



FOREIGN LAND DEALS AND HUMAN RIGHTS

CASE STUDIES ON AGRICULTURAL AND BIOFUEL INVESTMENT



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FOREWORD

BY OLIVIER DE SCHUTTER, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD*

There is a huge, mounting interest in farmland, from private investors and governments alike. Working on the basis of press reports—a fact which, in itself, provides a remarkable illustration of the lack of transparency surrounding this important agricultural shift—the World Bank notes that “investors expressed interest in 42 million [hectares] of land globally in less than a year,” with more than 75 percent of these deals concentrated in Sub-Saharan Africa.¹ Some large-scale investments in farmland may lead to the cultivation of land that has been previously underutilized: the World Bank’s “conservative estimate” is that 6 million hectares of additional land will be brought into production each year between now and 2030.² However, even leaving aside its environmental consequences, global expansion into “uncultivated” land may be at the expense of populations that depend on this land for grazing animals, hunting, or gathering wood and fruit. In addition, most new investments in farmland will simply mark a change in who owns the land and what grows on it. These transformations deeply affect the communities whose livelihoods and way of life depends on the land, and whose rights are routinely ignored by the very governments who should protect them. The World Bank observes: “Countries with fairly abundant non-forested, non-cultivated land with agricultural potential attracted more interest. However, countries with poorer records of formally recognized rural land tenure also attracted greater interest, raising a real concern about the ability of local institutions to protect vulnerable groups from losing land on which they have legitimate, if not formally recognized claims.”³

This Report, presented by the International Human Rights Clinic (IHRC), a program of the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law, offers a unique contribution to the current debate on “land-grabbing.” Based on extensive research, it provides further evidence of the dangers associated with the rush toward farmland and associated water resources that we are currently witnessing. Out of the four cases examined herein, three lead the researchers to raise serious questions about their compatibility with the human rights duties of the governments and investors concerned. For example, in Tanzania the conditions in which local communities were consulted on the development of sugarcane-ethanol projects by Swedish companies—currently covering some 22,000 hectares of land—appear of concern, particularly with regard to the quality of information that representatives of the communities were provided. The characteristics of the project concerning the use of water also raise questions about sustainability. The investment into forest plantations, carbon offsets, and forest products in Southern Sudan by TreeFarms Sudan Ltd. takes place in an especially volatile political environment, and the identified commitments of the investors are reportedly so vague as to make it difficult to envisage how they

* **Olivier De Schutter** was appointed the UN Special Rapporteur on the right to food in March 2008 by the United Nations Human Rights Council. He is independent from any government or organization and he reports to the Human Rights Council and to the UN General Assembly. For more on the work of the Special Rapporteur on the right to food, visit www.srfood.org.

¹ WORLD BANK GROUP, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? xiv (Sept. 2010), *available at* http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf.

² *Id.* at xi.

³ *Id.* at xiv.

would be practically enforced. In Pakistan, the sheer scale of the projected acquisitions raise particular concerns about the impact on affected communities. Moreover, the acquisitions of agricultural land by investors from Gulf States in order to produce food to be shipped exclusively back to their market rely on agreements that, to date, seem to suffer from a lack of transparency. This makes it impossible for the local populations to assess whether such investments will benefit them, or whether their interests have instead been sacrificed.

The fourth case study—examining the production of biodiesel from jatropha by Mali Biocarburant SA (MBSA)—stands out as a “best practice” case, especially in light of medium and large-scale land acquisitions taking place in the country. The following characteristics of the investment are worthy of note: MBSA and local farmers’ cooperatives, which have an equity stake in the joint venture with MBSA, have combined their efforts to produce biodiesel to meet local energy needs, intercropping jatropha with maize in order to increase both the production of food crops and of energy crops, while at the same time reducing the use of chemical fertilizers by the application of “presscake” residue that nourishes the soil. Moreover, MBSA has only acquired the land necessary for building the small processing plant to produce biodiesel from jatropha. The jatropha itself is produced by the farmers on their own land, through an outgrower scheme that ensures some support to the farmers—including technical assistance and access to inputs, as well as a reliable buyer. Significantly, the arrival of external investors has not negatively affected the farmers’ land rights.

It is not the place here to pass judgment on these various projects, which this publication examines in greater detail; I leave it to the reader to see for herself. A few more general points should be made, however, in the light of the evidence collected.

One thing should be stated at the outset: investment in agriculture *is* needed, particularly in some regions in developing countries where this sector has been neglected for the past 30 years. Lack of investment is responsible for the fact that, for example, average cereal yields in Africa have stagnated at 1.3 tons per hectare, whereas the figure is 4.7 tons per hectare for East Asia.⁴ There is no doubt that such discrepancies can be reduced. The critical questions, however, are: what types of investment are needed, for the benefit of whom, and with what impacts on rural poverty and on rural development? Aggregate figures on the volumes of investment needed are seriously misleading, since they treat all investments alike, passing over the significant qualitative differences between them. Small farmers in developing countries need infrastructure, such as roads and storage facilities. They need better access to credit. They need to be able to form cooperatives, and to improve their bargaining position in markets with better information about prices. Whether it is domestic or foreign, whether it is public or private, investment can help this to happen. However, what small farmers definitely do not need is investors acquiring from governments the land on which they rely for their livelihoods, robbing them of the single most important asset that they have. Ignoring this reality could have very serious consequences. Landlessness or quasi-landlessness is systematically correlated with under-nutrition in developing countries, because land is an essential

⁴ Luc Christiaensen & Lionel Demery, U.N. Univ., UNU-WIDER: World Inst. For Dev. Econ. Research, *Are African Countries Paying Too Much Attention to Agriculture?*, WIDER ANGLE NEWSL., Apr., 2010, http://www.wider.unu.edu/publications/newsletter/articles-2010/en_GB/04-2010-Christiaensen-Demery/.

safety net for those who have nothing else to fall back upon in hard times. *They simply have nothing else.*

Promises are made, of course. But there can be a huge gap between commitments made on paper and their effective implementation. The lesson from past experience is that even when promises are made—that local communities will be consulted, that they will be involved in negotiations, that jobs will be created, etc.—they are almost never kept when there is every reason for governments and investors alike to ignore or circumvent those who could create obstacles to their objectives. The same is true when local chiefs have been corrupted or coerced into ‘consenting’ to certain developments that affect the communities that they are supposed to represent.

Of course, we have learned from past mistakes. And there is now an attempt to seek to chart a way to discipline investors and governments, in order to ensure that investments will work, as they should, for the benefit of the local communities. When I proposed, in two successive phases, the Eleven Principles⁵ and measures to address the human rights challenge posed by large-scale land acquisitions and leases, I contributed to this effort, which I still believe to be most urgent.

However, we must be clear about the choice governments are facing. This choice is not between accepting certain investment projects or refusing them altogether; nor is it between improving productivity of farmland, or leaving land “underutilized.” There are a variety of ways to channel investment in order to combat rural poverty, and there are a variety of strategies to ensure that land will be used in ways that are productive and can contribute to local food security. When considering a proposed investment in agriculture that implies large-scale shifts in land use, governments should first consider the opportunity costs involved. This means that where land is underutilized or considered vacant, the question whether it should be redistributed to allow small independent farmers to use it or whether it should be developed into a large estate comes first, even before the question arises of whether a large-scale investment complies with a set of principles. Numerous studies have shown that a more equitable distribution of land is desirable on both efficiency as well as equity grounds, with a particularly strong potential to drive economic growth, empower women, and reduce rural poverty.⁶

This Report helps us to understand how large-scale land acquisitions can be disciplined and why improving the regulatory framework is urgent in this matter. Nevertheless, we must also ask, as the Report does, how agrarian reform can be promoted as an alternative to the global enclosures movement that we are currently witnessing. The problems we are facing are far too serious—and they affect far too many livelihoods—not to explore the full range of possibilities that are open to us.

⁵ Special Rapporteur on the right to food, *Addendum to Report of the Special Rapporteur on the right to food, Olivier De Schutter: Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, ¶ 12, delivered to the 13th Session of the Human Rights Council, U.N. Doc. A/HRC/13/33/add.2 (Dec. 28, 2009) available at http://www.srfood.org/images/stories/pdf/officialreports/20100305_a-hrc-13-33-add2_land-principles_en.pdf.

⁶ See, e.g., Special Rapporteur on the right to food, *Interim Report of the Special Rapporteur on the right to food, Olivier De Schutter, delivered to the 65th Session of the General Assembly*, U.N. Doc. A/65/281 (Aug. 11, 2010), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/65/281&Lang=E>.

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EXECUTIVE SUMMARY

In 2009, the number of hungry people in the world topped one billion.⁷ This milestone is a tragic reminder of what is at stake in the world today. Ensuring food security in a sustainable and equitable manner is both a paramount and increasingly urgent goal.

In this context, the Global South is experiencing a surge in foreign direct investments in agricultural land.⁸ Prompted in part by the global food crisis, state and private investors are buying and leasing millions of hectares of farmland in Africa, Asia, and Latin America,⁹ and “[this] ‘land rush’ is unlikely to slow.”¹⁰ As currently conceived and implemented, however, many large-scale land investments do not service the goal of ensuring equitable and sustainable food security and may, in fact, be further jeopardizing the rights of host populations.

This Report was prepared by the International Human Rights Clinic (IHRC)—a program of the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law—in support of the mandate of the United Nations Special Rapporteur on the right to food, Olivier De Schutter. It includes four case studies on large-scale land investments in developing countries and explores various ways in which states, investors, and host communities can address the numerous human rights challenges posed by large-scale land investments. The observations offered in this Report contribute to an understanding of the essential minimum steps that can be taken to enhance the benefits of investments that are already underway, while mitigating the risks moving forward. These observations combine an analysis of obligatory human rights standards applicable to states involved in these investments with proposals for private actors to ensure that their activities respect the rights of affected communities. Ultimately, these recommendations cannot substitute for the need to fundamentally reevaluate an increasingly discredited philosophy:

⁷ Press Release, Food & Agric. Org. [FAO], 1.02 Billion People Hungry (Jun. 19, 2009), *available at* <http://www.fao.org/news/story/en/item/20568/icode/>.

⁸ Large-scale land acquisitions are admittedly nothing new. Colonialists annexed large swaths of global farmland in the 19th century, and in the early 20th century, foreign fruit companies appropriated farmland in Central America and Southeast Asia. However, as Michael Kugelman observes, the recent trend differs from past land acquisitions in significant ways: “Their scale is much larger; they emphasize staples instead of cash crops; they are concluded on the basis of agreements instead of through the barrel of a gun; and they are spearheaded by more government-led investment than in the past.” WOODROW WILSON INT’L CTR. FOR SCHOLARS, LAND GRAB? THE RACE FOR THE WORLD’S FARMLAND 4 (Michael Kugelman & Susan L. Levenstein eds., 2009) [hereinafter RACE FOR THE WORLD’S FARMLAND], *available at* http://www.wilsoncenter.org/topics/pubs/ASIA_090629_Land%20Grab_rpt.pdf.

⁹ See generally GRAIN, SEIZED! THE 2008 LAND GRAB FOR FOOD AND FINANCIAL SECURITY (Oct. 2008), *available at* http://www.grain.org/briefings_files/landgrab-2008-en.pdf (offering a comprehensive listing of global land deals as of October 2008). According to the International Food Policy Research Institute (IFPRI), foreign investors sought or secured between 15 and 20 million hectares of farmland in the developing world from 2006 to the middle of 2009.

Outsourcing’s third wave: Buying farmland abroad, ECONOMIST, May 23, 2009, at 61, *available at* http://www.economist.com/world/international/displaystory.cfm?story_id=13692889. This figure does not include a 2009 offer allegedly made to South African farmers for ten million hectares in the Republic of Congo to grow maize and soya beans, as well as for poultry and dairy farming. *S. Africa farmers offered farm land in Congo Republic*, REUTERS, Apr. 15, 2009, *available at* <http://af.reuters.com/article/investingNews/idAFJ0E53E0GL20090415>.

¹⁰ WORLD BANK GROUP, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? 9 (Sept. 2010) [hereinafter RISING GLOBAL INTEREST IN FARMLAND], *available at* http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf.

that large-scale industrialized agricultural production and biofuel investments, as currently conceived, can ensure the environmental and developmental needs of the planet in a sustainable and equitable way.¹¹ The rights of communities affected by large-scale land investments must finally take center stage. Their agency over resources must be respected and the development of policies to address their needs must be made a priority.

I. CONTEXT SURROUNDING LARGE-SCALE LAND DEALS

A. DRIVING FORCES BEHIND LARGE-SCALE LAND DEALS

The drivers of large-scale land investments today are complex and varied, but certain common factors have emerged. First, the price volatility in the global food market has led certain food insecure countries to realize the precariousness of their situation. Some have turned to foreign direct investments in farmland to secure adequate food supplies for their domestic population. This is particularly evident in relation to investments made by many of the ‘Gulf States,’¹² whose scarce water and soil resources make them heavily dependent on international markets for their food supply.¹³ Countries with food security concerns and fast-growing populations, such as China, South Korea, and India are also seeking opportunities to produce food overseas.¹⁴

¹¹ See, e.g., News Release, Special Rapporteur on the right to food, Olivier De Schutter, Agroecology Outperforms Large-Scale Industrial Farming for Global Food Security (June 22, 2010), *available at* http://www.srfood.org/images/stories/pdf/press_releases/20100622_press_release_agroecology_en.pdf (“Today, most efforts are made towards large-scale investments in land—including many instances of land grabbing—and towards a ‘Green Revolution’ model to boost food production: improved seeds, chemical fertilisers and machines... But scant attention has been paid to agroecological methods that have been shown to improve food production and farmers’ incomes, while at the same time protecting the soil, water, and climate.”); Press Release, Special Rapporteur on the right to food, Olivier De Schutter, The Imbalance of Power Between Smallholders and Agribusiness Must be Corrected (Mar. 5, 2010), *available at* http://www.srfood.org/images/stories/pdf/press_releases/20100305_press-release_agribusiness_en.pdf (“In these circumstances, sourcing and pricing policies of commodity buyers have a huge and sometimes negative impact on the right to food... This situation partly explains why smallholders in developing countries are the single most important group of those suffering hunger in the world today.”); ACTIONAID, FOOD, FARMERS, AND FUEL: BALANCING GLOBAL GRAIN AND ENERGY POLICIES WITH SUSTAINABLE LAND USE 5 (2008), *available at* http://www.concordeurope.org/Files/media/0_internetdocumentsENG/3_Topics/Topics/10_Food_security/CONCORD%20documents/AAIBiofuels-ActionAid-Nov-2008.pdf (“Over the last two years, the public debate on agrofuels has undergone dramatic shifts... the doubts started to emerge—first as technical queries and then as alarmed reactions to drastic increases in food prices, which raised serious questions about the impacts of agrofuel production on climate change.”).

¹² In this Report, this term refers to those states bordering the Persian Gulf. For more on investments by the United Arab Emirates and Qatar, see *infra* Case Study Three: Foreign Direct Investments in Export-Oriented Agriculture in Pakistan.

¹³ The total food import bill of Gulf States rose from US \$8 billion to \$20 billion between 2002 and 2007. SHEPARD DANIEL & ANURADHA MITTAL, THE OAKLAND INSTITUTE, THE GREAT LAND GRAB: RUSH FOR THE WORLD’S FARMLAND THREATENS FOOD SECURITY FOR THE POOR 2 (2009) [hereinafter THE GREAT LAND GRAB], *available at* http://www.oaklandinstitute.org/pdfs/LandGrab_final_web.pdf (citing GRAIN, *supra* note 9, at 4). In response to this food import dependency, and with the rise in the global price of oil, many of these countries have begun using their surplus capital to invest in their own food and water security by securing land abroad. *Id.*

¹⁴ See Joachim von Braun & Ruth Meinzen-Dick, IFPRI Policy Brief 13: “Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities, 1 (Apr. 2009), *available at* <http://www.iatp.org/tradeobservatory/library.cfm?refID=106023> (listing Chinese investment in the Democratic

Second, the surging demand for biofuels¹⁵ has led investors to target vast tracts of land in developing countries for biofuel production.¹⁶ This increased demand is largely a result of ambitious targets that certain oil-dependent countries have established for biofuel production and for increasing the proportion of biofuels used in land transport.¹⁷ Another closely-related driver is the expectation of subsidies for carbon sequestration through plantation and the avoidance of deforestation.¹⁸ Trade in carbon credits through mandatory reduction schemes and on the voluntary market is proving to be an important source of revenue for many large-scale land investors.¹⁹

Lastly, many Western investors, including Wall Street banks and wealthy individuals, have begun to view direct investments in land as a safe investment in an otherwise shaky financial

Republic of Congo, Mozambique, Tanzania, Zambia, and the Philippines; South Korean investment in Sudan; and Indian investment in Ethiopia).

¹⁵ The term “biofuel” refers to the range of fuels that are derived from some form of biomass. However, some reports on the subject differentiate between “agrofuels” and “biofuels.” *See, e.g.*, FRIENDS OF THE EARTH AFR. & FRIENDS OF THE EARTH EUR., AFRICA: UP FOR GRABS: THE SCALE AND IMPACT OF LAND-GRABBING FOR AGROFUELS 8 (2010) [hereinafter AFRICA: UP FOR GRABS], available at http://www.foeeurope.org/agrofuels/FoEE_Africa_up_for_grabs_2010.pdf (“The term ‘agrofuels’ describes the liquid fuels derived from food and oil crops produced in large-scale plantation-style industrial production systems. These agrofuels are blended with petrol and diesel for use primarily as transport fuel. Biofuels, on the other hand, refer to the small-scale use of local biomass for fuel.”)

¹⁶ These investors are mainly from the private sector and Organisation for Economic Co-operation and Development (OECD) member countries. THE GREAT LAND GRAB, *supra* note 13, at 4.

¹⁷ *Id.* For example, the United States Renewable Fuel Standard aims to increase ethanol use by 3.5 billion gallons between 2005 and 2012, and the European Union aims to increase the proportion of biofuels used in transport to ten percent by 2020. *Id.* For a general overview and critique of EU involvement in large-scale land deals, see ALISON GRAHAM ET AL., FOODFIRST INFO. & ACTION NETWORK [FIAN], CSO MONITORING 2009-2010 “ADVANCING AFRICAN AGRICULTURE” (AAA): THE IMPACT OF EUROPE’S POLICIES AND PRACTICES ON AFRICAN AGRICULTURE AND FOOD SECURITY: LAND GRAB STUDY (2010), available at <http://www.fian.org/resources/documents/others/report-on-land-grabbing/pdf>. Relatedly, several of the countries that have been targeted for large-scale land acquisition for biofuel production “are also alert to the export potential of these crops.” AFRICA: UP FOR GRABS, *supra* note 15, at 14 (specifically referring to the establishment by 15 African countries of the Pan African Non-Petroleum Producers Association (“PANPP”).

¹⁸ Special Rapporteur on the right to food, *Addendum to Report of the Special Rapporteur on the right to food, Olivier De Schutter: Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, ¶ 12, delivered to the 13th Session of the Human Rights Council, U.N. Doc. A/HRC/13/33/add.2 (Dec. 28, 2009) [hereinafter De Schutter, *Large-scale Land Acquisitions and Leases*], available at http://www.srfood.org/images/stories/pdf/officialreports/20100305_a-hrc-13-33-add2_land-principles_en.pdf.

¹⁹ The Clean Development Mechanism (CDM) and the European Union’s Emission Trading Scheme are two examples of mandatory reduction schemes. “The CDM is provided for in Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The CDM allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol to implement an emission-reduction project in developing countries, in order to earn certified emission reduction (CER) credits. Each CER is equivalent to one ton of carbon dioxide. The CERs may be traded and can be counted towards meeting Kyoto targets.” *Id.*, ¶ 12 n.16. The voluntary market encompasses trade in carbon credits by individuals and organizations on a voluntary basis to offset their greenhouse gas emissions. “The voluntary market functions outside of the compliance market and allows individuals and companies to buy carbon offsets on a voluntary basis.” ANJA KOLLMUSS ET AL., WORLD WILDLIFE FOUND., MAKING SENSE OF THE VOLUNTARY CARBON MARKET: A COMPARISON OF CARBON OFFSET STANDARDS v, 6 (Mar. 2008), available at http://www.globalcarbonproject.org/global/pdf/WWF_2008_A%20comparison%20of%20C%20offset%20Standards.pdf.

climate.²⁰ Investors have not traditionally viewed land as a particularly attractive investment, as it presents a number of risks related to access, security, use, and consistency of production.²¹ However, with the mushrooming demand for agricultural land and certain macro changes in financial markets, land investments have become more attractive to private-sector financiers as a “hedge against inflation” and a way to diversify portfolios.²²

B. POTENTIAL PROBLEMS WITH LARGE-SCALE LAND DEALS

Large-scale land acquisitions—or “land grabs” as they have been dubbed by the media—pose serious threats to the human rights of host communities.²³ By denying land users access to vital natural resources, large-scale land investments may undermine local livelihoods, jeopardize food security, and exacerbate tenure insecurity.²⁴ Land users face possible eviction from lands that they have been cultivating for decades. Indigenous peoples and pastoral populations, in particular, stand to lose access to land that is indispensable to their livelihoods.²⁵ Moreover, as often underrepresented and marginalized members of their communities, women may be particularly at

²⁰ GRAHAM ET AL., *supra* note 17, at 51. Daniel and Mittal report deals by Morgan Stanley in the Ukraine and by Goldman Sachs in China, in addition to investments made by the New York-based money manager BlackRock, Inc., Swedish investment groups Black Earth Farming and Alpcot-Agro, and the British investment group Landkom. THE GREAT LAND GRAB, *supra* note 13, at 4 (also cited in GRAHAM ET AL., *supra* note 17, at 51-52 (noting that “the Oakland Institute highlights how many Western investors, ‘including Wall Street banks and wealthy individuals, have turned their attention to agricultural acquisitions over the course of the past two years.’”). As David Hallam observes, however, these private-sector investors, which are typically investment or holding companies, often lack the necessary expertise for managing complex large-scale agricultural investments. David Hallam, *International Investments in Agricultural Production*, in RACE FOR THE WORLD’S FARMLAND, *supra* note 8, at 30.

²¹ THE GREAT LAND GRAB, *supra* note 13, at 5.

²² Gary R. Blumental, *Investors’ Perspectives on Farmland*, in RACE FOR THE WORLD’S FARMLAND, *supra* note 8, at 57.

According to an analysis in the European Review of Agricultural Economics, cross-border acquisitions of firms in the global food sector have increased substantially, from around US\$4 billion in 1987 to US\$50 billion in 2000. Nils Herger et al., *Cross-border Acquisitions in the Global Food Sector*, 35 EUR. REV. AGRIC. ECON. 563, 564 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1359561.

²³ See THE GREAT LAND GRAB, *supra* note 13, at 1 (stating that the “[r]apid acquisitions of crucial food-producing lands by foreign private entities pose a threat to rural economies and livelihoods, land reform agendas, and other efforts aimed at making access to food more equitable and ensuring the human right to food for all”). See also Press Release, Special Rapporteur on the right to food, Olivier De Schutter, The UN Special Rapporteur on the Right to Food Recommends Principles and Measures to Discipline “Land Grabbing” (June 11, 2009), available at http://www.srfood.org/images/stories/pdf/press_releases/20090611_press-release_en.pdf (“[i]dentifying] large-scale transnational land investments as one of new trends that emerged out of the 2008 global food crisis.”). Inherent in these issues is the environmental aspect, wherein changes to the environmental landscape of countries, most notably decreases in biodiversity, threaten the ability of the local population to continue producing crops needed to attain food security. GRAHAM ET AL., *supra* note 17, at 25-27.

²⁴ GRAIN, *supra* note 9, at 9-10; Press Release, La Via Campesina et al., Stop Land Grabbing Now!! Say No to the principles of “responsible” agro-enterprise investment promoted by the World Bank (Apr. 12, 2010) [hereinafter Press Release, La Via Campesina et al.], available at <http://www.landaction.org/spip/spip.php?article499>. La Via Campesina is an independent, international movement of rural, agricultural, and indigenous persons who strive to develop solidarity and unity among small farmer organizations. More information about La Via Campesina is available at La Via Campesina: What is La Via Campesina?, http://viacampesina.org/en/index.php?option=com_content&view=category&layout=blog&id=27&Itemid=44 (last visited Sept. 25, 2010).

²⁵ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 23; GRAHAM ET AL., *supra* note 17, at 31-32.

risk of losing their lands in deals typically negotiated with the male heads of households.²⁶ Host populations face decreased food security as well as increased competition for water resources.²⁷ There are even troubling signs that large-scale land investments have the potential to fuel conflict.²⁸

The severity of these potential impacts has sparked a debate about whether large-scale land investments can deliver on their promises of social and economic development, poverty alleviation, and improved access to food, or whether they are one-sided deals designed to primarily benefit foreign investors and domestic elites.²⁹ The agricultural sector in the developing world has historically been largely under-funded³⁰ and large-scale land investments have the potential to create much-needed infrastructure and generate employment. If done responsibly, agricultural investment can increase public revenues and improve farmers' access to technology and credit. It can also increase production of food crops to supply local, national, and international consumers.³¹ However, many agricultural investments to date have been denounced by civil society groups and farmers' organizations as "depriving the poorest from their access to land, and increasing concentration of resources in the hands of a minority."³²

Approaches to limiting the negative impacts of large-scale land acquisitions have faced sharp criticism. The "Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources" are a case in point.³³ Promulgated by the World Bank Group, the Food and

²⁶ Sonja Vermeulen & Lorenzo Cotula, *Over the heads of local people: consultation, consent and recompense in large-scale land deals for biofuel products in Africa*, 34 J. PEASANT STUD. 899, 904 (2010), available at http://pdfserve.informaworld.com/677926_922517573_927238355.pdf. Women may also lose out on opportunities to obtain land. See GRAHAM ET AL., *supra* note 17, at 32-33 (arguing that in countries where women are the "bottom in the land access hierarchy," decreases in available land, which accompany large-scale land deals, limit the potential for women to gain access to such scarce resources).

²⁷ This competition negatively affects individuals' right to water. See GRAHAM ET AL., *supra* note 17, at 26-27 ("Some observers point out that in fact the global land grab is rather a water land grab..." because the competition revolves around limited water resources and water-rich lands specifically, since non-irrigable land is of little to no value.); AFRICA: UP FOR GRABS, *supra* note 15, at 23 (noting that "[i]n some parts of Africa water supplies are already over-stretched.").

²⁸ See RACE FOR THE WORLD'S FARMLAND, *supra* note 8, at 15 (reasoning that "the factors at play in most host countries—land, food insecurity, and poverty—make up a combustible mix that could easily explode."); GRAHAM ET AL., *supra* note 17, at 29-30 (observing that, "By putting unprecedented pressures on land resources, the global trends described above are placing new tensions on access to land.").

²⁹ See, e.g., Press Release, La Via Campesina et al., *supra* note 24 (arguing the latter by stating that such investment results in the "long-term corporate (foreign and domestic) takeover of rural people's farmlands").

³⁰ See De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 13 ("For many years, agriculture has been neglected, both in domestic public policies and in development cooperation, and has failed to attract foreign direct investment, particularly in sub-Saharan Africa.")

³¹ von Braun & Meinzen-Dick, *supra* note 14, at 2.

³² Olivier De Schutter, U.N. Special Rapporteur on the right to food, Keynote Address at the United Nations Conference on Trade and Development [UNCTAD] Commission on Investment, Enterprise and Development: Principles for Responsible Investment in Agriculture (Apr. 26, 2010) [hereinafter De Schutter, Keynote Address] (transcript on file with authors). One such farmers' organization has launched a campaign against "land grabs" on the grounds that "agricultural lands and forests are being diverted away from the smallhold producers, fishers and pastoralists to commercial purposes, and leading to displacement, hunger, and poverty." Press Release, La Via Campesina et al., *supra* note 24.

³³ FAO ET AL., PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT THAT RESPECTS RIGHTS, LIVELIHOODS, AND RESOURCES (Jan. 2010) [hereinafter PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT], available at http://www.donorplatform.org/component/option,com_docman/task,doc_view/gid,1280.

Agriculture Organization of the U.N. (FAO), the International Fund for Agricultural Development (IFAD), and the U.N. Conference on Trade and Development (UNCTAD), these principles and other such codes of conduct are seen as an attempt to legitimize large-scale land acquisitions using the erroneous justification that such investments promote rural development.³⁴ In other words, potential infringements of human rights “are (re)framed as side effects of an essentially beneficial cure—they are risks that can be managed in order to make possible a larger good,”³⁵ shifting the focus “away from questioning the fundamental roots of land-grabbing, i.e. the existing industrial pattern of food and energy production and consumption controlled by TNCs... .”³⁶ As noted below and throughout this Report, large-scale land investments affect a number of rights, especially for communities whose livelihood depends on access to land, making a human rights approach critical for responsible investment.

C. TOWARDS A HUMAN RIGHTS-BASED APPROACH

Renewed interest and investment in agriculture presents a number of opportunities for states to promote development and economic growth. These investments also present a number of human rights challenges. Large-scale land investments can negatively affect many human rights, including, but not limited to: the right to water; the right to participation; the rights of indigenous persons; the right to adequate housing, including the right to not be forcibly evicted from one’s home; the right to an adequate standard of living; the right to non-discrimination and equality; the right to self-determination; the right to development; and the right to adequate remedy.³⁷

The human right to food,³⁸ in particular, has a central role to play in this discussion.³⁹ The right to food requires that states “ensure for everyone under [their] jurisdiction access to the

³⁴ See generally Saturino Borrás, Jr. & Jennifer Franco, Comment, *From Threat to Opportunity? Problems with the Idea of a “Code of Conduct” for Land-Grabbing*, 13 YALE HUM. RTS. & DEV. L.J. 507 (2010), available at <http://capacity4dev.ec.europa.eu/system/files/c4d/Yale-April-2010-Borrás-Franco-CoC-paper1.pdf> (arguing that current principles proposed by such institutions as the World Bank are fundamentally not pro-poor); Press Release, La Via Campesina et al., *supra* note 24 (“The WB’s principles, which would be entirely voluntary, aim to distract from the fact that today’s global food crisis, marked by more than 1 billion people going hungry each day, will not be solved by large scale industrial agriculture, which virtually all of these land acquisitions aim to promote.”). See also SHEPHARD DANIEL & ANURADHA MITTAL, THE OAKLAND INSTITUTE, (MIS)INVESTMENT IN AGRICULTURE: THE ROLE OF THE INTERNATIONAL FINANCE CORPORATION IN GLOBAL LAND GRABS 6 (2010) [hereinafter (MIS)INVESTMENT IN AGRICULTURE], available at http://www.oaklandinstitute.org/pdfs/misinvestment_web.pdf (criticizing the World Bank Group’s “promotion of policies and technical assistance to governments in order to spur foreign direct investment in agriculture in developing countries” and the resultant “fueling [of] the global land grab.”)

³⁵ Borrás, Jr. & Franco, *supra* note 34, at 512.

³⁶ *Id.* at 521.

³⁷ See generally De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18 (explaining how large-scale land acquisitions and leases affect or have the potential to affect these rights); *supra* Section I.B.

³⁸ International Covenant on Economic, Social, and Cultural Rights [ICESCR], art. 11, Dec. 16, 1966, 993 U.N.T.S. 3.

³⁹ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 3. See also GRAHAM ET AL., *supra* note 17, at 8, 9 (emphasizing the importance of recognizing the right to food in drafting policies relevant to large-scale land deals). See generally FAO, VOLUNTARY GUIDELINES TO PROMOTE THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY (Nov. 2004), available at <http://www.fao.org/docrep/009/y7937e/Y7937E04.htm> (emphasizing that States must taking respect and promote the right to food in both domestic and international contexts). The Voluntary Guidelines were adopted by the 127th Session of the FAO Council. The FAO serves developed and developing countries to fight hunger by acting as a neutral fourth

minimum essential food that is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”⁴⁰ The U.N. Special Rapporteur on the right to food states that:

The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor.⁴¹

In light of their international obligations, states are required to ‘respect,’ ‘protect,’ and ‘fulfill’ the human rights enumerated above.⁴² As noted by the Special Rapporteur, “[a]greements to lease or cede large areas of land should under no circumstances be allowed to trump the human rights obligations of the States concerned.”⁴³ It is important to note that the investor, too, has a “responsibility to respect such rights and not to create obstacles to the State discharging its obligations under international law.”⁴⁴ Responsibilities also attach to additional actors. In particular, the home states of private investors “are under an obligation to regulate the conduct of these investors abroad, particularly if the host state appears unwilling or unable to do so.”⁴⁵ International financial institutions, which may be involved in facilitating and implementing these investments, are also bound by international human rights law, as part of general international law.⁴⁶

to negotiate agreements and debate policy. More information about the FAO is available at FAO, Home, <http://www.fao.org/> (last visited Sept. 25, 2010).

⁴⁰ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ. Soc. & Cultural Rights, *General Comment No. 12: The Right to Adequate Food*, ¶ 14, U.N. Doc. E/C.12/1999/5 (May 12, 1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3d02758c707031d58025677f003b73b9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3d02758c707031d58025677f003b73b9?Opendocument). For more on the international framework on the right to food and its effect on relevant actors see generally, Smita Narula, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis*, 13 YALE HUM. RTS. & DEV. L.J. 403 (2010).

⁴¹ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 4.

⁴² See Office of the High Commissioner for Human Rights [OHCHR], International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (noting that “The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.”). See also De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 3 (“The obligations of the State are threefold: to respect, protect and fulfil the human right to food.”). For example, in the context of their obligation to ‘respect’ the right to food, states must, *inter alia*, ensure that investment agreements do not result in food insecurity, for instance by creating a dependency on foreign aid or on increasingly volatile and unpredictable international markets (as can happen with export-oriented food production), or by decreasing the revenues of the most marginal local farmers as a result of the competition flowing from the arrival of such investors.

⁴³ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 33.

⁴⁴ *Id.* See also, Special Representative on the issue of human rights and transnational corporations and other business enterprises, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ¶ 16 (at point 59), delivered to the 11th Session of the Human Rights Council, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf> (stating that “the responsibility to respect requires companies...[to take] positive acts”).

⁴⁵ *Id.*, ¶ 5.

⁴⁶ *Id.*

The Special Rapporteur has promulgated the “Eleven Principles”—a set of minimum principles and measures developed to address the human rights challenges of large-scale land acquisitions and leases.⁴⁷ The Principles are based on—and give a concrete expression to—the minimum standards required by international human rights law, and should therefore be adhered to by the actors identified above.⁴⁸ Their purpose is also to guide the actions of states in their formulation of “policies and governance by international and regional organizations.”⁴⁹

The Eleven Principles call on the parties above to meet their respective “responsibilities”⁵⁰ to:

- (1) conduct investment negotiations in full transparency with the participation of host communities;
- (2) consult with local populations prior to any shifts in land use, with a view towards obtaining their free, prior, and informed consent for the investment project;⁵¹
- (3) enact and enforce legislation that safeguards the rights of host communities;
- (4) ensure that investment revenues are used for the benefit of local populations;
- (5) adopt labor-intensive farming systems that maximize employment creation;
- (6) adopt modes of agricultural production that respect the environment;
- (7) ensure that investment agreements include clear obligations and predefined sanctions, with non-compliance determined by independent and participatory *ex post* impact assessments;
- (8) ensure that investment agreements require that a minimum percentage of food crops produced be sold locally;
- (9) conduct participatory impact assessments prior to the completion of negotiations;

⁴⁷ *Id.* at 16-18.

⁴⁸ *Id.*, ¶ 5.

⁴⁹ *Id.*

⁵⁰ *Id.*, ¶ 33.

⁵¹ Although this standard normally attaches to indigenous populations under international law (*See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 10, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfi/en/drip.html>; International Labor Organization [ILO], *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, C169, Art. 16(2), ILO Doc. C169 (June 27, 1989), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>), according to the Special Rapporteur on the right to food, extending the free, prior and informed consent requirement to other communities having a similarly strong relationship to the land, on which they depend for their livelihoods, would be justified and would help to ensure that States and investors seriously consider the human rights impacts of their land investments. Indeed, already under current international law, the requirements applicable to indigenous peoples may have to be extended to at least certain traditional communities that entertain a similar relationship to their ancestral lands centered on the community rather than on the individual. *See* I/A Court H.R., *Moiwana Community v. Suriname* case, Judgment of June 15, 2005, Series C, No. 124, para. 132-33 (citing *Mayagna (Sumo) Awas Tingni Community* case, Judgment of Aug. 31, 2001, Series C, No. 79, para. 151) (“the Moiwana community members, a N’djuka tribal people, possess an ‘all-encompassing relationship’ to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole. Thus, this Court’s holding with regard to indigenous communities and their communal rights to property under Article 21 of the Convention must also apply to the tribal Moiwana community members: their traditional occupancy of Moiwana Village and its surrounding lands...should suffice to obtain State recognition of their ownership.”); I/A Court H.R., *Saramaka People v. Suriname* case, Judgment of November 28, 2007, Series C, No. 172 para. 86 (“the Court’s jurisprudence regarding indigenous peoples’ right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival.”).

- (10) comply with indigenous peoples' rights under international law; *and*,
- (11) provide agricultural waged workers with adequate protection of their fundamental human and labor rights.⁵²

Some critics, though generally accepting of the Eleven Principles, have pointed out that their simple promulgation may not be enough to safeguard against the detrimental aspects of large-scale land acquisitions⁵³ and that therefore a precautionary approach—whereby all large-scale land acquisitions are discouraged—should be adopted.⁵⁴ However, as the Special Rapporteur emphasizes, these Principles are minimum standards, and adherence to them does not necessarily validate the investment in question.⁵⁵ If agricultural investment is to be responsible, he notes, then the concerns raised by civil society groups and farmers' organizations must be taken seriously: "It must be investment that benefits the poor in the South, rather than leading to a transfer of resources to the rich in the North. It must be investment that truly reduces hunger and malnutrition, rather than aggravating them."⁵⁶ Governments, in collaboration with the international community, he counsels, must first ensure that appropriate safeguards are in place to promote responsible investment before moving to legitimize large-scale land investments.⁵⁷

Furthermore, foreign direct investments need not involve actual land acquisitions and the mass transfer of land rights that they often entail. Rather, the use of innovative production designs, such as contract farming and, specifically, "outgrower" schemes,⁵⁸ can work to benefit all parties involved.⁵⁹ He further counsels that such alternatives should be explored prior to any shift in land rights:

Unless such alternatives are prioritized, the development of large-scale land acquisitions or leases will result in nothing less than an agrarian counter-reform; such a consequence would

⁵² De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16-18. The Eleven Principles are included in full in Appendix I of this Report.

⁵³ *See, e.g.*, GRAHAM ET AL., *supra* note 17, at 8, 9 (noting for instance, the difficulties posed by delays caused by interweaving the implementation of regulations that conform to the Eleven Principles with other national policies and the inability of governments to enforce them on the ground).

⁵⁴ *Id.* at 9; Press Release, La Via Campesina et al., *supra* note 24.

⁵⁵ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 9.

⁵⁶ De Schutter, Keynote Address, *supra* note 32.

⁵⁷ *Id.*

⁵⁸ 'Outgrower' or 'out-grower' schemes are defined "as a contractual partnership between growers or landholders and a company for the production of...products. Out-grower schemes or partnerships vary considerably in the extent to which inputs, costs, risks and benefits are shared between growers/landholders and companies. Partnerships may be short or long-term...and may offer growers only financial benefits or a wider range of benefits. Also, growers may act individually or as a group in partnership with a company, and use private or communal land. Out-grower schemes are usually prescribed in formal contracts... Within this definition out-grower schemes may include joint ventures and contract...farming." D.J. Mead, ed., FAO, Forestry Department, *Forestry Out-Grower Schemes: A Global View 7* (Forest Plantations Thematic Papers, FAO, Working Paper No. FP/11, 2006), *available at* <ftp://ftp.fao.org/docrep/fao/006/ac131e/ac131e00.pdf>. *See also* SONJA VERMEULEN & LORENZO COTULA, FAO, INT'L INST. FOR ECON DEV. [IIED], THE INT'L FUND FOR AGRIC. DEV. [IFAD], MAKING THE MOST OF AGRICULTURAL INVESTMENT: A SURVEY OF BUSINESS MODELS THAT PROVIDE OPPORTUNITIES FOR SMALLHOLDERS 29 (2010), *available at* <http://www.iied.org/pubs/pdfs/12566IIED.pdf> (listing 'outgrower' schemes as a type of contract farming).

⁵⁹ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 9, ¶ 18.

be completely unacceptable and run directly counter to the realization of the right to food, further marginalizing the communities that depend on access to land for their livelihoods.⁶⁰

Ultimately, the extent to which agricultural investment can contribute to poverty alleviation, reduce hunger and malnutrition, and benefit populations in the host country, depends not only on how the investment is implemented at the project level, but also how it fits within the context of broader development strategies.⁶¹ Additionally, as the Special Rapporteur emphasizes, “[t]hese principles are not optional; they follow from existing international human rights norms.”⁶² Unless proposed approaches adopt a human rights-based framework, they will fail to articulate and implement policies that adequately defend against the negative side effects of large-scale land acquisitions⁶³ and will fail to comply with international law. It is vital that these strategies incorporate a human rights framework, as the Eleven Principles do, in order to ensure that affected individuals and groups have access to remedies and exploitative governments and private actors are held accountable.

This Report uses the Eleven Principles as the basis for its analysis of four case studies in large-scale land investments. As a result, it reflects the Special Rapporteur’s dual focus on the obligations incumbent on States as well as recommendations addressed to private parties involved in these investments. Given that many of these projects are ongoing, the assessments of their impacts on host communities are preliminary and there is still time for these projects to be oriented in a way that incorporates the full range of considerations to guarantee the rights of affected populations. The language of the case studies reflects this forward-looking perspective and is designed to focus future design and planning of investments.

II. OVERVIEW OF CASE STUDIES

The case studies at the heart of this Report evaluate large-scale agricultural investments in Tanzania, Southern Sudan, Pakistan, and Mali. These cases were selected to provide diversity across a range of variables, covering large-scale land investments in either Asia or Africa, managed by investors from either Europe or the Middle East. They cover a broad range of industries, from investments in biofuel crop production, to food crop production, timber production, and carbon offsets. The case studies explore the numerous human rights challenges posed by large-scale land investments and offer preliminary observations based on a careful review of the investments and an assessment of the extent to which they reflect the Eleven Principles.

⁶⁰ *Id.*, ¶ 9.

⁶¹ In furtherance of this goal, “[d]evelopment banks, including the World Bank and its private sector arm, the International Finance Corporation, . . . should immediately make their support to any large-scale investment in farmland conditional upon compliance with the minimum [Eleven] [P]rinciples.” *Id.*, ¶ 5.

⁶² *Id.*

⁶³ See Borrás, Jr. & Franco, *supra* note 34, at 521 (arguing that “prioritizing truly pro-poor outcomes would require adopting a human rights-based approach, including taking seriously the right to food and the right to land” in promulgating current principles); (MIS)INVESTMENT IN AGRICULTURE, *supra* note 34, at 31 (concluding that, “By promoting investor access to land instead of prioritizing . . . basic human rights, [the International Finance Corporation] fails in its mission” to alleviate poverty through foreign direct investment); Press Release, La Via Campesina et al., *supra* note 24 (disfavoring the proposed principles set forth in PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT, *supra* note 33, because of their supposed prioritization of investor rights over human rights). See also GRAHAM ET AL., *supra* note 17, at 9 (setting forth guiding principles that take into account human rights obligations).

Collectively, the case studies reveal that large-scale land investments are a growing trend and have the potential to deeply affect the rights of host communities. As the Special Rapporteur suggests, there may be a need to place limits on large-scale land investments until the proper regulatory frameworks are in place. In the meantime, land deals must be structured in a way that maximizes respect for the human rights of local populations and prioritizes their development needs. This Report offers a number of recommendations for how this can be done.

A. PURPOSE AND METHODOLOGY

The case studies in this Report seek to answer the following questions, among others: Who are the actors involved in the land investments? What are the host state regulatory mechanisms that govern the framework in which the investments operate? What kinds of impact assessments, if any, were carried out prior to the negotiation of the investment agreements? Who benefits and who stands to lose from the investments? And which practices can help maximize the positive impacts and minimize the negative impacts of large-scale land investments?

To help answer the questions above, the case studies are each organized into six sections. Section I provides an overview of the factual context and potential impacts of the projects concerned. Section II provides more detail surrounding the country context and the background information necessary to understand the investment's dynamics. Section III explores the relevant laws, policies, and institutions that comprise the framework in which the investors are operating, as well as the relevant actors involved. Section IV presents the investment characteristics and where possible examines the negotiations behind the investment and the allocation of benefits between relevant parties. Section V offers some reflections on the preliminary environmental, social, political, and economic impacts of the investment project. Finally, Section VI concludes with a summary of key observations from the case study and a set of preliminary recommendations. In the case of jatropha investments in Mali (Case Study 4), Sections III and IV are combined, in order to compare the project with other land acquisitions in Mali under Section V.

The case studies do not necessarily represent those large-scale land investments that have provoked the most outrage in recent years, or even those that have had the most serious documented impacts on the human rights of affected communities. The investments were, however, carefully selected so as to allow for an in-depth analysis into a variety of investments, which in turn allowed us to probe further into certain aspects of the large-scale land investment that have been otherwise been under-documented.⁶⁴

⁶⁴ Our selection of case studies was guided by the following criteria: 1) *Availability of information*—we prioritized the selection of case studies where information was more readily available, allowing us to better ensure high quality analyses; 2) *Nature of the investment*—we selected land investments that displayed diversity across a number of characteristics, including: business sector, size of land transfer, the extent of government involvement in the land deal, and the nature of local land rights implicated by the deal. This allowed us to explore many different dimensions of the trend in large-scale land investments; and 3) *Range of positive and negative impacts* - we aimed to select a group of case studies that displayed a variety of best practices and negative impacts, which in turn allowed us to provide observations on how to maximize the positive impacts and mitigate the negative impacts of large-scale land investments.

The surge in large-scale land investments, whose impacts are just beginning to be recognized, is a relatively new trend that has only recently become the subject of intense research. The investment agreements at the heart of these acquisitions also generally lack transparency and often involve proprietary commercial information that can be difficult to obtain.⁶⁵ Our research is based on extensive outreach conducted over the course of a year to a number of individuals and institutions. In particular, we reached out to and interviewed: researchers and experts on land issues in the developing world; academics, human rights activists, investors, legal professionals, and government officials; representatives of non-governmental organizations (NGOs) and civil society organizations that advocate on behalf of the affected populations; and the companies highlighted in this Report. Information obtained from these communications has been included in each respective case study to inform the analysis and conclusions contained therein.

We supplemented this primary research with secondary research, for which we extensively reviewed research reports and country studies, media reports, human rights reports, company reports, and other material related to the investments and the country context. As noted above, our rigorous research and outreach was necessitated, in part, by the paucity of readily-available information on these investments. This reflects a general lack of transparency associated with these land investments that is, in and of itself, a cause for concern.

Information contained in the case studies on Mali and Pakistan is up-to-date as of May 2010. Recent developments, where of significance to these two case studies, have been highlighted in the case study summaries included below. The case studies based in Southern Sudan and Tanzania reflect information gathered up until October 2010.

B. TANZANIA

The first case study involves investment in sugarcane projects in Tanzania by Swedish companies, for the purpose of sugar and ethanol production. The projects consist of approximately 22,000 hectares of land in Tanzania's Bagamoyo district that is in the process of being leased, and an additional 250,000 to 500,000 hectares that have been targeted by investors for future lease in the district of Rufiji.⁶⁶ Build-up of the Bagamoyo project may include a factory capable of processing sugar for the local market, as well as ethanol.⁶⁷ Both the Bagamoyo and Rufiji projects may also

⁶⁵ As has been noted, “[t]here is...a lack of detailed public information about land deals and ownership...and providing a full picture of the situation is close to impossible...Increased transparency and more research are required.” AFRICA: UP FOR GRABS, *supra* note 15, at 8.

⁶⁶ EMMANUEL SULLE & FRED NELSON, IIED, BIOFUELS, LAND ACCESS AND RURAL LIVELIHOODS IN TANZANIA 47 (June 2009), available at <http://www.iied.org/pubs/pdfs/12560IIED.pdf> (explaining that rights of occupancy preliminary to leasing the land in Bagamoyo were “being processed”); FRANCIS SONGELA & ANDREW MACLEAN, WORLD WILDLIFE FOUND. [WWF], SCOPING EXERCISE (SITUATION ANALYSIS) ON THE BIOFUELS INDUSTRY WITHIN AND OUTSIDE TANZANIA (FINAL DRAFT REPORT) 18 (Oct. 2008), available at http://www.wwf.se/source.php/1203701/WWF_Tanzania_Scoping_Report_Biofuels.pdf. See also E-mail from Chief Executive Officer, EcoDevelopment, to Center for Human Rights and Global Justice (CHRGJ), New York University School of Law (Oct. 5, 2010, 09:06:00 EST) [hereinafter E-mail from CEO of EcoDevelopment (Oct. 5, 2010)] (on file with authors) (stating that, in Bagamoyo, “there will be a lease”).

⁶⁷ See Levina Kato, *Bio-fuel production takes root as SEKAB readies for sugar production*, TANZ. DAILY NEWS, Nov. 28, 2009, available at <http://www.dailynews.co.tz/home/?n=5701&cat=home> (reporting that at the request of the Tanzanian government, the proposed plant in Bagamoyo will produce sugar as well as ethanol, in order to close the nation's sugar

incorporate outgrower partnerships with local farmers.⁶⁸ At present, however, the projects remain in their preliminary stages. Investors report that they are “struggling” to bring the Bagamoyo project to “financial closure” and that the Rufiji project remains in a state of “discussion and planning.”⁶⁹

The projects were initially majority-owned and managed by the SEKAB Group, a leading Swedish producer of ethanol for the European biofuels market, through its subsidiary SEKAB BioEnergy Tanzania (SEKAB BT).⁷⁰ In October 2009, due to shareholders’ concerns about its African investments,⁷¹ SEKAB BT sold its stake in the projects to EcoDevelopment in Europe AB (EcoDevelopment).⁷²

This case study examines issues surrounding negotiations over land use in Rufiji by SEKAB BT at the time that it controlled the investment, and addresses potential local human rights impacts of the projects. The site of the Bagamoyo project was reportedly unoccupied by human settlement at the time it was targeted for sugarcane-ethanol production.⁷³ The site of the Rufiji project, however, was and continues to be inhabited and, therefore, under Tanzanian law, project investors must gain the consent of villagers to lease village land.⁷⁴ According to ActionAid Sweden,⁷⁵ in order to obtain such consent, SEKAB BT paid villagers to come to town meetings at which they voted on the project and some villagers have since reported that they were unaware of their land rights when they provided their so-called consent.⁷⁶

shortage); E-mail from Chairman, EcoEnergy Tanzania, to Center for Human Rights and Global Justice, New York University School of Law (Oct. 20, 2010, 10:40:00 EST) [hereinafter E-mail from Chairman of EcoEnergy Tanzania] (on file with authors) (explaining that because “there is a major shortage of sugar in Tanzania,” EcoDevelopment has been offered the land in Bagamoyo primarily for sugar production). EcoEnergy Tanzania is a subsidiary of EcoDevelopment. E-mail from CEO of EcoDevelopment (Oct. 5, 2010), *supra* note 66.

⁶⁸ Telephone Interview with CEO, EcoDevelopment (Feb. 11, 2010) [hereinafter Interview with CEO of EcoDevelopment].

⁶⁹ *Id.* See also E-mail from Chairman of EcoEnergy Tanzania, *supra* note 67 (stating that, regarding the Bagamoyo project, “we will not sign any documents of land lease before we [know] for sure that we are able to get full financing for the entire project”).

⁷⁰ Letter from Anders Bergfors, Managing Director, SEKAB BioEnergy Tanzania Limited [SEKAB BT], to Swedish International Development Cooperation Agency, Re: SEKAB Bioenergy Tanzania Ltd – Application for Credit Enhancement Guarantee, 1 (July 28, 2009) [hereinafter SEKAB BT Credit Application] (on file with authors).

⁷¹ Interview with CEO of EcoDevelopment, *supra* note 68; *SEKAB: needs new investors, approached Sida for support*, DEV. TODAY, April 1, 2009, available at http://www.development-today.com/magazine/2009/DT_4/Business/4306. See also SEKAB BT Credit Application, *supra* note 70, at 1 (noting that SEKAB’s divestment from the projects is partly “an attempt to... separate the African ventures” from the company’s majority owners: three Swedish public utility companies).

⁷² Press Release, SEKAB, SEKAB sells subsidiaries in Tanzania and Mozambique to EcoDevelopment in Europe AB, (Oct. 23, 2009) [hereinafter SEKAB sells subsidiaries], available at http://www.sekab.com/Eng2/Information%20pages/Information%20PDF/091022_%20Press_SEKAB%20säljer%20Afrikabolagen%20EN%202.pdf.

⁷³ Interview with CEO of EcoDevelopment, *supra* note 68.

⁷⁴ SULLE & NELSON, *supra* note 66, at 41.

⁷⁵ ActionAid Sweden is the Swedish arm of the international anti-poverty agency ActionAid.

⁷⁶ ACTIONAID, SEKAB-ETANOL TILL VARJE PRIS HUR SEKABS BIOBRANSLEPROJECT I TANZANIA DRABBAR LOKALBEFOLKNINGEN [SEKAB-ETHANOL AT WHAT COST? HOW SEKAB’S BIOFUEL PROJECT IN TANZANIA AFFECTS THE LOCAL POPULATION] 14 (Oct. 2009) [hereinafter ACTIONAID, ETHANOL AT WHAT COST?], available at <http://www.mynewsdesk.com/se/pressroom/actionaid/document/view/sekab-etanol-till-varje-pris-hur-sekab-s-biobraensleprojekt-i-tanzania-drabbar-lokalbefolkningen-5785>.

Production of biofuels in Tanzania raises issues related to water availability, land rights, and livelihoods in host communities. Water supply is at the center of allegations of misconduct concerning the environmental impact assessment (EIA) of the Bagamoyo project, which SEKAB BT hired a Swedish consulting firm, Orgut, to conduct. According to the Orgut team leader in charge of the EIA, SEKAB BT altered Orgut's findings before submitting the EIA for review by the Tanzanian government.⁷⁷ In particular, Orgut asserts that SEKAB BT removed a finding that showed that the amount of irrigation required on the project's sugarcane plantations would be "high and sometimes exceed available water" from the Wami River—even as nearby residents and ecosystems rely on the same water source.⁷⁸ SEKAB BT responded to this allegation by stating that any changes to the report were made not by the company, but by additional consultants that it asked to assist with the EIA.⁷⁹ The revised EIA was approved by Tanzanian authorities prior to EcoDevelopment's involvement in the Bagamoyo project.⁸⁰ According to EcoDevelopment's CEO, the company plans to conduct further feasibility assessments to evaluate the project's potential impacts.⁸¹

The Bagomoyo and Rufiji projects could affect local livelihoods key to the realization of human rights in a number of ways, both positive and negative. Outgrower partnerships offer small farmers a market for their crops, and liquid fuels produced by the planned factory may reduce the need for labor-intensive charcoal that most of the community now depends upon.⁸² At the same time, potential competition between the project and small-scale farmers over water resources runs the risk of reducing nearby crop yields and household water supplies,⁸³ and the existence of a single purchaser under the outgrower model could exacerbate economic dependency and income volatility. In order to ensure economic benefits from large-scale land investments, a member of MVIWATA, a network of farmers' group in Tanzania,⁸⁴ has recommended that affected communities receive a direct equity stake in such investments.⁸⁵

⁷⁷ SEKAB 'substantially altered' biofuel study, kept Orgut's name, DEV. TODAY, Apr. 1, 2009, available at http://www.development-today.com/magazine/2009/DT_4/Business/4304.

⁷⁸ *Id.*

⁷⁹ Green light for Bagamoyo, SEKAB defends environment study, DEV. TODAY, May 24, 2009, available at http://www.development-today.com/magazine/2009/DT_7/Business/4421.

⁸⁰ *Id.*

⁸¹ Interview with CEO of EcoDevelopment, *supra* note 68.

⁸² *Id.*

⁸³ See HELEN WATSON, COMPETE GOOD PRACTICE ASSESSMENT FOR BIOENERGY PROJECTS: BAGAMOYO (SEKAB BIOENERGY) TANZANIA 3 (November 2009) [hereinafter COMPETE ASSESSMENT], available at <http://www.compete-bioafrica.net/bestpractice/COMPETE-032448-GoodPractice-CaseStudy4-Bagamoyo.pdf> (claiming that "in dry years there is not enough water for both irrigation and ecosystem needs between late July and early November.").

⁸⁴ MVIWATA stands for Mtandao wa Vikundi vya Wakulima Tanzania and serves as "an acronym for the National Network of Small-Scale Farmers Groups in Tanzania." Mtandao wa Vikundi vya Wakulima Tanzania (MVIWATA), About MVIWATA, <http://www.mviwata.org/content/about-mviwata> (last visited Oct. 20, 2010). MVIWATA is described as "a farmers organisation which unites small holder farmers in order to have a common voice in defence of economic, social, cultural and political interests of smallholder farmers in Tanzania." *Id.*

⁸⁵ Samuel Kamdaya, *Tanzanian farmers want a piece of the pie from agro-investors*, THE CITIZEN, Aug. 25, 2010, <http://thecitizen.co.tz/magazines/31-business-week/3769-tanzanian-farmers-want-a-piece-of-the-pie-from-agro-investors.html>.

Ongoing development of the Bagamoyo and Rufiji projects hinges on the availability of additional financing that, at the time of writing, had yet to be secured by EcoDevelopment.⁸⁶ Yet even if the company proves unable to carry the projects further, other large-scale Tanzanian biofuels projects appear imminent. In May 2010, President Jakaya Kikwete of Tanzania told delegates to the World Economic Forum on Africa that his nation “has huge agricultural potential and we want to partner with the private sector to invest in this area heavily.”⁸⁷ Then, in July, Brazilian President Luiz Inácio Lula da Silva paid his first official visit to Tanzania, during which he instructed African nations that they should allow investment in significant biofuels production, adding that Brazilian technology and capital may be available to help.⁸⁸

If and when large-scale investment in Tanzanian land gains traction, this case study can be drawn upon to illustrate the value of the Eleven Principles. Realization of free, prior, and informed consent by affected communities,⁸⁹ for instance, should prevent the sort of allegations that have emerged from Rufiji, where villagers reported that they were unaware of their land rights and uncertain about their future livelihood. Likewise, the shadows that hang over the EIA of the Bagamoyo project could be avoided with increased respect for the environment⁹⁰ and the conduct of timely studies of environmental and social impacts.⁹¹

C. SOUTHERN SUDAN

The second case study involves an investment in Southern Sudan, and concerns a company named TreeFarms Sudan Ltd. (“TreeFarms”), which is owned by Green Resources AS (“Green Resources”), a Norwegian company that also owns plantations in Mozambique, Tanzania, and Uganda. TreeFarms is seeking a 99-year lease to 179,000 hectares in Sudan’s Central Equatoria State (CES) to establish a tree plantation and forest conservation project.⁹² Although this investment does not fit neatly into the typical agriculture and biofuel-based categories of large-scale land investments, a major part of the project concerns anticipated subsidies from carbon credits,⁹³ one of the drivers of large-scale land investments mentioned above.

The case study includes detailed analysis of the investment agreement between TreeFarms, the CES Ministry of Agriculture and Forestry, and the Tindilo Community provided by the company in September 2010. The investment agreement consists of a Land Title Agreement and an accompanying Community Support Program Agreement. As of September 2010, the Land Title

⁸⁶ E-mail from Chief Executive Officer, EcoDevelopment, to Center for Human Rights and Global Justice, New York University School of Law (Oct. 1, 2010, 09:13:00 EST) [hereinafter E-mail from CEO of EcoDevelopment (Oct. 1, 2010)] (on file with authors).

⁸⁷ Finnigan Wa Simbeye, *Nation Mulls Ambitious Farming Projects*, TANZ. DAILY NEWS, May 5, 2010, available at <http://allafrica.com/stories/201005060017.html>.

⁸⁸ Frank Kimboy, *Brazil Leader Offers \$240 Million Debt Waiver*, THE CITIZEN, July 8, 2010, <http://allafrica.com/stories/201007080187.html>.

⁸⁹ See De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 2 (encouraging such consent).

⁹⁰ *Id.* at 17, Principle 6.

⁹¹ *Id.* at 17, Principle 9.

⁹² GREEN RESOURCES, ANNUAL REPORT 2008: COMPANY REPORT 2009 5 (Aug. 2009) [hereinafter GREEN RESOURCES, ANNUAL REPORT], available at http://www.greenresources.no/Portals/1/Reports/AR_2008_FINAL.pdf.

⁹³ *Id.* at 2.

Agreement was with the CES Governor awaiting his final approval of the transfer. The Community Support Program Agreement, on the other hand, will only be finalized after TreeFarms has obtained title to the land.⁹⁴ The two agreements are included as appendices to this Report as examples of legal documents that currently act as the vehicles for large-scale land investments. The information in the case study is also based on in-country interviews with TreeFarms employees, Sudanese government officials, and experts on land issues in Southern Sudan.

The TreeFarms case study highlights some of the difficulties that large-scale land investments face in a delicate post-conflict environment such as Southern Sudan. The Land Act, passed by the Southern Sudan Legislative Assembly in 2009, provides some important safeguards for affected communities; however, given the nascent state of government institutions and the still underdeveloped rule of law in the region, host communities do not yet have access to the law's protections. According to TreeFarms and the local CES government, the state in which the land investment is located, the investment agreement was negotiated with the participation of the host community.⁹⁵ However, the uncertainty of both the post-conflict environment and the uncertainty of applicable land law in Southern Sudan may have skewed the allocation of benefits in the investment agreement in favor of the investor, as demonstrated by the provisions of the agreement.⁹⁶ Moreover, the Community Support Program Agreement linked to the investment has yet to be finalized and leaves the determination of many of its details until after the transfer of title to the land. Although the company has publicly made general commitments to supporting the development of school facilities, roads, water systems, and dispensary units in Tindilo payam (district), these are not made binding in the Community Support Program Agreement, nor are the time limits precise.⁹⁷ In response, Green Resources has emphasized its successful completion of community-based projects in investments elsewhere, such as a project in Tanzania.⁹⁸

Additionally, despite the signing of the Comprehensive Peace Agreement (CPA) in 2005, Southern Sudan faces widespread problems of food insecurity and the very real risk of a return to war. A large-scale investment of this kind could have a profound impact on the future development of governance and the local economy in Southern Sudan at a time when the region is determining its very future and status as a region.⁹⁹ The case study concludes that the Government of Southern

⁹⁴ Interview by David Deng, Arthur Helton Global Human Rights Fellow, N.Y. Univ. Sch. of Law, with Plantation Manager, TreeFarms Sudan, in Juba, Sudan (Sept. 25, 2010) (on file with authors) [hereinafter Interview with Plantation Manager of TreeFarms Sudan].

⁹⁵ See, e.g., *id.* (explaining that negotiations occurred between TreeFarms and local chieftains, who signed MOUs with TreeFarms).

⁹⁶ See *infra* Case Study Two: A Large-Scale Tree Plantation and Carbon Credit Scheme in Southern Sudan, Section IV.B.

⁹⁷ GREEN RESOURCES, TINDILO REDUCED EMISSIONS FROM DEFORESTATION AND DEGRADATION (REDD) PROJECT, SUDAN: PROJECT IDEA NOTE (PIN) 6-7 (Mar., 2010) [hereinafter GREEN RESOURCES, TINDILO REDUCED EMISSIONS], available at <http://www.greenresources.no/Portals/0/Carbon/PIN%20Tindilo%20REDD%20Project.pdf>.

⁹⁸ E-mail from Chief Executive Officer, Green Resources, to Center for Human Rights and Global Justice, New York University School of Law (Oct. 4, 2010, 02:13:00 EST) [hereinafter E-mail from CEO of Green Resources (Oct. 4, 2010, 02:13:00 EST)] (on file with author). This reference pertains specifically to an unpublished press release that was attached to the e-mail from the CEO of Green Resources. *Id.* (referring to E-mail from Employee, Green Resources, to Chief Executive Officer, Green Resources (Sept. 18, 2010 13:37:00 UA) [hereinafter E-mail from Green Resources Employee] (on file with author) (listing the completion of community hall buildings in Chogo and Idete)).

⁹⁹ A referendum as to whether the Southern Sudanese wish to remain part of Sudan or declare independence is scheduled for January 2011. James Gatdet Dak, *South Sudanese in Khartoum will vote in referendum – SPLM*, SUDAN TRIB., Sept. 18, 2009, available at <http://www.sudantribune.com/spip.php?article32500>.

Sudan and foreign investors should seriously consider whether large-scale land investments are desirable in this environment or whether the government would be better advised to place limits on such investments until the institutions of governance have had an opportunity to better establish themselves.

Government policies regarding large-scale land investments should also better ensure compliance with the Eleven Principles. In particular, future investments must involve participatory impact assessments prior to the finalization of such investments,¹⁰⁰ a requirement that does not appear to have been met with respect to the TreeFarms investment. The Land Act calls for the collective registration of community lands and a ceiling on land acquisitions above a certain size and is therefore in accordance with the Special Rapporteur's principle that governments must enact legislation to safeguard the rights of host communities.¹⁰¹ However, the Act's protections are largely inaccessible to the Southern Sudanese until it is fully implemented.¹⁰² Furthermore, analysis of the components of the investment agreement indicates that potential ambiguities still exist, in deep tension with the Special Rapporteur's principle that investment agreements include clear obligations.¹⁰³

D. PAKISTAN

The third case study involves investments in Pakistan, where investors from Gulf States are in the process of acquiring agricultural land in order to export food to meet domestic demand. The Pakistan case study, and its findings on the paucity of publicly available information on the character and size of the investments in question, highlights the inherent need for greater transparency in and reassessment of large-scale land investments.

As noted above, the case study is up to date as of May 2010. Widespread and disastrous flooding that started in July 2010¹⁰⁴ has exacerbated many of the concerns highlighted in the case study. In addition to killing more than 1500 people,¹⁰⁵ the flooding has led to both short-term food shortages and increased concerns about long-term food security.¹⁰⁶ Pakistan's food security was already tenuous at the time of the flood,¹⁰⁷ but this new threat to long-term food security is of

¹⁰⁰ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 9.

¹⁰¹ *Id.* at 17, Principle 3.

¹⁰² David K. Deng, Land Administration in Juba: The complexity of land in a growing post-conflict capital city 16 (Jan., 2010) (unpublished directed research paper in fulfillment of J.D., New York University School of Law) (on file with authors).

¹⁰³ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 7. *See infra* Case Study Two: A Large-Scale Tree Plantation and Carbon Credit Scheme in Southern Sudan Section IV.B.

¹⁰⁴ Ismail Khan, *400 Killed in Flooding in Pakistan, Officials Say*, N.Y. TIMES, July 30, 2010, *available at* <http://www.nytimes.com/2010/07/31/world/asia/31pstan.html?ref=pakistan>.

¹⁰⁵ *Pakistan Floods*, GUARDIAN (UK), Aug. 13, 2010, *available at* <http://www.guardian.co.uk/world/gallery/2010/aug/13/pakistan-flooding>.

¹⁰⁶ Adam B. Ellick, *Floods Could Have Lasting Impact for Pakistan*, N.Y. TIMES, Aug. 16, 2010, *available at* <http://www.nytimes.com/2010/08/17/world/asia/17pstan.html>.

¹⁰⁷ Many of Pakistan's food security issues can be linked to the decreasing availability of water for agriculture. *See* WOODROW WILSON INT'L CTR. FOR SCHOLARS, *RUNNING ON EMPTY: PAKISTAN'S WATER CRISIS* 21 (Michael Kugelman ed., 2009) [hereinafter *RUNNING ON EMPTY*], *available at* http://www.wilsoncenter.org/topics/pubs/ASIA_090422_Running%20on%20Empty_web.pdf ("Growing urban

particular concern because a great deal of the affected land was already targeted for development by outside investors prior to the flood.¹⁰⁸ As a result, outside investors, and not the affected population, may develop and take control of this targeted land once the flooding recedes.¹⁰⁹ Although this Report does not specifically incorporate analysis based on circumstances after the flooding, in at least one sense, little has changed since May 2010: very little information has been forthcoming from any of the parties regarding the specific details of such investments in Pakistan.

From the information that is publicly available, it is clear that the Pakistani government has taken an active role in attracting investors to the country by providing a range of different investment incentives, including the right to export all crops produced on the land.¹¹⁰ The scale of these proposed land acquisitions and their potential impacts are immense. In May 2009, Pakistan's Ministry of Investment announced that it would make 2.43 million hectares of farmland available for sale or lease to foreign investors.¹¹¹ According to media reports, UAE companies have already acquired 324,000 hectares of land in Pakistan's Punjab province, and a staggering number of more than 25,000 villages may be displaced by Qatari land deals.¹¹²

The government of Pakistan claims that these large-scale land investments will lead to substantial benefits for the country.¹¹³ Yet the country faces a number of intractable problems—from water scarcity and food shortages, to the existing vulnerability of smallholder farmers and rural employees, and the added insecurity posed by the Taliban in the northern part of the country—and critics charge that these massive changes in land use patterns would only deepen these crises.¹¹⁴ Indeed, there is a history of social unrest associated with forced changes in land use in Pakistan,¹¹⁵

drinking water demand contributes to the rapid depletion of water in Pakistan's rural regions...[and] [a]gricultural water shortages mean higher food costs,...").

¹⁰⁸ See Ellick, *Floods Could Have Lasting Impact for Pakistan*, *supra* note 106 (noting that a small-scale wheat farmer in Southern Punjab had been adversely affected by the flood); *infra* note 519 and accompanying text (noting that some of the large-scale land investment is likewise targeted at Punjab province).

¹⁰⁹ See generally UN OCHA, Integrated Regional Information Networks [IRIN], Global: Taking on the land-grabbers (Oct. 26, 2010), <http://www.irinnews.org/report.aspx?Reportid=90885> (expressing concerns of post-disaster land-grabbing as highlighted in THE INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, WORLD DISASTERS RELIEF REPORT 2010: FOCUS ON URBAN RISK (2010), available at <http://www.ifrc.org/Docs/pubs/disasters/wdr2010/WDR2010-full.pdf>).

¹¹⁰ See *infra* Case Study Three: Foreign Direct Investments in Export-oriented Agriculture in Pakistan Section IV.A.

¹¹¹ Amena Bakr, *Pakistan Opens More Farmland to Foreigners*, REUTERS, May 17, 2009 [hereinafter Bakr, *Pakistan Opens More Farmland*], available at <http://in.reuters.com/article/southAsiaNews/idINIndia-39682520090517>.

¹¹² Najma Sadeque, *Giving Away the Family Silver*, NEWSLINE, Oct. 26, 2009 [hereinafter Sadeque, *Giving Away the Family Silver*], available at <http://www.newsline.com/2009/10/giving-away-the-family-silver/>.

¹¹³ *Id.*

¹¹⁴ Michael Kugelman, *Going Gaga over Grain*, DAWN, Sept. 17, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/04-grain-qs-04> [hereinafter Kugelman, *Going Gaga over Grain*].

¹¹⁵ See e.g., HUMAN RIGHTS WATCH, SOILED HANDS: THE PAKISTAN ARMY'S REPRESSION OF THE PUNJAB FARMERS' MOVEMENT 4-5 (July 2004) [hereinafter HUMAN RIGHTS WATCH, SOILED HANDS], available at <http://www.hrw.org/sites/default/files/reports/pakistan0704.pdf> (describing the 'extraordinarily tense standoff between the Pakistani army, paramilitary and police forces, and the tenant farmers' over changes in how farmer-sharecroppers paid rent for using state-owned, military-run farms). The issue was that, if the farmers accepted the change, which would obligate them to pay rent in cash instead of with a portion of their harvest, they would become contract farmers, and that, though "under existing tenancy laws they were occupancy tenants protected from eviction...[they] would not be if they became contract workers...[and] could be evicted from their land when their contracts expired." *Id.* at 10.

and if the Pakistani government and Gulf State investors do not adopt a more transparent and participatory approach, the government may face serious social unrest. The Pakistani government, in consultation with affected communities, should therefore explore all feasible alternatives prior to any shifts in land use, with a view to avoiding the need to resort to forced evictions. The government should also take steps to ensure that within affected groups themselves, marginalized populations are allowed to participate in, and equitably benefit from, large-scale land investments.

More particularly, and in relation to the first of the Eleven Principles, “[t]he negotiations leading to investment agreements should be conducted in a fully transparent manner.”¹¹⁶ The lack of information noted above not only limits the ability to scrutinize the investment arrangements but also hinders efforts to tailor these agreements to suit the human rights and development needs of the host population.

E. MALI

The fourth case study involves an investment in Mali, where a company named Mali Biocarburant SA (MBSA) is working with smallholder farmers to produce biodiesel from the jatropha plant. Between its investments in Mali and Burkina Faso, MBSA works with a total of 2611 farmers who have planted 1.6 million jatropha trees on 3250 hectares of land.¹¹⁷ In collaboration with Malian farming cooperatives, the company produces biodiesel from the jatropha plant for sale on the domestic market in Mali. A local farmers’ union is a 20 percent shareholder¹¹⁸ and the project has attracted support from public and private institutional investors in the Netherlands.¹¹⁹

The MBSA case study provides insight into best practices associated with agricultural investments. As a contrast, the case study also sheds light on a parallel trend in medium and large-scale land acquisitions that threaten the land rights of tens of thousands of rural landholders in the country.¹²⁰ Between 2004 and 2009, 162,850 hectares—representing 0.6 percent of Mali’s cultivable land—had been approved for allocation for large-scale foreign direct investment projects.¹²¹ Local conditions in Mali are characterized by particularly serious challenges of poverty, harsh

¹¹⁶ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 1.

¹¹⁷ E-mail from Chief Executive Officer, Mali Biocarburant SA [MBSA], to International Human Rights Clinic, New York University School of Law (Apr. 19, 2010, 07:14:00 EST) (on file with authors) [hereinafter E-mail from CEO of MBSA].

¹¹⁸ MBSA, Sustainable Production, http://www.malibiocarburant.com/Sustainable_production.html (last visited Oct. 8, 2010).

¹¹⁹ MBSA, Global Partnerships, http://www.malibiocarburant.com/Global_partnerships.html (last visited Oct. 8, 2010).

¹²⁰ *See generally* ALY DIALLO & GODIHALD MUSHINZIMANA, DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT [GTZ], FOREIGN DIRECT INVESTMENT (FDI) IN MALI (Dec., 2009), *available at* <http://www2.gtz.de/dokumente/bib/gtz2010-0064en-foreign-direct-investment-mali.pdf> (detailing the foreign direct investment agreement signed between Mali and Libya and the Markala Sugar Project, a public-private partnership, both of which raise “issues surrounding the granting of lands and the commencement of works without environmental and social impact assessment or public consultation being undertaken and the failure to take the land requirements of local communities or local customary land rights into account that regulate access to farm land, grazing areas, transhumance routes, settlement, herder accommodation, water, forests etc.”).

¹²¹ LORENZO COTULA ET AL., IIED, FAO, IFAD, LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 62 (2009) [hereinafter COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?], *available at* http://www.ifad.org/pub/land/land_grab.pdf.

environmental conditions, population growth, and the historical degradation of land resources. Eighty percent of the population relies on agriculture as a source of income,¹²² and yet only 14 percent of the land in Mali is fertile.¹²³ The government can therefore not afford to move ahead with these large-scale land acquisitions until it can garner the support and active participation of those who depend on the land in question for natural resources that are indispensable to their livelihoods. Over the past several decades, Mali has been experiencing a troubling increase in medium-sized land acquisitions.¹²⁴ These acquisitions are being driven by domestic investors, leading to the gradual concentration of land ownership in the hands of urban elites and government officials.¹²⁵ The registration of customary land rights can help to protect rural populations from some of the more speculative land deals, but the procedures in place are lengthy and expensive and outside the reach of most farmers.¹²⁶

Due to its innovative approach, MBSA claims that it has not had to acquire any land to produce its biofuel, thus minimizing the impact of the investment on local land rights.¹²⁷ Although large-scale jatropha projects in other contexts have given rise to a number of negative impacts on food security, MBSA's investment incorporates a number of innovations that help to reduce its negative impact. These innovations include the intercropping of jatropha with food crops to avoid direct competition with food production, and the use of the "presscake" residue left over from the oil extraction process as a low-cost fertilizer.

This case study is thus a prime example of an alternative means of production that avoids some of the negative consequences of land acquisition. It also demonstrates how certain models of foreign land investment can adhere to the Eleven Principles, even in the midst of particularly difficult and vulnerable local circumstances. MBSA has adopted labor-intensive production methods that favor smallholder farmers, thereby increasing the opportunity for employment

¹²² African Development Bank, Country Profile: Mali, <http://www.afdb.org/en/countries/west-africa/mali/> (last visited Feb. 19, 2010).

¹²³ JENS B. AUNE, ADAPTING DRYLAND AGRICULTURE IN MALI TO CLIMATE CHANGE: A REPORT FOR THE NORWEGIAN MINISTRY OF ENVIRONMENT 4 (2008), *available at* http://www.umb.no/statisk/noragric/publications/reports_other/aune_2008_mali.pdf.

¹²⁴ Telephone Interview with Joost Nelen, Advisor on Rural Econ. Dev., Neth. Dev. Org. (Jan. 1, 2010) (on file with authors).

¹²⁵ *Id.* The trend in medium-sized land acquisitions also coincides with the return of a large number of Malian expatriates following political changes that took place in the country in 1991. Competence Platform on Energy Crop and Agroforestry Systems for Arid and Semi-arid Ecosystems – Africa [Compete], *Sixth Framework Programme: PRIORITY A.2.3.: Managing Arid and Semi-arid Ecosystems: Annex 1-2-1: Second Task Report on WP1 Activities, Current Land Use Patterns and Impact* 15 (Jan. 2009) [hereinafter Compete, *Annex 1-2-1*].

¹²⁶ Tor A. Benjaminsen et al., *Formalisation of Land Rights: Some empirical evidence from Mali, Niger and South Africa*, 26 LAND USE POLY 28, 30 (2008) [hereinafter Benjaminsen et al., *Formalisation of Land Rights*].

¹²⁷ Telephone Interview with Dir., Annona Sustainable Dev. Fund (Feb. 1, 2010) [hereinafter Interview with Director of Annona Sustainable Development Fund] (on file with authors). *See also* Telephone Interview with Chief Executive Officer, MBSA (Feb. 19, 2010) [hereinafter Interview with CEO of MBSA] (on file with authors) (adding that MBSA has no plans to buy land from the farmers they work with).

creation.¹²⁸ Furthermore, MBSA produces a local source of renewable energy, thereby reducing Mali's dependency on imported oil and improving energy security in rural areas.¹²⁹

It remains to be seen how MBSA's model of production will affect the population and environment of Mali as it moves towards full-scale operation. As the case study points out, the cultivation of jatropha in commercial quantities requires large financial inputs in the early years and MBSA has encountered some difficulty in reaching sufficient levels of production to make its factory profitable. Furthermore, the impact of jatropha on other crops is still being debated. Some sources say there is no effect, since jatropha does not compete directly with food production,¹³⁰ while other scholars and reports raise concerns over the allocation of water and fertilizer it requires.¹³¹

The case study also examines some of the difficulties that have arisen in MBSA's relationship with the local farmers' union—such as monitoring membership in the union—and the steps that the company is taking to address these challenges. Interestingly, MBSA has expressed intentions to work with the local farmers' union to assist members in obtaining legal recognition of their land rights.¹³²

III. CONCLUDING REFLECTIONS

Large-scale land investments, which were previously hailed as founts of opportunity for alleviating such problems as food insecurity and unemployment, are now viewed more soberly as critics continue to point out their many attendant problems. As these case studies demonstrate, these investments must be regulated to ensure that governments respect, protect, and fulfill human rights obligations in any and all activities. This includes regulating the conduct of third parties. In other words, safeguards must be put in place to ensure that these obligations are realized regardless of the nature of the investment, its location, or whether the investor is local or foreign, private or governmental. Using the Eleven Principles and their underlying human rights obligations as a barometer for examination of the case studies, this Report highlights the many concerns that must be addressed. Many of the land deals are still in progress, and, as a result, their impacts are still prospective. It is, therefore, not too late for investors to adopt measures that can help safeguard the rights of affected communities. Moreover, states must ensure that affected communities, including

¹²⁸ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 5.

¹²⁹ *Id.* at 16, Principle 4 (MBSA seems to abide by Principle 4's requirement that the local population benefit from the investment agreement).

¹³⁰ "The experience with Jatropha programs has shown that it can benefit small holder farmers without compromising food production at local level." FORUM FOR AGRIC. RESEARCH IN AFR., MAPPING FOOD AND BIOENERGY IN AFRICA 55 (2010), available at http://fara-africa.org/library/browse/fara_publications/Mapping_Food_and_bioenergy_Africa__final_June_2010.pdf.

¹³¹ *See id.* at 42 ("Mali Biocarburant SA has identified water access as one of the main barriers for Jatropha adoption, as it produces overlapping of agricultural calendars between Jatropha and cash crops."); Lara Green, *Jatropha as Biofuel: An Analysis of the Possible Implications for Food Security in Mali* 31 (Apr., 2009) (unpublished Honours B.S. thesis, Dalhousie University) (on file with authors) ("Due to the current environmental and socio-economic conditions, there is a high risk of jatropha biofuel coming into competition with food production in Mali. This could occur if jatropha required fertilizer or water inputs, thus competing with food for the same resources.").

¹³² Interview with CEO of MBSA, *supra* note 127.

those most marginalized within these communities, have the right to meaningfully participate in investment decisions that have a profound impact on their rights.

Additionally, the potential benefits for host populations of these investments would be far more pronounced if the land that is transferred to investors is marginal land that is not otherwise being used. Areas that are targeted for investment are often mischaracterized as under-utilized, despite the fact that local communities may depend on land for productive resources that are indispensable to their livelihoods.¹³³ Host states should therefore guide investors towards abandoned land that is truly being neglected, such that the investment can help to enhance the capacity of host communities to make productive use of the land in new ways that are not possible without the support of the investor.

Ultimately, we must keep in mind the opportunity costs involved in prioritizing the development of large-scale investments in land over the redistribution of land in order to improve the access to land of rural households.¹³⁴ In other words, a default preference towards large-scale land investments may negatively affect equitable distribution of land, which affords strong potential for economic growth, reduces rural poverty, and enhances opportunities for the empowerment of women, among others.¹³⁵ As the Special Rapporteur has repeatedly noted, where land is underutilized or considered vacant, the question of whether it should be redistributed to allow small independent farmers to use it or whether it should be developed into a large estate comes first, before the question arises of whether a large-scale investment complies with a given set of principles.¹³⁶

¹³³ See COTULA ET AL, LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121, at 62 (stating that “[c]oncepts such as ‘available,’ ‘idle’ or ‘waste’ land, used to justify land allocations to investors, ...need critical analysis”).

¹³⁴ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 9, at 16, Principle 1.

¹³⁵ See generally Special Rapporteur on the right to food, *Interim Report of the Special Rapporteur on the right to food*, Olivier De Schutter, delivered to the 65th Session of the General Assembly, U.N. Doc. A/65/281 (Aug. 11, 2010) [hereinafter *Interim Report of the Special Rapporteur*], available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/65/281&Lang=E>.

¹³⁶ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 9, at 16, Principle 1. See also Special Rapporteur on the right to food, *Contribution in advance of the 36th session of the Committee on World Food Security, Rome, 11-15 October 2010* (Oct. 5, 2010) (on file with authors).

CASE STUDY ONE: LARGE-SCALE LAND INVESTMENTS FOR ETHANOL AND SUGAR PRODUCTION IN TANZANIA

I. INTRODUCTION

This case study looks at investments in sugarcane projects in Tanzania by Swedish companies for sugar and ethanol production. The projects involve approximately 22,000 hectares of land that is in the process of being leased in Tanzania's Bagamoyo district, and another 250,000 to 500,000 acres targeted by investors for future lease in the district of Rufiji.¹³⁷ Both districts are near the eastern coast of Tanzania. Investors in the projects plan to construct a plant in Bagamoyo that would process sugarcane grown on the leased land, along with sugarcane from local "outgrowers."¹³⁸ The plant would be built with "flex" capacity,¹³⁹ enabling it to produce not only ethanol, but also sugar that would be sold domestically in Tanzania.¹⁴⁰ The timeline for construction of the plant hinges on the availability of additional project financing that, as of October 2010, had yet to be secured.¹⁴¹ Investors report that they are "struggling" to bring the Bagamoyo project to "financial closure" and that the Rufiji project remains in a state of "discussion and planning."¹⁴²

SEKAB BioEnergy Tanzania (SEKAB BT), a subsidiary of the SEKAB Group, was the original investor in these projects.¹⁴³ Based in Sweden, the SEKAB Group is a major producer of ethanol for the European market. In October 2009, the SEKAB Group sold the subsidiary to another Swedish firm, EcoDevelopment in Europe AB (EcoDevelopment).¹⁴⁴ For the sake of clarity, this case study uses "SEKAB BT" to refer to the company that controlled the projects prior to the sale, and "EcoDevelopment" to refer to the company that has controlled the projects since the sale.

As the projects remain in their early stages, evaluating their long-term impacts is necessarily an uncertain exercise. The information that is currently available, however, reveals the challenges that investors must address if they move forward with these projects. Three particular concerns are raised by this case study: a lack of transparency surrounding investors' complex ownership structures; the need for adequate prior consultation with affected populations with a view to obtaining their informed consent; and the need for accurate prior impact assessments.

¹³⁷ See *supra* note 66.

¹³⁸ SULLE & NELSON, *supra* note 66, at 28; Interview with CEO of EcoDevelopment, *supra* note 68.

¹³⁹ E-mail from CEO of EcoDevelopment (Oct. 5, 2010), *supra* note 66.

¹⁴⁰ *Supra* note 67.

¹⁴¹ E-mail from CEO of EcoDevelopment (Oct. 1, 2010), *supra* note 86.

¹⁴² *Supra* note 69.

¹⁴³ SEKAB sells subsidiaries, *supra* note 72 (in which SEKAB describes SEKAB BioTechnology Tanzania limited as its subsidiary). See also SEKAB BT Credit Application, *supra* note 70 (stating that SEKAB owned a 98.5% share in SEKAB BT, and that a Tanzanian company, Community Development Corporation Limited, held 1.5%).

¹⁴⁴ SEKAB sells subsidiaries, *supra* note 72.

II. CONTEXT

Tanzania, a coastal country in East Africa with a population of approximately 42 million people,¹⁴⁵ has a predominantly agrarian economy. Almost half the land in Tanzania is considered arable¹⁴⁶ and the agricultural sector accounts for 45 percent of the gross domestic product (GDP).¹⁴⁷ Agriculture and pastoralism provide income for more than 80 percent of the population¹⁴⁸ and small-scale farming, occupying 0.9 to 3.0 hectares of land, dominates the agricultural sector.¹⁴⁹ The majority of the population lives in rural areas with poor sanitation and lacks access to safe drinking water.¹⁵⁰ Although Tanzania is one of the more politically stable countries in sub-Saharan Africa, poverty is widespread. According to the Food and Agriculture Organization (FAO), 40 percent of Tanzania's rural population and 25 percent of its urban population are considered poor and cannot provide for their basic needs.¹⁵¹ The FAO estimates that between 2004 and 2006, over one-third of children under the age of five were chronically malnourished.¹⁵²

In 2005, the German aid agency, Deutsche Gesellschaft für Zusammenarbeit (GTZ), published a report that highlighted the potential for growing biofuel crops in Tanzania.¹⁵³ The report specifically recommended the creation of a high-level Tanzanian task force to guide investment in biofuel projects in the country.¹⁵⁴ As described in Section IV below, Tanzania heeded the advice to establish a task force on biofuels, with assistance from foreign aid agencies. Also in the wake of the report, between 2006 and 2008, the Tanzanian government set aside 435,000 hectares of land for biofuel production.¹⁵⁵ It furthermore exempted exported biofuel from the 20 percent tax that it imposes on biofuel that is used domestically.¹⁵⁶

The projects discussed in this case study involve the cultivation of sugarcane to produce sugar and ethanol.¹⁵⁷ Measured in productivity per hectare, Tanzania is among the most efficient

¹⁴⁵ IFAD, Rural Poverty Portal, <http://www.ruralpovertyportal.org/web/guest/country/home/tags/tanzania> (last visited Feb. 28, 2010).

¹⁴⁶ 44 million hectares out of the total 94.5 million hectares land is arable land. SULLE & NELSON, *supra* note 66, at 15.

¹⁴⁷ FAO, Nutrition Country Profiles: Tanzania Summary, www.fao.org/ag/AGN/nutrition/TZA_en.stm (last visited Feb. 20, 2010).

¹⁴⁸ SULLE & NELSON, *supra* note 66, at 35 (citing United Republic of Tanzania [URT] Ministry of Energy and Minerals, *2008 Draft Guidelines for Sustainable Liquid Biofuels Investments and Development in Tanzania*).

¹⁴⁹ ACTIONAID, ETHANOL AT WHAT COST?, *supra* note 76, at 7.

¹⁵⁰ Tanzania Summary, *supra* note 147.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ ELKE FOERSTER ET AL., GERMAN TECHNICAL COOPERATION, LIQUID BIOFUELS FOR TRANSPORTATION IN TANZANIA: POTENTIAL AND IMPLICATIONS FOR SUSTAINABLE AGRICULTURE AND ENERGY IN THE 21ST CENTURY (Aug. 2005), <http://www.coet.udsm.ac.tz/biofuel%20documents/5.%20en-biofuels-for-transportation-in-tanzania-2005.pdf>. Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) is a federal organization tasked with assisting the German government's development objectives. GTZ, <http://www.gtz.de/en/index.htm> (last visited Sep. 26, 2010). GTZ has been operating on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ) in Tanzania since 1975. *Id.*

¹⁵⁴ FOERSTER ET AL., *supra* note 153, at 5.

¹⁵⁵ ACTIONAID, ETHANOL AT WHAT COST?, *supra* note 76, at 6.

¹⁵⁶ *Id.* at 7.

¹⁵⁷ See *supra* note 67 and accompanying text.

sugarcane producers per world.¹⁵⁸ Sugarcane production in Tanzania employs up to three different production models. In the first, corporations control all aspects of production on large-scale plantations. In the second—known as the “outgrower” model—corporations contract with outside farmers and independent suppliers to produce crops that are then sold to the corporations to process into biofuels. Finally, the third is a hybrid model that incorporates aspects of both small-scale farming and large-scale plantations.¹⁵⁹ The large-scale plantation approach is the primary production model planned for the Bagamoyo¹⁶⁰ and Rufiji projects,¹⁶¹ but there are also plans in formulation to contract local farmers to supply sugarcane as outgrowers.¹⁶²

III. INSTITUTIONAL FRAMEWORK

An examination of the role of institutional actors in this case study highlights the Tanzanian government’s approach to large-scale land investments in the country, and the particular role of the Swedish government as the investors’ home state. The current legislative context for foreign investments in Tanzanian land is a labyrinthine arrangement that contributes to transparency concerns and may therefore prevent full expression being given to the interests of host communities affected by projects.

A. RELEVANT ACTORS

The Swedish government has actively supported the biofuel industry in Tanzania—demonstrating how an investor’s home country can set the stage for large-scale land investments.¹⁶³ The Swedish International Development Authority (SIDA) provided financial support for the creation of Tanzania’s National Biofuels Task Force (NBTF),¹⁶⁴ an organ comprised of 11 Tanzanian government agencies.¹⁶⁵ Its responsibilities include reviewing existing regulations,

¹⁵⁸ In 2007, Tanzania produced 120 tons/hectare of sugarcane as compared to an average of 66 tons/hectares in other sugarcane producing countries. Only Peru is more efficient. FAO, FAO Statistical Yearbook 2009: Table B4, http://www.fao.org/fileadmin/templates/ess/documents/publications_studies/statistical_yearbook/yearbook2009/b04.xls.

¹⁵⁹ SULLE & NELSON, *supra* note 66, at 24.

¹⁶⁰ *Id.*

¹⁶¹ See SEKAB BioEnergy Tanzania Ltd, Company Profile 5 (Aug. 9, 2007), <http://www.coet.udsm.ac.tz/biofuel%20documents/SEKAB%20company%20profile%5B1%5D.doc> (last visited Oct. 8, 2010) (estimating that the Rufiji project will consist of “15-20 production units of 20,000 [hectares] each”).

¹⁶² Interview with CEO of EcoDevelopment, *supra* note 68.

¹⁶³ The Swedish government helped introduce biofuel production in Tanzania. It helped Tanzania establish a National Biofuels Task Force (NBTF) and facilitated contact between the Tanzanian government and SEKAB. See *id.* The National Biofuels Task Force has been funded primarily by both Sweden and Norway. Telephone Interview with Program Officer, Swedish Embassy in Tanz. (Mar. 4, 2010) (on file with authors).

¹⁶⁴ Press Release, SEKAB, Etanol i Tanzania –forskarna har fel! [Ethanol in Tanzania –Researchers are wrong!] (2009) [hereinafter Etanol i Tanzania], *available at*

<http://www.sekab.com/Sve2/Informationssidor/Information%20PDF/090204%20-%20Etanol%20i%20Tanzania%20-%20forskarna%20har%20fel.pdf>. Sweden and Norway are the primary funders of the NBTF; other countries are also involved and play an advisory function. According to the Program Officer of the Swedish Embassy in Tanzania, the Tanzanian government is also funding a small part of the project. The Program Officer notes that the involvement of the host government increases the likelihood of the project. Interview with Program Officer of the Swedish Embassy in Tanzania, *supra* note 163.

¹⁶⁵ SULLE & NELSON, *supra* note 66, at 32.

developing procedures to manage biofuel investments, and promoting the use of biofuel. The NBTf's purpose is to develop a sustainable program for these investments, taking into consideration national, community, and commercial interests, and the links between these interests and issues such as economic growth, poverty reduction, and economic empowerment.¹⁶⁶ The NBTf drafted guidelines for biofuel production that were supposed to have been enacted in 2008, but have yet to be put in place.¹⁶⁷

Because foreigners are not allowed to own land in the country, the Tanzanian Investment Centre (TIC) was established under the Land Act No. 4 of 1999 to facilitate investments by providing land derivative titles¹⁶⁸ that grant certain foreign investors a right of occupancy.¹⁶⁹ In exchange for an annual fee paid by the investor, the TIC identifies available land and assists in the process of obtaining the necessary permissions for land use by foreign investors. The process is complicated, requiring permission from several ministries as well as permission at the district level.¹⁷⁰

B. LEGAL FRAMEWORK

Tanzania has three designations for its land: general land, reserved land, and village land. All land is considered public with the President of Tanzania as trustee for all,¹⁷¹ but only general land is directly controlled by the government and may be leased to foreigners through a "granted right of occupancy" recognized through derivative titles that are issued by the TIC.¹⁷² Reserved land is that which is set aside for conservation purposes.¹⁷³ Village land is managed at the local level¹⁷⁴ and must be re-classified as general land before it can be leased. The President can re-classify village land to general land for proposed investments after obtaining the consent of the affected community and

¹⁶⁶ SONGELA & MACLEAN, *supra* note 66, at 10.

¹⁶⁷ As of March 2010, approval of the guidelines by the Cabinet was still pending. According to the Program Officer of the Swedish Embassy in Tanzania, the Cabinet endorsed the guidelines in early 2010, completing the main work of the legislation, though some technical details still needed to be finalized. The guidelines must also be translated into Swahili. Interview with Program Officer of the Swedish Embassy in Tanzania, *supra* note 163. In October 2009, "pending clear procedures and policies on such investments" the Tanzanian government reportedly imposed a moratorium on new investment in biofuels. Mike Mande, *Public fury halts biofuel onslaught on farmers*, THE E. AFRICAN (Oct. 5, 2009), available at <http://www.theeastafrican.co.ke/news/-/2558/667648/-/qy9vngz/-/>.

¹⁶⁸ A Tanzanian state-owned company must invest at least US \$100,000 to be allowed to lease through the Tanzanian Investment Centre, while a foreign or joint venture must invest at least US\$300,000. SULLE & NELSON, *supra* note 66, at 40.

¹⁶⁹ SONGELA & MACLEAN, *supra* note 66, at 26.

¹⁷⁰ SULLE & NELSON, *supra* note 66, at 40.

¹⁷¹ Land Act § 3-(1)(a) (1999) [hereinafter Tanzania Land Act], available at <http://www.parliament.go.tz/Polis/PAMS/Docs/4-1999.pdf>.

¹⁷² SULLE & NELSON, *supra* note 66, at 38, 39.

¹⁷³ *Id.* at 38; Tanzania Land Act, *supra* note 171, § 6-(1)(a).

¹⁷⁴ SULLE & NELSON, *supra* note 66, at 38 (citing LIZ ALDEN WILY, IIED, DRYLANDS PROGRAM, ISSUE PAPER NO. 120: COMMUNITY-BASED LAND TENURE MANAGEMENT: QUESTIONS AND ANSWERS ABOUT TANZANIA'S NEW VILLAGE LAND ACT, 1999 (2003), available at <http://www.iied.org/pubs/pdfs/9295IIED.pdf>). According to Sulle and Nelson, village land is defined as: "(a) any land within the boundaries of a registered village, including that land which was originally described as the village area or has been so demarcated through any procedure since then; (b) land agreed to be the land of a given village according to agreement between that village and its neighbours; [or] (c) any land which villagers have been using or occupying for the past 12 years." *Id.* at 39.

the Commissioner for Lands, a Commissioner within the Ministry of Lands and Human Settlements Development.¹⁷⁵

As noted above, foreigners are not allowed to buy land in Tanzania. However, under the Land Act, foreigners may lease land from the government for a term of up to 99 years.¹⁷⁶ Once an investor targets land that it intends to lease, the leasing process consists of several steps. If the targeted land is village land, the investor must first meet with the local Village Council, which will then decide whether the village and the investor will together forward the proposed investment plan to the District Council Land Committee for approval.¹⁷⁷ The Village Assembly, consisting of all villagers over the age of 18, must also vote to authorize the President to convert the land from village land to general land, making it eligible for lease to the investor.¹⁷⁸

When targeted land is converted from village land to general land, the affected village receives compensation based on an agreement that it negotiates with the Commissioner of Lands.¹⁷⁹ Though compensation is traditionally paid for what is on the land—such as buildings or cultivation—the land itself is not considered to have much value and is often leased very cheaply or even for free.¹⁸⁰ Investors often also promise work and investments in the area in exchange for use of the land.¹⁸¹

For the purposes of the analysis below, regulations concerning village land are most relevant, as the host population has to give consent for village land to be leased.¹⁸² According to the Village Land Act, every village should have a management plan, which provides the village with a “land certificate at the national level.”¹⁸³ Yet, as of 2009, only a small minority of the approximately 11,000 villages had such a plan.¹⁸⁴ Most villages therefore lack land certificates that confer official rights and only have customary rights over their land.¹⁸⁵

¹⁷⁵ *Id.* For the current organizational structure of the Ministry, see Ministry of Lands & Human Settlements Dev., The Current Organisation Structure of the Ministry of Lands, Housing and Human Settlements Development (Apr. 18, 2006), <http://ardhi.go.tz/sites/default/files/ORGANIZATIONAL%20STRUCTURE.pdf>.

¹⁷⁶ ACTIONAID, ETHANOL AT WHAT COST?, *supra* note 76, at 7.

¹⁷⁷ SULLE & NELSON, *supra* note 66, at 41.

¹⁷⁸ The Village Assembly consists of all adult villagers over the age of 18 years. *Id.* at 40–41.

¹⁷⁹ *Id.* at 41.

¹⁸⁰ ACTIONAID, ETHANOL AT WHAT COST?, *supra* note 76, at 7. The valuation of land is done under the authority of the Commissioner for Lands. Ministry of Lands and Human Settlements Development, Valuation, <http://www.ardhi.go.tz/valuation.html> (last visited May 26, 2010). If the local community is not satisfied with the amount of compensation determined by the Commissioner, it can appeal to the High Court. SULLE & NELSON, *supra* note 66, at 39 (citing WILY, *supra* note 174).

¹⁸¹ ACTIONAID, ETHANOL AT WHAT COST?, *supra* note 76, at 7.

¹⁸² Village land is a significant portion of the land that is open to potential investment. SULLE & NELSON, *supra* note 66, at 38.

¹⁸³ BARRY NESS ET AL., CTR. FOR SUSTAINABILITY STUDIES, LUND UNIVERSITY (LUCSUS), THE AFRICAN LAND-GRAB: CREATING EQUITABLE GOVERNANCE STRATEGIES THROUGH CODES-OF-CONDUCT AND CERTIFICATION SCHEMES 7 (2009), available at <http://www.earthssystemgovernance.org/ac2009/papers/AC2009-0294.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ See SULLE & NELSON, *supra* note 66, at 39 (“[E]ven villages do not have this certificate possess customary rights over land”).

As an additional requirement relevant to the Bagamoyo and Rufiji projects, under the Environmental Management Act of 2004, an environmental impact assessment (EIA) of biofuel projects in Tanzania must be carried out if the project stands to affect more than five hectares of land.¹⁸⁶ The EIA is meant to identify the project's potential environmental as well social impacts, and to present strategies for mitigating those impacts.¹⁸⁷ The EIA must also analyze alternatives to the project, including a "do nothing" option.¹⁸⁸ It is the responsibility of the developer of the project to conduct the EIA—independently or with the help of consultants—which is then submitted to Tanzania's National Environmental Management Council for review.¹⁸⁹

IV. INVESTMENT CHARACTERISTICS

The initial investor in the projects was SEKAB BT, a Tanzanian subsidiary of the SEKAB Group.¹⁹⁰ SEKAB BT acquired the right of occupancy to 22,000 hectares in Bagamoyo through the TIC.¹⁹¹ A small portion of the land has been under cultivation to produce sugarcane since 2008.¹⁹² In addition, SEKAB BT targeted, though did not acquire, 250,000 to 500,000 hectares for lease in the Rufiji district.¹⁹³ EcoDevelopment, SEKAB BT's successor to the projects, has maintained SEKAB BT's plans for large-scale land leasing in Rufiji, along with its plans to supplement crops from plantations on leased land with crops from local outgrowers.¹⁹⁴ EcoDevelopment intends that, in Bagamoyo, sugarcane from leased land and from outgrowers would be processed in a "flex" plant that would produce ethanol, as well as sugar, for the Tanzanian market.¹⁹⁵

In light of the basic facts above, this section focuses on two main dimensions of investment in the Bagamoyo and Rufiji projects: the complex changes in project ownership and negotiations between investors and members of host communities. The analysis of community-based negotiations focuses on Rufiji, where targeted land is more heavily inhabited than land involved in the Bagamoyo project.¹⁹⁶ According to EcoDevelopment, negotiations in Rufiji have not yet led to a land agreement.¹⁹⁷ As a result this case study looks at the process of acquiring community consent rather than the outcome of these negotiations.

¹⁸⁶ SONGELA & MACLEAN, *supra* note 66, at 27.

¹⁸⁷ *Id.* at 28.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ SEKAB BT Credit Application, *supra* note 70. *See also* SEKAB sells subsidiaries, *supra* note 72 (describing SEKAB BT as a subsidiary of SEKAB).

¹⁹¹ SULLE & NELSON, *supra* note 66, at 47 (finding that land in Bagamoyo has been "[g]ranted to SEKAB BT by TIC; derivative right still being processed").

¹⁹² COMPETE ASSESSMENT, *supra* note 83, at 1; Interview with CEO of EcoDevelopment, *supra* note 68 (stating that 100-200 hectares are being used to grow sugarcane).

¹⁹³ SULLE & NELSON, *supra* note 66, at 47.

¹⁹⁴ Interview with CEO of EcoDevelopment, *supra* note 68.

¹⁹⁵ *See supra* notes 67-68 and accompanying text.

¹⁹⁶ Interview with CEO of EcoDevelopment, *supra* note 68.

¹⁹⁷ E-mail from CEO of EcoDevelopment (Oct. 5, 2010), *supra* note 66.

A. CHANGES IN OWNERSHIP

In July 2009, SEKAB BT announced that its parent company, the SEKAB Group, was searching for “new investors” to acquire its African investments, including SEKAB BT.¹⁹⁸ The SEKAB Group’s majority shareholders—a regional consortium of municipally-owned Swedish energy companies¹⁹⁹—opposed its investments abroad.²⁰⁰ Ultimately, the SEKAB Group found its new investor from within. EcoDevelopment, a minority owner of the SEKAB Group, purchased the parent company’s investment in SEKAB BT in October 2009.²⁰¹

The sale from the SEKAB Group to EcoDevelopment marked a transfer in control from one Swedish company to another. However, even after the sale, the SEKAB Group continued to have a stake in the projects through personnel and contractual terms. Three “individuals connected to EcoDevelopment” sit on the SEKAB Group’s board.²⁰² Furthermore, EcoDevelopment granted the SEKAB Group an “off-take contract and repayment clause” providing it rights to acquire future ethanol production from Bagamoyo and Rufiji in order to recover its past losses on African ethanol projects.²⁰³ Under these arrangements, the SEKAB Group not only retains potential lines of communication with respect to the projects, but also carries a financial interest in their eventual success.

Following its purchase of SEKAB BT, EcoDevelopment now manages the projects through two corporate entities which it controls: EcoEnergy Tanzania, incorporated in Tanzania, and EcoEnergy Africa, incorporated in Sweden.²⁰⁴ The CEO of EcoDevelopment explains that the establishment of multiple corporations is due to “legal formalities” that will enable the projects to secure funding from different sources.²⁰⁵ Ownership of the projects will continue to shift if, as the CEO hopes, the EcoDevelopment companies are able to sign agreements with additional investors in early 2011.²⁰⁶

¹⁹⁸ SEKAB BT Credit Application, *supra* note 70.

¹⁹⁹ *Id.*

²⁰⁰ Interview with CEO of EcoDevelopment, *supra* note 68. See SEKAB BT Credit Application, *supra* note 70 (explaining that the SEKAB Group was “[attempting] to separate the African ventures from the municipalities in northern Sweden”). In September 2010, a resident of one of the municipalities constituting the regional consortium filed a complaint in Swedish administrative court charging that the municipality violated local law by financing the SEKAB Group’s investments in Africa. *Filed complaint about SEKAB’s Africa venture*, DEV. TODAY, Sept. 20, 2010, available at http://www.development-today.com/magazine/2010/dt_13/business/filed_complaint_about_sekabs_africa_venture.

²⁰¹ SEKAB sells subsidiaries, *supra* note 72. Prior to the purchase by EcoDevelopment, SEKAB BT had signed an MOU inviting the national Tanzania Petroleum Development Corporation to become a ten-percent owner of the Bagamoyo and Rufiji projects. Another minority investor, the Community Finance Corporation Limited (CFC), owned a 1.5 percent share. SEKAB BT Credit Application, *supra* note 70; see also E-mail from CEO of EcoDevelopment (Oct. 5, 2010), *supra* note 66 (confirming that CFC remains a minority investor).

²⁰² SEKAB sells subsidiaries, *supra* note 72.

²⁰³ *Id.*

²⁰⁴ E-mail from CEO of EcoDevelopment (Oct. 1, 2010), *supra* note 86.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

B. LOCAL AGREEMENTS

Several steps in the investment process require interaction with host communities. SEKAB BT negotiated directly with villages in Rufiji district in order to acquire their consent for leasing their village land in accordance with the legal framework outlined above.²⁰⁷ According to interviews carried out by ActionAid Sweden for its report *SEKAB-Ethanol At What Cost? How SEKAB's Biofuel Project in Tanzania Affects the Local Population* (ActionAid Report),²⁰⁸ villagers received between 6,000 and 9,000 shillings (US \$4.40 to \$6.60) in compensation to come to town meetings where they voted on the project. Some villagers were reportedly promised the right to use SEKAB BT's tractors on their own land as an incentive to get them to agree to SEKAB BT's investment.²⁰⁹

According to the ActionAid Report, villagers expressed concerns about their future livelihood, such as whether they would lose access to their land, without any guarantee of employment in the plants.²¹⁰ Moreover, some villagers in the Rufiji district were reportedly unaware of their land rights when they consented to the land agreement with SEKAB BT. One villager interviewed for the ActionAid Report stated: "If we had had education about our land rights or knowledge about the rules and how it is done, we would have acted differently and we would have had a different agreement with SEKAB today."²¹¹ The villagers were also confused about whether SEKAB BT was buying or leasing their land. The same villager continued: "We realized that we did not know whether we sold our land or leased it for 50 or 99 years."²¹²

As described in the ActionAid Report, some female villagers noted their apprehensions about the decision to lease land to SEKAB BT.²¹³ Because the final say lies with the village assembly, which is dominated by men, these women did not feel as though they had a voice in the matter, even though the new plantations could affect them deeply. They may, for example, have to travel further and find new areas from which to collect firewood and make charcoal.²¹⁴

It remains unclear how, if at all, the change in ownership from the SEKAB Group to EcoDevelopment will alter the nature of local agreements and other activities on the ground. According to its CEO, EcoDevelopment is aware of the ActionAid Report and would like to "cooperate with organizations" to promote a manner of development that benefits the "whole family."²¹⁵

²⁰⁷ See *supra* section III.B.

²⁰⁸ The original report is in Swedish. Information cited in this Report has been translated to English.

²⁰⁹ ACTIONAID, *ETHANOL AT WHAT COST?*, *supra* note 76, at 14.

²¹⁰ *Id.* at 14, 15.

²¹¹ *Id.* at 14.

²¹² *Id.*

²¹³ See, e.g., *id.* at 13, 18 (recounting that one woman in Rufiji was concerned that water use by SEKAB BT would increase crop yields on the company's own plantations while decreasing crop yields on neighboring land, while another woman in Rufiji, who had heard that farmers in other places have lost their land following an influx of heavy investment, reported being scared that she, too, will lose her land).

²¹⁴ See *id.* at 12, 13, 18 (explaining that Rufiji women typically are responsible for supplying food for their families, and that the site of SEKAB BT's operations may require the women to travel farther to collect wood).

²¹⁵ E-mail from CEO of EcoDevelopment (Oct. 5, 2010), *supra* note 66. E-mail from Chairman of EcoEnergy Tanzania, *supra* note 67 ("The project will also provide a major opportunity for a large number of small farmers, out growers, to activate idle land and produce sugar cane with a guaranteed off taker in the project.").

V. REFLECTIONS ON POTENTIAL IMPACT OF INVESTMENT

This section explores the potential social, economic, and environmental impacts of the investment, and particularly its effects on host communities. As noted above, the Bagamoyo and Rufiji projects are in their initial stages, which makes these observations preliminary.

With respect to benefits from the project, both SEKAB BT and subsequently EcoDevelopment have emphasized that a goal of these projects is to help free Tanzania from its dependence on oil imports.²¹⁶ EcoDevelopment has also asserted that the project will ensure activation of “idle land and produce sugar with a guaranteed off taker in the project.”²¹⁷ They have asserted that switching from charcoal to ethanol as a fuel source may have added benefits, such as positive impacts on public health.²¹⁸ In addition, EcoDevelopment has stated that, together with aid organizations and the Tanzanian government, it may build infrastructure necessary to support the biofuels industry in Rufiji.²¹⁹ Ethanol plants might also encourage labor migration, potentially stimulating the local economy.²²⁰

However, increased migration could also compound environmental concerns and put greater pressure on natural resources, while harming prospects for local employment at the plants.²²¹ The extent to which outgrowers will be compensated and their labor rights protected is also uncertain. According to the ActionAid Report, research on biofuels production in Tanzania has shown that outgrowers may earn substantially less than farmers who do not participate in the outgrower scheme.²²²

Other potential risks include disruptions in the daily life of villagers—and women in particular²²³—due to water shortages and reduced grazing land. The risk of displacement²²⁴ may give rise to disputes and social tension.²²⁵

²¹⁶ See Etanol i Tanzania, *supra* note 164 (asserting that if SEKAB BT’s projects succeed, Tanzania could be eliminate dependency on foreign oil in two to three decades); E-mail from Chairman of EcoEnergy Tanzania, *supra* note 67 (“[W]e also intend to produce ethanol in order to meet as much as possible of the national requirement to blend ethanol into the national gasoline pool in order to reduce the dependency on oil imports.”).

²¹⁷ See E-mail from Chairman of EcoEnergy Tanzania, *supra* note 67.

²¹⁸ See Interview with CEO of EcoDevelopment, *supra* note 68 (positing that the use of ethanol in indoor cooking stoves will alleviate health problems suffered by women who have heretofore been using charcoal for cooking).

²¹⁹ *Id.* SEKAB had also speculated substantial economic benefits for the Tanzanian government, as noted in the IIED Tanzania Report, “SEKAB BT (2008) suggests that the development of two million hectares of land for bioethanol in Tanzania would, over a 20-25 year period, generate US\$ 7 billion in revenue and one million new direct and indirect jobs.” Over the past 20 years it has been difficult to foresee the national economical impacts and the rural incomes by foreign direct investments and national economic growth. SULLE & NELSON, *supra* note 66, at 30.

²²⁰ See ACTIONAID, ETHANOL AT WHAT COST?, *supra* note 76, at 17 (predicting that labor migration into the area could boost sales of food and lodging).

²²¹ *Id.*

²²² See *id.* at 16 (finding, based on field research, that “independent” farmers may sell their jatropha biofuels crops for up to five times as much per kilogram than farmers bound by outgrower contracts with large businesses).

²²³ For instance, the United Nations Development Fund for Women (UNIFEM) has highlighted the impacts on women from increased food insecurity, noting that “th[ese] insecurity[ies] [are] compounded by a comparative lack of assets and arable land, and in some cases lack of the right to own the very land they till.” UNIFEM, Facts & Figures on Gender

According to the CEO of EcoDevelopment, the property leased in Bagomoyo through the TIC was unused.²²⁶ SEKAB BT, which negotiated the terms of the investment agreement with the Tanzanian government and with the host population, has also stated that large parts of the land that it intended to use were unused and that its plantations would not compete with food crops.²²⁷ However, according to a report by the International Institute for Environment and Development (IIED), entitled *Biofuels, Land Access and Rural Livelihoods in Tanzania* (IIED Tanzania Report), “14 households and some pastoralists were compensated for being displaced,”²²⁸ suggesting that some evictions may have occurred.

Even if the land targeted in Bagamoyo and Rufiji districts were uninhabited, daily life in surrounding communities, particularly among women who traditionally bear responsibility for the household, could still be affected. According to the ActionAid Report, “all land in the country is under use of some kind.... [U]noccupied lands are traditionally important areas for seasonal livestock grazing, extraction of forest products, or other important livelihood uses.”²²⁹ The report adds that the use of the land as sugarcane plantations would affect the local population’s access to firewood and charcoal, which account for 98 percent of energy consumption by local households.²³⁰ Unoccupied land may also be used for food and building materials.²³¹ If villagers have to move in order to secure access to new areas of land, there is a risk of disputes and social tensions.²³²

To the extent that sugarcane for ethanol production,²³³ and not food commodities, will be grown on arable land, this raises concerns that less land will be available for future food crop production.²³⁴ The managing director of SEKAB BT countered this critique by asserting that large-scale land investments will provide much-needed knowledge in farming techniques that, in turn, can

and Climate Change, http://www.unifem.org/partnerships/climate_change/facts_figures.php (last visited Oct. 26, 2010). See also *supra* note 26 and accompanying text.

²²⁴ See *Interim Report of the Special Rapporteur*, *supra* note 135, ¶ 25 (“In the United Republic of Tanzania, five years after a major titling effort had begun, pastoralists reported their eviction from multiple common grazing areas and were under threat of losing other grazing lands because those lands had been classified as ‘unused.’”).

²²⁵ As noted by OXFAM in a July 2008 summary report of a study conducted on behalf of Land Rights Research and Resources Institute (LARRRI) and Joint Oxfam Livelihood Initiative for Tanzania (JOLIT), “we are likely to see, [*vis*] increased land disputes as investors succeed to penetrate these areas [of supposedly underutilized land]. Such penetration in turn, is likely to be accompanied by human displacement and disruption of livelihood supporting activities as land is alienated.” OXFAM, *THE AGROFUEL INDUSTRY IN TANZANIA: A CRITICAL ENQUIRY INTO CHALLENGES AND OPPORTUNITIES* 9 (July 2008), available at <http://www.tnrf.org/node/9088>. Additionally, OXFAM found that “[l]ocal NGOs appear conscious of the threat of displacement of rural communities as well as food security for the marginalized.” *Id.* at 53.

²²⁶ Interview with CEO of EcoDevelopment, *supra* note 68.

²²⁷ Ethanol in Tanzania, *supra* note 164.

²²⁸ SULLE & NELSON, *supra* note 66, at 48 (citing SONGELA & MACLEAN, *supra* note 66).

²²⁹ ACTIONAID, *ETHANOL AT WHAT COST?*, *supra* note 76, at 4.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 17.

²³³ See *supra* note 67.

²³⁴ *Id.* at 18. The food rights advisor for ActionAid Tanzania highlighted a concern regarding using the land for biofuel production instead of food crops and emphasized that this might lead to negative impacts. Telephone Interview with food rights advisor, ActionAid Tanz. (Mar. 9, 2010) (on file with authors).

make farming more efficient and allow for both biofuel and food crops to grow on the land.²³⁵ SIDA, the Swedish development agency that helped finance Tanzania's task force on biofuels, has additionally expressed concern that the projects are "high risk" with respect to their environmental impact.²³⁶

IIED noted concerns regarding villagers' access to water.²³⁷ Water supply is at the center of allegations of misconduct concerning the EIA of the Bagamoyo project, which SEKAB BT hired a Swedish consulting firm, Orgut, to conduct. According to the Orgut team leader in charge of the EIA, SEKAB BT altered Orgut's findings before submitting the EIA for review by the Tanzanian government.²³⁸ In particular, Orgut asserts that SEKAB BT removed a finding which showed that the amount of irrigation required on the project's sugarcane plantations would be "high and sometimes exceed available water" from the Wami River—even as nearby residents rely on the same water source.²³⁹ SEKAB BT refuted the claim that the project will have significant negative environmental impacts, and added that they will use technology to mitigate potential problems such as water shortage.²⁴⁰ In response to the allegation that it had modified Orgut's findings, SEKAB BT indicated that any changes to the report were not made by the company, but by additional consultants that it asked to assist with the EIA.²⁴¹ Although EIA submitted by SEKAB BT was ultimately approved by Tanzania's National Environmental Management Council,²⁴² EcoDevelopment's CEO states that there are plans to conduct further feasibility assessments to evaluate the project's potential impacts.²⁴³

VI. CONCLUDING OBSERVATIONS

As the Bagamoyo and Rufiji projects have yet to be fully implemented, the company controlling the projects have the opportunity to make modifications so that the investments respect the rights of host community members and further their development needs. For example, the impacts highlighted immediately above make clear the importance of realistic impact assessments that encompass local employment, access to productive resources, arrival of new technologies and investment in infrastructure, environmental impacts, and access to food.²⁴⁴

²³⁵ Etanol i Tanzania, *supra* note 164. In this document, Anders Bergfors is referred to as "Chef SEKAB Östafrika," although elsewhere, e.g. SEKAB BT Credit Application, *supra* note 70, his title is described consistently as Managing Director of SEKAB BT.

²³⁶ *Sida spells out 'high' risks of SEKAB's African biofuel plan*, DEV. TODAY, Nov. 16, 2009, available at http://www.development-today.com/magazine/2009/DT_17/Business/4922.

²³⁷ See SULLE & NELSON, *supra* note 66, at 3 ("The environmental impact of biofuel plantations could involve could involve water scarcity and deforestation, particularly in coastal areas.")

²³⁸ SEKAB 'substantially altered' biofuel study, kept Orgut's name, *supra* note 77.

²³⁹ *Id.*

²⁴⁰ SULLE & NELSON, *supra* note 66, at 31-32 (citing interview with company officials).

²⁴¹ *Green light for Bagamoyo*, *supra* note 79.

²⁴² *Id.*

²⁴³ Interview with CEO of EcoDevelopment, *supra* note 68.

²⁴⁴ See De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 9 ("Only through such impacts, which should include a participatory dimension, can it be ensured that the contracts providing for the lease or sale of land will distribute the benefits equitably between the local communities, the host State, and the investor.")

Prior to any shifts in land use from the projects, affected communities must provide their free, prior, and informed consent.²⁴⁵ In inhabited areas of Rufiji, interviews with villagers conducted by ActionAid Sweden suggest that at least some members of the community may not have given informed consent to the investment plan, reportedly due to insufficient information and dubious enticements provided by SEKAB BT.²⁴⁶ As noted above, even in cases where land is uninhabited, the livelihood of surrounding communities that may depend on such land for access to productive resources can be greatly affected.²⁴⁷ In the case of land that is inhabited, displacement of the affected population should only be conducted in “the most exceptional circumstances” and in accordance with national law.²⁴⁸ Adequate compensation, resettlement, or access to productive land must also be offered to those displaced.²⁴⁹ The information available on the fourteen households and some pastoralists who were reportedly displaced in the Bagamoyo district is insufficient to evaluate here the conditions of the displacement or what sort of reparation they received.²⁵⁰ It is also not possible to assess whether all feasible alternatives were exhausted or whether the compensation paid was adequate.²⁵¹

Full transparency is needed to ensure the “full realization of [the local population’s] human rights” and to ensure that land use services their long-term needs.²⁵² As a preliminary matter, the Tanzanian government must ensure that the active involvement of foreign states and corporations in establishing and advising government institutions does not result in foreign agendas undermining affected communities’ rights and needs. Both the TIC and the NBTF, the two key institutional drivers of biofuel investments in Tanzania, have an important role to play in this process. Each institution should ensure the meaningful participation of affected communities in its work, for example, by making both the negotiation process and the content of the investment agreements available for scrutiny. In addition, under its mandate to facilitate investment in Tanzania, the TIC could help ensure that foreign investors are aware of the rights of host communities with respect to land leasing. For its part, the multi-agency NBTF should account for the many needs—including economic, social, and environmental—of affected communities.

The case study does reveal in particular the need for greater education about land rights among community members, as well as the need to ensure that women—who may be deeply affected by such projects—are able to play an active and meaningful role in community consent procedures. Should the projects move forward, the gender-based impacts of investment must be appreciated and addressed.

²⁴⁵ *Id.* at 16, Principle 2.

²⁴⁶ *See supra* Section IV.B.

²⁴⁷ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 2 (“[Forced evictions] are only allowable under international law when they are in accordance with the locally applicable legislation, when they are justified as necessary for the general welfare, and when they are accompanied by adequate compensation and alternative resettlement or access to productive land.”).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See supra* Section V.

²⁵¹ *See id.*

²⁵² De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 1.

Tanzania requires impact assessments to be carried out prior to any large-scale land investment. SEKAB BT has conducted some assessments and EcoDevelopment intends to conduct more. These assessments should retain a measure of independence from the investor, and be carried out both prior to the negotiations and after the investment. Environmental concerns, including the sufficiency of local water sources for the projects as well as for local communities, should continue to be taken into account on an ongoing basis, as natural resource constraints may change over time.²⁵³

EcoDevelopment has indicated that it intends to hire local community members on its plantations. Here, labor-intensive farming systems that maximize employment creation and that provide living wages for the host community ought to be prioritized.²⁵⁴ The use of outgrowers could be one such labor-intensive alternative.

Ultimately, and as discussed in Section V, the use of arable land for sugarcane-based biofuel production may affect access to food if it displaces food crop production. To the extent that such investments use land that could instead be used for food production, the projects carry a potential opportunity cost to food security that the government of Tanzania should consider before allocating the land for biofuels.²⁵⁵

²⁵³ *See id.* at 17, Principles 6 and 9 (instructing host states and investors to promote modes of agricultural production that safeguard the environment and freshwater reserves; citing soil depletion and genetic erosion as potential effects of large-scale land acquisitions or leases).

²⁵⁴ *Id.* at 17, Principle 5.

²⁵⁵ *See id.* at 16, Principle 1 (“In considering whether or not to conclude an agreement with an investor, the host government should always balance the advantages of entering into such an agreement against the opportunity costs involved, in particular when other uses could be made of the land available, which could be more conducive to the long-term needs of the local population concerned and the full realization of their human rights.”)

CASE STUDY TWO: A LARGE-SCALE TREE PLANTATION AND CARBON CREDIT SCHEME IN SOUTHERN SUDAN

I. INTRODUCTION

This case study evaluates the potential impacts of investments by TreeFarms Sudan, Ltd. (TreeFarms), which is in the process of acquiring land in Southern Sudan to establish a tree plantation and forest conservation project.²⁵⁶ The purpose of the investment is to produce timber, rehabilitate degraded forest areas, and generate revenue from carbon offsets.²⁵⁷ The company is seeking a total of 179,000 hectares from the Tindilo Community in Terekeka County, Central Equatoria State (CES), and has agreed to certain commitments in exchange for a 99-year lease.²⁵⁸ TreeFarms began initial negotiations with the community in 2007, started trial planting in 2008, and as of September 2010, was in the final stages of obtaining title to the land.²⁵⁹

Analysis of the terms of the TreeFarms investment in this case study is based on a wide range of sources, including: interviews with TreeFarms employees, government officials, and experts on land tenure in Sudan;²⁶⁰ a review of the investment agreement between TreeFarms, the CES Ministry of Agriculture and Forestry, and the Tindilo Community;²⁶¹ and information from corporate management at Green Resources, as well as information available in the company's own

²⁵⁶ TreeFarms is a wholly-owned subsidiary of Green Resources AS (Green Resources), a Norwegian company that invests in forest plantations, carbon offsets, forest products, and renewable energy in Africa. GREEN RESOURCES, ANNUAL REPORT, *supra* note 92, at 2; Green Resources, <http://www.greenresources.no/> (last visited Mar. 18, 2010).

²⁵⁷ GREEN RESOURCES, ANNUAL REPORT, *supra* note 92, at 13. The company hopes to earn carbon credit income under the Clean Development Mechanism (CDM).

²⁵⁸ *Id.* at 5 (stating that 20 percent of the 179,000 hectares will be devoted to growing hardwoods such as teak and eucalyptus, and the remainder will be managed as a forest conservation project to generate carbon offsets). *See also* Land Title Agreement between Ministry of Agriculture & Forestry, Central Equatoria State [CES] and TreeFarms Sudan Ltd. [TreeFarms], Preamble (n.d.) [hereinafter Land Title Agreement] (agreeing that TreeFarms is “ready and financially capable to invest and develop the property into a treefarms production” and “both the CES and...[TreeFarms] are desirous of entering into partnership in developing the property into an economically productive firm.”).

²⁵⁹ According to the company's annual report, title to the land was obtained in 2007. GREEN RESOURCES, ANNUAL REPORT, *supra* note 92, at 12-13. However, according to interviews with TreeFarms employees in Southern Sudan, the company has not yet acquired title to the land. Interview by Elizabeth Ashamu, J.D. Candidate, N.Y. Univ. Sch. of Law, with Country Manager, TreeFarms Sudan, in Juba, Sudan (Aug. 6, 2009) (on file with authors) (stating that the company was “very close” to obtaining title, after which they would discuss some “hard facts” about how much they could pay for the land and how they would implement the local community support) [hereinafter Interview with Country Manager of TreeFarms Sudan]; Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94 (stating that the Land Title Agreement is now on the desk of the Central Equatoria State Governor, whose signature will finalize the transaction).

²⁶⁰ The case study refers to interviews with: the Terekeka County Commissioner, the Director of Forestry for Terekeka County, the Director General of Forestry at the CES Ministry of Agriculture and Forestry, Members of Parliament representing Western Terekeka at the CES Legislative Assembly, the Plantation Manager of TreeFarms Sudan, and the Country Director of TreeFarms Sudan, among other interviews.

²⁶¹ The investment agreement provided by the company in September 2010 consists of a Land Title Agreement and an agreement outlining the terms of the company's Community Support Program. Land Title Agreement, *supra* note 258; Appendix to Land Title Agreement: Agreement about Community Support Program (CSP) between Tindilo Payam Community/Terekeka County-CES, Juba, and TreeFarms (Feb. 1, 2008) [hereinafter Community Support Program Agreement].

reports.²⁶² The investment agreement includes both a Land Transfer Agreement and a Community Support Program Agreement, both of which are included as appendices to this Report.

At the time the parties began negotiations in 2007, there was considerable uncertainty regarding applicable sources of law in Southern Sudan.²⁶³ Consequently, as of September 2010, the company had spent more than two years pursuing title to the land in Tindilo.²⁶⁴ Although legislation introduced in February 2009 includes a number of safeguards for community rights in land transfers above a certain size,²⁶⁵ the broad drafting and lack of implementing regulations of the legislation have limited its impact. Both the Ministry of Agriculture and Forestry and TreeFarms have asserted that open consultations were conducted with members of the host community.²⁶⁶ However, in this uncertain climate, and based on an evaluation of the investment agreement, community participation may not be enough to protect the interests of the affected community. This case study also raises concerns about the transitional political context in which such investments are being made, and their potential impact on host populations.

II. CONTEXT

Sudan is a much sought-after location for land acquisitions.²⁶⁷ Due to the uncertainty of the transitional context in the South of the country, most of the investment activity is currently concentrated in the North. There is reason to believe, however, that this may change in the near future.²⁶⁸ The 37-year-long civil war between the North and South was brought to an end with the signing of the Comprehensive Peace Agreement (CPA) in 2005.²⁶⁹ The CPA established the

²⁶² GREEN RESOURCES, ANNUAL REPORT, *supra* note 92; GREEN RESOURCES, TINDILO REDUCED EMISSIONS, *supra* note 97.

²⁶³ See Sara Pantuliano, *Going Home: Land, return and reintegration in Southern Sudan and the Three Areas*, in UNCHARTED TERRITORY: LAND, CONFLICT AND HUMANITARIAN ACTION 153, 165 (Sara Pantuliano ed., 2009) [hereinafter UNCHARTED TERRITORY], available at <http://www.odi.org.uk/resources/download/4566-l-full-contents.pdf> (noting the “vacuum” that existed after GoSS rejected Northern laws without first adopting its own comprehensive set of laws).

²⁶⁴ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94.

²⁶⁵ See Land Act, ch. V, § 15(5)-(6), ch. VIII, § 53(2) (2009) [hereinafter GoSS Land Act] (requiring that “[a]ny allocation of a piece of land beyond 250 feddans for commercial, agricultural, forestry, ranch, poultry, or farming purposes shall be approved by the Concerned Ministry in the State” and be based on a “land ceiling”). A feddan measures a little more than an acre, and “impl[ies] the area of ground that can be tilled by [a yoke of oxen] in a certain time.” WIKIPEDIA, Feddan, <http://en.wikipedia.org/wiki/Feddan> (last visited Oct. 8, 2010).

²⁶⁶ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94; Interview by Elizabeth Ashamu, J.D. Candidate, N.Y. Univ. Sch. of Law, with Dir. Gen. of Forestry, CES Ministry of Agric. & Forestry, in Juba, Sudan (Aug. 5, 2009) [hereinafter Interview with Director General of Forestry, CES Ministry] (on file with authors).

²⁶⁷ See COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121, at 17 (indicating that Sudan, along with Ethiopia, Madagascar, Mozambique, and Tanzania, are “hotspot[s] for international land acquisitions”). According to the World Bank, nearly four million hectares of land was transferred to investors in Sudan between 2004 and 2009, more than any other country surveyed. RISING GLOBAL INTEREST IN FARMLAND, *supra* note 10, at 44.

²⁶⁸ See, e.g., Telephone Interview with Program Manager, Land & Res. Rights, Norwegian People’s Aid (NPA) (May 6, 2010) [hereinafter Interview with Program Manager, NPA] (on file with authors) (noting that investment will likely increase after the 2011 elections and relaying information from the Terekeka County Commissioner, who mentioned having been contacted by investors from the US and China).

²⁶⁹ The CPA was signed between the National Congress Party (NCP), the dominant political party in the national government, and the Sudan People’s Liberation Movement and Army (SPLM/A), a Southern rebel movement that has since become the dominant political party in the autonomous GoSS. Government of Southern Sudan, History of Southern Sudan, <http://www.GoSS-online.org/magnoliaPublic/en/about/history.html> (last visited Sept. 30, 2010).

autonomous Government of Southern Sudan (GoSS), which is the highest authority in Southern Sudan and sits above the state and local governments in the federal hierarchy.²⁷⁰ In addition, the Agreement provided that on January 9, 2011, Southern Sudanese are scheduled to vote in a referendum on self-determination to decide whether the region will remain united with the North or secede and become an independent nation.²⁷¹ If the referendum proceeds smoothly and the peace is maintained, investors will likely be drawn to the resource-rich land of Southern Sudan.²⁷² This influx of investment would present both opportunities and risks for an independent South. Properly regulated land investments could help diversify the region's economy and improve agricultural productivity.

The lengthy civil war took a heavy toll on the region, and foreign direct investment can help to build an agricultural sector that is currently unable to provide adequate supplies of food for the domestic population.²⁷³ However, Southern Sudan is an extremely fragile environment prone to food insecurity and conflict and, if not carefully designed,²⁷⁴ large-scale land investments risk complicating efforts to provide the Southern Sudanese with secure access to food. The 2005 CPA set the stage for development in the South, but governance systems remain weak and the oversight mechanisms that are required to monitor investor activity are not yet fully operational.²⁷⁵ Furthermore, natural resources in the South are facing increased demands from the return of Southern Sudan's large internally displaced and refugee population, and large-scale land investments risk throwing local groups into increased competition for available land.²⁷⁶

A. GENERAL COUNTRY INFORMATION

With an area of approximately 2.5 million square kilometers, Sudan is geographically the largest country in Africa. Southern Sudan occupies about one-third of that area, or approximately

²⁷⁰ See Government of Southern Sudan, Politics, <http://www.goss-online.org/magnoliaPublic/en/about/politicalsituation.html> (last visited Oct. 27, 2010); Presidency of the Government of Southern Sudan, <http://www.goss-online.org/magnoliaPublic/en/president.html> (last visited Oct. 27, 2010).

²⁷¹ The referendum is provided for in the 2005 Comprehensive Peace Agreement (CPA), which brought to an end 22 years of war between the North and South in Sudan. Comprehensive Peace Agreement (CPA), ch. I, pt. B, § 2.5, *available at* <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>.

²⁷² Interview with Program Manager, NPA, *supra* note 268.

²⁷³ U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS [UN OCHA], HUMANITARIAN UPDATE: SOUTHERN SUDAN: ISSUE NO. 1 (Feb. 17, 2010), http://www.reliefweb.int/rw/rwb.nsf/retrieveattachments?openagent&shortid=ASHU-82UU4X&file=Full_Report.pdf.

²⁷⁴ *Id.*

²⁷⁵ The Southern Sudan Investment Authority [SSIA] was established by presidential decree in May 2008 and became operational with the enactment of the Investment Promotion Act in 2009. The SSIA is responsible for the licensing, promotion and facilitation of all investment activities in Southern Sudan. It remains, however, a young institution that has not yet fully assumed its role. See PEACE, SECURITY AND DEVELOPMENT NETWORK [PSDN], PUBLIC PRIVATE COOPERATION IN FRAGILE STATES, COUNTRY REPORT: SOUTHERN SUDAN 16 (Sept., 2009), *available at* http://www.clingendael.nl/publications/2009/20090900_report_cru_southern_sudan.pdf (indicating that resource constraints may hamper the initial effectiveness of the SSIA).

²⁷⁶ See INT'L RES. GROUP [IRG], SOUTHERN SUDAN ENVIRONMENTAL THREATS AND OPPORTUNITIES ASSESSMENT: BIODIVERSITY AND TROPICAL FOREST ASSESSMENT 48 (Sept., 2007), http://pdf.usaid.gov/pdf_docs/PNADL108.pdf (prepared for the United States Agency for International Development [USAID]) (indicating that returning populations increase demand for *inter alia*, construction and cooking materials).

640,000 square kilometers.²⁷⁷ Although hotly contested, the 2009 Census estimates the population of Southern Sudan at 8.26 million.²⁷⁸ The vast majority of this population is thought to reside in rural areas.²⁷⁹ Despite the perceived abundance of land in Southern Sudan,²⁸⁰ most land in the region is already subject to preexisting claims. According to Øystein Rolandsen, a researcher with the International Peace Research Institute in Oslo, “There are hardly any areas in Southern Sudan which can be considered *terra nullius* (no man’s land). Most of the territory belongs to someone in the sense that authority is claimed to regulate access to land and the use of its resources.”²⁸¹

Southern Sudan’s economy is dominated by oil.²⁸² The economy is currently in a state of flux due to the drop in global oil prices, distortions created by significant amounts of donor aid, and the return of large numbers of internally and externally displaced people who have not yet become economically established.²⁸³ If properly structured, foreign direct investment in land can help to develop the agricultural sector, offering an important source of diversification for the economy.²⁸⁴ Domestic food production has not yet reached self-sufficiency, and the population is highly dependent on food imports from neighboring countries such as Kenya and Uganda, in addition to large amounts of food aid.²⁸⁵ Agricultural production is mostly limited to traditional cultivation systems, such as shifting agriculture and slash-and-burn methods.²⁸⁶ Farmers typically cultivate a

²⁷⁷ *Id.* at 6.

²⁷⁸ Southern Sudan Centre for Census, Statistics, and Evaluation [SSCCSE], *5th Sudan Population and Housing Census – 2008: Priority Results* (Apr. 26, 2009), available at http://southsudaninfo.net/wp-content/uploads/reference_library/reports/5th_population_housing_census_sudan.pdf.

²⁷⁹ The United Nations Environment Program [UNEP] estimates that approximately 70 percent of the population of Sudan lives in rural areas, and 30 percent in towns and cities. Given that Southern Sudan is more rural than the north, the rural population in the south is likely higher than 70 percent. UNEP, *SUDAN: POST-CONFLICT ENVIRONMENTAL ASSESSMENT 32* (2007), available at http://postconflict.unep.ch/publications/UNEP_Sudan.pdf.

²⁸⁰ By way of comparison, Uganda, on Sudan’s southern border, is less than half the size of Southern Sudan and has a population of approximately 30 million people. US Department of State, Background Note: Uganda, <http://www.state.gov/r/pa/ei/bgn/2963.htm> (last visited Sept. 30, 2010).

²⁸¹ ØYSTEIN ROLANDSEN, NORWEGIAN PEACEBUILDING CENTRE, NOREF POLICY BRIEF: WHY IS VIOLENCE ESCALATING IN SOUTHERN SUDAN 5 (Feb., 2010), available at http://www.peacebuilding.no/eng/content/download/110387/446662/version/5/file/NorefBrief_SudanRolandsenFeb10.pdf.

²⁸² It has been estimated that 98 percent of the region’s non-aid income comes from oil, and the GoSS has been highly dependent on this source of income since it first started receiving oil revenue in 2006. The corresponding figure for the North is 60-70 percent. *Oil revenue in Sudan slashed by 60% in 2009: GoSS*, SUDAN TRIB., Mar. 2, 2010, available at <http://www.sudantribune.com/spip.php?article34298>.

²⁸³ BIODIVERSITY AND TROPICAL FOREST ASSESSMENT, *supra* note 276, at 29. According to a report compiled by the GoSS, the proceeds from oil exports in Sudan declined by 60 percent in 2009, with revenues measuring approximately \$2.5 billion compared to \$ 6.5 billion a year ago. *Oil revenue in Sudan slashed*, *supra* note 282.

²⁸⁴ According to USAID, “the precise contribution of agriculture to Southern Sudan’s economy is difficult to determine and is dependent on many unknown variables.” BIODIVERSITY AND TROPICAL FOREST ASSESSMENT, *supra* note 276, at 29.

²⁸⁵ According to the World Food Program (WFP) 4.3 million people in Southern Sudan—more than half the population—will be in need of food assistance during 2010. HUMANITARIAN UPDATE: SOUTHERN SUDAN, *supra* note 273, at 2.

²⁸⁶ See BIODIVERSITY AND TROPICAL FOREST ASSESSMENT, *supra* note 276, at 31 (noting that, “Measures that could promote better [agricultural] practices, such as using inputs (especially fertilizers) and more modern farming methods (spacing, improved seed, integrated pest management, etc.) are still unavailable to much of Southern Sudan’s rural population.”).

plot for several years until soil fertility declines, at which point they move to another plot, sometimes cutting trees and burning existing forest to create new agricultural land.

The need to develop sustainable food production in Southern Sudan is of vital importance, given the high levels of food insecurity in the region.²⁸⁷ In 2009, according to Hilde Johnson, the Deputy Executive Director of the United Nations Children’s Fund (UNICEF), 1.2 million people in Southern Sudan faced serious food insecurity.²⁸⁸ In February 2010, the World Food Programme (WFP) estimated that the number of severely food insecure had risen to 1.5 million.²⁸⁹ As Johnson notes, the high levels of food insecurity also contribute to conflict:

When natural resources are actually being diminished on a daily basis, you will see hard pressure coming in on already meager resources. This will exacerbate conflict, there is absolutely no doubt—it is not only the food but the water and grazing that are reduced, and then of course tensions increase.²⁹⁰

B. ATTRACTING FOREIGN INVESTMENT TO SOUTHERN SUDAN

According to a number of official statements, the GoSS views private investment as an important means of increasing agricultural productivity. In October 2009, the South Sudan Investment Authority (SSIA) unveiled a new set of regulations designed to attract foreign capital to Southern Sudan with a particular focus on the agricultural sector.²⁹¹ Chol Tong Mayay, the Governor of Lakes State, followed suit, declaring that the state would extend tax holidays, bonuses and other incentives to investors.²⁹² Upper Nile State also announced plans to set up

²⁸⁷ Southern Sudan has experienced a number of devastating famines in the recent past. See, e.g., Herve Cresvaux et al., *Famine in Southern Sudan*, 354 LANCET 852 (Sept., 1999), available at http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6T1B-45X015F-J-2&_cdi=4886&_user=142623&_pii=S0140673699800166&_origin=search&_coverDate=09%2F04%2F1999&_sk=996450818&view=c&wchp=dGLzVlb-zSkzV&md5=7686b3de120b2e96799be6c2dbc8873e&ie=/sdarticle.pdf (presenting data on a famine in Bahr el-Ghazal Province in 1998); *Southern Sudan’s Starvation*, ECONOMIST, July 16, 1998, available at <http://www.economist.com/node/144180> (reporting that “Southern Sudan’s famine...is growing more severe.”). There is also a history of famine being used as a weapon of war in the region. According to the FoodFirst Information and Action Network (FIAN): “...famine has been, and is continuing to be used as a political, military and economic weapon by both the government and the SPLA [Sudan People’s Liberation Army], as well as by splinter groups. This practice has significantly contributed to the levels of deprivation and suffering seen in present day Sudan [written in 2000].” FIAN, FIAN PARALLEL REPORT: THE RIGHT TO ADEQUATE FOOD IN SUDAN 10 (2000) [hereinafter FIAN, RIGHT TO FOOD IN SUDAN], available at <http://www.fian.org/resources/documents/others/the-right-to-adequate-food-in-sudan/pdf> (submitted as a parallel report to the 23rd session of the Committee on Economic, Social and Cultural Rights).

²⁸⁸ Peter Martell, *Famine and Conflict Risks Confront South Sudan*: UN, AFP, Nov. 8, 2009, available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/RMOI-7XLM3R?OpenDocument&RSS20=18-P>.

²⁸⁹ According to the World Food Programme (WFP), “There are an additional 1.8 million people who will be moderately food insecure at some point [in 2010]. On top of this, a further 1.1 million people will receive food assistance...” HUMANITARIAN UPDATE: SOUTHERN SUDAN, *supra* note 273, at 2.

²⁹⁰ Martell, *supra* note 288.

²⁹¹ Juma John Stephen, Government Woos Investors to South Sudan (Oct. 16, 2009), <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/2046/categoryId/2/Government-Woos-Investors-to-South-Sudan.aspx>.

²⁹² Manyang Mayom, *Governor of Sudan’s Lakes State’s outlines growth-oriented policy*, SUDAN TRIB., Sept. 3, 2010, available at <http://www.sudantribune.com/spip.php?article36163>.

“mechanization centers” to provide farmers with tractors “devoid of bureaucracies in the distribution process,” and to implement policies to make “agriculture and agribusiness attractive to the youth.”²⁹³ And the Western Equatoria State (WES) government sent a high-level delegation, including the governor himself, to attend a US conference on investment, in an effort “to move [the region] away from an economy that is dependent on oil to an economy that will now seek the growth of agriculture as an engine of wealth creation itself.”²⁹⁴

There are corresponding initiatives at the international level. The US government and the World Bank are both keen to open up markets in Southern Sudan. In September 2010, Scott Gration, President Barack Obama’s Special Envoy to Sudan, outlined a roadmap for the normalization of ties with Sudan conditioned on the peaceful conduct of the parties in holding the 2011 referendum. The first step would consist of relaxing regulations in the agricultural sector concerning the purchase of agricultural machinery for use in Sudan.²⁹⁵ According to the *Sudan Tribune*, the World Bank is also urging Sudan to do more to encourage private sector investment and develop agriculture “as the next big alternative source of growth to the oil sector in the medium-term.”²⁹⁶ Thus, analysis of TreeFarms’s investment in Southern Sudan comes at a particularly important time, as all signs point to the possibility of increased foreign investment in Southern Sudan in the near future.

C. THE COMPREHENSIVE PEACE AGREEMENT AND THE RETURN OF SUDAN’S DISPLACED POPULATION

Five years after the signing of the CPA, governance systems have not yet been fully established and service delivery remains severely constrained in rural areas.²⁹⁷ Local populations also have to grapple with high levels of insecurity. The Ugandan Lord’s Resistance Army (LRA) is active in Southern Sudan and there have been outbreaks of intertribal fighting throughout the region.²⁹⁸ In CES, the state in which TreeFarms has acquired land for its plantation and forest conservation project, conflict between the Bari and Mundari ethnic groups, long time neighbors who speak the

²⁹³ *Upper Nile ensures food security remains top priority*, SUDAN TRIB., Sept. 23, 2010, available at <http://www.sudantribune.com/spip.php?article36363>.

²⁹⁴ *Western Equatoria state sends high level delegation to investment conference in U.S.*, SUDAN TRIB., Aug. 28, 2010, available at http://www.sudantribune.com/spip.php?page=imprimable&cid_article=36104. See generally Deng Arob, Governor of Abyei Area, Policy Statement to the Abyei Area Legislative Council (June 10, 2010) (transcript on file with authors) (stating that policy in the area would be geared towards the promotion of mechanized farming and cash crop production).

²⁹⁵ *U.S. outlines details on possible incentives to North & South Sudan, warns of sanctions*, SUDAN TRIB., Sept. 15, 2010, available at <http://www.sudantribune.com/spip.php?article36279>.

²⁹⁶ *Sudan must drop oil dependency to sustain economic growth, World Bank says*, SUDAN TRIB., June 10, 2010, available at <http://www.sudantribune.com/spip.php?article35357>. Alan Boswell, a freelance journalist working in Southern Sudan, reports that the World Bank would work “speedily” to pave the way for international financing in Southern Sudan if the region opts for independence in the upcoming referendum. Alan Boswell, *World Bank Would Aim for Rapid Membership for Independent Southern Sudan*, BLOOMBERG, Sept. 4, 2010, available at <http://www.bloomberg.com/news/2010-09-04/world-bank-would-aim-for-rapid-membership-for-independent-southern-sudan.html>.

²⁹⁷ The war left a legacy of underdevelopment and poverty, and until 2005, there was only a single kilometer-long paved road in all of Southern Sudan. Peter Moszynski, *Peace deal in southern Sudan brings little respite for Darfur*, 330 BRIT. MED. J. 110 (Jan. 15, 2005).

²⁹⁸ According to the U.N., more than 2,000 people died and an estimated 250,000 others were displaced by intertribal violence in 2009. Martell, *supra* note 288.

same language and have intermarried extensively, has reportedly broken out for the first time in living memory.²⁹⁹ Conflict is also reportedly common between the Mundari and their Dinka neighbors to the north.³⁰⁰ In this environment, large-scale land acquisitions may bring with them much-needed development and revenue for host populations, but they may also pose risks to local livelihoods by restricting access to natural resources that are the subject of fierce competition.

The situation is further complicated by the return of large numbers of internally displaced persons (IDPs) and refugees to their home areas. The 22-year civil war displaced an estimated four million people; some remained in Sudan as IDPs, while others sought refuge in countries around the world.³⁰¹ Peace has brought the return of this displaced population and the influx of returnees is putting additional pressure on natural resources.³⁰² According to Martin Lomuro, the former GoSS Minister of Agriculture and Forestry, forest resources in Southern Sudan are generally robust.³⁰³ However, there is also evidence that the deserts of Northern Sudan are advancing southward.³⁰⁴ This is likely to reduce agricultural output and livestock carrying capacity in the long term.³⁰⁵

Forests are vital to the livelihoods of returnees and host communities alike, who depend on them for fuel-wood and construction materials.³⁰⁶ Estimates suggest that 95 percent or more of Southern Sudanese rely on charcoal and fuel-wood for their energy needs.³⁰⁷ Hunting and bushmeat consumption are also important supplements to diets.³⁰⁸ Although conservation projects may help to protect forest resources from overuse, they also pose risks to food security when communities are

²⁹⁹ E.g., Isaac Vuni, *Reconciliation does not materialize between Bari and Mundari*, SUDAN TRIB., May 14, 2009, available at <http://www.sudantribune.com/spip.php?article31157>.

³⁰⁰ Interview by David Deng, Arthur Helton Global Human Rights Fellow, N.Y. Univ. Sch. of Law, with Chairperson for Sec. & Pub. Order, CES Parliament, in Juba, Sudan (Sept. 25, 2010) [hereinafter Interview with Chairperson for Security and Public Order, CES Parliament] (on file with authors).

³⁰¹ The number of people killed during the war is estimated at nearly two million. US Committee for Refugees, Sudan: Nearly 2 million dead as a result of the world's longest running civil war (Apr., 2001) <http://web.archive.org/web/20041210024759/http://www.refugees.org/news/crisis/sudan.htm>.

³⁰² See *supra* note 276 and accompanying text.

³⁰³ BIODIVERSITY AND TROPICAL FOREST ASSESSMENT, *supra* note 276, at 19 (citing Martin Lomuro, *GOSS Agriculture and Forestry Policy Framework for the Ministry of Agriculture and Forestry* (May, 2006)).

³⁰⁴ FAO statistics show that forest cover in the Sudan as a whole has decreased at an annual rate of 0.8 percent. FAO, STATE OF THE WORLD'S FORESTS 109 (2009), available at <ftp://ftp.fao.org/docrep/fao/011/i0350e/i0350e.pdf>. According to USAID, “[s]everal studies over many years have reported advancing desertification in the center of the country and the decline in forest cover is most likely due to this phenomenon.” BIODIVERSITY AND TROPICAL FOREST ASSESSMENT, *supra* note 276, at 21. Yet other studies have also shown that forest areas have actually increased in the South. *Id.* (citing H.K. Ahmed & Essam I. Warrag, *Sudan Vegetation cover assessment, Using NOAA-AVHRR Data, for the period “Between 1983-1999”*, 11 SUDAN SILVA (2005)). USAID attributes the growth of forests in the South to a decrease in agricultural activity and timber exploitation during the war. Nonetheless, in some areas, forest cover has been degraded by decades of uncontrolled fire, uncontrolled grazing, and over-cutting. *Id.* at 19.

³⁰⁵ BIODIVERSITY AND TROPICAL FOREST ASSESSMENT, *supra* note 276, at 47 (citing Sean White & Wilfred Lomori, *Post-conflict Environment Assessment of Sudan: Yambio Case Study* (2006)). According to White & Lomori, the advancing desertification “is part of a wider, perhaps global, phenomenon and caused by factors outside the control of the local population,” and “the population must adapt to those changes through environment management strategies such as modified agricultural and range management practices.” *Id.*

³⁰⁶ It can take up to 50 small acacia or similar trees to build a simple dwelling. Constructing schools, clinics, churches, and other facilities that accompany settlements require additional sawn timber. *Id.* at 48.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 47.

denied access to vital natural resources. Reduced access to grazing land in forests can also lead to increased conflict among pastoralist groups.³⁰⁹ Until the government is in a position to provide more substantial service delivery in rural areas, local populations will continue to depend on forests for their livelihoods. Large-scale land investments could therefore negatively affect food security, even if they are not located on land that is traditionally used for agricultural production.

III. INSTITUTIONAL FRAMEWORK

The TreeFarms investment agreement was negotiated between TreeFarms, the Tindilo Community, and the CES Ministry of Agriculture and Forestry. Southern Sudan has a relatively decentralized land administration system and state authorities often take the lead in negotiating land investments.³¹⁰ There remains ambiguity, however, over what procedures investors must follow to acquire land and which government institution has the final say over the allotment.³¹¹ This is indicative of the prevailing legal uncertainty in Southern Sudan;³¹² attempts at legislative reform have sought to address the gaps in the regulatory framework, but due to poor uptake, the new laws are poorly understood and rarely applied.³¹³ This section provides additional information about the relevant actors involved in the TreeFarms investment and the development of rule of law in post-conflict Southern Sudan.

A. RELEVANT ACTORS

The local government structure in Southern Sudan is comprised of the county, payam, and boma administrations, the payam and boma roughly corresponding to the district and village level, respectively.³¹⁴ TreeFarms has leased virtually the entire area of Tindilo Payam, Terekeka County. The only segments of land that were not transferred to the company are: the area inhabited by Tindilo Community (near Tindilo Mountain, in the center of the payam); a small area in the eastern part of the payam that has been set aside for an airstrip; and some watering points in the western part of the payam.³¹⁵ The company estimates that it can realistically establish a plantation on 45,000

³⁰⁹ Interview with Mengistu, *infra* note 426, and accompanying text.

³¹⁰ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

³¹¹ According to the Plantation Manager of TreeFarms Sudan, the signature of the CES Governor will finalize the land transfer. Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94. However, the Terekeka County Commissioner insisted that the county would have the final say over whether the land would be transferred to TreeFarms. Interview by David Deng, Arthur Helton Global Human Rights Fellow, with Comm'r, Terekeka County, in Terekeka, Sudan (Sept. 24, 2010) [hereinafter Interview with Commissioner of Terekeka County] (on file with authors).

³¹² See PACT-SUDAN, ENHANCING PEOPLE TO PEOPLE INDIGENOUS CAPACITIES PROGRAM [EPPIC], CONFLICT THREATS AND PEACE ASSESSMENT 25 (June 2007) *available at* http://citizenshift.org/sites/citizen.nfb.ca/files/PACT_EPPIC_Conflict_Peace_Assessment_0.pdf (indicating that, for example, three layers of government control in Juba have led to uncertainty over its development).

³¹³ An example of this difficulty is the lack of commercial courts in Southern Sudan, making it “difficult to discover where one can turn to when one becomes involved in a commercial dispute.” PUBLIC PRIVATE COOPERATION IN FRAGILE STATES, *supra* note 275, at 13.

³¹⁴ BARBARA UNGER, SYSTEMIC CONFLICT TRANSFORMATION AND INCLUSIVE GOVERNANCE IN SOUTHERN SUDAN 13 (2007), *available at* http://www.berghof-peacesupport.org/publications/SUD_Inclusive_Governance_Southsudan.pdf.

³¹⁵ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94. According to TreeFarms, the total area of Tindilo Payam is 212,000 hectares. When one subtracts the area of Tindilo Mountain and the Tindilo Community’s settlements, 179,000 hectares are left. Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

of the 179,000 hectares that it has leased, leaving the remainder to grow as natural forest.³¹⁶ Eucalyptus, teak, mahogany, and pine trees will be planted in the open grasslands that are interspersed throughout the natural forest.³¹⁷ According to TreeFarms, Tindilo Payam is sparsely populated with a population of approximately 10,000.³¹⁸ The company therefore asserts that it can secure access to a large portion of land without displacing host populations.³¹⁹

The investment agreement was signed between TreeFarms, CES Ministry of Agriculture and Forestry, and the Tindilo Community. The people of the Tindilo Community belong to the Mundari ethnic group, traditionally agro-pastoralists who require access to large portions of land to graze their cattle. They are the majority ethnic group in Terekeka County and are bordered by a number of pastoralist and agriculturalist communities, including the Dinka Bor and Dinka Aliap (pastoralists) towards the north, and the Moru and the Bari (agriculturalists) to the west and south, respectively. Conflict is reportedly common among these groups.³²⁰

The main role of the CES Ministry of Agriculture and Forestry seems to be that of investment backer. Indeed, the Ministry played a key role in facilitating TreeFarms' investment,³²¹ and under the terms of the agreement, there is an expectation that it will assist TreeFarms in acquiring the necessary licenses and tax exemptions.³²² Contrary to practice in most other East African countries where land acquisitions of this size would be managed by the central government,³²³ in Southern Sudan state-level governments tend to take the lead on the allocation of land. However, there has been a great deal of tension between the GoSS and state-level governments on the issue of land, and the jurisdictional boundaries between the levels of

³¹⁶ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

³¹⁷ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94.

³¹⁸ GREEN RESOURCES, TINDILO REDUCED EMISSIONS, *supra* note 97, at 5. Tindilo was a frontline of combat between the North and South during the civil war. As a result, much of Tindilo Community was displaced to Juba, where they remain to this day. Interview by David Deng, Arthur Helton Global Human Rights Fellow, with Dir. of Forestry, Terekeka County, in Terekeka, Sudan (Sept. 24, 2010) [hereinafter Interview with Director of Forestry, Terekeka County] (on file with authors).

³¹⁹ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

³²⁰ Alula Berhe Kidani, *Eight Grassroots Conflicts in Sudan*, SUDAN VISION DAILY, n.d., available at <http://www.sudanvisiondaily.com/modules.php?name=News&file=article&sid=4028>; *Reconciliation does not materialize between Bari and Mundari*, SUDAN TRIB., Apr. 29, 2009, available at <http://www.sudantribune.com/spip.php?article31022> (stating a number of inter-group conflicts exist in the region). See also Interview with Chairperson for Security and Public Order, CES Parliament, *supra* note 300 (indicating that conflict between the Mari and the Dinka is common generally). The risk of conflict in the area has been reduced somewhat by a recent disarmament campaign. Interview with Director of Forestry, Terekeka County, *supra* note 318. However, the campaign reportedly targeted the Mundari while leaving the Dinka tribes with arms. This has left the Mundari vulnerable to cattle-rustling. Several interviewees believed that the Dinka were allowed to retain their guns because the cattle that they kept belonged to senior generals in the Southern army. Interview with Commissioner of Terekeka County, *supra* note 311; Interview with Chairperson for Security and Public Order, CES Parliament, *supra* note 300.

³²¹ Interview with Commissioner of Terekeka County, *supra* note 311.

³²² The agreement requires the CES Government to provide TreeFarms with tax exemptions for materials used in the development of the property. See Land Title Agreement, *supra* note 258, ¶ 3.3 (stating that one of the obligations of the CES is to “[f]acilitate exemptions of state taxes, fees, and other relevant local rates imposed on machinery, equipment, plants, chemicals, fertilizers and other materials, supplied for the development of the property,” and that “[t]his has to be done through the relevant ministry, Ministry of Finance.”).

³²³ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

government remain highly contentious.³²⁴ Sara Pantuliano, a political scientist with the Overseas Development Institute (ODI), traces the tension to the lack of a clear legal framework: “The current legislative vacuum has...contributed to [the] creat[ion] of tensions between GoSS, state governments and local communities... .”³²⁵ In contrast, the TreeFarms investment project has the support of both the GoSS and state-level ministries of agriculture and forestry, and indeed, officials from both ministries are on the company’s board of directors.³²⁶ The fact that government officials—who are meant to scrutinize the investment agreement to ensure that it sufficiently takes into account the interests of the host community in accordance with the Land Act—are board members in the company raises concerns about their ability to negotiate on behalf of the community.

TreeFarms is owned by Green Resources, a Norwegian company that was created in 1995 and invests in forest plantations, carbon offsets, forest products, and renewable energy.³²⁷ Green Resources also owns plantations in Mozambique, Tanzania, and Uganda.³²⁸ As one of the intended buyers of carbon credits, the Norwegian government has provided significant diplomatic support to Green Resources in its interactions with host countries, Tanzania in particular.³²⁹

Green Resources has come under scrutiny in relation to its investments in Tanzania. Norwatch, an independent news service that investigates Norwegian business activity in developing countries, has expressed concerns regarding the low rental amount that Green Resources is paying on its lease in Tanzania. When Green Resources negotiated the lease for 7330 hectares in Idete village in 2000, it was paying approximately US \$8100 in annual payments. By 2009, the rental amount had reportedly dropped to a third of that, or US \$2700.³³⁰ Explaining this decrease in the rental price, the CEO of Green Resources, stated:

³²⁴ See PACT-SUDAN, *supra* note 312, at 25 (pointing in particular to contestation over jurisdictional control of Juba).

³²⁵ UNCHARTED TERRITORY, *supra* note 263, at 154.

³²⁶ The Green Resources Annual Report lists Timothy Thwol, also known as Timothy Thwol Onak, and the Director General of Forestry of the CES Ministry of Agriculture and Forestry as board members of TreeFarms. GREEN RESOURCES, ANNUAL REPORT, *supra* note 92, at 67. Interview with Director General of Forestry, CES Ministry, *supra* note 266. Timothy Thwol was, as of 2008, the Director of Forestry, GoSS Ministry of Forestry. *Southern soil riches: Massive ungrown potential in vast swathes of fertile land*, EXECUTIVE, EXECUTIVE, Nov. 2008, <http://www.executive-magazine.com/getarticle.php?article=11257>.

³²⁷ *Id.* at 2.

³²⁸ In 2009, Green Resources received a US \$18 million loan from the International Finance Corporation (IFC) for its project in Tanzania. *Id.* at 5.

³²⁹ BLESSING KARUMBIDZA & WALLY MENNE, TIMBERWATCH COAL., POTENTIAL IMPACTS OF TREE PLANTATION PROJECTS UNDER THE CDM: AN AFRICAN CASE STUDY 4 (Dec., 2009), *available at* [http://timberwatch.org/uploads/Draft%20Plantation_Projects_under%20CDM%20-%20Blessing%20&%20Wally\(1\).pdf](http://timberwatch.org/uploads/Draft%20Plantation_Projects_under%20CDM%20-%20Blessing%20&%20Wally(1).pdf). TreeFarms had also hoped to obtain funding from the Norwegian Agency for Development Cooperation (NORAD) to finance its project in Tindilo Payam in Southern Sudan, which opted not to support the project over the course of the negotiations for the lease. Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94. NORAD gives support to the forestry sector in Southern Sudan, focusing on resource assessment and mapping, inventory, capacity-building in remote sensing and GIS [Geographical Information System], in addition to the promotion of private forestry and pilot projects in agroforestry and community forestry. BIODIVERSITY AND TROPICAL FOREST ASSESSMENT, *supra* note 276, at 37.

³³⁰ See Pia A. Gaarder, *Climate Project on Cheap Ground*, NORWATCH, May 6, 2009, *available at* <http://www.norwatch.no/200906051306/english/other/climate-project-on-cheap-ground.html> (summarizing that, “When Norwatch examined GreenResources’s tree-planting project in Tanzania more closely in 2000, one of the

The land price is determined by Tanzanian authorities and not by us. But it is interesting to note that the demand for land in Tanzania is very low and that there is little development within forestry and agriculture. The conclusion can only be that the price of land is too high.³³¹

Timberwatch, a coalition of non-governmental organizations that focuses on the welfare of forests and forest dependent peoples, is critical of the role that the Norwegian government played in facilitating Green Resources' land investment in Tanzania. According to Timberwatch, "what should have simply been a deal between a private investor and a host country, became an event in intergovernmental diplomatic affairs with the Prime Minister of Norway participating at the launch of the project agreement."³³² Timberwatch also criticizes Green Resources for not guaranteeing an adequate level of participation in decision-making by the affected communities and doubts the capacity of the Tanzanian government "to protect the communities from possible abuse and marginalization during the course of the project."³³³

These criticisms, while limited to the company's involvement in Tanzania, are relevant to the investment in Sudan, as Green Resources pointed to its successes in Tanzania in response to concerns about the TreeFarms project.³³⁴ They are also relevant to the investment in Terekeka County, Southern Sudan since they indicate a similar rental price to that included in the TreeFarms investment agreement³³⁵ and shed additional light on the relationship between Green Resources and the Norwegian government. Despite these criticisms, Green Resources has stressed the benefits to the community that its investments can provide.³³⁶ These benefits include employment opportunities and the company's commitments to undertaking community projects, such as building "schools, health centres, bridges, and village centres."³³⁷ In particular, the CEO of Green Resources noted two community buildings that Green Resources built for Chogo and Idete villages in the Mufindi district of Tanzania.³³⁸ He also highlighted the remarks of Hon. E Kalalu, the district

objections was that Tanzania leased out the ground at a bargain price. Nine years later the leasing price has sunk to a third of that.")

³³¹ *Id.*

³³² KARUMBIDZA & MENNE, *supra* note 329.

³³³ *Id.* Indeed, a 2008 report to the Norwegian Ministry of Finance by the consultancy firms Point Carbon and Perspectives Climate Change classified the plantation as "high risk." Perspectives Climate Change & Point Carbon, CDM Due Diligence Idete reforestation project in Tanzania, at 5 (Nov. 24, 2008), <http://www.regjeringen.no/upload/FIN/okonomiavdelingen/Idete%20CDM%20due%20diligence.pdf>.

³³⁴ E-mail from Chief Executive Officer, Green Resources, to Center for Human Rights and Global Justice, New York University School of Law (Oct. 4, 2010, 02:35:00 EST) [hereinafter E-mail from CEO of Green Resources (Oct. 4, 2010, 02:35:00 EST)] (on file with author).

³³⁵ A more in-depth analysis of the investment agreement in Southern Sudan is presented in Section IV, *infra*.

³³⁶ For public statements on the benefits of Green Resources' community investments, see generally Green Resources, Community Development: Developing People, <http://www.greenresources.no/Development/CommunityPrograms.aspx> (last visited Oct. 15, 2010).

³³⁷ E-mail from CEO of Green Resources (Oct. 4, 2010, 02:35:00 EST), *supra* note 334.

³³⁸ E-mail from CEO of Green Resources (Oct. 4, 2010, 02:13:00 EST), *supra* note 98. This reference pertains specifically to an unpublished press release that was attached to the e-mail from the CEO of Green Resources. *Id.* (referring to E-mail from Green Resources Employee, *supra* note 98). See also Green Resources, Mufindi Social Hall, <http://www.greenresources.no/Development/CommunityPrograms/MufindiSocialHall.aspx> (last visited Oct. 15, 2010) (referring to a district hall built in Mufindi in 2006 and 2007).

commissioner for Mufindi district, who praised Green Resources for “providing sustainable employment opportunities to villagers.”³³⁹

In addition to underscoring its commitment to community development, Green Resources asserts its compliance with industry standards. The CEO of Green Resources emphasized the company’s adherence to several standards of corporate accountability:

We are following the highest standards for sustainable forest management, as reflected in Forest Stewardship Council Certification. About half of our young forest has already been certified, and our mandate is to get all certified. We are also following a number of carbon and community certification standards. Furthermore, we are implementing all IFC standards for their customers across the board. These are tough standards that we have to work hard to meet.³⁴⁰

B. LEGAL FRAMEWORK

Post-independence land legislation in Sudan was based on the colonial model, in which all unregistered land in the country was presumed to belong to the colonial authority.³⁴¹ The Unregistered Land Act (ULA) of 1970 rendered all unregistered land “of any kind whether waste, forest, occupied or unoccupied,” government property, which the government could dispose of at will.³⁴² As noted by the FoodFirst Information Action Network (FIAN), “[i]n a single legislative act, the Sudan Government took legal hold of all smallholders’ land throughout Sudan.”³⁴³ Although the ULA was formally repealed in 1984, subsequent national legislation has reaffirmed government ownership of unregistered land.³⁴⁴ In government-controlled areas during the civil war, the Northern government freely disposed of unregistered community land, with little consideration for the wishes of affected communities.³⁴⁵ This was especially apparent in the Nuba Mountains of

³³⁹ E-mail from CEO of Green Resources (Oct. 4, 2010, 02:13:00 EST), *supra* note 98.

³⁴⁰ E-mail from Chief Executive Officer, Green Resources, to Smita Narula, Faculty Director, Center for Human Rights and Global Justice (CHRGJ), New York University School of Law (Sept. 22, 2010, 17:01:00 EST) [hereinafter E-mail from CEO of Green Resources (Sept. 22, 2010)] (on file with authors).

³⁴¹ UNCHARTED TERRITORY, *supra* note 263, at 153. The 1925 Land Settlement and Registration Ordinance provided for a rebuttable presumption that unregistered land was government property. Land Settlement and Registration Act, § 16(c) (1925).

³⁴² Unregistered Land Act, § 4(1) (1970). According to Okoth-Ogendo, “The target [of the ULA] clearly was to enable the national government of Sudan to exert proprietary power [over] land (especially in the South) that has for centuries been held under a developed system of customary land law, and administered by communities through their recognized governance structures.” H.W.O. Okoth-Ogendo, Norwegian People’s Aid [NPA], Resolving the Land Question in Southern Sudan, at 6 (Mar. 15, 2007).

³⁴³ FIAN, RIGHT TO FOOD IN SUDAN, *supra* note 287, at 12.

³⁴⁴ The 1984 Civil Transactions Act formally repealed the ULA and reaffirmed government ownership of unregistered land. John W. Bruce, *Country Profiles of Land Tenure: Africa, 1996* 193 (Land Tenure Center, University of Wisconsin-Madison, Research Paper No. 130, 1998), available at http://minds.wisconsin.edu/bitstream/handle/1793/21869/02_rp130.pdf?sequence=1.

³⁴⁵ As noted by William Kon Bior et al., community lands are not registered, and “[h]ad this legislation been enforced to the letter, all communities would have been dispossessed of their land.” WILLIAM KON BIOR ET AL., LAND TENURE STUDY IN SOUTHERN SUDAN PHASE 1: REPORT OF A PRELIMINARY SURVEY OF LAND TENURE SYSTEMS IN PARTS OF SOUTHERN SUDAN § 1.3.1 (n.d.) (prepared by the Secretariat for Agriculture and Animal Resources (SAAR) and Norwegian People’s Aid (NPA)).

Southern Kordofan, where the Northern government expropriated vast stretches of rural farmland for transfer to domestic elites to establish large-scale mechanized farming schemes.³⁴⁶ In fact, laws such as the ULA are cited as one of the reasons for the rebellion in the South.³⁴⁷

After the CPA was signed, there was ambiguity about which Northern laws would be given effect in Southern Sudan. GoSS was faced with a dilemma: the new government did not want to give effect to the oppressive Northern laws that had sparked rebellion in the South, but GoSS had not yet developed a comprehensive body of law for Southern Sudan and could not simply reject all Northern laws when there was nothing to take their place.³⁴⁸ Meanwhile, as this question of applicable law is being sorted out, people are returning to the South, the region is developing, and investors are flocking to access new opportunities in the region.³⁴⁹ The ambiguity over such fundamental issues as land ownership and jurisdictional boundaries between GoSS and the state-level governments is causing complications for land administration systems throughout the South.³⁵⁰ PACT-Sudan, a capacity-building non-governmental organization,³⁵¹ noted the following in relation to land in Juba, the capital city of Southern Sudan: “Whilst this contestation continues [between the GoSS and CES governments] the town continues to suffer as managed urban development is not taking place, people are settling all over as they please, land is being appropriated and developed

³⁴⁶ Simon Harragin estimates that 1,260,000-1,680,000 hectares of land in Southern Kordofan was placed under large-scale mechanized farming schemes by 2003. SIMON HARRAGIN, CONCERN WORLDWIDE & SAVE THE CHILDREN US, BACKGROUND REPORT TO ACCOMPANY THE LITERATURE REVIEW/ANNOTATED BIBLIOGRAPHY: NAIROBI: DESK STUDY ON LAND-USE ISSUES IN THE NUBA MOUNTAINS, SUDAN 13 (2003) (stating that large-scale mechanized farm schemes covered 3-4 million feddans, or 1.26 to 1.68 million hectares).

³⁴⁷ For example, “the approval of the Unregistered Land Act in 1970 and consequently the Civil Transaction Act in 1983 provided the Government of Sudan (GoS) a legal mechanism to interfere at will in customary land management. Leaseholds over large tracts of lands in South Darfur and South Kordofan (of land issued under the mechanized farming programme) generated massive displacements of the local population.” PAUL DE WIT, NORWEGIAN REFUGEE COUNCIL (NRC), UNHCR, & FAO, LAND AND PROPERTY STUDY IN SUDAN. INTERIM REPORT: SCOPING OF ISSUES AND QUESTIONS TO BE ADDRESSED 4 (Aug. 2004). The destabilizing effect of large-scale land acquisitions in the Nuba Mountains were described in a 1995 report by African Rights thusly: “Nuba farmers resisted the merchant farmers and their tractors. Many burned the barrels of diesel, others threatened the labourers. Ultimately, many turned to the SPLA [Sudan People’s Liberation Army].” AFRICAN RIGHTS, FACING GENOCIDE: THE NUBA OF SUDAN 48 (July, 1995), available at <http://www.justiceafrica.org/publishing/online-books/facing-genocide-the-nuba-of-sudan/>.

³⁴⁸ See UNCHARTED TERRITORY, *supra* note 263, at 165 (“The courts [in Southern Sudan] are unable to operate properly because they do not have any laws to guide them. The law as defined by the old GOS [Government of Sudan] is considered exploitative and GoSS does not want to use it. This has created a vacuum.”). According to a 2006 opinion letter circulated by the GoSS Ministry of Legal Affairs and Constitutional Development, non-*shari’a* based national laws “with the exception of land laws such as the Unregistered Land Act, 1970” would be given effect in Southern Sudan. MOLACD, Office of the Minister, Ministerial Circular No. 4, at 3 (June, 2006) (on file with authors).

³⁴⁹ John Luk, a Southern Sudanese lawyer who participated in the CPA negotiations, noted the implications of community ownership of land for potential investors: “We are being swarmed by a lot of people who want to invest. And they are curious about what they read in the [Comprehensive Peace] agreement, which says that land belongs to the communities. Now, as a government of South Sudan, how do we respond?” FRANCIS M. DENG, CUSTOMARY LAW IN THE MODERN WORLD: THE CROSSFIRE OF SUDAN’S WAR OF IDENTITIES 202 (2010).

³⁵⁰ According to Pantuliano, “[t]he complex and often unclear delineation of powers among GNU [the central Government of National Unity in Khartoum], GoSS, and state and sub-state authorities over land regulation and administration is a major bottleneck in the resolution of land problems linked to the return of IDPs and refugees.” UNCHARTED TERRITORY, *supra* note 263, at 154.

³⁵¹ PACT-Sudan, About Us, <http://www.pactsudan.org/Index.html> (last visited Oct. 20, 2010).

without due legal process and tensions are increasing all over.”³⁵² Rural populations are encountering similar difficulties.³⁵³

In order to address the prevailing uncertainty, and to give legal foundation to the ideas espoused in the CPA and the Interim Constitution of Southern Sudan (ICSS), the Southern Sudan Legislative Assembly passed the Land Act in February 2009.³⁵⁴ The Land Act reinforces the government’s recognition of customary land tenure in the CPA and ICSS, stating that “Customary land rights including those held in common shall have equal force and effect in law with freehold or leasehold rights”³⁵⁵ and calling for the collective registration of community lands.³⁵⁶ Foreigners are not permitted to own land, but they may obtain leases for up to a maximum of 99 years, leading to the criticism that such leases are little different than a full transfer of ownership rights.³⁵⁷ Community land may be allocated for investment purposes, but the investment activity must “reflect an important interest for the community” and “contribute economically and socially to the development of the local community.”³⁵⁸ The government must also consult with affected communities and take into consideration their views on decisions related to community land.³⁵⁹ Land acquisitions above 250 feddans (105 hectares) must be approved by state-level authorities and the Act calls for regulations to be established that prescribe a ceiling on land allocations.³⁶⁰ Pastoralists are also given special protection in the Act, which states that “no person shall without permission...carry out any activity on the communal grazing land which may prevent or restrict the residents of the traditional communities concerned from exercising their grazing rights.”³⁶¹

Although in theory the Land Act provides rural communities with certain protections against unilaterally imposed land acquisitions, the Act has very poor exposure, even within the government’s own institutions. Attempts to put its provisions into practice are likely to encounter a number of obstacles. The Act is drafted in broad terms and the implementing regulations that are necessary to clarify the official procedures for acquiring land have not yet been drafted.³⁶² Although land registries dating back to colonial times exist in a handful of towns in Southern Sudan, they are

³⁵² PACT-SUDAN, *supra* note 312, at 25.

³⁵³ See SARA PANTULIANO, HUMANITARIAN POLICY GROUP [HPG] & THE OVERSEAS DEV. INST. [ODI], THE LAND QUESTION: SUDAN’S PEACE NEMESIS 5 (Dec., 2007) [hereinafter PANTULIANO, THE LAND QUESTION], available at <http://www.odi.org.uk/resources/download/3182.pdf> (stating that “[p]revailing conditions in rural areas..., and the current legal vacuum favour opportunistic land grabbing and speculative activities”).

³⁵⁴ ROLANDSEN, *supra* note 281, at 4.

³⁵⁵ GoSS Land Act, *supra* note 265, ch. II, § 8(6) (2009).

³⁵⁶ *Id.*, ch. VIII, § 53(2).

³⁵⁷ *Id.*, ch. VI, § 18(2). In an interview with Sudan Radio in Juba, Dr. William Kon Bior, a lawyer and the former GoSS Under-Secretary in the Ministry of Legal Affairs and Constitutional Development, takes issue with the lengthy lease-terms provided for in the Act: “...when you give away land for 99 years [it’s] almost like you are actually alienating land from the very community which is supposed to own it.” *South Sudan’s proposed Land Bill will deny Sudanese ownership of their own land by granting foreigners 99 year leases*, SUDAN RADIO SERV., Dec. 18, 2008, available at <http://sudanwatch.blogspot.com/2009/01/south-sudans-proposed-land-bill-will.html>.

³⁵⁸ GoSS Land Act, *supra* note 265, ch. IX, § 63(1)-(2).

³⁵⁹ *Id.*, ch. IX, § 63(3).

³⁶⁰ *Id.*, ch. V, § 15(5)-(6).

³⁶¹ *Id.*, ch. IX, § 67(2).

³⁶² See *id.*, ch. XVI, § 101 (stating only that “[t]he Southern Sudan Land Commission shall issue rules and regulations for efficient and effective implementation of the provisions of this Act”).

hopelessly backlogged and unable to cope with the increased demand for land.³⁶³ Furthermore, access to information in the registries is tightly controlled by government officials, and the information in the registries sometimes does not describe existing property arrangements.³⁶⁴ Even if the CES government is able to expedite the survey and demarcation of TreeFarms's property, drawing boundaries on such a large area may give rise to any number of border disputes with neighboring payams. According to a Plantation Manager at TreeFarms Sudan, the lack of clarity in the procedures by which land is acquired by investors has been a source of frustration for the company.³⁶⁵

The question of ownership is also problematic. The ambiguity about who actually owns the land that TreeFarms has leased is evident in the investment agreement itself, which is written in a way that suggests that the land is owned by the CES Ministry of Agriculture and Forestry.³⁶⁶ With the passage of the Land Act, customary land tenure has been placed on an equal footing with formal land tenure and there should be no question that the land is owned by the Tindilo Community. However, the Act affords little legal protection until the land in question is collectively registered in the name of the community.³⁶⁷ Therefore, by transferring ownership to TreeFarms before the community has acquired registered ownership of the land, the investment may endanger the community's reversionary interest. With such a long-term lease, the investment is already in danger of becoming—in practice—a full alienation of the land. The lack of provisions in the investment

³⁶³ Historically, these registries were only used to register private holdings in a handful of government-controlled garrison towns. Consequently, a 2005 study by UNDP found that “[t]here is no comprehensive land register that provides a systematic record of urban land tenure and plot allocation.” Patrick Wakely et al., *UNDP: Southern Sudan Urban Appraisal Study* 23 (Aug., 2005). According to PSDN, “Survey departments are a shambles, important data and records have been lost and there is no reliable information on which to base new land allocations and transfers or to secure tenure rights. Respondents have indicated that there is a risk that cadastral and land registry data may disappear in areas where local authorities are complicit in land speculation.” PUBLIC PRIVATE COOPERATION IN FRAGILE STATES, *supra* note 275, at 14. The current plan is to modernize the existing registries and add new ones as needed, so that they may be used to register the previously unregistered customary lands.

³⁶⁴ This assertion is based on interviews conducted by David Deng, J.D. 2010, New York University School of Law, in Juba, Southern Sudan, from July to August 2009, as part of a study commissioned by the Southern Sudan Land Commission (SSLC) in furtherance of developing Southern Sudan's first land policy. Interviews were conducted with representatives from the GoSS, CES Government, Juba County and local governments, as well as chiefs and other traditional leaders, residents, civil society organizations, judges and legal professionals, investors, and representatives of aid organizations. See generally David K. Deng, Land Administration in Juba, *supra* note 102. According to John Bruce and Anna Knox, non-transparent bureaucracies, such as the one in Southern Sudan, are not simple implementers of national policy, but rather “entrenched stakeholders with vested interests in existing systems (including substantial opportunities for rent seeking), and they often defend them tenaciously.” John W. Bruce & Anna Knox, *Structures and Stratagems: Making Decentralization of Authority over Land in Africa Cost-Effective*, 37 *WORLD DEV.* 1360, 1361 (2009), available at <http://www.sciencedirect.com/science/article/B6VC6-4WCK0DF-1/2/f85c9dc64e213ed7cae84c7bf0860025>.

³⁶⁵ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94.

³⁶⁶ The first such inference is in the opening statement to the Land Title Agreement, which states that the agreement is “[b]etween Ministry of Agriculture & Forestry, Central Equatoria State...and Tree Farms Sudan Ltd.,” with no mention of Tindilo Community. Land Title Agreement, *supra* note 258. Furthermore, the Land Title Agreement explicitly states that “the CES owns a property (community land with an area of 250,000 ha of land approved in Tindilo Payam in Terekeka County, Central Equatoria State)...” *Id.*, Preamble. These pronouncements are made despite the fact that TreeFarms agrees to pay an annual rent to the Tindilo Community for use of the land. *Id.*, ¶ 4.8

³⁶⁷ Olivier De Schutter, the United Nations Special Rapporteur on the right to food, notes the importance of legislation safeguarding the local land rights of local populations: “States should assist individuals and local communities in obtaining individual titles or collective registration of the land they use, in order to ensure that their rights will enjoy full judicial protection.” De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 3.

agreement to clarify the status of ownership of the land or explain that it does indeed revert to the community upon the termination of the investment further compounds this risk. In the next section, we examine the investment agreement in greater detail.

IV. INVESTMENT CHARACTERISTICS

The TreeFarms investment agreement consists of a Land Title Agreement and a Community Support Program Agreement. As noted above, the investment agreement was negotiated between TreeFarms, the CES Ministry of Agriculture and Forestry, and the Tindilo Community. TreeFarms first began discussions with the community in 2007 and, according to the company, the community participated fully in the negotiation process.³⁶⁸ Indeed, for such a long-term lease, good relations between the investor and the host community are of utmost importance for both parties. However, to the extent that the host community participated in the negotiations, elements of the investment agreement indicate an unequal allocation of benefits among the parties. Furthermore, the Land Title Agreement is written in vague terms that does not sufficiently account for all the contingencies that may occur over the course of a 99-year lease period. This section examines the way in which negotiations were carried out and evaluates how the investment agreement allocates benefits among the parties.

A. NEGOTIATIONS

Post-CPA Southern Sudan has a relatively decentralized land administration system in which state-level institutions tend to take the lead in negotiating investment agreements.³⁶⁹ While the Land Act provides for community involvement in decisions relating to the use of community lands, as noted in Section III, a number of difficulties have been encountered in operationalizing the legislation. As such, communities do not yet enjoy many of its protections. Nevertheless, communities still have a substantial amount of de facto power by virtue of the normative effect of the Sudan People's Liberation Movement's (SPLM) slogan, "Land Belongs to the Community."³⁷⁰

The negotiations between TreeFarms, the CES Ministry of Agriculture and Forestry, and the Tindilo Community illustrate the decentralized decision-making in Southern Sudan discussed in Section III.³⁷¹ According to the TreeFarms Country Manager, the company "started from the

³⁶⁸ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

³⁶⁹ See GoSS Land Act, *supra* note 265, ch. VII, § 41(2) (2009) (stating that "land administration shall be based on the principles of decentralization, participation and transparency for the benefit of all the people of Southern Sudan"). When GoSS does take the lead in negotiating land investments, additional complications sometimes arise due to many communities' mistrust of the central government. According to TreeFarms, one of the first things the community asked when they were approached in December 2007 was whether this was to be a GoSS project. After they were told that the proposed plantation was not a government project, the community reportedly expressed relief. Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94.

³⁷⁰ See WILLIAM KON BIOR ET AL., A STUDY ON CUSTOMARY LAND TENURE SYSTEMS, CUSTOMARY INSTITUTIONS AND CUSTOMARY LAWS GOVERNING ACCESS, CONTROL AND MANAGEMENT OF LAND AND NATURAL RESOURCES 7 (2004) (prepared by the Secretariat of Agriculture and Animal Resources (SAAR) and Norwegian People's Aid (NPA)) (on file with the authors) (stating that "the SPLA/SPLM policy is that each community owns its land.")

³⁷¹ GoSS Land Act, *supra* note 265, ch. VII, § 41(2) (2009) (stating that "land administration shall be based on the principles of decentralization, participation and transparency for the benefit of all the people of Southern Sudan"). When GoSS does take the lead in negotiating land investments, additional complications sometimes arise due to many

ground, from the payam level, and went up.”³⁷² The CES Ministry of Forestry and Agriculture praised TreeFarms for the manner in which the company approached the host community, adding that it could be used as an example for other investors.³⁷³ TreeFarms has a very close relationship with the Ministry. The TreeFarms Sudan Plantation Manager³⁷⁴ is a former employee of the Ministry, and the Director General of Forestry is a board member with TreeFarms.³⁷⁵

The negotiations with the Tindilo Community were conducted through a local development committee. The development committee established a steering committee comprised of 15 community leaders to lead the negotiations.³⁷⁶ According to TreeFarms Sudan’s Plantation Manager, the steering committee consulted with the community through their traditional leaders.³⁷⁷ This process, he notes, took a full year.³⁷⁸ The attention that TreeFarms seems to have devoted to building relations with the host community may be indicative of the importance of maintaining a good relationship with local actors in long-term investments. It takes decades to grow trees of a sufficient size and quantity for harvesting, and in the intervening years the plantation is susceptible to damage from fire in the dry season. As TreeFarms Sudan’s Country Manager pointed out, “We need a local community who looks upon the project as their property, so they can guard and protect the plantation themselves. Because this will be to their own benefit, and for that of future generations, because this is such a long-term project.”³⁷⁹

The authors of the report were unable to verify the extent to which the steering committee was included in the full negotiation process, or whether marginalized groups within the community were given a voice in the investment negotiations. According to Terekeka County officials, however, the investment could not have proceeded without the community’s consent.³⁸⁰ Despite the ambiguity in the regulatory framework, the Director General of Forestry in the CES Ministry of Agriculture and Forestry, who is also a board member with TreeFarms,³⁸¹ asserts that the investment

communities’ mistrust of the central government. According to TreeFarms, one of the first things the community asked when they were approached in December 2007 was whether this was to be a GoSS project. After they were told that the proposed plantation was not a government project, the community reportedly expressed relief. Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94.

³⁷² Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

³⁷³ *Id.* TreeFarms’ approach would seem to be more-or-less consistent with the terms of the Land Act, which requires that land acquisitions of more than 105 hectares be authorized by the concerned ministry at the state-level. GoSS Land Act, *supra* note 265, ch. VI, § 27(3). Indeed, TreeFarms claims that it will be the first company to acquire land by following the requirements of the 2009 Land Act. Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94. However, as mentioned above, the Land Act is drafted in broad terms and the implementing regulations that are to provide detailed procedures governing land acquisition for investors have yet to be drafted.

³⁷⁴ The Plantation Manager of TreeFarms Sudan is from Tindilo Community and assisted the company in its negotiations. Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ According to the Plantation Manager of TreeFarms Sudan, the community was consulted through the chiefs, sub-chiefs, community elders, and clan headmen. Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94.

³⁷⁸ *Id.*

³⁷⁹ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

³⁸⁰ *See, e.g.*, Interview with Commissioner of Terekeka County, *supra* note 311 (stating that the community will have the authority to reject a final agreement).

³⁸¹ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

negotiations were carried out in a transparent and participatory manner.³⁸² TreeFarms' Plantation Manager adds that the company conducted consultations with the host community over a year-long period.³⁸³ Still, questions remain as to whether that consent was fully informed and whether the process was an inclusive one. According to TreeFarms Sudan's Plantation Manager, the community did not fully understand the significance of the carbon credit revenue.³⁸⁴ The company was also not able to give projected estimates for carbon credit income.³⁸⁵ Without these figures, it may have been difficult for the community and the Ministry to determine a fair asking price for the land. Furthermore, the fact that consultations were conducted through traditional institutions raises potential concerns about the inclusivity of the process, particularly regarding the role of women in the process.³⁸⁶ Many customary land tenure systems in Southern Sudan marginalize women in decision-making processes and do not permit them to own land.³⁸⁷

B. INVESTMENT AGREEMENT

The TreeFarms investment agreement consists of two documents: a Land Title Agreement that provides the terms of a 99-year renewable lease³⁸⁸ and a Community Support Program Agreement that outlines the Community Support Program obligations of the parties in three time periods, from 0 to 5 years, 5 to 10 years, and 10 to 25 years.³⁸⁹ As noted above,³⁹⁰ the Land Title Agreement is in the final stages of government review and TreeFarms hopes it will be soon be finalized. The Community Support Program, however, is still being developed, as the parties have agreed to transfer title before coming to an agreement on what the community will receive in exchange for the land. According to the Country Manager of TreeFarms Sudan, "As soon as we have the land title deed, then we can start to discuss some hard facts about how much we can pay for the land we are leasing and how we are going to implement the local community support."³⁹¹ After title has been transferred, any services that are to be delivered to the community will be

³⁸² According to the Director General of Forestry, TreeFarms "took the right steps" in gaining referrals from the various levels of government until they reached the community level, and the company "had no conflict with anybody." Interview with Director General of Forestry, CES Ministry, *supra* note 266. The Minister of Agriculture is reported to have said that the way TreeFarms went about acquiring land can be used as an example for other investors. Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

³⁸³ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94 (stating that the community was consulted through the steering committee of the local development committee and that chiefs, sub-chiefs, clan headmen and elders were consulted over the course of a year-long period). Terekeka County officials add that it would have been impossible for TreeFarms to conduct activities in the area if there was strong opposition from the community. Interview with Commissioner of Terekeka County, *supra* note 311; Interview with Director of Forestry, Terekeka County, *supra* note 318.

³⁸⁴ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94 ("The community does not know about carbon credits. Even our people in government don't know about carbon credits.")

³⁸⁵ *Id.*

³⁸⁶ Four women were represented on the steering committee. However, the authors were not able to determine whether they actively participated in the investment negotiations.

³⁸⁷ PANTULIANO, THE LAND QUESTION, *supra* note 353, at 7.

³⁸⁸ Land Title Agreement, *supra* note 258, ¶ 1.1-1.2; GREEN RESOURCES, TINDILO REDUCED EMISSIONS, *supra* note 97, at 6-7.

³⁸⁹ Community Support Program Agreement, *supra* note 261, at 1.

³⁹⁰ See *supra* Executive Summary, Section II.C.

³⁹¹ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

granted at the discretion of Green Resources' Board of Directors.³⁹² The sequencing of this aspect of the agreement may undermine the community's negotiating power and affect its ability to negotiate favorable terms for itself. However, Green Resources emphasizes its successful completion of community-based projects in other investments, which are similar to the types of obligations that TreeFarms's Community Support Program contemplates.³⁹³

In addition to the procedural point on sequencing, a careful review of the investment agreement allows for a number of substantive observations. First, for such a large land investment, the TreeFarms Land Title Agreement is written in remarkably vague terms.³⁹⁴ This seems to be an all-too-common feature of such investment agreements in developing countries. According to Lorenzo Cotula et al., in a study examining large-scale land acquisitions in five African countries (including Sudan):

Virtually all the contracts analysed by this study tend to be short and simple compared to the economic reality of the transaction. Key issues like strengthening mechanisms to monitor or enforce compliance with investor commitments, maximising government revenues and clarifying their distribution, promoting business models that maximise local benefit (such as employment creation and infrastructure development), as well as balancing food security concerns in both home and host countries are dealt with by vague provisions if at all.³⁹⁵

Second, the agreement does not include any requirements that TreeFarms produce timber for the domestic market,³⁹⁶ which potentially lessens the anticipated benefits of the investment for the Southern Sudanese economy. In addition to accruing carbon credits through the forest conservation project, TreeFarms plans to grow teak, eucalyptus, mahogany and pine trees on its plantation.³⁹⁷ According to Green Resources' CEO, the objectives of the project are to use the vast majority of the land for its carbon credit project, and the remainder for plantation forestry and

³⁹² See Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94 (indicating that the Community Support Program Agreement, which will only be finalized after the Land Title Agreement is signed, is subject to final approval by the Green Resources board of directors).

³⁹³ The Community Support Program, for example, commits TreeFarms to building a village "office/community house" in the first five years of operating in Tindilo. Community Support Program Agreement, *supra* note 261, at 2. This commitment seems to be in keeping with the two community hall buildings that Green Resources recently completed in Mufindi District, in Tanzania. E-mail from CEO of Green Resources (Oct. 4, 2010, 02:13:00 EST), *supra* note 98 (referring to E-mail from Green Resources Employee, *supra* note 98 (listing the completion of community hall buildings in Chogo and Idete)).

³⁹⁴ For example, the Land Title Agreement, which is only five pages in length, commits TreeFarms to providing employment opportunities, Land Title Agreement, *supra* note 258, ¶ 4.4, but does not provide any specific commitments in relation to that obligation. In addition, instead of creating a mechanism to monitor whether or not TreeFarms effectuates its obligations to make payments of US \$ 12,500 to the Tindilo local community, it instead conditions these payments on a demonstration to TreeFarms of "proper accounting" by the community. *Id.*, ¶ 4.8 It does not, however, define what proper accounting would be.

³⁹⁵ COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121, at 7.

³⁹⁶ Land Title Agreement, *supra* note 258, ¶ 5.0 (giving TreeFarms the right to sell the "Products and proceeds of the plantation," but not setting any quantitative restrictions on the amount of products that must be retained for the domestic market).

³⁹⁷ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

agricultural land for the local villagers.³⁹⁸ He further clarified that “ALL [sic] (100%) of the carbon revenues that we generate will be re-invested in Southern Sudan.”³⁹⁹ Furthermore, according to the Country Manager of TreeFarms Sudan, the eucalyptus will be used mainly to provide electrical poles in Southern Sudan.⁴⁰⁰ There is likely to be a huge demand for electrical poles as electricity begins to spread to rural areas in Southern Sudan. Currently, electrical poles are being imported from Kenya and South Africa, despite the fact that Southern Sudan has an abundance of fertile land with which to grow its own eucalyptus trees.⁴⁰¹

However, the investment agreement is not structured in a way that ensures this benefit for the domestic economy. According to the agreement, TreeFarms has “the right to harvest, market, and sell the Products and proceeds of the plantation,” without any stated restrictions.⁴⁰² If the company exports its timber, this could reduce the benefits to the domestic economy. Furthermore, according to a March 2010 report from Green Resources, TreeFarms plans to establish a community-based forest management plan as a means of protecting existing forest stocks and rehabilitating degraded forest areas.⁴⁰³ The company also says that it will plant indigenous fruit trees and high value hardwoods that will provide feedstock for community livelihood programs relating to shea butter and gum arabic production.⁴⁰⁴ However, none of these commitments is detailed with any specificity in the investment agreement. The broad license given to TreeFarms in the agreement could be interpreted as allowing the company to extract the forest’s natural resources for sale outside Sudan.⁴⁰⁵

Third, the agreement does not provide any details regarding employment opportunities to be generated by the investment. The agreement simply states that TreeFarms must provide the local community with employment opportunities and training.⁴⁰⁶ Indeed, the company cites the employment opportunities that will be created by the project as one of the main benefits to the host community.⁴⁰⁷ As an example of its policies, it points to the employment opportunities that its investments in Tanzania have made available to host communities.⁴⁰⁸ However, more detailed provisions concerning the proportion of the plantation employees that are to be hired from the host

³⁹⁸ E-mail from CEO of Green Resources (Oct. 4, 2010, 02:35:00 EST), *supra* note 334 (stating that the “long-term objective for TreeFarms Sudan is to establish the following set-up:...150,000 ha of REDD + project...20,000 ha of plantation forestry...2,000 ha plus of prepared agricultural land offered to the local villagers”).

³⁹⁹ *Id.*

⁴⁰⁰ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

⁴⁰¹ *Id.*

⁴⁰² Land Title Agreement, *supra* note 258, ¶ 5.0.

⁴⁰³ GREEN RESOURCES, TINDILO REDUCED EMISSIONS, *supra* note 97, at 8. The company also plans on supporting community members in establishing alternative livelihood activities to replace incomes derived from charcoal production. Their initial focus will be on shea butter and gum arabic enterprises. *Id.* at 9.

⁴⁰⁴ *See id.* at 7.

⁴⁰⁵ While the Land Title Agreement includes obligations, such as investment in the property and annual progress reports, that TreeFarms is subject to, noticeably lacking is a provision limiting TreeFarms’s ability to export all that they produce. Land Title Agreement, *supra* note 258, ¶¶ 4.1-4.9, 5.0.

⁴⁰⁶ *Id.*, ¶ 4.5.

⁴⁰⁷ GREEN RESOURCES, TINDILO REDUCED EMISSIONS, *supra* note 97, at 7.

⁴⁰⁸ E-mail from CEO of Green Resources (Oct. 4, 2010, 02:13:00 EST), *supra* note 98. This reference pertains specifically to an unpublished press release that was attached to the e-mail from the CEO of Green Resources. *Id.* (referring to E-mail from Green Resources Employee, *supra* note 98).

community or the rights of those workers are absent from the agreement.⁴⁰⁹ Without clear and verifiable commitments relating to the generation of local employment, compliance with labor standards, and investments that would ensure that the host community can capture a larger portion of the value chain—for instance through the construction of local processing plants—it is less likely that Tindilo Community will realize the full benefit of the investment in the long term.⁴¹⁰ Although Green Resources’s company practice is to invest ten percent of its carbon credit revenue into the local economy, details regarding how carbon credit income will be allocated are absent from the investment agreement.⁴¹¹

Finally, the rental amount indicated in the investment agreement does not seem to adequately represent the value of the land. According to the agreement, Tindilo Community is to receive rent in the amount of US \$12,500 in the first year of the lease, followed by annual rent increases of two-percent to cover inflation, in addition to the commitments that the investor made in the Community Support Program Agreement.⁴¹² This translates to approximately US \$0.07 per hectare per year and seems to be little more than a symbolic payment.⁴¹³ Further evidence of imbalance can be found in the Community Support Agreement, which requires all able men and women in the Tindilo Community to contribute two days unpaid work maintaining the road to Juba County in the first five years of the project.⁴¹⁴

There are several factors that may account for the seeming lopsidedness of the investment agreement. The aforementioned lack of negotiating capacity may have affected the Tindilo Community’s ability to secure more favorable terms. The absence of an established land market may have also played a role. The challenges facing the land administration system referenced below⁴¹⁵ make it difficult to assess the volume of land transfers in Southern Sudan or whether the compensation offered was based upon a fair evaluation of the land. Perhaps the most significant

⁴⁰⁹ The company currently employs 12 supervisors, five of whom are from Tindilo Community, and 100 workers who work on a combination of daily and monthly contracts, all of whom are from Tindilo Community. The supervisors are paid between US \$500 and \$1000 per month. The workers on monthly contracts are paid US \$4 per day and the workers on daily contracts are paid US \$3 per day. Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94. Although the company claims that priority will be given to the local community in hiring decisions, no restrictions are placed on the company in the investment agreement. Land Title Agreement, *supra* note 258, ¶ 4.5.

⁴¹⁰ See De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 7 (“The obligations of the investor should not be limited to the payment of rents, or — in the case of land purchases — to a monetary sum. They should include clear and verifiable commitments related to a number of issues which are relevant to the longterm sustainability of the investment and to its compliance with human rights.”).

⁴¹¹ TreeFarms is pursuing certification under the CDM for its forest conservation project in order to earn carbon credit income on the compliance market. GREEN RESOURCES, ANNUAL REPORT, *supra* note 92, at 35.

⁴¹² Land Title Agreement, *supra* note 258, ¶¶ 4.8-4.9.

⁴¹³ By way of comparison, in discussing “land [that] is leased and nominally state owned,” as in this case study, the World Bank characterizes annual rental payments in Mozambique of US \$0.08 per hectare for land used for livestock and game ranching and US \$0.60 per hectare for land used for rainfed agriculture as “symbolic” payments set “with little regard to the land’s potential.” RISING GLOBAL INTEREST IN FARMLAND, *supra* note 10, at 78. The World Bank goes on to claim that “[u]ndervaluation of land has not only negative distributional consequences but also encourages projects that would other not viable [*sic*],... .” *Id.*

⁴¹⁴ Community Support Program Agreement, *supra* note 261, at 2 (“Once a year, all able men and women from Tindilo, including our permanent staff/casual labor shall contribute two days unpaid work on the road distance Mundari Buda (Tindilo) to Rokon (border of Juba county).”)

⁴¹⁵ See *infra* Section VI.

contributing factor is the high risk of investing in an environment such as Southern Sudan. While governments and host communities should balance the advantages of entering into an agreement against the opportunity costs involved, in some circumstances alternate sources of investment are not available and domestic parties have no choice but to accept an offer from one of the few investors that are willing to invest in such an unpredictable environment.⁴¹⁶ When these low opportunity costs are coupled with the extreme need of host communities and the government's inability to provide adequate services, the investor is given a great deal of leverage in investment negotiations. This point has been echoed by the Country Manager of TreeFarms Sudan: "Investors are not lining up to come to Tindilo. They [the Tindilo Community] are forgotten by everyone, including their own authorities in GoSS."⁴¹⁷

Despite the low rental payment, the TreeFarms investment offers a number of benefits to the host community. The investment agreement indicates that TreeFarms would invest US \$3 million over the next five years to develop the property.⁴¹⁸ Although some of this money will presumably be used to establish the plantation, the community may benefit from the development of infrastructure in the area. Green Resources has also publicly released plans related to the project that outline more direct benefits for the community. According to the March 2010 report from Green Resources, in addition to agricultural and forestry-related support programs, the company has committed to supporting the development of school facilities, roads, water systems, and dispensary units in Tindilo payam,⁴¹⁹ all to be done in coordination with the local government.⁴²⁰ These commitments are in keeping with its prior work in other sites in which it has invested.⁴²¹ Under the agreement, these obligations continue with minor alterations in the five to ten-year period and the ten to 25-year period. From the 26-year point onward, the investor has no obligations in the Community Support Agreement and responsibility shifts to the GoSS, CES, and local governments.⁴²² No oversight or compliance mechanisms are included in the agreement. The lack of clear and verifiable obligations for the investor and corresponding rights of the host community as reflected in the agreement may hinder efforts to hold the company to its promises or accountable for its actions.

⁴¹⁶ De Schutter recommends that "In considering whether or not to conclude an agreement with an investor, the host government should always balance the advantages of entering into such an agreement against the opportunity costs involved, in particular when other uses could be made of the land available, which could be better conducive of the long-term needs of the local population concerned and the full realization of their human rights." De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 1.

⁴¹⁷ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

⁴¹⁸ Land Title Agreement, *supra* note 258, ¶ 4.1.

⁴¹⁹ GREEN RESOURCES, TINDILO REDUCED EMISSIONS, *supra* note 97, at 6-7.

⁴²⁰ Interview with Country Manager of TreeFarms Sudan, *supra* note 259. As noted by the Country Manager, "Schools are useless if the government of Southern Sudan isn't able to provide teachers." *Id.*

⁴²¹ E-mail from CEO of Green Resources (Oct. 4, 2010, 02:13:00 EST), *supra* note 98 (referring to E-mail from Green Resources Employee, *supra* note 98).

⁴²² See Community Support Program Agreement, *supra* note 261, at 4 ("From year 26 onwards the full responsibility is with the public administration and government of GOSS, CES, County and Payam to provide the normal infrastructure and roads, and the running costs of these, for the local community.").

V. REFLECTIONS ON POTENTIAL IMPACT OF INVESTMENT

The TreeFarms investment project holds the potential to have both positive and negative impacts. As the investment has not yet progressed beyond its initial stages, many of these impacts remain prospective in nature. According to the Plantation Manager, TreeFarms has not yet undertaken impact assessments.⁴²³ The company says that it will conduct social and environmental impact assessments and develop a land use plan only after the planned referendum takes place.⁴²⁴ Without impact assessments for consideration prior to the negotiations, it is unclear how the Tindilo Community and its government representatives factored concerns about the investments' impacts into their negotiating postures.⁴²⁵ The lack of information about likely impacts also bears on the parties' capacity to respond to unforeseen problems that may arise in the future, thereby increasing the potential for negative impacts.

One possible impact relates to the risk of restricting access to forest resources in an area characterized as a major transhumance route.⁴²⁶ According to Diress Mengistu, a land tenure specialist with many years of experience in Southern Sudan, the creation of a forest plantation could cause increased competition over grazing land among pastoralist groups in the area.⁴²⁷ The company claims to have taken note of this potential problem and has set aside land for grazing purposes.⁴²⁸ The Country Manager of TreeFarms Sudan asserts: "It seems that we are occupying a huge chunk of land from the community, but the fact is that a large part of it will remain as natural forest, and they will continue with their grazing as they have done for hundreds of years."⁴²⁹

However, TreeFarms Sudan's Country Manager's comment does not account for the ecological changes that would accompany the establishment of a tree plantation in the area. Eucalyptus trees consume large amounts of water and can reduce water availability for people and their livestock.⁴³⁰ Furthermore, by planting trees in the open grasslands that are interspersed throughout the natural forest, TreeFarms will be reducing the amount of grassland that is available for people to graze their cattle. This could, in turn, lead to increased competition for grasslands among pastoralist groups in the area.⁴³¹ The risk that the investment will negatively affect

⁴²³ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94.

⁴²⁴ *Id.*

⁴²⁵ See De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 9 (emphasizing the importance of conducting impact assessments before the conclusion of negotiations).

⁴²⁶ Telephone Interview with Diress Mengistu, Land Tenure Specialist (Feb. 14, 2010) (on file with authors).

'Transhumance' refers to the seasonal movement of people and their livestock in search of dry season water and forage supplies. By denying access to these resources, agricultural development projects can pose serious risks to transhumant pastoralists. See, e.g., John D. Unruh, *Integration of Transhumant Pastoralism and Irrigated Agriculture in Semi-Arid East Africa*, 18 HUM. ECOLOGY 223 (1990), available at <http://www.springerlink.com/content/t12p7476hl525655/fulltext.pdf> (looking in particular at the impact of changing water patterns on pastoralists).

⁴²⁷ Interview with Mengistu, *supra* note 426.

⁴²⁸ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

⁴²⁹ *Id.*

⁴³⁰ E.g., Nesy Daniel et al., U.N. Educ., Scientific, & Cultural Org. [UNESCO] & Peking Univ., Working Group 14: Ethics of Energy Techs. in Asia & Pacific (EETAP) Project, *Draft Report: Water Ethics and Water Resource Management, Case Study 7 – Water Ethics Reflections in Eucalyptus Planting*, at 85 (Aug. 18, 2009), available at http://www.unescobkk.org/fileadmin/user_upload/shs/Energyethics/EETAPWG14rpt5.pdf.

⁴³¹ Sudan and Somalia have the largest populations of pastoralists in the world, with seven million each. Nikola Rass, *Policies and Strategies to address the vulnerability of pastoralists in Sub-Saharan Africa* (Pro-Poor Livestock Policy Initiative

pastoralists is compounded by the long time period of the 99-year lease, changes in grazing patterns that accompany population growth, and the changing needs of neighboring communities, who may also rely on the forests in the payam for their livelihoods.

According to Green Resources, TreeFarms project activities will include the implementation of a community-based forest management plan that is intended to protect existing forest stocks and rehabilitate degraded forest areas.⁴³² The company states that it will plant indigenous fruit trees and high value hardwoods in degraded forest areas to enhance the nutritional safety net that the forest provides to the local community during poor harvests.⁴³³ The company also plans to support community members in establishing alternative livelihood activities to replace incomes derived from charcoal production, with an initial focus on shea butter and gum arabic enterprises.⁴³⁴ However, the investment agreement does not contain any provisions detailing such an arrangement.⁴³⁵ With the influx of returnees, population growth, and the increased demand being made on forest resources, there is no guarantee that the area set aside for the community will be sufficient to satisfy the demands of the local population. This risk is not accounted for in the investment agreement, which could be strengthened with more detailed terms in the community-based management plan.⁴³⁶

The lack of clarity in the investment agreement may also affect the extent to which the investment generates local employment opportunities. TreeFarms is already encountering difficulties in training members of the Tindilo Community to grow seedlings, since the Mundari are traditionally cattle-keepers and are not accustomed to a farming lifestyle.⁴³⁷ The Land Title Agreement does commit TreeFarms to “[p]rovide training and employment opportunities to the local community.”⁴³⁸ However, it does not spell out the scope of the employment opportunities it must provide. It is therefore possible that, in the absence of qualified people in the Tindilo Community, Treefarms may turn to migrant labor to staff their plantation.

[PPLPI], FAO, Working Paper No. 37, 2006), *available at* <http://www.reliefweb.int/rw/lib.nsf/db900SID/LTIO-6UHRZJ?OpenDocument>. As noted by De Schutter, large-scale land acquisitions in areas with large populations of pastoralists pose a “real risk that land considered ‘empty’ or ‘idle’ will be sold or leased to investors, including foreign investors, without taking into account the important services it renders to the local population.” De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 23.

⁴³² GREEN RESOURCES, TINDILO REDUCED EMISSIONS, *supra* note 97, at 8.

⁴³³ *Id.* at 7.

⁴³⁴ *Id.* at 9.

⁴³⁵ Such a program is not enumerated in the obligations imposed on TreeFarms in the Land Title Agreement. Land Title Agreement, *supra* note 258, ¶¶ 4.1-4.9. Furthermore, the Community Support Program Agreement includes terms for forestry and agricultural support, but these terms only include basic promises of seeds, fertilizer, and, potentially, agricultural training. Community Support Program Agreement, *supra* note 261, at 2. Finally, TreeFarms only indicates that Community Support Program Agreement is meant to serve as a framework wherein “TreeFarms Sudan Ltd will provide investments for new buildings, facilities and equipment.” *Id.* at 1.

⁴³⁶ In relation to land investments in food production, De Schutter suggests that “investment agreements with net food-importing countries should include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels.” De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 8.

⁴³⁷ Interview with Country Manager of TreeFarms Sudan, *supra* note 259.

⁴³⁸ Land Title Agreement, *supra* note 258, ¶ 4.5. See also E-mail from CEO of Green Resources (Oct. 4, 2010, 02:13:00 EST), *supra* note 98 (referring to E-mail from Green Resources Employee, *supra* note 98) (indicating that Green Resources has provided sustainable employment opportunities in the Munfindi district in Tanzania).

Perhaps the most attractive benefit for the host community is the much-needed development and stimulation of the local economy that TreeFarms will bring to Tindilo. With proper oversight, the rental payment could be used to finance small development projects in the payam. However, the agreement does not include mechanisms to manage the payments, increasing the danger of misappropriation or uneven distribution of the revenue among community members.⁴³⁹ There is also an assumption that the stimulation of the local economy will encourage the state and central governments to provide additional services in the area. The CES government has already built a school in Tindilo, the construction of which TreeFarms credits to its presence.⁴⁴⁰ While this development represents an important service for the host community, it is a service being provided by the government.

VI. CONCLUDING OBSERVATIONS

Southern Sudan is an extremely fragile environment in which livelihood patterns have been destabilized by conflict. If peace is maintained following the 2011 referendum on self-determination, the region may experience a marked increase in large-scale land investments. These investments may prove to be a ‘double-edged sword’ for host communities, as they promise a much-needed source of development, yet also risk dispossessing communities of natural resources that are indispensable to their livelihoods. Ideally, land policy in Southern Sudan would place limits on large-scale acquisitions until the institutions of governance have had a chance to better establish themselves. The legal uncertainty of applicable land law in the wake of the CPA makes these investments far more risky for host communities and investors alike. The Land Act—which provides for the registration of customary rights and calls for a ceiling on land acquisitions to be put in place, prohibiting transfers above a certain size—is one step in the right direction, but without implementation, the legislation offers little protection.

Despite the prevailing legal ambiguities, TreeFarms has taken steps to involve the host community in the investment process.⁴⁴¹ However, without additional information, it is not possible

⁴³⁹ De Schutter highlights the importance of ensuring that revenue from investment activity be used for the benefit of the local population: “Investment contracts should prioritize the development needs of the local population and seek to achieve solutions which represent an adequate balance between the interests of all parties.” De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 4. In the case of TreeFarms, both the low rental amount and the lack of oversight mechanisms for the payment lessen the potential positive impact of the revenue for the local population. Furthermore, the community must demonstrate “proper accounting” before successive payments are made. Land Title Agreement, *supra* note 258, ¶ 4.8. However, the Land Title Agreement does not specify what proper accounting would entail. *Id.*

⁴⁴⁰ Interview with Country Manager of TreeFarms Sudan, *supra* note 259 (postulating that “one of the reasons [why the school was built] is probably because they see that now people are earning salaries, and they think that they will be able to afford some money for school fees and teacher salaries... As soon as a company like ours comes, it begins to generate some other activities by the state and central government.”). According to Green Resources, “Green Resources is the only employer in the Payam and its presence has already started attracting social infrastructure to the village.” GREEN RESOURCES, ANNUAL REPORT, *supra* note 92, at 13.

⁴⁴¹ Other large-scale land acquisitions in Southern Sudan that have been reported in the media seem to be less conscientious in this regard. In 2009, the US financial investment firm Jarch Management Group acquired 400,000 hectares of land from a company owned by the son of the deputy commander-in-chief of the SPLA, despite disagreements over who actually owns the land. *See, e.g.,* Javier Blas & William Wallis, *U.S. investor buys Sudanese warlord’s land*, FIN. TIMES, Jan. 9, 2009, available at <http://www.ft.com/cms/s/0/a4cbe81e-de84-11dd-9464-000077b07658.html>

to determine whether the steering committee that was responsible for negotiating on behalf of the community was in fact representative of the community as a whole. Representative, inclusive, and informed community participation in the negotiation of investment agreements is vital to ensuring that investment projects do not deprive communities of land and other natural resources that are indispensable to their livelihoods.⁴⁴² Government officials are obligated by international law to ensure that the consultation process is fully transparent. Moreover, host communities, along with investors, should ensure that the views of all community members are taken into account.

Apart from whether the consultations with the host community were fully participatory and transparent, there remain concerns regarding the allocation of benefits laid out in the investment agreement. Several factors may account for this. Due to the extreme need of host populations, the nascent state of government, and the prevailing insecurity, opportunities such as that presented by TreeFarms are few and far between, and communities may not feel as though they can afford to reject offers. At the same time, investors—who themselves are facing substantial risks by investing in Southern Sudan—may be inclined to drive a hard bargain in order to safeguard their investment. Since land markets are not yet established in the region, it is also difficult for the parties to know what price to expect for leases such as these. Furthermore, local communities have not historically been given a role in decision-making on community land and community members tend to be ill-equipped to protect their interests in negotiations with foreign investors.

Although TreeFarms claims that the plantation is being established on land that is not currently being used,⁴⁴³ this determination does not necessarily take into account changing patterns of land use that could accompany population growth and the influx of returnees to Tindilo Payam. TreeFarms should be credited for its plans to develop a community-based forest management plan that the company says will protect existing forest stocks, rehabilitate degraded forest areas, and provide for the sustainable use of forest resources.⁴⁴⁴ However, under a strict interpretation of the investment agreement, the host community can only access forest resources on the land at the company's discretion.⁴⁴⁵ With the return of large numbers of displaced people following the signing of the CPA, forests resources are facing increased demands and restrictions on access to such a large

(detailing the parameters of the investment); McKenzie Funk, *Capitalists of Chaos*, ROLLING STONE, May 27, 2010, at 58. Although Jarch ostensibly leased the land for a joint agricultural venture, a report from the Small Arms Survey speculates that the deal was actually about oil. CLAIRE MCEVOY & EMILE LEBRUN, SMALL ARMS SURVEY, UNCERTAIN FUTURE: ARMED VIOLENCE IN SOUTHERN SUDAN 36 (Apr., 2010), available at <http://www.smallarmssurveysudan.org/pdfs/HSBA-SWP-20-Armed-Violence-Southern-Sudan.pdf>. Robert Lado, the Chairman of the Southern Sudan Land Commission, reportedly expressed skepticism of the deal: "Our land is communal in southern Sudan. An individual can only sell it when there is consensus among members of that community... Even if he is leasing this land on behalf of his family, there are other members of the family. Even if on behalf of his clan, there are other members of the clan." Skye Wheeler, *South Sudan Looking into US Land Deal*, REUTERS, Jan. 27, 2009, available at <http://af.reuters.com/article/commoditiesNews/idAFHEA72861320090127>.

⁴⁴² According to De Schutter, "The negotiations leading to investment agreements should be conducted in a fully transparent manner, and with the participation of the local communities whose access to land and other productive resources may be affected as a result of the investment agreement." De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 1.

⁴⁴³ Interview with Plantation Manager of TreeFarms Sudan, *supra* note 94.

⁴⁴⁴ GREEN RESOURCES, TINDILO REDUCED EMISSIONS, *supra* note 97, at 7.

⁴⁴⁵ The Land Title Agreement makes it clear that this is a lease between TreeFarms and CES. Land Title Agreement, *supra* note 258, ¶ 1.1. Under general principles of property law, the leaseholder, in temporary possession of the property, retains a right to exclude others from the property.

area could deprive the host community of much-needed resources. Tindilo Payam is also a major transhumance⁴⁴⁶ route and, as previously noted, exclusion from forest resources could cause increased competition over grazing land among pastoralist communities in the area.

There are additional safeguards that the GoSS can put in place to help mitigate the risks associated with large-scale land acquisitions in Southern Sudan. Investors seeking to acquire land should be required to conduct comprehensive impact assessments prior to beginning any negotiations with host communities.⁴⁴⁷ Those impact assessments should be done transparently and with the participation of host communities, and should include an assessment of the likely impact that the investment will have on the human rights of local populations.⁴⁴⁸ Investment agreements should define investors' obligations and the corresponding rights of host communities in clear and verifiable terms and include mechanisms to ensure that these obligations are made enforceable.⁴⁴⁹ As a matter of process, these obligations should be defined prior to transfers of land. Both the GoSS and foreign investors should seriously consider whether large-scale land investments are desirable in this environment, or whether their interests would be better served through other means, including, for example, by capping of land investments at a certain size until the institutions of government have had a chance to better establish themselves. The land administration system is particularly in need of urgent attention to ensure that the land rights of host communities are promptly registered so that they receive the legal protections they have been promised. The Special Rapporteur on the right to food has urged states to adopt this step as a minimum principle in the context of large-scale land acquisitions.⁴⁵⁰ The GoSS should exercise caution in registering community lands so that it does not encourage land acquisitions by streamlining the acquisition process. One way to do this would be to empower the institutions of land administration provided for in the Land Act and ensure that they play their role in overseeing land investments for the benefit of affected communities.⁴⁵¹ In addition to the requirements of the Land Act, there are also obligations placed

⁴⁴⁶ See *supra* note 426 and accompanying text.

⁴⁴⁷ According to De Schutter: "In order to highlight the consequences of the investment on the enjoyment of the right to food, impact assessments should be conducted prior to the completion of the negotiations on (a) local employment and incomes, disaggregated by gender and, where applicable, by ethnic group; (b) access to productive resources by the local communities, including pastoralists or itinerant farmers; (c) the arrival of new technologies and investments in infrastructure; (d) the environment, including soil depletion, the use of water resources and genetic erosion; and (e) access, availability and adequacy of food." De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 9. For more information on ways in which investors can improve their relationship with host communities, see LUC ZANDVLIET & MARY B. ANDERSON, GETTING IT RIGHT: MAKING CORPORATE-COMMUNITY RELATIONS WORK (2009).

⁴⁴⁸ See generally OLGA LENZEN & MARINA D'ENGELBRONNER, AIM FOR HUMAN RIGHTS, GUIDE TO CORPORATE HUMAN RIGHTS IMPACT ASSESSMENT TOOLS (Jan., 2009), available at http://www.aimforhumanrights.org/fileadmin/user_upload/pdf/HRB_Guide_to_corporate_HRIA_2009-def.pdf (providing model impact assessments for use by businesses).

⁴⁴⁹ As De Schutter points out, provisions that stipulate pre-defined sanctions in cases of non-compliance can help to enhance the enforceability of obligations. De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 7. For more on how investment contracts can be structured so as to protect local interests and encourage sustainable development, see LORENZO COTULA, IIED, INVESTMENT CONTRACTS AND SUSTAINABLE DEVELOPMENT: HOW TO MAKE CONTRACTS FOR FAIRER AND MORE SUSTAINABLE NATURAL RESOURCE INVESTMENTS (Mar., 2010), available at <http://www.iied.org/pubs/pdfs/17507IIED.pdf>.

⁴⁵⁰ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 3.

⁴⁵¹ The Land Act provides for the establishment of a County Land Authority and Payam Land Council. The County Land Authority's responsibilities include "advis[ing] the local community on matters related to land tenure, usage and

on the government under international law, as expressed by the Eleven Principles. Until the problems in the land administration system have been addressed, the GoSS should subject all acquisitions involving unregistered community lands to the strictest regulatory standards so as to reflect these responsibilities.

exercise over land rights.” GoSS Land Act, *supra* note 265, ch. VII, § 46(7). The Payam Land Council is responsible for the “[p]rotection of communal grazing land, forest, wetlands and water resources.” *Id.*, § 50.

CASE STUDY THREE: FOREIGN DIRECT INVESTMENTS IN EXPORT-ORIENTED AGRICULTURE IN PAKISTAN

I. INTRODUCTION

In 2009, a number of public and private investors from the United Arab Emirates (UAE) reportedly acquired a total of 324,000 hectares of land in Pakistan's Punjab province.⁴⁵² The goal of these investments is to produce food crops for export to the UAE.⁴⁵³ Prompted by the 2008 food crisis, the UAE has embarked on a campaign to secure its food supply by acquiring farmland abroad, thus reducing its dependence on a volatile international food market.⁴⁵⁴ Additionally, reports indicate that Qatar may also soon be "outsourcing" its food production to Pakistan, potentially displacing an estimated 25,000 villages in Punjab.⁴⁵⁵ While media reports indicate that several of the investment deals have been finalized, at this writing, there is little evidence of visible activity on the ground.⁴⁵⁶

These land investments pose a number of risks to host populations and have provoked a considerable amount of social opposition in Pakistan. The concerns voiced by farmers' groups, NGOs, and the media⁴⁵⁷ are amplified by a lack of transparency concerning the terms of the arrangements.⁴⁵⁸ Smallholder farmers are particularly vulnerable, since they often do not own the land they farm because land ownership is concentrated in the hands of a small landed class.⁴⁵⁹ These land acquisitions threaten to further centralize land ownership by transferring large tracts of land to

⁴⁵² THE GREAT LAND GRAB, *supra* note 13, at 8. There are also a number of other Middle Eastern countries investing in Pakistani farmland, including Saudi Arabia, Bahrain, and Qatar. Sadeque, *Giving Away the Family Silver*, *supra* note 112.

⁴⁵³ Press Release, Soc'y for Conservation & Prot. of Env't [SCOPE], Corporate farming...A wise development strategy or land grab? (Oct. 8, 2009) [hereinafter SCOPE, A wise development strategy or land grab?], available at <http://farmlandgrab.org/8133> (announcing a roundtable conference to discuss corporate agriculture farming in Pakistan). Gulf States import 60 to 80 percent of their food, including staples. Sadeque, *Giving Away the Family Silver*, *supra* note 112.

⁴⁵⁴ Sarmad Khan, *UAE may invest US \$500m in Pakistan farms*, THE NATIONAL, June 8, 2008 [hereinafter Khan, *UAE may invest US \$500m*], available at <http://farmlandgrab.wordpress.com/category/pakistan/page/4/>.

⁴⁵⁵ Sadeque, *Giving Away the Family Silver*, *supra* note 112.

⁴⁵⁶ See Telephone Interview with Azra Sayeed, Dir., Roots for Equity (Mar. 16, 2010) (on file with authors) (noting the potential detrimental effects of large-scale land investment but not being able to refer to the implementation of any specific deals).

⁴⁵⁷ See, e.g., *Pakistan: Civil society against land lease to aliens*, THE NATION, Oct. 11, 2009, available at <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Regional/Karachi/11-Oct-2009/Civil-society-against-land-lease-to-aliens> (reporting that "international experts and representatives of civil society have demanded an end to land leasing to foreign investors and countries," citing concerns about food shortages, access to water, and the prevalence of genetically modified seeds and crops).

⁴⁵⁸ See Kugelmann, *Going Gaga over Grain*, *supra* note 114 (observing that "the details surrounding these investments are sketchy and the facts elusive" and that "[i]n Pakistan [specifically], uncertainty reigns over the exact amount of land made available to investors, the quantum of land sold or leased so far, and who is in fact doing the investing.").

⁴⁵⁹ Najma Sadeque, *Gambling on Pakistan's Agricultural Future*, 51 DEV. 555, 556 (2008) [hereinafter Sadeque, *Gambling on Pakistan's Agricultural Future*], available at <http://www.palgrave-journals.com/development/journal/v51/n4/pdf/dev200862a.pdf>.

foreign investors, which in turn is likely to impede efforts to promote a more equitable distribution of land among Pakistanis.⁴⁶⁰

Meanwhile, the Pakistani government continues to facilitate and incentivize foreign direct investment in its agricultural land. Following recommendations from the International Finance Corporation (IFC) and the Foreign Investment Advisory Service (FIAS)—a World Bank institution that helps governments implement reforms to improve their business environment—the government has put into place a number of incentives to encourage foreign investment in Pakistani farmland.⁴⁶¹ The proposed scale of these investments is daunting; according to Najma Sadeque, a Pakistani journalist who has followed the issue closely, the Pakistani government announced in 2009 that it would make seven million acres of farmland available to investors,⁴⁶² while a 2010 media report states that the government plans to lease out a total of 9.1 million hectares of farmland across the country's four provinces to foreign investors.⁴⁶³ Marginalized community members—women, members of “lower castes,” and the rural poor—may stand to lose the most as a result of these regulatory changes and the investments they are meant to encourage.

This case study evaluates the preliminary impacts of the agricultural land investments in Pakistan. Although the current status of these land investments is somewhat uncertain, it is still possible to highlight many of the concerns that they raise. It is important to note that the research informing this case study is up to date as of May 2010. Subsequent to that date, Pakistan has experienced substantial flooding that has affected more than 20 million people and one-fifth of the area of the country.⁴⁶⁴ This flooding has direct bearing on the central element of this case study—food security in Pakistan—and the new threats to long-term food security wrought by the flooding need to be considered in light of the structural problems that are further identified in this Report.⁴⁶⁵ The research in this section does not touch upon changes to large-scale land development in the wake of the flood, nor does it speculate upon the types of investment that will be necessary or beneficial to restoring the infrastructure that has been damaged by recent events.⁴⁶⁶ However, the

⁴⁶⁰ See THE GREAT LAND GRAB *supra* note 13, at 8, 9 (concluding that “land deals are detracting from land reform efforts” and that “[i]n this context of . . . Gulf countries vying for Pakistani farmland, citizens are concerned about the lack of government attention to land reform and other rural development issues.”). This concern surrounding large-scale land acquisitions in Pakistan follows a historical trend of “troubling inequity in land ownership due to the feudal structure of power [that] has served as a barrier to social and economic progress for the poor for years.” *Id.* at 8.

⁴⁶¹ See *id.* (mentioning the following incentives: long-term leases with full proprietary rights; tax holidays; full retention of profits and dividends; and the ability to export all of the food produced).

⁴⁶² Sadeque, *Giving Away the Family Silver*, *supra* note 112. As Sadeque reports: “It was the sheer scale of the proposed land lease that shocked Pakistanis to attention. One million acres of Pakistani land were offered to any takers. It was immediately snapped up. The government promptly offered another six million acres.” *Id.* See also Bakr, *Pakistan Opens More Farmland*, *supra* note 111 (stating that in May 2009, Pakistan’s Ministry of Investment announced that it would make 2.43 million hectares of farmland available for sale or lease to foreign investors).

⁴⁶³ Riaz Khan Daudzai, *Landowners ready to lease farmlands to foreigners*, INT’L: THE NEWS, Feb. 14, 2010, available at <http://www.blogster.com/anacoana/china-is-the-fastest-growing-major-economy-in-the-world>.

⁴⁶⁴ Carlotta Gall, *Pakistan Flood Sets Back Infrastructure by Years*, N.Y. TIMES, Aug. 26, 2010, available at <http://www.nytimes.com/2010/08/27/world/asia/27flood.html>.

⁴⁶⁵ See *infra* Section II.B. For example, considering the crop destruction caused by the flooding, farmers will potentially be unable to plant this year in keeping with the rhythm of the growing season, thus affecting not only short-term but also long-term food security. Ellick, *Floods Could Have Lasting Impact for Pakistan*, *supra* note 106.

⁴⁶⁶ Gall, *Pakistan Flood Sets Back Infrastructure by Years*, *supra* note 464.

climate of reconstruction may provide even greater openings for foreign large-scale land development, making the analysis below all the more relevant.⁴⁶⁷

II. CONTEXT

Outside of Africa, Asia is perhaps the most sought after location for large-scale land investments by foreign investors.⁴⁶⁸ According to Raul Q. Montemayor, agribusiness opportunities abound in Asia, “where many countries simultaneously have burgeoning populations; increasing consumption trends; and limited capacities to produce and supply food to their consumers.”⁴⁶⁹ Among the incentives that are attracting foreign investors to Asia are the favorable agro-climatic conditions for producing certain crops, the low labor costs, access to nearby markets, and an ‘investor-friendly’ atmosphere in many host countries. Montemayor further notes how the promotion of free trade has opened opportunities for foreign investors in the agricultural sector in Asia: “An American investor who locates his production in a member country of the Association of Southeast Asian Nations (ASEAN), for example, could theoretically benefit from zero-tariff privileges for almost all agricultural products sold to other countries within the ASEAN free-trade area.”⁴⁷⁰ However, farmers in many Asian countries are also finding it difficult to produce and supply a sufficient amount of food for local consumption.⁴⁷¹ This shortcoming is exacerbated by the widespread lack of rural infrastructure, the difficulties and high expenses inherent in transporting inputs and products, as well as lack of access to rural credit, which often forces farmers to rely on lower inputs and thus suffer lower yields. Additionally, “due to poor marketing systems, farmers are often vulnerable to price volatility and manipulation,” which can decrease incentives for agricultural production, while simultaneously increasing the already high costs that farmers cannot afford.⁴⁷²

Although large-scale land investments offer an opportunity to improve agricultural production systems in Asia, export-oriented, large-scale land investments in an environment where the demand is so high can undermine domestic food production goals, while posing a number of risks related to displacement, food insecurity, one-sided contracts, and the welfare of farmers who may be forced to become waged agricultural workers with lower standards of living.⁴⁷³ These risks are all present in Pakistan where, as noted above, the government plans to make millions of acres of farmland available to foreign investors. This is further complicated by the fact that Pakistan also suffers from food shortages and a severe water crisis, both of which have undermined a once robust agricultural sector.⁴⁷⁴ Rural poverty is also on the rise and the negative impacts of large-scale land

⁴⁶⁷ See *supra* note 109.

⁴⁶⁸ RACE FOR THE WORLD’S FARMLAND, *supra* note 8, at 12.

⁴⁶⁹ Raul Q. Montemayor, *Overseas Farmland Investments—Boon or Bane for Farmers in Asia?*, in RACE FOR THE WORLD’S FARMLAND, *supra* note 8, at 96.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* The obstacles to agricultural production are made all the more significant by the fact that 50 percent of the world’s growing demand for food comes from Asia. Asian Development Bank [ADB], Agriculture, Rural Development, and Food Security (Apr. 2010), <http://www.adb.org/Documents/Brochures/InFocus/2010/Agriculture.pdf>.

⁴⁷² Montemayor, *supra* note 469, at 96.

⁴⁷³ *Id.* at 100-105.

⁴⁷⁴ See Ghulam Dastageer, *Corporate farming will exacerbate food crisis: NGO*, INT’L: THE NEWS, Oct. 18, 2009, available at <http://farmlandgrab.org/8319> (quoting Roots for Equity Director Dr. Azra Talat Sayed as saying: “Pakistan faces acute water shortage and with corporate farming being promoted the scarce water resources will be used by foreigners for earning profits through food, which will increase hunger and deprivation among the people of Pakistan.”).

investments may magnify caste-based discrimination and increase the inequalities of the bonded labor and feudal land tenure systems.⁴⁷⁵

A. GENERAL COUNTRY INFORMATION

Pakistan is a South Asian country with a total land area of 79.61 million hectares.⁴⁷⁶ Three-fourths of Pakistan's land mass is barren with negligible productive potential; the remaining one-fourth varies in productivity.⁴⁷⁷ The most arable land is found in Punjab province, along the border with India. Once known as the "granary of the East," farming in Punjab today accounts for 60 percent of the country's agricultural production.⁴⁷⁸ Of Pakistan's population of approximately 166 million, more than half live in Punjab province.⁴⁷⁹ The bulk of the UAE large-scale land acquisitions in Pakistan are also located in Punjab.⁴⁸⁰

The agricultural sector is Pakistan's main determinant of overall economic growth.⁴⁸¹ In 2005, agriculture contributed to 25 percent of Pakistan's gross domestic product (GDP), provided employment to 44 percent of the total labor force, and accounted for nearly 65 percent of export earnings.⁴⁸² More recent evidence indicates that agriculture was 20.4 percent of GDP, as of 2008.⁴⁸³ An estimated 67.5 percent of the rural population directly or indirectly depends on the agricultural sector for its livelihood.⁴⁸⁴ Pakistan's economic growth fluctuated considerably over the latter half of the twentieth century, but by the late 1980s, it had achieved near self-sufficiency in food

⁴⁷⁵ See Saadia Toor, *Structural Dimensions of Food Insecurity in Pakistan*, in HUNGER PAINS: PAKISTAN'S FOOD INSECURITY (Michael Kugelman ed., forthcoming 2010) (manuscript at 3, on file with authors) (observing that, "The distribution of rural poverty in Pakistan closely reflects land distribution, which is highly unequal in Pakistan and has become more so since the 1980s."); Sadeque, *Gambling on Pakistan's Agricultural Future*, *supra* note 459, at 557 (stating that a process of deeply indebted peasants selling out to bigger landlords or moneylenders has further enabled the expansion of already vast holdings of landlords and investors). According to Toor, "land distribution has repercussions in terms of the abuse and exploitation that the poor are subject to in rural Pakistan." Toor, *supra*, at 4. For additional information on caste-based discrimination and bonded labor in Pakistan, see International Dalit Solidarity Network [IDSN]: Dalits and bonded labour in Pakistan, <http://idsn.org/caste-discrimination/key-issues/bonded-labour/pakistan/> (last visited Apr. 24, 2010).

⁴⁷⁶ The U.N. Sys. in Pak., Thematic Group on Rural Dev. and Food Sec., *United Nations Statement on Food Security in Pakistan*, 3, UN-PAK/FAO/2000/1 (2000) [hereinafter U.N. *Statement on Food Security*], available at <http://www.rdfs.net/oldsite/EN/News/Pakistan1.pdf>.

⁴⁷⁷ Tarique Niazi, *Land Tenure, Land Use, and Land Degradation: A Case for Sustainable Development in Pakistan*, 12 J. ENVIRON. & DEV. 276 (2003) [hereinafter Niazi, *A Case for Sustainable Development*] (citing Government of Pakistan [GoP], Finance Division, *Economic Survey 1999-2000* (2000)).

⁴⁷⁸ Hammad Badar et al., *Factors Affecting Agricultural Production of Punjab (Pakistan)*, 44 PAK. J. AGRIC. SCI. 506, 506 (2007). Pakistan has four provinces: Punjab, Sindh, Balochistan and North West Frontier province.

⁴⁷⁹ World Bank: Development Indicators, Data: Pakistan, <http://data.worldbank.org/country/pakistan> (last visited Apr. 24, 2010). These figures are based on a 2008 estimate.

⁴⁸⁰ THE GREAT LAND GRAB, *supra* note 13, at 8.

⁴⁸¹ Mirza B. Baig & Nowshad Khan, *Rural Development in Pakistan: From Vision to Action 1* (2006) (presented at conference at University of Plymouth entitled *The Rural Citizen: Governance, Culture and Wellbeing in the 21st century*).

⁴⁸² *Id.* at 2 (citing GoP, Statistics Division, Federal Bureau of Statistics, *Pakistan Statistical Pocket Book* (2005); GoP, Ministry of Finance, *Pakistan Economic Survey 2004-2005* (2005)).

⁴⁸³ WORLD BANK, *Pakistan at a Glance* (Dec. 9, 2009), http://devdata.worldbank.org/AAG/pak_aag.pdf (last visited Oct. 24, 2010).

⁴⁸⁴ *Id.* (citing GoP, Ministry of Food, Agriculture and Livestock, Economic Wing, *Agriculture Year Book* (2004-05)).

production and had reduced the incidence of poverty to about 17 percent.⁴⁸⁵ Since the 1990s, however, poverty has been on the rise. Professor Saadia Toor traces the rise in poverty, in part, to the implementation of an International Monetary Fund (IMF)-enforced structural adjustment package implemented between 1987 and 1988.⁴⁸⁶ More recently, in the midst of the global food crisis of 2007 and 2008, the World Bank and the IMF advised the Pakistani government to reduce wheat subsidies and sell its wheat on the global market, since global prices were at a record high.⁴⁸⁷ The government proceeded to export half a million tons of wheat,⁴⁸⁸ and the reduction in subsidies caused many farmers to switch to producing other crops that were more profitable.⁴⁸⁹ Despite Pakistan's bumper wheat crop in 2006 and 2007, by 2008 the country was facing domestic wheat shortages that eventually culminated in food riots.⁴⁹⁰ As noted in Section IV, the Pakistani government, with the backing of international financial institutions, is now actively encouraging large-scale land investments in the country purportedly in an effort to strengthen the weakened agricultural sector.

Land in Pakistan is not merely the foundation of the agricultural sector; it also reflects the inequities of caste-based discrimination and bonded labor in the country.⁴⁹¹ Bonded labor is secured through the practice of debt bondage, in which landowners make loans to their workers and charge exorbitantly high interest rates to ensure that they can never be repaid.⁴⁹² According to Sadeque, debt bondage is prevalent in the farm sector, where sharecroppers and landless laborers face severe exploitation.⁴⁹³ Estimates of the number of bonded laborers in Pakistan vary widely,⁴⁹⁴ but the

⁴⁸⁵ U.N. *Statement on Food Security*, *supra* note 476, at vii.

⁴⁸⁶ Toor, *supra* note 475, at 2.

⁴⁸⁷ *Id.*

⁴⁸⁸ See Sadeque, *Gambling on Pakistan's Agricultural Future*, *supra* note 459, at 556 ("In 2007, the then Prime Minister Shaukat Aziz was so impressed by the last bumper wheat harvest that he approved the sale of half a million tons of wheat without reserving stockpiles for domestic needs.").

⁴⁸⁹ Toor, *supra* note 475, at 2.

⁴⁹⁰ *Id.* See also Sadeque, *Gambling on Pakistan's Agricultural Future*, *supra* note 459, at 556 (stating that, "From the time World Bank policies increasingly diverted Pakistan to export crops, the country has not been self-sufficient in wheat the way it used to be.").

⁴⁹¹ See generally IDSN, PAKISTAN'S "LOWER CASTE" HINDUS: EQUALITY DENIED (2008) *available at*, http://idsn.org/uploads/media/FACTSHEET_PAKISTAN.pdf (serving as a fact sheet on caste discrimination in Pakistan).

⁴⁹² According to Human Rights Watch, bonded labor in Pakistan involves the purchase and sale of laborers among landlords, the maintenance of private jails to discipline and punish laborers, the forcible transference of teachers who train laborers to maintain proper financial accounts, and a pattern of rape of female laborers by landlords and the police. HUMAN RIGHTS WATCH, CONTEMPORARY FORMS OF SLAVERY IN PAKISTAN 10 (1995) [hereinafter HUMAN RIGHTS WATCH, CONTEMPORARY FORMS OF SLAVERY], *available at* www.hrw.org/reports/pdfs/c/crd/pakistan957.pdf. The system is designed to enslave future generations, as children often inherit their families' debts and "remain trapped in a cycle of debt bondage." HUMAN RIGHTS WATCH, CASTE DISCRIMINATION: A GLOBAL CONCERN: A REPORT FOR THE UNITED NATIONS WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE, DURBAN, SOUTH AFRICA 14 (Aug., 2001) [hereinafter HUMAN RIGHTS WATCH, CASTE DISCRIMINATION], *available at* <http://www.hrw.org/reports/2001/globalcaste/caste0801.pdf>; see also Dexter Filkins, *Serfs Cast Off Chains in Pakistan*, L.A. TIMES, Aug. 20, 1999, *available at* <http://articles.latimes.com/1999/aug/20/news/mn-1966> (recounting a revolt by bonded laborers in 1999). According to Human Rights Watch, 50 percent of the bonded labor in Pakistan is in the agricultural sector. HUMAN RIGHTS WATCH, CONTEMPORARY FORMS OF SLAVERY, *supra*, at 83 (1995). For evidence of the continuing problem of debt bondage in Pakistan, see Press Release, ActionAid, Thousands enslaved in bonded labor/debt bondage in Pakistan (Aug. 6, 2007), *available at* <http://www.actionaid.org/micrositeAssets/pakistan/assets/thousands%20enslaved%20in%20bonded%20labor.doc>.

⁴⁹³ Sadeque, *Gambling on Pakistan's Agricultural Future*, *supra* note 459, at 555.

practice of debt bondage is most pronounced in Punjab and Sindh provinces.⁴⁹⁵ According to a report by the Asian Development Bank (ADB), most bonded agricultural laborers in Sindh province hail from “lower-caste” or so-called “untouchable” groups of Indian origin (known in India as Dalits). Under the current systems, these bonded laborers can never receive compensation for more than one-fourth of the crop that they have farmed.⁴⁹⁶ Bonded labor continues to thrive in Pakistan despite the safeguards that have been put in place under such legislation as the Bonded Labour (Abolition) Act of 1992.⁴⁹⁷ As Human Rights Watch has pointed out, the law is not enforced and the police often refrain from registering cases of bonded labor brought to their attention.⁴⁹⁸

B. FOOD AND WATER SECURITY

Further complicating the difficulties faced by marginalized populations, Pakistan is also struggling with food shortages⁴⁹⁹ and a water crisis.⁵⁰⁰ Pakistan was heavily affected by the global food crisis; according to the World Food Program, between 2007 and 2008 approximately 80 million people in the country were food insecure.⁵⁰¹ According to Toor, some “50 percent of Pakistan’s population consumes less than the minimum required for average human need,” and “[a] total of 95 of the country’s 121 districts face food insecurity resulting from hunger, malnutrition, under-nutrition, disease, and poverty.”⁵⁰² The United Kingdom-based risk intelligence firm, Maplecroft, includes Pakistan in a list of 15 countries where severe food shortages have been forecasted for the near future.⁵⁰³

Pakistan’s water crisis is closely intertwined with prevailing food insecurity. Although in 1995 the United Nations Development Program (UNDP) had rated Pakistan as having among the

⁴⁹⁴ According to a 2007 report, a population of 6.5 million bonded laborers was reported in Sindh province alone, where landlords held 4,500 bonded laborers in one region. Meanwhile, the Pakistani government’s meager estimate puts the number of bonded laborers at 7,000. Subir K. Kole, *People in Bondage: Modern Slavery and the Economies of South Asia – Prevalence and Estimates*, 2 RES. & PRAC. IN SOC. SCI. 75, 82 (2007).

⁴⁹⁵ HUMAN RIGHTS WATCH, CONTEMPORARY FORMS OF SLAVERY, *supra* note 492, at 10.

⁴⁹⁶ See ASIAN DEV. BANK, SINDH RURAL DEVELOPMENT PROJECT (TA 3132-PAK) FINAL REPORT, VOLUME 1 (Oct. 2000), *cited in* HUMAN RIGHTS WATCH, CASTE DISCRIMINATION, *supra* note 492, at 14 n.66. Many bonded laborers also live in “unregistered villages” and, as a result, have no political rights. *Id.* Since poor and landless people are not typically allowed access to institutional forms of credit, they have no option but to work for landlords. HUMAN RIGHTS WATCH, CONTEMPORARY FORMS OF SLAVERY, *supra* note 492, at 13.

⁴⁹⁷ Bonded Labor Abolition Act (1992), *available at*

http://www.bondedlabour.org/web/pdf/Pakistan_Bonded_Labour_System_Abolition_Act_1992.doc.

⁴⁹⁸ See HUMAN RIGHTS WATCH, CONTEMPORARY FORMS OF SLAVERY, *supra* note 492, at 24. As Ehsanullah Khan of the Bonded Labor Liberation Front (BLLF), a Pakistani advocacy group for bonded laborers, pointed out in a 1993 interview with Human Rights Watch/Asia, “One of the most important issues facing bonded laborers in all parts of Pakistan is rape of women bonded laborers. Our reports indicate that it is happening regularly in brick-kilns, at carpet-looms, and in agriculture.” *Id.* at 19.

⁴⁹⁹ Toor, *supra* note 475, at 1 (“In 2008, the World Bank put Pakistan on the list of 36 countries that faced a serious food shortage, warning that if the situation worsened, people might raid storage facilities for food.”)

⁵⁰⁰ See generally RUNNING ON EMPTY, *supra* note 107 (stating bluntly that “Pakistan’s water situation is extremely precarious” and summarizing the water crisis’s causes and effects).

⁵⁰¹ THE GREAT LAND GRAB, *supra* note 13, at 8.

⁵⁰² Toor, *supra* note 475, at 1.

⁵⁰³ Farzana Shah, *Corporate farming: pros and cons for Pakistani economy*, ASIAN TRIB., Dec. 7, 2009, *available at* <http://www.asiantribune.se/news/2009/12/07/corporate-farming-pros-and-cons-pakistani-economy>.

highest water potential per person out of the 130 countries surveyed,⁵⁰⁴ by 2003, Pakistan's total renewable water resources per capita were ranked 114th out of 180 countries.⁵⁰⁵ This water crisis has been attributed to factors ranging from drought caused by La Niña weather patterns, to antiquated irrigation and water storage systems.⁵⁰⁶ At least one study predicts that by 2025, water demand in Pakistan will exceed supply by approximately 100 billion cubic meters (bcm).⁵⁰⁷ Geographer and water expert Simi Kamal notes how the disadvantaged in society are made to carry a disproportionate share of the burden of Pakistan's water crisis.⁵⁰⁸ Since land ownership remains a proxy for water rights, landless farmers' access to water is severely limited. Women's water rights are similarly ill-defined, as they usually do not own or manage agricultural land.⁵⁰⁹

According to the United Nations Integrated Regional Information Networks (IRIN), the antiquated irrigation systems in the country are responsible for decreased agricultural productivity as a result of water logging and increased soil salinity.⁵¹⁰ The unequal distribution of water for agriculture has also strained tensions at the community and regional levels, particularly between the rival provinces of Sindh and Punjab.⁵¹¹ Pakistan's water supply is highly dependent on river flow from India and heightened tensions between the two countries have been linked to decreased water flow in recent years.⁵¹²

In sum, Pakistan is facing massive constraints from a variety of overlapping crises, from food and water insecurity, to the effects of macroeconomic fluctuations, to the exploitation of marginalized populations. The Pakistani government expresses hopes that foreign direct investments will help it to solve some of its problems relating to agricultural production, but the

⁵⁰⁴ IRIN, Pakistan: IRIN Special Report on the water crisis (May 14, 2001),

<http://www.irinnews.org/report.aspx?reportid=16364> [hereinafter IRIN, Special Report on the Water Crisis].

⁵⁰⁵ NILS ROSEMAN, ACTIONAID PAKISTAN, DRINKING WATER CRISIS IN PAKISTAN AND THE ISSUE OF BOTTLED WATER: THE CASE OF NESTLE'S 'PURE LIFE' 6 (Apr. 2005) available at www.alliancesud.ch/english/files/T_WrNn.pdf.

⁵⁰⁶ IRIN, Special Report on the Water Crisis, *supra* note 504.

⁵⁰⁷ RUNNING ON EMPTY, *supra* note 107, at 24 (citing TOUFIZ A. SIDDIQI & SHIRIN TAHIR-KHELLI, GLOBAL ENVIRONMENT AND ENERGY IN THE 21ST CENTURY, WATER NEEDS IN SOUTH ASIA: CLOSING THE DEMAND-SUPPLY GAP 79 (2004)).

⁵⁰⁸ See Simi Kamal, *Pakistan's Water Challenges: Entitlement, Access, Efficiency and Equity*, in RUNNING ON EMPTY, *supra* note 107, at 37-38 (disagreeing with the notion of "'equity' in provincial water distribution" and noting that "[t]he ownership of land remains a proxy for water rights—especially in agricultural areas.").

⁵⁰⁹ *Id.*

⁵¹⁰ IRIN, Special Report on the Water Crisis, *supra* note 504.

⁵¹¹ *Id.* Simi Kamal traces the tensions between Punjab and Sindh to disagreements over the amount of water that should be left to sustain the river ecosystem through downstream environmental flow according to the 1991 Water Accord: "This environmental flow is a major source of contention between Punjab and Sindh, with the former calling for more water for irrigation and the latter for an increase in environmental flow." Kamal, *supra* note 508, at 37.

⁵¹² According to Michael Kugelman, "Soon after the Mumbai terror attacks in 2008, Pakistani military officials began highlighting India's alleged violations of the Indus Waters Treaty—which stipulates how the various waters of the Indus River system are to be divided between the two countries—and suggesting that water issues constitute "a latent cause" of the ongoing conflict in Kashmir." RUNNING ON EMPTY, *supra* note 107, at 19 (citing ASIA SOC'Y, LEADERSHIP GROUP ON WATER SEC., ASIA'S NEXT CHALLENGE: SECURING THE REGION'S WATER FUTURE 18 (Apr. 2009)). In a January 2009 op-ed in the *Washington Post*, Pakistani President Asif Ali Zardari voiced concerns that the water crisis is posing to relations between Pakistan and India: "The water crisis in Pakistan is directly linked to relations with India. Resolution could prevent an environmental catastrophe in South Asia, but failure to do so could fuel the fires of discontent that lead to extremism and terrorism." Asif Ali Zardari, *Partnering with Pakistan*, WASH. POST, Jan. 28, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/27/AR2009012702675.html>.

legal incentives that it is reportedly extending to foreign investors, including the right to export 100 percent of the crops produced on Pakistani farmland, may undermine these goals and pose serious risks for the Pakistani population.⁵¹³

III. INSTITUTIONAL FRAMEWORK

Gulf State large-scale land acquisitions in Pakistan involve a number of public and private actors in both countries. Although the Pakistani government has issued a number of contradictory statements regarding these land acquisitions, rumors concerning the deals have sparked a considerable amount of concern in the country.⁵¹⁴ The lack of transparency around these investments makes it difficult to identify all relevant actors and their roles.⁵¹⁵ According to media reports, the primary actors involved are the Pakistani Ministry of Investment, the UAE government, and several Emirati financial investment firms.⁵¹⁶ A number of International Financial Institutions (IFIs) have also played a key role in Pakistan's creation of a regulatory framework that is attractive to foreign investment.⁵¹⁷ This section discusses the role of relevant institutional actors and highlights the Pakistani government's approach to large-scale land investments. It also reviews certain aspects of Pakistan's land tenure system and its more recent Corporate Agriculture Farming (CAF) policy, which marks a decisive shift towards large-scale agribusiness in Pakistan.

A. RELEVANT ACTORS

Land in the UAE has limited potential for food production and the country is heavily dependent on food imports to feed its population. As a result, UAE investors see an opportunity to secure domestic food supplies in the UAE through direct investments in farmland in Pakistan, among other areas.⁵¹⁸ Due to the dearth of reliable information on the UAE's land investments in Pakistan, it is difficult to determine the extent to which the UAE government is involved in the deals that have been reported in the media.

At least three UAE companies have, however, been publicly identified as pursuing land deals with the Pakistani government: the Emirates Investment Group (EIG)—a private investment group located in Sharjah, the third largest emirate in the UAE—is reportedly acquiring land in Punjab

⁵¹³ THE GREAT LAND GRAB, *supra* note 13, at 8.

⁵¹⁴ See, e.g., Khawar Ghumman, *Government keen to lease out farmland to foreigners*, DAWN, Jan. 14, 2010, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/business/13+govt-keen-to-lease-out-farmland-to-foreigners-410-za-08> (noting that according to Nazar Mohammad Gondal, the Federal Minister for Food and Agriculture, the Pakistani government is very keen on offering its land to foreigners, and adding that there are currently no such proposals under consideration).

⁵¹⁵ Kugelman, *Going Gaga Over Grain*, *supra* note 114.

⁵¹⁶ See, e.g., Sadeque, *Giving Away the Family Silver*, *supra* note 112 (reporting land deals by the Emirates Investment Group, Abraaj Capital, and a 150,000 hectare land deal by the Emirati government in Balochistan province); Ghumman, *Government keen to lease out farmland to foreigners*, *supra* note 514 (reporting on the Pakistani government's interest in attracting Gulf State investors in the agricultural sector).

⁵¹⁷ See THE GREAT LAND GRAB, *supra* note 13, at 8 (identifying the International Finance Corporation and the Foreign Investment Advisory Service as being particularly keen in encouraging foreign investment in Pakistan).

⁵¹⁸ Ghumman, *Government keen to lease out farmland to foreigners*, *supra* note 514. In 2008, a senior official from the Emirates Society of Consumer Protection, a division of the UAE Ministry of Economy, stated: "Moving into the Pakistani market is one of the options. It is on our radar." Khan, *UAE may invest US \$500m*, *supra* note 454.

province in order to grow tomatoes, potatoes, onions, and citrus fruits, and to engage in cattle-farming, for the purposes of export to the UAE;⁵¹⁹ Al Qudra Holding—a private joint stock company specializing in real estate, infrastructure, utilities, ventures, and agriculture—is reportedly aiming to acquire 400,000 hectares of agricultural land abroad for the purpose of producing vegetables and fruits with advanced technology and is eager to invest in Pakistan;⁵²⁰ and Abraaj Capital—a UAE private equity firm specializing in equity investments in South Asia, North Africa, and the Middle East—reportedly has plans to acquire 800,000 acres of land in Pakistan in order to grow rice and wheat, and to establish dairy farms.⁵²¹

While the Emirati investors view large-scale land acquisitions as both a profitable venture and a means of ensuring domestic food security in the UAE, the Pakistani government too anticipates a range of benefits from these deals. Indeed, the Pakistani government has been lobbying aggressively for foreign investments in the country's agricultural land in recent years. According to Michael Kugelman, representatives of the Ministry of Investment have appeared at “farmland road shows” across Gulf States to attract interest from foreign investors.⁵²² The Pakistani government is anticipating a range of positive benefits, including improved technologies, local employment opportunities, revitalized agricultural sectors, and improved agricultural yields. In a 2009 interview with the *Financial Times*, Shaukat Tarin, the now-former Finance Minister of Pakistan, implied that these benefits may be realized even if the land is leased for the express purpose of ensuring food security in the investing state:

We have talked to various countries and frankly we'll be spending a lot of attention and money on up-gradation of our agriculture in terms of yields, storage, value addition in vegetables and fruits, water resources, all these things. The same principle which is [sic] that we have gone to our friends and said, there are large tracts of land which is [sic] available and

⁵¹⁹ In a 2009 interview with Reuters, EIG's vice-chairman, Raza Jafar, said that EIG had a number of land investments pending in Pakistan: “In the pipeline we have a number of deals for leasing and buying land in the Punjab province of Pakistan which [will] come through by the end of the year.” He declined to comment on the size or cost of the land. Amena Bakr, *Interview – Emirates Investment Group to buy Pakistan farmland*, REUTERS, Apr. 28, 2009 [hereinafter Bakr, *Interview – EIG*], available at <http://in.reuters.com/article/domesticNews/idINLS82133420090428?sp=true>. Though EIG focuses mainly on investments in financial instruments, real estate, trading, aviation, and services, the company claims that it is seeking international partners who are specialized in agriculture to manage its projects in Pakistan. *Id.*

⁵²⁰ Al Qudra Holding was reported to have acquired 1500 hectares of land in Algeria and Morocco in 2008. *Al Qudra Holding in a Major Land Acquisition Push*, UAE INTERACT, Aug. 27, 2008, available at http://www.uaeinteract.com/docs/Al_Qudra_Holding_in_a_major_land_acquisition_push/31705.htm. For more information on Al Qudra, see Al Qudra, <http://www.alqudraholding.ae/> (last visited Mar. 28, 2010).

⁵²¹ SCOPE, *A wise development strategy or land grab?*, *supra* note 453; Sadeque, *Giving Away the Family Silver*, *supra* note 112. For more information on Abraaj Capital, see Abraaj Capital, *Mission & Values*, <http://www.abraaj.com/> (last visited Apr. 12, 2010).

⁵²² See Kugelman, *Going Gaga over Grain*, *supra* note 114 (reporting that representatives of the Ministry of Investment have been appearing at ‘farmland road shows’ across Gulf States offering Pakistani farmland as a solution to the region’s food security problems). As an example of such a “farmland road show,” at the first Middle East-Pakistan Agriculture and Dairy Investment Forum in Dubai in April 2008, investors pledged over US \$3 billion worth of new investments in Pakistan’s agriculture and dairy sectors, highlighting the country’s potential for milk and fruit production. Press Release, Arabian Bus., *Over US \$3 billion committed to Pakistan agriculture and dairy sector* (May 1, 2008), available at http://www.arabianbusiness.com/press_releases/detail/17551.

which can have access to water if you want food security, and also increase our export potential.⁵²³

International Financial Institutions (IFIs) have also played an important role in shaping Pakistan's agricultural system to favor foreign investors. The International Finance Corporation (IFC) and the Foreign Investment Advisory Service (FIAS) have both contributed to Pakistan's changing investment climate. In a 2005 study, the FIAS suggested that investors viewed land acquisition and site development regulations as the most significant barriers to investment in Pakistan, implying that relaxed regulatory standards were necessary to attract foreign investors.⁵²⁴ In 2008, the IFC provided Pakistan with US \$665 million for investments in the finance, health, education, infrastructure, manufacturing, petrochemicals, and telecommunications sectors.⁵²⁵ According to the Oakland Institute, the IFC's Global Trade Finance Program also enabled Pakistani banks to execute trade transactions worth roughly US \$121 million between July 2008 and January 2009, the benefits of which were reportedly concentrated in the agricultural sector.⁵²⁶ The regulatory changes promoted by the IFC and FIAS built upon agricultural reforms that the Pakistani government had previously enacted in its Corporate Agriculture Farming (CAF) policy of 2001. The CAF and its companion, the Corporate Farming Ordinance, were intended to attract investments in the country's farmland and are discussed in more detail in Section IV below.

B. LAND TENURE

According to the 2000 Agricultural Census,⁵²⁷ roughly one-third of the total cultivated area in Pakistan was managed through a tenant farming arrangement⁵²⁸ in which absentee landlords extracted rents from tenant farmers who were responsible for working the land. Roughly two-thirds of tenant farming uses a form known as sharecropping, in which the landlord allows the tenant to occupy the land in return for a share of the crop that the tenant produces.⁵²⁹ Costs and outputs are rarely shared equitably among landlords and tenants. According to IRIN, landowners typically demand from sharecroppers from half to two-thirds of their crop as payment.⁵³⁰ The Punjab Tenancy Act of 1887⁵³¹ governs the relationship between farmers and tenants in Punjab. It divides the farmers into those that have a statutory right to occupy the land—or so-called “occupancy tenants”—and those who occupy the land by virtue of contracts with the landlords—or “simple tenants.” Occupancy tenants may only be evicted from the land by court decree whereas simple

⁵²³ *Transcript of interview with Pakistan's top finance official*, FIN. TIMES, May 21, 2009.

⁵²⁴ Khaleeq Kiani, *Five major hurdles to FDI identified: World Bank-IFC survey*, DAWN, Aug. 23, 2005, <http://www.dawn.com/2005/08/23/ebr2.htm>.

⁵²⁵ THE GREAT LAND GRAB, *supra* note 13, at 8.

⁵²⁶ *Id.*

⁵²⁷ GOV'T OF PAKISTAN, MINISTRY OF ECON. AFFAIRS & STATISTICS, AGRICULTURAL CENSUS (2010), *available at* http://www.statpak.gov.pk/depts/aco/publications/agricultural_census2000/agricultural_census2000.pdf.

⁵²⁸ Hanan G. Jacoby & Ghazala Mansuri, *Incomplete Contracts and Investment: A Study of Land Tenancy in Pakistan 3* (World Bank Policy Research, Working Paper No. 3826, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922952&rec=1&srcabs=885347 (citing GoP, Ministry of Economic Affairs and Statistics, Agricultural Census (2000)).

⁵²⁹ *Id.*

⁵³⁰ IRIN, Pakistan: Absence of land reform entrenches poverty – activists (Sept. 28, 2009), <http://www.irinnews.org/Report.aspx?ReportId=86319> [hereinafter IRIN, Absence of land reform entrenches poverty].

⁵³¹ Punjab Tenancy Act, No. 16 of 1887, *available at* http://punjabrevenue.nic.in/pbtan_act1.htm.

tenants may be evicted when their contract runs out or when other conditions are present as stipulated in the Act.⁵³²

Ownership of rural land in Pakistan is characterized by high levels of land concentration and landlessness, both of which have been steadily increasing since the 1960s.⁵³³ In 1990, according to statistics from the government of Pakistan, a mere 7.5 percent of landowners owned 49 percent of the country's farmland, and 54 percent of smallholders (those with holdings of 5 acres or fewer) owned just 12 percent of the farmland.⁵³⁴ Estimates by the U.N. in Pakistan in 2000 found a similarly skewed pattern of landholding, with small farms (defined as those up to two hectares in size) comprising nearly half of the total number of farms but accounting for only 11.2 percent of the total land area.⁵³⁵ Large farms (defined as those over ten hectares in size), comprised only 6.8 percent of all farms but accounted for 39.8 percent of the total farm area.⁵³⁶ The highly unequal distribution of land ownership has contributed to widespread landlessness in rural areas.⁵³⁷ According to the Jacoby and Mansuri study, about half of Pakistan's population is landless.⁵³⁸ Sindh province alone has a population of 1.7 million landless agricultural workers (*baris*) and sharecroppers, most of whom are bonded laborers.⁵³⁹ Landlessness is also a key contributing factor to rural poverty.⁵⁴⁰

⁵³² HUMAN RIGHTS WATCH, SOILED HANDS, *supra* note 115, at 10.

⁵³³ Human Development Centre, Speeches of Mabub ul Haq, Inevitable land reforms (1996), <http://www.un.org.pk/hdc/Speeches%20of%20Dr.%20Haq%20Folder/land%20reforms.htm> (last visited Apr. 24, 2010). Punjab province has the most highly unequal distribution of land ownership, followed by North West Frontier province, Sindh and Balochistan. Talat Anwar et al., *Landlessness and Rural Poverty in Pakistan*, 43 PAK. DEV. REV. 855 tbl. 7 (2004), available at

<http://www.pide.org.pk/pdf/psde20AGM/Landlessness%20and%20Rural%20Poverty%20in%20Pakistan.pdf>.

⁵³⁴ GoP, Agricultural Census Organization, *Census of Agriculture* (1990), cited in Niazi, *A Case for Sustainable Development*, *supra* note 477, at 281. The government's statistics also showed that just 2.5 of landholders owned 34 percent of farmland in holdings of 50 acres or more. *Id.* at 280.

⁵³⁵ U.N. *Statement on Food Security*, *supra* note 476, at 4

⁵³⁶ *Id.* These statistics are confirmed by Pakistan's Gini coefficients—a general indicator of overall asset distribution in which zero represents perfect equality and one represents perfect inequality. In 1990, Kuhnen determined the Gini coefficients of land ownership and landholdings in Pakistan were 0.79 and 0.63 respectively. Niazi, *A Case for Sustainable Development*, *supra* note 477, at 281 (citing Frithjof Kuhnen, *Increasing socio-economic differentiation in agriculture: Evidence and implications for rural and agricultural development policy*, in AGRICULTURAL STRATEGIES IN THE 1990S: ISSUES AND POLICIES 115 (R. McConnen & S. Malik eds., 1990)).

⁵³⁷ See Niazi, *A Case for Sustainable Development*, *supra* note 477, at 280 (citing WORLD BANK, POVERTY IN PAKISTAN IN THE 1990S: AN INTERIM ASSESSMENT SUMMARY OF THE REPORT (2002), available at <http://siteresources.worldbank.org/PAKISTANEXTN/Resources/pdf-Files-in-Events/Poverty+Paper.pdf>) (“According to the World Bank (2002), the landownership concentration has bred massive landlessness in the country. The World Bank... estimates that one half of rural residents in Pakistan are landless, and 40% of them live in poverty.”).

⁵³⁸ Jacoby & Mansuri, *supra* note 528, at 3. According to Talat Anwar et al., 75 percent of households in Pakistan are without land. Anwar et al., *supra* note 533, at 1. Studies by the World Bank and Faruqee, on the other hand, put the number of landless people at 30 to 49 million. Rashid Faruqee, *Pakistan's agriculture sector: Is 3 to 4 percent annual growth sustainable?* (World Bank Policy Research, Working Paper No. 1407, 1995), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/1995/01/01/000009265_3970311121325/Rendered/PDF/multi_page.pdf (cited in Niazi, *A Case for Sustainable Development*, *supra* note 477, at 282); Niazi, *A Case for Sustainable Development*, *supra* note 477, at 282 (citing POVERTY IN PAKISTAN IN THE 1990S, *supra* note 537).

⁵³⁹ Niazi, *A Case for Sustainable Development*, *supra* note 477, at 282 (citing Human Rights Commission of Pakistan [HRCP] & Anti-Slavery International, *Bonded agricultural labourers in lower Sindh Province—Pakistan* (2002), available at <http://old.antislavery.org/archive/submission/submission2002-pakistan.htm> (presented to the 27th Session of the

Successive governments have attempted to address the problem of landlessness through land reform,⁵⁴¹ but all such efforts have reportedly failed due to the disproportionate political power of the feudal landlords who dominate state institutions.⁵⁴² In 2003, 85 percent of Pakistan's Parliament was drawn from feudal families.⁵⁴³ According to Mubashir Hasan, who served as finance minister from 1971 to 1974,⁵⁴⁴ “[l]and reform has not taken place because the lawmakers in many cases themselves have large land holdings and will never want to transfer ownership to tenants.”⁵⁴⁵ The Pakistani military, one of the largest landowners in the country, is similarly opposed to land reform.⁵⁴⁶ According to the Pakistani journalist Ayesha Siddiqa, “[t]he military controls about 11.58 million acres, which is approximately 12 per cent of the total 93.67 million acres of state land.”⁵⁴⁷ Control of this land is essential for maintaining the military's position within the Pakistani political structure.⁵⁴⁸ Planned large-scale land investments in Pakistan will likely compound this current state of inequality in land ownership by bypassing land redistribution within Pakistani society to the benefit of external parties, thereby undermining efforts to achieve a more equitable distribution in the future. The massive transfer of land rights that such land investments entail will also exacerbate the problem of landlessness, as rural populations will be forced to make do with less and less land. The next section explores some of the incentives that the Pakistani government has put in place to attract foreign investment. According to some commentators, these investment incentives further jeopardize the food security of the domestic population in Pakistan.⁵⁴⁹

IV. INVESTMENT CHARACTERISTICS

As noted above, the Pakistani government has enacted extensive regulatory reforms to create an investor-friendly environment in Pakistan. This section highlights some of the incentives that the

United Nations Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights, Working Group on Contemporary Forms of Slavery).

⁵⁴⁰ See Anwar et al., *supra* note 533, at 2 (arguing that, “Landlessness and rural poverty are closely linked since land is a principal asset in a rural economy like Pakistan.”).

⁵⁴¹ Efforts at land reform attempted in 1958, 1972 and 1977 failed. Niazi, *A Case for Sustainable Development*, *supra* note 477, at 290.

⁵⁴² *Id.* at 290 (citing Tarique Niazi, *The questionable success of economic growth in Pakistan*, 7 RES. IN SOC. PROBS. & PUB. POL’Y 199 (1999)).

⁵⁴³ *Id.* at 280.

⁵⁴⁴ Rulers: Pakistani Ministers, <http://rulers.org/pakgov.html> (last visited Apr. 22, 2010).

⁵⁴⁵ IRIN, Absence of land reform entrenches poverty, *supra* note 530.

⁵⁴⁶ Niazi, *A Case for Sustainable Development*, *supra* note 477, at 290. In a 2003 article for the Washington Post, John Lancaster observes that “the military continues to dominate—and occasionally add to—a real estate empire that includes horse farms, tracts of irrigated croplands and prime residential property in major cities, much of which is allotted to senior officers as part of their retirement package.” John Lancaster, *Fighting an Army's Empire; Pakistani Farmers' Land Battle Underscores Tension Over Military's Economic Power*, WASH. POST, June 29, 2003, at A19.

⁵⁴⁷ AYESHA SIDDIQA, MILITARY INC.: INSIDE PAKISTAN'S MILITARY ECONOMY 174 (2007). According to Siddiqa, the Government of Pakistan acquired land for the military under the Land Acquisition Act of 1894, which states that “the land of people may be acquired by the State for a public purpose meaning thereby for the use of the public at large.” Despite the public purpose requirement, “[t]he law . . . did not hamper the military from using its authority to subsequently change the usage class from farm land into land for golf courses or residential housing schemes, which was not necessarily sanctioned by the civilian government or the civil bureaucracy.” *Id.* at 176.

⁵⁴⁸ HUMAN RIGHTS WATCH, SOILED HANDS, *supra* note 115, at 5.

⁵⁴⁹ See, e.g., *supra* note 474 and accompanying text.

Pakistani government has offered to foreign investors, and then proceeds to outline relevant details, where available, of UAE large-scale land investments in the country.

A. INVESTMENT INCENTIVES BY PAKISTAN

Before embarking on its more recent regulatory reforms, the Pakistani government had already enacted a number of changes to make direct investments in agriculture more attractive to foreign investors. In 2001, as part of the Corporate Agriculture Farming (CAF) policy, Pakistan's former president, General Pervez Musharraf, passed the Corporate Farming Ordinance.⁵⁵⁰ The Ordinance allows foreign corporations to purchase land or obtain long-term leases of 50 years, extendable for another 49 years, and removes all limits on the amount of land that can be acquired.⁵⁵¹ It allows banks to earmark separate credit shares for corporate agriculture farming and extend loans to corporations. Furthermore, agricultural development projects are given ten-year tax holidays, land transfers are permitted without duties, and 100 percent of the capital, profit, and dividends are allowed to be remitted to the investor's home country.⁵⁵²

According to Toor, the CAF was only the “thin edge of the wedge”; in line with IFC and FIAS philosophy, the Pakistani government has extended numerous incentives to encourage large-scale land investments by foreign investors.⁵⁵³ An important shift in policy occurred during the 2008 global food crisis. Amidst the rising prices on the global food market, Pakistan was among a handful of countries that imposed restrictions on food exports in order to ensure adequate food supplies for their domestic populations.⁵⁵⁴ According to a report by the International Institute for Sustainable Development (IISD), the UAE asked for a blanket exemption from these export restrictions, but the Pakistani government was initially only willing to provide exemptions for certain zones specifically designated for agricultural investment—termed “agricultural free zones”⁵⁵⁵—maintaining that large-scale land acquisitions are “not [meant] to do away with precious farmland but in fact to raise the productivity of our farms and turn barren land into fertile farmland.”⁵⁵⁶ Despite these initial signs of resistance to export-oriented production, the Pakistani government eventually

⁵⁵⁰ Press Release, SCOPE, Corporate farming or land grab (Oct. 17, 2009), *available at* <http://desertification.wordpress.com/2009/10/18/corporate-farming-or-land-grab-scope-pakistan/>;

⁵⁵¹ *Id.*; Dastageer, *Corporate farming*, *supra* note 474. For additional information on the CAF, see Pakistani Board of Investment, Salient Features of Investment Policy for Corporate Agriculture, <http://www.pakboi.gov.pk/sec-policies.htm> (last visited Oct. 10, 2010).

⁵⁵² Pakistani Board of Investment, *supra* note 551, at 1.

⁵⁵³ Toor, *supra* note 475, at 5. *See also* Amena Bakr, INTERVIEW -- *Pakistan says committed to farmland deals*, REUTERS, Jan. 27, 2010 [hereinafter Bakr, *Pakistan says committed to farmland deals*], *available at* <http://in.reuters.com/article/southAsiaNews/idINIndia-45728420100127> (reporting that in 2009 the Pakistani government offered foreign investors to buy or lease approximately 400,000 hectares in the country).

⁵⁵⁴ CARIN SMALLER & HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV. [IISD], A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER 18 (May, 2009), *available at* http://www.iisd.org/pdf/2009/thirst_for_distant_lands.pdf.

⁵⁵⁵ Sarmad Khan & Vivian Salama, *UAE may buy Pakistan farms*, THE NATIONAL, May 5, 2008, *available at* <http://viviansalama.wordpress.com/2008/05/06/uae-may-buy-pakistan-farms/>. Pakistan offers a number of incentives in its agricultural free zones for investments in the agricultural, livestock, and dairy sectors. The incentives include duty free import of equipment and the ability to obtain full ownership rights, as opposed to mere leases. Khan, *UAE may invest US \$500m*, *supra* note 454.

⁵⁵⁶ 7Days, Feed the World, (Jan. 6, 2009), <http://www.7days.ae/storydetails.php?id=71912&page=localnews&title=Feed%20the%20world>.

agreed in principle to allow foreign investors to acquire Pakistani farmland without any export restrictions whatsoever, even in land outside of the agricultural free zones.⁵⁵⁷

The Pakistani government has also promised to provide a 100,000 men-strong security force—a force almost 20 percent the size of the entire Pakistani military—at a cost of US \$2 billion to protect large-scale land investments in the country.⁵⁵⁸ In addition, the government has guaranteed investors a ten-year tax holiday and is reportedly planning to offer “life insurance facilities” in the event of social unrest and suicide attacks.⁵⁵⁹ These facts signal the government’s recognition of the potential for social unrest associated with these investments.

B. UAE’S LARGE-SCALE LAND INVESTMENTS IN PAKISTAN

Although certain details of the UAE’s large-scale land investments in Pakistan have been sporadically reported in the media, the general lack of transparency associated with these deals makes it difficult to provide a definitive analysis of their contours.⁵⁶⁰ As noted in a 2009 article written for the English daily *DAWN* by Michael Kugelman, a program associate with the Woodrow Wilson Center’s Asia Program, the lack of transparency may contribute to the potentially severe impacts of the UAE’s land investments:

Given their lack of transparency, the details surrounding these investments are sketchy and the facts elusive. In Pakistan, uncertainty reigns over the exact amount of land made available to investors, the quantum of land sold or leased so far, and who is in fact doing the investing. Still, even without these details, there is strong evidence to suggest that the race for Pakistan’s farmland—if not halted prematurely by farmers’ opposition or investor change-of-hearts—could trigger droves of land deals, acute resource shortages and even political strife.⁵⁶¹

Although the precise identity of the Emirati investors and the nature of their relationship with the UAE government remain unclear, there are indications that both the UAE government and private investors are pursuing large-scale land investments in Pakistan. According to Eckart Woertz et. al., by September 2008, UAE companies and institutions had acquired approximately 324,000 hectares of farmland in Punjab province with the support of the UAE government.⁵⁶² Other media reports hint at similar deals in other parts of the country. The Society for Conservation and Protection of Environment (SCOPE) claims that in June 2009, the UAE government was negotiating to acquire 100,000 to 200,000 acres of land in “large holdings” in Sindh and Punjab

⁵⁵⁷ Khalid Mustafa, *Foreign investors may get legal cover*, INT’L THE NEWS, Dec. 20, 2008, available at <http://farmlandgrab.org/2640>.

⁵⁵⁸ Kugelman, *Going Gaga Over Grain*, *supra* note 114; Sadeque, *Giving Away the Family Silver*, *supra* note 112.

⁵⁵⁹ Mustafa, *supra* note 557.

⁵⁶⁰ Kugelman, *Going Gaga Over Grain*, *supra* note 114.

⁵⁶¹ *Id.*

⁵⁶² THE GREAT LAND GRAB, *supra* note 13, at 8; SMALLER & MANN, *supra* note 554, at 7; Sadeque, *Giving Away the Family Silver*, *supra* note 112; ECKART WOERTZ ET AL., GULF RESEARCH CTR., POTENTIAL FOR GCC AGRO-INVESTMENTS IN AFRICA AND CENTRAL ASIA 6 (Sept. 2008), available at http://www.grc.ac/download_generic.php?file_name=NTQ1NTk%3D&PHPSESSID=88b77d0e8068cd2eb5299734ce1bf7a6.

provinces at a cost of US \$400 to \$500 million.⁵⁶³ Sadeque reports that the UAE acquired 40,000 acres in the Balochistan province at a price of US \$40 million.⁵⁶⁴ As noted above, the following three private investors in the UAE have been identified as either seeking or having acquired land in Pakistan: EIG, Abraaj Capital, and Al Qudra.⁵⁶⁵

Although EIG's large-scale land investments have reportedly been structured for the express purpose of exporting the crop produced to the UAE, Raza Jafar, EIG's Vice-Chairman, claims that the UAE government is not directly involved with the deals: "We are not working with the government, we are a private company, but if people want to give us the credit of securing food supply then so be it."⁵⁶⁶ In his comments, Jafar also underscored the company's focus on the bottom line: "You have to keep in mind that this is a business for us, not a charity or a social project, so all we are after at the end like any company is to maximise profits."⁵⁶⁷ Jafar went on to note that EIG would be receptive to any code of conduct that the United Nations might develop to safeguard farmers' rights in the developing world, but that in the absence of any such regulations, the deals would move forward as planned.⁵⁶⁸

As reported by Reuters India, Al Qudra's attempts to secure land in Balochistan province have met with stiff resistance from local government officials. In April 2009, the general Chief-Secretary of Balochistan's provincial government, Nasir Khosa, blocked all deals with the UAE due to concerns about the rights of farmers affected by the land deals.⁵⁶⁹ According to Khosa, the UAE investors sought to acquire land directly from the farmers in Balochistan. Khosa claimed that a governmental body is supposed to approve these kinds of investments and it is unlawful for foreign investors to negotiate large-scale deals directly with farmers.⁵⁷⁰ In response to the opposition in Balochistan, the Pakistani Minister of Investment stated in 2009 that the government "expect[s] the investors in farmland to give the local farmers 50 percent of the land's yield, in addition to transferring the technology which will help increase the output of the land by three times."⁵⁷¹ However, government officials have been issuing contradictory statements regarding these acquisitions, and it remains uncertain whether the government will actually deliver on the promises made by the Minister of Investment.⁵⁷²

⁵⁶³ SCOPE, *A wise development strategy or land grab?*, *supra* note 453.

⁵⁶⁴ Sadeque, *Giving Away the Family Silver*, *supra* note 112.

⁵⁶⁵ WOERTZ ET AL., *supra* note 562, at 6; Bakr, *Pakistan Opens More Farmland*, *supra* note 111; Bakr, *Interview – EIG*, *supra* note 519.

⁵⁶⁶ Bakr, *Interview – EIG*, *supra* note 519. Jafar went on to say that the Pakistani government has been very positive and encouraging of the company's plans. *Id.*

⁵⁶⁷ *Id.*

⁵⁶⁸ Jafar stated: "We are ready to comply with the U.N. if they create a set of rules or international standards to deal with acquiring land. . . . But in the meantime they can't sit on the fence and say what needs to be done without taking action." *Id.*

⁵⁶⁹ Bakr, *Pakistan Opens More Farmland*, *supra* note 111.

⁵⁷⁰ *Balochistan blocks land deals with UAE investors*, REUTERS, Apr. 23, 2009, available at <http://www.pakissan.com/english/news/newsDetail.php?newsid=20447>.

⁵⁷¹ Bakr, *Pakistan Opens More Farmland*, *supra* note 111.

⁵⁷² See Mustafa, *supra* note 557 (indicating that the Pakistani government has permitted UAE investors to acquire land without any export restrictions whatsoever).

Pakistan's Foreign Minister, Shah Mehmood Qureshi, has additionally tried to provide assurances related to the nature of the land being leased or sold, indicating that such land is unused and would otherwise lie fallow if not for these land investments.⁵⁷³ According to the Oakland Institute, however, the land being offered for lease to foreign investors, though government-owned, is not unused and has been farmed for generations by small producers and landless peasants.⁵⁷⁴

As is evident from the preceding discussion, the available information about these investments is vague, at best. However, the information does indicate the potential for severe impacts on the host population, a topic that is covered in the next section.

V. REFLECTIONS ON POTENTIAL IMPACT OF INVESTMENTS

This section offers some preliminary observations, based on information available as of May 2010, about the potential impacts of these investments should they move forward as planned.

Perhaps the most severe impact of these land deals relates to their potential for mass evictions. Reportedly, 25,000 villages may be displaced as a result of Qatari land investments.⁵⁷⁵ Mass evictions such as these would contravene Pakistan's obligations under international law, unless adequate rehabilitation and compensation is ensured for affected populations. The legal obligations incumbent on the government must be integrated into impact assessments for the investments. Moreover, investors should consider that such evictions may further frustrate land reform efforts in the country, concentrating land ownership in the hands of even fewer people and exacerbating landlessness.⁵⁷⁶ According to Azra Sayeed, the Director of ROOTS for Equity, a Pakistani non-governmental organization that advocates on behalf of the rural poor, the Pakistani government's response to evictions in the past has been uneven; some displaced groups are given compensation and alternative resettlement whereas others are given nothing, with little rhyme or reason for which groups are compensated.⁵⁷⁷ Sayeed believes it unlikely that the government would commit the substantial funds necessary to provide compensation to those displaced.⁵⁷⁸

As noted in Section II above, Pakistan is in the midst of interrelated food and water crises, and these export-oriented investments may have negative impacts on the availability of food and water in Pakistan.⁵⁷⁹ Pakistani columnist Irfan Husain has tellingly reflected that, "Pakistan has a huge and growing population, and water shortage is making farming, especially in lower Sindh, a precarious occupation. Pakistan's water resources can hardly sustain intensive farming on the scale

⁵⁷³ Bakr, *Pakistan says committed to farmland deals*, *supra* note 553.

⁵⁷⁴ THE GREAT LAND GRAB, *supra* note 13, at 8.

⁵⁷⁵ Sadeque, *Giving Away the Family Silver*, *supra* note 112.

⁵⁷⁶ *See id.* at 8-9 ("land deals are detracting from land reform efforts" and "[i]n this context of...Gulf countries vying for Pakistani farmland, citizens are concerned about the lack of government attention to land reform and other rural development issues.").

⁵⁷⁷ Interview with Sayeed, *supra* note 456.

⁵⁷⁸ *Id.*

⁵⁷⁹ *See* RUNNING ON EMPTY, *supra* note 107, at 7 ("As one Pakistani observer points out, the country's water shortage 'is making farming, especially in lower Sindh, a precarious occupation. Pakistan's water resources can hardly sustain intensive farming on the scale being planned.'").

being planned.”⁵⁸⁰ Pakistan’s food security may also be jeopardized if smallholder farmers are forced to become waged agricultural workers, with lower standards of living. Without more information about the terms of the investment agreements, observations about the nature of labor rights in the proposed large-scale farming schemes would be mere speculations. However, given the prevalence of debt bondage in Pakistan’s farming sector and the weak enforcement of protective legislation described above, there is reason to be concerned that the system might perpetuate itself on foreign-owned farms.

In addition to the concerns over implications for food and water security in Pakistan, these investments also pose a significant risk of social unrest, which should be considered by potential investors and the government alike. Pakistan has a history of popular protest in response to forced changes in land rights. In 2001, for example, when the Pakistani military attempted to force a population of tenant farmers to switch to a contract-based system, it provoked what Human Rights Watch labeled “the most significant popular protest movement that Pakistan has witnessed in recent times.”⁵⁸¹ Led by the Punjab Tenants Movement (*Anjuman e Mazarin Punjab*), the protest included some 1 million landless tenants based in villages stretching over 15 districts in Punjab.⁵⁸² In the course of their protests against the actions of the Pakistani military, farmers were dismissed from their employment and exposed to arbitrary arrests and detentions, forced divorces (in which Pakistani security forces reportedly targeted the sons-in-laws of tenants who refused to consent to the new contracts, torturing them until they agreed to divorce their wives), torture, and killings.⁵⁸³ In total, 11 tenants lost their lives.⁵⁸⁴

As volatile as the standoff was between the Punjab Tenants Movement and the Pakistani military, the land use changes that are likely to result from Gulf State land acquisitions are on a scale many times that of what was being contested in Punjab in 2001. Kugelman judges the political risks associated with these large-scale land investments as being “particularly high” due to the prevalence of violent, extremist anti-government movements, such as the Taliban, that have mastered the ability to exploit land-based class divisions.⁵⁸⁵ If the Pakistani government does not carefully assess its plans to transfer such large areas of the country’s farmland to foreign investors, the threat of mass

⁵⁸⁰ Irfan Husain, *The great land grab*, DAWN, May 9, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/columnists/16-irfan-husain-the-great-land-grab-959>.

⁵⁸¹ HUMAN RIGHTS WATCH, SOILED HANDS, *supra* note 115, at 4. The military started demanding contracts with the farmers where they had to pay rent for the land. *Id.* at 10.

⁵⁸² Awaz Foundation Pakistan: Center for Development Services [AwazCDS] & Global Call to Action Against Poverty [GCAP], Pakistan National Secretariat, *Campaign for Land Rights in Punjab-Pakistan Malki YA Mant (Ownership OR Death): Long March by Anjuman Mazarine Punjab & Women Peasants 2* (Mar. 9, 2010), <http://www.whiteband.org/regions/asia/pak/pakistani-women-secure-land-rights.pdf>.

⁵⁸³ HUMAN RIGHTS WATCH, SOILED HANDS, *supra* note 115, at 5-6. As one example, in 2003, the police and Pakistan Rangers besieged the villagers in 18 villages for a month until they signed a contract. During that period, Human Rights Watch reported that the villagers experienced restricted movements and disconnection of water. The Chief Minister in Punjab acknowledged that some serious “human rights violations had taken place during this conflict.” *Id.* at 7.

⁵⁸⁴ AwazCDS & GCAP, *supra* note 582, at 3. Anjuman e Mazarin Punjab’s slogan for the movement is “ownership or death.” HUMAN RIGHTS WATCH, SOILED HANDS, *supra* note 115, at 12.

⁵⁸⁵ Kugelman, *Going Gaga over Grain*, *supra* note 114. According to Toor, the military and the agricultural departments tried to change the tenure status for the farmers working on some of the military farms, comprising 70,000 acres. They tried to make the peasants sign “limited tenure contracts” which would allow them to be displaced. However this situation caused the creation of the Anjuman e Mazarin Punjab movement. Toor, *supra* note 475, at 6. See also *supra* note 115 and accompanying text.

evictions, increased food and water insecurity, and social unrest could prove more costly than it has anticipated.

VI. CONCLUDING OBSERVATIONS

The Pakistani government anticipates a range of benefits from large-scale land investments that would justify the numerous incentives that it has extended to foreign investors.⁵⁸⁶ Due in part to the recommendations of several IFIs, the Pakistani government has therefore enacted significant regulatory changes that may skew the balance in favor of foreign investors and minimize benefits for host populations.⁵⁸⁷ According to SCOPE, if properly structured, the foreign direct investments can provide key resources for agriculture, including the development of much-needed infrastructure and the expansion of livelihood options for local people.⁵⁸⁸ However, given the social, political, and economic context in which these investments operate, the size of the deals in question, and the way in which they appear to have been structured, there is strong evidence to suggest that these large-scale land investments may lead to acute resource shortages, exacerbate food insecurity, and cause a level of social unrest that may lead to further human rights violations by the Pakistani military.⁵⁸⁹

As an initial step, transparency and participation of the affected communities—including to identify development needs and provide free, prior, and informed consent—are key to protecting the community’s human rights, notably the right to participation, to adequate housing, including the right to not be forcibly evicted from one’s home, the right to an adequate standard of living, right to non-discrimination and equality, labor rights, the right to development and the right to adequate remedy as examined above.⁵⁹⁰ Moreover, the apparent lack of community participation in these land acquisitions makes it far more difficult to tailor the arrangements to suit the development needs of the host population—a consideration that must be incorporated into the analyses of IFIs.⁵⁹¹ As with all large-scale land investments, impact assessments should be carried out prior to the negotiation of the investment agreement and throughout the life of the investment to ensure that the host populations’ needs are addressed.⁵⁹²

In order to mitigate the negative impacts on host populations, host states and investors should also cooperate to ensure that the modes of agricultural production respect the environment and do not accelerate soil depletion and the exhaustion of freshwater reserves.⁵⁹³ Given the reported

⁵⁸⁶ See Mustafa, *supra* note 557 (detailing the benefits extended to investors).

⁵⁸⁷ As noted by the Special Rapporteur on the right to food, development banks, including the World Bank and the IFC, are bound by international human rights law as part of general international law. They should therefore ensure that their support to any large-scale investment in farmland is made conditional upon compliance with minimum standards of human rights. See De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 5 (citing Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20, 1980) (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law ...”)).

⁵⁸⁸ SCOPE, *A wise development strategy or land grab?*, *supra* note 453.

⁵⁸⁹ Kugelman, *Going Gaga over Grain*, *supra* note 114.

⁵⁹⁰ See *supra* note 37 and accompanying text.

⁵⁹¹ See *supra* footnote 587.

⁵⁹² De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 9.

⁵⁹³ *Id.* at 17, Principle 6. De Schutter suggests that the parties explore low external input farming practices as a means of achieving this goal. *Id.*

scale of land transfers for export-oriented food production, the potential for negative impact on scarce water supplies and local food security is great. In order to ensure that these land investments will not cause additional food insecurity in Pakistan by increasing the host population's dependence on food imports in the context of volatile international markets, investment agreements should also include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets. The clause could also provide that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels.⁵⁹⁴

Forced evictions that are sometimes associated with these investments should also only be permitted in the most exceptional circumstances, even in relation to communities that lack legally-recognized claims to the land. Prior to carrying out any evictions or shifts in land use, Pakistan should ensure that all feasible alternatives are explored in consultation with the affected communities, with a view to avoiding the need to resort to forced evictions.⁵⁹⁵ Displaced persons must receive “full and fair rehabilitation” including resettlement, as well as access to productive land where appropriate.⁵⁹⁶

Furthermore, it is crucial that the government ensure farm workers' fundamental human rights and protect their labor rights.⁵⁹⁷ To achieve this, legislation outlawing bonded labor must be strictly enforced in large-scale land investments. The Pakistani government must also enforce its protective legislation regarding labor rights and tenants' rights without discrimination on the basis of caste or gender. To ensure maximum benefit for the host population, the investors could also incorporate labor-intensive farming practices—while ensuring that such practices do not under any circumstances involve the use of bonded labor—and provide farm workers with living wages, a key component of the human right to food.⁵⁹⁸ Any contracts with foreign investors could also include provisions that require a certain percentage of workers to be hired from the host community.

Pakistan is facing a number of crises related to food and water shortages that may exacerbate rural poverty and underdevelopment. These crises are compounded by the inequities of its feudal land tenure system and by the insecurity posed by the Taliban and the ongoing war in neighboring Afghanistan. In the midst of these intractable issues, the government of Pakistan is offering a virtually unprecedented amount of farmland to foreign investors. Should these land investments proceed, the potential negative impacts are daunting; if the human rights and development needs of host populations are not prioritized, millions of Pakistanis stand to lose in the process.⁵⁹⁹ Since the investments have not yet progressed into the implementation phase, the Pakistani government and Gulf State investors still have time to change their approach.

⁵⁹⁴ *Id.* at 17, Principle 8.

⁵⁹⁵ *See id.* at 16, Principle 2 (emphasizing that forced evictions should “occur [only] in the most exceptional circumstances.”). As De Schutter notes, forced evictions “are only allowable under international law when they are in accordance with the locally applicable legislation, when they are justified as necessary for the general welfare, and when they are accompanied by adequate compensation and alternative resettlement or access to productive land.”)

⁵⁹⁶ *Id.*

⁵⁹⁷ *See id.* at 18, Principle 11 (explaining that these rights “should be stipulated in legislation and enforced in practice, consistent with the applicable ILO instruments.”).

⁵⁹⁸ *Id.* at 17, Principle 5.

CASE STUDY FOUR: AN ALTERNATIVE APPROACH TO BIODIESEL PRODUCTION IN MALI

I. INTRODUCTION

Mali Biocarburant SA (MBSA) is a company that works with smallholder farmers in Mali and Burkina Faso to produce biodiesel from the jatropha plant, an inedible plant that grows wild across Africa.⁶⁰⁰ MBSA's investment in Mali has been active since 2007; at the time of this writing, the project in Burkina Faso was still in its early stages.⁶⁰¹ The company's stated goal is to produce biofuel in a manner that is sustainable as an independent profit-making venture, while at the same time supplementing farmers' incomes and contributing to poverty alleviation.⁶⁰² The business is funded by a number of private institutional investors in the Netherlands and subsidized by the Dutch government.⁶⁰³ Farmers in Mali implicated by the project are given representation on the board and a Malian farmers' union owns a 20 percent share of the company.⁶⁰⁴

The MBSA land investment incorporates a business model that avoids many of the risks associated with the other large-scale land investments featured in this Report. According to MBSA, the company has not had to acquire any land, other than a small training facility and the factory that it uses to produce the biofuel.⁶⁰⁵ Instead, the company encourages small-scale farmers in Mali to intercrop their fields with jatropha.⁶⁰⁶ Farmers harvest the jatropha nuts and sell them to MBSA, which then extracts their oil using a number of mobile presses.⁶⁰⁷ MBSA refines the oil into biodiesel, which is then sold locally and used to power generators and cars that have diesel engines.⁶⁰⁸ The extraction process produces residual "press cakes" that are used as organic fertilizer to help improve soil fertility and glycerin that is used to produce soap. MBSA's investment in Mali began in 2007 and, as of 2009, the company was working with an estimated 2,611 farmers who had planted approximately 1.6 million jatropha trees on 3,250 hectares of land.⁶⁰⁹

⁶⁰⁰ MBSA, Company Profile, http://www.malibiocarburant.com/Company_profile.html (last visited Oct. 25, 2010).

⁶⁰¹ Telephone Interview with Mohamoudou Kiemtore, Lawyer (Jan. 25, 2010) (on file with authors); E-mail from CEO of MBSA, *supra* note 117. This case study focuses on MBSA's land investments in Mali.

⁶⁰² Interview with Director of Annona Sustainable Development Fund, *supra* note 127.

⁶⁰³ MBSA, Company Profile, *supra* note 600.

⁶⁰⁴ Walter Hetterschijt, Mali Biocarburant SA Making Core Business of Sustainability 14 (July 8, 2009), http://www.landcoalition.org/cpl-blog/wp-content/uploads/Mali_Biocarburant.pdf [hereinafter Hetterschijt, Making Core Business of Sustainability]; MBSA, Company Profile, *supra* note 600; MBSA, Sustainable Production, *supra* note 118.

⁶⁰⁵ Interview with Director of Annona Sustainable Development Fund *supra* note 127; Interview with CEO of MBSA, *supra* note 127.

⁶⁰⁶ Interview with CEO of MBSA, *supra* note 127. "Intercropping" refers to the agricultural practice of growing two or more crops in the same place at the same time. In addition to MBSA, the company Eco-Carbone and the Malian non-governmental organization (NGO) MaliFolkecenter (MFC) are also managing jatropha projects that incorporate intercropping. Several other companies have leased land in the Office du Niger region of the country where they plan to develop large-scale monocropping of jatropha, although as of January 2010 these plantations were not yet operational. *Id.* "Monocropping" refers to the agricultural practice of growing the same crop on the same land, year after year.

⁶⁰⁷ Bioenergy Markets in West Africa Conference, Oct. 27-29, 2009, *Enabling Sustainable Biopower, Biogas and Biofuels Development in West Africa*, 17 (Oct. 29, 2009).

⁶⁰⁸ Royal Tropical Institute [KIT], <http://www.kit.nl/smartsite.shtml?ch=FAB&id=17098> (last visited Feb. 20, 2010).

⁶⁰⁹ E-mail from CEO of MBSA, *supra* note 117. These figures represent the combined totals for both the Mali and Burkina Faso ventures.

This case study evaluates MBSA's impacts on the host population in Mali and the insights they offer into innovative mechanisms that stand to minimize the harms and maximize the benefits of large-scale land investments. Section V examines a parallel trend in medium and large-scale land acquisitions in Mali and provides additional contextual information on the laws and policies that govern land rights in the country.

II. CONTEXT

Mali is the largest country in West Africa and the seventh largest country on the African continent.⁶¹⁰ Although its 2006 per capita gross domestic product (GDP) of US \$470⁶¹¹ placed Mali among the world's ten poorest nations, the country has made some progress in recent years; its 2009 per capita GDP was estimated at US \$641,⁶¹² and the World Bank had projected five percent growth for the economy in 2010.⁶¹³ Nevertheless, poverty is acute in rural areas. Seventy percent of the population lives in rural villages, of which 76 percent are considered poor.⁶¹⁴ The harsh environmental conditions compound the hardships of poverty and the country struggles with drought, hunger, an energy crisis, and the negative effects of climate change. Land resources in Mali are facing heavy pressure from all sides and under these difficult conditions, farmers have turned to the jatropha plant as a source of renewable energy with the potential to reduce the country's dependence on imported oil and contribute to rural development,⁶¹⁵ without negatively affecting local food security.

A. GENERAL COUNTRY INFORMATION

The Sahara Desert dominates the northern part of Mali and the majority of the country's population is concentrated in the less arid regions to the south.⁶¹⁶ Mali's total landmass consists of approximately 1,220,019 square kilometers, but due to the dry climate agricultural production is constrained to only 14 percent of the land.⁶¹⁷ Despite the harsh conditions throughout much of the

⁶¹⁰ Permanent Mission of the Republic of Mali to the United Nations, Country Facts, <http://www.un.int/wcm/content/site/mali/pid/3346> (last visited Feb. 20, 2010).

⁶¹¹ State Department: Mali Country Profile, <http://www.state.gov/r/pa/ei/bgn/2828.htm> (last visited Feb. 19, 2010).

⁶¹² This latter figure would make Mali the 19th poorest nation in the world. International Monetary Fund [IMF]: World Economic Outlook Database – October 2009, <http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/index.aspx> (last visited Mar. 29, 2010).

⁶¹³ *Mali: World Bank projects 5 pc economic growth in 2010*, AFRIQUE EN LIGNE, July 29, 2010,

<http://www.afriquejet.com/news/africa-news/mali:-world-bank-project-5-pc-economic-growth-in-2010-2010072953653.html>. The World Bank indicated that this prediction in growth was the result of “favourable agricultural forecasts and the global economic recovery.” *Id.* Additionally, Mali's inflation is expected to stabilize at 2%, with its deficit at 1.1% of GDP. *Id.*

⁶¹⁴ Thirty percent of the urban population is considered poor. FAO, Country Profile: Food Security Indicators, Country: Mali (2006),

http://www.fao.org/fileadmin/templates/ess/documents/food_security_statistics/country_profiles/en/Mali_e.pdf [hereinafter Mali Food Security Indicators]; IMF, POVERTY REDUCTION STRATEGY PAPER (PRSP) 13 (2002), *available at* <http://www.imf.org/external/pubs/ft/scr/2003/cr0339.pdf>.

⁶¹⁵ Green, *supra* note 131, at 24.

⁶¹⁶ DIALLO & MUSHINZIMANA, *supra* note 120, at 10-11.

⁶¹⁷ AUNE, *supra* note 123, at 4. The most arable land is found along the banks of the Niger River between Bamako and Mopti. State Department: Mali Country Profile, *supra* note 611.

country, the agricultural sector occupies a dominant position in Mali's economy and is the main source of growth, accounting for an average 35 percent of the GDP. According to the African Development Bank (ADB), agriculture is a source of income for 80 percent of the population and accounts for 75 percent of export earnings.⁶¹⁸ Small-scale traditional farming dominates the agricultural sector and about 90 percent of the 1.4 million hectares under cultivation are farmed through subsistence agriculture.⁶¹⁹

The harsh conditions complicate efforts to provide the population with secure access to food. Although Mali had projected gross surpluses of food stocks in 2008-09, the government had to import rice in 2009 after the national supply was reduced as a result of informal exports to neighboring countries and following the retention of rice stocks by producers seeking to achieve prices above those of the national markets.⁶²⁰ The figures concerning food surpluses conceal an underlying problem of hunger. According to the Food and Agriculture Organization (FAO), between 2004 and 2006, ten percent of Mali's population was undernourished and in 2005, an estimated 34 percent of the population was at risk of hunger.⁶²¹ The pressure to grow more food may be contributing to a vicious cycle as the degradation of Mali's resource base lessens production levels, causing additional hunger.⁶²² According to a 2009 estimate, 150,000 hectares—or 0.1 percent of the country's total land surface—are being degraded every year through soil depletion and desertification.⁶²³ Slow technological adaptation and high population growth are increasing land use intensity, pushing cultivation further into marginal lands and allowing for shorter fallow periods.⁶²⁴

⁶¹⁸ African Development Bank, Country Profile: Mali, *supra* note 122.

⁶¹⁹ State Department: Mali Country Profile, *supra* note 611. Cereals such as sorghum, millet, and maize, are the main subsistence crops. *Id.*

⁶²⁰ Mali had gross surpluses of 100,703 tons of rice and 1,144,600 tons of dry cereals in 2008-09. DIALLO & MUSHINZIMANA, *supra* note 120, at 10.

⁶²¹ Mali Food Security Indicators, *supra* note 614. Tanveer A. Butt et al., *The Economic and Food Security Implications of Climate Change in Mali*, 68 J. CLIMATIC CHANGE 355, 370 (2005).

⁶²² *Id.* at 355-356 (citing Jeffrey D. Vitale, *The Economic Impacts of New Sorghum and Millet Technologies in Mali* (2001) (unpublished Ph.D dissertation, Purdue University), available at <http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1821&context=dissertations>; Ousmane Coulibaly, *Devaluation, New Technologies, and Agricultural Policies in Sudanian and Sudano-Guinean Zones of Mali* (1995) (unpublished Ph.D dissertation, Purdue University); Lennart Olsson, *Desertification and Land Degradation in Perspective*, in DRYLAND DEGRADATION: CAUSES AND CONSEQUENCES (Ebbe Poulsen & Jonas E. Lawesson eds., 1991)). See also Ousmane Coulibaly, *Expected Effects of Devaluation on Cereal Production in the Sudanian Region of Mali*, 57 AGRIC. SYS. 489, 493-94 (1998) ("Water availability and soil fertility are the main constraints to increasing cereal yields in the Sudanian region. As land quality deteriorates, cereal yields fall and cultivation is pushed into marginal grazing or communal areas that generally are farther up on the toposequence... This response accelerates the soil-degradation process since it removes vegetation and other natural barriers against wind and water erosion.").

⁶²³ DIALLO & MUSHINZIMANA, *supra* note 120, at 10.

⁶²⁴ See Arie Kuyvenhoven et al., *Technology, Market Policies and Institutional Reform for Sustainable Land Use in Southern Mali*, 19 AGRIC. ECON. 53, 54 (1998) ("Due to high population growth, pressure on natural resources is rapidly increasing as traditional fallow periods are strongly reduced"). See also Tor A. Benjaminsen, *The Population-Agriculture-Environment Nexus in the Malian Cotton Zone*, 11 GLOBAL ENVTL. CHANGE 283, 284 (2001) ("Hence, autonomous intensification is taking place, but population growth is generally too high for rural communities to cope with the challenge of agricultural intensification without jeopardising the natural resource base."). According to the United Nations, Mali's population will grow from eight people per square kilometer in 2000 to 23 people per square kilometer in 2050. United Nations, Department of Economic and Social Affairs – Population Division, *World Population Prospects: The 2008 Revision*, <http://esa.un.org/unpp/> (last visited May 23, 2010).

The situation is further compounded by a weak state of energy security. The rural community, which comprises 70 percent of Mali's population, is particularly insecure and "benefits from less than 1% of available access to electric power."⁶²⁵ Mali has no significant domestic oil reserves and relies heavily on imported fossil fuels, which has a negative effect on its currency.⁶²⁶ The energy sector is mostly based on traditional fuels and 90 percent of the energy consumption comes from the unsustainable use of firewood.⁶²⁷ The high dependence on wood for fuel is causing the disappearance of biomass-producing surface area at a rate of 9000 hectares per year, leading to increased soil erosion and desertification.⁶²⁸ Current forms of energy consumption are clearly unsustainable, but according to the United Nations Africa Rural Energy Enterprise Development (AREED) program, Mali shows strong potential for incorporating renewable and environmentally sound energy technologies in rural areas due to an already established renewable energy sector and a reform-oriented government.⁶²⁹

B. JATROPHA: THE MIRACLE CURE?

In the midst of these food and energy crises, Malians have turned to the jatropha plant as a readily accessible biofuel that proponents say may avoid some of the risks to food security associated with other biofuel crops. Jatropha grows wild throughout sub-Saharan Africa and because of a smell and taste that repels grazing animals, farmers in Mali have been using it for decades as a living fence to help keep animals off their fields.⁶³⁰ Since it is inedible, jatropha does not directly divert food for fuel production, in contrast to food-based biofuel crops.⁶³¹ Jatropha can also be grown on marginal land and does not need to compete with food crops for arable land. Given this fact, jatropha may actually help to reclaim degraded land and guard against erosion.⁶³² Furthermore, jatropha can be harvested year-round and does not compete with food in terms of production, in contrast with other biofuel crops whose harvest times often coincide with that of other food crops.⁶³³

⁶²⁵ African Development Bank, Country Profile: Mali, *supra* note 122.

⁶²⁶ Hetterschijt, Making Core Business of Sustainability, *supra* note 604, at 7.

⁶²⁷ AFRICAN RURAL ENERGY ENTER. DEV. [AREED], MALI REPORT 1 (n.d.), <http://www.areed.org/country/mali/mali.pdf>.

⁶²⁸ *Id.* Biomass—organic material derived from living, or recently plant and animal-based material—has attracted attention as a source of renewable energy. Biomass Energy Centre, <http://www.biomassenergycentre.org.uk> (last visited Mar. 29, 2010).

⁶²⁹ AREED, MALI REPORT, *supra* note 627, at 1. Privatization of the energy sector has been credited for a great deal of Mali's economic growth and for helping to improve basic services and infrastructure. United Nations Conference on Trade and Development [UNCTAD] & International Commerce Chamber [ICC], *An Investment Guide to Mali: Opportunities and Conditions*, 3, U.N. Doc. UNCTAD/ITE/IIA/2006/2 (Oct., 2006), *available at* http://www.unctad.org/en/docs/iteia20062_en.pdf. According to AREED, the government has also been encouraging private enterprises to take the lead on the commercialization of renewable energy. *See* AREED, MALI REPORT, *supra* note 627, at 3.

⁶³⁰ Lydia Polgreen, *Mali's Farmers Discover a Weed's Potential Power*, N.Y. TIMES, Sept. 9, 2007, *available at* <http://www.nytimes.com/2007/09/09/world/africa/09biofuel.html>.

⁶³¹ Green, *supra* note 131, at 15. Examples of food-based biofuels include fuel made from corn, soy beans, sugar cane, and palm oil. Although jatropha may compete with food crops for available land, food-based biofuels carry their own unique risks. For instance, farmers can sell their food crops to biofuel companies at very little cost to the farmer, thereby lowering the availability of food for human consumption and weakening food security.

⁶³² *Id.* at 18.

⁶³³ Interview with Director of Annona Sustainable Development Fund, *supra* note 127.

However, according to researcher Lara Green,⁶³⁴ the claim that jatropha does not compete with food is highly contested. While jatropha can be grown on marginal lands, the evidence suggests that fertilizer or irrigation inputs would be required in order to produce commercially viable quantities of jatropha nut.⁶³⁵ If the same resources are needed for both food and biofuel crops, this could increase pressure on food production.⁶³⁶ Rather than trying to produce commercial yields on marginal lands, there is a high incentive to grow jatropha on arable land that could otherwise be used to produce food crops.⁶³⁷ This potential to compete with food production for fertile land and water is particularly problematic in Mali, where these resources are so tightly constrained. Depending on market conditions, jatropha production may also compete with food production through ‘crop switching’⁶³⁸ if farmers determine that growing jatropha is more profitable than growing food crops.⁶³⁹

Despite these potential drawbacks, jatropha biofuel projects are planned or underway in various countries throughout Africa, Asia, Central America, and South America.⁶⁴⁰ More than 11 million hectares of land have been targeted for jatropha cultivation in China alone.⁶⁴¹ Big oil companies like British Petroleum (BP) and the British biofuel giant D1 Oils have invested millions of dollars in jatropha cultivation.⁶⁴² However, farmers are complaining that they are being encouraged to grow crops that they cannot sell because there is no market for jatropha in their own country.⁶⁴³ According to Green, MBSA’s practice of intercropping jatropha with other food crops helps to minimize this risk for farmers by diversifying income and providing protection from the volatility of the market. As a result, jatropha production in Mali has not encountered the same resistance that has been found elsewhere.⁶⁴⁴

⁶³⁴ Green, *supra* note 131.

⁶³⁵ *Id.* at 16.

⁶³⁶ As noted by the FAO, “If the same land and other resources are needed for both food and biofuel feedstock crops, their prices will move together even if the feedstock crop cannot be used for food.” FAO, THE STATE OF FOOD AND AGRICULTURE 2008, BIOFUELS: PROSPECTS, RISKS AND OPPORTUNITIES 25 (2008), *available at* <ftp://ftp.fao.org/docrep/fao/011/i0100e/i0100e.pdf>.

⁶³⁷ AFRICA: UP FOR GRABS, *supra* note 15, at 4 (“Agrofuels are competing with food crops for farmland, and agrofuel development companies are competing with farmers for access to that land. And this appears to be as much the case for jatropha, as for other crops, despite the claim that it grows on non-agricultural land.”)

⁶³⁸ In this context, ‘crop switching’ refers to the act of farmers switching from food crops to more profitable crops, such as jatropha, despite the negative implications for food security. Green, *supra* note 131, at 20.

⁶³⁹ *Id.* at 19-20.

⁶⁴⁰ *Id.* at 7.

⁶⁴¹ GREG PAHL, BIODIESEL: GROWING A NEW ENERGY ECONOMY (2008).

⁶⁴² Polgreen, *supra* note 630.

⁶⁴³ See Carol Hunsberger, *Growing Fuel: Kenyans are Experimenting with Jatropha to Determine the Best Scale Production*, 35 ALTERNATIVES J.: CANADIAN ENVTL. IDEAS & ACTION 26, 27 (2009) (jatropha prices collapsed in Kenya despite promises that the crop could bring reliable income); Meena and Sharma, *Constraints in Jatropha Cultivation Perceived by Farmers in Udaipur District, Rajasthan*, 13 INT’L J. RURAL STUD. 1, 3 (2006) (“lack of marketing facilities for sale of produce was seen as the most important constraint by tribal and non-tribal respondents”); *Biofuel Gone Bad: Burma’s Atrophying Jatropha*, TIME, Mar. 13, 2009, *available at* <http://www.time.com/time/world/article/0,8599,1885050,00.html> (reporting on Burmese jatropha farmers’ complaints that “the [Burmese] junta’s planting directive has not been matched by adequate infrastructure...like...distribution systems.”).

⁶⁴⁴ See generally Lode Messemaker, *The Green Myth? Assessment of the Jatropha value chain and its potential for pro-poor biofuel development in Northern Tanzania* (2008) (unpublished M.Sc thesis, Universiteit Utrecht), *available at* <http://www.lodemessemaker.nl/jatropha/docs/Messemaker2008TheGreenMyth.pdf> (finding that jatropha production

III. INSTITUTIONAL FRAMEWORK AND INVESTMENT CHARACTERISTICS

The government of Mali views foreign direct investment as an important means of promoting the sustainable production of both food and energy in the country.⁶⁴⁵ MBSA's approach to biofuel production—which provides for the local production, local processing, and local consumption of its biodiesel—fits well with the government's efforts at energy reform.⁶⁴⁶ However, the company also exists to make a profit. MBSA's CEO views the financial independence of the venture as a key objective: “An aid project will live or die by its funders. But a business has momentum and a motive to keep going, even if its founders move on.”⁶⁴⁷ Due in part to its efforts to avoid disrupting local land rights, MBSA has attracted private institutional investors in the Netherlands and funding from the Dutch government.⁶⁴⁸ By taking advantage of existing smallholder production methods and making use of economies of scale only in the processing stage, MBSA claims that it has not had to acquire any land for production and has thereby avoided some of the negative consequences associated with land acquisitions.⁶⁴⁹ MBSA seems to be an outlier in this respect, however, because, as discussed further in Section V below, Mali is also experiencing an increase in both medium and large-scale land acquisitions that pose significant threats to the land rights of rural landowners and users.⁶⁵⁰

This section outlines the key institutional actors—both Malian and Dutch—that are involved in MBSA's investment. It also elaborates on some of the ways in which MBSA allocates benefits among the parties to the investment agreement and provides additional information about the formalities of the company's relationship with local actors.

A. RELEVANT ACTORS

The government of Mali has been researching jatropha since 1986 and is involved in biofuel initiatives at the national and international level. In 2004, it established a national jatropha program

in Tanzania failed to live up to populations' expectation that it was a promising biofuel crop). Farmers may also find that their access to the jatropha market is limited due to policies enacted under the auspices of economic efficiency. See UN-Energy, *Sustainable Bioenergy: A Framework for Decision Makers* 24 (2007) (“as with many industrial activities, significant economies of scale can be gained from processing and essentially distributing biofuels on a large scale, . . . thus favouring large producers.”).

⁶⁴⁵ UNCTAD & ICC, *supra* note 629, at 9. See also AREED, MALI REPORT, *supra* note 627, at 3.

⁶⁴⁶ See Hetterschijt, Making Core Business of Sustainability, *supra* note 604, at 19 (MBSA focuses on sustainable production through close interaction with communities and farmers). De Schutter notes the importance of including provisions that require a percentage of crops produced to be sold on the local market as a means of ensuring that large-scale land investments do not increase food insecurity. De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 8.

⁶⁴⁷ Polgreen, *supra* note 630.

⁶⁴⁸ See MBSA, Global Partnerships, *supra* note 119; Interview with Director of Annona Sustainable Development Fund, *supra* note 127.

⁶⁴⁹ Interview with Director of Annona Sustainable Development Fund, *supra* note 127; De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16.

⁶⁵⁰ Interview with Nelen, *supra* note 124. See generally COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121 (observing an increase in foreign direct investment in Mali).

under the Ministry of Energy.⁶⁵¹ In July 2006, Mali, along with fourteen other African countries, signed a treaty establishing the Pan African Non-Petroleum Producers Association (APNPP) aimed at the promotion of productions of biofuels.⁶⁵² The Malian government has expressed a commitment to solving its own local energy needs before considering producing biofuel for export and the government has refused any jatropha initiatives that are designed to produce biofuel for regional or international markets.⁶⁵³ According to Aboubacar Samaké, Director of a government project aimed at promoting renewable energy: “We [the Malian government] are focused on solving our own energy problems and reducing poverty. If it helps the world, that is good too.”⁶⁵⁴ In June 2009, the government created the National Biofuel Development Agency (ANADEB) to promote sustainable biofuel production in the country. ANADEB will be responsible for centralizing government policies, setting technical and quality standards for biofuel products, establishing biofuel pricing structures, and ensuring the market availability of biofuels. The agency will also provide a consultation framework for public and private stakeholders and encourage cooperation between national and international partners in the biofuel sector.⁶⁵⁵

Mali’s commitment to developing sustainable and renewable energy production was a key factor in attracting MBSA’s international partners in the Netherlands.⁶⁵⁶ The Dutch government matches any investment made by MBSA’s Netherlands-based partners through its Private Sector Investment Programme (PSI), formerly entitled the Programme for Cooperation with Emerging Markets Programme (PSOM).⁶⁵⁷ MBSA also contracts its carbon offsets to a Dutch company named ‘Trees for Travel, which in turn sells them to KIA Motors Netherlands (Kia Motors).⁶⁵⁸ The subsidies that MBSA received from the Dutch government and through the sale of carbon credits to

⁶⁵¹ Bioenergy Markets in West Africa Conference, *supra* note 607, at 10. In 2007, the Ministry of Energy set a goal of having a billion jatropha trees planted on 321,000 hectares of land with an annual production of a billion liters of jatropha oil, but as of 2009, only 20,000 hectares of jatropha had been planted. *Id.*

⁶⁵² AFRICA: UP FOR GRABS, *supra* note 15, at 14 (citing Adboulaye Wade, *Africa Over A Barrel*, WASH. POST, Oct. 28, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/27/AR2006102701105.html>).

⁶⁵³ See Nick Tattersall, *Malian Weed Brings Light Into Mud-Hut Villages*, REUTERS, May 23, 2007, available at <http://www.reuters.com/article/idUSL2348050620070523> (quoting Aboubacar Samake, head of the government-funded National Centre for Solar and Renewable Energy’s jatropha program: “We don’t intend to produce biofuel to send abroad but to satisfy the energy needs of the 80 percent of Malians who live in rural communities.”) However, this commitment may be called in to question by Mali’s membership in APNPP, the ‘green OPEC’, which some believe is aimed at realizing the export potential of biofuel crops. AFRICA: UP FOR GRABS, *supra* note 15, at 14. Other sources draw a distinction between “contract-farming” cases (such as MBSA) and “large-scale adoption of intensive monoculture practices” and accept the government’s assertions that in the former instance the product will be used for domestic use. Nnimmo Bassey, *Agrofuels: The Corporate Plunder of Africa*, 223 THIRD WORLD RESURGENCE (2009).

⁶⁵⁴ Polgreen, *supra* note 630.

⁶⁵⁵ Bioenergy Markets in West Africa Conference, *supra* note 607, at 10.

⁶⁵⁶ Interview with Director of Annona Sustainable Development Fund, *supra* note 127. MBSA’s private shareholders in the Netherlands include the Royal Tropical Institute (KIT), the SPF Foundation (Dutch Railways Pension Fund), and a company called Power Pack Plus, formerly known as FM Flowermachines. KIT and the Dutch Railways Pension Fund invest in MBSA through the Annona Sustainable Investment Fund. *Id.*; MBSA, Company Profile, *supra* note 600.

⁶⁵⁷ The PSI is financed by the Ministry for Development Cooperation in the Netherlands and executed by the EVD, an agency for international business and cooperation. In order to qualify for PSI funding, projects must be set up by two partners, one in the Netherlands and one based in the target country. Projects must be commercially viable and have a positive impact on the local economy in terms of employment creation, transfer of knowledge, impact on the environment, and impact on women. EVD, http://www.evd.nl/business/programmes/programmaint_psi.asp?land=psi (last visited Mar. 29, 2010).

⁶⁵⁸ Interview with CEO of MBSA, *supra* note 127.

KIA Motors were particularly important to reducing the risk for MBSA's shareholders in the initial stages of the project.⁶⁵⁹ However, the ability to attract this support may be an obstacle to efforts to replicate the MBSA business model in other contexts where similar sources of equity are unavailable.

B. MBSA'S PRODUCTION MODEL

MBSA has many features in common with so-called "contract farming" schemes, in which a central processing and distribution company purchases the harvests of individual smallholder farmers, and the terms of the purchase are arranged through contracts.⁶⁶⁰ Models such as these are an important means of maximizing the benefits that accrue to the host population from agricultural investments.⁶⁶¹ Since family farms are more labor-intensive than large-scale farms, contract farming may result in increased employment benefits over large-scale farms in which local farmers simply serve as waged agricultural workers.⁶⁶² Furthermore, although there are economies of scale in the processing and marketing of agricultural products, for most crops there are no economies of scale in agricultural production itself.⁶⁶³ In other words, smallholder farms are often as productive per hectare as mechanized farms. They also provide positive externalities in terms of preservation of agrobiodiversity, resilience of affected communities to price shocks or weather-related events, and environmental conservation. However, without being integrated into broader supply chains, smallholder farms cannot compete with large-scale mechanized farms, which are able access markets at a lower cost.⁶⁶⁴ By linking smallholder farmers with centralized processing and marketing facilities, contract farming schemes can have a more beneficial impact on the host economy at a comparable cost to mechanized schemes.⁶⁶⁵

MBSA goes beyond the traditional contract farming model by offering the local farmers a position as shareholders in the company.⁶⁶⁶ The farmers with whom MBSA works are organized into farming cooperatives that are in turn joined in a farmer's union, the *l'Union locale des Sociétés Coopératives de Producteurs de Pourghère* (ULSPP).⁶⁶⁷ The ULSPP owns a 20 percent share of the company and farmers benefit directly from the sale of their produce and from dividend payments from the increase in the value of their shares.⁶⁶⁸ By partnering with a local organization such as the

⁶⁵⁹ *Id.*

⁶⁶⁰ See generally Nigel Key & David Runsten, *Contract farming, smallholders, and rural development in Latin America: The Organization of Agro-Processing Firms and the Scale of Outgrower Production*, 27 *WORLD DEV.* 381 (1999) ("Contract farming has been discussed as having the potential to incorporate low-income growers into the modern sector.").

⁶⁶¹ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 4.

⁶⁶² *Id.* at 17, Principle 5.

⁶⁶³ *Id.*, ¶ 18.

⁶⁶⁴ De Schutter, Keynote Address, *supra* note 32. Although large mechanized farming schemes "produce at highly competitive prices, they also produce a number of social costs that are not accounted for in the price of the produce they sell on the markets." *Id.*

⁶⁶⁵ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 18.

⁶⁶⁶ Interview with CEO of MBSA, *supra* note 127.

⁶⁶⁷ The union's management structure is comprised of a general assembly, which has three members from each cooperative; a board of directors, composed of fourteen members, two of whom are women; a three-member oversight committee; and a technical management staff that has ten salaried employees. COMPETE International Workshop, 25-27 November 2008, Bamako, Mali Bioenergy Policies for Sustainable Development in Africa, [hereinafter COMPETE International Workshop], available at: <http://www.compete-bioafrica.net/events/events2/mali/COMPETE-Workshop-25Nov-Mali-Proceedings-090331.pdf>.

⁶⁶⁸ MBSA, Sustainable Production, *supra* note 118.

ULSPP, MBSA is able to achieve a better transfer of technologies and further increase the benefits that flow to the host population.⁶⁶⁹

The ULSPP was created in 2006 and is comprised of 12 farming cooperatives that, as of 2009, were producing jatropha on 2112 hectares of land.⁶⁷⁰ Through a partnership with the *Chambre Régionale d'Agriculture* (the Regional Chamber of Agriculture or "CRA") in Koulikoro, the ULSPP has acquired a soap-making machine that its female membership uses to make soap from the glycerin byproduct of the biodiesel production process.⁶⁷¹ The company also envisages a role for ULSPP in assisting their members to maneuver the administrative processes to obtain legal recognition for their land rights.⁶⁷² The ULSPP assists its members to cultivate jatropha by providing them with seeds, equipment, and technical support. Each farmer plants approximately 1000 jatropha plants per hectare and jatropha occupies approximately 20 percent of the field, leaving the rest available for the planting of food crops.⁶⁷³ The farmers sell their jatropha harvests to the ULSPP, which extracts the jatropha oil and sells it to MBSA.⁶⁷⁴ MBSA then processes it into biodiesel at their factory in Koulikoro.⁶⁷⁵ The ULSPP is responsible for negotiating the price of the jatropha oil with MBSA.⁶⁷⁶ It takes about four kilograms of seeds to make a liter of oil and the fuel that is produced costs about as much as regular diesel at the pump.⁶⁷⁷ MBSA hopes to produce 85,000 liters of biodiesel in 2010 and 9.3 million liters a year by 2016.⁶⁷⁸

In addition to ULSPP's role as a shareholder in MBSA, the company also has Malians represented in both its management and board of directors.⁶⁷⁹ The company also has a three-seat advisory board that includes two Malians, one of whom is a farmer that works on the project.⁶⁸⁰ Furthermore, the company directly employs 55 people, 30 of whom are full-time field agents who spend all of their time working with farmers in the villages.⁶⁸¹ The farmers are organized into

⁶⁶⁹ As noted by De Schutter, the transfer of technologies to the local population is an important way in which large-scale land investments can maximize their contribution to rural development. De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 13.

⁶⁷⁰ COMPETE International Workshop, *supra* note 667, at 48. The 12 cooperatives together have 1,017 members, of which 207 are women and 810 are men. *Id.*

⁶⁷¹ *Id.* at 49.

⁶⁷² Interview with CEO of MBSA, *supra* note 127.

⁶⁷³ Bioenergy Markets in West Africa Conference, *supra* note 607, at 17. Most farmers intercrop their fields with maize (corn) and MBSA has developed partnerships with the United States Agency of International Development (USAID), the *Institute d'Economie Rurale*, and University of Wisconsin-Madison, to develop drought resistant strains of maize to help increase yields for farmers. MBSA, Global Partnerships, *supra* note 119.

⁶⁷⁴ MBSA currently pays 60 Western African CFA francs (or US \$0.12) for every kilogram of jatropha nuts. The company expects this to increase to at least 70 CFA (or US \$0.14) per kilogram by 2016. This is a guaranteed minimum price which may increase relative to the price of diesel at the pump. E-mail from CEO of MBSA, *supra* note 117.

⁶⁷⁵ Bioenergy Markets in West Africa Conference, *supra* note 607, at 17. The factory was opened in February, 2008. MBSA, Sustainable Production, *supra* note 118.

⁶⁷⁶ COMPETE International Workshop, *supra* note 667, at 49.

⁶⁷⁷ Bioenergy Markets in West Africa Conference, *supra* note 607, at 17.

⁶⁷⁸ E-mail from CEO of MBSA, *supra* note 117. At this writing, the MBSA's Dutch CEO was training a Malian deputy who was a candidate for a future management position.

⁶⁷⁹ Hetterschijt, Making Core Business of Sustainability, *supra* note 604, at 14.

⁶⁸⁰ *Id.*

⁶⁸¹ Bioenergy Markets in West Africa Conference, *supra* note 607, at 18.

“farmer business schools” and are trained by field agents in jatropha planting and cultivation techniques.⁶⁸²

C. CARBON CREDITS AS A DRIVER OF INVESTMENT AND A LOCAL BENEFIT

The income that accrues from carbon credits is integral to the viability of MBSA’s venture.⁶⁸³ MBSA chose to operate in the voluntary market in order to avoid the expensive certification costs associated with the more heavily regulated compliance market.⁶⁸⁴ However, in 2010, the company began discussing with several partners the possibility of up-scaling its carbon offsets into the Clean Development Mechanism (CDM) of the compliance market.⁶⁸⁵ The expectation of subsidies through carbon storage and avoided deforestation is often cited as one of the drivers of large-scale land acquisitions worldwide.⁶⁸⁶ Indeed, MBSA’s investment may not have been viable without the revenue it generated from carbon credits.⁶⁸⁷ MBSA has established its carbon offset scheme through a partnership with the aforementioned Dutch charitable organization Trees for Travel and KIA Motors. MBSA contracts its carbon reduction to Trees for Travel which, in turn, has signed a contract to sell them to KIA Motors.⁶⁸⁸ MBSA uses a portion of the carbon credit income to cover the costs that it incurs in providing agricultural support.⁶⁸⁹ Any income that remains is distributed through direct payments to the farmers. In 2007, MBSA earned € 150,000⁶⁹⁰ in revenue from

⁶⁸² Hetterschijt, Making Core Business of Sustainability, *supra* note 604, at 19.

⁶⁸³ Interview with CEO of MBSA, *supra* note 127, at 4, 5.

⁶⁸⁴ The voluntary market encompasses trade in carbon credits by individuals and organizations on a voluntary basis to offset their greenhouse gas emissions. “The voluntary market functions outside of the compliance market and allows individuals and companies to buy carbon offsets on a voluntary basis.” ANJA KOLLMUSS ET AL., *supra* note 19.

⁶⁸⁵ Interview with CEO of MBSA, *supra* note 127. “The CDM is provided for in Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The CDM allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol to implement an emission-reduction project in developing countries, in order to earn certified emission reduction (CER) credits. Each CER is equivalent to one ton of carbon dioxide. The CERs may be traded and can be counted towards meeting Kyoto targets.” De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 12 n.16.

⁶⁸⁶ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 12.

⁶⁸⁷ Interview with CEO of MBSA, *supra* note 127. *Cf.* COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121, at 58 (citing MBSA as an example of an investment in which carbon offsets supply a complementary source of revenue, rather than being an explicit driver of the investment).

⁶⁸⁸ In 2007, MBSA planted more than 530,000 jatropha trees, reducing carbon dioxide emissions by 26,500 tons over the next ten years. *Nutty fuel tackles rural poverty*, EUR. BUS. AWARDS FOR THE ENV. NEWSL., July 2008, at 2, http://ec.europa.eu/environment/awards/downloads/ebae_newsletter_issue03.pdf. The projected carbon offsets in this ten-year period are calculated by a local auditing company in Mali, Institut d’Économie Rurale (IAR), and Trees for Travel and KIA Motors Netherlands visit Mali every year to verify that the process is operating smoothly. The farmers are permitted to keep the carbon credit income only if the jatropha plant remains for the entire ten-year period. If a plant is uprooted, then the *l’Union locale des Sociétés Coopératives de Producteurs de Pourghère* is contractually obligated to either pay that money back to MBSA or plant another jatropha bush elsewhere to compensate. Given the onerous burden that this could pose to farmers who lose their crop for reasons outside their control, MBSA is studying various crop insurance schemes to offset the risk. Interview with CEO of MBSA, *supra* note 127; E-mail from CEO of MBSA, *supra* note 117.

⁶⁸⁹ Hetterschijt, Making Core Business of Sustainability, *supra* note 604, at 24.

⁶⁹⁰ In 2007, this was about US \$205,525. This conversion is based on an average conversion rate of € 1: US \$1.3708333 in 2007 based on numbers available at x-rates, Monthly Average Graph (American Dollar, Euro) 2007, <http://www.x-rates.com/d/USD/EUR/hist2007.html> (last visited Oct. 23, 2010).

carbon credits. Of this, € 39,000⁶⁹¹ went to MBSA to recoup the costs of agricultural support and the remaining € 111,000⁶⁹² was paid to the farmers.⁶⁹³

In the future, MBSA hopes to hand over control of the carbon credit component of the project to the ULSP. The company is in the process of setting up an MBSA Foundation, which will be in charge of certifying and selling the carbon credits. The Foundation will be entirely managed by the ULSP and the cost that is incurred in managing the carbon credits will be financed by the carbon credit income. Once this arrangement is finalized, MBSA will only be responsible for the biofuel component of the project.⁶⁹⁴

IV. REFLECTIONS ON POTENTIAL IMPACT OF INVESTMENT

As noted above, MBSA's approach avoids many of the risks to food security associated with other forms of biofuel production and the company's business model includes a number of elements that indicate a potential contribution to rural development. This section probes further into MBSA's impact on the local environment and its contribution to the local economy. MBSA is often touted as an example of best practice, but the investment has also faced a number of challenges that may limit its impact.⁶⁹⁵

A. MBSA'S IMPACT ON FOOD SECURITY AND RURAL DEVELOPMENT

As explained in Section II above, the evidence shows that jatropha would require significant amounts of fertilizer and water inputs to produce commercially viable amounts of jatropha on marginal land.⁶⁹⁶ This introduces a number of potential risks to local food security. MBSA internally monitors its impact on farmers and their crop yields by virtue of a database in which all farmers, villages, and fields are geo-referenced with information on the amount of jatropha being cultivated, as well as its associated food crop.⁶⁹⁷ Additionally, as of April, 2010, the company had taken steps to conduct a joint project with the Catholic University of Leuven, located in Belgium, to study the environmental, economic, and social sustainability of jatropha biodiesel production.⁶⁹⁸ According to MBSA CEO, this will provide external monitoring of many aspects relating to food security and food production.⁶⁹⁹ MBSA's project mitigates the risks to food security through its

⁶⁹¹ In 2007, this was about US \$53,462.50.

⁶⁹² In 2007, this was about US \$152,162.50.

⁶⁹³ Interview with CEO of MBSA, *supra* note 127.

⁶⁹⁴ *Id.*

⁶⁹⁵ In 2008, MBSA's business model was adopted by African Ambassadors as the "most promising model contributing to economic growth in Africa." MBSA has also won the "Egg of Columbus" innovation award from seven Netherlands Ministries and the European Business Award for the Environment (EBAE). NETH. MINISTRY OF AGRIC., NATURE & FOOD QUALITY, NATIONAL REPORT FOR CSD-16 (2008), THE NETHERLANDS: A REVIEW OF SUSTAINABLE DEVELOPMENT IN AGRICULTURE, LAND AND RURAL DEVELOPMENT, DROUGHT AND DESERTIFICATION AND AFRICA 39 (2008).

⁶⁹⁶ Green, *supra* note 131, at 15-19.

⁶⁹⁷ Interview with CEO of MBSA, *supra* note 127; E-mail from CEO of MBSA, *supra* note 117.

⁶⁹⁸ See E-mail from CEO of MBSA, *supra* note 117 (announcing that, "We [MBSA] received a confirmation last Friday that a joint research proposal [to "study the sustainability of Jatropha biodiesel production"] that we submitted with the Belgian University of Leuven has been approved.").

⁶⁹⁹ *Id.*

practice of intercropping and the use of the press cake residue as fertilizer.⁷⁰⁰ In fact, MBSA expects 20 percent improved yields of corn, sorghum, and groundnuts in four years for farmers who have intercropped their fields with jatropha.⁷⁰¹ These improved yields are likely to compensate for the reduction in land area devoted exclusively to food production, since jatropha is cultivated on approximately 20 percent of each farmer's land.⁷⁰² In addition to the improved soil fertility resulting from the use of the press cake fertilizer, other factors that may account for the increased yields include: improved water filtration as a result of intercropping; jatropha's ability to reclaim degraded lands; jatropha's use as a living fence to protect crops; decreased vulnerability to pests resulting from jatropha's use as a biopesticide; and more sustainable production through enhanced biodiversity. Low external input farming practices such as these are particularly important in a country such as Mali, where land resources are degrading at such an accelerated rate.⁷⁰³

According to UN-Energy, since hunger tends to be concentrated in rural areas, "little sustained progress in food security is possible without paying particular attention to agriculture and rural development."⁷⁰⁴ By incorporating labor-intensive production methods that favor smallholder farmers over large-scale producers, MBSA takes advantage of the value-added chain and increases the potential for employment creation.⁷⁰⁵ MBSA's approach helps to spur growth in the agricultural sector by allowing for diversification of income and the company's use of local processing at its factory in Koulikoro contributes to greater benefits for the local economy.⁷⁰⁶ MBSA's biodiesel is sold locally and can be used to power vehicles, generators, and grain mills, thus enhancing energy security in rural communities.⁷⁰⁷ MBSA's biodiesel can also support agricultural production in rural communities and make farmers less vulnerable to shifts in global oil prices.⁷⁰⁸ This is particularly

⁷⁰⁰ MBSA, Sustainable Production, *supra* note 118.

⁷⁰¹ *Id.*

⁷⁰² Bioenergy Markets in West Africa Conference, *supra* note 607, at 17.

⁷⁰³ See De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principle 6 (encouraging such methods to alleviate any possible negative environmental consequences that may result from large-scale land acquisitions). In the long run, the local availability of biodiesel may offer a means of reducing erosion and the degradation of rural lands caused by the unsustainable use of firewood for fuel. However, as Keith Openshaw explains, jatropha's ability to substitute for fuelwood consumption is dependent on a number of factors. The cost of producing jatropha oil is often more than kerosene or purchased fuelwood. People are also reluctant to pay for cooking fuel, especially if any form of biomass can be collected for burning. See Keith Openshaw, *A Review of Jatropha Curcas: an oil plant of unfulfilled promise*, 19 BIOMASS & BIOENERGY 1, 3 (2000). Nonetheless, the potential for reducing reliance on fuel-wood consumption is still present, pricing considerations notwithstanding.

⁷⁰⁴ UN-Energy, *supra* note 644, at 33.

⁷⁰⁵ See De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 17, Principles 5 and 7. The 2007 UN Sustainable Energy Framework also emphasizes that "ownership of value-added parts of the production chain is critical for realizing rural development benefits and full economic multiplier effects associated with bioenergy." UN-Energy, *supra* note 644, at 29.

⁷⁰⁶ See Reinhard Henning, *Combating Desertification: The Jatropha Project of Mali, West Africa*, ARID LANDS NEWSL. (1996), available at <http://ag.arizona.edu/oals/ALN/aln40/jatropha.html> ("By promoting the integrated utilization of the Jatropha plant, the Jatropha System can provide direct financial benefits to the rural economy."). See generally Ashwani Kumar & Satyawati Sharma, *An Evaluation of Multipurpose Oil Seed Crop for Industrial Uses (Jatropha Curcas L.): A Review*, 28 INDUS. CROPS & PRODUCTS 1 (2008); Openshaw, *supra* note 703 (enumerating the ways in which jatropha can benefit local populations).

⁷⁰⁷ Green, *supra* note 131, at 29.

⁷⁰⁸ Specifically, having better access to biodiesel may make farmers more competitive in their agricultural production, and, because MBSA is not producing food for consumption, such farmers also would not have to worry about competing with the corporate farming scheme in local markets. See De Schutter, *Large-scale Land Acquisitions and Leases*,

important in a country such as Mali which is already so dependent on oil imports to satisfy its energy needs.⁷⁰⁹

As evidence of its benefits on the local economy, MBSA cites the increase in incomes of farmers who work with the company.⁷¹⁰ The company also pays 50 percent above market wages for its direct employees.⁷¹¹ With 1000 jatropha bushes planted per hectare, farmers gain additional daily revenue of between US \$1 and \$2. The Annona Fund projects that households with jatropha intercropping will increase revenues by at least 15 percent in the next five years.⁷¹² MBSA estimates that by 2016, combined jatropha nut production on the Mali and Burkina Faso ventures will have increased from 187.5 to 32,625 tons, and 15,000 farmers, each with an average of 1.5 hectares of intercropped jatropha, will be earning a total of US \$4.7 million per year.⁷¹³

B. LIMITATIONS OF MBSA'S IMPACT

Despite these positive impacts, the project has faced a number of challenges. One of the more significant challenges relates to difficulties MBSA has faced in producing sufficient quantities of jatropha to make the operation of its factory profitable.⁷¹⁴ Part of this difficulty can be traced to changes in harvest yields over time. Although jatropha nuts can be harvested after three years, large-scale commercial production does not usually become viable until the plants are five years old. As a result, jatropha production is heavily dependent on external financial inputs in the early stages, until the plants begin producing commercial-size yields.⁷¹⁵

Taking into account the intrinsic limitations of jatropha production, the ultimate success of MBSA's intercropping approach will still depend upon whether it can structure the incentives that flow to farmers such that they are encouraged to grow a sufficient amount of jatropha to supply the

supra note 18, at 17, Principle 8 (arguing for investment agreements to be made within the context of “[a]ppropriate support schemes... in order to ensure that they [farmers] will not suffer income losses as a result of low-priced produce arriving on the local markets, which has been produced under more competitive conditions on the large-scale plantations developed by foreign investors.”).

⁷⁰⁹ Mali consumes 600,000 tons of conventional diesel every year. When its production reaches maturity, MBSA expects to produce 4,500 tons of biodiesel a year in Mali and a similar amount in Burkina Faso. This represents about one percent of annual consumption. MBSA currently sells its biodiesel to various private companies and institutions, such as Grand Moulin du Mali, the Peace Corps, Omnium, and the American School. The United States Embassy is also interested in buying MBSA's biodiesel. In the near future, the company hopes to create a partnership with Total or Shell to mix 5 percent of their biodiesel with 95 percent conventional diesel to sell at the pump in Bamako. E-mail from CEO of MBSA, *supra* note 117. See also Jatropha World, Growing Diesel Fuel Plant, <http://www.globalgwa.org/index.php?mact=News,cntnt01,print,0&cntnt01articleid=265&cntnt01showtemplate=false&cntnt01returnid=78> (last visited May 23, 2010) (stating that biodiesel produced from jatropha can fulfill an important “need for oil-importing countries to reduce their dependence on a limited number of exporting nations by diversifying their energy sources and suppliers”).

⁷¹⁰ Interview with Director of Annona Sustainable Development Fund, *supra* note 127.

⁷¹¹ *Id.*

⁷¹² Hetterschijt, Making Core Business of Sustainability, *supra* note 604, at 22.

⁷¹³ E-mail from CEO of MBSA, *supra* note 117.

⁷¹⁴ Interview with Director of Annona Sustainable Development Fund, *supra* note 127.

⁷¹⁵ In the first few years, farmers face the additional cost of labor to plant the jatropha and decreased yields from their food crops. According to MBSA, these costs are recouped by year five, leaving the surplus income from jatropha yields. MBSA, *Benefiting the Farmer: Pourquoi devrais-je planter la pourghère?* 2 (2009).

factory. The danger of increasing jatropha production on fields is that at a certain point the increased fertility of the soil resulting from the press cake fertilizer will cease to cancel out the loss of land area for food production. Although farmers could technically devote their entire fields to jatropha, this may nullify any benefit of intercropping and give rise to the same issues of food insecurity associated with other biofuel crops. The risk that commercial jatropha production poses to food production through competition for fertilizer and irrigation inputs would similarly increase with increased jatropha production.⁷¹⁶

A second challenge concerns the relationship between MBSA, the ULSP, and the farmers. Due in part to large carbon credit subsidies, farmer registration increased 600 percent in 2009 and farmers are registering in record numbers.⁷¹⁷ However, the ULSP has had difficulty keeping track of its membership and the number of farmers who present themselves to MBSA as members of the Union far exceed those officially recorded in the Union's books.⁷¹⁸ It may be the case that farmers are presenting themselves as members of the ULSP to gain access to the additional resources. If there is no agreement between farmers and the union, this causes additional risk for the ULSP and MBSA, as they may be forced to incur costs for farmers who are not members of the union.

MBSA has taken several steps to combat the problem of fraud. First, they have formalized the arrangement between the farmers and the ULSP and now map farmers' fields using GPS units. This information is stored in a database and monitored by an auditor to see which farmers' fields are meant to be planted with jatropha. If there are discrepancies between the database and the fields, this may be evidence of misallocation of carbon credit income. Second, MBSA is taking steps to professionalize the ULSP so that it can better monitor its membership. Although MBSA has a contractual relationship with the ULSP, the arrangement between the ULSP and the farmers is handled informally without a written contract.⁷¹⁹ Starting in 2010, MBSA will help the ULSP to create a database with the names of all of its members and will encourage the union to formalize its relationship with its members through written contracts.⁷²⁰

V. LAND ACQUISITIONS AND LAND RIGHTS IN MALI

MBSA is an exceptional case in Mali, which is otherwise facing a rise in medium and large-scale land acquisitions that often lack the positive features of the MBSA project.⁷²¹ According to

⁷¹⁶ See Green, *supra* note 131, at 18 (concluding that "even if jatropha is planted on marginal lands in Mali, there is a strong potential for it to compete with food crops for water resources, yielding significant consequences for food security.").

⁷¹⁷ Hetterschijt, Making Core Business of Sustainability, *supra* note 604, at 22.

⁷¹⁸ Interview with CEO of MBSA, *supra* note 127.

⁷¹⁹ *Id.*

⁷²⁰ *Id.*

⁷²¹ See COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121, at 4 (grouping Mali in with Ethiopia, Ghana, Madagascar, Sudan, Tanzania, and Mozambique in concluding that there are "significant levels of activity" and a "rise in land-based investment"). Additionally, Cotula et al. found that "[d]ata from the national inventories suggest an upward trend for project numbers and allocated land, for instance in...Mali," and "[i]ncreases in land deals feature over the entire duration of the study period (2004-2009), though Ghana and Mali seem to have experienced an acceleration over the past couple of years." *Id.* at 47. Cotula et al. also note that there are "possible increases in the size of single acquisitions," pointing to a 100,000 hectare irrigation project in Mali as an example. *Id.* at

Joost Nelen, an adviser on rural economic development at the Netherlands Development Organization, a number of large-scale land acquisitions are either planned or underway. Medium-sized acquisitions—roughly defined as transfers of 200 to 1000 hectares—are becoming increasingly common, following a trend that has been rapidly developing for decades.⁷²² Unlike MBSA’s agricultural investment, these acquisitions pose serious threats to the land rights of Mali’s rural populations. In this section, we explore these medium and large-scale acquisitions in more detail and provide additional contextual information on the laws and policies governing land rights in the country.

A. MEDIUM AND LARGE-SCALE LAND ACQUISITIONS IN MALI

The government of Mali views large-scale land acquisitions as a means of improving the efficiency of the agricultural sector. According to the Minister of Agriculture, Mali has no choice but to turn to foreign direct investment in land if it is to feed its own population: “Our concern today is to modernize agriculture, especially rice cultivation. To do this, we need a lot of resources and a lot of land. We cannot give a tractor to a small producer who would use it on two or three hectares; that would be a waste.”⁷²³ A joint study by the International Institute for Environment and Development (IIED), the FAO, and the International Fund for Agricultural Development (IFAD) found that between 2004 and 2009, 162,850 hectares—representing 0.6 percent of Mali’s cultivable land—had been approved for allocation.⁷²⁴ These land deals are clustered in the Office du Niger region, 300 kilometers northeast of Bamako, in an area that contains some of Mali’s most fertile land.⁷²⁵ As of 2009, seven large-scale land acquisitions had been approved for which the Mali government will reportedly be paid US \$292 million by investors from Libya, the West African Economic and Monetary Union (UEMOA), and the US-funded Millennium Challenge Account.⁷²⁶

The largest of these acquisitions is a joint venture between Malibya Agriculture (Malibya), financed by Libyan and Chinese capital, and the Ministry of Agriculture in Mali for the development

4. This project is being undertaken by a subsidiary of the Libya Africa Investment Portfolio and encompasses land in “the Office du Niger, the land area with highest agricultural potential in Mali.” *Id.* at 36.

⁷²² Interview with Nelen, *supra* note 124. *See also* (MIS)INVESTMENT IN AGRICULTURE, *supra* note 34, at 37 (citing IRIN, Mali: Land Grab Fears Linger (Dec. 2, 2009), <http://www.irinnews.org/report.aspx?ReportId=87284> [hereinafter IRIN, Land Grab Fears Linger]) (“Mali has approved long-term leases for outside investors to help develop more than 160,000 hectares of land. Already approved land deals include a joint 10,000 ha project between Petrotech and AgroMali to produce biodiesel feedstock from jatropha seeds for EU countries, the US, and Egypt.”).

⁷²³ IRIN, Land Grab Fears Linger, *supra* note 722.

⁷²⁴ COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121, at 42. The leases that have been issued thus far include conditions that require the investors to develop irrigation infrastructure on the land, in the hope that this will improve local farmers’ capacity to grow food for the local population. *Id.* at 81; *see also* IRIN, Land Grab Fears Linger, *supra* note 722. The land acquisitions are facilitated by investment promotion agencies that assist the investors to obtain all the necessary licenses, permits, and authorizations. In order to receive authorization, large-scale investment projects must also fit into the annual socio-economic development plan established by local authorities. *See* École Polytechnique Fédérale de Lausanne (EPFL) Energy Center, West-African Consultation on Version Zero of a Global Standard for Sustainable Biofuels 8 (2008), <http://cgse.epfl.ch/webdav/site/cgse/shared/Biofuels/Regional%20Outreaches%20&%20Meetings/Mali/V2Break%20out%20sessions.pdf>.

⁷²⁵ IRIN, Land Grab Fears Linger, *supra* note 722.

⁷²⁶ *Id.* The report by Cotula et al. classifies “large-scale” acquisitions as those involving transfers of over 1,000 hectares. COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121, at 17.

of irrigation farming, agro-industries, and cattle-rearing. Malibya has been given a 50-year renewable lease for 100,000 hectares of land “free from any juridical constraints or individual or collective property that hinders the exploitation of the land.”⁷²⁷ It has been argued that such an arrangement would significantly undercut Malibya’s responsibility to compensate anyone displaced or harmed as a result of this project.⁷²⁸ According to the German development agency, Deutsche Gesellschaft für Zusammenarbeit (GTZ),⁷²⁹ Malibya and the Malian government agreed upon ‘*gratuité de la terre*,’ or ‘no payment for the land.’⁷³⁰ Apart from the obligation to pay water fees and respect Malian law on the environment, GTZ contends that the contract does not say anything else about obligations on the part of Malibya.⁷³¹ The skew of benefits in favor of Malibya may greatly reduce any potential benefits for the host population.

Although most of the large-scale acquisitions approved thus far involve the transfer of government-owned land, there are thousands of people who depend on this land for their livelihoods.⁷³² Seventy-five thousand people reportedly live on the land leased to Malibya alone and the majority of these people do not have formally recognized land rights.⁷³³ Rice producer Siaka Daou is among the farmers concerned that they will lose access to their land as a result of land acquisitions such as these: “The way the government is parceling out land from Office of Niger is worrisome. This will stamp out small producers. We will no longer have land to cultivate and will be forced to work for industrial agriculture producers.”⁷³⁴ According to GTZ, Malibya’s objective is to “export the whole production,”⁷³⁵ and Mali’s National Association of Farmers has stated that “the renewable 50-year lease sparks fears of a Libyan land grab.”⁷³⁶

As discussed in greater detail below, smallholder farmers and other rural land users often lack judicial protection from land acquisitions of any scale.⁷³⁷ Although Nelen observes that mass evictions have not occurred under the modern democratic state in Mali—in fact, one would have to

⁷²⁷ DIALLO & MUSHINZIMANA, *supra* note 120, at 18.

⁷²⁸ *See id.* at 21 (noting that, while “[i]t is still not known how Malibya Agriculture or the Malian Government will approach matters of compensation[,] [i]t is doubtful that Malibya will feel responsible,” and the Malian government has not taken measures to compensate those who have been displaced or otherwise harmed in the effectuation of the project).

⁷²⁹ Mali is considered a “priority partner country in German and International Development Cooperation” and GTZ has been operating on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ) in Mali for over 25 years. GTZ Worldwide, Sub-Saharan Africa, Mali, <http://www.gtz.de/en/weltweit/afrika/589.htm> (last visited Oct. 17, 2010).

⁷³⁰ DIALLO & MUSHINZIMANA, *supra* note 120, at 18.

⁷³¹ *See id.* (“Apart from the water fees and the obligation to respect the Malian law and regulations on the environment, the contract does not say anything else about any duties or obligations of the Libyan side.”). There is no obligation for Malibya to hire local employees or to produce for the Malian market, although, according to GTZ, Malibya intends to engage local farmers as agricultural workers. *See id.* at 19.

⁷³² Four of the seven land deals mentioned above are located on land owned by the Niger Basin Authority, a state agency responsible for the management of approximately 1 million ha of land along the Niger River. *Id.* at 16, 18.

⁷³³ *Id.* at 18 (stating that “[a]part from those living in the town Macina who have formal land rights over their land as the town has been created by the state, people do not have formally recognised land rights as they moved into the area only after the land was registered as property of the Niger Basin Authority in the mid 20th century”).

⁷³⁴ IRIN, Land Grab Fears Linger, *supra* note 722.

⁷³⁵ DIALLO & MUSHINZIMANA, *supra* note 120, at 20.

⁷³⁶ IRIN, Land Grab Fears Linger, *supra* note 722.

⁷³⁷ De Schutter notes the need to formalize and protect the land rights of local populations. De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 3.

look back to the colonial era to find examples of large numbers of people being forcibly evicted from their homes—smaller numbers of people are often displaced as a result of land transfers associated with an older trend in medium-sized land acquisitions in the country.⁷³⁸ According to Nelen, these medium-sized acquisitions are of much greater concern to Malians than the more recent large-scale acquisitions; unlike the large-scale land acquisitions in which land is being leased by foreign investors, these medium-sized acquisitions are largely driven by members of the Malian elite who seek to acquire rural lands in order to grow food crops, or sometimes as mere land speculation.⁷³⁹ Medium-sized acquisitions are somewhat more varied than the large-scale land acquisitions, with some involving arm's length transactions between willing buyers and willing sellers and others allegedly involving fraud, deception, and misuse of power.⁷⁴⁰ In many cases, individuals will approach rural communities to obtain land through informal channels, such as customary law, and, typically, the individual seeking to acquire the land will use the authorization of the chief (*chef de terre*) to register the land in his name, with the deal being finalized when the local government endorses the agreement.⁷⁴¹

Medium-sized acquisitions present a number of unique risks. Since large-scale acquisitions must be authorized by the central government, there is a degree of publicity associated with them. Medium-sized acquisitions, on the other hand, are often carried out with little transparency by well-informed individuals who are able to take advantage of legal processes.⁷⁴² Furthermore, the deals often do not allow for the participation of affected communities whose access to land and other productive resources are directly affected.⁷⁴³ In some cases, the local government will check to ensure that the host community actually endorsed the deal between chief and the investor, but in other circumstances they will simply sign off on the deal without verifying the community's approval. The transfers are especially difficult to monitor when they are carried out in accordance with customary law, since the lack of a paper trail means the chief may simply give the land away without notifying community members. Meanwhile, community members are often unaware of the appropriate procedures to contest the agreement, and are therefore left without access to legal redress.⁷⁴⁴

B. LAND RIGHTS IN MALI

As noted above, most of the land where the large-scale land acquisitions are concentrated is government-owned land, and the informal customary rights of the people living on these lands are not protected by law.⁷⁴⁵ State ownership of this land dates back to the French colonial era. The

⁷³⁸ Interview with Nelen, *supra* note 124.

⁷³⁹ *Id.* The trend in medium-sized land acquisitions also coincides with the return of a large number of Malian expatriates following political changes that took place in the country in 1991. Compete, *Annex 1-2-1*, *supra* note 125, at 15.

⁷⁴⁰ *Id.*

⁷⁴¹ Interview with Nelen, *supra* note 124.

⁷⁴² *Id.*

⁷⁴³ *Id.* De Schutter emphasizes the importance of transparency and local participation in land deals. De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 1.

⁷⁴⁴ Interview with Nelen, *supra* note 124.

⁷⁴⁵ See DIALLO & MUSHINZIMANA, *supra* note 120, at 15 (stating that, though “[t]he law also states that the developer is bound to take into account existing rights if these rights are legally sound....[this] only applies to customary rights on unregistered land and not to registered lands, such as the land within the Niger Basin Authority area where most FDI are made.” Furthermore, “Malian law does not entirely regulate compensation processes for customary land owners/users –

colonial system did not recognize land rights associated with land uses that fell outside the European notion of property, including pastoralism, the collection of firewood, and the gathering of medicinal plants, fruits, and wild grains.⁷⁴⁶ This land was designated as ‘vacant and ownerless’ and the state was declared to be the presumptive owner,⁷⁴⁷ granting itself large tracts of land that it then proceeded to register as government property and sell to trading companies and French settlers to establish large plantations and processing industries.⁷⁴⁸

In the modern era, the Code Domanial et Foncier (Land Code or “CDF”) and the Loi d’Orientation Agricole (Agricultural Orientation Law or “LOA”) have afforded some legal value to customary rights, but titling and registration remain the main focus of both law and policy.⁷⁴⁹ The CDF and LOA recognize customary rights only in relation to unregistered land—referring to land that is not registered as either private property or government-owned land.⁷⁵⁰ The concept of ‘productive use’ (*mise en valeur*) is the principal means for establishing customary land rights on unregistered land.⁷⁵¹ If approved by local authorities, informal customary rights on such lands can be formalized into legally recognizable *de jure* customary rights through legal procedures designed to establish the validity of traditional rights.⁷⁵² The medium-sized land acquisitions discussed above appear to mostly involve informal customary rights on unregistered land and community members can technically formalize their land rights in order to receive additional legal protection.⁷⁵³ However, the procedures for doing so are lengthy and expensive and outside the reach of most farmers. For those who are able to secure legally recognizable *de jure* customary rights, their land can only be

even not on unregistered lands], and] [a]s customary rights are considered to be use rights only, the government does not foresee any compensation for the land [itself].”).

⁷⁴⁶ TOR A. BENJAMINSEN, THE WORLD BANK/EDI’S CBNRM INITIATIVE, DECENTRALISATION AND MANAGEMENT OF VILLAGE LAND IN RURAL MALI 1 (2008), available at <http://srdis.ciesin.columbia.edu/cases/mali-008.html>

⁷⁴⁷ See *id.* (stating that land uses that fell outside the European notion of property was considered empty and without an owner in the forest *décret* of 1935),

⁷⁴⁸ TED WELLS, LAND TENURE AND THE CADASTRAL SYSTEM OF MALI - COUNTRY REPORT 4-5 (1999), <http://www.spatial.maine.edu/~onsrud/Landtenure/CountryReport/Mali.pdf>.

⁷⁴⁹ Moussa Djiré, IIED ISSUE PAPER NO. 144: LAND REGISTRATION IN MALI: NO LAND OWNERSHIP FOR FARMERS? 1-2 (2007), available at <http://www.iied.org/pubs/pdfs/12538IIED.pdf>. In addition to the registration of customary rights, the decentralization of decision-making over land is seen as a way of addressing the inefficiencies and lack of oversight that is a feature of the centralized system. However, according to James Thompson, the problem with Mali’s decentralization legislation is that it “represents a strong commitment to retaining state control over all forms of collective action,” and “[i]t fails to establish the kind of enabling framework for community initiative and autonomous problem-solving that seems indispensable to encourage low-cost, efficient, reliable efforts by rural populations to address the myriad issues.” Charles E. Benjamin, *Legal Pluralism and Decentralization: Natural Resource Management in Mali*, 36 WORLD DEV. 2255, 2256 (2008) (citing James T. Thomson, Mali: The enabling framework for user-based governance of forest resources, 5th Conference of the IASCP in Bodoe, Norway (1995)).

⁷⁵⁰ DIALLO & MUSHINZIMANA, *supra* note 120, at 12-13.

⁷⁵¹ Bruce, *Country Profiles of Land Tenure*, *supra* note 344, at 88. Articles 45 and 47 of the 2000 Land Code (*Code Domanial et Foncier*) require “evident and permanent” productive use as a condition for the registration of customary rights. COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 121, at 91 n. 65. This standard would not encompass some customary uses of land for purposes such as pastoralism, collection of firewood, and gathering of wild plants.

⁷⁵² DIALLO & MUSHINZIMANA, *supra* note 120, at 18.

⁷⁵³ See Interview with Nelen, *supra* note 124 (stating that medium-sized land acquisitions often involve informal customary rights). According to Nelen, the domestic investors involved with medium-sized acquisitions typically proceed to register the land in their name after obtaining it from the local community. See *supra* Section V.A. This can only be done on unregistered land.

expropriated for a public use and with the payment of compensation.⁷⁵⁴ Otherwise, unregistered land is considered to be in the national domain for the government to dispose of as it sees fit, irrespective of any existing informal customary land rights.⁷⁵⁵

In addition to *de jure* customary rights that grant usufruct, or usage rights, titles that grant full private ownership rights are also available, but the process is excessively expensive⁷⁵⁶ and requires literacy in French, the language of all official documentation. The central advantage of title is that titled land can only be expropriated under extraordinary circumstances and would require much higher compensation than is the case with *de jure* customary rights.⁷⁵⁷ However, titles too are inaccessible for most farmers, and land usage rights for the vast majority of the rural population continue to rely on informal customary definitions at the village level.⁷⁵⁸ Meanwhile, informal customary rights on registered land—which includes the government-owned land being transferred in large-scale land acquisitions in the country—receive no legal protection from expropriation,⁷⁵⁹ and individuals or groups living on these lands can be displaced at will by the government.

VI. CONCLUDING OBSERVATIONS

Given the challenges that Mali faces from poverty, harsh environmental conditions, population growth, and the degradation of land resources, it is vitally important that crop production is carried out in an environmentally sustainable manner. MBSA's use of low-input farming methods helps to limit the investment project's negative impacts on the environment and

⁷⁵⁴ The term 'public use' is not explicitly defined in the law. Article 228 lists some of the projects that would qualify as public uses of land. These include various types of canals, roads and railways, river ports, telecommunications facilities, power stations, military structures, and as a catch-all, all goods that are not open to private ownership. The open-ended definition gives the government wide license to expropriate land under color of law. Code Domanial et Foncier, tit. VI, ch. I, sec. II, art. 228 (2000).

⁷⁵⁵ See DIALLO & MUSHINZIMANA, *supra* note 120, at 14 (stating "statutory law considers all [unregistered] land to be state land (national domain) of which the central government can dispose – neglecting unwritten customary rights").

⁷⁵⁶ See Tor A. Benjaminsen & Espen Sjaastad, *Race for the Prize: Land Transactions and Rent Appropriation in the Malian Cotton Zone*, 14 EUR. J. DEV. RES. 129, 142 (2002) ("[in February and March 2001], a full title will require a... one-time payment of CFA 197,000 per hectare... These costs appear prohibitive for customary farmers who realise net revenues of 40,000 to 60,000 CFA per hectare per year... [Additionally,] obtaining legal titles to land is also for urban dwellers an exceedingly expensive and painfully slow process."); DJIRÉ, *supra* note 749, at 12-13 (citing the average cost of obtaining a registered land title in 2006 as being roughly US \$1,538 per hectare for customary rights holders and roughly US \$2,050 per hectare otherwise – based on current exchange rates). More up-to-date figures regarding costs—which have only increased—are available at World Bank Group, Doing Business in Mali, <http://doingbusiness.org/Data/ExploreEconomies/mali?topic=registering-property> (last visited Oct. 26, 2010).

Additionally, farmers with provisional titles face the cost of "complet[ing] improvements deemed necessary for a full title to be granted" and "pay[ing] a tax to the district of 4,700 CFA per hectare per year." Benjaminsen & Sjaastad, *Race for the Prize*, *supra*, at 136.

⁷⁵⁷ Benjaminsen et al., *Formalisation of Land Rights*, *supra* note 126, at 30. The expropriation of *de jure* customary rights are compensated only for added value that they have brought to the land—for instance, through infrastructure development and crops—but not for the land itself. DIALLO & MUSHINZIMANA, *supra* note 120, at 15.

⁷⁵⁸ Benjaminsen et al., *Formalisation of Land Rights*, *supra* note 126, at 30. In 1996, it was estimated that only two to three percent of the cultivated land in Mali had formalized property rights. Bruce, *Country Profiles of Land Tenure*, *supra* note 344, at 88-89.

⁷⁵⁹ This is because "[c]ustomary rights are only recognised by the state as long as they refer to unregistered land," and therefore those customary land rights that attach to registered land are without legal force. DIALLO & MUSHINZIMANA, *supra* note 120, at 12, 15.

the biodiesel that MBSA produces provides a local source of renewable energy that can help to improve energy security in rural areas, while reducing Mali's reliance on imported oil. By prioritizing the production of biofuel for the local market, MBSA's approach fits well within the context of the Malian government's efforts at energy reform.

MBSA's business model may also contribute to rural development and poverty alleviation. The company minimizes its impact on local land rights by encouraging smallholder farmers to intercrop their fields with jatropha. Since it has not had to acquire land for crop production, MBSA does not undermine tenure security of rural communities in the same way as medium and large-scale land acquisitions taking place in the country. MBSA's focus on local production, local processing, and local consumption also prioritizes the development needs of the local population, and thereby avoids some of the risks to food security associated with large-scale monocropping. MBSA expects to gradually transfer control of the project over to local actors, and through the provision of material resources and information technology to farmers, MBSA is promoting a transfer of technology that can help to build capacity on the local level.

However, MBSA is also heavily subsidized by both the Dutch government and income that accrues from carbon credits traded on the voluntary market. While the company has demonstrated an impressive ability to attract the support of large institutional investors, the fact that they have relied so heavily on these partnerships may not bode well for the ability to replicate his kind of venture in other contexts where it may be more difficult to attract the same amount of equity investments. It is also worth noting that Mali's membership in APNPP indicates amenability to biofuel investors that may not be present in other countries. Furthermore, the fact that jatropha was already a familiar plant used by Malian landowners raises the question of whether this specific model could be as seamlessly adopted in another country and context. The difficulty that the company has experienced in reaching production of jatropha on a sufficient scale to make their factory profitable, although an intrinsic feature of jatropha production, may also indicate some potential problems with the business design.⁷⁶⁰

It is also worth mentioning that carbon offset projects are controversial in their own right. By acting as a substitute for a reduction in emissions in industrialized countries, carbon credit investments are seen as giving developed countries a license to pollute on the premise that their pollution is "offset" by the carbon sequestration of plants in a developing country. This not only imperils the global fight against climate change by giving developed countries a license to pollute, but also tethers the need for a low-cost solution to developed countries' emissions problems to land and natural resource use in developing countries.⁷⁶¹ At least one manifestation of this problem can be seen in the trend in large-scale land acquisitions themselves, and the massive global transfers of land rights and changes in land use patterns that they entail.

Moving forward, there are several steps MBSA can take to maximize the benefit and minimize the harm of their investment. The company could continue monitoring the impacts of

⁷⁶⁰ Interview with Director of Annona Sustainable Development Fund, *supra* note 127.

⁷⁶¹ Interview by David Deng & Andrea Johansson, Law Student Advocates, Int'l Human Rights Clinic, N.Y. Univ. Sch. of Law, with Nikki Reisch, Root Tilden Kern & Inst. for Int'l Law & Justice Scholar, N.Y. Univ. Sch. of Law, Strategic Advisor, Int'l Accountability Project, in New York, N.Y., US (Mar. 30, 2010) (on file with authors).

jatropha production on local food security to avoid the risks identified above in Section II. In particular, it could put in place safeguards to assist farmers in repaying their debt to the company if the farmers are not able to keep the jatropha plant throughout the ten-year period of carbon sequestration. The crop insurance schemes that the company is investigating may be one method of protecting farmers from the onerous burden of repayment if they lose their crop for reasons outside their control.

The farmers who work with MBSA do not have formalized titles to their land and must rely on informal land rights derived through customary land tenure. Since the farmers do not have formal title, the government can technically sell their land to private parties whenever it wishes.⁷⁶² In its efforts to assist farmers in formalizing their land rights, the ULSP should take steps to minimize the problems that are sometimes encountered in the transfer from customary-based rights to more easily transferable formalized land rights. Although land titles, in some contexts, provide increased tenure security and are more easily leveraged for loans and investment projects, titling is also known to give rise to certain risks associated with land alienation, including landlessness, increased poverty, the loss of community land to outsiders, and the concentration of land ownership in the hands of elites.⁷⁶³ To avoid these risks, the ULSP should carefully think through the possible consequences of formalizing the land rights of its individual members and proceed cautiously in assisting its members to obtain title to their farms. The end goal must be to ensure land security for the farmers.⁷⁶⁴

Even with all the reported benefits of projects such as MBSA's in terms of poverty alleviation and rural development, it is important to keep in mind that the investment is taking place in the context of an increasing trend in medium and large-scale land acquisitions that are posing considerable risks to the land rights and livelihoods of host populations. MBSA's investment in Mali—and its focus on poverty alleviation and on addressing local development needs—demonstrates that these investments can be carried out in a manner that enhances domestic benefits, while safeguarding the land rights of rural populations. With regard to large-scale land acquisitions, there are a number of steps that the Malian government can take to ensure a more equitable balance of benefits than what was reported in the Malibya investment agreement. As a first step, the government could explore mechanisms to recognize customary rights on government-owned lands.⁷⁶⁵ The smallholder farmers living on the land leased by Malibya have been living there for

⁷⁶² However, according to MBSA, the risk of this happening to the farmers that it works with is quite small, and if the government were to try to expropriate the farmers' land to establish large-scale mechanized schemes, it would provoke a serious conflict with the local villages. Interview with CEO of MBSA, *supra* note 127.

⁷⁶³ Joan Kagwanja, currently a program officer with the Alliance for a Green Revolution in Africa (AGRA), notes how titling as a solution to land insecurity has fallen out of fashion in recent years: "Once advocated as the optimal solution for granting tenure security and land access, land titles often involve high transaction costs. While titling may benefit farmers of high-value commodities, it is usually impractical for poor resource farmers. In addition, the links between land titling and tenure security, credit availability, and investments have not been well established in Africa." Joan Kagwanja, *Land Tenure, Land Reform, and the Management of Land and Natural Resources in Africa*, in U.N. DEV. PROGRAM (UNDP), INT'L LAND COALITION (ILC), AND COLLECTIVE ACTION & PROP. RIGHTS (CAPRI), LAND RIGHTS FOR AFRICAN DEVELOPMENT: FROM KNOWLEDGE TO ACTION 3, 4 (2006), *available at* http://www.landcoalition.org/pdf/06_ILC_CAPRI_land_rights_africa.pdf.

⁷⁶⁴ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 26, at 16, Principle 3.

⁷⁶⁵ GTZ makes a similar recommendation in its study on foreign direct investments in Mali's farmland: "In any FDI, the land rights of occupants who derived their use rights (for settlement, agriculture, pasture, water, forests etc.) from

decades and their land rights should be protected. With respect to future land deals, in considering whether or not to conclude an agreement with an investor, the Malian government should first ensure that such deals do not trump its obligations to respect, protect, and fulfill the rights of host communities. It should additionally balance the advantages of entering into an agreement against the opportunity costs involved, in particular when other uses could be made of the land that are more conducive to the long-term needs of the host population and the full realization of their human rights.⁷⁶⁶ To the extent that the lopsidedness of the Malibya deal can be attributed to a lack of negotiating capacity on the Malian side, investing in the government's capacity to negotiate could help to avoid repetitions of such deals in the future.⁷⁶⁷ Allowing civil society to scrutinize land deals is critical to fulfilling transparency requirements and would also help to ensure that the land acquisitions are responsive to the development needs of the host population.

To address the problems of land concentration and tenure insecurity that arise with medium-sized land acquisitions, the Malian government should take steps to ensure that the protections for land rights that are provided for in law are in fact accessible in practice. The registration of land rights can help to reduce some of the fraudulent aspects of medium-sized acquisitions, in which elites collude with local leaders to acquire community land without the knowledge of the community as a whole. Land transfers could also contain conditions that the new landowners invest a certain amount in the land after ownership has been transferred, in order to combat speculative investments.

customary tenure need to be recognised – no matter if the land under question is registered or not. To achieve this objective, the Land Act (CDP) should be reviewed to ensure the recognition of all informal land (use) rights which are based on the customary land allocation system.” DIALLO & MUSHINZIMANA, *supra* note 120, at 7.

⁷⁶⁶ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, at 16, Principle 1.

⁷⁶⁷ Recent experience out of Liberia showed a marked improvement in the government's negotiating capacity. In negotiating agricultural and mining concessions, the government was able to secure an increase in public revenues, requirements to source labor, goods and services locally, and the relocation of certain processing activities to the host country. RAJA KAUL ET AL., REVENUE WATCH INST., GETTING A BETTER DEAL FROM THE EXTRACTIVE SECTOR – CONCESSION NEGOTIATION IN LIBERIA, 2006-2008 V (2009), *available at* <http://www.revenuewatch.org/files/RWI-Getting-a-Better-Deal-final0226.pdf>.

CONCLUDING REMARKS

Direct foreign investment in agricultural land in the Global South has increased dramatically in recent years, with some notable trends emerging: states are seeking to ensure their domestic food security by exporting food crops to their home countries, investors are acquiring agricultural land to grow sugarcane and jatropha plants for bioethanol and biodiesel production to meet increased targets for biofuel production, and companies are appropriating large tracts of land in anticipation of substantial returns from carbon credit schemes. These trends have generated significant media attention and have sparked heated debate over whether such large areas of agricultural land should be leased or sold to foreign investors, given the scale and severity of the potential negative impacts on host communities' rights. Some voices in the debate maintain that there is no justification for transferring such large areas of land to foreign investors and that the agricultural development needs of host communities and the interests of investors alike would be better served by joint ventures between investors and host communities in which land rights remain undisturbed.⁷⁶⁸

The four case studies presented in this Report highlight some benefits but also caution against the major drawbacks and risks associated with these land investments. Throughout our analysis, we have made reference to the Eleven Principles, inferring the extent to which the case studies live up to or fall short of these Principles, which themselves are grounded in international human rights law. In too many cases, the investments fall far short. It is important to remember that the Eleven Principles present a set of core *minimum* principles and standards, and that adherence to a minimum standard should not be the ultimate goal. States, investors, and host communities should rather work towards solutions that ensure the rights of host populations and harness the benefits of foreign direct investment in a sustainable and socially and environmentally responsible manner. In situations where this is not possible, the parties involved should reconsider whether large-scale land investments are worth the risk and long-term implications that they entail.

It is our hope that these case studies will provide useful insights that will help state and private actors to develop the strategies needed to address the challenges of agricultural investment, specifically with a view to respecting, protecting and fulfilling the rights of those most affected. As Special Rapporteur De Schutter has suggested, the most prudent approach would be for the governments involved, in coordination with the international community, to place limits on land acquisitions until regulatory frameworks can be put in place. These case studies highlight the urgent need for large-scale agricultural investments to ensure the rights of host communities and to prioritize their developmental needs, and offer certain key recommendations for how this may be accomplished. Ultimately, we must keep in mind the opportunity costs involved in prioritizing the development of large-scale investments in land over the redistribution of land in order to improve the access to land of rural households.⁷⁶⁹ Equitable land distribution, coupled with sustainable use, remain the strongest guarantors of the kind of economic growth that reduces poverty, enhances food security, and gives greater agency and protection to those most marginalized by large-scale land investments.⁷⁷⁰

⁷⁶⁸ Press Release, La Via Campesina et al., *supra* note 24.

⁷⁶⁹ De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 9, at 16, Principle 1.

⁷⁷⁰ See *Interim Report of the Special Rapporteur*, *supra* note 135, at 15 (“In addition to its economic functions of stimulating growth and reducing rural poverty, more equitable access to land for the rural poor contributes to social inclusion and economic empowerment.”).

APPENDIX I

THE ELEVEN PRINCIPLES: MINIMUM HUMAN RIGHTS PRINCIPLES APPLICABLE TO LARGE-SCALE LAND ACQUISITIONS OR LEASES⁷⁷¹

A number of principles based on existing human rights law are put forward by the Special Rapporteur..., in order to inform current initiatives, such as the adoption of guidelines on land policies and governance by international and regional organizations. But neither host States nor investors should wait until such guidelines are adopted, to act in accordance with human rights. The home States of private investors are also under an obligation to regulate the conduct of these investors abroad, particularly if the host State appears unwilling or unable to do so.⁷⁷² Development banks, including the World Bank and its private sector arm, the International Finance Corporation, which are bound by international human rights law as part of general international law,⁷⁷³ should immediately make their support to any large-scale investment in farmland conditional upon compliance with the minimum principles described below. These principles are not optional; they follow from existing international human rights norms.

(...)

[T]he Special Rapporteur insists on the fact that the principles listed in the annex are minimum principles. This means that a large-scale investment in land will not necessarily be justified even though it may comply with the various principles listed. Indeed, these principles call for governments to carefully examine the opportunity costs involved in ceding land to an investor (principle 1); to examine alternatives to agreements that have an impact on land tenure (principle 4); and to perform a participatory impact assessment prior to the conclusion of such agreements (principle 9). In the vast majority of cases of large-scale investments examined by the Special Rapporteur, the benefits of the investment (in terms of creation of infrastructure, marketing opportunities, and access to credit) could be achieved — and work for the benefit of both the investor and the producer—by the use of other business models such as contract farming, without

⁷⁷¹ The text in this Appendix is taken from: De Schutter, *Large-scale Land Acquisitions and Leases*, *supra* note 18, ¶ 5, ¶ 9.

⁷⁷² See, e.g., Committee on Economic, Social and Cultural Rights, general comments No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para. 39 and No. 15 (2002) on the right to water (arts. 11 and 12), para. 31. In general comment No. 14, the Committee affirms that States parties should “prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law”. Similarly, in 2007 the Committee on the Elimination of Racial Discrimination called on Canada to “... take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable” (CERD/C/CAN/CO/18, para. 17). See also report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/8/5, para. 91).

⁷⁷³ International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, Advisory Opinion (20 December 1980), p. 73, at 89–90, ¶ 37 (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law ...”).

any change being made to the rights over the land. Such alternatives should be explored prior to any shift in rights over the land. Unless such alternatives are prioritized, the development of large-scale land acquisitions or leases will result in nothing less than an agrarian counter-reform; such a consequence would be completely unacceptable and run directly counter to the realization of the right to food, further marginalizing the communities that depend on access to land for their livelihoods.

(...)

Principle 1: The negotiations leading to investment agreements should be conducted in a fully transparent manner, and with the participation of the local communities whose access to land and other productive resources may be affected as a result of the investment agreement. In considering whether or not to conclude an agreement with an investor, the host government should always balance the advantages of entering into such an agreement against the opportunity costs involved, in particular when other uses could be made of the land available, which could be more conducive to the long-term needs of the local population concerned and the full realization of their human rights.

Principle 2: In general, any shifts in land use can only take place with the free, prior and informed consent of the local communities concerned. This is particularly important for indigenous communities, in view of the discrimination and marginalization to which they have historically been subjected. Forced evictions should only be allowed to occur in the most exceptional circumstances. They are only allowable under international law when they are in accordance with the locally applicable legislation, when they are justified as necessary for the general welfare, and when they are accompanied by adequate compensation and alternative resettlement or access to productive land. Prior to carrying out any evictions or shifts in land use which could result in depriving individuals of access to their productive resources, States should ensure that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to resort to evictions. In all cases, effective legal remedies or procedures should be provided to those who are affected by eviction orders.

Principle 3: In order to ensure that the rights of local communities will be safeguarded at all times, States should adopt legislation protecting these and specifying in detail the conditions according to which shifts in land use, or evictions, may take place, as well as the procedures to be followed. Moreover, States should assist individuals and local communities in obtaining individual titles or collective registration of the land they use, in order to ensure that their rights will enjoy full judicial protection. Such legislation should be designed in accordance with the basic principles and guidelines on development-based evictions and displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living,⁷⁷⁴ and with general comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing (article 11 (1) of the Covenant): forced evictions.

⁷⁷⁴ See Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, delivered to the Human Rights Council*, U.N. Doc. A/HRC/4/18, annex I (Feb. 5, 2007).

Principle 4: The local population should benefit from the revenues generated by the investment agreement. Investment contracts should prioritize the development needs of the local population and seek to achieve solutions which represent an adequate balance between the interests of all parties. Depending on the circumstances, arrangements under which the foreign investor provides access to credit and improved technologies for contract farming, against the possibility to buy at predefined prices a portion of the crops produced, may be preferable to long-term leases of land or land purchases, although contract farming itself should comply with the conditions set out in the report of the Special Rapporteur on agribusiness and the right to food (A/HRC/13/33, paragraphs 43–45).

Principle 5: In countries facing important levels of rural poverty and in the absence of employment opportunities in other sectors, host States and investors should establish and promote farming systems that are sufficiently labour-intensive to contribute to employment creation. Labour-intensive modes of production can be highly productive per hectare. Investment agreements should contribute to the fullest extent possible to reinforcing local livelihood options and in particular provide access to a living wage for the local population affected, which is a key component of the human right to food.

Principle 6: Host States and investors should cooperate in identifying ways to ensure that the modes of agricultural production respect the environment, and do not accelerate climate change, soil depletion, and the exhaustion of freshwater reserves. Depending on local conditions, they may have to explore low external input farming practices as a means to meet this challenge.

Principle 7: Whatever the content of the arrangement, it is essential that the obligations of the investor be defined in clear terms, and that these obligations be enforceable, for instance by the inclusion of predefined sanctions in case of non-compliance. For this mechanism to be effective, independent and participatory ex post impact assessments should be made at predefined intervals. The obligations of the investor should not be limited to the payment of rents, or—in the case of land purchases—to a monetary sum. They should include clear and verifiable commitments related to a number of issues which are relevant to the longterm sustainability of the investment and to its compliance with human rights. In particular, such commitments may relate to the generation of local employment and compliance with labour rights, including a living wage as far as waged employment is concerned; to the inclusion of smallholders through properly negotiated outgrower schemes, joint ventures or other forms of collaborative production models; and to the need to make investments in order to ensure that a larger proportion of the value chain can be captured by the local communities, for instance by the building of local processing plants.

Principle 8: In order to ensure that they will not increase food insecurity for the local population, particularly as the result of increased dependence on international markets or food aid in a context of higher prices for agricultural commodities, investment agreements with net food-importing countries should include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels. Appropriate support schemes may also have to be put in place to increase the productivity of local farmers, in order to ensure that they will not suffer income losses as a result of low-priced produce arriving on the local markets, which has been produced under more competitive conditions on the large-scale plantations developed by foreign investors.

Principle 9: In order to highlight the consequences of investment on the enjoyment of the right to food, impact assessments should be conducted prior to the completion of the negotiations on (a) local employment and incomes, disaggregated by gender and, where applicable, by ethnic group; (b) access to productive resources by local communities, including pastoralists or itinerant farmers; (c) the arrival of new technologies and investments in infrastructure; (d) the environment, including soil depletion, the use of water resources and genetic erosion; and (e) access, availability and adequacy of food. Only through such impact assessments, which should include a participatory dimension, can it be ensured that the contracts providing for the lease or sale of land will distribute the benefits equitably between the local communities, the host State, and the investor.

Principle 10: Under international law, indigenous peoples have been granted specific forms of protection of their rights to land. States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Principle 11: Waged agricultural workers should be provided with adequate protection and their fundamental human and labour rights should be stipulated in legislation and enforced in practice, consistent with the applicable ILO instruments. Increasing protection of this category of workers would contribute to enhancing their ability, and that of their families, to procure access to sufficient and adequate food.

APPENDIX II

Land Title Agreement

This Agreement is valid when it has been signed by both parties.
Between Ministry of Agriculture & Forestry, Central Equatoria State (CES) hereinafter referred to as the CES, and Tree Farms Sudan Ltd. hereafter referred to as TFSL the following has been agreed upon:

PREAMBLE

Whereas the CES owns a property (hereinafter referred to as community land with an area of 250,000 ha of land approved in Tindilo Payam in Terekeka County, Central Equatoria State) and Tree Farms Sudan Ltd is desirous of developing the total area of 179,999.1 Ha in accordance with State's forestry development policies.

Whereas the TFS has accepted the offer and expressed its desire and competency and that it is qualified technically, ready and financially capable to invest and develop the property into a tree farms production.

Whereas both the CES and the TFS are desirous of entering into partnership in developing the property into an economically productive firm.

Now therefore this agreement witnesses that in consideration of the prosperity and the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows:

LEASE PERIOD

1.1. The CES shall lease to the TFS to hold and use its property for a term of 99, ninety nine years, commencing from ---/---/2008 and expiring on ---/---/2106 AD.

1.2. After the expiry of the agreed upon (99) years, the CES and the TFS may renew the terms of the lease on new term basis of mutual agreement.

COMMUNITY SUPPORT

2.1. TFS reserves the land title and CES acknowledges the right of the public interests and the social benefits to the local community in the following areas/social sectors:

- (i) Health
- (ii) Education
- (iii) Clean water
- (iv) Agriculture extension service
- (v) Community housing services
- (vi) Road maintenance

OBLIGATION OF CES

- 3.1. Provide the property to the TFS free from any disputes, claims or whatsoever by a third party.
- 3.2. Facilitate through the local authorities and the concerned technical ministries/ institutions all the necessary permits, licenses, concessions and guarantees, required for the development of the property.
- 3.3. Facilitate exemptions of state taxes, fees, and other relevant local rates imposed on machinery, equipment, plants, chemicals, fertilizers and other materials, supplied for the development of the property. This has to be done through the relevant ministry, Ministry of Finance.
- 3.4. With the assistance from the technical departments, monitor, review and carry out evaluation of the progress of work.

OBLIGATION OF THE TFS

TFS subject to provisions of this agreement shall:

- 4.1. Invest a total of USD 3 million, over the next five years, to develop the property.
- 4.2. Furnish CES, the technical ministry and the local authorities with the relevant project documents and annual progress reports.
- 4.3. To submit to the technical ministry through the CES, a descriptive list of equipments, machinery, materials and other supplies, implements its plans to import for the use of the property.
- 4.4. Provide professional skills, expertise knowledge and capacity building of the local community.
- 4.5. Provide employment opportunities and training to the community.
- 4.6. During the first 25, twenty five, years of the lifespan of the lease, TFS shall support as it's contribution to the community, basic, social services as mention in article 2.1 above, for which details of such projects have been set out in the Appendix (Community Support document).
- 4.7. Within a timeframe of 10 years, TFS shall also support the Directorate CES according to Appendix (Forestry Support document).
- 4.8. For the purpose of holding and the use of the property TFS shall pay the Tindilo local community, the sum of USD 12,500, US dollars twelve thousand only per annum. The Community shall by the end of the year present proper accounting

showing how the money has been spent, before new payment is done. The TFS is paying the annual amount within 30 June the year after.

- 4.9 The annual rent shall be increased by 2 % every year through the lifespan of the lease to cover for inflation.
- 5.0 The TFS shall have the right to harvest, market, and sell the Products and proceeds of the plantation.

SELLING OUT/TERMINATION

- 5.1. TFS has the right at any time during the lease period, to sell out and /or transfer the whole or part of the plantation to new owner(s).
- 5.2. CES reserves the right to terminate the lease should:
 - (i) TFS is declared bankrupt and unable to conduct its business, which termination shall have immediate effect without further judicial intervention
 - (ii) TFS fails to provide the support to the community social service projects/forestry projects as agreed upon

FORCE MAJEURE

- 6.1. Notwithstanding the provisions of this agreement, either parties shall not be liable for forfeiture of it's performance security, liquidated damages of termination for default, if and to the extent that it's delay in performance or failure to perform it's obligation under this agreement are the results of an event of force majeure.
- 6.2. For the purpose of this agreement force majeure means act of God, fire, explosions, flood, lightning, act of terror, war, rebellion, void, sabotage or strikes or similar labor disputes or event or circumstances outside the reasonable control of the affected party.
- 6.3. As soon as any event or circumstance of force majeure takes place, the affected party shall give notice thereof to the other party giving full details including but not limited to the nature of the event or circumstance, the date of it's occurrence, the anticipated duration and the likely effect of the force majeure events or circumstances.

ARBITRATION

- 7.1. All disputes, controversies or differences of any kind which may arise between the two parties in connection with or arising from this agreement shall in the first place be amicably settled by and between the parties. If the two parties fail to amicably resolve such disputes, controversies or differences, they shall finally be settled by arbitration under the laws of the Government of Southern Sudan. Arbitration shall take place outside Southern Sudan, preferably Uganda.
- 7.2. The award of such arbitration body shall be final and binding on the parties to this agreement.

APPLICABLE LAWS

- 8.1 This agreement shall be governed and construed by and in accordance with the laws of Southern Sudan.

MISCELLANEOUS

- 9.1 This agreement shall be in writing and signed by an authorized representative of both parties.
- 9.2. All attachments, annexes to this agreement are integrated part of this agreement and in case of contradicting wording, this agreement shall prevail.
- 9.3. Any notice required to be served hereunder shall be in writing and shall be sufficiently served upon either parties if left addressed to any of the parties at the premises/offices or forwarded to the party concerned by registered post address which shall be deemed to have been delivered.
- 9.4 There shall be a member representative of Tindilo Payam Community in the established Board of Directors.
- 9.5 Any assignment, cession or transfer of any right or obligation arising under this agreement shall be made with mutual consent of both parties.

EFFECTIVENESS OF THE LEASE

10.1 This lease agreement shall come into force from the date of its signature.

In witnesses whereof the CES and the TFS hereto have
Affix their respective signatures and seals to execute this Land Title Agreement on the
xxxx in the year 2008 AD.

CES [Land lord]

TFS [TENANT]



Witnesses



CERTIFICATE DE AUTHENTICATION

This is to certify that CES and the TFS to this Land Title Agreement in presence of the witnesses have appeared before me and signed it with their full knowledge and understanding of the provisions on ----- in the year ---- AD.

Head of Legal Administrator Public Prosecutor and Attorney,
Central Equatoria State, Juba, Southern Sudan

Agreement about

Community Support Program (CSP) Between Tindilo Payam Community/Terekeka County-CES, Juba.andTreeFarms Sudan Ltd (TFSL) Appendix to MoU (Land Lease Agreement) dated 1st / February/ 2008.

- The following agreements about Community Support constitute part of MoU (Land Lease Agreement) for 250,000 ha land; lease No ___ dated ___/___/___ issued by ___ to TreeFarms Sudan Ltd. In addition to the obligations outlined in the MoU (Land Lease Agreement), TreeFarms Sudan Ltd has committed to provide Tindilo Community with certain investments, as outlined below. These investments represent TreeFarms Sudan Ltd's obligations for support to the local community during the 99 years of the MoU (Land Lease Agreement).

TreeFarms Sudan Ltd will provide investments for new buildings, facilities and equipment. The operational costs of the facilities shall be covered by the local Government.

Based on information provided by the Tindilo Community to TreeFarms Sudan Ltd. in various meetings with Tindilo Community since December 2007, the company will implement the support during three different time periods, 0 – 5 years, 5 – 10 years and 10 – 25 years. The commitment periods start on the date of the final approval and legal registration of the MoU (Land Lease Agreement).

If 250,000 ha suitable land is not found in Tindilo Payam and the plantation is expanded into neighboring payam(s), this Community Support has to be shared with other specified payam(s), based on their part of the 250,000 ha.

Areas of support.

- Education (infrastructure)
- Dispensary (infrastructure)
- Village Office/Community House (infrastructure)
- Clean water access (boreholes)
- Agriculture
- Forest
- Roads
- Sport activities

SPECIFICATION FOR PERIOD 0 – 5 YEARS

Education:

- Build 6 classrooms primary school
- Build houses for 6 teachers
- Build 1 school office (administration building)
- Build latrines/washing facilities matching number of students
- Establish contact with UNICEF/Education Authorities for getting schoolbooks/material supplies

Dispensary:

- Build a dispensary (place chosen by the Community), following national specification for village dispensaries.
- Supply basic furniture and medical equipment, dispensary style

Village Office:

- Build a Village Office/Community House
- Supply solar panel equipment, satellite antenna, TV and video player

Clean Water Access:

- Drill 2 boreholes (places chosen by the Community)

Agriculture:

- Supply 1 ton fertilizer annually through the period
- Supply relevant seeds (quantity to be decided later)
- Establish contact with NPA in Tindilo/Tali/Juba to see how we can coordinate agriculture training

Forestry:

- Supply up to 100,000 seedlings of relevant specie each year to small scale farmers
- Arrange a two days tree planting session for the Primary School students each year (supply drinks, food, tools, seedlings, supervisors and so on)

Roads:

- Once a year, all able men and women from Tindilo, including our permanent staff/casual labor shall contribute two days unpaid work on the road distance Mundari Buda (Tindilo) to Rokon (border of Juba county). Whereupon the company provides food to the people for these two days and also provide two trucks (including our own) for ferrying murrum and people. The company also provides 2 culverts each year to improve problematic places.
- The main task each year is to clear bush growing close to the road, straight sharp corners, take out sharp stumps/stones from the road and dig ditches where water damages the road each year.

Sport activities:

- Sport equipment like soccer balls, volleyballs, and basketballs, two balls of each per year and whistles and pumps supplied to Primary school and also to local teams. Provide t-shirts for three school teams and the community soccer team. Provide for soccer goals, volleyball net and basketball baskets, one every two years.

SPECIFICATION FOR PERIOD 5 – 10 YEARS

Education:

- Build 2 more classrooms Primary School, if necessary
- Build 2 teacher houses, if necessary
- Build latrines/washing facilities according to number of students

Forestry

- Continue as under the 0 – 5 years period

Roads:

- Evaluate the experience from the previous period and consider support with grader due to more heavy traffic. Although local volunteer support should continue, clearing bush along the road being one important activity.

Sport activities:

- Evaluate and continue support as in the previous period

SPECIFICATION FOR PERIOD 10 – 25 YEARS

Education:

- Support building a Secondary School in Tindilo and the County/CES school authorities will provide skilled personnel/salaries for such a school.

Clean Water Access:

- Drill 4 more boreholes, places chosen by the community

Roads:

- Due to heavy log traffic out from Tindilo towards Rokon/Juba, both eucalyptus and thinning logs teak, main support should now go to roads. Through the period buy and put in place all necessary culverts and murrum the worst 10 km part annually. Voluntary support from the Community continues annually as in previous period

Sport activities:

- Continue the support as in previous period

SPECIFICATION FOR PERIOD 26-99 YEARS

From year 26 onwards the full responsibility is with the public administration and government of GOSS, CES, County and Payam to provide the normal infrastructure and roads, and the running costs of these, for the local community.

This document is legal and valid and fully agreed upon by both parties as soon as the MoU (Land Lease Agreement) is signed.

Dated: _____

For Tindilo Payam Community

for Central Equatoria State

Name:

Name:

Name:

Position:

Position:

Position:

Signature:

Signature:

Signature:

Witness:

Witness:

Witness:

FOREIGN LAND DEALS AND HUMAN RIGHTS

Case Studies on Agricultural and Biofuel Investment

In 2009, the number of hungry people in the world topped one billion. This milestone is a tragic reminder of what is at stake in the world today. Ensuring food security in a sustainable and equitable manner is both a paramount and increasingly urgent goal. In this context, the Global South is experiencing a surge in foreign direct investments in agricultural land. Prompted in part by the global food crisis, state and private investors are buying and leasing millions of hectares of farmland in Africa, Asia, and Latin America. As currently conceived and implemented, however, many large-scale land investments do not service the goal of ensuring equitable and sustainable food security and may, in fact, be further jeopardizing the rights of host populations.

Written in support of the mandate of the U.N. Special Rapporteur on the right to food, *Foreign Land Deals and Human Rights* presents four case studies analyzing agricultural and biofuel investments in Africa and Asia, and explores various ways in which states, investors, and host communities can address the numerous human rights challenges posed by large-scale land investments. The Report evaluates these investments against the Special Rapporteur's principles grounded in international human rights law and calls for greater transparency and a human rights-based approach to regulating these deals.

CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE

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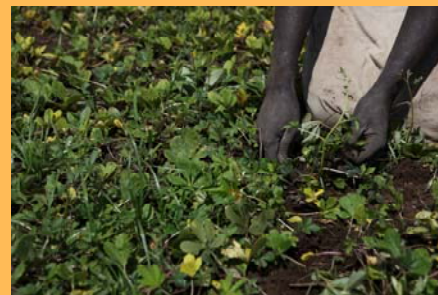
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Farmers near Arusha, Tanzania.

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Woman working on a community farm in Southern Sudan.

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