

LAND GRABBING: THE NEED FOR A LEGAL FRAMEWORK

Summary:

- 1) The problem of Land Grabbing
- 2) The three sources of law governing investments in land
- 3) The international law
 - 3.1) Permanent sovereignty over natural resources: UN Resolution 1803/ 1962, UN Resolution 3281/ 1974,
 - 3.2) Permanent sovereignty over natural resources and indigenous people: UN Declaration on the Rights of Indigenous People
 - 3.3) Property Rights
 - 3.4) Principles for Responsible Agricultural Investment
 - 3.5) FAO Voluntary Guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security
- 4) The domestic law
 - 4.1) The African situation
 - 4.2) A pro-poor Land system
- 5) Investment contracts
 - 5.1) Legal instruments to regulate land contracts
- 6) A conclusion

1) The problem of Land Grabbing

Over the last few years, a new phenomenon has attracted global attention: international investments in land. The purchase or long-term lease of agricultural land by State-owned and private investors has the potential to inject much-needed investment into agriculture and rural areas in poor developing countries, but it also raises concerns about the impacts on poor local people, who risk losing access to and control over land on which they depend.

The growing scale of this practice, combined with the increasing economic and environmental concerns that are motivating this surge, are creating a new dynamic of global importance. It is no longer just the crops that are commodities, rather, it is the land and water for agriculture themselves that are increasingly becoming commodified, with a global market in land and water rights being created.

The most visible driver of the recent land acquisitions was the 2008 food crisis. Countries with large population and food security concerns such as China, South Korea and India are seeking opportunities to produce food overseas, especially in developing countries where production costs are much lower and where land and water are more abundant.

Long-term factors have also driven the recent surge of investment. Food and energy security and the volatility of global commodity prices remain long-term concerns for most countries. Of cross-referenced deals for which the commodity is known, 78% are for agricultural production, of which three-quarters are for biofuel. Mineral extraction, industry, tourism and forest conversion are also significant contributors, adding up to remaining 22%¹.

Of the long-term factors, water is one of the most significant drivers. In some parts of the world, like the Gulf States, water from economically important river basins and aquifers is already overused, severely limiting the possibilities of increasing the quantity of water for irrigation.

Foreign investment in agriculture is, in principle, expected to bring a number of developmental benefits: increased employment, technological development, increased trade benefits, new markets, new services and infrastructure. What is now better understood, however, is that such benefits are not automatic.

More generally, the investments in land are realized through acquisition or long-term lease contracts, for 50 or even 90 years and they are predominant in poor or developing countries, where the land system is based on informal and traditional laws, recognized locally but not by international agreements.

The main actor is the private sector, including agribusiness, investment banks, hedge funds and commodity traders. However, in the past five years, States and sovereign wealth funds have begun to play a very significant role. In many instances the government is charged with negotiating the deals and, in turns, provides incentives to private sector to invest².

Many land deals may not be made on equal terms between the investors and local communities. Smallholders, who are being displaced from their land, cannot effectively negotiate terms favorable to them when dealing with such powerful national and international actors, nor can they enforce agreements in the foreign investor fails to provide promised jobs or local facilities. Thus, unequal power relations in the land acquisition deals can put the livelihoods of the poor at risk³.

This inequality in bargaining power is exacerbated when the smallholders whose land is being acquired for foreign investment projects have no formal title to the land, but have been using it under customary tenure arrangements.

Where local users have vague or non-existent land and water rights, the foreign investor will have its contractual rights to fall back upon as hard rights, enforceable under the chosen dispute settlement forum in the contract. The social and economic

¹ Mann H., Smaller C. (2010), *Foreign land purchases for agriculture: what impact on sustainable development?*, United Nation, p. 2.

² Cotula L., Vermeulen S., Leonard R., Keeley J. (2009), *Land grab or development opportunity? Agricultural investment and international land deals in Africa*, London-Rome, pp. 65 ss.

³ Von Braun J., Meinzen-Dick R. (2009), *"Land Grabbing" by Foreign Investors in Developing Countries: Risk and Opportunities*, Washington DC, p.2.

impacts on local communities could be disastrous, undermining their human right to adequate food, water, work and shelter.

National governments have a duty to protect the rights and interests of local communities and land rights-holders. But governments often fail, because they are corrupt and align themselves with investors, enticing them with low land prices and other incentives, and even helping them clear people from the land for personal gain.

Without national and international measures to defend the rights of people living in poverty, this modern-day land-rush is likely to leave too many poor families worse off, often evicted from their land with little or no recourse to justice.

Few States have their own laws on international investment in land. Legal avenues under national law are limited, villagers could redress the issue through international human rights law, focusing in human rights to food or to property.

But the substantive protection offered by international human rights law also presents shortcomings. For instance, the African Charter on Human and Peoples' Rights affirms the right to property, but does not require States to compensate right-holders for losses suffered; it merely requires compliance with applicable law⁴.

For this reason, a possible solution to ensure responsible investments in agricultural land could be an International Convention on Land Grabbing. But now this tool turns out to be difficult, if not impossible to realize, since there aren't the political, economic and social conditions to find an agreement among States and international traders.

It is necessary, therefore, to prepare the background for a shared solution of the problem, and for the writer this is possible only from the civil society. Social mobilization is essential, but among the actions that can be taken by intergovernmental organizations, the promotion of guidelines and principles for land governance and responsible investments in agriculture could be an important step for developing a legal framework.

The writer strongly believes that today only the use of soft law instruments (like guidelines or principles) may allow investments that offer a greater focus on sustainable development and the development of peoples. It is only from a non-binding law linked with the requirements and needs of economic and social relations, that investments in agricultural land will find a shared and then followed and respected legal framework among international operators.

2) The three sources of law governing investments in land

⁴ http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

There are three main sources of law that govern foreign investment in agriculture: domestic law, investment contracts and international law (international investment agreements and soft law)⁵.

The domestic law is the major basis for access of a foreign investor and once he invested. In the context of land acquisition and lease and land use rights, related domestic law is often characterized by legal pluralism with a mixture of official and informal land provisions. Informal land rights are based on tradition and mutual recognition within the rural communities. A lack of recognition of these informal land rights by the country makes it difficult for landholders to enforce their traditional rights.

In relation to investment contracts, today in the areas where the biggest investments are being made the State owns most of the farmland, like in sub-Saharan Africa. The investment contract therefore is often an international contract between the Government and the foreign investors, not purely a private contract. Investment contracts can often become the legal code for investment. They can determine which law applies in the event of a dispute, add to or limit the application of generally applicable domestic law, and in some cases freeze the applicable law as at the time of the investment.

International law is the third source of relevant law. It includes investment treaties that are in several forms, like bilateral investment treaties and regional investment treaties. The Bilateral Investment Treaties grant investors much stronger protection of their property rights, including through wide-ranging safeguards against expropriation, usually involving specific compensation standards, and through direct access to international arbitration as way to settle dispute. These treaties give more protection for investors instead of poor people and local communities.

Finally, an important role is played by soft law, that is defined as consisting of international standards, declarations of principles, recommendations or rules issued by international organization within society in matters related to the protection of human rights, economic relations and the environment, which embody a common core of principles, approaches or concerns of the international community⁶.

3) The international law

Speaking of international law, it is dangerous to transfer ideas from national legal systems to the very different context of international law.

⁵ Deutsche Gesellschaft für Technische Zusammenarbeit (2009), *Foreign Direct Investment in Land in developing countries*, Eschborn, pp. 16 ss.

⁶ Cuffaro N., Hallam D. (2011), *Land Grabbing in Developing Countries: Foreign Investors, Regulation and Codes of Conduct*, paper presented at the International Conference on Global Land Grabbing.

The result is that international law is made largely on a decentralized basis by the actions of the 192 States which make up the international community.

The Statute of the International Court of Justice, Art. 38 identifies five sources of international law⁷:

- a) Treaties between States;
- b) Customary international law derived from the practice of States;
- c) General principles of law recognized by civilized nations; and, as subsidiary means for the determination of rules of international law:
- d) Judicial decisions and the writings of “the most highly qualified publicists”.

This list is not a complete codification of sources. In the writer's opinion, international law is generated not only by States, but also by other actors such as international organizations and NGOs. Law is what actors as society consider to be the law. In fact, collective beliefs play a central role in international law as they direct the use and the understanding of fundamental legal categories. What the actors believe the law is may not coincide with how law is defined in the abstract by theorists. But what matters is what actors believe to be the law as law is embedded in the social texture⁸.

As far as international investments in agriculture land is concerned, a number of international instruments such as the Universal Declaration of Human Rights, the Rio Principles on Environment and Development, the UN Resolution 1803/ 1962 and UN Resolution 3281/ 1974, the UN Declaration on the Rights of Indigenous People (13th September 2007), come from the social need to commit governments to respect human rights and standards, to which they have jointly agreed.

The United Nations has pursued in the last decade a strategy aimed at improving the human rights accountability of transnational corporations, both in general and in the domain of agriculture and large land acquisitions⁹.

However, the current human rights legal framework does not adequately address the obligations of non-State actors such as transnational corporations and the effects of their policies abroad. Mechanism to hold transnational corporations directly accountable are soft law, i.e. non-binding instruments; indirect accountability

⁷ http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_II

⁸ Bianchi A. (2010), *Reflexive Butterfly Catching: Insights from a Situated Catcher*, Panel on IIPPM Normative Output and International Law, Geneva.

⁹ United Nations (2003) *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, New York.

De Schutter O. (2005), *Transnational Corporations and Human Rights: An Introduction*, Global Law Working Paper 01/05 http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLX_015787

De Schutter O. (2009), *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Report of the Special Rapporteur on the Right to Food , United Nations General Assembly Human Rights Council;

http://www.srfood.org/images/stories/pdf/officialreports/20100305_a-hrc-13-33-add2_landprinciples_en.pdf

through the role of the State is weak and States that do not ratify the treaties may escape obligations altogether.

The role of international treaties has been weak especially when compared to the specific and enforceable sets of rights enjoyed by investors against the rights of governments to regulate economic activity in their borders. This protection is entrenched in international investments treaties between States that are intended to provide investors from one State investing into the territory of the other State with special protections under international law. The most common international investment agreements are bilateral investment treaties between two States¹⁰.

In the 1990s, governments, NGOs and companies started to draw up responsibility codes. A large variety of codes have been adopted in agribusiness. Land rights have been so far a marginal topic in the CSR debate, but the recent wave of Foreign Direct Investment in agriculture has focused international attention on it.

Investors may have a self interest in commitments linked to land and specifically on property rights in land in a context involving local communities, in order to avoid conflicts and in exchange for consensus on stability of their rights in a globalized framework that includes international agencies. Indeed, considering both past experiences and recent reactions to land deals, it seems that investors definitely do have a self interest in this domain and should therefore pursue appropriate CSR.

A recent concerted effort for establishing consensus among development agencies (FAO, IFAD, UNCTAD, World Bank) on an international code for large land acquisitions, produced a set of principles for responsible agricultural investment involving significant acquisitions of resource rights¹¹, the first of which, respecting land and resource rights, is no doubt the core of the matter, as the available evidence shows.

In this key area, a code of conduct would serve the function of addressing the shortcomings of institutions in the host countries. The proposed principles demand governments to consistently improve their land rights framework and to accept a self-limitation of the scope of their intervention in the land market, which in many developing countries is indeed very large. The question is how a specific instrument as a code of conduct can contribute to such a virtuous outcome; and as usual it is safe to assume that self-interest is crucial.

A code developed by international organizations can have a role model and trigger coalitions. Furthermore when codes were promoted by development

¹⁰ Narula S. (2006), *The Right To Food: Holding Global Actors Accountable Under International Law* , Center For Human Rights And Global Justice Working Paper Number 7, NYU School of Law.

¹¹ Fao, Ifad, Unctad and the World Bank Group (2010) *“Principles for Responsible Agricultural Investment that Respect Rights, Livelihoods and resources.*

http://www.donorplatform.org/component/option,com_docman/task,doc_view/gid,1280

agencies, assistance in analysis, implementation and conflict avoidance could be gained in the interest of both destination countries and investors¹².

3.1) Permanent sovereignty over natural resources: UN Resolution 1803/1962 and UN Resolution 3281/1974

The principle of permanent sovereignty over natural resources arose in the context of decolonization and developed in subsequent debates regarding the human right of peoples to self-determination and the right of developing States to exercise control over the goals and means of their economic growth¹³.

This principle continued to evolve as part of global debates regarding the ability of developing States to engage in economic growth. In particular the States discussed in the Second Committee of the General Assembly of 1952 the issue of economic development of underdeveloped countries. On one side, the Western industrialized countries supported the idea to increase the flow of capital by reinforcing respect for acquired rights. On the other side, developing States began to emphasize the link between control over their natural resources and the ability to facilitate national economic progress. They supported the recognition of their rights along two primary axes: the assignment of ownership, possession, use, or exploitation of natural resources to private individuals or commercial interests, and the ultimate direction of socio-economic development based on the use and exploitation of their resources¹⁴.

In 1958, after renewed efforts by the Commission on Human Rights, the General Assembly established the Commission on Permanent Sovereignty over Natural Resources¹⁵. Later, the Commission produced General Assembly Resolution 1803 of 1962, entitled Declaration on Permanent Sovereignty over Natural Resources. That resolution states *“the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”*¹⁶. Through its provisions, the Commission attempted to balance concerns regarding

¹² Cuffaro N., Hallam D. (2011), *Land Grabbing in Developing Countries: Foreign Investors, Regulation and Codes of Conduct*, paper presented at the International Conference on Global Land Grabbing, University of Sussex, pp. 11-12.

¹³ Zambrano V. (2009), *Il principio di sovranità permanente dei popoli sulle risorse naturali tra vecchie e nuove violazioni*, Milan, pp. 1-2.

¹⁴ Elian G. (1979), *The principle of sovereignty over natural resources*, Aan den Rijn, pp. 2 ss.

¹⁵ G.A. Res. 1314 (XIII), U.N. Doc. A/RES/1314(XIII) (Dec. 12, 1958). In 1954, the Commission on Human Rights recommended that the General Assembly, through ECOSOC, establish a commission tasked with further elaborating upon the substantive contours of the right of “peoples” and “nations” to “permanent sovereignty over their natural wealth and resources,” which they deemed a “basic constituent of the right to self-determination;” however, it was not until 1958 that the General Assembly established the Commission on Permanent Sovereignty over Natural Resources.

¹⁶ <http://www1.umn.edu/humanrts/instree/c2psnr.htm>

the rights and concessions of foreign investors over natural resources and the interests of developing States in safeguarding and promoting the national economy.

Thereafter, the UN General Assembly further elaborated upon the principle of permanent sovereignty over natural resources in the Charter of Economic Rights and Duties of States in 1974. The Charter expanded upon the applicability of the principle beyond the physical natural resource wealth of the State to include economic activities. In this elaboration, the principle came to support the sovereign right of States to pursue economic activities commensurate with national development goals¹⁷.

These two UN General Assembly Resolutions concern and develop the principle of permanent sovereignty over natural resources. One basic difference divides these resolutions: when dealing with the problem of nationalization, Resolution 1803 of 14 December 1962 includes a reference to international law, and resolution 3281 of 12 December 1974 omits such reference. Today only Resolution 1803 is accepted as a restatement of customary international law¹⁸.

Resolution 1803 proclaims that the right of peoples and nations to permanent sovereignty over their national resources must be furthered by the mutual respect of States based on their sovereign equality¹⁹. It recognizes an important and basic limitation on the notion of relative sovereignty: a State's sovereignty over natural resources is subordinate to international law. For this reason, developing countries, principally, have criticized the Resolution as "conservative in character" and "not going far enough"²⁰.

Resolution 3281 declares that every State has permanent sovereignty over its wealth, natural resources, and economic activities and it recognizes that each State enjoys a sovereign right to nationalize, in which case appropriate compensation should be determined according to its own law and by its own courts²¹. However, this statement appears to be incompatible with the notion of relative sovereignty and its radical formulations also go beyond actual practice. Moreover, this resolution fails to address to the rules of international law and good faith.

The contemporary view of international law accepts that multilateral forums like the U.N. General Assembly, where representatives of States and other interested groups come together to address important international problems, often play a

¹⁷ <http://www.un-documents.net/a29r3281.htm>

¹⁸ Schrijver N. (1997), *Sovereignty over natural resources. Balancing Rights and duties*, Cambridge, pp. 57 ss.

¹⁹ Note 14.

²⁰ Perez F. X. (1996), *The relationship between Permanent Sovereignty and the obligation not to cause transboundary environmental damage*, Environmental Law, pp. 1190-1211.

²¹ Note 16.

central role in the creation and shaping of international law²². Although the amount of support displayed toward a rule under consideration in such a forum is of crucial importance, unanimous support may not be required to create and shape new law. A small number of objecting States may not stop the movement of a proposed rule towards law. It therefore could be argued that Resolution 3281, which was accepted by a large majority of votes, formulates legally binding rules of international law imposing rights and obligations on States²³.

The effect of the discussion and adoption of a General Assembly rule “depends upon the number of objecting States, the nature of their objections, the importance of the interests they seek to protect ... , their geopolitical standing,” and whether their objections go to the essence of the rule under consideration²⁴. Using this analysis, the *Arbitral Tribunal in Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Libyan Arab Republic* addressed the issue of whether Resolution 3281 - or any other resolution that omits reference to general rules - can become international law.

The Arbitrator in *Texaco Overseas Petroleum* considered the legal force of the U.N. resolutions when he examined Assembly voting conditions and analyzed the relevant provisions of the resolutions²⁵. While a great number of States, representing not only all geographical areas, but also all economic systems, assented to the principles stated in Resolution 1803, the subsequent resolutions, including Resolution 3281, were adopted without the assent of the most prominent Western countries and without general consensus among the states with respect to the most important provisions, particularly those concerning nationalization. The reference to international law, particularly the field of nationalization, was an essential factor in the support given by several Western countries to Resolution 1803. Therefore, Resolution 1803 seems “to reflect the State of customary law existing in this field”²⁶.

Conversely, Resolution 3281 (Article 2 of the Charter of Economic Rights and Duties of States) “must be analyzed as a political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States²⁷.”

²² Bianchi A. (2009), *Looking ahead: international law's main challenges*, Routledge handbook of international law, pp. 395 ss.

²³ Jane A. Hofbauer (2011), *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications* - LL.M. Master Degree Thesis - Faculty of Law, University of Iceland, p.18.

²⁴ Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic (*Texaco v. Libya*), 17 ILM 1, paras. 88-90 (Award, Jan. 19, 1977).

²⁵ Cantegreil J. (2011), *The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law*, European Journal of International Law, vol. 22, pp. 441-458.

²⁶ Jane A. Hofbauer (2011), *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications* - LL.M. Master Degree Thesis - Faculty of Law, University of Iceland, p.21.

²⁷ *Ibidem*.

Today, the international community generally accepts that Resolution 1803 – sometimes referred to as a carefully worked out compromise – is a “restatement of present day customary international law²⁸.” In contrast, Resolution 3281 represents a process of change and outlines principles that some industrialized Nations perceive as a fundamental departure from the traditional rules of contemporary international law. However, developing Countries do recognize Resolution 3281 as a legally binding instrument imposing rights and obligations on States.

3.2) Permanent sovereignty over natural resources and indigenous people: UN Declaration on the Rights of Indigenous People

The most recent development in the field of international law with regard to indigenous peoples can be found in the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted in 2007²⁹. Although non-binding, the Declaration is perceived as “the most universal, comprehensive and fundamental instrument³⁰” with regard to indigenous peoples, and exerts influence in its function of specifying and explaining the scope of human rights in the context cultural, historic, social and economic circumstances of indigenous peoples.

The Declaration affirms indigenous peoples’ right to the lands, territories and resources which they have traditionally possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired³¹.

It’s important to underline that the term “possess” has to be customized to an indigenous peoples’ rights context. In other words, one cannot necessarily expect and demand the same level of intensity and exclusivity with regard to land utilization in indigenous cultures compared to non-indigenous cultures.

An eminent doctrine and jurisprudence have underlined that “possession”, in the context of indigenous peoples, must be understood to mean “possession in fact”, in turn giving rise to a presumption that the indigenous people also has “possession in law³²”. This presumption must reasonably be particularly strong with regard to such

²⁸ Schrijver N., *Sovereignty over natural resources. Balancing Rights and duties*, Cambridge University Press, pp. 100.

²⁹ Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295, adopted with a vote of 143 in favour, 11 abstentions and 4 against (Australia, Canada, New Zealand, United States); C. J. Fromherz: “Indigenous Peoples’ Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples”, *University of Pennsylvania Law Review*, vol. 156, 2008, p. 1342.

³⁰ Permanent Forum on Indigenous Issues, Draft General Comment No. 1 (Article 42 of the Declaration on the Rights of Indigenous Peoples), May 5, 2009, para. 6, UN Doc. E/C.19/2009/CRP.12.

³¹ Art. 26 (1)(2), Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

³² McNeil K. (2001), *Emerging Justice?*, Essays on Indigenous Rights in Canada and Australia, Saskatoon.

parts of an indigenous people's traditional territory to which no other title exists. Lack of private ownership indicates that competing activities have been limited and that, consequently, the indigenous people in question has utilized the area with a large degree of exclusivity. The fact that the State might today regard itself as owner of the same land does not then prevent the indigenous people from "possessing" the same³³.

So, indigenous peoples hold ownership rights on land and natural resources they have traditionally, and continuously, use and moreover they have the right to restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally occupied or used, and which have been taken without their free, prior and informed consent³⁴. The criterion to recognize indigenous peoples' right is hence traditional use, which must be understood in the cultural context of the particular indigenous people³⁵.

When Declaration affirming indigenous land rights is viewed in conjunction with the requirement for free, prior and informed consent³⁶, it becomes clear why some countries are so opposed to this language. If indigenous rights are thus confirmed, it could mean the potential loss of billions of dollars in revenue from land and resource development in indigenous territories, like timber in Canada, oil in the Amazon Basin, gold and diamonds in Africa.

With regard to lands, territories and resources the Declaration states that primarily the decisions with regard to lands, territories and resources shall be taken by the indigenous people concerned. And moreover, in those situations, in which the State wishes to engage in an activity which will affect the indigenous people, the country must firstly consult and cooperate with the group concerned, and secondly, for conducting the wished activity, the indigenous people shall have given their free, prior and informed consent to the project³⁷.

One could argue that in effect, the rights of indigenous peoples to participate in, and be consulted with regard to decisions taken which affect their lands, territories and resources, and the obligation to secure their consent, helps create a *de facto* sovereignty over natural resources.

Delgamuukw v British Columbia [1997] 153 D.L.R. (4th) (Can.) at 1101. Delgamuukw v. British Columbia is a famous leading decision of the Supreme Court of Canada where the Court made its most definitive statement on the nature of Aboriginal title in Canada.

³³ See McNeil K. (2001).

³⁴ Art. 28(1)(2), Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

³⁵ Chartes C., Stavenhagen R. eds. (2009), *MAKING THE DECLARATION WORK: The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen, pp. 200 212.

³⁶ Note 31.

³⁷ Art. 32(1)(2), Annex, UNGA – Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295.

It's interesting to analyze that you find the verb "shall" and not "should": so the question is if the Declaration is legally binding or not. A formal analysis of the Declaration dictates that it does not have legally binding effect per se. Yet, the name "Declaration" appears to give it a more solemn ring, takes it closer to most important policy statements of the organized world community – into the vicinity of instruments such as the 1948 Universal Declaration of Human Rights. While these documents are clearly not binding as treaties, individual component prescriptions of them might have become binding if they can be categorized as reflective or generative of customary international law³⁸.

States voting against this document, including the U.S., have rejected any possibility that this document is or can become customary international law. They stated that it does not constitute evidence of customary international law, as lacking support in state practice, and that it cannot provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings³⁹.

This statement is true as it pertains to the non-binding nature of the Declaration itself. As far as it proclaims the absence of State practice in support of the content of the Declaration, the individual rights pronounced, it needs to be independently assessed. In the case of the UN Declaration on the Rights of Indigenous Peoples, the negative vote by four governments, even though they have a significant number of indigenous peoples living in their midst, does not necessarily invalidate the claims to the customary international law character of individual key parts of the instrument or of principles embedded in it. This distinct body of customary international law concerning indigenous peoples, not necessarily coextensive with the full reach of the present Declaration, had formed long before this vote occurred. The starting-point for any such analysis is the ICJ's definition of the requirements needed to establish new customary international law, as stated in the North Sea Continental Shelf Case⁴⁰, i.e. there needs to be a very widespread and representative State practice in support of the purported new rule, including the specially affected States, as well as a feeling to be obligated (*opinio juris*).

3.2) Property rights

Human rights are relevant to the protection of property rights. This includes, first and foremost, the human right to property, which is affirmed in the Universal Declaration of Human Rights and in the three regional human rights systems. In

³⁸ Anaya J. (2004), *Indigenous Peoples in international law*, Oxford, pp. 61 ss.

³⁹ Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, with Annex: Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples, September 13, 2007, USUN Press Release # 204(07), available at <http://www.diplomacymonitor.com/stu/dm.nsf/dn/dn9694A1E7EC293A8585257355006729CE>

⁴⁰ <http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5>

addition, property rights over natural resources are instrumental to the realization of other internationally recognized human rights. Particularly relevant are peoples' right to freely dispose of their natural resources; the right to an adequate standard of living, including food and housing; the rights to respect for private and family life, to public participation, and to legal redress. While the right to property may in principle apply to both foreign investors and local resource users, the other human rights are only relevant to local resource rights⁴¹.

The cornerstone of the international protection of the right to property is provided by article 17 of the Universal Declaration of Human Rights which states: "*Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property*"⁴².

The open formulation of this provision is the result of considerable debate and disagreement among States⁴³. It is worth noting the Declaration protects both individual and collective property rights.

Treaty provisions do exist on specific aspects of the right to property, for instance in relation to the natural resource rights of indigenous peoples; to nondiscrimination in property relations on the basis of gender and race; and to the protection of civilian property and objects related to the survival of the civilian population within the context of armed conflicts. But beyond such specific aspects, the protection of the right to property under the UN system is rather weak.

The weakness of the right to property under global instruments is partly compensated by its protection under regional human rights systems. The European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR) all recognize the right to property. However, differences in emphasis among these instruments result in the right to property enjoying considerably weaker international protection in Africa compared to Europe and the Americas.

The ACHR and ECHR right-to-property provisions present some differences⁴⁴. For instance, differently to the ECHR, the ACHR text explicitly refers to payment of compensation, although in the ECHR this gap has been filled through case law.

Overall, the ACHR provision features three rules that are essentially similar to the ECHR ones (affirmation of the right; limitation through regulation; limitation through expropriation). Moreover, the Inter-American Commission and Court of

⁴¹ Cotula L. (2009), *Property rights, negotiating power and foreign investment: An international and comparative law study on Africa*, University of Edinburgh, pp.80 ss.

⁴² <http://www.un.org/en/documents/udhr/index.shtml>

⁴³ Note 30.

⁴⁴ http://www.hrcr.org/docs/American_Convention/oashr5.html
<http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>

Human Rights have developed case law on the right to property, albeit not to the same extent as the European Court.

As for the African human rights system, the ACHPR affirms that the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws⁴⁵.

While the right-to-property provisions of the ACHR and of the ECHR are broadly similar, this right in the ACHPR is less detailed and specific. The ECHR and the ACHR clearly state that everyone has the right to use and enjoy his/her property, instead the ACHPR avoids clarifying who is the holder of the right to property.

The formulation of the right to property in the ACHPR reflects the political disagreement among African States about the protection to be granted to the right to property - particularly at a time when those States were divided between “socialist” and “capitalist” paths to development. It also reflects the lesser status that this right enjoys in the ACHPR compared to the European and American human rights systems - a lesser status that is partly compensated by the African Charter’s emphasis on other rights, such as peoples’ right to freely dispose of their natural resources. This peoples’ right also contributes to protect local resource rights, and is absent in the European and American systems.

The ECHR specifically protects the right to property of every natural or legal person⁴⁶. On the other hand, the Inter-American Commission on Human Rights ruled out human rights claims by legal persons in *Mevopal SA v. Argentina*⁴⁷.

While article 14 of the ACHPR does not explicitly refer to the right to property of legal entities, its open wording seems to enable this possibility. While most human rights, by their very nature, refer to physical persons (e.g. freedom from torture, right to health), the right to property raises no conceptual difficulties in being extended to legal entities.

Even if the possibility of recourse to human rights instruments by corporations is precluded, as in the ACHR system, their claims may be brought by the physical persons having interests in the corporation. Ultimately, behind a corporation are shareholders. However, things may be more complicated where it is not straightforward that interference with the property rights of the corporation also

⁴⁵ <http://www.achpr.org/instruments/achpr/#a14>

⁴⁶ article 1 of Protocol 1

⁴⁷ The case concerned several human rights, including the right to property. The Commission based its decision on article 1 of the ACHR, which specifically states that the term “persons” as used in the Convention refers to human beings. It must be noted, however, that, differently to most other ACHR provisions, article 21 affirms the right to property with regard to “everyone” rather than “every person”. The Commission’s decision in *Mevopal* does not rule out the possibility of individual shareholders filing petitions with respect to interests they hold in corporations.

translates into interference with the property rights of its shareholders, whose property is the share itself rather than the corporation's assets⁴⁸.

3.4) Principles for Responsible Agricultural Investment

The global surge in interest in investment in agriculture since the food crisis in 2008 could have profound implications for the future of global food security and world agriculture. In particular large scale acquisitions of farmland by foreign or domestic investors in agriculture-based countries with weak land governance raise complex economic, institutional and ethical issues in relation to food security, poverty reduction and rural development objectives.

In the wake of the G8-summit of L'Aquila in June 2009, the United Nations Special Rapporteur on the right to food, Mr. Olivier De Schutter, had already proposed a set of 10 principles based on human rights that should guide large-scale transnational land acquisitions and leases⁴⁹. Earlier in 2009, important studies on the issues of transnational land acquisitions had also been published by IFPRI and by IIED/FAO/IFAD.

In January 2010, the World Bank, the FAO, the United Nations Conference on Trade and Development (UNCTAD) and the International Fund for Agricultural Development (IFAD) have issued seven Principles for responsible agricultural investment. These principles encourage businesses and local companies to respect human rights and environmental policies of countries hosting the investment⁵⁰.

It is however important to note that the four involved organizations never formally submitted the RAI-principles to the approval of their governing bodies.

The principles analyze the problems as a consequence of lack of transparency in the investment contracts, of local breaches (States with weak laws or insufficiently prepared), of insufficient consultation particularly among rural populations, who

⁴⁸ Cotula L. (2009), Property rights, negotiating power and foreign investment: An international and comparative law study on Africa, University of Edinburgh, pp.

⁴⁹ De Schutter O. (2009), *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*, United Nations.

⁵⁰ 1. *Land and resource rights: Existing rights to land and natural resources are recognized and respected.*
2. *Food security: Investments do not jeopardize food security, but rather strengthen it.*
3. *Transparency, good governance and enabling environment: Processes for accessing land and making associated investments are transparent, monitored, and ensure accountability.*
4. *Consultation and participation: Those materially affected are consulted and agreements from consultations are recorded and enforced.*
5. *Economic viability and responsible agro-enterprise investing: Projects are viable in every sense, respect the rule of law, reflect industry best practice, and result in durable shared value.*
6. *Social sustainability: Investments generate desirable social and distributional impacts and do not increase vulnerability.*
7. *Environmental sustainability: Environmental impacts are quantified and measures taken to encourage sustainable resource use, while minimising and mitigating the negative impact.*
<http://unctad.org/en/Pages/DIAE/G-20/PRAI.aspx>

have to be expropriated, and of the absence of impact studies in accordance with international standards.

These principles are certainly an important step to find a common framework to regulate investment in agricultural land. They propose trademarks and codes of conduct, but not to revise the rules governing investment, foreign or not, nor to refer to a binding text. It seems that they rely more on the ability of self-regulation of markets rather than public action.

In this report it's important to analyze the Principle 1. Recognition of rights to land and associated natural resources, together with the power to negotiate their uses, can greatly empower local communities and such recognition should be viewed as a precondition for direct negotiation with investors. Specific attention to land rights by herders, women, and indigenous groups that have often been neglected in past attempts is critical to achieving a fair, inclusive outcome⁵¹.

In this principle you find the concept "existing land rights". In the writer's opinion, there is a problem: the concept does not cover the rights of landless people to gain effective access to land. The fact that the best farmlands are being taken over by private investors precludes the possibility of either landless or land-scarce people to obtain or substantially improve their "existing" land rights. This is a fundamental contradiction in the RAI initiative. In most contexts agrarian reform, including land redistribution, is an obligatory measure under the human right to food. Reducing the land resources available for such redistribution and orienting agrarian policies away from agrarian reform are regressive measures and therefore, violations of the human right to adequate food.

The Global Campaign for Agrarian Reform Land Research Action Network, Fian International, opposes this Principle, because identification of all right holders and legal recognition of all types of land rights are not sufficient to effectively guarantee respect for and protection and advancement of the right to land of local communities⁵².

By the way, RAI principles are very important, because they start from the presupposition that investment in land is something that needs to be regulated. The call for regulations has been so widespread that their development seems inevitable and consequently it may be best to participate in the process as much as possible to help shape their outcomes.

3.5) FAO Voluntary Guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security

⁵¹ <https://www.responsibleagroinvestment.org/>

⁵² <http://focusweb.org/content/why-we-oppose-principles-responsible-agricultural-investment-rai>

In May 2012, the UN Committee on World Food Security (CFS) endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests⁵³. The main objective of the Voluntary Guidelines is to provide practical guidance to governments to improve governance of natural resources, recognizing that secure tenure rights and equitable access to land, fisheries, and forests are crucial to achieve food security and the progressive realization of the right to adequate food. Despite being “voluntary”, the Guidelines explicitly refer to existing human rights obligations related to natural resources and provide interpretation and guidance on how to implement them⁵⁴.

For land tenure, the Guidelines provide a basis for actions, including improve tenure security for a wide range of people. They can guide actions to ensure that agricultural investments expand production, improve livelihoods, and build food and nutrition security, while safeguarding the tenure rights of local communities. They can serve to improve access to land administration services⁵⁵.

The Guidelines similarly supports activities to improve fisheries tenure. They can be used in the development and implementation of plans that ensure the sustainable use of fisheries and aquaculture resources, and thereby help to ensure that all stakeholders can benefit from better governance of tenure.

In the case of forest tenure, the Guidelines are a foundation for actions, such as encouraging countries to reflect on the effectiveness of existing forest tenure systems. They can support countries in reform processes that strengthen the security of tenure, particularly for the local communities and indigenous people. They can guide activities to improve forest governance, forest policy formulation, national forest programmes and inclusive approaches such as community-based forest management.

Importantly, the Guidelines promote the adoption of a coordinated approach for administering the tenure of land, fisheries and forests. By encouraging collaboration across sectors, this internationally negotiated agreement constitutes a basis for taking action on tenure in an integrated way.

To carry the dialogue further, the FAO initiated in 2006 a broad, participatory process to develop practice-oriented, voluntary guidelines on the responsible governance of natural resource tenure. More than 90 FAO member countries, several UN agencies and other international organizations, farmer associations, representatives from the private sector as well as civil society organizations (CSOs)

⁵³ http://www.fao.org/fileadmin/user_upload/newsroom/docs/VG_en_Final_March_2012.pdf

⁵⁴ Munro-Faure P., Palmer D. (2012), *An overview of the Voluntary Guidelines on the Governance of Tenure*, Land Tenure Journal n. 1, pp. 8-16.

⁵⁵ Ibidem.

participated in the process, which consisted of three rounds of negotiations facilitated by a working group of the Committee on World Food Security (CFS)⁵⁶.

The active involvement of CSOs seems particularly noteworthy; not only did they participate in the official negotiations, but they additionally held a series of regional civil society consultations, which were facilitated by the International Planning Committee for Food Sovereignty (IPC). Thus, the FAO's consultation process developed into a highly contentious debate, but in return was positively acknowledged by a broad range of stakeholders. In their final version endorsed by the CFS on May 11, 2012, the guidelines mainly address potential host States rather than investors. Consequently, they refer explicitly to existing binding international law such as the universal declaration on human rights or international conventions on indigenous people or biodiversity⁵⁷.

The inclusive and participatory character of the process gives the Guidelines a high level of legitimacy and political weight. Therefore all efforts are necessary to ensure implementation, with a special responsibility for States and UN agencies.

This is the main difference with the RAI principles: a law not from States or international institutions, but from civil society.

The writer is confident the Guidelines will be effective, first of all because they are an important soft law instrument and, as just said, it is usually easier for countries to reach agreement for soft law instruments compared with binding instruments and as a result they can be more comprehensive, detailed and better suited to technical matters and best practices.

These soft law instruments have been supported through the formulation of national action plans. They have been made operational through the design and implementation of national-level projects which embody the principles established at the international level. Field projects are an important mechanism for building on good principles where they exist, and for introducing them in national policies where they are not yet in place⁵⁸.

4) The domestic law

Land tenure is the way land is held or owned by individuals or groups. A number of individuals can hold different tenure claims and rights to the same land. These claims may be formal, informal, customary or religious, and can include leasehold,

⁵⁶ Saturnino M. Borras Jr., Jennifer C. Franco, Sergio Go´mez, Cristo´bal Kay and Max Spoor (2012), *Land grabbing in Latin America and the Caribbean*, The Journal of Peasant Studies, Vol. 39, N. 3–4, July–October 2012, pp. 845–872.

⁵⁷ Anni A., Palmer D., Vidar M., Cebolla J., Romano F., Shamsaifar L., (2012), *Governance of Tenure. Making it happen*. Land Tenure Journal, Vol. 1, p. 70.

⁵⁸ Palmer D., Anni A., Metzner R., Willman R., Muller E., Kafeero F., Crowley E., (2012), *Improving the Governance of Tenure of Land, Fisheries and Forest*, Land Tenure Journal, Vol. 1, pp. 59-60.

freehold, use rights and private ownership. The strength of one's land claims may hinge on national legal definitions of property rights, local social conventions and multiple other factors. Land tenure rights often include the freedom to: occupy, use, develop or enjoy one's land; bequeath land to heirs or sell land; lease or grant land or use rights over that land to others with reasonable guarantees of being able to recover the land; restrict others' access to that land; and use natural resources located on that land.

Property rights are a social and legal construction, and may be conceptualized differently in formal, customary or religious legal systems. The rights and obligations of individuals, families and communities in relation to land are embedded in the rules and norms sanctioned by local legal systems, which dictate how citizens and officials must behave in the pursuit and enforcement of land rights. Legal systems manage how land rights are administered and enforced and how the rules that make land tenure secure are applied⁵⁹.

4.1) The African situation

The main continent where investments in land are realized is Africa, where over 90 percent of land transactions are still governed by customary legal paradigms, and the decisions and rules established under customary systems are recognized as legally valid and binding by their users. The result has been a wide gap between nations' formal legal systems and the rules that govern the lived realities of the majority of those nations' citizens. There are two or more legal systems functioning side by side, blending and mixing, and occasionally clashing at places of intersection. In some nations, the greater part of rural populations govern themselves and their land according to a legal system outside of and unregulated by the state while relevant national legislation remains largely unknown, ignored, or distorted⁶⁰.

Tenure security rather than just property rights is the linchpin to rural economic development. Obtaining secure property rights is critical to smallholder development and equitable growth. With a system of property rights that is viewed as legitimate, smallholders can use their claim for collateral for agricultural inputs, improvements, innovations, and expansion of their enterprises.

To achieve tenure security, however, property rights are only effective when combined with other measures, such as affordable access to legal services,

⁵⁹ Collart Dutilleul F. (2012), *Le problème juridique des investissements dans les terres agricoles des pays en développement*, in Uniform Law Review n. 1-2 2012, pp. 73 ss.

⁶⁰ Chimhowu A., Woodhouse P. (2006), *Customary vs Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa*, in Journal of Agrarian Change, Vol. 6 n. 3 2006, pp. 346-371.

trustworthy land administration, and honest, fair, and gender-neutral enforcement and judicial systems. Without these additional conditions, property rights alone have minimal impact on land tenure security and the commitment of smallholders, particularly women, to invest in improvements or innovations⁶¹.

The normative content dimension of the protection of property rights is shaped by national Constitutions, the law of property and investment codes⁶².

Concerning of national Constitution, constitutional provisions on the right to property are brief and focused on key principles, although in a few cases (e.g. Ghana⁶³) they provide much more detailed regulation of property relations. While constitutional provisions on the right to property would in principle apply to both investors and local resource users, the extent to which resource rights based on customary rather than State law can be considered as protected by these constitutional provisions has been contested. As most of the rural population gains access to land through customary rights, the constitutional protection of these rights is particularly important.

Other human rights such as peoples' right to freely dispose of their natural resources and the right to an adequate standard of living may more easily lend themselves to protecting local resources rights regardless of whether they amount to full ownership recognized by national law. But these rights are more rarely included in the Constitution and, when they are, they tend to emphasize a State-centered perspective⁶⁴.

For instance, the Constitution of Chad affirms State sovereignty over natural resources for the benefit of the nation, rather than a people's right to freely dispose of natural resources⁶⁵.

Beyond constitutional provisions, ordinary legislation also shapes the protection of property rights within natural resource investment projects.

In many African countries, the State remains the key player in land relations in much of rural Africa. For instance, in Senegal in 1964, the government passed the National Domain Law, which was intended to break the grip of traditional ethnic and religious hierarchies over land access, to encourage productive use of land, and create an economic environment conducive to agricultural exports. The National Domain Law classified about 97% of all land in Senegal as State-owned; the 2–3%

⁶¹ Ibidem.

⁶² Cotula L. (2009), *Property rights, negotiating power and foreign investment: An international and comparative law study on Africa*, Edinburgh, pp. 154 ss.

⁶³ Larbi W.O. (2008), *Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies*, International Seminar on State and Public Sector Land Management, Verona, September 9-10, 2008.

⁶⁴ Note 62, p. 160.

⁶⁵ Art. 57 Constitution of Chad.

of land that had been registered as freehold during the colonial era remained under private ownership⁶⁶. This law helped to weaken the land rights of the inhabitants.

In African societies, in fact, the land has always been considered the most important resource and preserve it has always been a key priority for the community. However, when the law went into effect, all parcels which were not registered by the users prior to its promulgation became part of the national domain and, therefore, administered by the State.

In Africa there is no a clear land policy, with a precise orientation in favor of the poor. Where the accumulation of land in the hands of few investors and the exclusion of large sections of the population occurred, agrarian reform is needed to give people access to land and water through a redistribution of land.

4.2) A pro-poor Land system

To a large degree, legal pluralism, extra-legal land dealings, and the kind of mixing of formal and customary practices exist because for various reasons, the formal legal system is inaccessible to the poor. As an important FAO study argues⁶⁷, the solution is not to eliminate the customary, but to integrate and harmonize the two systems so that nations' formal legal frameworks mirror, legalize and oversee the customary, so long as customary practices do not violate national laws or basic human rights. Such integration must ensure that the poor can actually access and successfully navigate any new land administration and management processes; if they do not, efforts to integrate and streamline the two systems may partially or wholly fail. In such instances, the poor will remain essentially confined to customary land administration and management systems that appear to be increasingly discriminatory towards the land claims of more vulnerable populations, while those with the wherewithal to do so will leverage the formal system to claim valuable lands and resources.

An UNIDROIT study of 2012 sustains to develop a new affordable form of land recordation system that would make it possible for different types of land rights to be recorded, and operating within a co-management framework with the community⁶⁸. A system for the poor has to be affordable and take into account the existing social tenures being used by the poor.

A pro-poor system would need to allow participatory adjudication or enumeration for the poor and their social land tenures, it should be closer to the

⁶⁶ Monkam, Nara (2009) *Property Taxation in Francophone Africa 1: Case Study of Senega*. Lincoln Institute of Land Policy.

⁶⁷ Knight R. S. (2010), *Statutory recognition of customary land rights in Africa. An investigation into best practices for lawmaking and implementation*, in Fao Legislative Study n. 105, pp. 40 ss.

⁶⁸ Verstappen L., Zevenbergen J. (2012), *A Pro-Poor Land Recordation System – Toward a Design*, in Uniform Law Review n. 1-2 2012, pp. 57 ss.

ground to improve record correctness and ensure ease of access. The system should be affordable and the corporate culture associated with it needs to be pro-poor and based on co-management between the State and the community.

One of the main reason for introducing land registration is preventive justice: when two parties transfer land between them, objective information is available which clarifies the rights and contractual relations and limits the need to go to court to obtain a final agreement. Evidence from Uganda shows that adjudication of land rights decreases land conflicts dramatically⁶⁹.

In 1998 the Government of Uganda passed the Land Act. One of the most important changes this brought about was the introduction of Land Tribunals. Three years after they began operating in 2002 they were ineffective and inefficient in their delivery of land justice, because many people found it difficult to access justice through this system, in fact most people in rural areas do not have the time or money to go through the formal court system.

For this reason in 1995 The Uganda Land Alliance (ULA) was established as an independent non-governmental organization lobbying and advocating for fair land laws and policies that address the land right of the poor⁷⁰.

ULA distilled relevant research findings and presented them in formats accessible to the poor, thereby raising public awareness and empowering vulnerable groups to make their voices heard and demand accountability from their political representatives.

At the other end of the spectrum, the organization drew on its expertise to engage the more intellectually sophisticated policy makers. In engaging policy makers, ULA was able to use research to challenge the assumptions on which the government had based its land reform proposals. Aided by research-based arguments and information, ULA played a successful intermediary role, between the citizenry and the State elite, to arrive at a land law (Land Act, 1998) that is not just driven by economic imperatives but also addresses issues of equity⁷¹.

As the ULA experience has shown, to improve the land governance around a pro poor land recordation system, the system needs to be linked more closely to its user community through a co-management approach.

A local land records' office should be embedded in community processes to improve the land governance issues and increase transparency and inclusivity. the community, and particularly its leaders, such as local government leaders, community based leaders, no governmental organizations leaders, should carry out

⁶⁹ OKUKU J.A. (2006), *The Land Act (1998) and Land Tenure Reform in Uganda*, Africa Development, Volume XXXI, No.1, pp. 11 ss.

⁷⁰ <http://ulaug.org/>

⁷¹ Nkurunziza E. (2004), *Advocating for pro-poor land laws: Uganda Land Alliance and the land reform process in Uganda*, in <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3631.pdf>.

parts of the land recordation system tasks. This will make the system more affordable to the poor, particularly by cutting down the large amount of professional time that is usually involved⁷².

However, removing professionals from day to day operations to improve affordability can also weaken the capacity of the land recordation system on its own to deliver security of tenure and could increase the likelihood of poor administration which is often linked to corruption. The land governance function of the land recordation system also needs to be supported by the community using the system. That is, the community and its leaders need to have an increased oversight function of the land recordation system and the operations of its officials to ensure that the interests of the users are being looked after⁷³. Only in this way can a transparent and inclusive system be designed, which also looks after the rights of the vulnerable including the poor. This will also mean that the community and particularly its leaders will have to have a great deal more knowledge about how the system works than is currently known.

5) Investment contracts

In most cases of agricultural land and water investment, the role of the contract between the host State and the investor is critical, especially for the investor. The investor will set out not just the price, quantity and duration for the purchase or lease or lease of land, it will in most cases also address a range of other issues. These include taxation and investment incentives for the investors, rights to export production, rights to import equipment and other operational matters.

The investment contracts will identify the key elements of the fiscal and economic bargain relating to the investment. They should also set out the key sustainable development elements: environmental, social, human rights,...⁷⁴

Because of the private nature, information about private international contracts on investment projects in land can be hardly obtained. Negotiations usually happen behind closed doors. Only rarely do local landholders have a say in those negotiations. Few contracts are publicly available. Yet, together with applicable national and international law, contracts define who has the authority to sign contract and through what process greatly influences the extent to which people can have their voices heard. And the terms of the deals can have major and lasting repercussions for agriculture and food security in recipient countries.

⁷² Zevenbergen J., Augustinus C. (2011), *Designing a pro poor land recordation system*, Innovative and Pro-poor Land Records and Information System, paper 5028.

⁷³ Ibidem.

⁷⁴ Smaller K., Mann H. (2009), *A Thirst for Distant Lands: Foreign investment in agricultural land and water*, Winnipeg, p. 9-10.

Land deals come in many different shapes. Each deal may involve multiple contracts and legal instruments, from a Memorandum of Understanding outlining key features of the deal to an Investment Agreement or Convention of Establishment that regulates the investment as a whole, through to a Land Lease Contract or other instrument that actually transfers the land or parts of it⁷⁵. Contracts must also be read in light of the rules of national and international law that regulate the project. For example, national law regulates issues like land, water and resource rights, taxation, investment promotion and environmental protection. Instead, international law sets fundamental rights and protects foreign investment.

Although there are a number of actors/donors working in this area, there remain unaddressed needs for legal guidance whether held by individuals, by communities, or by legal persons. There should be principles and guidelines providing legislative guidance to help improve contracting between smallholders farmers and investors, providing guidance to States to support effective and mutually beneficial collaborative contracting between smallholders farmers and investors and on how best to improve smallholders' capacity to contract.

There is no doubt that the enjoyment of the land and land rights should be considered as part of the purpose of a good contract. Rates for sale and purchase, identify the lands which include the investment, the time of the sale, the required payments to vendors are all elements that must be in the contracts so that the payment of the investment can go directly to the people recipients, bypassing intermediaries or government agencies⁷⁶.

It is necessary that the contract include all the elements aimed at fostering a good investment, an investment that is likely to make a positive contribution to the development and the sustainable development of communities and peoples.

5.1) Legal instruments to regulate land contracts

Although international organizations have engaged to try to find solutions and shared principles to govern international investments, there are areas that need better care, especially the private sector investment contracts and protection of property rights.

According to the U.S. Agency for International Development, this area should be the subject of study and intervention from the UNIDROIT Principles on International Commercial Contracts⁷⁷.

⁷⁵ Cotula L. (2011), *Land Deals in Africa: what is in the contracts?*, London, pp. 7 ss.

⁷⁶ Ibidem, pp. 20 ss.

⁷⁷ Meyers G. (2012), *Private Law and Responsible Agriculture Investment. Select Legal Issue for Consideration by Unidroit*, in *Uniform Law Review* n. 1-2 2012, pp. 119 ss.

The writer believes that this solution could be a very important step to promote uniformity in the awarding of contracts in agricultural land, although the peculiarity of such contracts should lead to specific guidelines relating to this.

Last year UNIDROIT began an important project of a Guide on contract farming from the identification of principles encouraging contractual models in which there is a balanced protection for all parties involved and which promotes a greater understanding of the rules applicable to investment⁷⁸.

The purpose of the envisaged UNIDROIT Guide would be to spread knowledge with a view to providing all those who deal with contract farming, with a tool for the better understanding of the possibilities it offers.

In particular, the future Guide could be of assistance to parties in negotiating and drawing up contract farming arrangements by identifying the legal issues involved in those agreements, discussing possible approaches to the issues and where appropriate, suggesting solutions which parties may wish to consider. By furnishing comprehensive information the future Guide is aiming at filling the informational gap between the parties, which would otherwise have placed one of them at a disadvantage. It should therefore contribute to providing the parties with greater confidence in dealing with contract farming⁷⁹.

The writer hopes that, after this important work, UNIDROIT might also consider developing guidance to support private efforts to develop a collaborative contracting models for out-grower contracting, equity-sharing models or use of land trusts. It will be important to find a guidance on how to improve the interface between customary and formal legal rules and norms related to the use and transfer of land and other resource rights. This might help to address this gap and reduce the insecurity associated with property and land tenure rights in the developing world, which would create more positive incentives to invest.

Next to UNIDROIT, an important rule of law governing international investment contracts is represented by the UNCITRAL model laws.

The model law is a legislative text, characterized by a high degree of flexibility, the adoption of which is recommended to the Member as part of domestic legislation. This legislative instrument, adopted especially in areas where the individual national systems are glaring different and, therefore, difficult to uniform, does not have to be formally ratified by the State, which is in fact free to change (even partially) the text.

The model laws are generally developed and adopted by UNCITRAL, at its annual session because, as opposed to a convention, do not require a special diplomatic conference.

⁷⁸ <http://www.unidroit.org/english/documents/2012/study80a/wg01/s-80a-01rev-e.pdf>

⁷⁹ Ibidem.

According to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000)⁸⁰, a model law might promote transparent contracts. It is necessary that the applicable laws and procedures that will govern purchases and concession process should be publicly available and that land owners should be informed and involved in the negotiations.

This is definitely a key feature, because investment contracts in agriculture are characterized by a lack of transparency and this involves only an increase in corruption and the proliferation of contracts is not balanced⁸¹.

Moreover, it is necessary that the contracts comply with the existing land rights, including customary and traditional, that the benefits are distributed between the contracting parties and that there is adherence to national trade policies, or when national security is at risk of food, national needs should take priority.

The model law is an important example of assisted contractual autonomy in order to ensure the best investment both for investors and for the people hosting the investment. In particular, the UNCITRAL Model Law on Public Procurement⁸² contains methods that have been designed to allow for competition, objectivity and transparency in the procurement of complex goods, construction and services⁸³. The potential benefits that concessions to allow for foreign investment in agricultural land may offer are such that there will continue to be demand for these concessions from both potential parties to them (i.e. investors and host governments). However, the potential benefits are not guaranteed, and the risk of degradation of the natural resources of the host country means that the current laissez-faire approach to such investment should be reconsidered. Introducing transparency, competition and objectivity into the decision surrounding investments in land should help to promote a good balance between the interests of all parties.

6) A conclusion

This study has highlighted the main problems associated with Land-grabbing, with particular regards to long-term investments in agricultural land.

It might be recognized the difficulties to capture a comprehensive picture of the issue as complete as possible on the subject, mainly because of the scarcity of documents that address the topic from a legal point of view.

⁸⁰ Nicholas C. (2012), *Devising Transparent and Efficient Concession Award Procedures*, in Uniform Law Review n. 1-2 2012, pp. 104 ss.

⁸¹ Miller J. (2003), *Contracting in Agriculture: potential problems*, in Drake journal of agricultural law n. 8 2003, p. 70.

⁸²

⁸³ For a comprehensive relevant procurement method, see UNCITRAL, A/CN.9/WG.I/WP.79/Add.10-A/CN.9/WG.I/WP.79/Add.12.

In any case, this is a very exciting field for the jurist, in which he is called not only to investigate the right, but above all to create the right, moving from the reality that he is called upon to regulate.

And it is from reality, from the empirical analysis of agricultural investments that this research started.

International investments in agricultural land can be profitable to develop the country of destination, in terms of technology transfer, employment creation, upstream and downstream connections and so on. In this way, these investments bring benefits to all. However, as it emerges from this work, these benefits are not automatic: care must be taken in formulating investment contracts, and choosing of suitable business models.

Unfortunately, it is now clear that land investment have turned into a real race to the hoarding of agricultural land from many States and foreign investors, and there hides an insidious form of exploitation, that aims to establish a new form of colonialism.

In general, the legal framework tends to favor the investor rather than the host country, and to promote the rights of investors more than those of local stakeholders. This underlines the need to equip themselves with types of investment contract that take into account the concerns of the host country.

There is therefore an urgent need to monitor the scope, nature and impact of international investment and catalog best practices in law and policy to better inform both the host countries and investors.

Detailed impact analysis is needed to assess what policies and legislation, both national and international, are needed and what specific measures are most appropriate. If foreign direct investments want to play an effective role in bridging the financial gap that characterizes the agriculture of developing countries, there will be a need to reconcile the investors' objectives with the needs of developing countries. The priorities for investment should be identified as part of a comprehensive and coherent strategy, and efforts must be made in order to define the most effective measures to encourage how to match the objectives of those who supply the capital, with of opportunities and needs of local people

The host countries can also create a more favorable climate for investment, through policies that reduce transaction costs and risks for investors. As seen in this work, many developing countries have introduced in recent years extensive political reforms in this sense, liberalization of entry conditions and creating institutions that promote inward investment. Many developing countries have signed international investment agreements, although, as mentioned above, these entail commitments still in need to be balanced in domestic law. Moreover, some developing countries

tried to attracting and facilitating foreign investment by establishing mutual funds and other entities providing services as an agency for development.

Despite the measures taken by many countries to encourage investment, there remains a critical issue: as we have said, in fact, most of the contracts for agricultural investment are stipulated in an informal way, often orally. This is a major problem, since it does not allow to know how the negotiations brought about the conclusion of the contract and in particular whether the content of the contracts is clearly defined.

The writer strongly believes that the use of soft law instruments will enable greater standardization of investment contracts, favoring investments that offer a greater focus on sustainable development and the development of peoples.

In support to what is stated, it is possible to take into account the important interventions promoted by FAO and other international agencies analyzed in this work in the field of sustainable investment, such as the Principles for Responsible Investment Guidelines of 2010 and 2012.

Today more than ever, there is an urgent need to regulate the agreements between foreign investors and local people who have to give up their lands, so that contracts are not be used as a mere instrument to justify the claims of the economically and politically stronger parties.

It is important that the commitments made by investors, by adhering to international instruments for the protection of sustainable development and the adoption of conduct codes are respected and implemented. This can be obtained only by the intervention of international organizations and agencies summoning to ensure the implementation and compliance of these commitments. Consider, for example, the important information and monitoring activities carried out by FAO to promote contract farming models intended to promote both the interests of small producers and large investors. But this is not enough. National governments must actively intervene to prevent the investment contracts evolve from agricultural opportunities for local people to a means the middle of exploitation and further impoverishment. It's necessary that the national laws guide the investment contracts through universally recognized fundamental principles.

It is, therefore, necessary to rediscover the interconnected value of the economic, social and political relations that cannot be left alone to themselves, but which must be continuously monitored.

Milano, Ottobre 2013

*Dott. Matteo Manfredi
Università Cattolica Sacro Cuore di Milano*