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EXISTING AND POTENTIAL TOOLS TO REGULATE LAND ACCESS FOR INVESTORS IN MADAGASCAR

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Abstract

In Madagascar, since 2005, more than fifty investors decided to invest in agriculture. More than one third abandoned due to political instability, lack of funding, absence of a solid business plan but also due to absence of transparency during negotiations of land access. Others go ahead discreetly.

The Malagasy legal framework seems to be appropriate to regulate private investments: pro local rights land laws, investment law, compulsory environmental impact assessment, etc. However, the risks to local populations and to investors on the medium term are not associated to a lack of legislation but rather to lack of transparency and effective implementation and enforcement.

The communication analyzes existing and potential tools that regulate land-related investments in Madagascar. In the light of international and local experiences, the different sections discuss the relevance and limits of measures that aim to: select the types of investments and investors transparently (part 1), secure local and investor land rights (part 2), improve consultations (part 3), define and ensure compliance with investor's commitments (part 4). The conclusion sets out, in the form of food for thoughts to enhance critical thinking, propositions of tools and interventions that promote transparency and regulate land access for investors.

Key words: agriculture, land, investment, regulation, transparency, Madagascar

Introduction

In Madagascar, between 2005 and 2010, more than fifty large-scale land investment projects in the agricultural sector have been announced but one-third withdrew due to political instability and, above all, lack of a solid business plan (Andrianirina-Ratsialonana et al. 2011). However, large-scale land appropriations continue and the promotion of investments is still on the political agenda. The new 2014 - 2025 Agricultural Policy¹ (PSAEP) plans, in addition to improve the productivity of small-scale farmers, to allocate over 2 million hectares for agricultural and export-oriented private projects.

In an emerging country such as Madagascar, it is a real challenge to reconcile on the one hand support to family farming with promotion of private investments and on the other hand, land as an inalienable heritage with land as simple merchandise. Yet, the legal framework enables state institutions to promote and regulate large-scale land deals. Since the 2005 reform, new land laws recognize local land rights and enable the decentralization of land management at the Commune level. Consequently, these laws require the State and its services to only lease or sell to investors land that is actually unoccupied or registered in the name of the state. At the same time, new rules and institutions that promote investments have been established: an Investment Law, a One-Stop service provider for investors, and a decree to mitigate environmental and social risks associated with investment projects.

However, risks to local population, and to investors on the medium term, are not associated to a lack of legislation but rather to lack of transparency as well as lack of law's implementation and enforcement (Teyssier et al., 2010; Andrianirina-Ratsialonana et al., 2011). Indeed, various stakeholders, from state to local representatives ignore (more or less wilfully) these laws and the existing land rights in order to welcome the investment and consequently to attract resources in their territory or to capture rents (Burnod et al., 2013a&b). This is strikingly illustrated by the resulting land conflicts, some of which are regularly covered by the national and international mass media.

In this context, what are, beyond the laws, the interventions that can regulate large-scale investments and promote transparency in Madagascar? The communication analyzes existing and potential regulatory tools in Madagascar in the light of international experiences.

The communication is based on fifteen case studies on investment in agricultural sector in Madagascar, multi-country comparative analysis, as well as on a capitalization of the national and international experiences of the Observatory team, comprised of experts and researchers.

The communication successively analyzes existing and potential regulatory tools in the Malagasy land-related context. It discusses the diverse type of interventions that aim to: select types of investments transparently (part 1), secure local and investor land rights (part 2), improve consultations (part 3), define and ensure compliance with investor's commitments (part 4). Each section addresses relevance and limits of regulations' tools in general and in Madagascar in particular. The conclusion sets out, in the form of food for thoughts to enhance critical thinking, propositions of regulatory interventions; and point out the range of actors and territorial levels that need to be involved in to ensure their implementation and effectiveness.

¹ Agriculture, Livestock and Fisheries Sector Policy (PSAEP: *Politique Sectorielle Agriculture-Elevage-Pêche*)

1 Screening of types of investments or investors

1.1 Limited debates on business models

The agricultural sector in the Southern countries requires investments to provide diversified crop production, create employment and ensure sustainable resource management. In Madagascar, neither agricultural policy nor land policies address frontally what business models have to be promoted (large-scale plantation, contract farming, joint venture, other). The default position is then to develop the coexistence of different forms of agricultural investments.

1.2 Existing tools for promoting and guiding investments

The **Economic Development Board of Madagascar (EDBM)**, created in 2006, plays the role of a One-Stop service provider for foreign investors. It promotes investments rather than regulating them (no selection of investors, weak capacity to control). Moreover, it struggles to assume its duties - due to lack of funding during the national political crisis [2009-until now] - and to be the sole entry point for investors (Andrianirina-Ratsialonana et al., 2011).

The **Investment law (No. 2007-036)** leads to a substantial change compared to previous laws by authorizing and facilitating access to land property for foreign investors. It removes the three obligations previously required to investors (Pasquier et al., 2008): investing more than USD 500,000; respecting accurate investment and expenses plans; applying for a lease to the Prime Minister. Investors have only to register their company or subsidiary in Madagascar, realize a business plan and request an authorization of land acquisition to the EDBM. Afterwards, they have to apply to the land administration and follow the regular procedures for obtaining a land title. Once they become landowner, they can manage and even sell their land property².

In fact, the implementation of that investment law is limited, in the absence of any implementing decree and due to the land administration's reluctance to let the EDBM intervene in controlling land access (Burnod et al., 2013 a). Thus, the unique legal way for foreigners to access to land is to contract a land lease with a private person/company or with the Malagasy State, and in the latter case, the land administration has the sole responsibility for managing the process.

Moreover, in 2011, the **Ministry in charge of land issues** issued a new circular designed to regulate the procedure for large-scale land acquisitions (**more than 2,500 ha**)³, opposing the investment law. Implicitly excluding access to private land property, the circular authorizes access to large areas of land only through a 50 or 99-year lease for both native and foreigners (in practice, lease duration is reduced to 30 years). It requires investors to obtain an official approbation before engaging in procedures to access land and to get an "authorization to prospect land" (by the Minister in charge of land issues for projects above 250 ha, by an interministerial commission for those above 2 500 ha and eventually the Council of Ministers). Despite a land reform in favor of decentralization, this new process gives evidence of the State's will, to recentralize control over these land deals, to recall the authority of the

² However, land speculation is unauthorized. Besides, foreign potential buyers should get an authorization from EDBM

³ Circular No. 321-10/MATD/SG/DGSF : « Instructions concernant la procédure à suivre en matière de demande de terrain de grande superficie », 10/25/2011"

central administration to regional as well as local leaders⁴ and others institutions, and to exercise a tighter control on the financial resources associated to land deals – official rents and bribes (Burnod et al., 2011b & 2013b). The fact that an interministerial commission is involved in this process prevents the Minister in charge of land issue from monopolizing the power (at least apparently) and offers it the opportunity to share the risk in case of social protests⁵.

1.3 Absence of incentives promoting responsible investments

The Malagasy land policies do not attempt to make large-scale plantations less attractive. The tenfold increase in land rent in 2011 (from 1 to USD 10/ha) was realized to increase State's rents rather than restricting large-scale plantations. Unlike Argentina⁶ (Vorley et al., 2012), the Malagasy State does not put any upper limit to land allocation. Likewise, the choice to increase gradually the leased land areas, subject to compliance with the contract specifications, results more from the pressure applied to certain investors than from a new policy setting limits on the allocated areas.

1.4 Selection of investors

The selection of investors can occur first at the international level on the basis of international financial institutions policies, and then, at the national level, according to the host country's policies.

1.4.1 At international level: loan conditionality

Some financial institutions (Equator Principles Financial Institutions - EPFIs) have adopted the Equator Principles (EP). Then, they have to fund or guarantee only projects (notably the ones above USD 10 million) that are developed in a socially and environmentally responsible manner. Covering over 70 % of international project loans in emerging markets, the EPFIs can play a leverage effect in terms of social and environmental issues (Acosta, 2013). However, these Principles face various limits. To remain competitive, some EPFIs continue to fund unsustainable projects (Balch, 2013; Wörsdörfer, 2013). Because those principles are non-binding (op cit.), neither borrowers nor lenders are accountable towards affected community in case of non-respect of the EP. Finally, on the pretext of banking secrecy, almost none information proving that the projects actually respect the EP is published.

Projects funded according to EP are assessed following IFC's criteria⁷; the fifth one referring to land issues. But the formulation of this latter is too generic. For example, the French Development Agency (AFD) and Proparco (AFD's subsidiary dedicated to private sector) interpret it as an obligation to respect local land rights (even if they are not formalized through land titles), to consult customary authorities, to avoid displacement of people and, otherwise, to implement compensation measures. These principles, constructive to foster responsible investments, are quite limited in practice with respect to land. *Ex ante*, bankers do not systematically have the relevant expertise on the local land issues and the project's land effects during due diligence process, in order to adjust consequently the disbursement of

⁴ Some Head of Administrative Region allocated land to investors via informal Agricultural Investment Zones (cf. infra)

⁵ In 2009, the Ministry in charge of land issues, who started negotiation with the multinational Daewoo for allocating it thousands of hectares, exiled himself when the case was revealed and contributed to the fall of the Ravalomanana's government.

⁶ Maximum limit of 1,000 ha in districts with high agricultural production

⁷ Part of the World Bank group, dedicated to private sector

funds. Because of EPFI's specific concerns, the potential negative impacts on local land rights rarely justifies a loan rejection and, paradoxically, the bank can strengthen these negative effects by requiring a proof of a legal land access. Without *ex ante* intervention, land conflicts can emerge *ex post*. Then, the EPFI can rely on their sole available legal instrument: the action plan associated with the contract, if this latter is specific on land issues, to put pressure on the investor and threaten him not to realize expected disbursements (eg Conchou, 2013; Mignot, 2013).

In Madagascar, two mining companies (excluding EPFI) declare to respect the Equator Principles, but only one of them releases information to prove it. Displacements of communities have not been avoided but various compensations have been granted⁸.

1.4.2 At national level: a weak selection

Currently, there is no real screening of investors, and in that event, the selection criteria are not transparent. In the same way as in many African countries (Vorley et al. 2012), the one-stop office for investors (EDBM) does not carry out any selection (Andrianirina-Ratsialonana et al., 2011). Likewise, the inter-ministerial committee (cf. supra) have never definitively refused authorizations to prospect land to investors. And yet, a minimum selection seems to be important to avoid allocating land to investors without any means or expertise in agriculture. In Madagascar, a control is realized on the fifth year of the lease contract to check the effective cultivation of the land and to confirm its 30 years (or more) length. However, this control is realized once the land is registered in the name of the State. If this registration, which is funded by the investor, represents a significant profit for Malagasy State, it represents a strong legal loss for former local land users and owners. This is similar to Mozambique, the control performed after 2 years, allows the investor to obtain a permanent right to use land or the State to recover the land and hand over to another investor (Hanlon, 2011).

2 Secure local people as well as investors' land rights

2.1 An innovative but insufficiently implemented national legislation

In many African countries, customary lands are legally protected. Legal formalization of occupancy (individual land certificate in Ethiopia, or a DUAT for one community in Mozambique) may offer a first legal protection but covers in general a small part of the territory (Hanlon, 2011; Lavers, 2012). Moreover these legal protections do not prevent the land deals. The local communities, legally recognized as owners, can directly deal with investors (e.g. Ghana, Schoneveld & German, 2013). Besides, when the State needs land, it can define community-owned lands as State-owned land or make sure to reclassify them (Alden Wily, 2011, e.g. Tanzania, German et al., 2013).

In Madagascar, the land **reform** legally recognizes the local land rights and implements the decentralization of land competences. These new land laws establish that untitled but occupied land is no longer the property of the state but 'untitled private property' (*Propriétés Privées Non Titrées, PPNT*)⁹. On these PPNT, **the Commune and especially its local land**

⁸ Monetary compensation, support to income-generating activities, resettlement and securing resettled households with granting them land titles (Ambatovy, 2012)

⁹ Law No. 2006-031

office (*Guichet Foncier, GF*) can recognize and formalize local/customary land rights (if these latter are already acquired and socially recognized) and issue land certificates.

Consequence of this land reform, the land that the State land services can lease or sell to investors has been drastically reduced. It now amounts to land titled in the name of the State and un-titled and unoccupied land¹⁰. The State can neither lease nor sell land that includes or encroaches upon titled private property or upon occupied land (PPNT), whether or not formalized by a certificate.

But, in practice, the new land laws are insufficiently implemented and enforced (Andrianirina Ratsialonana et al., 2011; Burnod et al., 2013a&c; Franchi et al., 2013):

- The mere legal status of PPNT, even without GF or land certificate, is supposed to offer a first legal protection to individuals and communities. In practice, PPNT is recognized and respected only when the land administration decides to do it or when a certificate effectively materializes it. Besides, one third of the communes have a local land office and in these latter, only 9% of households hold a certificate (Burnod et al., 2013c);

- pastoralist rights on pastures are not protected (cf. *infra*);
- both land administration services and local leaders ignored (more or less wilfully) these laws and still conceive untitled land as stated-owned. Above all, they want to see the project develop, to get some rents for their territory (communes, Regions, etc.) and, sometimes, to extract some unofficial rents. (Burnod et al., 2013b);

- according to the law¹¹, expropriation or eviction are only possible when the State considered it to be in the public interest. In practice, the Malagasy State have already used this procedure for private interest, such was the case for multinational mining companies;

- consultations of local communities are compulsory in the land procedures but they are very often done in a rush so that rights holders find themselves dispossessed of their lands, leading to more or less violent oppositions (Burnod et al., 2013a);

- although the law specifying the compensation modalities is not updated regarding the new legal provision on PPNT, it prescribes compensation for all rights, whether or not they are legally registered. In practice, compensations are provided only for huge economic projects (large mining projects) and when donors and international media put pressure on the company and the State. On the one hand, compensations are paid only for some land rights and very often, those giving rise to a visible occupation (Andrianirina-Ratsialonana & Burnod, 2012). On the other hand, notably for informal land rights, compensations cover only a partial value of occupation (e.g. building value or food crops on the land) (*op cit*).

Land tenure security is acquired if socially legitimate institutions ensure it. Without consent of local community, investors' use rights sanctioned by law and State institutions are insufficient to stabilize property relations and confer secure land rights for investors. As observed in some regions of the island (Medernach & Burnod, 2013), investors may see their building and agricultural achievements damaged or burnt. However, their lease contract can protect them against eventual opportunistic expropriation fomented by some public decision-makers, via appealing to national justice system (if it is unbiased) or to institutions in charge of dispute settlement mentioned in bilateral investment protection agreements (cf. *infra*).

¹⁰ Law No. 2008-14

¹¹ Order No. 62-023

2.1.1 Soft laws

Madagascar's national legal provisions are more stringent and concrete on land issues than most of international *soft laws*. Indeed, in most cases, *soft laws* are generic and focus more on local people and indigenous rights in general; employees' rights and due diligence to manage investment risks than on land rights¹². However, further to large media coverage of controversies related to large-scale land acquisitions, several specific *soft laws* have been developed (Margulis et al., 2013):

- «Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests » unanimously approved by the UN Committee on World Food Security (CFS) in 2012;
- «principles for Responsible Agricultural Investment » (RAI), whose inclusive consultation is in process;
- «a set of minimum principles and measures to address the human rights challenge», relative to large-scale land acquisitions and leases drafted in 2009 by the UN Special Rapporteur on the right to food;
- « framework and guidelines on Land Policy in Africa », adopted by African Heads of State and Government in 2009.

These initiatives create only moral or political commitment. As non-binding instrument, they are voluntarily implemented and rely on investors and states' goodwill for complying with the principles (Banchand & Veilleux, 2001). They are therefore controversial. On the one hand, soft laws are considered as inefficient in context where the national legal framework is not even enforced (Djiré & Wambo, 2011; Plançon, 2012). On the other hand, they are recognized as useful since they address shortcomings of national legislation and used as references for States, donors, civil society and investors (Arial et al., 2012; Blank, 2013).

While specific *soft laws* on land issues recognize and protect pastoralists' land rights, in Madagascar these rights are not legally protected¹³. And yet, extensive grazing land areas are often coveted by investors and source of conflicts (Andrianirina-Ratsialonana et al., 2011; Medernach & Burnod, 2013). Although these *soft laws* are not very present in the Malagasy debate at the national level; they could be mobilized for improving national laws.

2.1.2 Bilateral Investment Promotion and Protection Agreement (IPPA)

Madagascar has signed IPPAs with several countries in order to provide to foreign investors equitable treatment, full protection and security of their investments. Expropriation can be done only for public purposes, under due process of law, on a non discriminatory basis and provides adequate compensation. Malagasy State must also compensate for losses in case of revolution or riots (but not in the case of conflicts between investors and local communities). Disputes are subject to the national justice, an arbitration body, or even the arbitration of the International Centre for Settlement of Investment Disputes (ICSID) (WTO, sd). These IPPAs, which are binding and in this sense very different from soft laws, underline that protection is stronger for investors than for local people (Cotula, 2012).

¹² The few that address concern about land issues are: «Children's rights and business principles» and the «UN Declaration of indigenous rights». They call for respect and protect community land rights and free, prior and informed consent to the approval of any investment project

¹³ Extensive grazing lands are not legally recognized as PPNT

2.1.3 Corporate Social Responsibility (CSR) instruments

An array of self-regulation tools for businesses has been developed by non-state actors in the framework of CSR¹⁴. Companies may have an interest in adopting them to avoid conflicts and stakeholders' pressure¹⁵; to reduce negative financial and reputational effects and to secure their investments (Arnal & Lemièrè, 2006; Cuffaro & Hallam, 2011). Within a context of growing critics and opposition against business practices, several tools aiming at enhancing some "good practices" have rapidly multiplied, such as labels, norms and standards or ethical stock indexes. These tools certify that a company respects several socio-environmental criteria (Arnal & Lemièrè, 2006; Robert-Demontrond & Joyau, 2009). Two of the more well-known tools are the Forestry Stewardship Council (FSC) for managing forest responsibly and the Roundtable on Sustainable Palm Oil (RSPO) norm promoting the growth and use of sustainable palm oil. They both appeal to respect the local land rights¹⁶. Other tools such as ethical indexes, set up by extra-financial rating agencies and stock exchanges, do not incorporate precise criteria on land issues but mention broadly the importance to respect of local population rights, the amount to invest in social projects or the interest in doing social reporting.

These tools have drawbacks that limit their efficiency. As their implementing cost are high, only few legal companies can afford it and other companies, that may be respectful of social and environmental issues, tend to be pushed aside. Besides, assessment methodologies are heterogeneous and the criteria are not specific enough. Moreover, the latter are very often badly assessed due to lack of auditor's expertise in complex land issues or inadequate consultation of local communities (Arnal & Lemièrè, 2006; Pagès, 2006; De Man, 2012). Thus, the assessments rarely mention or suggest solutions to land conflicts (op. cit.). In Madagascar, no recent entrepreneur is involved in this type of approach, except transnational companies that do not publish any specific report to prove that their Malagasy subsidiaries really follow the established principles.

Ultimately, beyond this multiplicity of tools and the vague criteria on land issues, these tools only apply once investors have developed their project. However, critical period takes place before investors start improving and working the land.

2.2 Land identification for investors

A key step in securing land for local people and investors is the identification of lands for investments.

Some countries establish land banks (Tanzania, Zambia, Ghana – German et al., 2011&2013), in addition to others tools designed and recommended by international donors to attract investors (Daniel & Mittal, 2010). Lots of experiences were unsuccessful (op. cit; Vorley et al., 2012; Lavers, 2012) but have underlined that their relevance and working depend on:

- the institution that identifies land (government, district and region in Tanzania, province in Ethiopia, traditional authorities in Zambia - German et al., 2013; Lavers, 2012). However, some land was classified as « unused » and gathered in these banks without any local consultation. To avoid such top-down identification without negotiation, some initiatives

¹⁴ No State regulation in these mechanisms

¹⁵ Stakeholders include shareholders, employees, consumers, civil society, etc.

¹⁶ Besides, RSPO imposes transparency on negotiations related to compensation of communities' rights losses (legal or customary rights); free, prior and informed consent of local population during investor's land acquisition.

in Senegal or in Mozambique promote the idea that local communities are the ones who have to identify the land and to reach a consensus between the different parties: land users, landowners and also those in charge of land management. The idea is also that, in case of non-use, these land would be reallocated to the original owners, but this is rarely the case (German et al., 2013);

- the institution that manage these land banks. In Tanzania, Zambia, Ghana and Ethiopia these banks are managed by investment agencies (or one-stop office). These institutions may have a weak expertise in land issues, see their role disputed by other authorities in charge of land issues and are ultimately more a source of information to identify land than real managers (Vorley et al., 2012);

- the type of identified land. In Tanzania, 2.5 million hectares have been selected but they were fragmented or located in unattractive zones. Finally, only 2% have been allocated to investors (Vorley et al., 2012). In Ethiopia, the State offers benefits to investors who decide to operate in the most remote areas (tax exemption) but these land may be common grazing lands (Lavers, 2012).

To avoid these difficulties and keep a logical of upstream land identification, development territorial plans¹⁷ can delimit investment areas that are consistent with other socio-economic activities and not restricted to some plots; investors having different requirements depending on their project (agriculture, cattle breeding, mining, etc.). These plans have the advantage to raise the negotiation between different actors of the territory and do not involve an irreversible mapping of activities to conduct (experiences in Senegal and Niger). In Tanzania, use of development plans at local level is strongly recommended under the « biofuel recommendations». However, it's not specified who has to finance these plans. The risk is that the company interested in land appropriation will finance it *ex post* and turn it to his advantage (Vorley et al., 2012).

In Madagascar, setting up such land banks has been considered under Ravalomanana's regime (2003-2009). Informally, Heads of Regions had to identify Agricultural Investment Zones (ZIA). Some investors established their project on this type of land but they had to leave or start again procedures to access to land because the ZIA do not have any legal existence. More recently, a new structure in charge of a land bank is also suggested under Act II of the land reform (Andrianirina-Ratsialonana & Legendre - coord., 2011) (cf. infra).

3 Local consultations

In Madagascar, the procedure to access land and the obligation to realize social and environmental impact assessment (EIA, cf. infra), legally require at least two local consultations:

- when investors prospect land. They have to request local authorities and neighbors' approval, while the local population is, at best, informed. Minutes of community consultation reveal a limited number of participants and rarely record any protest (Andrianirina – Ratsialonana et al., 2011, Burnod et al, 2013a);

- when experts conduct the EIA. Public hearings focus more on the desired counterparts than their choice to welcome or not the investment;

¹⁷ *Schéma d'aménagement du territoire* in French

In parallel, investors generally lead awareness campaigns and consultations. However, urged on by time and bankers, and guided by intermediaries or decision-makers favorable to the project, the investors and their team do not systematically have proficiency and resources to consult all the villages and, above all, all the landowners and land users (Burnod et al, 2013b; Medernach & Burnod, 2013).

During these consultations, required by law or realized under investors' initiative: information on the project is incomplete (sometimes due to lack of the project's completion); representation of all land rights holders is not wide enough; discussions are more about promises relative to jobs and infrastructures than about potential negative impacts; and local farmers are generally embarrassed to speak in front of investors, political or administrative representatives. Besides, the land areas targeted for acquisition are often presented as belonging to the State – even if it is not the case. This provides little room for maneuver for the local communities who already have low bargaining capacity.

In conclusion, local communities' opinion is required more on the nature of the counterparts and the localization of the land areas allocated to the project than on their acceptance or refusal of the company. Protests and refusals generally emerge later on when local population becomes aware of the effective gains and losses (Evers et al., 2011; Schoneveld & German, 2013).

4 Commitments and measures to push compliance

4.1 Definition

On their own initiative, constrained by law or at local population's request, investors undertake to give compensation in return for land and natural resources access. These various commitments are discussed below.

4.1.1 Environmental Impact Assessment (EIA)

In line with an environmental decree¹⁸, all agricultural investments exceeding an area of 1,000 hectares need to realize an EIA, integrating socio-economical and environmental issues. Subject to a positive evaluation of the EIA, the National Office for Environment (ONE) delivers an environmental permit combined with an Environmental Management Plan (EMP) and must enforce this requirements' document.

Implementation of this decree encounters various difficulties (Andrianirina Ratsialonana et al., 2011), similar to lots of African countries (Vermeulen & Cotula, 2010; German et al., 2013):

- consultation processes are weak;
- the quality of the EAI is questionable in the absence of any validation done by a certified organism;
- the EMP, as well as EIA, is hardly ever publicized. Moreover, social and economic investor's commitments are vague. Specifications about nature, quantity and timing of the required services and infrastructures are missing. Thus, monitoring and enforcement of these requirements are all the more tricky;

¹⁸ Decree to Make Investments Compatible with the Environment (MECIE decree, No 99-954, modified by Decree No 2004-167)

- lack of resources of the institutions – such as ONE and its regional sub-branches or the environmental units of all concerned Ministries, limits the reliability of the EMP and its enforcement. For example, the economic viability or the harmonization of the project with the recent land laws are not seriously assessed;
- the procedure to access to large-scale land areas requires only a receipt proving that the investor initiated an application for an environmental permit but not the environmental permit itself;
- some companies start and realize their investment without any environmental permit.

4.1.2 The land lease contract

The land lease contract is also combined with a requirements' document. This latter, identical for all investors, does not really specify the actions to undertake. It specifies that the non-payment of the land rent or the non-respect of the authorized use of land can breach the contract. But, beyond these specifications, it only mentions to maintain good neighborly relations, to engage socio-economic compensations for the local communities and to accept, in this respect, the monitoring of the regional authorities. Moreover, requirements' document is not articulated with the EMP. Finally, in practice, it is only used to pressure the investors to get new official or unofficial compensations.

4.1.3 Local agreements

During negotiation, investors and respectively Region, municipalities, villages' Representatives can reach agreements. These latter can only be verbal or formalized under very different ways (a document signed by the parties, or even stamped by an administration, etc.). Their legal value is often weak or non-existent. Moreover, these commitments, in addition to be varied and sometimes unrealistic, are vague. Then, those agreements are not efficient, neither for the local actors who enjoy in the best case only some advantages, nor for the investor who runs the risk of seeing the requests increasing.

4.1.4 Corporate social responsibility (CSR)

The tools promoting companies' reputation (code of conduct, social reporting, norms and labels), inappropriate to evaluate if the local land rights are respected (cf. supra), are more accurate to monitor the company's socio-economic and environmental commitments.

Since the States struggle to actually regulate the investments and since their sanctions are weak, non-existent or arbitrary, media and the civil society's pressures (through negative advertising, strikes, etc.) give credibility to the CSR tools and incite the companies to respect them, even if those CSR tools are implemented first for marketing concerns (Arnal & Lemièrre, 2006; Robert-Detromond & Joyau, 2009).

In Madagascar, few companies are familiar with CSR concept and they mainly match it to ways to improve working conditions, respect environment and promote themselves (Ernst & Young and UNICEF, 2011).

4.2 Commitments' monitoring

Nowadays, the capacities and resources of the (para) governmental institutions (EDBM; ONE; land, forest or mining State services) are scarce to monitor investors' commitments. Besides, they rarely impose sanction to companies that are not compliant with any requirements' documents.

Companies can, at their own initiative, be transparent to prove that they respect their commitments. This can be done through social reporting, of which the world reference is the *Global Reporting Initiative* (GRI) (Fogelberg, 2011). But this tool shows off several limits: it remains perceived as a communication tool; it mentions neither the respect of rights of the indigenous people nor the land issues; the reports, never detailed at the country level for transnational companies, are not checked by independent experts. In Madagascar, social reporting is little practiced¹⁹.

Other multi-stakeholders initiatives can promote transparency on investors' commitments, such as the Extractive Industries Transparency Initiative (EITI). This latter brings together, on a voluntary basis, government, companies and civil society to make sure that the State and the decentralized entities let some independent experts check and publish: the contracts they signed, the way they allocate them and the taxes they perceive from the companies.

In Madagascar²⁰, the EITI national committee puts in the annual EITI report all the companies paying more than USD 100,000 of taxes. But this tool displays several limits: contrary to the Liberia case (Cotula, 2014), the contracts are not published; the annual report does not analyze or make transparent local conflicts or the way companies access to land²¹. In addition, the participation of the civil society is crucial but this latter, member of EITI Madagascar, engages itself in few advocacy actions in general and about land issues in particular.

Watchdog organizations (such as Observatory) and research centers have an important role in promoting transparency and debate on land issues and on investors' inputs and abuses (Djiré and Wambo, 2011; Arial et al., 2012). The Malagasy organization, the Land Observatory, was created in 2007 to conduct researches on land issues, to enhance the public debate and to support the design and the implementation of the land policy. However, the Land Observatory is sometimes confronted with a lack of reactivity of its various partners, subject to the guidance of the Ministry in charge of land issues to which it is linked, and subject to an endless search for funding (as the government, private sector or the civil society do not finance it as it can be the case in other countries).

The civil society is present and active on land issues but it is relatively recent. It can be a key element to enforce the respect of local land rights and, more largely, the companies' commitments. The most active organizations are *Solidarité des Intervenants sur le Foncier*²² (SIF), *HAFARI Malagasy* or *Collectif pour la défense des terres malgaches*²³. Due to the passive and resigned public opinion, the threat of reprisal and limited means, their advocacy actions remain discreet.

Otherwise, the national media plays a minor role in the regulation of investment. Information is far from being objective for two main reasons. First, media are not totally free due to a strong politicization of the newspapers, radio and TV channels, and the recurrence of threats restricting the freedom of expression. Also, for almost all articles or documentaries, the

¹⁹ One third of the 1070 interviewed companies – all types of sector – publish information on their environmental and social practices but, most of the time, in a very succinct way (Ernst & Young and UNICEF, 2011)

²⁰ The application, accepted in 2008, is not yet validated due to the last political crisis

²¹ The Malagasy mining code (decree n°2006-910) oblige holders of mining license to respect the land rights holders

²² Solidarity amongst actors intervening in the land sector

²³ Collective for the protection of the Malagasy land: based in France, it develops connection with international actors

journalists are paid by the companies or the civil society organizations, and information is published without any critical analysis.

Finally, reporting companies' misconducts at the national level has an impact only if the international level echoes it, as it was the case for the company Daewoo Logistics²⁴. The media buzz spread first at the international level before reverberating at the national level. The network of civil society organizations working on land issues voiced their doubts and fears; the political opposition forces seized upon this sensitive issue to maintain and increase the mobilization of the masses during the 2009 protests; and the information was progressively spread from towns to countryside and lastly to affected people (Allaverdian, 2010). However, it seems to be difficult to systematically involve the international level for each advocacy action.

5 Discussions and policy proposals

- **Open an enlarged debate** on agricultural development and the role of large-scale land based investments;
- Within the framework of agricultural policy, **decide on the priority given to the large-scale farms or, on the contrary, to more inclusive agricultural business models** and, consequently, decide the suitable incentives (tax level, priority access, etc.);
- **Inform and involve decision-makers** in the debate and especially in the decision about: investment upper limits (land area or invested amount) beyond which the council of Ministers or the Parliament's approval is requested;
- **Rework the modalities to identify, select and negotiate the land** allocated to the investors (cf. infra);
- **Debate on the maximum land area that can be allocated to investors, and favor progressive allocation conditioned on the respect of socio-environmental obligations;**
- **Rethink the level of land rents and land lease length**, or even formalize the ongoing practice that allocates land for a 30 years period;
- **Select the investors according to the quality of their project.** At the local level, the local actors should realize their own selection according to what they want for their territory. At the national level, the existing 'pre-selection' could be reinforced through the following actions:
 - add to the existing committee some representatives from para-governmental agencies (such as EDBM) and discuss the possibility to rely on qualified experts in order to assess the project specificity (and to avoid, for example, admitting agricultural investment based on unrealistic agronomical hypothesis);
 - define and publish the list of selection criteria. In Perou, allocations of some State-owned land are based on public auction (Deininger et al., 2011). The selection is then explicitly done based on financial capacity (the highest bidder) but not necessarily on criteria favouring the respect of the socio-environmental issues. An option could be

²⁴ In November 2008, the Financial Times (Blas, 2008) broke the story that secret negotiations were taking place between the Malagasy government and the South Korean company to produce palm oil and corn for export on 1,300,000 hectares of populated areas

setting up a selection that prioritizes: a) investors engaged in norms and labels, experimented in CSR practices or/and funded according to Equator principles, b) agricultural investments that meet the objectives of the rural development policies and c) projects that plan ahead inclusive business models;

- publish the list of the selected investors;

- **Respect the land rights** by engaging the following actions (Burnod et al., 2011a):

- **complete the land laws in order to protect the cattle breeders' rights;**
- **strengthen the on-going land reform by consolidating and multiplying the land local offices.** Indeed, the land local office has 4 main functions. It offers to local population legal empowerment to defend and to have their land rights recognized. It strengthens the role of commune in land management. It supplies maps that could ease identification of the land targeted by the investor, of the land use competition, or even, the potential linkages between economic activities (agriculture, cattle breeding, wood harvesting). Lastly, the land local office represents a first authority to resolve conflicts;
- **better inform the local populations as well as the investors on the new land laws and procedures;**
- **publish at the local level the 'authorizations of land prospection';**
- **improve and enlarge local consultations** (cf. infra);
- inform widely on the scheduled date for the realization of the field visits aiming at identifying the land that is intended for investment;
- **open the land commission organized by the land administration** to an enlarged number of actors: representatives chosen by villagers, land local officer agents, external expert watching over that the process goes smoothly. **Disseminate the results** of this commission to allow, the absents and excluded persons, opposing the delimitation;
- where necessary, debate on expropriation conditions of all affected land owners and land users, as well as on the procedure of compensation. Transparency on compensation should reign to avoid elites capturing or embezzling them;

- **Identify the land areas: before investors come or on demand?**

- **discuss on the relevance of a para-governmental agency in charge of a land bank** (cf. Andrianirina-Ratsialonana & Legendre - coord., 2011) while taking in account the lessons from other countries. This agency could: a) make an inventory of the State-owned land (because until today no such inventory exists); b) decide on their allocation: productive investment, public housing, reallocation to occupants, etc.; c) fix the rent fees or the sale price. The idea would be more to highlight the existing State-owned land than to delimit new ones. However, questions remain about the number of such land areas, the effective absence of land users and, above all, the capacity of this type of agency to manage the land from the capital city;
- **or, in an alternative or complementary way, discuss on the relevance of the creation of 'municipality-owned lands'.** Under a process of reinforced decentralization, it could be relevant to transfer from the State to the municipalities the management of State's non-appropriated land areas (if they exist). A communal land use management plan is especially relevant in that case;

- **Improve the consultations through:**

- **the specification of the modalities**, notably for the consultations imposed by law. In Mozambique, the land laws define the number of compulsory public hearings as well as the number of men and women from each community that must attend the

consultation and sign the minutes; while in Tanzania, the local chiefs have to disclose and discuss on the project with all the village assembly (German et al. 2013). The idea is to avoid consulting only the local authorities (from mayor to customary chiefs) that extend their power and the opportunity for them to seize non official economic advantages. The idea is also to define the levels at which the official consultations need to take place in order to guide the investors or to protect them from an endless and multilevel negotiation process;

- **the systematic publication of the minutes** to offer absents or the excluded persons the possibility to oppose the project;
- **the participation of a third party designated by the civil society or specialists** (lawyers, land expert, etc.) and funded by civil society or investors (through a dedicated fund);
- **the publication of the dates and key steps of the consultations and the promotion of their spacing out in time** in order to let the information spread and the informal debates multiply – between the company and the local actors, between the local authorities and the local population and amongst the diverse local groups – on the approval of the investment and, in that event, on the requested compensations. Such transparency on the consultation process offers the civil society the opportunity to better organize itself. This transparency intensifies the risk of political twisting but can also further the public debate;
- **information sharing on the economic and social options the local communities have** as well as the discussion on the actual advantages the investment can bring, in order to avoid the local communities agreeing the project due to their lack of alternatives and their dazzle in front of numerous promises (Vermeulen & Cotula, 2010);

- **Make the local people, represented by several entities such as mayors, customary authorities but also elected villagers representatives, signatories of the land contract;**

- **Consolidate the requirements** towards more realistic and fair compensation for the local actors and the companies thanks to a debate on:

- **the nature and the value of the compensation.** Whatever the size of the investment, the local communities or the municipalities can ask for lots of compensation in return for the land access. The value of these compensations are hardly ever evaluated on a financial basis and compared with the total amount of the investment²⁵. Two points deserve to be discussed:

- let the local communities choose between compensation or their incorporation as shareholders of the company, decision-makers or producers (joint venture, contract farming). An inclusive business model can ease a better return on the means available in the investment (labor, land, natural resource) and create incentive to make the project work. The limits of some business models, inclusive in appearance but exclusive in practice, have to be taken into account as the actual competencies of the local communities in piloting a company or controlling the profit sharing can be very restricted (see the failure of joint venture in Malaysia - Cramb, 2013; or in South Africa - Lahiff et al., 2012);

- let the communities choose between financial compensation or advantages in nature. In other words, do investors have to contribute to a fund or to implement themselves the promised services and infrastructures? In both cases, the value of the compensation, from the local taxes to the contributions to the local development, should be proportional to the

²⁵ E.g. in Indonesia (East Java province), the companies must invest 2,5% of their annual profits in CSR actions, these latter being deductible of their taxes (TCS, 2013)

scale of the investment or the size of the allocated land areas. If investor contributes to a fund, this latter could be: a) allocated in coherence with a rule negotiated by the affected people and b) socially controlled thanks to regular publications of the bank statements. If investors give compensation in nature, their definition – and even their realization – should be supported by experts to avoid implementing unsuitable or unusable infrastructures or services;

- **harmonization, formalization and specification of requirement** which requires putting in connection the various documents (respectively the ones linked to the EIA, the land lease contract and the local agreements). This means to **develop the content of the requirements** by specifying the operators' commitment (quality, quantity, deadlines);

- **transformation of all requirements' documents in legally binding agreement** (Cotula, 2012);

- **Reinforce the existing authorities in charge of conflicts resolution and intervene only for a better connection of these latter** (from local mediation to mayor intervention, to local resolution mechanisms to the courts). In others countries, in case of conflict between companies and local people, several institutions can act: from village assemblies stipulated by law in Tanzania to courts specialized in land issues in Zambia (German et al., 2013). These different mechanisms did not often manage to solve the conflict (op. cit.) but their existence (and not the creation of new institutions) and their accessibility should be supported;

- **Plan how to enforce the stakeholders' commitments** by:

- **Defining institutions and organizations in charge of monitoring the parties' commitment, their linkages and their source of funding.** The control cannot be realized by institutions that promote investment (EDBM) or make – official or non official – profits from investors' activities. This control should result from a synergy between State institutions, civil society, media and research organizations (such as Observatory);

- **Publishing contract and requirements' documents.** The Land Observatory develops, in partnership with several institutions (ILC, CDE, Cirad), the Platform of Land based Investments (PLI) to publish on internet the large-scale land investments (name of companies, type of land access, state of progress, etc.). This tool, subject to the forthcoming Minister in charge of land issues' approval, should be public in 2014. The data comes from the Malagasy land administration and from repeated field surveys realized by the Land Observatory. Unfortunately, the requirements' documents will not be published. The civil society and the citizens are key partners to comment, feed and use these data;

- **Informing on land deals and their state of progress.** The PLI will serve this function as the Land Matrix²⁶ does it at the international level;

- **Training and connecting the diverse entities,** local or national, governmental or non-governmental, etc., that can participate in controlling and promoting legal empowerment.

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²⁶ www.landmatrix.org

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