Paper prepared for the Law and Development Conference 2013
"Legal and Development Implications of International Land Acquisitions"
Kyoto, 30-31 May 2013

DISCIPLINING FOREIGN INVESTMENT IN LAND IN AFRICA

Mapping the Role of International Investment Contracts and International Investment Law

Dr. Uche Ewelukwa Ofodile
Professor of Law
University of Arkansas School of Law

Abstract

This paper fills the gap in literature by seeking answers to three questions. What are the emerging trends in terms of the role of land investment contracts and international investment law in addressing the key environmental, social and governance (ESG) issues implicated in foreign investment in agricultural land (agro-FDI)? Are countries in Africa effectively using these instruments to maximize the benefits associated with FDI in agricultural land and to minimize associated risks and dangers? Do countries in SSA appreciate and are they effectively managing the complex interactions between international investment agreements, international investment law, and other regimes of international law, particularly the international human rights regime?

FOREIGN INVESTMENT IN LAND AND THE CLASH OF REGIMES

Dr. Uche Ewelukwa Ofodile♣

I. INTRODUCTION

Large-scale land acquisition of farmlands by foreign investors is on the rise in Sub-Saharan Africa (SSA) and is generating much controversy.[1] Indeed, no continent has been spared this new onslaught.[2] What some call investment, others call "land rush," "land grab," and even "new colonialism."[3] Institutional investors are showing growing interest in crop land and agricultural infrastructure as an alternative asset class.[4] Predictions about future performance of farmland and forestry are fueling the frenzy. Jeremy Grantham, Chief Investment Strategist for Boston-based Grantham, Mayo, Van Otterloo & Co., predicts that farmland and forestry will outperform the average of all global assets long-term.[5] One study projects that given the expected need for additional arable land to be brought into production on a global basis, the amount of capital that could enter the farmland and farm infrastructure sector could substantially exceed USD 150 billion.[6]

Regarding foreign direct investment in Africa for agricultural purposes (Agro-FDI), at least nine countries in SSA are among the main targets: Cameroon, Ethiopia, the Democratic Republic of Congo, Madagascar, Mali, Somalia, Sudan, Tanzania and Zambia.[7] By some accounts, since 2006, between 15 and 20 million hectares of farmland in developing countries have been the subjects of transactions or negotiations involving foreign investors.[8] Acquisition of farmlands, particularly by foreign investors, creates risks and opportunities for individuals, communities and the wider society.

♣ Professor, University of Arkansas School of Law. LL.B. (Nigeria); LL.M. (London); LL.M. (Harvard); S.J.D. (Harvard). Fellow, Carnegie Council on Ethics and International Affairs, 2003-2004. Vice-Chair, Corporate Social Responsibility Committee of the ABA Section of International Law (Aug. 2011 to Aug. 2012); Member, Steering Group, International Investment and Development Committee of the ABA Section of International Law (Aug. 2011 to Aug. 2012).

[1] See generally: GRAIN, *Seized! The 2008 land grab for food and financial security*, GRAIN, October 2008; GRAIN, *The new scramble for Africa*, GRAIN, July 2007 Margaret C. Lee, "The 21st Century Scramble for Africa", *Journal of Contemporary African Studies*, 24, 3, (September 2006). Joachim Von Braun and Ruth Meinzen-Dick, "'Land Grabbing' by Foreign Investors in Developing Countries: Risks and Opportunities, *International Food Policy Research Institute (IFPRI),* Policy Brief 13. April 2009. Also Cotula,L., Vermeulen, s., Leonard, R., and Keeley, J., Land *grab or Development Opportunity? Agricultural Investment & International Land Deals in Africa (*2009); World Bank, "Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?" (2010); Goswami, R. , "African landrush," Infochange News & Features, 5 April (2010).

[2] HighQuest Partners, United States (2010), "Private Financial Sector Investment in Farmland and Agricultural Infrastructure", *OECD Food, Agriculture and Fisheries Papers*, No. 33, OECD Publishing. http://dx.doi.org/10.1787/5km7nzpjlr8v-en; Malone, A. 18 July 2008. P. 10.

[3] *Id. How China's taking over Africa, and why the West should be VERY worried*. DAILY MAIL ONLINE. www. dailymail.co.uk/news/article-1036105/How-Chinas-taking-Africa-West-VERY-worried.html.; Smith, D.3 July 2009. *The food rush: rising demand in China and West spark African land grab*. THE GUARDIAN ONLINE. www.guardian.co.uk/environment/2009/jul/03/africa-land-grab

[4] Hedge funds 'grabbing land' in Africa, BBC NEWS, 8 June 2011. http://www.bbc.co.uk/news/world-africa-13688683

[5] Maria Kolesnikova, Grantham says farmland will outperform all global assets, Bloomberg, 11 August 2011.

[6] HighQuest at 13, para. 36.

[7] *See generally* Doya, David Malingha, "Karuturi global plans $500 million investment in Tanzania food production," Bloomberg, 18 Aug 2011; IANS (2009) "India offers to spur green revolution in drought-hit Tanzania," Indo-Asian News Service (IANS), 15 September. 40.

[8] World Bank, "Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?" (2010).

On the one hand, increased FDI in agricultural land could potentially bring significant macro-level benefits to countries in Africa in the form of GDP growth and improved government revenues and could create opportunities for strengthening Africa's agricultural sector.[9] On the other hand, there is growing evidence to suggest that foreign acquisition of farmland in Africa could seriously threaten and ultimately destroy millions of lives, negatively impact a host of internationally guaranteed human rights, and compromise long-term economic development objectives in the continent. [10]

Discussions about large scale acquisition of farmland in Africa are timely given the important role that agriculture plays in the domestic economy of most countries in the continent, the scale of the deals that have already been concluded, the speed at which the deals are being concluded, and projections that demand for land is likely to increase in the long term. According to the World Bank, "[c]ompared to an average annual expansion of global agricultural land of less than 4 million hectares before 2008, approximately 5g million hectares worth of large-scale farmland deals were announced ever before the end of 2009."[11] It is estimated that in developing countries 6 million ha of additional land will be brought into production each year to 2030 and that two-thirds of this expansion will be in SSA and Latin America.[12]

For most countries in Africa, the question is not simply whether to reject or embrace foreign acquisition of arable land. The more critical and more complex question is how to seize the opportunities that foreign direct investment (FDI) in land presents while at the same time taking measures to mitigate associated risks. Agro-FDI raises a host of environmental, social (particularly human rights), and governance (ESG) issues. Several questions thus arise. What legal options for maximizing opportunities and mitigating risks associated with foreign investment in land are available to countries in Africa? Are countries utilizing the available options and to what degree? For example, in negotiating land investment agreements are governments in Africa taking care to ensure that human rights are adequately protected and that they secure maximum benefit from the deals? Does international investment law undermine or complement international human rights law as far as addressing concerns associated with FDI in land?

With a specific focus on Ethiopia, this paper reviews the interaction between agro-FDI and international investment law. The paper concludes that the bilateral investment treaties, do not address the social and environmental issues that are implicated in agro-FDI and may constrain the ability of governments to regulate agro-FDI in the public interest. International investment law, embodied primarily in bilateral investment treaties (BITs), was never designed to address the human rights, environmental and developmental issues that arise as a result of the activities of a foreign investor in a host country. BITs were designed primarily to protect foreign investors and not to protect host governments and host communities. Although attempts are increasingly made to introduce human rights and sustainable development principles into international investment law, progress has been limited. As the South Africa's Department of Trade and Industry put it:

---

9 Haralambous, S., Liversage, H. and Romano, M., "The Growing Demand for Land: Risks and Opportunities for Smallholder Farmers," discussion paper prepared for the 32nd session of IFAD's Governing Council, 18 February (2009).
10 *Id.*
11 World Bank, *supra* note 1, at xiv.
12 *Id.*, at Xxviii.

> Major issues of concern for developing countries are not being addressed in the BIT negotiating processes. BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development.

This paper highlights challenges to integrating ESG concerns into international investment law and practice and stresses the need for further studies into country practices in this regard.

II. TRENDS IN FOREIGN ACQUISITION OF ARABLE LAND: A NEW ASSET CLASS AND A NEW CROP OF INVESTORS

The rush for agricultural land in Africa and other developing countries underscores the fact that land has once again emerged as a new asset class, one that is attracting the attention of a new breed of investors: institutional investors and sovereign wealth funds.[13] Although there are pull factors in Africa (e.g. desire to achieve food security, create jobs, encourage technology transfer, and revive the agricultural sector), agro-FDI in Africa the past decade appear to have been driven primarily by external actors with clearly defined agenda.

A. A New Asset Class?

Land is once again a highly prized commodity. Not only is Agro-FDI on the rise, mergers and acquisition (M&A) activity in the agribusiness sector is also on the rise.[14] In June 2008, an article in Reuters asked:

> What's with farming these days? The humble, even if slightly romantic vocation, is attracting a new breed of participants as investing in farmland and agriculture becomes the latest fad in the world of investments. With financial markets in turmoil and commodity prices at record highs, traditional financial players such as investment banks and hedge funds, and even sovereign wealth funds of cash-rich emerging economies are increasingly looking at farm land as the next major investment avenu*e*.[15]

---

[13] Nils Herger *et al.*, *Cross-border Acquisitions in the Global Food Sector*, 35 EUR. REV. AGRIC. ECON. 563, 564 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1359561. (pointing to an increase in cross-border acquisition of firms in the global food sector from about $4billion in 1987 to about $50 billion in 2000).

[14] Swiss commodities trader Glencore recently acquired global wheat producer Viterra , sparking suggestions that big commodity firms are positioning themselves ahead of any possible boom. Food - The Next Commodities Boom for Australia?, CNBC.Com, 12 June 2012, http://www.greenworldbvi.com/wp-content/uploads/2011/10/Food-The-Next-Commodities-Boom-for-Australia.pdf (speculating that as the world's population continues to grow and food sources become increasingly scarce, Australia "could be in the box seat to take advantage of a possible surge in demand for agricultural products.").

[15] Santosh Menon, *Enter the new farmers*, REUTERS, 25 June 2008.

Describing the frenzy over farmland, Brian O'Keefe, senior editor, Fortune Magazine writes:

> Over the past few years hedge fund gurus like George Soros, investment powerhouses like BlackRock, and retirement plan giants like TIAA-CREF have begun to plow money into farmland - everywhere from the Midwest to Ukraine to Brazil. Canadian private equity firm AgCapita, which raised $18 million in 2008 to invest in Saskatchewan cropland, estimates that as of the first quarter of 2009, more than $2 billion of private equity money had been raised for farmland investments globally, and another $500 million was planned.[16]

Analysts believe that more investors are likely to turn their attention to land and that additional monies will be committed to the sector. According to one study, "scarcity of land is likely to continue upward pressure on prices of agricultural commodities and the value of farmland for the foreseeable future … should continue to attract private institutional capital to the sector."[17]

Foreign acquisition of lands in Africa is not new. What is new is the scale and speed of the acquisitions, the terms of acquisition, the role of international and regional development banks in spurring these acquisitions,[18] and a new emphasis "on growing edible food crops explicitly for the purpose of shipping back home to domestic markets as part of a food security strategy."[19] What is also new is the fact that many African governments are actively soliciting foreign investment in farmland and are offering attractive incentives to prospective investors.[20] In the last decade, the number of investment promotion agencies in Africa has grown significantly; many of these agencies are actively promoting FDI in agriculture.[21] Recently, the Seychelles Investment Bureau advertised a Tender Notice for agricultural land. The Tender Notice read: "The Seychelles' Government hereby invites individuals, companies; *local and international*, to submit proposals for the agricultural development of a 6.4 Ha parcel of land at Barbarons, Grand Anse, Mahe. The parcel of land at Barbarons is ideal for arable farming projects."[22] Similar invitation for FDI in agriculture has been made by investment promotion agencies in Tanzania,[23] Mauritius,[24] Madagascar, [25] Kenya,[26] and Ethiopia.

---

[16] Brian O'Keefe, *Betting the Farm*, FORTUNE MAGAZINE, 16 June 2009.

http://money.cnn.com/2009/06/08/retirement/betting_the_farm.fortune/index.htm?postversion=20090611
0

[17] HighQuest at 13, para. 36.

[18] Shepard Daniel, The Role of the International Finance Corporation in Promoting Agricultural Investment and Large-scale Land Acquisitions, Paper presented at the International Conference on
Global Land Grabbing, 6-8 April 2011

[19] Rick Rowden, India's Role in the New Global Farmland Grab (2011)

[20] Id., at 12 (noting that Primary among the pull factors for Indian investors is the invitations to Indian companies by many governments in Africa and other developing regions."

[21] For an incomplete listing of African investment promotion agencies, visit: http://www.afribiz.info/content/african-investment-promotion-agencies

[22] http://www.sib.gov.sc/pages/invopp/Tenders/AgriculturalLandAtBarbarons.aspx (emphasis added).

[23] http://www.tic.co.tz/

[24] http://www.investmauritius.com/ViewPress.aspx?PressID=314

[25] http://www.edbm.gov.mg/page-agribusiness-5-3

[26] http://www.investmentkenya.com/index.php?option=com_content&task=view&id=87&Itemid=74

Regarding the magnitude and scale of land deals occurring in Africa, accurate information is hard to come by. By some accounts, two-thirds of the land acquired by rich nation investors over the last decade is in Africa.[27] In the last five years alone, Liberia reportedly sold off more than three tenths of its entire land mass.[28] U.K.-based development agency, Oxfam, asserts that in the past decade over 700 deals equivalent in land area to Kenya or Cameroon have occurred in Africa.[29] In a recent report, Oxfam identified Ethiopia, Tanzania, Sudan, the Democratic Republic of Congo and Madagascar, as countries in Africa particularly affected by so-called land-grab.

B. Who Are the Investors?

Although the land deals in Africa vary from country to country, some common trends can be discerned including high involvement of other developing countries and emerging economies and a growing interest from institutional investors.[30]

1. Institutional Investors

Evidence suggests that private investment groups are actively investing in agricultural land in Africa and other developing countries.[31] Farmland and farm infrastructure is attracting a diverse and wide range of institutional investors. According to a 2010 study by the Organization for Economic Cooperation and Development (OECD), the new breed of investors include large financial institutions, hedge funds, private and publicly-traded real estate investment trusts (REIT) and private and publicly-listed companies.[32] The investors are also endowments, pension funds, wealthy individuals and family offices.[33] In terms of investment vehicle used, no one legal/corporate structure appears to prevail as the optimal platform for investors investing in farmland. Fund structure varies and includes private, publicly-traded, closed end, limited partnerships and separate accounts (investors allocate their investment to specific sectors).[34] Corporate structure represented also vary and include private and publicly traded companies managing funds which acquire and own farmland as well as private and publicly-listed companies which provide farm management services (leases and for absentee land owners) and may also conduct farmland acquisition and ownership activities.[35] Africa is seeing a wave of Africa-targeted private equity and hedge funds.[36] For example,

---

[27] Damien McElroy, Protest at the great African land grab, The Telegraph, 4 October 2012.
http://www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/9584931/Protest-at-the-great-African-land-grab.html

[28] Damien McElroy, Protest at the great African land grab, The Telegraph, 4 October 2012.
http://www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/9584931/Protest-at-the-great-African-land-grab.html

[29] Kim Lewis, Land Grab in Africa Threatens Food Security, VOA, 5 October 2012.
http://www.voanews.com/content/land-grab-in-africa-threatens-food-security/1521168.html

[30] Although developed countries such as Japan, Switzerland, and United States are involved in some of the land deals, the field is overwhelmingly occupied by emerging economies and other developing countries in Africa (e.g. Libya, Egypt, Tunisia), in Asia (e.g. China, India, Malaysia, and South Korea) and in the Middle East (e.g. Saudi Arabia, Kuwait, United Arab Emirates, Jordan and Qatar).

[31] HighQuest Partners, United States (2010), "Private Financial Sector Investment in Farmland and Agricultural Infrastructure", *OECD Food, Agriculture and Fisheries Papers*, No. 33, OECD Publishing. http://dx.doi.org/10.1787/5km7nzpjlr8v-en

[32] HighQuest at 6

[33] HighQuest at 16, para. 50.

[34] Id. at 9

[35] Id.

in 2011, EmVest, an Africa-focused platform, was spun out from Emergent Asset Management (EAM), an emerging markets private equity investment company.[37]

2. Sovereign Wealth Funds. Emerging Markets

Emerging economies are playing a strong and increasing role in Africa's agricultural sector. The food crisis of the last decade is putting considerable pressure on food-insecure, food-importing countries to search for more predictable sources of food supply for their growing population.[38] On this list are countries such as India, China, Korea, Saudi Arabia, Korea, Libya and Japan.[39] To these countries, outsourcing of food production is part of a long-term strategy to ensure predictable sources of food at affordable prices. Not surprising, governments are increasingly taking steps to facilitate attractive land deals.[40] Indian Government and Indian companies have reportedly acquired 63,000 sq km land, an area almost twice the size of Kerala, in Africa, South America and Southeast Asia.[41] By one account, "India has two deals in Indonesia totaling about 79,847 hectares (ha), one deal in Cambodia totaling 7,635 ha, two deals in Lao PDR totaling 52,207 ha, 15 deals in Ethiopia, three deals in Madagascar and one deal each in Sudan, Cameroon and Mozambique."[42] Widening consumption-production gap in many emerging economies is another factor fueling the growing demand for farmland in Africa and around the globe.[43]

3. The China Factor

China's emergence in the global agribusiness markets is cited as the single most important factor driving the rush for farmlands in many developing countries. Factors such as rising middle class, growing demand for food, shrinking arable land, concerns about water scarcity, is fueling China's increasing role in agro-FDI. According to a 2011 paper entitled "China's Appetite for Protein Turns Global," from Morgan Stanley:

---

36 African agricultural finance under the spotlight, 1 September 2010. Africa: The Good News. http://www.africagoodnews.com/business/trade-and-investment/2076-african-agricultural-finance-under-the-spotlight.html (observing that commodity traders are circling the African market and that Armajaro, one of the world's biggest cocoa traders, is believed to be planning a private equity fund this year to acquire land, storage and transport infrastructure.).

37 TLG buys into EmVest, Private Equity Africa, 5 October 2012. http://www.privateequityafrica.com/uncategorized/tlg-buys-into-emvest/

38 "Rich countries launch great land grab to safeguard food supply." *The Guardian*. November 22, 2008.

39 Seized, supra note 1. ; Ramesh, M. (2009) "Solvent extractors want Govt aid to buy farmland abroad," The Hindu Businessline, 27 October (2009); Ramsurya, M.V., "Indian companies buy land abroad for agricultural products," Economic Times (New Delhi), 2 January (2010).

40 Rick Rowden, India's Role in the New Global Farmland Grab (2011); Vashisht, D., "Punjab's African plot," Indian Express, 11 July (2010); Woerz, Eckart, Pradhan, Samir, Biberovic, Nermina and Jingzhong, Chan, *Potential for GCC Agro-Investments in Africa and Central Asia*, Gulf Research Center, September 2008 (GCC stands for Gulf Cooperation Council); Media Line, *Saudi Arabia Launches $5.3b agricultural fund*, 27 January 2009.

41 Kumar Sambhav Shrivastava, *India inc involved in land grab abroad too, says international non-profit*, Down to Earth, 18 December 2012 (citing data presented by international non-profit Rights and Resource Initiative (RRI)).

42 Id,

43 Morgan Stanley, The China Files: China's Appetite for Protein Turns Global, Morgan Stanley Blue Paper, 25 October 2011. P. 6 http://fa.morganstanleyindividual.com/public/projectfiles/7cc81c12-ebfd-4ded-b492-e70c11736d0f.pdf (observing that as China's agricultural demand has grown, the country has faced difficulty in expanding its production capabilities at a similar rate.).

> An escalating proportion of China's household income is being spent on food. As China's per-capita GDP continues to climb, so does its spending on more—and higher quality— food. The dramatic growth in demand for meat (up 15% in the last three years alone), and, in turn, for livestock feed, has strained China's self-sufficiency and created an ever-widening consumption-production gap in the country's grain complex. Constraints on local production mean increased demand for agricultural products from around the globe. Today, China feeds one-fifth of the world's population with only 6% of the world's fresh water and 0.08 hectares of arable land per capita (less than half the global average).[44]

The increase in the spending power of Chinese citizens and high rate of urbanization in the country are factors contributing to the growing demand for food in China.[45] Chinese urban residents reportedly spend 267% more per capita on food than rural residents. Morgan Stanley predicts that "A further push towards urbanization in the coming years will continue to drive outsized demand for agricultural commodities as the combination of greater availability of western food options inside China's cities and higher incomes among urban residents support a diet higher in protein and fat."[46]

C. Motivating Factors

The motivations for agro-FDI are as varied as the types of investors involved. For institutional investors, the primary motivation is profit.[47]

1. *Profit.*[48]

To most investors, the motivation is profit maximization.[49] According to one article, "Investment banks and hedge funds are mopping up vast tracts of agricultural land around the world, hoping to ride the so-called "commodities supercycle" that has lifted prices of everyday agricultural commodities such as wheat, rice, soybeans and corn to record highs."[50] To Jim Rogers, Chairman of Singapore-based Rogers Holdings, "You've got to buy in a place where it rains, and you have to have a farmer who knows what he's doing. If you can do that, you will make a double whammy because the crops are becoming more valuable." According to Hedge-fund manager

---

[44] Morgan Stanley, *The China Files: China's Appetite for Protein Turns Global*, MORGAN STANLEY BLUE PAPER, 25 October 2011. http://fa.morganstanleyindividual.com/public/projectfiles/7cc81c12-ebfd-4ded-b492-e70c11736d0f.pdf

[45] Morgan Stanley (Noting that in 1970, only 17% of the country's population (or 144 million people) lived in cities but that today, about 50% of the total population—live in an urban environment, according to government estimates).

[46] Morgan Stanley

[47] Santosh Menon (noting that the motivations for the rush for land is varied — from pure financial punting to concerns about food security.).

[48] Kate Burgess, Chris Hughes and James Mackintosh, *Hedge funds muck in down on the farm*, FINANCIAL TIMES, 26 April 2008. http://www.ft.com/intl/cms/s/0/8f1cb9ca-1329-11dd-8d91-0000779fd2ac.html#axzz2Gcwc02f0 (stating that investors "believe the world is entering an era of high food prices where farms will once again be profitable, after two decades of being starved of investment.").

[49] Kate Burgess, Chris Hughes and James Mackintosh, Hedge funds muck in down on the farm, Financial Times, 26 April 2008. http://www.ft.com/intl/cms/s/0/8f1cb9ca-1329-11dd-8d91-0000779fd2ac.html#axzz2Gcwc02f0 (stating that investors "believe the world is entering an era of high food prices where farms will once again be profitable, after two decades of being starved of investment.").

[50] http://farmlandgrab.org/post/view/7171

Stephen Diggle, "Everyone said, 'Buy gold.' But at the end of the day, you can't eat it. If everything else goes and I just have these farms, it makes me moderately wealthy."[51]

2. *Inflation Hedging*

Related to the goal of profit maximization is the desire among investors to proactively hedge inflation. According to one study, "[h]istorically, farmland investments have provided an effective hedge against inflation, with returns in the U.S. highly correlated to the Consumer Price Index."[52] Some analysts point to value of Brazilian farmland which has reportedly appreciated at a compound rate of 12% over the last 15 years.[53] As one article in Bloomberg Market Magazine put it:

> "Investors find in farmland a respite from the cyclical price swings of the commodities market. Since 1970, there have been at least four price jumps of at least 100 percent that were followed by steep declines in the S&P agriculture commodities index. By contrast, the average value of an acre of farmland tracked by the U.S. Department of Agriculture has been on a mostly steady climb from $737 in 1980 to $2,350 in 2011."

3. *Long-term Strategy*

Overall, investors see farmland investment as a good long-term investment. Experts project "unprecedented growth in demand for agricultural crops over the next decade and beyond."[54] According to one analyst, "Even accounting for potential improvements in production yields resulting from improved genetics and agronomic practices, significant additional acreage will need to be brought into production."[55] Not surprising, many of the new investors are banking on continuing rise in food prices and are hoping to cash in when the time is ripe. "It is an unashamed bet on the continuing rise in the price of food stuffs and the rapid recovery of the farming industry" one hedge fund manager is reported as saying.[56]

4. *Safety. Low/Negative Correlation to Other Assets*

For institutional investors, agricultural investors are safe compared to traditional investments.[57] A major attractive feature of farm land investing for long-term investors is the low correlation between returns on farmland investments and the broader markets. Over the past 10

---

51 Id. (The hedge fund Diggle co-founded, Artradis Fund Management Pte in Singapore, suffered about $700 million in losses. He closed it in March and opened another Singapore-based hedge fund, Vulpes Investment Management Pte. Diggle plans to incorporate his five farms into an investment management group run by Vulpes.").
52 HighQuest, p. 17, para. 55.
53 Id.
54 HighQuest 18, para. 57.
55 Id.
56 Burgess et al.
57 Boyce Thompson, AgWeb.com Editorial Director, Investing in Farmland Not Guaranteed, Ag Web, 28 Novembr 2012. http://www.agweb.com/article/investing_in_farmland_not_guaranteed/ (observing that Institutional investors "have settled on agricultural land as a lucrative, relatively safe investment vehicle.").

years, the correlation of the quarterly returns on the NCREIF with the DJIA has been 0.107 and with the S&P 500 it has been 0.174.[58]

D. Conclusion

Today, agro-FDI in Africa is driven largely by institutional investors and corporations whose primary motivation is profit-making. There are two possible consequences to this. First, compared to traditional investors (e.g. in the extractive industry), institutional investors have been largely outside the radar of civil society organizations and do not appear to have clear track record of respecting international law relating to human rights or the environment. Second, the profit-driven nature of recent investments also means that sustainable development objectives are not likely to be prioritized when deals are structured.

Although developed countries are investing in farmlands in Africa, developing countries in general and emerging markets in particular are particularly active participants. The South-South dimension to land deals in Africa suggests the need for policy-makers and scholars to pay closer attention to fairness and accountability issues in South-South trade and investment economic relations. South-South cooperation (SSC) is growing and there are growing talks of a "new geography" of trade and investment.[59] This new geography of world trade has been described as "one of the major features of the recent globalization process."[60] In terms of trade and investment flows, South-South links have witnessed tremendous growth. The last decade saw an intensification of interregional and intraregional trade and investment cooperation among developing economies.[61] In the last decade, the world saw new major global players emerging from among developing countries[62] and also witnessed widening and deepening economic activity among developing countries. Proponents believe that South-South economic cooperation has the potential to deliver significant development gains to participating countries. The increase in trade and investment among developing countries raises urgent and critical questions about the evolving normative and institutional framework for South-South economic relations and the mechanisms that are in place to ensure accountability in the system. Questions must be increasingly asked about the way power is used and possibly abused in South-South economic relations and the mechanisms that

---

[58] HighQuest p. 18, para. 56

[59] The term "South" is used here to refer to developing and least-developed countries located primarily in the Southern Hemisphere in Africa, developing Asia, Latin America, and the Middle East. However, the North-South divide is not wholly defined by geography. Moreover, the author acknowledges that the terms "North" and "South" are increasingly becoming outdated. As has been rightly noted, "As nations become economically developed, they may become part of the "North", regardless of geographical location, while any other nations which do not qualify for "developed" status are in effect deemed to be part of the "South." South-South Cooperation (SSC) as used in this chapter refers to "cooperation activities among the developing countries on the basis of solidarity in a number of areas, including trade and investment, financial, technical and technological cooperation and the sharing of knowledge, experiences, policies and best practices." See UN LDC IV and OHRLLS, Background Paper '*Harnessing the Positive Contribution of South-South Co-operation for Least Developed Countries' Development.*" New Delhi, 18-19 February 2011.

[60] UNCTAD, 'The growth of "South-South" trade: it's not just the geography but the content that matters', <UNCTAD/PRESS/PR/Accra/2008/013>

[61] United Nations Conference on Trade and Development, UNCTAD XII: *The Accra Accord* and the Accra Declaration (2008), para. 52. http://unctad.org/en/docs/iaos20082_en.pdf (observing that "South–South cooperation has grown in importance, supported by a confluence of policy- and market-related factors")[hereinafter "Accra Accord"). *See also* Alan Beattie, 'BRICS: The changing faces of global power', *Financial Times*, 17 January 2010, <http://www.ft.com/cms/s/0/95cea8b6-0399-11dfa601-00144feabdc0.html>.

[62] *See generally* Dominic Wilson and Roopa Purushothaman, 'Dreaming With BRICs: The Path to 2050,' *Goldman Sachs Global Economics Paper* No: 99, 2003.

are in place or should be in place to constrain abuse of power if and when they occur. Questions must be asked about the cost and benefit of South-South trade and investment links for poor developing countries particularly the least developed countries (LDCs) in Africa. For example, does South-South trade and investment offer real opportunities for countries in Africa to address core development challenges, grow their economies and integrate into the global economy? Is Africa-South trade replicating the unhealthy pattern of trade that has long characterized Africa's relationship with the North? Will South-South trade and investment contribute to a more balanced process of global economic governance or the restructuring of the normative architecture of the global economic system?

III. FDI AND LAND INVESTMENT CONTRACTS IN AFRICA: A CRITIQUE

To critiques, FDI in agricultural land in Africa raises a host of human rights and environmental issues. The impact of FDI in agricultural land on the rights and welfare of vulnerable groups (e.g. women) and vulnerable communities (e.g. indigenous communities) is of particular concern. Attendant risks associated with entry by TNCs into developing-country agriculture are many and include:

> "…the possible disruption of traditional farming and loss of livelihood for subsistence farmers or other disadvantaged groups, such as indigenous peoples; the concentration of the industry into fewer hands, with the danger of market power being exercised against farmers and consumers; potential environmental degradation, for instance arising from the introduction of water-hungry "industrial" methods in agriculture; and the wider dangers of dependence on foreign investors, including concerns about "land grabbing" leading to neo-colonial relations between countries producing and consuming agricultural produce."[63]

In a recent study, the Center for Center for Human Rights and Global Justice at New York University conclude:[64]

> Large-scale land investments can negatively affect many human rights, including, but not limited to: the right to water; the right to participation; the rights of indigenous persons; the right to adequate housing, including the right to not be forcibly evicted from one's home; the right to an adequate standard of living; the right to non-discrimination and equality; the right to self-determination; the right to development; and the right to adequate remedy.[65]

In short, FDI in land has the potential to violate economic and social rights as well as civil and political rights?[66] Unless carefully managed and regulated, FDI in agricultural land has the potential

[63] UNCTAD, WORLD INVESTMENT REPORT 2009, at 94
[64] Center for Human Rights and Global Justice, *Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment* (New York: NYU School of Law, 2010).
[65] *Foreign Land Deals and Human Rights*, at 6.
[66] Leon Kaye, *The global land grab is the next human rights challenge for business*, THE GUARDIAN, Tuesday 11 September 2012. http://www.guardian.co.uk/sustainable-business/global-land-grab-human-rights-business (noting that "The opaque

to cause massive population displacement. Food insecurity, environmental destruction, violence against women, feminization of poverty as a result of loss of means of livelihood, conflict and wars, forced labor, child labor, illegal expropriation of natural resources, and widespread poverty have been cited as direct and indirect result of uncontrolled FDI in land.

The question taken up in this section is whether and to what extent countries in Africa are using land investment contract to mitigate risks associated with agro-FDI... Why examine land investment contracts? Land investment contracts are important because they are one mechanism that policy makers can proactively use to maximize the benefits associated with FDI in agricultural land and to mitigate associated risks. Policy makers in SSA can creatively use the land investment agreements they negotiate to promote more inclusive agricultural models among large-scale investors and to address core ESG concerns. As IIED rightly put it:

> Ultimately, if international land deals are to boost opportunities and mitigate risks, each project will need to be properly scrutinized, and have the right terms and conditions. These will have to consider how risks are assessed and mitigated (for instance, with regard to project location), what business models are used (from plantations to contract farming, through to local people having an equity stake in the project), how costs and benefits (including food produced) are shared, and who decides on these issues and how. So it is important to 'unpack' details on specific deals to examine how they tackle these issues.[67]

An examination of the land agreements is important because compared to BITs, investment contracts are generally regarded as the lesser of two evils. Unlike BITs that are generally one-sided in the sense that they typically accord rights to investors but do not impose any obligations on them, a good contract can be crafted to balance the rights and obligations of the parties. In other words, a carefully negotiated and drafted investment contract can be used effectively to supplement domestic law in the regulation of investor-state relations "because they allow for greater care to be taken and greater certainty to be achieved in the framing of the parties' legal rights and obligations."[68] An examination of the land investment contracts agreements allows for better assessment of the costs and benefits of recent land deals and the overall fairness of the deal. Foreign investors are interested in land in Africa not only because they are cheap but also because of the financial and other incentives that governments in the region offer foreign investors.[69] Fiscal incentives offered frequently range from extensive tax holidays on agricultural investment, zero import duty, 100 percent equity ownership, to guarantee of full repatriation of profit. The question to ask is, are these incentives worthwhile for the countries and the communities affected by agro-FDI? What do host countries get in exchange for the incentives they offer?

---

conditions under which these available or empty lands abruptly switched ownership displaced some of the world's poorest families, destroyed lives, and disrupted many communities' food security.").

[67] 'Land grabs' in Africa: can the deals work for development?, IIED Briefing. (September 2009). http://pubs.iied.org/17069IIED.html?k=land grab

[68] *Public Statement on the International Investment Regime (31 August 2010).* Available at: http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf

[69] Tanzania, for example, offers both fiscal and non-fiscal incentives which are provided for under four major schemes/legislations. Tanzania Investment Act 1997, Export Processing Zones Act 2002, Mining Act 1998; Petroleum Exploration and Production Act 1980, and Special Economic Zones Act 2005. See Tanzania Investment Center, Investment Incentives in Tanzania, http://www.tic.co.tz/

- Are the contracts drafted with a view to securing maximum benefit for host countries and furthering sustainable development in host countries?

- Are contracts drafted to proactively address the ESG issues implicated in agro-FDI?

- Do the contracts provide mechanism for managed renegotiation by the investor and state so as to accommodate significant changes in the circumstances of the underlying agreement?[70]

The conclusion reached in this section is that based on the contracts examined, policy-makers are not using investment contracts effectively to distribute risks, costs and benefits associated with agro-FDI. None of the promised outcome of agro-FDI (e.g. job-creation, technology transfer, capital contribution, rural development, linkages with domestic industries, infrastructure development, export growth, etc.) are mentioned in the contract in clear terms and none is entrenched in terms that suggest that they are legally binding. In addition, broader ESG issues and concerns are not addressed in clear terms.

The focus is primarily on Ethiopia. At least ten land purchase/sale agreements are examined in this Article: (i) the agreement between Ministry of Agriculture of Ethiopia ("Ministry") and Karuturi Agro Products PLC, an Indian company (*Karuturi Contract*);[71] (ii) the agreement between the Ministry and Saudi Star Agricultural Development Plc. (*Saudi Star Contract*);[72] (iii) the agreement between the Ministry and Hunan Dafengyuan Agriculture Co. Ltd., a Chinese company (*Hunan Contract*);[73] (iv) agreement between S & P Energy Solutions plc. and the Ministry of Agriculture and Rural Development of FDRE (*S&P Energy Contract*); (v) the contract between Whitefield Cotton Farm plc. and the Ministry of Agriculture and Rural Development of FDRE (*Whitefield Contract*); (vi) the contract between BHO Bio Products plc. and the Ministry of Agriculture and Rural Development of FDRE (*BHO Bio Contract*); (vii) contract between Sannati Agro Farm Enterprises Pvt. Ltd (Ethiopia Branch) and the Ministry of Agriculture and Rural Development of FDRE (*Sannati Agro Contract*); (viii) the contract between Ruchi Agri plc. and the Ministry of Agriculture and Rural Development of FDRE (*Ruchi Contract*); (ix) the contract between CLC industries plc. and the Ministry of Agriculture and Rural Development of FDRE (*CLC Contract*), and the contract *Between Ministry of Agriculture and Rural* Development and Verdanta Harvest PLC (*Verdanta Contract*).

The focus in this section is not on the contracting process although this deserves urgent attention. Rather the focus of this section is specifically on the legal implications of the contract as drafted.

A. Overview of the Contracts

[70] According to the 2010 *Public statement on the international investment regime, i*nvestment contracts " "should provide a mechanism for managed renegotiation by the investor and state, based on a fair and balanced process in which adequate support and resourcing is available to both parties, so as to accommodate significant changes in the circumstances of the underlying agreement.

[71] *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and Karuturi Agro Products Plc*., *executed on 25th October 2010*.

[72] *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and Saudi Star Agricultural Development Plc., executed on October 25, 2010*.

[73] *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and Hunan Dafengyuan Agricultural Co., Ltd., executed on November 25, 2011*.

1. The Karuturi Contract

Karuturi is a private limited company incorporated under the laws of Ethiopia to engage in palm oil production, maize, and rice farm development under the laws of Ethiopia. Karuturi is a subsidiary of Bangalore-based food company, Karuturi Global Ltd., a company incorporated in India in 1994.[74] According to information on the company's website, Karuturi Global is the largest producer of cut roses in the world and is increasingly branching into agri-business.[75] On its Website, Karuturi Global boasts that it has "acquired about 3,11,700 hectares of land in Ethiopia for the cultivation of Cereal Crops, Palm oil plants, sugar cane and vegetables, rendering Karuturi as the largest agricultural land bank owners in the world.[76] According to Karuturi Global: "The acquisition of large tracts of land in Ethiopia has set the stage for [Karuturi] to become a complete agriculture production company. [Karuturi's] goal now is to make a significant contribution to alleviate the global and African food crisis."[77]

The Karuturi Contract has 20 Articles in total. Pursuant to Article 1 (Scope of Agreement), the Karuturi Contract establishes a "long tem land lease of rural land for development palm, cereals and pulses farm on the land measuring 100,000 hectares." The lease is for 50 years "but can be renewed for additional years mutually agreed between the parties."[78] The annual lease rate per hectare is birr 20 (USD 1.16) and the total annual payment comes to only 2,000,000 Birr (USD 116,488.88). Thus, the total amount payment comes to only Birr One Hundred Million (USD 5,824,444.10). Under the contract, Karuturi has the right to develop the land "for main crop palm, cereal and pulses farming."[79]

2. The Hunan Contract

The Hunan Dafengyuan Agriculture Co, Ltd. is a private limited company incorporated in China. The lessee (Hunan) is a business organization incorporated to engage in development of sugar cane plantation and sugar processes. The Agreement has 19 articles in total. The Agreement establishes "a long term land lease of rural land for Sugar Cane farming and related activities."[80] The agreement covers land measuring 25,000 hectares located in Gambella Regional State. In addition to the land, the Agreement grants to the lessee "all rights of easement of amenities, fittings, fixtures, structures, installations, property or other improvements standing thereon."[81] The lease agreement "is made for period of 40 years but can be renewed for additional years mutually agreed between the parties."[82] The annual lease rate per hectare of land is fixed at Birr 158 (USD 9.17) with a total annual amount of Birr 3,900,000 (USD 226,354.73) and a total amount payable over the duration of the contract period standing of Birr 158,000,000 (USD 9,170,268.44).

3. The Saudi Star Contract

---

[74] Karuturi, *Overview*, available at:
http://www.karuturi.com/index.php?option=com_content&task=view&id=12&Itemid=211

[75] Id.

[76] Karuturi, *Karuturi Global Ltd Q1 FY 2012 results* ,
http://www.karuturi.com/index.php?option=com_content&task=view&id=185&Itemid=227

[77] Id.

[78] Karuturi Contract, Article 2.1.

[79] *Id.*, Article 3.1

[80] Hunan Contract, Article 1.

[81] Id., Article 1.1.

[82] Id., Article 2.1

The Saudi Star Contract is an agreement between the Ministry and Saudi Star Agricultural Development Plc., a private limited liability company incorporated under Ethiopia laws. Saudi Star, a food company owned by billionaire Sheikh Mohammed al-Amoudi, reportedly plans to invest $2.5 billion by 2020 developing a rice-farming project in Ethiopia.[83] The contract is a 50 years lease of 10,000 hectares (24,711 acres) in Ethiopia's western Gambella region at a cost of 158 birr ($9.42) per hectare annually.

4. S & P Energy Solutions Contract

S&P Energy Solutions is a private limited company incorporated under the laws of Ethiopia to engage in bio fuel tree development. The Ethiopian Ministry of Agriculture and Rural Development ("Lessor") entered into a fifty-year land lease with S&P according to the contract's 20 articles. The parties can mutually agree to renew the lease. The lease land includes 50,000 hectares in Benshangul Gumuz Regional State that S&P acquired for the development or cultivation of bio fuel, edible oil and value added crops. The lease rate per hectare is birr 143.4 a year. The total rate is birr 7,175,000 a year. The overall contract total is birr 358,750,000. Article 2 also includes a provision to increase or decrease the annual rate based on land development.

5. Whitefield Cotton Farm Contract

The Whitfield contract is a land lease agreement between the Ministry and Whitfield Cotton Farm PLC, a private limited company incorporated under Ethiopian law to engage in cotton farm development. The contract is a 25-year lease for 10,000 hectares in Ethiopia's Sothern Nations, Nationalities and Peoples Regional State for cotton farming and related activities. The lease rate is birr 158 ($8.52) per hectare. This comes to an annual payment of birr 1,580,000 ($85, 221.82) and a total payment of 39,500,000 ($2,130,545.52). The lease requires Whitfield to develop one fourth of the land within the first year and the entire plot in four years.

6. BHO Bio Products Co. Contract[84]

The BHO BIO Products Co. Contract is a lease agreement "to establish a long term land lease of rural land for farming of cereal crops, pulses and edible oil crops and related activities." BHO Bio Products PLC is a private limited company incorporated under the laws of Ethiopia. The land in question measures 27,000 hectares and is located in Gambela Regional State. The contract is for a period of 25 year "but can be renewed for additional years mutually agreed between the parties."[85] The annual lease rate of the land is set at birr 111 ($5.97 USD) for an annual amount of birr 2,991,000 (160,761.19 USD) and a total contract payment of birr 74, 925, 000 (4,027,091.89 USD).

7. Sannati Agro Farm Contract

---

[83] William Davidson, *Saudi Billionaire's Company Will Invest $2.5 Billion in Ethiopia Rice Farm*, 23 March 2011, http://www.bloomberg.com/news/2011-03-23/saudi-billionaire-s-company-will-invest-2-5-billion-in-ethiopia-rice-farm.html

[84] *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and BHO BIO Products Private Limited Company, executed on November 25, 2011.*

[85] Id., ¶ 2.1.

Sannati Agro Farm Enterprises is a private limited company incorporated under the laws of Ethiopia to engage in rice and rational pulse and cereal crops farm development. The Ethiopian Ministry of Agriculture and Rural Development ("Lessor") entered into a twenty-five-year land lease with Sannati Agro according to the contract's 20 articles. The parties can mutually agree to renew the lease. The lease land includes 10,000 hectares in Gambela Regional State that Sannati Agro acquired for the development or cultivation of bio rice, pulses, and other rotational crops. The lease rate per hectare is birr 158 a year. The total rate is birr 1,580,000 a year. The overall contract total is birr 39,500,000.

8. **Ruchi Agri Contract**[86]

The Ruchi contract is a Land Lease agreement between the Ministry and Ruchi Agri PLC, a private limited company incorporated under Ethiopian Laws to engage in Soybean farm development. The contract is a 25 years lease for 25,000 hectares in Ethiopia's Gambela Regional State for the farming soya beans, other crops, and related activities. The lease rate per hectare is birr 111 ($5.99). This is a payment of birr 2,755, 000 ($149, 677.5) annually for a total payment of birr 69, 375, 000 ($3,741,939.13) over the 25 years. The contract provides the Ministry with a right to increase payment after 10 years by up to 20%. The contract requires Ruchi to develop 10% of the land within the first year and the entire plot within 4 years.

9. **CLC Industries Contract**[87]

The CLC Industries Contract is a Land Lease Agreement between the Ministry and CLC Industries. CLC is a private limited company incorporated under the laws of Ethiopia to engage in cotton farming and textile manufacturing industry under the relevant laws of Ethiopia. The CLC Contract is for a 50 year lease of 25,000 hectares of Ethiopian land located in the Amhara and Benishangul gamuz Regions for the purpose of cultivation or development of cotton farming. The contract grants CLC the right to develop the land for major crop cotton farming and subsidiary crops of cereals. The Contract gives CLC a 5 year grace period for rent payment. Then CLC must pay the ministry birr 665.85 ($35.91) per hectare, which is birr 16, 646, 250 ($897,863.12) per year. Thus, the total amount of payment comes to birr 832,312,500 ($44,893,156.16). CLC is required to develop one tenth of the land within one year and the entire plot within 7 years

10. **Verdanta Contract**[88]

The agreement is a lease agreement "to establish a long term land lease of rural land for Tea and allied farming and related activities." The land in question measures 3,012 hectares and is located in Gambela Regional State. Verdanta is a private limited company incorporated in Ethiopia with office in Ethiopia. The land lease agreement is for 50 years "but can be renewed for another additional years mutually agreed between the parties." Regarding payment, the agreement provides for "a five years grace period for the land rent." The rent for the five years is to be prorated over the

---

[86] *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and Ruchi Agri Plc. (Ruchi Contract)*

[87] *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and CLC Industries PLC (CLC Contract)*

[88] *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and Verdanta Harvest PLC (Verdanta Contract).*

remaining years of the lease. The annual lease rate is set at Birr 111 for a total contract payment of Birr 16, 716,600 (898488.95 USD) and an annual payment of Birr 334, 332 (17,969.78)

11. **Varum Contract**[89]

The contract is between Varun Agriculture SARL, an agribusiness company, and thirteen different plains that are represented by their individual presidents. The owners of the land formed the "Association of Persons", as authorized holders of the land in the SOFIA, and agreed to give the land to Varun for the development or cultivation of rice, corn, wheat, pulses, fruits, vegetables and other crops. The parties entered into a fifty-year land lease and can mutually agree to renew the lease.

The lease land includes 170,914.93 hectares in the SOFIA Region of Madagascar. The Association agrees to sell the share of cultivated products to Varun at the prevailing local market price. Under the contract, the Association also obliges to agree "to all the decisions of the VARUN AGRICULTURE SARL related to cultivation and growing of any agricultural products in the alloted regions and will not in any manner interfere, directly or indirectly, in the workings of VARUN AGRICUTURE SARL or technology/other inputs or resources used by them."

B. A Closer Look at the Contracts

1. Food Security

One of the greatest concerns regarding large-scale acquisition of land by foreign investors is the likely negative impact on food availability and accessibility.[90] In a report, *Our land, Our lives*, Oxfam assert that FDI in land in Africa potentially threaten the livelihoods of 80 million small landholders, farmers and pastoralists.[91] Food security issues arise when land is acquired to grow food exclusively for export markets, when vast tracts of arable land are acquired by investors but are left uncultivated long after they are purchased, and when local food production is disrupted as a result of massive population displacement. According to the UN Special Rapporteur on the Right to Food:

> The need to preserve food security within the host country should be taken into account proactively, in the negotiation of the investment agreements concerned. It should be ensured that the revenues accruing from the investment will be at least sufficient to procure food in volumes equivalent to those which are produced for exports. Ideally, these agreements should include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels.

On the positive side, the contracts do not contain "export only" provisions. Furthermore, the contracts contain clauses designed to ensure that lands acquired are actually utilized for agricultural purposes and that they are utilized in a timely manner. Thus, Article 4 of the Karuturi Contract stipulates that the lessee "shall in no way make any unauthorized use of the leased land

---

[89] *Contract Farming Between Varun Agriculture SARL and Each Association of 13 (Thirteen) Different Plains (Varun Contract).*
[90] Kim Lewis, Land Grab in Africa Threatens Food Security, VOA, 5 October 2012. http://www.voanews.com/content/land-grab-in-africa-threatens-food-security/1521168.html
[91] OXFAM, Our Lives, Our Land, Oxfam Briefing Note (2012).

beyond the predetermined purpose and objective or plan … without the express consent of the lessor in writing." Furthermore, lessee cannot transfer the land or properties developed in the land in favor of any other company or individual "[u]nless 75% of the project land is developed." Similarly, the Hunan Contract provides that the Lessee "is expected **to start to develop** the land within six months from the date of execution of the land lease Agreement."[92] The Lessee is required to "provide **correct data** and investment activity report **upon request** by the ministry of Agriculture and Rural Development."[93] "Unless 75% of the project land is developed the lessee has no right to transfer the land or properties developed on the land in favor of any other company or individual"[94] Article 4 of the S & P Energy contract does permits S&P to transfer the land or developed properties to any company or individual if S&P develops at 75% of the land.

On the negative side, the contracts do not oblige the investors to sell any proportion of their harvest in the domestic market. The contracts do not provide that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels. Under the Varun Contract, Varun consents to use "good technology" and to respect traditions and disciplines of the region. However, the contract also stipulates that Varun can "sell the cultivated products or produce of lands to any party and in any manner." Varun agreed to give 30% of the harvest to the region and to buy that share from the owners at the prevailing market rate, and to sell the produce in a specific manner. In the absence of such a provision stipulating that a certain amount of crops produced must be sold in the host country, any future attempt to compel a lessee to sell in the host country could be deemed an act tantamount to expropriation.

The termination clauses in the contracts may also have an impact on the availability of food in Ethiopia in the future. A sudden termination of a contract followed by the abrupt departure of a lessee from the host country could seriously affect domestic food supply. Under the Karuturi Contract, the lessee has the right to terminate the agreements "subject to at least six months prior written notice."[95] The lessee apparently can terminate for any reason or for no reason whatsoever. The Hunan and Saudi Star agreements allow the lessee to terminate "subject to at least six months prior written notice *upon justified good cause*."[96] "Justified good cause" is not defined in most of the contracts and examples of what could count as justified good cause are not given.

2. Water Rights

Large-scale acquisition of agricultural land in Africa can potentially undermine the availability and accessibility of water. According to the Transnational Institute:

> Land grabbing and water grabbing are deeply intertwined. Investors in large scale agricultural projects are unlikely to grab the land needed for planting crops, without also ensuring that the large volume of water that will be needed to guarantee high yields is stable and secure. Some research has shown how

[92] Hunan Contract, Article 3. *Emphasis added.*
[93] Id.
[94] Id.
[95] Karuturi, Article 3.7; Saudi Star, Article
[96] Hunan Contract, Article 3.6; Saudi Star Contract, Article 3.6; Emphasis added.

> this water factor is often part of the land lease or purchase contracts between the investors and governments.[97]

Concerns regarding water availability and accessibility arise in situations where water is the main target of an investor (e.g. dam construction issues) as well as in situations where water is not the main target but is considered vital to the success of an investment project (e.g. agricultural production).[98] The impact of agro-FDI on water rights and water use is a major problem in Africa.[99]

The contracts examined do not address water rights or water use. The contracts do not preserve prior user-rights over local water supply systems. On the contrary, a provision common in many of the Ethiopian contracts confers on the lessee, the right to build infrastructures such as dams. While some require that lessee obtain permits prior to building, others do not appear to mention the need to obtain permits. Article 3.2 of the Karuturi contract confers on the lessee the right to:

> "Build infrastructure such as dams, water boreholes, powerhouses, irrigation system, roads, bridges, …fuel/power supply stations/out lets … **at the discretion of the 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**."[100].

There are many problems associated with granting an investor broad infrastructure development rights. First, such expansive rights relating to dams, water boreholes and irrigation systems can have serious impact on neighboring communities especially when the host country lack the capacity to routinely and consistently supervise the activities of a lessee and does not have adequate laws on water rights and water use. Expansive rights regarding dam construction are dangerous if they do not address the potential social and environmental consequences of such a project.

3. Environmental Conservation

Do the contracts contain provisions that address the possible negative impact of agro-FDI on the environment? Do the contracts address issues such as soil depletion, pollution from agrochemicals, or impact on biodiversity? On the positive side, most of the contracts examined impose on the lessee the obligation to conduct environmental impact assessment and to conserve the environment. For example, Article 4:1(d) of the Karuturi contract stipulates that the Lessee shall bear the obligation to provide good care and conservation of the leased land and natural resources thereon, with particular obligation to: "conserve tree plantation that have not been cleared for earth works," "apply appropriate working methods to prevent soil erosion in slopping areas," "[o]bserve

---

97 Transnational Institute, The Global Land Grab: A Primer 13 (2010).

98 Id. (observing that in the past, cases where water is the main target have "typically involved the massive expulsion of people and flooding of farm and grazing land, fields and forest.).

99

J. Franco and S. Kay (2012), The Global Water Grab: A Primer http://www.tni.org/primer/global-water-grab-primer?context=69566; L.Mehta, GJ Veldwisch and J. Franco (2012), Introduction to the Special Issue: Water Grabbing? Focus on the (re) appropriation of finite water resources. In *Water Alternatives* 5(2) http://www.water-alternatives.org/index.php?option=com_content&task=view&id=213&Itemid=1

100 S & P Contract, Article 3(2); Whitefield Contract, Article 3(2)

and implement the entire provision of legislation providing for natural resource conservation," and "conduct environmental impact assessment and deliver the report within three months of this agreement."[101] The Hunan Contract requires the lessee upon entering the lease contract to "submit an advance action plan as regards the use of the leased rural land" to the Ministry.[102] Article 4 of the S & P Energy Contract requires S&P to conserve tree plantations unless otherwise indicated, prevent soil erosion, conserve natural resources, conduct an environmental impact assessment, and remove assets installed on the land upon expiration or termination of the contract.

On the negative side, none of the contracts provide for an effective, independent and participatory *ex post* impact assessment at pre-determined interval. Instead of assessment at pre-determined intervals, the contracts require the lessee to submit activity reports "upon request." The Hunan Contract stipulates that the Lessee is obliged to "provide correct data and investment activity reports upon request by the ministry."[103] The problem with provisions requiring a lessee to submit activity reports "upon request" is that where domestic institutions are weak and human and technical resources are limited, such requests are rarely ever made. Even when such requests are made, the relevant government agencies frequently lack the human and technical expertise needed to critically evaluate the quality of the reports that are submitted. Indeed, the overall usefulness and effectiveness of contractual provisions relating to environmental conservation would depend in large part on the ability of the host government to routinely monitor the activities of companies for compliance. Investigation by non-governmental organizations such as the Oakland Institute have found that, in Ethiopia, contractual provisions calling for environmental impact assessment are routinely ignored by all sides.

4. Employment

The contracts examined were clearly not negotiated with job creation in mind. None of the contracts have local content provisions requiring the lessee to prioritize local workforce.[104] The contracts do not prioritize farming systems that are labor intensive and might induce job creation. On the contrary, common in the contracts examined is a clause which confers on lessee the right to "[d]evelop and cultivate the land and harvest the crop and carry on all other activities *by mechanization or such other means that the lessee shall in its own discretion deem fit and proper in the circumstances*."[105] The contractual provisions clearly ignore the suggestion of the UN Special Rapporteur on the Right to Food that "investors should be encouraged to establish and promote farming systems that are labour intensive rather than focused on achieving the highest productivity per hectare." The emphasis on mechanization undermines claims by the Ethiopian Government that large scale acquisition of farmland in the country will generate jobs. There is currently a dearth of information on the number of jobs that FDI in land in Ethiopia has created and the quality of the jobs that have been created.

5. Social/Human Rights Concerns

[101] See also Article 4 of the Hunan Agreement.
[102] Hunan Contract, Article 4.12.
[103] Hunan Contract Article 4.6
[104] Special Rapporteur, supra note --, (noting that "Even "local content" provisions requiring prioritisation of the local workforce in recruitment, common in extractive industry contracts, appear rare […].")
[105] Karuturi Contract, Article 3.5; Hunan Contract Article 3.4; Saudi Star Contract Article 3.4.

Several provisions in the contracts heighten concerns about the likely social impact of large scale land deal. *First*, of concern is a provision found in all the contracts stipulating that the lessee has the right to "[b]uild infrastructure such as dams, water boreholes, powerhouses, irrigation systems, roads, bridges … *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 *when ever it deems so appropriate*."[106] *Second*, the scope of land acquired under the contracts is significant and raises questions about the rights of prior users, possible displacement of individuals and communities, and the opportunity cost of the land deals in terms of other uses that might have been made of the lands in question. The extent of the land acquired under the three contracts is huge: 100,000 hectares (Karuturi), 10,000 hectares (Saudi Star), and 25,000 Hectares (Hunan). Even more interesting is a provision in all the contracts that grants to the lessee the right to acquire additional land. Under the Karuturi contract, lessee has the right to "[g]et additional 200,000 ha of land [up on] accomplishing the 100,000 ha with in two years." Under both the Hunan Contract and the Saudi Star Contract, the lessee has the right to additional land "based on the performance, accomplishment and need of the company."[107] Not surprising, the Chief Executive Officer of Saudi Star, Haile Assegide, in an interview on March 18, said that the company plans to rent an additional 290,000 hectares from the FDRE.[108] *Third*, also of concern is a provision, common in the contracts that grant the lessee the right to develop or administer the land "on his own or through a legally delegated person agency."[109] Problems arise, especially in the agricultural sector, with absentee-investors. Thorny issues relating to liability also inevitably come up. What happens if an investor decides to delegate its responsibility to a company with very poor records? In none of the contracts does the Ethiopian Government retain the right to vet an agent chosen by an investor. *Finally*, none of the contracts require the investors to conduct social impact assessment or sustainability assessments. In the absence of relevant social impact assessments, the long-term social implications of the land deals examined in this paper remains to be seen.

6. Investment Agreement Revenues

Large-scale leases or purchases of agricultural land are touted as a way for poor countries to generate much-needed revenue. However, one of the striking features of the contracts examined is the price of the land. Essentially, the lands were acquired at near give-away prices raising questions about lost revenues. Furthermore, the lessees enjoy a period of grace from the land rent ranging from three to five years. The Hunan Agreement grants to the lessee "a four year grace period for the land rent." Regarding the price of the land, a project Manager for Karuturi, Karmjeet Sekhon, is reported as saying: "It's very good land. It's quite cheap. In fact it is very cheap. We have no land like this in India."[110] Although in all contracts, the lessor "reserves the right to revise the lease payment rate as the need may arise," it is not clear if and how this right would be exercised in practice; future attempts by the Ethiopian Government to raise the rent of the properties in question could be challenged as expropriation. The criticism here is not necessarily the incentive offered to investors as these are sometimes necessary to attract the right investors. However,

---

[106] Karuturi Contract, Article 3.2; Hunan Contract Article 3.4; Saudi Star Contract Article 3.2. *Emphasis added.*

[107] Hunan Contract, Article 3.5; Saudi Star Article 3.5.

[108] http://www.bloomberg.com/news/2011-03-23/saudi-billionaire-s-company-will-invest-2-5-billion-in-ethiopia-rice-farm.html

[109] Para. 3.3

[110] http://www.guardian.co.uk/world/2011/mar/21/ethiopia-centre-global-farmlandrush?INTCMP=ILCNETTXT3487

problems arise if a contract is structured in such a way that the host country receives no benefit at all from an investment and if mechanisms are not in place to monitor the activities of an investor to ensure they meet international best standards and do not violate international law.

7. Peace and Security

None of the contracts examined address the security issues that might arise if communities affected by the land deals challenge the deals, for example, by protesting on or around the properties. The contracts do not address issues such as dispossession, displacement, and prior user. On the contrary, common to the contracts examined is a provision obliging the Ethiopian Government to provide security to the lessees upon request. Article 6.6. of the Karuturi contract provides: "The Lessor shall ensure during the period of the lease, Lessee shall enjoy peaceful and trouble free possession of the premises and *it shall be provided adequate security, free of cost, for carrying out its entire activities in the said premises*, against any riot, disturbances or any other turbulent time other than force majeure, **as and when requested by the lessee.**"[111] Article 14 of the Karuturi contract also stipulates: "The Lessor warrants that it has full ownership and property rights in the leased area … and *shall protect the right of the lessee to the peaceful possession, use and quiet enjoyment thereof*."[112] Article 6 of the S & P Energy contract requires the Lessor to provide adequate security to S&P without charge to enable S&P to carry out its contractual activities and ensure that S&P enjoys "peaceful and trouble free possession of the premises." The combined effect of Article 6 and 14 is significant. Combined the two provisions could mean that prior users who are affected by a land deal may have no meaningful legal recourse at all.

C. Conclusion

The contracts examined do not address most of the ESG concerns implicated in large-scale acquisition of farmlands. Many governments are either unwilling or unable to seriously negotiate land investment agreements with a view to securing maximum benefit from the investments. Even when a promising provision is inserted into a land contract, these are inserted without careful consideration of the legal and institutional frameworks needed to make such a provision effective..

On their face, the contracts do not appear to include any meaningful trade-offs for Ethiopia. If there are any tradeoffs beyond the land rents addressed in the contracts, these tradeoffs are not mentioned in the contracts themselves. One possible trade-off could be infrastructure development. However, under the three contracts, the provision relating to infrastructure projects is not binding. Thus, while the lessees have the right to build infrastructure such as dams, roads and bridges, the contracts do not require them to do so.

Ambiguities further undermine the effectiveness of some of the provisions in the contracts. For example, in the contracts examined, the Ethiopia Government retains the right to "Monitor and establish the fact that the lessee is discharging and accomplishing its obligations diligently" but the right "shall be exercised and performed in a manner that does not cause any hindrances to the work and activities of the lessee." It is not exactly clear what this clause means. What acts of a government inspector will constitute hindrances to the work of a lessee? One danger with ambiguities in a contract or failure to address specific issues in the contract is that the provisions of BIT binding on

---

[111] Emphasis added. See also, Hunan Contract, Article 6.6 and Saudi Star Contract Article 6.6.j.
[112] Emphasis added.

a host government may apply. For example, the termination clauses in the agreements could create problems for Ethiopia in the future. Under the Karuturi Contract, the Ethiopian Government retains the right to "Terminate the land lease agreement subject to at least six months prior written notice and consent to both parties by consultation up on justified good cause."[113] The contracts do not define what might constitute a "justified good cause" for terminating the agreements and do not spell out what would happen in the event that both parties do not agree to the termination. Terminating the contract in the absence of the consent of both parties may be considered an act tantamount to expropriation. Ultimately, even the best drafted contract is of limited utility in countries where institutional gaps, legal gaps, implementation gaps exist as is the case in many countries in SSA.

IV. **FDI IN AGRICULTURAL LAND AND INTERNATIONAL INVESTMENT LAW: EMERGING ISSUES**

The primary source of international investment law today is not customary international law or in any multilateral treaty but in BITs. As Salacuse and Sullivan put it, "[f]or all practical purposes, treaties have become the fundamental sources of international law in the area of foreign investment."[114] As Christopher Ryan also notes: "although originating as a form of customary international law, today international investment law derives its authority and its legitimacy from … bilateral investment treaties … and several multilateral investment treaties currently in force." To some observers, the growth of BITs and other IIAs "is one of the "more remarkable developments in international law in the past 40 years." Countries in Africa have not shied away from concluding IIAs. By the end of 2007, countries in Africa were party to 27 percent of all BITs. The past decade also witnessed a tremendous growth in the number of BITs that countries in Africa concluded with other developing countries.[115] According to UNCTAD, "About 60 per cent of the Chinese BITs concluded from 2002 to 2007 were with other developing countries, mainly in Africa." China concluded its first BIT with an African country in 1989. As of June 1, 2010, the number of China-Africa BITs had grown to about 30.[116]

Two issues are addressed in this section. First, this section offers an overview of international investment law regime. Second, emerging criticism of international investment law and the system of investor-State dispute settlement is offered.

A. Evolution of International Investment Law

The last sixty years witnessed phenomenal changes in the content and scope of international investment law. In 1970, the International Court of Justice (ICJ) noted, in the *Barcelona Traction* case,

---

113 Karuturi Contract, Article 5:4.

114 *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,* 46 HARV. INT'L L.J. 67, 67 (2005)(hereinafter "Salacuse and Sullivan").

115 Mahaz Malik, *South-South Bilateral Investment Treaties: The same old story?*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Oct. 27-29, 2010), http://www.iisd.org/pdf/2011/dci_2010_south_bits.pdf.

116 According to UNCTAD, "Nine of the 16 BITs China signed from 2003 to 2007 were concluded with African countries: Benin, Djibouti, Equatorial Guinea, Guinea, Madagascar, Namibia, Seychelles, Tunisia and Uganda." United Nations Conference on Trade and Development, WORLD INVESTMENT REPORT 34, no.13 (2008).

the slow development of international investment law.[117] From its humble beginnings as a sub-set of the doctrine of State Responsibility for Injury to Aliens, international investment law "has evolved to a dynamic set of rules and principles comprised in treaties and applied by institutional and ad-hoc arbitral tribunals."[118] The first BIT was concluded in 1959 and as of the end of 2008, the total number of BITs stood at 2,676. Not only has the number of BITs increased exponentially, their universe has expanded significantly and now includes the investment chapters of free trade agreement (FTAs), regional trade agreements (RTAs), and special purpose agreements such as the Energy Charter Treaty – together referred to as international investment agreements (IIAs).[119]

The scope of IIAs is also expanding. Today, the trend is in the direction of BITs with "more sophisticated investment protection provisions as well as liberalization commitments"[120] and IIAs that are far broader in their scope, approach, and content than traditional BITs. According to UNCTAD:

> [R]ecent agreements tend to encompass a broader range of issues that in the most comprehensive agreements may include not only investment protection and liberalization, but also trade in goods and services, intellectual property rights, competition policy, government procurement, temporary entry for business persons, transparency, the environment, and labor rights.

The geographical reach of IIAs is outstanding; virtually every country in the world has concluded a BIT. As the arbitral tribunal in *Mondev International Ltd. v. United States* put it: "Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*."[121] Although BITs were traditionally signed between developed and developing countries, developing countries are now concluding BITs among themselves. According to UNCTAD:

> [D]eveloping countries are parties to the majority of BITs. As of the end of 2004, 40 percent of all BITs were between developed and developing economies, while 25 per cent were between developing economies. Another 10 percent were between developing and transitional economies. Thus, developing countries were one or both parties to 75 per cent of all BITs.

The implications of the "treatification" of international investment law are real and significant.[122] Thanks to BITs, "[t]he reach of the international investment law system is broader today than at any other time in history." Most observers agree that the IIAs "are truly universal in their reach and essential provisions."[123] Even states that have strategically avoided concluding many

[117] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J., at 3 (Feb. 5).
[118] Omar Garcia-Bolivar, *International Law of Foreign Investments at a Crossroads: The Need for Reform* (2008)
[119] *See e.g.* HE Energy Charter Treaty, *opened for signature* Feb. 1, 1995, 34 I.L.M. 360 (1995); North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289 (1993).

[120] UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING 4 (2005).
[121] *Mondev Int'l Ltd. V. United States*, ICSID Case No. ARB(AF) 99/2, Award, 6 ICSID Rep 181, para. 117 (October 11, 2002).
[122] Jeswald W. Salacus, *The Treatification of International Investment Law*, 13 L & BUS. REV. AM. 155 (2007).
[123] Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327 (1994).

BITs have reason to be interested in the development of international investment law because of the potential reach and effect of this body of law. To some observers, BITs have "become an integral part of international relations."[124]

In conclusion, BITs, together with other IIAs, "constitute today's international investment regime,"[125] and this regime focuses primarily on the rights of investors and the responsibilities of host states. The significance of BITs lies in the fact that over the last sixty years they have gradually displaced domestic law and customary international law as the primary legal framework for the regulation of investor-state relations. BITs are also significant because they can and do frequently makeup for shortcomings in international investment agreements and can confer greater protection on foreign investors than they contracted for or are able to contract for in their investment agreements.

B. Concerns about International Investment Law

Should the developments in international investment law in the past sixty years be celebrated? Or, do policy makers in Africa have cause to be concerned?[126] Countries in Africa have reason to be concerned about the nature, content, and scope of international investment law. *First*, most BITs are unbalanced in the sense that they focus on investor protection but not on investor obligation and they focus on the obligation of host states but not on the rights of host communities. *Second*, most BITs are between developed and developing countries and are drafted based on model agreements developed by the former. *Third*, most BITs afford foreign investors greater rights than domestic investors and arguably modify the conditions of competitions in host countries in ways that harm domestic investors. *Fourth*, BITs allow investors to bypass domestic courts and lodge claims against host governments directly with international arbitration tribunals. Concerns have been raised regarding the rule-making process of the regime. A few of the most pressing concerns are addressed here.

1. Asymmetrical Instruments

BITs exist to protect the interest of exporters of capital. BITs were specially designed by Western nations to protect the interest of their investors in developing countries during the decolonization period.[127] In the absence of comprehensive international rules governing the treatment of foreign investment and in the face of challenges from some developing countries

---

124 *Id.*
125 Sauvant and Alvarez, xxxiii.
126 Salacuse and Sullivan, 32.

127 Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS L. REV., 157, 171 (2005) (observing that the motivation for the developed country to conclude BITs "was to obtain protection for its foreign investment.); Patrick Juillard, *Bilateral Investment Treaties in the Context of Investment Law, Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe*, OCED 1 (May 28-29, 2001), http://www.oecd.org/dataoecd/44/41/1894794.pdf (observing that BITs developed out of an emergency situation, which reached its peak, in the late 60s and early 70s. Noting specifically that in the late 60s, "developing countries – former colonies of former major European powers – embarked upon extensive expropriation policies which involve at foreign held investment – i.e. investment owned by nationals of the former colonial powers.").

regarding the content and scope of customary international law on the subject, capital-exporting nations saw the need to secure protection for their investors using BITs.[128] Today, Western nations use BITs to advance three broad policy goals: protect investors and investment; facilitate investment entry and operation; and liberalize the economies of developing countries.[129] Specifically, countries use BITs to secure core substantive and procedural rights for investors. Typically, BITs require host states to respect the following rights: (1) the right to fair, equitable, and non-discriminatory treatment; (2) the right to freely transfer capital out of a host country; (3) protection from expropriation and measures tantamount to expropriation and the right to prompt an adequate compensation in the event of expropriation; (4) the right to international arbitration if and when disputes arise; (5) limitation on performance requirements; and (6) the right of investors to select top managerial personnel.[130]

2. **Participation in International Investment Rule-Making**

How democratic and transparent is international investment rule-making processes? Is Africa actively involved in international investment rule-making? What has Africa's contribution been to the development of international investment law? The processes of international investment rule-making deserve serious scrutiny. There is a tendency to equate conclusion of BITs with participation in international investment rule-making. For example, in a 2008 report, UNCTAD observed that "the role of developing countries in international investment rule-making continues to increase. Some developing countries, such as China and Egypt, are among the most prolific signatories of BITs worldwide."[131] It is wrong and perhaps dangerous to judge the level of a country's participation in international investment rule-making process based solely on the number of BITs the country has concluded. Factors such as lack of negotiation capacity, limited knowledge of international investment law, pressures from institutions such as the World Bank, and weak domestic institutions, undermine the notion of effective participation in international investment rule-making.

Judged by the interests that have driven the development of international investment law and the stakeholders that have typically set the agenda for BIT negotiations and determined the core elements of these treaties, developed countries in general and African countries in particular have not been effective or active participants in international investment rule-making. Most observers agree that "[d]eveloped countries … have driven the creation of this regime."[132] As the principal exporter of capital in the past sixty years, developed countries introduced BITs to the world and used them primarily to protect their investors. To ensure that BITs achieved their primary purpose, developed countries concluded BITs based on model agreements that they rarely deviated from.[133]

128 Vandevelde, 44, (stating that BITs "were a defensive reaction to past expropriations of existing investments without payment of fair market value.").

129 Jeswald & Salacuse, 32.

130 OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, BILATERAL INVESTMENT TREATIES, *available at*: http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (discussing the six core benefits BITs provide to investors.).

131 UNCTAD, INTERNATIONAL INVESTMENT RULE-MAKING: STOCKTAKING, CHALLENGES AND THE WAY FORWARD 2 (2008).

132 Sauvant and Alvarez, at xxxi.

133 *Id* at xxxiii (noting that originally, developed countries were the initiators of BITs and that "most of the early BITs adhered to model agreements formulated by European Capital exporters.). Examples of Model BITs.

Today, "existing international investment agreements are based on a 50-year-old model that remains focused on the interests of investors from developed countries."[134]

3. **International Investment Law and Human Rights**

Concerns abound regarding the impact on human rights of FDI and the failure of international investment law to directly address the issue. International investment law does not impose behavioral rules on foreign investors and does not provide a mechanism for adjudicating human rights claims by host communities against foreign investors. Unfortunately, international human rights law also falls far short of imposing clear and enforceable obligations on foreign investors.[135] The result is that "notable cleavages remain between the effectiveness of enforcement mechanisms in the economic field of trade and investment, as compared to the equally important fields of human rights, environment, and labor."[136]

4. **International Investment Law and Sustainable Development**

Regarding the relationship between international investment law and sustainable development, there are a number of many concerns. *First*, some provisions of standard BITs appear to limit the regulatory space of host states and make it impossible for host governments to adopt pro-development policies. In a 31 August 2010 *Public Statement on the International Investment Regime*, lawyers, primarily from the academy, expressed a "shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability."[137] *Second*, standard BITs do not obligate foreign investors to actively promote development or expressly require that activities of foreign investors not undermine sustainable development. *Third*, to date, the claim that FDI yields development outcomes for host countries has not been conclusively established and is contested in many quarters and in many countries. *Fourth*, although the preambles of most BITs mention economic cooperation and development as natural outcomes of foreign investment activities, development is not usually identified as a clear and measurable goal; fundamentally, the international investment framework is not structured to contribute directly to economic development. The problem is compounded by the fact that most arbitrators "do not have firm grounding in public international law"[138] and are reluctant to interpret BIT provisions in ways that are supportive of development.

5. **Challenges Posed by the Overall Structure of the Regime**

Today, experts describe international investment law as "multi-faceted," "multilayered," "atomized," "complex," "diverse," "dynamic," as well as "innovative."[139] The changing nature,

---

[134] Department of Trade and Industry, 13.

[135] *See* Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 285-287 (2009).

[136] Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 432 (2004).

[137] Gus Van Harten, et al., *Public statement on the international investment regime*, AMERICA LATINA EN MOVIMIENTO (2010), http://alainet.org/active/40578&lang=es.

[138] Sornarajah, at 213.

[139] UNCTAD, INTERNATIONAL INVESTMENT RULE-MAKING: STOCKTAKING, CHALLENGES AND THE WAY FORWARD (2008).

expanding scope, and growing complexity of IIAs is a problem for countries in Africa and a challenge for policy makers in the region. *First* is the challenge of effective participation in international investment rule-making. Do countries in Africa have the capacity to negotiate complex IIAs and the capacity to effectively manage previously-concluded IIAs? UNCTAD has observed that "there is a risk that developing countries lacking the capacity to participate fully in the evolving IIA system are being marginalized and left behind in further investment rule-making."[140] *Second* is the challenge of maintaining policy coherence. Are countries in Africa able to keep their growing network of IIAs coherent and free of major inconsistences? Do they have the capacity to readily identify inconsistencies in their treaty obligations and to proactively address them? The question is important because without the necessary capabilities, countries are at a heightened risk of being subjected to international investment arbitration processes. *Third* is the increased risk of loss of regulatory space and the right to effectively manage foreign investment within their borders. In implementing their obligations under the IIAs do countries strike the right balance between private rights and the public interests?

Without intending to or even realizing it, countries in Africa contributed to the development of international investment law by concluding BITs that they did not fully understand and BITs that lacked a development dimension. The result is that today, international investment law has as its primary goal the protection of foreign investors, and the primary beneficiaries of the system, foreign investors, are not subject to public international law and do not assume any obligation under the BITs. Furthermore, for many countries, the assumptions that prompted the conclusion of BITs in the last three decades have proved to be largely illusory; there is as yet no conclusive evidence that BITs lead to increased FDI flows for countries that sign them or that FDI always yields development outcomes for host countries. On the contrary, the BITs which countries hastily-concluded in the past, now appear to be posing a problem for them.

IV. BILATERAL INVESTMENT TREATIES AND FDI IN LAND: ETHIOPIAN CASE STUDY

Three questions are addressed in this section: First, do the BITs incorporate ESG Obligations? Second, can BITs be drafted to incorporate ESG obligations? Three, what Are the Challenges to Incorporating ESG Obligations in BITs? Focus will be on the BITs that Ethiopia has concluded.

As of 1 June 2012, Ethiopia had concluded thirty (30) BITs (Table 1). Of the thirty BITs that Ethiopia has concluded 22 are already in force (Annex 1). In this section, four BITs involving Ethiopia are examined: Ethiopia-China BIT (signed 11 May 1998),[141] Ethiopia-Tunisia BIT (signed 14 December 2000),[142] Ethiopia-Kuwait BIT (signed 14 September 1996),[143] and Ethiopia-Austria (signed 12 November 2004). The BITs were chosen because they are accessible and available in

[140] *Id.* at 4.
[141] *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*.
[142] *Agreement Between the* Government of the *Federal Democratic Republic of Ethiopia and the Government of The Republic of Tunisia for the Promotion and Protection of Investments.*
[143] *Agreement Between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments.*

English. Discussions in this section are limited to BITs. Thus, other agreements such as free trade agreements and regional trade agreements that may likely affect foreign investment in land are not addressed.

Table 1: ETHIOPIA: Number of Bilateral Investment Agreements Concluded, 1 June 2012

Country	Date of Signature	Date of Entry Into Force
Algeria	4-Jun-02	1-Nov-05
Austria	12-Nov-04	1-Nov-05
Belgium and Luxembourg	26-Oct-06	---
China	11-May-98	26-Oct-06
Denmark	24-Apr-01	---
Egypt	27-Jul-06	27-May-10
Equatorial Guinea	11-Jun-09	---
Finland	23-Feb-06	3-May-07
France	25-Jun-03 7-Aug-04	25-Jun-03 7-Aug-04
Germany	19-Jan-04 4-May-06	19-Jan-04 4-May-06
India	5-Jul-07	----
Iran, Islamic Republic	21-Oct-03 15-Dec-04	21-Oct-03 15-Dec-04
Israel	26-Nov-03 22-Mar-04	26-Nov-03 22-Mar-04
Italy	23-Dec-94 8-May-97	23-Dec-94 8-May-97
Kuwait	14-Sep-96 12-Nov-98	14-Sep-96 12-Nov-98
Libyan Arab Jamahiriya	27-Jan-04	25-Jun-04
Malaysia	22-Oct-98	4-Jun-99
Netherlands	16-May-03	1-Jul-05
Nigeria	19-Jan-04	----
Russian Federation	10-Feb-00	6-Jun-00
South Africa	1-Jan-08	----
Spain	17-Mar-09	---

Sudan	7-Mar-00	15-May-01
Sweden	1-Oct-05	1-Oct-05
Switzerland	26-Jun-98	7-Dec-98
Tunisia	14-Dec-00	2-Oct-04
Turkey	16-Nov-00	10-Mar-05
United Kingdom	19-Nov-09	----
Yemen	15-Apr-99	15-Apr-00

Source: UNCTAD

An examination of the BITs that Ethiopia has concluded suggests that BITs may constrain policy space and make it difficult for policy makers to effectively regulate agro-FDI in the public interest. Common provisions in standard BITs – the provisions protecting investors against expropriation, provisions for compensation in the event of war or similar disturbances, the provisions guaranteeing the right to free and immediate transfer of investments, and the rules on dispute settlement – may make it difficult for policy makers to act in the public interest if and when the need arises. As a result of the core provisions in the BITs, it may be difficult if not impossible for Ethiopia to adopt laws that for example:

- Requires partnership arrangements between a foreign investor and local farmers;
- Bans or restricts the export of produce resulting from agro-FDI;
- Requires that investors employs a certain number of local labor;
- Limits the amount of water that an investor can draw from a river or other local water sources;
- Impose conservation obligations on foreign investors but not on local farmers; or
- Requires that investors recognize the right of indigenous groups or other vulnerable groups.

A. Do the BITs incorporate Human Rights and Environmental Norms and Principles?

The Ethiopian BITs do not appear to be sensitive to the ESG issues implicated when vast tracts of agricultural land are acquired by foreign investors. Furthermore, the BITs do not appear to be sensitive to broader development objectives. Four characteristics of the BITs are particularly worrisome.

First, suggesting lack of sensitivity to economic development in general and ESG issues in particular are: The absence of direct reference to "economic development," "sustainable development," or the right to development in the BITs; the absence of any direct reference to human rights, environmental protection or broader social issues; the absence of differentiated obligations between parties to take into account different levels of economic development; and vague investment promotion clauses.

Second, of concern also, is the development implication of some of the provisions of the BITs. Some provisions may limit the ability of host countries to regulate in the public interest. This includes: provisions relating to national treatment, expropriation, and fair and equitable treatment as well as provisions that limit the use of performance requirements, and those that

Third, a broader and more systemic problem is that the BITs are asymmetrical in the sense that while they accord foreign investors substantive rights, they do not impose any obligations on the same investors. Furthermore, they do not accord any enforceable right on host countries and host communities.

Fourth, the ambiguity and vagueness of most of the substantive provisions of the BITs pose a problem for a host country in the sense that they could be the basis for additional rights for foreign investors as interpreted by an investment tribunal.

Overall, the BITs examined do not: (1) reference human rights or environmental protection or other social issues; (ii) impose binding obligations on investors; (iii) establish clear mechanisms for monitoring compliance or enforcing human rights or environmental rights claims; (vi) incorporate, directly or indirectly, specific human rights treaties or environmental protection treaties; (vii) confer on investment tribunals the jurisdiction to consider human rights norms and principles when assessing a State's liability under a BIT; and (vii) do not condition the availability of investor rights on the observance of international law by the investors.

It is however impossible to make broad generalization. All BITs are not the same. Ultimately, the scope of a BIT depends largely on the precise words and phrases used in the BITs. With respect to Ethiopia, some BITs are drafted in very expansive terms and accord investors considerable rights. However, other BITs are drafted in terms that are not so expansive.

1. No Specific reference to ESG

An examination of the BITs that Ethiopia has concluded indicates that few, if any, make any specific reference to human rights, environmental protection or broader ESG issues. None of the BITs make any specific reference to the human rights treaties or the environmental treaties that Ethiopia had ratified. The Ethiopian BITs are not unique in this regard. As Peterson and Gray rightly note, BITs "are typically bereft of references to other international commitments made by the contracting parties in the area of human rights…."[144] The problem this creates is that it in the event of a dispute, investment tribunals typically focus on the underlying investment contract and a relevant BIT and rarely examine human rights issues and arguments.[145]

---

[144] Id., at 8.

[145] Luke Peterson and Kevin Gray, International Bilateral Investment Treaties and in Investment Treaty Arbitration (2003)(observing that "there appears to be less scope for human rights issues to play a determinative role in investment treaty disputes, where investors and host states have opted to show them little regard.").

All the BITs examined recite, in the preamble, the expectation that the BITs will stimulate the flow of capital and technology, promote economic development, stimulate prosperity, and stimulate private economic initiatives. For example, in the Ethiopia-Netherland BIT, State Parties state that they recognize "that agreement upon the treatment to be accorded to such investments *will stimulate the flow of capital and technology and the economic development* of the Contracting Parties."[146] In the Ethiopia-Tunisia BIT, State Parties expressed a conviction that a reciprocal protection of investment by virtue of a bilateral agreement "is likely to stimulate private economic initiative and to increase prosperity in both countries." The problem with these provisions is that they do not impose binding obligations on the investor or the home state of the investor.

Only the BIT between Ethiopia and the Belgium-Luxembourg Union has a provision on the environment and a provision on labor rights. Regarding the environment, in Article 5 of the Ethiopia-Belgium treaty State Parties: (1) recognize the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation; (2) agree that each Contracting Party "shall strive to ensure that its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation; (3) recognize that "it is inappropriate to encourage investment by relaxing domestic environmental legislation; and (4) reaffirmed their commitments under the international environmental agreements, which they have accepted. The BIT also contains a very similar provision on labor rights. The precise meaning, scope and implication of the environmental Clause in the Ethiopia-Belgium BIT are not clear. One problem with the clause is the fact that it does not impose any binding obligation on the investors.

2. Provisions that Constrain Policy Space

i. Non-Discrimination: National Treatment and Most-Favored Nation

Common in most BITs are national treatment clauses and most favored nation clauses. Under the national treatment clause, host countries usually commit to grant investors of the other contracting party treatment that is no less favorable that that granted to their own investors. The most favored nation treatment undertaking ensures that a host government accords to investors of a contracting party to a BIT, at least the same treatment that the host government accords investors of a third country.

While some of Ethiopia's BITs have both a national treatment clause and a most-favored nation clause, others just have a most-favored nation clause. The China-Ethiopia BIT lacks a national treatment clause but has a most-favored nation clause as well a "fair and equitable treatment" clause. Pursuant to Article 3(1) of the China-Ethiopia BIT, investments of investors of either Contracting Parties "shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party."[147] Article 3(2) provide that the treatment referred to in paragraph 1 "shall not be less favorable than that accorded to investment and activities associated with such investments of investors of any third state."[148] By contrast, the Ethiopia-Kuwait BIT

[146] Emphasis added.
[147] China-Ethiopia BIT, Article 3(1).
[148] Id., Article 3(3) exempts preferential treatment accorded by either Contracting Party based on custom union, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.

contains a national treatment clause, a most-favored nation clause and a fair and equitable treatment clause. Article 4 states:

> "Each Contracting State shall at all times ensure investments made in its territory by investors of the other Contracting State, fair and equitable treatment. **Such treatment shall not be less favorable than that which it accords in like situation to investments of investors or investors of any third state, whichever is the most favorable**."[149]

With specific reference to agro-FDI, the national treatment standard could create problems for a host government and may preclude the government from adopting measures that are intended to benefit small-scale farmers. For example, it can preclude a government from conferring certain advantage to domestic farmer if the same advantages are not extended to foreign investors? A national treatment clause could also make it difficult for a host government to impose labor or environmental requirements on foreign investors without imposing similar requirements on domestic farmers. While some BITs carve out an exception that allows policy-makers necessary policy-space to regulate in the public interest, others do not. Thus, Ethiopia-Israel BIT states that the national treatment provisions "shall not preclude a differential treatment in the laws or regulations of a Contracting Party or in the exercising of the powers conferred by those laws and regulations, regarding rights or privileges granted to its own investors, or to investments or returns of investment of its own investors."[150]

ii. Treatment of Investors and Investments: "Fair and Equitable" Standard; "Full Protection and Security," etc.

Common in most BITs are a cluster of standards that general and absolute in nature. The standards are considered "general" because they pertain to all aspects of the existence of an investment in a host country. The standards are also considered "absolute" because they are not dependent or conditioned on how a Contracting State treats investment by nationals or nationals of third countries. Four different standards are typically addressed under the general obligation clause: (i) guarantee of fair and equitable treatment (FET);[151] (ii) guarantee of full protection and security in the territory of the host government;[152] (ii) a guarantee of protection against "unreasonable or discriminatory measures" in the management, maintenance, use, enjoyment, extension or disposal of such investments.[153] The main concern with these standards is their vagueness and potential breadth. Broadly construed, these standards independently and cumulatively may seriously constrain domestic policy making.[154]

---

149 Emphasis added.
150 Ethiopia-Israel BIT, Article 3(3).
151 See e.g. Ethiopia-Turkey BIT, Article II; Ethiopia-Israel BIT, Article 2; and Ethiopia-U.K. BIT, Article 2.
152 See e.g. Ethiopia-Turkey BIT, Article II; Ethiopia-Israel BIT, Article 2; and Ethiopia-U.K. BIT, Article 2
153 See e.g. Ethiopia-Turkey BIT, Article II; Ethiopia-Israel BIT, Article 2; and Ethiopia-U.K. BIT, Article 2. There are variations in the BITs. For example, the Ethiopia-Israel BIT states provides for protection against unreasonable measures but not discriminatory measures stating that "Neither contracting Party shall in any way impair by unreasonable measure the management, maintenance, use, enjoyment or disposal of investments in its territory." However, because the Ethiopia-Israel BIT has a comprehensive national treatment provision as well as a most-favored treatment provision, the overall effect may likely be the same.
154 *See generally* Dolzer, Rudolph (2005a). "*Fair and equitable treatment: A key standard in investment treaties*", THE INTERNATIONAL LAWYER, 39, pp. 87–106.

The FET standard is generating much controversy because it is susceptible to very broad interpretations and is the subject of diverging interpretations. Some investment tribunals have interpreted the FET standard to reach conducts that are arbitrary, grossly unfair, unjust, or idiosyncratic, conducts that expose an investor to sectional or racial prejudice, and conducts that involve a lack of due process. According to UNCTAD, "[s]ome tribunals have read an extensive list of disciplines into the FET clause, which are taxing on any State, but especially on developing and least-developed countries; lack of clarity persists regarding the appropriate threshold of liability."[155]

Diverging approaches to FET interpretation is a challenge for countries. One approach calls for FET standard that is anchored in customary international law (CIL). Under this approach what is fair and equitable is determined by general and consistent state practice. An alternative approach favors an FET standard that is not limited to customary international law but is interpreted an evolutionary manner. Given the differing approaches to FET interpretation, FET clauses must be taken seriously in BIT negotiations. At the very least, such a provision should be clear on whether the FET is CIL-linked or not. Matthew Porterfield argues that "linking FET to CIL results in a standard of protection that is more deferential to the regulatory authority of governments than the … "autonomous" standard."[156]

In many respects, whether an FET standard is CIL-linked or not may make very little difference. This is because "investment tribunals continue to construe even CIL-based FET provisions to impose broad limits on government authority by accepting, without any evidence of state practice or *opinion juris*, the pronouncements of previous tribunals as definitive evidence of the standard under CIL."[157] Given the apparent reluctance of investment tribunals to base their interpretation of FET on customary international law, Matthew Porterfield suggests that "more aggressive approaches may be necessary to deter tribunals from adopting increasingly broad interpretations of FET."

iii. Access to Courts

A provision found in the Ethiopia-Kuwait BIT affords additional protection for investors beyond the protection offered by the four general obligations already discussed. Article 3(4) of the Ethiopia-Kuwait BIT stipulates:

> Each contracting State recognizes that in order to maintain a favorable environment for investments in its territory by investors of the other Contracting State, it shall *provide effective means of asserting claims and enforcing rights* with respect to investments. Each Contracting State shall ensure to investors of the other Contracting State, *the right of access* to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority.

[155] See UNCTAD, WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, available at http://www.unctad-docs.org/files/UNCTADWIR2012-Full-en.pdf at 139

[156] Matthew C. Porterfield, A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals." International Investment News, Issue 3, Volumn 3 March 2013.

[157] Id.

The problem with this provision is its vagueness and potential scope. In a developing country with weak laws and institutions, a host country is likely to violate this provision. Is a host country obliged to ensure investors "right of access to its courts of justice," over and above the rights that citizens enjoy? In many developing countries, access to the courts is a challenge even for citizens but particularly for vulnerable groups and the poor. It is not clear what a host country has to do to be found in violation of this provision?

iv. Expropriation

Standard in BITs is a provision aimed at protecting investors against expropriation. While the expropriation clauses of some BITs are drafted to focus primarily on expropriation or nationalization, others are couched in much broader terms. The Ethiopia-China BIT provides that neither Party "*shall expropriate, nationalize or take similar measures … against investments of investor of the other Contracting Party*" unless four conditions are met: (a) "for the public interest," (b) "under domestic legal procedure," "without discrimination" and "against compensation."[158] The Ethiopia-Kuwait BIT appears to go several steps further by providing that investments "*shall not be nationalized, expropriated,* ***disposed****, or subjected to direct or indirect measures having effect equivalent to nationalization, expropriation or* ***dispossession***." [159] The Ethiopia-Kuwait BIT also specifically provides that expropriation must be "for a public purpose related to the internal needs of that Contracting State." Compare can also be made between Article 5 of the Ethiopia-Malaysia BIT, with Article 6 of the Ethiopia-Netherland treaty. Article 5 of the Ethiopia-Malaysia BIT states that "Neither Contracting Party shall take *any measures of expropriation or nationalization* against the investments of an investor ….."[160] By contract, the Ethiopia-Netherland BIT states that "Investments of investors of one Contracting Party *shall not be expropriated or nationalized or subjected to similar measures* in the territory of the other Contracting Party."[161]

The biggest challenge for countries is determining the precise scope of the concept of indirect expropriation. What acts qualify as "measures tantamount to expropriation" or "measures having effect equivalent to nationalization." Judged by recent arbitral decisions, the concept of indirect expropriation is broadening and can extend to public interest regulations. In *Metalclad Corp. vs. Mexico*, the Tribunal stated:

> [E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."

Can regulatory acts of the state, for example, new taxes or environmental measures be considered expropriation? The Ethiopia-Kuwait BIT is in the affirmative. Article 6:4 stipulates: The Term "expropriation" shall also apply to acts of sovereign powers and to interventions or regulatory measures by a Contracting State such as the freezing or blocking of the investment, levying of

---

[158] Article 4(1). Emphasis added.
[159] Emphasis added.
[160] Emphasis added.
[161] Emphasis added.

arbitrary or excessive tax on the investment, compulsory sale of all or part of the investment, or other comparable acts or measures, that have a de facto or expropriatory effect in that their effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of the investment.

The provision of BITs relating to the compensation that a State must pay in the event of expropriation can create problems for a host country if drafted broadly and/or ambiguously. While the China-Ethiopia BIT merely provides that expropriation must be "against compensation," the Ethiopia-Kuwait BIT calls for "prompt, adequate and effective compensation" and requires that the expropriation must be "in accordance with due process of law of general application."

Does taking a property belonging to a locally incorporated company amount to expropriation? Under most BITs, such acts are considered expropriatory. For example, according to Article 6(3) of the Ethiopia-Kuwait BIT, expropriation "shall include situations where a Contracting State expropriates the assets of a company or enterprise that is incorporated or established under the laws in force in its own territory in which an investor of the other Contracting State has an investment."

v. **Restrictions on Performance Requirements**:

Performance requirement provisions also pose a challenge for developing countries. Restrictions on use of performance requirements in BITs limit the ability of governments to use FDI to advance development objectives. Although a good number of Ethiopia's BITs do not expressly limit the use of BITs, some do. Article 3(5) of the Ethiopia-Kuwait BIT stipulates:

> "Neither Contracting State may impose on the investors of the other Contracting State mandatory measures, *which may require or restrict the purchase of materials, fuel or of means of production*, transport or operation of any kind *or restrict the marketing of products inside or outside its territory*, or any other measures having the effect of discrimination against investments by investors of the other Contracting State in favour of investments by its own investors or by investors of third states."[162]

Article 3(5) will make it difficult for Ethiopia to demand that an agri investor sell its product locally since it expressly states that a Contracting Party may not impose mandatory measures that "restrict the marketing of products inside or outside its territory." A measure that requires an agri investor to employ locals or which imposes other local-content requirement on agri-investors will also likely violate the provisions of Article 3(5). Additionally, article 3(5) will also make it difficult for Ethiopia to adopt measures that will ensure that an investor establishes necessary linkages with the local farmers and the local economy more generally.

vi. Stabilization Clauses

Agro-FDI are often involve long durations. For example, some of the Ethiopian land contracts reviewed are for leases of twenty-five years or more. Given the long duration, it is important that host countries retain the flexibility to regulate in response to changing circumstances and changes in international law. Stabilization clauses in BITs may make preclude the possibility of regulatory flexibility. Generally, stabilization clause "limit the ability of governments to have new laws and

[162] Emphasis added.

regulations apply to a foreign investor that is the beneficiary of such a provision."[163] Some BITs have provisions that have the same effect as standard stabilization clauses. For example, Article 3(6) of the *Ethiopia*-Kuwait BIT stated:

> "Once established, investments shall not be subjected in the host Contracting State to additional performance requirements that may hinder or restrict their use, enjoyment, management, maintenance, expansion or other activities in connection with such investments or adversely affect or be detrimental to their viability."

The problem with Article 3(6) of the Ethiopia-Kuwait BIT and similar provisions is that they limit the ability of governments to respond to changing situations that may arise throughout the life of an investment project.

vii. Transfer of Payments

Most BITs including Ethiopia's BITs contain transfer of assets clause. The precise obligation imposed on a country depends on the specific provisions of a BIT. Issues such as when transfer must be made, what types of assets are covered, the currency in which transfer can be made can affect the scope of a transfer of payment provision and its likely impact on a host government. Compare, for example, Article 7 of the Ethiopia-Denmark BIT and Article 6 of Ethiopia-China BIT. Article 7 of the Ethiopia-Denmark BIT states:

> "Each Contracting Party shall ***allow without delay*** the ***transfer in a freely convertible currency of payments*** in connection with an investment, and shall include in particular, though not exclusively."

Article 6 of Ethiopia-China BIT reads:

> "each Contracting Party shall, ***subject to its laws and regulations***, guarantee investors …. the transfer of their investments and returns held in the territory of the one Contracting Party, including ….".

Article 7 of the Ethiopia-Kuwait BIT provides that each Contracting Party "shall guarantee to investors of the other Contracting State the free transfer of payments in connection with an investment into and out of its territory." The transfer covers initial capitals, returns, payments under a contract, royalty and fees, proceeds from the sale or liquidation of the investment, and payments arising out of settlement of disputes.

Transfer of asset clauses may make it difficult for a host country to compel foreign investors to reinvest part of their earnings in the host country. Such clauses also restrict the ability of a host country to respond to the sudden economic crisis with appropriate regulatory, structural, and macro-economic policies. The Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (U.N. Commission) has

---

[163] Howard Mann, *Stabilization in investment contracts: Rethinking the context, reformulating the result.* INVESTMENT TREATY NEWS (October 2011). See also Shemberg, Andrea "Stabilization Clauses and Human Rights", 11 March 2008, http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf

recognized that "'Developing countries need policy frameworks that can enable them to protect themselves from regulatory and macro-economic failures in systemically significant countries. To achieve this, policy space is a necessary precondition. Policy space is restricted not only by a lack of resources, but also by multilateral and bilateral agreements."[164] Regarding the restriction that BITs and other agreements place on countries, the U.N. Commission goes on to note that:

> "Countries that have fully opened their capital accounts, have engaged in financial market liberalization, and relied on private finance from international capital markets are among those most likely to be most adversely affected [by global financial crisis.]… **The difficulty is compounded by the fact that many developing countries have entered into free trade agreements (FTA), bilateral investment treaties (BIT) and World Trade Organization (WTO) commitments which enshrine the policies of market fundamentalism** ... and limit their ability to regulate financial institutions and instruments or manage capital flows. . .."[165]

viii. War & Riot Clauses

Another interesting provision found in most BITs, including the BITs that Ethiopia has concluded, is the provision relating to wars, protests, riots and other events. The goal of this type of provision is to protect the interest of foreign investors in in the event of war, insurrection, and civil disturbances broadly defined. Some BITs provide for most-favored nation treatment as regards any measure the host state adopts in relation to losses. Other BITs provide for both most-favored nation treatment as well as national treatment. Article 5 of Ethiopia-China BIT stipulates that

> "Investors of one Contracting Party who suffer losses in respect of their investment … in the territory of the other Contracting Party ***owing to war, a state of national emergency, insurrection, riot or other similar events***, shall be accorded by the latter Contracting Party, if it takes relevant measures, treatment no less favorable than that accorded to investors of a third State."[166]

Article 5 of the Ethiopia-Kuwait BIT is even broader in scope and states:

> "When investments made by investors of either Contracting State suffer damage or loss owing to ***war or other armed conflict, state of national emergency, revolt, civil disturbance, insurrection, riot or other similar events*** in the territory of the other Contracting State, they shall be accorded by the latter Contracting State, treatment as regards restitution, indemnification, compensation or other settlement, not less favourable than that the latter Contracting State accords to its own investors or investors of any third state, whichever is the most favorable."[167]

Article 7(4) of the Ethiopia-Belgium BIT states:

---

[164] Available at http://www.un.org/ga/president/63/interactive/financialcrisis/PreliminaryReport210509.pdf
[165] Available at http://www.un.org/ga/president/63/interactive/financialcrisis/PreliminaryReport210509.pdf
[166] See also Article 4 of Ethiopia-Malaysia BIT; Article 5 of Ethiopia-Yemen BIT.
[167] See also Article 4 of Ethiopia-Tunisia BIT; Article 7 of Ethiopia-Netherland BIT.

> Investors of one Contracting Party whose investments suffer losses owing to ***war or other armed conflict, revolution, a state of national emergency or revolt*** in the territory of the other Contracting Party shall be granted by the latter Contracting Party a treatment, as regards restitution, indemnification, compensation or other settlement, ***at least equal to that which the latter Contracting Party grants to the investors of the most favoured nation***.

There are at least two problems with the War Clauses. First is their imprecision and broad scope. What situations are really covered by the phrase "*war, a state of national emergency, insurrection*, *riot or other similar events"* or *"war or other armed conflict, state of national emergency, revolt, civil disturbance, insurrection, riot or other similar events*." Does this cover situations where populations displaced by a land deal are staging protests? A second problem is that such clauses provide an incentive for host governments to take draconian measures in efforts to stamp out growing protests against concluded and on-going land deals in the continent. In Africa, protests against agro-FDI are growing and the government responses have been questionable.[168] In a December 1, 2012 letter to the Chairman of the Sierra Leone Human Rights Commission, aggrieved landowners and land users in Malen Chiefdom in Pujehun district cited various human rights abuses stemming from the lease of local land to Socfin Agricultural Company S.L. Limited, a subsidiary of the Belgian company, Socfin.[169] A December 1, 2012 resolution signed by more than one hundred representatives of land holding families from about 36 villages and local communities in Sierra Leone, called for the "timely intervention" of all civil society organizations, the National Human Rights Commission and the United Nations Development Program to resolve the threat posed by the operation of Socfin on their lands.[170] In the resolution, land holding families in the Malen Chiefdom of Sierra Leone noted that their members who refused to give up their land for the operation of Socfin "are under constant threat from the Paramount Chiefs and the chiefdom authorities" and resolved to dissociate themselves from any lease agreement signed by the Paramount Chief on their behalf.

ix. Dispute Settlement

Like most standard BITs, Ethiopia's BITs provide for investor-state arbitration. Investor-state arbitration allows foreign investors to by-pass domestic courts and initiate arbitration directly with an international tribunal. Under the Ethiopia-Kuwait BIT, in the event of an investment dispute which cannot be resolved amicably, dispute shall be submitted for resolution "at the election of the investor party to the dispute," either: "(a) in accordance with any applicable, previously agreed dispute settlement procedures;" or "(b) to international arbitration." The scope of this provision is potentially very broad. Under the Ethiopia-Kuwait BIT, investors can also seek interim injunctive relief "before the judicial or administrative tribunals of the Contracting State that is a party to the

[168] Sonja Vermeulen & Lorenzo Cotula, *Over the heads of local people: consultation, consent and recompense in large-scale land deals for biofuel products in Africa*, 34 J. PEASANT STUD. 899, 904 (2010), *available at* http://pdfserve.informaworld.com/677926_922517573_927238355.pdf.

[169] Malen Affected Land Owners Association, *Gross Abuse of Our Fundamental Human Rights By the Paramount Chief and Chiefdom Authorities of Malen Chiefdom, Pujehun District, Southern Province of the Republic of Sierra Leone*, 12 December 2012 (hereinafter "Malen Letter"). See also Green Scenery, Press Release,

[170] Malen Chiefdom Land Holding Families Resolution.

dispute prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests."[171]

The dispute settlement provision of the Ethiopia-China BIT is somewhat narrower in scope. Article 9 stipulates that if an investment dispute cannot be settled through negotiation, "either party to the dispute shall be entitled to the competent court of the Contracting Party accepting the investment." Under the Ethiopia-China BIT, the only disputes that may be submitted to an ad hoc arbitral tribunal under the auspices of the International Center for Settlement of Investment Disputes (ICSID) are disputes "involving the amount of compensation for expropriation which cannot be settled within six months after resort to negotiations."[172]

Choice of law issues frequently arise. The choice of law clause in a BIT can determine whether the domestic law of a host country will apply in the event of a dispute or whether other laws will apply. Where choice of law issues are clearly in the underlying investment contract, the provisions of a BIT may become irrelevant. Problems arise where the underlying contract does not address choice of law at all or does not address it clearly. Article 9(7) of the Ethiopia-Kuwait BIT stipulates that the arbitral tribunal that is established "shall decide the issues in the dispute in accordance with *such rules of law as may be agreed by the parties to the dispute*." More serious consequences follow in the event of a failure by parties to agree on applicable law. In the absence of such agreement, the arbitral tribunal "shall apply the law of the Contracting State Party to the dispute … *and such recognized rules of international law as may be applicable, taking into consideration also the relevant provisions of this Agreement*."[173] A similar provision in the Ethiopia-China BIT is worded slightly differently: "The tribunal shall adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as *the generally recognized principles of international law accepted by both Contracting Parties*."[174]

3. Asymmetry in BITs

Two important observations can be made in this regard. First, the BITs examined do not impose any human rights obligation on foreign investors but nevertheless accords the investors a host of substantive and procedural rights. Second, the BITs do not provide opportunity for individuals or groups whose rights have been violated by a foreign investor or a foreign investment to seek redress through an investment tribunal. On the other hand, the same BITs guarantee to investors, the right to take cases to international investment tribunals of their choice. Overall, most of the BITs examined:

- Do not explicitly reference human rights or environmental protection;
- Do not impose binding obligations on investors;
- Do not create mechanism for monitoring compliance with any obligation mentioned;

[171]Ethioia-Kuwait BIT, Article 9(4). See also Article 9 of the Ethiopia-Yemen BIT; Article 7 of the Ethiopia-Tunisia BIT.
[172] Ethiopia-China, Article 9(3); Ethiopia-Malaysia BIT, Article 8(2).
[173] Ethiopia-Kuwait BIT, Article 9(7).
[174] Ethiopia-China BIT, Article 9(7).

- Do not incorporate human rights treaties, environmental treaties or other relevant international law norms; and

- Do not condition the rights available to investors on respect of human rights or environment.

The asymmetry in BITs underscores the need for strong domestic regulations that incorporate relevant international human rights and environmental norms and principles. It also underscores the need for strong domestic institutions able to monitor and enforce the laws.

4. Vagueness

One of the biggest challenges for countries in Africa is the fact that BITs are frequently very vaguely drafted. The decision of the Arbitral Tribunal in *Biwater Gauf (Tanzania) Ltd., v. Republic of Tanzania* demonstrates that standards common in many BITs, for example, the "full protection and security" standard the "fair and equitable" standard are potential minefields for a host government. The problem is that most countries in Africa: (1) conclude BITs on the basis of model BITs introduced by other countries; (2) most countries appear to lack the human and technical resources needed to effectively scrutinize the treaties that they ratify; (3) many countries do not appear to understand the full legal implication of BITs that are badly drafted or contain very ambiguous provisions.

In conclusion, the BITs examined do not address the ESG issues directly and do not appear to afford the Ethiopian government necessary policy space to address these issues if and when the need arises. There appears to be an assumption in international investment law that domestic legal frameworks are strong and will address necessary ESG issues. With respect to agro-investment, provisions of a BIT may make it difficult for a host government to prohibit the export of food crops, require an investor to employ local labor; or impose ESG standards on a foreign investor without imposing similar standards of small-scale farmers. In addition, provisions of a BIT may require a host government to treat a foreign investor more favorably than domestic investors and more favorably than domestic laws provides. Given the potential reach of BITs, therefore, it is important that governments negotiate land investment agreements thoughtfully and carefully.

VI. AFRICA AND INTERNATIONAL INVESTMENT ARBITRATION: A CRITIQUE

With the increase in the number of BITs and growing complexity in the provisions of these agreements has come a phenomenal increase in the number of investor-state disputes (ISD) and in the use of investor-state dispute settlement (ISDS) mechanisms. The majority of known ISD cases (about 90%) have taken place since 2000 and, to date, about 83 countries have been subjected to an ISDS.[175] However, the ISDS system has come under intense scrutiny in recent times, and there are growing calls for the system to be fundamentally restructured or completely abandoned.[176] In a 2010

[175] UNCTAD, HOW TO PREVENT AND MANAGE INVESTOR-STATE DISPUTES: LESSONS FROM PERU 6 (2011)[hereinafter "Lessons from Peru"].

[176] *An Open Letter From Lawyers to the Negotiation of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, TPP LEGAL (May 8, 2012), http://tpplegal.wordpress.com/open-letter/. [hereinafter "An Open Letter"]

report, Australian Productivity Commission recommended that the Australian government "seek to avoid" the inclusion of ISDS provisions in future trade agreements. In an 8 May 2012 *Open Letter to the Negotiators of the Trans-Pacific Partnership*, lawyers in Asia and the Pacific Rim urged negotiators not to include ISDS in the proposed partnership agreement out of concern that ISDS threatens to undermine the justice system of their countries and "fundamentally shifts the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of disputes." Similar concerns were also expressed in a 31 August 2010 *Public Statement on the International Investment Regime*. Several questions arise. What has been Africa involvement in this system as respondents? What has been Africa's contribution to the design, structure, functioning, and evolving practices of the system? Do policy makers in Africa have reasons to be concerned about the present functioning of the system?

This section offers an overview of the ISDS, reviews Africa's participation in the investment arbitration, and discusses concerns that developing countries in general and African countries have with the ISDS. It is impossible to get a clear and accurate picture of the operation of the ISDS system today because of the secrecy that surrounds investment treaty arbitration processes generally. To date, only the International Center for the Settlement of Investment Dispute (ICSID)[177] has taken steps to enhance institutional transparency. Consequently, discussions in this section will focus primarily on cases that were registered under the ICSID Convention and Additional Facility Rules.[178]

A. Sixty Years of International Investment Arbitration: Emerging Landscape

A review of the data of all cases registered and administered by the ICSID reveals a growing trend towards the use of ISDS mechanisms to settle investment disputes. For example, one case was registered under the ICSID in 1972. However, as of 31 December 2011, a total of 369 cases had been registered. A study of the data on cases registered under the ICSID Convention and Additional Facility Rule to date indicates that in 2012:

- BITs provided the basis of consent in 63 percent of the cases;
- In terms of geographic distribution of the cases by state parties involved, Sub-Saharan Africa accounted for 16 percent of the cases, South America (30 percent), Eastern Europe & Central Asia (23 percent), and Middle East & North Africa, 10 percent. By contrast, Western Europe accounts for only 1 percent of the cases registered under ICSID Convention and Additional Facility Rules, while North America (Canada, Mexico & US) accounts for only 5 percent of such cases.
- In terms of the sectoral distribution of the cases, Oil, Gas and Mining take the lion share and accounted for 25% of the cases. Other sectors of note include Electric Power & Other Energy (13%), Transportation (11%), Construction (7%), and Finance (7%).
- A majority of ICSID disputes (61%) have been decided by tribunals; only 39% of the cases have either been settled or discontinued.

---

177 *See* WORLD BANK, http://icsid.worldbank.org/ICSID/Index.jsp.

178 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* WORLD BANK (2012), http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm. *See also ICSID Additional Facility Rules* (as amended and in effect from April 10, 2006), WORLD BANK (2012), http://icsid.worldbank.org/ICSID/StaticFiles/facility/iii.htm.

- A significant percentage of the decisions (46%) in ICSID cases are decisions upholding the complainants. Only in 1% of the cases have tribunals ruled that complainants' claims lacked legal merit.

Clearly, today, the ISDS system affects all geographical regions and an ever-widening range of economic sectors.

B. Africa's Participation in the ISDS

Are African's involved in investment arbitration as arbitrators, conciliators, and committee members? The involvement of African countries in the ISDS in the past sixty years has been dismal. Although Africa accounts for 25% of the cases registered under the ICSID Convention and Additional Facility Rules, to date, only 2% of arbitrators, conciliators and ad hoc Committee Members appointed under that system have been from sub-Saharan Africa. By contrast, Western Europe accounts for 47% of arbitrators, conciliators, and ad hoc Committee Members, and North America accounts for 25% of all appointments.

Table 2: ICSID: Distribution of Cases by State Parties Involved and by the Number of Arbitrators, Conciliators and ad hoc Committee Members

Geographic Region	Distribution of Cases by State Parties Involved (%)	Number of Arbitrators, Conciliators and ad hoc Committee Members (%)
Western Europe	1%	47%
North America (Canada, Mexico & US)	5%	23%
South America	30%	10%
South & East Asia and the Pacific	8%	9%
Middle East and North Africa	10%	5%
Central America and the Caribbean	7%	2%
Sub-Saharan Africa	16%	2%
Eastern Europe & Central Asia	23%	2%

Source: ICSID (2012)

It would appear that neither the ICSID nor the parties involved in investment disputes, including African States, have had the desire or inclination to appoint Africans as arbitrators. Regarding appointment by State Parties, only 15 people from Sub-Saharan Africa have been appointed by Parties. This compares very poorly to other regions; Western Europe has seen 168 appointments by Parties and North America has seen 235 appointments by Parties. Obviously several factors affect the choice of arbitrators. An examination of the numerous factors that potentially affect a State Party's choice of arbitrators is beyond the scope of this paper. Whatever the factors, the picture that emerges of Africa's involvement in the ISDS is one of exclusion and marginalization with the result that Africa has had minimal input in the interpretation of the standard provisions of BITs and in the overall evolution of international investment law.

C. Concerns about the Investor-State Arbitration System

Concerns are growing regarding the functioning of the ISDS system.[179] There are concerns about threats to domestic legal process, the overall legitimacy of the system, the implications of the arbitration system for the regulatory powers of states, the sums awarded to investors as well as the cost of treaty arbitration, and the fact that the system places foreign investors in a better position than domestic investors. One of the biggest concerns is the fact that presently the system is not designed to address broader community interests such as human rights, environment, and sustainable development.

1. Threat to Domestic Legal Processes

There are concerns that the ISDS system allows foreign investors to bypass domestic courts and to litigate investment disputes in locations far removed from the place where the disputes arise. In an *Open Letter to the negotiators of the Trans-Pacific Partnership*, lawyers in Asia and the Pacific Rim urged negotiators not to include ISDS in the new agreement out of concern that it threatens to undermine the justice system of their countries and "fundamentally shifts the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of disputes."[180] The increase in the number of investor-state arbitration is heightening fears that investors are exploiting the system to the disadvantage of host countries. According to South Africa's Department of Trade and Industry:

> Investors have become aware of the attractive *status quo* under the global investment regime. Literally hundreds of long-ignored investment treaties offer investors access to an investor-state dispute settlement mechanism, allowing them to take their disputes directly to international arbitration - leapfrogging domestic legal systems (and thus, any safeguards designed to protect important public goods).[181]

2. Legitimacy Concerns

To critics, the ISDS system is not fair, transparent, independent, accountable, or balanced.[182] Regarding transparency, the present system is not public. To date, the total number of treaty-based cases is not known because most arbitration forums do not maintain a public registry of claims. In many cases, the existence of a dispute, the pleadings of the parties and even the final decisions are confidential. Critics question the rationale for secrecy in ISDS given the fact that, unlike purely commercial disputes between private parties, ISDS disputes typically involve at least one party which is public.[183] Regarding fairness, the fact that the system does not afford host communities the

---

179 *An Open Letter*, *supra* note 64.
180 *Id.*
181 Department of Trade and Industry, *supra* note 13, at 10 (emphasis in the original).
182 *Latest Developments in Investor-State Dispute Settlement*, UNCTAD IIA Monitor No. 1 (2008), http://unctad.org/en/Docs/iteiia20083_en.pdf.
183 Nassib G. Ziade, *Challenges and Prospects Facing the International Center for the Settlement of Investment Dispute* in Sauvant and Alvarez, *supra* note 3.

opportunity to participate in disputes including disputes that have the potential to affect their rights and interests is a major concern for human rights groups. According to critics, "The international investment regime, by not allowing for full and equal participation of such parties alongside the investor where their interests are affected, fails to satisfy this basic requirement of procedural fairness."[184]

3. Rule-Making by Unaccountable and Unelected Few

A major concern today is that investment treaty arbitral tribunals are increasingly engaged, *albeit* indirectly, in international investment rule-making. The growing rule-making function of tribunals raises concerns about the concentration of power in a select few who are appointed as arbitrators and the exclusion of important stakeholders and geographical regions from international investment rule-making process. In this respect, Africa's limited role in the ISDS as arbitrators and mediators means that the region as a whole has not contributed and is not presently contributing to the evolution of international investment law. Quite apart from the question of representation and exclusion in the rule-making processes of the regime is the concern that activist arbitral tribunals are interpreting provisions of IIAs in ways that reaffirm and reify the present network of BITs.[185]

4. Regulatory Space and Expansive Interpretation of IIAs

To critics, when interpreting IIAs, arbitral tribunals do not fully take sustainable development principles into account and, thus, jeopardize any chance of reconciling international investment law and international law on development. According to South Africa's Department of Trade and Industry, "[s]ome investors are using bilateral investment treaties to challenge treatment of foreign investments in various sensitive areas, including water and sewage provision, oil and gas exploitation and mining concessions" and "[m]ajor law firms are using BITs as the tool of choice for challenging host state regulation of public services."[186] In the *Public Statement on the International Investment Regime*, critics charge:

> Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over the … the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act.[187]

---

[184] Gus Van Harten, *supra* note 59, at para. 9.

[185] Bilateral Investment Treaty Policy Framework, *supra* note 13, at 10 (observing that "[i]nvestment dispute settlement has now embarked on a course that effectively assigns arbitral panels an active role in implementation and interpretation of BITs.").

[186] *Id.*

[187] Gus Van Harten, *supra* note 59, at para. 5.

Decisions such as those rendered in cases such as *Waste Management v. Mexico*, *Salini Costruttori SpA and Italstrade SpA (Salini) v. Kingdom of Morocco,*[188] *Siemens, A.G. v. The Argentine Republic,*[189] and *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*[190] deserve the attention of policy makers in Africa. Evident in these cases is the gradual expansion of traditional standards and concepts such as the "fair and equitable treatment" (FET) standard, the "full protection and security" standard, and the scope of the concept of "indirect expropriation." In *Siemens v. Argentine Republic*,[191] the tribunal stated that "from the ordinary meaning of 'fair' and 'equitable' and the purposes of the Treaty … these terms denote treatment in an even-handed and just manner, conducive to fostering the promotion and protection of foreign investment and stimulating private initiative." In *Waste Management v. Mexico* (No. 2), the Tribunal stated:

> Taken together, the … cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant **if the conduct is arbitrary**, **grossly unfair**, **unjust or idiosyncratic**, **is discriminatory and exposes the claimant to sectional or racial prejudice**, or **involves a lack of due process leading to an outcome which offends judicial propriety**–as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[192]

The expansive interpretation of standard BIT obligations has several implications for countries in Africa. *First*, it potentially limits the ability of states to take emergency measures in response to economic or other crisis. *Second*, it potentially limits the regulatory powers of states especially the power to regulate important sectors of the economy. *Third*, it arguably goes beyond what the parties originally intended and effectively displaces states as the key players in international investment law rule-making. Finally, it has the effect of taking traditional obligations to new heights – heights that most countries in Africa are not likely to meet given existing legal, structural and institutional inadequacies.

5. Investment Arbitration and ESG Issues

Investment tribunals typically focus on investor rights and the obligation of host states and rarely pay attention to the rights and interests of host communities. As Schreuer and Kriebaum note, "At present, community interests are not prominent in the reasoning of investment tribunals. Human rights, environmental protection, and development, while not completely absent from their case law, still play a somewhat peripheral and occasional role." In the past claims have been brought challenging the regulation of host States in sensitive sectors such as water, sanitation, and environmental conservation. These cases suggest that in relation to agro-FDI in land, it may be impossible for a host government to halt an operation that proves to have devastating consequences on the environment or for a host government to require that investors give special consideration or advantage to members of a particular ethnic group.

---

[188] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2001, 42 ILM 609 (2003).
[189] *Siemens, A.G. v. The Argentine Republic*, Decision on Jurisdiction, Case No. ARB 02/8 (Aug. 3, 2004)
[190] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* rest of citation
[191] *Siemens A.G. v. Argentine Republic,* ICSID Case No. ARB/02/08 (Argentina-Germany BIT), Award, 6 February 2007.
[192] *Waste Management v. Mexico (No. 2)*, Final Award, para. 98 (emphasis added).

6. Euro-Centric Orientation of Tribunals

To many, the ISDS system is still very Euro-centric in its design and operation. *First*, the system has been utilized primarily to bring claims against developing countries. *Second*, to date, the main seats of arbitration for investment disputes are located in the West. *Third*, to date, an overwhelming majority of arbitrators in decided cases have been developed countries' nationals. *Finally*, investment arbitral tribunals typically draw on Western concepts and principles to fill perceived gaps in BITs. The ISDS system has been used primarily against developing countries. As of 2008, at least 73 governments (15 in developed countries, 44 in developing countries, and 14 in South-Eastern Europe and the Commonwealth of Independent States) had faced treaty arbitration. Individuals who have served as arbitrators in ICSID cases have been primary from Western nations, and the seats of arbitration are primarily located in the West: the ICSID (Washington, USA), UNCITRAL (Vienna, Austria), Stockholm Chamber of Commerce (Stockholm, Sweden), and International Chamber of Commerce (Paris, France), the Permanent Court of Arbitration (The Hague).

8. Investment Awards and Costs

Huge awards ordered by investment tribunals are a concern for poor countries. Huge monetary awards can put a huge strain on a country's budget and can force policy makers to divert money away from important sectors of the economy. In *Occidental Petroleum Corporation v the Republic of Ecuador*, a 2012 decision, an investment tribunal ordered Ecuador to pay US1.77 billion in damages. The award is the reportedly the largest award in the history of the ICSID. Argentina's experience stands also as an example. In 2007 alone, five investment arbitration tribunals awarded a total of $615 million out of the $1,838 billion in damages that was originally claimed.

Another concern is the cost of investment treaty arbitration which can be staggering and has real implications for countries that do not have local lawyers skilled in international investment law and who must retain the services of foreign lawyers. The position is made worse by the fact that "[a]rbitrators have broad discretion to allocate arbitration costs and legal fees" and "there is no clear pattern on allocation of expenses and fees."[193] Bulgaria reportedly spent $13.2 million in legal costs in *Plama Consortium Limited v. Republic of Bulgaria*.[194] Hungary also reportedly paid the claimant's legal expenses (about $7.6 million) and had to cover its own costs and expenses (about $4.4 million) in *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary.*[195] The Slovak Republic paid $10 million of the claimant's reported costs and expenses in *Československá Obchodní Banka A.S. v. Slovak Republic*.[196]

D. *Biwater Gauf (Tanzania) Ltd., v. Republic of Tanzania*: Lessons Learned[197]

In August 2005, Biwater Gauff (Tanzania) Ltd. (BGT), a private water company, filed a request for arbitration with the ICSID regarding contractual dispute with the United Republic of

193 Lessons from Peru, *supra* note 63.
194 ICSID Case No. ARB/03/24. Even though the claimant was ordered to bear all fees and expenses of the tribunal and reimburse respondent $460,000 of the advance in costs and $7 million in legal fees and costs, that still left Bulgaria with a net cost of about $6 million.
195 ICSID Case No. ARB/03/16.
196 ICSID Case No. ARB/97/4.
197 ICSID CASE NO. ARB/05/22, Award, July 24 2008.

Tanzania (Tanzania) arising from three agreements for the operation and management of the Dar es Salaam water system. Under one of the agreements, the Water and Sewage Lease Contract (the "Lease Contract") – BGT, through a locally incorporated company, City Water Services Limited, agreed to provide water and sewerage services on behalf of the Dar es Salaam Water and Sewerage Authority ("DAWASA") for a ten year period. Between 13 May 2005 and 1 June 2005: the Minister of Water and Livestock Development terminated the Lease Contract; Tanzania made a call on the entire amount of the performance bond established by City Water in connection with the Lease Contract; the Tanzanian Revenue Authority withdrew a Value Added Tax exemption that was hitherto available to BGT; City Water's senior management were deported; and representatives of Tanzania and DAWASA seized the company's assets, installed a new management, and took over operations. BGT brought the instant case before the ICSID alleging that the events occurring between 13 May 2005 and 1 June 2005 violated several provisions of the *Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments* (U.K.-Tanzania BIT).[198] Specifically, BGT alleged violation of Articles 5 (expropriation), Articles 2 ("fair and equitable treatment" "full protection and security" and "unreasonable or discriminatory Measures" and Article 6 (unrestricted transfer of capital and returns) of the said BIT.

1. The Decision of the *Biwater* Arbitral Tribunal

i. Expropriation: The Cumulative Effect Test

Did Tanzania's conduct in repudiating the Lease Contract, occupying City Water facilities, usurping management control and deporting City Water's senior managers constitute expropriation? The Arbitral Tribunal answered in the positive. The Arbitral Tribunal noted the expansive language of Article 5 of the U.K.-Tanzania BIT which stipulates that investments shall not be: "nationalised, expropriated *or subjected to measures having effect equivalent to nationalisation or expropriation* ... in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a nondiscriminatory basis and against prompt, adequate and effective compensation. …." According to the Tribunal, as worded, the BIT "encompasses not only direct expropriation … but also de facto or indirect expropriation which do not involve actual takings of title but nonetheless result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor"[199] In determining what might qualify as "expropriation" the Tribunal considered the conduct of Tanzania "both in terms of the effect of individual, isolated, acts complained of, as well as in terms of the cumulative effect of a series of individual and connected acts, in so far as such a cumulative effect might be to deprive the investor in whole or in material part of the use or economic benefit of its assets."

The Tribunal drew a distinction between "interference with rights" and "economic loss" and concluded that "[a] substantial interference with rights may well occur without actually causing any economic damage which can be quantified in terms of due compensation." To determine if indirect expropriation has occurred, "a substantial deprivation of rights, for at least a meaningful period of time, is required" the Tribunal concluded. Ultimately, the Tribunal decided that BGT's investment, as embodied in the Lease Contract, "was the subject of an expropriation." Although the Tribunal

[198] Signed at Dar es Salaam on 7 January 1994, and entered into force on 2 August 1996.
[199] Id., ¶ 452.

found that by the beginning of May 2005, the normal contractual termination process was underway, it nevertheless concluded that the normal course of the contractual termination was interrupted by the conducts of Tanzania beginning on 13 May 2005. Regarding the occupation of City Water's facilities and usurpation of management control, the Arbitral Tribunal stated:

> These were acts executed by the Republic with the assistance of its police force, and well beyond the ambit of normal contractual behaviour. They were **unreasonable and arbitrary, unjustified** by any public purpose (there being no emergency at the time), and the most obvious display of *puissance publique*. In effect, City Water was completely shut out of the Project, in violation of its rights under the Treaty, without any adequate justification.[200]

ii. Fair and Equitable Treatment

BGT argued that Tanzania had violated the "fair and equitable treatment" provision of the BIT. Article 2(2) of the U.K.-Tanzania BIT provides that "investments of nationals or companies of each Contracting Party *shall at all times be accorded fair and equitable treatment*."[201] BGT argued that the fair and equitable treatment principle obliged Tanzania to: "act with due diligence in the protection of BGT's investment; respect BGT's legitimate expectations; create a stable and predictable investment climate; act in a transparent manner; and act in accordance with due process and procedural propriety." The Tribunal paid attention to the way the term was phrased in the BIT. Based on the wording of Article 2(2) of the BIT, the Tribunal concluded that "the Contracting States here ought to be taken to have intended the adoption of an autonomous standard." Furthermore, the Tribunal observed that "The concept of "*fair and equitable treatment*" is not precisely defined in the BIT, but appears to give each arbitral tribunal much latitude." Ultimately, the Tribunal concluded that Tanzania violated the fair and equitable treatment standard by, among other things, withdrawing BGT's the VAT Exemption, seizing control of City Water's offices, failing to put in place an independent, impartial regulator, insulated from political influences, and by failing to manage the expectations of the public with regards to the speed of improvements of the network.

iii. Unreasonable or Discriminatory Measures

Article 2(2) of the relevant BIT also states that: "[n]either contracting party shall in any way **impair** by *unreasonable or discriminatory measures* the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party."[202] The Tribunal concluded that the VAT withdrawal, the deportation of City Water's senior management, and the seizure of City Water's assets were abusive and unreasonable and were "a clear exercise of *puissance publique*." What does "unreasonable" mean? The Tribunal adopted the definition offered by the *Saluka v. Czech Republic* Tribunal. According to the *Saluka* Tribunal, reasonableness requires that a State's conduct "bears a reasonable relationship to some rational policy, whereas the standard of 'non-discrimination' requires a rational justification of any differential treatment of a foreign investor"[203].

---

[200] Emphasis added.
[201] Emphasis added.
[202] Emphasis Added.
[203] *Saluka v. Czech Republic*, Partial Award of 17 March 2006, ¶ 460

iv. Full Protection and Security

Did Tanzania fail to ensure that BGT's investments received full protection and security as required by Article 2(2) of the U.K.-Tanzania BIT which provides that "investments of nationals or companies of each Contracting Party shall at all times ... enjoy **full** protection and security in the territory of the other contracting Party"?[204] What obligations does the "full protection and security" standard impose on a host country? The Tribunal concluded that seizure of City Works premises were unnecessary and abusive and amounted to a violation of Tanzania's obligation to ensure full protection and security. It was irrelevant, in the Tribunal's view, that no force was used to accomplish this purpose. In reaching this conclusion, the Tribunal appeared to adopt the standard of due diligence elaborated in past decisions such as *AMT v. Congo*,[205] *AAPL v. Sri Lanka*,[206] and *Wena Hotels v. Egypt*.[207]

2. Lessons from the Biwater Arbitration

There are many lessons that can be drawn from the Biwater decision. Although it is up to foreign investors to make proper assessment of the risks associated with their investments[208] and although some investment tribunals have clearly states BITs "are not insurance policies against bad business judgments,"[209] a capital importing country must be careful when negotiating and concluding a BIT. The decision of the *Biwater* Arbitral Tribunal has a lot of implications for governments in SSA and for the land deals they are currently negotiating.

First, although most BITs look the same and sound the same, the devil is really in the details. Subtle differences in words and phrases can fundamentally change the meaning and scope of a treaty provision. Thus, the obligation to accord "full protection and security" to an investor is not necessary the same as the obligation to accord "protection and security" to the investor." As the *Biwater* Tribunal noted, "caution must be exercised in any generalised statement about the nature of the "fair and equitable treatment" standard, since this standard finds different expression in different treaties."[210]

Second, the fact that the Tribunal in *Biwater* declined to adopt an "economic damage" test for expropriation means that a government may be held to have expropriated an investment even if an investor has not suffered any economic damage. In other words, suffering of substantive and quantifiable economic loss is not a pre-condition for the finding that expropriation has occurred.

---

204 Emphasis Added.
205 *AMT v. Congo*, Award of 21 February 1997, paras. 6.05, 6.06.
206 *Asian Agricultural Products Ltd. v. Sri Lanka* (ICSID Case No. ARB/87/3), Award of 27 June 1990.
207 Wena Hotels v. Egypt (ICSID Case No. ARB/98/4), Award of 8 December 2006, 6 ICSID Rep. 89 (2004).
208 P. Muchlinski, "Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard", 55 ICLQ 527, 530 (2006)(observing "it is up to an investor to make a proper assessment of risks associated with a proposed foreign investment before entering into it and to be fully aware of both the prospects and pitfalls of an investment undertaken in a high risk-high return location.").
209 *Maffezini v. Spain*, Award of 13 November 2000, para. 64. In *Waste Management v. Mexico*, the tribunal noted in regards to Article 1110 of the North American Free Trade Agreement (NAFTA), that "it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor." *Waste Management, Inc. v. United Mexican States* (ICSID Case No ARB/AF/98/02), Award of 2 June 2000, 15 ICSID Rev.—FILJ 214 (2000); 40 ILM 56 (2001), para. 177 [hereinafter *Waste Management v. Mexico (No. 1)*].
210 *Biwater*, supra note 83, ¶ 590.

The test relied on "substantial interference with an investor's right" is imprecise and is a potential minefield for governments.

Third, the *Biwater* Tribunal's decision regarding the "fair and equitable standard" highlights the broad scope of the FET standard and underscores the need to negotiate BIT provisions carefully, the danger of vague terms in a BIT, and the risks that arise when terms are not clearly defined. In *Biwater*, the parties disagreed on the meaning of the "fair and equitable treatment" standard and on whether the applicable standard is an autonomous one (as BGT contended) or whether it is no more than the customary international law minimum standard (as Tanzania contended). Past arbitral tribunals differ on the meaning of the term. In *Saluka v. Czech Republic*[211] the tribunal held that the fair and equitable standard was different from the international minimum standard. On the other hand, in *Genin v. Estonia*,[212] the tribunal concluded that the idea of fair and equitable treatment was tied to the customary international law minimum standard.[213] However phrased, the specific obligations that the fair and equitable treatment imposes on host countries are significant and could be a problem especially for countries with weak legal system and poor institutions. Although the threshold for a finding a violation of the fair and equitable standard "is a high one," it is not one that is impossible to meet as the decision in *Waste Management v. Mexico* (No. 2) demonstrates."[214]

Fourth, the "protection and security" standard may provide an incentive for host governments to clamp down on domestic protests. A host government may be found to violate the obligation to afford full protection and security to an investor if it does not take all necessary action to stop such a protest? According to the *Biwater* Tribunal, the "full security" protection standard is implicated both in cases where organs and representatives of the State itself are involved and in cases where a State fails to prevent actions by third parties. Moreover, as the Tribunal stated, "when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. *It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal.*"[215]

Finally, the test applied to determine whether the "full protection and security" standard has been violated is the "due diligence" test. Due diligence requires a host country to show that it has taken all necessary precautions to protect a protected invested on its territory.[216] It is "an objective obligation which must not be inferior to the minimum standard of vigilance and care required by international law."[217] The "full protection and security" standard is thus a standard that "places a clear premium on political stability, and the obligation of host countries to ensure that any instability does not have negative effects on foreign investors, even above the ability to protect domestic investors".[218] A government faced with popular protest against a concluded land investment agreement may likely have to make a choice between ignoring its obligation under a BIT or

---

211 *Saluka v. Czech Republic*, Partial Award of 17 March 2006, paras. 286-295.
212 *Genin v. Estonia*, Award of 25 June 2001, para. 367
213 *Genin v. Estonia*, Award of 25 June 2001, para. 367.
214 *Waste Management v. Mexico (No. 2)*, Final Award, ¶ 98.
215 *Biwater*, *supra* note 83, ¶ 729. Cited with approval: *Azurix v. Argentina*, Final Award, para. 408.
216 AMT v. Congo, Award of 21 February 1997
217 *AMT v. Congo*, Award of 21 February 1997, ¶ ¶ 6.05, 6.06.
218 UNCTAD Series on International Investment Policies for Development, Investor-State Disputes Arising from Investment Treaties: A Review (2005), pp. 40-41.

decisively crushing all such protests by any means necessary even if the means chosen violate international human rights law.

What lessons then? *First*, land investment agreements should be negotiated against the backdrop of the BITs that a particular country has concluded. It may be necessary for governments to include, in the agreements, clear and specific provisions that would override provisions in a BIT. *Second*, governments must review their existing BITs with a view to, when possible, renegotiating better terms. *Third*, Governments must pay closer attention to the provisions of the BITs they are currently negotiating to ensure: (i) that they are development-friendly; (ii) that vague terms are defined; and (iii) that the government secures necessary policy space and, if possible, that key sectors of the economy are exempted from the reach of the BITs. Ideally all contract negotiations, including BIT negotiations, should be conducted with full transparency and with participation of major stakeholders.[219]

VII. DISCIPLINING FOREIGN INVESTMENT IN LAND: WHAT NEXT?

The demand for farmland will likely continue given growing world population, rise in the number of middle class in emerging economies like China and predictions regarding continued economic growth in these economies. According to Morgan Stanley:

> It is estimated that the middle class will expand from 12.4% of the population in 2005 to nearly 31% in 2015, which translates to roughly 27 million people entering the middle class each year. With an unprecedented number of people leaving poverty, our economists believe that China is entering a golden age for consumption, as incomes rise and the poverty rate ratio falls. If their forecasts prove correct, China's total consumption will likely reach two-thirds of the current US level by 2020.

Internally, Africa needs massive investment in agriculture and agro-FDI in land can provide needed capital for infrastructure and other developments in the continent. [220] Most analysts agree that FDI in land can be either a blessing or a curse. For most countries in Africa, then, the choice is not whether to wholly embrace or totally reject FDI in land. The challenge is how to maximize the potential benefits that come from FDI in land while minimizing related costs. As the UN Special Rapporteur on the Right to Food has repeatedly stated**:**

> This choice is not between accepting certain investment projects or refusing them altogether; nor is it between improving productivity of farmland, or leaving land "underutilized." There are a variety of ways to channel investment in order to combat rural poverty, and there are a variety of strategies to ensure that land will be used in ways that are productive and can contribute to local food security. When

[219] Biwater, ¶ 379.

[220] Olivier de Shutter ("investment in agriculture *is* needed, particularly in some regions in developing countries where this sector has been neglected for the past 30 years. Lack of investment is responsible for the fact that, for example, average cereal yields in Africa have stagnated at 1.3 tons per hectare, whereas the figure is 4.7 tons per hectare for East Asia. There is no doubt that such discrepancies can be reduced."

> considering a proposed investment in agriculture that implies large-scale shifts in land use, governments should first consider the opportunity costs involved. This means that where land is underutilized or considered vacant, the question whether it should be redistributed to allow small independent farmers to use it or whether it should be developed into a large estate comes first, even before the question arises of whether a large-scale investment complies with a set of principles.[221]

The problem today is that as a result of weak legal and institutional frameworks, many countries are presently ill-equipped to effectively manage agro-FDI. Most countries in Africa do not have the necessary laws in place and most do not have strong and functioning institutions that can ensure that laws are effectively enforced. A second problem is that it does not appear that investment contracts are negotiated with a view to securing maximum benefits from agro-FDI and mitigating associated risks. These problems are complicated by the fact that many countries in Africa, like Ethiopia, have concluded BITs that impose serious constraints on the ability of policy makers to structure agro-FDI in ways that ensure sustainable development. Given weak regulatory environment, proceeding with land deals on the scale and speed presently witnessed is dangerous at best. As organizations such as the Food and Agricultural Organization and the World Bank admit "where rights are not well defined, governance is weak, or those affected lack voice, there is evidence that such investment can carry considerable risks of different types."[222] What then for countries in SSA?

A. Proposals Regarding Agricultural Investment Contracts

1. Broad Public Debate

Whether large-scale acquisition of farmland will contribute to poverty reduction and sustainable development in Africa in the long term will largely depend on the way the arrangements are structured and the terms of related investment contracts? Even while suggesting that large-scale investment in farmland can yield win-win outcome, organizations such as the FAO and WB admit that "many large farming ventures attempted in the past have proven unsuccessful;"[223] that "Sometimes mistaken beliefs in economies of scale in agricultural production rather than value addition and better linkages to markets have saddled several countries with subsidy-dependent large farm sectors that provided few economic or social benefits;"[224] and that farmland expansion is not always necessary. According to the WB, "[i]n many countries … there is large scope to increase productivity on currently cultivated land."[225] Most countries in Africa are yet to have good and open debate about the type of development they want and the price, if any, which must be paid for such development.

2. Transparency and Participation in Investment Contract Negotiation

Transparency in the negotiation of investment contracts as well as greater public participation in the process of negotiating and concluding these agreements is important. According to the 2010

---

221 *Forward*, Center for Human Rights and Global Justice, Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment v (2009)
222 Briefing Note, at 2.
223 Id., at 2.
224 Id.
225 World Bank, *supra* note 1, at xxxv.

Public Statement on the International Investment Regime "Investment contracts should be concluded and implemented in accordance with the principles of public accountability and openness and should preserve the state's right to regulate in good faith and for a legitimate purpose. "

3. Flexibility and Long-Term Considerations in Investment Contracts

Investment contracts should be drafted to allow governments respond effectively to changing situations and changes in international law. Ideally, these contracts, "should provide a mechanism for managed renegotiation by the investor and state, based on a fair and balanced process in which adequate support and resourcing is available to both parties, so as to accommodate significant changes in the circumstances of the underlying agreement."

4. Better Understanding of the Role of Investment Contracts

Presently, governments in SSA do not appear to effectively use investment contracts to effectively manage and distribute risks, costs and benefits. Examples of best practices and country-examples may help to change the present climate of passivity in the continent.

B. Proposals Regarding Bilateral Investment Treaties

1. Comprehensive Review of BITs and Other IIAs

Most countries in Africa do not know their BIT negotiation history? Most countries in the region have not done a comprehensive risk assessment of the BITs they have ratified? For most countries, BIT negotiation is not driven by broader strategic considerations. Countries in Africa need to review their existing BITs and review their negotiation strategies and positions. A comprehensive review of existing BITs will help countries assess whether the BITs they concluded in the past yielded any tangible benefit, perhaps in the form of increased FDI inflow? A comprehensive review of existing BITs will also help countries identify areas of potential vulnerability. Finally, such a comprehensive review would also help countries develop new negotiation strategies and positions going forward. Overall, there is need for countries to rethink and review their growing network of IIAs.

To date, South Africa appears to be the only country in Africa that has carried out a BIT review. In 2009, South Africa's Department of Trade & Industry (the "DTI") initiated a review of the BITs that South Africa concluded since 1994.[226] In a June 2009 Government Position Paper, the DTI noted that the review was "partly necessitated by various arbitral proceedings initiated against the Republic of South Africa (RSA) and the need to conduct a comprehensive risk assessment."[227] South Africa's DTI admits that prior to 1994, South Africa "had no history of negotiating BITs," did not fully appreciate the risks that BITs posed, and as a result "entered into agreements that were heavily stacked in favour of investors without the necessary safeguards to preserve flexibility in a number of critical policy areas."[228] South Africa's BIT review also revealed that the country's

[226] The Department of Trade and Industry, Republic of South Africa, NOTICE 961 OF 2009, 7 July 2009.
[227] Department of Trade and Industry, 13.
[228] *Id.*

approach to both inward and outward FDI "had not been informed by a holistic policy perspective but rather a patchwork of general policy considerations."[229]

2. Development-Oriented FDI Policy

Countries in Africa must also work towards developing and operationalizing development-oriented FDI policies. For most countries in Africa, FDI policies are not comprehensive and are not fully integrated into broader development goals and objectives. For most countries, this will mean developing investment policies that are fully integrated into the country's economic development plan, are carefully designed to generate sustainable development outcomes, and are also designed to achieve the goals of liberalization and investment promotion. As UNTAD notes, a balanced investment policy must strive to "create synergies with wider economic development goals or industrial policies, and achieve seamless *integration in development strategies*;"[230] "foster *responsible investor behavior* and incorporate principles of [Corporate Social Responsibility];" and "ensure *policy effectiveness* in their design and implementation and in the institutional environment within which they operate."

3. Novel Provisions in IIAs

Countries in Africa must carefully and critically evaluate the terms of the BITs and other investment agreements that they conclude in the future to ensure that the terms are clear and free from ambiguity and that they contain necessary safeguards and preserve flexibility in critical policy areas. In this regard, policy makers in Africa must pay attention to novel provisions that can be included in BITs in order to ensure clarity of obligations and achieve a rebalancing of the rights and obligations between States and foreign investors.

There is now a growing trend towards "balanced" investment treaties. Balanced treaties are those that "accommodate the home state's interests in conserving regulatory space by introducing provisions that avoid liability for treaty violation by identifying circumstances in which a state may regulate foreign investment."[231] Novel provisions can be introduced to limit the discretion of arbitral tribunals and prevent expansionist interpretations that parties to the BIT did not contemplate. Achieving a balanced treaty may require:

- that countries reject the use of "model" BITs;
- that the content of obligations are clear and free of ambiguity;
- that BITs concluded have built-in mechanisms for interpreting ambiguous terms;
- that clauses that address investor obligations are inserted in new agreements;
- that attention is paid to the list of exceptions or preclusion of liability clauses;[232] and
- that countries consider clauses that limit the scope of state obligations through the use of general exceptions and carve outs; clauses similar to those in Article XX of the

---

229 *Id.*
230 UNCTAD, World Investment Report 2012 24 (2012)(emphasis added).
231 Soranarjah, at 228.
232 For example, Article 10 of Canada's 2004 Model BIT For The Promotion And Protection Of Investments". *Available at:* http://www.international.gc.ca/trade-agreements-accordscommerciaux/assets/pdfs/2004-FIPA-model-en.pdf.

General Agreement on Tariffs and Trade may go a long way in safeguarding policy space.[233]

Overall, policy makers in Africa must pay closer attention to the details of the BITs that they conclude. As South Africa's DTI rightly notes, "[t]hough most BITs follow a similar basic structure, nuances in language may result in very different legal consequences."[234]

4. Common African Position on International Investment Rule-Making

African countries must explore the possibility of developing a common African position on FDI and international investment rule-making more generally. Such a move is already underway in other regions. In the European Union, the EU now has exclusive competence over FDI-related matters.[235] A coordinated African voice on FDI would likely enhance the continent's global competitiveness, prevent destructive competition among countries, help strengthen Africa's position in investment agreements, and ultimately result in increased FDI flows to the continent. We are seeing some promising action in this direction. In June of 2012, Member states of the Southern African Development Community (SADC) concluded work on the draft SADC Model Bilateral Investment Treaty Template with Commentary ("Model BIT").[236] The Model BIT is designed to assist states with negotiating development-friendly international investment agreements. Part 3 of the Model BIT is titled "Rights and Obligations of Investors and State Parties." Part 3 addresses issues such as Environmental and Social Impact Assessment (Article 13), Environmental Management and Improvement (Article 14), Minimum Standard for Human Rights, Environment and Labour (Article 15), Corporate Governance Standards (Article 16), Investor Liability (Article 17) and Transparency of Contracts and Payments (Article 18). It remains to be seen whether SADC Member States will incorporate the Model BIT into domestic law and actually use it.

5. Manage the Multifaceted, Overlapping and Complex Web of Rules

Growing complexity in the rules governing foreign investment is a challenge for most countries in Africa. Given resource constraints and limited human and technical capacity, African countries will continue to face challenges with managing obligations under a growing universe of IIAs, multilateral trade agreements, and treaties outside the regime of international economic law.[237]

---

[233]Article XX, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

[234] Department of Trade and Industry, 13.

[235] See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 14/07 (3 December 2007), *available at:* http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf.

[236] The model is available here: http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf

[237] Ethiopia, for example, has signed about 30 bilateral investment treaties, is a member of the Common Market for Eastern and Southern Africa (COMESA), is a party to the World Bank's Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and the World Bank's Multilateral Investment Guarantee Agency (MIGA), has double taxation treaties with about 12 countries, and has ratified both the International

As countries in Africa become increasingly bound by more and more IIAs, they must work to develop the capacity needed to analyze how the different treaties interact with one another, with domestic law, and with their other international obligations. A growing network of IIAs causes inevitable gaps, overlaps, and inconsistencies in content and coverage. Countries must develop the capacity to understand the growing interface between different international investment agreements and the capacity to effectively manage overlapping obligations.

6. Interrogate Fairness in South-South Investment Contracts and BITs

The South-South dimension to land deals in Africa point to the need for policy-makers and scholars to pay closer attention to fairness and accountability issues in South-South trade and investment economic relations. The increase in trade and investment among developing countries raises urgent and critical questions about the evolving normative and institutional framework for South-South economic relations and the mechanisms that are in place to ensure accountability in the system. Questions must be increasingly about fairness in South-South trade and investment agreements. Questions must also be increasingly asked about the cost and benefit of South-South trade and investment links for poor developing countries particularly the least developed countries (LDCs) in Africa. Casual observation suggests that South-South investment do not automatically yield win-win outcomes for participating countries and that South-South investment may not necessarily offer real opportunities for countries in Africa to address core development challenges? The BITs reviewed do not reveal major differences between the BITs Ethiopia concluded with developed countries and those it concluded with developing countries. Indeed, in their BITs, developing countries appear to be adopting essentially the same model that developed countries have traditionally used.

Whether the necessary political exists in Africa is the question. Undoubtedly, policy makers in Africa face difficult questions and policy challenges. This challenge arises because of four factors. First, countries in Africa need capital for development projects and investment in agriculture has the potential to transform the continent and significantly improve the lives of ordinary Africans through the increased export of produce to Western markets and other emerging markets.[238] Second, with growing demand for food in emerging markets, countries in Africa can position themselves to reap the benefits through increased export of agricultural crops.[239] According to Morgan Stanley, in 2009-2010, China consumed 49% of global pork, 42% of cotton, 31% of rice, 25% of soybeans, 17% of chicken, 16% of wheat, 10% of beef, and 9% of sugar. During the same period, China represented 47% of growth in global soybean consumption and 21% in global corn consumption.[240] Third, within Africa, food insecurity is a problem. Growing population, growing middle class, urbanization are all putting pressure on existing food sources and point to higher demands for food in Africa in the future. Finally, globally, countries in Africa face intense competition from other countries to attract agro-investors. Countries in Eastern Europe are proving attractive to Investors.[241] In

---

Covenant on Civil and Political Rights (11 June 1993) and the International Covenant on Economic, Social and Cultural Rights (11 June 1993) and also the African Charter on Human and People's Rights (15 June 1998).

[238] Africa: The Good News, Foreign investors see potential in African agriculture, 3 March 2011. http://www.africagoodnews.com/development/agriculture/2467-foreign-investors-see-potential-in-african-agriculture.html

[239] Morgan Stanley (observing that China is responsible for a large share of global growth in agricultural commodity demand.).

[240] Id.

[241] HighQuest at 10 ("Eastern Europe has begun to attract investment for farmland acquisition

Southeast Asia, a briefing from the IIED notes that China "is also a major player in agribusiness throughout Southeast Asia.[242] Australia and New Zealand offer vast tracts of land and have the added advantage of proximity to expanding markets in Asia.[243] It is reported that Australia has "already taken steps to explore the possibility of capitalizing on the predicted boom in China's food needs."[244] Jonathon Barratt, the founder of Barratt's Bulletin, believes that Australia is in a good position to take advantage of any increase in demand for food products.[245] Countries in Africa also face intense competition from Western countries seeking market for their products. Morgan Stanley predicts that "Chinese corn imports are likely to be sourced predominantly from the western hemisphere, which today is already responsible for more than 70% of global exports." The report notes that "While China has worked in recent years to cultivate trade agreements and agricultural programs in Africa and south Asia, only the major corn producers in the western hemisphere will be able to handle the scale of China's demand in the next five years.[246]

VIII. CONCLUSIONS

Investment in farmland has emerged as a new asset class for all kinds of investors, including institutional investors.[247] Acquisition of large-scale agricultural land in Africa raises a host of ESG issues and concerns and point to the need for improve governance of natural resource investment in the continent. Urgent response to agro-FDI in Africa is important given the centrality of land to sustainable socio-economic growth and development in Africa. At stake is the security of the social, economic and cultural livelihoods of millions in the continent.[248] The issue of acquisition of farmland in Africa is troubling in part because Africa is currently experiencing an agricultural crisis – a crisis that has been aggravated by inadequate funding, the lack of adequate water control and management, poor rural infrastructure and neglect of agricultural research.[249] Millions in the continent are chronically and severely undernourished, majority of countries in the continent are net importers of food, Africa as a continent is the largest recipient of food aid in the world, and the continent is presently not on track to achieve the Millennium Development Goal (MDG) target on reducing hunger.[250] For many in Africa, land is not only about securing livelihoods for millions but also is an important part of the cultural heritage and social identity. Thus, for ordinary Africans, equitable access to land, secure land rights, gender equity, improved governance in the land sector and reduction of land related conflicts are important goals that governments should address as a matter of priority.[251]

---

and transformation.).

[242] Emily Polack, Agricultural land acquisitions: a lens on Southeast Asia, IIED Briefing: The Global Land Rush, April 2012. http://pubs.iied.org/pdfs/17123IIED.pdf

[243] HighQuest at 10 ("Given the large tracts of available land which have yet to be developed and the region's proximity to fast-growing markets in Asia.")

[244] Food - The Next Commodities Boom for Australia?, CNBC.Com, 12 June 2012, http://www.greenworldbvi.com/wp-content/uploads/2011/10/Food-The-Next-Commodities-Boom-for-Australia.pdf

[245] Id.

[246] Morgan Stanley at 6

[247] David Macdonald, Forward, The Responsible Investor's Guide to Commodities at 25 (2011).

[248] Declaration on Land (RECOGNISING the centrality of land to sustainable socio-economic growth, development and the security of the social, economic and cultural livelihoods of our people.")

[249] Draft AU Summit Declaration on Agriculture and Food Security in Africa, 12 July 2003, AU/MIN/AGRI/RPT (I),

[250] *Id.*

[251] Framework and Guidelines, ¶ 4.1.3

The time to act is now given projections about long-term boom in the prices of everything ag-related. According to O'Keefe:

> The fundamentals remain in place for a long-term boom in the prices of everything ag-related. The simplest metric to consider is the amount of farmland per person worldwide: In 1960 there were 1.1 acres of arable farmland per capita globally, according to data from the United Nations. By 2000 that had fallen to 0.6 acre (see chart above, "Precious Acres"). And over the next 40 years the population of the world is projected to grow from 6 billion to 9 billion.[252]

It is important that governments proactively address the myriad ESG issues implicated by FDI in land. First because while there are on-going efforts in the investment community to define best practices to guide investment in farmland, it is not clear that the private sector will develop the right standards or that these standards will be effectively implemented once they are adopted.[253] Second because the foreign interest in arable land in Africa is likely to continue to grow, this problem is not likely to go away anytime soon. Every indicator suggests that global demands for vital commodities such as food, water and energy will grow in the coming years and that "[g]lobal competition over scarce natural resources will be one of the defining aspects of the 21st century."[254] Third because some of the negative implications of large scale leases and acquisition of land in Africa are not yet known and may not be known for years; as investors begin to utilize the lands they have acquired, new issues will likely emerge.

International investment law as currently structured, does not address the ESG issues implicated in agro-FDI. The good news is that there is now a growing consensus that the international investment regime is at a crossroad and is in need of reform. As one scholar put it: "Although there have long been criticisms of international investment law, the system is now experiencing challenges that call into question its ability to *meet* the expectations of its constituents in a sustainable and predictable manner." The bad news is that there is no clear agenda for reforming the regime. The bad news also is that it does not appear that policy makers in Africa fully appreciate the legal implications of the BITs they concluded in the past and are presently concluding and do not appear to be engaged in present discussions about how to manage and ultimately reform the system.

Beyond foreign investment in land, countries in Africa must look at broader issues including the tension between human rights and foreign investment, challenges to Africa's participation in international investment law rule-making and international investor-state arbitration, and new problems arising from Africa's growing economic relations with emerging economies like China, Brazil and India.

---

[252] Brian O'Keefe, Betting the Farm, Fortune Magazine, 16 June 2009.

http://money.cnn.com/2009/06/08/retirement/betting_the_farm.fortune/index.htm?postversion=20090611
10

[253] c/f Id. P. 18

[254] David Macdonald, Forward, The Responsible Investor's Guide to Commodities (2011).

Cases Referenced

AMT v. Congo, Award of 21 February 1997

Asian Agricultural Products Ltd. v. Sri Lanka (ICSID Case No. ARB/87/3), Award of 27 June 1990.

Biwater Gauf (Tanzania) Ltd., v. Republic of Tanzania, ICSID CASE NO. ARB/05/22, Award, July 24 2008.

Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria. Communication No. 155/96.

Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of January 31, 2001

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya. Communication No. 276/2003

Genin v. Estonia, Award of 25 June 2001

I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125.

I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 131.

Maffezini v. Spain, Award of 13 November 2000

References

De Schutter, O. (2011) "G20 action plan addresses symptoms, not causes of food insecurity," africanagricultureblog.com, 27 June.

Doya, David Malingha (2011) "Karuturi global plans $500 million investment in Tanzania food production," Bloomberg, 18 Aug 2011.

EchoGéo (2010) "Land for agribusiness International? A dilemma for land policy Madagascar," EchoGéo, No. 11, December 2009 / February 2010.

ET (2011) "Ethiopia offers India farmland for investment," Economic Times (New Delhi), 2 February.

FAO (2011) "FAO head warns on land-grabbing: Foreign investment as tool for development," United Nations Food and Agriculture Organisation Media Centre, 12 May.

Goswami, R. (2010) "African landrush," Infochange News & Features, 5 April.

Hazra, A. (2009) "India joins race for land in Africa, China way ahead," Hindustan Times, 4 May.

Heinlein, P. (2010) "Foreign Agro Firms Scoop Up Ethiopian Farmland," Voice of America Online, 22 February.

IANS (2009) "India offers to spur green revolution in drought-hit Tanzania," Indo-Asian News Service (IANS), 15 September. 40

IANS (2011a) "Low cost, high returns make Africa attractive to India Inc.," Indo-Asian News Service (IANS), 5 April.

Le Monde (2009) "In Madagascar, an Indian company plans to rent nearly 500,000 ha," Le Monde (France), 21 March.

McLure, J. (2009) "Ethiopian farms lure investor funds as workers live in poverty," Bloomberg, 31 December.

McConnell, T. and Overdorf, J. (2010) "New Scramble for Africa's Land." The Global Post, 5 October.

Metho, O. (2010) "Response to Karuturi CEO on his Ethiopia land grab," Solidarity Movement for aNew Ethiopia (SMNE), Addis-Ababa, 10 November.

Metho, O. (2011a) "Major loopholes in land lease contracts raise many questions," Statement by Solidarity Movement for a New Ethiopia (SMNE), Addis-Ababa, 12 May.

Metho, O. (2011b) "An Open Letter to the People of India, a Day Light Robbery in Ethiopia: 'Doing Business' With African Dictators," Solidarity Movement for a New Ethiopia (SMNE), Addis-Ababa, 15 June.

Mihretie, K. (2010) "Ethiopia on the Verge of Colony of Many," Anyuak Media, 31 January.

Mitra, D. (2010) "Uganda offers farmland for Indian investment," Indo-Asian News Service (IANS), 20 August.

NAPM (2011) "Sangharsh to UPA: Ensure Land Rights: Stop Land Acquisition and Displacement," Press Release by National Alliance of People's Movements, 5 August.

Nelson, D. (2009) "India joins 'neocolonial' rush for Africa's land and labor," The Telegraph (Calcutta), 28 June.

NGOs (2010) “Stop land grabbing now!” A public statement led by La Via Campesina, FIAN, Land Research Action Network, GRAIN and signed by several dozen other organisations. List of co-signersis available at: http://farmlandgrab.org/post/view/12200, 22 April.

Pambazuka (2011) “Land ‘investment’ deals in Africa: Say ‘no way!’” Pambazuka News, 1 July.

Patkar, M. (2011) Interview with Medha Patkar of the Narmada Bachao Andolan and the National Alliance of People's Movements at the “Sangharsh to UPA: Ensure Land Rights: Stop Land Acquisition and Displacement” rally in New Delhi, 5 August.

Ramesh, M. (2009) “Solvent extractors want Govt aid to buy farmland abroad,” The Hindu Businessline, 27 October.

Ramsurya, M.V. (2010) “Indian companies buy land abroad for agricultural products,” Economic Times (New Delhi), 2 January.

Sahai, S. (2010) “The new colonizers,” Deccan Herald, 27 November.

Sharma, D. (2011) “With farmlands being grabbed, Africa too awaits march of the millions,” Ground Reality, 4 February.42

Smaller, Carin and Howard Mann, A Thirst for Distant Land: Foreign Investment in Agricultural Land and Water (2009)

Vashisht, D. (2010) “Punjab’s African plot,” Indian Express, 11 July.

von Braun, J. and Meinzen-Dick, R. (2009) “‘Land Grabbing’ by Foreign Investors in Developing Countries: Risks and Opportunities,” IFPRI Policy Brief, 13 April.

World Bank (2010) “Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?” World Bank, Washington DC.

Worldwatch 2011) “Land Grabs” in Agriculture: Fairer Deals Needed to Ensure Opportunity for Locals,” World Watch Institute, 26 July.