

Resource Conflicts over Arable Land in Food Insecure States:

Creating an United Nations Ombudsman Institution to Review Foreign Agricultural Land Leases

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Abstract

In the last decade of globalization, States in the Middle East, East Asia, Europe, and North America have looked towards Africa and Southeast Asia for opportunities to lease for 30-50 years large tracts of arable land for production of commodity crops and biofuels in order to meet the needs of home markets. Facing their own governance challenges, States in Africa and Southeast Asia have leased land to private foreign investors without requiring any environmental review or mitigation of the proposed land leases. This paper argues that in food insecure states the recent flurry of land leasing activity to foreign agribusiness is likely to lead to unintended long term consequences for the ecology in land-leasing States by depleting the already fragile environment through monocropping, chemical pesticide and fertilizer applications, and large scale irrigation.

This paper argues that international investment law may provide foreign investors with legal protection if land leasing States in the future decide to regulate the leases in a manner that discriminates against large agribusiness. The current proposals for self-regulatory voluntary codes of conduct do not provide sufficient oversight over the leasing process to protect the public's interest in a healthy and productive environment against foreign investors who have under the current lease structure no incentive to improve the land that they are leasing. The creation of an United Nations based ombudsman to provide legal and technical oversight and support for States making long-term leases has greater potential than a voluntary code for ensuring a balanced negotiation among the interests of host State governments for investment, investors for arable land, and the public for long-term sustainability.

A. Introduction

The world population is 6.8 billion and increasing¹ while the total arable land is approximately 4.1 billion acres and decreasing.² Some regions such as States within North Africa and the Near East are using all of their arable land.³ Without enough arable acreage to go around, foreign investors from land poor States such as Saudi Arabia are vying for potentially arable land in States like Ethiopia that appear to have surplus land to lease. While these 30 to 50 year investments are perceived by States needing foreign direct investment as a windfall, this paper argues that these very same investments may sow unintended seeds of long-term conflict over scarce resources.

The challenge of managing the remaining arable land is prodigious. As far as the application of international law to ensure protection, we are entering uncharted territory. We have neither treaties nor specific customary international law to guide us. What we have instead is a collision between the goals of international economic law to improve security and predictability for investors and the goals of international environmental and human rights law to protect fragile ecosystems, limited natural resources, and vulnerable communities. To better understand the emerging incompatibility between international investment law and international environmental law, the first part of this paper starts with a description of the recent phenomenon of large-scale arable land leases to foreign direct agribusiness investors. Without any conditions being placed on how the land will be farmed, the current land leases have a high potential for contributing to long-term degradation of already scarce arable land. The second part of the paper reviews the emerging and conflicting international legal framework within which these investments are being made. The third part of the paper responds to the concern that degraded land in already food insecure countries may contribute to conflicts over arable land by proposing

¹ U.S. Census Bureau, 'US & World Population Clock' available at <http://www.census.gov/main/www/popclock.html> (last visited 20 April 2011).

² A. J. Bot, F. O. Nachtergaele & A. Young, 'Food and Agricultural Organisation World Soil Resources Report: Land Resource Potential and Constraints at Regional and Country Levels' (2000) available at <ftp://ftp.fao.org/agl/agll/docs/wsr.pdf> (last visited 20 April 2011), Appendix 8, 101-110.

³ *Id.*, Table A8b, 103. (As of 1994, Afghanistan, Egypt, Iran, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Tunisia, United Arab Emirates, and Yemen had all of their potentially arable land in production.).

a precautionary approach to land leases made possible through a U.N. based office of the International Ombudsman for Environment and Development.

B. Large Scale Agricultural Land Leases

Disputes over the control of territory have long been and continue to be the source of international conflict. The situation with large-scale agricultural land leases introduces a new wrinkle in the older theme of territorial disputes. As this section will describe, most of the large-scale agricultural land leases are direct investments made by a combination of public and private foreign investors. While investors are not claiming inalienable interests in the land that they are leasing, they are securing a temporary legal interest in arable land under investor-friendly face of possible food shortages, investors may ultimately contribute to latent but nevertheless volatile conditions of environmental scarcity.

The first part of this section will describe some of the characteristics of these large-scale land leases in food insecure regions in both Africa and Southeast Asia and how these leases illustrate the dynamics of elite resource capture. The second part of this section will argue that this growing trend in overseas agribusiness investment is likely to further degrade fragile environments and may trigger threats to social security in some regions of the world.

I. Characteristics of Overseas Land Leases in Food Insecure Regions

The concept of overseas land leases where companies from a foreign country have exclusive access to arable land within another the territory of an unrelated nation is not an entirely new idea. Western colonial powers throughout the 18th and 19th centuries controlled land and populations through systems of plantations exporting rubber, cocoa, bananas, sugar and other commodities which could not be grown back in Europe.⁴ Like the former plantation owners who were granted generous concessionary rights by colonial governments, the current investors are granted long-term leasehold interests over large acreages of land by the government. This results in a schism between agribusiness investors and local farmers. For example, in Ethiopia, the Indian company Karuturi Global has obtained

⁴ M. Kugelman, Introduction, in M. Kugelmann (ed.), *Land Grab: The Race for the World's Farmland* (2009), 3.

300,000 hectares⁵ for an export business even though the majority of smallholder farmers in Ethiopia are generally restricted to operating on less than 2 hectares.⁶

What distinguish the current overseas land leases from the former colonial regimes are the participants, the products, and the legal governance structures. While some of the overseas investors are former colonizers from Europe who are now seeking new biofuel sources, many of the overseas investors are those who were formerly colonized including businessmen from India and Qatar. Instead of seeking to grow high-value indigenous crops which cannot be grown at home such as coffee, the new agribusiness investors are increasingly growing global commodities such as wheat and rice that are already in high demand in home countries and in other global markets.⁷ While most colonial enterprises were governed by colonial officials using some variation of home state laws, the current land leases are governed in large part by private international law and international investment law.

Most of the countries that are currently leasing land in Africa and Southeast Asia are food insecure countries including Pakistan, Cambodia, Cameroon, Ethiopia, the Democratic Republic of Congo, Madagascar, Mali, Somalia, Sudan, Tanzania and Zambia.⁸ Because overseas investors recognize that they are operating in risky political environments, they seek guarantees from government officials that will be able to legally export their commodities. Focused on the immediate prize of foreign direct investment, some countries are prepared to provide these assurances. For example, the government of Pakistan offers 99 year leases of agricultural lands with unrestricted repatriation of all profits and produce.⁹ With shrinking water

⁵ M. Fitzgerald, 'The New Breadbasket of the World?' (30 January, 2010) available at <http://www.irishtimes.com/newspaper/weekend/2010/0130/1224263415739.html> (last visited 20 April 2011).

⁶ S. Gebreselassie, 'Land, Land Policy, and Smallholder Agriculture in Ethiopia' (January 2006) available at http://www.future-agricultures.org/index.php?option=com_docman&task=doc_download&gid=129&Itemid=510 (last visited 20 April 2011).

⁷ Fitzgerald, *supra* note 5.

⁸ O. de Schutter, Special Rapporteur on Food Security, 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, 28 December 2009, para. 11.

⁹ N. Sadeque, 'Giving Away the Family Silver' (26 October 2009) available at <http://www.newslinemagazine.com/2009/10/giving-away-the-family-silver/> (last visited 20 April 2011).

tables in their own countries and with large amounts of food being imported, a number of Arab Gulf states have expressed interest in Pakistan's open-ended offer for agricultural investment opportunities and have entered into agreements. Bahrain has initiated a long-term lease for rice production and the United Arab Emirates is leasing 370,657 acres of agricultural land near a dam.¹⁰ In the case of threats to its own food security, the Pakistani government has publicly indicated they will not interfere with the investments. Commenting on a Saudi Arabian investment in land, the Investment Minister for Pakistan stated to the press that the Saudi investors would be able to remove "100 per cent crop yield to their countries, even in the case of food deficit"¹¹.

The Food and Agricultural Organization has been less sanguine about the long-term viability of the leases. It has observed that while foreign direct investment for agriculture has been flowing into African markets, the "related food production increases are often meant to be exported to the investing company, raising a number of possible political and economic concerns when investments are made in a country that itself is food insecure"¹². These export-oriented foreign investors are competing for land with the growing demands for land to produce agricultural products for growing local markets. 80% of Africa's food is produced by smallholder farmers whose numbers grew more than 3.5% in 2008.¹³

Financing the acquisition of lands for large scale agribusiness are investors from China, Korea, Saudi Arabia, Qatar, India, and other states who have applied sovereign wealth funds to lease approximately 20 million hectares (50 million acres) of land within Africa for export-oriented commodities including biofuel materials and commercial staples.¹⁴ Investors

¹⁰ *Id.*

¹¹ S. Shah, 'Corporate Farming Raises Concerns among Local Growers' (28 January 2009) available at <http://www.thenews.com.pk/print1.asp?id=159380> (last visited 23 January 2011).

¹² Food and Agriculture Organization, 'How to Feed the World in 2050, High-Level Experts Forum, Investment' (12-13 October 2009) available at http://www.fao.org/fileadmin/templates/wsfs/docs/Issues_papers/HLEF2050_Investment.pdf (last visited 20 April 2011), 3.

¹³ Food and Agriculture Organization, '2050 – Africa's food challenge: Prospects good, resources abundant, policy must improve' (28 September 2009) available at <http://www.fao.org/news/story/en/item/35770/icode/> (last visited 20 April 2011).

¹⁴ Food and Agriculture Organization (FAO), 'Foreign direct investment – win-win or land grab?', prepared for World Summit on Food Security (16-18 November 2009) available at <ftp://ftp.fao.org/docrep/fao/meeting/018/k6358e.pdf> (last visited 20 April 2011), 1.

in developing countries such as the United States through financial firms such as Morgan Stanley are financing the large scale land leases by creating agricultural funds designed to capitalize on the growing agricultural export market in Africa.¹⁵ Institutional investors including representatives of the largest pension funds and university endowments have also expressed interest in investing in the large scale overseas land leases.¹⁶ Overseas investors have high expectations of returns on agribusiness ventures such as 13-20% annual returns¹⁷ which some investors consider too good to be true.¹⁸ Some of the rationales proffered for overseas agribusiness investment raise ethical issues about both the rule of law and the legitimacy of an investor's expectations. For example, Jarch Capital, a U.S. investment company has been seeking large scale agricultural land leases in southern Sudan because as Philippe Heilberg, founder of Jarch Capital unapologetically reported to journalists: "When food becomes scarce, the investor needs a weak state that does not force him to abide by any rules"¹⁹.

On the other side of the negotiating table, central government investment ministries are the key players offering arable land for lease. Government ministries have the authority to lease the land because the land is held on trust by the government and few citizens have actionable private rights to their land. Government officials and private overseas investors continue to negotiate export-oriented agriculture land leases in spite of the food insecure status of many of the States offering leases. For example, in Ethiopia, the government recently leased to the Indian company Karuturi Global 300,000 hectares with water usage rights for 50 years at the cost of 20 birr (\$1.12) per hectare per year to farm commercial staples including maize, wheat, and rice for export.²⁰ All the while Ethiopia remains a

¹⁵ J. Silver-Greenberg, 'Land Rush in Africa' (25 November 2009) available at http://www.businessweek.com/magazine/content/09_49/b4158038757158.htm (last visited 20 April 2011).

¹⁶ H. Knaup & J. von Mittelstaedt, 'Foreign Investors Snap Up African Farmland' (30 July 2009) available at <http://www.spiegel.de/international/world/0,1518,639224,00.html> (last visited 20 April 2011).

¹⁷ Pharos Global Agricultural Fund, 'Fund Description' available at http://www.pharosfund.com/fund_agriculture.html (last visited 20 April 2011). (Fund is operating in Moldova, Romania, Ukraine, Russia, Kazakhstan, Tanzania and Ghana).

¹⁸ K. Allen, 'The land rush doesn't have to end in a poor deal for Africans' (16 August 2010) available at <http://www.guardian.co.uk/business/2010/aug/16/foreign-land-grab-threat-to-africa> (last visited 20 April 2011).

¹⁹ Knaup & Mittelstaedt, *supra* note 16, part 2.

²⁰ Fitzgerald, *supra* note 5.

recipient of World Food Programme Aid.²¹ Currently, Ethiopia has not imposed any legal conditions on foreign investors to preferentially supply the Ethiopian market in the event of a national food crisis.

Tensions simmer between local government officials and central government officials in relation to these land deals. For example, in Ethiopia, a Saudi Arabian investor has been given a lease of 1000 hectares for 99 years on which to operate a greenhouse. The greenhouse's water usage is the same as the water needs of 100,000 Ethiopians. Yet, local officials cannot charge for the company's water usage since the local officials have no representation at the government negotiating table and the agreement between the central government and the private investors explicitly does not permit local government oversight.²²

Encouraging both foreign investors and government ministries to conclude these leases are economic development reports from international organizations. In 2009, a jointly sponsored study by the World Bank and Food and Agriculture Organization proposed intensifying agriculture in a 400 million hectare area that it refers to as the "Guinea Savannah" which includes portions of 25 countries including numerous food insecure countries.²³

Meanwhile, citizens from countries leasing land to foreign investors have been largely excluded from participating in the negotiations for these large scale leases in spite of the leases having real impacts on customary land tenure. Many of the deals are kept confidential.²⁴ When the public has been able to participate in the process, the participation has not always been

²¹ World Food Programme, 'Ethiopia' available at <http://www.wfp.org/countries/ethiopia> (last visited 20 April 2011) (WFP anticipates assisting 10 million people in Ethiopia in 2010, approximately 1/8th of the countries' population).

²² J. Vidal, 'How Food and Water are Driving a 21st Century Land Grab' (7 March 2010) available at <http://www.guardian.co.uk/environment/2010/mar/07/food-water-africa-land-grab> (last visited 20 April 2011).

²³ World Bank Publications (ed.), *Awakening Africa's Sleeping Giant: Prospects for Commercial Agriculture the Guinea Savannah and Beyond* (2009). (Guinea Savannah countries include Senegal, Sierra Leone, Guinea, Mali, Cote D'Ivoire, Burkina Faso, Ghana, Togo, Benin, Nigeria, Cameroon, Chad, Central African Republic, Sudan, Ethiopia, Uganda, Kenya, Tanzania, Angola, Democratic Republic of Congo, Angola, Zambia, Malawi, Mozambique, and Madagascar), 2.

²⁴ E. Aryeetey & Z. Lewis, 'African land Grabbing: Whose Interest are Served, Brookings Institute' (25 June 2010) available at http://www.brookings.edu/articles/2010/0625_africa_land_aryeetey.aspx (last visited 20 April 2011).

meaningful as the World Bank acknowledged in a recent report.²⁵ Without any concerted interest on the part of host governments or legal obligations on the part of investors to protect existing land tenure structures or existing public goods such as regional biodiversity, soil fertility or water quality, the existing large scale land leases are classic examples of resource capture. Here the decline in quantity of available worldwide commodities coupled with the spike in commodity prices has resulted in powerful groups both international and domestic working together to capture control over the distribution of remaining arable land.

A number of international briefings have queried whether the land leases can result in a win-win situation.²⁶ This isn't the right question. The government elites negotiating the agreements are clearly winners as far as enhancing their career by creating new connections with foreign capital. The overseas investors have clearly won in terms of accessing low-cost but valuable resources.²⁷ The question that needs to be posed in terms of the potential long-term impacts of these investments is whether there can be a win-win-win situation. Can today's public and tomorrow's public be winners in this game of business and political elites?

The answer depends on choices made by the governments leasing their "surplus" land and on choices made by the multinational industries using the land. This is not a question of merely bilateral interest but rather one of international concern. If the land becomes degraded through conventional agriculture methods, the situation is more likely to be a lose-win-lose situation. Governments will lose the trust of their citizens and valuable territorial resources. Overseas investors will win by walking away from depleted soils and contaminated groundwater without legal obligations to remediate. The public will lose by being trapped in a cycle of ever-increasing conditions of environmental scarcity. The following section of

²⁵ J. Blas, 'World Bank warns on 'farmland grab'' (27 July 2010) available at <http://www.ft.com/cms/s/0/62890172-99a8-11df-a852-00144feab49a.html#axzz1CLg1t8pb> (last visited 20 April 2011). (Citing the World Bank Report, *The Global Land Rush: Can it yield sustainable and equitable benefits?*).

²⁶ e.g. FAO, *supra* note 14.

²⁷ D. Vashisht, 'Punjab's African plot' (11 July 2010) available at <http://www.indianexpress.com/news/punjab-african-plot/644788/0> (last visited 20 April 2011). (Farmer commenting after visiting Africa, "Vast tracts of arable land are lying vacant. There is no technology. In my entire trip of seven days, I saw two tractors and that too of the sort that we stopped using in India some 30 years ago. The land is fertile, the climate is suitable and water is abundant. Also, both land and labour are cheap.").

this paper examines the conditions of environmental degradation associated with conventional agricultural practices and suggests that an unregulated approach to land leasing may contribute to regional conflicts if government negotiators continue to neglect questions of protecting livelihoods through long-term protection of arable land resources.

II. Potential Environmental Impacts of Large Scale Land Leases

Conflict is particularly likely to emerge where foreign investors with the cooperation of government ministries either displace small-scale farmers from their customary lands or farm their allocated land in such a manner as to create conditions of environmental scarcity for both the current and the future generation. While there has been some evaluation of the impact of land leases on customary tenure, there has been little analysis of the current agricultural land leasing boom's potential to impact fragile and already stressed ecosystems. As the system is currently structured, there is little incentive for environmental stewardship. The owners of many of the agribusiness ventures in Africa and South Asia are foreign governments or private commercial entities focused on acquiring foreign leases to satisfy production demands for their home countries or for global markets. These ventures are bankrolled by hedge funds, pension funds, and sovereign wealth funds that expect some return on their capital. Assigned as 30 or 50 year leases, these foreign ventures do not have strong economic incentives to ensure long-term environmental protection for biodiversity, water quality, or soil productivity unless they are legally obliged to rehabilitate the land. There is no evidence that the existing contracts require investors to follow best environmental practices to prevent erosion or contamination of waterways.

Government officials from countries with investors seeking land leases believe that the onus for good policymaking is not on the investor but on the governments leasing the land. In a surprisingly candid remark on land leasing, the Minister of Investment in Egypt Mahmoud Mohieddin remarked that host countries must set their own responsible investment conditions and not blame "those who are coming to exploit and extract"²⁸.

²⁸ J. Bladd, 'ME's farmland buy in Africa seen as a win-win partnership' (15 April 2010) available at <http://www.arabianbusiness.com/586105-gulfs-farmland-policy-seen-as-win-win-partnership-for-africa> (last visited on 20 April 2011).

Resource capture focuses on the current economic benefits to a core set of involved actors without contemplating the externalities associated with large scale agricultural production. There are four critical environmental impacts on public goods that the current resource capture approach to large scale land leases has largely ignored. These impacts are all related to conventional farming practices: soil erosion/mining, habitat loss, environmental pollution, and water loss.

Pro-investment reports such as the FAO and World Bank Report *Awakening Africa's Sleeping Giant* gloss over probable environmental impacts. Relying on African case studies in Mozambique, Nigeria, and Zambia, the authors of the report observe that existing agricultural intensification for the purposes of commercial farming and subsistence farming practices has had impacts on both biodiversity and soil quality. For example, in Zambia, the decline in productivity of soil has been attributed to continued applications of inorganic fertilizers without adequate crop rotation²⁹: two practices common to large-scale commercial agriculture. Nothing is said in the FAO and World Bank Report about the potential for local, national, or regional conflict to emerge over degraded resources. The report authors instead remark, “[e]nvironmental change is an inevitable outcome of economic growth and development. Economic activity, including commercial agriculture, qualitatively transforms the physical environment within which it takes place—that is inevitable.”³⁰

The remainder of this section will evaluate how conventional farming practices on the leased land may result in irreversible soil erosion, habitat loss, environmental pollution, and water loss thereby exacerbating current conditions of environmental scarcity. The failure to address many of these concerns in agreements with foreign investors raises issues of whether States may be violating their international environmental treaty commitments.

²⁹ World Bank, *supra* note 23, 170.

³⁰ *Id.*, 171-172.

1. Soil Degradation

Soil degradation is a major issue for future food production for States that are already leasing large tracts of land to foreign investors or are contemplating entering such leases. For example, in Kenya, 56% of land in the well-populated Nyando River Basin is moderately to severely degraded.³¹ With only 9.2% of the country's land being designated as arable,³² the continuing loss of arable land costs Kenya up to 3.8% of gross domestic product.³³ In Africa, soil losses can average between 30 to 40 metric tons per hectare per year while soils are typically replaced at an average of between 1 to 2.5 metric tons per hectare per year.³⁴ Major sources of soil degradation include erosion caused by repeated cultivation, the removal of plant cover, soil compaction, overplanting, and salinization.³⁵

Mono-cropping is particularly problematic for topsoil erosion since soils are left exposed when seed is planted.³⁶ The current large scale land leases will contribute to soil erosion since the crops that are being planted are annual crops such as wheat and corn. The governments leasing the lands have not legally obliged investors to employ best soil erosion management practices such as letting land lie fallow, installing windbreaks, or keeping land planted with cover crops. Unabated erosion may also contribute to sedimentation in adjacent surface waters. Monocropping of commodities such as wheat will also contribute to soil degradation. Continually planting wheat in an area will deplete nutrients in otherwise fertile soil.³⁷

Without a concerted effort on the part of those governments who are leasing land to ensure that soil quality is not degraded, the land which may be restored to the government in 20, 50, or 99 years depending on the lease term will likely have been depleted of much of its original organic material. The current leases do not take into consideration the future costs of rehabilitating soil quality. For example, in Ethiopia, the Indian company

³¹ World Bank, *World Development Report 2008: Agriculture for Development* (2007), 191.

³² FIAN International Secretariat, 'Land Grabbing in Kenya and Mozambique' (April 2010) available at <http://www.fian.org/resources/documents/others/land-grabbing-in-kenya-and-mozambique/pdf> (last visited 20 April 2011), 16 [FIAN Report].

³³ World Bank, *supra* note 31, 191.

³⁴ J. Clay, *World Agriculture and the Environment: A Commodity-by-Commodity Guide to Impacts and Practices* (2004), 47.

³⁵ *Id.*, 47-48.

³⁶ *Id.*, 48.

³⁷ *Id.*, 380.

Karuturi Global is only paying \$99 per hectare for the life of the lease. Estimates in 1990s dollars for rehabilitation of degraded land ranged between \$2,000 per hectare to improve irrigated land and \$400 per hectare to restore rainfed cropland.³⁸ The government ministry's failure to systematically address future losses in soil fertility may inadvertently create irreversible conditions of environmental scarcity. As available arable land disappears from local food production, the stage is set for localized and potentially violent struggles over remaining arable land.

2. Habitat and Biodiversity Loss

Most of the States who are engaged in large land leases are signatories to the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources which call for parties to respectively for States to undertake "the conservation of biological diversity"³⁹ and "conservation and sustainable use of plant genetic resources for food and agriculture"⁴⁰. Yet the current leases do not explicitly require private investors to make any guarantee that their agribusiness activities will not interfere with State international environmental obligations. Given that most of the land leases are motivated by supplying overseas markets with specific large production crops, many of the leases are for single commodity crops such as wheat or rice.

Conventional agriculture puts pressure on protecting remaining biodiversity both at the species and habitat level. As a result of monocropping with only a limited and uniform variety of seeds, farmers have already lost access to 90% of genetic variations in crops.⁴¹ In many areas of the world local varieties of plants are being replaced by internationally managed varieties with better yields. Conventional agriculture has broad impact not just on wild habitats such as forests and wetlands biodiversity but also has a profound impact on agricultural biodiversity. The ongoing loss of human-generated biodiversity impacts the survival capacity of plants

³⁸ H. E. Dregne & N-T. Chou, Global Desertification Dimensions and Costs, in H. E. Dregne (ed.), *Degradation and Restoration of Arid Lands* (1992), 249-281.

³⁹ Convention on Biological Diversity, 31 I.L.M. (1992), 818, 823 Art. 1.

⁴⁰ 'International Treaty on Plant Genetic Resources for Food and Agriculture' (29 June 2004) available at <ftp://ftp.fao.org/docrep/fao/011/i0510e/i0510e.pdf> (last visited 20 April 2011), 2, Art. 1.1.

⁴¹ J. R. Treweek, C. Brown & P. Bubb, 'Assessing Biodiversity Impacts of Trade: a Review of Challenges in the Agriculture Sector' (December 2006) available at <http://www.cbd.int/impact/case-studies/cs-impact-iapa24-4-treweek-et-al-2006-en.pdf> (last visited 20 April 2011), 301.

and animals necessary for our food. Much of what constitutes agricultural biodiversity is now being preserved ex situ rather than in situ. Relying on genetic storage and captive breeding has fundamental impacts on the resiliency of living ecosystems.

One concern associated with mono-cropping is the elimination of wild varieties that cannot compete effectively with seeds bred for plantation style production. East Africa where a number of large land leases have been secured has had relatively success at promoting the conservation of agricultural biodiversity on smallholder farms.⁴² In Ethiopia, farmers in certain areas have used certain soil management practices to cultivate intensive but diverse gardens.⁴³ Depending on the proximity of large scale leases in countries such as Ethiopia or Tanzania to smallholder farms, mono-cropping practices could detrimentally interfere with practices of smallholders who are at least contributing to ongoing agricultural diversity.

Permitting large-scale conventional agriculture without putting any conditions on minimal environmental performance fails to secure appropriate integration between the environmental and agricultural sectors. Export-oriented farming activities of the intensity that are contemplated by foreign investors are likely to impact species either by removing their habitat or by removing species. There is no evidence in those States that are engaging in large-scale land leases that large commercial private investors are being required to evaluate their habitat impacts and mitigate for those impacts. In fact, evidence from civil society groups indicate that some foreign investors are flaunting what little environmental review has been done of their projects and are undertaking projects with irreversible impacts on habitat. In Kenya, civil society groups point to Dominion Farms, a US based investment that received environmental approval for rice production. Civil society groups observe that the project is now undertaking intensive aquaculture for export with effluent from the fish farm being dumped into a neighboring wetland.⁴⁴

Many communities depend on indigenous plants and animals for both their basic sustenance and their culture. The local loss of these plants and

⁴² M. Stocking, F. Kaihura & L. Liang, 'Agricultural biodiversity in East Africa – Introduction and acknowledgements', in F. Kaihura & M. Stocking (eds), *Agricultural Biodiversity in Smallholder Farms of East Africa*, (2003), 3.

⁴³ A. Konde *et al.*, 'Creating Gardens: The Dynamics of Soil Fertility Management in Wolayta, Southern Ethiopia', in I. Scoones (ed.), *Dynamics and Diversity: Soil Fertility and Farming Livelihoods in Africa* (2001), 45.

⁴⁴ FIAN report, *supra* note 32, 24.

animals as a result of large agricultural operations may contribute to conditions of environmental scarcity and increased competition over remaining resources. Some adaptation on the part of communities to the loss of certain species on the part of communities is possible, but these transitional periods may be complicated by the simultaneous loss of arable land. Where local populations can neither grow nor collect indigenous food, the conditions for social instability are created.

3. Environmental Pollution

The current laissez-faire approach to agricultural land leasing may also jeopardize States abilities to fully regulate pesticide applications by foreign investors even though many of the land-leasing States such as Ethiopia and Kenya are signatories to the Stockholm Convention on Persistent Organic Pollutants.⁴⁵ Pesticide application is low in Africa, with Africa absorbing only 2-4% of the global pesticide market and most of the chemicals being applied by commercial users on cotton, cocoa, oil palm, coffee, or vegetable plantations.⁴⁶ Wide scale pesticide application may result in unintended environmental consequences with impacts on crop production. Minor pests can become major problems when pesticide application unintentionally eliminates beneficial insects which had previously consumed minor pests. Equally concerning, some insects will develop resistance to pesticides so that more powerful pesticides will need to be applied to combat new strains of pesticide resistant species.

The application of certain chemicals to enhance crop production is likely to lead to freshwater contamination, soil contamination, loss of biodiversity both on and off the farm, and bioaccumulation of certain chemicals leading to problems both up and down the food chain. Leaching of chemicals from agricultural land into neighboring lands may lead to toxins entering water systems and impacting local communities.

Increased pesticide usage is also likely to have measurable implications for human health of farmworkers. In the United States where there is public knowledge of the dangerous aspects of pesticide usage, there are according to Monsanto approximately 300,000 reports of serious pesticide-related illnesses among farmworkers.⁴⁷ In Africa, current pesticide application is complicated by a general lack of education among farmers

⁴⁵ Stockholm Convention on Persistent Organic Pollutants, 40 I.L.M. (2001), 532.

⁴⁶ S. Williamson, A. Ball & J. Pretty, 'Trends in Pesticide Use and Drivers for Safer Pest Management in Four African Countries', 27 *Crop Protection* (2008) 10, 1327, 1327.

⁴⁷ Clay, *supra* note 34, 52. (citing Monsanto, *Fact Sheet on Pesticide Use* (1999)).

and a specific lack of awareness of the dangers of pesticide application. Researchers in the field have observed that pesticide application will often involve poorly maintained equipment, the use of banned products, dangerous combinations of products in pesticide cocktails, lack of minimal protective clothing, and overapplication.⁴⁸

Unregulated pesticide usage may impact fragile freshwater and marine habitats depending on the proximity of the leased land to surface water. Pesticide run off from United States agriculture has resulted in a dead zone in the Gulf of Mexico, and the Great Barrier Reef in Australia is threatened by runoff from pesticides and herbicides.⁴⁹

There is no indication in the current land leases that investors are expected to control the amount or the type of pesticide and herbicide applied. Currently, African farmers apply only modest amounts of chemical inputs to their fields. If agribusiness begins to apply large amounts of pesticides and herbicides to their leased lands as is common for current large scale agribusinesses, certain African ecosystems may be severely impacted by rising levels of pesticide residue resulting in growing health risks to both humans and other species. Unmanaged pesticide and fertilizer contamination could create local conflicts between investors and communities depending on the response of the government. In China, there is increasing concern that unmanaged environmental concerns will undermine the national and regional government. Chronic air and water contamination has generated protests from otherwise reticent Chinese including 50,000 pollution related protests in 2005⁵⁰ including some violent protests.⁵¹

⁴⁸ Williamson *et al.*, *supra* note 46, 1327-1329.

⁴⁹ Clay, *supra* note 34, 49.

⁵⁰ A. Ramzy, 'Are Chinese Citizens Ready for a Green Revolution (19 August 2009) available at <http://www.time.com/time/world/article/0,8599,1917369,00.html> (last visited 20 April 2011).

⁵¹ J. Yardley, 'Rural Chinese Riot as Police Try to Halt Pollution Protest' (14 April 2005) available at http://www.nytimes.com/2005/04/14/international/asia/14riot.html?_r=1&scp=1&sq=Rural%20Chinese%20Riot%20as%20Police%20Try%20to%20Halt%20Pollution%20Protest&st=cse (last visited 20 April 2011).

4. Water Loss

Agriculture uses 86.8% of fresh water in developing countries as compared to 46.1% in the developed world.⁵² Even taking into account that certain aspects of subsistence farming in developing countries are extremely inefficient in water usage, the problem of water allocation between foreign direct investors and subsistence farmers has the potential to threaten both community and environmental survival. In Africa where desertification has reclaimed formerly cultivatable lands, foreign agribusiness investors may gain preferential access to water needed by other users because just as there is no formal land tenure in many States, there is also no recognition of priority water rights.

Where States fail to require specific water conservation efforts on the part of private agribusiness investors or regulate water usage of agribusiness investors, States may be failing to achieve their obligations under the United Nations Convention to Combat Desertification.⁵³ Specifically, African states have agreed to “adopt the combating of desertification and/or the mitigation of the effects of drought as a central strategy in their efforts to eradicate poverty” as well as “reinforce participation of local populations and communities”⁵⁴.

In Africa, there is already existing tension between States in the Nile Basin on the equitable use and distribution of the water. Efforts are being made through the Nile Basin Initiative to reach some agreement on integrated water management. Given the water security needs of all of the States who rely on the Nile, it has proven difficult to negotiate agreements between upstream and downstream states. Arguably, foreign agribusiness has the potential to hijack current efforts to equitably resolve water allocations. Sudan and Ethiopia, both stakeholders in the Nile Basin, have leased large tracts of agricultural land to overseas investors. What arrangements have been made by the foreign investors to procure water for these tracts are unknown, but overseas investors may place undue influence on State water negotiators leading to long-term implications for water usage in the Nile region. For example, Sudan recently inaugurated the Merowe dam on the Nile River; the dam is being financed by Chinese and Middle Eastern investors at the same time as sovereign wealth funds and private

⁵² N. Mabey & R. McNally, ‘Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development’ (August 1999) available at <http://www.oecd.org/dataoecd/9/48/2089912.pdf> (last visited 20 April 2011), 24.

⁵³ United Nations Convention to Combat Desertification, 33 I.L.M. (1994), 1328.

⁵⁴ *Id.*, Annex 1, Art. 4.

investors from both China and certain Middle Eastern countries are procuring large land leases in Sudan.⁵⁵

Tensions over water usage are already apparent in East Africa where a 2010 Cooperative Framework Agreement, signed by land leasing upstream states such as Ethiopia guarantee equal access to the resources of the Nile river by all Nile Basin states.⁵⁶ Sudan has refused to sign the agreement and argues that it is guaranteed 15 billion cubic meters of Nile water and protests the ongoing hydroelectric projects installed by Ethiopia. Interests of large scale foreign agribusinesses who depend on irrigation for their commodities could further muddy these already delicate negotiations.⁵⁷

Given the challenges of obtaining access to clean water in Africa, there have been no public consultations about sharing water between foreign investors and local communities. As noted above, local government officials are not in a position to assert community rights to equitable utilization. Even if local governments are able to speak out on behalf of communities in their jurisdiction, unresolved ecological problems remain. No one at this time seems to be discussing protecting in stream values or the impact of agricultural water withdrawals on riparian species.

Even though large-scale export oriented mono-cropping has environmental risks that may interfere with the ability of States to meet their international environmental obligations,⁵⁸ States have generally refused to publicly acknowledge that land leases to foreign direct investors have negative externalities. The States instead focus on the growth opportunities associated with the investment including promises of new infrastructure

⁵⁵ 'Merowe Dam living model for South-South cooperation: Sudanese President' (10 April 2010) available at <http://english.peopledaily.com.cn/90001/90777/90855/6945283.html> (last visited 2 March 2011); A. A. Ali, 'Sudan's policy of selling land is more dangerous than building dams' (29 April 2010) available at <http://www.sudantribune.com/spip.php?article34911> (last visited 20 April 2011); D. Lepeska, 'In bid for food security, Qatar sows seeds globally' (2 September 2010) available at <http://farmlandgrab.org/post/view/15210> (last visited 20 April 2011).

⁵⁶ See in this volume D. Z. Mekonnen, 'Between the Sylla of Water Security and Charybdis of Benefit Sharing: The Nile Basin Cooperative Framework Agreement – Failed or Just Teetering on the Brink?', 3 *Goettingen Journal of International Law* (2011) 1, 345.

⁵⁷ R. Rotberg, 'The threat of a water war' (2 July 2010) available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/07/02/the_threat_of_a_water_war/ (last visited 20 April 2011).

⁵⁸ Two of the largest land leasing States are Sudan and Ethiopia. Both States are signatories to the Convention on Biological Diversity as well as the Convention to Combat Desertification.

built by private investors or State investors. The following section of this article explores the discontinuities that emerge between international economic law as a driver of arable land leasing to foreign investors and international human rights and environmental law as a legal approach requiring a precautionary angle on new investment to ensure adequate long-term protection for individual rights and ecosystems.

C. International Legal Context

These foreign land leases are at the nexus of two conflicting bodies of international law. On the one hand, international economic law enables these land leases while, on the other hand, foundational principles from international human rights law and international environmental law caution against proceeding with these leases unless the leases are conditioned to protect public, social and environmental values. This section examines how in the specific context of land leases some principles of international economic legal frameworks clash with competing human rights and environmental principles.

I. International Economic Framework

International investment law governs most of the land leases since most of the investors are foreign nationals or foreign corporations seeking to extend their resource base for home state markets. Many of the land leases are governed by the terms of Bilateral Investment Treaties (BITs) which frequently include provisions promoting national treatment for foreign investors, reducing risks for foreign investors, and providing injured foreign investors with access to State-investor international arbitration. States whose investors heavily invest in another State frequently require the source country for their investment to enter into a BIT before they will encourage their national to invest. In 2000, China concluded a BIT in Ethiopia which governs the \$1 billion of investment that China made in Ethiopia in 2009 as well as “future investment in agricultural projects”⁵⁹.

The Chinese-Ethiopian BIT is a prime example of how the law may be implemented to protect Chinese investors including both those who are

⁵⁹ M. Fitzgerald, ‘China invests in Ethiopia but at what cost?’ (27 January 2010) available at <http://abbaymedia.com/News/?p=3636> (last visited 20 April 2011).

funded by sovereign wealth funds and those who are privately funded.⁶⁰ The BIT is used here as illustrative of some of the international economic disputes that might arise in the context of land leases.

The BIT would apply to land leases since the term “investment” includes “immovable property”⁶¹ as well as “concessions [...] to [...] exploit natural resources”⁶². Both parties have agreed to accord to each other’s investments “fair and equitable treatment” as well as “protection in the territory of the other Contracting Party”⁶³. In the context of land leases without any existing environmental conditions in the lease, this may create a “legitimate expectation” that the investor will be free to operate through conventional mono-cropping without any restraints being placed on extracting surface water and groundwater for irrigation purposes. “Legitimate expectations” have been considered by investment tribunals to be possibly “relevant to the application of the fair and equitable treatment clause contained in the BIT”⁶⁴. Therefore, a breach of a “legitimate expectation” may be construed as a violation of a BIT’s “fair and equitable treatment” clause.

States such as Ethiopia may be inadvertently creating expectations by making promises of non-interference with investments. Since leasing arable land has become a competitive enterprise by African States with States such as Ethiopia creating specific government agencies to promote the leases, host states may find their investment sales pitches being transformed into “legitimate expectations”. As the *Saluka v. Czech Republic* tribunal observed, an investor’s legitimate expectations include that a State “will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on

⁶⁰ ‘Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investments’ (entered into force May 2000) available at http://www.unctad.org/sections/dite/iaa/docs/bits/china_ethiopia.pdf (last visited 20 April 2011) [Ethiopia-China Agreement].

⁶¹ *Id.*, Art. 1 (1) (a).

⁶² *Id.*, Art. 1 (1) (e).

⁶³ *Id.*, Art. 3 (1).

⁶⁴ *CMS Gas Transmission Company v. Argentina*, Decision of the *ad hoc* Committee on the Application for Annulment (25 September 2007) available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4 (last visited 20 April 2011), para. 89.

unjustifiable distinctions)”⁶⁵. Could a casual promise of no future burden some social or environmental regulatory action made by a government agent interested in closing the deal be interpreted as creating “legitimate expectations” if the State was to impose environmental conditions or local market conditions on the investment?

Likewise, both have agreed that neither State will expropriate or nationalize investments unless the actions are taken for the public interest, “without discrimination”⁶⁶ and the investors are compensated.⁶⁷ It is unclear at this juncture whether investing parties might file “expropriation” claims if States leasing land impose subsequent environmental or export conditions on investment designed to protect public interest. If, for example, Ethiopia was to impose certain regulations designed to minimize the damage associated with heavy irrigation, heavy pesticide application or monocropping on large agricultural tracts, Chinese foreign investors may claim that they are being singled out and discriminated against because the profitability of their investment depends on water intensive and pesticide intensive practices. Likewise, if Ethiopia was to require through a regulation promulgated after the start of the investment a certain amount of the food produced enter local Ethiopian markets as a safeguard against famine, this regulatory action could also be construed as a regulatory expropriation. Ethiopia could find itself paying China for the difference between what the crops could command in a Chinese market and the market price in Ethiopia.

International economic law governs any disputes that might arise under the BIT between an investor from China and Ethiopia. Article 9 provides that disputes over the amount of compensation for expropriation may be submitted to ICSID tribunal if the investor has not submitted the dispute to an Ethiopian court. Generally investors avail themselves of this option because of the perception that tribunals will focus only on the alleged economic losses of the investor and not on the underlying host-state policies triggering the loss. The touchstone case exemplifying a tribunal’s investor-friendly approach to legitimate environmental State action is *Santa Elena v.*

⁶⁵ *Saluka Investments B.V. v. Czech Republic*, Partial Award of the Permanent Court of Arbitration (17 March 2006) available at <http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf> (last visited 20 April 2011), para. 309.

⁶⁶ Ethiopia-China Agreement, *supra* note 59, Art. 4 (1) (c).

⁶⁷ Ethiopia-China Agreement, *supra* note 59, Art. 4 (2).

Costa Rica.⁶⁸ While the case narrowly focused on what compensation was fair for a rezoning of property adjacent to a national park that the investors had hoped to develop, the tribunal offered broad reflections on expropriation and environmental protection which could be construed by future panels to prioritize international economic legal concerns over non-economic concerns. Specifically, the tribunal stated “Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains”⁶⁹.

In addition to the investor-friendly BITs, some investor and host-State agreements may also contain stabilization clauses that allow investors to avoid compliance with new environmental measures.⁷⁰ In some instances, these stabilization clauses will receive international protection under international investment law. In *AGIP v. Republic of Congo*, an arbitration tribunal agreed that the government could not apply an ordinance to an investment that would change the private character of the investment because of the existence of a stabilization clause. Finding the State in breach of its agreement, the Tribunal stated:

“These stabilization clauses, freely accepted by the Government, do not affect the principle of its sovereign legislative and regulatory powers, since it retains both in relation to those, whether national or foreigners, with whom it has not entered into such obligations, and that, in the present case, changes in the legislative and regulatory

⁶⁸ *Compania del desarrollo de Santa Elena, S.A. and The Republic of Costa Rica*, ICSID Case No. ARB/96/1, 15 *ICSID Review – Foreign International Law Journal* (2000), 169.

⁶⁹ *Id.*, para.72.

⁷⁰ International Finance Corporation, ‘Stabilization Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights’ (27 March 2009) available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClause sandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClause sandHumanRights/$FILE/Stabilization+Paper.pdf) (last visited 20 April 2011), ix. (Broad stabilization clauses, with exemptions from new laws, are found in investment contracts based in Sub-Saharan Africa and North Africa).

agreements stipulated in the agreement simply cannot be invoked against the other contracting party”⁷¹.

International investment law as currently structured protects investors and facilitates foreign direct investment in a globalizing world. Yet conventional agribusiness leases of arable land in food insecure countries with fragile environments raise legitimate non-investment concerns. Where is the balance point among an investor’s expectations of return, society’s expectation of livelihood and sustenance, and the need for some long-term ecosystem protection in vulnerable habitats? The following section describes an international legal framework that threatens the security of existing reciprocal investment obligations by focusing on both non-corporate interests and non-economic interests.

II. International Human Rights and Environmental Legal Framework

The priorities of international human rights and environmental legal frameworks are in many instances in direct conflict with the priorities of guaranteeing predictability and security of investments. In contrast to protecting investment assets and returns on investments, international human rights and environmental law focus on protecting the rights of individuals particularly vulnerable groups and the integrity of ecosystems. In the context of land leases, there is no demonstration by States leasing land that they are requiring private investor’s interests to align their investment projects with the interests of community groups or long-term environmental protection. In return for the arable land concessions, States are bargaining for large infrastructure projects such as deepwater ports that could have inadvertent impacts on human rights through displacement of vulnerable groups leaving in the vicinity of the redevelopment area or on the marine environment.⁷²

The United Nations has raised concerns about the compatibility of the land leases with human rights obligations. Special Rapporteur on the Right

⁷¹ *AGIP Company v. Popular Republic of Congo*, Award of 30 November 1979, 21 ILM (1982), 726, 735-736, para. 86.

⁷² R. Laishley, ‘Is Africa’s land up for grabs?: Foreign acquisitions: some opportunities, but many see threats’ (October 2009) available at <http://www.un.org/ecosocdev/geninfo/afrec/vol23no3/233-land.html> (last visited 20 April 2011). (In exchange for 40,000 hectares in the Tana River Valley in Kenya, Qatar has agreed to build a deep-sea port for the Kenyan government.)

to Food, Olivier de Schutter expressed concerns about whether the leases would interfere with the right to adequate food, right of indigenous peoples to use their land, rights of local communities to exploit national natural resources, and the rights of development.⁷³ Relying on Article 11 of the International Covenant on Economic, Social, and Cultural Rights,⁷⁴ he observes that States must provide citizens with opportunities to obtain sufficient, nutritionally adequate, and safe food. He indicates that, the “human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives”⁷⁵. News reports indicate that foreign investors may already be violating the right to food. In December 2010, in Mali, small-scale farmers were informed that Libyan leader Muammar el-Qaddafi was now in possession of the lands that they had cultivated for multiple generations and would use the land to grow rice for export to Libya.⁷⁶

Special Rapporteur de Schutter recommends taking a transparent approach to understanding the long-term implication of the land leases. He proposes adopting a social and environmental impact report “prior to the completion of the negotiations on (a) local employment and incomes, disaggregated by gender and, where applicable, by ethnic group; (b) access to productive resources by local communities, including pastoralists or itinerant farmers; (c) the arrival of new technologies and investments in infrastructure; (d) the environment, including soil depletion, the use of water resources and genetic erosion; and (e) access, availability and adequacy of food”⁷⁷. His pre-investment commitment approach mirrors the basic international environmental principle of the precautionary approach.

Recognizing that planning can avoid irreversible environmental impacts, environmental negotiators have agreed over the last three decades to apply a precautionary approach where a State action may have adverse effects on the environment. Where there is a risk that a State is aware of, States have a duty to investigate the risk further. “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be

⁷³ De Schutter, *supra* note 8.

⁷⁴ Committee on Economic, Social and Cultural Rights, The right to adequate food (Art. 11), UN Doc. E/C 12/1999/5, 12 May 1999, para. 14.

⁷⁵ De Schutter, *supra* note 8, para. 4.

⁷⁶ N. MacFarquhar, ‘African Farmers Displaced as Investors Move in’ (21 December 2010) available at www.nytimes.com/2010/12/22/world/africa/22mali.html (last visited 20 April 2011).

⁷⁷ De Schutter, *supra* note 8, 17, principle 9.

used as a reason for postponing cost-effective measures to prevent environmental degradation [, States] according to their capabilities”⁷⁸ are expected to apply the precautionary approach. While there is some debate about the international legal status of the precautionary approach,⁷⁹ it seems reasonable to extend the concept of the “precautionary approach” to require State action either by prohibiting an activity or conditioning an activity where States have already experienced similar environmental degradation.

Taking a precautionary approach is particularly relevant regarding fresh water usage by foreign land investors in light of both the existing water shortages and future climate-related water shortages in Africa.⁸⁰ Many of the investors who are investing in African lands are nationals of water-insecure States. These investors have made no public indication that they will be employing water efficient irrigation techniques in their leased lands or protecting local water sources from agricultural runoff. Host states under Principle 15 should assume that investors will not voluntarily engage in sustainable agriculture approaches and should require some “cost-effective” affirmative action by private investors indicating how national water resources will be protected.

The precautionary approach as a general principle of law may serve an importing bridging function between the competing goals of international economic law and international environmental and human rights law in relation to overseas land leases. As Birnie, Boyle, and Redgwell suggest, the precautionary approach may be instrumental in determining “how conflicts between other rules or principles will be resolved”⁸¹. The final section proposes introducing an explicit precautionary approach into creating land leases that are conditioned to protect both social and environmental interests. While the Human Rights Council has already taken an active role in understanding the implication of the land leases on individual human rights, there has not been any similar response in terms of protecting arable lands from overexploitation. To address the anticipatory concerns of environmental exploitation of arable land raised earlier in this paper, this

⁷⁸ Report of the UN Conference on Environment and Development, UN Doc. A/CONF.151/26/Vol.1, 15 August 1992, principle 15.

⁷⁹ P. Birnie, A. Boyle & C. Redgwell, *International Law & the Environment*, 3rd ed. (2009), 159-160.

⁸⁰ United Nations Environmental Programme, *Africa Water Atlas* (2010). (Identifying Africa is the world's second-driest continent with only 9% of global renewable water resource and 15% of the global population.)

⁸¹ Birnie *et al.*, *supra* note 79, 28.

final section proposes the creation of a new international legal institution concerned with protecting the long-term environmental health of vulnerable, arable lands on behalf of vulnerable communities.

D. Policy Proposals for Ensuring a Precautionary Approach to Land Leases

Assuming application of ordinary conventional methods of large scale farming and no intention on the part of the investor to deliberately damage the land, the leased land, if it is farmed by conventional mono-cropping practices is likely to be returned depleted of nutrients and contaminated with some level of pesticides and herbicides. Likewise, where a crop requires irrigation, local aquifers may be over-tapped. Without some regulation of the agribusiness practices of private investor, the available production yield for the land will decrease over the lifetime of the lease.

Existing international economic law does not provide much guidance in terms of reconciling the interests in attracting foreign direct investment and the need to do so in a precautionary fashion that takes into account long-term social and environmental concerns. As such, the legal approaches embodied in economic law versus environmental and human rights law seem mutually incompatible. Is there some approach that might bridge present concerns of facilitating economically advantageous international investment transactions with the more forward-looking concerns of economic and social sustainability embodied in international environmental and international human rights law?

Intergovernmental institutions have made policy recommendations to respond to a variety of concerns involving the overseas leases including displacement of small scale farmers and environmental degradation but all of these recommendations are non-binding and left to the discretion of investors and States to implement without any monitoring. The Food and Agriculture Organisation and the World Bank have proposed a voluntary code of conduct for States engaged in land leasing encompassing several principles.⁸² Principle 7 of the draft code calls for environmental impacts due to a project to be “quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative

⁸² J. Blas, ‘UN to regulate farmland grab deals’ (18 November 18 2009) available at <http://farmlandgrab.org/9050> (last visited 20 April 2011).

impacts and mitigating them”⁸³. Interestingly, the principle appears to have been deliberately drafted in passive language to avoid assigning responsibilities. Who will be responsible to quantify and mitigate the impacts?

As drafted, principle 7 is too vague to be applied meaningfully. To address the issues raised by the large scale leases require detailed agro-ecological studies on a lease by lease basis and not just vague prescriptive language to quantify and mitigate environmental impacts. The authors of the principle recognize the inherent limitation of Principle 7 when they recognize several concrete impediments to public protection of environmental resources: arbitrary implementation of regulations, limited capacity of regulatory institutions, overlapping institution competencies, and limited opportunities “for the public to lodge complaints”⁸⁴. What becomes apparent from reading the text of the draft principles is that there are insufficient monitoring and accountability measures to ensure that foreign direct investment does not negatively impact competing social and environmental needs.

This paper proposes two legal strategies to ensure that environmental concerns are prioritized rather than marginalized in the lease making process. The first strategy is to rewrite draft principle 7 to be more specific in its intent and to empower both government agencies and citizens that have been marginalized from participating in the current land leases. For example, in Kenya, where the government has agreed to lease 40,000 acres to Qatar for export-based commodities, senior members of the Ministry of Lands were never informed of the proposed deals.⁸⁵ The second strategy is to create an institution that can assist in the full implementation of a revised Principle 7 that provides oversight to ensure adequate socio-environmental impact assessments are undertaken and that facilitates disagreements between the public and investors when alleged.

⁸³ FAO *et al.*, ‘Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources’ (25 January 2010) available at http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf (last visited 20 April 2011), 18.

⁸⁴ *Id.*, 19.

⁸⁵ FIAN Report, *supra* note 32, 19.

I. Redrafting Principle 7 of the FAO and World Bank Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources

First, Principle 7 should be redrafted to reflect the concerns raised in the FAO and World Bank's text about arbitrary implementation of regulations and limited capacity of national institutions. In order to address both substantive and procedural concerns, the language might read:

“Governments leasing agricultural land or land targeted for agricultural use will require third-party expert environmental assessment of a project's quantifiable impact on soil fertility, soil erosion, eutrophication of adjacent waterways, water quality, air quality, human health, biodiversity, water quantity, land tenure rights, and labor rights. Expert data will be communicated to communities in a form that is easily accessible to the communities. Individuals and communities will have an opportunity to lodge pre-investment complaints with a governmental department detailing their general socio-environmental concerns. The government officials must consider these complaints, investigate the nature of the complaint, and respond before a project can be tentatively approved. Copies of the complaints and responses must be provided to the office of the International Ombudsman. Investors must file a mitigation plan before the project can be finally approved to address public complaints. Mitigation plans are subject to public review. For approved projects where there are socio-environmental impacts, individuals and communities will have the opportunity to file their complaint with an International Ombudsman.”

As rewritten, the principle addresses the international and civil society concerns over the lack of transparency associated with the current land leases as well as the lack of meaningful input from citizens on national resource management. The principle provides specific guidance of what aspects of an investment a government must review as well as providing a neutral dispute resolution procedure outside of the influence of the host State. International investment law permits States to require that a private

investor undertake a pre-investment environmental impact assessment report.⁸⁶

II. Creating a UN Based International Ombudsman's Office for Socio-Environmental Review of Land Leases and Dispute Settlement

Second, in order to provide both marginalized government agencies and citizens with an opportunity to be heard, there is a need for an institution that can technically assist governments with undertaking environmental assessment, neutrally evaluate mitigation options to ensure long-term environmental health of the land and social protection of vulnerable groups, and monitor compliance with mitigation plans. To address all of these needs, it would be useful to create an International Ombudsman's office operating under the auspices of the United Nations Secretary-General who could assist developing governments and act as a neutral intermediary between environmental government ministries, labor ministries, and citizens on the one hand and investment ministries and investors on the other hand.

The first public sector ombudsman was created by the Swedish Parliament to protect individual rights against the excesses of the governmental bureaucracy.⁸⁷ Public sector ombudsmen are frequently employed as government intermediaries whose office is created by legislation. Ideally, the ombudsmen offices are able to receive and investigate complaints against governmental agencies, criticize government agencies, recommend corrective action, and issue public reports.⁸⁸ The Ombudsman proposed by this paper would continue in the tradition of other public sector ombudsman by operating as an intermediary between host States and investors with the single task of protecting remaining arable land from environmental degradation.

The idea of creating an international ombudsman who investigates environmental matters involving States is not new. In responding to a need voiced at the 1992 Environment and Development Conference, the

⁸⁶ *Maffezini v. Spain*, ICSID Case No.ARB/97/7, 13 November 2000, 5 *ICSID Reports*, 419 (2002), para. 67.

⁸⁷ United States Ombudsman Association, 'History' (2011) available at http://www.usombudsman.org/en/About_Us/history.cfm (last visited 20 April 2011).

⁸⁸ United States Ombudsman Association, 'Legislative Model for Ombudsman' (2011) available at http://usoa.non-profitsites.biz/en/About_Us/legislative_model.cfm (last visited 20 April 2011).

Ombudsman Centre for the Environment and Development (OmCED) opened in 2000 at the United Nations University of Peace in Costa Rica as part of a non-governmental initiative.⁸⁹ Created to provide non-adversarial and non-judicial methods of resolving transboundary environment and development disputes, OmCED offered mediation services including at the request of the Government of Costa Rica a mediation among the Government of Costa Rica, indigenous populations, and the World Bank regarding the construction of the a hydroelectric dam.⁹⁰ However, OmCED eventually ceased operating due to funding constraints.⁹¹

Some national ombudsmen are specifically charged with investigating environmental matters. For example, in Namibia, under the Ombudsman Act of 1990, the Ombudsman's office can investigate environmental degradation under its own authority. Specifically, the Ombudsman has the duty "to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of nonrenewable resources, the degradation and destruction of ecosystems"⁹².

Hungary has created an ombudsman's office that advocates on behalf of future generations.⁹³ The office is charged with investigating matters associated with the Hungarian constitutional right to a healthy environment. The office produces national reports focused on implementing cultural heritage preservation and nature conservation obligations for future generations. In a recent report on the development of a straw-fired energy plant, the Commissioner indicated that he would be seeking an annulment of the plant's environmental permits on the grounds that long-term environmental impacts were not properly considered. One of the environmental considerations that the Commissioner found was overlooked by local authorities was, interestingly enough, impacts on arable land. The

⁸⁹ Environmental Data Interactive Exchange (Edie), 'New Environmental Ombudsman Centre Begins Work this Month' (14 July 2000) available at http://www.edie.net/news/news_story.asp?id=2958 (last visited 20 April 2011).

⁹⁰ J. Carls & W. Haffar, 'Resolving the Boruca dam conflict in Costa Rica' (4 November 2008) available at http://www.monitor.upeace.org/archive.cfm?id_article=560 (last visited 20 April 2011).

⁹¹ N. L. Bridgeman & D. B. Hunter, 'Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism', 20 *Georgetown International Environmental Law Review* (2008) 2, 217.

⁹² 'Ombudsman Act No. 7 of 1990', *Government Gazette of the Republic of Namibia* (1990) 32, 1.

⁹³ See Parliamentary Commissioner for Future Generations available at <http://jno.hu/en/> (last visited 20 April 2011).

Commissioner found that the reliance on straw to fuel the energy plant “encourages intensive arable cultivation” leading potentially to “the loss of biodiversity, topsoil degradation, water pollution and destruction of habitats”⁹⁴.

As this paper envisions, the International Ombudsman’s office would house a combination of technical and legal experts who would operate independently of each other. In order to avoid conflicts of interest between employees and their national governments, ombudsman employees would only review projects from states where they are not citizens or have other substantial ties. Technical experts would be responsible for assisting government staff with measuring project impacts using generally accepted socio-environmental impact methodologies, providing feedback on an investor’s proposed mitigation plan, and monitoring subsequent compliance with approved mitigation plans. The work would be politically neutral. Legal experts would be responsible for reviewing complaints from individuals and communities and raising specific environmental concerns including potential treaty obligations with responsible government officials. The legal experts would work separate from the technical experts in order to avoid politicizing the work of the technical experts.

The Ombudsman’s dispute resolution mandate would be limited to addressing the impact of overseas investment on socio-environmental protection in member states. Where the Ombudsman is made aware of an emerging transboundary environmental or social issue (e.g. leases that may trigger international migration), the Ombudsman would be empowered to request that a government permit it to investigate the facts even though a complaint may not have been filed. The Ombudsman would not have the authority to respond to wholly domestic disputes unless mediation was requested by a government as in the OmCED-Case described above involving Costa Rica. Where the Ombudsman is aware of a domestic dispute, the Ombudsman could offer its facilitation services.

As a neutral, the Ombudsman would be in a unique position to investigate facts, publish findings of fact, and then serve as a mediator in the application of competing economic and environmental or human rights laws. Creating a more inclusive decision-making and enforcement process may be enough to challenge the current dynamics of elite resource capture

⁹⁴ Parliamentary Commissioner for Future Generations, ‘Main Conclusion of the Parliamentary Commissioner for Future Generations’ statement on the effects of the prospective straw-fired power plant in Szerencs’ available at http://jno.hu/en/?&menu=cas_summ&doc=szerencs (last visited 20 April 2011).

where marginalized government agencies and the public remain uninformed of critical development decisions. Food-insecure Africa and Southeast Asia need new investment, but citizens of these regions also need some assurances that external investment will not compromise the integrity of resources that they and their future generations are likely to depend on for sustenance. Based on the current secretive land deals whose details are known only by certain government elites, citizens cannot rely solely on their governments for these assurances.⁹⁵

E. Conclusion

Foreign investors leasing agricultural land in food insecure countries is an emerging case of elite resource capture that threatens human security. Agricultural land leases between private foreign investors and public governments should not be regarded as exclusively private business deals outside of the ambit of international law. They are business deals with potential long-term health consequences for the public and long-term implications for the environment. Unless investors are required to steward their leases and prevent soil degradation, water contamination, and loss of biodiversity, States may find themselves 20 to 100 years from now receiving land from investors that is no longer arable. In making leases, States need to consider the long-term sustainability of land for their own food security needs.

Since many States lack the management resources, the legislative will or the enforcement resources to ensure that short-term foreign investments do not undermine long-term public interests, there is a need for international cooperation. This paper proposes introducing an international ombudsman to provide environmental review of potential leases in hopes of avoiding future conditions of environmental scarcity. Globally we need to be forward-thinking in tackling a very real problem – how do we equitably feed growing populations?

Critics may say that creating a new institution would simply distract from the powerful economic interests underlying the existing leases. The opposite is true. The new institution would bring much-needed transparency into the current shadowy closed-door world of arable land negotiations and provide an important body to ensure a precautionary approach to foreign investment in arable land. Will this new institution be able to effectively

⁹⁵ FIAN report, *supra* note 32, 19.

mitigate for emerging conflicts over arable land in food insecure regions? It will depend on the resources allotted by the UN, the support of UN member states, and the vision of the proposed Ombudsman's office.

Every year, up to 30 million hectares of farmland are lost due to severe soil degradation, conversion to industrial use and urbanization.⁹⁶ Unfortunately, we have no technological fix for this loss of arable land. Given the pressures of population growth coupled with the uncertainties of climate change, the time for the global leaders to respond to the clash between long-term environmental obligations and the push for new investment opportunities supported by international economic law is now.

⁹⁶ 'Farmers hurt as pressure on arable land grows: U.N.' (21 October 2010) available at <http://www.reuters.com/article/idUSTRE69K42X20101021> (last visited 20 April 2011).