



## LAND TENURE: BALANCING SOCIAL RIGHTS AND INVESTMENT OPPORTUNITIES

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**RESUMEN:** Estudio sobre la investigación de la obligación del Estado de promover los derechos sociales, dentro del marco de referencia territorial no solo europeo. También se examina la relación entre propiedad de la tierra y productividad. Se detiene la autora igualmente en el sector alimenticio en los países subdesarrollados.

**PALABRAS CLAVE:** Derechos sociales, Propiedad de la tierra, Comité de Naciones Unidas sobre Derechos sociales y culturales, Sudán FAO, Zimbabwe.

**ABSTRACT:** The present study highlights the core aspects of the complex relationship between land tenure, social rights, and Investor-State dispute settlement. Research pointed out that humans are putting an increasing strain on the land resources of the planet due to the growing global food demand accompanying the demographic explosion.

**KEY WORDS:** Land tenure, Social Rights, UN Committee on Economic, Social and Cultural Rights, Sudan, FAO, Zimbabwe.

### *Introduction*

Due to population rise, governments of certain countries found themselves in need to ensure food to their populations, and at the same time, to gather sufficient resources in order to enact the necessary social policies. For these reasons, some governments have launched land reforms, selling – often to foreign investors – property rights on some public lands, which traditionally belonged to rural communities.

Although these policies were enacted with the aim to respond to social needs, they have caused a reduction in local rural communities' social rights, since the members of such communities have been dispossessed of communal land.

Since foreign direct investment is protected by investment law, and often by bilateral investment treaties between the investor's home country and the host state, the state wishing to revoke the investors' property rights would, in principle, violate the treaties, hence face investment arbitration, and potentially pay an elevated amount of damages.

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The present study highlights the core aspects of the complex relationship between land tenure, social rights, and Investor-State dispute settlement.

### 1. *The State's obligation to promote social rights*

Social rights, together with economic and cultural rights, are recognized and protected in international and regional human rights instruments. The latter provide, with respect to the states that ratified them, a legal obligation to respect, protect and fulfil those rights taking "progressive action" towards their fulfilment.

Among the instruments protecting social rights there are the Universal Declaration on Human Rights, which recognizes under Article 25 (1) the right to an adequate standard of living, declaring that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"<sup>1</sup>.

The General Comment No. 20 on the International Covenant on Economic, Social and Cultural Rights states under para. 6:

"In previous general comments, the Committee on Economic, Social and Cultural Rights has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, authors' rights, work and social security"<sup>2</sup>.

And under para. 25:

"(...) The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement"<sup>3</sup>.

And furthermore, under para. 35

"(...) A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places"<sup>4</sup>.

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<sup>1</sup> United Nations, The Universal Declaration of Human Rights, [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) (accessed on 8 July 2017).

<sup>2</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, <http://www.refworld.org/docid/4a60961f2.html> (accessed on 8 July 2017).

<sup>3</sup> CESCR, *supra* note 2.

<sup>4</sup> CESCR, *supra* note 2.

Often such principles are included in national constitutions: an example thereof are the German Grundgesetz, which states:

“The state promotes the achievement of real equality between men and women, and strives to do away with situations that prevent this at present”<sup>5</sup>,

and the Italian Constitution, which under Article 3 establishes:

“(…) It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country”<sup>6</sup>.

Therefore states are under obligation to provide services to their citizens, not only of infrastructures, such as “highways, streets, roads, and bridges; mass transit; airports and airways; water supply and water resources; wastewater management; solid-waste treatment and disposal; electric power generation and transmission; telecommunications; and hazardous waste management – and the combined system these modal elements comprise”<sup>7</sup>, but also, for example, ensuring food security, increasing development, and providing services of health care and education.

To provide all the above-mentioned services and create employment, promoting economic development, States need economic resources, which can be gathered through the collection of taxes, through the sale or lease of assets owned by the state or otherwise acquired by the State because without an owner.

## 2. *The relationship between land property and productivity*

The Food and Agricultural Organization of the United Nations (FAO) stressed already in 2011 that

“Land (...) and the way [it is] used are central to the challenge of improving food security across the world. Demographic pressures, climate change, and the increased competition for land (...) are likely to increase vulnerability to food insecurity, particularly in Africa and Asia. The challenge of providing sufficient food for everyone worldwide has never been greater. (...) For nutrition to improve and for food insecurity and undernourishment to recede, future agricultural production will have to rise faster than population growth. This will have to occur largely on existing agricultural land. Improvements will thus have to come from sustainable intensification that makes effective use of land (...) resources as well as not causing them harm”<sup>8</sup>.

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<sup>5</sup> Luciano Canfora, *Democracy in Europe. A History of an Ideology*, Malden: Blackwell, 2006, 181.

<sup>6</sup> Senato della Repubblica, Constitution of the Italian Republic, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed on 3 July 2017).

<sup>7</sup> Thinking broadly about Infrastructure, <https://www.nap.edu/read/2205/chapter/4> (accessed on 3 July 2017).

<sup>8</sup> FAO, *The State of the World's Land and Water Resources for Food and Agriculture. Managing systems at risk*, 2011, <http://www.fao.org/docrep/017/i1688e/i1688e.pdf> (accessed on 6 July 2017).

Research pointed out that humans are putting an increasing strain on the land resources of the planet due to the growing global food demand accompanying the demographic explosion<sup>9</sup>, dietary modifications<sup>10</sup>, and the significant rise in food prices during the period 2007-2008<sup>11</sup>.

Moreover, the proportion of the global population that must buy their food to survive has also expanded due to the increasing urbanisation<sup>12</sup>.

The need for land has been exacerbated even more by the growing global demand for production of biofuel, which is the result of rising oil prices<sup>13</sup>, the amendments made in 2007 to the United States policy regarding bioethanol usage<sup>14</sup>, as well as the 2009 Renewable Energy Directive adopted by European Union<sup>15</sup>.

It has been estimated that, by 2030, agricultural and animal feed production will require an extra 47 million hectares of land, while expansive afforestation will take up 42-48 million hectares, and biofuel feedstock production an additional 18-44 hectares<sup>16</sup>. However, land that is appropriate to be cultivated is quite limited.

Under these circumstances, research and development and use of agricultural techniques making the land more productive have received fresh attention.

Intensive farming, characterized by higher crop yields per unit land area, and therefore by alarger profitability per hectare, requiresgreater usage of capital and labour as well as low fallow.

A higher labour quota may be achieved by mechanization, which, in turn, requires significant investment, and the realization of larger properties, to be preferably destined to monocultures, according to the economic slogan“get big or get out”<sup>17</sup>.

One of the ways in which these changes are achieved is through the modification of the customary asset of communal lands, an arrangement type which was available in Europe until the 1700s:

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<sup>9</sup> H. Charles J. Godfray et al., “Food security: The challenge of feeding 9 billion people”, *Science*, 2010, 327 (5967): 812–818.

<sup>10</sup> Junguo Liu, Hong Yang, and Hubert H. Savenije, ‘China’s move to higher-meat diet hits water security’, *Nature*, 2008, 454 (7203): 397.

<sup>11</sup> Klaus Deininger and others, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?*, Washington: World Bank, 2011; George C. Schoneveld, ‘The geographic and sectoral patterns of large-scale farmland investments in sub-Saharan Africa’, 2014, 48 *Food Policy* 34.

<sup>12</sup> OECD/Food and Agriculture Organization of the United Nations, “OECD-FAO Agricultural Outlook 2015”, OECD Publishing, Paris, 2015, 29–30.

<sup>13</sup> Derek Headey and Shenggen Fan, ‘Anatomy of a crisis: The causes and consequences of surging food prices’, *Agric. Econ*, 2008, 39 (s1): 375–391.

<sup>14</sup> Energy Independence and Security Act of 2007 (EISA). Pub L No. 110–140, <https://www.gpo.gov/fdsys/pkg/PLAW-110publ140/pdf/PLAW-110publ140.pdf> (accessed on 8 July 2017).

<sup>15</sup> Directive 2009/28/EC of the European Parliament and of the Council (April 29, 2009) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028&from=EN> (accessed on 6 July 2017).

<sup>16</sup> European Report on Development, *Confronting scarcity: managing water, energy and land for inclusive and sustainable growth*, 2012, [https://ec.europa.eu/europeaid/sites/devco/files/consca-report-erd-2011\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/consca-report-erd-2011_en.pdf) (accessed on 6 July 2017).

<sup>17</sup> Glenn Davis Stone, ‘Malthus, Agribusiness, and the Death of Peasantry’, *Current Anthropology*, 2001, 42(4), 575-578.

Some scholars have highlighted that, over several generations, there was broad recognition of the fact that robust property rights and growth in the agricultural industry were correlated<sup>18</sup>.

Over time, an assumption has been made that land tenure had to be modernised for agriculture modernisation to be made possible, thus achieving a departure from seemingly outdated customary systems that employed land primarily for common grazing or foraging<sup>19</sup>, and supposedly hindered people from entrepreneurial initiatives thwarting investment in agriculture<sup>20</sup>.

Such promotion of modernization of land tenure began in Europe since the eighteenth century, and in Africa starting from the colonial period.

To make the legal status of land rights clearer and more stable, in the last years many African countries took the initiative to record and register land rights that were either not documented or documented inappropriately<sup>21</sup>.

The existence of a propensity to combine titling and tenure security has been mentioned by several specialists<sup>22</sup>. The beneficial effect of enhanced tenure security for agricultural productivity is supported by an expanding and relevant body of evidence. A good example in this regard is the evolution undergone by China from collective farming through the implementation of the household responsibility system to the provision of farmers with property rights over their own plots under the Rural Land Contracting Law<sup>23</sup>.

This relationship is affirmed by additional examples as well: for instance, the findings of a recent preliminary survey conducted in Tajikistan revealed that the productivity of farmers increased if they were given rights that they considered to afford greater security and clarity and that granted them freedom to choose between different farming options<sup>24</sup>.

However, others have voiced the opinion that this may just be a tactic within a wider endeavour to modify the legal substance of the actual rights. This was the case with initiatives to impose governmental control over communal land and then substitute customary tenure for individually titled statutory rights<sup>25</sup>. In most rural areas of Africa, systems classified as 'customary', due to being rooted in unwritten rules affirming their legality based on tradition, dictate the principles of land usage<sup>26</sup>.

These different endeavours are likely underpinned by various goals that are linked in a complex manner and prioritise distinct aspects. Enhancing economic efficiency, making the land more marketable, improving legal clarity about land tenure to safeguard the livelihood of disadvantaged groups, and mitigating

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<sup>18</sup> Anne-Marie Leroy and Jonathan Lindsay, *Agricultural Investment and Land: Some Reflections on Lessons Learned (and Still to be Learned) from Experiences with Land Titling*, 2012, de qua vid. <http://109.168.120.21/siti/Unidroit/index/pdf/XVII-1-2-0015.pdf>. (accessed on 6 July 2017).

<sup>19</sup> Lorenzo Cotula, 'Land Grabbing and International Investment Law: Toward a Global Reconfiguration of Property?', in Andrea K. Bjorklund, *Yearbook on International Investment Law and Policy 2014-2015*, Oxford: Oxford University Press, 2016, 177-214.

<sup>20</sup> Leroy and Lindsay, *supra* note 18.

<sup>21</sup> Leroy and Lindsay, *supra* note 18.

<sup>22</sup> Leroy and Lindsay, *supra* note 18.

<sup>23</sup> World Bank and Development Research Centre, *China: Integrating Land Policy Reforms 11 - Strengthening Land Rights for Equitable Growth and Social Harmony*, World Bank report, Washington, DC, 2007.

<sup>24</sup> Leroy and Lindsay, *supra* note 18.

<sup>25</sup> Leroy and Lindsay, *supra* note 18.

<sup>26</sup> Cotula, *supra* note 19.

disputes between neighbours as well as between local communities and governments are just some of these goals<sup>27</sup>.

### 3. *Selling or leasing public land to foreign investors*

Some governments have extended policies related to the availability of vast areas of arable land to private investors as purchase agreements or, more usually, as leases over an extended period of 55-99 years<sup>28</sup>. This action has been prompted by the huge increases in grain prices in 2007-2008, which gave rise to concerns about food shortages for the population, coupled with the desire to consolidate energy security. This action has been prompted by the huge increases in grain prices in 2007-2008, which gave rise to concerns about food shortages for the population, coupled with the desire to consolidate energy security<sup>29</sup>. Significant proprietary dimensions may accompany such concessions and leases, including possessory rights and excludability<sup>30</sup>.

Such trends are clearly reflected in the many recently established agribusiness investment deals for large-scale lands in countries with low and middle income<sup>31</sup>.

From 2005, there was a massive proliferation of land-related deals, peaking in 2009<sup>32</sup>.

According to an estimate of the World Bank (WB), from 2008 to 2010 land acquisition reached around 45 million hectares and most of land deals were related to areas in the range of 10,000-200,000 hectares<sup>33</sup>. Furthermore, the WB, FAO and the International Fund for Agricultural Development (IFAD), among other institutions, highlighted that the local population was rarely involved in the negotiation of deals, previous land users were inappropriately compensated, and initiatives to generate new employment or promote environmental sustainability

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<sup>27</sup> Samuel Mburu, Chris Ackello-Ogut, and Richard Mulwa, 'Analysis of Economic Efficiency and Farm Size: A Case Study of Wheat Farmers in Nakuru District', Kenya, Economics Research International Volume 2014, <https://www.hindawi.com/journals/ecri/2014/802706/> (accessed on 6 July 2017).

<sup>28</sup> Maru Shete and Marcel Rutten, 'Impacts of large-scale farming on local communities' food security and income levels—Empirical evidence from Oromia Region, Ethiopia', *Land Use Policy*, 2015, 47; David K. Deng, 'Land belongs to the community': Demystifying the 'global land grab' in Southern Sudan, LDPI Working Paper 4, 2013, <http://www.future-agricultures.org/papers-and-presentations/conference-papers-2/1266-land-belongs-to-the-community-demystifying-the-global-land-grab-in-southern-sudan> (accessed on 6 July 2017).

<sup>29</sup> Saturnino M. Borras and Jennifer C. Franco, *Political Dynamics of Land Grabbing in Southeast Asia: Understanding Europe's Role*, Transnational Institute: Amsterdam, 2011; Shephard Daniel and Anuradha Mittal, *The Great Land Grab: Rush for the World's Farmland Threatens Food Security for the Poor*, Oakland, CA: The Oakland Institute, 2009.

<sup>30</sup> Lorenzo Cotula, *Land Deals in Africa—What is in the Contracts?*, International Institute for Environment and Development, 2011.

<sup>31</sup> Cotula, *supra* note 19.

<sup>32</sup> Ward Anseeuw et al., *Transnational Land Deals for Agriculture in the Global South*. Analytical Report based on the LandMatrix Database, The LandMatrix Partnership, 2012, [https://www.oxfam.de/system/files/20120427\\_report\\_land\\_matrix.pdf](https://www.oxfam.de/system/files/20120427_report_land_matrix.pdf) (accessed on 6 July 2017).

<sup>33</sup> Deininger and others, *supra* note 11.

were usually absent<sup>34</sup>. The critical press has labelled this unparalleled proliferation of acquisitions of transnational lands as “land grabbing”<sup>35</sup>.

Some governments and enterprises resort to land grabbing to satisfy their food and energy demand through land acquisition in a different country. According to the 2012 Tirana Declaration “Securing land access for the poor in times of intensified natural resources competition”, land grabbing represents acquisition of land without the agreement of previous land users and without considering the implications for society and the environment, thus breaching human rights.

The decision-making related to land grabbing often lacks transparency and fairness<sup>36</sup>, and is detrimental to the local population whose use of land is governed by customary rules<sup>37</sup>.

For these reasons, some commentators proposed a definition of land grabbing as “the transfer of the right to own or use the land from local communities to foreign investors through large-scale<sup>38</sup> land acquisitions”, arguing that land grabbing can even be considered as a new type of colonialism that has become more prevalent in recent times<sup>39</sup>.

Recent studies have shown that the global scale of land grabbing is notable, with at least 62 countries from which land is grabbed and 41 countries grabbing the land; almost half (47%) of the grabbed area throughout the world is in Africa<sup>40</sup>, and in some countries the grabbed area amounts to a considerable proportion of the overall national territory. Land grabbing activities are particularly intense in countries situated in the Middle East, Southeast East Asia, Europe, and North America<sup>41</sup>. These countries take advantage of land grabbing to expand their agricultural land to a substantial degree, in this way gaining more food and energy resources<sup>42</sup>.

Nonetheless, it cannot be doubted that rural regions and the host countries as a whole do benefit from foreign direct investment in agriculture in terms of development and economic opportunities, such as a better agricultural infrastructure and more available jobs<sup>43</sup>. Indeed, according to the FAO, if inward

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<sup>34</sup> Lorenzo Cotula, Sonja Vermeulen, Rebeca Leonard, James Keeley, Land Grab or Development Opportunity? Agricultural Investment and International Land Transactions in Africa, London-Rome: IIED, FAO, & IFAD, 2009.

<sup>35</sup> *The Economist* (May 21, 2009) Buying farmland abroad: Outsourcing’s third wave. *The Economist*, available at <http://www.economist.com/node/13692889> (accessed on 6 July 2017).

<sup>36</sup> International Land Coalition Global assembly 2011, Tirana, Albania, Tirana Declaration “Securing land access for the poor in times of intensified natural resources competition”, <http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf> (accessed on 6 July 2017).

<sup>37</sup> Deng, *supra* note 29.

<sup>38</sup> Large-scale land acquisitions are those concerning more than 200 ha per deal.

<sup>39</sup> International Monetary Fund, Food and Fuel Prices, Recent Developments, Macroeconomic Impact, and Policy Responses, 2008, <http://www.imf.org/external/np/pp/eng/2008/091908.pdf> (accessed on 6 July 2017); John Beddington, ‘Food security: Contributions from science to a new and greener revolution’, *Philos Trans R Soc Lond B Biol Sci*, 2010, 365 (1537): 61–71.

<sup>40</sup> Among the countries whose land is being grabbed there are Ethiopia, Ghana, Liberia, Mozambique, Sudan, Uganda, and Tanzania. Cotula, *supra* note 19.

<sup>41</sup> Maria Cristina Rulli, Antonio Savioria, and Paolo D’Odorico, Global land and water grabbing, 2012, [www.pnas.org/content/110/3/892.full.pdf](http://www.pnas.org/content/110/3/892.full.pdf) (accessed on 6 July 2017).

<sup>42</sup> Rulli et al., *supra* note 41.

<sup>43</sup> Daniel and Mittal, *supra* note 28.

investment were regulated appropriately, both the investing countries and the host countries could benefit from large-scale agricultural investment<sup>44</sup>.

#### 4. *Dispossessed populations' perspective: the Sudan region case*

FAO states that: "Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. (...) In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions. Land tenure is an important part of social, political and economic structures. It is multi-dimensional, bringing into play social, technical, economic, institutional, legal and political aspects that are often ignored but must be taken into account"<sup>45</sup>.

Notwithstanding these important aspects related to land tenure, in certain areas of Sudan, the government has sold or leased out collective land for forest products, grazing and water supply to private investors with no consideration for the communities' ownership interests in land and related natural resources. The fact that communal land had been owned by communities historically and customarily, with traditional and other authorities at community level overseeing managing its usage, was ignored by the government as well<sup>46</sup>.

This was realized by means of a series of measures. The Unregistered Land Acts of 1970 was followed by the abolition of native administration in 1971, the Civil Transaction Act in 1984, and the Ministerial Act in 1996 legally entitle the state to manage the communal land. These Acts establish that any case against the government pertaining to unregistered land has no legal basis; hence there is no court invested with the power to hear any suit, claim or procedures related to land ownership against the state or registered owners of investment land assigned to them<sup>47</sup>.

Further acquisition of communal land was made possible with the introduction of the National Investment Encouragement Act in 2013. Removing most of restrictions imposed on the investment process, this Act specifies that the period for handing over the land allocated for the project is one month. Moreover, the Act permits the purchase of land by foreign investors under particular conditions, adding an exception to the general prohibition of land ownership for foreigners in Sudan.

Some have argued that, in addition to affording land ownership rights to foreign investors in Sudan, this Act makes it binding on the council to represent foreign investors if claims about the land are raised by individuals, various public

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<sup>44</sup> FAO, *From Land Grab to Win-Win: Seizing the Opportunities of International Investments in Agriculture*, 2009, <ftp://ftp.fao.org/docrep/fao/011/ak357e/ak357e00.pdf> (accessed on 6 July 2017).

<sup>45</sup> FAO, *Land tenure and rural development*, Rome, 2002, 7, <ftp://ftp.fao.org/docrep/fao/005/y4307E/y4307E00.pdf> (accessed on 6 July 2017).

<sup>46</sup> Deng, *supra* note 29.

<sup>47</sup> Mohyeldeen E. Taha, *Land Use, Ownership and Allocation in Sudan The challenge of corruption and lack of transparency*, 2016, 12, <http://www.democracyfirstgroup.org/wp-content/uploads/2016/10/Land-Use-Ownership-and-Allocation-in-Sudan.pdf> (accessed on 6 July 2017); Mona Ayoub, 'Land and Conflict in Sudan'. In Mark Simmons and Peter Dixon (eds.), *Peace by piece Addressing Sudan's conflicts* (Vol. 18). London: Conciliation Resources, 2006, 14-15; Omer Egemi, 'Land tenure in Sudan: challenges to livelihood security and social peace'. In Galal-Eldeen El Tayeb (ed.), *Land issue and peace in Sudan*. Khartoum, Sudan: Sudan Environment Conservation Society, 2006.

authorities or local communities, or if investors are taken to court to take back the communal land that the government bestowed on them. What is more, the Act exempts foreign investors from taxes for one decade<sup>48</sup>.

One could think that this Act regards only vacant land, however it does not refer to land without an owner: it rather points to communal land, where local communities live and work on, using it for agricultural activities as well as for fallow cycles and pastoralism<sup>49</sup>.

Following the approval of these Acts, several investments have been established, in areas with high population density where numerous people earned their livelihood from the land. However, in most cases, the population was not consulted prior to investment negotiation. Even in the few cases where the population was consulted, the consultation took the form of mere notification once the agreement was concluded regarding what to expect, without a chance to have a meaningful say in the shape that the investment would take.

Likewise, an environmental and social impact assessment (ESIA) was not carried out by any firm prior to conclusion of the investment agreement. An ESIA was undertaken by three firms following commencement of operations and other firms showed an intention to do it in the next future. However, in no case was the population actively involved in decision-making<sup>50</sup>.

Finally, compared to leases on communal land, leases on land owned by the government are not as long. This clearly demonstrates that the government has greater negotiating power than the communities when it comes to brokering deals on the respective land owned. Furthermore, given that the government remains involved in the investment only until the land is held by the investor, it does not have the motivation to safeguard the reversionary interests of the communities during the process of negotiation of community land deals<sup>51</sup>.

In addition, the culture of communal land system has been destroyed by the minimisation of the power of the native administration, which is a body representing rural inhabitants, local farmers and pastoral communities regarding their land rights. Consequently, these communities have been excluded from the political process even more<sup>52</sup>.

The lack of political representation allows that, notwithstanding several cases where the deals have given rise to strong opposition<sup>53</sup>, no political attention has been given from the central government to the displacement of these population and the lack of compensation.

### 5. *The investor's point of view*

In the above subsection we mentioned purchase, concession and lease. It is important to recall that

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<sup>48</sup> Sudan, National Investment Encouragement Act 2013, [http://ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=97252&p\\_country=SDN&p\\_count=67](http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=97252&p_country=SDN&p_count=67) (accessed on 6 July 2017).

<sup>49</sup> Howard Mann and Carin Smaller, "Foreign land purchases for agriculture: what impact on sustainable development?", Sustainable development innovation BRIEF issue 8, 2010.

<sup>50</sup> Deng, *supra* note 29.

<sup>51</sup> Deng, *supra* note 29.

<sup>52</sup> Yasin Elhadary and Hillo Abdelatti, 'The Implication of Land Grabbing on Pastoral Economy in Sudan', Scientific & Academic Publishing, 2016, 6 (2): 25-33

<sup>53</sup> Ruth Hall and others, 'Resistance, acquiescence or incorporation? An introduction to land grabbing and political reactions "from below"', 2015, 42 (3-4) Journal of Peasant Studies 467.

“There are some rights which count as property rights in land, but not in other forms of property. For example, if A owns land and gives B a right to exclusive possession of that land for a limited period, B acquires a lease: a property right”<sup>54</sup>.

It is also true that, according to the definition of investment included in the relevant investment treaty, “not all investment constitutes property, and not all property constitutes an investment”<sup>55</sup>.

However, based on the highlighted features, it is possible to hypothesize that the great part of land concessions and leases granted to foreign investors constitutes an investment.

Now, let us suppose that the political situation changes and the state decides to design and implement a land redistribution program, revoking leases and nationalizing foreign investors’ lands.

Since investors have rights both on leased and owned lands, both types of conduct could, in principle, amount to expropriation.

Being the property rights owner a foreign investor, he could, according to BIT terms between his home state and the host state, bring the latter before an investment tribunal claiming, among others, the violation of the clause of direct expropriation, the breach of fair and equitable treatment and the non-respect of legitimate expectations.

Published awards of investment arbitrations focused on land tenure comprise *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*<sup>56</sup> – a case related to the highly debated land redistribution scheme enacted by Zimbabwe; *Bernhard Von Pezhold and Others v. Zimbabwe*<sup>57</sup>, and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*<sup>58</sup> – two currently pending arbitral cases always against Zimbabwe; and *Vestey Group Ltd v. Bolivarian Republic of Venezuela* – an arbitration concerning the expropriation of landholdings in Venezuela<sup>59</sup>.

An approach whereby the state’s right to regulate is accepted by the investment tribunal would enable a different scenario. Such an approach is underpinned by a principle not unlike that on which article 1 of the First Protocol of the European Convention of Human Rights (ECHR) is based, providing that «Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in

<sup>54</sup> Ben McFarlane, Nicholas Hopkins, Sarah Nield, *Land Law*, Oxford: Oxford University Press, 2017, 9.

<sup>55</sup> Zachary Douglas, ‘Property, investment and the scope of investment protection obligations’. In Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice*, Oxford: Oxford University Press, 2014, 363-406, 374.

<sup>56</sup> *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, <https://www.italaw.com/cases/467> (accessed on 4 July 2017).

<sup>57</sup> *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, <https://www.italaw.com/cases/1472> (accessed on 4 July 2017).

<sup>58</sup> *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, <https://www.italaw.com/cases/1470> (accessed on 4 July 2017).

<sup>59</sup> *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, <https://www.italaw.com/cases/3616> (accessed on 4 July 2017).

any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest (...)»<sup>60</sup>.

In a comment on the interpretation of the ECHR given by the European Court for Human Rights, some researchers stressed that

“The court, therefore, found it quite natural [...] that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one”<sup>61</sup>,

and upheld that an equitable balance of interests must be represented by the measures imposed to restrain property rights”.

However, so far only the Norwegian draft model BIT 2008 proposes, under Article 6:

“1. A Party shall not expropriate or nationalise an investment of an investor of the other Party except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provision shall not, however, in any way impair the right of a Party to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”<sup>62</sup>.

In any case, even if the applicable BIT affirms the right of the state to regulate, it restricts this right to measures already consistent with international investment protection. One example, concerning environmental measures, is NAFTA Article 1114(1), which establishes:

“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns”<sup>63</sup>.

In truth, as stated by certain arbitration tribunals, investors must be aware that amendments to regulations over time are likely<sup>64</sup>; but many others stressed on the contrary the importance of regulatory stability<sup>65</sup>.

It is highly likely that, even if the state nationalised foreign properties, it would be required to compensate damages to foreign investors, which would be detracted from resources that could be destined to other social policies.

<sup>60</sup> European Convention on Human Rights, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (accessed on 4 July 2017).

<sup>61</sup> Ronald St. J. Macdonald, ‘The Margin of Appreciation’, in Ronald Macdonald, Franz Matscher & Herbert Petzold (eds.), *The European System for the Protection of Human Rights*, Dordrecht: Martinus Nijhoff Publishers, 1993, 523.

<sup>62</sup> Agreement Between the Kingdom of Norway and... For The Promotion and Protection of Investments, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2873> accessed on 4 July 2017).

<sup>63</sup> North American Free Trade Agreement, <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=539c50ef-51c1-489b-808b-9e20c9872d25#A1114> (accessed on 4 July 2017).

<sup>64</sup> Among them, *Parkerings- Compagniet AS v Republic of Lithuania* (Award, 2007), ICSID Case No ARB/ 05/ 8, [327]–[338].

<sup>65</sup> Among them, *CMS Gas Transmission Company v. The Argentine Republic* (Award, 2005), ICSID Case No ARB/ 01/ 8, [274].

With the described status quo, it is likely that no state revokes the land leases to foreign investors.

## 6. Land tenure as a social value

According to a conservative estimate, by 2030, a further 6 million hectares of land will be brought into production annually in developing countries, removing them from the communal lands pool and their traditional uses, with Africa and Latin America being the location of two-thirds of the expansion<sup>66</sup>.

Naturally, we shall not forget the positive purpose inducing the government to modify the traditional land tenure. Undoubtedly, the yet unexplored economic possibilities of rural Africa could be reaped through intensified private investment in agriculture with positive implications at both local and national level, provided that investment is undertaken appropriately<sup>67</sup>.

However, an inadequate or pernicious approach to investment could have serious repercussions for the local communities, in the form of loss of land and collective property resources, putting livelihoods and food security at risk and causing disruptions to social institutions<sup>68</sup>.

Deeply rooted in the singular history of each country, land tenure systems are indicative of a diverse range of land usage, ecologies, tenure systems, political regimes, colonial experiences, social institutions, cultural beliefs and religious customs<sup>69</sup>, tying people closer to the land, and highlighting the importance of the land as a basis for cultural identity, social relationships, and spiritual values<sup>70</sup>. In effect, there is a close correlation between land tenure and cultural or spiritual values due to its association with social identity. Furthermore, the basic principles of social and economic structure are influenced by land tenure, as are the links between private interests and public authority<sup>71</sup>.

Nonetheless, significant inter- and intra-regional differences exist regarding the wide distribution or concentration of land, how populous a region is and how much land is available, how fertile the soil is and the extent to which the land can support various agricultural activities, as well as how culturally and economically important agriculture is<sup>72</sup>.

Promotion of the rule of law depends greatly on protections against arbitrary state behaviour<sup>73</sup>: However, as highlighted in the subsection above, it has already happened that this role, usually undertaken by constitutional courts, has been performed by investor-state arbitration tribunals which reviewed how lawful state behaviour is with regard to land redistribution<sup>74</sup>.

Indeed, the landholdings of foreign investors are protected against land claims made by various groups (e.g. native peoples, small-scale rural producers, groups

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<sup>66</sup> Deininger et al., *supra* note 11.

<sup>67</sup> Leroy and Lindsay, *supra* note 18.

<sup>68</sup> Leroy and Lindsay, *supra* note 18.

<sup>69</sup> Leroy and Lindsay, *supra* note 18.

<sup>70</sup> Cotula, *supra* note 19.

<sup>71</sup> Cotula, *supra* note 19.

<sup>72</sup> Jonathan Lindsay, "Land", in Food and Agricultural Organization, *Law and Sustainable Development Since Rio: Legal Trends in Agriculture and Natural Resource Management*, FAO, Rome (2002).

<sup>73</sup> Lorenzo Cotula, *Land rights and investment treaties. Exploring the interface*, London: IIED, 2015, 43.

<sup>74</sup> Cotula, *supra* note 73.

of landless, poor and marginalised people) by investment treaties. However, tensions and conflicts may occur between investment treaties and progressive land policies, if the former make land redistribution, restitution, tenure reform, or public action to deal with land grabbing more complex and expensive<sup>75</sup>.

### 7. Conclusions

Considering the direction of food cost, demographics, climate change, and energy demands, the wide-scale commercial investment in agricultural land is not likely to lose any of its current popularity as a research subject in the following years<sup>76</sup>.

In truth, socio-legal study should be conducted on the effect of investment treaties and investor-state arbitrations on local land rights, as the legal safeguards afforded to foreign investment and the lack of protection that is the reality for numerous people in rural areas throughout the world constitute a poignant dichotomy<sup>77</sup>.

On the other hand, investment treaties and the interpretation that investment tribunals provide thereof, make the states seeking to implement land governance measures that are socially beneficial have to afford compensation to foreign investors for both actual and projected losses<sup>78</sup>.

Probably, the origin of conflicting views resides in a clash of norms and traditions. In the words of McAuslan, “[there] is [a] culture of globalization that impels the development of laws and policies based on the free and equal opportunity to invest in land so as to facilitate land being used to its highest and best purpose without regard to such irrelevant matters as the nationality of the user. This sees land as an economic and only as an economic asset. (...) [And there is also a different] culture that sees land as a social and political as much as an economic asset that resists land being parceled out to whoever can pay for it to exploit it as is seen fit”<sup>79</sup>.

The aspiration is that, in negotiating or re-negotiating investment treaties and contracts, the states will consider, at least with an equal amount of attention, their citizens’ social rights, which include their deep beliefs and attitudes with respect to land and the traditions linked to it.

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<sup>75</sup> Cotula, *supra* note 73.

<sup>76</sup> Leroy and Lindsay, *supra* note 18.

<sup>77</sup> Cotula, *supra* note 73.

<sup>78</sup> Cotula, *supra* note 73.

<sup>79</sup> Patrick McAuslan, ‘Ensuring Access to Land for Private Investors’, in Klaus Deininger, Clarissa Augustinus, Stig Enemark, and Paul Munro-Faure (eds), *Innovations in Land Rights Recognition, Administration, and Governance*, World Bank, 2010, 195-207, 203.