

The Right to Food and Water: Dependencies and Dilemmas

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1 Executive Summary

This paper analyses how businesses affect the right to water and the right to food. It looks primarily at businesses as water users, rather than as water providers, and as food producers. It examines the private sector impacts on these rights through the “Protect-Respect-Remedy” framework developed by the Special Representative of the UN Secretary General on business and human rights. As the Framework affirms, the corporate responsibility to respect rights applies to *all* human rights, and involves due diligence to understand potential impacts on rights and put systems in place to prevent and address any violations. Thus, the private sector’s responsibility to respect, and its attendant due diligence obligations, apply to the rights to food and water.

Sections 4 and 5 outline the normative content of the rights to water and food, and highlight recent developments which indicate that governments and the private sector are understanding and engaging with these rights more seriously. Growing awareness of water scarcity, in particular, has pushed efforts by businesses to use water more efficiently, and pay closer attention to access to water for communities surrounding sites of operation. Delving into the normative content of the rights to food and water, and looking in particular at the minimum core content of these rights, makes clear that those who suffer from violations of the right to food or the right to water are typically those who are poor, vulnerable, and experience a “rights deficit” more generally. Secure access to both food and water is reinforced by secure access to housing, healthcare, and livelihoods. Fulfilment of a wider range of socio-economic rights, in turn, is reinforced by robust protection of civil and political freedoms, which allow those who are vulnerable to demand information, participation in decision making and access to the basic goods which are essential to a dignified life.

Sections 8, 9 and 10 explore some of the impacts of industrial water use, industrial pollution, commercial food production, and commercial non-food production on access to food and water. Commercial agriculture and industry compete with other users of water, including individuals. The amount of water needed to fulfil the right to water for an individual is very small, as is the amount of water needed by subsistence farmers to produce food for personal consumption. However, examples abound internationally but often particularly in the developing world where regulation is lax and weakly enforced, of disproportionate water use and pollution by businesses that significantly impacts access to water for surrounding communities. This paper discusses examples which show that where a business adversely impacts access to water through its operations, it is also highly likely to be contributing to abuses of the right to food for individuals in the local area.

Private sector impacts on water and food are, of course, situated within and mediated by the regulatory regime and policy choices made by the State, the primary duty holder vis-à-vis human rights. Weak regulation may generate opportunities for profit, but it can also

create the potential for violations of the rights to food and water, and this is a dilemma that companies have to navigate. Moreover, macroeconomic forces also influence how a business impacts access to food and water for individuals, and given the global nature of food markets, these impacts are often felt by communities located far from a company's site of operations.

In light of this, how should companies strengthen their due diligence to ensure that they are respecting the rights to food and water? We present a set of questions for companies to consider, which encompass efficiency, waste disposal, ensuring adequate supply of water in the area of operations to other users, working conditions, use of free, prior, informed consent, and fair dealings with local communities.

Drawn from that, companies should:

- Abide by appropriate laws
- Use water efficiently and dispose of water responsibly
- Consider water impact while deciding the location of a plant
- Cooperate with others, giving water management a priority, drawn from a human rights framework.

2 Introduction

This paper explores the effects of business activities on the right to water and the right to food. It incorporates discussion amongst a group of individuals representing international organisations, business, and civil society at a convening on the private sector's impacts on the rights to water and food in Geneva on 8 July 2010.

Companies can potentially affect all human rights, and their actions, conduct, and practices can *inter alia* affect implementation of the right to adequate food and the right to water, and sanitation. For example, as *water users*, businesses compete with individuals over a limited resource, which in areas of water scarcity can negatively impact on individual and community access to adequate water and food. Where business activities pollute water sources, such actions have clear consequences in terms of access to safe drinking water and access to food.

At the same time, the private sector can contribute significantly to the realization of the rights to food and to water and sanitation. As employers paying salaries and contractors paying fees, all businesses contribute to individuals' incomes, and thereby to the ability to access adequate food and water. Particular industry sectors also perform many key roles in producing and distributing food. The production of agricultural inputs such as seeds and fertilizer, processing, transport, distribution and retail food and other agricultural products are all examples. Similarly, companies that provide water and sanitation services can make significant contributions to ensuring access to water and food. Finally, companies which build the infrastructure through which food and water reach individuals also play a vital role in realizing these and other fundamental rights.

In this paper, we look primarily at how companies in their capacity as *water users* and those which act as *food producers* affect the human rights to food and water. We look at industrial as well as agricultural water users that have a particularly strong nexus with food and water. We examine the effects of State choices on individuals and industry, and ask how businesses can behave responsibly in light of those choices.

Section 2 summarises the framework developed by the Special Representative of the UN Secretary General for human rights and business. We evaluate company behaviour within this framework. Sections 3 and 4 discuss briefly the normative contents of the rights to food and water. Section 5 steps back from the two rights under discussion, and queries how rights interact, how different rights reinforce one another, but might also make different demands on States and companies. Section 6 outlines the interplay between the rights to food and water, and highlights the different implications for States which must balance

different factors to realize both rights, as per their obligations. Sections 7, 8, and 9 look at how businesses affect these rights, in the context of national policy and international markets.

3 Human rights responsibilities of business

The UN Secretary General's Special Representative on business and human rights (SRSG)¹ has developed the "Protect-Respect-Remedy" policy framework, now endorsed by the Human Rights Council and other UN bodies. The framework comprises three core principles: the State duty to *protect* against human rights abuses by third parties, including business; the corporate responsibility to *respect* human rights; and the need for access to effective *remedies* at both State and company levels².

The corporate responsibility to respect includes the responsibility to comply with domestic laws that safeguard individual rights. However, the Special Representative has made clear that the scope of the responsibility to respect is broader than domestic legal obligations, and will also be determined by international standards as well as social expectations and needs. The SRSG argues that companies must **perform due diligence** in order to demonstrate that they meet their responsibility to respect human rights. This involves putting in place processes to learn about their human rights impacts, prevent and mitigate abuses to the fullest extent possible, and address abuses where they occur.

The SRSG framework also clarifies that businesses can and do affect **the full spectrum of internationally recognised human rights**, rather than a subset of these rights³, although some rights may be more salient than others in particular contexts. Therefore, companies should guard against the risk of human rights violations in all circumstances and perform due diligence in relation to all human rights.

The responsibility to respect applies to all activities and business relationships of a company, and philanthropic activities a company has undertaken cannot compensate for human rights harms its activities may have caused.

¹ Professor John Ruggie

² Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 7 April 2008, A/HRC/8/5

³ SRSG. *Ibid.* paragraph 24, 51,52

4 Normative content of the right to water

The International Covenant on Economic, Social, and Cultural Rights (ICESCR), adopted in 1966, recognizes the right to an adequate standard of living, including adequate food, clothing and housing⁴. While the ICESCR does not expressly disaggregate the right to water as a distinct right, water is, of course, essential to sustain life and access to sufficient water is intrinsic to a decent standard of living.

The High Commissioner for Human Rights points out that a range of international legal instruments refer to the human right to water, including the General Assembly resolution passed in July 2010, which explicitly “declares the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”⁵, following which the Human Rights Council affirmed the right to water and sanitation as a human rights in September⁶. Explicit references to safe drinking water or sanitation have also been included in the Convention on the Rights of the Child (CRC)⁷, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸, the Convention on the Rights of Persons with Disabilities⁹ and ILO Convention No. 161 of 1985 on Occupational Health Services¹⁰. References to the right to water are also explicitly included in different formulations in non-binding soft law. These instruments include the Standard Minimum Rules for the Treatment of Prisoners, Rules for the Protection of Juveniles Deprived of their Liberty, ILO Recommendation No. 115 of 1961 on Workers’ Housing, and the Guiding Principles on Internal Displacement. As of 2004, seven countries afforded constitutional protection to the individual’s right to water.¹¹

In 2002, the UN Committee on Economic, Social, and Cultural Rights formulated General Comment 15¹² (“GC 15”), which marked an important step towards explicating the content of the right to water. GC 15 states that “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is

⁴ Article 11

⁵ 64/292 Human Right to Water and Sanitation.

⁶ Resolution A/HRC/15/L.14

⁷ Article 24

⁸ Article 14(2)

⁹ Article 28

¹⁰ Article 5

¹¹ S. Hale. 2007. “The Significance of Justiciability: Legal Rights, Development, and the Human Right to Water in the Philippines.” SAIS Review, Vol. XXVII no. 2: 139

¹² Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 15 on the Right to Water, U.N. ESCOR, 29th Sess., Agenda item 3, U.N. Doc. E/C.12/2002/11. 2003.

one of the most fundamental conditions for survival.” GC 15 explains that “the human right to water is indispensable for leading a life in human dignity” and reminds us that “safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”

General Comment 15 outlines the essential elements of the human right to water: availability; adequate quality (free from harmful microorganisms and hazards); acceptability, accessibility, and affordability. Additionally, the human right to water requires access to information and decision making in regard to water policies and implementing measures.

GC 15 explains the State’s obligations to protect the right to water. It emphasises that States are obliged to prevent the infringement of this right by third parties, including private companies. Specifically, when water is distributed by the private sector, “[s]tates parties must prevent them [the private sector] from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.”

In the years since GC 15, awareness about water scarcity, particularly in light of climate change, has increased, and will grow further. Water management and conservation have received more attention in the public and private sectors. UN development agencies, including the United Nations Children’s Fund (UNICEF) and the United Nations Development Programme (UNDP) have prioritised water and sanitation related Millennium Development Goals (MDGs). Increasingly, UN agencies as well as bilateral development agencies are adopting a human rights based approach to their interventions in the water and sanitation sectors, which are having an important impact on increasing enjoyment of these rights.

In 2007, the UN High Commissioner for Human Rights analysed the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international law¹³. The High Commissioner expressed the view that “it is now time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non-discriminatory access to a sufficient amount of safe drinking water for personal and domestic uses - drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene - to sustain life and health”¹⁴. In March 2008, the UN Human Rights Council appointed an Independent Expert to clarify human rights obligations related to access to safe drinking water and sanitation. Concurrently, international civil society groups have sought through various ways and

¹³ Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments. A/HRC/6/3, 16 August 2007

¹⁴ *Ibid.* Paragraph 66

initiatives to get the international community to formally recognize the right to water. A few major companies¹⁵ also recognise the right to water.

This move towards deeper elucidation and recognition of the right to water reached a milestone on 28 July 2010, when the UN General Assembly recognised the right to safe and clean drinking water and sanitation as a human right¹⁶. While this resolution is a soft law instrument that is not binding upon states, it constitutes international political recognition of the right to water and sanitation.

5 Normative content of the right to food

The right to food is a part of the founding human rights texts of the post-World War Two era, the Universal Declaration of Human Rights 1948 (“UDHR”) and the International Covenant on Economic, Social and Cultural Rights, or the ICESCR, that entered into force in 1976. Other international legal instruments that incorporate the right to food include human rights treaties on the rights of women¹⁷, children¹⁸, refugees¹⁹, disabled persons.²⁰ Instruments relating to the conduct of states during armed conflict²¹ specifically stipulate state obligations, which duties concerning realisation of the right to food.

Article 11(1) of the ICESCR recognizes the right to an adequate standard of living including adequate food. State parties are expected to take steps to ensure the realization of that right. Article 11(2) of the ICESCR hones in on the core of the right to food, the right to be free from hunger, and enjoins States to take steps to address and prevent hunger, saying, *inter alia*:

“The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

¹⁵ Pepsi and Intel, for example, as well as water utility companies.

¹⁶ <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>

¹⁷ Convention on the Elimination of All Forms of Discrimination against Women 1979

¹⁸ Convention on the Rights of the Child 1989

¹⁹ Convention relating to the status of Refugees 1951

²⁰ Convention on the Rights of Persons with Disabilities 2006

²¹ Convention of 1949 relative to the Protection of Civilian Persons in Time of War; Article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and Articles 69 and 70 of the Protocol Additional to the Geneva Conventions, of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.

In 1999, the Committee on Economic, Social, and Cultural Rights formulated General Comment 12 (“GC 12”), which built upon earlier work by the then UN Commission on Human Rights on the right to food, and articulated the content of the right to food²².

The State has an urgent, immediate obligation to ensure freedom from hunger regardless of its level of development. The Committee on Economic, Social and Cultural Rights says that a State “in which any significant number of individuals is deprived of essential foodstuffs is, *prima facie*, failing to discharge its obligations under the Covenant. GC 12 delineates the core content of the right to food as sustainable access to **sufficient, nutritious, safe and culturally appropriate food**²³. GC 12 elaborates that accessibility includes economic as well as physical accessibility, and emphasises that State’s must ensure that vulnerable groups have secure access to food²⁴. A State must use all the resources at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations²⁵. Beyond this minimum core, a State should take steps to fulfil the right to adequate food, ensuring that the laws, policies and institutions designed to do so are accountable, transparent, participatory as far as possible, and do not discriminate between individuals.

The right to food, like any other human right, imposes three types or levels of obligations on States: the obligations to respect, to protect and to fulfil²⁶. The obligation to **respect** is a negative obligation, and requires the State to refrain from any measure that prevents individuals from accessing food. For example, an embargo on food supplies to a particular area would be a violation of the obligation to respect the right to food. The obligation to **protect** requires the State to ensure that the actions of third parties do not deprive individuals of their access to adequate food. The obligation to **fulfil** encompasses the obligations to facilitate and to provide. Facilitation means taking positive steps that strengthen people’s access to food and access to resources that enable better nutrition, including, *inter alia*, land, schooling, jobs and markets. The obligation to provide means direct provision by the State to those who don’t have the wherewithal, for reasons beyond their control, to secure adequate food on their own.

²² CESCR. General Comment No. 12: The Right to Adequate Food (Art. 11). E/C.12/1999/5

²³ GC 12, para 8

²⁴ GC 12, para 13

²⁵ GC 12, Para 17

²⁶ GC 12, para 15

In September 2000, United Nations Millennium Declaration committed countries to halving the proportion of people who suffer from hunger between 1990 and 2015²⁷. The same year, the Commission on Human Rights appointed a Special Rapporteur on the right to food, who has further clarified the content of this right and elaborated on how it should be respected and protected in different situations.

6 How human rights interact

Human rights are indivisible, interdependent and interrelated²⁸. This implies that each individual is entitled to all human rights. It also implies that there is no hierarchy between different rights²⁹, and that violation of one right is likely to stymie fulfilment of other rights. Rights are mutually reinforcing, and fulfilment of one right is likely to strengthen fulfilment of other, interconnected rights.

However, States have to balance between competing obligations (or duties) and claims (or rights), and international and domestic law have well-established principles on how to balance the demands of different rights. Below, we examine how rights might depend upon each other, and how they might pull in different directions.

6.1 The dependency between rights

Looking at interdependency through the right to food, for example, it is worth remembering that the call of the UDHR is not simply for food, but for an adequate standard of living. The right to food is one amongst several rights, including the rights to housing, water, education and health, that need to be fulfilled in order to achieve this, and must be viewed as part of a cluster of mutually reinforcing socio-economic rights. It requires extensive, cross-sectoral public provisioning by the State that goes well beyond securing food intake, to securing and enhancing access to the full complex of basic necessities that influence a human being's ability to live without under-nourishment. These include shelter, clean water, sanitation, adequate health care and education³⁰.

²⁷ <http://www.un.org/millenniumgoals/poverty.shtml>

²⁸ As per the Vienna Declaration and Programme of Action of 1993.

²⁹ See for example, Theodor Meron, 1986. *On a Hierarchy of International Human Rights*, American Journal of International Law 80: 1. p 21-22, where Meron observes that there is no accepted system by which higher rights can be identified and their content determined.

³⁰ S. Chopra. 2009. "Holding the State Accountable for Hunger." *Economic & Political Weekly*. Vol XLIV, No. 33, August 15, 2009

Further, this cluster of socio-economic rights must be understood as tied to and reliant upon the range of civil and political rights³¹. The right to food entails a claim, or an entitlement, on the part of the individual, an obligation on the part of the State, and the ability to hold the State accountable when it fails to meet its obligations. This, in turn, implies the need for certain civil and political rights such as freedom of expression and association, to participate in political processes, and institutional structures such as an independent judiciary and freedom of the press.

As an example, in colonial India the British government codified measures to counter hunger in legally binding Famine Codes. But, unaccountable to its subjects, it dispensed with these measures during the devastating Bengal famine of 1943, and diverted food instead for the needs of British troops in World War Two battlegrounds. In independent India, governments feared retribution at the ballot box for such egregious choices³². However inefficiently, Indian democracy moved to prevent the famines that had been a regular feature of pre-Independence India³³. Serious violations of the rights to food and water are also symptoms of weak access to civil and political protections.

Emphasising the interdependency of all rights in the development context, the UNDP's Human Development Report of 2006 argued: "Clean water and sanitation can make or break human development. They are fundamental to what people can do and what they can become—to their capabilities. Access to water is not just a fundamental human right and an intrinsically important indicator for human progress. It also gives substance to other human rights and is a condition for attaining wider human development goals. The violation of the right to clean water and sanitation is destroying human potential on an epic scale."³⁴

³¹ Kent. *Ibid.* p. 47

³² J. Dreze & A. Sen. 1989. *Hunger and Public Action*. Oxford University Press: New Delhi. p. 211-214

³³ Dreze & Sen. *Ibid.* p. 212. Although it is worth noting Dreze & Sen's argument that democratic institutions are much better at preventing extreme violations of the right to food, but weak at tackling chronic violations. While India faced no famines after Independence, rates of malnutrition and chronic hunger amongst the highest in the world.

³⁴ Human Development Report, UNDP (2006).

6.2 When rights conflict

As the discussion above shows, different rights are interdependent and mutually reinforcing. However, in the area of economic and social rights in particular and potentially limited resources, States have to make choices, for example, between building effective health systems or ensuring access to education for all, which might result in some rights being realized while other rights are not.

Equally, conflicts can occur between **different human rights held by different individuals**. For example, freedom of expression may be restricted for the respect of the rights and reputations of others. Conflicts can occur between **the same right held by different individuals**. For example, where two people are in need of emergency medical care, but a public hospital only has medical supplies sufficient for one person³⁵. And finally, in some circumstances, **different rights held by the same individual might be in conflict**. Euthanasia is often discussed as an example of this last category, because it involves a conflict between the same individual's right to live and right not to live³⁶. A more common conflict might be that between a child's rights to education and adequate healthcare in a household with scarce resources.

Where there is a conflict between **respecting** different rights, the State may curtail or infringe one right in order to respect another – for example, where a government passes a law regulating hate speech, it is choosing to prioritise one right over another. In doing so, the State has to ensure that its actions are consistent with its core minimum obligations, and the infringement of one right is in order to prevent a grave abuse of another right. Then there are trade-offs between **protecting, promoting and ensuring** different rights, as governments make choices every day about how to allocate limited resources amongst competing ends.

International human rights law and domestic law offer broad guidance and rules on how States should navigate these challenges and trade-offs between rights. Under international law, States can derogate from, or limit their obligations in relation to, certain rights; other rights are non-derogable and cannot be limited under any circumstances. For example, Article 4(2) of the ICCPR specifies that the rights to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude,

³⁵ Xu, Xiaobing & G. Wilson. 2006. On Conflict of Human Rights. *Pierce Law Review*, Vol. 5, No. 1. p.31 Available at <http://www.piercelaw.edu/assets/pdf/pierce-law-review-vol05-no1-xu-wilson.pdf>, downloaded on 13 June 2010.

³⁶ Xu, Xiaobing & G. Wilson. *Ibid.* However, opponents of euthanasia would contest that individual's have a right to die, and some proponents of euthanasia might argue that the right to end your own life is inherent in the right to life.

freedom from guilt unless determined by law, right to recognition as a person before the law, and right to freedom of thought, conscience, and religion, are non-derogable human rights.

States have certain **core minimum obligations**³⁷ with regard to every right, but acknowledging the capacity of states, human rights law recognizes that rights will be realized fully through **progressive realization** through the use of maximum available resources in each instance. Commentators argue that core minimum obligations with regard to socio-economic rights, including the rights to food and water, should be recognised as non-derogable. As with other rights, human rights law does not require that state must be one of the providers, or even the sole provider, of food, water, or any specific outcome related to a right. Non-state actors, including businesses, have a role to play. But the state does not cease to be responsible for the realisation of those rights, even if it has privatised a particular function, such as food distribution or water purification or provision.

Domestic law in most democratic jurisdictions lays down principles to guide limitations on rights and balancing between different rights. However, such international and domestic guidance is necessarily broad-brush, and preserves a State's discretion on the most appropriate choice in a given context.

6.2.1 Conflicts companies face between different human rights

Since companies can potentially affect the full spectrum of rights, it follows that, like States, companies will have to navigate trade-offs **between different human rights** – a particular action may help to secure one right, while militating against the fulfilment of another. As the SRSR notes, this can complicate efforts by companies to respect all rights³⁸. There may be situations where it is legitimate for companies acting within the framework provided for by the State to limit certain rights in the context of their operations, such as when safety considerations prohibit clothing required by some religious faiths or when equal treatment requires limitation on freedom of speech and expression.

The SRSR notes that “principles such as ‘necessity’, ‘legality’, and ‘proportionality’ are required of states when limiting rights, but there is no universal consensus on precise instruction, let alone how principles applicable to states may apply to companies”.

³⁷ Committee of Economic, Social & Cultural Rights. General Comment No. 3: The Nature of States Parties Obligations (Art 2(1)), paragraph 10. See also Young, Katharine. "The Minimum Core of Economic and Social Rights: A Concept in Search of Content." Yale Journal of International Law, Vol. 33, No. 1, 2008. Available at SSRN: <http://ssrn.com/abstract=1136547>

³⁸ http://www.srsrconsultation.org/index.php/main/discussion?discussion_id=35

7 Food and water: dependence and divergence

While the rights to food and water are distinct, they are also closely linked. Individuals who lack secure access to water for personal use are very likely to be facing acute or chronic hunger, and vice versa. The right to food also depends, immutably, on access to water, in that producing food requires access to adequate water for agriculture. Water used for producing food does not aim at fulfilling water requirements as such, but food requirements³⁹.

Where water is scarce, and demand for water exceeds supply, individuals will find it difficult to realize both rights – food and water. A subsistence farmer who produces food for himself or herself and his or her family, might need to apportion the limited water available between personal uses and growing food. It is worth noting that the water required to fulfil the right to water is so small – 100 litres per capita per day – that it is highly unlikely to prevent access to water for growing food. Someone living in an urban slum with poor access to water and sanitation will have to apportion limited resources between buying water and buying food. However, when the poor are making this trade-off at an individual level, the rights are not in conflict; rather, **both rights are simultaneously being violated**. The State is failing in its duty to protect both rights, forcing people, in effect, to choose between hunger and thirst, and consigning them to some measure of both.

On a societal scale, water scarcity raises potential conflicts between the fulfilment of the right to water for personal and domestic use, and fulfilment of the right to food. Access to water is interconnected with the right to food, in that it is one of the conditions to fulfil the right to food. Governments face difficult choices, which have implications for both rights. Should the State encourage large-scale farming or small-scale farming? For food or cash crops? Should the distribution of water be based on the principle of equal access for all types of users, or should there be prioritization? If there is to be prioritization, who should get the priority: domestic users, farmers, or industries? Should small farmers and small and medium enterprises be given priority over large farmers and large businesses? Should there be subsidies? If so, should the State subsidise food and water, should it provide employment, or should it subsidise agricultural production? Should a subsidy be applied universally, or should there be a graded scale?

An international reckoning raises similar quandaries. Demographic trends show rising global population, and increasing demand for food in large countries rapidly becoming more prosperous – notably, China and India, but also Brazil, the Russian Federation, and Indonesia. As these countries' populations increase, they will face pressure for more water being allocated for domestic use as well as increasing demand from industry. But rising

³⁹ Inga Winkler, Water for Producing Food for Basic Consumption - Guaranteed by the Right to Water or Food?, in: Malcolm Langford / Anna Russell (eds.), *The Right to Water: Theory, Practice and Prospects*, Cambridge University Press, Cambridge, forthcoming 2010

populations also need more food. And that would require more water being needed for food production. As agriculture is the basis of food production, should farmers have priority, since their activities help nations achieve food security? (It should be noted, however, that to achieve food security, States do not necessarily have to depend only on domestic production. The State's obligation is to ensure that individuals have access to food – that food does not have to be produced locally. Some countries, for example, lack the natural endowments to grow food).

If a State takes seriously the human rights to food and water, this can influence its choices which could have an effect on policies to be pursued towards economic development. Some areas of contention that emerge:

- Balancing competing rights when, for example, regions with a shortage of water must find ways to distribute the available water without violating the rights to water and food of indigenous people or users of traditional water sources;
- Negotiating demands between different sectors of the economy, such as when the industry needs water, as an input towards economic growth and livelihood generation, and agriculture, too, needs water, as a direct input in the production of food.
- Dealing with the tension between promoting industry and ensuring access to safe water, and for subsistence farmers in particular, access to safe food, particularly in relation to controlling industrial pollution;
- Managing competing claims on water made by commercial and subsistence agriculture;
- Resolving the challenge of balancing the rights to food and water of differently placed citizens – the urban poor and the rural poor, in an area where resource scarcity pits them against one another;
- Dealing with international obligations: Should a State take steps to secure food and water for its own citizens that harm fulfilment of these rights elsewhere in the world?

7.1 *Water, food and the private sector*

The private sector has a role in implementing the State's policy choices with regard to food and water. As water users, providers and food producers, businesses absorb the

consequences of State laws and policies.⁴⁰ However, as relatively powerful users and producers, large businesses are also in a position to *shape* the water and food regimes within which they operate.

Furthermore, many governments lack resources to meet all their obligations, which could include those affected by widespread poverty, those experiencing the effect of a natural disaster, and those facing an armed conflict. And in many countries, businesses encounter regulatory gaps, in areas such as pollution control or land acquisition, either because regulation is weak, or is weakly enforced. In such contexts, businesses are more likely to exploit regulatory gaps, as an opportunity for increasing profits. However, businesses are also more likely to face challenges to their social license to operate.

It is pertinent to note that while the State has the primary obligation to respect, protect, and fulfil human rights, and is the prime duty bearer with regard to human rights, and business has responsibility to respect human rights, increasingly, in many areas, the business sector views its role as the partner of the state in meeting certain development objectives. The motives that drive businesses are different from the obligations of the state; the impact on human rights can be positive if the two act in concert with a common objective.

Below, we examine the interplay between business activities and State choices on some of the contentious dilemmas identified in Section 6. We look at industrial water use, industrial pollution, commercial food production, and commercial non-food production.

8 Industrial pollution, and the rights to food and water

As noted earlier, a State's development priorities, such as establishing industrial hubs or promoting export-oriented agriculture and agribusiness can potentially have negative impacts on protection of the rights to adequate food and water. Promoting access to safe water and safe food requires strong regulation of industrial pollution, which could affect industry itself, and also a State or a region's ability to attract industrial investment.

While industry is not the largest polluter or water sources, the United Nations Environment Programme (UNEP) has noted that it is the most hazardous polluter⁴¹. Studies indicate that as much of 90% of developing country wastewater is dumped untreated into rivers⁴². Such

⁴⁰ This can be context-specific, such as when large-scale agricultural systems compete for scarce water resources with domestic users of water in areas where the water for these systems is being drawn from ground water, and the competition may be of a different order when the agricultural system is rain-fed.

⁴¹ UNEP. 2003. *Freshwater: Meeting our Goal, Sustaining our Future*, quoted in Blumel. p. 994

⁴² OECD. 2003. *OECD Policy Brief: Improving Water Management: Recent OECD Experience*.

pollution is particularly rife where regulation is weak, or where the State does not have the capacity to effectively enforce pollution control norms. This tension between promoting industrial investment and controlling pollution plays out across many parts of the world. Its effects at a local level can be seen, for example, in the textile production zone near Dhaka, Bangladesh.

The textile and clothing industry in Kaliakoir Upazilla, about 25 kilometres from Dhaka, Bangladesh's capital, has created serious problems for local residents⁴³. The 166 textile businesses in the area dispose an estimated 30 billion litres of untreated waste in surrounding rivers and streams. It is a legal requirement in Bangladesh for all "red category" factories (textile dyeing and tanning) to establish Effluent Treatment Plants (ETPs). However, there are very few ETPs in the area, and some are operated badly due to lack of technical expertise. Water pollution has made it difficult to access safe water for personal use, and reduced the availability of fish, fodder and other wetland products and services which local people have depended upon for generations. Researchers report reduced rice production in the area.

In recent years, civil society pressure led to a Government-supported "cleaner production audit" and water quality analysis in Kaliakoir. Local textile manufacturers were asked to try alternative production methods, and asked to install more effluent treatment plants. But the textile hub is growing rapidly – factories rose eight-fold in three years, by 2006. While some factories have adopted measures to reduce pollution, they are not contributing to cleaning polluted water bodies. At the same time, these factories are providing employment, increasing local incomes, and earning foreign exchange for the country.

The textile industry is an important engine of economic growth in Bangladesh, and provides jobs for large numbers of workers, particularly women. Not surprisingly, government efforts to enforce environmental norms have been lackadaisical, and pollution has largely grown unchecked. The residents of Kaliakoir, whose access to water and food has become more precarious, are subsidising the environmental costs of a thriving textile sector. What responsibility do investors have in such a context? What responsibility do companies abroad which buy from factories in this area have towards respecting the right to food and the right to water of people impacted by pollution in Bangladesh?

In some national or regional contexts, the government might deliberately choose to prioritise industrial development over controlling pollution and protecting access to safe water as well as to safe, locally grown food⁴⁴. This can bring significant economic gains, but

⁴³ USAID. 2006. Policy Brief Industrial Pollution and its Threat to Wetlands in Bangladesh: Example of Mokesh Beel Wetland in Kaliakoir. Management of Aquatic Ecosystems through Community Husbandry. Available at http://pdf.usaid.gov/pdf_docs/PNADJ857.pdf, downloaded on 21 June 2010

⁴⁴ J. Kahn & J. Yardley, "As China Roars, Pollution Reaches Deadly Extremes." New York Times, 26 August 2007

the State will have to balance those gains with significant human rights costs. At a macro-level, these costs were revealed in China in 2005, when the Chinese government endorsed “comprehensive environmental and economic accounting” — otherwise known as “Green GDP⁴⁵.” — which recalculated conventional GDP to reflect the cost of pollution. The first Green GDP calculation estimated that pollution in 2004 cost just over three percent of the GDP, meaning that the pollution-adjusted growth rate that year would drop to about 7 percent from 10 percent. In some Chinese provinces, pollution-adjusted growth rates were reduced almost to zero. (The second Green GDP report was never made public.)

Serious, long-running industrial pollution will affect the right to water for everyone in the local area, and the right to adequate food for those dependent upon locally grown food. (If local markets sell enough food grown elsewhere, this issue becomes less acute). A company that uses water in ways that reduce the access to water of local residents is also likely to be responsible for reduced access to food due to pollution of groundwater. By corollary, a company that respects the right to water, and takes the steps necessary to minimise water contamination, will also be doing its part to respect the right to food.

While water scarcity prompts a strong reaction in the short-term, people feel the effects of industrial pollution more slowly. This creates a particular responsibility for companies where regulation is weak. As a part of due diligence, a company should grapple with how to prevent pollution, but also with its responsibilities where it has caused pollution on a scale that harms access to safe water, and indirectly, to safe food, with regard to minimising future pollution and curing the effects of past pollution.

Around the world, some 40% of the areas equipped with irrigation rely on groundwater sources⁴⁶. As land conversion around cities continues at a rapid pace, the tension between customary agricultural users and urban and industrial users is likely to increase. In many instances, industrial and agricultural organic pollutants are persistent. Once the aquifers are polluted, the impact may be irreversible, and circulating groundwater may get continually imprinted with pollutants that have been absorbed on to the aquifer matrix. To deal with this problem effectively, it is important that the existing systems of water allocation and governance are representative and participatory, and their reach includes surface and groundwater use, and controlling pollution under these rapid land-use changes will need strict monitoring.

⁴⁵ Gross Domestic Product, or the sum total of goods and services produced in a country in a given year.

⁴⁶ The Food and Agriculture Organisation is soon to publish an inventory in this regard. <http://www.hydrol-earth-syst-sci-discuss.net/7/3977/2010/hessd-7-3977-2010.html>).

9 Industrial water use, and the rights to food and water

Even in instances where business activities do not take an environmental toll, they often can compete with other uses of water, including individual use. Certain types of manufacturing and extraction - chemicals, textiles, mining, electric goods, construction, food and beverage - are particularly “thirsty” industrial activities. As with examples of grave water pollution by industry, examples abound of intensive industrial water use that threatens community access to water. An industrial water user can directly harm the ability of individuals in the local area to access adequate water for personal and domestic use. It can similarly harm the ability of subsistence farmers to access adequate water for food production, thus indirectly violating their right to food. Where an industrial user has priority over or diverts water away from commercial agriculture, it could harm food production, and indirectly, the supply of food in domestic and international markets. At the same time, where an industrial water user creates jobs or other economic opportunities for local residents, it could strengthen access to food by providing employees and their families the means to purchase food.

An industrial user is most likely to over-exploit water where environmental regulation is weak and where water rights for individuals, communities and businesses are poorly developed. In some countries, it is likely that the government will grant an industrial user an operating license and environmental clearance without adequate analysis of its propensity to consume water vis-à-vis resources and other users in that location.

Thus, it is possible for intensive industrial water users to be within the bounds of the law, but nevertheless disrupt local availability of water and food. It can lose its *social* license to operate even while operating within *legal* limits, because those legal limits do not account for the rights to food and water. Multinational soft drink manufacturers Coca-Cola and Pepsi, for example, have faced community protest and legal action in India over their use of groundwater.

Coca-Cola’s bottling facility in Kerala was established in March 2000. Among the various approvals required for plant operations is a license from the local village council. In 2003, the local village council informed Coca-Cola’s bottler that it had decided not to renew the license. The Kerala High Court determined that the local village council was not justified in doing this, and directed the council to consider renewal. The local village council granted a license for a period of three months, but Coca-Cola opted not to reopen the plant because such a short duration was not sufficient to sustain investment in the facility. The bottling plant has not seen production since 2004.

In Pepsi's case, a study by Kerala's State Groundwater Department noted that Pepsi holds 53 acres of land in a 750-acre industrial park, and extracts 48 per cent of the groundwater in Palakkad district⁴⁷. Pepsi received clearance to run the plant in 2000, but, as with the case with Coca-Cola, in 2003, the local village council cancelled Pepsi's operating license, on the ground that Pepsi's over-exploitation of groundwater had made drinking water scarce for local residents. The Kerala High Court reversed this decision, but asked the government to investigate the local council's concerns. The Supreme Court of India upheld the Kerala High Court's verdict.

Legally, these judgments are sound. The Kerala government exempted industrial estates in 1999 from powers vested in local government bodies. Some years later, however, facing water crisis and growing discontent, the Kerala government chose to challenge the High Court's verdict, and argued against Pepsi in the Supreme Court of India. More recently, the Kerala legislature is deliberating whether to limit the amount of water Pepsi can extract in Pudukkottai from its current average of 700,000 litres per day to 230,000 litres per day⁴⁸. The legislative committee making the recommendation clarified that it didn't advocate plant closure, since 3,500 people are dependent upon the plant directly or indirectly.

As big, recognisable brands, these beverage manufacturers come under greater scrutiny, and might be more strategic targets of protest, than their less famous industrial counterparts who are also using water intensively. While recognising that community and activist protest may be disproportionately directed at large multinationals with a view to garnering headlines, it is also the case that sustained protest is likely to be grounded in genuine deprivations of food and water.

Water scarcity affects individuals so keenly and intimately, that it can become a flashpoint quite fast, unlike industrial impacts such as air pollution. It can trigger intense political protest, which governments find difficult to ignore and industries would be unwise to disregard. Prominent brands can become lightning rods for community discontent, and they might attract disproportionate criticism for the water shortages to which they have contributed.

This realisation, as well as shrinking supplies for their own purposes, have led several companies from different industries to take the issue of water seriously. Coca-Cola is one of

⁴⁷ M. Suchitra. "Inaction on panel findings against beverage major." India Together. 6 May 2008. Available at <http://www.indiatogether.org/2008/may/env-colawater.htm>, accessed on 23 June 2010

⁴⁸ Press Trust of India, Kerala assembly panel moots curbs on Pepsi plant, March 17 2010, available at <http://www.business-standard.com/india/news/kerala-assembly-panel-moots-curbspepsi-plant/88729/on>, accessed on 23 June 2010

a consortium of companies that in 2008 formed the 2030 Water Resources Group.⁴⁹ Furthermore, Coca-Cola has committed as part of its global water goal to safely return to communities and nature an amount of water equivalent to what the companies use in all their products and their production by 2020. The Global Environmental Management Initiative (GEMI), a group of 37 large U.S. firms, has a working group devoted to the issue of water sustainability and offers a water sustainability tool. Unilever says that its Medusa project reduced its total water use by 8% and reduced the load per tonne of production by 15%⁵⁰. SABMiller has launched a programme to save a quarter of the water needed to make a litre of beer by 2015⁵¹. Nestlé, which aims to be the most efficient water user among food manufacturers, has cut water withdrawals by a third since 2000 even though the volume of the foods and drinks it makes has risen by 60%⁵². Pepsi recently adopted Guidelines in Support of the Human Right to Water, stressing safety, sufficiency, acceptability, physical accessibility, and affordability⁵³.

Increasingly, investment funds and shareholders have begun to scrutinise industrial water management⁵⁴. Northstar Asset Management submitted right-to-water resolutions at the shareholder meetings of PepsiCo and American International Group (AIG) in 2008, receiving 7.2 percent and 18.7 percent support, respectively. In 2009, it submitted a similar proposal at Intel, which received 5.9 percent shareholder support. Northstar has also made a submission to the Mandate of the Independent Expert. The Intel resolution noted the company's use of "vast quantities of water" in its manufacturing sites in arid areas, such as Israel and the American Southwest. Even as the proposal is pending, Intel has announced a new water policy that recognizes the human right to water. The CEO Water Mandate⁵⁵ has made commitments in six areas, including direct action, supply chain management, transparency, community engagement and public policy to manage water resources responsibly. Thus, several leading companies are trying to use water more efficiently, choose locations with water use in mind, and engage with local communities more closely.

⁴⁹ 2030 Water Resources Group. 2009. Charting our Water Future: Economic Frameworks to inform Decision-making. Available at http://www.mckinsey.com/App_Media/Reports/Water/Charting_Our_Water_Future_Full_Report_001.pdf, accessed on 23 June 2010

⁵⁰ Economist. "Business begins to stir." 20 May 2010

⁵¹ Economist. *Ibid.*

⁵² Economist. *Ibid.*

⁵³ Effgen, E. "Corporations and Communities Compete for Water: Investors Push Business to Reduce Consumption, Improve Access." 11 June 2010.

⁵⁴ Effgen, E. *Ibid.*

⁵⁵ http://www.unglobalcompact.org/issues/Environment/CEO_Water_Mandate/

These developments are encouraging, but most water intensive businesses lag far behind the efforts of frontrunners on water conservation. While high profile brands face risk that pushes them to take the right to water more seriously, it is harder to evaluate how companies that do not have a “public face” are doing. A recent study by Ceres, a coalition of investors and public interest groups, found that disclosure of risk and performance on water was very weak, even for companies operating in sectors and locations facing water risk⁵⁶. Ceres recommended that, at a minimum, companies disclose information on five water-related indicators included Global Reporting Initiative’s (GRI) most recent sustainability reporting framework⁵⁷.

Another recent survey⁵⁸ suggested that water scarcity will fundamentally change how water intensive industries operate⁵⁹, and water will be a fundamental, not an optional consideration in plant siting, production techniques, product marketing and waste disposal. Water scarcity may alter the geography of production - manufacturers may be forced to, or choose to stop producing water-intensive products — cars, steel, chemicals, energy, for example - in water stressed areas, even if other factors of production, including land, labour, and infrastructure, are easily available.

10. Commercial agriculture and the rights to food and water

The modern agricultural sector includes a spectrum of producers, from large-scale commercial farms to small subsistence producers. Actors at different ends of this spectrum – commercial producers on one end and smallholders on the other - are embedded in different value chains⁶⁰, with some overlaps and intersection. These differences notwithstanding, both large and small farmers share a dependency on reliable access to

⁵⁶ Barton, B. 2010. Murky Waters. Corporate Reporting on Water Risk. Ceres; Circle of Blue, Water-intensive Companies Fail to Disclose Water Risks, Report Says, February 15 2010. Available at <http://www.circleofblue.org/waternews/2010/world/water-intensive-companies-fail-to-disclose-water-risks-report-says/>, accessed on June 23, 2010

⁵⁷ These include: (1) Total water withdrawal by source (EN8); (2) Water sources significantly affected by withdrawal of water (EN9); (3) Percentage and total volume of water recycled and reused (EN10); (4) Total water discharge by quality and destination (EN21); (5) Identity, size, protected status, and biodiversity value of water bodies and related habitats significantly affected by the organization’s discharge of water and runoff (EN25)

⁵⁸ Conducted by GlobeScan and Sustainability, which polled over 1,200 sustainability experts

⁵⁹ Keith Schneider, “Coming Era of Water Scarcity Will Prompt Global Industrial Transformation, According to Survey of International Experts.” 16 March 2010. Circle of Blue. Available at <http://www.circleofblue.org/waternews/2010/world/coming-era-of-water-scarcity-prompts-global-industrial-transformation/>, accessed on 23 June 2010

⁶⁰ FAO. 2009. “Why were high food prices not an opportunity for poor farmers?” The State of Agricultural Commodity Markets 2009, available at <ftp://ftp.fao.org/docrep/fao/012/i0854e/i0854e02.pdf>, accessed on June 22, 2010

water. At a global level, agriculture consumes approximately 70% of all available water⁶¹. Not all of the water used in agricultural production goes towards food, and directly or indirectly, towards fulfilling the right to food.⁶² A significant portion relates to non-food agricultural production, such as bio-fuels or horticulture. Some is diverted to produce “luxury” food items, and cannot properly be treated as water that is an input in ensuring realization of the right to food.

Water used to produce food by large and small food producers is a necessary input in securing access to adequate food, and it is certainly arguable that the right to food houses within in a right to water *for food production*, as distinct from a right to water for personal use. A recent study noted that 80% of the world’s hungry are food producers⁶³. Fifty percent of these are small-hold farmers, twenty percent are farm workers, and ten percent are pastoralists and fishermen. The other twenty percent of the world’s hungry are made up of the urban poor, who are acutely affected by rising food prices. Particularly for small food producers, poor access to water directly impacts on their ability to produce adequate food, and statistics indicate this is in fact the lived reality of millions.

Commercial agriculture competes with subsistence agriculture, with industry and with individuals for limited water resources.

- Commercial agriculture in proximity to large cities can negatively impact the right to water of the urban poor.
- In water scarce areas, large commercial farms may compete with small food producers for access to water for food production, impacting their right to food. Commercial agriculture can result in diverting water away from local residents, depriving them of water for personal use. Aggressive use of agrochemicals can also affect quality of water available to the surrounding community.
- The availability of cheap food imports benefits both the urban and the rural poor (assuming this food reaches rural markets). However, in the importing country, cheap food produced elsewhere is likely to hurt local food producers by making their produce uncompetitive. This pits the livelihoods of subsistence food producers against the well-being of those who are not food producers, but are poor and vulnerable to chronic hunger. (It is perhaps more appropriate to view this from the

⁶¹ See *Water: Facts and Trends* (World Business Council for Sustainable Development, 2009)

<http://www.wbcsd.org/DocRoot/ID1tMGiLZ7NL9mBOL2aQ/WaterFactsAndTrends-Update.pdf>

⁶² It is also important to note that the right to food includes the right to water in the sense that water is needed for agricultural production and thus to ensure the right to food. When water is withdrawn for industrial purposes it does not necessarily follow that it has an impact on the right to food, because not every region is fit for agricultural production and the amount of accessible water varies locally.

⁶³ A. Bloom, C. Duffy, M. Iyer, A. Jacobs-Smith, L. Moy. 2009. New York University Law Students for Human Rights. 2009. *Transnational Corporations and the Right to Food*. p.1

prism of the right to an adequate standard of living, and not only for its impact on the right to food.)

- Commercial agricultural producers can be involved in agriculture that, at a macro-economic level, significantly affects fulfilment of the rights to food and water. For example, rising agricultural crop prices caused by demand for biofuels are at the heart of what the World Bank calls a potential conflict between food and fuel⁶⁴. The International Monetary Fund has stated that diverting land and food crops into fuel production contributed to rising international food prices, which proved particularly painful for the urban poor, and hit the food-insecure in the developing world, many of whom spend more than half of their household incomes on food⁶⁵. A sharp increase in food prices implies further violations of economic, social and cultural rights, including less money to buy water, or less time to collect water.
- It is also important to note, however, that small holder farming, too, has adverse impacts on the right to water. Smallholder farming is typically less productive than large-scale agriculture than large-scale agricultural production systems, which are often more water-efficient in terms of drops of water used per calorie. Large systems are able to invest in better water management practices, their production processes yield more output, and their resources enable them to make bigger investments in water-saving technologies.

The effects of reduced access to food or water as a result of commercial agriculture will be mediated by the economic opportunities available, as well as the presence and nature of social safety nets. That said, there is no denying the serious direct and indirect impacts large scale commercial farming has on food and water for small food producers, particularly given the vast differences in power between large, often transnational, corporations and small-hold farmers and farm workers who contract with them, are employed by them, and may have to compete with them for natural resources.

We look at this more closely through the recent phenomenon of large scale land acquisition and leases in developing nations, which sharply highlights these dynamics.

In recent years, governments and companies have been buying or leasing large tracts of land in foreign countries and growing crops on foreign soil primarily for domestic

⁶⁴ World Bank. Biofuels: The Promises & the Risks. World Development Report 2008. Available at http://siteresources.worldbank.org/INTWDR2008/Resources/2795087-1191440805557/4249101-1191956789635/Brief_BiofuelPrmsRisk_web.pdf, accessed on 27 June, 2010

⁶⁵ Food & Agricultural Organisation. 2008. "Chapter 6: Impact on Poverty & Food Security." Biofuels: Prospects, Risks & Opportunities

consumption⁶⁶. The International Food Policy Research Institute (IFPRI) estimates that between 15 and 20 million hectares of farmland in developing countries have been the subject of transactions or negotiations involving foreign investors since 2006⁶⁷. Not surprisingly, fertile land, well served by irrigation and infrastructure and connected to food markets has been most in demand.

The sheer quantity of land makes these deals unusual; they also depart from earlier investment in agriculture because this land is intended for food and bio-fuels, rather than cash crops. The Special Rapporteur on the Right to Food posits that the main drivers of this controversial land acquisition are the global food price crisis of 2008 and increased investment in bio-fuel production⁶⁸. Private investors have been drawn to agricultural investment because of rising commodity prices and rising land prices – agriculture remained lucrative during the credit crunch, when many other sectors offered less attractive investment opportunities.

Land for growing food is not the only attraction for private investors and governments. Analysts speculate that growing water shortages have also driven many land deals. A recent article quotes Peter Brabeck-Letmathe, the chairman of Nestlé, as saying: “The purchases weren’t about land, but water. For with the land comes the right to withdraw the water linked to it, in most countries essentially a freebie that increasingly could be the most valuable part of the deal.” He called this phenomenon “the great water grab”.⁶⁹

On the one hand, these land deals are attempts by governments to secure food supplies for their citizens, and to secure water for producing food. Investors also say that they bring benefits to areas where investment in agriculture has stagnated and where farms are unproductive. Yet, the deals are contentious, and critics argue that individuals on the margins of these large plantations are likely to enter into deeply unequal competition with them over water, both for personal use and for subsistence farming.

It is often the case that ostensibly “unused” land, particularly such vast areas, supports pastoralists and subsistence farmers. Users of this land typically don’t have codified, secure rights to that use, and the contract between the host State and the investor will trump their

⁶⁶ Some leases or purchases of this sort are also to grow food for export to third countries – for example, Singapore has invested in rice farms in Burma, where its superior technology would presumably increase local productivity and the rice will not necessarily be transported to Singapore solely for domestic consumption, but also traded internationally.

⁶⁷ C. Smaller & H. Mann. 2009. A Thirst for Distant Lands: Foreign Investment in Agricultural Land and Water. International Institute for Sustainable Development. p.3

⁶⁸ Special Rapporteur on the right to food, Olivier De Schutter. Crisis into opportunity: reinforcing multilateralism. 2009. A/HRC/12/31: p. 5, para 3

⁶⁹ Economist. *Ibid.*

customary rights⁷⁰. Early examples suggest that large plantations are importing labour and exporting most of their produce, which may have a negative impact on local food markets⁷¹.

In many cases, the contract between a State and an investor includes clauses insulating the investment from future legislative protection or development. For example, what if a State that does not currently regulate ground water extraction enacts a framework to do so – would this entitle the investor to allege expropriation and claim compensation? What happens if other laws regulating the investment change, for example pollution-control laws?⁷² If the host State faces drought, or in the event of a global food price shock, can it restrict exports from large plantations? There have been instances where the national government of the host State weakens its own ability to protect citizens' rights to food and water.

Most countries hosting these investments have millions of individuals without access to adequate food and water – Ethiopia was facing drought when it leased land to Saudi investors, for example. So, large scale land acquisition to grow food seems to set the right to food of individuals in the food-receiving country against the rights to food and water of individuals in the home country.

What should private parties to such investments do to ensure they are respecting the rights to food and water? IFPRI has advocated codes of conduct for foreign investors to improve the terms of the deals for locals. The Special Rapporteur has developed a set of minimum human rights principles applicable to large-scale land acquisitions or leases, which offer guidance to States as well as investors⁷³. Principles particularly relevant to investors would entail the following types of good practice: ensuring participatory impact assessment before entering into a contract; pushing for land acquisition that respects the rights of land users; going beyond legally recognised rights and respecting customary rights; sharing benefits among locals – hiring locally on decent terms of work, increasing transparency and abiding by national trade policies (i.e., respecting export controls, and voluntarily limiting exports, if the host country is suffering a famine). The Special Rapporteur recommends that investors be bound by clear contractual commitments to respect human rights and environmental sustainability.

While the relatively recent phenomenon of mega-plantations throws these issues into sharp relief, these principles are relevant to most commercial food and non-food production.

11. SUMMING UP

⁷⁰ See C. Smaller & H. Mann

⁷¹ Economist. *Ibid.*

⁷² Question drawn from Smaller, C. & H. Mann

⁷³ Special Rapporteur on the right to food, Olivier De Schutter. 2009. Addendum. Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge. A/HRC/13/33/Add.2. Annex.

As companies begin to take into account the impact of their activities on the right to food and the right to water, it is important that their due diligence process fully reflects the wide range of their activities that can affect these rights.

It means companies need to ensure they respect community water resources and access to food, while they undertake activities which lead to jobs and improved livelihood opportunities. This requires the company to assess, *inter alia*, the following:

- Is the company using water as efficiently as possible? Are there techniques it can adopt to minimise water use?
- Is the company disposing waste in a manner that respects the rights to safe water and to health of the surrounding community?
- Is the company's disposal of waste in a manner that respects the cultural rights of the surrounding community?
- If the company uses disproportionate amounts of water, or if its activities generate pollution through the use of pesticides and fertilizers, what steps can it take to secure water supply for individuals in the area?
- Are the company's methods of production efficient?
- Are the company's activities adversely affecting people's access to adequate, safe, nutritious and culturally appropriate food?
- Is the company providing employment in the local area? Are the often divergent demands of efficient production and creating jobs being balanced in a way that maintains the company's social license to operate?
- Are employees and contract workers paid a living wage? Does the company comply with the core conventions of the ILO and other standards on labour rights?
- When the company buys or leases land, is it ensuring free prior and informed consent, paying a fair price, and working towards rehabilitation?

Drawing from these questions – which are illustrative and not exhaustive – we offer the following recommendations for companies to implement, in order to ensure that their conduct respects human rights.

- *Conducting due diligence*: Companies should understand the impact of their activities on the rights to food and water for the local community where they operate, and also for consumers and participants in the supply chain. They should identify violations or potential violations of these rights, and take steps to address them. The Food and Agricultural Organisation has voluntary guidelines on the right to food, as well as a right to food toolbox with detailed practical guidance on monitoring and assessment⁷⁴.

⁷⁴ Available at http://www.fao.org/righttofood/publi_02_en.htm

- *Abiding by national laws and complying with regulations giving priority to water for personal and domestic uses in water management:* In those countries where priority in water management is given to water for personal and domestic uses, industries should abide by relevant laws, regulations and policies.
- *Ensuring efficient use of water:* In many countries, governments do not sufficiently enforce their laws, even though they have prioritized access to safe-drinking water for personal and domestic use over other uses, nor integrated the right to water in their legislation and policies, nor set an adequate balance between allowing sufficient water for industry and conserving water resources. Industrial users should ensure – through undertaking a human rights due diligence process, including a human rights impact assessment conducted in a transparent manner to assess the impact of their activities on the right to water - that their activities do not undermine local populations’ access to safe-drinking water.
- *Ensuring socially and environmentally responsible waste disposal:* Industrial users should ensure that waste-water and industrial by-products are treated to minimize their impact on communities, aquatic systems, and water sources. Where national standards are not in place or insufficient, industrial users may have recourse to international guidelines, notably the WHO Guidelines for the safe use and disposal of wastewater, excreta and grey water.
- *Factoring in considerations related to the right to water when taking decisions about siting operations and selecting suppliers:* As part of their human rights due diligence industries should undertake a human rights impact assessment before setting-up a facility in order to consider its potential impact on access to safe-drinking water by local communities, with a focus on marginalized and vulnerable groups and ensuring access to information, as well as genuine participation of communities. They should also undertake assessments to ensure that they are not infringing on the enjoyment of the right to water indirectly through key suppliers who may be reducing access to safe-drinking water for local communities.
- *Working with national, regional and local governments and other stakeholders to ensure that priority in water management is given to water for personal and domestic uses for all:* Industries should work with the authorities and other stakeholders in order to ensure that water management policies prioritize access to safe-drinking water for personal and domestic uses, in line with the international human rights framework. Particularly where it is likely that water use will be contentious, companies should proactively urge governments to have a policy in place, at least for the relevant local area, and turn to international guidance and benchmarks on how best to achieve this.