REGULATORY FRAMEWORK FOR LAND ACQUISITION IN SUB-SAHARAN AFRICA. A COMPARATIVE STUDY.

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SYNOPSIS

This paper focuses on the regulatory frameworks that determine the conditions of access for foreign investors and the degree of control that national authorities can (or can no longer) maintain over land in sub-Saharan Africa.
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## Abbreviations

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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACP</td>
<td>African, Caribbean and Pacific</td>
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<tr>
<td>AfriIPAnet</td>
<td>African Investment Promotion Network</td>
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<td>AU</td>
<td>African Union</td>
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<td>CARICOM</td>
<td>Caribbean Community</td>
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<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>EAC</td>
<td>East African Community</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>MIGA</td>
<td>Multilateral Investment Guarantee Agency</td>
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<td>MNC</td>
<td>Multinational Company</td>
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<td>OHADA</td>
<td>Organization for the Harmonization of Business Law in Africa</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>SOE</td>
<td>State-owned enterprise</td>
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<td>SSA</td>
<td>Sub-Saharan Africa</td>
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<td>UNCTRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Commission on Trade and Development</td>
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<td>UNIDO</td>
<td>United Nations Industrial Development Organization</td>
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<td>VAT</td>
<td>Value-added Tax</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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1 Introduction

Developing countries have made extensive use of tax and trade policy instruments to favour foreign investors as a means to attract investment, promote industrial and technological development and create jobs. Examples include bilateral tax treaties to prevent double taxation and tax evasion; bilateral and multilateral trade and/or investment agreements; unilateral provisions with legal and tax incentives for specific sectors/industries; creation of economic free trade zones; and introduction of flexible rules to facilitate access by foreign investor to land/natural resources. In addition to this regulatory framework, governments have also created institutions such as agencies to facilitate foreign investment and to provide a ‘one stop shop’ to deal with the necessary licenses and permits.

Despite this regulatory and institutional framework, foreign investors face a lack of certainty in the tax and legal framework for their investments and sometimes the lack of guarantees in the event of expropriation. In order to create confidence in the legal system, and to make it easy for investors to access their markets, governments have made international agreements to protect investments. These agreements may be multilateral or bilateral and include, for instance, bilateral investment treaties, preferential trade and investment agreements, regional agreements and international investment contracts.

This paper focuses on the regulatory frameworks that determine the conditions of access for foreign investors and the degree of control that national authorities can (or can no longer) maintain over land in sub-Saharan Africa (SSA). It addresses the following questions:

- What are the main features of this regulatory framework?
- How has it changed in recent years?
- How does this affect land acquisition process?
- Does this regulatory framework contribute to sustainable (long-term) and inclusive (for all) growth in sub-Saharan Africa?


To date there has been no research from an investor’s perspective based on a comparative analysis of the regulatory framework in these selected countries. Published studies have focused on individual countries or on general descriptions of land deals.¹

The structure of this paper is as follows: Section 2 discusses the constitutional provisions applicable to land acquisition; Section 3 analyses domestic provisions for investment and for land acquisition. An analysis and comparison of the international agreements (including bilateral investment agreements) applicable to foreign land acquisition are presented in Section 4, and Section 5 draws conclusions and makes recommendations for further research.

¹ Cotula et al. (2009) examine agricultural investment and international land deals in Ethiopia, Ghana, Madagascar, Mali, Sudan, Mozambique and Tanzania. The Oakland Institute (2011) looks at land investments in Ethiopia, Mali and Sierra Leone and is publishing country reports on Mozambique, Sudan, Tanzania and Zambia.
2 Constitutional provisions

Among other issues, countries in SSA have been struggling to assert their post-colonial independence, guarantee ethnic, tribal and community equality, and establish the rules for land ownership, equitable land redistribution, land registration, and foreign access to land. These changes have taken place in national constitutions as well as in domestic and international regulations.

Seeking to become more competitive, many countries around the world have been amending or replacing their constitutions since the 1990s. Of the 17 countries under review, the following have made constitutional amendments, or introduced a new constitution:

- Democratic Republic of Congo (DRC), Ghana, Rwanda and Senegal introduced a new constitution between 2000 and 2009, and Burkina Faso, Mozambique and Uganda amended their 1990s constitution.
- Since 2010 Angola and Kenya have introduced a new constitution and Zambia has presented a parliamentary bill to approve a new constitution (pending at the time of writing).

In terms of investment and land acquisition, some of the changes to these constitutions created specific provisions regarding property rights; land ownership; land concession rules, i.e. for the transfer of land to non-citizens; arrangements for the Executive to implement land policy/investment rules; and the establishment of land commissions or boards. Such changes took place in the 17 SSA countries examined in this paper, and place limitations on land acquisition and international treaty concessions to foreign investors. In view of the importance of these provisions in the regulatory framework for land acquisition, this section offers a comparative analysis of the relevant constitutional provisions in the selected countries.

2.1 Right to property

In general, citizens have a right to own property. This right is sometimes exclusive, which means it is inalienable and cannot be removed from a person. In other settings it is not exclusive and the state may deprive the individual of this right by expropriating property in the public interest. In such cases, fair and prior compensation should be paid to the owner of the property.

All constitutions of the selected countries have introduced this right in a non-exclusive way, i.e. state expropriation is possible with payment of compensation. But who possesses this right and the grounds for expropriation differ among their national constitutions. With regard to property ownership, some constitutions refer to any person (e.g. Botswana, Burkina Faso, DRC, Ghana, Malawi, Mozambique, Namibia, Rwanda, Senegal, South Africa, Tanzania, Uganda and Zambia) while others refer to national citizens (e.g. Ethiopia and Nigeria) and still others mention that any person has this right individually or in association with others (e.g. Angola and Kenya). The reasons for such distinctions are not made explicit in their respective constitutions.

Nor is it specified in the case of Ethiopia and Nigeria, whose constitutions clearly refer to rights-holders as citizens, whether non-citizens can also claim compensation in case of expropriation. For instance, the Constitution of Ethiopia (art. 40), in which the right of ownership of property is an Ethiopian Citizen, the last proviso of art. 40 regarding expropriation states very generally that: ‘without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property’. The Constitution of
Nigeria (art. 43) states that ‘every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria’. However, the article regarding expropriation (art. 44) refers to any person that has been deprived of its right of movable or immovable property, the right ‘of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria’.

To date, there has been no discussion on whether only citizens may claim compensation in the case of expropriation, nor has the issue arisen in international investment disputes. It would therefore appear that despite differences among those with the right to own property, this right is guaranteed to everyone, i.e. companies or individuals, citizens and non-citizens, who owns property in a country.

The reasons for expropriation vary among the 17 countries and owners of or investors in land in SSA need to be aware of the justifications for expropriation before purchasing or investing in land in those countries. Among these reasons are:

- Town or country planning or land settlement (Botswana, Ghana).
- Public use, e.g. public purpose/interest/utility/necessity (Angola, Burkina Faso, DRC, Ethiopia, Kenya, Malawi, Mozambique, Namibia, Rwanda, Senegal, Uganda), although the respective constitutions do not explicitly define public use. The exception is the Constitution of South Africa, which establishes that the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to South Africa’s natural resources (art. 25(4) lit a). In Uganda, the term ‘public’ is also further developed to include public order, public morality and public health.
- Defence and public safety (Ghana, Uganda).
- The acquisition of land or an interest in land or a conversion of an interest in land, or title to land in accordance with the constitutional principles of land policy (art. 40 (3) lit a of the Constitution of Kenya).
- For the purposes prescribed by law or by the authority of an act of parliament (Nigeria, Tanzania, Zambia).
- To take measures to achieve land, water and related reform in order to redress the results of past racial discrimination (South Africa art. 25(8)).

The framework for expropriation in the selected SSA countries can often be characterised as vague and uncertain. First, although government may argue before a judge or administrative authority that there is a constitutional justification for expropriation, the scope of such justification is broad and vague, e.g. the use of terms such as ‘public use’ or ‘for the purposes prescribed by law’, and in some cases, expropriation due to ‘the implementation of land policy principles’. This undermines guaranteed property rights for landowners and investors in land.

There is also uncertainty and a lack of guarantees when the landowner disputes the reasons for expropriation asserted by the government or disagrees with the level of compensation due. In this case, the use of courts or tribunals can be often susceptible to corruption, lack of transparency, payment of bribes, and to long delays before the affected party can present the arguments against expropriation or dispute the amount of compensation paid.

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2 Art. 25(8) of the Constitution states that ‘no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1)’. Section 36(1) addresses the Bill of Rights.

3 There is considerable variation with regard to transparency and corruption, which it is important for investors to take into account, e.g. data provided by Transparency International in the 2010 Global Corruption Barometer, available at: http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results. The 2008 report on mapping of corruption in and SSA is available at: http://www.transparency.org/policy_research/surveys_indices/africa_middle_east. And a Council on Foreign Relations article on corruption and the payment of bribes in Sub-Saharan Africa is available at: http://www.cfr.org/democracy-and-human-rights/corruption-sub-saharan-africa/p19984.
In order to provide more guarantees to investors, all bilateral investment treaties (BITs) in the 17 countries under review contain clauses regarding expropriation and settlement of disputes between foreign investors and the host country. We would argue, however, that although foreign investors obtain more protection through the existence of arbitration clauses for dispute resolution in the treaties, their effectiveness is not guaranteed either for investors or for the host governments since the government may invoke the broader and more abstract justifications for expropriation.

Developing countries, including the 17 countries reviewed in this paper, also encounter the problem that their governments often have less experience than the foreign investors, the latter often having more resources and access to knowledge both during the negotiation of BITs and tax treaties and in international dispute-resolution processes. For example, trade officials often negotiate tax treaties, two areas that require different expertise (Lesage, McNair et al. 2010: 163). Another feature is that developing-country negotiators often have only a limited command of English and lack technical knowledge of complex provisions, with the result that treaty negotiators often have to rely on translators and may even accept provisions that they do not fully understand.

Thus, although foreign investors can invoke international arbitration clauses in BITs, the question is what can be done to remove this vagueness and uncertainty for all interested parties; and how the host country can avoid losing time, money and resources in dealing with disputes at the international level. Taking into account (a) the lack of experience of some of the African officials representing the host country in these dispute processes, and often their lack of knowledge of international procedures; and (b) the superior resources in time, money and knowledge of the foreign investors (mostly multinational companies (MNCs)) one might conclude that the host country needs to address the disadvantage of vague terminology, and that it is for the government to protect and guarantee property rights within its own territory. We discuss the content of the international arbitration clauses in the BITs in Section 4.2 below.

2.2 Land ownership

Countries in sub-Saharan African countries have struggled with land ownership since independence. This issue is by no means completely resolved but constitutional provisions for the state ownership of land, or even of the state or the national president administering the land on behalf of the country’s citizens, is an important dimension of the regulatory framework of land acquisition. The main issue is to identify who owns the land, and whether it can be expropriated.

The national constitution enshrines state ownership of the land in Ethiopia, Malawi, Mozambique, Nigeria and Rwanda and constitutional provision for the state or the president to administer the land on behalf of the people obtains in Angola, Ghana, Kenya, Uganda, Zambia (2010 parliamentary bill). Conversely, some constitutions lack provisions regarding land ownership, as in the case of Botswana, Burkina Faso, DRC, Namibia, South Africa, Senegal and Tanzania.
In terms of land acquisition, in some cases it is clear that only citizens of the country may own land, and that for non-citizens (foreigners) the only alternative is to take out a fixed-term lease.

2.3 Land concessions

In addition to provisions regarding state ownership of land, the system of classification of land is also relevant to the rules governing access both to citizens and to foreign investors. The types of land available in SSA vary depending on:

- How the land was acquired, i.e. land-tenure systems (freehold, lease, customary)
- Ownership (e.g. tribe, community)
- Location (i.e. rural, urban)
- How the land is used (e.g. oil exploitation, water, energy, bio-fuel, agri-business)

These distinctions affect the regulatory framework for land acquisition by foreign investors as there may be different tenure rules for each type of land, including the fact that some land may only be leased and not owned outright.

The first issue to be addressed is how land is classified in the country’s constitution. For example, in Botswana the constitution refers to tribal land and state land; in Kenya land is classified as public, community or private (art. 61 to 64); in Uganda it is classified as customary, freehold, mailoland, and leasehold (art. 237 (3)); customary land is tribal land, mailoland is colonial land that was granted to individuals and churches, and a citizen can lease freehold land to a foreigner. The 2010 Bill Constitution of Zambia distinguishes between state land and customary land (art. 353 and 354). South Africa, classifies the land as public, state, provincial and municipal land; Malawi classifies land as customary, public and private (land held in either freehold or leasehold ownership, both in rural and urban areas). In principle, only some types of land can be held by foreigners, namely state, private and freehold land and leasehold. It can be harder for foreigners to acquire other types of land (e.g. tribal and customary land) and is sometimes prohibited (e.g. mailoland).

This overview reveals that the 17 SSA countries under review have customary laws that govern land use. Some constitutions recognise customary law provided that it is consistent with formal legal provisions (Kenya, South Africa). In principle, even though there are references in these constitutions regarding customary land ownership and legal land ownership, no legal provisions appear to regulate which of the two types of ownership will prevail. An interesting exception is the Constitution of Botswana, in which art. 88 states that the laws enacted by the National Assembly (Legislative) are limited by customary practice and tribal organisation of property, and that the National Assembly cannot therefore change customary law or tribal property.

Some constitutions in the selected countries protect occupants in good faith (bona fide) who may not hold (legal) land title, for instance in the case of compensation for expropriation to such occupants (Kenya, 2010 Bill Constitution of Zambia). Others (Mozambique) state that an occupant’s right to the use and enjoyment of the land by in good faith is protected provided...

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6 Foreigners cannot own mailoland, and its use is subject to the agreement of bona fide or lawful occupants, who may not own the land but have the right to reside there.
7 Article 88 states that ‘the National Assembly shall not proceed upon any Bill (including any amendment to a Bill) that, in the opinion of the person presiding, would, if enacted, alter any of the provisions of this Constitution or affect—
(c) customary law, or the ascertainment or recording of customary law; or
(d) tribal organization or tribal property, unless
(i) a copy of the Bill has been referred to the House of Chiefs after it has been introduced in the National Assembly; and
(ii) a period of 30 days has elapsed from the date when the copy of the Bill was referred to the House of Chiefs’.
We would argue, however, that the wording following of items (i) and (ii) can allow for a National Assembly to change customary law or tribal property if the House of Chiefs (the second chamber) has not made any comments on the Bill.
that the law has not granted this right to another person (art 111). More specifically in respect of customary land ownership, the Constitution of Uganda (art. 237(8)) states that lawful or bona fide occupants of land (including mailoland) shall enjoy security of occupancy. Thus the constitution protects rightful occupants of customary land even if they do not have legal title.

The second issue is the provision for land concession in the selected countries. Their constitutions differ regarding who may own land (citizens and/or non-citizens) as well as the legal instruments that permit foreign investors to hold land (purchase, title or lease). Some countries have introduced specific rules in their constitutions or land laws governing concession. Other countries like Tanzania include in their land laws the right of non-citizens to take out a 99-year lease. Since this paper focuses on constitutional and investment law provisions, it does not therefore examine land laws in any detail.

The Constitution of Kenya explicitly provides that non-citizens may not own land outright and that a lease may not exceed 99 years (art. 65). In Ghana, a leasehold for non-citizens may not exceed 50 years (art. 266 (2)). In Uganda and in the 2010 Bill Constitution of Zambia, non-citizens may only lease land for a period of time determined by parliamentary legislation (art. 237 (2) lit. c for Uganda and art. 353 (3) for Zambia).

The most relevant issue is the concept of lease as it relates to landholding by non-citizens. The decision of those who framed the various constitutions to allow foreigners only to lease and not to purchase or rent land raises questions about the concept of lease, given that it is not defined in the respective constitutions or investment legislation. The Oxford Dictionary of Law defines it as ‘...a contract under which an owner of property (the *landlord or lessor) grants another person (the *tenant or lessee) exclusive possession of the property for an agreed period, usually (but not necessarily) in return for rent and sometimes for a capital sum known as a *premium’. The word ‘lease’ refers to the contract and ‘leasing’ to the ‘process of taking a lease’ (Gao, 1999: 15). In other words, during the period of a lease, the lessee (investor) has possession of but does not own the land. Thus, the lessee cannot make the land over to others or enter it in the land register (if any) of the country.

It is not clear from the provisions of the selected constitutions what rights foreign investors or non-citizens enjoy in relation to the type of lease (i.e. operational or financial). In an operational lease the lessee is generally interested only in using the asset while in a financial lease, the lessee intends to acquire ownership at the end of the lease period, for instance by exercising an option to purchase.

While it is beyond the scope of this paper to provide a comprehensive classification of different types of lease, it is important to analyse the type of ownership that the lease provides to the lessee. Unfortunately, the lease contracts concluded in the SSA countries under review are governed by the secrecy of land deals (Hall, 2011: 196), which means there are no available data on the various types of lease. Given that the state often owns the land, we may infer that many of the leases in the 17 SSA countries under review are operational rather than financial.

In financial leases, the lessee (investor) can become the owner of the asset by purchasing it at the end of the lease term from the lessor (legal owner). In operational leases, the lessee (investor) uses but cannot own the land. At the end of the lease term, the investor returns the land to the lessor (legal owner). The argument for operational leases in SSA is that given the constitutional and legal provisions for the state to own or administer the land on behalf of the people and that the investor (non-citizen) cannot own land, this rules out the possibility of financial leases since the state cannot sell the land.

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9 A premium can be paid if it has been agreed that a purchase option will be exercised at the end of the lease term.
10 See for instance my PhD dissertation on leasing dealing with a comparison of the he tax, accounting, banking, and private law aspects of cross-border leasing in Colombia, France, the Netherlands and the USA (Mosquera Valderrama, 2007).
It might be argued that although lease contracts have not given rise to any disputes with investors regarding land, the use of lease is an important investment incentive. Operational leases will be treated as off-balance-sheet transactions, meaning that no reporting on these leases is required in the company or individual investor accounts. But although the concept of lease protects the principle of state ownership, it may be asked what this ownership amounts to when leases can run for periods of 50 to 99 years, after which they can be renewed. If such operational (off-balance) leases run on, how should states regulate them? Are such long-term leases sustainable? The Oakland Institute (2011) has published three extensive reports regarding land investment deals including the use of long-term leases in Ethiopia, Mali and Sierra Leone (The Oakland Institute, 2011), and reports on Mozambique, Sudan, Tanzania and Zambia are in the pipeline. We believe, however, that African policy-makers, legislators and those involved in constitutional development can benefit from an overall comparative analysis of land policies and more specifically the consequences of land leases for investment, accounting reporting, and taxation.

2.4 Constitutional provisions applicable to land and investment

Some national constitutions include rules regarding land and investment. For instance, Ghana, Kenya, Malawi, Mozambique, South Africa, Uganda and Zambia in its 2010 bill have made relevant provisions on land policy, examples of which include the use of land and land acquisition. The following countries have investment provisions: DRC, Ghana, Kenya, Mozambique, Namibia, Uganda, and Zambia (in its current constitution and its 2010 bill). Examples include provisions encouraging foreign investment, regional integration, and authorising joint ventures between local and foreign investors.

Some countries have a land board or commission in charge of directing land policy, e.g. Ghana, Kenya, Uganda and Zambia in its 2010 bill, although their precise functions differ. For instance, the land commission of Ghana is charged with advising the government on areas for land development, land registration, and other functions assigned by the minister responsible for lands and natural resources (art. 258). Conversely, the land commission in Kenya has both abstract duties such as to manage public land and advise on land policy and more specific responsibilities such as assessing tax on land, monitoring and providing oversight for land-use planning throughout the country, initiating investigations into claims of injustice, and encouraging the application of traditional dispute-resolution mechanisms in land conflicts (art. 67).

Some constitutions authorise the parliament or government to introduce laws, decrees and codes regarding land and investment policy, as in the case of Kenya, Rwanda, Uganda and Zambia; and for investment in Namibia. Despite provisions for land policy and land commissions or boards set out in their constitutions, the countries under review leave a considerable margin of discretion to the state to regulate land concessions and transfers to foreign investors. This discretionary power means that the legislative and the executive branches of government could potentially introduce decrees or administrative rules that might affect foreign investors.

In order to protect investors from any such changes, several countries have introduced a stability clause in investment contracts. This clause effectively guarantees that legislative changes will not be applicable to the investor for the period of the contract. Such stability clauses have previously applied to oil and mineral extraction (e.g. Ghana and South Africa), but it could be argued that they could also be applied to investments in water, energy and land.

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11 Cotula et al. (2009: 8, 104) argue that long-term land leases to foreign investors are no longer sustainable unless there is some level of local satisfaction and suggest that ‘innovative business models that promote local participation in economic activities may make even more commercial sense. These include outgrower schemes, joint equity with local communities and local content requirements. On the last point, well established practice from other sectors like extractive industries may provide useful insights’.
The number of land deals (contracts) that include these stability clauses remains unknown (Smaller and Mann, 2009). The secrecy surrounding agricultural land deals (Smaller and Mann, 2009: 3) and the absence of empirical data/reports (Cotula et al., 2009: 107) or of information on stability clauses leads to a lack of transparency and accountability on the part of investors and governments regarding the potential benefits of such clauses. In fact the Tax Justice Network in Africa argues that these clauses ‘prevent future governments from renegotiating contract provisions, possibly including limits to length of the contracts’ and therefore reduce the governments’ bargaining power in international negotiations.

In summary, the constitutions of the countries reviewed in this paper contain provisions regarding property rights; expropriation and payment of compensation; rules regarding land concessions to citizens and foreigners; land commissions and boards; and delegated powers to the legislative and executive branches of government to implement laws, decrees and regulations on land and investment. A comparative overview of these issues for the selected countries is presented in Table A1 in Annex I.

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12 Smaller and Mann (2009) also elaborate on the consequences of the stability clauses in agricultural investment contracts and refer to the difficulty of finding empirical evidence of these contracts.

13 The only comprehensive report on stability clauses is Shemberg (2008).

3 Domestic legislation regarding investment

This section deals with the institutions and domestic rules for investment including benefits and incentives for foreign investors.

3.1 Investment institutions

All of the countries under review have an investment-promotion agency, which in some cases provides assistance to foreign investors and acts as a ‘one stop shop’ for all issues concerning approval of foreign investment (registration, licences, etc). In some countries these agencies facilitate foreign acquisition of real estate, e.g. the Land Bank promoted by the Investment Centre in Tanzania, the Zambia Development Agency that facilitates acquisition and disposition of all property in Zambia, and in Mozambique the Investment Promotion Centre, which helps investors to find suitable land for development, including agricultural land. Some such agencies may offer extra incentives for foreign investors. In Tanzania, for instance, a register creates incentives for foreign investors to participate in joint ventures with Tanzanians or to have wholly-owned foreign projects; in Botswana the companies operating within the jurisdiction of the Financial Services Centre are offered a reduced tax rate of between 15% and 25%.15 Some of these investment agencies16 are part of the African Investment Promotion Network (AfriIPAnet) promoted by the United Nations Industrial Development Organization (UNIDO).17

3.2 Investment rules

Most of the countries in this study have investment regulations in form of an Investment Law or Code. Over the years legislation has been introduced, replaced and/or amended and changes are in progress in some countries, e.g. the Investment Code of Burkina Faso was reviewed in 2010, the 2010 draft Investment Law of Angola, and the 2011 review of the Namibia Foreign Investment Act. The countries without any investment legislation are Botswana, whose government presented a bill to the National Assembly (Legislative) in April 2011 to merge two institutions for investment, but did not include any investment law;18 and South Africa, which has not yet enacted such legislation.

Regarding the treatment of foreign investors, in principle, domestic and foreign investors are treated equally (national treatment) for instance in Angola, Congo, Namibia, and Senegal. However, some countries place restrictions on foreign investors. For instance:

- In Ethiopia, equal treatment for foreign investors except for supply of electrical energy, postal services or only in joint ventures for the manufacture of weapons and in telecommunications.
- In Ghana, equal treatment for foreign investors except for banking, fishing, mining, petroleum and real estate.
- In Uganda, foreign participation is allowed except in areas of national security, business on crop-production or animal production, retail commerce and postal services among others.

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16 The agencies of the following countries belong to AfriIPAnet: Burkina Faso, Ethiopia, Ghana, Kenya, Malawi, Mozambique, Nigeria, Senegal, Tanzania and Uganda.
17 AfriIPAnet provides national and regional intermediary organisations in the public and private sector with timely and accurate information on the needs, performance, impact and future plans of different investor categories in Africa.
• In Nigeria investments in national security such as firearms and military equipment are reserved to domestic investors.

In addition, some countries encourage partnerships between foreign and domestic (public/private) companies by offering favourable treatment. This may extend the special treatment given to state-owned enterprises (SOEs) or the public sector, such as the Regime for Public Private Partners in Tanzania. In other cases the participation of domestic investors for certain activities is required, such as in Nigeria where foreign investors need to establish a joint venture with domestic investors in respect of petroleum activities. Similar participation has also been discussed in the proposed amendments to the Investment Act of Namibia.

3.3 Criteria for investors to be entitled to incentives and tax benefits

Investors’ entitlements to incentives and tax benefits vary.19 Of the 17 countries included in this comparative review, only the DRC lacks such entitlement criteria. The first criterion for incentives in the remaining countries is the type of activity carried out by foreign investors:

• Angola (agriculture, power, water and in development hubs20)
• Botswana (agricultural hub since 2008)
• Burkina Faso (greenfield investments)
• Mozambique (land designated for development);
• Rwanda (agro-based industries, bio-diesel, water resource activities, land husbandry/water harvesting and hillside irrigation, and additional investment if considered by the government21)
• Senegal, South Africa and Uganda (agro-processing)
• Tanzania (agriculture, energy, transportation, infrastructure, biofuel)
• Zambia (agri-business and hydroelectric power generation)

Some countries provide performance-related incentives for investment, e.g. in Angola for investment capable of achieving the economic and social goal of developing the interior or hinterland and in Kenya for activities that will benefit the country such as value-added in the processing of agricultural resources among others.

Other countries offer favourable treatment to foreign investors depending on the amount of capital invested (e.g. Angola, Burkina Faso, Ethiopia, Ghana, Kenya, Malawi, Mozambique, Namibia, Rwanda, Senegal, Tanzania, Uganda and Zambia); the location of the investment (DRC; and Uganda offers a ten-year tax holiday if agricultural investment is located more than 25 km from Kampala); or the use of local components22 (in Nigeria, local value-added, raw materials and labour; and in Mozambique and DRC local labour).

In sum, all 17 countries under review have investment agencies to promote and facilitate investment, including land acquisition by foreign investors, and all except for Botswana and

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19 These benefits can include relaxation of exchange controls, remittance of profits, exemption or reduction of tax, and exemption of customs duties. For an overview on tax policy, tax incentives and tax administration in Sub-Saharan Africa see Volkerink (2009: 37–40); and Fjeldstad and Rakner (2003: 3–5).
20 The Industrial Development Hubs or PDIs are one of the underpinnings of the Angolan Re-Industrialisation Programme, which is aimed at boosting the industrial sector to become the economy's main engine. The PDIs are strategic parcels of land set aside and equipped with basic industrial infrastructure, e.g. energy, water, telecommunications, road and/or railway access. Businesses willing to establish themselves in these areas may, among other incentives, be entitled to reduced land prices, tax benefits, incentives and government grants. Information based on Foreign Agricultural Investment Country Profile, available at: http://www.iie-angola-us.org/investorguide2.htm.
21 Article 19 of the Investment Code (Law 26/2005 of 17 December 2005) states that ‘Upon request by the Board of Directors of the agency, and depending on the nature of projects and the importance they have to the nation, their location or the capital invested, the Cabinet may put in place additional incentives and facilities for investors’.
22 The Domestic Content Act in 2010 to further support domestic production requires oil and gas production and service companies to use local resources for the delivery of some goods and services that are currently sourced from outside the country, according to Nigeria. US Investment Climate 2011, published by the US Department of State.
South Africa have Investment Laws, Codes and Decrees regulating the treatment of foreign investors and activities exempt from the same treatment as domestic investors. The countries also have investment rules setting out the requirements (type of activity, performance, amount of capital, location and use of local components) that foreign investors must meet in order to obtain special incentives and tax benefits. Some of these requirements influence how the investor uses the land given that in some countries legislators and/or government have made provisions with specific incentives for investment in activities such as agri-business, power, water, development hubs, biofuels and land husbandry, among others. A table with a comparative overview of these issues is presented in Annex II.
4 International framework: bilateral investment treaties

In most of the national constitutions, with the exception of Botswana, the framework for international treaties is set out in the constitution. In general, before an international treaty enters into force it needs to be incorporated into domestic law (i.e. approved by the legislature) and in some cases (e.g. Burkina Faso and Senegal) a constitutional review is also required to ensure that the treaty conforms to existing legal provisions. This ratification procedure also applies to regional and/or multilateral agreements and to bilateral treaties, including bilateral investment treaties (BITs).

Countries may also reach regional agreements where appropriate. For instance, all of the countries under review are signatories to one or more of the following: East African Community (EAC), Southern African Development Community (SADC), Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA) and the African Union (AU) (comprising 53 states).

Examples of multilateral agreements are the 2005 Partnership Cotonou Agreement with African, Caribbean and Pacific (ACP) countries (including the Caribbean Community (CARICOM), SADC and EAC countries) and the Trade and Investment Framework Agreement (multilateral version: EAC with the USA, bilateral version: Mozambique with the USA).

In order to promote trade and investment, countries may enter into free-trade agreements; custom agreements; preferential trade agreements; BITs for the (reciprocal or not) promotion and protection of investments; and economic partnership agreements. Examples of other specific agreements in the selected countries include preferential investment facilitation and property acquisition agreement (Ethiopia with Djibouti), investment incentive agreement (Ethiopia with the USA), agreements for (technical, development, economic) cooperation (Ethiopia) and stability agreements mostly for the extractive sector, i.e. mining, oil, gas (Ghana).

4.1 Provisions of BITs

According to the United Nations Commission on Trade and Development (UNCTAD), as of 1 June 2011 all of the countries covered in this study have concluded BITs for the promotion and protection of investments with developing (including neighbouring) countries and developed countries. South Africa has the most, i.e. 46 signed, of which only half have entered into force. All the other countries have also signed five or more BITs, although only between one third and half have entered into force (with the exception of Mozambique, where UNCTAD reports that 20 of 24 have entered into force).

It may be argued that a constraint on a BIT entering into force is the constitutional requirement for it to be incorporated into domestic law, which gives the legislature and the political opposition the opportunity to contest the signing of the BIT and its provisions for protecting foreign investors. Given the political instability in sub-Saharan Africa and the

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23 EAC members: Burundi, Kenya, Rwanda, Tanzania and Uganda.
24 SADC members: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.
25 ECOWAS members: Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.
26 COMESA members: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.
frequent changes of government, it may be also argued that political issues play an important role since a change of government might lead to a change in the investment policy. This means that, depending on the incoming government’s priorities, the entry into force of BIT can be postponed or negotiations can be stalled.

The main aim of a BIT is to guarantee rights and privileges (reciprocal or not) to the investors. They provide fair and equitable treatment to foreign investors (national treatment); favourable treatment for the investors and the investments covered under the treaty concerning agreements with a third country; easy transferability of funds; payment of compensation in the event of expropriation; and dispute-resolution mechanisms (for more details see Smaller and Mann, 2009: 11–13). These are standard BIT provisions that have developed over time and that emphasise the protection of foreign investors (Johnson, 2010: 919).

Some of the BITs concluded by the selected countries include provisions such as:

- A provision for transparency, which means that laws, regulations, procedures and international agreements that may affect the BIT should be promptly published and communicated to the other party, as in the case of some BITs concluded with Austria (Ethiopia, Namibia, South Africa) and with Finland (Ethiopia, Nigeria, Zambie).
- A Most Favoured Nation Treatment in matters of taxation except if there is bilateral tax treaty, participation in a customs union or on the basis of reciprocity with a third state (some BITs concluded with the Netherlands (i.e. Mozambique, Namibia, Nigeria, South Africa, Uganda and Zambia).
- A provision excluding taxation from the BIT scope, e.g. between Mozambique and Uganda (art. 4(2)) and between the countries under review with the USA (Congo, Mozambique, Senegal and Rwanda).
- A prohibition on introducing performance requirements for their investments in the BIT concluded by Rwanda and the USA.

29 The 2009 European Report on Development (‘Overcoming Fragility in Africa’) suggested that the right level of regional integration, including local leadership and adequate incentives for individual nations, is required to take advantage of regional integration mechanisms. Schuman (2009: 130) argues that although the underlying problems were identified as poor governance, weak national institutions, and lack of political will, the Report analysed neither the causes nor the possible solutions.

30 For example, BIT Ethiopia-Austria art. 4 states.

’(1) Each Contracting Party shall promptly publish or otherwise make publicly available its laws, regulations, procedures as well as international agreements which may affect the operation of the Agreement.

(2) Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to the other Contracting Party on matters referred to in paragraph (1) of this Article.

(3) No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws and regulations protecting confidentiality’.

31 For illustration purposes, BIT Mozambique-the Netherlands art. 4. ‘With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party, who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State who, are in the same circumstances, whichever is more favourable to the nationals concerned. For this purpose, however, any special fiscal advantages accorded by that Party shall not be taken into account:

a) under an agreement for the avoidance of double taxation; or
b) by virtue of its participation in a customs union, economic union or similar institution; or
c) on the basis of reciprocity with a third State’.

32 For instance, the BIT between Mozambique and the USA art. 13 states:

‘1.No provisions of this Treaty shall impose obligations with respect to tax matters, except that: article III, IX AND X will apply with respect to expropriation, and

Article IX will apply with respect to an investment agreement or an investment authorization.

2. With respect to the application of Article III, an investor that asserts that a tax measure involves an expropriation may submit that dispute to arbitration pursuant to Article IX, paragraph 3, provided that the investor concerned has first referred to the competent tax authorities of both parties the issues of whether that tax measure involves an expropriation.

3. However, the investor cannot submit the dispute to arbitration if, within nine months after the date of referral, the competent tax authorities of both Parties determine that the tax measure does not involve an expropriation’.

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3. However, the investor cannot submit the dispute to arbitration if, within nine months after the date of referral, the competent tax authorities of both Parties determine that the tax measure does not involve an expropriation’.
• A provision referring to the application of the laws at the time that the BIT was concluded between Uganda and Eritrea and Uganda and Mozambique.34

There are no specific provisions regarding land acquisition, except the protection from expropriation, land concessions for extractive industry and in some cases, the definition of investment applicable to leases (e.g. BIT between Zambia and Finland35).

4.2 Terms of the BITs and investment dispute-resolution clauses

The first difference reflected in the various BITs is the term of the agreement, i.e. between 10 and 20 years. In most cases the agreement will be automatically renewed for the same term and in some cases for an indefinite period (BIT Burkina Faso and Germany).

The second difference is in the rules for arbitration and the type of tribunal that can be chosen to settle disputes between an investor and a host country. While it is beyond the scope of this paper to discuss all elements of dispute resolution and whether the outcomes are fair to the host country (Pérez et al., 2011), it is important to mention that the rules for arbitration and choice of tribunal vary among countries and even between BITs concluded by a single country. In relation to the BITs concluded by the governments of countries under review, the investors may choose an ad hoc arbitral tribunal or one of the following international institutions to settle investment disputes:

• International Centre for Settlement of Investment Disputes (ICSID)
• Arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL)
• Court of Arbitration of the International Chamber of Commerce

33 Article 8: Performance requirements of the BIT Rwanda and the USA states

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:

(a) to export a given level or percentage of goods or services;
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or
(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;
(b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
(d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings’.

34 Article 12 Laws BIT Uganda and Eritrea.

‘For the avoidance of any doubt, it is declared that all investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made’.

35 Article 1 BIT Zambia and Finland. ‘The term “investment” means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, though not exclusively:

(a) movable and immovable property or any property rights such as mortgages, liens, pledges, leases, usufruct and similar rights...’
• Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa (OHADA)\textsuperscript{36}

The differences in the institutions and rules may result in investors being able to pick and choose the regime with which they are most familiar to solve the investment dispute. The lack of knowledge and experience on the part of the host country’s representatives in these arbitration procedures can be decisive for the case to be decided in the investor’s favour, and for the host country to pay compensation.

Finally, it is important to note that all of the selected countries in the SSA region are signatories of the Multilateral Investment Guarantee Agency (MIGA) of the World Bank. The MIGA Convention provides insurance to foreign investors for the eligible projects against such risks as expropriation, non-convertibility, war or civil disturbance. In addition, for countries that are MIGA signatories, assistance for investment dispute resolution can be given on a case-by-case basis. The main consequence for the selected countries of their membership of MIGA has to date been its support in more than 130 projects in 30 countries in sub-Saharan Africa. However, it is not clear from the BITs, the domestic investment laws, or the MIGA whether in investment disputes it will be the investor’s or the host country’s interests that are protected, nor how the MIGA applies when one of the above international courts or rules is involved in the settlement of disputes. A comparative overview of the international framework of the Bilateral Investment Treaties including the provisions for the settlement of disputes in case of expropriation is provided in Annex III.

\textsuperscript{36} For example, the BITs concluded by Burkina Faso and DRC.
Conclusions and recommendations for further research

In order to become globally competitive, sub-Saharan African countries have opened their economies to foreign investment. This has resulted in the relaxation of exchange controls; easy access to information and markets; the introduction of legal and tax incentives to attract foreign investment; the modernisation of domestic institutions dealing with investment, trade and taxation; the transfer of sovereignty to regional organisations, and the introduction of bilateral/multilateral agreements and treaties.

The countries reviewed in this paper have introduced/amended their constitutions, their investment laws and Investment tax treaty policies since the 1990s in order to assert and manage their independence and grant rights to their citizens, and to become more competitive by attracting foreign investment while also protecting their land and natural resources. This paper has offered a comparative analysis of these changes, and specifically the changes influencing land acquisition, with respect to constitutional and investment law provisions, and the international framework of BITs.

This section draws the main conclusions and makes some recommendations for further research.

5.1 Constitutional framework

In terms of land acquisition, the countries aim both to attract investment and to protect ownership of the land that in most cases either rests with the state, or is administered by the state on behalf of the people. The constitutional arrangement that permits foreign investors to gain access to land is the concept of lease, whereby ownership remains with the state or other owner and foreign investors have only the right to use the land. There is, however, no clear definition of lease either in the respective constitutions or in the investment laws that regulate these leases, and prevent their use only for the purposes of obtaining accounting advantages where the lease is regarded by the investor’s country as an off-balance-sheet transaction. We have argued that policy-makers, legislation and those responsible for constitutional development in African countries could benefit from an overall comparative analysis of land policies and specifically the consequences of leasing land for investment, accounting reporting, and taxation. In addition, when leases can last for anything between 50 and 99 years, the question arises of who really owns the land. Such long-term leases may weaken the position of the host country given its lack of bargaining power vis-à-vis the investor once the lease term has been agreed.

The respective constitutions of the countries reviewed in this paper introduce property rights in a non-exclusive way, i.e. that permits expropriation with payment of compensation. It could be argued that the possibility that an investor might dispute an expropriation and the compensation due according to domestic laws and in international agreements make it essential for countries to be more specific in setting out the valid justifications for expropriation. At present, the constitutions and relevant legislation use vague terms such as public use, public interest, for the purposes prescribed by law, or to apply land policy principles. This uncertainty places the host country at a disadvantage since it exposes them to the risk that an investor might take a disputed expropriation to international arbitration. The asymmetry in terms of knowledge, resources and the ability to hire experts in international investment disputes between the host country and the foreign investor (mostly MNCs) tend to favour the investor and can mean that the host country is required to pay compensation.
5.2 Rules for investment

All of the countries reviewed in this paper have an investment agency to promote and facilitate foreign investment. It is not mandatory for foreign investors to register at these agencies, but doing so can provide some legitimacy to their investments and may open the door to incentives and tax benefits such as participation in joint ventures with nationals, or lower taxation.

The investment rules introduced from the 1990s have since been amended or replaced, and some countries are currently discussing amendments, e.g. Angola, Burkina Faso and Namibia. All countries except Botswana and South Africa have investment laws or codes, but this it does not mean that the latter do not have other investment provisions. The rules for investment in Botswana and South Africa can be found in the Commercial Code and/or in the rules regulating their investment agencies.

In general, foreign and domestic investors are treated equally, although there are some exceptions. The exempted activities do not much influence land acquisition, except in Ghana where mining and real estate are areas confined to Ghanaian nationals. In addition, the use of incentives such as easy transfer of funds and tax benefits such as reduced tax rates, value-added tax (VAT) and custom exemption, are included in the investment rules of the selected countries in sub-Saharan Africa. These have introduced criteria for the eligibility of foreign investors to benefit from these incentives and benefits depending on the type of activity, investment performance, amount of capital invested, location of the investment, and use of local components.

From the comparison of these incentives, we found that countries frequently introduce eligibility criteria without specifying whether the investment should meet all of the criteria (cumulative criteria) or just one criterion. This means that the foreign investor can pick and choose between countries (investment criteria shopping), and within a country can select one or another requirement in order to determine the location and type of investment. Countries can benefit from comparative research of the incentives and tax benefits available in SSA that focuses not only on taxation, but also on other types of incentive of a legal and foreign exchange character. Previous studies regarding investment policy have dealt with tax incentives (policy) (Volkerink, 2002; Fjeldstad and Rakner, 2003) or with trade investment requirements. Joint qualitative and quantitative studies combining tax, trade, and investment in respect of land acquisition are recommended.

Furthermore, the general character of these criteria without further specifying the conditions of eligibility to investment or tax provisions often result in the administrative/tax authorities having the power to complete these requirements. This situation may sometimes give way to corruption including the payment of bribes, and lack of trust by investors in the government institutions. It is therefore important for the countries to cooperate at the regional and international level to tackle corruption, to enhance compliance, and to reform government institutions including the system of tax administration and the institutions charged with implementing land and investment policy.

Countries in SSA can benefit from regional initiatives to enhance tax, investment, and trade compliance and the exchange of best practices. For instance, an African Tax Administration Forum was created in 2009 in order ‘to mobilize domestic resources more effectively and

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38 Since 2007, the African Tax Institute sponsored by the Lincoln Institute on Land Policy has been conducting comprehensive property tax research which seeks to report and comment on the role of property taxation in Africa, but leaving aside the constitutional issues, investment rules and investment treaties influencing property tax systems. Further information is available at: http://www.ati.up.ac.za.
39 This Forum was inspired by the deliberations at the 2008 international conference on ‘Taxation, State Building and Capacity Development in Africa’, held in Pretoria. More information is available at: www.ataftax.net.
increase the accountability of African States to African citizens whilst actively promoting an improvement in tax administration through sharing experiences, benchmarking and peer reviewing best practices.\textsuperscript{40} African investment fora are organised each year with the support of African countries and the Commonwealth Business Council among others. Often these deal separately with tax and investment and do not therefore provide one common forum that might also address land acquisition. Moreover, apart from the tax forum that has its own website and organisation these events are convened on an ad hoc basis depending on a country’s willingness to host a forum, resources and donor support, and the participation of other countries. It is therefore recommended that there should be greater cooperation between the tax and investment, and that these events should be organised on a regular basis, and that a specific forum in Africa that combines land, tax and investment should be established.

5.3 International framework including regional agreements and BITs

The countries under review are currently active in the international arena as members of one or more regional organisations, such as the EAC, SADC, ECOWAS, COMESA and the AU as well as entering into bilateral and multilateral investment agreements. By enhancing regional tax, trade and investment initiatives, countries aim to increase their investment and productive capacities, and promote sustainable economic growth to eradicate poverty (United Nations Financing for Development, 2008: 7).

Regional initiatives tend to be viewed as a means to enable countries to create their own partnerships to address their own problems (South–South cooperation) (Mytelka, 1993). Yet despite the benefits of regional integration for development, not all countries respond to these initiatives, which undermines the process of regional integration (Hefeker, 2010). Countries may choose to (a) not ratify regional trade agreements; (b) introduce institutional arrangements that deviate from market arrangements; (c) join several regional organisations (overlap); and/or (d) act bilaterally. The divergence of approaches and choices within SSA create tensions within the region and show the lack of national ownership of and trust in regional integration. There is a need for further comparative studies addressing the implementation of regional tax, trade, and investment initiatives in SSA.

In addition, all the countries under review have concluded BITs with developed and developing countries. These agreements aim to create a business-friendly environment and favourable rules for investors. This paper has shown that the BIT provisions make no distinctions between developing countries (South–South) and developed countries (North–South), and that such provisions fail to address other problems. Moreover, there are not specific provisions in the BITs regarding land acquisition, except the protection regarding expropriation, land concessions for extractive industries and in some cases, the definition of investment applicable to leases.

5.4 Inclusive and sustainable development and land acquisition in sub-Saharan Africa

The European Union (EU) and African countries have agreed on the Second Action Plan 2011–2013 (‘the Plan’) to set up the issues for the EU–African Strategic Partnership. In the Plan, African countries and the EU agreed that ‘regional integration, trade and investment are vectors of economic stability and inclusive and sustainable growth.’\textsuperscript{41} At the regional and international levels, the Plan provides for actions to improve the investment climate in Africa such as (a) to facilitate the exchange of best practices in the area of regional investment codes; (b) strengthen the investment-promotion networks such as AfrIPAnet; and (c)
strengthen the Africa–EU business forum as a platform to promote business between Africa and Europe. These actions advocate for governments of SSA to cooperate with regional organisations (e.g. AU, ECOWAS, SADC) and to enhance regional integration for development.

At the domestic level, countries in SSA are required to take into account inclusive and sustainable growth, which means guaranteeing universal access to electricity and water, ensuring food security and promoting sustainable agriculture. In the provisions of constitutional and domestic investment law regarding access to land and land acquisition, to date most countries have hitherto focused on establishing land ownership; restricting land acquisition by foreigners to leasing arrangements; guaranteeing equal redistribution of land among their own citizens and foreigners; and providing incentives for investment in land. In none of the countries under review does the constitution or investment laws require investors to take into account the local community and environment where the land is located (inclusiveness) and/or criteria to determine whether the leases promote the country’s economic and sustainable growth.

The incentives that SSA countries have introduced depend on the activity (e.g. agri-business, power, water and development hubs), performance (e.g. development of hinterland) and requirements to use local components (e.g. labour), but they do not provide for post-control on the effect of these incentives in promoting sustainable growth. Incentives for investors should be reviewed on a regular basis. One issue that merits research is the effectiveness of these incentives to give access to energy, water resources, and to guarantee food security and sustainable agriculture. Incentives for investors should be carefully handled and evaluated. The introduction of incentives without any evaluation of their impact, and without any further requirements for the investors to contribute to sustainable growth, leave countries open to the risk that the investor may leave once the incentive is gone.

Finally, SSA countries apply standard BIT rules regarding expropriation and dispute clauses that favour the foreign investor. The BITs analysed in this paper do not take into account the economic and social status of the host country nor the need of African countries to regulate land acquisition. It is therefore recommended that sub-Saharan African countries address in their domestic rules and their bilateral/multilateral investment agreements the problems of (a) the lack of knowledge/bargaining power in international negotiations; (b) the need for better infrastructure; (c) stronger institutions, better investment and land policies; and (d) promotion of inclusive and sustainable growth. Only if these issues are resolved can sub-Saharan African countries benefit from the expansion of BIT networks around the world and of developed countries’ interest in establishing BITs with developing countries, including sub-Saharan African countries. Failure to do so will result in BITs that systematically favour the investors, usually from the richer countries, rather than those most needing favourable treatment, i.e. developing countries in sub-Saharan Africa.

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42 Ibid., p. 30.
43 For a conceptual analysis and recommendations for SSA countries regarding the role of the BITs in increasing foreign direct investment see Johnson (2010: 919).
References


### Annex I: Comparative overview of constitutional provisions for land acquisition

<table>
<thead>
<tr>
<th>Country</th>
<th>Constitution year/amendment</th>
<th>Protection of right of property</th>
<th>Reasons for expropriation</th>
<th>Land owner</th>
<th>Land concession rules for non-citizens</th>
<th>Land and investment provisions/ delegation power</th>
<th>Land board</th>
</tr>
</thead>
<tbody>
<tr>
<td>Angola</td>
<td>1992/2010</td>
<td>Art.14</td>
<td>Public use</td>
<td>People/State administrators</td>
<td>Non-citizens require a local</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Botswana</td>
<td>1994/1997</td>
<td>Art. 8</td>
<td>Town country planning/land settlement</td>
<td>None</td>
<td>No rules</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Burkina Faso</td>
<td>1991/2002</td>
<td>Art. 15</td>
<td>Public use</td>
<td>None</td>
<td>No rules</td>
<td>Land and investment provisions/ land board</td>
<td>None</td>
</tr>
<tr>
<td>DRC</td>
<td>2006</td>
<td>Art. 34</td>
<td>Public use</td>
<td>None</td>
<td>No rules</td>
<td>Investment provisions</td>
<td>None</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>1994</td>
<td>Art. 40</td>
<td>Public use</td>
<td>State</td>
<td>Right of investor to use land</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Ghana</td>
<td>2007</td>
<td>Art. 20</td>
<td>Town country planning/land settlement; defence and public safety</td>
<td>People/State administrators</td>
<td>Lease 50 years</td>
<td>Land and investment provisions</td>
<td>Yes</td>
</tr>
<tr>
<td>Kenya</td>
<td>2010</td>
<td>Art. 40</td>
<td>Public use; land policy</td>
<td>People/State administrators</td>
<td>Lease 99 years</td>
<td>Land and investment provisions/ land delegation</td>
<td>Yes</td>
</tr>
<tr>
<td>Malawi</td>
<td>1994</td>
<td>Art. 28</td>
<td>Public use</td>
<td>State</td>
<td>Parliament consent to acquire property by non-citizens</td>
<td>Land provisions</td>
<td>None</td>
</tr>
<tr>
<td>Mozambique</td>
<td>1990/2004</td>
<td>Art. 82</td>
<td>Public use</td>
<td>State</td>
<td>Conditions for use of land</td>
<td>Land and investment provisions</td>
<td>None</td>
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</table>
## Regulatory framework for land acquisition in sub-Saharan Africa: a comparative study

<table>
<thead>
<tr>
<th>Country</th>
<th>Constitution year/amendment</th>
<th>Protection of right of property</th>
<th>Reasons for expropriation</th>
<th>Land owner</th>
<th>Land concession rules for non-citizens</th>
<th>Land and investment provisions/delegation power</th>
<th>Land board</th>
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</thead>
<tbody>
<tr>
<td>Namibia</td>
<td>1990/1998</td>
<td>Art. 16</td>
<td>Public use</td>
<td>None</td>
<td>Parliament consent to acquire property by non-citizens</td>
<td>Investment provisions/investment delegation power</td>
<td>None</td>
</tr>
<tr>
<td>Nigeria</td>
<td>1999</td>
<td>Art. 43</td>
<td>Purposes prescribed by Law</td>
<td>State</td>
<td>Land transfer: only for citizens</td>
<td>None</td>
<td>None</td>
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<tr>
<td>Rwanda</td>
<td>1991/2003</td>
<td>Art. 29</td>
<td>Public use</td>
<td>State</td>
<td>No rules</td>
<td>Land delegation power</td>
<td>None</td>
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<tr>
<td>Senegal</td>
<td>2001</td>
<td>Art. 15</td>
<td>Public use</td>
<td>None</td>
<td>Equal access by man/woman</td>
<td>None</td>
<td>None</td>
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<tr>
<td>South Africa</td>
<td>1996</td>
<td>Art. 25</td>
<td>To redress past racial discrimination</td>
<td>None</td>
<td>Parliament consent to acquire property by non-citizens</td>
<td>Land provisions</td>
<td>None</td>
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<tr>
<td>Tanzania</td>
<td>1995</td>
<td>Art. 24</td>
<td>Purposes prescribed by Law</td>
<td>None</td>
<td>No rules</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Uganda</td>
<td>1995/2005</td>
<td>Art. 26</td>
<td>Public use; defence and public safety</td>
<td>People/State administers</td>
<td>Lease; law determine the period</td>
<td>Land and investment provisions; land delegation</td>
<td>Yes</td>
</tr>
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</table>
### Annex II: Comparative overview of domestic law provisions for land acquisition

<table>
<thead>
<tr>
<th>Country</th>
<th>Institution/member</th>
<th>Investment law/amended</th>
<th>Criteria for incentives/tax benefits related to use of land</th>
</tr>
</thead>
<tbody>
<tr>
<td>Angola</td>
<td>Investment</td>
<td>2010</td>
<td>Agriculture, power, water, development hubs/performance requirement: development of hinterland/ amount of capital invested</td>
</tr>
<tr>
<td>Botswana</td>
<td>Export/Investment</td>
<td>None</td>
<td>Agricultural hub</td>
</tr>
<tr>
<td>Burkina Faso</td>
<td>Investment AfrIPAnet</td>
<td>2010</td>
<td>Greenfield investments/amount of capital invested</td>
</tr>
<tr>
<td>DRC</td>
<td>Investment</td>
<td>2002</td>
<td>Location/use of local components (local labour)</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>Investment AfrIPAnet</td>
<td>1992/2002</td>
<td>Amount of capital invested/ performance requirement: activities with value added to processing agricultural resources</td>
</tr>
<tr>
<td>Ghana</td>
<td>Investment AfrIPAnet</td>
<td>1994</td>
<td>Amount of capital invested</td>
</tr>
<tr>
<td>Kenya</td>
<td>Investment AfrIPAnet</td>
<td>2004</td>
<td>Amount of capital invested/ performance requirement: activities with value added to processing agricultural resources</td>
</tr>
<tr>
<td>Malawi</td>
<td>Investment AfrIPAnet</td>
<td>1991</td>
<td>Amount of capital invested</td>
</tr>
<tr>
<td>Mozambique</td>
<td>Investment AfrIPAnet</td>
<td>1993/1995</td>
<td>Land designated for development/ amount of capital invested/ Use of local components (local labour)</td>
</tr>
<tr>
<td>Namibia</td>
<td>Investment</td>
<td>1990</td>
<td>Amount of capital invested</td>
</tr>
<tr>
<td>Nigeria</td>
<td>Investment AfrIPAnet</td>
<td>1995</td>
<td>Use of local components (local value added, local raw materials and local labour)</td>
</tr>
<tr>
<td>Rwanda</td>
<td>Development</td>
<td>2006/2007</td>
<td>Agro-based industries, bio-diesel, water resource, land husbandry and water harvesting, hillside irrigation, and additional investments to be determined by the government/ amount of capital invested</td>
</tr>
<tr>
<td>Senegal</td>
<td>Presidential investors council AfrIPAnet</td>
<td>2004</td>
<td>Agro-processing/ amount of capital invested</td>
</tr>
<tr>
<td>South Africa</td>
<td>Trade and investment AfrIPAnet</td>
<td>None</td>
<td>Agro-processing</td>
</tr>
<tr>
<td>Country</td>
<td>Institution/member AfrIPAnet</td>
<td>Investment law/amended</td>
<td>Criteria for incentives/tax benefits related to use of land</td>
</tr>
<tr>
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<td>------------------------------</td>
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<tr>
<td>Tanzania</td>
<td>Investment AfrIPAnet</td>
<td>1997</td>
<td>Agriculture, energy, transportation, infrastructure, bio-fuel/amount of capital invested</td>
</tr>
<tr>
<td>Uganda</td>
<td>Investment AfrIPAnet</td>
<td>2000</td>
<td>Agro-processing/amount of capital invested/location of the investment</td>
</tr>
<tr>
<td>Zambia</td>
<td>Development Agency</td>
<td>2000</td>
<td>Agri-business, hydro-electric power/amount of capital invested</td>
</tr>
</tbody>
</table>
#### Annex III: Comparative overview of international framework

<table>
<thead>
<tr>
<th>Country</th>
<th>Member regional organisations</th>
<th>BITs concluded/ in force</th>
<th>Standard BIT provisions/specific provisions</th>
<th>Expropriation and standard investment dispute clauses</th>
<th>Any land specific related provision</th>
<th>Member MIGA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Angola</td>
<td>SADC, AU</td>
<td>8/3</td>
<td>Yes</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>Botswana</td>
<td>SADC, AU</td>
<td>9/2</td>
<td>Yes</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>Burkina Faso</td>
<td>ECOWAS, AU</td>
<td>15/7</td>
<td>Yes</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>DRC</td>
<td>SADC, COMESA, AU</td>
<td>14/4</td>
<td>Yes except BIT with the USA</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>African Union</td>
<td>29/20</td>
<td>Yes except BITS with Austria, Finland</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>Ghana</td>
<td>ECOWAS, AU</td>
<td>26/8</td>
<td>Yes</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>Kenya</td>
<td>EAC, COMESA, AU</td>
<td>12/4</td>
<td>Yes</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>Malawi</td>
<td>SADC, COMESA, AU</td>
<td>7/2</td>
<td>Yes</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>Mozambique</td>
<td>SADC, AU</td>
<td>24/20</td>
<td>Yes except BITS with the Netherlands, Uganda, the USA</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<td>Namibia</td>
<td>SADC, AU</td>
<td>13/7</td>
<td>Yes except BITS with Austria, the Netherlands</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<td>Nigeria</td>
<td>ECOWAS, AU</td>
<td>23/13</td>
<td>Yes except BITS with Finland, the Netherlands</td>
<td>Yes standard</td>
<td>None</td>
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<td>Rwanda</td>
<td>EAC, COMESA, AU</td>
<td>6/2</td>
<td>Yes except BIT with the USA</td>
<td>Yes standard</td>
<td>None</td>
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<td>Senegal</td>
<td>ECOWAS, AU</td>
<td>24/9</td>
<td>Yes except BIT with the USA</td>
<td>Yes standard</td>
<td>None</td>
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<td>South Africa</td>
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<td>46/23</td>
<td>Yes except BITS with Austria, the Netherlands</td>
<td>Yes standard</td>
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<tr>
<td>Country</td>
<td>Member regional organisations</td>
<td>BITs concluded/in force</td>
<td>Standard BIT provisions/specific provisions</td>
<td>Expropriation and standard investment dispute clauses</td>
<td>Any land specific related provision</td>
<td>Member MIGA</td>
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<tr>
<td>Tanzania</td>
<td>EAC, SADC, AU</td>
<td>15/8</td>
<td>Yes</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>Uganda</td>
<td>EAC, COMESA, AU</td>
<td>15/7</td>
<td>Yes except BITs with the Netherlands, Mozambique, Eritrea</td>
<td>Yes standard</td>
<td>None</td>
<td>Yes</td>
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<tr>
<td>Zambia</td>
<td>SADC, COMESA, AU</td>
<td>12/2</td>
<td>Yes except BITs with Finland, the Netherlands</td>
<td>Yes standard</td>
<td>BIT with Finland (investment definition applicable to leases)</td>
<td>Yes</td>
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</tbody>
</table>