Land is Not the New Oil: What the Nigerian Oil Experience Can Teach South Sudan About Balancing the Risks and Benefits of Large Scale Land Acquisition

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LAND IS NOT THE NEW OIL: WHAT THE NIGERIAN OIL EXPERIENCE CAN TEACH SOUTH SUDAN ABOUT BALANCING THE RISKS AND BENEFITS OF LARGE SCALE LAND ACQUISITION

Scott P. Stedjan∗

“The only reason why we are hungry is because of how we have been investing in Agriculture.” – Ann Itto, South Sudan’s Minister of Agriculture

“When food becomes scarce, the investor needs a weak state that does not force him to abide by any rules.” – Phillepe Heilberg of Jarch Capital

Recent global food price volatility combined with the growing use of agricultural land to produce biofuels has sparked a global scramble for land. Precise numbers are difficult to verify, but the scale of new international land investment in recent years is, by all

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accounts, enormous.\(^4\) Compared to an average annual expansion of international investment in global agricultural land of less than four million hectares before 2008, the World Bank estimates that approximately fifty-six million hectares worth of new large-scale farmland deals were announced in 2009 alone.\(^5\)

Developing countries, particularly those in Sub-Saharan Africa, are the main targets for investors.\(^6\) These countries are enticing because land in Sub-Saharan Africa is relatively cheap and available, the climate is favorable to crop production, and labor is inexpensive.\(^7\) According to the International Land Matrix project,\(^8\) since 2001, governments and international investors acquired land


\(^5\) Klaus Deininger et al., World Bank, Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits xiv (2011).

\(^6\) Id. at xiv (noting that more than seventy percent of the demand has been in Africa).


\(^8\) The Land Matrix is an online public database that permits the public to contribute data on land deals. The Land Matrix facilitates the collection and representation of data; encourages citizens, researchers, governments, and companies to provide data and improve the quality of and access to data; and provides a regular and accessible analysis of trends. It is supported by nonprofit organizations as well as the Government of the Netherlands and the European Commission. What is the Land Matrix, http://landmatrix.org/en/about/ (last visited Feb. 4, 2013).
area in Africa equivalent to the northern U.S. plains states of North Dakota, South Dakota, and Nebraska combined.\(^9\)

Derided as “land-grabbing” by those opposed to the practice, the phenomenon of large-scale acquisition of farmland by governments and private investors sparked a global debate among international organizations, investors, researchers, and global civil society.\(^10\) Some analysts and institutions, like the World Bank, see the growth of this trend as a potential opportunity for rural development.\(^11\) They argue countries with large endowments of land, but gaps in productivity, can harness the technologies and capital associated with responsible international investment and expand cultivated areas and agricultural productivity.\(^12\) Others, however, see rapid acquisitions of crucial food-producing lands by foreign entities as a threat to rural economies and livelihoods.\(^13\) These analysts argue that the current trend of international land investment works against the goals of increasing food security and ending global hunger.

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\(^{9}\) Anseeuw, et al., supra note 4; see also How Much of Your State is Wet?, U.S. Geological Survey, http://ga.water.usgs.gov/edu/wetstates.html (last visited Oct. 19, 2012) (reflecting the figures on U.S. area. The land area of North Dakota (68,976 m\(^2\)), South Dakota (75,885 m\(^2\)), and Nebraska (76,872 m\(^2\)) combined is 221,773 m\(^2\). One square mile is 258 hectares. Thus, 221,773 m\(^2\) = 57.4 million hectares).


\(^{11}\) Deininger et al., supra note 5, at 129-42.

\(^{12}\) Id. at 5.

because investors prioritize production of food for export over supporting domestic food supplies.\textsuperscript{14} Still, others are generally supportive of increased investment in farmland, but would prefer these investments stop until appropriate laws, regulations, and industry standards can be implemented to protect the rights of farmers.\textsuperscript{15}

As this article will detail, investors in African land often encounter many of the same risks as investors faced during the twentieth century scramble for oil and gas in Africa endured. The story of oil and gas discovery in Africa has been, for the most part, a tragic one. For years, the governments of oil producing countries in Africa proved unwilling or unable to protect their citizens from the negative consequences of foreign investment.\textsuperscript{16} At the same time, many investors involved in the oil industry simply ignored the damage they caused to communities and the environment.\textsuperscript{17} As a consequence, African oil producers such as Nigeria, Angola, Congo-Brazzaville, Cameroon, and Gabon have all been largely unable to convert their oil wealth into broad-based economic growth.\textsuperscript{18} Combining weak state institutions with economies completely dependent on the export of oil or minerals has shown to reduce economic growth, feed corruption, and increase the risk of civil war.\textsuperscript{19}

\textsuperscript{14} Id. at 18.


\textsuperscript{16} See infra Part II.

\textsuperscript{17} Simon Warikiye Amaduobogha, Environmental Regulation of Foreign Direct Investment (FDI) in the Oil and Gas Sector, in LAW AND PETROLEUM INDUSTRY IN NIGERIA 115, 131 (Festus Emiri & Gowon Deinduomo eds., 2009).


environmental consequences. In Nigeria, for example, oil production since the late 1950s has damaged water and soil resources so much that fishing, forestry, and agriculture are no longer possible in large areas of the oil-producing region.

Some governments and investors in the non-renewable extractive industries have learned they could not simply ignore the damage their business practices caused and took remedial action. According to economist Paul Collier, “Nigeria’s dysfunctional management of its first oil boom of 1973–83 and its brilliant management of the second boom of 2003–08 cautions against the gloomy cynicism that until recently bedeviled investor thinking about Africa.” Unfortunately, in many cases, the remedial steps taken were too late to save the local environment, guard against corruption, or protect investors’ reputations.


22 Nonrenewable extractive industries are those industries that are related to the extraction of mineral and hydrocarbon products such as gold, diamonds, oil, gas, etc. from the land and cannot be replaced. See OIL, GAS, AND MINING UNIT, Extractive Industries Review Reports, WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,co ntentMDK:20306686~menuPK:592071~pagePK:148956~piPK:216618~theSitePK:336930,00.html (last visited Jan. 6, 2013).


25 See Spence, supra note 23, at 72 (“Shell eventually began to recognize and address its reputational problem by undertaking social investment and making concerted efforts to cultivate positive relationships with all of its important stakeholders in Nigeria. However, by that time, much of the reputational damage had been done. Despite pouring resources into social projects and stakeholder relations in Nigeria in the 1990s and early 2000s, protests against Shell became stronger and more organized.”).
This article is intended to contribute to the global discussion on international investment in African land by assessing lessons from the experience of foreign investment in the Nigerian oil sector in the later part of the twentieth century and applying these lessons to the current situation of large-scale land investment in South Sudan. One can derive many lessons about law, social policy, local governance, and the moral responsibility of multi-national corporations from studying the Nigerian oil experience. It is important to note, however, the comparison between agriculture in South Sudan and the extractive sector in Nigeria can only go so far. Developing policies and legal relationships based on analogy may lead policymakers and investors to ignore the peculiarities of each context.

This article will focus on the regulatory framework and legal relationships between investors and governments, and furthermore, will make suggestions on what type of frameworks and legal relationship will be most beneficial for all parties involved in the South Sudanese agricultural sector. Part I will explore the issue of large scale land acquisitions by foreign investors in general and will then focus on the phenomenon in South Sudan. Part I will also examine who the investors are, the motivations for investment, the possible threats to the people of South Sudan, and the risks borne by investors. Part II will explain the economic and social impact of oil investment in Nigeria during the second half of the twentieth century. Part II will then examine the reforms pursued by the Federal Government of Nigeria (FGN) and assess how litigation and government action influenced the conduct of investors. Finally, Part III will provide recommendations for investors and the Government of South Sudan (GoSS) for establishing governance and legal frameworks that will lead to benefits for both investors and the African communities.

The story of land investment in Africa is just beginning to be written. This article argues that the choices made by both investors and governments will have profound implications for the future of livelihoods and the global agricultural sector. Unless investors and governments learn from the mistakes of previous investment in
Africa’s abundant natural resources, there is little hope that large-scale land investment will be mutually beneficial.

I. LAND INVESTMENT: RISKS AND REWARDS

A. The Scope and Context of International Land Investment

Global demand for energy, food, and water is expected to accelerate over the next two decades. Three billion new middle-class consumers are expected to emerge from poverty and move into urban areas. This rise in demand already strains the agricultural sector due to its indispensable role in supplying food and energy needs. The rapid increases in demand for agricultural products have caused price shocks and volatility as the market attempts to bring supply and demand into proper alignment. Largely due to the rise


in demand for agricultural products in China and India, and biofuel policies in Europe and North America, the International Monetary Fund’s food price index reflected price increases of 130% from January 2002 to June 2008, and a staggering 56% between January 2007 and June 2008.

While the numbers are alarming, rapid increases in demand for energy and food is not new. Similar factors were observed throughout the twentieth century, as the world’s population tripled. The difference is that during the twentieth century, however, prices for primary commodities remained relatively stable. Economists from the McKinsey Global Institute attribute the lack of price volatility in the twentieth century to technological improvements related to the Green Revolution.

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32 Id.

33 Dobbs, supra note 26, at 1.

34 The Green Revolution refers to the massive investments in modern scientific research for agriculture in the mid-twentieth century, which were led by a handful of American foundations, most prominently the Rockefeller Foundation. This effort led to dramatic increases in agricultural yield, most notably in India. For more information on the Green Revolution, see Amanda Briney, Green Revolution: History and Overview of the Green Revolution, About (Oct. 12, 2014, 2:34 PM), http://geography.about.com/od/globalproblemsandissues/a/%20greenrevolution.htm.
Had supply remained constant [in the twentieth century], commodity prices would have soared. Dramatic improvements in exploration, extraction, and cultivation techniques kept supply ahead of ever-increasing global needs, cutting the real price of an equally weighted index of key commodities by almost half. This ability to access progressively cheaper resources underpinned a 20-fold expansion of the world economy.\(^{35}\)

Many investors see land as a unique investment opportunity in the current environment. Because demand for food is inelastic, some investors see land investments as secure assets at a time when the global financial crisis has made other investments less profitable.\(^{36}\) With modest investment in technology and infrastructure, these investors conclude that productivity in underutilized lands in the developing world could potentially increase and, in turn, increase food availability, lower prices, and lead to stable profits over the long term.\(^{37}\)

Private investors are not the only entities entering the market for African land. Increasing food prices over the past decade have led governments reliant on food imports to question the capacity of

\(^{35}\) Id.


\(^{37}\) See **CHARLES ROXBURGH ET AL., MCKINSEY GLOBAL INST., LIONS ON THE MOVE: THE PROGRESS AND POTENTIAL OF AFRICAN ECONOMIES** 8 (2010), [http://www.mckinsey.com/insights/mgi/research/productivity_competitiveness_and_growth/lions_on_the_move](http://www.mckinsey.com/insights/mgi/research/productivity_competitiveness_and_growth/lions_on_the_move) (estimating that by bringing more land into production, adding technology to increase yields, and shifts to a mix of both low-value crops and fruits and vegetables, Africa could increase its agricultural output from $280 billion in 2010 to $880 billion in 2030).
global markets to provide food at a predictable price. Rich countries that have land and water constraints, such as those in the Persian Gulf, have leased or purchased large tracts of land in Africa in pursuit of domestic food security. Likewise, countries with large populations and food security concerns, such as China, South Korea, and India, are looking to capitalize on investment opportunities in food production overseas.

Investors see Africa as the best place for land investment. They see the land as plentiful and possessing massive potential for economic growth. In fact, since 2001 more than half of international land investment occurred in Sub-Saharan Africa. The interest in Africa is unsurprising; Africa is home to more than one-quarter of the world’s arable land and sixty percent of the world’s remaining uncultivated land, but generates only ten percent of global agricultural output. Further, governments from across the continent are making strenuous efforts to attract agricultural investments by encouraging international access to historically national land resources.


42 ANSEEUW, supra note 4.

The Republic of South Sudan, the world’s newest nation, is among the most sought after locations for large-scale land acquisitions. The semi-autonomous region of southern Sudan emerged in 2005 after decades of war between the Government of Sudan and the mostly southern-based Sudan’s People’s Liberation Army. The peace agreement between the two parties ended the war and created an interim “Government of southern Sudan.” Six years thereafter, 98.83% of the people of southern Sudan voted in favor of a Referendum on Southern Independence. As a result, the Republic of South Sudan was formally established on July 9, 2011. Private investors flocked to southern Sudan after the war ended mainly due to its large size, low population density, and impressive natural resource wealth.

South Sudan is a unique case, because it is a new country struggling to recover from decades of war and internal violence after a referendum held in January 2011, South Sudan declared its independence on July 9, 2011. See Jeffrey Gettleman, After Years of Struggle, South Sudan Becomes a New Nation, N.Y. TIMES, July 10, 2011, www.nytimes.com/2011/07/10/world/africa/10sudan.html?pagewanted=all&_r=1


Gettleman, supra note 44.


Id.

Id.
between ethnic groups. The war seriously disrupted governance and undermined social hierarchies and traditional authorities. Conflict continues to plague South Sudan. In December 2013, political rivalries erupted into a major conflict between ethnic groups in South Sudan. A ceasefire was signed in May 2014, but violence remains and reports of serious human rights abuses continue to be reported by aid organizations and human rights groups.

The GoSS is faced with resolving disputes between its own people through strengthening and rebuilding social institutions, while at the same time creating state institutions and a legal regime basically from scratch. Because South Sudan is going through a fundamental shift in its governance systems and law, investors in South Sudan operate under the ambiguity of the prevailing law and weak

52 See Jok Madut Jok & Sharon Elaine Hutchinson, Sudan’s Prolonged Second Civil War and the Militarization of Nuer and Dinka Ethnic Identities, 42 AFR. STUD. REV. 2 (1999).


57 See generally Florence Martin-Kessler & Anne Poiret, How to Build a Country From Scratch, N.Y. TIMES, Feb. 4, 2013, http://www.nytimes.com/2013/02/05/opinion/how-to-build-a-country-from-scratch.html (opinion article arguing that the nascent nation had just a few short paved roads for a territory roughly the size of France; no infrastructure; no public services to speak of; no justice system, let alone law or order; the area was lush with weapons, rife with ethnic violence and in the midst of a tense divorce with its northern half).
government institutions. Operating in such a context comes with many potential risks and rewards to both investors and the people of South Sudan.

B. The Risks and Rewards for Investors of Land Investment in Southern Sudan

All investments involve risk in the sense that any number of events may unfold that lead to economic loss. This article will focus on political and reputational risks. Political risks are “threats to the profitability of a project that derive from some sort of governmental action or inaction, rather than changes in economic conditions in the marketplace.” Categories of political risk associated with land investment may include: (1) civil unrest; (2) direct or indirect expropriation of property; and (3) corruption. A forth type of risk is the risk that a company will lose potential business because its reputation or character has been called into question. Investors in some countries may be faced with risks that fall under one or two of these categories. In South Sudan, however, investors must grapple with serious risks that fall under each of the four categories.

58 DENG & MITTAL, supra note 49, at 42; see also U.S. AGENCY FOR INT’L. DEVELOPMENT, LAND TENURE ISSUES IN SOUTHERN SUDAN: KEY FINDINGS AND RECOMMENDATIONS FOR SOUTHERN SUDAN LAND POLICY (Dec. 2010), http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Southern_Sudan_Findings_and_Recommendations.pdf (provides a detailed account of tradition land ownership system and how the transitional period attempted to adjust the land ownership system).


61 Id. at 6 (Authors cite seven forms of political risks. Not all the risks cited apply to land investment (such as currency risks and trade restrictions) and some risks overlap in the context of land investment. Thus, for the purpose of this article I have reduced the number of risks to three.).

1. Civil Unrest. – The threat of civil unrest is the most serious risk facing foreign investors in South Sudan. Although no longer at war with its northern neighbor, violence and bloody conflict continue to plague South Sudan.\(^{63}\) Political rivalries, social institutions weakened by decades of war, pressures on land, and the prevalence of small arms among the civilian population\(^{64}\) have enabled and fueled violent conflicts. Conflicts between ethnic groups and among pastoralists that in the past would be solved by traditional institutions instead continue unabated.\(^{65}\) If the GoSS continues\(^{66}\) to be unable to insulate business interests from the direct and indirect impact of violence and civil strife, investors may find their property damaged or they may not be able to carry on regular operations due to threats to the workforce.\(^{67}\)


\(^{64}\) See generally Adam O’Brien, Shot in the Dark: The 2008 South Sudan Civilian Disarmament Campaign, SMALL ARMS SURVEY 10 (2009), http://www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP-16-South-Sudan-Civilian-Disarmament-Campaign.pdf (author argues that “the market for small arms thrives with strong demand and supply, undermining stability and threatening the fragile peace.”).


\(^{67}\) RUBINS & KINSELLA, supra note 60, at 19. Under international law, host governments are not required to compensate for loss to the investor caused by non-governmental actors, though this sort of risk is usually insurable.
Outside of violence, political or social unrest spurred by large-scale land investment is a serious risk in South Sudan. The right of communities to exercise ownership and control over their land was at the heart of the Southerners’ demands during the civil war.\textsuperscript{68} Because communities endured hardship throughout the war, many believe they have earned the right to be involved with decisions relating to the use of land held by the community.\textsuperscript{69} Any attempt to adjust or undermine the rights of landholders is likely to face stiff opposition from groups at the local level.\textsuperscript{70}

2. \textit{Expropriation}. – Under international law,\textsuperscript{71} host nations have the sovereign right to expropriate assets and to regulate activities within their jurisdiction.\textsuperscript{72} There are, however, some conditions to the general rule: a taking is illegal unless it is (1) non-discriminatory; (2) carried out for a public purpose; and (3) accompanied by full compensation.\textsuperscript{73}

In a classic expropriation situation, the host government annuls the investor’s title to an asset acting under local law.\textsuperscript{74} Expropriation can also occur in indirect ways when no formal transfer of ownership or control from an investor to the government.

\textsuperscript{68} DENG \& MITTAL, supra note 49, at 15.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} See \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 712 (1987).
\textsuperscript{72} The United Nations General Assembly expressed the principle of permanent sovereignty over natural resources in General Assembly Resolution 1803 in 1962. The Resolution declares that both people and nations have a right to exercise sovereignty over natural resources in the area under which they have sovereign control. \textit{See} G.A. Res. 1803 (XVI), U.N. Doc. A/5217 (Dec. 14, 1962); \textit{see also} Emeka Duruigbo, \textit{Permanent Sovereignty and People’s Ownership of Natural Resources in International Law}, 38 \textit{GEO. WASH. INT’L L. REV.} 33, 37 (2006) (arguing the right to permanent sovereignty over natural resources is vested in peoples, not states, though states retain a pivotal role insomuch as government exercises the right to permanent sovereignty).
\textsuperscript{73} G.A. Res. 1803, supra note 72, ¶4; \textit{see also}, RUBINS \& KINSELLA, supra note 60, at 8.
\textsuperscript{74} The term “nationalization” is often used interchangeably with an expropriation of this sort if the taking occurs across an entire industry.
International arbitral tribunals over the past twenty years have concluded that government measures that eliminate substantially all of an investment’s value may constitute “regulatory expropriation” or “indirect expropriation.” These tribunals held that withholding operational permits promised to an investor after the considerable funds have been expended, enacting legislation requiring corporations to be structured in certain ways, or establishing the investment land as a protected area could constitute regulatory takings.77

The Investment Promotion Act of South Sudan of 2011 provides a guarantee against expropriation that should, in theory, reduce the risk of direct expropriation.78 It states that “there shall be no expropriation of any enterprise . . . unless the expropriation is in the national interest for a public purpose, . . . is made on a non-discriminatory basis, [and] in accordance with due process of law.”79 According to this Act, compensation will be given without delay and the amount given will be determined by means agreed to by both the Government and the person whose property has been expropriated.80

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75 Tippetts, Abbett, McCarthy, Stratter v. TAMS-AFF Consulting Eng’rs of Iran, 6 Iran-U.S. Cl. Trib. 219 (1984).
76 See, e.g., Metalclad Corp. v. United Mexican States, ICSID Case No. ARB/97/1, Arbitration Award, ¶ 103 (Aug. 30, 2000) 40 ILM 36 (2001) (“Expropriation under NAFTA includes not only open, deliberate and acknowledged transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state.”).
79 Id. at 34 (2).
80 Id. at 34 (3-4).
While the GoSS has addressed direct expropriations in the Investment Promotion Act, the manner in which community land is held in South Sudan, combined with the practice of other governments in Africa raises some concerns for investors.81 The Land Act of 200982 states that all land is owned by the people of southern Sudan, and the Government is responsible for regulating its use.83 When no tenure can be established, the land is designated as public land and may be granted to investors by the Government.84 Public lands only represent a small fraction of South Sudanese land, and management of most rural lands is given to customary institutions.85 This situation differs from most African countries

81 The Government of Madagascar, for example, entered into a ninety-nine-year lease for 3.2 million acres with a South Korean firm in 2009. The public revolted against the agreement and helped lead to the fall of the Government of Madagascar. The new leader almost immediately cancelled the deal with the South Korean firm when he came into office. Madagascar Leader Axes Land Deal, BBC NEWS, Mar. 19, 2009, http://news.bbc.co.uk/2/hi/afrika/7952628.stm; see also Anastasi Telesetsky, A New Investment Deal in Asia and Africa: Land Leases to Foreign Investors, in EVOLUTION IN INTERNATIONAL INVESTMENT TREATY LAW AND ARBITRATION 1 (Chester Brown & Kate Miles eds., 2012) (detailing the expropriation experiences of other governments).

82 By discussing the Land Act I do not intend to provide an analysis of land tenure issues in South Sudan. Rather, the Land Act forms the backbone of the regulatory regime in land investment in South Sudan in the same way that the Petroleum Act, discussed infra note 208, addresses oil production in Nigeria.

83 The Land Act of 2009 (S. Sudan) § 7 (copy on file with author). Section nine of the Act classifies “land” as public, community, or private land. Id. § 9. Public land is land owned collectively by the people of South Sudan and held in trust by the GoSS. Id. § 10. Public land includes land used by government offices, roads, rivers, and lakes for which no customary ownership is established, and land acquired for public use or investment. Id. § 73(5). Community land is land held, managed, or used by communities based on ethnicity, residence, or interest. Community land can include land registered in the name of a community, land transferred to a specific community, and land held, managed, or used by a community. Id. § 11. Private land includes registered freehold land, leasehold land, and any other land declared by law as private land. Id. § 12.


85 IS ACADEMY ON LAND GOVERNANCE, SOUTH SUDAN FOOD SECURITY AND LAND GOVERNANCE FACTSHEET 4 (Apr. 2011), http://www.landgovernance.org/system/files/Sudan%20%20Factsheet%20landac%20april%202011.pdf (LANDac is a partnership between several organizations
where the land is owned by the state.  

According to the Land Act, it is communities, not national or state governments, that have the authority to allocate community land rights for investment activity. The objective of this provision was outlined in the 2011 Draft Land Policy, which states:

In many parts of the region, land holdings, large and small, urban and rural, are being allocated . . . without taking account of the rights of current landholders. These practices reflect a disregard and in some cases confusion over the proper land administrative authorities to engage in when applying for land. Some government officials have taken land allocation decisions without consulting communities and individuals who have ownership or use rights to the land in question.

These provisions of the Land Act and the Draft Land Policy raise two red flags for land investors. First, the Draft Land Policy unambiguously states that many land deals have been carried out in an incorrect manner. This is, in part, due to the fact that state governors across the country believe that attracting foreign investment is among their top priorities and often do not strictly involved in development-related research, policy and practice and supported by the Government of the Netherlands).

89 GOVERNMENT OF SOUTHERN SUDAN, DRAFT LAND POLICY 2011, 1.6.7. (copy held by author).
adhere to the law. At the same time, some communities have failed to hold their state and local governments accountable because they are reluctant to turn away foreign capital that may provide economic opportunities. The lack of accountability, however, is beginning to erode as communities are organizing and using the Government’s rhetoric about community ownership to demand respect for their interest in the land. These activities by the community increase the risk of expropriation on the grounds that an established investment violated the principles of the Land Act.

Second, the Land Act provision that grants the community the authority to allocate community land poses some major challenges to investors. Because South Sudanese communities are rarely a cohesive unit, it is difficult for investors to determine who may grant the land leases. South Sudanese communities are highly mobile and often host a mix of groups. It is not uncommon for a community to be comprised of those who have lived on community lands for generations, those who have left the area during the war and have recently returned and are claiming rights to the land, local strongmen who claim ownership of an entire region, and those who claim rights to land because they have historically enjoyed access to the land for seasonal grazing purposes.

In an example reported on by Financial Times and Rolling Stone Magazine, a U.S. firm entered into a fifty-five year lease agreement for 400,000 hectares of land with Paulino Matip, a local warlord turned

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91 Id.
92 Id.
93 Id.
94 Deng, supra note 90, at 450 (“communities are often fractured and ambiguously defined entities”).
95 Id.
deputy commander-in-chief of the army. The U.S. firm packed its board with Southern Sudanese with strong political connections in the hope that political connections could circumvent the need to abide by the Land Act. Yet, the state governor did not believe the General, or his family for that matter, owned the land. The leader of the local county also knew nothing of the deal until nonprofit researchers asked him about it. The investor believed that his contract to the land was secure by the strength of General Matip. General Matip died in August of 2012, and it is unknown at the time of writing whether the land deal has been or will be nullified.

Even if investors find an authorized representative of a local community with whom to negotiate, local governance systems have been so severely undermined by years of war that leaders may not have the capacity to manage land transactions. A particularly extreme example of this occurred in 2008, when a Texas-based company reportedly negotiated a forty-nine-year lease on 600,000 hectares in Lainay County, Central Equatoria State. Unfortunately for the investor, Lainay County is comprised of only 340,000 hectares and it is not clear how the investor was given rights to 600,000 hectares. This egregious example shows a lack of professionalism by the investors, but also illustrates that some “leaders” in South Sudan’s rural areas either do not understand the scale of the deals in which they negotiate or take advantage of the local situation.

97 Funk, supra note 96.
98 Deng, supra note 90, at 452.
99 Id.
100 Funk, supra note 96.
102 Email from David Deng, Research Director of South Sudan Law Society, to Author (Jan. 2, 2013, 9:37 EST) (on file with author).
103 Deng, supra note 90, at 449.
they are entering or are making illusionary agreements in order to make a quick fortune.  

3. Corruption. – Corruption of both the local decision-making mechanism and the larger political apparatus of the host state can have a significant impact on the establishment and operation of a foreign investment.  

Government officials may require a bribe before signing investment agreements, may require fees for access to important decision-makers, or may sell land they do not actually own.  

Investors may decide to pay these bribes or fees for several reasons, most notably, because many projects would not ultimately occur without payment.  

Yet, if an investor decides to work within a corrupt system, it opens the investor up to liability under both national and multilateral anti-corruption enforcement measures.  

Corruption is rampant in South Sudan. The President of South Sudan admitted publicly in 2012 that South Sudanese Government officials had stolen close to $4 billion since the end of the civil war.  

This amounts to about twenty percent of the country’s annual GDP.  

Corruption in South Sudan is caused by personal greed, but is also seen by some leaders as a necessary evil in a time of political instability.  

According to a Reuters special report

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104 Id. at 451.
105 See RUBINS & KINSELLA, supra note 60, at 22.
106 Id.
108 Id. at 48.
110 According to the Central Intelligence Agency (CIA), the GDP of South Sudan in 2011 was $21.12 billion. CIA WORLD FACTBOOK: SOUTH SUDAN, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/od.html (last visited Nov. 25, 2012).
from 2012, “the rulers of the world’s newest nation have fostered a system of patronage and reward to provide short-term stability in this vast and ethnically diverse country. But that has fuelled rampant corruption that undermines the stated ideals of the country’s liberators and its foreign backers.”

The Southern Sudan Anti-Corruption Commission Act of 2009 governs anti-corruption efforts in South Sudan. This Act establishes an independent commission “responsible for the investigation of cases of corruption with a view to protecting public property and combating administrative malpractices in public institutions.” The Commission’s role was further clarified in the Transitional Constitution in 2011, which states:

without prejudice to the powers of the Ministry of Justice in public prosecution, the Commission shall, *inter alia*, (a) protect public property; (b) investigate cases of corruption involving public property and public interest; and it shall submit such investigation to the Ministry of Justice for prosecution; (c) combat administrative malpractices in public institutions; and (d) pursuant to the provisions of Article 121 (1) herein, require all persons holding such public offices to make confidential formal declarations of their income, assets and liabilities.

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114 *Id.* § 6(1).

While the Interim Constitution grants the Commission the power to prosecute cases of corruption, some analysts argue that this rarely occurs in practice.\(^{116}\) Some attribute the failure of the Commission to prosecute cases to the lack of clear lines demarcating the role of the Justice Ministry and the Commission.\(^{117}\) The failure to establish clear lines has contributed to a situation where the Commission has the authority to prosecute corruption but lacks the experienced staff and political will to be an effective anti-corruption entity.\(^{118}\)

Recent attacks on activists and officials who publicized corruption raise serious questions about the will of the GoSS to combat corruption within its ranks.\(^{119}\) However, the current state of affairs may not continue and investors cannot become complacent. The GoSS is under intense pressure to crack down on corruption and is receiving ample support from the international community to strengthen its anti-corruption capabilities.\(^{120}\) These pressures and


\(^{117}\) Id.

\(^{118}\) Id.


inducements may lead to more investigations and more oversight of investment deals.

U.S. land investors must worry about more than just corruption from within, and possible enforcement efforts taken by the GoSS. U.S. investors must strictly adhere to anti-bribery regulations on international investments placed on them by the U.S. Government. Chief among the U.S. regulations that apply to large-scale land acquisition in Africa is the Foreign Corrupt Practices Act of 1977 (FCPA).\(^\text{121}\) Additionally, thirty-nine countries, including the United States, have adopted the Convention on Combating Bribery of Foreign Officials in International Business Transactions (Anti-Bribery Convention), which mirrors the FCPA in many ways.\(^\text{122}\)

Land investment in South Sudan is particularly ripe for FCPA violations. Democracies with weak legal systems, endemic corruption, and poor infrastructure pose significant FCPA risks.\(^\text{123}\) As many non-U.S. persons or entities vying for land in South Sudan come from countries with no FCPA counterpart,\(^\text{124}\) they may be permitted to bribe local officials and place U.S. persons or firms at a competitive disadvantage in securing leases. In such an environment,


\(^{124}\) Parties to the Conv. on Combating Bribery of Foreign Public Officials in Int’l Bus. Trans. does not include China or any Middle Eastern country. South Africa is the only African country that has ratified the Convention. For a full list of state parties, see Anti-Bribery Convention, OECD (Sept. 20, 2014) http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/.
U.S. investors may feel compelled to resort to paying bribes in order to not lose the investment opportunity. Violations of the FCPA can lead to large civil and criminal penalties, sanctions, and remedies, including fines, disgorgement, and/or imprisonment. Thus, international investors must take the law seriously and develop both internal compliance programs and transaction-specific safeguards.

4. Litigation and Reputational Risks. – According to the Interim Constitution of South Sudan, “the right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to courts of law to redress grievances whether against government or any individual or organization.” If the courts of South Sudan follow the example of the courts of other African countries, it is likely that investors in South Sudan face a risk of litigation and the associated risk to the investor’s global reputation.

It is too soon to determine how South Sudan’s nascent legal system will address potential litigation against land investors. However, courts of other African countries have begun to broaden the legal liability of international corporations operating in their country. There has been a growth in litigation against transnational corporations in Africa over the past two decades, which in large part can be attributed to campaigns by non-governmental organizations (NGOs) and media reports about the damage inflicted by oil and mining companies in Africa. The globalization of media

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125 Low & Davis, supra note 123.
126 Id. at 315.
127 Id. at 315.
130 See id. (Between 1981 and 1986, Nigerian courts heard 24 claims against Shell Oil. In early 1998, Shell was reportedly involved in over 500 cases. Chevron was involved in only 50 cases in the entire 1980s and by the end of the 1990s was involved in over 200 cases).
131 Id.
and the rise of new technologies, such as the Internet and cellular phone cameras, enabled NGOs to detect and publicize wrongdoing with speed and efficiency never seen before. These campaigns have generally made judges more responsive to those injured by the acts of oil and mining companies.

While awards given by African courts are relatively small compared to American or European courts, there is great risk of damage to a company’s reputation. Even if the investor or company obtains a legal victory, the damage inflicted upon its reputation may outweigh the liability of a lawsuit. Damage to a brand can eliminate millions of dollars from a company’s share value, initiate consumer boycotts, and even result in serious recruitment problems. According to a survey of major corporations by the Economist magazine’s intelligence unit, companies found reputational problems to be the most costly form of risk in financial terms. Among those who had faced reputational problems, twenty-eight percent described the financial toll as major.

C. The Risks of Land Investment in Southern Sudan for Communities

Other articles and books have comprehensively addressed the threats to the rights of communities posed by the wave of large-scale land acquisition in Africa. Some studies argue that international land investment contributes to food insecurity, environmental

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132 David Spence, supra note 23, at 61-62.
133 See generally Frynas, supra note 128, at 375 (quoting the Nigerian Chief Justice of the High Court in 1989, “Judges . . . are more aware now of oil industry than thirty years ago. . . . The judge cannot be isolated from what is currently going on in society in line with a particular subject.”); Id.
134 Id. at 373.
137 Id.
138 See de Schutter, supra note 40, at 503.
139 See, e.g., Geary, supra note 15.
degradation,\textsuperscript{140} corruption, lack of benefits for small-scale farmers,\textsuperscript{141} and the possibility of eviction and displacement.\textsuperscript{142} Because many of the risks to communities have been covered by other studies, this article will only focus on the most serious risks: social turmoil and armed conflict due to corruption and lack of benefits flowing to the local population.

South Sudan desperately needs investment in the agricultural sector.\textsuperscript{143} According to a World Food Program 2012 assessment, thirty percent of South Sudanese households are either moderately or severely food insecure.\textsuperscript{144} About forty-four percent of households receive at least one form of food-related assistance, such as food aid or seeds.\textsuperscript{145} Approximately eighty-five percent of South Sudanese are involved in agriculture for their livelihood and almost all South Sudanese are small-scale subsistence farmers.\textsuperscript{146} Because subsistence farmers do not produce food for the local market, much of the food found in South Sudan’s urban markets is imported from Uganda,

\textsuperscript{140} See, e.g., \textsc{national association of professional environmentalists (nape) / friends of the earth uganda, land, life and justice: how land grabbing in uganda is affecting the environment, livelihoods, and food sovereignty of communities} (apr. 2012), \textit{http://www.foei.org/en/resources/publications/pdfs/2012/land-grabbing-cases-uganda/view}.
\textsuperscript{141} See, e.g., cotula & vermeulen, \textit{supra} note 38, at 1243.
\textsuperscript{142} See, e.g., de schutter, \textit{supra} note 40.
\textsuperscript{143} Deng & Mittal, \textit{supra} note 49, at 42.
\textsuperscript{144} See generally \textsc{world food programme, food security analysis: south sudan food monitoring collaborative} (oct. 2012), \textit{http://documents.wfp.org/stellent/groups/public/documents/ena/wfp253180.pdf} (the world food programme uses the term food security as a composite indicator that includes information on food consumption (food consumption score), coping strategies (coping strategy index), relative expenditure on food and reliability and sustainability of income sources).
\textsuperscript{145} Id. (detailing the food security situation in south sudan in 2012).
\textsuperscript{146} Astrid R.N. Haas & Sarah Armstrong, \textsc{south sudan’s greenbelt: can tapping agriculture assets become the new nation’s economic elixir?}, \textsc{usaid frontlines} (sept./oct. 2011), \textit{http://transition.usaid.gov/press/frontlines/fl_sept11/FL_sept11_SUDAN_AGRICULTURE.html}.
Kenya, and other countries. According to the U.S. Agency for International Development (USAID), over the last three years, South Sudan imported approximately $262 million worth of produce from neighboring countries, half of which were fresh vegetables that could, and should, be grown locally.

The South Sudanese Government believes their best hope for food security comes from increasing private investment. Experience around the world suggests that the central path toward improving food security is through private investment and entrepreneurship. Some analysts argue that if private investment is properly channeled to support farming, South Sudan may be able to increase its food production to target levels of one million metric tons of cereal production annually. Private investment in agriculture also has the potential to generate government revenues through leases and tax revenues, create employment, and bring the technology and know-how required to develop infrastructure.

While private agricultural investment has the potential to unlock broad scale economic growth and development, a lack of meaningful consultations, low employment prospects, and the lack of domestic food security may undermine support for the government’s investment promotional activities and could lead to social turmoil and even armed conflict. As stated earlier, the Land Act of 2009

147 Id.
148 Id.
149 See SPLM Leaders Call for More Investments in Agriculture in Upper Nile, supra note 1.
152 Deininger, supra note 5, at 34-42.
153 See generally id. (arguing that rural populations have sacrificed so much in order to control their community lands. Also, attempts to undermine
promised a community-led process of agricultural development and consultations with community leaders about land policy. Yet, there is a danger the process of large-scale land acquisition will reflect a “continuation of the war-time economy which was characterized by capital flight, one-sided contracts that favor the foreign investor, and the government prioritizing the need of the investor over the local population.”

According to a report by the aid organization Norwegian People’s Aid, “generally speaking, there is a serious deficiency in the extent to which communities are being consulted regarding land investments.”

Southern Sudanese expect large-scale investment to bring jobs to the local population. Yet, many of the foreign multinational entities investing in South Sudan plan to employ highly mechanized types of farming that maximizes returns. Historic evidence on the effects of foreign direct investment in agriculture suggests the benefits of the investment do not materialize when the investment uses highly mechanized production technologies. High-tech farming reduces the need to create local employment and may have more adverse environmental impacts, such as a more rapid depletion of water supplies and land degradation. Additionally, benefits in the form of jobs are further limited should the investor import labor to manage high-tech farming enterprises. It is community land ownership are likely to face stiff opposition from groups at the local level.

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154 Deng, supra note 90, at 451.
156 Id. at 32 (explaining a case study where the company promised 6,000 jobs but only hired 600 and laid off most of these individuals after three years).
157 Deng, supra note 90, at 453.
158 HALLAM, supra note 10, at 7.
159 Id. at 7.
160 See generally Ward Anseeuw, Lorenzo Catula & Mike Taylor, Expectation and Implications of the Rush for Land, in HANDBOOK OF LAND AND WATER GRABS IN
common for investors to import management and skilled positions, leaving locals with only seasonal and low paying jobs.\footnote{161}

Finally, there is a conflict inherent in international agricultural investment in food insecure countries like South Sudan. Investors typically wish to export agricultural yield in order to meet their own food security needs or to obtain profits by selling the products on the international market.\footnote{162} Host countries, on the other hand, justify large-scale land acquisition as necessary to meet the host country’s own food security needs.\footnote{163} Many of the contracts investigated by researchers are silent on this issue and leave the investor free to decide whether to export or sell on local markets.\footnote{164} The choice to mainly export agricultural products may result in increased social costs.

The South Sudanese have high expectations about what independence will bring in terms of development\footnote{165} and demand a “peace dividend” from their government.\footnote{166} The people of South Sudan expect land investment to create employment opportunities and food security and expect to be involved in land ownership and use decisions.\footnote{167} Any attempt to remove communities from the decision-making process will be faced with stiff opposition, and possibly, armed conflict.\footnote{168}

\textsc{Africa: Foreign Direct Investment and Food and Water Security} 424, (Tony Allan, et al., eds. 2013).

\footnotetext{161}{Id.}
\footnotetext{162}{COTULA, supra note 86, at 38.}
\footnotetext{163}{Id.}
\footnotetext{164}{Id.}
\footnotetext{167}{DENG & MITTAL, supra note 49, at 15.}
\footnotetext{168}{Id. at 15.}
II. LESSONS FROM THE EXPERIENCE OF EXTRACTIVE INDUSTRIES
IN NIGERIA

The experience of international engagement in the extractive sectors in Africa is a cautionary tale for both host governments and land investors. Experience has shown that African nations that are rich in primary commodities, whether fossil fuels, minerals, timber, or land, often fall prey to the “resource curse,” unless governments and investors take certain steps to minimize risk. Competition for control of revenues from primary commodity exports and rents continues to fuel cycles of corruption, conflict, and poverty in many African countries. Where large-scale resource exploitation preceded the formation of a functional state, the effect of large-scale commodity extraction has been negative, on average, and disastrous in some cases. The risks of investment fueling corruption or


170 See Norman, supra note 19, at 1-2.

171 See KARL, supra note 169.

172 Governments that rely on revenues from primary commodities face risks for two main reasons: (1) rents and (2) price shocks. Rents are payments by foreign entities to the government of a host country. Rents can come in the form of oil leases, leases of land for plantations or agricultural development, or passage rights through a canal. When a country allows foreign entities to exploit natural resources, these rents form a large nontax income stream. Where a government has little or no need for taxing its citizens, citizens lose the incentive to demand accountability of those who spend the tax revenues, and consequently, governments tend to be more corrupt. See Paul Collier & Anke Hoeffler, Resource Rents, Governance, and Conflict, 49 J. CONFLICT RESOLUTION 625, 627 (2005); H. Mahdavy, The Patterns and Problems of Economic Development in Rentier States: The Case of Iran, in STUDIES IN THE ECONOMIC HISTORY OF THE MIDDLE EAST 428, 428
conflict is particularly acute in post-conflict settings where tensions between groups linger, legal and other accountability mechanisms are weak, and many military age men, still armed and fresh off the battlefield, are looking for employment.\textsuperscript{173}

Governments that rely on revenues from the export of primary commodities are also susceptible to the deleterious effects of price volatility.\textsuperscript{174} The global prices of primary commodities are more volatile than other prices largely due to the impact of weather and new discoveries on the supply of these products.\textsuperscript{175} Spikes and drops in revenues can make economic management very difficult, often resulting in over-spending and corruption when the price of the commodity is high, and public sector debt and popular frustration when the global price is low.\textsuperscript{176}

The experience of international oil and gas companies in Nigeria between 1973 and 1999 is often cited as the poster child for poor management of primary commodity exploitation.\textsuperscript{177} When the Nigerian civil war ended in 1970, the country began a thirty-year period of almost uninterrupted military rule.\textsuperscript{178} Nigerian military


\textsuperscript{173} Jill Shankleman, \textit{Mitigating Risks and Realizing Opportunities: Environmental and Social Standards for Foreign Direct Investment in High-Value Natural Resources}, 42 ENVT. L. REP. NEWS & ANALYSIS 10519, 10521 (2012).

\textsuperscript{174} Collier & Hoeffler, \textit{supra} note 172, at 627.

\textsuperscript{175} Id.

\textsuperscript{176} Id.


\textsuperscript{178} See JEDRZEJ GEORG FRYNAS, OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES 42-43 (2000) (arguing that between 1970-1999 there was only one civilian government in charge of Nigeria. President Shenu Shagari held office from 1979-1983 but was overthrown by a coup on December 31, 1983).
dictators led the country down a path where the government became almost entirely reliant on oil revenues.\textsuperscript{179} In 1970, twenty-six percent of the government’s total revenue came from oil revenue.\textsuperscript{180} By the end of military rule in 1999, oil revenues made up over eighty percent of all government revenues.\textsuperscript{181} Despite the massive increase in oil revenue, Nigeria in 1999 was one of the poorest counties in the world.\textsuperscript{182} That year, Nigeria’s per capita GDP was thirty percent lower than in 1965 despite oil revenues of roughly $350 billion during the intervening period.\textsuperscript{183}

In addition to the economic costs of oil dependency, the people of the Niger Delta were routinely subjected to extra-judicial executions, arbitrary detentions, and “draconian restrictions on the rights to freedom of expression, association, and assembly” by the Nigerian security forces.\textsuperscript{184} These violations of human rights have been committed principally in response to protests about the


\textsuperscript{180} FRYNAS, supra note 178, at 26.

\textsuperscript{181} Id.


\textsuperscript{183} SALA-I-MARTIN, XAVIER & ARVIND SUBRAMANIAN, NATIONAL BUREAU OF ECONOMIC RESEARCH, WORKING PAPER 9804, ADDRESSING THE NATURAL RESOURCE CURSE: AN ILLUSTRATION FROM NIGERIA (2003), http://www.aber.org/papers/w9804.pdf (in PPP terms, Nigeria’s per capita GDP was $1,113 in 1970 and is estimated to have remained at US$1,084 in 2000).

activities of the multinational oil companies. Further, the environment has been severely degraded by oil development. By one estimate, the Niger Delta endured oil spills equivalent of the Exxon Valdez disaster every year for fifty years.

The FGN and multinational companies operating in Nigeria learned from previous mistakes. At the turn of the century the government and oil companies began to implement reforms and change their behavior. These changes were intended to reduce political risk for investors, build confidence in state institutions, and ensure Nigeria’s natural resource wealth is used for the benefit of the population. While Nigeria has a long way to go, these reforms have begun to bear fruit.

A. Government Reforms

Since 1999, the FGN has been carrying out an ambitious reform agenda that focuses on fiscal responsibility, transparency and accountability, development, and privatization. The specific

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185 Id.
188 See Collier, supra note 24, at 3.
reforms that can most effectively teach governments and investors involved in large-scale land acquisition are discussed below.

1. Anti-corruption and Transparency Measures. – When the administration of President Olusegun Obasanjo assumed office in 1999, corruption “had eaten deep into the entire fabric of the Nigerian society.” President Obasanjo promised to fight corruption during his election campaign, and Section 15(5) of the new Constitution of 1999 required that the state abolish corrupt practices and abuses of power. Accordingly, the first legislation President Obasanjo brought to the National Assembly was the Corrupt Practices and Other Related Offenses Act of 2000. The Legislature subsequently enacted the Economic and Financial Crimes Commission Act of 2004 establishing the Economic and Financial Crimes Commission.

The Corrupt Practices Act made it a crime for government officers to ask for or receive any benefit for their governmental duties outside of government salary. The Act further criminalizes bribery by any individual of a public official, and makes the failure of a government official to report an attempted bribe punishable by a fine


195 Id.

196 Corrupt Practices Act § 8(1).

197 Id. §§ 18, 23 (related to contract awards).
or a prison term not exceeding two years or both. The Act gives the power to investigate corruption to an Independent Corrupt Practices Commission. After concerns arose over the political independence of the Commission, an amendment to the Corrupt Practices Act in 2002 clarified the roles and responsibilities of the Commission and gave the power to prosecute offenses under the Act to the Attorney-General. Some analysts bemoan the lack of political will by the government to fight corruption and how that has stalled the effective implementation of the Act. However, others argue the Act fills a necessary gap in the Nigeria’s anti-corruption regime and is “a strong step towards the eradication of corrupt practices in Nigeria.”

The Economic and Financial Crimes Commission of 2004 ambitiously attempts to eradicate “non-violent and illicit activity committed with the objective of illegally earning wealth.” Financial crimes include money laundering, contract scams, counterfeiting, and fraud. The Economic and Financial Crimes Commission has been a resounding success. In its first year the Commission recovered over $700 million, arrested more than 500 notorious criminals, and

198 Id. § 22.
199 Id. § 3.
200 See Ogbu, supra note 192, at 130-31 (arguing that this was a bad decision and that the Commission should be given the concurrent power to prosecute corruption).
202 Ogbu, supra note 192, at 128-29.
204 Economic and Financial Crimes Commission (Establishment) Act § 46, cited in Ogbu, supra note 192, at 131-34.
205 Id. § 6.
206 Ogbu, supra note 192, at 134.
investigated and prosecuted high profile cases such as the former Inspector General of the Police.\textsuperscript{207}

In addition to national legislation, Nigeria was the first country to adopt the Extractive Industries Transparency Initiative (EITI).\textsuperscript{208} The EITI is a global initiative that promotes transparency in company payments and government revenues from oil, gas, and mining.\textsuperscript{209} Countries voluntarily sign up to the EITI and report to an internationally appointed independent auditor on a monthly basis.\textsuperscript{210} The Nigerian experiment with the EITI is ambitious and path breaking.\textsuperscript{211} Audit reports were carried out between 1999 and 2004 and subsequently made available to the public. According to Nicholas Shaxson of the British Think Tank, Chatham House:

These reports . . . contributed to significantly better transparency in Nigeria’s oil industry, collecting and publishing an array of detailed and useful information for the first time. Nothing remotely like this has been done before, let alone published. The reports went far beyond the basic core requirements of global EITI; it produced not only raw data on the industry and on tax and other fiscal matters; but it also provided crucial and useful insights into processes involved in the industry that have helped many insiders and outsiders to see the oil sector in overview for the first time.\textsuperscript{212}

2. Extractive Sector Regulatory Regime. – The Petroleum Act of 1969\textsuperscript{213} is the primary legislation underpinning the oil and gas

\textsuperscript{207} Id.
\textsuperscript{208} Nicholas Shaxson, \textit{Nigeria’s Extractive Industries Transparency Initiative, CHATHAM HOUSE} (2009), \url{http://eiti.org/files/NEITI%20Chatham%20house_0.pdf}.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 2.
\textsuperscript{213} Petroleum Act, ch. 350 (1969) (Nigeria),
regulatory regime in Nigeria. The Petroleum Act was enacted in the midst of the Nigerian Civil War and vests the entire ownership and control of all petroleum in, under, or upon, any lands in the country to the government.\textsuperscript{214} While the government owns the oil, the Petroleum Act further states that Nigerian citizens or companies incorporated in Nigeria may be granted an oil exploration license, an oil-prospecting license, or a lease to search for and carry away petroleum.\textsuperscript{215} The holders of a license or lease are granted extensive rights and powers over the land.\textsuperscript{216} The First Schedule of the Petroleum Act limits the rights of lease or license holders by stating that a licensee or lessee may not enter upon, occupy, or exercise any of the rights and powers conferred by his license or lease over any private land until "fair and adequate compensation has been paid to the persons in lawful occupation of the land."\textsuperscript{217} The First Schedule also requires that within ten years of the enactment of the lease, at least seventy-five percent of all employees hired by a lessee or licensee must be Nigerian citizens.\textsuperscript{218}

The Petroleum Act remains in force, but some of its provisions that protect the rights of investors and communities were overtaken by events.\textsuperscript{219} When Nigeria joined the Organization of Petroleum Exporting Companies (OPEC) in 1971, it began to institute reforms in line with OPEC’s preference for indigenization of oil industries.\textsuperscript{220} In 1972, the government announced that it assigned all of the areas of the country not covered by an existing license or lease to the Nigerian National Petroleum Company (NNPC).\textsuperscript{221} In order to take advantage of foreign capital and expertise, the NNPC was authorized to form joint ventures with international

\begin{thebibliography}{9}
\bibitem{1} Id. § 1.
\bibitem{2} Id. § 2(1).
\bibitem{4} Petroleum Act § 36.
\bibitem{5} Id.
\bibitem{6} Omorogbe, \textit{supra} note 216, at 275-76.
\bibitem{7} Frynas, \textit{supra} note 178, at 31.
\bibitem{8} Omorogbe, \textit{supra} note 216, at 277.
\end{thebibliography}

companies.\textsuperscript{222} From 1971, the government gradually set up joint ventures with oil exploration and production companies and acquired shareholding ventures.\textsuperscript{223} By 1979, the government had acquired a sixty percent ownership of all major foreign oil companies in the country.\textsuperscript{224}

Under a joint venture model, the NNPC combined the functions of an oil company with the regulatory powers of a government ministry.\textsuperscript{225} This led to a “fox guarding the hen house” situation where the incentives to regulate the industry based on social and environmental needs of the Nigerian people were diminished.\textsuperscript{226} In March 1996, United States and Nigerian human rights groups partnered to jointly submit a legal communication to the African Commission on Human and Peoples’ Rights alleging that Nigeria, through a joint venture between NNPC and Shell International, facilitated acts that were in violation of its commitments under the African Charter.\textsuperscript{227} The complainants alleged that, because the FGN was involved in oil production through the NNPC, it “did not monitor or regulate the operations of oil companies, and in so doing paved a way” for destruction of the environment and human rights

\begin{itemize}
\item \textsuperscript{223} Frynas, supra note 178, at 31.
\item \textsuperscript{224} Id. The sixty percent figure cited above exempts a production-sharing agreement with Ashland and the Tenneco-Mobil-Sunray venture.
\item \textsuperscript{225} Id. at 33.
\item \textsuperscript{226} Tunde Morakinyo & Odigha Odigha, \textit{The Niger Delta and Oil Exploration}, Presentation to the 2009 Katoomba XV Conference, Accara, Ghana, (Oct. 6-7, 2009), \url{http://rmportal.net/library/content/translinks/translinks-2009/forest-trends/2010-katoomba-xv-meeting-accra-ghana/Presentation_NigerDeltaOil.pdf}.
\end{itemize}
abuses. After finding Nigeria in violation of its African Charter obligations, the Commission appealed to the FGN to ensure that “the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry.”

Many observers of Nigeria believe reform of the countries’ regulatory regime is past due. While privatization of the oil industry proceeded steadily since the end of military rule and the government transitioned to a policy of awarding all new contracts via production sharing contracts instead of joint ventures, the basic regulatory regime has remained more or less unchanged. Several

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228 Id. ¶ 55.
229 Id.
232 Emeka Duruigbo, The Global Energy Challenge and Nigeria’s Emergence As A Major Gas Power: Promise, Peril or Paradox of Plenty?, 21 GEO. INT’L ENVTL. L. REV. 395, 412 (2009) (Production sharing contracts are agreements “under which a foreign company, serving as a contractor to the host country, recovers its costs each year from production and is further entitled to receive a certain share of the remaining production as payment in kind for the exploration risks assumed.”); ZHIGUO GAO, INTERNATIONAL PETROLEUM CONTRACTS: CURRENT TRENDS AND NEW DIRECTIONS 72 (1994) (The switch to production sharing contracts has been attributed to the government of Nigeria’s inability to adequately meet its cash call obligations to fund joint venture operations); Olajumoke Akinjide-Balogun, Nigeria: Legal Framework Of The Nigerian Petroleum Industry, MONDAQ (Apr. 3, 2011), http://www.mondaq.com/x/10726/Legal+Framework+Of+The+Nigerian+Petroleum+Industry.
unsuccessful attempts have been made over the last decade to pass reform legislation. Finally, in the spring of 2014, the passage of a Petroleum Industry Bill, adjusting the fiscal and legal regime governing the petroleum and natural gas industry, seems to be gathering steam in the Nigerian National Assembly.

The Petroleum Industry Bill seeks to reshape the entire oil and gas industry in Nigeria. The Bill establishes a series of agencies and positions charged with overseeing the industry, and introduces a more transparent and competitive license award process. The major oil companies are actively lobbying for changes in the bill and their opposition has in part caused the delay.


235 Draft Petroleum Industry Bill § 1(a-k) (Objectives include: enhance exploration and exploitation of petroleum resources in Nigeria and promote petroleum production for the benefit of the Nigerian people; create a conducive business environment for petroleum operations; establish a progressive fiscal framework that encourages further investment in the petroleum industry whilst optimizing accruable revenues to the Federal Government of Nigeria; establish a commercially oriented and profit driven National Oil Company; deregulate and liberalize the downstream petroleum sector; create an efficient and effective regulatory entity; promote transparency, simplicity and openness; promote the development of Nigerian content in the petroleum industry; protect health, safety and environment; in the course of petroleum operations; and optimize domestic gas supplies, in particular for power generation). Id.

236 Draft Petroleum Industry Bill § 190-1; see also SNR Denton, supra note 230.

benefits and drawbacks of the Bill is beyond the scope of this discussion, but passage of these reforms would address some of the concerns of the African Commission and remove the cloud of uncertainty facing investors.

3. Land Use Act. – The Land Use Act of 1978 vested the ownership of all land within a state to the governor of that state in an effort to remove the traditional barrier to alienation of land and allow for oil to be extracted cheaper and more efficiently. Prior to the Land Act, the traditional land tenure system made it difficult to purchase land owned by a community or family because the system required oil companies to negotiate extraction rights with many stakeholders.

The Land Act is one of Nigeria’s most controversial laws, because of the effect on both customary land rights and the inability

http://www.vanguardngr.com/2012/11/pass-petroleum-industry-bill-paul-coller-tells-nigeria/ (arguing that there are strong indications that one of the reasons International Oil Companies (IOCs) are opposing the PIB is the lack of guarantees to existing investors. Holders of existing joint-venture and Production Sharing Contracts (PSC) licenses and leases would be required to re-apply for their respective contracts within a year of the PIB’s passage).


The traditional land tenure system was in effect in southern Nigeria. The northern part of Nigeria operated under Islamic law and had a different land system. See L. K. Agbosu, The Land Use Act and the State of Nigerian Land Law, 32 J. AFRICAN LAW 1, 4-5 (1988).

Id.
of communities to assert their rights in connection to oil exploitation. Arguably the most controversial section of the Land Act is Section 28, which provides that land may be appropriated for “overriding public interest.” Overriding public interest in this context includes “the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.” The Act legitimized the expropriation of land from traditional communities whenever oil interests were present and allowed oil companies to gain easier access to the land and oil resources because companies were not obliged to negotiate with landowners. After enactment of the Land Use Act, all negotiations on the alienation of land were to go through the state. Nigerian scholar Jedrzej Georg Frynas has argued that as a consequence of the Land Act “companies had lesser economic incentive to investigate the local patterns of land ownership, which can partly explain the carelessness with which oil companies deal with communities.”

Both President’s Obasanjo and Umaru Musa Yar’Adua advocated for reform or amendment of the Land Use Act. The Legislature has failed to enact the proposed amendments to the Act and no major progress has been seen during the Administration of President Goodluck Jonathan.

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244 Land Use Act § 28.
245 Id. § 28(2)(c).
246 See Ako, supra note 243, at 294-95.
247 Frynas, supra note 178, at 80.
4. Investment Promotion and Protection. – While the government of Nigeria, through the NNPC, was gaining a larger share of the oil market and promoting an indigenization policy in the 1970s and 80s, the government paradoxically also introduced new incentives for foreign oil companies to stimulate new exploration.\(^\text{250}\) By the mid-1990s, the Nigerian government was ready to promote international investment and implement measures to protect foreign capital.\(^\text{251}\) The Nigerian Investment Promotion Commissions Act of 1995 (NIPC)\(^\text{252}\) is the primary legislation regulating foreign investment in Nigeria.\(^\text{253}\) The law was amended in 1998 to include the petroleum industry within its scope.\(^\text{254}\)

Because the FGN feared foreign investors were reluctant to invest in the country due to the indigenization program of the 1970s and 1980s, and particularly the nationalization of British Petroleum by the Nigerian Government in 1978,\(^\text{255}\) the NIPC Act provides

\(^{250}\) Frynas, supra note 178, at 33.

\(^{251}\) See generally Obida Gobna Wafure & Abu Nurudeen, Determinants of Foreign Direct Investment in Nigeria: An Empirical Analysis, 10 GLOBAL J. OF HUMAN SOCIAL SCIENCE 26, 26 (2010) (reasoning that the new industrial policy of 1989, the establishment of the Nigeria Investment Promotion Commission (NIPC) in early 1990s, and the signing of Bilateral Investment Treaties (BITs) in the late 1990s are all examples of the Nigerian authorities trying to attract FDI via various reforms).

\(^{252}\) See Id. at 26. While passage of the amended NIPC Act preceded the Obasanjo administration by a year, implementation of the NIPC Act was left to the civilian authorities and is often grouped as part of the reforms initiated by the civilian government.


\(^{254}\) Ekwueme, supra note 253, at 179.

\(^{255}\) See ANN WEYMOUTH GENOVA, OIL AND NATIONALISM IN NIGERIA, 1970-1980 125 (2007) (arguing that the FGN nationalization of BP was justified as an effort to punish the United Kingdom for its failure to support anti-apartheid efforts in South Africa and Zimbabwe. However, the public narrative leaves too
concrete investment guarantees.\footnote{256} Section 25 (1)-(2) of the NIPC Act provides guarantees against nationalization and expropriation and provides for fair and adequate compensation and access to courts should land be expropriated.\footnote{257}

Additional guarantees against direct and indirect expropriation have come in the form of bilateral investment treaties and individual contract clauses.\footnote{258} Nigeria currently has twenty-two Bilateral Investment Treaties in effect\footnote{259} that elect to have disputes of all sorts settled by international arbitration forums such as at the International Center for the Settlement of Investment Disputes (ICSID).\footnote{260} Section 26(2) of the NPC also allows for the parties to a contract to determine how the dispute will be settled.\footnote{261} Most many gaps and argues that the nationalization fits within the larger trend of economic nationalism that the military government was pursuing in the 1970s.\footnote{256} Ekwueme, \textit{supra} note 253, at 188.

\footnote{257} Investment Promotion Commissions Act § 25(1)-(2) states:

\begin{quote}
(a) No enterprise shall be nationalized or expropriated by any Government of the Federation; and

(b) No person who owns whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.
\end{quote}

(2) There shall be no acquisition of an enterprise to which this Decree applies by the Federal Government unless this acquisition is in the national interest or for a public purpose and under a law which makes provisions for:

(a) payment of fair and adequate compensation; and

(b) a right of access to the courts for the determination of the investor’s interest or right and the amount of compensation to which he is entitled.”


\footnote{259} Ekwueme, \textit{supra} note 253, at 198-202.

\footnote{260} \textit{Id.}

\footnote{261} Investment Promotion Commissions Act § 26(2).
Nigerian petroleum agreements contain local arbitration clauses and are thus resolved in Nigerian arbitral tribunals.\textsuperscript{262} The enactment of the NIPC Act has not opened the floodgates of new investment in Nigeria.\textsuperscript{263} While the risk of expropriation diminished, other forms of risk remain high in Nigeria and deter investment.\textsuperscript{264} 

B. Reforms of Multinational Corporations

Because the Petroleum Act gives ownership of oil resources to the government and the Land Use Act vests ownership over land to state governors, multinational companies made the mistake of believing the government was the only Nigerian stakeholder involved in their business. This failure, combined with some heinous practices by oil companies, produced severe reputational damage to companies operating in Nigeria.\textsuperscript{265} The behavior of oil companies in Nigeria also resulted in an increasing number of civil suits filed against companies\textsuperscript{266} and violent conflicts between oil companies and village communities.\textsuperscript{267} Multinational oil companies have thus adjusted their behavior since 1995 by, among other things, implementing...
development programs, adjusting environmental practices, and engaging with communities.\textsuperscript{268}

Generally, foreign investors can protect their investments against political risk by structuring its business in a way that local population have a stake in the project’s success.\textsuperscript{269} In the same way that community opposition to an investment can lead to governmental adversity to an investment, community interest in an investment can lead to a stable investment environment.\textsuperscript{270} Often, governments compel foreign investors to implement certain measures aimed at building community support by host nation law.\textsuperscript{271} Some corporations, however, implemented policies on their initiative to reduce reputational or legal risk\textsuperscript{272} or to gain consent from a local community to carry out business activities in a certain area.\textsuperscript{273}

1. Changes in behavior due to reputational risks. – Nigeria has experienced a rise in litigation against international corporations since


\textsuperscript{269} RUBINS & KINSELLA, supra note 60, at 40.

\textsuperscript{270} Id.

\textsuperscript{271} Id.


the end of military rule in 1999. Litigation not only increased in Nigerian courts, but companies from the United States have also been hauled in front of U.S. courts and other international courts for actions that occurred in Nigeria.

As explained above, a company’s reputation has a direct bearing on the likelihood of successful litigation. No other incident impacted the reputation of oil companies in Nigeria more than the violence and environmental degradation in Ogoniland. Oil companies gained billions of dollars from the oil extracted from the land of the Ogoni people in the Niger Delta since oil was discovered there in the 1950s. Dissatisfied Ogoni leaders joined with international campaigners in the 1990s in a campaign to address the deleterious impact of oil exploitation. The Nigerian government

274 Frynas, supra note 129, at 371.
responded to this campaign through repressive tactics that resulted in thousands of Ogoni deaths and numerous other serious human rights abuses.279 Under pressure from the Ogoni and international NGOs, Shell was forced to pull out from Ogoniland in 1993.280

In response to the Ogoniland tragedy and other situations that led to reputational damage, oil companies in Nigeria took action to improve their environmental and human rights practices.281 While oil companies undertook social responsibility initiatives for decades, the quality of the investments greatly improved since 1995.282 Since then, Shell International, for example, “has re-invented its corporate strategy in line with principles of sustainable development and it has committed itself to a level of stakeholder engagement on its environmental and social performance which would have been unthinkable in 1995.”283 Prior to 1995, Shell “placed emphasis on one-time ‘gifts,’ rather than support for sustainable development programs.”284 Previous development initiatives were uncoordinated and focused on what Shell felt the communities needed, as opposed to engaging the communities in their own development and making communities stakeholders in Shell’s projects.285 Instead of a top down approach, Shell’s new approach “places emphasis on the empowerment of communities” and empowers communities and local governments to produce development plans, in which communities set their own development priorities.286

279 See generally HUMAN RIGHTS WATCH, supra note 184 (exploration of human rights violations related to oil exploration and production in the Niger Delta).

280 See INTERNATIONAL CRISIS GROUP, supra note 267, at 1.

281 Uwem E. Ite, Multinationals and Corporate Social Responsibility in Developing Countries: A Case Study of Nigeria, 11 CORP. SOC. RESPONSIB. ENVIRON. MGMT 1, 4 (2004).

282 Id.

283 Boele, supra note 277, at 74.

284 Ite, supra note 281, at 5.

285 Id.

286 Id. at 6.
2. Changes in behavior due to government regulation. – In addition to actions taken by investors to improve their reputation and guard against the risk of litigation, the FGN enacted laws that guide the behavior of oil and gas companies. The Nigerian Oil and Gas Industry Content Development Act of 2010 is intended to support economic development by promoting indigenous service providers and locally supplied goods to support the oil and gas industry. The law sets minimum thresholds for the use of local labor, services, and materials, with a goal of embedding the oil industry within the wider Nigerian economy by creating economic linkages between Nigerian businesses and the oil and gas companies. According to an analysis by KPMG, “if properly implemented, the Act has the potential to facilitate the participation of Nigerians in the oil and gas sector, and stimulate the development of other sectors of the economy, especially the manufacturing sector.”

Another way the Government is using law to change the behavior of oil companies is to require companies to set aside funds for local development initiatives. The Niger-Delta Development Commission (Establishment, etc.) Act requires an oil producing or


288 Id.


290 Id.

A gas processing company operating in the Niger-Delta Area to pay three percent of its total annual budget to a Development Commission. The Development Commission is charged with formulating development policies and implementing development programs focused on transportation, health, education, employment, industrialization, agriculture and fisheries, housing and urban development, water supply, electricity and telecommunications. The proposed Petroleum Industry Bill discussed above also creates a Petroleum Host Communities Fund to be filled by a requirement that upstream petroleum companies contribute ten percent of their net profits to the Fund on a monthly basis. The Fund will direct money to the development of the economic and social infrastructure of communities in petroleum producing areas.

The reforms described above, in addition to other reforms not mentioned, have helped the Nigerian economy grow an average of 7.6% between 2003 and 2010. Unfortunately, the benefits have not reached the average Nigerian. According to the U.S. Agency for International Development, “while the successive administrations of Presidents Obasanjo and Yar’Adua have enacted broad... policy reforms, the implementation of these reforms has yet to register

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292 Niger-Delta Development Commission (Establishment, etc.) Act, supra note 291, § 14(2)(b).
293 Id. § 7(b).
294 The Draft Petroleum Industry Bill, supra note 233.
295 The upstream sector includes the searching for potential underground or underwater oil and gas fields, drilling of exploratory wells, and subsequently operating the wells that recover and bring the crude oil and/or raw natural gas to the surface. Conversely, the downstream sector is defined as an oil sector term commonly used to refer to the refining of crude oil, and the selling and distribution of natural gas and products derived from crude oil. OIL & GAS IQ, OIL & GAS IQ GLOSSARY, http://www.oilandgasiq.com/glossary.
296 Id. § 118.
significant impact on the daily lives of ordinary Nigerians.\footnote{U.S. AGENCY FOR INT’L DEVELOPMENT, NIGERIA STRATEGY, 2010-2013 1 (2010), http://pdf.usaid.gov/pdf_docs/PDACP977.pdf.} The main reason for the failure of these reforms to reach ordinary Nigerians is the lack of strong governance institutions, especially at the state level, and a weak, non-oil economy.\footnote{WORLD BANK, supra note 298, at 2.} Decades of military rule and underinvestment in the non-oil sector will not be erased in one or two decades. If Nigeria continues along its current trajectory, however, it may finally be able to escape the resource curse.

III. APPLYING LESSONS FROM NIGERIA TO LAND INVESTMENT IN SOUTH SUDAN

Governments and investors can draw many lessons from the Nigerian experience in oil exploitation. Nigeria’s experience shows that large-scale natural resource exploitation comes with multiple risks to all stakeholders. Large-scale resource exploitation when state institutions are weak, corruption is rampant, and rights of populations are ill defined may lead to a situation where the benefits of the resource extraction do not reach the population, and investors face significant political risk. Nigeria’s reform efforts have also shown, however, that effective policies and legal frameworks may reduce risk. Governmental efforts at combating corruption, improving governance, creating an effective legal framework for investment, and cooperating with investors to reconcile the objectives of investors with the development needs of communities may lead to benefits to all stakeholders.

The remainder of this article will use the Nigerian example to provide eight recommendations for the GoSS and investors looking to enter the South Sudanese land market that will reduce political risk and help ensure the investment is beneficial to both investors and the people of South Sudan.
Lesson 1: The Government and investors must engage in meaningful consultations with communities prior to investment.

Government promotion of land investment in South Sudan is an appropriate response to the food security and developmental needs of the country. However, the pace of large-scale land investment should slow in order to ensure the provisions of the 2009 Land Act are effectively implemented. The Land Act provides a useful framework for allowing investment in a sustainable and consultative manner. According to the Act, the Ministry granting the lease must ensure that “the members of the community are duly consulted . . . and the project for which the land has been leased contributes to the social and economic development of the community, the County or/and the State.”\textsuperscript{301} The Act goes further and requires that customary land rights only be granted as a lease to international investors if there is “consensus between members of the community.”\textsuperscript{302}

Implementing these provisions will likely frustrate investors and government officials who want to speed up the pace of investment. However, given Sudan's history with conflict and civil unrest caused by disputes over land rights, these measures are absolutely essential. Populations must not only be consulted; they must have the ability to refuse an investment contract. In Nigeria, the Land Use Act vested the authority to grant leases to the state governor without consultations with the community. This mode led to a situation where the oil companies believed the government was the only stakeholder and acted carelessly toward the local population. South Sudan has wisely adopted a different approach. The GoSS must rigorously implement these provisions of the Land Act because the investment provides benefits to both investors and the South Sudanese if power is given to local communities.

\textsuperscript{301} The Land Act of 2009, \textit{supra} note 83, § 27(4).
\textsuperscript{302} \textit{Id.} § 27(1).
Lesson 2: The Government must aggressively combat corruption.

Corruption creates distrust between the government, investors, and the public, and thus must be urgently addressed if South Sudan is going to have any chance of creating an enabling environment for mutually beneficial land investment. Nigeria continually struggled with corruption at levels that rival or exceed the levels of corruption in South Sudan. In response to endemic corruption, both countries established independent anti-corruption commissions that take decisions over whether to investigate and prosecute government officials outside the political process. South Sudan is now faced with similar issues to what Nigeria faced in 2002 when, prior to the amending of the Corrupt Practices Act, power to prosecute corruption was concurrently vested in an independent anti-corruption commission and the Ministry of Justice. Because there was a perceived competition between the Ministry and the independent commission, the Nigerian legislature decided to vest sole prosecutorial authority in the Attorney-General. South Sudan similarly has vested prosecutorial duties to both an independent anti-corruption commission and the Ministry of Justice. The GoSS need not decide to vest sole authority in one entity over the other. Concurrent authority has worked in other countries and has the potential to succeed in South Sudan. However, the GoSS must

303 See Ogbu, supra note 192, at 130-31.
304 See Turuk, supra note 115.
305 See generally John R. Heilbrunn, WORLD BANK INST., Anti-Corruption Commissions Panacea or Real Medicine to Fight Corruption? (2004), http://wbi.worldbank.org/wbi/Data/wbi/wbiems/files/drupal-acquia/wbi/Anti-Corruption%20Commissions%20by%20John%20Heilbrunn.pdf (noting the success of Hong Kong’s Independent Commission Against Corruption and arguing that the first key variable that might explain a failure to reduce corruption through the establishment of an anti-corruption agency is the absence of laws necessary for its success. Without the legal tools to go after venal officials, a commission cannot succeed); Melissa Khemani, Anticorruption Commissions in the African State: Burying the Problem or Addressing the Issue? (2009) (unpublished manuscript), http://papers.ssrn.com/sol3/Delivery.cfm/SRNR_ID1353586_code1176273.pdf?abstractid=1334286&emirid=5 (arguing that anti-corruption commissions can play a critical role in the anti-
make a decision to either build up the prosecutorial powers and political will of the Commission or to grant sole authority to the Attorney General. Without the legal tools and strong political backing, no independent commission will succeed.\textsuperscript{306}

Lesson 3: The Government must limit expropriation of customary land to truly public purposes.

Implementing the Land Act requires the government to ensure that any expropriation of private or community held lands is legitimate. Like the Land Use Act of Nigeria, the South Sudan Land Act allows the government to expropriate land for “public purposes.”\textsuperscript{307} Yet, unlike Nigeria’s law, where public purposes embrace “the requirement of the land for mining purposes or oil pipelines or for any purpose connected therein,” the South Sudan Land Act defines public purposes in a relatively narrow way.\textsuperscript{308} However, the South Sudan Land Act also includes a clause that states that a public purpose can include “any activity with a public purpose undertaken by the government as specified by any other law.”\textsuperscript{309} South Sudan’s government must ensure that it does not interpret this provision to include promotion of land investment notwithstanding the communities’ right to refuse an investment.

corruption strategies of African states, provided they have certain structures, functions and characteristics).

\textsuperscript{306} Heilbrunn, supra note 305, at 15.

\textsuperscript{307} The Land Act of 2009, supra note 83, § 73.

\textsuperscript{308} Id. § 73(5) (Public Purposes is defined by the Act as: (a) exclusive for government or general public use; (b) planning of any new Government area or the extension or improvement of any existing Government premises; (c) sanitary improvements and urban development; (d) social housing, resettlement and reintegration; (e) control over land contiguous to any port, airstrip or airport; (f) control over land required for defense purposes; (g) control over land whose values enhanced by the construction of any railway, road, or public works about to be undertaken or provided by the Government; and (h) any other activity with a public purpose undertaken by the government as specified by any other law).

\textsuperscript{309} Id. § 73(5)(h).
Lesson 4: Investors must guard against indirect expropriation.

While the legal regime established by the South Sudanese Land and Investment Promotion Acts provides protection for investors against direct expropriation of its investment, investors still must face the risk of indirect expropriation. Government action, such as increased regulation or a drastic change in the legal or tax environment, which “would have the effect of depriving the owner, in whole or significant part, of the use of reasonably-to-be-expected economic benefit or property” remains a risk.

Investors in South Sudan can learn from the Nigerian experience. With great changes in society, like when Nigeria joined OPEC in 1971 or the end of military rule in 1999, come significant regulatory changes. These changes may have an adverse impact on particular investment ventures. Protections for investors found in the Nigerian Petroleum Act of 1969 were effectively ignored once Nigeria joined OPEC. Further, reforms of the oil industry outlined earlier in this paper could have great impacts on the ability of investors to enjoy the benefits of their assets. South Sudan, as a new state, will be crafting a large amount of legislation in the coming years and the stability of the government remains in question as peace negotiations between rival factions continue. Once an investment is made and infrastructure is developed, investors become vulnerable to changes in the local laws regulations and government policies. Investors must therefore find protection against “creeping” expropriation.

310 See Marina Azzimonti & Pierre-Daniel G. Sarte, Barriers to Foreign Direct Investment Under Political Instability, 93 ECONOMIC QUARTERLY 287, 289 (2007) (countries that have higher political instability are predicted to exhibit higher levels of indirect expropriation).
311 Metaclad, supra note 76, ¶ 103.
312 Azzimonti & Sarte, supra note 310, at 289.
313 See COTULA, supra note 86, at 40.
314 See RUBINS & KINSELLA, supra note 60, at 183 (creeping expropriation may occur where a series of State acts have a cumulative effect of depriving an asset of its value).
Investors in Nigeria and beyond use a variety of tactics to guard against indirect expropriations. Such tactics include Bilateral Investment Treaties (BITs), stabilization clauses in contracts, and political risk insurance. South Sudan has not entered into any BITs at the time of writing. Yet stabilization clauses in contracts may serve some of the same ends as BITs and could be included in land contracts. Stabilization clauses may prohibit the application of any new laws or regulations to an investment. Other forms of stabilization clauses would apply new laws and regulations to the investment, but require the state to fully compensate the investor for any compliance costs. While stabilization clauses are controversial, especially when a country is implementing non-discriminatory regulations aimed at promoting human rights or environmental protection, these clauses can provide predictability and protect investments from regulatory expropriation.

The purchase of political risk insurance is one of the simplest steps an investor can take to mitigate political risk. Insurance is available through private insurance companies, state-sponsored investment agencies, such as the United States’ Overseas Private Investment Corporation (OPIC), and multilateral agencies, such as the World Bank’s Multilateral Investment Guaranty Agency (MIGA). Both OPIC and MIGA protect against indirect expropriation and political violence. At the same time, the simple purchasing of insurance through a World Bank or U.S.-government-associated entity may reduce political risk because the GoSS has an interest in maintaining a productive relationship with both entities.

315 Telesetsky, supra note 81, at 18.
316 Id. at 19.
317 Id.
318 RUBINS & KINSELLA, supra note 60, at 69.
319 Id. at 70-109.
320 Id. at 113.
Lesson 5: The Government must not give up its police powers through contracts.

There is a thin line between the sovereign right of a state to regulate its economy and the act of indirect expropriation. The GoSS, however, must find a way to effectively regulate its economy while at the same time promote secure investments. According to Lorenzo Cotula, “these tensions between investment protection and sustainable development goals call for the development of innovative approaches that can reconcile the investors’ legitimate need to ensure stability of the investment climate with efforts to maximize the contribution of foreign investment to the pursuit of sustainable development goals.”

The Nigerian government failed at reconciling the goals of investment stability and sustainable development. The FGN erected a regulatory regime in the 1960s and 70s that promoted investment at the expense of oversight, transparency, and due process. Because the FGN gained a majority stake in the oil companies in the 1970s, the incentives for holding these companies accountable and ensuring fair competition were diminished. To its credit, the FGN is attempting to change the dynamics through passage of the Petroleum Industry Bill. Yet, the process has proven difficult, and it is not clear how easy it will be to make the petroleum industry more accountable and transparent when much of the industry is operating under long-

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323 See generally Decision Regarding Communication 155/96, supra note 227, ¶ 55 (finding that the FGN did not monitor or regulate the operations of oil companies, and in so doing “paved a way” for destruction of the environment and human rights abuses).
term contracts. Nigeria has signed twenty-two bilateral investment treaties that insulate investments from major changes in regulatory approaches, and the political power of oil companies remains strong.

The GoSS must learn from Nigeria’s failures and implement a regulatory regime that protects community land rights and ensures the benefit of investment is shared by shareholders and communities alike. South Sudan must take particular care not to give up its power to regulate through contracts or BITs. Because South Sudan has yet to enter any BITs, it can start with a clean slate and ensure the public interest is not compromised by allowing investments to shield themselves from non-discriminatory regulations. South Sudan should require, as a prerequisite for entering any BITs, language that allows it to establish its own level of environmental protection and human rights standards. This approach has been implemented by the Belgium-Luxembourg and Ethiopia BIT and the USA-Rwanda BITs.

325 See generally Nils Klawitter, Battling Big Oil: How Four Nigerian Villagers Took Shell to Court, DER SPIEGEL (Jan. 29, 2013), http://www.spiegel.de/international/business/nigerian-farmers-take-on-shell-in-a-dutch-court-a-880159.html (stating that individuals filing a lawsuit against Shell will be facing an armada of lawyers); Chika Amanze-Nwachuku, PIB - Oil Majors Lobby Senators, Govt Officials Over Fiscal Provisions, THIS DAY, Oct. 2, 2011, http://allafrica.com/stories/201210020070.html (“Multinational oil companies are said to have spent millions of dollars lobbying the National Assembly and top government officials to address their concerns over the fiscal provisions in the new Petroleum Industry Bill.”).
326 Such an approach could follow the Article 12 of the BIT between Mauritius and Comoros in 2001, which states: “Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting any measure whatsoever to protect its essential security interests or in the interest of public health or the prevention of diseases affecting animals and plants.” Agreement Concerning the Reciprocal Promotion and Protection of Investments, Mauritius – Comoros, May 18, 2001, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ:C_2014.169.01.0001.01.ENG.
BIT. Likewise, South Sudan should limit the scope of stabilization clauses it signs with investors. Stabilization clauses may be appropriate in certain circumstances, but only if these clauses do not require the Government to abdicate its police powers. According to Anastasia Telesetsky:

We should expect States to demand more of their private investors. States with the ability to lease arable land have a high demand commodity and need not be cowed by sophisticated private investors who present a ‘take it or leave it’ offer... States should demand contract... conditions that will create an investment climate which not only protects investors’ expectations but also safeguards the public interest in a safe environment and meaningful employment.

Lesson 6: The Government must ensure agreements are transparent.

According to a study by the Economist, land deals in Africa are “shrouded in secrecy.” Transparency in land investment can help set the conditions for greater competition among investors. Transparency also fosters public confidence in land investment by foreigners because contract awards would be subject to public scrutiny. The Extractive Industry Transparency Initiative

329 See COTULA, supra note 322, at 13-16.
330 Telesetsky, supra note 81, at 28.
332 THE WORLD BANK ET AL., PRINCIPLES FOR RESPONSIBLE AGRICULTURAL DEVELOPMENT (RAI) THAT RESPECT RIGHTS, LIVELIHOODS AND RESOURCES, KNOWLEDGE EXCHANGE PLATFORM FOR RESPONSIBLE AGRO-INVESTMENT (RAI) – EXTENDED VERSION 9 (2010),
implemented by Nigeria was ambitious. It informed the public and policymakers on the activities of oil companies and equipped civil society with a tool to hold their government accountable. South Sudan can learn from this experience and implement policies that provide information on pending contracts and existing allocations of land in a publicly assessable registry. Such a registry should include meaningful information such as: the price paid for the property, projections on use and cultivation targets, employment generated, and expected tax revenue. This information would enable civil society to take a more active role in land decisions. A land registry would also lower transaction costs borne by investors who currently must expend funds to investigate whether the claimed owner has good title.

Lesson 7: The Government and investors should negotiate contracts that prioritize local food security and development.

Because South Sudan suffers from food insecurity and underdevelopment, structuring land investment in a way that will contribute to, rather than undermine, food security and development is the utmost priority. Both investors and governments have a role to play in ensuring food security. A joint United Nations and World Bank report argues that while it is unrealistic to expect investors to make food security their primary concern, slight modifications of project design can have a major impact on the nutrition of local populations at little extra cost to investors.


Shaxson, supra note 208, at 2.

Id. at 7.

RAI, supra note 332, at 9.

See RAI, supra note 332, at 9. Such a registry would also prevent situations like that of Lainay County, where the investor acquired 600,000 acres in a County comprised of other a little more than half that amount. See supra Part II.B.2.

See generally WORLD FOOD PROGRAM, supra note 144 (showing the food security situation in South Sudan).

RAI, supra note 332, at 7.
The GoSS must address food insecurity in a variety of ways. The larger approach to food security is beyond the scope of this article. Yet, as it relates to land investment, there are at least three things the GoSS must do. First, South Sudan should consider implementing temporary export restrictions on food that limit the amount of food investors may export when food insecurity is acute. Second, the Government should negotiate contracts that require products to be grown that align with local dietary preferences. Finally, the GoSS must fully integrate investment plans within a larger development strategy.

South Sudan has wisely embedded foreign investment in land within its National Development Plan through the 2011 Draft Land Policy. Yet, equally important is to ensure that investment plans and contracts promote development initiatives. Large-scale agriculture based only on ad hoc decisions by often ill-informed investors might not correspond to a host community’s best interest in the long run. The GoSS must undertake legislative efforts and negotiate contracts that ensure land investments contribute to its national strategy for agriculture or rural development.

Nigeria’s efforts to promote indigenous service and sourcing industries through the Oil and Gas Industry Content Development Act of 2010 is one way of linking investment projects to food security.

339 South Sudan is not a member of WTO and has not adopted the General Agreement on Tariffs and Trade (GATT). However, such export restrictions are consistent with GATT article XI:2(a) (GATT’s prohibition on quantitative export restrictions does not apply to “export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party”). See Julia Ismar, How to Govern the Global Rush for Land and Water, in HANDBOOK OF LAND AND WATER GRABS IN AFRICA: FOREIGN DIRECT INVESTMENT AND FOOD AND WATER SECURITY 286, 290 (Tony Allan et al. eds. 2013); see also Joachim von Braun & Ruth Meinzen-Dick, supra note 39.

340 RAI, supra note 332, at 6.

341 See SOUTH SUDAN NATIONAL DEVELOPMENT PLAN, supra note 120, at 72.

342 DEININGER, supra note 5, at 112.

343 Id.
development initiatives. South Sudan should consider passing appropriate legislation requiring large scale agricultural projects to hire local workers, train workers on mechanized farming techniques, and require local sourcing of seed, fuel, and other inputs. Additional legislation similar to Nigeria’s Niger-Delta Development Commission (Establishment, etc.) Act requiring investors to contribute to development funds is also something that South Sudan should consider.

Even if a land deal seems to be beneficial to the development of the country as a whole, there may be local social and economic impacts that must be addressed prior to a land transfer. The GoSS should thus require social and environmental impact assessments prior to the transfer of land. This requirement could be embedded in the lease contract or through passing a national law that requires an impact assessment to be carried out.

Lesson 8: Investors must practice Corporate Social Responsibility

Because community attitudes toward an investor could damage an investment or the investor’s reputation, practicing socially responsible behavior is not simply charity; socially responsible practices are necessary to minimize political and reputational risks. Because the community’s right to land has been undermined by colonialism, years of war with its northern neighbor, and tribal conflict, issues of land and food production are highly emotive for

See Awogbade, supra note 287; KPMG, supra note 289, at 1.

See Niger-Delta Development Commission (Establishment, etc.) Act, supra note 291, § 7(b).

COTULA, supra note 86, at 30.

See id.

See generally U.N. FOOD AND AGRIC. AGENCY, FROM LAND GRAB TO WIN-WIN: SEIZING THE OPPORTUNITIES OF INTERNATIONAL INVESTMENTS IN AGRICULTURE 2 (2009), ftp://ftp.fao.org/docrep/fao/011/ak357e/ak357e00.pdf (arguing that realizing the benefits of land investment will take efforts of both investors and recipients. “Above all, it requires an understanding that collaboration promises mutual benefits.”).

Id.
How a community interacts and feels about an investment in such an environment will have as much impact on the productivity of the investment as market forces. Further, non-profit campaigns focusing on the impact of land investment in the developing world are starting to have an impact and have the potential to severely damage an investor’s reputation. The Nigerian experience has shown these campaigns could lead to costly litigation and changes in the regulatory framework under which investors operate.

The experience of oil companies in Nigeria is particularly instructive in the area of social responsibility. It seems from Shell’s recent social responsibility practices that the company has learned that their investments operate within a set of social norms and community expectations. Shell seems to have learned that empowering the community and giving everyday Nigerians a voice in their own future is an essential part of their efforts to minimize political and reputational risk.

Land investors in South Sudan should not only attempt to follow the example of Shell, but to exceed it. Shell’s reputation has

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350 See DENG & MITTAL, supra note 49, at 15.
352 See Frynas, supra note 129, at 371.
353 Spence, supra note 23, at 60-61.
354 See generally Ite, supra note 281, at 5-7 (“Shell has departed from the community assistance (CA) mode to the community development (CD) approach. The CD approach places emphasis on the empowerment of communities with a view to significantly reducing dependence on Shell for socio-economic development.”).
suffered from decades of neglecting the needs and desires of communities in their project areas. Land investors should strive from the outset of an investment to not only increase shareholder value but to generate tangible benefits for the communities in the project area. This would require at the least: (1) respecting internationally relevant human rights and labor standards;\(^{355}\) (2) subscribing to voluntary guidelines on land investment developed by international organizations\(^{356}\) and those endorsed by the African Union;\(^{357}\) (3) engaging with local communities to identify social risks, especially the risks to women and vulnerable groups, and implementing risk mitigation plans; (4) hiring local workers for higher skill work when possible; and (5) rigorously complying with government regulations and respecting existing land rights.

Finally, none of the socially responsible practices listed above will succeed if the project itself is not economically viable and fails to result in durable shareholder value.\(^{358}\) All parties will lose if an investment is not economically successful. Investors must be wary of investments that are only economically viable when food and energy prices are high and would fail under normal market conditions.\(^{359}\) The increase in investment in African agricultural land has occurred at a blistering speed and the long-term economic viability of these projects is still unknown. Because the economic decisions taken by investors will have major repercussions for the livelihoods of people

\(^{355}\) Such standards are outlined in the U.N. Global Compact and the ILO’s Declaration of Fundamental Principles and Rights at Work.


\(^{358}\) Harold Liversage, INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT, Responding to ‘Land Grabbing’ and Promoting Responsible Investment in Agriculture 9 (IFAD Occasional Paper 2, 2010), http://www.ifad.org/pub/op/2_e.pdf.

\(^{359}\) See RAI, supra note 332, at 13.
in the project area, the stakes are particularly high. Investors must not enter into contracts lightly and without doing all they can to ensure the project is viable.

**CONCLUSION**

International investment in agriculture plays a vital role in development and poverty reduction. Yet, international investors operating in South Sudan face many risks: the lack of predictable regulation, an unproven government, corruption, civil unrest, and reputational risks. Land investment also brings many risks to communities: the erosion of land rights, uneven development, environmental degradation, and violent conflict spurred by unmet expectations. This article argues these risks are not insurmountable. The experience of international investment in the oil sector in Nigeria has shown that with effective government regulation and a combination of successful risk management and responsible practices by investors, there is hope that international investment would meet the expectations of investors, governments, and communities.

The task of transforming large-scale land investment from a challenge to an opportunity will not be easy. In order to meet the challenge, the Government of South Sudan should slow international investment to ensure the rights of landholders are secured, the challenge of corruption is addressed, and that land investment is integrated into its national development and food security strategies. Investors must likewise take efforts to secure their investment against the risk of indirect expropriation, engage in meaningful consultations with communities, ensure investments

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360 *See supra* Part I.B.
361 *See supra* Part I.C.
362 *See supra* text accompanying notes 169-87.
contribute to food security, and practice corporate responsible practices.

Since the end of military rule in 1999, investors and the Government of Nigeria transformed themselves from the poster child of the resource curse into something closer to being called a success story. Nigeria still has a long way to go. But the reforms undertook by the FGN and investors since 1999 shows that a reform-minded government and investors willing to take the necessary steps to protect investments and all stakeholders can pave the way for mutually beneficial investment.