

# Kluwer Arbitration Blog

## Land deals could sow arbitration disputes

Luke Eric Peterson (Investment Arbitration Reporter) · Saturday, May 30th, 2009

In recent months, there have been a steady barrage of media reports about so-called “land grabs”.

Many believe that we are seeing a new “Scramble for Africa”, as food-scarce countries and private investors alike jostle to lease or purchase vast swathes of agricultural land abroad.

There are multiple drivers for such deals: including the perennial hope that land values will rise over time, as well as the inability of some Asian and Middle Eastern countries to grow enough food to feed their burgeoning populations.

Lately, the size and number of these land-deals are attracting concern in some quarters.

Earlier this month, I participated in a symposium on land investments at the Graduate Institute for International Studies in Geneva.

Among the speakers were the authors of [a new report](#) of the Food & Agriculture Organization (FAO) and the UK-based International Institute for Environment & Development (IIED).

To their credit, the authors did not limit themselves to hand-wringing over the wisdom and equity of large-scale land deals. Rather, they expended considerable energy in looking into the specific terms of deals entered into by a cross-section of African countries.

While they laid their hands on a handful of contracts governing these deals, many more are cloaked in confidentiality. Indeed, the lack of transparency around many of these arrangements could sow the seeds of their failure.

Already, we’ve seen governments toppled because of public alarm over un-transparent and lop-sided land concessions granted by the (now former) President of Madagascar to the Korean company Daewoo.

A [recent feature](#) in The Economist magazine bluntly warns that too many deals are “shrouded in secrecy”.

This lack of transparency often means that such deals have thin political support within the host countries.

In their new report, the FAO and the IIED, along with the International Fund for Agricultural Development (IFAD), warn that ostensibly long-term deals could have short lives, unless there is

some level of “local satisfaction” with such arrangements.

The authors call for deals which consult and compensate affected communities, including the current users of lands which are earmarked for offer to foreign bidders. The report’s authors also commend business models which employ and engage locals, rather than erecting walled-off gardens within communities.

(In reading such adjurations, one is reminded of the fated-to-fail water privatization scheme in Cochabamba, Bolivia, where a foreign investor was handed not only a local water concession, but also the rights to various other water sources that had long been used by members of the local community. As many will recall, the scheme failed spectacularly – with locals taking to the streets and sending company executives packing – and after several years of arbitration, all sides seemed to come away as losers).

It’s hard to find fault with those who seek to make large-scale land deals more palatable and sustainable over the long time-spans envisioned by the architects of such transactions.

Nevertheless, even where the best efforts are made, one can anticipate that investor-state arbitration will loom large over some of these cross-border deals in the years to come.

In many cases, bilateral investment treaties will provide a default dispute settlement mechanism for such land investments (apart from whatever remedies may be provided in the underlying contracts).

At the Geneva symposium, a representative of the IISD, (not to be confused with the aforementioned IIED) highlighted several potential investment treaty implications, including the fact that host-country export controls on food products in times of food scarcity could clash with investment treaty protections owed to export-oriented foreign investors.

Indeed, one key driver of these land-deals is a desire on the part of foreign investors to be more than passive purchasers of commodities on world markets. Investors hope to own or control agricultural production in other locales so that they can ensure food security at home.

When food producing countries slap export controls on food exports in future, it may fall to arbitrators to determine whether such measures can be squared with BIT obligations owed to foreign investors in the local agricultural sector.

Another way in which investor-state arbitration may impact upon such deals is the potential for governments to change their minds about certain sales or leasing agreements at some later date – and move to cancel, or re-write, these deals.

Any number of considerations could lead to states to reconsider these arrangements: unhappiness with the equity of these deals; poor performance of investors; negative environmental consequences; or simply local demands for land reform.

We’ve already seen several BIT arbitrations arise out of disputes over the nationalization of foreign-owned land tracts, particularly in parts of South America and Africa.

When some of today’s large-scale land deals end up in arbitration, arbitrators will doubtless be asked to consider the legitimate expectations of investors. Interesting questions will arise as to

what expectations can be deemed legitimate if certain land deals that run for 50 or a 100 years were struck without adequate consultation or transparency at the outset. Questions of corruption, which have also dogged certain of these deals, might also arise if, and when, disputes materialize.

Given the haste and lack of forethought going into some of these deals, it seems all too likely that they will give rise to a great deal of arbitration in the years or even decades to come.

Luke Eric Peterson

InvestmentArbitrationReporter.com

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