Questioning the 'regulatory approach' to large-scale agricultural land transfers in Ethiopia: A legal pluralistic perspective[1]

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"Laws are only as strong as the institution or collectivity that stands behind them" Meinzen-Dick and Pradhan (2002: 5).

1. Introduction

Lately, increased commodification of land, driven by rapid population growth, economic expansion, urbanization and other socio-economic factors, has put in danger the land access and tenure security of most poor and vulnerable societies, especially those in rural areas. One of such cases is the recent expansion in large-scale transfer of rural land to investors in most developing countries – what is also referred to as 'land grabbing' (White et al., 2012).

Though opinions differ on the weight given to individual factors, there is a broad consensus that recent intensification of large-scale investment in farmland and related land transfers are mainly triggered by the sharp rise in the global prices of oil and food commodities coupled with the financial crisis in 2007-2008 (Deininger and Byerlee, 2011). Other factors such as the expansion of carbon market, speculative land acquisition, tourism and mining also have played a role in recent land rushes (Anseeuw et al., 2012).

Even if there is no precise figure on the amount of land transferred to investors at a global level, several estimates are suggested in different studies. According to the World Bank, over 56.6 million hectares of land had been globally transferred to investors, more than 70% of which land is in Sub-Saharan Africa (Deininger and Byerlee, 2011). Also, the recently launched portal of Land Matrix makes cross reference to a worldwide transfer of around 76 million hectares of land as of 2000, of which land 48% is located in Africa (www.landportal.info). Both reports reveal one general fact that a considerable number of such large-scale land transfers are concentrated in Sub-Saharan Africa including Ethiopia, where there is a very high risk of food insecurity, and thus posing a debate on the equity and poverty reducing impact of such transfers in these poor countries.

The current debate on the equitable and developmental character of large-scale agricultural land deals is mainly related to the potential economic benefits and challenges of such deals, as well as the ways in which states can maximize the benefits and mitigate the risks through regulations – a regulatory approach to land deals. International institutions, like that of the World Bank and FAO, have played a key role in advancing such regulatory approach through

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the formulation of international guidelines and policy prescriptions for the regulation of land transfers. Such an approach is, however, lately criticized for putting excessive focus on states as the main agent of change, and thereby ignoring role of other actors in re/directing the land deals. It is also criticized for paying lesser attention to the local socio-institutional processes and contexts under which such large-scale land transfers are being implemented (Li, 2011; Stephens, 2011).

Following and in response to the move to regulate large-scale agricultural land transfers, several competing policy approaches, including the agrarian political economy approach, the human rights-based approach and legal pluralist approach, came into light each resensitising the process of land deals, problems associated to it and the way forward from a different perspective (Borras and Franco, 2012; De Schutter, 2011; Merlet and Bastiaensen, 2011). Indeed, while almost all the approaches have a similarity in recognizing the problematic nature of large-scale agricultural land transfers, each differ in the way they conceptualize the problems and try to scale-up the policy debate and responses. Using lenses of a legal pluralist approach, this paper analyzes and calls into question the assumptions and policy prescriptions of the regulatory approach to large-scale land transfers.

2. Re-conceptualizing issues around large-scale land transfer from a legal pluralistic approach

2.1. Legal pluralism: basic tents

In its early theoretical conception by Griffiths (1986:1) the term legal pluralism was defined as "the presence in a social field of more than one legal order". Here, the notion of legal pluralism is founded on a recognition of multiplicity of 'legal orders', in its broader sense as 'normative orders', which are generated in multiple social fields/spaces where people interact and form social bonding (Moore, 1973). These multiple social spaces which generate multiple legal orders may include the family, religious organizations, tribal or communal system, transnational or international community, and last but not least the state (Meinzen-Dick and Pradhan, 2002).

The theory of legal pluralism recognizes not only the multiplicity of social spaces but also the fact that people belong to more than one of such social spaces, and thus are governed by multiple legal orders at the same time. Indeed, as rightly underlined by Griffiths (1986), legal pluralism should not be narrowly construed as multiplicity of obligations within a single legal order, but multiplicity of legal orders and rules therein which adds to the complex nature of human relations and social order.

While the above definition of Griffiths gives insight into the central idea of multiplicity of social spaces and legal orders therein, it does not on the face indicate how these multiple legal orders interact with one another and operate at the same time. These and other key aspects of the legal pluralist approach are exhaustively discussed by Griffiths himself and other scholars which are worth noting.

Indeed, for legal pluralists, there is no strict hierarchical structure among the different social spaces. They coexist without subordination but rather interaction between the different actors within (Moore, 1973). Accordingly, rules emanating from such multiple social spaces are

also considered as not being subordinate of one another; and as such different rules can coexist at the same time even if they are in contradiction. Here, what really matters is the recognition of a rule by members of that particular social space and not concurrence with or recognition by another social space like that of the state.

This is unlike the approach of legal centralism wherein state law is regarded as the ultimate law or 'ground norm' in governing human relations, and other rule-generating social spaces are considered of having "a lesser normative orderings" or "subordinate position" to that of the state (Griffiths, 1986: 3). Here, uniformity of laws is deemed crucial and thus other forms of rules, for instance religious or customary rules, can exist if and only if they do not contradict but rather are incorporated into state law (Griffith, 1986). Hence, rules are viewed as mutually exclusive (Meinzen-Dick and Pradhan, 2002) wherein the state law is considered as the prime norm in play. It is with this legal centralistic or state-centric definition of laws that customary rules and practices are considered as 'null and void' if they are in contradiction with the 'ground norm' of the state.

The legal pluralistic approach views diverse social spaces not as simply autonomous, isolated or non-hierarchical but as mutually constructive, at times overlapping and semi-autonomous spaces (Guillet in Meinzen-Dick and Pradhan, 2002; Moore, 1973). Such semi-autonomous social spaces influence (shape and reshape) each other through interaction and negotiation between social actors belonging to them. In the words of Moore (1973: 720) "The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it...". Hence, what is really important at the end is neither the state law nor rules in other social spaces, but the norm that comes out of the interaction and negotiation on the ground – closely related to what different authors referred to as 'rules in use' (Ostrom and Cox, 2010), 'hybrid legal form' (F. and K. von Benda-Beckmann, 2006) or 'practical norms' (Olivier de Sardan, 2008).

Such 'practical norms' or 'rules in use' may be more influenced by one legal order than another depending on the agenda setting power of actors in different social spaces. As norms are socially constructed, the ability of some actors in presenting their perspective or meaning system as the 'only right perspective' affects the visibility of other perspectives or meaning systems. This is precisely stated by Meinzen-Dick and Pradhan (2002: 5) as "laws are only as strong as the institution or collectivity that stands behind them". Hence, the greater the agenda setting power of a certain group, for instance a state, the more visible and generally applicable its rules become. But it does not necessarily mean that the other rules and social orders will vanish or become 'null and void' as what is considered by legal centralists, they will rather coexist perhaps with lesser visibility and influence.

The visibility or degree of influence of different legal orders may be quite different at a certain point in time and will change with changes in social power of actors. Hence, the diverse legal orders operate in a continuously competing social network which renders rules anything but stable (Vanderlinden, 1989). Such openness to dynamism is one of the several merits of legal pluralist approach when dealing with complex social orders or socio-institutional processes which involve competition among 'bundle of powers' (Borras et al., 2012).

Hence, it is the legal centralistic conception of law as an 'exclusive' and 'coherent' piece of state rule that is mainly challenged under the legal pluralistic approach. This is backed by the

general legal and sociological understanding that the law does not stand in a vacuum; it needs people to maintain and enforce it which at the same time creates a room for manoeuvre to flexibly interpret and apply such laws (Long, 2001). Thus even if non-state actors do not make separate rules in their own social space, they still impact the construction and application of state laws as the latter are not complete and consistent. This in turn challenges another narrow view of legal centralism where laws are considered to be administered by 'a single set of state institutions', and thus free from the influence of other social spaces (Griffiths, 1986). This indeed is a very narrow conception of the state, which ignores the fact that state institutions are filled with human beings who belong to more than one social space, and thus inevitably bring influences from other spaces. Nowadays, there is almost a general consensus that the state is embedded in a society in that it needs social actors for both its symbolic and material existence (Migdal, 2001; Hagmann and Peclard, 2010). Hence, non-state actors play a role in the administration and enforcement of rules both within their own social spaces as well as within the official space of the state.

Besides the role of non-state actors in manoeuvring states' legal order, lack of homogeneity within the state itself is another factor that renders state laws far from a 'coherent' piece of rule. Indeed, a state is constituted of several actors each having different, at times contradictory, agendas and interests - making states non-monolithic in character, and thereby importing struggles and negotiation within the social space of the state (Migdal, 2001). Hence, the 'rules in use' are also determined by such intra-state struggles and negotiations which involve power and exclusion within.

Though the approach of legal pluralism is contextually applied under different disciplines, the core tenet remains the same – that the state is not the only source of law nor it is the only actor with the ability to enforce rules and shape the social order. In the words of Vanderlinden (1989: 5), "it acknowledges the state's incapacity to realize to the full its totalitarian ambition". It in turn underlines the capability or agency power of non-state actors to generate rules in their respective social space; administer and enforce such rules; as well as influence or manoeuvre rules in other social spaces including that of the state.

In recognition of the semi-autonomous nature of the different social spaces and their respective rules, the key focus of legal pluralistic approach lays on the way in which different legal orders interact with each other and get moderated through negotiation. It also explores the ways in which individual actors, belonging to multiple social spaces and thus having multiple identities, employ their agency in strategically choosing among the diverse legal orders that better legitimize their claim – what is commonly referred to as 'forum shopping' (Meinzen-Dick and Pradhan, 2002).

2.2. Legal pluralism and land rights: points of intersection

The legal pluralist conception of law as involving interaction and negotiation between multiple social actors belonging to different social spaces is a useful approach in the study of land rights from a socio-institutional perspective where land rights are nothing but social relations (Merlet, 2007). Under this socio-institutional approach, land is seen as a space that hosts diverse natural resources, and land rights are broadly defined as "relations with other humans who might travel over this space or use its resources" (Merlet, 2007: 8). Hence, the study of land rights is neither limited to, nor mainly about, who has a statutory right over a piece of land in a legal centralistic sense of it, but how competing claims of different actors are negotiated and exercised on the ground. This brings in issues of socio-institutional and

political processes including social identity, power and exclusion in negotiation processes (Bastiaensen et al., 2005; Lund, 2011).

Indeed, land has a multiproduct character in that it is not strictly speaking a single item that can be administered by a single norm (Meinzen-Dick and Pradhan, 2002). Rather land carries '*bundle of resources*' within it, including water, minerals, tree and soil, whose governance call multiple norms and which in turn gives rise to multiple basis of claims. Land hosts not only multiple resources but also multiple rights which often does not belong to one person – what is commonly referred to as '*bundle of rights*' (Merlet, 2007). Such multiple rights bring in multiple right holders in the social arena over land, each belonging to different social spaces and thus having a different base of claim.

Some broadly categorize the different rights over land into five categories – access, withdrawal, management, exclusion and alienation rights (Le Roy in Merlet, 2007; Schlager and Ostrom, 1992). In fact, these rights are not unique to land; they also exist in other objects as well. But for most other objects, all these different rights can absolutely belong to one person in exclusion of other claimants. This is not, however, the case for land where the idea of absolute ownership is highly contested due to the multiproduct nature of land which renders it least suitable for exclusive transaction or commodification (Merlet, 2007). Emphasizing on the relational and non-exclusive aspect of land claims, Borras added '*bundle of powers*' in the characterization of land rights wherein elites, who do not necessarily have a legitimate right on the basis of any legal order, can have an 'effective control' on land based on social power, and thus become one actor/claimant in the social relations over land (Borras, 2007).

Such non-exclusive nature of land rights and resulting coexistence of multiple claimants over same land calls the application of different rules and tenure system at the same time (Merlet and Bastiaensen, 2011), rendering legal pluralism a useful approach to capture such plurality of regimes, rights and claimants.

In recent years, the major challenge to land access and security of tenure by the poor has been the over-commodification of land and the trust that state regulated land markets can serve the interests of all, including the poor. Excessive commodification of land threatens the tenure security of most poor by abstracting the symbolic, social and ritual values of land, which are most valuable to the poor, and thus subjecting it to undervalued market transaction or state expropriation (Merlet, 2007). It is indeed more than half a century ago that Polanyi has characterized land, together with money and labour, as a fictitious and not real commodity in that it is too natural in creation to be categorized under real commodities that are made by humans with a destined purposed of sale, and also too much embedded in social relations to be left alone to the free operation of the market (Polanyi, 1994).

Also, problems of land access and security of tenure are often conceptualized as market imperfections which thus can be well addressed through state regulation (Deininger and Byerlee, 2012). Such legal centralistic view of land rights is again very narrow as it abstracts socio-institutional processes which generate and reinforce exclusions in resource distribution including that of land. Indeed, state laws and regulations alone cannot bring all desired changes in land allocation and security of tenure unless the underlying socio-institutional forces are altered accordingly. The state here can be regarded as a 'gardener' and not 'engineer' of the various institutional landscapes on land issues, in that it cannot create entirely new institutional landscapes but garden/rearrange the already existing ones in a way

that stimulate change – what is referred as 'institutional gardening' (Offe in Bastiaensen et al., 2005). Such institutional rearrangements may include enhancing the agency freedom and social power of weak actors against whom socio-institutional processes operate. While highlighting on the challenges of bringing social change through legislative innovation/engineering of the state, Moore (1973: 729 and 743) stated "the law (in the sense of state enforceable law) is only one of the number of factors that affect the decisions people make, the actions they take and the relationships they have [...] the moment that one focuses attention on these processes of competition, negotiation, and exchange, one becomes equally aware of the importance of binding rights and obligations that are not legally enforceable. *The legal rules are only a small piece of the complex*".

2.3. A legal pluralist view of the debates surrounding large-scale land transfers

A legal pluralist conception of rules and a close investigation of socio-institutional processes around land rights is crucial also in studying the current large-scale transfer of agricultural land to investors.

The initial debate over such land transfers was quite limited to its potential opportunities and challenges in terms of job creation, raising public revenue, export potential and other economic considerations (Cotula et al., 2009; Li, 2011). However with time, the debate has evolved into issues of regulating such large-scale land deals so as to maximize the benefits and mitigate the risks (Deininger and Byerlee, 2012). Here, the focus lays on which regulatory mechanisms to apply to render such deals a 'responsible investment in agriculture' – whether to have a domestic or international regulation on responsible investments; whether to design a standard lease agreement or negotiate terms on a case by case basis; whether to focus on the role of corporate social responsibility and so on (Liversage, 2011; Cuffaro and Hallam, 2011).

While part of the current debate still revolves around ways of regulating such large-scale land transfers, it has partly evolved into another stage with emerging critics on such 'regulatory approach' (Borras and Franco, 2012; De Schutter, 2011). According to the critics, putting the whole emphasis on regulatory approach and assuming that all the challenges related to large-scale land transfers will be dealt through state regulation is too simplistic for it ignores the fundamental point that land rights are not just legal but social matters. It also ignores the fact that land rights involve multiple actors arguing their claims from multiple legal orders. Hence, state's legal order is just one part of the social relations over land, and thus its regulation is not a panacea to all land-related problems. It is on same regard that Borras and Franco criticized the regulatory approach for being too narrow to put land grabbing into the broader 'agrarian change dynamics' – agrarian political economy approach to land grabbing (Borras and Franco, 2012: 52; White et al., 2012).

Even if both the political economy and legal pluralist approaches call for a broader perspective of looking into issues of large-scale land transfer, their area of focus is quite different but possibly complementary - the political economy approach focusing on the nature of institutions, in particular the 'exploitative' nature of capitalist institutions, as the main determinant of outcomes (Long, 2001), whereas the legal pluralistic approach paying greater attention to processes of interaction and negotiation within institutions, without adhering to a particular theory about the nature of institutions per se. Particularly in the context of current land deals, the political economy approach mainly focuses on institutional or structural

outcomes of such land deals including capitalist penetration or transformation in agrarian and labour structure - "land grab-induced accumulation, differentiation and displacement/dispossession" (Borras and Franco, 2012: 46), while the legal pluralistic approach takes more of an actor-oriented perspective wherein the focus lays on how structures can be manoeuvred and impacts moderated through negotiation and agency power of different actors.

As such, rather than seeing the outcome of land deals as a direct/passive submission of local land rights, the legal pluralistic approach makes an in-depth exploration of the interface between land grab-induced structural pressures on the one hand and actors' livelihood on the other – focusing on use of agency in processes of negotiation or struggle between actors with competing claims, rights and discourses. For instance Borras and Franco (2012: 50) have underlined that outcomes of large-scale land transfers are spatially varied which, according to the authors, is a result of variation in the form of property relations among different societies. While that is partly true, the variation in outcome of land grab can also be a result of spatial variation in the agency power of local actors in being able to change land grab-induced structural constraints or negotiate for better outcomes – justifying the need to extend beyond institutional analysis and further explore into socio-institutional processes of negotiation in any institutional structure.

3. A legal pluralistic view of the process of large-scale agricultural land transfers in Ethiopia

3.1. Trends and features

According to recent reports, Ethiopia is in the front run of transferring large tracts of agricultural lands to investors through long term lease agreements. There is no precise figure on how much land is transferred to investors so far. The figures presented in several studies are quite different partly because of a difference in time range for which data are presented. Also, most reports acknowledge the problem of getting complete data, and thus present figures as estimates. According to a report by the Oakland Institute (2011a), the total land transferred to investors up until January 2011 is estimated around 3.6 million hectares, involving 1349 investors. Another report is from the World Bank which accounts land transferred only during 2004-2009. According to this report, around 1.2 million hectares of land was transferred to 406 investors during those five years (Deininger and Byerlee, 2011). The most recent figure presented by the Land Matrix suggests a larger figure wherein around 5.3 million hectares of land in Ethiopia is reported to have been transferred to 83 investors for agricultural investment (See the online portal of Land Matrix, www.landportal.info). In the Gambella region alone, around 1.2 million hectares of land – 42% of the total land in the region - is reported of generally being available for investment transfers, of which land around 829,199 hectares – around 32% of the total land in the region - is assigned to the Federal Land Bank for large-scale investment transfers (Lavers, 2012a; Human Rights Watch, 2012a, The Oakland Institute, 2011a).

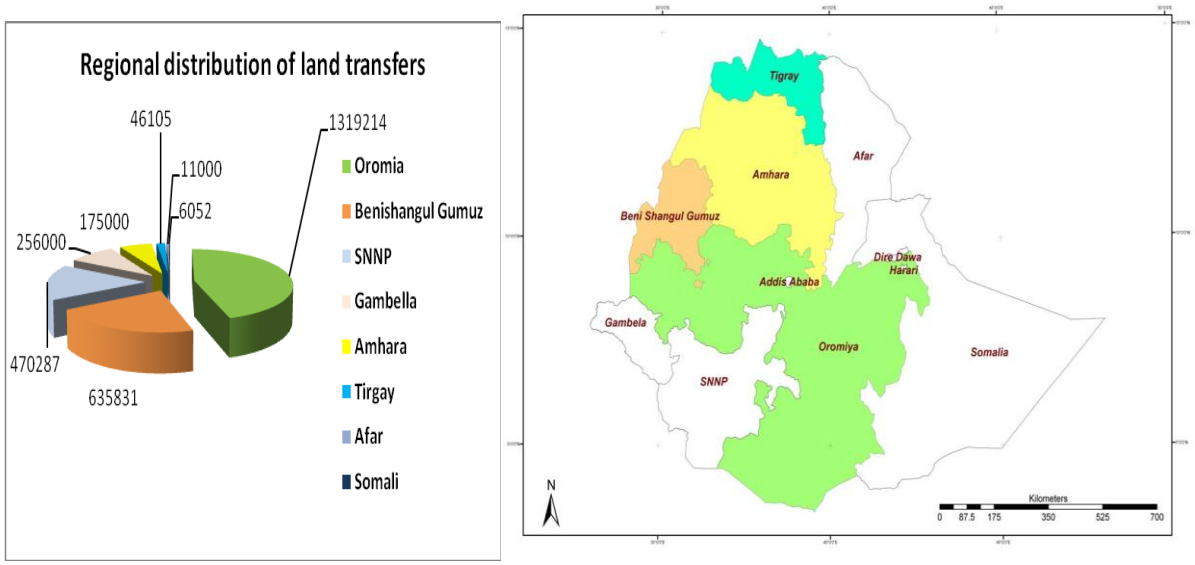
Discussions and debates around large-scale agricultural land transfers are conventionally limited to foreign investments or "cross-border land deals" as defined by Zoomers (2010: 429). While it is true that foreign investors are key actors in recent land transfers, they are not the only actor in the picture. Particularly in Ethiopia, nationals living abroad or the 'diasporas' as well as urban elites in the country play quite a considerable role in recent land

transfers (Lavers, 2012a). Several studies have empirically confirmed that the number of domestic investors acquiring land for commercial farming is quite significant compared to foreign investors (The Oakland Institute, 2011a; Lavers, 2012a). According to report of the World Bank, of the 406 total land deals concluded in Ethiopia during 2004-2009, 383 are made with domestic investors, including Ethiopian nationals living abroad (Deininger and Byerlee, 2011). This figure is, however, a bit deceiving as the size of land transferred to most domestic investors is quite small compared to acquisitions by foreign investors. The same report reveals that the 383 domestic investors account for only 49% of the total land transferred during 2004-2009, while 23 foreign investors alone acquire 51% of such land (Deininger and Byerlee, 2011). According to another study made in one of the regions in Ethiopia with highest rate of investment transfer (Oromia region), around 72% of the investors involved in agricultural land transfer are Ethiopian nationals who, however, get hold of only 16% of the total land transferred (Lavers, 2012a). Hence, the role of both foreign and domestic investors need not be undermined.

The Ethiopian government strongly supports and plans to further expand such large-scale land transfers claiming that there is abundance of marginal or unused land especially in the Southern lowland part of the country (Daniel, 2011). In an official communication, the late Prime Minister of the country has made known that over 4 million hectares of 'unutilized' land are available in the country for large-scale commercial farming (Rahmato, 2011; Stebek, 2011).

The trend so far reveals that most of the land transfers are concentrated in four regions in the southern part of the country where population density is relatively lower compared to the northern part (Makki, 2012).

Figure 1: Regional distribution of land transfers



Source: The Oakland Institute, 2011a

Some argue that the main reason behind concentration of land transfers in the southern lowland areas is not only the low population density there but also the historically built-in imbalance of socio-political power dynamics against the southern lowlands – what Makki (2012) and others consider as a reflection of the historical core-periphery power structure in

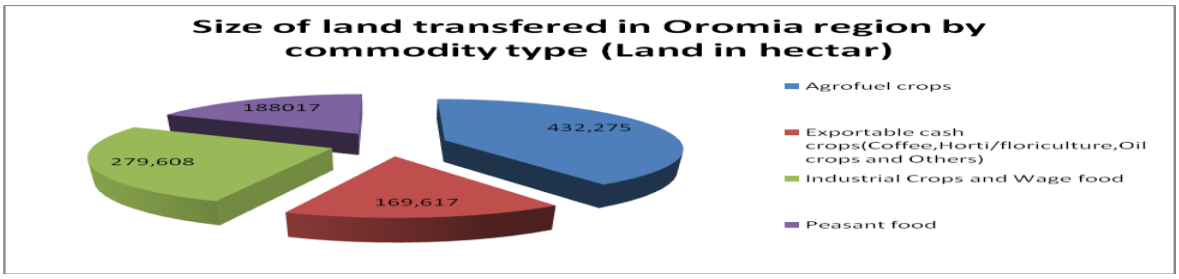
the country where the southern lowland population was subjected to extractive policy of the central power through the paying of tribute and taxes as well as raids for resources (Lavers, 2012b: 798). Accordingly, the southern population is assumed to be less resistant to such large-scale transfer of land and resulting change in land holding as compared to the more organized and powerful society in the northern part of the country.

The other reason suggested by some for the concentration of large-scale land transfers in few regions is the absence of formal land certification scheme in all such regions except for Oromia and SNNP (The Oakland Institute, 2011a).[2] This is alleged to reduce the possibility for payment of compensation to local users of the land since their rights are not documented and thus regarded as less clear and more vulnerable (Stebek, 2011). Indeed, the state takes advantage of its legal centralistic approach wherein what is not recognized by the state is considered to not exist.

When looking into the specific type of agricultural commodities primarily produced on large-scale farms in Ethiopia, on the lead are agrofuel feedstocks and other exportable cash crops (Lavers, 2012a; Deininger and Byerlee, 2011). Indeed most recent investments in farmland are generally characterized for having an export-oriented and agrofuel-driven characteristic (Anseeuw et al., 2011). This holds true also in Ethiopia wherein there is a significant presence of large-scale farm investors from major food importing countries especially Saudi Arabia and Egypt whose main motivation is the supply of food to home markets where there is an increasing demand but limited supply (Cotula, 2012). Indian firms also take a leading role in large-scale farm investment in Ethiopia which also is driven by the rapidly growing population and food security concerns at home, as well as the promise of financial returns from supplying to the global market where food prices are still relatively high (Rowden, 2011).

One thing that can be inferred from the higher focus placed on large-scale production of exportable food and cash crops as well as agrofuels feedstocks is a possible mismatch between increased scale of agricultural production and national food security – a risk that increased scale of agricultural production may not necessarily, if not mostly, translate into enhanced national food security in the sense of availability and affordability of food in local markets. The figure below on the major types of agricultural commodities produced by large-scale farm investors in Oromia – a region in Ethiopia with highest rate of land transfer – can illustrate the above point.

Figure 2: Size of land transferred in Oromia region by commodity type



2 Only four of the nine regions in the country have so far implemented the process of formalizing private land rights through certification. These regions are Amhara, Tigray, Oromia and Southern Nations Nationalities and Peoples (SNNP).

Source: Lavers, 2012a

Assessments made in the Gambella regional state also shows that most foreign investors in region seem to mainly focus on a large-scale production of rice and oilseeds, while domestic investors are largely engaged in the cultivation of cotton and sesame – all of which are high exportable cash crops meant to serve foreign than domestic markets (Rahmato, 2011).

Such an export-oriented and agrofuel-driven character of large-scale farm investments in fact bring a question on the ethical nature of the whole investment model, especially when carried out in a country like Ethiopia which is the most food insecure and largest recipient of food aid in Africa (Deininger and Byerlee, 2011: 146; Lavers, 2012a). The sustainability and food security impact of such land transfers become a more serious concern also when considering the fact that the rural population in Ethiopia is estimated to grow by more than twofold during 2000-2050, adding more pressure on land as an important rural asset, and also increasing the local demand for food (Haralambous et al., 2009).

On the basis of the above general discussion on the trends and structural features of land deals in Ethiopia, the next subsection will explore in fair depth the claims, roles and capabilities of different actors around land transfer in Ethiopia and how they interact with one another in the negotiating arena.

3.2. Negotiation among multiple actors, claims and rules

Besides vastness of the land subjected for transfer, another factor that makes the current land transfer quite unique in character is the involvement of several actors in the process (Merlet and Bastiaensen, 2011). Unlike the usual commercial transfer of land for private investors, recent land transfers host diverse actors belonging to different social spaces including the host state, investors of different origin, the local community, home states in case of foreign investment, and international financial institutions (Cotula, 2011a). All actors have different roles and interests in the process; they use different discourses to legitimize their claim; and try to shop around the different legal orders in better asserting their interest.

This section aims to re/conceptualize recent land deals in Ethiopia from a legal pluralistic perspective by exploring the different claims and discourses of the diverse actors as well as the discursive struggle among such actors in advancing one's meaning system. In the interest of space, the following discussion mainly focuses on three of the key actors – the host state, investors and local communities.

3.2.1. The state

With its constitutionally vested power of ownership of all lands as well as other natural resources in the country (Articles 40(3), 52(2) and 89(5) of the FDRE Constitution, 1994), the state in Ethiopia largely plays a central role over administration of land. Also almost no recognition being given to customary or local land administration systems under state laws, the state has to some extent succeeded in building a formal/legal hegemonic presence around land issues. Indeed, the state being considered as a statutory 'provider' of both private and communal land rights to local people (Rural Land Administration and Use Proclamation (2005) and the only actor statutorily allowed to transfer land for investment holding, one can boldly characterize the land tenure system in Ethiopia as creating a state-centric allocation, transfer and management of land.

Accordingly, the state plays a key role in recent large-scale land deals in Ethiopia both in negotiating and effecting such deals. The state manages to maintain its hegemony on the basis of a state legislation which entrusts the state as the only actor that can legally lease out land to investors on a long term basis, and indeed also based on its capacity implement such legislations even against non-state actors.

It is normally regional governments that have a constitutional power to administer land in their territory and therefore negotiate and decide on long term investment transfers in Ethiopia. However, this constitutional power of regional governments has been reduced by the federal government as of 2009, with the creation of a central authority (federal land bank) that is entrusted to negotiate and sign lease agreements for rural lands beyond 5,000 hectares (Makki, 2012). This further centralizes the administration of land transfer away from local level. It also creates a dual land administration system (for transfer of land below and above 5,000 hectares) wherein rules and practices are not necessarily coherent. For instance, land rental fees charged by regional governments are found out to be quite lesser than the amount charged by the federal government (The Oakland Institute, 2011a). Such fees are also different among the different regions, allowing investors to shop around the different lease arrangements. Though the federal government has come up with a standard guideline on assessment of rental charges, most regions are found resistant to adopt such guideline and rather continue to exercise their discretion (Rahmato, 2011). This shows the non-monolithic nature of a state in Ethiopia; and how divisions within the state into regional tiers and different Ministry offices preclude the uniform creation and application of state laws. From a legal pluralistic point of view, this also reveals how rules are made and applied through a discursive struggle not only among the different social spaces but also among different actors within a single social space – in this case among the different government offices within the state.

Accordingly, land deals are negotiated and signed in a very state-centric manner in Ethiopia whereby either tier of the government present itself as a party having "full ownership and property rights of the land leased" (Reference made to land lease agreements signed by the government of Ethiopia). As such, local people are absolutely put out of the picture in negotiating lease agreements or other terms of investment (Cotula, 2011b).

Indeed many states, especially in Sub-Saharan Africa, discursively justify their policy towards large-scale land transfers with the argument that there is availability of huge unutilized land in their territories (De Schutter, 2011). This, however, is a widely contested claim as there is a general tendency by states to consider most non-agricultural or uncultivated land as 'idle', 'marginal' or 'vacant' land, even if other claims may exist over such land (Borras et al., 2012; Wily, 2011). This actually is a disregard of the multi-functional role of land for local people and a narrow conception of land as a simple factor for agricultural production (De Janvry et al., 2001). Accordingly, several studies have found out that most lands that are considered 'vacant' and made open for investment transfer have in fact been used for long by local people for diverse purposes including for grazing, as source of water, firewood, hunting and for spiritual purposes (Deininger, 2011; Vermeulen and Cotula, 2010; Lavers, 2012b). Such fact is nicely put by one scholar as "if land in African hasn't been planted, it is probably for a reason. May be it's used to graze livestock or deliberately left fallow to prevent nutrient depletion and erosion" (Taylor in Daniel, 2011: 11).

In the case of Ethiopia also, land that is not actively being used for settlement or crop production is lightly labelled by the state as 'unused' or 'free of any claim' (Wily, 2011; Lavers, 2012b). This in fact is a critical concern in the Ethiopian context wherein most of the land transfers are concentrated in the lowland part of the country with a dominating local livelihood strategy of pastoralism and shifting cultivation, thus depending on land for various purposes but not necessarily for settled cultivation. Accordingly, there is a high tendency by the state to consider most lands in lowland areas as vacant and free from any claim. This allows transfers to be carried out in disregard of and without even compensating local pastoralists who have been using the land for generations (Deininger and Byerlee, 2011). An example can be one of the most popular cases where 100,000 hectares of land had been transferred to an Indian company (Karuturi), which land is described as vacant by the state but the transfer was reported of involving loss of crops cultivated by local people on common pastoral lands as well as destruction of a royal cemetery for local traditional leaders (The Oakland Institute, 2011a: 44). A representative of the Indian company also recognized the fact that the land has been of use to local people and multiple claims still exist in a statement "it is indeed true that Anuak community use and occupy land within the Karuturi's lease area without any disturbance. Karuturi has made no efforts to disturb their habitation and they still live in that area. *Karuturi co-exist with them*" (Human Rights Watch, 2012a: 116). Similar other cases also exist in several parts of Gambella region, especially among pastoral communities, where land is immensely valuable in several other ways than just as a factor of agricultural production, including as a source of grazing and drinking water for cattle, as well as a source to forest resources (Rahmato, 2011).

In fact, one of the core obligations of the state in most land lease agreements in Ethiopia is to deliver the land 'vacant' or 'free of impediments' (Reference made to land lease agreements signed by the government of Ethiopia). Since most of the land that is labelled as 'vacant' by the state are in fact being used by local people, the state mostly has the task of 'clearing' the land for delivery. Allegedly, one of the means used by the state to clear the land for delivery is relocation of local people to other places through villagization program (Makki, 2012). Villagization or resettlement program is not a new occurrence in Ethiopia; it had been carried out several times in history especially during the predecessor socialist regime where northern inhabitants used to be resettled into the southern part to work on small land holdings newly assigned to them or on state plantations there - part of the whole social engineering program of the socialist regime (Rahmato, 2003; Makki, 2012).

Despite similarities in their state-centric or top-down social planning, what makes recent villagization programs quite different from the past is that it is southern inhabitants who are being resettled this time, while in the past villagization involved resettlement of inhabitants from the densely populated northern part to the south. What makes the recent villagization programs also contentious is that they are introduced at almost the same time and in the same regions of the country where large-scale agricultural land transfers are intensifying. Indeed, several studies have reported that the land left behind by local people is being immediately transferred to investors (Rahmato, 2011; Human Rights Watch, 2012a), strengthening suspicions on the relationship between villagization programs and land transfers. Accordingly, around 135,000 households in two of the regions with high rate of large-scale land transfer are reported of being displaced from their original land through villagization program (The Oakland Institute, 2011a).

The state justifies its villagization program on the discourse of its responsibility to make available public services to populations in remote areas. Accordingly, the state labels such

program as a means to bring together the dispersed pastoral population so as to ensure their access to basic services including education, health care and safe water – "an effort to tackle poverty and ignorance" in the words of one state official in Ethiopia (Human Rights Watch, 2012a: 20).

Such villagization program is, however, resisted by local communities because it is viewed as a threat to their pastoral way of life and tradition, and a disguise to 'clear' the land for investment transfer (Rahmato, 2011). With state's weak capacity to provide basic services and infrastructure in new settlement areas, where previously pastoral communities can no more lead their traditional subsistence livelihood, such villagization program is also viewed as a threat to the very survival of relocated pastoral communities (Human Rights Watch, 2012a). Yet, the state as a more powerful actor in the social arena mostly manages to render more visible its 'socially good' label of villagization programs.

Besides use of its discourse on what constitutes 'vacant' land, the state in Ethiopia legitimizes its act of effecting large-scale land transfers based on its statutory power to administer all lands in the country and more specifically its power to change communal lands into private holdings "as may be necessary" (Article 5(3) of Rural Land Administration and Use Proclamation, 2005). But the question remains: necessary for whom? And who decides what is necessary? In the current process of land transfer where local people have no/lesser influential say in negotiations and decision making (Vermeulen and Cotula, 2010), and thus their interest being least represented, it is hardly possible to say such land transfers are necessary or important for the local people, at least from their point of view. Indeed, as reported by the World Bank (Deininger and Byerlee, 2011), more than a third of land expropriation cases in Ethiopia benefit private investors rather than the public at large – calling into question the role of the state as a promoter of public interest and signifying what is referred by Platteau as state giving of a 'helping hand to powerful private interests' despite its exclusionary impact on the general public (Platteau, 2002: 111).

Related to the above point, some also allege as to the use of large-scale land transfers as an instrument of political patronage where large tracts of land are being awarded to 'urban elites' and other supporters of the state (Wily, 2011; The Oakland Institute, 2011a) – what is referred by Platteau as a strategic state alliance with powerful actors for appropriation of valuable natural resources by the latter at the expense of customary right holders (Platteau, 2002: 110-111). Though little has been researched so far on this area, it is worth exploring in future works as it can partly explain why governments in host countries at times lack the necessary political will to take a firm stand against problems surrounding land deals, and why transparency is lacking in the whole process. It can also indicate why states are not always trusted custodian of public interest and a reliable actor to bring social change (Platteau, 2002).

3.2.2. Investors

As noted under the preceding subsection, both domestic and foreign investors are highly involved in large-scale land transfers in Ethiopia. While Ethiopian nationals living abroad and local elites in the country are main categories of domestic investors involved in land deals, foreign investors especially from the Gulf States and India are predominantly present in large-scale farm investments in the country.

Investors mostly base their claim on both state laws and the international legal order. Especially foreign investors heavily rely on bilateral investment treaties (BITs) negotiated

and signed between the host and their home state. This is because BITs are signed mainly to protect and promote the interests of foreign investors and as such mostly entitle investors with a much better protection than that of domestic state rules. Most BITs are also characterized by unequal bargain between signatory states, resulting in terms that are more favourable to foreign investors than poor host countries and their impoverished population (Anseeuw et al., 2012). Accordingly, foreign investors are mostly protected against the domestic regulatory power of host countries having a BIT protection against local content requirement, local employment requirement, local supply requirement, restrictions on free reparation of profit, and other host state requirements that discriminate between domestic and foreign investors (De Schutter, 2011). While this effectively hampers the regulatory capacity of host states, it at the same time entitles investors with stronger rights/claims which can be enforced in a different legal order than domestic legal order of the host state.

Ethiopia has already signed BITs with most of the countries where investors are mainly coming from including India, Egypt, China, Israel, Germany, US, UK and the Netherlands (Ethiopian Investment Agency, http://www.ethioinvest.org/IIAs.php). This gives foreign investors in Ethiopia the opportunity to shop around different legal orders - state's legal order and the international legal order - in better asserting their rights.

Investors also rely on land lease agreements to base and defend their claims. Such agreements are also results of negotiation between investors and host states where investors, especially foreign, have a better bargaining power given the desperation of most poor countries to attract foreign capital (Cotula, 2011b). This is evident from the fact that most developing countries, which compete against each other to attract foreign capital, offer lucrative deals for investors to win the competition (De Schutter, 2011).

Both the state and investors view land lease agreement as an important instrument to promote one's interest, through in a very different way and on the basis of different discourse. For investors, land lease agreements are like any other commercial instruments which equally secure the rights of both contractual parties. In the words of one foreign investor in Ethiopia "our agreement with government is *purely commercial*. Government is charging us a rent [...] what we choose to do on the land for our own commercial intent is our own business. *There is no governance, no constraints*" (The Oakland Institute, 2011a).

The government on the other hand views land lease agreement as a regulatory instrument to control the activities of investors and create safeguard mechanisms – "agreements precisely designed to ensure positive results in terms of job creation, availability of foreign exchange and availability of various agricultural products in domestic markets" in the words of the late Prime Minister of the country (Interview, http://www.youtube.com/watch?v=jED11-_LC7o). This shows how even a same legal order can be viewed differently by different actors and how each actor tries to advance its meaning system through negotiation and discursive struggle, which mostly comes out in favour of the more powerful actor.

Indeed even if investors seem to mostly legitimize their investment claims using their agreement/relations with the state (through BITs and lease agreements they have signed with the state), and thus to some extent adhere to a legal centralist view on the hegemonic application state law, such agreements, whether BIT or land lease, do not always represent a consensus between actors signing it. It is often the most powerful actor that defines, and thus better benefits from the rules. For instance in the context of land lease agreements signed by the state in Ethiopia, terms and conditions are clearly biased in favor of the interest of

investors than that of the host state and its population, signifying the skewing of bargaining power more towards investors than that of the host state. A more in-depth assessment of the BITs and land lease agreements signed by the government of Ethiopia will be covered under subsequent sections.

3.2.3. Local communities

As it is the case in most part of Sub-Saharan Africa, local communities in Ethiopia heavily rely on their customary land tenure system that has been in use for generations (Wily, 2011). This is particularly true in the southern lowland part of the country, including the Gambella region, where there is still no formal land certification system and where most of the large-scale land transfers are taking place. There, both private and communal land holdings for settlement, cultivation, grazing, water collection and other purposes is secured through a clan-based or tribal traditional tenure system which had its origin long before incorporation of southern territories into the imperial rule, and later coexisted with other tenure systems of the state (The Oakland Institute, 2011a).

Hence, as mentioned earlier on, lands statutorily considered 'vacant' by the state, because they are neither formally registered under private or communal holding nor being actively used for cultivation, are not all 'free from local claims'. This makes the local community another key actor in large-scale land transfers, having a competing claim on those lands being transferred to investors either as a 'legitimate' holder of the land through customary tenure or at least as a prior user. This also puts the local community in a discursive struggle with the state and investors on questions of who has a legitimate claim over the land and who decides on what is legitimate. Indeed, as rightly stated by Meinzen-Dick and Pradhan (2002: 5) "laws are only as strong as the institutions or collectivity that stands behind them".

Though of lesser capability to win most discursive struggles and change meaning systems, local communities on their part use their agency in changing their livelihood strategies so as to cope with loss of the land and natural resources they had been using for generations, and thus were the basis of their livelihood. A practical example in Ethiopia can be a case where farmers in one locality had to sell all their livestock and abandon their long-lived tradition of livestock-keeping following loss of their communal grazing land for investment transfer (Fisseha, 2011). However, such forced change of livelihood mostly comes along with anger and resentment. In the words of one local agro-pastoralist in the lowland part of Ethiopia "They are cutting down our bush and forest, and bulldozing our garden then they want us to sell off all our cows. No one is going to sell their cattle. They should go away. They should leave our forest alone and leave it to us to cultivate with our hands" (Human Rights Watch, 2012b: 60).

Yet, local communities express their resistance and frustration through indirect ways including attacking investors or their workers, poaching farm products and destroying other properties of investors – infrapolitics of the dominated in the hidden transcript as per Scott (1990). Example can be a case where five employees of one farm investor with large tracts of land in several parts of the country, were killed allegedly by members of the local community while working on a farm (Media report, http://farmlandgrab.org/post/view/20413). This indeed shows how costly the protection and enforcement of a state-based property rights can get when such is resisted and often subjected to aggression by local people (Platteau, 2002). In this regard, most investors in Ethiopia have managed to include in their land lease agreements a clause that obliges the state to provide assurance for peaceful possession of the

land – "free of riots, disturbances and troubles" (Reference made to land lease agreements signed by the government of Ethiopia).

Just as the state, local communities are not monolithic entities; they rather encompass multiplicity of actors which have different interests with an intra-community power asymmetry. Such differences make it hard for community members to have one voice and act in a same way when interacting with external actors including the state and investors – problem of weak internal cohesion (Cotula in Cotula and Mathieu, 2008). A typical example is the case of Gambella region in Ethiopia, wherein different communities, having different livelihood strategies and land uses, have a very different conception of what land use right constitutes and how/to what extent such right should be protected. As such, whereas the Anuak –being an agricultural community - relate to land as a factor of agricultural production and settlement, the Nuer – a pastoral community - largely relate to land as a source to water resources which they most need for their cattle.

Also, as a result of historical villagization programs from the densely populated northern part to the sparsely populated south, there are many residents in Gambella regional state having a decent from the northern or central part - largely referred by the indigenous people as 'highlanders' (Human Rights Watch, 2012b, The Oakland Institute, 2011a). Allegedly, access to employment opportunities arising out of large-scale commercial farms being quite biased in favour the 'highlanders' than indigenous 'lowlanders'(Shete, 2011), opinions are not so similar among residents about the welfare impact of large-scale farm investments. In fact increased use of 'highlanders' in the labour force under large-scale plantations is marked by many as a potential source of conflict between the local lowlanders and highlanders (Deininger and Byerlee, 2011; Li, 2011). In the words of a local elder in one of the southern regions of Ethiopia "we have no conflict with newcomers for now, but it is coming. Conflict will be about land issues and about lack of respect" (The Oakland Institute, 2011a: 38). In fact, tensions and conflicts have already started showing up in some parts of the country. A recent example can be the expulsion of over 20,000 northern settlers from a southern region, allegedly for dominating the region and snatching job opportunities from indigenous people (Media report, http://www.africareview.com).

This in fact is part and parcel of the local socio-institutional processes where struggles and exclusions persist not only between the different social spaces but also among actors within a single social space. Such a broader understanding of intra-community interactions and negotiations in a legal pluralistic approach is crucial to not make hasty generalizations and rather better identify local level losers and winners from large-scale land transfers.

To conclude, there is a sufficient indication to the state-centric and less participatory nature of large-scale land transfer process in Ethiopia which indeed is a result of tiling of socio-institutional power more on the side of the state, wherein the state as a dominant and visible actor has managed to advance its meaning system on what a 'vacant' land is and what is 'necessary' for the public, while local communities with lesser visibility lack the agency power to change such meaning system. As such, what is at the heart of the relational problem is asymmetry in socio-institutional power structures and invisiblization of local claims by more powerful actors including the state and investors, as well as resulting loss of access to land and land-based livelihood by local communities.

4. The 'regulatory approach' to land deals: can it address underlying challenges and/or effectively promote local interests?: A legal pluralistic view and reference to the case of Ethiopia

4.1. Background

Preceding sections have highlighted the various relational or socio-institutional problems underlying the process of large-scale land transfer in Ethiopia, as well as some structural challenges associated with the export-oriented and agrofuel-driven nature of recent land rushes in Ethiopia, including concerns of national food security. In view of such and various other challenges related with large-scale land transfers, a policy advance is lately taken by actors, both at international and national levels, to respond to such challenges through a 'regulatory' or 'code of conduct' approach – an approach that calls for mitigation of the challenges through the designing of multilevel regulatory frameworks.

Such a regulatory approach is neither a recent finding nor unique to large-scale land transfers. It rather is an extension of the long-established 'middle path theory' on the administration of investments by multinational corporations wherein such investments are considered of being intrinsically good to host states, provided that they are regulated through 'codes of restrictive business practices' that maximize the benefits and reduce the risks associated to it – an approach favouring a mix of regulation and openness (Sornarajah, 2004: 64).

Hence in the context of land deals, the regulatory approach does not question the very existence of large-scale land transfers; it rather promotes its continued existence with a minimized risk – the main focus being governance of investment externalities as if recent land deals are like any other forms of investment (Borras and Franco, 2010b: 7). Accordingly, many proponents of the regulatory approach consider large-scale agricultural land transfers as "an opportunity to overcome long term underinvestment in agriculture" which can be rendered both socially and environmentally sustainable through "guidelines or principles for good land governance and responsible investment in agriculture" (Liversage, 2011: 7-8). It is with this view that Von Braun and Meinzen-Dick describe such large-scale investments in farmland as a measure of 'necessity' for rural development which can be made 'virtuous' thorough the use of codes of conduct and other appropriate policies aiming to seize the benefits and mitigate the challenges (Von Braun and Meninzen-Dick, 2009: 3). On a same regard, the World Bank has identified lack of strong legal and institutional frameworks in host countries as a key limitation in the "moving from challenges to opportunities" with large-scale agricultural land transfers (Deininger and Byerlee, 2011: Xiii).

Of the major initiatives taken lately at an international level to regulate large-scale land deals, one is the formulation of different international guidelines including the World Bank Principles for Responsible Agricultural Investment; the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests; as well as the Minimum Core Human Rights Principles of the UN Special Rapporteur on the Right to Food. At a domestic level also, most states in developing countries strongly support discourses on the regulation of large-scale land transfers towards a win-win outcome. Of the various domestic policy instruments of host states, the one that is commonly referred for its huge relevance in regulating large-scale land transfers is the land lease agreements signed mostly between host state and investors.

Lately, however, such an approach towards regulating large-scale land transfers into a win-win outcome is facing criticisms for being too shallow, misleading and less practicable. It is considered shallow because it tries to fix the superficial problems surrounding land deals like that of payment of lesser compensation, secrecy of deals and issues of corruption which, however, are only manifestations of the real problem underlying land deals – imbalance of social power and exclusion in land relations which allows commodification of land at the expense of the local poor. Hence, rather than diagnosing the disease, policy prescriptions of the regulatory approach only treat the symptom which is less of a solution. With this view, Borras and Franco (2012: 55) criticized the regulatory approach as a dangerous diversion of attention from 'substance' (the central issue of power asymmetry in social relations as well as structural problems on the nature of investments) to 'form' (superficial issues of investment governance like: lease of how many years?; compensation of what amount?; what form of commercial presence?; which modality of land transfer and others). Also in the words of Li (2011: 292), the regulatory approach "takes a complex political economy problem driven by unequal power, and parses into components that can be addressed by technical means [...] drown primarily from the toolkit of 'good governance". Indeed, the main focus of the regulatory approach lays on reinventing the technical procedure through which land transfers are being carried out, and not altering the underlying power structure of the various actors involved in such transfers.

Related to the above point, the regulatory approach is also criticized for being misleading since it takes the prevailing imbalance in social power for granted, and the resulting local dispossession of land as 'inevitable' (De Schutter, 2011). Hence, rather than looking for other more efficient and equitable modes of agricultural investment, the regulatory approach tries to make a quick fix to problems of land deals, which in effect legitimizes such deals despite their socially inequitable and structurally problematic character. In the words of Borras and Franco (2010a: 515) a pure regulatory approach "necessarily operate within and seek to sustain or extend the existing global industrial agro-food and energy complex [...] it implicitly or explicitly assumes that there is no fundamental problem with existing industrial food and energy production and consumption patterns tightly controlled by TNCs [...] it a priory dismisses the possibility of other development pathway options".

Last but not least, the regulatory approach is criticized for being less practicable, especially when seen from a legal pluralistic perspective. This is because the central focus of the regulatory approach lays on state's legislative innovation, which depends much on the legal rather than social dimension land relations, and thereby underestimates the role of other actors in (re)shaping the institutional landscape around land deals. Also the trust that the state is a neutral actor which always strives to harness social benefit is subject to contestation, especially when it comes to land deals. As well elaborated in previous sections using the example of Ethiopian context, one of the underlying challenges of large-scale land transfers is the dominant presence of states in such transfers and invisiblization of local claims through operation of state's power in different dimensions. As such, it becomes questionable whether and to what extent the state, which is part of the underlying problem, can be a key agent of change as alleged under the regulatory approach.

Also given the fact that most land transfers are taking place in developing countries, especially in Sub-Saharan Africa, where governance and state capacity is very weak, assumption of the regulatory approach on the possibility of bringing change through states' legislative innovation is criticized for overestimating the governance capacity of such states, and thus being "disindigenous in [its] assumptions" (Stephens, 2011: 18; De Schutter, 2011).

On the basis of this general background about the theoretical assumptions and flaws of the regulatory approach to land deals, the following sub-sections explore in fair depth some of the major global and national level regulatory instruments which are trusted to redirect large-scale land transfer into a win-win outcome.

4.2. Global governance and regulation of land deals

Recent expansions in large-scale transfer of rural land and related challenges have lately attracted huge international attention, and drove some actors to look for ways of dealing with it through global governance of land and investment. As such, diverse principles and guidelines on the responsible governance of land deals are put forward in several international forums, most of which are however voluntary and not mandatory norms, which therefore do not give rise to enforceable rights and responsibilities on actors involved in land deals.

Such voluntary nature of the different international guidelines is justified by some with the argument that mandatory international regulations are "more difficult to negotiate; take longer to agree; are sometimes diluted as a result; and are often more difficult to enforce" (Liversage, 2011: 9). While that is generally true, also voluntary guidelines are hardly enforceable especially when it comes to disciplining business entities or investors (White et al., 2012). Indeed, in the absence of a mandatory regulatory regime, it is hardly imaginable for investors to voluntarily subject themselves to restrictive business practices which are costly in terms of corporate interests. This especially holds true for multinational corporations that are known most for advancing business interests in all the possible ways including forum shopping (Sornarajah, 2004). As such, the voluntary guidelines have lightly assumed that corporate interests of investors can easily be streamlined with local interests which, however, is an oversimplification of the power dynamics and discursive struggle actors go through, especially in the context of recent land deals which involve conflicting claims and interests among the different actors including the state, investors and local communities. In this regard, White and others have argued "capitalist firms are not boy scouts, and they are unlikely to place moral codes and 'good governance' above the interests and demands of their owner and shareholders" (White et al., 2012: 637). Hence, it is questionable if the prevailing asymmetry in bargaining power between investors and poor host countries can be redressed through voluntary codes of conduct which falls short of setting any accountability both on investors and host states (De Schutter, 2011).

The possibility of enforcing of such voluntary international guidelines is theoretically viable through their incorporation into state laws which then give rise to statutory rights and responsibilities. This, however, reinforces the state-centric approach in the governance of land deals; since it gives the ultimate discretion for states to decide on whether or not to incorporate such principles into state law, and thus opt for or against their applicability. Given the use of land transfers as an instrument of state corruption and political patronage in many Sub-Saharan African countries and also invisiblization of local claims through operation of states' power (Wily, 2011; The Oakland Institute, 2011a), it is indeed questionable if states in Sub-Saharan Africa, including Ethiopia, have the necessary political will to incorporate and stick to such principles.

This being a general concern on the normative disposition of the various international guidelines proposed so far, the following sub-sections explore in fair depth the substantive relevance and limitations of each international guideline in effectively addressing problems

underlying land deals, particularly in the Ethiopian context and using a legal pluralist approach.

4.2.1. World Bank Principles for Responsible Agricultural Investment

The World Bank is a leading actor in supporting the use of regulatory instruments to deal with problems of large-scale land transfers, and among the first to formulate a list of regulatory principles. The World Bank Principles for Responsible Agricultural Investment (hereafter the World Bank Principles) are founded on a general assumption that 'any land related investment' in developing countries is 'desirable in principle' since such has been lacking in the past (Paragraph 1 of the World Bank Principles, 2010). In particular, recent land deals are viewed as part of the general private investment in agriculture, and thus believed to enhance the transfer of agricultural technology, creation of local employment opportunities and facilitation of market access opportunities for developing countries. The World Bank also recognizes that recent large-scale agricultural investments carry some 'risks' along with which, however, "correspond to equally large opportunities" (Deininger and Byerlee, 2011: 142).

Hence, list of principles are formulated by the World Bank aiming to strike a balance between the opportunities and risks of such large-scale transfer of agricultural lands. The principles include: respecting existing land and resource rights of local people; strengthening food security; ensuring good governance in land transfers; holding consultation and participation; promoting responsible investment through respect for rule of law and best practices; as well as ensuring social and environmental sustainability of investments (The World Bank Principles, 2010; Deininger and Byerlee, 2011). Given the broad nature of such principles, detailed policy prescriptions that are meant to enforce each principles are also formulated by the World Bank wherein states are entrusted to play a key role.

While most of the policy prescriptions look quite sympathetic to interests of local communities, their realization on the ground is, however, highly questionable because of the prevalence of competing international principles and state obligations, as well as due to the very nature and purpose of land transfers which run counter to the policy prescriptions.

For instance in the context of food security, one of the policy prescriptions suggested is for host states to take into account the dietary preferences of local communities when admitting large-scale investments in farmland. This, however, is not compatible with the export-oriented nature of most large-scale agricultural investments where huge interest lays on the supply of agrofuel and other cash crops to foreign markets (White et al., 2012).

This is particularly true in Ethiopia where a significant share of large-scale farm investments involve production of agrofuel crops, in particular jatropha which is not edible at all (Lavers, 2012a). Moreover, as illustrated above under Figure 2, production of industrial and cash crops such as coffee, tea and horticulture take a considerable account of large-scale agricultural investments in Ethiopia which again is not within the dietary preference of local communities. Indeed the state in Ethiopia openly incentivizes and even at times pressurizes investors to produce exportable cash crops, which is in line with state's clear policy of using large-scale farm investments as a means of raising foreign exchange earnings and thereby a way out of its recurrent balance of payments problem (Lavers, 2012b; Shete, 2011).

In the existence of such competing interests of raising foreign exchange earnings through export-oriented farm investments on the one hand and ensuring local food security on the

other, it is quite naïve to simply assume that states will take into account the dietary preferences of local communities when admitting large-scale investments in farmland.

Also in view of enhancing the social sustainability of land deals, the World Bank suggested for the designing of domestic strategies by states that can ensure the materialization of host state benefits like that of local employment opportunities, transfer of technology, expansion of local public goods and others. From experiences so far, such socio-economic interests of host states are mostly enforced through the setting of performance requirements on investors including local employment, local content, and technology transfer requirements (Sornarajah, 2004). Imposition of such requirements, however, goes counter to other international rules and norms including the two decade long World Bank Guideline on the Treatment of Foreign Direct Investment, the WTO agreement on Trade-related Investment Measures (TRIMs), and BITs, among others.

It is indeed interesting to note that the World Bank already has a guideline on the treatment of foreign investors, drafted in 1992, which propagates for free admission of investors without any prerequisite or performance requirements (Paragraph 2.3 of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992). Same guideline calls also for a flexible or autonomous use of domestic labour and goods markets by foreign investors with least intervention from host states. It is in fact within the working mandates of the World Bank group, especially the International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA) and International Centre for Settlement of Investment Disputes (ICSID), to promote the corporate interests of foreign investors and facilitate their activities in host states. As such, the Bank has long been one of the key advocates of the 'classical theory' on foreign investment which regards multinational corporations as nothing but good to the economies of host countries, and thus calls for host state provision of utmost protection rather than restrictions on activities of such multinational corporations (Sornarajah, 2004: 68). Indeed, the 1992 World Bank Guideline on the Treatment of Foreign Direct Investment is a reflection of this stand – it pressing for the utmost security and protection of corporate interests of investors, while paying lesser attention to socio-economic concerns of host states and the need for regulation of investment undertakings.

Particularly in the context of current land deals, some even blame the World Bank for 'enabling' such transfers mainly through shaping/influencing the legislative environment of host states in a way that allows for the signing of "streamlined and lucrative investor contracts" rather than that the setting of rigorous regulatory frameworks (The Oakland Institute, 2011b: 1). This indeed shows how the World Bank, just like states, is not a monolithic actor in the international arena, and how different groups within the World Bank propagate for different policy stances towards large-scale land transfers.

In addition to the World Bank, the WTO also sets international norms on the treatment of investors which again are quite biased towards the corporate interests of investors than that of socio-economic concerns of host states. Under the TRIMs Agreement of the WTO, states are required to not employ any investment regulatory measure that can have a trade restrictive effect, including measures of quantitative restriction on the importation or exportation of goods by investors (Article 2 of the TRIMs Agreement, 1994). While this generally constrains the regulatory capacity of host states, including their ability to regulate land deals as suggested under the World Bank Principles, it supports the discourse base of inventors for freedom/autonomy of investment operations. For instance in the context of food security, one of the policy prescriptions of the World Bank is the designing of strategies by states which

tackle instability or shortage of food supply in local markets. Here the most commonly used safeguard strategy, which is also explicitly recommended under the Minimum Human Rights Principles of the UN, is the setting of local supply requirements or export restrictions on investors which, however, is prohibited under the TRIMs Agreement of the WTO except in times of food crisis.

Even if Ethiopia is not yet a full member to the WTO, and thus not currently bound by terms of the TRIMs Agreement, the BITs it has signed with several home countries of investors are even more constraining than the TRIMs Agreement. For instance, in almost all the BITs signed by Ethiopia, investors are entitled to an 'investment freedom' which is defined as a protection against host state intervention in the management, operation, maintenance, use and enjoyment of investments (Reference made to BITs signed by the Government of Ethiopia). This forms a key discourse base for investors in challenging regulatory interventions of host states including requirements of local employment, local supply of outputs, technology transfer, provision of public goods and other prescriptions suggested under the World Bank Principles.

In fact, most BITs signed by Ethiopia define expropriation of investment property very broadly to also include any loss of investment interests as a result of state's regulatory measure – what is commonly referred to as 'indirect taking of investment property' or 'regulatory taking' (Cotula, 2011b). Hence, the country holds a responsibility of paying compensation for any loss of corporate interests resulting from its application/enforcement of a regulatory measure, even if such is primarily meant to promote public interest. This is not a simple theoretical limitation to the regulatory capacity of Ethiopia as a host state, especially considering the fact that several other host states have been held liable in the past based on a similar clause (Sornarajah, 2004).

Most BITs signed by the government of Ethiopia also entitle multinational corporations with a treatment that is no less favourable than that provided for domestic investors in all aspects of investment undertakings including in the marketing of products outside the country. This makes it hardly possible for the country to separately regulate multinational corporations, for instance those engaged in large-scale agrofuel production, from small and medium sized domestic investors, despite the difference in their welfare impact.

In general, the World Bank Principles are neither coherent nor the only piece of international norms governing investments in farmland; other ideologically competing international norms also exist which entitle investors with a better base of claim and discourse against state's regulatory measures – allowing investors to do forum shopping among the different international norms, while constraining applicability of the World Bank policy prescriptions towards a 'win-win' regime of large-scale investments in farmland.

Last but not least is the World Bank's policy prescription towards formalization of customary land rights as a means to ensure tenure security of local land holders. Such approach of the World Bank is clearly influenced by the 'property rights school theory' wherein clear and stable property rights, which involves formalization of the different land rights through state registration or titling, is deemed necessary to ensure security of tenure for local land holders (Platteau, 2002). Accordingly, the World Bank Principles call for 'legal demarcation, registration and recording' of land rights as a way forward to ensure protection against dispossession of local land holders in the midst of large-scale land deals.

While such an approach towards formalization of land rights may be generally useful in clarifying boundaries of individual or communal lands, it is by no means a sufficient move to ensure tenure security of the poor particularly in the wake of the current large-scale transfer of land to investors (Platteau, 2002; De Schutter, 2011).

To start with, the underlying problem in current land deals that puts local people in a vulnerable position is not lack of clarity in their customary land rights, but lack of recognition of their customary rights by the state and operation of the legal centralism theory wherein what is not recognized by the state is deemed to not exist. In the words of Borras and Franco (2010b: 10) "formal land property rights are contested terrain, since they involve decisions about who counts and who does not". Especially in countries like Ethiopia where such decisions are made in a state-centric manner, there is no guarantee that the customary land rights of 'socially invisiblized' societies like that of pastoralists will be fully recognized and covered under the formal tenure system of the state. As such, formalization of land rights can even have the effect of formally/statutorily excluding the rights of weaker groups – legitimizing/reinforcing the already prevailing discourse-based socio-institutional exclusion/inviblization.

Such is already evidenced in those parts of Ethiopia with land certification scheme, where payment of compensation following investment-induced land dispossession is limited only to those land holders with title certificate. This leaves land holders whose rights are not recognized by the state with no protection and security – manifestation of legal centralism where state recognition is a base for security of rights. As such, formalization of tenure can be a successful instrument of exclusion especially when socio-political power structures are skewed against a certain group (Cotula, 2008).

Besides, even if the customary land rights of local people are all recognized and covered under the formal tenure system, there is still no guarantee for automatic enforcement or protection of such rights since formal laws of the state are also subject to contestation, interpretation and manoeuvring, especially by the powerful actors (Borras and Franco, 2010b). As such, a state-initiated top-down formalization of local land rights does not necessarily solve the central problem of exclusion and invisiblization of local claims in processes of land transfers, unless the underlying power asymmetry in socio-institutional relations is altered in favour of local people so that they can participate in the (re)shaping and implementation of institutional landscapes around land issues – the need to first bring social empowerment for successful realization of legal empowerment.

To conclude, most of the policy prescriptions under the World Bank principles compete with other international norms, wherein investors finally get to choose what better support their claim or increases their bargaining position in front of host states and even more in front of local communities. Also the basis under the World Bank principles for local security of tenure remains the formalization of land rights by the state which, similar to other legal centralistic dispositions, is not a panacea to the multidimensional and underlying problems around land deals, and can even diminish the bargaining position of those actors whose rights are not state-based.

4.2.2. FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests

The Voluntary Guideline on the Responsible Governance of Tenure, endorsed by the Committee on World Food Security in May 2012, is another widely publicized and most recent global initiative for the regulation of large-scale agricultural land transfers. Such Guideline is also result of a more inclusive and series of multi-stakeholder consultations among regional and international organizations, civil society groups, private sector representatives and other actors (White et al., 2012).

Unlike Principles of the World Bank, the FAO Voluntary Guideline takes a 'holistic approach' to land governance whereby land rights are characterized of being "inextricably linked with access to and management of other natural resources" (Preface of the FAO Voluntary Guidelines, 2012). This indeed is an important approach in the context of current land deals wherein loss of local land use rights brings a wide range of consequences in terms of loss of access to various other natural resources, including water, fisheries, forest woods and others, on which local livelihoods highly depend.

The Guideline also starts with an explicit recognition of the possible coexistence of different forms of tenure – statutory and customary, formal and informal – despite non-recognition of it by states. As such, it calls for non-infringement of rights emanating from customary or informal tenure systems by states, which indeed is at the heart of the problem around land deals.

However, similar to the World Bank Principles, the approach adopted in the detailed policy prescriptions of the FAO Guidelines is quite legal centralistic or state-centric wherein states are regarded as key actors in the governance of land in general, and thus, in the move towards a responsible and efficient market transfer of land to investors (Paragraphs 4.1 and 11 of the FAO Voluntary Guidelines, 2012). This can be inferred from the lesser attention paid in the Guideline to the role of non-state actors, including traditional institutions, in the local governance of land; while a long list of legislative innovations are suggested for states to carry out so as to bring a non-discriminatory, equitable, sustainable, transparent and accountable market transfer of land rights to investors. As an indication of the state-centric disposition of its policy prescriptions, the FAO Voluntary Guideline for instance uses the phrase 'states should' 164 times in a 40 page document.

Such an approach simplifies problems around land deals into a mere regulatory failure which thus is assumed to be within the regulatory control of states; and less of a socio-institutional issue. Accordingly, the Guideline entrusts states with a responsibility of reforming their legal and organizational frameworks, and also devising their regulatory policy instruments in a way that safeguards the land rights and food security concerns of local communities in the continued future of large-scale land transfers (Paragraph 12.6 of the FAO Voluntary Guidelines, 2012).

The Guideline also calls Transnational Corporations not to infringe or abuse the legitimate tenure rights of others, in particular local communities (Paragraph 3.2 of the FAO Voluntary Guidelines, 2012). However in the context of current land deals, investors do not mostly act with an intention of directly infringing/abusing the land rights of local people. They rather acquire a statutorily 'legitimate' land rights from the state, the exercising of which rights does, however, result in encroachment of land use rights of local people who also have competing claim over same land based on a customary tenure that is not recognized by the

state. Hence, at the heart of the problem is not a direct infringement of local land rights by investors, but misappreciation/invisiblization of local claims by the state, and thus transfer of lands which are being used by local communities to investors as if they are 'free of any claim' – inevitably causing conflict of interests.

Besides, the Voluntary Guideline highly emphasizes on the need to keep consistency between indigenous rules on customary tenure and national state laws, as well as between state laws and the international law – a legal centralistic conception of consistency and hierarchical incorporation among rules in different social spaces. This does not, however, hold true in a legal pluralistic view of 'rules in use' where lack of coherence and uniformity, leading to conflict and negotiation, exists not only between rules in different social spaces but also among rules emanating from a same social space. Hence, what is important in the context of land rights is to increase the visibility and negotiating capacity of weaker groups so that they can better influence negotiations and advance their meaning system, and not simply seek for an ideal conflict-free state of social relationship.

Lastly, the Guideline calls states to act in compliance with national and international laws while transferring land to investors. Yet, as repeatedly mentioned in this paper, laws are not always equitable in their own right; they are results of a political process and thus reflection of power asymmetry in socio-institutional processes. Indeed, most states do not act in contravention of statutory laws when transferring land to investors; they rather make use of already existing laws which are biased against weak and socially excluded groups – pastoralists in most cases including in Ethiopia. As such, it is worth underlining that compliance with laws does not necessarily guarantee equity and social justice in practice.

4.2.3. Core Principles and Measures to Address Human Rights Challenges of Large-scale Land Acquisitions

Another international response to the challenges of large-scale land deals is the formulation of a set of core international principles by Oliver De Schutter, Special Rapporteur of the UN on the Right to Food. These principles are designed to address the human rights challenges of large-scale land deals – a human rights-based approach to land deals (De Schutter, 2011). It is worth noting that such a human rights-based approach is developed improving on key weaknesses of especially the World Bank principles.

To start with, it recognizes the pitfalls in the voluntary nature of the World Bank and FAO guidelines, and thus recommends on the need to hold states responsible for their obligations under existing international human rights instruments which impose some level of state accountability (De Schutter, 2011). Accordingly, it calls states to respect and fulfill their human rights obligations towards citizens, particularly those rights relevant to current land deals including, among others, the right to food, the right to development, the right to self-determination and exploitation of natural resources by local populations, the right of indigenous people over traditionally owned lands, as well as labour rights of agricultural workers.

It also recognizes weaknesses of the World Bank and FAO guidelines in presenting blueprint policy prescriptions as measures sufficient to redirect large-scale land transfers into a win-win outcome. As such, it suggests a list of guiding principles which are "minimum principles in the sense that a large-scale investment in land will not necessarily be justified even though it may comply with the various principles listed" (De Schutter, 2011: 256). Hence, unlike the code of conduct approach of the World Bank and FAO, the human rights-based approach

does not simplify problems around land deals into mere investment externalities which can be sufficiently dealt through state regulatory measures. It indeed goes beyond the superficial problems on the technicalities of land deals, and touches up on some intrinsic/structural problems on the nature and impact of large-scale investments in farmland (Stephens, 2011). As rightly stated by De Schutter himself "it would be unjustified to seek to better regulate agreements on large-scale land acquisitions or leases without addressing also, as a matter of urgency, [the] circumstances which makes such agreements look like a desirable option" (Paragraph 6 of the Core Principles and Measures to Address the Human Rights Challenges, 2009).

However, such human rights-based approach shares some common flaws with the voluntary guidelines of the World Bank and FAO, especially when examined from a legal pluralistic perspective. The most important of such flaws are its purely rights-based legal orientation as well as its excessive focus on the state as a main actor responsible for social change.

As the name itself indicates, the human rights-based approach is a purely legal/state-based approach whose relevance in the context of current land deals can be put into question given the predominant operation of social power and negotiation, than that of legal entitlement, in the politics of land relations. Its relevance becomes more uncertain when looking at it from a socio-institutional perspective in that "rights cannot be enforced so long as the fundamental inequalities [or power asymmetries] in which social relations are grounded remain intact" (Hall in Cousins, 2009: 901-902). Hence, a focus on legal rights does not fully touch the core socio-institutional or relational problems underlying land deals, and thus promises no fundamental change on its own – a call for restructuring in socio-institutional processes as a precondition for successful operationalization of legal entitlements of weaker groups.

The other flaw of the human rights-based approach relates to its state-centric disposition wherein almost all of the prescribed principles call host states to take one or another measure to minimize the human rights challenges of large-scale land transfers. As such, all the critics made so far in this paper about the practicability of a top-down or state-centered legislative engineering for social change also applies here to the human rights-based approach. After all, the minimum human rights principles can be viewed of being another list of blueprint standards whose realization on the ground heavily depends on the political will and institutional capacity of host states. In the words of Li (2011: 292), the minimum human rights principles are "still limited to a technical fix: [whose] tools are naming, shaming and enjoining relevant authorities to be proactive in the protection of rights... [which however] cannot change the political economic context that translates paper rights into real ones". Indeed, most of the human rights principles and state measures suggested by De Schutter have already been covered under pre-existing and largely accepted international instruments, including the International Covenant on Economic, Social and Cultural Rights of the UN, whose realization on the ground is, however, a longstanding problem.

4.3. Land lease agreements as a domestic regulatory instrument

In ordinary cases of investment, the most commonly applied domestic regulatory instruments of host states are national legislations on investment, environment, labour, taxation and other relevant areas. By laying down rights and responsibilities of investors, such legislations aim to guide investment undertakings in a way that best fits broader state policies and strategies. Over and above these regulatory instruments, large-scale land transfers predominantly involve the signing of land lease agreements mostly between the state, as a leasor, and

investors as leases. Being a negotiated outcome, such agreements determine the terms of land transfer and subsequent investment undertakings.

As mentioned earlier on, the nature and role of land lease agreements is a subject of contestation in Ethiopia – investors viewing it as a commercial instrument while host states trying to use as a regulatory device. Despite such contestation, however, many regard land lease agreements as key domestic regulatory tools that host states can best employ to mitigate the challenges and seize opportunities of large-scale land transfers – "the legal code for the investment" in the words of Cuffaro and Hallam (2011: 9). Indeed, many regard the terms and conditions under lease agreements as important determinants of the 'pro-poorness' or 'distributional impact' of large-scale land deals (Zoomers, 2010). Accordingly, the following section examines the various terms included in the land lease agreements signed between the government of Ethiopia and large-scale farm investors. In particular, examination is made on whether and to what extent the socio-economic concerns of local populations are incorporated under lease agreements in Ethiopia. Twenty lease agreements are reviewed to this end, involving investors of different origin; investments of different nature; and lands of different size. Below is a description of the agreements reviewed.

Table 1: Description of land lease agreements reviewed

	Origin of investors	**Commodities for farming**	**Land in hectare**	**Lease period in years**	**Annual rent per hectare in USD**
Contract 1	Domestic/Local resident	Cotton, sugar cane and oil seeds	18,516	25, open for renewal	8.90
Contract 2	Domestic/Local resident	Cotton, oil seeds and cereals	5,000	25, open for renewal	8.90
Contract 3	Domestic/Local resident	Cotton and oil seeds	3,000	25, open for renewal	8.90
Contract 4	Domestic/Diaspora	Cotton and grains	2,137	25, open for renewal	8.90
Contract 5	Foreign/Indian	Soybean and other crops	25,000	25, open for renewal	6.25
Contract 6	Domestic/Diaspora	Cotton, sesame and soybean	1,000	25, open for renewal	8.90
Contract 7	Foreign/Indian	Cotton	10,000	25, open for renewal	8.90
Contract 8	Foreign/Indian	Cereal crops, pulses and edible oil crops	27,000	25, open for renewal	6.25
Contract 9	Foreign/Indian	Rice and cereal crops	10,000	25, open for renewal	8.90
Contract 10	Foreign/Indian	Tea	3,012	50, open for renewal	6.25
Contract 11	Foreign/Indian	Pongamia (agrofuel) and other value added crops	50,000	50, open for renewal	8.10
Contract 12	Domestic/Diaspora	Cotton, sesame and horticulture	431	25, open for renewal	40.12
Contract 13	Foreign/Indian	Cotton and subsidiary crops	25,000	50, open for renewal	12.50
Contract 14	Foreign/Indian	Palm, cereals and pulses	100,000	50, open for renewal	1.13
Contract 15	Foreign/Saudi Arabian	Rice	10,000	50, open for renewal	1.69

Contract 16	Foreign/Chinese	Sugar cane	25,000	40, open for renewal	8.90
Contract 17	Domestic/Diaspora	Oil seeds and sugar cane	3,000	25, open for renewal	19.02
Contract 18	Domestic/Local resident	Cotton, soybeans	5,000	25, open for renewal	10.81
Contract 19	Domestic/Local resident	Cotton	3,000	25, open for renewal	6.25
Contract 20	Domestic/Local resident	Cotton	5,000	25, open for renewal	22.21

Source: Ministry of Agriculture and Rural Development of Ethiopia

N.B. Exchange rate used is USD1=17.7621 Ethiopian Birr

4.3.1. Rules in contracts: sufficient to mitigate challenges and seize opportunities?

As mentioned above, terms and conditions included under lease agreements are considered by many to determine the 'economic balance', 'distributional impact' or 'pro-poorness' of land deals (Zoomers, 2010; Cotula and Vermeulen, 2009; Cotula, 2011b). Accordingly, many put focus on the balance of rights and commitments of parties in lease agreements wherein greater commitment of investors, in a form of local employment, technology transfer, infrastructural building and other requirements of benefit-sharing, is considered beneficial to host states (Robertson and Pinstrup-Anderson, 2010).

Indeed, many host countries endeavour to 'regulate' large-scale land transfers through the incorporation of diverse performance requirements and safeguard clauses under lease agreements. A good example is lease agreements signed by the government of Liberia wherein investors are obliged, amongst other things, to fulfill a long list of performance requirements including: filling a certain percentage of their employment post by local staff (local employment requirement); supplying a certain percentage of their farm output to the local market (local marketing requirement); buying investment inputs from local markets (local content requirement); sharing farm expertise with the public (Knowledge transfer requirement); forming an outgrower scheme in partnership with local farmers; and contributing to the community development fund for the expansion of social infrastructure – over and above a commitment for direct provision of health care, schooling and clean water services to employees and their family (Cotula, 2011b; Agreement between the Republic of Liberia and Sime Darby Plantation Inc, 2009). Another example of a host country with relatively strong lease agreements is Malawi where investors are held contractually liable for the building of investment infrastructure like that of irrigation that will be of broader social benefit to local populations (Cotula, 2009).

While effectiveness of such contractual clauses in actually bringing concrete social benefits on the ground is a subject of debate, as it will be discussed in the next section, this section examines to what extent such benefit-sharing and safeguard clauses are included in the land lease agreements signed by the government of Ethiopia.

A close look at the land lease agreements signed by the government of Ethiopia reveals three key observations. The first observation is that all the twenty agreements reviewed are structured in a very similar way wherein the terms and conditions under the different agreements are strikingly alike, except for specific differences on the duration of lease, rental charges and investment particularities. In this regard, some regions are even reported of

having a template lease agreement that they sign with all investors indiscriminately (The Oakland Institute, 2011a). This undermines the possibility of regulating land deals using such agreements since each deal involves different type of agricultural investment (some food production, others agrofuel, and still others industrial crops and floriculture), each having a different impact on local welfare.

Such close similarity in the terms and conditions of the different land deals in Ethiopia also gives the impression that the main focus of negotiation in such deals is over the size of land, rental charges and lease duration, which are more of commercial and less of social concerns. This relates to the second observation which is the design of all the agreements in a purely commercial fashion wherein rights and obligations of the 'lessor' and 'lessee' are enlisted in a way similar to corporate deals, with literally no reference made to the socio-economic concerns of local communities as stakeholders in such deals. Indeed, the state gives a warrantee under almost all the agreements that the 'full ownership and property rights' of the land being transferred belongs to the state, and thus is free of any 'legal or other impediments what so ever'. This puts local communities off the picture in the whole deal, and their concerns off the agenda – invisiblization of the various local claims which do not necessarily win state recognition. This can be further illustrated under the third observation on the balance of rights and obligations of parties in lease agreements, and the extent to which investors are put under a contractual commitment to bring local benefits.

In this regard, a close assessment of the various lease agreements reveals that the balance of rights in almost all the agreements is highly skewed towards investors who are contractually entitled to a wide range of investment and land rights, but are subjected to lenient commitments with almost no contractual clause safeguarding local benefits. Among the common rights given to investors in most agreements are: the full and exclusive use of land during lease period (with no reservation for use of same land by local people for passage, collection of water or other purposes); the rights to transfer such land to a third party upon development of 75% of it; the right to claim additional land based on performance and need (some contracts even specify the size of additional land for future claim which goes as much as 200,000ha); the right to benefit from all investment incentives provided under investment legislations including tax holidays of up to 5 years, duty-free importation of capital goods as well as free repatriation of capital and profit for investors from abroad.

When it comes to contractual commitments, investor's obligations under most lease agreements are quite limited to the timely payment of rent; conduct of environmental impact assessment; timely commencement of investment projects (mostly within six months after transfer of the land); and use of land only for the activities predefined under the contract. The last two commitments (timely commencement and use of land only for predetermined purposes) are quite crucial to ensure the productive use of land by investors, and thus prevent speculative land holding. Also, the contractual commitment for a conduct of environmental impact assessment prior to establishment, which is also required under environmental legislations, is vital in ensuring that investments will not cause adverse impacts on the environment and local livelihoods.

However, there is no clause in any of the contracts reviewed that commits investors to bring benefits to local populations be it through local employment, local purchase of inputs or formation of local partnership. While the building of investment and social infrastructures like that of road, bridge, irrigation and educational facilities is mentioned in all the agreements, such is made part of investors' right in that investors are granted a discretion but

not under any obligation to build any of such infrastructures. In the words of an Indian investor who acquired 100,000 hectares of land in Ethiopia and contractually promised with additional 200,000 hectares (contract 14 under Table 1), "there is nothing in the contract that stipulate anything but cash compensation. The government of Ethiopia expects us to pay a lease in cash and we are paying it in cash [...] it is not that we need to bring ten thousand job or build hospitals and schools [...] but we will do it because that is our philosophy" (Interview, http://www.youtube.com/watch?v=IU1-PpxqeZc&feature=related).

There is also no safeguard clause, in any of the agreements reviewed, requiring local marketing of farm outputs at least in times of domestic food shortage. On the contrary, few of the agreements grant investors with an explicit export right which constrains even the future possibility of setting local marketing requirement – a contractual safeguard of investors' export interest than that of local food security concerns. Stating investors' absolute right in choosing their product destination, a state official in Ethiopia said "It is not our task to take revenue away from investors [...] if the investors can get a good price here in the country, they will sell here" (Stebek, 2011: 201).

In the absence of any benefit-sharing and safeguarding clauses under the land lease agreements signed by the government of Ethiopia, it is questionable if such agreements can be an effective regulatory instrument and fit their description by the late Prime Minister as "agreements precisely designed to ensure positive results in terms of job creation, availability of foreign exchange and availability of various agricultural products in domestic markets" (Interview, http://www.youtube.com/watch?v=jED11-_LC7o).

Indeed such agreements, as part of the whole process of land transfer, suffer from a problem of asymmetry in bargaining power between economically poor host states who despair to attract investment capital on the one hand and capital rich investors on the other (Robertson and Pinstrup-Andersen, 2010; Cotula, 2011b). It is such asymmetrical power relationship, in addition to possible impacts of state patronage, that is partly reflected in the asymmetrical contractual balance. As such, land lease agreements, which are supposed to be a regulatory solution to the challenges of large-scale land transfer, suffer from a same relational problem of unequal power in negotiations.

4.3.2. Rules in contracts: same with rules in use?

So much as important, contractual terms which are well negotiated and formulated do not bring concrete benefit by themselves, unless they are put into action. As rightly stated by Cotula (2010: 19), "a good contract is one that is not only well drafted but also properly implemented". Hence, the issue of ensuring compliance with or enforcement of contractual terms is crucial when examining the possibility of creating social good through the use of land lease agreements. Nevertheless, several studies have revealed that the actual operation of large-scale farm investments mostly goes quite in a different way from the terms and conditions stipulated in lease agreements (Cotula et al., 2009) – a gap between the 'rules in contract' and 'rules in use' from a legal pluralistic perspective.

While such discrepancy between the 'rules in contract' and 'rules in use' has mainly to do with weak institutional cohesion among the different state organs in monitoring investment activities and enforcing contractual terms (Deininger and Byerlee, 2011; Cotula, 2010), it is also attributed to the exercising of agency power by non-state actors including investors in trying to manoeuvre the contractual balance further in their favour. Such discrepancy is vastly evidenced in Ethiopia, reducing the creditability of even well negotiated and designed

contractual terms, and thereby calling a need to examine beyond what is written in the contracts.

A common example of such gap between contractual terms and investment practice in Ethiopia is the case of environmental impact assessment. Here, despite investors' clear contractual and statutory obligation to undertake a pre-establishment environmental impact assessment, most large-scale farm projects in Ethiopia are reported of avoiding such crucial process through state lenience (Deininger and Byerlee, 2011). Such is alleged to be a result of weak institutional coordination between the different tiers of government at the federal and regional levels, as well as the different Ministry offices involved in the process - mainly the Ministry of Environment and Ministry of Agriculture and Rural Development (Tamirat, 2010). This further demonstrates the lack of monolithic character within the state and how that affects the enforceability of state rules – multiplicity of interests and negotiation within a single social space leading to the creation of 'rules in use'.

Also, several investors in Ethiopia are found being engaged in activities that are different from what was originally stipulated in lease agreements (Deininger and Byerlee, 2011). As such, while most lease agreements are quite vague about the particular commodity for investment production, through the use of broad terms, like 'cereals', 'value added crops', 'subsidiary crops' and 'related investments', even the terms made specific are not always respected. For instance, according to a field research in one region in Ethiopia, only 35% of the land transferred to investors is reported of being used for the originally intended purpose (Tamirat in Deininger and Byerlee, 2011). A recent example of this is the case of an Indian company (see contract 10 in Table 1) which, after acquiring 3,012 hectares of land for tea cultivation in Gambella region, was actually engaged in timber production for over two years until recently prosecuted (Media report, http://www.ethiopianreporter.com).

Moreover, despite contractual obligation of investors to commence operation in six months and make at least 10% progress in one year period, several investment projects in Ethiopia are reported of being either not operational at all or lagging far behind their contractual schedule (The Oakland Institute, 2011a).

All these are indicative of weaknesses on the part of state agents in making a periodic inspection of investment activities and ensuring investors' compliance with contractual terms. Accordingly, the claim that challenges of large-scale land transfer can be effectively regulated through the use of lease agreements is quite naive; especially in the Ethiopian context where lease agreements safeguard the interests of investors more than that of local communities, and where the little commitments investors carry do not necessarily get enforced for weak coordination among state agents.

5. Concluding remarks

Core problems around large-scale land transfers are so deep in character than just market risks or implementation challenges. Some are partly structural in that they are intrinsic to the very export-oriented, agrofuel-driven or speculative character of recent investments in farmland which are manifestations of excessive commodification of land and a shift away from local to extra-territorial concerns. This is particularly the case in Ethiopia where most land transfers are effected for the production of either agrofuel feedstocks or exportable cash crops which are of less help in alleviating the chronic hunger prevailing in the country, if not exacerbate it.

Other problems underlying large-scale land deals are relational in character in that the land transfer process is dominated by few actors which largely exclude local communities and renders their claims less visible in the negotiating arena – the outcome being loss of access to land and land-based livelihood by local communities. Particularly in the case of Ethiopia, the state plays a hegemonic role in the governance of land in general and the transfer of rural land to investors in particular with its statutory ownership of all lands and other natural resources in the country. The state mainly relies on its laws in its conduct which give a very limited and unsecured land rights to pastoralists while empowering the state to convert communal lands into private holding on its discretion. The state also makes use of its discourse about 'idle' or 'unused' land whereby all land which is not actively being used for settled cultivation is easily labelled as 'idle' and thus made available for investment transfer. This places pastoral communities, especially those in the southern lowland part of Ethiopia, in a vulnerable position whose customary land use rights fall short of state recognition, and thus are exposed to dispossession without any consultation or compensation. It is such power and discourse based domination of the state in the process of effecting land transfers as well as the resulting invisiblization of local claims and loss of livelihoods which is the underlying relational problem around land deals in Ethiopia.

In ordinary cases of investment, state regulatory frameworks play some undeniable role in controlling investment undertakings. However, recent land rushes cannot be equated with ordinary investments since such land rushes are driven by factors that are well beyond conventional investment interests; consisting of extra-territorial food, energy and financial security concerns which are structurally disadvantageous to local interests. Addressing challenges of such land deals thus necessitates policy interventions which go much beyond the traditional scheme of regulating investments through state legislations and corporate codes of conduct. Indeed, at the heart of the problem being loss of access to land and security of tenure by local communities, which is more of a social and not just legal matter, state regulation cannot be used as a panacea. Also, active involvement of the state in legitmation of large-scale land transfers and invisiblization of local claims erodes the trust that the state alone can being the necessary social change, which therefore reduces the credibility of a state-centered regulatory approach in effectively addressing challenges of land deals.

From analysis of the different international initiatives taken lately to regulate large-scale land transfers, this study reaches to a conclusion that almost all the principles and guidelines proposed so far are legal centralistic or state-centric in formulation whereby a list of blueprint standards are prescribed as a panacea, whose realization is made dependent on the willingness and capacity of states effecting such transfers. Realization of most of the policy prescriptions is also constrained by the prevalence of other ideologically competing principles in the international legal order - creating a room for manoeuvre and forum shopping in favour of investors. Indeed, neither the state nor international actors like that of the World Bank are monolithic in character, and thus rules emanating from any of them are neither coherent in their own right nor automatic determinants of social change on the ground.

Though some consider the possibility of domestically regulating large-scale land transfers through the use of land lease agreements, such is not of much prospect particularly in case of Ethiopia. This is because most lease agreements in Ethiopia are protective of investors' interests than that of local communities'. With almost no commitments on investors for local sharing of benefits and safeguarding of host state national interests like that of food security, there is little, if any, lease agreements can do to regulate land deals. Also, looking at the

practice so far, the little commitments investors carry under lease agreement are far from being implemented on the ground – further undermining the regulatory potential of lease agreements.

In general, though legal empowerment of local communities, through formalization of land tenure and state granting of other forms of entitlements, may be a useful step forward, it is by no means sufficient to effectively deal with underlying problems of recent land transfers which are results of unequal power structure and exclusion in socio-institutional relations. Hence, what is initially more pressing than legal empowerment is the need for social empowerment - restructuring of the power balance in socio-institutional relations more in favour of local communities so that their claims become more visible in the negotiating arena.

To this end, initiatives being taken by international development agents to address challenges of large-scale land transfer need to transcend well beyond the designing of blueprint standards. Such initiatives should rather try to identify and redress underlying socio-institutional forces which always put the poor at the losing end of the bargain. This includes enhancing the voice/agency power of the local poor as well as changing the existing socio-institutional power asymmetries, so that local communities can be more visible and their rules more applicable/influential in negotiations. Also, civil society organizations and the media can play a similar role in bringing to light the claims of local communities, and acting as watchdogs to state power.

Also further research is needed to more specifically understand the relational dynamics among the different actors around land deals and the rules in use on the ground, which is important to better answer key questions such as who wins and losses from the process of land deals, and to also come up with context-based or appropriate policy recommendations.

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