



Paper title: *“Foreign Land Acquisition agreements of Ethiopia: will they achieve major intended goals? An examination of the texts of the agreements”*

Presented at the

Sixth Annual conference

Theme:

“Foreign Land Acquisitions in Africa: Implications for Trade, Investment and Development Policies”

24 – 25 November 2011

Arusha, Tanzania

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Abstract:

Ethiopia, a country which suffers from a perennial food insecurity problem, has been struggling to address this problem ever since the 1984 drought. Currently, there are at least 6.2 million people in the country that are seriously threatened by hunger and malnutrition, and require urgent food assistance. Faced with such a massive predicament, it is an irony that the country is involved in giving away large tracts of land, the main means for food production, to foreign buyers. Based on data released; the federal Government so far leased a total 350,099 hectares of land. With a total of 3 million hectares of agricultural land, an area around the size of Belgium, so far designated to be leased to incoming foreign investors, it is a crucial matter to ascertain whether the land agreements are drafted to benefit the country. The appraisal of the agreements reveals a number of shortcomings. For a start, their rent fees are low when compared with international prices, besides the exemption from fees they enjoy. What's more, there is no mechanism for compensating for this by securing infrastructures for the local population since these are written as a right for the lessee not as an obligation. Furthermore, there is a lack of common understanding on how much produce can be exported and how much will stay in the country (for food security purposes). On top of this, almost all agreements reviewed contain no mention of the relationship between the firms and the local farmers/pastoralists as enshrined in the 2007 UN Declaration on the Rights of Indigenous Peoples. The dispute settlement provisions are also not without defects: some refers to the ICSID additional facilities but it seems unlikely if this can be applied in these specific situations because of the nationality of the investors and the non-membership of the countries involved in the ICSID. The land agreements seem simplistic and lack some important elements that could help the country in attracting investment and employment. The urgent matter of addressing the food security concern of the country, through these agreements, has also fallen in doubt since they don't explicitly address this matter. Indeed, the agreements have the potential in attracting investment and employment but it remains questionable if these can be achieved in their present form. This study is an examination of the large land agreements signed by the Ethiopian government and whether they fulfill the aspirations of the country, including becoming food self sufficient. In this study 22 large land lease agreements between the Ethiopian government and investors will be assessed.

1.0 Introduction

The Ethiopian government (GoE) has allocated a total 350,099 hectares of land to investors that are going to cultivate different cash crops, cereals and biofuel products on the land. Of this, 285,012 ha of land are leased to foreigners, while the rest is allocated to Ethiopians. Meanwhile, Cotula et al puts the figure for foreign allocations at 240,000 ha.(2009 p. 49). And according to Daniel Berhane (2011 Blog) out of the 285,012 ha of land so far transferred to foreign firms, 250,012 ha belongs to eight firms of Indian origin, 25,000 ha of land to a company of Chinese origin and 10,000 ha to a company of Saudi origin.

It is the perceived intension of the Government of Ethiopia to undergo these allocations for the following reasons: (1) to vastly increase acreage into agricultural production, (2) to make existing farmland more productive, and (3) to get finance since the public sector cannot fully finance needed modernization (wikileaks US embassy cables). In a nutshell, government believes, these private investments will help in technology transfer, job creation, getting infrastructure and towards food security. ((Ministry of Foreign affairs 2010 p.1 and MoFED 2010 p.26)

The recently released 22 land lease agreements¹ are all entered with firms incorporated in Ethiopia, though some of them have foreign origins. Since all land in Ethiopia is owned by government as per Article 40/3 of the 1995 Federal Constitution, there are no exclusive private deals.

To describe the kind of production that is going on these farms: 98% of the projects recorded involve food production, while 2% is for biofuels (though in terms of land area the split is slightly different: 94% versus 6%) (Cotula et al. 2009 p. 50).

A question that has been appoint of discussion for policy makers and academicians ever since these so called “land Grabs” came to light is: whether these agreements are

¹ The recently disclosed 22 agreements by the Ministry of Agriculture and Rural development are : Adama, Daniel Agricultural Development Enterprise, Mela Agricultural Development PLC, Rahwa, Reta, Ruchi, Tsegaye Demoze Agricultural Development, White Field, BHO, Sannati, Verdanta, Keystone, CLC , S& P, Access Capital, Karuturi Agro Products PLC, Saudi Star Agricultural Development, Huana Dafengyuan Agriculture, Kehedam Trading, Dr. Tamie Hadgu, Bruhoye, ASKY Agricultural Development, Tracon Trading Pvt. Ltd/ Co. the agreements range from ranging from the 430 ha of Keystone to 100,000 ha of Karuturi with an additional promise of 200,000 ha

worth the effort and expectation that African and other land giving countries are anticipating from them.

This very brief paper is not prepared to exhaustively tackle the pros and cons of such agreements but is a general observation on the text of the 22 large land agreements that Ethiopia has signed with investors, taking into account the main features of the agreements and the country, i.e., food security, rent rates, local communities protection, dispute settlement arrangements and last but not least Job creation and infrastructure. In this effort, due to the secretive and controversial nature of the deals some unfamiliar sources are made use of.

2.0 The agreements and food security

Ethiopia is a country with a history of food insecurity with at least 6.2 million people currently facing hunger and malnutrition. So, it will be logical if some of the produced food is channeled to local consumption. Unfortunately, there is no provision in the 22 agreements examined that addresses food security concerns in times of emergency. Furthermore, there is no clear law which addresses this matter although government can legislate so in case of emergency, as it had done previously.

What's perplexing is the confusion on the issue with different actors referring to different figures on the allowed amount of food product exports. Some investors (e.g. Saudi Star) claiming 60% while others are saying 2/3 of production (Daniel Berhane Blog).

An issue that can be to the disadvantage of investors around this issue can be the unilateral export ban government had enforced on some cereal exports in the recent past. If this precedence is to be followed there might be disagreements and disputes between the signatories which might derail the objectives government set out to achieve in the cereal production investments.

The Growth and Transformation Plan, Ethiopia's 5 year economic program (MoFED 2010 p. 26) also identifies private investment in large scale farms as primarily directed for export. This does not make it clear as to how much can be used for local consumption from the produced food.

3.0 Amount of rent

One of the main criticisms on the land deals is the low rentals that are asked for the land which has fueled the phrase "Land Grab". It stands to reason that every country can decide what its going price is so that it gets investment over and above its competitors. On the other hand, this does not mean a precious resource like land in a food insecure country should be given for a nominal price when it can be used for other worthy endeavors.

Coming into the contracts, out of the 22 lease contracts, 10 of them are for Birr 158/Hectare/per year rate, 4 are for Birr 111/Hectare/per year rate. Other than these

ones, the others are for Birr 394.5, Birr 143.4, Birr 712.61, Birr 337.80, Birr 665.85 and Birr 192/Hectare/per year rate. Saudi-star and the Indian firm Karuturi are at the bottom of the list with a Birr 30 and Birr 20 per Hectare/per year rate.

Generally, apart from the very low rentals of the last two (which are the largest) Cotula et al. describes (2009 p. 79) these as low when compared with the international rates.

What makes these rates more generous is, the tax incentives and benefits these companies get for their investment. A good example of such benefits is Article 6/2 of the Karuturi Agro Products PLC & the Ministry of Agriculture and Rural Development agreement. The Article reads:

“In view of the importance of the proposed major investment, the lessor undertakes to provide or cause to provide special investment privileges such as exemptions from taxation and import duties of capital goods and repartition of capital and profits granted under the investment laws of Ethiopia.” (Karuturi Agro Products PLC & the Ministry of Agriculture and Rural Development agreement)

It is estimated that these companies get an estimated US\$ 20 per hectare per year profit tax exemption for a period of 5 years (Cotula et al 09 p. 80). These kinds of benefits are not there for other poor smallholder farmers which makes these privileges a sort of regressive subsidy by the poor to the rich.

Meanwhile, government is thinking of revising the lease rates without consulting the investors to the dismay of some investors that got better deals. What government is doing according to Bezuallem Bekele, Agricultural Economist in MoARD's Agricultural Investment Support Directorate is:

“... undertaking a study of land prices across the country. The GoE's concern is that some investors are paying high prices for land (e.g., USD 321 per acre in Oromia) while others are paying low prices (e.g., USD 35 cents per acre in Amhara). Bekele said prices will probably be set based on proximity to Addis Ababa and, after the study is complete, the GoE plans to introduce legislation to revise all land lease terms.” (Wikileaks US embassy cables)

Although this information is from an unfamiliar source, If these actions are carried out it will conflict with the guarantees government gave in the agreements and will also

violate Article 8/1 of the agreements that the agreements will be renewed on the same terms and conditions.

3.0 Local communities

One of the major issues of investors in such contracts is the local context into which the investors are going into. It stands to reason that the new comers are in harmony with the local environment/context. In light of this spirit, when we look at the 22 agreements the overall inception of them is mired in controversy. On one side government says that the land allocations were done on waste land. In the statement of the Ministry of Foreign Affairs's weekly press release - A week in the horn of 24.12.2010: It is said:

"The government of Ethiopia has always made it quite clear that no single individual, smallholder or otherwise, will be displaced for the purpose of investment. What is allocated for this purpose are previously uncultivated and inaccessible lands in areas where there are virtually no farmers." (Ministry of Foreign affairs 2010 p.1)

On the other hand, there are arguments to the contrary. Cotula et al (2009 p.62) argues at least some of the lands allocated to investors in the Benishangul Gumuz and Afar regions were previously being used for shifting cultivation and dry-season grazing, respectively.

Supporting this, UNFAO and World Bank officials, believe there is no completely unused land in Ethiopia. According to them, almost all "unutilized" land that is not fenced off is used for livestock grazing, so the impact on livestock could be substantial (wikileaks US embassy cables). Such a difference of outlook is very confusing and it demands a thorough assessment by government to stem such kinds of concerns that end up in the international media.

Other very essential issues for local communities as far as the agreement are concerned are, the provisions for passage routes, water, and environmental protection. Here the basic idea as far as local communities are concerned is what is enshrined in Article 32/1 of United Nations Declaration on the Rights of Indigenous Peoples: it reads:

"Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."

in other words, the policies and ideas that are emerging around the principle of free, prior informed consent (FPIC) in academic legal discussions.

Having this as a guiding principle, a close look at the agreements shows us that there is no mention of the relationship between the local communities and investors on passage routes, water and similar issues in the 22 agreements.

Environmental protection, meanwhile, is part of all the agreements as the following provision from Saudi Star Agricultural development PLC. and the Ministry of Agriculture and Rural Development Agreement states under Article 4.1 litt. C & D:

“C. Observe and implement the entire provision of legislations providing for natural resource conservation
D. Conduct environmental impact assessment and deliver the report within three months of execution of this agreement” (Saudi Star Agricultural development PLC. and the Ministry of Agriculture and Rural Development Agreement)

Despite such agreements, there is concern on the actual implementation of the environment provisions. The World Bank in its 2011 report entitled “Rising Global Interest in Farmland” seems very doubtful on the actual execution of this. To begin with, it believes few agricultural investment projects had an environmental impact assessment (EIA) as required by law (Deininger & Byerlee 2011 p. 57). Moreover, the mandate of requiring or reviewing agricultural EIAs has been passed to the Ministry of Agriculture and Rural Development or respective regional bureaus, which lack the technical capacity and motivation to make compliance with EIA a priority (Deininger & Byerlee 2011 p. 122).

The World Bank report has clearly pointed out the lack of capacity in terms of execution of environmental protection provisions in the Agreements. But looking at the provisions in the Agreements which are similar to the quoted provisions above better drafting, particularly specificity seems to be lacking. This is an issue that can create confusion and more discretion for government which could make life harder for the investors.

4.0 Dispute settlement arrangements

The first issue that arises with the legal nature of the 22 agreements is the jurisdiction of the federal government to sign these agreements in the first place. Article 52/2/D of the 1995 Federal Constitution under the title “Powers and Functions of States” reads:

“Consistent with sub-Article 1 of this Article, States shall have the following powers and functions: To administer land and other natural resources in accordance with Federal laws;”

This provision clearly gives the power to administer land to states (as opposed to federal). Looking at the 22 agreements all of them are located within state boundaries. Thus, raising the question of why the federal government is signing contracts on state matters. It is true that states administer land in line with federal law but this law cannot

take away their constitutional right to administer their own land. This power emanates from the principles enshrined in Article 40/3 of the 1995 constitution which declares:

“The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia...”

which clearly portrays the constituent part of the federal state, i.e., Nations, Nationalities and Peoples of Ethiopia as the custodians of state resources.

The reason for the conflict with the constitution came about, according to Daniel Berhane, (Daniel Berhane Blog) at the end of 2009 when the EPRDF, decided that the Federal government should assume this responsibility for the sake of efficiency and facilitating monitoring. Thus, the regions delegated their mandate of leasing large plots of land to the Ministry of Agriculture and rural Development.

This is problematic for the following reasons:1. it is not an accepted move to discard a clear constitutional provision giving a clear mandate for states for the sake of efficiency. Because, if efficiency is a good enough reason to do away with constitutional provisions the government is creating a whole new mode of dealing with matters beside the constitutional order. Moreover, even though delegation in federal states, between federal and state and vice versa, is acceptable, there is usually an enabling provision for such moves as can be witnessed in the 1995 constitution itself. In this case, there is no such provision to this effect. Besides, it is not convincing that a political party is deciding this issue when there are more representative organs like parliament that are more representative and can do the job through a constitutional amendment. With no constitutional amendment, the issue is a time bomb for further complications. In fact, resentment to federal takeover is being voiced in some quarters (wikileaks US embassy cables).

On the other hand, the dispute settlement provisions of the contracts show that in the majority of cases disputes on the contract are to be settled by Ethiopian courts, while the contracts with the Indian firms: CLC(article 17), Ruchi(article 17) and S&P (article 17) make reference to an international organ known as International Center for the Settlement of Investment Disputes under the rule governing additional facilities for the administration of proceeding by the secretariat of the centre.

These references, though, applied if parties did not agree on procedures for a local dispute settlement, are also not without defects. According to Article 2 of the ICSID Additional facility rule either the state or the state whose national is a party must be a party to the ICSID convention to utilize the additional facilities. When we look at the agreements in light of this, all of the companies that have signed these 22 contracts,

including the above three, are incorporated in Ethiopia under Ethiopian law (as mentioned in all their preambles). This makes it difficult to imagine an international dispute which can be judged by the facility referred above. Even if the home country of the individuals that are behind the three companies, i.e., India is taken; it is not a signatory of the ICSID convention while Ethiopia did not ratify the convention.

This creates an unforeseen situation of lack of adjudicatory facility for the parties, especially for S&P which explicitly refers to only the facility for dispute settlement, resulting in possible failure to reach a settlement once there is a dispute.

Besides, since almost all of the companies are PLCs incorporated in Ethiopia under Ethiopian law the possibility of using BITS dispute settlement facilities as a resort appears minimal at least when the Chinese are involved (since they have a BIT with Ethiopia).

5.0 Job creation and infrastructure

One of the main benefits from such large scale land leases is the investors' Commitments on investment, employment and infrastructure (including construct housing, roads, schools, clinics and water supply facility) which would have demanded much needed capital.

In the 22 contracts examined there is no provision made for obligations to create employment (even without provision for job creation the expected projected job creation for Ethiopia according to the World bank is limited, with an average of 0.005 jobs/ha (Deininger & Byerlee 2011 p. 64)) or construct any infrastructure by the investors except for those that are indispensable for the running of each project (as a right to the investor). The Ruchi contract under article 3/2 shows the wording in these agreements. It states:

“Building infrastructure such as dams, water boreholes, power houses, irrigation systems, roads, bridges, offices, residential buildings, fuel/power supply stations/outlets health/ hospitals/dispensaries , educational facilities at the discretion of lessee upon consultation and submission of permit request with concerned offices subject to the type and size of the investment project whenever it deems so appropriate.” (Agreement made between The Ministry of Agriculture and Rural Development and Ruchi Agri PLC)

As a result, there are no social investments that can be legally enforceable. This, of course, does not mean that there will not be any facility like these based on the voluntary initiative of the investors as per the right the lessees are given in their contracts but given the tax exemptions and low rentals that the investors are subjected to, some provision to this effect would have gone some extent in addressing local needs.

Conclusion

This brief appraisal of the texts of the 22 land agreements reveals many shortcomings in their architecture. The priority issues that are of paramount importance to the country such as food security, job creation and infrastructure, among others, need to be the focus of attention when the government was signing these large land rental agreements.

An examination of the agreements demonstrates lack of provisions on local consumption of food production. There is no clear law on the amount to be exported and the amount to be sold inside. Judging from the previous government ban on cereals in the time of food emergency there is no guarantee the same will not happen now which might create disagreement with the investors.

As far as the rent rates are concerned, they seem to be lower than international levels, especially for the two largest contractors: Karuturi Agro Products PLC(100,000 ha of Karuturi with an additional promise of 200,000 ha) and Saudi Star Agricultural Development PLC(with 10, 000and negotiating for 250,000 ha). Besides these, the companies enjoy tax exemptions and import duties waiver on capital goods; privileges local smallholders are far from getting.

The matter of accommodating local communities is another central matter whenever indigenous people are affected. There are international standards enshrined in the UN Declaration on rights of indigenous people. In the 22 agreements considered the problem starts with the issue of whether people were uprooted from their lands so that it can be given to investors. While the government is claiming the allocated lands were waste lands, others are alleging there is no empty land in the country. Other than this, the relationship between locals and investors on water, contracting out, the environment and other similar issues are not given space in these agreements.

The environment provisions in the agreements, though encouraging lack specificity and are susceptible of not being enforced for capacity reasons.

Coming to the dispute settlement provisions, to begin with the legal basis for the Agreements is confusing, with the Federal Government usurping state powers through the back door. As to, the dispute settlement provisions in the agreements, they are not properly studied since the mechanism written in some of the agreements refers to the International Center for the Settlement of Investment Disputes under the rule governing additional facilities for the administration of proceeding by the secretariat demands that the host state or the investor sending country must be a member of the ICSID agreement which is not the case with these agreements.

Finally, the infrastructure and job creation are designed in the agreements to suit the investors. The provisions make it the right of investors to build infrastructure while nothing is said about job creation except the demand for mechanization in article 3.4 of the agreements. The consent and wishes of the local people need to be accommodated in these agreements so that the very aims of government in getting involved in these deals will not be reversed.

Recommendations

Although a lot can be said on the texts of the agreements the most important points are:

1. To review the already signed agreements and look for ways to address the concerns mentioned above.
2. For government negotiators, in future deals, to always remember the aims why these agreements are being signed. Benefits in infrastructure, job creation and food security must be part and parcel of the agreements' wording.
3. Study closely how agreements of this kind are drafted in other more experienced countries to gain the best out them.

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