AFRICA'S 'AGRARIAN' REVOLUTION: LEGAL AND POLICY PRESCRIPTIONS TO PROMOTE IMPACT INVESTMENT FOR FOREIGN LAND AQUISITIONS IN AFRICA

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ABSTRACT

The emerging trend of increased Foreign Direct Investment (FDI) in land within Africa has highlighted the need for sound policy, legal and regulatory frameworks to ensure a balanced and beneficial approach to the land FDI recipient countries. While investment inflows are important, there is a need to temper the flow of investment with the requirement that such investments must at the very least leave countries in a much better position than they were before. This is the concept of Impact Investment which combines the often opposed forces of capitalism and social justice to achieve two main goals; solving the major problems of our time such as poverty, food security and environmental degradation as well as generating reasonable financial returns for the companies, organisations and investors addressing these issues. This paper investigates the phenomenon of FDI in land within the African continent, the legal and policy frameworks for such transactions as well as the business models that are used to channel such investment. The paper recommends reforms to the legal, policy and regulatory frameworks as well as the adoption of sustainable business models that can promote Impact Investment.

1.0 INTRODUCTION

Africa has recently witnessed a shift in trends of trade and investment involving the acquisition of vast tracts of land by foreign investors. This phenomenon is likely to have significant implications ranging from food security, environmental degradation as well as exacerbation of poverty. The World Bank estimates that about 56 million hectares of land was leased or sold to foreign investors in 2008 and 2009. Of this total, Africa accounted for 70 percent.[2] This trend could have significant implications for Africa as demonstrated by a recent case. In 2008, Daewoo Logistics Corp, a South Korean firm, signed a land acquisition agreement with Madagascar to produce food for export through a 99 year lease for 1.3

[2] Klaus Deininger *et al*, (2011) *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?* World Bank, Agriculture and Rural Development Series.

million hectares of land which is roughly half of the country's arable land. This effectively means that, all factors remaining constant, the country would be exporting about half of its agricultural produce with adverse consequences to food security and livelihoods.

While the continent has witnessed increased interest in its land resources from foreign interests, its legal and policy frameworks for land acquisition and management as well as the trade and investment policies remain susceptible to abuse. On the one hand, such investments offer a chance for large scale agricultural production on idle or underutilised land. On the other, the absence of proper legal, procedural and policy frameworks or weakness of existing ones may fail to protect local rights and interests and could possibly lead to exacerbated poverty levels, food insecurity and even environmental degradation. This reality, therefore, demands a cautious approach in promoting investment through foreign land acquisition. One avenue of addressing the competing interests between capitalism and social justice is through the promotion of impact investment. This could act as a bridge to link the need to solve the major problems of our time while generating reasonable profits for the investors.

The objectives of this paper are four-folds. First, it will discuss the nature and typology of large scale land acquisition in Africa. This will provide background knowledge of the issues under discussion. Secondly, the paper will briefly examine the legal and policy frameworks for land acquisition in Africa as well as trade and investment laws and policies. Particular attention will be given to the East African Community (EAC). Third and most importantly, the paper will examine impact investment and the possibility of an impact investment model to steer investments involving land acquisition in East Africa. The fourth part of this paper will explore possible approaches to promote impact investment in the case of land transactions involving foreign FDI. The fifth part of the paper will bring the discussion to a close and offer a range of legal and policy prescriptions to address the issues discussed. .

1.1 THE NATURE AND TYPOLOGY OF LARGE SCALE LAND ACQUISITIONS IN AFRICA

The incentives for FDI in land have generally been stated to include the expectation of high and rising levels of prices for agricultural commodities, food aid requirements, climate change and loss of productivity, climate obligations such as the Clean Development Mechanism (CDM), the political support for agro-fuels as well as trade liberalisation and reforms of national agricultural policies of large exporters which have severely reduced the availability of surpluses.[3] Africa has witnessed an increase in FDI and while the disaggregation of available data does not usually factor in the component of FDI in land, the general observation is that Africa's FDI increase in recent times can generally be attributed to high commodity prices and rising profitability.[4]

The immediate triggers of an increase in FDI in land were the food crisis in 2007 and 2008 as well as the global financial crisis in 2008. According to the World Bank, food prices had risen over 83 percent from the previous three-year period.[5] This peak in prices triggered policy readjustments in favour of FDI in land in food importing countries as a dependence on

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[3] Görgen, M., *et al*, (2009), Foreign Direct Investment (FDI) in Land in Developing Countries. *Working Paper Compiled for BMZ/GTZ*, Escborn. Hereinafter, *FDI in Land in Developing Countries*.

[4] UNCTAD (2008b): *World Investment Report, Transnational Corporations and the Infrastructure Challenge*, Sales No. E.08.II.D.23. New York and Geneva.

[5] "Food Price Crisis Imperils 100 Million in Poor Countries, Zoellick Says." The World Bank News & Broadcast. 14 April, 2008.

global markets would have to contend with high import bills and the resultant burden on the balance of trade. Furthermore, the global financial crisis which led to the collapse of equity and bond markets as well as low return on investment for private investment and has forced a shift in investment patters towards emerging economies. Investors have seen the high commodity prices as providing a two-fold opportunity for investment in land; increase in the price of land and the rise in rents as well as an incentive for agricultural production.[6] The investment opportunity in land has attracted a number of Transnational Corporations (TNCs), private equity firms and sovereign wealth funds to invest in Africa.[7] However, the main dichotomy with regard to FDI in land remains to be a distinction between state-backed investments and private investments. It is important to briefly examine these two strands of investment.

1.1.1 State Backed Investments

This usually involves governments facilitating overseas investments relating to FDI in land. There is scanty information to document the nature and extent of such transactions in exactitude regarding the contractual and financial aspects of such models. However, these take a number of forms[8] that include:

- **Direct Land Acquisition by Government Agencies**: this involves the instance where a government agency acquires land in foreign countries through direct high-level negotiations with the relevant authority in the FDI recipient country. Although it is difficult to point out such cases because of the secret nature of such transactions, some of the reported incidences point to the direct involvement of high-level officials. A case in point is the acquisition of land by Qatar in Kenya. This involved a US$ 2.5 billion loan advanced to the latter to build a second deepwater port in return for 40,000 hectares of land to grow food. This was the culmination of a three day official visit by Kenya's president to Qatar.[9] Further details about this transaction have remained secret.
- **Investments by Sovereign Wealth Funds (SWF)**: These are state-owned investment funds that are usually managed in a separate portfolio from official foreign exchange reserves and usually have a high foreign currency exposure. They usually have long-term investment outlooks and do not necessarily seek to control the management of their investment.[10] It is important to note that while SWFs are essentially state-owned vehicles, they overlap into the private sector with the recent phenomenon where participate in joint investments with private institutional investors from their home

[6] *FDI in Land in Developing Countries*, *supra*, (note 2) above

[7] See e.g. UNCTAD (2009) *World Investment Report: Transnational Corporations, Agricultural Production and Development*, Sales No. E.09.II.D.15. New York and Geneva. Hereinafter, Transnational *Corporations, Agricultural Production and Development*.

[8] For an elaborate discussion on this issue, see Cotula, L., Vermeulen, S., Leonard, R. and Keeley, J., 2009, Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa, IIED/FAO/IFAD, London/Rome. ISBN: 978-1-84369-741-1

[9] Daily Nation, Qatar to Fund Lamu Port Construction, available at: <www.nation.co.ke/News/-/1056/496966/-/tm5rcj/-/index.htm>(accessed 12 October 2011).

[10] Kavaljit Singh 'Sovereign Wealth Funds and Land Grabbing' paper presented at the 3D Seminar, Geneva May 16, 2009

country who then carry out international land purchases and investments.[11] SWFs have become significant players in FDI patterns recording a 16 percent increase in FDI to US$ 20 billion in 2008 with total assets of US$ 3.9 trillion in the wake of the fall of oil prices in 2008.[12] An example in question is the Qatar Investment Fund (QIF), which has ventured to make significant purchase of land globally. The QIF, in responding to criticism of FDI in land, set up Hassad Food, a company established to buy stakes in major agricultural firms in different countries to ensure food security in Qatar.[13]

- **State Owned Enterprises**: These are entities that are registered under company law established as profit-making bodies and are fully owned by states or the majority stake is held by states. An example is the Saudi Company for Agricultural Investment and Production (SCAIAP) that was set up to invest in agriculture and livestock production companies in partnership with Saudi private businesses experienced in the sector. The company is wholly-owned by the Public Investment Fund (PIF) of the Saudi government with the objective of investing in projects to ensure food security and help stabilise food prices domestically.[14]
- **Support to public and private sector entities in investor and host countries:** This entails the creation of financial vehicles that do not necessarily acquire equitable stakes in projects but extend technical and financial assistance to public entities as well as the private sector in the host countries. A case in point is the Abu Dhabi Fund for Development for the United Arab Emirates (UAE) which is established to provide financial services including loans, guarantees, subsidies and insurance to both state entities as well as the private sector. A notable project by this entity is the acquisition of 30,000 hectares of land in Sudan to grow corn, alfalfa as well as wheat, potatoes and beans.[15]
- **Framework agreements and National Policy:** The legal and regulatory environment that drives investment is largely influenced by legislation as well as policy framework agreements established by the powers that be. African governments sign a number of Bilateral Investment Agreements as well as cooperation agreements as well as make commitments to liberalise trade between various trading partners. These have an effect as to the level of access accorded to investors. Various national commitments relating to the regulation of trade and investment regulate to a large extent such transactions.

1.1.2 Private Sector Investments

The private sector in developed countries has recently witnessed an exodus of investors into emerging markets in the wake of the global financial recession.[16] While such investments have been through a diversity of investment vehicles, investment in agriculture also has a stake even though it can go unnoticed in some instances.[17] It would be important to also briefly examine the nature of private capital that is channelled into agricultural investments

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[11] McNellis, E., 'Foreign Investment in Developing Country Agriculture – The Emerging Role of Private Sector Finance' (2009) FAO Commodity and Trade Policy Research Working Paper No. 28. Hereinafter, *Foreign Investment in Developing Country Agriculture*

[12] *Transnational Corporations, Agricultural Production and Development*, *supra* (note 5) above

[13] The Economist (2011), *Gulf Cooperation Council Trade and Investment Flows: The Emerging Market Surge*, Economic Intelligence Unit

[14] Andy Sambidge, Saudi Sets Up $800 Million Food Investment Firm. Available at <http://www.arabianbusiness.com/saudi-sets-up-800m-food-investment-firm-13693.html> (accessed 12 October 2011)

[15] *FDI in Land in Developing Countries*, *supra*, (note 2) above

[16] John Lyons, Alex Frangos & Alastair Stewart, *World Regains Taste for Risk: Stocks, Currencies in Emerging Markets Soar; China's Stimulus Spending Kicks In*, Wall Street Journal, May 11, 2009.

[17] *Foreign Investment in Developing Country Agriculture*, *supra* (note 10) above

in developing countries. This is mainly done through asset management entities that can be further stratified into pension funds, hedge funds and private equity firms. It is, however, important to briefly mention the role of SWFs in private sector investments. A brief overview of commodity markets is also necessary

- **Sovereign Wealth Funds/State Owned Enterprises**: While essentially public entities, these entities engage in private sector investment as earlier pointed out. Some SWFs establish joint ventures with private companies to enable them invest in agricultural projects overseas. A case in point is Saudi Arabia which has been phasing out wheat production locally to conserve water resources. The government has, however, actively encouraged private sector investment in farmland abroad sometimes with government support. Under the King Abdullah Initiative, the Saudi government through its company SCAIAP has partnered with Jannat, a limited liability company that is a joint venture between seven Saudi companies.[18] The firm set a target of acquiring between 100,000 to 215,000 hectares of land abroad with a US$ 100 million portfolio for Africa.
- **Pension Funds**: These are legal entities established with the objective of financing retirement benefits to the contributors. They invest members' contributions in listed and private companies to expand their assets. Pension funds may vary in nature ranging from open or closed pension schemes where membership is either restricted in terms of the employees contributing to the scheme or open to a wide category of employees. Whether they are public sector funds or private in nature is also an important factor in determining the nature and extent of their investment and the applicable laws. According to the global investment review by Towers Watson, the world's largest 300 pension funds have a collective asset net worth of about US$ 6 billion.[19] It is further estimated by Morgan Stanley that the global net worth of pension funds totals about US$ 20 trillion in assets.[20] Traditionally, pension funds have maintained a 'conservative' approach to investment that stresses a low-risk-low-returns methodology. However, recent developments have seen a move towards diversification with emerging markets seeing greater interest from these entities. For example, the Japanese Government Pension Investment Fund, the biggest such fund according to Towers Watson, is seeking to invest in emerging markets in alternative assets such as hedge funds, real estate and private equity.[21] Investment in agricultural projects overseas is also becoming an area of interest for these funds. For example, it has recently been reported that an American pension fund has invested about € 2 billion (euro) in a fund that is run by a hedge fund, Emergent Asset Management.[22] The fund has established a private equity fund named the 'Africa Land Fund' and is poised to invest in land within the continent. There has been a marked increase in the interest shown by pension funds to invest in emerging markets with the California Public Employees' Retirement Scheme (CALPERS) and the Teachers Insurance and Annuities Association-College Retirement Equities Fund (TIAA-CREF) of New York

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[18] Andres England, *Saudi Farms Turn Soil for Seeds of Change*, Financial Times, November 17, 2009

[19] For a statistical breakdown, see Towers Watson Research & Ideas, *Global Investment Matters*, available at <http://www.watsonwyatt.com/europe/pubs/gim/render2.asp?id=12170> (accessed 12 October 2011)

[20] The Economist, Asset-Backed Insecurity, 17 January 2008

[21] Tomoko Yamazaki & Komaki Ito (2011), *World's Biggest Pension Fund to Start Investing in Emerging Markets*. Bloomberg. Available at <http://mobile.bloomberg.com/news/2011-09-29/world-s-biggest-pension-fund-plans-to-start-investing-in-emerging-markets?category=%2Fnews%2Fmostread%2F> (accessed 12 October 2011)

[22] The Oakland Institute (2011), *Understanding Land Investment Deals in Africa: Deciphering Emergent's Investments in Africa*, Land Deal Brief, June 2011.

showing interest in such investments.[23] A similar fund, the California State Retired Teachers Pension Fund (CALSTRS) has considered committing about US$ 6 billion to a new investment portfolio that includes agriculture. This development indicates a shift into these markets with keen interest in land deals. Of note is the financial restructuring involving investment from a pension fund to a hedge fund that is channelled into a private equity firm.

- **Hedge Funds**: These are investment vehicles that deploy sophisticated strategies in investment and usually extend to a wider range of investment sometimes with greater risk than conventional investment funds that deal with bonds and equities. This may range from real estate, infrastructure and even distressed debt.[24] They usually invest in both short and long term ventures, use arbitrage, buy and sell undervalued securities, trade options or bonds with the aim of reducing volatility and risk in seeking profits.[25] Hedge funds can be categorised into four main categories depending on their approach to investment. These include global macro, directional, event-driven, and relative value (arbitrage) kinds of funds. One particularly distinct pattern of hedge funds, except in the United States, are not bound by the 'conventional' financial reporting requirements usually associated with other financial institutions. The registration and regulation requirements do not usually impose huge obligations on these funds. Further, they are managed by accredited investors and cannot, therefore, market themselves to retail investors. Hedge Funds usually have a structure where the fund itself is separate from the investment manager. In recent times, hedge funds have shown interest in investing in agriculture. A prominent case in point is the case of BlackRock Inc., an asset management fund which in 2008 set up a US$ 200 million agricultural hedge fund. Of this amount, US$ 30 million was earmarked to acquire farmland around the world.[26] The previously stated case of Emergent Asset Management also suffices. The firm intends to grow the Africa Land Fund to about € 3 billion (Euros) to be used in investments in agricultural land and livestock. There is also Passport Capital, a hedge fund that has put a strong case to investors to invest in its Agriculture Fund arguing that the '*growing demand for agricultural commodities and food products with constrained supplies, processing capacities, and distribution channels provides an attractive investment opportunity*.'[27] The hedge funds' interest distressed debt also poses a risk of vulture fund litigation for African countries. Therefore investment in land resources must undergo thorough examination as any kind of adverse conditions that occasion default could result to significant consequences for African countries.
- **Private Equity Funds**: These are collective investment schemes that are usually managed by an investment manager (private equity firms) and deploy a range of investment strategies such as venture capital, leveraged buyouts, growth capital, distressed investments as well as mezzanine capital.[28] These firms then seek their return on investments through Initial Public Offerings (IPO), mergers and acquisitions or recapitalisation. Their legal structure usually entails a limited partnership where a general

[23] *Foreign Investment in Developing Country Agriculture*, *supra* (note 10) above
[24] As above
[25] For a more elaborate analysis, see Anson, Mark J.P. (2006). *The Handbook of Alternative Assets*. Wiley, John & Sons. Pp. 123
[26] *Foreign Investment in Developing Country Agriculture*, *supra* (note 10) above
[27] Passport Capital (2009), *From Dirt to Dinner Table: The Case for Agriculture*. Presentation to Investors
[28] Marks, Kenneth H. & Robbins, Larry E., (2005) *The Handbook of Financing Growth: Strategies and Capital Structure*. John Wiley & Sons. See also Campbell Lutyen (ed) *The Private Equity Secondaries Market: A Complete Guide to Its Structure, Operations and Performance*. London: 2008 PEI Media Ltd.

partner tasked with raising capital from investors as well as limited partners who include institutional investors and high net worth individuals.[29] The private equity market is estimated to have totalled US$2.4 trillion by the end of the year 2010 with about US$ 1 trillion available for investment.[30] It is further estimated that about US$ 180 billion was invested globally by private equity funds, marking a 62 percent increase from the previous year.[31] A number of private equity funds have shown interest in investing in agriculture. Jarch Capital, a US based private equity fund acquired a lease for 400,000 hectares of land in South Sudan. This was after acquiring a 70 percent stake in a local company, Leac for Agriculture and Investment.[32] Another fund, the Blackstone Group of New York[33] and had made extensive investments in the agricultural sector in Sub Saharan Africa. Yet another private equity fund affiliated to Africa, Citadel Capital, also has extensive interest in agriculture. It set up an agricultural fund named Sabina which is the holding entity for its agricultural investment in Sudan.[34] Sabina obtained a 99 year freehold title on 107,000 hectares of land located directly on the Nile River. This is to be used for the cultivation of sugarcane and other crops. It is also considering investing in the EAC countries of Kenya and Uganda as well in Ethiopia. Further, Sanlam Private Equity, a South African fund, formed an agricultural fund named the Agri-Vie Fund as well as an investment group named Strategy Partners that raised over US$ 60 million within a year of its establishment with the intent of investing in agriculture within the continent. These examples provide a clear testimony of increased interest of private equity funds in agriculture.

2.0 THE LEGAL AND INSTITUTIONAL FRAMEWORKS FACILITATING FOREIGN DIRECT INVESTMENT IN LAND

The regulation of FDI in land is made possible through an interplay of legal regimes that are largely dependent on the nature of the investment. Traditionally, FDI is channelled through three main methods; takeovers, mergers and acquisitions as well as greenfields.[35] The regulation of investment in land can be identified in international trade and investment agreements, international investment contracts as well as domestic laws. The following part of this paper will examine these rules and how they regulate FDI in land.

2.1 International Frameworks and Agreements

These are agreements that establish rules that have been established to facilitate and protect investment whether at multilateral, bilateral or regional levels. They may include World Trade Organization (WTO) Agreements as well as International Investment Agreements (IIA). A brief examination of these regimes is important.

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[29] Trade Union Congress, *Private Equity – A Guide for Pension Fund Trustees*. Pension Investment Research Consultants

[30] TheCityUK, *Private Equity Report, 2011,* Financial Markets Series, August 2011

[31] As above

[32] 'New York Investment Firm Mulling More Leases in Southern Sudan' *Sudan Tribune*, 16 April 2009. It should be noted that this investment was jointly made with a warlord in the country.

[33] China recently invested in the fund to the extent of about US$ 3 billion by the China Investment Company

[34] Alison Graham, Sylvain Aubry, Rolf Künnemann & Sofía Monsalve Suárez (2010), *Advancing African Agriculture: The Impact of Europe's Policies and Practices on African Agriculture and Food Security*. FIAN International

[35] Colin Kirkpatrick, David Parker & Yin-Fang Zhang, 'Foreign Direct Investment in Infrastructure in Developing Countries: Does Regulation Make a Difference?' (2006) 15(1) *Transnational Corporations* 143

2.1.1 World Trade Organization Agreements

These are agreements containing rules with multilateral application and form the basis upon which IIAs are concluded. They also contain some specific rules that have an impact of agricultural investment. These include:

- **The Agreement on Trade Related Aspects of Investment Measures**: This agreement contains general rules for investment measures intended to avoid trade restrictive and distorting effects. Its main thrust is on measures with a possible impact on quantities of imports and exports and requires that there be equal treatment of national and foreign investors.
- **The General Agreement on Trade in Services**: This agreement lays out rules governing multilateral trade in services allowing for free movement of services between countries. It contains rules on basic obligations, schedules of national commitments as well as special situations. The agreement contains various modes under which services may be supplied. The third mode, commercial presence, avails the opportunity for foreign service suppliers to establish, operate or expand a commercial presence in a member's territory. It affects agricultural investments in the sense that an investor may be allowed to bring in foreign workers to work on the project.
- **The General Agreement on Tariffs and Trade (GATT) and the Agreement on Agriculture (AoA)**: These agreements contain rules relating to export restrictions in the event that a country faces food shortages.[36] These rules are designed for countries facing dire food shortage to restrict export to address the shortfall. However, the investor may ordinarily be allowed to export produce in the absence of such shortfall.

2.2.2 International Investment Agreements

These are treaties concluded between states to facilitate and promote cross border investment. These include Bilateral Investment Treaties (BITs), investment chapters in Free Trade Agreements (FTAs), as well as regional investment treaties. International Taxation Agreements and Double Taxation Agreements also have a significant impact on investment. For the purpose of this paper, BITs will be examined as they are more prevalent in regulating FDI and contain rules that are also used across IIAs.

2.2.2.1 Bilateral Investment Treaties

These are agreements that set the terms and conditions under which private investment by nationals and companies of one state is to be regulated in another. BITs gained currency in the wake of decolonization as a mechanism by western nations to protect their investors and their (investors') investments in developing countries. This was informed by the absence of clear rules of international law to govern the treatment of foreign investments.[37] BITs were designed with three-pronged policy objectives namely the promotion and protection of investment, the facilitation of investment entry and operation, as well as the

[36] See Article XI, 2 (a) and (c) of the General Agreement on Tariffs and Trade and Article 12 of the Agreement on Agriculture

[37] Uche Ewelukwa Ofodile, 'Africa-China Investment Agreements: Trends, Tricks and Traps – Implications for Broader Africa-South Economic Cooperation'. Paper presented at the Trade Policy Training Centre in Africa (TRAPCA) Trade Policy Research Forum, Arusha, Tanzania 8-9 August 2011. Hereinafter, *Africa-China Investment Agreements*

liberalisation of the economies of developing countries.[38] BITs are used to secure six core rights for investors namely (i) fair, equitable and non-discriminatory treatment; (ii) rights to freely transfer capital out of host-country; (iii) protection from expropriation and measures tantamount to expropriation and the right to prompt and adequate compensation in the event of expropriation; (iv) the right to international arbitration if and when disputes arise; (v) limitation on performance requirements; and (vi) the right of an investor to select top managerial personnel.[39]

These rules are designed to offer protection for foreign investors and sometimes extend such protection over and above what is given to domestic investors. A brief overview of some of the provisions contained in BITs that are also mirrored in other International Investment Agreements (IIA) is necessary. They include:

- **The National Treatment Obligations**: This is one of the fundamental rules that form the cornerstone of international trade. It obligates a country to afford a foreign investor treatment that is no less favourable than domestic investors in 'like circumstances'. However, national treatment obligations do not usually establish criteria with which to establish what amounts to 'like circumstances'. This has left the tribunals a wide interpretation margin. Available case law (*Methanex v. United States*) indicates that tribunals could use the test that examines the economic activity of the investors (foreign and domestic) without due regard to other compelling factors.[40] This approach asks whether the economic activities of the foreign investor are comparable to economic activity in the domestic sphere. Therefore, a measure that is in its own face non-discriminatory and applies to both domestic and foreign investors can nevertheless be interpreted as having the effect of according less favourable treatment to foreign investors as compared to domestic ones. This test can be used to equate a small scale farmer and a large multinational involved in agricultural production as being in 'like circumstances'. Therefore support policies for small scale farmers and any potential regulation to the large scale farmer to pursue health and safety may be challenged as violating national treatment obligations.
- **Most Favoured Treatment (MFN) Obligations**: This rule demands that a foreign investor be accorded the highest standard of treatment available to an investor from any other foreign country. This rule has recently been interpreted in a manner that broadens the scope of an investor's procedural and substantive rights beyond those contained in the agreement under which the investor claims protection under the MFN clause. In one arbitration case (*Maffezini v. Spain*), an Argentine investor in Spain was permitted to use a more beneficial time requirement in the arbitration process found in a different treaty between Chile and Spain in a claim that was filed under a BIT between Argentina and Spain.[41] While it could be argued that the case examined the applicability of MFN provisions in dispute settlement, it opens ground for the argument that substantive

[38] Jewald W. Salacuse & Nicholas P. Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Treaties and Their Grand Bargain (2006) 46:1 *Harvard International Law Journal*. Quoted in *Africa-China Investment Agreements*, *ibid*

[39] *Africa-China Investment Agreements*, *supra* (note 36) above

[40] See e.g. *Methanex v. United States*, UNCITRAL, Decision on *Amici Curiae*, 15 January 2001, and 1st Partial Award, 7 August 2002 (NAFTA). Final Award, 3 August 2005.

[41] *Emilio Augustin Maffezini v. The Kingdom of Spain*, ICSID (Case No. ARB/97/7), Decision on Jurisdiction 25 January 2000; Award, 13 November 2000; Rectification of Award, 31 January 2001 (Argentina/Spain BIT). See also *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (English), 3 August 2004 (Germany/Argentina BIT)

protections that are greater in a BIT with a third country can now be relied upon by an investor in any BIT arbitration.[42] In fact, it has been observed that "the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfil the objective of the BIT to protect investment and create conditions favourable for investments". In this regard therefore, obligations "that can be construed to be part of the fair and equitable treatment of investors" that are found in other agreements "would be covered by the (MFN) clause".[43] This provision could well make investors rely on other BIT provisions to considerably expand their rights in agricultural investments.

- **Prohibition of Expropriation Without Compensation**: Under the rules established by customary international law, foreign-owned property may not be expropriated or be subjected to a measure tantamount to expropriation unless four basic conditions are met. These include the requirement that the measure must be intended for a public purpose, such property should be taken in accordance with the applicable laws and due process, it should be non-discriminatory and full compensation must be paid.[44] Two kinds of actions can be stated as constituting expropriation. They include; (i) The actual taking of property by direct means where useful control of property is lost through nationalisation or the taking of specific assets; and (ii) Indirect taking of property through *creeping expropriation* which is understood as being the use of a series of measures to achieve deprivation of the economic value of the investment or *regulatory expropriation* where a measure instituted for regulatory purposes has an impact on the economic value of the asset.[45] The latter form of expropriation has been subject to litigation. In *Ethyl Corporation v. Canada*[46], a Canadian ban on imports of a gasoline additive, MMT was deemed to be expropriation and compensation was awarded. Further, in *Metalclad v. Mexico*[47], it was held that a measure to prevent the use of land as an underground landfill and its establishment as a state wildlife protected area was tantamount to expropriation and required compensation.
- **Dispute Settlement**: Most of the procedures of dispute settlement in IIAs involve international dispute resolution through investor-state arbitration. By the end of 2008, the number of known treaty-based cases has increased to 317 marking an increase of about 30 percent. These were filed at various international tribunals including 201 with the International centre for the settlement of Investment Disputes (ICSID), 83 under the United Nations Commission on International Trade Law (UNCITRAL), 17 with the Stockholm Chamber of Commerce, 5 with the International Chamber of Commerce and another 5 cases being *ad hoc*.[48] In these *fora*, the application of an investment agreement provisions places importance of such provisions over domestic laws and in the event of any inconsistency, the express provisions of the investment agreement will

[42] UNCTAD, 'Investor-State Disputes Arising From Investment Treaties: A Review' (2005) UN Doc UNCTAD/ITE/IIT/2005/4. Hereinafter, *Investor-State Disputes Arising From Investment Treaties*

[43] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case ARB/01/7, Award, 25 May 2004 (Malaysia/Chile BIT), paragraph 104

[44] *Antoine Goetz v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award 10 February 1999 (Belgian-Luxembourg Economic Union/Burundi BIT)

[45] *Investor-State Disputes Arising From Investment Treaties*, supra (note 41) above

[46] *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 (NAFTA)

[47] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000. This decision was upheld in subsequent processes. See Review by the British Columbia Supreme Court (2001 BCSC 664), 2 May 2001; Supplementary Reasons for BCSC Decision, 31 October 2001 (NAFTA) (2001 BCSC 994) Paras. 62-63

[48] UNCTAD, *Latest developments in Investor-State Dispute Settlement*, IIA MONITOR No. 1 (2009), International Investment Agreements

prevail. In the case that domestic legislation exists, the interpretation under the *Vienna Convention on the Law of Treaties* may, however, repudiate its effect since the existence of domestic legislation cannot be pleaded as an excuse to breach rules of international law.[49] Tribunals even ignore express provisions which require that disputes be the subject of local laws. In *Compania de Aguas del Aconquija & Vivendi Universal v. Argentine Republic*[50], an express provision in a concession contract that disputes over implementation of the contact be subject to local laws was overlooked in favour of investor-state arbitration. Another challenge is that the linkage between foreign investment and the domestic legal regime on issues such as labour laws, health laws, pollution control and taxation is severed in favour of investors even in the case where such would occasion great detriment to national interests.[51] Investor-state disputes can be initiated by the foreign investment of the investor which includes minority shareholders. This situation can sometimes allow the two concurrent processes sometimes with conflicting outcomes. In two cases; *Ronald S. Lauder v. Czech Republic*[52] and *CME Czech Republic v. Czech Republic*[53], one case found that there was no fault on the part of the Czech Republic while other established that there was a breach of an investment agreement for which an award of US$ 300 million was awarded. The conflicting decisions notwithstanding, the award was upheld upon appeal.[54] This situation the extent to which foreign investment is given primary consideration.

- **The Right of Investors to Access Logistic Infrastructure and Intermediate Goods**: The investor is allowed to use a host country's intermediates and infrastructure for production. This may include resources such as energy and water.[55] This is what could be described as an acquired right. Here, there is an assumption that by accepting foreign investment, the host state tacitly agrees to provide the means with which the investor is to operate. This does not require formal authorisation as it could be said to be a 'legitimate expectation' of the investor and may include the use of water resources for industrial or irrigation purposes.[56] In the situation that these acquired rights do conflict with local needs for agriculture, subsistence and even small industries. In the absence of clear stipulation of the nature and extent of water allocation rights, the investor would be considered as having acquired the quantity of water required by the investment with the concomitant benefit of having the right to protect such allocation through recourse to international law while local right holders may not benefit from the same protection and could even hold non-legal claims if rights are not properly defined. Further, in the course of carrying out business using such resources as water, the investor may end up polluting the local water as would happen even with a local investor. However, it would be difficult to implement new regulatory standards under the 'polluter pays principle' which is a well established customary international law norm. While such regulation

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[49] *Vienna Convention on the Law of Treaties*, (1969) 1155 UNTS 331, Art. 27.

[50] *Compania de Aguas del Aconquija & Vivendi Universal (formerly Compagnie Generale des Eaux) v. Argentine Republic* (Case No. Arb/97/3), Decision on Annulment, July 3 2002, 41 ILM 1135 (2002).

[51] Howard Mann, 'International Economic Law: Water for Money's Sake?' Paper presented at the Latin-American Seminar on Public Policy and Water Resources, Brazil, 22 September 2004. Hereinafter, *International Economic Law: Water for Money's Sake?*

[52] UNCITRAL Arbitration, Final Award, September 2001

[53] UNCITRAL Arbitration, Partial Award, September 13, 2001. The damages awarded in this case were upheld in *The Czech Republic v. CME Czech Republic*, B.V, Court of Appeal, Stockholm Sweden, Case No. T-8735-01, 2003.

[54] See *International Economic Law: Water for Money's Sake? Supra* (note 50) above

[55] *FDI in Land in Developing Countries*, *supra* (note 2) above

[56] *International Economic Law: Water for Money's Sake? Supra* (note 50) above

cannot be challenged by a local investor, the principles established under the national treatment, most favoured nation and expropriation by international law may serve to exempt international investors from the application of new measures.[57]

2.2 International Investment Contracts

International Investment Contracts are agreements that are concluded between investors and host governments or state-owned enterprises for the purpose of regulating specific investment projects.[58] They differ with investment treaties in the sense that the latter are concluded between two or more states to regulate the establishment and treatment of investments by nationals of one state within the territory of a different state.[59] These contracts take different forms including concession agreements, Production Sharing Agreements, Build-Operate-and-Transfer (BOT) Agreements and leases in the case of agricultural investments. One peculiar characteristic of foreign investment contracts is that they often extend investment protection well beyond the requirements of international law in general and a concomitant effect of limiting the policy space available to governments.[60]

These contracts usually contain intricate provisions relating to a number of issues including choice and structure of business models, investment commitments, infrastructure development and management, stabilisation and renegotiation clauses, dispute settlement as well as provisions relating to confidentiality.[61] The nature and extent of rights and obligations of investors and host governments have been subject to controversy owing to the extensive protection that is usually given to investors. Contention revolves around the confidential nature of these transactions, stabilisation clauses as well as dispute settlement processes. For the purpose of this paper, stabilisation clauses will be examined briefly.

2.2.1 Stabilisation Clauses in International Investment Contracts

These are clauses that are intended to 'stabilise' the terms and conditions of an investment project through the management of non-commercial risk entailing fiscal, regulatory or political risks.[62] Through these clauses, the host governments commit against making alterations to the regulatory framework of the project and in the alternative, compensate the investor so as to restore the economic equilibrium of the project. There exists a range of stabilisation clauses including[63]:

- **Intangibility Clauses**: These clauses commit the parties not to modify the contract except with the express consent of the parties. They further commit governments not to nationalise investments in the duration of the contract period. In *Revere Copper & Brass v. Overseas Private Investment Corporation*, the action by the government of Jamaica to increase royalties due from it from a concession agreement in spite of a stabilisation clause was tantamount to taking over the investment.

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[57] *International Economic Law: Water for Money's Sake? Supra* (note 50) above

[58] Cotula, L. (2010) *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and more Sustainable Natural Resource Investments*, Natural Resource Issues No. 20. IIED, London. Hereinafter, *Investment Contracts and Sustainable Development*

[59] *Investment Contracts and Sustainable Development, Ibid*

[60] Cotula, L., (2007) *Foreign Investment Contracts*, International Institute for Environment and Development, Sustainable Markets Investment Briefing 4. Hereinafter, Foreign *Investment Contracts*

[61] *Investment Contracts and Sustainable Development, supra* (note 57) above

[62] *Investment Contracts*, *supra* (note 59) above

[63] See *Foreign Investment Contracts*, *supra* (note 59) above

- **Freezing Clauses**: Such clauses limit the applicability of domestic laws for the contract to the law that was applicable at the date of the conclusion of the contract. Hence such contract would not be affected by any subsequent legislation that is inconsistent with the law at the time the contract was signed. An example is the COTCO-Cameroon Establishment Convention for the construction and operation of the Cameroonian section of the Chad-Cameroon pipeline which contained a commitment '*not to modify the legal, tax, customs and exchange control regime in such a way as to adversely affect the rights and obligations of COTCO*'[64]
- **Consistency Clauses**: These clauses repudiate the applicability of domestic legislation of a host state to the extent that such legislation is inconsistent with the investment contract. Therefore if any law, whatever its objective, is found to be inconsistent, then the protection of the investor takes precedence. In the COTCO-Cameroon Establishment Convention, the host government was bound not to apply to the project any legislative, regulatory or administrative measures inconsistent with the Convention. The application of such laws is hence deemed as a violation. In *Biloune v. Ghana*, the cessation of work on a construction project on the basis that local laws were violated as certain permits had not been obtained was held to be a *de facto* expropriation. The UNCITRAL tribunal observed that while not every individual act constituted an expropriation in and of itself, their cumulative effect led to '*irreparable cessation of work on the project*.' [65]
- **Economic Equilibrium Clauses**: The purpose of these clauses whose purpose is to link any alterations to the terms and conditions of the contract to be accompanied by a renegotiation process intended at restoring the original economic balance or in default of that payment of compensation. A case in point is the International Project Agreement (IPA) between Benin, Ghana, Nigeria and Togo as a joint entity and the West African Gas Pipeline Company for the construction and operation of the West African Gas Pipeline which contained provisions to the effect that any regulatory change that "*has a material adverse effect on the company"* or one which "*causes the benefits derived by the company from the project or the value of the company to the shareholders to materially decrease*" would oblige the parties to "*restore the company and/or the shareholders to the same or an economically equivalent position it was or they were in prior to such change*" or institute "*prompt, adequate and effective compensation*".[66]
- **Issue-Specific Stabilisation Clauses**: Investment contracts also contain some clauses that address specific issues such as clauses for the stabilisation of the fiscal regime or those that stabilise regulation of tariff structures in the case of public utility projects.

2.3 Domestic Legislation

Domestic legislation forms the primary source of legislation that regulates investment in agriculture within a given state. A number of key laws relating to admission of foreign investors, property, taxation, environment, labour and safety regulations may be relevant in regulating FDI in land. Most countries have an indirect model of investment regulation where laws relating to investment are found in various pieces of legislation. Such regulate the flow of investment through the modes of mergers and acquisitions, takeovers and greenfields investments. Given the varying nature of laws and regulations governing the

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[64] Articles 24 & 30 of the COTCO-Cameroon Establishment Convention.
[65] *Biloune v. Ghana*, Award on Jurisdiction and Liability of 27 October 1989
[66] *Foreign Investment Contracts*, *supra* (note 59) above

flow of investments in different countries, a case study of Kenya will be done for the purpose of this paper.

2.3.1 Kenya's Regulation of Foreign Investment in Land

The regulation of foreign investment in Kenya is primarily regulated through an indirect regulatory model involving a number of laws and regulations. Key laws affecting FDI include the *Investment Promotion Act* of 2004, the *Competition Act* of 2010, the *Capital Markets Authority Act* and the *Capital Markets (Takeovers and Mergers) Regulations* of 2002, and the *Companies Act*. The Investment promotion Act establishes the Kenya Investment Authority that is tasked with issuing investment certificates; assisting investors in obtaining licenses, permits, incentives and exemptions; providing information on investment opportunities and sources of capital; facilitating and managing investment sites, estates and land as well as advising the Government on improving the investment environment.

A number of statutes regulate the acquisition of land rights in Kenya. This is based on the history of land tenure rights and therefore property in land is recognised through various instruments including the Registration of Documents Act, the Land Titles Act, the Government Land Act, Registration of Titles Act, and the Registration of Lands Act. Land can be acquired by individuals or companies.

The Kenyan legal system has no specific laws regulating cross border mergers and acquisitions. However, the Competition Act makes provision for the regulation of market structure, regulation of conduct, as well as enforcement and compliance. It is also important to note that there are no specific rules regulating investments by sovereign wealth funds. This therefore exposes the country to a lacuna that can very well orchestrate the abuse of proprietary rights in the case of investments in land resources within the country. The country will mainly rely on the voluntary rules of best practice developed by the International Monetary Fund.

2.4 Conclusion

The foregoing snapshot at the legal and regulatory environment clearly exposes the lacuna that exists with regard to the regulation of foreign investment in land in Africa. There are cases which illustrate the extent to which such weak laws have been exploited in favour of foreign investors. To a large extent, foreign investors are accorded greater protection than even local right-holders. This can pose significant challenges when discussing investment in agriculture. This phenomenon will be explored in the following chapter relating to impact investment with regard to agriculture.

3.0 The Case for Promoting Impact Investment in Foreign Direct Investment in Agriculture in Africa

The emergence of the concept of impact investment lends itself to the understanding that investment should not be pursued for the singular goal of profit maximisation but rather should seek to generate both financial gains for investors as well as social and environmental gains for the society at large. If the perennial food insecurity and famine disasters in Africa are to be addressed, then FDI in land should be looked at not as an imminent threat of neo-colonialism but as an opportunity to generate social capital.

However, for such gains to be realised, there is need to address some fundamental flaws in land FDI that have limited such land transactions to profit maximisation. Only then can the 'agrarian revolution' being witnessed through the entry of foreign investment in agriculture leave an enduring impact for Africa. It is important to examine some of these transactions and the likely effect. Cases of land FDI in Kenya, Uganda and Tanzania will be explored.

3.1 Foreign Land Acquisition Transactions in Kenya

Kenya has witnessed some foreign inflows of investments in the agricultural sector involving huge land transactions. The country has the burden of endemic poverty with approximately 56 percent of the population living in absolute poverty with 53 percent of this total being in rural areas while 47 percent living in urban areas.[67] The Food and Agricultural Organisation (FAO) reckons that an estimated 10 million people suffer from chronic food insecurity and a total of 2 million people rely on food aid at any given time with 32 percent of the entire country's population being undernourished.[68] The country's arable land makes 9.2 percent of the country's territory. Out of this land, 1.8 percent constitutes land that has been placed under irrigation.[69] The country experienced famine in 2011 that killed a number of people prompting a national response in this regard. As of 2006, it was estimated that about 85 percent of the country's then 36.1 million lived in rural areas and depended on land for a living.[70]

The country's land tenure system has largely been influenced by colonial policies that seized prime agricultural land and was systemised through the supplanting of customary land tenure systems with individual registration. The policy at the time made local inhabitants 'tenants at the will of the crown'. This made customary claims over land difficult to recognise and the policy at the time of independence failed to address these issues. As such, there is a huge population of landless persons who live in abject poverty as a result of such dispossession. The country's land laws spread through a number of laws and Kenya has been without a National Land Policy until December 2009 when such policy was adopted by the legislature. This policy together with the new constitution offer some changes.

Under the country's previous constitution, there was distinction in land ownership between government land, private land and trust land. It should be noted that the tag of 'trust land' directly stems from the colonial time policy that did not consider indigenous groups as capable of holding titles to any land. The land was thus held 'in trust' for them. Under the National Land Policy, a distinction has been made between public land, community land and private land. The new constitution requires parliament to enact some laws that will regulate the management of land in the country.

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[67] Kenya Human Rights Commission (2007) Committee on Economic, Social and Cultural Rights Pre-Sessional Working Group 2007: List of Issues by the Kenyan Civil Society Coalition on Economic, Social and Cultural Rights, Nairobi and United Nations Development Assistance Framework (UNDAF) Kenya, 2004-2008

[68] FAO, Country Profiles, available at <http://www.fao.org/countries/55528/en/ken/> (accessed 12 October 2011)

[69] Rural Poverty Portal, <http://www.ruralpovertyportal.org/web/guest/country/statistics/tags/kenya> (accessed 12 October 2011)

[70] Kameri-Mbote, Patricia, Land Tenure, Land Use and Sustainability in Kenya: Towards Innovative Use of Property Rights in Wildlife Management, International Environmental Law Research Centre, 2005-4, p. 1