the governance of large scale agricultural investments.

Nonetheless, these strides in terms of the re-examination of existing international law aimed at the protection of the land rights of communities are not evenly matched in domestic laws in countries like Ethiopia. Efforts on the part of individual countries in terms of the human rights concerns and international soft law principles have not moved apace the changes taking place on the international arena. This discrepancy can be explained by the reluctance of many countries to accommodate these emergent legal developments and the optional and voluntary nature of the changes. On the contrary, the protection of land rights appears to be further complicated by existing domestic land tenure and investment laws which cater more towards the promotion and protection of investment laws at the expense of local land rights. Thus, the study will look in to the impacts of the adoption of international standards concerning the governance of large scale agricultural investments on the domestic arena in Ethiopia with the ultimate aim of suggesting proposals and recommendations for the improvement of current practices.

This thesis investigates the governance of large scale agricultural investments in Ethiopia in the absence of adequate legal and institutional framework and in the face of the divergence with international law standards with respect to the governance of large scale agricultural investments. What are the practical challenges stemming from the governance of large scale agricultural

investments in the absence of detailed legislative framework? What are the areas of disagreements between human rights obligations and the domestic practices in relation to the governance of large scale agricultural investments? Are human rights considerations trumped in the hope of attracting large scale agricultural investments? To what extent are the specific standards and parameters developed at the international and regional level in response to the phenomenon of large scale agricultural investments observed and complied with? What are the legislative and institutional mechanisms in place for accommodating the specific standards and parameters concerning agricultural investments? What are the challenges in the implementation of these standards, principles and parameters? What are the objectives of domestic laws and policies in pursuing large scale agricultural investments and are these objectives being met?

By so doing, the thesis will further the understanding of existing practices in agricultural investments and hopes to encourage responsible agricultural investments in Ethiopia. It also attempts to suggest ways and means and good practices whereby the conflict of interests that agricultural investments engender are accommodated and managed properly through proper legislation, institutional arrangements, contracts and practices. As Ethiopia is currently a country facing famines, food shortages and recurrent droughts, it is of pivotal importance to study the legal aspects of agricultural investments and food security in general. Moreover, the lessons drawn from this study focusing on Ethiopia are believed to be of relevance for other countries in Africa.

6. The Scope of the Study

Though the focus of this study is mainly large scale agricultural investments, it also has bearing on smaller and domestic agricultural investments since the aggregate impact of the latter is as important as the large scale ones. Moreover, as shown above, the bulk of agricultural investments in Ethiopia are not large scale and foreign owned. Instead, they are smaller and domestic forms of agricultural investments. As smaller domestic agricultural investments mushroom, human rights assessment of these investments becomes as important as those focused on large scale foreign owned agricultural investments.

Ethiopia is chosen as the focus of this study as it is one of the main African countries at the center of the large scale agricultural investments. The choice of Ethiopia as a case study country

is also motivated by the fact that the country has, on several occasions, declared its intention to proceed with the practice of large scale agricultural investments. The choice of a specific case study country to examine the practice of large scale agricultural investments also makes deeper and closer scrutiny of the normative and institutional arrangements at length.

7. Structure of the Study

The study takes the following structure.

In Chapter one, a general introduction of the study is laid out by providing the background of the study and identifying the main questions that the study aims to explore. Chapter One explores the literature on large scale agricultural investments and examines work that has already been done on the matter. This Chapter also deals with the significance and objectives of the study and the research methodologies used.

In Chapter two, the foundation is laid for the subsequent chapters by discussing the human rights norms which have direct implication on agricultural investments. The principles elaborated in this chapter will be used for the evaluation of policies, laws and regulations pertaining to land and other practices in the governance of large scale agricultural investments. The chapter also explores judicial decisions which are instructive in terms of elaborating the relevant human rights standards and their specific implications on the governance of agricultural investments.

The third Chapter proceeds with further reinforcing the analytical framework developed in the second chapter by laying down the *lex specialis* pertaining to governance of large scale agricultural investments. In particular, it explains the international soft law principles relating to the matter at hand with particular emphasis on the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) and draft Principles on Responsible Agricultural Investments (PRAI) of the Committee on World Food Security, Food and Agriculture Organization (FAO). The third chapter also touches upon continental standards particularly those applicable in the African context are looked into. By so doing, this chapter culminates the conceptual foundation for the ensuing analysis in the subsequent chapters.

Chapter four examines the legal and institutional framework for land tenure in Ethiopia. This Chapter particularly examines the conformity of domestic legislations on land with pertinent land

rights as discussed in the previous chapters. This chapter attempts to examine the compatibility of the land legislation in Ethiopia in the lights of the human rights standards discussed in the previous chapters, particularly from the point of view of the United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP) and the jurisprudence of regional and international mechanisms for the protection of human rights.

Chapter five of the thesis examines relevant legal provisions concerning land rights and investment and the interrelation between the two in the Ethiopian context. It also looks in to the package of investment incentives and inducements offered by the law and consider the effects of these on agricultural investments. It examines the extent to which the domestic property and land law uphold the land rights of indigenous and other communities. Moreover, it dwells upon the adequacy of procedural guarantees and compensation in the exceptional cases of forced eviction.

Chapter six is focused on the exploration of the processes followed in the negotiation of agricultural investments. It looks in to the extent to which norms of participation, community consultation and FPIC are complied with in the course of negotiating such deals. This Chapter therefore aims to examine whether these process are adequate to satisfy the requirements laid out in the human rights framework as well as the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT).

Chapter seven shifts attention to the examination of the design and content of deals involving agricultural investments. It attempts to analyze the extent to which the rights and obligations of the parties to the contracts are clearly defined based on established principles of responsible contracts as indicated in UNGPs. It looks into the extent to which the design of existing contracts takes the necessary elements into account. It tries to compare and contrast the existing contracts with other comparable templates and also tries to draw lessons from other contracts.

Chapter eight focuses on environmental and human rights impact analysis in relation to large scale agricultural investment in Ethiopia. It scrutinizes the extent to which the law addresses the potential adverse effects of these investments on the environment and human rights of communities. In particular, it examines the mechanisms and the process of Environmental Impact Assessment (EIA). In particular, this Chapter contends in favour of human rights due

diligence from the perspective of United Nations Guiding Principles on Business and Human Rights.

Chapter nine examines the actual compliance by large scale agricultural investors of the different standards which have been fleshed out in the previous chapters. It further clarifies the bases of monitoring in particular the Social and Environmental Code of Practice for Agricultural Investment. In particular, it attempts to show the lack of implementation of the Code of Practice by the investors and the root causes for non-compliance. The Chapter also examines the effects of non-compliance with the Code of Practice on the community and the environment as well as agricultural workers. It also dwells upon the legal constraints which hinder the active participation of civil society and local communities in the course of Monitoring of large scale agricultural investments. The Chapter also touches upon the availability and effectiveness of mechanisms of access to justice.

Chapter ten presents a summary of the findings and the conclusions drawn from the study. It also puts forward some action points to improve existing practices in relation to legal aspects of agricultural investments by way of recommendations.

Chapter Two

Land Rights and Agricultural Investments

Introduction

Agricultural investments involve the acquisition of land in some cases large tracts of land. Thus, such investments may have varying effects on local land rights of host communities. This Chapter aims at elaboration of normative standards on local land rights as well as human rights norms which have direct implication for the protection of land rights. Despite a limited recognition, international human rights law does not explicitly set out a general substantive right to land. As a result, key provisions of international human rights law bearing on the issue remain lacking specificity. Nevertheless, there are human rights norms which have obvious ramification on the protection of land rights. These include the right to property, the right to natural resources and the right to food. Hence, the right to land can be established as a self-standing right or as being instrumental to the realization of other rights particularly the right to food.¹⁴² As a standalone right, the right to land can be grounded upon as an element of the right to property and the right to natural resources. Moreover, the right to land is also explicitly affirmed in the case of indigenous peoples in recognition of the special relationship the people have with their lands.

This chapter examines the protection of land rights from the perspective of human rights law framework. The clarification of directly related human rights standards and the obligations they entail is vital as it constitutes the groundwork for the scrutiny of pertinent issues. Recent case law is employed as interpretive guide to shed light on the content and implications of the rights directly implicated. The discussion on this aspect culminates with the concluding consideration of the specific implications of human rights obligations on large scale agricultural investments in particular.

¹⁴² Olivier De Schutter, 'The Emerging Human Right to Land' (2010) 12 International Community Law Review 303-334

2.1. Property Rights to Land

The right to property has both intrinsic and instrumental value. The right to property has the intrinsic value of enhancing the personal dignity of the individual. The right is also of instrumental utility and social function for the realization of various economic, social and cultural rights including the right to adequate food, the right to adequate housing and the right to social security.¹⁴³ Property rights are of particular importance for the protection of housing rights. Property rights can also be invoked as a means of obtaining redress for violations of housing rights.¹⁴⁴ Moreover, the link existing between property, land and food is intrinsic and intimately interdependent.¹⁴⁵ Land property rights have a central function in the realization of the right to food.¹⁴⁶

Thus, the right to property is an entitlement which is widely recognized in international, regional human rights treaties as well as the national constitutions of many countries. The Universal Declaration of Human Rights is the only major global instrument which affirms a broad standard for the protection of the right to property.¹⁴⁷ The right to property is affirmed under Article 17 of the Universal Declaration of Human Rights (UDHR) as follows:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of property.

Apart from the UDHR, a number of other international human rights instruments also make a general reference to the right to property.¹⁴⁸ The two international covenants on human rights, which form the International Bill of Human Rights along with the UDHR, failed to reflect the protection on property rights in the UDHR due to differing conceptions of property rights and lack of consensus as to what constitutes fair compensation upon deprivation of property.¹⁴⁹

¹⁴³ Christophe Golay and IoanaCismas, Legal Opinion: The Right to Property from a Human Rights Perspective (2010). <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635359> accessed 25 July 2012

¹⁴⁴ *ibid*

¹⁴⁵ *ibid*

¹⁴⁶ *ibid*

¹⁴⁷ Theo R.G. van Banning, 'The Human Right to Property' (INTERSENTIA 2002) 36

¹⁴⁸ David Palmer *et al*, 'Fostering a New Global Consensus: The Voluntary Guidelines on the Responsible Governance' 2012 (No 1) LTJ <<http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/view/49/89>> accessed 30 July 2013

¹⁴⁹ van Banning (n 147)

Nevertheless, even if the instruments do not provide for explicit and substantive right to property, the notion of “property” appears in both instruments as a prohibited ground of discrimination.¹⁵⁰ The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) also affirms the right to property.¹⁵¹ The Convention on the Protection of the Rights of All Migrant Workers and members of their families also guarantees the right to property.¹⁵²

Other international instruments are not only limited to affirming the general right to property but they also set forth specific references to property rights to land. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognizes the right to mortgages¹⁵³ and the right of women to equal treatment in land and agrarian reform as well as in land resettlement schemes.¹⁵⁴ CEDAW also stipulates the equal treatment of women and men in the enjoyment of property rights and ownership of property.¹⁵⁵ The right to equal access to mortgages and property rights are also affirmed in the Convention on the Rights of Persons with Disabilities.¹⁵⁶ UN Declaration on Social Progress and Development also assures of guarantees of forms of ownership of land and the means of production.¹⁵⁷

The African Charter on Human and Peoples’ Rights also guarantees property rights. Article 14 of the Charter reads:

¹⁵⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2(1), Article 24(1), Article 26; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICECSR) Article 2(2); (Article 11(2)(a) of the International Covenant on Economic, Social and Cultural Rights makes an indirect reference to land while it calls upon states to develop or reform “agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.”)

¹⁵¹ Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD), Article 5(d)(v)

¹⁵² International Convention on the Rights of All Migrant Workers and Members of the Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, Article 15

¹⁵³ Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), Article 13(b)

¹⁵⁴ Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), Article 14 (2) (g)

¹⁵⁵ Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), Articles 15(2) and 16(1)(h)

¹⁵⁶ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), Article 12(5)

¹⁵⁷ Declaration on Social Progress and Development (G.A. res. 2542 (XXIV), 24 UN GAOR Supp. (No.30) at 49, U.N. Doc.A/7630 (1969))

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.¹⁵⁸

At the same time, Article 13(3) of the Charter guarantees the right of access to public property and services in strict equality of all persons before the law to every individual. The right of access to public property in the African Charter is a unique and significant stipulation which demonstrates the social aspects of property.¹⁵⁹ The right to property enshrined under the African Charter needs to be considered along with Article 2 of the African Charter which provides that:-

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”¹⁶⁰

2.1.1. The Substantive Content of the Right to Property

The right to property applies to both individual and collective forms of ownership.¹⁶¹ The right to property implies peaceful enjoyment of possession. Even though the term “property” was not defined during the course of the negotiation of this provision, representatives of countries viewed property as including “property rights to land” evidenced by the use of references including “real property, real estate or immovable property”.¹⁶² The term ‘property’ may refer to ‘existing possessions’ or assets including claims whereby one could assert “legitimate expectations” of obtaining effective enjoyment of a property right.¹⁶³ The term includes both movable and immovable things, corporeal or incorporeal elements, and is not confined to physical goods.¹⁶⁴

¹⁵⁸ African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), Article 14

¹⁵⁹ van Banning (n 147) 63

¹⁶⁰ African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), Article 2

¹⁶¹ Golay and Cismas (n 143)

¹⁶² Palmer *et al* (n 148)

¹⁶³ van Banning (n 142) 12

¹⁶⁴ *ibid*

For example, it includes contractual rights, goodwill, and entitlement to compensation if certain conditions are met and future income it has been earned or definitely payable.¹⁶⁵

The examination of the jurisprudence of the African Commission on Human and Peoples Rights is instructive to clarify the object of property rights. The question what constitutes property rights has been at the heart of a number of cases which have been dealt with by the African Commission. The decisions of the Commission underscore the contention that the term property has an autonomous meaning under international law which supersedes national law.¹⁶⁶ Put simply, the meaning ascribed to the term “property rights” is not confined within the bounds of the formal requirements of national law.¹⁶⁷ This issue was dealt with in the *Malawi African Association and Others v Mauritania* cases, whereby the African Commission made it clear that the term “property” includes land.¹⁶⁸ This decision shows that property rights can also include economic resources and rights over the common land.¹⁶⁹ Moreover, African Commission’s jurisprudence further demonstrates that the right to property includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also the right to undisturbed possession, use, and control of such property the manner the owner (s) pleases.¹⁷⁰

2.1.2. The Right to Natural Resources

Article 21 of the African Charter affirms the rights of people to their natural resources and property, which is one of the rights described as people’s rights.¹⁷¹ It reads as follows:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

¹⁶⁵ *ibid*

¹⁶⁶ Center for Minority Rights Development (CEMIRIDE) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya, Communication No. 276/2003, para. 185, African Commission on Human and Peoples Rights [hereinafter Endorois Decision]

¹⁶⁷ *ibid*, para. 185

¹⁶⁸ *Malawi African Association and Others v Mauritania*, African Commission on Human and Peoples Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 196/97, and 210/98 (2000), para. 128

¹⁶⁹ *Dogan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2002), paras. 138-139; Endorois Decision (n 123) para. 186

¹⁷⁰ *Huri-Laws v Nigeria*, (Communications No. 225/98), para. 52

¹⁷¹ *van Banning* (n 147) 64

2. In case of spoliation the disposed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies as to enable their peoples to fully benefit from the advantage derived from their national resources.

The African Commission on Human and Peoples Rights traces the origins of this right to colonialism whereby the human and material resources of the continent were exploited for the benefit of outside powers.¹⁷² The Commission further noted that the aftermath of the colonial exploitation exposed the natural resources of the continent to foreign misappropriation.¹⁷³ The Commission sees the provision as a reminder of this painful legacy and a call for the restoration of co-operative economic development.¹⁷⁴ The right to natural resources is also part and parcel of the right to self-determination by virtue of which peoples are entitled to freely dispose of their natural wealth and resources.

The right to natural resources is evidently a contested right owing to the fact there is overlapping claims including the right of communities to use and enjoy the natural resources that lie on their territory and the right of the state to grant concessions for exploration and extraction of resources including sub-soil resources.¹⁷⁵ The nature and scope of the right to natural resources as well as the holder of the right remain to be vexing issues. This can be exemplified by the conflicting interests of state laws which grant the inalienable right to exploration and exploitation of natural

¹⁷² Social and Economic Rights Action Center and the Center of Economic and Social Rights vs. Nigeria, Communications No 155/96, 27 May 2002, para. 56 [hereinafter the Ogoniland Case]

¹⁷³ *ibid*

¹⁷⁴ *ibid*

¹⁷⁵ Endorois Decision (n 166) para. 258

resources for the state as opposed to customary laws which vest the rights to use and enjoy the natural resources to the community.¹⁷⁶

At this point, it becomes appropriate to clarify the meaning of the term “natural resources”. The term natural resources can be employed to mean “*everything, from the very top of the trees to the very deepest place that one could go under the ground*”.¹⁷⁷ The term natural resources in the context of Article 21 of the Charter connotes those natural resources traditionally used and necessary for the very survival, development and continuation of the way of life of the communities.¹⁷⁸ In other words, the phrase natural resources needs to be understood as referring to those resources traditionally used for the subsistence, cultural and religious activities.¹⁷⁹ Such interpretation of the phrase is important for ensuring that Article 21 is not employed to divest the state of its power to grant concessions for exploitation and extraction of resources.¹⁸⁰ The African Convention on the Conservation of Nature and Natural Resources defines natural resources as renewable resources, tangible and non-tangible, including soil, water, flora and fauna, and non-renewable resources.¹⁸¹

The formulation of the right shows that the right to natural resources is vested in the people as opposed to the government.¹⁸² A people inhabiting a specific region within a state are entitled to claim the protection of Article 21.¹⁸³ On the contrary, states are vested with the responsibility of managing these resources on behalf and for the benefit of the people.¹⁸⁴ This is also clear from the phraseology “exercised in the exclusive interest of the people” readable under Article 21(1). Article 21 of the Charter is of particular relevance in the context of large-scale land acquisitions.

¹⁷⁶ *ibid*, para. 259

¹⁷⁷ *ibid*, para. 266

¹⁷⁸ *ibid*, para. 261

¹⁷⁹ *ibid*, para. 263

¹⁸⁰ *ibid*, para. 264

¹⁸¹ African Convention on the Conservation of Nature and Natural Resources, Article 5(1)

¹⁸² Endorois Decision (n 123) para. 151 (The right-holders of this entitlement to natural resources are “peoples” as opposed to governments. Despite the fact that the meaning of the term “peoples” remains contested. The African Commission on Human and Peoples rights noted that there is presently a growing consensus on a set of objective features that a group of people need to manifest so as to be referred to by the term “peoples”. Accordingly, the Commission noted that these include a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and economic life or other bonds. The people stand to benefit from the set of rights referred to as “peoples” rights in the Charter upon fulfillment of those conditions.)

¹⁸³ Endorois Decision (n 166) para. 267

¹⁸⁴ Korir Sing Oei A. and Jared Shepherd, ‘In Land We Trust: The Endorois Communication and the Quest for Indigenous Peoples Rights in Africa’ (2010) 16 *Buff. Hum. Rts. L. Rev.* 57

The right to natural resources enshrined under Article 21 of the Charter may be viewed as a specific application of the right to property. This can be evidenced by the practice of regional human rights mechanisms which read the right to natural resources into the right to property as observed by the African Commission.¹⁸⁵

The African Commission stressed the obligation of States Parties to protect the property right of their citizens through the adoption of appropriate laws and effective enforcement. More especially, the Commission also underscored the importance of protecting citizens from the damaging acts of private parties. The Commission also underlined the need to protect the rights of citizens to the enjoyment of property rights from unwarranted interference.¹⁸⁶ The Commission made a case for the legality and indeed the requirement of measures aimed at redressing imbalances through positive discrimination or affirmative action.¹⁸⁷

2.1.3. State Duties arising from the Right to Property

The right to property entails a variety of state duties as it is the case with human rights norms under the African Charter on Human and Peoples Rights. The African Commission noted that property rights give rise at least to four levels of duties.¹⁸⁸ These four levels of duties are sometimes referred to as the quartet layers of obligations. It is submitted that each layer of obligations is equally relevant to human rights.¹⁸⁹ The Commission further noted that these levels generate a combination of both negative and positive duties.¹⁹⁰ These are the duty to respect, to protect, to fulfill and to promote. In many of the cases that the Commission examined the quartet layers of obligations served as a point of departure or vantage point to assess the actions or omissions of respondent states. The Commission further added that these obligations apply universally.¹⁹¹

The primary level of obligation constitutes *the obligation to respect*. The State has the negative duty to respect i.e. abstain from interference with the enjoyment of fundamental rights. In regard to the right to property and the right to natural resources, the obligation to respect requires the

¹⁸⁵Endorois Decision (n 166) para. 256

¹⁸⁶Golay and Cismas (n 143)

¹⁸⁷ ibid

¹⁸⁸The Ogoniland Case (n 172) para. 44

¹⁸⁹ ibid

¹⁹⁰ ibid

¹⁹¹ ibid

state to respect the free use of resources owned individually or in association with others.¹⁹² The need to respect the resources owned and held by a group to satisfy its needs is one specific manifestation of the obligation to respect.¹⁹³ Frequently, the obligation to respect the right to property and the right to natural resources is violated by such measures including *de jure or de facto* expropriation, pillaging, confiscation, unwarranted removal of people, temporary seizure of property, destruction of property, rent controls and planning restrictions.¹⁹⁴

The secondary level of obligation constitutes *the obligation to protect*. As applied to the right to property and the right to natural resources, the obligation to protect requires safeguarding right holders against other subjects through legislation and provision of effective remedies.¹⁹⁵ This entails the need to create and maintain an atmosphere and framework conducive to the free exercise of rights to property and natural resources by the right holders.¹⁹⁶ For instance, the State has the positive obligation to put in place a judicial mechanism to settle effectively property disputes and to ensure that such mechanisms complies with the material as well as procedural safeguards set out under international human rights instruments.¹⁹⁷ The state also has the obligation to protect citizens from the damaging acts that may be perpetrated by private parties.¹⁹⁸ The state must take positive action not to allow private persons or groups to act freely and with impunity to the detriment of human rights and freedoms.¹⁹⁹ In other words, the state has the positive obligation to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.²⁰⁰

The tertiary level of duty constitutes *the duty to promote*. The obligation to promote requires the state to take measures to enable individuals and groups to exercise their property rights and the right to natural resources through a variety of measures including promoting tolerance, raising

¹⁹²The Ogoniland Case (n 172) para. 45

¹⁹³ *ibid*

¹⁹⁴Golay and Cismas (n 143)

¹⁹⁵The Ogoniland Case (n 172) para. 46

¹⁹⁶*ibid*, para. 46

¹⁹⁷ Golay and Cismas (n 143)

¹⁹⁸ Commission Nationale des Droits de l'Homme et des Libertés vs. Chad, Communication No. 74/92, *para.* 20

¹⁹⁹The Ogoniland Case (n 172) para. 57

²⁰⁰*ibid*, para. 57

awareness, and building infrastructures.²⁰¹ States must make sure that individuals and communities are able to exercise their rights.

The last layer of the duty constitutes the duty to fulfill. The obligation to fulfill requires the state to move its machinery and resources towards the actual realization of property rights and the right to natural resources.²⁰² It also implies the duty to eliminate social injustices and achieve greater social justice in terms of enabling the community at large to benefit from property rights.²⁰³

2.1.4. Limitations on the Right to Property and the Right to Natural Resources

The formulation of the right to property under Article 17 of the UDHR does not make mention of any restrictions on the right.²⁰⁴ This does not mean that the protection of the right to property is absolute as legitimate restrictions on the right may be warranted under certain circumstances.²⁰⁵ However, efforts to subject the enjoyment of the right to property “*in accordance with the laws of the country where the property is located*” were not accepted during the course of the negotiation of Article 17.²⁰⁶ Such claw-back clauses have the effect of subordinating the right to national laws, which may be used as a justification for arbitrary eviction and dispossession.²⁰⁷

Despite the fact that the conditions that must be met upon limitation of the right to property vary from treaty to treaty, there are certain common requirements. These common requirements include the existence of valid (legitimate) public purpose, non-discrimination, fair compensation and due process.²⁰⁸

In regard to the African Charter on Human and Peoples Rights (ACHPR), the formulation of the right to property in Article 14 has been subjected to what is sometimes described as the most far-

²⁰¹ *ibid*, para. 46

²⁰² *ibid*, para. 47

²⁰³ Golay and Cismas (n 143)

²⁰⁴ However, it may be argued that the general limitation clause under Article 29(2) of the UDHR also applies to the right to property. Accordingly, limitations may be imposed on the enjoyment and exercise of the right to property as provided by law, for purposes legitimate in a democratic society.

²⁰⁵ Golay and Cismas (n 143)

²⁰⁶ van Banning (n 147) 38

²⁰⁷ van Banning (n 147) 63

²⁰⁸ De Schutter (n 142)

reaching claw-back clause.²⁰⁹ The Charter provides that the right to property can be limited in the general interest of the community and in accordance with the provisions of appropriate laws.

Thus, the provision stipulates a two-pronged test to determine the legitimacy of restrictions on the entitlement. First, interference with the right must be justified by the legitimate purpose of the interests of public needs or in the general interest of the community.²¹⁰ The notion of ‘*general interest*’ allows balance of interest to fulfill the social function of property and is instrumental for the realization of economic and social rights.²¹¹ Even if states are given deference in the determination of what constitutes “*general interest*”, the concept should not be abused to benefit political allies and elites. The concept of “public purpose” or general interest should not be vaguely and poorly defined so as to justify expropriation of property rights to land in the name of public interest.²¹²

Second, limitations must be in accordance with the provisions of appropriate laws.²¹³ The principle of legality posits that interference and deprivation of property or possession must be prescribed by the law, which must be published and accessible so as to be in accordance with the principle of rule of law.²¹⁴ The reference to law here is not confined to national laws. On the contrary, the term “law” in this context should be understood as including international legal standards as well.²¹⁵ The African Commission has noted that the two requirements of legality and legitimacy are conjunctive or cumulative.²¹⁶

Additionally, the African Commission has ruled that limitations must be seen in the light of the principle of proportionality *i.e.* the justification of limitations must be strictly proportionate with

²⁰⁹Golay and Cismas (n 143)

²¹⁰Endorois Decision (n 166) para. 212 (The African Commission on Human and Peoples’ Rights noted that the ancestral land of indigenous people belongs to a special category of property. The Commission opined that the “public interest” test must be met with a much higher and stringent threshold in the case of encroachment upon the lands of indigenous peoples as opposed to individual private property.)

²¹¹Golay and Cismas (n 143)

²¹² Emily Polack, Lorenzo Cotula, Muriel Cote (International Institute for Environment and Development (IIED), Accountability in Africa’s Land Rush: What role for Legal Empowerment? (2013) <<http://pubs.iied.org/pdfs/12572IIED.pdf>> accessed 27 August 2013

²¹³ *ibid*

²¹⁴ Golay and Cismas (n 143)

²¹⁵ Michelo Hansungule, Legal Opinion: Violation of the Right to Property <<http://www1.chr.up.ac.za/index.php/opinion-pieces.html>> accessed 14 July 2013

²¹⁶ Endorois Decision (n 161) para. 211

and absolutely necessary for the advantages to follow.²¹⁷ Thus, The Commission also noted that interference with the right to property must be “proportionate to a legitimate need, and should be the least restrictive measure possible.”²¹⁸ The principle of proportionality implies that instance of interference should strike a ‘fair balance’ between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.²¹⁹

The Commission observed that the limitations must not erode the right to the extent that the right becomes “*illusory*”.²²⁰ The Commission further noted that the rendering of property rights illusory is indicative of the fact that the limitation is not proportionate and is a violation of the right.²²¹

2.1.5. The Right against Forced Eviction

Large scale agricultural investments are one of the different circumstances which induce forced eviction. Thus, it becomes important to review relevant international standards on forced evictions. “*Forced eviction*” is defined as the permanent removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal protection.²²² Owing to the fact that forced evictions are oftentimes related with the lack of security of tenure, legislation providing for the greatest possible security of tenure to occupiers of homes and land is recommended.²²³ The prohibition of forced evictions does not apply to those types of evictions which are carried out in accordance with the law and in conformity with the International Covenants on Human Rights.²²⁴ The right to property provides protection against forced eviction and arbitrary expropriation.

Legal tests have been developed by the Committee on Economic, Social and Cultural Rights as regards forced removal from lands traditionally claimed by a group of people as their property. The legal test was refined by the Committee in relation to the right to adequate housing, which

²¹⁷ *ibid*, para. 213

²¹⁸ *ibid*, para. 214

²¹⁹ Golay and Cismas (n 143)

²²⁰ Endorois Decision (n 166) para. 215

²²¹ *ibid*

²²² General Comment No.7 (1997) on the right to adequate housing (Article 11(1)): Forced Evictions para. 3

²²³ *ibid* para. 9

²²⁴ *ibid* para. 3

though not explicitly enshrined under the African Charter, is guaranteed by virtue of Article 14 of the Charter, among others, as opined by the African Commission.²²⁵In its General Comment No. 4, the Committee noted that forced removal is *prima facie* incompatible with the requirements of the Covenant on Economic, Social and Cultural Rights. Possession of a degree of security of tenure provides guarantees legal protection against forced eviction, harassment and other threats.²²⁶ Likewise, the African Commission observed that forced evictions by their very definition do not fulfill the requirement of being “*in accordance with the law*” within the meaning of Article 14 of the African Charter on Human and Peoples Rights.²²⁷

Eviction and expropriation may be justified when carried out in accordance with the stringent conditions as elaborated by relevant human rights bodies.²²⁸ The Committee on Economic, Social and Cultural Rights noted that forced removal or eviction may only be justified in the most exceptional circumstances.²²⁹ Forced eviction must take place according to previously established legislation which itself must be in conformity with international standards. The principle of legality also requires such legislation to be sufficiently clear about the precise circumstances whereby forced eviction may take place.²³⁰

In situations where forced eviction is said to be justifiable, a number of minimum guarantees of procedural protection and due process must be observed in carrying out such forced evictions. The forced eviction must take place in accordance with the relevant provisions of international human rights law and in the light of principles of reasonableness and proportionality.²³¹ The basic principles and procedural requirements that need to be applied in carrying out forced evictions include:-

- Consultation and participation of affected people and communities;

²²⁵ The Ogoniland Case (n 166) para. 63

²²⁶ Committee on Economic, Social and Cultural Rights, General Comment No.4 (1991) on the right to adequate housing (Article 11(1)) para. 8(a)

²²⁷ Endorois Decision (n 166) para. 218 (The Commission further noted that the phraseology “*in accordance with the law*” requires compliance not only with national law but also international law. The African Commission noted that the requirement of “in accordance with the law” includes consultation and compensation. In turn, the requirement of consultation requires seeking and securing the consent of the affected people.)

²²⁸ General Comment 4, The Right to Adequate Housing (Sixth Session, 1991), para. 18

²²⁹ Committee on Economic, Social and Cultural Rights, General Comment 4, The Right to Adequate Housing (Sixteenth Session, 1997) para. 18

²³⁰ General Comment No.7 (n 222) para. 14

²³¹ *ibid*

- Adequate notification;
- Effective administrative and legal recourse;
- Prohibition of actions resulting in homelessness;
- Prohibition of actions resulting in the deterioration of housing and living conditions; and
- Provision of adequate relocation and/or adequate compensation before evictions are carried out²³²

Similarly, “Basic Principles and Guidelines on Development Based Evictions and Displacement” developed by the Special Rapporteur on Adequate Housing also provide similar procedural protections.²³³ These procedural protections span over different stages including prior to eviction, during eviction and after eviction. The Basic Principles and Guidelines are keen to note that the procedural protections are applicable to the occupiers of homes and land irrespective of the fact they hold title under domestic law.²³⁴ The Basic Principles and Guidelines recommend to states to adopt preventative strategies, policies and programs with the aim of avoiding and eliminating the underlying causes of forced evictions.²³⁵

The African Commission draws attention to safeguards that restrictions to property rights involving forced removal must observe as ironed out by another regional mechanism to ensure that they do not amount to denial of the rights and survival of the affected communities. First, ensure the effective participation of the members of the communities in conformity with their customs and traditions concerning any development, investment, and exploration or extraction plan. Second, guarantee that members of the community will receive a reasonable benefit from any such plan within their territory. Third, perform a prior environmental and social impact assessment prior to issuance of any kind of concessions.²³⁶ According to the African

²³²ibid, para. 15, *See also* UNHCHR, Forced Evictions Assessment Questionnaire <<http://www2.ohchr.org/english/issues/escr/docs/ForcedEvictionsAssessmentQuestionnaire.pdf>> accessed on 27 July 2013

²³³Special Rapporteur on Adequate Housing, ‘Basic Principles and Guidelines on Development Based evictions and Displacement’ para. 21 < http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf > accessed on July 27, 2013

²³⁴ ibid

²³⁵ibid, para. 28

²³⁶Endorois Decision (n 166) para. 227

Commission all these elements are subsumed in the test of “in accordance with the law” for all intents and purposes.²³⁷

In regard to compensation, the African Commission takes note of the principle that any violation of an international obligation which has caused damage entails the obligation to provide appropriate reparations.²³⁸ The protection afforded by property rights would be illusory and ineffective in the absence of compensation.²³⁹

When it comes to the standard of compensation, this may also vary depending upon the nature of the property and the circumstances of the taking.²⁴⁰ The African Commission has made some important observations as regards the principles governing the determination of amount of compensation in the case of violations of property rights to land. The Commission gives priority to restitution of the lands, territories, resources of the communities which they have traditionally owned, occupied, used or acquired when they are confiscated, occupied, used or damaged without their free, prior and informed consent.²⁴¹ The question of alternative lands comes in to play only where the state demonstrates that it is unable to return the traditional land based on objective and reasonable grounds.²⁴²

Nevertheless, where restitution of the very same land, resources or territories is not possible, just and fair compensation should be effected. Compensation may take different forms. Priority is accorded to compensation in the form of land, territories, resources of equal, size, quality and legal status unless otherwise agreed by the affected communities themselves.²⁴³

The African Commission singles out certain standards that need to be observed in applying these different forms of compensation based on recommendations developed by the former UN Sub-Commission on the Prevention of Discrimination and protection of Minorities and applied by the European Court of Human Rights. Accordingly, displaced or evicted persons should be:-

1. Compensated for their losses at full replacement cost prior to the actual move

²³⁷ibid, para. 228

²³⁸ ibid

²³⁹Golay and Cismas (n 143)

²⁴⁰ ibid

²⁴¹Endorois Decision (n 166) para. 232

²⁴²ibid, para. 234

²⁴³ibid, para. 232

2. Assisted with the move and supported during the transition period at the resettlement site
3. Assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least restore them.²⁴⁴

2.1.6. The Interrelationship and Interdependence between the Property Rights to Land and Natural Resources and Other Rights

Property rights to land and the right to natural resources are interdependent and interrelated with the recognition, exercise enjoyment of a number of other human rights entitlements. Even though these rights affect a host of other human rights and freedoms, they have a more direct and immediate link with the right to existence and self-determination, the right to development and the right to satisfactory environment, and the right to adequate food. Consequently, it becomes appropriate to have a brief look into this direct link.

The Right to Self-Determination

Articles 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) proclaim the right of all peoples to self-determination. This right guarantees the entitlement of all peoples to freely determine their political status and freely pursue their economic, social and cultural development. The right to self-determination also assures of all peoples freely to dispose of their natural wealth and resources, without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law.²⁴⁵ The provision on the right to self-determination also prohibits the deprivation of a people of its own means of subsistence. These provisions imply that the deprivation of the land and resources on which the people rely for their livelihood is prohibited.²⁴⁶ Likewise, the African Charter on Human and Peoples Rights affirms the rights of all peoples to existence and the unquestionable and inalienable right of the people to self-determination. Accordingly, it posits the right of the

²⁴⁴ *ibid*, para. 237

²⁴⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 1(2), International Covenant on Economic, Social and Cultural Rights (16 December 1966, entered into force 3 January 1976) (ICESCR), Article 1(2)

²⁴⁶ De Schutter (n 142)

people to freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.²⁴⁷

The Right to Development

The dispossession of lands belonging to peoples undermines their right to development. Article 22 of the African Charter on Human and Peoples Rights assures of the right of all peoples to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. The formulation of the right to development under Article 22 of the Charter is very much akin to the UN Declaration on the Right to Development adopted in 1986. The Declaration states that the human person is the central subject of development and should be the active participant and beneficiary of the right to development.²⁴⁸ Likewise, the Declaration states that the right to development includes “active, free and meaningful participation in development.”²⁴⁹ Moreover, the Declaration recalls the primary responsibility of states for the creation of conducive conditions favorable for the realization of the right to development.²⁵⁰ By so doing, the Declaration affirms the procedural as well as the substantive elements of the right.²⁵¹ Similarly, the African Commission on Human and Peoples Rights also noted that the right to development is both *constitutive* and *instrumental*.²⁵² The Commission noted that the right serves both as a means and as end and that a violation of either the procedural or the substantive element constitutes a violation of the right to development.²⁵³

The Commission further outlined what it considers to be the five main criteria fulfillment of the recognition of the right to development, namely equitable, non-discriminatory, participatory,

²⁴⁷ African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), Article 20(1)

²⁴⁸ UN General Assembly, Declaration on the Right to Development: resolution /adopted by the General Assembly, 4 December 1986, A/RES/41/128, Article 2(1)

²⁴⁹ *ibid*, Article 2(3)

²⁵⁰ *ibid*, Article 3(1)

²⁵¹ Oei and Shepherd (n 184)

²⁵² Endorois Decision (n 166) para. 277

²⁵³ *ibid*

accountable, and transparent.²⁵⁴ It highlights the over-arching themes of equity and freedom of choice and the end result of development should be the empowerment of the community.²⁵⁵

The procedural element of the right pertains to the right to participate in the development process, while the substantive element is related with the right to improvement in the well-being.²⁵⁶ Thus, Article 22 of the African Charter affirms the right of peoples of control over the development communities. This is therefore a clear indication of the fact that the alienation of the land and natural resources of peoples against their will affects the realization of their right to development.

The Right to Satisfactory Environment

Article 24 of the African Charter guarantees the right of all people to have a general satisfactory environment favorable for their development. It is also referred to the right to a healthy environment.²⁵⁷ The observance of this right is directly linked with the right to the best attainable state of physical and mental health affirmed under the African Charter.²⁵⁸ The right imposes the obligations to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.²⁵⁹ In other word, governments are required to take measures to prevent projects that have the effect of threatening the health and environment of their citizens.²⁶⁰

This in turn implies that states must desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the right to general satisfactory environment.²⁶¹ The requirement and publication of environmental and social studies prior to the carrying out of development projects, undertaking appropriate monitoring and providing information for

²⁵⁴ *ibid*

²⁵⁵ Endorois Decision (n 166) para. 277-278

²⁵⁶ Oei A. and Shepherd (n 184) 106

²⁵⁷ The Ogoniland Case (n 172) para. 52

²⁵⁸ African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), Article 16

²⁵⁹ The Ogoniland Case (n 172) para. 52

²⁶⁰ *ibid*

²⁶¹ *ibid*

affected communities and providing meaningful opportunities to individuals to be heard and to participate in decisions affecting their communities are some of the examples that can be cited.²⁶²

2.2. The Right to Food

Large scale agricultural investments must be carried out without affecting the productive resources of local host communities which in turn would affect their food security. Total or partial loss of access to resources such as land and natural resources puts access to adequate food by households in jeopardy.²⁶³ The right of everyone to a standard adequate for the health and well-being of himself and his family including clothing and housing is affirmed in the Universal Declaration of Human Rights (UDHR).²⁶⁴ The right to food is recognized under the International Covenant on Economic, Social and Cultural Rights.²⁶⁵ Article 11(1) of the Covenant affirms the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing and to the continuous improvement of living conditions. Moreover, Article 11(2) provides that States Parties to recognize that immediate and urgent steps may be needed to ensure “the fundamental right to freedom from hunger and malnutrition.”

The nature of the general legal obligations implied by economic, social and cultural rights including the right to food is stipulated in Article 2 of the International Covenant on Economic, Social and Cultural Rights. The nature of the legal obligations stated in Article 2 is further elaborated in General Comment No. 3 by the Committee on Economic, Social and Cultural Rights. Consideration of the implications of Article 2 of the Covenant is of particular relevance owing to the fact that the right to adequate food is one of the rights affirmed in the Covenant. The right to food imposes the obligation on States Parties to take steps to progressively achieve the realization of the right to food.²⁶⁶ States Parties are required to adopt all appropriate measures to this effect including legislative measures.²⁶⁷ This implies the duty to take expeditious,

²⁶² *ibid*

²⁶³ Ward Anseeuw, Liz Alden Wily, Lorenzo Cotula, and Michael Taylor, ‘*Land Rights and the Rush for Land*’ (2012) (Findings of the Global Commercial Pressure on Land Research Project) <http://www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report_ENG.pdf>accessed 31 December 2011

²⁶⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UN GA Res 217A (III) (UDHR), Article 25

²⁶⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICECSR), Article 11

²⁶⁶ General Comment No. 12, The Right to Adequate Food (UN doc. E/2000/22, *para.* 14

²⁶⁷ *ibid*

deliberate, targeted and concrete steps towards the realization of that goal.²⁶⁸ In addition to legislation, States Parties are also expected to take other measures including administrative, financial, education, social and others.²⁶⁹

In spite of the fact that the Covenant recognizes the notion of progressive realization, the right to adequate food also implies obligations of immediate effect.²⁷⁰ Two of these immediate obligations deserve special mention in the context of the right to adequate food. These are the “undertaking to guarantee” that the rights enshrined in the Covenant “will be exercised without discrimination” and the obligation “to take steps.”²⁷¹ Instances of discrimination in relation to access to food, as well as to the means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitute a violation of the right to adequate food.²⁷² The obligation “to take steps” to the progressive achievement of the right to adequate food is also the principal obligation of result undertaken by States Parties under the Covenant.²⁷³

The right to food obligates States Parties to everyone within their jurisdiction access to minimum essential food which is sufficient, nutritionally, adequate and safe, to ensure their freedom from hunger. It also requires States Parties to ensure that each individual alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.²⁷⁴ The realization of the right to adequate food is a progressive obligation.²⁷⁵ Nevertheless, States Parties have the minimum core obligation of taking the necessary steps to mitigate or alleviate hunger.²⁷⁶

Based on the quartet layers of obligations developed by the African Commission on Human and People’s Rights, the right to adequate food imposes different types of obligations on State Parties

²⁶⁸ *ibid*

²⁶⁹ General Comment No. 3, The Nature of State’s Parties Obligations (UN doc./E/1991/23), para. 7

²⁷⁰ *ibid*, para. 1

²⁷¹ *ibid*, para. 1 and 2

²⁷² General Comment No. 12 (n 266) *para.* 6

²⁷³ General Comment No. 3 (n 269) *para.* 9

²⁷⁴ General Comment No. 12 (n 271), *para.* 4, *See also* De Schutter (n 147)

²⁷⁵ *ibid*, *para.* 18

²⁷⁶ General Comment No. 12 (n 266) *para.* 6

as in the case of other human rights.²⁷⁷ These include the obligations to respect, obligations to protect and obligations to promote and the obligation to fulfill.²⁷⁸ The obligation to respect requires States Parties to abstain from taking measures that deprive individuals of access to productive resources which they depend on when they produce food for themselves.²⁷⁹ It includes the obligation to refrain from infringing upon the ability of individuals to feed themselves. The obligation to protect refers to the duty of the state to safeguard access to productive resources from encroachment by other private parties.²⁸⁰ This includes the obligation of states to prevent others including private business firms from inhibiting the ability of individuals to feed themselves. The obligation to promote requires that state to ensure that individuals and communities enjoy the right to adequate food by building the necessary infrastructure. The obligation to fulfill is further divided into two: obligations to facilitate and obligations to provide.²⁸¹ Obligations to facilitate require the state to strengthen access to and utilization of resources and means to ensure their livelihood, including food security.²⁸² In other words, it imposes the obligation to actively strengthen the ability of individuals including smallholders to feed themselves. States may also be under obligation to provide food for where “an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal.”²⁸³

The right to adequate food prohibits various forms of actions and omissions which constitute violations of the right. These include, denial of access to food to particular groups and individuals, adoption of legislation or policies inconsistent with existing obligations pertaining to the right to adequate food, failure to regulate individuals and groups whose activities are in violation of the right to adequate food, or failure of the State Party to take into account its

²⁷⁷General Comment No. 12 (n 261) *para.* 14, *See also* Report of the Special Rapporteur on the Right to Food (UN Doc A/HRC/13/33/Add.2 (22 December 2009) <<http://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/177/83/pdf/G0917783.pdf?OpenElement>> accessed 11 July 2013

²⁷⁸General Comment No. 12 (n 261) *para.* 14

²⁷⁹General Comment No 12 (n 261) *para.* 15.

²⁸⁰ *ibid*

²⁸¹ *ibid*

²⁸² De Schutter (n 137)

²⁸³ *ibid*

international obligations concerning the right to food while entering into agreements with other States or entities or individuals.²⁸⁴

In spite of the fact that States Parties are the ones who are ultimately accountable for the realization of the right to adequate food, others also bear responsibilities for the realization of the right.²⁸⁵ These include, among others, individuals, local communities, non-governmental organizations and private business sector.²⁸⁶ In particular, national or transnational private business sector is required to conduct itself within a framework of code of conduct conducive to the respect of the right to adequate food.²⁸⁷ States Parties have the duty of ensuring the activities of private business sectors is in compliance with the right to food.²⁸⁸

The formulation and implementation of national strategies for the right to food requires observance of salient attributes of good governance including the principles of accountability, transparency, participation, decentralization, legislative capacity and independence of the judiciary.²⁸⁹ The strategy must accord utmost importance to the sustainable management and use of natural resources at national, regional, local and household levels.²⁹⁰ The strategy must also ensure the prevention of discrimination in access to food or resources for food.²⁹¹ These include, among others, guarantees of full and equal access to economic resources including ownership of land and other property and other natural resources.²⁹² States parties have the obligation to protect the resource base for food.²⁹³ The right to adequate food, in particular, must be respected in relation to vulnerable groups including women, pastoral and agro-pastoral peoples.²⁹⁴

It is argued that many commercial land acquisitions may be contrary to the right to adequate food for a variety of reasons. In the words of the Special Rapportuer on the Right to Food:-

²⁸⁴General Comment No. 12 (n 261) *para.* 19

²⁸⁵*ibid.* *para.* 20

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

²⁸⁸*ibid.*, *para.* 27

²⁸⁹*ibid.*,*para.* 23

²⁹⁰*ibid.*,*para.* 25

²⁹¹*ibid.*, *para.* 26

²⁹²*ibid.*,*para.* 26

²⁹³*ibid.*, *para.* 27

²⁹⁴*ibid.*,*para.* 26

States would be acting in violation of the human right to food if, by leasing or selling land to investors (whether domestic or foreign), they were depriving the local populations from access to productive resources indispensable to their livelihoods. They would also be violating the right to food if they negotiated such agreements without ensuring that this will not result in food insecurity, for instance because this would create a dependency on foreign aid on increasingly volatile and unpredictable international markets, as large proportions of the food produced thanks to the foreign investment would be shipped to the country of origin of the investor or sold on the international markets.²⁹⁵

General Comment 12 on the Right to Food imposes important duties on both food-secure and food-insecure countries. The General Comment stipulates that food-secure countries must ensure that their actions do not jeopardize access to food overseas.²⁹⁶ In short, States Parties have the obligation to respect the enjoyment of the right to food in other countries.²⁹⁷ Consequently, countries investing by way of commercial land acquisitions in low-income countries must make sure that their activities do not jeopardize the food security of the local population.²⁹⁸ Moreover, States Parties where international agricultural firms are registered have the obligation to regulate the activities of these firms abroad.²⁹⁹ FIAN (Food First Information and Action Network) International also argued that investor countries have a duty to protect the right to food through “regulation, monitoring and due diligence in their sphere of influence.”³⁰⁰ General Comment No. 12 calls upon international financial institutions, in particular the International Monetary Fund (IMF) and the World Bank to pay more attention to the protection of the right to food in their lending policies and credit agreements.”³⁰¹

2.3. Land Rights of Indigenous Peoples

The land rights of indigenous peoples have been elaborated in different international human rights instruments, particularly the 2007 United Nations Declaration on the Rights of Indigenous

²⁹⁵ Chris Huggins, *A Historical Perspective on the Global Land Rush* (2011) available at http://www.landcoalition.org/sites/default/files/publication/904/HUGGINS_History_web_11.03.11.pdf, accessed 2 July 2012

²⁹⁶ General Comment No 12 (n 261) para 36

²⁹⁷ *ibid*

²⁹⁸ Huggins (note 290)

²⁹⁹ *ibid*

³⁰⁰ *ibid*

³⁰¹ *ibid*

Peoples (UNDRIP) and the 1989 International Labour Organization (ILO) Convention No. 169.³⁰² The two instruments are compatible and complementary.³⁰³ The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by virtue of General Assembly Resolution 61/295 on September 13, 2007.³⁰⁴ The overwhelming support UNDRIP obtained with the affirmative votes of the majority of countries in the UN means the tremendous normative weight that it commands as an instrument of standard setting. Ethiopia was absent from the General Assembly upon the adoption of this Declaration.³⁰⁵ The African Commission on Human and Peoples Rights also manifested its support to the Declaration in its Advisory Opinion on the matter.³⁰⁶

The UNDRIP enunciates a comprehensive list of the rights of indigenous people including individual and collective. These entitlements constitute minimum standards for the survival, dignity and well-being of indigenous peoples of the world.³⁰⁷ In that, the Declaration serves as a basis for the articulation of human rights norms as they apply to indigenous people.³⁰⁸

³⁰² ILO Convention No. 169 was adopted with a view to revise ILO Convention No. 107 which was criticized for its narrow protection of the rights of indigenous peoples and its focus on assimilation of indigenous people. ILO Convention No.169 has been ratified by 22 countries in Latin America, Asia and Africa as of date.

³⁰³ ILO, 'Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169' <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf> accessed 17 July 2013

³⁰⁴ The Declaration was adopted by a majority of 144 states in favor and 4 votes against and 11 abstentions. However, the four countries which initially opposed to the Declaration, namely Australia, Canada, New Zealand and the United States reversed their decisions and have lately expressed their support to and endorsement of the Declaration.

³⁰⁵ International Work Group for International Affairs (IWGIA), 'The Indigenous World 2012, Copenhagen', p. 414 available at < http://www.iwgia.org/iwgia_files_publications_files/0573_THE_INDIGENOUS_ORLD-2012_eb.pdf> accessed on August 21, 2014

³⁰⁶ Advisory Opinion of the African Commission on Human and Peoples Rights on the United Nations Declaration on the Rights of Indigenous People <http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf> accessed 20 July 2013 ; African Commission on Human and Peoples Rights, Communique on the UN Declaration on the Rights of Indigenous Peoples (2007) < <http://www.achpr.org/sessions/42nd/resolutions/121/> > accessed 20 July 2013

³⁰⁷ UN Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007 UNGA Res. A/61/295/L.67 and Add.1), Preamble and Article 43

³⁰⁸ There is no universally accepted clear-cut definition of what constitutes indigenous and tribal peoples. This is due to the international consensus that a strict definition of indigenous peoples is neither necessary nor desirable.³⁰⁸ Instead, ILO Convention No. 169 is confined to a description of the people whom it meant to protect. It employs the recommended approach of identifying indigenous peoples based upon a combination of both subjective and objective criteria.³⁰⁸ The objective criteria include descent from populations, who inhabited the country or geographical region at the time of conquest, colonization or establishment of present state borders, retaining some or all of their social, economic, cultural and political institutions, irrespective of legal status, having social, economic and cultural conditions which distinguish them from the other sections of the national community and their status is regulated wholly or partially by their own traditions and customs, or by special laws and regulations. On the other hand, both ILO Convention No. 169 and UNDRIP recognize the right of self-identification or self-definition i.e. the

Consequently, indigenous people typically include different groups of hunter gatherers, and certain groups of pastoralists. A principal attribute of these people is the fact that the survival of their way of life depends on access and rights to their traditional land and natural resources.³⁰⁹

2.3.1. The Recognition of Land Rights of Indigenous Peoples

The UNDRIP does not proclaim new rights or to create a “special class of citizens”³¹⁰ as such. Instead, it is an affirmation of universal human rights norms as they apply to indigenous peoples.³¹¹ In other words, the Declaration is elaboration of existing international human rights standards as they apply to indigenous peoples.³¹² The rights of indigenous peoples can also be established by virtue of Article 27 of the International Covenant on Civil and Political Rights and the interpretation of the right by the Human Rights Committee, the treaty body vested with the responsibility of following upon the implementation of the ICCPR.

UNDRIP provides the special spiritual, social and economic relationship existing between indigenous peoples and their lands and territories.³¹³ Land is of indispensable importance to indigenous peoples as it constitutes the basis for their cultural identity and integrity.³¹⁴ Indigenous peoples are largely dependent upon their land and territories for their livelihood.³¹⁵ Thus, the loss of ancestral lands by indigenous peoples amounts to a threat to their survival as distinct communities and peoples.³¹⁶ In other words, the importance of the lands and territories of indigenous people cannot simply be explained in terms of its monetary or productive value.³¹⁷ Consequently, the special attention given to the land rights of indigenous people is informed by

right of indigenous communities to identify themselves as such, which is the subjective criteria for the definition of indigenous peoples.

³⁰⁹ Endorois Decision (n 166) para. 150

³¹⁰ *ibid*, para. 149

³¹¹ Birgitte Feiring, Indigenous Peoples Rights to Lands, Territories and Resources <<http://www.landcoalition.org/sites/default/files/DraftILCIndigenousPeoplesPeerReview.pdf>> accessed on July 17, 2013

³¹² Oei A. and Shepherd (n 184)

³¹³ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 25

³¹⁴ ILO Convention (No. 169) concerning Indigenous and Tribal peoples in Independent Countries (adopted on 27 June 1989, into force since 5 September 1991), Article 13(1)

³¹⁵ Asia Indigenous People Pact (AIPP), Training Manual on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) <http://aippnet.org/home/phocadownload/userupload/UNDRIP_MANUAL-FINAL.PDF> accessed July 17, 2013

³¹⁶ ILO, Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169 (n 303)

³¹⁷ Birgitte Feiring (n 311)

the need to ensure the observance of the broader rights of self-management, self-determination and determination of their own priorities for development.³¹⁸

In light of this, the Declaration clearly affirms the rights of the indigenous people to the lands, territories and resources which they have traditionally owned, occupied, or otherwise used or acquired.³¹⁹ Article 26 of the Declaration, which is the main provision on the rights of indigenous people to land and natural resources, reads as follows:-

1. Indigenous peoples have a right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous people have the right to own, use, develop and control the lands territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous people concerned.

The Declaration points out that the rights of ownership and possession of indigenous and tribal peoples over the land they traditionally occupy shall be recognized and respected.³²⁰ The reading of Article 26 shows that the right of indigenous people is not confined to the land they directly cultivate or inhabit, instead to the broader territory including the total environments of the areas which they occupy or otherwise use, inclusive of natural resources, rivers, lakes and coasts.³²¹ As regards the substantive content or subject matter of the right to land and natural resources, Article 26(2) makes it clear that the land rights of indigenous people is comprised of a number of elements including the right to own, use, develop and control the lands, territories and resources.

³¹⁸ The right of indigenous peoples to self-determination is enshrined under the UNDRIP. The right to self-determination entitles them to freely determine their political status and freely pursue their economic, social and cultural development. UNDRIP goes on to affirm the right of indigenous peoples to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. The right of indigenous peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully in the political, economic, social and cultural life of the state is also assured in the Declaration. (*See also* Birgitte Feiring (n 311))

³¹⁹ UN Declaration on the Rights of Indigenous Peoples (n 302) Article 26 (1)

³²⁰ The same right is also reaffirmed under ILO Convention No. 169. (See UN Declaration on the Rights of Indigenous Peoples (n 302) Article 26(1))

³²¹ Birgitte Feiring (n 311)

These resources include both renewable and non-renewable resources inclusive of timber, fish, water, sand and minerals.³²²

2.3.1.1. Traditional Occupation, Ownership, Use or Otherwise Acquisition

The formulation of the right shows that the rights to land, territories and resources of indigenous peoples are established based upon their traditional occupation and use. The traditional occupation, ownership or use confers a right to the land, whether or not such a right was recognized by the state.³²³ It is this traditional occupation, ownership, use or otherwise acquisition, which provides the basis for the legitimacy of the claims of indigenous people to their lands and natural resources. By necessary implication, the basis for such recognition is not the official recognition or registration of that ownership.³²⁴ Traditional occupation, ownership and use are sufficient basis for state recognition of title of indigenous peoples over these lands.³²⁵ The provision shows that the protection of the right to property extends to “*extra-legal*” forms of occupation not recognized through title and occupation predicated upon customary tenure, though such protection does not extend to all forms of illegal occupation.³²⁶ The absence of formal title deeds does not deprive indigenous peoples of their ownership rights over their ancestral rights.³²⁷ The African Commission also noted that settled possession of ancestral lands by indigenous peoples is sufficient to trigger the state obligation to provide legal recognition without the need to produce formal title to the lands in question.³²⁸

This makes the phrase “traditional occupation, ownership, use or otherwise acquisition” of far reaching significance. This stipulation is made in acknowledgement of the fact that the loss and dispossession of the lands of indigenous peoples is attributed to the non-recognition or the lack

³²² *ibid* (Article 15(2) requires that indigenous peoples have the rights to consultation and participation, regarding the benefits of resource exploitation as well as compensation for damage caused due to such exploitation.)

³²³ ILO, *Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169* (n 303)

³²⁴ Birgitte Feiring (n 311)

³²⁵ Sedfrey M. Candelaria, *Comparative Analysis on the ILO Indigenous and Tribal Peoples Convention No.169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and Indigenous Peoples Rights Act (IRPA) of the Philippines* < http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms_171406.pdf> accessed 16 July 2013

³²⁶ De Schutter (n 142)

³²⁷ *Endorois Decision* (n 166) para. 207

³²⁸ *ibid*

of official recognition of customary tenure rights.³²⁹ The absence of legal recognition of collective customary land tenure is one of the major reasons for the dispossession of lands of indigenous people.³³⁰

The recognition of the traditional occupation, ownership, use or acquisition of the indigenous peoples in turn presupposes the recognition of the juridical personality of the people as a community.³³¹ Granting of juridical personality to the community is a prerequisite for the exercise of its right to seek judicial protection and seek remedies in the event of alleged violations of its rights to communal property. Article 20(1) of the African Charter on Human and Peoples' Rights assures of the rights of all peoples to existence. This entitlement is critical in view of the fact that indigenous people are oftentimes denied the right to exist as people with their cultural distinctiveness and determine their own development.³³² Without acknowledging the existence of a group of people, it becomes difficult to recognize their traditional occupation, ownership, use or acquisition of land.

The recognition of the land rights of indigenous peoples based upon their traditional occupation, ownership or use also reverses the negative role that international law played in the past against the rights of indigenous people generally and against their right to land particularly.³³³ The recognition of the concept of "traditional occupation, ownership, use or otherwise acquisition" also constitutes a paradigm shift in terms of the protection of the rights of indigenous peoples. Previously, international law was employed as an instrument of dispossession of the lands, territories and natural resources of indigenous people.³³⁴ The rules of title to territory under international law have been employed to justify the dispossession of the lands of indigenous peoples.³³⁵ The Final Act of the Berlin Conference entrenched the doctrine of recognition by virtue of which rights to land have to be formally recognized by the new colonial power to

³²⁹ Valerie Couillard, Jeremie Gilbert, Justin Kenrick, Christopher Kidd, Land Rights and the Forest People of Africa: Historical, Legal and Anthropological Perspectives (2009) (Forest Peoples Programme) < <http://www.forestpeoples.org/sites/fpp/files/publication/2010/05/overviewlandrightsstudy09eng.pdf> > accessed 15 July 2013

³³⁰ *ibid*

³³¹ Endorois Decision (n 166) para. 192

³³² Oei A. and Shepherd (n 184) 105

³³³ Forest Peoples Programme (n 329)

³³⁴ *ibid*

³³⁵ *ibid*

produce legal effects.³³⁶ It was also the Final Act of the Berlin Conference which endorsed the doctrine of effective occupation. The principle of effective control submits that colonial states need to exercise effective control of the territory to claim title over it.³³⁷ Likewise, the legal concept of productive use has the effect of eroding security of local land rights by facilitating the reallocation of local land rights to third parties in case of “*non-use*”.³³⁸ Such legal concepts have obvious adverse implications on the lands of indigenous peoples by classifying them as “idle”, “unused”, “empty” or “unproductive”.³³⁹ Such qualification of lands as being “idle”, “unused” or “unproductive” echoes the *terra nullius* narratives which has been used to justify enclosures.³⁴⁰

In particular, nomadic people had little rights under the doctrine since it was based upon effective or productive use of the lands, as a result of which their lands were considered as empty or vacant.³⁴¹ These rules of international law tended to accord better rights to agricultural societies than nomadic people.³⁴² In the past, the land that belonged to pastoralists, hunter-gatherers and shifting cultivators was considered to be *terra nullius* i.e. vacant land or land which belongs to no one.³⁴³ The doctrine of *terra nullius* provides that indigenous lands are legally unoccupied until the arrival of a colonial presence, thus the land becomes the property of the colonizing power by virtue of effective occupation. Such claims were also supported by the invocation of the Latin maxim *cuius est solum, eius est usque ad caelum et ad inferos*, i.e. whoever owns the soil, it is theirs up to the sky and down to the depths.³⁴⁴ As a result, one of the demands of indigenous communities remains to be the recognition and protection of collective forms of tenure.³⁴⁵ These concepts reflect the use of property law in general and land law in particular as an instrument of misappropriation.

³³⁶ *ibid*

³³⁷ *ibid*

³³⁸ Polack, Cotula and Cote (n 212); Liz Alden Wily, ‘Looking back to see forward: the legal niceties of land theft in land rushes, (2012) 39 (3-4) *Journal of Peasant Studies*’ 751-775

³³⁹ Polack, Cotula and Cote (n 212)

³⁴⁰ *ibid*

³⁴¹ *ibid*

³⁴² *ibid*

³⁴³ Asia Indigenous People Pact (AIPP) (n 315)

³⁴⁴ Oei A and Shepherd (n 184)

³⁴⁵ Forest Peoples Programme (n 329)

Thus, the legal recognition and protection referred to in Article 26(1) of UNDRIP and Article 14(1) of the ILO Convention is not confined to lands which are actually occupied by indigenous people. Instead such recognition and protection extends to lands not exclusively occupied by indigenous peoples but which they have traditionally owned, used or otherwise acquired. This shows that the exercise of the rights is not confined to lands under contemporary physical use but extend to ancestral and traditional use.³⁴⁶

The official recognition and registration of the territories of indigenous peoples is also affirmed by the judicial decisions of many international and regional human rights bodies.³⁴⁷ The African Commission on Human and Peoples Rights has affirmed the rights of indigenous people to their traditional lands particularly in the seminal case of *Endorois Decision*.³⁴⁸ The said communication relates to alleged violations as a result of displacement of the *Endorois* indigenous community from their ancestral lands without effecting adequate compensation for the loss of their property rights.³⁴⁹

The African Commission catalogues the list of problems faced by indigenous people when it comes to the right to property. Particularly, the Commission identified three interrelated

³⁴⁶ Special Rapporteur on the Rights of Indigenous Peoples, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: Report on the Situation of Indigenous People in Nepal < http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34-Add3_E.pdf > accessed 19 July 2013

³⁴⁷ De Schutter (n 142)

³⁴⁸ The decision is also the first quasi-judicial pronouncement rendered by international body following the adoption of UNDRIP.

³⁴⁹ The *Endorois* community was forcibly evicted from the Lake Bogoria area of Baringo and Koibatek Administrative districts as well as Nakuru and Laikipia Administrative Districts in the Rift Valley Province in central Kenya in 1973. Prior to their forced removal and denial of access to entry in 1978, the *Endorois* community established and have been practicing a sustainable way of life, which was inextricably linked with their ancestral lands. The alleged violations encompass disruption of pastoral way of life, practice of religion, cultural integrity as well as overall development. In the communication to the African Commission, the *Endorois* sought relief of restitution of their traditional lands, issuance of collective title over the lands to the community and compensation for the forced eviction. In its decision on the merits, the Commission underlines the unambiguous relationship existing between indigenous people and their ancestral lands and the inextricable linkage and unique association existing between the people, their cultural and religious practices and their lands as manifested by several attempts to define the term “indigenous” peoples. This shows the special relationship with land as one of the main indicators of indigenesness.³⁴⁹ It is this inextricable linkage between the people and their distinct and specific territory that the African Commission singles out as being the common thread in various attempts to describe indigenous peoples. African Commission noted that the culture, religion and traditional way of life of the *Endorois* people are inextricably linked with their ancestral lands. The Commission appears to be content that the *Endorois* people fulfill the test of having “a profound and all-encompassing relationship with their ancestral lands”. The Commission further submits that the acceptance of *Endorois* community as indigenous peoples as individuals and as a group is a further testimony to the fact that they fulfill the test of self-identification.

problems.³⁵⁰ First, indigenous people lack “formal” title to recognition of their historical territories.³⁵¹ Second, domestic legal systems do not acknowledge communal property rights of indigenous people. Third, post-colonial states claim formal legal title to indigenous land. Governmental claim to formal title to land is based upon national laws which are profoundly impacted by the colonial legacy whereby ownership of much of the land was vested in colonial administrations.³⁵² Despite some changes, the fundamental characteristics of colonial land legislation remain intact in post-independence Africa.³⁵³ The Commission takes note of the contention on the part of indigenous peoples that the claim to formal legal title by post-colonial states which they inherited from colonial authorities as serving as a basis for the many cases of displacement of indigenous people.³⁵⁴ The empowerment of the government as the legal owner of land in turn vests it with the prerogative to allocate land rights to commercial operators including issuance of long term leases.³⁵⁵

The African Commission on Human and Peoples Rights highlighted the observation on the part of its Working Group on the Rights of Indigenous Populations/Communities noting that some African minorities are subject to dispossession of their lands and the need to take special protection measures for their survival as distinct communities.³⁵⁶ The African Commission underscores the fact that the first step in so doing is the acknowledgement that the rights, interests, benefits of such communities in their traditional lands constitute property rights within the meaning of Article 14 of the African Charter on Human and Peoples Rights.³⁵⁷ The Commission goes on to underscore the need for special measures for the protection of these property rights.³⁵⁸

In particular, it takes note of the fact that the domestic law of the respondent state i.e. Kenya does not recognize the right of the community to enjoy and exercise their collective property as a

³⁵⁰Endorois Decision (n 166) para. 187

³⁵¹ *ibid*

³⁵² *ibid*; Polack, Cotula and Cote (n 212)

³⁵³ *ibid*

³⁵⁴ Endorois Decision (n 166) para. 187

³⁵⁵ Polack, Cotula and Cote (n 212)

³⁵⁶Endorois Decision (n 166) para. 187 (Special protection measures are permanent measures which are aimed safeguarding the special needs of indigenous communities, namely to maintain their cultural integrity, individuality and distinctiveness and not to be assimilated.)

³⁵⁷ *ibid*

³⁵⁸ *ibid*

community. Instead, the recognition is confined to mere privilege to use the land.³⁵⁹ One of the justifications put forward to support domestic laws' non-recognition including collective property rights claims based upon historic occupation and cultural rights is that the communal property system of the indigenous community lacks clarity, particularly regarding ownership of land.³⁶⁰ In this sense, the Endorois decision best captures the use of domestic property law in general and land law in particular as instruments of misappropriation.

The African Commission on Human and Peoples Rights identifies inherent problems in national laws of the respondent state non-recognition of collective property rights of the community.³⁶¹ The Commission further argued that the community should be entitled to legal capacity and juridical capacity as prerequisite to seek judicial protection of their property rights.³⁶² The lack of such legal capacity and juridical capacity is presented as a reason why collective property rights are trumped by individual property rights, while the community are unable to seek redress for lack of legal capacity to do so.³⁶³

The African Commission makes it clear that the rights of indigenous people over the land and territory are not only confined to access rights.³⁶⁴ Access rights are comparable to privilege to use the land, which can be taken by the State and can be trumped by real property rights of third parties.³⁶⁵ Such access rights and mere privilege to use the land do not guarantee the right to effectively control the land from interference by third parties. As opposed to ownership, mere access rights expose the communities to expropriation by the state and interference by other third parties.³⁶⁶ Thus, the Commission opines that the granting of privilege rights to access for indigenous peoples fall far below the internationally recognized standards.³⁶⁷

On the contrary, the African Commission held the view that members of indigenous peoples and tribal peoples should obtain title to territory which guarantees its permanent use and

³⁵⁹ *ibid*, para. 194; Liz Alden Wily (n 338)

³⁶⁰ *ibid*, para. 194

³⁶¹ *ibid*, para. 192-193

³⁶² *ibid*

³⁶³ *ibid*

³⁶⁴ *ibid*, para. 204

³⁶⁵ *ibid*, para. 206

³⁶⁶ *ibid*, para. 204

³⁶⁷ *ibid*, para. 206

enjoyment.³⁶⁸ Title to territory extends to ownership which enables the concerned people to engage with the government as active stakeholders instead as passive beneficiaries.³⁶⁹ Furthermore, the Commission makes the distinction between *de facto* and *de jure* ownership. It notes that it is only *de jure* ownership of land which guarantees effective protection for indigenous peoples.³⁷⁰ While underscoring the need to recognize and respect the title to territory of the indigenous people, the Commission proceeds to clarify that such recognition must be reduced into the law.³⁷¹ The Commission stipulates only such recognition in law assures of legal certainty.³⁷² The logical consequence of this requirement is that the land traditionally used and occupied by indigenous people must be delimited and demarcated in consultation with the inhabiting and neighboring people.³⁷³

In the final analysis, in its decision on the merits, the African Commission made four important interrelated conclusions:-

- Traditional possession by indigenous peoples has the equivalent effect of state granted full property title;
- Traditional possession entitles the indigenous community to demand official recognition and registration of their property title;
- Members of indigenous community who left unwillingly or lost possession of their traditional land involuntarily shall maintain their property rights thereof unless the lands have been lawfully transferred to third parties in good faith; and
- Members of the indigenous community who have unwillingly lost possession of their lands when the lands have been transferred to innocent third parties shall be entitled to restitution of their lands or other lands of equal quality and extension.³⁷⁴

The decision of the Commission further demonstrates that in situations where the concerned indigenous communities have been subsequently forcibly evicted from their traditional lands,

³⁶⁸ *ibid*

³⁶⁹ *ibid*, para. 204

³⁷⁰ *ibid*, para. 205

³⁷¹ *ibid*, para. 206

³⁷² *ibid*

³⁷³ *ibid*

³⁷⁴ *ibid*, para. 209

such wrongful dispossession cannot be invoked against them to deny their rights to restitution and compensation.

2.3.1.2. The Recognition of Customary Tenure of Indigenous Peoples

In a related manner, UNDRIP calls for respect for the procedures of indigenous peoples for the transmission of rights to land, territories and resources.³⁷⁵ This is tantamount to the recognition of the fact that indigenous peoples have their own customary laws to recognize the land and resource rights of individual members or households.³⁷⁶

The Declaration calls for the establishment of a fair, independent, impartial, open and transparent process whereby the laws, traditions, customs and land tenure systems of indigenous people are given due recognition and for the recognition and adjudication of the rights of indigenous peoples pertaining to their lands, territories and resources. Such process needs to be established with the full consultation and participation of the indigenous people and must be based upon traditional occupation, ownership or use.³⁷⁷

The question whether a given indigenous community has traditionally occupied, owned, used or otherwise acquired a specific territory can be determined through evidence of indigenous peoples' traditional and customary land tenure can be established by qualified expert and academic opinion as well as by objective facts that can be discerned from the oral accounts and documentation produced by the indigenous communities concerned.³⁷⁸

2.3.2. The Protection of the Rights to Land, Territories and Resources

Apart from recognition, UNDRIP requires the effective protection of the rights of indigenous people to lands, territories and resources.³⁷⁹ Accordingly, States are required to take the appropriate legislative, administrative, and other measures necessary to create an effective

³⁷⁵ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 27, *See also* Jacur F. Romanin, Bonfanti Angelica and Seatzu Francesco (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill Nijhoff 2015) 75

³⁷⁶ *ibid*

³⁷⁷ *ibid*

³⁷⁸ Oei and Shepherd (n 184) 102

³⁷⁹ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 26(3)

mechanism for protection of the land rights of indigenous peoples with due respect to their customary laws, values, norms and mores.³⁸⁰ Effective protection of these rights undoubtedly calls for a variety of measures that need to be taken on the part of the state. These include identification, demarcation, titling, providing mechanisms for access to justice as well as penalizing unauthorized intrusion.³⁸¹ Protection implies the prevention of non-indigenous persons from acquiring ownership, possession or use of the lands, territories and resources of indigenous peoples against the wishes of the people.³⁸² This may take place by acts of fraud or duress exercised upon indigenous persons who are forced into relinquishing their ownership rights over the lands and territories.³⁸³

2.3.2.1. The Identification and Demarcation of Lands

The identification and demarcation of lands, territories and resources owned, acquired, used by indigenous peoples is of paramount importance for the protection of their property rights to land. Hence, States are obliged to give legal recognition and protection to these lands, territories and resources with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.³⁸⁴ Thus, the identification of the lands of indigenous people and the determination of the scope of the rights thereof cannot only be predicated upon state-sanctioned concepts and traditions, which in most cases tend to be conflictual with those of the indigenous people.³⁸⁵

Therefore, land titling procedures must aim to give protection to the land and resource rights of indigenous peoples in accordance with their customary laws and traditional land and resource tenure systems. According to the Special Rapporteur on the Rights of Indigenous Peoples, even though there may be some flexibility as regards the nature of land titling procedure, the following minimum considerations must be implemented:-

- Identification of the area and the rights that correspond to the indigenous communities
- Resolution of conflicts over competing uses and claims

³⁸⁰ De Schutter (n 142)

³⁸¹ Birgitte Feiring (n 311)

³⁸² ILO Convention (No. 169) (n 314) Article 17(3)

³⁸³ Birgitte Feiring (n 311)

³⁸⁴ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 26(3)

³⁸⁵ ILO, Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169 (n 303)

- Delimitation and demarcation
- Issuance of title deed or other appropriate document describing the nature of the right or rights in the lands or resources³⁸⁶

Similarly, decisions by regional human rights bodies indicate that delimitation, demarcation, and titling of the territory inhabited by indigenous people as being part and parcel of the positive obligations of the state to protect property rights to land and natural resources.³⁸⁷ The property rights of indigenous people are interpreted as entailing the protection of the communal rights of the people through a combination of various measures to allow them to provide for their own means of subsistence.³⁸⁸

Protection also implies the establishment of mechanisms for investigating and redressing the violations of the rights to land, territories and resources of indigenous people.³⁸⁹ The loss of land rights of indigenous people without their free, prior and informed consent should lead to redress of some kind including that of restitution and compensation.³⁹⁰ Moreover, violations of the rights of indigenous people to lands, territories and resources must not take place with impunity.³⁹¹ On the contrary, adequate penalties must be administered on the perpetrators of such violations.³⁹²

2.3.2.2. The General Prohibition of Forced Removal or Displacement

UNDRIP prohibits the forced removal of indigenous peoples from their lands and territories without the free, prior and informed consent of the concerned people and agreement on a just and fair compensation.³⁹³ Article 10 of the Declaration points out that ‘no relocation shall take place without the free, prior and informed consent of indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.’ UNDRIP also requires states to prohibit any action which has the aim or effect of dispossessing indigenous peoples of their lands, territories and resources.³⁹⁴ The prohibition of displacement of

³⁸⁶BirgitteFeiring (n 311)

³⁸⁷Endorois Decision (n 166) para.187

³⁸⁸Golay and Cismas (n 143)

³⁸⁹ UN Declaration on the Rights of Indigenous Peoples (n 302) Article 28

³⁹⁰BirgitteFeiring (n 311)

³⁹¹ ibid

³⁹² ILO Convention (No. 169) (n 314) Article 17(3)

³⁹³ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 10, ILO Convention No. 169 (n 314) Article 16 (1)

³⁹⁴ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 8(2) (b)

indigenous peoples is in line with the recognition of the centrality of the lands and territories not only to the economies and livelihood strategies of the peoples, but also their very survival as distinct cultures.³⁹⁵ This general prohibition is in conformity with the general prohibition of forced evictions discussed earlier. Therefore, as a general principle, indigenous people should never be removed from their lands and territories.³⁹⁶

2.3.2.3. The Procedures upon Necessary Relocation

Even though the displacement of indigenous peoples from their lands is in principle prohibited, both the Declaration provides for exceptions in recognition of the fact that this may become necessary in some situations. The question is when does removal or displacement become necessary. UNDRIP does not define situations whereby relocation or displacement may be deemed to be necessary. Nevertheless, examples of circumstances which justify the displacement of indigenous people may be necessary for their own good. Such situations may include situations where the survival of indigenous peoples is threatened as a result of submergence of small islands due to climate change.³⁹⁷ This example illustrates the fact that relocation should take place in the most exceptional circumstances. UNDRIP makes it clear that removal and displacement of indigenous people even in such cases must take place only with their free, prior and informed consent.

The Right to Consultation and Participation in Decision-Making

The right to consultation and participation in decision-making is one of the rights enunciated under the UNDRIP³⁹⁸ and ILO Convention No. 169.³⁹⁹ This requirement must be seen in conjunction with the proviso of UNDRIP which entitles indigenous peoples to the process of development and to exercise as much control as possible over their economic, social and cultural development.⁴⁰⁰ Accordingly, the right of indigenous people to determine and develop priorities and strategies for the development or use of their lands, territories and other resources is also

³⁹⁵ ILO, *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (n 303)

³⁹⁶ Birgitte Feiring (n 311)

³⁹⁷ ILO, *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (n 303)

³⁹⁸ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 32(2)

³⁹⁹ ILO Convention (No. 169) (n 314) Article 6(1)

⁴⁰⁰ UN Declaration on the Rights of Indigenous Peoples (n 302), Article 32(1), ILO Convention (No. 169) (n 314) Article 7(1)

recognized under the Declaration.⁴⁰¹ This right imposes on states the duty to consult and cooperate in good faith with the concerned indigenous peoples through their own representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁴⁰² States are required to undertake consultation with indigenous peoples to obtain their free and informed consent prior to the approval of any project likely to impact their lands, territories and resources.⁴⁰³ The requirement of consultation is critical if the project in question involves development, utilization and exploitation of natural resources including water and minerals, which is applicable to large scale agricultural investments. It is therefore evident that consultation has to be undertaken with a view to obtain the free, prior, informed consent of indigenous peoples including, among others, in relation to large-scale development or investment projects. The state bears the responsibility of ensuring the correct application of the right to consultation.⁴⁰⁴

Consultation is the means through which indigenous people can participate in decisions that affect them.⁴⁰⁵ It also constitutes a fundamental principle of democratic governance and inclusive development.⁴⁰⁶ ILO Convention No. 169 provides that indigenous peoples must be consulted whenever consideration is being given to legislative or administrative measures which may affect them directly.⁴⁰⁷ Such measures include development projects designed to take place on the lands of indigenous people. The Convention also requires that consultations shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent.⁴⁰⁸ The obligation to consult implies the need to establish institutionalized mechanisms for regular and broad consultations with indigenous peoples.⁴⁰⁹ The right also

⁴⁰¹ UN Declaration on the Rights of Indigenous Peoples (n 307), Article 32(1),), ILO Convention (No. 169) (n 314) Article 7(1)

⁴⁰² UN Declaration on the Rights of Indigenous Peoples (n 307) Article 19

⁴⁰³ UN Declaration on the Rights of Indigenous Peoples (n 307), Article 32(2), ILO Convention (No. 169) (n 314) Article 15(2)

⁴⁰⁴ ILO, International Labour Standards Department, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for Tripartite Constituents* (International Labour Office 2013)
<http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf>
accessed 1 August 2013

⁴⁰⁵ ILO, Handbook for ILO Tripartite Constituents (n 404)

⁴⁰⁶ *ibid*

⁴⁰⁷ ILO Convention (No. 169) (n 314)Article 6(1) (a)

⁴⁰⁸ ILO Convention (No. 169) (n 314) Article 6(2)

⁴⁰⁹ ILO, Handbook for ILO Tripartite Constituents (n 404)

implies that mechanisms must be in place to ensure that appropriate consultations take place with affected communities, while making consultation a legally mandated requirement.⁴¹⁰

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) issued general observations meant to clarify the concept of consultation. Accordingly, the Committee stated that consultations need to be formal, full and exercised in good faith. It further noted that consultations need to involve a genuine dialogue between governments and affected indigenous people with the hallmarks of communication, understanding, mutual respect good faith and sincere wish to reach a common accord.⁴¹¹ The Committee further noted the need to establish appropriate procedural mechanisms at the national level in a form appropriate to the circumstances. Thus, *pro forma* (simple formality) consultations or mere information on a decision that has been made does not constitute consultation within the meaning of Article 32 of UNDRIP.⁴¹²

Consultations are typically conducted with institutions and individuals which are deemed to be the rightful representatives of the people. Thus, it is important that the said institutions are indeed accepted by the people as such. Such representative institutions owe fiduciary obligations to act in the best interests of their respective communities. The fact that the people affected accept the institution as their representative is a precondition for the legitimacy of the consultation. Furthermore, governments are also duty bound to ensure the full development of the representative institutions and initiatives of indigenous people by way of providing resources for their development, where appropriate.⁴¹³

It is also evident from the provisions that the obligation to ensure that consultations take place in line with the aforementioned considerations is that of the government as opposed to private individuals or non-state actors including private business enterprises.⁴¹⁴ The UNDRIP provides that it is the indigenous people who need to be consulted through their representative institutions. Though both instruments do not define what constitutes “representative institution”, the representativeness or otherwise of the institution should be determined by the indigenous

⁴¹⁰ *ibid*

⁴¹¹ *ibid*

⁴¹² *ibid*

⁴¹³ ILO Convention (No. 169) (n 309) Article 6(1) (c)

⁴¹⁴ ILO, Handbook for ILO Tripartite Constituents (n 404)

people themselves. It follows a given institution cannot claim to be the representative of the indigenous people without being able to determine its constituents and establishing its accountability to these constituents.⁴¹⁵

The Meaning of Free, Prior and Informed Consent

However, the relocation and displacement of indigenous peoples is subject to various conditions and requirements. Relocation of indigenous and tribal peoples may take place only where such relocation is believed to be “*necessary as an exceptional measure.*”⁴¹⁶ The UNDRIP also provides that indigenous people shall not be relocated without their free, prior and informed consent and just and fair compensation.⁴¹⁷ The Convention stipulates that the relocation of indigenous and tribal peoples shall take place with the free, prior and informed consent of the people where such relocation is necessary.⁴¹⁸

At this juncture, it becomes important to closely scrutinize the meaning of the phrase “*free, prior and informed consent*”. The principle of free, prior and informed consent (FPIC) is of vital importance to the indigenous peoples as it constitutes an instrument of self-determination.⁴¹⁹ It is also characterized as an instrument of empowerment.⁴²⁰

Nevertheless, there is no universally accepted definition of what constitutes free, prior and informed consent (FPIC). The consideration of the United Nations Development Group (UNDG) Guidelines on Indigenous Peoples Issues helps to clarify the different elements of free, prior and informed consent.⁴²¹ Thus, the term “free” implies that there should be no coercion, intimidation or manipulation. The term “prior” implies that consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation or consensus processes. Lastly, the term “informed” implies that adequate information is provided in relation to at least the nature, size, pace, reversibility and scope of any proposed project or activity, the reasons or purpose of the project and/or activity, its duration and

⁴¹⁵ *ibid*

⁴¹⁶ ILO Convention (No. 169) (n 169) Article 16(2)

⁴¹⁷ UN Declaration on the Rights of Indigenous Peoples (n 302) Article 10

⁴¹⁸ ILO Convention (No. 169)(n 307) Article 16(2)

⁴¹⁹ Asia Indigenous People Pact (AIPP) (n 315)

⁴²⁰ *ibid*

⁴²¹ United Nations Development Group (UNDG) Guidelines on Indigenous Peoples

<<http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>> accessed 17 July 2013

the locality of areas that will be affected. The information should also include a preliminary assessment of the likely economic, social, cultural and environmental impact as well as procedures that the project may entail.

The requirement of free and informed consent means that the people concerned fully understand the meaning and consequences of the relocation and accept the same.⁴²² This in turn requires that the indigenous people in question be provided with clear and accurate information on the relevant facts and figures.⁴²³ Thus, the consent of indigenous people must be free, true and effective as opposed to vitiated consent. These provisions show the central role given to the application of free, prior and informed consent (FPIC) in relation to relocation of indigenous people from their traditional lands.

At this point, it would be appropriate to inquire whether or not the requirement of free, prior, informed consent is an absolute requirement. UNDRIP does not provide a clear definition of the term “consent”. The meaning of the term “consent” is contested due to its intrinsic veto-power. Some international financial institutions opted to “free, prior and informed consultations” instead of consent to allay of the veto-power connotation of the term “consent.”⁴²⁴ If the requirement is said to be absolute, it follows that indigenous people would have a veto power on proposed decisions to relocate them. Nevertheless, the consideration of the views of the Special Rapporteur makes it clear that Article 19 of UNDRIP should not be construed as to mean veto power.⁴²⁵ In situations where it is not possible to obtain the consent of the people concerned, such relocation shall take place only based upon established appropriate procedures under national laws and regulations, including public inquiries, which affords adequate opportunity for effective representation of the people concerned.⁴²⁶

⁴²² ILO, *Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169* (n 314)

⁴²³ *ibid*

⁴²⁴ International Land Coalition, Oakland Institute and Global Witness, *Dealing with Disclosures: Improving Transparency in Decision Making Over Large Scale Land Acquisitions, Allocations and Investments* <http://www.globalwitness.org/sites/default/files/library/Dealing_with_disclosure_1.pdf> accessed 5 August 2013

⁴²⁵ Birgitte Feiring (n 311)

⁴²⁶ ILO Convention (No. 169) (n 307) Article 16(2)

The Right to Return

UNDRIP establishes the right of return where this is possible.⁴²⁷ The Convention also stipulates for the right of return of the concerned peoples to their previous land upon cessation of the grounds of relocation.⁴²⁸ The right to return can be exercised in situations where the circumstance which led to the displacement of the indigenous people, which may be armed conflict, natural disaster, ceases to exist.

Access for Redress

The Declaration also establishes the right of indigenous peoples to redress, by means that can include restitution or, when this is not possible, just fair, equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, which they have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.⁴²⁹ The Convention also envisages a possibility whereby the relocation becomes permanent, in which case return is not possible. In such cases, the people should be provided with replacement land of equal quality, size and legal status to that of the land which they previously occupied.⁴³⁰ For instance, the replacement land can be comparable in terms of its agricultural potential and the legal ownership to that land.⁴³¹

In situations where the indigenous and tribal peoples opt for compensation in money and or in kind, they are entitled to compensation along with appropriate guarantees.⁴³² As regards the standard of compensation, the Convention stipulates full compensation equivalent to the resulting loss and injury. The loss or injury may be exemplified by the loss of house or property, adverse health impacts due to change of climate.⁴³³

⁴²⁷ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 10

⁴²⁸ ILO, *Handbook for Tripartite Constituents* (n 404); ILO Convention (No. 169) (n 314) Article 16(3)

⁴²⁹ UN Declaration on the Rights of Indigenous Peoples (n 307) Article 28(1)

⁴³⁰ UN Declaration on the Rights of Indigenous Peoples (n 307), Article 28(2), ILO Convention (No. 169) (n 314) Article 16(4)

⁴³¹ ILO, *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (n 303)

⁴³² UN Declaration on the Rights of Indigenous Peoples (n 302) Article 28(2), ILO Convention (No. 169) (n 314) Article 16(5)

⁴³³ ILO Convention (No. 169) (n 314) Article 16(3)

Conclusion

The foregoing discussion identified the human rights norms which are directly impacted by large scale agricultural investments. The discussion demonstrates that human rights norms affirmed in international as well as regional instruments entail specific obligations on large scale agricultural investments. Having considered the relevant human rights norms, it now becomes appropriate to identify their specific implications on large scale agricultural investments particularly.

The implications of human rights obligations on large scale agricultural investments are best captured by the Set of Principles Developed by the Special Rapporteur on the Right to Food. The concerns on the human rights implications of large scale agricultural investments have led to multiple efforts for the development of principles and standards to mitigate the effects of such acquisitions on food security. Some of these principles and standards will be primarily the focus of the subsequent chapter. Nevertheless, it is pertinent to draw attention to the set of principles developed by the Special Rapporteur on the Right to Food, Oliver De Schutter, on Large Scale Land Acquisitions as these are formulated from the perspective of the right to food.

The set of principles and measures suggested by the Special Rapporteur preceded the adoption of the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT), which will be considered in more detail in the subsequent chapter. From the outset, it was made clear that the set of principles were therefore complementary and meant to inform international and regional initiatives aimed at the formulation of guidelines on land policies and governance.⁴³⁴ The primary objective of the set of principles is that of ensuring compliance with procedural requirements, adequate benefit sharing and human rights obligations of states are not trumped by these transactions. The set of principles developed by the Special Rapporteur are comprised of the principles as discussed below.

The first principle highlights the importance of concluding investment agreements involving large scale agricultural investments in a fully transparent manner with the participation of local communities whose access to land and other productive resources may be curtailed as a result of

⁴³⁴ Olivier De Schutter, The Special Rapporteur on the Right to Food, 'Large Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge' A/HRC/13/33/Add.2 < <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-33-Add2.pdf> > accessed 9 August 2013

such agreements.⁴³⁵ This principle also calls for the need to balance advantages of such agreements against the opportunity costs they occasion particularly in situations where the land in question can be put to use for the long-term needs and the realization of the human rights of the local communities affected.

The second principle highlights the importance of giving due consideration to the free, prior and informed consent of the local communities affected before undertaking shifts in land use.⁴³⁶ The principle gives special attention for free, prior and informed consent particularly in the case of indigenous communities in view of the historical marginalization these communities have long been subjected to. The need for the free, prior and informed consent of indigenous peoples is also mirrored in the tenth principle. It recalls the general prohibition of forced evictions noting that they are allowed in the most exceptional circumstances. Thus, the need to avoid or minimize resort to forced evictions by considering other alternatives in consultation with the affected communities is buttressed by the principle. In situations, where forced evictions are deemed to be justified for the general welfare, they must be accompanied with the appropriate safeguards of adequate compensation and alternative resettlement to productive lands.

The third principle urges states to adopt appropriate legislative measures aimed at the protection of the rights of local communities and detailing the specific procedures that must be observed in land use shifts involving large agricultural investments.⁴³⁷ The principle also dwells upon the need to the issuance of individual as well as collective title deeds with a view to guarantee full judicial protection of the rights to land and productive resources. The principle goes on to highlight the need to ensure conformity of national legislation on the matter with international standards as discussed above.

There are a number of principles which aim at mitigating the adverse impacts of large scale agricultural investments at different levels. The fourth and fifth principles focus on the social impacts of large agricultural investments. The fourth principle underscores the need to ensure that local populations are benefited from the revenues derived from the investment agreement.⁴³⁸ The principle emphasizes the obligations of states to prioritize the development needs of local

⁴³⁵ *ibid*

⁴³⁶ *ibid*

⁴³⁷ *ibid*

⁴³⁸ *ibid*

populations and to consider investment models such as contract farming and out growing schemes which do not involve large scale agricultural investments. The fifth principle calls upon states to promote labour-intensive farming systems which are more conducive to the generation of employment opportunities for local communities.⁴³⁹ The six principle also calls upon host states and investors to ensure that modes of production are environmentally sustainable.⁴⁴⁰ In a related manner, the eighth principle specifically requires the inclusion of contractual clause requiring the availability upon consideration of a specified amount of the agricultural produce locally if the bulk of the produce is meant for export. This is aimed at staving off adverse impacts on local food security. It is related with the ninth principle which calls for the need to undertake participatory environmental and social impact assessments before such projects are given the go ahead.⁴⁴¹

The seventh principle aims to integrate the aforementioned consideration into the contractual arrangements between host governments and investors.⁴⁴² The principle highlights the need to ensure that the obligations of the investor are clearly defined and enforceable through, among others, the inclusion of sanctions. To this effect, the principle goes on to note that, for this mechanism to be effective there is a need for independent and participatory periodic process of *ex post facto* impact assessments. The principle makes it clear the obligations of the investor should not be confined to the payment of rents or monetary sum. Instead, the obligations of the investor should relate to a number of issues relevant to the long-term sustainability of the investment and compliance with human rights. For example, the obligations of the investor should include, among others, generation of employment and compliance with labour standards. The issue of compliance with the labour standards of agricultural workers is also the focus of the eleventh principle as developed by the Special Rapporteur. The seventh principle is also deals with the need to make sure that the desirable spin-off effects of the investments are captured by the local communities in the course of the value chain coordination. For instance, it mentions the case of establishment of agro-processing in the vicinity of the local community.

⁴³⁹ *ibid*

⁴⁴⁰ *ibid*

⁴⁴¹ *ibid*

⁴⁴² *ibid*

Chapter Three

Principles and Standards on Responsible Agricultural Investments

Introduction

The idea of regulating large scale agricultural investments by the use of voluntary guidelines, standards, principles and codes of conduct is controversial. Some argue that this approach is not effective as these principles and guidelines are not binding. It is contended that such guidelines and standards do not address the fundamental wrongfulness of large scale land acquisitions that agricultural investments involve; instead such initiatives have the effect of legitimizing the practice.⁴⁴³

In spite of the controversy as regards the efficacy of voluntary guidelines and codes of conduct, there is a multiplicity of efforts to draw up and elaborate such guidelines and principles by different actors. Several voluntary frameworks, guidelines and codes of conduct have been formulated by different actors following the wave of large scale land acquisitions. Some studies revealed that there are about seventeen key initiatives and actors involved in the process of drawing or elaborating such guidelines and standards ranging from governmental, inter-governmental to that of civil society and the private sector as well.⁴⁴⁴

Be that as it may, this Chapter discusses the main principles and internationally accepted standards which have bearing on the governance of large scale agricultural investments. The principles and standards discussed in this Chapter are drawn from a variety of instruments and initiatives developed in response to the need to ensure “responsible” investments in land.

⁴⁴³GRAIN, “*Responsible Farmland Investing?*” (2012) <<http://www.grain.org/article/entries/4564-responsible-farmland-investing-current-efforts-to-regulate-land-grabs-will-make-things-worse>> accessed 8 July 2013

⁴⁴⁴ The key initiatives and actors include G8, G20, African Union Framework and Guidelines on Land Policy in Africa, AU Declaration on Land Issues and Challenges in Africa, UN Special Rapporteur on the Right to Food Set of Minimum Principles for Land Investments, Committee on Food Security Voluntary Guidelines on the Responsible Governance of Tenure, World Bank, FAO, IFAD and UNCTAD, APEC and Pan-African Parliament. Internal corporate policies and instruments and support advisory services include UN PRI, Principles for Responsible Investment in Farmland, African Agriculture Fund, IHRB Draft Guidelines on a rights based approach to business land acquisition and use, IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement, Sustainalytics, Interfaith Center on Corporate Responsibility Recommended Guidelines for Responsible Farmland Investment as well as the many investment funds and firms directly involved in land acquisitions. See GRAIN, “*Responsible Farmland Investing?*” (August 2012) <<http://www.grain.org/article/entries/4564-responsible-farmland-investing-current-efforts-to-regulate-land-grabs-will-make-things-worse>> accessed 8 July 2013

As forms of land based investments, the responsible governance of large scale agricultural investments presupposes the responsible governance of tenure of land and other natural resources. Agricultural investments cannot be responsible if they are contingent upon poor land tenure governance and practices. Thus, the task of considering the responsibility of large scale agricultural investments must start from the principles and standards for the responsible governance of tenure of land and other natural resources as well.

Consequently, the Chapter in particular focuses on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) as it is the most comprehensive international soft law instrument and the most prominent standard on the subject. The focus on the Voluntary Guidelines is warranted by the fact that they constitute the first unprecedented international agreement and a historic milestone on the governance of tenure.⁴⁴⁵ The Voluntary Guidelines also constitute the only existing global reference for the best practices in governance of tenure of land, fisheries and forests.⁴⁴⁶ The Voluntary Guidelines represent ‘the common ground’ on tenure and constitute international soft law instrument on tenure. The Guidelines also mark the first time the issue of land tenure has been thoroughly examined at the international arena.⁴⁴⁷

3.1. The Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)

It has been noted that large scale agricultural investments have prompted concerns for a variety of reasons. As indicated above, this has led to processes at different levels with a view to address the concerns associated with large scale agricultural investments. In this regard, one of the most notable efforts is the process initiated by the Food and Agriculture Organization of the United Nations (FAO). This process led to the endorsement of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of Food Security* on 11 May 2012 by the Committee on World Food Security (CFS).

⁴⁴⁵ Paul Munro-Faure & David Palmer, ‘An Overview of the Voluntary Guidelines on the Governance of Tenure’ (2012) No. 1, Land Tenure Journal <<http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/issue/view/5>> accessed 28 June 2013

⁴⁴⁶ Actionaid, ‘Brief Introduction to the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security’ (2012) <http://landportal.info/sites/default/files/actionaid_voluntaryguidelines_guide.pdf> accessed 29 June 2013

⁴⁴⁷ Karin Gregowet *al*, “The Race for Land” (2012) <http://www.weeffect.org/files/2012/12/LandGrabbingReport.pdf> accessed 8 July 2013

The preparation of the Guidelines commenced with the inclusive consultation process by the Food and Agriculture Organization of the United Nations (FAO) in 2009. The Voluntary Guidelines have been particularly lauded for being founded upon a bottom-up process of consultation.⁴⁴⁸ The process involved various stakeholders including government officials, civil society organizations, private sector representatives, farmers associations and academics. The process culminated with the endorsement of the Guidelines after intergovernmental negotiations led by the Committee on World Food Security (CFS) after three years of consultations and negotiations.⁴⁴⁹

These Guidelines demonstrate the complementarity between land tenure and resource management and human rights based approaches which have hitherto remained separate and distinct.⁴⁵⁰ This is buttressed by the fact that the Voluntary Guidelines are based upon a foundation of human rights principles and abound with human rights language and frequent invocation of relevant human rights instruments.⁴⁵¹ In particular, the Guidelines make mention of the Universal Declaration on Human Rights (UDHR), ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, the Convention on Biological Diversity (CBD) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the pertinent aspect of which has been elaborated in the preceding Chapter.

The Guidelines constitute the most authoritative international framework on land tenure governance.⁴⁵² The guidelines are the first-ever global land tenure guidelines. The voluntary nature of the Guidelines is seen both as a source of weakness and strength. While the Guidelines are criticized for not being legally binding, this also makes it possible to garner the support of many countries and for being comprehensive. The choice for the Voluntary Guidelines makes it

⁴⁴⁸ Karin Gregowet *al* (n 447)

⁴⁴⁹ The Committee on World Food Security (CFS) is the forum of the United Nations for reviewing and following up of policies concerning world food security. It is the central political platform of the UN for food security and nutrition. The Committee is vested with the responsibility of examining issues which affect the world food situation. It was established pursuant to the recommendations of the 1974 World Food Conference.

⁴⁵⁰ ActionAid (n 446)

⁴⁵¹ Karin Gregowet *al*(n 447)

⁴⁵²Thomas McInerney, ‘The implications of how society regulates ownership of land, fisheries, and forests: New international guidelines on land titles and transactions’ (2012) <<http://farmlandgrab.org/post/view/21055>> accessed 2 August 2013

possible to achieve unanimity. Given the controversial nature of the matters regulated in the Voluntary Guidelines, it would have been very difficult to agree on a binding international convention since agreements requiring obligatory compliance are difficult to negotiate.⁴⁵³ It is contended that the Voluntary Guidelines carry a normative legal force as a template or benchmark.⁴⁵⁴ The Voluntary Guidelines are also global in scope.⁴⁵⁵ Despite the fact that these Guidelines are not legally enforceable, they are significant as they set standards for both governments as well as investors to follow in relation to large-scale agricultural investments. In a way, the Voluntary Guidelines can be a precursor to binding international instrument on the matter.

In the Ethiopian context, the moral and normative force of the Voluntary Guidelines on the Responsible Governance of Tenure appears to have been acknowledged. This assertion is made in view of the fact that the Ethiopian Agricultural Investment Land Administration Agency Establishment Regulation makes reference to “agricultural investment code of conduct.”⁴⁵⁶ The term “agricultural investment code of conduct” is befitting to the Voluntary Guidelines on the Responsible Governance of Tenure along with the Principles of Responsible Agricultural Investments discussed below. The label “agricultural investment code of conduct” is befitting to the Voluntary Guidelines as the common provisions in the Guidelines on land tenure governance have direct and obvious implication on land-based investments including agricultural investments. More specifically, Paragraph 12 of the Voluntary Guidelines falls within the ambit of “agricultural investment code of conduct” as it outlines the specific substantive and procedural requirements applicable to investments in land including agricultural investments.

The Ethiopian Agricultural Investment Land Administration Agency Establishment Council of Ministers Regulation provides that agricultural investment code of conduct includes those national and international applicable requirements to ensure that agricultural investment activities are carried on in a friendly manner with environment, safety of the local community

⁴⁵³ Bread for the World, ‘Large Scale Land Acquisitions in Liberia’ <http://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analyse_39_large_scale_land_acquisitions.pdf> accessed 10 July 2013

⁴⁵⁴ Karin Gregowet *al* (n 447)

⁴⁵⁵ The Voluntary Guidelines, Paragraph 2.4

⁴⁵⁶ FDRE, *Regulation 283/2013* (n 7), Article 2(5)

and sustainable use of natural resources and that the products are suitable to human health.⁴⁵⁷ The allusion of the Regulation to internationally applicable requirements also reinforces the contention that the Voluntary Guidelines on the Responsible Governance of Tenure can be considered as forming part and parcel of “agricultural investment code of conduct”. Consequently, The Voluntary Guidelines on the Responsible Governance of Tenure have been given legal force in the Ethiopian context although not directly mentioned in name as they fall within the ambit of the phrase “agricultural investment code of conduct”. Additionally, one of the purposes for the establishment of the Ethiopian Agricultural Investment Land Administration Agency is that of studying local and international best practices in relation to agricultural investment.⁴⁵⁸ The Voluntary Guidelines on the Responsible Governance of Tenure along with the Principles on Responsible Agricultural Investments are widely believed to constitute internationally accepted best practices in the area of investment in land, particularly agricultural investments.

The Voluntary Guidelines do not replace laws and treaties which are already in place and they do not limit or reduce existing obligations.⁴⁵⁹ Thus, the interpretation and application of the Voluntary Guidelines by states is required to be consistent with existing obligations under national and international law. The Guidelines represent the framework within which current tenure challenges are being addressed.⁴⁶⁰ Accordingly, the Voluntary Guidelines reemphasize existing international obligations of states particularly those pertaining to human rights since they aim to protect people’s rights of access to land.⁴⁶¹

The Voluntary Guidelines are backed by international consensus among different stakeholders. The Voluntary Guidelines have drawn global recognition shortly after their endorsement as evidenced by encouragement of implementation by G20, Rio+20, UN General Assembly (67th Session). Despite winning the consensus of more than 100 countries⁴⁶², the Voluntary Guidelines also suffer from criticisms on various grounds for having fallen short and not sufficiently

⁴⁵⁷ *ibid*

⁴⁵⁸ *ibid*, Article 6(11)

⁴⁵⁹ Francesca Romano, ‘Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests: Relevance for Sustainable Bioenergy’ <http://www.globalbioenergy.org/fileadmin/user_upload/gbep/docs/2012_events/WGCB_AG3_Rome_15_November_2012/3_-_ROMANO.pdf> accessed 5 July 2013

⁴⁶⁰ *ibid*

⁴⁶¹ Karin Gregow *et al* (n 447)

⁴⁶² Javier Blas, ‘UN moves to curb farmland grabs’ (London, *The Financial Times*, 25 March 2012)

protecting land rights. Many of the criticism directed against the Voluntary Guidelines are similar to the ones usually made against such optional principles and standards. To begin with, they lack effective mechanism to ensure accountability of governments and investors. The sanctions and incentives for observance remain feeble.⁴⁶³ Second, they do not call for a moratorium of agricultural investments involving large scale land acquisitions.⁴⁶⁴

3.1.1. The Purpose of the Guidelines

The primary purpose of the Voluntary Guidelines is to promote the responsible governance of tenure of land, fisheries and forests.⁴⁶⁵ They aim to promote food security and sustainable development by way of improving secure access to land, fisheries and forests and protecting the legitimate tenure rights of people. The Guidelines highlight the importance of good land governance as a condition for the achievement of food security and the progressive realization of the right to food.⁴⁶⁶ The achievement of food security for all and supporting the progressive realization of the right to adequate food are their encompassing objectives.⁴⁶⁷ Apart from supporting efforts meant to eradicate hunger and poverty, they are also believed to play a crucial role in the realization of sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic well-being.⁴⁶⁸

They have instrumental utility for host governments in the formulation of policies, strategies, programs and activities in the realm of large scale agricultural investments and enabling public and private actors to evaluate their own proposed actions and of others. Consequently, they are intended to serve as hybrid instrument between the state and market.⁴⁶⁹ They provide a baseline of acceptable practices for evaluation of proposed or existing policies and activities.⁴⁷⁰ Accordingly, they offer an important reference point for policy makers and a range of other

⁴⁶³Polack, Cotula and Cote (n 212)

⁴⁶⁴ Karin Gregow *et al* (n 447)

⁴⁶⁵ FAO, Voluntary Guidelines on the Governance of Tenure: At a Glance
<<http://www.fao.org/docrep/016/i3016e/i3016e.pdf>> accessed June 28, 2013

⁴⁶⁶Actionaid (n 446)

⁴⁶⁷ FAO, Voluntary Guidelines on the Governance of Tenure: At a Glance (n 465)

⁴⁶⁸ *ibid*

⁴⁶⁹ Laura German, 'Multi-level Governance of Large-Scale Land Acquisitions: Mapping and Evaluating the Terrain' (2012) <<http://www.cornell-landproject.org/download/landgrab2012papers/german.pdf>> accessed 8 July 2013

⁴⁷⁰ Bread for the World (n 453)

actors.⁴⁷¹ They also provide a sound basis for the articulation and definition of what constitutes responsible agricultural investment.

The Voluntary Guidelines are a set of global guidelines helping governments safeguard the rights of people to own or access land, forests and fisheries. They advance principles relating to the recognition and respect for customary and informal land rights of vulnerable and marginalized groups including indigenous communities, women and smallholders. These Guidelines set out principles and practices that governments can consult when making laws and administering land, fisheries and forest rights.

The specific objectives of the guidelines are multifold. To begin with, the Guidelines aim at improving tenure governance through the provision of guidance and information on internationally accepted practices for systems dealing with the rights to use, manage and control, land, fisheries, and forests.⁴⁷² Secondly, the Voluntary Guidelines aspire to contribute to the improvement and development of the policy, legal and organizational frameworks regulating the range of tenure rights existing over these resources.⁴⁷³ Thirdly, the Voluntary Guidelines aim at enhancing the transparency and improving the functioning of tenure systems.⁴⁷⁴ Finally, the Voluntary Guidelines aim at strengthening the capacities and operations of implementing agencies, judicial authorities, local governments, organizations of farmers and small-scale producers, of fishers, and of forest users, pastoralists, indigenous peoples and other communities, civil society, private sector, academia, and all persons concerned with tenure governance as well as promoting the cooperation between the aforementioned actors.⁴⁷⁵

The Voluntary Guidelines provide foundational principles as well as principles of implementation affecting responsible governance of tenure. Accordingly, the Voluntary Guidelines set forth a set of principles that need to be respected by states as well as non-state actors. The two sets of principles can be grouped into two as founding principles and principles of implementation. Though the focus of this study is the governance of agricultural investments, it is pertinent to consider the foundational principles and the principles of implementation owing

⁴⁷¹ Araya and Hofisi (n 75)

⁴⁷² The Voluntary Guidelines, Paragraph 1.2

⁴⁷³ The Voluntary Guidelines, Paragraph 1.2

⁴⁷⁴ The Voluntary Guidelines, Paragraph 1.2

⁴⁷⁵ The Voluntary Guidelines, Paragraph 1.2

to their ramifications and implications on large scale land acquisitions. The study of the foundational principles and the principles of implementation is also instructive as it demonstrates the interface and linkage between the Voluntary Guidelines and the human rights framework as discussed in the preceding chapter.

3.1.2. The Founding Principles

The first five set of principles that the Voluntary Guidelines provide are referred to general principles. The general principles can also be further divided into principles applicable to states and principles applicable to non-state actors. The principles applicable to states include recognizing and respecting legitimate tenure rights and the people who hold them, safeguarding legitimate tenure rights against threats, promoting and facilitating the enjoyment of legitimate tenure rights, providing access to justice to deal with infringements and preventing tenure disputes, violent conflicts and opportunities for corruption. On the other hand, non-state actors are required to respect human rights and legitimate tenure rights. The brief consideration of these principles is vital to understand the specific obligations arising from them and to determine and evaluate whether or not governance of large scale agricultural investments constitutes acceptable practices.

3.1.2.1. The Recognition and Respect for Legitimate Tenure Rights

Land tenure refers to “the relationship, whether legally or customarily defined, among people, as individuals or groups, in respect to land.”⁴⁷⁶ It includes the terms and conditions on which land is held, used and transacted.⁴⁷⁷ It denotes the rights individuals and communities have with regard to land.⁴⁷⁸ Land tenure rules define as to how property rights to land are to be allocated within societies.⁴⁷⁹ They define property rights to use, control and transfer land and the associated

⁴⁷⁶ PANGEA, ‘Land Grab Refocus: Roots and Possible Demise of Land Grabbing’ (2011) <<http://www.ascension-publishing.com/BIZ/LandgrabStudy.pdf>> accessed 13 July 2012; FAO (2002) Land Tenure and Rural Development <<ftp://ftp.fao.org/docrep/fao/005/y4307e/y4307e00.pdf>> accessed 13 July 2012

⁴⁷⁷ Janine M. Ubink, Andre J. Hoekema and Willem J. Assis (eds), ‘Legalizing Land Rights’ (Leiden University Press, 2009) 11

⁴⁷⁸ *ibid*

⁴⁷⁹ PANGEA (n 476)

responsibilities and restraints.⁴⁸⁰ In short, land tenure determines who has access to and control over natural resources, for how long and under what conditions.⁴⁸¹

The Voluntary Guidelines primarily require states to recognize and respect all legitimate tenure right holders and their rights.⁴⁸² Such recognition and respect for legitimate tenure rights to land is vital for tenure security. This requirement is of particular importance in the context of large scale agricultural investments since most of the states targeted for large scale agricultural investments are characterized by limited recognition of existing local rights to land and natural resources.⁴⁸³ Tenure security reinforces legal certainty, which embodies the assurance to exercise rights and the ability to do so without incurring inhibiting or prohibitive costs.⁴⁸⁴ It also enables individuals and groups to have effective protection against forced eviction.⁴⁸⁵ In the absence of secure land rights, individuals and communities would be living under the constant threat of eviction.⁴⁸⁶ The insecurity of local land holders is further heightened against the backdrop of large scale commercial agricultural investments in land.

The first founding principle of the Voluntary Guidelines requires states to take reasonable measures by way of identifying, recording and respecting all legitimate tenure right holders and their rights.⁴⁸⁷ States are required to do so irrespective of the fact that the rights may or may not be formally recorded.⁴⁸⁸ Thus, States are required to refrain from infringement of the legitimate tenure rights and to comply with their associated duties.⁴⁸⁹

The Voluntary Guidelines specifically require states to recognize and respect legitimate customary tenure rights that are not currently protected by law.⁴⁹⁰ The stipulation in the Voluntary Guidelines goes hand in hand with the growing understanding of local customs and practices as part of the architecture of land tenure to be supported and not to be brushed aside or

⁴⁸⁰ *ibid*

⁴⁸¹ *ibid*

⁴⁸² The Voluntary Guidelines, Paragraph 3.1.1

⁴⁸³ International Land Coalition, Oakland Institute and Global Witness (n 424)

⁴⁸⁴ Ubink, Hoekema and Assis (*eds*) (n 477) 13

⁴⁸⁵ *ibid*, 11

⁴⁸⁶ Elisabeth Wickeri and Anil Kalhan, *Land Rights Issues in International Human Rights Law* <http://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf> accessed 27 August 2013

⁴⁸⁷ The Voluntary Guidelines, Paragraph 3.1.1

⁴⁸⁸ The Voluntary Guidelines, Paragraph 3.1.1

⁴⁸⁹ The Voluntary Guidelines, Paragraph 3.1.1

⁴⁹⁰ The Voluntary Guidelines, Paragraph 5.3 & 7.1

sidestepped. This realization adds impetus to the drive to give formal recognition to customary land tenure arrangements and harmonizing these with the formal land tenure.⁴⁹¹ This requirement is of particular importance in the African context where customary and informal tenure systems are by far the most common and dominant forms of tenure.⁴⁹² Irrespective of being the most dominant mode whereby rural citizens access land in most African countries, customary tenure have hitherto remained not properly protected by national laws.⁴⁹³ The demarcation and registration of community lands also requires the adoption of appropriate legislative framework.

The Voluntary Guidelines also provide specific protections to the rights of indigenous peoples and other communities with customary tenure systems. In keeping with the special relationship existing between indigenous communities and their land and the Declaration on the Rights of Indigenous Peoples (UNDRIP), the Voluntary Guidelines provide that state and non-state actors should acknowledge that land has social, cultural, spiritual, economic, environmental, and political value to indigenous peoples and other communities with customary tenure systems.⁴⁹⁴ Consequently, the Voluntary Guidelines require states to provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems in line with their existing obligations under international law.⁴⁹⁵ The Voluntary Guidelines also prohibit the forced eviction of indigenous peoples and communities from their ancestral lands forcibly.⁴⁹⁶

In the event where it is not possible to provide legal recognition to tenure rights, states are asked to prevent forced evictions which are inconsistent with existing obligations of states under national and international laws.⁴⁹⁷ The same obligation also extends to land which is collectively used and managed.⁴⁹⁸

⁴⁹¹Ruth Hall and Dr. Gaynor Paradza, Pressures on land in Sub-Saharan Africa: Social Differentiation and Societal Response<http://erd-report.eu/erd/report_2011/documents/dev-11-001-11researchpapers_hall-paradaza.pdf> accessed 29 August 2013; *See also* PANGEA (n 476)

⁴⁹² *ibid*

⁴⁹³ Emily Polack, Lorenzo Cotula, Muriel, International Institute for Environment and Development (IIED) (n 212)

⁴⁹⁴ The Voluntary Guidelines, Paragraph 9.1

⁴⁹⁵ The Voluntary Guidelines, Paragraph 9.4

⁴⁹⁶ The Voluntary Guidelines, Paragraph 9.5

⁴⁹⁷ The Voluntary Guidelines, Paragraph 7.6

⁴⁹⁸ The Voluntary Guidelines, Paragraph 8.3

3.1.2.2. Safeguarding Legitimate Tenure Rights

In addition, States are required to safeguard legitimate tenure rights against threats and infringements.⁴⁹⁹ To this effect, States are expected to safeguard tenure right holders against the arbitrary loss of their tenure rights.⁵⁰⁰ In particular, States are required to protect legitimate tenure rights holders from forced evictions which are inconsistent with their obligations under national and international legislation as discussed in the preceding chapter.⁵⁰¹ Measures aimed at safeguarding legitimate tenure rights should include registration, titling, delimitation, demarcation and issuance of individual as well as collective title deeds and recording of customary rights.⁵⁰²

3.1.2.3. Promoting and Facilitating the Enjoyment of Legitimate Tenure Rights

The obligation of states also extends to promotion and facilitating the peaceful enjoyment of legitimate tenure rights.⁵⁰³ States are required to take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with rights, including that services are accessible to all.⁵⁰⁴ Thus, the promotion of awareness of local land rights to communities and also registration and demarcation plays a key role in enhancing the capacity of the right holders to exercise their rights.

3.1.2.4. Providing Access to Justice

The recognition of legitimate tenure rights may not suffice unless they are complemented with judicial safeguards which ensure their observance. Consequently, states are required to provide access to justice to deal with infringements of legitimate tenure rights.⁵⁰⁵ States are required to provide effective judicial remedies for the negative consequences occasioned by the adverse activities of business enterprises.⁵⁰⁶ States should facilitate effective and accessible means to

⁴⁹⁹ The Voluntary Guidelines, Paragraph 3.1.2

⁵⁰⁰ The Voluntary Guidelines, Paragraph 3.1.2

⁵⁰¹ The Voluntary Guidelines, Paragraph 3.1.2 (The obligation to safeguard legitimate tenure rights is further explained under the section dealing with code of conduct for non-state actors.)

⁵⁰² Polack, Cotula and Cote (n 212)

⁵⁰³ The Voluntary Guidelines, Paragraph 3.1.3

⁵⁰⁴ The Voluntary Guidelines, Paragraph 3.1.3

⁵⁰⁵ The Voluntary Guidelines, Paragraph 3.1.4

⁵⁰⁶ The Voluntary Guidelines, Paragraph 3.2

resolve tenure disputes to everyone through judicial authorities and other approaches.⁵⁰⁷ Moreover, states should also provide affordable and prompt enforcement of the outcomes of such proceedings.⁵⁰⁸ States are also expected to provide just and prompt compensation in the event of the taking of tenure rights for public purposes.⁵⁰⁹

3.1.2.5. Prevention of Tenure Disputes

In a related manner, states also bear the responsibility to prevent tenure disputes, violent conflicts and corruption.⁵¹⁰ States should take measures aimed at the prevention of tenure disputes and also the duty to prevent the escalation of these into violent conflicts.⁵¹¹ States must combat corruption that militates against the effective enjoyment of legitimate tenure rights.⁵¹²

Oversight over the activities of business activities is not confined to the host state. The state to which transnational corporations or multinational corporations belong to have the obligation to ensure that such business enterprises do not engage in violations of the human and legitimate tenure rights of local communities.⁵¹³

3.1.3. Code of Conduct for Business Enterprises, UNGPs and Extraterritorial Obligations

Although the primary responsibility for the implementation of responsible governance of tenure lies on the shoulders of government, the Voluntary Guidelines also have clear implications for private sector actors. The Voluntary Guidelines establish the responsibility of non-state actors including business enterprises to respect human rights. They embody separate principles and provisions applicable to the private sector to ensure these duties are observed.

Non-state actors including business enterprises are under obligation to respect human rights and legitimate tenure rights.⁵¹⁴ They are charged with the duty to act with due diligence and refrain

⁵⁰⁷ The Voluntary Guidelines, Paragraph 3.1.4

⁵⁰⁸ The Voluntary Guidelines, Paragraph 3.1.4

⁵⁰⁹ The Voluntary Guidelines, Paragraph 3.1.4

⁵¹⁰ The Voluntary Guidelines, Paragraph 3.1.5

⁵¹¹ The Voluntary Guidelines, Paragraph 3.1.5

⁵¹² The Voluntary Guidelines, Paragraph 3.1.5

⁵¹³ The Voluntary Guidelines, Paragraph 3.2

⁵¹⁴ The Voluntary Guidelines, Paragraph 3.2

from infringing the human rights and legitimate tenure rights of others.⁵¹⁵ Non-state actors and business enterprises are expected to introduce appropriate risk management systems to prevent and mitigate the impact of their activities on human rights and legitimate tenure rights.⁵¹⁶ Their obligations extend to provision of and cooperation with non-judicial mechanisms for remedy and grievance mechanism.⁵¹⁷ They should identify and assess any actual or potential impacts of their activities on human rights and legitimate tenure rights in which they may be involved.⁵¹⁸ This provision constitutes a breakthrough in terms of enabling the application of corporate social responsibility to land tenure.⁵¹⁹

Likewise, the Voluntary Guidelines impose various obligations on host as well as home states to ensure that business enterprises respect human rights and legitimate tenure rights. Host states are charged with the duty to protect against abuses of human rights and legitimate tenure rights by business enterprises which are owned or controlled by the state or which receive substantial support or services from state agencies.⁵²⁰ States are charged with the duty to provide effective judicial remedies for redressing negative impacts on human rights and legitimate tenure rights by business enterprises.⁵²¹

On the other hand, home states of private business also bear extraterritorial obligations. This is indicative of the potential for the application of transnational legal relations and litigation, although limited, in the home states of business enterprises.⁵²² Home states are expected to assist transnational corporations as well as the host states to ensure that businesses are not involved in the infringement of human rights and legitimate tenure rights.⁵²³ Multinational enterprises engaged in foreign land acquisitions may not be directly accountable under international law.⁵²⁴ In spite of this, the corporate responsibility to respect is a standard of expected conduct

⁵¹⁵ The Voluntary Guidelines, Paragraph 3.2

⁵¹⁶ The Voluntary Guidelines, Paragraph 3.2

⁵¹⁷ The Voluntary Guidelines, Paragraph 3.2

⁵¹⁸ The Voluntary Guidelines, Paragraph 3.2

⁵¹⁹ ActionAid (n 446)

⁵²⁰ The Voluntary Guidelines, Paragraph 3.2

⁵²¹ The Voluntary Guidelines, Paragraph 3.2

⁵²² Polack, Cotula and Cote (n 212)

⁵²³ The Voluntary Guidelines, Paragraph 3.2

⁵²⁴ Cuffaro and Hallam (n 1)

acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility.⁵²⁵

This shows the complementarities between the Voluntary Principles on the Responsible Governance of Tenure (VGGT) and to the United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs are a set of principles developed by the UN Special Representative on Business and Human Rights to clarify the human rights responsibilities of business enterprises. They are based upon Protect, Respect and Remedy Framework.⁵²⁶ The UNGPs which are informed by the International Bill of Human Rights and they have been unanimously endorsed by the Human Rights Council of the UN.⁵²⁷ They define business responsibility for fulfilling human rights and the responsibility of home states to ensure business enterprises meet their human rights obligations.

The Framework is predicated upon three cardinal principles.⁵²⁸ First, states have the duty to protect against human rights abuses by third parties including private business by adopting appropriate policies, regulation, and adjudication. Second, private businesses have the corporate responsibility to respect human rights, which implies the duty to act with due diligence to avoid infringing on the human rights of others. Third, there should be greater access by victims to effective remedy, which may take the form of judicial or non-judicial.

The second cardinal principle of the UN Framework for Business and Human Rights *i.e. the responsibility to respect* implies that the corporate response to managing the risks of infringing the rights of others is to exercise human rights due diligence. The duty to act with human rights due diligence embodies the following four basic elements.⁵²⁹

- A statement of policy articulating the company's commitment to respect human rights
- Periodic assessment of actual and potential human rights impacts of company activities and relationships

⁵²⁵ UN Framework for Business and Human Rights (A/HRC/14/27)

<http://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf> accessed 1 August 2013

⁵²⁶ The UNGPs were drafted by Professor John Ruggie, UN Special Representative for Human Rights in Relation to Transnational Corporations and other Business Enterprises. Hence, they are sometimes referred to as the Ruggie Framework.

⁵²⁷ ILO, *Handbook for Tripartite Constituents* (International Labour Office 2013) (n 404)

⁵²⁸ UN Framework for Business and Human Rights (A/HRC/14/27) (n 525)

⁵²⁹ ILO, *Handbook for Tripartite Constituents* (International Labour Office 2013) (n 404)

- Integrating these commitments and assessments into internal control and oversight systems; and
- Tracking and reporting performance

Ensuring responsible access to land and land use has several advantages for private business. To begin with, it reduces risks and prevents conflict with previous land users and the local community thereby expediting projects.⁵³⁰ Second, it promotes the good reputation of the private business.⁵³¹ Third, it makes the application of corporate social responsibility possible.⁵³²

3.1.4. Principles of Implementation of the Guidelines

The Voluntary Guidelines suggest a combination of principles for conducting governance of tenure. These principles of implementation are not new in the Voluntary Guidelines but they are also existing standards of international law. These principles run through the entire Guidelines as recurrent themes. The main principles of implementation identified in the Guidelines include the following.⁵³³

- Human dignity: requires the acknowledgement of the inherent dignity and the equal and inalienable human rights of all individuals.
- Non-discrimination: prohibits the subjection of individuals to discrimination under the law and policies as well as in practice
- Equity and justice: the realization of equality between persons sometimes implies the need to recognized differences between them. This in turn entails the obligation to take positive action, particularly empowerment, with a view to promote equitable tenure rights and access to land including to women, youth, vulnerable and marginalized communities.
- Gender equality: requires measures aimed at ensuring the equal rights of women and men to the exercise of all human rights, while recognizing differences between them and taking special measures aimed at accelerating *de facto* equality and equitable tenure rights and access to land

⁵³⁰ Romano (n 459)

⁵³¹ *ibid*

⁵³² *ibid*

⁵³³ The Voluntary Guidelines, Paragraph 3B

- Holistic and sustainable approach: acknowledge that natural resources and their uses are interrelated and employ an integrated and sustainable approach to their administration.
- Consultation and participation: involve and seek the support of those who may be impacted by decisions, previous to making decisions and accommodate their concerns. In so doing, states are also required to take into account existing power imbalances between different parties and ensure the free, active, effective, meaningful and informed participation of all concerned individuals and communities in the course of making decisions. The qualifications “previous to making decisions” and “free, active, effective meaningful and informed” indicate that consultation and participation should be genuine and should not be mere smokescreen.
- Rule of law: employ a rules-based approach through laws which are widely circulated through local languages, equally enforced and independently adjudicated
- Transparency: requires the precise definition and wide dissemination of laws, policies, procedures and decisions in local languages and in accessible formats
- Accountability: hold individuals, public agencies and non-state actors for their actions, inactions, decisions pursuant to the principle of rule of law.
- Continuous Improvement: engage in the improvement of mechanisms for monitoring and analysis of tenure governance.

3.1.5. The Specific Substantive and Procedural Requirements on Agricultural Investments

One of the main issues considered in the Voluntary Guidelines is the issue of land transfers and investment in land dealt with under the fourth part of the guidelines. The fourth section of the Voluntary Guidelines deals with tenure of land upon the transfer or reallocation of existing rights and duties voluntarily or involuntarily as a result of, among others, through markets and transactions in tenure rights by way of investments. Large scale land acquisitions are carried out as form of investments in land. The Voluntary Guidelines do not provide a definition of the term “large scale land acquisitions” or “large scale agricultural investments” opting instead for the definition of the term to national laws.

The founding principles as well as the principles of implementation of the Voluntary Guidelines discussed earlier are common by their nature and are applicable in the case of large scale agricultural investments as well. Thus, states must ensure compliance with the founding principles and the principles of implementation in the case of large scale land acquisitions or agricultural investments as well. To this effect, states must ensure that all legitimate tenure rights, including those arising from customary and informal systems, are systematically and impartially identified. This process of identification of legitimate tenure rights should be carried out in line with principles of consultation and participation.⁵³⁴ In short, states must ensure that existing legitimate rights are not compromised by such investments.⁵³⁵ The Guidelines do not call for an end to the practice of large scale agricultural investments. They call upon states to take measures to prevent the undesirable impacts that may arise from land speculation, land concentration and abuse of customary forms of tenure of local communities, indigenous peoples and vulnerable groups.⁵³⁶

The specific standards, principles and parameters that need to be observed in the course of large scale land acquisitions as implied by the voluntary guidelines include supporting broader social, economic and environmental objectives and the obligation not to do harm, supporting investment by smallholder producers, transaction transparency, provision of safeguards, FPIC, consultation, participation and capacity development, assessment of positive and negative effects, monitoring impact of agreements and provision of grievance mechanism. These principles and standards are both substantive and procedural requirements by their very nature. The writer has deemed it necessary to discuss these specific substantive and procedural requirements in detail as they constitute the yardstick against which the responsibility of agricultural investments is measured.

⁵³⁴ The Voluntary Guidelines, Paragraph 12.10

⁵³⁵ The Voluntary Guidelines, Paragraph 12.10

⁵³⁶ The Voluntary Guidelines, Paragraph 11.2

3.1.5.1. Supporting broader social, economic and environmental objectives and the obligation not to do harm

Agricultural investments can bring about a wide range of developmental benefits if they are responsible and carefully planned to avoid potential adverse effects. Accordingly, the Guidelines acknowledge the broader social, economic and environmental advantages such investments yield. Such investments are required to be consistent with the objectives of social and economic growth and sustainable human development with particular attention to smallholders.⁵³⁷

At this juncture, it is appropriate to inquire what is meant by the broader social, economic and environmental objectives. As outlined in the VGGT, these objectives include poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable.⁵³⁸

This shows that the Voluntary Guidelines promote responsible agricultural investments which contribute to the attainment of the aforementioned objectives. The Voluntary Guidelines highlight the importance of responsible investments in land resources by way of increasing sustainable agricultural production and generating higher incomes.⁵³⁹ They convey the message that responsible investments in land and other natural resources which are supportive of broader social, economic and environmental objectives deserve to be promoted.⁵⁴⁰ In so doing, states are required to ensure all actions are consistent with existing obligations under national and international law and give due regard to voluntary commitments under applicable regional and international instruments.⁵⁴¹

⁵³⁷ The Voluntary Guidelines, Paragraph 12.3, *See also* Jacur F. Romanin, Bonfanti Angelica and Seatzu Francesco (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill Nijhoff 2015) 23

⁵³⁸ The Voluntary Guidelines, Paragraph 12.4

⁵³⁹ The Voluntary Guidelines, Paragraph 12.1.

⁵⁴⁰ The Voluntary Guidelines, Paragraph 12.1.

⁵⁴¹ The Voluntary Guidelines, Paragraph 12.1.

One matter that requires for clarification here is the meaning of responsible agricultural investment. Paragraph 12.4 of the Voluntary Guidelines sheds light on the meaning of what constitutes a responsible agricultural investment. It states as follows:-

“Responsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights. Such investment should be made working in partnership with relevant levels of government and local holders of tenure rights to land, fisheries and forests, respecting their legitimate tenure rights. They should strive to further contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable; and comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organizations.”

At this point, it becomes important to examine the work of FAO Committee on World Food Security (CFS), which has been drafting a set of principles on responsible agricultural investment (CFS-RAI). The principles are informed by the need to achieve the broader social, economic and environmental objectives stated under Paragraph 12.4 of the Voluntary Guidelines as indicated above. They are informed by the principles of implementation of the Voluntary Guidelines discussed earlier. The Principles for Responsible Agricultural Investments (CFS-RAI) are based upon multi-stakeholder consultation and broad ownership.⁵⁴²

In August 2014, the FAO Committee on World Food Security (CFS) adopted the Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI). The CFS-RAI enjoys broader support due to the multi-stakeholder, holistic, and consensus-driven approach they employed.⁵⁴³ The process of formulating these principles followed a widely consultative

⁵⁴² This makes these principles different from other set of principles of similar nature which have been formulated primarily by international financial institutions.

⁵⁴³ Committee on World Food Security (CFS), *Principles for Responsible Investment in Agriculture and Food Systems*, available at

approach involving many stakeholders. These principles are, among others, complementary with human rights obligations of states and the VGGT as discussed in the thesis. The ten principles elaborated by the CFS oblige governments and other stakeholders that agricultural investments should contribute to food security and nutrition, contribute to sustainable and inclusive economic development and the eradication of poverty, foster gender equality and women's empowerment, engage and empower youth, respect tenure of land, fisheries, forests and access to water, conserve and sustainably manage natural resources, increase resilience, and reduce disaster risks, respect cultural heritage and traditional knowledge, and support diversity and innovation, promote safe and healthy agriculture and food systems, incorporate inclusive and transparent governance structures, processes and governance mechanisms and assess and address impacts and promote accountability.⁵⁴⁴ Consequently, these principles constitute the core elements of responsible agricultural investments. As in the case of the VGGT, the CFS-RAI principles are voluntary and not binding. CFS-RAI principles reflect the do no harm approach that is provided under Paragraph 12.4 of the VGGT. The principles on the responsible governance of tenure dwell upon the impacts that such investments should entail namely the food security and nutrition impacts, the environmental and natural resource impacts, the economic and social impacts and cultural impacts of agricultural investments.

The aim of CFS-RAI is to promote responsible agricultural investment to contribute to food security and nutrition (FSN) and the realization of the right to adequate food.⁵⁴⁵ These principles are said to be consistent and complementary to the Voluntary Guidelines on the responsible governance of tenure of land and other natural resources.⁵⁴⁶ They are voluntary principles and based upon existing frameworks and guidelines to be applied and interpreted pursuant to national legal systems and their institutions.⁵⁴⁷

The CFS-RAI Principles also elaborated the different roles and responsibilities of stakeholders to realize these beneficial outcomes. Thus, as per the CFS-RAI, the many stakeholders bear responsibility to ensure responsible investment in agriculture including states, intergovernmental

<http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/Endorsement/CFS_RAI_Principles_For_Endorsement_Ver_11_Aug_EN.pdf> accessed September 13, 2014

⁵⁴⁴ *ibid*

⁵⁴⁵ *ibid*

⁵⁴⁶ Karin Gregow *et al* (n 447)

⁵⁴⁷ *ibid*

and regional organizations, financing institutions, donors, foundations, and funds, research organizations, universities, extension organizations, smallholders and their organizations, business enterprises, civil society organizations, communities and consumer organizations.⁵⁴⁸

3.1.5.2. Supporting Investment by Smallholder Producers

In particular, the Voluntary Guidelines prioritize state support for investment on the part of smallholder producers.⁵⁴⁹ The Voluntary Guidelines take note of the narrative that smallholders are the main investors.⁵⁵⁰ Smallholders are singled out by the Voluntary Guidelines as the largest investor in low and middle income countries.⁵⁵¹ This prioritization of smallholder farmers is prompted by the fact that it is the smallholder producers who account for the major agricultural investments which contributes to food security, nutrition poverty eradication and environmental resilience.⁵⁵² Apart from supporting investment by these producers, the Voluntary Guidelines provide for public and private smallholder-sensitive investments.⁵⁵³ Smallholder producers are also the majority of the food insecure people in the world.⁵⁵⁴ Smallholders produce the vast majority of the crops that feeds the population in particular in Africa and Latin America.⁵⁵⁵ Thus, it is evident that investments by smallholders and smallholder-sensitive investments are the type of investment models favored under the Voluntary Guidelines.

3.1.5.3. Transaction Transparency

In spite of the fact that the Voluntary Guidelines are not prohibitive of large scale land acquisitions, they recognize the necessity of regulating transfers and investments in land. Decision making on large scale land allocations and investments is oftentimes criticized for being shrouded in secrecy without the knowledge or consent of the affected communities.⁵⁵⁶ This secrecy has the effect of preventing local communities from being able to hold governments and

⁵⁴⁸ Committee on World Food Security, Principles for Responsible Investment in Agriculture and Food Systems, August 2014

⁵⁴⁹ The Voluntary Guidelines, Paragraph 12.2

⁵⁵⁰ Committee on World Food Security (CFS) (n 544)

⁵⁵¹ Romano (n 459)

⁵⁵² The Voluntary Guidelines, Paragraph 12.2

⁵⁵³ The Voluntary Guidelines, Paragraph 12.2

⁵⁵⁴ De Schutter (n 137); CFS, Investing in Smallholder Agriculture for Food Security (2013) <http://www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE_Reports/HLPE-Report-6_Investing_in_smallholder_agriculture.pdf> accessed on 5 July 2013

⁵⁵⁵ De Schutter (n 142)

⁵⁵⁶ International Land Coalition, Oakland Institute and Global Witness (n 424)

business enterprises accountable for negative impacts such investments potentially entail.⁵⁵⁷ Apart from undermining governance and the democratic process, lack of transparency also fosters high level of corruption.⁵⁵⁸ Such concerns have led to increased recognition of the importance of improving transparency and accountability in the governance of natural resources.⁵⁵⁹ Increased transparency enables local communities to protest against illegal, inappropriate and badly implemented agricultural investments.⁵⁶⁰ It also prevents opaque and potentially corrupt deals in total disregard for existing local rights to land and natural resources. As a result, suggestions have been made to emulate the example of the Extractive Industries Transparency Initiative (EITI) also in the shape of “land transparency initiative.”⁵⁶¹ Thus, there has to be disclosure of appropriate information in accessible manner for the communities affected at different stages including land natural resource use planning, impact assessment and investment contract negotiation, monitoring the implementation of the contract and close or end of the business.⁵⁶²

Hence, the Voluntary Guidelines require that all transactions involving tenure rights as a result of investments in land are carried out transparently.⁵⁶³ The requirement of transparency is itself associated with the freedom of information and the right to participate in the conduct of public affairs or participation. The requirement of transparency has instrumental utility in the prevention of opportunities for corruption as well, which is one of the founding principles of the Voluntary Guidelines mentioned above. The lack of transparency of ongoing negotiations and signed contracts undermines the ability of citizens to scrutinize the deals and hold decision-makers to account.⁵⁶⁴

The requirement of transparency entails the obligation to disclose relevant information to all concerned stakeholders. This in turn calls for the adoption of legislation on public disclosure of contracts. In regard to the types of information that need to be disclosed, memorandums of understanding, investment agreements, land lease contracts and impact assessments should be

⁵⁵⁷ *ibid*

⁵⁵⁸ *ibid*

⁵⁵⁹ *ibid*

⁵⁶⁰ *ibid*

⁵⁶¹ *ibid*

⁵⁶² *ibid*

⁵⁶³ The Voluntary Guidelines, Paragraph 12.3

⁵⁶⁴ Polack, Cotula and Cote (n 212)

included.⁵⁶⁵ In addition, it also becomes appropriate to translate such documents and contracts in to local vernaculars and make sure that they are available free of charge.⁵⁶⁶ Therefore, the practice of posting investment agreements and contracts of lease online will not be sufficient for local authorities who have no internet access or who are not well versed in the language whereby the documents are written.

Given the lack of adequate laws and weak enforcement of legislation in most countries targeted for large scale agricultural investments, contracts become all the more important.⁵⁶⁷ Thus, this demonstrates the need for detailed and comprehensive contracts involving large scale agricultural investments.

The Voluntary Guidelines require states to determine with all affected parties the conditions that promote responsible investment and develop and publicize policies and laws which encourage responsible investment in line with the principles of consultation and participation.⁵⁶⁸ States should also make sure that their policies and laws promote human rights, food security and the sustainable use of the environment.⁵⁶⁹ To this effect, the relevant laws must require the clarification of the respective rights and obligations of the parties to these agreements involving large scale transactions in tenure rights.⁵⁷⁰ Obviously, these agreements must also be in compliance with national laws as well as investment codes.⁵⁷¹

States are also required by the Voluntary Guidelines to provide transparent rules concerning the scale, scope and nature of allowable transactions in tenure rights.⁵⁷² States are also expected to define what constitutes large scale transactions in tenure rights in their national legislation.⁵⁷³

3.1.5.4. Provision of Safeguards

States are also required to provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security, and the environment from risks that could arise from large-scale

⁵⁶⁵ International Land Coalition, Oakland Institute and Global Witness (n 424)

⁵⁶⁶ *ibid*

⁵⁶⁷ *ibid*

⁵⁶⁸ The Voluntary Guidelines, Paragraph 12.8

⁵⁶⁹ The Voluntary Guidelines, Paragraph 12.8

⁵⁷⁰ The Voluntary Guidelines, Paragraph 12.8

⁵⁷¹ The Voluntary Guidelines, Paragraph 12.8

⁵⁷² The Voluntary Guidelines, Paragraph 12.5

⁵⁷³ The Voluntary Guidelines, Paragraph 12.5

transactions in tenure rights.⁵⁷⁴ Illustrations of such safeguards include introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, for example, through parliamentary approval.⁵⁷⁵ The Voluntary Guidelines call upon states to consider a range of production and investment models which do not result in the large scale transfer of tenure rights to investors and also to encourage partnerships with local tenure right holders.⁵⁷⁶

The wording of the Voluntary Guidelines indicates that they tend to discourage larger deals since they call for setting limits to permissible land transactions and demand stringent procedures for approval of larger deals. Moreover, they put more emphasis on investment models which do not result in the large scale transfer of tenure rights to investors.

3.1.5.5. FPIC, Consultation, Participation and Capacity Development

Investments involving all forms of transactions of tenure rights including acquisitions and partnership agreements are required to be in conformity with the principles of consultation and participation rights of all those affected including those with subsidiary rights.⁵⁷⁷ The rights to participation, consultation and consent are also enshrined in the International Bill of Human Rights.⁵⁷⁸ In order to realize these rights of consultation and participation, states and other relevant parties are expected to inform individuals, families and communities of their tenure rights.⁵⁷⁹ Affected individuals and communities should also be assisted in terms of the development of their capacity in consultations and participation, including the provision of professional assistance.⁵⁸⁰

The right to free, prior, informed consent has been discussed in connection with the right of indigenous peoples to land and natural resources in the preceding chapter. The meaning of “free, prior and informed consent” has also been discussed in connection with the rights of indigenous peoples. There have been arguments that the right to consent affirmed in relation to indigenous

⁵⁷⁴ The Voluntary Guidelines, Paragraph 12.6

⁵⁷⁵ The Voluntary Guidelines, Paragraph 12.6

⁵⁷⁶ The Voluntary Guidelines, Paragraph 12.6

⁵⁷⁷ The Voluntary Guidelines, Paragraph 12.9

⁵⁷⁸ Universal Declaration of Human Rights, Article 21; International Covenant on Civil and Political Rights, Article 1 & Article 25; International Covenant on Economic, Social and Cultural Rights, Article 1

⁵⁷⁹ The Voluntary Guidelines, Paragraph 12.9

⁵⁸⁰ The Voluntary Guidelines, Paragraph 12.9

peoples should also be extended to other communities.⁵⁸¹ In spite of the fact that efforts to extend the right to free, prior and informed consent to all communities does not appear to have succeeded, the Voluntary Guidelines include a strong definition of “consultation and participation.”⁵⁸² The Voluntary Guidelines require free, prior and informed consent before initiating the project, adopting or implementing administrative or legislative measures affecting the land and resource rights of local communities. The Guidelines also underscore the importance of conducting good faith consultations with indigenous communities by states and other parties before the initiation of any investment project affecting the resource rights of these communities.⁵⁸³

Parties to the transactions involving large-scale acquisitions of tenure rights including acquisitions and partnership agreements are required to provide comprehensive information enabling all relevant persons and communities to be engaged in the process and to be well-informed in the course of the negotiation.⁵⁸⁴ In other words, it is incumbent upon states to make sure that agreements are documented and understood by all those affected.⁵⁸⁵ Thus, states must ensure that the negotiation process is non-discriminatory and gender sensitive.⁵⁸⁶

One of the avenues for the facilitation of local participation in the allocation of land is that the devolution of land management responsibilities to local government.⁵⁸⁷ Decentralization and devolution in turn call for the development of the land management capacity of local level governments and authorities. The exercise of free, prior, informed consent becomes effective if the right holders and duty bearers of land rights have adequate capacity. As a result, it becomes important to enhance the capacity of both the right holders to have a deeper understanding of their rights and the ability of the duty bearers to be able to discharge their respective obligations. The duty bearers of land rights range from individuals, local customary chiefs, non-state actors including business enterprises, civil society groups as well as local and central governmental authorities. Enhancement of the skills and competence of the right holders in turn requires measured aimed at legal empowerment and provision of legal aid so they are in a better position

⁵⁸¹ International Land Coalition, Oakland Institute and Global Witness (n 424)

⁵⁸² *ibid*

⁵⁸³ The Voluntary Guidelines, Paragraph 12.7

⁵⁸⁴ The Voluntary Guidelines, Paragraph 12.10

⁵⁸⁵ The Voluntary Guidelines, Paragraph 12.11

⁵⁸⁶ The Voluntary Guidelines, Paragraph 12.11

⁵⁸⁷ Polack, Cotula and Cote (n 212)

to exercise their rights. Likewise, a variety of activities have to be undertaken with a view to enhance the competence of the governmental and other duty bearers to be able to understand and discharge their obligations properly. Capacity development also requires the allocation of adequate human, economic and financial resources to competent bodies vested with the governance of large scale land acquisitions.

3.1.5.6. Assessment of Positive and Negative Effects

States must make sure that all parties affected can conduct their own prior assessments of the potential positive and negative impacts when investments involving large scale transactions of tenure rights, including acquisitions and partnership agreements.⁵⁸⁸ Environmental and Social Impact Assessments (ESIA) are instrumental in identifying and mitigating risks.⁵⁸⁹ To this effect, certain principles of EIA best practice have been developed. To this effect, EIA need to be purposive, rigorous, practical, relevant, cost-effective, efficient, focused, adaptive, participative, interdisciplinary, credible, integrated, transparent and systematic.⁵⁹⁰ As a result, national laws need to be clear about requirements of both environmental and social impact assessments.⁵⁹¹ Such legislation is as expected to be precise in terms of the timing, the standards, independence of the assessor, the public disclosure requirements, and other matters relating to environmental and social impact assessments.⁵⁹²

3.1.5.7. Monitoring Impact of Agreements and Provision of Grievance Mechanism

States and affected parties are called upon to contribute to the effective implementation and monitoring of the impacts of agreements involving large-scale transactions in tenure rights, including acquisitions and partnership agreements.⁵⁹³ States should take corrective action where necessary to enforce agreements and to protect tenure and other rights and provide mechanisms whereby aggrieved parties can request such action.⁵⁹⁴ Judicial as well as non-judicial mechanisms of legal recourse need to be made available to those who wish to challenge the legality of decisions concerning land allocations in line with the founding principle of providing

⁵⁸⁸ The Voluntary Guidelines, Paragraph 12.10

⁵⁸⁹ Polack, Cotula and Cote (n 212)

⁵⁹⁰ International Land Coalition, Oakland Institute and Global Witness (n 424)

⁵⁹¹ *ibid*

⁵⁹² *ibid*

⁵⁹³ The Voluntary Guidelines, Paragraph 12.14

⁵⁹⁴ The Voluntary Guidelines, Paragraph 12.14

access to justice to deal with infringements discussed above. The Voluntary Guidelines underlines that when states invest or promote investment abroad, they should make sure that their conduct is consistent with the protection of tenure rights and ensuring food security as well as with their national and international obligations and their voluntary commitments.⁵⁹⁵

Nevertheless, the ability of local land rights holders to exercise these legal routes is undermined by a variety of factors including the lack of legal literacy, lack of significant resources needed upon litigation, mistrust of courts and reverence towards government and local chiefs.⁵⁹⁶ It is therefore necessary to facilitate conditions necessary for local land rights holders to avail themselves of the provision of legal aid services and to benefit from the assistance provided by civil society groups working on these areas. A case in point is the role of local and transnational watchdogs which brought the violations of the land rights of the Endorois community to the attention of the African Commission on Human and Peoples' Rights as discussed in the preceding chapter.⁵⁹⁷ Such cases underscore the importance of legal empowerment at various levels of local communities to access justice and grievance mechanisms.

3.2. Effects of Non-Compliance with the Standards and Parameters

Failure to comply with the standards and parameters on investments in land that were outlined above render the transactions to fall within the ambit of what is oftentimes referred to as “land-grabbing”. The first use of the catch-phrase “land grabbing” is attributed to activist groups opposed to the practice.⁵⁹⁸

In spite of the absence of universally accepted definition of what constitutes “land-grabbing”, the following attributes and distinctive characteristics of the phenomenon have been identified:-

- The involvement of international investors other than traditional multinational enterprises and transnational corporations
- The geographic origin of these international investors

⁵⁹⁵ The Voluntary Guidelines, Paragraph 12.15

⁵⁹⁶ Polack, Cotula and Cote (n 212)

⁵⁹⁷ In this case, the Endorois community whose land rights have been violated by the Kenyan government made use of the services of Center for Minority Rights Development and Minority Rights Group International.

⁵⁹⁸ Saturnino Borrás Jr and Jennifer Franco, *Regulating Land Grabbing?*

<<http://www.commercialpressuresonland.org/research-papers/regulating-land-grabbing>> accessed 27 August 2013

- The large size of the deals in terms of the amount of land involved
- The lack of transparency and incompleteness of contracts
- The emergence of resource seeking investors oriented to the production of food for export to their home markets.⁵⁹⁹

Land grabbing refers to land acquired *via* illegal or illegitimate means.⁶⁰⁰ Land grabbing differs from other forms of land deals. The Tirana Declaration provides a definition of the notion of “land-grabbing”. The Tirana Declaration is adopted on 26 May 2011 in Tirana, Albania by 150 representatives of civil society organizations, social movements, grassroots organizations, international agencies and governments from 45 countries.⁶⁰¹ The Tirana Declaration of May 2011 defined “land grabbing” as acquisitions or concessions that are one or more of the following:-

- (i) In violation of human rights, particularly the equal rights of women;
- (ii) Not based on Free, Prior and Informed Consent of the affected land-users;
- (iii) Not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered;
- (iv) Not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and;
- (v) Not based on effective democratic planning, independent oversight and meaningful participation.⁶⁰²

Various considerations must be taken in order to determine whether or not a given transaction constitutes land grabbing. These include the terms of the contract, the manner of the acquisition of the land and the reactions to the deal on the part of locals.⁶⁰³ The above definition

⁵⁹⁹Cuffaro and Hallam (n 1)

⁶⁰⁰ PANGEA (n 476)

⁶⁰¹ Tirana Declaration: Securing Land Access for the Poor in Times of Intensified Natural Resource Competition (2011) <http://www.commercialpressuresonland.org/sites/default/files/Tirana_Declaration_ILC_2011_ENG.pdf> accessed 5 January 2011

⁶⁰² Ibid, *See also* Jacur F. Romanin, Bonfanti Angelica and Seatzu Francesco (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill Nijhoff 2015) 18

⁶⁰³ PANGEA (n 476)

demonstrates that transactions characterized as land grabbing clearly fall short of the specific standards and parameters that investments in land should fulfill under the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) and the draft Principles of Responsible Agricultural Investment (PRAI).

Conclusion

As minimum standards, the voluntary guidelines call for the adoption of transparent policy and regulatory frameworks for large scale agricultural investments. They call for a fair, standard, transparent, neutral and non-discriminatory process of acquisition of land which respects existing legitimate tenure rights. The implementation of the Principles on Responsible Agricultural Investments (CFS-RAI) would also call for the adoption of measures at institutional, regulatory and policy levels as well as at the level of agricultural investors.

Chapter Four

The Recognition of Legitimate Land Rights and Agricultural Investments

Introduction

The previous Chapters dwelt upon the tests that must be applied to determine whether or not practices of agricultural investments are in conformity with internationally accepted standards and principles. Accordingly, it has been contended that agricultural investments must be predicated on responsible land tenure governance. The propriety and legitimacy of deals that involve the allocation of land to investors is contingent upon the broader context of formal recognition and protection of local land rights. This is due to the fact that the extent to which local landholders have secure rights to their land is an important part of the legal framework regulating land deals.⁶⁰⁴ The land governance tenure system in place in a given country must reflect the founding principles and principles of implementation discussed in connection with the Voluntary Guidelines on the Responsible Governance of Tenure. In many cases, sound land legislation can be a basis for responsible agricultural investment. On the contrary, land legislation can also facilitate large scale agricultural investments which are not responsible. Thus, this Chapter looks into the extent to which the legal regime governing land tenure governance in Ethiopia recognizes legitimate tenure rights and protects and promotes the exercise and enjoyment of these rights.

4.1. State/Public Ownership of Land

The land tenure system in Ethiopia has undergone major changes and transformation depending on the policy of successive governments. Previous to the 1974 Ethiopian Revolution, the Ethiopian land tenure system had been primarily feudal system which was comprised of kinship, tenancy, private forms of tenure.⁶⁰⁵ Following the fall of the imperial regime as a consequence of the 1974 Ethiopian Revolution, the *Derg*, the military junta which took power, pressed on with nationalization and redistribution of land to peasant households. The major land reform drive that

⁶⁰⁴ Lorenzo Cotula, 'Land Deals in Africa: What is in the Contracts?' (2011) (IIED, London) p. 32 available at <<http://pubs.iied.org/pdfs/12568IIED.pdf>> accessed July 20, 2013

⁶⁰⁵ Imeru Tamrat (n 53) 4

took place in 1975 in the country marked a turning point by replacing previously existing systems with communal or state ownership of land. The *Derg* also entrenched these major land tenure changes in the 1987 PDRE (Peoples Democratic Republic of Ethiopia) Constitution.

The Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) government proceeded with the policy of state ownership declaring all urban and rural land in Ethiopia as state property subsequent to the fall of the *Derg* in 1991. As a Federal Democratic Republic comprised of nine regional states and two administrative cities, the issue of administration of land is governed by the laws of federal and regional states.⁶⁰⁶ The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) retained the land policies of the previous *Derg* regime by maintaining public ownership of all land.⁶⁰⁷ Following the pattern of nationalization of land ownership by the *Derg*, Article 40(3) of the Constitution stipulated the following provision:

The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the state and in the peoples of Ethiopia. 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.

Since the above provision specifies that land “shall not be subject to sale or to other means of exchange”, it has dispensed with any form of private or communal ownership of land. Nevertheless, the manner the above provision is formulated leaves certain questions unanswered. The first statement in the provision gives the impression that the Constitution has established co-ownership over land and all natural resources in the country by the state and the people. On the other hand, the second statement states that Nations, Nationalities and Peoples are said to be the owners of land and natural resources without adverting to the state.⁶⁰⁸ On the other hand, the Rural Land administration and Land Use Proclamation describes the government as the owner of land in a manner inconsistent with Article 40(3) of the FDRE Constitution which provides that

⁶⁰⁶ Article 47(1) of the FDRE Constitution

⁶⁰⁷ The issue of state ownership of land has long remained a contentious issue in Ethiopia. The Ethiopian People's Revolutionary Democratic Front (EPRDF) contended that opening up the land market would provide inroads for dispossession of the land of poor and vulnerable peasants. The coalition maintained that privatization of land would lead to distress sales and displacement of the peasantry.

⁶⁰⁸ Daniel Weldegeberiel Ambaye, *Land Law*, Bahr Dar University, p. 23

land is owned by the state and the people.⁶⁰⁹ This conveys the message that the state is the legal owner of land by virtue of this constitutional provision and holds the ultimate title to all land in Ethiopia. Irrespective of these ambiguities, the examination of the drafting of the provision demonstrates that the provision is meant to establish joint ownership of land by the people and the state.⁶¹⁰ The FDRE Constitution has settled the question by declaring all urban and rural land under the ownership of the state and the people.

The reading of Article 89(5) of the FDRE Constitution implies that the role of the government regarding land and natural resources is confined to that of stewardship. Article 89(5) reads:

“Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.”

The question of ownership of land has been one the most contentious issues at the time of the drafting of the FDRE constitution. The policy option of joint state and public ownership of land is justified by social equity and tenure security.⁶¹¹ The intention of ensuring social equity reveals itself in those provisions which provide for free access to agricultural land. This policy has resulted in the approximation of the principle of equality of plots of land to be allocated to peasant farmers, and ostensibly, equality of citizens.⁶¹² On the other hand, tenure security is pursued to protect peasant farmers against market forces.⁶¹³ One of the justifications put forward to support state/public ownership of land is the possibility of allowing investors to cultivate the large swathes of “*unoccupied*” land instead of enticing peasant farmers to sell their plots of land and migrate to the cities.⁶¹⁴ This shows that the claim that the large swathes of the lands in low lying areas in the country are *unoccupied* served as a justification to pursue state/public ownership of land in the first place.

⁶⁰⁹ FDRE, Federal Rural Land Administration and Land Use Proclamation No. 456, Federal Negarit Gazeta, Year 11, No.44, July 15, 2005, Article 5(3)

⁶¹⁰ Daniel Weldegeberiel Ambaye (n 608) 23

⁶¹¹ *ibid*, p. 38

⁶¹² *ibid*

⁶¹³ *ibid*

⁶¹⁴ Belachew Mekuria, Human Rights Approach to Land Rights in Ethiopia, in Muradu Abdo (ed.) Land Law and Policy in Ethiopia since 1991: Continuities and Changes, Addis Ababa University, School of Law, pp.65-68

Nevertheless, critics contend that the policy is erroneous since peasant farmers would not sell their plots of land even if they are granted such right of ownership.⁶¹⁵ Thus, the policy of state/public ownership of land is criticized for having caused insecurity of tenure by enabling the government to use land as a political weapon.⁶¹⁶ The government refutes such claims by invoking the land registration and certification system it has been undertaking in some of the regional states such Tigray, Amhara, Oromia and SNNPRS which it claims has enhanced security of tenure of peasant farmers by providing them with land certificates for their holdings.⁶¹⁷ Although certain international financial institutions agree with the government's claim, others contest if such measures have indeed brought about tenure security.⁶¹⁸

4.2. The Recognition of Legitimate Land Rights in the FDRE Constitution

Even though the FDRE Constitution does not confer private ownership rights to peasants, Article 40(4) of the Constitution affirms the right of Ethiopian peasants to obtain land without payment and the protection against eviction from their possession. Accordingly, this Constitutional principle has established the principle of free access to rural land.⁶¹⁹

Likewise, the federal and regional land laws acknowledge the usufruct and habitation rights of individuals and communities although they do not confer the power of alienation of land since ownership is vested in the state. These laws acknowledge use rights in the form of state, private or communal holdings.⁶²⁰ Moreover, Article 40 (7) of the FDRE Constitution guarantees the full right of an Ethiopian citizen to the immovable property that he or she builds and to the permanent improvements he or she brings about on the land by his or her labour or capital. The Constitution goes on to provide that the right in question embodies the right to alienate, to bequeath, to remove his or her property upon the expiry of the right to use, to transfer his or her title and to claim compensation for it. Thus, the Constitution allows land rentals and leasing.

Article 51(5) of the FDRE Constitution provides that the power of enacting laws for the utilization and conservation of land and other natural resources, historical sites and objects is

⁶¹⁵ Daniel Weldegeberiel Ambaye (n 608) 23

⁶¹⁶ *ibid*, p. 39

⁶¹⁷ *ibid*

⁶¹⁸ *ibid*

⁶¹⁹ *ibid*, p. 23

⁶²⁰ Imeru Tamrat (n 53) 4

vested in the government. The power of administration of land and natural resources is vested in the regional states by virtue of Article 52(2) (d) of the FDRE Constitution. Administration of land includes land allocation, disposal, use, registration, and adjudication.⁶²¹ Even if the basic land policy and laws are determined at the Federal level, the regional states in the Federation are entitled to exercise their autonomy of administration of land. It is therefore argued that the fact that the federal government is entitled to enact laws regarding the utilization and conservation of land demonstrates that it has maintained broader powers as compared to that of the regions that are left with the task of administering land.⁶²² Moreover, the mandate of the regional states in terms of administration of land is subject to the general policies and laws issued by the federal government.⁶²³

Consequently, the Federal Government issued the Federal Rural Land Administration and Land Use Proclamation. The Proclamation was enacted with the objectives of ensuring sustainable conservation and development of natural resources, introducing information database on land holdings in the country, establishing a conducive system of rural land administration and strengthening the land use right of farmers.⁶²⁴

The power of administration of land vested in regional states is also reflected in the Federal Rural Land Administration and Land Use Proclamation. Article 17(1) of the Proclamation vests state councils of regional states to enact rural land administration and land use law comprised of detailed provisions necessary for the implementation of the Federal Rural Land Administration and Land Use Proclamation. Accordingly, many of the regional states have enacted their own rural land administration and land use proclamation.⁶²⁵

⁶²¹ Dessalegn Rahmato (n 32) 6

⁶²² Elias N. Stebek (n 28) 178

⁶²³ *ibid*

⁶²⁴ Federal Rural Land Administration and Land Use Proclamation No. 456, Preamble

⁶²⁵ These include the Revised Tigray National Regional State Rural Land Administration and Use Proclamation (Proclamation 136/2007, Tigray Negarit Gazeta, Year 16 No.1), The Revised Amhara National Regional State Rural Land Administration and Use Proclamation, Proclamation 133/2006, Zikre Hig, Year 11, No. 18), Oromia Rural Land Use and Administration, Proclamation 130/2007, Southern Nations, Nationalities and Peoples Regional State Rural Land Administration and Utilization Proclamation, Proclamation 110/2007, Debub Negarit Gazeta, Year No)

4.2.1. The Recognition of Use Rights over Land

The Federal Rural Land Administration and Land Use Proclamation further reinforces the principle of state ownership of land affirmed in the FDRE Constitution by outlining the conditions necessary for the exercise of the usufruct rights over rural land. The Proclamation stipulates the right to hold and use rural land. It affirms what is referred to as “holding right”. “Holding right” is defined as the right of any peasant farmer or semi-pastoralist and pastoralist to use rural land for the purpose of agricultural and natural resource use development, lease and bequeath to members of his family or other lawful heirs.⁶²⁶ Holding right extends to the right of peasant farmer or semi-pastoralist and pastoralist to acquire property produced on his land thereon by his or her labour or capital and to sale, exchange and bequeath the same.⁶²⁷

In line with the constitutional principle of free access to rural land, Article 5(1)(a) of the Federal Rural Land Administration and Land Use Proclamation stipulates as follows:

“Peasant farmers/pastoralists engaged in agriculture for a living shall be given rural land free of charge.”

The exercise of the use rights over the land recognized under federal and regional laws are dependent upon many factors. These include residence in a *kebele*⁶²⁸, personal engagement in agriculture, “proper” management of the land, and other restrictive conditions.⁶²⁹ Moreover, Article 10 (1) of the Federal Rural Land Administration and Land Use Proclamation stipulates:

“A holder of rural land shall be obliged to use and protect his land. When the land gets damaged, the user of the land shall lose his use right. Particulars shall be given in the land administration laws of the regions.”

These provisions indicate that the usufruct rights of peasant farmers and pastoralists are contingent upon much conditionality. Failure to comply with such conditions can entail penalties including the loss of the right to land.⁶³⁰ Furthermore, holders may also lose the right to use the land if they are absent from their farms and the land is left idle for three or more consecutive

⁶²⁶ Federal Rural Land Administration and Land Use Proclamation (n 619) Article 2(4)

⁶²⁷ *ibid*

⁶²⁸ The word *kebele* refers to the lowest administrative level in Ethiopia.

⁶²⁹ Dessalegn Rahmato (n 32) 6

⁶³⁰ *ibid*

years.⁶³¹ The requirement that the land has to be in productive use and must not be left idle for a longer period is a reflection of the labour theory of property *i.e.* property only comes through one's labour and that it involves clearance and cultivation.⁶³² The contingency of legal protection of land rights to visible productive use is particularly problematic to indigenous people since fallow, pastoralist, hunting and gathering do not fall within the ambit of local resource use.⁶³³ Broadly and vaguely formulated concept of “productive use” is amenable for subjective and arbitrary interpretation. The labour theory is also reflected in the definition of the term *private property* in Article 40(2) of the FDRE Constitution which ascribes entitlement to property on condition of improvement. The provision reads as follows:

“Private property, for the purpose of this Article, shall mean any tangible intangible product which has value and is produced *by the labour, creativity, enterprise or capital* of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.”

Thus, the emphasis placed on the labour, creativity, enterprise or capital is a clear manifestation of the influence of labour theory in the formulation of the definition of the term private property. This conception of ownership over property based on one's labour further justifies state ownership of “*empty lands*” which are not developed.

4.3. The Profile of the Main Locations for Large Scale Agricultural Investments

Any discussion on large scale agricultural investments in Ethiopia must take into consideration the regional disparities or the core-periphery divide. As mentioned in the introductory chapter, the bulk of the enclosures for large scale agricultural purposes take place in parts of the country referred to as least advantaged in economic and social development.⁶³⁴ These regions include Benishangul Gumuz Region, Gambela Region and Southern, Nations, Nationalities and Peoples Regional State (SNNPRS). Although not confined to these regions, these three regions are the ones which host many of the large-scale agricultural investments in the country at the time of

⁶³¹ *ibid*

⁶³² Liz Alden Wily (n 338)

⁶³³ Cotula (n 604) 33

⁶³⁴ FDRE Constitution, Article 89(4)

writing of the thesis.⁶³⁵ For instance, one can consider the guide prepared on Agricultural Investment Areas in Ethiopia by the previous Agricultural Investment Support Directorate within the Ministry of Agriculture. This guide promotes investments in Gambela, Benishangul-Gumuz and Oromia regions by stating that the conducive situation prevalent in the regions for this purpose.⁶³⁶

For example, Gambela Region has been attracting considerable investor attention and targeted as focal area for land acquisitions due to its extensive and untapped land water resources.⁶³⁷ Gambela lies in the extreme west of Ethiopia and shares a long border with South Sudan. The total population of Gambela is estimated to be less than half a million, as a result it is oftentimes described as sparsely populated.⁶³⁸ The three major ethnic groups inhabiting the region include the indigenous people of the Annuak, the Nuer, and the Majangir. The region is described as being in possession of 1.2 million hectares of land suitable for investment.⁶³⁹ Some studies indicate that as much as 600, 000 hectares of land in Gambela region has already been allocated to large scale, medium and small foreign and domestic investors.⁶⁴⁰ The Gambela Regional State is one of the regions in Ethiopia which have been subject to neglect.⁶⁴¹ As a result of this, the regional state lacks basic infrastructure and social services.⁶⁴² The indigenous people of the Annuak, the Nuer, and the Majangir live on the basis of their customary tenure system predicated upon communal ownership.⁶⁴³ They consider the land as their common property.⁶⁴⁴ Nevertheless, 42 % of the landmass in Gambela is either transferred to large scale agricultural investors or under negotiation.⁶⁴⁵ A mere look at the promotional leaflets prepared by the concerned bodies show that some of the regions as the preferred destinations for such investments.

Although the search for land for large scale agricultural land focuses mainly on low lying areas in the country, transferring land for large scale agricultural investment in Afar and Somali

⁶³⁵ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 19)

⁶³⁶ Ministry of Agriculture, Agricultural Investment Support Directorate, Agricultural Investment Areas

⁶³⁷ Dessalegn Rahmato (n 32) 18-19

⁶³⁸ *ibid*

⁶³⁹ *ibid*

⁶⁴⁰ *ibid*

⁶⁴¹ *Ibid*

⁶⁴² *Ibid*

⁶⁴³ *ibid*

⁶⁴⁴ *ibid*

⁶⁴⁵ IWIGA (n 305)

Regional States proved to be daunting due to the fact that land is administered by clans in the two regional states.⁶⁴⁶ Land in these two regions is, by and large, under the control of clan leaders although the Constitution declares land to be the property of the state and nations, nationalities and peoples.⁶⁴⁷ Apart from the fact that the land is administered by clans, there is also strong resistance against the allocation of such lands for investment purposes.⁶⁴⁸ This situation prevented the Ministry of Agriculture to allocate land for this purpose in particular in the two regional states with the exception of the 6000 hectares of land in Somali regional state. However, the administrations of the two states reportedly agreed to secure land from clan leaders and designate the land for agricultural investment purpose.⁶⁴⁹ It is contended that investors who operate in these regional states have been subject to concurrent payments of land rentals to the regions and to the clan leaders.⁶⁵⁰ Apart from inability to secure loans from banks by using their farmlands as collateral, investors are said to be reluctant to operate in these regions since they are displeased with their land tenure system.⁶⁵¹ The government decided to reduce the amount of land rental to 100 birr to accommodate the concerns of investors operating in the regions.⁶⁵²

The fact that the bulk of large scale agricultural investments in Ethiopia are concentrated in low-lying areas entails momentous legal implications as these areas are inhabited by pastoralists or indigenous peoples. Pastoralist people in Ethiopia meet the criteria to identify indigenous people including the profound extent of marginalization suffered, self-identification and dependence on land and natural resources for their collective survival as peoples.⁶⁵³ Nevertheless, there is no formal constitutional or legislative recognition of indigenous peoples in Ethiopia and the FDRE Constitution does not employ the terminology of “indigenous peoples”.

A joint study undertaken by International Labour Organization and the African Commission on Human and Peoples’ Rights in 2009 identifies Ethiopia as one of the African countries whereby

⁶⁴⁶ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 5

⁶⁴⁷ Wudineh Zenebe, Afar and Somali Regional States asked to Designate Land for Agricultural Investment, (Addis Ababa, *The Reporter*, August 10, 2014)

⁶⁴⁸ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 14

⁶⁴⁹ Wudineh Zenebe (n 647)

⁶⁵⁰ *ibid*

⁶⁵¹ *ibid*

⁶⁵² *ibid*

⁶⁵³ African Commission on Human and Peoples Rights, Center for Human Rights, ILO, Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples Rights on the Constitutional and legislative protection of the rights of indigenous peoples in 24 African Countries, (2009) 19

indigenous people live.⁶⁵⁴ Pastoralism is the way of life about 10 million people in Ethiopia.⁶⁵⁵ Indigenous pastoralist people in Ethiopia constitute about 12% of the total population but they occupy 60% of the landmass in the country.⁶⁵⁶ Seven out of nine of the country's regional states are inhabited by pastoralist communities who live in the lowlands which make up 61% of the total landmass in the country.⁶⁵⁷ In 2005, the African Commission's Working Group of Experts on Indigenous Populations/Communities identified 29 pastoralist communities in Ethiopia as indigenous.⁶⁵⁸ Accordingly, the report identifies ethnic Somalis, Afar, Oromo, Borana, Karayu, Hamar, Dassenech, Nygagatom, Tsemay, Nuer, Erbore and other peoples as being indigenous peoples in the country.⁶⁵⁹ Some of the things that these people share in common are the fact that they are historically characterized by poor administrative capacity, political marginalization and economic exploitation by the core established regions.⁶⁶⁰

4.4. The Recognition of the Land Rights and Customary Tenure System of Indigenous Peoples

The fact that many, if not all, of the large scale agricultural investments are concentrated in regions inhabited by indigenous peoples entails far-reaching legal implications under international law as discussed in the second chapter. From the 1990s there is growing realization that resource land tenure includes not only state laws but also local practices and customs.⁶⁶¹ There is increased understanding of the fact that individual titling coupled with marketability is not amenable for effective recognition of customary tenure over communal lands and common property resources.⁶⁶² There is growing understanding of local customs and practices as part of the architecture of land tenure to be supported and not to be brushed aside or sidestepped.⁶⁶³ This realization led to the enactment of policies and laws to recognize informal and unregistered land

⁶⁵⁴ African Commission on Human and Peoples Rights, Center for Human Rights, International Labour Organization (ILO) (n 653)

⁶⁵⁵ IWIGA (n 305)

⁶⁵⁶ Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities

⁶⁵⁷ IWIGA (n 305)

⁶⁵⁸ Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities, p.18

⁶⁵⁹ Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities, p.18, *See also* International Work Group for International Affairs

⁶⁶⁰ Nalepa (n 33)

⁶⁶¹ Ruth Hall and Dr. Gaynor Paradza, *Pressures on land in Sub-Saharan Africa: Social Differentiation and Societal Response*, *See also* PANGEA (n 476)

⁶⁶² De Schutter (n 142)

⁶⁶³ Hall and Dr. Paradza (n 661)

rights.⁶⁶⁴ This led to efforts to give formal recognition to customary land tenure arrangements and harmonizing these with the formal land tenure.⁶⁶⁵ The land tenure reforms appear to be focused on strengthening the protection of local land rights.⁶⁶⁶

Accordingly, Article 26 of the UNDRIP recognizes the rights of the indigenous people to the lands, territories and resources which they have traditionally owned, occupied, or otherwise used or acquired.⁶⁶⁷ It has been stated that this right extends to the right to own, use, develop and control the lands, territories and resources.

In the same vein, Article 40(5) of the FDRE Constitution reads as follows:

Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law.

As mentioned earlier, the Constitution employs the term “pastoralists” instead of indigenous peoples. The Federal Rural Land Administration and Land Use Proclamation defines the term pastoralist as 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 the produce from cattle.⁶⁶⁸ On the other hand, the term “semi-pastoralist” is defined as a member of a rural community whose livelihood is based mainly on cattle raising and to some extent on crop farming.⁶⁶⁹

In spite of the protection provided under Article 40(5) of the Constitution, the federal and the rural land legislation is criticized for not providing clear and enforceable entitlements for collective land rights of traditional communities.⁶⁷⁰ In addition, the land regime in the country sidesteps the traditions, customs and land use systems of the people and by introducing alien

⁶⁶⁴ Ibid

⁶⁶⁵ Kojo Sebastian Amanor, Land Governance in Africa (2012) 7, available at

< <http://landcoalition.org/sites/default/files/publication/1271/FramingtheDebateLandGovernanceAfrica.pdf>>
accessed July 13, 2013

⁶⁶⁶ PANGEA (n 476)

⁶⁶⁷ UN Declaration on the Rights of Indigenous Peoples (n 302) Article 26 (1)

⁶⁶⁸ The Federal Rural Land Administration and Land Use Proclamation 456/ 2005, Article 2(8)

⁶⁶⁹ *ibid*, Article 2(9)

⁶⁷⁰ African Commission on Human and Peoples Rights, Center for Human Rights, International Labour Organization (ILO) (n 653) 91

concepts in the land regime.⁶⁷¹ The Federal Rural Land Administration and Land Use Proclamation has been criticized for failing to give due consideration to communal ownership of land in pastoral regions.⁶⁷² Moreover, it did not even include pastoral land rights included in the Constitution.⁶⁷³ There are also inconsistencies and gaps between the constitutional provisions on the one and the implementation subsidiary legislation on the other hand and their actual implementation.⁶⁷⁴ The legal framework is characterized by lack of respect for the customary tenure of the indigenous people contrary to Article 27 of the UNDRIP.⁶⁷⁵ The mere recognition of the usufruct rights of indigenous peoples is contrary to Article 26(1) of the UNDRIP which calls for the respect and recognition of the ownership and possession rights of indigenous and tribal peoples over the land they traditionally occupy. The nature and scope of the rights of indigenous communities over communal landholding is far from clear.⁶⁷⁶ The substantive content the landholding rights of pastoralist communities in the country has not been elaborated in Ethiopia thus far.⁶⁷⁷ In addition, the requirements and processes for the legal recognition of communal landholding is not also elaborated under federal and regional laws.⁶⁷⁸

According to the Ethiopian Agricultural Investment Land Administration Agency, the main legal framework for large scale agricultural investments is the FDRE Constitution itself. In particular, the Agency points to Article 40(6) of the FDRE Constitution as the principal provision which justifies such investments. The provision reads as follows:

“Without prejudice to the right of Ethiopian Nations, Nationalities and Peoples to the ownership of land, the government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law.”

The cumulative reading of Article 40(6) of the FDRE Constitution and that of Article 5(3) of the Federal Rural Land Administration and Land Use Proclamation facilitates the displacement of

⁶⁷¹ *ibid*

⁶⁷² IWGIA, *The Indigenous World*, 435 (2006)

⁶⁷³ *ibid*

⁶⁷⁴ Housing and Land Rights Network & Oakland Institute, *Stakeholder Submission to the Universal Periodic Review of the Republic of Ethiopia* (2013) available at <http://www.hlrn.org/img/documents/UPR%20Submission%20-%20Ethiopia.pdf> accessed on August 22, 2014

⁶⁷⁵ Housing and Land Rights Network & Oakland Institute (n 674)

⁶⁷⁶ Imeru Tamrat (n 53)

⁶⁷⁷ *ibid*

⁶⁷⁸ *ibid*

the people from their traditional lands. Article 5(3) of the Federal Rural Land Administration and Land Use Proclamation reads:

“Government being the owner of rural land, communal rural land holdings can be changed to private holdings as may be necessary.”

Article 2(12) of the Federal Rural Land Administration and Land Use Proclamation defines “communal holding” as rural land which is given by the government to local residents for common grazing, forestry and other social services.” The same meaning is ascribed to the notion of communal holding in regional land administration laws. Thus, Article 5(3) of the Federal Rural Land Administration and Land Use Proclamation and counterpart provisions in regional land administration laws confer substantial discretionary power of reallocating and changing communal land holdings to private holdings to the government as the owner of rural land. Such provisions demonstrate the limited say that holders of communal land holdings have regarding land use planning.⁶⁷⁹ Article 5(4) (a) of the same Proclamation goes on to state that private investors that engage in agricultural development activities shall have the right to use rural land in accordance with the investment policies and laws at federal and regional level. This is further reinforced by the fourth preambular provision of the Proclamation which underlines the need to encourage individual farmers, pastoralists and agricultural investors and the need to establish a conducive system of rural land administration.⁶⁸⁰

The power of the government to reallocate communal land holdings to private ones undermines the security of tenure of holders of legitimate tenure rights.⁶⁸¹ It also demonstrates the limited say that holders of communal land holdings have regarding land use planning. As a result, this shows that holders of communal lands do not have the same rights as individual landholders.⁶⁸² This provision affects indigenous people as they practice communal holding as opposed to individual landholding. Such provisions also undermine the use rights of pastoralist communities in the country affirmed in the FDRE Constitution.

⁶⁷⁹ *ibid*

⁶⁸⁰ The Federal Rural Land Administration and Land Use Proclamation 456/ 2005, Preamble

⁶⁸¹ Imeru Tamrat (n 53)

⁶⁸² *ibid*

As is clear from the label, the bundle of rights encompassed under the rubric “holding right” pertains to plots of land which are tilled and farmed or used for construction of homes. Consequently, the Proclamation is silent as regards the rights of peasant farmer, semi-pastoralist or pastoralist when it comes to commons which are untilled and unfarmed. This omission is particularly momentous in regard to land belonging to indigenous people who are by and large pastoralist or semi-pastoralist people. Since indigenous peoples usually do not settle on a particular plot of land and do not adopt sedentary way of life, the principle of holding right does not squarely apply to their circumstances. In other words, holding rights apply to plots of land which are effectively occupied by the peasant farmer, semi-pastoralist or pastoralist i.e. homesteads and farms.

As a result, it is difficult to state that Federal Rural Land Administration and Land Use Proclamation recognizes the rights of peasant farmers, semi-pastoralist or pastoralist in regard to commons or unfarmed lands which are not effectively occupied. The law recognizes the usufruct rights of peasant farmers, semi-pastoralist or pastoralist over the land given to them for agriculture.⁶⁸³ The formulation of the provisions of the Federal Rural Land Administration and Land Use Proclamation is well-suited to the settled agricultural holdings common in the highlands of Ethiopia. On the contrary, the Federal Rural Land Administration and Land Use Proclamation does little by way recognizing the rights of pastoralists and semi-pastoralists in the low lying areas of Ethiopia. This is particularly due to the fact that the Proclamation is predicated on the idea of “private land holding” which is not common among the indigenous pastoralist and semi-pastoralist populations. By and large land holding among these indigenous population groups is communal as opposed to individual.

Apart from failing to specify the rights of indigenous population groups as regards commons, the Federal Rural Land Administration and Land Use Proclamation has in effect established state holding in the bulk of their territory. Article 2(13) of the Federal Rural Land Administration and Land Use Proclamation defines state holding as

⁶⁸³ The Federal Rural Land Administration and Land Use Proclamation , Article 5(1) (a)

rural land demarcated and those lands to be demarcated in the future at [sic] federal or regional states holding; and includes forest lands, wildlife protected areas, state farms, mining lands, lakes, rivers and other rural lands.

The Federal Rural Land Administration and Land Use Proclamation recognizes rights to land on the basis of individual farms and homesteads as opposed to common property. However, in pastoralist communities land is regarded more as common property than individual entitlement.⁶⁸⁴ This results in difficulty in translating land rights of pastoralist communities to individual titles.⁶⁸⁵ The labour theory of property i.e. the requirement that the land has to be in productive use and must not be left idle for a longer period particularly affects pastoralist communities as the development and investment in the land is not directly noticeable as in the case of settled farmers.⁶⁸⁶ This situation has further contributed to the increased conversion of pastoralist land to large scale agricultural investments.

The federal and regional land legislation in Ethiopia gives little recognition of the customary tenure systems upon which the land tenure of indigenous people is based upon. Moreover, the regional states which are inhabited by indigenous peoples are the primary targets of large scale agricultural investments due to sparsely populated commons. The regional rural land use and administration laws of the regions where large scale agricultural investments are ongoing do not provide secure land rights for pastoralists.⁶⁸⁷ In an apparent exercise of their constitutional rights, many of the regions have already promulgated their land utilization and administration legislation. These include the Rural Land Administration and Utilization Proclamations of Tigray, (Proclamation 136/2007), Amhara (Proclamation 133/2006), Oromia (Proclamation 130/2007), Benishangul Gumuz (Proclamation 85/2010), Ethiopia Somali (Proclamation 128/2013), Southern Nation, Nationalities and peoples Regional State (SNNPRS) (Proclamation 110/2007) and Gambela.

⁶⁸⁴ Kojo Sebastian Amanor (n 665)

⁶⁸⁵ *ibid*

⁶⁸⁶ *ibid*

⁶⁸⁷ Solomon Bekure and Abebe Mulatu, Safeguarding Pastoralist Land Use Rights in Ethiopia (2014 Conference on Land Policy in Africa) 2014, available at <
http://www.uneca.org/sites/default/files/images/safeguarding_pastoral_land_use_rights_in_ethiopia_-_abebe_mulatu.pdf> accessed December 24, 2015

The land utilization and administration legislation of some of the regions is of recent origin. The weakness of regional land administration implementation laws demonstrates the limited recognition of the legitimate tenure rights of the inhabitants in these regional states. Instead, the legislation is founded upon the concept of eminent domain, whereby the state is the ultimate owner of land and is entitled to acquire land through compulsory acquisition for public purposes.⁶⁸⁸ The non-recognition of customary tenure of indigenous people in Ethiopia is a reflection of the traditional view of many African governments which viewed customary land tenure as “backward-looking” and obstacle for development.⁶⁸⁹ It is reminiscent of the view that communal tenure is an impediment to agricultural growth and land ownership.⁶⁹⁰ The position taken by the federal and regional land legislation as regards customary tenure does not take into account the growing understanding of local customs and practices as part of the architecture of land tenure to be supported and not to be brushed aside or sidestepped.⁶⁹¹ Nevertheless, the non-recognition of customary tenure system of indigenous peoples and other communities reflects the tendency to abandon and reject communal or collective forms of tenure in the country. The federal and regional land laws manifest impatience with the idea of customary tenure.⁶⁹²

Thus, the terms and provisions of property and land law in Ethiopia have been invoked by the government to claim particularly untitled and unfarmed land as its own. Regardless of the fact that, the lands which have been allocated by and large allocated to large scale agricultural investments are traditionally occupied by indigenous people in the country and other communities, the lands have been characterized as *unowned* and *unused*. As a result, the narratives of the terms and provisions of federal and regional land laws echo the *terra nullis* narratives of colonial land legislation. In other words, the lands in question are regarded as vacant lands empty of owners. Lands which are said to be not covered by title, not exploited and occupied have been a target of large scale agricultural investments. Consequently, the federal and regional land laws are predicated on concepts of effective occupation. Customary land arrangements are barely recognized in the federal and regional laws and local populations have only use rights of their immediate farms and homesteads under these laws. Federal and regional

⁶⁸⁸ Kojo Sebastian Amanor (n 665)

⁶⁸⁹ Hall and Dr. Paradza (n 661) 31

⁶⁹⁰ Liz Alden Wily (n 338)

⁶⁹¹ Hall and Dr. Paradza (n 661) 31, *See also* PANGEA (n 476)

⁶⁹² Liz Alden Wily (n 338)

land legislation only recognizes the right to secure tenure to house and farm plots and excludes the much more substantial unfarmed land areas in Ethiopia. The federal and regional laws in Ethiopia laws do not give due recognition to indigenous tenure regimes and collective forms of customary tenure or collective group-owned property. The practical effect of these provisions is that of declaring swathes of untilled and untitled land in low-lying areas of the country as national and public property under the statutory law although these lands are deemed to be customary property. This demonstrates the existence of vacuum of legal support for customary rights in Ethiopian federal and regional land legislation.⁶⁹³ Communities in Ethiopia are not recognized as lawful owners of their land. The absence of such legal support makes it easy for the state to claim title over communal lands inhabited by indigenous peoples and other communities in the country and to easily handover these lands for large scale agricultural investment purposes. This also shows that the tenure legislation in Ethiopia is more investor-friendly at the expense of the interests and rights of local communities.

These laws do not take into consideration the principle of traditional occupation, ownership, acquisition and use as elaborated by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Furthermore, the laws in the country do not give due recognition to the juridical personality of indigenous peoples and do not give legal effect to the principles enshrined under the UNDRP. Thus, the federal and regional land legislation in Ethiopia is not based upon the principle of recognition and respect for legitimate tenure rights. This is the first founding principle of the Voluntary Guidelines on the Responsible Governance of Tenure as discussed in the previous Chapter. The non-recognition of the concept of traditional occupation, ownership, use and acquisition as basis of legitimate tenure rights divest indigenous peoples of their rightful claims to land resources. The land rights of indigenous people in Ethiopia would be grossly affected by large scale agricultural investments as these investments target particularly untitled land as regional states inhabited by these people are sparsely populated.

4.5. The Right to Compensation upon Expropriation

Article 40(8) of the Constitution provides that the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value

⁶⁹³ *ibid*

of the property. Particularly, Article 44(2) of the Constitution stipulates that all persons who have been displaced or whose livelihoods have been adversely affected as a result of State programs have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance. Article 40(2) of the Constitution defines the term “private property” as “any tangible or intangible product which has value and is produced by the labour and creativity, enterprise or capital of an individual citizen, association which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common”.

Matters related to expropriation and compensation for private property is regulated by Proclamation 455/2005 and Council of Ministers Regulation 135/2007.⁶⁹⁴ Article 2(5) of Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation defines the term “public purposes” as follows:

“the use of land as such by the decision of the appropriate body in conformity with 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”

Thus, the concept of “public purpose” is defined very broadly and vaguely as to justify the consideration of any activity as serving the public purpose” and is susceptible to subjective political interpretation. The Proclamation further stipulates that *woreda* or urban administration has the power to expropriate rural or urban landholdings for public purpose where it believes that it should be used for “a better development project” to be carried out by public entities, private investors, cooperative societies or other organs.⁶⁹⁵ The broad understanding of land takings for public purpose and the inclusion of private investment supportive of economic growth as constituting public purpose in the general interest undermines the land rights of individuals and

⁶⁹⁴ Regional States are entitled to issue their own directives for the implementation of the Proclamation and the Regulation. Nevertheless, many of the regional states have not yet issued directives to this effect. The directives issued by some of the regional states do not bear upon all matters dealt with in Expropriation of Landholdings for Public Purposes and Payment of Compensation Federal Proclamation. On the other hand, the land administration laws of some of the regional states embody provisions relating to compensation some of which may not be compatible with the Federal Proclamation.

⁶⁹⁵ FDRE, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005, Federal Negarit Gazeta, Year 11, No. 43, Article 3(1)

local communities. In addition, the Proclamation does not provide for opportunity for contesting decisions of existence of public purpose made by the authorities to landholders.⁶⁹⁶ As a result, the broad and vague formulation of the notion of public purpose makes expropriation of landholdings expedient. Thus, the formulation of the notion appears to be incompatible with the tests developed by the African Commission on Human Rights as discussed in the first Chapter.

The Proclamation imposes various preconditions prior to expropriation. To begin with, compensation has to be paid well in advance of the planned expropriation.⁶⁹⁷ Secondly, the concerned organ must also issue written notification of expropriation order to the landholder indicating the time when the land has to be vacated and the amount of compensation to be effected.⁶⁹⁸ The Proclamation further provides that the determination of the period of notification is left to the directives of regional states, although it may not be less than ninety days.⁶⁹⁹ Despite the fact that the Proclamation has laid out such preconditions prior to the expropriation, it does not envisage and stipulate for mechanisms and procedures for the participation and consultation with the affected landholders.⁷⁰⁰

4.5.1. Standard of Compensation

The government undertakes the obligation to deliver land “*free from any right*” as a party to land deals with investors as stated in the template land deal agreements. This is therefore likely to involve the acquisition of land compulsorily in some cases from local land holders based on the contention that the local people will be given land elsewhere.⁷⁰¹ The Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation defines the term “compensation” as payment to be made in cash or in kind or in both to a person for his property situated on his expropriated landholding.⁷⁰² The Proclamation authorizes compensation for the property situated on the land and permanent improvements thereof.⁷⁰³ The phrase “the property situated on the land and permanent improvements thereof” demonstrates that the compensation is not for the use right in the land instead solely for the property located on the plot of land

⁶⁹⁶ Imeru Tamrat (n 53)

⁶⁹⁷ Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, Article 7(1)

⁶⁹⁸ *ibid*, Article 4(1)

⁶⁹⁹ *ibid*, Article 4(2)

⁷⁰⁰ Imeru Tamrat (n 53)

⁷⁰¹ Cotual (n 604)

⁷⁰² Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, Article 2(1)

⁷⁰³ *ibid*, Article 7(1)

expropriated.⁷⁰⁴ The failure to include the value of the land in the computation of the compensation on the ground that the land is already owned by the state contradicts the facts that the people have legally recognized use rights over the land.⁷⁰⁵ In other words, compensation is paid for visible improvements as opposed to loss of land. This in turn implies that compensation is highly likely to be inadequate to restore livelihoods.⁷⁰⁶ In addition, it also implies that no compensation is payable for lands where there is no visible improvements which is highly likely in the case of the land of indigenous people.⁷⁰⁷

In regard to the amount of compensation, the amount for the property situated on the expropriated land shall be determined on the basis of replacement cost of the property.⁷⁰⁸ The fact that “replacement cost of the property” is the basis for the computation of compensation also implies that it constitutes compulsory mitigation of compensation. The Proclamation envisages in the longer term that the valuation of the property is to be carried out by certified private or public institution or individual consultants on the basis of the valuation formula adopted at the national level.⁷⁰⁹ Pending such capacity development, the valuation of property is to be carried out by committees comprised of five persons to be established by the *woreda* Administration.⁷¹⁰ The Proclamation goes on to provide that the compensation for permanent improvement is equivalent to the value of capital and labour expended on the land.⁷¹¹

In addition to compensation for property and permanent improvements, the Proclamation also provides for compensation for displacement for a rural landholder whose landholding has been permanently expropriated.⁷¹² Displacement compensation is equivalent to ten times the average annual income the rural landholder secured during the five years preceding the expropriation of the land.⁷¹³ In the case of temporary displacement, the rural land holder shall be paid compensation for lost income based on the average annual income secured during the five years preceding the expropriation of the land on condition that the amount of compensation does not

⁷⁰⁴ Elias (n 28)

⁷⁰⁵ Cotual (n 604)

⁷⁰⁶ *ibid*

⁷⁰⁷ *ibid*

⁷⁰⁸ Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, Article 7(2)

⁷⁰⁹ *Ibid*, Article 9(1)

⁷¹⁰ *ibid*, Article 9(2) um Article 10

⁷¹¹ *ibid*, Article 7(4)

⁷¹² *ibid*, Article 8(1)

⁷¹³ *ibid*, Article 8(2)

exceed compensation to be paid in the case of permanent displacement.⁷¹⁴ In the case of temporary displacement, compensation is effected only until repossession of the land expropriated.⁷¹⁵

In spite of what the law says, the practice relating to expropriation and compensation is besieged with many irregularities. For instance, studies document the prevalence of problems pertaining to inventory of property, valuation and determination of the compensation. In addition to the lack of transparency in the determination of amount of compensation, no compensation is effected at times particularly in relation to, for instance, permanent improvements.⁷¹⁶ Thus, cultivators and pastoralists whose lands have been expropriated allege that the amount of compensation paid to them is unfair and inadequate.⁷¹⁷ This is indicative of the relative ease for governmental authorities to expropriate the landholdings of land users.

The other irregularities relate to eligibility for compensation. Article 2(3) of the Proclamation defines the term “landholder” as “an individual, government or private organization or any other organ which has legal personality and has lawful possession over the land to be expropriated and owns property situated thereon.” Nevertheless, there are discrepancies in the understanding of the term “private holding” and the proof required to show such holding from one region to another.⁷¹⁸ Some regional states require holding certificate as a requirement or eligibility for compensation. However, other regional states are silent as to whether or not holding certificate is a requirement of eligibility.⁷¹⁹ The issue of eligibility for compensation becomes particularly vexing in the case of those regional states which have not yet promulgated their own land administration laws.⁷²⁰ This is further complicated by the fact that holding certificates have not been issued to all peasants in the country and that the process is not yet completed.⁷²¹ Some regional states have opted to address this gap by the issuance of simple documents bearing their official seal or temporary certificates as proof of holdings.⁷²² More importantly, both federal and regional land administration laws omitted communal landholdings from eligibility for

⁷¹⁴ Ibid, Article 8(2)

⁷¹⁵ Ibid, Article 8(2)

⁷¹⁶ Imeru Tamrat (n 53)

⁷¹⁷ Dessalegn Rahmato (n 32)

⁷¹⁸ Imeru Tamrat (n 53)

⁷¹⁹ *ibid*

⁷²⁰ *ibid*

⁷²¹ *ibid*

⁷²² *ibid*

compensation in the case of expropriation.⁷²³ The situation appears to be better in the Amhara Regional State which expressly recognizes the right to hold land communally and stipulates that compensations provisions also apply to communally held lands.⁷²⁴ Thus, with the exception of the Amhara regional state, it is not clear whether or not communally held is eligible for compensation in the event of expropriation.⁷²⁵

4.6. Provision of Access to Justice to Deal with Infringements

One of the founding principles of the Voluntary Guidelines on the Responsible Governance of Tenure is that of the provision of access to justice to deal with infringements of legitimate tenure rights. It has been noted that apart from the recognition of legitimate tenure rights and their protection and safeguarding, states are also required to provide access to justice to deal with infringements of these rights.

However, the remedies available in Ethiopian and regional land administration laws in case of violations of legitimate tenure rights are far from adequate. For example, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation stipulates grievances and appeals can be taken from decisions concerning the amount of compensation. Nevertheless, the recourse to take appeal does not extend to decisions concerning expropriation of the land itself.⁷²⁶ As a result, one is not in a position to contest whether the requirements of public purpose necessary for expropriation are fulfilled in the particular case.⁷²⁷ In addition, individuals and communities whose lands have been subject of expropriation proceedings are not well informed of their rights of appeal and the remedies at their disposal.⁷²⁸

Conclusion

The foregoing discussion of the federal and regional land laws shows that the land system in Ethiopia confers only limited use rights to landholders. The recognition of the legitimate tenure rights of rightful landholders, particularly communal landholders, is far from adequate. In addition, the laws falls short of giving due recognition to customary tenure rights of local

⁷²³ *ibid*

⁷²⁴ *ibid*

⁷²⁵ *ibid*

⁷²⁶ Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, Article 11(1)

⁷²⁷ Imeru Tamrat (n 53)

⁷²⁸ *ibid*

communities and collective title. Land is nationalized and owned by the state. Private land ownership is prohibited. The exercise and enjoyment of the limited use rights recognized in the laws is contingent upon conditions. The rights are susceptible to abrogation at any time. Thus, contrary to what the Voluntary Guidelines on the Responsible Governance of Tenure requires, the security of tenure that landholders in Ethiopia have is weak. This in turn shows that landholders and communities do not have effective control and use of their land their natural resources. The limited recognition of legitimate tenure rights is confined to farms and homesteads and does not extend to common resources. The laws are highly influenced by *terra nullius* narratives of colonial land legislation which have in turn affected the land laws of many African countries following their independence. As will be shown in the subsequent Chapters, large scale agricultural investments which are predicated on land laws which do not duly recognize the legitimate tenure rights of local landholders and their customary tenure entail momentous implications on the rights to land, property, natural resources of the local people. The fact that local rights are insecure suggests the need for reform in the land legislation of the country and the need for effective mechanism for entrenching these reforms.⁷²⁹

The land legislation does not confer specific and express recognition of the land and resource rights of indigenous people whose lands have become the prime target of large scale agricultural investments. The absence of recognition of the people as indigenous further prevented the robust application of the UNDRIP, which would have enhanced the protection of the people and ensure their best interests. The land legislation introduces a variety of concepts such as individual ownership, labour theory and effective control which are alien to the customary tenure of the people, making the exercise of their land and resource rights uphill task.

The non-recognition of legitimate tenure rights in Ethiopian federal and regional land legislation in turn reflects adversely on the implementation of the founding principles of the Voluntary Guidelines which were discussed in the previous chapter. Accordingly, the non-recognition of legitimate tenure rights compromises their protection and the prevention of violations. In addition, it is nearly impossible to facilitate and promote the exercise and enjoyment of land rights which are in the first place not properly recognized. The absence of recognition of the legitimate tenure rights also implies that there is little that can be done by way of provision of

⁷²⁹ Cotula (n 604)

access to justice, effective remedy and grievance mechanisms in the event of their violations since they are not recognized beforehand.

Chapter Five

The Impact of Ethiopian Investment Incentives Package on Land Rights

Introduction

This chapter focuses on the legal regime applicable to large scale agricultural investments in Ethiopia. The existing regulatory regime governing large scale agricultural investment by foreign and domestic investors includes the 2012 Investment Proclamation (as amended by Proclamation 849/2014) and the Regulation on Investment Incentives and Investment Areas Reserved for Domestic Investors (Regulation 270/2012) (as amended by Regulation 312/2014). The chapter scrutinizes the specific provisions which have detrimental impact on the large scale land acquisitions by investors in the country and also examines the impact of the investment law on the land rights of local people in Ethiopia. In addition to relevant substantive provisions, the chapter briefly dwells upon the institutional arrangements for agricultural investments including one-stop shop services and their effect upon land rights of local people.

5.1. Objectives of Ethiopian Investment Law

The existing Ethiopian investment Proclamation has been formulated in such a way as to facilitate the emergence of large scale agricultural investments.⁷³⁰ The Proclamation stipulates that the objective of the Investment Proclamation is that of improving the living standards of the people through the realization of the sustainable economic and social development.⁷³¹ In particular, it outlines, among its specific objectives, accelerating the economic, development of the country, exploitation and development of the immense natural resources of the country, the development of the domestic market through the growth of production, productivity and services, increasing foreign exchange earnings and saving foreign exchange through substitution of imports locally, encouraging balanced development and integrated economic activity among the regions and strengthening the inter-sectoral linkages of the economy, enhancing the role of the private sector in the acceleration of the country's economic development, enabling foreign investment play its role in the country's economic development and creating ample employment

⁷³⁰ FDRE, Investment Proclamation 769/2012, Federal Negarit Gazeta, Year 18, No 63, September 17, 2002 (as amended by Investment Amendment Proclamation 849/2014, Federal Negarit Gazeta, Year 20, No 52, July 22, 2014

⁷³¹ *ibid*, Article 5

opportunities for Ethiopians and advancing technology transfer.⁷³² These objectives are aligned with the beneficial developmental benefits that large scale agricultural investment should bring about as discussed in relation to the preceding chapters.

5.2. The Requirements for the Registration and Approval of Large Scale Agricultural Investors

Large scale agricultural investment is among those investment areas which are allowed to foreign investors.⁷³³ Foreign and domestic investors are differentiated for purposes of distinctions in terms of investment areas and capital requirements. The amendment to the Investment Proclamation requires all investors to secure their investment permit.⁷³⁴ In regard to capital requirements, any foreign investor is required to allocate a minimum capital of 200,000 USD for a single investment project.⁷³⁵ The minimum capital requirement is reduced to 150,000 USD if it is joint investment with a domestic investor.⁷³⁶ It is submitted that 11,773 companies with a combined capital of 132 billion Ethiopian Birr (ETB) have secured investment license to engage in agricultural investment in Ethiopia until 2011.⁷³⁷ However, it appears that foreign investors are favored over domestic ones in regard to the allocation of land for large scale agricultural investments due to perceived superiority in terms of capital and technology.⁷³⁸

The Agricultural Investment Land Administration Procedure Guidelines lays down the specific requirements that must be fulfilled by investors to engage in agricultural investment. The requirements for the registration and approval of investors in this area vary depending upon whether or not they are foreign or domestic. Furthermore, the requirements differ depending upon whether or not the investment is sole proprietorship or by a business organization.

Large scale agricultural investment may be undertaken in different forms including sole proprietorship, business organization incorporated in Ethiopia or abroad, public enterprise and

⁷³² *ibid*

⁷³³ Investment Incentives and Investment Areas Reserved for Domestic Investors council of Ministers Regulation, Regulation 270, Federal Negarit Gazeta, Year 19, No 4, November 29, 2012, Article 4 (as amended by Regulation 312/2014, Federal Negarit Gazeta, Year 20, No 62, August 14, 2014)

⁷³⁴ Investment Incentives and Investment Areas Reserved for Domestic Investors council of Ministers Regulation, Amendment Regulation 312/2014 (n 733) Article 12(1)

⁷³⁵ *ibid*, Article 11(1)

⁷³⁶ *ibid*, Article 11(2)

⁷³⁷ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

⁷³⁸ Rahmato (n 32)

cooperative society.⁷³⁹ In the case of domestic business organizations, public enterprise or cooperatives, Article 10(1) (1) requires these to submit their Memorandum and Articles of Association. Article 10(1)(1)(d) of the Agricultural Investment Land Administration Procedure Guidelines requires domestic investors to submit evidence of personal and company profiles and testimonials. These are expected to demonstrate the experience of the investor or the company in the field of agricultural investment, the effectiveness and sustainability of the institutions the investor has been running and the balance sheet and the bank statement.

The application form for land request that the Ministry of Agriculture has been using requires the investor to furnish different formalities.⁷⁴⁰ The investor is required to provide information regarding the location or site of the investment land, the project description, the employment opportunity that the project is expected to generate, the marketing plan. Article 10(1)(2) of the Agricultural Investment Land Administration Procedure Guidelines requires the applicant to submit studies which confirm the suitability of the selected location for agricultural investment. The marketing plan requires the investor to clarify as to the percentage of the agricultural produces the investor plans to sell locally and abroad. Similarly, Article 5(3) of the 2009 Agricultural Investment Land Rent Enforcement Guidelines stipulates that the investor has to submit a business plan including the location of the land of choice, the size of land in terms of hectares, the type of agricultural investment planned, initial investment capital for the development, the timing of commencement of activities, the number and type of employment opportunities likely to be generated, the type of technology for use, profitability, profile of the company and other related items of evidence.

Likewise, the requirements that foreign investors must fulfill differs depending on whether or they are sole proprietorship or business organization. Article 10(2)(1) the Agricultural Investment Land Administration Procedure Guidelines and the application form require the investor to adduce his or her passport in case of sole proprietorship. In case of joint venture between domestic investors and foreign investors, Article 10(2)(1) (c) requires certificate of the

⁷³⁹ Investment Proclamation 769/2012 (as amended by Investment Amendment Proclamation 849/2014) (n 730) Article 10

⁷⁴⁰ The Application Form for Agricultural Investment Land Request Form is made available on the website of the ministry of Agriculture of the FDRE < <http://www.moa.gov.et/documents/93087/469745/application-form.pdf/77cb1d00-a6d9-470c-985e-e612ac8075d2>> accessed on May 30, 2014

status of domestic investor. Article 10(2)(2) stipulate that the Memorandum and Articles of Association to be adduced in the case of business organization incorporated in Ethiopia or Ethiopian branch of business organization incorporated abroad. As in the case of domestic investors, Article 10(2) (1) (d) requires foreign investors to adduce their personal or company profiles and testimonials to demonstrate their previous capacity.

Foreign investors are further required to provide investment license, letter of interest to pay a one year lease, Bank Statement of at least one year duration, audit report conducted by external auditor, confirmation letter to conduct and submit environmental audit report before the commencement of the project, work permit, residence permit, tax identification number (TIN) and CPO for land rent by the application form.

Some argue that the requirements, conditions, commitments and obligations required by the application form and the business plan are not that stringent. In addition, it is contended that the mechanisms for checking the accuracy of the information provided by the investors are inadequate.⁷⁴¹ Consequently, the procedure for the allocation of land appears to be flawed and susceptible to manipulation by unscrupulous profiteers who claim to be genuine investors.

An investor who seeks to engage in large scale agricultural investment has to fulfill certain precondition prior to engagement in the sector. The Ministry is required by law to transfer lands only to those investors proved to be capable development investors.⁷⁴² The Ministry claims that it has put certain measures in place to ensure that investors who are engaged in land speculation and do not have the track record to develop the land they acquired are not granted permits. The Ethiopian Agricultural Investment Land Administration Agency is required to make assessments with a view to ensure whether or not the proponent of the project has the capacity to undertake the obligation. Hence, the assessment should include the experience of the proponent in related investment sectors especially with the planned development activities, the financial position of the proponent, the kind of production for which the land is suitable to and the business plan

⁷⁴¹ Rahmato (n 32)

⁷⁴² FDRE, *Council of Ministers Regulation, Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions* (March 5, 2010), Article 5

submitted by the proponent.⁷⁴³ These requirements are further reflected in Article 10 of the Agricultural Investment Land Administration Procedure Guidelines of the Agency.

In spite of the allegation of the Ethiopian Agricultural Investment Land Administration Agency that its screening of the track record of the applications for large scale agricultural investments is rigorous and meticulous, there are instances showing that this may not be the case. For example, at the time Karuturi Global Agro Industry was allocated large tracts of land to invest, there was proof that the agricultural investment business of the company in Kenya and Europe was on the brink of collapse.⁷⁴⁴ Similarly, there were instances whereby some managed to secure investment land on the basis of forged investment licenses. This is in particular observed in the case of local investors. Apart from securing land, some even went to the extent of applying for loans from the banks.⁷⁴⁵ Some of these cases have led to prosecution on the part of Anti-Corruption Commission of Ethiopia.⁷⁴⁶

In regard to financial capacity, Article 3(1) of Regulation by the Council of Ministers on the Administration of Agricultural Investment Land is vested with the responsibility to assess the capacity of investors to develop the land allocated to them. Article 5(5) of the 2009 Agricultural Investment Land Rent Enforcement Guidelines provides that decision has to be made on the application within fifteen days from its receipt. The decision to grant the application for land request is made by a committee comprised of different experts of the Ethiopian Agricultural Investment Land Administration Agency (EAILAA). Investors are requested to submit both their technical as well as financial proposals *i.e.* the amount of sums proposed to be paid for the land requested.⁷⁴⁷ Investors are required to demonstrate their financial capability to undertake the proposed investment plans so that land is allocated for them.⁷⁴⁸ Nevertheless, proving the veracity and credibility of the information provided by the investors remains to be a daunting task.⁷⁴⁹ The competent authorities in regional states do not adequately investigate into the

⁷⁴³ *ibid*

⁷⁴⁴ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

⁷⁴⁵ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

⁷⁴⁶ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

⁷⁴⁷ Imeru Tamrat (n 53)

⁷⁴⁸ *ibid*

⁷⁴⁹ *ibid*

veracity of the statements and information provided by the investors.⁷⁵⁰ Studies indicate that the capital investment that investors are submitting tends to be exaggerated and that the investors do not even have adequate investment capital to commence their proposed investment.⁷⁵¹ Certain investors intentionally exaggerate the benefits likely to accrue from their projects and the amount of capital they expect to invest in the projects.⁷⁵² Nevertheless, there are instances whereby the investment license of investors has been renewed in spite of dismal performance of their contractual obligations particularly that of developing the land they took.⁷⁵³

Article 7(2) of the Directive on the Transfer of Large Scale Lands for Agricultural Investment to Investors adopted by the Ministry of Agriculture and Rural Development also highlights similar requirements. The provision stipulates the concerned organs must ensure that the investor applying for land has not been accused of fraudulent practices in the field of trade and business, the investor has good reputation in the sector and has proven credibility to repay debts and loans owed.

5.3. Investment Incentives, Guarantees and Export Incentives

The Investment Proclamation also stipulates generous package of inducements to foreign investors. Large scale agricultural investment is among the pioneer investment areas eligible for these incentives. Article 6(2) of the standard form contracts employed by the Ministry of Agriculture as a template contract with large scale agricultural investors stipulates that the Ministry undertakes to provide or cause the provision of special investment privileges such as exemptions from taxation and import duties of capital goods and repatriation of capital and profits granted under the investment laws of Ethiopia. These different forms of incentives, guarantees and other benefits are discussed as follows.

⁷⁵⁰ *ibid*

⁷⁵¹ *ibid*

⁷⁵² Rahmato (n 32)

⁷⁵³ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 18

5.3.1. Investment Incentives

A variety of investment incentives are offered to lure investors into large scale agricultural investment. These include tax incentives, loss carry forward, customs-duty exemptions as well as loans.

5.3.1.1. Tax Incentives

The Council of Ministers has adopted the regulations on areas of investment eligible for incentives and the form and scope of incentives applicable to both domestic and foreign investors.⁷⁵⁴ This Regulation offers attractive package of incentives for investors engaged in agricultural investment. As can be seen from the Schedule attached to the Regulation, the income tax exemption period depends upon the type of crop produced and the locality of production. Differing periods of income tax exemption are awarded to crop production. The type of crop production is further divided into annual crop, growing of medium term crops, and perennial crop. As can be seen from the list of the crop production entitled to incentives, much emphasis is accorded to export-oriented investment. Article 6(3) of the Ethiopian Agricultural Investment Land Administration Agency establishment Regulation vests the Agency with the power to prepare agricultural products suitability document of the agricultural investment lands and introduce the crop suitability document to investors. This provision is indicative of the role of the Agency in terms of influencing the type of crops to be produced on these agricultural lands with a bias towards export crops as discussed below.

In relation to locality, crop production which takes place in Addis Ababa and the surrounding Special Zone of Oromia are either not eligible for exemption from income tax or eligible relatively for a shorter period of time ranging from two up to three years. On the contrary, Article 5(2) of the Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012 (as amended by Regulation 312/2014) provides income tax exemption for agricultural investment taking place in certain areas. This provision reads as follows:-

⁷⁵⁴ Investment Incentives and Investment Areas Reserved for Domestic Investors council of Ministers Regulation, Amendment Regulation 312/2014 (n 733)

Any investor who invests to establish a new enterprise in:

- a) The State of Gambela Peoples*
- b) The State of Benishangul/Gumuz*
- c) The State of Afar (except in areas within 15 kilo meters right and left of the Awash River)*
- d) The State of Somali*
- e) Guji and Borena Zones of the State of Oromia; or*
- f) South Omo Zone, Segen (Derashe, Amaro, Konso and Burji) Area Peoples Zone, Bench Maji Zone, Sheka Zone, Dawro Zone, Kaffa Zone or Konta and Basketo Special Woreda of the State of Southern Nations, Nationalities and Peoples*

shall be entitled to an income tax deduction of 30% for three consecutive years after the expiry of the income tax exemption period specified in the Schedule attached hereto.

It is thus clear from the reading of the provision that investors who invest in some parts of the country stand to enjoy generous package of incentives. The Schedule to the Regulations already provide for a tax exemption period ranging from two up to five years.⁷⁵⁵ If the investor is engaged in crop production in one of the localities mentioned in the provision, the investor stands to benefit from the additional income tax deduction of 30% for three consecutive years.

The list of Regional States, Zones and *Woredas* outlined in the provision where investors are incentivized to invest are mainly the low lying areas referred to as the “periphery” which differs from the “core” densely populated highland areas. In reality, these are also the areas which are the target of large scale agricultural investments where enclosures have taken place to that effect. They overlap with the three most important destinations of large scale agricultural investment, namely Southern Nations, Nationalities and Peoples (SNNPRS), Gambela and BeniShangul Gumuz Regional States.⁷⁵⁶ These are the regions where many of the agricultural investors are extensively engaged in the sector and many also seek to invest in.⁷⁵⁷

At face value, the reason behind granting package of incentives for investors in these areas may appear to be the need to ensure the geographic distribution and equitability of investment in the country. However, the choice of the destination of areas for enclosure for large scale agricultural

⁷⁵⁵ The Schedule of Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012, as amended by Regulation 312/2014 (n 733)

⁷⁵⁶ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 4

⁷⁵⁷ *ibid*

investment demonstrates the “*core-periphery divide*” evident in the incidence of large scale agricultural investment.⁷⁵⁸ Therefore, the most obvious and direct impact of investment laws and regulations in Ethiopia is the facilitation of large scale agricultural investments and enclosures in some designated parts of the country than others. Furthermore, the selected states, zones and *woredas* are low population areas mostly inhabited by indigenous peoples or what the constitution refers to as “pastoralists or semi-pastoralists”. The list of selected areas manifests efforts to focus investment on low population areas so as to limit displacement of smallholders.⁷⁵⁹ The regional states listed in the provision are also states identified as underdeveloped and disadvantaged. Ostensibly, the effort to focus investment in these regions is motivated by the desire to accelerate their development.

In addition, Article 6 of the Regulation on Investment Incentives and Investment Areas Reserved for Domestic Investors provided that any investor expanding or upgrading his existing enterprise shall be entitled to income tax exemption with respect to the additional income generated by the expansion or the upgrading according to the Schedule appended with the Regulation.⁷⁶⁰

5.3.1.2. Loss Carry Forward

Business enterprises that suffer losses during the tax holiday period can carry forward such losses for half of the income tax exemption period, after the expiry of such period. This device enables the investor to limit tax liability by incorporating the loss incurred as a reduction to taxable income.

5.3.1.3. Export Incentives

The Ethiopian Agricultural Investment Land Administration Agency contends that agricultural investment is beneficial in terms of producing and supply the market with particularly export produce thereby expanding and strengthening different sectors of the economy.⁷⁶¹ Accordingly, Article 7 (1) of the Investment Incentives and Investment Areas Reserved for Domestic Investors

⁷⁵⁸ Makki (n 31)

⁷⁵⁹ Tom Lavers (n 13)

⁷⁶⁰ Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012, as amended by Regulation 312/2014 (n 730), Article 6

⁷⁶¹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

Council of Ministers Regulation 270/2012 (as amended by Regulation 312/2014) provided that any investor who exports or supplies to an exporter as production or service input, at least 60 percent of his products or services shall be entitled to income tax exemption for two years in addition to the exemption provided for in the Schedule appended with the Regulation. This provision is also a subject of amendment by the draft bill. As per the new formulation, any investor who exports his products shall be entitled to 25% income tax exemption on his income derived from this export.⁷⁶²

According to the Schedule on Investment Areas and Income Tax Exemptions Investors of Regulations 270/2012 (as amended by Regulation 312/2014), investors engaged in crop production stand to benefit from income tax exemption ranging from three years up to six years.⁷⁶³ The list of investment sectors which benefit from the package of incentives and inducements is indicative of the policies and priorities of the government. Article 7 of the Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012 (as amended by Regulation 312/2014) also provides that any investor who exports at least 60% of his products or services shall be entitled to an additional income tax exemption for two years on top of the exemption provided for in the Schedule appended to the Regulations. The same incentive is granted for any investor who supplies to an exporter as production or service input, at least 60% of his products.⁷⁶⁴ The period of exemption from income tax commences from the date of production.⁷⁶⁵

These incentives are particularly meant to encourage production of export crops and food to secure much needed foreign currency.⁷⁶⁶ Nevertheless, the facilitation of production of crops and food, the bulk of which meant to export and not local consumption, risks undermining local food security.⁷⁶⁷ This is also a possible outcome in view of the fact that those investors who opt to the domestic market are given lower attention in that they are exempted from payment of income tax only for two years. It is argued that the priority given to exports and foreign earnings brushes

⁷⁶² Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012, as amended by Regulation 312/2014 (n 733), Article 7

⁷⁶³ *ibid*, Schedule on Investment Areas and Income Tax Exemptions

⁷⁶⁴ *ibid*, Article 7

⁷⁶⁵ *ibid*, Article 10(1)

⁷⁶⁶ Tom Lavers (n 13)

⁷⁶⁷ *ibid*

aside considerations of domestic food security, in a country which has been besieged by food insecurity and food shortages for decades.⁷⁶⁸

5.3.2. Customs-duty Exemption

In addition to exemptions from income tax, Article 13(1) of the Regulation also stipulates that an investor may import duty-free capital goods and construction materials necessary for the establishment of a new enterprise or the expansion or upgrading of an existing enterprise as they fall within the areas of investment outlined under item number 2 of the Schedule appended to the regulation. Furthermore, an investor eligible to a duty-free incentive is allowed to import spare parts the value of which is not greater than 15% of the total value of the capital goods within five years from the date of commissioning of his or her project.⁷⁶⁹

The Regulation also envisages the issuance of directive relating the total or partial exemption of motor vehicles from customs duties.⁷⁷⁰ The Directive to determine the type and quantity of motor vehicles eligible for exemption from customs duty was issued in March 2013. This Directive attempts to respond to the criticism that all large scale agricultural investors importing motor vehicles have been granted customs duty uniformly in spite of the variation in terms of the land leased to them and the actual land they managed to have developed. The Directive stipulates that the type and quantity of the motor vehicles entitled for exemption from customs duty is contingent upon the size of the land leased to the investor and the size which has been developed by the investor.⁷⁷¹ Moreover, the Directive requires the investor to produce items of evidence to corroborate if the investor has indeed been allocated land; the investor has started land clearance, infrastructure development, warehouse, roads etc from investment office located in the vicinity of the investment.⁷⁷²

Nevertheless, there are misgivings that the implementation of the guideline concerning the quantity and quality of cars eligible to be imported duty free. For instance, it is contended that

⁷⁶⁸ Rahmato (n 32)

⁷⁶⁹ Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012, as amended by Regulation 312/2014 (n 733), Article 10(1)

⁷⁷⁰ *ibid*, Article 14

⁷⁷¹ Directive to determine the type and quantity of motor vehicles eligible for exemption from customs duty, March 2013, Article 5(1)

⁷⁷² *ibid*, Article 5(2)

the implementation of the guideline does not take into account the actual size for the land that is allocated for the investor. Thus, it is the practice of providing the same entitlement duty free machineries, equipment and vehicles regardless of the size of the holding is said to be unfair.⁷⁷³ In addition, the Authority allowed machineries and equipment which are not suitable to use in the country.⁷⁷⁴ For instance, John Deer tractors which have been imported by some of the investors operate with 405 horse power. Nevertheless, much of the land in Ethiopia is amenable for cultivation with a tractor with horse power ranging from 85 up to 105. Thus, these tractors which have been imported at a huge cost lie idle in some of the investment areas since they cause damage to the land as much of the cultivable land in the country is the top soil. This is indicative of the fact the lack of rigorous study as regards the type of machinery and equipment which is environmentally friendly by the concerned bodies. Apart from that, the provision of such services by Ethiopian Revenue and Customs Authority is said to be time-consuming.⁷⁷⁵ For instance, the machineries and instruments imported for the sake of agricultural investments remain in port for a long period of time. Similarly, such machineries and instruments have to undergo prolonged process to get the clearance needed for their release from the Authority.⁷⁷⁶

Moreover, in spite of the fact that, exemption from customs duty was granted with a view to encourage investors to import capital goods and equipment necessary for their work, there have been some instances whereby certain investors were found while leasing the same machineries to third parties. The Capital Goods Leasing Proclamation allows only those licensed by the Ministry of Trade.⁷⁷⁷

5.3.3. Grace Period

Article 9(2) of the Agricultural Investment Land Rent Enforcement Guidelines affords grace period for the payment of land rent. The incentive mechanism for agricultural investment stipulates that even though the investor should pay the land rent which is cheapest as compared to other countries; the government gives 2 to 5 years grace period based on the commercial crop

⁷⁷³ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 10

⁷⁷⁴ Interview, Ethiopian Agricultural Investment Land Administration Agency, Head of the Legal Affairs Directorate, Mr. Asefa Amde, June 23, 2014 (*See also* Ministry of Agriculture, Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report (January 2013) 5)

⁷⁷⁵ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 10

⁷⁷⁶ *ibid*, p. 21

⁷⁷⁷ Capital Goods Leasing Business Proclamation (Proclamation 103/1998) as amended by proclamation 807/2013, Article 3

harvest period, which gives economic yield. As per Article 9(2) of the Agricultural Investment Land Rent Enforcement Guidelines, the investor shall commence to pay one year land rent as presented as follows:

Table 5: Type of Production

No	Type of Production	Start of the Payment of Land Rent
1	Perennial Crops (e.g. mango, tea, coffee, biofuel plants such as jatropha, palm oil, etc.)	Fifth year as of the possession of the land
2	Growing of Medium Term Crops or Animal Production	Fourth year as of the start of production
3	Annual Crop Production (e.g. maize, wheat, oilseed, chickpeas, soybeans, cotton, etc)	Third year as of the possession of the land

However, Article 12(3) of the Agricultural Investment Land Administration Procedure Guidelines requires the investor to effect a payment of one year land rental in advance to be considered upon the expiry of the period of grace.

5.3.4. Loans and Credit Lines

One of the most peculiar features of the package of incentives accorded for investors considering engaging in the agricultural investment sector is extending bank loans. This incentive is peculiar in that it is not practiced in many other states.⁷⁷⁸ Investors can obtain 70% of the capita by way of loan from domestic financing institutions provided that the investor can expend 30% of the capital needed for the implementation of the investment.⁷⁷⁹ Moreover, loans are also extended for new as projects as well as expansion of existing ones. Borrowers who seek to obtain financing for new export oriented and manufacturing projects are required to provide initial cash

⁷⁷⁸ Dereje Abebe, Ethiopian Agricultural Investment Land Administration Agency, May 21, 2014

⁷⁷⁹ Ministry of Agriculture and Rural Development, *Government Incentive Policies*, (May 2009); See also EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 5

equity contribution of 30% of the total project cost.⁷⁸⁰ Foreign currency generating projects such as large scale agricultural investments stand to benefit from this scheme.⁷⁸¹

In connection with loans for expansion projects, borrowers who seek to obtain financing for expansion of existing export oriented and manufacturing projects are required to provide an initial equity contribution of 30% of the total required expansion capital. This can be in form of cash or in form of the projects assets, provided that the project's assets are uncollateralized and valued at no less than 2/3 of the required loan amount. Any shortfall in the assets valuation has to be met with a cash contribution. The Ethiopian Development Bank gives its clients a maximum grace period that involves the period of implementation up to the commencement of operation. The grace period cannot exceed 3 years.

The Ethiopian Development Bank and the Commercial Bank of Ethiopia are the principal organs which have been engaged in lending money for such projects.⁷⁸² Although these two banks are said to have amended their lending policies favorably⁷⁸³, investors who seek to borrow money from the Bank complain that the conditions that must be complied with to obtain the loan are very cumbersome.⁷⁸⁴ Moreover, the process of securing loan from the Bank is said to be time-consuming.⁷⁸⁵ The chances of securing the loan becomes even slim if the investor makes of irrigation.⁷⁸⁶ Moreover, at times it is said that the possibility of securing loan is influenced by aspirations of personal gain.⁷⁸⁷ Consequently, financing institutions such as Ethiopian Development Bank and Commercial Bank of Ethiopia are said to have failed to contribute their fair share to develop the large scale agricultural investment sector.⁷⁸⁸ As a result, investors who took possession of land in the hope of getting loan for their investment were unable to import the necessary machineries and inputs due to failure to secure the loan expeditiously.⁷⁸⁹

⁷⁸⁰ Ministry of Agriculture and Rural Development, *Government Incentive Policies*, (May 2009)

⁷⁸¹ *ibid*

⁷⁸² EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 6

⁷⁸³ Ministry of Agriculture, The Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 4

⁷⁸⁴ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 6

⁷⁸⁵ *ibid*, p. 5

⁷⁸⁶ *ibid*, p. 6

⁷⁸⁷ *ibid*

⁷⁸⁸ *ibid*

⁷⁸⁹ *ibid*, p.21

Unable to engage in actual development of the land they took, some companies have defaulted to effect payment of the loan they undertook to repay. The company was granted 100,000 hectares of land in Gambela Regional State in 2008.⁷⁹⁰ The Company embarked upon the investment by stating that it would engage in the production of wheat, corn and palm tree. Nevertheless, the company managed to develop only 5000 hectares of the total size of the land allocated to it up until 2014. In this regard, Karuturi Global Ltd is particularly the large agricultural investor company which is singled out for having failed to undertake its contractual obligation to develop the land allocated to it. The Indian company narrowly escaped sale by auction due to its default to repay the debt it took from the Commercial Bank of Ethiopia.⁷⁹¹ The auction was halted as a result of the fact that the company effected 25% of the debt it owed to the Bank. The company took 65 million Birr from the Bank for undertaking its agricultural investment due to the policy of the Bank of giving priority to agricultural development and the manufacturing sector. Attempts on the part of the Loan Recovery Section of the Ethiopian Commercial Bank to recover the loan without resorting to public auction did not succeed. This led to the decision of foreclosure and announcement of public auction on the land allocated to the company and the harvest on that part of the land which is under cultivation. However, the first public auction was called off upon the payment of the minimum required by the company.

In spite of this, the Commercial Bank issued a second auction in December 2015 since the company failed to effect the 55.8 million Birr debt it owed to the Bank.⁷⁹² The announcement relates to the lease right of the company to the 100,000 hectares of farm land, which is six times the size of Addis Ababa, the warehouses, dormitories and prefabricated houses.⁷⁹³ The Bank also foreclosed the assets of the company and sold two water drilling machines to a local company for

⁷⁹⁰ Initially, Karuturi Agro Plc was allocated with 300,000 hectares of land in Jekow and Itang Special woredas (districts) in Gambela regional state by virtue of two contracts with the administrations of the two *Woredas* and the MoU with the ten president of the regional state. These two contracts were later rescinded and replaced with a contract signed with hither Ministry of Agriculture and Rural Development which reduced the size of the land allocated to 100,000 hectares as per the contract concluded on 25th of October 2010.

⁷⁹¹ Berhanu Fekade, Karuturi Saved from Sale by Auction by Effecting 25% of Its Loan to the Commercial Bank Of Ethiopia (Addis Ababa, *The Reporter*, June 8, 2014) 3

⁷⁹² Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015, available at <<http://addisfortune.net/columns/non-performing-agricultural-investments-get-the-axe/>>

⁷⁹³ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

the price of 2.6 million Br.⁷⁹⁴ The founder of Karaturi Agro Products claimed to have secured injunction order against the second auction but there is no evidence to that effect.⁷⁹⁵ Nevertheless, the founder and managing director of Karaturi Agro Products, Say Ramakrishna Karaturi, described the issuance of the second public auction in what he referred to over “inconsequential matter” as contrary to the laws of the country and inappropriate. Although the Bank argued that it has not obtained the injunction ordered the company said to have secured, the corporate Communication Director of the Bank stated that the company is in a position to negotiate if it is in a position to settle 25 per cent of the outstanding debt until the opening of the auction which was adjourned for 22 December 2015.⁷⁹⁶ It is also common knowledge that Karaturi Agro Products was also involved in altercation with another Bank in Ethiopia in the shape of Zemen Bank. Karaturi Agro Products settled its dispute with Zemen Bank in out of court settlement and admitted that it owed 26 million Birr to Zemen Bank.⁷⁹⁷ Karaturi Agro Products is said to have secured from a third bank in Ethiopia, Dashen Bank.⁷⁹⁸ Consequently, the founder and manager of the company explained that the company is indebted to the tune of a total of 170 million Birr to all the banks.⁷⁹⁹

One of the most glaring challenges facing the Banks is the difficulty of recovering the loans due to the fact that the collateral or mortgage employed to secure the loan is the land which is allocated to the investors and movable and immovable property. In what amounts to land speculation, the prospect of the land allocated being put on public auction does not appear to be a major problem for the large scale agricultural investors as all there is to lose is the land itself. Thus, securing the loan will still be lucrative for the investors as there is not much to lose but the land. The Banks usually send letter to the Ethiopian Agricultural Investment Land Administration Agency to take provisional measures including injunction to prevent the transfer

⁷⁹⁴ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁷⁹⁵ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁷⁹⁶ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁷⁹⁷ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁷⁹⁸ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁷⁹⁹ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

of the immovable and movable property that is taken as real security to ensure the payment of the loan. These include existing and future machineries and equipment that are used and procured for agricultural production. Nevertheless, the Agency takes issues with such requests on the part of the banks since it is of the belief that the Agency may be required to ensure that the land allocated to the investor is not going to be transferred to their parties. Apart from this, the Agency contends that it is not within the remit of its mandate to ensure injunction order as regards to other property which is taken as real security.⁸⁰⁰ If the Agency declines the task of observance of the injunction order concerning the real security, this lack of institutional clarity as regards the appropriate duty bearer to discharge this obligation jeopardizes the repayment of the loans as the real security is subject to disposal by the debtor.⁸⁰¹

Ethiopian Agricultural Investment Land Administration Agency also criticized the practice of extending loans in its January 2014 evaluation of 52 agricultural projects in Gambela Regional state. The Agency noted that the practice of extending loan to agricultural projects in the region lacks transparency.⁸⁰² In its evaluation, the Agency lamented the practice of extending money to investors who have not carried out any practical activities on the land they have taken possession of.⁸⁰³ The evaluation underlines the need to undertake discussions with financial institutions to address the problem regarding investors who make use of the loan they took for unwarranted purposes.⁸⁰⁴ These findings of the agency clearly demonstrate that some investors profiteer by

⁸⁰⁰ Interview with Mr Asefa Amde, Head of the Legal Affairs Directorate, Ethiopian Agricultural Investment Land Administration Agency, June 23, 2014

⁸⁰¹ This gap can be evidenced by the letter authored by Ethiopian Development Bank to Ethiopian Agricultural Investment Land Administration Agency dated June 13, 2014. In this letter, the Bahir Dar branch of the Bank recounts the allocation of 3000 hectares of land to Syk Agricultural Development Plc in Abaydar Farmers Association *kebele*, Dangur Woreda, Metekel Zone, Benishangul Gumuz Regional State. The Bank extended a sum of 14,665,560.00 Ethiopian Birr to the agricultural project according to a loan agreement concluded between the parties. The Bank demanded injunction order against the movable and immovable property of the company pending the payment of the loan to the Agency. Nevertheless, the request of the Bank was not granted by the Agency as it contended that it is not up to it to enforce injunction order against the real security apart from ensuring that the land allocated shall not be transferred to their parties. The lack of interface between the stakeholders demonstrates the absence of strong mechanisms to ensure the repayment of the loan. This in turn suggests the likelihood that the loan extended by the banks may go bad.

⁸⁰² EAILAA, Gambela Agricultural Investment Land Utilization Evaluation Report, January 2014, p.10

⁸⁰³ *ibid* (The case in point is the loan extended to two sisters and spouses who have not yet started activities on the ground. Furthermore, the Agency takes note of some investors who have obtained loan from two banks. In addition, there are some investors who obtained the loan the very same year they obtained the land is transferred to them. On the contrary, some investors were denied loan although they are undertaking practical activities on the ground.)

⁸⁰⁴ EAILAA, Gambela Agricultural Investment Land Utilization Evaluation Report, January 2014, p.11

virtue of the land they are in actual control of and the loan they get although they claim to be investors and companies engaged in agricultural development.

5.4. Investment Guarantees

The Investment Proclamation stipulates that no investment may be expropriated or nationalized except for public interest and only in compliance with the requirements of the law.⁸⁰⁵ The Proclamation goes on to provide that adequate compensation, which is commensurate to the market value, will be effected in case of expropriation or nationalization of a given investment for public interest.⁸⁰⁶ Moreover, the foreign investor is entitled to the right to make remittances in convertible foreign currency at the prevailing rate of exchange on the date of remittance out of Ethiopia including profits and dividends accruing from the investment, principal and interest payments on external loans, payments related to a technology transfer agreement, payments related to a collaboration agreement, proceeds from the transfer of shares or of partial ownership of the enterprise to a domestic investor, proceeds from the sale or liquidation of the enterprise and compensation paid to the foreign investor upon expropriation of the investment.⁸⁰⁷

In spite of such legal assurances, some investors engaged in large scale agricultural investment are apprehensive of possible expropriation of the land allocated to them. For instance, some investors in Pawe and Dangur *woredas* of Benishangul-gumuz Regional state complained the land allocated to them have been handed over to farmers. The farmers are displaced from other lands which are under development for sugar plantation. These investors were simply provided with the assurance that there will be restitution of land of equal size commensurate to the land expropriated from them.⁸⁰⁸

Article 7(4) of the Agricultural Investment Land Rent Enforcement Guideline stipulates that the land transferred to the investor shall not be subject to expropriation by the government except for public purpose and in accordance with the law. Article 7(5) of the Guideline goes on to state that

⁸⁰⁵ Investment Proclamation 769/2012 (as amended by Investment Amendment Proclamation 849/2014) (n 730), Article 25(1)

⁸⁰⁶ *ibid*, Article 25(2)

⁸⁰⁷ *ibid*, Article 26

⁸⁰⁸ Ministry of Agriculture, Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report (January 2013) 8

in the event whereby the land is expropriated for public purpose and in accordance with the law, compensation shall be effected to the investor pursuant to the Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005 discussed in the previous chapter. The Proclamation on Expropriation is further explained by its implementing regulation, i.e. Payment of Compensation for Property situated on landholding expropriated for public purposes Council of Ministers Regulation 135/2007. However, the investor may not be in a position to obtain effective, prompt and adequate compensation since the standard of compensation elaborated in Regulation 135/2007 is problematic. The second part of Regulation envisages compensation for buildings, for fences, crops, perennial crops, protected grass, and permanent improvement on rural land, relocated property, mining licensee and burial ground. In the context of agricultural investment, the provisions on compensation for crops and perennial crops are the ones with direct and obvious relevance than the others. Accordingly, it is appropriate to looking to those provisions closely as reproduced below.

Article 5: Compensation for Crops

- 1) The amount of compensation for crops shall be calculated by multiplying the amount of yield that would have been collected from the land at maturity by the current market price of the crops.
- 2) The owner of ripe crops may, in lieu of compensation, harvest and collect the crops within the period fixed pursuant to Article 4 of the proclamation.

Article 6: Compensation for Perennial Crops

- 1) The amount of compensation for unripe perennial crops shall be determined by calculating the estimated cost for growing the plant.
- 2) The amount of compensation for ripe perennial crops shall be determined on the basis of the average annual yield, the current local market price of the crops.

Article 13 of the Regulation provides the formula for the computation of the amount of compensation payable in the case of compensation for crops and perennial crops. Accordingly, Article 13(2) of the Regulation stipulates that compensation for crops shall be equivalent to the total area of the land (in square meters) multiplied by the value of the crop per kilogram multiplied by the amount of crop to be obtained per square meter plus the cost of permanent

improvement on land. Article 13(3) goes on to provide that the compensation for unripe perennial crops is equivalent to number of plants (legs) multiplied by cost incurred to grow an individual plant plus cost of permanent improvement on the land. On the other hand, Article 13(4) goes on to provide that compensation for ripe perennial crops is equivalent to the annual yield of the perennial crops (in kilo grams) multiplied by the current price of the produce of the permanent crops.

Thus, the consideration of the provisions concerning the formula for the computation of compensation leaves many questions unanswered. First, what is the justification to expropriate the land once it has already been allocated to the investor? The designation of the land for agricultural investment purposes only to expropriate the same land for other reasons triggers the question whether or not there is a well-considered land use plan in the first place. Second, what if there are no crops or perennial crops on the land at the time of its expropriation as it is likely due to the need for land clearance preceding the period of production. In this case, the law does not appear to award compensation in the case of expropriation of the land since there is compensable claim in accordance with the law. Second, even if the investor gets compensation for crops or perennial crops on the land, it is unlikely to be commensurate to the prompt, adequate, effective compensation that the investor expects. It is likely that the investor may have invested tremendous amount by way of land clearance and preparation in view of long range objectives which cannot be accounted for by mere payment for the value of the crops or perennial crops as per the formula. Some argue that the compensation to be paid for the investor is not likely to be appropriate since the regulations were drafted on the backdrop of expropriation of land for pavement of roads on the land of smallholder farmers and did not take into consideration the case of agricultural investments.⁸⁰⁹

5.5. Other Incentives

In addition to the package of incentives discussed above, the Ethiopian Agricultural Investment Land Administration Agency is also conferred the power to conduct studies on granting additional incentives to strengthen the sector follow up the implementation of the same upon approval by the government.⁸¹⁰ This provision shows that there is a possibility to grant more

⁸⁰⁹ Interview Asefa Amdie, September 24, 2014

⁸¹⁰ FDRE, *Regulation 283/2013* (n 6), Article 6(8)

incentives and inducements to attract large scale agricultural investments. Moreover, it has been stated that a bill has been presented to the House of Peoples Representatives to amend the 2012 Investment Proclamation. The draft bill accords significant powers to the Prime Minister who will be heading the Investment Board with a view to address dynamic economic matters quickly with the needed to involve the Council of Ministers.⁸¹¹ Accordingly, one of the powers accorded to the Prime Minister as stated under Article 29(6) of the draft bill is authorizing the granting of new or additional incentives, where necessary, other than the ones already provided by the existing laws.⁸¹²

5.6.One-Stop-Shop Services

One of the reasons for the establishment of Ethiopian Agricultural Investment Land Administration Agency was the need to provide one-stop-shop-services.⁸¹³ It is submitted that the investors, particularly, foreign investors, have to undergo prolonged bureaucratic red tape to secure land for investment.⁸¹⁴ These investors have to deal with various governmental organs in search of information and other forms of services. Thus, the investor considering to engage in agricultural investment may be obliged to pay visit to Ministry of Foreign Affairs, Ethiopian Investment Commission (EIC), Ministry of Trade, Ministry of Agriculture, Ethiopian National Bank, Ethiopian Revenues and Customs Authority, Water, Irrigation and Energy Minister, Ethiopian Development Bank, etc.⁸¹⁵ Consequently, the investor is exposed to considerable waste of time and resources.⁸¹⁶ Thus, the bureaucratic red tape has been identified as one of the major bottlenecks that prevented potential investors from investing in the sector.⁸¹⁷

The issuance of investment license is taken care of either by the Ethiopian Investment Agency or by Regional investment organs.⁸¹⁸ The issuance of investment permits takes relatively short

⁸¹¹ Investment Proclamation 769/2012 (as amended by Investment Amendment Proclamation 849/2014) (n 730)

⁸¹² *ibid*

⁸¹³ Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013)3

⁸¹⁴ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 5

⁸¹⁵ *ibid*

⁸¹⁶ *ibid*

⁸¹⁷ *ibid*

⁸¹⁸ The newly adopted investment amendment proclamation 849 restructured the Agency in the form of a Commission. This amendment was motivated by the need to accord more powers to the organ to be able to decide on significant issues particularly intended to promote the manufacturing sector, especially industrial zone developments. This is meant to expedite decision making to strengthen the management in the manufacturing sector.

period of time once the required information is already submitted spanning from few days to a month.⁸¹⁹ The Ethiopian Investment Commission (EIC) is vested with the power to “issue, renew and cancel investment permits within its jurisdiction and register investment capital brought into the country by foreign investors.”⁸²⁰ Accordingly, the Ethiopian Investment Commission is responsible for the issuance of permits to wholly foreign owned investment, joint investment made by domestic and foreign investors, investment made by a foreign national, not Ethiopian by origin, treated as domestic investors under the investment Proclamation and to investment made, in areas eligible for incentives, by a domestic investor who is required to obtain a business license from the concerned federal organ.⁸²¹ Apart from that, investments other than those referred to above fall under the jurisdiction of regional investment organs.⁸²² The Commission is organized in the shape of one-stop-shop with a view so as to provide as many services as possible to investors at the same service point.⁸²³ The reading of Article 30(1) of the Proclamation shows that the plan to render one stop services has been confined to those investors who wish to engage in areas of manufacturing. However, agricultural investment projects shall also stand to benefit from one stop shop services. This is clear from the reading of Article 30(4) of the Investment Proclamation and the amendments likely to be made to these provisions. The changes to the existing Investment Proclamation appears to have been motivated by the criticism the federal as well as regional investment bodies are not organized in such a way so as to render one-stop-shop services to agricultural investors.⁸²⁴

Article 30(4) of the Investment Proclamation provides the list of services that the Ethiopian Investment Commission shall provide on behalf of the investors. First, the Commission executes the investor’s request for land required for the investment projects.⁸²⁵ Second, the Commission

The Commission will be headed by Investment Board which in turn will be headed by the Prime Minister. See Ethiopian Investment Board and the Ethiopian Investment Commission Establishment Council of Ministers Regulation 313/2014, Federal Negarit Gazeta, Year 20, No 63, August 14, 2014

⁸¹⁹ Imeru Tamrat (n 53)

⁸²⁰ Investment Proclamation 769/2012 (as amended by Investment Amendment Proclamation 849/2014) (n 730), Article 28(8)

⁸²¹ *ibid*, Article 4(1)

⁸²² *ibid*

⁸²³ *ibid*, Article 30

⁸²⁴ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 13

⁸²⁵ Investment Proclamation 769/2012 (as amended by Investment Amendment Proclamation 849/2014) (n 730), Article 30(4)(a)

executes the investors' requests for loan on their behalf.⁸²⁶ Other services likely to be rendered by the Commission include:-

- Execution of foreign investors' requests for residence permits⁸²⁷
- Execution of investors' requests for approval of environmental impact assessment studies conducted on their investment projects⁸²⁸
- Execution of investors' requests to acquire water, electrical power and telecom services.⁸²⁹

The Ethiopian Agricultural Investment Land Administration Agency also seeks to adopt the model of provision of one-stop-shop services to investors.⁸³⁰ The upgrading of agricultural investment along with those eligible for one-stop-services in the draft amendment also demonstrates the increased attention being accorded to the sector. Nevertheless, some question the wisdom of this arrangement in that it is not amenable to accommodate the environmental, social and food security concerns that arise as a result of large scale agricultural investments.

5.7. Bilateral Investment Treaties on Agriculture

In addition to the domestic legal regime governing investment, large scale agricultural investments also stand to benefit from bilateral investment treaties (BITs) or Investment Protection and Promotion Treaties (IPPA). Ethiopia has signed several BITs with various countries. However, it is pertinent to investigate some of the provisions in the BITs signed with those countries which are usually the source of large scale agricultural investments in Ethiopia. For instance, one can consider the BIT that is signed between Ethiopia and India on June 5, 2007.⁸³¹ The treaty applies to all investment made by investors of India in the territory of Ethiopia or vice versa.⁸³²

⁸²⁶ Investment Proclamation 769/2012 (as amended by Investment Amendment Proclamation 849/2014) (n 730), Article 30(4)(b)

⁸²⁷ Investment Proclamation 769/2012 (as amended by Investment Amendment Proclamation 849/2014) (n 730), Article 30(4)(c)

⁸²⁸ *ibid*, Article 30(4)(d)

⁸²⁹ *ibid*, Article 30(4)(e)

⁸³⁰ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 1

⁸³¹ The choice of this BIT is justified by the fact many of the foreign large scale agricultural investments in Ethiopia are made by Indian companies.

⁸³² Agreement Between the Federal Democratic Republic of Ethiopia and the Republic of India for the Reciprocal Promotion and protection of Investments, June 5, 2007, Article 2

By virtue of this treaty, parties are obliged to encourage and create favorable conditions for investors of the other Contracting Party to make investments in their territory and to admit such investments in accordance with its laws and regulations.⁸³³ Moreover, investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.⁸³⁴ In regard to national treatment, the treaty obliges parties to accord to investments of investors of each treatment which shall not be less favorable than that accorded to investments made by its own investors or investments of investors or any third State.⁸³⁵ The treaty also provides for most favored nation treatment whereby each Contracting Party shall accord to investors of the others Contracting Party, including in respect of returns on their investments, treatments which shall not be less favorable than that accorded to investors of any third State.⁸³⁶

The treaty also provides extensive protection against expropriation. Article 5 of the Treaty stipulates that investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except for a public purpose or interest, with due process of law, on a non-discriminatory basis and against fair and equitable compensation.⁸³⁷ In the event of expropriation, the compensation must be commensurate to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. It shall, however, include interest at a fair and equitable rate until the date of payment and shall be made without unreasonable delay, be effectively realizable and freely transferable.⁸³⁸ Similarly, Article 6 of the treaty stipulates that investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency or civil disturbances in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which the latter Contracting Party accords to its own

⁸³³ *ibid*, Article 3(1)

⁸³⁴ *ibid*, Article 3(2)

⁸³⁵ *ibid*, Article 4(1)

⁸³⁶ *ibid*, Article 4(2)

⁸³⁷ *ibid*, Article 5(1)

⁸³⁸ *ibid*

investors or to investors of any third state. The provision goes on to state that resulting payments shall be freely transferable.⁸³⁹

In regard to repatriation, the treaty stipulates that each Contracting Party shall permit the transfer of funds related to an investment freely, without delay and on a non-discriminatory basis in accordance with its laws and regulations. The provision goes on to state that such funds may include capital and additional capital amounts used to maintain and increase investments, net operating profits including dividends and interest in proportion to their share-holdings, repayments of any loan including interest thereon, relating to the investment, payment of royalties and service fees relating to the investment, proceeds received from sale of their shares, proceeds received by investors in case of sale or partial sale or liquidation, the earning of nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party.⁸⁴⁰

5.8. The Impact of the Investment Incentives on Land Rights

The impact of this generous package of investment incentives lures many investors into the agricultural investment sector. The legal framework offers a generous package of investment incentives and guarantees at times described as “mouthwatering”. Perhaps, this explains the one of the reasons for the increased interest in large scale agricultural investment in Ethiopia.⁸⁴¹ There are instances whereby investors engaged in illegal practices, among others, the misuse of tax holiday and investment incentives. Some of the investors are taking advantage of this package of investment incentives and inducements improperly. The investors exploit the opportunities offered by the package of incentives without actually getting involved in production phase. Thus, one can say the provision of such incentives and inducements to unscrupulous individuals who present themselves as genuine investors appears to have exacerbated land acquisitions and accumulation. Such profiteers finally withdraw from the agreements by invoking pretexts once they have taken advantage of the investment incentives without entering the production phase. The Ethiopian Agricultural Investment Land Administration Agency itself admits that the practice of land transfer to investors in the past

⁸³⁹ *ibid*, Article 6

⁸⁴⁰ *ibid*, Article 7(1)

⁸⁴¹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 4

failed to distinguish between “developmental” and “rent-seeking” investors.⁸⁴² The incidence of land speculation has also been witnessed on the part of certain investors as documented by the Transfer of Large Scale Lands for Agricultural Investment to Investors Directive.⁸⁴³

The fact that the investors do not engage in actual development of the land they acquired also means that they do not generate net income or profits. In spite of this, land is allocated for individuals who claim to be investors without due consideration of their capacity.⁸⁴⁴ As a result, the government loses the opportunity to obtain the income tax that could have been derived if such net income has accrued. This situation has triggered criticism that the main interest of certain investors is not that of agricultural production instead that of speculation.⁸⁴⁵

It is therefore easier to understand the inclusion of a clause on this matter in the Regulation which established the Ethiopian Agricultural Investment Land Administration Agency. The Regulation stipulates that one of the powers and duties vested in the Agency is ensuring that investment incentives granted are used for their intended purposes.⁸⁴⁶ Accordingly, the Agency is required to report on the implementation of these incentives.⁸⁴⁷ The Investor Follow-Up and Support Directorate of the Agency is particularly tasked with this responsibility.⁸⁴⁸

5.9 The Failure of Indian Agricultural Investments in Ethiopia and the Lure of Investment Incentives

Perhaps there is no better example of the unintended adverse impacts of investment incentives on land rights than that of the high profile failure of Indian agricultural investments in Ethiopia. In spite of their venture into agricultural investments in the country, many Indian high profile

⁸⁴² EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities (Guidelines) Manual, p.6

⁸⁴³ Ministry of Agriculture and Rural Development, Guideline on the Transfer of Large Scale Lands for Agricultural Investment to Investors, p.1

⁸⁴⁴ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

⁸⁴⁵ Howard Mann, ‘Foreign Investment in Agriculture: Some Critical Contract Issues’ (2012) Uniform Law Review < http://www.iisd.org/pdf/2012/uniform_law_review_foreign_inv_ag_2012.pdf> accessed September 10, 2013

⁸⁴⁶ FDRE, *Regulation 283/2013* (n 6), Article 6(8)

⁸⁴⁷ Ministry of Agriculture, The Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 9

⁸⁴⁸ *ibid*, p.22

investments failed flatly. Many of the Indian agricultural investors are now placed in default for failure to undertake their obligation to develop the land that is transferred to them. These include Sannati Agro Farm Enterprises PLC, JVL Overseas, Green Valley, S& P Energy Solution Agro Plc, Saber Farms PLC and Karaturi Agro Products. Closer examination of the root causes of their failure reveals that some of them were primarily motivated by the “mouthwatering” incentives package which is proffered in relation to investors in the field. In view of the Ethiopian Agricultural Investment Land Administration Agency, at least one foreign investor, namely Karaturi Agro Products, is believed to have misused the incentives package for the wrong reason.⁸⁴⁹ The agency argued that 98.9 per cent of the investors have employed the incentives package for the appropriate purposes.⁸⁵⁰ Karaturi Agro Products concluded lease agreement over the land which lasts for half a century. Nevertheless, it was unable to cultivate the land with the only exception of 7,645 hectares out of the total of 100,000 hectares that was allocated to it.⁸⁵¹ The Head of the Ethiopian Agricultural Investment Land Administration Agency also admitted that the company failed to undertake its contractual obligation to develop the land.⁸⁵² The Head also made it clear that the company was engaged in smear campaign against the Agency and the Ministry of Agriculture despite the fact that the management of the company was undergoing upheaval and financial crisis.⁸⁵³ The Head also criticized the allegation of the company that the government has not created favourable conditions for the company to engage in actual development of the land.⁸⁵⁴ The Head further explained that the government allowed the company to engage in the lease of machineries sector which is allowed only for domestic investors to mitigate the financial crisis that the company was undergoing.⁸⁵⁵ Nevertheless, the founder and manager of the company complained about the characterization of the company as unreliable and bankrupt and in terminal crisis by the Commercial Bank of Ethiopia, officials of

⁸⁴⁹ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Annual performance Report (2014/15)

⁸⁵⁰ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Annual performance Report (2014/15)

⁸⁵¹ There are conflicting figures regarding the actual size of the land cultivated by the company some suggesting only 1200 hectares of land while others stating 7645 hectares of land.

⁸⁵² Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁸⁵³ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁸⁵⁴ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁸⁵⁵ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

the Ministry of Agriculture and the media saying that this is tantamount to depiction of the company as “criminal”.⁸⁵⁶ Consequently, the founder and manager of the company, threatened to make use of all legal avenues to defend the rights of his company.⁸⁵⁷

Karuturi Agro products, the company which set out to cultivate one million tons of maize, rice, palm tree and other agricultural produce when it started failed miserably to achieve its goals. In spite of this, the founder and manager of the company still vows to realize these goals against all odds. Its failure warranted a meeting convened up on the initiation of the Prime Minister, Hailemariam Dessalegne, to discuss possible resolution to the debacle. In this meeting, the company contended that it managed to rectify its problems and has managed to cultivate close of 30,000 tons of agricultural produce on 4000 hectares of land, which it wants to sell for neighboring countries. Since the costs to transport the agricultural produce to Addis Ababa, the capital, is exorbitant, the company argues the only option at its disposal is to get the produce to the market through South Sudan.⁸⁵⁸ The fact that company proceeded to sell its shares in the international Stock Market by flagging the extensive land allocated to it, casted doubt about the strength of the capital of the company from the outset.⁸⁵⁹ Consequently, higher echelon of the Ministry of Agriculture and Natural Resources are increasingly turning their back on the likes of Karuturi Agro Products and other companies who have defaulted to develop the land they secured.⁸⁶⁰ The Head of the Ethiopian Agricultural Investment Land Administration Agency

⁸⁵⁶ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁸⁵⁷ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015) The founder and manager of the Karuturi Agro Products alleged that he is in a position to settle the debt owed to the Bank when the company recovers the 100 million Birr claim that it is asserting against another company. He went on to state that the company is now trying to secure a tripartite deal involving the three parties to resolve the matter including itself, the debtor company and the commercial Bank of Ethiopia, facts which the Commercial Banks has no knowledge of. (*Confer*: Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015))

⁸⁵⁸ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁸⁵⁹ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁸⁶⁰ Berhanu Fekade, *Karaturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

threatened to take similar actions on the other companies which failed to undertake their contractual obligation on the sidelines of the meeting convened by the Prime Minister.⁸⁶¹

In the final analysis, the Ethiopian Agricultural Investment Land Administration Agency disclosed that it has terminated its agreement with Karuturi Agro Products as of December 28, 2015.⁸⁶² This was shortly followed by the announcement by the Agency that it has taken over 98.8 thousand hectares of land which had been in the possession of the company.⁸⁶³ Despite media reports to this effect, Karuturi claimed that it is unaware of the said measure but called upon parties involved to respect the rule of law.⁸⁶⁴ It was later reported that Karuturi Agro Products contested the measure taken by the Ethiopian Government since its termination of the agreement does not follow the procedure already provided in the agreement between the parties and that the measure runs counter to the investment agreement between India and Ethiopia. Although the government cancelled the agreement due to insufficient development, Karuturi Agro Products argues that the clearing of 65,000 hectares of land and building of 100 kilometers of dykes to manage floodwater constituted development within the meaning of the agreement between the parties.

Nevertheless, the contention that the misuse of incentives packages for unrelated personal gain is not confined to one Indian agricultural investor. Other cases also reveal the same pattern. CLC Industries is a case in point. On the 26th of December 2009, CLC Industries Plc, an Indian Company, entered into a land lease agreement with the Ministry of Agriculture and Rural Development of Ethiopia. As per Article 1(1) of agreement, the parties agreed to establish a long term land lease of rural land for cotton farming and related activities on land measuring 25,000 hectares, located in Amhara and Benishangul-Gumuz Regional States, in Awi and Metekel zones, Jawi and Pawe special *woredas (districts) in Alkurand and Jabana legality and Ankwasha burzi kebeles*. The land was leased at a rate of 665.85 Ethiopian Birr per hectare and a total of

⁸⁶¹ Berhanu Fekade, *Karuturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

⁸⁶² Berhanu Fekade and Wudinhe Zenebe, Government Took over more than 98,000 hectares of land from Karuturi (Addis Ababa, The Reporter, 2 January 2016)

⁸⁶³ Berhanu Fekade and Wudinhe Zenebe, Government Took over more than 98,000 hectares of land from Karuturi (Addis Ababa, The Reporter, 2 January 2016)

⁸⁶⁴ Berhanu Fekade and Wudinhe Zenebe, Government Took over more than 98,000 hectares of land from Karuturi (Addis Ababa, The Reporter, 2 January 2016)

832,312,500 Ethiopian Birr. According to Article 2(1) of the agreement, the deal lasts for a period of 50 years. The Company took over the land to engage in cotton production.

Following this agreement, the lessee, CLC Industries Plc, concluded another contract of loan on May 9, 2011 with the Commercial Bank of Ethiopia (CBE), Megnagna Branch whereby the lessee took 11,690,909.00 Ethiopian Birr for the purpose of developing the land transferred to it. On the other hand, the lessee also concluded a real security contract to ensure the payment of the loan on the same date. The collaterals the lessee gave to secure the payment of the loan included the lease right on the land leased to it, cotton produced and to be produced by the lessee on the land, other movable and immovable property located on the property and future production on the plot of land it took. The lessee, CLC Industries Plc also concluded another contract with Lammergeier Construction Plc to undertake land clearance and other works on the plot of land on December 1, 2010.

Nevertheless, the Ministry of Agriculture served prior notice of termination dated May 24, 2012 to undertake its obligation of developing the land as per its business plan and to effect payment of outstanding land rental. Article 9(3) & 9(6) of the contract requires a written notice of six months before termination. However, the Ministry decided to terminate the land lease agreement On June 11, 2012 before the expiry of this time limit. The Ministry argued that the company failed to develop the land as agreed and since it has failed to effect the second and third installments of the land lease rental. The lessee, CLC, demanded that the letter of termination be rescinded since it is wrongful termination in contravention of the contractual provisions. The company stated that the termination of the agreement was wrongful since the Ministry did not serve notice to that effect six months earlier as required by Article 9(6) of the agreement. On July 12, 2012, the Ministry rescinded its letter of termination. Thus, the Ministry demanded the lessee to perform its obligation *as per* the prior notice of already issued.

On the other hand, CLC Industries Plc issued its own prior notice of termination in a letter dated 19 August 2012 and demanded payment of compensation for the loss it incurred. The Company contended that the Ministry has failed to perform the agreement since it did not transfer the land within thirty days since the making of the contract as agreed. According to the company, the transfer of the land took place in January 2011 long after the making of the contract. The Company went on to state that even this delayed transfer of the land was only to the tune of

20,579 hectares of land and not the entire 25,000 hectares of land agreed upon. The Company argued that the prior notice of termination served upon it but which was later rescinded by the Ministry has already interrupted the six month period of notice required. Thus, the Company argued that the initial prior notice of termination cannot have any retroactive effects and for all intents and purposes no prior notice of termination was properly served upon it. The Company indicted the need for serving a prior notice of termination anew. The Company also alluded to the failure on the part of the Ministry to ensure that the company engages in the development of the land peacefully. Article 6(6) of the Agreement imposes the obligation on the lessee to ensure peaceful enjoyment and trouble free possession of the premises. However, the Company argued the string of notices and warnings by the Ministry has eroded whatever confidence it has placed on the lessor. The Ministry contended that demanding the performance of the obligation to develop the land and the payment of one year advance payment does not amount to interference or threat of any kind.

Even effort was underway to resolve the dispute amicably and to transfer the remaining plot of land by identifying appropriate land, the Company is said to have communicated its desire not to proceed with the agreement and demanded the reimbursement of 2.53 million Ethiopian Birr for the cost it incurred thus far. It appears that the lessor was unable to hand over the 25,000 hectares of land since part of the land overlapped with land which was later slated for development of sugarcane by the Ethiopian Sugar Corporation. The Company was promised the remaining 4921 hectares of land would be allocated to it in due course.

The legal memorandum by the Directorate of Legal Affairs of the EAILLAA shows that the termination of the agreement is inconsistent with the deal. First, the minutes by virtue of which the company took possession of the land was not located in the files making it difficult to determine the exact date of delivery. The certificate of holding, which is believed the appropriate evidence to demonstrate possession, was also issued in January 2011. The legal memorandum goes on to state that the total size of land that has been transfer to the CLC until January 2012 was only 2000 hectares of land which is only one tenth of 20,579 hectares of land delivered thus far. Since taking possession of the land, the Company managed to clear 2600 hectares of land in preparation for the agricultural production and covered 550 hectares of land with cotton farm. This, the memorandum indicated that the only line of argument at the disposal of the lessor, the

Ministry of Agriculture is the argument that the entire 2600 hectares of land cleared has not been covered with seedlings. The legal memorandum also makes it clear that even if the second and their installments of the land rental has not been paid, the company may argue that the Ministry is not in a position to demand the entire payment before delivery of the land in its entirety although it is also indicated that the company may still be required to pay rent for the land which has already been transferred.

The Ministry should be cognizant of the fact the termination of the agreement has to be in line with the relevant contractual provisions. Otherwise, wrongful termination may serve as a ground to invoke compensation. CLC could have itself terminated the deal unilaterally arguing that the Ministry failed to deliver the land within thirty days. The fact CLC did not do so implies that it has tacitly waived its right to do so. The claim for compensation by CLC can be rebutted by invoking the fact that CLC has already taken possession of 20,579 hectares of the land and has secured certificate of holding for the same parcel. Article 4(4) of the agreement requires the lessee to develop one tenth of the leased plot of land within the first year from the date of the making of the agreement or from the date of the receipt of all the clearances from the government and other agencies. Even the Ministry was unable to transfer the total size of the land indicated in the agreement, no effort was made at least to vary the existing contract.

In a related manner, the Commercial Bank of Ethiopia gave a default notice to CLC demanding the repayment of the 11,690,909.00 Ethiopian Birr loan it gave or threatened to proceed with the foreclosure of the collateral given to secure the payment of the loan according to Proclamation 97/98 as amended by Proclamation 216/2000. The Bank also requested the then Agricultural Investment Support Directorate (now reestablished as the Ethiopian Agricultural Investment Land Administration Agency) to furnish the property mortgaged to realize the repayment of the loan in a letter dated June 20, 2012.

Despite this, the dispute between the parties has not yet been resolved and remains dormant. The lessee also left the country and halted its activities on the land. The loan it took from the Bank has not been repaid since the company complained that it has incurred substantial cost in the course of developing the plot of land by Lammergeier Construction Plc.

This case is emblematic of many of the problems and practices noticed in relation many of the large scale agricultural investments. It also demonstrates the ease at which some investors secure large sums of loan and the difficulty to ensure the repayment of the same. Since the main collateral employed to secure the payment of the loan is the land itself or “lease right”, the investor does not have much to lose in case of default to repay the debt. This case and many other similar cases trigger the question how the lofty ideals of large scale agricultural investments can be achieved in the light of such illegal practices. Thus, such practices tantamount to a clear violation of the principles discussed in Relation to the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) and Principles on Responsible Agricultural Investment (CFS-RAI).

Fraudulent practices like the ones above on the part of certain investors triggered recent changes in the credit policy the Development Bank of Ethiopia (DBE). In November 2015, the Development Bank of Ethiopia announced amendments to its credit policy to adopt the new 25/75 and 50/50 arrangements in respect to local and foreign investors respectively.⁸⁶⁵ Before the amendment, the credit policy of the Bank referred to as 70/30 authorized provision of 70 per cent credit to if both foreign and local investors contributed 30 percent of the total investment capital to engage in selected priority ventures.⁸⁶⁶ On the contrary, the newly adopted policy authorizes DBE to provide 75 percent credit if local investors are in a position to contribute 25 per cent. On the other hand, the newly adopted credit policy authorizes the Bank to provide 50 per cent of credit if foreign investors are in a position to contribute 50 per cent of the total investment capital.

5.10 The Adequacy of the National Law to Govern Large Scale Agricultural Investments

Large scale agricultural investments trigger the application of three bodies of law, namely, the specific contractual agreements, Bilateral Investment Treaties (BITs) and national laws. In regard to national law, there is no single consolidated law which exclusively deals with large

⁸⁶⁵ Bethlehem Lemma, Development Bank of Ethiopia Amends Its Credit Policy, 2Mercato.com, available at < <http://www.2merkato.com/news/alerts/4296-development-bank-of-ethiopia-amends-its-credit-policy>> accessed 13 December 2015

⁸⁶⁶ Bethlehem Lemma, Development Bank of Ethiopia Amends Its Credit Policy, 2Mercato.com, available at < <http://www.2merkato.com/news/alerts/4296-development-bank-of-ethiopia-amends-its-credit-policy>> accessed 13 December 2015

scale agricultural investments thus far. Interview conducted with professionals of the Ethiopian Agricultural Investment Land Administration Agency revealed that there is no such plan to adopt a legal framework which specifically deals with this matter.⁸⁶⁷ It was further learnt that it is believed the existing legal framework on investment in general is deemed to be sufficient for governing agricultural investment matters as well. Nevertheless, it has been stated that the Ethiopian Development Research Institute (EDRI) has taken up the assignment to draft a policy document concerning agricultural investment.

Nevertheless, the position that there is no any need for a consolidated legal framework on large scale agricultural investment is arguable. First, there are scattered and fragmentary items of legislation dealing with the matter including proclamations, regulations, and a host of guidelines and directives, codes of practice on different aspects of these investments. Apart from the FDRE Constitution (in particular its Article 40(6)), the investment Proclamation and regulations, bilateral investment agreements (BITs) and specific contractual agreements, there are many various other important items of legislation including:

- Ethiopian Agricultural Investment Land Administration Agency Establishment Council of Ministers Regulation, Regulation 283/2013
- Council of Ministers Regulation, Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions
- Federal Rural Land Administration and Land Use Proclamation
- Regional Rural Land Administration and Land Use Proclamation
- Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005
- Council of Ministers Regulation on Payment of Compensation for Property Situated on Landholding expropriated for Public Purposes (Regulation No 135/2007)
- Council of Ministers, Agricultural Investment Land Administration Procedure Directive
- The 2009 Agricultural Investment Land Rent Enforcement Directive
- Agricultural Investment Land Utilization Reform Follow-up and Support Activities Directive (Manual)
- Directives on the Transfer of Large Scale Lands for Agricultural Investment to Investors
- The 2011 Social and Environmental Code of Practice for Agricultural Investment

The multiplicity of regulations, guidelines and directives hints the inadequacy of the existing investment proclamation and regulations. The specific peculiarities and realities of large scale

⁸⁶⁷ Interview with Mr. Bizualem Bekele, Deputy Director of EAILAA, May 21, 2014

agricultural investments imply that there is a need for a coherent and consolidated body of rules and regulations governing large scale agricultural investments. The proliferation of directives and manuals poses a possibility of conflict and inconsistencies. It only the adoption of a comprehensive codified legal framework that would ensure harmonization among the different items of legislation as indicated above. In addition, some of the guidelines try to address basic issues of far reaching importance which the involvement of the federal as well as the regional legislature. The Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions is a case in point as will be discussed in more detail in Chapter six of the thesis. Nevertheless, items of legislation impinging upon the constitutional dispensation are adopted by the executive merely as directives without sufficient scrutiny by the legislative bodies.

Conclusion

It has been stated that Investment laws in Ethiopia are bent on promoting and attracting large scale agricultural investments. To this effect, the laws grant a variety of investment incentives, guarantees as well loans. Nevertheless, the implementation of the exemption from income tax is problematic due to the fact that the period of income tax exemption commences as of the date of production.⁸⁶⁸ However, as will be discussed in Chapter seven, most of the investors who took land for agricultural investment have not been successful in terms of actual development of the land and by necessary implication, also production. One-stop-shop services are among the services accorded to investors in the sector. Even if such incentives have been granted with a view to attract and encourage investment which aims to achieve the objectives of investment laws, the actual implementation of the incentives system does not mesh with the reality on the ground. This is due to the fact many investors profiteer solely from the incentives package without actually engaging in actual development of the land they took delivery of. Therefore, by and large, the incentives regimes introduced to promote and protect large scale agricultural investments do not appear to have succeeded to realize the objectives of the Investment Proclamation discussed earlier.

⁸⁶⁸ Investment Incentives and Investment Areas Reserved for Domestic Investors council of Ministers Regulation 270 as amended by Regulation 312/2014 (n 730), Article 10(1)

Chapter Six

The Governance Structures and Processes of Acquiring Land for Agricultural Investment

Introduction

In view of the fact that large scale agricultural investments are likely to affect the rights and interests of local people, the manner how land is acquired for this purpose is of vital importance. This chapter examines the extent to which the actual process employed for the acquisition of land for agricultural purposes complies with the human rights obligations and the founding principles and the principles of implementation of the Voluntary Guidelines and CFS principles as discussed in the second and third chapters respectively. International and regional standards considered in these chapters reveal the importance of consultation, participation, free, prior and informed consent (FPIC) and transaction transparency. In recent times, more effort has been exerted in terms of clarifying the meaning of such terms so as to give them specific practical content to them. Therefore, the issues will be considered in the light of these international guidelines. Moreover, the Chapter would also consider the federal and regional institutional setting for acquisition of land for agricultural investment purposes in Ethiopia.

6.1. The Governance Structure and Processes for the Administration of Land for Agricultural Investment

One of the requirements that need to be fulfilled to ensure the trustworthiness of large scale agricultural investments is the existence of inclusive and accessible governance structures. Accordingly, principle nine of the CFS Principles for Responsible Investment in Agriculture and Food Systems call for the incorporation of inclusive and accessible governance structures, processes and grievance mechanisms.⁸⁶⁹ The implications of this principle are multifold. To begin with, the rule and application of law must be respected in the governance of large scale agricultural investments free from corruption.⁸⁷⁰ Second, information concerning such

⁸⁶⁹ Committee on World Food Security (CFS), *Principles for Responsible Investment in Agriculture and Food Systems* (n 538) Principle 9

⁸⁷⁰ *ibid*

investments needs to be shared in an inclusive, equitable and transparent manner.⁸⁷¹ Moreover, as discussed in connection with the second and third chapters of the thesis, efforts must be exerted to secure the free, effective, meaningful and infringed participation of affected groups.⁸⁷² This test is particularly stringent in the case of indigenous peoples whereby the free, prior, informed consent needs to be ensured.⁸⁷³ The CFS principles also require the provision of non-discriminatory, fair, gender sensitive, effective, accessible, affordable, timely and transparent administrative procedures, mediation, and grievance and dispute resolution mechanisms.⁸⁷⁴

Consequently, it becomes pivotal to examine the institutional setting in place in Ethiopia to govern large scale agricultural investments and the processes followed in the allocation of land for this purpose. The governance structures for large scale agricultural investments can be divided into the regional and federal channels.

6.1.1. The Regional Channel

There used to be two channels for the acquisition of land for agricultural investments in Ethiopia: the regional and the federal. Initially, the allocation of land for large scale agricultural investment was within the remit of regional states in Ethiopia. This mandate was exercised by the regional states based on their constitutional power of administration of land. It has been said that the FDRE Constitution vests the power of administration of land to the regional states. Thus, in addition to the legislative mandate they have in relation to this matter, Article 17(2) of the Federal Rural Land Administration and Land Use Proclamation provides that regional states shall establish institutions at all levels to implement rural land administration and land use systems. The same provision calls upon regional states to strengthen institutions already established to that effect. Accordingly, the mandate to administer land including the allocation of land to large scale agricultural investments has been exercised by the regional states until March 2010. However, the practice of allotment of land to investors by the regional states themselves changed.⁸⁷⁵ One of the reasons that prompted the change, among others, is the allocation of land

⁸⁷¹ *ibid*

⁸⁷² *ibid*

⁸⁷³ *ibid*

⁸⁷⁴ *ibid*

⁸⁷⁵ The reasons for the change of the practice of allocation of land to the investors by the regional states are multifold. To begin with, the federal government was concerned by the sheer size and terms of some of land transfer agreements by regional states in the peripheral areas. This can be exemplified by the agreement concluded by

in some regional states to agricultural investors is highly influenced by motivations of personal gain.⁸⁷⁶ Some public officials are said to have been engaged in pursuit of their personal interests by abusing their power, harassing investors and arbitrarily intervening in their activities.⁸⁷⁷ The practice of allocating large scale land at regional level was dispensed with due to lack of transparency and accountability as discussed below.⁸⁷⁸ Many of the agreements concluded by regional states and local level *woreda* administrations with investors are said to be inappropriate.⁸⁷⁹

Gambella Regional State to hand over 300,000 hectares of land to Karuturi Agro Products Plc. for a period of 50 years (until the 3rd of August 2058) at lease fee of (20 Ethiopian Birr) 1USD per hectare. This decision was made by the then President of the Gambela Regional State, Omod Obang, *as per* an overly brief two-page Memorandum of Understanding (MoU) signed with Karuturi Agro Plc. The MoU stipulates that no payment of land rental for a period of seven years since the making of the contract. The MoU further states that the project is expected to generate 300,000 direct and 750,000 indirect jobs for the local people. The company is provided with the sole right concerning the sale of its produce and products. The land allocated is located in Gambella town (Gambella Woreda), Jekow/Itang and Lare Woreda. Jekow Woreda in Nuer Zone contributed 198,000 hectares of land according to the contract signed on the 4th of October 2008. Itang Special Woreda contributed 102,000 hectares of land as per the contract concluded on the 4th of August 2008.

Nevertheless, a different land rent contractual agreement was made between the Ministry of Agriculture and Rural Development on the 25th of October 2010 which allocated a total land area of 100,000 hectares of land. The Preamble with this agreement stipulated that it has become necessary to replace the above agreements that the company concluded with the Gambela Regional State. Article 19 of the Agreement concluded with the Ministry further states that the agreement replaces the contracts concluded with Jekow and Itang district administrations on the 4th of August 2008. In spite of the allocation of 100,000 hectares of land to the company, the company managed to develop only 7,645 hectares of land in December 2015 five years after the conclusion of the deal. Nevertheless, in what appears to be a twisted turn of events, the founder and manger of Karuturi Agro products claimed in a newspaper interview that the company did not seek to be allocated with 300,000 hectares of land in the first place. He contended that he made it clear for the official of the regional government of Gambela that the company is able to develop only 10,000 hectares of land. He went on to state that, the officials of the regional state insisted that they refused to allocate anything short of 300,000 hectares of land. (*Confer*: Berhanu Fekade, *Karuturi Agro Products subjected to Second Auction* (The Reporter, Addis Ababa, 20 December 2015)

Karuturi is also given 11,000 hectares of land in Bako Woreda in Oromia. This makes the land allocated for Karuturi the largest land allocation in the country for a foreign investor. The German based company ACAZIS (formerly Flora Eco Power) was awarded swath of land which partly overlapped with elephant sanctuary designated in the northwestern area of Oromia national Regional state. (Nalepa) The government also discovered the fact that only 20% of the 8000 foreign and domestic applicants to whom land was allocated by regional governments between 1996 and 2008 had actually commenced project implementation. 3.5 million hectares of land has been allotted to investors by regional authorities from late 1990s till the end of 2008. (Nalepa)

⁸⁷⁶ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Challenges and Recommendations on Foreign Agricultural Investment (May 2014), p. 14, (translation mine)

⁸⁷⁷ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Challenges and Recommendations on Foreign Agricultural Investment (May 2014), p. 15, (translation mine)

⁸⁷⁸ Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency, April 2013, p.2

⁸⁷⁹ EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities (Guideline) Manual, p.8

As per Article 5(6) of the 2009 Agricultural Investment Land Rent Enforcement Guideline, the task of transfer of the land is carried out by the Federal Ministry of Agriculture and the concerned regions if the land is designated for a foreign investor. On the other hand, the land is to be transferred by the investment office of the region solely if the land in question is administered by the region.

6.1.2. The Federal Channel

On March 5, 2010, the Council of Ministers adopted the Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions based on the controversial “*upward delegation*” by regional states to the federal government. According to the Preamble, the Regulation is adopted for the purpose of designing an integrated administration system on agricultural investment land among the federal and regional governments to implement the export led agricultural development strategy and reinforce the agricultural sector which has vital role in country’s economic development and prosperity.⁸⁸⁰ The Preamble goes on to state that such integrated system is instrumental for creating suitable investment environment for the agriculture investors by identifying the large arable lands in the regions and for promoting lands and transferring the same to the investors legally, transparently and efficiently.⁸⁸¹ Consequently, the Council of Ministers vests the power of handing over large arable lands suitable for agricultural investment from the regions and issue to investors with the aforementioned objectives in view.⁸⁸²

Conflicting reasons are proffered as justifications to divest the allocation of land to large scale agricultural investors by the regions themselves. On the one hand, resource constraint and gaps in administrative capacity were invoked as justifications.⁸⁸³ On the other hand, the need to expedite the allocation of land as compared to regional processes cited as explanation.⁸⁸⁴

Since 2007, the Ethiopian government has been organizing different organs accountable to the Ministry of Agriculture for identification and preparation of large scale lands suitable for

⁸⁸⁰ Council of Ministers *Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions* (n 7)

⁸⁸¹ *ibid*

⁸⁸² *ibid*

⁸⁸³ Nalepa (n 33)

⁸⁸⁴ *ibid*

agricultural investments, to administer the same upon delegation from regional states, transfer the land to investors, to prepare land use plans, support and follow-up of the performance of investors.⁸⁸⁵ Following the change of policy whereby regional states used to allocate land for large scale agricultural investors, the government established the Agricultural Investment Support Directorate (AISD) in 2009 under the auspices of the then Ministry of Agriculture and Rural Development.⁸⁸⁶ The Agricultural Investment Support Directorate (AISD) was vested with the responsibility to administer the allocation of rural land measuring 5000 hectares and above for investment purposes. Its mandate included the preparation of information and technical inputs to attract investors, signing contracts with investors and transferring land to those deemed eligible and undertaking follow up and oversight.⁸⁸⁷ The AISD entertained requests for land submitted by foreign investors and domestic investors who aspire to acquire more than 5000 hectares of land.⁸⁸⁸ Its specific objectives included the establishment of uniform land prices, setting lease terms and monitoring project performance with the right to revoke land from investors upon failure of investors to undertake contractual obligations.⁸⁸⁹ The AISD was also responsible for the identifying and cataloguing land parcels appropriate for allocation to investors through the establishment of the federal land bank.⁸⁹⁰ Despite the claim of the AISD that it is working in collaboration with the Regional states in the identification of lands for the federal land bank, the administrative capacity and agency of the regional states to do so differs widely.⁸⁹¹

The AISD received and administered land and consolidated investment lands stretching 5000 hectares or more from Regional States in the country.⁸⁹² These lands were to be deposited into what is called the Federal Land Bank to be made at the disposal of investors.⁸⁹³ Nevertheless, it is contended that the income derived from the transactions including land rent, income tax and other payments were to be devoted to the Regional states where the land is located.⁸⁹⁴

⁸⁸⁵ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 1

⁸⁸⁶ Nalepa (n 33)

⁸⁸⁷ Rahmato (n 32)

⁸⁸⁸ Nalepa (n 33)

⁸⁸⁹ *ibid*

⁸⁹⁰ *ibid*

⁸⁹¹ *ibid*

⁸⁹² Rahamato (n 32)

⁸⁹³ *ibid*

⁸⁹⁴ *ibid*

Accordingly, the regional states have been reporting the revenue derived from large scale agricultural investment to the Agency albeit intermittently.⁸⁹⁵ The practice whereby the regional states also allocated land continued on condition that the land allotted does not exceed 5000 hectares and it does not overlap with the land the concerned region deposited in the Federal Land Bank.⁸⁹⁶

Since the establishment of the AISD in 2009, many regional states have deposited land to the Federal Land Bank “voluntarily”. The basis of the allocation of rural land for agricultural purposes for the AISD is the delegation by the Regional states. However, there are also unconfirmed reports of reluctance and resistance on the part of the regions to do so.⁸⁹⁷ It also alleged that pressure might have been exerted upon the regional states to do so.⁸⁹⁸ The Agricultural Investment Support Directorate (AISD) has now been replaced with the Ethiopian Agricultural Investment Land Administration Agency (EAILAA). The replacement of the AISD was deemed necessary to address the institutional problems and to curb shortcomings to strengthen agricultural investment and bring about the desired outcomes.⁸⁹⁹

6.2. The Establishment of the Ethiopian Agricultural Investment Land Administration Agency (EAILAA)

The Agency is now the lead agency in respect to large scale agricultural investments in lieu of the former AISD. The Ethiopian Agricultural Investment Land Administration Agency has been established by the Council of Ministers Regulation 283/2013 in March 2013.⁹⁰⁰ The agency is established as an autonomous federal government agency as opposed to the previous AISD.⁹⁰¹ The Agency is responsible for the administration of land for large scale agricultural purposes. The establishment of the Agency was prompted by the need to rectify the dismal performance of the agricultural investment sector under previous forms of organization.⁹⁰² The Agency is

⁸⁹⁵ Interview conducted with Dr. Workafes Woldetsadik, EAILAA, May 30, 2014

⁸⁹⁶ Rahmato (n 32)

⁸⁹⁷ *ibid*

⁸⁹⁸ *ibid*

⁸⁹⁹ Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 3

⁹⁰⁰ FDRE, *Regulation 283/2013* (n 6), Article 3

⁹⁰¹ *ibid*

⁹⁰² EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 1

envisaged to realize modern agricultural development which makes use of the state of the art technology to attain high productivity and which contributes to the economy of the nation.⁹⁰³

The establishment of the Agency is not without controversies. The legality and lawfulness of Regulation 283/2013 which laid the foundation for the establishment of this Agency as well as its predecessor the Agricultural Investment Support Directorate (AISD) has been subject to criticisms. Article 50(9) of the FDRE Constitution is cited as the legal basis for the delegation by the Regional States to AISD. The provision stipulates that the Federal government may, when necessary, delegate to the states powers and functions granted to it by Article 51 of the Constitution. Nevertheless, this provision concerns itself with delegation by the Federal government to the regional states and does not warrant delegation by Regional States to the federal government. In other words, there is no clear legal basis and authorization in the Constitution for upward delegation by the Regional States to the Federal government.⁹⁰⁴ Consequently, the legal basis for the delegation by the regional states of the administration of large tracts of land is predicated on a weak legal basis. Moreover, the delegation scheme is also criticized for lack of transparent and clear legal framework on the process of allocating land to investors and ensuring follow-up and monitoring of such allocation for investment.⁹⁰⁵ Thus, the practice of allocation of large tracts of land by regional states to the Federal government is tantamount to the entrenchment of centralization of land administration in the name of delegation contrary to the promise of decentralization. Moreover, the vesting of the administration of rural lands in local governments but with key land powers given to the federal government calls the federal system in to question. This is sometimes characterized as manipulation in the name of delegation.

In spite of such criticisms, the federal government appears to have opted to proceed with the establishment of the Ethiopian Agricultural Investment Land Administration Agency. The objectives of the Agency are multifold. Firstly, the Agency is meant to administer agricultural investment lands entrusted to the federal government on the basis of power of delegation

⁹⁰³ Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 6

⁹⁰⁴ Imeru Tamrat (n 53)

⁹⁰⁵ *ibid*

obtained from regional states.⁹⁰⁶ Secondly, the Agency is envisaged to enhance, facilitate and support expansion of agricultural investment and sustainable growth of production and productivity.⁹⁰⁷ Thirdly, Agency is established to create favorable conditions for production of agricultural investment products in sufficient quantity for export and local markets that meet the requirements of agricultural investment code of conduct.⁹⁰⁸ The Agency is the federal organ responsible for the allocation of land to agricultural investors. This arrangement attests the dominant role of the federal government in the allocation of land for agricultural investment.

6.2.1. The Powers and Functions of EAILAA

The establishment of the Ethiopian Agricultural Investment Land Administration Agency can be instrumental in terms of facilitating conducive environment for negotiating fair deals. The Agency is mandated to identify and survey agricultural investment lands in cooperation with regional states. It is expected to identify and prepare land suitable for agricultural investment and compile and consolidate relevant information and disseminate to potential investors.⁹⁰⁹ It is required to make sure that the lands allocated for agricultural investments are “free from” the possession of farmers and pastoralists. The Agency must ascertain that the land is not required by the regional state in question for other specific purposes before allotment of the land to agricultural investment. It is also duty bound to delimit and demarcate the land identified and issue site maps and cancel the same where necessary.⁹¹⁰ The Agency is vested with the power to take possession of the agricultural investment lands identified on the basis of power of delegation obtained from the regional states where the land is located. The Agency is required to demarcate borders and prepare site plans for the lands identified. The Agency is also vested with the power to develop land bank system and collect data on agro-ecology, soil topography, geography and socio-economy. In a related manner, the Agency is given the power to collect data on lands transferred to investors and lands under investment and create agricultural investment land information system easily accessible to beneficiaries. It is duty bound to handover the site plans of the lands to the investors. It is obliged to monitor and provide advice and technical support on

⁹⁰⁶ FDRE, *Regulation 283/2013* (n 6), Article 5(1)

⁹⁰⁷ *ibid* , Article 5(2)

⁹⁰⁸ *ibid*, Article 5(3)

⁹⁰⁹ Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 6

⁹¹⁰ *ibid*, p. 8

land use system and corrective measures when necessary. Moreover, it is also expected to monitor and ensure that investors to whom agricultural investment lands have been transferred are implementing their business plans.

The Ethiopian Agricultural Investment Land Administration Agency is the body responsible for conclusion of contracts with investors and agricultural investment lands *as per* Article 6(4) of the establishment Regulation. Article 5(4) of the 2009 Agricultural Investment Land Rent Enforcement Guidelines also deals with the competent organs entitled to conclude agreements with investors whose application for agricultural investment land and whose project has been approved. The provision stipulates that such agreements should be concluded by the Ministry of Agriculture, more specifically the EAILAA, in the following three situations:

- If the lands in question are large scale agricultural investment lands administered by the EAILAA
- If the project is to be executed by foreign investors or
- if it is a joint venture with an Ethiopian and foreign investor

Article 5(4) (3) of the 2009 Agricultural Investment Land Rent Enforcement Guidelines vests the power to conclude agreements in situations which do fall in the above three categories. Nevertheless, there have been instances whereby investors were allocated land directly from the regional states or from zones complicating follow-up and support activities to be undertaken by the Agency.⁹¹¹ By their nature, land contracts involve many stakeholders. Nevertheless, in the Ethiopian context, they are signed only by two parties. Local people are not involved in the negotiation of the transactions relating to large scale agricultural investment.

Thus, unlike other countries such as Liberia, contracts involving the acquisition of land for agricultural investments are not approved by the House of Peoples Representatives or the Councils of the Regional states, which are in effect the parliaments at the federal and regional level respectively.⁹¹² In view of the various irregularities which have been documented in this study in the course of the making of contracts with investors, it appears that the practice of introducing parliamentary approval of the deals in Ethiopia is commendable. This is also true in

⁹¹¹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 5

⁹¹² Cotula (n 604)

view of the fact the size of the lands involved in the deals is so huge as to warrant the involvement of close parliamentary scrutiny. The practice of allocating land exceeding 5000 hectares by regional states themselves was dispensed with due to concerns of bad deals. Moreover, subjecting the decision of the regional states and the Agency to the scrutiny of parliamentary bodies can prevent unconscionable contracts and prevents disputes and opportunities for corruption. The monetary and other implications of large scale agricultural agreements on Ethiopia are far-reaching. Thus, it is appropriate that such agreements should not be operational before they are scrutinized by the parliament in line with the recommendation of the VGGT to provide safeguards.

The state ownership of land and the prohibition of private land ownership in Ethiopia entitle the government to conclude contracts involving acquisition of extensive areas of land destined for large scale agricultural investments. The establishment of the Agency and the upward delegation by the regional states has resulted in the centralization of control over land. Some of the staff of the Agency are also supportive of the model of re-centralization of land and are of the belief that this can be exemplary to other countries in Africa.⁹¹³ In the view of the writer, this centralization in turn leads to the relegation of the local community in decision-making. Apart from the fact that local landholders do not have more secure rights over their land, they do not also have greater control over decisions affecting their land implying that they are not legally empowered. This also shows the central role of the federal state in relation to large scale agricultural investments than that of the regional states. Consequently, many of the large scale agricultural investments in Ethiopia display a gap between legality and legitimacy.⁹¹⁴ The government may be in a position to own the land and allocate it to investors (legality). Nevertheless, local people contend that the land belongs to them (legitimacy). In the final analysis, there is significant risk that this gap between legality and legitimacy may lead to displacement and contestation.⁹¹⁵ The writer believes that the re-centralization model is inconsistent with the Constitution and with the principle of devolution of land management responsibilities to local government and decentralization as a mechanism for the facilitation of local participation. The absence of

⁹¹³ Interview with Biranu Tesfaye, Large Scale Land Identification Expert & Land Identification Coordinator, Ethiopian Agricultural Investment Land Administration Agency, May 20, 2014

⁹¹⁴ Cotula (n 604)

⁹¹⁵ *ibid*

capacity at the regional and local levels cannot justify divesting these authorities of their constitutional rights and the administrative drawbacks and shortcomings can be remedied through capacity development as opposed to usurpation of constitutional entitlements.

In principle, the Regional state Administrations are responsible for the administration of agricultural investment land below the size of 5000 hectares. It has been said that the Ethiopian Agricultural Investment Land Administration Agency is the Federal channel for the acquisition of land of 5000 hectares of land or above. Thus, on the face of it, the administration and allocation of land less than 5000 hectares to local and international investors is carried out directly by the regional governments.⁹¹⁶ This statement may give the impression that the Ethiopian Agricultural Investment Land Administration Agency is not involved in the administration or allocation of land lesser than 5000 hectares of the land. Nevertheless, it would be inaccurate to state that the Agency is not involved in the administration of land lesser than 5000 hectares of land. This is due to the fact that Article 3(1) (a) of the Regulation on the Administration of Agricultural Investment Land under the Appointment of regions entitles the Agency to administer agricultural land even lesser than 5000 hectares if this is proved to be *needed and important*.⁹¹⁷ The phrase “*needed and important*” is formulated in such a broad manner so as to invest the Agency to engage in the administration of the land of the regional states at its discretion. Moreover, interviews conducted with experts in the Ethiopian Agricultural Investment Land Administration Agency also revealed that the Agency is also involved in the administration and allocation of less smaller plots of land to the tune of 500 hectares of land based on the delegation of the regional states to the federal government.⁹¹⁸ Thus, the Agency is highly involved in the study, identification, depositing in the federal land bank, compiling agro-ecology, topography, geography and socio economic information on lands even lesser than 5000 hectares.⁹¹⁹ This appears to contradict Article 4(2) of the 2009 ‘Agricultural Investment Land Rent Enforcement Guideline’ which stipulates that lands which are below 5000 hectares and

Ministry of Agriculture of FDRE, *Ethiopia: The Gifted Land of Agricultural Investment* (2012) 8

⁹¹⁷ Council of Ministers *Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions* (n 8), Article 3(1) (A)

⁹¹⁸ Interview with Ato Addisu Negash, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency, May 20, 2014

⁹¹⁹ Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 8

separated and divided and pocket lands will be administered by the competent authority of the regional state.

Apart from that, the Agency is vested with the power to facilitate the efficient supply of inputs necessary for agricultural investment in cooperation with other stakeholders. It is also meant to ensure that invest incentives granted for agricultural investors are used for their intended purposes along with conducting studies on the possibility of granting additional incentives to strengthen the sector and follow up its implementation upon the approval by the government.

In regard to its organization, the Agency is headed by a Director General and a Deputy General appointed by the government.⁹²⁰ As the Chief Executive Officer (CEO) of the Agency, the Director General is vested with the power to direct and administer its activities according to guidance provided by the Ministry of Agriculture.⁹²¹ The Director General is entitled to exercise the powers and duties of the Agency as discussed above.⁹²² It is also the General Director who represents the Agency in all its dealings with third parties.⁹²³

Apart from this, the Agency has different major Directorates, namely:

- Agricultural Economic Zone Directorate
- Agricultural Investment Land Administration Directorate
- Legal Services Directorate
- Environmental Protection Directorate and
- Investor Follow-up and Support Directorate.⁹²⁴

The Agricultural Investment Land Administration Directorate is responsible for taking over the suitable agricultural investment lands from the regions and secure and administer the land.⁹²⁵ In addition to dissemination on agricultural investment in the country, the Directorate is duty bound

⁹²⁰ FDRE, *Regulation 283/2013* (n 7), Article 7(1)

⁹²¹ *ibid*, Article 8(2) (a), *See also* Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 2

⁹²² FDRE, *Regulation 283/2013* (n 7), Article 5(2)

⁹²³ FDRE, *Regulation 283/2013* (n 7), Article 8(2) (e)

⁹²⁴ Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 15

⁹²⁵ *ibid*, p.21

to deposit information on such lands in the federal land bank.⁹²⁶ The Directorate is the organ responsible for evaluating investor information and business plan and transferring land.⁹²⁷

The Investor Follow-Up and Support Directorate is charged with the duty to ensure the implementation of continental and international principles in the agricultural sector so as to ensure the country remains competitive in global agricultural products market.⁹²⁸ The Diaspora Coordination Case Team of the Directorate is responsible for promotion of the sector and encouraging and supporting investors of Ethiopian origin to invest in the sector. The Directorate is the organ responsible for identification of problems faced by investors and resolves the same. This includes the facilitation of provision of loans and incentives and infrastructure to investors engaged in the sector.⁹²⁹ The Directorate is responsible to follow-up and monitor whether or not the investors are undertaking their obligation to develop the land according to the agreement and taking corrective actions when necessary.⁹³⁰

The Agricultural Economic Zone Directorate is tasked with the duty to prepare guidelines, regulations, manuals and proclamations regarding agricultural economy zones.⁹³¹ It is duty bound to facilitate the development of agricultural economy zones and the necessary infrastructure.⁹³²

The Environmental Protection Directorate undertakes environmental audit in areas designated as agricultural land to ensure the conservation of natural resources and social and cultural values.⁹³³ It also provides education and advice to those engaged in agricultural investment to ensure they have prior knowledge of the potential impact of their activities.⁹³⁴ Apart for ensuring that investors in the sector formulate their Environmental Impact Assessment (EIA) study reports assessing their adequacy; it is expected to ensure that business plans on agricultural investments are centered on environmental protection.⁹³⁵ The Directorate suggests changes to the study

⁹²⁶ *ibid*, p.21

⁹²⁷ *ibid*

⁹²⁸ *ibid*, p.22

⁹²⁹ *ibid*

⁹³⁰ *ibid*

⁹³¹ *Ibid*, p.24

⁹³² *ibid*

⁹³³ *ibid*, p.27

⁹³⁴ *ibid*, p.22

⁹³⁵ *ibid*, p.27

reports and approves when the necessary requirements are fulfilled.⁹³⁶ In addition to ensuring compliance with code of practice, the Directorate oversees whether or not investors are operating based on the Environmental Protection Management Plan they formulated.⁹³⁷

The Legal Affairs Directorate is duty bound to ensure that agricultural investment agreements signed by the Agency fulfill national as well as international requirements. It is responsible for the preparation of contracts and agreements on agricultural investment and attends the signing ceremony. The Directorate ensures whether or not the parties to the agreements are undertaking their obligations and takes corrective actions if need be. It consolidates criminal and civil cases revolving around agricultural investments to ensure that mistakes are not repeated.⁹³⁸ It provides recommendations on the resolution of complaints and grievances presented by investors.⁹³⁹ It is also tasked with the preparation of negotiating document based on national laws and international agreements to which Ethiopia is party to.⁹⁴⁰

In accordance with its decision to closely support and follow up the undertakings investors in the regions where agricultural investments are widespread, the Agency has been recruiting undertaking activities to establish branches in three regions, namely Benishangul-Gumuz, Gambela and Southern Nations, Peoples and Nationalities (SNNPRS).⁹⁴¹

6.3. The Roles and Responsibilities of Federal and Regional Authorities in relation to Agricultural Investment

The Council of Ministers of the FDRE adopted the Agricultural Investment Land Administration Procedure Guidelines to curb the lack of interface between concerned federal and regional organs and to create conducive environment for the investors. The Guideline aimed at implementing the mandate of the Federal Ministry of Agriculture in terms of identification, taking possession and administration by clarifying the roles and responsibilities of federal as well as regional bodies and ensuring accountability. The second part of the Guideline deals with identification of land for agricultural investment and establishment of database on lands

⁹³⁶ *ibid*

⁹³⁷ *ibid*, p.22

⁹³⁸ *ibid*, p.27

⁹³⁹ *ibid*

⁹⁴⁰ *ibid*

⁹⁴¹ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Performance Report (2014/15) 9

identified for this purpose. Article 5(1) of the Guideline provides that the Ethiopian Agricultural Investment Land Administration Agency shall identify land suitable for agricultural investment in collaboration with regional states. The Agency is also given the responsibility to compile agro-ecology, soil, topography and socio-economic information on the lands. The Agency is also called upon to undertake verification studies to ensure that the land identified is free from possession of farmers or pastoralists and is not designated for particular uses by the regional state where the land is located. The Agency is responsible for the demarcation of the land and preparation of site maps for the land as per Article 5(3) of the Guideline.

Article 7 of the Guideline stipulates that the Agency is responsible for the preparing database concerning the lands transferred for investors and the land developed in a manner accessible for investors and other stakeholders. In addition, the Agency is further charged with the task of installing the data base accordingly.

The third part of the Guideline deals with issues of handing over of lands designated as suitable agricultural investment by the regions to the Ethiopian Agricultural investment Land Administration Agency. The Ministry of Agriculture is duty bound to prepare appropriate forms for facilitating the handing over and disseminating the same to regions as per Article 8 of the Guideline. The regional states are therefore expected to hand over the lands to the Agency as per the Guideline. The Ministry of Agriculture is expected to identify lands suitable for export-oriented agricultural investment and promote these to potential investors. The Ethiopian Agricultural Investment Land Administration Agency evaluates the background of the investor, the source of capital, investment permit, business plan and related documents *as per* Article 9(1)(4) of the Guideline. The Agency concludes the agreement with the investor if the documentation is believed to be genuine and gives green light for the transfer of the land to the investor. The Agency demarcates and hands over the land in collaboration with the region and follows up whether or not the land is being developed as per the business plan *as per* Article 9(1)(6).

On the other hand, administrations of the regional states are duty bound to hand over identified lands measuring more than 5000 hectares to the Agency pursuant to Article 9(2) of the Guideline. The regional administrations are expected to appointing an organ responsible for the administration of agricultural investment lands measuring less than 5000 hectares. The regional

administration must first present contiguous lands said to be suitable for agricultural investment to the cabinet of the region. The handing over is conducted by way of an agreement signed by the President of the regional states as per Article 9(2)(3). The regional administration is also expected to disseminate information on the importance of agricultural investment for the communities living within and around lands identified for this purpose in accordance with Article 9(2)(5) of the Guideline. This provision attests the possibility that lands inhabited by communities may still be identified for the purpose of agricultural investment as opposed to the claim that the land has to be free from possession as will be discussed below. The regional authority is required to transfer the land to the investors within a month in collaboration with the Ministry of Agriculture. According to the Guidelines, the regional authority is also responsible for collection of the land rental and commits the same in its entirety for the purpose of the development of the region. Moreover, the regional administration is called upon to ensure that conflicts do not erupt in agricultural investment lands and seek solution to disputes that may arise.

6.4. The Verification of Land for Large Scale Agricultural Investment

The specific rules and procedures for the identification of land for large scale agricultural purposes is determined mainly by the Council of Ministers Regulation on the Agricultural Investment Land Administration which vested the power of administering land for such purposes based on the controversial delegation to the Ministry of Agriculture.⁹⁴² Accordingly, the Ethiopian Agricultural Investment Land Administration Agency which is accountable for the Ministry is responsible for the task of identification of land to this effect.⁹⁴³ By virtue of this regulation, the Ministry is given the power to identify suitable agriculture investment lands of 5000 hectares and above.⁹⁴⁴ Nevertheless, the power vested upon the Ministry does not end there and then. This is due to the fact that the Agency is also in a position also to hand over to investors lands less than 5000 hectares with the regions and collect agro ecology, soil, topography, and geography and socio economy data where there is shown to be to *needed and*

⁹⁴² Council of Ministers *Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions* (n 8), Article 3(1), *See also* Directive on the Transfer of Large Scale Lands for Agricultural Investment to Investors, Article 6(2)

⁹⁴³ Ministry of Agriculture and Rural Development, Directive on the Transfer of Large Scale Lands for Agricultural Investment to Investors, Article 6(1)

⁹⁴⁴ *ibid*, Article 3(1) (A)

important. Furthermore, the Ministry is duty bound to ensure that the identified land is not occupancy of the farmer/pastoralist and not needed for special purposes by the regional government.⁹⁴⁵

Many governmental bodies and experts from a variety of fields are involved in the process of identification of land suitable for large scale agricultural investment purposes. Accordingly, agronomists, GIS experts, land use experts, agro-economists, environmental and bio-diversity and soil experts are involved.⁹⁴⁶

It is contended that the land allocated for large scale agricultural investment is either land under government holding or land which is “idle”, “unused”, “empty” or “unproductive”.⁹⁴⁷ As stated in the introductory chapter of this thesis, the government claims that only 20 percent of the total land in the country is “cultivated area” thereby contending that there is plenty of unused land. Consequently, millions of hectares of land have been deposited in the federal “land bank” to be allocated for agricultural investments. The claim the land designated for large scale agricultural investments is “empty” finds legal basis in Regulation for the establishment of the Agency. Article 6(1) of the Regulation stipulates that the Agency shall have the powers and duties to:

“in cooperation with regional states, identify and survey agricultural investment lands; make sure such land is free from farmers and pastoralists possession and not required by the regional state for any other specific purpose; develop land bank system and collect data on agro-ecology, soil topography, geography and socio-economy”.

The phrase “*free from farmers and pastoralists possession*” appears to suggest that the land intended for allocation for large scale agricultural investment must not be already occupied by farmers. This is further reinforced by the principle enshrined in the Council of Ministers Regulation that the land to be identified for large scale agricultural purposes must not be under the occupancy of the farmers or pastoralists. However, the use of the term “*possession*” here may be construed as to mean “effective occupation” in what appears to be echo of the concept of *terra nullius* if the land is not in effective occupation. Furthermore, the formulation of the

⁹⁴⁵ *ibid*, Article 3(1) (B)

⁹⁴⁶ Interview with Biranu Tesfaye, Large Scale Land Identification Expert & Land Identification Coordinator, Ethiopian Agricultural Investment Land Administration Agency, May 20, 2014

⁹⁴⁷ Imeru Tamrat (n 53)

provision demonstrates that the law does not entrench the concept of traditional occupation enshrined under the United Declaration on the Rights of Indigenous Peoples (UNDRIP). The non-recognition of the concept of “*traditional occupation*” would be of far reaching consequences to the indigenous peoples who inhabit the area without being in effective occupation thereof.

Interviews conducted with experts in the Ethiopian Agricultural Investment Land Administration Agency also claimed that the allocation of land to investors is guided by the following four principles.⁹⁴⁸ The land is allocated for large scale agricultural purposes by the Agency, on condition that

- It is free from farmers and pastoralists possession
- It is not protected forest area or land designated for forestry and biodiversity
- It is not wildlife area and
- Not currently or previously earmarked for investment projects.

Nevertheless, some argue that the designation of the land as “unused” is erroneous. It is contended that the term “cultivated area” is a narrow designation since it does not include land from which peasants and agro-pastoralists obtain resources vital for their survival.⁹⁴⁹ Similarly, Nalepa argues that the series of map overlays the lands characterized as “marginal” by the government are not unused and/or degraded.⁹⁵⁰ On the contrary, the lands, which are said to be “marginal”, are potentially productive lands which play vital roles in terms of supporting nomadic and semi-nomadic livelihoods as well as the maintenance of the biodiversity in the country.⁹⁵¹ In light of this, the characterization of the land as marginal by the government triggers the question in some circles whether or not there is a link between “marginal” lands and “marginal” population.⁹⁵²

The contention of the Agency that the land for agricultural investment has to be “free from farmers and pastoralists possession” is further contradicted by the very Guidelines adopted by

⁹⁴⁸ Interview with Ato Birhanu Tesfaye, Large-Scale Land Identification Expert, Ethiopian Agricultural Investment Land Administration Agency, May 22, 2014

⁹⁴⁹ Rahmato (n 32)

⁹⁵⁰ Nalepa (n 33)

⁹⁵¹ *ibid*

⁹⁵² *ibid*

the Agency. For instance, as per Article 10(1(5) and Article 10(2) (6) of the Agricultural Investment Land Administration Procedure Guidelines one of the requirements that investor must fulfill to obtain land is financial capacity to pay commensurate compensation for those communities who have to be relocated as a result of the investment.

The Ethiopian Agricultural Land Administration Agency employs air photograph, satellite imagery, field GIS, soil sample, agro-ecology, land use and socio-economic profile to identify the land for intended purpose. Some contend that the characterization of land as ‘unused’ is at times attributed to the lack of knowledge on the part of the central government about the actual land use.⁹⁵³ This is in turn imputed to the fact that land identification task is mainly carried out based on satellite imagery without actual presence on the ground. On the contrary, the Agency refutes such claims as unfounded as the mapping is complemented by field assessment which takes place following the mapping task also carried out.⁹⁵⁴

Apart from the task of identifying and taking delivery of lands deemed to be suitable for large scale agricultural investments, the Ethiopian Agricultural Investment Land Administration Agency is also given coordination and dissemination responsibilities.⁹⁵⁵ These include the identification of lands suitable for agricultural development and preparing documentation. It also includes the dissemination of documentation to investors with the cooperation of the regions, Federal Investment Agency, Ministry of Foreign Affairs and other concerned bodies. Moreover, the Agency is empowered to collect data on the lands transferred to investors and those in operation and to coordinate the federal land bank for easier supply to investor, the leadership and other beneficiaries.

Contrary to the contention on the part of the Agency that the land allocated for agricultural investments are free from use, there have been occasions where lands and sites of cultural and religious importance to the local community have been handed over to investors. Many instances of communities taking over the land allocated for agricultural investors confirm this. Many investors complain incidents of trespass by surrounding smallholders in the lands allocated to

⁹⁵³ *ibid*

⁹⁵⁴ Interview with Ato Birhanu Tesfaye, Large-Scale Land Identification Coordinator & Large Scale Land Identification Expert, Ethiopian Agricultural Investment Land Administration Agency, May 22, 2014

⁹⁵⁵ Council of Ministers *Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions* (n 8), Article 4

them. Reta Hailemariam Farm Organization and Sagela Farm Development organizations are among the companies which encountered such eventualities.⁹⁵⁶ Reta Hailemariam Farm Organization is one of the underperforming farmlands which left the land allocated to it idle for a long time. The surrounding smallholders started cultivating the land. The ensuing dispute was resolved upon the agreement between the smallholders and the local administrations held on November 7, 2013.⁹⁵⁷ On the other hand, Sagela Farm Development took 1500 hectares of land in 2009 to engage in large scale agricultural investment in Bena Tsemay *woreda* of Segen Zone in SNNPRS. However, the Masyoa people in Segen zone took over half of the land allocated to the company. The South Omo zonal administration conducted a meeting with Segen Zonal administration on the matter on February 5, 2014.⁹⁵⁸ The meeting resulted in the allocation of other lands to the farmers and for them to leave the land allocated for the company.⁹⁵⁹

Apart from allocation of land that is used for cultivation by farmers, the Ministry and the regional states have also transferred land that is of cultural and religious importance to local communities. Likewise, Jabela, Bazena and Mekacha localities in SNNPRS which are sites of religious and cultural practices of the local communities were handed over to Omo Valley Agro Industry Company.⁹⁶⁰ The dispute that arose between the company and the local community who took possession of these lands forced the authorities to allocate other replacement lands for the investor. Such irregularities demonstrate the absence of rigorous studies concerning existing uses of the lands before they are allocated to investors.

According to Article 3(1) of the Agricultural Investment Land Rent Enforcement Guideline' adopted in September 2009 by the Ministry of Agriculture and Rural Development the landscape, socio-economic, soil type, environmental Impact of agricultural investment lands shall be prepared by federal and regional organs in tandem. Land identified for agricultural investment purposes in such a manner and confirmed to be free from any possession are classified into different blocks amenable for transfer to interested investors upon confirmation that they have the necessary infrastructure and site maps are prepared as per Article 3(2) of the

⁹⁵⁶ Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 16

⁹⁵⁷ *ibid*

⁹⁵⁸ *ibid*

⁹⁵⁹ *ibid*

⁹⁶⁰ *ibid*

same Guideline. Article 5(1) of the Guideline stipulates that agricultural investment land shall be presented for lease upon the preparation of site plans and approval of this by higher echelon of the Ministry of Agriculture.

The utilization of agricultural investment land is riddled with several problems including identification and transfer of land, the lack of national database of lands identified, failure to promote the lands in question, use of technology and administrative bottlenecks.⁹⁶¹

6.5. The Establishment of Agricultural Economic Zone (AEZ)

The Ethiopian Agricultural Investment Land Administration Agency (EAILAA) is vested with the responsibility of studying, organizing and administering agricultural economy zones.⁹⁶² The term “agricultural economy zone” is defined in the same Regulations as “a land furnished with infrastructures necessary to create conducive atmosphere for investors”.⁹⁶³ It is comprised of lands designated for agricultural purposes and equipped with infrastructure including electricity and roads.⁹⁶⁴

One of the reasons for the establishment of agricultural economy zones was the need to facilitate the actual development of the land that is allocated for agricultural investment. It has been said that many investors failed to discharge their contractual obligations to develop the land with the appropriate time limit. Consequently, there is less actual development despite the allocation of sizeable land. The cause for this non-performance is the inability of the land to develop the land due to soaring land clearance costs and infrastructure. The cost of land clearance increased dramatically much higher than the cost anticipated by the investor at the time of the making of the contract. It is contended that one of the big problems with these investments is expensive initial cost.⁹⁶⁵ The investors suffer from lack of corridors for the transportation of produce.

⁹⁶¹ FDRE, Council of Ministers, Agricultural investment Land Administration Procedure Guidelines

⁹⁶²FDRE, *Regulation 283/2013* (n 7), Article 5(4); Ministry of Agriculture, the Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 9

⁹⁶³ FDRE, *Regulation 283/2013* (n 7), Article 2(6)

⁹⁶⁴ Nalepa (n 30)

⁹⁶⁵ Interview with Mr. Sahele Ebdo, EAILAA, Case Team Coordinator, Agricultural Economy Zone Directorate, December 8, 2015

The lack of infrastructure including roads, electricity, water, telecommunications and irrigation has made the implementation of the projects difficult.⁹⁶⁶ It has been said that large scale agricultural investments in Ethiopia are concentrated more in the low land periphery regions than the core highlands. These low land regions which host many of the investments including Benishangul, Gambela, Southern, Nations, Nationalities and Peoples (SNNPRS) are noted for lack of infrastructure as the bulk of the existing infrastructure in the country is located in the core highlands.⁹⁶⁷ The lack of electricity has detrimental impact upon those irrigated farmland investments which require electric power. Those investments which were assisted with generators were not able to proceed as expected.⁹⁶⁸ Other related limitations include the lack of gas stations, garages, etc. nearby the vicinity of the location of large scale agricultural investments.⁹⁶⁹ The inaccessibility and poor quality of telecommunication services also hampered the investments.⁹⁷⁰ As a result, the Ethiopian Agricultural Investment Land Administration Agency points its finger on those bodies responsible for the development of these infrastructures.⁹⁷¹ Moreover, even if investors manage to bring agricultural workers from neighboring regions due to absence of workforce in the areas of investment, these workers leave their job for lack of infrastructure and health services and clinics.⁹⁷² The failure to undertake infrastructure development in some areas has retarded the development of the lands transferred to the investors. The Ethiopian Agricultural Investment Land Administration Agency points to the case of the failure to build the Omo Bridge and its ensuing impact on the investments as an example.⁹⁷³ In some situations, monitoring of the practice of agricultural investment has also been prevented due to the inaccessibility of the farmland as a result of the lack of roads as is the

⁹⁶⁶ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 7

⁹⁶⁷ *ibid.*, (translation mine), See Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 1

⁹⁶⁸ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

⁹⁶⁹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 7

⁹⁷⁰ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

⁹⁷¹ *ibid.*

⁹⁷² Ministry of Agriculture, Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report (January 2013) 8

⁹⁷³ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 14) (Although eight companies have taken possession of 44,519 hectares of land beyond Omo Bridge, only two of the companies started production, namely Whitefield and Lucy farmland. The rest of the companies could not proceed farther than land clearance and canals. The companies were charged 4000 up to 10,000 birr to transport one tractor to the site. In addition, they have to pay 110 birr per quintal to transport their cotton produce. Nevertheless, the construction of the bridge is fully completed at present.)

case in some of the *woredas* in South Omo zone of SNNPRS.⁹⁷⁴ If the Ministry of Agriculture and the regional authorities are unable to undertake monitoring and evaluation, one can see the situation is likely to be much more complicated to the investor.⁹⁷⁵ These circumstances have prevented investors to transport machineries and workers particularly during rainy season and peak seasons when a lot of agricultural work needs to be carried out.⁹⁷⁶ The lack of electricity prevented many of the investors developing the land using the water from Omo River as they are unable to run their water pumps.⁹⁷⁷

Therefore, the government has embarked upon the establishment of agricultural economy zones on its own and furnishes the same to investors to make it easier for the investor to proceed with the investment right away.⁹⁷⁸ It is argued that the establishment of such zones will enhance the participation as well as the performance of investors.⁹⁷⁹ Interviews conducted with experts at the Ethiopian Agricultural Investment Land Administration agency revealed that three options are under active consideration as to how the establishment of the zones is going to be undertaken.⁹⁸⁰ First, the government plans to undertake the infrastructure work at its own cost. Second, the government is toying with the idea of establishing the zones with the investors in joint ventures. Third, there is also a plan to sublease the establishment of the zones to developers who are specifically engaged in this trade.

⁹⁷⁴ Ministry of Agriculture, Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report (January 2013) 3

⁹⁷⁵ The investors also suffer from lack of access to markets due to absence of infrastructure including roads, electricity and telecommunication. The problem is more severe in certain particular areas such as Almhal in Guba Woreda of Benishangul-Gumuz Regional State. Sixty per cent of the oil seed which was produced in 2013 in the regional state comes from this area. However, bringing the produce to the market proved to be a daunting task as a result of the absence of infrastructure. See Ministry of Agriculture, Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report (January 2013) 3)

⁹⁷⁶ Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 7

⁹⁷⁷ *ibid*, p.13

⁹⁷⁸ Interview with Ato Birhanu Tesfaye, Large-Scale Land Identification Coordinator & Large Scale Land Identification Expert, Ethiopian Agricultural Investment Land Administration Agency, May 22, 2014

⁹⁷⁹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 2

⁹⁸⁰ Interview with Ato Birhanu Tesfaye, Large-Scale Land Identification Coordinator & Large Scale Land Identification Expert, Ethiopian Agricultural Investment Land Administration Agency, May 22, 2014, See also EAILAA, Agricultural Economy Zone Directorate, Reviewing Literature on the Success of Economy Zone Development, Land Development Options and Land Developer to Establish Agricultural Economy Zone in Ethiopia (September 2014)

The Ethiopian Agricultural Investment Land Administration Agency made efforts to draw lessons and inspiration from the experience of enterprises engaged in agricultural development in its plan to establish the AEZ. To this effect, the Agency has been compiling the experience gained from Ethiopian Sugar Corporation and also the ongoing development of industrial zones.⁹⁸¹

With these objectives in view, the Ethiopian Agricultural Investment Land Administration Agency has identified land suitable for the purpose of Agricultural Economic Zone in two regions thus far. Accordingly, the Agency verified 70,000 hectares of land in Benishangul Gumuz. The verification of the land slated for the purpose has been fully completed.⁹⁸² The Agency has also completed 100,000 hectares of land in Gambella region. Nevertheless, about 36,000 hectares of the land which was slated for this purpose in Gambella region has been allocated by the regional government to investors. This move on the part of the regional government has triggered investigation as to why the regional government of Gambela assigned the land for investors when it was already earmarked for the purpose of Agricultural Economic Zone to investors. The investigation has led to the restitution of the land to the original purpose of Agricultural Economic Zone.⁹⁸³

It appears that the attention accorded to the development of Agricultural Economy Zones is high on the agenda. This is reflected in the feedback to the inquiry of the Agricultural Transformation Agency (ATA) of Ethiopia as regards what are the transformational agendas of the EAILAA are. Accordingly, the three transformational agendas identified by the Agency included⁹⁸⁴:-

- The development of infrastructure and capacity building for the EAILAA
- The development of Agricultural Economy Zones
- The Implementation of Out-grower schemes

⁹⁸¹ Ethiopian Agricultural Investment Land Administration Agency, Annual Performance Report 2014/15, p. 12

⁹⁸² Ethiopian Agricultural Investment Land Administration Agency, Annual Performance Report 2014/15, p. 11

⁹⁸³ Ethiopian Agricultural Investment Land Administration Agency, Annual Performance Report 2014/15, p. 11

⁹⁸⁴ Interview with Mr. Sahele Ebdo, EAILAA, Case Team Coordinator, Agricultural Economy Zone Directorate, December 8, 2015

6.6. The Procedures upon Land Transfer

Until recently, there were no standardized practices, procedures and guidelines for the transfer of land to investors in Ethiopia. The Ministry of Agriculture drafted standard guidelines for land transfers, rent assessment and land use practices, though this has not been employed by the Regional states and is not commonly practiced.⁹⁸⁵ Thus, the practice of allocation of land to investors did not follow established rules and standards.⁹⁸⁶ Thus, there was no clear mechanism for the identification and preparation, provision and transfer of land to investors.⁹⁸⁷ It is alleged that extralegal consideration are taken into account in making decisions concerning land allocations such as the influence and the financial leverage of the investor.⁹⁸⁸ This has led to the adoption of the Directive on the Transfer of Large Scale Lands for Agricultural Investment to Investors land and EAILAA has started implementing the same.⁹⁸⁹ The Directive is issued with a view to ensure the transparency, fairness of the process of land transfers to investors.⁹⁹⁰ It is contended that the Directive will also serve the purpose of identifying developmental investors from those who are engaged in land speculation and rent-seeking and ensure efficiency of the process of land transfer.⁹⁹¹

Once the investor concludes the contract, the Regional Investment Organ or with the Ethiopian Agricultural Investment Land Administration Agency, relevant bureaus and concerned *woredas* are informed to provide support for follow-up and supervision and to facilitate the actual transfer of the land to the investor. Authorities at the lowest administrative level where the land is located are requested to ensure the implementation of the contract and project activities.⁹⁹² Consequently, it is the local authorities who undergo the delicate and difficult task of dealing with grievances or claims of affected local communities and individuals in regard to the land transferred.⁹⁹³

⁹⁸⁵ Rahmato (n 32)

⁹⁸⁶ *ibid*

⁹⁸⁷ Ministry of Agriculture and Rural Development, Guideline on the Transfer of Large Scale Lands for Agricultural Investment to Investors, p.1

⁹⁸⁸ *ibid*

⁹⁸⁹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

⁹⁹⁰ *ibid*

⁹⁹¹ *ibid*

⁹⁹² Rahmato (n 32)

⁹⁹³ *ibid*

Article 7(1) of the 2009 Agricultural Investment Land Rent Enforcement Guidelines stipulates that the Ministry of Agriculture furnishes the investor with certificate of holding upon the conclusion of the agreement. Article 7(2) of the Guidelines requires the certificate to include various particulars including the name of the investor, address, the size of the land transferred, the date of issuance of the certificate and the seal of the Ministry as well as the signature of a higher representative of the Ministry. The investor is required to take delivery or possession of the land within ten days following the execution of the agreement as per Article 9(4) of the agreement. On the other hand, the provision stipulates that the agreement shall be cancelled if the investor fails to take possession of the land within one month following the making of the agreement.

6.6.1. The Negotiation and Conclusion of Agricultural Investment Agreements

The process of acquiring land for agricultural investors may be initiated in a variety of ways. The process may be initiated by an investor seeking to acquire land approaching the Agricultural Investment Agency or Regional states. One of the reasons behind the establishment of the Agricultural Investment Agency is to constitute, organize and administer agricultural economy zone.⁹⁹⁴ The constitution of the Agricultural Economic Zone demonstrates that the process of land acquisition may also be initiated by the government by way of offering incentives and attracting investors.

6.6.2. The Practice of Forced Eviction and Displacement

As discussed earlier, the Ethiopian government alleges that much of the land allocated and designated for agricultural investors is marginal. The description of the land as “marginal”, “barren” and “unusable” tends to suggest that it is uninhabited. This implies that the allocation of land to large scale agricultural investors will not involve displacement, forced removal of pre-existing inhabitants.⁹⁹⁵ Ostensibly, since “unused” land is allocated for large scale agricultural investments, the issue of expropriation of private or communal landholdings and compensation thereof is deemed to be minimal.⁹⁹⁶ As mentioned earlier, the land that is designated for large agricultural investment purpose has to “*free from farmers and pastoralists possession*” and field

⁹⁹⁴ FDRE, *Regulation 283/2013* (n 6), Article 5(4)

⁹⁹⁵ Nalepa (n 33)

⁹⁹⁶ Imeru Tamrat (n 53)

assessment has to be carried to ensure if this is indeed the case on top of desktop mapping. Therefore, the Federal Ministry of Agriculture has long disputed claims that the allocation of land to large scale agricultural investors has led to displacement of farmers as well as pastoralists. Interviews conducted with experts at the Ethiopian Agricultural Land Administration Agency revealed that the issue of compensation and substitution does not arise in the case of the practice of the Agency since land inhabited by such communities is not in the first place targeted. Nevertheless, the public outcry and media reports claim that the practice has caused mass displacement and dislocation could be as a result of the practice on the part of regional governments to allocate land for agricultural investment purposes which at times involves removal of farmers or pastoralists and hence compensation and substitution.⁹⁹⁷

The position that there are no people who have been displaced as a result of land allocation for these investments as practiced by the Ministry of Agriculture flies in the face of the truth. In spite of the allegation of allocation of “*unused*” land for agricultural purpose, there are many reports of dispossession and displacement of individuals and communities from the land they have been using.⁹⁹⁸ The presence of farmers and pastoralists can easily be established based on the studies and reports of the Ethiopian Agricultural Investment Land Administration Agency. For instance, the monitoring and evaluation report of the Agency of agricultural investment in Benishangul-Gumuz in 2013 cites the presence of farmers on the holding of the farmers as one of the predicaments investors are facing. The same report makes it clear that farmers are located on the lands allocated to investors for instance in such districts such as Dangur, Mandura and Pawe *woredas*. The report goes on to state that efforts are being made to address this challenge by identifying the causes in consultation with administrations at regional, zonal and *woreda* levels.⁹⁹⁹ It highlights the issue as one which requires utmost attention.¹⁰⁰⁰ Moreover, the presence of inhabitants in the localities handed over to companies can also be established by the accusation of the Agency against administrators of *kebeles*. In its evaluation of its performance in 2014, the Agency accused the administrators of the *kebeles* of failure to confirm that the lands

⁹⁹⁷ Interview with Ato Birhanu Tesfaye, Large-Scale Land Identification Coordinator & Large Scale Land Identification Expert, Ethiopian Agricultural Investment Land Administration Agency, May 22, 2014

⁹⁹⁸ Imeru Tamrat (n 53)

⁹⁹⁹ Ministry of Agriculture, Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report (January 2013) 7

¹⁰⁰⁰ *ibid*

are not inhabited by communities.¹⁰⁰¹ Likewise, the Agency complained that lands which are being transferred to investors prior to the demarcation and delimitation of the boundaries are causing friction with the local communities.¹⁰⁰²

As a result, it is difficult to say that sufficient efforts are made to identify legitimate tenure rights on the land before allocation of the land. Likewise, the requirements of consultation and free, prior and informed consent (FPIC) would also be affected due to the allegation that there are no populations affected by the allocation of the land to the investor. The launching of the Saudi Star large scale investment project in Abobo *woreda* of the Gambela region led to full-scale resettlement program aimed at moving populations to other designated areas.¹⁰⁰³ The villagers who were interviewed by researchers revealed that they had no prior knowledge of the project and were not consulted.¹⁰⁰⁴ Nevertheless, the regional authorities justified the measure as resettlement program meant to facilitate the provision of social services such health, education and clean water.¹⁰⁰⁵ The villagers maintained that the land was transferred to investors without their knowledge and consent.¹⁰⁰⁶ Moreover, the communities did not obtain any compensation.¹⁰⁰⁷ The inhabitants were resettled further informed the researchers that the land they were resettled in lieu of their original settlement is unsuitable for habitation and cultivation.¹⁰⁰⁸

This finding has also been reinforced by the recent study by the Ethiopian Human Rights Commission which confirmed that there was no sufficient consultation undertaken before resettlement.¹⁰⁰⁹ The study conducted by the Commission revealed that the resettlement carried out in Benishangul-Gumuz Regional State was not based on the consent of the affected population.¹⁰¹⁰ These practices amount to violations of the right against forced eviction and the

¹⁰⁰¹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁰⁰² *ibid*

¹⁰⁰³ Rahmato (n 32)

¹⁰⁰⁴ *ibid*

¹⁰⁰⁵ *ibid*

¹⁰⁰⁶ *ibid*

¹⁰⁰⁷ *ibid*

¹⁰⁰⁸ *ibid*

¹⁰⁰⁹ Yemane Nagish, 'The Resettlement Program Carried out in Benishangul-Gumuz Region Declared Involuntary' (Addis Ababa, The Reporter, May 21, 2014)

¹⁰¹⁰ *ibid*

right to natural resources, the right to property and the special relationship existing between indigenous people with their land discussed in the second Chapter of this thesis.

6.6.3. Requirements of Community Consultation, Participation and FPIC

Article 43 of the FDRE Constitution provides the right of peoples to improved living standards and to sustainable development, to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community, and the enhancement of their capacities for development and to meet their basic needs, is boldly recognized.

Community consultation, participation, free, prior and informed consent (FPIC) are important for the success of large scale agricultural investments. As a result, it becomes relevant to look at the implementation FPIC, the purpose of consultation, the inclusiveness of the participation, the provision of legal assistance and capacity development to make participation and consultation more effective.

FPIC is considered as the fundamental basis of negotiations involving the large scale acquisition of land. As has been discussed in the previous Chapters, FPIC requires that acquisition of land has to be free of coercion, prior to any authorization or commencement of activities and the provision of sufficient information on proposed projects.¹⁰¹¹

Given the fact that the land that is usually designated for agricultural investment is a subject of statutory and customary land tenure land rights, community consultation, participation, free, prior and informed consent (FPIC) are important for the success of such investments. FPIC is considered as the fundamental basis of negotiations involving the large scale acquisition of land for agricultural investments. The fundamental importance of FPIC has been discussed in the second chapter of the thesis in connection with the recognition of the concept in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), other international human rights instruments and the jurisprudence of the African Commission on Human and Peoples Rights. The need for a participatory process has also been highlighted in the Voluntary

¹⁰¹¹ Kerstin Nolte and Lieske Voget-Kleschin, Evaluating Consultation in Large Scale Land Acquisitions: Spotlight on Three Cases in Mali, p. 4 available at

<http://www.iss.nl/fileadmin/ASSETS/iss/Research_and_projects/Research_networks/LDPI/LDPI_WP_28.pdf> accessed May 21, 2014

Guidelines on the Responsible Governance of Tenure of Land (VGGT) and the Principles of Responsible Agricultural Investments (PRAI). The need for FPIC is one of the principles highlighted by the Special Rapporteur on the Right to Food as discussed in the second chapter.

The Environmental Impact Assessment Proclamation provides that the Ministry Environment and Forests or the relevant regional environmental agency is required to make any environmental impact study report accessible to the public and solicit comments on it.¹⁰¹² Thus, in addition to serving the purpose of protection of the environment, the EIA process is of crucial importance as a platform for consultation and public participation.

In regard to the objective of consultation and public participation, the Environmental Impact Assessment states that the purpose is to “solicit comments” on the study. To this effect, the Authority or the responsible organ is required to ensure the accessibility of the EIA study report to the public. The requirement of accessibility implies that the environmental impact assessment study report to be made available for the affected population in the local vernacular. The Authority or the relevant regional environmental agency is expected to ensure that the comments made by the public and in particular by the communities likely to be affected by the implementation of a project are incorporated in to the environmental impact study report as well as its evaluation.¹⁰¹³ However, the affected populations are not in a position to shape and turn down or veto the investment project.

Nevertheless, the process of implementing consultation and FPIC in Ethiopia in relation to large scale agricultural investments is fraught with problems in reality. There are no established procedures for undertaking participation and consultation in Ethiopia.¹⁰¹⁴ Moreover, Environmental Impact Assessments study reports involving agricultural investments in Ethiopia are not made public.¹⁰¹⁵ The procedures that need to be followed upon public participation and

¹⁰¹² FDRE, Environmental Impact Assessment Proclamation, Proclamation 299/2002, Federal Negarit Gazeta, Year 9, No 11, December 3, 2002, Article 15(1)

¹⁰¹³ *ibid*, Article 15(2)

¹⁰¹⁴ Tesafye Abate, ‘Environmental Impact Assessment and Monitoring under Ethiopian Law’ (2012) 1(1) *Haramaya Law Review*, p.103 available at < http://www.haramaya.edu.et/wp-content/downloads/law_journal/HU_law_journal_1.1.pdf>

consultation are not clearly laid out.¹⁰¹⁶ This *lacuna* demonstrates the need for the proclamation of clear public participation and consultation standards.

Various case studies document the failure to comply with the requirement of FPIC. Governmental authorities have been allocating land to agricultural investors without consulting with landholders regardless of the impact such allocations may entail on the livelihood and of the communities and the natural environment.¹⁰¹⁷ For instance, in its report on the evaluation of the land utilization of investors in SNNPRS, the Ethiopian Agricultural Investment Land Administration Agency admitted that no consultations have been conducted by local administrations with the local communities before the transfer of land to investors.¹⁰¹⁸ There are gaps in terms of transferring land to investors with the participation of affected communities by preparing appropriate maps in particular in case of lands riddled with boundary disputes.¹⁰¹⁹ First, despite general prohibition of forced evictions, there are many reports which show that the practice is widespread. The process of land acquisition for agricultural investment purposes in the country is characterized by coercion, intimidation or manipulation. The Federal Rural Land Administration and Land Use Proclamation and regional land administration laws vest the power of reallocating and changing communal land holdings to private holdings to the government as the owner of rural land. Holders of communal land have limited say regarding land use planning.¹⁰²⁰ There are various credible case studies documenting the transfer of land without the knowledge and consent of the communities.¹⁰²¹ There is also a tendency to view illegal land transfers undertaken under the auspices of regional authorities indifferently and failure to take timely corrective actions.¹⁰²² There are no measures taken against officials who are engaged in the practice of transferring lands illegally to investors.¹⁰²³ It is argued that this in turn is emboldening others to follow suit.¹⁰²⁴

¹⁰¹⁵ *ibid*

¹⁰¹⁶ *ibid*

¹⁰¹⁷ Rahmato (n 32)

¹⁰¹⁸ Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 17

¹⁰¹⁹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 19

¹⁰²⁰ Imeru Tamrat (n 53)

¹⁰²¹ Rahmato (n 32)

¹⁰²² EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 19

¹⁰²³ *ibid*

¹⁰²⁴ *ibid*

Second, sufficient effort is not exerted to secure the consent of the affected communities in advance of any authorization or commencement of activities and respect time requirements of consultation or consensus processes. In some cases, the local communities come to know about the transfer of the land only upon the arrival of the bulldozers of the investors.¹⁰²⁵

Third, efforts are not made to provide adequate information to the affected communities in relation to at least the nature, size, pace, reversibility and scope of any proposed project or activity, the reasons or purpose of the project and/or activity, its duration and the locality of areas that will be affected. Affected communities are not provided with clear and accurate information on the relevant facts and figures.

6.6.3.1. Purpose of Consultation and Degree of Inclusion

At this point, it is important to inquire as to what the purpose of consultation is in the process of acquisition of land for large scale agricultural investments in Ethiopia. As stated earlier, the Environmental Impact Assessment Proclamation states that the objective of the consultation is “to solicit comments” from the public. It is, however, contended that the purpose of consultation should not merely be that of provision of information. As things stand now, the process can be characterized as a one-way track. Consultation will merely be *pro forma* if it does not confer the affected local communities the opportunity to be able to shape, turn down or veto the proposed project if is not to their liking. If the consultation is meant to merely inform the local community about the proposed agricultural investment, it cannot be characterized as giving the people opportunity for active involvement.

One of the important considerations that need to be taken into account in regard to consultation is the identity of the parties taking part in the process. It has been stated that consultation and FPIC become valid only if they are conducted with “a representative institution” within the meaning of the UN Declaration on the Rights of Indigenous Peoples. The absence of full and effective participation of communities affected by the proposed agricultural investment is likely to undermine the adequacy of the degree of inclusion of the consultation. The semblance of consultations in Ethiopia usually takes place with local elites who are not necessarily representative of the affected communities, particularly women who are usually sidelined from

¹⁰²⁵ Messele Fisseha (n 94)

such discussions. For instance, the *woreda* officials of the Abobo in Gambela region confirmed they themselves were not consulted on the matter and were simply told to convey the message to the local communities about the decision through higher echelon of officials. Moreover, the officials further submit that they were informed of decision already made which demonstrates that this is only meant to provide information as opposed to two-track consultation. This shows that the process of consultation is tainted with elite capture they do not adequately involve local communities whose access to land and other productive resources may be affected contrary to the Principles of Responsible Agricultural Investments (PRAI).

Moreover, even if communities have the rights to consultation and FPIC, they do not have the capacity to exercise them effectively.¹⁰²⁶ The absence of legal empowerment and assistance to the affected communities makes FPIC quite difficult. In the absence of legal empowerment of affected populations to effectively engage in public consultations, they are likely to remain passive respondents. Therefore, this implies the need to enhance the capacity of the claim holders to assert their rights more effectively. The authority of the representative institutions of the indigenous communities in charge of administering the lands has been further weakened by the introduction of decentralized local government structures in Ethiopia.¹⁰²⁷

The allocation of land to large scale agricultural investment without appropriate consultation and FPIC requirements has led to various disagreements in Ethiopia. In many cases, the local communities have inimical relationship with the investors.¹⁰²⁸ The disaffection on the part of the public manifests itself in many ways including extreme cases of arson, robbery, general lack of security and suspicious attitudes towards investors from other areas.¹⁰²⁹ One of the major grievance on the part of companies engaged in large scale agricultural investments is the recurrent boundary disputes. The boundary disputes between investors engaged in the cultivation of coffee and the local community that often take place in Guraferda *woreda* and Bena Tsemay

¹⁰²⁶ Cotula (n 604)

¹⁰²⁷ Bekure, Solomon and Mulatu, Abebe , *Safeguarding Pastoralist Land Use Rights in Ethiopia* (2014 Conference on Land Policy in Africa) 2014, available at <http://www.uneca.org/sites/default/files/images/safeguarding_pastoral_land_use_rights_in_ethiopia_-_abebe_mulatu.pdf> accessed December 24, 2015

¹⁰²⁸ Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 11

¹⁰²⁹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 16

woreda of Bench Maji zone in SNNPRS can be cited as an example.¹⁰³⁰ Local populations are said to have settled in areas already allocated for large scale agricultural investors due to “*lack of awareness*”.¹⁰³¹ The government attempts to project these incidents as protracted and isolated caused by “*anti-peace*” and “*anti-development elements*” while at the same time claiming that the local population has failed to accommodate these investments contrary to initial expectations.¹⁰³² Local communities are accusing of failing to come forward with information to identify the culprits although they are said to have the knowledge.¹⁰³³ Investors also mention the resistance on the part of the local residents as one of the major causes of their non-performance of their contractual obligations.¹⁰³⁴ Even if the government attempted to contain the security problems in some of these areas, it proved to be very difficult to convince the investors to come back and proceed with their investment and attract new ones.¹⁰³⁵ Occasional incursions and trespass, theft of produce, arson as well as harassment and assault on agricultural workers engaged in these investment areas demonstrate the disaffection of members of the local communities in the surrounding areas.¹⁰³⁶ Apart from trespass, some farmers are accused of cultivating the land already designated for the investors.¹⁰³⁷ One of the reasons for such incidents is the concern on the part of some members of the communities that the land slated for their descendants is being transferred to investors.¹⁰³⁸ One of the factors that contribute to such problems is the failure on the part of certain investors to build the infrastructure they promised to when they start their work initially.¹⁰³⁹ The local authorities themselves are at times accused of failing to address such security problems.¹⁰⁴⁰ The police and courts are criticized for failing to prosecute and resolve those suspected of disturbance in the vicinity of the investments.¹⁰⁴¹

¹⁰³⁰ *ibid*, March 2014, p.14

¹⁰³¹ *ibid*

¹⁰³² *ibid*

¹⁰³³ Ethiopian Agricultural Investment Land Administration Agency, *Special Plan for Facilitating the Development of Land Transferred to Investors*, August 2013, p.3

¹⁰³⁴ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

¹⁰³⁵ *ibid*, p. 16

¹⁰³⁶ *ibid*, p. 21

¹⁰³⁷ *ibid*

¹⁰³⁸ *ibid*

¹⁰³⁹ *ibid*, p. 22

¹⁰⁴⁰ *ibid*, p. 17

¹⁰⁴¹ *ibid*, p. 21

Furthermore, the situation is exacerbated in areas in Gambela, Benishangul and Southern Nations, Nationalities and Peoples Regional State (SNNPRS) affected by ethnic conflicts.¹⁰⁴²

In 2014, the investigative panel established by the Board of Directors of the World Bank recounted that 26 indigenous people from Nuer group expressed their discontent over what they described as “involuntary resettlement.”¹⁰⁴³ They made it clear that the government of the regional state has disposed them of their ancestral lands without their consent.¹⁰⁴⁴

According to the Ethiopian Agricultural Investment Land Administration Agency, one of the reasons for the dismal outcome of large scale agricultural investments is attributable to the limited awareness on the part of the public about the benefits of these investments.¹⁰⁴⁵ Consequently, local communities displayed negative attitudes about these investments in their localities. The difficulty of securing the blessing and acceptance of the part of local communities can be considered as one of the major causes of the dismal performance of the investments.¹⁰⁴⁶ The variance between federal level and local level authorities and officials is indicative of lack of interface between them. Authorities at the local level oftentimes are the target of criticisms for failing to contain local discontent and at times being privy and complicit with individuals who display negative attitudes towards large scale agricultural investments. In particular, authorities at the local level are accusing of failing to educate the public about the importance of the investments.¹⁰⁴⁷ At times, the local authorities at *woreda* and *kebele* levels are accused of harboring attitudes which are inimical to the investments thereby sabotaging the investments.¹⁰⁴⁸ In a related manner, local authorities are said to have neglected the work of supporting large scale agricultural investments as if this is the realm of the federal government.¹⁰⁴⁹ In other words,

¹⁰⁴² *ibid*, p. 16

¹⁰⁴³ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

¹⁰⁴⁴ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

¹⁰⁴⁵ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁰⁴⁶ *ibid*

¹⁰⁴⁷ *ibid*

¹⁰⁴⁸ Interview with Ato Birhanu Tesfaye, Large-Scale Land Identification Coordinator & Large Scale Land Identification Expert, Ethiopian Agricultural Investment Land Administration Agency, May 22, 2014; See also Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁰⁴⁹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

local authorities, particularly, those at *kebele* level are said to have sided with what the Ethiopian Agricultural Investment Land Administration Agency calls “*anti-development elements*.”¹⁰⁵⁰

On top of that, in some instances, members of local communities are said to have been engaged in “*illegal*” activities.¹⁰⁵¹ The repercussions of failure to implement FPIC requirements in the acquisition of land for large scale acquisitions has led to disaffection on the part of affected populations. The following incidents are selected to illustrate the reactions of the local communities in response to the irregularities in terms of the transfer of land without consultations and FPIC.

This explains the reason why the Ethiopian Agricultural Investment Land Administration Agency decided to establish Land Administration and Protection Office under its auspices.¹⁰⁵² The Office is charged with the duty to ensure that the land deposited within the federal land bank is not taken over by “*illegal*” elements.¹⁰⁵³ The Office is also responsible for follow-up, support and monitoring of the utilization of the land transferred to investors. It is the same Office which is responsible for the actual hand over of the lands for investors.¹⁰⁵⁴ Apart from this the Office is required to identify and solve problems encountered by investors and report same when they are beyond its capacity to do so.¹⁰⁵⁵

6.7. Transaction Transparency

Transaction transparency in large scale agricultural investments is described as of fundamental and critical importance.¹⁰⁵⁶ Transactions involving large scale agricultural investments are initiated upon the applications and proposals of individual investors.¹⁰⁵⁷ Transactions involving large scale agricultural investments are conducted through negotiations between concerned government agencies and investors.¹⁰⁵⁸ Contracts pertaining to large scale agricultural investments need to be publicly disclosed as they since they affect public interest. Thus, as a

¹⁰⁵⁰ *ibid*

¹⁰⁵¹ *ibid*

¹⁰⁵² Ministry of Agriculture, The Organization of Ethiopian Agricultural Investment Land Administration Agency (April 2013) 33

¹⁰⁵³ *ibid*

¹⁰⁵⁴ *ibid*

¹⁰⁵⁵ *ibid*

¹⁰⁵⁶ Mann (n 845)

¹⁰⁵⁷ Imeru Tamrat (n 53)

¹⁰⁵⁸ *ibid*

party to the contracts, the government is duty bound to ensure that the contracts are made accessible to the public free of charge and translated into local vernaculars.¹⁰⁵⁹ The disclosure of agreements is also justified by the fact that these are the meager source of detail about the deals due to the inadequacy of national legislation pertaining to these issues.¹⁰⁶⁰ However, the standard form contracts currently in use in Ethiopia for this purpose do not stipulate the transparent disclosure of the contract to the general public and to the local community through their local vernacular. Thus, the failure of the contracts to provide for the requirement of transparency of payments is one of their drawbacks.

In spite of the fact that the issues involved in these contracts require public scrutiny, the transactions are not made officially available and they are not subject to public oversight.¹⁰⁶¹ Not much is known about the exact terms of large scale agricultural investment deals in the country. The negotiation of the deals in Ethiopia is not sufficiently transparent. The representatives of local community have very limited or no say in the negotiation of the contract. The contracts themselves are not made publicly available and access to contractual documentation is very limited. The Ethiopian Agricultural Investment Land Administration Agency claims that it is transparent since some of the contracts are made available online. Although this is commendable in its own rights, the online disclosure of contracts is not sufficient. To begin with the information which is made publicly available online is not up-to-date and accurate. Thus, it is not reliable source of information always as it does not disclose all contracts and all relevant information. Second, online posting of contractual documentation is inaccessible for local communities who are far removed from internet services although they are the ones directly affected by these transactions.

As discussed earlier, one of the founding principles of the Voluntary Guidelines on the Responsible Governance of Tenure is that of the prevention of tenure disputes, violent conflicts and opportunities for corruption, the opaque nature of transactions involving the acquisition of land for large scale agricultural purposes creates a situation where corruption thrives. Access to information is also affirmed under Article 29 of the FDRE Constitution and Ethiopia's Freedom

¹⁰⁵⁹ International Land Coalition, Oakland Institute and Global Witness (n 424)

¹⁰⁶⁰ *ibid*

¹⁰⁶¹ Imeru Tamrat (n 53)

of the Mass Media and Access to Information Proclamation.¹⁰⁶² The absence of disclosure of contractual documentation also stokes false information. This lack of transparency has created the opportunities for some of the political elite in the regional states to acquire land themselves.¹⁰⁶³ In addition, authorities at the local level are also said to have collaborated with those who take land illegally by taking no actions against such individuals.¹⁰⁶⁴ The inaction to take measures against those officials who transfer land illegally also fosters corruption by inducing others to follow suit.¹⁰⁶⁵ The same problem is also manifested by the failure of local authorities to prevent companies which take actual control of land which is much more than stipulated in the agreements.¹⁰⁶⁶ In some localities, professionals hand over illegal site maps based on flawed business plans in collusion with investors.¹⁰⁶⁷

In many of the Regional states the allocation of land for large scale agricultural purposes is conducted through negotiations.¹⁰⁶⁸ The Amahra National Regional State can be considered an exception since it has introduced a system whereby land is allocated for the investors through auction process.¹⁰⁶⁹ A directive issued by the Regional State to implement land administration laws outlines in detail the criteria for the assessment and selection of investment proposals.¹⁰⁷⁰

The information concerning the assessment and selection of investors in agricultural investment is rarely made public.¹⁰⁷¹ In situation where information is made public, it is very sketchy and does not show the whole picture.¹⁰⁷² Due to reasons of the need to ensure the confidentiality of the content of investment proposals, information concerning such matters is shrouded in secrecy.¹⁰⁷³ Although Ethiopia's candidacy for membership in the global Extractive Industries

¹⁰⁶² FDRE, Freedom of the Mass Media and Access to Information Proclamation 590/2008, Federal Negarit Gazeta, Year 14, No 64, December 4, 2008

¹⁰⁶³ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁰⁶⁴ *ibid*

¹⁰⁶⁵ *ibid*

¹⁰⁶⁶ *ibid*

¹⁰⁶⁷ *ibid*

¹⁰⁶⁸ Imeru Tamrat (n 53)

¹⁰⁶⁹ *ibid*

¹⁰⁷⁰ *ibid*

¹⁰⁷¹ *ibid*

¹⁰⁷² *ibid*

¹⁰⁷³ *ibid*

Transparency Initiative (EITI) was approved in March 2014¹⁰⁷⁴, it may not accommodate land transparency as its focus is mainly on extraction of resources in the ground and not above ground as such.

The Ethiopian Agricultural Investment Land Administration Agency (EAILAA) took one major step in the right direction in connection with transaction transparency. In December 2014, the Agency adopted what is referred as “Client Charter”. The Client Charter is adopted in line with Article 12(1) and (2) of the Constitution of the FDRE which enshrine the principles of transparency and accountability. Moreover, Article 11 of the Part Three of Mass Media and Access to Information Proclamation (Proclamation 590/2008) is also invoked as the legal basis for access to information in the Client Charter. The Client Charter aims at ensuring the satisfaction of investors and other clients thereby ensuring the contribution of the sector to the overall national economy. The Charter lists the services rendered by the Agency and the internal and external stakeholders involved in its work. The Charter further explains the different services rendered by the major Directorates of the Agency, the time limit within which the service has to be provided and the different requirements that clients are expected to fulfill to obtain the services.¹⁰⁷⁵

Conclusion

The chapter has attempted the flaws in the processes leading up to the acquisition of land for agricultural investments in Ethiopia. The process of land acquisition in Ethiopia appears to flaunt many of the important requirements of responsible agricultural investments. There are limitations as regards the screening which agricultural investment projects should be subject to EIA. The review of the environmental impact assessment and decision-making appears to be subject to broad and vague administrative discretion. The absence of clear criteria to determine whether or not agricultural investment projects require EIA and the absence of clear criteria to determine the licensing of environmental consultants to undertake EIA manifests the poor coordination of the

¹⁰⁷⁴ Ethiopia: Extractive Industries Transparency Initiative (EITI) Approves Ethiopia's Candidacy, available at <<http://eiti.org/ethiopia-extractive-industries-transparency-initiative-eiti-approves-ethiopia-candidacy>> accessed on September 1, 2014

¹⁰⁷⁵ Ministry of Agriculture, Ethiopian Agricultural Investment Land Administration Agency, Client Charter (December 2014)

EIA process in Ethiopia.¹⁰⁷⁶ This demonstrates the drawbacks in the implementation of the EIA legislation and procedures in Ethiopia in relation to agricultural investment. Thus, it appears that the affected populations remain to be by and large passive respondents in the EIA process.

The contention that no population is displaced as a result of large scale agricultural investments flies in the face of justice as the sheer number of studies and reports amply document several instances of forced eviction. Consequently, many of the requirements that need to be observed in relation to forcible eviction are not complied with in practice. Nevertheless, the contention that the land allocated is vacant and inhabited implies the absence of adequate opportunity for consultation and the implementation of FPIC. Participation and consultation are among these important requirements for fair contractual arrangements for responsible agricultural investments. The Chapter has demonstrated that the process of consultation, participation and FPIC is not sufficient, adequate and inclusive. The process of concluding contractual arrangements involving agricultural investments is not also sufficiently transparent. The inclusion of the affected population in decision-making processes falls short of international standards. In actual fact, the implementation FPIC does not conform to international norms. The absence of sound consultation and implementation of FPIC undermines the soundness of the process of acquisition of land for large scale agricultural processes. The incidents involving the arrest and detention of members of the local community also demonstrate the failure to comply with the quartet layers of obligations of States Parties to the International Bill of Human Rights and the United Declaration on the Rights of Indigenous Peoples (UNDRIP).

Apart from the fact that transactions are not undertaken and negotiated in a transparent manner, the contractual arrangements are not disclosed and made accessible to the public. The fact that the conclusion of large scale agricultural investment deals is shrouded in secrecy means that this fundamental and critical component is missing. The failure to comply with this critical element undermines the credibility of the deals. The fact that the process of land acquisition for agricultural investment does not follow international law and recommendations also makes it

¹⁰⁷⁶ Tesfaye Abate, 'Environmental Impact Assessment and Monitoring under Ethiopian Law' (2012) 1(1) Haramaya Law Review <http://www.haramaya.edu.et/wpcontent/downloads/law_journal/HU_law_journal_1.1.pdf>

question the extent to which such investment is likely to benefit local community as well as the national public.

Chapter Seven

Contractual Equilibrium of Agricultural Investment Agreements and Performance of Obligations

Introduction

As indicated earlier, the establishment regulation of the Ethiopian Agricultural Investment Land Administration Agency provides the power to conclude the contracts involving the transfer of land to agricultural investors. As discussed in the introductory chapter of this thesis, the principal objectives that the Ethiopian government aims to attain by pursuing this avenue include fiscal and non-fiscal (non-monetary). These include production of export crops and increasing the foreign earnings of the country, expansion of the production of crops needed for agro-industry, benefiting local communities by way of the construction of infrastructure and social assets including health posts, schools and access to potable water, provision of the opportunity for technology transfer and promotion of energy security.¹⁰⁷⁷ If these are the objects that agricultural investment is expected to accomplish, then utmost effort must be made to ensure the contracts embody these ideals.

Large scale agricultural investments have been promoted in the hope that they bring about enforceable and tangible benefits to the local community and the host country as a whole. It is obvious that this cannot be achieved without painstaking design of the investment contracts. Investment contracts need to be designed in such a manner so as to ensure the attainment of the environmental, social and economic objectives of the country. Effort must be exerted to ensure that the investment contracts adequately reflect the interest of the country as a whole and that of particular local communities where the investment actually takes place.

In the absence of detailed legal architecture for governing large scale agricultural investments in Ethiopia, the formulation of comprehensive contractual agreements becomes pivotal. The formulation of overly simplified and vague is a recipe for disputes and disagreements. Contracts are instrumental for defining the terms of large scale agricultural investments including the

¹⁰⁷⁷ Rahamato (n 32)

manner how risks, costs and benefits are determined.¹⁰⁷⁸ The terms of large scale agricultural investments bear significant effects on environmental, social, cultural and food security and nutrition of local communities.

7.1. Standard Form and Other Contracts

The agreements employed in the case of large scale agricultural investments can be broadly classified into two. The first category of agreements is the contracts used by regional governments. As opposed to the contracts employed at the federal level, these agreements display variations from one another depending upon the particular circumstances of the investor. Even though, the approach by the regional governments affords more freedom of contract, there are occasions whereby investors manage to insert provisions and stipulations which harm the interests of the regional state as evidenced by the case of FRI-EL Green power SPA case discussed below in relation to dispute settlement.

The second category of agreements is the template contracts used by the Ministry of Agriculture comprised of nine pages with large scale agricultural investors.¹⁰⁷⁹ The contracts are entitled “Land Rent Contractual Agreements”. By and large, the agreements are standard form contracts or contracts of adhesion which do not allow much room for negotiation for the companies. In other words, the terms appear to be more of take it or leave it. Owing to the fact that land in Ethiopia is under state ownership, it is the federal government which concludes the investment contracts with the investors where the land allocated exceeds 5000 hectares through the medium Ethiopian Agricultural Investment Land Administration Agency. Nevertheless, the inclusion of a range of actors impacted by agricultural investment in the pre-contractual phase is a predictor of the success of the investment contracts. Such comprehensive approach is needed for the successful accomplishment of the investment contracts.

¹⁰⁷⁸ Cotula (n 604)

¹⁰⁷⁹ In spite of the fact that many of the investors engaged have already concluded contracts prior to embarking upon their agricultural investment, there were also cases whereby some commenced the work prior to the conclusion of contracts. This was evidenced by the evaluation report of the Ministry of Agriculture in January 2013 in relation to its report of the agricultural investment monitoring activities in Benishangul-Gumuz. *See* Ministry of Agriculture, Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report (January 2013)

The use of standard contracts at the federal level may have its own advantages and disadvantages. The fact that the Ethiopian Agricultural Investment Land Administration Agency can determine the terms of the contract, may give much more leverage and bargaining power. However, the use of contracts of adhesion may not always be amenable to accommodate specific realities of a given situation. By their very nature, contracts involving agricultural investments vary depending upon the identity of the investor, regional government where the investment is intended to take place, the local community and tribal leaders, local communities inhabiting the vicinity of the farmland, and individuals. It is very likely that all these actors have different issues and approaches towards the proposed agricultural investment. Thus, it is arguable whether or not the use of standard form contracts to agricultural investments is likely to accommodate the range of peculiarities the investments engender.

The contracts underlying large scale agricultural investment deals in Ethiopia appear to be simple and investor-orientated treaties which do not impose cumbersome obligations on the investors. The contractual agreements are overly brief and imprecise. Thus, the contracts suffer from the criticism that they are skeletal agreements for agricultural investments.¹⁰⁸⁰ This sharply contrasts with the requirement that the terms of a contract need to be clearly defined. The contracts are not sufficiently sophisticated. The contracts also reflect poor and rudimentary draftsmanship. It may be said that the original contracts may be subject to subsequent variations and clarification. Nevertheless, the allocation of land based upon ill-defined contractual terms and investor obligations reflects adversely on possible gains from subsequent negotiations. The use of the same contract template irrespective of the fact the tremendous variations in terms of the land size allocated. The absence of sufficiently defined and clearly specified contractual terms in the case of larger areas of land allocated is highly likely to have adverse implication on economic, social and environmental aspects.¹⁰⁸¹ Particularly, overly brief contracts nature of the contracts makes it difficult to ensure that costs and risks are properly managed, distributed and benefits envisaged accrue.¹⁰⁸² This, however, does not imply that longer contracts necessarily bear beneficial terms. As a result, there are instances whereby lands have been transferred to investors before sufficient effort is made to ensure that such lands are free from possession by

¹⁰⁸⁰ Mann (n 845)

¹⁰⁸¹ Cotula (n 604)

¹⁰⁸² *ibid*

dwellers and before they are properly delimited.¹⁰⁸³ Such transfers lead to conflicts with the local communities thereby delaying the progress of the investment.¹⁰⁸⁴

7.2. The Rights and Obligations of the Investors

7.2.1. The Rights of the Investor

Investors acquire long-term leases. According to the new guidelines said to have been formulated by the Ministry of Agriculture, the size of the land that will be transferred to the investor depends upon the nature of the crop they wish to cultivate.¹⁰⁸⁵ Thus, investors aspiring to grow biofuel plants such as palm oil will be a maximum size of 50, 000 hectares of land.¹⁰⁸⁶ Investors seeking to grow cereals, oil crops or agro-industry crops including cotton and sugar cane will be awarded a maximum size of 20,000 hectares of land. On the other hand, investors who seek to cultivate tea and coffee will be assigned a maximum size of 5,000 hectares of land.¹⁰⁸⁷ Nevertheless, the practice on the ground is at variance with the guidelines suggesting that the guidelines are not in fact meant to be applicable. This can be established by the fact that Saudi Star, a company which acquired 10,000 hectares of land in Gambela in 2008 has been allocated further 129,000 hectares of land to grow rice for export to Saudi Arabia.¹⁰⁸⁸ The company is aspiring to obtain a total size of 500, 000 hectares of land in Gambela, Benishangul and Oromia Regional States with the aim of producing one million tons of rice and earning one billion dollars in exports yearly.¹⁰⁸⁹

Nevertheless, the Ethiopian Agricultural Investment Land Administration Agency (EAILAA) appears to have introduced land ceilings. The Agency reduced the size of the land that is allocated for a given investor to a maximum of 5000 hectares of land. However, this size can be further extended if the investor has managed to have developed the land allocated. The decision to introduce land ceilings was prompted by the fact that many investors who took much larger tracts of land failed to develop much of the land they took delivery of.

¹⁰⁸³ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 18

¹⁰⁸⁴ *ibid*

¹⁰⁸⁵ Rahmato (n 32)

¹⁰⁸⁶ *ibid*

¹⁰⁸⁷ *ibid*

¹⁰⁸⁸ *ibid*

¹⁰⁸⁹ *ibid*

The standard form contracts outline the obligations of the lessor so that the investor can engage in agricultural investment. Article 6(1) of the contract states that the lessor shall be obliged to deliver and handover the vacant possession of the leased land free of impediments to the lessee within thirty days after the investor has effected down payment. On the contrary, Article 7 (3) of the contract requires the investor to deliver the leased land within thirty days following the making of the agreement.¹⁰⁹⁰ Thus, there is a discrepancy when it comes to the time frame for the handing over of the leased land between the two provisions. This is one of the many instances of poor draftsmanship that the contracts are riddled with.

Article 6(3) of the contract goes on to provide that the lessor assures the lessee that there are no legal or other impediments whatsoever in the lessees clearing the land leased land and using the same for the investors activities on the land which is the subject matter of the agreement including ancillary and incidental thereto. Article 6(6) goes on to provide that the lessor shall ensure that the investor shall enjoy peaceful and trouble free possession of the premises and it shall be provided adequate security, free of cost, for carrying out in its entire activities in the said premises, against any riot, disturbance or any other turbulent time other than force majeure during the period of the lease. Some commentators point out that Article 6(6) is problematic in that it ascribes police powers to the lessor, the Ministry of Agriculture. Article 7(1) of the contract also obliges the lessor to handover the site plan of the leased land title certificates within thirty days following the conclusion of the agreement.

7.2.1.1. The Scope of the Rights Transferred

The Preambles of the standard form contracts stipulates that the lessor, the Ministry of Agriculture, shall provide the required land for the lessee. Similarly, common Article 1(1) of these contracts alludes to the establishment of a long term land lease of rural land for farming and related activities. Article 16 of the standard form contracts stipulates that the site plan of the leased land is one of the documents to be appended. Nevertheless, the agreements are oftentimes criticized for not clearly identifying the land transferred to the investors. There are many cases of transfers of lands the size of which is not clearly known. The failure to clearly identify the lands transferred in the contracts has long been a source of contradiction with local community

¹⁰⁹⁰ Nevertheless, the lessor cannot be held liable for delay caused due to reasons attributed to the investor as per Article 7(2) of the agreement.

impeding the process of agricultural investment.¹⁰⁹¹ The fact that land transfers take place without corresponding site maps prevented the investors to proceed with their work and triggered several border disputes.¹⁰⁹² There is a practice of measuring land based on guesswork and assumptions.¹⁰⁹³ The variance between the land under the actual control of the investor and the size indicated in the contract is partly explained due to the shift in the practice of allocation of large scale agricultural land from the regional states to the federal Ministry of Agriculture. For instance, Verdanata Harvest Plc, an Indian-owned company, was allocated 5000 hectares of land by the regional administration in Gambela Regional State, Mezhenger Zone, Godere *Woreda*, Gumare and Kabu *kebeles*. However, when this contract was replaced by an agreement with the Ministry of Agriculture following the decision to delegate the administration of large scale agricultural land to the federal level, the land allocated to the company was reduced to 3,012 hectares. In spite of this reduction, the company is reported to have kept on the original 5000 hectares of land.¹⁰⁹⁴ This demonstrates the fact that the company was in a position to exercise more rights than was granted by the agreement. In a similar vein, the Agency admitted cases of lands being transferred to investors prior to the demarcation and delimitation of the boundaries.¹⁰⁹⁵ The boundary disputes between investors and the local community in Guraferda *woreda* and Bena Tsemay *woreda* of Bench Maji zone in SNNPRS are also caused by the failure to properly demarcate the land allocated.¹⁰⁹⁶ In addition, there have been instances whereby the same parcel of land has been handed over to more than one investor triggering disputes.¹⁰⁹⁷ This situation occurs when the land which is been transfer to the investor by the federal Ministry of Agriculture is handed over to another investor at the regional level.¹⁰⁹⁸ Such discrepancies demonstrate the lack of interface between the Ethiopian Agricultural Investment Land Administration Agency and the regional administrations.¹⁰⁹⁹

¹⁰⁹¹ EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities (Guideline) Manual, p.7

¹⁰⁹² *ibid*

¹⁰⁹³ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁰⁹⁴ Wudineh Zenbe, Residents in Gambela set Indian-owned Farm on Fire (Addis Ababa, The Reporter, 26 October 2013); *See also* EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 11

¹⁰⁹⁵ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁰⁹⁶ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 14

¹⁰⁹⁷ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁰⁹⁸ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁰⁹⁹ Some of the agricultural investors attribute their failure to develop the land and to cultivate it due to the fact that it takes a long time to have a document certifying their possession by the appropriate body. The investors are not

In its report on the evaluation of the practice of agricultural investors in Benishangul-Gumuz, the monitoring team stated that it was unable to carry out its monitoring and evaluation in relation to six of the farmlands since it was unable to locate the farmlands.¹¹⁰⁰ Thus, if the Ministry of Agriculture and the Regional authorities themselves are unable to locate the farmlands leased, this demonstrates the lack of clear definition of the object of the contract. Furthermore, there have been cases whereby plots of land which were already allocated to large scale agricultural investors were subject to distribution by the local regional officials. For instance, officials in Itang *woreda* in Gambela regional state illegally distributed 27,000 hectares which was leased to an Indian company, namely BHO Bio-Products.¹¹⁰¹

Article 1(2) of the standard form contracts stipulates that the agreement shall be applicable to the full and exclusive use of that parcel of rural land. The agreements do not expressly exclude that the rights transferred do not extend to subsurface resources. Although it may sound obvious it would have been advisable if the agreements are quick to add that the rights being transferred to the agricultural investor do not extend to subsurface resources.¹¹⁰² The term “full and exclusive use” can lead to potential ambiguities and it calls for clarification. It appears that the term “exclusive” implies that local inhabitants may be prohibited for having access to the land in question and also right of way. It may be questioned whether or not exclusivity is always necessary or whether some level of accommodation of the local community to have access to the fields without interfering with the activities of the investor may be contemplated.

In spite of the fact that these standard form contracts highlight the transfer of land as such they sidestep the fact that the contract is also about extraction of water.¹¹⁰³ Large scale agricultural

provided with site plan of the land allocated right away upon conclusion of the contract. Thus, the only item of evidence in their custody to demonstrate the lease rights over the land is the contract they signed with the EAILAA. This is because the document certifying their lease rights over the land must be endorsed by the regional cabinet where they operate.

¹¹⁰⁰ Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in Benishangul Gumuz (January 2013) 3

¹¹⁰¹ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

¹¹⁰² Mann (n 845)

¹¹⁰³ *ibid*

investments take place in close proximity to eight of the twelve international rivers in Ethiopia as shown in the figure below.¹¹⁰⁴

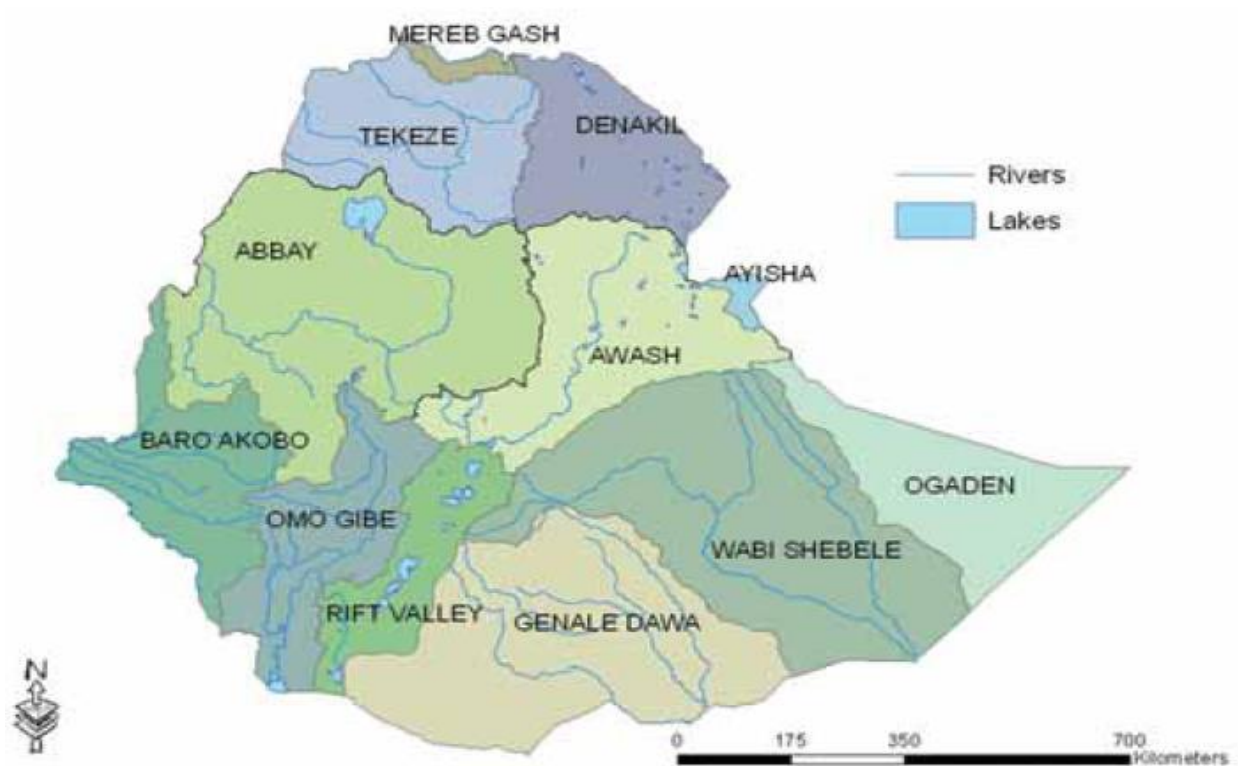


Figure 1: Trans-boundary Rivers in Ethiopia

Accordingly, it is contended that one of the drawbacks of these standard form contracts is the scant attention they accord to the extraction of water, the most valuable commodity on the plant at present.¹¹⁰⁵ Thus, the contracts overlook the extraction of water in spite of the fact that the transfer of land is of little value in the absence of water. The consideration of the extraction of water among the rights transferred to the investor would also give the opportunity to consider these contracts as part of contracts in the extractive industry since they involve extraction of water. The characterization of large scale agricultural investments as mere land leasing is

¹¹⁰⁴ Mr. Addisu Negash, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency, *Presentation in relation to the Consultative Workshop on Social and Environmental Code of Practice* [held on December 15, 2015]

¹¹⁰⁵ *Ibid*, See also *See also* Jacur F. Romanin, Bonfanti Angelica and Seatzu Francesco (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill Nijhoff 2015) 93

erroneous. This in turn implies inspiration can be drawn from the principles of contracts in the extractive industry in the formulation of contracts involving agricultural investments.¹¹⁰⁶

This is particularly true in areas which are noted for lack of rain. In these areas land is allocated for companies in consideration of irrigation water available in the area from rivers in some cases from nearby lakes. Irrigation water is allocated for the investors even at the expense of local communities. This can be illustrated by the cases from Daramalo *woreda* and Natsemay *woredas* in SNNPRS. In Natsemay *woreda* in SNNPRS in the area bordering South Omo and Segen Zones, the activities of one of the large scale agricultural investors was suspended as a result of the fact that local community took over 500 hectares of the land allocated to him and the irrigation canal was blocked.¹¹⁰⁷ In Daramalo *woreda* in Gamo Gofa Zone, the local community started using the irrigation canals developed by the investor.¹¹⁰⁸ Even if the investor was allocated land assuming that the company can make use of water from the river inside the *Nach Sar* National Park in SNNPRS, the investor was prevented from using water from the river in the park by Ethiopian Wildlife Conservation Authority leading to suspension of the activities of the investor.¹¹⁰⁹ This case demonstrates the lack of collaboration between the authorities responsible for the allocation of land and other relevant actors. It appears that Ethiopian Wildlife Conservation Authority prohibited the use of water from the river inside the park due to its adverse impact on the wildlife in the park and the park in its entirety. It also shows the need for collaboration in the process of allocating land for investors. If the investor is not in a position to make use of the water from the river, the land should not have been allocated for large scale agriculture as the area is known for shortage of rainfall.

In addition, in spite of the centrality of the allocation of water rights, the standard form agreements are silent on this issue. The allocation of land for agricultural investment also implies the allocation of water rights. In view of this fact, the standard form contracts should include specific provisions on the allocation of water rights.¹¹¹⁰ This means the investors should also be required to pay consideration for water they use in addition to land rentals.

¹¹⁰⁶ *ibid*

¹¹⁰⁷ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013)7

¹¹⁰⁸ *ibid*

¹¹⁰⁹ *ibid*

¹¹¹⁰ Mann (n 845)

7.2.2. Land Ceilings

Article 10 of the 2009 Agricultural Investment Land Rent Enforcement Guidelines also introduces land ceilings of the land to be allocated for investors. Article 10(1) stipulates that the land ceilings are determined based upon the nature of the production in question i.e. whether it is the production of food crops, animal production, vegetables or fruits, etc. In addition, the provision goes to state that the capacity of the project in terms of capital and skilled manpower, the number of job opportunity it is likely to generate, the fertility of the land are also taken into account. The land ceilings introduced based upon the aforementioned considerations takes the following form.

Table 6: Ceilings of Land for Agricultural Investment

No	Type of the Investment	Maximum Land Ceilings in Hectares
1	Biofuel Plants	20,000
2	Palm Oil	20,000
3	Rubber Tree	10,000
4	Cotton	20,000
5	Forestry	20,000
6	Sugar Cane	20,000
7	Coffee	5000
8	Tea	5000
9	Animal Fodder	5000
10	Crop Production	10,000
11	Oilseeds	5000
12	Vegetable	150
13	Fruits including <i>enset</i>	5000
14	Animal Production	30
15	Animal Fattening	5
16	Select Seed	5000
17	Wild Animals	50
18	Tobacco	5000

Source: Ethiopian Agricultural Investment Land Administration Agency

Despite the land ceilings shown in the table above, Article 10(1) of the Agricultural Investment Land Rent Enforcement Guidelines provide exception whereby more land may be provided for investors in view of their capital, developmental endeavor, and capacity to develop the land. The provision also factors the extent to which the investor managed to develop the land already transferred. If the aforementioned considerations are fulfilled, the investor may be allocated more land equivalent to the size of the land the investor already developed.

7.2.3. The Obligations of the Investor to Develop the Land

Article 4(3) of the standard form contracts stipulates that the investor has the obligation to develop the land within six months from the date of the making of the agreement or from the date of the receipt of last of all the clearances from government and other agencies are received by the lessee whichever is latter. Article 4(4) of the contracts goes on to state that the investor has the obligation to develop one fourth of the leased plot of land within the first year from the date of signing the contract or from the date of the receipt of all the clearances from the government and other agencies, as may be required are received by the lessee whichever is later. The same provision goes on to state that the investor is under obligation to develop the entire plot of leased land within a period of not more than four starting from the date specified above. To this effect, the investor is required to provide correct data and investment activity reports upon the request by the Ministry of Agriculture as per Article 4(6) of the agreement.

In the same vein, Article 11 of the Agricultural Investment Land Rent Enforcement Guidelines provides that any investor who took delivery of land has to develop at least one third of the land in the first year since taking delivery. The provision goes on to stipulate that the investor is duty bound to develop the total size of the land within five years.

In spite of this, many of the investors have failed to undertake the obligation to develop the land they obtained.¹¹¹¹ It has been said that only about 20 up to 25 per cent of the total land area which has been allocated to investors both by regional and federal levels has been developed by

¹¹¹¹ The Minister of Agriculture of the FDRE, Mr. Tefera Derbew is also quoted as saying that he expressed his dismay to Indian media outlets over the dismal performance of large scale agricultural investors including Karuturi Global Limited, Saudi Star and others. He made it a point that his expectations from such large scale agricultural investors turned upside-down; See also *Agricultural Investment Land Utilization Reform Follow-up and Support Activities (Guideline) Manual*, p.7

the investors.¹¹¹² When this figure is disaggregated, only 34 per cent of the land transferred at the federal level is developed.¹¹¹³ The actual size of the land which is actually developed is said to be within the range of 30-35 per cent of the total land transferred.¹¹¹⁴ Nevertheless, this figure itself may require further verification. It is further submitted that only 20 percent of the investors licensed to engage in the sector ventured into actual development of the land among more than 7300 investors who have been licensed to engage in the sector.¹¹¹⁵ The consideration of the extent of the land developed by investors in the three key regions where much of the large scale agricultural investment is located is discussed below to make this case.

In compiling its report on the evaluation of the performance of agricultural investors in Benishangul-Gumuz regional state, the Ministry of Agriculture bemoaned the practice of allocating land much bigger in size to investors with lesser capital.¹¹¹⁶ The report investigated the performance of 146 investors in the region who took a combined land area of 84,351 hectares.¹¹¹⁷ However, these investors managed to develop only 20,338 of the total land area they took over.¹¹¹⁸ This means the investors in this region managed to develop only 24.17% of the land in their possession during 2013, a slight improvement from 18.15% the previous year.¹¹¹⁹ Only 17 of the investors were found to have developed more than 70% of the land transferred to them in the same regional state.¹¹²⁰ These figures demonstrate the substantial non-performance on the part of the investors in terms of developing the land in their actual control.

In Gambela, 231 investors who have been provided with land were not engaged in the actual development of the land transferred to them according to an assessment made in January

¹¹¹² Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹¹¹³ EAILAA, *Special Plan for Facilitating the Development of Land Transferred to Investors* (August 2013) 2

¹¹¹⁴ Interview with Ato Daniel Zenebe, Head of the Public Relations Directorate of the Ethiopian Agricultural Investment Land Administration Agency, December 8, 2015, *See also* Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015, available at <<http://addisfortune.net/columns/non-performing-agricultural-investments-get-the-axe/>>

¹¹¹⁵ EAILAA, *Agricultural Investment Land Utilization Reform Follow-up and Support Activities (Guideline) Manual*, p.6

¹¹¹⁶ Ministry of Agriculture, *Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report* (January 2013)

¹¹¹⁷ *ibid*, p.3

¹¹¹⁸ *ibid* (Benishangul-Gumuz state also cancelled 55 contracts of agricultural investment due to the failure on the part of the investors to develop the land they took. The complaints of the investors protesting the decision to cancel the contracts are under consideration.)

¹¹¹⁹ Ministry of Agriculture, *Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report* (January 2013) 3

¹¹²⁰ *ibid*

2014.¹¹²¹ The 53 local and six foreign companies which have started activities have taken possession of land measuring 209,860 hectares.¹¹²² Nevertheless, the evaluation conducted revealed that only 10,845.2 hectares of land was harvested with soybeans, cotton, sorghum, corn, rice, oilseed and the like.¹¹²³ Thus, the land which has been developed is only 5.16 of the total land that is transferred to the investors demonstrating a very meager performance.¹¹²⁴

The evaluation carried out on 46 companies engaged in agricultural investment in Southern Nations, Nationalities and Peoples Regional State (SNNPRS) demonstrates that these companies managed to develop only 13,629.5 hectares out of the total combined area of 145,756 allocated to them.¹¹²⁵ This figure represents only 9.4 per cent of the total land.¹¹²⁶ Only 13 of the companies managed to develop 50 up to 100 per cent of the total land allocated to them.¹¹²⁷

Evaluation carried out in 2014 by the Ethiopian Agricultural Investment Land Administration Agency carried out in South Omo and Bench Maji Zones of SNNPRS also demonstrates the variance between contractual obligations and the extent of performance.¹¹²⁸ The evaluation considered 38 companies engaged in large scale agricultural investments who have taken possession of 150 hectares of land or more from the regional state or federal state in South Omo and Bench Maji zones.¹¹²⁹ Many of these agricultural investments are concentrated in Dasenech, Ngnagatom, Bebena Tsemay in South Omo Zone and Guraferda, South Bench, Menit Shasha and Menit Goldya in Bench Maji Zone.¹¹³⁰ Sixteen of these companies are operating in South Omo, while twenty-two are in active in Bench Maji zone.¹¹³¹ Many of these companies are engaged in the production of cotton, coffee, mango and corn in addition to oil seeds, soya bean, and sorghum.¹¹³² In spite of the fact that the total land size which has been transferred to these

¹¹²¹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 5

¹¹²² *ibid*

¹¹²³ *ibid*

¹¹²⁴ *ibid*

¹¹²⁵ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013) 4

¹¹²⁶ One of the justifications proffered to explain the low level of performance the failure to build Omo Bridge. It is contended that the performance of those companies which took land behind Omo River is dismal because of infrastructure problems. If these companies are not considered, the level of performance by the other companies located in other parts of the regional state stands at 17.27 per cent.

¹¹²⁷ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013) 4

¹¹²⁸ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014)

¹¹²⁹ *ibid*, p.3

¹¹³⁰ *Ibid*, p.1

¹¹³¹ *ibid*, p.3

¹¹³² *ibid*, p.3

companies included in the evaluation is 88565 hectares, the companies managed to develop only 14,791.7 hectares of land.¹¹³³ In terms of productivities, the same evaluation report revealed that it is not that different from the small holders in the area. This lack of improved productivity is attributed to the fact that the companies took possession of more land than they can actually manage.¹¹³⁴ The evaluation report singles out those companies which have completely failed to perform their obligation to develop the land contrary to the contract they concluded and the business plan they presented.¹¹³⁵ This situation is particularly the case in relation to the companies which took land in Ngangatom and Dasencech *woredas* of South Omo Zone.¹¹³⁶

The failure on the part of Karuturi Global Limited to develop the land it took is presented here as a case in point as it is emblematic of the situation. As discussed in Chapter five, the company was granted 300,000 hectares of land in Gambela Regional State in 2009. The size of the land which was handed over to the company was later reduced to 100,000 hectares under a replacement contract concluded with the Ministry of Agriculture and the file was transfer to the Ministry from the regional state. Nevertheless, the company managed to develop only 5000 hectares of the total size of the land allocated to it up until 2014. The total size of the land cultivated increased to 7,645 hectares in December 2015 five years after the conclusion of the deal.¹¹³⁷ The company is particularly the large agricultural investor company which is singled out for having failed to undertake its contractual obligation to develop the land allocated to it. The land allocated to the company and the harvest under cultivation narrowly escaped sale by auction due to the default of the Company to repay the debt it took from the Commercial Bank of Ethiopia.¹¹³⁸ The auction was halted as a result of the fact that the company effected 25% of the debt it owed to the Bank. The Company invoked various for its dismal performance including damage to its produce due to flooding, the dearth of capital, conflict with agricultural workers and the surrounding communities.¹¹³⁹

¹¹³³ *ibid*, p.3

¹¹³⁴ *ibid*, p.4

¹¹³⁵ *ibid*, p.4

¹¹³⁶ *ibid*, p.4

¹¹³⁷ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015, available at < <http://addisfortune.net/columns/non-performing-agricultural-investments-get-the-axe/>>

¹¹³⁸ Berhanu Fekade (n 791)

¹¹³⁹ *ibid*

The failure to develop land which was initially transferred to the investors appears to have triggered applications by some of the investors for the reduction of the size of the land allocated to them. For instance, in 2014/2015 fiscal year, the agreements of nine investors have been revised to reduce the size of the land originally allocated to them.¹¹⁴⁰

The failure to discharge this obligation is attributed to various causes. The bottlenecks identified relate the governmental bodies, local community, investors and others. The lack of initiative on the part of governmental organs at federal and regional and local levels to identify and address bottlenecks which militate against the development of the land allocated is singled out as the structural cause of the problem.¹¹⁴¹ The concerned governmental organs are also criticized for lack of collaborative management and coordination.¹¹⁴² Particularly, local level authorities including *woreda* and *kebele* administrations are said to have been engaged in activities contrary to these agricultural investments including the failure to expeditiously resolve security issues which flare up in relation to the investments.

Local communities are also blamed for the dismal performance owing to negative attitudes towards the investment due to the apprehension that the land for future generations is being exhausted.¹¹⁴³ This assessment has led to suggestions of dissemination and training on the developmental benefits of the investments by addressing the negative attitudes of local communities.¹¹⁴⁴

Local and foreign investors who have taken actual control of the land are also part of the reason for the dismal performance. To begin with, investors do not undertake appropriate feasibility studies and request much larger size of land than they can actually develop and finance.¹¹⁴⁵ Some of the investors fail to embark upon the development of the land expeditiously and do not operate in compliance with the laws and regulations of the country.¹¹⁴⁶ Second, investors lack

¹¹⁴⁰ Ethiopian Agricultural Investment Land Administration Agency (EAILAA), Annual Performance Report (2014/2015), p. 11

¹¹⁴¹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹¹⁴² *ibid*

¹¹⁴³ *ibid*; *See also* EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014)1

¹¹⁴⁴ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹¹⁴⁵ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 17

¹¹⁴⁶ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

appropriate expertise on farm management is cited as another cause.¹¹⁴⁷ The companies engaged in large scale agricultural investment are ill-equipped in terms of education, training and experience and do not create conducive environment and labour conditions for the agricultural workers.¹¹⁴⁸ Apart from that, some investors have been engaged in practices which amount to profiteering and proved themselves incapable.¹¹⁴⁹ Third, investors opt to delegate to third parties the actual task of the development of the land and are not present in person on site and do not ensure whether the work is progressing according to the business plan they undertook.¹¹⁵⁰

Moreover, the inaccessibility of the land that is allocated for the investor is mentioned as another factor.¹¹⁵¹ Some of the areas designated for large scale agricultural investment such as Omo Valley are noted for their inaccessibility. Thus, such areas require infrastructure such as bridges, roads, telecommunications and other services. As indicated earlier, this can be considered as one of the reasons for the plan to establish Agricultural Economic Zone (AEZ) by virtue of Article 5(4) of Regulation 283/2013 and to introduce the land ceiling of 5000 hectares of land.¹¹⁵² It is believed the provision of land which is accessible with the necessary infrastructure makes it easier for the investors to develop the land within the appropriate time.

Moreover, there is material variance between the terms of the agreement the investors undertook and the actual performance. For instance, even if the investors undertook the obligation to engage in large scale agricultural investment, they engage into the production of crops which can be cultivated by smallholder farmers *per se* contrary to the terms of the contract.¹¹⁵³ The investors embark upon the investment without first securing sufficient capital and poor technology. As a result, in some instances, the performance of the so-called large scale agricultural investors pales in comparison with smallholder farmers in the surroundings.¹¹⁵⁴ The non-performance on the part of the investors also reflects adversely on the governmental organs responsible for the allocation of the land. In other words, the allocation of land to investors

¹¹⁴⁷ Interview with Mr. Dereje Abebe, Ethiopian Agricultural Investment Land Administration Agency, Agricultural Investment Support and Follow-up Directorate, Coordinator, Diaspora Case Team, May 29, 2014

¹¹⁴⁸ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 17

¹¹⁴⁹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 14)

¹¹⁵⁰ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 17

¹¹⁵¹ Interview with Mr. Dereje Abebe, Ethiopian Agricultural Investment Land Administration Agency, Agricultural Investment Support and Follow-up Directorate, Coordinator, Diaspora Case Team, May 29, 2014

¹¹⁵² *ibid*

¹¹⁵³ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 17

¹¹⁵⁴ *ibid*, p. 17

without due consideration of their financial and human resource capability has led to wastage of limited resources.¹¹⁵⁵

To this effect, the Ethiopian Agricultural Investment Land Administration Agency launched an initiative is dubbed as *National Mobilization on Agricultural Investment* in a forum held in May 2014. The Agency also adopted the Special Plan for Facilitating the Development of Land Transferred to Investors in August 2013.¹¹⁵⁶

Ironically, additional land is allocated to investors without due consideration to the level of performance is said to have led to wastage of land resources.¹¹⁵⁷ Lands have been allocated to investors without appropriate assessment of the financial and human resources of the companies.¹¹⁵⁸ The size of the land allocated does not appear to go hand in hand with the amount of capital the investor registered.

7.2.4. Environmental, Social and Human Rights Obligations of the Investor

The standard form contracts require the investor to comply with environmental law. Article 4(1) of the standard form contracts stipulate the obligation of the investor to provide good care and conservation of the leased land and natural resources thereof. In particular, the stipulation imposes the obligations on the investor to:-

- Conserve tree plantations that have not been cleared for earth works
- Apply appropriate working methods to prevent soil erosion in slopping areas
- Observe and implement the entire provision of legislations providing for natural resource conservation
- Conduct environmental impact assessment and deliver the report within three months following the execution of the agreement

One provision found commonly in many of the contracts is the obligation to plant native tree species covering at least two percent of the project land. However, the utility of this provision for environmental sustainability is limited owing to the fact that much of the forest and vegetation

¹¹⁵⁵ *ibid*, p. 18

¹¹⁵⁶ EAILAA, *Special Plan for Facilitating the Development of Land Transferred to Investors* (August 2013)

¹¹⁵⁷ *ibid*, p. 5

¹¹⁵⁸ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

cover will be destroyed by the projects during the course of clearance and cultivation. The environmental impact assessment reports that the investors are required to compile is meant to ensure that land management practices they employ will not cause environmental degradation. Nevertheless, the situation on the ground shows that the clearance of forest and vegetation is leading to erosion and land degradation thereby depriving local communities of valuable natural resources and compromising their food security.¹¹⁵⁹

One of the drawbacks of the standard form agricultural investment contracts employed in Ethiopia relates to the timing of the Environmental Impact Assessment (EIA). As indicated earlier, Article 4(d) of the standard form contracts stipulates that environmental impact assessment needs to be conducted and the report delivered within three months following the execution of the agreement. This implies that the contracts require the undertaking of EIA after the investment contract is already concluded. This implies that the contract gives the investor to commence its activities before undertaking EIA. This contractual provision appears to be incompatible with Proclamation 299 which is the EIA legislation in the country as discussed in the previous Chapter. One of the outcomes of conducting the EIA is that of the outright rejection of the project. Thus, issuance of investment permit and the conclusion of the contract prior to the EIA appear to contradict the very purpose of undertaking the EIA. It would be appropriate to require the EIA to be carried out previous to the conclusion of the contract and revise the contract based on the findings of the EIA. The concerned organs must also make sure that the investor has included the findings of the EIA. Apart from undertaking the EIA, the standard form contract does not clearly lay down the obligation to comply with the EIA. The contract should have required the investor to prepare Environmental Management Plan and Action Plan and report periodically as regards the measures taken to comply with this. The contract should have also specifically included failure to comply with environmental obligations as constituting material breach of the terms of the contract.

Many of the investors do not have an Environmental Management Systems (EMS).¹¹⁶⁰ In addition, the ones who claim to have EMS have not implemented their plans.¹¹⁶¹ For instance, the conservation of natural resources by many of the companies operating in South Omo and

¹¹⁵⁹ Rahmato (n 32)

¹¹⁶⁰ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 8

¹¹⁶¹ *ibid*

Bench Maji Zones in SNNPRS is said to be poor.¹¹⁶² This is attributed to the limited awareness of the investors concerning conservation of natural resources and the lack of commitment to engage in sustainable agriculture.¹¹⁶³ By and large, investors have not been successful in terms of clearance of the land they took so as to make it conducive for cultivation and production.¹¹⁶⁴ Many of the farms are not managed by experts who have relevant expertise in farmland management.¹¹⁶⁵ As a result, they lack knowledge regarding the environmental protection and conservation of natural resources.¹¹⁶⁶ Thus, they do not ensure adequate number of indigenous trees on the farmland in the course of land clearance.¹¹⁶⁷ They also fail to take adequate measures to prevent erosion and land degradation. The lack of knowledge about the utilization, stockpiling of chemicals leads to outcomes injurious to human health and damage to the soil.¹¹⁶⁸

7.2.5. Provisions on Transfer to Third Parties

The standard form contracts include provisions which guard against the transfer of land investment land without the prior approval of the government. Article 4(10) of the standard form contracts stipulates that the investor has no right to transfer the land or properties developed on the land in favour of any other company or individual unless 75% of the land is developed. The preclusion of the transfer of the investment without the prior approval of the government is beneficial feature of the agreements as it prevents opportunity for land speculation for unscrupulous investors.¹¹⁶⁹ The same principles are also mirrored in Article 12 of the Agricultural Investment Land Rent Enforcement Guidelines. Article 12(3) of the Guidelines allows the transferability of the rights to the remainder of the period of the agreement to the rightful heirs of the investor in the event of the death of the investor in the case of physical persons.

However, this does not mean that there are no possibilities whereby the investor can transfer the land to third parties. The agreement allows the investor to transfer the land or properties

¹¹⁶² *ibid*

¹¹⁶³ *ibid*

¹¹⁶⁴ *ibid*, p.6

¹¹⁶⁵ *ibid*

¹¹⁶⁶ *ibid*

¹¹⁶⁷ *ibid*

¹¹⁶⁸ Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in Benishangul Gumuz (January 2013) 3

¹¹⁶⁹ Mann (n 845)

developed on the land in favour of any other company or individual upon the prior permission of the lessor if 75% of the land is developed. This possibility of transfer to third parties upon the fulfillment of the stated condition is instrumental for the investor to mitigate risk and secure lending for the project. The possibility of transfer to third parties gives the investor exit strategy. It also assures lenders that they can recover their debts even if the investor defaults to repay the debts. Stipulations of this kind are likely to be subject to approval and consent of the host government as it is the case in Ethiopia. Such consent requirements are important for governments to ensure that they can prevent land speculation and to prevent the possibility of land being acquired by parties who do not have the track record to develop it.¹¹⁷⁰

However, contrary to these prohibitions, investors are said to have engaged rampant practice of transferring the land they took delivery of to third parties.¹¹⁷¹ This demonstrated the risk of land speculation and rent-seeking.¹¹⁷² Moreover, Article 3(3) of the standard form contract provides the right of the investor to develop or administer the leased land on his own or through a legally delegated person or agency. Nevertheless, the right for developing and administration of the leased land through a legally delegated person or agency should have also been subject to consent requirements on the part of the host state. This is because this provision may also be invoked to transfer the land to third parties under the guise of agency.

The issue of transfer of leased land to third parties can be a contentious as witnessed in relation to the 2011 incident whereby an Indian Company, Karuturi, was reported as being actively engaged in negotiation with Indian framers in Punjab to outsource part of the land it leased from the Ministry of Agriculture.¹¹⁷³

7.3. Fiscal Benefits and Lease Rates

Land is transferred upon payment of land rentals and arguably the fees do not constitute the principal host country benefit. *Land lease fees payable by investors had not been uniform*

¹¹⁷⁰ Cotula (n 604)

¹¹⁷¹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 18

¹¹⁷² Ibid; See also Ministry of Agriculture and Rural Development, *Guideline on the Transfer of Large Scale Lands for Agricultural Investment to Investors*, p.1

¹¹⁷³ Meron Tekleberhan, 'Karuturi to Subcontract its Ethiopian Farmland' (Addis Ababa, 2mercato, 14 October 2011) available at < <http://www.2merkato.com/news/alerts/450-karuturi-to-subcontract-its-ethiopian-farmland>>

throughout the country. It differed from regional state to regional state and depending on the nature and size of the investment.¹¹⁷⁴ The Land lease fees which are determined per hectare are normally payable on annual basis.¹¹⁷⁵ Land rental has been very low and nominal and do not reflect the market price.¹¹⁷⁶ The nominal nature of the fees is among the factors that contribute for the failure on the part of the investors not to develop the land and promote land speculation.¹¹⁷⁷

Article 4(7) of the standard form contracts stipulate that the investor has the obligation to settle the current predetermined annual land rent including the prorated amount of the grace period to the Regions where the land is located during the months December up to June every year.

Accordingly, the amount of the land fee is determined based on a combination of factors including location, access to transport, markets, communication, banking services and whether or not it will be used with irrigation or not.¹¹⁷⁸ Apparently, lands nearby urban centers and having adequate roads and other basic services and which employ irrigation scheme cost the highest rental value.¹¹⁷⁹ Following the criticism that the amount of rental fees charged fly in the face of justice, the rates have been increased lately. The low amount of rental fee charged along with the package of incentives afforded has been described as “giveaway” and “mouthwatering” by investors. The land rental fees charged by the regional states have long remained below the market value and symbolic and almost absent. The land rental fees are also criticized for not considering the value that can be derived from the resources.¹¹⁸⁰ The low land rentals encourage land speculation.¹¹⁸¹

¹¹⁷⁴ Imeru Tamrat (n 53)

¹¹⁷⁵ *ibid*

¹¹⁷⁶ *ibid*

¹¹⁷⁷ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 17, *See also* Jacur F. Romanin, Bonfanti Angelica and Seatzu Francesco (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill Nijhoff 2015) 22

¹¹⁷⁸ Rahmato (n 32)

¹¹⁷⁹ *ibid*

¹¹⁸⁰ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 10

¹¹⁸¹ *ibid*, p. 14

However, the Ministry of Agriculture and Rural Development adopted a new set of Agricultural Investment Land Lease Rates approved by the Council of Ministers in September 2009.¹¹⁸² The Guideline is entitled ‘Agricultural Investment Land Rent Enforcement Guideline’. The Guideline makes it clear that the lease rates in place previously considered only labour and fixed capital costs without taking into account the fact that land has its own value. In other words, the value of the land was not considered *per se* although land is the anchor of all things.¹¹⁸³ The Guideline provides that the value of land needs to be taken into account considering the fact that land is fundamental in the process of production. Accordingly, Article 9(1) of the newly adopted Guideline stipulates that the land lease rates are computed on the basis of the following fundamental considerations:

- Labour
- Fixed capital
- Profit of the investor
- Costs which do not have direct relation with production
- Costs likely to be incurred for the transportation or forwarding of production

The Guideline classifies the agro ecology in the country into three as *dega* (highlands), *woyna dega* (mid lands), and *kola* (low lands) to determine the share of land value in the computation. The lands are further characterized as rainfed or irrigable. The amount of land rental is determined based on Land Return Approach.¹¹⁸⁴ The land return is computed on the basis of residual method whereby profit is deducted from the gross surplus or the value of labour costs and fixed capital is deduced from value added and considering the terminal market. Thus, the Guideline prescribes lease rates based on the above method of computation to be applied throughout the country. The Guideline aims to lease agricultural investment lands in the country in a uniform manner and ensure land rental is utilized in an equitable manner beneficial to the people, the government and the investors. The Agency contends that these newly determined rates have considered the benefits that ensue from agricultural investments and encourage the

¹¹⁸² Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹¹⁸³ Ministry of Agriculture and Rural Development, Agricultural Investment Land Rent Enforcement Guideline’ (September 2009) 2

¹¹⁸⁴ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 10

role of developmental investors.¹¹⁸⁵ Moreover, it is submitted that the rates consider the distance of the location of the agricultural investment from the capital and value of export as well.¹¹⁸⁶ Thus, the Guidelines aim to promote convenience, equitability and uniformity. Article 5(2) of the Agricultural Investment Land Rent Enforcement Guideline stipulates that the land may be presented for lease based on the determined land rental rates or upon auction. The land rental rates in the locality shall serve as the initial bid for the negotiation or auction. In relation to the land rental of agricultural investment lands in densely populated areas with the necessary infrastructure, the land rental is determined on the basis of auction as per Article 5(2)(1) of the Guidelines. Article 6(2) of the Guideline provides that the rate of the land rental is to be determined jointly by the Federal Ministry of Agriculture and the regions.

The low levels of the land rentals charged can be seen as the principal objective of the land allocation is not public revenues. Instead, it can be explained by other considerations such as the need for capital, development of irrigation and other infrastructure, development of the land, technology transfer, acquisition of equipment, construction of processing facilities and attracting investment.¹¹⁸⁷ These may constitute major benefits for the host country as they complement the meager resources available at disposal of the governments to undertake such costly activities.¹¹⁸⁸ In spite of this, land rentals which are below the market price are bent on spurring land speculation particularly in the light of long term leases and transferability of the leases to third parties.¹¹⁸⁹ On top of that, not all the investors are effecting payment of even this smaller amount of land rental due to inability and absconding the areas of investment as a result of conflicts and security failures.¹¹⁹⁰ The failure to effect the payment has resulted in unnecessary altercations in some regional states.¹¹⁹¹

It has been said that the Voluntary Guidelines, on the Responsible Governance of Tenure encourage states to prioritize agricultural investment models which do not involve transfer of extensive areas of land.¹¹⁹² These would include models involving value coordination with local

¹¹⁸⁵ *ibid*

¹¹⁸⁶ *ibid*

¹¹⁸⁷ Cotula (n 604)

¹¹⁸⁸ *ibid*

¹¹⁸⁹ *ibid*

¹¹⁹⁰ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹¹⁹¹ *ibid*

¹¹⁹² Cotula (n 604)

farmers such as out-grower schemes.¹¹⁹³ Nevertheless, absent land rentals and rentals below market prices have the effect of acquisition of extensive areas of land at the expense of such models.¹¹⁹⁴

In regard to the payment procedure of the land rental, Article 2 (2) (1) of the standard form contracts stipulates that there shall be a 3 years grace period for the land rent. The provision goes on to state that the rent during this period will be prorated over the remaining years annually commencing from the date of the making of the agreement. Notwithstanding this, Article 2 (2) (1) requires a down payment for one year for the parcel of land.

Article 2 (2) (5) of the agreement provides for periodic adjustment of land rentals. It states that the lessor reserves the right to revise the lease payment rate as the need may arise in consultation with the lessee. Nevertheless, the provision does not specify factors which may justify such a revision.¹¹⁹⁵ This shows that the standard form contracts do not stipulate stabilization clauses in what may be considered as a strong point of the investment contracts in Ethiopia. The contracts do not include what are called “freezing” or “stabilization” clauses. Freezing clauses or stabilization clauses are clauses whereby the investor is forever subject to the national law in force on the date of contracting, making subsequent regulation impossible. Similarly, Article 9(3) of the Agricultural Investment Land Rent Enforcement Guideline provides that the land rental shall be subject to revision every five years without including or varying yearly upfront cost. It is normal for such investment contracts to include provisions concerning the preclusion of introducing new or changed regulatory measures.¹¹⁹⁶ These clauses are meant to guard the investor against risks that transpire as a result of future changes in law. Stabilization clauses can be divided into fiscal and non-fiscal following the United Nations Guiding Principles on Business and Human Rights. Fiscal stabilization clauses deal with issues of the preclusion of the application of new, revised laws and regulations concerning issues including taxes, royalties, rents, rates, etc. On the other hand, non-fiscal stabilization clauses are those pertaining to the preclusion of application of new or revised laws and regulations concerning issues including

¹¹⁹³ *ibid*

¹¹⁹⁴ Cotula (n 604)

¹¹⁹⁵ Some argue that some of the reasons that could possibly justify such a revision may include change in foreign exchange rates, changing conditions in lease rates in other countries, rising prices of the agricultural production, increasing demand for commercial farm land lease. (*See* Elias (n 28) 204)

¹¹⁹⁶ Cuffaro and Hallam (n 1)

environment, labour, health and safety. In spite of the fact that limited fiscal stabilization clauses in a contract may be somewhat tolerated, broadly and vaguely formulated non-fiscal stabilization clauses are believed to be unacceptable. It is therefore commendable that the standard form contracts in Ethiopia stipulate neither fiscal nor non-fiscal stabilization clauses.

Apart from stipulating provisions which entitle the government to revise the rate of the land rental periodically, this provision has also been invoked in practice. The decision on the part of the government to increase the initial land rental was met with uproar from certain investors as being arbitrary.

The standard form contracts do not clearly spell out the party to whom the payment should be made. The lack of express mention of the party to whom the payment should be made can be contentious. This is because there are other stakeholders who may be entitled to payment including traditional users and surrounding communities.¹¹⁹⁷ Article 2 (2) (3) stipulates that a copy of the receipt of the payment of the land rental should be submitted to district administrative office. Thus, the agreements should have been more precise about the creditor qualified to receive payment to ensure that the payment is made to the appropriate people as opposed to intermediaries.¹¹⁹⁸ Although Article 4(7) the standard form contracts states that the investor should effect payment to the Regions where the land is located, it is still remains unclear. Furthermore, Article 12(2) of the Agricultural Investment Land Administration Procedure Guidelines stipulates that the investor shall effect payment to the Finance and Economic Development Bureau of the regional state where the land is located. This stipulation can be contention as the specific *woredas* or districts where the investment take place may take issue with it.

¹¹⁹⁷ Mann (845)

¹¹⁹⁸ *ibid*

Table 7: Land Lease Rental per Hectare

Distance from Addis Ababa in Km	Land Lease Rental for land to be developed through irrigation/ hectare	Land Lease Rental for rainfed land/ hectare
Addis Ababa	3077	2946
100	2660	2541
200	2243	2136
300	1826	1731
400	1409	1326
500	992	921
600	557	516
700	158	111

Source: Ethiopian Agricultural Investment Land Administration Agency

7.3.1. Taxation and other Fiscal Provisions

The inclusion of taxation and other fiscal provisions is a necessary element of contracts involving agricultural investments. In spite of this, the standard form contracts do not clearly lay down the obligation of the investor to effect taxation. There are some provisions which allude to “relevant tax payments” as in the case of Article 9(4) of the agreements. However, the payment of taxation should have featured conspicuously among the provisions on the obligations of the investor under Article 4, which deals with the obligations of the investor (lessee). In addition to the revenue derived through land rentals, agricultural investment is also instrumental to generate income from taxation. Although in Ethiopia, exemptions are granted for some time, the taxes can be obtained from such investments include income tax, turnover tax, customs duties, export taxes, taxation on dividends and interests and others.¹¹⁹⁹

¹¹⁹⁹ Cotula (n 604)

The Ethiopian Agricultural Investment Land Administration Agency contends that the land rental and the income tax that the investors paid are benefiting the regional states as well as the particular *woredas* where the investment is taking place.¹²⁰⁰

7.4. Non-Fiscal Host Country Benefits

It has been stated that the low rates of land rental is due to the fact host-countries do not consider this as the principal benefit which transpires from agricultural investments. Instead, it is alleged that the main benefits which flows from large scale agricultural investments is that of the non-fiscal benefits that they are hoped to bring about. These non-fiscal benefits which arise as a result of such investments may include community development, generating employment, infrastructure, technology transfer, etc. In spite of this, the standard form contract currently in use does not reflect such non-fiscal host country benefits.

7.4.1. Benefit Sharing Obligations

Benefit-sharing arrangements do not feature prominently in the standard form contracts. This is one of the manifestations of the lack of contractual equilibrium. Consequently, investors do not appear to be under obligation to ensure benefit sharing along with the local community in so far as the standard form contracts are considered.¹²⁰¹ There are clear provisions in the contract that oblige the investor to invest in tangible benefits to the communities involved and the country at large.

The vague commitments in the contracts concerning the number and characteristics of jobs make the enforceability of such stipulations cumbersome.¹²⁰² The provisions lack clarity about the number and types of jobs and the timeframes.¹²⁰³ The provisions are not sufficiently clear about job opportunities are skilled or unskilled, permanent or seasonal and part-time or full-time.¹²⁰⁴ Mere allusions in the contracts requiring the investor to create job opportunities and training opportunity for the community is far from enforceable.¹²⁰⁵

¹²⁰⁰ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹²⁰¹ Imeru Tamrat (n 53)

¹²⁰² Cotula (n 604)

¹²⁰³ *ibid*

¹²⁰⁴ *ibid*

¹²⁰⁵ *ibid*

In practice, the contribution of large scale agricultural investors in terms of benefit sharing is minimal and at a very early stage.¹²⁰⁶ Some of the investors have been commended for having provided support in terms of installing grinding mill, provision of transportation services, participating in resettlement activities, provision of financial and material assistance to schools, religious and governmental institutions, and cooperation to support the provision of health services to the local community.¹²⁰⁷ The provision of stationeries, school uniforms, tuition fees, transportation services, maintenance of schools and roads and medical services are also mentioned.¹²⁰⁸ However, these services are provided by few of the companies and are more of charity.¹²⁰⁹ Still better some companies in SNNPRS supported the smallholder farmers by installing irrigation channels, provision of best seeds, and professional assistance and training.¹²¹⁰ Thus, the failure of large scale agricultural investments in terms of the realization of the participation and benefits of the local community is triggering the complaints on the part of the community.¹²¹¹

7.4.2. Infrastructure Development

Article 3(2) of the standard form contracts stipulate that the investor has the right to:

build infrastructure such as dams, water boreholes, power houses, irrigation system, roads, bridges, offices, residential buildings, fuel/power supply stations, outlets, health/Hospital/Dispensaries, educational facilities, at the discretion of Lessee upon consultation and submission of permit request with concerned offices subject to the type and size of the investment project whenever it deems so appropriate.

As can be seen from the excerpt above, the provision concerning infrastructure appears to be very poorly drafted. To begin with, it appears to have mingled infrastructure which is incidental to the task of the investor to engage in agricultural investment with that of activities related to community development. Second, it is formulated in terms of the right of the investor as opposed to the obligation of the investor. Third, the provision goes on to state that the investor is expected

¹²⁰⁶ Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in Benishangul Gumuz (January 2013) 6

¹²⁰⁷ *ibid*

¹²⁰⁸ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 11

¹²⁰⁹ *ibid*

¹²¹⁰ *ibid*, p.6

¹²¹¹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

to do so upon its discretion in consultation with concerned offices upon securing permission based upon the type and size of the investment project whenever it deems so appropriate. Thus, this gives the impression that community development activities are contingent upon the discretion and good will of the investor solely. Thus, it is not surprising that the performance of large scale agricultural investors in terms of infrastructure development in Ethiopia is minimal.

Nevertheless, there are some notable positive overtures on the part of some investors who have contributed money for the construction of roads, schools, etc. in some areas.¹²¹² Some investors have gone to the extent of constructing schools and availed the same to use for the local community.¹²¹³ The effort of some investors in terms of provision of transportation to health posts for local community also deserves mention.¹²¹⁴ Some other investors have been instrumental in developing fountains for use of drinking water to the local community.¹²¹⁵

7.4.3. Forward Linkages

Responsible contracts on agricultural investment should also include provisions on local economic linkages to goods and services by the investor. There are no provisions in the contracts which require the investor to collaborate with local farmers in terms of procurement of goods and services from them.¹²¹⁶ However, Articles 10(1) and Article 10(2)(5) of the Agricultural Investment Land Administration Procedure Guidelines of the Agency stipulate that that the agricultural produce should be of sufficient quality for export and the investor has to ensure value addition to the produce. Thus, the non-inclusion of forward linkages has the effect of limiting benefit sharing by way of linkages with the local economy.¹²¹⁷ Moreover, there are no requirements in the agreements of local processing, which can be instrumental in helping the country move up the value chain from the primary commodity to the secondary sector.¹²¹⁸ Nevertheless, the contracts are silent on the construction of processing plants and facilities. Investors engaged in the sector are said to have failed to understand the importance of such

¹²¹² EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 9

¹²¹³ *ibid*

¹²¹⁴ *ibid*

¹²¹⁵ *ibid*

¹²¹⁶ Cotula (n 604)

¹²¹⁷ *ibid*

¹²¹⁸ *ibid*

linkages with the local population thereby contributing to increased incomes.¹²¹⁹ Thus, there are no significant instances of forward linkages as such.¹²²⁰

7.4.4. Food Security

It has been said that large scale agricultural investments which export the entirety or the bulk of their production may risk food security at home.¹²²¹ Much of the agricultural produce is intended to either food for export or biofuel products. This raises concerns relating to food security of the local community. Therefore, it would have been important if the agreements included a provision concerning export limitations.¹²²² Although the inclusion of such provisions would help for addressing food security concerns, the clauses are absent in the standard form agreements employed in Ethiopia. Instead, the government appears to be keen on encouraging investors to export their entire agricultural production as noted in connection with Chapter Six with a view to garner increased foreign exchange earnings.

7.4.5. Generating Employment

Responsible contracts on agricultural investments should also include provisions concerning labour, training, minimum employment levels, etc.¹²²³ In this regard, the case of the counterpart contracts in Liberia are notable. These contracts require unskilled positions to be filled by nationals.¹²²⁴ Moreover, the Liberian contracts also stipulate provisions whereby nationals should be recruited in skilled positions and management progressively over specified period of time.¹²²⁵ Nevertheless, these issues are not addressed in the standard form contracts used in Ethiopia.

The fourth principle of CFS Principles for Responsible Investment in Agriculture and Food Systems focuses on engagement and empowerment of the youth.¹²²⁶ Among others, the principle highlights the importance of agricultural investments in creating opportunities for decent work for the youth.¹²²⁷ Large scale agricultural investors are credited for having created limited

¹²¹⁹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 17

¹²²⁰ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 14)

¹²²¹ Lavers (n 13)

¹²²² Mann (n 845)

¹²²³ *ibid*

¹²²⁴ Cotula (n 604)

¹²²⁵ *ibid*

¹²²⁶ CFS, *Principles for Responsible Investment in Agriculture and Food Systems* (n 543)

¹²²⁷ *ibid*

number of temporary and permanent jobs.¹²²⁸ The Ethiopian Agricultural Investment Land Administration Agency states that these investments have generated job opportunities for a total of 2.3 million.¹²²⁹ Of these, 2.1 million are temporary, while 335,000 are permanent.¹²³⁰ Some youth in the localities where the large scale agricultural investments are located have been hired to serve as operators of tractors and other machineries.¹²³¹ However, there are a number of issues revolving around labour in large scale agricultural investments in Ethiopia. There is lack of labour in some of the places where the large scale agricultural investments are located.¹²³² Consequently, it is very costly to bring agricultural workers from other regions.¹²³³ Moreover, some of the workers leave the farm land due to grievances related with payment and labour conditions.¹²³⁴ Agricultural workers also avoid the large scale investments as a result of conflicts erupting as in the case of Dasenech, Ngnagatom, Hamer and Maj *woredas* in SNNPRS.¹²³⁵ Nevertheless, the investors are criticized for absence of documentation on their workers and for having failed to create safe and humane conditions of work.¹²³⁶

The employment of expatriates in large scale agricultural investments is one of the issues which have long remained contentious.¹²³⁷ There are cases of investors who give priority to employ expatriate staff despite the fact that professions are available locally.¹²³⁸ Regardless of that, there is a need to facilitate the employment of expatriates in this investment to materialize the potential benefits. The Investment Proclamation also allows the employment of expatriates in case where

¹²²⁸ For instance some of the large scale agricultural investments in Benishagul Gumuz regional state are said to have created close of 880 permanent jobs, while they created 7444 temporary jobs. Many of the workers are not skilled with only 15% of them having a diploma or certificate. By and large, many of the farm lands are run by workers who are well acquainted with agriculture sometimes referred to as *kobrari* or *kabo*. This is cited as one of the reasons for lower productivity of the farmlands. See Ministry of Agriculture, Benishangul Gumuz Agricultural Investment Land Utilization Evaluation Report (January 2013) 5)

¹²²⁹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹²³⁰ *ibid* (It has been said that close to 2.2 million hectares of land has been transferred to investors at the federal and regional levels. It was assumed that if the entire 2.2 million hectares of land was under active cultivation and production, it was expected to generate 33 million job opportunities annually. This is calculated on the basis of assumption that it takes the labour of 15 agricultural workers to develop one hectare cotton plantation subtracting off season. Despite such high expectations, the job opportunity generated thus far is very small.)

¹²³¹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 11

¹²³² EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 11

¹²³³ *ibid*

¹²³⁴ *ibid*

¹²³⁵ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 13

¹²³⁶ Ministry of Agriculture, Evaluation of Land Utilization by Large Scale Agricultural Investors in Benishangul Gumuz (January 2013) 5

¹²³⁷ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 12

¹²³⁸ EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities Manual, p.9

such professionals are not locally available.¹²³⁹ Nevertheless, the law allows the duration of employment of such expatriate professionals only for a period of three years.¹²⁴⁰

The fact that most of the companies are not managed by individuals who are well-versed with farm management is another problem in many of the regional states. In most cases, these positions are taken up by individuals who do not have the necessary skills and experience.¹²⁴¹ This in turn adversely affects production and productivity of the farmlands.

7.4.6. Transfer of Technology

One of the benefits of large scale agricultural investments is the transfer of much needed technology, best practices and know how in the field to locals. Some of the large scale agricultural investors have been instrumental in acquainting local investors and smallholder farmers with new technology and knowhow.¹²⁴² In particular, they have demonstrated first steps in terms of technology transfer and know by way of introducing contract farming. In spite of these bright spots, the expectations of technology transfer that these investments were expected to bring about did not materialize.¹²⁴³ The fact that many investors are undertaking the development of the land without being assisted with modern technology is cited as one of the reasons for the dismal performance.¹²⁴⁴ In reality, some of the investors make use of the same method of cultivation as used by the smallholders as opposed to making use of improved technologies.¹²⁴⁵ In some cases the companies do not have the machinery and equipment needed and are forced to procure the same by way of lease.¹²⁴⁶ The lack of modern agricultural practices and technology is cited as one of the reasons for the low productivity of the large scale agricultural investors.¹²⁴⁷ For instance, the rate of productivity of the companies engaged in the cultivation of coffee in Gura Ferda *woreda* of Bench Maji zone is ranges between 2 up to 7 quintals, which is lesser or the same when compared with the smallholders in the area.¹²⁴⁸ This

¹²³⁹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 12

¹²⁴⁰ *ibid*

¹²⁴¹ EAILAA, *Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS* (June 2013) 5

¹²⁴² Presentation by the Director of EAILAA, Mr. Abera Mulat (n 14)

¹²⁴³ *ibid*

¹²⁴⁴ EAILAA, *Agricultural Investment Land Utilization Reform Follow-up and Support Activities (Guideline) Manual*, p.7

¹²⁴⁵ *ibid*

¹²⁴⁶ EAILAA, *Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela* (January 2014) 9

¹²⁴⁷ EAILAA, *Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS* (March 2014) 4

¹²⁴⁸ *ibid*

is due to the fact that their agricultural practices are far from modern.¹²⁴⁹ Hence, their contribution to agricultural development is negligible.¹²⁵⁰

In addition, it appears that there are some legislative and practical bottlenecks that impede technology transfer. For instance, the stipulation in the Investment Proclamation that the employment of expatriate professionals can be valid only for a period of three years does not seem to take into consideration the maturity period of certain agricultural produce.¹²⁵¹ Consequently, this short duration militates against transfer of technology.¹²⁵² Moreover, investors appear to lack the initiative to establish linkages with local communities and help in the improvement of the usage of technology.¹²⁵³

7.5. Common Obligations

The standard form contracts have failed to include a number of important provisions concerning issues which are crucial to both parties. For instance, the contracts are silent on matters of anti-corruption, protection of human rights and transparency of contracts as well as payments. The contracts do not establish mechanisms for independent audits and financial monitoring schemes.¹²⁵⁴ Such mechanism would go a long way to prevent money laundering.

7.6. Time Period of the Contracts

Article 8 of the Agricultural Investment Land Rent Enforcement Guideline stipulates the time period of the agreements of lease depending upon the agricultural sector. Accordingly, the period of time is presented as follows:

¹²⁴⁹ *ibid*

¹²⁵⁰ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 14)

¹²⁵¹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 12

¹²⁵² *ibid*

¹²⁵³ *Ibid*, p.17

¹²⁵⁴ Elias (n 75)

Table 8: Type of Production and Duration of Lease

No	Type of Production	Duration of the Lease
1	Perennial Crops (e.g. mango, tea, coffee, biofuel plants such as jatropha, palm oil, etc.)	Fifty Years
2	Rainfed Growing of Medium Term Crops or Animal Production	Twenty Five Years
3	Rainfed Annual Crop Production (e.g. maize, wheat, oilseed, chickpeas, soybeans, cotton, etc)	Twenty Five Years
	Annual Crop Production and Growing of Medium Term Crops by the use of irrigation (e.g. alpha alpha, banana, sugar cane, etc)	Forty-Five Years

Source: Ethiopian Agricultural Investment Land Administration Agency

The time period of the lease agreements as well the land rental described above is criticized for lack of uniformity thereby adversely affecting the competitiveness among the investors.¹²⁵⁵ The standard form contracts are criticized for conferring continual rights over large tracts of land in consideration for minimal revenue for local communities and hazy pledges of benefit sharing. Consequently, the long duration of the contracts and the possibility of further renewal blur the distinction between lease and sale.¹²⁵⁶ This is particularly true where transfer to third parties is also stipulated in the contract and when such transferability is unrestricted.¹²⁵⁷ The lease period for agricultural land varies from one region to the other. The lease period recommended by the newly adopted guidelines (i.e. 25-45 years) are not respected in practice. The fact that the contracts are intended to be long-term implies that decisions made now are likely to entail major and lasting repercussions for decades to come. For example, the long durations imply that once transferred, local communities are unlikely to have access to their lands for generations to come.¹²⁵⁸ This in turn leads to the loss of age old livelihood strategies and agricultural knowledge.¹²⁵⁹ One of the reasons for the longer duration is the need on the part of lenders to

¹²⁵⁵ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 11

¹²⁵⁶ Cotula (n 604)

¹²⁵⁷ *ibid*

¹²⁵⁸ *ibid*

¹²⁵⁹ *ibid*

ensure that recover debts and other gains in the event where projects fall behind schedule.¹²⁶⁰ On the contrary, in some exceptional cases land is transferred for agricultural investors only for a period of one year or two years. This period in turn is too short for the investor to engage in the development of the land effectively.¹²⁶¹

7.7. Non-Performance and Termination

The standard form contracts provide non-performance of obligations of the parties to the contract as a ground of termination. Both parties are given the right to unilaterally terminate the agreement upon the non-performance of the obligations in the agreement by the other party. Article 9(5) of the standard form agreements stipulates that the agreement shall be terminated, among others, if the investor fails to perform its obligations within its control. For example, the failure of the investor to effect the payment of the annual rental and other relevant tax payments for two consecutive years is one of the grounds which trigger the termination of the agreement by the lessor as per Article 9(4). Article 12(4) of Agricultural Investment Land Administration Procedure Guidelines also stipulates that any investor who defaulted to effect payment of land rental for one year after the obligation falls due would be warned. Article 12(4) of the Guideline goes on to state that the investor shall be required to restore the land allocated if unable to effect payment of land rental within three months since receipt of such warning.

As mentioned earlier, the level of the actual performance of the obligation to develop the land transferred by the federal investors is very dismal. The table below attempts to demonstrate the level of the actual performance of the obligation to develop the land transferred by federal investors. The investors invoke a variety of investors for the poor performance as mentioned earlier. The main reasons for the poor performance include failure to start land clearance, preparatory works and develop the land as a result of the lack of infrastructure such as roads, bridges¹²⁶², electricity, telephone, the minimal support rendered by local administrators, the claim of the surrounding communities to the land transferred and the concomitant intervention,

¹²⁶⁰ *ibid*

¹²⁶¹ EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities (Guideline) Manual, p.7

¹²⁶² In particular, several investors mentioned the construction of Omo Bridge which leads to the farms as one of the main bottlenecks. Nevertheless, the investors were unable to commence the performance of their obligations even after the completion of the bridge. Thus, this is indicative of the fact that the lack of infrastructure may also be used as pretext not to commence actual performance.

the lack of attention on the part of the investors, the steep consideration for the purpose of transporting the produce from the farms, lack of security, trespassing the farms by taking cattle for the purpose of grazing, failing rains, fire triggered by members of the local community intending land clearance and the fact that the investor is at the earliest stage of the investment in the case of those contracts which have been concluded very recently.

Table 9: Level of Performance of Obligation to Develop the Land Transferred by Federal Investors

No	Project	Regional State where the Project is located	Date of Transfer	Total Size of Land Transferred (Hectares)	Land Cleared (ha)	Land expected to have been developed (ha)	Land Actually Developed (ha)	%
1.	Ayka Addis	SNNPRS	2013/14	10,000	-	1000	-	New
2.	Tsegaye Demoz	SNNPRS	January 18, 2010	450	100	1000	101	10.1
3.	Reta	SNNPRS	August 26, 2009	2,137	345	2137	45	2.11
4.	Omo Valley	SNNPRS	July 14, 2012	10000	4900	5000	1441	28.82
5.	Adama Agro Industry	SNNPRS	August 23, 2010	18516	-	14816	-	-
6.	Hash Agro Industry	SNNPRS		14,705	-	8823	-	-
7.	Dr. Taeme Agricultural Devt.	SNNPRS	May 12, 2011	5000	1000	5000	76	1.52
8.	Dasali Farm (formerly Daniel Farm)	SNNPRS		5002	600	5002	43	0.86
9.	Mela Agri. Dev't.	SNNPRS	March 16, 2010	5000	-	-	5000	-
10.	Dasenech Agro Dev't.	SNNPRS	March 18, 2010	3000	150	-	3000	-
11.	Lucy Farm	SNNPRS		4003	1500	427.54	4003	10.68
12.	Al-Mahadi Matchmaker	SNNPRS	October 8, 2011	1000	120	118	480	24.58
13.	Whitefield	SNNPRS	April 9, 2010	10,000	600	-	10,000	-
14.	Anaya Farm	SNNPRS	February 5, 2015 (recent)	500				
15.	Abdurhaman Nuru Farm Dev't.	SNNPRS	-(recent)	500				
16.	Akeno Farm	SNNPRS	May 2015 (recent)	500				
17.	Ruchi	Gambela	December 14, 2009	25,000	3500	206	10000	2.06
18.	BHO	Gambela	January 19, 2010	27,000		1103	21600	5.11
19.	Sanatin	Gambela	May 9, 2010	10,000	1800	1100	8000	13.75
20.	Verdanta	Gambela	December 29, 2009	3,012	148	100	1204.8	8.3
21.	Karaturi	Gambela	July 2,	100,000	12,000	129	100,000	0.129

			2010					
22.	Saudi Star	Gambela	July 2, 2010	10,000	6000	300	10,000	3
23.	Toren Agro Industry	Gambela	August 7, 2012	6000	4000	1005	4000	25.13
24.	Green Valley Agro Industry	Gambela	July 15, 2011	5000	1500	600	3333.3	18
25.	Akula Farm	Gambela	2014/2015 (recent)	1000	-	-	-	-
26.	Ashenafi Gebremeskel	Gambela	May 2014 (recent)	1000	-	-	-	-
27.	AD PLC	Gambela	June 2014 (recent)	1500	-	-	-	-
28.	Atnafu and Family	Gambela	May 2014 (recent)	1000	-	-	-	-
29.	Belsti Negaso	Gambela	May 2014 (recent)	1000	-	-	-	-
30.	Berhe Gidey	Gambela	May 2014	1000	-	-	-	-
31.	Debrich Import and Export	Gambela	May 2014	1000	-	-	-	-
32.	Ephrem Atakliti Gesese	Gambela	May 2014	1000	-	-	-	-
33.	Fasil Hailu	Gambela	June 2014	1000	-	-	-	-
34.	Gebresellasi Gebremedhin	Gambella	June 2014	800	-	-	-	-
35.	Gebremariam Abreha	Gambella	May 2014	500	-	-	-	-
36.	Ginbe Work	Gambela	June 2014	1000	-	-	-	-
37.	Gush Demoz	Gambela	June 2014	1000	-	-	-	-
38.	Gush Gebresellasi	Gambela	May 2014	500	-	-	-	-
39.	Hadush Ambay Gbremichael	Gambela	May 2014	1000	-	-	-	-
40.	Hagos Gebrehiwot	Gambela	June 2014	500	-	-	-	-
41.	Henok Gebreegiziabher	Gambela	June 2014	1000	-	-	-	-
42.	Hunde Lalisa	Gambela	June 2014	1500	-	-	-	-
43.	Etefa Mekonnen	Gambella	June 2014	1500	-	-	-	-
44.	Phonix	Gambela	2015	500	-	-	-	-
45.	Seti Semela	Gambela	June 2014	500	-	-	-	-
46.	Shimbelina	Gambela	2013/2014	500	-	-	-	-
47.	Tecron General Trading	Gambela	2013/2014	3000	-	-	-	-
48.	Teclé Birhan Tadesse	Gambela	May 2014	1000	-	-	-	-

49.	TG Farm	Gambela	2015	500	-	-	-	-
50.	Tsega Gebremedihn	Gambela	2015	500	-	-	-	-
51.	Saber Farm	Gambela	January 17, 2011	25000	-	-	10,000	-
52.	JVL Agro Industry	Gambela	19/2/05	5000	-	-	1000	-
53.	Kerseraw Benson General Trading PLC	Gambela	October 29, 2012	500	-	-	-	-
54.	Beliga Business Plc	Gambela	2015		-	-	-	-
55.	Ambaye Girmaye Farm Dev't.	Gambela	2015	1000	-	-	-	-
56.	K Z Farm Dev't.	Gambela	2015	1000	-	-	-	-
57.	Hamelmallo Agri Dev't.	Gambela	2015	1000	-	-	-	-
58.	Mikmat Agri Development	Gambela	2015	1000	-	-	-	-
59.	Menebih Agri Development	Gambela	2015	1000	-	-	-	-
60.	Gebremichael Kidane Mariam	Gambela	2015	500	-	-	-	-
61.	Bereket Berhe	Gambela	2015	500	-	-	-	-
62.	A S Kidney Beans and Oilseeds Agri Dev't.	Gambela	2015	500	-	-	-	-
63.	Shaporji	Benishangul	November 10, 2009	50,000	172	165	20,000	0.8
64.	Kedam Trading	Benishangul	December 1, 2010	1000	675	675	500	74.07
65.	Biruh Way Mechanized Farm	Benishangul	April 12, 2011	5000	2000	815.5.	5000	16.31
66.	Sky Agri Dev't.	Benishangul		3000	750	700	3000	23.33
67.	Tracon Trading*	Benishangul	2013/2014	904	870	820	750	91.50
68.	Tigab Agro Industry	Benishangul	November 21, 2010	300	300	300	3000	10
69.	Tikmit Agricultural	Benishangul	September 27, 2011	204	204	115	2000	5.75
70.	Gashaw Bezu Takele	Benishangul	November 24, 2011	2000	1200	1200	2000	60
71.	Nega Mamaye	Benishangul	July 19, 2012	1070	1070	947	2000	47.35
72.	G-7 Limited	Benishangul	June 2014	1000	-	-	-	-

* Kiston is no longer in operation at the time of writing.

	Company							
73.	Gutit	Benishagul	2013/2014	500	-	-	-	-
74.	Lisa PLC	Benishangul	2013/2014	3000	-	-	-	-
75.	Medhane General Trading	Benishangul	2013/2014	1000	-	-	-	-
76.	Michael Dismod	Benishangul	June 2014	1000	-	-	-	-
77.	Minbal Mengistu	Benishangul	2013/2014	1000	-	-	-	-
78.	Neka Andualem	Benishangul	2013/2014	500	-	-	-	-
79.	Kiston	Benishangul	November 10, 2009	431	0	0	0	0
80.	Wegagen	Benishangul	2013/2014	1000	-	-	-	-
81.	Tarekegn Belay	Benishangul	2013/2014	2000	-	-	-	-
82.	Yeshi Emebet	Benishangul	2013/2014	1000	-	-	-	-
83.	Yomed Agri & Agro Industry PLC	Benishangul	June 2014	1000	-	-	-	-
84.	Access Capital	Benishangul	October 11, 2010	5000	-	-	-	-
85.	Workneh Adamu	Benishangul	2013/2014	500	-	-	-	-
86.	Helwan Adnan Abdurhaman	Benishangul	February 22, 2013	5000	-	-	-	-
87.	Hashim Esmael	Benishangul	October 20, 2011	3000	-	-	-	-
88.	Horizon Plantation	Benishangul	February 15, 2012	20000	-	-	-	-
89.	Lotus International	Benishangulgu muz	July 9, 2012	3000	-	-	-	-
90.	Usman Issa Farm	Benishangul	27-02-2014	1000	-	-	-	-
91.	TYS Agri Dev't.	Benishangul		1000	-	-	-	-
92.	Africa Farm	Benishangul	2012/13	2000	600	550	1000	55
93.	Getafan Mechanized Farm	Benishangul	2010/2011	3000	1500	720	3000	24
94.	E.N.S Agri Dev't' PLC	Benishangul	March 4, 2015	1000	-	-	-	-
95.	Mohammed Amiru	Benishangul	June 10, 2015	2000	-	-	-	-
96.	Fireselam PLC	Benishangul	June 10, 2015	2000	-	-	-	-
97.	Yoseph Gebreegziabeh er	Benishangul	April 17, 2015	750	-	-	-	-
98.	Hagos Yibrha	Benishangul	February 27, 2015	1000	-	-	-	-
99.	Addis Alem	Benishangul	March 27, 2015	738	-	-	-	-

100	Kaza Wonz Trading	Benishangul	February 27, 2015	500	-	-	-	-
101	Solomon Leykun	Benishangul	June 13, 2015	1000	-	-	-	-
102	Solomon Amare	Benishangul	June 19, 2015	1000	-	-	-	-
103	Gashaw Kasse Agri Dev't.	Benishangul	May 4, 2015	1000	-	-	-	-
104	N M Agro Industry	Benishangul	May 27, 2015	500	-	-	-	-
105	Priest Desalegn Haile Agri Dev't.	Benishangul	May 27, 2015	1000	-	-	-	-
106	Asyae Mulat Agri Dev't.	Benishangul	May 27, 2015	500	-	-	-	-
107	Tayton Agri Dev't.	Benishangul	May 11, 2015	1000	-	-	-	-
108	BHN Agri Dev't.	Benishangul	2015	1000	-	-	-	-
109	Mulugeta Yetwale Impoerter & Exporter	Benishangul	2015	1000	-	-	-	-
110	Animaw Alemu Impoerter & Exporter	Benishangul	2015	2000	-	-	-	-
111	H 2 Me Agri Dev't.	Benishangul	2015	1000	-	-	-	-
112	Michael Abrha	Benishangul	2015	500	-	-	-	-
113	Agede Agri Dev't.	Benishangul	2015	500	-	-	-	-
114	Moria Agri Dev't'	Benishangul	2015	500	-	-	-	-
115	JDKH Agri Dev't.	Benishangul	2015	1000	-	-	-	-
116	JL Agri Dev't.	Benishangul	2015	500	-	-	-	-
117	Avino Agri Dev't.	Benishangul	2015	1000	-	-	-	-
118	Tsegaye Yemane	Benishangul	2015	1000	-	-	-	-
119	Temesgen Yohannes Agri. Dev't.	Benishangul	2015	500	-	-	-	-
120	Elafi Agri Dev't.	Benishangul	2015	1300	-	-	-	-
121	Alexander Salew	Benishangul	2015	1000	-	-	-	-
122	Hanamariam Andualem & Associates	Benishangul	2015	500	-	-	-	-
123	Endeg Agri.	Benishangul	2015	200	-	-	-	-

	Dev't.							
124	Melkamu and Family Agri Dev't. PLC	Benishangul	May 2, 2015	3000	-	-	-	-
125	Shewit Abera	Benishangul	April 8, 2015	500	-	-	-	-
126	Habi Hotel	Benishangul	-		-	-	-	-
127	Freedom Agri. Dev't.	Benishangul	May 2015	650	-	-	-	-
128	Asfaw Gola	Benishangul			-	-	-	-
129	Agro Peace Bio Ethiopia	Somali Region	August 24, 2012	2000	-	-	-	-
130	Pan Agro Industry	Somali Region	2014/15	4000	-	-	-	-

Source: Ethiopian Agricultural Investment Land Administration Agency

7.8. The Effects of Non-Performance of Obligations

One of the most vexing questions in regard to large scale agricultural investments in Ethiopia is what measures should be taken in relation to those investors who have defaulted upon their obligation to develop the land. The unilateral or the judicial cancellation of the agreements will not be easy as it appears to be. This is partly due to the fact that the investors also invoke a variety of reasons for the delayed performance including the failure of the Agency and regional and local administrators at *woreda* level to transfer timely handover of the land allocated which in turn results in wastage of time.¹²⁶³ The failure to hand over the land to the investors in a timely manner on the part of the local investors is indicative of the huge gap existing between the federal and the local administrations.¹²⁶⁴ The problem is further exacerbated by the lack of security as discussed in the previous chapter. Other reasons for delayed performance also include the interference or “trespass” on the part of the local communities and others which have been alluded to above. Therefore, the decision as to whether or not the contracts must be cancelled and the investor has to be required to restore the land mainly rests upon the higher echelon of the administration of the Ethiopian Agricultural Investment Land Administration Agency (EAILAA) rather than that of courts of law.¹²⁶⁵

¹²⁶³ Some of the foreign agricultural investors who are placed in default have already absconded. These include Indian companies named JVL Overseas PLC, CLC Industries PLC, Saber Farms PLC. Mela Agro Agri Dev't. is also one of the companies which has restored the land allocated to it voluntarily and gave up on the investment.

¹²⁶⁴ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

¹²⁶⁵ Interview, Ms. Blen, EAILAA, Legal Affairs Directorate, December 8, 2015

Table 10: List of Federal Investors who are Placed in Default (December 2015)

No.	Name of the Company	Type of Default Notice Served
1.	Sannati Agro Farm Enterprise PLC	First Warning
2.	JVL Overseas PLC	Termination of Land Lease Agreement
3.	Green Valley Agro PLC	First Warning
4.	Karaturi Agro Products PLC	Final Warning
5.	Al-Mehdi Matchmakers PLC	First Warning
6.	Ruchi Agro PLC	Final Warning
7.	S&P Energy Solutions Agro PLC	Restricting Undeveloped Land
8.	Saber Farms PLC	Termination of Land Lease Agreement
9.	Whitefield Cotton Farm PLC	First Warning
10.	Hashim Ismaile Al-khwajy	First Warning
11.	BHO Bio Products PLC	First Warning
12.	Reta Hailemariam and Family Farm	First Warning
13.	Hash Agro Industry	Final Warning
14.	Mela Agro Industry	Termination of Land Lease Agreement on its own Accord
15.	Tigab Agro Industry	Final Warning
16.	Gashaw Bizhu Agri Dev't.	Final Warning
17.	Adama Development	Final Warning
18.	Tikmit Agri Development	Final Warning

Source: Ethiopian Agricultural Investment Land Administration Agency (EAILAA) (December 2015)

The combined size of the total land allocated to the 18 agricultural investment placed in default as shown in the table above is 133, 058 hectares. Of this, 51,358 hectares, 197,000 hectares and 62, hectares of land is located in Southern Nations, Nationalities and peoples Regional State

(SNNPRS), Gambela and Benishangul respectively.¹²⁶⁶ Out of the total of 12 foreign agricultural companies operating in Gambela region, seven are in the penalty list.¹²⁶⁷ The fact that the Ethiopian Agricultural Investment Land Administration has placed in default the aforementioned 18 major ventures of agricultural investments out of the 97 large scale agricultural investments has casted doubt on the overall sector itself.¹²⁶⁸ The total combined agricultural investment area allocated to the aforementioned 18 companies constitutes about 20% of the total investments in the sector.¹²⁶⁹ As shown in the table above, eight of the agricultural investors are on first warning, while seven are on final warning. The Agency has terminated the agreements with two agricultural companies namely JVL Overseas PLC and Saber Farms PLC, while Mela Agro has terminated the agreement on its own motion.¹²⁷⁰

It has been said that one of the major defaults on the part of many of the large scale agricultural investors thus far is the failure to develop the land they took. The consideration of the practice of the Ethiopian Agricultural Investment Land Administration Agency demonstrates that the Agency has been taking different actions in response to this ranging from issuance of warning to that of reclaiming the land allocated.¹²⁷¹ Article 13 of Agricultural Investment Land Administration Procedure Guidelines also deals with the effects of failure to develop the land allocated for the investor. Article 13(1)(1) of the Guideline stipulates that the investor shall be warned if unable to develop the land within one year since the making of the agreement. Nevertheless, this stipulation is in contravention with Article 14(4) of the Guideline which states that the investor shall be required to restore the land if he or she has not started construction after six months after taking possession of the land upon placing the investor in default by issuance of first warning. If the investor has not started any activities of developing the land within two years, the investor shall be required to return the land having effected payment of land rental

¹²⁶⁶ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015, available at < <http://addisfortune.net/columns/non-performing-agricultural-investments-get-the-axe/> >

¹²⁶⁷ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

¹²⁶⁸ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

¹²⁶⁹ Dawit Endeshaw & Misganaw Getachew, *Non-Performing Agricultural Investments Get the Axe*, Addis Fortune, December 13, 2015

¹²⁷⁰ Ethiopian Agricultural Investment Land Administration Agency, Annual Performance Report (2014/15), p. 11

¹²⁷¹ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

since taking delivery of the land as per Article 13(1)(2). On the other hand, if the investor managed to develop the land only partially, Article 13(1)(3) requires the investor to restore the part of the land not developed by effecting two years land rental since the making of the agreement.

Moreover, Article 9(6) of the agreement provides that the lessor is in a position to terminate the agreement upon issuance of six month prior notice to the investor for good reasons". This is echoed in Article 5(4) of the agreement which entitles the lessor to terminate the agreement for "justified good cause". At this point, it is appropriate to inquire what situations may fall within the ambit of "justified good cause" or "good reasons". Article 9(7) provides a similar right to terminate the agreement to the investor upon issuance of six months prior notice for its own good reasons in line with Article 3(6) of the agreement. Nevertheless, the agreement does not specify situations which amount to "justified good cause."

Similarly, Article 9(3) stipulates that the agreement shall be terminated if the lessor fails to fulfill or observe any of its obligations or covenants. However, a party who seeks to terminate the agreement is required to put the other party in default upon the issuance of six months prior notice. For instance, the failure on the part of the lessor to deliver the land to the lessee is one of the grounds which entitle the investor to terminate the agreement unilaterally in accordance with Article 9(2) of the agreement. In addition, the expiry of the lease contract period or the period extended based on the mutual agreement of the parties is one of the reasons that bring about the termination of the agreement as indicated in Article 9(1).

Similarly, Article 14 of the 2009 Agricultural Investment Land Rent Enforcement Guidelines stipulates six grounds of termination of the agreement. These are if the investor is found in activities which are at variance with the ones indicated in the project proposal submitted, if the investor failed to develop the land as per the schedule in the project proposal, violation of investment laws and regulations of the country, termination upon the request of the investor, expiry of the time period of the investment and failure to effect timely payment of land rent.

The Guidelines hints at a possibility whereby the investor may be held liable pursuant to the law in the event of termination of the agreement. Article 14(1) (6) stipulates that the investor shall be 'legally culpable' although the provision does not specify as to the exact nature of the liability

envisaged. Moreover, the provision qualifies the possibility of being held legally liable by adding the phraseology “if necessary.” Thus, it is far from clear what circumstance warrant the investor to be held legally liable and the nature of the legal recourse envisaged in this context.

7.9. Settlement of Disputes

International investment contract also deal with the law applicable to interpret the contract in case of disputes.¹²⁷² These clauses regulate issues concerning the role of courts of home state, arbitration in the home state under domestic law, international arbitration process and the like.¹²⁷³ Therefore, such contracts confer more sweeping rights to an international investor as opposed to the domestic investor who is subject to the domestic laws.¹²⁷⁴

The standard form contracts do not seem to ascribe any role to the laws of another State or international law as interpretational basis.¹²⁷⁵ Article 17 of the standard form contracts dwells upon settlement of disputes. It stipulates that both parties will do their utmost to resolve the dispute amicably and to their mutual satisfaction. The provision goes on to state that the dispute shall be referred to the Ethiopian Federal Court in the event where the parties are unable to reach agreement. The fact that the contract does not encourage international arbitration and prioritizes domestic process is one of the strong points of the contract.¹²⁷⁶

Some of the provisions in the contracts concluded between the Ethiopian Agricultural Investment Land Administration Agency and foreign large scale agricultural investors echo similar provisions to be found in the Bilateral Investment Treaties alluded in the fifth chapter of the thesis. Thus, Bilateral Investment Treaties (BITs) form part and parcel of the laws applicable to govern large scale agricultural investment, namely, Ethiopian domestic law, the international contract between the parties and the BITs. In many cases, the BITs include provisions concerning settlement of disputes between a State Party and an investor from the other State Party. For instance, Articles 9 -10 of the BIT signed between Ethiopia and India on June 5, 2007 can be considered as a case in point. Article 9(1) of the treaty mirrors Article 17 of the standard

¹²⁷² Cuffaro and Hallam (n 1)

¹²⁷³ *ibid*

¹²⁷⁴ *ibid*

¹²⁷⁵ Mann (n 845)

¹²⁷⁶ Carin Smaller, ‘Investment Contracts for Farmland and Water: Investment Contracts for Farmland and Water: Ten Steps’ <http://www.iisd.org/pdf/2013/investment_contracts_farmland_en.pdf> accessed September 13, 2014

form contracts which stipulates that, as far as possible, disputes shall be settled amicably. Article 9(2) provides two options for dispute settlement in the event where the dispute has not been settled within a period of six months from the date either party to the dispute requested amicable settlement. First, Article 9(2) (a) provides that the dispute shall be submitted to the competent court of the Contracting Party. Second, Article 9(2) (b) of the treaty submits that an International Conciliation will consider the dispute under the Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL).

The question will be what if the parties fail to agree on the aforementioned dispute settlement procedures. Article 9(3) of the sample BIT that Ethiopia signed with India stipulates that the International Center for Settlement of Investment Disputes (ICSID) shall consider the matter. Although Ethiopia signed the Convention on the Settlement of Investment Disputes between States and Nationals of other States in 1965, it has not yet ratified the treaty. ICSID is established by virtue of this treaty. If Ethiopia has not ratified the treaty, it is not possible to consider the country as a State party to the treaty. Article 9(3) (a) of the sample BIT under consideration requires membership to the Convention to trigger the application of this provision. Thus, this forum of dispute settlement shall not be operational pending the ratification of the Convention by Ethiopia. Article 9(3) (b) & (c) goes on to provide that the dispute shall be referred to the International Center for Settlement of Investment Disputes under the Rules Governing Additional Facility for the Administration of Proceedings by the Secretariat of the Center (Additional Facility Rules), or an international ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Article 9(4) stipulates that the arbitral awards shall be final and binding on both parties to the dispute and shall be made in accordance with the provisions of this Agreement.

Nevertheless, the contracts are silent as regards the role of surrounding communities located in the vicinity of the investment in the process. Local community should be given active role in terms of reporting to and giving input for settlement of disputes as they are the ones who have the most immediate interest in the proper enforcement of the investment agreement as opposed to officials in capitals.¹²⁷⁷

¹²⁷⁷ Mann (n 845)

Responsible contracts on agricultural investment should also include specific provisions on management compliance and dispute settlement process.¹²⁷⁸ Article 12 of the standard form contracts currently employed in Ethiopia stipulates that the contracts will be governed by Ethiopian laws. Nevertheless, this is likely to pose a predicament since existing laws in Ethiopia pertaining to issues of large scale land investments are weak and inadequate. This problem could be remedied if the contracts alluded to basic levels of conduct pursuant to international standards.¹²⁷⁹ At this juncture, it is possible to mention the case of Environmental and Social Code of Practice adopted by the Ministry of Agriculture. It would also be prudent to include some of the outcome of the EIA or human rights due diligence in the contractual arrangement.

However, certain provisions relating to settlement of disputes to be found in some of the contracts used by the regional states are very problematic. For instance, one can consider the case of FRI-EL Green power SPA agreement alluded to above. On April 4, 2007, the Trade and Industries Department of South Omo Zone in Southern Nations, Nationalities and Peoples Regional State signed a lease contract with FRI-EL Green power SPA. As per Article 1 of the contract, the Department alienated 30,000 hectares of land found in the regional state to the company to be used for agricultural purposes. Although the agreement did not specify the exact agricultural purposes, it was learnt that the company sought to engage in the production of palm oil and jatropha plants on the tract of land. The land designated for the investment is located in Dasenech and Gngatom *woredas* (districts) of the zone. The land allocated to the company partly overlapped with the former Ethio-Korea Agricultural Development Enterprise administered under the North Omo Agricultural Development Enterprise. The Privatization Agency also handed over the Ethio-Korea Agricultural Development enterprise to the company according to a contract concluded on February 4, 2007.¹²⁸⁰ Article 4 of the Agreement stipulates that the lease shall last for a period of 70 years. The lessee undertook to pay yearly land rental of 49 birr per hectare starting from the seventh year after the delivery of the land.¹²⁸¹ However, the agreement does not stipulate the total amount of land rent that the company is supposed to pay yearly.

¹²⁷⁸ *ibid*

¹²⁷⁹ *ibid*

¹²⁸⁰ Letter dated May 6, 2011 written by FRI-EL GREEN Power Company to South Omo Zone Administration

¹²⁸¹ A lease contract made between Trade and Industries Department of South Omo Zone in Southern Nations, Nationalities and Peoples Regional State, Ethiopia and FRI-EL Green power SPA, April 4, 2007, Article 5(1) & (2)

Article 13 of the Agreement deals with dispute resolution. The provision reads as follows:

1. All disputes, disagreements or conflicts that may arise between the parties shall be settled amicably.
2. Where the parties fail, within a reasonable time, to settle the disputes, disagreements or conflicts amicably, the dispute shall be finally settled by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Center (“SIAC”) for the time being in force, which rules are deemed to be incorporated by reference to this clause. The Tribunal shall consist of three arbitrators.
3. Each party shall appoint one arbitrator and the two arbitrators so appointed shall choose a third arbitrator who shall serve as a Chairman. In case a party fails to appoint its arbitrators or the two arbitrators fail to choose a third arbitrator within 30 days, then the Chairman of the SIAC shall appoint an arbitrator on their behalf.
4. The award of the arbitrators shall be final and binding upon the parties.
5. The seat of the arbitration shall be Singapore, while the physical place for conducting the arbitration meetings shall be in Addis Ababa.
6. The arbitration proceedings shall be conducted in the English language.

After the company took delivery of the land and started digging canals, the administration of Dasenech *woreda* stopped it based on a letter dated December 12, 2007 stating that its activities are illegal.¹²⁸² This led to the suspension of the activities of the company for a significant period of time pending the demarcation of the land allocated.¹²⁸³ The demarcation of the land designated for the company culminated on August 8, 2009 although it was supposed to have been finalized on March 9, 2008.¹²⁸⁴ The company was also issued with the land holding certificate on January 28, 2010.

The company complains that the development of the land did not proceed as planned due to delay in the delivery of the land holding certificate and the actual delivery of the land which in turn delayed the importing of water pumps and workshop equipment needed for the activities.¹²⁸⁵

¹²⁸² Letter dated December 12, 2007, written to FRI-EL Green Power Company by Dasenech *Woreda* (district) Administration Office, SNNPRS

¹²⁸³ Letter dated May 6, 2011 written by FRI-EL Green Power Company to South Omo Zone Administration

¹²⁸⁴ *ibid*

¹²⁸⁵ *ibid*

Moreover, it submitted that the geo-membrane cover spanning over 15 square kilometers was stolen on different occasions by armed robbers leading to the destruction of the seedlings. Effort made to stop the robbery did not succeed and the threat of further robbery was still there.¹²⁸⁶

Nevertheless, the company received a letter notifying it that the 30,000 hectares of land which has been allocated to it based on the original contract has been reduced by half to 15,000 hectares since the company is unable to develop the land as was stipulated in the agreement within a reasonable time. Accordingly, the company was also requested to enter into a new contractual arrangement based on these changes. The company argues that this decision was made only a year and four months after taking possession of the land and issuance of the land holding certificate.¹²⁸⁷ This decision was taken by the South Omo Zone administration on March 11, 2011 following the evaluation of the performance of the project by the South Omo Zone Council.¹²⁸⁸ The company protested the decision contending that the council of the zone did not witness firsthand the development activities on the ground by coming to the site.¹²⁸⁹ The company sought this to be rescinded.¹²⁹⁰

According to the lawyer of the Ethiopian Agricultural Investment Land Administration Agency, the agreement concluded between the parties suffers from many shortcomings. To begin with, the contract mixed upon the rights and obligations of the lessee by dealing with the matter in a single provision, namely Article 8.¹²⁹¹ The legal memorandum of the lawyer goes on to state that, as this is a contract which lasts for a period of 70 years the rights and obligations of the parties should have been dealt with separately in distinct provisions.¹²⁹² Furthermore, the contract has not clearly outlines the rights of the lessor except that of the right to monitor the activities of the lessee within the plot of land allocated.

¹²⁸⁶ *ibid*

¹²⁸⁷ *ibid*

¹²⁸⁸ The Office of the President of SNNPRS also decided the designation of 82 hectares of land from the former Ethio-Korea Farm to the expansion of Amorate town according to a letter dated January 17, 2008.

¹²⁸⁹ Letter dated May 6, 2011 written by FRI-EL GREEN Power Company to South Omo Zone Administration

¹²⁹⁰ As the reduction of the size of the land amounts to variation, it needed to be governed according to the terms of the agreement. As per Article 10 of the agreement, any adjustment of the agreement requires the agreement of both parties. Nevertheless, it is clear from the circumstances of the case that the company never consented to such a reduction.

¹²⁹¹ Mr. Assefa Amde, Directorate, Legal Affairs Directorate, Ethiopian Agricultural Investment Land Administration Agency, Legal Memorandum concerning the Agreement Concluded between Trade and Industries Department of South Omo Zone, SNNPRS & FRI-EL Green power SPA

¹²⁹² *ibid*

In regard to termination, the agreement stipulates only two grounds.¹²⁹³ First, the agreement may be terminated in the event of delay in payment of the lease fee for two consecutive years without the consent of the lessor. Second, the contract may be terminated upon the failure of the lessee to commence the project on the land without any acceptable cause within one year after the delivery of the land. Article 9(2) & (3) is of particular interest in the context of the discussion on the design of the contract relating large scale agricultural investments. It reads as follows:

In the event of termination of the lease, howsoever caused, then the lessee shall be entitled to claim from the lessor and the Government of Ethiopia compensation of a fair amount taking into account the total amount invested by the lessee.

In addition Article 9(3) goes on to state that the lessee is required by the operation of the laws of Ethiopia or any Ethiopian government or regulatory agency, or any action of such agency to abandon the operations on the land or to surrender possession of the land (including the refusal to grant or the cancellation of any license required by the lessee to occupy or carry on operations on the land by any such agency), the lease shall thereupon be deemed to be terminated, and the lessee shall be entitled to claim from the lessor and the government of Ethiopia compensation of a fair amount taking into account the total amount invested by the lessee, as well as an amount representing loss of profits.

The consideration of such provisions in the agreement is a clear manifestation of the one-sided nature of the contract which is highly favorable to the investor. This is particularly clear considering the fact that the company is entitled to claim fair compensation regardless of the grounds for the termination of the agreement as can be gathered from the phrase “howsoever caused.” In his assessment of the agreement, the Director of the Legal Affairs Directorate of the Ethiopian Agricultural Investment Land Administration Agency also concluded that the terms of the agreement unduly favour the company at the expense of the country.¹²⁹⁴ The inclusion of such provisions led the Legal Affairs Directorate of the Agency to conclude that the contract is more generous to the lessee than the lessor. However, the termination of the agreement would be

¹²⁹³ A lease contract made between Trade and Industries Department of South Omo Zone in Southern Nations, Nationalities and Peoples Regional State, Ethiopia and FRI-EL Green power SPA, April 4, 2007, Article 9(1) (a) & (b)

¹²⁹⁴ Mr. Assefa Amde, Directorate, Legal Affairs Directorate, Ethiopian Agricultural Investment Land Administration Agency, Legal Memorandum concerning the Agreement Concluded between Trade and Industries Department of South Omo Zone, SNNPRS & FRI-EL Green power SPA

very difficult due to the fact that the lessee has already paid the yearly land rental to the tune of 1.4 million birr. Since the agreement entitles the lessee to a fair compensation, irrespective of the party which terminates the agreement. In the event of dispute between the parties, the parties will be obliged to submit the dispute to Singapore International Arbitration Center (“SIAC”). Owing to the fact that SIAC charges in foreign currency for the services it renders it is evident that the amount of fee to be paid would be very high. Thus, the Legal Memorandum concerning the Agreement concluded between Trade and Industries Department of South Omo Zone, SNNPRS & FRI-EL Green power SPA Legal Affairs Directorate culminates by suggesting the shortcomings in terms of the design of such contracts and the need for legal capacities and education in this regard.¹²⁹⁵ The Legal Affairs of the Agency also characterized the agreement as “very weak”.¹²⁹⁶

The South Omo zonal administration contends that 15,000 hectares of land has been taken away from the FRI-EL due to poor performance. Even if FRI-EL argued that the zonal administration has to replace the 15,000 hectares of land taken away from it, the administration denied this is actually the case as can be seen from a recent report.¹²⁹⁷ On the contrary, the zonal administration produced a copy of the letter it claimed to have written to FRI-EL requesting the later to take delivery of the rest 15,000 hectares of land.¹²⁹⁸ Agreement was reached for the company to present a letter demanding the replacement of the 15,000 hectares that was taken away and conclude a new contract by preparing a new business plan.¹²⁹⁹

7.10. Annexes to the Agreements and Authentication of the Agreement

Article 16 of the standard form contracts stipulates that certain documents will accompany the agreements. These documents include the site plan of the leased land, the photocopy of the ID or passport of the lessee or a person duly authorized by the lessee and the photocopy of the Memorandum and Articles of Association of the lessee. Nevertheless, it is not clear the importance of appending such documents to the agreement. It would have been much better if the agreements are accompanied by such other documents such as community development plans

¹²⁹⁵ *ibid*

¹²⁹⁶ *ibid*

¹²⁹⁷ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 15

¹²⁹⁸ *ibid*

¹²⁹⁹ *ibid*

and human rights due diligence. Article 4(8) of the standard form contracts stipulates that the investor is required to submit an advance action plan as regards the use of the rural land. Thus, the advance action plan that the provision alluded to should have been mentioned as one of the documents forming part and parcel of the annex to the standard form contracts. The need to append the Environmental Management Plan and Action Plan, which is prepared based upon the results of the EIA, to the contractual arrangement.

Article 11 of the contracts specifies that the agreement shall not be subject to requirements of registration and approval by a notary office. Instead, the provision stipulates that the Ministry of Agriculture, the lessor, shall guarantee the validity of the agreement in spite of the absence of registration as a representative and the highest authority of the federal Democratic Republic of Ethiopia with respect to the lease agreement. It appears that this provision in this contractual arrangement has the effect of sidestepping relevant laws concerning registration of contracts. The provision goes on to state that copies of the contract agreement shall be sent to the lessee, District administration, finance office, investment commission and other concerned bodies accompanied a cover letter seeking the cooperation on the part of these organs seemingly for the performance of the contract. The provision would be incompatible with Article 1723 of the Civil Code which requires that contracts which create or assign the right of usufruct in immovables to be registered.¹³⁰⁰ Although the law provides different options for the registration of contracts concluded with organs of public administration including at court, notary or public administration, it does not relieve such contracts from the requirement of registration.¹³⁰¹ Similarly, the federal land legislation also requires registration since it calls for the application of required procedures in the case of rural land lease agreements.¹³⁰²

Conclusion

The standard form contracts employed in large scale agricultural investments are not sufficiently informed by international recommendations including the Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGT) and the Principles of Responsible Agricultural Investment (CFS-RAI). The standard form contracts used in Ethiopia in relation to

¹³⁰⁰ Elias (n 75)

¹³⁰¹ *ibid*

¹³⁰² The Federal Rural Land Administration and Land Use Proclamation , Article 8(3)

large scale agricultural investments are characterized by economic disequilibrium and unfairness. In other words, these contracts manifest the absence of the balance of the parties' rights and obligations.¹³⁰³ The contracts stipulate substantially disproportionate obligations to the parties. The contracts do not properly accommodate environmental, economic and social concerns. Admittedly, the agreements concluded by investors with regions and *woreda* (district) administrations are particularly inappropriate as illustrated by the FRI-EL Company case.¹³⁰⁴ The investors are at liberty to determine the type of crops to grow and where to market their produce. Partly explained by the impact of investment law and the package of incentives offered, the investors are not under obligation to supply the local and the national market as such. Instead, the investors are strongly encouraged to export their produce abroad.¹³⁰⁵ There are no contractual provisions requiring the investors to meet the food security needs of the local population. The contracts do not include contractual obligations requiring the investors to provide social services to the local communities or engage in the construction of infrastructure. On the contrary, it is the government which has been responsible for the construction of infrastructure including roads and irrigation schemes employed for the use of the investment projects.¹³⁰⁶ Owing to the fact that the contracts do not sufficiently specify the development obligations expected of the investor, it is difficult to consider the contracts as being carefully constructed.

¹³⁰³ Cotula (n 604)

¹³⁰⁴ EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities Manual, p.8

¹³⁰⁵ Rahmato (n 32)

¹³⁰⁶ *ibid*

Chapter Eight

Human Rights and Environmental Impact Assessments in Agricultural Investments

Introduction

Agricultural investment is one of the different forms of business enterprises with potential adverse human rights impacts. The activities of agricultural investors can affect the rights of communities where they operate. The impact that such activities entail may be positive or negative. Positive impacts include, generating employment and improving livelihood by way of benefit sharing schemes, while negative impact includes the displacement of communities. Agricultural investors bear human rights responsibility to mitigate the adverse impacts of their activities. Consequently, the tenth CFS Principle for Responsible Investment in Agriculture and Food Systems calls for the review of impacts and ensure accountability and transparency. It stipulates that there has to be mechanisms to review economic, social, environmental, and cultural impacts and ensure the accountability and transparency of each actor to all relevant stakeholders.¹³⁰⁷ Such mechanisms need to provide prior, independent, and participatory assessment of potential and realized impacts involving all stakeholders. Apart for that, mechanisms must be in place to implement remedial actions in the case of negative impacts and/or non-compliance with applicable national laws and/or contractual obligations.¹³⁰⁸ Given the size of many of the agricultural investments in question, it is argued in this thesis that human rights impact assessments need also to be undertaken as per the United Nations Guidelines on Business and Human Rights (UNGPs). Thus, the chapter outlines the pressing need for human rights due diligence in large scale agricultural investments in Ethiopia.

¹³⁰⁷ CFS, Principles for Responsible Investment in Agriculture and Food Systems (n 543) Principle 10

¹³⁰⁸ *ibid*

8.1. The Legal and Policy Framework on Environmental Protection and Large Scale Agricultural Investments

Ethiopia has adopted the strategy on Climate Resilient Green Economy (CRGE). The country has adopted a variety of policies, laws and regulations to ensure social and environmental protection in relation to investments including large scale agricultural investments. These include the adoption of Social and Environmental Code of Practice to govern large scale agricultural investments. The country is also a State Party to a number of international instruments aimed at the protection of the environment. Ethiopia ratified the United Convention on Biodiversity (UNCBD) on May 31, 1994. The Convention on Biodiversity aims at the protection of biological diversity, ensure the use biological diversity sustainably and ensuring benefit sharing biological resources are commercialized. The country ratified the Convention by virtue of proclamation 98/1994. Ethiopia has also adopted National Biodiversity Strategy and Action Plan in December 2005, which underwent revision in June 2014. The country also adopted the Proclamation on Access to Genetic Resources and Community Knowledge and Community Rights (Proclamation 482/2006). Ethiopia ratified the Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) (the Kyoto Protocol) on 2 May 1994 by virtue of Proclamation 97/1994. Ethiopia ratified the United Nations Convention to Combat Desertification (UNCCD) by virtue of Proclamation 80/1997. Ethiopia ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes by virtue of Proclamation 356/2002. Ethiopia ratified the Convention for the Control of the International Trade in Endangered Species of Wildlife (CITES) in 1989. Ethiopia ratified the Stockholm Convention on Persistent Organic Pollutants (POPs) on May 22, 2002 by virtue of Proclamation 279/2002.

In addition to the aforementioned international instruments, the FDRE Constitution has stipulated a number of provisions aimed at the protection of the environment. Article 44(1) of the FDRE Constitution stipulates the rights of all persons to a clean and healthy environment. Article 44(2) goes on to state that all persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate assistance. Article 43(2) of the FDRE Constitution provides that nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting

their community. Article 92(1) of the Constitution provides that government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment. Article 92(2) of the Constitution goes on to state that the design and implementation of programmes and projects of development shall not damage or destroy the environment.

Furthermore, Ethiopia has also adopted domestic legislative framework concerning the protection of the environment. Apart from the adoption of its Environmental Policy, the country has adopted a variety of subsidiary legislation for the implementation of the policy. Accordingly, it adopted the Environmental Impact Assessment Proclamation (Proclamation 299/2002), Environmental Pollution Control Proclamation (Proclamation 300/2002) and Solid Waste Management Proclamation (Proclamation 513/2007).

In spite of the aforementioned legal and policy framework, the actual implementation of large scale agriculture agricultural investments in the country appears to be contrary to many of the obligations that the country has undertaken by the international instruments and domestic legislation. As will be discussed below, agricultural investments are plagued with several adverse social and environmental effects on the environment including the deforestation and burning of forest resources, the loss of biodiversity, pollution and degradation of water and soil resources, distorted utilization and management of agricultural chemicals, the absence of conducive environment for workers, the failure to take due recognition for the way of life of inhabiting and surrounding communities and others.¹³⁰⁹ Moreover, water and soil resources have been subjected to wastage, degradation and erosion, the soil is increasingly salty, rivers filled up with earth and landslide, the stockpiling of chemicals nearby the residence of workers, etc.

8.2. The Mandate of EAILAA in relation to the EIA Process

The EIA process is an indispensable mechanism for the enforcement such constitutional rights and obligations.¹³¹⁰ Moreover, the Environmental Policy of Ethiopia provides that EIA study reports should not only consider physical and biological impacts but also address social, socio-

¹³⁰⁹ Mr. Addisu Negash, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency, *Presentation in relation to the Consultative Workshop on Social and Environmental Code of Practice* [held on December 15, 2015]

¹³¹⁰ FDRE, Environmental Impact Assessment Proclamation, Proclamation 299 (n 1012), Preamble

economic, political and cultural conditions.¹³¹¹ The Policy also highlights the importance of public consultation as an integral part of the EIA process.¹³¹² Consequently, the policy highlights the need for ensuring the social, socio-economic, political and cultural conditions in EIA procedures.¹³¹³

One of the prerequisites for responsible agricultural investments is the need to undertake prior assessments of the potential positive and negative impacts. Environmental Impact Assessments (EIA) or Environmental and Social Impact Assessments (ESIA) are the preferred means for such assessments.¹³¹⁴ The Ministry of Environment and Forest and Regional Environmental Protection Organs are required to undertake oversight and follow up of the implementation of the project to ensure that it is environmentally sustainable.¹³¹⁵

The Environmental Protection Authority (EPA) had been the organ in charge of regulation of environmental Impact Assessments (EIA).¹³¹⁶ In 2013, the mandate of the EPA was passed to the Ministry of Environment and Forests based on proclamation 803/2013. While it was in operation, the EPA developed directives that identify categories of projects that require EIA, for the issuance of guidelines that direct the preparation and evaluation of EIA study reports and for the evaluation of EIA study reports on projects subject to federal licensing, execution or suspension, and on projects likely to cause inter-regional impacts.¹³¹⁷ Although the establishment Proclamation vested the then EPA with the authority to conduct EIAs, the Authority lost this power as a result of the decision reached by the Council of Ministers on the occasion of its 73rd Regular Meeting on November 14, 2008. The Council of Ministers rendered the decision based on Article 6(24) of Proclamation on Environmental Protection Organs Establishment which stipulates that the Environmental Protection Authority (EPA) is empowered to delegate some of its powers and duties to other agencies. Accordingly, the Council of Ministers delegated other

¹³¹¹ FDRE, Environmental Policy of Ethiopia (1997) p.24

¹³¹² *ibid*

¹³¹³ *Ibid*, p.25

¹³¹⁴ International Land Coalition, Oakland Institute and Global Witness (n 419), *See also* Environmental Impact Assessment Proclamation (n 1012), Preamble

¹³¹⁵ Rahamato (n 29)

¹³¹⁶ FDRE, Environmental Protection Organs Establishment Proclamation 295/2002, Federal Negarit Gazeta, Year 9, No 7, October 31, 2002, Article 6

¹³¹⁷ FDRE, Environmental Impact Assessment Proclamation (n 969), Article 5 and 8, *See also* Mellese Damtie and Mesfin Bayou, Overview of Environmental Impact Assessment in Ethiopia: Gaps and Challenges <http://www.academia.edu/2509527/Overview_of_Environmental_Impact_Assessment_in_Ethiopia> accessed January 30, 2014

organs including the Agricultural Development sector of the Ministry of Agriculture to oversee the EIAs relating to agricultural projects including large scale agricultural investments.¹³¹⁸

Based on this decision, the Ethiopian Environmental Authority delegated the Ministry of Agriculture to approve or reject the implementation of projects presented to it.¹³¹⁹ Apart from delegating the power to oversee Environmental Impact Assessment studies, the statement of delegation also empowers the Ministry of Agriculture to undertake monitoring of the implementation of such studies. The statement of power of delegation also prescribes the terms and conditions under which the Ministry is to exercise its delegated power. The Ministry is required to submit the Environmental Impact Assessment study reports to the Authority quarterly.

By virtue of this delegation, the Ministry has the authority to make decisions on and evaluate the EIA study reports developed by the proponent.¹³²⁰ The delegation of undertaking EIA to the Ministry of Agriculture has been criticized since the Ministry does not have the requisite technical capacity to undertake such assessments.¹³²¹ It is also contended that enabling an organ to review and approve the implications of its own licensing decisions leads to conflict of interest.¹³²²

In spite of this, the Ethiopian Agricultural Investment Land Administration Agency outlined a draft guideline to guide the EIA process in July 2014. According to this guideline, the purpose of undertaking the EIA is to maintain the natural balance that should exist in the project site of large scale agricultural investments.¹³²³ The Guideline goes on to state that it is aimed at avoiding or mitigating the adverse impacts of agricultural investments.¹³²⁴ Moreover, the guideline

¹³¹⁸ Agreement on delegation to undertake EIA by other Ministries took place on November 14, 2008. *See* Tesafye Abate (n 971) 103

¹³¹⁹ Statement of Delegation of the Power by Ethiopian Environmental Authority to the Ministry of Agriculture to approve or reject projects based on EIA Study Reports based on the decision of the Council of Ministers on the occasion of its 73rd Regular Session on November 14, 2008 based on Article 6(24) of the Environmental Protection Organs Establishment Proclamation 295/2002; *See also* Ethiopian Agricultural Investment Land Administration Agency, Draft Guidelines on EIA Process on Large-Scale Agricultural Investments, Preamble, July 2014

¹³²⁰ Tesafye Abate (n 971) 103

¹³²¹ World Bank, *Rising Global Interest In Farmland: Can It Yield Sustainable and Equitable Benefits?* <http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf> accessed January 30, 2014

¹³²² Tesafye Abate (n 971) 103

¹³²³ EAILAA, *Draft Guidelines on the EIA Process on Large-Scale Agricultural Investments* (July 2014)

¹³²⁴ *ibid*

underscores the need for EIA to make utmost of the limited land resources of the country to ensure sustainable benefits for the people.¹³²⁵ The preamble of the draft Guideline also underlines the need to ensure the implementation of relevant proclamations including Environmental Impact Assessment Proclamation 299/2002 and regulations and directives.¹³²⁶

8.3. Requirements of Environmental Impact Assessment (EIA) in Large-Scale Agricultural Investments

The EIA process in large scale agricultural investments needs to be in line with the basic principles of EIA including early application, participation, issues based, consideration of alternatives, accountability, flexibility, credibility, time and cost-effectiveness, transparency, supportiveness, conservation-based and practicality.¹³²⁷ The EIA Process in large-scale agricultural investments involves different steps including screening, scoping, and the time frame or undertaking EIA, the preparation of the EIA study report, Impact Analysis and Mitigation, review of the EIA report and decision making and examination of alternatives as discussed below.

8.3.1. Screening

According to the Environmental Impact Assessment Proclamation categories of projects likely to have negative impacts are required to undergo EIA study.¹³²⁸ On the contrary, the Proclamation stipulates that projects not likely to have negative impacts on the environment are not required to undergo EIA study.¹³²⁹ Nevertheless, the definition and determination of whether or not a given project is likely to require such study is susceptible to manipulation since it gives a wide margin of administrative discretion.¹³³⁰ In spite of this, the interview conducted with the Coordinator of EIA case team of the Environmental Protection Directorate of the Ethiopian Agricultural Investment Land Administration Agency revealed that screening is not undertaken when it

¹³²⁵ *ibid*

¹³²⁶ *ibid*

¹³²⁷ Environmental Protection Authority (EPA) of the FDRE, *Environmental Impact Assessment Procedural Guideline*, Series 1 (2003) 6-7

¹³²⁸ FDRE, Environmental Impact Assessment Proclamation (n 969), Article 5(2)(b)

¹³²⁹ *ibid*, Article 5(2)(a)

¹³³⁰ World Bank (n 1250)

comes to large scale agricultural investments.¹³³¹ He explained that this is due to the fact that all such projects are always required to undergo Environmental Impact Assessment without the need to screen.¹³³² The Social and Environmental Code of Practice for Agricultural Investment issued by the Ministry of Agriculture in May 2011 also makes it clear that investors engaged in agricultural investment are duty bound to undertake EIA.¹³³³

The Environmental Council Directive outlines those projects which require environmental impact assessment.¹³³⁴ The Directive does not outline criteria for the determination of which projects are subject to screening of EIA. Instead, it lists twenty two forms of projects which will be subject to EIA screening. Accordingly, the Directive stipulates that irrigation development projects exceeding 3000 hectares, horticulture and floriculture development projects, and investments near protected areas require environmental impact assessment.¹³³⁵ Thus, the Directive does not clearly require agricultural investments, large or small, be subject to environmental impact assessment. The annex to the statement of the delegation of power by Ethiopian Environmental Authority to the Ministry of Agriculture also lists, among others, “*investments near protected areas*” as requiring environmental impact assessment.¹³³⁶ However, the phraseology remains nebulous and does not necessarily refer to large scale agricultural investments which may not take place nearby such protected areas.

On the other hand, the draft guideline on the process of EIA in relation to large scale agricultural investments developed by the Environmental Protection Directorate of the Ethiopian Agricultural Investment Land Administration Agency outlines the projects that are duty bound to prepare EIA study reports. These include agricultural investments on projects more than 500 hectares of land, projects likely to displace more than 100 households, large scale land reclamation projects, dams and manmade impoundment in low land areas covering an area of 100 hectares or more, projects

¹³³¹ Interview with Addisu Negash, EIA Case Team Coordinator, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency, May 20, 2014

¹³³² *ibid*

¹³³³ Ministry of Agriculture, Social and Environmental Code of Practice for Agricultural Investment (May 2011) 6

¹³³⁴ FDRE, Environmental Protection Authority, Directive issued to Determine the Categories of Projects Subject to the Environmental Impact Assessment Proclamation No. 299/2002 (Directive No.1/2008)

¹³³⁵ *ibid*

¹³³⁶ Statement of Delegation of the Power by Ethiopian Environmental Authority to the Ministry of Agriculture to approve or rejects projects based on EIA Study Reports based on the decision of the Council of Ministers on the occasion of its 73rd Regular Session on November 14, 2008 based on Article 6(24) of the Environmental Protection Organs Establishment Proclamation 295/2002

on 250 hectares of land or more which involve the construction of dams or manmade lakes, groundwater fed irrigation projects more than 100 hectares, river diversions and water transfers between catchments and drainage area of forestry wetlands or wildlife habitat covering an area of 10 hectares or more.¹³³⁷ The omission of projects on less than 500 hectares of land appears to be incorrect since such projects may still cause potentially significant effects. In the view of the writer, agricultural investments on less than 500 hectares of land should be subject to the EIA process as there is a high degree of public interest in relation to such projects.¹³³⁸ The claim that agricultural projects on tract of land measuring less than 500 hectares of land do not entail significant environmental impacts does not appear to be tenable.

8.3.2. Scoping

The proponent of a given large scale agricultural investment must first prepare a scoping report before the EIA study report. The scoping report dwells upon a variety of introductory matters, the study area and its boundaries, review of previous studies and policies, baseline data, public and stakeholder involvement, the method of data collection and analysis, impacts and issues to be studied, matters that need to be included in Environmental Management and Monitoring Plans, deliverables, timetable and requirements for completion of the EIA process and EIA practitioners and experts.¹³³⁹ Thus, the scoping report is required to include the objectives and background of the project and the location, site, slope, topographic, soil and drainage maps of the site.¹³⁴⁰ The scoping report aims to involve groups potentially affected by the project, consider reasonable alternatives, evaluate concerns expressed, understand local values, determine appropriate methodologies and establish terms of reference for the EIA study report.¹³⁴¹ The scoping report must show the composition of the EIA study team along with their addresses and their expertise and qualification in the field.¹³⁴² The profile, organizational chart, license of firms engaged in the preparation of EIA study reports must also be shown in the scoping report.¹³⁴³

¹³³⁷ EAILAA, Draft Guidelines on the EIA Process on Large-Scale Agricultural Investments (July 2014)

¹³³⁸ *ibid*

¹³³⁹ *ibid*

¹³⁴⁰ EAILAA, Guidelines on Preparation of Scoping Report on Large-Scale Agricultural Investments

¹³⁴¹ Environmental Protection Authority of the FDRE, Environmental Impact Assessment Procedural Guideline Series 1 (2003) 9

¹³⁴² EAILAA, Guidelines on Preparation of Scoping Report on Large-Scale Agricultural Investments

¹³⁴³ *ibid*

The Social and Environmental Code of Practice for Agricultural Investment requires that all relevant elements indicated in the Code should be included in the EIA study reports.¹³⁴⁴ The Ethiopian Agricultural Investment Land Administration Agency requires investors to undertake Environmental Impact Assessment (EIA) but not human rights diligence. Nevertheless, the EIA study reports also touch upon social aspects including treatment of labourers and the local community. Thus, it can be said that some of the EIA study reports consulted dwell upon certain human rights issues. There is also a tendency to understand EIA study reports as including issues related to observance of core labour standards and the treatment of local communities.¹³⁴⁵ However, they do not amount to human rights due diligence in the sense explained above. The project proponent should proceed to the preparation of the EIA study report once the scoping report is approved by the Agency.

8.3.3. Timeframe for EIA

Proper identification and mitigation of potential social and environmental risks has been identified as one of the prerequisites of responsible agricultural investments. As per the Environmental Impact Assessment Proclamation in Ethiopia, no person shall commence implementation of any project that requires environmental impact assessment without authorization from the Ethiopian Environmental Authority or the relevant regional environmental agency.¹³⁴⁶ The Proclamation further stipulates that any licensing agency shall ensure that Environmental Protection Authority or the relevant regional environmental agency has authorized the implementation of a given project prior to issuance of any investment permit or operating license for the project.¹³⁴⁷ The Environmental Impact Assessment Proclamation highlights the need to undertake EIA to bring about administrative transparency and accountability, to involve the public and communities in the planning and decision making on developments affecting them and the environment.¹³⁴⁸

In spite of the fact that environmental protection laws require undertaking environmental impact assessment prior to the allocation of land for large scale agricultural investments, investment

¹³⁴⁴ Ministry of Agriculture, Social and Environmental Code of Practice for Agricultural Investment (May 2011)

¹³⁴⁵ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 9

¹³⁴⁶ Environmental Impact Assessment Proclamation (n 1012), Article 3(1)

¹³⁴⁷ *ibid*, Article 3(3)

¹³⁴⁸ *ibid*, Preamble

laws do not impose similar requirements.¹³⁴⁹ As a result, there are allegations that large scale agricultural investments have been undertaken without environmental and social impact assessments against what the law says.¹³⁵⁰ The absence of EIA study reports is more chronic in places like.¹³⁵¹ Moreover, the timeframe for the purpose of compiling EIA Study Reports is also problematic as investors are required to undertake such studies only three months after they have already taken delivery of the land. This is also clear from the Article 4(1) (d) of template of the contracts for such transactions which states that “the lessee is under obligation to conduct environmental impact assessment and deliver the report within three months of execution of this agreement.” This provision is contrary to the Environmental Impact Assessment Proclamation which calls for EIA prior to the approval of the project.¹³⁵² The Draft Guidelines on EIA Process on Large-Scale Agricultural Investments appears to change this practice by requiring the preparation of EIA study reports before the proponent takes possession of the land concurrent with the preparation of the feasibility study.¹³⁵³

8.3.4. Preparation of the EIA Report

The Environmental Impact Assessment Proclamation provides that the project proponent is the party responsible for ensuring the preparation of the EIA study report.¹³⁵⁴ In this context, the project proponent refers to any company or investor in the private sector who initiates an agricultural project. Thus, agricultural investors are required to submit environmental impact assessment reports.¹³⁵⁵ It is obvious that the EIA study has to document the impacts of the proposed project clearly and impartially. The study is also expected to recommend the measures for mitigation, the significance of effects, the concerns of interested public and the communities affected.¹³⁵⁶

¹³⁴⁹ Imeru Tamrat (n 53)

¹³⁵⁰ William Davison, ‘Ethiopia Push to Lure Farm Investment Falts on Flood Plain’ (Bloomberg, November 26, 2013) < <http://www.bloomberg.com/news/2013-11-24/ethiopian-drive-to-lure-farm-investment-founders-on-flood-plain.html>> accessed November 26, 2013

¹³⁵¹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013) 5

¹³⁵² FDRE, Environmental Impact Assessment Proclamation, Proclamation (n 1012)

¹³⁵³ EAILAA, Draft Guidelines on EIA Process on Large-Scale Agricultural Investments (July 2014)

¹³⁵⁴ FDRE, Environmental Impact Assessment Proclamation (n 969) , Article 7(1)

¹³⁵⁵ Rahamato (n 32)

¹³⁵⁶ International Land Coalition, Oakland Institute and Global Witness (n 424)

The Environmental Impact Proclamation requires the assessment study to be carried out by legally authorized and capable consulting firm comprised of who must meet the requirements specified under the directive issued by the previous Environmental Protection Authority.¹³⁵⁷ The EIA reports are usually prepared by a firm licensed to provide consultancy services on agriculture, land use, natural resources and the environment.¹³⁵⁸ The project proponent is required to adduce evidence of an agreement with such a consulting firm to undertake the EIA study report.

Nevertheless, the environmental consultants hired by the project proponent are likely to be favorably biased to the agricultural investment. The absence of established standards for the licensing of consultants to practice EIA studies remains a bottleneck that entails adverse implications on the quality of the reliability of the study.¹³⁵⁹ There are instances that the consulting firm hired by the proponent of the project failed to prepare the EIA study reports properly.¹³⁶⁰ Consequently, it becomes even more time consuming to get the approval of the study before the appropriate body.¹³⁶¹

The experts to conduct the EIA are required to be comprised of agronomist, a livestock expert, land use expert, environmentalist, forester or ecologist, sociologist, health expert, soil and water conservation and wildlife expert.¹³⁶² Nevertheless, the environmental consultants hired by the project proponent are likely to be favorably biased to the agricultural investment. The absence of established standards for the licensing of consultants to practice EIA studies remains a bottleneck that entails adverse implications on the quality of the reliability of the study.¹³⁶³ There are instances that the consulting firm hired by the proponent of the project failed to prepare the EIA study reports properly.¹³⁶⁴ Consequently, it becomes even more time consuming to get the approval of the study before the appropriate body.¹³⁶⁵

¹³⁵⁷ FDRE, Environmental Impact Assessment Proclamation (n 969), Article 7(2)

¹³⁵⁸ EAILAA, Some Explanation about the Guideline to conduct EIA for Agricultural Investments

¹³⁵⁹ Tesafye Abate (1014)

¹³⁶⁰ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 12

¹³⁶¹ *ibid*

¹³⁶² EAILAA, Some Explanation about the Guideline to conduct EIA for Agricultural Investments

¹³⁶³ Tesafye Abate (n 1014)

¹³⁶⁴ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 12

¹³⁶⁵ *ibid*

EIA study reports are required to include executive summary highlighting the main issues for decision making. The requirement that the summary must be written in layman terms is instrumental for the understanding of the report by local communities. The report must also include the baseline survey on socio-economic conditions.¹³⁶⁶ These should include fauna, flora, habitats, soil, water, air cultural artifacts, and socio-cultural, socio-economic and health considerations.¹³⁶⁷ Interestingly, the baseline is also expected to document tribes, nationalities or clans in and around the site.¹³⁶⁸ Likewise, the report should provide information concerning the religion, beliefs, cultural practices of the peoples, the hierarchy of the tribal leaders and social administration, past history of social conflicts and the manner they are resolved, places or locations of religious or cultural ceremonies, locations of cemeteries or current burial relics and the livelihood of the people.¹³⁶⁹ This requirement of information on the inhabitants of the land contradicts with the position of the Ethiopian Agricultural Investment Land Administration Agency's contention that the land allocated for agricultural investment is free from possession. The requirement of baseline information on tribes and nationalities presupposes the presence of people on the land. Moreover, one of the documents that need to be appended with the EIA report is that of the minutes with the local communities.¹³⁷⁰ The requirement of appending such minutes is another manifestation of the fact that the area can be under the actual control of local communities.

In addition, the EIA study report is required to provide information concerning number of trees per hectare, identify existing indigenous trees and shrubs, species of high economic importance and fodder trees, shrubs, herb species and their abundance.¹³⁷¹

8.3.5. Impact Analysis and Mitigation

Impact analysis, mitigation and management form the most important aspects of EIA study reports.¹³⁷² The EIA study report is expected to propose mitigation measures which are in compliance with the Social and Environmental Code of Practice discussed in detail in the next

¹³⁶⁶ EAILAA, Some Explanation about the Guideline to conduct EIA for Agricultural Investments

¹³⁶⁷ *ibid*

¹³⁶⁸ *ibid*

¹³⁶⁹ *ibid*

¹³⁷⁰ *ibid*

¹³⁷¹ *ibid*

¹³⁷² *ibid*

chapter. The Guideline of the EAILAA requires that the report includes an account of the prediction and assessment of each impact at all stages of the project cycle for each alternative.¹³⁷³ The impacts must be distinguished as adverse or beneficial and reversible and irreversible.¹³⁷⁴ Moreover, measures needed to avoid or mitigate the adverse impacts must be indicated in the report.¹³⁷⁵ The report must also capture the relative importance and acceptability of residual impacts i.e. impacts that cannot be mitigated.¹³⁷⁶ The EIA study must provide information on the nature of the impact, extent, duration, intensity and probability.¹³⁷⁷ The mitigation measures that the report may consider may take different forms including the need for changes in the project planning and design, improving monitoring and management or monetary compensation.¹³⁷⁸ Once the EIA study report is authorized, the project proponent should establish an Environmental Unit to implement the different mitigation measures indicated in the study. Moreover, the proponent is expected to submit quarterly reports on the implementation of the mitigation measures and other aspects of the study. The Draft Guidelines on EIA Process on Large-Scale Agricultural Investments provides that a project proponent who fails to submit the EIA study report or who fails to implement the EIA study report shall be liable for the penalties stipulated in the sixth part of the Proclamation on Environmental Impact Assessment.¹³⁷⁹

8.3.6. Review of the EIA Report and Decision Making

Following the preparation of the EIA study report, the proponent of the large scale agricultural investment presents the report for consideration to the Ethiopian Agricultural Investment Land Administration Agency along with the cover letter.¹³⁸⁰ The review process is conducted by a group of professionals ranging from five to six.¹³⁸¹ According to the draft Guidelines being prepared by the Ethiopian Agricultural Investment Land Administration Agency to govern the EIA Process on Large-Scale Agricultural Investments, the case team to review the study reports

¹³⁷³ *ibid*

¹³⁷⁴ *ibid*

¹³⁷⁵ Ministry of Environment and Forest of the FDRE, Environmental Impact Assessment Procedural Guideline Series 1 (2003) 10

¹³⁷⁶ *ibid*

¹³⁷⁷ EAILAA, Some Explanation about the Guideline to conduct EIA for Agricultural Investments

¹³⁷⁸ *ibid*

¹³⁷⁹ FDRE, Environmental Impact Assessment Proclamation, Proclamation (n 1012), Article 18

¹³⁸⁰ EAILAA, Draft Guidelines on EIA Process on Large-Scale Agricultural Investments (July 2014)

¹³⁸¹ *ibid*

is to be comprised of experts on natural resource conservation or agricultural engineers, land resource utilization or soil science, forest or plant science, sociologist or lawyer, agricultural economist or economist.¹³⁸² However, some argue that the absence of professionals such as civil engineers and sanitary engineers undermines the interdisciplinary nature of the EIA study as it is required to be.¹³⁸³ The draft Guideline also provides that the members of the case shall be severally and jointly accountable for failure to evaluate the report in accordance with the relevant laws of the country.¹³⁸⁴

The case team comprised of professionals from the Environmental Protection Directorate of the Agency reviews the environmental impact assessment report and gives decision. The case team is called upon to undertake its evaluation transparently and reliably.¹³⁸⁵ Some of the members of the team serve as the chairperson or secretary of the case team.¹³⁸⁶ The chairperson of the case team is responsible for coordinating the task of evaluation of the EIA study reports and to consolidate the feedback from each of the experts in the case team as per their field of specialization. The different parts of the EIA study report is then submitted to the members of the case team according to their respective field of specialization.¹³⁸⁷ The members of the team, apart from presenting the findings of the case team on the study report to a higher body, the chairperson communicates corrections and feedback that need to be made on the report to the consulting firm which prepared the report.¹³⁸⁸ The draft Guidelines on EIA Process on Large-Scale Agricultural Investments provides only one day for each of the professions in the case team to provide feedback on their respective parts of the EIA study report based on the requirements formulated.¹³⁸⁹ Considering the complicated nature of such reports, the timeframe to provide feedback by the experts appears to be very limited.

¹³⁸² *ibid*

¹³⁸³ Tesafye Abate (1014)

¹³⁸⁴ EAILAA, Some Explanation about the Guideline to conduct EIA for Agricultural Investments (July 2014)

¹³⁸⁵ *ibid*

¹³⁸⁶ EAILAA, Draft Guidelines on EIA Process on Large-Scale Agricultural Investments (July 2014)

¹³⁸⁷ *ibid*

¹³⁸⁸ *ibid*

¹³⁸⁹ *ibid*

The Draft Guidelines on the EIA Process on Large-Scale Agricultural Investments provides different options upon evaluation of the EIA study report once it is fully evaluated. First, the case team may approve the report without conditions. Second, the case team may give feed back to the consulting firm to make certain corrections on the report. The report shall be approved if the consulting team has accommodated the feedback and corrections as indicated by the case team. On the contrary, the report shall be sent back once more to the consulting team if it has not accommodated these concerns.¹³⁹⁰ If the project proponent fails to commence the execution of the project within six months after the approval of the EIA study report, the EIA report shall be no longer valid and will have to be prepared afresh in line with Article 10(1) of the Environmental Impact Assessment Proclamation 299/2002.¹³⁹¹

The Ethiopian Agricultural Investment Land Administration Agency is responsible for the evaluation of an environmental impact study report and the monitoring of its implementation once the project is subject to licensing, execution or supervision by a federal agency or when it is likely to produce trans-regional impact.¹³⁹² On the other hand, the regional environmental agencies in each region shall be responsible for the evaluation and authorization or any environmental impact study report and the monitoring of its implementation if the project is not subject to licensing, execution and supervision by the federal agency and if it is unlikely to produce trans-regional impact.¹³⁹³ The phraseology “by taking in to account any public comments and expert opinions” in Article 9 (2) of the Proclamation further attests to the importance attached to public participation and consultation in the EIA process. The phrase indicates that there is a need for obtaining the opinion of the public about the environmental impact assessment study report following its preparation.

¹³⁹⁰ *ibid*

¹³⁹¹ *ibid*

¹³⁹² Environmental Impact Assessment Proclamation (n 1012) Article 14(1)

¹³⁹³ *Ibid*, Article 14(2)

8.3.7. Consideration of Alternatives

The EIA a study reports should go as far as rejecting the proposed project if large scale agricultural investment by the proponent is not advisable. One of the purposes of Environmental Impact Assessment (EIA) is that of examination of alternatives which constitute environmentally friendly options. In this regard, smallholder agriculture has been singled out in the Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGT). It has been said that the Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGT) does not encourage large scale enclosures of land for investment. Instead, it calls for governments to pursue a model of agricultural development based on smallholder cultivation. In other words, the Voluntary Guidelines encourage investment by smallholder and smallholder sensitive investments.

Recently, there are arguments that large scale agricultural investments are not proving economically viable.¹³⁹⁴ On the contrary, smallholder and family farmers are said to be even dynamic and competitive on the global market. Likewise, the development plan of Ethiopia is referred to as Agricultural Development Led Industrialization (ADLI). This development strategy considers smallholder cultivation as vital for economic growth.¹³⁹⁵ The policy of supporting smallholder cultivation was pursued for a decade as of the mid-1990s.¹³⁹⁶ The form of support rendered for peasants included technology packages, improved farming and resource management practices, credit services and capacity development programs. Nevertheless, the policy of promoting smallholder farming started to change since 2000s.¹³⁹⁷ Ever since this subtle shift in policy from peasant cultivation to capitalist farming, more attention was accorded to the role of large scale agricultural enterprises and investors.¹³⁹⁸

8.4. The Need for Human Rights Due Diligence in Large Scale Agricultural Investment Projects

As discussed in the third Chapter of the thesis, the human rights responsibilities of agricultural investors is outlined, among others, in the United Nations Guidelines on Business and Human

¹³⁹⁴ Cotula (n 604)

¹³⁹⁵ Rahmato (n 32)

¹³⁹⁶ *ibid*

¹³⁹⁷ *ibid*

¹³⁹⁸ *ibid*

Rights (UNGPs), also known as the Ruggie Framework or the “Protect, Respect, and Remedy Framework” for business and Human Rights. The UNGPs were adopted by the Human Rights Council of the United Nations in June 2011.¹³⁹⁹ Apart from the adoption of this resolution, the Council also adopted a resolution aimed at establishing an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises in July 2014.¹⁴⁰⁰ The UNGPs deal with not only the human rights responsibilities of states but also business enterprises which include agricultural investors. The Guidelines apply to all states and businesses irrespective of the size, sector, location, ownership, or structure whether or not the state is willing and able to fulfill its human rights obligations.¹⁴⁰¹ Thus, agricultural investments in Ethiopia as forms of business enterprises are obliged to respect the Guidelines.

The UNGPs are a set of principles developed by the UN Special Representative on Business and Human Rights to clarify the human rights responsibilities of business enterprises. They are based upon Protect, Respect and Remedy Framework.¹⁴⁰² The UNGPs which are informed by the International Bill of Human Rights and they have been unanimously endorsed by the Human Rights Council of the UN.¹⁴⁰³ They define business responsibility for fulfilling human rights and the responsibility of home states to ensure business enterprises meet their human rights obligations.

The Framework is predicated upon three cardinal principles.¹⁴⁰⁴ First, states have the duty to protect against human rights abuses everyone in their territory and/or jurisdiction by third parties including private business.¹⁴⁰⁵ Second, private businesses have the corporate responsibility to respect human rights, which implies the duty to act with due diligence to avoid infringing on the human rights of others. Third, there should be greater access by victims to effective remedy, which may take the form of judicial or non-judicial.

¹³⁹⁹ UN Framework for Business and Human Rights (A/HRC/14/27) (n 525)

¹⁴⁰⁰ UN Human Rights Council, ‘Resolution on the Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to human rights’ A/HRC/26/L/REV.1 (June 25, 2014)

¹⁴⁰¹ UN Framework for Business and Human Rights (A/HRC/14/27) (n 525)

¹⁴⁰² The UNGPs were drafted by Professor John Ruggie, UN Special Representative for Human Rights in Relation to Transnational Corporations and other Business Enterprises. Hence, they are sometimes referred to as the Ruggie Framework.

¹⁴⁰³ ILO, *Handbook for Tripartite Constituents* (International Labour Office 2013) (n 404)

¹⁴⁰⁴ UN Framework for Business and Human Rights (A/HRC/14/27) (n 525)

¹⁴⁰⁵ UN Framework on Business and Human Rights (n 525) Guiding Principles 1-3

Accordingly, the Ethiopian government is required to prevent, investigate, punish and redress by adopting appropriate policies, legislation, regulation, and adjudication.¹⁴⁰⁶ The state duty to protect is not only confined to the host state but it also extends to home state. Apart, from the states which host the business enterprises engaged in large scale agricultural investments, the homes states where the businesses are registered also owe the obligation to ensure that such business are not involved in human rights abuses.¹⁴⁰⁷ These are what have been referred to as the extraterritorial obligations of homes states in the third chapter.

One can take the extraterritorial obligations of India as many of the large scale agricultural investment companies active in Ethiopia hail from that country.¹⁴⁰⁸ By virtue of the principle of extraterritorial obligations, the Indian Government has the obligation to ensure that business enterprises incorporated in India and engaged in agricultural investments in Ethiopia do not infringe upon the rights of locals.¹⁴⁰⁹

Concerns relating to the violations of extraterritorial obligations also extend to those countries providing development assistance to Ethiopia. As such countries are duty bound to ensure that the development assistance they provide is not employed directly or indirectly to support projects likely to involve violations of human rights in Ethiopia. Such concerns over violations of human rights in Ethiopia in connection with villagization program has to a landmark decision by British Courts authorizing judicial review of development assistance of the UK to the Ethiopian government. Thus, the legal action taken by an Ethiopian farmer by the name Mr. O against the UK can serve as a good example of the implication supporting large scale agricultural investments may entail on other countries. In this legal battle, Mr. O claimed that he has been evicted from and beaten under a villagization program funded by the UK.¹⁴¹⁰ Although the UK government denied funding the program, the High Court ruled that Mr. O has an arguable case

¹⁴⁰⁶ *ibid*, (Nevertheless, such monitoring activities should not be tantamount to arbitrary interference in the activities of the interference.)

¹⁴⁰⁷ Voluntary Guidelines, para 3.2.

¹⁴⁰⁸ Oakland Institute, 'FAQs on Indian Agricultural Investments in Ethiopia' (February 2013) available at <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Ethiopia_India_FAQ.pdf> accessed August 16, 2014

¹⁴⁰⁹ *ibid*

¹⁴¹⁰ Ethiopian man takes UK to court over resettlement policy (BBC, 14 July 2014) <<http://www.bbc.com/news/world-africa-28296394>> accessed August 16, 2014

against UK's Secretary of State for International Development.¹⁴¹¹ This decision amounted to a judicial review of UK's aid to Ethiopia.¹⁴¹² Similarly, in June 2014, some of the major aid donors to Ethiopia announced the launch of investigation of human rights abuses induced by large scale agricultural investments , among others, in south west Ethiopia.¹⁴¹³

8.4.1. The Responsibility to Respect and the Need for Human Rights Due Diligence

Private businesses have the corporate responsibility to respect human rights, which implies the duty to act with due diligence to avoid infringing on the human rights of others. In other words, the corporate responsibility to respect implies that companies should not infringe the rights of others in the course of doing business.¹⁴¹⁴ This obligation requires companies to demonstrate decency and respect for people.¹⁴¹⁵

The responsibility to respect human rights requires that business enterprises to:-

- avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur¹⁴¹⁶
- seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.¹⁴¹⁷

Thus, business enterprises in Ethiopia engaged in large scale agricultural investment would also be required to refrain from violations of human rights through their own activities and also in the span of their supply chain. With a view to identify, prevent, mitigate and account for how they

¹⁴¹¹ *ibid*

¹⁴¹² William Davison, 'UK's court orders judicial review of aid given to Ethiopia' (August 1, 2014)

< <http://www.zegabi.com/articles/8907>> accessed on August 16, 2014

¹⁴¹³ Survival International, 'Aid donors announce investigation into tribal evictions in Ethiopia' (June 23, 2014)

< <http://www.survivalinternational.org/news/10310>> accessed August 16, 2014

¹⁴¹⁴ Global Compact Network Netherlands, How to Do Business with Respect for Human Rights: A Guidance Tool for Companies, p. 34

<http://www.gcnetherlands.nl/docs/how_to_business_with_respect_for_human_rights_gcn_netherlands_june2010.pdf> accessed August 16, 2014

¹⁴¹⁵ *ibid*

¹⁴¹⁶ UN Framework on Business and Human Rights (n 525), Guiding Principle 13

¹⁴¹⁷ *ibid*, Guiding Principle 16

address their adverse human rights impacts, business enterprises should conduct human rights due diligence. Apart from the UN Framework on Business and Human Rights, the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) also provides similar requirements.¹⁴¹⁸ Thus, it states that business enterprises have a responsibility to respect human rights and legitimate tenure rights. It goes on to state that they should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. The VGGT further imposes the obligation on the part of business enterprises to include appropriate risk management systems to prevent and address adverse human rights impacts on human rights and legitimate tenure rights. In a manner similar to the UN Framework on Business and Human Rights, it submits that business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved by way of human rights due diligence.

Human rights due diligence refers to the mechanisms through which business enterprises can identify, prevent, mitigate and account for the harms they may cause or contribute and the means through which judicial and regulatory bodies can assess an enterprises respect for human rights.¹⁴¹⁹ Human rights due diligence is described as the principal tool that a business can make use of to address the potential human rights impacts of its activities and operations.¹⁴²⁰ It is the process whereby companies become aware of, prevent, and mitigate adverse human rights impacts.¹⁴²¹

The UN Framework on Business and Human Rights identifies the common components of human rights due diligence. These include the business responsibility to: -

- identify actual or potential human rights impacts
- prevent or mitigate adverse human rights impacts thus identified and
- account for impacts and responses to them

¹⁴¹⁸ Voluntary Guidelines, para. 3.2.

¹⁴¹⁹ Professor Olivier De Schutter, ‘Human Rights Due Diligence: The Role of States’ <<http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>> accessed January 18, 2014

¹⁴²⁰ *ibid*

¹⁴²¹ Johan Ruggie, (2008), “Protect, Respect and Remedy: a Framework for Business and Human Rights” Report of the Special Representative of the Secretary-General of the United Nations on the Issue of human rights on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Document: A/HRC/8/5/

Even though, business enterprises considering engaging in large scale agricultural investment are required to complete their Environmental Impact Study (EIS) as a precondition for approval, this is not the case in regard to human rights impact assessments (HRI). One of the reasons cited for the limited success in terms of developing the land allocated for companies is the failure on the part of the companies to undertake rigorous feasibility studies.¹⁴²² This has resulted in swathes of land left idle.¹⁴²³ In addition, companies request for land which is much bigger than they can possibly develop within a reasonable time given their capacity and financial constraints.¹⁴²⁴ The undertaking of consultations and negotiations with the affected communities by the investors is beneficial in that it enhances local ownership and accountability between the parties directly.¹⁴²⁵ This is particularly true in countries like Ethiopia where resources and capacity for monitoring implementation is low.¹⁴²⁶

Nevertheless, the existing regulatory legal framework in Ethiopia does not require undertaking human rights due diligence as an approach to facilitate the implementation of the responsibility to respect. It is contended that the requirement of human rights due diligence would have been instrumental in preventing and mitigating potential or actual adverse human rights impacts likely to arise as a result of such investments. Such adverse human rights impacts may relate to food security, environmental degradation, cultural and social implications. Moreover, the human rights due diligence could also been instrumental in preventing or at least mitigating other challenges including corruption, money-laundering, worker safety and the like.

By and large, the relationship existing between the investors and the local community leaves much to be desired.¹⁴²⁷ In many cases investors who secured lands for agricultural investment are not present themselves on the ground in person.¹⁴²⁸ Instead, they leave the area delegating their relatives.¹⁴²⁹ Thus, they are not in a position to ensure that they have undertaken their obligations in accordance with the contracts and the business plans they have submitted and fail to take

¹⁴²² EAILAA, *Special Plan for Facilitating the Development of Land Transferred to Investors* (August 2013) 2

¹⁴²³ *ibid*

¹⁴²⁴ *ibid*

¹⁴²⁵ International Land Coalition, Oakland Institute and Global Witness (n 424)

¹⁴²⁶ *ibid*

¹⁴²⁷ EAILAA, *Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela* (January 2014) 9

¹⁴²⁸ EAILAA, *Special Plan for Facilitating the Development of Land Transferred to Investors* (August 2013) 5

¹⁴²⁹ *ibid*

corrective actions.¹⁴³⁰ They are also engaging in the cultivation of produce which can be produced by the smallholder farmers themselves.¹⁴³¹ This would put the investors on a collision course with the smallholder farmers as they prove to be competition as opposed to complementing them. At times, the investors transfer the land in their control to their parties without any value addition thereby engaging in land speculation.¹⁴³² Investors are also using financial, machinery and other forms of support they are given to unwarranted purposes.¹⁴³³ Although there are improvements, much remains to be done in terms of maintaining adequate number of indigenous trees in the course of land clearance.¹⁴³⁴ The practices of some of the foreign companies such as B.H.O, Saudi Star and Karuturi in terms of conservation of natural resources warrant further investigation.¹⁴³⁵ These companies do not have the EIA study reports they undertook nearby and do not report their activities in terms of environmental protection quarterly as required.¹⁴³⁶

8.4.2. The responsibility to identify actual or potential human rights impacts

The enormity of the size of large scale agricultural investments in Ethiopia warrants the need to undertake studies aimed at identifying possible adverse human rights impacts. Business enterprises engaged in large scale agricultural investments are required to make efforts to seek information about the actual or potential adverse impacts of their activities and supply chain on human rights.¹⁴³⁷ In other words, business enterprises must investigate the impacts of their activities on human rights.¹⁴³⁸ As opposed to one-off activity, the effort to compile information and investigation has to be ongoing and continuous.¹⁴³⁹

Human rights due diligence should include assessments of internal procedures and systems and external engagement with groups potentially affected by the operations of the business enterprise.¹⁴⁴⁰ The process of seeking information in turn implies that large scale agricultural

¹⁴³⁰ *ibid*

¹⁴³¹ *ibid*

¹⁴³² *ibid*, p.6

¹⁴³³ *ibid*

¹⁴³⁴ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 10

¹⁴³⁵ *ibid*

¹⁴³⁶ *ibid*

¹⁴³⁷ De Schutter (n 1419) 55

¹⁴³⁸ *ibid*

¹⁴³⁹ *ibid*

¹⁴⁴⁰ *ibid*

investors have to put in place appropriate reporting and grievance mechanisms to obtain the required information.¹⁴⁴¹

8.4.3. The responsibility to prevent or mitigate identified adverse human rights impacts

If the information sought by the business enterprises confirms that there are actual or potential adverse human rights impacts that their activities may entail, this implies that they have to take measures to prevent or mitigate such adverse impacts.¹⁴⁴² Some of the investors are said to have infringed upon the right of local communities to their natural resources as well as their cultural values leading to disputes and recipe for disaster.¹⁴⁴³ On the contrary, some investors have raised high expectations on the part of the public failing to make good on those promises.¹⁴⁴⁴ The investors engage in such practices with a view to build rapprochement with the surrounding communities.¹⁴⁴⁵ As a result, the communities are under the impression that the investors are duty bound to build the infrastructure they promised to.¹⁴⁴⁶ Such mistakes on the part of the investors have led to misunderstanding with local communities which in turn adversely impact their own investment.¹⁴⁴⁷ Moreover, some investors have failed to undertake follow up and support leading to the contamination of water resources due to chemicals they employed, erosion and the clearance of indigenous trees from the land unnecessarily.¹⁴⁴⁸

8.5. Local Reactions to the absence of Human Rights Due Diligence

The case of Indian-owned Verdanata Harvest Plc in Godere Woreda, Gambela Regional State best illustrates the Local Reactions to the Lack of Human Rights Due Diligence. Verdanata Harvest Plc, an Indian-owned company, was allocated land in Godere *woreda* of Gambela Regional state according to the contract concluded on April 20, 2010. According to Article 1(1) of the Agreement the company is allocated land measuring 3,012 hectares located in Gambela Regional State, Mezhenjer Zone, Godere *Woreda*, Gumare and Kabu *kebeles*.¹⁴⁴⁹ Article 2(1) of

¹⁴⁴¹ *ibid*, p. 56

¹⁴⁴² *ibid*, p. 55

¹⁴⁴³ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁴⁴⁴ EAILAA, '*Challenges and Recommendations on Foreign Agricultural Investment*' (May 2014) 18

¹⁴⁴⁵ *ibid*, p. 22

¹⁴⁴⁶ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

¹⁴⁴⁷ EAILAA, '*Challenges and Recommendations on Foreign Agricultural Investment*' (May 2014) 18

¹⁴⁴⁸ EAILAA, '*Challenges and Recommendations on Foreign Agricultural Investment*' (May 2014) 18

¹⁴⁴⁹ Initially, Verdanta Harvest Plc was allocated 5000 hectares of land by Gambela Regional State. The land allocated was reduced to 3012 hectares by the Ministry following the decision to administer large scale agricultural

the Agreement provides that the contract would remain in force for duration of 50 years. The company obtained the land with the intention of engaging in tea plantation. The allocation of land to the Indian company was met with much opposition and resistance since the Gumare area is one of the 58 areas protected as reserve forest area as designated by the country.¹⁴⁵⁰ The company is said to have proceeded to land clearance and destruction of the forest prior to undertaking Environmental Impact Assessment Study.¹⁴⁵¹ Moreover, irrespective of the fact that the company was granted license to undertake tea plantation on the land, it was learnt that it was actually engaged in the production of timber. However, the Ministry of Agriculture and the administration of the regional state contested these facts by saying that these timbers are not for sale.¹⁴⁵²

The low-key protest which occurred in the Godere *woreda* of Gambela is one of the cases which manifest the trend. The Shakicho people, the local communities inhabiting the area, consider the protected forest as a basis of their livelihoods and culture. The local communities of Godere *woreda* held various meetings to stave off the impending deforestation of their *woreda*. The meetings which were organized without the knowledge of the local authorities resulted in the preparation of an alternative land use policy whereby local communities would grow agricultural products without environmental damage.¹⁴⁵³ The local community also managed to send an envoy to the President of the country who shared their concern and sent a letter to the Environmental Protection Authority (EPA).¹⁴⁵⁴ The intervention on the part of the President and the authorities of the EPA did not succeed in cancelling the contract concluded between the parties. This made it possible for the company to remain in possession of the tract of land. Nevertheless, the protest staged by the local community led to the detention of a number of activists by the authorities.¹⁴⁵⁵

investment land at the federal level by the Ministry of Agriculture. However, in spite of the fact that the land allocated was reduced, the company kept the entire 5000 hectares of land originally allocated by the region. (See also Wudineh Zenebe, 'Residents in Gambela set Indian-owned Farm on Fire' (Addis Ababa, *The Reporter*, October 26, 2013)

¹⁴⁵⁰ *ibid*

¹⁴⁵¹ *ibid*

¹⁴⁵² *ibid*

¹⁴⁵³ Rahmato (n 32)

¹⁴⁵⁴ *ibid*

¹⁴⁵⁵ *ibid*

The low-key protests were then followed by more violent attacks. In particular, residents attacked and set fire on the property of the company including stores, fuel tankers, machineries, tractors, excavators and logs of timber on October 20, 2013.¹⁴⁵⁶ In an unprecedented move, the President of Gambela Regional State himself wrote a letter of protest to the Ministry of Agriculture stating that investors in the region are causing long-term damage to the environment and natural resources of the region.¹⁴⁵⁷ Similarly, members of Shakicho local community also lamented that their call for respect of their human rights have fallen on deaf ears.¹⁴⁵⁸

The disaffection on the part of the communities is also manifested by the actions of the local communities reclaiming the land allocated to investors on their own. For instance, in Natsemay *Woreda* (district) of South Omo Zone of SNNPRS, the local community took over 500 hectares of land allocated for the investor.¹⁴⁵⁹ The local community also blocked the irrigation canal the investor constructed.¹⁴⁶⁰ The investor was not in a position to get resolution to this problem despite efforts to obtain solution from South Omo and Segen Peoples Zone where the land is located.¹⁴⁶¹ Similarly, local communities in Daramalo *Woreda* of Gamo Gofa Zone also took over 230 hectares out of a total of 300 hectares of land allocated to the investor in Galama Farmland.¹⁴⁶²

Conclusion

The discussion in this Chapter demonstrates the many gaps and inconsistencies inherent in relation to Environmental Impact Assessment in regard to large scale agricultural investments. The vesting of supervising the EIA process in the Ministry of Agriculture, particularly in the Ethiopian Agricultural Investment Land Administration Agency which does not have the requisite capacity to discharge such responsibility is one of these gaps. The Council of Ministers

¹⁴⁵⁶ Wudineh Zenebe (n 1379), *See also* Aman Sethi, ‘ Attack on Indian-owned farm in Ethiopia turns spotlight on land policy’, (The *Hindu*, November 5, 2013)

¹⁴⁵⁷ Meleskachew Amha, ‘*President of Gambela Regional State complained about the damage caused by investment projects upon natural resources*’ (*Voice of America*, January 8, 2014)
<<http://amharic.voanews.com/content/ethiopia-gambella-investment-ecosystem-complaint-01-08-14/1826168.html>>
accessed July 5, 2014

¹⁴⁵⁸ Meleskachew Amha (n 1457)

¹⁴⁵⁹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013) 7

¹⁴⁶⁰ *ibid*

¹⁴⁶¹ *ibid*

¹⁴⁶² *ibid*

regulation sidelines the role of the Ministry of Environment and Forests in the monitoring of the EIA process. Consequently, the EIA process followed in the case of large scale agricultural investments does not fulfill the basic principles of EIA. The EIA process as currently applied by the Agency is flawed in many respects. The exclusion of agricultural projects on land less than 500 hectares from the EIA process is not justified as such projects are involve high degree of public interest. The existing practice of EIA does not afford adequate opportunities for public consultation to the local communities. The review and decision-making process concerning EIA reports is not sufficiently transparent and accountable. Such gaps undermine the reliability and credibility of the EIA process to a mere formality which is opaque, not sufficiently interdisciplinary and participatory.

Chapter Nine

Monitoring the Implementation of Large Scale Agricultural Investments

Introduction

Monitoring the implementation of agricultural investments is crucial to ensure that these investments are carried out in conformity with appropriate laws, standards, conditions and recommendations. Moreover, monitoring also serves the purpose of ensuring that there are no circumstances that may have been overlooked at the time of impact assessments. To this effect, there must be appropriate monitoring checklists and organizational structure. The Ethiopian Agricultural Investment Land Administration Agency is required to monitor and ensure that investors to whom agricultural investment lands have been transferred are implementing the business plans they submitted.¹⁴⁶³ Apart from that, the Agency is expected to ensure that the lands transferred to companies by regional states are also being developed according to the agreements and the Code of Practice discussed below.¹⁴⁶⁴ As indicated earlier, only about 20 up to 25 per cent of the total land area which has been allocated to investors both by regional and federal levels has been developed by the investors.¹⁴⁶⁵ However, there is lack of information concerning how many of the investors proceeded with the development of the land in line with the laws and regulations of the country. Effective monitoring of large scale agricultural investments would be instrumental to prevent land speculation. Particularly, such monitoring activities enable to ascertain whether or the investor has managed to develop the land as per the agreement and the business plan, created conducive working environment for laborers and ensured environmental protection.

9.1. The Bases of Monitoring

The task of monitoring the implementation of large scale agricultural investment is carried out based upon the Social and Environmental Code of Practice for Agricultural Investment, the

¹⁴⁶³Regulation 283/2013 (n 6) Article 6(5)

¹⁴⁶⁴ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 3

¹⁴⁶⁵ Presentation by the Director of EAILAA, Mr. Abera Mulat (n 20)

contract, the business plan of the investor, the Environmental Impact Assessment study reports and monitoring checklist prepared by the Ethiopian Agricultural Investment Land Administration Agency. The Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGT) highlight the importance of transparency as discussed in chapter three. However, the restriction imposed on the full disclosure of these documents which serve as a basis of monitoring reflects negatively on the monitoring as well. In other words, the lack of transparency affects the capacity of stakeholders to undertake effective monitoring. This is partly due to the broad understanding of confidentiality that the Agency employs in the absence of compelling justification.

9.1.1. The Social and Environmental Code of Practice for Agricultural Investment

In May 2011, the Ministry of Agriculture adopted the Social and Environmental Code of Practice for Agricultural Investment. The Ministry took it upon itself to prepare the Code of Practice instead of following the approaches whereby such Codes are formulated by associations involved in the sector.¹⁴⁶⁶ This approach was pursued due to the fact that the associations in the sector are still nascent to undertake such a task.¹⁴⁶⁷ The Code is inspired by the constitutional right to a healthy and clean environment.¹⁴⁶⁸ This code is informed by the national policy on sustainable agriculture, which among others aspires to promote sustainable large scale agriculture.¹⁴⁶⁹ In its introductory part, the code identifies environmental degradation as one of the challenges facing the country.¹⁴⁷⁰ The Code defines sustainable agriculture as an environmentally friendly agricultural practice involving the use of the limited natural resources to satisfy the present generation without compromising the interest of future generations.¹⁴⁷¹

In regard to the formal nature of the Code, it is not clear if the Code carries a force of law. Apparently, it appears that it is more of recommendatory. This is because the Code itself states that non-compliance with the Code is not actionable in that it does not trigger a proceeding

¹⁴⁶⁶ Ministry of Agriculture, Social and Environmental Code of Practice for Agricultural Investment (May 2011) 9

¹⁴⁶⁷ *ibid*

¹⁴⁶⁸ FDRE Constitution, Article 44(1)

¹⁴⁶⁹ Ministry of Agriculture, Social and Environmental Code of Practice for Agricultural Investment (May 2011) 1

¹⁴⁷⁰ *ibid*

¹⁴⁷¹ *ibid*, p.4

before courts of law. The Code states that compliance with the minimum standards is a major consideration in the course of the evaluation of farm enterprises by governmental organs. Nevertheless, the Ethiopian Agricultural Investment Land Agency is tasked with the duty to facilitate the legal recognition of the principles in the Code of Practice.¹⁴⁷² The Code states that such minimum standards are mostly voluntary in other jurisdictions. Nevertheless, it goes on to state some aspects of the minimum standards are already supported by counterpart legislation such as the proclamation on the environmental pollution control and labour codes. Thus, investors will be obliged these aspects as they are already binding on account of such laws.

The Code highlights the importance of applying Environmental Management Systems (EMS).¹⁴⁷³ The concept of Environmental Management Systems (EMS) is in turn defined in the Code as “part of the overall management system which includes organizational structure, planning activities, responsibilities, practices, procedures, and resources for developing, implementing, achieving, reviewing, and maintaining the environmental policy.”¹⁴⁷⁴ The Code goes on to state that EMS is carried out through Environmental Impact Assessment (EIA) and plans of action for mitigation measures.¹⁴⁷⁵ Thus, the Code urges individuals who seek to engage in agricultural investments to prepare EIA and design plan of action to prevent damage to the environment. The Code introduces three levels which investors are required to comply with. These are bronze, silver and gold.¹⁴⁷⁶ The Ethiopian Agricultural Investment Land Administration Agency is envisaged to disseminate and follow-up its implementation.¹⁴⁷⁷

¹⁴⁷² *ibid*, p.9

¹⁴⁷³ *ibid*, p.2

¹⁴⁷⁴ *ibid*

¹⁴⁷⁵ *ibid*

¹⁴⁷⁶ *ibid*, p.3

¹⁴⁷⁷ *ibid*, p.9

9.1.1.1. Objectives of the Code of Practice

The major objective of the Code of Practice is to establish a system or mechanisms whereby the Ethiopian Agricultural investment sector can proceed on environmentally friendly agricultural practices.¹⁴⁷⁸ It is meant to minimize the vulnerability of human and natural resources to the adverse impacts occasioned by heightened degradation and increased competitiveness of agricultural products in markets both within the country and abroad and to nurture the export of such products by way of providing technically sound and sustainable set of operational standards.¹⁴⁷⁹ The specific objectives include ensuring the health and safety of farm workers and the community living around agricultural investments, creating a favourable working environment, protecting the soil, water and land cover from degradation, and achieving a sustained agricultural investment with a qualitatively and quantitatively increasing production and productivity.¹⁴⁸⁰

The Code is predicated upon the need to ensure environmental protection, the safety of surrounding communities and agricultural workers. It aims to stave off potential environmental degradation and the wanton destruction of natural resources. The Code stipulates minimum standards that must be complied with by investors.¹⁴⁸¹ The Code envisages a cycle of continuous improvement and more sustainable cultivation practice beginning with undertaking EIA, and proceeding to implementation, internal auditing, corrections, external auditing and certification.¹⁴⁸² Its formulation is based upon the experience of other countries including United Kingdom, New Zealand, Kenya, Australia and South Africa.¹⁴⁸³

In regard to large scale agricultural investments, the Code takes note of the significant role that the community plays in relation to labour, security and other social factors affecting the investment.¹⁴⁸⁴ The Code aims to nurture a close relationship between the surrounding

¹⁴⁷⁸ *ibid*, p.6

¹⁴⁷⁹ *ibid*

¹⁴⁸⁰ *ibid*

¹⁴⁸¹ *ibid*, p.8

¹⁴⁸² *ibid*

¹⁴⁸³ *ibid*

¹⁴⁸⁴ *ibid*, p.4

communities and investing companies. It also aspires to enhance the participation of local communities and maintenance of a healthy local security situation.

The Code places significant emphasis on humane and safe conditions of work and attempts to entrench industrial peace. In this regard, it underlines the need to respect core minimum labour standards established under international law. Some of the specific issues dealt with in this regard include protection of agricultural workers from accidents and injuries, measures for the prevention and response to accidents, transparency of labour management, enhancing the participation of female workers as well, the prohibition of child labour and the enjoyment of labour rights including freedom of association.

When it comes to the binding nature of the Code, it is declared that compliance is compulsory.¹⁴⁸⁵ The Code of Practice outlines various benefits that compliance with the Code including the enhancement of the implementation of safe working practices to maintain the well being of the work force, long term economic viability of the agricultural sector, development of skills at all levels of employment, implementation of at least the minimum labour conditions in accordance with the National Law and promotion of sustained relations between agriculture and the industry, active contribution to community in which we operate, enhancement of consumer health and safety and continuous and responsible management of the environment.¹⁴⁸⁶

With these objectives in view the Code of Practice requires investors to demonstrate their commitment to it by undertaking EIA, attending to the soil and water management of the farmlands, protecting the biodiversity and or habitats from fragmentation and complete destruction, minimizing detrimental impact on environment, taking a responsible attitude towards health and safety of workers and the surrounding community, consumer and health safety and developing a responsible positive attitude and active interaction towards the local community.¹⁴⁸⁷

¹⁴⁸⁵ *ibid*, p.6

¹⁴⁸⁶ *ibid*

¹⁴⁸⁷ *ibid*, p.7

9.1.1.2. The Required Level of Compliance

In regard to the level of compliance, the Code establishes the minimum level of standardization of environmental management system (EMS), namely bronze or minimum in consideration of the fact that agricultural investment in the country is at its earliest stage.¹⁴⁸⁸ The minimum or bronze level of compliance requires agricultural investment enterprises to put in place a basic EMS ensuring planning, monitoring and evaluation of salient environmental issues.¹⁴⁸⁹ It also calls for a mechanism for implementing safe working practices by way of observance of core labour standards and other laws in the country.¹⁴⁹⁰ Agricultural investments which comply with this minimum level must ensure the protection of the farm and surrounding communities from pollution due to their activities and establish a favourable working condition accompanied by settlement and other facilities.¹⁴⁹¹ Moreover, they are expected to employ safe use of agricultural chemicals and fertilizers.¹⁴⁹² On top of that, they are duty bound to give due attention to the biodiversity, the soil, water and desist from engaging from the destruction of the natural resource base in the locality.¹⁴⁹³

The decision to comply with the bronze level of compliance was promoted due to the fact that the large scale agricultural investments in Ethiopia are at their stage of infancy.¹⁴⁹⁴ Thus, it is argued that if we are going to seek higher threshold of compliance, it may be difficult to achieve this at this point.¹⁴⁹⁵ However, even if the level of compliance remains bronze, there is a belief on the part of the Ethiopian Agricultural Investment Land Administration Agency that there are certain issues omitted from the existing Code of Practice.¹⁴⁹⁶ Thus, the Agency is undertaking revision of the existing Code of Practice to accommodate additional concerns.¹⁴⁹⁷

¹⁴⁸⁸ *ibid*, p.14

¹⁴⁸⁹ *ibid*

¹⁴⁹⁰ *ibid*, p.15

¹⁴⁹¹ *ibid*

¹⁴⁹² *ibid*

¹⁴⁹³ *ibid*

¹⁴⁹⁴ Interview with Addisu Negash, EIA Case Team Coordinator, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency, May 20, 2014

¹⁴⁹⁵ *ibid*

¹⁴⁹⁶ *ibid*

¹⁴⁹⁷ *ibid*

9.1.1.3. The Major Components of the Code

The Code of Practice has included some of the major issues that need to be addressed. Accordingly, the three major components of the Code of Practice are the social, agricultural practice components and the natural resource components.¹⁴⁹⁸ The specific requirements for the bronze level of the Code of Practice are annexed with the code.¹⁴⁹⁹ The social component of the Code provides different requirements aimed at enhancing community participation, appropriate employment practice, safe and healthy working environment and the observance of occupational rights. The agricultural practice component of the Code dwells upon issues such as fertilizer storage, agrochemical product register, pesticide transport and storage, measuring and mixing of chemicals, spraying schedules of pesticides, spraying equipment and practices, waste management, farm site risk assessment, water use, farm site mapping, crop hygiene and crop scouting.¹⁵⁰⁰ On the other hand, the natural resource component deals with requirements related with proper agricultural investment land utilization, soil and water management practices, and maintenance of flora and fauna or biodiversity.¹⁵⁰¹

9.2. Organizational Structure for Supporting Implementation of the Code

As the primary duty-bearer, the state has the obligation to ensure that the conduct of large scale agricultural investors is compatible with the relevant standards established under the Code of Practice. As a result, the Ethiopian government is obliged to establish enabling institutional environment to ensure the enforcement and implementation of these standards.

The Code also proposes institutional structure to oversee its implementation. The Code explains that the oversight of the implementation of such codes is undertaken by a coalition comprised of the government, sector associations and farm enterprises based on the experience of other countries.¹⁵⁰² The Code makes it clear that the institutional structure to support the implementation of the Code shall be comprised of both governmental and non-governmental organizations. As the diagram in the Code shows, the organizational structure is comprised of the

¹⁴⁹⁸ Ministry of Agriculture, Social and Environmental Code of Practice for Agricultural Investment (May 2011) 10

¹⁴⁹⁹ *ibid*, p.17

¹⁵⁰⁰ *ibid*, pp.25-32

¹⁵⁰¹ *ibid*, p.33-34

¹⁵⁰² *ibid*, p.9

Ministry of Agriculture (MoA), Board of Associations and the Council of Stakeholders.¹⁵⁰³ The MoA is the body vested with the principal responsibility of facilitating the environmental management code of practice and establishing a system for its implementation.¹⁵⁰⁴ The Code outlines a list of responsibilities that the MoA is required to discharge.¹⁵⁰⁵ Accordingly, the MoA is responsible for the development of a guiding outline to prepare AIA study reports and to formulate instructions, directives, manuals for the comprehensive and integrated implementation of the Code of Practice, to organize a national EMS implementation structure and assist the regions to do the same, to provide professional and technical assistance for regions and investment enterprises, to review and revise the code of practice if the need arises and for the establishment of national agricultural investment associations which are responsible for the actual implementation of the code of practice.¹⁵⁰⁶ Such responsibilities are meant to ensure the protection of the environment, the safety of farm labourers, the maintenance of production and productivity, and the well-being of the local communities.¹⁵⁰⁷ The Ministry of Agriculture (MoA) is required to work in close partnership with code management and capacity building teams at sector association and farm enterprise levels to ensure the implementation of the Code.¹⁵⁰⁸ To this effect, the MoA is expected to support sector associations in organizing, searching for material and financial support and in terms of provision of skilled labour to address fill gaps in trainings.

The Board of Association is mainly tasked with the responsibility to implement the Code of Practice.¹⁵⁰⁹ The Council of Stakeholders is responsible for the amendment and modification of the Code of Practice and for provision of improved strategies for the implementation of the Code. It is comprised of governmental and non-governmental organizations sector farm enterprise associations and related corporations. The Code is subject to amendments and modification which may be initiated upon the motion of farm enterprises, labourers, local communities and other stakeholders.¹⁵¹⁰

¹⁵⁰³ *ibid*, p.11

¹⁵⁰⁴ *ibid*, p.15

¹⁵⁰⁵ *ibid*

¹⁵⁰⁶ *ibid*

¹⁵⁰⁷ *ibid*

¹⁵⁰⁸ *ibid*, p.12

¹⁵⁰⁹ *ibid*, p.11

¹⁵¹⁰ *ibid*, p.12

The Code singles out sector farm enterprise associations and farm enterprises as having the leading responsibility in the management of the Code of Practice.¹⁵¹¹ The Code makes it clear that agricultural investment enterprises bear the major responsibility for the actual implementation of the code of practice.¹⁵¹² Thus, individual agricultural investment enterprises are called upon to cooperate with their associations to ensure compliance with the code. In turn, the associations are responsible for ensuring that their individual members are complying with the code and take appropriate action if they fail to do so.¹⁵¹³ These associations are mainly responsible for support and capacity building activities, dissemination of good practices, capacity development for internal audit, and regular follow-up of individual member agricultural investment enterprises.¹⁵¹⁴ To this effect, sector associations and farm enterprises are required to establish two teams, namely code management and capacity building teams.¹⁵¹⁵ The teams are expected to be established at two levels, namely sector associations and individual farm enterprises.¹⁵¹⁶ The teams are required to be comprised of women, labourers and the management.¹⁵¹⁷

The Code management team is tasked with the responsibility to encourage and follow-up the preparation of EIA study reports, the implementation of the code of practice according to the EIA by farm enterprises, identifying bottlenecks for the implementation of the code of practice and suggesting solutions, collection of progress reports from farm enterprises, encouraging farm enterprises to undertake internal audits, liaise between farm enterprises and external certifying bodies, ensuring the overall planning, monitoring and evaluation of the implementation of the code of practice and communicating with stakeholders.¹⁵¹⁸

On the other hand, the capacity building team is charged with the duties to plan the capacity requirements, to conduct trainings and secure financial sources to do so, plan, evaluate, monitor

¹⁵¹¹ *ibid*, p.11

¹⁵¹² *ibid*, p.16

¹⁵¹³ *ibid*

¹⁵¹⁴ *ibid*

¹⁵¹⁵ *ibid*, p.11

¹⁵¹⁶ *ibid*

¹⁵¹⁷ *ibid*

¹⁵¹⁸ *ibid*, p.11-12

manpower requirements and trainings to be undertaken at farm level and communicate with stakeholders concerning trainings.¹⁵¹⁹

Agricultural investment enterprises are expected to undertake internal audits periodically two or three times annually. To this effect, the Ministry has established a list of requirements and compliance criteria. The enterprises are required to adduce relevant, true and sufficient evidence to demonstrate that they have complied with the requirements to the association of agricultural investment enterprises.¹⁵²⁰ Apart from the aforementioned organizational structure, the Code also envisages accreditation and certification of agricultural investment enterprises from an internationally accredited and reputable body to be selected by tender.¹⁵²¹ This external organization is tasked with the responsibility to undertake external audit periodically based on internationally acceptable practices.

9.3. The Lack of Implementation of the Code of Practice

The lack of strong enforcement of the code of practice and follow-up of agricultural investment can be attributed to various factors. The absence of competent and ethical monitoring and follow-up of agricultural investments is believed the fundamental cause for the dismal performance of the sector.¹⁵²² The bottlenecks include attitudinal problems, lack of management and coordination, and insufficient budgetary allocation and poor utilization. There are no strong structures that support and undertake monitoring and follow-up of agricultural investment from federal, regional, zonal, *woreda* or local levels.¹⁵²³ In spite of the fact that the Code put in place this organizational structure, the actual task of monitoring and follow up remain weak.¹⁵²⁴ The organizational structure provided in the Code of Practice as described above has not been operational.¹⁵²⁵ In some cases, the absence of roads and infrastructure has prevented access to the monitoring team to conduct supervision. This is for instance the case in relation to agricultural investments carried out in Selamago and South Are *woredas* in South Omo zone of SNNPRS.

¹⁵¹⁹ *ibid*, p.12

¹⁵²⁰ *ibid*, p.14

¹⁵²¹ *ibid*

¹⁵²² EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities (Guidelines) Manual, p. 7

¹⁵²³ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 19

¹⁵²⁴ *ibid*

¹⁵²⁵ Interview with Addisu Negash, EIA Case Team Coordinator, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency, May 20, 2014

The team which was dispatched to conduct monitoring returned back unable to go these areas due to lack of roads.¹⁵²⁶ Similar problems are encountered in Bena Tsemay *woreda* in the region.¹⁵²⁷ This shows some large scale agricultural investments are even outside the semblance of any monitoring. This implies that the current practice of large scale agricultural investments is not in compliance with the CFS principle which calls upon the existence of a mechanism to review impacts and to ensure accountability and transparency.¹⁵²⁸

The awareness on the part of federal as well as regional authorities concerning the aforementioned code of practice and other guidelines is incomplete and lacks uniformity.¹⁵²⁹ On the other hand, in cases where there is awareness of these guidelines, there is procrastination and apathy for their actual implementation due to attitudinal problems.¹⁵³⁰ The regional authorities fail to follow-up and monitor the illegal transfer of land to investors and take timely corrective action.¹⁵³¹ This inaction has encouraged the holding of land illegally and adversely impacted land use.¹⁵³² The ability of the Ethiopian Agricultural Investment Land Administration Agency and Regional and local level environmental protection organs to undertake oversight and follow up of the implementation of the projects is undermined by the lack of authority and and capacity.¹⁵³³

9.4. The Effects of Non-Compliance with the Code of Practice

The lack of effective monitoring of large scale agricultural investments appears to be causing significant damage to the environment, wildlife and surrounding communities. Many of the companies have not adequately complied with the social, agricultural practice components and the natural resource components of the Code of Practice. In regard to the natural resource component, the agricultural companies establish camps nearby the river thereby exposing them to pollution.¹⁵³⁴ This is particularly the case in relation to large scale agricultural investment companies which have taken possession of land from regional states as opposed to the federal

¹⁵²⁶ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 7

¹⁵²⁷ *ibid*

¹⁵²⁸ CFS, Principles on Responsible Investments and Foods Systems (n 538) Principle Ten

¹⁵²⁹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 19

¹⁵³⁰ *ibid*

¹⁵³¹ *ibid*

¹⁵³² *ibid*

¹⁵³³ Rahamato (n 32)

¹⁵³⁴ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 9

Agency.¹⁵³⁵ Companies operating in South Omo and Gamo Gofa Zones cleared the land and built camps within the vicinity of only 20 up to 300 meters nearby rivers and water bodies contrary to the Code of Practice in violation of the requirement of 500 meters buffer zone stipulated in the Code.¹⁵³⁶ Moreover, they cleared all the vegetation and in some cases some companies were using water from the lakes rendering the nature of the soil into salty in the long term.¹⁵³⁷ This is causing land slide and degradation.¹⁵³⁸ The investors tend to clear all vegetation on the land including indigenous trees.¹⁵³⁹ The protection accorded to river banks is minimal triggering recurrent land slide.¹⁵⁴⁰ This problem of clearance of all vegetation is severe when it comes to investors engaged in the production of cereals.¹⁵⁴¹ Those engaged in the cultivation of coffee fare better since the coffee tree needs shades as a result of other surrounding trees.¹⁵⁴² The protection accorded to wildlife is very minimal. For instance, water bodies reserve forest areas are not spared for the procreation of wildlife. There are no traffic signs to slow down vehicles employed in areas which are highly populated by wildlife.¹⁵⁴³

In connection with the agricultural practices component, many of the investors are depositing pesticides, chemicals and fertilizers alongside seed in warehouses which are made of corrugated iron and not amenable for depositing chemicals contrary to what the Code of Practice provides.¹⁵⁴⁴

In regard to the social component, many of the evaluation reports carried out by the Ethiopian Agricultural Investment Land Administration Agency document widespread non-compliance with core labour standards particularly the lack of housing, drinking water and medication.¹⁵⁴⁵ The evaluation carried out in selected farmlands operating in Gambela regional state also found out that the companies are not discharging their responsibilities in terms of ensuring the core

¹⁵³⁵ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013) 5

¹⁵³⁶ *ibid*

¹⁵³⁷ *ibid*

¹⁵³⁸ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 9

¹⁵³⁹ *ibid*

¹⁵⁴⁰ *ibid*

¹⁵⁴¹ *ibid*

¹⁵⁴² Interview with Addisu Negash, EIA Case Team Coordinator, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency, May 20, 2014 ; *See also* EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 9

¹⁵⁴³ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 9

¹⁵⁴⁴ *ibid*

¹⁵⁴⁵ EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities Manual, p.8

labour standards.¹⁵⁴⁶ There are also instances of violations of the democratic and human rights of the workers.¹⁵⁴⁷ Even if some of the companies have constructed housing for the workers, workers have been forced to stay in makeshift huts unable to withstand heat and cold in the localities.¹⁵⁴⁸ Likewise, agricultural workers in many of the large scale agricultural investments in SNNPRS live in substandard housing.¹⁵⁴⁹ They are devoid of recreation centers, latrines and showers.¹⁵⁵⁰ Workers are forced to stay in housing which is far from adequate and made of mud or grass and are exposed to rain, hot weather conditions. In addition, the companies have not provided the workers with latrines.¹⁵⁵¹ In South Omo and Bench Maji Zones of SNNPRS, by and large, the companies did not live up to the core labour standards.¹⁵⁵² The housing of the workers is made of grass or corrugated iron entirely exposed to heat and cold, they have earth floors and devoid of beds.¹⁵⁵³ The workers do not have access to clean drinking water and make use of water from the river or the fountain.¹⁵⁵⁴

Moreover, workers are deprived of even first aid medical attention, drinking water and recreational services.¹⁵⁵⁵ In Gambela, Toren Company was identified as the only one providing medical services to its workers while B.H.O was said to be engaged in awareness on primary health care in partnership with the Red Cross.¹⁵⁵⁶ Most of the other companies are ensuring the provision of medical services to their workers from government health posts. Most of the local investors are getting water from the pond and the rivers.¹⁵⁵⁷ Even if they companies are expected to provide clean drinking water for their workers, they instead obtain water from the ponds for

¹⁵⁴⁶ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 5

¹⁵⁴⁷ EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities Manual, p.9

¹⁵⁴⁸ *ibid*, p.3

¹⁵⁴⁹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013) 5

¹⁵⁵⁰ *ibid*

¹⁵⁵¹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 3

¹⁵⁵² EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 6

¹⁵⁵³ *ibid*

¹⁵⁵⁴ *ibid*

¹⁵⁵⁵ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Benishangul Gumuz (January 2013),5, *See also* EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 6

¹⁵⁵⁶ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 8

¹⁵⁵⁷ *ibid*

this purpose.¹⁵⁵⁸ The workers are not provided appropriate protection during the time they spray pesticides.¹⁵⁵⁹

Moreover, the investors effect a petty amount by way of wages sometimes ranging between 20 up to 50 birr.¹⁵⁶⁰ The situation appears to be even worse in SNNPRS where the companies pay only 20 up to 32 birr per day.¹⁵⁶¹ Workers who are engaged in spray of pesticide chemicals are not exercising due care and not provided with sufficient materials to ensure their safety.¹⁵⁶² At times, the companies engaged in large scale agricultural investment are unable to compete with the government in terms of wages in areas where the government is engaged in the development of sugarcane farms.¹⁵⁶³ Such problems have contributed to incidents of industrial action such as strikes on the part of the workers.¹⁵⁶⁴ In addition, studies indicate that the free movement of workers during daytime is restricted by security concerns in some of the regions.¹⁵⁶⁵ For instance, there have been incidents of shooting upon the workers of Toren Company and Ruchi farmland in Gambela regional state.¹⁵⁶⁶

The Ethiopian Agricultural Investment Land Administration Agency developed different ranking of the investors following its monitoring of their activities along with local administrations. The Agency employs a method of classification of the companies and investors engaged in the sector following its field assessments. There are different ways of classifying the investors into different categories as per their level of compliance. First, the level of compliance of the companies is rated as very good, satisfactory weak and very weak. Second, there is a six-tiered categorization of the investors as outlined in the Agricultural Investment Land Utilization Reform Follow-up and Support Activities Manual:

- investors who have failed to develop the land three since taking delivery of the land and subject to termination of the agreement and repossession of the land

¹⁵⁵⁸ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013) 5

¹⁵⁵⁹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 6

¹⁵⁶⁰ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Benishangul Gumuz (January 2013) 6

¹⁵⁶¹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (June 2013) 5

¹⁵⁶² EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 8

¹⁵⁶³ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 11

¹⁵⁶⁴ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 10

¹⁵⁶⁵ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 11

¹⁵⁶⁶ *ibid*, p.12

- Investors who only developed the land partly after three years since taking delivery of the land and manifest lack of capacity to develop the rest of the land and thus subject to return the size of the land they failed to develop
- Investors who develop the land satisfactorily (i.e. more than half of the total size of the land they took delivery) after three years since transfer and manifest sluggish performance and are subject to written warning or default notice to develop the rest of the land within one year period exhaustively
- Investors who have utilized and developed the land relatively better but are still in need of follow-up and support in consideration of the size of the land they took
- Investors whose is pending due to discrepancy in terms of the size of the land in their actual possession and the title deed
- Investors who have developed the land they took properly and are entitled to additional land upon their request

Many of the land utilization reports considered demonstrate that the overall level of compliance by the companies as regards the code of practice is at a very weak stage. For instance in its report on the evaluation of companies in Gambela regional state, the Agency rated only 3 out of the 52 companies it assessed as being very good and entitled to additional necessary support, while it singled out another three as satisfactory and promised to provide further support to upgrade their level of compliance.¹⁵⁶⁷ On the other hand, the Agency identified 23 companies as weak and another rest 24 as very weak.¹⁵⁶⁸ The ones which are deemed to be weak are subject to closer scrutiny and recommendations will be submitted for decision makers on the course of action to be taken concerning the companies.¹⁵⁶⁹ The 24 companies which have been labeled very weak will be subject to corrective actions in accordance with the rules and regulations.¹⁵⁷⁰ On the other hand, so far the 231 companies which have already taken possession of land in the regional state but have not yet started any activities the report recommends corrective actions in accordance with the rules and regulations.¹⁵⁷¹

¹⁵⁶⁷ *ibid*

¹⁵⁶⁸ *ibid*

¹⁵⁶⁹ *ibid*

¹⁵⁷⁰ *ibid*

¹⁵⁷¹ *ibid*

Similarly, the land utilization report on South Omo and Bench Maji zone adopts a similar approach in ranking the level of compliance of the 38 companies evaluated. Only 7 out of the 38 companies are said to be in a good standing based on their level of production and other considerations.¹⁵⁷² 19 of the companies have rated at medium level of compliance and requiring further follow up so as to improve their standing within a year period. On the other hand, 12 farmlands were identified as at a weak stage for failing to develop the land transferred to them, weak utilization of technology and not assisted by professionals.¹⁵⁷³

9.5. The Method of Monitoring and the need for Capacity Development

Ethiopian Agricultural Investment Land Administration Agency is given the power to monitor and ensure that investors to whom agricultural investment lands have been transferred are implementing the business plans they submitted.¹⁵⁷⁴ Thus, a team comprised of the different directorates of the Ethiopian Agricultural Investment Land Administration Agency undertakes periodic monitoring to the main sites of the investments. This is carried out in the form of occasional filed on-site visits by the members of the teams. These on-site visits are carried out not only on large scale agricultural investment lands transferred by the Agency to the investors but also on those lands transferred by the respective regional administrations. The task of mentoring and follow-up is mainly undertaken at the federal level through the medium of the Agency in particular in relation to some selected investors.¹⁵⁷⁵ These are:

- Investors engaged in the production of perennial crops on a tract of land more than 200 hectares
- Investors engaged in the production of pulses & oilseeds on a tract of land more than 500 hectares
- Investors engaged in the production of grain, rice, wheat and other cereals on a tract of land more than 500 hectares of land
- Investors engaged in the production of biofuel on a tract of land more than 1000 hectares of land

¹⁵⁷² EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 19

¹⁵⁷³ *ibid*

¹⁵⁷⁴ Regulation 283/2013 (n 6) Article 6(5)

¹⁵⁷⁵ EAILAA, Agricultural Investment Land Utilization Reform Follow-up and Support Activities Manual, p.11

Agricultural investments which do not fall within the ambit of one of the aforementioned categories are subject to monitoring mainly by the regional states where they are located. The periodic filed visits are carried out in such a manner due to the lack of capacity on the part of the regional states to carry out such monitoring. As can be seen from the reports on the outcome of the monitoring, the team dispatched from the Agency approaches line bureaus from the regional, zonal and *woreda* administrations and explains the purpose of the filed visits and outlines work plan to undertake the monitoring work. Thus, professionals comprised from the Ministry of Agriculture, Investment, agriculture development, land management and utilization, environmental protection bureaus of the regions, zones and *woredas* undertake the monitoring. Apart from undertaking such on-site visits, the team also discusses challenges revolving around such investments along with concerned officials at different levels and the investors. Nevertheless, the reports do not demonstrate whether the monitoring teams undertake consultations with the local community and involve them in the monitoring. The sidelining of the local community in the course of monitoring casts doubt as to the efficacy of the existing approach as they are main stakeholders.

Accordingly, the Agency has formulated a monitoring checklist to carry out its mandate. The consideration of the monitoring checklist shows that the focus is mainly on information concerning development of the land, employment generation, and activities preceding investment, creation of conducive work environment, environmental protection, and provision of infrastructure, services rendered to the local community and challenges encountered by the investors.¹⁵⁷⁶ The form requires the investor to provide information relating to the extent of the land that has been cleared and readied, that is under development and cultivation.¹⁵⁷⁷ In reality, the actual task of monitoring focuses more on the extent to which the land transferred has been developed. The attention accorded to matters relation to benefit sharing such forward linkages is minimal. The other main issues highlighted in the checklists include camp organization and treatment of workers, availability of agricultural equipment, environmental protection and support rendered to the local communities by the investors.

¹⁵⁷⁶ EAILAA, Monitoring and Evaluation Form on the Performance of Large-Scale Agricultural Investment Companies

¹⁵⁷⁷ *ibid*

The Code of Practice submits that the Ministry shall be engaged in the development of the capacity of sector associations and farm enterprises for the implementation of the standards.¹⁵⁷⁸ There are different organs at various levels which are meant to support the agricultural investment sector. These include the Ethiopian Agricultural Investment Land Administration Agency, Agriculture Bureaus, Environmental Protection Bureaus as well as Land Management Bureaus. These organs which are in charge of spearheading large scale agricultural investment lack sufficient human, financial, logistical, material support particularly at regional level.¹⁵⁷⁹ Moreover, their intervention is not collaborative.¹⁵⁸⁰ There is no clear understanding of the mandated of the respective bureaus in regard to issuance of land holding certificate which results in overlapping activities.¹⁵⁸¹

As discussed earlier, the bulk of large scale agricultural investments are concentrated in areas which the FDRE Constitution refers to as least advantaged in terms of economic and social development.¹⁵⁸² Consequently, these regional states are severely affected by capacity gaps to administer land and large scale agricultural investments.¹⁵⁸³ In spite of fact that the task of monitoring and oversight of the implementation of the investment projects is vested in the local administrations as well, some of the *woreda* administrations do not have adequate documentation of the complies and investors engaged in the sector in their *woredas* and do not undertake monitoring.¹⁵⁸⁴ The local administrations do not have the human, financial, material, logistical, institutional and technical capacity currently to undertake this task.¹⁵⁸⁵ This is particularly the case in regard to Land Management, Environmental Protection Bureaus of the regional states. As a result, it is claimed that the appreciation of the significance of investment among public officials, the investors and the public at large leaves much to be desired.¹⁵⁸⁶ It is argued that in some instances expectations that the local population may accommodate large scale agricultural investment appears to have been dashed.¹⁵⁸⁷ This failure on the part of the local population to

¹⁵⁷⁸ Ministry of Agriculture, Social and Environmental Code of Practice for Agricultural Investment (May 2011) 10

¹⁵⁷⁹ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 19

¹⁵⁸⁰ *ibid*, p. 4

¹⁵⁸¹ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Gambela (January 2014) 12

¹⁵⁸² FDRE Constitution, Article 89(4)

¹⁵⁸³ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 13

¹⁵⁸⁴ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in SNNPRS (March 2014) 17

¹⁵⁸⁵ EAILAA, Evaluation of Land Utilization by Large Scale Agricultural Investors in Benishangul Gumuz (January 2013) 3

¹⁵⁸⁶ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 14

¹⁵⁸⁷ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 15

accommodate investment is attributed to ignorance and ‘*narrow-mindedness*’.¹⁵⁸⁸ It has been mentioned that some public officials are said to have been engaged in pursuit of their personal interests by abusing their power, harassing investors and arbitrarily intervening in their activities.¹⁵⁸⁹ The lack of positive attitude and good governance is mentioned as one of the reasons for the minimal participation of investors in large scale agricultural investment.¹⁵⁹⁰

Moreover, the Ethiopian Agricultural Investment Land Administration Agency is a federal government organ which has limited presence on the ground in these regions. In recent times, the Agency is making efforts to establish branch offices in the regions where the investments are more prevalent. The responsibility of monitoring the environmental sustainability of large scale agricultural investment projects was given to the Ministry of Agriculture on the basis of exchange of letters and memorandum of understanding between the agencies.¹⁵⁹¹ This mandate of monitoring was transferred to an agency which does not have the technical and institutional capacity to discharge it.¹⁵⁹² In addition, the coordination among line bureaus in the regional states including investment bureaus, environmental protection authorities, and agricultural bureaus is not collaborative.¹⁵⁹³ As a result, there are allegations that large scale agricultural investments have been undertaken without environmental and social impacts assessments contrary to what the law says.

The Agency recently opened offices only in three regional states, namely Southern Nations, Nationalities and Peoples Regional State (SNNPRS), Gambela and Benishangul.¹⁵⁹⁴ Investment Bureaus are more confined to the issuance of investment permits and license and are not actively engaged in terms of supporting the investors due to lack of capacity.¹⁵⁹⁵ Thus, the support rendered to large scale agricultural investors is not accessible and effective.¹⁵⁹⁶ Due to the fact that there is no protection for the investors in some of the regional states, there have been

¹⁵⁸⁸ *ibid*

¹⁵⁸⁹ *ibid* (As was explained in Chapter six, this is one of the reasons for the divestment of the regional states’ power to administer their land and to return to recentralization of land. See page 2 chapter six)

¹⁵⁹⁰ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 16

¹⁵⁹¹ Rahamato (n 29)

¹⁵⁹² *ibid*

¹⁵⁹³ Imeru Tamrat (n 53)

¹⁵⁹⁴ Interview with Mr. Dereje Abebe, Ethiopian Agricultural investment Land Administration Agency (EAILAA), Agricultural Investment Support and follow-Up Directorate, Head of Diaspora Coordination Case Team, May 29, 2014

¹⁵⁹⁵ EAILAA, *Challenges and Recommendations on Foreign Agricultural Investment* (May 2014) 13

¹⁵⁹⁶ *ibid*

incidents of arson and robbery, theft and threats.¹⁵⁹⁷ In addition, some incidents of disturbance in relation to large scale agricultural investments also stem from the lack of collaborative coordination among the different stakeholders.¹⁵⁹⁸ There is lack of information to monitor and follow-up and to take corrective action owing to the fact that the allocation of land by regional states was not based upon clearly defined contracts.¹⁵⁹⁹

9.6. The Role of Civil Society and Local Communities in Monitoring

The Ethiopian Agricultural Investment Land Administration Agency is expected to work in cooperation with many stakeholders. The CFS Principles clarify the roles and responsibilities of different actors including the state, intergovernmental organizations, private sector enterprises, financing institutions, donors, research organizations, universities, civil society organizations, communities as well as consumers.¹⁶⁰⁰ These stakeholders play critical role in ensuring that large scale agricultural investments comply with international, national and local standards discussed in this thesis.

Nevertheless, the role of civil society in the monitoring of the implementation of agricultural investments is hampered by the lack of conducive legal environment in the country. In 2001, the House of Peoples Representatives adopted the Proclamation for the Registration and Regulation of Charities and Societies (Proclamation 621/2009). Accordingly, it came with a three-pronged classification of charities and societies as Ethiopian charities, Ethiopian resident charities and international and foreign charities. The law proclaims that only Ethiopian charities are entitled to engage on advocacy on human rights including land rights and the rights of indigenous peoples. However, the law requires Ethiopian charities to obtain 90 percent of their funding from local sources. Since at present, Ethiopian charities are not in a position to muster the strength to secure 90 percent of funding for their activities, this has adversely impacted their activities for the promotion of land rights in general and the land rights of indigenous peoples in particular.

As a result the lack of effective involvement of civil society has adversely affected the ability of local communities to actively participate in the monitoring of these investments. Thus,

¹⁵⁹⁷ *ibid*

¹⁵⁹⁸ *Ibid*, p.16

¹⁵⁹⁹ *ibid*, p.18

¹⁶⁰⁰ CFS, Principles for Responsible Investment in Agriculture and Food Systems (n 543)

communities have limited experience in terms of negotiating and consulting with investors. Moreover, there are no activities aimed at enhancing the legal empowerment of the local communities who have very limited knowledge of their land rights. The situation is more acute when it comes to indigenous peoples in Ethiopia whose lands have attracted a lot of attention for large scale agricultural investors. Even though civil society organizations and local communities should have been consulted in the formulation of the indicators developed under the Code of Practice discussed above the preparation for the Code has not taken this into account. According to the code, the stakeholders who have been consulted in the process include only Environmental Authority (EPA), Biodiversity Agency, Ministry of Labour and Social Affairs, the Confederation of Labour Associations, Ethiopian Horticulture Producers and Exporters Association (EHPEA), and Ethiopian Agricultural Research Organization (EARO).¹⁶⁰¹ Thus, this demonstrates that the consultation process ahead of the adoption of the Code of Practice was not adequately inclusive and participatory.

9.7. The Availability and Effectiveness of Mechanisms of Access to Justice

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) stipulates that states shall provide effective mechanisms for the prevention of and redress for any violation which has the aim of dispossessing them of their lands, territories and resources.¹⁶⁰² However, in spite of this the provision of legal aid to local communities is hampered by the absence of legal empowerment due to the existing legal framework on civil society. Consequently, the ability of local communities to contest the legality of allocation of land for large scale agricultural investors is undermined. The access of local communities to legal remedies is further hindered by the lack of awareness about their rights and resources to litigate before courts of law. Moreover, the insistence on the requirement of vested interest makes it difficult for civil society actors to take Public Interest Litigation against the government or investors on behalf of indigent local communities whose land rights have been violated.

¹⁶⁰¹ Ministry of Agriculture, Social and Environmental Code of Practice for Agricultural Investment (May 2011) 2

¹⁶⁰² United Nations Declaration on the Rights of Indigenous Peoples (n 302) Article 8(2)

9.8. The Reward System for Investors

In September 2008, the Ministry of Agriculture introduced a system to reward those investors deemed to be better performing in terms compliance with the Code of Practice.¹⁶⁰³ This approach was practiced along with taking corrective actions on those investors who were defaulting on their obligations in the contracts and the Code of Practice.¹⁶⁰⁴ The preamble of the Reward System provides that it was deemed necessary to introduce such a system with a view to encourage those investors who demonstrated strong performance and to attract new ones.¹⁶⁰⁵ The system attempts to emulate the approach to reward those investors who are engaged in the export of agricultural products. It outlines the list of requirements that must be fulfilled to grant rewards for better performing investors. The system singles out those investors engaged in exporting and agro-industry activities. Moreover, those engaged in coffee, tea, oil seed, cotton and soya bean plantations are prioritized. One other consideration to be eligible for reward is the total land area equivalent to 200 hectares or more except those who are engaged in tea plantation since they are all entitled. The system is overseen by a Reward Committee comprised of different directorates. Seven requirements have been identified as the basis for the evaluation of eligibility to the reward system. These are:

- The Coverage of land under actual cultivation
- The utilization modern agricultural technology
- The utilization of Appropriate Expertise
- Data Management
- Environmental Protection Activities
- Transfer of Technology to Smallholder Farmers in the vicinity
- Activities carried out to benefit the local communities including provision of health, education and drinking water services

Thus, the requirements in for eligibility into the reward system demonstrate that there are considerations of environmental protection and benefit sharing activities carried out by the

¹⁶⁰³ Ministry of Agriculture, Practice Manual on Evaluation and Rewarding of Agricultural Investors (September 2008) 1

¹⁶⁰⁴ *ibid*

¹⁶⁰⁵ *ibid*

investor including transfer of technology to smallholders in the vicinity and provision of health, education and drinking water services to the local community.

Pursuant to Article 6(11) of the establishment Regulation, one of the powers vested in the Ethiopian Agricultural Land Administration Agency is that of studying local and international best practice in relation to agricultural investment and encourage experience sharing and support implementation.¹⁶⁰⁶ Accordingly, some investors have been identified for their commendable agricultural practices. There is also limited effort by way of compiling the best practices of some of these investors with the intention of disseminating the same practices. A case in point is the documentation of the best practices of two notable investors, namely Alemayehu Mekonnen Farmland and Amaro-Gayo Coffee Plantation by the Ministry of Agriculture concerning.¹⁶⁰⁷ Alemayehu Mekonnen Farmland is established on 750 hectares of land in Alaba Special *Woreda* in SNNPRS in 2007.¹⁶⁰⁸ In what appears to be break from tradition, the investor did not embark upon agricultural investment right away following the allocation of the land. Reportedly, the reactions of the local community towards the participatory approach the investor employed in this case was deemed positively by the local community. Instead, the investor convened the intellectuals, elders, youth and women in the locality to consult them about the proposed project.¹⁶⁰⁹ The farmland commenced with the cultivation of maize on a 150 hectares of land. The farmland has been successful due to its harvest of maize and wheat best seeds on 650 hectares of land in 2012.¹⁶¹⁰ The farmland became a source of best seeds for smallholder farmers in the neighboring areas.¹⁶¹¹ The farmland is commended for a variety of reasons including its treatment of the agricultural workers, use of technology, farmland management, environmental protection and benefit sharing with the local communities.¹⁶¹²

¹⁶⁰⁶ Regulation 283/2013 (n 7) Article 6(11)

¹⁶⁰⁷ EAILAA, Best Practices in Agricultural Investments (January 2014)

¹⁶⁰⁸ *ibid*

¹⁶⁰⁹ *ibid*

¹⁶¹⁰ *ibid*

¹⁶¹¹ *ibid*

¹⁶¹² *ibid* (For instance, the farmland is reported to have harvested a drought-resistant maize seed named Abaraya and distributed the same to smallholder farmers in neighboring and adjacent areas. The farmland is also distinguished for offering its tractors to plough the land belonging to smallholders upon their request. The farmland also allowed the local community to utilize the drinking water well of its agricultural workers in connection with cultural and traditional occasions.)

Amaro-Gayo Coffee Plantation which is located in Amaro Woreda of SNNPRS is also cited as an example for its best practices. The plantation which is owned by Mrs. Asnakech Thomas was initially established on 75 hectares of land although it is likely to expand further.¹⁶¹³ The plantation is said to be exemplary for its fair treatment of agricultural workers. In addition, the investor also established out growers scheme which benefits the smallholder farmers in the vicinity. The plantation takes delivery of the produce of 1017 in January 2014 farmers and manages to supply high quality coffee to the international and local markets. The success of the plantation is partly explained by the fact that it is administered by skilled farmland experts and consultants. The establishment of the out-growers scheme was motivated by the fact that the farmers in the locality did not obtain commensurate amount for their produce. Apart from raising the income the farmers obtained from their produce previously, the scheme has made it possible to maintain a peaceful relationship with the local community. The Coffee Plantation was also noted for offering training for 120 farmers engaged in coffee production to enhance the quality of their produce. The same plantation is also distinguished for having undertaken activities aimed at ensuring environmental protection. Particularly, the Coffee Plantation has installed a system to ensure that byproducts of coffee do not venture into the nearby river. Instead, the system has allowed for the use of the byproduct as compost to develop the coffee plantation.¹⁶¹⁴ In addition, the coffee plantation is also commended for nurturing integrated agricultural development including bee keeping. The plantation offered technology transfer and trained about 60 farmers in the trade.¹⁶¹⁵

Conclusion

It has been explained that the Social and Environmental Code of Practice for Agricultural Investment adopted forms the main basis of monitoring of the activities of large scale agricultural investors. Although, this Code of Practice provided for an elaborate organization structure to ensure its follow-up, this proposed structure has not been operational. Thus, the Code of practice has not been implemented properly even though it provided for the least level of compliance, namely bronze. This lack of enforcement explains the reasons for the many

¹⁶¹³ *ibid*, p.13

¹⁶¹⁴ *ibid*, p. 21

¹⁶¹⁵ *ibid*

contraventions by investors in relation to the agricultural practice component, the environmental protection component and the social component of the Code. Thus, large scale agricultural investment in Ethiopia are characterized by the lack of effective compliance and monitoring required by the human rights obligations of the country, the VGGT and CFS-RAI principles. Effective assessment and monitoring of these investments in Ethiopia are further undermined by the absence of conducive legal environment in relation to legal empowerment, provision of legal aid, public interest litigation or *actio popularis*. Such interventions are needed to ensure that legal remedies are available and accessible sufficiently for the indigent peasants and communities. In addition, the absence of adequate knowledge and skills on the part of judges on land rights of individuals and communities under national, regional and international laws renders the remedies ineffective.

Chapter Ten

Conclusion and Recommendations

This study set out to explore the controversial issue of large scale agricultural investments in Ethiopia and to clarify the extent to which these forms of investments are informed by human rights obligations of the country and other relevant international standards. It inquired into whether or not the transfer of 2.2 million hectares of land at the regional and federal levels in the country for 9000 large scale agricultural investors in Ethiopia is steered in the right path so as to bring about the desired developmental outcomes including sustainable development and livelihoods, social stability, rural development, and environmental protection, and sustainable social and economic well-being. It has been necessary to undertake this inquiry due to the lack of comprehensive and rigorous study based upon emerging international standards on the subject. The study sought to answer whether or not the implications of human rights norms and other standards are reflected in national legislations of Ethiopia governing large scale agricultural investments.

The responsibility of large scale agricultural investments is understood to mean respect for relevant human rights and standards and principles on responsible investment. The thesis set out by elaborating these standards. Thus, the study attempted to address specific research questions pertaining to the recognition of legitimate land rights and agricultural investments, the legal framework on large scale agricultural investments, the governance structures and processes of acquiring land for such investment, the design of agricultural investment agreements, human rights and environmental impact assessments in agricultural investments, monitoring the implementation of large scale agricultural investments.

The thesis underlined that large scale agricultural investments need to be predicated upon respect and recognition of legitimate tenure rights. The obligation to respect legitimate tenure rights is implied by the right to property, the right to natural resources and the right to food for such investments. It has been noted that States must exercise particularly heightened caution when it comes to the land and resources rights of indigenous peoples as enshrined under the UN Declaration on the Rights of Indigenous Peoples since land is more of identity to them than that of commodity. This is also reflected in the first founding principle of the Voluntary Guidelines

which requires states to take reasonable measures by way of identifying, recording and respecting all legitimate tenure right holders and their rights.

Nevertheless, closer scrutiny of the land laws in Ethiopia revealed that the laws fall short of giving legitimate tenure rights, in particular to the land belonging to indigenous pastoralist communities. In spite of the fact that Article 40 (3) of the FDRE Constitution meant to establish joint ownership of land by the people and the state, subsidiary federal and rural land laws confer usufruct rights to land. The Federal Rural Land Administration and Land Use Proclamation counterpart rural land laws impose various conditionalities to exercise these usufruct rights including the requirement of productive use. Thus, the requirement that the land has to be in productive use and must not be left idle for a longer period is a reflection of the labour theory of property. The vague requirement of productive use is particularly problematic in the case of indigenous people in the country who constitute about 12% of the total population but occupy 60% of the landmass in the country. These people are engaged in pastoralism, hunting and gathering activities, which in the eyes of the land law in place do not amount to “productive use”. Article 40(2) of the FDRE Constitution also mirrors the labour theory since it calls for visible improvement of the land, which is not amenable to the way of life of indigenous peoples. This understanding has resulted in the characterization of the large swathes of land inhabited by indigenous people as “idle”, “unused”, “empty” or “unproductive”. Thus, these legal niceties facilitate the displacement of these communities from their lands for the purpose of large scale agricultural investments contrary to Article 40(3) of the FDRE Constitution which assures the right of pastoralists to free land for grazing and cultivation and their right not to be displaced from their own lands. The stipulation under Article 5(3) of the Federal Rural Land Administration and Land Use Proclamation which entitles the government to change communal rural land holdings to private holdings as may be necessary erodes the land and resource rights of the indigenous peoples as enshrined under Article 26 of the UNDRIP. Despite the fact the UNDRIP calls for the recognition of the legitimate tenure rights of the indigenous peoples on the basis of their traditional occupation, ownership, use or otherwise acquisition, the Ethiopian land law recognizes their usufruct rights based upon the principle of “effective control” rendering much of the 60% of the land they occupy virtually *terra nullius*. Thus, these laws are incompatible not only with the right to property, the right to natural resources, and the right to food and the right of indigenous people to their identity, but also to the jurisprudence of the

pertinent jurisprudence of the African Commission on Human and Peoples' Rights particularly its Endorois Decision. In the Endorois Decision, the African Commission has held that traditional possession by indigenous peoples has the equivalent effect of state granted full property title.

The rejection of the juridical personality of these communities as “indigenous” within the meaning of the UNDRIP by the Ethiopian state as evidenced by its absence at the time of the adoption of the instrument makes the exercise of the land and resource rights of the people as enshrined in the document even more precarious.

Thus, the lack of effective recognition of legitimate tenure rights of local communities adversely affects the identification of land for large scale agricultural investment, the allocation of land for this purpose and the establishment of agricultural economic zones currently under consideration. It has been said that the Ethiopian Agricultural Investment Land Administration Agency is vested with the responsibility to identify land “*free from farmers and pastoralists possession*” and not designated for special purposes by the concerned regional government by virtue of Article 6(1) of Regulation 283/2013 on the establishment of the Agency. The phraseology “*free from farmers and pastoralists possession*” also shows that the land rights of local communities is confined to their immediate farms and homesteads and does not extend to common resources. The lack of recognition of legitimate tenure rights of local communities also adversely affects compliance with the other founding principles of the VGGT including safeguarding legitimate tenure rights, promoting and facilitating the enjoyment of legitimate tenure rights, providing access to justice and the prevention of tenure disputes. The practice of identification of land and establishing Agricultural Economic zones based on these land laws would also constitute breaches of the quartet layers of obligations established by the African Commission which prohibit acts of *de jure or de facto* expropriation, pillaging, confiscation, unwarranted removal of people, temporary seizure of property and destruction of property.

Article 40(6) of the FDRE Constitution which stipulates the right of private investors to the use of land on the basis of payment arrangements established by law is said to constitute the principal provision for large scale agricultural investments. In the absence of a specific piece of legislation exclusively dealing with large scale agricultural investments, they are governed by the Investment Proclamation 769/2012 (as amended by Proclamation 849/2014), the Regulation on

Investment Incentives and Investment Areas Reserved for Domestic Investors 270/2012 (as amended by Regulation 312/2014) and the Ethiopian Agricultural Investment Land Administration Agency Establishment Council of Ministers Regulation (Regulation 283/2013.) The Ethiopian Development Research Institute (EDRI) has taken up the assignment to draft a policy document concerning large scale agricultural investment. In addition the contractual agreements with the investors form part and parcel of the framework to govern these investments. Nevertheless, the implementation of these items of legislation did not bring about the intended broader social, economic and environmental objectives at least thus far. The thesis argued that the failure for realizing these objectives is mainly attributed to the misguided governance of these forms of investments in a manner lacking responsibility and social accountability.

It has been said that only about 20 up to 25 per cent of the total land area which has been allocated to investors both by regional and federal levels has been developed by the investors. When this figure is disaggregated, only 34 per cent of the land transferred at the federal level is developed. On the contrary, some of the investors profited from the “*mouthwatering*” package of investment incentives and guarantees including tax incentives, loss carry forward, customs-duty exemptions as well as loans at the expense of the local communities. The process of licensing investors is fraught with problems as it lacks effective means for checking the accuracy of the information provided by the investors making it possible for manipulation by unscrupulous profiteers masquerading in the name of investors. This problem appears to be more pronounced at the regional level since the authorities do not adequately investigate into the veracity of the statements and information provided by the investors.

One of the effects of Article 5(2) of the Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012 (as amended by Regulation 312/2014) which provides income tax exemption for agricultural investment taking place in certain areas is the concentration of large scale agricultural investments in regions largely inhabited by indigenous pastoralist people. This choice of the destination of areas for enclosure for large scale agricultural investment cements the “*core-periphery divide*” evident in the incidence of large scale agricultural investment in the country. The package of incentives offered to for the purpose of the facilitation of production of crops and food, the bulk of which meant to export and not local consumption, risks undermining local food security in the absence of clear

benefit sharing schemes. The non-inclusion of a contractual clause requiring the availability upon consideration of a specified amount of the agricultural produce locally contrary to the eighth principle developed by the Special Rapporteur on the Right to Food in the template contracts used by the Ethiopian Agricultural Investment Land Administration Agency is jeopardizes food security of the local population. Moreover, the allocation of land to some of the investors encouraged illegal practices such as the securing loan, the misuse of tax holiday and investment incentives with no or little significant activities in terms of production.

Large scale agricultural investments in Ethiopia are governed by scattered and fragmentary items of legislation including Ethiopian Agricultural Investment Land Administration Agency Establishment Council of Ministers Regulation, Regulation 283/2013, Council of Ministers Regulation, Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions, Federal Rural Land Administration and Land Use Proclamation, Regional Rural Land Administration and Land Use Proclamation, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005, Council of Ministers Regulation on Payment of Compensation for Property Situated on Landholding expropriated for Public Purposes (Regulation No 135/2007), Council of Ministers, Agricultural Investment Land Administration Procedure Directive, The 2009 Agricultural Investment Land Rent Enforcement Directive, Agricultural Investment Land Utilization Reform Follow-up and Support Activities Directive (Manual), Directives on the Transfer of Large Scale Lands for Agricultural Investment to Investors and The 2011 Social and Environmental Code of Practice for Agricultural Investment. The multiplicity of regulations, directives and guidelines deprives much needed clear and precise legal framework for these investments.

In addition to the gaps and inconsistencies in the legal regime pertaining to land rights and agricultural investment, the governance structures and processes of acquiring land for agricultural investment and the conclusion of contractual agreements are fraught with problems. The practice of concluding of transactions pertaining to large scale agricultural investments both at the federal and regional levels lacks transparency and is mainly conducted without the knowledge or consent of the affected communities. This lack of transaction transparency is contrary to the standards contained in the VGGT and De Schutter principles. These standards recommend that transactions involving transfer of land to agricultural investors be concluded in a

fully transparent manner with the participation of local communities so as to prevent, among others, high level of corruption. The transactions are not made officially available and they are not subject to public oversight. Although the online disclosure of some of the contracts by the Agency is commendable practice, the database is not up-to-date and is inaccessible to the local communities who have little or no access to internet. Moreover, there is no adequate disclosure relevant information including the non-disclosure of Environmental Impact Assessments study reports. This is due to a broad and unwarranted understanding of confidentiality.

In addition, the model of re-centralization of land and “*upward delegation*” is contradictory with the constitutional right of local administration of land enshrined under Article 52(2) (d) of the Constitution of the Federal Democratic Republic of Ethiopia. This is also inconsistent with Article 17(2) of the Federal Rural Land Administration and Land Use Proclamation. The Ethiopian Agricultural Investment Land Administration Agency established by the Council of Ministers Regulation 283/2013 is given the power to administer agricultural investment lands measuring 5000 hectares or more delegated by the regions. Moreover, if this is proved to be *needed and important*, the Agency can also administer land lesser than 5000 hectares by virtue of Article 3(1) (a) of the Council of Ministers Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions. Such phrases like “if *needed and important*” confer substantial discretionary power to the Agency which in turn may undermine the power of regional states to administer agricultural land even lesser than 5000 hectares of land. The thesis argued against re-centralization model since it is inconsistent with the Constitution. Re-centralization is also inconsistent with the principle of devolution of land management responsibilities to local government and decentralization as a mechanism for the facilitation of local participation.

Moreover, contrary to the recommendation under chapter 12 of the VGGT for the introduction of provision of safeguards such as parliamentary approval in the case of transfers exceeding a certain scale without the involvement of the Federal and regional Parliaments. The thesis argued that the good practice of subjecting such contractual agreements for parliamentary approval as is the case in countries such as Liberia is instructive. It has been stated that the agreements, although legal, may lack legitimacy among the local communities whose lands have been transferred so far as they are not involved in the process. Thus, there are various gaps in terms of

ensuring the inclusive and accessible nature of the structures in place for the governance of large scale agricultural investments as required by CFS-RAI principles.

Consequently, the contractual agreements concluded both at the federal and regional level manifest lack of contractual equilibrium and do not include important provisions necessary to ensure benefit sharing. This observation is applicable to the standard form contracts employed by the agency and the contracts concluded by the regions as well. The contracts stipulate substantially disproportionate obligations to the parties. Moreover, the contracts are overly simplified, skeletal and vague. It is further argued that the use of contracts of adhesion may not always be amenable to accommodate specific realities of a given situation. In particular, the contracts display weakness in the definition of the land allocated resulting in disputes among investors and local communities as illustrated by the Verdanata Harvest Plc case.

This study argues that contractual agreements involving land transfers should be treated as part of contracts in the extractive industry since they involve extraction of water. The contracts do not properly accommodate environmental, economic and social concerns. The contracts do not include provisions obliging the investors to supply the local and the national market as such in line with the De Schutter principles. Contrary to the recommendation for the inclusion of clearly defined and enforceable obligations of the investor, the contracts do not clearly stipulate the obligations of the investor concerning the provision of social services to the local communities or engage in the construction of infrastructure. The failure of the contracts to sufficiently specify the development obligations expected of the investor shows that they are not carefully constructed.

The thesis highlighted the importance of consultation, free, prior and informed consent (FPIC) and participation. These standards are reflected not only in the VGGT but also constitute human rights obligations compliance with which is detrimental for the legality and legitimacy of large scale agricultural investments. The question of FPIC assumes special importance in particular in the case of indigenous people as land is not a mere economic commodity but the basis of their identity. The Ethiopian Agricultural Investment Land Administration Agency contends that there is no displacement of people occasioned by the practice of land allocation by the federal channel. According to the Agency, this is due to the fact that it operates based on the principle that the land is allocated for agricultural investment purposes only if it is free from

farmers and pastoralists possession, it is not protected forest area or land designated for forestry and biodiversity and that it is not wildlife area and not currently or previously earmarked for investment projects. Contrary to this contention, the incidence of displacement of people from their lands in Ethiopia is rife and well-documented. The presence of farmers and pastoralists can easily be established based on the studies and reports of the Ethiopian Agricultural Investment Land Administration Agency as illustrated in Dangur, Mandura and Pawe *woredas* in *Benishangul Gumuz* regional state. The same reports also demonstrate the difficulty on the part of the Agency to ascertain whether or not the land is inhabited by communities. There are also cases of allocation of land of cultural and religious importance to large scale agricultural investors as evidenced by the incidents of Jabela, Bazena and Mekacha localities in SNNPRS.

One natural consequence of the frequent denial of acts of displacement by the authorities is the fact that many of the necessary conditions that must be respected in connection with forced eviction of people are not complied with in the process. The right to free, prior, informed consent and consultation has been highlighted both in the case of the VGGT and De Schutter principles. The process of implementing consultation and FPIC in Ethiopia in relation to large scale agricultural investments is fraught with problems due to the contention that there are no affected populations in contravention with Article 43 of the Constitution. Contrary to the requirement of FPIC, the process of land acquisition for agricultural investment purposes in the country is characterized by coercion, intimidation or manipulation. The lack of sufficient consultation before resettlement is also documented by the studies of the Ethiopian Human Rights Commission. Apart from the absence of established guidelines to conduct consultations, the very reports of the Ethiopian Agricultural Investment Land Administration Agency admitted no consultations have been conducted by local administrations with the local communities before the transfer of land to investors in certain situations. The fact the Environmental Impact Assessment Proclamation provides that the purpose of consultation is to solicit comments shows that the semblance of consultations is more of *pro forma* or simple formality exercises as opposed to two-track consultations. Moreover, the local elites are summoned in these *pro forma* consultations are not representative within the meaning of the UNDRIP. The lack of legal empowerment for the members of the local population to ensure their effective participation and the absence of representative institutions of the local people shows that the process amounts to elite capture. As illustrated in the Verdanta Harvests Plc case, the disaffection on the part of local

communities manifests itself in many ways including extreme cases of arson, robbery, general lack of security and suspicious attitudes towards investors from other areas. These problems are further exacerbated by the lack of enforcement of the Social and Environmental Code of Practice despite of the lapse of some years since its adoption.

In conclusion, as things stand now, the practice of large scale agricultural investments in its current form in Ethiopia does not fulfill the salient features of responsible agricultural investments as defined under VGGT and CFS-RAI. In actual fact, many of the allocations of land for this purpose could fall within the definition of the term “*land grabbing*” or “*land speculation*” as defined in the Tirana Declaration. Analysis of the practice in the country manifests many gaps and inconsistencies in violation of relevant international standards as embodied in international human rights instruments, the VGGT and CFS-RAI. Therefore, it would be necessary to overhaul the governance of large scale agricultural investments in the country so as to make it congruous with international standards as suggested in the recommendations below.

Recommendations

The thesis is informed by the liberal view that large scale agricultural investments can be regulated by principles and guidelines as opposed to the view that they are not amenable for regulation by such methods. Consequently, it is argued that Ethiopia has to overhaul its national legislation, the governance structure and existing practices relating to these investments. It is believed that compliance with human rights obligations and international standards as elaborated in the thesis would enhance the viability of large scale agricultural investments in the country. On the contrary, failure to accommodate and implement these principles would result in momentous and adverse outcomes to local community and to the country as a whole. In view of these considerations, detailed and structured recommendations are addressed to the Ethiopian government and other stakeholders as follows.

10.1. The Need for Consolidated Laws on Agricultural Investment

The overarching nature of large scale agricultural investment implies the need for a coherent and unified body of law. Nevertheless, currently, these investments are governed by scattered and fragmentary items of legislation. The inadequacy of the existing Investment Proclamation and regulations to govern these investments manifests itself by the multiplicity of the regulations,

Directives and guidelines issued by the Council of Ministers and the Ethiopian Agricultural Investment Land Administration Agency. Thus, there is a need for a coherent and unified law which lays down the legal basis of large scale agricultural investments in line with the principle of legality.

10.2. Recognition and Protection of Land Rights

The ownership and possession rights of Ethiopian indigenous and tribal peoples over their land must be recognized based on the principle of traditional occupation, ownership, use or otherwise acquisition as opposed to the principle of effective occupation. Article 5(3) of the Federal Rural Land Administration and Land Use Proclamation which gives the government extensive discretionary powers to change communal rural land holdings to private holdings must be repealed as it is unconstitutional. The practice of viewing commons which are untilled and unfarmed as *terra nullius* needs to be dispensed with.

The conditions imposed upon the exercise of use rights such residence in a *kebele*, personal engagement in agriculture, “*proper*” management of the land, and other restrictive conditions do not accommodate the specific realities of indigenous people in Ethiopia and must not be applicable to them. The current practice of recognition of the land rights to visible productive use is particularly problematic to indigenous people since fallow, pastoralist; hunting and gathering do not fall within the ambit of local resource use. The usufruct rights of pastoralist communities must not be confined only to their individual farms and homesteads. The traditions, customs and land use systems of the people and their customary tenure should be legal support *as per* Article 27 of the UNDRIP. This would also necessitate the need to recognize the juridical personality of the pastoralist people as indigenous people. Local customs and practices need to be recognized as part of the architecture of land tenure. Sufficient efforts must be exerted to determine the existence of legitimate land rights before decisions are made to allocate the land to large scale agricultural investors. Excessive reliance on desktop mapping to determine whether or not land is under occupation should be replaced with on- site filed visits as it is susceptible to erroneous outcomes. Lands which are sites of religious and cultural practices of the local communities should not be transferred to investors.

Forced relocation of people must be resorted to only in most exceptional circumstances or where it is deemed to be necessary as an exceptional measure. The minimum international guarantees must be complied with in situations forced relocation is justified. The payment of compensation only to visible improvements as a result of the outcome of the labour theory must be replaced with payment of prompt, adequate and effective compensation for the loss of the land communities are entitled to by virtue of traditional occupation, acquisition, ownership or use. Clear standardized practices, procedures and guidelines must be adopted in connection with the establishment of Agricultural Economic Zones (AEZ).

10.3. Investment Incentives and Guarantees

Adequate measures must be introduced to ensure that the investment incentives, guarantees and export incentives for large scale agricultural investors are not abused by unscrupulous investors. The practice of extending large sums of money by way of loan for investors who have not yet involved in the actual development phase of the land must be dispensed with. The provision of loan must be undertaken in a transparent manner so as to allay off corruption and collusion for personal gain. The practice of allocation of land to investors who do not have the requisite capacity to develop the land must be halted. The experience and financial position of individuals and companies who seek to engage in the sector must be thoroughly assessed. The veracity and credibility of the information provided by the investors must be subject to rigorous checking. The practice of renewing the license of those investors with dismal performance of the project must be reconsidered. Caution must be exercised to ensure that the move to adopt the model of one-stop-shop services to large scale agricultural investors is not going to undermine environmental, social and food security concerns. Mechanisms must be in place to ensure that investment incentives granted are used for their intended purposes.

10.4. The Governance Structure

Since the power of administration of land and natural resources is vested in the regional states by virtue of Article 52(2) (d) of the FDRE Constitution, the trend towards the re-centralization of land in the hands of the government has to be re-examined. The model of re-centralization is also inconsistent with Article 17(1) of the Federal Rural Land Administration and Land Use Proclamation. Instead, the right of regional states for local administration of their land and

resource rights must be respected. Accordingly, the practice of “*upward delegation*” of the administration by the regional states to the federal government in the form of the Federal Land Bank must be dispensed with since it does not have constitutional basis. Consequently, Article 50(9) of the FDRE Constitution does not warrant delegation by Regional States to the federal government. Thus, the 2010 Council of Ministers Regulation on the Administration of Agricultural Investment Land under the Appointment of Regions lacks constitutional basis. The Regulation is formulated in such a broad and vague manner so as to deprive regions of administering land even lesser than 5000 hectares of land as can be seen from Article 3(1) (a) of the Regulation. Instead, the focus should be on development of the capacity of regional governments and administrations at local levels to be able to discharge their constitutional mandate to administer their own land resources. The resource constraints and capacity gaps of regional and local level administrations need to be addressed. The role of the Ethiopian Agricultural Investment Land Administration Agency should be transitional and limited to capacity development of the regional bodies engaged in the administration of land for agricultural investment purposes. In addition to the development of capacity of the regional and local bodies, right holders in the local communities should be legally empowered.

10.5. Provision of Safeguards

In line with the VGGT, it is advisable to introduce certain safeguards including the introduction of land ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, for example, through parliamentary approval. The allocation of 5000 hectares of land to investors at one go still appears to be substantial. Thus, it would be preferable to introduce land ceilings lower than 5000 hectares. Land should be allocated incrementally in consideration of the performance of the investor by way of developing the land already allocated to them. Safeguards must be provided by way of the involvement of the State Councils (Parliament) for the purpose of approving the allocation of land exceeding 5000 hectares.

10.6 Consultation, Participation and FPIC

The acquisition of land for large scale agricultural purposes must be based upon formal and full good faith the participation and consultation with representative institutions of the local communities. The institutions which claim to be representatives of the local communities must

be legitimate and acceptable to the people. Transactions involving land acquisition must allow for the participation of a range of actors including affected local communities.

The Free, Prior, Informed Consent (FPIC) must also be implemented in particular in cases involving the acquisition of the land of pastoralist indigenous peoples. Thus, the current practice of conducting meetings for the sole purpose of mere one-way track provision of information and the allocation of land without the knowledge and consent of the community should be dispensed with. The acquisition of land must be free from coercion, intimidation or manipulation. The consent of the local community must be secured sufficiently in advance of any authorization or commencement of activities. Local community must be provided with adequate information concerning the nature, size, pace, reversibility and scope of any proposed project or activity, the reasons or purpose of the project and/or activity, its duration and the locality of areas that will be affected. Clear procedures and guidelines must be in place for the purpose of guiding participation and consultation with affected communities. Legal empowerment and assistance should be provided to local communities to ensure they can avail themselves of the right of consultation effectively.

10.7 Transaction Transparency

Transactions involving large scale agricultural investments should be made accessible to the public free of charge and translated into local vernaculars. Launch Ethiopian land transparency initiative for the purpose of disclosure of appropriate information concerning large scale agricultural investments including contract negotiation, monitoring the implementation of the contract and close or end of business. Relevant information to be disclosed includes memorandums of understanding, investment agreements, land lease contracts and impact assessments.

10.8. Contractual Equilibrium

Agreements need to be redesigned in such a way so as to attain the intended environmental, social and economic objectives. They need to be sufficiently detailed and comprehensive. They should be negotiated in such a way so as to ensure contractual equilibrium. They should include all the elements necessary that need to be included in such deals including benefit sharing obligations such as forward linkages, food security, and transfer of technology. Charging

investors meager amount by way of land rentals should be dispensed with as they encourage land speculation.

Agreements must clearly define the land transfer to investor so as to avoid variance between the land indicated in the contract and the land actually transferred to the investor. The agreements should clearly indicate that rights transferred do not extend to subsurface resources. More attention should be given to the extraction of water considering the contracts as contracts in the extractive industry. Thus, investors should effect payment not only for the land allocated but also extraction of water. Local community should be given active role in terms of reporting to and giving input for settlement of disputes.

10.9. Impact Assessments

The practice of allocating land prior to the undertaking of EIA study reports must be dispensed with. The provision in the standard form contracts which stipulates that environmental impact assessment needs to be conducted and the report delivered within three months following the execution of the agreement should be done away with since it encourages allocation of land prior to conducting EIA. EIA study reports must be made available publicly and should not be considered confidential. The capacity of federal and regional organs overseeing the preparation of EIA study reports needs to be enhanced. The Ministry of Environment and Forest must ensure that EIA study reports are prepared in line with the basic principles of EIA best practice. Land allocations less than 500 hectares should not be out of the EIA process. Standards must be established for the licensing of consultants to practice EIA studies. Caution must be exercised that the one-stop-services intended to be provided for the investor is not going to undermine the EIA process.

Investors seeking to engage in large scale agricultural investment must be required to undertake not only EIA but also human rights due diligence in line with the UN Respect, Protect and remedy Framework. Home states of large scale agricultural investment must make sure that investors under their jurisdiction are not involved in violations of human rights.

10.10. Monitoring Implementation

The Social and Environmental Code of Practice must be enforced. The structures envisaged in the Code of Practice to ensure the implementation and enforcement of the Code need to be operational. Mechanisms need to be in place to for continuous monitoring and follow up of the compliance of investors with their obligations under the laws, contracts and the Social and Environmental Code of Practice. The role of civil society, local communities and other stakeholders in terms of monitoring and follow-up must be encouraged and strengthened. There has to be conducive legal environment to this effect.

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Annex

Annex A: Table on List of Federal Inverstors

No	Project	Nationality	Regional State where the Project is located	Woreda	Date of Transfer	Total Size of Land Transferred (Hectares)
1.	Ayka Addis	Turkish	SNNPRS	Hammer	2013/14	10,000
2.	Tsegaye Demoz	Diaspora (American)	SNNPRS	Dasenech	January 18, 2010	450
3.	Reta	Diaspora (Canadian)	SNNPRS	Hammer	August 26, 2009	2,137
4.	Omo Valley	Turkish	SNNPRS	Hamer	July 14, 2012	10000
5.	Adama Agro Industry	Ethiopian	SNNPRS	Gnagatom	August 23, 2010	18516
6.	Hash Agro Industry	Ethiopian	SNNPRS	Debub Ari		14,705
7.	Dr. Taeme Agricultural Devt.	Diaspora (American)	SNNPRS	Gnagatom	May 12, 2011	5000
8.	Dasali Farm (formerly Daniel Farm)	Diaspora (American)	SNNPRS	Dasenech	-	5002
9.	Mela Agri. Dev't.	Ethiopian	SNNPRS	Dasenech	March 16, 2010	5000
10.	Dasenech Agro Dev't.	Ethiopian	SNNPRS	Dasenech	March 18, 2010	3000
11.	Lucy Farm	Ethiopian	SNNPRS	Dasenech		1500
12.	Al-Mahadi Matchmaker	Pakistani	SNNPRS	Ditcha	October 8, 2011	1000
13.	Whitefield	Indian	SNNPRS	Dasenech	April 9, 2010	10,000
14.	Anaya Farm	Ethiopian	SNNPRS	Ditcha	February 5, 2015	500
15.	Abdurhaman Nuru Farm Dev't.	Ethiopian	SNNPRS	Ditcha	-	500
16.	Akeno Farm	Diaspora (Canadian)	SNNPRS	Ditcha	May 2015	500
17.	Ruchi	Indian	Gambela	Anuak	December 14, 2009	25,000
18.	BHO	Indian	Gambela		January 19, 2010	27,000
19.	Sanatin	Indian	Gambela	Dima	May 9, 2010	10,000
20.	Verdanta	Indian	Gambela	Godere	December 29, 2009	3,012
21.	Karaturi	Indian	Gambela	Jikawo and Itang	July 2, 2010	100,000
22.	Saudi Star	Indian	Gambela	Abobob	July 2, 2010	10,000
23.	Toren Agro Industry	Turkish	Gambela	Gog	August 7, 2012	6000
24.	Green Valley	Indian	Gambela	Abobo	July 15, 2011	5000

	Agro Industry					
25.	Akula Farm	Double	Gambela	Dima	2014/2015	1000
26.	Ashenafi Gebremeskel	Ethiopian	Gambela	Dima	May 2014	1000
27.	AD PLC	Ethiopian	Gambela	Dima	June 2014	1500
28.	Atnafu and Family	Ethiopian	Gambela	Dima	May 2014	1000
29.	Belsti Negaso	Ethiopian	Gambela	Dima	May 2014	1000
30.	Berhe Gidey	Ethiopian	Gambela	Dima	May 2014	1000
31.	Debrich Import and Export	Ethiopian	Gambela	Dima	May 2014	1000
32.	Ephrem Atakliti Gesese	Ethiopian	Gambela	Dima	May 2014	1000
33.	Fasil Hailu	Ethiopian	Gambela	Dima	June 2014	1000
34.	Gebresellasi Gebremedhin	Ethiopian	Gambella	Dima	June 2014	800
35.	Gebremariam Abreha	Ethiopian	Gambella	Dima	May 2014	500
36.	Ginbe Work	Ethiopian	Gambela	Dima	June 2014	1000
37.	Gush Demoz	Ethiopian	Gambela	Dima	June 2014	1000
38.	Gush Gebresellasi	Ethiopian	Gambela	Dima	May 2014	500
39.	Hadush Ambay Gbremichael	Ethiopian	Gambela	Dima	May 2014	1000
40.	Hagos Gebrehiwot	Ethiopian	Gambela	Dima	June 2014	500
41.	Henok Gebreegiabher	Ethiopian	Gambela	Dima	June 2014	1000
42.	Hunde Lalisa	Ethiopian	Gambela	Dima	June 2014	1500
43.	Etefa Mekonnen	Ethiopian	Gambella	Dima	June 2014	1500
44.	Phonix	Ethiopian	Gambela	Dima	2015	500
45.	Seti Semela	Ethiopian	Gambela	Dima	June 2014	500
46.	Shimbelina	Ethiopian	Gambela	Dima	2013/2014	500
47.	Tecron General Trading	Ethiopian	Gambela	Gog	2013/2014	3000
48.	Tecele Birhan Tadesse	Ethiopian	Gambela	Dima	May 2014	1000
49.	TG Farm	Ethiopian	Gambela	Dima	2015	500
50.	Tsega Gebremedihn	Ethiopian	Gambela	Dima	2015	500
51.	Saber Farm	Indian	Gambela	Dima	January 17, 2011	500
52.	JVL Agro Industry	Singapore	Gambela	Dima	19/2/05	5000
53.	Kerseraw Benson General Trading PLC	Ethiopian	Gambela	Akula	October 29, 2012	500
54.	Beliga Business Plc	Ethiopian	Gambela	Akula	2015	
55.	Ambaye Girmaye Farm Dev't.	Ethiopian	Gambela	Akula	2015	1000

56.	K Z Farm Dev't.	Ethiopian	Gambela	Akula	2015	1000
57.	Hamelmallo Agri Dev't.	Ethiopian	Gambela	Akula	2015	1000
58.	Mikmat Agri Development	Ethiopian	Gambela	Akula	2015	1000
59.	Menebih Agri Development	Ethiopian	Gambela	Akula	2015	1000
60.	Gebremichael Kidane Mariam	Ethiopian	Gambela	Akula	2015	500
61.	Bereket Berhe	Ethiopian	Gambela	Akula	2015	500
62.	A S Kidney Beans and Oilseeds Agri Dev't.	Ethiopian	Gambela	Akula	2015	500
63.	Shaporji	Indian	Benishangul	Dangur	November 10, 2009	50,000
64.	Kedam Trading	Ethiopian	Benishangul	Guba	December 1, 2010	1000
65.	Biruh Way Mechanized Farm	Ethiopian	Benishangul	Dangur	April 12, 2011	5000
66.	Sky Agri Dev't.	Ethiopian	Benishangul	Dangur		3000
67.	Tracon Trading*	Ethiopian	Benishangul	Dangur	2013/2014	904
68.	Tigab Agro Industry	Diaspora	Benishangul	Dangur	November 21, 2010	300
69.	Tikmit Agricultural	Diaspora	Benishangul	Dangur	September 27, 2011	204
70.	Gashaw Bezu Takele	Diaspora (American)	Benishangul	Dangur	November 24, 2011	1200
71.	Nega Mamaye	Diaspora (Australian)	Benishangul	Dangur	July 19, 2012	1070
72.	G-7 Limited Company	Ethiopian	Benishangul	Guba	June 2014	1000
73.	Gutit	Ethiopian	Benishagul	Guba	2013/2014	500
74.	Lisa PLC	Ethiopian	Benishangul	Dangur	2013/2014	3000
75.	Medhane General Trading	Ethiopian	Benishangul	Dangur	2013/2014	1000
76.	Michael Dismod	Turkish	Benishangul	Guba	June 2014	1000
77.	Minbal Mengistu	Ethiopian	Benishangul	Dangur	2013/2014	1000
78.	Neka Andualem	Ethiopian	Benishangul	Guba	2013/2014	500
79.	Kiston		Benishangul	Pawe	November 10, 2009	431
80.	Wegagen	Ethiopian	Benishangul	Dangur	2013/2014	1000
81.	Tarekegn Belay	Diaspora (Israeli)	Benishangul	Dangur	2013/2014	2000
82.	Yeshi Emebet	Diaspora (British)	Benishangul	Guba	2013/2014	1000
83.	Yomed Agri &	Ethiopian	Benishangul	Guba	June 2014	1000

* Kiston is no longer in operation at the time of writing.

	Agro Industry PLC					
84.	Access Capital	Ethiopian	Benishangul	Dangur	October 11, 2010	5000
85.	Workneh Adamu	Ethiopian	Benishangul	Dangur	2013/2014	500
86.	Helwan Adnan Abdurhaman	Sudanese	Benishangul	Dangur	February 22, 2013	5000
87.	Hashim Esmael	Saudi Arabian	Benishangul	Mao Komo	October 20, 2011	3000
88.	Horizon Plantation	(Ethiopian Origin) Saudi Arabian	Benishangul	Guba	February 15, 2012	20000
89.	Lotus International	Saudi Arabian	Benishangulgumuz	Mao Komo	July 9, 2012	3000
90.	Usman Issa Farm	Saudi Arabian	Benishangul	Guba	27-02-2014	1000
91.	TYS Agri Dev't.	Ethiopian	Benishangul	Guba		1000
92.	Africa Farm	Ethiopian	Benishangul	Guba	2012/13	2000
93.	Getafan Mechanized Farm	Diaspora (American)	Benishangul	Dangur	2010/2011	3000
94.	E.N.S Agri Dev't' PLC	Ethiopian	Benishangul	Guba	March 4, 2015	1000
95.	Mohammed Amiru	Ethiopian	Benishangul	Guba	June 10, 2015	2000
96.	Fireselam PLC	Ethiopian	Benishangul	Guba	June 10, 2015	2000
97.	Yoseph Gebreegziabeher	Ethiopian	Benishangul	Mao Komo	April 17, 2015	750
98.	Hagos Yibrha	Ethiopian	Benishangul	Guba	February 27, 2015	1000
99.	Addis Alem	Ethiopian	Benishangul	Guba	March 27, 2015	738
100.	Kaza Wonz Trading	Ethiopian	Benishangul	Guba	February 27, 2015	500
101.	Solomon Leykun	Ethiopian	Benishangul	Guba	June 13, 2015	1000
102.	Solomon Amare	Ethiopian	Benishangul	Guba	June 19, 2015	1000
103.	Gashaw Kasse Agri Dev't.	Ethiopian	Benishangul	Assosa Zuria	May 4, 2015	1000
104.	N M Agro Industry	Ethiopian	Benishangul	Guba	May 27, 2015	500
105.	Priest Desalegn Haile Agri Dev't.	Ethiopian	Benishangul	Guba	May 27, 2015	1000
106.	Asyae Mulat Agri Dev't.	Ethiopian	Benishangul	Guba	May 27, 2015	500
107.	Tayton Agri Dev't.	Ethiopian	Benishangul	Guba	May 11, 2015	1000

108.	BHN Agri Dev't.	Ethiopian	Benishangul	Guba	2015	1000
109.	Mulugeta Yetwale Impoerter & Exporter	Ethiopian	Benishangul	Guba	2015	1000
110.	Animaw Alemu Impoerter & Exporter	Ethiopian	Benishangul	Guba	2015	2000
111.	H 2 Me Agri Dev't.	Ethiopian	Benishangul	Guba	2015	1000
112.	Michael Abrha	Ethiopian	Benishangul	Guba	2015	500
113.	Agede Agri Dev't.	Ethiopian	Benishangul	Guba	2015	500
114.	Moria Agri Dev't'	Ethiopian	Benishangul	Guba	2015	500
115.	JDKH Agri Dev't.	Ethiopian	Benishangul	Guba	2015	1000
116.	JL Agri Dev't.	Ethiopian	Benishangul	Guba	2015	500
117.	Avino Agri Dev't.	Ethiopian	Benishangul	Guba	2015	1000
118.	Tsegaye Yemane	Ethiopian	Benishangul	Guba	2015	1000
119.	Temesgen Yohannes Agri. Dev't.	Ethiopian	Benishangul	Guba	2015	500
120.	Elafi Agri Dev't.	Ethiopian	Benishangul	Guba	2015	1300
121.	Alexander Salew	Ethiopian	Benishangul	Guba	2015	1000
122.	Hanamariam Andualem & Associates	Ethiopian	Benishangul	Guba	2015	500
123.	Endeg Agri. Dev't.	Ethiopian	Benishangul	Guba	2015	200
124.	Melkamu and Family Agri Dev't. PLC	Diaspora (Israeli)	Benishangul	Guba	May 2, 2015	3000
125.	Shewit Abera	Diaspora (American)	Benishangul	Guba	April 8, 2015	500
126.	Habi Hotel	Diaspora (American)	Benishangul	Guba	-	
127.	Freedom Agri. Dev't.	Diaspora (American)	Benishangul	Guba	May 2015	650
128.	Asfaw Gola	Diaspora (American)	Benishangul	Guba		
129.	Agro Peace Bio Ethiopia	Israeli	Somali Region	Shinle	August 24, 2012	2000
130.	Pan Agro Industry	Ethiopian	Somali Region	Gode	2014/15	4000

Annex B: Regional Disaggregation of the Land Transferred

S.No	Investor/Campany's Name	Size and location of delivered land				Date
		size(ha)	Region	Woreda	Kebele	
1.	AD PLC	1500	Gambela	Dima	Akula	Jun-06
2.	Akula	1000	Gambella	Dima	akula	2007
3.	Ashensfi G/meskel	1000	Gambela	Dima	Achagna	May-06
4.	Atinafu & Betesebochu	1000	Gambela	Dima	Akula	May-06
5.	Ayika addis	10000	SNNP	Nyangatom /Dassenech	SNNP OMO	2006
6.	Belisti Negaso	1000	Gambela	Dima	Akula	May-06
7.	Berehe	1000	Gambela	Dima	Akula	Jun-06
8.	Debrich Impo.& Expor.PLC	1000	Gambela	Dima	Achagna	May-06
9.	Efrem Atakilt Gessese	1000	Gambela	Dima	Achagna	May-06
10.	Fasil	1000	Gambela	Dima	Akula	Jun-06
11.	G/Silassie	800	Gambela	Dima	Akula	Jun-06
12.	G-7 limited Company	1000	Benishangul	Guba	Isidi	Jun-06
13.	Gebremariam Abreha	500	Gambela	Dima	Achagna	May-06
14.	Ginbe work	1000	Gambela	Dima	Akula	Jun-06
15.	Gotit	500	Benishangul	Guba	Basheta	2006
16.	Gu'ish	1000	Gambela	Dima	Akula	Jun-06
17.	Gu'ish G/Sillassie	500	Gambela	Dima	Achagna	May-06
18.	Hadush Imbaye G/Micha'el	1000	Gambela	Dima	Akula	May-06
19.	Hagos	500	Gambela	Dima	Akula	Jun-06
20.	Henok	1000	Gambela	Dima	Akula	Jun-06
21.	Hunde	1500	Gambela	Dima	Akula	Jun-06
22.	Itefa	1500	Gambela	Dima	Akula	Jun-06
23.	Lisa	3000	Benishangul	Dangur	Abbay Dar	2006
24.	Medhane	1000	Benishangul	Dangur	Abbay Dar	2006
25.	Mika'el Desmond	377	Benishangul	Guba	Mankush	Jun-06
26.	Minbale	1000	Benishangul	Dangur	Abbay Dar	2006

27.	Neka	500	Benishangul	Guba	Mankush	2006
28.	Pan Agroindustry	4000	Somali	Gode	Gereblo	2006
29.	Phoenix	500	Gambella	Dima	akula	2007
30.	Seti Semal	500	Gambela	Dima	Akula	Jun-06
31.	Shimbelina	500	Gambella	Dima	Akula	2006
32.	Sudan	1000	Benishangul	Guba	Almehal & Mankush	2006
33.	Tarekegn Belay	2000	Benishangul	Dangur	Abbay Dar	2006
34.	Tecron	3000	Gambella	Goge	Goge Gebriel	2006
35.	Teklebirhan Tadesse	1000	Gambela	Dima	Achagna	May-06
36.	Tg	500	Gambella	Dima	akula	2007
37.	Tsega	500	Gambela	Dima	Akula	Jun-06
38.	Wogagen	1000	Benishangul	Dangur	Abbay Dar	2006
39.	Workneh	500	Benishangul	Dangur	Abbay Dar	2006
40.	Yeshimebet	1000	Benishangul	Guba	Babishenko r	2006
41.	Yohanis(TYS)	1000	Benishangul	Guba	Babishenko r	2006
42.	Yomed agricultural and agroindustry PLC	1000	Benishangul	Guba	Almehal	Jun-06
43.	Access capital	5,000	Benshangul Gumze	Dangur		1/2/2003
44.	Adama agro plc	18,516	SNNP	Gngangatom		17/12/02
45.	Africa Farm	2,000	Benshangul Gumuz	Guba		15/06/05
46.	Agro Peace Bio Ethiopia	2,000	Somali	Shinele		18/12/04
47.	Al- Mehdi match maker	1,000	SNNP	Decha		16/11/04
48.	Askay agricultural development	3,000	Benshangul Gumze	Dangur		7/13/2003
49.	Beruhoye	5,000	Benshangul Gumze	Dangur		4/8/2003
50.	BHO	27,000	Gambela	Itang		11/5/2002

51.	Daniel	5,000	SNNP	Dasench District		20/12/01
52.	Dr Taem Hadeгу	5,000	SNNP	Gnangatom District		9/4/2003
53.	Gasahw Bezu take	3,000	Benshangul Gumuz	Dangur		14/03/04
54.	Green valley agro industry	5,000	Gambela	Abobo district		8/11/2003
55.	Halewan Adenan Abdurehman	5,000	Benshangul Gumze	Dangur	Manbuk	15/6/05
56.	Hase agro industry	14,705	SNNP	Debub Ari		30/11/03
57.	Hashim Isemal	3,000	Benshangul Gumuz	Mao komo		9/2/2004
58.	Horizon plantation	20,000	Benshangul Gumze	Guba		7/06/04
59.	JVL agro industry	5,000	Gambela	Dima district		19/2/05
60.	Karatury	100,000	Gambela Abebo,	Etang		25/10/02
61.	Keydam trading	3,000	Benshangul Gumze	Guba		22/03/03
62.	Keystone	431	Benshangul Gumuz	Pawe		1/3/2002
63.	Lotus International	3,000	Benshangul Gumuz	Mao komo		2/11/2004
64.	Lucy	4,003	SNNP	Dasenech		30/03/02
65.	Mela	5,000	SNNP	Dasenech District		7/7/2002
66.	Nega	3,000	Benshangul Gumuz	Dangur		12/1/2004
67.	Olehman Isa Farm	1,000	Benshangul Gumuz	Guba		27/02/2014
68.	Omo valey	10,000	SNNP	Hamer		7/11/2004

69.	Rahwa	3,000	SNNP	Dasenech		7/9/2002
70.	Reta	2,137	SNNP	Dasenech		20/12/01
71.	Ruchi	25,000	Gambela	Gog		5/4/2002
72.	Saber farms	25,000	Gambela	Dima		9/5/2003
73.	Sanati	10,000	Gambela	Dima		1/9/2002
74.	Saudi Star	10,000	Gambela	Abebo		25/10/02
75.	Shaporgy	50,000	Benshangul Gumze	Dangur		1/3/2002
76.	Tigab agro industry	3,000	Benshangul Gumze	Dangur		12/3/2003
77.	Tikimet agro industry	3,000	Benshangul Gumze	Dangur		16/01/04
78.	Torn agro industry	6,000	Gambela	Gog district		1/12/2004
79.	Tracon trading	5,000	Benshangul Gumze	Dangur		10/7/2003
80.	Tsegaye Demoze	1,000	SNNP	Dasenech		10/5/2002
81.	TYS agricultural development	1,000	Benshangul Gumuz	Guba		6/28/2006
82.	Verdant	3,012	Gambela	Godere		20/04/02
83.	White field	10,000	SNNP	Dasench		1/8/2002

SNNPRS

S.No	Investor/Company's Name	Size and location of delivered land				Date
		size(ha)	Region	Woreda	Kebele	
1	Ayika addis	10000	SNNP	Nyangatom/Dasenech	SNNP OMO	2006
2	Adama agro plc	18,516	SNNP	Gnangatom		17/12/02
3	Al- Mehdi match maker	1,000	SNNP	Decha		16/11/04
4	Daniel	5,000	SNNP	Dasench District		20/12/01
5	Dr Taem Hadegu	5,000	SNNP	Gnangatom District		9/4/2003
6	Hase agro industry	14,705	SNNP	Debub Ari		30/11/03
7	Lucy	4,003	SNNP	Dasenech		30/03/02
8	Mela	5,000	SNNP	Dasenech District		7/7/2002
9	Omo valey	10,000	SNNP	Hamer		7/11/2004
10	Rahwa	3,000	SNNP	Dasenech		7/9/2002
11	Reta	2,137	SNNP	Dasenech		20/12/01
12	Tsegaye Demoze	1,000	SNNP	Dasenech		10/5/2002
13	White field	10,000	SNNP	Dasench		1/8/2002
		89,361				

Gambella

S.No	Investor/Company's Name	Size and location of delivered land				Date
		size(ha)	Region	Woreda	Kebele	
1.	AD PLC	1500	Gambela	Dima	Akula	Jun-06
2.	Akula	1000	Gambella	Dima	akula	2007
3.	Ashensfi G/meskel	1000	Gambela	Dima	Achagna	May-06
4.	Atinafu & Betesebochu	1000	Gambela	Dima	Akula	May-06
5.	Belisti Negaso	1000	Gambela	Dima	Akula	May-06
6.	Berehe	1000	Gambela	Dima	Akula	Jun-06
7.	Debrich Impo.& Expor.PLC	1000	Gambela	Dima	Achagna	May-06
8.	Efrem Atakilt Gessese	1000	Gambela	Dima	Achagna	May-06
9.	Fasil	1000	Gambela	Dima	Akula	Jun-06
10.	G/Silassie	800	Gambela	Dima	Akula	Jun-06
11.	Gebremariam Abreha	500	Gambela	Dima	Achagna	May-06
12.	Ginbe work	1000	Gambela	Dima	Akula	Jun-06
13.	Gu'ish	1000	Gambela	Dima	Akula	Jun-06
14.	Gu'ish G/Sillassie	500	Gambela	Dima	Achagna	May-06
15.	Hadush Imbaye G/Micha'el	1000	Gambela	Dima	Akula	May-06
16.	Hagos	500	Gambela	Dima	Akula	Jun-06
17.	Henok	1000	Gambela	Dima	Akula	Jun-06
18.	Hunde	1500	Gambela	Dima	Akula	Jun-06
19.	Itefa	1500	Gambela	Dima	Akula	Jun-06
20.	Phoenix	500	Gambella	Dima	akula	2007
21.	Seti Semal	500	Gambela	Dima	Akula	Jun-06
22.	Shimbelina	500	Gambella	Dima	Akula	2006
23.	Tecron	3000	Gambella	Goge	Goge Gebriel	2006
24.	Teklebirhan Tadesse	1000	Gambela	Dima	Achagna	May-06
25.	Tg	500	Gambella	Dima	akula	2007
26.	Tsega	500	Gambela	Dima	Akula	Jun-06
27.	BHO	27,000	Gambela	Itang		11/5/2002
28.	Green valley agro industry	5,000	Gambela	Abobo district		8/11/2003

29.	JVL agro industry	5,000	Gambela	Dima district		19/2/05
30.	Karatury	100,000	Gambela Abebo,	Etang		25/10/02
31.	Ruchi	25,000	Gambela	Gog		5/4/2002
32.	Saber farms	25,000	Gambela	Dima		9/5/2003
33.	Sanati	10,000	Gambela	Dima		1/9/2002
34.	Saudi Star	10,000	Gambela	Abebo		25/10/02
35.	Torn agro industry	6,000	Gambela	Gog district		1/12/2004
36.	Verdant	3,012	Gambela	Godere		20/04/02
37.		241,312				

Benishangul Gumuz

S.No	Investor/Company's Name	Size and location of delivered land				Date
		size(ha)	Region	Woreda	Kebele	
1	G-7 limited Company	1000	Benishangul	Guba	Isidi	Jun-06
2	Gotit	500	Benishangul	Guba	Basheta	2006
3	Lisa	3000	Benishangul	Dangur	Abbay Dar	2006
4	Medhane	1000	Benishangul	Dangur	Abbay Dar	2006
5	Mika'el Desmond	377	Benishangul	Guba	Mankush	Jun-06
6	Minbale	1000	Benishangul	Dangur	Abbay Dar	2006
7	Neka	500	Benishangul	Guba	Mankush	2006
8	Sudan	1000	Benishangul	Guba	Almehal&Mankush	2006
9	Tarekegn Belay	2000	Benishangul	Dangur	Abbay Dar	2006
10	Wogagen	1000	Benishangul	Dangur	Abbay Dar	2006
11	Workneh	500	Benishangul	Dangur	Abbay Dar	2006
12	Yeshimebet	1000	Benishangul	Guba	Babishenkor	2006
13	Yomed agricultural and agroindustry PLC	1000	Benishangul	Guba	Almehal	Jun-06
14	Access capital	5,000	Benshangul	Dangur		1/2/2003
15	Africa Farm	2,000	Benshangul	Guba		15/06/05
16	Askayagricultural	3,000	Benshangul	Dangur		7/13/2003

	development					
17	Beruhoye	5,000	Benshangul Gumze	Dangur		4/8/2003
18	Gasahw Bezu take	3,000	Benshangul	Dangur		14/03/04
19	HalewanAdenan Abdurehman	5,000	Benshangul	Dangur	Manbuk	15/6/05
20	Hashim Isemal	3,000	Benshangul	Mao komo		9/2/2004
21	Horizon plantation	20,000	Benshangul	Guba		7/06/04
22	Keydam trading	3,000	Benshangul	Guba		22/03/03
23	Keystone	431	Benshangul	Pawe		1/3/2002
24	Lotus International	3,000	Benshangul	Mao komo		2/11/2004
25	Nega	3,000	Benshangul	Dangur		12/1/2004
26	Olehman Isa Farm	1,000	Benshangul	Guba		27/02/2014
27	Shaporgy	50,000	Benshangul	Dangur		1/3/2002
28	Tigab agro industry	3,000	Benshangul	Dangur		12/3/2003
29	Tikimet agro industry	3,000	Benshangul	Dangur		16/01/04
30	Tracon trading	5,000	Benshangul	Dangur		10/7/2003
31	TYSagricultural development	1,000	Benshangul	Guba		6/28/2006
		132,308				

Ethiopia Somali

S.No	Investor/Company's Name	Size and location of delivered land				Date
		size(ha)	Region	Woreda	Kebele	
1.	Pan Agroindustry	4000	Somali	Gode	Gereblo	2006
2.	AgroPeaceBio Ethiopia	2,000	Somali	Shinele		18/12/04

CURRICULUM VITAE

1. **Family name:** BIRMETA ADINEW
2. **First names:** Yonas
3. **Date of birth:** 19/12/1975
4. **Passport holder:** Ethiopia
5. **Residence:** Ethiopia
6. **Phone No** 0911646092 (Mobile) 0116183422 (Residence)

7. **Education:**

Institution (date from – date to)	Degree(s) or Diploma(s) obtained:
Martin Luther University (Germany) (current)	PhD Candidate – Law
University of Oslo (Aug 2001 – Sept 2002)	MA Human Rights Law, Theory and Practice
Addis Ababa University (Sept 1993 – July 1998)	LLB Law
University of Pretoria, Centre for Human Rights	Certificate in International Humanitarian Law (IHL)

9. **Language skills:** indicate competence on a scale of 1 to 5 (1 – excellent; 5 – basic)

Language	Reading	Speaking	Writing
English	1	1	1
Amharic	1	1	1

10. **Membership of professional bodies:**

- Addis Ababa University School of Law Alumni

11. **Other skills (e.g. computer literacy etc.):**

- Microsoft Office

12. **Present position:**

- Lecturer (Addis Ababa University, School of Law)

13. **Years with the present employer:**

- 7 Years

14. **Key qualifications (relevant to the project):**

- Ten Years of Human Rights Education and Research
- 6 years of involvement in adjudication of cases involving child protection including as a Judge
- Various years of Training Experience on Human Rights Topics including child protection

15. **Specific experience in the region:**

Country	Date from – Date to
Ethiopia	1996 – present

14. Professional experience:

Date from-to)	Location	Company	Position	Description
April 2010-April 2011	Ethiopia	Addis Ababa University, School of Law	Associate Dean, Graduate Programs including Human Rights Law Stream	<ul style="list-style-type: none"> Overall coordination of the program, Modularization of the Curriculum, Selection of Students, Drawing Up of Module Offering Schedule, Assignment of Professors, Provision of Support to Professors and Students, Administration of Exams, Coordination of Student Thesis Writing, Monitoring Progress, Handling Student Petitions as a Member of the graduate Commission, Following-up payment of dues to instructor and Administering Thesis Grants to Students, Approving list of graduating students
Associate Prof. Zekarias Keneaa, Dean of School of Law, zekentes@yahoo.com				
Jan 2006 – date	Ethiopia	Addis Ababa University	Lecturer, School of Law	<ul style="list-style-type: none"> Teaching Human Rights Law for undergraduate law students both in the regular and evening programs of the school. The core content covered includes the International Bill of Human Rights and the 9 Core International Human Rights Treaties. The 2007 edition of Philip Alston and Henry Steiner's entitled International Human Rights in Context is used as the principal textbook for the course. Particular attention is accorded to major human rights problems in the country including Gender Based Violence. Consequently, significant attention is drawn to the discussion of such International Instruments such as DEVAW and CEDAW. Detailed discussion on the CRC is conducted with particular focus on the CRC. Counterpart regional instruments such as the African Women Protocol and African Charter on the Rights and Welfare of the Child are covered. Domestic laws on the subject are closely scrutinized. The jurisprudence of European Court of Human Rights, African Commission on Human and Peoples Rights and local courts of law is used to make the course case-oriented. Likewise, the Concluding Observations of UN Treaty Bodies, State Reports and Outcome Report of the UPR are used as a reference.
Associate Prof. Zekarias Keneaa, Dean of School of Law, zekentes@yahoo.com				
October – November 2011	Ethiopia	Centre for Human Rights (Addis Ababa University)	Adjunct Lecturer	<ul style="list-style-type: none"> I have taught a Module on the Ethiopian Bill of Human Rights. The Module focuses on the national human rights protection and promotion system in Ethiopia. The Module focuses on both the normative and institutional aspects of the system. Consequently, I have covered the situation of human rights of women in the country more extensively in this Module.
Dr. Girmachew Alemu , Director, Center for Human Rights (AAU), Email: ganeme@gmail.com				

Date from-to)	Location	Company	Position	Description
September 2008/ September 2009	Ethiopia	UNHCHR (East Africa Regional Office)	Trainer	Training of law enforcement officials in Gambela Regional State, focusing on protection of women and children from violence
Abdu Mohammed, Human Rights Officer (UNHCHR-East Africa Regional Office), E-Mail: AbduM@uneca.org				
2010-2011	Ethiopia	Population Media Centre	Trainer	<ul style="list-style-type: none"> Several training conducted particularly on women rights issues including GBV. Some of these trainings were offered for women government officials and women working in the media.
April 2010 – December 2011	Ethiopia	Population Media Centre, Journal of Ethiopian Law	Case Editor	Identifying illustrious and notable court decisions involving child and women protection issues and reporting these. This is aimed at familiarizing the court decisions having multiplier spinoff effects.
Associate Prof. Zekarias Keneaa, January 2010- December 2010	Ethiopia	Dean of School of Law, zekentes@yahoo.com UNICEF	Legal Expert and Co-Researcher	<ul style="list-style-type: none"> Produced two chapters concerning the legal Framework for the Protection of Children and Women from Violence The work involved primary data collection from all the regions in the country based on study instruments prepared beforehand. Various governmental and non-governmental organizations have been contacted. The basis for the study was international, regional and domestic laws on the protection and promotion of the rights of children and women. The concluding observations by UN Treaty Body organs were used in particular that of CEDAW and CRC. The views of African Commission on Human Rights on Human Rights and State Reports submitted to these organs have been consulted. The Criminal Code and the Revised Family Code of the country have been used. Recent studies on violence against women in the country have been included. The work was part of a team work. Many of the staff of UNICEF Ethiopia working on Child Protection have been involved. The study was jointly commissioned by UNICEF and the Ethiopian government (Ministry of Finance and Economic Development (MoFED)). The UNICEF wanted the studies as part of a bigger study for its future interventions in the area of women and child protection. The study is used to inform the 5 years Poverty Reduction Strategy Program (PRSP) of the country, which was then consideration. I was invited to make a presentation of the chapter on Child and Women Protection as maiden presentation on the launching of monthly consultation on Child Protection.
Roger Pearson, Senior Social Policy Specialist, 2010 September -December 2009	Ethiopia	Unicef Ethiopia, rpearson@unicef.org Addis Ababa University	Module Writer	<ul style="list-style-type: none"> Preparation of a Distance Education Material on the Rights of Persons Accused and Prisoners. This 200 page material was prepared as part of the LL.B Degree

Date from-to)	Location	Company	Position	Description
Associate Prof. Zekarias Keneaa, Dean of School of Law, zekentes@yahoo.com August 2009- December 2009	Ethiopia	St Mary University College	Module Writer	<p>offered to Public Prosecutors working in the Oromia Regional State in Ethiopia. This mandatory course related to several aspects of the pre-trial, trial and post trial rights of accused and prisoners as enshrined in international human rights instruments, in the federal Constitution as well as other subsidiary domestic legislations. The Module has extensively dealt with accused women and prisoners. In particular, it has explained the minimum guarantees for women in detention and penitentiaries. It has also looked into the minimum guarantees of children in conflict with the law. The assignment also included the face to face tutorials offered for the trainees conducted in Adama and Ambo towns in Oromia.</p> <ul style="list-style-type: none"> Preparation of a Teaching Material on International Humanitarian Law (IHL). This 350 page distance education material I prepared is aimed at the LL.B Degree training of distance education students for St. Mary University College students. The material extensively deals with the protection of civilians in particular women and children in situations of armed conflict: internal and international. It also deals with internal disturbance. The material has used actual cases from the experience of international mechanisms of repression including the ICC. It also explains the obligations arising from the 1949 Geneva Conventional and the two Additional Protocols. This material served as the basis for dissemination of International Humanitarian Law for University Students, organized by the School of Law along with Ethiopian National Red Cross Society and the ICRC-Ethiopia Office.
Reference Person: Wondwossen Tamirat, President of St. Mary University College, 251 11 553 7994/ +251 11 553 7997	Ethiopia	Ministry WCYA	Trainer	<ul style="list-style-type: none"> Offered a three DAY training on Child Abandonment Laws In Ethiopia
March 2012	Ethiopia	UNICEF	Presentation	<ul style="list-style-type: none"> Presentation on The Situation of Alternative Child Care In Ethiopia
20September 2010-February 2010	Ethiopia	Addis Ababa University	Module Writer	<ul style="list-style-type: none"> Teaching Material on Human Rights Law for undergraduate distance law students. The study was organized for Public Prosecutors of Oromia Regional State in Ethiopia. The core content covered includes the International Bill of Human Rights and the 9 Core International Human Rights Treaties. The 2007 edition of Philip Alston and Henry Steiner's entitled International Human Rights in Context is used as the principal textbook for the course. Particular attention is accorded to major human rights problems in the country including Gender Based Violence. Consequently, significant attention is drawn to the discussion of such International Instruments such as DEVAW and CEDAW. Detailed discussion on the CRC is conducted with particular focus on the CRC. Counterpart regional instruments such as the African Women Protocol and African Charter on the Rights and Welfare of the Child are covered. Domestic

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Associate Prof. Zekarias Keneaa, Dean of School of Law, zekentes@yahoo.com September 2007- January 2008	Ethiopia	Ethiopian Catholic Church Social and Development Coordination Office of Addis Ababa and Organization for Social Services for Aids (ACD-SDCO & OSSA)	Co-Researcher	<p>laws on the subject are closely scrutinized. The jurisprudence of European Court of Human Rights, African Commission on Human and Peoples Rights and local courts of law is used to make the course case-oriented. Likewise, the Concluding Observations of UN Treaty Bodies, State Reports and Outcome Report of the UPR are used as a reference. As the students are public prosecutors, the material was designed in such a way as to enhance their knowledge, skills and attitude concerning gender based violence, among others. The assignment also included the face to face tutorials offered for the trainees as conducted in Adama and Ambo towns in Oromia.</p> <ul style="list-style-type: none"> • Preparation of a Baseline Study on the Prevalence of Violations of Inheritance Rights of Orphans • This study was commissioned by Ethiopian Catholic Church Social and Development Coordination Office of Addis Ababa (ACS-SDCO) and Organization for Social Services for Aids (OSSA). I was one of the three individuals involved in the study. The Baseline Study was conducted in Yeka and Cherkos sub-cities in Addis Ababa. It was informed with various interviews conducted with government officers and civil society. • The purpose of the study was to establish the scale of grabbing of the property of orphans by relatives and non-relatives and violations of their inheritance rights. When parents of orphans die without leaving will, others who show up as guardians do not always cater after the best interests of the child. The study highlighted the need for parent to make a will while they are in good condition as a mechanism to safeguard the interests of their children. This same study led to the preparation of the Training Manual on Will Writing which I prepared.
Mr. Merid Getachew, ijimereid@yahoo.com	Ethiopia	Save the Children Alliance	Lead Consultant	Preparation of Situation Analysis of Children In Ethiopia with Special Reference to
January 2006-	Ethiopia	Save the Children Alliance	Lead Consultant	Preparation of Situation Analysis of Children In Ethiopia with Special Reference to

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August 2007				<p>Children with Disabilities</p> <p>This is a study which I conducted. The study revolved around four major, namely non-discrimination, best interest of children, the right to life and survival as well as respect for the views of children. It in particular focused on the situation of children with disabilities. Primary data was collected in Addis Ababa, Awassa, Adama as well as Bahir Dar cities of Ethiopia. I had to travel to the cities mentioned to collect primary data from children with disabilities, their parents, government officials, members of civil society. The study also made use of secondary data.</p>
Mr. Ashebir Debebe, Save the Children Denmark-Ethiopia, September 2007- January 2008	Ethiopia	ASD-SDCO & OSSA	Consultant	<ul style="list-style-type: none"> • Preparation of Will Writing Manual • This study was commissioned by Ethiopian Catholic Church Social and Development Coordination Office of Addis Ababa (ACS-SDCO) And Organization for Social Services for Aids (OSSA). • The purpose of the Manual was to raise awareness of the poor about the importance of making wills concerning their meagre properties and to appoint appropriate guardians for their children. It also aimed at enhancing the will writing skills of the indigent. It was the outcome of Baseline Study on the Prevalence of Violations of Inheritance Rights of Orphans mentioned above.
Mr. Merid Getachew, jjimereid@yahoo.com May 2010- October 2010	Ethiopia	Ethiopian Institution of the Ombudsman	Lead Consultant	<ul style="list-style-type: none"> • Study the Status of Children Parliaments in Ethiopia and prepare Guidelines for Rules of Procedure. • The Ethiopian Institution of the Ombudsman commissioned this study to evaluate the status of Children Parliaments in Ethiopia which it facilitated since 2007. The Parliaments established based on the Finnish Tampere Child Parliament model were very instrumental in preventing and responding to maladministration, which is the mandate of the Institution. The study involved visits to Konso Special Woreda in Southern Nations, Nationalities and Peoples and Kinbebit Wordeja in Oromia Regional State. The study documented the activities of the Parliaments for the prevention of violence against children and women in the country. • The study led to the preparation of Guidelines for regulating the Conduct of the Proceedings of the Parliaments and other activities.

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Mr. Ahmed Mohammed, May 2007- February 2008	Ethiopia	Handicap International Ethiopia	Lead Consultant	<ul style="list-style-type: none"> • Conducting a Baseline Survey on Sexual Violence against Persons with Disabilities • Handicap International commissioned the study to grasp the prevalence of sexual violence against persons with disabilities in particular women and children. The study proved to be instrumental in highlighting the scale of the problem, its causes and consequences, various civil society organizations providing services to PWD were contacted. Government organs also provided useful insight into this study. The study was used to scale up the activities of HI in the study areas. It was conducted in Yeka Sub-City in Addis Ababa. I served as a lead consultant in the study.
Mr. Melaku Meaza, September 2006- December 2006	Ethiopia	Child Justice Project Office and Save the Children Sweden	Consultant	<ul style="list-style-type: none"> ■ Developed Child Rights' Duty Bearers Handbook ■ This study was needed to raise the awareness of various governmental institutions working with children to have a clearer understanding of their obligations arising from the CRC and other laws. Once the study was completed, a seminar involving line ministries and other stakeholders was prepared for sensitization. The handbook has now been translated in to Amharic and widely circulated. I was the sole person responsible for the work.
Mrs. Selamawit Girmay, March 2007- August 2007	Ethiopia	Child Justice Project Office, Federal Supreme Court	Consultant	<ul style="list-style-type: none"> • Writing a Handbook on Child Rights for Parliamentarians In view of the fact that, the role of Parliamentarians for the protection and promotion of the rights of children is paramount, it was necessary to prepare a handbook highlighting the roles they can play in this regard. The Handbook has extensively dealt with the role of parliamentarians in the prevention of violence against girls. I wrote the book, which is now published. There was also a one day seminar on the Handbook conducted for 50 Parliamentarians from the House of Peoples Representatives of the FDRE. The Handbook has also been widely distributed.
Mrs. Selamawit Girmay, January 2006- September 2006	Ethiopia	The African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN): Ethiopia Chapter	Consultant	<ul style="list-style-type: none"> ■ Developed Training Manual on Child Rights and Life Skills ■ It was believed that the lack of life skills has prevented children from safeguarding their interests despite the fact they may be knowledgeable. The study was commissioned to raise the awareness of children on their rights and to enhance

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Ayalew W/Semait, June 2005 – September 2005	Ethiopia	Child Justice Project Office under the Federal Supreme Court	Consultant	<p>their life skills to deal with difficult situations. It was prepared in a child friendly manner. The study involved travel to Woldia, Wollo in Amahara regional State. It was conducted in areas where Save the Children Denmark was engaged in different activities. The Manual served as a basis for further training.</p> <ul style="list-style-type: none"> Handbook on the Implementation of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child in Courts of Law This handbook was commissioned to raise the awareness of judges as regards the specific obligations arising from the Convention on the Rights of the Child. The Handbook extensively deals with the implications of the CRC for the prevention and responding to violence against children. The Handbook also highlights the African Charter on the Rights and Welfare of the Child and domestic laws including the Criminal Code, the Revised Family Code, and the Labour Proclamation. It was prepared after thorough consultation with various judges in the Federal Courts in the country. Following its preparation, the Handbook was published and circulated throughout the country.
Mrs. Selamawit Girmay, March – December 2005	Ethiopia	Action Professionals' Association for the People (APAP)	Program Officer	<p>The work involved conducting baseline studies on various human rights issues including gender based violence. I travelled to various places in Ethiopia to offer training on the basis of the manuals I helped prepare. These trainings in particular focused on the rights of the protection of the rights of the poor. The training is offered to individuals who are chosen to serve as paralegals to provide legal aid. Thus, we also facilitated the opening of offices to offer the services. I trained 30 paralegals in Harar and Dire Dawa cities in Ethiopia.</p>
Mr. Wongel Abate, October 2002- February 2005	Ethiopia	Unity University College	Module Writer	<ul style="list-style-type: none"> Developed Teaching Material on Human Rights Law Teaching Material on Human Rights Law for undergraduate distance law students. The core content covered includes the International Bill of Human Rights and the 9 Core International Human Rights Treaties. The 2002 edition of Philip Alston and Henry Steiner's entitled International Human Rights in Context is used as the principal textbook for the course. Particular attention is accorded to major human rights problems in the country including Gender Based Violence. Consequently, significant attention is drawn to the discussion of such International Instruments such as DEVAW and CEDAW. Detailed discussion on the CRC is conducted with particular focus on the CRC. Counterpart regional

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				<p>instruments such as the African Women Protocol and African Charter on the Rights and Welfare of the Child are covered. Domestic laws on the subject are closely scrutinized. The jurisprudence of European Court of Human Rights, African Commission on Human and Peoples Rights and local courts of law is used to make the course case-oriented. Likewise, the Concluding Observations of UN Treaty Bodies, State Reports and Outcome Report of the UPR are used as a reference. As the students are public prosecutors, the material was designed in such a way as to enhance their knowledge, skills and attitude concerning gender based violence, among others.</p>
April 2009 – Sept 2009	Ethiopia	Member of the Drafting Committee	Editor	<ul style="list-style-type: none"> ■ Drafting Periodic State Reports under the Treaty Reporting Project ■ Various State Reports were formulated by the Committee and other legal experts. The task of the Drafting Committee was to oversee the accuracy of the information in the state reports. The Committee was responsible for examining draft government reports and approving the same. As a member of the Committee, I examined and took part in the compilation of state reports under CEDAW, ICCPR, CAT, ICECSR, UPR, AFRICAN Charter on Human NAD Peoples' Rights. The reports were commissioned by the UNHCHR and the Ministry of Foreign Affairs. The preparation was followed by validation involving various stakeholders including civil society. The UN was highly instrumental for the formulation of the preparation of the reports.
Reference Person: June 2007 – July 2009	H.E. Ato Menelik Alemu, Ethiopia Ethiopia	Ethiopia's Ambassador to Switzerland, minelika@yahoo.com Law Extension Program, AAU	Coordinator	<ul style="list-style-type: none"> ■ Assignment of Processors for Course offering, Advising and overall Administration of students,
Associate Prof. Zekarias Keneaa, Oct 2001 – Aug 2002	Ethiopia	Dean of School of Law, Norwegian Centre of Human Rights	Research Assistant	<ul style="list-style-type: none"> • Transcription and Editing of Interviews conducted with Ethiopian Officials and other Notable Persons
Prof. Kjetil Tronvoll, July 1996 – Aug 2001	Ethiopia	Federal First Instance Court	Judge, Assistant Judge, and Law Clerk over 6 years	<p>I served as a law clerk in July and August Months of 1996 and 1997. During those years, I was still a law student at the School of Law of Addis Ababa University. Thus, I was serving as a law clerk during the time school was closed. Following my graduation in law degree in July 1998, I started serving as an assistant judge until December 1999. In January 1999, I was appointed by the Parliament as a federal judge. I served in the Federal First Instance Court in Addis Ababa. I was stationed in OLD Airport Area Division of the court. I served in this capacity until August 2001. I was sitting in both civil and criminal cases. I had the opportunity to dispose and adjudicate many cases involving GBV including cases involving rape, Sexual Crimes, HTP and many more.</p>
Justice Desalegn Berhe,	President,	Federal First Instance Court		

15. Publications

- Yonas Birmeta *et al*, Handbook on Human Rights in Ethiopia (2013)
 - Yonas Birmeta *et al*, Child Rights in Ethiopia (2012) Apple Printing Press
 - Series Editor, Ethiopian Constitutional and Public Law Series, Some Observations on Sub-National Constituitions in Ethiopia
 - The Bill of Rights in Sub-National Constituitions in Ethiopia, Ethiopian Constitutional and Public Law Series, Some Observations on Sub-National Constituitions in Ethiopia
 - Series Editor, *Human Rights and Legal Pluralism in Ethiopia*, Ethiopian Human Rights Series, Volume 7, Addis Ababa University, School of Law (forthcoming)
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