

INVESTMENT IN AGRICULTURE

Policy Brief #4

Investing in Land for Water: The converging legal regimes

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1. Introduction

Access to water is ultimately what makes farmland attractive to foreign investors. The large-scale commercial farming that typically characterizes foreign investment in agriculture implies the need for vast amounts of water for crop irrigation or livestock production. Yet, with all the focus on “land grabbing” and food security, the related water issues tend to become an afterthought. Indeed, water is taken for granted until the supply is strained or completely depleted.

In the context of farmland investments, both the quantity and quality of water inputs are important, and have implications for users. In terms of volume, it is well established that about 70 per cent of all freshwater extraction is used for agricultural production. However the value of this water has yet to be fully understood or appreciated—either as an agricultural input or vis-à-vis other residential, industrial or environmental uses. In terms of quality, the chemicals from pesticides and fertilizers used in agricultural production directly affect the water resources available for others. Interconnected and in constant motion, water resources are particularly vulnerable to the impacts of farmland investment.

These same water resources are lifelines for local farmers, pastoralists and other rural communities, which makes understanding the legal framework governing these investments all the more necessary.¹

Most foreign investment in farmland occurs in Africa. These investments tend to be concentrated around the main African river basins, confirming that investor interest in farmland is directly related to its proximity to water (see Figures 1 and 2).

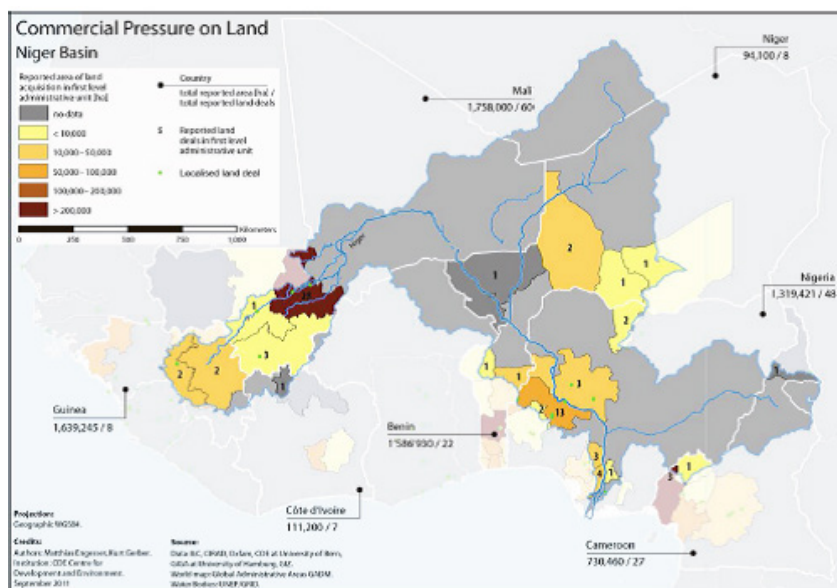


Figure 1: Concentration of Investments in the Niger River Basin
Source: Land Matrix (2011)

¹ This article summarizes the following report: Mbengue, M. M., & Waltman, S. (2015). *Farmland investments and water rights: The legal regimes at stake*. Geneva: IISD. Retrieved from <http://www.iisd.org/publications/farmland-investments-and-water-rights-legal-regimes-stake>

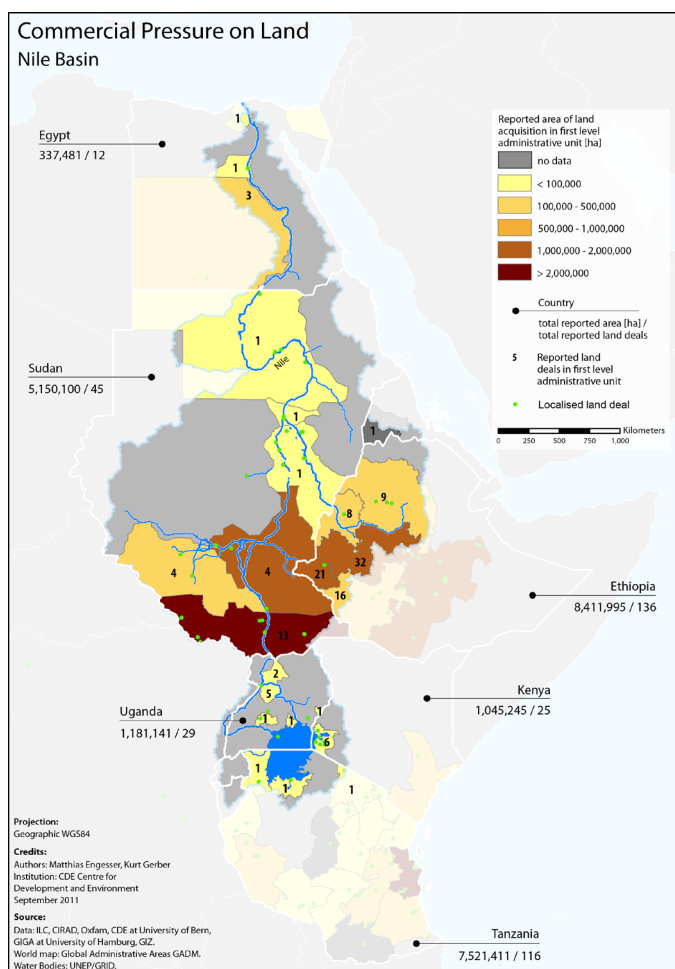


Figure 2: Concentration of Investments in Nile River Basin
 Source: *Land Matrix* (2011)

2. How Abundant Are Africa's Water Resources?

Africa has been promoted internationally as having vast untapped water resources, but a number of Africans already live in water-stressed environments, as can be seen in Figure 3 below. Population growth, climate change and land-use change are predicted to drastically increase that phenomenon. Farmland investments, and the significant amounts of water they require, further exacerbate this strain on water resources.

Climate change, in particular, threatens to drastically alter the amount and location of water resources across the African continent. Impacts such as changing precipitation patterns, increases in the frequency of flooding and droughts, and rising temperature are in fact already being experienced. Water levels in various African lakes, for example, have been declining due to the combined effects of drought, warming and human activities. Some studies suggest a significant decrease in suitable rain-fed agricultural land: arid and semi-arid land could increase by 5 to 8 per cent in Africa—that is, 60 million to 90 million hectares (Boko et al., 2007; Kundzewicz et al., 2007).

Irrigation is therefore understood to be a necessary adaptive response, and host states see foreign

investment as a chance to develop irrigation systems and infrastructure. But if irrigation is simply increased, overall water use will increase, depriving downstream areas and other users of water (Boko et al., 2007; Kundzewicz et al., 2007). Studies suggest that putting all farmland leased to foreign investors into irrigated production would be “hydrological suicide,” because the amount of water that would be required is more than what is available, particularly in the Nile River Basin (Figure 3 below) (GRAIN, 2012).

Although these fears may be exaggerated, farmland investments will certainly increase water consumption significantly in the region, and the use of pesticides and fertilizers will continue to threaten water quality (Mirza, Speller, Dixie, & Goodman, 2014).

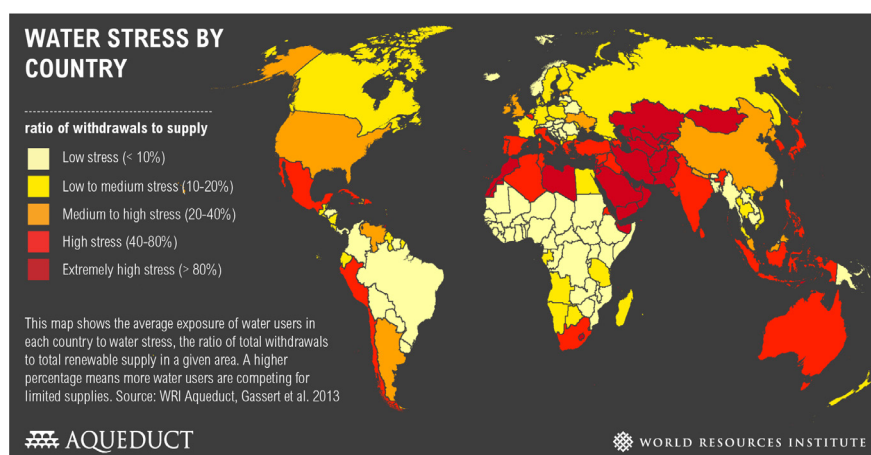


Figure 3: Water Stress by Country
 Source: *World Resources Institute* (2013)



3. What Does the Evidence Show?

Existing research on the conduct of large-scale agricultural investments reveals severe deficiencies in the measuring, monitoring and regulation of use and access to water resources. Even where there are well-established water acts—complete with use rights, monitoring and reporting systems—the capacity of the state to enforce them was found not to be sufficient. When investors did have to apply for water rights or adhere to extraction limits, these were often only enforced at the project approval stage, and there was no subsequent monitoring of adherence to the agreements made. In many cases, the monitoring of water contamination by host states is “cursory at best and investors appear to be virtually unregulated” (Fisher, 2009). This “virtually unregulated” water use by foreign investors contradicts the requirements of international law.

Moreover, studies have revealed that the crop production from these investments are for export only—either to the investor’s home state, or destined for high-end urban consumers—and are not accessible to local nor vulnerable rural populations (Mirza et al., 201). The investments therefore do little to address food security concerns in the host state, hardly offsetting the extra strain on water resources.

4. The Legal Framework Governing Water Rights and Farmland Investments

There are multiple legal regimes that govern water allocation in the context of farmland investments (Box 1).

Several legal regimes have developed to respond to different objectives: investment protection, sustainable management of water resources, the environment more generally and human rights. In the context of farmland investments and their water use, these interests converge and potentially clash. In addition to the increasing pressures on water resources, an imbalance in the legal framework governing farmland investments and water rights exists at both domestic and international levels, as discussed below.

Box 1: Different sources of law triggered by the use of water for farmland investments

- **Domestic law of the host state:** Varies depending on the country. It can require investors to apply for permits for water extraction and fees for water use, and perform an environmental impact assessment. Local communities mainly have informal customary rights, while foreign investors have formal statutory rights that prevail in most instances. The water rights of local communities are legally vulnerable compared to those of foreign investors. Water and other environmental laws are often poorly implemented.
- **Investment contract:** The legal basis of the foreign investors’ statutory (formal) rights to the land and water under the domestic law of the host state. Any express reference to water use, rates and periodic review of water use rates will govern the water use of foreign investors and allow the host state to periodically review and adjust those rates and rights accordingly. Water rights may be implicit whether or not they are expressly referred to in the contract.
- **Investment treaty:** Safeguards foreign investors’ rights that come from the contract with the host state and additional guarantees provided in the investment treaty. Most investment treaties commit the host state to binding international arbitration with foreign investors in the event of a dispute.
- **International freshwater law:** Governs the protection and preservation of international watercourses. It is extremely relevant for farmland investments located near a transboundary basin. Although the primary source of obligations is the Watercourses Convention, which is only binding on state parties, some principles, like the no-harm principle, are now customary international law that binds all states, even non-parties, to the Watercourses Convention. The Watercourses Convention urges an approach that moves from the international to the regional to the subregional for sustainable water management, and this has taken place. Thus each transboundary basin may be covered by subregional, regional and international frameworks, including:
 - › **The Economic Community of West African States (ECOWAS):** Regional community that provides the framework for the management of transboundary basins within the ECOWAS region.
 - › **The Southern African Development Community (SADC):** Has developed the SADC Protocol on Shared Watercourses and the SADC Regional Water Policy that further elaborate and tailor the principles of the Watercourses Convention to the SADC region. The Protocol and Policy, as well as the Watercourses Convention, encourage the establishment of river basin institutions to implement and enforce their principles.
- **International environmental law:** Provides for the obligation not to harm the environment of another state, expressed through the obligation binding on all states to conduct a transboundary environmental impact assessment when a farmland investment is planned near a transboundary basin. The interconnected use of water triggers these obligations: water use in one state affects the quality and quantity of water for downstream states.
- **International human rights law:** Provides for the obligation to protect and ensure the human right to water.
- **Soft law instruments:** Principles and guidelines that have achieved global consensus but are not legally binding on states or other actors unless enshrined in law or integrated into company codes of conduct. The most relevant for farmland investments come from the Committee on World Food Security.



4.1 Domestic Law and Contracts

4.1.1 Domestic Law

In most African states, water belongs to the public domain; rights to use water can be either exercised by the state or local authority, or granted to private individuals and corporations according to domestic law. Although constitutional arrangements governing water resources vary across Africa, common elements can be found, depending on whether the legal system developed out of the common law or the civil law tradition, and from the prevailing role of custom in Africa, resulting in either formal or informal customary rights.

Most local communities hold their land and water rights under customary law. Customary law is the most known and respected source of law by most host state populations, but it places local users at a disadvantage when compared to foreign investors who obtain statutory rights from contracts with the host state. Under most domestic legal systems, customary law and rights are recognized, but cannot apply over areas covered by written law or rights. Foreign investors' statutory written rights will therefore prevail over the customary unwritten rights of local communities in the event of conflict over water or land resources.

Furthermore, in states that do have adequate water legislation and administration in place, local usages and customs are often left unwritten and unrecorded, since they generally apply to minor water use and/or areas not already covered by the written law (Fisher, 2009). Local communities are thus legally vulnerable even where an administrative framework is in place to govern water resources. It is also true that most formal land and water management systems are poorly implemented, therefore having little force when positioned against foreign investors' statutory rights.

4.1.2 Contracts Between Foreign Investors and Host States

Many agricultural investment contracts between investors and host states do not expressly mention or deal with water, let alone provide for water fees or for the periodic revision of allocation. Host states may not realize that, when granting foreign investors the right to operate and maintain an agricultural investment, they also grant the necessary water rights to sustain that production, even where water is not explicitly mentioned in the contract. Furthermore, far-reaching stabilization clauses prevalent in contracts throughout Africa thwart the development of regulatory frameworks for sustainable water resource management. These clauses freeze domestic laws at the time the contract is signed. If not drafted carefully, these contracts disproportionately strengthen the position of foreign investors.

Nonetheless, the contract between the investor and the host state could and should be used to regulate the water use of farmland investments, and to indicate acceptable levels of downstream water quality. The contract also represents a golden opportunity to set a fee or tariff to incentivize water conservation, and to recognize the value of water as a production input. It should also provide for the right to revise those rights and fees in the event of a water shortage (Smaller, 2014).

4.2 International Investment Law

Investment treaties further strengthen the position of foreign investors by providing additional legal guarantees and safeguards to protect their investments. In times of drought and water shortage, there can be conflict between meeting the water needs of the farmland investments and ensuring that basic needs for residential water are met, as well as maintaining sufficient minimum water flows to sustain river systems and biodiversity—critical for the long-term sustainability of the host state. Standard provisions in international investment treaties—like the fair and equitable treatment standard, most notably, and the prohibition against expropriation without compensation—may limit the host state's ability to reallocate water resources.²

² For an overview and discussion of how investment standards may impact farmland investments and water rights, see also Smaller & Mann (2009).



In particular, foreign investors may form a legitimate expectation for continued access to the water necessary for agricultural production if the contract does not expressly limit water use, or provide for periodic review of water allocation or access. There could also be claims of expropriation if host states reallocate water resources and encroach upon the foreign investor's right to operate the business of commercial agricultural production. Other international legal regimes described below, however, provide some considerations to counter these claims and can serve to justify any interference with foreign investors' water use.

4.3 International Freshwater Law

International freshwater law requires host states: to respect and “do no harm” to the reasonable and equitable share of other state users; to ensure that priority water use goes to meeting vital human needs; to notify and consult other states when a farmland investment is planned near a watercourse; and to protect and preserve water resources against pollution and overexploitation. Given the location of most farmland investments on or around international watercourses, the principles and mechanisms of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (the Watercourses Convention) apply to the water use of farmland investments and should be consulted when issues arise.

In most of Africa, the implementation of the Watercourses Convention has been tailored to meet specific regional and subregional needs. Most international watercourses in Africa are governed by their own joint institutional management scheme at the subregional level, as well as a regional policy for sustainable water management and the international scheme provided by the Watercourses Convention. For example, the Southern African Development Community (SADC) has developed and effectively implemented a regional institutional framework for the sustainable management of river and lake basins, in line with the Watercourses Convention principles. Where no regional mechanisms are in place, the Watercourses Convention provides the fall-back reference. Where the state concerned is not a party to the Watercourses Convention, international environmental law provides relevant general obligations.

4.4 International Environmental Law

The International Court of Justice has recognized the duty in customary international law to conduct a transboundary environmental impact assessment if an activity is likely to result in transboundary harm, particularly on shared water resources.³ The obligation applies to all states and all international water resources, not just those covered by the Watercourses Convention. This assessment should call attention to the water use of farmland investments and reveal their impacts on transboundary waters. Unfortunately, it does not seem that any of these obligations has been implemented in relation to agricultural investments in Africa; they have therefore had little tangible impact to date.

4.5 International Human Rights Law

Numerous human rights instruments recognize the human right to water, either explicitly or implicitly as a fundamental prerequisite for the enjoyment of all other rights.⁴ The UN General Assembly has recently recognized the right to water as universally binding, and the UN Human Rights Council has called on states to pay particular attention to vulnerable groups in ensuring it is guaranteed.⁵ Accordingly, host states must ensure that the water use of farmland investments does not interfere with the vulnerable water rights of local communities.

³ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 83, para. 204.

⁴ For a comprehensive list of the dozens of instruments that include access to water as a human right, see Viñuales (2009).

⁵ See G.A. Res. 64/292, The human right to water and sanitation, U.N. Doc. A/RES/64/292 (July 28, 2010). Retrieved from <http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E>; U.N. Human Rights Council Res. 15/9 of September 30, 2010, Human rights and access to safe drinking water and sanitation, in U.N. GAOR, 65th Sess., Supp. No. 53/A, p. 28, U.N. Doc. A/65/53/Add.1 (September 13–October 1, 2010). Retrieved from <http://www.un.org/es/comun/docs/?symbol=A/65/53/Add.1&lang=E>



5. Building Bridges Toward a Holistic Legal and Policy Framework

The multiple legal regimes relating to water, as presented above, apply and interact when a farmland investment takes place. Below are some recommendations to help reconcile these different legal regimes and ensure water issues are adequately addressed in farmland investments.

5.1 Recommendations for Domestic Law

Many states have begun to reassess and transform their water governance structures in light of increasing global and local water scarcity. These efforts, and their effective implementation, are vital in the context of farmland investments. Avenues for improvement include: increased stakeholder participation in water-management decisions, incorporation of integrated water-resource management (IWRM) principles (i.e., recognize and give effect to the link between land and water), clarification of institutional roles and responsibilities through formal legislation and informal customary rights, and designing institutions that can adapt to changing physical limits (i.e., water scarcity) and stakeholders (i.e., new user groups).

In the case of farmland investments made within a shared water basin, host states should effectively implement their water-related international responsibilities in their domestic law by providing for the cooperation and consultation with affected states.

In the event that host states must justify reallocating water in the public interest (e.g., during a drought), they can legitimately draw upon the principles and obligations under international freshwater, environmental and human rights law. In terms of practice, however, poor implementation of these regimes at the domestic level means they have not yet been used in this way.

5.2 Recommendations for Investment Contracts

Before contracting with foreign investors, host states must carefully consider their wide-ranging international obligations, particularly their duty to notify and consult other states if the agricultural land in question is located near transboundary water or an international border, and to conduct an environmental impact assessment expressly considering water use. Contracts between investors and the host state should include specific provisions on water rights, including reference to the volume of water and the establishment of fees. Contracts should also clearly provide for periodic revision of water allocation and rights, particularly with respect to environmental and human rights concerns. They should also include safeguard clauses to the effect that nothing in the contract shall impede or frustrate the implementation of the host state's obligations under freshwater, environmental and human rights law—in effect strengthening the host state's ability to reallocate water resources when necessary for the public good.

5.3 Recommendations for Investment Treaties

Finally, states should ensure coherence between the investment regime and the other applicable international regimes in order to best facilitate their duty to manage water resources sustainably.

Negotiations of future investment treaties could potentially address the conflict between international investment law, on the one hand, and human rights and freshwater law on the other. Negotiators could seek to include a provision to the effect that nothing in the investment treaty can prevent the host state from taking action to adopt measures to fulfil their obligations under international freshwater, environmental and human rights law, particularly relating to health and safety concerns, nor would such action require the host state to compensate the foreign investor.



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