



Elements for a model land concession contract for agro-industries in Africa

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Presentation

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Introduction

Context

Since the 2008 financial crisis, there has been a new wave of large-scale land investments on the African continent. Since 2008, Land Matrix has recorded 1638 transactions representing a total of 45 million ha. Most of the investments concerned come from new partners in the host countries and concern increasingly large areas. The sectors concerned are agro-industry, extractive sector, logging, conservation concessions, protected areas, sport hunting areas, construction of major infrastructure, etc. All these activities are occurring at the same time, and this dynamic has led to the intensification of reflection on land management in Africa, and especially on large-scale land demands on the continent.

With regard to agro-industries, States now have to deal with highly experienced actors with long experience in developing projects around the world, who often negotiate with representatives of States who have a limited appreciation of the issues and practices. Contractual practice is one of the areas in which compliance indicates a difficulty for States to ensure optimal protection of their interests vis-à-vis investors.

Contracts have become more complex since 2008, and the international investment law context in which they are embedded limits the States' room for manoeuvre in the management of the land granted, and in the imposition of obligations on dealers.

The idea of a model contract was raised, to assist State representatives in negotiating complex clauses to which they were not accustomed. However, it must be recognized that preparing a rigid model contract is not necessarily an effective solution for the States of the continent, due to the diversity of national contexts, size and nature of investments. It therefore seemed more appropriate to draw on recent contractual practice in this field on the continent in order to identify guidelines to be proposed to negotiators in African countries.

This document has been designed for those African negotiators who are still unfamiliar with the developments recent relations between agro-industrial enterprises and States. It gives them an overview of the contracts signed in the other countries of the continent, enabling them to take advantage of the past experiences, positive and negative, to guide their national practice. It also intends to provide material for reflection on a central aspect of the issue of land concessions on a large scale. Some of the principles may inspire negotiators of contracts awarding rights related to logging, extractive resources, and conservation concessions for example.

The situation in

There is an increase in the demand for land for large-scale agricultural projects, which concerns Cameroon since 2009. The figures of the requests expressed by the companies exceed the actual transfers, and indicate the interest of the companies. Many African countries are hosts of land investments in areas larger than Cameroon. Based on the observation of practices that have taken place there, and the first experiences in Cameroon, useful lessons can be drawn to improve practices in Cameroon.

The first generation companies were «classical planters», interested in land for agriculture. Today, there are also more and more opportunistic companies, interested in the land as a safe haven, and ready to speculate.

Contracts have gone from relatively short documents (3 to 6 pages) with references to the laws and regulations in force, to longer documents (up to 70 pages and more), intended to regulate in detail the relations between the investor and the State, and referring as little as possible to the texts in force.

The challenge

Contracts, which sometimes bind States over extremely long periods (up to 99 years) and contain the most binding obligations, sometimes contain clauses that are particularly unfavourable to States.

The findings

The analysis of large land transfer contracts in sub-Saharan Africa shows that they contain many problematic clauses relating to the main issues: the parties, the duration, the location and area, pricing, renewal terms and conditions, third party rights in contracts, company obligations, compensation terms and conditions, land use changes, dispute resolution, confidentiality clauses, contract termination terms and conditions, contract language, place of the contract in the hierarchy of standards, environmental clauses, most-favoured-company clause, stabilization clauses, exemption clauses, etc.

The proposal

The suggested proposal is the formulation of clauses that could constitute a model land transfer contract for large-scale agricultural projects. This is not a standard contract in the sense that the articles are not written. The structure for each of the points retained is as follows: (1) observations made after reading the existing contracts, and risks incurred; (2) Proposals for an effective contract that protects the rights of the State.

A model contract provides negotiators with elements that can assist them in evaluating the terms of past contracts and guide their future negotiations.

1 The contracting parties

Findings:

The reading of the contracts shows several different situations

- a. Who is a signatory on the state side? It is important to make sure that the signing authority has the appropriate powers. We have seen signatories as distinct as non-technical administrations, or state corporations outside the sector.
- b. Make sure the co-signer is a clearly identified company. In one case, several different names were found for the same company, which may imply the existence of several different legal entities.

Proposals:

- a. Make sure, on behalf of the State, that the powers to sign land concession contracts are respected. Ensure that the State has a clear system for determining the signatory(s) on its side. An interesting formula would consist in ensuring that the signature of the State is final only after a control/validation of the signature by a defined mechanism (example: registration in a single land register) ;
- b. Require companies applying for land concessions to register in the country's commercial register. It is important for the State to avoid: (1) signing contracts with companies located abroad; (2) signing contracts with companies whose owners are not known; (3) signing contracts with companies registered in the country but controlled by companies registered in tax havens.

2 Duration

Findings:

There was a wide disparity in contracts on this issue. Between 10 and 99 years, with contracts of 25, 30, 50 years. The possibility of renewal is generally specified.

There were also two different systems: (1) the direct award of land concessions for the longest possible duration; and (2) a two-tier system, which provides for a probationary period of variable duration, during which the State can assess the performance of the co-contractor and its ability to meet its commitments, before finalizing a longer-term contract.

Proposals:

- a. Avoid signing concessions for too long a period, covering periods beyond which States could reasonably foresee the consequences of land transfers
- b. Avoid issuing blank cheques to companies, which may not be able to make the investments they promise, thus depriving the State of the planned benefits, and preventing any other use of the spaces for long periods. It is imperative to assess the capacity of companies prior to final land transfer.
- c. Avoid, for example, that timber rights are assigned at the same time as land rights. This situation could create an incentive for companies that would be tempted to access wood without going through the competitive processes provided for by the forest legislation. It is imperative that legislation decouples access to land rights from access to rights over

other resources. Investors should not be allowed to use the resources exploited on land (and belonging to the State) free of charge to finance their operations.

3 The size of concessions

Findings:

- a. In rare cases, the contract does not provide for size.
- b. Sometimes the size granted is larger than that over which development is planned, and the investor therefore has control over an area over which he will not have any activity. It can pay rent on these undeveloped areas.
- c. Sometimes the area granted is bigger than that on which the company pays the rent for the land.
- d. Sometimes, there is a commitment by the State to provide additional areas (with or without indication of size) at the investor's request (SGSOC, Malaysia).

Proposals:

- a. The contract must relate only to the size granted and must not include any commitment to provide the investor with land at a later date.
- b. The contract must limit the areas controlled by the investor and not exploited
- c. Provide for recovery by the State of undeveloped areas.
- d. Exclude any possibility of subleasing the land granted.

4 Location of the concession

Findings:

- a. The contracts sometimes include a map, which forms an integral part of the contract and indicates the precise location of the concession.
- b. Some contracts do not include a map, but contain geographical details that may enable a map to be drawn up.
- c. Some contracts are silent on the issue of location.

Proposals:

- a. It is important to provide, in addition to the precise description of the site, a map of the exact location of the conceded site. This will be a provisional map, which will only be definitive after participatory mapping and subsequent subtraction of land claimed by the communities.

5 Effective date of contract

Findings

- a. Some contracts provide for entry into force on the date the contract is signed.
- b. Others institute a grace period during which the company is not obliged to respect all its commitments, especially fiscal ones, but not only. Example of a clause.
- c. Some still run certain effects of the contract based on a production volume on a given area.

Proposals

- a. The effective date must be set, either on the date of signature of the contract, or at a specific date in the future. If the State chooses to provide for a grace period, it is better that it be fixed in time, and not determined by elements depending on the company, and difficult to establish. An example of what should not be done, for example, would be this contract providing that some financial consequences will only start to accrue from a point in time determined by productivity... It is absolutely imperative to avoid choosing a date of entry into force determined by random elements over which the State does not have control
- b. Choosing the date of signature of the contract as the date of entry into force facilitates the task for the State, especially in the case of tacit renewal clauses: in 25 or 50 years, with the archiving difficulties experienced by our administrations, it will be difficult to find the data relating to the date of entry into force (and thus, possibly, to the date of referral of the co-contractor for termination of the contract)

6 Renewal of the concession

Findings:

- a. Sometimes renewal is automatic
- b. Renewal is sometimes subject to conditions: (1) respect for commitments made; (2) contribution to development

Proposals :

- a. Provide for (1) an assessment of investor performance, based on pre-defined criteria; (2) consultation of riverside communities; (3) formal consent of the State, prior to any renewal.

7 The rent price of the land

Findings:

- a. Generally, the contract provides for a fixed amount, indicating the total rent price of the land per year, or the rent price of the land per hectare or per year.
- b. The amount is sometimes quoted in national currency, sometimes in national currency and in dollars, without indication of the reference currency.

- c. Sometimes the contract contains provisions for a price increase of a certain percentage per fixed period
- d. In some cases, the value of the land is calculated, for the contract grants a substantial discount to the investor
- e. Sometimes land is valued as a partial contribution by the State to the company's capital.

Proposals:

- a. It is important to provide for a price, and the contract must indicate how the rent for the land is to be determined, to guard against the risks of inconvenience in the case of a possible devaluation, or a high rate of inflation.
- b. The price of the land cannot remain the same for the duration of the contract
- c. It is important to determine how the land price is calculated, not to set a price that, in many cases, may seem arbitrary.
- d. It is important to indicate the rate of increase in the rent of the land, which could be linked to the rate of inflation, or to the value of the cultivated resource.
- e. The contract should prohibit a downward modification of the land rent, and should prohibit that documents other than the contract contain special provisions on the price of the land.

8 Terms of payment of the land rent

Findings:

- a. Payment every six months, or annually.
- b. Payment in advance, or silence on the terms.

Proposals:

- a. It is important that the contract provide for the terms of payment of the land rent (every six months, or every year, at the beginning of the period, and indicate the counter(s) empowered to collect the rent). Payment in advance enables the State to know fairly quickly whether its co-contractor is experiencing financial difficulties, and what precautionary measures, if any, should be taken to protect its interests.
- b. It is important to indicate the distribution of the payment when there are several beneficiaries of the rent on the land.

9 Land Allocation

Findings:

- a. The contracts shall provide that the land granted may not be changed of use
- b. Contracts shall provide for the possibility of total or partial land use change without conditions.
- c. The contracts provide for a total or partial change in the use of the land granted, with the express authorization of the State.

Proposal:

- a. Provide in the contract for prior authorization from the authority that signed the contract for possible total or partial changes in land use. Include in the contract the conditions for the validation of changes of use (avoid, for example, that an authorization given for a crop, and have a modification for a less strategic crop, or more problematic such as GMOs, etc.).

10 The company's obligations

Findings:

- a. Traditional bonds, expected from any co-contractor of the State
 - Pay the fee
 - Pay compensation/compensation to the victims of the work
 - Observe the legislation (when there is no exemption provided by the contract for some legislative or regulatory texts or provisions)
 - Do not go beyond the limits of your concession
 - Have the concession boundary demarcated at its own expense
 - Respect tax commitments (register the lease, etc.)
 - Prohibition of alienation/transfer of rights

Proposals:

- a. Require the company, at its own expense and under its own responsibility, to identify the rights, uses and interests of the communities and other stakeholders prior to the demarcation of the concession. This exercise should be done through the use of participatory mapping.
- b. Provide in the contract that the area will not be definitive until the areas claimed by the communities bordering the investment have been identified and excluded, in a participatory process.

11 Rights of third parties in the contract

Findings:

- a. Some contracts recognize the communities' right to peaceful use of the roads within the concession, as well as resources that are not the subject of an exclusive concession to the company (rivers, for example). It is sometimes specified that such use is only possible when it does not hinder or impair the activities of the concession holder.
- b. Other contracts allow communities to use resources not granted to the investor, even when they are inside the concession, without restrictions being specified by the texts.

Proposal:

- a. Impose on the company the preparation of a participatory map identifying the uses, rights and interests of the communities, prior to any final concession of the areas, in order to ensure that the company's presence does not result in a reduction in the populations' access to vital resources.

12 Confidentiality provisions

Findings:

- a. The contracts sometimes contain a confidentiality provision binding on both parties (the State and the investor).
- b. Some contracts do not contain a confidentiality provision, but de facto confidentiality is observed in practice.

Proposals:

- a. Include a clause in the contract providing for its publication. It is important that third parties are aware of the nature and extent of the rights granted
- b. Make publication of the contract a condition of its validity. This measure will enable the various competent administrations to: (1) carry out the necessary controls to ensure that the State is not exposed to financial risks as a result of the non-application of unknown contractual obligations; (2) to know the content of the contractual provisions binding the State, in order to ensure that the influence of current contracts on past contracts is known and assumed: many contractual provisions indeed provide that if the State were to give more favourable conditions to other companies in the future, these clauses would ipso facto extend to the contract in question (most favoured company clause).

13 Termination of contract

Findings:

The conditions for termination of contracts are generally as follows:

- a. Non-fulfilment of one of the essential clauses of the contract (non-payment of the fee, for example, generally over a more or less long period)

No development within a given period, possibly after a formal notice

As a general rule, the procedure for establishing default and terminating contracts is not very precise, which can constitute a weakness, especially if companies challenge the State's decision before the courts or before an arbitral tribunal (formal notice, for example). The process is sometimes long, and involves many steps by the State.

Proposals:

- a. The contract should provide for simple terms of termination, based on conditions that are easy to prove: (1) non-performance of essential terms of the contract; (2) cessation of activities for a period specified in the contract; (3) attempt to transfer the contract without prior formal authorization from the authority signing the contract; (4) change in land use, without prior authorization from the State.
- b. The contract must also specify the termination procedure, where the law does not expressly provide for it. It will also be necessary to know the competent authorities to terminate the contract on the administrative side.

14 Contract language

Findings:

- a. Some contracts are written in only one language (the official language(s) of the host country (ies) of the investment), and no mention is made of the language in the contract provisions.
- b. Contracts are sometimes written in only one of the official languages of a country, and no mention is made of the language.
- c. Other contracts are drafted in more than one language, and the contract indicates that both languages are equally authentic, even when one of them is not an official language of the country.

Proposals

- a. Prepare the contract in the languages in which the laws of the country are drafted. Any translations into the investor's working language must not have the same force as those into the official languages of the State, which are the working languages of the administration (which will be responsible for implementing the State's obligations and monitoring compliance with the administration's contractual obligations) and of the judge, who will be competent in the event of a dispute.
- b. Impose on the administration and the investor, when the communities so require, that the contract (or its main provisions) be translated into a language accessible to the local populations of the project operations.

15 The place of the contract in the hierarchy of standards at national level

Findings:

- a. Some contracts are silent on the issue, and in this case the place of the contract in the hierarchy of norms is in conformity with what the common law provides, i.e., the contract is required to comply with the law.
- b. In some cases, the contract indicates its place in the hierarchy of standards. And contractual clauses have been observed that place the contract above the law in the hierarchy of norms.

Proposals:

- a. It would be important to ensure that the contract does not exceed legislative or regulatory texts in the hierarchy of standards. Two mechanisms make it possible to achieve this: (1) the prohibition of stabilization clauses (2) silence on the place of the contract in the hierarchy of norms. This silence leaves the host State free to change its legislation as it sees fit, without any interference from the contract.

16 Respect for the environment

Findings:

- a. The contract provides that the investor will submit to all measures provided for by the laws and regulations in force in the field
- b. The contract provides that the investor will comply with all the environmental protection obligations laid down by law and regulation, but gives a grace period during which the company will not be subject to these obligations
- c. Sometimes the contract completely exempts the company from its environmental obligations, in particular by means of exemption clauses.

Proposals:

- a. Stabilization provisions should not exist in land concession contracts. Their deletion will ipso facto lead to the deletion of environmental safeguard provisions.
- b. The contract should provide that the investor will not oppose the implementation of subsequent commitments made by the State in environmental matters, and will contribute to this in the context of its operations.
- c. The contract will include an obligation for the company to apply, in its operations, the highest standards adopted by the sector to which it belongs
- d. The contract will include an obligation for the company to prepare an annual report on compliance with its environmental obligations, which will be made public.

17 Favoured company clause

Findings:

- a. The contract sometimes indicates that if the host State subsequently granted a company more favourable terms than those contained in the contract in question, these terms would automatically extend to its contract. Such a clause makes it extremely complex for the State to monitor contracts, since the actual content of a contract is no longer necessarily that of the document signed between the State and the company, but certain clauses are replaced by more favourable clauses in subsequent contracts, without the need to consolidate the text of the contract with the new clauses. The State is therefore no longer capable of knowing all of its obligations, and above all has chosen not to fully enjoy its right to express its formal consent to be bound by obligations towards companies.

Proposals:

- a. Exclude any most-favoured-company provisions in land concession contracts.
- b. Denounce any such provisions in existing contracts.

18 Arbitration provisions

Findings:

- a. Some contracts provide that in the event of a dispute, the parties undertake to resort to arbitration. Some contracts contain provisions that specify the place of arbitration, while others specify how the arbitral tribunal is to be constituted.
- b. Some contracts are silent on the issue of arbitration, or indicate the jurisdiction of national courts. But where the investor's home State and the host State are bound by a bilateral investment treaty providing for recourse to arbitration, the absence of an arbitration provision cannot be interpreted as excluding this form of dispute settlement.

Proposals:

- a. It would be important to conclude simple contracts in structure and content, so that all provisions are easily understandable, so that host States can monitor compliance with the commitments of both parties.
- b. Recourse to the national court must be the rule in the settlement of disputes between the State and the investor. Even if it does not avoid recourse to arbitration, it at least allows the national court to give its decision.

19 Stabilization provision

Findings:

- a. Some contracts contain clauses providing that subsequent tax changes will not apply to the company's operations
- b. Some contracts extend these stabilization provisions to more than one jurisdiction, whose post-contract amendments will not apply to the company's operations.
- c. There has been at least one case that may resemble a stabilization clause in the host country's constitution.

Proposals:

- a. Exclude any legislative stabilization provision in land concession contracts
- b. Denounce stabilization provisions in existing contracts

20 Exemption provision

Findings:

- a. Some contracts provide that some provisions of existing laws or regulations will not apply to the investor's transactions
- b. Some contracts provide for a temporary exemption

Proposals:

- a. It would be desirable to exclude any stabilization provision from land concession contracts.
- b. existing exemption clauses should be denounced.



Conducted by CED:

Centre for Environment and Development (CED)
16, Rue 1115 Etoa-Meki
P.O.Box. 3430 Yaounde, Cameroon Tel:(237) 695 544 931
E-mail: contact@cedcameroun.org;
Web Site:www.cedcameroun.org