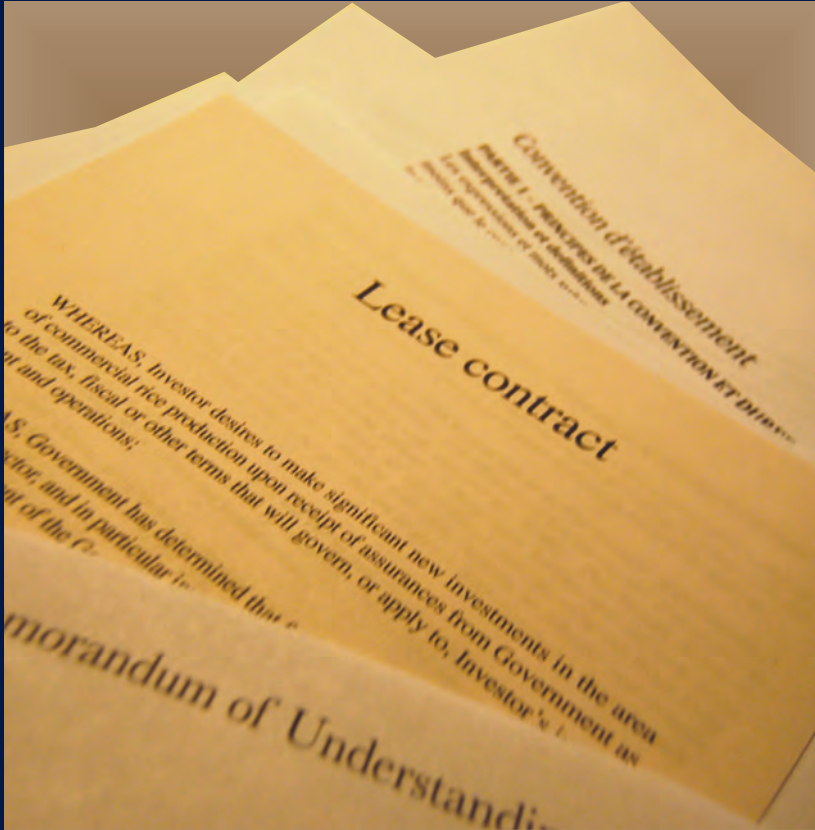


# Land deals in Africa: What is in the contracts?



Lorenzo Cotula





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First published by the International Institute for Environment and Development (UK) in January 2011, last revised in March 2011

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IIED Order No: 12568IIED

Citation: Cotula, L., 2011, LAND DEALS IN AFRICA: WHAT IS IN THE CONTRACTS? IIED, London.

ISBN: 978-1-84369-804-3

*Design and cover montage: Smith+Bell ([www.smithplusbell.com](http://www.smithplusbell.com))*

*Printing: Park Communications ([www.parkcom.co.uk](http://www.parkcom.co.uk))*

*Printed with vegetable oil based inks on Chorus Lux, an FSC certified paper bleached using a chlorine free process.*

## **ACKNOWLEDGEMENTS**

This report was prepared for “Legal tools for citizen empowerment”, a programme steered by the International Institute for Environment and Development (IIED). The programme is generously supported, through a framework agreement with IIED, by Danida (Danish International Development Agency), DFID (the UK Department for International Development), DGIS (Directorate-General for Development Cooperation, the Netherlands), Irish Aid, Norad (Norwegian Agency for Development Cooperation), SDC (Swiss Agency for Development and Cooperation) and Sida (Swedish International Development Agency). The views expressed in the report do not necessarily represent those of the supporting institutions involved. The author would like to thank Joe Bell, Lila Buckley, Isilda Nhantumbo, Emily Polack, Andrea Shemberg, Jamie Skinner and Sonja Vermeulen for their helpful comments on earlier drafts of the report. Additional comments on parts of the report were provided by Moussa Djiré and David Deng.

The draft analysis of each contract reviewed in the report was also sent for comment to the relevant investor when an email address and/or phone number could be found on the internet (as of 20 December 2010). One of the investors contacted provided helpful comments and disclosed additional information, and the report took this input into account.

# ACRONYMS

BIT	Bilateral investment treaty
ESIA	Environmental and social impact assessment
GPS	Global Positioning System
IFC	International Finance Corporation
MoU	Memorandum of Understanding
NGO	Non-governmental organisation
USD	United States Dollar

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# EXECUTIVE SUMMARY

Over the past few years, agribusiness, investment funds and government agencies have been acquiring long-term rights over large areas of land in Africa. Government concerns about food and energy security and private sector expectations of increasing returns from agriculture underpin much recent agricultural investment.

Together with applicable national and international law, contracts define the terms of an investment project, and the way risks, costs and benefits are distributed. Who has the authority to sign the contract and through what process greatly influences the extent to which people can have their voices heard. And the terms of the deals can have major and lasting repercussions for agriculture and food security in recipient countries. Yet very little is known about the exact terms of the land deals. Negotiations usually happen behind closed doors. Only rarely do local landholders have a say in those negotiations. Few contracts are publicly available.

This report analyses 12 land deals and their wider legal frameworks. Limited access to contractual documentation means that the analysis is preliminary and incomplete. The aim is to discuss the contractual issues for which public scrutiny is most needed and to promote informed public debate about them. The report examines the contracts through a sustainable development lens. In this perspective, for host countries, attracting investment is not an end in itself, but a means to an end. The ultimate goal is to improve living conditions whilst protecting the environment. Because of this lens, key issues discussed in the report relate to participation in the contracting process, to economic fairness between investor and host country, to the distribution of risks, costs and benefits within the host country, to the degree of integration of social and environmental concerns, and to the extent to which the balance between economic, social and environmental considerations can evolve over contract duration.

In relation to many of these issues, there are real concerns that some contracts underpinning the recent wave of land acquisitions may not be fit for purpose. A number of the contracts reviewed appear to be short, unspecific documents that grant long-term rights to extensive areas of land, and in some cases priority rights over water, in exchange for seemingly little public revenue and/or apparently



vague promises of investment and/or jobs. Also, a number of the deals are being negotiated in legal contexts where safeguards for local interests are weak, and some contracts appear not to properly address social and environmental issues. As a result, there is a substantial risk that local people may internalise costs without adequately participating in benefits, and that environmental issues are not properly factored in.

Some contracts feature better terms. For example, a deal from Cameroon features higher and better distributed revenues, while a contract from Mali involves a sophisticated partnership with the host government and local farmers and applies international social and environmental standards. Three contracts from Liberia stand out for their more flexible duration, their clearer identification of the land being transacted, their more specific investor commitments on jobs, training, local procurement and local processing, their greater attention to local food security, and their tighter social and environmental safeguards. The Liberian contracts have been ratified by parliament and are available online.

In Liberia, determined political leadership, a strong government negotiating team, world-class legal assistance, effective use of financial analysis, and simultaneous (re)negotiation of agricultural and mining contracts (which led to productive cross-fertilisation) have made this outcome possible. Development agencies can play an important role in helping host governments access the capacity support they need.

But irrespective of contract terms, process is critical. In several countries, centralised control over land creates real risks that local people are marginalised in decision-making. Some of the contracts reviewed involved consultation and agreements with local communities, but it is the government that usually calls the shots in contracting and land allocation procedures. So even in the better negotiated contracts, the gap between legality (whereby the government may formally own the land and allocate it to investors) and legitimacy (whereby local people feel the land they have used for generations is theirs) exposes local groups to the risk of dispossession and investors to that of contestation.

More generally, contracts are only part of the story. They only work if they are properly implemented – good contracts may still result in bad investments, while investments may produce benefits even if the contracts are lacking.

Contracts are often negotiated under time pressure and unequal negotiating power. Different contractual regimes in force in the same host country may result in disparities of treatment for affected people or the environment. And the very fact that a contract is concluded indicates that a decision has been taken for the land to change hands.

So wherever local rights are insecure or social and environmental safeguards are weak, there is a need for radical reform in national legislation, and for effective mechanisms to translate law reforms into real change. In this context, legal empowerment of local landholders is key. This means that people must have more secure rights to their land and greater control over decisions affecting it. It also means that legal rights alone are not enough – adequate capacity is needed to exercise them in practice, and collective action can help give real leverage to legal rights. There is growing experience with ways to promote legal empowerment in practice, and much can be learned from it.

In addition, there is a need for inclusive debate in host countries. Much discussion about large-scale land acquisitions has so far been led by players and processes based in the global North. It is time for the people who are most directly concerned to have their say. The right to food of many people in some of the poorest countries of the world is at stake. The belief that large-scale plantations are needed to “modernise” agriculture is dominant in many government and investor circles, but there is no evidence to back it up. The literature suggests that many recent land-based investments are not proving economically viable, while family farmers have proved to be highly dynamic and competitive on global markets. It also shows that, where outside investment is required to improve productivity and livelihoods, productivity gains and commercial profitability can be achieved through working with local farmers.

Decisions taken now will have major repercussions for the livelihoods and food security of many people for decades to come. Land deal negotiations are unfolding fast and behind closed doors. But secrecy and haste are no friends of good deals. Rather than rushing into land contracts, governments should promote transparent, vigorous public debate about the future of agriculture in their country. Producer organisations must be central to that debate, and scrutiny from civil society can help make the renewed interest in agriculture work for broad-based sustainable development. Research can help provide an empirical basis for these processes, and it is hoped that this report might be a contribution in that direction.



# 1. WHAT THIS REPORT IS ABOUT

## WHY CONTRACTS MATTER

In the scrublands of Southern Mozambique, land is becoming increasingly scarce. In 2000, the creation of a large natural park required the resettlement of local villagers. But resettlement dragged, and a few years later the government allocated to a private investor the land it had promised to the villagers. The plan was to develop a 30,000-hectare sugarcane plantation and processing plant to produce sugar and ethanol, thereby creating thousands of jobs. But people living in the park felt betrayed. Villagers from a neighbouring community claimed part of the land as theirs, and were planning to use it for game farming and tourism development. Concerns were raised that the plantation would out-compete local farmers in access to water from the Limpopo River and from a local dam reservoir. By late 2009, the company reportedly announced suspension of its investment due to intervened changes in the world economy, and the government cancelled the lease. The government is understood to now be looking for new investors to continue the project.<sup>1</sup>

This plantation project in Southern Mozambique is part of a much wider, global process. Over the past few years, agribusiness, investment funds and government agencies have been acquiring long-term rights over large areas of farmland in Africa. Government concerns about food and energy security and private sector expectations of increasing returns from agriculture underpin much recent agricultural investment. Some commentators have welcomed this trend as a bearer of new livelihood opportunities in lower-income countries. Others have raised concerns about negative social impacts, including loss of local rights to land, water and other natural resources; threats to local food security; and the risk that large-scale investments marginalise family farmers.

Very little is known about the exact terms of land deals in Africa. Negotiations usually happen behind closed doors. Only rarely do local landholders have a say in those negotiations. Few contracts are publicly available. Yet, together with applicable national and international law, contracts define the terms of an investment project, and the way risks, costs and benefits are distributed. Who has the authority to sign the contract and through what process greatly

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1. This example draws on Nhantumbo and Salomão (2010), FIAN (2010), media reports and a field visit carried out by the author in September 2008.

influences the extent to which people can have their voices heard. And the terms of the deals can have major and lasting repercussions for agriculture and food security in recipient countries. Fundamental human rights such as the internationally recognised right to food are at stake (De Schutter, 2009). Public scrutiny of land deals is therefore crucial.

## **FOCUS AND METHODS**

This report discusses key features of land deals and their wider legal frameworks. It draws on the legal analysis of a sample of 12 contracts for agricultural investments in Africa. Contract selection was heavily influenced by the author's ability to access documents. The contracts reviewed are quite diverse. They include host countries from East, West, Central and Southern Africa; very different land area sizes – from 500 to just below 200,000 hectares;<sup>2</sup> a wide range of food, fuel, timber and agro-industrial crops; diverse activities (from production alone to processing); and diverse land providers (central and local governments, local landholders) and acquirers (nationals/non-nationals, private/government, different regions of origin). All the contracts were signed in the past decade – most of them over the past three years.

Space constraints prevent a discussion of each contract, but key information is provided in Table 1 (see pages 8-9). Most of the contracts reviewed are publicly available, several of them through the “farmlandgrab” blog run by GRAIN – which by making contracts available plays an important role in promoting public scrutiny of these deals.

The lens through which the report examines the contracts is that of sustainable development – the careful and evolving balancing of social, environmental and economic considerations. In this perspective, for host countries, attracting investment is not an end in itself, but a means to an end. The ultimate goal is to improve living conditions and enable people to have greater control over their lives, whilst protecting the environment. Because of this lens, the report focuses on three issues concerning land deals: who takes decisions and how; the economic fairness of the contracts; and the way social and environmental considerations are addressed in the deals.<sup>3</sup>

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2. Actual land transfers may be smaller than the area indicated in the contract.

3. For a fuller discussion of how to analyse investment contracts from a sustainable development perspective, see Cotula (2010).

The aim of the report is to discuss the contractual issues for which public scrutiny is most needed and to promote informed public debate about them. The report is concerned with policy, rather than the conduct of individual companies, and the contracts are only identified through their host country. Reference to the host country is necessary as contracts must be read in light of national legislation. The host countries covered may have signed many more contracts than those reviewed here; this is illustrated by available aggregate figures on land acquisitions in selected countries, which are presented in Table 2 on page 13.

## **LIMITATIONS**

A few caveats are in order. Land deals come in many different shapes. Despite their diversity, the contracts in the sample cannot be considered as “representative” of wider trends in a statistical sense. In addition, each “deal” may involve multiple contracts and legal instruments – from a Memorandum of Understanding (MoU) outlining key features of the deal to an Investment Agreement or Convention of Establishment that regulates the investment as a whole, through to a Land Lease Contract or other instrument that actually transfers the land or parts of it. Some deals integrate these different aspects into a single document. Separate contracts may regulate lending, taxation, shareholding in joint-venture companies, technical or engineering services, or supply chain relationships. Contracts must also be read in light of the rules of national and international law that regulate the project. For example, national law regulates issues like land, water and resource rights, taxation, investment promotion and environmental protection. International law sets fundamental human rights and protects foreign investment.

The fact that each land deal may consist of multiple contracts and bodies of law has two implications for the limitations of this report. Firstly, contractual provisions cannot be viewed in isolation. To be properly understood, they must be considered in light of the overall deal – an advantageous or unfavourable provision may be offset by another clause in the same or another contract or in applicable national or international law. In Mali-2, for instance, the 2007 Convention is still in force but important aspects of project design have been subsequently altered through ancillary contracts. The report does discuss some relevant national and international law applicable to the contracts. But only the contracts mentioned in Table 1 could be accessed, to the exclusion of other contracts related to the same investments. Coupled with the great complexity of

**TABLE 1. LIST OF CONTRACTS AND KEY FEATURES**

Host country / contract identification	Contract title / type	Year	Total land area (ha)	Activity and crop	Parties to the contract (land provider; land acquirer)	Other comments
Cameroun-1	Land Lease Contract	2006	11,980	Sugarcane	Central government; national company controlled by private foreign investor (Europe)	Expands land area of existing plantation
Ethiopia-1	Land Lease Contract	2008	500	Agriculture	Regional government; individual national investor	Examined through unofficial translation undertaken by the study; the date on the contract is 2001 following the Ethiopian calendar
Liberia-1	Investment Agreement	2007	8,011 (19,795 acres); additional land may be acquired	Oil palm	Central government; company incorporated in host country but controlled by private foreign investor (Europe)	Renegotiation of earlier agreement
Liberia-2	Concession Agreement	2008	15,000	Rice	Central government; company incorporated in host country and linked to local NGO and foreign sovereign wealth fund (North Africa)	
Liberia-3	Concession Agreement	2008	48,154 (118,990 acres); additional land may be acquired	Rubber	Central government; company incorporated in host country and controlled by private foreign investor (North America)	Renegotiation of earlier agreements
Madagascar-1	Contract Farming Agreement	2009	170,914.13	Rice, maize, wheat, pulses, fruit, vegetables or other	13 farmer associations; local subsidiary of a private foreign investor (South Asia)	Some signatures missing on publicly available contract; linked to reportedly cancelled contract with state for additional land (Ullenberg, 2009)

Mali-1	Convention of Establishment / Investment Agreement	2008	100,000	Agricultural production, livestock, processing	Central government; foreign government (North Africa) but land allocated to company controlled by foreign government	Only the first part of the contract is publicly available
Mali-2	Convention of Establishment	2007	20,245 plus option to acquire additional 17,000	Sugarcane plantation and processing plant for sugar, ethanol and power	Central government; private foreign investors (Europe, North America) but land transferred to private companies controlled by the two contract parties; most of the land is acquired by a company controlled by the host government	Expansion of pre-existing project
Mali-3	Convention on the Conditions for the Cession and Lease of Lands	2009	20,000	Sugarcane plantation and processing plant	Central government; foreign investor (East Asia); land acquired by a company in which the host government has a minority stake	Publicly available contract signed by investor only
Senegal-1	Contract for the Exclusive Utilisation of Land	2008	10,000	Jatropha and "other oleaginous plants"	Local government body; private foreign investor (Europe)	Original in Arabic, contract examined through unofficial translation undertaken by the study
Sudan-1	Agricultural Investment Agreement	2002	12,600 (30,000 faddans)	Agricultural production, livestock, processing	Central government; foreign government (Middle East)	Signatures not in publicly available contract; CHR&GJ (2010) reports deal as still being finalised by government in 2010
Sudan-2 (Southern Sudan)	Land Lease Agreement	2008	179,999	Timber plantation and forest conservation for carbon credits	State-level government; company controlled by private foreign investor (Europe)	

Sources and notes: table based on information contained in the contracts; information about origin of land acquirers integrated from internet-based data. The contracts reviewed are publicly available at [http://farmlandgrab.org/home/post\\_special?filter=contracts](http://farmlandgrab.org/home/post_special?filter=contracts) (Cameron, Mali, Madagascar and Senegal); [www.leiti.org.lr](http://www.leiti.org.lr) (Liberia); Ullenberg, 2009 (Madagascar-1); <http://faolex.fao.org/> (Sudan-1); CHR&GJ, 2010 (Sudan-2). Ethiopia-1 not publicly available, on file with author. It was impossible to verify implementation status; Andrianirina-Ratsialonana and Teysier (2010) raise doubts as to whether Madagascar-1 going forward due to political changes. It is assumed that the documents available from these sources are the contracts in force between the parties. Unless explicitly stated otherwise in the contract itself, the document reviewed is assumed to be the main contract between the parties.



the numerous issues at stake, this circumstance means that the analysis is inevitably preliminary and incomplete – the aim is to promote debate on the issues raised.

Secondly, the contracts reviewed in the report have diverse legal nature and function in the overall deal, and are therefore not always easily comparable. For example, Mali-2 and Mali-3 are for broadly similar projects (sugarcane plantation and processing plant); but Mali-2 is a Convention of Establishment, while Mali-3 is the contract through which the land is transferred (the Convention of Establishment for this project is not publicly available). Limited comparability also flows from other differences characterising the contracts reviewed: some government-to-government deals appear to be mainly political documents, though the legal obligations they create (to provide a specified land area, for example) are binding; contracts for different crops may raise different legal issues;<sup>4</sup> and the economics of projects involving the construction of processing plants are quite different to projects only involving plantations. In addition, two contracts (Cameroon-1 and Mali-3) relate to area extensions of existing projects, and two of three Liberian contracts (Liberia-1 and -3) are renegotiations of existing concessions. Renegotiations raise somewhat different issues as in principle no new land allocation is involved.

The report does not aim to assess the social, economic and environmental performance of agricultural investments. It only draws on the legal analysis of accessible contracts and applicable law. Where possible, other project documents are referred to – such as resettlement action plans. However, no fieldwork was undertaken to assess project implementation and impacts on the ground. The distinction between contract analysis and performance assessment is very important – an investment may well engage with communities, create jobs or produce other positive impacts even if the contract is lacking; though, from a legal point of view, a weak contract means that mechanisms to hold the investor to account are less effective. Conversely, even well negotiated contracts may be concluded with little local consultation or may be poorly implemented and produce disappointing results.

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4. For example, in a tree farm where tree ownership at contract expiry is transferred to the host government, arrangements are needed to ensure that towards the end of the lease the investor has continued incentives to manage the farm sustainably, including through ongoing replanting. This issue would not arise in a rice project, for instance.

## **OUTLINE**

The next section recalls key facts on the scale of the phenomenon and key players within it. Section 3 discusses the parties to the deal, and the extent to which local people have control over decision-making processes. Sections 4 and 5 discuss the economic fairness of the contracts and their social and environmental safeguards. Finally, the conclusion discusses key findings and their implications.

## 2. HOW MUCH LAND IS BEING ACQUIRED, AND BY WHOM?

Before analysing the contracts in the sample, it may be useful to recall some key facts concerning large-scale land acquisitions, drawing on the social science literature. Despite much international interest in land deals over the past couple of years, reliable figures on scale and trends are still difficult to come by. Media reports have been a major source of information, and have played an important role in raising public awareness on this phenomenon. Friis and Reenberg (2010) reviewed the media reports featured on the blog of the International Land Coalition. They found that land deals in Africa alone affected between some 51 and 63 million hectares. But media reports are not always reliable, and these figures must be treated with extreme caution.

Cotula *et al.* (2009), Görgen *et al.* (2009) and World Bank (2010) all undertook national inventories of approved land acquisitions based on in-country empirical research. Figures from these inventories must also be treated with caution, as they may underestimate scale due to constrained data access and exclusion of deals still under negotiation. Defining what constitutes an “approved” deal is also not straightforward – for example, where a Convention of Establishment has been signed that commits the host government to make land available, but no land lease has actually been granted. For example, the Mali-1 contract in the sample concerns 100,000 hectares, but implementation is starting on 25,000 hectares (Office du Niger, 2009). Conversely, some contracts allow the investor to acquire additional land if certain conditions are in place. Conflicting data sources may also result in discrepancies among datasets. For example, while land ministries tend to have figures for lands actually transferred, investment promotion agencies under pressure to show success in attracting investment may refer to the usually larger land areas featured in the MoU or business plan.

Aggregate figures for land areas acquired in selected countries over the period January 2004-March 2009 are presented in Table 2, drawing on the set of existing national inventories (World Bank, 2010; Görgen *et al.*, 2009; Cotula *et al.*, 2009). The table also integrates quantitative data from other available country studies, including research (Schoneveld *et al.*, 2010) and an inventory carried out by a parastatal agency (Office du Niger, 2009). Aggregate data is available for all the countries that are party to the contracts reviewed in the

**TABLE 2. AGGREGATE LAND AREAS ACQUIRED IN SELECTED COUNTRIES, JANUARY 2004-MARCH 2009 (HECTARES)**

<i>Country</i> \ <i>Source</i>	World Bank (2010)	Görge <i>n et al.</i> (2009)	Cotula <i>et al.</i> (2009)	Office du Niger (2009)	Schoneveld <i>et al.</i> (2010)
Ethiopia	1,190,000		602,760		
Ghana			452,000		1,075,000
Liberia	1,602,000				
Madagascar		1,720,300	803,414		
Mali		159,505	162,850	242,577	
Mozambique	2,670,000				
Sudan	3,965,000				

*Notes: Cotula et al. (2009) only include data for projects above 1,000 hectares. World Bank data for Liberia includes renegotiations of pre-existing concessions. Görge*n et al.* (2009) figures refer to land “demanded” – not necessarily approved deals. None of the nine projects studied by Schoneveld et al. (2010), out of a total of 17 identified by that research, had actually obtained leasehold titles and would therefore be considered as “approved” under the Cotula et al. (2009) inventory. Office du Niger (2009) is an official inventory only covering the Office du Niger area of Mali; but according to the national inventories undertaken by Cotula et al. (2009) and Görge*n et al.* (2009), this area is where recent land acquisition in Mali is concentrated. Office du Niger (2009) does not indicate timeframes; its aggregate figure of 242,577 hectares includes 49,304 hectares leased by the Office du Niger and 193,273 hectares promised by the central government through Conventions of Establishment (for which the Office du Niger will then have to allocate land leases). According to Office du Niger (2009), letters of intent have also been issued for 402,682 hectares; but these expire if the investor does not undertake feasibility studies within a year, and unfruitful expiry is reportedly common (a circumstance confirmed by the roughly ten-to-one ratio between areas under letters of intent and actual leases). Study timeframes for Görge*n et al.* (2009) and Schoneveld et al. (2010) are slightly different to the one indicated in the table title.*

report, with the exceptions of Cameroon and Senegal. Figures from Ghana and Mozambique are also available and are included in the table for information.

It is difficult to extrapolate global estimates from these national inventories – not least because the countries covered are those where investor interest is reported to have been particularly strong. With a few exceptions, research-based figures for 2004-09 are much lower than those suggested by media reports published since 2008 (as aggregated and analysed by Friis and Reenberg, 2010), even using top-end inventory figures. For example, about 250,000 hectares have been acquired in Mali (about 650,000 hectares if one-

year letters of intent are included), compared to media reports for 2,417,000 hectares; 1,190,000 hectares in Ethiopia, compared to a media-based figure ranging between 2,892,000 and 3,524,000; and 2,670,000 hectares in Mozambique, compared to media reports for 10,305,000 hectares.

Also, although the size of single land acquisitions can be very large (e.g. a 100,000-hectare project in Mali; Cotula *et al.*, 2009), the average sizes of projects above 1,000 hectares are much smaller than what is suggested by media reports: in Ethiopia a mean of 7,500 hectares and in Mali a mean of 22,000 hectares (figures based on data collected for Cotula *et al.*, 2009). These figures can be contrasted with the average sizes suggested by media reports: a mean ranging between 111,000 and 135,000 hectares for Ethiopia and of about 186,000 hectares for Mali.<sup>5</sup>

While media reports appear to overestimate scale, the phenomenon is nevertheless massive and growing. Using World Bank data, more than 9 million hectares have been acquired in four African countries alone (Ethiopia, Liberia, Mozambique and Sudan). The effects of these processes on competition for land are increased by two factors. First, despite much rhetoric on targeting “marginal” lands, investor interest often focuses on the best land in terms of irrigation potential, soil fertility, proximity to markets or availability of infrastructure. For example, land acquisitions in Mali are heavily concentrated in the irrigable areas of the Ségou Region (Cotula *et al.*, 2009; Görgen *et al.*, 2009).

Second, while media attention has focused on agricultural investments, pressures on land are growing as a result of a wider set of factors – both endogenous, such as strong demographic growth in many target countries, and exogenous, like investments in mining, petroleum, timber plantations and tourism. As for the former, population densities (population/sq km) have changed from 17 (Ethiopia), 7 (Madagascar), 3 (Mali) and 4 (Sudan) in 1950 to 59 (Ethiopia), 26 (Madagascar), 8 (Mali) and 14 (Sudan) in 2000; they are projected to reach 157 (Ethiopia), 73 (Madagascar), 23 (Mali) and 30 (Sudan) in 2050 (United Nations, 2008). However, population changes may not be concentrated in rural areas, as urbanisation is also increasing in many African countries.

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5. Mean calculated by the author on the basis of aggregate land areas and number of reported deals compiled by Friis and Reenberg (2010).

The relevance of natural resource investments other than agricultural projects is illustrated by both quantitative and qualitative data. In Liberia, for example, in addition to the 1,602,000 hectares acquired for plantations, mining exploration or development concessions have been granted for 1,195,894 hectares since 2004.<sup>6</sup> The above-mentioned case of the failed 30,000-hectare biofuel project in an area of Mozambique where villagers were being resettled from a newly established natural park illustrates how, from the perspective of local people, farmland acquisitions are only one of the multiple sources of pressure. An ongoing study on “commercial pressures on land”, led by the International Land Coalition, will improve understanding of this wider set of drivers.

Media reports and empirical research point to a huge diversity of land acquirers – from a financier that reportedly concluded a deal for 400,000 hectares with a military commander in Southern Sudan; through to an agribusiness with established track record in tropical agriculture that negotiated a sophisticated contract for both production and processing in Mali, and that applies the social and environmental standards of a multilateral development bank. In quantitative terms, media reports have focused on Gulf governments and Western investment funds; but empirical research suggests that nationals are key players in land acquisition (Cotula *et al.*, 2009; Görgen *et al.*, 2009; World Bank, 2010), and that private agribusiness deals, many by Western companies, account for about 90% of the aggregate land area acquired in Ethiopia, Ghana, Madagascar and Mali (Cotula *et al.*, 2009).

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6. Author's calculation based on contracts database available at [www.leiti.org.lr](http://www.leiti.org.lr). Data include renegotiation of existing concessions.

### **3. OVER THE HEADS OF LOCAL PEOPLE: WHO ARE THE PARTIES TO THE DEAL?**

#### **CENTRAL ROLE OF THE STATE IN LAND ALLOCATIONS**

Land contracts are typically signed between two parties, but they tend to involve a wider range of players. In most of the deals reviewed, land was allocated by a central government agency (see Table 1). In some cases, the host government reportedly played a proactive role in seeking out investors (e.g. Mali-1).

The central role of the state in land allocations reflects trends in national law. In most African countries, land is owned by the state. For instance, land is nationalised in Ethiopia, where private land ownership is outlawed and only long-term land leases may be acquired. Other countries do allow private ownership, which may be acquired through land registration procedures (for instance, in Cameroon and Mali). But even in these cases, costly and cumbersome procedures mean that very few rural people hold ownership rights (Egbe, 2001, on Cameroon; Djiré, 2007, on Mali). In addition, where customary tenure systems are functioning and perceived as legitimate, local resource users may feel they have sufficient tenure security under these systems without needing to seek formal title. In Cameroon, for example, only about 3% of the land has been formally registered and is held under private ownership (Egbe, 2001), mainly by urban elites such as politicians, civil servants and businessmen (Firmin-Sellers and Sellers, 1999). As in many jurisdictions all untitled land is owned or otherwise held by the state, governments end up controlling much rural land even where the statute books devote numerous provisions to regulating private ownership.

Even where the land is formally owned by the state, local people – farmers, herders, hunter-gatherers – have often used it for generations and see it as theirs. There are widespread perceptions in government and investor circles that much land in Africa is empty or underutilised. Statistical databases and satellite imagery suggest that land is underutilised in some African countries (Fischer *et al.*, 2002). But much of this data goes back to the mid-1990s and does not fully factor in intervening changes such as land degradation; and satellite-based studies seriously underestimate the land areas used by shifting cultivation and

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7. Title from Vermeulen and Cotula (2010a).

pastoralism (Roudart and Even, 2010). As discussed, strong demographic growth in many poorer countries exacerbates competition for land and resources. In practice, very large land deals are bound to involve some squeeze on existing rights, even where the intensity of current resource use is low. This is particularly so where agricultural investments target higher-value lands.

The problem is that the customary rights of local people may have no or little recognition under national law. This circumstance is historically rooted in the colonial experience, when colonisers treated conquered lands without visible developments as being empty (*terres vacantes et sans maître*, in French) and brought them under state ownership, and in decades of post-independence law-making shaped by single-party regimes or military dictatorships (Alden Wily, 2010). In countries like Cameroon and Ethiopia, where customary rights are not legally recognised, and even in countries like Mali, where customary land rights enjoy legal protection, national law considers most rural people as having qualified use rights on land owned or administered by the state. As a result, the government has sole legal authority to sign off transactions. Governments and investors may still undertake local consultations, but in many publicly reported deals in Africa local people are not properly consulted (World Bank, 2010) and are therefore vulnerable to dispossession.

Two additional points need to be made about the central role of host governments in land deals. Firstly, several government agencies may be involved – even in countries that have created a central point of contact (so-called “one-stop shop”) for prospective investors. This could create some confusion. In Mali, the Mali-1 contract was signed by the Minister of Agriculture, while Mali-3 was concluded by the Minister of Habitat, Land and Urbanism. Both deals are in or around the Office du Niger area, where management responsibilities for irrigated and irrigable lands are vested with a parastatal agency that is not directly a party to either contract (article 2 of Decree No. 96-118 of 1996). In such cases, the contract may commit the government to “do all that is necessary” to ensure that the authority that is formally empowered to allocate land will give effect to the deal (e.g. Mali-2). Unless this authority is properly involved in the negotiation of the deal, there is a risk that its efforts to plan land use in a given area are undermined by contracts granted by higher levels of government.<sup>8</sup>

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8. But for example, investor sources indicate that in Mali-2 the land management authority was involved in contract negotiation and subsequent stages.



Secondly, although large government contracts are an important policy tool, as already mentioned negotiations tend to happen behind closed doors – and the contracts themselves are rarely publicly available. Lack of transparency and public scrutiny arguably creates the breeding ground for corruption and deals that do not maximise the public interest. It also fosters misinformation that can ultimately damage the investor and the host government. Liberia is an example of better practice – land contracts are ratified by parliament and posted online ([www.leiti.org.lr](http://www.leiti.org.lr)).

## **LOCAL LANDHOLDERS AS CONTRACTING PARTY**

There are exceptions to the predominant role of the central government in land allocations, and this has direct implications for contractual practice. In Madagascar, for example, Laws No. 2005-019 of 2005 and 2006-031 of 2006 abolished the presumption of state ownership over untitled land. In light of this legal context, the Madagascar-1 contract included in the sample was signed with the presidents of 13 associations of local landholders. Similarly, in Senegal laws on land and decentralisation vest land management responsibilities with local governments, and the Senegal-1 deal is with a local government body. The Sudan-2 deal is between the investor and a state-level agency, and its Appendix contains an “Agreement about Community Support Program” between the investor and the local community that gives legal value to the investor’s social responsibility programme.

The effort made by these investors to engage with local communities in the contracting process seems an important positive feature. However, Andrianirina-Ratsialonana and Teyssier (2010) suggested that only two weeks were allocated to the process to establish local associations and negotiate with them the terms of the Madagascar-1 deal. The long duration and massive scale of very large land deals (see Table 1) would call for a degree of scepticism on how short timeframes can enable informed and inclusive decision-making by local groups. Also, in Africa there are usually limited local capacity to access and analyse information (for example, about the revenues that are likely to be generated by the project), and major asymmetries in negotiating power between investors and local people. As a result, unless local people are properly supported, there is a risk that they conclude unfavourable deals.<sup>9</sup>

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9. On the challenges affecting investor-community negotiations, see for example Nhandumbo and Salomão (2010) and Norfolk and Tanner (2007), both on Mozambique. It was not possible to assess local conditions in the land deals covered by this study.

## **INVESTORS, LENDERS AND OTHER OPERATORS**

Land may be acquired by national individuals (as in the Ethiopian contract), foreign governments (e.g. Sudan-1) or companies controlled by foreign private operators (e.g. Senegal-1 and Sudan-2). In Liberia-2, land is understood to be acquired for a project involving collaboration between an NGO and a company controlled by a North African government. Given their diversity, land acquirers are broadly referred to here as “investors”.

The boundaries between private and public investors are not clear-cut. For example, where land is acquired by a foreign government, project implementation may still be driven by private operators. This is specifically allowed by the Sudan-1 deal, for instance. In addition, the contract may transfer land rights to a third party that is not a signatory to the contract, though ultimately controlled by one of the contract parties. For example, the Mali-1 contract is signed by the ministers for agriculture of host and investor governments, but land allocation is for a private company ultimately controlled by the foreign government. Similarly, the Mali-2 contract provides for land allocation to two companies controlled by the contracting parties (foreign private investors, host government). In this deal, while a company controlled by the investor acquires the land for the processing plant, most of the land is for a sugarcane plantation and is acquired by a company that is 90% owned by the host government – though the investor-controlled company may exercise an option to acquire additional plantation land within 15 years.

Lenders and insurers are also likely to play an important role in many transactions – with the likely exception of acquisitions by foreign government agencies. The Mali-3 deal involved a separate loan agreement with the investor state’s export credit agency; in Mali, the loan agreement was ratified through special legislation.<sup>10</sup> Explicit reference to financing is made in the Mali-2 contract. Experience suggests that, because of their interest in ensuring debt repayment, commercial lenders tend to require three things: that robust safeguards are established to protect the investment against adverse host state action; that lenders can seize project incomes or assets in case of non-repayment by the investor; and that project design ensures predictable sales and reliable supplies. Although investors typically approach lenders only after the deal has been signed, they will bear these considerations in mind when

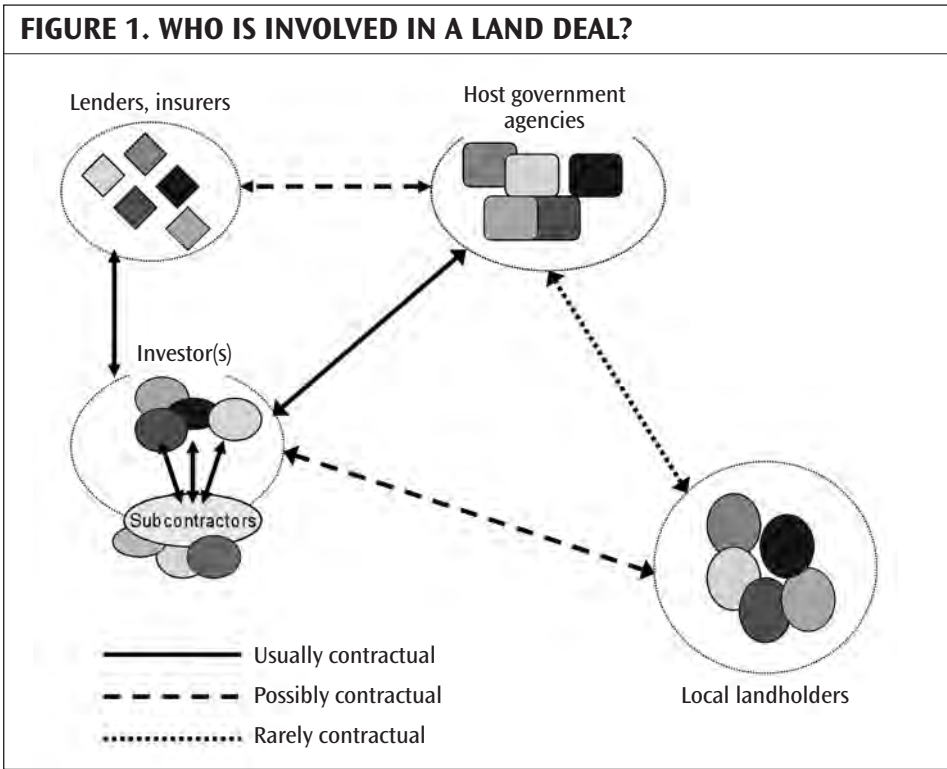
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10. Ordinance No. 09-013 of 2009 and Law No. 09-001 of 2009.

negotiating the contract. For example, the need to demonstrate reliability of supplies to feed a processing plant may create incentives for investors to acquire land for a plantation: where lack of existing processing facilities in the area requires the project to build a plant, it may be more difficult to get a loan if the project relies entirely on supplies from local farmers.

A range of other operators may also be involved, for instance as subcontractors responsible for constructing infrastructure necessary for the project. The construction of a canal and a road under the Mali-1 contract is reportedly led by an East Asian subcontractor.

Figure 1 maps out some of the key players in a typical land deal and the relations among them, though of course each deal is different. The different shadings emphasise the diversity of interests that usually exists within each category of stakeholders – for example, within the host government (between different ministries or between central and local government) or among local landholders (along status, income, wealth, gender, age and other socio-economic lines).



## **4. THE ECONOMIC DISEQUILIBRIUM OF THE CONTRACT: WHAT RESOURCES, IN EXCHANGE FOR WHAT?**

Lawyers refer to the balance of the parties' rights and obligations as the "economic equilibrium" of the contract. Lack of access to documents referred to in some of the deals (e.g. a *cahier des charges* mentioned in the Mali-3 contract) and to other contracts that are known to have been signed in relation to the same project (e.g., for Mali-3, a Convention of Establishment, a loan agreement and three technical contracts) means that any assessment of economic equilibrium is inevitably tentative and incomplete. As only the first part of the Mali-2 contract is publicly available, it is impossible to assess its economic equilibrium – though parts of that contract are referred to in this section to illustrate relevant issues.

With these important caveats, an analysis of contractual provisions raises real concerns about the economic equilibrium of some of the deals reviewed, where investors are given long-term rights to extensive areas of land, while host country benefits appear to be limited or ill-defined. Other contracts present better terms, and the Liberian contracts seem to have been negotiated particularly well by the host state. The next few subsections discuss these issues in greater detail.

### **OVERALL CONTRACT OUTLOOK**

Some of the deals reviewed, namely the Liberian contracts and Mali-2, are quite complex and sophisticated. Liberia-1 and -3 are respectively 40 and 56 pages long. On the other hand, Mali-1 seems short (6 pages) and unspecific – despite the considerable scale of the deal (100,000 hectares). Subsequent contracts would be required to actually transfer the land, and they may contain more detail. But if at that later stage the host government has already agreed to offer the land against poorly defined investor obligations, this may arguably have implications for what can be achieved through later negotiations. Similar considerations can be made about Sudan-1, which is 3 pages long. Madagascar-1 is 8 pages long; Sudan-2 includes a 5-page state-investor contract and a 4-page community-investor agreement.

Cameroon-1 (3 pages and a 9-page annex mainly for GPS coordinates) and Mali-3 (7 pages) also seem short, though these documents appear to be legal instruments to operationalise a land transfer agreed in earlier agreements. Mali-3 involves a deal structure broadly similar to Mali-2, as both concern joint ventures for sugarcane plantations and processing plants; but the quality of legal drafting in Mali-3 appears to be more rudimentary.

Even accounting for differences in the nature of the contracts, discussed in section 1, the length and level of specificity of the shorter contracts are a source of concern. They seem comparable to those found in the Ethiopian contract, despite the major disparity in land area size and economic value – 500 hectares in Ethiopia-1, thousands of hectares in the other cases mentioned. For contracts that involve allocating large areas of land and that are therefore likely to have major economic, social and environmental impacts, the apparent lack of specificity may arguably undermine safeguards to ensure that risks will be properly managed and that expected benefits will materialise. This is not to say that longer contracts necessarily have more advantageous fiscal regimes; but important aspects of the deal (from employment creation to safeguards for local food security through to social and environmental standards) are likely to be more tightly tied down.

The three Liberian contracts have broadly similar structure and content despite the diversity of investors. This suggests that these negotiations were influenced by contract models coming from the host government. On the other hand, the three Malian contracts are extremely different in length, level of specificity and key features of the deals. The impression is that the deals were largely shaped by the investor.

## **THE LAND RIGHTS ACQUIRED**

Most sample contracts involve long-term land leases on land owned or managed by the state (e.g. Cameroon-1, Mali-1, Sudan-1 and -2 and the Liberian contracts). Two deals in the sample involve some transfer of land ownership. Mali-2 combines a long-term lease for most of the land, to be used for a sugarcane plantation, and the transfer of 857 hectares in full ownership for the processing plant. A similar combination exists under Mali-3.

The Liberia and Cameroon deals contain GPS identification of the land in an Appendix to the contract. In the case of the Liberian contracts, the investor or the host government, depending on the deal, must prepare a survey to finalise the identification of the land and produce a revised Appendix to be attached to the contract (e.g. under Liberia-2).

On the other hand, some contracts do not appear to clearly identify the lands to be transferred beyond broad geographical references. In Mali-1, definitive site selection seems effectively based on feasibility studies to be conducted by the investor; from the contract it is not clear what power the host government has to influence site selection. Sudan-1 also identifies the land through broad geographical references (the locality of Abu Fouta in al-Hasahisa province, al-Jazeera state). Under this deal, the host government will define the land area in coordination with the investor and taking into consideration the investor's feasibility study.

Properly scrutinising the investors' feasibility studies would require technical capacity that government agencies may lack. Limited detail about the identification of the land would tend to decrease room for government planning of land management, particularly if the investor can effectively "pick and choose".

The Liberian contracts are for extendable terms ranging from 20 to 50 years. But a total duration of about a century seems to be common practice. The lease component of Mali-2 and -3 is for 50 years, renewable by agreement between the parties for another term up to a total of 100 years. A renewable 50-year term also applies to Mali-1 and Sudan-1. Senegal-1 and Sudan-2 are for a total of 99 years.

Such long durations mean that, where local people lose their land, they will be separated from it for generations – enough to eradicate longstanding livelihood strategies and agricultural knowledge. From the contracts alone, it is difficult to assess why such long terms are required by the economics of the project. The fact that very different projects have similar durations (with the exception of Liberia) suggests that term clauses are standardised, rather than being tied to what is required to recover costs and make a reasonable return. Pressures for long terms may also come from financing needs: lenders may expect longer durations for the lease than for the loan to protect themselves where projects fall behind schedule. Finally, national legislation may fix

contract durations in a standardised way (e.g. 30 or 50 years, renewable, under articles 46 and 54 of Mali's Decree No. 96-188 of 1996, which regulate long-term leases involving irrigation development in the Office du Niger area).

Several contracts effectively enable the investor to transfer the lease, subject to approval by the host government (e.g. Cameroon-1, Liberia-3 and Mali-1), or authorise the investor to use part of the land as collateral for credit (Mali-2). The Liberian contracts go further by stating that the government's consent "shall not be unreasonably withheld", but they also increase effectiveness of government control by clarifying that selling shares in the investor company is subject to the same consent procedure (otherwise, restricted lease transferability can be circumvented through selling the lease holding company). Sudan-2 grants the investor the right "to sell out and/or transfer the whole or part of the plantation", though it later states that "any assignment, cession or transfer" of rights requires mutual consent of the parties.

For the investor, being able to transfer the lease is a way to mitigate risk (as it provides an exit strategy) and obtain financing for the project (as lenders can be reassured that they can acquire the lease if the investor does not repay its debt). But from the host state's perspective, consent requirements are useful to prevent speculative acquisitions and ensure that the project is not transferred to operators that lack the track record needed. More generally, unrestricted transferability, coupled with the very long contract duration, would blur the distinction between a lease and a sale: a 100-year transferable lease has similar practical implications to a sale, even though the land will eventually revert back to the state.

## **HOST COUNTRY BENEFITS: LAND FEES, INFRASTRUCTURE DEVELOPMENT**

Most of the leases reviewed involve payment of some land rental – ranging from less than USD 2 per hectare/year under Ethiopia-1 to USD 5 per hectare/year under Liberia-2 through to USD 13.80 per hectare/year under Cameroon-1.<sup>11</sup> Differences in land fee amounts alone reveal little: local market values may be different, and while in Cameroon-1 land rentals appear

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11. Data for Cameroon and Ethiopia come from the author's calculations based on contract figures in local currency (exchange rates as of October 2010).

to be the main host country benefit (in addition to compensation payments), the Liberian contracts provide for several other benefits, which are discussed below. Ethiopia-1 exempts the investor from land rental for the first five years. Some contracts require land fees to be periodically adjusted, including in light of inflation (e.g. Liberia-2 and Cameroon-1). Non-payment of the land fee is a ground for contract termination under all contracts requiring payment of land rental (e.g. Cameroon-1, Ethiopia-1 and Liberia-1, -2 and -3).<sup>12</sup>

Some contracts do not involve payment of land fees, however. Senegal-1 makes no mention of rentals – so unless other legal instruments provide otherwise, it would seem that the investor gets the land for free. Under Mali-1, land is explicitly allocated for free; this would seem to contrast with article 51 of Decree No. 96-188 (which requires payment of land fees to be determined by a decree). In Sudan-2, as noted by CHR&GJ (2010) the investor is required to pay about USD 0.07 per hectare/year – which “seems to be little more than a symbolic payment” (CHR&GJ, 2010:56).

Low or absent land fees may be compensated by investor commitments to contribute capital and develop infrastructure. Indeed, the aim of attracting investment appears to be a key consideration for host governments involved in land deals – more so than public revenues per se. Investors may bring much-needed capital to sustain agriculture and improve local livelihoods. For example, under Sudan-2 the investor promised to contribute USD 3 million over five years to develop the property (in addition to providing community training and infrastructure, mentioned below). In Senegal-1, the investor promises to cover costs for all necessary equipment and to construct processing facilities. In Mali’s Office du Niger area, holders of long-term leases must develop irrigation infrastructure (under articles 45 and 55 of Decree No. 96-188 of 1996). The Mali-1 project involves constructing a canal so as to extend the irrigated area of Mali’s Office du Niger scheme. This can be a major benefit in a country where the irrigation potential is not fully exploited and government resources to expand irrigated areas are limited. Contracts may also require the investor to develop infrastructure outside the project area (e.g. Sudan-1).

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12. Liberia-2 and -3 authorise the government to terminate the contract if the company fails to comply with “any material obligations” under the contract – which would presumably include payment of the land rental.



Even so, transferring land below market prices seems problematic. It tends to encourage speculative acquisitions, particularly in light of the long contract durations and of lease transferability. It also seems to create little incentives for investors to explore business models that involve collaboration with local farmers, rather than large land acquisitions, and significant opportunity costs if the investment plan is not complied with.

In addition, contracts where host country benefits are mainly in the form of investment contributions, rather than monetary payments, assume clear, enforceable investor commitments in the contract, and host state capacity to monitor compliance and sanction non-compliance. The latter is often limited, and in any case implies a cost for the host state. As for the former, subjecting leases to compliance with investment plans is common practice (e.g. Ethiopia-1, Cameroon-1 and Sudan-1). The publicly available Mali-1 and Mali-3 contracts do not appear to do this, though it is possible that the *cahier des charges* annexed to the legal instrument that will actually transfer the land (referred to in Mali-3) regulates this matter effectively. But the effectiveness of these provisions would be undermined if investor commitments are formulated in vague terms. For example, the Mali-1 contract seems unspecific about the investor's legal obligations concerning the timing, nature and quality of infrastructure provision.

## **JOBS AND BUSINESS OPPORTUNITIES**

Agricultural investments may create jobs in agriculture and/or processing, both directly and through supply chain relations, and may improve livelihoods through links with local producers. Contractual provisions regulating these issues are important to ensure that hoped-for benefits materialise.

In some contracts, investor commitments on employment creation contain little detail about job numbers and characteristics (skilled/unskilled; permanent/seasonal; part-time/full-time). As a result, they would seem difficult to enforce. For example, Senegal-1 mentions the objective of creating jobs in its preamble, but the main text of the contract merely requires the investor to “contract local farmers to plant, maintain and harvest [jatropha] plants” (author's translation). Sudan-1 also contains no figures on job creation and allows the investor to hire both home and host state nationals for all

positions, including unskilled. Sudan-2 requires the investor to “provide employment opportunities and training to the community”, without however clarifying numbers, job types and timeframes. Mali-1 contains no provision on the creation of local employment.

These clauses contrast with the much more specific provisions contained in the Liberian contracts, which for instance require unskilled positions to be filled by nationals, establish sliding scales to progressively increase recruitment of nationals in skilled positions over specified timeframes, and explicitly require compliance with national labour law (e.g. Liberia-3). But even in the Liberian contracts, precise figures for how many skilled and unskilled jobs will be created are not available.

In addition, in Mali-2 a Poverty Alleviation Programme and Relocation Action Plan provides that 40% of the land assigned for the plantation will be cultivated by outgrowers. The Liberian contracts contain provisions on local procurement which apply to the investors and their subcontractors (e.g. Liberia-2), or requirements for the investor to establish outgrower programmes (e.g. Liberia-1). On the other hand, several contracts reviewed do not require the investor to collaborate with local farmers or to procure goods and services from local producers (“local content” provisions). This may limit benefits through linkages with the local economy and seems to be a missed opportunity.

Requirements that at least part of the processing be done locally can help the host country progressively move up the value chain – from the low value added, primary sector to the secondary sector. The Mali-2 and Mali-3 deals involve local processing, as they regulate the construction of plants to process sugarcane – and Mali-2 provides detail on key characteristics of processing facilities. The Liberian contracts contain specific requirements that part of the processing take place locally (e.g. Liberia-3). But several other contracts seem vague or silent on local processing. Madagascar-1 makes no mention of processing. Senegal-1 mentions the construction of processing facilities for jatropha oil but appears to provide no further detail. Mali-1 and Sudan-1 refer to processing in generic terms as part of a wider set of economic activities that the investor would carry out, but the publicly available contracts do not contain specific requirements.

## TAXATION

General taxation of profits, activities or assets may generate public revenues on top of land fees. For example, Liberia-3 contains detailed provisions on payment of income tax, turnover tax, customs duties, export taxes, taxation on dividends and interest, and other items – though some exemptions are granted and tax rates are capped.

In several deals, however, benefits to public finances seem limited by exemptions. For instance, Sudan-1 exempts machinery, equipment and vehicles from customs duties, and exempts conducted business from profit tax for up to ten years. Tax incentives established by investment codes are also explicitly referred to in some contracts (e.g. Mali-1 and Sudan-1).

More generally, it must be remembered that income tax is only payable once the project starts generating net income (i.e. profits). Depending on the economics of each deal and given the high costs that may be involved in the early stages of the investment (due to the construction of irrigation infrastructure, for example), this may mean that the government will have to wait a long time before collecting any income taxes. Differently to mining concessions, the land deals reviewed do not involve payment of royalties based on production value. In addition to their being generally easier for the host government to calculate and collect, royalties would be payable irrespective of profitability and would thus enable the host government to receive revenues before the project starts generating profits.

With a few exceptions (e.g. the Liberian deals and contracts ancillary to Mali-2) many deals do not appear to require independent audits and government oversight of the investor's financial accounts, or to establish safeguards against "transfer pricing" – the practice whereby the project company's taxable profits are decreased through input purchases from, or product sales to, related companies at inflated or discounted prices, respectively. So even where taxes are formally due, there is a risk that host governments may receive little in practice.

## **A STAKE IN THE PROJECT: IMPLICATIONS OF JOINT-VENTURE ARRANGEMENTS**

The Mali-2 and -3 contracts set land fees at specified amounts. But instead of charging these fees, they treat them as an in-kind contribution from the host government in exchange for an equity participation in the project companies. This way, the government of Mali can acquire up to 6% of the company running the processing facility under the Mali-2 contract,<sup>13</sup> and 90% of the company that will run the sugarcane plantation under the same contract. Mali-3 also creates a joint-venture arrangement but the government will have to pay cash upfront as well as contributing land in-kind, with cash accounting for more than half its overall contribution – all for a 40% stake in the project company.

Specific comments on the extent to which these joint-venture arrangements are advantageous to the host country would require an analysis of the wider web of contracts at stake, which is not publicly accessible. In principle, an equity participation by the host government would enable it to have greater control over the project and receive dividends – which would seem important benefits. But much depends on detail, including the extent to which robust safeguards are established to avoid transfer pricing that would erode the profits of the joint-venture company and therefore the dividends and taxes that the host government will receive.

In Mali-2, a Technical Services Agreement and a Cane Supply Agreement have been negotiated at arm's length between the host government and the investor. The Cane Supply Agreement features a formula for the division of proceeds from the sale of sugar, electricity and ethanol. According to investor sources, the application of this formula is open for independent audit.

Irrespective of whether it is good value for money, equity participation may arguably create conflicts of interest between the government's roles as public-interest regulator and as commercial player involved in the project.

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13. Investor sources indicate that currently expected government participation is 3%.

## 5. WHAT SAFEGUARDS FOR LOCAL PEOPLE AND THE ENVIRONMENT?

Even a deal that is economically beneficial to the country as a whole (in terms of gross domestic product or public revenues, for instance) is bad news if social and environmental interests are not properly taken into account – if local people are arbitrarily dispossessed of their land and do not benefit from the deal, or if irreversible damage is done to precious ecosystems, for example. Arrangements to address social and environmental concerns are therefore crucial. This is an area where linking the contract to national and international law is particularly important to fully understand the implications of the contracts.

### IMPACT ASSESSMENTS AND ENVIRONMENT PROTECTION

Social and environmental impact assessment (ESIA) requirements aim to ensure that social and environmental risks are properly identified and mitigated. Liberia-2 refers to the Equator Principles, an international benchmark which a number of banks have signed up to and which include impact assessment requirements.<sup>14</sup> On the other hand, some contracts require the investor to undertake feasibility studies within specified timeframes (e.g. Sudan-1; Mali-1), but make no explicit mention of an environmental and social impact assessment. National laws often do require an impact assessment to be carried out prior to the land transfer – for instance in Mali and Cameroon. It is understood, for example, that an impact assessment was carried out for the part of the Mali-1 project currently being implemented (pers. comm. from a Malian commentator). As a general point, however, the criteria for approving or failing land deal applications on the basis of the ESIA are not always explicit in national laws, and the results of these assessments are often not available for public scrutiny (Vermeulen and Cotula, 2010a). Research has documented cases of land-based investments getting started without the required environmental permits (e.g., Schoneveld *et al.*, 2010; Nhantumbo and Salomão, 2010). An impact assessment was carried out for the Mali-2 project and a summary is publicly available.<sup>15</sup>

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14. <http://www.equator-principles.com/>

15. <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/mali%20fr.pdf>

Another key issue is what standards are applicable to regulate environmental matters, such as pollution linked to fertilisers or pesticides. Some contracts require compliance with national law (e.g. Mali-1), international standards (e.g. Sudan-1), or both (e.g. Liberia-2). Reference to national law alone would seem to be inadequate in countries where environmental legislation is not well developed. On the other hand, reference to unspecified “international standards”, as in Sudan-1, would not mean much in legal terms, as these standards are not always clear or universally accepted.

The Liberia-2 contract clarifies that international standards include the Equator Principles, which effectively entails the application of the social and environmental standards developed by the International Finance Corporation (IFC). These standards are seen by many as best industry practice, though it is unclear whether the host government is equipped to enforce such external standards and whether the costs of building capacity to do so have been integrated into the economics of the deal. Also, reference to external standards may indicate that legislative reform is needed to improve national law standards. The Liberian contracts define applicable law as including treaty obligations – which would entail the application of environmental treaties where these are specific enough to be applicable without need for conversion into national legislation (Liberia-1 and -2).

Some deals involve little or no mention of environmental issues. Sudan-2, which includes a forest conservation component aimed at generating income via carbon credits, appears to contain no explicit reference to environmental standards. Senegal-1 merely commits the investor to “develop and maintain the land in a responsible way”, while Cameroon-1 requires the investor to comply with legislation on soil protection and on hygiene.

## **TAKINGS OF LOCAL LAND RIGHTS**

As discussed in section 3, large-scale land acquisitions are likely to involve the taking of land used or at least claimed by local people. As land deals move from letters of intent to actual land allocation and project implementation, evidence of adverse impacts on local land access is starting to emerge (e.g. FIAN, 2010, on Kenya and Mozambique; Nhantumbo and Salomão, 2010, on Mozambique; Schoneveld *et al.*, 2010, on Ghana; Sulle and Nelson, 2009, on Tanzania). There have also been reports that land acquisitions specifically

linked to some of the contracts reviewed have affected or may affect groups of local landholders, for instance with regard to Mali-1 (Diallo and Mushinzimana, 2009). The ESIA undertaken for the Mali-2 project concluded that land acquisitions will have negative impacts on local food security and potentially on access to grazing, though these impacts were deemed to be outweighed by expected project benefits.<sup>16</sup> The Resettlement Action Plan produced for the same project estimated that 1,718 households will be directly affected, and that, within these, 1,644 people from 127 households will be physically displaced.<sup>17</sup>

Given this context, the extent to which local landholders have secure rights to their land is an important part of the legal framework regulating land deals – not only because people may depend on land and natural resources for their livelihood and food security, but also because fundamental human rights are at stake: the human right to property, which has been consistently interpreted as including collective, customary rights even where these have no legal recognition under national law;<sup>18</sup> the right to food, which is directly relevant where people depend on natural resources for their food security (De Schutter, 2009); the right to housing, which includes protection against forced evictions; and the rights of indigenous peoples over their ancestral lands, enshrined in the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 United Nations Declaration on the Rights of Indigenous Peoples.

As mentioned in section 3, people in rural Africa tend to have use rights on state-owned land. Under the Sudan-1 deal, the host government commits itself to delimiting the land and delivering it to the investor “free from any right” other than ownership, which remains vested with the government of Sudan.<sup>19</sup> A similar provision is contained in Mali-1, for instance. To meet these obligations, the host government may have to compulsorily acquire any existing land rights. It is important to understand the wider legal context within which provisions like these would operate.

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16. <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/mali%20fr.pdf>, paras. 6.7 and 6.8.

17. <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/mali%202.pdf>, para 6.1.

18. See the cases *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *Maya Indigenous Communities of the Toledo District v. Belize*, *Sawhoyamaya Indigenous Community v. Paraguay* and *Saramaka People v. Suriname in the Americas*, and, in Africa, *CEMIRIDE and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, which refers extensively to the cases from the Americas.

19. Unofficial English translation commissioned by the study.

Virtually all countries have legislation that enables government compulsorily to take rights if it is in the public interest to do so. In exchange, governments are usually required to pay compensation, and to respect certain procedural safeguards. The idea is that if the government is to build a school or a hospital, individual rights must be reconciled with the interests of society at large. But in Africa many private investments involve acquiring land on a compulsory basis (World Bank, 2010). In fact, in several jurisdictions, certain types of private investments are legislatively deemed to be for a public purpose, thereby triggering legislation for the compulsory taking of local resource rights. Yet if commercial projects really can generate greater economic benefits than current land users, one might expect them to be able to buy out local people on a negotiated rather than a compulsory basis.

Beyond these extensive powers of compulsory acquisition, other features of national legal systems in Africa tend to undermine the protection of land use rights on land held by the state:

- Most people do not have certificates for their land – only 2-10% of land in Africa is estimated to be held under formal tenure (World Bank, 2003).
- Legal protection is often subject to visible productive use,<sup>20</sup> and some forms of local resource use (fallow, pastoralism, hunting and gathering) may not be considered to meet this requirement despite their importance to local livelihoods.
- There is usually no legal requirement to obtain free, prior and informed consent of local landholders before land is allocated to an investor; local consultation requirements, where they exist, rarely require conclusion of binding agreements and their implementation may fall short of expectations (World Bank, 2010).
- Compensation is often paid for loss of visible improvements, not for loss of land,<sup>21</sup> with the consequence that payments may be inadequate to restore livelihoods and that no compensation may be paid for rangelands or for lands set aside for future generations.

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20. See e.g. article 15 of Senegal's Law No. 64-46 of 1964; and articles 15 and 17 of Cameroon's Ordinance No. 74-1 of 1974.

21. For instance, Cameroon's Law No. 85-09 of 1985 requires compensation for loss of land but does not apply to takings of land use rights.



- Loss of resources other than land, such as water and forest resources, is rarely compensable, though exceptions exist (e.g. forest use rights under article 8 of Cameroon's Forest Law No. 94-1 of 1994).

The usual justifications for not including the value of land in compensation amounts are that the land is already owned by the state, and hence not actually taken, and that local people may be given access to land elsewhere. However, the first argument seems at odds with the fact that, depending on the jurisdiction, people may be deprived of a legally recognised use right. The second argument would seem problematic in contexts where land is becoming scarcer due to demographic growth.

This wider legal context makes people affected by land deals vulnerable. The fact that land fees or rentals usually accrue to the government makes compensation issues even more pressing, as local landholders would receive no income from the land allocated to the investor. In other words, local people may internalise the adverse impacts caused by the project but may receive little benefit even where the project is beneficial to the country as a whole. Exceptions exist: under Sudan-2, the investor must pay annual rent to the local community, though as discussed the amount seems low; Cameroon-1 requires a share of land fees to be paid to local groups (40% to municipalities and 20% to affected villages); while Madagascar-1 entitles local landholders to a share of the produce, as will be discussed further below. Contracts may also provide for the establishment of community development funds (e.g. Liberia-1), or require the investor to provide an agreed set of social infrastructures like education, health, water and other facilities (e.g. under the Appendix to Sudan-2, non-compliance with which would justify termination of the main contract), but these provisions are rare in the contracts reviewed.

Some contracts provide for more generous compensation regimes than what is required under national law. Where international lenders with stringent performance standards are involved, the project must comply with those standards. For example, the Resettlement Action Plan for the Mali-2 project refers to restoration of local livelihoods to at least pre-project levels, rather than to the mere compensation of the value of crops and buildings lost.<sup>22</sup> This

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22. <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/mali%202.pdf>, para 7.5.

was necessary to comply with the policies of an international development bank that is involved as a lender to the project. And as discussed, the Liberia-2 contract requires compliance with the Equator Principles. In turn, these principles require compliance with IFC Performance Standard No. 5 on Involuntary Resettlement, which is seen as best practice in this area. Publicly available information suggests that no Equator Principle bank is involved in that deal, and this provision seems to have been inserted due to the government's and investor's willingness to do the right thing.

In industry practice, however, there is commonly no binding legal instrument that gives local landholders a legally enforceable right to the treatment outlined in international standards like IFC Performance Standard No. 5. The contract is usually concluded between the investor and the government, and lender requirements are usually integrated through the contract between the lender and the investor. Lenders can exert effective pressure to induce compliance. However, local landholders would appear to have no direct legal claim under the contract or a Resettlement Action Plan – though corporate or lender grievance mechanisms may be available.

Job creation and business opportunities through local content provisions may partly offset negative impacts on land access – but much depends on the terms of the deal. As discussed above, local content provisions are rare in the contracts reviewed, and provisions on employment creation are often unspecific. Although it was impossible for this study to assess the number and type of jobs created under the contracts reviewed, evidence from the literature suggests that jobs may be few, short-lived (as the planting phase ends or the project shifts towards greater mechanisation) and low-paid (e.g. Schoneveld *et al.*, 2010, on Ghana). As a broad generalisation, family farming tends to be more labour-intensive, and shifts to large plantations may not create jobs for all those working the land before the project (see e.g. Andrianirina-Ratsialonana and Teyssier, 2010, discussing Madagascar-1). And there is no guarantee that jobs will accrue to those who have lost land, though Madagascar-1 requires the investor to give preference to local workers.

## COMPETITION FOR WATER

A land lease in semi-arid countries would be worthless if it did not ensure access to sufficient water for agricultural use. While some contracts are largely silent on water rights (e.g. the Liberian contracts), others contain explicit provisions. Mali-1 grants the investor the right “to use the quantity of water necessary for the project without restrictions” during the wet season (author’s translation), and to use the water necessary for less water-intensive crops during the dry season. Similarly, Sudan-1 gives the investor the right to use the water needed for the project. A convention for the provision of specified quantities of water for irrigation (20m<sup>3</sup>/s) has reportedly been signed for Mali-2, and is referred to in that project’s ESIA.<sup>23</sup>

Some contracts require the investor to pay water fees at specified rates – such as Mali-1, which seems to contain higher water fees than current practice in the area (pers.comm. from a Malian commentator). In some cases, water fees are determined through a separate government decree. But other deals contain no reference to what water fee, if any, is applicable (e.g. Sudan-1) or explicitly say that no water fee will be charged for irrigation (Senegal-1).

Where water is a scarce resource and government allocates water rights, use of tools such as pricing, permits and flexible allocations according to the fluctuating annual supply of water seems essential in meeting growing water demand. A lack of proper water pricing may also promote inefficient water use and deprive the government of an important source of revenue. The Sudan-1 deal does require the investor to use water without waste, but arrangements to monitor and enforce compliance seem unclear.

Where local farmers pay water fees, free water rights also constitute a subsidy to large-scale agriculture. Even where investors cover the investment and running costs for the irrigation infrastructure on their leased land, host governments may still have to cover upstream costs associated with delivery of water to the investors’ system – which again would act as a subsidy to large-scale agriculture (as discussed, in Mali-1 the investor covers construction costs, though the contract does not explicitly state this). Also, the government authorities in charge of water management in a given area would need to be

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23. <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/mali%202.pdf>, para 7.5.

involved in the negotiation of the deal; otherwise, contracts signed at the highest level of government may undermine the ability of water authorities to plan water resource management.

Even more importantly, while absence of clear provisions regulating water access may make it more difficult to deal with future water competition, “hard” contractual commitments towards the investor create a legal obligation for the host government to ensure that the water needs of the project are met. Effectively, this establishes priority rights for access to water: should a water shortage occur, government authorities would be required to prioritise large projects backed by contractual commitments over other water users (Smaller and Mann, 2009). The full implications of this issue can only be understood in light of the long contract durations, of local contexts, and of the way these contexts are affected by global processes like climate change.

For example, the rise in large-scale irrigation projects in the Office du Niger area of Mali may impinge on water availability to other users in the Office du Niger area and in the seasonally flooded Inner Niger Delta of Mali. The environmental impact assessment study for the Mali-2 project notes that, although there is currently enough water to meet the water demands of different users in the Office du Niger area, the cumulative effect of numerous land acquisitions in that area could create shortages vis-à-vis the multiple water demands of existing or planned users. The study also found that only measures to increase seasonal water availability, such as the construction of the Fomi dam planned upstream in Guinea, would ensure that water demand is met during the dry season in the longer term.<sup>24</sup> But the Fomi dam is still at the planning stage and may have major environmental impacts of its own, including possible adverse effects on the area of seasonal flooding in the Inner Niger Delta in Mali (Wymenga *et al.*, 2005). The Inner Niger Delta is designated as a wetland of international importance under the Ramsar Convention,<sup>25</sup> hosts high-quality dry-season grazing that is crucial to herders from Mali and beyond, and supports local livelihoods based on farming and fishing.

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24. <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/mali%20fr.pdf>, paras. 6.13-6.16. Investor sources indicate that the possible land area extension of Mali-2 depends upon additional water rights becoming available, most likely post-Fomi dam.

25. Convention on Wetlands of International Importance especially as Waterfowl Habitat, adopted in Ramsar on 2 February 1971 and amended in 1982 and 1987 (text available at [http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671\\_4000\\_0](http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671_4000_0)).

## WHOSE FOOD SECURITY?

The production of food crops for export is a key driver in many recent land acquisitions, yet several host countries are themselves food-importing and even recipients of food aid. This has prompted much public concern, though a counter-argument is that agricultural investment can bring yield increases that will benefit food security in both host and investor countries. How do contracts regulate the distribution of produce between domestic and international markets? What mechanisms do they establish to deal with possible food shortages in the host country?

This issue seems central, yet some agrifood contracts reviewed seem silent about it. Sudan-1 leaves the investor free to decide whether to export or sell on local markets. The preamble of the Mali-1 deal refers to the objective of food security and self-sufficiency but the main text contains no specific rules on product marketing. These contracts appear to create no safeguards to ensure that local food security needs are met. This circumstance contrasts with the policy objective that is sometimes stated by host governments to justify large land allocations – namely, to attract the investment needed to improve the country’s food security.

On the other hand, Liberia-2 grants the investor the right to export rice “provided domestic consumption demands are met”, though no further details are provided. Madagascar-1 determines export and domestic market quotas for specified crops (rice, wheat and maize), though all pulses are for export and the contract allows exceptions where “situation or circumstances otherwise demanded”. It also goes beyond national aggregates and provides for 30% of produce to be paid to local landholders as compensation for the taking of their land. This seems a positive feature of this deal. However, apart from issues concerning the desirability of converting local farmers into food recipients and the possible difficulties in clearly establishing who is entitled to this benefit,<sup>26</sup> the contract also gives the investor the right to purchase part of the landholders’ share of produce at market prices (Andrianirina-Ratsialonana and Teysier 2010). A critical analysis of contract terms (Andrianirina-Ratsialonana and Teysier, 2010) raised some doubts as to whether the local produce shares are adequate to ensure the landholders’ food security – but Ullenberg (2009) reached different conclusions.

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26. As discussed, the contract was signed by the presidents of 13 local associations on behalf of local landholders.

## REGULATORY STABILITY AND REDUCED POLICY SPACE

A final point worth looking at is how social and environmental safeguards evolve over project duration. The balancing act between economic, social and environmental considerations that is at the heart of the concept of sustainable development is not a static one. Rather, it evolves as a result of changing circumstances – for example, as new hazards are discovered, as new technologies are developed that more effectively mitigate social and environmental risks, or as changing social needs and sensitivities require changes in national law. This issue is particularly important given that many contracts have very long durations, and that national law on social and environmental matters is currently not well developed in many African countries.

The problem is that action to improve social and environmental safeguards can adversely affect the economic equilibrium of an investment project. For example, stricter environmental regulations that ban certain chemicals or protect against runoff of fertilisers, or more stringent requirements for the taking of local land rights or the consultation of affected people may increase project costs or delay implementation. Land deals may contain provisions to shelter the investment from adverse impacts caused by regulatory changes.

Indeed, stabilisation clauses included in the contract may commit the host government not to change the regulatory framework governing the investment in a way that affects the project's economic equilibrium, and to compensate the investor if it does so. For example, among the contracts reviewed, Mali-2 contains a stabilisation clause that provides: that the contract prevails over “any new law” the implementation of which may affect project implementation; and that no new law or measure will be applied to the project if it affects the rights of the parties in a way to cause direct or indirect prejudice to the project. Should the government breach these provisions, it would have to compensate the investor. The Liberian contracts stabilise the fiscal regime but not applicable law. In fact, they specifically require investment projects to comply with applicable law “as in effect from time to time”. However, they also state that the contract prevails over (existing or future) national law except for the constitution (e.g. Liberia-3).

Stabilisation clauses are primarily aimed at preventing arbitrary host state action that may adversely affect the project – or even expropriate it altogether.

Indeed, once most of the investment is made – for example, after the irrigation infrastructure or processing plant is constructed – the investor becomes vulnerable to arbitrary changes in applicable rules that may undermine the project. These concerns are particularly pressing in countries where political risk is high. But if not properly formulated, clauses that stabilise applicable law may restrict the ability of the host state to take action in the public interest – for instance, where improving social or environmental standards would increase project costs (Shemberg, 2009). The host government would have to either exempt the project from complying with the new standards, or compensate the investor for losses suffered. Stabilisation clauses would also ring-fence the hard commitments that the host government may have entered into to provide specified amounts of water – so that subsequent changes to water allocations would entitle the investor to compensation. Where public finances are a concern, the obligation to compensate investors may make it more difficult for host governments to take action needed to protect people or the environment. If a stabilisation clause is included in the contract, best contractual practice clearly defines its scope to ensure that social and environmental matters are not stabilised (for some examples, see Cotula, 2010).

The full implications of a land deal can only be understood in light of applicable international investment law. Liberia-3 makes this explicit and refers to applicable international law on the protection of foreign investment. But even without express contractual references, bilateral investment treaties (BITs) that may have been signed between the host government and the investor’s home government would protect a land-based investment beyond the safeguards provided by the contract. For example, investment treaties usually require host governments not to discriminate against investors from the other state party, to treat investors in a fair and equitable way and to pay compensation in case of expropriation. Investment treaties may also strengthen the legal value of the land contract itself, by requiring states to respect their contractual commitments vis-à-vis investors from the other state parties (these treaty provisions are usually called “umbrella clauses”).

Regulatory measures that undermine the viability of a land-based investment may be considered as an expropriation of that investment (so-called “regulatory taking”). The BIT standard of “fair and equitable treatment” may also have direct implications for land deals. For example, some observers have

commented that a government decision to revise a contract's water allocation to meet the water needs of other users may be deemed to constitute a breach of that standard (Smaller and Mann, 2009). In all of these cases, a breach of an applicable BIT would require the host government to compensate the investor for the losses suffered. This is only fair where investors are victims of opportunistic host state action; but it raises concerns where host state action genuinely pursues a public purpose. Indeed, where public finances are strained, an obligation to pay compensation may make it more difficult for host governments to act in the public interest if doing so may negatively affect ongoing investments.

If an investor feels that the host government has breached its obligations under the land deal (on stabilisation or water allocation, for instance) or under an applicable investment treaty, it can refer the dispute to international arbitration where the host state has consented to this – for example, in the land deal, a national investment code or an applicable treaty. International arbitration is a process whereby a neutral third party solves the dispute through a binding decision. Some of the contracts reviewed explicitly enable investors to bring disputes to international arbitrators, rather than national courts (e.g. Liberia-3). Senegal-1 requires that disputes be settled through international arbitration via the Paris-based International Chamber of Commerce and that English be the language of arbitration proceeding (Senegal is a Francophone country). This mechanism seems onerous for the local government body that signed the deal – arguably, should a dispute go to arbitration, the local government body is likely to find it difficult to participate.

Arrangements for enforcing arbitral decisions have proved quite effective. Where breaches were found, international arbitrators have awarded investors large amounts of public money in compensation. Legal fees alone can amount to millions of dollars.<sup>27</sup> And where governments are unwilling to pay up, investors can seize host state assets held abroad. In addition, governments are often under pressure to comply with contracts in order to keep attracting investment. So any restrictions that the land deals may create on the policy space must be taken very seriously.

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27. See for example the case *Ceskoslovenska Obchodni Banka v Slovakia*, where the host state was ordered to pay the investor \$10 million as a contribution to its litigation costs.



## 6. DISCUSSION

In agricultural investments, contractual terms and processes matter a great deal. Investments on bad terms or through exclusionary processes are unlikely to deliver positive sustainable development outcomes. And even where their terms are advantageous, land deals still raise important issues of legitimate public concern, as they may entail a shift towards large-scale, mechanised agriculture that can marginalise local producers; or towards more export-oriented agriculture that exposes the local economy to uncertainties in international markets. Land deals may also increase pressure on land and resources, with possible adverse impacts on local people and the environment. Interrogating the contracts raises fundamental issues of governance – who decides what and how, who benefits and who loses, and how competing social, environmental and economic considerations are reconciled.

Through its analysis of a small sample of contracts, this report has identified some of the issues for which public scrutiny is most needed. This includes issues relating to:

- The contracting process – namely, the extent to which local landholders have control over key decisions affecting their land, and the public at large can hold governments and investors to account.
- Economic fairness between investor and host country – from the nature, duration and transferability of the land rights acquired by the investor, to the content and enforceability of different types of host country benefits.
- The distribution of risks, costs and benefits within the host country – for instance, as people who lose land or water may not be the ones who get jobs or business opportunities, or as unrestricted export clauses may jeopardise the food security of some in the host country.
- The degree of integration of environmental considerations, for instance through impact assessments and applicable environmental standards.
- The extent to which the balance between economic, social and environmental considerations can evolve over often long contract durations, as ill-designed stabilisation clauses and other investment protection devices may make it more difficult for host states to take action in the public interest.

More research is needed to assess how these issues are addressed in the contracts for land-based investments – looking at a larger number of deals and at a fuller set of contracts for each deal. The preliminary analysis undertaken in this report raises concerns and points to better practice. While often each contract presents a combination of both, the contracts reviewed are very diverse in length, content and level of specificity.

With regard to many of the issues identified, there are real concerns that some contracts underpinning the recent wave of land acquisitions may not be fit for purpose. A number of the contracts reviewed appear to be short, unspecific documents that grant long-term rights to extensive areas of land, and in some cases priority rights over water, in exchange for seemingly little public revenue and/or apparently vague promises of investment and/or jobs. Also, many deals are being negotiated in legal contexts where safeguards for local interests are weak, and some contracts appear not to properly address social and environmental issues. As a result, there is a substantial risk that local people may internalise costs without adequately participating in benefits, and that environmental issues are not properly factored in.

On the other hand, some contracts feature better terms. For instance, with regard to revenues, Cameroon-1 presents significantly higher levels of land fees compared to the other contracts, and provides for 60% of this revenue to be channelled to local municipalities and villages. And with regard to the land acquisition, Mali-2 involves a sophisticated joint-venture arrangement whereby most of the land is allocated to a company controlled by the host government, 40% of this land is cultivated by outgrowers, and the foreign investor brings capital and expertise to develop processing facilities. Mali-2 also involves application of international social and environmental standards. The three contracts from Liberia stand out for their more flexible duration, their clearer identification of the land being transacted, their more specific investor commitments on jobs, training, local procurement and local processing, their greater attention to local food security, and their tighter social and environmental safeguards. The Liberian contracts have been ratified by parliament and are available online. But, on the downside, more sophisticated deals like Mali-2 also seem more likely to feature stabilisation clauses that, if not properly formulated, can raise concerns about the government's ability to take action in the public interest.

In the case of Liberia, several factors have enabled the government to get better contracts: an effective renegotiation of Liberia-3 back in the 1970s, which laid the

foundations of the current contract and developed in-country capacity; determined political leadership and a strong government negotiating team in the latest renegotiation of Liberia-3; world-class legal assistance provided to the government of Liberia by the International Senior Lawyers Project;<sup>28</sup> effective use of financial analysis during negotiation; simultaneous (re)negotiation of agricultural and mining contracts, which led to productive cross-fertilisation; and use of Liberia-3 as a model for subsequent negotiations.<sup>29</sup> This experience shows that better contracts are possible, and development agencies can play an important role in helping host governments access the capacity support they need to negotiate and enforce better deals.

But irrespective of contract terms, process is also critical. In several countries, centralised control over land creates real risks that local people are marginalised in decision-making. Some of the contracts reviewed involved agreements with local communities (Senegal-1, Sudan-2 and Madagascar-1), but it is the government that usually calls the shots in contracting and land allocation procedures. Even in the better negotiated contracts, the gap between legality (whereby the government may formally own the land and allocate it to investors) and legitimacy (whereby local people feel the land they have used for generations is theirs) exposes local groups to the risk of dispossession and investors to that of contestation. Even the Liberia-2 deal, in itself a relatively well negotiated contract, has been criticised as being a “land grab” (GRAIN, 2009), and World Bank (2010) reports problems with compensation and consultation in some investments in Liberia.

More generally, contracts are only part of the story. They only work if they are properly implemented – good contracts may still result in bad investments, while investments may produce benefits even if the contracts are lacking. Contracts are often negotiated under time pressure and unequal negotiating power. Different contractual regimes in force in the same host country may result in disparities of treatment for affected people or the environment. And the very fact that a contract is concluded indicates that a decision has been taken for the land to change hands.

So wherever local rights are insecure or social and environmental safeguards are weak, there is a need for radical reform in national legislation, and for effective mechanisms to translate law reforms into real change. In this context, legal empowerment of local landholders is key. This means that people must have more secure rights to their land and greater control over decisions affecting it.

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28. <http://www.islp.org/>

29. Kaul *et al.* (2009) and personal communications from people involved in some of the negotiations.

It also means that legal rights alone are not enough – adequate capacity is needed to exercise them in practice, and collective action can help give real leverage to legal rights. The Community Land Fund supported by a consortium of donors in Mozambique provides an interesting model for interventions to support legal empowerment. The Fund finances service provision for communities to become more aware of their rights, delimit their collective lands, establish local organisations, and make more effective use of local consultation requirements contained in national legislation. A wider range of practical approaches to legal empowerment is discussed in Cotula and Mathieu (2008).

In addition, there is a need for inclusive debate in host countries. Much discussion about large-scale land acquisitions has so far been led by players and processes based in the global North. It is time for the people who are most directly concerned to have their say. The right to food of many people in some of the poorest countries of the world is at stake. The belief that large-scale plantations are needed to “modernise” agriculture is dominant in many government and investor circles, but there is no evidence to back it up. A recent World Bank study found that many of the land-based investments reviewed by it had gone wrong, not only in terms of adverse social impacts – for instance, with local landholders not being consulted or paid adequate compensation – but also with regard to progress with implementation and commercial viability (World Bank, 2010). On the other hand, evidence shows that family farmers can be highly dynamic and competitive on global markets, and that small farm development is feasible and desirable for its impacts on poverty reduction (Wiggins *et al.*, 2010). It also shows that, where outside investment is required to improve productivity and livelihoods, productivity gains and commercial profitability can be achieved through working with local farmers (Vermeulen and Cotula, 2010b; Cotula and Leonard, 2010).

Decisions taken now will have major repercussions for the livelihoods and food security of many people for decades to come. Land deal negotiations are unfolding fast and behind closed doors. But secrecy and haste are no friends of good deals. Rather than rushing into land contracts, governments should promote transparent, vigorous public debate about the future of agriculture in their country. Producer organisations must be central to that debate, and scrutiny from civil society can help make the renewed interest in agriculture work for broad-based sustainable development. Research can help provide an empirical basis for these processes, and it is hoped that this report might be a contribution in that direction.

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# Land deals in Africa: What is in the contracts?

Over the past few years, agribusiness, investment funds and government agencies have been acquiring long-term rights over large areas of land in Africa. Together with applicable national and international law, contracts define the terms of an investment project, and the way risks, costs and benefits are distributed. Who has the authority to sign the contract and through what process greatly influences the extent to which people can have their voices heard. Yet very little is known about the exact terms of the land deals.

Drawing on the legal analysis of twelve land deals from different parts of Africa, this report discusses the contractual issues for which public scrutiny is most needed, and aims to promote informed public debate about them.

ISBN: 978-1-84369-804-3



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