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A Thirst for Distant Lands: Foreign investment in agricultural land and water

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International Institute for Sustainable Development
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1. Introduction

1.1 Scope of this paper

There has been a recent surge of interest in foreign investment in agricultural land. The purchase or long-term lease of agricultural land for food production, predominantly by state-owned and private investors from Arab and wealthy Asian states (Japan, China and Korea) into Africa and Southeast Asia, has received significant media attention. Investment banks, hurt by the crisis in the banking and property sector, and in search of new sources of investment, have also contributed to the recent surge. The surge in foreign investment in land for biofuel production has received less media attention, but may be equally important.[1] It is being pursued primarily by the private sector in Europe, Japan and North America, and by state-owned investors in China and Korea. Russia, Ukraine and Australia have also offered large tracts of farmland to foreign investors.

Foreign investment in agricultural land is not a new phenomenon. Large foreign-owned plantations exist in parts of Africa, Asia and Latin America, in many cases remnants of the colonial era, and are used to produce bananas, sugar, tea, cocoa and other export crops. Since the 1980s, however, foreign ownership of land for agriculture significantly declined as other types of foreign investment, particularly contract farming[2] and investment in other aspects of agricultural production—including seeds, fertilizers, machinery, processing, manufacturing and retail—have been preferred by investors and transnational corporations.[3]

The biofuels boom that began in 2003 and the global food crisis of 2008 revived the strategy of foreign investors (both states and private investors) to purchase or secure long-term leases of land. Importantly, this latest investment strategy is more strongly driven by food and energy security rather than a notion of comparative advantage in the large-scale production of indigenous crops, which has been more characteristic of foreign-owned plantations since the end of the colonial era (Chiquita banana plantations in Central America, for example).

This paper focuses on the renewed interest in purchasing or leasing land, and securing water rights for agricultural production; it does not focus on other forms of foreign investment in agriculture. In Sections 2 and 3, it identifies the key drivers behind the recent surge in these investments, and examines prevailing trends in reported land contracts. In Section 4, the range of legal issues

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[1] For the reasons explained below, it is impossible to determine the precise amount of investment in land and water for food, feed or fuel.

[2] Contract farming can be defined as an agreement between farmers and processing and/or marketing firms for the production and supply of agricultural products under forward agreements, frequently at predetermined prices. FAO, *Contract Farming : partnerships for growth*, FAO, 2001

[3] Rama, Ruth and Wilkinson, John, *Foreign direct investment and agri-food value chains in developing countries: a review of the main issues*, in FAO Commodity Market Review 2007–2008, FAO, 2008

associated with these types of contracts, including in relation to domestic law, the international investment contracts and international investment agreements, is identified. While there are uncertainties due to the absence of any access to actual contracts, this section suggests the key issues that are propelling the rapid evolution of this area of foreign investment.

1.2 Limitations on available information

There is a small body of literature on the growth in foreign investment in agricultural land. There is also plenty of information available in the media. For more empirically-based policy and legal work, however, there is a significant lack of concrete and verifiable material. Most critically, for local communities and stakeholders and for broader policy development purposes, there appear to be virtually no actual contracts available in the public domain, and there is a dearth of information on negotiations in progress.

The dominant source of information is the print media. GRAIN, a Spanish-based grassroots NGO, has done an excellent job of monitoring and collating media articles. Their publications are useful, but do not provide much detail beyond what is reported in the media. Since June 2008 they have tracked over 530 news articles. The International Food Policy Research Institute (IFPRI) has done a similar job of monitoring and collating media reports on foreign land deals.

GRAIN documents around 180 land deals at varying stages of negotiation, while IFPRI documents 57 land deals.[4] Many of the deals are in the early stages, some have already fallen through or been stalled, while others are in more advanced stages, including drafting of contracts. Many deals have already been finalized, but it is impossible at this point in time to know exactly how many or their full scope.

The Food and Agriculture Organization (FAO), the UN Conference on Trade and Development (UNCTAD) and the World Bank, are working on the issue but have not published anything substantial yet. They have very little data on investment flows in this area. This year's *World Investment Report* from UNCTAD will focus on agriculture, and will include a chapter on investment in agricultural land that will start to provide some data on the scope and nature of these investments.

The International Fund for Agricultural Development (IFAD) has done some important work arguing in favour of contract farming over land purchases or leases, and have published some important cases, but they have very little information on land acquisition itself.

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[4] GRAIN, *Seized! The 2008 land grab for food and financial security*, GRAIN, October 2008, and GRAIN, *The new scramble for Africa*, GRAIN, July 2007, and von Braum, Joachim and Meinzen-Dick, Ruth, "*Land Grabbing" by Foreign Investors in Developing Countries*, IFPRI, April 2009

The International Institute for Environment and Development (IIED) has published some preliminary research on land acquisitions for energy crops. They prepared a report for the UN Food Summit in July 2008. They rely on existing literature and on information gathered by telephone conversations, e-mails and site visits. IIED is preparing a report on land acquisitions for biofuels in Mozambique and Tanzania. Since November 2008 they have started looking at food crops as well. They are preparing a scoping paper on the scale of land acquisitions, commissioned by FAO and IFAD in collaboration with the World Bank. They are also compiling an inventory on how much land has been allocated over the past five years and the key features of the land contracts.

While the literature on the land component of these investments is growing, the analysis of the water component of these investments remains less developed. Yet, access to land without water is pointless for agricultural investments. In essence, what are often described now as land grabs are really water grabs: the purchase or long-term lease of land in order to obtain the water rights that come with the land under domestic law or with the investment contract itself. While the existing reports do not ignore the water issue by any means, few to date focus on it. Here, the lack of access to concrete information from the contracts is critical. As a result, any analysis relating to the water component of these investments is even more suppositional than in relation to the land component. As a result, this paper proceeds more by way of identification of issues, rather than a determination of answers to these issues.

To supplement this sparse literature, this report is also based on interviews with government officials from investing and receiving States, representatives of UN agencies and civil society organizations.

1.3 A note on transparency

To date, as already noted, no, or at least very few contracts have been made available to the public or to intergovernmental or non-governmental organizations (NGOs). More worrisome is the anecdotal evidence that in some cases where land deals are understood to have been agreed, legal contracts either do not exist or have not been made available to government officials responsible for foreign investment or to local communities and stakeholders affected by the agreements.[5]

The culture of secrecy that surrounds agricultural land deals raises concerns about government conduct in relation to issues of public interest. The lack of transparency undermines government accountability, and increases the opportunities for corruption and other inappropriate acts. It raises concerns about the right to information (Article 19 of the UN Covenant on Civil and Political Rights). It has potential implications for access to land, water and food for individuals and communities in areas subject to these contracts, impacting their human right to an adequate standard of living (the backbone of the UN Covenant on Economic, Social and Cultural Rights, Article 11).

[5] According to government officials from host states.

These are the very issues that are the focal point of media and policy-makers' attention today.

2. The Drivers: Food, Water and Energy Security

A number of key factors triggered the recent surge of interest in investment in agricultural land. The short-term factors include a response by food-importing countries to the high global food prices in 2008, and the subsequent decision by leading commodity exporters to impose export restrictions on key staple crops. At least 25 countries imposed export bans or restrictions in 2008, including India, Russia, Argentina and Vietnam. High oil prices in 2007 and early 2008 triggered further interest by the private sector to acquire land for energy crops, and helped promote interest in receiving agricultural investment to reduce the costs of imported foods into developing countries. Finally, financial investors, searching for new sources of investment outside the banking and property sector, saw opportunities in agricultural land markets, expecting the value of both food and fertile land to increase as the long and short-term factors continue to grow. "Sell banks, buy cheese," said Crispin Odey, manager of a London-based hedge fund Odey Asset Management, to the *Financial Times* in April 2008.[6] A number of investment banks have set up agricultural investment funds including BlackRock (U.S.), Deutsche Bank (Germany), Goldman Sachs (U.S.), and Knight Frank (U.K.).[7]

In 2009, many of the short-term factors that were present in 2008 (with the exception of the financial crisis) have temporarily disappeared. As a result, and combined with the impacts of the financial crisis and accompanying credit restrictions, the impetus to conclude deals is showing early signs of fading. Some deals that were announced have either been delayed or abandoned. At the 5th World Islamic Economic Forum in March 2008, the Binladin Group, one of the biggest enterprises in Saudi Arabia, decided to stall its plan to invest $4.3 billion in rice production in Indonesia as a result of the global financial crisis.

Long-term factors have also contributed to the recent surge of investment. This includes growing concerns for food and energy security and the volatility of global commodity prices. Securing production capacity has also become a long-term concern for food companies.

[6] Financial Times, *Hedge Funds Muck in Down on the Farm*, 25 April 2008

[7] GRAIN, *Seized! The 2008 land grab for food and financial security*, GRAIN, October 2008 and GRAIN, *The new scramble for Africa*, GRAIN, July 2007

Of the long-term factors, water is one of the most significant drivers of this new surge of investment. Close to 70 per cent of all freshwater appropriated for human use goes to agriculture. Irrigation is crucial to the world's food supplies and is on the rise. Between 1962 and 1998, irrigated land expanded by about 1.6 per cent a year, a total increase of 100 million hectares.[8]

Box 1. Water use in selected countries

The following countries and territories withdraw more than 90 per cent of their renewable water resources for agricultural, industrial and domestic use. These countries are also some of the main countries pursuing investment in agricultural land abroad: Bahrain, Barbados, Egypt, Israel, Jordan, Kuwait, Libya, Malta, Oman, Qatar, Saudi Arabia, Turkmenistan, United Arab Emirates, Uzbekistan, West Bank and Gaza, and Yemen.

Source : FAO 2002

Sub-Saharan Africa uses only two per cent of its freshwater resources for irrigation.[9] The region is therefore seen by investors as having an untapped potential for irrigated agriculture. Sudan, one of the countries interested to sell and lease land, greatly expanded irrigated agriculture in the 1970s with investment from Gulf states. Irrigated land now constitutes 10.2 per cent of total Sudanese cropland and provides more than half of total agricultural production. Mozambique, another case in point, also has strong potential for irrigation. It has significant renewable water resources and only withdraws a minimal amount. Irrigated crops only make up three per cent of agricultural production in Mozambique. In 2002, the cultivated area was estimated at 4.44 million hectares, and the total cultivable land was estimated to be much larger at 36 million hectares.[10]

The Gulf states, on the other hand, use around 80 per cent of their total water supply for agriculture (see Box 1).[11] Saudi Arabia, which for many years encouraged wheat production at home, has decided to phase out its own wheat production by 2016 because it has significantly depleted the freshwater reserves in the country. In 2008, Saudi Arabia established a new agricultural fund whose prime concern includes preserving water resources by investing in agricultural production overseas[12] (see Box 2).

Moreover, water issues are multiplying because they are now inextricably tied to climate change impacts. This is propelling state-based foreign investment in particular, including joint venture investments with national private sector companies. In essence, early movers are seeking to lock in access to water for agriculture with investments in states perceived to have a surplus of water today. The need for this was confirmed in the 2007 findings of the Intergovernmental Panel on Climate

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[8] FAO Fact Sheet, *Unlocking the Water Potential of Agriculture*, FAO, 2003

[9] ibid., p1

[10] Woerz, Eckart, Pradhan, Samir, Biberovic, Nermina and Jingzhong, Chan, *Potential for GCC Agro-Investments in Africa and Central Asia*, Gulf Research Center, September 2008. It should be noted however that defining cultivated land is difficult in Africa, where many communities practice traditional cycles of framing with long fallow periods, sometimes as high as five times fallow for each period of cultivation. Many areas are also used as community grazing lands, which may not be reflected in statistics.

[11] ibid., p5

[12] Media Line, *Saudi Arabia Launches $5.3b agricultural fund*, 27 January 2009; Reuters, *Middle-East nations eye $1bln Australian cropland*, Friday 12 December 2008

Change (IPCC), which noted the likely impact of climate change on agricultural production and access to water.[13]

Water issues are also a critical part of the equation for American farm companies, especially those growing corn and other water-intensive crops for biofuels. Diminishing water supplies for agriculture in the U.S. means companies need to find alternative sources for growing these crops. These are not food security issues (though they may translate into this in the future), but more traditional market-oriented issues for companies selling to and sourcing from global markets.

Box 2. A strong push in the Arab region

The Gulf Research Center, a Dubai-based think tank, published a paper in May 2008 calling on Gulf states to invest in agriculture abroad. The paper stated that "self-sufficiency is not an option for the arid and increasingly populous GCC* (Gulf Cooperation Council) countries. Therefore, close dialogue with exporter countries and investments in agricultural projects in Africa, South East Asia and Eastern Europe could add to the GCC countries' food security."

Salim Allowzi, Director-General of the Arab Organisation for Agricultural Development (AOAD), supported this strategy and called on the private sector in the Arab world to step up investment in farming projects. Allowzi said sufficient investment in Sudan, the most fertile country in the region, could meet the region's needs of cereal and other basic food items. "I am convinced that if there is a real interest and seriousness by investors in the farming sector, then the whole Arab world needs of cereal, sugar, fodder and other essential foodstuffs could be met by Sudan alone," Allowzi said.

"The Arab food gap is rapidly growing and only farming co-operation and integration among Arab nations could tackle this danger. There is an urgent need now to forge a common Arab agricultural policy and implement it fully if we want to tackle this gap, which peaked at $19bn in 2007," Allowzi told the Qatari *Al Sharq* Arabic language newspaper.

Sources: Gulf Research Center, Food Inflation in the GCC Countries, GRC Report, May 2008 and Emirates Business "Arab nations urged to set up strategic cereal stock," 4 February 2009.

*GCC countries include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE).

3. Prevailing Trends in Agricultural Land Deals

A number of observations can be made about the prevailing trends in agricultural land deals. The lease period is typically 50–99 years and the land acquisitions are often in excess of 10,000 hectares, with some reports of deals of up to one million hectares.[14] The main actors are states, sovereign wealth funds and the private sector, including agri-businesses, investment banks, commodity traders and mining companies.

The current investment flows fall into different categories. The private sector in Europe, the U.S. and Japan are looking for land all over the place, from Russia to Sudan to Australia. They are likely to produce crops for food, feed and fuel; whichever takes the highest price or supplies other integrated production chains. Gulf states are looking for land in countries with which they share cultural or historical ties or geographical proximity. The primary goal is food production for home state consumption. China, Japan and South Korea are looking for land predominantly in Africa and Asia. They are interested in producing food, animal feed and energy crops. While the data appear to indicate that this is not exclusively for home consumption, it is widely understood that it is primarily for this purpose.

[13] IPCC, *Climate Change 2007: Synthesis Report*, IPCC 2007

[14] Reuters, *Pakistan offers farmland to foreign investors*, 21 April 2009; Financial Times, *Hedge Funds Muck in Down on the Farm*, 25 April 2008

It is this feature perhaps more than any other that helps redefine the nature of the current land purchase and lease arrangements: they are not market-driven in the classic sense of seeking comparative advantage for production for global markets. Rather, they are about shifting land and water uses from local farming to essentially long-distance farming to meet home state food and energy needs. It is, in practice, purchasing food, with the risks that local food needs, land users and water rights will be displaced. This is not completely new. However, the growing scale of this practice today, combined with the increasing economic and environmental concerns that are motivating this surge, are creating a new dynamic of global importance. It is no longer just the crops that are commodities: rather, it is the land and water for agriculture themselves that are increasingly becoming commodified, increasingly subject to globalized rights of access.

In many instances the government is charged with negotiating the deals and, in turn, provides incentives to the private sector to invest. Saudi Arabia, for example, established the "King Abdullah initiative for Saudi agricultural investment abroad" which includes credit facilities to Saudi investors in agriculture abroad. Hail Agricultural Development Corporation (HADCO), a Saudi company, invested in Sudan, with the government providing 60 per cent of the funding.[15] The private equity company Abraaj Capital and other United Arab Emirates (UAE) companies and institutions have already acquired 800,000 acres of farmland in Pakistan with the support of the UAE.[16]

When the private sector investment is backed by the government, the agreement is more likely to contain export home only provisions. South Korean Companies—Daewoo Logistics Indonesia and Cheil Jedang Samsung, for example, plan to grow and process energy crops in Indonesia and will export the entire production back to South Korea.[17] There are deals, however, like in the case of Mauritian companies investing in Mozambique or Chinese companies investing in Zambia, where food can also be sold domestically and regionally.[18] Other private sector investments are more strongly motivated by profits and do not place restrictions on the destination of exports (see Annex 1).

Some of the land acquisitions are reported to include trade-offs or other incentives for the host government. A lease can be given in exchange for oil contracts or investments in infrastructure projects in the host country, including roads, ports and bridges (see Box 3.). Tax incentives,

[15] Financial Times, *Saudis get first taste of foreign harvest*, 4 March 2009

[16] Woerz, Eckart, Pradhan, Samir, Biberovic, Nermina and Jingzhong, Chan (2008), *Potential for GCC Agro-Investments in Africa and Central Asia*, Gulf Research Center, September 2008

[17] The New Security Beat, *In land grab, food is not the only consideration*, The New Security Beat, 3 March 2009

[18] James Keeley from IIED is collating information on China's role in agricultural investments. He has been studying the growing number of Chinese farms in Zambia. Now totalling 23, representing a total investment of $10 m, he finds that to date they are all providing for the local food market, not for export. For example, they currently provide 15 per cent of all Lusaka's eggs. On the other hand, China's more recent investment for a five-fold increase in rice production in Mozambique, which is accompanied by loans to modernize roads and harbours, points to a more export-oriented investment. Source: Pambazuka, "*China and the Great Global Land Grab*," 11 December 2008

including tax exemptions on the import or purchase of goods and machinery, or income tax relief for investors are also included in some of the deals.

Feasibility or sustainability assessments are a common component of the private sector leases. South Korea Daewoo conducted an assessment on the Madagascar land deal. Lonrho PLC, a U.K.-based investment company, conducted a feasibility study for 25,000 hectares of land in Malawi and 100,000 hectares of land in Mali. It is less clear whether they are a part of state-state contracts. In both cases, the quality of such assessments is understood to vary widely, assuming they are done at all.

Box 3. The trade-offs

Libya and Ukraine are negotiating a deal whereby Ukraine would provide Libya with 247,000 acres of land to grow wheat in exchange for access to Libyan oil fields.

The President of Kenya, Mwai Kibaki, was widely reported to have concluded a deal with Qatar to lease 40,000 hectares of uncultivated land for fruit and vegetable production in exchange for Qatari investment to build a new port, estimated to be worth USD$2.3 billion.

Since 2002, Gulf states have been financing a dam 350 km north of Khartoum, Sudan. The project was conceived in 1993 and started in 2000.

Kuwait has reportedly agreed to offer loans to Cambodia totalling $546m to finance a dam on the Stueng Sen River for irrigation and hydropower and to build a road to the Thai border, in exchange for a large rice farming agreement.

Sources: Chicago Tribune, Global grain rush under way as rich nations snap up farmlands overseas, 14 December 2008; Business Daily Africa, Ministry says it was not consulted over Qatar land deal, 16 January 2009; Gulf Research Center, September 2008, Economist, Disputes erupt over plans to invest million in rice farming, 23 April 2009

4. Scoping the Legal Issues

The changing nature and quantity of foreign investment in land and water increases the potential to shift rights from domestic to foreign actors. This is because of the current frameworks of domestic and international law for foreign investment. In many of the host states, there is either no, insufficient or unclear domestic law concerning land rights, water rights, pollution controls for intensive agriculture, human health, worker protection and so on. On the other hand, the international law framework provides hard rights for foreign investors. This leads to a layering of international law over domestic law, with significant impacts.

In this context, the notion of the "commodification" of land and water for agriculture is important. The two primary sources of international law that relate to this issue are the international contracts, which are commercial in nature; and the international treaty law on investment. Both start from the commercial perspectives, and often fail to expressly address the social, environmental, and other dimensions. This supports the economic interests of the foreign investor, potentially at the expense of the social and economic interests of the local users.

Section 4.1 briefly introduces the three sources of law most immediately relevant to land-related investments: (1) domestic law; (2) international investment contracts; and (3) international investment agreements. Section 4.2 illustrates various scenarios on how these three different legal sources might interact. Very few concrete conclusions can be drawn because agricultural investment contracts are not publicly available. Therefore, this section focuses on the manner in which risks relating to land investments can both arise and be foreclosed.

4.1 The three sources of relevant law

4.1.1 Domestic law

The primary source of law that should be used to regulate all investments in agricultural land and water is domestic law in the host state. Given the range of issues involved, this might typically include laws relating to the admission of foreign investors, laws and regulations on incentives for foreign direct investment (FDI), taxation, property law, water rights and rates, and an array of laws relating to the potential impacts of the investment on the local community: environmental, human health and safety, worker safety, labour rights, and possibly others. An environmental impact assessment may or may not be required prior to the conclusion of an investment agreement.

This array of laws is not uncommon in relation to FDI. Indeed, other sectors such as mining may involve even more domestic laws. Where these areas of law are fully developed, regulatory structure should help promote the positive impacts of FDI, and act as a buttress against its negative impacts. Land rights will be clear. Water rights and rates will ensure an ongoing equitable distribution of access to water. The environment will be protected from impacts of pesticide or fertilizer usage. Workers will be ensured that chemicals are applied safely and that protective equipment is available on the job. Wages will be protected, and so on. But, in many instances this array of laws does not exist. Moreover, if they do exist, there is often no enforcement. In other cases, the most developed area of domestic law is that which provides protection for investor rights. In the area of land rights, for example, a foreign investor's rights under its contracts will be seen as hard contractual rights in many states, while a subsistence farmer in the same area will have ill-defined land tenure rights. Water rights may be even less defined for individual and community users.

4.1.2 International investment contracts

In most cases of agricultural land and water investment, the role of the contract between the host state and the investor is critical, especially for the investor. The contract will set out not just the price, quantity and duration for the purchase or lease of land, it will in most cases also address a range of other issues. These include taxation and investment incentives for the investors, rights to export production, rights to import equipment and personnel, any associated infrastructure or logistics requirements (e.g., road, rail, shipping), and other operational matters.

The contracts will often address environmental and development issues either expressly or through general provisions. In some cases, drawing on experience in other sectors, contracts may set out specific environmental standards to be achieved, or invoke domestic law for this purpose. Where it is silent, domestic law will be applicable. Similarly, issues relating to workplace safety and labour conditions may be expressly addressed or left to domestic law. While initial reports suggest many of the agricultural investment contracts are not extensive, there is no way to determine this on an empirical basis at this time. If economic linkages with the local economy are required by the government, they will also be expressed in the contract.

In short, the investment contract will identify the key elements of the fiscal and economic bargain relating to the investment. They should also set out the key sustainable development elements: environmental, social, human rights, economic linkages, etc.

Investment contracts increasingly have a propensity to become a legal code for the investment. In several developing countries, investment contracts become enshrined in legislation. In some instances, they even have a quasi-constitutional status. When such contracts depart from the application of otherwise generally applicable national or sub-national laws, they attain a law-making status for that investment that goes outside normal commercial contracts.

This law making function can come in the direct terms of the contract and/or through the application of what are known as "stabilization" clauses. These are clauses in the contracts between investors and host states that either preclude the application of, or require compensation for, new or changed regulatory measures that affect the investments. They may apply for a certain period, or for the full life of the contract and any renewal period.

The most significant independent study on stabilization clauses was prepared in 2008 for the UN Special Representative of the Secretary General on Business and Human Rights and the International Finance Corporation (IFC) arm of the World Bank.[19] It noted that while not all contracts have such clauses, the use of stabilization clauses is widespread across sectors, but far more prevalent in developing country regions of the world than in developed countries. Africa, not surprisingly, was the region where such clauses were most prevalent. It was also noted that such clauses can vary in scope of coverage (from narrowly defined fiscal issues to all laws and regulations applying to the investment) and degree of impact (the extent to which they preclude the application of new or changed laws or require compensation for them). Broadly speaking, for present purposes it was generally seen that the investment contracts with African states had the most far-reaching stabilization clauses. Given that Africa is the region with the largest number and size of land contracts, this finding is particularly important.

In addition to the law-making function, investment contracts also determine which law applies to interpret the contract in the event of a dispute and which court or tribunal will be responsible for resolving a dispute arising under the contract. The three main choices are: (1) the courts of the home state; (2) arbitration in the home state under domestic law; or (3) an international arbitration process. In many instances, investors choose international arbitration to avoid possible biases in the domestic court.

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[19] Shemberg, Andrea, *Stabilization Clauses and Human Rights*, 11 March 2008 at http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf

4.1.3 International investment agreements

International investment agreements (IIAs) are treaties between states that are intended to provide investors from one state investing into the territory of the other state with special protections under international law. IIAs can come in several forms. The most common is bilateral investment treaties (BITs) between two states. According to UNCTAD, there are now over 2,600 such treaties that have been signed, though somewhat fewer are actually in force.[20] In addition, there are a growing number of chapters in free trade agreements that include the same type of provisions as those found in bilateral investment treaties. Finally, there are a growing number of regional investment treaties, for example in the COMESA region of Eastern and Southern Africa, and the ASEAN region of Southeast Asia.

Given the proliferation of IIAs, it is likely that a significant percentage of foreign investments in agricultural land and water fall under the scope of a BIT, a free trade agreement or a regional agreement. When this is so, the IIA will provide a range of rights and remedies for the investor additional to those in domestic law or the contract. These rights, in legal terms, are layered over the domestic law, which must comply with the terms of the treaty.[21] Any laws or other government activity inconsistent with the treaty can be challenged by the investor.

IIAs have been designed to protect foreign investors from a range of governmental measures. The theory is that, in so doing, they make investments more secure, which will attract investment to developing countries. While it is by no means clear that this goal has been met,[22] it is clear that IIAs have a wide range of potential implications. The main provisions of these types of investments are:

1. **The requirement of national treatment.** This is a commitment by the host state to treat foreign investors that are "in like circumstances" to domestic investors in a manner no less favourable than the domestic investors. The key issue is what is meant by the term "in like circumstances." For example, would a large commercial farmer with thousands of hectares of land be "in like circumstances" to a small-scale farmer with only a few hectares? If yes, the government would have to treat both farmers similarly. Past case law indicates that tribunals tend to focus on the economic activity of investors, rather than giving significant consideration to other factors. In this case, the large commercial farmer and the small-scale farmer could be considered "in like circumstances," making it potentially difficult for the government to support the small-scale farmer and to apply health and safety regulations on the large commercial farmer.

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[20] UNCTAD, Bilateral Investment Treaties, http://www.unctadxi.org/templates/DocSearch____779.aspx

[21] It is clear in international law that the existence of or compliance with domestic law is not a legitimate excuse for the breach on an international treaty obligation.

[22] The literature on this issue is canvassed in Sauvant, Karl, and Sachs, Lisa, eds., *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Oxford University Press, 2009), summarized in Chapter 1. Ultimately in concludes that no empirical link between investment treaties and investment flows is clearly established.

2. **The requirement of most-favoured nation treatment.** This is a commitment to extend the treatment provided to the most-favoured foreign investor, to all other foreign investors. This has been interpreted to include not just the treatment under domestic law and policy, but also under other investment treaties.

3. **Fair and equitable treatment, also known as the minimum international standards of treatment.** This has become a broadly conceived standard that includes elements of government transparency in decision-making, and a prohibition against arbitrary or discriminatory acts. In many instances, Tribunals have considered the "legitimate expectations" of the investor as part of the standard. The "legitimate expectations" can arise from the investment contract or from other forms of commitments given by government officials to an investor.

4. **A prohibition against expropriation without compensation.** This is one of the critical elements common to all investment treaties. While treaties do not bar expropriations from taking place, they do require proper compensation to be paid when they do take place. A variety of issues related to this type of provision are considered in Section 4.2.

5. **Rights to export the products produced.** It is commonplace in investment agreements to provide investors with the capacity to operate their investment in accordance with their own needs. One element of this, in particular as production facilities became integrated into global production chains, is the ability to export what is produced. This broad provision is also consistent with the general approach found in the WTO Agreement on Trade Related Investment Measures, which prohibits measures to constrain exports by foreign investors. This is especially important in the agricultural field, where the right to export all or almost all of the production is presumed to be a part of most land contracts. However, even if it is not, if there is an applicable IIA, this provision may be included there.

6. **Safeguards.** Many IIAs include provisions that allow the host state to limit the export of capital by the investor in the event of economic or fiscal crisis. No such provisions appear to have extended to other types of crisis, for example domestic food shortages.

7. **National security.** Almost all IIAs have provisions that allow the obligations in the treaty to be superseded by national security concerns. The scope of this exception clause has generally thought to mean national security in a policing and military sense; however, as many of these provisions are self-judging by the invoking state, it is not clear that this is the necessary limit. Indeed, it is possible that the national security exception could be employed by host states in the event of a serious food crisis, thereby overriding the prohibition on export limitations in such treaties. But this has not been tested to date.

8. **Dispute settlement.** Virtually all of the IIAs concluded since 1990, which is the great majority of the existing treaties, have special dispute resolution processes known as investor-state arbitration. These processes are unique under international law in that they allow a private foreign investor to initiate an arbitration to determine whether the provisions of the IIA have been breached. No other field of international law has this type of binding enforcement process that can be directly initiated by a non-state actor. It is now frequently used. The first such arbitration took place in 1987. By 2000, there were about 15. Now, there

are over 300 known cases, and a presumed significant additional number taking place in total secrecy.[23] One must expect the dispute settlement process to be invoked whenever a potential dispute arises or a dispute actually materializes. The arbitration process will apply the provisions of the IIA over the domestic law. Where there is an inconsistency between the two, the provisions of the IIA will prevail.[24] For example, a domestic law requiring that a food producer sell 25 per cent of its production in the host state would breach an IIA provision prohibiting the host state to limit exports of the foreign investor. This gives foreign investor a significant legal tool with which to promote their interests.

In addition to the above forms of investor rights and protections, an increasingly common additional feature of IIAs is the inclusion of what are often called "pre-establishment" rights. This is the right of an investor from one state to make investments into the other state on the same footing as a domestic investor. In the agricultural land and water sector, this would mean that an investor could purchase land and access water rights on the same basis as domestic land-owners and water users. No additional constraints, unless excluded from the scope of the pre-establishment rights by exception provisions in the treaty, can be imposed on the foreign investor. In effect, these pre-establishment rights extend the normal national treatment requirement that applies after an investment is made to the establishment or acquisition of an investment in the host state.

Often accompanying these pre-establishment rights is a prohibition on imposing "performance requirements." Performance requirements are legal or policy measures that are used to require the investor to have specified levels of business linkages with the local community or state businesses, to employ a given number of employees, to share revenues, or other such constraints on the business operations. The provisions on performance requirements found in investment treaties prohibit their application to foreign investors. As a result, some of the options being considered to improve the social and development dimensions of investments, might actually be precluded by the prohibitions on performance requirements.[25] Sorting though these potential inconsistencies will be important to establish regimes that work from a development perspective.

4.2 Implications of the three sources of applicable law

In this section, we develop some simple scenarios to illustrate the possible implications for developing countries of the application of these three different sources of law. No specific conclusions can be drawn for any one country or any one instance of land purchase or lease. But the

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[23] UNCTAD, *Latest Developments in investor-State dispute settlement*, IIA MONITOR No. 1 (2009), International Investment Agreements

[24] This is common under international law, and is stated as a clear principle in the Vienna Convention on the Law of Treaties. The reason for this is that the opposite approach, that any international law inconsistent with domestic law is not applicable to the state in question, would mean that all any state has to do to avoid compliance is pass a domestic law.

[25] See, e.g., the IFPRI study and recommendations, supra, n. 4.

importance of considering and coordinating these different legal sources is illustrated. The following legal issues are reviewed below:

- Do foreign investors have a right to buy land and water rights?
- What rights do foreign investors acquire if they do invest?
- What happens to the rights of previous users of the land or water?
- Can obligations to promote sustainable development be imposed?
- What happens if land or water rights are expropriated or redistributed, especially if there is a food or water shortage?
- What happens if other applicable laws relevant to the investment change, for example pollution control laws?
- What happens if a host government implements a trade measure?

4.2.1 Do foreign investors have a right to buy land and water rights?

International law generally does not give foreign investors rights to invest in land and water in another state. Normally, whether a foreign investor can acquire land, and in particular agricultural land here, is a matter of domestic law within each state, and each is allowed to open its economic sectors, or not, as it sees fit. This remains the case unless a commitment is made in an international treaty to allow foreign investment in any given sector, or the economy at large. Such commitments provide "pre-establishment rights" for foreign investors (see above).[26]

It is important to note in this context that investment treaty commitments are not required in order to open sectors of the economy to foreign investors. Only the appropriate domestic law must be in place. However, once a treaty commitment is made, it becomes very difficult to reverse that commitment through domestic policy changes or when potential emergencies arise. Treaty commitments are intended to "lock in" liberalization measures and prevent "backsliding" on such policies.

4.2.2 What rights do foreign investors acquire if they do invest?

Absent any international contracts or treaties, foreign investors would be treated the same as a domestic investor under the applicable domestic law. However, when a contract between the state and investor is in place, the investor may acquire, depending on the terms of the contract, additional rights not set out in domestic law relating to water use, land tenure rights, the right to export all products of the investment, etc. In addition, a foreign investor may obtain favourable taxation terms and other economic incentives available under domestic law to foreign investors. The contractual

[26] It is not clear under existing case law whether an investment liberalization commitment made in one IIA will be available for investors from third states that benefit from a treaty with a most-favoured nation treatment (MFN) clause. This will likely be determined based on the very specific wording of the MFN clause.

rights may also replace parts of the generally applicable domestic law. Finally, an investor that includes a stabilization clause in its contract may also be able to avoid complying with domestic laws that come into force after the date the contract was entered into.[27]

International investment agreements may provide foreign investors with additional rights aimed at securing not only title to the investment but also its operations. In broad terms, by accepting a foreign investment, host governments generally accept that they will provide the means for them to operate, for example to draw water for agricultural purposes. Unless domestic law clearly provides for periodic reviews of water allocations and rights, this right to have access to the necessary means of production may become part of the "legitimate expectation" of the foreign investor, discussed above under the fair and equitable treatment standard. This international law right under an IIA could provide a secured right, even if it conflicts with existing or future local needs for potable water, small-scale farming, small industries or subsistence uses.[28]

Foreign investors may also be understood to acquire additional protections from possible changes in the law and the expropriation of their land if they benefit from an investment treaty, as described below.

4.2.3 What happens to the rights of previous users of the land or water?

The rights of prior users of purchased or leased land and water is a critical issue in the debate over the "land grabs." Under domestic law, where these rights are clear and vested in local owners or users, they will be entitled to be the vendor of the property or water rights, and thus to participate in the contracting process. If the government determined that an investment should take place despite the opposition of a land or right holder, expropriation might be possible, subject to the relevant compensation requirements.

The problem is that in most states where such contracts are being completed, land and water rights are vague, based on local traditions or non-existent. Title is often vested in the government, or in local chiefs or other community structures. Actual users may have no clear rights. In such cases, the investor will have its contractual rights to fall back upon as hard rights, enforceable under the chosen dispute settlement forum in the contract.

In addition, if an IIA is in place to cover the investment, the investor would have the additional rights of protection, adding a further layer of rights to the investor over the previous users of the land or water. The enforcement of the contract rights could then be raised to the level of international treaty rights, directly enforceable by the investor under the investor-state dispute settlement system. In this instance the "hard" investor rights would likely prevail over the unclear rights of previous users.

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[27] There are even reports of contracts rolling back existing law to a previous version under some contracts.
[28] Mann, Howard, *International Economic Law: water for money's sake?* IISD, September 2004

4.2.4 Can obligations to promote sustainable development be imposed?

An often identified approach to improve the equity and development impacts of land investment contracts is to include certain requirements of investors to contribute to the local community in economic terms. Hiring a designated number of local workers, purchasing a designated percentage of local inputs, providing technology transfer and training to the community, minimum levels of contract farming, contributing a designated percentage of production to local communities or markets, and other options have been voiced in this regard.[29]

Normally domestic law will allow such conditions to be imposed. A contract could include such provisions as well. Once signed, they would become binding and enforceable under the law of the contract, though it is unclear whether communities could seek to enforce these provisions or only the contracting state.

However, if an investment treaty is in place that includes pre-establishment rights, it may well include prohibitions on the imposition of such performance requirements as well. This could limit the ability of the host state to impose such requirements, or eliminate it completely. Thus, it is possible that an IIA could actually conflict with sustainable development objectives for the local community and host state, and one of the commonly identified "win-win" approaches to these types of investments.

4.2.5 What happens if land or water rights are expropriated or redistributed, especially if there is a food or water shortage?

The first recourse, in the event of an expropriation of land rights or water use rights by the government, is usually under domestic law. Most legal systems provide some form of recourse to either challenge the expropriation or seek compensation. This is so even when the property or rights are taken for a legitimate public purpose.[30]

All IIAs impose a requirement for compensation to be paid if investor rights are expropriated. The international obligation for compensation would apply to the business operation being lost, not just the land. This may be a much larger financial obligation for compensation than under domestic law in most developing countries.

The matter becomes less clear where critical rights for operating the enterprise are reduced but not fully taken away. This is a foreseeable situation in relation to agricultural investments, all of which rely upon the availability of water, and many of which are for 50–99-year lease periods. If water resources drop to a level below the requirements of the investment, the host state will not be able to

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[29] See, e.g., IFPRI, note 4, supra.

[30] In general terms, a legitimate public purpose is a prerequisite of a legal expropriation, but not a ground for not paying compensation. Compensation is, again in general, an additional requirement for a legal expropriation.

do much, and no compensation could be foreseeable. However, if there is sufficient water available, but the amount allocated to the investor is reduced to meet the needs of other users, reducing water allocations to the investor may be defined by a tribunal as an expropriation of the right to operate the business. It could also constitute a breach of the fair and equitable treatment standard by frustrating the legitimate expectation of the investor.[31] The redistribution of land to address a significant food security problem would create similar legal uncertainties.

4.2.6 What happens if other applicable laws relevant to the investment change, for example pollution control laws?

Some simple examples may be noted to indicate the kinds of issues this question relates to:

- New environmental measures to protect against runoff of pesticides and fertilizers.
- The banning of certain chemicals to protect the health of workers or the local community.
- Mandatory increases in minimum wage.
- Promoting the right of workers to unionize.

This question raises one of the most vexing and unpredictable issues in international investment today. It is one that clearly links the state of domestic law, the contract and treaty rights into an interlinked whole, but with no definitive answer.

Generally speaking, and absent unjustified discrimination between domestic and foreign investors, existing laws at the time an investment is made will not create a problem. Changes in the laws, however, can lead to assertions of breaches of the contract or of treaty protections for foreign investors.[32] Several of the known investor-state arbitrations have concerned changes in environmental law, zoning laws, royalty levels and other measures that impact the operation of an investment.

One reason this issues is so unpredictable is that there are two contradictory directions in the case law on whether regulatory measures enacted for legitimate public objectives, including public health, safety and the environment, can be considered an indirect expropriation and therefore subject to compensation, or a breach of the fair and equitable treatment obligation. This is due to an ideological difference between arbitrators that have decided the cases, and the absence of any process to reconcile these competing lines of argument. As a result, it is impossible to determine in advance if a regulation will be classified as an expropriation if it is challenged under a treaty. In effect, it is has now become a question of who the arbitrators are, their views of the role of the state, and the "normalcy" of adopting new regulatory measures after an investment is made.

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[31] Mann, Howard, *International Investment Agreements, Business and Human Rights: key issues and opportunities*, February 2008, IISD

[32] ibid., p17

In response to this uncertainty, governments are increasingly including provisions in IIAs that specify that public health, safety and environmental measures do not, or do not generally, constitute an indirect expropriation. Nevertheless, the majority of international investment agreements that are in place today, do not contain these changes, and this is especially so in Africa and Asia. [33]

One factor in this area seems to be the extent of the financial impact of a regulatory measure on a foreign investor. Where it is large, there is a higher risk that the arbitration panel will award compensation to the foreign investor. The right to unionize, for example, may lead to very high wage differences in the investors operations. The banning of certain chemicals or pesticides due to their human health impacts may require an investor to pay millions more to change agricultural production methods or may result in financial losses from lower yields. But, again, new treaties are indicating that the degree of economic impact alone should not be determinative of this issue.

Finally, the linkages to contracts have become critical. Most critically, if a contract includes a stabilization clause that limits the ability of the government to make new laws applicable to the investment, tribunals will take this into account in determining whether there has been a breach of either the expropriation provision of a treaty or the fair and equitable treatment provision. In brief, the inclusion of such a clause in a contract is being used now to turn a normal exercise of regulatory powers into a breach of international law that requires the state to pay compensation. Compliance with normal regulatory procedures is not a defence to such a claim if the result is seen to breach the contract commitment. Hence, in this area, the linkage between domestic law, the contract and the treaty, is inextricable. Identifying this and addressing it expressly, including by limiting any stabilization clauses, are essential ingredients to address this issue in advance.

4.2.7 What happens if a host government implements a trade measure?

A key policy tool for host states in the event of food shortages is the ability to impose food export restrictions on the investor. The use of trade measures including export taxes and export restrictions, permissible under international trade law, can create problems for host governments if they negatively affect investor rights. This is a particularly pertinent for contracts where agricultural production is for export to the home country only.

In 2008, countries like India, Vietnam, Pakistan, Egypt, Argentina, Kazakhstan, Russia and Ukraine imposed restrictions on food exports in response to the massive spike in agricultural prices and the internal food security issues this created.[34] These are among the group of countries that have signed or are negotiating deals to sell or lease land to states or foreign investors for food exports to the home country.

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[33] ibid.

[34] FAO, *Crop Prospects and Food Situation*, FAO, December 2008

The United Arab Emirates (UAE), which leases land in Pakistan for food exports, tried to get a blanket exemption from Pakistani export restrictions, which the country had implemented in 2008 for reasons of domestic food security. Pakistan was willing to give such privileges only for specifically proposed agricultural free zones and cautioned that a possible investment deal is not "to do away with precious farmland but in fact to raise the productivity of our farms and turn barren land in to fertile farmland."[35] Despite these calls of resistance, Pakistan still removed export restrictions on rice in early October 2008.[36]

Policy measures consistent with international trade law may now find they are in breach of international investment law if they impact rights granted to foreign investors. Contract provisions may include rights to export all or designated percentages of the production. These will generally be enforceable under the chosen dispute settlement system. IIAs can also be called upon in aid of the investor here, both to enforce its legitimate expectations when such contract provisions exist, and to enforce the provisions often found in the IIAs themselves that prohibit states from imposing export restrictions on the production of the investment. Hence, host governments could find that these trade measures, even if imposed during periods of food-related crises, are challenged under investor-state arbitration. Whether the national security exceptions described above would come into effect to create a defence is simply unclear at this time.

5. Conclusion

The renewed interest by states and investors to purchase or lease agricultural land deserves serious attention. There is plenty of information circulating in the media about such land deals, but there remains a lack of concrete evidence, data and statistics on the nature and extent of such deals. It is especially unclear whether contracts exist for those deals that have been confirmed by government officials.

The lack of information about the investments, and the unavailability of contracts, makes any legal analysis difficult. Nevertheless, it is clear that some key and potentially disastrous legal consequences could arise during the life of such investments. It is imperative that both the investing and receiving states are aware of the legal implications, the possible impact on the local population in terms of access to land, water and food, and the consequences that could arise when national laws change or during times of national crisis.

At the same time, both the decline of food and oil prices and a global recession that has shrunk investment flows, raise questions about whether the pace and enthusiasm of recent deals can be sustained. There are enormous economic, social and political risks that are associated with foreign

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[35] Woerz, Eckart, Pradhan, Samir, Biberovic, Nermina and Jingzhong, Chan (2008), *Potential for GCC Agro-Investments in Africa and Central Asia*, Gulf Research Center, September 2008

[36] FAO, *Crop Prospects and Food Situation*, FAO, December 2008

ownership of land and water rights. This was demonstrated most strikingly in the South Korea Daewoo-Madagascar deal, where civil opposition to a range of government policies, including sale of farmland, eventually contributed to the overthrow of the government.

Nevertheless, the interest by governments and the private sector in land is unlikely to disappear. The search for land overseas will continue to be a structural feature of a world population that continues to grow and a planet that struggles to keep pace. The global food and energy crises that exploded in 2008 will not be the last, and governments are continuing to prepare for a more permanent state of high food prices and water scarcity.

Annex 1. Examples of Agricultural Land Contracts

Democratic Republic of Congo-MagIndustries (Canada). MagIndustries acquired a 68,000 hectare eucalyptus forestry plantation and is constructing a 500,000 tonne-per-year wood-chipping plant near the port city of Pointe-Noire. The wood chips will be shipped to Europe for use as biomass.
Source: GRAIN, The new scramble for Africa, July 2007

Ethiopia-Flora EcoPower (Germany). Flora EcoPower is investing $77 million in Ethiopia's Oromia state as part of a purchase of over 13,000 hectares of land for biofuel production.
Source : Reuters, FACTBOX : Investing in Africa : Land and agriculture, 7 October 2008

Mozambique-CAMEC (U.K.). The government of Mozambique signed a contract with the London-based Central African Mining and Exploration Company (CAMEC) for a bioethanol project, which involves the allocation of 30,000 ha of land for a sugar cane plantation and a factory to produce 120 million litres of ethanol a year. The land was allocated on a provisional basis for two years, within which the investor must initiate project implementation. The plantation will abstract water from a dam, which also supports irrigated smallholder agriculture. Farmers downstream have expressed concerns. The deal was highly contentious since the same land had been promised to four local communities, numbering over 1,000 families, who had previously been displaced by the creation of a national park. Under Mozambique's Land Act, community consultation must be undertaken regardless of whether the land has been registered. To date, the community consultations have been fraught with problems.
Source : IIED and FAO, Fuelling Exclusion? The biofuels boom and poor people's access to land, 2008

Mozambique-Mauritius. Two memoranda of understanding (MOU) have been signed with Mauritius and Mozambique in early 2008. The plan focuses on improving local as well as regional production. The priority crops identified are maize, potato, onion, rice, pulses and soybean for both the local and regional markets. About 5,000 hectares of land are available to Mauritian entrepreneurs

in the province of Manica in Mozambique for agricultural production. Mauritius and Mozambique have close geographical, historical and cultural ties.
Sources: IPS, Mauritians Also Competing for Land in Africa, 27 February 2009

Pakistan-Monsanto (U.S.). Monsanto has acquired 10,000 acres (4,047 ha) of land for experimenting with GMOs including BT-cotton and BT-wheat. Monsanto is looking for an additional 50,000–100,000 acres (20,234–40,468 ha) of land for experimental purposes.
Source: Pakistani government official

Sudan-HADCO (Saudi Arabia). HADCO, a Saudi agribusiness firm, has leased 25,000 acres (10,117 ha) for $95 million north of Khartoum to produce food and feed for export to Saudi Arabia. HADCO has benefited from government-backed loans for its investment.
Source: FT, Saudis get first taste of foreign harvest, 4 March 2009; GRAIN, Seized! The 2008 land grab for food and financial security, October 2008

Sudan-Jordan. In 1998 Jordan signed an agricultural protocol with the Sudanese government entitling Jordan to utilize 25,000 ha of land on the banks of the Nile. Under the scheme, Jordan was entitled to grow its essential cereals and other crops including animal fodder and to rear livestock. But the project was shelved and Khartoum set 2009 as a deadline for Jordan to make up its mind, either to start actual investment or risk losing the opportunity.
Source : Jordan Times, Agricultural investment in Sudan to resume early 2009, 30 November 2008

Sudan-United Arab Emirates. The UAE has farms in several Sudanese provinces, including a 40,000-feddan (16,800 ha) farm where wheat and corn are grown.
Source : Reuters, FACTBOX: Investing in Africa: Land and agriculture, 7 October 2008

Tanzania-Sun Biofuels (U.K.). Under the Tanzanian Investment Act 1997, the Tanzania Investment Center (TIC) is mandated with identifying and providing land to investors, as well as with helping investors obtain all necessary permits (Article 6). Under this arrangement, the land is vested with the TIC and transferred to the investor on the basis of a derivative title (under article 19(2) of the Land Act 1999). After the end of the investment project, the land reverts back to the TIC (article 20(5) of the Land Act). The TIC has set up a "land bank" of 2.5 million ha identified as suitable for investment projects. The U.K. firm, Sun Biofuels, has acquired 18,000 hectares of agricultural land for jatropha production.
Source: IIED and FAO, Fuelling Exclusion? The biofuels boom and poor people's access to land, 2008; GRAIN, The new scramble for Africa, July 2007

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