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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

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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

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“The only reason why we are hungry is because of how we have been investing in Agriculture.” – Ann Itto, South Sudan’s Minister of Agriculture¹

“When food becomes scarce, the investor needs a weak state that does not force him to abide by any rules.” – Philippe Heilberg of Jarch Capital²

Recent global food price volatility combined with the growing use of agricultural land to produce biofuels has sparked a global scramble for land.³ Precise numbers are difficult to verify, but the scale of new international land investment in recent years is, by all

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¹ *SPLM Leaders Call for More Investments in Agriculture in Upper Nile*, SPLM TODAY, July 11, 2008, http://splmtoday.com/index.php?option=com_content&task=view&id=106&Itemid=1.

² Horand Knaup & Juliane von Mittelstaedt, *The New Colonialism Foreign Investors Snap Up African Farmland*, DER SPIEGEL, July 30, 2009, <http://www.spiegel.de/international/world/the-new-colonialism-foreign-investors-snap-up-african-farmland-a-639224.html>.

³ Lesley Wroughton, *Oxfam Urge World Bank to Freeze Land Investments*, REUTERS, Oct. 3, 2012, 5:40 AM, <http://www.reuters.com/article/2012/10/04/worldbank-oxfam-land-idUSL1E8L2LKF20121004>.

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

⁴ See WARD ANSEEUW ET AL., THE LAND MATRIX PARTNERSHIP, TRANSNATIONAL LAND DEALS FOR AGRICULTURE IN THE GLOBAL SOUTH: ANALYTICAL REPORT BASED ON THE LAND MATRIX DATABASE 7 (Tim Bending ed., Apr. 2012), <http://www.landcoalition.org/en/publications/transnational-land-deals-agriculture-global-south> (International investors have acquired 56.2 million hectares in Africa since 2001); *Are Foreign Investors Colonizing Africa*, AL JAZEERA, Oct. 25, 2011, <https://www.youtube.com/watch?v=Y05fzp0YSrw> (Foreign investors bought or leased a land area in sub-Saharan Africa about the size of France in 2009 alone).

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).

⁷ OLIVER DE SHUTTER, UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, LARGE-SCALE LAND ACQUISITIONS AND LEASES: A SET OF CORE PRINCIPLES AND MEASURES TO ADDRESS THE HUMAN RIGHTS CHALLENGE 3 (June 11, 2009), <http://www.oecd.org/site/%20swacmali2010/44031283.pdf>.

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

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 m²), South Dakota (75,885 m²), and Nebraska (76,872 m²) combined is 221,773 m². One square mile is 258 hectares. Thus, 221,773 m² = 57.4 million hectares.).

¹⁰ *See* WOODROW WILSON INT’L CTR. FOR SCHOLARS, LAND GRAB? THE RACE FOR THE WORLD’S FARMLAND (Michael Kugleman & Susan L. Levinstein eds., 2009), http://www.wilsoncenter.org/sites/default/files/ASIA_090629_Land%20Grab_rpt.pdf; David Hallam, *Foreign Investment in Developing Country Agriculture – Issues, Policy Implications and International Response*, OECD GLOBAL FORUM ON INT’L INV. (Dec. 7, 2009), http://www.responsibleagroinvestment.org/sites/responsibleagroinvestment.org/files/OECD_RAI%20Issue_Policy%20Implications.pdf; *see also* *Responsible Farmland Investing? Current Efforts to Regulate Land Grabs Will Make Things Worse*, GRAIN (Aug. 22, 2012), <http://www.grain.org/article/entries/4564-responsible-farmland-investing-current-efforts-to-regulate-land-grabs-will-make-things-worse>.

¹¹ DEININGER ET AL., *supra* note 5, at 129-42.

¹² *Id.* at 5.

¹³ DANIEL SHEPARD & ANURADHA MITTAL, THE GREAT LAND GRAB: RUSH FOR WORLD’S FARMLAND THREATENS FOOD SECURITY OF THE POOR 6 (2009).

because investors prioritize production of food for export over supporting domestic food supplies.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.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.¹⁶ At the same time, many investors involved in the oil industry simply ignored the damage they caused to communities and the environment.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.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.¹⁹ Investment practices by multinational corporations acting without strong regulations in West Africa have led to devastating social and

¹⁴ *Id.* at 18.

¹⁵ See generally Kate Geary, *Our Land, Our Lives: Time Out on the Global Land Rush*, OXFAM INT'L (2012), http://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf (advocating for the World Bank to institute a temporary freeze on investments involving large-scale land acquisitions).

¹⁶ See *infra* Part II.

¹⁷ Simon Warikiyei 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).

¹⁸ See Ian Gary & Terry Lynn Carl, *Bottom of the Barrel: Africa's Oil Wealth and the Poor*, CATHOLIC RELIEF SERVICES (2003), http://www.crs.org/publications/showpdf.cfm?pdf_id=183.

¹⁹ Matthew L. Norman, *The Challenges of State Building in Resource Rich Nations*, 10 NW. U. J. INT'L HUM. RTS. 173, 173 (2012).

environmental consequences.²⁰ 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.²¹

Some governments and investors in the non-renewable extractive industries²² have learned they could not simply ignore the damage their business practices caused and took remedial action.²³ 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.”²⁴ Unfortunately, in many cases, the remedial steps taken were too late to save the local environment, guard against corruption, or protect investors’ reputations.²⁵

²⁰ See *The Curse of Oil: The Paradox of Plenty*, ECONOMIST, Dec. 20, 2005, <http://www.economist.com/node/5323394>.

²¹ Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to A Healthy Environment*, 15 B.U. INT’L L.J. 261, 271 (1997).

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,,contentMDK:20306686~menuPK:592071~pagePK:148956~piPK:216618~theSitePK:336930,00.html> (last visited Jan. 6, 2013).

²³ David Spence, *Corporate Social Responsibility in the Oil and Gas Sector: The Importance of Reputational Risk*, 86 CHI.-KENT L. REV. 59, 69-70 (2011).

²⁴ Paul Collier, *The Case for Investing In Africa*, MCKINSEY QUARTERLY 3 (June 2010), https://www.mckinseyquarterly.com/The_case_for_investing_in_Africa_2611.

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.²⁶ This rise in demand already strains the agricultural sector due to its indispensable role in supplying food and energy needs.²⁷ 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.²⁸ Largely due to the rise

²⁶ Richard Dobbs, et al., *A New Era for Commodities*, MCKINSEY QUARTERLY (Nov. 2011), http://www.mckinseyquarterly.com/A_new_era_for_commodities_2887.

²⁷ Production of biofuels, particularly ethanol and biodiesel for use in the transport sector, has tripled since 2000 and is projected to double again within the next decade. Regulations in the E.U., U.S., and Canada intended to mitigate climate change, enhance energy security, and support the agricultural sector to require the shift of agriculture land from food production to energy-related crops. This has led to the merger of the energy and food markets and has contributed to higher food prices as a whole. See FOOD AND AGRIC. ORG. OF THE U.N., CLIMATE CHANGE AND BIOENERGY CHALLENGES FOR FOOD AND AGRICULTURE 2 (Oct. 12, 2009), http://www.fao.org/fileadmin/templates/wsfs/docs/Issues_papers%20/HLEF2050_Climate.pdf/en/; WORLD BANK, RISING FOOD PRICES: POLICY OPTIONS AND WORLD BANK RESPONSE 9 (2008), http://siteresources.worldbank.org/NEWS/Resources/risingfoodprices%20_back_groundnote_apr08.pdf; INT'L FOOD POLICY RESEARCH INST., HIGH FOOD PRICES: THE WHAT, WHO, AND HOW TO PROPOSED POLICY ACTIONS (May 2008), www.ifpri.org/sites/default/files/publications/foodpricespolicyaction.pdf.

²⁸ See Catherine Hornby, *Food Prices to be Even More Volatile*, UN Says, REUTERS, Oct. 10, 2011, 3:57 PM, <http://www.reuters.com/article/2011/10/10/us-food-prices-idUSTRE7995D720111010>.

in demand for agricultural products in China and India, and biofuel policies in Europe and North America,²⁹ the International Monetary Fund's food price index³⁰ reflected price increases of 130% from January 2002 to June 2008, and a staggering 56% between January 2007 and June 2008.³¹

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.³² The difference is that during the twentieth century, however, prices for primary commodities remained relatively stable.³³ Economists from the McKinsey Global Institute attribute the lack of price volatility in the twentieth century to technological improvements related to the Green Revolution.³⁴

²⁹ See DEREK HADLEY & SHENGGEN FAN, INT'L FOOD POLICY RESEARCH INST., REFLECTIONS ON THE GLOBAL FOOD CRISIS: HOW DID IT HAPPEN? HOW HAS IT HURT? AND HOW CAN WE PREVENT THE NEXT ONE? 165 (2010), <http://www.ifpri.org/sites/default/files/publications/rr165.pdf> (providing a detailed account of the factors that led to the global food crisis of 2008).

³⁰ For more information on the IMF Commodity Price Index, see IMF *Primary Commodity Prices: Frequently Asked Questions*, INT'L MONETARY FUND, <http://www.imf.org/external/np/res/commod/faq/index.htm#q1> (last updated Dec. 19, 2012).

³¹ Donald Mitchell, *A Note on Rising Food Prices* (July 2008), http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2008/07/28/000020439_20080728103002/Rendered/PDF/WP4682.pdf.

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.*

³⁶ ALEJANDRO LITOVSKY & PAULINA VILLALPANDO, EARTH SEC. INITIATIVE, THE LAND SECURITY AGENDA: HOW INVESTOR RISKS IN FARMLAND CREATE OPPORTUNITIES FOR SUSTAINABILITY 5 (Mar. 2012), <http://www.africafoicentre.org/index.php/reports-publications/8-the-land-security-agenda/file>.

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 (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.³⁸ Rich countries that have land and water constraints, such as those in the Persian Gulf, have leased or purchased large tracks of land in Africa in pursuit of domestic food security.³⁹ 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.⁴⁰

Investors see Africa as the best place for land investment. They see the land as plentiful and possessing massive potential for economic growth.⁴¹ In fact, since 2001 more than half of international land investment occurred in Sub-Saharan Africa.⁴² 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.⁴³

³⁸ Lorenzo Cotula & Sonjia Vermeulen, *Deal or No Deal: The Outlook for Agricultural Land Investment in Africa*, 85 INT'L AFFAIRS 6, 1233, 1235 (2009).

³⁹ JOACHIM VON BRAUN & RUTH MEINZEN-DICK, INT'L FOOD POLICY RESEARCH INST., "LAND GRABBING" BY FOREIGN INVESTORS IN DEVELOPING COUNTRIES: RISKS AND OPPORTUNITIES 1 (Apr. 2009), <http://www.ifpri.org/sites/default/files/publications/bp013all.pdf>.

⁴⁰ Oliver de Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 503, 515 (2011).

⁴¹ Kartik Jayaram et al., *Africa's Path to Growth, Sector by Sector*, MCKINSEY QUARTERLY (June 2010), http://www.mckinsey.com/insights/economic_studies/africas_path_to_growth_sector_by_sector.

⁴² ANSEEUW, *supra* note 4.

⁴³ David Hallam, *International Investment in Agricultural Production*, in LAND GRAB? A RACE FOR THE WORLD'S FARMLAND 27, 27 (Michael Kugelman & Susan L. Levenstein eds., 2011).

The Republic of South Sudan, the world's newest nation,⁴⁴ is among the most sought after locations for large-scale land acquisitions.⁴⁵ 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."⁴⁶ Six years thereafter, 98.83% of the people of southern Sudan voted in favor of a Referendum on Southern Independence.⁴⁷ As a result, the Republic of South Sudan was formally established on July 9, 2011.⁴⁸ Private investors flocked to southern Sudan after the war ended⁴⁹ mainly due to its large size, low population density, and impressive natural resource wealth.⁵⁰ International investors were welcomed in southern Sudan with eager partners within the GoSS, local public officials, and community elites.⁵¹

South Sudan is a unique case, because it is a new country struggling to recover from decades of war and internal violence

⁴⁴ After a referendum held in January 2011, South Sudan declared its independence on July 9, 2011. See Jeffery 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&.

⁴⁵ See *United Nations Mission in Sudan, Background to the Comprehensive Peace Agreement*, UNITED NATIONS, <http://unmis.unmissions.org/Default.aspx?tabid=515> (last visited Jan. 6, 2013).

⁴⁶ *The Comprehensive Peace Agreement Between The Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army*, Dec. 31, 2004, <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>.

⁴⁷ *Results for the Referendum for Southern Sudan*, S. SUDAN REFERENDUM COMMISSION, <http://southernsudan2011.com/>.

⁴⁸ Gettleman, *supra* note 44.

⁴⁹ DAVID DENG & ANURADHA MITTAL, OAKLAND INST., UNDERSTANDING LAND INVESTMENT IN AFRICA: COUNTRY REPORT, SOUTH SUDAN 5 (Anuranda Mittel & Frederic Mousseau eds., 2011), http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/%20OI_country_report_south_sudan_1.pdf.

⁵⁰ *Id.*

⁵¹ *Id.*

between ethnic groups.⁵² The war seriously disrupted governance and undermined social hierarchies and traditional authorities.⁵³ Conflict continues to plague South Sudan. In December 2013, political rivalries erupted into a major conflict between ethnic groups in South Sudan.⁵⁴ A ceasefire was signed in May 2014,⁵⁵ but violence remains and reports of serious human rights abuses continue to be reported by aid organizations and human rights groups.⁵⁶

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.⁵⁷ 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).

⁵³ GOVERNMENT OF SOUTHERN SUDAN, SOUTH SUDAN LAND COMMISSION, DRAFT LAND POLICY (Feb. 2011) (copy held by author H.E. Robert Lado Lwoki).

⁵⁴ Isma'il Kushkush, *Three Days of Violence in South Sudan Leaves Scores Dead*, N.Y. TIMES, Dec. 17, 2013, http://www.nytimes.com/2013/12/18/world/africa/violence-in-south-sudan.html?_r=0.

⁵⁵ *South Sudan rivals Kiir and Machar agree peace deal*, BBC NEWS, May 10, 2014, 2:30 AM, <http://www.bbc.com/news/world-africa-27352902>.

⁵⁶ Carol Odera, *South Sudan Ceasefire Under Threat as Government and Rebels Clash*, REUTERS, July 20, 2014, 9:30 AM; see also Isma'il Kushkush & Nicholas Kulish, *Civilians Flee as Violence Worsens in South Sudan*, N.Y. TIMES, Feb. 26, 2014, <http://www.nytimes.com/2014/02/27/world/africa/civilians-flee-as-violence-worsens-in-south-sudan.html>.

⁵⁷ See generally Florence Martin-Kessler & Anne Poret, *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.⁵⁸ Operating in such a context comes with many potential risks and rewards to both investors and the people of South Sudan.⁵⁹

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.”⁶⁰ Categories of political risk associated with land investment may include: (1) civil unrest; (2) direct or indirect expropriation of property; and (3) corruption.⁶¹ A fourth type of risk is the risk that a company will lose potential business because its reputation or character has been called into question.⁶² 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).

⁵⁹ *See* Elizabeth Asiedu, *On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?*, 30 WORLD DEV. 107,107-11 (2002).

⁶⁰ NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER’S GUIDE 3 (2005).

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.).

⁶² *Reputation Risk*, THE ONLINE BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/reputation-risk.html#ixzz2HbAdhSQE>.

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 population⁶⁴ 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 continues⁶⁶ 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

⁶³ See Robyn Dixon, *South Sudan Violence Leaves Donors Disillusioned*, L.A. TIMES (Mar. 1, 2014), <http://articles.latimes.com/2014/mar/01/world/la-fg-south-sudan-governance-20140301> (detailing the concern by donors on the future of state building in South Sudan); See also, INTERNATIONAL CRISIS GROUP, SOUTH SUDAN: A CIVIL WAR BY ANY OTHER NAME, Africa Report No. 217 (2014), <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/south%20sudan/217-south-sudan-a-civil-war-by-any-other-name.pdf> (detailing the dynamics of the most recent civil conflict in South Sudan).

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.”).

⁶⁵ See SCHOMERUS ET. AL., LONDON SCHOOL OF ECONOMICS INSTITUTE FOR DEVELOPMENT STUDIES, SOUTH SUDAN AT ODDS WITH ITSELF: DYNAMICS OF CONFLICT AND PREDICAMENTS OF PEACE 9-10 (2010), <http://www.lse.ac.uk/businessAndConsultancy/LSEConsulting/pdf/southernSudan.pdf>; Jonah Leff, *Pastoralists at War: Violence and Security in the Kenya-Sudan-Uganda Border Region*, 3 INT'L J. CONFLICT & VIOLENCE 188, 191 (2009).

⁶⁶ See Ashish Kumar Sen, *Violence Mars Investment Scene in South Sudan*, WASH. TIMES, Dec. 13, 2011, <http://www.washingtontimes.com/news/2011/dec/13/violence-mars-investment-scene-in-south-sudan/?page=all>.

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.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.⁶⁹ Any attempt to adjust or undermine the rights of landholders is likely to face stiff opposition from groups at the local level.⁷⁰

2. *Expropriation.* – Under international law,⁷¹ host nations have the sovereign right to expropriate assets and to regulate activities within their jurisdiction.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.⁷³

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

⁶⁸ DENG & MITTAL, *supra* note 49, at 15.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (1987).

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. See G.A. Res. 1803 (XVI), U.N. Doc. A/5217 (Dec. 14, 1962); see also Emeka Duruigbo, *Permanent Sovereignty and People's Ownership of Natural Resources in International Law*, 38 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 inasmuch as government exercises the right to permanent sovereignty).

⁷³ G.A. Res. 1803, *supra* note 72, ¶4; see also, RUBINS & KINSELLA, *supra* note 60, at 8.

⁷⁴ The term "nationalization" is often used interchangeably with an expropriation of this sort if the taking occurs across an entire industry.

occurs.⁷⁵ 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."⁷⁶ 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

⁷⁵ Tippetts, Abbott, 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.").

⁷⁷ See *Metalclad*, *supra* note 76; Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB/00/2, Arbitration Award (May 29, 2003) 43 ILM 133; Starrett Housing Corp. v. Gov't of the Islamic Rep. of Iran, 4 Iran-U.S. C.T.R. 122 (1983).

⁷⁸ The Investment Promotion Act of 2011, 34 (S. Sudan), Jan. 20, 2010, <http://www.oxfam.ca/sites/default/files/imce/country-profile-south-sudan.pdf>.

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/africa/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.

⁸⁴ The Land Act of 2009, *supra* note 83, § 10(2)(ii)(b).

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.⁸⁶ Establishing a land system whereby communities are given ownership rights protects the rights of communities, but makes allocating land for investment more cumbersome.⁸⁷

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.⁸⁸ 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.⁸⁹

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).

⁸⁶ Lorenzo Cotula, *Land Deals in Africa: What is in the contracts?*, INT'L INST. FOR ENV'T & DEV. 16 (2011).

⁸⁷ See generally Clemens Hoffman, *The Contradictions of Development: Primitive Accumulation and Geopolitics in the Two Sudans*, in HANDBOOK OF LAND AND WATER GRABS IN AFRICA: FOREIGN DIRECT INVESTMENT AND FOOD AND WATER SECURITY 454 (Tony Allan et al. eds., 2013).

⁸⁸ The Land Act of 2009, *supra* note 83, § 15.

⁸⁹ GOVERNMENT OF SOUTHERN SUDAN, DRAFT LAND POLICY 2011, 1.6.7. (copy held by author).

adhere to the law.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ South Sudanese communities are highly mobile and often host a mix of groups.⁹⁴ 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.⁹⁵

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

⁹⁰ David K. Deng, *Competing Narratives of Land Reform in South Sudan*, in HANDBOOK OF LAND AND WATER GRABS IN AFRICA: FOREIGN DIRECT INVESTMENT AND FOOD AND WATER SECURITY 454, 450 (Tony Allan et al. eds., 2013).

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.⁹⁶ 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.⁹⁷ Yet, the state governor did not believe the General, or his family for that matter, owned the land.⁹⁸ The leader of the local county also knew nothing of the deal until nonprofit researchers asked him about it.⁹⁹ The investor believed that his contract to the land was secure by the strength of General Matip.¹⁰⁰ General Matip died in August of 2012,¹⁰¹ and it is unknown at the time of writing whether the land deal has been or will be nullified.¹⁰²

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.¹⁰³ 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

⁹⁶ Javier Blas & William Wallis, *U.S. Investor Buys Sudanese Warlord’s Lands*, FIN. TIMES, Jan. 9, 2009, 11:18 PM, <http://www.ft.com/cms/s/0/a4cbe81e-de84-11dd-9464-000077b07658.html#axzz2HGEDrED8>; McKenzie Funk, *Will Global Warming, Overpopulation, Floods, Droughts, and Food Riots Make this Man Rich? Meet the New Capitalists of Chaos*, ROLLING STONE, May 27, 2010; see also FRED PEARCE, *THE LAND GRABBERS: THE NEW FIGHT OVER WHO OWNS THE EARTH* 42 (2012).

⁹⁷ Funk, *supra* note 96.

⁹⁸ Deng, *supra* note 90, at 452.

⁹⁹ *Id.*

¹⁰⁰ Funk, *supra* note 96.

¹⁰¹ *South Sudan’s Paulino Matip Dies in Kenya*, BBC NEWS, Aug. 22, 2012, <http://www.bbc.com/news/world-africa-19346831>.

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 illusory agreements in order to make a quick fortune.¹⁰⁴

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.¹⁰⁵ 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.¹⁰⁶ Investors may decide to pay these bribes or fees for several reasons, most notably, because many projects would not ultimately occur without payment.¹⁰⁷ 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.¹⁰⁸

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.¹⁰⁹ This amounts to about twenty percent of the country's annual GDP.¹¹⁰ 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.¹¹¹ According to a Reuters special report

¹⁰⁴ *Id.* at 451.

¹⁰⁵ See RUBINS & KINSELLA, *supra* note 60, at 22.

¹⁰⁶ *Id.*

¹⁰⁷ See generally Susan Rose-Ackerman, *The Political Economy of Corruption, in* CORRUPTION AND THE GLOBAL ECONOMY (Kimberly Ann Elliott, ed., 1997), http://www.iie.com/publications/chapters_preview/12/2iie2334.pdf (highlighting the economic opportunities found in corrupt environments).

¹⁰⁸ *Id.* at 48.

¹⁰⁹ *South Sudan Officials 'Stole \$4bn'*, BBC NEWS, June 5, 2012, <http://www.bbc.com/news/world-africa-18326004>.

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).

¹¹¹ See Leonardo R. Arriola, *Patronage and Political Stability in Africa*, 42 COMP. POLITICAL STUD. 1339 (2009).

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.”¹¹²

The Southern Sudan Anti-Corruption Commission Act of 2009 governs anti-corruption efforts in South Sudan.¹¹³ 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.”¹¹⁴ 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.¹¹⁵

¹¹² Hereward Holland & Pascal Fletcher, *Special Report - In South Sudan, Plunder Preserves a Fragile Peace*, REUTERS, Nov. 20, 2012, 6:35 AM, <http://uk.reuters.com/article/2012/11/20/uk-south-sudan-governors-idUKBRE8AJ08K20121120>.

¹¹³ Anti-Corruption Commission Act of 2009 (S. Sudan), <http://southsudanngoforum.org/wp-content/uploads/2012/02/Anti-Corruption%20Commission%20Act%202009.pdf>.

¹¹⁴ *Id.* § 6(1).

¹¹⁵ THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN § 20 (2011), http://planipolis.iiep.unesco.org/upload/South%20Sudan/South%20Sudan_Transitional_constitution_2011.pdf.

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

¹¹⁶ Mut Turuk, *South Sudan: Anti-Corruption Commission, Functions and Effectiveness*, SUDAN TRIBUNE, Sept. 13, 2012, <http://www.sudantribune.com/spip.php?article43878>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Alan Boswell, *American Expelled from South Sudan for Anti-Corruption Work*, MCCLATCHY NEWSPAPERS, Aug. 20, 2012, <http://www.mcclatchydc.com/2012/08/20/162893/american-expelled-from-south-sudan.html>; Hereward Holland, *Anti-Graft Activist Kidnapped for 2 Days in South Sudan*, REUTERS, July 14, 2012, 12:18 PM, <http://www.reuters.com/article/2012/07/14/southsudan-corruption-idAFL6E8IE15H20120714>.

¹²⁰ See GOV'T OF THE REPUBLIC OF SOUTH SUDAN, SOUTH SUDAN DEVELOPMENT PLAN 2011-2013 (2011), <http://www.jdt-juba.org/wp-content/uploads/2012/02/South-Sudan-Development-Plan-2011-13.pdf> (providing government's plan to use donor funding to combat corruption); see generally U.K. DEP'T FOR INT'L DEV., SOUTH SUDAN OPERATIONAL PLAN 2011-2015 (2011), <http://www.jdt-juba.org/wp-content/uploads/2012/02/South-Sudan-Development-Plan-2011-13.pdf>; U.S. AGENCY FOR INT'L DEV., TRANSITION PLAN FOR SOUTH SUDAN 2011-2013 (2011), http://transition.usaid.gov/our_work/policy_planning_and_learning/documents/SouthSudanTransitionStrategy2011-13.pdf (detailing the plans of two major development donors for anti-corruption assistance).

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).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.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.¹²³ As many non-U.S. persons or entities vying for land in South Sudan come from countries with no FCPA counterpart,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,

¹²¹ 15 U.S.C § 78dd-1 (1998). The FCPA makes it unlawful for certain classes of U.S. persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. A detailed explanation and analysis of the FCPA is beyond the scope of this article. For a detailed account see U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11 (2012), <http://www.justice.gov/iso/opa/resources/29520121114101438198031.pdf>.

¹²² Conv. on Combating Bribery of Foreign Public Officials in Int'l Business Trans., Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 ILM 1, <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf>.

¹²³ Lucinda A. Low & John E. Davis, *Coping with the Foreign Corrupt Practices Act: A Primer for Energy and Natural Resource Sectors*, 16 ENERGY & NAT. RESOURCES L. 286, 287 (1998).

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.¹²⁵ Violations of the FCPA can lead to large civil and criminal penalties, sanctions, and remedies, including fines, disgorgement, and/or imprisonment.¹²⁶ Thus, international investors must take the law seriously and develop both internal compliance programs and transaction-specific safeguards.¹²⁷

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.”¹²⁸ 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.¹²⁹ There has been a growth in litigation against transnational corporations in Africa over the past two decades,¹³⁰ 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.¹³¹ The globalization of media

¹²⁵ Low & Davis, *supra* note 123.

¹²⁶ *Id.* at 315.

¹²⁷ *Id.* at 315.

¹²⁸ THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN § 20 (2011), http://www.sudantribune.com/IMG/pdf/The_Draft_Transitional_Constitution_of_the_ROSS2-2.pdf.

¹²⁹ Jędrzej George Frynas, *Social and Environmental Litigation against Transnational Firms in Africa*, 42 J. MODERN AFRICAN STUDIES 363, 371 (2004).

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.¹³² These campaigns have generally made judges more responsive to those injured by the acts of oil and mining companies.¹³³

While awards given by African courts are relatively small compared to American or European courts,¹³⁴ 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.¹³⁵ 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.¹³⁶ Among those who had faced reputational problems, twenty-eight percent described the financial toll as major.¹³⁷

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.¹³⁸ Some studies argue that international land investment contributes to food insecurity,¹³⁹ environmental

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.

¹³⁵ Richard Boele, Heike Fabig & David Wheeler, *Nigeria and the Ogoni II: A Study in Unsustainable Development*, 9 SUSTAINABLE DEV. 121, 125 (2001).

¹³⁶ *Reputation: Risks of Risk*, ECONOMIST INTELLIGENCE UNIT (Dec. 2005), <http://www.acegroup.com/eu-en/assets/risk-reputation-report.pdf>.

¹³⁷ *Id.*

¹³⁸ See de Schutter, *supra* note 40, at 503.

¹³⁹ See, e.g., Geary, *supra* note 15.

degradation,¹⁴⁰ corruption, lack of benefits for small-scale farmers,¹⁴¹ and the possibility of eviction and displacement.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.¹⁴³ According to a World Food Program 2012 assessment, thirty percent of South Sudanese households are either moderately or severely food insecure.¹⁴⁴ About forty-four percent of households receive at least one form of food-related assistance, such as food aid or seeds.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.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,

¹⁴⁰ See, e.g., 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), <http://www.foei.org/en/resources/publications/pdfs/2012/land-grabbing-cases-uganda/view>.

¹⁴¹ See, e.g., Cotula & Vermeulen, *supra* note 38, at 1243.

¹⁴² See, e.g., de Schutter, *supra* note 40.

¹⁴³ DENG & MITTAL, *supra* note 49, at 42.

¹⁴⁴ See generally WORLD FOOD PROGRAMME, FOOD SECURITY ANALYSIS: SOUTH SUDAN FOOD MONITORING COLLABORATIVE (Oct. 2012), <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).

¹⁴⁵ *Id.* (detailing the food security situation in South Sudan in 2012).

¹⁴⁶ Astrid R.N. Haas & Sarah Armstrong, *South Sudan's Greenbelt: Can Tapping Agriculture Assets Become the New Nation's Economic Elixir?*, USAID FRONTLINES (Sept./Oct. 2011), http://transition.usaid.gov/press/frontlines/fl_sep11/FL_sep11_SUDAN_AGRICULTURE.html.

Kenya, and other countries.¹⁴⁷ 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.¹⁴⁸

The South Sudanese Government believes their best hope for food security comes from increasing private investment.¹⁴⁹ Experience around the world suggests that the central path toward improving food security is through private investment and entrepreneurship.¹⁵⁰ 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.¹⁵¹ 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.¹⁵²

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.¹⁵³ 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.

¹⁵⁰ CALVIN MILLER, U.N. FOOD AND AGRICULTURE AGENCY, SOUTH SUDAN AGRICULTURAL MARKET INVESTMENT 1 (2008), http://www.fao.org/docs/up/easypol/521/3-4_sudancase_150en.pdf.

¹⁵¹ DENG & MITTAL, *supra* note 49, at 10; see also GOVERNMENT OF SOUTH SUDAN, SOUTH SUDAN DEVELOPMENT PLAN 2011-2013 (2011), <http://www.jdt-juba.org/wp-content/uploads/2012/02/South-Sudan-Development-Plan-2011-13.pdf> (listing development targets).

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.”¹⁵⁴ 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.”¹⁵⁵

Southern Sudanese expect large-scale investment to bring jobs to the local population.¹⁵⁶ Yet, many of the foreign multinational entities investing in South Sudan plan to employ highly mechanized types of farming that maximizes returns.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ Additionally, benefits in the form of jobs are further limited should the investor import labor to manage high-tech farming enterprises.¹⁶⁰ It is

community land ownership are likely to face stiff opposition from groups at the local level).

¹⁵⁴ Deng, *supra* note 90, at 451.

¹⁵⁵ DAVID K. DENG, NORWEGIAN PEOPLE’S AID, THE NEW FRONTIER, A BASELINE SURVEY OF LARGE-SCALE LAND BASED INVESTMENT IN SOUTH SUDAN 30 (Mar. 2011), http://www.rtfn-watch.org/uploads/media/new_frontier_large-scale_land_grab_sout_sudan.pdf.

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.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.¹⁶² Host countries, on the other hand, justify large-scale land acquisition as necessary to meet the host country's own food security needs.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.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 development¹⁶⁵ and demand a "peace dividend" from their government.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.¹⁶⁷ Any attempt to remove communities from the decision-making process will be faced with stiff opposition, and possibly, armed conflict.¹⁶⁸

AFRICA: FOREIGN DIRECT INVESTMENT AND FOOD AND WATER SECURITY 424, (Tony Allan, et al., eds. 2013).

¹⁶¹ *Id.*

¹⁶² COTULA, *supra* note 86, at 38.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Press Release, Amid 'Huge Expectations' for Transition to Democracy, South Sudan Will Need All Support It Can Get, Special Representative Tells Security Council, U.N. Press Release SC/10450 (Nov. 15, 2011), <http://www.un.org/press/en/2011/sc10450.doc.htm>.

¹⁶⁶ See ERIN MCCANDLES, UN PEACEBUILDING SUPPORT OFFICE, PEACE DIVIDENDS AND BEYOND 24 (2012), http://www.un.org/en/peacebuilding/pbso/pdf/peace_dividends.pdf.

¹⁶⁷ DENG & MITTAL, *supra* note 49, at 15.

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,”¹⁶⁹ unless governments and investors take certain steps to minimize risk.¹⁷⁰ Competition for control of revenues from primary commodity exports and rents continues to fuel cycles of corruption, conflict, and poverty in many African countries.¹⁷¹ 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.¹⁷² The risks of investment fueling corruption or

¹⁶⁹ The “resource curse” thesis posits that there is a negative relationship between dependency on natural resource endowments and economic development in part due to the deleterious impact resource dependency has on institutional quality. See generally TERRY LYNN KARL, *THE PARADOX OF PLENTY: OIL BOOMS AND PETROL STATES* (1997); JEFFREY D. SACHS & ANDREW M. WARNER, *NATURAL RESOURCE ABUNDANCE AND ECONOMIC GROWTH 2* (Harv. Inst. for Int’l Dev., Development Discussion Paper No. 517a, 1995); CARLOS LEITE & JENS WEIDMANN, *DOES MOTHER NATURE CORRUPT? NATURAL RESOURCES, CORRUPTION AND ECONOMIC GROWTH*, IMF WORKING PAPER WP/99/85 (1999) <http://www.imf.org/external/pubs/ft/wp/1999/wp9985.pdf>.

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.¹⁷³

Governments that rely on revenues from the export of primary commodities are also susceptible to the deleterious effects of price volatility.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.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.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.¹⁷⁷ When the Nigerian civil war ended in 1970, the country began a thirty-year period of almost uninterrupted military rule.¹⁷⁸ Nigerian military

(M.A. Cook ed., 1970); Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT'L ECON. L. 1, 17 (2005).

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

¹⁷⁴ Collier & Hoeffler, *supra* note 172, at 627.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See ANNEGRET MÄHLER, GERMAN INSTITUTE FOR GLOBAL AND AREA STUDIES, NIGERIA: A PRIME EXAMPLE OF THE RESOURCE CURSE? REVISITING THE OIL-VIOLENCE LINK IN THE NIGER DELTA (Jan. 2010), http://www.giga-hamburg.de/de/system/files/publications/wp120_maehler.pdf; Carmen Gentile, *Analysis: Nigeria's Resource Curse*, UPI, Feb. 14, 2008, 9:03 PM, http://www.upi.com/Business_News/Energy-Resources/2008/02/14/Analysis-Nigerias-resource-curse/UPI-82671203041007/.

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.¹⁷⁹ In 1970, twenty-six percent of the government's total revenue came from oil revenue.¹⁸⁰ By the end of military rule in 1999, oil revenues made up over eighty percent of all government revenues.¹⁸¹ Despite the massive increase in oil revenue, Nigeria in 1999 was one of the poorest counties in the world.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.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.¹⁸⁴ These violations of human rights have been committed principally in response to protests about the

¹⁷⁹ See James Donnelly-Saalfield, Note, *Irreparable Harms: How the Devastating Effects of Oil Extraction in Nigeria Have Not Been Remedied by Nigerian Courts, the African Commission, or U.S. Courts*, 15 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 371, 373 (2009).

¹⁸⁰ FRYNAS, *supra* note 178, at 26.

¹⁸¹ *Id.*

¹⁸² IMF *World Economic Outlook Database*, Apr. 2000, <http://www.imf.org/external/pubs/ft/weo/2000/01/data/> (Nigeria in 1999 was the twenty-first poorest nation in the world with a per capita GDP of \$279); See also GB AYOOLA ET AL., COUNTRY SYNTHESIS REPORT PREPARED FOR THE WORLD DEVELOPMENT REPORT 2000-2001, CONSULTATIONS WITH THE POOR: NIGERIA, <http://siteresources.worldbank.org/INTPOVERTY/Resources/335642-1124115102975/1555199-1124138866347/nigeria.pdf> (provides an assessment of the poverty situation in Nigeria at the turn of the century).

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.nber.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).

¹⁸⁴ HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES 1 (Jan. 1999), <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf>.

activities of the multinational oil companies.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸

A. Government Reforms

Since 1999, the FGN has been carrying out an ambitious reform agenda that focuses on fiscal responsibility,¹⁸⁹ transparency and accountability, development, and privatization.¹⁹⁰ The specific

¹⁸⁵ *Id.*

¹⁸⁶ Adam Nossiter, *Far From Gulf, A Spill Scourge 5 Decades Old*, N.Y. TIMES, June 16, 2010, http://www.nytimes.com/2010/06/17/world/africa/17nigeria.html?_r=0.

¹⁸⁷ *See Nigeria: Sustaining the Momentum for Growth*, WORLD BANK (Aug. 1, 2009), <http://documents.worldbank.org/curated/en/2009/08/11516615/nigeria-sustaining-momentum-growth>.

¹⁸⁸ *See Collier, supra* note 24, at 3.

¹⁸⁹ *See generally* NATIONAL PLANNING COMMISSION (NIGERIA), NATIONAL ECONOMIC EMPOWERMENT AND DEVELOPMENT STRATEGY (2004), http://siteresources.worldbank.org/INTPRS1/Resources/Nigeria_PRSP%28Dec2005%29.pdf (outlining the National Strategy for reform, focusing on four main areas: improving the macroeconomic environment, pursuing structural reforms, strengthening public expenditure management, and implementing institutional and governance reforms); *see also* Investment and Securities Act, No. 29 (2007) (Nigeria), <http://www.sec.gov.ng/files/20090915470014THE%20INVESTMENTS%20AND%20SECURITIES%20Act%202007.pdf>.

¹⁹⁰ World Bank, *supra* note 187; *see also* Pat Utomi et al., *Nigeria—The Political Economy of Reform: Strengthening the Incentives for Economic Growth*, THE POLICY PRACTICE (Oct. 2007), <http://thepolicypractice.com/papers/10.pdf>.

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.”¹⁹¹ 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.¹⁹² Accordingly, the first legislation President Obasanjo brought to the National Assembly was the Corrupt Practices and Other Related Offenses Act of 2000.¹⁹³ The Legislature subsequently enacted the Economic and Financial Crimes Commission Act of 2004¹⁹⁴ establishing the Economic and Financial Crimes Commission.¹⁹⁵

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.¹⁹⁶ The Act further criminalizes bribery by any individual of a public official,¹⁹⁷ and makes the failure of a government official to report an attempted bribe punishable by a fine

¹⁹¹ A. Irene Pogonson, *Globalization and Anti-Corruption Reform in Nigeria: 2003-2007*, in ANTI-CORRUPTION REFORMS IN NIGERIA SINCE 1999: ISSUES, CHALLENGES AND THE WAY FORWARD 59, 65 (David U. Enweremadu & Emeka E. Okafor eds. 2009).

¹⁹² Constitution of the Federal Republic of Nigeria (1999), <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>; Osita Nnamani Ogbu, *Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions, and the Political Will*, 14 ANN. SURV. INT’L & COMP. L. 99, 100 (2008).

¹⁹³ See Ogbu, *supra* note 192, at 100; see also Corrupt Practices and other Related Offenses Act No. 5 (2000) (Nigeria), <http://www.nigeria-law.org/Corrupt%20Practices%20and%20other%20Related%20Offences%20Act%202000.htm> [hereinafter *Corrupt Practices Act*].

¹⁹⁴ Economic and Financial Crimes Commission (Establishment) Act § 1 (2004) (Nigeria), [http://www.nigeria-law.org/Economic%20And%20Financial%20Crimes%20Commission%20\(Establishment\)%20Act.htm](http://www.nigeria-law.org/Economic%20And%20Financial%20Crimes%20Commission%20(Establishment)%20Act.htm).

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.¹⁹⁸ The Act gives the power to investigate corruption to an Independent Corrupt Practices Commission.¹⁹⁹ 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.²⁰⁰ Some analysts bemoan the lack of political will by the government to fight corruption²⁰¹ and how that has stalled the effective implementation of the Act.²⁰² 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."²⁰³

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."²⁰⁴ Financial crimes include money laundering, contract scams, counterfeiting, and fraud.²⁰⁵ The Economic and Financial Crimes Commission has been a resounding success.²⁰⁶ 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).

²⁰¹ See, e.g., HUMAN RIGHTS WATCH, CRIMINAL POLITICS: VIOLENCE, GODFATHERS, AND CORRUPTION IN NIGERIA 31 (Oct. 12, 2007), <http://www.hrw.org/reports/2007/nigeria1007/nigeria1007webwcover.pdf>.

²⁰² Ogbu, *supra* note 192, at 128-29.

²⁰³ Ijeoma I. Opara, *Nigerian Anti-Corruption Initiatives* (Berkeley Electronic Press Working Paper No. 1392) (2006), <http://law.bepress.com/cgi/viewcontent.cgi?article=6368&context=expresso>.

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.²⁰⁷

In addition to national legislation, Nigeria was the first country to adopt the Extractive Industries Transparency Initiative (EITI).²⁰⁸ The EITI is a global initiative that promotes transparency in company payments and government revenues from oil, gas, and mining.²⁰⁹ Countries voluntarily sign up to the EITI and report to an internationally appointed independent auditor on a monthly basis.²¹⁰ The Nigerian experiment with the EITI is ambitious and path breaking.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.²¹²

2. *Extractive Sector Regulatory Regime.* – The Petroleum Act of 1969²¹³ is the primary legislation underpinning the oil and gas

²⁰⁷ *Id.*

²⁰⁸ Nicholas Shaxson, *Nigeria's Extractive Industries Transparency Initiative*, CHATHAM HOUSE (2009), http://eiti.org/files/NEITI%20Chatham%20house_0.pdf.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 2.

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.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.²¹⁵ The holders of a license or lease are granted extensive rights and powers over the land.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.”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.²¹⁸

The Petroleum Act remains in force, but some of its provisions that protect the rights of investors and communities were overtaken by events.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.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).²²¹ In order to take advantage of foreign capital and expertise, the NNPC was authorized to form joint ventures with international

<http://www.lexadin.nl/wlg/legis/nofr/oeur/arch/nig/petroleumact.pdf>.

²¹⁴ *Id.* § 1.

²¹⁵ *Id.* § 2(1).

²¹⁶ Yinka Omorogbe, *The Legal Framework for the Production of Petroleum in Nigeria*, 5 J. ENERGY & NAT. RESOURCES L. 273, 275 (1987).

²¹⁷ Petroleum Act § 36.

²¹⁸ *Id.*

²¹⁹ Omorogbe, *supra* note 216, at 275-76.

²²⁰ Frynas, *supra* note 178, at 31.

²²¹ Omorogbe, *supra* note 216, at 277.

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

Under a joint venture model, the NNPC combined the functions of an oil company with the regulatory powers of a government ministry.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.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.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

²²² See Chudi Ubezonu, *Doing Business in Nigeria by Foreigners: Some Aspects of Law, Policy, and Practice*, 28 INT’L LAW. 345, 359 (1994) (noting that before 1989 a foreign company could only invest in Nigeria’s oil sector in the form of a joint venture arrangement); see also Oserheimen A. Osunbor, *Nigeria’s Investment Laws and the State’s Control of Multinationals*, 3 ICSID REV. 38 (1988).

²²³ Frynas, *supra* note 178, at 31.

²²⁴ *Id.* The sixty percent figure cited above exempts a production-sharing agreement with Ashland and the Tenneco-Mobil-Sunray venture.

²²⁵ *Id.* at 33.

²²⁶ Tunde Morakinyo & Odigha Odigha, *The Niger Delta and Oil Exploration*, Presentation to the 2009 Katoomba XV Conference, Accara, Ghana, (Oct. 6-7, 2009), http://rmportal.net/library/content/translinks/translinks-2009/forest-trends/2010-katoomba-xv-meeting-accra-ghana/Presentation_NigerDeltaOil.pdf.

²²⁷ Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1 (Afr. Comm’n Hum. & Peoples’ Rts. May 27, 2002), available at http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf.

abuses.²²⁸ 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.”²²⁹

Many observers of Nigeria believe reform of the countries’ regulatory regime is past due.²³⁰ While privatization of the oil industry proceeded steadily since the end of military rule²³¹ and the government transitioned to a policy of awarding all new contracts via production sharing contracts²³² instead of joint ventures, the basic regulatory regime has remained more or less unchanged. Several

²²⁸ *Id.* ¶ 55.

²²⁹ *Id.*

²³⁰ SNR Denton, *Nigerian Draft Petroleum Industry Bill*, AFRICAN UPDATE (Nov. 14, 2012), <http://www.dentons.com/en/insights/articles/2012/november/14/nigerian-draft-petroleum-industry-bill-2012> (stating that industry players are eagerly anticipating and welcoming the notion of a more structured, consistent, and transparent framework for the industry); *see also* *Nigeria’s Oil: A Desperate Need of Reform*, ECONOMIST (Oct. 20, 2012), <http://www.economist.com/news/middle-east-and-africa/21564906-goodluck-jonathan-says-he-wants-reform-oil-industry-really>.

²³¹ *See generally* *Oil and Politics in Nigeria*, PBS NEWSHOUR, Apr. 5, 2007, http://www.pbs.org/newshour/indepth_coverage/africa/nigeria/oil.html (noting that President Olusegun Obasanjo introduced reforms in 2003 to privatize the government-owned and -subsidized oil operations, or parastatals, partly in an attempt to attract more capital investment and foreign business partners).

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,²³³ adjusting the fiscal and legal regime governing the petroleum and natural gas industry, seems to be gathering steam in the Nigerian National Assembly.²³⁴

The Petroleum Industry Bill seeks to reshape the entire oil and gas industry in Nigeria.²³⁵ The Bill establishes a series of agencies and positions charged with overseeing the industry, and introduces a more transparent and competitive license award process.²³⁶ The major oil companies are actively lobbying for changes in the bill and their opposition has in part caused the delay.²³⁷ Discussion of the

²³³ The Draft Petroleum Industry Bill (2012) (Nigeria), <http://www.nigeria-law.org/Legislation/LFN/2012/The%20Petroleum%20Industry%20Bill%20-%202012.pdf>.

²³⁴ *Nigeria: Petroleum Industry Bill to Be Passed Soon - Sen Nwaogu*, ALLAFRICA.COM, Dec. 26, 2012, <http://allafrica.com/stories/201212270299.html>. For details on what the Bill includes see KPMG, ADVISORY SERVICES PETROLEUM INDUSTRY BILL 2012: HIGHLIGHTS OF THE FISCAL PROVISIONS (Aug. 2012), <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/taxnewsflash/Documents/nigeria-oct3-2012no1.pdf>.

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.

²³⁷ See Elisha Bala-Gbogbo, *Nigeria Bill Risks Output in Top African Oil Country, Shell Says*, BLOOMBERG NEWS, Nov. 30, 2012, <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/taxnewsflash/Documents/nigeria-oct3-2012no1.pdf>; *Pass Petroleum Industry Bill, Paul Collier Tells Nigeria*, AGENCE FRANCE-PRESSE, Nov. 9, 2012,

benefits and drawbacks of the Bill is beyond the scope of this discussion,²³⁸ but passage of these reforms would address some of the concerns of the African Commission and remove the cloud of uncertainty facing investors.²³⁹

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.²⁴⁰ Prior to the Land Act, the traditional land tenure system²⁴¹ 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.²⁴²

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-collier-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).

²³⁸ For a detailed discussion on the bill with section by section commentary, see ERNST & YOUNG, NIGERIA’S PETROLEUM INDUSTRY BILL – 2012 (2012),

[http://www.ey.com/Publication/vwLUAssets/Nigeria_Petroleum_Industry_Bill_%E2%80%94_2012/\\$FILE/Nigeria_Petroleum_Industry_Bill_26Oct12_lowres.pdf](http://www.ey.com/Publication/vwLUAssets/Nigeria_Petroleum_Industry_Bill_%E2%80%94_2012/$FILE/Nigeria_Petroleum_Industry_Bill_26Oct12_lowres.pdf).

²³⁹ See Camillus Eboh, *Nigeria Oil Reforms to Be Taken-up by New Parliament*, REUTERS, June 1, 2011, 5:47 AM EST,

<http://www.reuters.com/article/2011/06/01/nigeria-oil-reforms-idUSLDE75019L20110601> (arguing that “[U]ncertainty over the Petroleum Industry Bill . . . has left billions of dollars of potential investment on hold.”).

²⁴⁰ Land Use Act, ch. 202, § 1(1) (1978) (Nigeria), <http://www.nigeria-law.org/Land%20Use%20Act.htm>.

²⁴¹ 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).

²⁴² *Id.*

of communities to assert their rights in connection to oil exploitation.²⁴³ Arguably the most controversial section of the Land Act is Section 28, which provides that land may be appropriated for “overriding public interest.”²⁴⁴ Overriding public interest in this context includes “the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.”²⁴⁵ 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.²⁴⁶ After enactment of the Land Use Act, all negotiations on the alienation of land were to go through the state. Nigerian scholar Jędrzej 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.”²⁴⁷

Both President’s Obasanjo and Umaru Musa Yar’Adua advocated for reform or amendment of the Land Use Act.²⁴⁸ 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.²⁴⁹

²⁴³ Rhuks T. Ako, *Nigeria’s Land Use Act: An Anti-Thesis to Environmental Justice*, 53 J. AFRICAN LAW 289, 289 (2009).

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.

²⁴⁸ Otey Oham, *Nigeria: Representatives Reject Yar’Adua’s Land Reform Bill*, DAILY INDEPENDENT, Mar. 23, 2010, <http://allafrica.com/stories/201003240320.html>; *Presidential Committee Seeks Land Reform Panel*, THE GUARDIAN, Aug. 1, 2010, http://www.guardiannewsngr.com/index.php?option=com_content&view=article&id=94072:presidential-committee-seeks-land-reform-panel-&catid=1:national&Itemid=559.

²⁴⁹ See Emma Amaize, *Ex-MEND Leaders Threaten Jonathan Over Land Use Act*, VANGUARD, July 22, 2010, <http://allafrica.com/stories/201007220464.html>.

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.²⁵⁰ By the mid-1990s, the Nigerian government was ready to promote international investment and implement measures to protect foreign capital.²⁵¹ The Nigerian Investment Promotion Commissions Act of 1995 (NIPC)²⁵² is the primary legislation regulating foreign investment in Nigeria.²⁵³ The law was amended in 1998 to include the petroleum industry within its scope.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 1978,²⁵⁵ 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.

²⁵³ Investment Promotion Commissions Act Decree No. (16) (1995) (Nigeria), <http://www.nigeria-law.org/Nigerian%20Investment%20Promotion%20Commission%20Act.htm>; see also Khrushchev U.K. Ekwueme, *Nigeria's Principle Investment Laws in the Context of International Law and Practice*, 49 J. AFRICAN LAW 177, 177 (2005).

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.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.²⁵⁷

Additional guarantees against direct and indirect expropriation have come in the form of bilateral investment treaties and individual contract clauses.²⁵⁸ Nigeria currently has twenty-two Bilateral Investment Treaties in effect²⁵⁹ 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).²⁶⁰ Section 26(2) of the NPC also allows for the parties to a contract to determine how the dispute will be settled.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.).

²⁵⁶ Ekwueme, *supra* note 253, at 188.

²⁵⁷ Investment Promotion Commissions Act § 25(1)-(2) states:

- “(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.
- (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.”

²⁵⁸ See Duncan E. Alford, 36 INT’L J. LEGAL INFO. 506, 506 (2008) (reviewing Khrushchev Ekwueme, et al., PROTECTION OF FOREIGN INVESTMENT IN CONTEXT: NIGERIA’S INVESTMENT LAWS, TREATIES, AND PETROLEUM AGREEMENTS (2007)).

²⁵⁹ Ekwueme, *supra* note 253, at 198-202.

²⁶⁰ *Id.*

²⁶¹ Investment Promotion Commissions Act § 26(2).

Nigerian petroleum agreements contain local arbitration clauses and are thus resolved in Nigerian arbitral tribunals.²⁶²

The enactment of the NIPC Act has not opened the floodgates of new investment in Nigeria.²⁶³ While the risk of expropriation diminished, other forms of risk remain high in Nigeria and deter investment.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.²⁶⁵ The behavior of oil companies in Nigeria also resulted in an increasing number of civil suits filed against companies²⁶⁶ and violent conflicts between oil companies and village communities.²⁶⁷ Multinational oil companies have thus adjusted their behavior since 1995 by, among other things, implementing

²⁶² Ekwueme, *supra* note 253, at 203.

²⁶³ *Id.*

²⁶⁴ *Id.* See also Alford, *supra* note 258, at 507 (noting that frequent changes in government, the Biafran civil war, the continuing unrest in the Niger Delta, the imposition of Sharia law in the northern states of Nigeria, endemic corruption, armed violence, an erratic power supply, and a persistent shortage of fuel have discouraged foreign investment).

²⁶⁵ See Paul Lewis, *Rights Groups Say Shell Oil Shares Blame*, N.Y. TIMES, Nov. 11, 1995, <http://www.nytimes.com/1995/11/11/world/rights-groups-say-shell-oil-shares-blame.html?ref=kensarowiwa>.

²⁶⁶ See Frynas, *supra* note 129, at 371.

²⁶⁷ See generally INTERNATIONAL CRISIS GROUP, NIGERIA: Ogoni LAND AFTER SHELL 2-3 (2008), <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/B054%20Nigeria%20Ogoni%20Land%20after%20Shell.pdf> (detailing the history and dynamic of the conflict between Shell and the Ogoni people).

development programs, adjusting environmental practices, and engaging with communities.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.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.²⁷⁰ Often, governments compel foreign investors to implement certain measures aimed at building community support by host nation law.²⁷¹ Some corporations, however, implemented policies on their initiative to reduce reputational or legal risk²⁷² or to gain consent from a local community to carry out business activities in a certain area.²⁷³

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

²⁶⁸ See SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, GAS FLARING IN NIGERIA (2013), <http://s02.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2013notes/gas-flaring.pdf> (Shell oil cut gas flaring by seventy-five percent since 2003); SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, IMPROVING THE LIVES OF THE NIGER DELTA (2012), <http://s07.static-shell.com/content/dam/shell/static/nga/downloads/pdfs/briefing-notes/improving-lives-2012.pdf> (Shell contributed \$83.5 million to development initiatives (as required by law) in 2011, provided micro-credit that helped 30,000 people establish or expand businesses since 1998, and implemented a practice of obtaining Memorandum of Understanding with communities and local governments in 2006); see also CHEVRON CORP., *Nigeria: In the Community*, <http://www.chevron.com/countries/nigeria/inthecommunity/> (last modified Apr. 2012).

²⁶⁹ RUBINS & KINSELLA, *supra* note 60, at 40.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² David Spence, *supra* note 23, at 64-65; see also *A Survey of Corporate Social Responsibility: Just Good Business*, ECONOMIST, Jan. 17, 2008, <http://www.economist.com/node/10491077>.

²⁷³ Sylvanus Elijah Abila & Damfebo K. Derri, *Sustainable Development Issues in the Niger Delta*, in LAW AND PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES 213, 227 (Festus Emirik & Gowon Deinduomo eds. 2009).

the end of military rule in 1999.²⁷⁴ 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.²⁷⁵

As explained above, a company's reputation has a direct bearing on the likelihood of successful litigation.²⁷⁶ 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.²⁷⁷ Dissatisfied Ogoni leaders joined with international campaigners in the 1990s in a campaign to address the deleterious impact of oil exploitation.²⁷⁸ The Nigerian government

²⁷⁴ Frynas, *supra* note 129, at 371.

²⁷⁵ See, e.g., *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010) (Nigerian citizens filed suit against Chevron, asserting claims under Alien Tort Statute (ATS) that Chevron allegedly acted through Nigerian subsidiary to pay Nigerian military to carry out attacks on offshore oil platform. Ninth Circuit upheld jury verdict in favor of Chevron on all claims.); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted 132 S.Ct. 472 (Nigerian residents filed putative class action, under Alien Tort Statute (ATS), claiming that Dutch, British, and Nigerian corporations engaged in oil exploration and production aided and abetted Nigerian government in committing human rights abuses. Second Circuit dismissed claims.); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jad Mauoawad, Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 8, 2009, http://www.nytimes.com/2009/06/09/business/global/09shell.html?_r=0 (Shell settled out-of-court with the Saro-Wiwa family for \$15.5 million in 2009); see also, Ivana Sekularac & Anthony Deutsch, *Nigerian Villagers Sue Shell in Landmark Pollution Case*, REUTERS, Oct. 11, 2012, 11:24 AM, <http://www.reuters.com/article/2012/10/11/us-shell-nigeria-lawsuit-idUSBRE8991SE20121011> (discussing case against Shell in the Netherlands); Alexis Flynn, *Shell Faces Two Nigerian Spill Lawsuits*, WALL ST. J., Mar. 23, 2012, <http://online.wsj.com/news/articles/SB10001424052702304636404577299733426445746?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F%2FSB10001424052702304636404577299733426445746.html>.

²⁷⁶ See Frynas, *supra* note 129, at 147-48.

²⁷⁷ See Richard Boele, Heike Fabig & David Wheeler, *Shell, Nigeria and the Ogoni I: A Study in Unsustainable Development*, 9 SUSTAINABLE DEV. 74, 74 (2001).

²⁷⁸ *Id.*

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.²⁸⁷ The law sets minimum thresholds for the use of local labor, services, and materials,²⁸⁸ 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.²⁸⁹ 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.”²⁹⁰

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.) Act²⁹¹ requires an oil producing or

²⁸⁷ Soji Awogbade, *The New Nigerian Oil and Gas Industry Content Development Act – A Game Changer*, BUSINESS DAY (Nigeria), Apr. 29, 2010, <http://www.businessdayonline.com/ARCHIVE/index.php?option=comcontent&view=article&id=10547:the-new-nigerian-oil-and-gas-industry-content-development-act-a-game-changer&catid=133:legalindignity&Itemid=557>.

²⁸⁸ *Id.*

²⁸⁹ KPMG, NIGERIAN OIL AND GAS INDUSTRY CONTENT DEVELOPMENT ACT, 2010 1 (2010), <http://www.kpmg.com/NG/en/IssuesAndInsights/ArticlesPublications/Documents/Newsletter%20on%20Nigerian%20Oil%20and%20Gas%20Industry%20Content%20Development%20Act%20-%20June%202010.pdf>.

²⁹⁰ *Id.*

²⁹¹ Niger-Delta Development Commission (Establishment, etc.) Act (Nigeria), Act. No. (6) (July 12, 2000), http://www.commonlii.org/ng/legis/num_act/ndcea504/. For a detailed analysis of the act, see Nelson E. Ojukwu-Ogba, *Legislating Development in Nigeria’s Oil-Producing Region: The NDDC Act Seven Years On*, 17 AFR. J. INT’L & COMP. L. 136 (2009).

gas processing company operating in the Niger-Delta Area to pay three percent of its total annual budget to a Development Commission.²⁹² 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.²⁹³ The proposed Petroleum Industry Bill discussed above²⁹⁴ also creates a Petroleum Host Communities Fund to be filled by a requirement that upstream petroleum companies²⁹⁵ contribute ten percent of their net profits to the Fund on a monthly basis.²⁹⁶ The Fund will direct money to the development of the economic and social infrastructure of communities in petroleum producing areas.²⁹⁷

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 2010.²⁹⁸ 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

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, IQ GLOSSARY, <http://www.oilandgasiq.com/glossary>.

²⁹⁶ The Draft Petroleum Industry Bill, *supra* note 233, §§ 116-119.

²⁹⁷ *Id.* § 118.

²⁹⁸ WORLD BANK, NIGERIA: MACROECONOMIC STABILITY AND DELIVERING SERVICES TO THE POOR 1 (2011), http://siteresources.worldbank.org/IDA/Resources/73153-1302790208764/IDA_AT_WORK_Nigeria_2011.pdf (updated Apr. 2011).

significant impact on the daily lives of ordinary Nigerians.”²⁹⁹ 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.³⁰⁰ 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.

²⁹⁹ U.S. AGENCY FOR INT’L DEVELOPMENT, NIGERIA STRATEGY, 2010-2013 1 (2010), http://pdf.usaid.gov/pdf_docs/PDACP977.pdf.

³⁰⁰ WORLD BANK, *supra* note 298, at 2.

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.”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.”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.

³⁰¹ The Land Act of 2009, *supra* note 83, § 27(4).

³⁰² *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.³⁰³ South Sudan similarly has vested prosecutorial duties to both an independent anti-corruption commission and the Ministry of Justice.³⁰⁴ 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.³⁰⁵ 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/wbicms/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/SSRN_ID1353586_code1176273.pdf?abstractid=1334286&mirid=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.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.”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.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.”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).

³⁰⁶ Heilbrunn, *supra* note 305, at 15.

³⁰⁷ The Land Act of 2009, *supra* note 83, § 73.

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).

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.³¹⁰ 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”³¹¹ remains a risk.³¹²

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.³¹³ Investors must therefore find protection against “creeping” expropriation.³¹⁴

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.³¹⁵ 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.³¹⁶ 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.³¹⁷

The purchase of political risk insurance is one of the simplest steps an investor can take to mitigate political risk.³¹⁸ 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.³¹⁹ 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.³²⁰

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.³²¹ 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.”³²²

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.³²³ 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-

³²¹ OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, “INDIRECT EXPROPRIATION” AND THE “RIGHT TO REGULATE” IN INTERNATIONAL INVESTMENT LAW, *in* INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 43 (2005), http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/international-investment-law-a-changing-landscape_9789264011656-en#page1.

³²² LORENZO COTULA, OECD GLOBAL FORUM ON INT’L INV., REGULATORY TAKINGS, STABILIZATION CLAUSES AND SUSTAINABLE DEVELOPMENT 3 (Mar. 27-28, 2008), <http://www.oecd.org/investment/globalforum/40311122.pdf>.

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,³²⁴ and the political power of oil companies remains strong.³²⁵

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.³²⁶ This approach has been implemented by the Belgium-Luxembourg and Ethiopia BIT³²⁷ and the USA-Rwanda

³²⁴ Ekwueme, *supra* note 253, at 198-202.

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.

³²⁷ Agreement on the Reciprocal Promotion and Protection of Investments, Belg.-Lux.-Eth., Oct. 26, 2006, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/360>.

BIT.³²⁸ 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.³²⁹ 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.³³⁰

Lesson 6: The Government must ensure agreements are transparent.

According to a study by the *Economist*, land deals in Africa are “shrouded in secrecy.”³³¹ 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.³³² The Extractive Industry Transparency Initiative

³²⁸ Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, Feb. 19, 2008, S. Treaty Doc. No. 110-23, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2241>.

³²⁹ See COTULA, *supra* note 322, at 13-16.

³³⁰ Telesetsky, *supra* note 81, at 28.

³³¹ *Outsourcing’s Third Wave: Buying Farmland Abroad*, ECONOMIST, May 21, 2009, http://www.economist.com/node/13692889?subjectid=478044&story_id=13692889.

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.³³³ It informed the public and policymakers on the activities of oil companies and equipped civil society with a tool to hold their government accountable.³³⁴ 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.³³⁵ 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.³³⁶

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.³³⁷ 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.³³⁸

http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf [hereinafter RAI].

³³³ Shaxson, *supra* note 208, at 2.

³³⁴ *Id.* at 7.

³³⁵ RAI, *supra* note 332, at 9.

³³⁶ 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.

³³⁷ See generally WORLD FOOD PROGRAM, *supra* note 144 (showing the food security situation in South Sudan).

³³⁸ 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.³³⁹ Second, the Government should negotiate contracts that require products to be grown that align with local dietary preferences.³⁴⁰ 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.³⁴¹ 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.³⁴² The GoSS must undertake legislative efforts and negotiate contracts that ensure land investments contribute to its national strategy for agriculture or rural development.³⁴³

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

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.³⁴⁴ 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.) Act³⁴⁵ 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.³⁴⁶ 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.³⁴⁷

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.³⁴⁸ Because the community's right to land has been undermined by colonialism, years of war with its northern neighbor, and tribal conflict,³⁴⁹ issues of land and food production are highly emotive for

³⁴⁴ See Awogbade, *supra* note 287; KPMG, *supra* note 289, at 1.

³⁴⁵ See Niger-Delta Development Commission (Establishment, etc.) Act, *supra* note 291, § 7(b).

³⁴⁶ COTULA, *supra* note 86, at 30.

³⁴⁷ See *id.*

³⁴⁸ 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.").

³⁴⁹ *Id.*

the South Sudanese.³⁵⁰ 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 impact³⁵¹ 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.³⁵²

The experience of oil companies in Nigeria is particularly instructive in the area of social responsibility. It seems from Shell's recent social responsibility practices³⁵³ 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.³⁵⁴

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

³⁵⁰ See DENG & MITTAL, *supra* note 49, at 15.

³⁵¹ See, e.g., Josh Kron, *In Scramble for Land, Group Says, Company Pushed Ugandans Out*, N.Y. TIMES, Sept. 21, 2011, http://www.nytimes.com/2011/09/22/world/africa/in-scramble-for-land-oxfam-says-ugandans-were-pushed-out.html?_r=0Oxfam; Press Release, Oxfam International, Investigation into Uganda "Land Grab" Must Be Genuinely Independent and Transparent (Oct. 4, 2011), <http://www.oxfam.org/en/grow/pressroom/pressrelease/2011-10-04/investigation-nfc-uganda-land-grab-must-be-independent-transparent> (noting that the World Bank has called for an investigation into land grabbing claims in Uganda).

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 organizations³⁵⁶ 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.

³⁵⁶ See, e.g., WORLD BANK ET AL., *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*, U.N. Doc. TD/B/C.II/CRP.3 (Apr. 16, 2010).

³⁵⁷ See, e.g., AFRICAN UNION, AFRICAN DEVELOPMENT FUND, AND ECONOMIC COMMISSION FOR AFRICA, *Framework and Guidelines for Land Policy in Africa* (Sept. 2010), <http://rea.au.int/en/sites/default/files/Framework%20and%20Guidelines%20on%20Land%20Policy%20in%20Africa.pdf>.

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.³⁶⁰ Land investment also brings many risks to communities: the erosion of land rights, uneven development, environmental degradation, and violent conflict spurred by unmet expectations.³⁶¹ 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.³⁶²

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.³⁶³ Investors must likewise take efforts to secure their investment against the risk of indirect expropriation, engage in meaningful consultations with communities, ensure investments

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.³⁶⁴

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 undertaken by the FGJ 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.