



Toward a new regulatory framework for agricultural investments in Madagascar



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Executive summary

The 1.3 million hectare agricultural project planned in Madagascar by South Korean company Daewoo Logistics exemplified the risks of large-scale land acquisition for local people, governments, and investors alike. It also highlighted issues associated with agricultural investments of this type in terms of economic growth, equity, and social cohesion. However, despite the failure of this project and the new political context in Madagascar, the flow of agricultural investments continues. What regulations are available to govern such projects?

Madagascar's institutional framework presents some safeguards, but does not guarantee respect for the rights and interests of local communities or a fair share for them of the potential economic benefits. In order to renew this framework, a public debate on the role of such agricultural investments is required.

This policy brief first offers an outline of the current situation. It then presents the issues that must be debated in order to renew the regulatory framework and to enable its implementation.

Investments in agriculture continue

In 2008 Daewoo Logistics attempted to secure an area of 1.3 million hectares, with a lease period of 99 years, on which it planned to produce cereals and palm oil for export to South Korea. The project attracted a great deal of media attention due to its scale – it amounted to half of all Madagascar's arable land – and the effect it had in catalyzing social movements against President Ravalomanana. Moreover, it exemplified the difficulties involved for a government in attempting to combine two contrasting development models, one based on family smallholder farming and the other based on large-scale plantations.¹

Since 2005, a total of 52 agricultural investment projects have been announced in Madagascar, involving an overall land area of 3 million hectares. However, Daewoo's failure and the new political context have significantly slowed the flow of investment: one-third of projects have collapsed and, currently, the targeted land area totals about 150,000 hectares. Nevertheless, the flow of investment has not stopped. Thirteen projects are currently in progress and are awaiting the approval of government-allocated land leases. Mainly based on foreign investment, these projects will produce biofuels from large-scale jatropha plantations on a combined land area of between 5,000 and 30,000 hectares. Fifteen other projects are in preparation: five foreign companies are planning large-scale plantations of cereals or jatropha, while ten Malagasy companies are targeting sugarcane-based production of biofuels, hoping to add value to the raw material produced by small farmers.

¹ The controversial deal fuelled popular anger against President Marc Ravalomanana, who was forced out of office in March 2009. His successor, President Andry Rajoelina, cancelled the deal. (BBC News. 19 March 2009. <http://news.bbc.co.uk/1/hi/world/africa/7952628.stm>)

The regulatory framework controlling investment

In Madagascar, three areas of law currently regulate the involvement of investors in the agricultural sector:

The Law on Investment (2008) created the Economic Development Board of Madagascar (EDBM), a one-stop service provider, to simplify administrative processes for investors.

New land legislation (2005–2008) introduced reforms based on modernization of land administration, decentralization of land tenure management to local government (*communes*), and legal recognition of local land rights.

Previously, non-titled land was presumed to belong to the State and was managed by land administration services (*services des domaines*). Now, non-titled but occupied land is no longer state-owned. Land claimed by local people acquires the status of “non-titled private property” and is the administrative responsibility of the communes. The communes have local land offices which are responsible for recognizing private property rights and issuing land certificates, with a local recognition commission made up of elected representatives of the village and neighbours of the claimant concerned.

As a result of the new legislation, state-owned land now consists only of land registered in the name of a public actor or unoccupied land on which no claims have been made. Thus the State, via the *services des domaines*, can neither lease nor sell land that includes or encroaches upon titled or occupied land, apart from exceptional cases when the Council of Ministers can authorize expropriation and due compensation procedures.

An environmental law (decree MECIE, 2004), enforced by the National Office for the Environment (Office National pour l'Environnement), specifies that all agricultural projects larger than 1,000 hectares must obtain an environmental licence. This licence is issued only after the validation of an impact assessment that includes environmental and socio-economic criteria.

From legal framework to implementation: the challenges

On the ground, and on the basis of cases studied, existing laws do not provide an adequate framework for negotiation between local people affected by land investments and the authorities, nor do they guarantee respect for their rights and interests or a fair share of the potential economic benefits. At the same time, they do not guarantee security of investment for companies.

Lack of visibility on projects in progress

Officially, investors are required to consult with the EDBM, the land administration, and the National Office for the Environment, but this is rarely done. Therefore neither the

EDBM, which has virtually ceased to operate since the political crisis of 2009, nor any other institution has oversight of the projects currently in progress.

In addition, investors do not have clear or full information on the documentation they must supply or on the timescale required to complete this process.

Lack of security for local people and for investors' land rights

Land targeted by investors, either for lease or for purchase, is meant to be unoccupied and state-owned. A Commission for State-ownership Recognition, organized by the *services des domaines*, is meant to verify that such land is effectively non-titled, non-certified, and unoccupied. However, preliminary case studies reveal that:

- Local people are not properly informed about planned investments, nor consulted;
- When local people are informed, their claims are stronger for cultivated and wooded land than for pasture land. However, promises made by investors – such as the creation of jobs and increased fodder supply – weaken these claims, without giving any real guarantees to local people;
- The land administration does not properly consult local governments (*communes*), which are meant to manage certified and occupied land;
- It is not easy for the Commission for State-ownership Recognition to conduct field interviews due to technical issues (e.g. lack of maps showing the legal status of land, large land areas). Moreover, interviews can be biased by corrupt practices or by political pressures. As a result, according to early evidence, cultivated land, wooded plots, pastures, and fallow land are all being included in land areas earmarked for transfer to investors, which risks breaching local land rights;
- Even though no agricultural investment project to date has resulted in legal expropriation of land, conditions for justifying such a procedure are still vague. In the cases studied, as local land rights were not duly recognized, issues of compensation were not formally raised;
- If negotiation at the local level is neglected and the rights of local people are not respected, their opposition to projects can be fierce – in some cases this has even led to large-scale plantations being burned, and this remains a risk for new plantations. Therefore the investor's land rights, even if they are legally formalized in a government-allocated lease, are not protected either.

Safeguards needed to strengthen EIAs

An environmental impact assessment (EIA) – required by the National Office for the Environment and conducted or financed by the investor – is a condition of obtaining a land lease. After the EIA has been conducted, the investor must commit to respect certain special environmental or social

requirements (e.g. planting trees, improving water access for local villages), drawn up by an evaluation commission. However, case studies show that the social and economic commitments made by investors are vague. Moreover, questions remain as to how the relevant administrative teams in ministries and in regional governments can enforce these commitments.

In addition, an EIA cannot be used as a tool to select or refuse investment projects or to modify their business plans. It does not include any economic assessment of a project's feasibility or its potential impacts. It obliges investors to consult local populations and authorities (e.g. village chiefs, mayors) but does not force them to negotiate, which precludes any substantial modification of projects. Lastly, there is no obligation to make the results of an EIA publicly known, which prevents civil society from being able to inspect the process.

The institutional framework governing land access and EIAs needs to be renewed in order to properly regulate investments in the forest and agricultural sectors, as well as in the mining sector, which faces similar issues.

Recommendations to widen the debate

First, full information on projects in preparation or in progress must be published. Then, as soon as the current political crisis has been resolved, a debate should be initiated on the role of land investments, their regulation, and their possible linkages with other socio-economic activities. This debate could involve representatives of government and technical services, members of Parliament, and civil society. It could also build on and strengthen existing platforms, such as the multi-actor advisory committee that exist for biofuels, and NGOs.

The aim is to elaborate a new national framework aimed at regulating and promoting responsible and fair investment. This debate should cover the following needs:

- **Channel investments** through a one-stop service provider, the EDBM. This would mean improving the way the agency works, rethinking its sources of funding, and introducing incentives that would encourage investors to use it;
- **Make negotiations with local communities and authorities both compulsory and transparent**, from the first phases of any project. This implies that consultation could be validated by a third party, and also that **local communities and/or local authorities could employ a legal advisor, to be paid via a fund set up by investors**;
- **Propose, or even impose, the inclusion of local communities** (community organizations and/or local governments) in contracts between operators and the State;
- **Plan new measures to share economic benefits in a fairer way**. Several ways of doing this could be envisioned:
 - **Integrate local communities as shareholders in the company, as decision-makers, and as**

producers, via e.g. joint ventures or contract farming. **Communities would thus receive better remuneration for their inputs (labour, land, natural resources)**, and they would be incentivized to make the project work. A legal advisor's support would again be necessary here;

- **Choose between including social measures in operators' terms and conditions or resorting to a specialized organization funded by the operator:** i.e. either the operator finances and manages social measures itself, or it pays a compulsory tax to a specific fund that is then used to finance an organization specialized in social infrastructure;
- **Modify land fees and land taxes, and the way in which they are distributed** between local governments and the State;
- Respect existing land rights:
 - **Strengthen the ongoing process of land reform by consolidating and expanding the network of local land offices.** Local land offices have four main functions: they legally empower local communities to defend and protect their land rights; they strengthen the role of local government in land management; they provide maps that can help to identify land targeted by investors, together with competition for land use and even potential linkages between economic activities (agriculture, cattle breeding, wood harvesting, etc.); and, lastly, they provide a first recourse to authority in resolving conflicts;
 - **Open up the Commission for State-ownership Recognition organized by the service des domaines to a greater number of actors:** representatives chosen by villagers, local land office agents, and external observers to watch that the process goes smoothly. The results of this commission should be **publicly disseminated**;
 - **Open up a debate about the possibility of, and the conditions for, expropriation** of land in cases of privately-owned agricultural developments and about compensation procedures for landowners and land users;
 - **Specify the documentation that should be supplied** and the different steps that should be followed by investors wishing to buy or lease state-owned land;
 - **Resolve ambiguities about "authorizations of land acquisitions"** for non-national investors: these authorizations are mentioned in Madagascar's investment law but have never been specified in a decree. Such "authorizations" may imply that foreign investors can buy land, and therefore could encourage land speculation;

- Promote a pragmatic approach based on field interviews and avoid drawing up complex maps of legal land status, which are very expensive to update and so not particularly useful;
- Strengthen the role of the environmental impact assessment. This implies:
 - Using an international organization to certify the quality of EIA studies;
 - Establishing firm criteria for the approval of projects, such as their economic viability, social impacts, the business model envisioned, the company's reputation in terms of respecting fundamental human rights, etc.;
- Reinforce requirements:
 - Open up the evaluation commission in charge of establishing requirements for and validating the EIA to representatives of local communities and external observers;
 - Develop the content of requirements by specifying operators' commitment to e.g. quality, quantity, deadlines;
- Plan how to enforce stakeholders' commitment and how to resolve conflict by:
 - Defining institutions and organizations responsible for monitoring, evaluation, and conflict resolution (local government, specialist staff in relevant ministries, National Office for the Environment), the linkages between them, and their sources of funding;
 - Promoting social compliance via NGOs and monitoring organizations (observers).

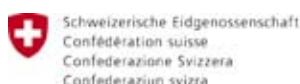
Priority must be given to sustainable agricultural development that is capable of creating jobs and preserving natural resources. To achieve this objective, the World Bank and the IAASTD (International Assessment for Agricultural Knowledge, Science and Technology for Development) have emphasized the major role played by smallholder farming. Rural policies should be consolidated, first and foremost, to promote smallholder farming while foreign and national private investments should be regulated in order to ensure that they respect and are compatible with smallholder farming.

Sources

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ILC wishes to thank the following donors for their support:



This policy brief is derived from a wider initiative on Commercial Pressures on Land (CPL). If you would like further information on the initiative and on the collaborating partners, please contact the Secretariat of the International Land Coalition or visit www.landcoalition.org/cpl.

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