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Foreign land purchases for agriculture: what impact on sustainable development?

Private investors and governments have recently stepped up foreign investment in farmland in the form of purchases or long-term lease of large tracks of arable land, notably in Africa. This brief examines the implications of this trend for sustainable development.

There is a new global interest in foreign investment in farmland. The purchase or long-term lease of agricultural land by state-owned and private investors has received significant media attention. The target is countries with arable land and water resources in Africa, South and Central Asia, and Latin America. Russia, Ukraine and Australia have also offered large tracts of farmland to foreign investors.

The current investment flows fall into different categories. The private sector in Europe, the USA and Japan are looking for land around the world, from Russia to Sudan to Australia. They are likely to produce crops for food, feed and fuel, whichever commands the highest price or supplies other integrated production chains. Investment banks and hedge funds have established funds to acquire agricultural land. Gulf states are more likely to be looking for land in countries with which they share cultural or historical ties or geographical proximity. The primary goal is food production for home consumption. Private and public investors from Asia are looking for land predominantly in Africa and Asia to produce food, animal feed and energy crops. While the data appears to indicate that this is not exclusively for home consumption, it is widely understood that it is primarily for this purpose.

Foreign investment in agricultural land is not a new phenomenon. Large foreign-owned plantations have long existed 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 and investment in other aspects of agricultural production—including seeds, fertilizers, machinery, processing, manufacturing and retail—have been preferred by investors and transnational agribusinesses.

Importantly, the new investment strategy is more strongly driven by food, water and energy security than a notion of comparative advantage in the large scale production of indigenous crops for global markets, which has been more characteristic of foreign-owned plantations since the end of the colonial era. The current land purchase and lease arrangements are largely 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 production

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facilities. This is not completely new, but the process of doing so mainly or exclusively for home country consumption is. In addition, 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, with a global market in land and water rights being created.

Further, these proposed investments often have little connection to a country's domestic plans to develop the agriculture sector, when such plans exist. These developments are creating risks that local food needs, and land and water users, will be displaced. This Brief examines this new trend and its possible implications for sustainable development in the countries that are hosting such foreign investments.

Main drivers of foreign land purchases for agriculture

The most visible driver of recent land acquisitions was the 2008 food crisis. Countries that depend on food imports for their food security reacted to the high global food prices and subsequent decisions by commodity exporters to impose export restrictions on key food crops. At least 25 countries imposed export bans or restrictions in 2008, including India, Russia, Argentina and Vietnam. The high oil prices in 2007 and early 2008 were another driver, which triggered interest by the private sector to acquire land for energy crops. Finally, the global financial crisis pushed financial investors to search for new sources of investment. The value of both food and fertile land seemed set to increase, making them an attractive new investment. Indeed, 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 (UK).

Long-term factors have also driven the recent surge of investment. Food and energy security and the volatility of global commodity prices remain long-term concerns for most countries. Securing production capacity has also become a long-term concern for food companies.

Of the long-term factors, water is one of the most significant drivers. Close to 70 percent of all freshwater appropriated for human use goes to agriculture. Irrigated agriculture is crucial to food production and is on the rise. In some parts of the world, water from economically important river basins and aquifers is already overused, severely limiting the possibilities of increasing the quantity of water for irrigation. The Gulf states use around 80 percent of their total water supply for agriculture. 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 fresh water 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. By contrast, Sub-Saharan Africa uses only 2 percent of its freshwater resources for irrigation. The region is therefore seen by investors as having an untapped potential for agriculture.

Water issues are also a critical part of the equation for US farm companies, especially those growing corn and other water-intensive crops for biofuels. Diminishing water supplies for agriculture in the USA mean companies need to find alternative locations for growing these crops. These are not food security issues, but more traditional market-oriented issues for companies selling to and sourcing from global markets.

Moreover, water issues are multiplying because they are now tied to climate change impacts, as suggested by the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. 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.

How Much Land is at Stake?

A quantitative inventory of five African states (Ethiopia, Ghana, Madagascar, Mali and Sudan) compiled by the International Institute for Environment and Development (IIED), the Food and Agriculture Organisation (FAO) and the

International Fund for Agriculture and Development (IFAD), documented a total of 2,492,684 hectares of approved land acquisitions from 2004 to early 2009. That is almost half the arable land of the United Kingdom and three times the arable land of Norway. These include a biofuel project in Madagascar involving 452,500 hectares of land and a livestock project in Ethiopia involving 150,000 hectares of land.

More generally, the land acquisitions typically involve lease periods for 50-99 years and are often in excess of 10,000 hectares with some reports of deals of up to 1 million hectares. The main actor is the private sector, including agribusinesses, investment banks, hedge funds, and commodity traders. However, in the past two years, states and sovereign wealth funds have begun to play a very significant role. In many instances the government is charged with negotiating the deals and, in turn, provides incentives to the private sector to invest (**Box 1**).

The Legal Setting: Real Concerns, Few Answers

There are three main sources of law that govern foreign investment in agriculture: domestic law, international investment contracts, and international investment agreements, or IIAs (see **Box 2**). The interplay between them determines the extent to which international law will prevail over domestic law in any given instance and provide additional rights and remedies to foreign investors. In developed states, the domestic law provides a broad base that protects domestic stakeholders and governments and sets obligations for all investors. However, in many developing states, the contracts and treaties provide greater rights and protections to foreign investors over a weak or incomplete domestic legal base on social, economic or environmental issues. This can tilt the entire "legal pyramid" in favour of the foreign investors when the international contracts and treaties fill the gaps by default. This is particularly relevant to foreign investments in agriculture, where domestic land tenure rights, water rights, environmental management regimes relating to chemicals, labour law on farms and so on can be weak or absent. The following paragraphs consider some of the legal issues that may arise.

Foreign investment creates minimum international standards for host countries. 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 or the investment contract clearly provides for a periodic review of water allocations and rights, the right to have access to the necessary means of production may become a legitimate expectation of the foreign investor and therefore a legal entitlement of the investor under international law. This could provide a secured right to the investor, even if it conflicts with existing or future needs in local communities for potable water, small-scale farming, small industries or subsistence uses.

Prohibition against expropriation without compensation is an element common to all investment treaties. While treaties do not bar expropriation from taking place, they require proper compensation to be paid when it does take place. The first recourse in the event of an expropriation of land or water use rights by the government is under domestic law. 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 on

Box 1

Government support to foreign land purchases

Saudi Arabia 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. The private equity company Abraaj Capital and other United Arab Emirates (UAE) companies and institutions have already acquired 800,000 hectares of farmland in Pakistan with the support of the UAE.

Land is sometimes given in exchange for oil contracts or investments in infrastructure projects in the host country, including roads, ports and bridges. Tax incentives, including tax exemptions on the import or purchase of goods and machinery and income tax relief for investors, are also included in some of the deals.

the availability of water, and many of which are for 50- or 99-year lease periods. If, for example, water resources drop to a level below the requirements of the investment, the host state will not be able to 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. The redistribution of land to address a significant food security problem would create a similar legal uncertainty and risk of legal challenges.

Rights to export products versus the implementation of trade restrictions on food. 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 is the ability to export what is produced. In the case of agricultural land investments, the right to export all or almost all of the production is presumed to be a part of most contracts. Yet many states have in the past few years taken measures to ban food exports, either due to shortages or spikes in global food prices, or both. This raises the specter that policy measures like export restrictions, used to protect food security, including at times of critical food shortages, and that are consistent with international trade law, may be in breach of international investment law if they impact rights granted to foreign investors. Hence, host governments could find that these trade measures are subjected to claims for compensation under investor-state arbitration, adding another legal and political barrier to protecting food security at home.

Changes in environmental and labour laws. Changes in the domestic law can lead to assertions of breaches of the contract or of treaty protections for foreign investors and therefore require compensation to be paid. Several of the known investor-state arbitrations have concerned changes in environmental law, zoning laws and royalty levels, with results favouring both the investors and host states in apparently similar circumstances.

There is great unpredictability in this area of international law today, with two contradictory directions in the case law. One direction says new laws enacted for legitimate public purposes can be considered an indirect expropriation if they have a significant economic impact on the investment, and the other says they cannot. As a result,

Box 2

The three sources of law governing foreign investments in agricultural land

Domestic law: The primary source of law that should be used to regulate all investment in agricultural land and water is domestic law in the host state, including laws relating to foreign investments, taxation, property laws, water rights, environmental protection, labor laws and any other laws relating to the potential impacts on local communities.

International investment contracts: International investment contracts are direct agreements between a foreign investor and the host government. These contracts should set out the price, quantity and duration for the purchase or lease of land, as well as other issues including incentives for the investor, rights to export production, associated infrastructure requirements on the government or investor, environmental requirements, and economic and social development linkages with the local community and economy. Investment contracts can often become the legal code for the investment. They can determine which laws apply in the event of a dispute, add to or limit the application of generally applicable domestic law, and in some cases freeze the applicable law as at the time of the investment. They often have international arbitration provisions associated with them, or become the object of arbitration under international investment agreements.

International investment agreements (IIAs): IIAs are treaties between states that provide investors from one state investing into the territory of the other state with special protections under international law. They come in several forms including: bilateral investment treaties (BITs), of which there are over 2,700; investment chapters in free trade agreements; and regional investment treaties. The IIA provides a range of rights and remedies for the investor additional to those contained in domestic law or investment contracts. These rights are layered over the domestic law, which must comply with the terms of the treaty. IIAs are designed to protect investors, and very few include any investor obligations or provide express language recognizing the rights of states to regulate in the public interest. Most IIAs have a special dispute resolution process known as investor-state arbitration, which allows a private foreign investor to initiate arbitration to determine whether a state has breached the IIA.

governments are increasingly including provisions in IIAs that specify that new public health, safety and environmental measures do not constitute an indirect expropriation. Nevertheless, the majority of IIAs do not contain these changes, and this is especially so in Africa and Asia where most of the land deals are taking place. It is not known whether such issues are being addressed to date in the investment contracts themselves.

Economic and social impacts on host countries and local communities

Foreign investment in agriculture is, in principle, expected to bring a number of developmental benefits: increased employment, technological development, increased trade benefits, new markets, and local economic spillovers. What is now better understood, however, is that such benefits are not automatic. Even if it boosts GDP growth, investment does not necessarily translate into increased social and economic development within the receiving community. Nor is the environmental sustainability of any resulting development guaranteed.

An issue of critical importance is the lack of transparency that surrounds many of the foreign investments in land and water today. To date, no investment contracts appear to have been made available to the public, and only a very few have been made available to intergovernmental and non-governmental organizations seeking to better understand and appraise these issues. The lack of transparency undermines government accountability, and increases the opportunity for corruption and other inappropriate acts. It raises concerns about the right to information, guaranteed under article 19 of the UN Covenant on Civil and Political Rights, and reverses progress in other sectors, such as mining, where community engagement is in the ascendancy and rights of local or indigenous groups are increasingly being recognized. It has 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).

A growing number of countries have enacted legislation or policies requiring consultation and consent with affected communities. Under Mozambique's Land Act, community consultation must be undertaken regardless of whether the land has been registered. Ghana and Tanzania have also enacted laws that include local communities in the decision-making. A recent study on biofuels done by IIED and FAO suggests that to date, however, the community consultations have often been fraught with problems, and tend to look better on paper than in practice (**Box 3**).

Shifts of land and water rights from traditional users to foreign users. The rights of local communities who were prior users of purchased or leased land and water is a critical issue in the debate over land acquisition. 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 determines 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 use rights are often not codified in "modern" law, but are either based on local traditions or non-existent in any formal legal terms. Title or ownership is often formally vested in the government, in local chiefs or in other community structures. Actual users may have no clear rights of access or use of land, or its related water resources, outside of the traditional context. Where local users have vague or non-existent land and water rights, the foreign investor will have its contractual rights to fall back upon as hard rights, enforceable under the chosen dispute settlement forum in the contract. The social and economic impacts on local communities could be disastrous, undermining their human right to adequate food, water, work, and shelter.

This lack of clear legal itle feeds into the widespread perception by many foreign investors that the land deals involve arable land that is uninhabited, lying idle or considered wasteland. In fact, these assumptions must be treated with caution, since much of the so-called "available" land is inhabited and being used by local communities for agricultural purposes, including fallow

cycles and pastoralism. Estimates of the amount of land used in fallow cycles or shifting cultivation practices, and common-use lands are difficult to find. One recent survey suggested that about 20% of cultivated land in Africa is used this way. However, there is even controversy about what such terms as idle and productive use mean in some contexts, especially where low-productivity farming is important to local populations.

Loss of land tenure may also mean the loss of livelihood. It is not a given that large scale land purchasers will employ numbers equal to those who lose their land rights and thus farming rights. If shifts in land tenure are followed by shifts in labor demand, significant increases in rural poverty are possible, as well as significant additional pressure for urban migration. Both of these can become significant sources of social unrest.

Food security: Most of the land acquisitions are not for growing crops for domestic markets, but rather are part of the food and energy security goals for the home state of the investor. This feature of land acquisitions has serious economic, social and political implications, especially for countries that are already food insecure. In fact, many of the countries that are leasing large tracts of land to foreign investors also have some of the highest percentages of undernourished people in the world, including the Democratic Republic of Congo (76%), Ethiopia (46%), Kenya (32%), Madagascar (37%), Mozambique (38%), Sudan (21%), and Tanzania (35%). In 2008, some of these countries imposed restrictions on food exports in response to the massive spike in agricultural prices and the internal food security issues this created.

Water insecurity: As already noted, a critical motivation in the current trend towards large-scale land acquisitions is the water factor. Agriculture trade specialists have long recognized the notion of trade in virtual water to account for the water needed to grow different crops. Today, we see investment in water rights in foreign states, through the purchase or lease of land with associated water rights and access, as a critical part of the new process of securing long-term farming investments. In practice, such water rights appear to come free, or close to it, in the valuations given to the land in investment contracts. To our knowledge, these valuations have not accounted for the full value of water that is accessed.

Importantly, while the reported size of the land acquisitions is substantial, there have been no studies, as far as we know, of the amount of water resources involved, the relative importance of these water resources to other economic activities, or how these resources fit into local water use patterns and history. The absence of this information, and the still infrequent use

Box 3

Impacts on local communities

Ethiopia: **There is evidence that some of the lands allocated to foreign investors in Benishangul Gumuz and Afar regions were previously being used for shifting cultivation and dry-season grazing.**

Kenya: **Farming and pastoralist communities in the delta of Kenya's Tana River reacted strongly to reports of the government's intention to lease 40,000 hectares of coastal land to Qatar. The news was particularly devastating since Kenya faces food shortages and high prices after a third consecutive year of drought. A representative of a local NGO said the agreement would displace thousands of locals. He argued that at least 150,000 families in farming and pastoralist communities depend on the land in question and will be negatively impacted by the deal.**

Tanzania: **A Swedish company is in the process of securing 400,000 hectares of land for sugarcane production in the Bagamoyo district. Evidence suggests that 1,000 small-scale rice farmers will need to move and may not be eligible for compensation since their land rights are not recognized.**

Mozambique: **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 sugarcane plantation and a factory to produce 120 million litres of ethanol a year. 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.**

Sources : IIED and FAO, 2008; IRIN News, Africa: Tractored out by "land grabs"? 11 May 2009 ; Cotula et al., 2009.

of environmental impact assessments for these projects, raises serious concerns. Water security at the local level has already become a source of conflict in some regions. Such conflicts could be exacerbated under the current trend.

Environmental protection: In many of the new host states, laws on pesticides, herbicides, water protection around farms, protection of biodiversity, etc., are lacking. This creates risks to other water users, soil management, and the long-term sustainability of the projects. Local fisheries may also be at particular risk from large-scale projects in some regions.

Labour protection: Many developing states have little in the way of health and safety standards in workplaces, and many do not apply them to the agriculture sector. Here again, issues of handling agricultural chemicals arise, and human health can be directly impacted. Ensuring living wages can also become a problem. Research in progress by the Research Society of International Law in Pakistan, an independent legal agency, indicates that none of Pakistan's labour laws or worker health and safety laws applies to large investments in the agricultural sector, leaving potentially thousands of workers unprotected in a major potential recipient of FDI in the form of large scale land acquisitions.

The way forward

There is no question that more investment in agriculture is critically needed. The question that needs to be addressed is how can foreign investments in agriculture make a positive contribution to development and food security. One particular concern is that such investments not remain enclaves of high-technology, high-productivity agriculture in a sea of low-technology subsistence agriculture. Several international agencies, led by a joint UNCTAD-FAO-IFAD-World Bank initiative, are now involved in developing a set of principles to be adopted at the international level to direct foreign investment in agriculture along a sustainable path. In addition, the UN Special Rapporteur on the Right to Food has developed a set of core principles and measures to address the human rights challenge of large-scale land and water rights acquisitions and leases.

However, principles alone are not enough. Enhanced productivity spillovers from foreign agricultural investment need to be achieved. A number of enabling conditions are briefly examined below.

Assess the benefits and risks of the new land acquisition strategy. Foreign ownership of land and water rights is potentially associated with significant economic, social and political risks for host governments. This was demonstrated in Madagascar, where opposition to a range of government policies, including the lease of farmland to foreign investors, eventually contributed to the overthrow of the government. Alternative farming models have proven to be economically profitable and more socially and politically acceptable than large-scale foreign-owned plantation projects. If done properly, they could provide better prospects for food security, local employment and sustainable development. Joint ventures, including contract farming or outgrower schemes, although not without their own drawbacks, have become a preferred farming model for many agribusinesses and supermarket retailers, while at the same time providing farmers with secure income and allowing them to maintain ownership over their land and water resources. Such models provide investors with access to land and the opportunity to organize a reliable supply of products of the desired quality.

Improve legal and technical capacities of countries. Investing and receiving states must be better 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 may arise when national laws change or during times of national crisis. Host governments also need to be able to factor expectations of future water and land availability and value into negotiation of long-term leases or purchases. Short-term capacity and technical support is needed in any such negotiations. Longer-term capacity building is equally essential.

Conduct impact assessments for the host country on the benefits, costs and risks of land acquisition. Private investors commonly carry out feasibility or sustainability assessments for prospective land deals. Host states, on the

other hand, have generally not carried out the necessary assessments to measure the potential benefits, costs and risks. Such a process would ensure that governments are better prepared, that they include the necessary provisions to safeguard legitimate public policy objectives, that there is no blanket prohibition on imposing performance requirements, and that there is sufficient flexibility to deal with emergencies and periods of national crisis.

Ensure contracts of all types promote shared food security interests. This is a critical need for these types of investments today. Developing and least developed states should not be asked to trade their food security for that of states with greater fiscal resources. Recognition of shared needs and a common agenda for food security is critical.

Improve transparency and participation. To date, the majority of stakeholders, and in particular local communities, are excluded from participating in or receiving information about potential or agreed land deals. The realization of the human rights to development, to food, to water, to work, and to clean environments depends on people having a say in public policy. Effective participation is contingent on access to information and transparency in the process.

Create development and employment opportunities. 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, known in investment law as "performance requirements." Hiring a designated number of local workers, purchasing a designated percentage of local inputs, minimum levels of contract farming providing technology transfer and training to the community, contributing a designated percentage of production to local communities or markets, and other options have been mentioned in this regard. 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.

Provide tools to all stakeholders. The tools to assist investors, developing states and local communities in implementing the principles into investment contracts, domestic law and ultimately into practice, are critical. Such tools should include model contracts for this area of investment, best practice guides for water efficiency in agriculture and land management, best practices on community engagement and environmental management, financing guides and options, and others. These tools are in critical need right now.

Key reading

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