

Laws of investment and environmental protection: The case of Ethiopian large-scale agriculture

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Declaration

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I declare that **Laws of investment and environmental protection: The case of Ethiopian large-scale agriculture** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



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Abbreviations and Acronyms

- ADLI** - Agricultural Development Led Industrialization
- ASGISA**- Accelerated and Shared Growth Initiative for South Africa
- BACEN**- Banco Central do Brazil
- BATAT**- Broadening Access to Agriculture Thrust
- BITs**- Bilateral Investment Treaties
- CDM**- Clean Development Mechanism
- CIC**- International Council for Game and Wildlife Conservation
- CISDL**- Centre for International Sustainable Development
- CITES**- Convention on International trade in Endangered Species of World Fauna and Flora
- CLaRA** - Communal Land Rights Act
- CMN**- Conselho Monetario
- CONAMA** - National Environment Council (of Brazil)
- Contemp. Readings L. & Soc. Just.-** Contemporary Readings in Law and Social Justice
- CSE** - Conservation Strategy of Ethiopia
- CSR**- Corporate Social Responsibility
- CVM**- Comissao de vabres mobiliarios
- DRD**- Declaration of the Right to Development
- EIA**- Environmental Impact Assessment
- EIC**- Ethiopian Investment Commission
- EKC**- Environmental Kuznets Curve
- EMAS** - Environmental Management and Audit Scheme
- EMS**- Environmental Management System
- EP**- Equatorial Principles
- EPA** - Environmental Protection Act
- EPA**- Environmental Protection Authority
- EPE**- Environmental Policy of Ethiopia
- ESG**- Environmental, Social and Governance
- Eur.Env.-**European Environment
- FAO**- Food and Agriculture Organisation for the United Nations

FDI- Foreign Direct Investment
FDRE- Federal Democratic Republic of Ethiopia
FSS - Forum for Social Studies
GATT - General Agreements on Trade and Tariff
GHG- Green House Gases
GTP - Growth and Transformation Plan
Ha- Hectare
IAIA- International Association for Impact Assessment
IBAMA- Institute of Environment and Renewable Natural Environment Council
ICJ- International Court of Justice
ICONE-Institute for International Trade Negotiations (Brazil)
ICSID- International Centre for Settlement of Investment Disputes
IDL- International Development Law
IFPRI - International Food Policy Research Institute.
IFM- Integrated Farm Management
IGAD- Inter Governmental Authority on Development
IAs- International Investment Agreements
IISD - International Institute for Sustainable Development
IPM- Integrated Pest Management
ILA- International Law Association
ILO- International Labour Organisation
INCRA- Institute for Colonisation and Agrarian Reform
IPM- Integrated Pest Management
IUCN - International Union for the Conservation of Nature
LAR- Legal Amazon Region (Brazil)
LEAD – Law, Environment and Development Journal
LRAD- Land Redistribution for Agricultural Development
LSLBI- Large-Scale Land Based Investments
MAP- Millennium Africa renaissance Programme
MDGs - Millennium Development Goals
MEAs- Multilateral Agreements
MoFED- Ministry of Finance and Economic Development

NEMA -National Environmental Management Act
NEMBA- National Environmental Management: Biodiversity Act
NEPAD – New Economic Partnership for Africa’s Development
NGOs- Non- Governmental Organisations
Non-St. Actors & Int'l L.- Non-State Actors and International Law
NPBCR -National Policy on Biodiversity Conservation and Research
NPCC- National Policy for Climate Change
NSSDP - National strategy for sustainable development and action plan (South Africa)
OECD- Organization for Economic Co-operation and Development
PASDEP- Plan for Accelerated and Sustainable Development to End poverty
PIC- Rotterdam Convention on Trade in Hazardous Chemicals
PoI - Plan of Implementation
POPs- Persistent Organic Pollutants
PTO- Permit to occupy
RAI- Responsible Agricultural Investment
RDP - Reconstruction and Development Programme
RI- Responsible Investment
SADC - South East Asian Development Community
SDGs- Sustainable Development Goals
SDPRP- Sustainable Development and Poverty Reduction Programme
SISNAMA- National Environment System
SLAG- Settlement Land Acquisition Grant
SNNPRS- Southern Nations, Nationalities & Peoples
TNCs- Trans National Corporations
UNCBD- United Nations Convention on Bio-Diversity
UNCCD- United Nations Convention to Combat Desertification
UNCED - United Nations Conference on Environment and Development
UNCHE- United Nations Conference on Human Environment
UNDP- United Nations Development Programme
UNDRIP- United Nations Declaration on the Rights of Indigenous Peoples
UNEP- United Nations Environmental Program

UNESCO- United Nations Education and Scientific Organisation
UNFCCC- United Nations Framework Convention on Climate Change (1992)
UNGA- United Nations General Assembly
UN PRI- United Nations Principles for Responsible Investment
UNU-IAS - United Nations University Institute of Advanced Studies
WCED- World Commission on Environment and Development
WHC- World Heritage Centre
WHO- World Health Organisation
WSSD- World Summit on Sustainable Development
WTO - World Trade Organisation
UNISA- University of South Africa

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Key Terms

Investment law; environmental law; Ethiopian large-scale agricultural investment law; responsible large-scale agricultural investment law; sustainable large-scale agricultural investment law

Abstract

A contradiction between the Ethiopian law of investment and environmental law is prevalent since law of investment promotes development while environmental law protects the environment. The thesis investigates the general legal issue: How do the investment and environmental laws of Ethiopia promote large-scale agricultural development without adversely affecting the environment? In the research, comparative legal research methodology is employed: comparison is made between the internationally accepted principles of large-scale agricultural investment and Ethiopian laws; the laws and experiences of Brazil and South Africa are showed that law of sustainable large-scale agricultural investment is vital to promote agricultural development and protect the environment. International law on investment and environment are also considered. International legal principles of solving the contradiction between environmental law and investment law are analysed. Legal and document analysis of Ethiopian laws, policies and government documents have been made. Interviews have been made, data through questionnaires have been collected and analysed, and 12 large-scale agricultural investment farms have been observed and critically analysed. The thesis identified that law of large-scale agricultural investment promotes development while Ethiopian environmental law protects the environment. The law has a role in promoting large-scale agricultural development by recognising the right to development and providing incentives and creating conducive environment. Thus, the law should be used to promote both the right to development and environmental protection. The nexus between investment law and environmental law should be strengthening. It is identified that the law of sustainable large-scale agricultural development could protect the environment while promoting large-scale agricultural development. The thesis identified the Ethiopian law and the practices do not promote sustainable large-scale agricultural development. Thus, it is recommended that precautionary principle, like EIA should be made a requirement for large-scale agricultural investment,

implementing efficiently and effectively the large-scale agricultural law principles, and laws to achieve sustainable large-scale agriculture.

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Chapter One: Introduction

1.1 Background

Ethiopian legal system is characterised as a civil law legal system.¹ At the time of Emperor *Zera Yaikob* (1434-1446) the first attempt made to codify Ethiopian law.² After a long period of time, *Fetha Negast*- The law of kings- was introduced in Ethiopia as a code.³ At the era of Emperor *Hialeselassie* different laws were codified including the Civil Code, the Commercial Code, and the Maritime Code. However, common law also influenced the Ethiopian legal system. Therefore, the Ethiopian legal system is mixed.⁴

Investment in agriculture is warmly welcomed by host developing states since it contributes to their economic development and employment. The primary goal of agricultural investment is food and energy production for home state consumption.⁵ According to the World Bank, agricultural development investments have been greatly contributing to economic growth, agricultural development, and poverty reduction in developing regions over the past five decades.⁶ In the same vein, agricultural production, in Africa, plays a role in sustaining food and for commerce. Thus, African states are required to work on the agricultural sector in prioritizing it to achieve their development goal.⁷

According to the Ministry of Finance and Economic Development (MoFED), the existing Ethiopian Government, in its long term development strategies, has shown its commitment by giving due attention to agricultural productivity, growth and food security. The Ethiopian Government has adopted the objective of promoting large-scale agricultural investment. The rapid growth path of Ethiopia still puts a great emphasis on agriculture.⁸ Therefore, the

¹ Abera Jembere *An introduction to the legal history of Ethiopia* (2000) 11.

² Z Augustyniak 'The genesis of the contemporary Ethiopian legal system' (2012) 102.

³ Above, 103.

⁴ Mulugeta M. Ayalew *Ethiopia* (2010) 19.

⁵ WM Choi 'WTO rules and agricultural development cooperation between developed and developing countries' 2011 (Vol. 4 No. 2) *The Law and Development Review* 30. Agriculture is considered as a vital development tool for achieving the Millennium Development Goal. See for detailed discussion World Bank 'Agriculture for development' (2008).

⁶ N Bentema & GJ Stads 'African agricultural R & D in the new millennium progress for some, challenges for many' (2011) 1.

⁷ HE Zunkel *Agriculture: Future scenarios for Southern Africa- Ensuring food security through trade policy* (2009) 7.

⁸ The document recognizes agriculture as major source of economic growth, See FDRE Ministry of Finance and Economic Development (MoFED) Growth and transformation plan (GTP) 2010/11- 2014/15, 22.

agriculture sector will continue to be the major driver of the economic growth while particular focus will be given to industrial growth.⁹

Agriculture is the backbone of the Ethiopian economy, accounting for about 45%¹⁰ of the GDP and 85% of employment. It is also a major share of export earnings. The Ethiopian Government attaches great importance to agricultural development.¹¹ The Ethiopian Sustainable Development and Poverty Reduction Program (SDPRP) emphatically recognised agricultural development as a centre to rural development.¹²

1.2 Statement of the problem

Large-scale agricultural investment requires inputs. One of the inputs to agricultural growth is fertilizers. Fertilizers use in Ethiopia has increased¹³ from 140,000 tons in early 1900s to 400,000 tons in 2012.¹⁴ What is bad of fertilizers is that they cause damage to the environment. In addition, the steady population growth, with its increasing need for energy and food, presents a challenge for the environment. More people mean more demand for energy and food production, and more demand for production would result in more carbon emissions. Emissions of greenhouse gases from energy and food production cause climate change. In short, managing the interplay between agricultural development (investment) and environmental protection is a grand challenge.¹⁵

⁹ As above.

¹⁰ A recent governmental document describes the contribution of agriculture to GDP to be 41.6% for the period 2005/06-2009/10. In general, it is observable that agriculture contributes almost half of the GDP of the country and requires due attention so as to endure it. See above 4.

¹¹ In 1994/95 the Ethiopian Government introduced agricultural development led industrialization (ADLI) policy. ADLI is a long-term strategy to achieve faster growth and economic development by employing technologies, fertilizers, improved seeds and cultural practices. However, some argue that agriculture is too stagnant to lead the economic development. See Kiros FG *Enough with famines in Ethiopia: A clarion call* (2005) 86-7. Now a days, industrial sectors and service sectors exceeded in development than agriculture. For instance, 2008/09 service sector scored 14% while the industrial sector recorded 9.9% but agriculture scored only 6.4% rate of growth. See P Mwanakative & L Barrw 'Ethiopia's economic growth Performance: Current situation and challenges' (2010) 17 *Economic Brief* 2. Nevertheless, agriculture remains to be the mainstay of Ethiopia's economy and the Government is working to promote investment in agriculture. See The Business Excellence *Investment guide to Ethiopia* (2007) 92-103.

¹² Gizachew Abegaz & Solomon Bekure (eds) 'Rural land transactions and agricultural investment' (2009) ix.

¹³ DJ Spielman *et al* 'Seed, fertilizer and agricultural extension in Ethiopia' (2011) 19; S Rashid *et al* 'Fertilizer in Ethiopia: An assessment of policies, value chain and profitability' (2013) 1; Abate *et al* 2015 *Food Sec.* 973; See also M Zappacosta *et al* 'FAO/WFP Crop and Food Security Assessment Mission to Ethiopia' (2012) 14.

¹⁴ Gebrerufael Girmay 'Chemical fertilizer marketing and uptake in Ethiopia: Evidence from Ada'a district of Oromia Regional State' (2015) 4 *Research Journal of Agriculture and Environmental Management* 307 310.

¹⁵ DB Climate Change Advisors, *Investing in agriculture: far-reaching challenge, significant opportunity-An assessment management perspective* (2009) 6.

The assessment made by the researcher asserts that large-scale agricultural investment will not help much to create employment or sustainable development in Ethiopia.¹⁶ In Ethiopia, the existing procedures and screening process of agricultural investment lack proper scrutiny and rigor in assessment. Furthermore, regular monitoring and follow up is not well undertaken.¹⁷ It is obvious that at least the investment of some development projects will inevitably affect the environment adversely unless some mechanisms are devised.

Environmental impact assessment is one tool, among others, to identify whether or not a given investment project will adversely affect the environment.¹⁸ Nevertheless, this research indicates that implementation of the environmental impact assessment is poor in Ethiopia. In addition, government institutions do not have 'the capacity for effective monitoring'¹⁹ of large-scale agricultural investments.²⁰ Currently, the land use management by the investors, in Ethiopia is not environmental-friendly and it will adversely affect the environment in the long run.²¹ In sum, unless an appropriate measure is taken, the environment will be damaged due to the negative effects of large-scale agricultural investment in the country. This reveals the contradictory relationship between investment promotion and environmental protection.²²

The basic aim of this research is to investigate the roles of legal rules of development and environment and their implementation in large-scale agricultural investment without adversely affecting the environment in Ethiopia.

¹⁶ Imeru Tamrat 'Governance of large scale agricultural investment in Africa: The case of Ethiopia' (2010) 3.

¹⁷ Hung *Assessing land for developing a Coffee plantation in Oromia Regional State* 5.

¹⁸ See MA Bekhechi & JR Mercier *The Legal and Regulatory Framework for Environmental Impact Assessments: A Study of Selected Countries in Sub-Saharan Africa* (2002) xi.

¹⁹ See Dessalegn Rahmato *Land to investors: Large-scale land transfers in Ethiopia* (2011) 37.

²⁰ According to Rahmato, large-scale means 2000 hectares or more. See above 53.

²¹ Above 37.

²² Researches prove three types of relationships between investment for economic development and environment: positive correlation whereby investment and economic growth will not affect the environment; negative relationship where the economic growth will negatively affect the environment; and the investment may or may not adversely affect the environment. See JE Vinuales *Foreign investment and the environment in international law* (2012) 7; JE Vinuales & MJ Langer 'Managing conflicts between environmental and investment protection norms in international law', in Y Kerbrat & S Majeau-Dubois (eds) *The transformation of international environmental law* (2011) 171-191; X Guang *et al* 'China's economic development & environmental protection.' The report emphatically addresses the contradictory relationship between economic development and environmental protection in China.

1.3 The relationship between the investment promotion laws and environmental protection laws

The basic purpose of investment law is to accelerate development though the process pollutes the environment. Thus, the basic purposes of environmental law contradict with that of investment law. Is it possible to reconcile this contradiction? If so, what is the mechanism to reconcile the contradiction?

Today there is a debate on the issue of investment and environment and efforts have been made to resolve it. The issue of investment to bring about development for a country and the protection of the environment was a point of contestation between developing countries and developed countries at the time of negotiation of Rio Declaration. Developed countries argued that nations in the world should work for the protection of the environment. Thus, they believed that the development projects implemented by developing countries should not be implemented if they affect the environment because environment must be protected. Otherwise, the life on earth would be at stake. On the contrary, developing countries argued that no limitation could be imposed on their development strategies. Therefore, the argument of the developed countries in the interest of the protection of the environment is considered as a limitation on their development strategies. For the developing countries, poverty and the alleviation of misery were more poignant and real problems. This was reflected at the negotiation of the 1972 Stockholm Declaration. Finally, both the developed and developing countries agreed that economic development was not necessarily incompatible with environmental protection and, therefore, it could be possible to undertake developmental projects without damaging the environment.²³

In 1992, nations of the world adopted the Rio De-Janeiro Declaration on Environment and Development which incorporates the principle of sustainable development and protection of environment. In the same year, the Convention on Biological Diversity incorporates the principle of sustainable development.²⁴ In short, the principle of sustainable development is accepted as a tool to reconcile the need to development and protecting the environment.

The concept known as green growth is developed so as to ensure sustainable development. Green growth generally means promoting economic development while reducing environmental

²³ Declaration of the United Nations Conference on the Human Environment (1972).

²⁴ United Nations Development Programme 'Human development report' (1994).

pollution, for instance, reducing green house gas emissions, minimizing waste and inefficient use of natural resources, and maintaining biodiversity.²⁵

Coming to agriculture, agricultural investments that may not adversely affect the environment should be implemented. Licensed investments shall be undertaken according to the environmental standards and conditions that are provided under the permit. Investors are required to undertake their activities in line with standards that are aimed at protecting the environment. Environmental standards are criteria for measuring acceptable quality of the environment with regard to pollutions.²⁶ The environmental law protects the environment by stipulating standards such as standards of pollutants released to air, standards for production and control of hazardous materials.²⁷

Today, environmental standards are aimed at protecting the environmental quality than compensating the harm caused to an individual. Thus, the modern environmental law focuses to protect the environment itself.²⁸ To sum up the problem of investment and environment could be resolved by the application of the principle of sustainable development. This research argues that large-scale agricultural investment in Ethiopia should be regulated by law to ensure sustainable development in the sector because law has become an essential component of development.²⁹

1.4 Research questions

The research investigates general and specific questions.

General research question

The research investigates the following conspicuous research question: how do the investment and environmental laws of Ethiopia promote large-scale agricultural development without adversely affecting the environment?

²⁵ OECD *Investment for green growth* (2010). Rules of international investment put protecting the environment as a limitation on investment. P Sands *et al Principles of international environmental law* third edition (2012) 870.

²⁶ BA Garner (Editor-in-Chief) *Black's law dictionary* Eighth edition (2004) 1441.

²⁷ Addis Ababa City Government Environmental Pollution Control Regulations, Reg. No. 25/2007 Art 5(1) (hereinafter Reg. No. 25/2007).

²⁸ L Morrison & R Wolfrum (eds) *International, regional and national environmental law* (2000) 806.

²⁹ N Schrijver & F Weiss (eds) *International law and sustainable development: Principles and practice* (2004) 265.

Specific research questions

- 1) What is the role of law to promote large-scale agricultural development in Ethiopia?
- 2) Why we need to strengthen the nexus between the Ethiopian laws of investment and environment?
- 3) How the Ethiopian laws of investment and environment promote large-scale agricultural investment and protect the environment?
- 4) What can we learn from the laws and experiences of Brazil and South Africa on large- scale agricultural development?

1.5 Purpose/Objective of the study

The basic purpose of the research is to investigate the legal rules that apply to investment and protecting the environment in large-scale agricultural investment in Ethiopia. Therefore, the general objectives include:

- To analyze the role of existing Ethiopian laws to foster large-scale agricultural development and protect the environment;
- To investigate critically the specific laws of Ethiopia those apply to large-scale agricultural investment in Ethiopia. The specific objectives of the research include the following:
- To analyze the rules of Ethiopia that are aimed at promoting large-scale agricultural investment;
- To investigate the Ethiopian laws aimed at protecting the environment;
- To assess critically the implementation of the large-scale agricultural investment and environmental laws in Ethiopia.

1.6 Hypotheses

- The Ethiopian agricultural development policy and laws are believed to be the engine of growth and an instrument to reduce poverty in Ethiopia.³⁰
- The law of environment is aimed at protecting the environment;
- The law of sustainable large-scale agricultural development promotes large-scale agricultural development without adversely affecting the environment in Ethiopia.

³⁰ See Imru (n 16 above) 4.

1.7 Research methodology

Comparative legal research methodology is employed to make comparison between the internationally accepted legal principles of large-scale agricultural investment and the Ethiopian laws. The laws and experiences of Brazil and South Africa are critically assessed with a view to drawing relevant lessons. International law on investment and environment are also considered. Thus, treaties and laws are analyzed. International legal principles of solving the contradiction between environmental law and investment law are also dealt.

The researcher also makes use of relevant literature written by renowned publicists in an extensive manner. Environmental policies, treaties and conventions are frequently consulted to underpin the legal and policy framework in Ethiopia. In the case of Ethiopia, the environmental policy and investment objectives of the country as provided in the respective legislations and policy frameworks are analyzed at close ranges. Other relevant governmental documents are also important sources of data. In addition, on the basis of purposive and random sampling method, questionnaires were developed and distributed after a discussion made with supervisors. Further, the research took the form of appropriate interviews with 44 officials and experts, 4 group discussions with selected experts, governmental officials, investors, and local peoples in *Amhara*, *Benishangul Gumz* and *Gambella* Regional States. In addition, 424 questionnaires have been filled by local residents, governmental officials and experts, and analyzed. Based on accessibility, twelve large-scale agriculture investments from *Amhara*, *Benishangul Gumz*, and *Gambella* Regional States are critically assessed and observations are made.

1.8 Citation style

The citation of the research is based on the ‘Pretoria University Law Press PULP Publication Style guidelines.’ Nevertheless, to make easy to the Ethiopian readers, I cited the Ethiopian works as accustomed in Ethiopia- First name, second name, sir name (where available).

1.9 Scope and framework of the dissertation

1.9.1 The scope of the study

The scope of the study is determined by the statement of the problems stated above. Thus the study is limited to assess the rules that are applicable to investment and protection of the

environment. The researcher examines the investment laws of Ethiopia that are aimed at accelerating social and economic development of the country. Investment may be made by Ethiopian nationals. However, since Ethiopia is a developing country, major developmental investment could be made by foreign investors. Thus, the research critically assesses the international investment law applicable to Ethiopia.

Development is also an internationally recognized right of people. Thus, it is essential to consider the rules of development as they are recognized at the international level and their application in Ethiopia. Furthermore, development should not be made at the expense of environment according to international and Ethiopian environmental laws. Thus, the roles of laws that aimed at protecting and conserving the environment at the national level and international rules are examined critically.

1.9.2 The structure of the research

The first part of the research is devoted to introduce the research problem and the background. The second chapter assesses international law that is applicable to development and large-scale sustainable agricultural investment. The third chapter considers the international laws that govern sustainable large-scale agricultural development. Chapter four is meant to discuss the Ethiopian law in the context of Ethiopian large-scale agricultural investment, and the law of sustainable large-scale agricultural investment in Ethiopia is discussed under chapter five. The sixth chapter provides the data and analysis the practice of Ethiopian law of sustainable large-scale agricultural development. The law and experiences of Brazil and South Africa on responsible large-scale agricultural investment are considered under the seventh chapter. A summary and lists of recommendations are included in the eight chapter.

Chapter Two: The role of international law in development in the context of Ethiopian large-scale agriculture

2.1 Introduction

Law has a great role to play in development. The concept of development will be considered firstly and then this will be followed by the discussion of the role of law in development. Thirdly, the concept of development law at the international level will be discussed. Fourthly, the legal principles applicable to the large-scale agricultural development will be considered. This will be followed by the discussion of the concept of large-scale agricultural investment. Next, the nature and purpose of international environmental law will be treated, and this will be followed by the discussion on debates and conflicts of large-scale agricultural investment law and environmental law. Finally, the chapter will end with conclusion.

2.2 The concept of development

2.2.1 Definition and nature of development

Development became significant after the end of World War II having a purpose to reconstruct what had been lost due to the war. Thus, the International Bank for Reconstruction and Development, which soon came to be known as the World Bank,¹ was created for the task. At that time development was considered as synonymous with industrialization. Then, Asian and African countries came to independence politically but remained poor, and therefore, aspired for accelerated development.²

However, we do not find one and universally acceptable definition for the term ‘development’.³ The concept of development may be approached from two angles: the right against poverty; and the analysis of long-term economic and social development. The fighting against poverty is an ‘approach (that) focuses on the problem of widespread poverty, hunger and misery in developing countries and on the question of what can be done’⁴ so as to realize

¹ The International Bank for Reconstruction and Development was established in 1944 with the purpose to promote economic and social progress in less developed nations by helping raise their productivity. See JL Parpart *et al* *Theoretical perspectives on gender and development* (2000) 24.

² J Rapley *Understanding development: theory and practice in the Third World* (2007) 1.

³ It is difficult to define the concept ‘development’. RC Blake ‘The World Bank’s draft comprehensive development framework and the micro-paradigm of law and development’ (2000) 3 *Yale Human Rights and Development Law Journal* 159 165; D Simon ‘Development reconsidered: New directions in development thinking’ (1997) 79 *Geografiska Annaler* 183 184.

⁴ A Szirmai *The dynamics of socio-economic development: An introduction* (2005) 2.

development in the short term. This requires development policies and strategies so as to alleviate poverty. However, this approach ignored or disregarded developments that take place irrespective of the fashion of the day. The approach concentrated on short-term perspective of development, and such an approach is criticized for neglecting the agriculture sector in the drive for industrialisation in the 1950's. The long-term approach focuses on issues like why such a difference is there between the developed and developing countries and how it could be possible to solve the problem. It emphasizes that economic growth in its modern form is closely connected with the economic development of the Western countries since the mid-eighteenth century. In addition, the historical study of process of economic growth reveals the importance of saving and investment. Economic growth is expressed in terms of an enormous increase in the capital-labour ratio. Saving, in developing countries is not easy because people living at subsistence level have to postpone present consumption for the sake of investment in future production. This long-term approach to the concept of development is criticized that it seldom offers solution to the present day problem.⁵ From the society or socio-economic point of view, development means 'improvement either in the general situation of the system or in some of its constituent elements.'⁶ Some deliberate actions undertaken by an agent or authority pre-ordered may be considered to achieve improvements. Development policies and private investments are examples of such acts, as recited by Bellu.⁷ The term 'development' may also be defined as 'a planned process of social change'⁸ which would enable to show the role of law in development because law is considered as a tool of social change.⁹

Sen defines development as freedom, and argues that development can be considered as 'a process of expanding the real freedoms that people enjoy.'¹⁰ According to Sen, accepting

⁵ See above, 2-4.

⁶ LG Bellu 'Development and development paradigms: A (reasoned) review of prevailing visions' (2011) 2; The contemporary jurisprudence accepts development as a directed or planned social change, See U Baxi *Human Right in a posthuman World: Critical essays* (2007) 76.

⁷ Bellu (as above); *The stand of Bellu is important for this research since it advocates that policies and investments as instruments to achieve developmental goals, i.e. improvement in the life of the society in general. The term 'development' may also be defined as 'a planned process of social change' which would enable to show the role of law in development because law is considered as a tool of social change.*

⁸ SP Tsoako 'The role of law and lawyers in national development' (1978) 11 *The Comparative and International Law Journal of Southern Africa* 76.

⁹ Law plays a key role in bringing about planned social change. (as above). See also 2.3, below the part that deals with the role of law in development.

¹⁰ A Sen *Development as freedom* (2000) 3. Sen acknowledges that social and economic arrangements facilities for education and health care, as well as political and civil rights, like the liberty to participate in public discussions

development as growth of gross national products or technological advance or social modernization is a narrower view. He explains that poverty, tyranny, poor economic opportunities, systematic social deprivation, neglect of public facilities and intolerance or over activity of repressive states shall be removed so as to achieve development. He further argues that lack of substantive freedom sometimes relates directly to economic poverty, and it robs people the freedom to satisfy hunger, or to obtain sufficient nutrition, or obtain medical services to cure from illness, to cloth or shelter, to have clean water or sanitary facilities.¹¹

Furthermore, the United Nations Declaration on the Right to Development describes development, in its preamble, as:

A comprehensive economic, cultural and political process, which aims at the constant improvement of the well being of all the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.¹²

The Declaration emphasises that development is holistic which embraces a comprehensive economic, cultural and political process. It puts the aim of development to improve constantly the well-being of the entire population including individuals based on their active, free and meaningful participation. Such constant well-being of the society could be achieved on the basis

and security determine freedom. However, he emphatically argued that development advances freedom, See as above.

¹¹ Above 3-4. For treatment of development, law and freedom see CMP Neto 'Development theory and foundations of universal access policies' (2005).

¹² Declaration on the Right to Development, Preamble second para.; Art.1(1); Some do not accept this as a definition to the term 'development' but only a description, See KD Feyter *World development law: Sharing responsibility for development* (2001) 22. However, it helps to understand the essence of development. The definition of the term 'development' comprises of material element, choice and equity. Material element of development indicates the improvement of the standard of living and the reduction of absolute poverty that is the satisfaction of material needs. This relates to the improvement of material wellbeing of people. It is essential to note that development should develop people themselves. Activities must enhance the skills and capabilities of people otherwise, it is not considered as development though people increase in wealth. Therefore, true development is empowerment of people that 'place' 'people in a position to make choices and determine outcomes independently.' Development brings freedom and an individual will have the chance to participate in discussion and decision. Choice- development is 'process of enlarging peoples' choice' as the United Nations Development Programme indicates. It is connected with the enlargement of choices as the expansion of human capabilities and functioning. The threefold essential human capability include 'to be able to lead a long and healthy life, to be knowledgeable and to have access to the resources needed for a decent standard of living' Choice emanates from everyone's inherent dignity- that is everyone should have the ability and opportunity to make choices about his/her wellbeing. Equity-economic growth can promote the well being of people only if it incorporates equity. Equity may either be intersocial equity or intergenerational equity. Intersocial equity requires that development should benefit everyone, and the most vulnerable sections of the society should benefit from the development. This concept is related with the emergence of international law on development that emanates from 'modernization theory' and 'dependency theory'. Intergenerational equity refers to the notion that the development of one generation shall not deny the development of the next generation. It informs the concept of sustainable development. Jd Visser 'Developmental local government in South Africa: Institutional fault lines' (2009) 2 *Commonwealth Journal of Local Governance* 7.

of the increment of the well being of all of individuals in the development activities.¹³ Moreover, the Declaration requires that there should be fair distribution of benefits resulting from their active participation. Nevertheless, it does not include environmental protection as a requirement for development.

Today, the concept of development is required to take into account the issue of environmental protection.¹⁴ According to The World Commission on Environment and Development, development and environment are inexorably interlinked; development cannot subsist upon a degraded environment and the environment cannot be protected where development leaves out the protection of the environment.¹⁵ A concept that considers development and protection of the environment is called sustainable development. Sustainable development is ‘development ... that... meets the needs of the present without compromising the ability of future generations to meet their own needs.’¹⁶ Sustainable development includes peace and security, economic development, and social and human rights as well as environmental protection and conservation.¹⁷

To sum up, the concept of development is a socio-economic process aims at constant improvement of the wellbeing of the population including individuals that they benefit fairly on the basis of their active participation in the development process, and ensuring the protection and conservation of the environment.

¹³ Fulfilling the wellbeing of a person is core in defining development. Report of the Secretary-General ‘The emergence of the right to development’ in United Nations *Realizing the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the right to development* (2013) 8.

¹⁴Rapley (n 2 above) 9. The protection of the environment has gained prominence in the 1970s and 1980s. See RE Gordon & JH Sylvester ‘Deconstructing development’ (2004) 22 *Wisconsin International Law Journal* 1 30. Following the 1972 Stockholm Conference, the concept of development began to consider the environment. Rapley (n 2 above) 9. The protection of the environment has gained prominence in the 1970s and 1980s. See Gordon and Sylvester (above) at 30.

¹⁵GH Brundtland ‘Report of the World Commission on Environment and Development: Our Common Future’ (1987) 48; See also JC Dernbach ‘Creating the law of environmentally sustainable economic development’ (2011) 3 *Pace Environmental Law Review* 614 620-21. Development needs to be considered in balancing the environmental protection and development. SP Marks *et al* ‘The role of international law’ in United Nations *Realizing the Right to Development: Essays in commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) 445-469.

¹⁶ Brundtland (above) 24.

¹⁷ Dernbach (n 15 above) 622.

2.2.2 Development as human right: The right to development

Today the right to development is accepted as a human right.¹⁸ Development has become a right of peoples and individuals in Ethiopia. The right to development is a relatively new¹⁹ concept in international human rights law and integrates human rights and economic development.²⁰ Article 1 of the Declaration of the Right to Development (DRD) defines it as:

An inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.²¹

The definition comprises of three elements as explained by Sengupta. These elements are:²²

¹⁸ At the time of the adoption of the Universal Declaration on Human Rights in 1948, much focus was given to civil and political rights rather than the right to development. Though the Declaration incorporates provisions on economic, social and cultural rights, the issue of development was not included. B Ibhawoh 'The right to development: The politics and polemics of power and resistance' (2011) 33 *Human Rights Quarterly* 76 81-2. The Universal Declaration on Human Rights is considered as a precursor to the right to development. Mesenbet Assefa Tadeg 'The right to development as a normative framework for the human rights obligations of international financial institutions' unpublished mini theses, University of Pretoria, 2008 34. In the 1970s, the distinction between human rights and development fields began to change and the right to development was articulated by developing countries in relation to the New International Economic Order (NIEO). Ibhawoh (as above).

¹⁹ The right to development was formally recognised under the Declaration on the Right to Development for the first time. In 1968, the interconnection between the realisation of human rights and economic development was asserted in an international conference on human Rights held in Tehran. Then, the UN showed its concern with the issue by adopting the Declaration on Social Progress and Development in 1969. ID Bunn 'The right to development: Implications for international economic law' (2000) 15 *American University International Law Review* 1425 1432-33. Keba M'Baye, a Senegalese jurist, has initiated the concept of the 'Right to development' in 1972 in his lecture at the International Institute of Human Rights in Strasbourg by asserting that the right belongs to all persons as 'every [person] has a right to live and a right to live better.' Bunn (above) 1433. The writings of M'Baye emphasised on the right to development as a claim of developing countries at the international level, as equitable development process with the obligation of international community. Thus, the right to development was emphasized on the obligations of the international community rather than those of states. Ibhawoh (n 18 above) 83. In 1977, the UN Commission on Human Rights referred to the right to development in a resolution adopted. The Commission enquires the UN Secretary General, UNESCO and other agencies to examine the right to development. Then, a second study that focused on the right to development at the regional and national dimensions was conducted. In 1981, the UN has established a Working group of experts on the right to development and the Working Group prepared a draft upon the demand of UN. Then, the UN General Assembly adopted the Declaration on the Right to Development on December 4, 1986. The United States of America has opposed it while one hundred and forty-six members voted in favour. Furthermore, Denmark, Finland, Federal Republic of Germany, Iceland, Israel, Japan, Sweden and United Kingdom have abstained. Bunn (above) 1433-34.

²⁰ M Orellana 'Climate change and the right to development: International cooperation, financial arrangements, and the clean development mechanism' (2010) 5.

²¹ Declaration on the Right to Development (n 12 above) Art 1(1). For the meaning of the right to development, see Belachew M. Fikre 'The politics underpinning non-realization of the right to development' (2011) 5 *Mizan Law Review* 249-256.

²² F Kirchmeier 'The right to development- where do we stand? State of the debate on the right to development' (2006) 9. The right to development includes four elements vs. Development is a process that facilitates the realization of all human rights; all human rights are interrelated and interdependent; the right to development is both individual and group right; both states and international communities have the responsibility to fulfil the right to development. Ibhawoh (n 18 above) 83-4. There were controversies even before the adoption of the Declaration on the Right to Development and they continue to be prevalent after the right to development came into being. Western

- A) It is an inalienable human right; according to this concept, it cannot be bargained away.
- B) It includes the process of economic, social, cultural and political development in which all human rights and fundamental freedom are fully realized;
- C) It is a human right by which every person and all people are entitled to participate in, contribute to and enjoy the particular process of development.

The right to development has both internal and external dimensions. The internal dimension of the right to development addresses the duties of each state to ensure domestic policies, and laws to realize the right to development to all its peoples. The external dimension considers disparities of the international political economy. In this regard, states have responsibilities acting individually or collectively at the international level.²³

The first consensus was reached at the 1993 Vienna World Conference on Human Rights and the right to development was described as an ‘integral part of fundamental human rights.’²⁴ From the right-based approach it is aimed at to be an instrument to ensure the development of individual persons as well as peoples at national and international level, and therefore, it has such a dualistic nature.²⁵

The right to development is indivisible and interdependent as all human rights are.²⁶ The right to development as incorporated under the DRD is a right based approach to development, which ‘requires that human rights must be integrated into sustainable human development.’²⁷ It

countries oppose the right to development and social rights as human rights by arguing that they are not individual rights; See A Sengupta ‘The right to development as a human right’ (2000) 9.

a) There is no a duty holder whose obligation would be to deliver the right, Bunn (n 19 above) 1435. Ghai argues that the right to holders and duty bearers are not clear in the case of the right development. See Bunn (as above). Sengupta (n 18 above) 10. The Declaration on the Right to Development clearly imposes duties on States to implement the right to development, See for instance, Art. 3(1)(3), 4(1) of the Declaration.

b) They are not justiceable. Sengupta (as above).

²³ M Salomon ‘Legal cosmopolitanism and the normative contribution to the right to development’ in SP Marks (ed) *Implementing the right to development: The role of international law* (2008) 17-18.

²⁴ Kirchmeier (n 22 above). See also *Vienna Declaration and Programme of Action* (1993), Paragraph 10. Rights based approach to development is essential in development planning and practice. Costantinos BT Costantinos ‘Law and development: Public policy & Legal empowerment of the poor to access justice’ (2012) 54.

²⁵ Kirchmeier (n 22 above). NG Villaroman ‘The right to development: Exploring the legal basis for a supernorm’ (2010) 22 *Florida Journal of International Law* 306.

²⁶ M Ozen *The Right to Development: Current state of the debates held at the UN on the implementation of the historic declaration* (1986). Article 6(2) of the Declaration on the Right to Development reads: ‘All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be to the implementation, promotion and protection of civil, political, economic, social and cultural rights.’

²⁷ Ibhawoh (n 18 above) 84. The Second preamble of the Declaration reads as: ‘... development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the wellbeing of the entire population and all of individuals on the basis of their active, free and meaningful

is also part and parcel of human rights because human rights are interrelated and indivisible. This kind of approach is called holistic approach. Development has political, social, economic and cultural ramifications and development cannot be achieved unless and otherwise other human rights are implemented. Human rights and the right to development are mutually reinforcing each other²⁸ in that the latter requires the application of human rights in development policies and practices.²⁹ The right to development, according to the Declaration on the Right to Development, ensures the responsibility of states³⁰ as well as international community. This clearly shows a deviation from the traditional conception of human rights that are claimed by individuals against states. The Declaration also recognises the importance of international community in the implementation of the right.³¹ In short, the right to development is a core right from which all other rights arise.³²

Moreover, the notion that states and ‘peoples’ can claim as human right from the international community and other states marked a paradigm shift from the concept of traditional human rights, and considered as a non-western conception of human right.³³ The development right is reaffirmed in the Vienna Declaration and Program of Action of 1993 that makes it part and corpus of international human rights law.³⁴

participation in development and in the fair distribution of benefits resulting therefrom’. Declaration on the Right to Development.

²⁸ P Alston & M Robinson (eds) *Human rights and development: Towards mutual reinforcement* (2005) 3-4; A Hayrapetyan ‘The right to development and rights based approach to development as mutually reinforcing concepts for the implementation of international development’ unpublished master's thesis, Riga Graduate School of Law, 2011 32.

²⁹ SP Marks ‘Human rights and development’ in *Research Handbook on International Human Rights Law* (2012) 168-69. It is also argued that the right to development does not add values to the existing human rights. See A Vandenberghe ‘The right to development in international human rights law: A call for its dissolution’ (2013) 31 *Netherlands Quarterly of Human Rights* 187-209.

³⁰ The conventional framework of state responsibility that requires beholder of another state does not suit here, and it requires a re-conceptualization of state responsibility to implement the RTD. See generally Nvd Have ‘The right to development and state responsibility: Towards idealism without a sense of realism?’ unpublished masters thesis, Public international law, 2012.

³¹ Ibhawoh (n 18 above) 85-6; See also Declaration on the Right to Development (n 12 above) Arts 3 and 4. See also ME Samon & A Sengupta *The Right to development: Obligations of states and the right of minorities and indigenous peoples* (2003).

³² Bunn (n 19 above) 1435. According to Art. 1(1) of the Declaration on the Right to Development, it is a right ‘in which all human rights and fundamental freedoms can be fully realised.’ This affirms the claim made by Bedjaoui.

³³ Ibhawoh (n 18 above) 86; The Right to development is controversial concept. See AK Sengupta ‘Conceptualizing the right to development for the twenty-first century’ in United Nations *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the right to development* (2013) 73-80.

³⁴ Ibhawoh (n 18 above) 86; *Vienna Declaration and Programme of Action* (n 24 above). The Vienna Declaration and Programme of Action was revised recently by Vienna + 20 CSO Conference that took place June

2.3 Role of law in development

There is a debate on the issue that law be used as an instrument for development. Some argue that law should follow the society and others argue that law should be a determinant agent in the creation of new norms.³⁵

2.3.1. Theories on law and development

There are various theories on law and development which have changed overtime and new theory crystallizes as older ideas changed and new practices evolve.³⁶ Theory of law and development describes ‘the relationship(s) between law (however defined) and development (however defined) in the particular context of the so called developing countries of the world.’³⁷ In general, theory on law and development is a theory about the relationship between development and law particularly in developing countries, because the role of law in development is given due attention there. In this part of the thesis we will consider the connection of law in development endeavour and how the theories put their role in achieving development. Since economics and law are interconnected in law and development, ‘... there is an intimate relationship between prevailing economic ideas and dominant notions of the proper role of law in development.’³⁸ Therefore, law and development theory is the product of the interaction between legal theory, economic development theory and the practices of development agencies, and it changes as theories and practices in them change.³⁹

25 and 26 2013, and adopted on July 26 2013. See The Vienna + 20 CSO Declaration Adopted in Vienna on June 26, 2013. The Declaration on the Right to Development also envisages that ‘the realisation of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations.’ Declaration on the Right to Development (n 12 above) Art. 3(2).

³⁵ DD Bradlow ‘Differing conceptions of development and the content of international law’ (2005) 21 *South African Journal of Human Rights* 47.

³⁶ DM Trubek & A Santos ‘Introduction: The third moment in law and development theory and the emergence of a new critical practice’ in DM Trubek & A Santos (eds) *The new law and economic development A critical appraisal* (2006) 1.

³⁷ EM Burg ‘Law and development: A review of the literature & a critique of “Scholars in self-entrancement”’ (1977) 25 *The American Journal of Comparative Law* 492 492.

³⁸ DM Trubek ‘Developmental states and the legal order: Towards a new political economy of development and law’ university of Wisconsin legal research paper No. 1075(1 December 2008) 16. Various law and development theories basically are associated with economic theories of the time they have been developed. DM Trubek ‘Law and the ‘New developmentalism’ in DM Trubek *et al* (eds.) *Law, state and development in Latin America* (2013) 1.

³⁹ Trubek, above. A clear set of developmental policies can be derived and development projects planned where law, economics and development agencies practices are all aligned. Trubek, above. See also Trubek, above 1.

Different theoreticians classify theories of development and law variously, for instance, into traditional⁴⁰ and modern⁴¹ or micro⁴² and macro⁴³ law and development theories. However, the writer chooses to treat modernization theory, dependency theory, Neoclassical/Washington

⁴⁰ According to traditional view, development is primarily an economic process consisting of discrete projects like building a dam, a road and a school. Though traditional view recognises that development has social, environmental, and political implications, it argues that these can be dealt with separately from the economic aspects. Bradlow (n 35 above) 53; C Picker (2011) 4 'International trade and development law: A legal cultural critique' *The Law and Development Review* 44-5. According to this view, environmental and social issues are externalities to a given development project. It also accepts that broad policy issues shall be decided by political process, the government and the society in which the policy or project will be implemented. Thus the decision making is 'top-down'. Bradlow, above, 53-55. The traditional view of international development law considers itself as a branch of international economic law that deals with legal aspects of international trade, finance and investment relating the challenges facing developing countries. In investment, it deals with issues of nationalisation and compensation, treatment and responsibilities of investors, regulation and incentives of investors. In trade, it focuses, for instance, on issues to special and differential treatment for developing countries through general system of preference (GSP), and the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement on developing countries. Bradlow (n 35 above) 57-58.

⁴¹ The modern view asserts that economic aspects of development cannot be separated from social, political, environmental and cultural aspects. In short, it views development as holistic and integrated process. Thus, development projects and policies should be treated not so much as discrete economic events but as episodes of economic, social, and environmental transformation. Picker (n 40 above) 44-5; Daniel Haile 'Law and social change in Africa: A preliminary look at the Ethiopian experience' (1973) 2 *Journal of Ethiopian Law* 380. According to this view, environmental and social issues that may be affected by a development project should be incorporated in the project and government must ensure that environmental and social costs are internalized into a development project. Furthermore, the proponents of this development view making consultation of all who will be affected by the development project before decision is made as essential, since consultation is important because the decision makers will learn about the benefits and drawbacks of the project and this will enable them to make a reasonable decision. The modern view of development demands more participatory form of decision-making than the traditional view. And thus, the sovereign is only one actor in the development process. Daniel above, 380-82.

⁴² Micro development is in practice, highly multidisciplinary which includes economic, social and cultural objectives as well as education, health services, income improvement and poverty alleviation, environmental protection, and public participation. Therefore, success in micro development cannot be measured merely through economic growth. We shall also consider developments in other sectors, for example, improved skills in communication, leadership management, stronger sense of self; protection of rights and liberties; increase in agricultural production or manufactured goods; a rise in a family income; buildings, roads, or water system. Furthermore, development focuses on the poor in developing as well as developed countries. Above, 168. Micro development theory was initiated in early 1980's and focuses on developing law and legal resources for the poorest of the poor. Based on the micro development theory, several organisations, such as the International Centre for law in Development, founded in 1982, the International Development Law Institute founded in 1983, and the International Third World Legal Studies Association founded in 1980 were created. Blake (n 3 above) 169. Micro development theory operates in a number of substantive areas including human rights, land reform, environmental and natural resources, gender law, labour law, and consumer law. Micro Development is not a panacea: some problems may remain unsolved. Blake, above, 170.

⁴³ According to macro development theory, development theory is best made from policy makers at the top. Macro development theoreticians assume that development law shall apply in developing countries so as to benefit the poorest of the poor ignoring the poor in developed countries. Development at macro-level is essential particularly in drafting constitution, import/export laws, and labour laws, among others, must well be done at national level. Micro-level development policy and programmes can be criticised from macro-level development theory. Ideally, it is essential to combine both the macro and micro law and development theories. Blake, above, 171-72.

Consensus, Sustainable Development law and development theories to clearly understand the theories and to appreciate the role of law in development.

Modernization theory of law and development

Law and development theory began in the 1960s as an outgrowth of modernisation theory of development.⁴⁴ Modernisation theory propagates for Western style legal institutions to bring about development in developing countries.⁴⁵ In addition to legal reform, it asserts that American legal education would help developing countries to develop and legal education reform has been made to remove the obstacle and training programmes were undertaken throughout Africa, Asia, and Latin America in the hope that lawyers could be trained to appreciate the role of law in development, and to make them ‘social engineers’ to achieve development.⁴⁶

Modernization theory of law and development is based on Weber’s⁴⁷ historical explanation of capitalism in Western Europe. Law could best contribute for capitalism if universally and properly applied where property law protects the fruits of labour, and contract law guarantees the security of future exchanges.⁴⁸ According to Weber, modern law is a necessary condition for modern market. He identified that rational legal system brings about development of capitalism and European legal system was considered more rational than other legal system.⁴⁹

⁴⁴ Blake, above 2, 166. Law and development movement began in 1950’s and 1960’s but failed to address the role of law in the era of colonization, and it is fair to date the current development and law activities to the 1960’s. In 1960s, Western governments, institutions and academics involved themselves with the legal systems of many developing and newly-independent countries. JKM Ohnesorg ‘Developing development theory: Law and development orthodoxies and the Northeast Asian experience’ (2008) 28 *University of Pennsylvania Journal of International Economic Law* 119 222-23.

⁴⁵ Blake (n 3 above) 166; Modernization theory, whose hay-day dates to the 1950s and 1960s consider development as a “process by which “traditional” or “backwards” societies would transform along a host of directions to become “modern”. Ohnesorg, above 233.

⁴⁶ G Barron ‘*The World Bank & rule of law reforms*’ (2005) 6.

⁴⁷ Weber in L Cao ‘Law and economic development: A new beginning?’ (1997) 32 *Texas International Law Journal* 544.

⁴⁸ Cao, above, 543. Modernization theory propagated by American economic historian Rostow, states that all countries should pass similar stages of economic growth as that of developed countries. Modernization of developing countries could be made possible by diffusing capital, institutions and values from developed countries. Thus, modernization law and development theory argued that modernization of developing countries is made possible by diffusing Western law to developing countries. K Davis & MJ Trebilcock ‘What role do legal Institutions play in development?’ (1999) 12-13.

⁴⁹ Cao (n 48 above) 548. The following are factors for development: a) There should be a rational legal system autonomous from other social structure; b) It should consist of systematically observable norms and rules that are purposively constructed; and c) The ‘norms and rules must be applied with principles consistency to produce a

Modernization theory of law and development⁵⁰ believed that newly developing states need the help of developed states not only in the form of money, machines and food but also the great capital of knowledge that includes law teachers, government professors, and research assistants.⁵¹ Thus, legal transplantation was made. The theory encouraged and promoted the adoption of Western economic institutions and legal infrastructure by developing countries. According to this theory, the basic objective of law is ‘...to lead the way to progress through law reform.’⁵²

Moreover, this theory took law as an instrument of change and is called instrumentalist concept. It considered ‘law as a force which can be moulded and manipulated to alter human behaviour and achieve development.’⁵³ The theory is based on the principle of contractual freedom, private property, and competitive markets.⁵⁴ Modern law would provide functioning of modern market system and includes contract and property rights.⁵⁵

Furthermore, this theory attempted to change the ‘traditional’ life of the society to ‘modern’ way of life.⁵⁶ According to this theory, law is a social engineering by which reformist developing country governments would achieve social change in the direction of socially responsible

system of predictable, systematic, formal, and rational law autonomous from prevailing political or religious considerations.’ As above.

⁵⁰ Modernization law and development theory is regarded as the first theory that began in the 1950s and ended up in 1980s. Ohnesorg (n 44 above) 232.

⁵¹ Burg (n 37 above) 499. Since law and development writers were born or at least educated in the West, they prefer Western models to be adopted by developing countries to achieve development. Above, 503.

⁵² Cao (n 47 above) 546-547. Modern law and development theory believes that development in developing countries could be hastened by transplanting legal institutions from developing Western countries. KE Davis & MJ Trebilcock ‘Legal reforms and development’ (2001) 22 *Third World Quarterly* 22.

⁵³ Davis and Trebilcock (n 48 above) 13; Burg (n 37 above) 505. At the time law and development scholars did not give proper attention to the concept that law can foster behavioural norms as educative function. Burg (n 37 above) 509.

⁵⁴ Cao (n 47 above) 549.

⁵⁵ Davis and Trebilcock (n 48 above) 13.

⁵⁶ Alex Inkeles identified the following as factors characterizing ‘modern’ person: a) openness to new experience- to the extent of controlling births; b) independence from parents, priests leaders of government, trade unions, etc; c) belief in the efficiency of science and medicine; d) ambition to achieve high goals, in educational and profession; e) careful in time management (be on time); f) participate in civic and politics; g) update oneself with NEWS. However these may not be accepted in some other parts of the world as Harvard. A Inkeles ‘Making men modern: On the causes and consequences of individual change in six developing countries’ (1969) 75 *American Journal of Sociology* 208-225.

capitalism and pluralist democracy.⁵⁷ Besides, it aspired for competent independent judiciary to ensure or uphold rule of law.⁵⁸

In Ethiopia, it was a time for codification of the laws where Civil Code was one. In the preface, it is, partly provided as follows:

.... in order to consolidate the progress already achieved and to facilitate yet further growth and development, precise and detailed rules must be laid down regarding those problems which do not only face the individual citizen but the nation as a whole....⁵⁹

It was also believed that the Code would contribute to the progress of the state and the welfare of the people(s).⁶⁰ The Commercial Code of the 1960 of Ethiopia also provides in a similar fashion that law contributes for development of the country. In this regard, the preface partly reads:

In the modern world, no nation can hope to expand its commercial and economic life unless there exists a firm legal basis which will assure the necessary elements of stability and security in business transactions while at the same time providing a sufficiently articulated yet flexible framework within which trade and commerce may flourish and grow....⁶¹

This indicates the applicability of modern theory in Ethiopia. However, history has shown that modern law did not necessarily bring about development in developing countries, and the theory was attacked.⁶² The theory was criticised for ignoring the roles that ethnicity and culture can play in development. In the mid 1970s, this fault, *inter alia*, resulted in an ‘open crisis’ in law and development.⁶³

⁵⁷ Ohnesorg (n 44 above) 236.

⁵⁸ Davis and Trebilcock (n 48 above) 22.

⁵⁹ Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960 *Negarit Gazeta* 19th Year No. 2 Addis Ababa 5 May 1960, 1st paragraph of the preface at V (here in after referred to as Civil Code).

⁶⁰ Above, last paragraph of the preface, at VII.

⁶¹ Commercial Code of the Empire of Ethiopia Proclamation No. 166 of 1960 *Negarit Gazeta* 19th Year No. 3 Addis Ababa 5 May 1960, 1st paragraph of the preface, at V (here in after referred to as Commercial Code). The Commercial Code is under revision with the aim to make it fit to the new developments.

⁶² Cao (n 48 above) 550. In 1970s, the theory failed since it was possible to identify the discrepancy between the American ideals and the reality in developing countries. See Davis and Trebilcock (n 48 above) 14. Brian argues that law should be based on the unique forces and factors of each country and a good law in one location may have ill function or be dysfunctional elsewhere. BZ Tamanaha ‘The primacy of society and the failures of law and development’ (2011) 44 *Cornell International Law Journal* 209 219.

⁶³ Blake (n 2 above) 166. David argues that a thought one fits all should be abandoned because the practice of law and development in the past has shown that such an idea is a failure. But we need to have alternatives for a given country based on a detailed study of the uniqueness of a country’s legal regimes. See DM Trubek ‘The owl and the pussy-cat: Is there a future for Law and development?’ (2007) 25 *Wisconsin International Law Journal* 235-241. See also J Kroncke ‘Law and development as anti-comparative law’ (2012) 45 *Vandervilt Journal of Transnational Law* 477-554.

Dependency theory of law and development

The approach of modernization theory in trusting the developing countries as representing the public interest through socially responsible economic development was contested. By 1970s, neoclassical economists attacked the modernization theory by arguing that intervention was insufficient and excuse for rent seeking.⁶⁴ Thus, dependency theory and the World Systems Approach have been developed as a result of the criticism to the modern theory.⁶⁵ Dependency theory and World Systems theory are similar on categorizing the world into two such as ‘core/periphery’, ‘centre/periphery’ or ‘dominant/dependent’ depending on their wealth and power.⁶⁶

Dependency theory as developed by Marx views development as political and intertwined with power dynamics unlike modernization theory that views development as relatively apoliticised.⁶⁷ Marx provided analytical foundation of dependency theory that recognized ‘law as a reflection of the material force of production.’⁶⁸ According to Marx and Engles, law is secondary to economics. The theory detested transplantation of Western law by arguing that the law institutionalise the inequalities of ‘trade’, and structure economic relations to the advantage of European colonizers.⁶⁹ Most dependency theorists contended that the replacement of regimes dominated by elites with more populist governments that would adopt socialist economic

⁶⁴ Ohnesorg (n 44 above) 239-40. Dependency theory of law and development was come into being as a response to the failure of modernization law and development theory. Though both modernization and dependency theories recognize that liberalism and market imported from developed countries to developing countries as problematic, while dependency theory believed that capitalism is imposed upon developing countries is the cause for underdevelopment. Cao (n 48 above) 551; D Greenberg ‘Law and development in light of dependency theory’ in S Spitzer (ed) *Research in law and sociology* (1980) 135.

⁶⁵ Ohnesorg (n 44 above) 232. The second Law and development theory began around 1989 which was the result of changes in the economics academy since the 1970s and a neoliberal rule of law theory associated with the ‘Washington Consensus’ has been developed. As above. Modernization theory is different from dependency theory in view that creation of surplus capital as a necessary condition to the economic development, and developing countries would develop if they put in place the right policies as Europe did. Dependency theory, on the contrary, considers capital accumulation as a historically specific occurrence that is related with exploitation of developing countries by developed ones. Cao (n 47 above) 551-52. See also Davis and Trebilcock (n 48 above) 23.

⁶⁶ Ohnesorg (n 44 above) 241. Core- represents the advanced countries, whereas peripheral indicates poor countries. *Ibid.*

⁶⁷ Cao (n 47 above) 551.

⁶⁸ Above, 552. For detailed treatment of the dependency theory see Greenberg (n 64 above) 129-159.

⁶⁹ As above.

policies. This requires state ownership of basic industries, prohibit investment, and adopt protectionist tariff regimes.⁷⁰

Dependency and world systems approach influenced deep scepticism towards legal development assistance in domestic legal systems. The theorists believed that rectifying the disadvantageous distribution of property and land is essential that implies the redistribution of property and the reform of oppressive land tenure regimes. Economic and social rights such as the right to education, health services, food, housing, employment and income are given emphasis. Then, instead of reforming national law a movement towards international law reform has made and the New International Economic Order (NIEO) movement of the 1970s came into being.⁷¹ One of the objectives of NIEO was to permit developing countries to enact laws to promote foreign trade and investment that would help them to reduce their dependence to developed countries. Thus, they tried to change the principle of most favoured nations and limit the amount of compensation payable for nationalization and expropriation of foreign owned property. There was also a movement to change the system of intellectual property right to encourage technology transfer.⁷²

Dependency theory proposes that the development of Third World country depends on similar institutions and development systems of other developed country. However, this theory is attached for the reason that it does not consider the internal characteristics of developing countries.⁷³

Neoclassical/Washington consensus law and development theory

The Washington Consensus and energetic neo-liberalism were necessitated to frame and justify the law and development agenda after the collapse of Soviet Union and the economic globalisation of the 1990s. Law was considered as ‘institution’ justifying legal reform and the

⁷⁰ Davis & Trebilcock (n 48 above) 17. Dependency theory propagated for socialist form of government. Above 23.

⁷¹ Ohnesorg (n 44 above) 242-43. Dependency theory of law and development flourished in mid 1970s while modernization theory came under attack. Cao (n 47 above) 551. Davis & Trebilcock (n 48 above) 18.

⁷² Davis & Trebilcock (n 48 above) 18. There is an argument that development theory by the end of 1970s lacked not only a leading model but also clear ideas about what could be done to achieve development. Tamanaha (n 62 above) 210. This seems to be the reason why some authors do not consider dependency theory of law and development as a theory.

⁷³ Tamanaha, above, 241.

rule of law became the umbrella to unify a wide range of legal development initiatives.⁷⁴ The neoclassical economic thinking dominated at that time and concern to modernizing government institutions and law was intended to build modern government institutions and to ensure effective transition of government policies into free market and limited intervention of the government.⁷⁵ Neoclassical law and development theory, which was prevalent in the 1980s and early 1990s, propagates for the rule of law and protection of property rights.⁷⁶

The Washington Consensus or neoliberal rule of law that is developed by the World Bank⁷⁷ implanted a bottom up legal system where private property protection was the centre of the approach. It also needed both private and public law to regulate the game. Private law protects the private property and contract law that would facilitate the trade. Reform of courts is intended to make them effective, 'user-friendly', low-transaction-cost that enforces private rights. Legal profession reduced the cost of transacting while private property was protected by criminal law, which recognises law and order for proper functioning of the economy. In addition, intellectual property rights were protected to encourage invention; competition law to make markets competitive; effective corporate law protecting shareholders were important field of law.⁷⁸

By the end of the 1990s, the NIEO has been taken as a failure. However, Rajapo argues that NIEO has impacts on international law that shaped it in important and continuing manner by establishing institutions and norms.⁷⁹

The current law and development - Sustainable development

The concept of sustainable development has emerged as a concept that describes patterns of development that minimizes the adverse effect of development on the environment.⁸⁰

⁷⁴ Ohnesorg (n 44 above) 243. The 1990s Washington Consensus and neo-liberalism is considered as a real law and development theory after modernization. As above. It took root in the second 'moment' of law and development, neoclassical economic came into being in the late 1980s and early 1990s and could be taken as the basis for Washington Consensus. C Thomas 'Law and neoclassical economic development in theory and practice: Toward an institutionalist critique of institutionalism' (2011) 96 *Cornell Law Review* 977.

⁷⁵ Ohnesorg (n 44 above) 244.

⁷⁶ The Neoclassical law and development theory bases its assumption on the New International Economics (NIE) that holds that transitional costs determine the productivity of economic system, and institutions are keys in determining efficient economic organization. NIE focuses on property and contractual laws. Thomas (n 74 above) 979-85.

⁷⁷ Ohnesorg (n 44 above) 247.

⁷⁸ Above, 248-49.

⁷⁹ B Rajagopal *International law from below Development, social movements and Third World resistance* (2003) 78.

Environmentalists believe that some factors affect the environmental quality, and absolute poverty is an obstacle which tends to contribute to environmental degradation because no alternatives might be explored since one is in poverty. For instance, poor people cultivate ecologically sensitive land, burn biomass fuels to cook, and have more number of children - all of which may affect the environment.⁸¹

Sustainable development requires developing countries to adopt laws to protect the environment by restricting pollution and promoting conservation.⁸² Environmental protection needs policies like birth control, environmental education, prevention of pollution etc.⁸³ People whose well-being is closely tied should air their opinion in formulating rules that will affect the human interaction with a given ecosystem.⁸⁴ Moreover, administrative law and civil procedure may be reformulated to empower people with relevant interest and expertise to have a stand and influence environmentally significant decisions. What is more, property law is needed to grant property rights to certain groups like future generations, women and indigenous peoples.⁸⁵

2.3.2 Role of law in development

The Marxian thought and Historical Schools do not accept the concept law plays roles in bringing development. Those schools are out of tune with modern reality and totally inapplicable in developing countries, as Bradlow correctly pointed out.⁸⁶

There is an agreement, particularly in a developing country like Ethiopia, that law can be employed as a means of social engineering.⁸⁷ According to Bradlow,⁸⁸

...law as an agent of change has direct and indirect role to play. It may create new norms or it may make the atmosphere conducive to change by permitting the other factors that bring social change to have full play.

⁸⁰ Davis & Trebilcock (n 48 above) 28. For the discussion of new developmentalism see FC Sherman 'Law and development today: The new developmentalism' (2009) 10 *German Law Journal* 1257-1273.

⁸¹ Davis & Trebilcock (n 48 above) 30.

⁸² Above, 31.

⁸³ As above. Sustainable development dictates the adoption of legal rules that restrict pollution and promote conservation. Davis & Trebilcock (n 48 above) 25.

⁸⁴ Above 31.

⁸⁵ Bradlow (n 35 above) 78.

⁸⁶ Above, 48.

⁸⁷ As above; See also AW Seidman & RB Seidman 'Lawmaking, development and the rule of Law' in J Arnscheidt *et al* (eds) *Lawmaking for development Explorations into the theory and practice of international legislative projects* (2008) 91-132. Sarkar and Singh argue that it is not the law that determines the development of India but the politics, See P Sarkar & A Singh 'Law, finance and development: further analyses of longitudinal data' 2010 *Cambridge Journal of Economics* 328.

⁸⁸ Bradlow (n 35 above) 54.

American development and legal scholars accepted that law plays essential role in the development of a nation.⁸⁹ Law has a positive role in socio-economic development. Many theories support this role of law. In this regard, it is underscored that:

Law has repressive, facilitative and ideological dimensions. Any given system of laws will probably have aspects of all three within them. However, one may be dominant. The repressive function of law addresses the question of coercion in law. Thus legal repression is variable. Law can be more or less coercive. By repressive functions we mean the degree of mobilisation of physical force in the service of social control.... the facilitative function in law can be defined as the degree to which law aids in assuring predictability and certainty in behavioural expectations... Law, in its facilitative function allows coordination, planning and the expectation that certain behaviours will normally follow other behaviours. So long as there is congruency between us concerning our expectations we can plan, participate, respond and carry project forward with a minimum of difficulty.... The Third function of law is ideological. Ideological as a belief system is always present in law. In other words, law systematically embodies the value of some people, but disregards some values of others. Accordingly, the question of gender, race, class, sexual preference, etc, becomes a central issue in discussions of ideology....⁹⁰

Law has the function of coordinating and planning as well as achieving a required behaviour. It is possible to use law to bring about change in a society. To date, a law that promotes development as a process is considered as a proper law.⁹¹ Among the three functions of law, i.e., the repressible,⁹² ideological and facilitative functions, facilitative is the most important in promoting socio-economic need of a community. Law has an 'essential role in guiding and legitimizing the process of change'⁹³ in a society.

Ulen raises three points to argue that law is not at least the only thing for economic development. He argues that first it ignores other alternatives to development. Social norms play great role in development since they are accepted and followed by the society. It is only where social norms could not solve the problem that law comes into picture. According to him, social norms are a close substitute to law. 'Social norms are the principal guide to good behaviour', particularly in developing countries, that they are guiding behaviour to efficient, growth-enhancing channels.⁹⁴ However, he admits that there are deleterious social norms that may hinder development like racism, and he accepts that law has a role in correcting such things in

⁸⁹ Anlo *Neither the role that is indifferent nor is overboard* 5. Weber argues that law plays a pivotal role in economic development. See generally R Swedberg 'Max Weber's contribution to the economic sociology of law' (2006) 2 *Annual Review Law Social Science* 61- 81.

⁹⁰ A Ali *Law and development in changing Indonesia* (2001) 76.

⁹¹ S Bahuja 'Decolonizing International Law: Development, economic growth and the politics of universality' unpublished PhD thesis, University of London, 2009 288.

⁹² As a repressive function, law plays a vital role in implementing government programmes by providing sanction. DR Mandelker 'The role of law in planning proces' (1965) 30 *Law and Contemporary Problems* 26.

⁹³ IFI Shihata 'The role of law in business development' (1996-1997) 20 *Fordham International Law Journal* 1578.

⁹⁴ TS Ulen 2010 'The role of law in economic growth and development' (2010) 18-19.

developing countries. He also argues that modern legal system may be a product to development rather than being pre-requisite for development.⁹⁵ In any case, law is essential to promote development behaviour in developing countries like Ethiopia.

The second critic of Ulen is that developmentalism ignores the great contribution that stability plays in economic growth and development. Stability is extremely an essential background for long-term growth. Investors need to assure that the next year will be as stable as this year so as to continue their investment. Democracy could be taken as an institution to stability. However, Ulen, by referring the great economist Seymour Martin Lipset, argues that democracy is the product of growth, but not a precursor to it. He further argues that democracy is essential condition for growth.⁹⁶ The writer of this thesis believes that democracy will play an essential role to stabilise the society, but it is important to enhance development hand in hand with well-established democracy, and the role of law in the process is irreplaceable.

Thirdly, Ulen argues that developmentalism undermines other things. He emphasised that it does not consider the role of leadership in enhancing development. Development requires change and people may be resistant to development. Responsive politicians are important to lead the society, he argues. The losers in the change will try to fight against change. He pointed out that 'leaders with extraordinary courage, vision and determination' are required to bring about development.⁹⁷ In fact political determination as well as quality of leaders play vital role in development. However, this could not lead one to deny the role of law in development.

The pragmatic evidence shows that the rule of law does contribute to the development of a nation and its wealth. At least in theory, a reasonably well functioning legal system is a necessary condition of prosperity of a nation. The anomaly is that a poor country may not be able to afford a good legal system and it can never be rich without a good legal system.⁹⁸ In the United States of America, law has played a central role in the process of social change. Law has played a role to free the slaves and it also introduced an affirmative action.⁹⁹ According to

⁹⁵ Ulen does not fully comfortable to conclude that social norms substitute legal norms in developing countries; rather he tends to accept the role of law in development in developing countries. See Ulen (above) 19-20.

⁹⁶ Above, 20-21.

⁹⁷ Above, 21-23.

⁹⁸ Blake (n 3 above).

⁹⁹ SJM Donnely 'Reflecting on the rule of law: Its reciprocal relation with rights, legitimacy, and other concepts and institutions' *Annals of the American Academy of Political and Social Science*, (2006) 603 *Law, Society and Democracy: Comparative Perspectives* 41. It has been found that law and legal institutions have been played a role in Korea's economic development, and this can be taken as an example. See SW Chang 'The role of law in economic development and adjustment process: The case of Korea' (2000) 34 *The International Lawyer* 267-287.

Duncan Kennedy, 'legitimacy of power' is an essential element in social change through law. This concept was used to attack the slave trade.¹⁰⁰

The absence of law and well functioning legal system presents a fundamental barrier to economic development.¹⁰¹ Thus, the state shall design and enforce laws that support economic growth. The law should clearly indicate the roles of individuals (investors) in market oriented policy so as to promote economic growth. Laws that detail the rules of engagement among economic actors and between economic actors and the state are essential for development. These laws should also be fully enforced.¹⁰²

Since there is a connection between legal institutions and economic growth in the modern world, it is possible to use law to promote development.¹⁰³ Law is vital to development since it creates incentives for people to behave in a growth-enhancing manner. Thus, law can harness individual interest to serve the public good, including people to 'do good by doing well'.¹⁰⁴ Law mobilizes incentives and disincentives to enhance appropriate behaviour to achieve its goals. Land law provides rules about land rights and regulatory frameworks and administrative competencies that are the basis for mobilizing non legal incentives.¹⁰⁵ Hence, a business organization must have appropriate incentives to produce and sale to make a profit, by respecting the interests of customers and employees by the products they are purchasing or producing.¹⁰⁶

Law promotes rule of law.¹⁰⁷ Though the practice does not show that good governance is an essential factor, economists argue that governance is one of the critical factors explaining the

¹⁰⁰ Donnely (above) 41-42.

¹⁰¹ TF McInerney (ed) *Searching for success: Narrative accounts of legal reform in developing and transition countries, legal and governance reform: Lessons learned No. 1* (2006) 9. Ulen argues that 'economic growth could not occur without efficient institutional arrangements and property rights.' Ulen (n 94 above) 989.

¹⁰² AJ Perry 'The Relationship between legal systems and economic development: Integrating economic and cultural approaches' (2002) 29 *Journal of Law and Society* 294.

¹⁰³ Ulen (n 94 above) 17. Institutions are important to achieve development. Law establishes and empowers institutions to bring about development. See AR Roth 'Capital-market development in Israel and Brazil: two examples of the role of law in development' (1967) 19 *Stanford Law Review* 1277-1306. For the role of institutions in development see D Acemoglu & J Robinson 'The role of institutions in development' (2008).

¹⁰⁴ Ulen (n 94 above) 17.

¹⁰⁵ JW Bruce 'Reforming land law to achieve development goals' in JW Bruce *et al* (eds) *Land law reform: Achieving development policy objectives* (2006) 3.

¹⁰⁶ Ulen (n 94 above) 17.

¹⁰⁷ Though there is no agreed definition to the term 'rule of law', Ringer T concludes that rule of law should be understood as a means of development. T Ringer 'Development, reform, and the rule of law: Some prescriptions for a common understanding of the 'rule of Law' and its place in development theory and practice' (2007) 10 *Yale Human Rights & Development Law Journal* 178. Rule of law is a guarantee against arbitrary government. It contains the notion of bureaucratic quality that directs towards institutional strength and quality of civil service.

divergence in performance across developing countries.¹⁰⁸ Thus, the absence of rule of law and not well functioning legal system presents a fundamental barrier to economic development.¹⁰⁹ Development includes various freedoms, like freedom from torture, and other abuses, freedom of expression, freedom of political opposition and dissent. Rule of law guarantees freedom and human rights, and rule of law is not only instrumental to development, but also an intrinsic value of development.¹¹⁰

Law is the basis on which parties can conclude their agreement, and it provides confidence for parties that disputes may be resolved fairly and efficiently. Since law establishes predictability and order,¹¹¹ the rule of law promotes economic development. The rule of law sets 'rules of the game' in critical fields like investment, contracts and property. It also assures social rights and government accountability.¹¹² Rule of law ensures property rights and the enforcement of contractual obligations¹¹³ predictably. This would ensure that government will enforce 'the

Thus, professionalism, independence from political pressure, adequate pay, appropriate staffing and freedom from corruption are essential elements of rule law. (Above) 10. Rule of law exists where:

The government itself is bound by the law; 2) every person in society is treated under the law; 3) the human dignity of each individual is recognised and protected by law; and 4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy. T Krever 'The legal turn in late development theory: The rule of law and the World Bank's development model' (2011) 52 *Harvard International Law Journal* 311.

¹⁰⁸ MH Khan 'Governance, economic growth and development since the 1960s' (2007) 1.

¹⁰⁹ Loris Director General International Development Law Organisation 9. It is submitted that rule of law must play in development that envisions 'new form of governance and law that are experimental, participatory, flexible, multi-level, and revisable.' Trubek, 2008 (n 38 above) 31-2.

¹¹⁰ MJ Trebilcock & RJ Daniels *Rules of law reform and development: Charting the fragile oath of progress* (2008) 5.

¹¹¹ Characteristics of law for development include: 1) predictability-since law is predictable, persons guide their actions in relation to others and they will have confidence in their assessment of how others will act. Law of contract, sales, agency, business organizations, labour law, etc are laws to guide economic relationships in a country. 2) procedural capability- procedural laws that help resolving disputes in court or administrative authorities or by arbitration be functional efficiently to bring economic activity to its maximum level; 3) codification of goals- a law often embodies a government's statements of goals for the development of its country. This may be done explicitly or impliedly. therefore, people can understand the intention of their government and act accordingly; 4)education-law can confirm existing habits or creates new habits, i.e., it establishes new norms of conduct that are conducive for the development of a country; 5) balance- a government may wish to undertake several goals such as education, economic development, environmental protection. These various goals may conflict each other. The law may help to embody a balance among these goals; 6) defining and clarify of status- law clarifies acceptable or legitimate status of things and people. A law clarifies the use of land. This help the planners and masses to act accordingly; 7) accommodation- it may be essential to consider the interests of people in the process of change. Law helps to accommodate these different interests through the means of courts, arbitral tribunals and administrative bodies. JD NY Hart 'The role of law and economic development' (1964) 12-15; See also Shihata (n 93 above) 1581-1583.

¹¹² See H Yu & A Guernsey The rule of law as a goal of development policy available at: <http://www.viowa.edu/ifdebook/faq/Rule.of.Law.shtml> accessed on: 24 May 2016.

¹¹³ Krever (n 107 above) 312. Rule of law as instrument protects private property rights and facilitates the enforcement of long-term contracts. These are crucial to raise the level of investment and rates of economic growth.

rules of the game' and investors would be voluntary to invest in a certain stable environment. The rule of law is essential that creates incentive structure for private sectors and facilitates by which private sector to function.¹¹⁴ Moreover, rule of law promotes 'economic development more sustainable without jeopardizing competitiveness.'¹¹⁵

Today, development is given high priority in all African states and law must play a new and important role in the development process.¹¹⁶ It is believed that '... law can certainly play both instrumental and responsive roles for the realisation of sustainable socio-economic development in Africa,...'¹¹⁷ African States have adopted Abuja Declaration on Development of Agribusiness and Agro-industries in Africa to promote agricultural role in development. Mindful of the role of law in development, they urge to 'establish the requisite legal, regulatory and institutional framework to support agribusiness and agro-industry development.'¹¹⁸ As a developing country, Ethiopia aspires to achieve development by ensuring democracy and rule of law and adopted policy and strategy that ensure citizens' right to get benefit from development according to his/her contribution thereto.¹¹⁹

2.4 International development law

Development law may be described as a field of law that 'embraces any legal field which, under the given circumstances of a country, is relevant or essential for social, economic and political

MJ Trebilcock & RJ Daniels *Rules of law reform and development: Changing the fragile path of progress* (2009) 5. See also, YS Lee 'Law and development for least developed countries: Theoretical basis and regulatory framework for microtrade' in YS Lee *etal* (eds) *Law and development perspective on international trade law* (2011) 7-28; P Bardhan *Law and Development* 1.

¹¹⁴ Krever (n 107 above) 312.

¹¹⁵ J Tendler *The rule of law, economic development, and modernization of the state in Brazil: lessons from existing experience for policy and practice* (2007) 7. There is no agreed definition of the term 'rule of law' for the purpose of development. However, it is considered as a means of development. See generally Ringer (n 107 above) 149.

¹¹⁶ MA Baderin 'Law and development in Africa: Towards a new approach' *NIALS Journal of Law and development* 4. African countries, after liberalization from colonization, have believed that law can bring about social change. See Y Ghai 'The role of law in the transition of Societies: The African experience' (1991) 35 *Journal of African Law* 8-20.

¹¹⁷ Baderin (above) 6. There has been an increase recognition that law matters for development. Bv Rooij *et al* 'Law making for development: An introduction' in Bv Rooij *et al* (eds) *Lawmaking for development: Explorations into the theory and practice of international legislative projects* (2008) 11. A research confirmed that law plays a key role in development. See generally T Ginsburg 'Does law matter for economic development? Evidence from East Asia' (2000) 34 *Law & Society Review* 829-856. To achieve development goals, African countries should develop a law that emanates from the unique national cultural ethos. G Jessup 'Development law: Squaring the circle, advancing human rights in Africa' (2006) *Human Rights Review* 96 98.

¹¹⁸ Abuja Declaration on Development of Agribusiness and Agro-industries in Africa.

¹¹⁹ ልማት፣ ዲሞክራሲና አብዮታዊ ዲሞክራሲ (ጥቅምት 1999 ዓ.ም.) (Development, democracy and revolutionary democracy (October 2007)) 82 (Available only in Amharic).

development or advancement.¹²⁰ Development law also called law of development is aimed at overcoming development impediments,¹²¹ by identifying:

- 1) relevant behaviour or tradition in terms of law;
- 2) development goals or aims that can be achieved through law reform;
- 3) legal institutions to be reformed;
- 4) persons whose legal rights to be affected are vested or who are subject to be reformed.

Since the issue of development is required to be addressed at the international and national levels, development law that governs development is classified into international and national or domestic development law.

Today, we do have the corpus of international development law, and the emerging new international law requires a new approach to the very notion of international development law.¹²² Bradlow describes international development law (IDL) as a 'branch of international law that deals with the rights and duties of states and others involved in the development process.'¹²³ This makes clear that the content of IDL depends on the content of development. It is difficult to reach agreement on the content of IDL since there is no consensus on how the economic, social, cultural, spiritual and environmental aspects of human life.¹²⁴

IDL can accommodate the dynamic and evolving nature of the concept development, unlike other branches of law.¹²⁵ Thus, IDL is a dynamic, progressive and forwarding looking, whose

¹²⁰ A Thomashausen 'The concept of development law' (1986) *South African Public Law* 230 232.

¹²¹ Above, 233.

¹²² M Bulajic *Principles of international development law*, Progressive development of the principles of international law relating to the New International Economic Order (1993) xi.

¹²³ DD Bradlow 'Development decision-making and the content of international development law' (2004) 27 *Boston College International & Comparative Law Review* 195 195; Bradlow (n 35 above) 47. See also Picker (n 40 above) 44. International development law is also defined as 'international law of development'. S Sucharikul 'The nature and sources of international development law' (Encyclopaedia of Life Support Systems (EOLSS)) 3. As to the nature of international development law, see G Wang 'International development law in the globalized world' (2006) 13 *James Cook University Law Review* 187 199; A Carty 'The concept of international development law' (Encyclopaedia of Life Support Systems (EOLSS) Vol. 1.

¹²⁴ Bradlow (n 35 above) 47. International development law considers the legal roles and procedures that result in development policies and projects, which consider the economical, environmental, social and legal sustainability defining the rights and responsibilities of both developing and developed states in the international economic activity. In addition, modern international development law includes the traditional, international economic law issues, as well as international environmental and human rights law principles and documents that are relevant to the holistic view of the development process. Bradlow (n 123 above) 210-11.

¹²⁵ AFM Maniruzzaman 'International development law as applicable law to economic development agreements: A prognostic view' (2001-2002) 20 *Wisconsin International Law Journal* 40 42-3. International development law consists of various international instruments that govern development, while the right to development law is a branch and significant aspect of law of development. E Kwakwa 'Emerging international

value lies in serving the special development needs of the developing world by setting a dualistic normative standard in international economic relations between the developed and developing world and also between states of different levels of development within the developing world itself.¹²⁶

IDL promotes development. It consists of 1) international rules and arrangements concerned with aid, trade, investment and the like to accrue benefit for less developed countries; and 2) resolutions, declarations, charters of rights and duties as well as standards of international organizations and conferences.¹²⁷ IDL includes the rights to development, sustainable development, and regulating development projects.¹²⁸ IDL is a very wide subject encompassing myriad aspects, including foreign investment as well as the total well being of human beings (in addition to economic development of a country through foreign investment).¹²⁹ IDL is a branch of international law¹³⁰ that governs development. International law is defined as

...rules and principles of general application dealing with the conduct of nations and of international organisations and with their relations inter se as well as with some their relations with persons, whether natural or judicial.¹³¹

Thus, all transnational and international development activities, policies, obligations and liabilities fall within the ambit of international law.¹³² IDL is a law that regulates the relations among sovereigns but economically unequal states. However, it is essential to note that IDL is not the law of the Third World, but the international law of the modern era of development of human being. IDL proceeds from the premise that equality in conditions of economic inequality is tantamount to the legalisation of inequality while classic international law is based on the principle of sovereign equality.¹³³

development law and traditional law-congruence or cleavage?' (1987) 17 *Georgia Journal of International & Comparative Law* 431 432-433.

¹²⁶ Maniruzzaman (above) 42-3.

¹²⁷ Kwakwa (n 125 above) 433 and 435. International development law is based largely on international treaties, UN resolutions and declarations, and state practice. The substantive content of international development law arises from: 1) resolution on the Charter of economic Rights and Duties of States; 2) Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States; and 3) The United Nations Covenant on Economic, Social and Cultural Rights. Kwakwa (above) 446-447.

¹²⁸ Sucharitkul (n 123 above) 7.

¹²⁹ Maniruzzaman (n 125 above) 45.

¹³⁰ International development law has become integral part of public international law with a binding force in the international community. Wang (n 123 above) 232.

¹³¹ Restatement [third] Foreign Relations, 1986 cited by Picker at 48.

¹³² Picker (n 40 above) 48. For the treatment of international law and IDL, see Sucharitkul (n 124 above).

¹³³ Bulajic (n 122 above) 43. International development law has the objective of redressing international inequalities in development. S Newton 'The dialectics of law and development' in DM Trubek & A Santos (eds) *The law and economic development: A critical appraisal* (2006) 186.

Large parts of IDL are not sufficiently similar with international law. IDL is dissimilar to international law in substance, style, origins and objectives. Since its objectives are more likely to be carried out in or concerning non-western countries than is the case for the rest of international law, IDL will be found prevalently in non-western legal culture. This is a single largest factor influencing the uniqueness of international development law.¹³⁴ Second, IDL is designed, *inter alia*, to regulate asymmetric relations-from developed to developing and vice versa, international law, in contrast usually applies between equals or deemed equals. Third, there may be a normative content to IDL not as typically recognised or accepted for other parts of international law. IDL is not at times quite focused on the human condition, while international law is strongly positivistic legal system focused on states. In fact international law includes non-positivist concepts like human rights and humanitarian law which are rare. What is more, the legal culture in those areas is different from general international law. IDL has no one international institution or well-defined substantive body of law in which it can be solely located. In other subfields of international law, we find institutions, WTO for trade; and International Criminal Court for international criminal law for instance.¹³⁵ IDL is not a cohesive body of law so much as an unsystematic collection of hard and soft rules and regulations found across numerous systems.¹³⁶

According to the opponents of IDL, the principles of IDL should be classified as functional or optional. They argue that these principles are not part of general international law, nor included in the existing principles of positive international law, since they are not recognized in a treaty. The principles of preferential and non-reciprocal treatment of developing countries should

¹³⁴ Picker (n 40 above) 53. Western legal culture has the following characteristics:

- 1) A distinction between legal and other institutions, with law having an independent existence and identity from the other institutions;
- 2) A theoretical separation of politics and morals from law;
- 3) Administration of the law by trained specialists-lawyers and judges;
- 4) Legitimate contribution of legal scholarship to the development law ;
- 5) Growth and change of law as part of a pattern of development;
- 6) Supremacy of law over political authorities;
- 7) A view of the competing legal systems and justifications as interdependently legitimate; and
- 8) Endurance of the legal tradition even when legal systems are overthrown.

Many of these characteristics may be found in non-western legal cultures, but what distinguishes western legal culture, it is the full package together which defines the western legal tradition. See Picker (n 97 above) 54.

¹³⁵ Picker (n 40 above) 55-56.

¹³⁶ Above, 57.

remain limited to their implementation. They further believed that any other approach to the implementation of IDL is unacceptable.¹³⁷

2.5 Laws to promote international investment

The term ‘investment’ may have various definitions in different disciplines and contexts.¹³⁸ It can be defined as a commitment of funds made in the expectation of positive return, i.e., profit, with a risk assumed.¹³⁹ According to this definition, profit is essential. A fund is committed to gain profit. However, there is a risk of loss during the investment. To avoid loss, proper care and management is required. From the legal point of view, investment is defined as ‘expenditure to acquire property or asset to produce revenue.’¹⁴⁰ This definition also includes an essential element since producing revenue means profit making. Investment, under international investment law, is defined as any kind of asset such as property, rights and interests.¹⁴¹ However, this definition does not clearly incorporate profit making as an important element to define ‘investment;’ it is simply any kind of asset.¹⁴²

Investment may be either international or domestic. Foreign investment¹⁴³ is classified into portfolio investment and foreign direct investment. Portfolio investment is that where there is a movement of money for the purpose of buying shares in a company formed or functioning in another country.¹⁴⁴

¹³⁷ Bulajic (n 122 above) 44.

¹³⁸ See Tesfaye Abate Abebe *Investment law teaching material* (2008) 2. The concept ‘investment’ is subject to debate. For detailed treatment, see S Manciaux ‘The notion of investment: New controversies’ (2008) *The Journal of World Investment & Trade* 1-24.

¹³⁹ V Gangadhar & GR Babu *Investment management: Including portfolio management & security analysis* (2003) 2.

¹⁴⁰ BA Garner (Editor-in-Chief) *Black’s law dictionary* Eighth edition (2004) 844.

¹⁴¹ SP Subedi *International investment law: Reconciling policy and principle* (2008) 58. Investment may be defined restrictively or broadly. For the treatment of the term under ICSID, see JD Mortenson ‘The meaning of “investment”: ICSID’s Travaux and the domain of international investment law’ (2010) 51 *Harvard International Law Journal* 257-318.

¹⁴² Asset is defined as an ‘item that is owned and has value. The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and good will.’ It is the entire person’s property. Garner (n 140 above) 125-126.

¹⁴³ Foreign investment is defined as ‘a transfer of funds or materials from one country (called the capital exporting country) to another country (called the host country) in return for a direct or indirect participation in the earnings of that enterprise’ See M Sornarajah *The international law on foreign investment* Third edition (2010) under foot note 10.

¹⁴⁴ Above 7-9.

Foreign direct investment (FDI), on the other hand, is an ‘investment made to acquire a lasting management in an enterprise operating in a country other than that of the investor.’¹⁴⁵

Foreign direct investment, one type of international investment, is essential in bringing about development. Foreign direct investment will transfer necessary technology, knowledge and skill that are essential inputs for development to the host state. It also offers the opportunity to use the advantages of liberal and open economy.¹⁴⁶

Foreign direct investment (FDI) can boost exports and foreign currency earnings.¹⁴⁷ FDI flows to developing countries from developed countries to transfer technology that promotes development in the former countries.¹⁴⁸ However, the technology that is transferred should be relevant to the host state. The technological level of the host state is also of a great importance. Where the absolute technological level in the host state is low, or where the technological gap or difference is high, local enterprises are unlikely to be able to absorb foreign technologies transferred.¹⁴⁹ Generally, foreign direct investment helps to transfer and diffuse technology in the host state.¹⁵⁰

International investment law regulates international investment activities. International investment law is a branch of international law, which aims at regulating international investment, called international investment law.¹⁵¹ Foreign investment is regulated by customary international law, bilateral or regional investment treaties.¹⁵² International investment agreements (IIAs) are instruments in international law that impose the duty to protect investor’s rights on

¹⁴⁵ TT Hung ‘Impacts of foreign direct investment on poverty reduction in Vietnam’.

¹⁴⁶ KR Gray ‘Foreign direct investment and environmental impacts- Is the debate over?’ (2002) 11 *Review of European Community & International Environmental Law* 306 306.

¹⁴⁷ M Trink *The role of investment promotion agents at attracting foreign direct investment and their impact on economic development in Central Europe* (The Czech Republic and Slovakia in Comparative Perspective) unpublished master’s thesis, Central European University, 2007)12. FDI offers potential for raising the quality of exports in developing countries. See generally, T Harding & BS Javorcik ‘FDI and export upgrading’ (2011).

¹⁴⁸ Trink above 13; P Conconic *et al* ‘The internationalization process of firms: from exports to FDI’ (2015) 3.

¹⁴⁹ Trink, above.

¹⁵⁰ The foreign investor will train workers on the new technology and this enables to diffuse the technology in the host state. The technology will also be available to domestic firms that would enable them to be more productive. However, the empirical evidence about FDI and technology diffusion is mixed. N Foster & O Memedovic ‘The role of intellectual property rights in technology transfer and economic growth: Theory and evidence’ (2006) 30.

¹⁵¹ See Sornarajah (n 144 above) 87. On the basis of Art. 38(2) of the Statute of the International Court of Justice, he explains treaties, custom, general principles of law, judicial decisions as sources of international investment law.

¹⁵² Subedi (n 141 above) 154.

States.¹⁵³ International investment law is part of international public law.¹⁵⁴ Only few IIAs are binding while most of them deal with investment promotion issues employing very general treaty language.¹⁵⁵

2.6 Legal principles applicable to large-scale agriculture

At the international level, some legal principles that are applicable to large-scale agricultural investment have been developed to which this section of the thesis is devoted.¹⁵⁶

1. Respect property rights

Ensuring local land right is essential since an interest in land grows. Therefore, countries are required to register land, ensure free, prior and informed consent, improve land and related resource governance, and to provide legal aid and assistance.¹⁵⁷ In Sub Saharan Africa and other developing countries, the rights of land users are not properly secured.¹⁵⁸ The land users have no property titles on the land they cultivate because much of the land is owned by the government. There is a complex combination of property rights and users' rights are not protected. Grazing and gathering woods are also essential, particularly for women.

International law protects the right of land users. For instance, the General Comment No. 7, 1997 of the Committee on Economic, Social and Cultural Rights on the Right to Adequate Housing, and the basic principles and Guidelines on Development-based Evictions and Displacement presented in 2007 require States to ensure that no forced eviction takes place.¹⁵⁹ Eviction is not allowed, unless and otherwise,¹⁶⁰

¹⁵³JW Salscuse 'The emerging global regime for investment' (2010) 5 *Harvard International Law Journal* 427 427. International investment law is basically grown out of bilateral investment treaties. See generally SW Schill 'The multilateralization of investment law: The emergence of a multilateral systems of investment protection on the basis of bilateral treaties' (Inaugural Conference, Geneva, July 15-17, 2008 Working Paper No.18/08).

¹⁵⁴ See SW Schill 'Enhancing international investment law's legitimacy: Conceptual and methodological foundations of a new public law approach' (2011) 52 *Virginia Journal of International Law* 57-102.

¹⁵⁵ United Nations 'Investment promotion provisions in international investment agreements' (UNCTAD Series on International Investment policies for Development, United Nations, New York, 2008) 13.

¹⁵⁶ Carin *Large-scale acquisition of agricultural land* 5. Land deals are embodied in contracts, which may range from a framework agreement to specific issues. These contracts should be read in conjunction with relevant international law, particularly bilateral investment treaties. L Cottula & S Vermeulen 'Deal or no deal: the outlook for agricultural land investment in Africa' (2009) 85 *International Affairs* 1233 1237.

¹⁵⁷ Above, 1245.

¹⁵⁸ OD Schutter 'Large scale land acquisition and leases: A set of core principles and measures to address the human rights challenge' (2009) 7. See also OD Schutter 'The green rush: the global race for farmland and the rights of land users' (2011) 52 *Harvard International Law Journal* 504 534.

¹⁵⁹ For detailed treatment of development-induced displacement, see S Chaudhry 'Development-induced displacement and forced evictions' in W Kalin *etal* (eds.) *Incorporating the guiding principles on internal displacement into domestic law: Issues and challenges* 591-645.

¹⁶⁰ See Schutter 2009 (n 158 above) 8.

- 1) It is authorised by law;
- 2) It is undertaken in line with international human rights law;
- 3) It must be taken to promote the general welfare;
- 4) Be reasonable and proportional;
- 5) Be regulated to ensure full and fair compensation and rehabilitation;
- 6) Be undertaken in accordance with the Guidelines.

International law protects access to land for indigenous peoples. For instance, the 1989 ILO Convention Art. 13 to 19 are devoted to this issue. In addition, states must provide effective mechanisms for prevention of, and redress for dispossession of indigenous peoples of their land, territories or resources according to Art. 8 paragraph 2(b) of the United Nations Declaration on the Rights of Indigenous Peoples. Art. 10 of the Declaration guaranteed persons from forced eviction and relocation without their free, prior and informed consent. As per this provision, and just and fair compensation should be given to persons who are affected and relocated. Furthermore, Articles 25 and 26 of the Declaration recognise the spiritual relationship of persons who own or otherwise occupy and use lands, in addition to the right to own, use, develop and control these lands. Therefore, states must recognise and protect these rights.¹⁶¹

It is further asserted that ‘comprehensively assigned, clearly defined, secure and transferable property rights are necessary conditions for the efficient allocation of resources among competing users.’¹⁶²

Tenure security is essential because individual titling goes beyond securing tenure and the associated productivity benefits from the investment on land. It also facilitates and secures land transaction. Land tenure may either be individual, communal or collective.¹⁶³ Countries implement programmes on registering land rights to protect the rights of the local people. Defining clearly the land rights facilitates investment since it seldom occurs on a blank state. In addition, understanding and respecting land rights will enable or promote socially legitimate and

¹⁶¹ As above; See also Schutter (n 158 above) 533-34. The United Nations Basic Principles on development based displacement and evictions call on states to guarantee security of tenure to all those currently lacking titles to land. See Kothari *UN Basic principles and Guidelines on Development based Displacement and Evictions* 4.

¹⁶² W Legg ‘Agri- Environmental policies in OECD countries and natural resource management’ (2006) 4.

¹⁶³ Schutter (n 158 above) 527. Land tenure is a formal right like ownership rights, and where such rights are recorded or registered, tenure security would be relatively strong tenure right may also arise from customary law. D Vhugen ‘Large-scale commercial investments in land: Seeking to secure land tenure and improve livelihoods’ (2012) 1 *Haramaya Law Review* 1 15. However, the FDRE Constitution does not allow customary land tenure rights to individuals. See the FDRE Constitution Art. 9(1).

legally secure investment. It is also possible to identify cultivated areas and design appropriate strategies that will enable a country to protect the environment.¹⁶⁴

2. Environmental and social sustainability

Environmental and social sustainability should be ensured in undertaking the large-scale agriculture investment. Thus, the environmental policies and laws should clearly define the environmental protection as well as social safe guards like addressing the issue of gender and worker welfare and should be implemented.¹⁶⁵

3. Rights of displaced persons

Large-scale agricultural investment may require land to be expropriated, and people to be displaced. The UN Principles and Guidelines on Internal Displacement allow displacement of peoples where large-scale development projects like large-scale agricultural investment if justified by compelling and overriding public interests.¹⁶⁶ What is prohibited is forced and arbitrary displacement that would violate human rights.¹⁶⁷ All governments should provide compensation, restitution and/or alternative accommodation or land to forcibly displaced persons.¹⁶⁸

A) Compensation

In principle, persons who lose land, voluntarily or otherwise, should be compensated. Where the affected persons live on the benefits from the land, compensation is essential since their livelihood is affected. Compensation should be calculated taking into account at minimum, to cover the loss of land, buildings, and other improvements over it as well as the disturbance or loss to livelihood. In principle, compensation should be given not only to the owners but also to those who do have the right to use the land.¹⁶⁹

¹⁶⁴ K Deininger & D Byerlee *Rising global interest in farmland: Can it yield sustainable and equitable benefits?* (2011) 98.

¹⁶⁵ Deininger & Byerlee, above 96.

¹⁶⁶ Paragraph 2 (C) of Principle 6 reads: ‘The prohibition of arbitrary displacement includes displacement:..... c) In case of large-scale development projects that are not justified by compelling and overriding public interests;’ UN Principles and guidelines on internal Displacement.

¹⁶⁷ See W Kalin *Guiding principles on internal displacement: Annotations* (2008) 27. Lawful displacement of persons should not violate their human rights. The UN Office of the Higher Commissioner for Human Rights Prohibition of forced evictions Commission on Human Rights Resolution: 2004/28, para.5.

¹⁶⁸ The UN Office of the Higher Commissioner for Human Rights (above) para. 4.

¹⁶⁹ Deininger & Byerlee (n 164 above) 108. The Guiding Principles on Internal Displacement requires the persons to be informed on compensation. Guiding Principles on internal Displacement Principle 7 (3) b). Compensation be beyond the legal right over the land but includes rights and values such as customary use right of

B) Relocation assistance

Persons whose lives are affected by the implementation of large-scale investment should also be granted relocation assistance.¹⁷⁰ It is also important to inform the displaced persons about the relocation assistance to be granted.¹⁷¹

IGAD member States have adopted Khartoum Declaration: Ministerial Conference on Internally Displaced Persons in the IGAD Sub-region, to which Ethiopia is a member. IGAD member states recognise the Guiding Principles on Internal Displacement as a useful tool for developing and evaluating appropriate national policies and laws.¹⁷²

1) The Right to be consulted

The basic principle on large-scale agricultural investment requires that persons to be displaced internally should be given full information on the reasons and procedures of their displacement.¹⁷³ According to this principle, the law should require consultation of the affected persons particularly where property rights are not formalised. Effective consultation must be made before approval and the law should clearly provide who should be consulted,(to attend), what type of information has to be made available, how the decisions are to be recorded and enforced. Consultation should be meaningful and the local stakeholders should be included in the consultation with a clear understanding of their legal rights, the issue at stake, and the rules of engagement.¹⁷⁴

2) Principles applicable to land transfer-Free and informed consent

It is important to make sure that no claims are there over the land to be transferred to the investor, for the expropriation of land to function well.¹⁷⁵ The free and informed consent of those to be displaced is essential.¹⁷⁶ The land lease or purchase must be fully transparent and some benefits should go to the local community. Pursuant to Art. 2(3) of the Declaration on the Right to Development, States must ensure that development programmes benefit the local people and free consent of them in undertaking the investment. Thus, states shall ensure that the

the land. African Union, African Development Bank and United Nations Economic Commission for Africa Guiding Principles on Large Scale Land based Investments in Africa (2014) 8.

¹⁷⁰ Deininger & Byerlee (n 164 above) 108.

¹⁷¹ UN Guiding Principles on internal Displacement (n 166 above) Principle 7 (3) b).

¹⁷² Khartoum Declaration: Ministerial Conference on Internally Displaced Persons in the IGAD Sub-Region.

¹⁷³ UN Guiding Principles on internal Displacement (n 166 above) Principle 7 (3) b).

¹⁷⁴ Deininger & Byerlee (n 164 above) 106.

¹⁷⁵ Deininger & Byerlee (n 164 above) 104.

¹⁷⁶ UN Guiding Principles of Internal Displacement (n 166 above), Principle 7(3) (C).

adequate participation of the local communities concerned in the purchase or lease and decision-making must be fully transparent.¹⁷⁷ In Ethiopia, the community is less participatory in the land transfer process.¹⁷⁸

According to the Working Group on The Right to Development, the right to development requires that foreign direct investment should contribute to local and national development in a responsible manner.¹⁷⁹ It is essential to integrate the large-scale agriculture with the development strategy of the country. In general, transfer of lands to investors must be voluntary, and based on fairness in the agreement.¹⁸⁰

2.7 The Concept of responsible large-scale agricultural investment law

2.7.1 Definition and nature of responsible investment

There is no universally accepted definition for the term ‘responsible investment.’ Responsible investment (RI) is a concept by which investors consider the influence of longer-term non-financial factors in their investment decision making.¹⁸¹ ‘Responsible investment is investment

¹⁷⁷ Schutter 2009 (n 158 above) 12; See also Arts. 6(3) and 8(2) of the Declaration on the Right to Development.

¹⁷⁸ Mullela et al ‘Questioning the “regulatory approach” to large-scale agricultural land transfers in Ethiopia: A legal pluralistic perspective’ (2013) 16.

¹⁷⁹ Schutter 2009 (n 158 above) 13.

¹⁸⁰ Deininger & Byerlee (n 164 above) 96.

¹⁸¹ R Harding Think Piece 8 The collaborative entrepreneur CEO Delta Economics (Co-operatives UK Limited, 2013) 5. Sustainable investment and socially responsible investment are terms related to responsible investment. Sustainable investment (SI) is an investment that considers environmental or social themes, like the provision of water, and renewable energy. Harding above, 5. Sustainable investing combines two profound appreciations: first, incorporating long term environmental, social and economic trends in investment decision making; and second, achieving global sustainability that requires the mobilisation of the international capital markets. C Krosinesky & N Robins (eds) *Sustainable investing The Art of Long –Term Performance* (2008) xxii. See also W Vandereckhove et al (eds) *Responsible investment in times of turmoil* (2011). Though the term ‘socially responsible investment’ is defined in various ways, it ‘seeks to integrate environmental and social concerns into investment decision-making.’ FJ Prue & BJ Richardson ‘German socially responsible investment: Barriers and opportunities’ (2011) 12 *German Law Journal* 866. The term ‘socially responsible investment’ (SRI) is a wide term that includes investment strategies that consider creating positive social change, minimizing environmental damage, and incorporating ethics. In other words, SRI is investment decision-making taking into account the environmental, social and governance standards. According to the Social Investment Forum, SRI is defined as ‘an investment process that considers the social and environmental consequences on investments, both positive and negative, within the context of rigorous financial analysis.’ HG Fung et al *Socially responsible investment in a global environment* (2010) 4. At a company level, the concept corporate social responsibility applies, and we do find no agreed definition to the term, but it may be defined as ‘... a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’ D Crowth & G Aras *Corporate social responsibility* (2008). This definition is very wide. Socially responsible investment (SRI) takes into account the environmental or social impacts in the investment decision-making. Harding (above) 5. Socially responsible investment is also known as ethical investment and it takes into account the social, environmental and ethical consequences of the investment. BJ Richardson ‘Protecting indigenous peoples through socially responsible investment’ (2007) 6 *Indigenous Law Journal* 7.

that incorporates an active consideration of environmental, social and governance (ESG) issues into investment decision-making and ownership.¹⁸²

There are two points that differentiate responsible investment from conventional approach to investment. First, responsible investment's goal is the creation of sustainable, long-term investment returns. Second, responsible investment requires investors to pay attention to wide contextual factors that include the sustainability and health of the environment and economic systems.¹⁸³

The UN principles for responsible investment consists of internationally accepted frameworks for investors to manage environmental, social, and governance issues compatible with improving long-term investment returns.¹⁸⁴ The first UN principle for responsible investment is to integrate environmental, social and governance (ESG) issues into investment analysis and decision making process.¹⁸⁵ This principle requires, among others, to address ESG issues in investment policy statements, supporting development of ESG related tools and analysis, advocating ESG training for investment professionals.¹⁸⁶ The third principle of UN PRI requires investor to disclose on ESG issues.¹⁸⁷ This principle requires the investor to take actions such as adherence to relevant norms, standards and code of conduct.¹⁸⁸

Equator Principles are also developed to guide banks in providing funds for investors to check that the investors incorporate environmental issues in their decision-making. Equator Principles apply to banking activity particularly in borrowing money greater than US \$10 million. for investors.¹⁸⁹ These principles do not apply to small investments and this differentiates them from UN Principles. Equator Principles, unlike UN Principles, are 'private' in

¹⁸² See UNEP FI African Task Force (ATF) *The state of responsible investment in South Africa A survey of approaches and perceptions of the South African investment community to environmental, social and governance issues*, (no year) 7.

¹⁸³ PRI Association *Principles for responsible investment* (2014) 1.

¹⁸⁴ Guardians of New Zealand Superannuation Statement of investment policies, standards and procedures (17 June 2015) 5.

¹⁸⁵ The United Nations Principles for Responsible Investment (PRI), principle 1. The principles were designed by the investment community partnership with the UNEP Finance Initiative and the UN Global Compact with the purpose to encourage incorporation of ESG issues into investment decisions. Just Economics, *Investing for sustainable development? A review of investment principles-trends and impacts* (2011) 12.

¹⁸⁶ Above, possible actions.

¹⁸⁷ Above, 3rd Principle. The UN Principles for Responsible Investment (PRI) consists six principle, vs. the Integration principle; active owners principle; appropriate disclosure principle; 4. promoting acceptance and implementation of the Principles; 5. working together Principle; and 6- reporting the implementation principle. See UN Principles for responsible investment (n 185 above).

¹⁸⁸ Above, 3rd principle, possible actions.

¹⁸⁹ Just Economics (n 185 above) 15.

that they are enacted by a group of banks.¹⁹⁰ The Equator principle requires investor to conduct social and environmental impact assessment and propose mitigation and management measures.¹⁹¹

At the international arena, there is a move to incorporate responsible investment principles in codes of conduct to be implemented by investors. However, there is an argument that guidelines and voluntary codes are difficult that cannot counter balance investment and environmental objectives since they are not legally binding. Investors may adhere to them to improve their reputation, and the international community should also exert impacts on investors to comply with the principles. These principles, as accepted by states of host countries should be respected. The principles could help states to legislate new laws to protect environment and promote investment.¹⁹²

In short, responsible investment should be regulated by law, and such a law should include elements and principles of responsible investment, called responsible investment law. Though the principles are voluntary,¹⁹³ regulating the acts of investors is required and the law regulates how waste must be disposed off and the level of pollutants allowed for discharges into rivers, and it may restrict the amount of water that can be used from rivers.¹⁹⁴

Business companies are required to consider the protection of the environment, in decision-making and this would enable them to be viable in their business. International and national laws provide environmental standards that investors must meet to protect the environment.¹⁹⁵ A company management should ensure compliance with environmental law that the company is committed to it. It should develop its own environmental policy and this policy must be made

¹⁹⁰ Above.

¹⁹¹ The Equator Principles had been adopted in 2010 by 68 banking institutions, which represent 75 per cent of large-scale project finance. The Principles are grouped into ten vs; 1. Review and categorization; 2. Social and Environmental Assessment; 3. Applicable Social and Environmental Standards; 4. Action Plan and Management System; 5. Consultation and Disclosure; 6. Grievance Mechanism; 7. Independent Review; 8. Covenants; 9. Independent Monitoring and Reporting; and 10. EPFI Reporting 16.

¹⁹² NM Perrone 'Responsible agricultural investment: is there a significant role for the law to promote sustainability?' (2011) 38 *Columbia FDI Perspectives* (Perspectives on tropical foreign direct investment issues by the Vale Columbia Centre on Sustainable International Investment). Regarding the Principles of Responsible Investment and Equator Principles, the signatories undertake voluntarily to consider environmental, social and /or governance issues in making investment and financial decisions. See Asset Management Working Group of the United Nations Environment Programme Financial Initiative 'Fiduciary responsibility Legal and practical aspects of integrating environmental, social and governance issues into institutional investment' (2009) 24.

¹⁹³ Both the UN Principles and Equator principles are voluntary principles that give option for investor to guide its, his/her investment decisions. See Just Economics (n 186 above) 15.

¹⁹⁴ Crowth & Aras (n 181 above) 30.

¹⁹⁵ C Madu *Environmental planning and management* (2007) 68.

available to the public, to implement elements of environmental management system (EMS) as incorporated in ISO 14001.¹⁹⁶

2.7.2 Responsible large-scale agricultural investment law

Large-scale agricultural investment requires conservation of forests and/or rangelands to monocropping to farmlands, which in turn will reduce carbon stocks above the ground and on the surface and help sustain biodiversity.¹⁹⁷ Therefore, it is important to ensure that large-scale agricultural investment is properly managed so as to reduce the above mentioned and related problems. In this regard, the duration of the lease may determine the interest to manage the land. As a result, foreign investors may have a short-term perspective on the sustainability of agriculture where the lease is for short period. The best instrument is conducting a careful environmental impact assessment that considers the impacts of large-scale agriculture not only in the local area but also offside impacts on soil, water, greenhouse gas emissions, and biodiversity. Moreover, land lease contracts must ‘include safeguards to ensure that sustainable practices are employed.’¹⁹⁸

In short, it is necessary to promote sustainable and responsible agricultural investment by which investors enjoy reasonable profit at the same time ensuring the investment benefits for the host population. Thus, investors should consider the social and environmental sustainability in accordance with the principles for responsible agricultural investment that respect rights, livelihoods and resources. Though they are nonbinding, they help the state to formulate new regulations.¹⁹⁹ The UN confirmed that effective national regulation, *inter alia*, made agricultural investors, both domestic and foreign, to improve their activities to be environmentally friendly.²⁰⁰

The International Food Policy Research Institute (IFPRI) argues that a dualistic approach that utilises opportunities through the policies of the host states, on the one hand, and code of

¹⁹⁶ As above.

¹⁹⁷ Dejene Aredo *Agricultural Development: Theory, policy and practice* (2011) 171.

¹⁹⁸ As above.

¹⁹⁹ Perrone (n 94 above) 2; Committee on World Food Security Thirty-sixth Session *Policy Roundtable Land Tenure and International Investment in Agriculture* (2010) 8.

²⁰⁰ United Nations Conference on Trade and Development (UNCTAD) ‘Transnational Corporations, Agricultural Production and Development’ (2009) 157.

conducts for investors on the other hand could solve the problem. The win-win code of conduct proposed by IFPRI consists of the following elements:²⁰¹

A) Transparency in negotiations- where land deals are undertaken, the landholders must be informed and involved in the land negotiation deals. In short, ‘free, prior, and informed consent is the standard to be uphold.’²⁰²

B) Respect property rights- this includes respect for existing land rights including common property rights and customary rights. Where property rights and land rights are respected, those who lose land should be compensated and rehabilitated to an equivalent livelihood.

C) Sharing of benefits- according to this principle, the local community should benefit from the investment in large-scale agriculture contract farming or out-grower are taken as better since they allow smallholders in contract of their farms and deliver the output to foreign investor.

D) Environmental sustainability- to ensure sound and sustainable agricultural production that guard against depletion of soils, loss of critical biodiversity, increased greenhouse gas emissions, or significant deviation of water from other human or environmental uses it requires careful environmental impact assessment and monitoring.

E) Adherence to national (trade) policies: Investors should adhere to national policies, for instance, where food security is at stake in the host country, investors should not export, and otherwise they should meet the domestic demand.

²⁰¹ See Jv Braun & R Meinzen-Dick “Land grabbing by foreign investor in developing countries: Risks and opportunities’ (IFPRI Policy Brief 13 April 2009) 3. We find similar principles adhered by different organisations, See Organization for Economic Co-operation and Development (OECD) *Responsible investment in agriculture* (2010). Principles for responsible agricultural investment consist of the following:

- A) Recognition & respect land rights-it includes land and associated natural resources right must be recognised and respected;
- B) Food security- investments should not jeopardize food security but must rather strengthen;
- C) Transparency- the process of land deal and lease must be 'transparent, monitored and ensure accountability of stakeholders, thereby improving the business, legal and regulatory environment
- D) Rights of affected persons- all those materially affected must be consulted and their agreement must be recorded and enforced;
- E) Sustainability- the projects must be economically viable, respect the rule of law, reflect industry best practice and result in durable shared value;
- F) Social- investments must generate and contribute desirable social impacts;
- G) Environmental impacts- ‘must be quantified, and measures must be taken to encourage sustainable resource use while minimising and mitigating negative impacts. International Fund for Agricultural Development (IFAD), ‘Responding to “land grabbing” and promoting responsible investment in agriculture’ (2015) 8.

²⁰² Dejene (n 197 above) 172.

The RAI principles proposed by CFS are intended to apply to, *inter alia*, large-scale agricultural investment. The principles are grouped into three:²⁰³ Group I Principles with regard to the impacts of agricultural investment.²⁰⁴ Group II Provides for principles in support of enabling environment.²⁰⁵ Group III is about principles for coordination, cooperation, partnerships and accountability.²⁰⁶

Efforts have been exerted to develop responsible investment principles for farmland investments.²⁰⁷ African Union Member States have endorsed Guiding Principles on Large-Scale Land Based Investments (LSLBI) in Africa. The basic need for adopting these principles is to establish agricultural investment that ensures benefits for governments, local communities and

²⁰³ See Committee on World Food Security (CFS) Background Document on principles for agricultural investments (rai) in the context of food security and nutrition (Zero Draft).

²⁰⁴ Principle 1 ‘Responsible agricultural investment enhances food security and nutrition for all;’ principle 2 is about environmental sustainability which reads as: ‘Responsible agricultural investment is environmentally sustainable;’ principle 3 ‘Responsible agricultural investment sustains or improves livelihoods and sets in motion inclusive growth;’ principle 4 ‘Responsible agricultural investment respects cultural norms, is compatible with universal human rights and is considered legitimate by relevant stakeholders’ CFS, above.

²⁰⁵ Principle 5 ‘Responsible agricultural investment is supported by enabling, facilitating, and regulatory structures based on internationally-recognized good governance principles;’ principle 6 ‘Responsible agricultural investment is supported by policies and legislations consistent with each other, and addressing all aspects of responsible investment as described in this document;’ Principle 7 ‘Responsible agricultural investment that affects local communities requires active, free, informed, and effective participation of stakeholders;’ Principle 8 ‘Responsible agricultural investment is accompanied by mechanisms for regular review and improvement of agricultural investment-related governance instruments and policies;’ principle 9 ‘Responsible agricultural investment is accompanied by non-discriminatory access to justice grievance procedures and fair and effective remedy mechanisms.’ CFS, above.

²⁰⁶ Principle 10 ‘Responsible agricultural investment is facilitated by clear mechanisms and institutions promoting coordination, cooperation, and partnership among the actors involved;’ principle 11 ‘Responsible agricultural investment is supported by multilateral international and regional organizations that comply with these principles and primarily support small-scale food producers and processors in a perspective of local and national FSN;’ Principle 12 ‘All actors involved in agricultural investment are accountable for their decisions, actions and the impacts thereof.’ CFS, above.

²⁰⁷ For instance, principles for responsible investment in farmland were developed over 2011 and endorsed by ABP (Netherlands), APG (Netherlands), Ap2 (Sweden), BT Pension Scheme(UK), Hermes EOS (UK), PGM (Netherlands) and TIAA- CREF (USA), all of whom are signatories to the UN Principles for Responsible Investment (PRI). The Following nine investors also have signed on to the Farmland Principles: Aquila Capital Green GmbH (Germany), Adveq Management AG (Switzerland), Insight(UK), PKA Ltd (Denmark), AAG Investment Management Pty Ltd (Australia), Rabo Farm (The Netherlands), UFF Asset Management (South Africa), Treetops Capital LP (USA) and Southern Pastures Management Limited (New Zealand). The Principle developed five principles, vs., Principle 1: Promoting environmental sustainability; Principle 2: Respecting Labour and Human Rights; Principle 3: Respecting existing land and resource rights; Principle 4: Upholding high business and ethical standards- includes respecting rule of law; Principle 5: Reporting on activities and progress towards implementing the principles and promoting the principles. Principles for responsible investment in farmland. Principles for responsible investment in farmland are known as the ‘Farmland Principles.’ T Currell *et al* (eds) *Responsible investment in Farmland: A compendium of case studies* (2012) 6. Principles for Responsible Investment in Agriculture and Food Systems were also developed by Working Group over October 2012 - October 2014, and were endorsed by the Committee on World Food Security (CFS) at its 41st Session on 15 October 2014, having ten principles. Committee on World Food Security (CFS) *Principles for responsible investment in agriculture and food systems* (2014) 5.

investors.²⁰⁸ The principles, designed by African Union to improve land governance to ensure land rights and livelihoods, increase productivity as well as to enhance environmental stewardship.²⁰⁹ The principles include the following six fundamental principles:²¹⁰

1. respect human rights of communities;
2. decisions on LSLBI are guided by a national strategy of sustainable agricultural development;
3. good governance- including transparency, inclusiveness, prior informed participation and social acceptance of affected communities;
4. respect land rights of women;
5. desirability and feasibility of LSLBI made on independent, holistic consideration of economic, financial, social and environmental costs; and
6. cooperation, collaboration and mutual accountability.

2.8 Nature and purpose of international environmental law

Definition and nature of environment

‘Environment’ is an amorphous term having no precise legal definition, save in particular contexts.²¹¹ In a specific law, it is defined as consisting of

all or any of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.²¹²

This is clearly a very wide definition which encompasses environmental challenges ranging from ecological problems, such as damage to natural habitat and the conservation of flora and fauna. Furthermore, Article 2(10) of the 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment defines the environment to include ‘natural’ resources both abiotic and biotic, such as the air, water, soil, fauna and flora and

²⁰⁸ African Union, African Development Bank and United Nations Economic Commission for Africa Guiding principles on large scale land based investments in Africa (2014) 3.

²⁰⁹ As above.

²¹⁰ Above, 5-6.

²¹¹ C Redgwell ‘International environmental law’ in MD Evans (ed) *International law* Fourth edition (2014) 688-726; M Kidd *Environmental law* Second edition (2011) 2.

²¹² Environmental Protection Act (EPA) of 1990 (UK) Art. 1(2). This is considered as a convenient start to define ‘environment’ See M Sunkin; *et al Source Book on Environmental law* Second edition (2002) 61. The concept of environment includes the biophysical (natural) and the human dimensions. The biophysical dimension includes climate, air topography, geology, soils vegetation (flora), fauna (animals), water, while the human dimension consists of people, land tenure and use, archaeological, social, cultural, political and economic aspects. The biophysical and human dimensions of the environment constantly interact in a dynamic nature that support all forms of life on earth. See Nhamo G & Inyang E *Framework and tools for environmental management in Africa* (2011) 1.

the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape.²¹³ This broad definition encompasses natural and cultural heritage protection, species and habitat protection.²¹⁴

In the context of sustainable development, environment is defined as encompassing the physical and social factors of the surroundings of human beings and includes land, water, atmospheric, climate, sound, odour, taste, energy, waste management, coastal and marine pollution, the biological factors of animals and plants, as well as cultural values, historical sites, and monuments and aesthetics.²¹⁵

Under Ethiopian laws, the term is defined as follows:

Environment means the totality of all materials whether in their natural state or modified or changed by humans, their external spaces and the interaction which affect their quality or quantity and the welfare of human or other living things including but not restricted to, land, atmosphere, weather and climate, water, living things, sound, odour, taste, social factors and aesthetics.²¹⁶

One can identify the following elements of the definition of the term environment.

Environment includes natural resources. Natural resource is ‘a substance that found in nature that can be used to produce goods and services.’²¹⁷ In other words, natural resource is any material, not human made, having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, and wild life. It also encompasses ‘environmental features that serve a community’s well-being or recreational interests such as park.’²¹⁸

The second element of the definition of environment is property, which includes cultural heritage. Cultural property comprises of moveable and immovable property that have cultural significance, whether in the nature of antiquities or monuments of a classical age or important modern items, of fine arts, decorative arts, and architecture. Sometimes cultural property is equated with cultural heritage. Nevertheless, the latter is broader which includes intangible cultural things such as folklore, crafts, and skills.²¹⁹

Thirdly, the characteristics aspects of the land escape are included under the term ‘environment’. Furthermore, environment includes the social factors that include the relationship between the human-person each other and the natural environment, natural resources. In general, environment comprises of natural resource, the property, characteristic aspect of land escape and

²¹³ The 1993 Council of Europe Convention on Civil liability for Damage Resulting from Activities Dangerous for the Environment, Art. 2(10).

²¹⁴ Regwell (n 211 above).

²¹⁵ United Nations Environmental Programme *Training Manual on International Environmental Law* (1994) 15.

²¹⁶ Environmental Pollution Control Proclamation, Proclamation No 300/2002 art 2(6)(hereinafter Proc. No. 300/2002); See also Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002 Art 2(3)(hereinafter Proc. No. 295/2002).

²¹⁷ W Ashworth & CE Little *The Encyclopaedia of environmental studies* (2006) 326.

²¹⁸ Garner (n 140 above) 1056.

²¹⁹ Garner (n 140 above) 407.

the social factors. Thus, the law that governs these elements of the environment is environmental law.

Nature and scope of environmental law

Environmental pollutions create great problems to the environment. The World Health Organisation (WHO) has observed that over 70% of all human ailments are influenced by environmental deterioration.²²⁰ Since environmental pollution has become a major threat to human survival and development, 'environmental law' has emerged as one of the most important tool for promoting development without destruction.²²¹ Since environmental problems²²² are international as well as national by their nature, environmental law is developed²²³ at the international and national levels.²²⁴

Black's law dictionary²²⁵ defines the term 'environmental law' as:

The field of law dealing with the maintenance and protection of the environment, including preventive measures such as the requirements of environmental impact assessment, as well as measures to assign liability and provide clean up for incidents that harm the environment. Since most environmental litigations involve disputes with governmental agencies, environmental law is heavily intertwined with administrative law.

This definition makes clear that environmental law is very much intertwined with the administrative law.²²⁶ Administrative law is a branch of law that governs the organization and operation of administrative agencies (including executive and independent agencies) and the relations of administrative agencies with the legislature, the executive, the judiciary and the public.²²⁷ This shows the public aspect of environmental law because administrative law is public law.

²²⁰S Shanthankumar *Introduction to environmental law* Second edition (2007) 1; Though not conclusive, polluted environment contributes for health risks of persons (Disease). For instance, unsafe water, sanitation and hygiene contribute 3.7% to the world burden of disease. United Nations Environmental Programme *Assessing the Environmental Impacts of consumption and Production: Priority Products and Materials* (2010) 27. Environmental problems are risk to human health. See generally A Pruss-Ustun & C Corvalan *Preventing disease through healthy environments: Towards an estimate of the environmental burden of disease* (2006).

²²¹ Shanthankumar above.

²²² Environmental problems can be grouped into four: 1) species extinction and the loss of biodiversity; 2) environmental contamination by hazardous chemicals and wastes; 3) climate change, including global warming; and 4) stratospheric ozone depletion. D Hunter *et al International environmental law and policy* 3rd edition (2007) 2.

²²³ For the creation and development of international environmental law, See Hunter *et al* above 1-42.

²²⁴ Environmental law alone can never solve the environmental problems since problems are related to the economic and socio-legal relations that shape the field. C Carlane 'Delinking international environmental law & climate change' (2014) 4 *Michigan Journal of Environmental & Administrative Law* 4.

²²⁵ Garner (n 140 above) 575.

²²⁶ See Kidd (n 211 above) 7.

²²⁷ Garner (n 140 above) 48.

What is more, 'environmental law' refers to a set of enforceable rules and principles regulating the activities of persons, natural or legal, which have impact on the 'environment',²²⁸ and it is an instrument to protect and improve the environment and control or prevent any act or omission polluting or likely to pollute the environment.²²⁹ Environmental law is an instrument in which businesses are regulated by the government in the interest of protecting the environment and therefore, it is considered as one of the most important and modern tools of environmental management.²³⁰

Environmental law consists of set of rules to regulate pollutants and natural resource conservation as well as allocation. It, *inter alia*, touches on agriculture and land use.²³¹ It is broad that includes natural resources law governing the acquisition, ownership, development, allocation and conservation of natural resources such as conservation of natural resources such as water, wildlife, crops, and forests.²³²

Environmental law is divided into international environmental law and national environmental law.

International environmental law

International environmental law is a law developed by sovereign states to set standards at the international level and provide obligations for states including regulating their behaviour in international relations in environment related matters.²³³ International environmental law deals with the control of pollution, the protection of the environment and the depletion of natural resources within a framework of sustainable development.²³⁴ Development and growth are predicted on the protection of the environment so as to safeguard the health and economic needs of future generations. International environmental law has been developed to address

²²⁸ As above.

²²⁹ Shanthankumar (n 220 above) 1-2.

²³⁰ Above; According to Douglas, to date, environmental law 'has moved... from protection to management of environment and from reactive to proactive legal mechanisms' see J Smith 'The changing nature of environmental law: Recent development in public participation.'

²³¹ Yale Law School Career Development Office, *Environmental law* (2014-2015) 5; Kidd (n 212 above) 4.

²³² Yale Law School Career Development Office, above.

²³³ United Nations Environmental Programme (n 215 above) 1.

²³⁴ See LD Guruswamy & BR Hendricks *International environmental law in a nutshell* (2001)1. Currently, environmental law marries the protection of environment with economic development, which is embraced in the concept of sustainable development. Redgwell (n 211) 694.

environmental problems²³⁵ and pollutions at the global level. Modern international environmental law has boosted with the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden.²³⁶

According to Sands, international environmental law ‘comprises these substantive, procedural and institutional rules of international law which have as their primary objective the protection of the environment.’²³⁷ International environmental law provides rules that influence State conduct to prevent environmental damage and degradation, and it provides the consequences of unlawful behaviour²³⁸ and imposes responsibilities on states to protect the environment.²³⁹ Sands makes clear that international environmental law is a part of international law: it is a sub set of international law.²⁴⁰ Therefore, international environmental law shares features of international law with primary objective to protect the environment. International environmental law comprises of treaties, conventions and agreements.²⁴¹

International environmental law is distinct from traditional international law. First, the creation and development of international environmental law, for most part, is based on national environmental laws and policies because states entered into international environmental agreements and practices primarily to solve their domestic environmental problems. Therefore, international environmental agreements and practices emanate from the national environmental laws of states. Second, the law making in international environmental law has been shaped primarily by biophysical rather than geo-political forces, and this communal foundation disfigured political decision from international environmental law.²⁴² It is worth mentioning that

²³⁵ Kuokkanen explains that international environmental law developed to respond to environmental problems. See T Kuokkanen *International law and the environment: Variations on a theme* (2002)105.

²³⁶ As above. See also P Birnie; A Boyle & C Redgwell *International law and the environment* Third edition (2009) 48-57.

²³⁷ P Sands *Principles of international law* 2nd Ed (2003) 15.

²³⁸ R Verheyen *Climate change damage and international law: Prevention duties and state responsibility* (2005) 3.

²³⁹ See Redgwell (n 211 above) 688-726.

²⁴⁰ Verheyen (n 238 above). Kiss and Shelton explain international environmental law as a branch of public international law, See A Kiss & D Shelton *Guide to international environmental law* (2007) 1. However, international environmental law has also private international law aspect since it governs the liability of harms done to the environment by individuals, See PT Stoll ‘Transbounrady Pollution’ in FL Morrison & R Wolfrum (eds) *International, regional and national environmental law* (2000) 193-200.

²⁴¹ United Nations Environment Programme (n 127 above) 3.

²⁴² Guruswamy & Hendricksid (n 234 above) 1-2; see also S Ferrey *Environmental law: Examples and explanation* Third edition (2004) 575.

international environmental law is not similar to national environmental law since it is a compromise between nation states regarding environmental issues at international level.²⁴³

2.9 Debates and conflicts of large-scale agricultural investment law and environmental law

2.9.1 General

There are debates on investment promotion and environmental protection, which have several layers. The first layer of debates relates to environmental practices of individual foreign- owned companies. According to this approach, individual foreign investment activities are considered to show the negative impacts on environment. It is argued that though foreign investments may generate economic wealth at national level in the host country, they do not bring benefits to the local community in the vicinity of the project site. Some argue²⁴⁴ that foreign investment does not necessarily promote sustainable development, rather it causes environmental degradation. This approach believes that international investment law is designed to protect investors, not in the interest of the communities and liberalisation of foreign investment would exacerbate these problems.²⁴⁵

The other debate relates to management practices, and some argue that foreign investor will not implement effective and clearer management that will not damage the environment. Others, on the contrary, argue that foreign investors will practice efficient and effective management that will help protect the environment. It is argued that where the parent company is an over sea company implementing effective environmental management, it will also use its experience, technology and management skills to protect the environment in the host country. There is an assertion that transnational corporations, by transferring both clearer technology and/or better environmental management practices, will help to drive up standards in developing countries and therefore, FDI could be employed for sustainable development. However, the empirical evidence is mixed.²⁴⁶ The experience in Chile in 1970s and 1980s shows that foreign investors performed better than domestic investors did, and they diffused better environmental management practices.

²⁴³ Ferry above.

²⁴⁴ K Miles 'Transforming foreign investment: Globalisation, the environment, and a climate of controversy' (2007) 7 *Macquaire Law Journal* 81 85.

²⁴⁵ Above. Some argue that liberalization of investment will accelerate environmental degradation unless and other wise mandatory and enforceable guidelines are provided to protect the environment. See KP Gallgher & L Zarsky 'No miracle drug: Foreign direct investment and sustainable development' in Zarsky L(ed) *International investment for sustainable development: Balancing rights and rewards* (2004) 26.

²⁴⁶ Gallgher & L Zarsky, above 27.

Studies made in Latin America in 1990's, which include bananas in Costa Rica and soybeans in Brazil confirmed that foreign direct investment promotes better environmental management.

Nonetheless, the debate remains hot because other studies failed to find a positive link between foreign investors and environmental performance in host countries²⁴⁷. After studying manufacturing firms in Mexico and pulp and paper firms in Asia, World Bank researchers concluded that foreign investors performed no better than domestic companies did. Rather, it was found that environmental protection depended on two conditions: 1) the scale of the plant (bigger is better); and 2) the strength of local regulation, both government and civil society via informal mechanisms. Depending on empirical researches, it is concluded that local norms and institutions are important to determine the environmental management and the inflow of FDI does not automatically create a general improvement in environmental performance.²⁴⁸

Developing countries particularly the poorest do not have the capacity and/or political will to enforce environmental performance by investors. Therefore, the choice will be left to foreign investors and the latter may select either of the following four choices: 1) to follow local practice; 2) to comply with local regulations, regardless of local practice; 3) to adopt company-wide global standards based on home country standards; or 4) to adopt international standards or 'best practice' norms for corporate social responsibility (CSR).²⁴⁹

It is argued that if FDI is channelled to sustainability of production, it would have a positive impact upon sustainable development and the environment. To date, however, the rapid economic growth in developing countries has tended to be associated with an increase in unsustainable production and consumption patterns. Economists argue that it is true that an increase in the rate of growth can worsen environmental problems, but economic growth over time, will generate environmental improvements. According to Environmental Kuznets Curve (EKC), environmental quality first worsens and then improves as per capita income (GDP) increases. The following reasons are given for this assertion:²⁵⁰ as the economy grows, the less polluting consumer goods will be substituted; changes in the structure of the industry will take

²⁴⁷ As above.

²⁴⁸ Though FDI stimulates economic growth, it will likely accelerate environmental degradation unless it is regulated with adequate international and national laws, regardless of NTCs are good performers. The experience of East Asia, which is an 'economic success story', reveals that 'resource degradation and environmental pollution in both East and South Asia is so 'pervasive, accelerating and unabated' that it risks human health and livelihoods.' Above, 29.

²⁴⁹ Above, 28.

²⁵⁰ Above, 30.

place that will take into account the environment and there will be greater political demands for environmental regulations.

According to Araya,²⁵¹ when investment leads to economic activity it places new demands for raw materials, energy, water, transportation services and this in turn leads to more waste. Scale effects are expected to be negative as a result of increased emissions and depletion if the investment uses unchanged technology. It is argued that the country's capacity for achieving higher environmental quality may be enhanced as national income grows. Environmental protection may become a political priority for citizens when income increases and the country develops. Empirical evidence reveals that Environmental Kuznets Curve which asserts that pollution increases at the early stage of development and then it decreases once a certain development is achieved.²⁵²

EKC suggests that the pursuit of economic growth is itself a sustainable development strategy. The problem, however, is that the environmental and resource degradation at lower levels of income often resulted in irreversible losses. For instance, there could be losses of biological and genetic diversity that could not be renewed or revived after development is achieved. Potable water may also be lost or there could be destruction of old grown forests. It may also be difficult to replace the depletion or destruction of fish stock due to environmental degradation. Human deaths are also there due to severe air pollution. There is also a debate that a positive relation between economic growth and environmental protection in one area may not be true in another locality. Nevertheless, many studies question the validity of EKC especially for developing countries. The turning point is limited primarily to sulphur and particulate matter. There is no consistent evidence regarding other environmental problems like water pollution, municipal waste, carbon dioxide emission, and loss of bio-diversity.²⁵³

²⁵¹ Araya M 'FDI and the environment: What empirical evidence does-and does not-tell us' in Zarsky L (ed) (n 245 above) 51.

²⁵² Above, 51. According to the Environmental Kuznets Curve at the high-income level, economic growth leads to environmental improvement. It states that people will start a good quality environment along with developing economy and increasing income, and enhancing environmental awareness. Thus, there will be positive synchronization of increasing capacity of investment and increasing sustainable development. L Guo & H Ma 'Conflict between developing economic and protecting environment' (2008) 1 *Journal of Sustainable Development* 94.

²⁵³ Gallgher & L Zarsky (n 245 above) 30; With regard to EKC to biodiversity it is acknowledged the conflict between economic growth and environmental protection and it is believed that the conflict will be resolved when enough economic growth occurs. Biodiversity 'Prospects for reconciling the conflict between growth and biodiversity conservation with technological progress' (2008) 22 *Conservation Biology* 1392-93.

Different criticisms have been forwarded against EKC. The first criticism indicates that environmental damage does not reduce economic growth and it is argued that this may not reduce the level of income in the future. This assumes that economic growth is sustainable.²⁵⁴ The other criticism holds that environmental regulation in developed countries might encourage polluting activities in developing countries because investors will relocate their polluting investment activities from developed countries to developing ones.²⁵⁵

In the absence of global environmental standards, governments may tend to seek to attract FDI based on negotiations made with TNCs. They may even be tempted to offer lower than-average environmental standards to attract FDI. Some argue that the impact of intense global competition for FDI and the absence of environmental norms (known as ‘stuck –in-the mud’) will likely inhibit the rise of environmental standards. On the other hand, the empirical evidence suggests that high environmental standards do not deter investors; in some cases, investors prefer such high standards. On top of that, the rise of the concept of social responsibility movement may change the expectations of TNCs and host governments. Generally, it is concluded that FDI can improve, worsen or have no impact on environmental quality for there is no determined trends. Rather, government’s regulation, the rate of economic growth, company culture, the particular industry in which the FDI takes place and the governing rules are key variables or factors to determine environmental pollution.²⁵⁶

Generally, it is also possible to categorise the relationship between environmental and investment laws into three categories.²⁵⁷

- A) Whether lower environmental standards may attract foreign investment from developed countries to developing countries. The hypothesis that basis this argument is known as the ‘pollution haven’ hypothesis;
- B) Whether the competition for FDI leads to a downward pressure environmental standards which is called ‘race to –the –bottom’ hypothesis;
- C) Whether competition for investment leads countries to improved environmental standards-that is called ‘race-to-the- top’ hypothesis.

²⁵⁴ DI Stern ‘The rise and fall of the environmental Kuznets curve’ (2004) 32 *World Development* 1419 1426.

²⁵⁵ Above 1427.

²⁵⁶ Gallgher & Zarsky (n 245 above) 31.

²⁵⁷ KR Gray (n 146 above) 307.

According to 'pollution haven' theory, investors will seek a country where regulatory requirements are cheaper and more efficient than other countries. Comparatively speaking, the regulatory requirements in developing countries are not strict and investors seek developing countries as pollution haven.²⁵⁸ A number of case studies show that investors do not seek a country where regulatory requirements are cheap and more efficient. However, environmental costs are not taken as a strong determining factors for location of FDI, rather, 'matters like taxation, domestic market conditions and foreign exchange restrictions'²⁵⁹ are considered as determining factors. Therefore, the strictness or laxity of environmental regulation is not a determinant factor. In some cases, investors may lose confidence to invest in a country where environmental regulation is weak or non-existent fearing that they may incur liabilities or clean up costs in the future. Thus, investors in Central and Eastern Europe were reluctant to relocate due to environmental concerns. On the contrary, investors in pollution intensive industries, such as chemicals, chlorine, and pesticides, relocate their investments to lax environmental laws in countries. Studies made in this regard revealed that investors relocate their investments to developing countries where environmental regulation is not strict; for instance, the US chemical companies migrated to developing countries where lax environmental regulation exists.²⁶⁰ A study shows that countries with a more stringent and better-enforced environmental policy and law deter FDI in agriculture.²⁶¹

According to race-to-the-bottom theory, a positive action by a government is made in lowering environmental standards, which in turn brings in foreign investment and thus, it is a subset of the pollution haven theory. However, states may not lower environmental standards intentionally and act against their interest but the empirical evidence shows that countries

²⁵⁸ See generally, N Mabey & R McNally 'Foreign direct investment and the environment: From pollution haven to sustainable development' (1999).

²⁵⁹ Gray (n 146 above). See also OECD *Foreign direct investment and the environment* 3. Pollution Haven is emerged due to variations in environmental policy (law) that leads to relocating polluting activities to less stringent laws. JP Tang 'Pollution havens and the trade in toxic chemicals: Evidence from U.S. trade flows' (2015) 1. A research made on European countries shows that even though stricter environmental regulation seems to deter the most polluting industries, availability of capital, skilled labour and research and development resources in a host country play great role in relocating investments. European Commission *Strict environmental law does not necessary create pollution havens* (2010).

²⁶⁰ Gray (n 146 above) 307-08. See also J He 'Pollution haven hypothesis and environmental impacts of foreign direct investment: The case of industrial emission of Sulphur Dioxide (SO₂) in Chinese province' (2005) 06. For general discussion See N Mathys *In search of evidence for the pollution-haven hypothesis* (2002); see also U Temurshoev 'Pollution haven hypothesis or factor endowment hypothesis: Theory and empirical examination for the US and China' (2006).

²⁶¹ S Pochhekke & F Ploeg 'Green havens and pollution havens' (2012) 3.

employ the race to the bottom theory. Institutional limitations that are the characteristics of the developing countries may restrain the effort of governments to regulate the environment. On top of that, in countries where education, awareness and income level of the community is high, the local pressure challenging the lowering of environmental standards to attract foreign investment can be taken as a force to restrain this theory. In any case, the race to the bottom exists in natural resource sectors since developing countries often have limited regulatory experience,²⁶² but little empirical evidence confirms the theory.²⁶³

Race to the top is a theory contrary to the race to the bottom and pollution haven. The theory states that ‘stronger environmental policies can impose competitiveness in the market place by fostering innovation and efficiency, therefore attracting investors.’²⁶⁴ It is also known as ‘pollution halo’ or the ‘California effect’ because the higher air standards in California led to other US states adopting similar levels. However, this theory cannot be universally applicable since its application depends on the policies and objective realities of countries. The second weakness of the theory is that ‘it occurs mainly in high technology and energy-intensive sectors’,²⁶⁵ and the other problem is that investors who produce under lower standards may not have access to markets in the world.²⁶⁶

Regulatory Chill is a situation whereby countries refrain from enacting stricter environmental standards so as to attract FDI. As a result, ‘environmental regulations can get ‘stretch in the mud.’²⁶⁷ However, it is difficult to attribute the reason of the government enactment to this theory.²⁶⁸ Some argue that stringer environmental policies may improve competitiveness by fostering innovation and efficiency. This is promoted by OECD. There is also a debate on

²⁶² Gray (n 146 above) 309. A Strict law of federal state may not be an effective tool to ensure that states will not have too lax environmental law since they can do it in other areas. See RL Levez ‘Rehabilitating interstate competition: Rethinking the “race-to-the-bottom” rationale for Federal Environmental Regulation’ (1992) 67 *New York University Law Review* 1210-1254.

²⁶³ See A Prakash & M Poloski ‘Racing to the bottom? Trade, environmental governance, and ISO 14001’ April (2006) 50 *American Journal of Political Science* 350-364 352.

²⁶⁴ Gray (n 146 above) 309.

²⁶⁵ Above, 310.

²⁶⁶ Above, 310. See also EM Medolla & DC Lazaro ‘Trade and environmental protection: Another look at the issues’ (2005).

²⁶⁷ Gray (n 146 above) 310.

²⁶⁸ As above. See E Neumayer ‘Do countries fail to raise environmental standards? An evaluation of policy options addressing ‘regulatory chill’” (2001) 4(3) *International Journal of Sustainable Development* 231-244.

repercussions of investment protection laws on environmental laws. It is debatable whether investment protection laws decrease the regulatory autonomy of the host state.²⁶⁹

Today, some states²⁷⁰ worry to introduce more restrictive regimes to protect the environment since investors will challenge it because it may make the investors to be liable for environmental damages. On the other hand, investors should expect some form of environmental regulations and management to respond to environmental problems, and this must be internalized as a risk of investment. Investors will also impose the cut on the taxpayers by adopting the polluter pays principle.²⁷¹

2.9.2 Conflicts between large-scale agricultural investment law and environmental law

International law regulates FDI, and the basic objective of investment law is to promote investment. On the other hand, the objective of environmental law is to protect the environment that would go against the interest of investment law. Thus, regional and bilateral investment treaties impose the duties that must be performed even against the interest of environment.²⁷² At the international level some conventions attempted to reconcile the issue of investment and environmental protection. For instance, the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC) regulates both the promotion of foreign direct investment and protection of environment.²⁷³ Here the two are complementary. There is also conflict between norms of international investment laws that encourages foreign direct investment that fully protect the rights and interests of the investors, on one hand, and norms of international environmental law that seek to protect the environment. A country may enact a law to expropriate investment land to turn it into a protected national park.²⁷⁴

The conflicts between international investment law on the one hand and environmental law on the other may be categorized into two: ‘legitimacy conflict’ and ‘normative conflict.’ Legitimacy conflict is a conflict between an obligation arising from international investment law

²⁶⁹ Gallgher & Zarsky (n 245 above) 49.

²⁷⁰ Gray (n 146 above) 311.

²⁷¹ As above.

²⁷² It is identified by a research that international investment treaties address environmental issues in a limited number of concerns. K Gordon & J Pohl ‘Environmental concerns in international investment agreements: A Survey’ (2011).

²⁷³ See Kyoto Protocol to the UN Framework Convention on Climate Change, Art. 12.

²⁷⁴ P Sands ‘Litigating environmental disputes: Courts, tribunals and the progressive development of international environmental law’ (2008) 7.

and a domestic measure based on environmental considerations other than an obligation stemming from international law.²⁷⁵ Legitimacy conflict is a contradiction between a domestic environmental measures and an international investment norm. According to the traditional approach, the standards of environmental protection could only operate within the limits set by the ‘higher’ (international) law, i.e. investment disciplines. This recognises that foreign investment protection and promotion enshrined under international investment law is adversely affected by national environmental measures (laws). As a result of superiority of international law over domestic law, the purpose of environmental law is mostly constrained by the bounds set by investment law, in practice.²⁷⁶

International environmental law imposes certain obligations, for instance, as per Article 4(5) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ‘a party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from non-party.’²⁷⁷ Therefore, any investment should not violate this provision. However, there are investments made on such types of chemicals. Accordingly, a conflict may arise between international obligation stemming from international investment law and another international obligation arises from international environmental law.²⁷⁸ Such type of conflict is known as ‘normative conflict.’²⁷⁹ Normative conflict is a conflict between an obligation stemming from international environmental law and an obligation deriving from international investment law.²⁸⁰ Conflict of norms is a conflict within a legal system.²⁸¹ ‘There is

²⁷⁵ JE Vinales & MJ Langer Managing conflicts between environmental and investment norms in international law, available at: <http://ssrn.com/abstract=1683465>, last visited on: 9 March 2018, 4-5. For the treatment of ‘legitimacy Vs normative conflicts’, see JE Vinales ‘The environmental regulation of foreign investment schemes under international law’, in PM Dupuy & JE Vinales (eds) *Harnessing foreign investment to promote environmental protection: Incentives and safeguards* (2012) 275-78.

²⁷⁶ JE Vinales ‘The dormant environment clause in trade and investment’, 2012 5-8.

²⁷⁷ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal Article 4(5).

²⁷⁸ JE Vinales ‘The environment breaks into investment disputes’, in M. Bungenberg *et al* (eds), *International investment law* (2013) 2.

²⁷⁹ JE Vinales ‘Foreign investment and the environment in international law: An ambiguous relationship’ (2009/2010) 80 *British Yearbook of International Law* 254.

²⁸⁰ Vinales & Langer (n 275 above). For the discussion on conflict of norms in public international law, see J Pauwelyn *Conflict of norms in public international law: How WTO law relates to other rules of international law* (2003) 5-24.

²⁸¹ R Michaels & J Pauwelyn *Conflict of norms or conflict of laws?: Different techniques in the fragmentation of international law*. For detailed treatment of Conflict of Norms in European Union Law See GM Conway *Conflict of norms in European Union Law and the legal reasoning of the European Court of Justice* unpublished PhD thesis, Brunel University (2010).

a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated.²⁸²

Normative conflict is a conflict between the existence and recognition of a link between the environmental measures and the states' obligations under international environmental law.²⁸³ In such a case, priority is given to international investment law over domestic environmental law and investment may be undertaken contrary to environmental law of a host state. International investment obligations are interpreted, in most cases, in accordance with the laws of host-countries. If the activities are illegal under the host state's law, it may not be protected through the relevant bilateral investment treaty that protects the investment. In this respect, Vinuales²⁸⁴ cites two cases that became obstacle to the jurisdiction of the tribunal. In *Inceysa Vs El Salvador*, the respondent argued that protection should not be granted for investments procured by fraud, forgery or corruption. The applicable bilateral investment treaty (BIT) does not provide the legality of such kind of investments and it provides that investment should be undertaken in compliance with national laws dealing with admission and protection. The tribunal rejected the allegation of the investor by reasoning that the investment is made in an openly illegal manner and such an investment cannot be protected.²⁸⁵

Similarly, in *Fraport v Philippines*, the respondent argued that the investment was in violation of the law of Philippines and it should not be protected. It was further argued that the legality should be not only at the entrance of the investment, but also at its implementation. The implementation should not violate the Philippine law of ownership and control of companies engaging in certain activities.²⁸⁶ Depending on the above-mentioned cases, Vinuales argues that

²⁸² E Vrones 'The Definition of 'norm conflict' in international law and legal theory' (2006) 17 *The European Journal Of International Law* 395 418.

²⁸³ Normative conflict is a contradiction between two norms that that application of one norm leads to a breach of the other. M Milanovic 'Norm conflict in international law: Whither human rights?' (2009) 20 *Duke Journal of Comparative & International Law* 69 72. Norms are legally binding rules that establish rights and obligations between subjects of international law. As above. There would be a conflict between the obligation of a state to protect foreign investor and the obligation to protect its own environment. This is a normative conflict. A Romson *Environmental policy space and international investment law* (2012) 51.

²⁸⁴ Vinuales (n 275 above) 15-6; Vinuales argues that the view that environmental law can apply within the bounds of investment disciplines would no longer applies. See Venuales (n 275 above) 15.

²⁸⁵ *Inceysa Vallisoletana v Republic of El Salvador*, ICSID (2 August 2006) (2006) ARB/03/26.

²⁸⁶ *Frankfurt AG Frankfurt Airport Services Worlwe v Republic of the Philippines*, ICSID Ad hoc Committee (23 December 2010) ICSID Case No. ABR/03/25 (2010)

relations between investment and environmental protection should not be underestimated and the investments that violate the laws of the host state should not be protected.²⁸⁷

2.9.3 Solving conflicts large-scale agricultural investment law and environmental law

Since there is no available norm to solve the tension between investment norms and norms of environmental protection, Vinuales and Langer recommend the application of general principles, and the operation of such techniques depends up on the type of ‘tension’. Thus, there are two techniques to solve the tension: interpretation and conflict.²⁸⁸ Where two norms cannot be applied at the same time because they are conflicting, we have to give priority to one of them. Where there is conflict, normative priority can be found in at three levels: 1) though there is no priority of formal sources of international law, norms that arise from different sources will follow certain logic. Therefore, treaties and custom are primary sources, where as the general principles of law as secondary source, the decision of the international jurisdictions and the teachings of the most highly qualified publicists as auxiliary sources, and equity as alternative source; 2) we can consider the content of norms to make hierarchy between conflicting norms. This material hierarchy derives from concepts such as *jus cogens*,²⁸⁹ *erga omnes* obligations, fundamental norms,²⁹⁰ or essential interests;²⁹¹ and 3) Where the conflict arises between norms that are in the same level, we use the principles like *lex posterior*, *lex specialis* or the determination of the will of the parties, and by *ad hoc* techniques often used by investment tribunals.²⁹²

Basically two interpretative principles are used to resolve conflicts between treaty provisions: the principle that the later law prevails over the earlier law known as *lex posterior*; and the principle that a specific provision supersedes the general one, called *lex specialis*. In addition, the principle that a special rule relating to a particular subject matter applies is applicable.²⁹³

²⁸⁷ Vinuales (n 275 above) 16.

²⁸⁸ Vinuales & Langer (n 275 above) 1.

²⁸⁹ *Jus cogens* refers to the body of peremptory norms of international law. Milanovic (n 283 above) 71.

²⁹⁰ The UN Charter Art. 103. For the discussion of this provision, see Milanovic (n 283 above), 76-102.

²⁹¹ Art. 25 of the ILC Project on the International Responsibility of States.

²⁹² Vinuales & Langer (n 275 above) 2-3; CA Waschefort ‘Child soldiers and international law: progressing towards “an era of application”’ unpublished PhD thesis, SOAS University of London, 2011 123-24.

²⁹³ D Gaukrodger ‘Harnessing freedom of investment for green growth’ (2011) 19.

Regarding the same subject matter Art. 30(3) of the Vienna Convention envisages that one of the treaties may resolve the matter expressly.²⁹⁴ The earlier treaty applies so far as it is compatible with the new treaty; otherwise, the later law prevails. *Lex specialis* suggests that priority should be given to a more specific rule where two rules deal with the same subject matter. The rationale for this principle 'is that the more specific rule likely takes account of the specific context and also probably better reflects the parties' intentions.'²⁹⁵ However, *lex posterior* and *lex specialis* principles are considered to be less persuasive tools in interpreting the conflicts between norms from different regimes. These principles provide a choice of one norm over the other.

In recent years, however, increasing efforts have been made to reconcile interests from different regimes through interpretation. Thus, such an accommodative interpretation is considered as

... a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted in order to give rise to a single set of compatible obligations.²⁹⁶

Sands argues that international tribunals in adjudicating disputes should

... strive for balance, balance between potentially competing objectives of environmental protection on the one hand, and the protection of foreign investors on the other hand. Neither of these important societal interests should trump the other, they should be treated in an integrated manner.²⁹⁷

Therefore, in interpreting conflicting norms, we employ the technique known as 'systematic integration' by which we consider other international norms, which are applicable in the relations between the parties.²⁹⁸

²⁹⁴ See Vienna Convention on the Law of Treaties, Art. 30(2).

²⁹⁵ Gaukrodger (n 293 above) 20. It is provided that 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail' Vienna Convention Art. 30(2). In respect of *lex specialis* See generally B Bowring 'Fragmentation, *Lex specialis* and the tensions in the jurisprudence of the European Court of Human Rights' (2010) 14 *Journal of Conflict & Security Law* 485-498; M Koskenniemi 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' (2006); See J Pauwelyn *Conflict of norms in public international law How WTO rules relates to other rules of international law* (Cambridge university Press, 2004) 385-418.

²⁹⁶ See Fragmentation Conclusions, §4 in Gaukrodger (n 293 above). In the same token scholars suggest that a reasonable accommodation of competing interests is an appropriate approach to solve a conflict between international environmental law and economic law. Such an approach of integrating interests is also central to the principle of sustainable development. Gaukrodger (n 293 above) 21.

²⁹⁷ Sands (n 274 above) 9.

²⁹⁸ This technique is stipulated under Articles 31-3 of the Vienna Convention on the Law of Treaties. According to the general principle of interpretation, 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose, Art. 31(1). It also provides that the interpreter to consider 'any relevant rules of international law applicable in the relations between the parties' Art. 31(3). For detailed consideration of principles of Normative Integration, see generally T Broude 'Principles of normative integration and the allocation of international authority: The WTO, the Vienna Convention on the law of treaties, and the Rio Declaration' (2008) 6 *Loyola University Chicago International Law Review* 173-207.

Coming to the practice, in 'Iron Rhine' arbitration between Belgium and the Netherlands,²⁹⁹ a case was decided in 2005 by five arbitrators, including three ICJ judges. The case involved the 19th century treaty according to which Belgium has a right to transit by railway Dutch territory to link Antwerp with Germany. After a railroad had been used Belgium sought to use it. Modernization and expansion were necessary for this purpose but Dutch law imposes environmental obligations on expansion and impose responsibility for costs. The arbitration agreement included a clause that provides for the application of international law. Then, the tribunal found that 'environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts'³⁰⁰ and that environmental protection must be integrated into the development process. The tribunal interpreted that a 'principle of general international law' that 'where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate such harm.'³⁰¹ Thus, it tried to reconcile the interests as far as possible.³⁰²

In interpreting hierarchically superior norm, we use the 'harmonization principle'.³⁰³ It is natural for the interpreter to use one amongst various possible interpretations of a norm, the one that renders it compatible with the other norms of international law, and in particular with superior law.³⁰⁴

Conclusion

In this chapter, the concept of development has been considered. The concept of development includes socio-economic development, and human rights as well as sustainable development that ensures environmental protection and conservation. Furthermore, both development and sustainable development share freedom, opportunity and quality of life as their goals. Therefore, development is inseparable from the protection of the environment.

The Ethiopian law seems to promote development and protect the environment. The right to development is recognised under international law, customary international law and conventions and declarations. Its nature is controversial, and some argue that it is injusticeable, the right

²⁹⁹ The Kingdom of Belgium v The Kingdom of The Netherlands ICJ (20 September 2005)(2005).

³⁰⁰ Gaukrodger (n 293 above) 22.

³⁰¹ As above.

³⁰² As above.

³⁰³ Vinuales & Langer (n 275 above) 3.

³⁰⁴ As above.

holders and bearers are not clearly identified. Notwithstanding the debate, the right to development is incorporated as part of international human rights law, particularly in the African Human Rights Charter.

Ethiopia recognized the right to development under its constitution. This, in the opinion of the writer, gives the country better position in the promotion and implementation of the right to development. However, the right as incorporated under the Constitution is injusticeable but it must be interpreted in accordance with the Declaration on the Right to Development to which Ethiopia is a party.

Development law is paramount in developing countries including Ethiopia to manage conflicts and to bring about socio-economic development. The Constitution incorporates basic rules aimed at bringing about socio-economic development of the nation. The legislative manual also emphatically provides that laws that are enacted should be crafted so as to bring about development. Furthermore, almost all pieces of legislation of the country are moulded by the concept that law should bring development in all aspects of the life of the Nations, Nationalities, and the Peoples of Ethiopia.

Ethiopia has made a number of laws to promote development, but remained poor. Ethiopia also is a party to the Declaration on the Right to Development, which recognises development as a human right. The country has lounged a large-scale agricultural investment that would help to implement the right to development and is considered under this chapter. The Ethiopian investment law has the objective to improve the living stands of the peoples through socio-economic development. Both foreign and domestic investments have been made in large-scale agricultural investment promotes in Ethiopia. Foreign direct large-scale agricultural investment promotes development by attracting foreign capital, facilitating technology transfer and developing knowledge. The Ethiopian investment law, proclamation no. 769/2012, Regulations no. 272/2012, directives, bilateral investment treaties and the large-scale agricultural investment leases incorporate incentives, exemptions and guarantying the protection of investors to attract foreign direct investment. However, the law does not provide for remedies should investor fail to fulfil the requirements of the law. In practice, what is provided in the law never exercised. This makes clear that the investment law is not strong to play a role in development in large-scale agricultural investment.

The legal principles applicable to large-scale agricultural investment have been developed at the international level. They include securing property right, especially ;and rights for local peoples, free, informed and prior consent of local peoples to transfer land to investors, environmental and social sustainability, compensation, restitution, and/or alternative accommodation to forcibly displaced people, right to be consulted for affected peoples. In Ethiopia, the laws incorporate these principles but their enforcement is not satisfactory.

Chapter Three: International law of sustainable large-scale agricultural development

3.1 Introduction

The issue of sustainable development is an agenda of almost every state in the world today. Developing countries indulged in implementing sustainable development so as to bring about development to their peoples while protecting the environment and preserving the interest of the existing and future generations on natural resources. Sustainable development is about balancing the interest of the existing and coming generations and reconciling the conflict between the protection of the environment and development activities. Regulating the activities by law is important to ensure this balance, and the law plays a pivotal role in doing so.

This chapter is devoted to consider the international law of sustainable large-scale agricultural development. First, we will consider the international law of development. We shall deal with the international law of sustainable development, and then we will consider the principles of sustainable development that were developed by the International Law Commission. The role of investment law in promoting sustainable development is also dealt.

Sustainable agricultural development promotes profitability of the sector without adversely affecting the environment, which involves the economic, environmental and social pillars of sustainability. This chapter considers the concept of sustainable large-scale agricultural development law. It treats the pillars of sustainable large-scale agricultural development. The international law that is applicable to sustainable agricultural development is also treated under the chapter.

3.2 International law of sustainable development

3.2.1 Definition and nature of sustainable development

Considering the definition and nature of the concept of sustainable development is important to deal with the international law of sustainable development.

Definition of sustainable development

The concept ‘sustainable development’ is variously defined,¹ and its meaning differs from country to country, and attempting to define the term in a precise manner is problematic.²

¹ See MCC Segger & A Khalfan *Sustainable development law: principles, practices, and prospects* (2012); for the debate on the definition of the term ‘sustainable development’, see generally M Chakrabarti *Towards an*

However, some common standards of thought have emerged.³ In 1987, the World Commission on Environment and Development (WCED) in its report defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’⁴ This definition has two elements: It recognises that development must be geared toward meeting basic needs of human being. Thus, it urges to end poverty so that it would be possible to meet the basic needs. The second element of the definition is recognising limits to development; limits to the ability of human being, for instance, technology and governance in addition to numerous environmental limitations.⁵

The International Union for the Conservation of Nature (IUCN) in 1991 defines sustainable development as ‘improving the quality of human life while living within the carrying capacity of supporting ecosystems.’⁶ According to this definition, sustainable development is improving the

operational definition of sustainable development (2002). ‘Sustainable development’ is ambiguous and unclear. JS Applegate & AC Aman ‘Introduction: Syncopated sustainable development’ (2001) 9 *Indiana Journal of Global Legal Studies* 1 3. Sustainable development is a fluid concept and various definitions have been emerged. J Drexhage & D Murphy ‘Sustainable Development: from Brundtland to Rio 2012’ in United Nations Headquarter First meeting by the high level panel on global sustainability, New York 6. P Schwartz ‘Sustainable development in international law’ 2005 (5) *Non-State Actors and International Law* 127-152; See ME Gherasim & G Tanase ‘The Fundamentals of Sustainable Development’ (2012) 4 *Contemporary Readings in Law and Social Justice* 446-456.

² See CD Stone ‘Deciphering sustainable development’ (1994) 69 *Chicago-Kent Law Review* 977 977.

³ MR Redclift ‘Sustainable development (1987-2005)- An oxymoron comes of age’ (2006) 12 *Horizontes Antropologicos* 65 66. Sustainable development is defined as a concept indicating interdependent concern with: ‘promoting human welfare; satisfying basic needs; protecting the environment; considering the fate of future generations; achieving equity between rich and poor; and participating on a broad basis in development decision-making’. W Beckerman ‘The chimera of “sustainable development”’ (2007) 1 *The Electronic Journal of Sustainable Development* 17 22. The Brundtland definition is accepted as a standard definition, though it does not mention development and environment. However, the subsequent paragraphs make it clear that inter generational equity is important, and human needs are basic and essential economic growth and equity should share resources with the poor. RW Kates *et al* ‘What is sustainable development? Goals, indicators, values, and practice’ (2005) 47 *Environment: Science and Policy for Sustainable Development* 11. X Fuentes ‘International law-making in the field of sustainable development: The unequal competition between development and the environment’ in N Schrijver, & F Weiss, (eds.) *International law and sustainable development: Principles and practice* (2004) 7.

⁴ GH Brundtland ‘Our common future’ (1987); See MCC Segger ‘The role of international forums in the advancement of sustainable development’ (2009) *Sustainable Development Law & Policy* 5; Segger and Khalfan, (n 1 above) 2; Freedom 21 Santa Cruz Understanding sustainable development-Agenda 21-A guide for public officials available at: www.freedom21santacruz.net Accessed on 02/10/2012, 4; JM Harris *Sustainability and sustainable development* (2003) 1. It is pointed out that the definition provided under the 1987 Brundtland Report is not a scientific blue print rather it is a political and social consideration. Segger and Khalfan (n 1 above) 4. The Brundtland Report had borrowed the concept sustainable development from the 1980 IUCN/UNEP/ WWF World Convention Strategy. PH Sand ‘Sustainable development- of forests, ships, and law’ (2007) 37 *Environmental Policy and Law* 201.

⁵ Segger & Khalfan (n 1 above) 3.

⁶ DA Munro & MW Holdgate (eds) *Caring for the Earth: A strategy for sustainable living* (1991) 3-4. In 1980, the World Conservation Strategy of the International Union for the Conservation of Nature also defined sustainable development as ‘the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life.’ Segger (n 4 above). It is clear that the definition emphasises on the modification of biosphere. It also considers the application of resources particularly

quality of human life. However, improving the quality of human life is limited with the carrying capacity of the ecosystem. In other words, development to improve the quality of life of human being is limited by the ecosystem, one part of the environment.

As one can learn from the above-mentioned definitions, sustainable development focuses on the future, and it ‘solves not just short term issues, but attempts to build capacity and knowledge that will allow countries to develop in the long term too.’⁷ Thus ‘sustainable’, in this context, seems to be synonymous with ‘long-term benefits’. Long-term benefit may include long-term employment prospects, improved social welfare, permanent transfer of superior technology and improved infrastructure facility for further development after the end of a given project.⁸

Moreover, the definition given by Brundtland Report focuses on more economic growth. However, there is an argument that to have a truly sustainable economy, the developed world should reduce its polluting economic activities, not to expand further.⁹ Under the report made by the Commission, ecology is not primary, but merely one among a number of factors to be considered. The relevant part of the Report reads:

The ability to choose policy paths that are sustainable requires that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, industrial and other dimensions (...) on the same agenda and in the same national and international institutions. That is the chief institutional challenge of the 1990s.¹⁰

As one can learn from the quotation above, ecological dimension is one among the economic, trade, agricultural, industrial and other dimensions of development. Furthermore, the concept is human-centred as it would be clear from the forward made by Brundtland herself, ‘... first and foremost our message is directed towards people, whose well-being is the ultimate goal of all environment and development policies.’¹¹ The report considered other species of animals and plants as ‘resources’ for human use, which do not have intrinsic value in their own right. Thus, the Brundtland Report is considered as resourcist view of the world. According to the Report, resources do not have value until they are made into products useful for humans. The Report

human, financial, living and nonliving resources so as to improve the quality of life of human being. Thus, the basic purpose of sustainable development is to improve the quality of the life of the people. Above.

⁷ Redclift (n 3 above) 66.

⁸ A Macdonald ‘Improving or disproving sustainable development in the clean development mechanism in the midst of a financial crisis?’ (2010) 6 *Law, Environment and Development Journal* 19.

⁹ The Green Web characterized sustainable development as ‘ecopornography’ that prostitutes ‘the earth for economic growth, regardless of environmental costs, despite claims to the contrary.’ Above, 3.

¹⁰ Brundtland (n 4 above) 313.

¹¹ Above, XIV.

indicates that '(c)onservation of living natural resources-plants, animals, and micro-organisms, and the non living elements of the environment on which they depend-is crucial for development.'¹²

In addition, sustainable development, in technical terms, can be defined as 'a development path along which the maximization of human well-being for the (present) generations does not lead to decline in future well-being.'¹³ This requires eliminating negative externalities that cause natural resource depletion and environmental degradation. It also includes flexibility element to observe future shocks that we may not assess certainly. From the political point of view, sustainable development requires balancing goods of economic efficiency, environmental protection and social development and requires considering the long-term perspective about our activities.¹⁴

International Institute for Sustainable Development (IISD), on its part, provides the following sophisticated definition, by describing sustainable development as

An open and participatory process of environmental, social, economic, cultural and political change that can be achieved through protecting and enhancing ecosystems, transforming the direction of investments and the orientation of technology and redesigning institutions to ensure current and future potential to meet the needs and aspirations of communities.¹⁵

According to this definition, sustainable development involves an open and participatory process of environmental, social, economic, cultural and political change. It can be achieved through protecting and enhancing ecosystems, transforming the direction of investments and the orientation of technology and redesigning institutions. As one can observe from the definition, regulating investment and technology is essential to ensure sustainable development in a manner that contributes for development and protecting the environment. It is aimed at ensuring current and future potential to meet the needs and aspirations of communities. Sustainable development

¹² Above, 247. The Brundtland report also pointed out that

explicit efforts to save particular species will be possible for only relatively few of the more spectacular or important ones. Agonizing as it will be to make such choices planners need to make conservation strategies as systematically selective as possible. Above, 164.

¹³ Organisation for Economic Co-operation and Development (OECD) 'Policy coherence: vital for global development' (2003) 2. From technical point of view, sustainable development is an increase in wealth production of a country without entailing parallel reduction or degradation of its natural capital. M Decleris 'The law of sustainable development General principles' (2000) 45.

¹⁴ OECD, above, 2.

¹⁵ See Segger & Khalfan (n 1 above) 3.

has the same goals as development- freedom, opportunity, and quality of life. Therefore, the meaning of sustainable development is intrinsically interrelated with development.¹⁶

A study conducted by the board on Sustainable Development of the U.S. in its report ‘Our Common Journey:’ A Transition toward sustainability identified three categories that should be sustained: nature, life support systems, and community, and the intermediate category include Earth, environment and cultures. Life support systems as defined nature or environment is considered as a source of services for the utilitarian life support of humanity. However, some argue that nature must be valued for its intrinsic value rather than its utility to humankind. On the other hand, people, economy and society are categories to be sustained as some argue.¹⁷

In order for the development to be sustainable, it has to be comprehensive and therefore, it has to successfully balance economic goals with that of social and environmental.¹⁸ In line with this, the 2002 Johannesburg World Summit on Sustainable Development developed the standard definition by identifying three pillars of sustainable development: economic, environmental and social.¹⁹ However, culture is added to these three pillars of sustainable development.²⁰ Thus, the definition to the term should include culture.

Under the Rio- Declaration, the 1997 and 2002 affirmation made by states, states are under national commitments to implement sustainable development law.²¹ The World Summit on Sustainable Development (WSSD) Plan of Implementation (PoI) stresses that every country is duty bound to its own sustainable development, and all countries must promote sustainable development at the national level by promulgating and enforcing clear and effective laws that support sustainable development.²² Furthermore, Agenda 21 provides a comprehensive plan, strategies, and programmes to curb and reverse the effect of environmental degradation and to

¹⁶ JC Dernbach ‘Creating the law of environmentally sustainable economic development’ (2011) 3 *Pace Environmental Law Review* 614 614.

¹⁷ A study conducted by the Board on Sustainable development of the United States in its report ‘Our Common Journey’ A transition toward sustainability identified the three categories to be sustained. OECD (n 13 above) 11.

¹⁸ T Soubbotina *Beyond economic growth: An introduction to sustainable development* Second edition (2004) 9. According to Dolezalova, a development that does not increase the burden on the environment is sustainable development. H Dolezalova ‘Enforcement of environmental aspects of sustainable development in land-use planning’ (2009) *Journal of Interdisciplinary Research* 1.

¹⁹ Kates *et al* (n 3 above) 12.

²⁰ See United Cities and Local Governments (UCLG) *Culture: Fourth pillar of sustainable development* 4.

²¹ The principles could be converted to questions and government officials, members of NGOs, and academic and other experts will be interviewed and qualitative analysis can be made to check the implementation of the principles of international law of sustainable development. J Dernbach & JA Mintz ‘Environmental laws and sustainability: An introduction’ (2011) 3 *Sustainability* 538-39.

²² M Pallemerts ‘International law and sustainable development: Any progress in Johannesburg?’ (2003) 12 *Review of European Community & International Environmental Law* 1 3.

promote sustainable development in all countries.²³ Nonetheless, the Rio Declaration and Agenda 21 are not legally binding, but considered as ‘soft law’. Since 1992, many countries embrace the concept of sustainable development and prepared national action plans to implement Agenda 21.²⁴

Nature of sustainable development

The concept of sustainable development bridges the tension between environmental limits on the one hand and economic and social development, on the other. As to the concept, it is a common obligation of the present and the future generations to balance development activities and environmental protection. ‘Sustainable development seeks to create the conditions for long-term sustainability for present and future generations.’²⁵ The concept sustainable development requires an accommodation between economic development and social justice as well as environmental protection. It provides for cooperative, integrated solutions to the problem of the relation between development and environmental protection.²⁶ Sustainable development involves significant procedural elements. It is implemented through involvement and consultation of the people, which requires public participation. Further, it is done through the expansion of opportunities and capabilities of people for development. In addition, it is implemented through environmental impact and risk assessment. Sustainable development is not a goal; rather it is a process.²⁷

The concept sustainable development is fluid that is open to different definitions. The definition given by Brundtland report and human rights approach are attempting a balance between developmental needs and environmental protection. This definition incorporates integrity as a key factor.²⁸ However, there are criticisms against this definition. The first of them is that the concept is flexible and without fixed content so that it can mean different things to different groups which is called indeterminacy objection. The other criticism, known as

²³ See Agenda 21(1992).

²⁴ Segger & Khalfan (n 1 above) 22.

²⁵ Kates *et al* (n 3 above) 3. Development that considers not only short term but also long term is called sustainable development. LG Bellu ‘Development and development paradigms A(reasoned) review of prevailing visions’ (2011) 3.

²⁶ Economic development should not deplete the environment. TL Anderson & LR Kosnik ‘Sustainable skepticism and sustainable development’ (2002-2003) 53 *Case Western Reserve Law Review* 442. Sustainable development reconciles the opposites. A Peck ‘Sustainable development and the reconciliation of opposites’ (2012 - 2013) 57 *Saint Louis University Law Journal* 151-183.

²⁷ Segger & Khalfan (n 1 above) 3.

²⁸ D Tladi *Sustainable development in international law: An analysis of key enviro-economic instruments* (2007) 74.

ecocentric objection, also argues that sustainable development undermines the ability of environmental law and policy to protect the environment.²⁹

Based on the flexibility nature of sustainable development, environmentalists claim that it is the ecological conditions, not the economic development that must be sustained.³⁰ On the other hand, those advocating economic growth define sustainable development to mean 'lasting economic growth and lasting energy development.'³¹ The practical implication of flexibility of sustainable development is that a single activity can be taken as promoting or undermining sustainable development.³²

Klause Bosselmann classified sustainable development into 'weak' and 'strong'.³³ Weak sustainable development is understood as policies that lead to maintenance of the aggregate stock of capital in the economy.³⁴ According to this, different economic and ecological resources can be expressed in terms of money, while different recourses can serve as substitute for one another. As per weak sustainable development, it is possible to lose natural capital and replace it with economic capital.³⁵ Strong sustainable development on the other hand argues for all capitals to be independently preserved.³⁶ Nevertheless, these two models of sustainable development are criticized. For instance, some argue that sustainable development may be made at the expense of development, while others argue that weak sustainable development undermines the role of environmental law to protect the environment. Thus, it proposes that sustainable development should integrate the development, environment and social concerns.³⁷ This approach does not include culture, the fourth pillar of sustainable development while it concentrates on the three pillars.

²⁹ Above 75.

³⁰ Above 76.

³¹ Above 75.

³² Above 76.

³³ K Bosselmann 'The concept of sustainable development' in K Bosselmann & D Grinlinton (eds) *Environmental law for sustainable societies* Second edition (2013); K Bosselmann 'Strong and weak sustainable development: Making the difference in the design of law', paper presented at the World Summit 2002: Environmental Law Foundations for Sustainable Development, University of Natal, Pietermaritzburg, South Africa (Bosselmann 'Making the difference in the design of law'); for the current debate on the issue see J Pelenc & J Bsllet, Brief for GSDR 2015 'Weak sustainability versus strong sustainability' (United Nations).

³⁴ Tladi (n 28 above) 77. See MC Cabeza 'The concept of weak sustainability' (1996) 17 *Ecological Economics* 147-156.

³⁵ As above 77.

³⁶ As above 77.

³⁷ Above 78. Some argue for middle ground. See GR Davis *Appraising weak and strong sustainability: searching for a middle ground* (2013) 10 *Consilience: The Journal of Sustainable Development* 111-124.

Sustainable development includes both substantive and procedural elements. The substantive elements, incorporated under Principles 3-8 of the Rio Declaration includes sustainable utilization of natural resources; the integration of environmental protection and development; inter and intra generational equity and right to development. The procedural elements that are provided under principles 10 and 17 of the Rio Declaration deal with public participation in decision making, access to information and environmental impact assessment. Other principles are also included such as state sovereignty over natural resources, the principle not to cause harm onto others, common but differentiated responsibility, precautionary principle, and polluter pays principle.³⁸

Integration is the core philosophy of sustainable development law.³⁹ The basic nature of sustainable development is balancing and reconciling between the economic, environmental, social and cultural laws; the four pillars of sustainable development.⁴⁰

Sustainable development law can be described as

...an emerging corpus of ...legal principles and instruments which address the intersections between ... Economic, environmental and social law (including human rights law), towards development that can last for the benefit of present and future generations.⁴¹

This definition makes clear that it is a legal principle to address the competitions between environmental law, development law and social laws which include human rights law. From the international law point of view, Markus Gehring⁴² defines interactional sustainable development law as that kind of law that balances priorities of international environmental law,⁴³ international social law⁴⁴ and international economic law.⁴⁵

³⁸ Nabaat Tasnima 'Sustainable development and its evolution in the realm of international environmental law' (2016) Nnamdi Azikiwe University Journal of International Law 1 4.

³⁹ V Barral 'Sustainable development in international law: Nature and operation of an evolutive legal norm' (2012) 23 377-400, *European Journal of International Law* 381.

⁴⁰ See I Alogna 'The circulation of the model of sustainable development: Tracing the path in a comparative law perspective' in V Mauerhofer (ed) *Legal aspects of sustainable development* (2016) 19.

⁴¹ See MC Cordonier Segger & A Khalfan (n 1 above); MC Cordonier Segger & CG Weeramiantry (eds) *Sustainable justice: Reconciling economics, social and environmental law* (2004).

⁴² M Gehring 'International law and the sustainable development goals- Shaping the rules for our common future' (2017).

⁴³ International environmental law includes laws applicable to atmosphere, water and biodiversity. M Gehring 'Sustainable development goals and the law: Measuring sustainable development' (2015).

⁴⁴ International social law includes human rights law, social development law, and health law. Gehring, above.

⁴⁵ International economic law is a law applicable to investment, trade, competition, and natural resources. Gehring, above.

In general, international sustainable development law is a norm⁴⁶ to balance different priorities of environmental law, development law and human rights law. It is a law rationalized by science for sustainability and justice, which imposes ethical responsibility.

The Johannesburg Declaration recognises the interdependence and mutually reinforcing three pillars of sustainable development-economic development, environmental protection and social development.⁴⁷ Thus, the concept of sustainable development was developed to include the economic, environmental and social pillars or dimensions, which are hierarchically equal and mutually interacting. However, three critics have been directed to the three-pillar conception. The political criticism raises that such kind of conception would encourage governments to uphold the existing activities, *status quo*, as sustainable development, legitimizing the existing goals of the society. Another criticism argues that the three-pillar model would cause separation from social to economic. This radical critique considers the three-pillared model as flawed and false consensus that reflects the fundamental flaws in the relations between human society and the environment. The third critique focuses on the relations among the three and the three have their own logic, and might likely to conflict but the model does not provide for how to resolve the conflict. The economy has profitability as its objective, and this objective contradicts with the objective of environmental protection. Thus, three pillars are not qualitatively equal, but occupy different positions in hierarchy. Though they are criticized, the three pillars have been working.⁴⁸ Culture also is recognized as the fourth pillar of sustainable development. Therefore, the three-pillared concept of sustainable development is developed to four-pillared.

3.2.2 Pillars of sustainable development

Sustainable development, today, is four-pillared, which includes culture in the three-pillars. The three pillars of sustainable development- environmental, economic and social pillars- were

⁴⁶ However, some argue that sustainable development is not a legal framework rather a normative conceptual framework that is written into law. F Cheever & JC Dernbach 'Sustainable development and its discontents' (2015) 4 *Journal of Transnational Environmental Law*, 247 251.

⁴⁷ Johannesburg Declaration on Sustainable Development (2002) Paragraph 5; Kates *et al* (n 3 above) 12. Sustainable development must take into account three interacting factors- which are, economic development, environmental protection, and social (human rights) development. Kates *et al* above, 6. See also III BS Malagang 'Rethinking sustainable development' (2006) 81 *Philippine Law Journal* 119.

⁴⁸ M Lehtonen 'The environmental-social interface of sustainable development: capabilities, social capital, institutions' (2004) 49 *Ecological Economics* 199 200-201.

coined in Johannesburg Declaration, which influenced the definition of the concept of sustainable development.⁴⁹ The pillars are ‘interdependent and mutually reinforcing.’⁵⁰

A) Environmental pillar

Environmental pillar is governed by fragmented governance structure and meagre financial means, is much weaker. It has weakness; first, environmental pollution lacks moral significance attributed to the protection of human lives. Environment conceived as ‘public good’ is considered to be friendly enjoyed by humans.⁵¹ Moreover, environmental protection for a long term has been a political debate as one of the futures of sustainable development. Environmental harm became evident and required measures to protect the environment. According to Jane and Maria, ‘environmental damage is already sufficiently bad to demand action.’⁵² It is recognised that international law lags behind the pace of ecological basis of development and called upon for development of environmental law.⁵³

B) Social pillar

The concept ‘sustainable development’ emanates from the well-established area of international law such as human rights, state responsibility, environmental and economic law, etc. In the socially sustainable development, the ‘social’ element is derived from the economic, social and cultural rights entrenched in international human rights law such as the International Covenant on Economic, Social and Cultural Rights.⁵⁴

⁴⁹ J Holder & M Lee *Environmental protection, law and policy: Text and materials* 2nd Edition(2007) 237. The three pillars are connected and interdependent. See T Strange & A Bayley *Sustainable development Linking economy, society, environment* (2008) 27. The economic and social pillars are stronger than the environmental pillar because they possess strong anchor institutions that determine the global and regional policies that generate trickle down effects to the national level. UNEP Issue Brief No. 1, *The environmental dimension of IFSD* 3.

⁵⁰ A Ross ‘Modern interpretations of sustainable development’ (2009) 36 *Journal of Law and Society* 35.

⁵¹ The relative weakness of the environmental pillar was recognized by the Secretary General. UNEP above.

⁵² However, environmental protection is downplayed in the Johannesburg documents. Holder & Lee (n 49 above) 238.

⁵³ Segger & Khalfan (n 1 above) 19. The 1987 Brundtland Report explicitly provides for how to reconcile the demands of development from the developing countries with the demand of environmental protection particularly from the developed countries. Developing countries have rejected the ‘no grow’ response to the environmental degradation. Holder & Lee (n 49 above) 220.

⁵⁴ K Papadakis ‘Signing international framework agreements: Case studies from South Africa, Russia and Japan’ (2009) 4; Socially sustainable development is considered as a fundamental principle of contemporary international law. Above, 7. The International Covenant on Economic, Social and Cultural Rights incorporates the right to work under Art. 6, the right to Security under Article 9, the Right to adequate standard of living, including food, clothing and housing under Article 11, and the right to education under Article 13. International Covenant on economic, social and cultural rights (1966).

Social sustainability is defined as ‘... a quality of societies which signifies the nature-society relationships, mediated by work, as well as relationships within the society.’⁵⁵ The definition contains sustainability, intergenerational equity, intra-generational equity, and public participation. The first three are substantive feature where as the fourth is a procedural element. Intra-generational equity requires the elimination of existing inequalities between the ‘developed’ and ‘developing’ as well as between the poor and the rich. Inter-generational equity means ‘that present generations should adjust their behaviour so that the conditions of life of future generations are taken into account.’⁵⁶

According to the World Bank, socially sustainable development is ‘a developmental approach that integrates equity in economic relations between states and within each state.’⁵⁷

The UNDP, in its part, explained it as

a development framework which makes the conquest of poverty, the goal of full employment and the fostering of a stable, safe and just society the overriding objectives of development policy and interventions.⁵⁸

Generally, socially sustainable development aims at reconciling legal obligations related to economic development and social protection, that might conflict in the policy making, and principles of inter-and intra-generational equity and sustainability.⁵⁹

C) Economic Pillar of Sustainable Development

Economic sustainability means ‘... creating the conditions that are necessary to allow economic production to continue into the indefinite future.’⁶⁰ Thus, the economy should continue

⁵⁵ B Litting & E GrieBler ‘Social sustainability: a catchword between political pragmatism and social theory’ (2005) 8 *International Journal of Sustainable Development* 72. Equity, awareness for sustainability, participation, and social cohesion are important points in describing social pillar. K Murphy ‘The social pillar of sustainable development: a literature review and framework for policy analysis’ (2012) 8 *Sustainability: Science, Practice, & Policy* 19. Social sustainability is defined in various forms and lacks clarity. However, it includes values like participation, equal opportunities, and justice. Litting & GrieBler above, 70.

⁵⁶ Papadakis (n 54 above) 2.

⁵⁷ World Bank ‘Attacking poverty’ (2000/2001) 92-93.

⁵⁸ United Nations Development Programme (UNDP) ‘Millennium development goals: A compact among nations to end human poverty’ (2003) 5. The term ‘social’ includes individual and collective levels and social development is one element of development dimensions. Lehtonen (n 48 above) 202.

⁵⁹ UNDP, above, 5. There are three sets of indicators of social sustainability. The first includes the quality of life and satisfaction of basic needs, which relates to individual income, poverty, employment, education, housing, health security. The second set deal with justice that relates to the distribution of economic goods like income, in a broader sense-it implies equal opportunities in education, and gender equity. The third group of core indicators relates to social coherence that suggests measurement of, for instance, integration into social networks, involvement in solidarity and tolerant attitudes. It also requires a fairer distribution of work among the gender. Litting & GrieBler (n 55 above) 75-6.

⁶⁰ R Smith *et al* ‘A proposed approach to environment and sustainable development indicators based on capital’ (2001) 2.

to develop in a manner that should not affect the national resources.⁶¹ The economic pillar of sustainable development consists of two components:⁶² creation of 'sustainable' value through the identification of value that contributes to sustainable development; and sustainability of this creation, and by extension of the company itself as its source. Companies are accountable for development, value creation and sustaining the value. They are required to consider the environmental protection. Furthermore, companies should consider the impact of their behaviours on the environment and take necessary measures to protect the environment. In addition, they must sustain, in the business, long-term survival as actors in sustainable development, and they must turn the responsibility of sustainable development into opportunities for long-term growth.⁶³ Economic sustainability requires economic growth that employs environmentally friendly technology 'in addition to less energy and raw material-intensive production.'⁶⁴

Litting and Griebler argue that institutions, existing or newly created, are also important in addition to the three pillars of sustainable development. It is also argued that cultural conditions and values are essential resources that need to be presented for future generations. In general, ecology, economy and social matters should remain stable in long term in a manner that does not jeopardise achievement of civilization. It is criticised that the three-pillared model is not complete and must include a cultural-aesthetic, a religious-spiritual, or a political-institutional pillar. It is also criticised that equality among the three pillars is not pragmatic since such equality does not exist in the real world.⁶⁵

D) Culture as pillar of sustainable development

Culture is recognized as the fourth pillar of sustainable development.⁶⁶ Culture is defined variously.⁶⁷ The UNESCO Universal Declaration on Cultural Diversity defines it as

⁶¹ Above.

⁶² Jean-Pierre TADIEU-VEDLIA ENVIRONMENT (Chairperson) *The economic pillar of sustainable development: a business perspective* 4.

⁶³ Above, 20.

⁶⁴ Dolezalova (n 18 above) 1. It is believed that holistic approach to the three pillars of sustainable development-economic, social and environmental development is vital. UNESCO 'The Economic pillar of sustainable Development: educational approach' (2009) 1.

⁶⁵ Litting & Griebler (n 55 above) 67.

⁶⁶ United Cities & Local Governments (n 20 above) 4.

⁶⁷ A du Plessis & C Rautenbach 'Legal perspectives on the role of culture in sustainable development' (2010) 13 *Potchefstroom Electronic Law Journal* 27 31-2.

... a set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.⁶⁸

It is essential to shape the development and determines how people act in the world to achieve sustainable development. This pillar requires 1) the development of culture itself (heritage, creativity, crafts, cultural tourism), and 2) to ensure that culture has its rightful place in public policies, especially in education, economy, science, communication, environment, social cohesion and international cooperation.⁶⁹ Culture is essential and inseparable from sustainable development.⁷⁰ Without culture, the three pillars of sustainable development not only never be implemented but also cannot be understood. Therefore, culture is considered as a fourth pillar of sustainable development.⁷¹

Since cultural diversity binds universal development goals to plausible and specific moral visions, it guarantees sustainable development as a source of innovation, creativity and exchange.⁷² Thus, government should promote the enjoyment of culture by all, protect, and enhance the citizen's right to freedom of expression and access to information and resources.⁷³ The Statement calls upon governments to integrate culture into their development policies develop a solid cultural policy, and national development plans.⁷⁴ The Convention on the Protection and Promotion of the Diversity of Cultural Expressions requires member States to ‘... integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development...’⁷⁵

3.2.3 International law of sustainable development

Law and institutions play crucial role to achieve sustainable development.⁷⁶ Thus, environmental law, land use and property laws, tax laws, laws governing the structure of a given government, and so on are necessary legal frameworks to achieve sustainable development. Law of sustainable development is about governance for sustainability since it provides for essential

⁶⁸ *Universal Declaration on Cultural Diversity* (2001) fifth Paragraph of the Preamble.

⁶⁹ United Cities & Local Governments (UCLG) (n 20 above).

⁷⁰ Plessis & Rautenbach (n 67 above) 37.

⁷¹ Above, 43.

⁷² *Cultural Diversity and Biodiversity for Sustainable Development* (2002) 7.

⁷³ United Cities & Local Governments (n 20 above) 5.

⁷⁴ Above, 7.

⁷⁵ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Art. 13.

⁷⁶ Dernbach & Mintz (n 21 above) 531-32; Fuentres (n 3 above) 36. Law can define and determine the scope of sustainable development. Hodas DR ‘The Role of Law in Defining Sustainable Development: NEPA reconsidered’ (1998) 3 *Widener Law Symposium Journal* 1 51.

tools and institutions for governing sustainability.⁷⁷ International law of sustainable development is a law that provides legal principles and imposes duties so as to protect the environment, on the one hand, and promote economic and social development, on the other.⁷⁸ Sustainable development law addresses the negative agenda that encourages the depletion and exploitation and use of wasteful use of resources.⁷⁹ It also provides rules that promote sustainable development by enabling a state to plan for sustainability.⁸⁰

International law on sustainable development is derived from international environmental law and international development law. Human rights law is also considered as essential part of sustainable development law that relates to social pillar of sustainable development,⁸¹ and development law relates to the economic pillar, while environmental law relates to the ecological pillar of sustainable development.⁸² According to professor Brown Weiss, law can help to develop social norms that are necessary to protect the environment.⁸³

The concept of sustainable development is recognized under international law⁸⁴ and it has become a customary norm of international law.⁸⁵ In addition, the issue of sustainable

⁷⁷ Dernbach & Mintz (n 21 above) 531-32. Regarding the role of law in sustainable development, see TB Adams, 'Is there a legal future for sustainable development in global warming? Justice, economics and protecting the environment' (2003-2004) 16 *The Georgetown International Environmental Law Review* 98-99. See Her Honour Ms. P Sandra 'The role of environmental law within the framework of sustainable development' (Paper presented at the Regional needs Assessment and Planning Meeting of Chief Justices of the English-Speaking Caribbean Trelawney Jamaica June 11th 2004) 2-3. The Law provides norms and reconciles the opposites. Tladi (n 28 above) 108.

⁷⁸ Adams, above, 98-9. See generally Schwarz (n 1 above) 127-152. Sustainable development law is that encourages sustainable development. See JW Futrell 'The transition to sustainable development law Ninth Annual Lloyd k. Garison Lecture on Environmental Law' 2003-2004 (21) *Pace Environmental Law Review* 181.

⁷⁹ JW Futrell 'Defining sustainable development law' (2004-2005) 19 *Natural Resources & Environment* 9 10.

⁸⁰ Above, 12.

⁸¹ Cultural and social rights as well as civil and political rights of people are considered central to the pursuance of sustainable development. See A Hildering *International law, sustainable development and water management* (2005) 39.

⁸² Hildering above, 35. International development law is concerned about 'eradication of poverty, permanent sovereignty over natural resources, entitlement to development assistance and transfer of technology, preferential treatment of developing countries in trade and common but differentiated responsibilities.' Above, 39. The Right to development and good governance are core elements of the law of sustainable development law. MPW Silveira & B Ruis 'International law for sustainable development: an attempt at definition' (1996) 2 *NAFTA: Law and Business Review of the Americas* 12 17.

⁸³ Adams believes that law plays a vital role to achieve sustainable development. Adams, (n 77 above) 98-9.

⁸⁴ See generally Henning *Sustainable development in international intellectual property law-New approaches from EU economic partnership agreements?* Sustainable development has acquired normative standard and being practiced. N Schrijver & F Weiss (eds) 'Introducing the Book' in N Schrijver & F Weiss (n 3 above) xi.

⁸⁵ Customary international law that is a mixture of public, private and common concepts of property may promote sustainable development. See generally P Orebech *et al The role of customary law in sustainable development* (2005).

development is incorporated under certain economic development treaties and international practices in regional cooperative initiatives, or resource management sectors.⁸⁶

Though the concept sustainable development law is not yet well developed, it may be possible to define it as a corpus of international legal principles and treaties, which address the areas of intersection among international economic law, international environmental law and international social law aiming toward development that can last.⁸⁷ Procedural and substantive norms and instruments that help to reconcile or balance the economic, environmental and social issues form the body of international sustainable development law. In other words, sustainable development law is a body of rules and principles that balance conflicting legal norms of environmental protection, social justice and economic growth.⁸⁸ It integrates economic development with environmental protection.⁸⁹

Rio Declaration, Agenda 21, the Johannesburg Plan of Implementation, the Millennium Development Goals (MDGs) and numerous multilateral environmental agreements (MEAs) govern sustainable development and those instruments are adopted by all member States, which indicate the consensus on the issue.⁹⁰

Furthermore, there is an international consensus regarding a need for sustainable development and foreign direct investment is a key component of development agenda. Many soft laws recognise the importance of investment in sustainable development, for instance, Agenda 21 recognises that ‘... foreign direct investment contributes toward financing sustained economic growth over the long-term.’⁹¹ Thus, transparent, sustainable, and predictable investment climate, proper contract enforcement, respect for property rights are essential for

⁸⁶ Segger & Khalfan (n 1 above) 45. See also Gerhard ‘The evolving regime on climate change and sustainable development.’ Since the Rio Declaration, most international agreements adhere to the concept of sustainable development, Gerhard, above, 98.

⁸⁷ Segger & Khalfan (n 1 above) 46. See generally JR Nolon ‘The law of sustainable development: Keeping pace’ (2010) 30 *Pace Law Review* 1246-1298. For treatment of environmental principles in sustainable development context, see Verschuuren J ‘Sustainable development and the nature of environmental legal principles’ (2006) 9 *Potchefstroom Electronic Law Journal* 1-57.

⁸⁸ Segger & Khalfan (n 1 above) 47. International law of sustainable development includes the intersection of international environmental law, international economic and social laws. Pallemmaerts (n 21 above) 6.

⁸⁹ Viriyo Available at: <http://ssrn.com/abstract=2133771> Accessed on: 17/08/2015 at 3. See generally Schwartz P ‘Sustainable development in international law’ (2005) 5 *Non-State Actors & International Law* 127-152.

⁹⁰ B Lode & N Meyer-Ohlendorf ‘Rio+20: Sustainable development goals-The environmental pillar rigorous stock-taking and present proposals’ (2012) 3. See also Abeba Tadesse Gebresilassie ‘The idea of sustainable development to reconcile the environmental and the intellectual property protection of plants’ (2010) 12 *Journal of Sustainable Development in Africa* 125 125.

⁹¹ Smith *et al* (n 60 above) 9.

investment at national and international levels. Efforts have been made to integrate sustainable development with investment under international investment agreements.⁹²

In sum, law can play great role to achieve sustainable development.⁹³ It is essential to further develop international sustainable development law, that accord due weight to both development and environmental concerns.⁹⁴

3.3 International law principles of sustainable development

In 2002, the International Law Association (ILA) Committee on the Legal Aspects of Sustainable Development drafted seven principles of sustainable development,⁹⁵ while the 2012 Sofia Guiding Statements elucidate these principles.⁹⁶ The norms as they stand are not exhaustive and several of them are not recognized as binding rules of international law. What is essential is that they are increasingly made part of binding international treaties, and form part of international law of sustainable development.⁹⁷ Thus, this section of the thesis is devoted to discuss these principles.

3.3.1 The principle of sustainable use of natural resources

It is essential to manage natural resources, such as land, water, and living resources, to achieve sustainable development.⁹⁸ The first principle stipulates the duty of states to ensure sustainable

⁹² Above, 9-10.

⁹³ Above, 536.

⁹⁴ Principle 27 of Rio Declaration, Chapter 39 of Agenda 21 of the UN Conference as well as other resolutions call for the development of international law on sustainable development. See ILA New Delhi Declaration of principles of international law relating to sustainable development (2002) 1, 6th para.

⁹⁵ 'G20 Leaders' Statement: Pittsburgh Summit (September 24-25, 2009, Pittsburgh) 6. The International Law Association's (ILA) Committee on the Legal Aspects of Sustainable Development recommended the seven principles and the 70th Conference of the International Law Association held in New Delhi, 2-6 April 2002 passed them as a Resolution. The seven principles seek to integrate the economic, environmental and social pillars of sustainable development. MCC Segger *et al* 'Respects for principles of international sustainable development law after the WSSD: Common but differentiated responsibilities, precaution and participation' (2003) 12 *Review of European Community & International Environmental Law* 55. M Goepel 'Formulating future just policies: Applying the Delhi sustainable development law principles' (2010) 2 *Sustainability* 1694 1697.

⁹⁶ See the 2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development the principles of sustainable development law arise from public international law, private international law, and international administrative law. MPW Silveira & B Ruis 'International law for sustainable development: an attempt at definition' (1996) 2 *NAFTA: Law and Business Review of the Americas* 12 18; International Law Association Sofia Conference, 'International law on sustainable development' (2012) 3-4.

⁹⁷ Goepel (n 95 above) 1698.

⁹⁸ NB Ugulu & E Aladag *Natural resources and education for sustainable development* (No year) 2; See also J Kloeckner 'Developing a sustainable hard rock mining and mineral processing industry: Environmental and natural

use of natural resources. This principle was first reflected in Principle 21 of the Stockholm Declaration. According to this principle, States must use their natural resources in a manner not to cause damage the environment as well as natural resources of other States.⁹⁹

As one can understand from the principle, using natural resources is a right recognised under international law, but states are required to use natural resources according to their environmental policies. However, states are duty bound to ensure that activities of using their natural resources do not cause environmental damage beyond the limits of their national jurisdiction.

Furthermore, the 1992 Rio Declaration, under principle 2, provides this principle almost in a similar fashion with principle 21 of Stockholm Declaration. According to this principle, states have the right to use natural resources ‘pursuant to their own environmental policies...’¹⁰⁰ The principle of using natural resources without causing environmental damage to other states, at least in directly requires States to adopt environmental and developmental policies that enable them to use their own natural resources without causing environmental damage to other states. It is important to note that natural resources must not be purely domestic resources as a principle of international law. The harm should some international or transboundary element. ‘Sustainable use’ is another condition of this principle, but it may differ from country to country.¹⁰¹

States should regulate natural resources according to their environmental policies and development policies. In this regard, both Declarations require two elements: the first element reaffirms the sovereign rights of states to exploit their own natural resources while the second element puts a limit on the first element by imposing obligation not to cause damage to the environments of other states.¹⁰²

resource law for twenty-first century people, prosperity, and the planet’ (2010) 25 *Journal of Environmental Law and Litigation* 123ff.

⁹⁹ M Gehring & Andrew Newcombe ‘An introduction to sustainable development in World investment law’ in MCCC Segger *et al* (eds) *Sustainable development in world development law* (2011) 7-8; Segger (n 4 above) 10. The Stockholm Principle 21 reads:

States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction...

Declaration of the United Nations Conference on the Human Environment, Stockholm, Principle 21.

¹⁰⁰ Segger and Khalfan (n 1 above) 110.

¹⁰¹ As above.

¹⁰² Above, 111.

This principle of sustainable development is increasingly incorporated in international treaties. Accordingly, many international agreements include the sovereign rights of states over their natural resources and the duty to protect the environment. For instance, the 1992 Biodiversity convention reaffirms the principle.¹⁰³ The second principle of the sovereign right limits the sovereignty which was imposed by environmental protection and universal human rights law, and it is (the obligation to protect the environment in using natural resources) which is ‘a central tenet of international environmental law.’¹⁰⁴

The principle of permanent sovereignty over natural resources, under international law, implies the following two duties: 1) the duty to ensure that all people benefit from the exploitation of natural resources and resulted national development; and 2) the obligation to have due care for the environment. This incorporates the customary duty to prevent harm beyond national jurisdictions, and the responsibility to manage natural resources to ensure sustainable production and consumption.¹⁰⁵ However, the principle does not attain the status of customary international law.¹⁰⁶

3.3.2 The principle of equity and poverty reduction

Equity and poverty reduction refers to

both inter-generational equity (the right of future generations to enjoy a fair level of the common patrimony) and intra-generational equity (the rights of all the peoples within the current generation’s entitlement to the earth’s natural resources).¹⁰⁷

It addresses the importance of eradicating poverty to achieve sustainable development.¹⁰⁸

¹⁰³ Biodiversity Convention, Para 2, Art. 15(1).

¹⁰⁴ Segger & Khalfan (n 1 above) 112.

¹⁰⁵ Above, 112-13. See also African Convention on the Conservation of Nature and Natural Resources, Art. 16.

¹⁰⁶ Segger & Khalfan (n 1 above) 116. Law should be dynamic to regulate human needs of natural resources and sustainable development. TW Walde ‘national resources and sustainable development: From ‘Good intentions’ to ‘Good consequences’ in Schrijver & Weiss (n 3 above) 148.

¹⁰⁷ Ghering & Newcombe (n 99 above) 8. See also Segger (n 4 above) 11. Intergenerational equity is defined as ‘that principle of ordering of the community of mankind which will make it possible for every generation, by virtue of its own effort and responsibility, to ensure a proportional share in the common good of the human species’. Segger & Khalfan (n 1 above) 124. Intra-generational equity, the other element of the principle of equity, is equity among the existing generation both at the global and national levels with regard to allocation and utilization of resources. Segger & Khalfan (n 1 above) 125; See Institute of Environmental Security *International law of sustainable development: Legal aspects of environmental security on the Indonesian Island of Kalimantan* (2005) 23; S Beder *Environmental principles and policies: An interdisciplinary introduction* (2006) 71. I Millar ‘The environmental law framework for sustainable development in international, national and local laws’ (2009) 3. Equity deals about how to allocate future responsibilities for environmental protection among states that are at various levels of development, that contributed for environmental pollution, and which have different environmental and developmental needs and priorities. P Sands *et al Principles of international environmental law* third edition (2012) 262.

Equity is a key social concept in sustainable development, which refers to distribution of welfare goods and life chances fairly, and it is applicable on international, regional and national, and intergeneration contexts. Where all citizens have an equal opportunity to both survival and fulfil their development potentials regardless of gender, it is known as equitable distribution. It promotes the concept of freedom from discrimination based on gender.¹⁰⁹ As spelt out in the New Delhi Declaration, the principle of equity includes a duty to cooperate among the parties of developed and developing states to secure development opportunities, and the duty to cooperate to eradicate poverty.¹¹⁰

The principle has its roots in the Charter of the United Nations because it enshrines the role to promote higher standards of living, employment, economic and social development, respects for human rights etc.¹¹¹ It is also incorporated under various international instruments such as the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration on Human Rights, the Declaration on the Right to Development, etc.¹¹² Agenda 21 also gives due attention for eradication of poverty.¹¹³

The 2005 World Summit calls for coalition of governments (interested), inter governmental organizations, research institutions, civil and business societies to work on the program to end poverty and secure healthy environment for the current and the coming generations.¹¹⁴ According to UN, poverty reduction is essential to increase the economic wellbeing and achieve sustainable development.¹¹⁵

3.3.3 The principle of common but differentiated responsibilities

The principle involves common responsibility of states to protect the environment at the national, regional and international levels as shall be balanced by the need to consider circumstances like states historical contribution to the creation of particular problem, the liability to prevent, reduce

¹⁰⁸ Ghering and Newcombe (n 99) 8.

¹⁰⁹ K Murphy 'The social pillar of sustainable development: a literature review and framework for policy analysis' (2012) 8 *Sustainability: Science, Practice & Policy* 20. Equity is a device through which international law should be interpreted-regarding the notion of inter-and intra generational equity. Papadakis (n 54 above) 5.

¹¹⁰ Segger (n 4 above) 11.

¹¹¹ See Arts. 55-56 of the Charter of United Nations.

¹¹² Segger & Khalfan (n 1 above) 123.

¹¹³ As above. See also Principle 5 of Rio Declaration.

¹¹⁴ United Nations Development Programme 'Sustaining the Environment to Fight Poverty and Achieve the MDGS. The Economic Case and priorities for Action. A Message to the 2005 World Summit' (2005) 1.

¹¹⁵ UNCN, in TADIEU-VEDLIA (n 62 above) 20.

and control environmental threat.¹¹⁶ The principle includes two elements: a) common responsibilities; and b) differentiated responsibilities. The former element elucidates the responsibility of all states to protect the Earth, which is common to all, while the second element takes into account the historical contribution of countries to environmental degradation.¹¹⁷

The 1974 Charter of Economic Rights and Duties of States stipulates the principle in a precise manner as 'the environmental policies of all states should enhance and not adversely affect the present and future development potential of developing countries'.¹¹⁸

The principle as incorporated under the Kyoto protocol distinguishes between developed and developing countries in fighting against climate change.¹¹⁹ The principle makes developed countries the first actors to reduce emissions and the developing countries to follow overtime. The principle reflects the general principle of equity in international law. The 1987 Montreal Protocol contains the principle in a nascent form, which allows the developing countries to delay their compliance with Protocol Control measures for ten years.¹²⁰ The Rio Declaration incorporates the principle and Principle 7 of Rio Declaration includes two fundamental elements: the common responsibilities of states for the protection of the environment at national, regional or international levels; and second, it considers the differences in the contribution of States to the environmental problems, and its ability to prevent, reduce and control environmental threat.¹²¹ Furthermore, the UNFCCC attempted to duplicate the successful model in controlling climate change.¹²²

¹¹⁶ Segger (n 4 above) 11. The principle of common but differentiated responsibilities evolved from the notion of 'common heritage of mankind'. It recognises the historical difference in contribution of environmental problems of States. Segger & Khalfan, (n 1 above) 132-33. Segger *et al* (n 95 above) 56.

¹¹⁷ Y Matsui 'The principle of common but differentiated responsibilities' in N Schrijver & F Weiss (eds)(n 3 above) 75.

¹¹⁸ Charter of Economic Rights and Duties of States, Art. 30.

¹¹⁹ MJ Borlischeller 'Equitable but differentiated responsibilities hobbles the global fight against climate change' (2010) 10 *Sustainable Development Law & Policy* 49. Developing countries have been stressed on the developed countries' contribution to global environmental degradation. Matsui (n 117 above) 78.

¹²⁰ See Montreal Protocol, Art. 5.

¹²¹ Segger & Khalfan (n 1 above) 133. The principle reads:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressure their societies place on the global environment and of the technologies and financial resources they command.

Rio Declaration (n113 above) Principle 7. Matsui (n 117 above) 75.

¹²² Borlischeller (n 119 above) 50.

The principle requires developed countries to spend a significant amount of money to control emissions while developing countries do not. According to the UNFCCC, two conditions determine the obligations of countries with respect to climate change. First, a particular nation's contribution to climate change through green house gases (GHG) emissions should be taken into account. Secondly, the economic and technological capacity of a country to reduce emission should be considered. The principle focuses on the past polluting history of a given country to lay down a responsibility to reduce emissions, and therefore, it is primarily back-ward looking. It is voluntarily that countries categorise themselves into the developed or developing categories and to be bound by the responsibilities to reduce emissions. Trajectorically China grouped itself into developing countries, while it is the first country in polluting, by emissions. The United States did not ratify the agreement. Under the Kyoto Protocol, developing countries are not bound but agree to monitor emissions and promote sustainable development.¹²³

The principle, which attains a status of customary international law,¹²⁴ seeks to bridge the division between the developed and developing countries, and is sound and equitable. However, some question making the modern citizens liable for historical pollutions made by the foregone generation and find it unjust. However, they failed to acknowledge the benefit of current generation from the fruits of the activities that emitted pollution. For instance, infrastructure, economic strength, development and industrializations achieved. Some also argue that it is too difficult to predict the differentiated needs of developing countries since science is uncertain about the impact on climate change. The principle does not have any mechanism to adopt the evolving global reality since it is backward looking. It is argued, therefore, that it might not be effective without considering the future emissions and it would hinder the overall effectiveness of the climate change regime.¹²⁵

¹²³ Above, 50. The principle of common but differentiated responsibilities has been included in 'soft laws' such as Rio Declaration and Agenda 21, but also international conventions like the FCCC and the Montreal Protocol, and therefore it has become a fundamental principle of international environmental law. Matusui (n 117 above) 95.

¹²⁴ Institute of Environmental Security *International law of sustainable development: Legal aspects of environmental security on the Indonesian Island of Kalimantan* (2005) 43.

¹²⁵ Above, 51-2. See also R Boyte 'Common but differentiated responsibilities: Adjusting 'developing/developed' dichotomy in international law' (2010) 14 *New Zealand Journal of Environmental Law* 63-102. She calls for defining the Developing, and developed countries. Above, 100.

3.3.4 The precautionary principle regarding human health, natural resources and ecosystems

Attempting to define precautionary principle is futile since the term ‘has an elusive kaleidoscopic character.’¹²⁶ The precautionary principle is traced to the early 1950s under the guise of ‘safe minimum standard of conservation.’¹²⁷ West Germany enacted a national environmental policy in the mid 1970s, which provides precautionary approach. The German concept of ‘*vorsorgeprinzip*’ (which is a principle of foresight) incorporates precautionary principle.¹²⁸ The concept ‘*Vorsorge*’ (Germany) is found in the 1974 Federal Emission Protection Act and in 1980 the *vordogeprinzip* emerged in the German environmental policy makers to address decision-making in air pollution issues. Then, in 1983, it was firmly established principle in German environmental policy.¹²⁹

In 1980, the German Council of Experts found the principle as essential requirement for successful environmental policy for the North Sea Ecosystem and the principle was incorporated in the Final Declaration of the Second International North Sea Conference. The Vienna Convention and its Montreal Protocol incorporate the principle and the parties to the protocol are committed to protect the ozone layer by implementing precautionary measures to control equitably total global emissions of substances that deplete it, depending on their scientific knowledge, technical and economic conditions.¹³⁰

In Europe, precautionary principle was introduced in the early 1970s to provide environmental risk managers with a tool for decision-making.¹³¹ The precautionary approach was first endorsed in the World Charter for Nature in 1982, and the precautionary principle was explicitly incorporated in the 1987 second international Conference on the Protection of the North Sea. It was widely adopted in the 1990 Bergen Declaration and the 1992 Rio Summit.

¹²⁶ See JMV Dyke ‘The evolution and international acceptance of the precautionary principle,’ in DD Caron & HN Scheiber (eds) *Bringing new law to ocean waters* (2004) 358. Some governments refer to a ‘precautionary approach’ instead of a precautionary principle.’ See also T Ellis & A FitzGerald ‘The precautionary principle in international law: Lessons from Fullel’s internal morality’ (2004) 49 *McGill Law Journal* 782.

¹²⁷ RE Deloso ‘The precautionary principle: Relevance in international law and climate change’ unpublished Master’s thesis, Lund University, 2005 14.

¹²⁸ As above. The precautionary principle has a root to German environmental policy termed as *Vorsorgeprinzip*. Segger & Khalfan (n 1 above) 143-44.

¹²⁹ MW Ghering & MCC Segger ‘Precaution in World trade law: The Precautionary Principle and its Implications for the World Trade Organisation’ 6-7.

¹³⁰ The Vienna Convention and its Montreal Protocol Preamble.

¹³¹ JN Hatchcock ‘The precautionary principle-An impossible burden of proof for new products’ (2000) 3 *AgBioForum* 255. Hatchcock argues that the application of the principle could create an impossible burden of proof and the overzealous application of precaution can do more harm than good. Above, 258.

Pursuant to Rio Declaration Principle 15, the precautionary principle consists of two elements: serious or irreversible damage as a trigger to apply it; and cost effectiveness of measures taken according to the principle.¹³² However, there is little consistency across agreements and the precautionary approach is not yet a rule of customary international law.¹³³

According to the precautionary principle, where the action might lead to significant, serious or irreversible harm to the environment, the proponent is duty bound to take measures (preventive) including halting the proposed activity. It switches the burden of proofing that the activity will not harm the environment to the proponent. The magnitude, distribution and probability of damage would trigger the application of the principle.¹³⁴

The precautionary principle provides that absence of incontrovertible, conclusive, or definite scientific proof is not a reason for inaction where there is risk of severe damage to humans and/or the environment. It is 'a better-safe-than-sorry approach' and thus is a preventive and pre-emptive measure than the traditional regulatory practices, which are reactive.¹³⁵ It requires using precautionary approach to human health, natural resources as well as ecosystems.¹³⁶ The principle attempts to fill the gap between the scientific uncertainty and risk regulation.¹³⁷

3.3.5 The principle of public participation and access to information and justice

Public participation, in relation to sustainable development, requires effective protection of human right to hold and express opinion and to seek, receive and impart ideas, as well as access

¹³² Ellis & FitzGerald (n 126 above) 782. The principle reads:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason postponing cost-effective measures to prevent environmental degradation.

Rio Declaration, (n 113 above) Principle 15.

¹³³ T Iverson & C Perrings 'The precautionary principle and global environmental change' (2009) 4. However, precaution has already become a guiding norm in international environmental law on regional and global levels. Segger *et al* (n 95 above) 61. Many environmental lawyers argued that the precautionary principle became already a principle of customary international law. Some also argued that there is sufficient state practice that supports the emergence of the principle as customary international law. United Nations University of Advanced Studies (UNU-IAS) 'Trading precaution: the precautionary principle and the WTO' (2005) 12.

¹³⁴ Ellis & FitzGerald (n 126 above) 144. The principle requires the proponent to prove that the activity is free of environmental risk, above, 782.

¹³⁵ Deloso (n 127 above) 14. For scientific consideration of precautionary principle, see J McEldowney & S MvEldoweney 'Science and environmental law: Collaboration across the Double Helix' (2011) 13 *Environmental Law Review* 169-198.

¹³⁶ Ghering & Newcombe (n 99 above) 8.

¹³⁷ Deloso (n 127 above) 4. Sands P 'Environmental protection in the twenty-first century: sustainable development and international law' in RL Reversz *et al* (eds) *Environmental law, The ecology and sustainable development* (2008) 375.

to information. Access to justice is the third element of the principle that should be available to all those who are affected by environmental harm, including noncitizens.¹³⁸ It requires the participation of as many social groups as possible in decision-making process since the benefits accrue to both citizens and state. People can contribute inputs and it enables the government policy legitimate. Increased social engagement promotes social cohesion and social sustainability. It is important to promote environmental goals and to achieve sustainable development.¹³⁹

It considers as a condition of responsive, transparent and accountable governments.¹⁴⁰ Sustainable development law recognises the principle of public participation, and access to information and justice. The principle is incorporated under various international instruments such as Art. 25 of the International Covenant on Civil and Political Rights, and Art. 21 of the Universal Declaration of Human Rights. The 1986 Declaration on the Right to Development is one of the first international documents to recognise public participation as central to equitable socio-economic development. In its preamble, the Declaration emphasis that

development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits arising therefrom.¹⁴¹

In addition, Art. 1 of the Declaration emphatically provides that all people are ‘entitled to participate in, contribute to, and enjoy social, cultural and political development...’¹⁴² Therefore, people should participate and contribute to the development programmes. Furthermore, the Johannesburg Summit strongly recognised this principle.¹⁴³ Environmental justice responds to environmental injustice in general.¹⁴⁴

¹³⁸ Segger *et al* (n 95 above) 64. Access to information is a vital element of a democratic society. Holder & Lee (n 49 above) 101.

¹³⁹ Murphy (n 109 above) 24. The principle of public participation is based on (sourced) draws on international human rights law, and it requires ensuring the participation of marginalised and disempowered groups to give their ideas on economic considerations so as to incorporate environmental considerations. Papadakis, (n 54 above) 2; socially sustainable development enables all affected parties or stakeholders to discuss a matter and arrive at an agreement or ‘social contract’ by resolving contradictions of economic development and environmental protection on the basis of the principle of equity. Papadakis (n 54 above) 7.

¹⁴⁰ Ghering & Newcombe (n 99 above) 8.

¹⁴¹ Declaration on the Right to Development, second Preamble.

¹⁴² Above, Art. 1.

¹⁴³ United Nations ‘Report of the World Summit on sustainable development’ (2002) 157.

¹⁴⁴ T Chitewere ‘Equity in sustainable communities: Exploring tools from environmental justice and political economy’ (2010) 50 *Natural Resources Journal* 315 322. See also J Milligan ‘Equity in the Resource Management Act: Section 5, and a ‘capacity’ approach to justice’ (2000) 4 *New Zealand Journal of Environmental Law* 248.

3.3.6 The principle of good governance

At international and national level, it is stipulated that:

Good governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and economic policies, domestic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basis for sustainable development.¹⁴⁵

Governance is ‘the exercise of economic, political and administrative authority to manage a country’s affairs at all levels and on all issues.’¹⁴⁶ It consists of ‘mechanisms, process and institutions through which citizens and groups articulate their obligations and mediate their differences.’¹⁴⁷ Good governance is essential to ensure reliable institutions for coherent and effective decision-making, and respect for the rule of law. Good governance is related to the principle of participation, and information and justice. The Johannesburg Declaration, and Agenda 21, as well as the New Partnership for Africa’s Development incorporate the principle of good governance.¹⁴⁸

Good governance is defined ‘as the exercise of authority through political and institutional processes that are transparent and accountable, and encourage public participation.’¹⁴⁹ According to the World Bank, ‘public sector management, legal framework, accountability and transparency’ are signposts of good governance.¹⁵⁰ Good governance is a paradigm shift of the role of governments.¹⁵¹ It is essential for successful development. Good governance comprises of ‘participatory, transparent and accountable, effective and equitable, and it promotes the rule of law.’¹⁵² It ensures the political, social and economic priorities are made on broad consensus in

¹⁴⁵ Ghering & Newcombe (n 99 above) 8, paragraph 4; According to the former UN Secretary- General, Kofi Annan, ‘Good governance is perhaps the single most important factor in eradicating poverty and promoting development.’ United Nations *Good governance practices for the protection of human rights* (2007) 2.

¹⁴⁶ Segger & Khalfan (n 1 above) 166.

¹⁴⁷ As above. Governance is a process by which power is exercised without explicitly stating the ends being sought. AM Abdellatif ‘Good governance and its relationship to Democracy and Economic Development Global Forum III on Fighting Corruption and Safeguarding Integrity’ (2003) 4.

¹⁴⁸ Segger & Khalfan (n 1 above) 166.

¹⁴⁹ United Nations (n 145 above) 2. See generally Francis N. Botchway ‘Good governance: The old, the new, the principle, and the elements’ (2001) 13 *Florida Journal of International Law* 159-210.

¹⁵⁰ Segger & Khalfan (n 1 above) 167. According to the UNDP, good governance includes: a) participation; b) rule of law; c) transparency; d) responsiveness; e) consensus orientation; f) equity; g) effectiveness and efficiency; h) accountability; i) strategic vision. World Bank, on its part considers the following dimensions of governance as key: a) public sector management; b) accountability; c) legal framework for development; and d) transparency and information. Abdellatif (n 147 above) 5-6.

¹⁵¹ Abdellatif (n 147 above) 3.

¹⁵² Above.

society and the voices of the poor and vulnerable are heard in decision making regarding development.¹⁵³

Where democracy prevails, there is good governance. Democracy is representation on the basis of free and fair elections; popular participation in policy-making and execution; rule of law; and respect for human rights are fundamental principles of democracy.¹⁵⁴ Good governance is the sixth principle of sustainable development law.

3.3.7 The principle of integration and interrelationship

Principle of integration and interrelationship relates to human rights, and social, economic and environmental objectives. According to Chapter 39 of Agenda 21, States agree to 'focus on the further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns'.¹⁵⁵ Principle of integration is a commitment to integrate environmental protection into economic and social developments, and to consider the needs of economic as well as social development in crafting, implementing and interpreting environmental duties.¹⁵⁶

Sustainable development integrates economic, environmental, and social as well as human rights and international sustainable development addresses the intersection among international economic, environmental and social laws. In the economic field, tax, financial or investment laws, and international protection of human rights, social development or humanitarian assistance may not include the issue of sustainable development. Thus, it is essential to integrate these fields of laws. Therefore, sustainable development law 'refers to a specific narrower set of legal instruments and provisions where environment, social and economic considerations are integrated to varying degrees in different circumstances.'¹⁵⁷

The principle requires taking into account the economic, environmental and social issues in decision-making. According to the principle, states must ensure that social and economic development decisions take into account environmental protection. The general purpose of the principle is 'to ensure the necessary integration between social, economic and environmental

¹⁵³ Above, 4. Good governance is an essential foundation for sustainable development. Anderson & Kosnik (n 34 above) 474.

¹⁵⁴ Federal Ministry for Economic Cooperation and Development 'Promotion of good governance in German development policy strategies' 178 (2009) 12.

¹⁵⁵ Ghering and Newcombe (n 99 above) 9.

¹⁵⁶ Sands *et al* (n 107 above) 263.

¹⁵⁷ Segger & Khalfan (n 1 above) 103.

policies and laws, responding to the ‘collective responsibility’ assured by States in the Johannesburg Declaration.’¹⁵⁸

The 1972 Stockholm Declaration, the 1992 Rio Declaration, Agenda 21 and the 2002 Johannesburg Declaration and Plan of Implementation incorporate the principle of integration.¹⁵⁹ The ILC suggests that all normative and interpretive decisions should integrate in sustainable development.¹⁶⁰ Integration principle requires that environmental policy should be horizontal and cover all areas with environmental impacts, and it should be viewed in isolation as a specific policy sector alone. Integrating environmental consideration into other fields is one of the legal aspects of the principle of sustainable development.¹⁶¹

‘Interrelationship is a ‘mutual or reciprocal relation’ that implies the integration of different norms. Integration principle requires States to consider the interdependence of economic, environmental, social and human rights issues. Furthermore, it needs ‘reconciling, accommodating and harmonizing the priorities, concerns and norms emanating from these four main subject-matter areas.’¹⁶²

3.4 Role of investment law in promoting sustainable development

Law can play a key role in ensuring that investment contributes to sustainable development in host-states where there is a strong regulatory environment.¹⁶³ A good policy, legal and institutional framework can maximize benefits of large-scale agricultural investment and minimize risks related with natural resources. Thus, the law can encourage investors to generate economic benefits in line with the long-term development goal of a nation. A good law will also

¹⁵⁸ Above, 104; I Millar ‘The environmental law framework for sustainable development- Principles of sustainable development in international, national and local laws’ (2009) 2.

¹⁵⁹ Segger & Khalafan (n 1 above) 105. The Rio Declaration stipulates: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’ Rio Declaration (n 113 above) Principle 4.

¹⁶⁰ D Shabalala ‘Technology transfer, climate change and regime conflict: The challenge of Systematic integration’ (2011) 5.

¹⁶¹ H Veinla ‘Scope and substance of the integration principle in EC law and its application in Estonia’ (2008) 15 *Juridica International* 4 5-6.

¹⁶² C Hebert-Sabourine & S Jodoin ‘The principle of integration and interrelationship in relation to human rights and social, economic and environmental objectives: recent developments in international law related to sustainable development’ (2005) 5.

¹⁶³ See SF Puvimanasinghe *Foreign investment, human rights and the environment: A perspective from South Asia on the role of public international law for development* (2007) 164. H Mann ‘Reconceptualising international investment law: Its role in sustainable development’ (2013) 17 *Lewis & Clark Law Review* 521 530.

ensure adherence to environmental and social standards.¹⁶⁴ This means that investment policy and law can play great role in creating and regulating sustainable large-scale agricultural investment.¹⁶⁵ Investment law that governs international investment in a given country consists of national laws, treaties, bilateral, regional sectoral and multilateral instruments, and codes of conduct.¹⁶⁶ The threats of large-scale agricultural investment can be addressed and the opportunities tapped by appropriate policies, law and code of conduct and this will ensure win-win that is maximizing economic benefits for investors and protecting the environment.¹⁶⁷

Today, there is an agreement on the point to use law to make foreign investment work for sustainable development.¹⁶⁸ Law can balance between competing interests of the development, which is investment and environmental protection.¹⁶⁹ To date where large-scale agricultural investment increases, law is used as an instrument through which competing claims are mediated.¹⁷⁰

Thus, international investment agreements (IIAs) including BITs should include provisions relating to development, and protection of the environment and human rights. In doing so international investment law can promote sustainable development, since sustainable development implies issues of environmental law, human rights and distributive justice.¹⁷¹ Thus, international investment law, in conjunction with domestic investment law, must be used as an instrument to promote sustainable development.¹⁷²

¹⁶⁴ K Deiningel & D Byerlee *et al* *Rising global interest in farmland Can it yield sustainable development and equitable benefits?* (2011) 95.

¹⁶⁵ Jv Braun & R Meinze-Dick 'Land Grabbing' by Foreign Investors in Developing Countries: Risks and opportunities (2009) 3.

¹⁶⁶E Nieuwenhuys 'Global Development through International Investment law: Lessons learned from the MAI' in Schrijver & Weiss (n 3 above) 296.

¹⁶⁷ Braun & Meinze-Dick (n 165 above).

¹⁶⁸ L Cotula *Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries* (2014) 1. See also JC Dernbach 'The essential and growing role of legal education in achieving sustainability' (2011) 60 *Journal of Legal Education* 489-518. She concludes that law schools should do more than they are doing now to ensure that law and lawyers can contribute to achieving sustainable development. Cotula, *above*, 518.

¹⁶⁹ Cotula, *above*, 4. Investment law which basically aims at promoting development should also play a great role in protecting the environment. G Mayeda 'Sustainable international investment agreements challenges and solutions for developing countries' (preface) in MCCC Segger *et al* (eds) *Sustainable development in world investment law* (2011) 540.

¹⁷⁰ See Cotula (n 168 above) 9. The law should regulate poverty reduction, environmental sustainability and protection of human rights. J Mugabe 'Governing foreign direct investment in Sub-Saharan Africa sustainable development policies and Considered' L Zarsky (ed) *International investment for sustainable development: Balancing rights and rewards* (2005) 94.

¹⁷¹ Mayeda (n 169 above) 542.

¹⁷² *Above*, 543.

With regard to BITs, it is submitted that their content should include the goals of sustainable development explicitly. BITs should ‘...include promises to further sustainable development goals,’¹⁷³ and international investment law must balance the protection of investors with host countries with the obligation to promote sustainable development objectives of the host country.¹⁷⁴ Host governments do have the responsibility to ensure that investments will contribute to their sustainable development- focusing on the quality of investment. The link to investment to sustainable development is important.¹⁷⁵ Foreign direct investment can provide ‘...a very valuable way to disseminate new technologies and processes, and thus to more rapidly advance the goal of sustainable development at the different levels of communities, states and globally’.¹⁷⁶ Where foreign investment is well done and regulated by investment law, it can make significant contribution to sustainable development at the local, national and global levels.¹⁷⁷ Government regulation is one of the key determinant factors that determine foreign direct investment impact on the environment.¹⁷⁸ Investment requires a sound law and policy that ensure environmental protection and sustainable development¹⁷⁹ and different mechanisms could be employed to use law to ensure that investment contributes to sustainable development of the host state. Linking investment and sustainable development as an objective is essential. The new models¹⁸⁰ on bilateral investment treaties expressly refer to ‘... sustainable development as the goal of investment agreements, rather than the protection of investor rights.’¹⁸¹ This can be

¹⁷³ Rose-Ackerman ‘Sustainable international investment agreements: Challenges and solutions for developing countries (preface)’ in MCCC Segger *et al* (n 169 above) 535-38.

¹⁷⁴ As above.

¹⁷⁵ Mann (n 163 above) 534.

¹⁷⁶ Above, 535.

¹⁷⁷ Above, 536. The 2012 UNCTAD Core principles for investment for Sustainable development includes: promoting investment for development and sustainable development; balancing the rights and obligations of states and investors in the interest of development for all; and investment promotion should be aligned with sustainable development goals. UNCTAD ‘Investment policy framework for sustainable development’ (2012) 10-11; Cotula (n 168 above) 5.

¹⁷⁸ Other factors include the rate of economic growth; company culture, the particular industry and rules that govern FDI. KP Gallagher & L Zarsky ‘No miracle drug: Foreign direct investment and sustainable development’ in L Zarsky (ed) (n 170 above) 31.

¹⁷⁹ Above, 39. Investment law ‘...can play a key role in shaping corporate environmental strategies’ and studies have confirmed that investment law of host country’s ‘...do influence investor’s environmental behaviour’ M Araya ‘FDI and the Environment: What empirical evidence does and does not tell us?’ in Zarski, above, 62. International investment agreements would improve the ability of host countries to promote sustainable development by incorporating provisions that balance investment with environmental protection. See Mayeda (n 169 above) 544-45.

¹⁸⁰ See Southern African Development Community, SADC Model Bilateral Investment Treaty Template with commentary (2012).

¹⁸¹ Mann (n 163 above) 537. See also JA VanDuzer *et al* *Integrating sustainable development into international investment agreements: A guide for developing countries* (2012).

incorporated in the preamble and objective of the investment treaty. The models also require ‘...the hiring of expatriate personnel be tied to obligations for training local employees for social employment positions, both in terms of management levels and technological skills.’¹⁸² This would enable to have capable persons to undertake investment in a manner that promotes sustainable development. In addition, the host state will have the right to regulate investments so as to ensure that they are working to achieve sustainable development objectives of the nation.¹⁸³ Furthermore, the investment treaties impose obligations on investors. Thus, investors will have the obligation to protect the environment that requires environmental impact assessment; the obligation to apply the International Labour Organization’s Core Labour Standards; the obligation to protect human rights; the obligation to promote local economic and social development benefits to the local communities via economic linkages, purchasing of local goods and services etc. Gender equality should also be promoted.¹⁸⁴

John Mugabe argues that African countries do have responsibility to ensure the protection of human rights of citizens and the protection of the environment. He proposes for ‘... the explicit integration of environmental and poverty reduction considerations into FDI policies, laws and practices.’¹⁸⁵

For FDI to contribute to economic development and environmental sustainability in the host state requires ‘...to establish an explicit interface between policies and laws designed to encourage inflows of FDI and these for promoting environmental sustainability and socio-economic development.’¹⁸⁶ Countries also must ensure that their investment laws and ‘...practices are consistent with overall national sustainable development objectives.’¹⁸⁷ Furthermore, the policy and institutions must channel and control FDI in a manner that it contributes to the achievement of sustainable development.¹⁸⁸

¹⁸² Mann (n 163 above) 538.

¹⁸³ Above, 539.

¹⁸⁴ Above, 541. Some bilateral investment treaties impose limitations on investments to protect the environment. See A Romson *Environmental policy space and international investment law* (2012) 26. The European Union trade, investment and competition rules; and the Asia Pacific Economic Community incorporate provisions that promote sustainable development. K. von Moltke *An international investment regime? Issues of sustainability* (2000) 285. See also AC Chandra *et al The gender implications of trade liberalisation in South East Asia* (2010) 3-4.

¹⁸⁵ Mugabe (n 170 above) 74.

¹⁸⁶ Above, 76.

¹⁸⁷ As above.

¹⁸⁸ As above.

Overall, investment law must ensure and create a mechanism by which foreign investors are monitored to ensure that they are working in consistent with the agreed sustainable development and goals.¹⁸⁹ Countries should set out ‘... national frameworks that set out minimum sustainable development principles and objectives that [investors] must meet.’¹⁹⁰ Such framework must ensure the balance between investor’s rights and their obligations in poverty reduction, development and promotion of sustainable development through law.¹⁹¹

Investment contracts should ensure that large-scale agricultural investment promotes sustainable development.¹⁹² Land lease contracts must provide safeguard to ensure that sustainable practices are employed in soil, land, bio-diversity conservation and protection.¹⁹³ Large-scale agricultural investment should ensure investor’s comply with high environmental standards. Sustainable large-scale agricultural investments can meet the development demand. Thus, the law should ensure that large-scale agricultural investor are undertaking their investments while ascertain sustainable land, soil, forest, bio-diversity, water management practices and this requires the creation of sustainable large-scale agricultural investments.¹⁹⁴

3.5 Law of sustainable large-scale agriculture

3.5.1 The concept of sustainable large-scale agriculture

Although sustainable agriculture is understood in various ways,¹⁹⁵ it may be defined as ‘...developing agricultural practices which protect the environment while preserving the economic profitability of farmers.’¹⁹⁶ Sustainable agriculture has the potential for addressing

¹⁸⁹ Above, 93.

¹⁹⁰ Above, 94.

¹⁹¹ As above.

¹⁹² For detailed discussion see L Cotula & K Tienhaara ‘Reconfiguring Investment Contracts to promote Sustainable Development’ in KP Sauvant (ed) *Yearbook on international investment law & policy 2011-2012* (2013) 281-310.

¹⁹³ Braun & Meinze-Dick (n 165 above) 3.

¹⁹⁴ OD Schutter *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge* (2009) 6; See also United Nations, Commission on Sustainable Development, ‘Report on the seventeenth session’ (2009).

¹⁹⁵ See KR Srinivas ‘Sustainable agriculture, biotechnology and emerging global trade regime’ (1996) 31 *Economic and Political Weekly* 1922. There is no standard definition to the term ‘sustainable agriculture’. MD Janis ‘Sustainable agriculture, patent rights, and plant innovation’ (2001) 9 *Indiana Journal of Global Legal Studies* 91.

¹⁹⁶ ND Hamilton ‘The role of law in promoting sustainable agriculture: Reflections on ten years of experience in the United States’ (1998) 3 *Drake Journal of Agricultural Law* 423 425; ND Hamilton ‘Issues shaping the future of agricultural Law’ (1993) 19 *William Mitchell Law Review* 271 277.

both environmental protection and the social needs of agriculture in countries.¹⁹⁷ Sustainable agriculture should sustain the resources that are necessary for its operations, and should be successful on both short and long terms.¹⁹⁸ It also requires sustaining the necessary economic structure for agriculture. Sustainable agriculture can harness profitability by giving attention to the economics of farming and incorporating the concern of the environment at the same time.¹⁹⁹ Thus, sustainable agriculture ‘is economically successful, environmentally sustainable, and a positive contributor to the success of the global food system.’²⁰⁰ It is a model of agriculture that protects biodiversity, promotes diverse agricultural practices that are ecologically sound and encourages farmers’ participation.²⁰¹ Sustainable agriculture takes into account the next generations’ capacity to produce and thrive.²⁰²

The term sustainable agricultural development, from the legal point of view, is defined as ‘the appropriate use of crop and livestock systems and agricultural inputs supporting those activities which maintain economic and social viability while preserving the high productivity and quality of ... land.’²⁰³ Moreover, the United States federal law defines the term as:

An integrated system of plant and animal production practices having a site-specific application that will, over the long-term²⁰⁴

- A) satisfy human food and fiber needs;
- B) enhance environmental quality and the natural resource base upon which the agriculture economy depends;
- C) make the most efficient use of non-renewable resources and non-farm resources and integrate, where appropriate, natural biological cycles and controls;
- D) sustain the economic viability of farm operations; and

¹⁹⁷ Hamilton (1998) above, 424. Sustainable agriculture, in Netherlands, is defined as ‘a societal-accepted agriculture which meets the ecological, cultural, economic and international standards as required by the community.’ ‘Transition Sustainable Agriculture 2003-2006’- the Roadmap 10.

¹⁹⁸ The resources include soil, air, water, which are physical environment and the human environment that includes rural communities, or farm families. Hamilton, 1998, (n 196 above) 425.

¹⁹⁹ Hamilton, 1998, (above) 425.

²⁰⁰ MR Taylor ‘The emerging merger of agricultural and environmental policy: Building a new vision for the future of American agriculture’ (2001) 20 *Virginia Environmental Law Journal* 186.

²⁰¹ Sirinivas (n 195 above) 1923.

²⁰² Hamilton ND ‘Feeding our green future: Legal responsibilities and sustainable agricultural land tenur’ (2008) 13 *Drake Journal of Agricultural Law* 385.

²⁰³ Hamilton, 1998 (n 2 above) 425. Iowa is the leader in research and farming relating to sustainable agriculture in the United States of America. CB Connard ‘Sustaining agriculture: An examination of current legislation promoting sustainable agriculture as an alternative to conventional farming practices’ (2004) 13 *Penn State Environmental Law Review* 125 140.

²⁰⁴ 7 U.S.C. 3103 (17) (1994), cited in Hamilton, (n 1 above) 427. See also Connard, above, 141. Sustainable agriculture pays attention to long-term interests such as preserving top soil, biodiversity, rather than short term interests like profit. L Horrigan *et al* ‘How sustainable agriculture can address the environmental and human health harms of industrial agriculture’ (2002) 110 *Environmental Health Perspectives* 445-456. See also Kershen DL ‘The contested vision for agriculture’s future: Sustainable intensive agriculture and agroecology’ (2013) 46 *Creighton Law Review* 591.

E) enhance the quality of life for farmers and society as a whole....

Sustainable agriculture increases profitability of farm without adversely affecting the environment.²⁰⁵ This requires employing environmentally sound modifications to conventional farming techniques without increasing cost to the farmer.²⁰⁶ It therefore balances between economic benefit and environmental protection.²⁰⁷ Sustainable agriculture is associated with four practices. First, instead of cultivating same crop every year on a given plot of land, it requires crop diversification year after year. Second, to control pest and weed, integrated pest management (IPM) is better used as an alternative to pesticides and this requires using organic materials like manure and nitrogen rich crops so as to maintain soil fertility and reduce soil erosion through preventive measures. Third, crop focused farms need to include livestock production as a supplementary activity because 'livestock provides organic materials to keep the fertility of soil and livestock pasture can be used to offset erosion on highly erodible land.'²⁰⁸ Finally, tillage systems that leave thirty percent of the previous crop's residue farm after cultivation is essential for sustainable agriculture.²⁰⁹

Sustainable agriculture integrates economic profitability, environmental health, social and economic equity. Agriculture is said to be sustainable where it is economically viable, ecologically sound, culturally appropriate, and socially just.²¹⁰ In this regard, organic farming, protecting biodiversity, integrated pest management are essential components of sustainable agriculture.²¹¹ However, it is submitted that large-scale bio-fuels production may not be sustainable by 2020. Bindradan for instance indicates that large-scale bio-fuel production demands more land and this will contribute to the loss of bio-diversity resulting in extra GHG emissions, and competes with food production as well.²¹²

²⁰⁵ Connard (n 203 above) 136.

²⁰⁶ Above, 136.

²⁰⁷ Janis (n 195 above) 91.

²⁰⁸ Above. Definition of sustainable agriculture responds to objectives of sustainable agriculture that includes: a) conserve and enhance natural resources that agriculture uses and shares with other economic sectors; b) to make agriculture compatible with environment; and c) to promote food production. International Institute for Sustainable Development 'Agriculture and Sustainable development: Policy analysis on the Great Plains' (1995) 9.

²⁰⁹ Sustainable agriculture is sustainable development applicable to a specific sector: that is agriculture. Connard (n 203 above) 136. It integrates the pillars of sustainable development. I Feher & J Beke 'The rationale of sustainable agriculture' (2013) 9 *Iustum Aequum Salutare* 73 75.

²¹⁰ Horrigan *et al* (n 204 above) 452.

²¹¹ Janis (n 195 above) 92.

²¹² PS Bindradan *et al* 'Can large-scale biofuels production be sustainable by 2020?' (2009) 101 *Agricultural Systems* 198.

Sustainable large-scale agriculture may be also conceptualized as a farming practice that harmonizes animal and plant production to satisfy human food needs along with the protection of land and the natural ecosystem.²¹³ Large-scale agriculture relates to organic agriculture. In a nutshell, organic farming is an ‘agricultural system that seeks to provide the consumer with fresh, tasty and authentic food while respecting the natural life-cycle systems.’²¹⁴ Organic farming requires the adoption of some practices like ‘multi-annual wide and varied crop rotation, the use of organic fertilizers...’²¹⁵ avoiding dependency of soil to chemical fertilizers, the plantation of appropriate varieties that compete with weeds and resist pests and diseases. Soil nutrient and erosion must be also protected, water should be retained and protected. Sustainable agriculture is based on rational water consumption and farmers are required to protect water from pollution.²¹⁶

Therefore, one can conclude that sustainable large-scale agriculture protects and increases natural biodiversity. In the process every living organism from the smallest to the biggest are protected. Sustainable large-scale agriculture relies on prevention mechanism using organic fertilizers and weed resistant indigenous breeds of plants and as such promotes livestock rearing, protects native species, the rural landscape and local traditions, in addition to advancing the growth of local products.²¹⁷ Sustainable large-scale agriculture has also an important role in minimizing climate change. Currently, the agriculture sector is responsible for 12% of global greenhouse gas emissions, and applying sustainable large-scale agricultural practices can contribute for reducing green gas emissions from the sector.²¹⁸

3.5.2 Role of law in sustainable large-scale agriculture

In addition to research on the issue and knowledge, sustainable agriculture requires new laws that can regulate the process.²¹⁹ Law can be considered as a key tool to achieve sustainable

²¹³ G Teixeira & LC Abreu Legal perspective of sustainable agriculture (2013) *The overarching Issues of the European Space*. Ed. Faculdade de Letras da Universidade do porto 119.

²¹⁴ European Commission ‘What is organic farming,’ *Agriculture and Rural Development*, http://eu/agriculture/organic-farming/what-organic_en

²¹⁵ Teixeira & Abreu (n 213 above) 119.

²¹⁶ Above.

²¹⁷ Above, 119-20.

²¹⁸ Above, 120.

²¹⁹ JP Reganold *et al* ‘Sustainable Agriculture’ (1990) *Scientific American* 112 120.

agriculture and environmental protection.²²⁰ Regulating farming practices would help to achieve sustainable agriculture. Enforcement of code of conduct in farming practice, for instance, can intimate ways of handling and spraying of pesticides and farmers who fail to observe prescribed practices could be held accountable. In short, law can help regulate the agricultural practice by placing constraints on damaging activities, imposing duties to protect the environment with the aspiration of achieving sustainability in the agricultural sector.²²¹

The sustainable agriculture promotion law in Korea, for example, requires farmers to practice environment-friendly methods in the production process. The law obliges farmers to use organic farming methods avoiding the use of chemical fertilisers and pesticides. The government labels that the foods are safe for consumers (buyers).²²² All these procedures promote sustainable agriculture.

The law can also promote education and research on sustainable agriculture, which includes organic methods, biological control, and integrated pest management.²²³ In the agriculture sector, law is used to improve a duty to protect the environment. It regulates the behaviour of farmers relating to environment and assigns the costs of the environmental degradation to those who are responsible. It also imposes a duty on farmers (landowners) to protect their soil from erosion.²²⁴ Other than just imposing duties, the law provides incentives for those who comply with conservation rules as well and harness a research on sustainable development and as such it can be used to regulate conservation of soil and water in a given district.²²⁵

States are required to implement policies to encourage integrated management of food, energy, land and water. They should ‘implement policies to diversify agricultural production as

²²⁰ See generally E Morgera & J Wingard ‘Principles for developing sustainable wildlife management laws’ (2008).

²²¹ I Bowler ‘Developing sustainable agriculture’ (2002) 87 *Geography* 205-212. Lack of regulating the farm industry is the main cause for environmental degradation in the United States of America. See Connard (n 203 above) 139; ND Hamilton ‘Feeding our future: Six philosophical issues shaping agricultural law’ (1993) 72 *Nebraska Law Review* 225-26.

²²² ‘More Farmers Producing Environment-Friendly Products’ *Korea Times* 20 July 1999 1. In relation to the experience of USA, it was pointed out that the main cause for the farming industry’s poor environmental record is lack of comprehensive regulatory programme. In the lack of regulation, the farming industry is given a license to pollute the environment, some criticize. The lack of regulation has enabled the farmers to increase productivity and profitability with the cost of extreme environmental degradation. See Connard (n 203 above) 128.

²²³ Connard (n 203 above) 139.

²²⁴ Hamilton 1998 (n 196 above) 227-28. Lease contracts require that good husbandry on the part of the lease 9 the farmers. As above.

²²⁵ Hamilton 1993 (n 196 above) 276.

a means for managing soil, water and biodiversity,²²⁶ and in this regard laws play a significant role in promoting sustainable large-scale agriculture through policies.

Neil D. Hamilton pointed out that law could be used to promote sustainable agriculture in four ways. First, law can be used to promote the concept of sustainable development and when all pertinent policies are crafted on the basis of it and their implementation is measured against sustainable development, which includes sustainable agriculture. In other words, agricultural policy and its implementation should be measured against the standards of sustainability.²²⁷ Second, the success of efforts to achieve sustainable development depends largely on information and research. It is believed that farmers will adopt alternative methods that protect the environment and promote their economic viability if they are informed. Therefore, law can be used to promote sustainable agriculture by increasing funding for research on sustainable agricultural practices and their accessibility to the farmers.²²⁸ Thirdly, it is important to incorporate social and human issues into agriculture because traditional knowledge and practices of farmers could promote sustainable agriculture. Here, the law can be used as an instrument to promote the traditional knowledge and practices of farmers that promote sustainable agriculture. Fourth, international institutions, for example, the impact of General Agreements on Trade and Tariff (GATT) and World Trade Organisation (WTO) rules on the protection of environment and the promotion of agriculture should be taken into account.²²⁹ Thus, law can be used to promote sustainable large-scale agriculture by incorporating international rules (laws) on environmental protection and agricultural production.

In general, sustainable large-scale agricultural law regulates agriculture for economic sustainability, environmental sustainability as well as social sustainability, including cultural sustainability.²³⁰ Law can contribute to achieve large-scale agricultural development.²³¹

²²⁶ Rio +20 Corporate Sustainability Forum, 'Overview and outcomes innovation & collaboration public policy recommendations commitments to action' (2012) 21.

²²⁷ Hamilton, 1998, (n 196 above) 430.

²²⁸ Above, 431.

²²⁹ As above.

²³⁰ See SA Schneider 'A reconsideration of agricultural law: A call for the law of food, farming, and sustainability' (2010) 34 *William & Mary Environmental Law and Policy Review* 935-947-48.

²³¹ M Stallworthy *Sustainability, land use and environment: a legal analysis* (2002) 308.

3.5.3 International law on sustainable agriculture

Sustainable agriculture was referred to in the 1996 Rome Declaration, especially in relation to smallholder production.²³² The Declaration recognizes the importance of sustainable agriculture for achieving food security.²³³ Furthermore, sustainable agriculture is linked with food security in the 2009 UN Declaration of the World Summit on Food Security.²³⁴ The Declaration developed the principle of sustainable agricultural food security and rural development to eliminate the root causes of poverty.²³⁵

A) Laws to combat desertification

The UN Convention to Combat Desertification gives attention to combating activities that cause desertification, which would include agricultural activities that are not sustainable. It pays a practical attention to the agrarian countries which in most cases, are attacked by drought. Combating desertification includes integrated development of land in arid, semiarid and dry sub-humid areas for sustainable development that aimed at:

- a) prevention as well as reduction of degradation;
- b) rehabilitation of partly degraded land; and
- c) 'reclamation of desertified land',²³⁶

The objective of the Convention is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification especially in Africa²³⁷ so as to achieve sustainable development.

Achieving this objective will involve long-term integrated strategies that focus simultaneously, in affected areas, on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level.²³⁸

The parties to the Convention are duty bound, among others, to 'integrate strategies for poverty eradication into efforts to combat desertification and mitigate the effects of drought',²³⁹ and the Convention gives priority to Africa.²⁴⁰ The objective of the Convention includes ensuring

²³² CB Flora 'Food security in the context of energy and resource depletion: Sustainable agriculture in developing countries' (2010) 25 *Renewable Agriculture and Food Systems* 123.

²³³ Rome Declaration on World Food Security (2009) 8th para.

²³⁴ Heads of State and Government were decided to promote sustainable agriculture and reduce poverty, among others. *FAO World Summit on Food Security, Declaration on the World Food Security* para. 7.3.

²³⁵ *FAO Declaration on the World Food Security*, above, Principle 3.

²³⁶ United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (hereinafter CCD) Art. 1(b).

²³⁷ Above, Art. 2(1).

²³⁸ Above, Art. 2(2).

²³⁹ Above, Art. 4(2)(C).

²⁴⁰ Above, Article 7. Article 7 of the Convention reads:

that food production is not threatened and enabling sustainable agricultural development because agriculture is one of the sectors that would help to achieve economic development in a given nation.²⁴¹

B) The Millennium Development Goals (MDGs)

The millennium development goals aspire for both ensuring environmental sustainability and eradicating extreme poverty and hunger.²⁴² The agricultural sector helps to eradicate poverty and hunger while it should also ensure environmental protection and in general, sustainable agriculture can meet both goals.

C) Sustainable Development Goals

Building on the Millennium Development Goals, the United Nations General Assembly adopted 17 sustainable development goals and 169 targets to stimulate actions over the next 15 years²⁴³ while promoting sustainable agriculture is one of these goals²⁴⁴ promoting sustainable economic growth, full and productive employment, decent work for all.²⁴⁵ Sustainable management of forests, combating desertification, halting and reverse land degradation and biodiversity loss are some of the other goals.²⁴⁶

D) Rio Declaration

The Rio Declaration provides that environmental protection shall be an integral part of development process so as to achieve sustainable development.²⁴⁷ According to this principle, agricultural development must take into account protection of environment. Thus, sustainable agriculture is one that considers both economic benefit (development) and environmental protection. Moreover, eradicating poverty is an indispensable requirement for sustainable

In implementing this Convention, the Parties shall give priority to affected African country Parties, in the light of the particular situation prevailing in that region, while not neglecting affected developing country Parties in other regions.

²⁴¹ It is also provided that promoting sustainable development is both the right and an obligation of the Parties. Economic development programs adopted by Parties should ensure addressing climate change. All parties are also duty bound to promote sustainable management and conserve and enhance in sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol that includes biomass, forests, and oceans United Nations Framework Convention on Climate Change Article 3(4), and Article 4(1)(d).

²⁴² Millennium Development Goals, 1 & 7. Millennium Declaration, signed by 187 world leaders at the Millennium Summit on 8 September 2000.

²⁴³ United Nations Resolution Adopted by the General Assembly on 25 September 2015 *Transforming our world: the 2030 Agenda for sustainable development* (A/RES/70/1) 3rd and 4th para. of the Preamble.

²⁴⁴ Above, Goal 2.

²⁴⁵ Above, Goal 8.

²⁴⁶ Above, Goal 15.

²⁴⁷ Rio Declaration (n 113 above) Principle 4.

development.²⁴⁸ We have considered that agriculture plays a pivotal role in eradicating poverty. Improving the living standards of the majority of the people is paramount as enshrined under principle 5 of the Declaration. States should eliminate unsustainable patterns of production and consumption and should promote appropriate demographic policies so as to achieve sustainable development and bring about higher quality of life for all people.²⁴⁹ In general, sustainable agriculture can be seen in light of the above-mentioned principles of the Rio Declaration.

E) Agenda 21

Agenda 21 is aimed at translating the principles enshrined under the Rio Declaration on Environment and Development.²⁵⁰ Chapter 14 of the agenda is devoted for promoting sustainable agricultural development. States are required to undertake major adjustments in agriculture and environmental policy to achieve sustainable development.²⁵¹ This includes utilization of economic incentives and employing appropriate and new technologies.²⁵²

Programme areas include:

- land resource planning;²⁵³
- land conservation and rehabilitation;²⁵⁴
- water use for sustainable agriculture;²⁵⁵
- conservation and utilization of plant²⁵⁶ and animal genetic resources for sustainable agriculture;²⁵⁷
- integrate pest management and control;²⁵⁸ and
- efficient energy use to enhance productivity.²⁵⁹

²⁴⁸ Above, Principle 5.

²⁴⁹ Above, Principle 8.

²⁵⁰ United Nations *Agenda 21* Preamble para. 1.6.

²⁵¹ Above, para. 14.2.

²⁵² As above.

²⁵³ Above, para. 14.4.d.

²⁵⁴ Above, para. 14.4.e

²⁵⁵ Above, para. 14.4.f.

²⁵⁶ Above, para. 14.4.g.

²⁵⁷ Above, para. 14.4.h.

²⁵⁸ Above, para.14.4.i.

²⁵⁹ Above, para. 14.4.k.

Activities include implementing laws and regulations to transfer appropriate technologies and to use incentives²⁶⁰ and formulate and implement integrated agricultural activities that include management of forests, rangelands and wildlife appropriately.²⁶¹

F) World Summit on Sustainable Development (WSSD)- Johannesburg

The conference hosted in South Africa in 2002 after ten years of Rio calls for promoting action and pressing ahead on tackling main challenges of poverty and environmental protection. States committed themselves to improve agricultural conditions, among others.²⁶² The Johannesburg Declaration on Sustainable Development recognizes that eradicating poverty and changing production and consumption patterns as well as managing natural resources for economic and social development as objectives and essential requirements for sustainable development.²⁶³

On top of that, the UN General Assembly reiterates that sustainable production and consumption are essential to achieve sustainable development. Governments, international organizations, the private sector and all major stakeholders must play active role in promoting sustainable production and consumption patterns.²⁶⁴ Ethiopia, being party to these international instruments is duty bound to promote sustainable agricultural development. These instruments should also apply to large-scale agricultural investments.

Equator principles are also essential in regulating sustainable large-scale agricultural investment. The Equator principles provide that financial institutions should consider ensuring environmental protection issues while financing investment projects.²⁶⁵ The equator principles apply globally to all industry sectors including agricultural investments.²⁶⁶ The Equator principles (EP) is an agreement entered into by signatory Financial Institutions (EPFI) to assess and manage environmental and social risks associated with investments, according to

²⁶⁰ Above, para. 14.9.e.

²⁶¹ Above, para. 14.9.h.

²⁶² Resolutions adopted by the Summit, Adopted at the 17th plenary meeting, on 4 September 2002 5.

²⁶³ Above, 11.

²⁶⁴ Resolution adopted by the General Assembly, 64/235 Implementation of Agenda 21, the programme for the further implementation of Agenda 21 and the outcomes of the World Summit on sustainable development.

²⁶⁵ Equator principles are meant to implement environmental and social policies, procedures and standards to finance projects. *Equator Principles Official First Draft of EP III for Public Consultation (2012)* 4th paragraph of the preamble. The Equator Principles were originally developed in 2003 and revised in 2006 and 2012. Norton Rose Fulbright *Equator Principles III An Introduction and practical guide* (January 2014) 5.

²⁶⁶ Equator principles, above, 5.

internationally accepted standards and host country and international laws.²⁶⁷ Financial institutions provide the finance where: the risk of the project has been categorized,²⁶⁸ an environmental assessment is prepared for those projects which have medium or high risk and require environmental assessment and the risks are appropriately addressed.²⁶⁹ Environmental impact assessment report should address baseline environmental and social conditions.²⁷⁰ In addition, relevant laws of the nation and applicable treaties and agreements should be considered.²⁷¹ The project should include the sustainable use of renewable resources;²⁷² protection of human health, cultural properties, biodiversity; major hazards; occupational health and safety; land use plan; socio-economic impacts of the project, including its impact on indigenous peoples and communities;²⁷³ action plan and management system²⁷⁴-plan to address the risks; pollution prevention, solid and chemical waste management. Furthermore, the project needs to describe how the risks are mitigated, monitored and managed. Equator principles are included in the contract and the investor is duty bound to implement them as per the contract.²⁷⁵

3.5.4 Principles of sustainable agriculture

Sustainable agriculture must address the potential conflict between conservation and environmental protection on the one hand and agricultural development on the other.²⁷⁶ According to the United Nations Global Compact, sustainable agricultural system meets the following criteria:

Land tenure is established; soil fertility is maintained and improved; water quality is enhanced; biodiversity is protected; farmers, farm workers, and all other actors in the agriculture supply chains earn liveable incomes; food is affordable and nutritious; business can be competitive and efficient; and the use of energy and the discharge of waste are within the capacity of the earth to absorb forever.²⁷⁷

Furthermore, sustainable agriculture can help to reduce poverty, ensure food security, and good environmental stewardship.²⁷⁸ Principles of sustainable development apply to sustainable

²⁶⁷ Norton Rose Fulbright, above, 5.

²⁶⁸ Equator principle 1.

²⁶⁹ Above, Principle 2.

²⁷⁰ Above, Principle 3.

²⁷¹ As above.

²⁷² As above.

²⁷³ As above.

²⁷⁴ Equator Principle 4.

²⁷⁵ Norton Rose, (n 267 above) 6.

²⁷⁶ LD Guruswamy 'Sustainable agriculture: Do GMOs imperil biosafety?' (2002) 9 *Indiana Journal of Global Legal Studies* 466.

²⁷⁷ United Nations Global Compact, *Scaling up global food security and sustainable agriculture* (2012) 7.

²⁷⁸ Above, 7-8.

agriculture.²⁷⁹ Thus, economy, environment, and social aspects are accepted as dimensions of sustainable agriculture²⁸⁰ and culture is also essential dimension. Each of the four pillars of agricultural sustainability ‘involves many technical and behavioural processes’²⁸¹ and the law can regulate these technical and behavioural processes. Farmers can be required by law to respect certain environmental standards, which are aimed at promoting conservation of land, natural resources and biodiversity as well as reducing water and air pollution etc. Law can help farmers to increase their best practices and that in turn allows achieving the economic, environmental, cultural and social goals of sustainable agriculture.²⁸²

Large-scale agricultural investment cannot be dealt in isolation but with investment in a bigger picture.²⁸³ Therefore, principles of sustainable investment are also applicable to large-scale agricultural investment. Sustainable agriculture requires economic viability, careful dealing of environmental assets, and respect and fulfilment of human needs.²⁸⁴

Sustainable large-scale agricultural investment balances the culture, economic, environmental and social consideration, which is central to sustainable development.²⁸⁵ Certain principles of sustainable agriculture have been developed.²⁸⁶ The general principles of sustainable agricultural investment may be summarized as a) complying to the national laws of the host state, both to the federal and state laws; and b) complying to consumer's right to know where and how agricultural product are produced.²⁸⁷

Economic principles of large-scale sustainable agriculture

Legal tools can be used to promote the right to development and environmental protection.²⁸⁸ The economic principles of large-scale agricultural investment may be summarized as follows.

²⁷⁹ Guruswamy (n 276 above).

²⁸⁰ FJ Hani *et al* (eds) ‘Sustainable agriculture from common principles to common practice’ (2006) 31; OECD, ‘OECD contribution to the United Nations Commission on sustainable development 16- Towards sustainable agriculture’ (2008)10. The economic, environmental and social dimensions are also considered as the three pillars of sustainable agriculture. See OECD, above 3.

²⁸¹ OECD, above, 10.

²⁸² Above, 14.

²⁸³ S Heri *et al International instruments influencing the rights of people facing investments in agricultural land* (2011) 68.

²⁸⁴ Above, 70.

²⁸⁵ See L Cotula, *Foreign investment, law and sustainable development A handbook on agriculture and extractive industries* Second edition, (2016) 69.

²⁸⁶ Leonardo Academy has developed a draft national sustainable agriculture standard that includes principles of sustainable agriculture. See Leonardo Academy *National sustainable agriculture standard* (2014).

²⁸⁷ Above, paragraph 2.

²⁸⁸ Cotula (n 285 above) 40; See Rio Declaration (n 113 above), Principle 3

1) Business longevity

The investor must plan and execute same to produce quality food, feed, fibre etc to meet market demand while earning sustainable profit and addressing environmental sustainability.²⁸⁹ Economic success from the producers' perspective, on the other hand is a success of producers' income and survival.²⁹⁰

2) Manage the investment for risk and resilience

The investor needs to plan to manage risks and increase resilience through means such as diversifying marketing channels and products diversity, and through ecosystem service markets.²⁹¹ The economic goal of agriculture basically is to increase its productivity; thus, farmers may need to use 'more intensive inputs of fertilisers, pesticides, energy and water on a largely unchanged land area.'²⁹² Furthermore, they use technology. However, all these inputs of agriculture may have damaging effect on the environment. Therefore, policies and laws are needed to minimize these potential harmful inputs on bio-diversity, resource use and ecosystems by controlling and substituting damaging over use of such inputs (like fertilizers and pesticides). Farming could be useful if 'farmers have the right level of educational, information, financial resources and incentives.'²⁹³ In general, to increase agricultural productivity in a sustainable way,

- Reorganising production process and managing resources more efficiently;
- Increase the use of intellectual capital;
- Upgrade farmers' educational level and farming skills;
- Create conducive environment for farmers to adopt appropriate technology;
- 'implementing safeguards against negative environmental effects'²⁹⁴ and
- 'managing the resulting social adjustment process'²⁹⁵ are essential.

²⁸⁹ Leonardo Academy (n 286 above) para. 2.4.1.

²⁹⁰ Rio Declaration (n 113 above) Principle 3.

²⁹¹ Leonardo Academy (n 286 above) para. 2.4.1.

²⁹² OECD (n 280 above) 16. Farmers must use natural resources like soil, water to produce food and fiber on a massive scale. To achieve this production, modern farming needs to use large quantities of fertilizers and pesticides, consumes energy from non-renewable sources, and requires building dams, irrigation systems and other physical infrastructure. Taylor (n 200 above) 171.

²⁹³ OECD (n 280 above) 17.

²⁹⁴ As above.

²⁹⁵ As above.

Nevertheless, fulfilling the above-mentioned factors in developing countries may be difficult.²⁹⁶ Agriculture could not be successful unless the policies and laws promote education, transport and communication infrastructure, and development of private sector.²⁹⁷

3) Provide safe products to the market

Investors should ensure their products meet consumer's expectations for safety and quality.²⁹⁸ The core economic function of agriculture from society's perspective, is to 'produce the food crops and other goods people needed at a price they can afford.'²⁹⁹ If agriculture does that consistently then will be economically successful.

4) Contribute to the local community

Investors must sell their products in local market as well to foster business and socioeconomic development of the society.³⁰⁰

Environmental aspect of large-scale sustainable agriculture

Environmentally sustainable agriculture '... effectively minimises negative impacts on health and environment and conserves natural resources so that future generations can produce the food they will need.'³⁰¹

Agriculture poses impacts on natural resources: soil depletion, water scarcity and habitat loss due to over-cropping, over-grazing and deforestation are main concerns. Therefore, managing agricultural resources sustainably is paramount. Land use management and habitat conservation are essential.³⁰² Environmental principles of sustainable large-scale agriculture include the following:

²⁹⁶ As above. Reducing fertilizers and other chemicals inputs is essential, but farmers will use of chemical inputs if that will improve their profits. Taylor (n 200 above) 188. The green Revolution that began in 1950s in Mexico and expanded to southern Asia in 1960s that was successful by using new seed varieties to produce high yields, with the application of fertilizer, pesticides and irrigation, could not be successful in Africa, partly because the government fails to provide the accompanied institutions and infrastructure necessary for the new technology.²⁹⁶ OECD (n 280 above) 17-8.

²⁹⁷ OECD (n 280 above) 24.

²⁹⁸ Leonardo Academy (n 286 above) para. 2.4.2

²⁹⁹ Taylor (n 200 above) 187.

³⁰⁰ Leonardo Academy (n 286 above) para. 2.4.3

³⁰¹ Taylor (n 200 above) 185.

³⁰² OECD (n 280 above) 29.

A) Protecting the environment

The investor is required to avoid and/or minimize soil, water and air pollution and degradation.³⁰³ According to this principle, the large-scale agricultural investor is required to preserve the soil fertility by preventing degradation, erosion and protecting soil biodiversity.³⁰⁴

B) Using resources efficiently and minimize waste

The investor should use renewable and non-renewable resources such as energy, fuel, water, nutrients, pest control materials. Investors need to avoid and/or minimize wastes to the environment, prevent the release of materials that can pollute air, soil and water.³⁰⁵ This principle requires managing water resources sustainably in balancing with the interest of the community as well as the ecosystem. Water quality can be kept by protecting it from agricultural pollution, such as waste and chemicals.³⁰⁶ Agricultural investors are required to maximize efficient use of energy. They are also expected to maximize the use of available and cost effective renewable energy, and reduce greenhouse gas emissions from agricultural practices.³⁰⁷

C) Maintain or enhance biodiversity

The investor should support habitats within the investment area and its surroundings. The investor should ensure terrestrial, wetland, and aquatic ecosystems.³⁰⁸ Agricultural investors must promote and protect natural habitats and biodiversity by conserving the natural fauna and flora. It also requires conservation of the ecosystem services like natural pest and disease controls, fresh water flows as well as pollination. It needs to promote sustainable woodlands from deforestation and illegal harvesting.³⁰⁹

D) Integrated Land Use Management

Holistic approach is essential to address the problem of deforestation, desertification, air and water pollution, etc. Integrated farm management (IFM) started in 1990s, stresses the importance of a holistic strategy for managing resources. The main principles of IFM are:

efficient soil management and appropriate cultivation techniques, good animal husbandry and animal welfare standards, use of crop rotations, minimum reliance on chemical crop protection and fertilizers, careful selection

³⁰³ Leonardo Academy (n 286 above) para. 2.2.1.

³⁰⁴ The Coca-Cola Company *Sustainable agricultural guiding principles* para. 10.

³⁰⁵ Leonardo Academy (n 286 above) para. 2.2.3.

³⁰⁶ The Coca-Cola Company (n 304) para. 7.

³⁰⁷ *Above*, para. 8.

³⁰⁸ Leonardo Academy (n 286 above) para. 2.2.4.

³⁰⁹ The Coca-Cola Company (n 304 above) para. 9.

of seed varieties, landscape maintenance, enhancement of wild life habitats, and a commitment to communication, training and involvement.³¹⁰

The fundamental objective of integrated land use planning is to identify areas where a particular technology can provide multiple benefits. For instance, it requires techniques that improve soil fertility thereby increasing productivity and biodiversity. Planners need to have relevant information about interactions between farming practice and eco-system, and appropriate spatial databases.³¹¹

Land use planning is linked with the achievement of sustainable development. The planning system regulates the development and use of land. Development plan is the most effective instrument to reconcile economic development with environmental protection. Planning plays a key role in contributing for government's strategy for sustainable development.³¹² Large-scale agricultural development strategy and planning forms a framework for sustainable development.³¹³

E) Combating desertification and drought

Desertification is 'the process of sustained deterioration of the biological productivity of land, as manifested in phenomena such as soil erosion, soil structure compaction, reduction in organic matter and nutrient content, and salination.'³¹⁴

Inappropriate land use in general and especially cultivation of fragile and marginal soils, over grazing, inadequate soil conservation, and deforestation are major causes of desertification.³¹⁵

Incentive structures based on property rights to land are essential where individual owners do all the best to conserve the fertility of the land. Incentives are weakened where individuals fear of losing the land. The likelihood of adoption and success considerably weakened where the land is in the hands of a government or under communal ownership. Environmental stewardship depends on the commitment of farmers to agricultural policy and law. Farmers operate in short term economic pressure though they are interested in the long productivity of their land. Increasing separation of ownership of farmland from its operation tends farmers to the short-term (profit) of their land. In America, more than fifty percent tend to short-term economic benefits

³¹⁰ OECD (n 280 above) 33.

³¹¹ As above.

³¹² Stallworthy (n 231 above) 155.

³¹³ Above, 159. Land use planning requires diversified land use. Leonardo Academy (n 286 above) para. 2.2.5.

³¹⁴ OECD (n 280 above) 34.

³¹⁵ As above.

since the ownership of land is not there for them.³¹⁶ Water harvesting should also be made at village level with participation of the community at planning, construction and operation stages.³¹⁷ The function of the law here is to ensure land tenure right, and to require the user to preserve water.

F) Facilitating agricultural adaptation to climate change

Coherent, multi-sectoral climate adaptation strategies are needed to be made by government action plans. In developed countries, farmers can shift sowing and harvesting dates, adopt different varieties or species, modifying field operation like tillage methods and fertilizer application, modify water supply, irrigation system, efficient use of water, education and training.³¹⁸

G) Crop protection

Investors need to follow laws that regulate the label requirements for safe and proper use of agrochemicals. To protect crops from pests, weeds, and disease, they are required to use integrated pest management techniques.³¹⁹

Social principles of large-scale sustainable agriculture

Wendell Berry argues that ‘we must integrate social standards into our aims of production, economic growth, and profit, so that other aims, for example, freedom and pleasure are considered’. The health of the human culture that is linked to preserving the health of nature is the key standard Berry is speaking about and therefore it should be promoted by sustainable agriculture.³²⁰

A) Clear work agreement

An investor must provide agreements with the worker which explains terms and conditions of work.³²¹

B) Engage the local community as good neighbours

The investor must take into account the needs of the local community and meet their food demand while earning sustainable profit and ensuring environmental sustainability.³²² The first

³¹⁶ ND Hamilton ‘Agriculture without farmers? Is industrialization restructuring American food production and threatening the future of sustainable agriculture?’ (1994) 14 *Northern Illinois University Law Review* 613.

³¹⁷ OECD (n 280 above) 36.

³¹⁸ Above, 37.

³¹⁹ The Coca-Cola Company (n 304 above) para. 11.

³²⁰ Hamilton (n 316 above).

³²¹ Leonardo Academy (n 286 above) para. 2.3.1.

³²² Above, para. 2.3.12.

social goal of sustainable agriculture is to ‘produce enough food to enable people to lead productive lives,³²³ and thereby reduce the number of undernourished people.

Assuring food security, in terms of people having both physical and economic access to the basic food they need at all times, involves ensuring that adequate food is available on a regular, stable basis.³²⁴

It is essential to address the issue of distribution and economic access to food. In addition to the existence of economic institutions (market integration) the ‘distribution of resources, and hence income, across households and communities³²⁵ must receive due attention. Sustainable agriculture has a goal to sustain rural life and communities.³²⁶

B) Provide fair wages and benefits to workers

The investor should provide all workers with fair wages and benefits that meet the requirements of the law.³²⁷

C) Working environment- Ensuring fair work hours,³²⁸ safe and healthy work environment³²⁹

D) Protecting labour rights-Avoid child labour,³³⁰ forced labour,³³¹ and any discrimination³³²

States are obliged to avoid all forms of discriminations.³³³ Investor is duty bound to avoid all forms of forced or compulsory labour.

It is important to prevent exploitative child labour in agriculture. Child labour could be considered as a consequence of poverty and a contributing factor to poverty by depriving the next generation of education. About 70% of working children are engaged in the agricultural sector. Child labour laws are not properly implemented.³³⁴

The focus should be on promoting a sustainable agriculture sector that does not require the use of child labour and on reducing rural poverty so that households are not only food-secure but can also keep their children out of work and in school.³³⁵

³²³ OECD (n 280 above) 41.

³²⁴ As above.

³²⁵ Above, 42.

³²⁶ Above, 47.

³²⁷ Leonardo Academy (n 286 above) para. 2.3.2

³²⁸ Above, para. 2.3.3.

³²⁹ Above, para. 2.3.4.

³³⁰ Above, para. 2.3.5.

³³¹ Above, para. 2.3.6.

³³² Above, para. 2.3.7.

³³³ See ILO Forced Labour Convention No 29 of 1930 and ILO Abolition of Forced Labour Convention 105 of 1957.

³³⁴ OECD (n 280 above) 49.

³³⁵ Above, 50.

Agricultural development plans and poverty reduction strategies should incorporate child labour concerns.³³⁶

E) Assure employee freedom of association

Workers do have the freedom to association and collective bargaining.³³⁷ In addition to ensuring freedom of association for workers, the investor must respect voluntary and good faith collective bargaining.³³⁸

F) Provide appropriate training, education and professional development programs for workers

The investor must provide access to relevant training that match individual capabilities and workforce needs. S/he must also promote professional development.³³⁹

G) Promoting gender role (Women)

Sustainable agriculture needs focusing on gender roles in agriculture. Women do not have adequate access to land, property rights and credit. Women do have lower access to education and health services than men.³⁴⁰ In Africa, ‘women have not been able to benefit from investment and the expansion of trade in agricultural products due to limited access to productive resources, such as land, credit, transport and extension services....’³⁴¹ Land tenure systems in many developing countries do not allow women ownership or inheritance rights. It is essential to reverse this and bring in laws that recognise property and land rights of women.³⁴²

Cultural principles of sustainable large-scale agricultural investment

The instruments we discussed above do not include principles regarding the cultural aspect of sustainable development. However, the writer believes that the large-scale agricultural investment principles should include cultural sustainability as one of the essential pillars of sustainable agriculture.

³³⁶ As above.

³³⁷ See Cotula (n 91 above) 84; See ILO Convention No. 87 Freedom of Association and Protection of the Right to Organise Convention, 1948 and ILO Convention 98 Right to Organise and Collective Bargaining Convention, 1949.

³³⁸ Leonardo Academy (n 92 above) para. 2.3.8.

³³⁹ Above, para. 2.3.11.

³⁴⁰ OECD (n 86 above) 47.

³⁴¹ Above, 48.

³⁴² Above, 48-9.

3.5.5 Law of green economy as an instrument to promote sustainable large-scale agriculture

Definition and nature of green economy

Green economy refers to a system that promotes resource efficiency and low carbon economic development that ‘contributes to the protection and enhancement of natural resource base and promotes sustainable consumption and production patterns.’³⁴³ This conception emphasizes on economic development with low carbon and efficient resource utilization. Therefore, economic development is one of the essential components of green economy. Secondly, it requires protection and enhancement of natural resources, i.e., the environment at the same time. Promoting development requires investment while protecting the environment is the mandate of environmental law, and the two are combined by the principle of sustainable development. The third essential component of green economy is sustainable consumption pattern. As stated before green economy is about sustainable development and the third point strengthens this point. However, this definition does not address culture as important component.

According to the United Nations Environmental Programme (UNEP), ‘green economy’ is a form of economy which recognizes the protection of environment (healthy environment) as ‘the backbone of economic and well-being and as a precondition for poverty reduction.’³⁴⁴ Green economy, according to UNEP, aspires for development that improves social well-being and such economic and social development takes the healthy environment as a corner stone. Poverty eradication is the other essential component of green economy.

In green economy, the costs that arise due to environmental degradation are internalised in the economic system. Agriculture to be sustainable and to serve as major engine of economic growth, it needs to create job and reduces poverty.³⁴⁵ Green growth is a means to implement sustainable development.³⁴⁶

³⁴³ United Nations Environmental Programme (UNEP) ‘Towards a green economy, pathways to sustainable development and poverty eradication: A synthesis for policy makers’ (2011) 15.

³⁴⁴ A Steiner ‘Eleventh Annual Grotius Lecture Series: Focusing on the good and the bad: What can international environmental law do to accelerate the transition towards a green economy?’ (2010) 25 *American University International Law Review* 846-47. Green economy is explained as ‘...low carbon, resource efficient, and socially inclusive....’ United Nations Environment Programme ‘Green Economy Institution: Setting the stage for a green economy transition towards a green economy’ (2011) 16.

³⁴⁵ Steiner, above, 847.

³⁴⁶ Green economy is distinct from green growth. Green growth aims at promoting ‘more resource efficient, greener and more competitive economy’ E Morgera & A Savaresi ‘A conceptual and legal perspective on the green economy’ (2013) 22 *Review of European Community & International Environmental Law* 17. Thus, it is defined as

Green economy is a broad concept that addresses the debates on how to organise the economics and lives in order to achieve viable and strong economy, environmental sustainability as well as social justice.³⁴⁷ In sum, green economy gives due attention to the social aspect, whereas green growth does give less attention. The move to green economy implies that the existing economy of the world is not working for environmental protection.³⁴⁸

Green economy, an efficient, functioning economy is recognized as a precondition for addressing the environment and social pillars of sustainability. Thus, green economy is a key implementation tool for sustainable development.³⁴⁹ In general, green economy is an engine to achieve sustainable development and eradicate poverty.³⁵⁰ Green economy for Africa is an agenda for growth, poverty reduction and employment creation.³⁵¹

Green economy in international law

As a new concept green economy demands a change in regulation or law to achieve it, that ensures reduce carbon emissions and pollution, enhances energy and resource efficiency, and prevents loss of biodiversity.³⁵² Policy and regulatory frameworks are essential for the implementation of green economy that includes development strategies, laws and standards, as well as international policy instruments.³⁵³

Multilateral environmental agreements (MEAs) provide a cornerstone to achieve the objectives of green economy by providing legal frameworks and policy solutions to protect the environment and safeguard human health, ‘strengthen governance, democracy, transparency and accountability, reduce emissions, promote resource efficiency and sustainable production.’³⁵⁴

Convention on Long-Range Transboundary Air Pollution and its protocols demand the adoption of low-emission technologies that promote technological innovation and protect human

“fostering economic growth and development while ensuring that natural assets continue to provide the resources and environmental services upon which human well-being relies” Above, 18.

³⁴⁷ T Bigg ‘Development governance and the green economy: A matter of life and death?’ (2011) 28 *Review of Policy Research* 459.

³⁴⁸ H Selin & A Najam *Beyond Rio+ 20: Governance for a green economy* (2011) 5.

³⁴⁹ Food and Agriculture Organisation of the United Nations (FAO) ‘Greening the economy with agriculture’ (2012) 3.

³⁵⁰ United Nations Economic Commission for Africa ‘A green economy in the context of sustainable development and poverty eradication: What are the implications for Africa?’ (2012) 2.

³⁵¹ As above.

³⁵² United Nations Environment Programme (n 343 above) 16.

³⁵³ United Nations Economic Commission for Africa (n 350 above), 13.

³⁵⁴ www.unecce.org/edu/greeneconomy/welcome.html Accessed on: 14/06/2013, P.1.

health by reducing exposure to harmful pollutants.³⁵⁵ Furthermore, the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) aims at increasing transparency in decision making and promotes resource efficiency in a transboundary context.³⁵⁶ Its protocol on Strategic Environmental Assessment integrates environmental, and health considerations into economic development while strengthening participation in decision making. Thus, it provides an instrument for planning and policy making in relation to greening the economy.³⁵⁷

The Convention on the Protection and Use of Transboundary Watercourses and International Lakes also demands equitable and reasonable use of water resources through the integration of water in development and sectoral policies such as food and energy-related policies so as to foster resource efficiency. In addition, its protocol on Water and Health is an essential tool to ensure universal access to safe water supply and adequate sanitation. It also emphasises on equity.³⁵⁸

What is more, the Convention on the Transboundary Effects of Industrial Accidents is initiated to protect human life and environment. It promotes safe production technologies, and prevents industrial accidents.³⁵⁹ The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)³⁶⁰ and its Protocol on Pollutant Release and Transfer Registers offer protection for the environment and human rights. They put principle 10 of the Rio Declaration into practice and ensures public input in defining and implementing green economy.³⁶¹

The clean development mechanism (CDM) that grew out of the Kyoto Protocol is one among the global initiatives to promote green growth.³⁶² The 1997 Kyoto Protocol demands renewable

³⁵⁵ As above.

³⁵⁶ See Convention on Environmental Impact Assessment in a Transboundary Context (1991) 7th paragraph of the preamble.

³⁵⁷ See Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (2003), Arts. 7, 8 & 9.

³⁵⁸ See Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1999) Art. 1 and Art. 5(L).

³⁵⁹ See generally the Convention on the Transboundary Effects of Industrial Accidents (1992).

³⁶⁰ See the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) Article 6 and 6th paragraph of the preamble.

³⁶¹ www.unecc.org/edu/greeneconomy/welcome.html

³⁶² SS Golub *et al* 'Defining and measuring green FDI' (2011) 9.

forms of energy like wind energy.³⁶³ Wind energy is one of the renewable, environment friendly that contributes to green economy. Since wind energy produces no air pollutants or greenhouse gases and has little impact on the environment, it is regarded as ‘green’ technology.³⁶⁴

The Global Green New Deal develops ‘a win-win strategy for the economy and the environment’ which also gives due attention to the need for energy security.³⁶⁵

According to the ‘Future We Want’ Rio+20 Outcome

Each country is at liberty to adopt visions, models and tools that reflect the country’s existing situation to achieve sustainable development. Green economy is one of the important tools available for achieving sustainable development, since it could provide options for policy making but should not be taken as rigid rules.³⁶⁶

Based on the Rio+20 Conference, green economy in international law can be summarized into three legal principles: the principle of intergenerational equity and related human rights; international standards on corporate environmental accountability; and the principle of environmental integration.³⁶⁷

1) The principle of intra-generation equity and human rights

As it is discussed earlier, intra-generational equity is an essential dimension of sustainable development. In the Rio+20 Conference, little debate took place regarding how green economy might affect equitable relations among governments and their communities but the issue of equity and fairness among states. Moreover, the need for procedural guarantees for human rights in the environmental and sustainable development goals raised by human rights advocates in the Rio+20 Conference. In addition, substantive right of access to national resources and to the protection of traditional knowledge has made an agenda in the Conference.³⁶⁸

The ecosystem approach could have addressed both the procedural and substantive human rights concerns. This approach is defined as

³⁶³ KR Zaidi ‘Wind energy and its impact on future environmental policy planning: Powering renewable energy in Canada and Abroad’ (2007) 11 *Albany Law Environmental outlook Journal* 208.

³⁶⁴ Above, 207-08. For example, wind energy may have an impact on specific bird, and bat population. As above.

³⁶⁵ AA Hezri & W Hofmeister ‘Energy policy and the transmission to a green economy: An introduction’ in AA Hezri & W Hofmeister (eds) *Towards a green economy In Search of sustainable energy policies for the future* (2012) 5.

³⁶⁶ The Future We Want, (2012) paragraph 56. See also M Gehring ‘The role of EU Law in the Global Green Economy 2012 Canada-Europe Law Lecture’ (2012).

³⁶⁷ Morgera & Savaresi (n 346 above) 23.

³⁶⁸ Above, 25.

... the integrated, interactive, adaptive and precautionary approach to environmental management that is based on broad stakeholder engagement and consideration of the impacts of the environmental degradation and management options on the most vulnerable sectors of society.³⁶⁹

Sharing profits from the conservation and sustainable use of biological resources and access to genetic resources is a key element. Benefit sharing approach requires government to involve indigenous peoples and local communities in decision making and good faith negotiations. Local peoples must contribute their traditional knowledge in planning and environmental management and they should be compensated for what they lost as well as for the negative impacts of conservation or sustainable management activities in their localities, or cultural practices.³⁷⁰ International guidance on benefit sharing has been applied on private sector.

Furthermore, eco-system approach requires the government to adopt a bottom-up approach so as to build a partnership with communities for conservation and sustainable use of the environment.³⁷¹ The most important adventure of the Rio+20 is the strengthening of the social dimension of the green economy and firmly contained a human rights-based approach.³⁷²

2) Corporate accountability

The 2002 World Summit on Sustainable Development pays premium to ‘corporate accountability’ to be met by private companies. Therefore, private companies (investors) do have an obligation to protect human rights and environmental sustainability under international law, though not developed. Unfortunately, the Rio+20 outcome document does not include the concept of corporate accountability.³⁷³ It merely invites investors to contribute to sustainable development and green economy, among others in accordance with the national legislations.³⁷⁴

Global compact principles demands investors to ‘undertake initiatives to promote greater environmental responsibility.’³⁷⁵ To date, addressing environmental issues has become part of business practice for an increasing number of investors.³⁷⁶ Investors are required to adopt green

³⁶⁹ As above.

³⁷⁰ Benefits can be of monetary or non-monetary nature. The non-monetary benefit includes the legal recognition of traditional rights to access to certain natural resources or protection of customary sustainable use practices. Provision of guideline like training or capacity building to improve sustainability of community practices and the identification of opportunities for better livelihoods in these endeavours would be included in the benefits. Morgera & Savaresi (n 346 above) 26.

³⁷¹ As above.

³⁷² As above.

³⁷³ Above, 26-7.

³⁷⁴ Above, 27.

³⁷⁵ The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and distinctive contributions (2005) 5.

³⁷⁶ J Corfee- Morlot *et al*, ‘Towards a green investment policy framework The case of low-carbon, climate-resilient infrastructure’ (2012) 50.

technology in their activities, though it needs additional costs. Green economy is seen as market incentive for investors since they become profitable due to the fact that they adopt green technology. Banks also allow credit for investors who pursue investments with sound environmental practices, as they indicate quality of management and market opportunities.³⁷⁷

3) Environmental integration

Environmental integration is a practical tool by which issues relevant to sustainable development can be synthesized as that requires placing of environmental management at the centre of economic development. Green economy takes a 'positive approach that environmental protection measures would be actively favoured to achieve economic development.'³⁷⁸

Dimension of 'internal' environmental integration demands a holistic approach to global environmental law making.³⁷⁹ Integrating climate and investment policies is key for promoting green development. In addition to being an important communication tool for working policies, integrating environment and investment policies provide a check list for strengthening policy performance.³⁸⁰ Green economy aspires to reinforce the integration among the economic, environmental and social pillars of sustainable development that aims at alleviating poverty.³⁸¹

Conclusion

The term 'sustainable development' is variously defined but it may be defined as a development that attempts to build capacity and knowledge to develop in long term in addition to solving short-term issues. It is a development that takes into account economic, environmental, cultural and social issues that are known as pillars of sustainable development. Sustainable development lubricants the friction between economic and social development, on the one hand, and environmental protection, on the other. Thus, the economy should develop sustainably, socially sustainable development takes into account a development approach that integrates equity, and the economic and social development decisions should consider the environmental issue.

³⁷⁷ M Hasper 'Green technology in developing countries: Creating accessibility through a global exchange forum' (2009) 1 *Duke Law & Technology Review* 4-5.

³⁷⁸ Morgera & Savaresi (n 346 above) 23.

³⁷⁹ Above, 24.

³⁸⁰ Corfee- Morlot et al (n 376 above) 27.

³⁸¹ FAO, 2012 (n 349 above) 79.

Law and institutions play indispensable role to achieve sustainable development. Law of sustainable development that intersects economic law, environmental law and social law is a set of rules to govern sustainable development by providing tools and institutions. Sustainable development law has been developed after the 1992 Rio Declaration both at the international law and at national law levels. Furthermore, the 2002 Johannesburg Summit has adopted seven principles of international sustainable development law that have developed by international law association. The seven principles of sustainable development law are: the principle of sustainable use of natural resources; the principle of equity and poverty reduction; the principle of common but differentiated responsibility; the precautionary principle regarding human health, natural resources and ecosystems; the principle of public participation and access to information and justice; the principle of good governance; and the principle of integration and interrelationship.

States have adopted strategies to implement the international law of sustainable development through the instrumentality of Agenda 21 of 1992 as well as the millennium development goals. Sustainable large-scale agricultural development may be defined as the appropriate use of inputs and cultivation that promotes economic development while protecting the environment. The concept of sustainable large-scale agricultural development, like the general concept of sustainable development, involves economic sustainability, environmental protection, and social sustainability as well as culture as pillars.

The law regulates the farming practices that help to achieve sustainable large-scale agricultural development, by placing restrictions on damaging activities, imposing duties to protect the environment. Rules that are applicable to sustainable agricultural development in general are developing which are basically aimed at protecting (combating) desertification, promote the millennium development goals and the like.

Green economy is a system that fosters efficient and low carbon economic development that contributes to the protection and enhancement of natural resources. It aspires for improved standard of human being and social equity whilst reducing environmental risks as well as ecological scarcities. Thus it is a path to sustainable development and poverty reduction. Green economy is an economic policy strategy to achieve sustainable development. Green economy differs from green growth particularly on the point that the latter does not pay due attention to social issues unlike the former. Green economy for Africa and Ethiopia is an agenda of

development, poverty reduction and employment creation. Therefore, Ethiopia has established green economy vision and strategy recently.

Law has a great role to play in the implementation of green economy. At the international arena, laws that can govern green economy are not developed well yet, and the same is true for Ethiopia. Sustainable development can be taken as a baseline to govern green economy since green economy is economic policy strategy to achieve the objectives of sustainable development. Thus, multilateral environmental agreements are essential legal framework to achieve the objectives of green economy, by providing legal framework and policy solutions to protect the environment, human health and promote sustainable economic development. Therefore, the Convention on Long-Range Transboundary Air Pollution and its protocols, the Environmental Impact Assessment in Transboundary context, Aarhus Convention, Rio Declaration, Kyoto Convention and its protocol are few instruments that govern green economy at the international level.

Furthermore, the Global Green New Deal pays due attention to a 'win-win' strategy for both the economic development and environmental protection. It also secures the need for green technology-energy. Moreover, the "Future We Want" Rio+20 outcome mandates each country to implement green economy.

Chapter Four: The role of Ethiopian law in the context of large-scale agriculture

4.1 Introduction

In this chapter the role of Ethiopian law in the context of large-scale agriculture is considered. The right to development is treated. Law has a great role to play in development. The concept of development will be considered firstly and then this will be followed by the discussion of the role of law in development in Ethiopia. Thirdly, the concept of development law at the national level will be discussed. Fourthly, the legal principles applicable to the large-scale agricultural development will be considered. The role of investment law in promoting large-scale agricultural development in Ethiopia will also be discussed.

Large-scale agricultural law strives to promote investment in the sector while the environmental law aims at protecting the environment. The relationship between large-scale agricultural investment law and environmental law is the subject to debate and the eighth section of this chapter deals with this issue. The concept of responsible investment law and responsible large-scale agricultural investment will be treated. Then, the chapter considers the principles and laws of Ethiopian large-scale agricultural investment.

4.2. The right to development in Ethiopia

Ethiopia was one of the one hundred and forty six voters in favour of the Declaration on the Right to Development. Being member to the African Union Ethiopia is under obligation to implement the right to development as incorporated in the African Charter on Human and Peoples Rights.¹ Ethiopia is required to adopt legislative or other measures to give effect to protected rights under the Charter including the right to development.² The Law should advance the ability of Ethiopian Government to properly acquire and manage the resources through which to create the environment, support the process and to ensure equitable enjoyment of the benefit that flow from the development.³ The country had also adopted the Constitution in 1995, which

¹ African Charter on Human and Peoples' Rights, Art. 22(2).

² Above, Art. 1 cum Art. 22.

³ OC Okafor 'Righting' the right to development: A socio-legal analysis of Article 22 of the African Charter on Human and Peoples' Rights' in SP Marks (ed) *Implementing the right to development: The role of international law* (2008) 60.

recognises the right to development.⁴ The Constitution stipulates that ‘[t]he Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.’⁵ As one can understand from the above-mentioned provision, the right to development is a group right recognised for the Peoples, Nations and Nationalities of Ethiopia. It is categorised under the democratic rights, which are recognised by the government.⁶

The FDRE Constitution promotes the right to development one step ahead by envisaging sustainable development.⁷ The right to development can be implemented through investment law. Thus, the basic objective of the Ethiopian investment policy is to improve the living standards of the people through sustainable economic and social development.⁸ This promotes further the right to development in the legal regime of the country. The Constitution clearly puts improving the living standard of peoples as a separate right from the right to sustainable development. In other words, the Constitution recognises the right to improved living standard and the right to sustainable development as two elements of the right to development, because the provision provides them through conjunction ‘and’.⁹ Nevertheless, as per the investment proclamation, economic and social sustainable developments are the means by which the improved living standard could be achieved.¹⁰

⁴ Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta* 1st Year No. 1 Addis Ababa 21 August 1995, Art. 43 (here in after referred to as the FDRE Constitution).

⁵ Above, Art. 43(1). The *Benishangul Gumz* Regional State Constitution incorporates the right to continuous development for the residents in the region. Constitution of the *Benishangul Gumz* Region (as amended), 2003, Asosa, Art. 43(1).

⁶ The Constitution classifies fundamental rights and freedoms into (a) human rights; and (b) democratic rights. ‘Human rights and freedoms, emanate from the nature of mankind, are inviolable and inalienable.’ The FDRE Constitution (n 4 above) Art. 10(1).

⁷ Above, Art. 42(1).

⁸ Investment Proclamation No. 769/2012 (as amended by Proc. No. 849/2014), *Federal Negarit Gazeta* 18th Year No. 63 Addis Ababa- 17 September 2012 (here in after referred to as FDRE Investment Proclamation No. 769/2012) first paragraph of the Preamble; Art. 4. The provision goes to read in part as:

The objectives of the investment policy of the Federal Democratic Republic of Ethiopia are designed to improve the living standards of the peoples of Ethiopia through the realization of sustainable economic and social development... (As above).

⁹ The Constitution reads: ‘Article 43 The Right to Development- 1) The peoples of Ethiopia as a whole and each nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.’ The FDRE Constitution (n 4 above) Art. 43.

¹⁰ For instance investment proclamation provides that the Proclamation is necessitated to ‘...accelerate the economic development of the country and improve the living standards of its peoples’ Proclamation No. 769/2012 (n 8 above) first paragraph of the Preamble.

The right to development, in Ethiopia, seems to be injusticeable right that no one is allowed to bring a case to a court of law to claim remedies where the right is violated.¹¹ The purpose of incorporating the right to development under the FDRE Constitution is to recall the government what necessary measures to take. The explanatory document of the Constitution in part reads as: ‘... unless such principles are explicitly stated, government organs would not know the course they should take the public would not have standard to evaluate its representative.’¹² Therefore, persons who are dissatisfied with the government in the implementation of the right to development can hold their ballot at the time of the election.¹³ However, Ethiopia is a party to the African Charter on Human and Peoples’ Rights¹⁴ and right to the Declaration on the Right to Development, which provides the right to development as justiceable and it may be possible to argue that the right to development is justiceable in Ethiopia too since both the African Charter on Human and Peoples’ Rights and the Declaration are part of Ethiopian law.¹⁵

In Ethiopia, large-scale agricultural investment is taken as one of the instruments to implement the right to development. In Ethiopia, the Ministry of Agriculture is empowered to promote sustainable agricultural development that includes large-scale agricultural development.¹⁶ The Ministry of Agriculture is entrusted to administer and assist the implementation of large-scale agricultural investment in the country, as the Ethiopian Government is duty bound to assist

¹¹ House of Peoples’ Representatives *Short explanation of the Constitution* (1987 EC) 98 (Available only in Amharic); Belay Getachew ‘Critical analysis of the applicability of the right to development in the Ethiopian context’ unpublished LL.M thesis, Addis Ababa University, 2009 90; Abigeya Getachew ‘The normative understanding of the right to development under the African Charter on Human and Peoples’ Right; Lesson for Ethiopia’ unpublished LLB thesis, Addis Ababa University, 2014 58.

¹² House of Peoples’ Representatives Documentation FDRE *Constitutional explanatory document* (Unpublished) 91(Available only in Amharic).

¹³ Belay (n 11 above) 22.

¹⁴ Ethiopia, as a party to the African Charter on Human and Peoples’ Rights, has the duty to implement the right to development. African Charter on Human and Peoples’ Rights, (adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), Art. 22(2); See Berihun Adugna Gebeye ‘Unsustainable: An evaluation of the legal and policy interventions for pastoral development in Ethiopia’ (2016) 6 *Research, policy and practice* 5.

¹⁵ See The FDRE Constitution (n 4 above) Art 9 (4). All human rights shall be interpreted in accordance with the international law instruments from which the rights are sourced from. See above, Art 13(2).

¹⁶ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, Proclamation No. 916/2015 *Federal Negarit Gazeta* 22nd Year No. 12, Addis Ababa 9 December 2015 Art. 19(1) (e) and (q) (here in after referred to as Proc. No. 916/2015).

peoples in their effort to implement the right to development.¹⁷ It is also obliged to ensure the participation of peoples in the formulation of development policies and programmes.¹⁸

4.3 Development law in Ethiopia

There is a great deal of development activity that takes place solely in domestic context of states, and this activity is regulated by domestic development law. National development law may conflict with or complement international development law.¹⁹ International development law may directly interact with domestic legal traditions.²⁰ However, there is a sharp distinction between national and international development law.²¹ National or domestic development law regulates domestic-based development policy.

National development law regulates the financial, economic, social, environmental, industrial and cultural development of a nation.²² Since economic development is an element of international development, economic plan made at national level should include and enhance as well as coordinate social, cultural and educational development of human resources. It coordinates services in sectors such as resource, sea and atmosphere, power as well as energy. All these are included in the notion of national development and national development law is that law which coordinates and regulates all national development.²³

In Ethiopia, development law can be observed as incorporated in different laws of the country.²⁴ Currently, the FDRE Constitution aspires that

We, the Nations, Nationalities and Peoples of Ethiopia:

¹⁷ See the FDRE Constitution (n 4 above) Art. 89(4) and (6).

¹⁸ Above, Art. 89(6) and 43(2). The Ethiopian Government reports to the African Commission on Human and peoples' rights, See for example, Federal Democratic Republic of Ethiopia Combined report (Initial and Four Periodic Reports) to the African Commission on Human Rights and Peoples' Rights. The report does not explain the concept of the right to development rather it rephrases the provisions of the Constitution.

¹⁹ C Picker 'International trade and development law: A legal cultural critique' (2011) 4 *The Law and Development Review* 48.

²⁰ G Wang 'International development law in the globalized world' (2006) 13 *James Cook U. L. Rev.* 221.

²¹ DD Bradlow 'Differing conceptions of development and the content of international law' (2005) 21 *South African Journal of Human Rights* 66. As Sucharitkul defines international development law is a part of international law that regulates and controls various aspects of national development and development of shared resources of the global society, of a region or sub region or common heritage of peoples. S Sucharitkul 'The nature and sources of international development law' (Encyclopaedia of Life Support Systems (EOLSS)) 3. This indicates that international development law and national development law are interconnected.

²² DD Bradlow 'Development decision-making and the content of international development law' (2004) 27 *Boston College International & Comparative Law Review* 206-07; Sucharitkul, above 4.

²³ Sucharitkul, above.

²⁴ Tilahun Teshome 'Rule of law and development in Ethiopia: Now and twenty-five years from now', translated by Yonas Admassu (2004) 6 *Economic Focus* 19-35.

Strongly committed, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guarantying a democratic order, and advancing our economic and social development.²⁵ (emphasis added).

This makes clear that Ethiopian Nations, Nationalities and Peoples are committed to their economic and social development. Therefore, the Constitution gives due emphasis to development. It also provides that the federal government shall formulate and implement overall social, economic and development policies, strategies and plans of the country.²⁶

The policies, strategies and laws of the country must promote the accelerated development and cause institutions to implement them.²⁷ The Rural Development Policies and Strategies aspire for the development of the country.²⁸

Investment law of Ethiopia is an essential development law of the country. Investment proclamation of the country, has a rationale, *inter alia*, to encouraging and promoting the investment so as to ‘...accelerate the economic development of the country and to improve the living standards of its peoples.’²⁹ Moreover, bilateral investment agreements Ethiopia signed aim at promoting investments in Ethiopia.³⁰ The Ethiopian Government adopted a free-market economy whereby the investor will triumph from the competition and thereby contributes for the accelerated development of the nation.³¹

The Criminal Code aims at accelerating the economic progress of Ethiopia and to strengthen a steady order of free market.³² Furthermore, the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation, Proclamation No. 433/2005 provides that fighting corruption is necessary ‘to promote and sustain the development and the democratic process in Ethiopia...’³³ This can also be considered as part of the development law of the country.

²⁵ The FDRE Constitution (n 4 above) 1st paragraph of the Preamble.

²⁶ Above, Art. 51(2). Similarly, the Council of States is empowered to ‘formulate and implement economic, social and development policies and strategies.’ Above, Art. 77(6).

²⁷ ልማት፣ ዲሞክራሲና አብዮታዊ ዲሞክራሲ (ጥቅምት 1999 ዓ.ም.) (Development, democracy and revolutionary democracy, October 2007) 72.

²⁸ FDRE Rural Development Policies and Strategies (Ministry of Finance and Economic Development Addis Ababa April 2003).

²⁹ Proclamation No. 769/2012 (n 8 above) 1st paragraph of the preamble. One of the investment objectives of Ethiopia is ‘to accelerate the country’s economic development.’ Above, Art. 5(1).

³⁰ See for example *the Agreement between The Belgian-Luxemburg Economic Union, on the one hand and The Federal Democratic Republic of Ethiopia on the other hand on The Reciprocal Promotion and Protection on Investments*, 2006, Article 2.

³¹ Development, democracy and revolutionary democracy (n 27 above) 76.

³² The Criminal Code of FDRE, Proclamation No. 414/2004, last paragraph of the preface.

³³ Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005, *Federal Negarit Gazeta* 11th Year No. 8 Addis Ababa 2nd February, 2005, 2nd paragraph of the Preamble.

Furthermore, the proclamation, which provides for the powers and duties of the executive organs, establishes institutions that are important to transform the development goals of the country into practice. For instance, it empowers each Ministry to supervise different public enterprises that are established in accordance with the Public Enterprises Proclamation No. 25/1992.³⁴ Each Ministry has the duty to ensure that public enterprises operate as development catalysts.³⁵ The public enterprises proclamation is basically aimed at implementing the new economic policy.³⁶ It also aspires to make public enterprises 'to be efficient, productive and profitable as well as strengthen their capacity to operate by competing with private enterprises.'³⁷

One of the rationales of enacting the labour law is to enable the workers and employers to work towards the all-round development of our country³⁸ by providing the rights and duties of the parties as well as ensuring working environment. Therefore, it is one piece of development law of Ethiopia.

The agricultural sector is required to be promoted to commercialization.³⁹ Pursuant to Art. 19(1)(a) of the Proclamation No. 916/2015, the Ministry of Agriculture and Natural Resources is empowered to promote the expansion of extension and training services that aim at improving the productivity of the agricultural sector to farmers, pastoralists and private investors. This aims at increasing the productivity of the agriculture sector. Training centres are also envisaged so as to enhance agricultural development and improvement of rural technologies.⁴⁰ The Ministry, furthermore, is duty bound to coordinate activities related to food security,⁴¹ and to ensure the provisions of credit facilities for farmers and pastoralists.⁴²

The Agricultural Transformation Council and Agency Establishment Council of Ministers Regulations No. 198/2010 establishes the Agricultural Transformation Council.⁴³ As indicated in the Regulations, the following are two important powers of the Council, among others,⁴⁴

³⁴ Public Enterprise Proclamation No. 25/1992, *Negarit Gazeta* 51st Year No. 21 Addis Ababa, 27 August 1992 Art. 10(3) (hereinafter Proc. No. 25/1992).

³⁵ Above, Art. 3

³⁶ Above, 1st paragraph of the Preamble.

³⁷ Above, 2nd paragraph of the Preamble.

³⁸ Proclamation No. 377/2003, *Federal Negarit Gazeta* 10th Year No. 12 Addis Ababa 28th February 2004, 1st paragraph of the Preamble.

³⁹ Development, democracy and revolutionary democracy (n 27 above) 73.

⁴⁰ Proclamation No. 916/2015 (n 16 above) Art. 19(1)(q).

⁴¹ Above, Art. 19(1)(s)

⁴² Above, Art. 19(1) (m). The provision reads: 'ensure the creation of enabling environment for the provision of credit facilities to farmers and pastoralists'

⁴³ Regulations No. 198/2010, *Federal Negarit Gazeta* 17th Year No. 20 Addis Ababa 1 March 2011, Art. 3.

- A) Provide leadership in identifying, designing and effectively implementing solutions to basic hurdles of agricultural development; and
- B) Provide policy directives and effective coordination is realised among different actors involved in agricultural development.

As it is clear from the provisions, the Council is empowered to lead the agricultural development endeavour. To lead this, it is essential to identify basic problems that hinder the agricultural development, and the Council is responsible to provide leadership in solutions to the identified problems. Showing the policy direction is the second power of the Council, and that is why the Prime Minister and the Minister of Agriculture are made Chairperson and Deputy Chairperson respectively.⁴⁵ Furthermore, the Regulations establish the Agricultural Transformation Agency with the objectives to⁴⁶

- A) Identify systemic constraints of agricultural development, through conducting studies, and recommend solutions in order to ensure sustainability and structural transformation, and support the application of same;
- B) Support the establishment of strong linkages among agricultural and related institutions and projects in order to ensure the effectiveness of agricultural development activities.

As the Regulations provides for rules that are aimed at promoting agricultural development of the country, it can be seen as part of agricultural development law of Ethiopia. Besides, the law provides for incentives to investors engaging in irrigation development to ‘bring about an accelerated economic development of the country.’⁴⁷ This is also part of development law of Ethiopia that aimed at bringing economic development in the agricultural sector.

4.4 The concept of democratic developmental state in Ethiopia

The concept democratic developmental state is composed of democracy, development and state. Developmental state is a paradigm to bring about development. The neoliberal development

⁴⁴ Above, Art. 5.

⁴⁵ See above, Art. 4(1).

⁴⁶ Above, Art. 9.

⁴⁷ Irrigation Development Investment Incentives Council of Ministers Regulations, Regulations No. 162/2009, *Federal Negarit Gazeta*, Addis Ababa.

paradigm has failed to bring about development in developing countries including Ethiopia⁴⁸ and therefore new alternative paradigm is needed.⁴⁹ Learning from the experiences of successful East Asian countries, Ethiopian government has adopted developmental state paradigm.⁵⁰

Definition

Developmental state is explained as a state where it promotes the idea of development having the institutional capacity to formulate and implement its policies and development programs.⁵¹ It is a type of state that intervenes and guides the direction and process of economic development.⁵² A given state to be considered as developmental state it must be development oriented and should demonstrate a high level of commitment to attain economic development. It must also possess sufficient capacity to influence, direct and set private sector to achieve development goals.⁵³

Elements

Number of elements of the developmental states has been developed but they may not exist in a single state considered as developmental state. The following are policy lists that indicate developmental state.⁵⁴

- The role of private investor in the economy;
- The major role of state to steering investment and coordinating projects;
- Collaboration and communication between public and private sectors;
- Strong interest in export and openness to import;
- Due attention to entrepreneurship, innovation and product development rather than relying on imported technology and know-how;

⁴⁸ Meles argues that the neoliberal development paradigm has failed in Africa. Befekadu Wolde Gebriel EPRDF 'Developmental state and rent seeking' (University of Utah) 3.

⁴⁹ Teshome A. 'Melese's development paradigm and its impacts on economic transformation in Ethiopia' (2012) 8.

⁵⁰ Befekadu (n 48 above) 1.

⁵¹ Sehen Bekele & Tsegaye Regassa 'Democratization in a developmental state: the case of Ethiopia Issues, challenges and prospects' (2012) 5.

⁵² EP Caldentey 'The Concept and Evolution of the Developmental State' (2009) 37 *International Journal of Political Economy* 28.

⁵³ See Fisseha Mulu Gebremariam & Abtewold Moges Bayu 'Ethiopia: A democratic developmental state?' (2017) 7 *ILIRIA International Review* 156.

⁵⁴ DM Trubek 'Developmental states and the legal order: Towards a new political economy of development and law' 11-12.

- Promoting effective foreign direct investment (FDI);
- Making private firms competitive;
- Public-private partnership in providing public services;
- Promotion of domestic capital markets and the financial sector in order to generate and allocate resources;
- Attention to social protection such as reducing inequality;
- Welfare programs to invest on human capital.

Developmental state has two major features: a) developmentalist ideology and b) institutional arrangements that will ensure the enforcement of its developmental ideology.⁵⁵ These features are called ‘software’ and ‘hardware’ of developmental state and they may be regrouped into four.

A) Developmental ideology

As per this feature, the state should promote an ideal and development agenda. It must have a mission to bring about economic development to the nation by applying appropriate strategies.⁵⁶ Some argue that the Ethiopian government adopts developmental ideology because reducing poverty and bringing sustainable development is considered as a ‘life-and-death’ issue.⁵⁷ The FDRE Constitution states that Nations, Nationalities and Peoples of Ethiopia are committed to advance their economic and social development.⁵⁸ The Constitution aspires for a democratic government on the basis of ‘...rule of law...’ so as to achieve ‘economic and social development’ of the country.⁵⁹ This shows the existence of ideological element of democratic developmental state in Ethiopia.⁶⁰ Moreover, the country’s vision is entrenched on a system of good governance, rule of law and justice on the basis of free will of the peoples. It reads:

⁵⁵ Sehen & Tsegaye (n 51 above) 7.

⁵⁶ Fisseha & Abteuold (n 53 above) 157.

⁵⁷ Above, 163; Development, democracy and revolutionary democracy (n 27 above) 72.

⁵⁸ The FDRE Constitution (n 4 above) first paragraph of the Preamble.

⁵⁹ The FDRE Constitution (n 4 above) 1st paragraph of the preamble. In Ethiopia, unlike the East Asian countries, it is impossible to postpone democracy for the sake of development. Dessaegn An interview given to the media on current Ethiopian situations, Radio Fana FM 98.6 2013 Saturday 3:15 PM.

⁶⁰ See Sehen & Tsegaye (n 51 above) 6; Ideological, institutional and economic are features of democratic developmental state. Developmentalism is the ideological feature of democratic developmental state. The ideology of developmentalism enables the state to develop structure that would help to implement economic policy to achieve development. Ibrahim Worku ‘Analysing developmental state in Ethiopia: The case of ‘Project Hegemony’ and ‘Good Institutional Framework’ (Proceedings of Fifth National Conference on Growth and Transformation Plan (GTP) and Civil Service in Ethiopia Addis Ababa July 2012) 48. The 1995 Ethiopian Constitution was ‘applauded

To become a country where democratic rule, good governance and social justice reign, upon the involvement and free will of its peoples, and once extricating itself from poverty to reach the level of middle-income economy as of 2020-2023.⁶¹

The economic sector vision reinforces this vision giving a premium on industrial sector to play the leading role while modern and productive agricultural sector with enhanced technology is essential.⁶² The objective of the state to eradicate poverty and to become middle income level indicates the developmentalist orientation of the state, which is the ideological element of developmental state.⁶³ This is a clear indication of the ideology of the Ethiopian state to bring about development for the country.

B) Institutional capacity

Developmental state should have a strong institutional capacity to implement the developmental ideology. Institution includes governmental bureaucracy staffed by professionally competent persons.⁶⁴ This implies that the staff in bureaucracy should be empowered, capable and depoliticized.⁶⁵ Besides, developmental state needs visionary and committed leaders to mobilize the resources and the peoples to enhance economic development.⁶⁶ Developmental state needs building trust and confidence on institutions and norms including the rule of law, justice, political stability and peace.⁶⁷

In Ethiopia, institutional capacity is a challenge for the establishment of developmental state.⁶⁸ Committed, strong and depoliticized bureaucracy is missing in the country.⁶⁹ The government does not attract professionals to its bureaucracy.⁷⁰ Recently, the government appointed some professionals in the highest positions such as ministers and minister d'état.

for its commitment to liberal democracy and respect for political freedoms and human rights,' Bertelsmann Stiftung (BTI) 'Ethiopia Country Report' (2012) 2. However, the EPRDF regime is accused of refusal to accept democratic rules of the game. Above, 3.

⁶¹ Ministry of Finance and Economic Development *Federal Democratic Republic of Ethiopia Growth and Transformation Plan 2010/11-2014/15 Volume I: Main Text* 21 (here in after referred to as GTP I).

⁶² As above.

⁶³ Sehen & Tsegaye (n 51 above) 17.

⁶⁴ Sehen & Tsegaye (n 51 above) 7. Fisseha & Abteuold (n 53 above) 158.

⁶⁵ Sehen & Tsegaye (above). Fisseha & Abteuold (above) 158.

⁶⁶ Fisseha & Abteuold (above).

⁶⁷ Sehen & Tsegaye (n 51 above) 7. Fisseha & Abteuold as above.

⁶⁸ Mesгна Gebretensae 'The challenges and prospects of building a developmental state in Africa: A comparative study of Botswana and Ethiopia' unpublished Master Thesis Addis Ababa University, 2015 65.

⁶⁹ Fisseha & Abteuold (n 53 above) 164. Some indicate the attempt of the Ethiopian government to incorporate ethnicity in its bureaucracy does not consider the merit of persons and this is a challenge to implement the developmental state ideology of the country. Zemenu Y. Ayenew, 'The Developmental State and Ethnic Federalism in Ethiopia: Issues to Worry about' (2017) 1 *Hawassa University Journal of Law* 1-22 14.

⁷⁰ Fisseha & Abteuold (n 53 above) 164.

However, it seems not producing a difference in the performance of the government to enhance development in the country.

C) State and Private Sector

State intervenes in the economy so as to ensure economic development. State prepares a plan and follows up its enforcement. It also rectifies market failures of the economy.⁷¹ It plays a vital role in guiding and regulating the economic development of the nation.⁷² The private sector, such as investors are major players in the economic development.⁷³

The Ethiopian government has been playing a regulating and controlling role of the economic development and has scored a continued economic development.⁷⁴ It also controlled some of the strategic economic sectors such as electricity and telecom which is considered as appropriate in the absence of strong private sector to play the role.⁷⁵ The nature of economic development in the country is heavily top down by which the government is playing a great role.⁷⁶ The Ethiopian government opted to large-scale agricultural investment to involve private investors and it took cheap options without adequate appraisal of the environmental conditions; and in the absence of massive infrastructural development little significant production has resulted.⁷⁷

D) Legitimacy

The development process cannot be achieved in a short period; it needs a continuity of performance regardless of change of leaders, or government. This kind of legitimacy should be given by the people in general. The government and leaders should bring about a meaningful reduction of poverty and unemployment.⁷⁸ In principle, government in Ethiopia is elected by the

⁷¹ Above, 159.

⁷² Bizuayehu Daba & Fesseha Mulu 'Incorporating "Democratic developmental state ideology" into Ethiopia's Ethnic Federalism-A Contradiction?' (2017) 6 *Universitpark Bulten* 114.

⁷³ Fisseha & Abteuold (n 53 above) 159.

⁷⁴ The Ethiopian government has implemented different plans to bring about accelerated development to the country. Now the growth and transformation plan II (GTP II) is being implemented. See Federal Democratic Republic of Ethiopia Growth and transformation plan II (GTP II) (2015/16-2019/20) (National Planning Commission, Addis Ababa, May 2016).

⁷⁵ Above, 166.

⁷⁶ C Clapham 'The Ethiopian developmental state' (2017) *Third World Quarterly* 10.

⁷⁷ Above, 8.

⁷⁸ Fisseha & Abteuold (n 53 above) 159.

peoples for each election term⁷⁹ and this could be taken as a ground for legitimacy of the government to undertake development programs in the country.

Democracy

Since the mid 1990's, paradigm of good governance as the role of the state in development has developed that 'focused primarily on how states should govern rather than on what they should be doing...'⁸⁰

In Ethiopia, unlike the East Asian countries, it is not possible to postpone democracy for the sake of development. Democracy is a must in a multicultural and ethnic country like Ethiopia. In the absence of democracy, economic development is unthinkable. In addition, democracy now a day is considered as one of the components of basic human rights.⁸¹ Democracy and development enforce each other,⁸² where there is democracy, peoples will work for development. The FDRE Constitution provides that the rule of law and guaranteeing democratic order are visions of the country.⁸³ The country aspires for respecting individual and peoples' fundamental rights and freedom as necessary condition for achieving the above mentioned objectives,⁸⁴ by devoting 1/3 of its provisions to promulgate same. Since 2002, Ethiopia has been on the process of constructing democratic developmental state.⁸⁵ The Ethiopian government has issued policies such as Rural and Agricultural Development Policy and Strategy, Capacity Building Strategies and Programs.

However, in the 2005 election held in the country a large number of seats in the parliament were controlled by opposition parties and resulted in deterioration of democracy in Ethiopia. The promulgation of the Charities and Civil Societies Proclamation No. 621/2009 and Anti-terrorism Proclamation No. 652/2009 are understood by many as measures to narrow the political space of

⁷⁹ The FDRE Constitution (n 4 above) Art 38(1).

⁸⁰ Trubek (n 54 above) 4.

⁸¹ Teshome (n 49 above) 16-17. Prime Minister Hailemariam Desalegn emphatically remarked that democracy is not an option to Ethiopia but a must. May 20, 2013.

⁸² Omano Edigheji, A democratic developmental state in Africa? A Concept Paper (2005).

⁸³ The FDRE Constitution (n 4 above) 1st paragraph of the Preamble.

⁸⁴ As above.

⁸⁵ See Teshome (n 49 above); See also Ibrahim Worku 'Analyzing developmental state in Ethiopia: The case of 'project hegemony' and 'good institutional framework'' *Proceedings of the fifth national conference on Growth and Transformation Plan (GTP) and civil service in Ethiopia* (2012) 43. Ibrahim is talking about developmental state, without emphasizing on democratic element.

civil societies and opposition parties in the country. It is argued that the Charities and Civil Societies Proclamation No. 621/2009 severely weaken the work of civil society organization especially human rights defender and advocates of democratic governance.⁸⁶ The Anti-terrorism proclamation is also taken as a challenge to democracy in the country since it incorporates restrictive provisions which poses danger against freedom of expression.⁸⁷ In general, it is argued that Ethiopia can be considered as developmental state. However, the activities of development are being made at the expense of democracy, and therefore, the country could not be considered as a democratic developmental state.⁸⁸

In a developmental state, law is required to ensure stable property rights and contracts among private actors and an administrative law that allows maximum bureaucratic flexibility and minimum transparency.⁸⁹ In a new developmental state, law should play an important role in public-private coordination, experiment and mutual learning. In addition, appropriate legal institutions are needed to undertake the new developmentalism.⁹⁰ The fact that Ethiopia is developmental state in principle will have a negative effect on the environmental protection since the basic goal of the country is development. Therefore, the country will not give due attention to environmental protection while undertaking its development programs. This again will implicate the country's development not to be sustainable.

4.5 The role of investment law in promoting large-scale agricultural development in Ethiopia

Large-scale farms have to do with high-value, export oriented products and they account for a very small percentage of rural players in developing countries.⁹¹

4.5.1 Size and nature of large-scale agriculture

Even though definitions vary, 1,000 or more hectares of land is taken as a large-scale at the international level,⁹² in Ethiopia, the size of the land is not clearly defined to constitute large-

⁸⁶ Fisseha & Abteuold (n 53 above) 166.

⁸⁷ Police and national security have the power to 'intercept or conduct on the telephone fax, radio, internet, electronic, postal and similar communications.' Anti Terrorism Proclamation No. 652/2009 *Federal Negarit Gazeta* 15th Year No. 57 Addis Ababa 28 August 2009, Art 14 (1)(a).

⁸⁸ Fisseha & Abteuold (n 53 above) 167.

⁸⁹ T Ginsburg 'Does law matter for economic development? Evidence from East Asia' (2000) 34 *Law and Society y Review* 836.

⁹⁰ Trubek (n 54 above) 9.

⁹¹ L Wegner & G Zwart 'Who will feed the World? The production challenge' (2011) 16.

⁹² Salcito *Large-Scale Land Investment* 1.

scale agriculture. The Ethiopian Investment Commission seems to take 1,000 ha as a threshold because the officers working there consider it as an appropriate size.⁹³ 2,000 hectares or more is also taken as the threshold for large-scale agriculture.⁹⁴ Moreover, the size of 5,000 ha is taken as a threshold land size that constitutes large-scale.⁹⁵ On the other hand, the Ministry of Agriculture is empowered to administer and transfer to investors land with a size of 5000 hectares and more. Therefore, 5,000 hectares is used as a threshold for large-scale agriculture investment. The Regions also granted lands of 2,000 hectares, or 3,000 hectares before the Federal Government undertakes the administration of large-scale agriculture investment.⁹⁶ However, an officer in the Ministry of Agriculture made it clear that the size is not defined, but high volume of investment is the basic future and it is primarily operating for export.⁹⁷ However, for the purpose of this research, large-scale agricultural investment the size of 2,000 or more hectares of land is taken as a threshold for large-scale agricultural investment because the practice reveals this.⁹⁸

Today, countries wish to possess large area of land in some other countries. Gulf States, China and South Korea are the forefront of such activities to invest in developing countries where production costs are much lower and land and water resources are more abundant. Geographic proximity and climatic conditions for preferred staple crops of the investors are also other factors influencing investments in the large-scale agriculture.⁹⁹ The basic purpose of such

⁹³ The writer has been given data on large-scale agriculture from the Ethiopian Investment Agency, which takes 1000 hectares as a threshold. At the international level, the size of large-scale agriculture is 1000 ha of land. E Aabo & T King 'The political economy of large-scale agricultural land acquisitions: Implications for food security and livelihoods/employment creation in rural Mozambique' (2012) foot note 2.

⁹⁴ Dessalegn Rahmato *Land to investors: Large-scale land transfers in Ethiopia* (2011) 53. The Regulations that establish Ethiopian Horticulture and Agricultural Investment Authority does not define large-scale agriculture. See Ethiopian Horticulture and Agricultural Investment Authority Establishment Council of Ministers Regulations No. 396/2017 *Federal Negarit Gazette* 23rd Year No. 13 Addis Ababa, 24 January 2017 Art. 2.

⁹⁵ Imru Tamrat 'Governance of large-scale agricultural investment in Africa: The case of Ethiopia' (2010) 26.

⁹⁶ An interview made with Mr. Dereje Abebe, an Expert in the Ministry of Agriculture and Rural Development, on 26 March 2012 in his office. The interviewee was smart in answering the question, he did not answer the issue of the size of the land directly, rather he explained that the federal government transfers and administers investment lands with the size of 5000 hectares and more as are given to it by the Regions by delegation. (However, this appears to be an imposition by the Federal Government).

⁹⁷ Interview with Mr. Bizualem Bekele, Land availability and administration case team leader (MoA), an interview made on 20 March 2012 in his office, Addis Ababa. He remarked that at the time of Derge the largest land was 2,300 hectares. And in other countries, the size differs, what is common to all of them are known by commercial agriculture.

⁹⁸ See the table about the list of large-scale agricultural investors, below.

⁹⁹ The factors that attract land investment in developing countries in general and Sub-Saharan African countries in particular, include the perception of the availability of plenty of land. In addition, the climate is favourable to the

investment is to ensure food supply and energy for investing countries.¹⁰⁰ Saturnine and Jenifer explain this situation as ‘National governments in ‘finance-rich, resource poor’ countries are looking to ‘finance-poor, resource rich’ countries to help secure their own food and especially energy needs into the future’.¹⁰¹ Large-scale land investment is characterised as:¹⁰²

- a) Land use change that involves converting forest lands or lands previously used to produce subsistence domestic consumption to produce food or bio-fuels for export;
- b) The underlying land deals increasingly involve finance capital;
- c) The deals are non-transparent, non-consultative and fraught with corruption involving national and local governments;
- d) It leads or has to lead to, dispossession where ‘local communities’ do not have formal, legal and clear property rights over the contested land;
- e) Regulation of land deals is needed through responsible agricultural investment or voluntarily guidelines.

This indicates that large-scale agricultural investment has risks on local peoples. Deininger and Byerlee argue that ‘a good policy, legal and institutional framework can minimize risks and maximize benefits from’¹⁰³ large-scale agricultural investment. This could help to ensure the rights of land owners, attract investment that benefits the country and itself, that is in line with the long term development strategy, and it also encourages sharing of benefits with local land users. A good legal framework requires adherence to social and environmental standards. In

crop production, local labour is inexpensive, and the land is relatively cheap. OD Schutter ‘Large scale land acquisition and leases: A set of core principles and measures to address the human rights challenge’ (2009) 3.

¹⁰⁰ Jv Braun & R Meinze-Dick ‘*Land grabbing’ by foreign investors in developing countries: Risks and opportunities* (2009) 1; see also SM Borrás & JC Franco ‘Global land grabbing and trajectory change: A preliminary analysis’ (2012) 12 *Journal of Agrarian Change* 37. Drivers of large-scale land investments are varied and complex. Centre for Human Rights and Global Justice (CHRGJ) ‘Foreign land deals and human rights: Case studies on agricultural and biofuel investments’ (2010) 2.

¹⁰¹ Borrás & Franco (above) 37. Some countries view large-scale mechanised farming as a path to modernisation of agriculture because smallholders based efforts to improve productivity in Sub-Saharan Africa is not successful while vibrant large-scale agriculture in Brazil has been successful. Large-scale farming in Latin America and Eastern Europe reveals competitiveness in export. In addition, large-scale farming was taken as a response to the 2007/8 global food crisis and with a belief that it would be possible to make labour saving technologies to develop the economy in land-abundant regions of Latin America and Africa. Braun and Meinzen-Dick (above) 2.

¹⁰² Borrás & Franco (n 100 above) 38. Target countries in Central Europe, Asia and Latin America include Brazil, Cambodia, Indonesia, Kazakhstan, Pakistan, Russia, and Ukraine. Cameroon, Ethiopia, the Democratic Republic of Congo, Madagascar, Mali, Somali, Sudan, Tanzania, and Zambia are the main target countries in Sub-Saharan Africa. Schutter (n 99 above) 3.

¹⁰³ K Deininger & D Byerlee *Rising global interest in farmland: Can it yield sustainable and equitable benefits?* (2011) 95-6.

general, it is essential to facilitate negotiation of rights, ensure voluntarily transfer of land, promote fairness and promote social and environmental sustainability.¹⁰⁴

Unlike the ‘Sustainable Development and Poverty Reduction Program’(SDPRP),¹⁰⁵ the ‘Plan for Accelerated and Sustainable Development to End Poverty’ (PASDEP) which covered the period 2005-2010 put emphasis on economic growth on the basis of commercialisation of agriculture. The PASDEP considered the importance of private sector in the agricultural development. It is a basic shift that placed emphasis on commercialisation of agriculture. This helps the government to launch private large-scale agricultural investments in Ethiopia with the participation of both domestic and foreign investors.¹⁰⁶

The Growth and Transformation Plan (GTP) provides that large-scale agricultural investment will be undertaken in lowland areas where abundant extensive, not inhabited land is available. The basic objective of large-scale agricultural investment, according to the GTP is ‘...to ensure that products from these farms are primarily for export or raw materials for domestic industries.’¹⁰⁷ According to the Plan, ‘... an effective land administration system and

¹⁰⁴ As above. Large-scale agriculture investment presents both opportunities and risks. First and foremost, it changes the long tradition that agriculture does not attract investment especially in Sub-Saharan Africa. It will reduce poverty where it is effectively implemented. It also creates jobs, and leads to transfer technology; According to Wegner & Zwrt, large-scale agriculture investment may facilitate transfer of technologies to smallholders and create market access. Employment generation is another advantage of large-scale agriculture investment. See Wegner & Zwrt (n 91 above) 27-8.; improves access to local producers to the market both at domestic and international level. Furthermore, it increases public revenue through taxation and export duties. Investment on staple crops abroad for capital sending countries means increase food security for their populations. Schutter (n 99 above) 4-5. Large scale agriculture can be the best model for the production of staple foods. Wegner & Zwrt (n 91 above) 25. It enables the producers to compete in export markets that require a very stringent quality requirements and demand. Wegner and Zwrt (n 91 above) 26. Large-scale agriculture investment also has risks in its development. The investors may depend on existing agreements, which guarantee against expropriation, fair treatment, and compensation for loss of profits due to restrictions imposed on them. Schutter, therefore, suggests that such restrictions and issues be fully anticipated at the time of the agreement. Schutter (n 99 above) 5. Furthermore, in case of large-scale agriculture, there could be deficient process for local consultation, and this in turn resulted in an increase likelihood of conflicts over resources. In addition, the transferring of land does not consider the full spectrum of land users’ rights, for instance, lands in most cases are registered only in the name of men. On top of that, in the case of excess profit, it may crate rent seeking or corruption. Wegner & Zwrt (n 91 above) 28-29. In Ethiopia, this happened in *Gambella*, for example. The local people claim over the natural resources.

¹⁰⁵ SDPRP put in 2002, emphasizing on agricultural development by stimulating smallholder agriculture.

¹⁰⁶ Imru (n 95 above) 2.

¹⁰⁷ GTP I (n 61 above) at 54-55. Investors select to invest in Ethiopia includes: according to Aditya V. Agarwal, director, Emami Biotech, leased 30,000 ha for jatropha in Oromia, they ‘... have chosen Ethiopia for investment because of availability of cheap labour, contiguous land and congenial business environment.’ Spokesperson for Ruchi Soya, leased 25,000 ha in *Gambella* for soybeans explains: ‘Ethiopia has been chosen for agriculture investment considering the availability of labour, its strategic location and the Government support to boost foreign investment and development.’ In Oackland Institute ‘Understanding land investment deals in Africa: Country report Ethiopia’ (2011) 14.

implementation agency that ensure transparent and accountable land leasing and land use will be established.¹⁰⁸

In Ethiopia, large-scale agriculture has become a point of discussion. The government argues that the experience of Latin America and Asian countries shows that implementing large-scale agricultural investment brings development.¹⁰⁹ On the other hand, participants in a workshop organized by Forum argued that large-scale agricultural investment is not environmentally friendly; investment licences were and are being granted without Environmental Impact Assessment (EIA).¹¹⁰ Regardless of the debates, Ethiopia attracts large-scale agricultural investment and it is essential to have appropriate law to govern it.

4.5.2 History of land tenure in Ethiopia

In the pre-1975 period, the land tenure system in Ethiopia was complex and not clear.¹¹¹ Based on the difference in geographical and cultural settings and the different socio-political events of different regions of the country, the land tenure system varied from place to place. However, the most common features of land tenure can be classified into *rist*, *gult*, *maderia (Yemengist)* land and *Semon* (Church) land.¹¹²

Rist was a right to share a land based on kinship to a historical ancestor having in common with other *rist* holders.¹¹³ It was a right for descendants whereby each descendant has the right to share. *Rist* was ‘hereditary, inalienable and inviolable’¹¹⁴ land right. According to *rist*, no occupier of a piece of land was allowed to sell, to mortgage or exchange by any means to other persons than the family.¹¹⁵

Gult was a right to tax the benefit from a land and it was not considered as a land use right. Unlike *rist*, *gult* was not hereditary. Person with this right has the right to collect tribute from

¹⁰⁸ GTP I (n 61 above) 54. In the second growth and transformation plan, emphasis is given to small scale agriculture. The Federal Democratic Republic of Ethiopia, National Planning Commission, *The second growth and transformation plan* (GTP II)(2015/16-2019/20)(2015) 21.

¹⁰⁹ Ethiopian Television, *Land grabbing or development?* Broadcasted on 10 April 2004 EC

¹¹⁰ Green Forum ‘Environmental sustainability and/or economic growth’ (2009) 108.

¹¹¹ Belay Zerga ‘Land resource, use, and ownership in Ethiopia: Past, present and future’ (2016) 2 *International Journal of Scientific Research & Engineering Trends* 19.

¹¹² As above.

¹¹³ Yigremew Adal ‘Review of landholding systems and policies in Ethiopia under the different regimes’ (2002) 2.

¹¹⁴ Belay (n 111 above) 19.

¹¹⁵ As above.

the local people. In addition, it granted the *Gult* holder the right to receive services such as labour, fire wood, looking after livestock and domestic chores. Gult right was given to ruling elites for their loyalty to the lord and religious institutions as endowments.¹¹⁶

Maderia was land of the state which was originally unoccupied land. Most of the lands were located in the south part of the country. This kind of land right was created when the state concurred the southern and west part of the country and by declaring unsettled lands as state property and gave the land to state officials and loyalties of the crown. This created the *gabbar* system that was a system of free hold tenure. This resulted in making the mass landless and interred them into tenancy relationship with land lords.¹¹⁷ *Maderia* created a private form of land ownership.¹¹⁸

Samon is a type of land tenure system given to the Ethiopian Orthodox Church. Though the exact amount of land is not known,¹¹⁹ it is estimated that about 10-12% of the land of the country was given to the Orthodox Church.¹²⁰

Under the Derg Regime

Until the Derg regime took power, the landlord-tenant relationship and *rist* system continued to be dominant land tenure systems in most parts of the country. The Derg introduced a radical reform in the land tenure system.¹²¹ Derg enacted law to make all land public property. One of the rationales of the law is to abolish feudal oppression and bring about equality, freedom and fraternity to all people.¹²² The other rationale of the law is to ‘increase agricultural production and to make the tiller the owner of the fruits of his/her labour.’¹²³ According to this law, ‘all rural lands shall be the collective property of the Ethiopian people.’¹²⁴ No private ownership over land is allowed.¹²⁵ It is only the holding right over land that is granted by the law and no one is

¹¹⁶ As above.

¹¹⁷ As above.

¹¹⁸ Wubshet Kassaw Hussen ‘Land tenure and Democracy in Ethiopia’ unpublished LL.M thesis, Addis Ababa University College of Law and governance, 2017 27.

¹¹⁹ Some estimate it to be 50% while others estimate it to be only 5%. Yigremew (n 113 above) 4.

¹²⁰ Desalegn Rahmato *Agrarian reforms in Ethiopia* (1984).

¹²¹ Belay (n 111 above) 19.

¹²² Public Ownership of Rural Lands Proclamation No. 31/1975 3rd paragraph of the Preamble.

¹²³ Above, 5th paragraph.

¹²⁴ Above, Art. 3(1).

¹²⁵ Above, Art. 3(2).

allowed to transfer its holding rights by lease, sale, exchange, mortgage etc.¹²⁶ It is only possible to transfer holding right to a spouse, or a child upon death and those who accept the land are allowed only to use same.¹²⁷ At that time, large-scale agricultural farms were nationalized.¹²⁸

Land tenure system under the existing regime

The existing government continued Derg's policy of land as common property of the public.¹²⁹ The FDRE Constitution states that the right to ownership of rural land

... is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.¹³⁰

Proclamation no. 89/1997 empowered regional states to make land holding redistribution¹³¹ and this was done after the enactment of land laws of regional governments.¹³²

Rural land proclamation stipulates that government is the owner of the rural land.¹³³ This provision does not go in line with the FDRE Constitution which provides that both the state and the peoples of Ethiopia are the owners of rural land.¹³⁴ Private agricultural investors are given the right to use rural land according to the investment policies and laws of the country.¹³⁵

The Ethiopian pastoralists have the right to free land for grazing and cultivation and they shall not be displaced from their own lands.¹³⁶ However, the land use law limits this right that it is the government who should give rural land for pastoralists to own communally for the purpose of common grazing, and other social purposes.¹³⁷

¹²⁶ Above, Art. 5.

¹²⁷ Proclamation No. 31/1975 (n 122 above) Art. 5.

¹²⁸ Above, Art 16.

¹²⁹ Belay (n 111 above) 19.

¹³⁰ The FDRE Constitution (n 4 above) Art. 40(3).

¹³¹ Federal Rural Land Administration Proclamation No. 89/1997 *Federal Negarit Gazeta*, 3rd Year No 54 Addis Ababa, 7 July 1997, Art 6(1) & (2).

¹³² See Belay (n 115 above) 20.

¹³³ The Federal Democratic republic of Ethiopia Rural land Administration and Land use Proclamation No. 456/2005, *Federal Negarit Gazeta* 11th Year No. 44 Addis Ababa 15 July 2005, Art. 5(3) (hereinafter Proclamation No. 456/2005)

¹³⁴ The FDRE Constitution (n 4 above) Art. 40 (3).

¹³⁵ Proclamation No. 456/2005, Art 5(4)(a)

¹³⁶ The FDRE Constitution (n 4 above) Art. 40(5).

¹³⁷ Proclamation No. 456/2005 (n 133 above) Art 2(12).

User right documentation

Currently, land certification program is undertaken in the country. *Amahara, Oromia, Tigray* and Southern Nations Nationalities and Peoples Regional States are undertaking land certification.¹³⁸

However, it is argued that this is not sufficient to address the fundamental issues as it lacks clarity regarding security and property ownership.¹³⁹ This documentation does not secure land tenure in the true sense of the term because the peasants fear that they are vulnerable to title changes, because redistribution of land would be made in the future. In addition, the system could not be successful in the absence of cadastral system. Cadastral system could help to keep the record without conflict and uncertainty.¹⁴⁰

4.6 Role of investment law in large-scale agriculture in Ethiopia

Ethiopia has introduced an agricultural policy that pays due attention to the role of private investors in the development of large-scale modern agriculture in the low lands.¹⁴¹ Investment Proclamation No. 769/2012, Regulations No. 269/2012, Regulations No. 270/2012, Regulations No 396/2017, Commercial Code, bilateral treaties, as well as laws of the Regional States are main legal frameworks for both domestic and foreign investment in Ethiopia. Investment Proclamation No. 769/2012 has a rationale, among others, to encourage and expand investment ‘... so as to strengthen the domestic production capacity and thereby accelerate economic development of the country and improve the living standards of its peoples...’¹⁴² This law envisages only the economic development of the country. But the investment law of the Southern Nations Nationalities and Peoples’ Investment Administration Proclamation No. 81/2004 widens the role of investment to include acceleration of the economic and social development of the region.¹⁴³ The basic policy of investment law in Ethiopia is to improve the living standards of the

¹³⁸ See Belay (n 111 above) 21.

¹³⁹ As above.

¹⁴⁰ As above.

¹⁴¹ Essayas Kebede ‘Trends and challenges in rice investment in Ethiopia’ in Assefa *et al* (eds) *Challenges and opportunities of rice in Ethiopian agricultural development* 18.

¹⁴² FDRE Investment Proclamation No. 769/2012 (n 8 above) 1st paragraph of the Preamble.

¹⁴³ First paragraph of the Investment proclamation reads: ‘... The encouragement and promotion of investment has become necessary so as to accelerate the economic and social development of the region and to improve the living standards of the society.’ Southern Nations Nationalities and Peoples’ Regional States’ Investment Administration Proclamation Re-enactment Proclamation No. 81/2004, *Debab Negait Gazeta*, 9th Year No. 14, *Awassa*, 18 August 2004. One of the objectives of the investment law of Gambella Regional State is to enhance the

peoples.¹⁴⁴ Accelerating the economic development alone can never improve the living standards of the Ethiopian people's: it requires the social development. However, the policy, as stated in the first paragraph of the Preamble of the FDRE investment proclamation does not include social development. Moreover, protection of the environment is not envisaged under the investment policy.

The Investment Proclamation has the objective to 'develop the domestic market through the growth of production, productivity and services'¹⁴⁵ which is intended to enhance agricultural productivity for profit. It is also intended to enhance the role of private investment including investment in agriculture sector to accelerate the economic development of the country.¹⁴⁶

The Commercial Code of Ethiopia provides the legal framework for undertaking commercial activities including commercial agriculture.¹⁴⁷ The Trade Practice Proclamation No. 329/2003 was enacted to promote open competition that promotes private investment participation through incentives and export duty incentives scheme to promote export in general including export of agricultural production.¹⁴⁸

FDRE investment law pays due attention to the role of foreign investment in the economic development of the country.¹⁴⁹ Bilateral investment treaties to which Ethiopia is a party are based on the policy to create favourable conditions for investors of the State Parties, and to provide protections for investors so as to increase the economic development of the countries.¹⁵⁰

The Ethiopian government aspires for every agricultural activity to produce marketable output of acceptable quality that is competitive in the international market.¹⁵¹ The participation of private investors in agriculture is imperative in commercialization of agriculture in Ethiopia. Private investors are expected to buy agricultural products from farmers and give value to farms to increase the productivity of agriculture. In addition, private investors could add values to agricultural products through industrial processing. All this is in line with the government

economic and social developments in the region. Gambella's Peoples National State Proclamation to establish Investment Administration Proclamation No. 12/1999, *Gambella Negarit Gazeta*, Art. 3(A).

¹⁴⁴ FDRE Investment Proclamation No. 769/2012 (n 8 above Art. 5).

¹⁴⁵ Above, Art. 5(3).

¹⁴⁶ Above, Art. 5(6).

¹⁴⁷ See Commercial Code; See also Ethiopian Investment Agency *Invest in Ethiopia An investment guide to Ethiopia Opportunities and conditions* 26.

¹⁴⁸ See D Tezera & S Lingohr-Wolf 'Ethiopia in United Nations Industrial Development Organization Agribusiness for Africa's Prosperity: Country case studies' Second edition (2012) 85.

¹⁴⁹ FDRE Investment Proclamation No. 769/2012 (n 8 above) Art. 5(7).

¹⁵⁰ See Ethiopian bilateral investment treaties made with German, China and Malaysia

¹⁵¹ GTP I (n 61 above) 42.

strategy to achieve rapid and sustainable rural development. The policy envisages attracting foreign investors to the agricultural sector.¹⁵²

Foreign direct investment (FDI) contributes most to the development process in a given country.¹⁵³ According to Nunnenkamp,¹⁵⁴ for foreign direct investment to contribute to development process, 1) improving country's attractiveness to foreign investors; and 2) the host-country environment should be conducive to favourable FDI are essential. Local markets and institutions, policy, law and administrative framework to promote investment, and the availability of local complementary factors of production are considered as major driving forces of FDI.¹⁵⁵ Since 1992, Ethiopia has been exerting efforts to promote investment both domestic and foreign by implementing favourable policies and strategies, like the Rural Development Policy and Strategy as well as the Industrial Policy and Strategy.¹⁵⁶

Host countries design large-scale agricultural investment for development benefits-technology transfer, employment creation, and infrastructural development. Policy and legal frameworks are needed to maximize development benefits and minimize risks.¹⁵⁷ Investment law, also called investment code in countries, promotes investment in general and large-scale agricultural investment in particular, by determining conditions and procedures for both foreign and domestic investors.¹⁵⁸

¹⁵² Above, 43-52.

¹⁵³ TH Moran 'Foreign direct investment and development: A reassessment of the evidence and policy implications' (1999) 3. The empirical evidence regarding the impact of FDI on growth in the host state is mixed. See Alfaro et al *Does Foreign Direct Investment Promote Growth?* See also E Bode & P Nunnenkamp 'Does foreign direct investment promote regional development in developed countries? A Markov chain approach for US states' (2011) 147 *Rev World Economy* 351-383. It is found that FDI in Nigeria has a negative significance to growth in the long run. See Nkechi 2013 *Asian Economic and Financial Review* 1134-1151.

¹⁵⁴ P Nunnenkamp *How to promote development-friendly FDI: An agenda for policy makers in developing countries* 1.

¹⁵⁵ Above. To be beneficiary of FDI host states need to provide: i) political and macroeconomic stability so that investors can predict about their investments; ii) legal and regulatory environment that facilitates doing business; iii) adequate social and physical infrastructure that smoothens functioning of the market and transfer of knowledge; and iv) appropriate investment promotion by which it disseminates information about the investment site and existing service. X Sun 'Foreign direct investment and economic development: What the states need to do?' (2002) 18.

¹⁵⁶ See Ethiopian Investment Agency, *Invest in Ethiopia An investment guide to Ethiopia opportunities and Conditions* 6.

¹⁵⁷ Food and Agricultural Organization of the United Nations, *International investment in developing country agriculture*. Ethiopia would benefit from large-scale agricultural development since it can transfer new technology, environmental friendly production methods, reduction of soils erosion. E Cesar & A Ekbom 'Ethiopia Environmental and Climate Change policy brief' (2013) 20.

¹⁵⁸ International Institute for Environment and Development (IIED) *Agricultural investments and land acquisitions in Mali: Context, trends and case studies* (2012) 21.

Large-scale agricultural investment has a significant role in moving capital to the developing host country and promoting sustainable development. Foreign direct investment (FDI) is accepted as a means of enhancing development.¹⁵⁹ In Ethiopia, the role of foreign direct investment in large-scale agriculture in contributing for the improvement of the living standard of the local peoples is accepted by the government.¹⁶⁰

FDI enables the accumulation of capital that in turn contributes to economic growth. However, FDI needs appropriate policy and laws to promote its flow.¹⁶¹ FDI transfers technologies and knowledge that are not available in the host developing country that promotes productivity and economic growth.¹⁶² FDI can also bring human capital to the host developing country, which is important for growth.¹⁶³ Thus, the role of investment law is to ensure that capital is moved to the developing host state, and enhance the transfer of technology, as well as the development of human capacity.

Coming to Ethiopia, bilateral investment treaties are intended to attract the flow of capital and transfer of new technologies and widen the opportunity for foreign investors to contribute to the economic development of Ethiopia.¹⁶⁴ In Ethiopia, increasing the inflow of capital and speeding up the transfer of technology are the main investment policy issues.¹⁶⁵ It regulates the inflow of foreign capital¹⁶⁶ into the country. Accordingly, it provides that any foreign investor, including agricultural investor, must have a minimum of 200,000 USD to invest in Ethiopia alone or 150,000 USD¹⁶⁷ in case of joint investment with a domestic investor.¹⁶⁸ The foreign

¹⁵⁹ See generally World Economic Forum *Foreign direct investment as a key driver of trade, growth and prosperity: The case for a multilateral agreement on investment* (Geneva, 2013).

¹⁶⁰ A minutes of the discussion on the tea development in *Gumary Kebele*, in Mezenger Woreda of Gambella Regional State, held in the *Gumary Kebele* Hall, on 26/3/2003 EC. In the meeting, the *Woreda* Administrative Peoples explained that the investment would bring about much improvement of the living standards of the local peoples. (above).

¹⁶¹ JD Gregorio 'The role of foreign direct investment and natural resources in economic development' (2003) 4.

¹⁶² Above, 5.

¹⁶³ Above, 5-6.

¹⁶⁴ See የካቲት 19/1991 ዓ.ም. የኢ.ፌ.ዲ.ሪ. የሕዝብ ተወካዮች ምክር ቤት 4ኛ ዓመት የሥራ ዘመን በኢ.ፌ.ዲ.ሪ. መንግሥትና ኔዘርላንድ፣ በማሌዥያና በቻይና መንግሥታት መካከል ኢንቨስትመንት ለማስፋፋትና ዋስትና ለመስጠት ስለተደረገው ስምምነት ማጽደቅ ረቂቅ አዋጅ አስመልክቶ የቀረበ የውሳኔ ሃሳብ ቁጥር 5/1991(A recommendation for the Bilateral Investment Treaty between FDRE Government and Netherland Government; FDRE Government and Malaysian Government; and FDRE Government and Chinese Government)(Available only in Amharic).

¹⁶⁵ FDRE Investment Proclamation No. 769/2012 (n 8 above) 2nd paragraph of the Preamble.

¹⁶⁶ The term capital is defined to mean 'local or foreign currency, negotiable instruments, machinery or equipment, buildings, working capital, property rights, patent rights, or other business assets' FDRE Investment Proc. No. 769/2012 (n 8 above) Art. 2(3). This definition seems to be in-line with the definition given under international investment law.

¹⁶⁷ Above, Art. 11(1).

capital has to be registered with the investment Commission.¹⁶⁹ An officer in the Ethiopian Investment Commission explains that a foreign investor must prove registration and the required minimum capital before licensing. The investor will not be given a licence if registration and deposit of minimum capital is not proved.¹⁷⁰ However, the assertion of the investment officer does not conform to the law since certificate is not made an essential document to give a licence for the investor.¹⁷¹ In addition, the investment law does not provide any civil (administrative) or criminal remedy should foreign investor fails to register such a minimum amount.

One of the specific objectives of the investment law is to advance transfer of technology for the development of Ethiopia.¹⁷² Technology transfer agreement, to give a legal effect,¹⁷³ is required to be registered with the Investment Commission,¹⁷⁴ and the Commission should provide a certificate upon registration.¹⁷⁵ Though the law is not clear, one of the effects could be that the foreign investor may not have a legal right to claim returns and profits from the technology transfer agreement. However, the issue, from the Ethiopian point of view, as a host state is to ensure the transfer of technology to the country that the investment law fails to do. The lease agreement provides that the investor is given the right to undertake the investment activities by mechanization or other means that the investor deems fit and proper in the circumstances.¹⁷⁶ This discourages the transfer of technology because the investor may prefer to use traditional or at least not up-to-date technologies in the investment.

Knowledge is the other essential point that investment law must have to ensure in Ethiopia from foreign investors. In this regard, the law provides that one of the specific objectives of investment is to create employment opportunities for Ethiopians.¹⁷⁷ Any investor is allowed to recruit qualified employees, and gradual replacement of the expatriates by Ethiopians is

¹⁶⁸ Above, Art. 11(2).

¹⁶⁹ Above, Art. 11(5).

¹⁷⁰ Interview made with Mrs Genet Sibani, Contract Administration Directorate Directress, Ethiopian Investment Agency, in her office, Addis Ababa, on 25 December 2013.

¹⁷¹ The investment law only requires the Commission to see a document that evidence the financial status or profile of the investor where it deems necessary. Art. 14(1)(g). This does not relate to the foreign capital.

¹⁷² FDRE Investment Proclamation No. 769/2012 (n 8 above) Art. 5(8).

¹⁷³ Above, Art. 21(4).

¹⁷⁴ Above, Art. 21(1).

¹⁷⁵ Above, Art. 21(3).

¹⁷⁶ Land Rent Contractual Agreement made between Ministry of Agriculture and Saudi Star Agricultural Development Plc, Art. 3.4; Land Rent Contractual Agreement made between Ministry of Agriculture and Karuturi Agro Products Plc, Art. 3.5

¹⁷⁷ FDRE Investment Proclamation No. 769/2012 (n 8 above) Art. 5(8).

necessary.¹⁷⁸ However, the law gives a right to the investor to employ expatriates without restriction on top management positions.¹⁷⁹ This is a big obstacle for the human capacity development because what is significant knowledge is leading a given investment management and giving such right means that a foreign investor may not give a chance to Ethiopians to train or learn to run big investment projects. Furthermore, the law does not give a remedy to ensure that the investor replaces expatriates.

To promote investment in the agricultural sector, the Investment Commission is given the power to give services on behalf of the investors:

- To execute investors' request for land required for their investment;¹⁸⁰
- To execute investors, request to acquire electrical power, telecommunication services and water.¹⁸¹

Incentives are granted to investors to encourage investment in commercial agriculture that includes discount on initial lease prices, provision of grace period of payment, and provision of land for free.¹⁸² Agricultural investors are granted incentives,¹⁸³ the type and extent of which shall be determined by regulations.¹⁸⁴ The law defines and provides the range of incentives for each sector. Thus, it offers tax holidays and duty exemptions based on the location of investment- the further the location (distance) of the investment from Addis Ababa, the centre, the longer the period of exemption. This is aimed at attracting investment in regions such as *Afar*, *Benishangul Gumz*, *Gambella* and *Somali* with currently slow economic development. Furthermore, agricultural investment is given tax exemption depending on the type of production.¹⁸⁵

An investor who invests to establish a new enterprise is entitled to income tax exemption.¹⁸⁶ Particularly, an agricultural investor who establishes a new enterprise in the State of *Benishangul*

¹⁷⁸ Above, Art. 37(2).

¹⁷⁹ Above, Art. 37(3).

¹⁸⁰ Above, Art. 30(4)(a).

¹⁸¹ Above, Art. 30(4)(e).

¹⁸² Ethiopian Investment Agency *Factor cost* (2013) 27. See also Ethiopian Investment Agency *Invest in Ethiopia An investment guide to Ethiopia Opportunities and Conditions* (2013) 29-30.

¹⁸³ FDRE Investment Proclamation No 679/2012 (n 8 above) Art. 23.

¹⁸⁴ Above, Art. 23(2).

¹⁸⁵ Tekleberehan 'New law expected to boost Ethiopian investment' Ethiopian Business News-Business Proclamations and Regulations Wednesday 25 July 2012.

¹⁸⁶ Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulations No. 270/2012 *Federal Negarit Gazeta* 19th Year No. 4 Addis Ababa 29 November 2012 (hereafter Regulations No. 270/2012), Art. 5(1).

Gumz or *Gambella* is entitled to an income tax deduction of 30 percent for three consecutive years in addition to the tax exemption.¹⁸⁷ Moreover, an agricultural investor who exports at least 60 percent of its /his/her production is entitled to income tax exemption for two years.¹⁸⁸ The period of exemption from income tax begins from the commencement date of production by the investor.¹⁸⁹ Exemption for income tax is extended to half of the exemption period for the investors who incurred loss within exemption period,¹⁹⁰ not more than for five income tax period.¹⁹¹

An agricultural investor who establishes a new enterprise is given a privilege of exemption of capital goods and construction materials from customs duty.¹⁹² An investor who produces cereals, leguminous crops and/or oil seeds and rice is exempted from income tax for three years, in areas other than Addis Ababa and *Oromia* surrounding Addis Ababa.¹⁹³ An investor who engages in production of certified seed is exempted for 3 to 4 years, and who produces perennial crops such as coffee, tea, mango, avocado, orange, papaya, is exempted for 5 years whereas producing rubber tree, palm, jatropha etc is exempted for 6 years.¹⁹⁴ Foreign agricultural investors are also granted trade duty incentive schemes, especially, duty drawback scheme,¹⁹⁵ and voucher scheme.¹⁹⁶ Investors who are eligible for incentives are required to be registered and be granted business licence.¹⁹⁷

¹⁸⁷ Above, Art. 5(2).

¹⁸⁸ Above, Art 7.

¹⁸⁹ Above, Art 10(1).

¹⁹⁰ Above, Art. 12(1).

¹⁹¹ Above, Art. 12(3).

¹⁹² Above, Art. 13(1).

¹⁹³ Above, Scheme 2.1.

¹⁹⁴ Above, Scheme 2.1.3.

¹⁹⁵ Export Trade Duty Incentive Schemes Proclamation No. 768/2012 *Federal Negarit Gazeta* 18th Year No. 62 Addis Ababa 4 September 2012 Art. 4(1). Duty-draw-back is 'duty paid on raw materials and accessories used in the production of commodities and refunded to the payer upon exportation of the commodity processed.' Above, Art. 2(1).

¹⁹⁶ Above, Art. 8(1).

¹⁹⁷ FDRE Investment Proclamation No. 769/2012 (n 8 above) Art. 12(4).

4.7 Legal principles applicable to large-scale agriculture in Ethiopia

Property rights

The Ethiopian Agricultural Investment Administration Agency is duty bound to ensure that agricultural investment land is free from third party possession.¹⁹⁸ However, the Ethiopian Government may expropriate¹⁹⁹ land use rights for ‘public purpose’²⁰⁰ such as to allocate it to investors, cooperatives for the use of land for more productivity.²⁰¹ Private investors have the right to use land on the basis of payment and the government is duty bound to ensure this right.²⁰²

To promote large-scale agricultural investment, ‘land bank’ is established²⁰³ at the federal level that can be accessed by investors.²⁰⁴ In the 2011, about 3.5 million ha of land was transferred to the federal land bank.²⁰⁵

¹⁹⁸ Ethiopian Horticulture and Agricultural Investment Authority Establishment Council of Ministers Regulation No. 396/2017, *Federal Negarit Gazette* 23rd Year No 13 Addis Ababa 24 January 2017 Art 6(3). The FDRE Constitution Article 40(1) provides for private property while sub art 3 vested the right to ownership to land in the State and in the peoples of Ethiopia. Furthermore, it states that land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or other means of exchange. This provision makes clear that land is common property and cannot be sold or exchanged by other means. The Constitution grants every peasant the right to obtain land freely and guaranteed from eviction from his/her possession. What is more, the Constitution provides that pastoralists have ‘the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands.’ The FDRE Constitution (n 4 above) Art. 40 (5).

¹⁹⁹ Relevant federal, regional or local authority has the power to expropriate. Proc. No. 455/2005 Art. 3(1); Muradu Abdo Srur ‘State policy and law in relation to land alienation in Ethiopia’ unpublished PhD thesis, 2014 150-151. For the detailed analysis of expropriation see generally Belachew Yirsaw Alemu ‘Expropriation, valuation and compensation in Ethiopia’ unpublished PhD thesis, School of Architecture and the Built Environment Royal Institute of Technology (KTH), 2013.

²⁰⁰ In Ethiopia public purpose is defined to mean

... the use of land defined as such by the decision of appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire the direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development. Expropriation of Landholdings for Public Purposes and Payment of the FDRE 11th Year No. 43 Addis Ababa 15 July 2005 Art. 2(5).

This definition is broad. J Faust & H Handeland *Analysis of the Ethiopian expropriation process- In rural areas in the Amhara Region* (2013) 46-7. The concept is elastic having different meanings. Daniel Woldegebriel Ambaye ‘Land rights and expropriation in Ethiopia’ unpublished PhD thesis in land Law, School of Architecture and the Built Environment Royal Institute of Technology (KTH) Stockholm, 2013 189-90. The government decides as to the public purpose. Belachew Yirsaw Alemu ‘Expropriation, valuation and compensation practice in Ethiopia The case of Bahir Dar city and surrounding’ (2013) 31 *Property Management* 132 140.

²⁰¹ Ethiopia: *Food security and land governance factsheet* 4.

²⁰² The FDRE Constitution (n 4 above) Art. 40(6).

²⁰³ See Agricultural Investment Land Administration Directive, Council of Ministers, 5 March 2010, Addis Ababa.

²⁰⁴ Ethiopia (n 201 above) 5.

²⁰⁵ See Dessalegn (n 94 above) 46.

The Ministry of Agriculture and Natural Resources is empowered to administer agricultural investment lands that are entrusted to it by delegation from regions.²⁰⁶ The provision that empowers the Ministry reads as: ‘The Ministry of Agriculture and Natural Resources shall have the powers and duties to ...ensure the proper execution of functions relating to agricultural research and agricultural investment.’²⁰⁷

Pursuant to this provision, a power is delegated from regions regarding the administration of investment lands. This law does not make clear whether the power entrusted relates to large-scale agriculture investment lands, but the law as it stands seem to include all types of investment lands.

Ethiopia has developed an innovative approach to secure land rights, i.e., land registration and certification, which was started in 1995 in *Tigray* and now it is implemented in all regions. Thus, over 15 million household farmers have a land certificate. Farmland registration is systematic and takes place at the lowest levels of local government, i.e., *Woreda* and *Kebele*.²⁰⁸ Land certification improved the tenure security for farmers since they can register their use right.

²⁰⁶ On the other hand, regional investment organs can allocate land to investors if it is less than 5000 ha, and the income from all land leases are to be given to the respective regions. Ethiopia (n 201 above) 4. See Responsibilities of MOARDs Agricultural Investment Support Directorate.

²⁰⁷ Proc. No. 916/2015 (n 16 above) Art. 19(1)(r). Formerly the Ministry of Agriculture was empowered to ...ensure the proper execution of functions relating to agricultural research, conservation of biodiversity and the administration of agricultural investment lands entrusted to the federal government on the basis of powers of delegation obtained from regional states. Above

It is a memorandum of understanding signed by the political leaders of each Region and the Federal Government. It is a political commitment. As the officer stated, the former agricultural practice was abused, and it must be rectified. Therefore, such a political commitment was made so as to curb the problem. Lease tax, renewal of investment licence, etc are transacted in respective Regions and it is paid to the same. Thus, in Southern Nations Nationalities and Peoples and *Amhara* Regions payments are made effective to the respective *Woreda* while it is paid to the Region in *Gambella*. In short, a memorandum of understanding signed regarding the land bank to the federal government. Interview with Mr Bizualem Bekele, Land availability and administration case Team Leader (MoA), an interview made in 2012. An expert in the Ministry of Agriculture, on his part explained that, it is a political commitment that regions agree to transfer 5,000 hectares and above investment lands to the federal government. He pointed out the rationales, as:

- a) To make the local people more beneficial by transferring land to investment;
- b) To help regions to build their capacity;
- c) It is because all the income is paid to the perspective region. An interview made with Mr. Dereje Abebe, an Expert in the Ministry of Agriculture and Rural Development, in 2012.

²⁰⁸ The registration users’ right and the boundaries are made in the presence of neighbours publicly. The registration of users’ right has increased the willingness to invest and this in turn could contribute for the productivity of crops. It also contributes to reconfirm in public the boundaries of the fields. Land Governance for Equitable and Sustainable Development Ethiopia Food Security and Land Governance Factsheet (2016) 3.

This is important for high crop production by investors. However, the land rights of pastoralists and common land is becoming less secured in Ethiopia.²⁰⁹

Environmental and social sustainability

Sustainable development is ensured under the Ethiopian Constitution.²¹⁰ Environment is also protected by the Ethiopian Constitution.²¹¹ Consequently, environmental protection and social sustainability should be ensured in the implementation of large-scale agriculture in Ethiopia. The Social and Environmental Code of Practice provides that care must be taken to protect the historical relics, burial sites, and scientific values from damage, in cooperation with the local people.²¹²

As environmental sustainability cannot be seen isolated from economic sustainability, participants of a workshop on environmental issues agree that using resources in the long-term without depleting them for the sake of short-term gains equals to achieving sustainability.²¹³ The Government also explained that there is a business plan and agreement to protect the environment. There are also law executors, and therefore, no piece of land-large-scale agriculture investment causes damage to the environment, argued, the Government.²¹⁴

Right of displaced persons

Article 44 of the FDRE Constitution is intended to ensure environmental rights in general. According to the Constitution,

All persons who have been displaced or whose livelihoods have been adversely affected as a result of state programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance.²¹⁵

According to this Constitutional provision, all persons who have been displaced from their lands or whose livelihood is adversely affected due to the implementation of large-scale agricultural investment have the right to compensation as well as relocation assistance.

²⁰⁹ Ethiopia (n 201 above) 5. It was reported that the residents in *Gambella* Regional State 'have never had formal title to the land they have lived and used' and the Ethiopian government by pass their right not to be relocated. NEWS Ethiopia: Forced Relocations Bring Hunger, Hardship.

²¹⁰ See The FDRE Constitution (n 4 above) Art. 43.

²¹¹ See above, Art. 44.

²¹² Annex 1 of the Code of Practice; and Social and Environmental Code of Practice 5.

²¹³ Green Forum (n 110 above) 110.

²¹⁴ Ethiopian Television, broadcasted on 10 April 2004 EC.

²¹⁵ FDRE Constitution (n 4 above) Art. 44(2).

A) Compensation

Every person has full right to immovable property and permanent improvements s/he made on the land by his/her labour or capital. S/he has the right to claim compensation for those properties so long as s/he has the right to use the land.²¹⁶ Where government expropriates land use right and properties over it, for public purpose, compensation that commensurate to the value of the property should be paid in advance.²¹⁷

B) Relocation assistance

The Ethiopian Constitution clearly stipulates that persons who have been displaced or whose life is adversely affected have the right to compensation, and relocation assistance.²¹⁸

The right to be consulted

The FDRE Constitution guarantees that peoples have the right to be consulted and participate in development projects.²¹⁹ The Social and Environmental Code of Practice requires consultation of the local community in the investment project so that they will be aware of the project and will have the opportunity to ensure that the investment will promote their interest. Consultation should be conducted by identifying persons that will participate in the consultation, before the investment project activities take place.²²⁰

Principles applicable to land transfer- Free and informed consent

In some African countries, the land is under the ownership of respective governments and this makes easy the transfer of lands to investors.²²¹ The Ethiopian government has undertaken the obligation to deliver the land with the site plan and title certificate of the land within 30 days from the date of signing the lease contract with the lessor.²²² The lease contracts vary regarding the requirement of one-year lease payment as a down payment before transfer of the land to the

²¹⁶ Above), Art. 40(7).

²¹⁷ Above), Art. 40(8).

²¹⁸ Above) Art. 44(2).

²¹⁹ Art. 43(2) of the FDRE Constitution (n 4 above), reads as: 'Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.'

²²⁰ See Social and Environmental Code of Practice, Annex 1 18.

²²¹ M Rechards 'Social and environmental impacts of agricultural large-scale land acquisitions in Africa- with a Focus on West and Central Africa' (2013) 7.

²²² Land Rent Contractual Agreement made between Ministry of Agriculture and Saudi Star Agricultural Development Plc Arts. 7.1 cum. Art. 4.2. Art. 3.4.

investor.²²³ Such down payment is a requirement under the lease agreement but not in the Saudi Star contract.²²⁴ In practice once the land to be given is determined, the investor is required to pay the lease to the relevant district (*woreda*) and the Ministry of Agriculture instructs the relevant regional authorities and requests their support in facilitating the transfer of land.²²⁵ Then, the relevant regional authority will collect the lease payment and notify it to the Ministry of Agriculture. Finally, the ministry will transfer the land to the investor.²²⁶

Land transfer is made effective through the means of lease agreement in Ethiopia. There is no special law that govern land lease in Ethiopia, but the general principles that are applicable to lease in general would apply to large-scale agricultural investment. The Civil Code of defines the lease of immovable as

... a contract whereby one of the parties, the lessor, undertakes to ensure to the other party, the lessee, the use and enjoyment of an immovable, for a specified time and for a consideration fixed in kind or otherwise.²²⁷

Here the lessor undertakes the obligation to ensure for the lessee the use and enjoyment of the immovable, the land. Therefore, the government, in case of the large-scale agriculture investment lease contract, is duty bound to ensure the investor the use and enjoyment of the land.²²⁸ Pursuant to the Civil Code, the lease contract of immovable property is required to be registered so as to protect the right of third parties.²²⁹ Leases made for a five years period and not registered can affect the right of third party where the date is certain.²³⁰ In other cases, the

²²³ Land Rent Contractual Agreement made between Ministry of Agriculture and *Karuturi* Agro Products Plc, Art. 4.2 (here in after referred to as *Karuturi* Agreement)

²²⁴ Land Rent Contractual Agreement made between Ministry of Agriculture and Saudi Star Agricultural Development Plc, Art. 4.2

²²⁵ See Dessalegn (n 98 above) 23. A business visibility study is conducted and the Ethiopian Government is undertaking a study how to transfer the land: by making ready the land for farm or giving it without deforesting to the investor. HE Tefera Derbew, Minister, Ministry of Agriculture and natural Resources, and Mr. Wondrad, Minister D'état, Ministry of Agriculture and natural Resources, Radio Fana, 2013.

²²⁶ See A letter written by the *Gambella* Regional State to the *Godere Woreda* Administrative Council, Dated 10/03/2003 EC, number 002/2031/716. A letter was written about the *Verdanta* Harvest PLC LTD. The *Woreda* Administration Council also has written a letter to the finance and economy Office of the same *Woreda* to collect a one year lease payment as down payment from the investor and to write a letter to the Federal Ministry of Agriculture about the payment and to cooperate the investor in other respects. See a letter Number 1183/13/3 Dated 23/3/2003 EC.

²²⁷ Civil Code of Ethiopia, *Negarit Gazetta*, Art. 2896(1) (hereinafter referred to as Civil Code). Urban Lands Lease Holding Proclamation, Proclamation No. 721/2011, *Federal Negarit Gazeta*, 18th Year No 4, Addis Ababa, 28 November 2011, Art. 2(1) defines Lease in relation to urban land lease, as 'a system of land tenure by which the right of use of urban land is acquired under s contract of a definite period.'

²²⁸ See the Lease Contract.

²²⁹ Civil Code (n 227 above) Art. 2899(1). It reads as 'Lease made for a period exceeding five years shall not affect third parties until they are entered in the registers of immovable property at the place where the immovable is situate (Art 1571).' Even today, no registration is made to the lease agreements. An interview to an official in the Agency who require anonymity, 2016.

²³⁰ Civil Code (n 227 above) Art. 2899(2).

lease is presumed to be made for indefinite period of time.²³¹ Coming to the large-scale land lease contract, the lease agreements made so far are not registered.

Formality requirement is essential for the validity of contracts. A contract binding the government shall be made in writing and registered with a court, public administration or notary.²³² In particular, a lease agreement that creates a *usufructuary* rights over the land shall be made in writing and registered with a court or notary.²³³ Where no registration is made, 'there shall be no contract but a mere draft of a contract.'²³⁴ The Ministry of Agriculture can never waive the legal requirements of registration of the lease contract.²³⁵

4.8 Debates and conflicts of large-scale agricultural investment law and environmental law

In considering the relationship between investment law and environmental law, debates regarding foreign direct investment are paramount.

4.8.1 Debates and relationships between large-scale agricultural investment law and environmental law in Ethiopia

In Ethiopia, in a workshop organized by Green Forum, the following pros and cons of large - scale agriculture schemes were identified in the debate. First, there is an indiscriminate use of herbicides and pesticides²³⁶ that cause ecological disasters. For instance, participants of the workshop argued that large-scale production of sugar cane in Ethiopia is not environmentally friendly. Besides, in some parts of the country, particularly in the low lands, there is scarcity of drinking water resources, irrespective of the fact that Ethiopia is a virgin land with extensive unused fertile land and water resources. On top of that, investment projects that were licensed

²³¹ Above, Art. 2899(3).

²³² Above, Art. 1724.

²³³ Above, Art. 1723(1).

²³⁴ Above, Art. 1720.

²³⁵ See Elias (n 216 above) 209; Land Rent Contractual Agreement (n 224 above) Art 11; የጋምቤላ ሕዝቦች ብሄራዊ ክልላዊ መንግሥት የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ: ቁጥር 52/1998 (*Gambella Peoples National Regional State Rural Land Administration and Use Proclamation Negarit Gazeta* 13th Year No. 22 *Gambella*) Art. 9(7) (Available only in Amharic).

²³⁶ The Social and Environmental Code of Practice for Agricultural Investment requires large-scale agricultural investors to ensure that the use of pesticide is in line with the standards of FAO. FDRE Ministry of Agriculture *Social and Environmental Code of Practice for Agricultural Investment* (May 2011) Para. 2.2.

without conducting Environmental Impact Assessment (EIA)²³⁷ and using chemicals are causing environmental pollutions. The chemical pollution caused by large-scale farm is destructive.²³⁸

Those who argue against the investment contend that foreign investors will ‘dump’ older, dirtier technologies in host countries. On the other hand, others argue that foreign investors will invest in newer, cleaner ‘best available’ technology and thereby do not harm the environment.²³⁹

According to the Ethiopian Government, large-scale agriculture offers various advantages to the country. First, it uses modern cultivation and production methods. Second, it transfers agricultural technology to Ethiopia. Third, it also creates job opportunity for a number of Ethiopians. Fourth, it brings about development to the country.²⁴⁰ It is also explained that large-scale agriculture offered some benefits to the local people. For instance, indigenous people in *Benishangul Gumz* learnt from the investors how to use oxen for cultivation and observance of the use of tractors inspired them to work so that some farmers acquired property and became prosperous and start to lead a modern way of life. Investors are helping the local society by constructing schools and roads; they are helping students and ploughing the farms of local farmers.²⁴¹

According to officials of the Ayehu Farm (in *Amhara*), local farmers are beneficiaries of technology transfer, for instance sawing maize in line; they also use selected seeds they purchase from the large-scale farms.²⁴² However, some other investors in *Ahmara* Regional State do not

²³⁷ Environmental Impact Assessment Proclamation No. 299/2002 *Federal Negarit Gazeta* 9th Year No. 11 Addis Ababa 3 December 2002, Art. 4 and 5 (2)(b), (hereinafter FDRE Environmental Impact Assessment Proclamation No. 299/2002); FDRE Environmental Protection Authority *Environmental Impact Assessment Guideline* (Addis Ababa, 2000).

²³⁸ Green Forum (n 110 above) 108.

²³⁹ KP Gallagher & L Zarsky ‘No miracle drug: Foreign direct investment and sustainable development’ in L Zarsky (ed.) *International investment for sustainable development: Balancing rights and rewards* (2004) 26-27. See I Dubava *Reconciling International Investment Law and Sustainable Development* (2010) 2.

²⁴⁰ የኢትዮጵያ ቴሌቪዥን የመሬት ሽግግር ወይስ ልማት? (Ethiopian Television, ‘Land grabbing or development?’ broadcasted on 17 December 2011) (Available only in Amharic). An expert also argued that large-scale agriculture offers various advantages to the local people. Interview conducted with an expert in the Investment Attraction and Helping Work process who wants anonymity. Interview conducted with Mr Yitbarek Woubet, Acting Head, Investment Attracting and Helping Work Process, *BahirDar*; *Amhara* Regional State Industry and Trade Bureau, 2012.

²⁴¹ Interview made with Mr Dessalegn Tesema, Head, Investment Office, *Benishangul Gumz* Regional State, 2012.

²⁴² Interview conducted with Mr Goshimie Teklu, Manager for Sub Farm 3, 2012. He was not volunteer to tell the researcher the problems that he called as insignificant. However, he did not hide the existence of some insignificant problems.

introduce new technology; they are not distinguished from the traditional farmers in practice. Worst of all, some investors lease the farm to local farmers.²⁴³

It was identified that some large-scale agricultural investments are environment friendly. To explain these two examples are cited here: the tea plantation in Western Ethiopia owned by East African Limited, and the *Wushwush* tea plantation, which was owned by the Government, and currently privatized. The latter company is found to be environmentally sensitive from the start and developed 1,250 ha of forestland for tea processing rather than depleting the natural environment. On the contrary, the East African Ltd company did not plant forest (trees) and deplete the natural environment. The participants in the workshop agree that it is not how large the farm is, but what matters is the environmental management scheme applied.²⁴⁴ The former Prime Minister of Ethiopia Meles Zenawi, also underscored that it is vain to appreciate the virginity of the country while we are starving; we shall exploit the natural resources (including land) and develop.²⁴⁵ However, *Wushiwush* Tea plantation was conducted by clearing natural forest and it is not tuneable to argue that it is environment friendly.

Ethiopia is under accelerated economic development since 2003.²⁴⁶ Agriculture is one of the sectors that bring about such economic development in the country.²⁴⁷ The Ethiopian economy in general and the agricultural sector in particular is highly dependent on natural resources of the nation. Exploitation of these natural resources, as evidenced, would benefit the country in short terms. However, unsustainable use of these natural resources will not only cause environmental degradation, but decreases economic growth in the country. The Ethiopian flourishing economy is taken as the driver of both economic growth and environmental degradation and commercial agriculture has significant impact on the environment. Unsustainable agricultural practices cause loss of soil fertility, soil erosion, loss of biodiversity, and ecosystem services. Chemical fertilizers used for agriculture have negative impact on the environment while an intensified and

²⁴³ Interview conducted with Mr Yitayal Abebe, Environmental Impacts Documents Evaluation, Examination and Control Expert, 2012. There are some investors who use donkeys to plough instead of tractors. However, the *Benishangul Gumz* Regional State does not take measure because they would despond if they are forced to plough with tractors, and the image of the Region may be damaged, but they are expected to come to the law through time. As above.

²⁴⁴ Green Forum (n 110 above) 109.

²⁴⁵ Ethiopian Television (n 218 above).

²⁴⁶ Ethiopia's annual average economic development is acknowledged to be 10 %. See E Cesar & A Ekbom *Ethiopia Environmental and climate change policy brief* (2013) 7.

²⁴⁷ Agriculture scores 6.6. National Planning Commission, The Federal Democratic Republic of Ethiopia, The Second Growth and Transformation Plan (GTP II)(2015/16-2019/200) (2015) (hereinafter referred to as GTP II) 5.

inefficient agricultural production leads to soil depletion, pollution, loss of ecosystem services as well as water shortage.²⁴⁸

The 1996 Ethiopian investment proclamation provides that the investment organ shall ascertain ‘... the intended investment activity would not be contravening the operational laws of the country and that, in particular, it complies with conditions stipulated in environmental laws...’²⁴⁹ to issue an investment permit. One of the conditions of the environmental law for large-scale agricultural investment is to prepare and submit an environmental impact assessment. Applying for and be granted with investment permit without EIA amounts to the contravening of the environmental law. Thus, this law was good at ensuring the protection of the environment by ascertaining compliance to environmental laws. However, the current investment law does not incorporate similar provision to the Proc. No. 37/1996.

The stand of the Ethiopian Government is not clear since it seems to choose less restrictive regime because it does not provide environmental impact assessment (in the investment proclamation) as a per requisite for large-scale agricultural investment license. On the other hand, large-scale agricultural investors are not clearly included under the lists that are required to conduct environmental impact assessment, according to the EIA Directive.²⁵⁰

4.8.2 Conflicts between large-scale agricultural investment law and environmental law in Ethiopia

In Ethiopia, a bilateral investment treaty between the Ethiopian Government and Belgian government provides a clause on environment. It requires the parties to strive for adopting and implementing high levels of environmental protection laws.²⁵¹ Bilateral investment treaties to which Ethiopia is a party have the objective to promote investment in contracting party’s country

²⁴⁸ Cesar and Ekbohm (n 246 above).

²⁴⁹ Investment Proclamation No. 37/1996, *Federal Negarit Gazeta* Art 14(1).

²⁵⁰ The Lists that are annexed with the EIA Directive. A Directive issued to determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008 Addis Ababa. The List provided by the Addis Ababa Environmental Authority also includes that agriculture and forestry projects require EIA. See Addis Ababa Environmental Authority *List of projects requiring environmental impact assessment (EIA)*.

²⁵¹ Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on The Reciprocal Promotion and Protection of Investments, Done at Brussels, on the 26 October 2006, Art. 5(hereinafter referred to as Ethio-Belgium Investment Treaty).

and protect investors.²⁵² On the contrary, Ethiopian law imposes obligations like environmental impact assessment and investing on sound technology to avoid or reduce, to the required minimum, the generation of pollutant.²⁵³ Where a large-scale agricultural investor causes environmental pollution, the investor is obliged to clean up or pay the cost of cleaning up the polluted environment.²⁵⁴ Moreover, it will be closed where the harm to the environment is great.²⁵⁵ This indicates how the law is strict to protect the environment.

International environmental law requires Ethiopia to protect and preserve forests in the country. On the other hand, bilateral investment treaties to which Ethiopia is a party oblige the country to encourage large-scale agricultural investment while large-scale agricultural investment may need deforestation. Therefore, there is a normative conflict between international environmental law and international investment law in Ethiopia. The biodiversity Convention²⁵⁶ imposes an obligation on Ethiopia to preserve biodiversity but the bilateral investment treaties²⁵⁷ together with the large-scale agricultural investment agreements²⁵⁸ made with foreign investors require Ethiopia to clear the land to fit for farming and this inevitably causes damage to the biodiversity wealth of the country.

There is also a normative conflict between the international law of the right to development and the right to development under Ethiopian Constitution. The right to development under international law is justiciable,²⁵⁹ while it is unjusticiable²⁶⁰ under the Ethiopian Constitution. Generally, legitimacy conflict and normative conflict between Ethiopian large-scale agricultural investment law and environmental law are prevalent which calls for solution.

²⁵² See Treaty between the Federal Democratic Republic of Ethiopia and the Federal Republic of Germany concerning the *Encouragement and Reciprocal Protection of Investments*, done at Addis Ababa on 19 January 2004, Art. 2 and 4 (hereinafter Ethio-Germany Investment Treaty).

²⁵³ Environmental Pollution Control Proclamation No. 300/2002 *Federal Negarit Gazeta* Art. 3(3) (hereinafter Environmental Pollution Control Proclamation No. 300/2002).

²⁵⁴ Above, Art. 3(4).

²⁵⁵ Above, Art. 3(5).

²⁵⁶ Convention on Biological Diversity (CBD).

²⁵⁷ The Bilateral treaties to which Ethiopia is a party require the promotion of investment. See for instance, Agreement Between the government of the Federal Democratic Republic of Ethiopia and the Government of the People's of Republic of China Concerning the Encouragement and Reciprocal Protection of investments (1998) Art. 2 (hereinafter Ethio-China Investment Treaty).

²⁵⁸ See for instance Land Rent Contractual Agreement made between Ministry of Agriculture and Rural Development and *Verdanta* Harvests PLC (20 April 2010) Art. 6.1 (hereinafter *Verdanta* Lease Agreement).

²⁵⁹ See Chapter two.

²⁶⁰ See the FDRE Constitution (n 4 above) Art. 43.

4.8.3 Solving conflicts between large-scale agricultural investment law and environmental law

The fact that Ethiopia is a signatory to Rio Declaration would help the country to integrate large-scale agricultural investment with environmental protection.²⁶¹ The Ethiopian Government is also politically committed to integrate large-scale agricultural development with the protection of environment and achieve sustainable development.²⁶² In sum, integrating the interest of large-scale agricultural investment with that of environmental protection through the instrument of interpretation is a solution to solve the conflict between large-scale agricultural investment law and environmental law in Ethiopia.

In Ethiopia, social and environmental code of practice includes principles for the management of 1) the social issue; 2) the agricultural practice; and 3) the natural resource. Management of the social component includes the participation of local people to facilitate large-scale agricultural investment; the protection of historical relics, burial sites, and scientific values; employment processes and rights of the employees; regulating the grievance and disciplinary procedures and their documentation; ensuring the healthy working environment.²⁶³ The management of the agricultural practice also includes the use, transportation, and spray of fertilizers and pesticides; solid and liquid waste management; management of irrigation water.²⁶⁴ The management of the natural resource includes²⁶⁵ protection of the land; soil conservation; forest protection; combating illegal hunting; introduction of forest trees be made after a permit from authorized bodies; and seeds or germplasm imported abroad to be certified (bio-diversity protection) by authorized bodies.²⁶⁶ The code does not include cultural issue.

²⁶¹ Art. 4 of the Rio Declaration on Environment and Development reads: 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.' Article 3 of the Declaration also requires the integration of the right to development with environmental protection. Furthermore, Article 25 of the Declaration stipulates that 'peace, development and environmental protection are interdependent and indivisible.' United Nations Rio Declaration on Environment and Development.

²⁶² See United Nations Johannesburg Declaration on Sustainable Development 5 and 11.

²⁶³ See Ministry of Agriculture *Social and Environmental Code of Practice for agricultural investment* (May 2011)(Hereinafter FDRE Social and Environmental Code, 5-6; Bronze/minimum level requirements and compliance of the Code No. 1 Management of Social Affairs Annex 1 to FDRE Environmental Code.

²⁶⁴ FDRE Social Environmental Code, above, 7-8; Bronze/minimum level requirements and compliance of the Code, above, No. 2 Management of Agricultural Production.

²⁶⁵ FDRE Social and Environmental Code, above, 8-9; Bronze/minimum level requirements and compliance of the Code, above, No. 3 Management of the Natural Resource.

²⁶⁶ An advance informed agreement is required to import any modified organism to Ethiopia. Biosafety Proclamation No. 655/2009 *Federal Negarit Gazeta* 15th Year No. 63 Addis Ababa 9 September 2009, Art. 8(1).

Principles for responsible agricultural investment are not a set of hard and fast rules to be followed; but they are a platform for dialogue and consultation and therefore follow more iterative process.²⁶⁷ Principles are aimed to be used as common reference,²⁶⁸ to give guideline and framework for governments and other stakeholders. It is argued, based on experience, that mandatory regulations are more difficult to comply, in negotiation; take longer to agree; and more difficult to enforce, and therefore resorted to non mandatory guidelines and principles. However, it is recognised that neither ‘voluntary guidelines’ nor principles’ are enforceable in themselves, but can mobilise support for good and against bad practices. Then, they ‘refer to existing mandatory treaties, laws and codes for enforcement.’²⁶⁹ Thus, they are toothless instruments, which are dependent on existing laws for their enforcement. On the other hand, some argue that an internationally accepted code of conduct should have ‘teeth’.²⁷⁰ Furthermore, RAI is criticized for not including free, prior and informed consent, a principle incorporated under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Critiques also argue that RAI ‘have been developed without meaningful consultations, especially with people who live and rely on the lands that are being leased or bought.’²⁷¹

4.9 Law of responsible large-scale agricultural investment in Ethiopia

Principles of responsible large-scale agricultural investment require transparency in negotiation, protection of land rights, (are considered in the previous chapter), adherence to Ethiopian laws and policy, benefit sharing and environmental sustainability.

²⁶⁷ International Fund for Agricultural Development (IFAD), Responding to ‘land grabbing’ and promoting responsible investment in agriculture 8. The ‘seven tenets’ that is the principles of responsible agricultural investment include: a) land and resource rights; b) food security; c) transparency, good governance and the enabling environment; d) consultation and participation; e) economic sustainability and responsible agro-enterprise investing; f) social sustainability; and g) environmental sustainability. OECD ‘Freedom of investment process: Responsible investment in agriculture’ (2010) 5; Government of Japan ‘Promoting responsible international investment in agriculture’ 2.

²⁶⁸ ‘Responsible agricultural investment aims to act as a reference point for international investment contracts and corporate social responsibility.’ Brief *What are the principles for responsible agricultural investment (RAI) and why do they matter?* (2011) 2.

²⁶⁹ Dejene Aredo *Agricultural development: Theory, policy and practice* (2011) 172.

²⁷⁰ As above. The principles are aimed at mitigating negative impact of large-scale agricultural investment through policy measures. OECD (n 267 above) 3.

²⁷¹ Brief (n 268 above) 3.

4.9.1 Adherence to Ethiopian laws

Large-scale agricultural investors are required to comply with the Ethiopian laws in general. This is incorporated in the bilateral investment treaties. For instance, Ethiopia is empowered to promote investment in the country according to its laws and Chinese investors are obliged to comply with the Ethiopian laws.²⁷²

The investment law of Ethiopia also requires every foreign investor to comply with the Ethiopian laws. Before issuing investment permit, the Ethiopian Investment Commission (EIC) is responsible to ensure that the investors observe the relevant laws of the country.²⁷³ This indicates that the large-scale agricultural investors should undertake the duty to comply with relevant laws of Ethiopia. The Commission is duty bound to monitor that investors undertaking their investment according to the Ethiopian laws and the terms and condition of the investment permit.²⁷⁴ Furthermore, the large-scale agricultural investors are under obligation to observe the laws of the country in carrying out their investment activities.²⁷⁵

4.9.2 Benefit sharing

The benefits of large-scale agricultural investment to the local people should be clearly provided in the law. This could be made in the agreement. However, the purpose of large-scale agricultural investment is not clearly put.²⁷⁶

Putting some performance requirements on large-scale agricultural investors can promote the development policy of the host state and ensure benefits to the local people. Thus, Ethiopia should impose performance requirements to promote domestic development benefits from large-scale agricultural investments.²⁷⁷ Such performance requirements can include imposing an obligation on large-scale agricultural investor to export only certain percentage of its products and to sale certain percentage of its products on local or domestic market.²⁷⁸ It is also essential to oblige foreign large-scale investor to purchase goods or services from persons or farmers in the

²⁷² Ethio-China Investment Treaty (n 257 above) Art. 2. See also Ethio-German Investment Treaty (n 252 above) Art. 2(1).

²⁷³ FDRE Investment Proclamation No. 769/2012 (n 8 above).

²⁷⁴ Above, Art. 28(11).

²⁷⁵ Above, Art. 38. The provision gives attention to environment by specifically obliging the large-scale agricultural investor to give due regard to environmental protection laws of Ethiopia. Above.

²⁷⁶ Interview made with Mr Abebe Mulatu, a legal expert conducted in 2013 (Addis Ababa).

²⁷⁷ See International Institute for Sustainable Development (IISD) *Model international agreement on investment for sustainable development* (2005) Art. 26(B).

²⁷⁸ Above, Art. 26(C) (i) and (ii).

locality.²⁷⁹ Moreover, other measures like constructing roads, electricity providing and pure water for the local residents should be imposed as obligations on large-scale agricultural investors to promote domestic development in the locality.²⁸⁰ Large-scale agricultural investment contracts should provide the rights and obligations of all parties to ensure benefit sharing and it should be formulated in specific and enforceable terms.²⁸¹ In Ethiopia, activities such as constructing roads and educational institutions are crafted in the form of the rights of the large-scale agricultural investor instead of being made obligations.²⁸² Thus, this contract cannot ensure benefit sharing to the local community.²⁸³

Export requirement is a development strategy of earning income through the export of goods.²⁸⁴ This development model aims at earning foreign exchange through exporting products that are manufactured in host states.²⁸⁵ According to this development model, foreign investors are duty bound to export certain percentage and such requirement could be made as an entry requirement under the host state investment law. However, performing this requirement may be difficult for investors and became a point of dispute.²⁸⁶

Neither the BITs nor the investment proclamation of Ethiopia does provide this requirement.²⁸⁷ The basic reason for that seems to be the fact that the foreign countries do not want such a requirement to be imposed on their investors (citizens). Thus, *Karuturi* promised to produce maize, rice, palm oil and sugar for the global market, while Saudi Star will produce rice

²⁷⁹ Above, Art. 26 (C) (iv).

²⁸⁰ See Above, Art. 26 (C) (vii).

²⁸¹ African Union *et al Guiding principles on large scale land based investments in Africa* (2014) 10.

²⁸² See for instance, *Verdanta Land Rent Contractual Agreement* (n 258 above) Art. 3.2. According to this provision, the lessee has the right to build infrastructure like dams, powerhouses, irrigation system, roads, bridges, office, power supply stations for the purpose of the investment, not for the local residents. Similarly, the investor has the right to build infrastructures for the purpose of the investment itself. Gambella People's National Regional State Regulations to Determine Rural Land Investment Lease Cost Regulations No. 2/1999, *Gambella Negarit Gazeta*, Art. 16 (hereinafter Gambella Rural Land Regulations No. 2/1999).

²⁸³ In developing countries, large-scale agricultural investment contracts, in most cases, are negotiated between foreign contractors who are advised by experienced lawyers, and the host government who is having less incapable personnel. Public policy should ensure that foreign investment and domestic commercial interests are of beneficial to the host country at large. CD Phiri 'Agricultural investment and agriculture, rural development and food security' (2011) 5. In Ethiopia, the large-scale agricultural investment agreements are designed by non-lawyers, and this perhaps is one of the reasons for poor drafting.

²⁸⁴ Singapore, Hong-Kong, Taiwan and South Korea have succeeded in bringing a spectacular growth for their economies through this development model. M Sornarajah *The international law on foreign investment* (2010) 109.

²⁸⁵ As above.

²⁸⁶ Above, 109-110.

²⁸⁷ *Karuturi* is investing in *Gambella* to cultivate cereals and pulses, among others, but the contract does not include a requirement of certain percentages of the products to be sold in Ethiopia. See *Karuturi Agreement* (n 223 above) Art. 3. See *Saudi Star Agreement* (n 222 above) Arts. 1 and 3.

to sell on global market.²⁸⁸ However, *Karuturi* has abandoned working after causing severe destruction on the environment.

4.9.3 Environmental sustainability

The principle for sustainable large-scale agricultural investment requires the investment to be environmentally sustainable.²⁸⁹ The principle requires large-scale agricultural investors to use natural resources, like land, energy and water in the most sustainable and efficient ways, according to the existing knowledge, technologies and capacity. Investors are also required to sustain ecosystems.²⁹⁰

Participants in a workshop organised by Green Forum to discuss on environmental sustainability in Ethiopia argued that economic growth, i.e. large-scale agricultural development and environmental sustainability are interdependent. The participants emphasised the need to have and implement appropriate policies so as to promote the large-scale agriculture and protect the environment.²⁹¹ Ethiopia enacted various laws to ensure environmental sustainability in carrying out large-scale agricultural investment.²⁹² In addition, the Ministry of Agriculture and Natural Resources has developed social and environmental code of practice for agricultural investment.²⁹³ Regarding the implementation of the Code, training is given to inspectors working

²⁸⁸ GRAIN *Land grabbing and the global food crisis* (2011) 23.

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 are (sic) no governance, no constraints, no contracts, none of that. Foreign investor in Gambella Region, cited by Okland Institute (n 107 above) 30.

²⁸⁹ Committee on World Food Security (CFS) 'Background document on principles for agricultural investments (rai) in the context of food security and nutrition (Zero Draft)' Principle 2. It is believed that the interest of development and environmental protection can be balanced by employing sustainable development. See RN Stavins 'Environmental Protection and Economic Well-being: How does (and how should) government balance these two important values?' (2003).

²⁹⁰ CFS, above, 5. Clean air, fresh water, trees, forests, productive soil, and animal life together with other renewable resources constitute ecosystem. Above, 5.

²⁹¹ Green Forum (n 110 above) 110-11.

²⁹² One of these laws is the lease agreement concluded between the Ethiopian government and each large-scale agricultural investor. The agreement imposes obligation on investors to protect the environment. See *Karuturi* Agreement, (n 223 above) Art. 4(1), Saudi Star Agreement (n 222 above) Art. 4(1). It is possible to categorize the obligations imposed on investors as general and specific as provided under the lease agreement.

²⁹³ FDRE Social and Environmental Code (n 263 above). Agricultural investment code of conduct is aimed at ensuring the safety of local community, sustainable use of natural resources, and the investment is friendly with the environment and the [products are suitable to human health. Ethiopian Agricultural Investment Land Administration Agency Establishment Council of ministers Regulations No. 283/2013, *Federal Negarit Gazeta* 19th Year No. 32 Addis Ababa 4th March 2013 Art. 2(5); See also Ethiopian Horticulture and Agricultural Investment Authority Establishment Council of Ministers Regulations No. 396/2017 *Federal Negarit Gazeta* 23rd Year No. 13 Addis Ababa 24 January 2017 Art. 2.

in regions so as to enable them to inspect that investors are working according to the code of conduct.²⁹⁴

Laws of protected areas

Several agreements have been made at the international level to establish and govern protected areas. The World Heritage Convention (WHC), is one that was concluded and adopted on November 16, 1972 at the Stockholm conference on the Human Environment.²⁹⁵ The Convention on Biological Diversity stipulates that parties should 'establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity'.²⁹⁶ In Africa, several instruments are made and the 2003 African Convention is intended to provide protection only for properties of outstanding interest, importance or value.²⁹⁷ Ethiopia is a party to the CBD and the African Convention and has the obligation to establish protected areas.

Protected areas are parts of the environment, which include historic places, national parks, and forests. Numerous national parks have been established that recognised protected areas in Ethiopia.²⁹⁸ The Ethiopian protected area system also considers forest areas and wildlife conservation as a principal mechanism for protecting biodiversity and the ecosystem.²⁹⁹

The Ethiopian Wildlife Strategy and Policy identified that improper land use that '...includes habitat destruction due to illegal agricultural encroachment, rapid population growth, illegal settlement and poaching are main threats to the wildlife of Ethiopia.'³⁰⁰ Therefore, administering the wildlife-protected areas is paramount, and this requires delineating the boundaries and regulating them by law.³⁰¹ Accordingly, the Ethiopian Government enacted a proclamation having the following objectives:³⁰²

- 1) to 'conserve, manage, develop and properly utilise the wildlife resources of Ethiopia;'

²⁹⁴ Interview conducted with Mr. Assefa Onani, 2012.

²⁹⁵ A Gillespie *Protected Areas and international environmental law* (2007) 10.

²⁹⁶ CBD (n 256 above) Art. 8.

²⁹⁷ See Gillespie (n 295 above) 11.

²⁹⁸ Federal Democratic Republic of Ethiopia United Nations Development Program Global Environment Facility 'Sustainable development of the protected area system of Ethiopia (SDPASE)- PIMS' (Project Document) 9-10.

²⁹⁹ Global Environment Facility 'Request for CEO environmental/approval' (CEO Endorsement Template) 9.

³⁰⁰ Federal Democratic Republic of Ethiopia, *Wildlife strategy and policy* (2005) 1.

³⁰¹ Above, 2.

³⁰² Development, Conservation and Utilization of Wildlife Proclamation No. 541/2007, *Federal Negarit Gazeta*, Art. 3 (hereinafter FDRE Wildlife Proclamation No. 541/2007).

2) To create conducive environment to discharge international treaty obligations;
and

3) To promote wildlife tourism and private investment.

Parks that do have national and international representative ecological zones and biodiversity and sanctuaries inhabited by the Ethiopia's endemic and endangered species, among others, shall be designated and administered by the Federal Government.³⁰³

The Ministry of Agriculture and Natural Resources is empowered to ensure the conservation of wildlife as per the international standards³⁰⁴ and to control illegal activities regarding wildlife,³⁰⁵ and to ensure the implementation of treaties to which Ethiopia is a party.³⁰⁶ Regions are also empowered to perform similar duties regarding the wildlife areas under their jurisdictions.³⁰⁷ Any person who violates the provisions of the proclamation is punishable.³⁰⁸ One of the rationales to enact Forest Development, Conservation and Utilization Proclamation is to ensure sustainable utilization of the Ethiopia's forest resources³⁰⁹ while protecting the environment.³¹⁰

Major forest resources must be designated as state forests, their boundaries must be demarcated with the participation of the local community, and shall be registered as protected and productive forests so as to properly conserve, develop and utilize the forest resources of the country.³¹¹ Moreover, state forests must be utilized sustainably without disturbing wildlife, and conserving the ecosystem and the biodiversity.³¹² This proclamation allows undertaking of large-scale agricultural investment in consultation with and getting the approval of the Ministry of

³⁰³ Above, Art. 4(1)(a)(b).

³⁰⁴ Above, Art. 13(5).

³⁰⁵ Above, Art. 13(2). The provision reads:

13. Powers and duties of the Ministry

The Ministry shall, in addition to those given to it under other provisions of this Proclamation, have the powers and duties to:

...

2/ develop and administer wildlife conservation areas established in accordance with Article 4 of this Proclamation and control illegal activities to be committed in relation thereto

³⁰⁶ Above, Art. 13(7).

³⁰⁷ Above, Art. 14.

³⁰⁸ Above, Art. 16.

³⁰⁹ Forest Development, Conservation and Utilization Proclamation No. 542/2007, *Federal Negarit Gazeta*, 2nd paragraph of the Preamble (hereinafter FDRE Forest Proclamation No. 542/2007).

³¹⁰ Above, 3rd para. of the Preamble.

³¹¹ Above, Art. 8.

³¹² Above, Art. 9(9).

Agriculture or the appropriate regional body.³¹³ The Amharic version makes it clear that such activity can be made in state forests, which indicates protected and productive state forests can be given for large-scale agricultural investment. Protected forests should not be given to large-scale agricultural investment. This contradicts with the basic rationale of the proclamation itself to sustainably utilize the forest with protecting sanctuaries, wildlife and the biodiversity. It also contradicts with the environmental law of the country.

On the other hand, it is prohibited to undertake agricultural activities or preparing land in protected areas for cultivation.³¹⁴ In Ethiopia, national parks,³¹⁵ wildlife reserves,³¹⁶ wildlife sanctuaries,³¹⁷ controlled hunting areas,³¹⁸ community wildlife development, protection and utilisation areas are protected areas. The government is duty bound to delineate or re-delineate their boundaries so as to improve their management.³¹⁹

The Ministry of Agriculture and Natural Resources is responsible for the implementation of this proclamation, and for issuance of regulations and directives to implement the proclamation by coordinating relevant federal and regional bodies, and by providing technical support to them.³²⁰ Any person who violates the provisions of this proclamation, and destroys forest by any means is punishable by law.³²¹

³¹³ Above, Art. 14(5).

³¹⁴ Wildlife Development, Conservation and Utilization Council of Ministers Regulations No. 163/2008, *Federal Negarit Gazette*, Art. 5(1)(e) (hereinafter FDRE Wildlife Regulations No. 163/2008).

³¹⁵ National park is defined as ‘an area designated to conserve wildlife and associated natural resources to preserve the scenic and scientific value of the area which may include lakes and other aquatic areas.’ Proclamation No. 541/2007 (n 302 above) Art. 2(8).

³¹⁶ Wildlife reserve is ‘an area designated to conserve wildlife where indigenous local communities are allowed to live together with and conserve the wildlife.’ Wildlife Proclamation No. 541/2007 (n 302 above) Art. 2(10).

³¹⁷ Wildlife sanctuary is ‘an area designated to conserve one or more species of wildlife that require high conservation priority.’ Above, Art. 2(9).

³¹⁸ Wildlife controlled hunting area is ‘an area designated to conserve wildlife and to carryout legal and controlled hunting.’ Above, Art. 2(11).

³¹⁹ Forest Proclamation No. 542/2007 (n 309 above) Art. 3. ‘Lands demarcated for forest, wild life, and soil conservation as well as for mining development and historical use shall be preserved sustainably with their general ecological content....’ The Benishangul Gumz Regional State Land Administration and Use Proclamation No. 85/2010, Art. 24(1) (hereinafter Benishangul Gumz Rural Land Administration and Use Proclamation No. 85/2010). The Regulations includes burial areas in addition to the lists included in the proclamation. See Regulations to implement Rural Land Administration and Use Proclamation, Regulations No. 44/2011, Art. 12(7). National parks, historical, religious places and areas for public use should not be used for investment. Gambella Rural Land Regulations No. 2/1999 (n 282 above) Art. 10(2).

³²⁰ Above, Art. 17(1)(a).

³²¹ Above, Art. 20, and 21. The practice also shows the implementation of this and relevant laws. For instance, in Oromia Region, in *Homosha Woreda, Shi Gu Gut*, a person was charged because he caused damage to 15 ha forest by fire against Proc No. 542/2007, Art. 12(1). The Court has found him guilty. *Homosha Woreda* Court File No. 00592, 04/2/2003 EC (unpublished). In *Benishangul Gumz*, a person was charged for causing to 2 ha forest in *Assossa Woreda, Megele 32 Kebele*, and the court has fined him. Prosecutor Vs. Aragaw Awel Hussien, File No.

The Ethiopian Wildlife Development and Conservation Authority is established³²² with the objectives ‘... to ensure the development, conservation, and sustainable utilization of the country’s wildlife resource.’³²³ The Authority has the duty to control illegal activities committed on wildlife conservation areas.³²⁴ However, the law fails to provide controlling mechanisms and measures to be taken.

According to Wildlife Regulations No. 163/2008, ‘undertaking agricultural activities or preparing land for cultivation’³²⁵ in protected areas is prohibited. Therefore, no one, including the government, is allowed to give a piece of land for agricultural activity from land reserved for national Parks, Wild life Sanctuaries and Wild life resources. Therefore, the act of giving some part of the land from any National Park is forbidden. In practice, parts of Omo and Mago National Parks have been given for sugar plantation, and Gambella National Park was affected by large-scale agricultural investment.³²⁶

As we have discussed, large-scale agriculture requires the clearance of land to undertake cultivation, which means that all vegetations, trees, bushes and so on shall be cleared to use the land for agriculture. However, some trees should be left to be used as a windbreaker and to conserve the soil. Therefore, the lease agreements provide that a lessee shall conserve trees that have been left after a land is cleared.³²⁷ This in fact could help to protect the trees that are in the farm field so long as they do not disturb the agricultural activities. However, the agreement does

1039 *Assossa Woreda* Court, 29 Oct. 2003 EC (unpublished). In *Gambella* Region, *Majang* Zone, 19 individuals were charged for causing damage to state forest in *Mengesh Woreda, Gubet Kebele*. They cut trees and produce logs. Prosecutor File No. 62/2000 dated 30/11/2007 Numbered 295/ፀ /06/01 *Majang* Zone prosecution office (unpublished). The court passed a sentence each to pay 5,000 Birr or to be imprisoned for three years where failed to pay. Dated 14/9/2001 (unpublished).

³²² Ethiopian Wildlife Development and Conservation Authority Establishment Proclamation No. 575/2008, *Federal Negarit Gazette*, Art. 3 (hereinafter FDRE Wildlife Authority Establishment Proclamation No. 575/2008).

³²³ Above, Art. 5.

³²⁴ Above, Art. 6(2).

³²⁵ Wildlife Regulations No. 163/2008 (n 314 above) Art. 5(1)(e). Entering the parks holding poisonous substances and entering the parks with a snare or hunting weapon is prohibited. Gambella National Park Designation Council of Ministers Regulation No. 334/2014 *Federal Negarit Gazette* 21st Year No. 24 Addis Ababa 20 January 2015. Arts. 9(1) and 9(3).

³²⁶ J Young *Ethiopian Protected Areas: A ‘snapshot’* (March 2012). In *Gambella*, some investors interfere into some part of the national park. Group discussion with Majack, Peter and Paul; The agricultural cultivation undertaken by *Karuturi* is threatening to the biodiversity that includes wetlands. Though the boundaries of *Gambella* National Park have never been demarcated, large-scale investors including *Karuturi* and Saudi Star cleared presumed part of the Park. The Okland Institute (n 107 above) 27; Dessalegn (n 94 above) 23. Recently, the Ethiopian Government has designated Gambella National Park covering an area of 4575 kilometre square. Gambella National Park Regulation No. 334/2014 (n 325 above), Arts. 3 cum 4.

³²⁷ Art. 4.1. A of the lease agreement.

not make clear how many trees, which trees (indigenous) and at what distance they should be left.

The Federal Government enacted a law to preserve trees and forest in general and it is recognized that:

The development, conservation and utilisation of forest plays a decisive role in preventing soil erosion, expansion of desertification, disturbance of ecological balance, depletion of biodiversity and reduction of agricultural production due to the alarming situation of forest degradation in the country,³²⁸

Trees are constituent elements of a forest. In fact, the process of making the land suitable for large-scale agriculture requires clearance of trees and consequently destroys forests. However, some trees may be left in a farm and the trees must be preserved. However, this does not substitute what has been cleared. Therefore, the writer believes that the investors shall be required to plant a number of trees as far as possible around the cleared land. This would at least enable to replace some of the trees that are cut for the cultivation. Otherwise, the clearance of trees and forests will contradict the basic aim of forest development, conservation and utilisation proclamation as stated above. The proclamation makes clear that ‘forests shall be protected from...deforestation...’³²⁹

The *Oromia* land law envisages that ‘private investors are obliged to plant indigenous trees at least on 2 % of the given land.’³³⁰ The law needs indigenous trees to be planted and 2% of the land should be covered by these indigenous trees.

Land and soil protection laws

It is difficult to separate land from soil because ‘soil is an integral part of the earth’s ecosystems and is situated at the interface between the earth’s surface and bedrock.’³³¹ However, for the sake of convenient discussion, land protection laws are treated separately from soil protection laws.

³²⁸ Forest Proclamation No. 542/2007 (n 309 above) third paragraph of the preamble.

³²⁹ Above, Art. 9(7). Sustainable forest management is addressed in several international agreements. See Christy Et al *Forest Law and Sustainable Development*.

³³⁰ Proclamation to amend Proclamation No. 56/2002, 70/2003, 103/2005 of *Oromia* Rural Land Use and Administration Proclamation No. 130/2007 (here in after *Oromia* Land Proclamation No. 130/2007) Art. 12 (2). Article 24 of the *Oromia* law imposes an obligation on land users ‘to conserve and protect mother trees found on their holdings.’ The *Amhara* Regional State Environmental Protection, Land Administration and Use Law provides similar obligation. The Revised Rural Land Administration and Use Determination Proclamation No. 133/2006, Art. 20(1)(b). (hereinafter The Revised *Amhara* Rural Land Administration and Use Proclamation No. 133/2006). See *Amhara* Regional State Rural Land Use and Administration Proclamation enforcement Regulations, Reg. No. 51/2007, Art. 16(1)(C). Similarly, the *Benishangul Gumz* law imposes an obligation to plant and care trees in substitute to the trees and bushes cut at the time of clearing the land for farm.

³³¹ I Hannam & B Boer ‘Legal and institutional frameworks for sustainable soils’ (2002) 9.

Land protection laws

In Ethiopia, the investors as land users/holders are duty bound to protect the land that is given to them to invest on. Article 10 (1) of Proc. No. 456/2005 states:

A holder of rural land shall be obliged to use and protect his land. When the land gets damaged, the user of the land shall lose his right to use the land. The Proclamation states that particulars shall be given in the land administration laws of the respective regions.³³²

Since all relevant laws are intended to protect the natural resources and be applicable or be implemented by agricultural investors, large-scale agricultural investors must protect the land and lose their right to use if the land is damaged due to the fact that they failed to do as required by the law. The writer believes that the investors must be held liable to redress the damage, in addition to losing their right to use the land.³³³ In this regard, the Gambella Regional State Land Administration and Use law stipulates that any large-scale agricultural investor who caused damage to the environment shall perform activities to restore the damaged environment or pay compensation to the community.³³⁴

A person who damaged the land is answerable before a court of law and has the obligation to rehabilitate the land or the environment.³³⁵ In this respect, the proclamation goes far in setting the consequence of damaging the land or the environment. What is more important is that the

³³² FDRE Rural Land Administration and Land Use Proclamation No. 456/2005 (n 137 above). See also the Southern Nations, Nationalities and Peoples Regional State Rural Land Administration and Utilization Proclamation stipulates that a land user (large-scale agricultural investor) must 'properly use and protect his land' otherwise he will lose his use right. Art. 10(1). The Southern Nations, Nationalities and People Regional State Rural Land Administration and Utilisation Proclamation, Proclamation No. 110/2007, Art. 10(1) (hereinafter SNNPRS Rural Land Proclamation). *Oromia* Rural Land Use and Administration Proclamation No. 130/2007, states that any private investor has the right to access to rural land and is obliged to conserve. Proclamation to amend Proclamation No. 56/2002, 70/2003, 103/2005 of *Oromia* Rural Land Use and Administration Proclamation No. 130/2007 (n 330 above); Proclamation No. 110/2007, Art. 12 (1). The investment land should be determined in a manner that it shall protect the natural resources of the surrounding (environment). Proclamation No. 110/2007, Art. 12 (3). Similarly, the *Amhara* Regional State law provides that the investor is duty bound 'to protect the land under his holding or land obtained in rent and conserve the surrounding;' *Amhara* Rural Land Use and Administration Proclamation No. 133/2006 (n 330 above), Art. 20(1)(a). The word surrounding seems to indicate the environment because the Amharic version is equivalent to that.

³³³ Proclamation No. 300/2002 requires that a person who is held liable for the environmental pollution must also pay for restoration of the damaged environment. Proclamation No. 300/2002 (n 253 above) Art 17(c).

³³⁴ Gambella Regional State Land Administration and Use Proclamation No. 52/2006, Art. 14(6). The Revised Amahara National Regional State Rural Land Administration and Use law, and The Benishangul Gumz Regional State Rural Land Administration and Use Law stipulate only compensation according to the Civil Code where the environment is damaged. The Revised Amhara National Regional State Rural Land Administration and Use Proclamation No. 133/2006 (n 330 above) Art. 21(5); Benishangul Gumz Regional State Rural Land Administration and Use Proclamation No. 85/2010 Art. 23(5). According to the Civil Code, compensation should be made to the person who sustains damage. See Civil Code, Arts. 2028 and 2090.

³³⁵ Proclamation No. 52/2006 above, Art. 10(5). In Ethiopia, land degradation is the most serious environmental problem. Shibru Tedla & Kifle Lemma *Environmental management in Ethiopia: Have the national conservation plans worked?* (1998) 11.

law provides an obligation that anybody who caused damage to the environment must rehabilitate it. This, if properly implemented, will help to protect the environment because the person is liable to rehabilitate the environment.

Furthermore, any investor is duty bound to manage the land held by lease and the natural resources thereon.³³⁶ In fact, the provision is not clear as to what it meant by management; it should be qualified by ‘appropriate’ or similar word. The law thus, provides that ‘any individual or organisation shall be obliged to properly manage the land and the natural resources thereon that is held by rent/lease throughout the contract period.’³³⁷ This provision seems to render the above provision redundant, or useless, because the phrase ‘any individual or organisation’ is more inclusive. However, one may also argue that the former provision is specific to investor that does not impose proper management unlike the next provision. However, the intension of the legislature, and the purpose of the law in providing the two provisions separately, one can argue, is to protect the environment and to impose specific obligation on investors.

On top of that, the investor must use the land by protecting it and in accordance with a plan, if any.³³⁸ The obligation includes tilling the farm according to the local custom, and according to the advice of the professionals in case of modern farming; (the writer believes that the local custom must fit to conserve the land, negative customs must be disregarded); undertake water and soil conservation works.³³⁹ However, the *Benishangul Gumz* Regional State law does not provide for such obligation. Furthermore, there is no land use master plan in *Benishangul Gumz* Region.³⁴⁰

The *Amhara* Land Use law also stipulates that an investor ‘...shall have an obligation to plough his land far from river or gully where his land is near to a bank of river or gully.’³⁴¹ This law seems to have the intension to protect the soil as well as the water.

³³⁶ *Oromia* Land Proclamation No 130/2007 (n 330 above) Art. 10 (6).

³³⁷ Above, Art. 10(7).

³³⁸ Reg. No. 51/2007 (n 330 above) Art. 16(1)(a).

³³⁹ Above, Art. 16 (2).

³⁴⁰ Interview made with Mr Lemi Biratu, Head (and Vice Head) Environmental Protection, Land Administration and Use, 2012; Interview conducted with Mr Fekadu Melaku, Acting Head, Environmental Protection, Land Administration and Use Department, 2012; Interview conducted with Mr Habtamu Regassa, Acting Head, *Dangur Woreda*, Environmental Protection, Land Administration and Use Office, 2012.

³⁴¹ Proc. No. 133/2006 (n 330 above), Art. 20 (2).

Soil protection laws

Law plays vital role to conserve soil. Soil conservation law requires investors to act in a manner that preserves its desired qualities largely than their normal manner of operation would do.³⁴² The draft World Soil Charter requires careful soil management. It provides principles and guidelines for actions to careful soil management. These principles and guidelines are recommended to be translated into sound policies and tangible activities at the international, regional and national level.³⁴³

Preventing soil erosion is the third specific duty of large-scale agricultural investor in Ethiopia. In this respect, the Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation provides for land use plan and proper use of sloppy, gully and wetlands. The law requires that

(a) guiding land use master plan, which takes into account soil type, landform, weather condition, plant cover and socio-economic conditions and which is based on a water shed approach, shall be developed by the competent authority and be implemented.³⁴⁴

The agreement does not define what slopping area means.

Soil conservation is ‘the adoption of various agricultural practices to reduce the wind and water erosion of valuable soils.’³⁴⁵ According to the Rural Land Administration and Land Use Proclamation,

(t)he management of rural lands, the slope of which is less than 30 per cent shall follow the strategy of soil conservation and water harvesting. The details shall be determined by rural land administration laws of regions.³⁴⁶

This provision shows that areas, which are less than 30 per cent slope, could be cultivated, but soil conservation and water harvesting strategy must be employed. The law provides that ‘development of annual crops on rural lands that have slops between 31-60 percent may be allowed only through making bench terraces.’³⁴⁷ Making such terrace is the basic soil conservation strategy, according to the law, to cultivate lands having 31-60 percent slops, to produce annual crops. The law seems to prohibit cultivating large-scale or commercial

³⁴² Hannam & Boer (n 331 above) 27.

³⁴³ FAO *The Revised World Soil Charter*, Based on the Committee on Agriculture, the FAO Council at its 150th Session adopted the Charter in 2014. FAO Conference at the 21st Session in November 1981 adopted the World Soil Charter, whose principles are still valid. See Food and Agriculture Organisation of the United Nations (FAO) *World Soil Charter*.

³⁴⁴ Art. 13 (1) of the Agreement. However, there is no such a master plan in the country.

³⁴⁵ W Ashworth & CE Little *The Encyclopaedia of Environmental Studies* (2006) 453.

³⁴⁶ FDRE Rural Land Administration and Land Use Proclamation No. 456/2005 (n 133 above) Art. 13(4).

³⁴⁷ Art. 13(5) of Proclamation the *Amhara* Regional State Land Law provides that the investor has the obligation to undertake terracing and favourable soil conservation method to use the land which is 31-60 percent for perennial plants, Proc. No. 133/2006 (n 330 above) Art. 20(1) (D).

productions on such sloppy areas. The law also prohibits any cultivation activity on areas whose slopes are more than 61 percent. According to the law,

rural lands, the slope of which is more than 60 percent, shall not be used for farming and free grazing; they shall be used for development of trees, perennial plants and forage production.³⁴⁸

The law is intended to conserve the soil, particularly from soil erosion. Though the law provides some essential provisions aimed at protecting the soil from erosion, detailed rules are required to provide management strategies.

The investor is obliged to undertake proper management and conservation of land individually as well as in cooperation with his neighbours.³⁴⁹ The investor is prohibited from ‘activities that aggravate soil erosion, like forest clearing, cultivating along the slope and unplanned design of traditional drainage systems.’³⁵⁰

The Southern Nations, Nationalities & Peoples Regional State (SNNPRS) law provides that ‘(r)ural lands that are demarcated for soil conservation, mining and historical importance shall be protected in sustainable manner and shall be administered by the law issued by competent authority.’³⁵¹ This law envisages soil conservation, though it does not indicate the management system.

The *Amhara* Regional State law stipulates that the investor must prepare and submit same to the relevant body for approval and implement it upon approval. The plan shall include the fertility of the land, the health of the society, and the environment.³⁵² The *Amhara* Regional State law stipulates that the investor is duty bound to follow a method of farming that decreases soil erosion.³⁵³ The *Benishangul Gumz* Environmental Protection and Land Use Law seems to be better in this regard because it provides that the investor must employ methods that are fit to the cultivation of sloppy and vulnerable areas for erosion to prevent soil erosion.³⁵⁴ However, the

³⁴⁸ According to Art. 18(3)(4) of Oromia Land Administration and Use Law, free grazing is forbidden on rural lands where the slope is 30-60 and soil and water conservation works have been undertaken. The Law provides that a rural land of any slope which is highly degraded must be closed from human and animal interference to give it the chance to recover. Oromia Rural Land Proclamation (n 330 above) Art. 18(7)).

³⁴⁹ Above, Art. 19(1).

³⁵⁰ Above, Art. 19(3).

³⁵¹ SNNPRS Land Proclamation NO. 110/2007 (n 332 above) Art. 13(16).

³⁵² Proc. No. 133/2006 (n 330 above), Art. 20(3). See also Art. 16(4) of the Regulations No. 51/2007 (n 331 above).

³⁵³ Proclamation No. 133/2006 (n 330 above), Art. 20(1)(C). The provision reads: ‘to follow the land holding system that decreases soil erosion and collect water concerning the lands under 30 per cent slope.’ It is not a land holding system, but land management system that the investor should follow to preserve soil erosion.

³⁵⁴ See ቤኒሻንጉል ጉሙዝ ክልል ኢንቨስትመንት ጽ/ቤት ማዕደ ኢቨስትመንት (*Benishangul Gumuz* Investment Office Maede investment (volume 1, No. 1, 2012)) 13 (Available only in Amharic). Ironically the land in *Benishangul Gumz* Region is less sloppy than the land in *Amhara* and Southern Nations, Nationality Region.

law is again defective since it does not impose obligation to adapt farming methods that do not cause soil erosion even in non-sloppy areas, flat or gentle areas. In principle, agriculture causes soil erosion and thus, the investor must be under obligation to adapt methods that decrease soil erosion at all times.

A research indicates that, soil erosion is a problem caused by large-scale agricultural investment and using heavy machineries on fragile soils could damage the environment as evidenced from Sudan and Tanzanian large-scale agricultural investments. The report made by experts suggests that environmental harms caused by large-scale agricultural investment can be avoided or minimized by ‘combining land security, regulation, information and market advantages’³⁵⁵ which could help achieving sustainable patterns of land and water management.

The Southern Nations, Nationalities, and Peoples Regional State Land law stipulates that rural lands that have gullies must be rehabilitated by the investor and neighbours, and the community must participate where appropriate. The rehabilitation should be made using biological and physical conservation methods.³⁵⁶ On top of that, gully areas on hills must be properly managed, rehabilitated and developed, according to Art. 13(9) of SNNPRS law. The Oromia law, similarly to the SNNPRS law, stipulates that ‘(r)ural lands that have gullies and those located on hilly areas shall be rehabilitated and developed communally, and privately individuals as necessary.’³⁵⁷ Furthermore, Article 18(8) of the Ormoia land law provides that ‘(r)ural lands that have gullies shall be put to rehabilitation and use by private and neighbouring holders and, as appropriate by the local community, using biological and physical conservation works.’

Land use master plan is essential to prevent soil from erosion. However, as the participants in Green Forum workshop correctly identified, we lack land use planning. Therefore, it is paramount to have land use plan and implement same.³⁵⁸

The *Oromia* Regional State law envisages that the *Oromia* Agricultural and Rural Development Bureau shall develop a guiding land use master plan that considers soil type, landscape, weather conditions, vegetation cover and socio-economic conditions in water shade

³⁵⁵ High Level Panel of Experts (HLPE) on food security and nutrition, ‘Land tenure and international investments in agriculture’ (A report, Rome, 2011) 36.

³⁵⁶ SNNPRS Land Proclamation (n 332 above), Art. 13(8).

³⁵⁷ Oromia Land Proclamation (n 330 above), Art. 18(9).

³⁵⁸ Green Forum (n 110 above) 109.

based approach.³⁵⁹ This seems to be fair in preparing land use master plan unlike other Regional States. Furthermore, the *Oromia* Proclamation stipulates: '(p)atches of natural forest lands shall be identified, demarcated, protected, conserved, and sustainably used by the local community.'³⁶⁰ One can learn from this provision that forests in general and natural forests in particular have got due attention to be protected and conserved.

According to an official, the large-scale agricultural investor is required to prepare contour map, and expected to explain how to plough a land, which is 8-15 degree slope. Then the government follows whether the investors perform according to the water shade management, Ethiopian soil management, and land use planning. In general, the investor is expected to undertake soil management, taking into account the texture, type, etc of the soil. The Ministry of Agriculture also follows the investor to check whether an appropriate land management is undertaken by the investor, after the calcification of the land is identified.³⁶¹ There is no land use plan in Ethiopia but its preparation is on progress in the directorate by the relevant section.³⁶²

According to the land rent agreements concluded between the Ministry of Agriculture and Natural Resources, and agricultural investors, the investor is duty bound to 'apply appropriate working methods to prevent soil erosion in sloppy areas.'³⁶³ The basic problem of this provision is that it focuses only on 'sloppy areas.' Does that mean that there will not be soil erosion in other areas other than sloppy ones? The other problem of the provision is that it does not define appropriate working methods.

Biodiversity protection laws

Wild life and biodiversity need proper attention and management in large-scale agricultural investment. Thus, protecting the wild life is the other essential obligation imposed on the shoulders of the large-scale agriculture investors. According to the land Administration and Use Proclamation of the Federal Government, 'the biodiversity in rural wetland shall be conserved and utilised as necessary, in accordance with a suitable land use strategy.'³⁶⁴ The land use strategy should protect the biodiversity and the large-scale agricultural investment must take into

³⁵⁹ Oromia Land Proclamation (n 330 above), Art. 18(1).

³⁶⁰ Above, Art. 23.

³⁶¹ Interview conducted with Mr. Haddis, 2012.

³⁶² Interview conducted with Mr. Assefa (n 294 above); Interview conducted with Mr. Haddis, above.

³⁶³ Art. 4.1.b of the lease Agreement.

³⁶⁴ See Proc. No. 456/2005 (n 133 above), Art. 13(10).

account the issue of biodiversity in a given area (land) in his/her investment area. Large-scale agricultural investors are required to conserve the flora and fauna of the area and the seeds and germplasm they use shall be certified.³⁶⁵

As per Art. 11(2) of the Proclamation No. 541/2007,

(t)he Ministry (of Agriculture and Natural Resources), or Regions and other concerned bodies, shall ensure that development activities to be undertaken in or out side of wildlife conservation areas shall be carried out in such manner that the well-being of the ecosystem of the areas are not disturbed.³⁶⁶

According to this provision, an investor should undertake the agricultural investment activities without disturbing the ecosystem of the area. However, the clearance of the land for the farm definitely disturbs and changes the ecosystem of the area since the trees, bushes, shrubs and grasses are cut. Thus, the Government should ensure that large-scale agricultural investment activities are operated without disturbing the ecosystem.

The *Oromia* Regional State law provides that biodiversity in rural wetland shall be conserved and utilised in accordance with a suitable land use strategy as deemed necessary.³⁶⁷ It further provides for wetland management and therefore investors are duty bound to conserve wetland areas by 'refraining from performing activities that cause damage to the wetlands and springs'.³⁶⁸ Moreover, Art. 20(2) of this law prohibits mismanagement and improper utilisation of wetland. Wetlands may be used for agricultural purposes but with the consent of the community and technical support of professionals, as per Art. 20(3) of the land law. The law also prohibits land use that can cause damage to natural resources and biodiversities in the vicinity of lakes, streams and springs.³⁶⁹

The *Amhara* Environmental Protection, Land Administration and Use Law imposes a duty to care for wild life in and around the farms.³⁷⁰ Furthermore, the Regulations states that the investor is duty bound not to take intentional attack on the wild animals that are living around. Some wild animals may be hostile to the people working on a given farm. In this case, it may be necessary to protect human lives and health. Even in such a case, the investor is duty bound to be granted

³⁶⁵ FDRE Social and Environmental Code of conduct (n 263 above) 3.3.

³⁶⁶ Proc. No. 541/2007 (n 306 above) Art. 11(2).

³⁶⁷ Oromia Land Proclamation (n 330 above), Art. 18(10).

³⁶⁸ Above, Art. 20(1); In a similar fashion, the Southern Nations Nationalities and Peoples land law provides that 'the biodiversity in rural wetland shall be conserved and utilised as necessary, in accordance with a suitable land use strategy' SNNPRS Land Proclamation, (n 332 above), Art. 13(10).

³⁶⁹ Oromia Land Proclamation, (n 330 above), Art. 21(2).

³⁷⁰ Proc. No 133/2006, (n 330 above), Art. 20(1)(H). The Provision reads: 'to exercise proper care for wild lives and birds found around his holding.'

permission to take measures on such wild animals from an authorized body.³⁷¹ The law does not envisage liability in case of negligence. The writer believes that the investor should be entrusted with a duty to take care (reasonable care) and s/he should be answerable in case of negligence that causes damage to the wild animals too.

Water resources protection laws

One of the essential points that must be considered in undertaking large-scale agricultural investment is water use. The land administration and use proclamation stipulates that 'an equitable water use system shall be established between upper and lower water shade communities.'³⁷²

An investor must undertake activities far away from the river or gully to a distance to be determined by a manual and plant trees that s/he can use by replacing them at a time.³⁷³ Planting trees will help to conserve the soil from erosion and a distance will help to filter out some chemicals used on the farm so that they will not pollute the water. However, the *Benishangul Gumz* law does not stipulate for such kind of management.

The *Amhara* Environmental Protection, Land Administration and Use Law states that the investor should undertake proper farming that preserves the water resources. The provision is coined in a negative way, which reads: '(t)o take care of water resources not to go dry due to improper farming.'³⁷⁴ Furthermore, the investor must not to change the direction of the flow of the water and cause damage to the farm of the lower holder.³⁷⁵ Nevertheless, the *Benishangul Gumz* land use law does not provide similar obligation.

The duty to prepare an environmental impact assessment and submit the report

Convention on Environmental Impact Assessment in a Transboundary Context requires parties to establish effective environmental impact assessment (EIA) that is legal and

³⁷¹ *Amhara* Regional State Reg. No. 51/2007, (n 330 above).

³⁷² Proclamation No. 456/2005 (n 133 above) Art. 13(2); *Amhara* Regional State Reg. No. 51/2007 (n 330 above), Art. 16 (1)(H), which provides similar to the Proclamation. The *Oromia* Land Proclamation provides that 'an equitable water use system shall be established between upper and lower watershed communities' (n 334 above), Art. 18(2).

³⁷³ Reg. No. 51/2007 (n 330 above), Art. 16(3).

³⁷⁴ Proc. No. 133/2006 (n 330 above), Art. 20(1) (e).

³⁷⁵ Reg. No. 51/2007 (n 330 above), Art. 16(1) (I).

administrative measures that permit public participation and preparation of EIA document.³⁷⁶ Ethiopia, as party to the Convention on the Conservation of Nature and Natural Resources of Africa, is duty bound to ensure that large-scale agricultural investment activities be go through environmental impact assessment at the earliest possible stage and to conduct environmental monitoring.³⁷⁷

Large-scale agricultural investors should prepare EIA of their projects based on prior, meaningful consultation of affected communities. The draft impact assessment should be made widely available in appropriate language to the people and their comments be incorporated. The investors should also prepare a plan to address environmental risks and manage the environment to ensure its sustainability.³⁷⁸ In Ethiopia, a large-scale agricultural investor is duty bound to conduct environmental impact assessment at the early stage of the project³⁷⁹ and submit the report to the Ministry of Agriculture. Therefore, the law of EIA is applicable on large-scale agricultural investment.³⁸⁰ The EIA proclamation provides minimum points to be included under the EIA report. Primarily, it must contain sufficient information that will enable the Ministry of Agriculture to decide on report regarding how to proceed (implement).³⁸¹ After EIA is conducted, a report must be submitted to the Ministry of Agriculture, which should describe:³⁸²

- A) The nature of the project- which includes the technology and process to be used;
- B) The content and amount of pollutants to be released during the implementation of the project;
- C) The source and amount of energy to be used;
- D) Describing the trans-boundary impacts of the pollutants;
- E) Measures intended to eliminate, minimize or mitigate negative impacts;

³⁷⁶ Convention on Environmental Impact Assessment in a Transboundary Context done at Espoo (Finland) Art. 2(2).

³⁷⁷ African Convention on the Conservation of Nature and Natural Resources Art. 14(2)(b). The Dire Dawa Environmental Impact Assessment law requires EIA to be made before a license is granted to an investor. Dire Dawa Provisional Administration Environmental Impact Assessment Regulation No. 28/2006 *Dire Negarit Gazeta* 4th Year No. 2 Dire Dawa 9 November 2006, Art. 6(1) and (2).

³⁷⁸ African Union *et al Guiding Principles on Large Scale Land Based Investments in Africa* (n 281 above) 22-23.

³⁷⁹ The Principle of environmental sustainability requires environmental impact assessment to be conducted. See Background Document on the Principles of Sustainable Agricultural investment, Principle 2. Convention on Environmental Impact Assessment in a Transboundary Context requires EIA to be made at the project level of an investment. Art. 2(7).

³⁸⁰ See FDRE Investment Proclamation No. 299/2002, (n 8 above).

³⁸¹ Above, Art. 8(1).

³⁸² Above, Art. 8(2). See also Tesfaye Abate Abebe 'Environmental impact assessment and monitoring under Ethiopian law' (2012) 1 *Haramaya Law Review* 103-123.

- F) Contingency plan in case of accident;
- G) Procedures of self-auditing and monitoring during the implementation of the agriculture investment project.

In addition to the above-mentioned points, the Ministry of Agriculture and Natural Resources is required to issue guidelines that determine the elements necessary to prepare and evaluate the EIA report.³⁸³ However, the Ministry did not enact guidelines, but uses what is provided by the EPA, which is not approved by the relevant body yet. A Guideline Prepared by EPA provides detailed points that EIA should consider in case of agricultural investment, such as soil degradation, damage to water resource, maintenance of culturally or historically significant sites.³⁸⁴

Conclusion

The Ethiopian law seems to promote development and protect the environment. The right to development is recognised under international law, customary international law and conventions and declarations. Its nature is controversial, and some argue that it is injusticeable, the right holders and bearers are not clearly identified. Notwithstanding the debate, the right to development is incorporated as part of international human rights law, particularly in the African Human Rights Charter.

Ethiopia recognized the right to development under its constitution. This, in the opinion of the writer, gives the country better position in the promotion and implementation of the right to development. However, the right as incorporated under the Constitution is injusticeable but it must be interpreted in accordance with the Declaration on the Right to Development to which Ethiopia is a party.

Development law is paramount in developing countries including Ethiopia to manage conflicts and to bring about socio-economic development. The Constitution incorporates basic rules aimed at bringing about socio-economic development of the nation. The legislative manual also emphatically provides that laws that are enacted should be crafted so as to bring about development. Furthermore, almost all pieces of legislation of the country are moulded by the

³⁸³ See Proclamation No. 299/2002 (n 237 above) Art. 8(3).

³⁸⁴ Federal Democratic Republic of Ethiopia Environmental Protection Authority Environmental impact assessment guideline document (2000) 25-27.

concept that law should bring development in all aspects of the life of the Nations, Nationalities, and the Peoples of Ethiopia.

Ethiopia has made a number of laws to promote development, but remained poor. Ethiopia also is a party to the Declaration on the Right to Development, which recognises development as a human right. The country has lounded a large-scale agricultural investment that would help to implement the right to development and is considered under this chapter. The Ethiopian investment law has the objective to improve the living stands of the peoples through socio-economic development. Both foreign and domestic investments have been made in large-scale agricultural investment promotes in Ethiopia. Foreign direct large-scale agricultural investment promotes development by attracting foreign capital, facilitating technology transfer and developing knowledge. The Ethiopian investment law, proclamation no. 769/2012, Regulations no. 272/2012, directives, bilateral investment treaties and the large-scale agricultural investment leases incorporate incentives, exemptions and guarantying the protection of investors to attract foreign direct investment. However, the law does not provide for remedies should investor fail to fulfil the requirements of the law. In practice, what is provided in the law never exercised. This makes clear that the investment law is not strong to play a role in development in large-scale agricultural investment.

In Ethiopia, large-scale agricultural investors should observe the Ethiopian laws in carrying out their investments. This obligation is incorporated in investment law but the law fails to provide a remedy should the large-scale agricultural investor fail to comply with the Ethiopian laws.³⁸⁵ This would lead to disputes and therefore, the principle of adherence to Ethiopian laws should be appropriately addressed under the large-scale agricultural investment laws of Ethiopia.

Benefit sharing is another principle of responsible large-scale agricultural investment. However, this principle is not provided under Ethiopian laws and the lease agreements fail to incorporate benefit sharing as the obligation of large-scale agricultural investor. What is even more, the environmental and social code of practice never addresses the principle of benefit sharing to the local people as the duty of large-scale agricultural investor.

Proclamation No. 542/2007 Article 14(5) allows carrying out large-scale agricultural investment in consultation and getting approval from the Ministry of Agriculture or the

³⁸⁵ Large-scale agricultural investors are duty bound to implement Environmental Impact Assessment Proclamation, Pollution Control Proclamation and other relevant environmental laws to protect the environment.

appropriate regional body. This does not go in line with Regulations No. 163/2008, Art. 5(1)(e) that prohibits undertaking agricultural activities or preparing land in protected areas for cultivation, and in practice parts of national parks have been given to large-scale agricultural investors. This should be rectified prohibiting the conduct of large-scale agricultural investment in protected areas by law.

The law and the environmental and social code of practice impose an obligation on large-scale agricultural investors to conserve certain percent of trees on their farms. However, there is a discrepancy as to the percentage or number of trees that should be left and conserved in farms under the environmental and social code of practice and laws of the regions. Thus, the federal government should provide this obligation under a binding law in order to solve the problem.

Chapter Five: Law of sustainable large-scale agricultural investment in Ethiopia

5.1 Introduction

This chapter is devoted to consider the Ethiopian law of sustainable large scale-agricultural development. First, we shall deal with the international law of sustainable development, and then we will consider the principles of sustainable development that were developed by the International Law Commission as incorporated under Ethiopian law.

Sustainable agricultural development promotes profitability of the sector without adversely affecting the environment, which involves the economic, environmental and social pillars of sustainability. This chapter considers the concept of sustainable large-scale agricultural development law of Ethiopia. It treats the pillars of sustainable large-scale agricultural development. The international law that is applicable to sustainable agricultural development in Ethiopia is also treated under the chapter.

5.2 Law of sustainable development in Ethiopia

National law of sustainable development includes law to integrate decision-making. The integration of multiple national objectives can be made through a variety of legal and policy tools like using regulation to foster innovation; research and development; and tax policies. Integration across levels of government and the law (of planning) should also be used.¹ In addition, the pre-existing laws, in most cases, which are traditional environmental laws, could be used to promote sustainable development by adopting them to the new concept; they can be used pervasively and creatively as part of new sustainable governance. Property law, particularly a law involving common-interests of communities can be used to foster sustainable development, for instance governing wild life conservation, hunting, and land law would be used to promote economic opportunities to use land for sustainable development.² Moreover, local governments such as provinces or states use their laws to promote sustainable development. Laws may govern

¹ J Dernbach & JA Mintz 'Environmental laws and sustainability: An introduction' (2011) 3 *Sustainability* 531 532-33.

² As above. Plan of Implementation of the World Summit on Sustainable Development calls for the ratification of existing international instruments, particularly multilateral agreements (MEAs) to promote sustainable development. However, not all MEAs and other multilateral treaties relevant to sustainable development have been successful in attracting participation except the Vienna Convention on the Ozone Layer and its Montreal Protocol. M Pallemarts 'International law and sustainable development: Any progress in Johannesburg?' (2003) 12 *Review of European Community & International Environmental Law* 1 4-5.

education, provision of drinking water, and land use.³ In addition, decision making on land use, and sustainability planning are also important. The efficiency of decision-making at sub-national levels is of paramount.⁴

In Ethiopia, the concept ‘sustainable development’ is defined nowhere in a clear manner. However, we can discern that the meaning given by Brudtland is accepted in Ethiopia. The Ethiopian Environmental Policy provides for the overall goal of the policy to promote sustainable development by using natural, human made and cultural resources ‘... to meet the needs of the present generation without compromising the ability of the future generations to meet their own needs.’⁵ This makes clear that the concept of sustainable development adopted by the UN is accepted by Ethiopia.

However, the Amharic words used to indicate sustainable development can be translated as ‘unstoppable or continuous and ongoing growth.’⁶ Besides, sustainable development under the FDRE Constitution is about economic development, since it implies economic development rather than environmental health.⁷ It is better for the law to provide clearly to balance among the economic and social development, and environmental protection. This would implement the Ethiopian’s international obligation that requires the right to development to be implemented taking into account ‘... developmental and environmental needs of the present and the future generations.’⁸ The concept sustainable development, in Ethiopia, does not include culture as essential element.

³ This applies to both federal and non-federal governments. Dernbach and Mintz (n 1 above) 534.

⁴ Above 535.

⁵ Federal Democratic Republic of Ethiopia, *Environmental Policy* (1997) 2.1; Ethiopia send its representative to Rio Conference and this energizes it to craft the environmental policy and laws on sustainable development. See James and Ian, Knowledge 2000 *Journal Of Modern African Studies* 103. It is incontestable that the Ethiopian Environmental Policy has been influenced by the international principle of sustainable development. J Krueger *et al* ‘Environmental permitting in Ethiopia: No resistant on “unstoppable Growth”?’ (2012) 1 *Haramaya Law Review* 76.

⁶ For instance, the Amharic version of article 43 of the Ethiopian Constitution talks about ‘non-stoppable growth’ ‘... የማያቋርጥ እድገት...’ as an equivalent to ‘sustainable development’. Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Negarit Gazeta 1st Year No 1, Addis Ababa 21 August 1995, Art. 43(1) and (2) (hereinafter the FDRE Constitution). Under the investment proclamation, it is also provided ‘... ቀጣይነት ያለው...’ which means ‘continuous growth’. Investment Proclamation No. 769/2012, Negarit Gazeta 18th Year No 63 Addis Ababa 17th September, 2012, Art. 5(hereinafter Proclamation No. 769/2012). The standard usage in Amharic is ‘ቀጣይነት ያለው’”

⁷ Krueger *et al* (n 5 above) 78. See also FDRE Constitution (above) Art. 43(1) which provides for the right to improved living standards, and Art. 41(1) that ensures the right to clean and healthy environment; it is essential to integrate economic, environmental and social development, but economic growth in developing countries retain primacy in the name of justice 87.

⁸ Rio Declaration on Environment and Development Principle 3. To achieve sustainable development, human beings must consider (balance) their right to a healthy and productive life in harmony with environmental protection.

The Ethiopian Government has designed cultural policy having the purpose to develop culture itself.⁹ However, it does not clearly recognize culture as the fourth pillar of sustainable development, perhaps because it was designed before the concept was recognised as such. In practice, the government is working on enhancing cultural diversity for poverty reduction and sustainable development.¹⁰

5.3 Basic laws and plans towards achieving sustainable development in Ethiopia

Ethiopia is an active participant in many of international conventions, and is a party to many regional and multilateral environmental agreements including the United Nations Convention on Bio-Diversity (UNCBD), United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), United Nation Framework Convention on Climate Change (UNFCCC), Cartagena Protocol on Biodiversity, Kyoto Protocol, Basel Convention, Rotterdam Convention on PIC, Vienna Convention on the Protection of the Ozone Layer, Stockholm Convention on POPs, Bamako Convention, etc.¹¹

Ethiopia, being member to the African Union, urges for the promotion of sustainable development.¹² The African Charter recognises the right of peoples to have environment that fits to their development that includes sustainable development.¹³ The African Convention on the Conservation of Nature and Natural Resources should also be interpreted so as to suggest sustainable development concept though it does not clearly incorporate.¹⁴

At the regional level, Ethiopia is a member to new partnership for Africa's development (NEPAD). Through the new partnership for Africa's development, African leaders have pledged

Rio Declaration, Principle 1. However, the Declaration on the Right to Development does not clearly provide the duty to protect the environment but it is intended for the promotion of economic, cultural, political and social development. Rio Declaration, above, Art. 1(1).

⁹ Ministry of Youth, Sports and Culture of Ethiopia (MYSC) *National culture policy*, (1997) Introduction 2.

¹⁰ See Beyene Tadesse 'Ethiopia-Culture' (2013).

¹¹ FDRE Environmental Protection Authority (EPA), *Ethiopia Environment Outlook: Environment for development* (2007) 13 (hereinafter FRDE EPA). Ethiopia has ratified Bamako Convention by Proclamation No. 355/2003, and Basel Convention by Proclamation No. 356/2003. According to the FDRE Constitution, all international agreements concluded by Ethiopia are an integral part of the domestic legislation. FDRE Constitution (n 6 above) Art. 9(4).

¹² See Constituent Act of African Union 20.

¹³ Charter of African Union, Art. 24.

¹⁴ AA Du Plessiss 'The balance of sustainability interests from the perspective of the African Charter on Human and Peoples' Rights' in M Faure & W Du Plessis (eds) *The balancing of interests in environmental law in Africa* (2011) 44-5.

that they have a pressing duty to eradicate poverty and to put their countries, individually as well as collectively, on a path of sustainable development. Furthermore, the programme of Action: The Strategy for Achieving Sustainable Development in the 21st Century recognises that growth is not sufficient by itself; it should be sustained at the level required to achieve poverty reduction. Moreover, one of the long-term objectives of NEPAD is to eradicate poverty and achieve sustainable development.¹⁵ Ethiopia is also a member to Inter Governmental Authority on Development (IGAD), which the fundamental objective of IGAD's Environment and Natural Resources Strategy is to 'enhance the integration of environmental and natural resources into development frameworks for environmentally sustainable economic development in the region.'¹⁶ The document also recognises the principle of sustainable development.¹⁷ In general Ethiopia pledges a duty to promote sustainable development at the regional and international levels.

Furthermore, the FDRE Constitution recognises sustainable development for the peoples, nations and nationalities of Ethiopia as one of democratic rights.¹⁸ The Constitution stipulates that all international agreements and relations concluded by our State must protect and ensure Ethiopia's right to sustainable development.¹⁹

In addition, the Constitution provides that the federal government shall formulate and implement overall social, economic and development policies, strategies and plans of the country.²⁰ Nonetheless, the provision is not clear as to the making of a balance among the economic, social development and environmental protection. It emphasises on the developmental aspects of the economy, social and development issues, rather than the issue of environmental protection. Therefore, it would be safe to conclude that the Constitution tends to the developmental aspect rather than the protection of the environment.

¹⁵ New Partnership for Africa's Development (NEPAD) (2001) 19. Peace, security, good governance, human rights and sound economic management are recognized as conditions for sustainable development. Above, 22. See generally A Olukoshi 'Governing the African political space for sustainable development: A reflection on NEPAD' (2002).

¹⁶ Ethiopia is one of the members of IGAD, others being Djibouti, Eritrea, Kenya, Somalia, Sudan and Uganda. Inter Governmental Authority on Development (IGAD) Environment and natural resources strategy (2007) 11.

¹⁷ As above. The principles, *inter alia*, include the principle of integration (Principle 11), the precautionary principle (Principle 10), equity and poverty reduction (Principle 5 and 6), the principle of good governance (Principle 1 and 4).

¹⁸ The FDRE Constitution (n 6 above) Art. 43(1).

¹⁹ Above, Art. 43(3).

²⁰ The FDRE Constitution (n 6 above), Art. 51(2) and 77(6). The Council of Ministers is duty bound to '... formulate and implement economic, social and development policies and strategies.' Art. 77(6).

Previously the Ministry of Finance and Economic Development was empowered to ‘initiate policies that ensure sustainable and equitable economic development...’²¹ In addition, the law that established the Environmental Protection Authority, holds the objective

... to formulate policies, strategies, laws and standards, which foster social and economic development in a manner that enhance the welfare of humans and the safety of the environment sustainable, and to spearhead in ensuring the effectiveness of the process of their implementation.²²

This tries to show the concern of the government to balance only the three pillars of sustainable development, since it tries to emphasise that the policies, strategies and laws of the country that the Environmental Protection Authority should formulate and address the issues of economic and social development and environmental protection. The practical problem in this regard is that the economic and the social policies and laws are not prepared or drafted by the Environmental Protection Authority but by other relevant bodies, and that might create a chance not balance the three pillars of sustainable development.²³ It is important to note that the above mentioned law does not address culture, which is the fourth pillar of sustainable development.

In 1990s, particularly since the 1992 Rio Declaration, the Ethiopian government has made various strategies, policies, laws and institutional arrangements to bring about an improved livelihood to the society and Ethiopia is gradually engaged in major undertakings to ensure sustainable development. It developed the first comprehensive conservation strategy and environmental policy both at national and regional levels.²⁴

The conservation strategy of Ethiopia (CSE) assesses the formulation of policies and strategies, action plans and investment and to regulate them through law.²⁵ It also seeks to integrate environmental protection in cross sectors.²⁶ The conservation Strategy strives for the integration of the three sustainable development elements- economic sustainability

²¹ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010 Art. 18(1).

²² FDRE Environmental Protection Organs Establishment Proclamation No. 295/2002, Art. 5. Principle 4 of Rio Declaration, which has binding effect on Ethiopia, provides: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’ Rio Declaration (n 8 above), Principle 4. The Declaration also imposes a duty on states to enact effective legislation regarding the protection of the environment and development. Above, Principle 11.

²³ For instance the new investment proclamation does not address the environmental protection in a proper way. See Proclamation No. 769/2012, (n 6 above).

²⁴ FDRE EPA, (n 11 above) 12-3.

²⁵ Transitional Government of Ethiopia, National Conservation Strategy Volume I The Resources base, its utilization and planning for sustainability (1994) Chapter two, paragraph 50 (hereinafter National Conservation Strategy of Ethiopia Vol. I).

²⁶ As above.

environmental sustainability, and social sustainability - on equal footing.²⁷ This strategy again does not incorporate culture as a fourth pillar of sustainable development.

5.3.1 Economic policy and laws

The Ethiopian economic policy changed the role of the former government by making the liberal economy. It envisages the designing of economic development strategies, as well as promulgating laws and regulations that would foster economic development.²⁸ The conservation strategy of Ethiopia indicates that the country's economy is highly dependent on biological resources since its economy is largely agriculture, and effective policy would play a role in making such resources sustainable. '...The strategy for conservation should (...) concern itself with both economic development and care for the natural resources and for the environment.'²⁹ This is an aspiration for sustainable development that tries to balance economic development and environmental protection in the different sectors of the economy.

Investment is an instrument to bring about development and the Ethiopian investment law intends to achieve economic development in the country. One of the rationales to enact the investment law in Ethiopia is to accelerate the economic development of the country and to improve the living standard of its people.³⁰ In addition, the basic objective of the investment law is to realize sustainable economic and social development of Ethiopia.³¹

Furthermore, it is recognised that corruption and impropriety should be controlled to promote and sustain the development of the country.³² Moreover, different action plans and programmes

²⁷ Transitional Government of Ethiopia National Conservation Strategy Volume II National Policy on Natural Resources and the Environment (1994) Chapter I paragraph 12 (hereinafter National Conservation Strategy of Ethiopia Vol. II).

²⁸ Transitional Government of Ethiopia, Ethiopia's economic policy during the transitional period (1991) 17-8.

²⁹ National Conservation Strategy of Ethiopia Vol. I (n 25 above) paragraph 239.

³⁰ Proclamation No. 769/2012 (n 6 above) 1st para. of the Preamble. This was also similarly provided under the former investment proclamation repealed by the new one. See Investment Proclamation No. 280/2002, 1st para. of the Preamble.

³¹ Proclamation No. 769/2012 (n 6 above) Art. 5; The investment objectives include, *inter alia*, 1) to accelerate the country's economic development; to encourage balanced development and integrated economic activity among the regions and to strengthen the inter-sectoral linkages of the economy; (Sub Art. 5); to enhance the role of the private sector in the acceleration of the economic development of the country (sub Art. 6); to enable foreign investment play its role in the economic development of Ethiopia (sub Art. 7); to create ample employment opportunities for citizens and to advance the transfer of technology required for the development of Ethiopia (sub Art. 8). The objectives do not address the issue of environmental protection.

³² Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005, *Federal Negarit Gazeta* 11th Year No. 18 Addis Ababa 2 February 2003, 2nd paragraph of the Preamble.

have been developed and being implemented.³³ Plan for Accelerated Sustainable Development to End Poverty (PASDEP) is the first and the first Growth and Transformation Plan (GTP I) was implemented. Ethiopia's vision which guides the GTP is:

To become a country where democratic rule, good governance and social justice reign, upon the involvement and free will of its peoples, and once extricating itself from poverty to reach the level of a middle-income economy as of 2020-2023.³⁴

This vision does not address the issue of environmental protection, or the concept of sustainable development. Here again it would be possible to argue that the Ethiopian vision seems to favour economic development instead of balancing development with the protection of environment because its emphasis is the eradication of poverty. In practice, the economic sector is full of problems to achieve sustainable development.³⁵

5.3.2 Environmental policy and laws

The Ethiopian Conservation Strategy (CSE) plays great role in sustainable development. CSE is an umbrella framework that sets guidelines and strategies for environmental management.³⁶ The CSE attempts to integrate Governmental planning in all sectors that impinge on the environment.³⁷ The overall goal of the Strategy is 'to improve and enhance the health and quality of all Ethiopians and to promote sustainable social and economic development' using natural resources and the environment.³⁸ Furthermore, Ethiopia adopted the environmental policy in 1997 after the Rio Declaration, which requires laws, and policies should be harmonized with the principle of sustainable development.³⁹

³³ FDRE EPA, (n 11 above) 13.

³⁴ See Ministry of Finance and Economic Development (MoFED), FDRE Growth and transformation plan (GTP I) 2010/11-2014/15, 21. GTP II is to realize the vision of the Country and considers the post-2015 sustainable development goals, among others, as bases. Para 1.1. However, it does not give due attention to sustainable development, rather, it emphasises to the economic development. See objectives and strategic pillars of GTP II. The Federal Democratic Republic of Ethiopia, The second growth and transformation plan (GTP II) (2015/16-2019/20) (2015, hereinafter GTP II).

³⁵ Federal Democratic Republic of Ethiopia Environmental Protection Authority 'National report of Ethiopia' (2012) Pp. 42-3.

³⁶ FDRE EPA, (n 11 above) 120-21. At the time of dawn fall of Derg government in 1991, most of government initiated projects were dismantled and collapsed which indicate the challenge to sustainable environmental conservation. Daniel Kassahun 'Towards the development of differential land taxation in Ethiopia' in Dessalegn Rahmato & Taye Assefa (eds), Land and the challenge of sustainable development in Ethiopia (2006) 119.

³⁷ National Conservation Strategy of Ethiopia Volume II (n 27 above) 1.

³⁸ Above, section 2.2

³⁹ The relevant provision of the policy partly reads, the laws should '... ensure agreement with the Constitution and the prevailing, political, social cultural and economic policies, laws and practices and to harmonize these with the principle of sustainable development.' FDRE Environmental Policy (n 5 above) para. 5.2.C.

In addition, the Water Resource Management Policy stipulates goals to enhance and promote efforts towards an efficient, equitable and optimum utilization of water so as to contribute to the socio-economic development of the country in a sustainable manner.⁴⁰ The policy requires environmental impact assessment (EIA) in water resource development projects.⁴¹ In addition, National Policy on Biodiversity Conservation and Research (NPBCR) aims at sustainably conserve, develop and utilize biodiversity resources of the country. Nevertheless, the implementation of the policy tends towards conservation rather than sustainable utilization. Moreover, the conservation is not integrated into sectoral plans and programs and the policy lacks clarity as to the management of invasive species. On top of that, though benefit sharing of the protection of biodiversity related indigenous knowledge and communities is the inalienable right,⁴² it is not yet effective.⁴³

Furthermore, one of the rationales to enact Proclamation No. 295/2002 is to regulate sustainable use of natural resources.⁴⁴ Though Proc. No. 295/2002 is intended to ensure sustainable development and environmental safety, a study shows that it is not fully effective since monitoring and evaluation after the start of projects is poor.⁴⁵ Pollution control proclamation⁴⁶ is also promulgated but is limited in its success, the factors include low level of awareness at all levels, limited financial and human capacity, and poor technological basis.⁴⁷ The EPA was empowered by law to propose incentives or disincentives to discourage practices that

⁴⁰ The Federal Democratic Republic of Ethiopia Ministry of Water Resources Ethiopian water sector policy (2001) para. 1.1.

⁴¹ Above, para. 2.2.2(A)(2); The Federal Republic of Ethiopia Ministry of Water Resources Ethiopian water sector strategy (2001) *para.* 4.1.10.

⁴² Access to Genetic Resources and Community Knowledge and Community Rights Proclamation No. 482/2006, *Federal Negarit Gazeta* 13th Year No 13 Addis Ababa 27 February 2006, Art. 8. For further treatment of the right see Mekete Bekele 'Community rights to genetic resources and their knowledge: African and Ethiopian perspectives' in NJ Chalifour *et al* (eds) *Land use law for sustainable development* (2007) 111-119. For the discussion of the topic under international law, see J Curci *The protection of biodiversity and traditional knowledge in international law of intellectual property* (2009).

⁴³ Mekete, above 123.

⁴⁴ Proclamation No. 295/2002, (n 22 above) 1st para. of the Preamble.

⁴⁵ United Nations Industrial Development Organization Acting as Project Executing Agency for the Common Fund for Commodities (CEC), 'Technical report: on legal environment assessment and policy and strategy suggestions prepared for the Government of Ethiopia' (2006) 16.

⁴⁶ FDRE Environmental Pollution Control Proclamation No. 300/2002, *Federal Negarit Gazeta* 9th Year No. 12 Addis Ababa 3 December 2002.

⁴⁷ FDRE EPA, (n 11 above) 122.

hamper sustainable use of natural resources or the prevention of environmental pollution or degradation.⁴⁸

Furthermore, different sustainable development and environmental action plans and programmes have been developed and being implemented. Some of these include the following:⁴⁹

- National Action Plan to Combat Desertification- Ethiopia has signed and ratified the International Convention on Desertification that requires Party States to prepare and implement action plan. Accordingly, Ethiopia has prepared National Action Programme (NAP) to combat desertification.⁵⁰
- Biodiversity Strategy and Action Plan: the goal of the Ethiopian Biodiversity Strategy and Action Plan includes to establish effective systems
...that ensure the conservation and sustainable use of Ethiopia's biodiversity, that provide for the equitable sharing of the costs and benefits arising therefrom, and that contribute to the well-being and security of the nation.⁵¹
- National Action Plan for Implementation of the Stockholm Convention on POPs- Ethiopia prepared this Action plan so as to implement its international obligation imposed under the Stockholm Convention;⁵²
- National Adaptation Plan of Action to the Effect of Climate Change(Draft);
- Synergy Document on the National Implementation of the Rio Conventions;
- Endorsement of the MDGs⁵³ - the Ethiopian Government has endorsed MDGs and has planned to eradicate poverty and bring about social development.⁵⁴
- Endorsement of the NEPAD Environmental Action Plan.

⁴⁸ Proclamation No. 295/2002 (n 22 above) Art. 6(12).

⁴⁹ FDRE EPA (n 11 above) 13.

⁵⁰ See generally Federal Democratic Republic of Ethiopia *National Action Programme to Combat Desertification* (1998).

⁵¹ Government of the Federal Democratic Republic of Ethiopia Institute of Biodiversity Conservation *Natural Biodiversity Strategy and Action Plan* Institute of Biodiversity Conservation (2005) para. 3.2 at 56. Ethiopia prepared this Strategy and Action plan to implement its international obligation as required by Art. 6 of the Convention on Biological Diversity (CBD). Ethiopia ratified the Convention in 1994.

⁵² Stockholm Convention on Persistent Organic Pollutants under Art. 7 requires States to prepare and implement Action plan. See also Federal Republic of Ethiopia National implementation plan for the Stockholm Convention (2006) 8.

⁵³ Millennium Development Goals are: goal 1: eradicate extreme poverty & hunger; goal 2: achieve universal primary education; goal 3: promote gender equality and empower women; goal 4: reduce child mortality; goal 4: improve maternal health; goal 6: combat HIV/AIDS, malaria and other diseases; goal 7: ensure environmental sustainability; and goal 8: develop a global partnership for development. See United Nations Development Programme (UNDP) *The millennium development goals and human right* (2008) 3.

⁵⁴ Federal Democratic Republic of Ethiopia FDRE Ministry of Finance and Economic Development (MoEFD) 'Ethiopia: Sustainable development and poverty reduction programme' (2002) 2.

However, limited financial resources, lack of skilled human power, limited access to appropriate technology, limited institutional capacity, and low level of environmental awareness at all levels were challenges accepted by the Ethiopian Government in implementing the plans. In addition, poor coordination among different agencies has a negative impact upon the implementation of the plans.⁵⁵

5.3.3 Social policies and laws

The FDRE Constitution stipulates the obligation of the state ‘... to allocate ever increasing resources to provide to the public health, education and other social services.’⁵⁶ One of the important social policies to achieve sustainable development in Ethiopia is educational and training policy. The CSE addresses the social aspect of the sustainability.⁵⁷ Ethiopia has designed education and training policy in 1994, whose objective, *inter alia*, is to create environmental aware citizens by providing environmental education, and provide education that will enable students to have international and national outlook to protect the environment and natural resources, and historical heritages of Ethiopia.⁵⁸

The health policy of the country is intended to achieve environmental health, development of safe disposals of industrial wastes and protecting the environment from hazardous chemical wastes.⁵⁹ However, the health proclamation does not clearly incorporate environmental health but the disposal of wastes from the human being interest point of view.⁶⁰ The CSE makes clear that high rate of population growth has negative impact upon the environment, and calls for appropriate measures.⁶¹ Ethiopia also adopted population policy with the objective of harmonising the population growth rate with the level of economic development of the country. It aimed at reducing the rate from 7.7 to 4.0 by 2015, increase the prevalence of use of

⁵⁵ FDRE EPA (n 11 above) 119-20. To date the second Growth and Transformation Plan is being implemented since 2015. See FDRE GTP II (n 34 above).

⁵⁶ The FDRE Constitution, (n 6 above) Art. 41(4).

⁵⁷ See National Conservation Strategy of Ethiopia Volume I, (n 25 above), at 4.4. The conservation strategy calls for self employment of students after graduation. As above.

⁵⁸ FDRE Education and training policy (1994); See also Institute of Biodiversity Conservation (IBC) Genetic resources policy initiative-Ethiopia (GRPI/E), *National report GRPI Ethiopia country component* (2006) 20.

⁵⁹ Health Policy of the Transitional Government of Ethiopia (1993), Section 3.4. The policy was adopted in 1993.

⁶⁰ See generally Proclamation No. 200/2002, *Federal Negarit Gazeta*, 6th Year No 28 Addis Ababa, 9 March 2000.

⁶¹ National Conservation Strategy of Ethiopia Volume I, (n 25 above) 4.5

contraceptives, and education.⁶² Furthermore, the FDRE Constitution guarantees the women equality with men.⁶³ Thus, they ‘... have equal rights while entering into, during marriage and at the time of divorce....’⁶⁴ Family law is revised so as to respond to the issue of women, among others. Accordingly, the provisions that enshrined the supremacy of men, or husband are redrafted in a manner to reflect the equality of a wife with a husband.⁶⁵

5.4 Principles of sustainable development

The Environmental Policy of Ethiopia (EPE) envisaged that the renewable and non-renewable natural resources should be used sustainably.⁶⁶ One of the key environmental guiding principles is to use and manage the renewable resources sustainably.⁶⁷ Conditions should also be created to support community and individual resource users to manage the environment resource sustainably.⁶⁸ Furthermore, uninterrupted and continuous access to piece of land and resources in a sustainable natural management is important.⁶⁹ In addition, the environmental policy is intended to implement the sustainable use of resources (natural, manmade and cultural resources).⁷⁰ The EPE emphasizes the need for sustainable use and management of resources.⁷¹

⁶² The National Population Policy of Ethiopia Specific Objectives; Institute of Biodiversity Conservation (IBC) Genetic Resources Policy Initiative-Ethiopia (GRPI/E), National Report GRPI Ethiopia country component (n 58 above) 21. Population growth in the country is still a challenge to achieve sustainable development; it is expected to be over 120 million in 2030. FDRE Environmental Authority (n 35 above) 42.

⁶³ See the FDRE Constitution (n 6 above) Art. 35(2). The provision provides some detailed rights of women.

⁶⁴ The FDRE Constitution (n 6 above) Art. 34(1).

⁶⁵ For example, both the spouses have equal rights in marriage. See Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia *Federal Negarit Gazeta* Extra Ordinary Issue No. 1/2000 The Revised Family Code Proclamation No. 213/2000, Addis Ababa 4 July 2000.

⁶⁶ FDRE Environmental Policy (n 5 above) para. 2.2. (a) and (b); One of the rationales of promulgating the Environmental Protection Organs Establishment Proclamation is to ensure ‘... sustainable use of environmental resources...’ Proclamation No. 295/2002 (n 22 above) 1st Para.

⁶⁷ FDRE Environmental Policy (n 5 above), para. 2.3.e. The provision reads: ‘Appropriate and affordable technologies which use renewable and non-renewable resources efficiently shall be adopted, adapted, developed and disseminated’. Recycling the solid waste materials could promote sustainable use of natural resources. See Solid Waste Management Proclamation No. 513/2007, *Federal Negarit Gazeta*, 13th Year No. 13, Addis Ababa 12 February 2007, Arts. 6(30 and 11(1)). See also Art. 4(2) of FDRE Environmental Control Proclamation No. 300/2002 (n 46 above).

⁶⁸ FDRE Environmental Policy (n 5 above) para. 2.3.i

⁶⁹ Above, para. 2.3.k. The provision stipulates: ‘The existence of a system which ensures uninterrupted continuing access to the same piece(s) of land and resources creates conducive conditions for sustainable natural resource management’. The Rural Land Administration and Use proclamation is also enacted to ‘...sustainably conserve and develop natural resources and pass over to the coming generation through the development and implementation of a sustainable rural land use planning...’ 2nd paragraph. The Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No. 456/2005, *Federal Negarit Gazeta*, 11th Year No. 44, Addis Ababa 15 July 2005.

⁷⁰ FDRE Environmental Policy (n 5 above) para. 5.1.a

⁷¹ Above, para. 5.2.a.

Programmes should also create conditions for sustainable use of resources in the country.⁷² The law is required to ‘...create the conditions for formulating, renewing and updating sectoral regulations on and procedures for, restoration, protection, management and sustainable use of the natural, human-made cultural resources and the environment.’⁷³

Ethiopia aspires for conserving and utilization of the country’s natural resources in a productive and sustainable manner. It tried to ensure opportunities to adopt sustainable land use and water management systems so as to alleviate threats to natural resources. Watershed management, water harvesting, irrigation and increased water use efficiency are methods to be adopted by Ethiopia to conserve water resources. Conservation methods, reforestation and appropriate conservation agriculture methods should be implemented to address the fertility depletion and soil erosion, which threaten the sustainability of arable agriculture. It is also recognized that rangeland degradation is threatening the lives of pastoral community in large areas of low lands, and better rangeland management and alternative forms of income generation to reduce grazing are envisaged.⁷⁴

Principle of equity and poverty reduction

Social equity in resource use is the key guiding principle in Ethiopia.⁷⁵ Thus, equitable water use system must be established between the upper and lower watershed communities.⁷⁶

In Ethiopia, various policy measures have been spelt out to combat poverty and to achieve sustainable economic growth and equity that includes regional equity. Its poverty reduction strategy is well defined but food aid, inadequate health services for the rural poor and inadequate

⁷² FDRE Environmental Policy (n 5 above) para. 5.2.b. The policy requires the laws 'to enable the creation of programmes that motivate the peoples of Ethiopia into restoring, protecting, managing and sustainably using the natural, human made and cultural resources and the environment of the country'.

⁷³ Above, para. 5.2.e. Any person who causes damage to the environment may be required to restore, or cover the cost of restoration. Proclamation No. 300/2002 (n 46 above) Art. 17(b).

⁷⁴ FDRE Ministry of Finance and Economic Development in Conjunction with Ministry of Agricultural Development Global agriculture and food security programme request for funding public sector window agricultural growth program (2010) 5.

⁷⁵ See the FDRE Environmental Policy (n 29 above) para. 2.3.1 Tewolde-Birhan argues that development is paramount by maximization of natural resources and it should be distributed for each of us, not for some. Equitable distribution is also essential to reduce poverty in Ethiopia. Tewolde-Birhan Gebre-Egziabher, the then FDRE Environmental Protection Authority Director, Keynote address, 27/01/2012.

⁷⁶ Proclamation No. 456/2005 (n 145 above) Art. 13(2).

infrastructure were constraints to implement it. In addition, weak technical capacity and poor financial sources were major constraints.⁷⁷

The Sustainable Development and Poverty Reduction Programme (SDPRP) clearly states that ‘poverty reduction is the core objective of the Ethiopian Government.’⁷⁸ The Ethiopian Government believes that proactive development policies play crucial role to create ‘enabling environment for accelerated development and attainment of improvements in the standards of living of the people.’⁷⁹ The SDPRP was intended to be used as an instrument to achieve the Millennium Development Goals(MDGs) by undertaking ‘...reform in the legal system, enforcing contracts, ensuring property rights, maintaining peace and stability, and improving the functioning of public services...’⁸⁰

The country has implemented the first growth and transformation plan (GTP), one of its seventh pillar strategies is sustaining faster and equitable economic growth.⁸¹ ‘The Government’s endeavour of poverty eradication and employment expansion is intended to be pursued by sustaining rapid and broad based economic growth in a more coordinated and sustained manner.’⁸²

⁷⁷ United Nations Johannesburg Summit 2002 Ethiopia Country Profile 3. Development endeavours made by the government and other development partners in Wolaita has failed to address significant determinants of poverty and destitution. In general, food security cannot be ensured in Wolaita. Dessalegn Rahmato, *Development interventions in Wolaita, 1960s-2000s: A critical review* (2007) 22-3.

⁷⁸ FDRE Ministry of Finance and Economic Development (MoEFD) *Ethiopia: Sustainable development and poverty reduction programme* 36. Ethiopia adopted pro-poor growth strategy, which is based on the design to distribute gain of the growth. Thus, ‘growth with equity is the optional strategy for Ethiopia’. Most of the people should share the benefits of the growth, according to Ethiopian Government. Above, 26. Ethiopia has adopted sustainable development and poverty reduction programme (SDPRP) in July 2002. The definition given by the World Bank is believed to explain the nature of poverty in Ethiopia that reads ‘... a pronounced deprivation of well-being related to lack of material income or consumption, low levels of education and health, vulnerability and exposure to risk and voicelessness and powerlessness,’ in Enquobahri *Understanding Poverty: the Ethiopian Context* 6; in Ethiopia, low agriculture production, low non-farm income, low education and poor health, high population growth and weak institutional structures are determinants of poverty. Asmamaw Enquobahri ‘Understanding poverty: the Ethiopian context’ (2004) 7-8.

⁷⁹ FDRE Ministry of Finance and Economic Development (MoEFD) (n 78 above) 36. Free market economy is believed to serve to achieve rapid economic development.

⁸⁰ Above, 26. Institutions play pivotal role in eradicating poverty and promoting sustainable development. See generally A Duraiappah ‘Poverty and environmental degradation: a literature review and analysis’ (1996).

⁸¹ GTP I (n 34 above) 8. The other six pillar strategies are: maintaining agriculture as a major source of economic growth; creating favourable conditions for the industry to play key role in the economy; enhancing expansion and quality of infrastructure development; enhancing expansion and quality of social development; building capacity and deepen good governance; promote women and youth empowerment and equitable benefit. The second growth and transformation plan sustains the rapid economic growth and development achieved in the first growth and transformation plan. FDRE GTP II (n 34 above) 16.

⁸² Above, 8. Bewket argues that Ethiopia is one of the developing countries who are vulnerable to climate change and it has a very poor capacity to stand with the climate change problems. The life of most of the people is directly based on or related to natural resources, sectors, and the people are vulnerable to climate change problems.

Precautionary principle

Precautionary principle is one of the environmental principles in Ethiopia, which is considered as a cornerstone to protect the environment.⁸³ Precautionary principle should be taken in assessing potentially damaging impacts in decisions that affect social and economic conditions, natural and environment, particularly in pastoral areas.⁸⁴ EIA is essential instrument to implement the precautionary principle.⁸⁵ EIA refers to the determination of the environmental consequences of proposed projects or activities.⁸⁶ EIA, by its nature, is anticipatory that indicates the likely environmental effects of a proposed project and is used as a basis to decide.⁸⁷ It has also an interdisciplinary feature so that in most cases EIA reports are prepared by a team, which includes an environmental engineer, social scientist, biologist, and physical scientist.⁸⁸ In Ethiopia, there is lack of professionals to conduct EIA.⁸⁹

The environmental policy envisages that environmental impact assessment should consider not only the physical and biological impacts, but also social, socio economic, political and cultural impacts.⁹⁰ This accepts the interdisciplinary nature of EIA. Thus, public and private projects, which are likely to have negative impacts, should go through environmental impact assessment.⁹¹ In public projects, the relevant sector, and in private projects, the developer (the

The reasons that make bad the situations are extreme poverty, capacity limitation (in human development, technology and institutions) and the prevalence of social problems make the capacity of the people very poor. Woldamlak Bewket, 'The relationship between climate change and poverty in Ethiopia,' in Alebachew Adem, *Climate change, environmental protection and sustainable development nexus in Ethiopia* (2012) 26.

⁸³ FDRE Environmental Policy (n 5 above) para. 3.8.a. The environmental policy directs to adhere to the precautionary principle of minimising and where possible preventing discharges of substances, biological materials or their fragments from industrial plants and personal or communal appliances or any other external sources that could be harmful, and to disallow the discharge when they are likely to be hazardous.

This provision seems to be sourced from the Rio Declaration, See Rio Declaration (n 32 above) Principle 15.

⁸⁴ FDRE Environmental Policy (n 5 above) para. 3.1.q.

⁸⁵ Above, para. 3.1.S. Environmental impact assessment proclamation is enacted to undertake EIA. See Proclamation No. 299/2002, Environmental Impact Assessment Proclamation No. 299/2002, *Federal Negarit Gazeta*, 9th Year No. 11, Addis Ababa, 3 December 2002.

⁸⁶ RK Jain *Environmental assessment* Second edition (2002) 5. Environmental impact assessment, under Ethiopian law, is defined as '... the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of proposed project or public instrument.' Proclamation No. 299/2002 (Above) Art. 2(3).

⁸⁷ J Brady (ed) *Environmental management in organizations: the IEMA handbook* (2005) 187.

⁸⁸ BN Lohani *et al Environmental impact assessment for developing countries in Asia* Volume 1 (1997).

⁸⁹ Mr Haile, Executor and Acting Coordinator of Environmental impact, Addis Ababa City Environmental Protection Authority, Interview made in 2010.

⁹⁰ FDRE Environmental Policy (n 5 above) para. 4.9.a.

⁹¹ Above, para. 4.9.b; any project, individual or public, that is required by directive to go through impact assessment must go same. Environmental Impact Assessment Proclamation No. 299/2002 (n 85 above) Art. 5. A directive is issued, but it does not set criteria to determine a project to conduct environmental impact assessment.

investor) should prepare environmental impact assessment.⁹² Public consultation is central in the preparation of EIA. There should also be independent review and public comment should be considered by decision makers.⁹³ Environmental impact assessment should always include mitigation plans for management of environmental problems and contingency plans in case of accidents.⁹⁴ In practice, the Investment Commission grants investment permits without environmental impact assessment as a requirement.⁹⁵ During the implementation of a project, there should be monitoring, inspection and record keeping.⁹⁶

However, EIA law is limited in its implementation due to poor monitoring and follow up, low capacity to conduct EIA, low awareness levels, and poor inter-agency and Federal-regional coordination,⁹⁷ and lack of legal standards. In addition, EIA guidelines are not yet issued which remain on draft.⁹⁸

Principle of public participation and access to information and justice

The FDRE Constitution stipulates the right to participate in national development, and particularly to be consulted with respect to projects and policies that affect them, for

Environmental Protection Authority, *Directive issued to Determine Projects Subject to Environmental Impact Assessment*, Directive No. 1/2008.

⁹² FDRE Environmental Policy (n 5 above), para. 4.9.f.; Proclamation No. 299/2002 (n 85 above) Art. 7(1).

⁹³ FDRE Environmental Policy (n 5 above) para. 4.9.C.; Proclamation No. 299/2002 (n 85 above) Art. 15. Public participation is very poor in practice, in most cases the people do not participate even where EIA study is made. See Tesfaye Abate Abebe 'Environmental impact assessment and monitoring under Ethiopian law' (2012) 1 *Haramaya Law Review* 103-123.

⁹⁴ FDRE Environmental Policy (n 5 above) para. 4.9.d. An environmental impact study should also include the nature of the project, the content and amount of pollutant, the likelihood of trans regional impact, characteristics and duration of the estimated impacts, measures proposed to mitigate, or illuminate the impacts. Proclamation No. 299/2002 (n 85 above) Art. 8(2).

⁹⁵ See Tesfaye (n 93 above) 114. The Investment Agency does not no longer consult the Environmental Protection Authority for authorization by arguing that EIA is not a requirement for investment permit. See Krueger *et al* (n 5 above) 90. In the past, EIA was made a requirement for investment permit. Proclamation No. 37/1996, Art. 14(1). The EIA proclamation has also the intention EIA to be made prior to the investment permit. See Proclamation No. 299/2002, (n 85 above), second preamble, and Art. 3(3).

⁹⁶ FDRE Environmental Policy (n 5 above) para. 4.9.e.

⁹⁷ FDRE EPA (n 11 above) 122. Environmental impact assessment is not properly implemented because environmental clearance is not a requirement for investment permit. See Proclamation No. 769/2012 (n 27 above) Arts. 12-16. On the contrary, the Investment Agency is duty bound to provide the service of 'execution of investors' requests for approval of environmental impact assessment studies conducted on their investment projects.' Art. 3094(d). For detailed assessment of environmental impact assessment, see Tesfaye, (n 93 above).

⁹⁸ The Environmental Authority is empowered to issue '... guidelines that determines the elements necessary to prepare as well as evaluate an environmental impact study report.' Proclamation No. 299/2002 (n 85 above) Art. 8(3).

Nationalities.⁹⁹ Furthermore, the environmental policy provides for public participation in the environmental management as a policy objective.¹⁰⁰ Women should participate in environmental decision-making, resource ownership and management.¹⁰¹ Furthermore, resource users and managers should participate in environmental management starting ‘from project conception to planning and implementation to monitoring and evaluation.’¹⁰² It is also essential to develop effective method of popular participation in the planning and implementation of environment and natural resource use and management.¹⁰³

In addition, environmental information that must be widely disseminated is a guiding principle.¹⁰⁴ The right to live in a clean and healthy environment includes the right to be informed about the environmental issues.¹⁰⁵ Factories are required to report to the relevant authority about the environmental protection, and the Environmental Authority must publish a report regarding the amount, source, movement and disposal of pollutants in the country at least every five year.¹⁰⁶ The Environmental Protection Authority (now the Ministry) is empowered to establish environmental information system that promotes efficiency in environmental data collection, management and use in consultation with competent agencies.¹⁰⁷

⁹⁹ The FDRE Constitution (n 6 above) Art. 43(2). The Constitution does not recognize the right to be consulted for peoples and nationalities, it recognizes it for nations.

¹⁰⁰ FDRE Environmental Policy (n 5 above) para. 2.2.h. Persons should actively participate in and benefit from the right to development. Declaration on the Right to Development Art. 2(1).

¹⁰¹ FDRE Environmental Policy (n 5 above) para. 4.1.e. See also the Rio Declaration (n 8 above) principle 20.

¹⁰² FDRE Environmental Policy (n 5 above) para. 4.2.a. Environmental impact study report of a given project must be made accessible to the public and comments on it be made by the public. Proc. No. 299/2002 (n 85 above) Art. 15(1).

¹⁰³ FDRE Environmental Policy (n 5 above) para. 4.2.d. it is recognised that the indigenous people have a great role in environmental management and development due to their knowledge and traditional practice, and state should enable them to participate effectively in the achievement of sustainable development. Rio Declaration, (n 8 above) Principle 22. See also Principle 10.

¹⁰⁴ FDRE, Environmental Policy (n 5 above) para. 2.3.m.

¹⁰⁵ Above, para. 4.7.a.

¹⁰⁶ Prevention of Industrial Pollution Council of Ministers Regulations No. 159/2008, *Federal Negarit Gazeta*, 15th Year No. 14, Addis Ababa 7 January 2009, Art. 11. Every one whose activity would impact on the environment is duty bound to report to the environmental authority in Addis. Addis Ababa City Government Environmental Pollution Control Regulations No. 25/2007, *Addis Negari Gazeta*, 4th Year No. 56 Addis Ababa 4 May 2006, Art. 10. The Environmental Protection Authority is obliged to prepare a periodic report and make same accessible to the public. Public Enterprise Proclamation No. 295/2002, (n 22 above), Art. 6(16).

¹⁰⁷ Proclamation No. 295/2002 (n 22 above) Art. 6(13).

Principle of good governance

Nonetheless, it is not clearly provided under the Ethiopian Environmental Policy except that power should be decentralized in accordance with the Constitution.¹⁰⁸ The Constitution stipulates good governance and the policy should be interpreted in accordance with the Constitutional provisions.¹⁰⁹

In Ethiopia, the adoption of new constitution, introduction of a multi-party system, and the holding of public elections are taken as features of a democratic, federal state. The participation of women in national parliament increased, but their participation in the executive branch of the government is minimal. The emergence of legally recognised political parties in the past 1991 in Ethiopia is taken as one of the most important developments. However, the political party registration and other related practices have not been viewed as fair and credible since the Office of Registration arbitrary delays the issuing of certificates. It is also indicated that ‘public mass media and other public resources are not as accessible to opposition parties as they are to the ruling party during elections.’¹¹⁰

In Ethiopia, the Auditor general, the Budget and Finance Affairs Standing Committee of the Parliament, the Human Rights Commission and Office of Ombudsman are established as official public watchdog organs. Nonetheless, human rights violations are doubted in general, and it is also found that police seek bribes whose duty is to uphold the rule of law.¹¹¹

Principle of integration and interrelationship

The principle of integration is the last principle of sustainable development law that is incorporated under Ethiopian law. As stipulated in the environmental policy, integrating the natural resource and environmental management in across all sectors and vertically among all levels of organisation is one of the key guiding principles.¹¹² In addition, the issue of natural resources and environmental management should be integrated in the federal and regional and

¹⁰⁸ FDRE Environmental Policy (n 5 above) para. 5.1.d.i.

¹⁰⁹ See for example human and Democratic rights are provided under the FDRE Constitution, Art 10 cum. Arts 13-44; Arts. 10 and 12 of the FDRE Constitution also stipulates principles of transparency and accountability.

¹¹⁰ S Oertel ‘Economic Commission for Africa Governance profile of Ethiopia Development Policy Management Division’ (2004) 3-5. Opposition parties and others argue that the National Election Board is not independent from the ruling party rather served as key instrument to maintain dominance. Above, 6.

¹¹¹ Above, 20. Corruption in Ethiopia is rampant though less compared to other developing countries. See generally J Plummer (ed) *Diagnosing corruption in Ethiopia: perceptions, realities, and the way forward for the key sectors* (2012).

¹¹² FDRE Environmental Policy (n 5 above) para. 2.3.p.

local policies and strategies.¹¹³ It is essential to harmonize sectoral interests¹¹⁴ and ‘integration of environmental planning with development planning.’¹¹⁵ Therefore, development decision making is required to integrate environmental protection in Ethiopia.

5.5 Law of sustainable large-scale agriculture in Ethiopia

In the previous section of the thesis, the concept of the law of sustainable agriculture is considered. In this section, the law of sustainable large-scale agriculture is treated. Since it is related to the issue of commercial agriculture, the law of commercial agriculture is considered briefly.

5.5.1 The law of commercial agriculture in Ethiopia

Commercial agriculture is the situation whereby ‘farms intensify their use of productivity – enhancing technologies on their farms, achieve greater output per unit of land and labour expended, produce greater farm surpluses(...), expanded their incomes and living standards.’¹¹⁶ Commercial agriculture is understood as the production of crops for market and profit that are competitive locally, regionally and globally.¹¹⁷ In Ethiopia, ‘commercial farming’ includes farms under state and private ownership that are established mainly for profit making by selling agricultural products at domestic and /or foreign markets. Commercial farming is characterized by the use of intensive capital, modern farm management practices and inputs like high tech-farm machineries, irrigation, fertilizers, pesticides and improved seeds.¹¹⁸ Commercial agriculture that is sustainable in the long term, though less profitable in the short term, is the most desirable.¹¹⁹

¹¹³ Above, para. 2.3.s. The provision reads: ‘The integrated implementation of cross-sectoral and sectoral, federal, regional and local policies and strategies shall be seen as a prerequisite to achieving the objectives of this policy on the Environment.’

¹¹⁴ Above, para. 5.1.d. ii.

¹¹⁵ Above, para. 5.1.d.iii. Integration principle is incorporated under the Rio Declaration, See Rio Declaration (n 8 above) Principles 4, and 25. Principle 13 of the Stockholm Convention also incorporates the integration principle.

¹¹⁶ TS Jane *et al* ‘Agricultural commercialization, rural transformation and poverty reduction: What have we learned about how to achieve this?’ (2011) 1.

¹¹⁷ See P Norris *et al* ‘When urban agriculture meets Michigan’s Right to Farm Act: The Pig’s in the Parlor’ (2011) *Michigan State Law Review* 377; C Pinder & D Wood ‘The socio-economic impact of commercial agriculture on rural poor and other vulnerable group’ (2003) 5.

¹¹⁸ Federal Democratic Republic of Ethiopia Central Statistical Agency ‘Large and medium scale commercial farms sample survey 2020/11 results at country and regional levels’ Volume VIII (2011) 2.

¹¹⁹ Pinder & Wood (n117 above).

In commercial farming, advanced harvest technologies are applied.¹²⁰ In Ethiopia, a prime emphasis is given to the development of both small holders and large-scale commercial agriculture. Smallholder intensified commercial agriculture that includes floriculture and horticulture is developed in the high lands whereas large-scale commercial agriculture is developed in the low lands peripherals of the country.¹²¹

In Ethiopia, much emphasis is given to market oriented agricultural production and various policy and strategic instruments have been put in place to achieve this.¹²² Currently, government policy on commercialization of agriculture focuses on both small and large-scale agriculture.¹²³ The 2003 Ethiopian Government's rural development policy and strategies provides for the commercialisation of agriculture of small holders through market-led production and commercialization of agriculture via modern large-scale investment.¹²⁴

Ethiopia has introduced liberal economic policy that promotes commercial agriculture.¹²⁵ Agricultural policy gives due attention to the role of private investors in the development of large-scale modern farming. The government policy focuses on developing medium and large commercial farms in the low lands.¹²⁶ The country has planned to promote commercial agriculture as a business to ensure development and to eradicate poverty in rural areas.¹²⁷ The food security strategy is intended to promote commercial agriculture that could be profitable.¹²⁸ Furthermore, market oriented development master plan was designed to increase production of

¹²⁰ See World Bank 'Opportunities and challenges for developing high-value agricultural exports in Ethiopia' (2004) 64.

¹²¹ Tsegaye Moreda 'Postponed local concerns? Implications of land acquisitions for indigenous local communities in Benishangul Gumuz Regional State, Ethiopia' (2013) 11-12.

¹²² SID- Consult-Support integrated development 'Market assessment and value chain analysis in Benishangul Gumuz Regional State, Ethiopia' (2010) 12.

¹²³ Samuel Gebereslassie & E Ludi 'Agricultural commercialization in Coffee growing areas of Ethiopia' (2008) 5; See also Samuel Gebreselassie & K Sharp 'Commercialization of smallholder agriculture in selected Tef-growing areas of Ethiopia' (2008) 1.

¹²⁴ Government of the Federal Democratic Republic of Ethiopia Rural development policy and strategies (2003) 52; Samuel & Ludi, above.

¹²⁵ See Transitional Government of Ethiopia, Ethiopia's economic policy during transitional period (1991). It was intended to be used even after the transitional period.

¹²⁶ FDRE Rural development policy and strategies (n 124 above) 53. Essayas Kebede 'Trends and challenges in rice investment in Ethiopia' in Kebebew Assefa *et al* (eds) *Challenges and Opportunities of Rice in Ethiopian Agricultural Development* (2011) 18.

¹²⁷ Federal Democratic Republic of Ethiopia Ministry of Agriculture and Rural Development *Ethiopia's agricultural sector policy and investment framework* (PIF) 2010-2020 13. See also Firehiwot Worku 'The role of large scale commercial agriculture investment and its policy implications in Ethiopian economy' (2015) 18-20.

¹²⁸ Federal Democratic Republic of Ethiopia, Food Security Strategy (2002) para. 21; See Dejene Tezera & S Lingohr-Wolf 'Ethiopia' in PK Kormawa *et al* 'Agribusiness for Africa's prosperity: Countries case studies' (2012) 86.

marketable surpluses.¹²⁹ The master plan incorporates a shift from subsistence production to commercial modes.¹³⁰

In Ethiopia, it is emphasized on development market based agricultural development with making the bulk of the farmers as the main actors, and beneficiaries of the development, which is believed to create conducive environment to build free market economy.¹³¹ The Ethiopian government aspires for every agricultural activity to produce marketable output of acceptable quality that is competitive in the international market. The participation of private investors in agriculture is imperative in commercialization of agriculture in Ethiopia. Private investors are expected to buy agricultural products from farmers and give value to farms to increase the productivity of agriculture. In addition, private investors could add values to agricultural products through industrial processing. All this is in line with the government Strategy to achieve rapid and sustainable rural development. The policy envisages attracting foreign investors to the agricultural sector.¹³²

The GTP emphasises on high land agricultural investment and low land investment. It aspires for commercial agriculture by increasingly using modern agricultural technologies and increase production and productivity by small holders. It also gives due attention to increase the share of private investment in agriculture.¹³³ Nevertheless, due to the prevalence of pre-existed problems, the large-scale agricultural investment could not bring about expected outcome. In the future, it is necessary to strengthen land administration, the selection of investors, and the capacity to control and help investors and provide the necessary infrastructure.¹³⁴ Under GTP II, agriculture is required to produce for market and the industry.¹³⁵ This indicates that the interest is on commercial agriculture. During GTP II, it is planned for the youth to participate in agricultural investment while selected national and foreign investors will participate in high investment in areas such as floriculture and fruitification.¹³⁶

¹²⁹ The Market Oriented Development Mater Plan was developed by the Ministry of Agriculture and has been implemented since June 2004. Dejene & Lingohr-Wolf, above 86.

¹³⁰ See as above.

¹³¹ FDRE Rural development policy and strategies (n 124 above) 13.

¹³² Above, 43-52.

¹³³ GTP I (n 34 above) 19.

¹³⁴ GTP II (n 34 above) 23.

¹³⁵ Above, 72.

¹³⁶ Above, 106.

Investment Proclamation No. 769/2012 (as amended)¹³⁷ and Regulations No. 270/2012(as amended)¹³⁸ are main legal frameworks for both domestic and foreign investment in Ethiopia. The Commercial Code of Ethiopia provides the legal framework for undertaking commercial activities including commercial agriculture.¹³⁹ The Civil Code of Ethiopia too governs various types of contracts including lease.¹⁴⁰

In Ethiopia, commercial agriculture includes the production of organic coffee, cotton, tobacco, sugar cane, tea and spices.¹⁴¹ An investor can also engage in seed production. Seed production shall be made under integrated plan.¹⁴² Investors who produce for commerce shall be competent and be certified. They should meet the required seed quality standards.¹⁴³

Regardless of incentives provided in the law, agricultural investors wanted to invest where there is availability of water, labour, transportation, power, and communication. Accordingly, agricultural investors chose *Oromia* and *Amhara* regions where the abovementioned infrastructures are more or less better off compared to others.¹⁴⁴

Ethiopia enacted a law to ensure agricultural sustainability and to improve the performance and market competitiveness of farms.¹⁴⁵ The Code incorporates the rational ‘to define and regulate the essential elements of environmentally sustainable and socially acceptable agricultural practices to enhance the sustainability of the floriculture industry.’¹⁴⁶

¹³⁷ Investment proclamation No. 769/2012 is amended by proclamation No 849/2014. Investment (Amendment) Proclamation No 849/2014 *Federal Negarit Gazette* 20th Year No. 52 Addis Ababa 22 July 2014 Art 1.

¹³⁸ See Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers (Amendment) Regulation No. 312/2014 *Federal Negarit Gazette* 20th Year No. 62 Addis Ababa 13 August 2014, Art 2.

¹³⁹ See Commercial Code of the Empire of Ethiopia Proclamation No. 166 of 1960 *Negarit Gazeta* 19th Year No. 3 Addis Ababa 5 May 1960 Book II Art 210 -560; See also Ethiopian Investment Agency *Invest in Ethiopia An investment guide to Ethiopia* (2015) 26.

¹⁴⁰ The Civil Code provides rules regarding the lease of lands. See Civil Code Proclamation No. 160 *Negarit Gazeta*, 1960 Arts. 2975-3018.

¹⁴¹ Ethiopian Investment Commission (EIC) Ethiopia: A preferred location for foreign direct investment in Africa An investment guide to Ethiopia (2015) 26.

¹⁴² Seed Proclamation No. 782/2013 *Federal Negarit Gazette* 19th Year No. 27 Addis Ababa 15 February 2013, Art. 7(1).

¹⁴³ Above, Art 6.

¹⁴⁴ Tadesse Kuma ‘Private investment in commercial agriculture in Ethiopia: opportunities and constraints’ (2003) 10. Commercial agriculture requires improved infrastructure, market access, and access to financial services, telecommunications, product standards and quality assurance systems, storage and transportation facilities. FDRE Agriculture and rural development 13.

¹⁴⁵ See Code of practice of the Floriculture Sector Council of Ministers Regulations No. 207/2011 *Federal Negarit Gazeta* 17th Year No. 74 Addis Ababa 7 June 2011 Art. 3.

¹⁴⁶ Above, 2nd paragraph of the Preamble.

5.5.2 The law of sustainable large-scale agriculture in Ethiopia

Member States of the United Nations are required to include the new sustainable development goals in their development plans and strategies.¹⁴⁷ Heads of States and governments of Africa are convinced that agriculture should be used to ensure sustainable food and economic development.¹⁴⁸ In Africa, land is considered as a centre of sustainable development.¹⁴⁹ Member States of AU are required to develop comprehensive policies that should consider their peculiar needs.¹⁵⁰ Kigali Declaration requests Member States to review and implement their laws on natural resources, and on environment to ensure agricultural sustainable development.¹⁵¹ It expresses the commitment of African countries to strengthen existing national and regional laws and harmonize them with the framework and guidelines on land policy and other international good practices,¹⁵² and adopt new laws to regulate agricultural investment.¹⁵³ Law would promote sustainable agricultural investment¹⁵⁴ and it is recognized that the success of agricultural investment is based on the implementation of fair and well-monitored legal framework.¹⁵⁵ Law is required to govern the sustainability of agriculture.¹⁵⁶ Thus, governments do have the interest to improve legal and policy frameworks to promote sustainable agricultural investment.¹⁵⁷ In Ethiopia, there is no single law that regulates sustainable large-scale agriculture, but we find the principle incorporated in different legislations. The FDRE Constitution incorporates the right to sustainable development, which also includes the right to agricultural development.¹⁵⁸

In Ethiopia, the concept of sustainable agriculture is explained as ‘an environmentally friendly agricultural practice that involves the use of the limited natural resources to satisfy the

¹⁴⁷ Sustainable Development Goals, para. 78.

¹⁴⁸ Declaration on Agriculture and Food Security in Africa, 6th paragraph of the Preamble. Heads of State and Government of African Union gathered in Mozambique, Maputo 10 to 12 July, 2003 and adopted Maputo Declaration. Above.

¹⁴⁹ Declaration on Land Issues and Challenges in Africa third paragraph of the Preamble.

¹⁵⁰ Above, 1st para.

¹⁵¹ African Parliamentarians *Making agricultural investment work for Africa: Final declaration* paragraph 4.

¹⁵² Above, third para.

¹⁵³ Above, 4th paragraph.

¹⁵⁴ *Yaoundé Declaration Promoting Sustainable Investment in Agriculture: legal and policy options* 1st para.

¹⁵⁵ Above, 7th para. Law should consider the sustainable agriculture as a supplement to conventional agriculture practices. CB Connard ‘Sustaining agriculture: An examination of current legislation promoting sustainable agriculture as an alternative to conventional farming practices’ (2004)13 *Penn State Environmental Law Review* 245.

¹⁵⁶ See CP Rodgers ‘Environmental policy and the reform of European agriculture law’ in MN Cardwell *et al* (eds) *Agriculture and International Trade Law, Policy and the WTO* (2003) 285.

¹⁵⁷ International Institute for Sustainable Development (IISD) ‘Promoting sustainable investment in agriculture: An introduction for host governments’ (2014) 3rd paragraph.

¹⁵⁸ The FDRE Constitution (n 6 above), Art. 43.

present generation without compromising the interest of the future generations.’¹⁵⁹ It is recognised that sustainable agriculture cannot be implemented unless water, soil and biodiversity are used wisely or sustainably.¹⁶⁰

Ethiopia has ratified the agreement establishing the Global Green Growth Institute.¹⁶¹ The country is a member to the Global Green Growth Institute (GGGI)¹⁶² and expected to promote its objectives, which includes implementing green growth. Green growth is a new paradigm of economic growth that balances economic growth and environmental sustainability¹⁶³ which is central to the objective of GGGI.¹⁶⁴ Being a member, Ethiopia assumes an obligation to ensure that large-scale agricultural investment promotes sustainable development in addition to economic development.

Green growth intends to a sustainable economy that marries economic performance with environmental sustainability.¹⁶⁵ Green growth is an instrument to achieve sustainable development.¹⁶⁶ Members of African Union, including Ethiopia have the interest to ensure large-scale agricultural investments promote sustainable development.¹⁶⁷ Thus, they developed guiding principles to improve the governance of large-scale land investments.¹⁶⁸ Those guiding principle are comprehensive, mutually reinforcing and formed around a set of fundamental principles.¹⁶⁹ Large-scale agricultural investment must be guided by ‘...a national strategy for sustainable agricultural development...’¹⁷⁰ Investors should show that their large-scale agricultural

¹⁵⁹ FDRE Ministry of Agriculture *Social and Environmental Code of Practice for Agricultural Investment* (2011) 4.

¹⁶⁰ As above.

¹⁶¹ The House of Peoples’ Representatives of the Federal Democratic Republic of Ethiopia has ratified the Agreement at its session held on the 11 June 2013. See third paragraph of the proclamation. Global Green Growth Institute Establishment Agreement Ratification Proclamation No. 796/2013 *Federal Negarit Gazette* 19th Year No. 47 Addis Ababa 3 July 2013.

¹⁶² See Global Green Growth Institute, GGGI Ethiopia: Fact sheet available at: www.greengrowthknowldge.org/sites/default/files/GGGI%Fact%20%Sheet%Ethiopia%20-%20%Climate%Resileint%20%Green%20%Economy.pdf Accessed on 22 July 2016.

¹⁶³ Agreement on the Establishment of the Global Green Growth Initiative (Rio de Janeiro 20 June 2012) Art. 2(a).

¹⁶⁴ Above, Art 2(b).

¹⁶⁵ Above, Second paragraph of preamble of green growth.

¹⁶⁶ Above, 5th paragraph of the Preamble.

¹⁶⁷ African Union (AU) *Guiding principles on large-scale land based investments in Africa* (2014) 1st paragraph of the Preamble. (hereinafter referred to as AU Guiding principles)

¹⁶⁸ As above.

¹⁶⁹ Above, 2nd para. of the Preamble.

¹⁷⁰ Above, Fundamental Principle 2.

investments would further the realization of the Ethiopian sustainable agricultural strategy.¹⁷¹ The legal principles require decision on large-scale agricultural investment be made based on the holistic assessment of the economic, social and environmental costs and benefits.¹⁷²

In March 2002, the Ethiopian Government has adopted Agricultural and Rural Development Policies and Strategies (RADPS), the principles of which include improving farming skills, improving the supply and replication and dissemination of technologies, ensuring access to land and tenure security, improving rural finance, developing rural energy sector and telecom, among others.¹⁷³

One of the key elements of the Rural Development Policy and Strategies (RDPS-2003) is to ensure rapid economic growth.¹⁷⁴ Furthermore, the PASDEP was intended to sustain the achievements, mobilising resources, and providing incentives to the private sector, in general.¹⁷⁵ Furthermore, Food Security Strategy (FSS) derived from the rural development policy of the country was adopted in March 2002, so as to increase domestic food production. Recognizing soil, water and vegetation as the main assets of farming, water and natural resource conservation based agricultural development is taken as the centrepiece of the strategy. Thus, ‘water harvesting, proper land utilisation and environmental rehabilitation are identified as the top priority areas of intervention.’¹⁷⁶

Similarly, the environmental policy envisages conserving natural resources such as soil, water¹⁷⁷ and using organic fertilizers like manures, farmyard manures and compost instead of chemical fertilizers,¹⁷⁸ as well as using diversified crops.¹⁷⁹ Large-scale agricultural investors

¹⁷¹ African Union, African Development Bank and United Nations Economic Commission for Africa *Guiding principles* (2014) (hereinafter referred to as AU *et al* Guiding principles) 11.

¹⁷² AU Guiding Principles (n 167 above), principle 5.

¹⁷³ Federal Democratic Republic of Ethiopia Environmental Protection Authority ‘The 3rd national report on the implementation of the UNCCD/NAP in Ethiopia’ (2004) 9.

¹⁷⁴ Federal Democratic Republic of Ethiopia Ministry of Finance and Economic Development & Ministry of Agriculture and Rural Development Global Agriculture and Food Security Programme Request for Funding Public Sector Window (2010) 2. According to this document, Ethiopia has planned to ‘achieve a sustainable increase in productivity and production.’ Above, 4.

¹⁷⁵ Diao X ‘Economic importance of agriculture for sustainable development and poverty reduction: The case study of Ethiopia’ (2010) 8.

¹⁷⁶ FDRE Environmental Protection Authority, (n 173 above) 10.

¹⁷⁷ Federal Democratic Republic of Ethiopia Environmental policy (n 5 above) para. 3.1.e, d.

¹⁷⁸ Above, para. 3.1.d.c.

¹⁷⁹ Above, para. 3.1.k.

should comply with the regional and international laws, as well as national laws of investment and development in general.¹⁸⁰

5.5.3 Legal principles of sustainable large-scale agricultural investment in Ethiopia

Certain legal principles have been developed at regional and national level.

A) Principle of economic sustainability

Large-scale agricultural investment should help implement the national economic development strategy of Ethiopia.¹⁸¹ Ethiopia's economic sector vision is 'to build an economy which has a modern and productive agricultural sector with enhanced technology...; to sustain economic development and secure social justice.'¹⁸² This does not clearly indicate the concept of sustainable agricultural development, but it focuses on economic profitability by increasing its productivity. It envisages modern and productive agricultural sector that uses modern technology. On the other hand, sustaining faster and higher economic growth is the primary pillar strategy of the plan.¹⁸³ This would be taken as an indicator of (implies) sustainable agriculture.

1) Profit making

Increasing investment in agriculture is essential. Agricultural research and extension services, technology are means to increase the productivity of agriculture.¹⁸⁴ Large-scale agricultural investments should be profitable and commercially viable.¹⁸⁵ African States should ensure that large-scale agricultural investments are financially and economically viable and promote growth in the form of technology improvements.¹⁸⁶ However, African States recognize, on evidence that large-scale agricultural investors do not bring about anticipated financial and economic benefits for host countries.¹⁸⁷ The Government tries to promote agricultural development by providing incentives for investors on irrigation development. The basic objective of the incentive is

¹⁸⁰ AU Guiding principles (n 167 above) Fundamental Principle 2.

¹⁸¹ Above, Fundamental Principle 2.

¹⁸² Growth and Transformation Plan (GTP I) (n 34 above) 7.

¹⁸³ Above, 8. In *Debreberhan*, Government intervention was proposed in zero grazing, rotational grazing, application of herbicides and fungicides and the like to increase sustainable production. See A Ares & NS Eosh 'Trip report: Ethiopia, Tanzania' (2012) 2.

¹⁸⁴ Sustainable Development Goals para. 2.a

¹⁸⁵ AU Guiding Principles (n 167 above) principle 14.

¹⁸⁶ AU *et al* *Guiding principles* (n 171 above) 21.

¹⁸⁷ Above, 20.

Providing incentives to investors engaging in irrigation development pursuant to this Regulation (sic) is to bring about an accelerated economic development of the country by increasing the role of the private sector in developing irrigation through utilising the huge available irrigable land and water resources of the country.¹⁸⁸

This law focuses only on achieving accelerated development of Ethiopia, which does not consider the economic, social and environmental sustainability of development.

Large-scale agricultural investors consider investment in this sector as golden opportunity to gain profits that immunises their asset to the global financial fluctuations.¹⁸⁹ If large-scale agriculture produces for industry, it will sustain since industry exists that needs agriculture production.¹⁹⁰ Furthermore, training was given to managers on modern technologies and management to sustain the agriculture and the Farm prepared five-year strategic plan to achieve sustainable agricultural development.¹⁹¹

Fertilizer use is responsible for the productivity of agriculture.¹⁹² Since 1990, the use of chemical fertilizer in Ethiopia has increased.¹⁹³ Large-scale agricultural investors use fertilizers to increase production.¹⁹⁴ Fertilizers would cause environmental pollution, ground water contamination, acid rain, water acidification and as such it may contribute for environmental problems.¹⁹⁵ Therefore, fertilizers must be used with the highest standards of operation and maintenance.¹⁹⁶ Sustainable large-scale agriculture needs management of fertilizers, and increasing the soil fertility. Environmental impacts of fertilizers could be minimized with proper use of fertilizers at the proper time and in adequate quality.¹⁹⁷ The quantity of fertilizers should

¹⁸⁸ Irrigation Development Investment Incentives Council of Ministers Regulations No. 162/2009, *Federal Negarit Gazeta*, 15th Year No. 24 Addis Ababa, 13 February 2009, Art. 4.

¹⁸⁹ J Richardson 'Agricultural development and land rights: Who wins and who dies?' (2011) 4.

¹⁹⁰ Interview made with Mr Goshime Teklu, Manager for Sub Farm 3, in 2012.

¹⁹¹ Interview made with Mr Simachew Kebede, Manager, in 2012.

¹⁹² V Kelly & E Crawford 'Policies and actions to stimulate private sector fertilizer marketing in sub-Saharan Africa' (2007) 1. See also JUI Agbahey *et al* 'Fertilizer supply chain in Ethiopia: structure, performance and policy analysis' 2015 (28) *Afrika Focus* 81.

¹⁹³ S Rashid *et al* 'Fertilizer in Ethiopia: An assessment of policies, value chain and profitability' (2013) 23.

¹⁹⁴ Fertilizers are plant nutrients that increase production. Federal Environmental Protection Authority, Environmental impact assessment guideline for fertilizer (2004) 5 (hereinafter referred to as EPA EIA guidelines for fertilizers).

¹⁹⁵ Federal Environmental Protection Authority (n 173 above) 8. Using Pesticides and fertilizers in agricultural production has diverse impacts on health of humankind and the environment. See JS Carpenter 'Farm chemicals, soil erosion, and sustainable agriculture' 1994 (13) *Stanford Environmental Law Journal* 191-204.

¹⁹⁶ Federal Environmental Protection Authority (n 173 above) 8. Nitrogen, phosphorous, and potassium are widely used fertilizers and the unused fertilizers by planted crops contaminate soil and water. Carpenter (n 195 above) 201.

¹⁹⁷ Federal Environmental Protection Authority (n 173 above) 7.

not be excessive as well.¹⁹⁸ The law must encourage farmers and investors to apply sustainable agricultural production system.¹⁹⁹

Ethiopia is a signatory to the Rio agreements and other international treaties. The Ethiopian EIA Guideline for Fertilizers provides for mitigating measures to be taken to mitigate environmental impacts of fertilizers. This includes:²⁰⁰

- Fertilizer plan;
- Preventing the leaching of nutrients by increasing green cover, sowing crops with elevated nitrogen demand;
- Use environmentally sound fertilizers;
- Evaluate and monitor the impacts;
- Apply environmental management systems (EMS);
- Proper handling and management of hazardous materials.

Since fertilizer is the determining input of agriculture, its timely supply, quality, quantity and distribution shall be regulated by law.²⁰¹ Fertilizers, as chemicals, require controlling and follow up to ensure that their use conforms to the standards during storage, distribution and handling.²⁰²

The environmental policy requires proper attention to be given to balance the quantity of chemicals and organic fertilizers.²⁰³ In addition, the Ethiopian Environmental Policy aspires for safeguarding human and environmental health by producing adequate regulation of agricultural chemicals.²⁰⁴ The social and environmental code of practice for agricultural investment requires the proper handling of fertilizers.²⁰⁵

Any fertilizer made ready for distribution and sale must confirm to the requirements of Ethiopian Standards,²⁰⁶ and must be registered by the National Fertilizer Industry Agency for use in Ethiopia.²⁰⁷ Fertilizers should be stored separately²⁰⁸ because storing fertilizers with

¹⁹⁸ Federal Environmental Protection Authority Environmental impact assessment guidelines on pesticides (2004) 10.

¹⁹⁹ Carpenter (n 195 above) 243.

²⁰⁰ EPA EIA guidelines for Fertilizer (n 194 above) 16.

²⁰¹ Fertilizer Manufacturing and Trade Proclamation No. 137/1998, *Federal Negarit Gazeta* 5th Year No. 14 Addis Ababa 24 November 1998, 2nd para. of the Preamble.

²⁰² Above, 3rd para. of the Preamble.

²⁰³ FDRE Environmental policy (n 5 above) para. 3.1.d.

²⁰⁴ Above, para. 3.1.p.

²⁰⁵ Social and Environmental Code of Practice Annex. No. 2.

²⁰⁶ Proclamation No. 137/98 (n 201 above), Art. 13(1).

²⁰⁷ Above, Art. 13(2) cum Art. 2(21).

²⁰⁸ Ethiopian Standard, Fertilizers Handling and Storage of Bagged Fertilizers, Art. 3.

agrochemicals will endanger the health of store workers.²⁰⁹ Fertilizer warehouses should be climatically suitable and dump proof. Appropriate ventilation shall be installed for fertilizers.²¹⁰

In principle, fertilizers must be packed and labelled. “Packing materials for fertilizer bags and labels affixed on bags shall comply with the relevant Ethiopian standards.²¹¹” According to the Standard, fertilizers should be labelled, and each container shall bear the types of fertilizer, net mass of fertilizer, and content of the nutrient as information.²¹² Large-scale farms are allowed to buy unpacked fertilizers.²¹³ This is an exception to the packed fertilizers. This may be because large-scale farms could use the unpacked fertilizer immediately. However, this requires appropriate handling of fertilizers not to cause environmental pollution and harms to people working on fertilizer.

Fertilizers production and use produce wastes. Appropriate treatment and disposal techniques should be applied to reduce the impacts of wastes released to the environment.²¹⁴ The following are hierarchical options in the waste management route.²¹⁵

Waste reduction at source;

Waste recycling and re-use;

Recovery of raw material and/or of energy;

Treatment of wastes;

Disposal of the residues from treatment, and of other unavoidable waste.

The Ethiopian government should regulate the distribution and use of pesticides by large-scale agricultural investors. The government must adopt and promote integrated pest management (IPM).²¹⁶ Any reasonable effort should be made to reduce health and environmental risks posed by pesticides.²¹⁷ The government must introduce necessary legislation for pesticide regulation and establish pesticide registration schemes and structures.²¹⁸ A person who sells

²⁰⁹ See Ethiopian Fertilizers Standards, Art. 2.1; Mesfin Admassu, ‘Environment and social assessment fertilizer support project, Project ID: 113156’ (2009) 18.

²¹⁰ See Ethiopian Fertilizers Standards (n 209 above) Art. 2.1; Mesfin, above, 18.

²¹¹ Proclamation No 137/98, (n 201 above), Art. 15(1).

²¹² Ethiopian Fertilizers Standards, Urea Specification, Art. 5.

²¹³ Proclamation No 137/98 (n 201 above), Art. 16(2).

²¹⁴ Environmental Protection Authority (n 173 above) 22.

²¹⁵ As above.

²¹⁶ FAO, International Code of Conduct on the Distribution and Use of Pesticides Revised version (2006) 3.7.

²¹⁷ Above, para. 5.2.3. cum 5.1.1

²¹⁸ Above, para. 6.1.2.

fertilizers not fulfilling the Ethiopian Standards is punishable with 5-7 years imprisonment and 25, 000 to 30,000 Birr fine.²¹⁹

The Authority is responsible for listing and inspecting and certifying the quality of fertilizers (manufactured in Ethiopia or imported).²²⁰ The Authority is also empowered to:

- decide fertilizers to be imported or manufactured locally;²²¹
- perform quality control;²²²
- follow up timely distribution of fertilizers.²²³

An inspector assigned by the Agency inspects the quality of fertilizers, and check its storage, and distribution is made according to the proclamation.²²⁴ The Management Board of the Agency is empowered to investigate appeals from the Agency and the Authority.²²⁵ Where bags do not meet the standards, the person is liable for criminal punishment of 3-5 years of imprisonment and 15,000 to 25,000 Birr fine.²²⁶

Bio-fertilizers are recommended since they increase the supply or availability of primary nutrients to the host plant. They increase water absorption keep soil biologically active.²²⁷ Pesticides should be regulated to minimize their impact on the environment as they have negative impacts on air, soil, water, and living things.²²⁸ Thus, using environmental management tools such as integrated pest management (IPM), cleaner production (CP), application of different cultivation practices, using natural enemies and pathogens etc are essential.²²⁹

At the international level the International Code of Conduct on the distribution and use of pesticide was adopted in 1985 by FAO and revised in 2003.²³⁰ It provides framework for management of all pesticides including those used in agriculture.²³¹ The Ethiopian Government

²¹⁹ Proclamation No 137/98 (n 201 above) Art. 26(2).

²²⁰ Above, Art. 21(1).

²²¹ Above, Art. 22(1).

²²² Above, Art. 22(4).

²²³ Above, Art. 22(6).

²²⁴ Above, Art. 23.

²²⁵ Above, Art. 25.

²²⁶ Above, Art. 26(5).

²²⁷ NSW Simiyu *et al* *Effective regulation of bio-fertilizers and bio-pesticides: A potential avenue to increase agricultural productivity* (2013) 2.

²²⁸ Federal Environmental Protection Authority *Environmental impact assessment guidelines on pesticides* (2004) 14.

²²⁹ Above, para. 17-19.

²³⁰ World Health Organization (WHO) *Public health pesticide registration and management practices by WHO Member States* (2011) 1.

²³¹ As above.

has enacted a law to minimize the adverse effects that pesticide use might cause to the environment by laying down controlling scheme.²³² ‘Pesticide’ is defined as ‘any substance or mixture of substances or a living organism’ intended for preventing, destroying or controlling any pest,²³³ unwanted species of plants or animals that cause harm,²³⁴ or insects.²³⁵

A pesticide should be registered after the efficacy, safety and quality is tested and approved by the Ministry of Agriculture. Formulating, manufacturing, importing, packing, re-packing, labelling, sell, distribute, store or use can be made only after the registration of pesticide.²³⁶ Certificate of registration will be issued, and the registration will be valid for five years²³⁷ Albeit it may be renewed.²³⁸ A prior permit is required to import pesticide²³⁹ and permit may not be given where the pesticide creates potentially harmful residues, among others.²⁴⁰

Occupational safety

The investor must provide facilities and protective clothing for safe handling of the pesticide to the employee who handles a pesticide.²⁴¹ In general, laws should include bio-fertilizers and bio-pesticides to promote productivity of the agriculture and protect the environment.²⁴²

2) Risk and resilience

The economic, social and environmental and financial issues should be considered in an integrated manner to maximize benefits for the host state, promote equitable distribution of risks and benefits, as well as respect the biodiversity and ecological balance.²⁴³ On top of that, the plan (GTP) emphatically provides that ‘the agricultural sector continues to be the major source of economic growth.’²⁴⁴ Agricultural strategy includes facilitating, and supporting the development of large-scale commercial agriculture, and produce high value crops. Furthermore, ‘concerted

²³² Pesticide Registration and Control Proclamation No. 674/2010 *Federal Negait Gazetta* 16th Year No. 52 Addis Ababa 25 August 2010, 2nd paragraph of the Preamble.

²³³ Above, Art. 2(20) (a).

²³⁴ Above, Art. 2(20)(b).

²³⁵ Above, Art. 2(20)(c).

²³⁶ Above, Art. 3(1).

²³⁷ Above, Art. 6.

²³⁸ Above, Art. 7.

²³⁹ Above, Art. 17(1).

²⁴⁰ Above, Art. 17(3)(c).

²⁴¹ Above, Art. 22(2).

²⁴² Simiyu *et al* (n 227 above) 1.

²⁴³ AU *et al Guiding Principles* (n 171 above) 20.

²⁴⁴ GTP I (n 34 above) 8. GTP II also considers agriculture to play an important leading role in producing natural resources in appropriate manner and make same available for the input of the industry. GTP II (n 34 above); Government of FDRE ‘Executive organs organization amendment study and recommendation’ (2015) 6.

support will be given to increase private investment in large commercial farms.²⁴⁵ It is also planned to promote multiple cropping to better cope with climate variability and ensure food security by using the country's water resources.²⁴⁶

Managers of large farm claimed that they are working to achieve sustainable economic development by using modern technologies in irrigation, selected seeds, and other inputs such as fertilisers.²⁴⁷ It is submitted that large-scale agricultural investors are producing more than once per annum using irrigation and other inputs like fertilizers. To be more productive and sustain development, they are required to use mechanised technologies in addition to the inputs mentioned.²⁴⁸

3) Safe product for the market

African States should ensure that large-scale agricultural investments provide market for the locality.²⁴⁹

Large-scale agricultural investment will produce export crops to earn foreign exchange for Ethiopia, it will expand crop production, creates employment opportunities in the localities where large-scale agricultural investment is undertaken.²⁵⁰ In practice, Tracon Trading PLC Farm is working to gain foreign exchange.²⁵¹

Contribution to local economy

Large-scale agricultural investments should improve the livelihoods of local communities.²⁵² States should ensure that large-scale agricultural investments create decent jobs especially for the youth.²⁵³ Agricultural development in Ethiopia is intended to promote production and achieve the Millennium Development Goals, by promoting food security. However, the problem of food security is not adequately addressed by the state.²⁵⁴

²⁴⁵ GTP I, above.

²⁴⁶ GTP I, above, 9.

²⁴⁷ Interview with Mr Abraham Mekonnen, Technique and Engineering Section Head, *BirAgriFarm, Fnote-Selam*, in his office; Interview conducted with an expert in the Investment Attraction and Helping Work Process who wants anonymity.

²⁴⁸ Interview conducted with Mr Yitbarek Woubet, Acting Head, Investment Attracting and Helping Work Process, *Amhara Regional State Industry and Trade Bureau*, on 07/16/2012, in his office (*BahirDar*).

²⁴⁹ AU *et al Guiding Principles* (n 171 above) 21.

²⁵⁰ Richardson (n 189 above) 16.

²⁵¹ Interview with Mr Meketa Adafre, Manager, Tracon Trading Farm, in 2012, (*Benishangul Gumz, Metekel*). This is in line with the TGP that gives priority for production for foreign market.

²⁵² AU *Guiding Principles* (n 167 above) principle 14.

²⁵³ AU *et al Guiding Principles* (n 171 above) 21.

²⁵⁴ Richardson (n 189 above) 19. The Large-scale agricultural investment agreements do not clearly provide securing food for the nation as the obligation of the investors. See agreements.

Inputs

The environmental policy of Ethiopia aspires that sustainable agricultural production can be achieved by using appropriate technologies.²⁵⁵ In addition, the law needs to improve the productivity of agriculture through extension and training services to private investors.²⁵⁶ The law envisages appropriate agricultural inputs to increase productivity of agriculture.²⁵⁷ In Ethiopia, one of the basic objectives of agricultural sector is to improve the productivity of crops.²⁵⁸ The focus in private large-scale farms will be to ensure production primarily for export and raw materials for industries. Thus, emphasis will be accorded for palm (date palm), tea, cotton, rubber tree and so on. Furthermore, by double cropping system, food crops production will be encouraged.²⁵⁹ Ensuring food security seems to be secondary according to the growth and transformation plan (GTP I). On top of that, agricultural research should be conducted to promote sustainable agricultural investment.²⁶⁰

According to the law, it should be ensured that a land would be used for an activity for better economic benefit.²⁶¹ Intensification of marketable farm products, is given due attention by the plan, by small and large farmers to produce crops for domestic and export markets.²⁶²

Fiscal and non-fiscal incentives play a role to create environments for the would-be investors. Fiscal incentives offered to encourage large-scale agricultural investments include duty exemptions, tax holidays while non-fiscal incentive include allowing expatriate employment, remittance of profits and other benefits to foreign investors.²⁶³

²⁵⁵ FDRE Environmental Policy (n 5 above) para. 3.1.b.

²⁵⁶ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 916/2015 *Federal Negarit Gazette*, 22nd Year No. 12 Addis Ababa 9 December 2015 Art. 19(1)(a). This Proclamation has repealed Proclamation No. 691/2010. See Proc. No. 916/2015, Art. 40(1)(a).

²⁵⁷ Above, Art. 19(1)(h).

²⁵⁸ Above, Art. 19(1)(a). Ensuring food security was one of the objectives of Ethiopian agriculture during the GTP I. See Proclamation No 691/2010, Art. 19(1)(i). One of the basic objectives of sustainable agriculture is ensuring food for the people. Until the late 1950s, Ethiopia was not only self sufficient in staple food, but also a net exporter of food gain. However, this has been changed as time passes, and at present more than half of the population is food unsecured. Domestic food supply has often failed to meet the food requirements of the people since the early 1970s in Ethiopia. Richardson (n 189 above) 19.

²⁵⁹ GTP I (n 34 above) 26.

²⁶⁰ Proclamation No. 916/2015 (n 256 above) Art. 19(1)(r).

²⁶¹ Revised Rural Land Administration and Use Determination Proclamation No. 133/2006 *Zikire Hig* 11th Year No. 18 *Bahir Dar* 29 May 2006, Art. 13(4)(a).

²⁶² GTP I, above.

²⁶³ AU *et al Guiding Principles* (n 171 above) 20.

B) Environmental principles of sustainable agriculture

The law recognises that the Ministry of Agriculture and Natural Resources is empowered to promote sustainable natural resources development and protection.²⁶⁴ This provision addresses sustainable agriculture.

Organic agriculture law

Organic agriculture law regulates and promotes organic agriculture. Organic agriculture has social, economic and environmental benefits. It is used for climate change mitigation by employing measures like enhanced soil carbon sequestration. It is ecosystem-friendly since it gives attention to minimum tillage and reduced use of pesticides, herbicides and synthetic fertilizers. It also plays a key role in combating desertification, preserving biodiversity and contributes for sustainable development.²⁶⁵ Organic legislation regulates the production of natural crops, labelling, certification and marketing. Organic standards vary across countries be adapted to the conditions of the nation.²⁶⁶

At the international level, Convention on Biological Diversity and UN Convention to Combat Desertification are important instruments that regulate organic agriculture. Convention on Biological Diversity (CBD) developed agricultural biodiversity to conserve, and use sustainably.²⁶⁷ It provides ecosystem approach in its three integrated objectives that are integrated land management, water and living resources that promotes conservation and sustainable use in an equitable manner.²⁶⁸

UNCCD requires improved productivity of land and rehabilitation, conservation and sustainable use of water resources.²⁶⁹ National plan to combat desertification should be made by the participation of the people.²⁷⁰ Organic agriculture involves less intensive use of land and it protects the biodiversity and the environment.²⁷¹

²⁶⁴ Proclamation No 916/2015 (n 256 above) Art. 19(1)(e).

²⁶⁵ E Morgera *et al* *Organic agriculture and the law* (2012) V- Vi.

²⁶⁶ Above, 15.

²⁶⁷ Above, 50.

²⁶⁸ Above, 51.

²⁶⁹ United Nations Convention to Combat Desertification in those countries experiencing serious drought and/or desertification, particularly in Africa (hereinafter referred to as CCD) Art. 2.2

²⁷⁰ Above, Art 9(1).

²⁷¹ Ethiopian Organic Agriculture System Proclamation No. 488/2006 *Federal Negarit Gazeta* 12th Year No. 21 Addis Ababa 8 March 2006 2nd Para. of the Preamble.

‘Organic agricultural product’ is defined as ‘a product which is produced, processed or handled and distributed without the use of synthetic chemicals and genetically modified organism.’²⁷²

The law is applicable to ‘the production, processing, packaging labelling, storing, transportation, marketing, exportation and importation of agricultural products which carry or are intended to carry labels referring to organic production methods.’²⁷³ The ministry of Agriculture is responsible for implementation of the Proclamation,²⁷⁴ and to harmonize the national organic agriculture system of Ethiopia with international practices.²⁷⁵

Environment impact assessment

Environmental and social impact assessment of large-scale agricultural investments should be undertaken to ensure their desirability prior to their approval.²⁷⁶ ‘Impact assessments should be based on prior, meaningful consultation of affected people.’²⁷⁷ The draft impact assessment should be accessible to the affected people in appropriate language and format. The comments made by the people should be taken into account before finalization of the impact assessment studies.²⁷⁸ The investments should be monitored to ensure the compliance with the conditions provided in the licence and the agreement. The Assessment should be accompanied by detailed plan to mitigate the identified risks.²⁷⁹

In Ethiopia, EIAs are routinely ignored by both the government and the investors in case of large-scale agricultural investment.²⁸⁰ In large-scale agricultural investment in Ethiopia, environmental impact studies are conducted after the land is allocated to investors, where it is conducted. For instance, Saudi Star started developing its land in mid 2009 while lease certificate

²⁷² Above, Art. 2(4).

²⁷³ Above, Art. 3.

²⁷⁴ Above, Art. 6 and 7.

²⁷⁵ Above, Art. 7(5).

²⁷⁶ AU Guiding Principles (n 167 above), Principles 15. The African Convention on the Conservation of Nature and Natural Resources requires environmental impact assessment to be undertaken at the earliest possible stage. African Union, African Convention on the Conservation of Nature and Natural Resources (2003) Art. XIV (2)(b).

²⁷⁷ AU *et al* *Guiding Principles* (n 171 above) 22.

²⁷⁸ Above, 22-23.

²⁷⁹ Above, 23.

²⁸⁰ UE Ofodie ‘Disciplining foreign investment in land in Africa: Mapping the role of international investment contracts and international investment law’ (2013) 20.

was issued in October 2010 and it submitted environmental study report in May 2011.²⁸¹ Thus, it may not be possible to ensure the sustainability of the environment.

Administration and control of pesticides is also important to protect the environment.²⁸² To ensure sustainable agricultural development in adequate moisture areas appropriate natural resources conservation practices will be done in scaling up strategy. Soil and water conservation, as well as forestry development, protection and utilisation works will be fully implemented through proactive and organised community participation.²⁸³

Large-scale agricultural investors in Ethiopia are needed to conserve and utilise natural resources.²⁸⁴ Natural resource includes renewable resources, such as soil, water, fauna and flora.²⁸⁵ The Five Year Plan, GTP II gives due attention to green economy that responds to climate change.²⁸⁶ Implementing environmental laws of Ethiopia is indispensable to achieve green economy.²⁸⁷

Land and Soil Protection

Land use planning

Being member to the African Convention on the Conservation of Nature and Natural Resources, Ethiopia shall prevent land degradation. Ethiopia must develop long-term integrated strategies for the conservation and sustainable management of land resources that include vegetation and soil.²⁸⁸ Further, Ethiopia must develop land Use plan that improve soil conservation and promote sustainable large-scale investment.²⁸⁹ A law that responds to the (customary) rights of small farmers, pastoralists, forest dependent people and indigenous people

²⁸¹ GC Schoneveld *The Governance of large-scale farmland investments in Sub-Saharan Africa: A comparative analysis of the challenges for sustainability* (2013) 64.

²⁸² Proclamation No 916/2015 (n 256 above) Art. 19(1)(g). Investors do not perform according to their environmental protection plan incorporated in EIA. Interview made with Mrs Kibra Alemseged G/Egziabher Director, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency, 2016.

²⁸³ GTP I (n 34 above) 22. In Tigray where a project is being implemented farmers are working to eliminate using fossils fuel in the form of chemical fertilisers. Swedish Society for Nature Conservation 'Ecological in Ethiopia' (2008) 8. They also employ diversification of crops and cropping methods. Above, 14.

²⁸⁴ Social and Environmental Code of Practice, 3(Annex).

²⁸⁵ African Convention on the Conservation of Nature and Natural Resources, Art. 3(a).

²⁸⁶ FDRE GTP II (n 34 above) 53-4, and 70.

²⁸⁷ Above, 54.

²⁸⁸ African Convention on the Conservation of Nature and Natural Resources, Art. VI (1).

²⁸⁹ Above, Art. VI (3) (a) and (B) (i).

can promote sustainable large-scale agricultural investment.²⁹⁰ The Kigali Declaration requests African States to develop and implement land use master plan to guide agricultural investment.²⁹¹

Ethiopia should promote inclusive land use planning at the federal and regional or local levels so as to address multiple demands of land to use resources equitably and sustainably.²⁹² The rural development policy and strategies of Ethiopia requires proper use and management of agricultural land that implies productivity. Natural resource conservation is the basis for sustainable large-scale agricultural development.²⁹³ The environmental policy requires the large-scale agricultural investors in low lands of Ethiopia to undertake land management system that yields high out puts.²⁹⁴

Land use planning is important to achieve sustainable large-scale agriculture. However, due to lack of information, bamboo area in *Benishangul Gumz* Regional State was included under the land for large-scale agricultural investment. Now, land use plan is being prepared both *Benishangul Gumz* and *Gambella* Regional National States. Currently, land which was given for the Indian company is reallocated to *Gambella* National Park.²⁹⁵

Ethiopia is committed to conserve and utilize natural resources sustainably and therefore adopt sustainable land and water management systems. Thus, watershed management, water harvesting, irrigation development are being implemented.²⁹⁶ In Tigray Region, a sustainable agricultural development project has been implemented, that employs sustainable cultivation methods to restore the water balance and decrease the use of artificial fertilisers.²⁹⁷

²⁹⁰ See generally M Behnassi & S Yaya 'Land resource governance from a suitability and rural development perspective' in M Behnassi *et al* (eds.) *Sustainable agricultural development: Recent approaches in resource management and environmentally-balanced production enhancement* (2011).

²⁹¹ African Parliamentarians *Making agricultural investment work for Africa: Final declaration* (2013) third paragraph.

²⁹² AU *et al* (n 171 above) 11.

²⁹³ See Lakew Desta *et al* (eds) *Community-based participatory watershed development: A guideline* (2005) 8.

²⁹⁴ FDRE Environmental Policy (n 5 above), para. 3.1.i.

²⁹⁵ J Keeley *et al* *Large-scale land deals in Ethiopia: Scale, trends, features and outcomes to date* (2014) 47.

²⁹⁶ Federal Democratic Republic of Ethiopia Ministry of Finance and Economic Development & Ministry of Agriculture and Rural Development, 'Agricultural Growth Program' (GASP SP GAP Financing) (2010) 5.

²⁹⁷ The project started in 1996 and has been managed by the Institute for Sustainable Development (ISD), the Bureau of Agriculture and Rural Development (BoARD) in Tigray, Mekele University, the local communities and their local authorities. Now it is successful. See Swedish Society for Nature Conservation (n 283 above) 8.

Sustainable land management (SLM) takes into account lessons learnt from the research done on soil and water conservation in Ethiopia.²⁹⁸ Sustainable land management is defined as the use of land resources like water and soil to fulfil human needs while assuring the long-term productivity of the land as well as protecting the environment.²⁹⁹

Water resource management law

This law regulates water particularly by participating the local society for sustainable development and poverty reduction.³⁰⁰ Ethiopia is obliged to prevent water from pollution. It should develop and implement policies regarding the planning, conservation, utilization of water resources.³⁰¹ It should conserve water in irrigated agriculture (large-scale agricultural investment) to improve food security and sustainable agro-based industrialization.³⁰²

Wetlands do have environmental functions and they deserve wise use.³⁰³ Integrated approach is essential to preserve wetlands in Ethiopia.³⁰⁴ Integrated approach to water resources should balance the use of water, mining cost with safeguarding the environment.³⁰⁵ The environmental policy of Ethiopia requires integrated management of protection of wetland into conservation, development and management of water resources.³⁰⁶

Research

In the agricultural sector, research is planned to ‘focus on crop, livestock, natural resources and agricultural mechanisation,’ and the strategy to supply technologies will include primarily importing and adapting foreign technologies, and secondly generating technologies from the national agricultural systems.³⁰⁷ In general, the linkage between research and extension-farmers is felt necessary to identify technology problems and promote solutions; and to use improved

²⁹⁸ Mitiku Haile *et al* *Sustainable land management - A new approach to soil and water conservation in Ethiopia* (2006) 16.

²⁹⁹ Above, 164.

³⁰⁰ AB Dixon & AP Wood ‘Local Institutions for wetland management in Ethiopia: Sustainability and state intervention’ in B Koppen *et al* (eds.) *Community-based Water law and Water Resource management Reform in Developing Countries* (2007) ix.

³⁰¹ *African Convention on the Conservation of Nature and Natural Resources* (n 288 above) Art. VII (2).

³⁰² Above, Art. VII (4).

³⁰³ Dixon & Wood (n 300 above) 130.

³⁰⁴ Federal Democratic Republic of Ethiopia Ministry of Water Resources Ethiopian Water Sector Policy (2001) para. 2.1.1.1; RU Chance ‘Plant communities of a wetland in western Ethiopia’ unpublished Master thesis, University of Oslo, 2006 5; See Hagos Gebreslassie, *et al* ‘Wetland degradation in Ethiopia: Causes, consequences and remedies’ (2014) 4 *Journal of Environment and Earth Science* 40-48.

³⁰⁵ Transitional Government of Ethiopia, *National Conservation Strategy Volume I, National Policy on the Resource Base, its utilization and planning for sustainability* (1994) para. 3.7.

³⁰⁶ FDRE Environmental policy (n 5 above) Para. 3.4. b.

³⁰⁷ GTP I (n 34 above) 23.

technologies and practices.³⁰⁸ The environmental policy highlights that research in low lands with the aim to develop appropriate farming and management systems to bring about sustainable agriculture must be conducted.³⁰⁹

Ethiopia has established an Agricultural Transformation Agency with the basic objective of identifying constraints through studies and recommending solutions to ensure sustainable agriculture.³¹⁰ The Agency is empowered to conduct studies on input supply system and to supply proven technologies to farmers in the required quality and quantity.³¹¹ It also conducts study to ensure the agricultural extension system is structured and staffed with capable personnel so as to support the agricultural transformation.³¹²

Biodiversity

Climate change is real and the large-scale agricultural investor shall respond to it appropriately. Climate change adaptation of the agricultural investment is essential and biodiversity is an important component of adaptation. The investors must adopt the solution that fits to the locality.³¹³

Environmental management system

Large-scale agricultural investors should use environmental management system (EMS) to protect the environment. Environmental management system (EMS) is ‘the overall management system that includes organizational structure, planning activities, responsibilities, procedures, processes and resources for developing implementing, achieving, reviewing and maintaining the environmental policy.’³¹⁴ EMS requires that investors adopted their environmental policy at the business level, and prevents environmental pollution; plan an EMS that includes developing quantifiable objectives and targets to reduce the large-scale farm impacts on the environment.³¹⁵

³⁰⁸ Above, 22.

³⁰⁹ FDRE Environmental policy (n 5 above), para. 3.1.i.

³¹⁰ Agricultural Transformation Council and Agency Establishment Council of Ministers Regulations. No. 198/2010, *Federal Negarit Gazeta* 17th Year No. 20 Addis Ababa 1 March 2011, Art. 9.

³¹¹ Above, Art. 10(3).

³¹² Above, Art. 10(5).

³¹³ C Sere ‘Perspectives on the impact of climate change on agriculture and food security in Ethiopia’ in International Livestock Research Institute (ILRI) *Dialogue on Ethiopian agricultural development* (2009) 108.

³¹⁴ EPA EIA guideline for fertilizers (n 194 above), 19.

³¹⁵ Above, 20.

In addition, investors are required to check and undertake corrective measures in implementing the EMS.³¹⁶

C) Social sustainability

Since large-scale agricultural investment has an impact on human rights member States of African union are required to provide the rights of stakeholders and establish institutions to implement those rights.³¹⁷ Human rights of workers and local community should be promoted and implemented through these guiding principles.³¹⁸ States are obliged to ensure that legal, judicial and institutional arrangements to large-scale agricultural investments are functional and accessible at local level. In this case, labour laws are important.³¹⁹

However, there is no single provision in the contracts that require investors to conduct neither social impact assessment nor sustainability assessment.³²⁰ Therefore, the social principles of sustainable large-scale agricultural investment could not be achieved.

Employment, training & education

Local communities do not actively participate in employment.³²¹ Employment is a right of persons.³²² Agricultural workers also have the right to education.³²³

Safety and health

Large-scale agricultural investors undertake the obligation to adopt high standards for their workers. According to the ILO Safety and Health in Agriculture Convention, and Recommendation No. 192, agricultural workers have the same rights and protection regarding their health and safety as other categories of workers.³²⁴ The large-scale agricultural investor is obliged not to cause harm to the health of the society.³²⁵

³¹⁶ Above, 21.

³¹⁷ AU Guiding principles (n 167 above), Principe 3.

³¹⁸ See AU *et al* (n 171 above) 7-8.

³¹⁹ Above, 9.

³²⁰ See Ofodie (n 303 above) 21.

³²¹ Schoneveld (n 304 above) 72.

³²² Universal Declaration of Human Rights, Art.23(1); FDRE Constitution, (n 6 above), Arts. 41(2) and 42.

³²³ Convention against Discrimination in Education (1960), particularly Art. 4 and 5; FDRE Constitution (n 6 above) Art. 41(4).

³²⁴ Richardson (n 210 above) 28.

³²⁵ Proclamation No. 133/2006 (n 212 above) Art. 20(3).

Community participation is one of the social requirements of sustainable large-scale agricultural investment.³²⁶ However, no consultation has been made by the Ethiopian Government or Saudi Star with the local community regarding large-scale agricultural investment made by Saudi Star in *Gambella* near *Alwero* River.³²⁷

Coming to practice, Tracon Trading PLC Farm that invests in *Gambella* Regional State is operating a large farm investment with the aim to make the local people beneficiary from it by transferring technology to farmers and creating employment. It also teaches the local people how to plough and foster civilization. In addition, farmers sell their products to the local people with low price. It also creates opportunity for farmers to use selected seeds.³²⁸

Non-Discrimination

Women are playing a vital role in keeping the bio-diversity in farming, particularly in Tigray Region by reserving local varieties of crops and breeds.³²⁹ The Ethiopian Constitution guarantees women equal rights with men.³³⁰ Ensuring access of women to key resources like land, forest and water is essential, and thereby the involvement of women in natural resource management would increase.³³¹

On the other hand, some believe that the large-scale agricultural investment undertaken in the *Benishangul Gumz* Region can never bring about sustainable agricultural development if it continues as it is undertaken now because activities are not undertaken in a good manner as required.³³² In addition, the investment is not fully undertaken.³³³ Moreover, some investors use traditional way of cultivation that will never bring about sustainable agricultural development.³³⁴

³²⁶ See Social and Environmental Code of Practice (n 180 above) Annex 1-Bronze/minimum level requirements and compliance of the Social and Environmental Code of Practice.

³²⁷ Richardson (n 244 above) 13.

³²⁸ Interview made with Mr Adafre, (n 307 above); Interview made with Mr Lemi Biratu, Head, (and Vice Head) Environmental Protection, Land Administration and Use, in 2012; Interview with Mr. Abiyot Abeje, Acting Head, *Metekel* Zone Administration, and Head Agriculture Bureau, in 2012.

³²⁹ Since poor women play role in agriculture, resource management and maintenance of natural assets, strategies should address the gender issue. Swedish Society for Nature Conservation (n 304 above) 21- 22.

³³⁰ See FDRE Constitution (n 6 above) Arts. 35 and 36.

³³¹ FDRE Environmental Protection Authority (n 173 above) 24.

³³² Interview made with Mr Desalegn Tesema, V/Head, Investment Office, *Benishangul Gumz* Regional State, in 2012.

³³³ Only 4% of the investors are undertaking their investment, and the writer observed that the investors are not working with their full capacity and cultivating only a certain portion of the land given to them. See Interview made with Mr Fekadu Melaku, Acting Head, Environmental Protection, Land Administration and Use Department, in 2012.

³³⁴ Above.

There is also a knowledge gap and lack of scientific knowledge even on the part of the government employees and the investors as to how to increase production without harming the environment. Since large-scale agricultural investors or managers are not professionals in agriculture, they do not implement agricultural practices that will help to achieve sustainable development. On top of that, there is lack of personnel to implement the relevant laws properly.³³⁵ Therefore, one can conclude that large-scale agricultural investment in Ethiopia can never achieve sustainable agricultural development. Large-scale agricultural investment, some argue, is an investment model that is least likely to bring about sustainable benefits to local community.³³⁶

D) Cultural sustainability

Culture has become the forth pillar of sustainable development. The FDRE Constitution guarantees this as a right. Cultural heritage in Ethiopia is a basis for every facet of daily life that provides a powerful and socially cohesive force. It is a major attraction for tourists and is important for the development of the tourism industry.³³⁷ Cultural and natural heritages are given due attention in the Ethiopian Environmental Policy. The heritage conservation should be promoted as integrated with the social and economic development of the country³³⁸ and be sustainable.³³⁹

In general, Ethiopia is undertaking large-scale agricultural investment without fully implementing requirements of sustainability, but having an ambition. It is paramount to ensure that large-scale agricultural investment is not speculative but productive.³⁴⁰

³³⁵ Interview made with Mr Assefa Onani, Legal Expert in the Directorate-Ministry of Agriculture (MoA), on 13/04/2012, at 9:00- 5:00 AM (Morning), at the vicinity of St. George Church, Piazza, Addis Ababa. Ramaswany identified two basic problems of large-scale agriculture investment in Ethiopia. They are, they faced with unqualified management teams since managers do not have experience in large scale commercial agriculture above 3000 ha in one location. Secondly, large-scale agriculture investors do not give proper attention for human development rather they heavily invest on machineries. D Ramaswany 'Comments on agriculture investment in Ethiopia' available at: www.kysq.org/docs/ramaswany.pdf Last visited on 22 July 2016, 1-8.

³³⁶ J Karlsson *Challenges and opportunities of foreign investment in developing country agriculture for sustainable development* (2014) 5.

³³⁷ FDRE Environmental policy (n 5 above), para. 1.3.

³³⁸ Above, para. 3.10. a.

³³⁹ Above, para. 3.10.c.

³⁴⁰ Keeley *et al* (n 318 above) 51.

5.5.4 Ethiopian green economy law

Under this part of the thesis, Ethiopian green economy law will be considered.

General

Governments have a central role to play in putting in place appropriate development strategies, and legislations to realize green economy.³⁴¹ The Future We Want demands countries to implement the green economy with policies that promote sustainable development and that create inclusive, equitable economic growth and job creation particularly for women, youth and the poor.³⁴²

Ethiopia has adopted climate resilient³⁴³ green economy strategy. The Ethiopian Government believed that green growth is an opportunity to realise the country's huge potential in renewable energy and it is also necessity to arrest agro-ecological degradation that threatens to trap millions of Ethiopians in poverty.³⁴⁴

The principle of resilience demands managers

to analyse the long-term effects of their decisions, in order to protect the interests of future generations and of nature itself, which can be understood as the preservation of the ecosystem capacity to reorganize and maintain itself...³⁴⁵

the principle of resilience enhances a management system that preserves the ecosystem capacity to recognize and maintain itself.³⁴⁶

The principle of resilience needs to consider the interests of the peoples through participation. Law ensures participation of the people to consider their interests.³⁴⁷ Environmental law influences human decisions towards the achievement of ecosystem resilience by consolidating a new legal principle, the principle of resilience, and by applying the principle

³⁴¹ United Nations Environment Programme 'Green economy Why a green economy matters for the least developed countries' (2011) 4.

³⁴² United Nations The Future We Want Para. 62.

³⁴³ Climate resilience is the ability to manage the climate change brought by weather stress and shock and it is a means to cope up with it. The economy protected against the negative impacts of extreme climate events (weather and climate change) so that the well-being of the people and the economic growth are preserved is called a climate resilient economy. Building a climate resilient economy thus means adapting efficient economy responds to climate change that minimizes the potential damages whilst maximizing benefits. Federal Democratic Republic of Ethiopia (FDRE), *Ethiopia's Climate Resilient Green Economy Strategy* 7.

³⁴⁴ Meles Zenawi, late Prime Minister, in Federal Democratic Republic of Ethiopia, above 5.

³⁴⁵ LHMdL Demange 'The principle of resilience' (2013) 30 *Pace Environmental Law Review* 695.

³⁴⁶ As above.

³⁴⁷ The FDRE Constitution guarantees participation the public in public projects. FDRE Constitution (n 5 above) Art. 92(3).

to relevant areas of environmental law the principle takes into account conservation and existing environmental law principles and concepts, especially the concept of intergenerational equity.³⁴⁸

Ethiopia accepts green economy as ‘a path to sustainable development.’³⁴⁹ It is embedded in the development agenda of the country. Moreover, it is intended to eradicate poverty by promoting sustainable development.³⁵⁰ Furthermore, it is flexible and innovative to learn from experience.³⁵¹ This is in line with the concept that green economy which requires green economy not to be based on ridged rules. Agriculture that increases productivity builds resilience to climate change; and reduces and/or removes green house gases emission is known as climate-smart agriculture (CSA).³⁵²

Green economy laws in Ethiopia

The Ethiopian Constitution aspires for citizens to live in a clean and healthy environment.³⁵³ Besides, Ethiopian peoples, nations and nationalities have the right to sustainable development³⁵⁴, and green economy is a means to achieve this constitutionally guaranteed right.

Ethiopia also adopted international conventions that are the basis for sustainable development and green economy. It has adopted the Convention to Combat Desertification so as to alleviate threats of desertification.³⁵⁵ Moreover, Ethiopia has adopted International treaty on plant genetic resources for food and agriculture³⁵⁶, the UN Framework on Climate Change (UNFCCC)³⁵⁷ as well as the Kyoto Protocol to the UNFCCC.³⁵⁸ The Kyoto protocol demands the 36 industrial countries excluding the United States of America to reduce CO₂ emission by 7% and below the 1990 baseline level by 2012.³⁵⁹

³⁴⁸ Demange (n 368 above) 711-14.; public participation in Environmental impact in projects that would affect the environment is also provided under the Environmental Impact Assessment proclamation. Environmental Impact Assessment Proclamation Proc. No. 299/2002 *Federal Negarit Gazeta* 9th Year No. 11 Addis Ababa 3 December 2002, Art 15.

³⁴⁹ FDRE, (n 173 above) 49; See also Federal Democratic Republic of Ethiopia (FDRE) *G.M.V National Strategy and Action Plan for the Implementation of the Great Green Wall* initiative in Ethiopia (2012) 31.

³⁵⁰ FDRE *Ethiopia's Vision for a climate resilient green economy (crge vision)* 12-13.

³⁵¹ Above 23.

³⁵² FAO *Climate-smart agriculture Source book* (2013) ix.

³⁵³ The FDRE Constitution (n 6 above) Art. 44.

³⁵⁴ Above, Art. 43.

³⁵⁵ The country ratified the Convention by Proclamation No. 80/1997.

³⁵⁶ Ethiopia ratified it in 2003.

³⁵⁷ Ratified by Ethiopia on 31 May 1994.

³⁵⁸ Ratified by Ethiopia on 21 February 2005.

³⁵⁹ S Ferrey ‘Gate keeping global warming: The international role of environmental assessments and regulation in controlling for future power development’ (2009) 19 *Fordham Environmental Law Review* 118.

Being a member of the African Union, Ethiopia has endorsed a number of regional instruments to promote green economy. Thus, African countries have adopted the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary movement and management of Hazardous Wastes within Africa (1991) to protect human health and the environment.³⁶⁰ Therefore, Ethiopia as party to the Convention is obliged to ‘... take appropriate legal, administrative and other measures within...’ its jurisdiction to ‘prohibit the import of all hazardous wastes...’³⁶¹

It is essential to integrate development and environmental protection, but it is not clearly made in Ethiopia. The environmental protection seems to be treated separately rather than treated in an integrated manner.³⁶²

Ethiopia has identified four pillars of the Climate-Resilient Green Economy (CRGE) strategy focuses. They are: agricultural and land use efficiency, developing forests to increase carbon emission and economic capacity, renewable clean energy, and using appropriate technologies in industry, transport and buildings.³⁶³ Now let us discuss the relevant laws and programmes regarding green economy in the agriculture sector.

Ethiopian agriculture is prone to climate change and there could be soil erosion due to rain as well as damage to crops.³⁶⁴ Ethiopia’s Programme of Adaptation Climate Change (EPACC) has been adopted by the government with the purpose to address agriculture climate change problem, among others.³⁶⁵ Moreover, the Naturally Appropriate Mitigatory Actions (NAMAs) demands the application of compost to increase the fertility of the land, and increased carbon retention by

³⁶⁰ See Bamako Convention on the ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa (1991) paras. 1, 2 and 3 of the preamble of the convention. The 3rd paragraph of the preamble reads: ‘...Aware of the risk of damage to human health and the environment caused by transboundary movements of hazardous wastes.’ Above.

³⁶¹ Above, Art. 4. Bamako Convention was adopted in Bamako, Mali on 30 January 1991, and entered into force on 22 April 1998. Ethiopia has signed the Convention on 24/07/2003 and the date of deposit was 28/08/2003. See African Union.

³⁶² See N Oates *et al* ‘The ‘mainstreaming’ approach to climate change adaptation: insights from Ethiopia’s water sector’ (2011) 4.

³⁶³ Federal Democratic Republic of Ethiopia Environmental Protection Authority *United Nations Conference on Sustainable Development (Rio+20) National Report of Ethiopia* (2012) 45.

³⁶⁴ 79% of Ethiopian farmland is a slope of greater than 16%, while 25% have a slope greater than 30%, FDRE (n 194 above) 8.

³⁶⁵ Above, 12.

soil. It also requires the implementation of agro-forestry practices for livelihood and carbon sequestration.³⁶⁶

Agriculture must have to increase productivity to secure food and income of the farmer whilst reducing emissions.³⁶⁷ Agriculture intensification is taken as a measure to make agricultural productivity sustainable.³⁶⁸ Furthermore, sustainable land use via efficient agriculture is a method to combine economic growth in the agriculture sector with low GHG emissions.³⁶⁹ Irrigating degraded land and using lower emitting techniques are also remedies.³⁷⁰ However, the government does not clearly address the land for large-scale agricultural investment, which is one pillar of the growth and transformation plan (GTP I).

Irrigation needs water conservation management laws. Thus Ethiopia has adopted water sector policy in 2001 which provides basis for irrigation policy. The policy envisions sustainable and reliable irrigation to be employed so as to enhance productivity in the agriculture sector.³⁷¹ The overall objective of the irrigation policy is to develop irrigation that is efficient and sustainable without degrading the fertility of fields and water resources base.³⁷² The policy further envisages for the development of irrigation that does not have adverse effect on the environment.³⁷³

In addition, irrigation development strategy is developed by the Ethiopian government in 2001 having the principal objective

³⁶⁶ NAMAs -6 in FDRE Ethiopia's Vision for a climate resilient green economy (?) 21.

³⁶⁷ FDRE Environmental Protection Authority GMV *National Strategy and Action Plan for the Implementation of the Great Green Wall* (n 349 above) 31.

³⁶⁸ FDRE Environmental Protection Authority (n 173 above) 5; Federal Democratic Republic of Ethiopia Rio+20 (n 363 above) 46.

³⁶⁹ FDRE Environmental Protection Authority (n 173 above) 6. The Ethiopian government believes that sustainable land use in agriculture and hydropower for sustainable energy are cornerstones of the green economy. Federal Democratic Republic of Ethiopia Environmental Protection Authority *United Nations Conference on Sustainable Development (Rio+20)* (n 363 above) 14.

³⁷⁰ Above, 8.

³⁷¹ The Federal Democratic Republic of Ethiopia Ministry of Water Resources *Ethiopian Water Sector Policy* (2001) 29-30.

³⁷² Above, para. 2.2.2.1. One of the detailed objectives of the irrigation policy is: 'promotion of irrigation study, planning and implementation on economically sound basis as well as development of sustainable, productive and affordable irrigation farms'. Above, para 2.2.2.2.3 Detail objective.

³⁷³ Above, para 2.3.2.3 E.

...to exploit the agricultural production potential of the country to achieve food self sufficiency at the national level, including export earnings, and to satisfy the raw material demand of local industries, but without degrading the fertility and productivity of country's land and water resources base....³⁷⁴

The strategy states environmental impact assessment as a tool to control environmental damage due to irrigation. Technical and technological options should be applied to minimize loss of forests, protect erosion, siltation, salination and pollution, among others.³⁷⁵

Moreover, water proclamation was proclaimed with the purpose to protect and utilize water resource of Ethiopia for the highest economic and social benefits of the peoples of Ethiopia. It also envisages proper water management including irrigation.³⁷⁶ The Proclamation regulates water use management by embedding the permit principle that requires permit to undertake irrigation, except traditional irrigation.³⁷⁷ If water use for irrigation causes permanent depletion of the water resource, the water use permit shall be terminated.³⁷⁸

Agriculture should not only meet new demands for food, fuel and fiber, but it should also not harm the environment and create sustainable livelihoods. This is the essence/demand of green economy in agriculture sector.³⁷⁹

Conclusion

Ethiopia adopted international instruments on sustainable development and the FDRE Constitution stipulates sustainable development as one of human rights, and various legislation incorporate the concept. The country adopted various policies, strategies and plans so as to reduce poverty and achieve sustainable development. However, the implementation of laws is very limited due to lack of human capacity, poor coordination among the federal and regional environmental agencies. Furthermore, the investment law does not make EIA a pre-requisite for

³⁷⁴ The Federal Democratic Republic of Ethiopia Ministry of Water Resources *Ethiopian Water Sector Strategy* (2001) 23. The strategy is considered as a means to translate the water sector policy in general and the irrigation sector policy in particular. See above, 1.

³⁷⁵ Above, 20.

³⁷⁶ Ethiopian Water Resources Management Proclamation No. 197/2000, *Federal Negarit Gazeta* 6th Year No 25 Addis Ababa 9 March 2000, Art. 3.

³⁷⁷ Above, Art. 6(4) cum Art. 12(1)(b). Traditional irrigation is defined as '...peasant managed irrigation that supplies water to land at a maximum rate of one or one little per second (1.1/s) or not more than one hectare of land per peasant for his/her subsistence use' Above, Art. 2(9). Water use is defined as '... the use of water for drinking, irrigation, industry, power generation, transport, animal husbandry, fishing, mining and uses of water for other purposes.' Council of Ministers Ethiopian Water Resources Management Regulations No. 115/2005, *Federal Negarit Gazeta* 11th Year No 27 Addis Ababa 29 March 2005, Art. 2(6).

³⁷⁸ Regulations No. 115/2005, above, Art. 6(3)(d).

³⁷⁹ Agriculture is expected to meet the demands for predicted 9 billion people by 2050. Food and Agriculture Organisation 'How to feed the world in 2050' (2009) 1.

investment permit, and investors are granted investment licence without going through EIA. Thus, this legal lacuna creates a deficiency in law that would boil down all efforts to achieve sustainable development futile in Ethiopia.

Overall, investment law can play a great role in achieving the goal of sustainable development in Ethiopia if the law is good and enforced properly. Thus, the international investment law as well as the domestic law of Ethiopia including the lease contract must regulate the balance between development environmental protection and ensure human rights protection.

In Ethiopia, sustainable agriculture is an environmentally friendly agricultural practice that promotes agricultural productivity by using the limited natural resources to satisfy the present generation without compromising the interest of the coming generations. This considers the economic sustainability, environmental protection and social sustainability as well as cultural sustainability, which are pillars of sustainable agriculture.

The Ethiopian law empowers the Ministry of Agriculture to formulate and facilitate the implementation of a strategy for natural resources protection and development through sustainable agricultural development.³⁸⁰ Ethiopia adopted Agricultural and Rural Development Policies and Strategies (RADPS) and Food Security Strategy (FSS) in 2002, to promote sustainable agriculture. The environmental policy under section 3, envisages sustainable agricultural development that promotes accelerated production by using appropriate technologies, environmental protection, and social development. In addition, the GTP aims at sustaining faster and higher economic growth. The country's agricultural strategy *inter alia* envisages sustainable large-scale agricultural development. The use and storage of fertilizers and chemicals is also regulated by law.

Green economy is a system that fosters efficient and low carbon economic development that contributes to the protection and enhancement of natural resources. It aspires for improved standard of human being and social equity whilst reducing environmental risks as well as ecological scarcities. Thus it is a path to sustainable development and poverty reduction. Green economy is an economic policy strategy to achieve sustainable development. Green economy differs from green growth particularly on the point that the latter does not pay due attention to social issues unlike the former. Green economy for Africa and Ethiopia is an agenda of

³⁸⁰ Proclamation No. 916/2015 (n 277 above), Art. 19(1)(e).

development, poverty reduction and employment creation. Therefore, Ethiopia has established green economy vision and strategy recently.

Law has a great role to play in the implementation of green economy. At the international arena, laws that can govern green economy are not developed well yet, and the same is true for Ethiopia. Sustainable development can be taken as a baseline to govern green economy since green economy is economic policy strategy to achieve the objectives of sustainable development.

Since Ethiopia is a party to most of international environmental agreements, and the African Countries, those multilateral agreements are applicable to govern green economy in Ethiopia as since the international conventions the country ratified according to the FDRE Constitution, are integral part of the law of the country.

The Ethiopian Climate resilient green economy strategy provides a policy and strategic directions to implement green economy in the country. In addition, the FDRE Constitution and the environmental policy are the cornerstones for green economy. The Convention to Combat Desertification, the UN Framework on Climate Change (UNCFCCC) are basis for sustainable development law in Ethiopia. Ethiopia focuses on four pillars in the implementation of green economy; of the first is agriculture and sustainable land use. Ethiopia adopted Programme of Adaptation Climate Change (EPACC) to solve agricultural climate change problems. In addition, to the Nationally Appropriate Mitigatory Actions (NAMAs) requires the application of compost to increase the land's Fertility. Adopting agro-forestry practices is the other policy direction to promote carbon sequestration in the agriculture. Using modern technologies and intensification as well as irrigating degraded land in order to decrease the pressure on forest is the policy direction of green economy in Ethiopia. Here the law must have to play a vital role in ensuring the implementation of green economy in the agriculture sector. Forest and wild life proclamation, water policy and laws that are intended to protect water in irrigation of land to be sustainable should be effectively implemented. The green economy strategy does not clearly address the issue of large-scale agricultural investment and land use. This may create a legal lacuna and environmental protection may be neglected.

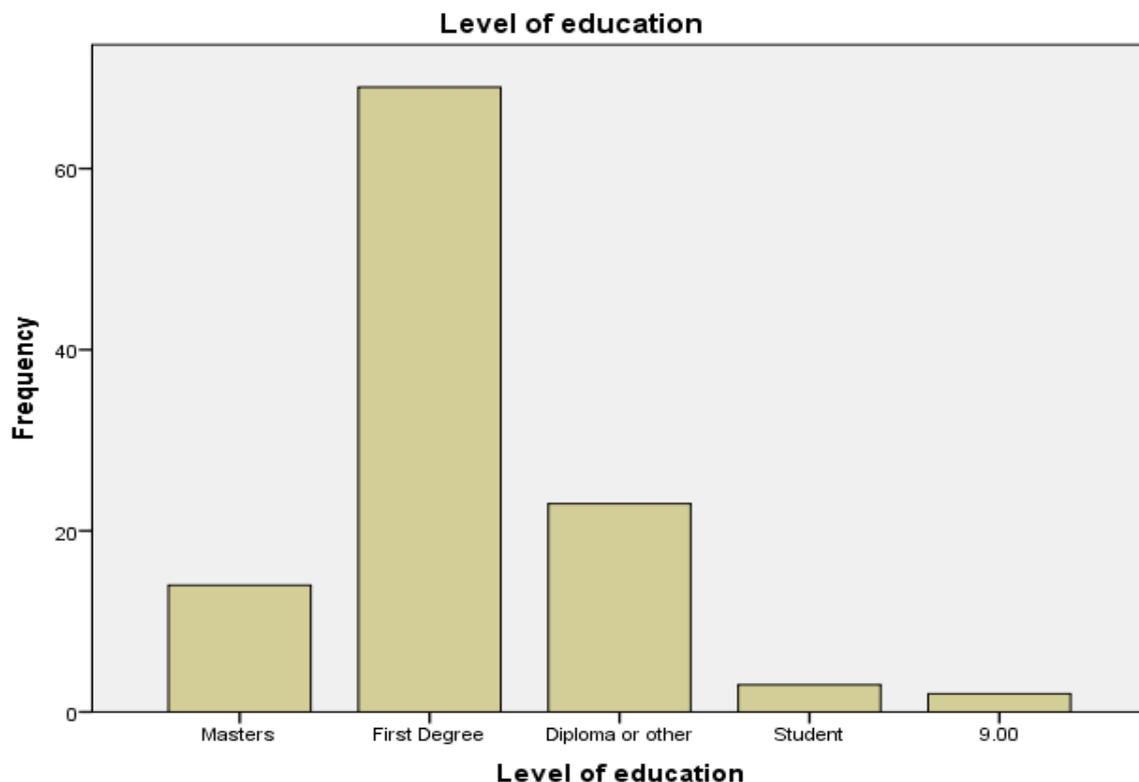
Chapter Six: The practice of law of sustainable large-scale agricultural investment in Ethiopia

6.1 Introduction

To investigate the practice of laws and principles that are applicable to large-scale agricultural investment, the researcher has conducted interviews, distributed questionnaires and made observations of the farms. Available cases also are analysed. This chapter is meant to present and analyse the practical data gathered. First, the level of education of the respondents is provided to show the reader that the respondents are able to understand and properly respond to the questions. In addition, the profession of the respondent is indicated. Then, the data is presented and analysed against the legal principles applicable to large-scale agricultural investment. Finally, a conclusion is provided.

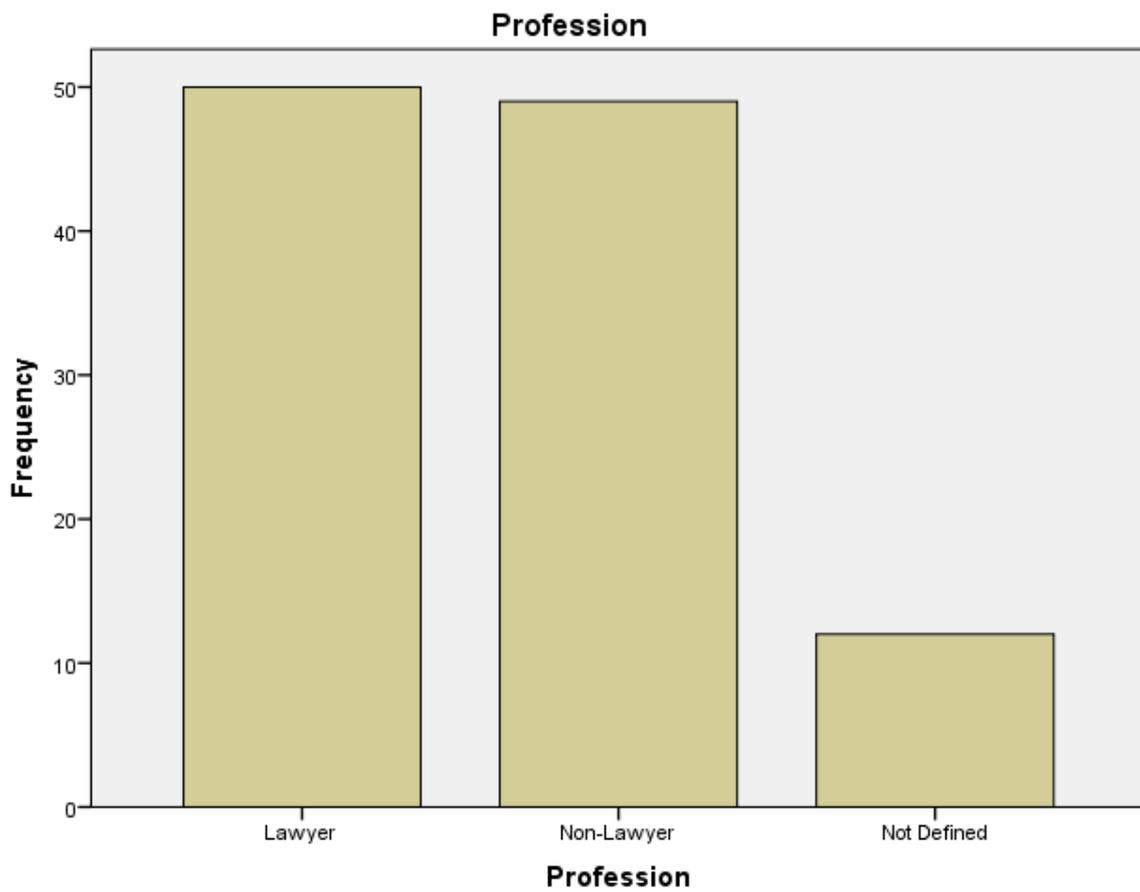
6.2 Information about the respondents

Chart 6.1: Level of education



The chart indicates that the respondents do have an acceptable level of education, that is diploma, first or second degrees, to understand and respond to the research questions.

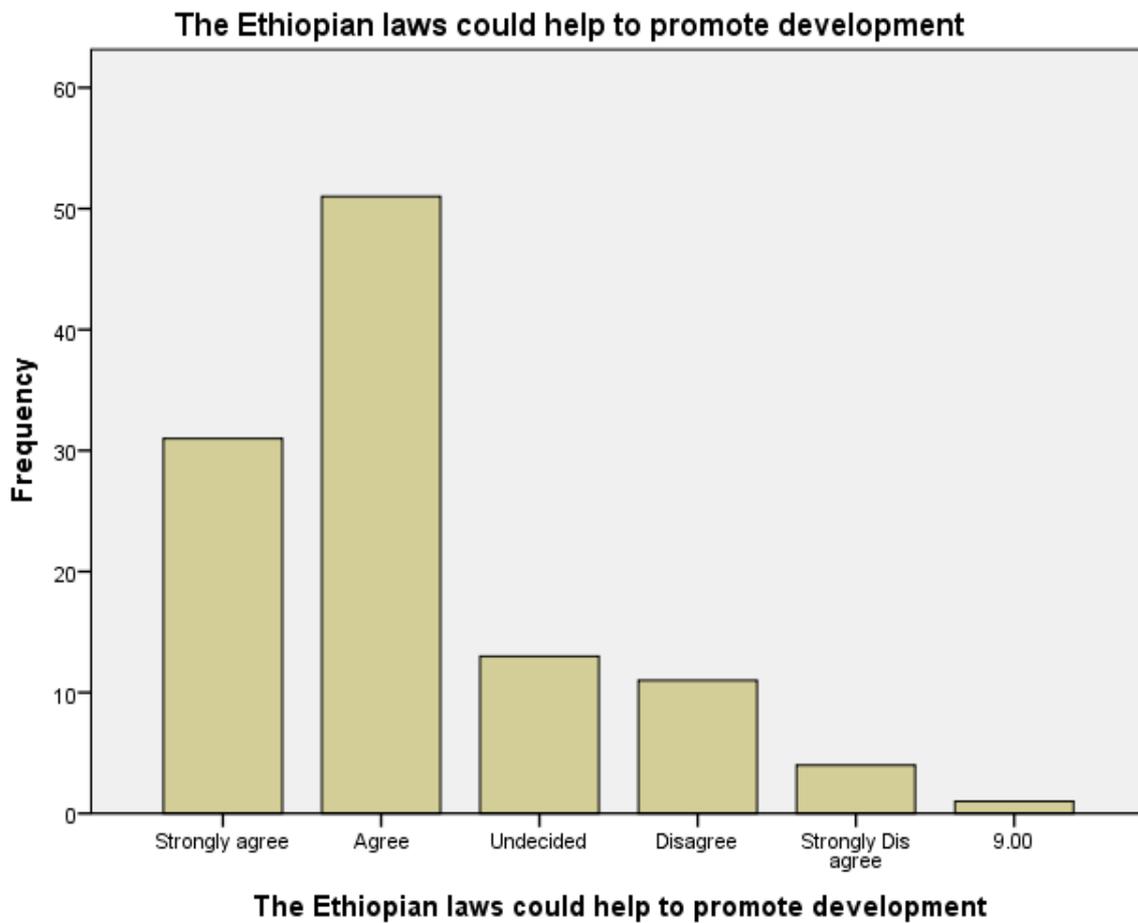
Chart 6.1 Profession



This chart clearly shows that many of the respondents are lawyers, and they are in a position to understand and respond to the questions properly.

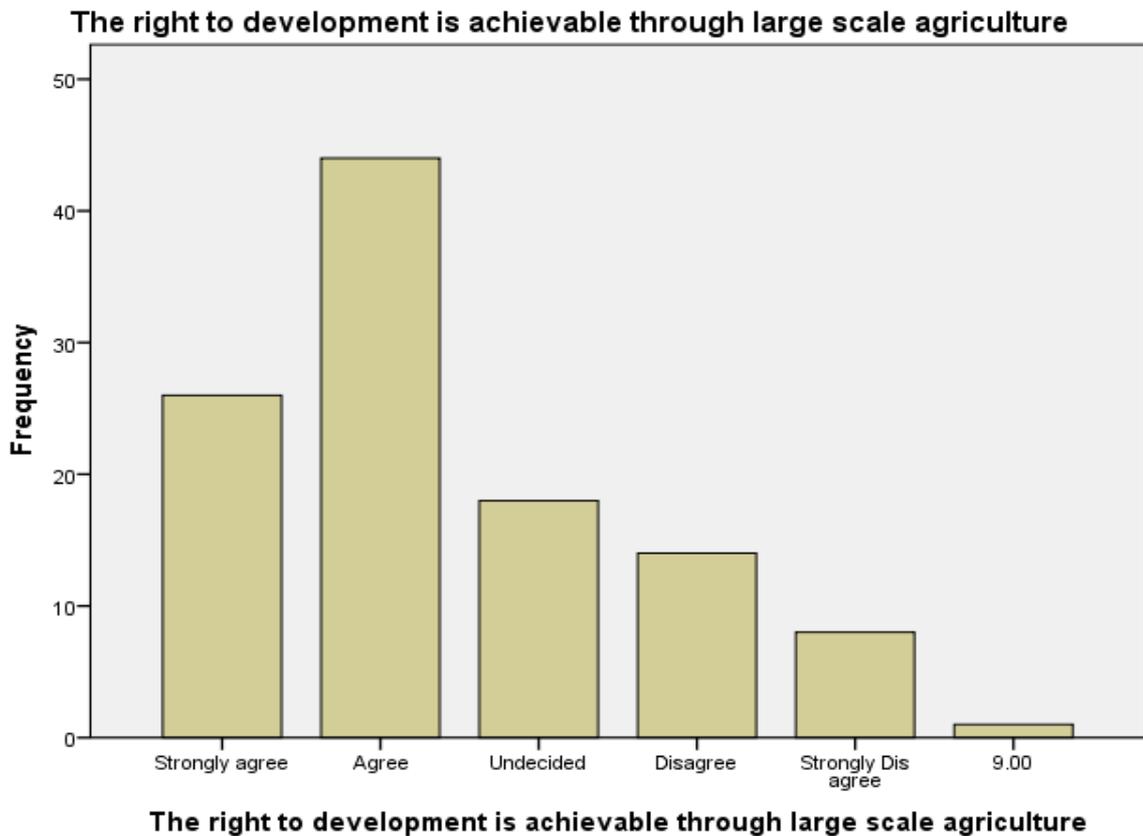
6.3 The practice of the role of law in development in the context of Ethiopian large-scale agricultural investment

Chart 6.3 Role of Ethiopian laws to promote development



The chart makes clear that many of the respondents strongly agree to the statement that Ethiopian laws could promote development in the country. In addition, the majority of the respondents agree to this statement. From this one can learn that many of the respondents believe that the laws of the country could help to promote development.

Chart 6.4 Right to development



We have seen that development has recognised as a human right. This right to development, according to the majority of the respondents, could be achieved through large-scale agricultural investment. Besides, most of the respondents agree that the right to development could be achieved through the implementation of large-scale agriculture in the country. However, the researcher has confirmed to the contrary since the implementation of large-scale agriculture did not bring about a meaningful development.

6.4 Legal principles applicable to large-scale agriculture in Ethiopia

Various legal principles are applicable to large-scale agriculture and are expected to be applicable in Ethiopia.

Compensation

In one case, 12 individuals in *Arsi* claimed compensation in accordance with Proc. No. 455/2005, Articles 7 and 8 for the damage they bear due to the eviction of their 6666 square

meter agricultural land possession by the Ethiopian Road Authority to establish a camp to construct a road. The Supreme Court Cassation Bench decided that the farmers have a right to compensation so long as they proved their possessory right over the land as indicated under Art. 40(7) of FDRE Constitution.¹ From this case, one can learn that a claimant should have a possessory right –the right to use the land to claim compensation. The *acontrario* reading of the spirit of the decision is that a farmer who does not have a possessory right has no right to claim compensation.²

Relocation assistance

The Ethiopian Constitution clearly stipulates that persons who have been displaced or whose life is adversely affected have the right to compensation, and relocation assistance.³ However, the practice proves otherwise. In a workshop that discussed about environmental issues, the participants identified that people are displaced in order to set up large-scale agricultural farms.⁴ Nevertheless, the government replied that idle land is given to large-scale agricultural investors.⁵ It is explained that the remote low land area where only pastoralists may live are identified and transferred to the large-scale agricultural investors.⁶ This indicates that people were displaced to make large-scale agriculture though they are pastoralists. In this regard, Dessalegn Rahmato argued that though no people were settled on the land, the people used the farm, the place for grazing land and some other purposes.⁷

¹ Ethiopian Road Authority v. Ato Kedir Hailejinso and Others (12 individuals), Cassation Reg. No. 52496 Tikimt 16, 2003 EC, *Federal Supreme Court Cassation Decision Book* 251-54.

² We have seen that land ownership is vested in the State and the peoples, according to the FDRE Constitution.

³ Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta* 1st Year No 1 Addis Ababa 21 August 1995 (hereinafter referred to as the FDRE Constitution) Art. 44(2).

⁴ Green Forum 'Environmental sustainability and/or economic growth' (2009) 110. Human Rights Watch reported the prevalence of displacement of local peoples without their consent in *Gambella* Region, particularly in the farm area of *Karaturi*. See Human Rights Watch 2011. See also OKLAND Institute, FAQs on Indian Agriculture Investments in Ethiopia available at www.oaklandinstitute.org last visited: 7 March 2018.

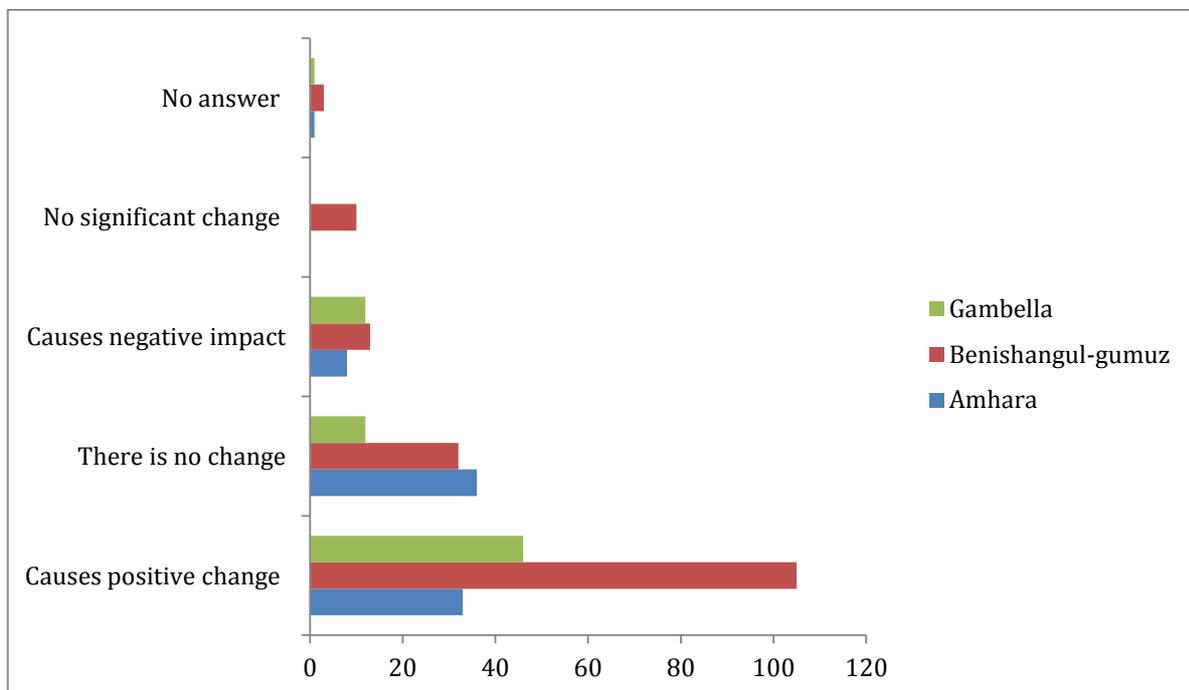
⁵ Ethiopian Television, 'Land grabbing or Development?' broadcasted on 10 May 2004 EC.; Mr Dereje Abebe confirmed that no one is displaced due to the large-scale agriculture investment. See An interview made with Mr Dereje Abebe, an expert in the Ministry of Agriculture and Rural Development, in 2012.

⁶ See interview with Mr Dereje, above. Regarding the population, Mr Bizualem Bekele explained that population dynamics is considered in studying a land for large-scale agriculture. The study takes into account some of the youngsters will live in their locality though some others will leave their locality for education, job etc. Therefore, we advised the Region not to make it available for agriculture investment. He underlines that he told me what is done by the Federal government but there could be different stories in a relevant region. Interview with Mr Bizualem Bekele, Land availability and administration case Team Leader (MoA), in 2012.

⁷ Ethiopian Television (n 5 above). On the other hand, the Ethiopian Government claims that more than 66% of arable land is available in the country. However, Professor Petros argued that there is no piece of free land that is not used in the country. The Ethiopian Government explained that in Ethiopia, land is available and 3.4 million hectares

An expert in the Ministry of Agriculture also explained that the implementation is problematic, because the persons at the *Kebele* and *Woreda* level enforced the program by force; they do not follow the procedures of the law; they did not write a notice to the people before evacuation, etc.⁸ The practice shows that in *Gambella* Regional State, some people have been displaced⁹ for the purpose of large-scale agricultural investment, and villagized.¹⁰ The researcher has distributed and collected 312 questionnaires in *Amhara*, *Begishangul Gumz*, and *Gambella* Regional States in the respective localities of large-scale agriculture investments are undertaken. The result is shown in the chart as follows.

Chart 6.5 Displacement of people



Source: Computed from questionnaires

of arable land not used so far and 42,000 hectares is developed which accounts for only 1.2% of the arable land. Ethiopian Television (n 5 above).

⁸ Interview made with Mr Assefa Onani, a legal expert in the Ministry of Agriculture and Natural Resources 2012.

⁹ Interview with Mr Belete Tesfaye, Animal Husbandry Head, and Mr Wondimu Kebede Cooperatives Associations-Head *Itang Woreda, Gambella*, 2013; interview with Mr Koang Tut Environmental Education Expert, Representative Environmental Protection Office, *Gambella*, in 2013. The establishment of Verdanta farm, for instance, has displaced more than 340 households and 420 households in Gamari Kebele and Kabo Kebele respectively. Seyuom Mesfin 'Federalism at the margins of the Ethiopian state: The lived experience of the Majang people' unpublished PhD thesis, Addis Ababa University, 2015 205.

¹⁰ In *Gambella* Region, about 70,000 indigenous people by 2011 were relocated from the western *Gambella* to new villages. Many of the areas from which the people were being moved from were intended for commercial agricultural investment. NEWS Ethiopia: Forced Relocations Bring Hunger, Hardship.

As it can be observed from the chart, 33 persons out of 77 peoples in *Amhara* Regional State that is 42.86 percent, out of 160 people 105 people in *Benishangul Gumz* Regional State (65.63%), out of 70 people, 46 people in *Gambella* Regional State (65.71%), who respond to the questionnaire indicate that large-scale agriculture has caused displacement of local people. In general, 184 respondents out of 308 peoples indicate that large-scale agricultural investment has caused displacement of local peoples. Furthermore, it was made clear that some farmers were living in the midst of the farm, and the government gave them substitute land and resettled same.¹¹ In general, in *Beneshangul Gumz* Regional State, people were displaced in order to set up large-scale agricultural investment farms though officials deny the displacement was not for the purpose of commercial farm.¹²

About 45,000 households' indigenous peoples in *Gambella* Regional State and 90,000 households in *Benishangul Gumz* Regional State were relocated from their ancestral lands to new villages. In *Gambella* Region, the relocation was made forcefully while in *Benishangul Gumz* Region village committees approved the new locations by ensuring that they were near to main roads, water, central between villages, and had good lands for agriculture and grazing.¹³

The compensation, however, is made only to the 'permanent improvements' the farmers made on the land, the income they would have generated had they not been displaced, and the property situated on the land.¹⁴ The amount of compensation for the income is equal to ten times the average annual income the farmer earned during the five years before the expropriation.¹⁵

¹¹ An informal discussion made with a higher official in S & P Energy Solution.

¹² Government officials explain that free from the settlement of people, were given investors. The interview made with Mr Dessalegn Tesema, Head, Investment Office, *Benishangul Gumz* Regional State; The interview conducted with Mr Dereje (n 5 above); Ethiopian Television (n 5 above); interview with Mr Wondmagegn in 2012. However, the rectification work undertaken in the Region has shown that displacement has been made. Thus, similar substitute lands have been given to those who have been displaced. The interview made with Mr Lemi Biratu, Head, Environmental Protection, Land Administration and Use Bureau, in 2012.

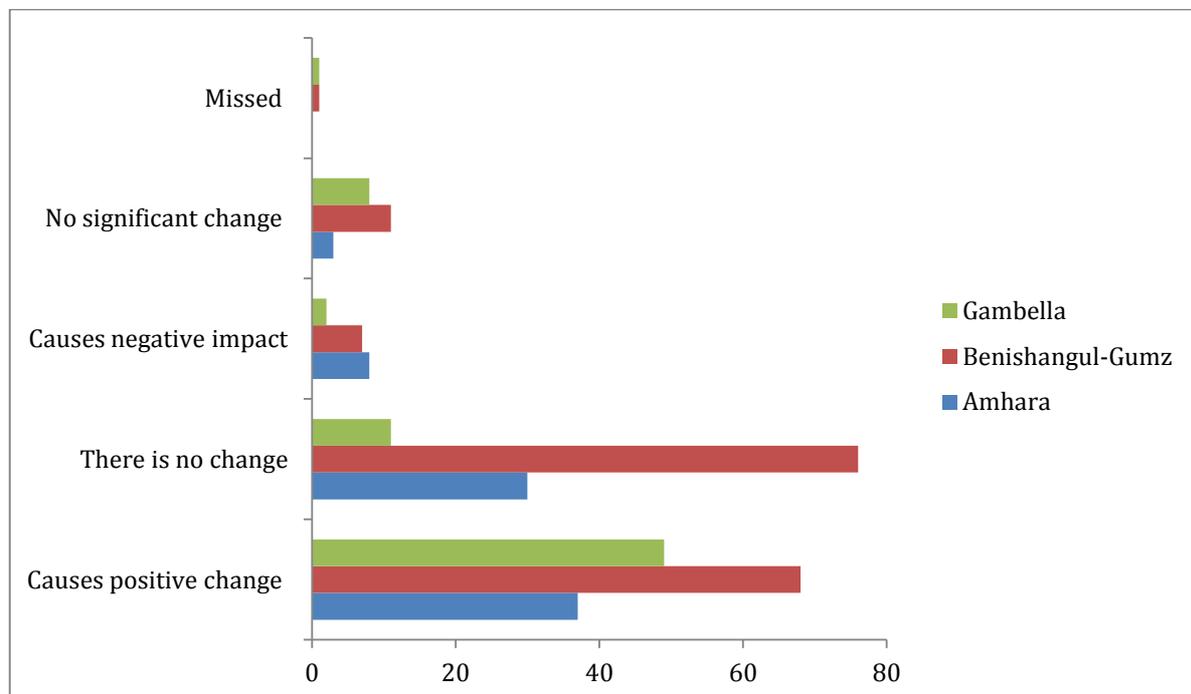
¹³ Oakland Institute *Understanding land investment deals in Africa* 40, and Oakland Institute *Unheard Voices The human rights impact of land investments on indigenous communities in Gambella* 8. Compensation in kind, for instance, certain hectares of land to the affected farmer, is preferable for rural people since it guarantees livelihood security. K Havnevik *Outsourcing of African lands for energy and food-challenges for smallholders* (2009) 14.

¹⁴ Expropriation of land holdings for public purposes and payment of compensation Proclamation No. 455/2005, *Federal Negarit Gazeta* 11th Year No 43 Addis Ababa 15 July 2005 (hereinafter referred to as Proclamation No. 455/2005) Arts. 7(1) and 8 (1). The *Benishangul Gumz* Regional State Land Use proclamation limits the compensation to be given to the displaced person only to the 'permanent developments' made on the land. See *Benishangul Gumz* Regional State Land Administration and Use Proclamation No. 85/2010, Art. 13(4). The *Amhara* Regional State Land use law is similar. See The Revised Rural Land Administration and Use Determination Proclamation No. 133/2006 *Zikire Hig* 11th Year No. 18 *Bahir Dar* May 29 2006 Art. 12 (4). On the other hand, it is stipulated that the compensation will be determined by the Proclamation No.455/2005. Regulations No. 44/2011 A regulation to Implement Land Administration and Use Proclamation *Benishangul Gumz* Regional State Council

In addition to compensation made in terms of money, the government may also give substitute land to the farmers.¹⁶ However, the question is what type of land should be given in substitute? This may go against the interests of the displaced person since the law does not put criteria to be used to give substitute land.¹⁷ As reported by the government television, displaced persons will be resettled and given necessary farmland. Settlement in villages will enable the people to benefit from several services of the government.¹⁸

A research conducted by the researcher through questionnaires regarding the impact of large-scale agricultural investment on the culture of local people is summarized in the following chart.

Chart 6.6: Impact of large-scale agriculture on the environment



Source: Questionnaires

Assosa Art. 27(4). The *Amhara* Regional State Land Administration and Use Regulations provides that a compensation should take into account a permanent property, development on the land, and act done to preserve the land. Regulations No. 51/2007 *Amhara* National State Council *Bahir Dar* Art. 14(6) and 30.

¹⁵ Proclamation No. 455/2005, Art. 8(1). Where the land is expropriated by the Federal Government, the compensation should also be computed and effected by same. Art. 8(3) of the Land Use Proclamation No. 52/2005, *Negarit Gazeta* 13 Year No. 22 *Gambella* March 2005.

¹⁶ Proclamation No. 455/2005 (n 14 above) Art. 8(3).

¹⁷ See Sefanit Mekonnen 'Rights of citizens and foreign investors to agricultural land under the land policy and laws of Ethiopia' (2012) 1 *Haramaya Law Review* 31 39.

¹⁸ Ethiopian Television (n 5 above).

The chart depicts that 37 people(47.44% of the respondents), 68 (41.96% of the respondents), 49 people (70.00 % of the respondents), in total 154 people out of 310 respondents that is 49.68 % of the respondents indicate that large-scale agricultural investment has a positive change in the culture of the local people. This means it helps the local people to modernize their working culture. This confirms what has been stated by the managers. However, 17 people that are 5.48 % of the respondents said that large-scale agriculture investment has a negative impact on their culture. This is a significant number that cannot be underestimated. In this regard, a research concludes that large-scale agricultural investment causes damage to the cultural identity of local peoples in *Gambella*.¹⁹

Right to be consulted

In practice, local peoples were never consulted about the large-scale agricultural investment.²⁰ In addition, there is no transparency among the government, the investors and local people, in land investment negotiation and agreements.²¹

The practice of free and informed consent

In Ethiopia, large-scale land transfer takes place by the permission of government(s). Out of 1,205,000 hectares of land, 1,156,000 hectares of land that constitutes about 96 percent of the large-scale farms (i.e. farms with 2000 hectares or more) are allocated to foreign investors.²² The basic justification given by government officials is that foreign investors are much better endowed with capital and technology, and these place them in much better position to make a successful investment.²³

Coming to the practice, there is no registration of lease contract. The advantages and disadvantages were discussed but registration is not included because there was no a lawyer at that time. Now the lawyer, who joined the Agency (now the Authority) after the agreement was drafted and being implemented, is arguing that registration is important for both parties where a dispute arises. It was not registered because we refuse the registration.²⁴ The investor is given the

¹⁹ Oackland Institute (n 4 above) 38.

²⁰ Metho, Executive Director, Solidarity Movement for a new Ethiopia in Oackland Institute (n 4 above) 4. See also Oakland Institute (n 13 above) 30-31.

²¹ Above, 31; Seyoum (n 9 above) 205.

²² Elias Nur Stebek 'Between 'land grabs' and agricultural investment: Land rent constraints with foreign investors and Ethiopia's normative setting in focus' (2011) 5 *Mizan Law Review* 175 180. Mr Assefa comments that at the beginning, there was an understanding that land in Ethiopia will not be finished, but latter it was understood. Interview with Mr Assefa (n 8 above) A legal expert in the Agricultural Investment Administration.

²³ Dessalegn Rahmato *Land to investors: Large-scale land transfers in Ethiopia* (2011) 16-17.

²⁴ Interview with Mr Bizualem Bekele (n 6 above).

chance to comment up with a draft lease agreement and that gave an opportunity for the investor to negotiate on issues that are burdensome where the government may lose the power to include provisions that oblige the investor to protect the environment.

In Ethiopia, a model lease agreement is prepared and it is modified from time to time. The contract is intended to attract investment in the sector. According to the information obtained from the Ministry of Agriculture 33 investors have been licensed to undertake large-scale agriculture investment and were granted about 400,000 hectares of land.²⁵

Table 6.1: Large-scale agriculture in *Benishangul Gumz*

No	Investor	Foreign/ Domestic	Location	Hectares
1	Shaporji	Indian		50,000
2	CLC (Spentex)	Indian	Dangur	25,000
3	Access Capital	Ethiopian	Dangur	5,000
4	Kehedam Trading	Diaspora	Guba	3,000
5	Bruhway	Ethiopian	Dangur	5,000
6	ASKY Agricultural Development	Ethiopian	Dangur	3,000
7	Tracon Trading PLC	Ethiopian	Dangur	5,000
8	Getafam Mechanised Farming	Ethiopian	Dangur	3,000
9	Tigabe Agro-	Ethiopian	Dangur	3,000

²⁵ An interview made with Mr Dereje (n 6 above). See also the website of the Ministry of Agriculture www.eag.gov.et

	Industry	Diaspora		
10	Ambassel	Ethiopian		10,000
11	E.Africa Agric	Ethiopian		6,500
12	Finote Selaam	Ethiopian		5,000
13	Sun Bio(NBC)	UK		80,000
14	S & P		Dangur	50,000
15	GashawBizu Commercial Farm	Ethiopian	Dangur	3,000
16	Horizon Plantation	Foreign	Guba	20,000
17	Tikimt Agro- Industry	Diaspora	Dangur	3,000
18	Mamye Mihret Nega	Diaspora	Dangur	3,000
19	Hashim Esmael Alkawaji	Forien	Mao Komo	3,000
20	Alwal Adina Abdrohman PLC	Foreign	Guba Wodelbehit	5,000
21	Lisa PLC	American	Dangur	3,000
22	Fireselam PLC	Ethiopian	Guba	2,000
23	Mehamed Amiru Agri Development	Ethiopian	Guba	2,000
24	Tarekegn Belay	Diaspora	Guba	2,000
25	Anmaw		Guba	2,000
26	Acess Capital	Ethiopian	Dangur	5,000

27	African farm	Ethiopian	Guba	2,000
28	Lotus International	Sawdi Arabian	Mao Como	3,000
29	Melkamu & Family	Diaspora	Guba	3,000

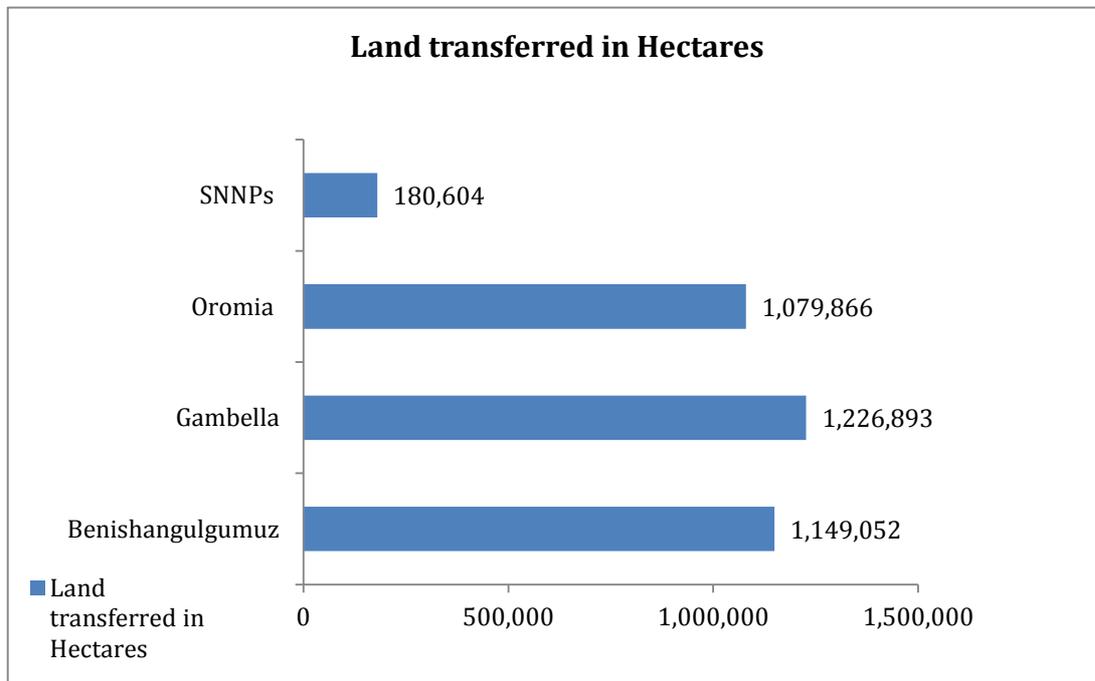
Source: Dessalegn Rahmato, p. 52; Ministry of Agriculture, www.eag.gov.et Accessed on 07/02/2012; data from Investment Bureau of *Benishangul Gumz*, 30/06/2014; Data from the Agricultural Investment Agency 16 May 2016.

Table 6.2: Large-scale agriculture investors in Gambella

N o.	Investor	Foreign/ Domestic	Hectares	Location
1	Tewodros Abreham	Domestic	3,000	Abobo Wereda
2	Bazen Agri Industry	Domestic	10,000	Abobo Wereda
3	Kidane Teklu	Ethiopian	2,000	Gog Wereda.
4	Deksa Agriculture Development		2,000	Gog Wereda.
5	Dinsho PLC		2,000	Gog Wereda.
6	Hagerbekel Organic Coffee PLC		2,000	Goderena Mengesh
7	Tepi Coffee Agriculture Development		5,835.80	Goderena Mengesh
8	Sintayehu Tesfaye		2,000	Dima Woreda
9	Bale perabim		2,000	Dima Woreda
10	Tedla Sintayehu		2,000	Dima Woreda
11	Yonas Alemu		3,000	Dima Woreda
12	Karaturi	Indian	100,000	Itang/geco

13	BHO	Indian	27,000	
14	Sawdi-Star	Sawdi Arabian	10,000	Abobo
15	Sandati		10,000	Dima
16	Ruchi	Indian	25,000	Abobo
17	Berdanata Harvest	Indian	3012	Goderie
18	Hunan Dafegyuan	China	25,000	Dima
19	Green Valley	Indian	5,000	Abobo
20	Torren Agro-Industry	Indian	6,000	Gog
21	Saber Farm	Indian	25,000	Dima
22	GVL Agro-Industry	Singapore	5,000	Dima
23	Tekron General Trading	Ethiopian	3,000	Dima

Chart 6.7: Land Transferred to Federal Land Bank in 2011



Source: Rahmato Land to Investors, Annex 1.

Benefit sharing

In practice, there is no meaningful follow-up and controlling mechanism to check that an investor exports only a certain percentage and to ensure the earning is brought to Ethiopia because foreign investors can send the foreign money to their home countries or somewhere else.²⁶

Environmental sustainability

However, the social and environmental code of practice for agricultural investment is not yet translated into practice.²⁷ 37 workers out of 65 respondents in farms in the research areas with 56.92 % rate indicate that social and environmental code of practice prepared by the Ministry of Agriculture is not implemented. This is an indication that the environment is at risk because the farmland may not use an appropriate method of environmental protection or use a different method other than the MOA's. Therefore, it is necessary to implement the code of conduct on the large-farmlands under discussion.

Protected areas

The problem in practice here is that the investor may plant a certain plot of land only so long as it constitutes 2 % of his land, and other parts of the land may be degraded or eroded easily. The law apparently does not protect the existing trees on the land from clearance. In this regard, the laws differ with regard to the number of trees to be preserved and/ or to be planted. At the federal level, the investor is required to plant indigenous trees on 5 % of the leased land.²⁸

²⁶ For example, in the case of floriculture investment, there is no control on the volume of production exported, and only 5 million flows to Ethiopia where as 50 million is exported. Interview made with Mr Abebe Mulatu, a legal expert conducted in 2013. Therefore, in large-scale agricultural investment activities, local concerns should get due attention in international investment agreements, investment contracts, and domestic law. See D Hallam 'Promoting "win-win" investments in developing country agriculture-business models and international guidelines' (2013).

²⁷ See Interview made with Mr Lemi (n 12 above); Interview conducted with Mr Fekadu Melaku, Acting Head, Environmental Protection, Land Administration and Use Department, in 2012; Interview conducted with Mr Habtamu Regassa, Acting Head, *Dangur Woreda*, Environmental Protection, Land Administration and Use Office, in 2012. Interview conducted with Mr Aschalew Belay, expert in the Environmental Protection, Land Administration and Use Bureau, Benishngul Gumuz; Interview conducted with Mr Simachew Kebede, manager to Ayehu Farm; Majority of the managers in Tracon Trading Farm, 83.33 percent, claimed that they did not implement the Social and Environmental Code of conduct prepared by the MOA. See Table.

²⁸ Ministry of Agriculture *Social and Environmental Code of Practice for agricultural investment* (2011) (Hereinafter FDRE Social and Environmental Code, paragraphs 33, 3.1. the Tigray law requires any investor to leave 40 indigenous trees per hectare where it carries, and where there are no natural indigenous trees, the investor is duty bound to plant 40 trees per hectare and take care of them, and where the land is not used for farming, the number of trees may be about 100 per hectare. The Revised Regulations to implement the Rural Land Administration and Use Proclamation, Regulations No. 48/2007, Art. 36 (I).

Furthermore, the investor is 'obliged to plant tree species that cannot cause any damage to agricultural land and those having ecological and environmental advantages.'²⁹

It is explained that a manual is under preparation that obliges an investor to preserve 20-40 trees on his/her/its farmland and the investors are told and their observance of the instruction is checked on the spot. Regarding the cleared farms, investors are told to plant indigenous trees like juniper tree, but problems are encountered in securing seedlings.³⁰ The large-scale agricultural inventors continued to deforest. The attention given by the government in monitoring is not as such satisfactory. In such a case, giving the investors awareness as to the environmental protection may solve the problem.³¹

The Ministry of Agriculture and Natural Resources receives reports from investors weekly, or monthly, though it is not yet decided, through email to ensure that the environment is protected. In addition, the Ministry checks the activities of the investors on the spot at least twice a year so as to ensure that the investor is working according to the terms of the lease agreement. Where the investor fails to perform, a discussion will be conducted with him/her to rectify.³² It is clear that reports through email will not ensure the protection of the environment.

In *Benishangul Gumz* Regional State, the large-scale agriculture has transformed forests into farms.³³ Farmworkers cut trees so as to build houses; they cleared vegetations and bushes to cook their foods.³⁴ Moreover, it is revealed that the investors deforest and do not plant a sufficient number of trees on the farms.³⁵ It is also explained that the investors licensed by the Federal Government have cleared the forests on the farmlands and it is creating a devastating effect on

²⁹ Proclamation to amend Proclamation No. 56/2002, 70/2003, 103/2005 of *Oromia* Rural Land Use and Administration Proclamation No. 130/2007 (hereinafter *Oromia* Land Proclamation No. 130/2007) Art. 19(4). The SNNPRS law does not envisage plantation of trees at all.

³⁰ Interview conducted with Mr Assefa (n 8 above); Interview conducted with Mr Haddis W/Gebriel, in 2013.

³¹ A group discussion. For example, Hiwot Mechanisation in *Humera* does not protect the environment, as the group members explained. According to Mr Abiyot Abeje, there is a big gap in this regard that investors do not replant what have been cut. Interview made with Mr Abiyot Abeje, Acting Head, *Metekel* Zone Administration, and Head Agriculture Bureau, in 2012.

³² An interview made with Mr Abiyot (above). The researcher has proven that no facility is there in farmlands not alone internet access to send a report. Thus, this is not an acceptable system. Now, the Agency is conducting a research on the issue. Interview conducted with an official who require anonymity, on 16 may 2016.

³³ Interview conducted with Mr Aschalew (n 27 above).

³⁴ Interview made with Mr Assefa (n 8 above). In *Benishangul Gumuz* Regional State, some civil servants in localities and daily labourers of investors started their own farms that cause threat to the forest because they clear the forest to plough. Interview conducted with Mr Aschalew (n 27 above); Interview conducted with an expert in the Investment Attraction and Helping Work process who wants anonymity, *BahirDar*.

³⁵ Interview made with Mr Dessalegn (n 12 above).

the environment as per the environmental audit conducted.³⁶ In *Amhara* Regional State, the large-scale agricultural investors clear all the land, including incense tree so that they can till the farm by tractors.³⁷ However, Bir Agri-farm is planting 20,000-30,000 trees like eucalyptus trees, *cardia africana* annually.³⁸

The researcher distributed questionnaires to managers of large-scale agricultural investment farms to assess whether the farms left trees as required by the law. 11 out of 12 managers that is 91.67 percent of them respond that at the time of clearing the farmland some trees have been conserved. It is a fact that some trees have been left from clearing, but the question is how much of the trees have been left? To this issue, they gave different answers; some say 3.5 percent; others 3; others 5 and 4 percent. This indicates that the farms did not do the work according to the law; if that was not the case the managers would have given the exact number of trees left. 59 of the 69 respondents from the workers made it clear that trees have been conserved. However, in *Metekel*, at times, investors do not leave trees on the farmland as required. Leaving trees as required by law has not yet become the practice. There is also a big gap that investors do not replant what have been cut.³⁹ Furthermore, very little is done regarding replacing trees that have been cleared at the time of making the farm ready for farming. Accordingly, some indigenous trees are destroyed once and for all and never be replaced.⁴⁰

In S & P Energy Solutions one can also see trees very scantily on the farm. However, two operational managers⁴¹ claimed that census was conducted and species were identified and reserved after being marked. Furthermore, the managers said that they left trees on the bank of

³⁶ Interview made with Mrs Kibra Alemseged G/Egziabher Director, Environmental Protection Directorate, Ethiopian Agricultural Investment Land Administration Agency in 2016; Interview made with Mr Lemi (n 12 above).

³⁷ Interview conducted with Mr Yitayal Abebe, Environmental impacts documents evaluation, examination and control expert, on 25/07/2012, in his office. Interview conducted with Mr. Yitayal (n 10 above). Monitoring is also very weak in *Amhara* Regional State, Interview conducted with Mr Asfaw. Interview conducted with Mr Simachew (n 27 above); Interview conducted with Mr. Goshimei (n 9 above); After 1993, the sister company of Midroc has bought it. Now the farm size is about 6,688 hectares out of which about 5,000 hectares is cultivated.

³⁸ Interview conducted with Mr Abreham Mekonnen, Technique and Engineering Section Head, Bir AgriFarm-Finote Selam, in 2012.

³⁹ Interview made with Mr Abiyot (n 31 above); See also Interview conducted with Mr Fekadu (n 27 above); Karuturi has cleared 3,000 ha area of dense forest to cultivate oil palm. Okland Institute *Food Crisis and the Global Land Grab, Karuturi* 07. Where there are no trees in the farm, investor is required to plant trees. Interview with an official who require anonymity. However, the *Benishangul Gumz* land directive does not provide this obligation in a clear manner while it provides for how to develop an investment land and use forest wealth. The Regional rural land administration and use Directive No. 018/2013 (*Assossa*) Art. 37.

⁴⁰ Interview conducted with Mr Habtamu (n 27 above).

⁴¹ Interview conducted with two operational managers who wanted their identity not to be disclosed, in 2012.

the river so as to preserve the soil. However, the researcher observed that the farm undertakes its activity close to the riverbank and not 500 meters apart from the river.

Picture 6.1: Impact on Water



The picture depicts that the riverbank is devoid of trees. Picture by the researcher, 27/07/2012.

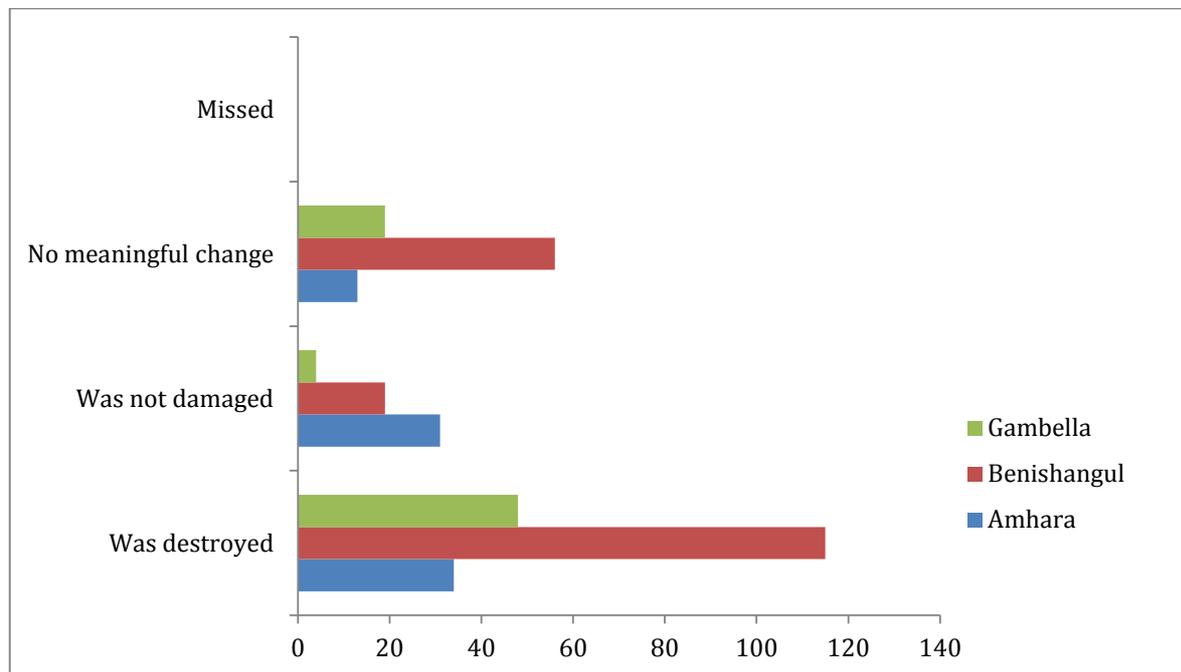
In *Gambella*, farmlands are cleared without leaving trees as required by the law.⁴² Some argue that the legal requirement to leave tree within 50-100 meters is inapplicable to mechanized farm because the planter machine is wider than 10 meters. Furthermore, burning what is cleared from the farm without producing charcoal causes economic waste. Trees that could have been used to produce charcoal are being fired.⁴³ The government should work on this so as to enforce the law, by educating the investors and the public about the environment and by raising their awareness, for instance.⁴⁴

⁴² Interview with Mr Belete (n 9 above); interview with Mr Koang (n 9 above).

⁴³ Interview with Mr Taye Amdebirhan W/Medhin, Farm Manager, Green Valley Agro PLC, in 2013.

⁴⁴ Interview conducted with Mr Yonatan Kinfu & Mr Haddis W/Gebriel, in 2013.

Chart 6.8: Impact on Forests



Source: Computed from questionnaires.

The researcher distributed questionnaires to the local peoples and officers to assess whether trees were conserved at the time of clearance of farms to make ready for cultivation. 197 out of 339, i.e. 58.11 percent of the respondent said that forests have been cleared to make ready the farm for cultivation. However, the forest remains uncleared where the land in the farm is sloppy, rocky and hilly that does not fit for farming. Thus, investors did not cut trees in such places.⁴⁵ Some farms plant *Pongamia* trees that are evergreen throughout the year even during dry season.⁴⁶

The case of Gumare Kebele, Gambella forest

Protected forests are given to investors and dispute arose between the *Gambella* Regional Government and the local peoples. In *Gambella* Regional State *Majang Woreda*, *Gumare*

⁴⁵ Interview conducted with Mr Tadesse Belay, dozer operator, Getfan PLC, Metekel. The farm wants to increase its possession to the other side of the River, which is not legal. Interview conducted with Mr Shikur Abdi, Secretary General of the PLC, Getfan, Metekel.

⁴⁶ Interview conducted with Mr Meketa Adafre, Manager, Tracon Trading Farm, in 2012. Interview made to Mr Anberbir Daba, Head, Personnel Administration and General Service, Tracon Trading Farm, *Metekel*; See also S& P Energy Solution.

Kebele, the people through their representatives⁴⁷ lodged their complainant to the former President, his Excellency Mr. Girma W/Giorgis complaining that the protected natural forest should not be deforested in the name of large-scale agricultural investment.

The former President, Mr. Girma W/Giorgis wrote a letter to the former Environmental Protection Authority ordering to take immediate measure. The then Environmental Protection Authority wrote a letter⁴⁸ to the then Ministry of Agriculture and Rural Development explaining that the local residents have lodged a complainant alleging that 5,000 ha of the protected natural forest not to be given for tea development project. The Environmental Protection Authority (EPA) explained the contribution of forests in fighting climate change. EPA argued that the social, economic and environmental benefit is more important than tea development by deforesting a 5000 ha protected natural forest. It requested the investment permit given to the investor be revoked and alternative land be given to the investor.⁴⁹

However, the then Ministry of Agriculture wrote a letter to the *Gambella* Regional Administrative Office requesting to collect a down payment of lease from *Verdanta* Harvests PLC, which concluded an agreement to be given 3012 ha in *Majang Zone Godere Woreda*. The *Gambella* Regional Administrative Office also wrote a letter to *Godere Woreda* Administrative Council to execute as per the letter of the Ministry of Agriculture.⁵⁰

In the, meantime the *Majang Zone* Administration, *Godere Woreda* Administration and the *Gumare Kebele* Administration⁵¹ have conducted a meeting and 230 local people have participated in the meeting and the *Majang Zone* Administrator explained that instead of keeping the forest, the Indian investor, if the land is given to him, could bring some benefits to the peoples, poverty will be eradicated from the locality, it will create job opportunities for a number of people. Then, the local people aired their opinions. Accordingly, some argued that the forest area should not be given to the investor by reasoning that the forest is a heritage transferred from

⁴⁷ Mr *Ambello* Chairperson on the *Gumare Kebele*; Mr *Kesito*, an elder in the *Kebele*; and Mr *Kelilo*, a resident in the *Kebele* were representatives of the residents. See a letter written to HE Girma W/Giorgis by Tamru Ambello, dated 30/03/2003 EC.

⁴⁸ Letter Dated 28/08/2002 EC, Numbered 8/8.4/1124.

⁴⁹ The letter was copied to the *Gambella* Peoples' National Regional State Administrative Office. See the letter.

⁵⁰ A letter dated 10/03/2003 EC Numbered መ 2/2031/716.

⁵¹ The *Godere Kebele* Administration was represented by the Vice Chairperson, perhaps because the Chairperson was a representative to the local people who stand against the giving of the protected forest for the foreign investor.

their ancestors, and they are entrusted to them by the government for custody and protection and therefore should be protected.

Others argued that they did not get any benefit from the forest, but if investment is undertaken lots of people will get job; it is better to develop the area instead of protecting the forest; the investor can construct a road that will benefit the local people; health centres, schools will be established; the living standard of the local people will be promoted through the development of the locality by investment; electric power will be there/available for the local people. Finally, a majority vote was given to the idea that since no benefit is offered by preserving the forest, an investment that will bring about development to the local people was accepted by the people.⁵²

Then, the *Majang Zone Godere Woreda* Administrative Council wrote a letter to the *Woreda* Economy and Development Office to collect the down payment from *Verdanta* Harvests PLC as per the letter of the Ministry of Agriculture and the Region.⁵³ Once again, the representatives of the local people wrote a compliant to HE *Girma W/Giorgis* opposing that 3012 ha of land covered by natural protected forest should not be given to the Indian investor, *Verdanta* Harvests PLC. The representatives explained that the transfer of forest land is not accepted by professionals from the *Woreda* to the Federal; the *Godere Woreda* Administrative Council and *Majag Zone* Administrative Council have fraudulently made the local people decide in favour of the transfer of the forest land to the investor.⁵⁴

The former President, HE *Girma W/Giorgis* wrote a letter to His Excellency *Tefera Derbew*, the Minister of Ministry of Agriculture, explaining that forestland should never be given to large-scale agricultural investment and requested the Minister to take appropriate measure.⁵⁵

The *Godere Woreda* Administrative Council wrote a letter to the *Gumare Kebele* noting that all the local residents agreed for the investment to be undertaken but a few individuals and youths are acting against the development goal of the government and requested appropriate

⁵² Minutes of the General meeting with the local peoples in *Gumare Kebele*, 16 Hidar 2003 EC.

⁵³ A letter dated 23/3/2003 Numbered 1183/133.

⁵⁴ A letter written to the FDRE President, Dated 30/03/2003 EC.

⁵⁵ A letter dated 1/4/2003 EC, Numbered 58/2/6/2003.

measures to be taken.⁵⁶ Finally, the chairperson of the *Gumare Kebele* was suspended from his position/office.⁵⁷

Lessons learned

The above-discussed case demonstrates the existence of the debate on the benefits of large-scale agricultural investment. The professionals at different levels, both at federal and regional levels do not agree that the forest should be cleared for tea development.

The President insisted that forests should never be cleared for large-scale agricultural investment. Nevertheless, the Ministry of Agriculture and Regional Administrative Councils did not bother or worry about the preservation of the forest. This implies that the Ministry of Agriculture favours the investment rather than preserving the protected forest (and the environment in general). This contradicts the laws of protected areas.

The discussion with the local people should have been made before the land was given to the investor and before the investment agreement was concluded. It has been difficult for the Ministry of Agriculture to preserve the forest once it transferred the land by lease to the Indian investor.

The benefits the investment will accrue to the local people should be included in the lease agreement but the lease agreement concluded between the Ministry of Agriculture and Vendirnata PLC does not include benefits to the local people.⁵⁸

It would have been better had the local people representatives, including the chairperson of *Gumare Kebele*, participated in the meeting, because that would have given the chance to express their opinions to the people as well as to the chairs of the meeting. This case demonstrates that the investment activity was undertaken by disregarding the requirements of the law.

The practice of land and soil protection laws

Regarding preserving soil erosion on their farmland, 11 out of 12 managers respond positively. However, in *Gambella*, soil erosion happens in the farms.⁵⁹

⁵⁶ A letter dated 13/5/2003 Numbered 1675/63/5.

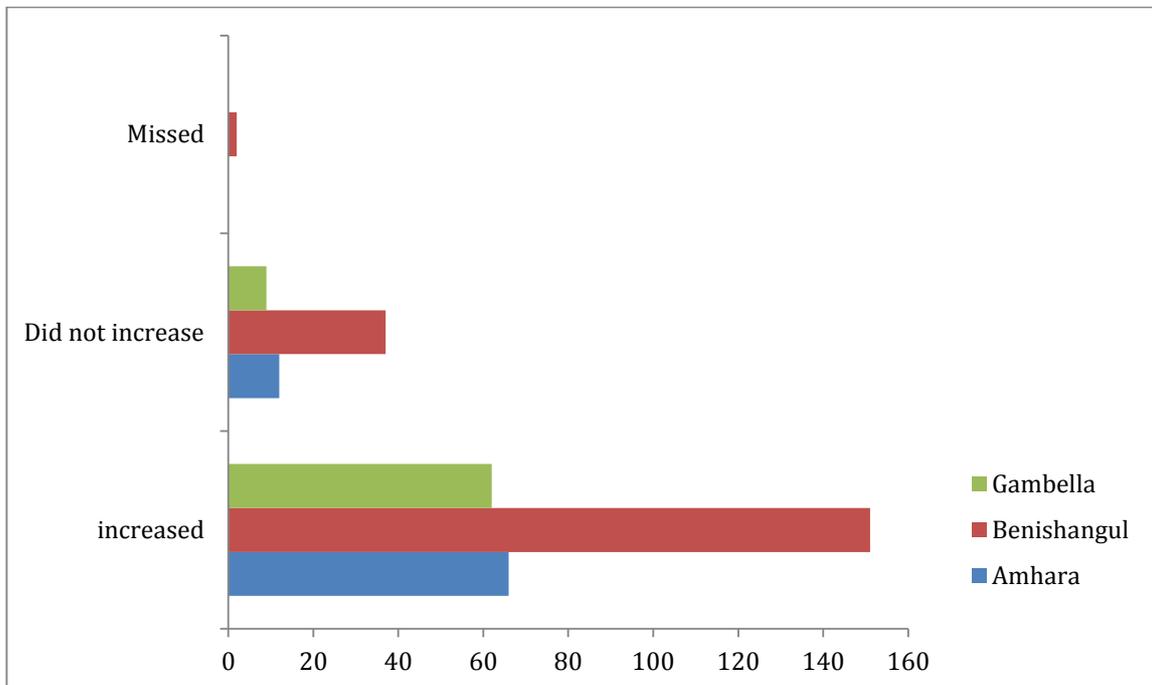
⁵⁷ A letter written by *Godere Woreda* Administrative Council to the *Gumare Kebele* Administrative Office Dated 16/5/2003 Numbered 1702/63/2003.

⁵⁸ See Land Rent Contractual Agreement made between Ministry of Agriculture and Rural Development and Verdanta Harvests PLC (20 April 2010) Art. 6.1 (hereinafter Verdanta Lease Agreement). This agreement stipulates that constructing facilities like road, school, office as rights of the investor to run the investment. Art. 3.2.

⁵⁹ Interview with Mr Koang (n 9 above); Group discussion with Mr Koang Majack, Head Rural Development, *Itang*, Mr Peter, and Mr Paul, in 2013.

Chart 6.9: Soil protection

The researcher distributed to residents and officers in *Amhara*, *Benishangul Gumz*, and *Gambella* Regional States to assess the situation of soil protection and the result is summarized under the following chart.



Source: Computed from questionnaires filled by residents in the relevant locality and government officers in the relevant Government offices.

279 respondents that are 82.30 % made it clear that soil erosion in the farm and/or the locality has increased after the implementation of large-scale agriculture in the locality. In addition, 17 of the workers' respondents say that soil erosion is happening on their respective farms.

The practice of biodiversity laws

The *Benishangul Gumz* Region Bureau of the Environmental Protection and Land Use demarcated about 25 protected areas (forest places) by the year 2012.⁶⁰ In practice, according to

⁶⁰ Interview made with Mr Lemi, (n 12 above); according to Mr Fekadu, there is a problem of biodiversity protection in large-scale farms given before; See Interview conducted with Mr Fekadu (n 12 above); in Dangur Woreda, forest areas in 9 out of the 29 *Kebeles* are demarcated, in *Java Kebele* there is a park to be demarcated which has more dense forest, in which diverse bio diversity exists. Interview conducted with Mr Habtamu, (n 27 above).

Mr. Lemi,⁶¹ the past work did not consider the wildlife and other living things in *Benishangul Gumz* Regional State.

With regard to biodiversity preservation, the Ayehu Farm is planting indigenous trees.⁶² However, 28 of the respondents, i.e. 60.87 percent responded that biodiversity has been damaged (disappeared) after the implementation of large-scale agriculture in the locality.

In the case of Bir Farm, the forest was cleared at the time of the start of the farm but now the farm protects the forest and consequently, monkeys, baboons, Colobus Abyssinia (Colobus monkey) are found in the forest.⁶³ The farm protects the biodiversity of the locality, particularly the wild life. The local people also acknowledged the planting of trees by the Farm.⁶⁴

In *Gambella* Regional State, a forest is cleared, and biodiversity could not be protected where the forest is all cleared.⁶⁵ Most wild animals fled to Sudan, or to other places since the forest is cleared.⁶⁶

⁶¹ Interview made with Mr Lemi (n 12 above).

⁶² Interview made with Mr Teklu Damtie, Acting Head, Environmental property evaluation and study work process, in 2012.

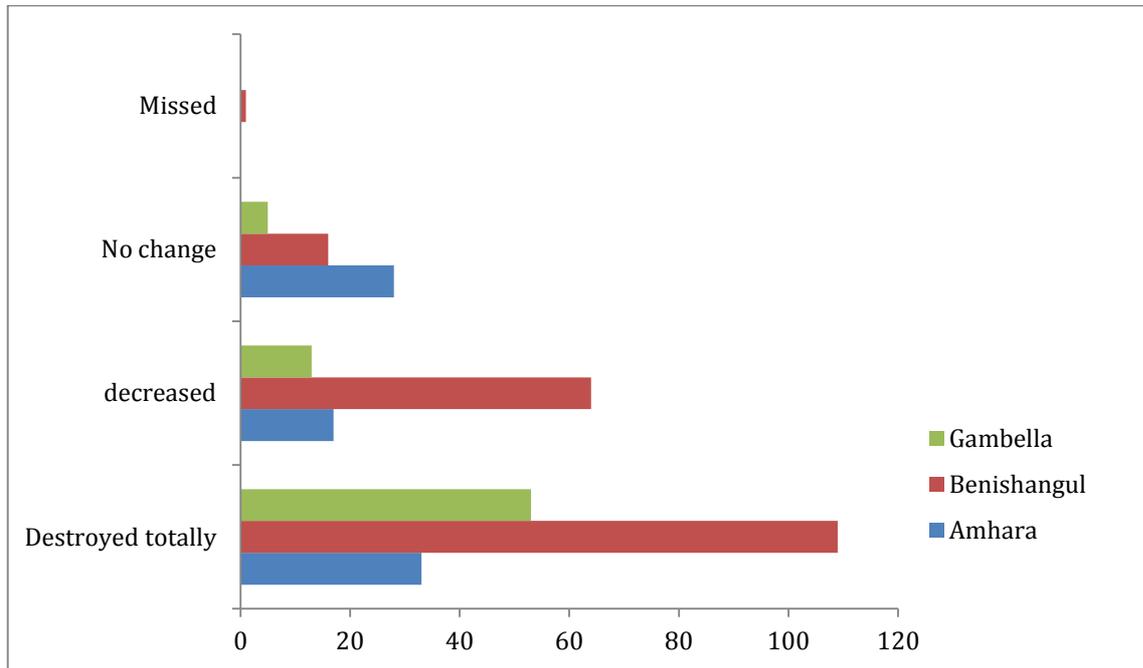
⁶³ Above. Some people in the locality that the researcher has the opportunity to talk with confirmed that the forest is well protected, in addition, some additional trees have been planted and the number of wild animals is increasing after the farm is sold to the private investor.

⁶⁴ A field visit made by the researcher.

⁶⁵ Interview conducted with Mr Koang (n 9 above).

⁶⁶ Interview with Mr Taye Amdebirhan W/Medhin, farm manager, Green Valley Agro PLC, in 2013; Interview conducted with Interview conducted with Mr Yonatan Kinfu, in 2013; and Mr Haddis (n 30 above); interview with Mr Teketel Haile, sustainable land management coordinator, in 2013; Interview with Mr Daniel Silva, consultant, BHO, in 2013, (Mrs Abril Meratie, interpreter).

Chart 6.10: Impact on biodiversity



Source: Computed from questionnaires.

The above table shows that 195 of 339 respondents made clear that biodiversity in the localities has been decreased due to the large-scale agricultural investment.

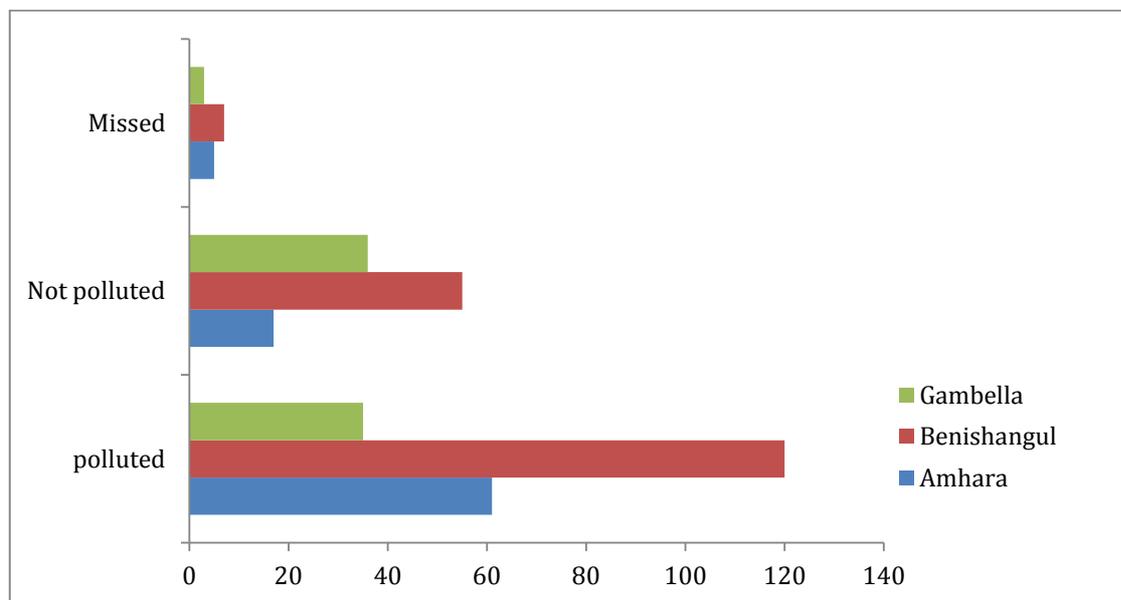
The Practice of Water resource protection law

Coming to the practice, though it is explained that to avoid water pollution, an investor will not be given land within 500 metres to a river or water body⁶⁷ some investors invested near rivers, around 300 meters, because they are given, and this has resulted in the reduction of the volume of water in some rivers. There are procedures to undertake large-scale agriculture in

⁶⁷ An interview made with Mr Dereje (n 6 above); A group discussion. They also confirmed the point.

protecting water from pollution, but there is lack of personnel to implement it.⁶⁸ A research identified that Saudi Star has caused negative impacts on *Alwero* River.⁶⁹

Chart 6.11: Water protection



Source: Computed from questionnaires

The chart shows that 216 of 339 respondents said that large-scale agricultural investment has caused water pollution.

EIA practice

Participants in a workshop organised by Green Forum to discuss environmental sustainability in Ethiopia, identified that large-scale agricultural farms are set up without prior environmental impact assessment (EIA).⁷⁰ The Proclamation requires EIA to be prepared before the investor started working, but in practice, contrary to the Proclamation the investor is required to prepare

⁶⁸ Interview conducted with Mr Assefa (n 8 above); According to Mr Dessalegn Tessema, Head, Investment Office, *Benishangul Gumz* Regional State, there is no as such much water polluting activities, except some. Interview made with Mr Dessalegn (n 12 above); so far the investors do not use waters (rivers) like *Dabus*, *Didesa*, most of them are working on rain-fed farms. It is only about 1.6 percent of investors in general that ploughed land use irrigation, and this is very much insignificant. Mr Aschalew (n 27 above); Mr Fekadu explained that there is a distance from water bodies. However, it will have an effect on the underground water. However, there is no study in this regard. Interview conducted with Mr. Fekadu, (n 27 above).

⁶⁹ Okland Institute ‘Understanding land investment deals in Africa Country report: Ethiopia’ (2011) 32. The Farm is given the right to use the *Alwero* River and is constructing further dams to the existing ones. Dessalegn (n 12 above) 28.

⁷⁰ Green Forum (n 4 above). The participants pointed out that EIA could help in solving such problems and they recommend that it is important to ensure that EIA is conducted before the large-scale agricultural farm is undertaken. Above.

EIA after starting his/her work. Thus, EIA is prepared after the environment is damaged.⁷¹ According to Mr Aschalew, in *Benishangul Gumz* Regional State, about 95 percent of the 300 large-scale agriculture investors in the Region started their investment without preparing EIA which is very damaging to the environment.⁷² In most cases, the investors start cultivation without submitting an EIA. Even where EIA is prepared, usually, the document is a copy of previous EIA document for there is a lack of consultants. Consultants prepare an EIA in a very general matter and it does not include specific things; therefore, it might not be implemented.⁷³

After an EIA is prepared, a management plan will be prepared by the investor to implement same. The plan will identify environmental issues, mitigation measures in detail, the magnitude of the impact on the environment, costs, a source of the budget, which will be performed etc will be indicated in the plan. The Ministry of Agriculture monitors that the investment is undertaken according to the EIA, on the spot by preparing a term of reference based on the EIA document. If the investors fail to perform according to the EIA, the Ministry will warn the former. The Ministry is intending to delegate the follow up to Regions after giving them appropriate training to the relevant experts from the Regions.⁷⁴ Nevertheless, this seems to remain a dream since almost all investors do not prepare EIA.

In *Dangur Woreda*, investors enter into the practice without submitting an EIA document. The environmental office, once a year, monitors the large-scale agricultural investors in the *Woreda*.⁷⁵ In *Gambella*, EIA is not prepared by large-scale agricultural investors.⁷⁶

⁷¹ Interview conducted with Mr Asfaw (n 37 above).

⁷² Interview conducted with Mr Aschalew (n 27 above); the past work which was done in respect of EIA has lots of problems, See interview conducted with Mr Lemi (n 12 above).

⁷³ In *Amhara* Regional State, neither the EIA nor the environmental management is better performed and now the investors are working without conducting EIA and preparation of same in some cases is not made by professionals where it is made. Interview conducted with an expert in Investment Attraction and Helping Work Process who wants anonymity.

⁷⁴ Interview conducted with Mr Haddis (n 30 above).

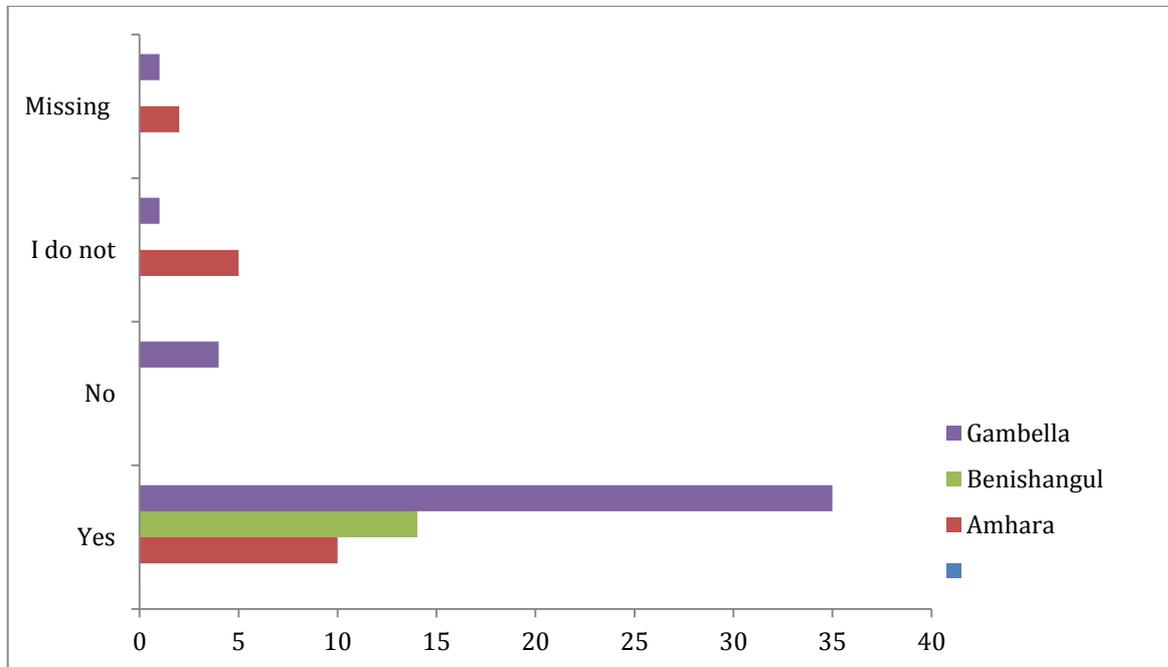
⁷⁵ Interview conducted with Mr Habtamu (n 27 above). Where the investor fails to undertake the investment as per the obligations imposed by the Environmental Impact Assessment, the lease agreement can be terminated and the investor shall pay compensation to make good the damage. Proclamation No. 85/2010, Art. 20(2)(n). The provision lacks clarity. In *Benishangul Gumz*, large-scale agricultural investor shall submit the document on Environmental impact Assessment before s/he/it is given investment land. See Regulations No. 44/2011, Art. 12(8) and Art. 14(1)(H).

⁷⁶ Interview with Mr Koang (n 9 above). In Ethiopia, regarding the large-scale agricultural investment, EIA system is weak and implementation of EIA law is weak. EIA, sometimes, is considered as an obstacle to development activities. See Cesar and Ekbohm *Ethiopia Environmental and Climate Change policy brief* 21. The Ethiopian legal and institutional system is not adequate to ensure EIA implementation. Dejene Girma Janka 'Environmental impact assessment in Ethiopia: Laws and practices,' unpublished PhD thesis, University of

The practice of law of sustainable large-scale agricultural investment

At the time of clearing the farmland some trees have been conserved

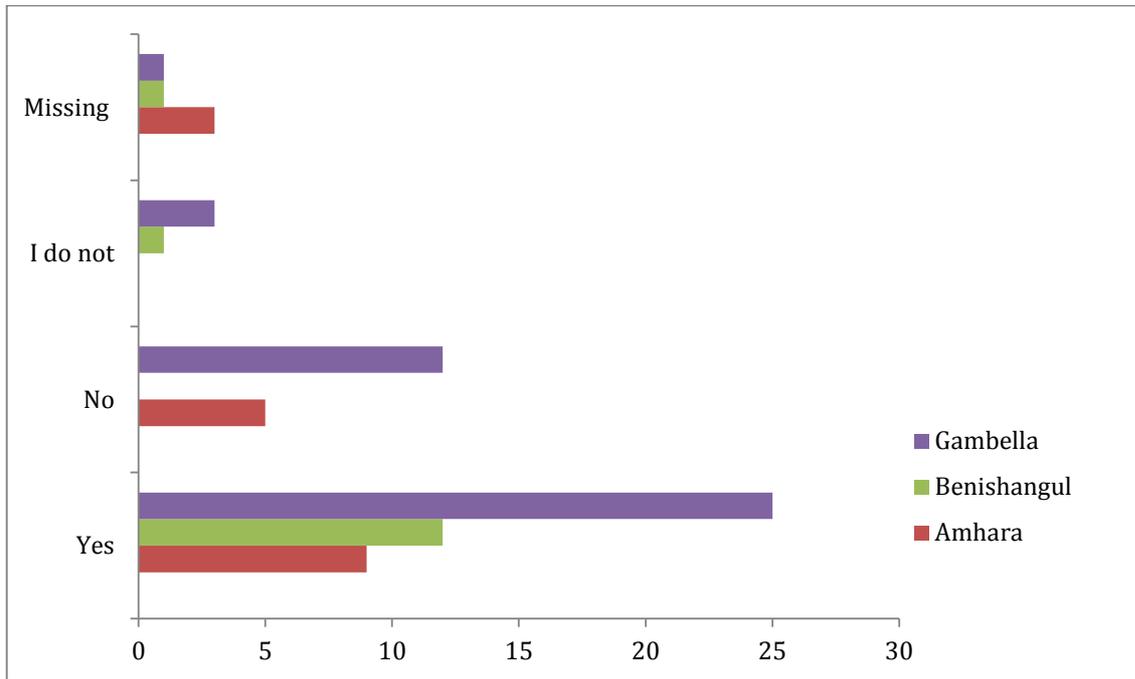
Chart 6.12: Impact on forest



Source: Computed from questionnaires.

The workers in the farm land respond that the farms preserved trees.

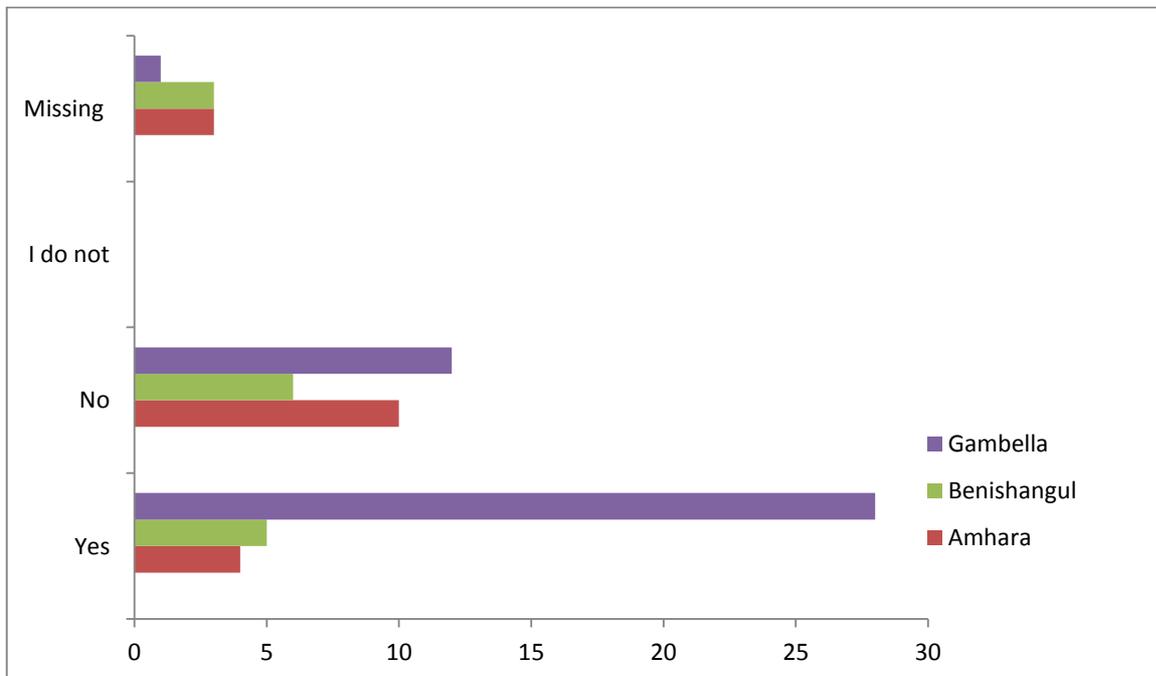
Chart 6.13 Preserving soil erosion on the farmland



Source: Computed from questionnaires

This chart depicts that the workers respond to the positive regarding soil protection in the farm lands.

Chart 6.14: Implementation of Code of practice



The chart indicates that farms implement the agriculture code of practice. On the other hand, it also makes clear that it is not implemented yet.

Table 6.3: Answers of farm Managers

No.	Questions	Answers		Missing	Total
		Yes	No		
1	At the time of clearing the farmland some trees have been conserved.	11	1		12
2					
3	Are you preserving soil erosion on your farmland?	11	1		12
4	If your answer for Q. 3 is 'yes'; which methods do you use to prevent soil erosion?	3	7	2	12
5	Did you prepare and submit environmental impact assessment to the Ministry of Agriculture?	5	6	1	12
6	Did you prepare action plan for your farmland?	11		1	12
7	Did you include environmental and social issues in your action plan?	10	1	1	12
8	Do you implement the Social and Environmental Code of Practice Prepared by the Ministry of Agriculture?	5	7		12
9	Do you have management system of pesticides?	10	2		12
10	Do you manage your farmland in a manner not to cause air pollution?	9	3		12
11	Do you manage your farmland in a manner not to cause bad odours?	9	3		12
12	Do you manage your farmland in a manner not to cause water pollution?	8	4		12
13	Do you believe that the farm will bring about sustainable development?	11		1	12
14	Does your farm land include areas like parks and other protected areas?	3	8	1	12

Source: Computed from questionnaire

The table depicts those managers of farmlands answer in a positive manner in general. This, if it is true, would indicate that the principles of large-scale agriculture are implemented.

Questionnaires were distributed to lawyers around the selected large farms in *Amhara, Benishangul Gumz, and Gambella* Regions to assess their opinions regarding the role of law in bringing sustainable Large-Scale Agricultural Development, and the result is summarized in the following table.

Table 6.4: Role of law to promote sustainable large-scale agricultural development

Statements	Areas	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	Total
The Ethiopian laws could help to promote sustainable large-scale agricultural development	Amhara	13	4				17
	BeniShangu 1	2	11	2			14
	Gambella	27	21	1	5		54
	Total	42	36	3	5		85

The role of law to achieve sustainable large-scale agricultural investment is generally recognised in Ethiopia. As the figure in the above table depicts, 42 lawyers in the areas of large-scale agriculture farms out of 85 i.e. 49.41 percent strongly believe that the Ethiopian laws could help to promote sustainable large-scale agricultural development. Moreover, 36 lawyers, i.e. 42.35 percent agree that the Ethiopian laws could help to promote sustainable large-scale agricultural development.

Table 6.5: Sustainable development

Questionnaires were distributed to residents of large-scale agricultural investment in *Benishangul Gumz, Gambella* and *Amhara* Regional States and the result is summaries in the following table.

Question	Area	Yes	Will not change	No.		M is	Total
Do you believe that the large-scale agriculture in the locality will bring about sustainable development?	Ayehu	28	10	8			46
	Bir Farm	30		2			32
	Java	50	8				58
	Tracon	16	10	2			28
	Kota	43	15	15		1	74
Total		167	43	27		1	238

It is observable from the table that 167 residents out of 238 i.e. 70.17 percent of the respondents believe that large-scale agricultural investment will bring about sustainable development. The local resident people, in general, believe that S & P Energy Solution could achieve sustainable development because it is working by sharing some benefits to the local peoples. It is also working with agricultural machinery and is well staffed. Thus, local residents have a positive attitude towards the farmlands operating in that locality unlike, other farmland sites. In general, some believe that sustainable agricultural development can be achieved by large-scale agriculture.⁷⁷

On the other hand, 43(18.07percent) of respondents believe that it will bring no change. A significant number of respondents, i.e. 27(11.34 percent) also believe that it will not bring about sustainable development.

Large-scale agricultural investment, particularly at the beginning, was undertaken without considering environmental protection. Soil and water preservation had not been taken in the

⁷⁷ Interview made with Mr Habtamu (n 27 above).

operation, and no biodiversity protection was accorded. Furthermore, investors failed to preserve 60-100 trees per hectare. They also ploughed very close to water bodies disregarding the requirement of the law that states that 50-100 meters of distance must be kept between farmlands and water bodies.⁷⁸ On the other hand, some farms conducted research on soil, use zero tillage in *Bega* so that vegetables will be used as organic fertilizer.⁷⁹

Conclusion

The data shows that lawyers in the localities of farmlands believe that Ethiopian laws could help to promote large-scale agricultural development. According to the data, the right to development is achievable through large-scale agricultural investment.

Legal principles applicable to large-scale agricultural investment are not properly implemented as the practice witnesses. In practice, the right of individuals for compensation and relocation assistance is not practiced as the law requires for those people who displaced, and the government at a lower level does not follow appropriately the legal procedure. The large-scale agricultural investment has a negative effect on the culture of the local people. The social and environmental code of practice for large-scale agricultural investment is not yet translated into practice. Investors have transformed forests into farms, leaving no trees as required by the law. In this regard, the case of *Gumare Kebele* is an excellent example. Soil erosion has increased in farms and the large-scale agricultural investment did not consider the protection of wildlife and other living things. Though there are some encouraging efforts made by farms, the biodiversity protection law is not properly implemented. Water is polluted, while EIA is not prepared in a manner required by law.

The empirical evidence witnesses both the law can promote sustainable large-scale agricultural development and it negatively affects. The practice shows that the law encourages sustainable large-scale agricultural development and it would be achieved. On the contrary, the evidence reveals that the law does not promote sustainable large-scale agricultural development and since there is lack of knowledge and personnel to implement the law effectively, sustainable

⁷⁸ Interview made with Mr Aschalew (n 27 above).

⁷⁹ Interview conducted with Mr Tegenu Worku, Farm Manager *Bruhway* Agri Industry PLC, in 2012.

large-scale agricultural development remains to be a dream.⁸⁰ Thus, it is essential to enact a law that provides sustainable agricultural practices by defining the concept, first. Moreover, training and education for personnel to implement the law, as well as monitoring and supervision are paramount.

⁸⁰ The Ethiopian floriculture sector cannot bring sustainable development unless some corrective measures are undertaken. See generally Elias Nour 'The Investment Promotion and Environment Protection Balance in Ethiopia's Floriculture: The Legal Regime and Global Value Chain' unpublished PhD thesis, University of Warwick School of Law, 2012.

Chapter Seven Experiences of Brazil and South Africa

7.1 Introduction

This chapter is devoted to consider the experience of large-scale agricultural development and environmental protection in Brazil and South Africa. Brazil is considered as ‘agricultural and environmental superpower.’¹ The country is a leading exporter of food in the world, such as coffee, sugar and second in soybeans, sugar cane and tobacco.² In Brazil, around 12% of the world's species are found and that makes the nation the most biodiverse country on Earth.³ It has also the world’s largest river basin.⁴ The legal system being one of the attractive factors for foreign investors, Brazil attracts foreign direct investment.⁵ The Ethiopian GTP II also refers the development experience and policies of Brazil.⁶ Therefore, it is important for Ethiopia to take a lesson from Brazilian legal system so this chapter considers the experience of Brazil.

South Africa is an African country as Ethiopia that indulged in the establishment of a developmental state. South Africa is rich in biodiversity,⁷ and large-scale agricultural investment contributes to the development of the nation.⁸ The Code of Conduct for the Large-scale agricultural investment of Ethiopia also uses the South African documents as an example.⁹ Therefore, its experience would contribute to Ethiopia and this chapter will consider the experience of South Africa as well.

¹ The Nature Conservancy ‘Sustainable agriculture efficiency and responsible use of natural resources’ 5.

² Above.

³ Above 4.

⁴ Above 5.

⁵ BP Reydon & VB Fernandes ‘Land grabs or land acquisitions: lessons from Latin America and Brazil’ 11.

⁶ See በኢ.ፌ.ዴ.ሪ መንግሥት የአስፈጻሚ አካላት አደረጃጀት ማሻሻያ ጥናትና የውሳኔ ሃሳብ ነሐሴ 2007 ዓ.ም. አዲስ አበባ (FDRE Government study and recommendations for executive organs’ organisation amendment August 2015, Addis Ababa) 7(Available only in Amharic).

⁷ LJ Kotze & A Du Plessis ‘The inception and role of international environmental law in domestic biodiversity conservation efforts: The South African experience’ (2006) 6 *Queensland University of Technology Law and Justice Journal* 30.

⁸ Agriculture, Forestry & Fisheries of South Africa, ‘South African agricultural production strategy’ (Concept document 2011-2015) 8; Binswanger –Mkhize HP ‘From failure to success in South African land reform’ (2014) 9 *African Journal of Agricultural and Resource Economics* 265.

⁹ See Ethiopian Ministry of Agriculture, Social and environmental code of practice for agricultural investment (2011) 9.

7.2 Law of large-scale agricultural investment and environmental protection in Brazil

Brazil¹⁰ has attempted to attract foreign direct investment using laws and policy.¹¹ It has a development strategy based on primary commodity export, where agriculture plays a key role.¹² Foreign direct investment is regulated by law,¹³ and incentives are offered to attract foreign direct investment.¹⁴ Substantive and administrative protections¹⁵ are given to foreign investors, and foreign capital is regulated.¹⁶ Brazil is successful in attracting foreign direct investment (FDI). Receiving USD 64 billion in 2013, the country was the fifth largest destination for global FDI flows in 2014.¹⁷ FDI has played a significant role in Brazil's development.¹⁸ Though arbitration¹⁹ is common, disputes that arise from FDI can be settled by Brazilian courts.²⁰

7.2.1 Brazilian legal system

Basically, Brazil has a civil law legal system.²¹ Roman law is the source of Brazilian legal system.²² The civil law legal system in Brazil was implanted by the Portuguese colonizers. Thus, we found Civil Code, Criminal Code, Commercial Code, and Procedure Code enacted in Brazil.²³ Decisions are rendered by courts according to the enacted laws and the basic function of the judges is to interpret those laws. However, courts are allowed to pass judgments based on

¹⁰ The researcher had relied on materials written in English since he cannot read Portuguese.

¹¹ H Chirstiansen; *et al* 'Incentives-based competition for foreign direct investment' (2003) 15. See U.S. Department of State 'Brazil investment climate statement' (2015) 3-4.

¹² L Mattei 'The Brazilian rural development model in the context of green economy' (2015) 9.

¹³ For the discussion of the issue, see KS Rosenn 'Regulation of foreign investment in Brazil: A critical analysis' (1983) 15 *University of Miami Inter-American Law* 307-365.

¹⁴ See Brazil- Information and Documentation Centre *Doing business and investing in Brazil* (2013) 42.

¹⁵ For the discussion of the protections, see GdB Pucciet *al* (eds) *Investment protection in Brazil* (2013) 69-258.

¹⁶ Foreign capital, in Brazil, is regulated by Law 4.131 of 3 September, 1962 and Law 4.390 of 29 August 1964. Brazil, Ministry of Foreign Relations, *Legal guide for foreign investors in Brazil* (2007) 23.

¹⁷ US Commercial Service, *Doing business in Brazil: 2015 Country commercial guide for US companies* (2015) Chapter 6; Minister of Development, Industry and Foreign Trade, *Brazilian official guide on investment opportunities* (2014) 5.

¹⁸ See generally PdM Veiga *Foreign direct investment in Brazil: regulation, flows and contribution to development* (2004).

¹⁹ For the treatment of arbitration, see CA Corrie 'International commercial arbitration in Brazil' (2013) 35 *Comparative Law Yearbook of International Business* 113-158.

²⁰ US Commercial Service (n 17 above).

²¹ AP Grinover 'Brazil' (2009) 622 *The Annals of the American Academy of Political and Social Science* 63 63.

²² DB Emlund 'Working with precedents to develop the rule of Brazilian Commercial law in a worldwide scenario' *The Export of Legal Education* 1.

²³ HJ Steiner 'Legal education and socio-economic change: Brazilian perspectives' (1971) 19 *The American Journal of Comparative Law* 39 44.

analogy, customary law, and the general principles of law where there is no specifically enacted law.²⁴ Recently, there is a move to reinforce the growing application of precedents.²⁵

The 1988 Constitution guarantees access to courts as a basic individual right. The Constitution establishes Federal and State courts.²⁶ The Brazilian civil procedure is highly influenced by German and Italian laws and scholars. Civil procedure is governed by the 1973 Code of Civil Procedure as amended.²⁷

The fundamental philosophy of Brazilian legal system focuses on the ordinary person and private relations between individuals; hence there is the sense of justice and morality present in civil law legal system.²⁸ However, this civil law legal system is supplemented by many concepts and procedures of common law legal system.²⁹ The US Constitution has influenced the Brazilian Constitution. The influence of US legal system is seen in all sectors of public law particularly in constitutional and administrative law.³⁰

The American authorities and court decisions have influenced the Brazilian legal system.³¹ However, the fundamental distinction between the US Constitution and the Brazilian Constitution is that the latter has been changed for a number of times while the former constitution remains stable.³²

7.2.2 Nature and size of large-scale agricultural investment in Brazil

In Brazil, commercial farming was started in the 1960s and by the 1976 it had gained 16% of the world market. After a brief decline in the 1980s, production again grew dramatically. In the 1990s, Brazil adopted a set of commercial and financial measures, which enabled large-farms to dominate Brazil's soybeans sector. Thus, agribusiness is the driving force of the growth with

²⁴ Nd Araujo 'The status of Brazilian legal education' (2001) 51 *Journal of Legal Education* 325-326. CESA (Centro de Estudos das Sociedades de Advogados) *Legal guide for the foreign investor in Brazil* (2014) 29.

²⁵ CESA above.

²⁶ Araujo (n 24 above). The 1988 Federal Constitution is supreme law of the land which has been amended for 67 times. States have enacted their own constitutions that must not contradict the federal constitution. CESA (n 24 above) 27-8.

²⁷ Brazilian Code of Civil Procedure Law 5,869 of January 11, 1973 as amended; Araujo (n 24 above) 326.

²⁸ DB Emlund 'Working with precedents to develop the rule of Brazilian Commercial law in a worldwide scenario' *The Export of Legal Education* 1.

²⁹ Grinover (n 21 above) 63.

³⁰ J Dolinger 'The influence of American constitutional law on the Brazilian legal system' (1990) 38 *The American Journal of Comparative Law* 803-804.

³¹ Above, 804.

³² Above, 806.

capital intensive and technologically advanced large-scale farms.³³ In Brazil, in the largest soy-producing municipality 85% of the farms are larger than 1,000 hectares.³⁴

In Brazil, the concentration of agriculture in the hands of large-scale agribusiness is increasing.³⁵ Mechanised agriculture is rapidly expanding. For instance, it increased at an average rate of 19.4 percent per year in Mato Grosso State in five years. An economic factor is a principal driver for the conversion of large-scale land use into mechanised agriculture in Brazil.³⁶ Large-scale agribusinesses are a major player in Brazilian agriculture production.³⁷

In short, Brazil is explained as world's food basket, and FAO estimated that meat production should be doubled and grain output should increase 50% by 2050 to meet the diets and higher food demand of the world population that will increase from 7 billion to 9 billion.³⁸

Brazil is a country with the largest arable land.³⁹ The country constitutes about 400 million hectares of potentially arable land but only 50 million hectares are being used. Capital-intensive large farms are producing 76 percent of its total farm output. In general, the agribusiness in Brazil is successful, though many argue that Brazil's agricultural success has come at the expense of the environment. Some prefer to the deforestation of the Amazon rainforest. In addition, the Cerrado, one of the oldest and most diverse tropical ecosystems is under threat

³³ Agribusiness plays a great role in employment and economic development of Brazil, particularly increasing after the 1990s. The Brazilian Institute of Geography and Statistics states that agribusiness contributes for 33% of the Gross Domestic Product (RS 540 billion in 2006), 42% of the total expropriation (around the US \$ 50 billion) and 37% of employment force in Brazil (17.7 million workers. DdN Goyos (Coordinator) *Legal guide: Business in Brazil* 9th edition (2014) 233. According to Schlesinger, mechanised production has severe negative impact on the reduction of rural employment, for instance, between 1985 and 2004, production tripled, from 18 to 50 million tons per year whereas employment fell 805, from 1.7 million workers to 335,000. In addition, working conditions are expressed as tantamounting to slavery in the soy sector. See M Perze *et al* 'The promise and the perils of agricultural trade liberalization: Lessons from Latin America' (2008)12.

³⁴ Perze *et al*, above 11.

³⁵ Oxfam International 'Fighting hunger in Brazil: Much achieved, more to do' (2010) 2.

³⁶ E Jasinski *et al* 'Physical landscape correlates of the expansion of mechanised agriculture in Mato Grosso, Brazil' (2005) 9 *Earth Interactions* 1 1.

³⁷ Oxfam International (n 35 above) 4. In Brazil, agribusiness is important in export, for instance, the three principal products of Brazil's soy sector-soybeans, meal, and oil- are most important agricultural exports. In 2006, they amounted to 80% of the total exports, in 2005, more than 22 million hectares were planted in soybeans. By 2003/04, Brazil was the second world's soy exporter following the US, but now it becomes the leader. Perze *et al* (n 33 above) 19. Though Brazil is a leader in export of agribusiness products, about 70% of its agricultural production aims the national market. See Ministry of Agriculture 11. However, Brazil does not compromise domestic food supply for the international agricultural market. Thus, the share of production projected by 2019/2020 is '18% for corn, 46% for soybeans, from 21% to 37% for meat, and 24% for ethanol.' Production is expected to grow by 2.88% per year. Thus, cropland will increase to 9.3 million hectares. This area will represent only 5.9% of the current pasture area in Brazil. E Contini & G Martha 'Brazilian agriculture, its productivity and change' (2010) 11.

³⁸ Economist Intelligence Unit 'The global power of Brazilian agribusiness' (2010) 4.

³⁹ Above 2.

because of agricultural growth, since over 37 percent of its original vegetation cover has disappeared. Nonetheless, Brazil is ‘the first tropical agricultural giant’ and an important exporter of agricultural products.⁴⁰ Brazil is an important recipient of foreign direct investment in the agricultural sector.⁴¹ It is the most FDI attractive and the best in forest investment sector.⁴²

In Brazil, though the majority of farmers are smallholders, most of the farmland is occupied by large farmers. The average size of farm land in Brazil is around 73 hectares⁴³ the medium size in the Cerrado is more than 1,000 hectares and many companies operate more than 100,000 hectares of cropland in this region.⁴⁴

Reforms on the macroeconomic stabilisation, trade liberalisation, deregulation and privatisation of government business organisations have benefited Brazilian agriculture because these reforms created a better climate for productivity and investment in agriculture, which enhanced competitiveness. In Brazil, the reforms opened up trade and allowed its more capital-intensive larger farms to compete in the world market. However, the growth in Brazil has not been favourable to the poor due to uneven distribution of wealth.⁴⁵

7.2.3 Land tenure policy and law in Brazil

In Latin America, including Brazil, the issue of land tenure is subject for debate in development as well as environmental issues.⁴⁶ Brazil had experienced the most unequal patterns of land distribution in the world. Now, land reform has been made as a consequence of a popular organisation known as the Landless Workers’ Movement, not by the state.⁴⁷ Brazil land tenure is

⁴⁰M Escaler & P Teng ‘Can Asia learn from Brazil’s Agricultural Success?’ (2010) 2; See also Economist Intelligence Unit (n 38 above) 4.

⁴¹JR Nascimento ‘Analysis of international investments in the agricultural sector in Brazil’ (2011) 13.

⁴²Above 43.

⁴³Escaler & Teng (n 40 above) 3.

⁴⁴KD Deininger *et al* *Rising global interest in farmland Can it yield sustainable and equitable benefits?* (2011) 5.

⁴⁵Escaler & Teng (n 40 above) 3-4.

⁴⁶CEF Young ‘Economic adjustment policies and the environment: A case study of Brazil’ unpublished PhD thesis, University of London, 1996 95.

⁴⁷JK Boyce *et al* ‘Land reform and sustainable development’ (2005) 5. Land tenure or security is important because, there is widespread evidence that farmers are more likely to invest in their land, and achieve productivity when they have secured land rights. RNR & Agriculture team, and Martin Adams ‘Land reform, agriculture and poverty reduction’ (2004) 3.

characterised by large, family-owned properties.⁴⁸ In rural areas, the following are tenure types in Brazil:⁴⁹

- a) Ownership (freehold tenure);
- b) Rural adverse possession as a means to obtain tenure (Art. 191 of the Constitution);⁵⁰
- c) Rental;⁵¹
- d) Rights of use; temporary loan for use;⁵²
- e) Assignment of possession, CDRU.⁵³

In many parts of Brazil, for example Mato Grosso, the most agriculturally productive area is under private property.⁵⁴ Land ownership in Brazilian land law is governed by the ‘principle of effective use’, which provides a legal opening for land occupation. According to this principle, as incorporated in the law, landowners, who fail to use their property (land) productively and fail fulfilling the ‘social function’⁵⁵ the property shall be expropriated. This principle was affirmed in the 1964 military rule of Land Statute, and again incorporated in the 1985 National Agrarian Reform Plan. According to this law, a farm is said to be productive farm where ‘at least 80% of the acreage is effectively used, environmental and labour standards are respected, and the use of the land is ‘of common benefit to landowners and workers’’.⁵⁶ The reform enabled more than a million people (300,000 families) to win legal recognition for more than eight million acres of land reform settlements.⁵⁷ Furthermore, the 1988 Brazilian Constitution incorporates the social function principle. According to the Constitution, the social function is fulfilled where the following requirements are fulfilled:⁵⁸

⁴⁸ CP Barroset al ‘Brazilian land tenure and conflicts: The landless peasants movement’ (2013) 33 *Cato Journal* 47 52.

⁴⁹ UN HABITAT *Land tenure, housing rights and gender in Brazil* (2005) 43.

⁵⁰ Constitution of the Federative Republic of Brazil 3rd edition (2010) Art. 191.

⁵¹ Above Art. 190.

⁵² Above Art. 188 Para. 1.

⁵³ Decree 271 of 1967 Art. 7.

⁵⁴ P Barreto & MD Childress ‘Land tenure and climate change mitigation in the Brazilian Amazon’ in K Deininger *et al* (eds) *Innovations in land rights recognition, administration, and governance* (2010) 169.

⁵⁵ For discussion of the issue, see Ads Cuncha ‘The social function of property in Brazilian Law’ (2011) 80 *Fordham Law Review* 1171-1181.

⁵⁶ Boyceet al (n 47 above) 5; See also Z Navarro ‘Expropriating land in Brazil: principles and practices’ (Draft) 5.

⁵⁷ Boyceet al (n 47 above) 6.

⁵⁸ Brazilian Constitution (n 50 above) Article 191.

- a) Adequate and rational use;
- b) Adequate use of the natural resources available and preservation of the environment;
- c) Observance of the dispositions which regulate labour relations;
- d) Exploration, which favours the well-being of the repertories and workers.

In many cases, settlers use chemical-intensive farming that is used by larger farmers and which is not environment-friendly. Efforts have been made to shift to environmentally friendly farming practices, albeit it is slow, but with experience and education. These include replanting trees, the use of crop rotation and manures to build soil fertility and organic farming.⁵⁹

7.2.4 Laws applicable to large-scale agricultural investment in Brazil

In the past 20 years, acquisition of a rural real estate by foreigners or by Brazilian companies controlled by foreigners has been increased in Brazil.⁶⁰ Brazil has an agrarian law, which consists of a 'set of laws and administrative rules that regulate all activities that arise from agricultural production.'⁶¹ The purpose of agrarian law is to protect natural resources, ensure the development of production, and secure the welfare of the rural community. Thus, the law is linked with a number of other areas of law, which includes investment law and environmental law.⁶²

A) Constitution

The first important law of Brazil applicable to agribusiness is the Constitution. Article 190 of the Constitution states that the law shall regulate and limit the acquisition and lease of the rural real estate by foreigners.⁶³ Basically, Law No. 5,709 of October 7th, 1971;⁶⁴ Decree No. 74,965 of November 26th, 1974; Law No. 8,629 of February 25th, 1993⁶⁵ are governing legislation of this sector in Brazil.⁶⁶ The Land Statue, Law No. 4,504 of 30 November 1964 is another law applicable to agribusiness that governs rural activities in Brazil.⁶⁷

⁵⁹ Boyce *et al* (n 47 above) 7.

⁶⁰ Ministry of Agriculture, Livestock and Food Supply Agricultural and livestock plan 2009/2010 (2009) 50.

⁶¹ Agrarian law in Brazil is described as 'Rural law, or agriculture law, or in modern sense agribusiness law.'
See Goyos (n 33 above) 234.

⁶² Above 233-34.

⁶³ Brazilian Constitution (n 50 above) Art 190.

⁶⁴ Brazilian Law 5709 of October 1971.

⁶⁵ Brazilian Law 8629 of 25 February 1993.

⁶⁶ Ministry of Agriculture, Livestock and Food Supply (n 60 above) 50.

⁶⁷ The law regulates the rural property rights and duties to implement land reform and promote agricultural policy of the country. See of Law 4,504 of 30 November 1964 Art. 1.

The Brazilian agrarian law is based on the following six legal principles:⁶⁸

- a) principles of Social Function of property;
- b) principle of environmental protection;
- c) principle of the reformation of rural structure;
- d) principle of the economic and social progress;
- e) principle of the social justice and of increase in productivity; and
- f) principle of the prevailing of the collective interest over the individual interest

Furthermore, bill of Law No.325, of 11 December 2006, established the Rural Procedure Statute in Brazil.⁶⁹

B) Agrarian Contracts

Contracts in the economic sector including the agriculture field, can be entered into between rural producers, rural landlords, financial institutions, industries etc. The Commercial, Civil, Banking and other legislations regulate these areas. However, the Land Statute, Law No. 4.504, of 30 November 1964⁷⁰, and the Decree No. 59.566 of 14 November 1966, deal agrarian contracts in more extensive manner. A lease is one form of a contract to undertake agribusiness in Brazil. According to the Brazilian Law No. 4,504 of November 30th 1964 and Decree No. 59,566 of November 14th, 1966 both as amended, states

...the lease of rural real estate is a type of contract under Brazilian law, whereby the use of a rural property is assigned to a person, by the owner or lessee in exchange of payment in order to perform on such property the development of agricultural activity.⁷¹

Thus, the law makes clear that lease is one type of contract, and therefore all the general principle of the law of contract of Brazil shall apply to it. The lease contract transfers the use right to the lessee, so that the lessee will be able to use the land and acquire necessary profits from the agribusiness. Furthermore, it is the owner or the lessee of the rural land who has the right to transfer the land to the lessee. In short, rural land lease presupposes a person to be an owner or a lessee so as to transfer his/her right of use over the land. Finally, the lessee, the person to whom the right of use over the land is transferred can undertake agricultural activities, which means, s/he has the right to exploit the land.

The Brazilian law is peculiar in emphasising on the preemptive rights of the lessee to renew the lease or purchase the rural property.⁷²

⁶⁸ Goyos (n 33 above) 234.

⁶⁹ As above.

⁷⁰ Brazilian Land State Law 4504 of 30 November 1964.

⁷¹ Ministry of Agriculture, Livestock and Food Supply (n 60 above) 53.

Partnership is another form of development of rural activities in Brazil. In this case, the owner of the rural property assigns its use to a person in exchange of participation in the results of such use.⁷³ Pursuant to partnership, both the investor and the landlord share the risks of the investment.⁷⁴

The Brazilian government has put some criteria and proceedings to have sufficient control to ensure that the investments are not harmful to the interests of the country and to keep the agrarian structure. Therefore, there is the possibility of a greater plan of public policies for the sector.⁷⁵

C) Applicable rules to foreigners

Where the rural property is greater than three Undefined Exploration Modules-MEI⁷⁶(from 15 to 300 hectares, depending on the region), it must be authorised by the National Institute for Colonisation and Agrarian Reform (INCRA) to acquire or lease the rural property.⁷⁷ The authorisation granted by INCRA must be evidenced by the document that transfers the ownership or in the Real Estate Registry to permit its registration and then transfers the *in rem* right over the rural area.⁷⁸

7.2.5 Laws of acquisition of land by foreign investor in Brazil

Brazil constitutes an area of 851 million hectares, out of which 77 million are farmland, and 519.5 million hectares are covered by forest.⁷⁹ From the total arable land, around 4.3 million hectares, that is 1.7 percent is owned by foreign investors.⁸⁰

Legal restrictions are made to foreigners to acquire real estate in Brazil. Art. 190 of the Constitution reads: ‘This law shall regulate and limit rural property acquisition or lease by foreign natural or legal persons, and shall establish the cases to be authorized by Congress.’⁸¹A

⁷² See Law 6025 of 31 December 1973 Art. 167.

⁷³ See Law 4504 of 1964 (n 67 above) Art. 96.

⁷⁴ Ministry of Agriculture, Livestock and Food Supply (n 60 above) 54.

⁷⁵ As above.

⁷⁶ Modulo de Exploration-MEI- is a unit of measurement (in hectares) used to determine, according to the characteristics of a region, a standard size for rural areas without specific economic destination. See Ministry of Agriculture (n 20 above) 51.

⁷⁷ See Law 5,709 of 1971 (n 64 above) Art. 3 & Art. 5(1).

⁷⁸ Decree No. 74,965 of 1974 Art 10.

⁷⁹ M Pirieiro & F Villarreal ‘Foreign investment in agriculture in MERCOSUR Member Countries’ (2012) 10.

⁸⁰ Above 11.

⁸¹ Brazilian Constitution (n 50 above) Art 190.

foreign investor is required to register its/her/his capital in the Central Bank of Brazil,⁸² and it/s/he must have a representative in Brazil.⁸³ Foreigners are allowed to convert into foreign exchange and send to their home.⁸⁴

Ownership and lease of rural land by foreigners is restricted.⁸⁵ Law No 5,709/71 controlled land sales under the military government (1964-1985).⁸⁶ In addition, Law No 8,629 of 1993 established land lease restrictions.⁸⁷ Land, as immovable property, is basically governed by the Brazilian Civil Code. Foreigners do have the right to acquire land provided that they register prior to the acquisition of the land.⁸⁸

According to Law No 5,709/71, a natural person (foreigner) cannot acquire or lease a rural property (directly or indirectly) greater than 50 MEI (from 250-5,000 hectares), depending on the region, or pursuant to law No. 8,629/93 a legal person cannot acquire or lease a real property greater than 100 MEI (from 500 to 10,000 hectares, depending on region).⁸⁹ In addition, not more than 25% of a municipality's total area could be under the ownership or direct or indirect possession of foreigners,⁹⁰ and not more than 40 percent of that percentage could be possessed by foreigners of the same nationality.⁹¹

After receiving the concrete case, the National Congress may authorise the investment in rural properties greater than the maximum limits of 50 or 100 MEI. The president of the Republic also approve acquisitions or leases beyond the limits established for each municipality, in case of projects considered priority to the plans of national development.⁹² To acquire a land more than 2,500 ha by a foreigner requires a prior approval by the national Congress.⁹³

The National Civil Code (Law No. 10,406 of January 10th 2002 (Brazilian Civil Code) Art 1245) registration of deed transfers real property confirms that the deed of sale and purchase must be registered before the Real Estate Registry. The documents submitted must be valid and

⁸²R Russo & GDT de Oliveveira 'Brazil' in BA Facey (ed) *The foreign investment regulation review* Third edition (2015) 21; BM Ferla 'Brazil' in C Goldman (ed) *The foreign investment regulation review* (2013) 28.

⁸³ US Commercial Service (n 17 above).

⁸⁴ Above.

⁸⁵ Above 22.

⁸⁶ Pirieiro & Villarreal (n 79 above) 21.

⁸⁷ As above.

⁸⁸ CESA (n 24 above) 134; See Ordinance No. 1005, as amended by Ordinance No 1097 issued on December 13, 2010.

⁸⁹ Law No. 8,629/93 Art. 23(2).

⁹⁰ Law No. 5,709/71 (n 64 above) Art. 12.

⁹¹ Above Art. 12(1).

⁹² Law 5,709/71 (n 64 above) Art. 12(3).

⁹³ Brazilian Constitution (n 49 above) Art. 188; See also Russo & Oliveveira (n 82 above) 22.

the seller and the former owner of the property must be ascertained. It is important to note that an instrument determining on the basis of which the business will be executed is signed before the final deed.

This instrument can be a Memorandum of Understanding, a Purchase Option Agreement or even a Commitment to sell and purchase the property, whereby the seller undertakes to provide the necessary documents for the legal due diligence, at the satisfactory direction of the potential purchaser.⁹⁴

The Brazilian government has a policy that Brazilian land should not be given to foreigners for the production of food for Brazil. However, foreign investors such as Arab investors have continued to invest in Brazil.⁹⁵ In Brazil, large-scale agricultural investors have been acquired land for soybean production and sugar cane.⁹⁶ Foreign investors can buy land for industrial investment, soybean production, and mining.⁹⁷ Between the end of 2007 and the middle of 2010, 1,152 rural properties, totalling 515,100 hectares were bought by foreigners in Brazil.⁹⁸

Table 7:1 Foreign direct investment in large-scale agriculture in Brazil

Investor	Origin	Area, Ha	Use of farmland
Cresud	Argentina	175,000	Cattle, crops, sugar cane
EI Tejar	Argentina	220,000	Cereals, oilseeds
Los Grobo	Argentina	60,000	Soybean
Chongqing grain Group	China	200,000	Cotton, soybean
Louis Dreyfus	France	250,000	Sugarcane
Shree Renuka sugars	India	133,000	Sugarcane
Prio Foods	Portugal	29,528	Soybean
Clean Energy Brazil	UK	30,000	Sugarcane

⁹⁴ Ministry of Agriculture, Livestock and Food Supply (n 59 above) 53. Brazilian Civil Code Art. 1277 also requires that the sale of real estate, including rural land shall be registered in Public Register to transfer ownership. Brazilian Civil Code, Art. 1277.

⁹⁵ T Ferrando 'Dr. Brasilia and Mr. Nacala: the apparent duality behind the Brazilian state-capital nexus' (2015) 35 *Brazilian Journal of Political Economy* 343 347.

⁹⁶ EA Clements & BM Fernandes 'Land Grabbing, Agri business and the Peasantry in Brazil and Mozambique' (2012) 3.

⁹⁷ Ferrando (n 66 above) 346-47. Clements & Fernandes (above) 4.

⁹⁸ BM Fernandes *et al* 'Land governance in the 21st century: Framing the debate series land governance in Brazil A Geo-historical review of land governance in Brazil' (2012) 49.

Ade coagro	US	165,000	Cattle, coffee, grains, soybean, sugarcane
Archer Daniels Midland	US	12,000	Oil palm
Bunge	US	10,000	Sugarcane
Sollus Capital	US	35,000	Crops
Tiba Agro	US	320,000	

Source: Schaffnit-Chattergie, Claire Foreign Investment in farmland no low-hanging fruit (November 13, 2012) 6.

7.2.6. Environmental protection laws in Brazil

Commercial agriculture in Brazil creates environmental degradation.⁹⁹ Large-scale agriculture ‘has induced irreparable damage to natural resources such as water contamination, the silting of rivers, lakes, dams; the loss of cultivable soils, predatory deforestation and the destruction of biomes...’¹⁰⁰ Brazil is home to one-fourth of the world’s plant species and numerous animal species. It is a critical site for biodiversity conservation and environmental law enforcement.¹⁰¹ In Brazil, there is a problem of deforestation, habitat destruction, and loss of biodiversity in the Amazon Basin and in other key ecosystem areas in the country.¹⁰²

Brazil has environmental laws with the purpose to protect its environment. The Brazilian environmental law is considered as one of the most advanced one in the world.¹⁰³

The 1988 Constitution provides for environmental right.¹⁰⁴ It also imposes obligations on the government and the community to protect the environment for present and future generations.¹⁰⁵

⁹⁹ Mattei (n 12 above) 12.

¹⁰⁰ Above 13.

¹⁰¹ NS Bryner ‘Brazil’s Green Court: Environmental Law in the Superior Tribunal de Justica (High Court of Brazil)’ (2012) 29 *Pace Environmental Law Review* 470-71.

¹⁰² Above 473.

¹⁰³ CR Sluter & ALAd Mendonca ‘Dependent aspects of Brazilian environmental laws and national topographic mapping series’ 3. CESA (n 24 above) 143.

¹⁰⁴ The 1988 Brazilian Constitution (n 50 above) Art. 225. The Constitution chapter VI is devoted to environmental protection. See CESA (n 24 above) 143.

¹⁰⁵ Brazilian Constitution (n 50 above) Art 225. Art 225 of the Constitution reads:

To protect the environment, Brazil has enacted an extensive environmental legislation.¹⁰⁶ Law No 7347 of 1985, establishes public civil suit for damage to the environment; Law No 99 274 of June 6, 1990, is about environmental policy and Law No. 11105 of 2005- the biodiversity law- is enacted to implement Art. 255 of the Constitution.¹⁰⁷

Act 6938/1981 establishes the Brazilian National Policy for Environment.¹⁰⁸ The National Environmental Policy Act of 1981 establishes a system of government entities responsible for environmental protection, known as the National Environment System (SISNAMA) now led by the National Environment Council (CONAMA).¹⁰⁹ The Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) is the federal agency having the power to implement environmental policy.¹¹⁰

The Agricultural policies of Brazil are sensitive to environmental protection, for instance, agro-ecological zoning for various crops has been implemented.¹¹¹

Environmental Impact Assessment

Precautionary measure to protect the environment is adopted in Brazil.¹¹² The Constitution assures that environmental impact study to protect the environment is the duty of the state.¹¹³ Then, a system of environmental impact assessment and reporting was created by Resolution No. 1.¹¹⁴

The Constitution requires the government environmental impact study to be made for activities that may have potential harm to the environment.¹¹⁵ This requirement is being

All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations. Federal Constitution Art. 225.

¹⁰⁶ See Bryner n 101 above; Sluter & Mendonca (n 103 above) 4.

¹⁰⁷ CESA (n 24 above) 144.

¹⁰⁸ Sluter & Mendonca (n 103 above) 3.

¹⁰⁹ National Environmental Policy Act of 1981 Arts. 6, 8.; Sluter & Mendonca (n 103 above) 4.

¹¹⁰ Sluter & Mendonca n 102 above 4.

¹¹¹ CAM Santana & JR Nascimento 'Public Policies and Agricultural Investment in Brazil' (2012) Paragraph 193.

¹¹² See GF Cunha *et al* 'The precautionary Principle in Brazil Post-Rio-92: Environmental Impact and Human Health' (2013) 16 *Sao Paulo* 65-80.

¹¹³ CESA (n 24 above) 144; the Constitution reads: the Government has the duty to demand, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public Art. 255 para 4.

¹¹⁴ CONAMA Resolution No. 1, 1986.

¹¹⁵ Precautionary principle is applicable in Brazil because the Constitution requires prior environmental impact study to be made for activities that would cause significant degradation of the environment. LK McAllister 'Judging

implemented by Brazilian Courts. For instance, in one case,¹¹⁶the company appealed the quo's decision on a civil action started by the Ministerio Publico. The appellate argued that the company had already restrained from performing activities by the Iquacu river; and it had replaced the damaged plants, and the company was ordered to present environmental impact assessment.¹¹⁷

The Ministerio Publico explained that the company extracted sand from the river creating a 200 mts depression, without having a licence and without undergoing environmental impact assessment.¹¹⁸The court held that the environmental damage alleged by the plaintiff were proven, and the company was liable to reforest the damaged area and to present an environmental impact assessment.¹¹⁹

In Brazil, environmental impact assessment (EIA) is mandatory at the federal and state levels.¹²⁰ The law provides lists that are exempted from EIA; that are subject to simplified EIAs; or that are subject to comprehensive EIAs.¹²¹ Therefore, the federal and state officials must ensure that projects under their respective jurisdictions have gone through EIAs before they are granted license.¹²² However, the system has faced problems such as 'excessive bureaucracy, slow administrative process, legal insecurity, lack of institutional capacity...'¹²³ Ethiopia should learn from this not to face with similar problems. Brazil's EIA system is under pressure for change.¹²⁴

The Brazilian Constitution also requires the government to demarcate appropriate areas for special environmental protection.¹²⁵ Article 170 of the Constitution provides that environmental protection as one of the principles upon which Brazil's economic order is based.¹²⁶

GMOs: Judicial Application of the Precautionary Principle in Brazil' (2005) 32 *Ecology Law Quarterly* 149-174 163. Precautionary Principles that are incorporated under the Convention on Biological Diversity and the Framework Convention on Climate Change are applicable in Brazil. For detailed treatment on the issue see McAllister above 165.

¹¹⁶ GR Extracao de Areia & Transportes Rodoviaros Ltda v Ministerio Publico Tribunal of Justice, State of Parana March 1 1994, in UNDP *Compendium of Summaries of Judicial Decisions in Environment Related Cases* (2004) (hereinafter the GR Extracao de Areia & Transportes Rodoviaros Ltda case) 80.

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ As above.

¹²⁰ See Cunha (n 113 above) 65.

¹²¹ CPF Rocha & A Fonseca 'EIA screening criteria in Brazil: a logical test?' (2014) 1.

¹²² Above 2.

¹²³ Above 1.

¹²⁴ See A Fonseca & LE Sanchez 'Pressure for change in Brazil's EIA system' (2015).

¹²⁵ See of the Brazilian Constitution (n 50 above) Art. 225. For the treatment of the Constitution, see Bryner (n 100 above) 481.

Activities that are regulated by agrarian law are developed from activities strictly relating to nature and the environment. Thus, agrarian law is directly connected to environmental law. The Environmental Preservation principle of the agrarian law indicates such a relationship, the intention of which is to consolidate economic exploitation with the conservation of natural resources.¹²⁷

In Brazil, the production of soya beans in large-scale farms is accused of impacts in terms of degradation of the Amazon biome. Agrochemicals (pesticides and herbicides) used by large-scale soybean farms in Latin America have negative impacts on health and biodiversity. UN confirmed that effective national regulation, *inter alia*, made agriculture investors, both domestic and foreign, to improve their activities to be environmentally friendly.¹²⁸ The law puts a condition that rural land must meet 'social function' and appropriate use of natural resources and preservation of the environment.¹²⁹

Biodiversity

Brazil's Forest Code of 1965 is the foundation of Brazilian environmental law which governs the protection and maintenance of flora.¹³⁰ The new Forest Code has also been in force since May 25, 2012.¹³¹ It establishes the legal reserve (*reserve legal*) and the permanent preservation area (*areas de preservaco permanente*, or APPs) - two mechanisms for the protection of flora.¹³²

In Brazil, the forest law and Preservation Areas (public national and state conservation parks and Indian reservation) influence Brazilian Agriculture and its expansion pattern. The forest law divides the rural private land into productive land and protected areas. Land dedicated to reservation is further classified into legal reserves and areas of permanent preservation, in which the former includes a specific area of land to be preserved on the private farmland whereas the latter includes: A) riparian systems defined as vegetation strip along rivers and water bodies; B) steep slope (greater than 45 degree); C) hilltops; and D) altitudes greater than 1800 m above sea

¹²⁶ Brazilian Constitution (n 49 above) Art. 170.

¹²⁷ Goyos (n 33 above) 239. Brazil launched an environmental policy in 1981 through Federal Law No. 6,938, See Magrini & Fraga & Santos *Environmental management of watersheds in Brazil* 2.

¹²⁸ World Investment Report 'Transnational Corporations, Agricultural Production and Development' (2009) 157.

¹²⁹ Constitution (n 50 above) Art. 186. See also Bryner (n 101 above) 481.

¹³⁰ Bryner (n 101 above) 486; See Forest Code of Brazil, Arts. 2 and 16.

¹³¹ Brazilian New Forest Code Law No. 12651 of 2012.

¹³² Bryner (n 101 above) 486; See Brazilian Forest Code (n 131 above) Arts. 2, 16; F Machado Brazil's New Forest Code: a guide for decision makers in supply chains and governments (2016) 10.

level (masl). The basic rationale of Areas of Permanent Preservation is to protect and prevent degradation of areas so as to preserve freshwater. These areas are not allowed for any cultivation and must be maintained with the original native vegetation. Extreme slopes (greater than 45 degrees or 100%) and altitudes above 1800 masl have limited suitability for agriculture and they should be preserved. Legal Reserves are aimed at promoting fauna and flora biodiversity and sustainable use of natural resources. Forests and vegetations should be preserved and therefore mechanised agriculture that employs intensive inputs or forestry operations that destroys forests completely is not allowed.¹³³

Forest law requires 35% of private farm to be protected, as Legal Reserves in the Savannah Regions inside the Legal Amazon Region (LAR), and 20 % of private land should be preserved outside of LAR. Conventional private agriculture use is not allowed in Preservation Areas that are under public administration. However, self-sufficiency food production under low-impact traditional agricultural systems following management plans is allowed exceptionally in Indian Reservations. In Brazil, the law is influential on agricultural activities due to the fact that improved monitoring capacity, more strict local governance, effective legal enforcement, and the adoption of new demands of certified markets which areas required to comply with the legality of operations.¹³⁴ According to the Brazilian Forest law, the owner of the land must designate the percentage as Reserva Legal (RL) in the deed of the property and the allowed economic activities within these areas must be sustainable. This requires the implementation of sustainable forest management, in accordance with technical and scientific criteria, for instance. This plays an important role in biodiversity conservation and sustainable use of natural resources because it obliges private owners to preserve part of their land with native vegetation. This is one of the unique features of Brazilian environmental law.¹³⁵

Coming to practice, the High Court of Brazil (Superior Tribunal DC Justica-STJ) was established as a national court to enforce environmental laws in Brazil.¹³⁶ It interprets and enforces environmental laws of the nation and developed its jurisprudence on environment.¹³⁷

¹³³ G Sparovek et al 'Brazilian agriculture and environmental legislation: Status and future challenges' (2010) 40 *Environmental Science & Technology* 6049.

¹³⁴ As above; see also G Sparovek et al 'The revision of the Brazilian Forest Act: increased deforestation or historic step towards balancing agricultural development and nature conservation' (2012) 16 *Environmental Science & Policy* 65 65.

¹³⁵ 'The Challenges proposed in the Brazilian Forest Code do not have scientific support' (2010) 10 *Biotaneotropica*, Editorial.

¹³⁶ Bryner (n 101 above) 482.

Environmental protection compliance is given due attention in Brazil and the court has decided cases accordingly. For instance, in one case¹³⁸ the plaintiff argued that the former and the present Municipal Prefects of Rolante-RS had continuously exposed human beings and the environment to health hazards by waste deposits made without environmental licence. The waste was of domestic, industrial and hospital origin had been dumped daily by a river line of an area identified as permanent preservation. These waste caused environmental damage-polluted the soil, the air and the vegetation.¹³⁹

The defendants did not defend the matter in a proper manner.¹⁴⁰ Then, the court held that documentary evidence has supported the allegations environmental damage. It also held the defendants criminally liable for the damage caused since they did not do everything they should have done to control environmental damage. The court punished each of the defendants with two years of reclusion and 10 days of fine.¹⁴¹

This case makes clear that the officials of the government must be made answerable for the failure to protect the environment. If there is accountability, it would be possible to implement the environmental law in Brazil.

In Brazil, there is no full compliance of forest law by private farms. In areas of agricultural expansion, the natural vegetation is not protected.

In total, about 68 Mha of natural vegetation outside LAR is unprotected, and inside LAR, 24 Mha is unprotected, of which 14 Mha is savannah. The total area of unprotected natural vegetation (92 Mha) is roughly twice the area presently occupied by the four major Brazilian crops(soybean, corn, sugar cane, beans) or 1.4 times the total agriculture area excluding pastures(64 Mha).¹⁴²

In Brazil, the contradiction between agricultural development and natural conservation increases where agricultural expansion violates the law of natural resources.¹⁴³

In July 2010, the Brazilian Parliament began analysing an amendment to the existing forest law that is applicable on natural vegetation protection. The revision partly was necessitated because of the ineffectiveness of the law in private farmland. However, there is an argument that the draft law may fail to promote additional conservation. There is a risk that agriculture would

¹³⁷ Above 485.

¹³⁸ *Ministerio Publico v Orlando Linden & Hermes Girido Masera* Tribunal of Rio Grande do Sul April 30 1998, 73-74.

¹³⁹ Above 73.

¹⁴⁰ As above.

¹⁴¹ Above 74.

¹⁴² Sparovek *et al* (n 134 above) 4-5. In 2010, 75 % of the 6,451 sq km of Amazon forest destroyed. *Fernadeset al* (n 98 above) 48.

¹⁴³ Sparovek *et al* (n 134 above) 5. In recent years, deforestation increases due to the bio-energy projects, though it makes Brazil one among the leading bio-fuel producing nations. See Sparovek *et al* (n 135 above) 65.

develop at the sake of deforestation and converting other land to agriculture land. The law will never be effective in areas where there is high pressure on land neither provides sufficient incentives for efficient and productive land use practices. Therefore, it is suggested that intensification is an option for combining conservation and agricultural development. Thus, not to clear forest and natural resources to expand agriculture is important.¹⁴⁴

Brazil enacted Law No. 9,433 to manage water in 1997. The management of water should always take into account multiple use of water.¹⁴⁵

In one case,¹⁴⁶ *Captain Kishnichan* appealed to the court for a decision that held him liable for negligence for the consequence of the shipwreck. The shipwreck resulted in the spill of 3.1 tons of sulphuric acid that resulted in ecological damage.¹⁴⁷

The plaintiff argued that Captain Kishnichan behaved negligently.¹⁴⁸ The court confirmed the decision of the *quo* and ratified the prison sentence of the defendant concluding his conscious fault.¹⁴⁹

In one case,¹⁵⁰ the plaintiff requested the immediate suspension of any activity to the construction of the Paraguay Parana hydro way. The project consisted of a navigation system along 3,440 kms in Caceres River in Brazil and Nueva Palmira in Uruguay.¹⁵¹

The plaintiff argued that the aboriginal communities located by River Paraguari did not participate in the study conducted about the project. The plaintiff explained that the hydro way crosses river Paraguari from beginning to the end it would cause environmental damage.¹⁵² The defendant argued that a study had been conducted.¹⁵³

The court restrained the Federal Union from:

- a) carrying out any study or work of the implementation of the hydro way; or
- b) from initiating its operation; or

¹⁴⁴ Sparovek et al (n 133 above) 70. The amendment of the forest law significantly reduce protection of Brazilian native vegetation. 'The challenges proposed in the Brazilian Forest Code do not have scientific support'(editorial) *Biotaneotropica* 2010 10.

¹⁴⁵ Magrini & Fraga & Santos (n 128 above) 4.

¹⁴⁶ *Ministerio Publico v Volodymir Kysnichan Federal Regional Tribunal of the 4th Region* (1999) 75-76.

¹⁴⁷ Above 75.

¹⁴⁸ As above.

¹⁴⁹ Above 76.

¹⁵⁰ *Ministerio Publico v Federal Union Substitute Federal Judge of 2a Vara, Stae of Mato Grasso* January 19 1998, 77(hereinafter Federal Union case).

¹⁵¹ As above.

¹⁵² Above 77-78.

¹⁵³ Above 77.

c) from any arrangement of resources for such a purpose before Congress authorised the implementation of the project after hearing the native communities.¹⁵⁴

7.2.7. Responsible large-scale agricultural investment law in Brazil

In general, 'the Brazilian legal framework is very receptive, safe and reliable for foreign investment'¹⁵⁵ and foreign investors have constitutional guarantee for their funds. Brazil has adopted prudential economic policies that put the country in a 'path of sustainable, high –quality growth.'¹⁵⁶ In Brazil, agriculture is based on competitive policy. In addition, 'land instruments in Brazil follow well established regulatory procedures permitting several forms of access to foreign investors.'¹⁵⁷ These elements render Brazil the capacity to offer unique opportunities in the agribusiness industry.¹⁵⁸

In Brazil, foreign investment is subject to the supervision of

- A) The *Consolho Monetario*(CMN)- the decision-making body of the national Financial System responsible for establishing the general guidelines; and
- B) The *Banco Central do Brazil* (BACEN), 'is the Brazilian Central Bank , who acts as part of the national Financial System and executes the guidelines and rules enacted by the CMN',¹⁵⁹

The *Comissao de vabres mobiliarios* (CVM) also monitors the Brazilian capital markets and imposes corporate governance standards for public companies. Foreign direct investment is governed by law 4,131/62 in Brazil.¹⁶⁰

7.2.8. Sustainable large-scale agricultural law in Brazil

Brazil has implemented Agenda 21 and other regional sustainable development initiatives.¹⁶¹ Fundamentally, international law of sustainable development is applicable in Brazil.¹⁶² The concept of sustainable development is incorporated in the 1988 Brazilian Constitution.¹⁶³ The Constitution provides that 'the environment must be protected for the interest of present and

¹⁵⁴ As above.

¹⁵⁵ Ministry of Agriculture, Livestock and Food Supply (n 60 above) 9-10.

¹⁵⁶ As above.

¹⁵⁷ Ministry of Agriculture, Livestock and Food Supply (n 60 above) 9-10.

¹⁵⁸ As above.

¹⁵⁹ Above 45.

¹⁶⁰ As above.

¹⁶¹ Stratus Inc. Strategies to Sustainability 'Brazil Case Study analysis of national strategies for sustainable development' (2004) 3.

¹⁶² G Wedy 'Climate change and sustainable development in Brazilian law' (2016) 4.

¹⁶³ As above.

future generations.¹⁶⁴ This makes clear that the concept of sustainable development as defined under the Prudent Report is accepted in Brazil.

The country's environmental policy incorporates the principle of integration¹⁶⁵ which is adopted to promote sustainable development.¹⁶⁶ Act 12,187/2009 that established the national Policy for Climate Change (NPCC) incorporates the concept of sustainable development.¹⁶⁷ The concept of sustainable development is paramount in Brazil.¹⁶⁸

Brazil is working on the post 2015 outcome of sustainable development.¹⁶⁹ In practice, industries such as pulp and paper sector are working towards the goals of sustainable development.¹⁷⁰

Based on Agenda 21, Brazil has developed national sustainable development strategy.¹⁷¹ Brazilian government integrated environmental issue in its development policy.¹⁷² The National development strategy provides that

...the common objective to be achieved is not restricted to the preservation of the environment alone, but to a progressive and expanded sustainable development, which brings into discussion the search for balance between economic growth, social equity and environmental preservation.¹⁷³

The document includes sustainable agriculture as one of the six themes.¹⁷⁴

It is concluded that the practice in Brazil reveals that sustainable development can happen.¹⁷⁵ Brazil is working on the issue of reconciling agricultural investment and environmental protection.¹⁷⁶ Sustainable agriculture that does not erode nature and that promotes agricultural investment is adopted.¹⁷⁷

¹⁶⁴ Brazilian Constitution (n 50 above) Art. 225.

¹⁶⁵ See EMSC Neves 'Environmental policy, municipalities and intergovernmental cooperation in Brazil' (2012) 26 *Estudos Avancados* 137-150.

¹⁶⁶ G Nogueira & V Lopes 'Brazilian environmental policies and issues' (Environmental Policies 2015/2016) 5.

¹⁶⁷ See Wedy (n 162 above) 5.

¹⁶⁸ G Wedy 'Sustainable development and the Brazilian judge' (2015) 1.

¹⁶⁹ L Saad 'Brazil and the post 2015 sustainable development goal agenda: What has it been defending so far?' (2015) 6.

¹⁷⁰ SdS Rocha & LTd Almeida 'Does foreign direct investment work for sustainable development? A case study of the Brazilian pulp and paper industry' (2007) 17.

¹⁷¹ Stratos Inc. *Brazil National Strategies for Sustainable Development* 3.

¹⁷² As above.

¹⁷³ Stratos Inc. (n 160 above) 4.

¹⁷⁴ Stratos Inc. (above) 4-5. Sustainable cities; infrastructure and regional integration; natural resource management; reduction of social inequalities; and science and technology for sustainable development are the five themes included in the sustainable strategy document. Stratos Inc. (above) 5.

¹⁷⁵ United Nations Development Programme, 'Case studies of sustainable development in practice: Triple wins for Sustainable development' (2012) 29.

¹⁷⁶ Nascimento (n 41 above) 60-1.

¹⁷⁷ Above 61.

Brazilian large-scale agriculture investment is productive in general.¹⁷⁸ The country is successful in reducing poverty, broadening social service access, balancing production with environmental conservation.¹⁷⁹ Deforestation in the Amazon region has been decreasing due to 'progressive tightening on land use monitoring.'¹⁸⁰ Sustainable forestry is part of sustainable development in the country.¹⁸¹ Now, agriculture is not responsible for deforestation, rather deforestation in the region is due to infrastructural projects.¹⁸²

Commercial agriculture in the Southern state of Rio Grande do Sul, Sao Paulo and Parana uses fertilizers. It has an impact on water use and quality. The use of no tillage or minimum tillage practices is adopted in Brazil to reduce soil erosion.¹⁸³

The agriculture sector is working on responsible production due to the demands of the consumers and to become more competitive in the market. Thus, agriculture investors are required to implement environmental laws to achieve sustainable agriculture.¹⁸⁴ Sustainable production chain, environmental governance, management & planning tools and economic incentives are strategies for strengthening sustainable agriculture in Brazil.¹⁸⁵ The nation is also working on integrating conservation and sustainable use of biological resources into sustainable development strategies.¹⁸⁶ The Brazilian agricultural policy has given due attention to sustainable agricultural development.¹⁸⁷

7.3. Laws of large-scale agricultural investment and environmental protection in South Africa

7.3.1. South African legal system

The modern law of South Africa is a mixed system that has been influenced both by the Roman law and the British common law legal system.¹⁸⁸ European law is also a source for South African

¹⁷⁸ For detailed discussion, see HM, Mathey *et al* 'Brazil: The future of modern agriculture?' (2004).

¹⁷⁹ United Nations Development Programme (n 175 above) 37.

¹⁸⁰ OECD-FAO *Agricultural Outlook 2015-2024*, 70.

¹⁸¹ SR Hirakuri *Can law save the forest? Lessons from Finland and Brazil* (2003) 12.

¹⁸² OECD-FAO (n 180 above) 70-71.

¹⁸³ Above 71.

¹⁸⁴ The Nature Conservancy Protecting nature, preserving life (n 1 above) 6.

¹⁸⁵ As above.

¹⁸⁶ See generally Ministry of the Environment Secretariat of Biodiversity and Forests 'BRAZIL' (2015).

¹⁸⁷ OECD-FAO 'Brazilian agriculture: prospects and challenges' in *Agricultural outlook* (2015) 99.

¹⁸⁸ L Greenbaum 'History of South African law' in P Maisel & L Greenbaum (eds) *Foundations of South African law critical issues for law students* (2002) 30; PF Iya 'The Legal System and Legal Education in Southern Africa: Past influences and Current Challenges' (2001) 51 *Journal of Legal Education* 355-358.

law. In South Africa, a civil law legal system is united with the common law legal system.¹⁸⁹ Therefore, the South African legal system is a mixed legal system.

Civil law legal system has developed from the European legal traditions and it was shaped by Roman law. Common law, on the other hand, is developed from English legal tradition.¹⁹⁰ The Constitution Act 108 of 1996 provides a room to incorporate indigenous (customary) law by courts.¹⁹¹

Therefore the modern law of South Africa is a result of the amalgamation of¹⁹²

1. indigenous or customary law of peoples in the South African region;
2. Roman-Dutch Law: The Dutch colonizers have brought this law to South Africa in 1652. The basic sources of this Dutch law are A) Roman Civil law that provides the theoretical influence; and B) the customary law of Holland.
3. English common law tradition influenced the South African legal system as well during the colonial period (1806-1910) and ‘even after South Africa became a union and a member of the British Commonwealth, until 1961.’¹⁹³

Judicial decisions have incorporated many of those sources as South African common law.¹⁹⁴

In South Africa, environmental law is fundamentally governed by enacted laws. The courts also play great role in expanding the rules to protect the environment in their decisions.¹⁹⁵

In South Africa, agriculture contributes less than 4% of the country’s GDP in 2001-2002 and accounts for 10% of total employment.¹⁹⁶ South Africa is export-oriented country.¹⁹⁷ In most regions, agricultural conditions are not favourable ‘due to poor land quality, highly variable climatic conditions and a scarcity of water.’¹⁹⁸

¹⁸⁹ P Thomas *et al* *Historical foundations of South African private law* Second edition (2000) 7.

¹⁹⁰ As above.

¹⁹¹ See Sections 39 and 211 of the Constitution of the Republic of South African, 1996 ; see also Thomas *et al* (n 189 above) 8.

¹⁹² Greenbaum (n 188 above) 2.

¹⁹³ As above.

¹⁹⁴ Above 3.

¹⁹⁵ See LJ Kotze ‘The Constitutional Court’s contribution to sustainable development in South Africa’ (2003) 6 *Potchefstroom Electronic Law Journal* 81-95.

¹⁹⁶ OECD *South Africa highlights and policy recommendations* 7. For contribution of agriculture to employment see generally Directorate: Economic Services Department of Agriculture, Forestry and Fisheries *Estimate of the contribution of the agriculture sector to employment in the South African economy* (2010). In 2016, agriculture, forestry and fishing grew by 2.4%. OECD ‘Country statistical profile: South Africa’ (2018) 7.

¹⁹⁷ South Africa is the third exporter of corn in the world to the global market. Unites States Department of Agriculture (ASDA) ‘World agricultural survey and demand estimates’ (Approved by the World Agricultural Outlook board, 8 March 2018) 22.

¹⁹⁸ OECD above.

Large-scale agricultural investments in the country have been successful in contributing for the growth in the sector.¹⁹⁹ Agriculture is an important engine of growth for the economy.²⁰⁰ Agriculture plays key role in industrialization and development of the country.²⁰¹ Moreover, it is an important source of employment.²⁰² Agriculture in South Africa is also a major earner of foreign exchange.²⁰³

Large-scale agriculture investment increases in South Africa as elsewhere in the developing world to attract foreign direct investment. In South Africa the deals for large farm is imitated by the European countries to produce bio-fuel to meet energy need. The country also wanted to develop bio-fuel to meet its energy needs rather than fuels. In South Africa, jatropha and sugar cane are planted vastly for ethanol by small holders and large-scale agriculture. This caused displacement of food production systems.²⁰⁴

Commercial agriculture is the production of agricultural goods for the purpose of profit. It includes small investor farmers (where family members and the owners are involved primary and with some hired workers) and large-scale commercial farms, where we find specialized farming staffs.²⁰⁵ Commercial agriculture is made up of less than 40,000 farming units. It covers about 82 million hectares, and covers more than 99% of South Africa's marketed agricultural output.²⁰⁶

¹⁹⁹ HP Binswanger –Mkhize 'From failure to success in South African land reform' (2014) 9 *African Journal of Agricultural and Resource Economics* 253-265.

²⁰⁰ See Agriculture, Forestry & Fisheries of South Africa (n 8 above) 7.

²⁰¹ Above.

²⁰² See Department of Agriculture, Forestry and Fishers *Economic Review of the South African Agriculture* (2015). The South African Statistics showed that 614962 paid employees were included in the large-scale agriculture sector, 322025 were fulltime workers while 292937 were workers on contractual basis. Western Cape employed 71856 workers, KwaZulu-Natal 53561 workers, and Mpumalanya 46444 workers accounted for the highest total number of full time workers. On the other hand, Eastern Cape- 15 278 workers, and Northern Cape 14018 workers were registered as the lowest full time workers. Regarding casual workers, large-scale agriculture in Western Cape absorbed 83569 workers, Northern Cape 35,984 workers and Npumalang 35,742 workers which accounts for the highest total number of contractual workers. On the other hand, the sector in the Eastern Cape 13,265 workers and Guateng 12,140 workers account for the lowest number of contractual workers. Statistics South Africa Survey of Large Scale Agriculture 2005 (2006) 2.

²⁰³ See Department of Agriculture, Forestry and Fishers, above.

²⁰⁴ R Hall 'The many faces of the investor rush in Southern Africa: Towards a typology of commercial land deals' (2011) 3-8.

²⁰⁵ C Poulten *et al* 'Commercial agriculture in Africa: Lessons from success and failure' (2010) 10.

²⁰⁶ Agriculture, Forestry & Fisheries of South Africa (n 8 above) 7.

The largest commercial agriculture enterprises are high productive. Major field crop producers use irrigation and export-oriented horticulture. In most cases, they are established as companies and they are managed by professional managers.²⁰⁷

At the time of Apartheid, commercial agriculture (large scale) was controlled by white farmers. In 1994, whites occupied 85.8 million hectares, which constitutes 86 per cent of rural land.²⁰⁸ The South African government has made land redistribution since 1994.²⁰⁹ By 2002, the white commercial farms had reduced to 45,000 from about 60,000.²¹⁰ Even though the number of farming units decreased their output increased which implies efficiency in production.²¹¹ Commercial farmers are well advanced in terms of technologies and use agro chemicals.²¹²

South Africa has a strategy to increase commercial agriculture.²¹³ It is planned to improve the entry land of small hold farmers into commercial agriculture through different supports that includes infrastructure development programme.²¹⁴ To address past economic and social inequalities, South Africa has adopted strategic policies:²¹⁵

- Broadening Access to agriculture thrust (BATAT)
- The white paper on Agricultural policy;
- The Agricultural policy South Africa Discussion document;
- The strategic plan for South Africa ‘Sector Plan,’ and
- The Accelerated and Shared Growth Initiative for South Africa (AVGISA)

The South African Agriculture strategic plan includes the vision to:

- enhance equitable access and participation;
- improve global competitiveness and profitability;
- ensure sustainable resource management.

It also envisages integrated and sustainable rural development, among others.²¹⁶

²⁰⁷H Bernstein ‘Commercial agriculture in South Africa since 1994: ‘natural, simply capitalism’’ (2013) 13 *Journal of Agrarian change* 23 26.

²⁰⁸ Above 25.

²⁰⁹ Above 26. The reform has been made in accordance with section 25 of the Constitution. See Section 25 of the Constitution of the Republic of South Africa.

²¹⁰ Bernstein (n 207 above) 26.

²¹¹ Agriculture, Forestry & Fisheries of South Africa (n 8 above) 8.

²¹²R Sandrey & N Vink ‘Deregulation, trade reform and innovation in the South African agriculture sector’ (2008) 4-5.

²¹³ Agriculture, Forestry & Fisheries of South Africa (n 8 above) 13.

²¹⁴ Above 14.

²¹⁵ Above 19-20.

²¹⁶ Republic of South Africa, *Agriculture and Agro-processing sector strategy*, para. 9.

In South Africa, there are two types of agriculture:²¹⁷ 1) the black farming sector; and 2) the white agricultural sector, which is characterized by large-scale farming among others. Thus, land reform, in 1993, was suggested to redistribute commercial farms. However, the land reform does not bring a change as expected.²¹⁸

A statistical survey made in 2005 took a farming income of R2 million and above to consider an enterprise as a large-scale agriculture, in South Africa.²¹⁹ In South Africa, the size of large-scale agriculture investment is over 1,000 hectares, and there is huge variation ranging up to deals of 500,000 hectares and plans of deals up to 10 million hectares. In Southern Africa, in general, the duration of land lease is 15-25 year, and often renewable up to 50 or 99 years.²²⁰ In South Africa, the commercial farm in the form of project was 92.5 hectare per project.²²¹ This would indicate the size of large-scale agriculture investment in South Africa.

7.3.2. Land tenure policy and law in South Africa

In South Africa, commercial agriculture was dominantly run by white farmers while blacks undertake subsistence farms. Thus, agricultural reform has been made to address past injustices including land redistribution. Policy changes made since the mid-1990s, that influenced agriculture includes deregulation of agriculture market products, abolition of certain tax; land reform; trade reform and broadening the labour law.²²²

Land reform has been made to redress the past undue access of citizen's to land. It is based on the provisions of sections 25(5), 26 and 36 of the Constitution of the Republic of South Africa. Section 36 of the Constitution of the Republic of South Africa provides that land right may be limited by reasonable law.²²³ It is provided that the '... state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable

²¹⁷ JS Davis 'Policy and implementation: Land and agrarian reform in South Africa' (2011) 10 *International Business & Economics Research Journal* 37; Historically large-scale agriculture in South Africa was undertaken by Europeans and European principles were applicable before the democratic process has been made. See K Deininger & HP Binswanger 'Rent seeking and the development of large-scale agriculture in Kenya, South Africa, and Zimbabwe' (1995) 43 *Economic Development and Cultural Change* 493 500-503.

²¹⁸ Davis above 37-46.

²¹⁹ Statistics South Africa Survey of Large scale agriculture 2005 (2006) 2.

²²⁰ Hall (n 204 above)16.

²²¹ Binswanger –Mkhize (n 199 above) 258.

²²² OECD (n 196 above) 12.

²²³ Constitution of the Republic of South Africa (n 191 above) Section 36.

citizens to gain access to land on an equitable basis.²²⁴ This makes clear that citizens should be given access to land.²²⁵ This would have a negative impact on foreign investors. Section 25(4) of the Constitution of the Republic of South Africa deals with national interest to be taken into account.²²⁶ In South Africa, the land reform should ensure poverty alleviation and should create job. The National Development Plan seeks to eradicate poverty and reduce inequality by 2030. To achieve this goal an inclusive economy is important.²²⁷

The agricultural development plan should be ‘based on successful land reform, employment creation and long environmental safeguards.’²²⁸ To promote commercial farming in South Africa, it is planned to use underused land in communal areas and o employ land reform projects.²²⁹ Commercial farms do have potential to create 250,000 direct jobs and 130,000 indirect jobs. Thus, agriculture needs to be sustainably expanded to achieve this goal.²³⁰

The current owner of land will be given cash or in-kind contributions for the part s/he, it losses to empower blacks. Thus, commercial farmers will be secured from losing their investment.²³¹

Land redistribution is aimed at guaranteeing people with access to land for settlement or agricultural activities. It targets to transfer 30 % of all white-owned agricultural land to previously disadvantaged individuals within 15 years. However, its implementation is below expectation because of institutional incapacity, financial constraints, lack of appropriate agricultural support services and coordination.²³²

At the time of apartheid, most natives do not have access to land right or legal title on the land they live on. However, after apartheid and since the establishment of democracy in the country a number of laws and policies have been enacted to re-balance land ownership and to

²²⁴ Above, Section 25 (5).

²²⁵ Above, Section 25 (5).

²²⁶ Above, Section 25 (4).

²²⁷ National Planning Commission Department: The Presidency Republic of South Africa *National development plan 2030 our future-make it work* 24 (hereinafter South African Development plan 2030).

²²⁸ Above 219.

²²⁹ As above.

²³⁰ Above 222.

²³¹ Above 227.

²³² OECD (n 196 above) 10-14.

protect tenure rights since the establishment of democracy in South Africa. The land reform laws aimed at improving tenure security and to accommodate diverse forms of land tenure.²³³

The following are relevant laws of South African land tenure.²³⁴

- A) Restitution of land Rights Act, 1994 (Act 22 of 1994) provides for the restitution of land rights to persons or communities disposed due to racial discrimination.
- B) Extension of Security of tenure Act (Act 62 of 1997) guarantees protection of illegal eviction for people who possess and live on rural or peri-urban land with the permission of landowners, as employed or otherwise.
- C) Land Reform (Labour Tenants) Act. 3 of 1996 aims at protecting labour tenants from eviction and grants them the right to acquire ownership over the land they live on or use.
- D) Land and Assistance Act, 1993 (Act 126 of 1993). This law provides the legal basis for grants and assistance for market-based land redistribution, which is based on the principle of willing buyer-willing seller. This law aims at the transfer of ownership over land to previously underprivileged groups of commercial farmers.
- E) Land Redistribution for Agricultural Development (LRAD) replaced the 2001 Settlement (Land Acquisition Grant (SLAG)) and aimed at promoting commercial agriculture. In general, it retained the ‘market-based, demand-led approach of previous policies.’²³⁵
- F) Commercial Land Rights Bill has been debated in the parliament that it could adversely affect the right of women. The 2004 Commercial Land Rights Act was expected to impact on ‘how the rural poor in South Africa hold land rights and how those rights are administered.’²³⁶ This law is criticized for it does not address some of the fundamental issues of incompatible systems for recognising the evidence of property rights. It transferred land to group rights.²³⁷
- G) The Land Care Programme a community-based programme with the basic purpose of integrating the use and sustainable management of agricultural resources. It focuses on degraded and water scarce parts of the country.

²³³ UN Economic Commission for Africa *Land tenure systems and sustainable development in Southern Africa* 16.

²³⁴ C McClain-Nhlapo *Right to food Case study* 27. In 1994 and follows, laws of land tenure in South Africa strengthen possessory rights but criticised for not extended to real rights. See T Cousins & D Homby ‘The realities of tenure diversity in South Africa’ (2006) 4-5.

²³⁵ McClain-Nhlapo (n 234 above) 27.

²³⁶ Cousins & Homby (n 234 above) 5.

²³⁷ As above 5.

The biggest challenge for South African land policy is to reconcile individual rights with group rights as well as the common law that governs ownership with customary law. Customary law rights are register able rights but it missed some important principles of customary law especially around layers of different use rights for different users.²³⁸

In general, the land tenure in South Africa may be classified as follows:²³⁹

- 1) Registration of Deeds System (ROD)The South African land tenure system is based on a conventional cadastral model, i.e. registration of deeds. It includes special components such as the geographical description of the land, records or registers, the nature of interests and ownership over the land parcel. This cadastral system demands high accuracy surveying and legal conveyancing. It is among the most accurate in the world, but the system failed to make an impact on the property rights of the poor.²⁴⁰

Land rights, in South Africa, are strongest rights. Land ownership rights are real rights, which is based on common law of ownership derived from the Roman-Dutch law on property. Since land right is a juridical (legal) cadaster that secures land rights in South Africa, land must be “cadastered” to be recognised by the land management system. Therefore, cadaster is a form of land tenure literacy in South Africa.²⁴¹

- 2) Customary tenure is widespread in its use and application in South Africa. The majority of rural South Africa land is governed by customary tenure system.²⁴² Customary land tenure system in South Africa is criticised as ‘undemocratic, and backward and as a system that cannot secure tenure and elude bureaucratic control, regulation and prevent investment and development.’²⁴³ It needs change so as to address this problem.

²³⁸ Above 5.

²³⁹ Above 8-15. Land tenure in Africa may be categorized into statutory and customary land tenure. Statutory land tenure is administered by government and evidenced by documents like title deed or lease certificate. Customary land tenure, on the other hand, is governed by unwritten traditional rules and traditional; leaders administer it. Being member to a tribe of community gives rise to the right to claim land tenure right based on customary land tenure. Customary land tenure land is alienable from the community so it is not possible to use as collateral for loans. See UN Economic Commission (n 232 above) 2.

²⁴⁰UN Economic Commission, above 2.

²⁴¹UN Economic Commission (n 232 above) 2.

²⁴² According to the 1996 census 83 % of rural population in South African land use right was based on customary land tenure system. See Cousins and Homby (n 233 above) 9. According to Adams, land tenure is the system of rights and institutions that govern access to and use of land. It is the way how land is hold, used and transferred and it is one of the principal factors that determine how resources are managed and used as well as the manner of distribution of benefits. See UN Economic Commission for Africa (n 228 above) 2.

²⁴³ Cousins and Homby (n 234 above) 9.

3) The tenures in Between There are many semi-official land tenure arranged in South Africa. Such type of land right may include permission to occupy (PTO) rights, quitrent tenure, lapsed and semi lapsed “freehold” titles, and extra legal arrangements that have been formalised over time, and recently formalised tenure systems that evade full integration into farm land management system.²⁴⁴

South Africa is required to think a form of tenure that is socially meaningful and socially legitimate.²⁴⁵

7.3.3. Laws applicable to large-scale agricultural investment in South Africa

Measure acts and plans relevant to the agriculture sector in South Africa include the following.

The conservation of agricultural resources Act 43 of 1983 provides for the conservation of soil, water resources and for controlling the use of natural agricultural resources.²⁴⁶

The national development plan 2030 (NDP 2012) emphasises on the elimination of poverty and reduction of inequality. It also provides the importance of linking agriculture to green economy.²⁴⁷ This promotes sustainable development of large-scale agricultural development since green economy can enhance both the agricultural economy and the protection of the environment.

It provides that agricultural development should go hand in hand with environmental protection.²⁴⁸ This is sustainable development that includes sustainability in economic, social, environmental and cultural sectors.

The agriculture integrated growth and development plan (IGDP 2012) envisages competitive and profitable sustainable agriculture. This promotes sustainable large-scale commercial agriculture in the Republic of South Africa. It further plans for agricultural benefits to all South Africans.²⁴⁹

²⁴⁴ Above, 15.

²⁴⁵ As above.

²⁴⁶ Green Cape ‘Agriculture market intelligence report’ (2017) 22-24.

²⁴⁷ Pan Chapter 5.

²⁴⁸ South African Development Plan 2030 (227 above) 199

²⁴⁹ Green Cape (246 above) 22.

One of the basic features of sustainable large-scale agriculture is benefiting the society. Thus, this plan is vital in promoting and serving as an instrument to achieve sustainable development goals for all South Africans.

South Africa's agriculture, forestry and fishery sector aspires to achieve growth of 'equitable, productive, competitive, profitable and sustainable agriculture, forestry and fisheries sector growing to the benefit of all South Africans.'²⁵⁰ The vision of the sector embraces sustainable agriculture. This can be achieved by sustainable use of natural resources, maintaining the biodiversity and ecosystem as well as ensuring agricultural development.

The agricultural policy action plan (APAP 2014) is a pragmatic response to policy documents such as the National development plan (ADP) and the new growth path (NGP).²⁵¹

National environmental management act (NEMA 1998) provides that the principle of development has to be environmentally, socially and economically sustainable.²⁵² No doubt that this principle promotes sustainable large-scale agricultural development in South Africa.

National environmental management biodiversity act (NEMBA 2004) sets for sustainable use of indigenous biological resources.²⁵³ This also promotes sustainable development in large-scale agriculture particularly by using indigenous biological resources for agriculture.

National water act (NWA 36 of 1998) envisages growth in the country. The national water resources strategy 2 (NWRS2 2013) implements the national water act in a manner of developing and controlling water resources in a sustainable and equitable manner.²⁵⁴

The South African agriculture employs new technologies and practices which increase efficiency and benefit to the environment and it should employ environmentally sustainable strategies to achieve environmental sustainability and low-carbon economy.²⁵⁵ Ensuring the well-beingness of the environment, reducing negative impacts, like pollution, and increasing resilience to climate change are important ways by which sustainable agriculture could be

²⁵⁰ Republic of South Africa Agriculture, forestry and fisheries, Integrated growth and development plan 2012 (2012) 49.

²⁵¹ Green Cape (n 246 above) 23.

²⁵² Green Cape (n 246) above 23.

²⁵³ As above.

²⁵⁴ Above 24.

²⁵⁵ South African Development plan 2030 (n 227 above) 199; See Green Cape (n 246 above) 13.

promoted in South Africa.²⁵⁶ One of the principles to translate environmentally sustainable low-carbon economy is internalising environmental and social costs in planning and investment decisions.²⁵⁷ This guiding principle is essential to implement sustainable commercial agriculture in South Africa.

The plan aspires for agricultural development based on successful and strong environmental safeguards.²⁵⁸ It is planned to expand commercial agriculture to create job opportunities and bring about agricultural development.²⁵⁹ Large-scale agricultural investment has a role in food security.²⁶⁰ This again requires sustainable agricultural investment that promotes sustainable development of the nation whereby safeguarding the environment.

South African agriculture contributes R66.7 billion which is 2% of the nation's gross domestic product (GDP) at the end of the second quarter of 2016.²⁶¹ In South Africa particularly in Western Cape export market is the key driving factor for sustainable agricultural practices that need to meet international regulations which requires more environmentally friendly practices. There is a growing pressure, for instance, to adhere to integrated production method that reduces residual level of certain chemicals.²⁶²

The Competition Act of 1998 regulates the activities of commercial farmers. It establishes the competition commission, tribunal and Appeal court. One of the objectives of this Act is to ensure fair distribution of ownership particularly for those who were historically disadvantaged.²⁶³

Another law that is applicable to large-scale agricultural investment in South Africa is Black Economic Empowerment (BEE). Black Economic Empowerment was established in 2003 in the broad Band Black Empowerment Act. Then, the BEE sector charter for Agriculture, Agri BEE was promulgated in 2008 which is black economic empowerment (BEE) in agriculture. A Black

²⁵⁶ See Green Cape (n 246 above) 13.

²⁵⁷ South African Development plan 2030 (n 227 above) 200.

²⁵⁸ Above, 219;

²⁵⁹ Above, 222;

²⁶⁰ Above, 224;

²⁶¹ See Statistics South Africa (2016).

²⁶² Above, 16.

²⁶³ Bernstein (n 207 above) 37; Competition Act 89 of 1998 section 2(f).

Economic Empowerment Act of 2004 was promulgated to promote access for previously disadvantaged people to productive resources.²⁶⁴

It was proposed that by 2014, 30% of commercial land be redistributed to blacks.²⁶⁵ Relocating large-scale farms has been very challenging because the white large-scale farmers were not voluntary. For example, according to one large-scale farmer, it necessitates relocating of money as well as some of his own skills or some of his children's skills.²⁶⁶

This shows that the white farmers were not volunteer to transfer land to blacks by selling because they attached material and symbolic values to it.²⁶⁷ This Act encourages black ownership and management of agricultural enterprises.²⁶⁸

The objective of AgriBEE, *inter alia*, is to “facilitate Board-based Black Economic Empowerment in the Agricultural sector by implementing initiatives to include black South Africans at all levels of agricultural activity and enterprises by: ‘Promoting equitable access and participation of Black people in the entire agriculture value chain.’²⁶⁹ The empowerment is related to ownership²⁷⁰ management control²⁷¹ and employment,²⁷² among others.²⁷³

Notwithstanding the availability of abundant agricultural land and generally favourable climate, South Africa lags behind other regions in agricultural development and investment.²⁷⁴ Having excellent domestic agricultural policy and laws is essential but it means nothing unless funds for agricultural investment are made available.²⁷⁵

²⁶⁴ GF Ortmann ‘Promoting the competitiveness of South African agriculture in a dynamic economic and political environment’ (2005) 44 *Azrekon* 286 291.

²⁶⁵ As above.

²⁶⁶ A Fraser ‘White farmers’ dealings with land reform in South Africa: Evidence from Northern Limpopo Province’ (2008) *The Royal Dutch Geographical Society* KNAG 24 30.

²⁶⁷ As above.

²⁶⁸ Berneistan (n 207 above)414.

²⁶⁹ Transformation Charter for Agriculture AgreBEE Department of Agriculture South Africa Government Gazette 20 March 2008 No. 30886, Section 5.2 Section 3.2 of AgriBEE. Section 12 of the Broad Based Black Economic Empowerment Act 2003 (Act No. 53 of 2003) requires the issuance of this Act.

²⁷⁰ AgreBEE Act 30886 of 2008, above, Section 5.1.2

²⁷¹ Above Section 5.2.

²⁷² Above Section 5.3.

²⁷³ Above Section 4.1.

²⁷⁴ P Draper *et al* *How might agriculture develop in Sothern Africa? Making sense of complexity* (2009) vi.

²⁷⁵ As above.

7.3.4. Laws of acquisition of land by foreign investors in South Africa

Since 1993, the output of agricultural investment has increased in South Africa.²⁷⁶ This is due to the political changes and an increase in consumer demand for food, among others.²⁷⁷ Rising market efficiency and improving product quality through up to date technology are the drivers of investment in large-scale agricultural investment in South Africa.²⁷⁸

Large-scale commercial farms are allowed to invest in the form of long term leases, and they have been highly successful.²⁷⁹ This form of ownership is similar with that of Ethiopian large-scale agricultural investment.

In South Africa, foreigners will be allowed to own land in long lease.²⁸⁰ According to the statement made by Rural Development and Land Reform Minister Gugile Nkwinti, the minimum period for lease is 30 years. Mr. Nkwinti said that the Regulation of Land Holdings Bill will be submitted to parliament.²⁸¹ The basic purposes of the Bill are to give access to land to previously disadvantaged people and to enable the blacks to participate in agriculture and food production.²⁸²

Large-scale farmers qualify for a long-term lease. They have also an option to purchase.²⁸³ A lease may be made for 30 years period and it may be renewed for another 20 years.²⁸⁴ State or public land is not subject for sale and remains under leasehold.²⁸⁵

In South Africa, there is land problem for investors. The country has only 14.6 million hectares cultivable land which accounts for about 12 percent of the total area of the country.²⁸⁶ One of the steps taken by the government is to prepare a guideline for investors in the sugar industry that indicates how to address the issue of land, social and environmental protection. The South African government took the state-to-state negotiation to ensure food and fuel supply

²⁷⁶ D Esterhulzaet *al* 'Are we still Investing in South African Agriculture: Perceptions, Evidence and Analysis' 5-6.

²⁷⁷ Above 6.

²⁷⁸ As above.

²⁷⁹ Binswanger –Mkhize (n 199 above)264.

²⁸⁰ 'Agricultural leases refer to lease arrangements that provides for the use of property at primary agricultural land: Such level is constricted to exclude processing of raw agricultural products.' Above iv.

²⁸¹ L Ensor 'Land Holding bill to be submitted to parliament this year', Business Day BD live 24 February 2015.

²⁸² President Jacob Zuma – In his State of the Nation Address (2015).

²⁸³ Rural Development & Land Reform Department: Rural Development and Land Reform Republic of South Africa, State Land Lease and Disposal Policy (signed 25/07/2013) paragraph 22.

²⁸⁴ Above paragraph 12(1).

²⁸⁵ Above paragraph 21-3.

²⁸⁶ E Woertz *et al* 'Potential for GCC Agro-Investments in Africa and Central Asia' (2008) 14.

while pursuing regional integration. Thus, in late 2009, 'talks were underway with Angola DRC, Sudan, Uganda and Zambia, in addition to the already bilateral investment agreements. Tina Joemat-Petterson, Minister of Agriculture, assured that 'if we cannot find opportunities for white South African farmers in this country, we must do it elsewhere in the continent'.²⁸⁷

Agri South Africa established Agri SA Africa committee to secure funding for those farmers who want to extend their farming operations into other African Countries in 2010. By 2008, 1,000 farmers signed and gave their consent to be part of the expansion. According to Johannes Moller, AgriSA president, South African Commercial farmers want to move to other countries because there is scarcity of natural resources and land redistribution. In general, AgriSA was in negotiations for land with 22 African governments by late 2010. South African farmers have started operations in Mozambique, Malawi, Botswana, Kenya and several other countries.²⁸⁸ South African companies are now engaging in farming projects in Congo, Mozambique, Swaziland, Zambia and Nigeria.²⁸⁹ The terms vary quite substantially and diplomatic missions of various countries have made direct contact with AgriSA and offered preferential investment terms. For instance, Zambia has offered to waive import duties and VAT, construct roads and power grids to attract South African farmers to its two new 150,000 hectares of 'farm blocks'.²⁹⁰

According to African Business, the ideals are

...usually characterised by allowing free access water, repatriation of profits, tax exemptions and the ability for investors to acquire land at no cost whatsoever, with little or no restriction on the volume of food exported or its intended use, in return for a loose promise to develop infrastructure and markets. However, the terms of the concessions vary from country to country and deal from deal- in some instances, the host country drives a hard bargain and in other cases, the investors call the shots.²⁹¹

The much discussed Congo land lease granted South African farmers with 200,000 hectares of land with a further 10 million hectares on balance, and the activity is not only to secure food in the country, but also for securing export.²⁹² An official from ABSA Agri-Business explains

²⁸⁷ Hall (n 204 above) 15. According to Ruth land acquisition elsewhere in Africa that began to move to Mozambique, Zambia and other several African countries in an organized and coordinated manner through large concessions makes unique the South African land acquisition. See R Hall 'The next great Trek? South Africa Commercial farmers move north' (Draft) (2011) 2.

²⁸⁸ Above 5.

²⁸⁹ R Hall & B Cousins 'Commercial farming and agribusiness in South Africa and their changing roles in Africa's agro-food system' (2015) 6.

²⁹⁰ Hall (n 204 above) 5.

²⁹¹ Africa Business Land Concessions *The South Africa-Congo concession* 14.

²⁹² The contract was concluded between AgriSA and the Republic of the Congo (Brazzaville) in October 2009 by which the latter allocated 200,000 hectares of former state farms. According to the contract, the area will expand to 10million hectares and the lease is made for 30 years and renewable. See Hall (n 204 above) 5-6.

the South African Farmers as ‘they are capable of farming without government support, can compete against the best in the world and even without scarce resources, they produce profitability.’²⁹³ According to Andre Botha, President of Argi Gauteny, a division of AgriSA, there are three main reasons as to why they are investing in the Congo,

...the first is, of course, to diversify our business; the second is to assist local farmers to commercially develop their own land and the third reason is to assist the government of South Africa to fulfil the expectations of the world in stabilising the African continent through the exchange of skills and technology.²⁹⁴

On 8 May 2010, the governments of South Africa and Congo concluded a new bilateral investment treaty. Then, pro forma ‘Government to Farmer’ contracts were prepared by AgriSA and Congo authorities and the first contracts for 88,000 hectares, were concluded between the South African farmers and the Congolese Ministries of Agriculture, Livestock and land on 10 March 2011. In general, South African farmers are going out of South Africa to find cheap land, water, labour and more lenient tax conditions. They are investing elsewhere to export to whichever markets that appear to be most lucrative.²⁹⁵

Legal uncertainty with respect to land reform is considered as a factor that negatively affects commercial farming.²⁹⁶ Due to the land reform policy, the number of commercial farming units decreased from about 60,000 in 1996 to around 35,000 in 2014.²⁹⁷ Land reform is perceived as a threat to large-scale commercial farmers in South Africa.²⁹⁸

South Africa has been undertaken land redistribution program with the purpose of giving land access to disadvantaged people. Therefore, land claim made under restitution program is one of the main risks to commercial farmers in South Africa.²⁹⁹ Land claim is taken as one factor that prevents investments in land.³⁰⁰

Costly and cumbersome labour regulations and high crime levels are also important factors, *inter alia*, serving as obstacles to large-scale agriculture in South Africa.³⁰¹

²⁹³The South Africa-Congo concession (n 291 above) 14.

²⁹⁴ As above. The South African farmers are intended to turn the Congo into a net exporter of food to other African countries. See Africa Business Land Concessions, above 20.

²⁹⁵ See Hall (n 204 above) 17.

²⁹⁶ Sandrey & Vink (n 212 above) 5.

²⁹⁷ Hall & Cousins (n 289 above) 3.

²⁹⁸ RM Nicol *et al* ‘Changing perceptions of the risk environment faced by commercial sugarcane farmers’ in Kwazulu-Natal, South Africa IFMA 16- Theme 1 *The Role of Agriculture in the Rural Economy* 70.

²⁹⁹ K Bindu ‘Environmental and developmental rights in the Southern Africa Development Community with specific reference to the Democratic Republic of Congo and the republic of Southern Africa’, unpublished LLD thesis, University of South Africa, 2010 291.

³⁰⁰ As above.

³⁰¹ Esterhulza *et al* (n 276 above) 7.

7.3.5. Environmental protection laws in South Africa

Large-scale agriculture in South Africa contributes for development. However, development should be one that will not adversely affect the environment and environmental sustainability needs to be ensured.³⁰² Investment decision must, among others, take into account the interest of the environment.³⁰³

Agricultural investors are required to undertake their investment activities in meeting social, environmental and governance standards.³⁰⁴ South Africa is rich in natural resources and determined to protect the environment while development projects are undertaken. It is a party to various international conventions and treaties to protect the environment.³⁰⁵

The Constitution of the Republic of South Africa guarantees environmental rights.³⁰⁶ Furthermore, various legislations to protect the environment are enacted by the government.³⁰⁷ In South Africa, the Environmental Laws Regulations Act, 51 of 1997 regulates the environment in general.³⁰⁸ The National Forests Act also provides for the promotion and enforcement of sustainable forest management. The law envisages standards to be applicable to enforce it. Furthermore, the minister is empowered to designate protected forest areas and provides for the management of such areas. On top of that, the Act requires the protection of trees.³⁰⁹

Biological Diversity Laws

South Africa is rich in biodiversity heritage and to protect it the country has enacted the National Environmental Management: Biodiversity Act 10 of 2004 (the 'NEMBA').³¹⁰ South Africa is party to the Convention on Biological Diversity (CBD) and duty bound to conserve the biodiversity resources of the nation, as well as to develop national strategies, plans of

³⁰² South Africa National Development Plan 198.

³⁰³ Above 200.

³⁰⁴ See B Schanzenbalcher & J Allen 'Responsible investment in agriculture in practice: Results and conditions from a case study review' (2015).

³⁰⁵ M Dariuset *al* 'Environmental law' 81-83 in W Wentzel *Investing in South Africa: Charting the legal landscape with Webber Wentzel* (2015/2016) 82.

³⁰⁶ See Constitution of the Republic of South Africa (n 191 above) section 24.

³⁰⁷ Darius *et al* (n 305 above) 82-3.

³⁰⁸ Republic of South Africa Environmental Laws Regulations Act 51 of 1997, *Government Gazette* vol. 389 No. 18420, November 1997, No. 1507.

³⁰⁹ Part 3 of the Act provides: 'part 3 allows the Minister to declare a tree, a group of trees, a woodland or a species of trees as protected....' Republic of South Africa National Forests Act 84 of 1998, *Government Gazette* Vol. 400 No. 19408.

³¹⁰ LJ Kotze & A Du Plessis 'The inception and role of international environmental law in domestic biodiversity conservation efforts: The South African experience' (2006) 6 *Queensland University of Technology Law and Justice Journal* 30 30; see J Glazewski *Environmental law in South Africa* Second edition (2005) 268.

programmes to conserve and sustainably use its biological diversity.³¹¹ South Africa is also expected to implement the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.³¹²

Section 24(b)(iii) of the Constitution of Republic of South Africa provides for sustainable use of natural resources. In addition, NEMBA is the basic law applicable to biodiversity conservation in South Africa. Section 1 of NEMBA defines biodiversity as '... the variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species, and of ecosystems'.³¹³

The objectives of NEMBA include, among others, managing and conserving the biological diversity of the nation to use biological resources in a sustainable manner and sharing the benefits equitably among shareholders.³¹⁴

Compliance with environmental law is essential for the fulfilment of environmental protection. Compliance means the 'full implementation of environmental requirements'.³¹⁵ Enforcement refers to 'the actions on the part of governors... to compel compliance ... with the requirements contained in environmental law'.³¹⁶ It includes ensuring that situations are corrected or stopped when they jeopardise the environment.³¹⁷ Environmental laws should be enforced in South Africa.³¹⁸

To implement the law, section 10 of the NEMBA establishes the South African National Biodiversity Institute. The Institute has the responsibility to:³¹⁹

- monitor and report on the status of the nation's biodiversity on regular basis;
- conserve the status of listed threatened or protected species and listed ecosystems; and
- the status of all listed invasive species.

³¹¹ Kotze & A Du Plessis above 36.

³¹² See above 37-9.

³¹³ Constitution of the Republic of South Africa (n 191 above) Section 1.

³¹⁴ See Kotze & Du Plessis (n 310 above) 40.

³¹⁵ International Network for Environmental Compliance and Enforcement (INECE) *Principles of Enforcement* (2005) available at: <http://www.inece.org/principles/ch1.pdf>.

³¹⁶ A Du Plessis 'Local environmental governance and the rule of local government in realising section 24 of the South African Constitution' (2010) 21 *Stellenbosch Law Review* 286.

³¹⁷ As above.

³¹⁸ Above 287.

³¹⁹ South African National Management: Biodiversity Act 10 of 2004(NEMBA) Section 11(1)(a).

It also has advisory, consultancy and coordinating role.³²⁰ It also implements the provisions of CBD.³²¹

Chapter 7 of the NEMBA provides for 'command and control' type of regulating biodiversity resources in the form of permit system. Permit could be granted after assessment of risks.³²²

Environmental impact assessment

The Environment Policy of 1997 sets out environmental impact assessment.³²³ Environmental impact assessment regulations have been issued.³²⁴ Administrative structure is set up to implement environmental impact assessment.³²⁵ The Constitution of the Republic of South Africa obliges the state to facilitate the participation of the public in environmental impact assessment study.³²⁶

Environmental impact assessment is a 'key tool for environmental protection and sustainable development.'³²⁷ Environmental Impact Assessment is a tool to integrate environmental concerns in development activities.³²⁸

Since environmental issues are significant for the people, they should be participated in environmental debates.³²⁹ Information is essential for meaningful participation and people have the right to access to environmental information.³³⁰ Public participation is required in every stage of EIA process.³³¹ However, the key steps in which public participation include: the scoping phase impact identification and mitigation; and EIA statement review.³³²

³²⁰ NEMBA above Section 11(1)(c)-(e).

³²¹ Kotze & Du Plessis, n 310 above 43.

³²² Above 50.

³²³ SADAC above 323.

³²⁴ See for instance, Environmental Impact Assessment Regulations, 2014, Notice 733 of 2014. For detailed discussion of EIA regulations, see Glazewski(n 310 above) 237-243.

³²⁵ SADAC, above.

³²⁶ See Chapter 2 of the Constitution; 'South Africa' in SADAC *Environmental Legislation* (2012) 316.

³²⁷ CB Betej & E Godfred 'Environmental impact assessment and sustainable development in Africa: A critical review' (2013) 3 *Environment and Natural Resources Research* 37.

³²⁸ See TA Saidi Environmental impact assessment as a policy tool for integrating environmental concerns in development (2010).

³²⁹ S Fakier *et al* 'Background research paper: Environmental governance South Africa environmental outlook' (2005) 17.

³³⁰ As above; See also the Constitution of the Republic of South Africa section 32(1)(b).

³³¹ For the steps in EIA, See G Nhamo & E Inyang *Framework and tools for environmental management in Africa* (2011) 121-123.

³³² Above 135.

Coming to a court case, Magaliesberg Protection Association (MPA), (has the objective of fostering and encouraging the conservation and protection of the Magaliesberg mountain range, which is a well known conservation area) after knowing that Kgaswane Country Lodge (pty) Ltd is engaged in a lodge construction in the Magaliesberg protected Environment,³³³ lodged an application to the Department complaining that the development activity should not be undertaken without authorization.³³⁴

The department has authorized *ex post facto*. Then, MPA brought the case to the High Court claiming that the authorization was not legal.³³⁵ The High Court, after considering relevant laws, para.15 has decided that the authorization was accepted.³³⁶

Then, the case was brought to the Supreme Court of South Africa. The Supreme Court considered the Environmental Impact report, which indicated an impact on the environment as moderate³³⁷ and the measures to be taken to protect the environment.³³⁸

The Supreme Court of Appeals recognized that the case concerns about the development and environmental protection and referred to the concept of sustainable development.³³⁹

The Court reasoned that environmental authorities should consider an environmental management report when considering report for authorization.³⁴⁰ A satisfactory public participation process should be followed in preparing the environmental impact report,³⁴¹ mitigating measures should be included.³⁴² The Court concluded that development can be undertaken so long as it does not adversely affect the environment.³⁴³

South Africa has enacted the National Management: Biodiversity Act 10 of 2004 (NEMBA) to protect biodiversity. The objectives of NEMBA, among others, include within the framework of NEMA to provide for management and conservation of biodiversity of the nation;³⁴⁴ to

³³³ *Magaliesberg Protection Association v MEC Department of Agriculture, Conservation, Environment and Rural Development North West Provincial Government and others* 2013 80 ZASCA 563/2012 para. 4 (hereinafter Magaliesberg case).

³³⁴ *Magaliesberg Case*, above Para. 8.

³³⁵ See above Para. 10.

³³⁶ See above Para. 16 and 17.

³³⁷ Above Para. 33.

³³⁸ Above Para. 34.

³³⁹ Above at 80 Para. 40.

³⁴⁰ Above Para. 44.

³⁴¹ Above Para. 53.

³⁴² Above Para. 54.

³⁴³ Above Para. 55.

³⁴⁴ NEMBA (n 319 above) section 2(a)(i).

implement the ratified international agreements regarding biodiversity.³⁴⁵ The NEMBA has established South African National Biodiversity Institute.³⁴⁶ South Africa has promulgated the National Environmental Management Protected Areas Act 57 of 2003.

Participating and consulting the people is one mechanism to ensure environmental protection.³⁴⁷ It concluded that VEJA was entitled to request the information from AM and VEJA met the threshold requirement for obtaining the requested information.³⁴⁸ This is a good example that shows that South Africa is putting effort to protect its environment.

7.3.6. Responsible large-scale agricultural investment law in South Africa

Commercial agriculture heavily relies on pesticides. In South Africa, since many of the pesticides in use have been banned in many other countries due to their toxic effects, the well-being of farmers, workers and the environment is at risk.³⁴⁹ The South African agriculture has changed to large-scale intensive farming producing high-value products for exports, like deciduous fruit, citrus and game.³⁵⁰ This necessitates implementation of the principle of large-scale agricultural investment.

Furthermore, South Africa embraces the concept of responsible investment and a small but growing number of investors believe that they are duty bound to achieve financial profits and consider long-term environmental, social and governance risks and opportunities. In South Africa, attention is given to social transformation and development goals and little attention is paid for environmental risks. By September 2009, about nineteen asset management houses in South Africa have signed to the principle of responsible investment. A research identified that investors in South Africa are willing to implement responsible investment approaches. They also explained that environmentally responsible investment industry has a future in South Africa. Some of the investors believe that environmentally responsible investment would not occur in

³⁴⁵ Above, Section 2(b).

³⁴⁶ *Minister of Water and Environmental Affairs v Kloaf Consultancy* 2015 177 ZASCA 106/2015 Para.15; NEMBA (n 320 above) Section 10.

³⁴⁷ *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* (69/2014) ZASCA 184 (26 November 2014)[(2014)] (here in after Arcelormittal Case) Para. 71.

³⁴⁸ Above Para. 74.

³⁴⁹ Goldblatt *Agriculture* (2010) 15.

³⁵⁰ Above 18.

the absence of legislation. Furthermore, they indicated that development issues are given more priority than environmental issues in South Africa, and it will get a priority in the future.³⁵¹

Another research has also shown that South Africa did not develop a socially responsible investment even in asset management funds. It was identified that environmental issues in investment industry is given less concern in South Africa.³⁵² The adoption of socially responsible investment in South Africa is limited to the financial sector.³⁵³

African countries adopted a convention on the Conservation of Nature and Natural Resources in 1968 which it is believed would help to conserve natural resources in undertaking large-scale agricultural investment in Africa in general. The Convention defines natural resources so as to include soil, water, flora and fauna.³⁵⁴ Adopting responsible agricultural investment would help to conserve natural resource.

7.3.7. Sustainable large-scale agricultural law in South Africa

South Africa embraces the concept of sustainable development.³⁵⁵ The National Environmental Management Act 107 of 1998 is the basis to regulate for sustainable development in South Africa.³⁵⁶ Development must be socially, environmentally and economically sustainable.³⁵⁷ Thus, sustainable development must ensure sustainability in all economic, social and environmental issues.

In South Africa, sustainable development is considered as a win-win solution to promote economic development and protect the environment, especially for previously disadvantaged people.³⁵⁸

³⁵¹ Giamporcaro, 'A Market for Environmentally Responsible Investment?' 2-3. In South Africa, responsible investment is defined as '...investment that incorporates an active consideration of environmental, social and governance(ESG) issues into investment decision-making and ownership' UNEP FI African Task Force(ATF) *The state of responsible investment in South Africa A survey of approaches and perceptions of the South African investment community to environmental, social and governance issues* University of South Africa (UNISA), 7. The research assessed the responsible investment status in 2007 in South Africa.

³⁵² S Gimaporcaro & L Pretorius 'Sustainable and responsible investment (SRI) in South Africa: A limited adoption of environmental criteria' (2012) 75*Investment Analysis Journal* 15.

³⁵³ See Notes 1980/81 *Review of Law and Social Change*.

³⁵⁴ See African Convention on the Conservation of Nature and Natural Resources, 1968, Article 3(A).

³⁵⁵ See generally, Y Dixon & JG Pretorius *Sustainable development: A South African perspective*. A du Plessis & Johan G Nel 'An introduction' in A du Plessis (ed) *Environmental law and local government in South Africa* (2015) 23.

³⁵⁶ NEMA Section 2 of chapter 1.

³⁵⁷ NEMA Section 2(2).

³⁵⁸ IW Ferreira & HR Lloyd 'Developmental Issues and Environmental Policy in South Africa' in Public Administration and public policy Vol II *Encyclopaedia of Life Support Systems* (EOLSS).

South Africa has developed and has been implementing several plans and sectorial strategies for large-scale agricultural sustainable development.³⁵⁹ The concept of sustainable development is given due attention in South African law and court decisions.³⁶⁰

In one case, the nature and scope of obligation of environmental authorities in deciding cases that may have a detrimental effect on the environment was raised. It is about 'the interaction between social and economic development and the protection of the environment'.³⁶¹

The case arose because the Department of Agriculture, Conservation and Environment, Mpumalanga Province (Department) decided that the Inama Family Trust (the Trust) should be granted authorization as per section 22 (1) of the Environment Conservation Act 1989 (ECA) to construct a filling station on a land property in White River, Mpumalanga.³⁶²

According to section 22 (1) of ECA any person shall not undertake an activity that has been identified under section 21(1) as having substantial detrimental impact on the environment unless s/he/ it is given a written authorization by the competent authority.³⁶³

Before granting authorization, a report on the environmental impact of the project must be submitted. The relevant authority may grant authorization by imposing conditions as may be necessary to ensure the protection of the environment.³⁶⁴

The Fuel Retailers Association of Southern Africa challenged the decision of the Department by arguing, among others, that the environmental authorities in Mpumalanga had not considered the socio-economic impact of the proposed filling station. However, the Department contended that there is no need to consider the impacts since once the local authority has decided the rezoning application of the property.³⁶⁵

The High Court, by upholding the contention of the Department, dismissed the application 'so did the Supreme Court of Appeal'³⁶⁶ and this appeal was brought to the Constitutional Court

³⁵⁹B Rennkamp 'Sustainable development planning in South Africa: a case of over-strategizing?' (2012) 2.

³⁶⁰ In South Africa Courts contribute for the development of the concept sustainable development. See Kotze (n196 above) 81-95.

³⁶¹*Fuel Retailers Association of Southern Africa (pty) Ltd v MEC Department of Agriculture, Conservation and Environment, Mpumalanga province and others* 2007 67 ZACC 13 (CCT) (hereinafter the Fuel Retailers case]. Paragraph 1.

³⁶² The Fuel Retailers case above Para. 1.

³⁶³ Above Para. 2; Section 21-23.

³⁶⁴ Above Para. 2.

³⁶⁵ Above Para.5.

³⁶⁶ Above Para. 6.

of South Africa.³⁶⁷ The Constitutional Court of South Africa accepted that since the matter concerns section 24 of the Constitution of the Republic of South Africa, which guarantees environmental right and the ECA as well as NEMA which give effect to this Constitutional provision, the appeal raises a Constitutional issue.³⁶⁸

In interpreting section 24 of the Constitution of the Republic of South Africa, the Constitutional Court has explained that the provision incorporates the concept of sustainable development. It reasoned as follows:

What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable "economic and social development". Economic and social development is essential to the well-being of human beings. This Court has recognized that socio-economic rights that are set out in the Constitution are indeed vital to the employment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environmental and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. And as has been observed-

Environmental stress and patterns of economic developments are linked one to another. The agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not about the protection of nature; they are both equally relevant for improving the lot of humankind.³⁶⁹

The Constitution recognizes the interrelationship between the environment and development; indeed, it recognizes the need for the protection of the environment while at the same time it recognizes the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24 (b)(iii) which provides that environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.³⁷⁰

The Constitutional Court has balanced between the right to development and the right to environmental protection through the instrument of sustainable development.

In South African law, as the case in international law, the concept of sustainable development plays a key role in solving environmental issues. The concept of sustainable development, under South African law, resolves the tension between the need to promote socio-economic

³⁶⁷ Above Para. 6.

³⁶⁸ Above Para. 40.

³⁶⁹ Above Para. 44.

³⁷⁰ Above Para. 45.

development on the one hand, and the need for protection of the environment on the other. Thus, it provides a framework for reconciling the right to development and environmental right.³⁷¹

Sustainable development regulates the socio-economic development, rather than ceasing them, in the name of protection of the environment. Thus, decision makers guided by sustainable development will ensure socio-economic developments that will not adversely affect the environment.³⁷²

NEMA was enacted to give effect to section 24 of the Constitution of the Republic of South Africa and therefore, embraces the concept of sustainable development.³⁷³ NEMA requires all developments - social, economic and environmentally sustainable by requiring the people and their needs to be placed at the forefront of environmental management.³⁷⁴ Thus, the social, economic and environmental impacts of a proposed project should be 'considered, assessed and evaluated'³⁷⁵ and appropriate decision should be made.³⁷⁶

NEMA, as interpreted in the light of section 24 of the Constitution, requires the integration of economic and social development and environmental protection. In general, it balances the right to development and the right to environmental protection through the concept of sustainable development.³⁷⁷

In one case *Mec: Department of Agriculture, Conservation and Environment* was first applicant, and *DR ST Cornelius* was second applicant while *HTF Developers (pty) Limited* was respondent. The appeal was lodged to the Constitutional Court of South Africa against the judgment of the Supreme Court of Appeal.³⁷⁸ The case arose because HTF Developers planned to sub-divide a land property into residential stands for sale to individual buyers. However, the Department of Agriculture,

Conservation and Environment, the now second applicant, by a letter sent to HTF on 18 July 2005 identified the property under development as 'virgin ground'³⁷⁹ and prohibited construction without authorization after ascertaining that the construction will not have a substantial

³⁷¹ Above Para. 57.

³⁷² Above Para. 58.

³⁷³ Above Para. 59.

³⁷⁴ NEMA Section 2(2), *The Fuel Retailers case* (361 above) Para. 60.

³⁷⁵ NEMA section 2(4)(1)(i).

³⁷⁶ *The Fuel Retailers case* (n 361 above) Para. 60.

³⁷⁷ Above Para. 61.

³⁷⁸ *HTF Developers (pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2007 5 SA 438 (SCA) (Here in after HTF Developers Case).

³⁷⁹ *HTF Developers Case* at para.4.

detrimental effect on the environment.³⁸⁰ Then, the department showed its intention to issue a directive according to section 31A of the ECA ordering HTF to cease the development until the relevant authorization was obtained. It afforded HTF 48 hours to submit the Department with compelling reasons as to why the Department should not exercise its power as per section 31A.³⁸¹

In response, HTF argued that the land in question did not fall within the definition of 'virgin land' and the construction activities were not included within the list, and therefore, the Department did not have legal power to order cessation of its development.³⁸² However, not persuaded by the reasons provided the Head of Department, HTF issued a directive according to section 31A ordering HTF to stop clearing the site and other construction activities, and to submit an environmental management plan within 30 days for approval by the department.³⁸³

The High Court decided that the directive issued as per section 31A was unlawful since it was issued in respect of an activity not falling within listed activities under section 31 of the ECA³⁸⁴ and dismissed the claim of HTF. The HTF appealed to the Supreme Court of Appeal. At that stage, the regulation that contained the prohibition of harmful activities on virgin land was repealed.³⁸⁵ The Court reasoned that the purpose of section 31A is to promote the right to environment,³⁸⁶ and concluded that (the majority) the Head of Department giving HTF notice was legal.³⁸⁷ Then, the case was brought to the Constitutional Court of South Africa That accepted that the case believing that it requires the interpretation of the Constitution that gives effect to the environmental right.³⁸⁸

The matter concerns the issue of environmental protection.³⁸⁹ Section 24 of the Constitution provides everyone has the right

- a) to an environment that is not harmful to their health or well –being; and
- b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:-
 - i) prevent pollution and ecological degradation,

³⁸⁰ Above para. 6.

³⁸¹ Above para. 8.

³⁸² Above para. 9.

³⁸³ Above para. 10.

³⁸⁴ Above para. 11.

³⁸⁵ Above para. 13.

³⁸⁶ Above para. 17.

³⁸⁷ Above para. 18.

³⁸⁸ Above para. 19.

³⁸⁹ Above para. 22.

- ii) promote conservation, and
- iii) secure ecologically sustainable development and use of natural resources while promoting justiceable economic and social development.

NEMA is a legislative measure as per section 24 (b) of the Constitution. NEMA sets out principles that make clear that environment is a composite right which requires social, economic and cultural considerations to make a balanced environment.³⁹⁰ NEMA envisages the concept of sustainable development that needs to apply 'risk averse and cautious approach'³⁹¹

In addition, negative impacts on the environment are anticipated and prevented or where they cannot be prevented, they must be minimized and remedied.³⁹² The tension between environmental rights and development rights should be balanced through the concept of sustainable development. The court reasoned that courts have to balance appropriately where more than one right comes into play³⁹³ However, NGCOBOJ, in his dissenting opinion on the interpretation of the Constitution, argued that section 24 of the Constitution 'explicitly recognizes the integration between environmental protection and socio-economic development'.³⁹⁴

The court argued that 'environmental protection must be balanced with socio-economic development through the ideal of sustainable development'.³⁹⁵

National Environmental Management principles as incorporated in NEMA are intended to give effect of section 24 of the Constitution of the Republic of South Africa.³⁹⁶ Thus, the concept of sustainable development is at the heart of the NEMA principle, as interpreted by NGCOBO.³⁹⁷ Both the Constitution and the NEMA require the integration of environmental protection and social development.³⁹⁸ (para. 64). The court concluded:³⁹⁹

..... the Constitution and environmental legislation require authorities to adopt an integrated approach to the environment; an approach that protects the environment while promoting socio-economic growth. To this end, the authorities are enjoined to adopt a risk averse and cautious approach and to prevent and remedy negative impacts on the environment...

In fact, sustainable development is a concept that balances between economic development and environmental protection: sustainable development should be interpreted as incorporating

³⁹⁰ Above paragraph 24; NEMA (n 319 above) Section 2(3).

³⁹¹ NEMA (n 319 above) Section 2(4)(a)(vii).

³⁹² Above Section 2(4)(a)(viii).

³⁹³ *HTF Developers Case* (n 378 above) paragraph 28.

³⁹⁴ Above para. 60.

³⁹⁵ Above para. 61.

³⁹⁶ Above para. 62.

³⁹⁷ Above para 63.

³⁹⁸ Above para. 64.

³⁹⁹ Above para. 65.

different principles including integration principle. The concept of sustainable development is applicable to large-scale agriculture.

Though South Africa is rich in biodiversity in the world, poverty and environmental challenges, particularly land degradation and water shortage are prevalent in rural areas.⁴⁰⁰

In South Africa the principle of sustainable agriculture, as incorporated in Living Farms Reference are being implemented.⁴⁰¹ The WWF-South Africa's Vision reads: 'All citizens of South Africa value respect and defend the integrity of the natural ecosystems that underpin the sustainable development of our country and the well-being of our people.'⁴⁰²

South Africa has adopted 'The Green Choice Living Farmers Reference' so as to promote sustainable agriculture. Farmers increase use of fertilizers, herbicides, pesticides and water. Soil is eroded, water is used almost to the full and it is often polluted; ecosystem is being degraded or used unsustainably and the biodiversity is threatened. All these require the activities of farmers to be controlled and sustainable agriculture be practiced. Sustainable agriculture will minimize any adverse impact of farming on the environment, enhance social well-being, and ensure production and profit. Living farmers Reference outlines basic sustainability principles that can be applied across different farms (including large-scale agriculture) to ensure sustainable agriculture in South Africa.⁴⁰³ It includes economic principles to promote agricultural productivity and profit, social principle to enhance the social aspect of sustainable development, and environmental principle to protect the environment.⁴⁰⁴ The agricultural code of conduct of South Africa is one of the sources of the Ethiopian 'Social & Environmental Code of Practice for Agricultural Investment.'⁴⁰⁵

Conclusion

Brazil is successful in agricultural development and it is becoming the leader in agricultural exports. Agricultural law is used to promote agricultural development goals of Brazil and

⁴⁰⁰United Nations Development Programme, *Case studies of Sustainable Development in Practice: Triple Wins for Sustainable Development* (2012) 53.

⁴⁰¹Goldblatt (n 349 above)24.

⁴⁰²Above 25.

⁴⁰³JSB Scother 'The green choice living farms reference' (2009/10) 1-2.

⁴⁰⁴See above.

⁴⁰⁵See Ethiopian Ministry of Agriculture Social and environmental code of practice for agricultural investment (2011) 9.

therefore Ethiopia could learn experience from it participatory on how the law can be used to bring about development in general and agricultural development in particular.

In Brazil, forest protection is given due attention where the law requires private investors to preserve 35 percent of their farms in Savannah region, and 20 percent of their farms in other regions. That is the unique feature of Brazilian environmental law. This is an important point where Ethiopia could take a lesson. The large-scale agricultural investors ought to preserve certain percent of the farm to protect biodiversity.

In South Africa, the concept of responsible investment is not well developed but the trend in general shows that the large-scale farm investment is under reform. This gives a lesson to Ethiopia that it should promote responsible large-scale agricultural investment in due time. Furthermore, large-scale investors are searching to invest in other African countries due to the fact that land in the nation is becoming scarce. This will be a point for Ethiopia to learn that the now large farms will once in the future be taken by investors for a long period of lease and land will become scarce. Therefore, it is important to consider this and implement well crafted land plan in Ethiopia. Finally, beyond the preparation, Ethiopia should also learn that the application of code of conduct to promote sustainable large-scale agricultural investment is vital. In South Africa the role of court is vital in developing the concept of sustainable development that balances the right to development and the right to environment. Ethiopia can take a lesson from this that the Supreme Court Cassation bench can promote sustainable large-scale agricultural development through interpretation.

Chapter Eight: Conclusion and recommendations

One of the fundamental objectives of the Ethiopian investment law, Proclamation No. 769/2012 and Regulations No. 270/2012 is the enhancement of large-scale agricultural investment thereby accelerating rapid economic development. The objective of the environmental law, on the other hand, is to protect the environment, i.e., to protect the water, land, fauna and flora, as well as the social and cultural factors. The point here is striking the right balance and increase the complementarity of the two apparently competing interests.

8.1 Conclusion

In spite of the existing debates, the right to development that is implemented through investment law in general and the large-scale agricultural investment law in particular, and environmental protection have been incorporated under various international instruments, such as the 1992 Rio Declaration, and the 1981 African Charter on Human and peoples' Rights. As a signatory, to give effect to these international agreements Ethiopia has incorporated both the right to development and the duty to protect the environment as legal provisions under its Constitution, and various piecemeal legislation including proclamations, subordinate legislation such as regulations, directives, and programmes at federal as well as regional levels.

It has also issued and attempted to implement policies, strategies and plans to promote large-scale agricultural investment and at the same time protect the environment. However, promoting large-scale agricultural investment exploits natural resources and almost always contradicts with the objective of environmental conservation. Both development and environmental rights are human rights that must co-exist together striking a balance between them through the instrumentality of law. This thesis, therefore, investigates how to use law to enhance agricultural investment without at the same time adversely affecting the environment in Ethiopia.

Sustainable large-scale agricultural investment is the key to promote development in the sector and protecting the environment. Thus, the central argument of the research is that large-scale agricultural investment in Ethiopia should be regulated by law to ensure sustainable development in the sector. It is to be reminded that the basic research question is how do the Ethiopian laws bring about sustainable large-scale agricultural investment in the country? Specific questions include:

- 1) What is the role of Ethiopian law to promote large-scale agricultural development?
- 2) What is the nexus between the Ethiopian investment law and environmental protection laws in the context of large-scale agricultural investment?
- 3) How do Ethiopian laws of investment and environment promote large-scale agricultural investment and protect the environment?
- 4) What can we learn from the law and experiences of Brazil and South Africa on sustainable large-scale agricultural development?

The concept of development, from the legal point of view, denotes a socio-economic process aiming at constant improvement of the wellbeing of the population including individuals that they benefit fairly on the basis of their participation in the development process, and ensuring the protection and conservation of the environment. Today, as it is clear from various international instruments the concept of sustainable development modifies the requirements of development by adding the environmental protection and conservation aspects, thereby making development inseparable from the protection of environment.

The concept of sustainable development, a current law and development theory, has emerged as a concept that describes patterns of development that minimizes the adverse effect of development on the environment. Sustainable development requires developing countries to adopt laws to protect the environment by restricting pollution and promoting conservation.

Regardless of the debate on the role of law at the international arena, it is accepted as a tool to promote agricultural development in Ethiopia. The fact that the right to development has been recognized as human right, and Ethiopia being a party to the 1986 Declaration on the Right to Development, the right to development is recognized under the FDRE Constitution, as both the right of individuals and groups as one of their democratic rights. In Ethiopia, the right to development is elevated to sustainable development which can be taken as a step forward in the development of the concept of the right to development.

In Ethiopia, although Regulation No. 283/2013 does not define large-scale agriculture, agricultural investment land with the size of 5000 ha, or less, but that is feasible and administered by the federal government, as well as the high volume of investment particularly for export distinguish large-scale agricultural investment.

The FDRE Constitution, by providing the right to development, recognizes large-scale agricultural development. Short of incorporating social development, as well as failing to include

environmental protection under the investment policy, the Ethiopian investment law also aims at accelerating the economic development of the country. The investment law does not include ‘social development’ and ‘environmental protection’ objectives. The Ethiopian investment law, including bilateral investment treaties to which Ethiopia is a party, strive to attract foreign investment in large-scale agricultural investment. The law provides guarantees and various incentives to investors with a view to facilitating a conducive environment for foreign direct investment in large-scale agricultural investment that is held to contribute for flow of capital, technology transfer, job creation and, human development. However, the lease agreement (the contract) gives a right to investors to undertake their investment activities by non-mechanized means which discourages the transfer of new technology to Ethiopia.

Though not well staffed with the required professionals, the Ministry of Agriculture and Natural Resources, the Ethiopian Investment Commission and the Ethiopian Agricultural Investment Land Administration Agency are the principal government agencies established under various laws to implement large-scale agricultural investment.

Ethiopia is expected to undertake the large-scale agricultural investment in light of the international legal principles applicable to large-scale agriculture which include respect to property rights, ensuring environmental and social sustainability, respect to rights of displaced persons, the right to be consulted, free and transparent consultation with and benefits to local community. According to the FDRE Constitution, ownership over land in Ethiopia is vested in the state and the peoples while individuals have only the right to use. The FDRE Constitution also guarantees grazing rights for pastoralists, but the large-scale agricultural investment has adversely affected this right. The Ethiopian Government has issued the Social and Environmental Code of practice for large-scale agricultural investment which aims at environmental and social sustainability. The investors, let alone to implement it, they are not familiarized with it. The practice shows that the large-scale agricultural investment is not undertaken in a manner to sustain the environment and social development. Besides, as the Code is not legally binding since it is a voluntarily guide, it makes enforcement and practice weaker.

Displaced persons have the right to compensation and relocation assistance under Ethiopian law. In practice, however, people are displaced for large-scale agricultural investment without

compensation. The Ethiopian government villagises the local peoples who are displaced which is understood by the government as relocation assistance provided by law.

The international principle of fair and transparent consultation about the project with local people is guaranteed under the FDRE Constitution and the Social and Environmental Code of Practice. However, no consultation, for instance has been made with the local peoples in *Benishangul-Gumz* and *Gambella* Regional States about the large-scale agricultural investment.

Regarding transfer of land to investors, contrary to the requirements of an international principle, the process was not fully transparent to the local people, though they were told that the land was needed for investment. In addition, it has been established that the transfer of land for large-scale agriculture made so far, at least in the study areas had damaging effects on land resources, biodiversity, wildlife, water resources and the natural environment. It also violates laws of national park and protected areas.

The lease agreement is an instrument to transfer land and governs large-scale agricultural investment in Ethiopia. As there are no special laws that specifically deal with lease, we can say that the general provisions of the 1960 Civil Code are generally applicable. Lease contract, according to the Ethiopian Civil Code, must be registered, but that is not the case in practice. The requirement of registration is a validity requirement for the lease contract. Surprisingly enough, the Ministry of Agriculture and Natural Resources has blatantly declared in the contracts, that as a representative and highest authority of the Ethiopian Government it will guarantee the validity of the agreement in the absence of its registration. This vividly shows as if the Ministry of Agriculture and Natural Resources is above the law and this in turn amounts to the violation of the constitutional principle of rule of law.

Furthermore, the relationship between investment law and environmental law in Ethiopia is debateable. The Ethiopian Government argues that large-scale agricultural investment is essential to ensure food security, and attracts FDI that will create job opportunity. On the other hand, opponents argue that it causes environmental damage since it is being undertaken without environmental impact assessment (EIA), forests are being cleared, improper irrigation is used, and chemicals pollute the environment. Surprisingly, the evidence on the grounds points to both arguments. Some large-scale agricultural investments are working on the protection of the environment, though after causing damage on the environment at the initial stage of their establishment. Most of the newly established large-scale agricultural investments in

Benishangul- Gumz and *Gambella* Regional States cause an irreversible damage to the environment in general.

Regarding the relation between international investment law and environmental law, it is pointed out that investment law, such as regional and bilateral investment treaties has a fundamental objective to promote investment even if it is against the interest of the environment, while environmental law is intended to protect the environment. The conflict between investment law and environmental law is categorised into two: normative and legitimacy conflict. Normative conflict is a conflict between an obligation stemming from international investment law and an obligation deriving from international environmental law. Legitimacy conflict, on the other hand, is a conflict between an obligation arising from international investment law and national environmental obligations, where the purpose of environmental law is mostly constrained by the bounds set by international investment law. When it comes to resolving the conflicts, normative conflicts between international investment law and international environmental law can be resolved by employing ‘harmonisation principle’ that reconciles the interests as far as possible. In other words, it can be possible to reconcile normative conflicts by accommodating the interests of both the investment law and environmental law.

The environmental law requires preparing an environmental impact assessment to protect the environment. The Ethiopian investment law does not provide EIA as a legal requirement for licence which shows normative conflict with environmental law. Moreover, the required EIA guideline is not yet enacted and this has become an obstacle to implement EIA proclamation. The fact that the investment proclamation does not make EIA a requirement for investment licence creates a legal lacuna and consequently, the environment is not protected. This is a clear indication that the Ethiopian law favours large-scale agricultural investment regardless of the threat it poses on the environment. Large-scale agricultural activity may cause irreversible damage to the environment, and that may amount to living today by killing the future coming generation in violation of international law, though soft as recognised under the 1992 Rio Declaration and the Declaration on the Right to Development.

The Ethiopian laws respect property rights of persons, and land use right of landholders. The Ethiopian laws of large-scale agricultural investment do not consider ensuring food security of the local peoples rather investors are investing for foreign markets. But in practice, some large-scale agricultural investors, like Saudi Star and Ayehu farms are working to ensure the food

security of the local peoples in the respective localities. The negotiation process was not transparent to the local people and their views have not been taken into account. In addition, environmental impact assessment has not yet been made. As noted in the foregoing the investment law does not make environmental impact assessment a requirement for licence.

Ethiopian laws impose a duty to protect the environment on large-scale agricultural investors. However, the implementation of the laws is not possible since there is no standard against which we can judge large-scale agricultural activities. The practice reveals that large-scale agriculture investment in *Beneshangul-Gumuz* and *Gambella* Regions of the study areas is made at the expense of the environment.

The large-scale agriculture investors have the obligation to protect the land they leased. The investors should undertake the investment activities in a manner that protects the natural resources, and should carry out their activities far from gullies according to the law. The investors must also protect water resources by undertaking activities far away from rivers or gullies, plant trees, and use proper farming. In practice, investors in *Benishangul-Gumuz* Region are ploughing close to water bodies.

Ethiopia is party to international instruments that protect bio-diversity like the Convention on Bio-diversity, and these laws are part of the Ethiopian laws as per the FDRE Constitution. In addition, Ethiopia's domestic law protects the biodiversity of the country. In practice, however, biodiversity in *Benishangul-Gumuz and Gambella* Regions is not protected.

In addition, large-scale agricultural investors must conserve trees (about 20%) that have been left after a land is cleared. It is recommended that the agreement were to require investors to plant as many trees as possible on the land. In practice, investors in *Amhara and Benishangul-Gumuz and Gambella* Regions do not leave trees on the farm land as required, and they do not replant sufficient number of trees which makes the law to remain only on paper.

Protecting soil erosion is the other specific duty of the large scale agriculture investor in Ethiopia. The law provides for land use plan, and proper use of sloppy and gully such as bench terrace. Nevertheless, no land use plan is enacted in the country yet.

The practices in *Amhara, Benishangul-Gumuz and Gambella* Regions show that natural resources have been depleted, water pollution is prevalent, biodiversity have been damaged, trees have been cleared and soil erosion has increased in areas of large-scale agricultural investments. This proves that 'pollution haven' is the principle, that the law and the practice do not balance

the promotion of large-scale agriculture investment with the protection of the environment. Rather large-scale agricultural investment is being undertaken at the expense of the environment since the Ethiopian law and the practice go for large-scale agricultural development.

Law of sustainable development provides a solution for both promoting investment and protecting environment. Though the concept 'sustainable development' is variously defined, it is a development that balances the economic, environmental, social, cultural, and institutional goals. It is identified that environmental, social and economic developments as the three pillars of sustainable development through the instrumentality of precautionary and prevention principles. There is also a movement that institutions should also be included as the forth pillar of sustainable development. This requires good governance (democracy) as the fourth pillar of sustainable development. Culture is also accepted as one of the pillars of sustainable development recently.

International law of sustainable development provides essential tools and institutions to govern sustainable development. However, international sustainable development law in Ethiopia, though accepted, is crippled due to the fact that the country cannot implement it because of lack of human capacity and poor coordination between federal and regional agencies.

Sustainable large-scale agriculture as an extended form of sustainable development is considered as an instrument to promote large-scale agricultural investment while protecting the environment. The concept 'sustainable agriculture' though fluid refers to agriculture that is economically successful, contributes for global food system, and environmentally sound. It integrates economic profitability, environmental protection, social and economic equity as well as the principle that advocates that agriculture be culturally appropriate.

It is made clear that law can play a role in promoting sustainable large-scale agriculture by requiring investors to use inputs that do not harm the environment, deploy agricultural management methods that bring sustainable development, impose duties, and provide incentives for those who comply with conservation rules. In general, law can be used to promote sustainable large-scale agriculture by providing rules on environmental protection and agricultural production. Under the current Growth and Transformation Plan (GTP II -2015/11-2019/20), Ethiopia has recognised large-scale agriculture to be the source of development.

In Ethiopia, the concept of sustainable-large scale agriculture that incorporates the economic, environmental and social elements seems to be adopted. However, the economic profitability of

agriculture seems to have been given more attention. Though one of the basic objectives of agriculture in Ethiopia is to secure food, the focus of private large-scale farms is to ensure production primarily for export and raw materials for industry.

The law envisages environmental sustainability in agricultural investment sector. The law requires the sector to employ agricultural practices that protect the environment such as planting trees, terracing, water harvesting, protecting the fertility of the soil. The law further requires the large-scale agricultural investor to undertake the activities taking into account the health of the people.

Ethiopia's economic vision is basically geared towards promoting modern and productive agricultural sector with enhanced technology to achieve sustainable development. It focuses on economic profitability. On the other hand, the environmental policy of the country aspires to promote sustainable agriculture, where as the law envisages appropriate agricultural inputs to increase productivity in agriculture. The GTP, on its part, provides that the agricultural sector continues to be the major source of economic growth. The Government is trying to promote agricultural development by providing some incentives, like irrigation incentives.

The environmental pillar of sustainable large-scale agricultural investment is also regulated in Ethiopia, by environmental law to promote development in the sector while protecting the environment at the same time.

The GTP states that soil, and water conservation, forestry development production and utilisation work could be fully implemented through community participation. The law requires investors to undertake investment undertakings by protecting the environment and natural resources. However, large-scale agricultural investment is undertaken without taking into account the protection of the environment. Soil and water are not protected, and no biodiversity protection was accorded. Investors also failed to preserve 60-100 trees per hectare. They also plough near water bodies disregarding the law that requires 0.5 km distance away from rivers. The large-scale agricultural investment activity is not undertaken to the level it is required by law to achieve sustainability, and this could end up in damaging the environment. Thus, strict adherence to the laws and the requirements is necessary.

International law regulates sustainable agricultural investment at global level. Multilateral environmental agreements (MEAs) provide a cornerstone to achieve objectives of green

economy by providing legal frameworks and policy solutions to protect the environment and promote investment.

Ethiopia has already adopted climate resilient green economy as a path to sustainable development. The FDRE Constitution provides for the right to sustainable development and the right to live in a clean and healthy environment, which is the basis for sustainable large-scale agricultural investment. Ethiopia has also ratified international conventions that are bases for sustainable development and sustainable large-scale agricultural investment. In Ethiopia, Agricultural and Rural Development Policies and Strategies (RADPs) and Food Security Strategy (FSS) are intended to promote sustainable agriculture.

The thesis considers the laws and experiences of Brazil and South Africa on large-scale agricultural investment. In Brazil, a large and well developed agriculture is a key contributor to the country's economy which produces about 28 different agricultural commodities like coffee, oranges, cassava, and soybean. Brazil introduced modern technology and mechanisation to its agriculture sector in 1990s and the state interventionist and protectionist policies are merged with private sector participation.

Coming to South Africa, it is noted that the Reconstruction and Development Programme (RDP) introduced a paradigm shift and recognised the participation of private sector in agriculture. Large scale agriculture is given more attention with increasing corporate ownership and skilled managers. Agricultural production must be based on sustainable use of natural resources in South Africa. From the experience of South Africa, one can learn that skilled managers are essential to achieve sustainable large-scale agriculture. In Ethiopia, as opposed to South Africa, it is pointed out that there is lack of skilled managers in large-scale agricultural investment. Therefore, the law should at least promote a minimum skill and experience to be a manager in large-scale agricultural investment.

In Brazil, large farms adopt capital intensive and advanced technology advanced. Mechanised large-scale agribusiness is a major player in Brazilian agriculture production particularly in soya bean. Large-scale agribusiness is successful. In Brazil, the average farm size is around 73 hectares and the medium size in the Cerrado is more than 100,000 hectares of crop land in this region.

In Brazil, we find that the National Institute for Colonisation and Agrarian Reform must authorise to acquire or lease a rural land greater than three undefined Exploration Modules

(MEI). The National Congress may also authorise investment for 50 or 100 MEI. Furthermore, the president of the Republic approves acquisitions or lease beyond the limit established for each municipality. This may give the opportunity to ensure uniformity and proper control of rural land investment is made so as to achieve development of the country.

What is more, the Brazilian land law requires the investor to use the land effectively. In addition, a farm should be productive that must comply with environmental standards, among others. This would be taken as a lesson that Ethiopia could learn in terms of using land productively and in ways that protect the environment.

In South Africa, large-scale agricultural investment is made by whites on a size of over 1,000 hectares. Land reform has been made to rectify the land tenure problem in the country. The most challenging part the country faced in this regard is to reconcile individual rights and the common law that governs ownership with customary law. In South Africa, large-scale agricultural investors are out looking to other African countries such as Zambia, Mozambique, Malawi and Kenya to find out land for their investment, because land is limited in South Africa. Ethiopia can take a lesson from this that land could be scarce in the future unless the government undertakes large-scale agricultural investment sustainably based on appropriate land plan.

In Brazil, the environment is regulated by its advanced environmental law. The agrarian law also regulates agricultural activities related to nature and the environment. The forest law and preservation areas require farmers to design 35% of private farm as protected. In general, improved monitoring, stricter local governance, effective legal enforcement and the adoption of new demands of certified market are important for the law to be influential on agricultural activities in Brazil. Ethiopia should take a lesson from the experience of Brazil that requires more effective enforcement of the law to be successful in promoting large-scale agricultural investment.

In Brazil, the practice of sustainable agriculture development is not successful, because there is no full environmental law compliance. It is submitted that the law should be revisited to provide for legal restrictions, and regarding land use to achieve sustainable agriculture. In addition, better farming techniques and more professional management are required to make Brazilian agriculture more sustainable. Here, too Ethiopia should learn a lesson that full compliance with environmental laws, better farming techniques that promote sustainable

agriculture, professional management as well as research are vital tools to achieve sustainable large-scale agriculture.

8.2 Recommendations

To make the large scale agricultural investment sustainable that takes into account the protection of environment, legal lacuna should be addressed, principles of large scale agricultural investment be properly implemented, the laws be implemented properly, and capacity should be built as well as supervision and monitoring be made. The details are provided as follows:

8.2.1 Filling the legal lacuna

- International environmental law recognizes environmental impact assessment as essential tool to protect the environment. The Ethiopian investment law, however, does not make EIA a requirement for licence. In practice, large-scale agricultural investments are undertaken without undergoing EIA and that should be rectified. Precautionary principle that is accepted under international sustainable development law as important device to protect the environment can be implemented if EIA is made a pre-requisite for investment licence for those which do have the potential to harm the environment. Ethiopia should implement the international obligation it assumed under the Rio Declaration and other instruments by implementing EIA. Thus, the investment law should be revisited so as to make EIA a pre-requisite for licensing investments that are potentially harmful to the environment, including large scale agricultural investments. In addition, EIA law should be fully enforced by putting in place EIA guidelines.
- Accommodating the purposes of both the investment law and environmental law, even at domestic level is possible to resolve the normative conflicts. This could be made by adopting the concept of sustainable development law in general and sustainable large scale agricultural development law in particular. Therefore, the existing normative conflicts between environmental law and large-scale agricultural investment law can be resolved by the Ethiopian Government by accommodating the interests of large scale agricultural investment law and environmental law. Providing

EIA as a licence requirement and providing the investment incentives by law may solve the existing normative conflict.

- In the absence of land use plan law, it is hard to achieve sustainable large-scale agricultural investment. The Ethiopian Government should complete the preparation of land use plan and implement it immediately.
- Since the Environmental and Social Code of Conduct prepared by the Ministry of Agriculture is not binding as it stands now, it should be promulgated in the form of binding law, like directive.
- Ethiopia has not as yet set environmental standards to ensure the protection of the environment. The standard should be given in the law, so that it would be possible to judge whether a given large-scale agricultural investment activity pollutes the environment or not.
- The federal law does not put the obligation to rehabilitate the damaged environment to recover the cost of clear up, where an investor is found answerable to environmental damage. Therefore, the law must be revisited to include these remedies.

8.2.2 Implement effectively and efficiently the large-scale agricultural investment principles

- At the international level, legal principles have been developed to ensure sustainable large-scale agricultural investment. Ethiopia, being an active advocate of environmental protection and promoter of large-scale agricultural principles should implement those principles.
- Though the FDRE Constitution guarantees the right to use land for grazing, the large-scale agricultural investment adversely affects these rights. Therefore, the government should implement these rights for instance, by giving sufficient land for grazing.
- As pointed out, consultation with the local people could ensure the productivity of large-scale agricultural investment. Consultation will also help to nurture a sense of ownership a sense of ownership of the investment by the local people. But consultation is not practised in Ethiopia. Therefore, the Ethiopian Government should ensure the consultation with local people is being practiced.

- Compensation is not effected to those who were displaced due to the large scale agricultural investment. As discussed in the thesis compensation should be made for those whose rights are affected by the implementation of large scale agricultural investment. The Government should be sincere in providing compensation as well as relocation assistance for those who have been displaced due to large-scale agricultural investment.
- Regarding protected areas-since demarcation of national park in *Benishangul-Gumuz* Region is not yet finalized, the demarcation should be completed. Large-scale agricultural investors in *Gambella* were intervening in the National park, and such kind of fault should not be repeated.
- Ensuring food security should be given equal attention to export in Ethiopia. The practice of large-scale agricultural investment shows a tendency to ensure economic product sustainability by selling the products in foreign markets.
- The lease agreement is an instrument to transfer land to investors and governs large scale agricultural investment in Ethiopia. We do not find a special law to govern this lease but the general provisions of the 1960 Civil Code of Ethiopia are generally applicable. Lease contract, according to the Civil Code must be registered, but that is not practiced and that needs to be rectified. Dispute may arise from the large-scale agricultural investment activities and these disputes could be resolved according to the lease agreement if it is duly registered. Therefore, the Ethiopian Government should ensure the registration of lease contract for large-scale agricultural investment.

8.2.3 Implement or enforce the laws to achieve sustainable large-scale agriculture

- Ethiopia has adopted development law in different legislation but they are not effectively implemented. The Ethiopian Government must work on the effective implementation of laws so as to achieve development since ineffective implementation of laws discourages investors and this decreases investment activities.
- Investors cultivating very close to water bodies, the Government must enforce what is provided by the law, which states for maintenance of a minimum of 500 meters away from water bodies.

8.2.4 Undertaking proper supervision and coordination

- Since supervision is poor, the relevant government authority must supervise to check that investors leave spare trees and replant indigenous trees in sufficient number as required by the law.
- The federal government should work in cooperation with the relevant regional governments effectively and efficiently.
- Ethiopia should learn from the experience of South Africa that giving more attention to development issues and using natural resources unsustainably like giving lands without national land plan would result in environmental degradation. Thus, implementing the responsible large-scale agricultural investment is indispensable.

8.2.5 Developing capacity is key for achieving sustainable large-scale agricultural development

- There is lack of scientific knowledge on the part of the government officials and large scale agricultural investors. Thus, this gap should be addressed and investors should upgrade their knowledge of environment and their managers should be professionals, and relevant laws should be implemented properly.
- To achieve sustainable large-scale agricultural development in Ethiopia, the Ethiopian Government must ensure that investors implement proper sustainable large-scale agricultural practices like using advanced environment friendly technologies.

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Annex: Guidelines and Questionnaires

Basic Guidelines to conduct interview with workers in Farmlands

The purpose of this interview is to assess the role of law in promoting large scale agriculture development and protecting the environment in Ethiopia for LL.D research at the University of South Africa (UNISA). Your answers will determine the quality of the research. Therefore, please respond as you feel and believe. Thank you very much for your cooperation in advance.

Information about the respondent

A) Name (to be coded)

B) Level of Education

C) Profession

D) Occupation ___ **Age** _____ **Sex:** Female _____ Male _____

E) Name of the Place _____

Questions

- 1) How do you see the Large scale agriculture being undertaken in your locality in general?
- 2) At the time of clearing the farmland some trees have been conserved.
- 3) If your answer for Q. 1 is 'yes'; the trees conserved are ___ percent of the farm.
- 4) Is the organization preserving soil erosion on the farmland?
- 5) If your answer for Q. 3 is 'yes'; which methods does the organization use to prevent soil erosion?
- 6) Is the organization implementing the Social and Environmental Code of Practice Prepared by the Ministry of Agriculture?
- 7) Does the organization have management system to manage pesticides so as to protect environmental pollution?
- 8) Does the organization manage the farmland in a manner not to cause air pollution?
- 9) Does the organization manage the farmland in a manner not to cause water pollution?

Thank you very much!!

Guidelines to conduct interview with Investors (Managers)

The purpose of this interview is to assess the role of law in promoting large scale agriculture development and protecting the environment in Ethiopia for LL.D research at the University of South Africa (UNISA). Your answers will determine the quality of the research. Therefore, please respond as you feel and believe. Thank you very much for your cooperation in advance.

Information about the respondent

A) **Name (to be coded)**

B) **Level of Education**

C) **Profession**

D) **Occupation** ___Age _____ **Sex:** Female _____ Male _____

E) **Name of the Place** _____

Questions

- 1) At the time of clearing the farmland some trees have been conserved.
- 2) If your answer for Q. 1 is 'yes'; the trees conserved are ___ percent of the farm.
- 3) Are you preserving soil erosion on your farmland?
- 4) If your answer for Q. 3 is 'yes'; which methods do you use to prevent soil erosion?
- 5) Did you prepare and submit environmental impact assessment to the Ministry of Agriculture?
- 6) Did you prepare action plan for your farmland?
- 7) Did you include environmental and social issues in your action plan?
- 8) Do you implement the Social and Environmental Code of Practice Prepared by the Ministry of Agriculture?
- 9) Do you have management system of pesticides?
- 10) Do you manage your farmland in a manner not to cause air pollution?
- 11) Do you manage your farmland in a manner not to cause water pollution?
- 12) Do you believe that the farm will bring about sustainable development?

Thank you very much!!

Basic Guidelines to conduct interview with public officers in investment and Environment offices

The purpose of this interview is to assess the role of law in promoting large scale agriculture development and protecting the environment in Ethiopia for LL.D research at the University of South Africa (UNISA). Your answers will determine the quality of the research. Therefore, please respond as you feel and believe. Thank you very much for your cooperation in advance.

Information about the respondent

- A) Name (to be coded)
- B) Level of Education
- C) Profession
- D) Occupation ___Age _____ Sex: Female _____ Male _____
- E) Name of the Place _____

Questions

The Right to Development & Laws of Large Scale Agriculture

- 1) Do you believe that the Ethiopian laws could help promote to achieve development in the country?
- 2) Do you believe that the right to development is achievable through large scale agriculture?
- 3) How and to what extent the large scale agriculture investment law enhances the capacity of citizens for development and to meet their basic needs?
- 4) What are the activities undertaken by investors to enhance the capacity of citizens to enhance their capacity for development?
- 5) Did the local people participate or consulted in the large scale agriculture projects? How? Are they consulted now about the investment?
- 6) Do you believe that law promotes large scale agriculture investment? Why?
- 7) What are compensations and relocation assistance given to people who are displaced? How are they implemented?

Laws of Sustainable Large Scale Agriculture: Practice

- 1) Could the licensed large scale agriculture projects contribute for sustainable development?
How?
- 2) What mechanisms are implemented to ensure sustainable development?
- 3) How do you follow the implementation?
- 4) How is the code of practice prepared by the Ministry of Agriculture implemented? Is it adopted by the investors? How?

Laws of Environmental Protection: practice

- 1) How could investors preserve the trees in their farmland?
- 2) How do you ensure that the investors preserve the trees on their farmland?
- 3) What are the working methods adopted so as to protect the soil from erosion?
- 4) Is there any guiding land use master plan?
- 5) How is it implemented?
- 6) Is there a guideline drawn regarding soil conservation and water harvesting as envisaged under the land administration proclamation?
- 7) What strategies have been developed to protect natural resources?
- 8) Are there any environmental standards implemented in large scale agriculture investment so as to protect the environment? What are they, if any?
- 9) Is there a guideline to prepare an environmental impact assessment? What are the content and the practice?
- 10) What methods have been adopted to protect bio-diversity?

Thank you very much!!

Guidelines for group discussion

The purpose of this group discussion is to assess the role of law in promoting large scale agriculture development and protecting the environment in Ethiopia for LL.D research at the University of South Africa (UNISA). Your answers will determine the quality of the research. Therefore, please respond as you feel and believe. Thank you very much for your cooperation in advance.

Information about the participants

A) Name (to be coded)

B) Level of Education

C) Profession

D) Occupation ___Age _____ **Sex:** Female _____ Male _____

E) Name of the Place _____

Questions

- 1) How do you see the large scale agriculture investment undertaken in the region?
- 2) What are positive contributions of large scale agriculture investment to the local society?
- 3) Are there any challenges to implement the agreements and the laws in general?
- 4) What are the steps undertaken to solve the problems, if any?
- 5) What legal problems did you observe regarding the sector?
- 6) What mechanisms are being implemented to ensure sustainable agricultural development?

Thank you very much!!!

Questionnaire for workers in Farmlands

The purpose of this questionnaire is to assess the role of law in promoting large-scale agriculture development and protecting the environment in Ethiopia for LL.D research at the University of South Africa (UNISA). Your answers will determine the quality of the research. Therefore, please respond as you feel and believe.

Thank you very much for your cooperation in advance.

Information about the respondent

F) Level of Education (please thick)

Doctorate _____ Masters _____ First Degree _____ Diploma Or below _____

G) Profession: Lawyer _____ Non-lawyer _____

H) Occupation _____ Age _____ **Sex:** Female _____ Male _____

I) Name of the Place _____

Please indicate your position by choosing the letter.

10) At the time of clearing the farmland some trees have been conserved. A) Yes B) No C) I do not know

11) If your answer for Q. 1 is 'yes'; the trees conserved are ___ percent of the farm.

12) Is the organization preserving soil erosion on the farmland? A) Yes B) No C) I do not know

13) If your answer for Q. 3 is 'yes'; which methods does the organization use to prevent soil erosion?

A) Rotating crops B) by leaving sufficient buffer zones to water body

14) Is the organization implementing the Social and Environmental Code of Practice Prepared by the Ministry of Agriculture? A) Yes B) No

Please kindly check your position against the values that reflect your position and indicate by the checking

against the box.

Statements	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
1 The organization has management system to manage pesticides.					
2 The organization manages the farmland in a manner not to cause air pollution.					

1	The organization manages the farmland in a manner not to cause bad odors.					
4	The organization manages the farmland in a manner not to cause water pollution.					
5	The Ethiopian laws could help to promote sustainable large-scale agricultural development					

Thank you very much!!

Questionnaire for Investors (Managers)

The purpose of this questionnaire is to assess the role of law in promoting large-scale agriculture development

and protecting the environment in Ethiopia for LL.D research at the University of South Africa (UNISA). Your

answers will determine the quality of the research. Therefore, please respond as you feel and believe. Thank you

very much for your cooperation in advance.

Information about the respondent

J) Level of Education (please thick)

Doctorate _____ Masters _____ First Degree _____ Diploma _____
Below Diploma _____

K) Profession: Lawyer _____ Non-lawyer _____

L) Occupation _____ Age _____ **Sex:** Female _____ Male _____

M) Name of the Place _____

Please indicate your position by choosing the letter.

- 1) At the time of clearing the farmland some trees have been conserved. A) Yes B) No
- 2) If your answer for Q. 1 is 'yes'; the trees conserved are ___ percent of the farm.
- 3) Are you preserving soil erosion on your farmland? A) yes B) No
- 4) If your answer for Q. 3 is 'yes'; which methods do you use to prevent soil erosion?
B) Rotating crops B) by leaving sufficient buffer zones to water body
- 5) Did you prepare and submit environmental impact assessment to the Ministry of Agriculture?
A) Yes B) no
- 6) Did you prepare action plan for your farmland? A) Yes B) No
- 7) Did you include environmental and social issues in your action plan? A) Yes B) No

- 8) Do you implement the Social and Environmental Code of Practice Prepared by the Ministry of Agriculture? A) Yes B) No
- 9) Do you have management system of pesticides? A) Yes B) No
- 10) Do you manage your farmland in a manner not to cause air pollution? A) Yes B) No
- 11) Do you manage your farmland in a manner not to cause water pollution? A) Yes B) No
- 12) Do you believe that the farm will bring about sustainable development? A) Yes B) No
- 13) The Ethiopian laws could help to promote sustainable large-scale agricultural development. A) Strongly agree B) agree C) undecided D) disagree E) Strongly disagree
- 14) Does your farm land include areas like parks and other protected areas? A) yes B) No

Thank you very much!!

Research Questionnaire for Local people

The purpose of this questionnaire is to assess the role of law in promoting large-scale agriculture development and protecting the environment in Ethiopia for LL.D research at the University of South Africa (UNISA). Your answers will determine the quality of the research. Therefore, please respond as you feel and believe. Thank you very much for your cooperation in advance.

Information about the respondent

N) Level of Education (please thick)

Doctorate _____ Masters _____ First Degree _____ Diploma Or other _____ Student _____

O) Profession: Lawyer _____ Non-lawyer _____

P) Occupation _____ Sex: Female _____ Male _____

Please kindly check your position against the values that reflect your position and indicate by the checking against the box.

No	Statements	Strongly		Agree		Undecided		Disagree	
		Agree	Disagree	Agree	Disagree	Agree	Disagree	Agree	Disagree
1	The right to development is achievable through large scale agriculture								
2	The Ethiopian laws could help to promote development								

1) Do you believe that the Ethiopian laws could help promote to achieve development in the country?

2) If your response for the above question is 'No', what are the obstacles that make the law unable to bringing about development, in your opinion?

Thank you very much!!

ለአካባቢ ነዋሪዎች የተዘጋጀ ቃለ-መጠይቅ

የዚህ ቃለ-መጠይቅ አላማ አጥኝው በደቡብ ፍሪካ ዩኒቨርሲቲ በህግ ዶክትሬት ዲግሪ ለመመረቅ ለሚያደርገው ጥናት ግብአት ለማግኘት ነው።

እርሶዎ የሚሰጡት ምላሽ ትክክለኛነት ለጥናቱ ጥራት ከፍተኛ አስተዋጽኦ ስላለው ትክክለኛ ምላሽ እንዲሰጡ ይለመናሉ። ለትብብርዎ በቅድሚያ

አመሰግናለሁ።

ስለ መላሹ መረጃ

የቦታው ሥም _____ ጾታ ፤ ወንድ _____ ሴት _____ እድሜ _____

የትምህርት ደረጃ፣ ከዲፕሎማ በታች _____ ዲፕሎማ _____

የመጀመሪያ ዲግሪ _____ ሁለተኛ ዲግሪ _____ ሥሥተኛ ዲግሪ _____

ጥያቄዎች

- 1) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ የአፈር መሸርሸር ጨምሮአል?
- 2) በአካባቢው የሚደረገው የሠፋፊ እርሻ ልማት በአካባቢው ውሃ ላይ ብክለትን አስከትሎአል?
- 3) በአካባቢው የሚደረገው የሠፋፊ እርሻ ልማት በአካባቢው የነበሩ ልዩልዩ ህይወት ያላቸውን ነገሮች አጥፍቶአል?
- 4) በአካባቢው የሚደረገው የሠፋፊ እርሻ ልማት ሥራውን ሲጀምር በአካባቢው ደን ላይ ጉዳት አድርሶአል?
- 5) በአካባቢው የሚደረገው የሠፋፊ እርሻ ልማት ሥራውን ከጀመረ በሁዋላ በአካባቢው ጠቅላላ የተፈጥሮ ሀብት ቀንሶአል?
- 6) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ በአካባቢው ነዋሪ ላይ የጤና ችግር አስከትሎአል?
- 7) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ በአካባቢው ነዋሪ ላይ መጥፎ ሽታ አስከትሎአል?
- 8) በአካባቢው ሠፋፊ የእርሻ ልማት መጀመር በአካባቢው ነዋሪ ላይ መፈናቀል አስከትሎአል??
- 9) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ በአካባቢው ነዋሪ ባህል ላይ ያደረሰው ተጽእኖ ምንድን ነው?
- 10) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ የአካባቢው ነዋሪ የሥራ ባህል ላይ ያደረሰው ተጽእኖ ምንድን ነው?
- 11) በአካባቢው የሚደረገው ሠፋፊ የእርሻ ልማት ዘላቂ እድገት ያስገኛል ብለው ያስባሉ?

አመሰግናለሁ።

ለአካባቢ ነዋሪዎች የተዘጋጀ መጠይቅ

የዚህ መጠይቅ አላማ አጥኝው በደቡብ ፍሪካ ዩኒቨርሲቲ በህግ ዶክትሬት ዲግሪ ለመመረቅ ለሚያደርገው ጥናት ግብአት ለማግኘት ነው።

እርሶም የሚሰጡት ምላሽ ትክክለኛነት ለጥናቱ ጥራት ከፍተኛ አስተዋጽኦ ስላለው ትክክለኛ ምላሽ እንዲሰጡ ይለመናሉ። ለትብብርም በቅድሚያ

አመሰግናለሁ።

ስለ መላሹ መረጃ

የቦታው ሥም _____ ጾታ ፤ ወንድ _____ ሴት _____ እድሜ _____

የትምህርት ደረጃ፣ ከዲፕሎማ በታች _____ ዲፕሎማ _____

የመጀመሪያ ዲግሪ _____ ሁለተኛ ዲግሪ _____ ሥሥተኛ ዲግሪ _____

ከተሰጡት አማራጮች ውስጥ የርሶምን ሃሳብ የሚገልጸውን በመምረጥ ያመልክቱ።

- 1) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ የአፈር መሸርሸር ሀ) ጨምሮአል ለ) አልጨመረም
- 2) በአካባቢው የሚደረገው የሠፋፊ እርሻ ልማት በአካባቢው ውሃ ላይ ብክለትን ሀ) አስከትሎአል ለ) አላስከተለም።
- 3) በአካባቢው የሚደረገው የሠፋፊ እርሻ ልማት በአካባቢው የነበሩ ልዩልዩ ህይወት ያላቸውን ነገሮች ሀ) አጥፍቶአል ለ) ቀንሶአል መ) ምንም ለውጥ አላስከተለባቸውም።
- 4) በአካባቢው የሚደረገው የሠፋፊ እርሻ ልማት ሥራውን ሲጀምር በአካባቢው ደን ላይ ሀ) ጉዳት አድርሶአል ለ) ጉዳት አላደረሰም። መ) የከፋ ጉዳት አድርሶአል።
- 5) በአካባቢው የሚደረገው የሠፋፊ እርሻ ልማት ሥራውን ከጀመረ በሁዋላ በአካባቢው ጠቅላላ የተፈጥሮ ሀብት ሀ) ቀንሶአል ለ) ምንም ለውጥ አላስከተለም መ) በእጅጉ ቀንሶአል።
- 6) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ በአካባቢው ነዋሪ ላይ የጤና ችግር ሀ) አስከትሎአል ለ) አላስከተለም።
- 7) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ በአካባቢው ላይ መጥፎ ሽታ ሀ) አስከትሎአል ለ) አላስከተለም።
- 8) በአካባቢው ሠፋፊ የእርሻ ልማት መጀመር በአካባቢው ነዋሪ ላይ መፈናቀል ሀ) አስከትሎአል ለ) አላስከተለም መ) በአካባቢው ሰው አልነበረም።
- 9) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ በአካባቢው ነዋሪ ባህል ላይ ሀ) መልካም ለውጥ አስከትሎአል ለ) ምንም ለውጥ አላስከተለም መ) መጥፎ ለውጥ አስከትሎአል። ረ) የረባ ለውጥ አላስከተለም።
- 10) በአካባቢው ሠፋፊ የእርሻ ልማት ከተጀመረ በሁዋላ የአካባቢው ነዋሪ የሥራ ባህል ሀ) መልካም ለውጥ አስከትሎአል ለ) ምንም ለውጥ አላስከተለም መ) መጥፎ ለውጥ አስከትሎአል። ረ) የረባ ለውጥ አላስከተለም።
- 11) በአካባቢው የሚደረገው ሠፋፊ የእርሻ ልማት ዘላቂ እድገት ያስገኛል ብለው ያስባሉ ሀ) ያስገኛል ለ) ለውጥ አያመጣም መ) አያስገኝም

አመሰግናለሁ።

Interviews for residents in locality of the Farmlands

The purpose of this questionnaire is to assess the role of law in promoting large-scale agriculture development

and protecting the environment in Ethiopia for LL.D research at the University of South Africa (UNISA). Your

answers will determine the quality of the research. Therefore, please respond as you feel and believe. Thank you

very much for your cooperation in advance.

Information about the respondent

Q) Level of Education (please thick)

Doctorate _____ Masters _____ First Degree _____ Diploma
Below Diploma _____

R) Profession: Lawyer _____ Non-lawyer _____

S) Occupation _____ Age _____ **Sex:** Female _____ Male

T) Name of the place _____

Please indicate your position by choosing the letter.

Questions

- 1) After the implementation of large-scale agriculture in the area, soil erosion in the farm and/or the locality;
A) Increased B) did not increase
- 2) After the implementation of large scale agriculture in the locality, water is;
A) polluted B) not polluted
- 3) After the implementation of large scale agriculture in the locality, biodiversity;
A) Destroyed totally B) decreased C) no change
- 4) At the time of making ready the farm, forest in the locality;
A) Was Destroyed B) was not damaged C) no meaningful change has been made
- 5) After the implementation of large scale agriculture in the locality, natural resource in the area;
A) Decreases B) no change C) very much decreased
- 6) Large scale agricultural investment in the locality has caused health problem to the residents.
A) Yes B) no
- 7) Large scale agricultural investment in the locality has caused odor problem in the locality.
A) Yes B) no
- 8) Large scale agricultural investment in the locality has caused displacement of persons.
A) Yes B) no C) no person was there in the area
- 9) Large scale agricultural investment in the locality has caused impacts on the culture of the local peoples.
A) Has positive impact B) no change
C) caused negative impact D) did not cause significant change

10) The implementation of large scale agriculture in the locality,

A) has positive impact

C) has caused negative impact

B) has caused no change

D) does not caused any significant change

11) Do you believe that the large scale agriculture in the locality will bring about sustainable development?

A) Yes

B) does not bring any change

C) no

Thank you very much!!!