

**FOREIGN DIRECT INVESTMENT IN AGRICULTURE AND LAND  
LEASE CONTRACTING: A CRITICAL EVALUATION OF LEASE  
CONTRACTS IN EASTERN AFRICA**

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## **INTRODUCTION**

This paper seeks to evaluate some of the lease contracts involving Foreign Direct Investment (FDI) in Agriculture in Eastern Africa. For the purposes of this paper, Eastern Africa has been taken to include the five countries that already form the East African Community as well as the neighbouring countries of Ethiopia, Sudan and South Sudan. It must be pointed out early on that for a number of reasons it was not possible to obtain many copies of contracts signed for purposes of investment in agriculture in the region. The main challenge was having access to the documents which have been signed under legal systems that demand secrecy on the part of government officers. On the other hand, the investors feel no obligation to release the information and instead also refer any questions to the government agencies. This paper therefore, is aided by an evaluation of the few accessed contracts as well as analysis of similar contracts done elsewhere. Reference was therefore made to other similar work done by the World Bank, the International Institute for Environment and Development (IIED) among others. Additionally, the paper has benefitted from the engagement of the author in relevant initiatives in Kenya, Uganda, Tanzania, Mozambique and Zimbabwe. For what it was worth, the author did also look at other lease contracts in non-agricultural areas such as mining.

## **FDI AS A DEVELOPMENT PARADIGM**

A feature of economic development paradigms that is common to Eastern African countries is the push to attract Foreign Direct Investment (FDI) to spur economic growth. Thus, FDI has remained common in almost all sectors of the economies of these countries. These include agriculture, trade, extractive industries, manufacturing industries, service industries, tourism, among others. In a number of countries specific agencies have been created to spearhead such investments. Kenya for example has the Investments Promotion Council. Concomitant infrastructure have been developed to aid this process such as the enactment by Kenyan Parliament of the Investment Promotion Act (Act No. 6 of 2004).

The main attraction of FDI as a development paradigm, according to some economic analysts is that it is one of the most dynamic resource flows to developing countries. It is in this regard therefore that under this mode of investment, a new trend has arisen, that of Foreign Direct Investment in Agriculture. The New Partnership for Africa's Development (NEPAD) which seems to embrace it, envisions the importance of Foreign Direct Investment in Agriculture perceiving it to be a key resource for the translation of NEPAD'S vision of growth and development into reality. This, according to the agency is important because African countries like many developing countries, need substantial inflow of external resources in order to fill the saving and foreign exchange gaps and leap-frog themselves to substantial growth levels in order to eliminate its current pervasive poverty. It is therefore not uncommon to see Heads of States and Governments travel to other countries to solicit for FDI or alternatively host delegations of foreign governments and/or companies to interest them to invest in African countries.

Since the recent food crisis, FDI in agriculture has been driven by at least two critical factors. On the one hand is the desire by the governments to transform the economic potential of countries in the region. On the other hand, there is the push by foreign governments, concerned about food security for their citizens seeking alternative sources of land upon

which to grow food for their nationals. Africa becomes attractive in this respect partly out of the view that there is plenty of land in Africa with concepts such as idle, barren, underutilized, marginal, unproductive, degraded or abandoned lands being used to justify the allocation to large-scale investors without consideration of the interests of all land users which also seems to raise this trend.

## **THE POLITICAL ECONOMY OF LAND LEASE CONTRACTING FOR FDI IN AGRICULTURE IN EASTERN AFRICA**

If there are various design, process and content issues in the manner in which the various land contracts in eastern Africa have been drawn, it is because there are a number of factors that influence how the deals are signed and who the parties to the contracts are not to mention the explicit terms of the contracts themselves. These social, political, cultural and governance realities directly impact the end product- the contract.

Land contracts are typically signed between two parties, but they tend to involve a wider range of players. In most of the contracts reviewed, land was allocated by a central government agency. In some cases, the host government reportedly played a proactive role in seeking out investors. The central role of the state in land allocations reflects trends in national law. In most African countries, land is owned by the state. For instance, land is nationalised in Ethiopia, where private land ownership is outlawed and only long-term land leases may be acquired. Other countries do allow private ownership, which may be acquired through land registration procedures. But even in these cases, costly and cumbersome procedures mean that very few rural people hold ownership rights (Lorenzo Cotula, 2011). In addition, where customary tenure systems are functioning and perceived as legitimate, local resource users may feel they have sufficient tenure security under these systems without needing to seek formal title. As in many jurisdictions all untitled land is owned or otherwise held by the state, governments end up controlling much rural land even where the statute books devote numerous provisions to regulating private ownership.

According to ILC (2011), people may lose the resources that have supported their livelihoods for generations- not just their land, but also water, wood and grazing. This can have major negative impacts on their food security and sense of justice. Even where approved land allocations account for relatively small shares of total land suitable for agriculture, they may still result in people's displacement as demand focuses on higher-value lands (for example those with greater irrigation potential or proximity to markets).

The ILC (2011) studies and reports point out that evidence of both direct and indirect impacts on local land access is starting to emerge. In Ghana, a biofuels project that involved the taking of 800 hectares of land resulted in the loss of land for 70 households from three villages. A 30,000 hectares of biofuels project in Mozambique involved the taking of land used for grazing, and of land promised to communities being resettled from a newly established national park. In Tanzania, several large biofuels projects involved the taking of village lands, for example in Rufiji, Kigoma and Kisarawe districts.

The International Institute for Environment and Development (IIED, 2009- Cotula, L et al)) studies on their part observe thus:

'an important problem is that land acquisitions often take place in contexts where local land rights are insecure and local voices in decision-making limited...This legal regime,... can open the door to abuse and land dispossession-particularly to groups whose resource use is often not considered as productive due to widespread misconceptions, such as pastoralists. Legal safeguards, for local land rights (social and environmental impact assessments, local consultation requirements) do exist in many jurisdictions, but their effectiveness tends to be limited.'

The World Bank (2010) on its part while acknowledging that there are both potentials and risks, observes that the extent to which the potential will be realised- and the associated benefits accrue to local populations and contribute to poverty reduction- will depend on the policy and institutional environment.

A good policy, legal and institutional framework can minimise risks and maximise benefits from large-scale investment involving land and related natural resources. It can help avoid involuntary permanent losses of rights that could have negative consequences, be instrumental in attracting technically competent investors able to generate significant economic benefits in line with a country's longer term development strategy, and encourage the sharing of benefits with local land users who may lack capacity for negotiating with outsiders'-(p68).

Thus, countries with stronger governance structures tend to have agreements that are more favourable to the local communities and host countries. For example, under the Constitution of Kenya, promulgated in 2010, there are a number of requirements for public participation and consultations with local communities. Similarly, the new land regime under the constitution is expected to change how land transactions are done and by who (for example Article 71 of the Constitution requires transactions that involve grant or concession for the exploitation of a natural resource to be subject to ratification by Parliament). Strong governance structures would also provide opportunities for boosting of negotiation capacities of local communities or government agencies as well as provide for transparency of the negotiation process. It is instructive that most of the land deals in question are taken to be Top-Secret documents.

It is also vital to note that most the countries concerned do not have any policy framework in place for the renting of agricultural land to foreign governments or foreign companies. A policy environment does impact on the nature of the transactions.

Another important factor is the prevailing political environment. In a number of instances, some FDI projects have been linked with particular big political players- be they Heads of States or Government or otherwise wielding immense political influence. Such scenarios may lead to low-negotiation thresholds. Government agencies typically bend backwards to accommodate the investor so as not to offend the big political players. On the other hand, the investors, aware of this fact make low commitment or otherwise choose to play hard ball. This environment of intimidation sometimes engulfs civil society organizations and local community leadership who do not wish to have the guns of the big players trained upon them. Concomitant with this dynamic is past economic neglect of certain regions of the countries, mainly for political reasons. In this scenario, any proposed investment in such an area is embraced by all players which players unwittingly combine forces to fend off any voices that question the relevant land deals. In the case of the investment of Dominion Farms Limited in western Kenya, the local community threw its weight behind the project

interpreting it as a savior to the region. Civil society organizations that raised concern over the project were branded as part of the forces that wanted to continue to subject the community and the region to economic strangulation. In such a case, the keenness with which such transactions should be conducted is lost.

The genesis of the investments is yet another key factor. Quite often, discussions leading to FDI in agriculture could be additional to other discussions between host governments and their foreign counterparts of foreign companies on matters totally unrelated to agriculture. Thus, a host government could be in discussions with another government for support in infrastructural development. As part of the incentives for these investments, the host country could offer land or investments in land/agriculture as deal-sweeteners. The end results are composite agreements that deal with more than one issue in more than one sector. Consequently the agreements tend to be loosely drafted or contain low commitments by investors such as low rates of land rents and other fees. On the other hand, various government agencies become obligated through the agreements to 'do all that is necessary' to support the investor.

## **SOME SALIENT FEATURES OF THE LAND LEASE CONTRACTS**

An examination of the land lease contracts in Eastern Africa paints a picture of commonalities and variances. Some of these include the following:

### **i) Terminologies**

The various lease contracts go by various names. These include 'Agreement to Lease', 'Lease', 'Memorandum of Understanding', 'Concession Agreement', 'Investment Agreement', 'Agricultural Investment Agreement', 'Contract for the Exclusive Utilization of Land', 'Land Lease Contract', 'Contract Farming Agreement', among others. It is not quite clear what causes this disparity in terminologies. We posit that it has something to do with individual country governance arrangements relating to land. It has, however, been observed that in some cases, more than one type of agreement is drawn over the same piece of land. For example in the case of Dominion Farms Limited in Kenya, a Memorandum of Understanding was signed dated 20<sup>th</sup> May 2003. This was followed by a Lease dated 25<sup>th</sup> May 2004. Thereafter an 'Agreement To Lease' was done in 2008. A careful reading of all the three legal documents disclose glaring disparities on critical terms of the agreements. Under the MoU for example, the County Councils of Bondo and Siaya respectively would lease to Dominion Farms Limited '**...for a term of Twenty Five (25) years from 1<sup>st</sup> June 2003**'. There is the option to renew for a '**further 20 years**'. Under the Agreement to Lease on the other hand, the lease is said to be for '**a period of fifty (50) years commencing 26<sup>th</sup> May 2009**'. There is provision for extension for a '**further period of forty (40) years...**' These disparities have profound implications legally, economically and socially. A constant factor, however, is that the host government and local communities are the main losers from such confusion while the investor is the main beneficiary.

## **ii) Duration of the contracts**

A common feature of almost all the land lease contracts is that they are for generally very long durations of time. The least seems to be 25 years while some go as far as close to 100 years. Upon the expiry of the initial terms, it is invariably provided that there could be extensions 'at the option' of the investor. Such long durations mean that, where local people lose their land, they will be separated from it for generations – enough to eradicate longstanding livelihood strategies and agricultural knowledge (Cotula, 2011). From the contracts alone, it is difficult to assess why such long terms are required by the economics of the project. The fact that very different projects have similar durations suggests that term clauses are standardised, rather than being tied to what is required to recover costs and make a reasonable return. Pressures for long terms may also come from financing needs: lenders invariably prefer longer durations for the lease than for the loan to protect themselves where projects fall behind schedule. Additionally, national legislation may fix contract durations in a standardised way. For example under the Constitution of Kenya, 2010, non-citizens can only have leaseholds and even then for not more than 99 years.

## **iii) Parties to the contracts**

The land deals are typically signed between two parties, but they involve wider range of players. In most of the deals reviewed, land was allocated by a central government agency. Depending on the land management framework, local government units have also been parties to these deals. The party conspicuously missing in all these transactions is the local community. Of course, the official position in response to this allegation is that the local community is represented by the local authorities for their respective area. Some analysts disagree with this position on both general governance grounds as well as legal foundations.

## **iv) Comprehensiveness of the contracts**

Some of the land deals reviewed are quite complex and sophisticated. They are equally long spanning as many as 40 to 60 pages. On the other hand, some seem short (6 pages) and unspecific though these documents appear to be legal instruments to operationalise a land transfer agreed in earlier agreements. Indeed in some cases the quality of legal drafting appears to be fairly rudimentary. Even accounting for differences in the nature of the contracts, the length and level of specificity of the shorter contracts are a source of concern. For contracts that involve allocating large areas of land and that are therefore likely to have major economic, social and environmental impacts, the apparent lack of specificity may arguably undermine safeguards to ensure that risks will be properly managed and that expected benefits will materialise. This is not to say that longer contracts necessarily have more advantageous fiscal regimes; but important aspects of the deal (from employment creation to safeguards for local food security through to social and environmental standards) are likely to be more tightly tied down.

## **v) Skewed obligations**

Contracts generally spell out the rights and obligations of parties. The final contract terms quite often are the outcome of negotiations. In most of the land deals reviewed, however, the obligations are skewed in favour of the investors. This raises the question about why the landlord (be it central government agency or a local government entity) would appear to be negotiating from a weaker position compared to the investor. In some cases for example, the investor or the host government, depending on the deal, must prepare a survey to finalise the identification of the land and produce a revised Appendix to be attached to the contract. On the other hand, some contracts do not appear to clearly identify the lands to be transferred beyond broad geographical references. See for example an extract from a Kenyan agreement which reads thus: ‘...The parties hereto recognize that a portion of the Additional Area cannot be used for agricultural purposes since it is likely to be under water and further (Investor) do not yet know of the exact boundaries of the additional land that they require for agricultural purposes’. In some cases, definitive site selection seems effectively based on feasibility studies to be conducted by the investor. From the contracts it is not clear what power the host government has to influence site selection. An illustrative example extracted from a contract reads thus: ‘... and in the interim the Councils agree to permit Dominion to take possession of and farm such area of land as may be reclaimed by Dominion from time to time notwithstanding that it does not entirely fall within the boundaries of the Additional Area’.

Other examples of onerous obligations placed upon host governments include an obligation to ‘assist and support any application for such authority, approval, licence or consent as may be required by the (Investor) from time to time...’ In some cases, what this means is that agencies which ought to be regulating the operations of the investor are effectively rallied to the support of the investor.

## **THROWING THE STICK FORWARD: SUGGESTIONS FOR BETTER LAND DEALS**

Critical evaluations of existing land deals in Eastern Africa underscore need for major initiatives on the part of governments, legislatures, civil society organizations and local communities themselves to make existing or future deals beneficial to all. As they are, the lease contracts offer more losses than gains to local communities and host governments. Looking ahead, attention needs to be paid to the following critical areas:

### **i) Recognition of land rights**

Rights to land and natural resources need to be recognized, clearly defined, identifiable on the ground and enforceable at low cost. The reforms of the land sector must be such as to ensure that there is a bridging of the disconnect between the protection of customary land

rights, large land acquisitions as well as the actual process of land acquisition. Additionally there is need for stricter statutory guidance and enforcement of guidelines on types and durations of land rights that can be granted to investors, what types of lands can be granted and for what purposes, payments of compensation and other mechanisms for maximizing benefits for local communities and host governments.

## **ii) Transparency**

Commentators and researchers have observed that *“Land deal negotiations are unfolding fast and behind closed doors, but the implications of these will come out because, secrecy and haste are not friends with good deals”* (Cotula, 2011). While agreeing with this position, the World Bank in its 2010 report on large land acquisitions especially in Africa observes that transparency is beneficial to all parties- governments, investors, local communities and therefore need to be enhanced. Communities that have not been educated about their rights or potential land values will be less likely to anticipate and contest investments that are not sustainable or may lead to conflict.

Information on contracts, rights, prices, land use plans should be publicly available to help local people to monitor performance of investments and public institutions to properly do their job. Public availability of information on rights and written contracts will help local communities and civil society to ensure that contracts are enforced and promises kept. The availability of information, however should also allow for public participation in the creation of the contracts and not just the provision of information on contracts that have already been negotiated and signed.

## **iii) Re-negotiation of existing deals**

Whereas it might be true that equity mends no man’s bargains, it is equally correct that the state, as a collective organ through which the society realizes its aspirations cannot suffer injustices being visited upon itself and do nothing about it. Liberia has provided good examples of renegotiation of land lease contracts and how that can be done. The result is that Liberia offers some of the best case studies and good practice on land deals. The Liberian contracts stand out as the best examples of contracts with sophisticated partnership which embody a win-win situation. The three Liberian contracts that were analyzed stood out because of their more flexible duration, their clearer identification of the land being transacted, their more specific investor commitments on jobs, training, local procurement and local processes, their greater attention to local food security and their tighter social and environmental safeguards. In addition, the Liberian contracts are ratified by parliament and are available online.

What made the Liberian government to get better contracts? Several factors combined to deliver acceptable outcomes. These included:

- ✓ An effective renegotiation of Liberia -3 (one of the 3 contracts analyzed) back in the 1970’s which laid the foundations of the current contract and led to development of in-country capacity.
- ✓ Determined political leadership and a strong government negotiating team.



- ✓ World class legal assistance to the Liberian government by international senior lawyers Project.
- ✓ Effective use of financial analysis during negotiation.
- ✓ Simultaneous renegotiation of agricultural and mining contracts.

**iv) Provision of support structures to aid government agencies and local communities negotiate better**

Even as most Governments in the region are involved in signing land deal contracts, it is clear that the same are being done under ill-informed circumstances. It is, however instructive that efforts are being made to change to a better platform. The African Agro-industry and Agro-processing Programme (3ADP) is among the several initiatives that have been established to provide guiding principles with regards to agricultural practices and management in the continent. In the Eastern Africa region, the East African Community or (E.A.C.) has put in place the (3ADP) and the East African Agro-industry and Agro-processing programme (E3ADP). The E3ADP is partly in a bid to boost food security and encourage public and private engagement in agriculture. Under this programme, the EAC member states are encouraged to use the instruments outlined by the programme to negotiate for maximum but people- centered benefits of FDI in Agriculture with a view of alleviating food insecurity in the region. These, and other arrangements are needed to enhance the benefits that ought to accrue to governments or local communities from FDI in agriculture.

**In conclusion**

That land forms the basis of social, political and economic life of most African countries cannot be overemphasised. So too is the fact that food security and food sovereignty in the Continent and within the region greatly depends on good land governance.

Good land governance is therefore critical for addressing the current socio-economic challenges faced by the region. It is therefore important that countries in the Eastern Africa region come up with a framework or a blue print which will guide them during the creation of land deal contracts. Additionally the regional governments must promote transparency and vigorous public debate about the future of FDI in agriculture in their respective countries.