Problems and progress in land, water and resources rights at the beginning of the third millennium

Edited by Cristiana Fiamingo

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Strada per Zavattarello, 52 - 27043 - Broni (PV)
tel. 0385 09 16 00 fax 0385 09 15 99
www.edizionialtravista.com

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Best practices

This volume is dedicated to the memory of Sara Crippa (Segrate, 25 May, 1977- Katmandu, 3 June, 2017). Sara was an exceptional woman, who in her outstanding MA research into a massive water-management project (Burkina Faso, 2003), prioritized the role of the people of the Kissirigouem district. Her whole life was indeed dedicated to deploying correct and sustainable resource management in an effort to spread economic and social justice, and together with her husband Filippo De Monte, she brought up their children in these environments. From 2004 onwards Sara was both participant and/or leader in various cooperation projects in Chad, Tanzania, Niger, Kenya and then, finally, Nepal. Her life is a shining example of coherence and working on the cutting edge. It is our great pleasure, indeed, to remember her as a supporter of the values that SHuS has inherited from SIII and recall her presence in the 2008 SIII workshops, all of which will surely inspire us for the future.

Cristiana Fiamingo[1]

PREFACE

> *Interdisciplinarity […] is when creative collaboration, intellectual symbiosis, and true "team-teaching" happens. It is in additive engagement, where validation of everyone may yield an unforeseen greater good. This is not a denial of the usefulness of critical methods, or an argument that cooperation is better than competition and debate. My point, simply, is of the value of "yes and" approaches, in addition to adversarial techniques, for developing an integration of knowledge.*
>
> *Richard J. Borden*[2]

Connections and acknowledgements

One of the many initiatives promoted by the European Union 'Joint Research Centre World Expo Milano 2015 Task Force' (JRC.A.TF), and the Milan Expo 2015 Scientific Committee, to run parallel to the Exposition, was the three-day International Conference, (6-8 July 2015) entitled 'Land, Water and Resources Rights'. The conference moved between IULM University, where two sessions were dedicated to the land/consumption relationship, and the University of Milan 'La Statale', which hosted six sessions and a round table on global governance and land deals, supported by case studies originating in four continents.

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1. Cristiana Fiamingo [cristiana.fiamingo@unimi.it] is Assistant Professor of History and Institutions of Africa (BA) and History and Politics of Sub-Saharan Africa (MA) at the Faculty of Political Science, Economics and Social Sciences, University of Milan, La Statale. She is coordinator of SHuS: 'Sustainability and Human Security: cooperation and governance agendas' – an interdisciplinary research center, [www.shus.unimi.it].
2. R. J. Borden, *Ecology and Experience: Reflections from a Human Ecological Perspective,* North Atlantic Books, 2014, pos. Kindle 6493-6494.

Generated by the alchemy created by the conference, this collection of essays goes, however, well beyond a simple record of the proceedings, given that a group of speakers in the University of Milan sessions decided to carry on and develop some of the topics in question in a continuation of fruitful dialogues. Matching interdisciplinary readings of access denials to the 'Commons' – as we can call natural resources, in Garrett Hardin's well known term – is the aim behind both conference and book, together with collecting and publishing recommendations to the EU, as requested by the JRS.A.TF itself. The e-book was then conceived as a support, with free access encouraging the widest possible dissemination of the principles and experiences absorbing academics, agents of civil society and international organisations.

The project to gather a selection of theories and practices on the issue of resources governance for publication followed on from the constitution of the new Interdisciplinary Research Centre: "Sustainability and Human Security: Cooperation and Governance Agendas" (SHuS), at Milan State University in November 2015.[3] It is an institutionalised evolution of SIII (Seminario Interdisciplinare Interuniversitario Interfacoltà), which was an informal annual workshop on resources management run by the three Milanese state universities (University of Milan "La Statale", University of Milano-Bicocca and the Politechnic), where academics exchanged experiences with members of Lombardy's civil society, organisations and public administrations. Over the period 2007-2015, SIII functioned as a pool of scientific volunteers concerned with the sustainability of the Planet,[4] and offered citizens a scientific, critical approach to the

3. See www.shus.unimi.it.
4. Three publications have followed three SIII seminars: *Conflitti per la terra. Accaparramento, consumo e accesso indisciplinato* [Conflicts over land. Hoarding, consumption and undisciplined access],C. Fiamingo C., L. Ciabarri and M. Van Aken (eds.), Altravista, Lungavilla, 2014 – awarded the COGEME prize for the Micropublishing in November 2015 –; *Culture della memoria e patrimonializzazione della memoria storica*, [Cultures of memory and capitalization of historical memory], C. Fiamingo (ed.), Unicopli Milano 2014; and *Alimentazione, sicurezza, accesso, qualità, culture* [Food security, access, quality, and cultures], C.Fiamingo and S. Bocchi (eds.), Codex, Milano, 2010.

inspirational values proclaimed in the Milan Expo motto 'Feeding the Planet: Energy for Life' which appears, however, to be belied in the means deployed for the project, realisation and building of the location, as is evident, *inter alia*, in the cover photo, for which I am grateful to ISPRA.

As SIII's coordinator, I was nominated conference organiser, with the backing of 'Universities for Expo 2015 Scientific Committee, City of Milan', and the JRC.A.TF. For the scientific aspects of the conference I was helped by Paolo Corvo (Gastronomic Sciences University, Pollenzo) for the IULM sessions, and by Carla Maria Gulotta (University of Milano-Bicocca) for the panel on large scale land-deals and investment law. I am also grateful for the advice generously given by Simona Beretta and Sara Balestri (ASERI and ExpoLAB, Catholic University, Milan).

I would also like to express my thanks to Dr Julia Beile of the JRC.A.TF and Professor Claudia Sorlini, President of the Expo 2015 Scientific Committee City of Milan, for promoting and financing university events during Expo. They gave invaluable help in creating the new scientific synergies this publication represents, in the true spirit of that *universitas studiorum* we all should be always working towards.

While we are excited and fascinated by the alchemy of so many brains working together, bureaucracy remains our destiny, and so let me express my deep gratitude to those who went well beyond the limits of their duties to listen, react quickly and match up the ethical profile I required for a conference on the limits of self-determination of peoples and managing resources in habitats with my ambition to host at sustainable costs speakers from four continents – an achievement which would not have been possible if we had had to combine the public and the private.[5] I want to thank Erika Paslauskaite, financial officer of

5. An EU public tender was awarded to the Pomilio Blumm agency for the "Organization of events and logistics for the EU to World Expo 2015", to manage 200 events for the six months of EXPO with a budget of 6 million euros. The services provided by the Pomilio Blumm agency resulted unsustainable for the project I wanted to fulfil. Thanks to the good will of these officers, and the cash advance from

the JRC.A.TF, Professor Gian Vincenzo Zuccotti, University of Milan representative on the Expo 2015 Scientific Committee City of Milan, Stefania Palma, Head of the Accounts Office of my University and Ambrogio Ghiringhelli, Head of Administration of the Department of International, Legal and Political History Studies I belong to. Last but not least, my University itself a sensitive context backing the project with understanding, support and resources.

Finally, let me thank the authors for their patience, as this e-book comes out later than we had hoped, the anonymous reviewers for their time,[6] and Professor Patricia Kennan, of the University Milano-Bicocca, for her invaluable help as copy editor.

Interdisciplinary answers to complex problems

With the closing of the Milan Expo, SIII had come to the end of its life. In turning over the page, the aim of the SHuS, became to convey the heritage of eight years of brainstorming about the sustainability of resources management and the high standard of contributions analysing the complex themes of access to rights and resources worldwide, to a world looking to the future and projecting its next development goals. SHuS opted for the more accessible format of the e-book to create a seamless connection between scientific communities and the wider civil society, in order to ensure the greatest possible impact of multifaceted scientific approaches on society. This impact needs to be felt throughout the academic community and beyond it, stimulating interdisciplinary debates closely linked to the practices experienced *by*, and

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the Accounting office of my University, plus the selection of advantageous costs/benefits of regular providers (via Mepa system), despite my renouncing the 25% of the budget assigned to every university by the JRC.A.TF to allow the EU to remain in the contractual terms with the agency, I was able to supply board and lodging and low-cost travel for 41 people and also fund two e-books on sustainability - the present one is the first - by limiting to two cases Pomilio Blumm's administration.

6. The academic essays only have undergone blind peer review, with the exception of the essay "Malaysia palm oil expansion on a global scale".

quite often nowadays, *with* the organisations of the civil society – which is the case of the majority of SHuS members – as well as public institutions.

Although this e-book is not animated either by any claim to be exhaustive or offer systematic models to apply to the governance of resources, it does aim to offer a multi-disciplinary approach to its topics, where, as is shown below, all the authors have applied inter-disciplinary perspectives.

Contents of the e-book

It does not often happen that a powerful regional economic community (REC) like the EU asks intellectuals for their opinion ('to produce a verse' in Walt Whitman's telling terms) when it is writing up its final report of an experience like Expo. Hoping their suggestions could act as a guide to future political choices, our authors took full part in an operation aiming at correcting the imbalances concealed by legal treaties. Hence, the majority of the authors have sought to offer brief but succinct assessments and suggestions for political and legal approaches that a regional community like the European Union should adopt to prevent legitimization leading to severe forms of injustice – if not actual crimes – against communities and individuals.

The essays offered here include critical analyses of sometimes hasty and simplistic evaluations of the deep causes of some contemporary situations of tension, in the imbalanced power relations between citizens and governments. Latent conflicts over access to land and water can explode into struggles for survival – struggles often spreading their negative effects in complex political emergencies which involve entire regions and beyond. At the crossroad of transnational environmental management and internal tensions, "intermestic issues" develop where bureaucratic patrimonialism engages neo-developmental governments in competition with their citizens, especially where the strong economic interests of third parties are involved (other states and/or corporations). Regional intergovernmental organisations have been

widely expected to be the appropriate arenas for managing such tensions, but expectations so far have only brought delusions.

Especially after the "United Nations Development Programme 1994 Report", which exhorts states to endorse their own responsibilities in assuring the "seven spheres of human security" to individuals, the so-called International Community, in its multiple shapes, should be considered interfacial systems, tending to equilibrium and ready to put right via diplomatic channels unsuitable behaviour in democratic member countries or others they have relations with. In such contexts, the inopportune silence of powerful regional organisations legitimizes the improper behaviour of states and leaderships towards their citizens, which implies more responsibilities than those publicly admitted.

In these pages, rights and claims, denunciations and recommendations, analyses of good practices and critiques of good or bad actions and intentions beyond the scope of the authors are other steps and contribute to the study of human ecology, anthropology, history of the environment, political sciences, international rights, political philosophy, geography as well as studies of the continents where injustice is experienced with no distinctions being drawn – as we should stress – between the First, Second or Third Worlds, but where injustice often seeps out from the First.

The e-book is divided in three sections in such a way as to underscore the contradictory state of the art. It opens with a description of the aims and achievements of governance, processed and polished at international level these days, and then goes on to considered multi-faceted aspects of current land investment and the limits of economic bargaining, even within the legal frame of bilateral economic treaties. The volume then offers a cross-section of relevant perspectives and cases that indicate the limits of normative and economic mechanisms world-wide and adds a small number of projects calling attention to the consequences on populations of resources management and also offering possible remedies.

The first section entitled "Harmonizing governance" begins with framing the achievements in providing the Voluntary Guidelines on the Governance of Tenure of land, fisheries and forestry (VGGT) under the aegis of FAO as an interstate or-

ganisation. It goes on to examine the principles sustaining the International Land Organisation, a major NGO which supports peoples in their claims for access to land and water resources and also forefronts the way the VGGT respect national land tenure systems worldwide. The sect is then rounded off with contributions from international rights experts, which focus on land grabbing, analyse legal frameworks and suggest policy instruments for harmonising corporate governance at global, regional and national levels.

The second section "Case studies" is structured according to a geographical logic, moving eastwards from Milan, the headquarters of SHuS, venue both of the 2015 Expo and our conference. The approach is interdisciplinary, while the focus is on the limits of governance, violation of peoples' rights and the multifarious consequences on the environment and human rights in different contexts.

The final section summed up in its title "Best practices. Securing rights: efforts from below" starts with a limited but representative range of no-governmental associations working from below to arouse awareness in a culture of rights via partnership projects. It comes to a close with papers on a company and an NGO of academic origins describing their activity at environmental, social and governance levels.

Addressing the European Union

This e-book, at times very critical in its judgements, is an attempt to define problems, overview their history, policies and attempted solutions, and offer predictive possibilities of problem-solving, or suggesting ways to implement them or deploy legal instruments. With its energy and faith it invests in the possible roles states, international organisations, RECs and the EU can carry out and addresses many recommendations – especially to the latter – calling for adjustments to both politics and policies.

Human society has apparently reached the acme of its consciousness in terms of human rights, but conscientious citizens

still meet difficulties in obtaining information, knowledge and coordination and applying pressure in the right places, in order to create a world of Justice. Although not always accessible at the same stage and level, communication has spread, but the information imparted is chaotic. More often than not, agendas imbued with the mainstream neoliberal ideology are hidden or disguised, so that its concepts are taken for granted as the only possible way, although largely proved as unsustainable in the long run, even by authors who apparently question it.[7]

Not only should universities take part in the process of disclosure, dissection of socio-economic and political problems, and finally provide theories for their solutions – as often their members already do – but, firstly, their role should be recognised and encouraged by facilitated exchanges and improved research directions free from market interests. Secondly, Academia should find the courage to communicate its observations to the world at large, disseminating the rigour of its scientific methods and revealing the tricks communication can deploy.

In this part of the hemisphere, the EU is the main investor in research, although, according to Crouch, under the pressure of the efficiency-directed investments in the scientific research. Its evident aim is to please the business lobby,[8] and its attitude is very much North-centric in the selection of humanities research topics, as is often denounced in many congresses todays.[9] This is

7. As is evident in authors such as Paul Collier, in the *Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About it,* Oxford University Press, Oxford, 2007, or even William Easterly in its *Tyranny of Experts: Economists. Dicatators, and the Forgotten Rights of the Poor*, Basic Books, New York, 2013.
8. See Colin Crouch, *Quanto capitalismo può sopportare la società*, (Italian Edition) [*Making Capitalism Fit For Society*, orig.], Editori Laterza e-book, Kindle pos. 2606-2617.
9. This tendency recalls a persistent deafness to the admonitions of the Comaroffs, the last of a long list of predecessors: "Western enlightenment thought has, from the first, posited itself as the wellspring of universal learning, of Science and Philosophy, uppercase; concomitantly, it has regarded the non-West – variously known as the ancient world, the orient, the primitive world, the third world, the underdeveloped world, the developing world, and now the global south – primarily as a place of parochial wisdom, of antiquarian traditions, of exotic ways and means. Above all, of unprocessed data. These other worlds, in short, are treated less as sources of refined

perhaps why such an effort to put together brains and insist on a major impact of Academia on society was made by an assistant professor in the History and Politics of Sub Saharan Africa, considered in Italy an "area study", where the history of Europe is still classed as "contemporary history". The EU finances only a few research topics regarding the rest of the world, often citing in its calls for papers categories such as "democratisation", "resilience", "sustainability", with a risk of reducing them to a set of dogmatic constraints conducive to everything, but substantially crippling creativity in research. The result is a dearth of innovative solutions to the main global problems, and a failure to relieve the pressure Europe labors under, from many perspectives, both internal and external.

With the authors of this e-book, however, I am sure that we have followed Whitman's example and 'contributed a verse', or perhaps quite a few, given the wide variety of perspectives we offer.

Let me close with the inspiring Preamble of the failed Constitutional revision of the European Union, as the essays contained in this e-book, coming from four angles of the Earth, are largely inspired by the principles contained here, denouncing the perverse logics of walls and preventive defence, and proposing openness, also in reducing the rigour of the law and the protection of the weakest, while at the same time defending the rights to self-determination.

> *DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,*

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knowledge than as reservoirs of raw fact: of the historical, natural, and ethnographic minutiae from which Euromodernity might fashion its testable theories and transcendent truths, its axioms and certitudes, its premises, postulates, and principles. Just as it has capitalized on non-Western "raw materials" – materials at once human and physical, moral and medical, mineral and man-made, cultural and agricultural – by ostensibly adding value and refinement to them. In some measure, this continues to be the case.". See Jean and John Comaroff, *Theory from the South: Or, How Euro-America is Evolving Toward Africa (The Radical Imagination)*. Taylor and Francis, United Kingdom, 2014, p. 1.

BELIEVING that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress;

and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world,

CONVINCED that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny,

CONVINCED that, thus "United in diversity", Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope.

PREAMBLE of the EU draft Constitution, 2004

Harmonising governance

Land, water and resources rights between limits to access and tools of governance

Maria Guglielma da Passano[1]

VOLUNTARY GUIDELINES ON THE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTRY IN THE CONTEXT OF NATIONAL FOOD SECURITY (VGGT)

Roles and responsibilities in tenure governance: the VGGT and their implementation

Abstract

This paper introduces some of the lessons learned from supporting the national implementation of the Voluntary Guidelines on the Governance of Tenure of Land, Fisheries and Forestry in the context of National Food Security (VGGT). Based on the experience of the Food and Agriculture Organization (FAO) in more than twenty countries, the paper describes how the VGGT are being rendered at national level, identifies some of the areas where the tool is showing promise of greater impact, and analyses how these experiences are changing the different stakeholders' approach to tenure governance.

1. Why the VGGT?

In recent years national governments worldwide have found an increasingly demanding challenge in tenure governance. Competition over scarce natural resources, population growth, urbanisation, changing diets and demand for energy are only a few of the factors that are straining governing institutions and legal and administrative systems, weakening their capacity to govern natural resources efficiently. Outdated systems are no longer responsive to the fast pace of change and demands of populations whose numbers and capacity are increasing.

The VGGT were born out of the recognition that bridges needed to be built between priorities that had traditionally been

1. Land Tenure Officer in FAO and member of the VGGT Secretariat since 2014. She has ten years' experience working for different UN organisations on land tenure and a specialisation in fragile contexts.

perceived as opposites. Governments came together to create a tool that would open a path toward improved tenure governance by harmonising local priorities with national visions, making public needs and private interests coexist, integrating urban expansion and rural livelihoods, balancing the request for services and affordable taxes. This tool had to address land, forestry and fisheries and through their integration achieve a better and more sustainable governance of natural resources.

The Guidelines are based on an inclusive, FAO-led consultation process and were finalized through CFS (Committee on World Food Security) intergovernmental negotiations, including participation by the civil society and the private sector, leading to endorsement by the CFS on 11 May 2012. The implementation of the Guidelines was further encouraged at the Rio+20 meeting in June 2012 and by the Assemblée Parlementaire de la Francophonie, the G20 in Mexico, the G8 and the Ministers at the 5th Berlin Agriculture Ministers' Summit.

Besides bringing tenure governance issues to the forefront of the global dialogue and recognising their importance and relation to food and human security, development and sustainable growth, the VGGT have established for the first time a global consensus on universally applicable standards for the recognition, recording and protection of tenure rights. They promote secure tenure rights and equitable access to land, fisheries and forests as means of eradicating hunger and poverty, supporting sustainable development and enhancing the environment.

2. Tenure governance

Tenure governance as defined in the VGGT is not restricted to supporting and protecting legitimate tenure rights, it is about defining in a participatory way what right is to be considered legitimate in a specific context. Once identified, the legitimate right not only needs to be protected and safeguarded, but its enjoyment be actively promoted, and transparent mechanisms need to be in place to deal with disputes that may arise, as well as ad-

dress grievances. This is what the VGGT define as "responsible" tenure governance, and by adding the dimension of responsibility they provide the opportunity to embrace an innovative and truly participatory way of managing natural resources.

By setting up inclusive processes, the VGGT ensure that all perspectives be included in the tenure governance dialogue, thus basing ensuing decisions and actions on reality. This process allows societies to overcome the traditional one-fits-all approach to tenure governance and work out diverse solutions that best apply to complex and diverse contexts and can best accommodate ever-changing priorities and needs.

By assessing the existing tenure governance frameworks against reality, the VGGT encourage societies to realistically identify what is needed to improve tenure governance in terms of human, financial and physical capacity, thus creating an enabling environment to improve tenure governance.

3. VGGT implementation, a paradigm shift

VGGT implementation is provoking a shift in the concept of tenure governance, making it everybody's close and personal business, advocating for increased capacity and awareness and demanding each of us to take our share of responsibility. The Guidelines are also compelling each individual and organization to reflect on what its responsibility is, assess it against its capacity and identify how to most effectively engage with the process.

The VGGT divide the responsibility of recognizing, respecting, safeguarding and promoting legitimate tenure rights among all of us as members of a given society, at the same time committing to provide all of us with the capacity to actively engage with tenure governance. Tenure governance is no longer the exclusive pertinence of the state, but becomes a public matter to be jointly managed. Along with the barriers between sectors, the VGGT challenge the longstanding separation between policy makers, administrators and the public by assigning part of the responsibility to each stakeholder.

By showing the impact that tenure governance decisions will have on the individual stakeholders' areas of interest, the VGGT are inspiring actors that have traditionally been estranged from policy making, to engage and feed in lessons they are learning and contribute to the creation of an enabling environment for improving tenure governance. Everyone, from national to local government, from professionals to academics, from private sectors to civil society, is encouraged to be actively involved in and engage with tenure governance issues.

4. Tenure role responsibilities in the VGGT: national level stakeholders

The Guidelines are encouraging states to be inclusive, inviting to the table those whose rights have always been neglected. While the states maintain a role of primary importance, in each country non-state actors are finding new and innovative ways to engage and influence the processes governing their tenure systems. National stakeholders are at the forefront of these efforts to improve tenure governance.

Based on VGGT guidance, countries need to lead in-country processes. Making a concrete effort to increase the participation and capacity of their citizens and taking responsibility for improving their legal, policy and administrative systems, countries are creating an enabling environment for improved tenure governance.

Non-state actors at the national level are finding new ways to engage with tenure governance by taking ownership of the processes instead of delegating to states, ensuring any adverse impact of their actions is prevented, and building capacity to support implementation. A wide variety of stakeholders, ranging from the private sector to Academia, and civil society is finding both the motivation and means to engage with tenure governance through the VGGT.

The VGGT have encouraged the private sector at global level to look into the tenure implications of its activities and learn how to align concepts of socio-corporal responsibility to the Guidelines.

At the national level as well as in the private sector, recognition of the importance of good tenure governance is on the increase. In Malawi, for example, the Chamber of Commerce, recognizing that weak governance increases exponentially risks related to any land-based investment, is actively engaging in VGGT discussions, providing best practices and helping inform the new land law.

Academia is similarly increasing its commitment and actively supporting VGGT implementation. In Pakistan, universities are committed to informing policy decisions from an academic perspective; producing research in order to strengthen such decisions technically; assessing the capacities needed for improving tenure governance; adapting curricula to ensure that the right capacities are in place. The University of Liberia has activated a course that uses the VGGT as a framework for discussing tenure governance issues with students. And in Sierra Leone, Uganda and Nigeria, universities are partnering with governments to actively support VGGT-related projects.

In Nepal, civil society is finding in the VGGT implementation processes an opportunity to voice the needs of its constituencies, and in Niger and five other countries, civil society is using the VGGT as a tool to raise awareness with communities about their rights and responsibilities related to tenure and to advocate for their rights to be protected.

5. Tenure role responsibilities in the VGGT: international actors

The new roles and responsibilities shaped by the practical use of the Guidelines at country level to improve tenure governance are in turn changing the roles and demands of international stakeholders, from the UN to private sector, to civil society, to Academia, to donors.

FAO, for example, is being asked to step away from its traditional sectorial approach to its mandate, build on its neutrality and play the role of facilitator and convenor. To support coordination mechanisms that integrate the three sectors and are empowered

to improve tenure governance, provide technical backstopping in the areas of land, fisheries and forestry, and help disseminate lessons learnt from country to country. In order to better achieve these goals, FAO is developing in collaboration with its partners specific technical guides that support VGGT implementation.[2]

The public is holding the international private sector – including multinational corporations – more and more accountable for their actions, encouraging them to take a stand in support of the VGGT and opening a debate to identify what it means for them to commit to VGGT implementation. Multinational corporations such as Nestlé and PepsiCo have made official statements demonstrating their willingness to improve their ways of doing business and follow VGGT guidance, and are now engaged in a debate with other stakeholder groups to agree on what implementation means in their operations.

International civil society is using the Guidelines as a tool to raise awareness, make the tenure governance debate more inclusive and to advocate for legitimate tenure rights. Ways are being explored to use the VGGT as a tool for communities in order to evaluate tenure governance, and assess where there may be margins for increased participation or improvement.

The VGGT are helping strengthen the connections between academia and tenure governance at global and national levels. Being more involved in the tenure governance debate, academics are challenged to come up with innovative solutions to long-standing and emerging tenure governance issues, inform policy processes, assess capacity needs and contribute to building needed capacity. In the same way the donors' role is becoming more active: besides external support to VGGT implementation both at global and national levels through development cooperation programs, donors are now being called on to be vigilant at home (financing mechanisms, investments) and be accountable for the actions of their citizens abroad, preventing adverse impact on tenure governance.

2. See http://www.fao.org/nr/tenure/voluntary-guidelines/en/

6. The EU and VGGT implementation

The EU was one of the main promoters of the VGGT through the early stages of development and rounds of reviews before CFS approval, and is now renewing its commitment by supporting their implementation. National EU delegations are encouraged to engage actively with tenure governance topics as part of their programs. Already 18 countries worldwide have received EU funding for projects related to improving tenure governance and FAO has been mobilized to provide transversal support. At the same time, a debate is ensuing on how accountable the EU and its individual member states should be for the actions of their citizens abroad. Under increasing pressure from their citizens, individual states are putting in place guidelines which their citizens should follow when investing abroad and are starting to take responsibility for their citizens' actions.

The EU has opened a debate with the European private sector on what the implications of the VGGT on their operations are, and what role private sector can play in VGGT implementation. The basic argument is that while weak tenure governance capacity may initially appear a shortcut to get access to resources, it will increase the immediate risks of the investment and become a liability in the medium to long term. It is therefore in the investors' interest and part of their responsibility to ensure that the VGGT principles of consultation, participation and support to good tenure governance are fully adhered to before and during the life of the investment. Applying due diligence moves from being merely an issue of conscience and accountability to clients, to an investment in the medium/long term success of the speculation. The time, energy and funds that may be required to ensure good tenure governance practices are adhered to become part of the initial investment that has to be factored in.

7. The EU and VGGT implementation, recommendations

The political, financial and physical commitment of the EU to the VGGT is already firm and clear. However, in order to transition from strong commitment to a new way of doing business for the future, further actions could be recommended for mainstreaming the VGGT and making them guide tenure governance actions inside the European Union and abroad.

European member states are making individual commitments to VGGT implementation, but it would be useful for the EU to play a role in strengthening the ongoing integrated debate on tenure governance issues and follow the example of some of its members who are evaluating their tenure governance systems on the VGGT in order to improve them. This debate could lead to an agreement on how accountable the EU and its member states should be for the actions of their citizens abroad and how to prevent adverse impacts on their public and private investments.

Regarding the private sector, the EU should play an active role in helping it to understand how in practical terms private sector stakeholders can support implementation of the VGGT through their actions and activities, and clearly identify the mechanisms and extent of the EU vigilance on, and accountability for, their actions.

In the area of development cooperation an effort should be made to increase the Delegations' capacity to understand tenure governance issues and support VGGT implementation when they agree with governments on priorities and projects and during their implementation. This would in turn enable them to mainstream the VGGT in those EU projects that are not directly related to tenure governance, but that still have an impact on tenure (forestry, agriculture, irrigation schemes, etc.). The more the EU will be able to increase its delegations' capacity to frame their interventions in the context of the Voluntary Guidelines, the greater the contribution they will be able to make to the overarching development objectives of the different countries.

Michael Taylor[1] *and Andrea Fiorenza*[2]

TOWARDS PEOPLE-CENTRED GOVERNANCE OF LAND, TERRITORIES AND NATURAL RESOURCES

The International Land Coalition and international guidelines on land tenure

Abstract

In an era of increasing competition over natural resources, the world food and energy crises that have characterised the last decade, have made the strategic role of the resource land very clear, putting it very high on the international agenda. But land is not simply a strategic economic asset. Land remains a key factor in the construction of social identity, and it represents a fundamental cultural, social and environmental resource for all those communities whose livelihoods depend on it. The way in which decisions over land access, use and ownership are made therefore become central in determining how land rights are recognised and assigned.

While recognising that a gap still exists between aspirations and reality on the ground, this paper analyses progress achieved through the two main outcomes of an unprecedented consensus reached among states in recent years: the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs) and the Framework and Guidelines for Land Policy in Africa (F&G). In doing so, it firstly reviews the legal nature and contents of such instruments, arguing their influencing power over national governments in shaping land policy processes and contents despite their non-binding nature. It then looks at their specific focus, highlighting the role they can play in defining how land policies should be developed on the one hand, and what such policies should look like on the other hand. The paper then concludes by describing how, through the promotion of the People-centred land governance ten commitments, the International Land Coalition aims at reducing the gap between aspirations and reality.

1. Director, International Land Coalition Secretariat.
2. National Engagement Strategy Coordinator, International Land Coalition Secretariat.

1. Introduction

There is widespread recognition that land rights are a fundamental element addressing the major challenges of humanity: achieving gender equality; overcoming rural poverty; building fair and sustainable food systems that recognise small-scale producers; recognising collective land rights and diverse tenure systems; peace-building, mitigating and adapting to climate change; managing ecosystems and reversing land degradation.

States have achieved a historical international consensus on land governance in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs) and the Framework and Guidelines for Land Policy in Africa (F&G), which are among the building blocks of a wider commitment in the adoption of sustainable development goals beyond 2015 for a just, equitable and inclusive future. At the same time, grassroots movements have their own visions of development being increasingly heard, and producer organisations are successfully gaining support for the critical role that family farmers and smallholders play in feeding the world and caring for the earth.

These gains notwithstanding, a substantial gap remains between our aspirations and the reality we see on the ground. We live in an increasingly unequal world, in which income, wealth and influence are controlled by the few, and democratic space for participation is shrinking. Ownership and control over land continues to concentrate in fewer hands, putting over 500 million small-scale producers and 230 million Indigenous Peoples who live on and from the land at risk of being further marginalised. Human Rights defenders on land and environment who oppose such injustices face serious threats and abuses, and in many cases their lives are at risk.

Closing the gap between aspiration and reality means giving space to those who live on and from the land to become the drivers of their own change, change that responds to their own needs and priorities. The International Land Coalition is a global alliance of 207 civil society and multilateral organisations that works to realise land governance for and with people at country level,

responding to the needs and protecting the rights of those who live on and from the land.

ILC's membership has defined 10 commitments to jointly realise people-centred land governance at country level. These commitments are the benchmark by which ILC members work towards the implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs), and other similar internationally agreed instruments, to achieve:

1. Secure tenure rights
2. Strong small-scale farming systems
3. Diverse tenure systems
4. Equal land rights for women
5. Secure territorial rights for Indigenous Peoples
6. Locally-managed ecosystems
7. Inclusive decision-making
8. Transparent information for accountability
9. Effective actions against land grabbing
10. Protected land rights defenders

These ten pillars provide a focus for working towards land governance, by people and for people whose livelihoods derive from their land.

This paper examines the VGGTs and the F&G, and the response of members of the International Land Coalition in their application.

2. What are the VGGTs and F&G?

In July 2009, the heads of state and government of the African Union endorsed the Declaration on Land Issues and Challenges in Africa. This declaration established the Framework and Guidelines on Land Policy in Africa as a unique reference to guide the land policy process in African countries. For the first time, governments from across Africa endorsed key goals and good practices for reforming land governance on the African continent.

Also in 2009, FAO began a global consultation to develop the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT). They were adopted by governments through the Committee for World Food Security (CFS) in May 2012. This was the first time that such a detailed and internationally accepted guide to best land governance practice had been drawn up and endorsed by the international community.

These two documents give new direction and authority to both government institutions and civil society organizations (CSOs) seeking to improve land governance policy and practice on the continent. They create an opportunity for stakeholders to work together to promote land policy change in Africa that is people-centred, sustainable, and that responds to the needs of the majority of women and men, in particular those in poverty. They also give impetus to other international agreements that touch upon land tenure.

Box 1: International instruments relating to land and natural resources governance in Africa

The VGGT and the F&G are the two international instruments that most directly focus on land policy and governance. But it should not be forgotten that there are a variety of instruments that are still important points of reference for various aspects of land governance.

Binding instruments (International Law)

ACHPR	*African Charter on Human and Peoples' Rights*
CBD	*Convention on Biological Diversity*
CEDAW	*Convention on the Elimination of Discrimination Against Women*
CESCR	*Convention on Economic, Social and Cultural Rights*
Maputo Protocol	*Protocol to the ACHPR on the Rights of Women in Africa*
UNCCD	*United Nations Convention to Combat Desertification*
ILO169	*ILO Convention 169*

Non-binding instruments ("soft law")

F&G	*Framework and Guidelines on Land Policy in Africa*
PFPA	*Policy Framework for Pastoralism in Africa*
Pretoria Declaration	*Pretoria Declaration on Economic Social and Cultural Rights in Africa*
SDGEA	*Solemn Declaration on Gender Equality in Africa*
VGGT	*Voluntary Guidelines on the Responsible Governance of Tenure*
UNDRIP	*United Nation Declaration on the Rights of Indigenous Peoples*
(no acronym)	*Draft Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*

The F&G and the VGGT are both non-binding commitments on actions to be taken in the area of land policy and natural resource governance. They have been developed through long processes of consultation and officially endorsed by governments. They can be influential in inspiring, assisting and creating momentum for change.

2.1 Legal status

The F&G and the VGGT are both voluntary and non-binding. The F&G is clear in stating that all AU member states have the sovereign right to decide their own policies, and describes its role as providing assistance (1.1.1). Likewise, the VGGT are clear in that they do not limit or undermine any existing obligations of states, but must be applied in a way that is consistent with national and international law (2.2). In other words, these documents do not have the force of law, and governments cannot be taken to court, nationally or internationally, on the basis of what they say.

Box 2: The development of the Framework and Guidelines

The Land Policy Initiative was formed in 2006 as a joint program of the African Union Commission (AUC, the UN Economic Commission for Africa (UNECA) and the African Development Bank (AfDB). The aim was to develop a joint framework for land policy and land reforms in Africa, with a view to strengthening land rights, enhancing productivity and securing livelihoods. A draft of the Framework and Guidelines was developed through continent-wide and regional multi-stakeholder consultations, before being refined by national experts and finalized by Ministers from African States.
The Framework and Guidelines was endorsed by the Assembly of African Heads of State and Governments at the AU summit in Sirte, Libya, in July 2009. Specifically, the Assembly endorsed the Declaration on Land Issues and Challenges in Africa. This declaration not only contained an endorsement of the Framework and Guidelines as a reference for policy reform, but also important resolutions on leading land policy development, allocating adequate resources, ensuring equitable access to land and strengthening women's land rights.

2.2 "Soft power"

Although the F&G and the VGGT are voluntary, they are still potentially very influential and important. Their legitimacy and influence derives from their endorsement by governments, and also from the long and inclusive processes of consultation and negotiation that lead to endorsement (see Boxes 2 and 3). In other words, their recommendations may be politically hard to argue against in national contexts because governments have already endorsed them at a high level, and because they are the outcome of consultations with so many experts and different stakeholders.

What is more, although these guidelines are voluntary, states may still be obliged to follow their recommendations under other commitments, such as international human rights law.

Box 3: The development of the VGGT

Like the F&G, the VGGT underwent a similarly long period of consultation and negotiation, including expert consultation and regional consultation that included different stakeholder groups. FAO took the lead in initiating and facilitating this process.

They were finalized through intergovernmental negotiations led by the Committee on World Food Security (CFS). This is an intergovernmental body made up of governments (members) and inter – or non-governmental participants and observers, that acts as a platform for stakeholders to work together in a coordinated way to ensure food security and nutrition for all. Its membership is open to all member states of FAO, IFAD and WFP, and it reports to the Economic and Social Council of the United Nations (ECOSOC). Negotiations on the VGGT included the participation of civil society organizations, private sector representatives, academics and international organizations. The Voluntary Guidelines were officially endorsed by CFS at the Thirty-eighth (Special) Session on 11 May 2012.

States are obliged to respect, protect and take steps to ensure the progressive realization of human rights. The VGGT is explicitly seen as a way to help states and non-state actors identify how this is to be done. The Voluntary Guidelines seek to provide "guidance and information on internationally accepted practices" (1.2.1). In a court dispute, a government could thus potentially be forced to justify why it has not followed the "internationally accepted practices" embodied by the VGGT.

In particular, the *Declaration on Land Issues and Challenges in Africa,* which officially endorses the Framework and Guidelines as a reference for African societies, is a powerful statement of commitment by African heads of state. On the one hand, it includes commitments to make sure that meaningful land policy reforms take place. On the other, it includes specific commitments on ensuring equity in access to land and securing the tenure rights of women (see Box 5).

Box 4: Why the VGGT and the F&G matter

- *They represent unprecedented global/continental consensus on good land governance practices for promoting inclusive and sustainable development.*
- *They have received the official endorsement of governments, so are hard for governments to dismiss.*
- *They have been developed through extensive and inclusive processes of consultation, increasing their legitimacy.*
- *They describe internationally accepted best practices for meeting governments binding land and natural-resource related human rights commitments.*

3. What are the F&G and the VGGT about?

The Framework and Guidelines and the VGGT are both aimed at providing guidance and assistance on how to improve land policies and governance practices for sustainable, pro-poor deve lopment. Both speak to all land-concerned actors, but particularly to governments. In this regard, they are very similar.

But their focus is in many ways quite different. The F&G has a broader focus. It is about why land policy is important, the contexts and issues it must address, and the challenges that have been encountered within the African region. It also focuses heavily on change processes: land policy development, implementation and progress tracking. The F&G is mostly about WHY change should happen, and HOW, but says relatively little on what policies should actually look like.

The VGGT, by contrast, are about WHAT land policy should look like. They discuss the policy process only in passing, and focus heavily on best practices across a comprehensive range of areas of land governance. They go into much greater detail about how land tenure rights should be recognized, allocated, transferred and administered in a range of (globally applicable) governance contexts.

Box 5: The Declaration on Land Issues and Challenges in Africa

In the Declaration on Land Issues and Challenges in Africa, the heads of states and government of the African Union undertake to:

- *"prioritize, initiate and lead land policy development and implementation processes in our countries, notwithstanding the extent of multi-stakeholder contribution to such processes involving also civil society, private sector;*
- *support the emergence of the institutional framework required for the effective development and implementation of land policy and implementation;*
- *allocate adequate budgetary resources for land policy development and implementation processes, including the monitoring of progress."*

They resolve to:

- *"ensure that land laws provide for equitable access to land and related resources among all land users including the youth and other landless and vulnerable groups such as displaced persons;*
- *strengthen security of land tenure for women which require special attention."*

The AUC, in collaboration with RECs, UNECA and the AfDB, is requested to work on coordinating follow-up activities, facilitating mutual learning, setting up a fund to support follow-up activities, and establishing mechanisms for progress tracking.

AU member states are further urged to:

- *"review their land sectors with a view to developing comprehensive policies which take into account their peculiar needs;*
- *build adequate human, financial, technical capacities to support land policy development and implementation;*
- *take note of the steps outlined in the Framework and Guidelines on Land Policy in Africa for their land policy development and implementation strategies"*

3.1 The focus of the F&G

The F&G can be seen as having two parts: the "Framework" and the "Guidelines". The "Framework" part (Chapters 2 and 3) seeks to provide a framework for understanding land issues on the African continent. It seeks to put the land policy development process in context. Chapter 2 illustrates the ecological, political, economic,

social, cultural, and demographic context in which the land question must be addressed, as well as discussing the "new scramble for African land resources". Chapter 3 goes into the implications of land policy for different sustainable development issues, including agriculture and other economic uses such as mining and energy development, and the need to protect ecosystems.

The "Guidelines" part (Chapters 4, 5 and 6) is focused on the process of policy development, the process of policy implementation, and the tracking (i.e. monitoring) of progress. The focus is very much on processes (*how* to do policy development, implementation and tracking), rather than on the contents of policy.

Box 6: Overview of the contents of the Framework and Guidelines

Chapter 1 – About the Framework and Guidelines

Chapter 2 – On understanding "the land question" in Africa
- *context of resource scarcity and environmental issues (2.2)*
- *political context, from the legacy of colonialism to growing demands for Africa's natural resources (2.3)*
- *economic context and significance of land resources (2.4)*
- *land, culture and marginalisation based on gender and ethnicity (2.5)*
- *context of population growth and urbanization (2.6)*
- *climate change, transboundary resource management, and the "new scramble for Africa's resources" (2.7)*

Chapter 3 – On other factors that need to be taken into consideration in the policy development process
- *recognize the role of land in the development process (3.1)*
- *mainstream land policy in poverty reduction programmes (3.2)*
- *make agriculture an engine of growth (3.3)*
- *manage land for other uses (3.4)*
- *protect natural resources and ecosystems (3.5)*
- *develop land administration systems that are effective (3.6)*

Chapter 4 – The land policy development process
- *goals of land policy development (4.1, 4.2)*
- *experiences and challenges with land policy development in Africa (4.3, 4.4)*
- *strategies for land policy development (4.5)*
- *summary of land policy development steps (4.6)*

Chapter 5 – The land policy implementation process
- *common challenges for implementation (5.1, 5.2)*
- *necessary steps for effective land policy implementation (5.3)*

Chapter 6 – Tracking progress in policy development and implementation
- *value of tracking and key requirements (6.1)*
- *key challenges that may be faced (6.2)*
- *principles to guide tracking systems (6.3)*
- *need for feedback (6.4*

Chapter 7 – Concluding statement

3.2 The focus of the VGGT

The VGGT are focused on the recognition, transfer, allocation and administration of (tenure) rights to access, use, manage and benefit from land resources. They barely mention the context or ultimate goals of land policy making. The focus is on the actions that governments and other actors should consider taking. They are focused on the content of policy, and only mention the process of policy making in passing – particularly in relation to the need for it to be participatory. They do not, unlike the F&G, examine processes of policy development, implementation and tracking in detail.

Box 7: Overview of the contents of the Voluntary Guidelines

Part 1 – The objectives, nature and scope of the Guidelines

Part 2 – General and cross-cutting principles and guidance
- *general, cross-cutting principles (3)*
- *the nature of tenure rights, and states' obligations in relation to them (4)*
- *general guidance on policy, legal and organisational frameworks related to tenure (5)*
- *general guidance on the delivery of services (6)*

Part 3 – Guidance on the recognition and allocation of tenure rights by states
- *general safeguards to ensure that the recognition or allocation of rights do not infringe on the rights of others (7)*
- *the allocation/recognition of tenure rights to use public land, fisheries and forests (8)*
- *the recognition of indigenous and customary tenure rights (9)*
- *the recognition of informal tenure (10)*

Part 4 – Guidance on actions that involve transfers of tenure rights
- *the use and regulation of land markets (11)*
- *the regulation of land tenure transfers for investment purposes (12)*
- *designing and implementing land consolidation and readjustment programmes (13)*
- *designing and implementing land restitution programmes (14)*
- *designing and implementing redistributive land reforms (15)*
- *general guidance on land expropriation and compensation (16)*

Part 5 – Guidance on the administration of tenure rights
- *systems for recording tenure rights (17)*
- *land valuation (18)*
- *land taxation (19)*
- *regulated spatial planning (20)*
- *the resolution of tenure disputes (21)*
- *the management of resources that traverse national boundaries (22)*

Part 6 – Guidance on responding to climate change, natural disaster and conflicts

Part 7 – Responsibilities for the promotion, implementation, monitoring and evaluation of the Guidelines

4. ILC's ten commitments to people-centred land governance

With reference to these two benchmarks, ILC members have defined those aspects that are most critical to achieving what they define as People-centred land governance. This was stated in the *Antigua Declaration* of ILC members in 2013, as follows:

Commitment to action on the VGGT and ALPFG with a focus on women and men living in poverty

As members of ILC, we welcome and reaffirm the Voluntary Guidelines on Responsible Governance of Tenure, and the Framework and Guidelines on Land Policy in Africa, as much-needed global and regional norms and benchmarks. We call on States to take the appropriate legal and institutional policies to operationalise these Guidelines, and we commit ourselves to working with them and other partners towards extending these Guidelines to practice and policy, both as member organisations and as a coalition.

We, in particular, recognise that the implementation of these Guidelines at the country level requires intensive engagement by multiple stakeholders at local, national and regional levels, and that implementing these Guidelines and other international standards involves trade-offs between competing interests and priorities. We also know that transforming international norms into reality on the ground is an enormous challenge that requires the collaboration of all.

As ILC members, we commit ourselves to contribute to their operationalisation, with a particular focus on those who live in poverty and consistent with our vision that 'Secure and equitable access to and control over land reduces poverty and contributes to identity, dignity, and inclusion.' Drawing on our fifteen years of experience as a coalition, we emphasise the following ten actions as essential to achieving people-centred land governance. We will work together as a coalition, and with all concerned state and non-state actors, to see that these actions are put into practice.

1. *Respect, protect and strengthen the land rights of women and men living in poverty, ensuring that no one is deprived of the use and control of the land on which their well-being and human dignity depend, including through eviction, expulsion or exclusion, and with compulsory changes to tenure undertaken only in line with international law and standards on human rights.*
2. *Ensure equitable land distribution and public investment that supports small-scale farming systems, including through redistributive agrarian reforms that counter excessive land concentration, provide for secure and equitable use and control of land, and allocate*

appropriate land to landless rural producers and urban residents, whilst supporting smallholders as investors and producers, such as through cooperative and partnership business models.

3. *Recognize and protect the diverse tenure and production systems upon which people's livelihoods depend, including the communal and customary tenure systems of smallholders, indigenous peoples, pastoralists, fisher folks, and holders of overlapping, shifting and periodic rights to land and other natural resources, even when these are not recognized by law, and whilst also acknowledging that the well-being of resource-users may be affected by changes beyond the boundaries of the land to which they have tenure rights.*
4. *Ensure gender justice in relation to land, taking all necessary measures to pursue both de jure and de facto equality, enhancing the ability of women to defend their land rights and take equal part in decision-making, and ensuring that control over land and the benefits that are derived thereof are equal between women and men, including the right to inherit and bequeath tenure rights.*
5. *Respect and protect the inherent land and territorial rights of indigenous peoples, as set out in ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, including by recognizing that respect for indigenous knowledge and cultures contributes to sustainable and equitable development and proper management of the environment.*
6. *Enable the role of local land users in territorial and ecosystem management, recognizing that sustainable development and the stewardship of ecosystems are best achieved through participatory decision-making and management at the territorial-level, empowering local land users and their communities with the authority, means and incentives to carry out this responsibility.*
7. *Ensure that processes of decision-making over land are inclusive, so that policies, laws, procedures and decisions concerning land adequately reflect the rights, needs and aspirations of individuals and communities who will be affected by them. This requires the empowerment of those who otherwise would face limitations in representing their interests, particularly through support to land users' and other civil society organizations that are best able to inform, mobilize and legitimately represent marginalized land*

users, and their participation in multi-stakeholder platforms for policy dialogue.

8. *Ensure transparency and accountability, through unhindered and timely public access to all information that may contribute to informed public debate and decision-making on land issues at all stages, and through decentralization to the lowest effective level, to facilitate participation, accountability and the identification of locally appropriate solutions.*
9. *Prevent and remedy land grabbing, respecting traditional land use rights and local livelihoods, and ensuring that all large-scale initiatives that involve the use of land, water and other natural resources comply with human rights and environmental obligations and are based on:*
    - *the free, prior and informed consent of existing land users;*
    - *a thorough assessment of economic, social, cultural and environmental impacts with respect to both women and men;*
    - *democratic planning and independent oversight; and*
    - *transparent contracts that respect labour rights, comply with social and fiscal obligations and are specific and binding on the sharing of responsibilities and benefits.*
    - *Where adverse impacts on human rights and legitimate tenure rights have occurred, concerned actors should provide for, and cooperate in, impartial and competent mechanisms to provide remedy, including through land restitution and compensation.*
10. *Respect and protect the civil and political rights of human rights defenders working on land issues, combating the stigmatization and criminalisation of peaceful protest and land rights activism, and ending impunity for human rights violations, including harassment, threats, violence and political imprisonment.*

5. Conclusion

Like any global guidelines, the F&G and VGGT face the challenge of moving from aspiration to reality. Recognising that the aspiration they define is a minimum agreement between widely diverse stakeholders, ILC members have made an additional step,

and that is to raise the level of aspiration. They have done this by defining ten particular areas that they see as critical in bringing about transformation in land governance that serves the need of the women, men and communities whose livelihoods are based on land and natural resources; the ten commitments to *people-centred land governance.*

These commitments provide the framework by which ILC members – also diverse – structure their collaboration. In this manner, they are part of the effort to bring into reality these guidelines.

Federica Violi[1]

PERMANENT SOVEREIGNTY OF STATES OVER NATURAL RESOURCES AND THE PRACTICE OF LAND GRABBING: A EUROPEAN UNION PERSPECTIVE

Abstract

The paper deals with the intricate relationship between the principle of permanent sovereignty over natural resources and the phenomenon of land grabbing, trying to assess how this practice might affect a host state's ability to regulate in favour of its territorial community, and what kind of legal consequences arise at an international level. Following this assessment, the paper will try to identify EU policy areas which might be relevant for the 'race to land', while at the same time suggesting policy proposals that might tackle the negative effects generated by land grabbing.

1. Introduction

Investing in agriculture is not a new trend. Food companies have largely resorted to externalisation both before and after decolonization. What makes this new wave of investments different and worth analysing is both the investment type and its legal framework, as well as the drivers behind it. For a number of reasons, in fact, the extent of contract farming or technical and financial assistance to developing countries farmers have started to decrease – all to the advantage of foreign direct investments (FDI), which facilitate the direct ownership of land (Hallam, Cuffaro 2011).

The 2007-2008 food price crisis allegedly furthered this process. With the aim of securing national food supplies, a series of countries have supported, or undertaken, intensive outsourcing

1. International and European Union Law Fellow, University of Messina; PhD in International Law, University of Milan.

programs, independent of purely market needs (resource-seeking). Although state-driven investments are apparently strictly related to food and energy security, the predominance of non-state actors adds much to the phenomenon. The commodification of natural resources, which turns them into flexible crops and commodities, is a key element in the present analysis, since it clarifies the fact that land investments are not merely defined by the produce *per se*, but rather by their ultimate goal in terms of allocation in the flow of trade (Borras et al. 2011).

Water and green grabbing are clear examples of this complexity. The latter, in particular, is directed towards land acquisition for the intensive cultivation of forest trees, in order to reduce gas emissions and gain carbon credits – a rapidly growing sector, which together with biofuels, is one of the primary goals in so-called market environmentalism. However, investment factors vary according to the level of industrialization and preferred development sectors (Cotula 2012). For some countries, for example, it is not so much a question of food or energy security: foreign direct investment in land is driven by dependence on non-food agricultural products, which are essential for the realization of industrial models of global production.

2. Land or control grabbing?

This specific connotation draws attention to the difficulty in regulating the phenomenon on a global level. The production of food for human consumption, for example, is regulated by normative and economic mechanisms which are considerably different from those governing the production of biofuels or forest timber for the carbon market. It is clear that the race to land interests very diverse governance fields and blurs the boundaries that separate them, thus generating a complex muddle of both rules and institutions designated to regulate the phenomenon, not to mention that state international obligations related to land-grabbing issues might conflict, thus creating harmonisation difficulties. It is useful to keep this in mind in order to identify a coherent system

of policies and avoid implementing, overlapping or contrasting instruments at different governance levels.

All these circumstances make it clear that land grabbing cannot be considered a unitary phenomenon, either in terms of investment operations and/or land uses; thus some scholars have elaborated the concept of "control grabbing" (Peluso, Lund 2011). In other words, land investment deals are mainly related to investor *exercise of control* over natural resources, rather than being exclusively product-oriented. This observation raises a series of concerns in terms of respect of the host state's sovereignty and regulatory space.

This is all the more evident in "the" analysis of the normative content of many of the clauses included in the majority of land-grabbing deals. In order to assess what dangers the phenomenon might bring, it seems useful to consider particular investment contract features which differentiate the 'race to land' from other land-related Foreign Direct Investments – FDI (Cotula 2011). In fact, there is no presumption of negativity in investing in land *tout-court*. The identification of the risk factors which might produce negative effects on a general level proves fundamental, therefore.[2] In the first place, the extent of land is highly relevant. Contracts refer to terrains ranging between 10,000 and 500,000 ha, which is a considerable area, especially considering the high number of other natural resource-related investments carried out within the very same countries. At the same time, the lifespan of contractual obligations is generally particularly long, and subject to renewal (from 30 to 99 years), thus generating an almost definitive separation from the local communities living on the same tracts, whose rights are usually violeted in order to implement the investment contract. Similar concerns in terms of advantages for host countries are raised by significantly low rents (1,50$/ha

2. This analysis is based on a survey of land deals retrieved from farmlandgrab.org. In particular, we refer here to the following: Convention between the Republic of Cameroon and SG Sustainable Oils Cameroon PLC; Convention d'investissement dans le domaine agricole entre La République du Mali et la Grand Jamahiriya arabe Lybienne populaire et socialiste; Contrat d'exclusivité pour l'Utilisation de Terre entre Agro Africa (Norvège) et Kounkane (communauté rurale), Sénégal.

approximately), an element which might well encourage speculative operations. Stabilization clauses[3] and produce export duty exemptions further reduce the development counterpart of these contracts. Many aspects, such as labour obligations or social protection duties – though fundamental considering the scope of the investment operation – are either poorly covered or not at all, with the result that transfers or leases of large-scale agricultural production areas are regulated by laconic terms and vague commitments.

Thus, depending on the circumstances, contractual provisions play a fundamental role in terms of investment results. In fact, as the contract is the principle legal vehicle of the investment, its terms may substantially impact both on the interests of negotiators (host state and investor) and third parties, especially those of individuals or local communities affected by the investment operations.[4]

3. Permanent sovereignty of states over natural resources, why is the principle relevant?

It seems clear that land-grabbing contracts may generate a significant, dangerous (and almost permanent) constraint of host state sovereign powers over vast regions of their territory (Sassen 2013, Violi 2015). This to the detriment of the population and environment, since the contracts reduce the host states' ability to respect and implement regulatory measures addressing their public interest. As already mentioned, such investments potentially carry a high number of risks for the population of the host country, in particular, in terms of access to land and food supplies. On the

3. Stabilization clauses introduce a compensation mechanism for damages to investors in those cases where host states decide to amend the internal normative framework regulating the investment activity, in view of pursuing the public interest, thus causing a disadvantage for investors.
4. In some cases, host states even authorize investors' security services to apprehend and detain any person trespassing the investment property. See e.g. the contract with Cameroon in Section 9.3.

portion of land subject to a given investment, there may already be crops or herds belonging to rural communities, who use the land by virtue of custom or usage rights and are usually granted a lower level of protection if compared to formal titles of ownership, rare at best in most developing countries. In some regions of the world, the holders are therefore particularly vulnerable, given the difficulty they have in exercising their uncertain land rights and obtaining adequate judicial protection as a result.

Against this backdrop, it seems fundamental to focus on the principle of a state's permanent sovereignty over its natural resources and its intricate relationship with global land grabbing.

The core content of permanent sovereignty might be translated into the right of states to dispose freely of natural resources and regulate the exploitation thereof. Land-investment contracts shall, therefore, be immediately connected to the principle. The question is, then, how much discretion the host state holds in exercising its contracting competences.

The present analysis will start from the presumption that permanent sovereignty implies a set of both rights and obligations. Sovereignty is subject to a series of limitations, both inherent to its own nature and related to distinct international customary or treaty law relationships (e.g. environmental obligations). These should therefore be taken into consideration when assessing what boundaries and modalities are prescribed under international law for the state to exercise its natural resource disposal power, which is not fully discretional. This is particularly relevant to the internal dimension of permanent sovereignty over natural resources, which we connect to 1) the principle of self determination, and respect of 2) the legitimizing criterion of the "well-being" of the population when stipulating land deals, which we relate to respect for the human rights of the host state's own territorial community.

4. The internal dimension of permanent sovereignty: content and applicability of the principle of self-determination and the relevance of human rights.

Do the people of a host state enjoy the right of self-determination in its internal dimension? Economic self-determination is usually connected to the state as it is the entity which represents the economic interests of the country at an international level and is traditionally used as a synonym of permanent sovereignty. Nevertheless, the phenomenon of the race to land might be interpreted as a triangular – rather than bilateral – relationship, between the host country, the investor and the people. It might be argued, therefore, that self-determination can be applied in its internal dimension, with specific regard for the relationship between a people and its government. Internal economic self-determination is an immediate consequence of political self-determination (Palmisano 2012), which should be understood as the freedom of all peoples to choose their own organizational, economic and social life, according to their aspirations in terms of identity *status*. According to this definition, Art. 1(2) of both 1966 New York Covenants cannot be interpreted as mere restatements of a country's permanent sovereignty over natural resources. Rather it regulates its exercise modalities within the territory (Cassese 1995, Kiwanuka 1988), so the principle acquires significance if connected to the people as beneficiaries of the right to their own government. Host states are under an obligation to dispose of their natural resources in the interest of their populations, without causing detriment to their territorial community or depriving it of its own means of subsistence (art. 1(3) 1966 ICCPR – ICESCR).

The scope of internal self-determination is usually linked to treaty-based provisions, though this interpretation might prove too restrictive. In fact, self-determination operates as a guiding principle in international law, protecting the status of peoples and their aspirations in broad terms. This means that the FDI through which the host state exercises sovereignty over natural resources should be in full compliance with its obligation to respect the principle of self-determination. However, this is not always

the case, since large-scale land deals might in some cases entail an act of final disposition of natural resources and land and, at the same time, a significant transfer of control to entities which do not guarantee any protection to peoples.

The immediate consequence is that large-scale land deals considerably impair peoples' access to natural resources. This can be defined as the set of processes through which individuals, individually or collectively, are able to use natural resources, regardless of a formal title of access (De Schutter 2010). These processes include participation in formal and informal markets, access to resources through kinship and social networks, including inherited transmission rights over resources, as well as allocations from the state and other authorities (Cotula 2009). In the rural areas of many developing countries, natural resources are crucial sources of supply, both with immediate use through the direct consumption of the products of the land and through activities of economic exploitation. Policies facilitating access to land and natural resources are therefore placed among the key strategies for the full realization of the right to food. However, the trend towards the concentration of agricultural property is leading to a progressive reduction of available land, and consequently hindering access to the full realization of the right to food. This is especially true where there are no suitable alternatives, if, for example, the peoples live on the land to gain their livelihood. Furthermore, access to natural resources might immediately or indirectly impact on other rights, such as the right to property (individual or collective) or to adequate housing, and to a generally interpreted adequate standard of living. Land represents an immediate link of cultural identity for rural communities and an opportunity for development, in full respect of the principle of agricultural multi-functionality, which assumes great importance in the selection of investment operations and assessment of their social impact. Forced evictions from ancestral lands risk jeopardizing the existence of local communities and causing worrying internal migration flows.

Contemplating/Taking into consideation both self-determination and human rights helps by introducing both a collective and individual approach to protecting a people from a state abus-

ing its right to dispose of natural resources. While self-determination claims tend to focus more on reverting the current decision-making process mechanisms (and the relationship between states and their people) when dealing with contracting away natural resources, individual human right claims help by substantiating each violation an individual may suffer. Both prove meaningful in the counter-narrative of land investments as an absolute win-win situation (van Bernstorff 2013).

In this regard, rights related to public participation included in international and regional instruments aimed at protecting human rights are extremely relevant. In particular, in General Comment no. 12, the ESCR Committee considered that transparency and public participation were among the requirements for the proper formulation and implementation of national strategies[5] to ensure the full realization of the right to food. Institutional mechanisms in charge must then be reformed to ensure that the process of food policy definition is fully representative. At the same time, participatory rights are considered instrumental and symptomatic of the respect for and exercise of right to self-determination. In this sense, the experience of already agreed environmental procedural rights (access to information, participation in decision-making and access to justice)[6] could well prove interesting and would deserve further analysis.

5. Legal consequences and the way forward

5.1 International obligations

Host states bear the primary responsibility for the implementation and respect of their own peoples' right to self-determination

5. General Comment n. 12, *The Right to Adequate Food*, UN Doc. E/C.12/1999/5, 12 May 1999, para 2.
6. See in particular the 1988 Aarhus Convention. Though promoted within UNECE, the Convention is open for signature by all states as well as international organizations.

and human rights obligations, since they directly negotiate and conclude land investment contracts which are implemented on their territory and under their direct jurisdiction. Under current international law, host states are the main guarantors for the recognition, protection and enforcement of human rights (unless investors have an immediate *de jure/de facto* organic link to home states) and no alternative regime of international responsibility has yet emerged.

Nevertheless, there is still margin to reason on the legal consequences generated by the unlawful conduct of host states for the international community as a whole, i.e. also for EU members and the EU as a subject of international law. Starting from the premise that self-determination and, to a certain extent, some human rights have an *erga omnes* character, it seems useful to elaborate on the applicability of art. 48 of Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARSIWA). In the case of a violation of an *erga omnes* obligation, the international community will be entitled to invoke a state's international responsibility with a view to protecting a collective value. Its claim will thus be limited to the request for the cessation of the wrongful act, for assurances and guarantees of non-repetition of the said act and reparation in the interest of the beneficiaries (art. 48, par. 2). The latter option is an extremely relevant hypothesis to the rights in question, given the difficulty both individuals and peoples encounter when seeking redress for violations suffered in relation to land investment contracts. For this purpose, states other than the injured one may, for example, access a court or quasi-judicial institution, or even bring the violation to the attention of an international forum. Furthermore, serious infringements of an *erga omnes* obligation would activate further consequences of art. 41 of the Draft, which is related to a series of obligations of solidarity placed upon the international community as a whole. The hypothesis in Par. 2 is particularly relevant: it is related to the prohibition to recognize a situation arising from the wrongful act as lawful. This is interesting, since the prohibition might also include/or maybe address behaviours which do not formally imply an endorsement of the conduct of

the infringing states (Papa 2014). Even more interesting, Art. 41 (2) specifically obliges states not to render assistance in maintaining the unlawful situation. In the land-grabbing context, this might have a very interesting application potential if linked to the obligation for the international community not to render economic/financial assistance to host states causing serious breaches of either self-determination or HRs when consenting to land-grab contracts. Indeed, investments are often financed by agribusiness multinational enterprises (MNE) home states and boosted by a number of incentives for produce exportation back to the home-states. It seems, therefore, possible to argue that if the practice amounts to a gross violation of the principle of internal self-determination or other HRs with an *erga omnes* nature, the economic and financial assistance of the home states could well be ascribed to behaviour censored by Art. 41 (2) of the project.

Duty-bearers other than host states might also be bound to other primary international obligations relevant to land investment contracts. The present analysis will be focusing on the obligation of cooperation, with specific reference to the provisions of Arts. 1(3) and 2 (1) of the 1966 International Covenant on Economic Social and Cultural Rights. In this sense, some have argued that with regard to human rights, Article 2 (1) may contribute instrumentally to providing a normative content to Art. 1 (3).

Art. 2 (1) entails an obligation of a progressive character, since it does not impose an immediate obligation on states to guarantee the rights enshrined in the Covenant. It provides that the duty of states to work towards the progressive realization of the rights in question is not limited to individually undertaken actions. On the contrary, it holds that states should strive to achieve their goal through international cooperation, *notamment sur le plan économique et technique* (Pisillo Mazzeschi 2006).

As is clear from legislative history it appears that the intention of the drafters of the Covenant was not to bind states to providing assistance or cooperation to a specific predetermined level. However the provision cannot be deprived of all legal meaning. Starting, in fact, from the assumption that the provision in question incorporates an obligation *complexe et prolongé,* it is possible

to infer that the obligation is subject to further specification on a case by case basis and, in particular, mainly requiring due diligence efforts.

For our purposes, this obligation has an interesting margin of application in those cases where land investment operations are directly implemented by home states in the framework of an economic cooperation agreement or development aid project between the home and host state. Although it is true that the duty to cooperate does not impose the implementation of specific positive actions of a state, it has nevertheless a full prescriptive negative counterpart, which obliges third-party states not to compromise or interfere with the full realization of the protected rights of peoples and individuals outside their territory. With regard to this issue, some scholars have observed that vast investment transactions implemented within the framework of Economic Partnership Agreements or agricultural development projects directly vehiculated by third-party states might infringe the negative counterpart of the duty to cooperate (Saul, Kinley 2014), since the acquisition of vast tracts of land turning into export processing zones (Coomans 2011)[7] have determined unacceptable consequences in terms of the detriment of the social, economic and cultural rights of individuals and peoples.

As already mentioned, the progressive obligation under article 2 (1) of the Covenant is likely to be further detailed into more specific obligations. In accordance with the guidelines of the ESCR Committee,[8] member states of an international financial institution (IFI) should ensure that the activities of these organizations contribute to the realization of economic, social and cultural rights related to their field of competence. However, any positive obligation on the part of states directed towards insisting on a specific amount of resources to be destined to the realiza-

7. In the same direction, see CESCR *Concluding Observations* to Kenya Report. The Committee has called upon the country to prevent economic activities undertaken under the upcoming EPA regime with EU from violating HRs of Kenyan people, UN E/C.12/KEN/CO/1
8. See the General observations on the right to food (UN Doc. HRI/GEN/1/Rev.9) and right to water (UN Doc. E/C.12/GC/19).

tion of human rights should be excluded. Yet, it is still possible to consider an obligation of states towards orienting the general policies of the institutions, related in particular to structural conditionalities (De Sena 2011). Furthermore, states may have a due diligence obligation to prevent IFI actions and measures from generating a detriment or decline in the level of realization of human rights under the Covenant.

The question remains whether and to what extent, the duty to cooperate for the progressive realization of human rights and self-determination of peoples could also be connected to the EU itself, which is not a signatory of the 1966 New York Covenants.

Although scholars debate on the existence of a duty to cooperate at the customary international level, it is possible to recognize at least a tendency on the part of the EU to explicitly undertake commitments in this sense. Art. 21 TEU seems very clear in this regard. The EU's external action is based on general goals, which it seeks to pursue "in the wider world", promoting multilateral solutions to common problems. These goals include, among others, the consolidation and support of human rights and democracy, fostering the sustainable, social, economic and environmental development of developing countries, with the aim of eradicating poverty. Far from representing a mere statement of intent, the combination with Arts. 207 and 208 TFEU make these goals operational and highly relevant to our analysis. Both the common commercial policy and development cooperation provisions require EU policies to be conducted within the framework of its external action. The implementation of any action conducted within these two fields should, therefore, be consistent with the objectives of Art. 21. Although the language is somehow weak and leaves discretion on how to coordinate policies (Schrijver 2011), the wording of the provisions introduces a sort of coherence obligation (Perfetti 2014). Questions remain on how to implement consistency, not only *in abstracto*. A prior and correct assessment of the EU's policies impact and its effects on HRs or social/economic development of third countries is, therefore, indispensable for making this coherence obligation fully operational. This is all the more relevant with regard to large-scale

land deals. Considering the complexity of the phenomenon, a significant number of the EU's actions might somehow influence the course of land grabbing. Economic partnership agreements, for example, while allowing third country produce to enter the EU market freely, might at the same time encourage large-scale agribusiness investments within these regions, at the expense of small-scale farmers, thus frustrating the goals of development co-operation which the very same deals explicitly pursue.[9] Similar considerations may apply to investments, now that the EU has exclusive competence in the field. A mere, general (and mostly unenforceable) reference to respect for HRs would not tackle investment treaty dilemmas, usually related to the preservation of the regulatory space of host countries for the protection of their territorial community. Moreover, in terms of development cooperation, there have been allegations that public-private partnership aid have favoured commercial interests involved with agribusiness activities (Provost 2014). Although the renewed Action on Human Rights and Democracy initiative[10] does not single out the impacts of land grabbing on land and human rights, it clearly requires EU involvement in the field of economic, social and cultural rights. It could therefore be inferred that the EU should at least, when undertaking external action policies, take into consideration the potential outcome this might have on individuals and local communities of recipient states, before engaging in negotiations or policy implementation activities.[11]

9. Detrimental effects are connected among others to the abolition of export taxes (usually considered a useful development tool), with the consequence of 1) allowing private companies to ignore local food market needs other than in a few cases where states may activate rather weak safeguards; 2) discouraging local produce and employment creation. Export duty abolition was among the outstanding issues during the negotiation process for the EAC-EU EPA On ongoing negotiations, see Overview of EPA Negotiations 2015, http://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/
10. Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019, 10897/15, 20 July 2015.
11. Sustainability impact assessments are usually conducted only *ex post*, once the agreement has been already negotiated.

6. Conclusion. Policy suggestions

Once factual and legal antecedents have been assessed, it seems useful to try and elaborate a series of policy suggestions directed toward identifying possible solutions for reverting the phenomenon of land grabbing and the worrying impact it has on peoples' livelihoods, bearing in mind the EU's work on HRs and its frequently asserted endorsement of the right of self-determination of peoples.

The background and essential guiding principle should be policy coherence, in conformity with the EU Policy Coherence for Development initiative. Considering that both drivers and factors can be connected to different governance/economic areas, it is absolutely necessary for the EU to fine-tune its actions, introducing cross-cutting considerations when dealing with policies that, at implementation level, might result in an undue prejudice of peoples' and individuals' rights.

Building on the classification of existing literature (Cotula 2014), and considering the role of the EU as a commodity importer, home state and source of finance to several agribusiness investments, and at the same time provider of aid and promoter of human rights, it seems useful to classify policy suggestions in the area of EU policy fields strictly related to the phenomenon of land grabbing:

1. The EU plays a very important role in terms of HR protection on a global level, with an action that should be directed towards:
   - mainstreaming land-related issues in Human Rights action (review of Action Plan on Human Rights and Democracy 2015-2019). The agenda already contemplates a specific reference to land grabbing, although this is related to protecting human rights defenders only. Even if the right to land *per se* is still emerging, it is closely related to the realization of a number of human rights;
   - fostering respect and the implementation of ESCR rights in a dialogue with partner countries. External assistance should also be directed towards raising awareness in terms

of clarifying rights and obligations scope of HR international treaties.

- promoting the ratification of the Optional Protocol to ICESCR, which provides both groups and individuals with a quasi-judicial system of redress in case of HR violations;

2. Development cooperation

EU land policy initiatives are highly related to land-grabbing issues.

- EU Land Policy Guidelines provide guidance to land policy development in several developing countries. The EU has also significantly invested and financed numerous reforms on land management and administration. Moreover, it is supporting the African Land Policy Initiative and the G8 Land Transparency Initiative. What is extremely important is that EU efforts are aimed at ensuring that land governance programming addresses the issues of land grabbing (Cotula 2014), demands an increase in local control over land governance and investment processes through stronger local rights to land and natural resources and more effective mechanisms for transparency in public participation and accountability.
- EU policies should foster free, prior and informed consent (FPIC) mechanisms and other participatory rights. Public participation included in international and regional instruments aimed at protecting human rights are extremely relevant; participatory rights (consultation, FPIC etc.) present a significant demonstrative value with regard to the effective exercise of peoples' right to self-determination and are able to combine the collective and individual dimension of land-grabbing impact, thus constituting a meaningful indicator for new policies to adopt or existing ones to be adjusted. Moreover, FPIC guarantees enhancing the role of "formal" third parties, usually excluded from contractual negotiations.
- Public-private partnerships or lending, initiatives that involve private actors in agricultural sector, should provide compliance mechanisms for FAO Voluntary Guidelines on Land Tenure (VGGT).

3. Trade

While aiming at fostering development and cooperation between the EU and third countries, preferential trade agreements and the Generalized System of Preferences with developing countries might have a detrimental effect. The EU's action should therefore strive to implement mechanisms for filing individual petitions for the suspension of preferential trade agreement benefits if HR land-deal related abuses are documented. The EU should work at:

- strengthening GSP HRs related clauses through stricter investigation mechanisms[12]
- considering WTO consistent measures to address land-grabbing related distortions (social labelling; extraterritorial application of art. XX GATT (Brilmayer, Moon 2014); illegal produce import prohibition)
- considering introducing VGGT *ex ante* and *ex post* within the HR impact assessment of preferential trade agreements.

4. Investment
   - Future EU-third country investment treaties should preserve the regulatory space of the host states, while clearly referring to respect for the land rights of local populations
   - EU-third country investment treaties should allow *amici curiae* allegations in land investment related disputes.
5. Land titling projects, land contract issues
   - when dealing with land policy development projects, the EU should consider suggesting model contracts which exclude the effect of stabilization and prevalence clauses, through, e.g. promoting the civic approach to stabilization clauses. This approach prohibits the extension of stabilization clause effects to third-party (individual and local communities) rights, whose interests are affected by the investment operation (Leader 2006);

12. The GSP mechanism does not impose an obligation on the EU Commission to initiate HR abuse investigations. See, in particular, the issue of Cambodia sugar cane plants, and related criticism for produce exports to the EU. Equitable Cambodia and IDI, *Bittersweet Harvest: A Human Rights Impact Assessment of the European Union's Everything But Arms Initiative in Cambodia*,, 2013.

- furthermore, the EU should consider fostering *collaborating partnership contracts*, *outgrower contracting* or *equity-sharing* and *contract farming* (see UNCITRAL guide) contract models as an alternative to state contracts between host states and investors, and allow small-scale farmers to implement their own agricultural development path;
- land titling should be carefully implemented, otherwise there might be a risk of land commercialization, given the asymmetries between small farmers and investors. The EU has announced a 33 million euros investment in land governance project, which promotes the formalization of titles to land and property rights. Although formalization might guarantee certainty of title and higher judicial protection, it might not tackle the structural problems beneath land grabbing, since it would transform the title into a tool of exchange in the commercialization of land.
- The EU should consider promoting the *Titrement Secure Semplifié*; this title is not transferable *tout court*; while formalizing the right, it only allows partial commercial use thereof.[13]

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13. This project was initiated in Africa by the International Union of Notaries. It provides a system of local issued titles through a participatory mechanism. The title is issuable also to women and collectivities and entails a clause of partial inalienability. For more information see Ioli, Liotta, " Dalla povertà alla proprietà" , in *Editoriale dell'UINL*, 3/2012.

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Carla Gulotta[1]

A WELCOME CONDITIONALITY

The role of investment banks and export credit agencies in protecting land and resources rights

Abstract

The aim of this paper is to demonstrate that among the different instruments international law can offer today to stall the increasing number of violations of human rights over the use of land and resources caused by international investment transactions, a prominent role needs to be recognized in the conditionality mechanisms adopted by multilateral lending institutions and export credit agencies (MLIs and ECAs respectively). The reasons for a positive evaluation of the use of such conditionality schemes will be explained. Attention will focus on the EU's legal order, where conditionality mechanisms are already interwoven with strictly legal duties, and where enforcing the latter can exploit the implementation procedures inherent in conditionality schemes. Here an effective way to protect third-world and resources rights in danger of being impaired by European investors would be to set up a structure to oversee the compliance of EU investors with the EIB standards and procedures and the environmental and special standards required for financial support. It could be conducted either by the Commission via the network of Market Access teams or with EEAS. Outside the EU, too, the convergence of public and private lending institutions on environmental and human rights conditionality policies seems to open positive perspectives for a more responsible regulation of international investments.

1. Introduction

The current globalization of the world economy is witness to an increasing number of violations of human rights over the use of land and resources, caused by international investment transactions

1. Carla Maria Gulotta is Associate Professor of International Law, University Milano-Bicocca (carla.gulotta@unimib.it)

made possible by the lack of preventive measures in host state legal systems. Most of the investment transactions take place thanks to huge capital flows from industrialized to underdeveloped countries.

The aim of this paper is to demonstrate that among the various different instruments international law can offer today to stall such a problematic trend in our economic relations, a prominent role needs to be recognized in the conditionality mechanisms adopted by multilateral lending institutions and export credit agencies (MLIs and ECAs respectively). The paper will open with a brief analysis of the concept and function of the environmental and human rights conditionality MLIs and ECAs call for, as opposed to the IMF's economic conditions and the political use of the same environmental and human rights (HR) conditionality in trade and investment treaties. The reasons for a positive evaluation of the use of conditionality schemes by MLIs and ECAs will be explained.

Attention will then focus on the EU's legal order, where conditionality mechanisms are already interwoven with strictly legal duties, and where enforcing the latter can exploit the implementation procedures inherent in conditionality schemes.

2. The conditionality of investments financing institutions: why "welcome"?

Conditionality mechanisms are well established in the practice of the International Monetary Fund. Since its first years of activity, member states have in fact had to accept specific economic conditions in order to access the resources of the Fund (Dordi, 2002). In the 1980s this took the form of the very controversial 'structural conditionality', expressly subordinating aid to the reform of whole sectors of the beneficiary's economy. The economic soundness of such a scheme has received strong criticism (Stiglitz, 2002), with debate centring mainly on the questionable content of the conditions formulated by the Fund's economists. There are also other debatable features like a strong economic institution imposing conditions on a State in a situation of need, so that a certain "colonial flavour" is perceived as one of the flaws of the

IMF's economic conditionality, which the adoption of specific procedural criteria was not able to counterbalance.[2]

This sort of criticism cannot be extended to human rights or environmental conditionality schemes, which have become quite common in international trade or cooperation agreements signed between developed and developing countries. They range from mere declarations of common concerns to quite effective clauses suspending treaties in cases of the violation of the rights and principles established by the Parties involved (Bartels 2005).

This form of conditionality is certainly less controversial than the IMF's economic requests, and it is far easier to give a positive reading to the conditions it requires. It cannot be denied, however, that states often tend to make a political use of the schemes, and even when they do not, effects do not go beyond an intergovernmental level of relationships. That is precisely why it is possible to draw a line between these forms of conditionality and later versions introduced in the practice of investments financing institutions.

MLIs and ECAs make a regulatory use of HR/ environmental conditionality: conditions create obligations for the investor, normally from a developed country, usually the same as the ECA's, and take the form of procedural accomplishments that can be easily reviewed. Moreover, the conditions are automatically applicable in the investment operation (which has legal implications).

Last but not least, this form appears to be more effective than a pure CSR scheme: here the driver for fulfilling the condition is not only of a voluntary/ethical nature, but can be identified in the investor's more prosaic need to qualify for the grant. Thus we understand the difference between the said conditionality and the scheme of "socially responsible investing" (SRI), which has also gained relevance since the 1990s,and which concerns the voluntary choice of privates and funds to invest in "socially responsible companies".[3]

2. See the IMF Guidelines on Conditionality of September 25, 2002 and following integrating documents on the IMF website.
3. For an introduction to SRI see B. J. Richardson, Socially responsible investing through voluntary codes, in Dupuy, Viñuales (eds.), Harnessing Foreign Investment to Promote Environmental Protection. Incentives and safeguards, CUP, 2013.

3. Short overview of the conditionality schemes of main multilateral lending institutions.

Over the last few decades, the rising environmental and social awareness of the international civil society has prompted many initiatives with the aim of subordinating the granting of loans or other forms of financial support to specific commitments undertaken by applicants. Multilateral lending institutions have discovered how incisive a role they can play in seeing that international investments are carried out in respect of fundamental human rights and the environment. The World Bank, the International Financial Corporation and the Multilateral Investments Guarantee Agency (MIGA) have adopted conditionality mechanisms which subordinate their intervention to a previous screening of the impact of investment transactions on the environment and the local community's social and human rights.

The World Bank has also recently started to use conditionality to promote structural interventions and social reforms in beneficiary countries.[4] Still inside the World Bank Group, there are fostered – though on the different level of private businesses – targets of social and environmental policy by the International Financial Corporation (IFC), which since 2006 has applied its performance standards on environmental and social sustainability to all investment projects it supports.[5] Multilateral investment banks and even major private financial institutions[6] have followed its example.

Most of these mechanisms encompass specific standards relating to land and resources rights, tackling issues like stakehold-

4. World Bank, Review of World Bank Conditionality: Recent Trends and Practices (SECM2005-0390/4),OPCS, July 2005; Id., From Adjustment Lending to Development Policy Lending: Update of World Bank Policy (R 2004 – 013), OPCS, 15 July 2004.
5. The Guidelines applied by the International Finance Corporation for the assessment of the projects qualifying for its support can be retrieved on the IFC website: http://www.ifc.org
6. Like the *Equator Principles*, a risk management framework for determining, assessing and managing environmental and social risks in projects, currently adopted by roughly 80 financial institutions in 35 countries: the latest version (June 2013) can be downloaded at www.equator-principles.com.

er involvement, resettlement policies and the transparency of negotiations.

While the standards adopted are usually fairly advanced, in most cases the effect is not to refuse financial support directly in case of non compliance, but rather to help investors comply "in a reasonable period of time".[7]

4. The conditionality of ECAs: the CSR approach.

Only lately, however, has the same attention towards the protection of human rights included export credit agencies, whose role is becoming more and more relevant in international economic relations. ECAs are mainly governmental or quasi-governmental agencies which help economic internationalization by providing grants and guarantees to national exporters and investors. Although their function is inherently public (in seeking to internationalize a country's economy), they can be either public bodies or private entities entrusted with public policy functions.

The incisive role that ECAs can play in balancing the interests of international businesses with the due protection of environmental and HR in host states (Keenan 2008) has been well understood by the UN Special Rapporteur John Ruggie, who envisages states carrying out a special care duty and calls for "additional steps" to be taken for the conduct of enterprises benefiting from ECA financial support.[8]

4.1. OECD Common Approaches

This call was promptly answered by the OECD. Since the late 1970s, in fact, the OECD has been providing for the harmoniza-

7. MIGA, Policy on Environmental and Social Sustainability, part III, par. 19, 1st October 2013.
8. UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21 March 2011, part I, B, par. 4.

tion of the lending policies of the most industrialized countries through a gentlemen's agreement (the "Arrangement"), accepted by most of its members, a soft law instrument which has proved to be incredibly effective. Then, in 2003 the organization, building on the experience of the Arrangement on Export Credits, adopted common environmental criteria that member states are required to follow when giving their financial support to export credit transactions of two years' maturity or more,[9] so as to foster good environmental practices in a level playing-field situation for business (known as the 'Common Approaches'[10]).

The latest version of Common Approaches (2012) has adhered to the UN Guiding Principles on Business and Human Rights Framework, and now requires both social and environmental due diligence.[11] For the first time it has been established that the *ex ante* assessment projects undergo before the concession of the grant has been decided, has to encompass not only the foreseeable impact on the environment but also related social risks. Member states are called on to screen all applications for officially supported export credits so as to identify those with a potentially negative impact on the environmental or human rights. Applications must then be classified and, where appropriate, reviewed. An Environmental and Social Impact Assessment (ESIA) may be required.

Thanks to the Common Approaches, OECD export credit support policies are expected to comply with an acceptable plat-

9. Common rules apply to all exports of capital goods (with the exception of military equipment and agricultural commodities) and services.
10. OECD, Recommendation on Common Approaches on Environment and Officially Supported Export Credits, C(2003)236, revised by the Council in 2004, C(2004)213 and in 2007: Revised Council Recommendation on Common Approaches on Environment and Officially Supported Export Credits, TAD/ECG(2007)9 of 12 June 2007. The adoption of Common Approaches was preceded by several initiatives of the OECD Working Group on Export Credit and Export Credit Guarantee highlighting the importance of environmental issues in the context of public export credit support, starting in 1998 with the Statement of Intent on Environment.
11. OECD 2012, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches), TAD/ECG(2012)5, 28 June 2012.

form of environmental and social standards, which can still be improved by the unilateral adoption of higher ones, like those in EU law.[12] The OECD adopts a twofold level of environmental and social conditionality for official export credit support, the first level the ESIA required from the beneficiaries for problematic projects and the second the environmental and social due diligence carried out, by the public bodies financing the grant themselves. This process introduces a potentially effective framework of corporate social responsibility in an area of vital importance for global investments and trade.

Unfortunately, the ongoing negotiation for a multilateral convention on official export credits fostered by the US and China (Tucker 2012) expressly excludes the issue of environmental and social standards,[13] and this could mean an abrupt stop to the spread of the Common Approaches outside the OECD area.

5. The legal approach

It could be argued, though, that the duty of public ECAs to assure the conformity of their lending/guarantee operations to the standards of protection of land and natural resources rights binding for their home countries also has to be affirmed on other grounds.

Any ECA violation of HR norms operative in its home country could give rise to the country being held responsible. It may be directly, if the agency is a branch of the public administration, or indirectly, as in the case of a private body empowered by the state to fulfil the nationally relevant task of supporting the internationalization of the economy through public export support and investments promotion in third countries, see Article 5 of the ILC Project on Responsibility of States for Internationally Wrongful Act (Gulotta 2015: 115).

12. It is part V, par. 24 of the Common Approaches' Recommendation (see above, note 9) that expressly qualifies the EU's standards as "more stringent" than those provided for in the WB Safeguard Policies or IFC Performance Standards.
13. Information on the first two years of negotiations is reported by the EU Commission to the EP and the Council in its Report of 28 May 2014, COM(2014)299 final.

Even if the ECA is public, its duty to apply HR conventions in force in its home country as a means of protecting the land and resources rights of the host country and its people, whose lives will be affected by the impact of the investment, risks being trammelled by the dubious extraterritorial ambit of the conventions.[14]

A change of perspective might then be necessary in order to get public recognition of such a duty. If we consider international investment as a complex operation, which is by no means confined to the relationship host state/ investor but inherently requires the intervention of a third party in the role of financial backer or guarantor of the investor, the relationship between the latter and the investor must be qualified as an essential element of the whole operation.

In other words, we can perceive any international investments as made up of two conceptually separate though substantially interlinked phases, which are part of the economic and legal construction of the deal and its implementation.[15]

When, as usually happens, the first phase takes place in an industrialized country whose companies, financial institutions or even public bodies are involved, there is no reason why the investment operation as a whole should escape the application of the normative complex binding the country and those under its jurisdiction.

On the contrary, if we apply to the investment operation the procedure of "dépecage" typical of the conflict of laws reasoning, it will appear perfectly correct for the relationship between investor and the body granting (on behalf of the home country) the guarantee/financing essential to the investment, to be regulated according to the laws and principles of the home country.

The fact that a second phase of the investment operation will be taking place abroad is not by itself a valid reason for the home country's mandated bodies to avoid the responsibilities and duties of care under which they usually operate.

The effective normative power of the home country on draw-

14. The topic is thoroughly analyzed by Marko Milanovic, *Extraterritorial Application of Human Rights Treaties. Law, Principles and Policy*, paperback ed., Oxford, 2013.
15. This reasoning has been long applied by the ECJ in the field of competition law: see Judgement in *Ahlstrom Osakeyhtio and others*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120.

ing up and implementing its system of official export credit support, control over the methodology applied by its ECA and the power/duty of the latter to monitor the correctness of the due diligence procedure and standards followed by the businesses requiring the grants, allow us to envisage what can be called a "functional jurisdiction" of the home state on the trade/investment transaction.

Such "functional" jurisdiction could even encompass the responsibility of the home state for any violation of the human rights conventions it has signed, whenever it is proved that it could have been avoided if the home state and/or its ECA had correctly exercised their duties of care over the first phase of the economic operation.[16]

The reading offered in this paper does not jeopardize the host state's sovereignty: the financing ECA cannot be held responsible for the management of local resources, over which it has no legal legitimacy. But it can be called to account for the investment's impact on the international human and environmental rights on land and resources that its power of control could have prevented. However, a complete protection of such resources can only lie in the parallel acknowledgment of the limits to the host state's power to dispose of those resources, which can be expressed by affirming its "functional sovereignty" over them (Francioni 2013).

6. Concerns over environmental and human rights in the European Union's lending institutions and ECAs: how to improve an already strengthened regulatory framework

A more favourable scenario is offered by the European Union's legal system. Here we witness a progressive strengthening of control over the compliance of investment or export transactions financed by the European Investment Bank (EIB) or covered

16. The functional approach to jurisdiction in the application of the ECHR is broadly explained by Besson (2012), The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to, Leiden Journal of International Law.

by the export credit agencies' guarantees to sound environmental and HR standards. But this comes from European law itself, more than from international standards.

As part of the EU system, the EIB is first of all required to contribute to fulfil the European Union's objectives (Pistoia 2014:327): these encompass fairly advanced civil and social rights within the boundaries of member states, but through Articles 3(5) and 21 of the UE Treaty and Articles 205, 207, 208 of the TFUE such objectives are also made relevant for projects financed by the EIB in foreign countries.

When the EIB is involved in the financing of a project potentially infringing on human or environmental rights, the conditionality mechanism provided for in the revised *Environmental and Social Handbook* of 1 January 2014 comes into play. The Bank conducts a social assessment for all operations/projects outside EU member states, candidate and potential candidate countries and on a selective basis inside the EU.[17]

The standards on "involuntary resettlement" and "stakeholder engagement" encompass the principles of full participation in decision making and free, prior, informed consent, in conformity with the UN Declaration on the rights of indigenous peoples.[18]

It is noteworthy that, besides the EIB environmental and social standards, which apply to any investments, benchmarks vary according to the site of the investment. The "EU *acquis* for the protection of the environment and human well being" has to be guaranteed for investments located inside the EU territory, while for projects in third countries the "EU environmental and social principles, standards and practices" and the "applicable national and relevant international environmental and social legislation and conventions" have to be respected.

The EIB's conditionality mechanism complements the normative framework resulting from Decision no. 466/2014,[19] which

17. EIB Environmental and Social Handbook, Vol. II, par.28, Note E.
18. EIB Environmental and Social Handbook, Vol. I, Standards 6 and 10, pp. 52 and 85.
19. Decision No 466/2014/EU of the European Parliament and of the Council of 16 April 2014 granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the Union,

regulates its external mandate.

The standards and procedures that have to be respected to qualify for the Bank's financial support give concrete form to the range of tools provided for in the Decision to ensure the compliance of the Bank to its non economic concerns and focused on the central role of the European Commission.[20] The Commission is, first of all, empowered to modify the lists of beneficiary countries set up by EU legislators[21] and must do so through "an overall assessment, including economic, social, environmental and political aspects, in particular those related to the democracy, human rights and fundamental freedoms".

It is then mandated to oversee the Bank's report, the contents of which the Commission must refer to both the European Parliament and the Council. Such a control of compliance could and should be made more forceful, aiming at a substantial and not merely formal assessment. This result could be achieved by making the most of the cooperation – already provided for[22] – between the Commission and the European External Action Service (EEAS), to be extended so as to encompass an inspection activity in third countries. A positive role could be played by the network of Market Access Teams, already established under the Market Access Partnership[23] in all the main foreign markets of interest to European exporters and investors and often located in the EEAS delegations.

But there is another compliance tool to which the abovementioned decision makes only a passing reference[24] and which appears full of scarcely exploited potentialities. The in-

OJ L 135, 8.5.2014, p. 1.

20. According to article 5, 2 "In the case of EIB financing operations falling under this Decision, where the Commission delivers an unfavourable opinion, that operation shall not be covered by the EU guarantee".
21. Annexes II and III to Decision 466/2014.
22. As of art. 6, Decision no. 466/2014.
23. EU Commission (2007), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Global Europe: a stronger partnership to deliver market access for European exporters, COM(2007)183 final, Brussels, 18 April 2007.
24. Dec. no.466/2014, article 11, 1(i).

novative mechanism, negotiated by the EIB and the European Ombudsman (EO), permits relevance to be given to complaints of bank maladministration filed by third country citizens or non-residents in a EU member state.[25] Such an instrument should be extensively advertised in host countries, especially for NGOs and stakeholders who could make good use of it.

The reporting function of the Commission, duly extended to the inspection results and the EIB/EO follow-up would then be effectively enhanced.

As for European ECAs, Regulation no. 1233/2011,[26] which has conferred a binding effect on the OECD "Arrangement" in the EU, it expressly calls, *inter alia*, for the "respect of human rights and policy coherence for development" in the fulfilment of their function, providing for a series of compliance tools to this effect.

It also recalls how

> "Member States should comply with the Union's general provisions on external action, such as consolidating democracy, respect for human rights and policy coherence for development, and the fight against climate change, when establishing, developing and implementing their national export credit systems and when carrying out their supervision of officially supported export credit" (Recital 4).

Although the political rather than legal value of such a statement has been claimed (Bartels 2014:1077), the fact that it is placed in the introductory section of the Regulation and the use of the advisory but not compulsory form "should" is of little significance, as the obligation of the member states to carry out their policies

25. Memorandum of Understanding between the European Ombudsman and the European Investment Bank concerning information on the Bank's policies, standards and procedures and the handling of complaints from non-citizens and non-residents of the European Union, 26 May 2008 at www.eib.org.
26. Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits and repealing Council Decisions 2001/76/EC and 2001/77/EC, *OJ* L 326, 8.12.2011, p. 45.

of export credit support in strict compliance with article 21 of the UE Treaty results from the combined effect of Articles 3(5) and 21 TUE and of Articles 205, 207[27] and 208 TFUE. With all the consequences on the enforcement side (admissibility of infringing procedures and following recourse to the Court of Justice as of Article 258 TFEU).

The relevance given by the EU legislator to the compliance of member states to the Union's objectives and obligations in their export credit policy is stressed again by Annex I, 3 of Regulation no. 1233/2011, which mandates the Commission to produce an annual review of member states' reports on the issue to the European Parliament, and which expressly asks the Commission to include an evaluation of their compliance.

In the Annual Activity Report that member states are committed to make available to the Commission once a year, they must describe, *inter alia*, "how environmental risks, which can carry other relevant risks, are taken into account in the officially supported export credit activities of their ECAs". The way this should be done or, better, what the content of the legal duty of member states' ECAs is (stemming from the combined effect of the aforesaid Regulation and of Articles 3(5) and 21 TEU and 205, 207 TFEU) to comply with environmental and HR in their granting activities, remains, nevertheless, worded in too general terms.

The gap could be filled by the already mentioned Common Approaches, the OECD Recommendations that complement the Arrangement on export credits' guarantees, imposing an environmental and social assessment of any projects deemed suitable for official support. Contrary to the Arrangement, which is binding for EU members through Regulation no. 1233/2011, Common Approaches still have the nature of a gentlemen's agreement, as up to now they have not been formally implemented in European law.

It must be noted, though, that all EU States are both participants in the OECD Export Credit Group that has drawn up the document and members of the organization, whose Council has

27. Article 207 TFEU constitutes the legal basis of Regulation no.1233/2011.

adopted it.[28] Together with A.G. Kokott, we can say that this can have an effect on the interpretation of the provisions of EU law (Reg. no. 1233/2011 in this case), thanks to "the general principle of good faith which also applies under international law and has found specific expression under EU law in Article 4(3) TEU".[29]

The objection that the above case concerns an international agreement, while the OECD Recommendation on Common Approaches is devoid of mandatory effect can be rebutted by pointing out that nearly all EU members have felt bound to implement the Common Approaches in their export credit policies and have actually done so, as the EU Commission has confirmed in its Annual Review for the year 2013.[30] As for Italy, SACE has recently modified its guidelines so as to require, besides the environmental impact assessment, a specific assessment of the potential effects on the human rights issues in the projects desiring its support.[31]

The Commission's report showing that the duty of the ECAs in member states to comply with environmental and HR considerations in making grants is taking concrete form through the adhesion of these agencies to the Common Approaches' framework, leads us to affirm that the latter can play, for the time being, an important role in the European legal system.

This said, it seems recommendable for reasons of efficacy and legal certainty that Common Approaches should be given a formally binding effect in European law by being adopted through a regulation, in analogy with what has been done for the OECD Arrangement on export credits. True, it has been said that such a development would damage EU exporters on the global markets (Klasen 2011), but a high standard of protection of HR in

28. OECD 2012, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches), TAD/ECG(2012)5, 28 June 2012.
29. A.G. Kokott in *Air Transport Association of America,* C-366/10, EU:C:2011:637, at para. 66.
30. EU Commission 2015, Annual review of Member States' Annual Activity Reports on Export Credits in the sense of Regulation (EU) No 1233/2011, COM(2015) 130 final, 17 March 2015.
31. See SACE environmental and social due diligence guideline [http://sace.it/en/footer/sace-environmental-and-social-due-diligence-guideline].

external relations is already required by the EU Treaties and EU businesses could, on the contrary, be rewarded by global consumers over their greater sensitivity to responsible corporate conduct.

There is no need to recall, anyhow, how effective not formally binding rules can be in economic international relations: increasing State involvement in the promotion of exports and investment transactions and the adhesion of OECD-based ECAs to the standards and procedures of Common Approaches could even make these recommendations evolve into regional customary rules for public bodies giving official support to exporters and investors.

7. Conclusion

HR and environmental conditionality as applied by international lending institutions and ECAs appears to function as a potentially effective tool for the protection of land and resources rights, with features that go well beyond pure CSR schemes and that could lead capital exporting countries to be more responsible without infringing on the sovereignty of the host states. It is an issue that deserves further study and in-depth analysis, possibly in a collaboration between academics, public agencies and financial operators.

The activities of both MLIs (e.g. EIB and EBRD) and ECAs in the European Union are subject to many constraints aiming at assuring they contribute positively to safeguarding the human and environmental rights of communities subject to EU business investment and trade transactions even when located in third countries.

A very effective way to protect third-world and resources rights in danger of being impaired by European investors would be to set up a structure to oversee the compliance of EU investors with the EIB standards and procedures and the environmental and social standards required for financial support. It could be conducted either by the Commission via the network of Market Access teams or with EEAS. It could also unveil cases of malpractice in publicly financed projects where anti-competitive elements have emerged, to such a level as to warrant legal action, either at national or European level.

Outside the EU too the convergence of public and private lending institutions on environmental and human rights conditionality policies seems to open positive perspectives for a more responsible regulation of international investments. The OECD's new strategy directed at linking respect of a common core of environmental and HR principles to public support for export credits appears quite promising in the present economic context, considering the prominent position that promoting exports has gained among the measures adopted to face the 2008 crisis and its after effects.[32]

Such a desirable evolution could nevertheless be hindered by the express exclusion of non investment concerns from the recently opened negotiations of a multilateral agreement intended to substitute the OECD Export Credit Arrangement. The EU Commission should exert its maximum leverage to oppose this decision and insist on human rights and green issues being included in the agreement.

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32. The recognition of the reinforcement of trade finance as one of the main reactions against the economic crisis can be traced back to the strategy taken up by the G20 London Summit in April 2009: see the Leaders' Statement of 2 April 2009, on the website www.G20.org.

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Angelica Bonfanti[1]

MULTINATIONAL CORPORATIONS INVESTING IN LAND: INTERNATIONAL INVESTMENT LAW ISSUES

Abstract

Multinational corporations (MNCs) are some of the main investors in land. Given the extension of the lands currently leased by contract, the potential negative effects of land investments on food security, environmental protection, the rights of local farmers, peasants and indigenous peoples, as well as the positive contribution that these projects can bring to local development, the role of MNCs is crucial and worthy of examination from the perspective of international investment law. This paper analyses which legal tools host states can rely on in order to combat land-grabbing practices and require MNCs to comply with standards of responsible conduct.

1. Introduction

Multinational corporations (MNCs) are some of the main investors in land, together with states and sovereign wealth funds. Pursuant to the Land Matrix Initiative,[2] investment in land covers up to 38 million hectares. The most affected countries (host states) are African,[3] followed by those in the Far East,[4] as well as Argentina, Brazil and Russia. Among the multinational corporations investing in land are Nestlé, Daewoo Logistics, Lonhro and

1. Angelica Bonfanti is Associate Professor in International Law at the University of Milan, where she teaches Sustainable Development in Global Trade (WTO) Law; International Investment Law, Dispute Settlement and Sustainable Development; EU Law on Business and Human Rights.
2. Data available at http://www.landmatrix.org/en/
3. Ethiopia, Mali, Madagascar, and Ghana, Tanzania, Kenya, Mozambique, Sudan, Uganda, Congo. See Cotula L., 2015; Cotula L., Vermeulen S., Leonard R., Keeley J., 2009.
4. Laos, Philippines, Indonesia, Cambodia.

Varun.[5] Land investment contracts are usually long-term agreements lasting between 20 and 99 years, drafted as land leases, farming contracts, agricultural commercialization contracts or agriculture cooperation agreements.[6]

Investments in land, if not adequately managed, can have negative effects on the rights of peasants, farmers, indigenous peoples, as well as on environmental protection. They can also affect negatively local food security and state sovereignty. On the subject of food security, it is remarkable that many host states are net-importing food states;[7] regarding state sovereignty, several scholars hold that investments in land decrease the governments' formal authority and decision-making power over the territory and create a "structural hole in the tissue of national sovereign territory".[8]

Given the extension of the lands leased by contract, the potential negative effects on food security, environmental protection, and the rights of local farmer, peasants and indigenous peoples, as well as the positive contribution that these projects can bring to local development, the role MNCs play is crucial and worthy of examination from the viewpoint of both international and international investment law. To this aim, this paper is divided into three parts. The first part focuses on the international legal framework for foreign investment and the legal instruments recommending MNCs standards of responsible conduct in conformity with the international principles and standards on human rights and environmental protection. The second part analyses the relevance of the standards of responsible conduct under international investment law. The third part suggests clauses that might be inserted in land investment contracts, in order to combat land-grabbing practices and strike a balance between host state public interests and investor rights.

5. Martin A., Ayalew M. M., 2011, p. 4 ss; Cotula L., Vermeulen S., Leonard R., Keeley J. 2009:37-38.
6. Cotula L. 2010; Id. 2011; Martin, A., Ayalew M. M. 2011; Cotula L., Berger T. 2014.
7. WTO, List of net food-importing developing countries for the purposes of the Marrakesh Ministerial Decision on measures concerning the possible negative effects of the reform programme on least-developed and net food-importing developing countries, Revision, G/AG/5/Rev.10, 23 March 2012.
8. Sassen S. 2013:43. On this topic see Jacur F. R., Bonfanti A., Seatzu F. 2015.

2. The international legal framework

2.1 The international investment legal framework

Foreign investments in land are governed by Bilateral Investment Treaties (BITs). Today, more than 2,900 BITs have been concluded worldwide.[9] If we take the states most affected by land grabbing into consideration, a variety of situations is apparent. Among the host countries, Indonesia, Philippines, Laos, Cambodia, Mozambique, Ghana, Sudan, and Ethiopia have entered into a considerable number of treaties, while Madagascar, Kenya, the Congo, Uganda, and Mali have ratified only a few agreements. In terms of the nationality states of the investors, China has signed 125 BITs, Korea 93, India 74, and the United Arab Emirates 38.

BITs provide, on the one hand, for the right of foreign investors to be treated in accordance with specific standards – for example, the most favoured nation and the national treatment, fair and equitable treatment, and the discipline of expropriation – and, on the other hand, for the obligation of the host states to comply with the abovementioned standards. Thus, in principle, host states are duty holders, while investors are right holders.

Given the scenario, this paper aims at examining whether international investment law provides for adequate rules for protecting host states from practices that amount to the appropriation of their natural resources by foreign investors and for obliging the latter to respect standards of responsible conduct while carrying out their economic activities.

2.2 Standards of responsible conduct for human rights and environmental protection in land investments

Many international soft law instruments have been adopted with the aim of imposing on foreign investors – and MNCs – stand-

9. Data available at http://investmentpolicyhub.unctad.org/IIA.

ards of conduct to be respected when investing in land. Among them, the *Principles for responsible investment in agriculture and food systems,*[10] the *Principles for responsible agricultural investment that respects rights, livelihoods and resources,*[11] and the *Minimum principles on large-scale land acquisitions and leases.*[12]

International soft law pursues the task of interpreting the states' international obligations and adding depth to their content by way of attention to the particular sets of events and specific class of actors involved, i.e. the violations of human rights and environmental standards ascribed to MNCs.[13] In so doing, it facilitates the application of international law.

The above mentioned soft law instruments on land investment globally call investors (and MNCs) to respect: tenure of land; fisheries; forests; cultural heritage and traditional knowledge; the environment; access to water; safe and healthy agriculture and food systems; consultation with all materially affected stakeholders; obtaining free, prior, and informed consent of the local communities concerned; the contribution to food security; nutrition; sustainable and inclusive economic development and the eradication of poverty; the conservation and sustainable management of natural resources; the rule of law; and the reflection of industry best practices.

This catalogue of standards of conduct and their fulfilment allow distinctions to be drawn between "responsible land investment" and "land grabs".

10. Committee on Food Security, FAO, *Principles for responsible investment in agriculture and food systems*, 2014.
11. FAO, IFAD, UNCTAD and the World Bank Group, *Principles for responsible agricultural investment that respects rights, livelihoods and resources*, 2010.
12. Special Rapporteur on the Right to Food, Olivier De Schutter, *Large-scale land acquisitions and leases: a set of minimum principles and measures to address the human rights challenge* 2009.
13. Shelton D. 2010, Especially Chinkin C.: 30.

3. "Responsible land investment" under international investment law

3.1 The notion of "investment"

As a preliminary remark, it is worth noting that BITs do not give proper consideration to the above-mentioned distinction between "responsible land investment" and "land grabs" when determining their own field of application. Regardless of their responsible or irresponsible implementation, investments in land and natural resources fall within the definition of "investment" generally established by BITs.[14] In fact, most of them provide for a definition of "investment" that includes business concessions to search for, cultivate, extract or exploit natural resources.[15]

Not only do BITs not require that standards of responsible conduct are complied with in order to be "investments", but also – in principle – they do not condition their application on the respect of human rights and environmental protection. Given this premise, it is necessary to enquire whether the laws host states may adopt in order to force foreign investors and MNCs to respect human rights, indigenous peoples' rights, and to ensure environmental protection are consistent with their obligations under international investment law.

3.2 Domestic laws protecting essential public interests and their consistency with BITs

In order to strike a balance between the protection of foreign investors and the safeguard of national essential public interests

14. Carducci G. 2011:649; Sornarajah M. 2011:153.
15. Pursuant to the China-Ethiopia BIT (art. 1) "The term investment […] includes: […] (e) concessions conferred by law, including concessions to search for or exploit natural resources". According to art. 1 of the Korea-Congo BIT, investments include "(v) business concessions having an economic value conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources".

– such as human and labour rights, food security, local development and the environment – host states might adopt, for instance, domestic laws providing for the introduction of local content provisions, land distribution policies, land title certification and agrarian reforms and the establishment of a fixed percentage of the harvest to be preserved for the local market. However, it is here submitted that these laws would not necessarily be consistent with the protection of foreign investors' rights, as guaranteed pursuant to the BITs.

As regards the introduction of local content provisions, it aims at pursuing local development through the employment of local workers, the transfer of technology and a preference for locally produced goods. Performance requirements are stipulations imposed on foreign investors by host states, requiring them to meet certain specified goals with respect to their operations, usually justified on the basis of the host states' economic and developmental policies. The reference to human rights, labour rights or environmental protection, in the form of performance requirements, can be a useful tool host states can employ to direct and govern foreign investors' activities. However, are domestic laws establishing local content provisions consistent with the regulation of performance requirements pursuant to the BITs?[16] Most international investments agreements – including BITs between countries most affected by land investments – do not cover performance requirements. Thus, they are not prohibited under these BITs. Other agreements, such as the Model BIT 2012 of the Southern African Development Community, establish minimum standards for the protection of human rights, environment and labour, and provide for environmental and social impact assessment, management, and improvement.[17] Likewise, the Ghana Model BIT provides that foreign companies

16. Muchlinski P. 2008:31.
17. See Southern African Development Community Model BIT: art.7, Senior Management and Employees; art. 13. Environmental and Social Impact Assessment; art. 14, Environmental Management and Improvement; art. 15, Minimum Standards for Human Rights, Environment and Labour; art. 16, Corporate Governance Standards.

> "shall, to the extent possible, encourage human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees and the transfer of technology [and] […] shall behave in accordance with relevant guidelines and other internationally accepted standards applicable to foreign investors".[18]

As regards distribution of land, certification of land titles, and the implementation of agrarian policy reforms, if enacted after the signature of the investment contracts, they might be considered violations of the fair and equitable standard of treatment or measures tantamount to expropriation. Looking at the BITs entered into between states affected by land grabbing, none provide for clauses specifically focused on human rights protection or general exceptions. The preambles of some of them only recall the objective to increase prosperity in the territory of both contracting states.[19] It would be certainly advantageous for host states to negotiate the introduction of exceptions such as those drafted under the SADC Model BIT, pursuant to which

> "[…] Nothing in this Agreement shall be construed to oblige a State Party to pay compensation for adopting or enforcing measures taken in good faith and designed and applied: (a) to protect public morals and safety; (b) to protect human, animal or plant life or health; (c) for the conservation of living or non-living exhaustible natural resources; and (d) to protect the envi-

18. Ghana Model BIT, art. 12. Diverging provisions can be found in NAFTA, art. 1106 (Performance Requirements): "1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory: […] (b) to achieve a given level or percentage of domestic content; (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory; […] (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory […]".
19. For instance, see: India – Senegal BIT; India – Sudan BIT; Ethiopia – Libia BIT; Ethiopia – China BIT.

> ronment […] Nothing in this Agreement shall apply to a State Party's measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its national security interests".[20]

Finally, if we take the laws providing for the conservation of a fixed percentage of the harvest in the local market, one might wonder whether they can at least be justified by state of necessity. Given that none of the BITs concluded between the states affected by land grabbing provide for the necessity defence, it is worth inquiring whether food shortage can qualify as a state of necessity, that is, the circumstance precluding wrongfulness pursuant to article 25 of the UN International Law Commission *Articles on the Responsibility of States for internationally wrongful acts.*[21] As is well known, the application of the state of necessity is highly debated by arbitral tribunals[22] and scholars.[23] In the author's view, emergency laws enacted in order to face food shortages might be consistent with article 25 ILC Articles. However, some requirements must be met, as the enactment of the legislation must be the only way to safeguard essential interests against grave and imminent

20. SADC Model BIT, art. 25, General exceptions.
21. International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two.
22. ICSID: CMS Gas Transmission Company v. The Argentine Republic, ARB/01/8, Award, 12 May 2005; LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic, ARB/02/1, Decision on Liability, 3 October 2006; Enron Corporation Pondorosa Assets L.P. v. The Argentine Republic, ARB/01/3, Award, 22 May 2007; Sempra Energy International v. The Argentine Republic, ARB/02/16, Award, 28 September 2007; Continental Casualty Company v. Argentine Republic, ARB/03/9, Award, 5 September 2008; Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. The Argentine Republic, ARB/03/19, Decision on Liability, 30 July 2010; Total S.A. v. Argentine Republic, ARB/04/1, Decision on Liability, 27 December 2010; Impregilo S.p.A. v. Argentine Republic, ARB/07/17, Award, 21 June 2011; El Paso Energy International Company v. Argentina, ARB/03/15, Award, 31 October 2011; National Grid plc v. The Argentine Republic, Award, 3 November 2008.
23. Binder C. 2014:71; Hoelck Thjoernelund M.C 2009:423; Tanzi 2014:308; Waibel M. 2007:637.

peril, it must not impair the essential interest of the state towards which the obligation exists. And – most problematic – the state invoking the situation of necessity must have not contributed to such a necessity. The latter demonstration is highly problematic if we think that host states are often net-food-importing states that not only have not realized the necessary agrarian policy reforms but sometimes have even entered into contracts providing for the export of their whole harvests to foreign or international markets.[24]

3.3 Systemic interpretation of international investment law

Apart from justifying the adoption of the abovementioned domestic laws pursuant to the BIT provisions, it is worth recalling that international investment law must be interpreted in accordance with the rules on interpretation established by the Vienna Convention on the Law of Treaties,[25] taking into account "any relevant rules of international law applicable in the relations between the parties".[26] Thus, "international investment law […] cannot be read and interpreted in isolation from public international law",[27] including the rules and principles on food security, human rights and environmental protection.

This systemic interpretation should influence the content of the investment standards. For instance, as regards the notion of "expropriation", it should lead ICSID Tribunals[28] to follow the interpretation according to which: "A State does not commit an expropriation and it is thus not liable to pay compensation to a

24. This is the case of Kenya, in 2008. See Cotula L., Vermeulen S., Leonard R., Keeley J. 2009:86.
25. Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969.
26. Ibid., art. 31.3(c).
27. ICSID, Phoenix Action, Ltd. v. The Czech Republic, ARB/06/5, Award, 15 April 2009, para. 78.
28. The International Centre for Settlement of Investment Disputes (ICSID) was established in 1965 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed at Washington on 18 March 1965).

disposed alien investor when it adopts general regulations that are commonly accepted as within the policy power of States."[29] In conformity with this interpretation, in order to determine if regulatory measures are to be characterized as expropriatory, the tribunals should consider that

> "a non-discriminatory regulation for a public purpose, which is enacted on accordance with due process and which affects inter alias a foreign investor or investment, is not deemed expropriatory and compensable unless specific commitments had been given by the regulation government to the then putative foreign investor contemplating investment that the government would refrain from such regulation".[30]

This interpretation is in line with the trend followed by several recent model BITs that exclude that "non/discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment" can be considered as indirect expropriations.[31]

Likewise, the investors' expectations, which are relevant in assessing whether the fair and equitable standard of treatment has been violated by the host state, can be qualified as 'legitimate' only "if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment".[32] However, "it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose".[33] In principle, "signatories of such treaties do not thereby relinquish their

29. UNCITRAL, Saluka Investments B.V. v. The Czech Republic, Award, 17 March 2006, para. 262.
30. UNCTRAL, Methanex v. USA, 3 August 2005, Part IV – Chapter D, para. 7.
31. US Model BIT 2012, Annex B.
32. ICSID, Parkerings-Compagniet AS v. Republic of Lithuania, ARB/05/8, Award, 11 September 2007, para. 331. On the notion of 'expectations': Potestà M. 2013:88.
33. ICSID, Continental Casualty Company v. The Argentine Republic, para. 258.

regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties".[34] Thus, the investors' expectations that the host state will never introduce laws necessary to protect its own essential interests should not be considered reasonable. Moreover, "the assessment of the reasonableness or legitimacy [of the investor's expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State".[35]

Finally, ICSID jurisprudence has recognized that ICSID Tribunals are competent to adjudicate disputes arising only from investments that present the following requirements: the investor's involvement, the risk, the duration, and – most important in this context – the contribution to the host state's development.[36] In light of this jurisprudence, it may be asked whether economic operations that are structured and performed without having due regard to the impacts on the economic development of the host states (for example, contracts that do not provide for an equitable price, either through a pecuniary payment, or other means, such as the realization of infrastructures) can be considered "investments" under the ICSID Convention.

More specifically, it is worth emphasizing that ICSID Tribunals should adjudicate only disputes concerning "good faith investments". Pursuant to the ICSID case law, "[t]he protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance".[37] Thus, investment protection is strictly connected with, and depends on, compliance with good faith.

34. ICSID, Total S.A. v. The Argentine Republic, para. 115.
35. ICSID, Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ARB/04/19, Award, 18 August 2008, para. 340.
36. ICSID, Mr. Patrick Mitchell v. Democratic Republic of the Congo, ARB/99/7, Annullment Decision, 1 November 2006, paras. 27 ff.
37. ICSID, Phoenix Action, Ltd. v. The Czech Republic, ARB/06/5, para. 106.

Only investments made in accordance with the good faith principle (*bona fide* investments) are internationally protected, and "nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights".[38]

4. Suggested contractual clauses to strike a balance between host state and investor rights protection

Given this scenario, the author suggests that some clauses might be inserted in land contracts in order to strike a balance between the safeguard of the public interests of host states and the protection of the investors' rights.[39] First, host states should require that foreign investors collaborate with local communities and local farmers; the farmers' association might be a shareholder in the company they collaborate with, and smallholders might be included through properly negotiated grower schemes, joint ventures, or other forms of collaborative production models. Second, contracts should provide for the obligation to purchase produce from farmers up to specified production levels, to promote a local procurement of goods and services and maximize local employment, in compliance with the ILO core labour standards, and preserve a fixed percentage of the harvest for the local market. In order to guarantee the protection of farmers' rights, the parties should agree to create a register of the land titles. Furthermore, in order to prioritize the development needs of the local population, access to credit and improved technologies for contract farming could be granted against the possibility of buying at predefined prices a portion of the crops produced. Finally, compliance with contractual terms should be assessed through the obligation to carry out impact assessments at predefined intervals and the inclusion of sanctions in the event of non-compliance.

38. Ibid., para. 78.
39. Suggestions can also be found in Cotula L., Tienhaara K. 2011-2012:281.

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Pia Acconci[1]

THE REGULATORY APPROACH OF THE EUROPEAN UNION TO INTERNATIONAL INVESTMENT LAW AND LAND USE IN NON-EU STATES

Abstract

The typical regulatory approach at the root of international investment law is designed to promote foreign direct investment (FDI) in developing and least-developed countries through international treaties for the facilitation and protection of a foreign investor's goals. In 2007 the European Union became an important new player in the international investment arena because of its new competence on FDI provided for in the Treaty of Lisbon at Art. 207 of the Treaty on the Functioning of the European Union. Immediately after the entry into force of the Treaty of Lisbon in 2009, several acts adopted by the EU Commission, Council and Parliament gave rise to the idea that the EU would be influential in changing the typical regulatory approach at the root of the international legal framework on investment, by revising the weight of non-investment concerns. The impact of foreign investments in agriculture and extractive industries on land and natural resources management in developing and least-developed countries is one of the non-investment concerns under discussion because the relationship between international investment law and land use in developing and least-developed countries has become controversial. The expectations of certain scholars and representatives of public opinion have not yet been realized. The provisions on investment of the EU agreements concluded or still under negotiation, tend to be similar to those typical of bilateral investment treaties. This is one of the reasons why such 'new' treaties are a matter of discussion. In order to discourage 'indirect land use change', the EU regulatory approach might change to overcome the typical diversification of international law.

1. Law Faculty, University of Teramo, Italy. The author may be contacted at pacconci@unite.it

1. Introduction

In 2007 the European Union became an important new player in the international investment arena because of its new competence on foreign direct investment (FDI) provided in the Treaty of Lisbon at Art. 207 of the Treaty on the Functioning of the European Union. Immediately after the entry into force of the Treaty of Lisbon in 2009, several documents adopted by the Commission, Council and Parliament gave rise to the idea that through a comprehensive European international investment policy, the European Union would be influential in changing the typical regulatory approach at the root of the international legal framework on investment.[2]

This generated expectations by certain scholars and public opinion.[3] Articles 21 of the Treaty on the European Union and 205 of the Treaty on the Functioning of the European Union were considered highly relevant, as they provide for consistency between the EU's external action and the principles and values at the basis of its integration process. These principles and values include the rule of law, sustainable development, the protection of human rights and the environment.

So far, these expectations have not been realized. The reason may be that the current financial crisis has led the EU to focus more on consolidating the internal liberalization process and stabilizing the Monetary Union rather than supporting requests for a change in the key reference concepts of the international regulatory framework on investment and economic relations.

Without following a unitary approach, since the entry into force of the Treaty of Lisbon the European Union has concluded a relevant number of international agreements on economic rela-

2. On 7 July 2010 the Commission published a communication entitled 'Towards a comprehensive European international investment policy', COM(2010)343 final. See also the 'Conclusions on a comprehensive European international investment policy' adopted by the Council, 25 October 2010 and the report on the 'Future European International Investment Policy' adopted by the Committee on International Trade of the European Parliament, 22 March 2011.
3. Cf. Brown and Alcover Llubià 2010-2011, especially p. 161; Dimopoulos 2010.

tions.[4] The agreements are heterogeneous because they tend not to refer to a single regulatory approach or model. A few of them aim at liberalizing foreign investments. Other recent EU international treaties with industrialized countries, specifically the Comprehensive Economic and Trade Agreement (CETA), concluded but not yet in force, with Canada and the Trans-Atlantic Trade and Investment Partnership Agreement (TTIP) under negotiation with the United States, are examples of the new trend towards signing 'mega-regional' trade agreements.[5] As will be pointed out, both the CETA and TTIP draft texts include a chapter on the protection of investment that is similar to the typical regulatory model of international investment treaties. These treaties are mainly bilateral, commonly named BITs (from 'bilateral investment treaties'), and pro-investor oriented.

The EU has also initiated negotiations for investment and trade agreements or partnership and cooperation agreements with Japan, Thailand, Malaysia, India, Egypt, Tunisia, Jordan and Mercosur. Furthermore, it has demonstrated its intention to negotiate free trade area agreements including an investment chapter with the members of the Association of Southeast Asian Nations (ASEAN) in order to replace the bilateral investment treaties of EU member states with one 'mega-regional' treaty.

At the international level, discussions are taking place on the typical orientation of international investment treaties, on lack of a balance between the 'safeguards' and 'duties' of foreign investors, the lack of protection for certain non-investment concerns and the alleged lack of legitimacy in direct arbitration proceedings in terms of openness and transparency.

In Europe certain scholars, politicians, representatives of local communities and public opinion have been particularly criticiz-

4. See Section 3 below.
5. A relevant number of non-EU States have concluded mega-regional agreements. For example, in 2009 a Free Trade Agreement was concluded by the ASEAN, its member states, Australia and New Zealand. Other 'mega-regional' agreements on trade and investment are under negotiation, such as the Trans-Pacific Trade Partnership (TPP) Agreement among the United States, Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam.

ing the inclusion of a direct arbitration clause in the CETA and the TTIP draft text, and have proposed a revision of the balance of interests between foreign investors and host states, as well as of the weight of non-investment concerns in international investment treaties.

The impact of foreign investments in agriculture and extractive industries on land and natural resources management in host countries is one of the non-investment concerns under discussion.[6]

The EU regulatory approach to international investment law is criticized because its international treaties on trade and investment concluded after 2009 tend not to revise the typical balance of interests in international investment agreements, by including relevant regulatory safeguards for the effective realization of sustainable development, such as a safeguard against the misuse of land arising from foreign investments.

In this article it will be shown how the EU might deal with this criticism in order to improve its contribution to the sustainability of international investment law.

2. The connection between European Union law, investment and land use in developing countries

Since the 2008 financial crises, foreign investments in the agricultural sector have increased, and the relationship between these investments and land use in developing and least-developed countries has become controversial. As a number of developing countries have decided to give foreign investors – which in the agricultural sector include a relevant number of sovereign wealth funds – the permission to dispose of large areas of rural lands for products, such as palm oil, sugar cane and corn, all needed for industrial production in "developed" countries and biofuels, the issue of land governance has arisen as a specific topic in the international debate over the realization of the right to food and the relevance of non-investment concerns within the interna-

6. See Cotula 2014.

tional investment legal framework. Because in certain developing countries in Africa, Asia and Latin America no land registration or land-ownership legislation has been in force, and small-scale farmers lack the capacity to acquire or hire the land they have been cultivating, this issue has demonstrated the need to avoid 'indirect land use change' and safeguard access to land by local small-scale farmers through an adequate tenure or property regime in order to improve rural living standards. According to certain non-governmental organizations (NGOs) and scholars, the lack of local legislations on land registration or land ownership has not been the main cause of land-grabbing as similar legislations might be an instrument of neo-colonialism through the exportation of the concept of property from the 'North-side of the world' into the developing part.[7] Many NGOs and scholars agree that one of the contributing factors has been the EU regulatory framework on renewable energy and biofuels such as ethanol and biodiesel.[8] The framework has been criticized because it has encouraged large-scale foreign investments in certain developing countries – based on the use of large areas of rural land – for the cultivation of crops that are used for the production of biofuels and bio-liquids, such as vegetable and seed oils. 'Indirect land use change' is perceived as negative not only because it can undermine food security,[9] but also because the production of biofuels and bio-liquids from crops can cause an increase in greenhouse gas emissions, even though such a production has been promoted for the realization of sustainable development through greenhouse gas emissions savings.

International organizations and specialized agencies of the United Nations, such as the Food and Agriculture Organization

7. For a different point of view, see Manfredi 2013, in particular pp. 824-828.
8. See in particular Directive No. 2003/30/EC of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport (see *the Official Journal of the European Union*, L 123, 17 May 2003, p. 42 ff.) and the Directive No. 2009/28/EEC of 23 April 2009 on the promotion of energy from renewable resources (see *the Official Journal of the European Union*, L140, 5 June 2009, p. 16 ff.).
9. See Report of the Special Rapporteur on the right to food, Olivier de Schutter on "The transformative potential of the right to food", A/HRC/25/57, 24 January 2014, especially para. 23.

(FAO) and World Bank, and the Organization for Economic Cooperation and Development (OECD) have dealt with the impact of foreign investments in agriculture on land management by publishing the results of specific researches and adopting non-binding guidelines, principles and policy frameworks. These acts aim at influencing the conduct of investors and the attitude of host states and rendering foreign investments in the agriculture sector directed towards biofuel production in line with the principles at the root of sustainable development, to the satisfaction of the basic needs of local populations. One of these principles is the sustainable and equitable use of natural resources, which promotes a rational and prudential use of these resources.[10] More specifically, the guidelines, principles and policy frameworks adopted by international organizations and specialized UN agencies aim at mitigating the economic competition between food and biofuel production, as well as between food and energy security, by promoting the voluntary adoption by investors and host states of a coherent integrated approach based on economic, environmental and social considerations.[11] Important examples of this approach are the 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests' adopted by the FAO Committee on World Food Security (CFS) in 2012[12] and the 'Performance

10. For the relevance of the sustainable use of natural resources, in particular of land, as a tool for poverty reduction, see Beyerlin 2003.
11. See, among others, UNCTAD, Making Certification Work for Sustainable Development: the Case of Biofuels, New York, Geneva, 2008; UNCTAD, Opportunities and Challenges of Biofuels for the Agriculture Sector and the Food Security of Developing Countries, New York, Geneva, 2008; UNEP, Towards Sustainable Production and Use of Resources: Assessing Biofuels, Paris, 2009; FAO, Biofuels and the Sustainability Challenge: A Global Assessment of Sustainability Issues, Trends and Policies for Biofuels and Related Feedstocks, Rome, 2013; UNEP, Assessing Global Land Use: Balancing Consumption with Sustainable Supply, Paris, 2014; the World Bank, The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments, World Bank Report No. 86175 – GLB, 2014; the UN Economic Commission for Africa, the African Development Bank, the African Union, Guiding Principles on Large Scale Land Based Investments in Africa, Addis Ababa, 2014.
12. The 2012 FAO Guidelines on the Governance of Tenure "are intended to contribute to the global and national efforts towards the eradication of hunger and poverty, based on the principles of sustainable development and with the recognition of the

Standards on Environmental and Social Sustainability' adopted by the International Finance Corporation in 2012.[13]

The EU has been working on a revision of its regulatory framework on renewable energy in order to promote the sustainability of biofuels[14] and take into account the impact of such a framework on small-scale farmers living in non-European Union member states that happen to be the hosts of outward investments made by EU investors. In 2004, the EU Task Force on Land Tenure adopted the non-binding 'EU Land Policy Guidelines to Support Land Policy Design and Reform Processes in Developing Countries'.[15] Another Directive on the promotion of renewable energy was adopted, i.e. Directive No. 28 of 23 April 2009 on "the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC",[16] which refers to the need for the sustainability of biofuels and bioliquids to reduce greenhouse gas emissions[17] and safeguard food security.[18] In 2014 the

centrality of land to development by promoting secure tenure rights and equitable access to land, fisheries and forests." For further information, see http://www.fao.org/nr/tenure/voluntary-guidelines/en/.

13. Performance Standard No. 5 concerns 'Land Acquisition and Involuntary Resettlement' (for further information see the website of the IFC: www.ifc.org).
14. In order to balance greenhouse gas emissions savings and the protection of biodiversity, the EU has adopted several criteria. In accordance with its policy, "[…] only biofuels and bioliquids that comply with the criteria can receive government support or count towards national renewable energy targets. The main criteria are: 1. to be considered sustainable, biofuels must achieve greenhouse gas savings of at least 35% in comparison to fossil fuels. This saving requirement rises to 50% in 2017. In 2018, it rises again to 60% but only for new production plants. All life cycle emissions are taken into account when calculating greenhouse gas savings. This includes emissions from cultivation, processing, and transport. 2. Biofuels cannot be grown in areas converted from land with previously high carbon stock such as wetlands or forests. 3. Biofuels cannot be produced from raw materials obtained from land with high biodiversity such as primary forests or highly biodiverse grasslands." For further information, see http://ec.europa.eu/energy/en/topics/renewable-energy/biofuels/sustainability-criteria.
15. Communication from the Commission to the Council and the European Parliament, COM (2004) 686 final, 19 October 2004.
16. Quoted above at footnote 7.
17. See, in particular, the preamble, points 69-71, 85, 92. See also art. 17.
18. See, in particular, the preamble, points 9, 69 and 78. See also art. 17, specifically at ara. 7.

Commission announced a new financial program for Sub Saharan Africa. This programme aims to facilitate the implementation of the 2012 FAO Guidelines, contribute to land governance, tenure management, food and nutrition security of small-scale farmers and thus to eradicate poverty, in particular through the empowerment of local populations and the establishment of specific technological mechanisms for land registration.[19] The EU Commission has also promoted the use of second and third generation biofuels, which are produced from materials other than food and/or feed crops, such as municipal wastes, in order to discourage large-scale land acquisitions and 'indirect land use change'. These new biofuels would offer more safeguards for the achievement of both greenhouse gas emissions savings and food security. As to the objective of sustainable land use through the avoidance of 'indirect land use change', the second generation biofuels might not be the most appropriate solution as they are mainly produced from biomass, and therefore from the exploitation of relevant areas of rural lands.

3. The relevance of sustainable development in the international treaties on trade concluded by the European Union after the entry into force of the Lisbon Treaty

The EU has not yet exercised its new competence on foreign direct investment by adopting a comprehensive legal and policy framework, because its political institutions are looking for the most appropriate method for contributing to a 'new' regulatory approach to foreign direct investment at an international law level. In effect, although many investment treaties are still focusing on the promotion and protection of foreign investments, new international investment treaties have been concluded by non-EU states. The appearance of these treaties shows the propensity of the Contracting States to revise the typical 'old' legal framework in order to find answers to criticism through a new balance of the conflicting interests.

19. See the Press Release of 9 April 2014.

The typical regulatory approach at the roots of international investment law has been designed to promote foreign investments in developing and least-developed countries through the conclusion of international treaties for the facilitation and protection of foreign investors' goals. After decolonization, the design of a pro-investor legal framework through the conclusion of bilateral investment treaties appeared to States the best solution to balance at an international law level the conflicting interests of home and host States of foreign investments.

These treaties tend to include special provisions on the treatment standard, the determination of compensation for expropriation and the recourse to direct arbitration for the settlement of disputes between a contracting state and an investor of the other contracting state. As for direct arbitration, BITs tend to include an ICSID arbitration clause often in combination with other international institutionalized arbitrations, such as UNCITRAL and ICC. Up to the present, innumerable BITs have been concluded.

Over the last twenty years, 'regional' trade agreements including an investment chapter with a similar legal structure to bilateral investment treaties have been concluded, too. Within such a typical investment legal framework sustainable development was of minor importance until few years ago.

The trend has been for change.[20]

A number of international investment treaties have acknowledged the importance of sustainable development by referring to certain non-investment concerns, such as the environment, health and labour conditions, in their preambles and/or in specific treaty clauses, whereas a few international investment treaties have included clauses on non-precluded measures related to the conservation of natural resources.[21] The texts of these clauses

20. See Acconci 2014, especially pp. 169-181; Nowrot 2014.

21. See, among others, the Canadian 2004 Model BIT of art. 10 (c); the Investment Chapter of the 2004 Free Trade Area among the Dominican Republic, Central America and the United States (CAFTA – DR), art. 10.9, para. 3, (c), and art. 10.11 that runs as follows: "[n]othing 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."

appear similar to that of Art. XX of GATT. This has contributed to the idea that these clauses have to be considered exceptions to the provisions on the treatment of the investors of the contracting parties and/or to specific treaty obligations, such on the prohibition of performance requirements, and a narrow interpretative method would be the most appropriate for these clauses, in line with the typical interpretative method of exceptions adopted within the frameworks of the EU and WTO.

Some states have moved towards a different approach by safeguarding their right to take regulatory actions for the protection of the environment and labour through the inclusion of specific clauses in their investment treaties.

The 2004 Canadian Model BIT,[22] the 2012 American Model BIT[23] and the 2012 Southern Africa Development Community (SADC) Model BIT[24] are important examples of this new approach. Other investment treaties include similar provisions, such as those concluded by ASEAN and India.

India's 'new' Model BIT re-conceptualizes the typical balance of interests between foreign investors and host states by providing for "investor, investment and home State obligations" in order to

22. The 2004 Canadian Model BIT includes an important provision concerning the requirements of an indirect expropriation arising from non-discriminatory regulatory actions. One of its annexes – Annex B.13(1) – provides that "[e]xcept in rare circumstances, such as when an action or a series of actions by a Contracting Party is extremely severe or disproportionate in light of its purpose, non-discriminatory regulatory actions adopted by the Contracting Party for the purpose of legitimate public welfare do not constitute indirect expropriation". The 2012 BIT between Canada and China is an example. See also art. VI (2) (c) of the 2007 Colombian Model BIT; the Investment Chapter of the 2004 Free Trade Area among Dominican Republic, Central America and the United States (CAFTA – DR), Annex 10-C; the 2009 ASEAN Comprehensive Investment Agreement, Annex 2, art. 4; the 2009 Association Agreement between ASEAN, Australia and New Zealand, Annex on 'Expropriation and Compensation', art. 4; the Protocol to the 2012 Trilateral Investment Treaty among Japan, China and South Korea, art. 2 (c), as well as the 2015 investment chapter of the Trans-Pacific Partnership (TPP) Agreement, Annex 9-B, para. 3(b)
23. See arts. 12 and 13 of the 2012 US Model BIT.
24. See, in particular, arts 13-15 and 21-22. Arts. 21-22 refer to the "rights of States to regulate" and "to pursue development goals". art. 22.2 includes a non-relaxation clause.

"ensure that the conduct, management and operations of investors and their investments are consistent with the law of the host State, and enhance the contribution of investments to inclusive growth and sustainable development of the host State".[25]

A few treaties include specific provisions on land management as a *caveat* to treaty obligations on the protection of a foreign investor's interests in case, for example, of expropriation with the particular purpose of mitigating the calculation of compensation.[26] These changes in treaty practice have not yet been tested.

Certain of these new international investment treaties are a reaction to the outcomes of specific treaty-based investment arbitration cases, such as the *Methanex*,[27] *Chemtura*,[28] *Glamis*[29] and *Phillip Morris* cases.[30]

The impression that transpires from these changes is that there is a search for a different balance between economic development arising from the safeguard of private interests on the one hand, and environmental and human sustainability associated to the safeguard of certain public non-investment concerns on the other.

As negotiations towards one wide-ranging multilateral investment agreement or network of 'regional' investment agreements are not on the agenda of states and/or international organizations usually involved in such processes, the search for a different bal-

25. See Ch. III, arts. Arts. 11-12, of the revised Indian Model BIT that was published in December 2015.
26. See, for example, art. 8, para. 4, of the 2009 Investment Agreement between ASEAN and China, which runs as follows: "any measure of expropriation relating to land shall be as defined in the expropriating Party's existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations"; art. 9, para. 6 and footnote 8 of the 2009 Association Agreement among ASEAN, Australia and New Zealand. Art. 9-C of the 2015 TPP Agreement and Art. 5.1, footnote 3 of the 2015 revised Indian Model BIT.
27. *Methanex v. The United States*, NAFTA/UNCITRAL Arbitration, Final Award on jurisdiction and merits, 3 August 2005.
28. *Chemtura v. Canada*, NAFTA/UNCITRAL Arbitration, Award, 2 August 2010.
29. *Glamis v. The United States*, NAFTA/UNCITRAL Arbitration, Award, 8 June 2009.
30. The *Philip Morris Asia v. Australia* UNCITRAL case was dismissed on 17 December 2015 because of lack of jurisdiction (Award on Jurisdiction and Admissibility, not published yet); and *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7 (on-going).

ance of interests still depends on the conclusion of bilateral and/or regional investment treaties. This state of affairs maintains regulatory diversification at an international law level. International treaties that are concluded for the protection and/or liberalization of investment tend not to include relevant provisions to connect these goals and those related to the promotion of sustainable development. In particular, in these treaties there is no direct connection between land use, water management, food security and foreign investments.

The EU approach to international investment law is also not contributing to mitigate such a diversification.[31] As already pointed out, the EU concluded the CETA with Canada in 2014 and is negotiating the TTIP with the United States. Both CETA and TTIP, as far as we know, include an investment chapter. The basic provisions of these chapters appear similar to those typical of recent bilateral investment treaties because, on the one hand they maintain the typical pro-investor orientation and on the other include a few provisions for the safeguarding of certain non-investment concerns at the root of sustainable development, in the form of non-relaxation and/or non-precluded measures clauses.

The EU has also concluded and/or is negotiating a variety of other international agreements on trade and investment with a number of non-EU Member States. The EU concluded the Association Agreements with Georgia, Moldova, Ukraine in 2014, a Trade Agreement with Colombia and Peru in 2013, the Free Trade Area Agreements with South Korea in 2011, Central America in 2012 and Singapore in 2013, the Partnership and Cooperation Agreements with Vietnam and Iraq in 2012, the Interim Agreement Establishing a Framework for an Economic Partnership Agreement (EPA) with Cameroon in 2009, with ESA (Eastern and Southern Africa) in 2012 and the Interim Agreement with SADC in 2009. These agreements focus on the promotion of free trade as well as the protection and/or liberalization of foreign investment, and include minor provisions on the promotion of sustainable development, although the EU association,

31. See Armand de Mestral 2010; Reinisch 2014.

partnership, cooperation or free trade area agreements concluded after the entry into force of the Lisbon Treaty do not provide for an investment chapter designed to be the typical legal structure of bilateral investment treaties, i.e. pro-investor oriented. A relevant number of such agreements include a general non-relaxation clause[32] and/or a specific non-precluded measures clause[33] in favour of the safeguard of certain non-investment concerns. A few of them provide that a specific treaty on investment will be concluded shortly after[34] or when this might be appropriate.[35]

Certain post-2009 EU agreements include relevant provisions on land management, corporate social responsibility and the promotion of sustainable development, but these provisions are in the article on "environment and natural resources".

The 2011 Partnership and Cooperation Agreement with Iraq establishes a connection among agriculture, rural and social development.[36] The 2012 Partnership and Cooperation Agreement

32. See art. 1.1 of the 2010 Free Trade Agreement between the European Union and South Korea which runs as follows "to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties." See also art. 277 of the Free Trade Area Agreement among the EU, its member states, Colombia and Peru.
33. See art. 9.3 on national treatment, para. 3, of the 2013 Free Trade Area Agreement between the EU and Singapore.
34. See art. 7.16 of the 2010 Free Trade Agreement between the European Union and South Korea on the "[r]eview of the investment legal framework" according to which "1. [w]ith a view to progressively liberalising investments, the Parties shall review the investment legal framework, the investment environment and the flow of investment between them consistently with their commitments in international agreements no later than three years after the entry into force of this Agreement and at regular intervals thereafter."
35. See art. 80.2 of the Association Agreement with Georgia which provides that "2. [i] n the context of the review referred to in paragraph 1, the Parties shall assess any obstacles to establishment that have been encountered. With a view to deepening the provisions of this Chapter, the Parties shall find, if need be, appropriate ways to address such obstacles, which could include further negotiations, including with respect to investment protection and to investor-to-state dispute settlement procedures." See also art. 116.2 of the Free Trade Area Agreement with Colombia and Peru.
36. See Art. 90 on "cooperation on agriculture, forestry and rural development" which clarifies that "[t]he objective is to promote cooperation in the agriculture, forestry and rural development sectors with a view to promoting diversification, envi-

with Vietnam refers to the principle of "sustainable land management" in connection to the protection of soil and the preservation of "soil functions", as well as to the enhancement of "land management capacity".[37]

The 2014 Association Agreement between the EU and Georgia provides for the commitment of both contracting parties to the promotion of corporate social responsibility in the field of trade and investment.[38] The same agreement includes an article on 'the sustainable management of forests and trade in forest products',[39] an article on the involvement of "local level authorities in regional policy cooperation" that refers to "cooperation in the fields of regional development and land use planning",[40] a chapter on "industrial and enterprise policy and mining"[41] and a list of horizontal reservations on 'public utilities' that each contracting state, in particular EU Member States, have made, *inter alia*, in order to limit "the acquisition of land and real estate… by

ronmentally sound practices, sustainable economic and social development and food security. To this end the Parties will examine: […] (d) measures relating to sustainable economic and social development of rural territories, including environmentally sound practices, forestry, research, transfer of know-how, access to land, water management and irrigation, sustainable rural development and food security."

37. See art. 30, respectively letters (i) and (j).
38. See art. 231 (e) which runs as follows: "the Parties agree to promote corporate social responsibility, including through exchange of information and best practices. In this regard, the Parties refer to the relevant internationally recognised principles and guidelines, especially the OECD Guidelines for Multinational Enterprises." See also art. 239 (f) and (g).
39. See art. 233. See also art. 369 of the 2014 Association Agreement between the EU and Moldova.
40. See art. 373, para. 2, according to which "[t]he Parties will cooperate to consolidate the institutional and operational capacities of Georgian institutions in the fields of regional development and land use planning by, *inter alia*: (a) improving inter-institutional coordination in particular the mechanism of vertical and horizontal interaction of central and local public authorities in the process of development and implementation of regional policies; (b) developing the capacity of local public authorities to promote reciprocal cross-border cooperation in compliance with EU principles and practices; (c) sharing knowledge, information and best practices on regional development policies to promote economic well-being for local communities and uniform development of regions." The 2014 Association Agreement between the EU and Moldova provides for a similar provision at art. 108.
41. See arts. 313-315.

foreign natural and juridical persons".[42] It is interesting that these specific reservations on land acquisition are in the section of horizontal reservations on "real estate" rather than with horizontal reservations on "investment". The 2014 Association Agreement between the EU and Moldova refers to the "sustainable utilisation of natural resources".[43] This agreement also includes a commitment of both contracting parties to the promotion of corporate social responsibility.[44] Other recent EU agreements provide for a similar commitment.[45]

4. Conclusion: looking for a specific regulatory approach of the European Union to foreign direct investment and land use

To deal with 'indirect land use' in developing countries due to large-scale foreign investments, an appropriate solution might be to conclude special contracts on the management of land between a foreign investor and a host state including stabilization clauses, the use of environmental and social impact assessment mechanisms and certifications related to the protection of the environment, 'indirect land use change', the safeguard of social and human rights, in terms of access to water and food. This might improve the quality of the contracts on large-scale foreign investments. Another improvement might be to include in such contracts a reference to participatory mechanisms involving local communities in case of a conflict on the accountability and transparency of a specific investment project concerning large areas of rural land.[46]

42. See *OJEU*, L 261, 30 August 2014, pp. 205-206. Similar reservations are included in the 2014 Association Agreement between the EU and Moldova (see *OJEU*, L 260, 30 August 2014, pp. 338-339).
43. See art. 87.
44. See art. 367 of the Association Agreement between the EU and Moldova and art. 231 of the Association Agreement between the EU and Georgia.
45. See, for example, art. 286 on "cooperation on trade and sustainable development" of the 2013 Trade Agreement among the EU, its member States, Colombia and Peru which at para. 3 provides that "[t]he Parties agree to promote best business practices related to corporate social responsibility".
46. See Report of the Special Rapporteur on the right to food, Olivier de Schutter on

The pro-investor approach is one of the reasons why 'traditional' BITs and 'mega-regional' agreements are a matter of discussion. This approach appears inevitable because of the legal diversification typical of international law, i.e. the regulation of different issues – economic (energy security) and non-economic (greenhouse gas emissions savings and food security) – through separate legal instruments.

The EU political institutions have given indications that they are ready to overcome regulatory diversification. However, such institutions are not yet proposing the adoption of a single regulatory approach and have not yet even designed a new approach to international investment law based on a revision of the typical balance of interests between investors and host states. As highlighted above, in a relevant number of recent international trade agreements the same institutions have not connected the promotion of the sustainable and equitable land use to the promotion and protection of foreign investments.

The debate on the design of the EU common investment policy, the legitimacy of international investment law, in particular of investment treaty-based direct arbitration and the on-going TTIP negotiations are for a reconceptualization of the investment legal and policy framework, as today the establishment of a favourable climate for foreign investments depends on the expectations regarding not only the treatment and protection of investors, but also the social and environmental dimensions of investments.

The search for a balance between economic interests and non-economic concerns still appears the most appropriate method at international and EU law levels.

An open issue is to understand if a reform of the international investment legal framework through a different balance between safeguards and 'responsibilities' of host states and (transnational) corporations as the chief foreign investors would be accepted.

"[t]he transformative potential of the right to food", A/HRC/25/57, 24 January 2014, as to his final 'key recommendation' B.4 on contract farming as a tool to support 'local food systems', especially letter (d).

As shown above, the reference to the environment and/or labour conditions in a few of the rules in international investment treaties has been the first method that some states have used in order to find a new balance. Such a method has also been used by certain states in relation to land governance. This method does not appear the most satisfactory remedy for reconciling foreign investments and a non-investment concern like the 'indirect land use change' because it is a method that maintains regulatory diversification and thus a different intensity in the regulatory safeguarding of economic and non-economic concerns/interests at an international law level. The safeguard of the concerns and interests of foreign investors would still be ensured by the binding rules included in the innumerable international investment treaties that are in force, whereas the safeguard of the concerns and interests of small-scale farmers in developing countries would depend mainly on the non-binding rules and principles adopted by international organizations. These latter concerns and interests would matter within the international investment legal framework only as exceptions.

The adoption of an EU Model BIT including specific provisions on the protection of certain non-investment concerns would be a clear indication of the effective willingness of the European Union to take its place in the international arena as a promoter of a 'real' social market economy. The EU institutions have the decision-making power to adopt a regulatory approach likely to bring about binding rules, such as an EU Model BIT inspired by the conciliation of investment and non-investment interests. The sustainable development goals (SDGs) that are under discussion within the 'post-2015 UN Development Agenda' might be an appropriate reference point for a reconceptualization aimed at attributing a special importance to land management. To achieve 'Goal 1' related to "end poverty in all its forms everywhere", according to the proposed Target 1.4, it would be appropriate to "ensure" that "by 2030 … all men and women, particularly the poor and the vulnerable, have […] control over land and other forms of property". However, this target does not refer to community land rights, although according to a few NGOs and scholars such rights would be a relevant contribution to the improvement of rural livelihoods.

The inclusion in the EU treaties of a reference to the effectivity of land holding in the definition of the 'enterprise' as a relevant investor might be another satisfactory solution, as seen in the 2012 draft of the new Indian Model BIT.[47] The EU Model BIT might include a similar provision, which would be a starting point for a new regulatory approach as to 'indirect land use change'.

Specific provisions establishing an integrative relationship between the protection of investments and land use management might be an additional satisfactory regulatory solution.

As to procedural safeguards, the EU treaties and the EU Model BIT might include provisions on the participation in arbitration proceedings of local communities through, for example, *amici curiae* submissions and/or reports by experts in environmental and social matters.[48]

The requested change in international legal and policy frameworks on investment might be achieved through another complementary approach, i.e. a multilateral approach promoted by the EU. Its institutions might be the drivers of a new attempt towards multilateralism within the international legal framework on investment. This attempt could lead to the conclusion of a multilateral investment treaty or the adoption of non-binding guidelines and principles related to the relationship between the protection of foreign investments and non-investment concerns at the root of sustainable land management within an international organi-

47. See art. 1.2.2 of the new Indian Model BIT. According to art. 1 "[f]or the purposes of" the Model BIT, "'enterprise' means (i) any legal entity constituted, organised and operated in compliance with the law of the host State […]; and (ii) having its management and real and substantial business operations in the territory of the host State […]." art. 1.2.2 specifies that "real and substantial business operations do not include: […]; (ii) the passive holding of […], land […]."

48. See art. 38 of the 2009 ASEAN Comprehensive Investment Agreement on 'Expert Reports' according to which "[w]ithout prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, the tribunal, at the request of the disputing parties, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, public health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree." See also art. 10.24 of the Investment Chapter of the Free Trade Area among Dominican Republic, Central America and the United States (CAFTA – DR).

zation, such as FAO, the World Bank or the OECD. Over the last decades these international organizations have been the most active and interested in influencing the conduct of states and private corporate investors in accordance with the principles of sustainable development. Multilateral rules might deal with the diversification of international investment law, reduce its inconsistency and make international investment law less controversial. Multilateral rules could reduce the number of conflicts between diverse interests, which arise from the interpretation and application of different international treaties. In addition, multilateral rules – whether binding or non-binding – would mitigate potential norm conflicts by identifying a few minimum relevant conditions that must be met by large-scale foreign investments based on the use of land in a developing or least-developed country.

More specifically, the conclusion of a multilateral investment treaty would contribute to the co-ordination of international treaty obligations of states. This result could ensure a balanced implementation of stabilization clauses included in contracts and the fair and equitable treatment standard provided in investment treaties so as to meet expectations both of foreign investors and the people living in host states, particularly in least-developed countries, in order to reach a more equitable share of the benefits from foreign investments.

From a pro-sustainable development standpoint, the reference – in contracts, the EU Model BIT, a multilateral treaty and/or other multilateral rules – to certain specific principles of sustainable development, such as the common but differentiated responsibilities, prevention and precautionary principles, would be an appropriate solution, even if the reference to these principles would increase the discretionary powers of the contracting parties and, in case of a dispute, of arbitrators.[49] The latter would in any case be facilitated

49. The 2014 Association Agreement between the EU and Georgia includes an express reference to the precautionary principle at art. 236 on 'Scientific information'. This runs as follows: "[w]hen Ok preparing and implementing measures aimed at protecting the environment or labour conditions that may affect trade or investment, the Parties shall take account of available scientific and technical information, and relevant international standards, guidelines or recommendations if they exist. In this

by uniformity and consistency in the applicable international rules. This might reduce lengthy arbitrations, whenever non-investment concerns such as land use, are relevant to settle a case.[50]

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regard, the Parties may also use the precautionary principle."

50. Cf. Alvarez 2011, especially pp. 452-457.

Case Studies

From Europe, Africa, the Middle East, Asia, Northern and Latin America

Gérard Choplin[1]

COMMON AGRICULTURE POLICY AND LAND CONCENTRATION IN THE EUROPEAN UNION

Abstract

Land is also a question in Europe. In the EU, big farms control a major part of agricultural land. The Common Agriculture Policy has been an important driver of land concentration. Since 1992 CAP subsidies have been paid per ha, without modulation or ceiling, increasing competition for land and its price. This has been done at the expense of small farms, which are disappearing and being replaced by corporate agricultural enterprises. Access to land has become more difficult and expensive for aspiring farmers, who already face the volatile and low farm-gate prices allowed by the CAP and international trade rules. In Central and Eastern Europe, the situation is worse, due to increasing land grabbing: cheap prices for land and CAP subsidies coupled to land are attractive for foreign investments. To stop land concentration, land grabbing, land artificialisation and the disappearance of sustainable family farming, proposals exist to change the present CAP (and other policies like bio-energy, rural development, internal market and investment policies). The EU needs a land governance which should be inspired by the Voluntary Guidelines. Farming without farmers cannot be an option for the future. The issues of land concentration, land grabbing and land reform are mostly mentioned in relation to southern countries. But land is also an issue for Europe, where concentration and grabbing happen more and more often.

1. Soil use in Europe

Let us recall that about 45% of land is used for agriculture and 40% for forest.[2] But the agriculture area is shrinking, due to the

1. Free-lance expert on European and international agricultural and trade policies. From 2008 to 2013 he worked at the European Coordination Via Campesina, Brussels. Previously he had gained a twenty-year professional experience as Coordinator in the European Farmers Coordination [www.gerardchoplin.wordpress.com].
2. LUCAS 2012 (Land use cover area survey) Eurostat in [http://ec.europa.eu/euro-

artificialisation of land. Between 1990 and 2000, for example, the EU lost 275 hectares per day (315 football grounds).

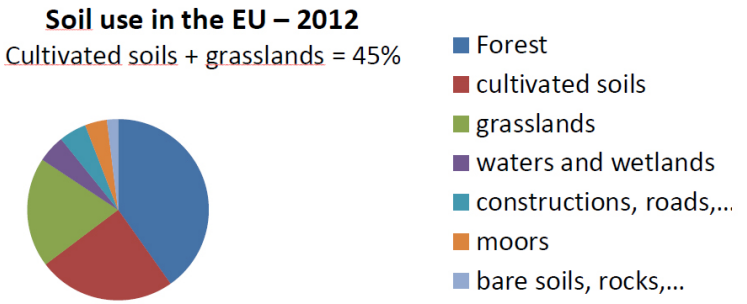

Fig. 1. Elaborated by the author

1.1 Concentration of agricultural land

Today in the European Union, a very small number of farms control the major part of agricultural land. Less than 3% of farms hold 50% of the land, whereas 80% of farms control only 14.5% of land.

% of farms in the EU	% of agricultural land
1.00 %	*20.00 %*
2.70 %	*50.00 %*
80.00 %	*14.50 %*

Tab. 1. From Hands on the Land for Food Sovereignty 2015[3]

stat/documents/4031688/5931504/KS-03-13-587-EN.PDF]

3. Hands on the Land for Food Sovereignty is a collective campaign by 16 partners, including peasants and social movements, development and environmental NGOs, Human Rights organisations and research activists. It aims to raise awareness on issues related to the use and governance of land, water and other natural resources and its effects on the realization of the right to food and food sovereignty [https://handsontheland.net/about/]

The next figure indicates the quantity of land occupied by farms over 100ha: the concentration is particularly high in Central and Eastern Europe, due to the way land was granted to private owners in the 1990s. But some Western European countries like Portugal, Spain and the UK have huge farms taking up most of the land. In countries like Denmark, France and Sweden, farms over 100 ha are becoming more in number and size.

1.2 Repartition of CAP subsidies as a driver of concentration

Since 1992, as the result of the GATT negotiation in the Uruguay Round, CAP subsidies have replaced price support and been paid per hectare, without any ceiling being imposed. Since 2003 most of them have been decoupled from production.

The result of this was predictable: an increase in competition for land, and an increase in the price of land. And as big farms received bigger subsidies, they could buy more land and get even bigger, to the detriment of small and medium size farms.

Between 1992 and 2003, subsidies were partially decoupled. Grain farmers had to sow their fields, but were not forced to harvest them in order to get the CAP subsidies. There was a famous case in Poitou, France, in the 1990s, where several thousand hectares of arable land were being rented, seed rarely sown, only to be unharvested and left in the fields, and yet a huge subsidy went into the farmer's pockets in the autumn. And that was all legal. Since 2003, the subsidy has been fully decoupled from production and in the case of grain prices under production costs, so it is more profitable not to produce and just receive the subsidy.[4]

4. During the Uruguay Round, the EU and the US succeeded in imposing subsidies decoupled from production, classified in a so-called "green" box, i.e. with a green light at the WTO, without any ceiling to the subsidies paid out. The CAP reforms in 1992, 1999 and 2003 then replaced export subsidies with decoupled payments. In connection with the lowering of European agricultural prices to world levels, which supplied the downstream sector cheaply, green box subsidies allowed the continuation of exports at prices often below European production costs. This is a beautiful laundering of dumping, and is still ongoing.

Member State	Farms > 100ha	Total farms	% of farms	UAA of farms > 100ha (ha)	Total UAA of MS (ha)	% of MS total UAA
EU-27	325,860	12,074,700	2,7	90,872,940	179,685,870	50.6
Bulgaria	5,490	370,490	1.5	3,687,860	4,475,530	82.4
Slovakia	2,210	24,460	9	1,726,490	1,895,500	91.1
Estonia	1,720	19,610	8.8	688,710	940,930	73.2
Hungary	7,450	576,810	1.3	3,034,080	4,686,340	64.7
Romania	13,730	3,859,040	0.4	6,508,390	13,306,130	48.9
Portugal	6,110	305,270	2	2,117,670	3,668,150	57.7
Spain	51,190	989,800	5.2	13,089,450	23,752,690	55.1
Czech Rep	4,420	22,580	19.6	3,085,160	3,483,490	88.6
U Kingdom	39,240	186,800	21.0	12,481,400	16,881,690	73.9
Denmark	8,080	42,100	19.2	1,750,750	2,646,860	66.1
France	94,250	516,100	18.3	16,453,960	27,837,290	59.1

Tab. 2. From EP 2015[5]

5. See Directorate-General for Internal Policies Policy Department B: Structural

By choosing a subsidy per hectare and not per farmer and by refusing any serious ceiling for this subsidy,[6] the EU has promoted a very unfair repartition of CAP subsidies among farms. The EU Court of Auditors has notified the other EU institutions about the situation several times, without any significant reactions or results.

In fact, the farms which receive more than €50,000, which represent only 1.7% of all farms receiving CAP payments, are cashing in on 32% of all payments. 1/3 of the farms, receiving less than €500, are given only 1.6 % of the payments. Would the taxpayers agree, if consulted?

Size class of direct payment	% of beneficiaries	% of all payments
> €100,000	*0.3 % (33,620 farms)*	*16.6 %*
> €50,000	*1.7 %*	*32.0 %*
between €5,000 and €50,000	*19.2 %*	*52.4 %*
<€ 5,000	*79.1 %*	*15.6 %*
< €500	*33.2 %*	*1.6 %*

Tab. 3 From DG AGRI 2014[7]

It goes without saying that along with the concentration of land, the repartition of subsidies is very unfair in many EU member states.

and Cohesion Policies Agriculture and Rural Development Extent of Farmland Grabbing in the EU. Study. European Parliament (EP), 2015.

6. The European commission proposed capping the subsidy several times, but was opposed by the Council, under the pressure of COPA [www.copa-cogeca.be] which defending the interest of big farmers. In the last CAP reform in 2013, an optional reduction – for the member states – of the subsidy exist, beyond €150.000 per farm.
7. Distribution of direct aids to the producers (Financial year 2013) – Members states fact sheets – European union – page 8 – statistics – DG Agri – EU Commission [http://ec.europa.eu/agriculture/statistics/factsheets/pdf/eu_en.pdf].

Member state	% of farms	% of CAP subsidies
Romania	*1.0 %*	*50.0 %*
Hungary	*1.0 %*	*38.0 %*
Bulgaria	*1.1 %*	*45.6 %*
Germany	*1.2 %*	*28.4 %*
Poland	*1.3 %*	*26.0 %*
Italy	*0.3 %*	*18.0 %*
UK	*2.5 %*	*24.0 %*
France	*1.2 %*	*9.0 %*

Tab. 4 From DG AGRI 2014

2. Land grabbing in Central and Eastern Europe

2.1 Farm grabbing in Eastern Germany

"When the Berlin Wall fell in 1992, a single company (BVVG) was charged with leasing out and selling off former state owned agricultural land in eastern Germany, which it evidently managed to do well: by the end of 2009, 627,000 ha of agricultural land had been sold, while 393,000 ha was under lease, with a large part set to expire by 2010. In the late 2000s, the government's preference shifted decidedly toward land privatisation, leading to accelerated land sales to private investors. Land prices and land lease rates skyrocketed, with the price of new leases in Uckermark leaping from €50/ha in 2005 to €279/ha in 2010 (and almost doubling between 2007 and 2009 alone). Small farmers especially were hard-pressed to renew their lease contracts, amidst a strong government push to sell land (not renew leases) and because lease prices were too high. Meantime, a preferential scheme (EALG) was introduced giving existing

> leaseholders owning less than 50% t of their total cultivated land – regardless of the farm size – a pre-emptive right to buy the leased land at discounted rates. With 75% of the total area leased out by BVVG for large farms (500 hectares and above) on the one hand, and many small farmers unable to afford even the discounted sale price on the other hand, the scheme led to accelerated land concentration. Several big investors acquired land in eastern Germany in this way, such as Steinhoff Holdings, an international furniture company which now controls an estimated 25,000 ha mainly for biogas.".[8]

Land prices are increasing fast: between 2009 and 2012, + 54% in Brandenburg, +79% in Mecklenburg-Vorpommern.

2.2 Land grabbing in Central and Eastern Europe

According the Land Matrix database, a land monitoring initiative of the International Land Coalition, large-scale land deals of European investors in the EU were totalling 166,359 ha in March 2015 (EP 2015). It mainly happens in Romania, where the total reaches 137,000 ha. European investors now control around 25% of Romanian agricultural land while foreign investors hold 10%. "For example, in the county of Timis, it is estimated that approximately 150,000 ha of agricultural land – almost a third of the agricultural area in the county – is cultivated by Italian-owned companies" (EP 2015).

In the other states, land grabbing is far less significant, but Western European investors, especially banks, are continuing to increase their investments, as we can see in the next figure:

8. Report *Land concentration, land grabbing and people's struggles in Europe*, Hands Off the Land Network, 2013

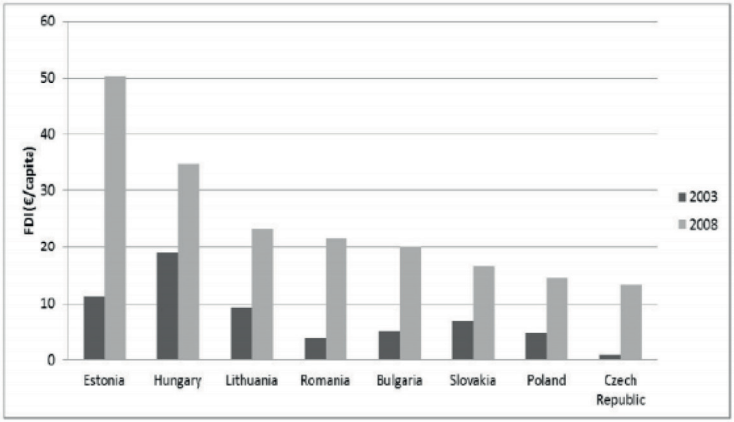

Fig. 2. Foreign direct investment in the agricultural sector (stock,€/capita) in selected EU member states 2003 and 2008 (EP 2015)

In Poland the biggest CAP subsidies are allowed to the Danish Poldanor farm (13,000ha) and Top Farm (Spearhead International Ltd, managing 75,000 ha between the UK and Eastern Europe)

The biggest farm in Romania belongs to the Lebanese-owned *Maria Group*, and amounts to 65,000 ha, with its own port and slaughter house. It exports meat and cereals, largely to the Middle East and East Africa.

The "Black Sea farm belt" (Ukraine, Romania and Bulgaria) has become the place to be for "land grab entrepreneurs".

3. The decline of small farms

The concentration of land and the rise of large corporate farms are happening at the expense of small and medium size farms. From 2003 to 2010 – only 8 years – the EU lost 3 million farms (20%) (ECVC 2011) and Estonia alone lost 43% of its farms.

Agricultural Holdings <10 ha	1990	1995	2000	2003	2005	2007	2010	1990-2010 Variation
Austria		126,270	108,310	88,530	86,310	84,590	72,970	**-42%**
France				219,060	194,270	173,510	175,910	**-20%**
Germany	316,870	260,870	189,510	155,760	143,020	133,240	73,260	**-77%**
Italy	2,376,440	2,191,790	1,901,570	1,712,970	1,474,600	1,431,580	1,363,180	**-43%**
Spain	1,194,540	904,940	904,310	776,150	725,560	694,690	644,930	**-46%**
United Kingdom	62,050	60,010	68,520	94,500	96,650	58,020	39,370	**-37%**
Poland				1,789,770	2,110,420	2,015,840	1,158,370	**-35%**
Hungary			876,140	665,660	617,730	524,210	485,340	**-45%**
Romania				4,238,430	4,025,400	3,751,160	3,641,560	**-14%**
Bulgaria				643,290	507,550	466,690	336,080	**-48%**

Tab. 5 From EP 2015

By losing so many family farms, rural areas are also losing related activities like services. That means that EU taxpayers are paying subsidies to the biggest farms, and thus promoting land concentration creating new costs in rural areas. To compensate for this destructive policy, the EU is giving funds in the second pillar of the CAP for the "development" of rural areas.

4. Difficult access to land for aspiring farmers

The concentration of land increases the difficulty for aspirant farmers to have access to land. In addition, the lack of income perspectives from agriculture makes young people flee from working on the land.

As a result, European farmers are becoming older and older, without prospects of successors. In 2010, only 7.5% of farms were run by people under 35 and 50% by people over 50. Here below the example of two EU countries.

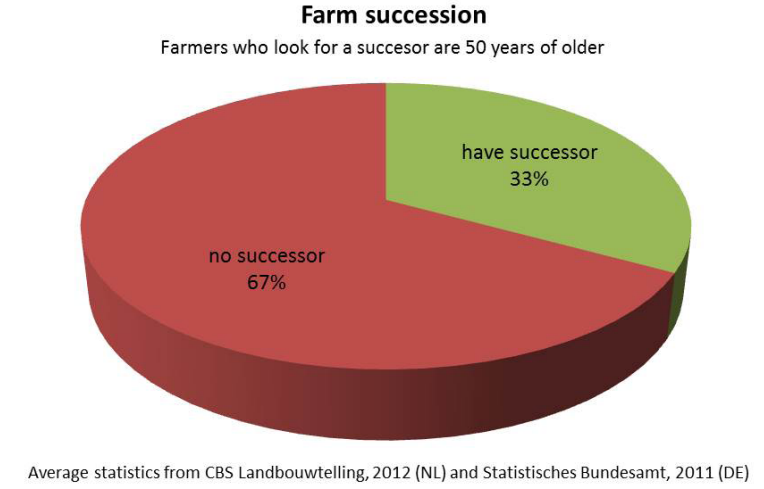

Fig. 3 Farmers over fifty looking for successors

4.1 Less and less land for food production

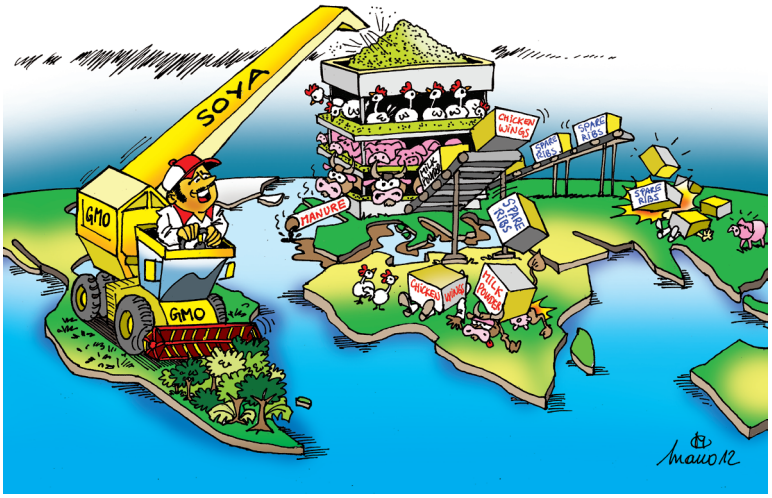

Fig. 4. The European land grab: the EU uses over 16 million ha of farmland outside the EU to feed its livestock and fuel its cars.

Land artificialisation

More than 60,000 ha of mostly fertile farmland are lost every year due to land use conversion to non-agricultural uses (infrastructures, houses, industry, tourism).

Agrofuel policies

The 2009 EU renewable energy directive, which imposed 10% of agrofuel on transport by 2020, has dramatically increased competition for land, for example:

In Germany, more than 1 million ha of rapeseed is used for biodiesel and 800,000 ha of corn is grown for biogas. In 2012 Germany was unable to produce enough grain for its own needs!

In the UK 125,000 ha of corn for biogaz were planned by 2020 (now 25,000).

In France, if 20% of all arable land were used to grow rapeseed for biodiesel, it would only provide 5% of the 50 million tons of fuel consumed on French roads. The major part of rapeseed harvest is processed into biodiesel.

Many protests against the EU directive led the EU to cut the rate of biofuels in transport to 7%.

Artificialisation and agrofuels are increasing competition for land. This leads to rising prices, and so attracts new investors. A good example is offered by the German financial investor, *KTG Agar*, which controls 38,000 ha of land in Germany, 10,000 in Lithuania, and is expanding rapidly.

5. Changing the CAP to help solve land issues

For a better distribution of land, a better use of subsidies, a better access to land for aspiring farmers, supporting persons rather than capital and creating a balanced territorial development, the Common Agriculture Policy has to be changed. Here are some key proposals:

- cap CAP subsidies per farmer and per farm;
- mandatory and higher redistributive CAP payment for the first ha of the farm;
- limit subsidies to farmers who work on the farm;
- move from subsidies per hectare to subsidies per farmer;
- give priority to food production (drop agro-fuel targets);
- change EU trade and investment policies.

5.1 The need for EU land governance

Although land is exclusively a competence of the member states and not of the EU, various EU policies influence largely the evolution of agricultural land within the Union. There is then a need for a European land governance.

In its 2015 report, mentioned several times in this text, the European Parliament recommends several interesting changes on this issue:[9]

- land should be considered a resource, not a commodity;
- EU member states should be allowed to regulate land markets, with exceptions for the free movement of capital. Examples of regulations already exist in France and Germany;
- an EU observatory on agricultural land should be created, including the Cadastre.

The FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests tenure Guidelines should inspire EU directives on agricultural land.

9. See note 3

Maria Cristina Rulli,[1] *Paolo D'Odorico*[2]

ENVIRONMENTAL IMPACTS OF LARGE-SCALE LAND ACQUISITIONS IN AFRICA

1. Introduction

Agricultural land, forests and mines have become the target of agribusiness corporations, investment funds, governments and conservation-oriented NGOs. Over the last ten years these actors have been securing property rights, leases, concessions, licenses or other forms of permits on vast tracts of land in the developing world. Their investments are often motivated by the need to enhance food and energy security, but also by environmental conservation goals and financial speculation (e.g. Anseeuw et al. 2012, Kugelman and Levenstein 2013). The recent 2008/2011 food crises saw an escalation in food prices that led to export bans in major exporting countries (e.g. Fader et al. 2013). The uncertainty and unreliability of the international food market in a period of increasing demand for food, fibres and biofuels have drawn the attention of governments and corporations toward investments in productive but often underperforming agricultural land. In many cases the land is not promptly put under production but left fallow (Table 1), which suggests land acquisitions are often the result of financial speculations and land investors are just treating the land as a commodity likely to increase in value, should other food crises arise. The targeted countries are mostly located in the developing world and typically exhibit relatively large yield gaps and good access to freshwater resources (Rulli and D'Odorico 2013, 2014). The African and Asian continents have been particularly targeted by large-scale land acquisitions

1. Department of Civil and Environmental Engineering, Politecnico di Milano
2. Department of Environmental Sciences, University of Virginia

(23.6 and 14.0 million ha, respectively), particularly Sub Saharan Africa and Southeast Asia (Table 1).

Often known as the "land rush", in recent years this phenomenon has received the attention of political ecologists, development economists, human rights scholars and experts in land tenure legislation. The environmental impact of large-scale land acquisitions, however, remains poorly investigated. It is not clear whether land investors are mindful of the environmental impact of their management decisions. It has been speculated that large-scale (and long-distance) land investments cause a geographic disconnection between the land and its managers. While local managers live close by the land and are therefore expected to care about its sustainable use and act as good guardians of its natural resources, the distancing of investors from the land they indirectly manage could lead to a loss of environmental stewardship (D'Odorico and Rulli 2014). However, the narrative that large-scale land acquisitions break the ethical bond between land and managers has seldom been based on empirical evidence. The few existing studies have focused on forest loss in Southeast Asia (Carlson et al. 2012, Davis et al. 2015), in countries such as Indonesia, Cambodia and Papua-Guinea, which are major hotspots of global deforestation. The case of Africa remains understudied and, to date, a comprehensive analysis of the environmental impacts of large-scale land acquisitions in this continent is still missing. In this chapter we provide a critical review of the existing quantitative studies on the impact of land investments in Africa. We focus on how agribusiness investments are associated with the appropriation of freshwater resources and food production capability and with the loss of forest cover.

Tab. 1 Land area undergoing acquisition and the fraction of the area under production or acquired by foreign investors.[3] Water appropriation resulting from large-scale land acquisitions.[4] Food that could be produced by the

3. Legenda: 1 data from Land Matrix, January 2015.
4. Legenda: 2 based on Rulli and D'Odorico 2013.

acquired land, based on land area, intended crop and country-specific yields (Mueller et al. 2012). Number of people who could be cared for with this food.[5]

	Africa	Asia and Oceania	S. America	Europe	Total Global
Acquired Land (× 10^6 ha)[1]	*23.6*	*14.0*	*5.1*	*5.3*	*48.1*
% Under production	*3.5*	*19.7*	*28.8*	*26.5*	*13.5*
% Foreign	*89.1*	*72.4*	*76.0*	*65.1*	*80.2*
Water Appropriation (× 10^9 ha)[2]	*150.1*	*219.5*	*21.3*	*0.1*	*391.0*
Potential Food Appropriation (× 10^{12} kcal y^{-1})[3]					
– yields of 2000	*93*	*381*	*21*		*496*
– at gap closure	*227*	*448*	*30*		*708*
People who could be fed (millions)[3]					
– yields of 2000	*52-89*	*123-263*	*13-18*		*188-371*
– at gap closure	*123-212*	*157-312*	*21-26*		*303-551*

5. Legenda: 3 based on Rulli and D'Odorico 2014.

2. Large-scale land acquisitions in Africa

According to The Land Matrix (2013), in the African continent about 24 million ha have been acquired for agriculture over the last 10 years. To date, however, only a small fraction of this land – much less than in the other continents – <5% has been put under production (Table 1). Most of the land investments (89%) are transnational and therefore based on the land stewardship narrative, are more likely to be managed unsustainably. Except for Morocco, all these investments are in Sub Saharan Africa, Sudan, South Sudan, Ethiopia, Liberia, Sierra Leon, Mozambique and Madagascar have been particularly targeted by large-scale land acquisitions (Figure 1). The land is typically used for tree plantations, oil palm, sugar cane, jatropha, maize, rice and other grains.

3. Impacts on food security

Even though the land is often left fallow, prior users often lose access to it and the services provided for their communities, such as firewood, game or wild fruit. If the land is cultivated, they lose an important source of livelihood or at least the option of potentially using the land for agriculture. Rulli and D'Odorico (2014) provided a quantitative assessment of the loss of such a potential. They found that about 93×10^{12} kcal y^{-1} could be produced on the acquired land without any new technological inputs (i.e. without closing the gap; see Table 1). This estimate could increase by 140% at gap closure (Figure 2A), i.e. after the adoption of modern agricultural technology such as industrial fertilizers, irrigation, mechanized systems of cultivation, better seed varieties and new food commodities that can be potentially produced in the acquired land would be sufficient to feed 52-89 million people, which could increase to 123-212 million, at gap closure (Figure 2B). These calculations were based on a daily diet of 3000 kcal (including unavoidable waste), 20% from animal products, and the range of values here presented corresponds to different scenarios of food caloric availability.

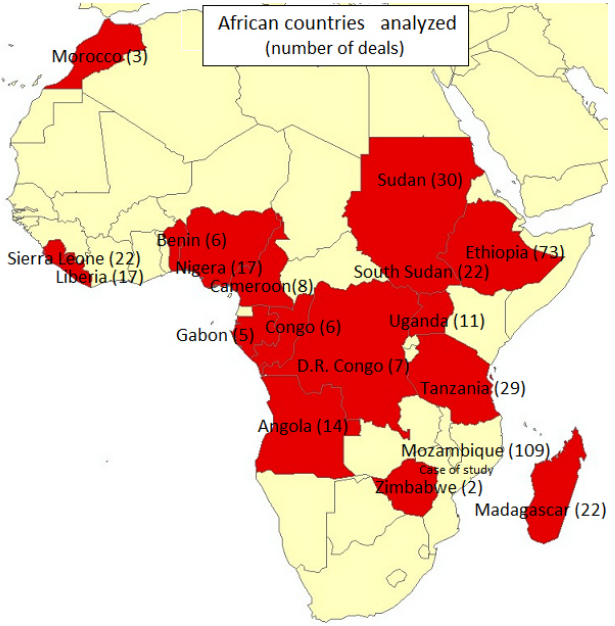

Fig. 1 A map of large-scale land deals in Africa[6]

Thus these estimates are overall conservative because they refer to a balanced diet which is substantially richer than the average in these countries. It is worth noting that the amount of food potentially appropriated by land investors would be sufficient to reduce malnourishment in Sub Saharan Africa, where recent estimates (FAO 2013) indicate there are about 223 million undernourished people. Ethiopia, Liberia and Sierra Leone are countries that suffer from most potential food "grabbing" in Africa. All these countries have a high yield gap (Figure 2B) in that they can more than double their production at gap closure. Overall, these findings are consistent with the argument that investors are targeting underperforming agricultural land and that by bringing investments in modern agricultural technology, large-scale land

6. Legenda: based on data from The Land Matrix, l.c. 11.2015.

acquisitions will enhance food production and generally improve its security in the region. It is unclear, however, to what extent the food that land investors could produce will remain on the continent instead of going to the export market. To date, we are unable to address this question because most of the investments are not currently under production, which disproves the argument for a positive impact of large-scale land acquisitions enhancing food security.

4. Impacts on water security

There is some consensus that many of the recent large-scale land investments were driven by a quest for water resources. Some of the major investor countries are in regions of the world (e.g. the Arabic Peninsula) with chronic water scarcity and therefore rely on imports to meet their domestic needs. By importing food, they virtually import the water required for its production (Allan 1998). Recent studies have quantified the amount of water that is potentially appropriated by land investors (Rulli et al. 2013, Rulli and D'Odorico 2013). Should the land go under production, they would will virtually extract a substantial amount of water (Table 1). Even though in the target regions agriculture is mostly rain-fed, it is expected that to close the yield gap, the agribusiness firms buying the land will make investments in irrigation technology. As a result, water withdrawals for irrigation will likely increase. The estimates presented in Figure 3 refer to the total amount of water appropriated, including both rainwater ("green" water) and irrigation water ("blue" water). The latter should be included only for the areas that are currently under production.

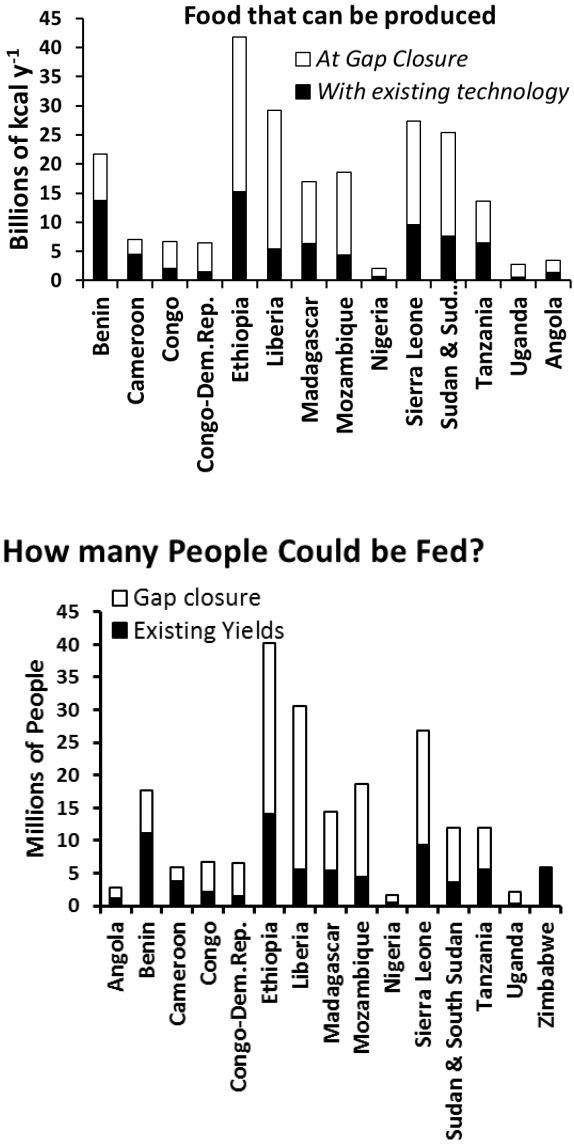

Fig. 2 A and B: Amount of food that could be produced in the acquired land and number of people that could be fed: Based on estimates by Rulli and D'Odorico, 2014.

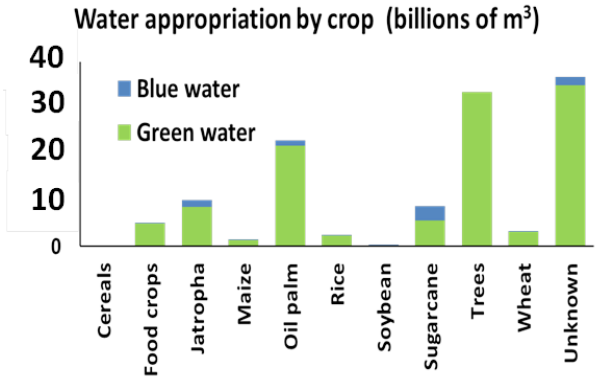

Fig. 3 Water appropriation in Africa by crop (in billions of m^3).

5. Impact on land-use change

Research on large-scale land acquisitions in Southeast Asia has shown how land concessions are hotspots of deforestation, suggesting that large-scale land concessions may exacerbate forest loss in the region (Davis et al. 2015). Similar studies are completely missing in Africa. A major limitation to the assessment of the impacts of investments on land use and land-cover change is due to the lack of access to geo-referenced data with the perimeters of the acquired land. Such data are available for a few countries and include the Congo, Cameroon, the Democratic Republic of Congo, Gabon and Liberia. As expected, logging concessions are heavily disturbed and a substantial fraction of their area has been cleared. Particular concern existed for the case of Liberia after a 2012 article in *The Guardian* reporting that it had sold 25% of its land to logging companies (Hirsch 2012). Fortunately, in the following months the case received international attention and the magnitude of the phenomenon turned out to be less than initially feared. To date, the rate of timber extraction from these forests is still limited. Nevertheless, Table 2 shows how logging concessions are strongly affected by

deforestation, particularly in the Congo and Gabon, where a substantial fraction of the concession land is losing its forest cover (see the last section of this volume *Ed.N.*).

	Deforested Area ($\times 10^6$ ha)	**Deforestation in logging concessions**	**Deforestation in palm oil concessions**
Cameroon	*0.49*	*4.0%*	*6.0%*
Congo	*0.30*	*51.5%*	*1.9%*
DRC	*5.55*	*8.8%*	-
Gabon	*0.21*	*32.5%*	-
Liberia	*0.43*	*16.9%*	*7.5%*

Tab. 2 Deforestation (forest loss between 2000 and 2010) in logging and palm oil concessions in western equatorial Africa.

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Makane Moïse Mbengue and Susanna Waltman[1]

WATER ISSUES INVOLVED IN FARMLAND INVESTMENTS IN AFRICA

The parallel legal regimes at the intersection of land and water

Abstract

Access to water resources is a significant driving force behind the surge in foreign investment in farmland. Unfortunately, water issues have received less attention than the focus on "land grabbing" and food security. Yet, human water use is dominated by agricultural purposes, and water is the value of all agricultural land. Freshwater resources are increasingly vulnerable due to increased pressure from climate change and population growth alone. Further, water resources are particularly vulnerable to impacts of farmland investments due to the cyclical unitary nature of water. Adding to these pressures is the problem of the imbalanced legal framework in this area, to the extent that foreign investors have more legally secured water and land rights than local communities in most instances.

This contribution seeks to elucidate the water issues involved in farmland investments. It highlights in particular the increased pressure on water resources, the imbalance in the legal framework governing access to water resources for foreign investors as compared to local communities in the domestic law of the host states and international law, and examines the responsibilities of the actors and stakeholders (host states, local communities, foreign investors and other states) as set out in international law. In particular, it highlights the role of the domestic law of the host state as the primary source of law in this area, and the fundamental imbalance created by the statutory rights granted to foreign investors that prevail over the predominantly customary rights of most local communities in the event of conflict. It further outlines the various applicable regimes of international law, most obviously international investment law but more important in this context is international freshwater, environmental and human rights law. It concludes with modest recommendations to address the problems highlighted in the area, most importantly the integration of international freshwater, environmental and human rights law into the legal and policy framework.

1. Makane Moïse Mbengue is Associate Professor of International Law, University of Geneva, Faculty of Law and Institute of Environmental Sciences (ISE), Susanna Waltman, PhD Candidate, University of Geneva.

1. The vulnerability and necessity of freshwater resources

Freshwater resources tend to be taken for granted until they are strained or completely depleted, despite the fact that water is vital for all life on Earth. Although water resources may seem abundant, in fact less than 3% of all available water resources are suitable and available for human use. Of that 3%, more than 70% is used for agricultural purposes (Kundzewicz, Mata et al. 2007, Boisson de Chazournes 2013). It is thus high time that water resources received adequate attention when dealing with agriculture more generally and agricultural investments in particular. This is particularly imperative, considering that the most significant impact of climate change is on freshwater resources, and Africa is purported to be the most vulnerable to this process.

Africa is the primary recipient of farmland investments and has been promoted internationally as having vast untapped water resources, but a significant number of Africans already live in water-stressed environments in terms of the physical availability of water and the economic ability to access it. Population growth and climate change alone are predicted to drastically worsen the situation, while land use change is another contributing factor. The most tangible impact of climate change on water resources is an increase in the risk of flooding and drought in many areas (Kundzewicz, Mata et al. 2007). Rain-fed agriculture is therefore particularly vulnerable to climate change forces in Africa, leaving arid and semi-arid areas the most vulnerable.[2] Some studies point to a significant decrease in suitable rain-fed agricultural land in Africa, and warn that arid and semi-arid land will increase in Africa by 5-8% in the coming century (Boko, Niang, Nyong et al. 2007). This makes the duration of agreements between foreign investors and host states and the location of the investments even more important. As available water and arable land decrease, the secured rights of foreign investors over the remaining arable land

2. This contribution is a summary of an extensive report funded by the International Institute of Sustainable Development, see Mbengue, M. M., and Waltman, S. (2015) for further details on the issues discussed herein.

and water resources will become more significant and increasingly problematic.

Nonetheless, irrigation is viewed as a necessary adaption to climate change impacts on rain variability and agricultural stability, and host states increasingly look to foreign investors as a source of irrigation technology. If irrigation is simply increased as a single-minded response to climate change, however, the overall water use is significantly increased, which deprives downstream areas of water that would have re-entered the stream as return flow (Kunzewicz, Mata et al. 2007). Water resources are particularly vulnerable to the impacts of farmland investments due to the cyclical unitary nature of water. Water is interconnected and in constant motion. The amount of water extracted to sustain farmland investments and the quantity and nature of the chemicals discharged by the use of pesticides and fertilizers directly impact the quantity and quality of water resources available for other users, including local communities, other investors or neighbouring states.

The majority of farmland investments are clustered around Africa's largest river and lake systems (GRAIN 2012). Irrigation is seen as a perquisite of commercial production in most of these investments (GRAIN 2012). Some suggest, however, that if all large-scale commercial farmland leased to foreign investors was put into irrigated production it would amount to "hydrological suicide", because the amount of water required to maintain the irrigated production of these investments is simply more than what is available, particularly in the Nile River Basin (GRAIN 2012). Although these fears seem exaggerated, it is clear that these large-scale farmland investments will significantly increase water consumption in Africa, while the fruits of that agricultural land will be enjoyed by the home state of the investor, for the most part. Studies have revealed that the vast majority of crops grown are destined for export to the investor's home state, while any destined for the market of the host state are higher-end products priced for urban consumers (Mirza et al. 2014). Accordingly, the food available within the host state may be increased but this does not necessarily translate into improved access to food for

rural populations most in need, and most vulnerable in Africa. Food security can thus hardly be seen as a trade-off for the extra strain on water resources.

The increased pressure on freshwater resources is not fully appreciated, however, which could have severe consequences for local communities, other state users and the environment. In fact, a recent World Bank study revealed that the water use of farmland investments in Africa has thus far been "virtually unregulated" and/or not monitored in anyway (Mirza, Speller, Dixie and Goodman 2014). The water use of farmland investments has thus far gone unnoticed and slipped through the cracks. The same World Bank study notes that farmland investments are proceeding so quickly that governments face difficulty monitoring and assessing the investments in a meaningful way, and therefore recommends that states consider slowing down or halting approval of new investments until the impact of those in place can be understood (Mirza et al. 2014).

International investment law has thus far received the most attention in this context, although the location of the investments near international river and lake basins and their sustained water use trigger obligations from international freshwater law, as well as environmental and human rights law. The law of the host state is also fundamentally important as the primary law governing the investment. As water becomes more scarce, water rights and these other regimes will become all the more important. Truly understanding and appreciating the rights that foreign investors obtain when they invest in agricultural land is critical, along with recognizing the corresponding obligations on host states and the wider obligations from international law triggered by their sustained water use.

2. The multiple legal regimes governing water rights and farmland investments

Several legal regimes are triggered by the sustained water use of farmland investments forming the legal framework in this area.

Each of these regimes was developed to suit its own interests: domestic law in Africa has been developed to promote and attract foreign investment;[3] international investment law is concerned with safeguarding investments; international freshwater law is concerned with the protection and preservation of freshwater resources; international environmental law is concerned with the environment more generally while human rights law is concerned with the rights of human beings. All of these interests converge and potentially clash over land and water, and are all brought to a head by farmland investments and their water use. While the domestic law of the host state is the primary source of law governing the investments, foreign investors obtain their rights therein from the contract with the host state, and international investment law provides an additional layer of rights and guarantees. International freshwater law, environmental and human rights law impose further obligations on host states and grant rights to other stakeholders including other states and local communities. These latter regimes must be more effectively integrated into the legal framework governing farmland investments to address the imbalances in this area.

3. Domestic law

Domestic law primarily governs water and land rights/access in the host state, subject to certain requirements of international law set out below. The framework established by domestic law in this area, however, results in a legal imbalance putting foreign investors in a more favourable legal position than local communities. This is because local communities primarily hold informal land and water rights in customary law in Africa, while foreign investors obtain formal statutory rights from their contract with the host state. In the event of conflict, the statutory rights of foreign

3. See Oaklan Institute 2011, for example, for an overview of the "Pan African" strategy of the World Bank, a strategy for African states to reform their laws to attract foreign direct investment and increase economic prosperity.

investors will prevail over the customary rights of local communities, leaving local communities vulnerable to conflicting land/water claims.

Water belongs to the public domain throughout most of Africa and users may be granted the right to use water in accordance with the applicable domestic framework. Private individual ownership over freshwater or other resources is foreign throughout most of Africa, facilitating its exploitation by foreign investors who pay negligeable fees in exchange for these valuable resources.[4] African domestic legal systems developed following the common or civil law traditions (Caponera 2007). These domestic legal systems have generally developed together with customary law, which varies from area to area, and is particularly significant in Africa in matters relating to land and water. This creates a problem in this area where local communities predominantly hold customary rights that are legally vulnerable to the statutory rights of foreign investors in case of conflict. Although constitutional arrangements governing water resources are varied, there are certain common elements that can be seen in the legal systems that have developed from the common law and civil law systems, and in the role of custom throughout Africa (Fisher 2009).

Despite the close link between land and water and the clear necessity of water for agricultural production, the administrative and regulatory frameworks governing land and water have evolved in isolation in most parts of the world (Hodgson 2004). Water rights have received less attention and a lower profile than land rights. This is partly because while water is necessary for most productive uses of land, water rights are not (Hodgson 2004). In states with arid climates that struggle with drought like parts of southern Africa or where all water resources have been developed, water shortages demand greater consideration of water rights where irrigation may be required and may appropriate water resources formerly used by local communities. In

4. Studies have revealed that foreign investors pay little or no fees for the land or water under the contract with the host state, and that arable land is substantially undervalued in Africa. See Cotula 2011, for example.

many states, water rights have long been considered a subsidiary component of land tenure rights, where a right to use water is dependent on the existence of a land tenure right.

This is particularly the case in common law countries. In common law countries, riparian landowners can make unfettered use of water sources accessible from their land unless it has been brought under government control through specific legislation or judicial decision (Caponera 2007). Land ownership is thus particularly important in common law countries since riparian landowners automatically have use rights to the water accessible from their land, and no centralized water administration generally exist in most of these states. This further amplifies the impact and risks associated with farmland investments given the cluster of investments around Africa's largest natural water systems and huge tracts of land acquired by them. Civil law countries are more likely to have some form of centralized water administration, where water is generally placed in the hands of the state and use is subject to administrative authorization, permit or concession under that administrative system (Hodgson 2004). However, studies have revealed that even where there is an adequate administrative framework in place to govern the sustainable management of water resources, it is poorly implemented and enforced and therefore has little impact thus far in this area (Mira et al. 2014).

Further, even where adequate water administration exists in Africa, most water use by local communities is considered minor and therefore does not require authorization/registration (Hodgson 2004). Thus even where there is a regulatory framework that could translate local communities' customary rights into statutory rights through their authorization/registration, which would bring them on the same plane as foreign investors, local communities rights remain customary and thus legally vulnerable to the statutory rights of foreign investors. Moreover, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries (the "Voluntary Guidelines") and the Principles for Responsible Investment in Agriculture and Food Systems (the "Principles for Responsible Investment") do not address this imbalance. In particular, the Voluntary Guidelines and

Principles for Responsible Investment do not protect customary rights or local communities, but expressly protect "legitimate right holders" throughout their texts. In the case of conflict between statutory and customary rights, the "legitimate right holder", legally speaking, is the statutory right. These principles and guidelines thus further entrench the power imbalance between local communities and foreign investors. Nonetheless, integration of all of the regimes described below into one legal and policy framework in this area would greatly strengthen the position of local communities and address this imbalance. The principles and guidelines at the very least make reference to these wider regimes, bringing them onto one plane.

4. Contracts between foreign investors and host states

The contract plays a critical role and could be the most effective means to limit and deal with the water use of agricultural investments. Unfortunately, most contracts do not expressly mention or deal with water or provide for any fees for its use, and host states may not recognize the extensive water rights that may be granted notwithstanding (Cotula 2011). Water is an essential element of agricultural production and mandatory for the operation of an agricultural investment. When host states grant foreign investors the right to operate and maintain an agricultural investment, they also grant the necessary water rights to sustain that production even when water is not expressly mentioned in the contract. For example, the following clause would suffice to grant foreign investors extensive water rights over the land in question:

> "Government hereby grants to Investor the non-exclusive right, franchise and license for and during the Term to: (i) engage in Production in the Production Area (and subject to the terms of this Convention, in other areas of Cameroon), (ii) to develop, manage, maintain, rehabilitate and expand (as may be permitted herein) the Production Area, (iii) to utilize Oil Palm Products in Cameroon and to supply to local markets and to export Oil Palm

> Products from Cameroon, (iv) to produce other agricultural products after providing Notice to Government and (v) to conduct such other activities as contemplated by this Convention, in accordance with applicable law."[5]

If water is expressly addressed and limited in the contract, however, then the investor will only have those water rights as specified therein. It is therefore crucial that contracts deal expressly with water, provide a fee for its use to incentivize lower usage and recognize its value and to provide for periodic reviews in case of water shortage or other issue. The development of the contract is therefore a crucial moment in the relationship between the host state and investor, and the golden opportunity to address and limit a foreign investor's water use (Smaller 2010). However, far-reaching stabilization clauses prevalent in contracts throughout Africa further frustrate attempts at sustainable water resource management, considering that most states in Africa still need to develop a regulatory framework for such management that takes into account the relationship between water and land. Nevertheless, many potential problems and issues raised by the water use of farmland investments could and should be adequately dealt with in the contract with the host states. This further requires efforts towards improving the negotiating power of host states when facing giant corporations with massive legal teams devoted to developing and negotiating the contract so as to be as beneficial to the investor as possible.

5. Establishment Convention Dated as of 17 September 2009 By and Between the Republic of Cameroon an SG Sustainable Oils Cameroon PLC, available from: http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/SGSOC%20Convention%20with%20the%20Government%20of%20Cameroon.pdf.

5. International Law

5.1 International Investment Law

International investment treaties further strengthen the position of foreign investors by providing safeguards and guarantees under international law. Water is a necessary guarantee for the operation of an agricultural investment that may be safeguarded by an investment treaty in force. Foreign investors may seek to enforce their water rights for the operation of their investment through an investment treaty, particularly Bilateral Investment Treaties (BIT) that are especially prevalent and far-reaching in Africa (Smaller 2010). Investment treaties thus further secure the legal position of foreign investors and contribute to the imbalance in the legal framework by providing directly enforceable rights against the host state. No other stakeholder may directly initiate a unilateral claim against the host state for financial compensation. The most legally significant provision of these treaties is therefore the dispute settlement provision that grants foreign investors access to initiate arbitral proceedings against the host state. The dispute settlement clause therefore gives teeth to foreign investors rights by providing the procedural means to enforce the substantive rights in the treaty and contract with the host state.

In times of drought or water shortage, ensuring that basic water needs are met while maintaining water flows for sustaining river systems and biodiversity (critical for the long term sustainability of the host state) can conflict with the water needs of an agricultural investment. If long-term droughts develop as predicted or if there are political changes in a host state, it is conceivable that steps may be taken to expropriate the land or reallocate water resources (Smaller 2010). This could lead to disputes under investment treaties. Standard provisions in these agreements apply and may limit the host state's ability to reallocate water resources if it becomes necessary to do so. In particular, the fair and equitable treatment standard and the prohibition against expropriation without compensation may limit host state ability to act in

the face of water shortages, thus further strengthening a foreign investor's rights. Nonetheless, this limitation on host state action should not and legally cannot interfere with its obligations to ensure the sustainable management of water resources and that the right to water of its population is met. Unfortunately, in reality, this limitation is rarely implemented or enforced.

If the contract between the foreign investor and the host state does not expressly pose limits on the water use of foreign investors, then they may form a legitimate expectation of the necessary water use to maintain and operate their agricultural investment. In that case, any attempt by the host state to interfere with the water usage of that investor may breach the fair and equitable treatment standard of the investment treaty, and the host state may be required to financially compensate the investor. This is especially problematic considering the low fees paid under these contracts and the host states overriding responsibilities under international law to protect and preserve freshwater resources and ensure that local communities have access to water. It is therefore fundamentally important that contracts address and limit water use, for example by imposing a duty to ration in case of drought or seasonal variation, so that these limitations and potential interference with the water use of foreign investors is not claimed as a breach of legitimate expectations under an investment treaty.

There could be further claims of expropriation if host states reallocate water resources, depriving foreign investors of the necessary water to maintain commercial production of their investment. The obligation to pay compensation in the event of government expropriation applies to the loss of business operation and not just to loss of land (Smaller and Mann 2009). If water reallocation occurs when there is sufficient water available to meet the needs of other users, the reduction in a foreign investor's water allocations may be defined by an arbitral tribunal as an expropriation of the right to operate the business (Smaller and Mann 2009). International freshwater law, environmental law and human rights law, on the other hand, demand that host states take action to reallocate water in the event of shortage. These regimes thus need to be integrated and developed in a mutually

supportive manner. The first step in this direction is recognizing that investment law is not the only facet of international law triggered by these investments.

5.2 International Freshwater Law

The location of the majority of agricultural investments clustered around Africa's major river and lake systems triggers obligations from international freshwater law that must be considered and adequately integrated into the framework governing farmland investments. Water and water use is intricately connected – water use in state A may negatively impact the quantity and quality of water resources available in state B. This is particularly the case in Africa, where international watercourses cross the boundary of every single state on the continent. Africa has over 60 international river basins, many of which have developed their own institutional mechanisms for the use and protection of the shared water resources, implementing the general principles prescribed by international law in a detailed basin-specific approach (McCaffrey 2007). Foreign investors' use of these water resources trigger the obligations and mechanisms set out in international freshwater law. The principles and mechanisms in the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (the "Watercourses Convention") must therefore be consulted to address this water use, especially considering that many of these principles now represent customary international law. Customary international law binds all states and therefore applies to all water systems whether subject to the Watercourses Convention or not.[6]

Most significantly, international freshwater law requires host states to respect and not to cause harm to the reasonable and equitable share of water resources of other states.[7] The principle of reasonable and equitable use is a part of customary international law

6. See Mbengue, M.M and Waltman, S. (2015) at 31-32.
7. See *ibid*.

binding all states that prevents one state from depriving another of its equitable share of the water resource.[8] The definition of that equitable share may change over time, which is why the consultation and negotiation procedures set out in the Watercourses Convention are particularly important, given the fluctuations and uncertainties surrounding water resources. States therefore have a further obligation to notify and consult other states in the event an agricultural investment is planned near an international watercourse, to ensure that such a reasonable share is not harmed throughout the life of the investment. The no-harm principle set out in the Watercourse Convention further requires the avoidance of harm to an international watercourse to the extent that is reasonable under the circumstances. The no-harm and reasonable and equitable use principles thus complement and reinforce each other (McCaffrey 2007).

In fulfilling the obligation of equitable utilization, states must exercise due diligence and conduct an environmental impact assessment to determine whether the investor's water use will interfere with the equitable water use of other riparian states. This assessment should be used to address and consider the water use of foreign investors before it becomes an issue. The Watercourses Convention further requires that states ensure priority water use for vital human needs, thus ensuring that in times of water shortage, vital human needs are given top priority. This may be developed to support the divergence of water resources for small-scale productive use where necessary. This must be recognized by the relevant stakeholders in the context of farmland investments, particularly by host states and foreign investors themselves.

Further, the Watercourses Convention calls for the implementation and elaboration of its principles at the regional and sub regional level, which has occurred at various levels in Africa (Mbengue and Waltman 2015). Most international watercourses in Africa are therefore governed by their own joint institutional management scheme at the basin level, a regional policy for

8. See Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), 197 ICJ 7 Judgment of 25 September 1997, and ibid.

sustainable water management like the SADC Regional Water Policy and the international scheme provided by the Watercourses Convention. Some basin level agreements go even further than international law where states have relinquished their sovereign control over the shared water resource and subjected it to a regime of collective ownership exercised by the basin authority, such as the legal regime governing the Senegal River and the Lake Chad Basin Commission. In those cases, only the basin commission may authorize agricultural investments near the Senegal River and Lake Chad Basins. Foreign investors and host states must give effect to these legal obligations.

These intuitions and mechanisms must therefore be integrated into the framework governing agricultural investments as part of the standard process in this area. Unfortunately, the poor implementation and enforcement of these regimes has meant they play little practical role in the context of agricultural investments. Nonetheless, international freshwater law is binding on host states and has the potential to address and deal with the water use of farmland investments. Where there are no regional mechanisms in place, the Watercourses Convention kicks in to provide the fall-back position, and where the state concerned is not a party to the Watercourses Convention the obligations from customary international law provide the general obligations. These are elaborated upon more generally in international environmental law. The enforcement and integration of these regimes and the integration of their obligations into the legal and policy framework governing agricultural investments would help to address and counter the imbalanced legal framework in this area.

5.3 International Environmental Law

Pesticides and fertilizers used in commercial farming seep into the soil and trickle downhill, eventually finding their way into shared watercourses due to the interconnected nature of water. This triggers more general obligations from international environmental law, particularly where the agricultural investment is

near a border or has a potential transboundary effect. The no-harm principle discussed above as set out in the Watercourses Convention finds its roots in environmental law. It is implemented and translated into a general duty to conduct a transboundary environmental impact assessment in the event an agricultural investment is planned near an international border. This obligation is recognized in customary international law as binding on all states.[9] This assessment should call attention to the water use of these investments and reveal the impact on transboundary waters. Stakeholders must therefore respect the obligation and enforce it, however, for it to have any impact.

5.4 International Human Rights Law

Numerous human rights instruments recognize the human right to water either explicitly or implicitly as a prerequisite for the enjoyment of all other human rights (Vinuales 2009). The UN General Assembly has recognized the human right to water as universally binding and the Human Rights Council has called on states to pay particular attention to vulnerable groups in ensuring the obligation to respect and protect the human right to water is met.[10] Stakeholders must therefore ensure that the water use of agricultural investments does not interfere with the vulnerable water rights of local communities regardless of the applicable investment agreement. In order for this to occur, the human right to water must be recognized and integrated into the policy framework in this areas.

9. See Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 83 and ibid.
10. General Assembly Resolution 64/292. The human right to water and sanitation. Adopted by the General Assembly on 28 July 2010, para. 1 and Human Rights Council resolution 15/9 of 30 September 2010, Human rights and access to safe drinking water and sanitation, see Official Records of the General Assembly Sixty-fifth Session, Supplement No. 53/A.

6. Recommendations towards integration of the legal and policy framework governing water and farmland investments

A fundamental step that must be taken in the management of agricultural investments is to recognize the water issues involved and give effect to the regimes developed to ensure its sustainable management. This requires a transformation in water governance to include increased stakeholder participation in water-management decisions, and recognition in the legal and policy framework of the fundamental link between water and land.[11] This should be fostered at the local level, as well as increased efforts towards the implementation and enforcement of the regimes described above. In particular, enhancing the role of basin institutions throughout the investment process, given the inherent water required for all agricultural investments, is a fundamentally necessary step.

Before contracting, it is vital that all stakeholders carefully consider the wide-ranging obligations described above, particularly the duty to notify and consult other states and conduct an environmental impact assessment. This would address many of the problems in this area. Separate provisions in the contract with the host state to address water rights, use and fees that also clearly provide for periodic revision of water allocation and rights are also fundamentally necessary to address the problems in this area. While permits and regulations on water use may not mitigate the problem of investor's statutory rights prevailing over the customary rights of local communities, they at least provide a legal basis for Government to interfere with the water use of foreign investors if necessary, and would prevent foreign investor's from forming a legitimate expectation otherwise.

Safeguard clauses in the contract with the host state as well as in investment treaties would be a further way to address and resolve the problems created by farmland investments and their water use. Such clauses seek to ensure that nothing in the contract or investment treaty impedes or frustrates the implementa-

11. See Mbengue, M.M and Waltman, S. (2015) for a development of this argument in the context of farmland investments.

tion of host state obligations under international law, including international freshwater, environmental and human rights law. They therefore safeguard the rights under these under regimes and in effect aids in the implementation of these rights and obligathions. The inclusion of such clauses would help to ensure that investment law and international freshwater, environmental and human rights law are mutually supportive. Recognizing and giving effect to these obligations is imperative for the equitable and sustainable management of freshwater resources, and the sustainable management of freshwater resources is, in turn, imperative for all life on Earth.

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Marina Bertoncin, Andrea Pase and Daria Quatrida[1]

IRRIGATION MEGA-PROJECTS IN SAHELIAN AFRICA: LAND-RIGHT CONCEPTIONS BETWEEN STATE AND LOCAL COMMUNITIES

Abstract

This paper proposes a reading of the issues concerning land rights in Sahelian Africa through the case study of the irrigation mega-projects in the Senegal river delta, which offers itself as a laboratory for analysing the development of irrigation with the relative changes made to the system of managing and owning the lands, and the reactions of the local actors.

1. Introduction

This paper proposes a reading of issues concerning land rights in Sahelian Africa through a case study of the irrigation mega-projects[2] that have been carried out since the colonial era in the big wet zones created by the allogeneic rivers (Senegal, Niger,

1. Marina Bertoncin is full professor of Social Geography at the University of Padua (Italy). Her main research topics concern hydraulic territorialization and development projects in Sahelian Africa: theoretical (actor analysis) and empirical (territorial impacts) perspectives. Andrea Pase is professor of Historical Geography at the University of Padua. His research focuses on the construction of modern state borders and also on the geography of irrigation in Sahelian Africa. Daria Quatrida is researcher in Geography at the University of Padua. Her research interests concern socio-territorial analyses of irrigation development projects in the Sahelo-Sudanese areas. All three contributors are members of the Department of Historic and Geographic Sciences and Antiquity – Padua University.
2. According to Gellert and Lynch (2003:15-16) the mega-projects transform the territory «rapidly, intentionally, and profoundly in very visible ways, and require coordinated applications of capital and state power. They use heavy equipment and sophisticated technologies, usually imported from the global North, and require coordinated flows of international finance capital».

Logon and Chari, Nile).[3] These areas have a strategic importance because they represent a kind of 'green oasis' in a semi-arid region just south of the Sahara desert; at the same time, they are very fragile ecosystems as they largely depend on the annual amount of rainfall and flooding.

In order to cope with the climatic uncertainty, the Sahelian peoples have developed sophisticated skills and practices based on human mobility and the plurality of land use: fishing, rainfed and flood recession farming, transhumant grazing. Rivers and lakes are also used as waterways for commerce. Such a multiplicity of uses also confers a high level of resiliency and multi-stability on the local systems (Aschan-Leygonie 2000).

This land rights conception – based on the collective and integrated management of resources – was substantially changed by large-scale irrigation projects, which have considerably modified the rules and ways of accessing both land and water.

The irrigation mega-project relies on mechanised agriculture and monoculture to the detriment of other activities and has instituted a market economy based on state law and developed within modern social structures (bureaucracies, associations and cooperatives), which organise the various working phases.

The aim of the development works is very clear: to bring populations regarded as backward towards modernity and lead them to progress, with a move from a subsistence to market economy, from customary regulation to state law, from the collective and integrated control of resources to the parcelling of labour and from the plurality of land use to monoculture. The mega-project in effect cancels everything that existed prior to its establishment. It abolishes the customary forms of ownership of resources and power, it alters the hydrography, flattens the micro-relief, defor-

3. The first big colonial irrigation project was carried out by the English in Sudan, on the Gezira plain, for the cultivation of cotton and cereals on 420,000 hectares (Bertoncin et al. 1995; Bertoncin and Pase 2011). On the Gezira model, the French set up the *Office du Niger* in Mali for the cultivation of 960,000 hectares of cotton and rice (Bertoncin et al. 2010; Quatrida 2015). Starting from these experiments, irrigated agriculture spread from the Nile to the Senegal delta.

ests the wooded zones and moves the population. This regional operation causes a laceration in the spatial continuity of the original land, the transhumant paths are obstructed and the other activities (fishing, livestock farming, silviculture) are excluded (Pase 2011).

But despite the big investments and expectations of progress, the development of these modernisation projects has been beset by financial, technical and organisational shortfalls.

Not only this. The changes introduced by the development projects caused great insecurity and uncertainty about rights, also resulting in the merging and overlapping of normative systems (national laws, customary rights, oral and written norms), to the detriment of the weakest and most vulnerable actors.

Nowadays this situation contributes to the land grabbing phenomenon, whose targeted zone is Africa and, in particular, Sub Saharan Africa (Cotula et al. 2009; Peluso and Lund 2011). Among the different zones studied it was decided to present in this paper the Senegal river delta (Quatrida 2012),[4] at the extreme west of the Senegal river valley, which offers itself as a laboratory for analysing the development of irrigation with the relative changes made to the system of managing and owning the lands, and the reactions of the local actors.

Starting from a presentation of the traditional land management system in the valley, three stages of the irrigation development will be studied.

The stage of the Senegal state's independence with the introduction of the law on state-owned property and the implementation of big schemes for irrigated rice-growing entrusted to a state company especially set up in 1965, the Société Nationale d'Aménagement et d'Exploitation des Terres du Delta (SAED).

The stage of Structural Adjustment Programs with the state and SAED withdrawing in favour of private investments, and the parallel process of decentralising powers to the rural communities to which the land management was entrusted.

4. The Senegal river (figure 1), which rises in Fouta Djalon (Guinea), is 1790 km long and has a catchment area of 343,000 $km^{2.}$

The post-adjustment stage with the accentuation of the neo-liberal measures in favour of private investments that have created a favourable context for land grabbing.

2. Before the irrigation schemes: the customary land tenure system in the Senegal river valley

In the Senegal river valley (figure 1),[5] the traditional land tenure system satisfied the need to ensure the maximum provision of food supplies, and reduce the risks of climatic uncertainty (quantity-distribution-duration of the rains and of the river in flood), by the complementary use in time and space of the available resources:

- the floodplain (*walo*) for fishing, flood recession farming and grazing during the dry season;
- the water courses and seasonal water-holes for fishing and watering the livestock;
- the sand dunes (*djéri*), at the outer edge of the river's maximum bed, for rain-fed agriculture and grazing during the rainy season.

A strategic agricultural space, the *walo* lands, were marked by a strict and complex system of use based on the probability of the filling of the flood settling bowls, which establishes their value. Access to the land mirrored the social structure: the deepest and middle parts of the bowls, which were most likely to be flooded, were the exclusive prerogative of the nobility, while the higher and rarely flooded parts were granted to the slaves and their descendants. The flooded bowls also acted as fish hatcheries. After the harvest of the flood recession crops, they were used by the herdsmen[6] to pasture their animals, which thus fertilised the fields.

5. The valley is distinguished geographically into four large zones subject to different climatic regimes: the upper valley with a Sudanese climate, the middle and lower valleys with a Sahelian climate and the delta with a Sahelian climate influenced by the presence of the ocean. The climate is generally characterised by a rainy season from July to October and a long dry season (eight months in the Sahelian zone).
6. Livestock farming is distinguished into two main forms: transhumant and extensive farming (practised mainly by the *peul*) and 'village' farming, which involves the daily movement of cattle and goats to the areas around the settlements; the sheep are generally kept in the yards.

There were no particular rules for the *djéri*, however, given their low productivity and the uncertainty of the rainfed cropping.

The central figure in the seasonal organisation of the use of the resources was the *chef de terre*, the 'political head' of the region, a role played by a noble. He had the task of deciding the dates for sowing the flood recession crops, which in turn determined the harvest period and thus the subsequent opening to the herdsmen for flood recession grazing (Boutillier and Schmitz 1987).

Occupation of the space was also based on the mobility of the settlement according to the seasons: every village on the *walo* had its replica in the *djéri* (for example Fanaye walo and Fanaye djéri) so as to avert flooding in the case of very high spates and especially to make the most of the resources offered by the two zones, whose ecological dynamics were seasonally opposed.

The result was an 'itinerant territoriality' (Mbembe 2005), built on fluid limits that did not involve the exclusion of one activity in favour or another, but rather the integration of different territorial practices and different societies (with a prevalent agricultural-sedentary or pastoral-nomadic vocation).

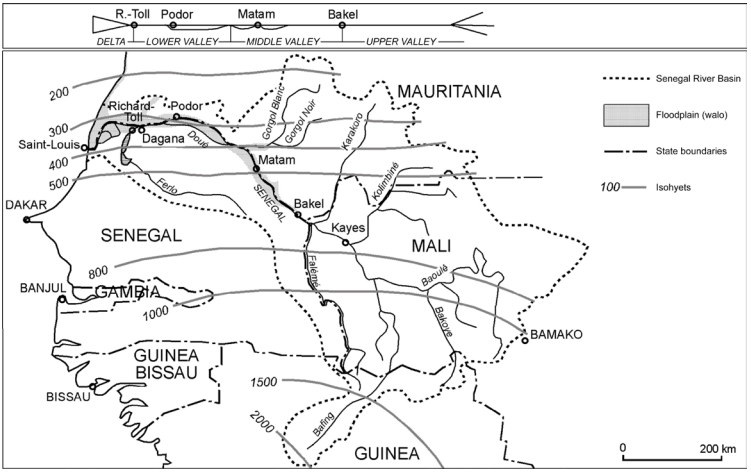

Fig. 1 The Senegal river basin.

3. The agrarian reform and the big hydraulic transformation

After independence (1960), Senegal suffered a deficit in the provision of rice to the population, especially urban, so making it dependent on imports. In this context, the Senegal river valley, given its hydro and agricultural potential (assessed at 240,000 hectares of irrigable land), was chosen by the state to be made into the country's 'rice basket', starting precisely with the delta area.[7]

To meet the challenges of food self-sufficiency and development of the country, in 1964 the government enacted an agrarian and land reform, the *Loi sur le Domaine national*, on the basis of which the state became the owner of 'all the lands not classified in public ownership and not registered[8] on the date of the current law coming into force' (article 1). The purpose of the law was to ensure the rational use and 'improvement' of the land, and at the same time foster more equal and democratic access. The *Domain national* lands were divided into four categories: *urban zones*, *protected zones*, *countryside zones* – for rural settlements, agriculture and livestock farming and managed by the rural communities (which in the river region were set up only in 1981 due to the strong resistance from the traditional hierarchies). The fourth zone was *pioneer zones*, intended for specific projects and programmes and entrusted to development companies.

In 1965 the government thus granted SAED 30,900 hectares of bowls in the delta *walo* classified as *pioneer zones* to be turned into big schemes over in a ten-year span for the production of 60,000 tonnes of rice[9] and improvement in the population's quality of life.

In its turn SAED attributed the lands to farmers organised into cooperatives as recipients of plots in exchange for the an-

7. Here, in the 1950s France had launched the first attempts at mechanised rice growing but with very disappointing results: 6000 hectares cultivated against the planned 50,000 and an annual deficit wavering between 8 and 50 million CFA (African Financial Community) francs.
8. A first attempt at land registration was made by France in 1906 to turn customary into property rights, but at independence only 3% of the land was registered due to the lack of information and conveyance measures in rural areas, as well as the entrenchment of customary rights.
9. Rice imports amounted to 150,000 tonnes.

nual payment of the water rates, the costs of ploughing and the agronomic input (seeds, fertilisers, pesticides) provided on credit by SAED and settled collectively by the farmers with a part of the sacks of rice harvested. The big schemes were very large indeed, from 100 to more than 1000 hectares, and were entrusted to cooperatives of a 100 to 350 members. So their management was very complicated. An 85 km embankment was built for the irrigation of the schemes, equipped with sluice gates to control the inflow of water from the river in spate. But the embankment isolated the bowls from the flood, thus making flood recession farming and grazing impracticable (Maïga 1995).

State investment in the project was considerable, 5.5 billion CFA francs, of which 66 % came from foreign financing, but the results were very poor. In ten years SAED created only 10,000 hectares of schemes, and the production of rice did not take off (on average between 0.6 and 2 tonnes per hectare). There were also various problems relating to the repayment of credit, the management of the schemes[10] and, most of all, land allocation.

The plots were distributed in an egalitarian manner to the heads of families on the basis of the number of active males in the family nucleus. This principle, though on one hand introducing an important element of democratisation with access to the land by traditionally excluded groups, on the other left out young people (both men and women), who according to traditional uses should have received land to cultivate on reaching maturity (Mathieu 1991).

Furthermore, the parcels, at an average of 2.3 hectares, were too small to ensure sufficient income, and each year they were redistributed among the members of the cooperatives, a procedure that induced the farmers not to tend their portion, given that they then had to abandon it in favour of another. The farmer, feeling he was a mere employee, did not develop a sense of belonging to the project and thus compromised its success.

At the same time the traditional elites, who often had the role of presidents of the cooperatives, began reasserting themselves

10. So there was a move from gravity irrigation, overly dependent on the flood, to the construction of pumping stations.

with actions like illegally selling part of the rice crop on the parallel market to procure personal gains. They exploited to their own advantage the principle of the 'joint repayment' of the credit by all members of the cooperative with the complicity of SAED agents, who received part of the profits (Dahou 2004). A relationship of patronage thus developed between SAED and some exponents of the rural world, so reinforcing their political role.

The most significant impact of the spread of rice growing was the exclusion and marginalisation of the *peuls* herdsmen, predominant in the delta,[11] who with the land going under the control of the SAED lost their centuries-old rights to flood recession grazing, and found themselves expelled from the grazing lands turned into schemes (Le Gal and Dia 1991). Indeed, the delta had been a favoured place for extensive transhumant grazing as it offered the seasonal complementarity necessary for maintaining the livestock: pasturing on the dunes of the *djéri* during the rainy season and flood recession, grazing in the *walo* and along the banks of Lake Guiers in the dry season. Because of this mobility, the *peuls* had enjoyed all of the delta space (Lericollais 1975).

The environmental situation was also critical because of the deterioration of the soils (salinisation, pollution, deforestation) and the loss of eco-systemic balance caused by the irrigated schemes and the protection embankment, which put an end to annual flooding.

The 1970 drought aggravated the deterioration and rarefaction of the vegetal cover, further weakening the pastoral activities.

4. The structural adjustment and the boom in private irrigation

In the meantime, at the end of the 1970s, the country's serious financial crisis and at a local level the difficulties of the schemes (their rapid decline, the wear and tear of the pumping material)

11. The few farmers' villages were near the river, where flood recession farming was accompanied by fishing, or further south in the lands bordering the *djéri*.

plus the onerous debt to SAED forced the government to adopt Structural Adjustment Programs.

In 1984 the government implemented a profound restructuring of the agriculture sector with the *Nouvelle Politique Agricole*, on one hand reducing the public financing and state structures, on the other encouraging the devolvement of responsibility to the producers in the management of the schemes and promotion of the private sector so as to increase production and productivity. In order to facilitate the devolvement of responsibility to the producers, a form of association that was lighter than the cooperatives and qualified for bank loans was set up: the Economic Interest Group (GIE). The disbursement of rural loans was entrusted to the *Caisse Nationale de Crédit Agricole du Sénégal* (CNCAS), set up in 1984.

The process of privatisation was accompanied by administrative decentralisation in favour of local autonomy with the creation of rural communities and the respective rural councils, to manage the *countryside zones*. In 1987, the *pioneer zones* managed by SAED and still free were converted into *countryside zones* and transferred to the rural communities.

At the end of the 1980s, the construction of the Diama and Manantali dams[12] (the former at the mouth for blocking the salt-water intrusion, the latter upstream to hold back the water) allowed the capacity of the river to be regulated and agricultural production to be freed of the droughts that had afflicted the Sahel since the end of 1960s.

The important mobilisation of credit carried out by CNCAS, along with the transfer of land management to the rural communities, triggered the creation of new schemes, by individuals alone or associated with GIE, and resulted in three particularly important phenomena: a ruthless competition for the land; an appropriation of the irrigable lands, also by external actors; the gradual expulsion of the herdsmen from the pasturing zones and access to the water.

12. The dams were built by the *Organisation pour la Mise en Valeur du Sénégal* OMVS, which groups together Senegal, Mali and Mauritania for an integrated river management.

The private schemes were of 20-50 hectares, created mechanically but without drainage canals and without any prior topographical or soil studies. The only criterion followed for their location was their proximity to water. Almost all the land situated along the river and the irrigation canals was occupied very quickly and in a disorderly way, without taking into account the real availability of water, respecting the transhumance paths or the areas for watering and grazing the livestock (Bélières and Kane 1995). Indeed, the situation for nomadic herding became more and more critical, due to the extension of these schemes. SAED itself (2003) made these observations on the matter: 'in the Delta, the ordering of one hectare of irrigated perimeter has caused the stripping of from four to six hectares of pasture. In this way the 80,000 hectares of pathways, which supported a density of about 20,000 head of stock, have been reduced to less than 10,000 hectares. And because of the high salinity, the drainage water does not favour regeneration of the natural pastures'. The administrative division of the land into rural communities also posed problems for pastoral mobility by the creation of limits to the flows of herdsmen and stock.

Although cultivated surfaces grew rapidly (from 22,700 hectares in the 1987-88 campaign to 41,500 in 1993-94), as did the production of rice (180,000 tonnes in 1991-92) (Bélières et al. 1995), there was a quick inversion of trend: the yields from the private schemes rapidly decreased so as to cause the land to be abandoned and new spaces sought.

The rural councils, on their part, did not have either the preparation or the means to plan and manage the irrigation development: 'There were no financial measures (long term loans) to help or encourage the producers to create technically sustainable schemes. There was no overall development plan for the delta on the basis of which to organise and distribute the private schemes' (Bélières et al. 1995:165).

But this situation was also explained by the fact that the local elites quickly took control of the councils and thus the land attribution, in order to recover their lost privileges (Mathieu 1991). In this way they circumvented the rules for assigning the land

which provided for the land to be granted to members of the rural community who would assure their 'improvement' (*mise en valeur*), and benefited instead their own families, friends of party companions.

Emblematic of this was the Lake Guiers zone. In the first two years (1982-83) of the Mbane and Ross Béthio rural communities, which face onto the lake, numerous requests were made to the rural councils for the attribution of land totalling a good 5,500 hectares, corresponding to almost all the irrigable banks belonging to the two rural communities. More than 40% of the requests came from non-resident individuals or companies; the rest were from members of the local aristocracy: village chiefs or members of their families, presidents of the cooperatives (Mathieu et al. 1986).

Alongside this, many leaders of the rural organisations joined the socialist party, the majority in the area, in order to get onto the rural councils and have the land granted to their associates, mainly young people and women excluded from the big schemes, but also the farmers of the cooperatives who sought to obtain new plots to feed their families. There was also an interest in 'securing the land' before external investors or big agro-industrial companies did (Dahou 2004).

In order to gain a greater capacity for putting pressure on the rural councils, many GIE joined together into big federations, which became the intermediaries of the land negotiations with the rural communities. The leaders of these organisations thus became genuine '*courtier de développement*' (Blundo 1995), thanks to their ability to communicate with the 'development actors' and so attract financing and projects and obtain the land, ensuring the link between the local, national and international political arenas (Dahou 2004). Local farmers, but also those from outside the zones, retired or still active licensed employees, young graduates, merchants and the self-employed thus moved through these organisations to obtain land. Many of them, unskilled in agriculture and living far from the production places, eventually went bankrupt and abandoned this new activity. (Bélières and Kane 1995).

In general, the increase in production costs, due to the removal of state subsidies, did not allow for adequate profits, partly due to the competition from Asian rice, with the result that many farmers were not able to repay the credit and were forced to abandon their parcels, becoming tenants or wage-earners of the richer producers.

The introduction of the rural communities and rural councils was intended to put an end to the customary rights to the land, but the unequal access to the land on the basis of social status was actually replaced by that determined by the economic possibilities of rural credit repayment.

Although the traditional land management rules were not based on equity, they were known by all members of the society, who could resort to them when problems and disputes arose (Seck 1998). The modern ordering, however, based on written laws, is the prerogative of the more educated and more influential members of local society, who use them for personal reasons and patronage. Furthermore, the composition of rural councils raises an important problem of representation regarding the interests of the local community: some categories of actors are not included or are under represented (young people, women, herdsmen, members of castes) (Traoré 1997).

5. Liberalisation and land grabbing

Nowadays, economic liberalisation policies, the opening up to private investment and the food crisis (2007-2008) have rekindled interest in agricultural development, which had been drastically reduced by the Structural Adjustment Programmes. In 2008, in response to the food crisis, the Senegalese government launched the *Grande Offensive Agricole pour la Nourriture et l'Abondance* (GOANA), a new agricultural policy for the modernisation and accelerated increase of production with the ambitious aim of reaching food self-sufficiency. For this reason, due to the public

debt and the reduction in agricultural aid,[13] the state was driven to facilitate foreign investments with quick and attractive procedures in regions with a high hydro-agricultural potential.

With the GOANA law, the government established notable economic advantages for agricultural activities (e.g. exemption from VAT and customs duties for the purchase of agricultural materials; guarantee of the transfer of profits abroad) that were added to other measures to attract investments:

- a new investment code adopted in 2004 and updated in 2012, with creation of a free export business regime for companies exporting at least 80% of their turnover, which provides for the free transfer of wages for foreign workers, free transfer of dividends to foreign shareholders and the unrestricted hiring of foreign personnel;
- the institution of the Centre de Facilitation des Procédures Administratives, as part of the Agence nationale chargée de la Promotion de l'Investissement et des Grands Travaux (APIX), charged with taking in requests for land from investors and transferring them to the presidents of the rural communities so as to the facilitate attribution times and procedures.[14]

In a very short time numerous investors arrived, especially in the delta zone (see table 1), with wide-ranging projects that had little to do with the aim of increasing cereal production for food self-sufficiency. Indeed, most of these projects are destined for biofuel (highly incentivised by the new energy policies adopted by the USA and the EU). So there is a risk of food insecurity and a loss of sovereignty.

13. From the mid 1980s the volume of aid for agricultural development was halved, totalling 6.2 billion dollars in 2007 (Gabas 2011).
14. Similar dynamics also exist in Mali, where the government has launched measures to attract investment and has created the *Agence pour la Promotion des Investissements* (Quatrida, 2015), In Sudan the *Supreme Council for Investment* and the *National Investment Authority*, its executive arm, have been set up with the task of defining a national strategy for encouraging investments in the country.

Investor	Investor country	Crop	Size (ha)
Asiyla Gum Company	*Saudi Arabia, Senegal*	*Non-food agricultural commodities: Acacia, Rubber*	*20,000*
Compagnie fruitière	*France*	*Food crops: Tomatoes, Corn*	*300*
Dangote Industries	*Nigeria*	*Biofuels: Sugar Cane*	*40,000*
Durabilis	*Belgium*	*Biofuels: Jatropha*	*5,000*
Nuove Iniziative Industriali srl	*Italy*	*Biofuels: Jatropha*	*50,000*
Senhuile-Senethanol SA (Tempieri Financial Group)	*Italy*	*Biofuels and Food crops: Corn, Peanuts, Rice, Sun Flowers, Sweet Potatoes*	*20,000*
Société de culture légumière	*France*	*Food crops: Onions, Peanuts, Sweet Potatoes, Corn, Vegetables*	*3,000*

Tab. 1 The main agricultural investments in the delta zone (Source: Land Matrix 2015)[15]

One of the most controversial cases is that of Senhuile-Senethanol SA, which, after the blocking of its first organisational project in the Fanaye rural community following clashes with the population that caused the deaths of two people, received a new lot of 20,000 hectares in the delta zone thanks to the intervention

15. http://www.landmatrix.org/en/get-the-detail/by-target-country/senegal/?order_by=&starts_with=S (8 June 2015).

of Wade. In March 2012 the president provided for the downgrading of 26,550 hectares belonging to the Ndiael natural reserve into a countryside zone and the granting of 20,000 hectares of it to the company for a period of fifty years. The remaining 6550 hectares are to be reallocated to the 37 villages in the project zone, belonging to three different rural communities (The Oakland Institute 2014).[16] In the Diama rural community, too, 1800 hectares reserved as a protected area have been given over to individuals for agricultural projects, changing their end use (Faye et al. 2011). In the Mbane rural community more land than is actually available has been attributed (mainly to ministers and local politicians): 232,207 hectares on 190,600. Indeed, the sizes of the new schemes are often negotiated only at a political level, without any evaluation of the sustainability and coherence of the investments with the available resources and compatibility with the present uses and users (there is corruption and a general absence of adequate socio-environmental impact assessment).

Regarding the availability of land, it must be noted that land pressure in the delta zone is already very high and the new projects represent a further reduction in agricultural and grazing land.

If the new land attributions are added to the existing rice-growing schemes and to those being established, the total land area destined for irrigated agriculture greatly exceeds the 240,000 hectares of the valley's irrigable potential. In reality, on the basis of the *Plan Directeur de Développement intégré pour la Rive Gauche de la vallée du fleuve Sénégal* – adopted by the government in 1994 as a frame of reference for the development strategies in the valley for the subsequent 25 years – the figure of 240,000 hectares is a theoretical maximum available in that it does not take into account the drawing of water for domestic use (nor of the demographic increase of the population), losses by evaporation, seepage and inefficiency of the piping network, or the need to guarantee the artificial flood of the river for regeneration of

16. The project was then suspended by the newly elected president, Macky Sall, who during his electoral campaign had placed himself against the buying up of land, but who after a few months did a 180° turn and ratified the decrees issued by his predecessor.

the ecosystem. So, considering these limiting factors, the actual irrigable surface would come to 154,500 hectares (République du Sénégal 2003).

These diverse elements show how such private investments are inserted in a frame of national deregulation (Sassen 2013) to remove obstacles to the arrival and free movement of companies, capital and goods, lowering the environmental and social protection laws and completely losing sight of the needs of the local people. Indeed, the ever-increasing dependence on foreign investments incites African states to compete with one another to make themselves more attractive by creating a 'business friendly' environment. From pilot actor and driver of development, the state in this way risks becoming a mere economic space for producing profit and performance on the global market (Walford et al. 2013).

6. Conclusions

By means of a brief excursus on the irrigation development in the Senegal delta, this paper has highlighted the different conceptions of the land and of the rights to the land in the move from a customary management system to a 'modern' one, and also the reactions and adjustments of the local actors to the changes introduced. The result is a re-composition that does not make a clean break with the past, but reflects the multiple inheritances that over time have become interwoven, overlaid, mixed, and which must be taken into account to promote access to the land that is more equal and more attentive to the weakest and most vulnerable actors.

The land reform adopted by the Senegalese state in 1964 has various critical aspects (Plançon 2009) because of the ambiguity of some definitions such as the concept of 'improvement' (*mise en valeur*) of the land and that of 'member' of the rural community. The notion of 'improvement', which, although not making explicit reference to agriculture, has actually excluded the multiple uses of the land made prior to the introduction of irrigation, allowing only agricultural use as being valid. This question is not

at all trivial if consideration is given to the fact that the valley and delta of the Senegal river are fragile ecosystems in which human activities should take account, on one hand, of the times and methods of regeneration of the natural resources with a view to the sustainable management of these; on the other, that the different interpretation of the notion implies a choice of the uses thought valid, consequently creating opportunities for some actors (the farmers) and exclusions for others (e.g. herdsmen and those who do not have the financial means to build hydraulic infrastructure). At the same time, the work of cultivating land takes on a very different economic and social value if directed towards the promotion of family agriculture, which is the most widespread production system in the region, or of big, highly mechanised monocultures that imply specific environmental (use of the water and soil resources) and social impacts. The notion of 'member of the rural community' has also generated no few ambiguities, leaving room for practices contrary to the objective pursued by the law itself (democratising access to the land). Being a member of the rural community should respond to criteria of residence in the area in which the land is requested, but the assignment of land to members of other rural communities and even foreigners who associate themselves with residents or use political (patronage) or economic (corruption) pressure has been seen. Furthermore, much of the land attributed is not actually used or is used for productive purposes related to exports and not the country's food supply, as shown by the new agricultural investments being made.

The lack of any clear regulation, control procedures or criteria of real representation of the local communities within the rural councils encourages a dynamic of concentration of the land in the hands of the most wealthy and those affiliated to the party in power, at the cost of the weaker and more vulnerable local actors.

National laws do not take into account adequately the local rural land tenure system, or the specific nature of the pastoral system (grazing and watering areas, passages, transhumance paths), which is not given adequate representation either at a local level in the rural councils or a national one in rural development policies.

The agricultural development policies of irrigation, in particular, show the prevalence of production aims and adaptation to the needs of world governance and the market that highlight the difficulty (or perhaps the impossibility) of establishing a balance between opening up to markets, capital and investments and the maintenance of principles of equality and solidarity in access to the land and to food security.

The launch of a new land reform (currently under way) should start from this complexity to restore the multiple actors involved and the interweaving of the social, economic, political and cultural dimensions.

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Massimo Zecchini, Silvana Mattiello[1]

THE RIGHTS OF SAHELIAN TRANSHUMANT PEOPLE

Abstract

Transhumant pastoralism is one of the dominant production systems in Sahelian countries because of its capacity to adapt to a changing environment. This system involves 70-90% of the Sahel cattle (zebu) and 30-40% of small ruminants and a significant proportion of the population in West Africa. In last few decades, various factors have been seriously influencing these pastoral practices, such as climate changes, demographic and agricultural expansion, land occupation by extractive industry and monocultures, the sedentarisation process and natural resources protection policies. The present paper analyses these factors and the trends of transhumant pastoralism in the Sahel area following these changes. In particular, sustainability and the integration of pastoral systems in a natural resources management of Sahelian environment are reviewed and discussed.

1. Geographic and social context

The Sahel is the eco-climatic and biogeographic zone of transition between the Sahara desert to the north and the Sudanese savanna to the south (14th to 18th parallel) and between the Atlantic Ocean and the Red Sea, with rainfall variability from 100 and 600 mm per year (Hein and de Ridder et al. 2011). Although this area is defined in different ways, we adopt the definition of Sahel as an African area that includes parts of the following eight countries: Mauritania, Senegal, Mali, Burkina Faso, Niger, Chad, Sudan and Eritrea (Le Houerou, H.N. 1980).

It is a traditional area of nomadic and/or transhumant pastoralism used by various ethnic groups: the Moors in Mauritania, Senegal and Mali; the Tuareg in Mali, Burkina Faso and Niger;

1. Università degli Studi di Milano, Dipartimento di Scienze Veterinarie e Sanità Pubblica (Department of Veterinary Science and Public Health).

the Fulani from Senegal to Chad across Mali, Niger, Burkina Faso and Nigeria; the Teda and other Arabic groups in Chad; the Zaghawa, Baggara, and Kabbabish in the Sudan (ibid.).

There are no official statistics on pastoral population numbers in the Sahel but some attempts have been made to estimate them (ILRI 2002), as shown in Table 1.

Countries	Human population (2010)	Rural population (% of tot.)	Pastoral population (% of tot.)
Mauritania	*3,609,000*	*2,121,000 (58.8%)*	*n.a.*
Senegal	*12,951,000*	*7,479,000 (57.7%)*	*813,337 (9.8 %)*
Mali	*13,986,000*	*9,192,000 (65.7%)*	*2,182,947 (19.3 %)*
Burkina Faso	*15,540,000*	*11,552,000 (74.3%)*	*845,042 (7.0 %)*
Niger	*15,894,000*	*13,094,000 (82.4%)*	*1,627,132 (14.4 %)*
Chad	*11,721,000*	*9,173,000 (78.3%)*	*n.a.*
Sudan	*36,431,000*	*22,779,233 (64.2%)*	*n.a.*
Eritrea	*5,741,000*	*4,541,000 (79.1%)*	*n.a.*
Tot.	*115,873,000*	*57,152,000*	*5,468,458*

Tab. 1 Human, rural and pastoral population in the Sahelian countries (FAOStat, 2011 and ILRI, 2002)

This data demonstrates that a significant proportion of the population in the Sahel area, ranging from 7% in Burkina Faso to almost a fifth of the population in Mali, is pastoral. Work by Rass

(2006) indicates that in Sudan, Chad, Niger, Mali and Mauritania pastoralists represent a small fraction of the population but hold a major share of the national herd.

Transhumant pastoralism is one of the dominant livestock production systems in West Africa in general, and in Sahelian countries in particular, because of its capacity to adapt to changing rainfall patterns. The transhumant system involves 70–90% of Sahel cattle (zebu) and 30–40 % of small ruminants in West African Sahel (SWAC/OECD 2007) and can be defined as a livestock production system characterized by seasonal and cyclical movement of varying degrees between complementary ecological areas (FAO 2011).

As cited by Ayantunde et al. (2014), the basic pattern of transhumance in the Sahelian region is a north-to-south migration in which pastoralists and their livestock transit from the more arid Sahelian region in the north to the more humid Sudano-Guinean regions in the south. This traditional seasonal migration covers hundreds of kilometres within or across national boundaries and lasts from three to eight months.

Frequently viewed as an archaic system, there is evidence demonstrating how pastoralism adapts to the changes and constraints of the Sahelian environment by means of a strategy which ensures the sustainable use of land (Niamir-Fuller 1999). Nevertheless various factors have influenced transhumant pastoralism during the last few decades and can be grouped in two broad categories: (1) environmental factors such as climatic change (and consequent seasonal pasture and water scarcity) and animal diseases; (2) socio-economic factors such as land use changes, demographic pressure, and consequent loss of pastureland, social relations and networks (FAO).

2. Factors influencing transhumant pastoralism and land use

Major factors influencing the pastoral practices of transhumant people in the Sahel region can be defined as follows.

2.1 Climatic changes

In a recent past, the Sahel region experienced serious drought or declining rainfall periods, mainly between 1968-1974, 1983-1984, 2002-2003, 2005 and 2009 (Touré, Ickowicz et al. 2012). In 1984, drought severely affected all the countries from Mauritania to Ethiopia, including several bordering on the southern edge of the Sahel. Climate changes affect transhumant pastoralists because they affect the quantity and quality of natural pastures. As a result, transhumant herders are forced to find new routes and lands to access rangelands and water for the livestock.

2.2 Animal diseases

Trypanosomosis, a tsetse-borne disease potentially affecting all domestic animal species is endemic in the sub-humid and humid ecological zones of West Africa. The zebu cattle (*Bos indicus*) are not tolerant to trypanosomosis, which represents a serious barrier to livestock production in these areas. In general, transhumant herders with Sahelian breeds avoid zones with high tsetse populations and high risk of trypanosomiasis infection, but the Sudano-Guinean (sub-humid and humid) area, where access to pasture and water (and partially to trypanocidal drugs) is easier and presents an opportunity for pastoral populations. Nevertheless, these sub-humid areas are more and more dedicated to agriculture activities, which results in an increasing conflict between the two communities.

2.3 Demographic and agricultural expansion

In the last thirty years, the population of the Sahelian countries has been growing in a significant way (Table 2). This shows the importance of demographic increase, with rates which are expected to stay within the same range at least in the coming decades. This expansion contributes to increasing agricultural lands (Table 2) mainly in the sub-humid area, where crop production

is more developed. As a consequence, livestock mobility and transhumance are more difficult than in the past.

Countries	Human population in 1980	Human population in 2010	Trend %	Agricultural land in 1980 (% of tot.)	Agricultural land in 2010 (% of tot.)	Trend %
Mauritania	*1,534,000*	*3,609,000*	*135*	*38*	*39*	*3*
Senegal	*5,569,000*	*12,951,000*	*135*	*46*	*49*	*7*
Mali	*6,735,000*	*13,986,000*	*108*	*26*	*34*	*31*
B. Faso	*6,823,000*	*15,540,000*	*128*	*32*	*4435*	*38*
Niger	*5,834,000*	*15,894,000*	*172*	*24*	*39*	*46*
Tchad	*4,513,000*	*11,721,000*	*160*	*38*	*47*	*3*
Sudan	*n.a.*	*36,431,000*	*n.a.*	*46*	*57*	*24*
Eritrea	*3,345,000*	*5,741,000*	*72*	*n.a.*	*72*	*n.a.*

Tab. 2 Agriculture and human population trend (FAOStat, 2015) * n.a.=not available

2.4 Land occupation by extractive industry and monocultures

Extractive industries (petroleum, mining industry, …) have been on the increase in several Sahelian countries (Chad, Niger and Sudan particularly), taking away lands originally dedicated to agricultural and pastoral use. Similarly, monocultures like sugar cane and *Jatropha curcas*, this in particular for biofuel production, have been expanding in Senegal and Mali, suggesting that this is just the beginning of a massive trend (Kachika 2011). It was estimated that agricultural production for the exporting trade has multiplied by 2.5 in the last few years (Ayantunde et al. 2014).

2.5 Pastoral sedentarisation process

In most of development governmental policies on livestock management, the pastoral system is considered an archaic method, which should be abandoned in favour of up-to-date, intensive and sedentary models that would better respond to the problems of agricultural expansion and the increasing demand for animal products (Bonnet et al. 2010). In this context, various Sahelian authorities are managing natural resources, land tenure and livestock mobility by means of a decentralisation system and a community-based approach that imply a sedentarisation process of pastoral communities. Although this process is an important step towards democracy, most pastoral people have little awareness of the policy and legislative framework governing access to the resources on which they depend (SEREIN 2011). So, there is actually a low level of representation of pastoral people on local councils and the needs of these communities are not sufficiently considered.

Furthermore, it is important to highlight that the process of sedentarisation of transhumant and/or nomadic people is increasing partly for the following other reasons:

- Governments encourage the sedentarisation process in order to control demographic development and taxation;
- Transboundary paths are more and more difficult because of custom and animal disease controls; moreover, transhumance

across different countries involves the multiplication of government taxes on livestock herds;
- Proximity to villages or urban centres allows better schooling, family healthcare and commercial transitions.

3. Natural resources protection policies

Awareness of wildlife, plants and biodiversity protection has increased all over the world, especially in the last century. This has led to the creation of new protected areas, or to the enlargement of existing ones, in order to safeguard plants and animals, with special regard to threatened or endangered species. These areas currently represent 13.5% of pastoral zone in the Sahel (Niamir-Fuller 1999).

Although this process is obviously important for maintaining biodiversity, it results in barriers to the movement of transhumant herds, which are usually prevented from entering protected areas, in order to avoid the transmission of diseases and competition for food and water resources between domestic and wild species. This sometimes forces transhumant herders to modify their migration routes and travel long journeys to pass around the protected areas to reach suitable pasture areas.

4. Is transhumant pastoralism still sustainable in the Sahelian environment?

There is general consensus that transhumant pastoralism is essential for maintaining the ecological resilience of the Sahelian ecosystem and ensuring livestock productivity (FAO 2011; Niamir-Fuller 1999; Touré, Ickowicz et al. 2012). To confirm these views with the help of various authors, some evidence is provided to confirm that the needs of transhumant pastoralism in Sahelian countries demand particular attention:
- Animal production by pastoralism system is the major economic resource in most Sahelian countries (Rass 2006);
- Livestock mobility is recognised to be a far more effective

strategy for ensuring a sustainable use of a dryland environment and climatic variability with the best utilization of dispersed and uncertain pastures with little alternative economic exploitation (Ayantunde et al. 2014);

- Benefits of a mobile pastoralism involve both transhumant and host communities. For transhumant pastoralists, the benefits include herd productivity (more milk and improved herd reproductive performance), a decrease in herd mortality (with preservation of livestock effects), general low production costs and opportunities to build social relationships with the host communities. On the other side, for the sedentary communities the benefits of transhumance include manure on crop fields from transhumant herds and the availability of animal products (milk, meat) (FAO 2011);
- Transhumant pastoralism from the Sahelian area is taking advantage of the growing livestock trade, due to rising demands in coastal countries such as Nigeria, Ghana, Cameroon and Cote d'Ivoire;
- Pastoralists are custodians of key national resources, found in arid and semi-arid areas and help to protect and safeguard these resources (*African Union* 2010);
- The sub-humid and humid areas of Africa are not suitable for breeding zebu cattle because of the endemic presence of trypanosomosis, though the rangelands and water availability are important elements of attraction.

Despite its importance, pastoralism faces serious obstacles mainly because it lacks in environmental policy, with important problems of conflicts between transhumant herders and crop farmers in the Sudano-Guinean zone, especially because of competition between grazing and agricultural resources (FAO 2011).

Moreover, some authors affirm that government policies have failed to protect key pastoral resources such as wetlands and livestock corridors from agricultural expansion. Reduced pasturelands, blocked livestock routes and limited or difficult access to water or dry-season fodder are undermining pastoral livelihood systems, contributing therefore to environmental degradation, exacerbating poverty and fuelling conflict (Kachika 2010).

5. How Sahelian transhumant pastoralism is changing

Personal experience and bibliographic reports (FAO 2011) agree with the findings that the trends and patterns of transhumant pastoralism are changing in West Africa, especially in the Sahel zone, according to the following dynamics:

- There are more southerly movements by transhumant pastoralists into the Sudano-Guinean zone because of climate changes (desertification and droughts) and the expansion of cropping into grazing areas in the Sahel (agriculture);
- There is more livestock in the Sudano-Guinean zone now than before, with increasing ownership by farmers as well as the settlement of some pastoralists in the area. This trend has exacerbated resource use competition between the indigenous farming population and the transhumant herders, with a higher risk of conflicts;
- Transhumant routes show an increasing trend and are more dispersed. This has been attributed to increased frequency of droughts and the expansion of crop fields and protected areas into livestock corridors, which may force transhumant herders to create alternative livestock routes;
- As a part of the people leave pastoralism, others remain in the system and continue to rear livestock as the main means of their livelihood. However, in areas with relatively higher rainfall and the option of crop production, pastoralists are under increasing pressure from farmers and, in the absence of land tenure, lose their land and way of life.
- A part of pastoral land has been sequestered by governments for extractive industries and monocultures without contemplating a compensation system. This attitude discourages pastoral people and pushes transhumant communities to find new lands.

On the basis of previous elements affecting not only land, pasture and water tenure but also the social relationships of the transhumant people, we believe that pastoralism is an essential and central practice in the region, not only in terms of the number of people and domestic animals involved, but also relating to the

high economic induced value and its characteristic of resilience in a changing environment.

6. Integrating Sahelian pastoralism in a modern vision of natural resources management

In agreement with the African Union, which has suggested a very interesting policy for pastoralism in Africa (SEREIN 2011), we believe that the actual strategy for improving food production and the resilience level of local communities (and cattle population) in Sahelian area is not to extinguish pastoral and transhumant practice. Intensive systems of animal production are more suitable in urban and peri-urban contexts, while in rural and pastoral environments mobility is the key to an appropriate exploitation of lands. Thus, it is imperative to assist Sahelian countries in improving their natural resources management according to a modern vision preserving livelihoods and defending the rights of pastoral communities. The following points are offered as a basis for a discussion aiming at improving understanding between pastoralists and policy makers.

Climate changes have an undoubtable impact on land management in the Sahelian area with drought cycles that affect water and rangelands availability. In West Africa, emergency responses are still dominated by food aid strategy, whereas risk-based approaches are not sufficiently developed. It is important to encourage this approach in order to prevent crisis periods and manage the best strategies to implement before emergencies arise. Moreover, there are many lands unsuitable for agricultural labour that could become interesting for pastoral activities once investments have been made in livestock corridors and basic services along the transhumant routes (water points, resting areas, access to markets, clinics, etc.);

It should be recognized that mobility is the basis for an efficient use and protection of rangelands and the key to an appropriate adaptation to the climatic variability of the Sahel. In order to improve and properly manage this strategy, it is essential to secure access to rangelands for the pastoralists through supportive land

tenure policies and the development of regional procedures to enable movements and livestock trade. A starting point may be the international agreement among West African countries that allows free cross-border livestock movement including seasonal cross-border transhumance (SWAC-OECD/ECOWAS 2008). This policy recognizes the ecological and economic importance of mobile pastoralism, its implications on cross-border transhumance as well as on the integration of regional livestock markets. Related to inter-regional livestock movements and animal disease, there is also the need to update policies and use more contemporary assessments of epidemiological and market opportunity studies;

In the sub-humid and humid area (Sudano-Guinean zone), where human and cattle densities are increasing, the integration of pastoral and agricultural activities (crop-livestock system) is probably the main way of allowing the cohabitation of two models of life and improving both agricultural and livestock production;

In a perspective of a decentralisation system and a community-based approach, mainly in the Sudano-Guinean zone, the sedentarization process of the pastoral people is evident. In order to consider the necessities and the rights of mobile pastoral communities in natural resource management programs, local government authorities need support to implement decentralisation processes and favour a participatory approach including these communities. The integration of pastoral issues into decision-making processes is important also for minimising and preventing the conflicts between different communities. It is also important to remember that decentralization reform should not be a pretext for multiplying taxes on livestock herds, even if there are communities not welcoming transhumant herds in their territories, despite regional and national laws that guarantee freedom of livestock mobility;

Concerning pastoral lands confiscated by extractive and/or monocultures industries, pastoralists should always be adequately compensated and/or their consent should be required in the case of the expropriation of their communal pastoral land for bio-energy production, development of oil and mineral deposits and the construction of basic socio-economic infrastructures (e.g. wells, transhumant corridors, cattle markets, etc).

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Stefano Corsi and Laura Marchisio[1]

STRENGTHENING FOOD CHAINS TO STRENGTHEN LAND RIGHTS

Case study of Eastern Chad

Abstract

Secure and predictable access to land as a productive resource is central to the livelihoods of millions of farmers around the world as well as being an asset for economic development, food security and poverty reduction. Effectively, secure land rights enable farmers to invest in long-term improvements to their farms and soils in the expectation that they will reap the benefits of those investments (Lawry et al. 2014)

Moreover, several papers (Persha et al. 2010, Porter-Bolland et al. 2012) on the use and management of resources demonstrate that ecological and livelihood outcomes are greater where farmers have clear-cut, secure rights to the resource. As a result, formal and informal land rights are seen as key factors for improving poor conditions in developing countries in terms of economic growth, agricultural production, food security, natural resource management, gender-related inequalities, conflict management and local governance processes (Lawry et al.2014).

In the last decade, scholars and practitioners have greatly recognized that smallholder agriculture is an important part of the livelihood for many poor people, and it has been argued that its growth is fundamental for widespread poverty reduction (Dorward et al. 2004). This growing importance has led to two major streams of theory and practice aimed at enhancing Africa's uncertain agricultural economies. The first stream states that agricultural development and especially the development of the agro-food value chain will not occur without involving smallholder farmers, who account for the overwhelming majority of actors in this sector (Magingxa and Kamara October 2003) (Diao and Hazell 2004). According to the second stream, the major issue facing smallholder-led agricultural growth is the lack of market access, which will lead to increased incomes and food security, more rural employment, sustained agricultural growth and, finally, shape an efficient and well-structured supply chain (Stiglitz 2002) (Dorward 2003). There is an increasing recognition that the opportunity for smallholders to increase their incomes from agricultural production, natural resource management and related rural enterprises

1. Department of Agricultural and Environmental Sciences, University of Milan.

depends on their ability to participate successfully in markets. Consequently, the focus of research and development has broadened from building up farmers' production capabilities to facilitating their access to markets (Shepherd 2007).
In the present paper we will face the links between land tenure and agriculture performance, assuming that the value chain is a tool that could help smallholders organization to increase both tenure security and food security.
In the first paragraph we address land tenure systems in Africa, especially how customary systems are changing over the years and which factors are influencing the process. In the second paragraph we present a value chain approach and the importance of collective actions in it. The third paragraph is the case study and presents a research carried out in Eastern Chad.
As a result, in this paper we will try to answer the following question: can a value chain approach and collective action increase the resilience of local farmers in the case of social shock?

1. Land tenure systems in Africa

Land tenure policies in Sub Saharan Africa have been influenced over the last few centuries by a variety of factors such as local traditions, religion and colonialism. Before the colonial period, African local authorities had been subjected to nonlocal legal regimes that departed fundamentally from the still generally dominant customary systems of tenure and natural resource management (Elbow et al. 1996). Trying to provide adequate tenure security, the post-colonialist independent local governments have based their policies mainly on three different strategies: a) acquisition of individual land titles; b) recognition of different types of tenure; c) land nationalization (Feder and Noronha 1987).Through such multifaceted regulations, states tried to promote agricultural development and control lands as valuable assets and a source of political power. However, in much of rural Sub Saharan Africa, the lack of legitimacy of official rules and institutions have contributed to limiting the outreach of state interventions even where land registration has been pursued. In fact, registering lands has turned out hard, expensive and difficult in trying to keep up-to-date procedure for local governments and even harder for poor people to access (Cotula 2007). Today, African customary systems are constantly being adapted and reinterpreted as a result

of diverse factors like cultural interactions, population pressures, socioeconomic change and political processes (Cotula 2007) and still are the most widespread systems in rural Africa.

Strategies on land tenure can be influenced by local habits or religions. In many areas, Islamic laws play a large part in the community-based tenure systems as they dictate that all land belongs to all Islamic people. However private rights can be established through ten years of continuous resources exploitation such as for agricultural production, and in the same way can be forfeited after ten years of disuse (Elbow et al. 1996).

As for local habits, studies from all parts of Africa indicate that inheritance is the main method of land acquisition and is accompanied by strong, long-lasting private rights (Bruce et al. 1994). Once allocated to families or households, land rights (access and resources exploitation) are rarely revoked by a traditional authority (Sjaastad and Bromley 1997) since they are an essential part of social relationships. In addition, in common customary systems, it is not possible to sell land as it is considered to be held by lineage, and is not classed as individual property.

In most parts of Sub Saharan Africa, a land chief's authority over lands derives from community ancestors, which are supposed to be in contact with the spirits of the place, which means that they can either accept or refuse the re-settlement of their household. African customary land tenure systems may be strongly affected by the society being matrilineal or patrilineal. As a result, distinctions in inheritance systems and in how land is transferred from one generation to another are gender-related.

As general rule, African land is not a marketable good, although temporary transfers of land between community members are allowed. For a long time, in fact, plots have been borrowed or rented. However, due to an ever-increasing integration among global markets, land is now beginning to be locally considered as having a commercial value and even customary land tenure systems, which had restrictions against land sales (particularly to outsiders), are now adjusting to market conditions (Lastarria-Cornhiel 1997).

Tenure regimes, both customary and statutory, are rarely static, since many endogenous factors and/or external shocks can deeply

modify land tenure systems as well as regional and national economy. Systems differ in terms of exposure to threats or individual resilience and ability to adapt. These differences are highly significant for the vulnerability and adaptive capacity of particular individuals (Schwarz et al. 2011). Therefore, following Walker et al., "managing for resilience" might become a central objective for planning and management, since it is expected to enhance the likelihood of sustaining desirable pathways for development in an environment where the future is recognized as unpredictable, and surprises are expected to occur (Walker et al. 2004).

2. Value chain approach and collective actions

Growth in Sub Saharan Africa will take place through investment, while at the same time ensuring the livelihoods and food security of subsistence farmers. Furthermore "getting agriculture moving requires improving access to markets and developing modern market chains. It requires a smallholder based productivity revolution [...]" (World Bank 2008). Though optimism about poverty reduction is expressed, but not by all authors (Broad 2006, Havnevik et al. 2007 and McMichael 2009). African agricultural smallholders can be internationally competitive (Poole et al. 2013), at least within more favoured agricultural areas and for a range of commodities. Literature has recognized the importance of smallholder agriculture in overcoming the structural deficiencies of countries. There is a recognition that the opportunity for smallholders to increase their earnings from agricultural production, natural resource management and related rural enterprises depends on their ability to participate successfully in markets.

According to Stockbridge et al. (2003), collective actions offer one way for smallholders to participate in the market more effectively. Acting collectively, smallholders may be in a better position to reduce the transaction costs of accessing inputs and outputs, obtain the necessary market information, secure access to new technologies and tap into high value markets, so allowing them to compete with larger farmers and agribusinesses.

Literature on market access highlights the persistent imperfections of markets in developing countries (De Janvry et al. 1991). The lack of information on prices and technologies, lack of connections to established market actors, distortions or absence of input and output markets, all added to credit constraints, often make it difficult for small farmers to take advantage of market opportunities. The high transaction costs they face due to their small scale worsen these challenges, especially in niche markets such as organic or fair trade (Poulton et al. 2005). Access to these markets often requires expensive third party certification, which in turn may be a major barrier to them participating (Barrett et al. 2001).

To thrive in the global economy and enter a well-structured value chain, small farmers need to benefit from a new entrepreneurial culture in rural communities (Lundy et al. 2002). This means shifting the focus from only production-related programmes to more market-oriented interventions (Barham and Chitemi 2009).

Before taking this step, it is extremely important to understand the structure of rural communities and the characteristics of the Chadian smallholder farmers that represent the fundamental building block for shaping an efficient, equitable and relational agro-food value chain.

3. Case study: evidence of collective actions in strengthening the value chain between land non-owners in Eastern Chad[2]

In spite of considerable oil revenues, Chad remains one of the world's poorest countries, with 80% of its labour force in the agricultural sector. Eastern Chad is mainly an agro-pastoral zone; agriculture focuses on food crops (maize, millet, sorghum), cash crops (groundnut and sesame) and low-season cultures (vegetables). Because of the difficulties increasingly encountered (poor soil, pest attacks and poorly distributed rainfall in space and time), agricultural production is low. With the additional pres-

2. We consider the Wadi-Fira, Ouaddai and Dar Sila regions as part-.s of Eastern Chad

ence of refugees and social instability in the area, communities are vulnerable to internal and external shocks (Boubacar 2012). Moreover, 22.4% of Eastern Chad households experiment constant food insecurity (FAO 2014).

As in a vicious circle, the land tenure issue could be considered both the consequence and cause of the crescent insecurity. The country's skeletal land legislation dates from 1967 and does not cover the present critical issues of land tenure, including the evolution from communal tenure to individualized rights, rights to pasture and range land, and the pressure of a growing population on the limited arable land.

The most recent and decisive intervention in this matter was in 2001, when the government formulated the Rural Development Intervention Plan (PIDR) and the Master Plan for Agriculture (MPA) that included support for diversifying agricultural production, promoting farmers' organizations and building capacity in agricultural sector institutions.[3]

While customary systems vary widely across the country, most Chadians traditionally obtain land through their kinship group or lineage, through application of the *principle of first occupant*. It means that land is collectively owned under a patrilineal lineage-based tenure system, beginning with the individual who first cleared the land. The occupant receives inalienable use-rights to the cleared land, conditioned upon the payment of an annual or seasonal fee to the traditional authority (Furth 2006). More recently, this customary system is evolving into a family-based in-

3. The plan's primary development objective is a sustainable increase in agricultural production, in combination with environmental conservation and rural capacity-building. The government also prepared for implementation over a 10-year period (2006–2015). The MPA's objectives are (1) food security; (2) increased incomes and employment, particularly in rural areas; (3) increased economic growth and higher volumes of foreign exchange entering the country; (4) a sustainable improvement in rural living standards and quality of life; and (5) strengthened regional integration for Chad in the area of trade. The country also has a National Programme of Action to Combat Desertification (PAN/LCD), which sets out a framework of measures to assist people and local organizations in securing a sustainable improvement in dryland management. The programme identifies factors contributing to desertification and concrete measures to combat it and to mitigate the effects of drought (IFAD 2009).

heritance system. As land becomes scarcer, families are unwilling to give up their land to the lineage. In some areas, land is transferred within the informal system as a commodity, both within and outside the kinship group.

Women have limited rights to land, especially when it is fertile; they obtain access to land through their husbands (Koultchoumi 2008). 95% of women are illiterate, and few have any knowledge of their legal rights. As a result of male migration and death, households in urban and rural areas headed by women are increasing. Woman-headed households are among the poorest families (ADF 2004; ROC 2003; World Bank 2003). In some areas women are increasingly accessing land by establishing rental agreements with neighbours or obtaining their own land from churches and cooperatives; their land rights are becoming more dependent on their own efforts and less on their relationship to their husbands.

Traditionally, most land held under customary tenure could not be sold. And good-quality arable land has become scarce and the traditional right to inherit land is no longer assured. In some areas, the roles of chiefs and sultans have evolved from custodians of the land to landowners and agents (Koultchoumi 2008).

Access to scarce natural resources has generated fierce competition and conflicts.[4] A history of political instability and civil conflict, combined with prolonged drought and resulting environmental degradation, has jeopardized traditional tenure relations. New relationships are developing in agricultural and pastoral domains as well as in the realms of natural resources, economics and social relations. While communal land tenure systems were once quite stable, the decrease in the quantity and quality of fertile lands has destabilized traditional land tenure systems on agricultural lands. Families are clinging tightly, more and more, to their lands and assuring that they be transmitted within their nuclear families instead of reverting to the lineage. However, traditional communal systems are still paramount. Attention needs to be

4. At the end of 2009, about 253,000 Sudanese refugees were living in Chad in 12 camps situated along Chad's eastern border, and there were 168,000 IDPs in Eastern Chad. Chad also has about 68,000 refugees from violence in the Central African Republic (USAID/DCHA 2010; AI 2008).

paid not necessarily to the increase in individually held lands, but to the stabilization of land tenure systems. The lack of land tenure stability has shown adverse effects on agricultural production and is therefore a crucial issue for Eastern Chad.

The stabilization of the land tenure system is the focus of the matter at this point of the argument. Scholars and practitioners demonstrate that working on strengthening supply chains and collective action with the smallholders could be beneficial for achieving stabilization goals. We tackled the issue in presenting the project entitled "Peanuts and Sesame Food Chain Support: from production to marketing", an intervention belonging to PADL-GRN EST.[5] Global objectives are: a) analysing the peanut and sesame food chain; b) strengthening farmers' organizations; c) promoting income-generating activities linked to production, processing, distribution and marketing. Research activities involved a global study of the context as well as a socio-economic trend analysis reference markets (based in Eastern Chad and Sudan). The research highlights the local agricultural calendar, availability and access to markets, prices fluctuations and investigates markets and traders. It is based on the answers given by a number of associated smallholder farmers (30 villages, 9 ethnic groups) to the structured questionnaires formulated by the UNIMI team. Complementary information has been collected through in-depth interviews between the farmers' representatives, interest groups and local institutions.

The aim is to determine which features affect a farmer's ability to improve his market performance and competitiveness in the value chain; the methodological idea was to gather information at different organizational levels.

In Table 1 we introduce some interesting data about the structure of the rural communities which are divided into two relevant groups, plot owners and non-owners. Among non-owners, around 85% are women, probably due to the above-mentioned Islamic customary system of women not being allowed to inherit land; among them, 92.31% are illiterate and no woman in the

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sample has received primary education. These data lead us to speculate that non-owners are a vulnerable category. In addition, our sample shows that the majority of smallholder farmers are women, which matches with the World Bank's reports asserting that women are responsible for at least 70% of staple food production in Africa as well as for playing important roles in other agricultural activities, including processing and marketing, cash cropping and animal husbandry. The women's involvement is significant not only in terms of their labour input, but also in terms of their decision-making authority. In fact, an increasing number of women are becoming heads of households and managing farms on a day-to-day basis. Women generally operate under greater constraint than men, because they have the main responsibility for the home and child care, and hence need special help. Associations between farmers might become a significant tool for removing constraints such as non-access to information, technology, inputs, credit, and land.

According to the questionnaire answers, we can class peanuts, millet and sorghum as the staple food for local people while sesame stands out as a cash crop. We were able to mark a wide gap between production costs for owners and non-owners. In fact, to cultivate one hectare of peanuts, owners spend around 61.67 euros, non-owners spend 45.60. And like peanuts, owners invest more than non-owners for one hectare of millet (52.49 euros vs 33.87 euros) as well as sorghum (48.48 euros vs 23.96 euros). On the other hand, sesame production costs are higher for non-owners (42.01 euros vs 40.01 euros).

The production cost difference between owners and non-owners is directly linked to the farmer's economic background and market dynamics. In fact, non-owners are generally more vulnerable than owners and therefore invest the minimum required to generate a production which can satisfy family needs. Vice versa, owners are able to invest more than the minimum on peanuts, millet and sorghum production as the investment can be certainly recovered by sales in the local market. Since sesame is not interesting at the local level, but it is a pure cash crop, the two groups behave in a homogeneous way.

The interviews also measure the quality of farmer-performance improvement, comparing it with the previous years, when associations were not involved in the value chain. To determine perceived quality, multi-item scales were used and measured through 5-point Likert scales (ranging from 1=lowest rating for the question to 5=highest rating for the question).

We noticed that the involvement in associative activities is higher for non-owners (average score 4.3), therefore we can assume it is due to a stronger motivation to improve performance as one of the main aims of farmer collaboration and collective action is to reduce the poverty in rural areas. A better organizational structure of farmers and the creation of a relational value chain can help boost the market and create more added value. The profits can be reinvested to consolidate occupancy/ownership of land, create more jobs within associations and more rural employment to reduce the global poverty in the agro-food industry. Both categories consider the role played by training very important, as demonstrated by a score of 4.8 (mean). To sum up, we observed that the role of collective action seems to be very significant in the upstream stages of the value chain. Furthermore, associations play a key role in boosting the productive competences through farmer training and learning (4.67), in the access to production inputs (4.84) and basic services (3.75). These elements have led to enhanced efficiencies in the production phase and, consequently, to a significant improvement in the farmers' market performance (4.27). The farmers' commitment seems to be a critical factor, especially referring to relations with other actors in the value chain (2.45) and other farmers (3.22) outside the associations. This issue can lead to increased transaction costs and a high level of information asymmetries. Furthermore, another criticality is represented by the access to outputs and markets (2.33) provided by the farmers' associations, especially related to processors, retailers and international markets. This issue precludes the possibility of jumping into high value markets and allowing rural producers to better compete with larger farmers and incumbents. We observed that for non-owners, aid in agricultural activities is essential as well as cooperation in the stocking process. For both

groups transport and delivery services need to be implemented in the future. In general terms, we detected the criticalities linked to the contribution of the association in accessing the outputs.

Assuming that non-owners are part of more vulnerable group, entering into a cooperation mechanism within a supporting structure greatly increases their chances of improving their agricultural performance.

The role of associations could be meaningful for access to production inputs and services. Farmers' cooperation groups have enhanced mainly efficiencies in land access and production.

4. Discussions and conclusions

According to our analysis, land tenure issues can be partially solved by involving farmers in an efficient food chain in which agricultural activities are supported by a medium to long term land ownership (5-10 years). The involvement and commitment of the farmers seem to be critical factors for reducing transaction costs and information asymmetries within local and global markets. A well-structured food chain is essential for jumping into high value markets and allowing rural producers to better compete with larger farmers and incumbents. Thus, collective action through farmer organizations can generate economies of scale in the production and commercialization phases (Trebbin 2012). Furthermore, farmers' cooperation groups can achieve efficiencies in production and lower marketing and commercialization costs (Bernard 2009, Fischer 2011, Francesconi 2011). In addition, in acting collectively smallholders may be in a better position to cut the transaction costs of assessing inputs and outputs (Markelova 2009), obtain an easier access to market information and ensure the achievement and the effective use of new technologies and social innovation. They may be able to jump into high value markets allowing rural producers to compete with larger farmers and incumbents, enter into markets by improving their bargaining power with buyers and intermediaries because of higher quantities of marketable surplus, have easier access to financial and hu-

man capital and, finally, monitor their own food safety standards ensuring traceability (Fischer 2011, Trebbin 2012, Narrod 2009).

Furthermore, our research suggests that elements of good community-level governance such as social cohesion, leadership or individual support for collective action can improve the perception that people have of their communities' capacity to cope with change. We contend that these components are necessary for creating (or supporting) an enabling environment to build resilience and facilitate adaptation to external drivers. Medium and long term land ownerships as well as NGO support are not enough to reach a stable production, a strong food chain and land rights. The lack of clear-cut, steady and fair land tenure rights can affect food security as well as be an obstacle to socio-economic development. Therefore, in our research we observed that there is a strong link between land tenure rights, economic development and agricultural production in which achieving positive results is only possible through the simultaneous cooperation of all stakeholders involved.

In Chad modern, fair and sustainable agricultural projects can be implemented by involving private investors and institutions. In fact, the participation of local government, in terms of establishment of laws (land tenure rights, for example), credit facilitation and control can prevent land grabbing, inequities, stresses and resilience in agriculture and rural livelihoods.

A successful example could be a hybrid organization between institutions of collective action and market-driven private enterprises called producer companies (PCs) which "… are just like cooperatives, but they are registered as companies. The requirement is that the members, the shareholders of this company, are producers themselves. No non-producer can be a member of the company." (Trebbin 2012). Producer companies are an example of changes directed towards more profit-oriented forms of organization arising among farming communities. Producer companies could have access to new markets and opportunities by creating new relationships to highly specialized demand. It could represent a model for Chadian smallholder farmers to organize and share their activities and gain several benefits, not only from joint action, but also from

linkages to developing new profitable markets. Moreover, on the productive side, it can also ensure the opportunity of an intervention on fertility and soil protection such as taking advantage of leguminous nitrogen emissions if planning agricultural activities on the medium to long term land ownership.

Finally, the producer company can be the innovative and effective project for transforming the current fragmented and weak state into an advanced, integrated, competitive, inclusive and sustainable system, where farmers are the makers of their own success but at the same time they are supported and protected by a strong, socially oriented organization.

We can hypothesize a virtuous circle: on one hand, a value chain could be successful only if land tenure stability is guaranteed by institutions, on the other hand, farmers organized in PCs, can influence governmental policy on land rights.

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Maria Sapignoli[1]

THE STRUGGLE TO "BE SAN"

Indigenous peoples and access to land and resources in Southern Africa

Abstract

Indigenous peoples, including the San of southern Africa who I will discuss here, live in places that contain valuable resources, both natural and cultural. All too often, indigenous peoples have been forced off their land, and have had to cope with efforts by other groups, governments, settlers, or transnational corporations to take away their lands and resources and assimilate them into contemporary nation-states. This process of dispossession is one of the sources of common experience and serve as a reference point for collective identity in the international movement of indigenous peoples. In this paper, I discuss the history of this land dispossession since Botswana's independence in 1966. Two contemporary examples of land dispossession in different contexts can be seen in 1) the forced removals and denial of services affecting the San of the Central Kalahari Game Reserve; and 2) the government mandated privatization of land use and benefits which has led to the dispossession of the Xai/Xai Community-Based Natural Resource Management (CBNRM) program. These two examples reveal the widely varying processes by which centralized programs of poverty eradication and commercial development produce results that can more accurately be described as land dispossession.

1. San livelihoods

In this paper I consider how over time the San's access to land and resources has been limited by the state's non-recognition of their land use and forms of occupancy. This is closely associated with state legislation and transformation of land tenure, administrative decisions that limit access and use to land, as well as national

1. Department of Law and Anthropology, Max Planck Institute for Social Anthropology. The author may be contacted at sapignoli@eth.mpg.de.

and international land grabbing in the form of farming, conservation, and mining. Even though the San peoples have had multiple strategies of subsistence, those that are most closely related to their collective identity are based on hunting and gathering. I will look at two examples in which the San and their neighbours have attempted to either maintain or regain their occupancy and traditional use of land and resources. The first is that of the Central Kalahari Game Reserve, where people were relocated by the government in the 1990s and early 2000s. After a series of partially successful court cases in 2006 and 2011, some of the former residents went back to their territories inside the game reserve. The second case is that of the /Xai/Xai, in the North West District, which was the first village in Botswana to form a community trust under the government's Community Based Natural Resource Management (CBRNM) program. Through this program, the /Xai/Xai people were able to generate substantial income (more than 2 million pula per annum at its height) and to provide for the subsistence and natural resource needs of the community. I examine some of the internal dynamics of the trust and relations among its members regarding ways to handle land use and resource management. I then discuss the ways that the government and district council have more recently changed the rules of the CBNRM program to reduce benefits flowing to the community with the effect of compromising community control over land and natural resources.

Both of these cases illustrate the tension, as it is played out in the daily lives of people who derive most of their subsistence and well-being from the access to land, between customary rights over the land and neoliberal forms of land appropriation. It is well documented by scholars in Africa that land conflicts revolve around differential claims of belonging. In the case of Botswana, discourse about indigeneity is the focal point of this tension, having been affirmed by the San as a way to regain access to land and resources, and denied by the state as a way of not recognizing, and ultimately dispossessing, specific groups. This will lead us to several conclusions that could have implications for the European Union's strategies for implementing the rights of indigenous peoples in Botswana.

The San (Bushmen) of southern Africa are some of the best-known groups of people in the world, thanks in part to extensive research, films, popular books and articles, and detailed documentation by development workers and government agencies (see Gordon and Douglas 2000, Barnard 1992, 2007; Cassidy et al 2001, Bollig 2003, Marshall 2003, Biesele and Hitchcock 2013, Dieckmann et al 2014, Suzman 2003). The San were known for years primarily as hunter-gatherers or foragers (Marshall 1958, 2003; LeRoux and White 2004). Over time and in different places, however, San groups acquired different forms of subsistence, including keeping livestock (cattle, sheep, goats, horses, and donkeys), fishing, and agriculture (Hitchcock 1988, Wilmsen 1989, Solway and Lee 1990, Lee 2013, Hitchcock et al 2015, Hitchcock and Sapignoli 2016). Temporal cycles of livestock acquisition and loss resulted from environmental (e.g. drought), social (e.g. sharing, giveaways), and political conditions (e.g. the receiving of livestock for management purposes, related to alliance formation and distributing, hence mitigating, risk).

Following closely from their popular recognition as a hunting and gathering society that is representative of a distinctive and all but extinct form of human existence, the San have also acquired and cultivated their status as indigenous peoples. Indigeneity is complex in a complex concept to be applied in the African context (cf. Bollig et al 2000 Daes 2008, Anaya 2013, Pelican and Maruyama 2015, Sapignoli 2015, 2016). Indigenous peoples' arguments in favour of their distinct rights often draw objections from African governments, which claim that differentiating people on the basis of ethnic identification or specific status is inappropriate and undermines the efforts to create unitary states. The states also argue that separating indigenous from non-indigenous people favours one group over another. In addition, some African governments have said that claims of indigeneity promote 'tribalism' and could lead to secession efforts, undermining the integrity of the state (ACHPR 2006). At the beginning of the XXI century, the African Commission on Human and Peoples' Rights adopted the category of "indigenous peoples" for those peoples on the fringe of society, which the decolonisation process, in

transferring power to the dominant groups in the same lands, has marginalised and subdued. Indigenous peoples become those groups in a "structural position of marginalization" and which distinct "livelihood practices", primarily pastoralism and hunting and gathering (ACHPR 2005).

The San have been recognized as indigenous peoples by international and regional organisations, Africa-based non-government organisations (African Commission on Human and Peoples Rights 2005, 2006, 2008), researchers, and neighbouring groups but not by the states in which they live (South Africa, Namibia, Botswana, Angola, Zimbabwe), which maintain the position that everybody in Africa is indigenous.

Botswana after an initial opposition, adopted the United Nations Declaration on the Rights of Indigenous Peoples, but it has not signed the only convention on indigenous peoples rights, the Indigenous and Tribal Peoples Convention No. 169 of the International Labour Organization (1989). As will be discussed in the balance of this chapter, Botswana has no laws relating to indigenous peoples nor is the concept of indigenous peoples mentioned in the Botswana constitution, unlike for example the Republic of Cameroon, which mentions both indigenous people and minorities in its constitution.

Botswana, in fact, does not recognize the San as indigenous peoples, which would imply the government's obligation to confer ´special rights´ under international law; instead, the government defines them as "Remote Area Dwellers" (RADS), as people living in remote parts of the country. More recently, they have been described as residents of "Remote Area Communities" (RACs), a new terminology that does not acknowledge their status as peoples or settlements, hence circumventing the state's obligation to provide them with services and support. This leaves the San in circumstances in which the government is infringing upon their social, cultural, and economic rights, including their rights to make their own decisions about their livelihoods and ways of living.

Botswana state policies toward its indigenous minorities have been examined critically by the United Nations, the African Commission on Human and peoples' Rights of the African

Union, the Special Rapporteur on the rights of indigenous peoples, and the Human Rights Council's Universal Periodic Review (Anaya 2010, Sapignoli 2012, 2015).

San non-government organizations were formed in Botswana beginning in the 1980s (Bollig et al 2000), with the central aim of representing San's interests and acquiring a voice in national and international meetings. For instance, First People of the Kalahari (FPK), a San based organization, was established in 1993 in direct response to the Botswana government's policies of failing to recognize San political representatives, their way of life, and their rights as indigenous peoples. In particular, FPK was one of the key players in representing the people of the Central Kalahari Game Reserve in opposing the government-sponsored relocation and in seeking redress from it. San activism took place in several United Nations meetings, as well as at the national and regional level. Today most of the San NGOs in southern Africa struggle in carrying out their agenda because of financial constraints (Hitchcock 2002, Sylvain 2015, Sapignoli 2016).

Even if today few, if any, San follow a foraging way of life, though hunting and the sharing of wild meat is a crucial part of both traditional and contemporary San societies, serving to reinforce social alliances while ensuring the distribution of protein to young and old, male and female, hunters and non-hunters. Far from being 'remote' and 'independent, full-time hunter-gatherers', the San are very much a part of the overall southern African economies, societies and political systems, interacting intensively with other groups, as well as national and regional institutions. Few, in fact, hunt and gather full-time but even those who do not (or cannot) participate in traditional subsistence activities value them as part of their identities and as a means of buffering themselves against difficulties in the formal economy.

San groups have a strong sense of attachment to their land, which many of them see as their 'mother' and as being responsible for sustaining them (Kiema 2010). Land is held communally, that is, in the name of the group, and people have to ask permission to enter the territories of other groups (Bishop 1998, Biesele and Hitchcock 2013:51-59, Hitchcock 2005, Hitchcock and

Sapignoli 2015, Heinz 1972, Barnard 1992:223-236). As noted by various observers, their territories generally contained a number of different kinds of resources, including water points, wild animals, wild plant foods and medicines, and trees and shrubs for shelter, fuel, and building materials. They were thus the basic focal points of subsistence, mobility, and residential areas of local groups. The rights to these territories were usually inherited from one's parents, although there were cases in which claims were established through use and occupancy in areas that were either empty or had been abandoned.

The San's understanding of territoriality and ownership of resources and land use conflicted with the approaches and policies of colonial and post-colonial governments (Hitchcock 2005, Widlok 2003). As an outcome of differing government interests, they were subject to successive policies and practices of land grabbing and displacement. In the following section we will look at the processes of land and resource dispossession of the San through state divisions of the land.

In this paper I will consider in particular how over time the San's access to land and resources in Botswana has been limited by the state's non-recognition of their land use and forms of occupancy. I present two cases in which the San and their neighbours have attempted to either maintain or regain their occupancy and traditional use of land and resources. In the case of Botswana, discourse about indigeneity has been affirmed by the San as a way to regain access to land and resources, and denied by the state as a way of not recognizing specific groups. The tension between these two approaches to land results in ongoing struggles, out of which the San have actively promoted their indigenous identity.

2. Dividing the land

Botswana, a land-locked country in southern Africa that is the same size as France, achieved independence on 30 September 1966. During the British Protectorate (1895-1966) most of the land inhabited by the San was classified as Tribal Land, which was

under the control of the Tswana *merafe* (proto-states), as Crown Land (land set aside for the British Crown in 1895), as freehold land (occupied by settlers), and some was set aside for protected areas (Peters 1994, Gulbrandsen 2012, Sapignoli and Hitchcock 2013, Hitchcock et al 2015).

In 1961, the Central Kalahari Game (CKGR) was established (which I will return to in more detail later on). The original idea for this area was to create a park for people, but the Bechuanaland Protectorate administration decided it would be a game reserve instead (Silberbauer 2012). At the time of its creation, the CKGR had hundreds of people in it, who were dependent on hunting and gathering and continued to live there (though their numbers fluctuated), until the government sponsored relocations in the 1990s.

Since independence in 1966 the new state's main objective has been the creation of "one people one nation" where being "Batswana" (i.e. citizens), means assuming the cultural, political and social traits characteristic of the majority Tswana tradition. The economic development of Botswana has been based mainly on resource extraction (minerals, especially diamonds and to some extent copper and other minerals), beef production and export, manufacturing, tourism, and more recently the conservation of wildlife. The state's conceptions of citizenship and economic development were prominent elements in the dispossession of the San. And just as in colonial times, the San occupancy and use of land (as we will see further below) were not taken into consideration in the results of the state land reforms (Gulbrandsen 2012, Sapignoli 2015, Good and Taylor 2009).

One of the first actions of the independent government was to come up with land reforms that transformed the ways in which land was allocated and divided in the country. The previously designated Tribal and Crown lands become Districts under the control of District Councils, and Tribal Authorities were replaced with District Land Boards,[2] which since then have managed the allocation and divisions of land.

2. Under the *Tribal Land Act* (Republic of Botswana 1968, which went into effect in 1970).

A major cause of San land dispossession took place when, in the 1970s Botswana embarked on a major land reform effort, the Tribal Grazing Land Policy (TGLP), which was geared toward the commercialization of the livestock industry in the country. This policy and its implementation sub-divided the tribal land into three basic zones and categories: communal (where customary land tenure rules would continue to prevail); commercial (which would be divided into ranches leased out to individuals and groups of livestock owners); and reserved (set aside for the poor). In the final analysis, no tribal land was set aside as reserved for the poor but this category was instead zoned as Wildlife Management Area (WMA) (Republic of Botswana 1975, Peters 1994, Sapignoli and Hitchcock 2013). By the 1980s, some 51,094 km^2 of the total of 414,795 km^2 communal land in the country were set aside for leasehold ranches (see Table 1).

The privatization of land under TGLP presented various challenges to the wildlife management, including the fact that fencing interfered with wildlife migrations. The original government planning did not envision any space for the wildlife use outside of national parks and game reserves, being blind to non-pastoral and non-agricultural livelihoods and lifestyles (i.e. those dependent on foraging).

As a result of the district-based TGLP land use planning process, significant areas of land that did not have ranches in them were declared Wildlife Management Areas (WMAs), through the Wildlife Conservation Policy of 1986, as a way to ban development for livestock production in certain portions of land. The Wildlife Conservation Policy promotes the commercial utilization of wildlife but also non-commercial use of natural resources, arguing for the local involvement of residents in conservation (Poteete 2009:290). This set the stage for the introduction of what came to be known as the Community-Based Natural Resource Management Program in Botswana, which was based in areas that were either communal or Wildlife Management Areas (WMAs). Wildlife Management Areas covered some 129,450 km^2 representing 22.2% of the country's total land area (Rihoy and Maguranyanga 2010, Sapignoli and Hitchcock 2013).

Type of Land	Land Zoning Category	Amount of Land (km²)	Percentage of Country (%)
Freehold Land [6%]	*Freehold Farms*	*32,970*	*5.70*
State Land [23%]	*Parks and Reserves*	*101,535*	*17.40*
	Forest Reserves	*4,555*	*0.78*
	Other	*27,900*	*4.80*
Tribal Land [71%]	*Communal*	*173,432*	*29.80*
	Commercial	*51,094*	*8.80*
	Wildlife Management Areas	*129,450*	*22.20*
	Leasehold Ranches	*3,351*	*0.60*
	Remote Area Dweller Settlements	*3,523*	*0.60*
	Other	*53,945*	*9.30*
Grand Total		*581,720*	*100.00*

Tab. 1 Land Zoning Categories in Botswana[3]

Other land-related acts passed in 1989, 1993, 2000, 2002 and 2011 allowed communal land areas to be leased out by granting rights to individuals and companies. The 2011 Draft land policy of Botswana in particular allows for the auctioning-off of

3. Data obtained from the Ministry of Agriculture, the Ministry of Local Government and Rural Development and the Ministry of Lands and Housing, Government of Botswana. The category "other" includes land in towns and land set aside for government purposes (e.g. trek routes, quarantine camps for livestock). It should be noted that this table represents the official data but the information has not been updated in light of events at district and national levels, demonstrating an important issue of transparency and accountability.

tribal land to people "with means" (that is to say, the wealthy) (Republic of Botswana 2011). This auctioning-off of tribal lands had important consequences. Many of the areas in which the ranches were established had sizeable numbers of San and other peoples residing in them. Ranchers evicted many of the people on their ranches, who then moved to areas that had yet to be developed, or to towns.

The land use planning process saw small blocks of land set aside for communal service centres and what in Botswana are known as Remote Area Dweller settlements. The Remote Area Dweller (RAD) settlements were created by the Botswana government to accommodate the needs of the rural poor, mainly San, some of whom had been displaced by commercial ranches, roads, mines, and protected areas. The settlements had social and physical infrastructure provided (e.g. schools, clinics and boreholes), but did not have much potential for employment or income generation opportunities for residents. The RAD settlements, many local people say, are basically dumping grounds for people removed from other places.

The privatization of land under TGLP presented various challenges to wildlife management, including the fact that fencing interfered with wildlife migrations. The original government planning did not envision any space for the wildlife use outside of national parks and game reserves, being blind to non-pastoral and non-agricultural livelihoods and lifestyles (i.e. those dependent on foraging). Rivalries were present between ministries (e.g. the then Ministry of Commerce and Industry, the Ministry of Agriculture and the Ministry of Local Government and Lands). The Community-Based Natural Resource Management Programme was initiated in Botswana as a way to increase community involvement in wildlife management and to decentralize control over wildlife from the central government to lower-level institutions, including district councils and Community-Based Organizations. The land use planning process carried out by the districts led to the division of the Wildlife Management Areas into two basic categories: Community-Controlled Areas and Privately Controlled Areas. In the former case, communities

could apply for the right to oversee the wildlife and conduct tourism and other kinds of income-generating activities, sometimes engaging a joint-venture partner (JVP), usually a safari company. In the Privately Controlled Areas, companies such as Wilderness Safaris or Kwandu Safaris could bring in safari clients in exchange for often substantial payment.

Botswana's Community Based Natural Resource Management (CBNRM) policy, which began in 1990 but was not elaborated formally in a government white paper until 2000 (Republic of Botswana 2000, updated in 2007), allowed communities to have access to portions of communal areas if they formed Community Trusts and Community Based Organizations (CBO). In the case of Botswana, a CBO, usually a trust, must be established to represent the "community," where a CBO can include one or several villages within, or adjacent to, an area designated as a WMA. In line with Botswana government policy, these community trusts cannot be based on ethnicity.

Under the CBNRM policy, CBOs need to apply for land leases to the Land Boards and the Department of Wildlife and National Parks (DWNP) for a wildlife quota. They could get access rights to the wildlife, but not the land and not to wild plant resources or grazing in these areas. They also do not have subsurface rights. The communities can opt to use the wildlife quota that they obtain from the government environment ministries for their own purposes or they can lease out a portion or all of the quota to private safari operators. Community members can also opt not to use any of the wildlife in their area, choosing instead to conserve the wildlife resources for the future.

The potential Joint Venture Partner companies that bid for the rights to the wildlife quota in Community-Controlled Hunting Areas (CCHAs) in Botswana sometimes offer to employ local people as guides or safari camp assistants, and they may agree to cover the costs of some social services or provide goods for local people such as medicines and blankets. The clients of the safari companies also sometimes purchase products from local people, including handicrafts, thus enabling the trust members to generate some income.

The CBNRM policy was refined again and passed by the Parliament in 2007 (Republic of Botswana 2007, Hoon 2014). The 2007 policy opted to split wildlife revenues in two, where the CBOs will continue to receive 35% of the revenues and a recently created National Environment Fund will receive 65%, with the task of redistributing the money being done at a national level through applications (Poteete 2009:292). This meant the recentralization of CBRNM and nationalization of revenues and more power and funds going to central government and district councils with the government intending "to stop malfeasance in current projects" (Hoon 2014:58).

In the recent 2007 policy on CBRNM, wildlife is redefined as a national resource, similar to minerals, where the revenues have to be divided among citizens. In the words of former President Festus Mogae:

> "The Botswana collective ownership of our natural resources is fundamental […] Government is the custodian of our wildlife resources. This ensures that all our citizen have a common stake and enjoy unqualified benefits from our natural resources" (cited in Hoon 2014:60).

With these words and the policies that follow from them, the government´s approach to the "national community" has been opposed to "local community" benefit, and "terms such as ownership and benefits have become rhetorical devices to privilege national claims and reject particular claims by local communities" (Hoon 2014:64). In taking this approach, the CBRNM policy today denies local claims of rights and access to resources. The idea of the national good is used to privatize the land and its resources by the state.

As a number of scholars (e.g. Pauline Peters and Philip Woodhouse) note, community customary tenure acts neither as an obstacle to investment nor as an inalienable safety-net for the poor. This is the case in Botswana, where over time various land tenure policies and legislations have served to make inroads on communal lands and have allowed private companies and indi-

viduals to take over land that in the past was considered communal (Sapignoli and Hitchcock 2013).

The case of the village of /Xai/Xai presented below will show how the communal land in the Wildlife Management Areas and the community trust areas in the community-controlled hunting areas within WMAs did not prevent the privatization of the land. The government facilitated the takeover of "wildlife-related" land by private companies through legislation and allowing both domestic and foreign companies to establish control and ownership in WMAs, portions of state land, and in communal areas.[4]

We will also see in the case of the Central Kalahari Game Reserve, how even if the High Court recognized the occupancy and subsistence rights of the people living in the reserve, this did not prevent the land and resources from being taken over by other institutions including private mining and tourism companies.

3. The struggle to be San and access to land and resources today

The cases of the Central Kalahari Game Reserve and of the /Xai /Xai community illustrate the ways in which the San and their neighbours used the law to try to regain or maintain collective access to land and resources. We will see that even if they achieved some partial success compared to other cases in the country, the San continue to be involved in a struggle for their rights to land, resources, and a different way of life from that of the majority in the nation.

4. In section 2.1.8. the 2011 Draft Land Policy discusses CBNRM programmes, saying that these programs will be allowed to continue but that management of these areas will be enhanced by incorporating partnerships with the private sector (Republic of Botswana 2011:8). The policy goes on to say that communal land tenure has not worked well for securing the rights of Remote Area Dwellers, so the solution is to give titles over land to people in government-recognized settlements (Section 2.2.5, Republic of Botswana 2011:11). Thus, the land policy seeks to privatize both community trust areas and RAD settlements, as we will see in the case of the /Xai /Xai

3.1 Central Kalahari Game Reserve

During the past fifty years, the Central Kalahari region of Botswana has been a locus of protracted and at times desperate and dramatic struggles over land and resource rights. The San and their neighbours, the Bakgalagadi people, have attempted to regain their rights to land and resources, as seen in the case of the Central Kalahari Game Reserve (CKGR), the largest protected area in the country (52,730 km^2). This reserve was established originally in 1961 as a means of securing and protecting the livelihoods and lifestyles of its inhabitants, and conserving the fauna, flora, and habitats of the region (Hitchcock 2002, Silberbauer 2012). At the time of its creation, the CKGR had hundreds of people living in it, many of these people were part time hunter-gatherers, as well as small-scale food producers, raising small livestock and growing melons, and who continued to live there (though their numbers fluctuated) until the government-sponsored relocations in the 1990s. In the 1980s and 1990s, ecologists, environmental organizations and Botswana government ministries recommended that the people of the CKGR should be relocated outside the Reserve (Sapignoli 2012, Taylor and Mokhawa 2009). Following up on these recommendations in 1997 and 2002, the government of Botswana relocated some 2,400 people to three resettlement sites on the peripheries of the reserve. The government maintained that an important aspect of the Central Kalahari was conservation, something that, it was argued, could be beneficial to the tourism industry in Botswana. There were tensions and contradictions between the state's ideas on modernization and environmental conservation and the San way of life. Through time, regulations were introduced to restrict hunting activities; fences and gates were erected to delimit the borders of the reserve and control the movements of people and animals. A conflict over different understandings of land use, environmental knowledge and land occupancy rights resulted in the forced resettlement of peoples outside of the reserve.

In order to try to prevent resettlement and gain occupancy and use rights inside the reserve, the communities tried to de-

velop a CBNRM plan. In the early 1990s the European Union supported a project that addressed conservation and development in parks and reserves in Botswana. Project personnel worked in several of Botswana's protected areas, including the Central Kalahari Game Reserve. A management plan was drawn up for the Central Kalahari, which assumed the presence of people inside the Reserve. Community-based consultation work was done in the Central Kalahari by the Department of Wildlife and National Parks, working with personnel from the San non-government organization First People of the Kalahari. The plan was eventually shelved by the government of Botswana when the decision was made to remove the Central Kalahari's people in 2002.

The CKGR's inhabitants have not been passive victims of these government actions. After several failed efforts at negotiation with the government, the people of the Central Kalahari filed suit against the state in the High Court in 2002. In 2006, after a lengthy trial, *Sesana and Others v. The Attorney General,* the applicants won the right to return to and occupy the Central Kalahari and to have access to wildlife through the granting of SGLs (Special Game Licenses) (see Sapignoli 2015, Saugestad 2011).

The first High Court verdict, however, has not been implemented. While the people of the Central Kalahari won the right on occupancy of the reserve, state agents at the gates have stopped people from entering unless they possess a special entrance permit or they are part of the applicants' list (which includes only 186 people and their families) developed in the 2006 Sesana case. And again, they won the right to practice subsistence hunting in the reserve but since 2006 around 180 applications for Special Game Licenses have been submitted to the Wildlife Department by the residents of the reserve, without success (see Sapignoli 2015, Hitchcock et al 2011). At the same time, the Reserve is under a process of privatization: it is currently divided into tourism zones and there are various prospecting areas and an operating diamond mine in the south-eastern part which was opened in 2009. There are plans for additional mines in other parts of the reserve including a copper-silver mine in the north western cor-

ner of the CKGR known as Khoemacau (formerly Hana Mining Pty. Ltd). The Gope (ghagoo) diamond mine has also been slated for expansion, and the Botswana government is accelerating its coal production in the area around Moruplue near Palapye.

Some of the biggest challenges facing the San and Bakgalagadi in the Central Kalahari and surrounding areas included questions about the duties of the government and the rights and responsibilities they have, the lack of sufficient water availability, the uncertainty over the availability of social services, and physical infrastructure and insecurity of land tenure.

After the government pursued a policy in which the people of the Central Kalahari were denied services, particularly water inside the reserve, the San and Bakgalagadi took the government to court again over the right to water. In a Court of Appeal decision in 2011, the applicants won the right to drill a borehole for water at their own expense (Ruppel and Van Wyk 2012, Dinokopila 2011, Morinville and Rodina 2013). Currently, as of 2015, there are approximately 300-400 people in five communities in the Central Kalahari, and they have only one functioning borehole drilled by a support group, at Mothomelo, and another that rarely works in Molapo. They get some of their water from plants and small pools of water left after the rains and share the water in the borehole.

The CKGR is the only place today in Botswana where the San have been able to maintain certain rights over land and resources, even if they remain in a condition of uncertainty due to the government's actions (or strategic inaction) in response to their determination to remain in their territories in the Reserve. However, according to the implementation of the *Sesana* verdict (2006), not all the people relocated from the reserve have the right to return to what were once their villages, but just the applicants to the court case and their families. The people who have returned to the reserve since 2007 are making a living in the reserve in a variety of ways, combining foraging techniques with small-scale crop production and raising domestic animals (like sheep, goats, donkeys and horses), and through purchase of foods in the resettlement sites and towns outside of the reserve. They have lived there without any government services, such as desti-

tute food rations, pensions, health assistance, and primary school, all of which they had before the 2002 relocation. Discussions on the services re-commenced early in 2015; and after the visit of government representatives to the Reserve in August of the same year, it appears that at least some services, including mobile clinics, will be restored. There is also discussion under way about the possibility of allowing the communities inside the CKGR to have their own community trusts so that they can participate in the government's CBNRM programme, as was attempted in the early part of the new millennium.

3.2 /Xai /Xai

Xai/Xai is another example where the San have tried to maintain a certain degree of autonomy in the use of the land in spite of the encroachment by state policies. In this case, they sought to take advantage of Botswana's Community-Based Natural Resource Management (CBNRM) policy in an effort to get access rights to wildlife resources. Botswana's CBNRM policy allowed communities to have access to portions of communal areas if they formed community trusts. Under the CBNRM policy, communities were able to get access rights to wildlife, but not to the land, wild plant resources or grazing in these areas.

The community of the /Xai/Xai in western Ngamiland is a multi-ethnic community of some 500 inhabitants, mainly consisting of Ju/'hoansi San and Mbanderu (Herero). It was the first community to form a Community Based Organization (CBO) and to come up with a management and land use plan and constitution. /Xai/Xai received Community Trust status from the Botswana Government as the Cgae Cgae Tlhabololo Trust, in October, 1997. After its establishment, the /Xai/Xai trust worked with joint-venture partners (safari companies) and NGOs on tourism, craft, and other economic activities. This trust, which is broadly representative of the community, has sought to establish natural resource management with wildlife quotas, ecotourism, and small-scale business opportunities for people at /Xai/Xai.

Income expanded from US$12,700 (P45,000) in 1997 to over US $122,500 (P1,000,000) yearly in 2013. The land use plan was negotiated between the Herero and the Ju/'hoansi in the trust and was then presented for approval to the North West District Council and Tawana Land Board and government. These institutions over time chose to require changes in the land use plan, setting aside an important area for both the Ju/'hoansi and Herero as a national monument, the G/wihaba Hills, for which the government applied to UNESCO for World Heritage Site status.

Unfortunately, the story does not end here. Policies relating to wildlife management continue to be sources of contention, particularly following the recent 2007 policy on CBRNM, the 2011 Draft Land Policy, and the Botswana government's imposition of a hunting ban in January, 2014. These policies indicate that CBRNM programmes will be allowed to continue but that management of these areas will be enhanced by incorporating partnerships with the private sector. These mean that what was started as a process of decentralization of control over wildlife and land management to local communities is now being recentralized through state intervention and controlled by private investors.

Due to these new policies, it is uncertain whether community trusts still have the right to make their own decisions and control the resources and benefits deriving from them. In response to this uncertainty, the District councils have been taking the funds away from the community trusts and granting rights over the community trust areas to private companies. By 2015 this was the case with the /Xai/Xai Tlhabololo Trust, which has in effect fallen victim to an internal land grabbing process. In fact, the Tawana Land Board and the North West District Council had told the trust managers that they no longer had the right to control the financial benefits that they had been receiving from the various community-based natural resource management and ecotourism projects there.[5]

5. The only areas in Botswana that are owned legally (*de jure*) by the San (i.e. land that is freehold or private land) are (1) Dqae Qare Game Farm in Ghanzi District (7,500 hectares), which is run by a community development trust (Kuru Development Trust) and (2) D'Kar, a Naro San community in Ghanzi District (3,000 hectares)

It is not only restricting access to land but also new legislation that can limit access to livelihood. From 1979-2004 Botswana was the only country in Africa that had a national-level policy on subsistence hunting. But through time the government did away with this policy and in January 2014 prohibited hunting altogether (Hitchcock et al 2015). Thus, the people who depend on hunting for part of their subsistence (in the form of food or income economy) no longer have any legal access to hunt. This has particularly impacted communities such as the /Xai /Xai that derive much of their income from safari and subsistence hunting and the people of the Central Kalahari Game Reserve, for whom hunting is essential for their subsistence.

4. Conclusions and implications

The San peoples, who identify as indigenous peoples and as people who value hunting and gathering as a way of life, with its extensive use of wild resources, have had difficulties in getting their land and resource rights recognized by the Botswana government. As a result, much of the land of Botswana that was in the hands of the San in the past has now been designated for other uses, including livestock ranching, tourism, and mines of various kinds. The San have attempted to act on their land and resource rights through negotiations with the Botswana government, national and international advocacy, and through legal means, filing legal cases in the High Court and taking part in government policies and programs involved with community-based natural resource management.

Going back to the intent of the conference and of the editor of this volume, I will conclude this short essay by proposing several recommendations to the European Union for the role it could play in the advancement of indigenous peoples rights and access to land and resources in Botswana.

The European Union has already had an influence relative to

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which belongs to the Naro and in the past to a D'Kar-based church.

land, development, livestock and conservation in Botswana, and it is likely that this constructive influence will continue.

Botswana currently does not have any NGOs that actively advocate for land issues and rights, nor is there any NGO that monitors the way that legislation relating to land tenure is developed and implemented. Recently, the EU pressured Botswana to create an NGO Council to identify gaps in policy and offer suggestions about how to monitor land and development related issues, including the ways through which to channel EU funds to NGOs and evaluate transparency and accountability.

The EU can clearly continue to play an important role in all of this. Through its 1998 Council Resolution, the EU recognizes the key role played by indigenous peoples in conservation and the management of natural resources.[6] According to the EU, indigenous peoples have the same rights as other people in the country to a secure livelihood, including a choice in the way of life, self-development where free, prior, and informed consent has a key role, and to be treated equally within the state's legal framework. Indigenous peoples should have access on a non-discriminatory basis to land and resources, which currently is not the case in Botswana. Botswana, like many other African countries where the EU has projects, has not recognized the San as indigenous peoples, an issue that the EU should address with such governments. The EU can provide recommendations to the government of Botswana on international policies and procedures that deal with indigenous peoples, for example on wildlife conservation, resettlement, compensation and development. There is a need for

6. EU and Indigenous peoples: European Commission Working Document on support for Indigenous Peoples in development cooperation (1998); European Council Resolution (1998) and Council Conclusions (2002) on indigenous peoples; European Instrument For Democracy and Human Rights (2006); EU Regulation on Development and Cooperation Instrument (DCI) 2014-2020; EU Strategic Framework and Action Plan for Human Rights and Democracy (2012) Social corporate responsibility; The European Consensus (2005); European Parliament, Indigenous Peoples, extractive industries and human rights (2014); EU and UN Declaration on the Rights of Indigenous People ILO 169; World Conference on Indigenous Peoples resolution (2014). The EU can recommend that states become signatories of ILO Convention 169.

a comprehensive policy on indigenous peoples in Botswana, not simply an affirmative action program for people residing in remote areas, which is what it has at present.

Efforts can be made to ensure EU development policies and international investment and trade agreements comply with international human rights and the rights of indigenous peoples. And the EU can recommend member states to ratify ILO169 on Indigenous and Tribal Peoples and include reference to indigenous peoples and UNDRIP in their Business and Human Rights National Action Plans.

Some European Union funding to Namibia is being used to provide assistance in agriculture, livestock management, fire, grazing, and water resource management and in obtaining indigenous knowledge of the Ju/'hoansi San people on wild resource use, community-based natural resource management, and strategies that they employ as a means of adapting to social, economic, and environmental change (Nyae Nyae Development Foundation of Namibia 2015). If such a program were applied in Botswana, this would go a long way toward assisting indigenous peoples to gain greater rights over land and resources along the lines of the conservancies in the communal areas of Namibia.

The 2012 Voluntary Guidelines on the responsible governance of tenure developed by FAO and the CFS – the Committee on World Food Security – dedicate a section to indigenous peoples and customary tenure systems. These recommendations are a good starting point for evaluating the work of the EU government partners regarding the recognition of the rights of indigenous peoples to their lands, resources, and livelihoods.

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Mauro Van Aken[1]

GRABBING FARMING CITIZENSHIP IN THE MIDDLE EAST

Peasant realities of land and water and their disconnections

Abstract

Following the large-scale industrialization of agriculture, the commodification of land and water and the "super-green revolution" based on intensive irrigation, agriculture has radically changed in the Middle East: a global disjuncture has increasingly taken place at the local level between the farmers or those who produce food, the consumers and their territories, and the cultures and 'agri-cultures'. Agriculture has been seen as a mere economic and technical sector, representing small farmers out of political settings in their patterns of land and water use, and thus transcending local realities and inequalities in development policies.

Through some cases from Jordan fields and "battlefields", different patterns of disjuncture, which are at the core of inequalities and dependencies of small farmers, will be highlighted.

1. Introduction

Following large-scale industrialization of agriculture and agribusiness, the commodification of land and water and the "super-green revolutions" based on intensive irrigation, rural and pastoral realities have been radically transformed in the Middle East: a global disjuncture has imposed more and more at the local level between the farmers (and even more, pastoral populations), or those who produce food, the consumers, the territories and the

1. Mauro Van Aken is researcher at the University of Milan-Bicocca, where he teaches Cultural Anthropology ad Economic Anthropology and Development. He has conducted fieldwork in Northern Pakistan, Jordan, Egypt and Italy on socio-cultural dynamics in humanitarian aid and on culture/environment relationships in a modernization context.

local "agri-cultures". In modernization paradigms, agriculture has been translated into a delimited economic and technical sector, delinking small farmers and their patterns of land and water use from political settings, thus transcending political dynamics and relations of inequalities. Through some field experiences from the Jordanian case, different patterns of disjuncture, which are at the core of inequalities and dependencies of small farmers, will be highlighted.

New modes of production in producing and thinking food and managing land and water have inevitably modified the ideas of locality and of local autonomy, the notions of the environment and the working patterns and relations of dependency. On the global scale, agriculture is undergoing a strong agrarian crisis due to unsustainable development models, strong social fears connected to the food crisis or food manipulations and diseases, increasing hydro-geological risks and rural land abandonment (van der Ploeg 2008, Vasavi 2015), side by side with the strong impact of intensive agriculture on global heating. Furthermore, the consumption of soil in peri-urban contexts is extending, land and water grabbing has intensified in transnational patterns (Fiamingo, Ciabarri, Van Aken 2014), while the marginalization of small and family farming is increasing within the global dynamics of the agro-food industry. The management of common resources, like land and water, shows the strong contradictions of intensive modernization paradigms and reveals at the same time its political character at centre of the public and civic debate and social movements.

The analysis of rural context and resource management are often restrained by a reductionist perspective, unable to understand the complexity, heterogeneity and dynamics that are today at stake in agricultural and pastoral areas. An image of "virtual farmers" has often taken place within modernization theories based on urban, western ideals and stereotypes of a productivity and on a technical label of "farmer" distant from the multiplicity of roles played by small peasants in contemporary reality, which hinders at the same time a comprehension of the innovation patterns present at a local level in rural environments.

As development anthropology has taught in decades (Long and Long 1992, Olivier De Sardan 1993, Grillo 1990), modernization processes in rural contexts are political arenas and "battlefields": an interface and encounter in the fields and at work of four crucial different main discrepancies between planners and their "clients", who often perceive themselves as "planned" more than active agents within political change. First of all, the different ideas of community and belonging (who is the client? what are their needs and problems?) are at stake; secondly, different ideas of territory, of the "place" of the "projects areas" encounter and contrast; thirdly, different logics of time in the field between planners and local populations, as divergent agricultural calendars, local socialization of time and work patterns or the encounter with the exogenous patterns of "economic" time and phases of projects conceived as linear phases of technical advancement; last but not least, the contrasting ideas of the environment and of resources, specifically land/water, which are related to different patterns in socializing the environment. All these main cultural encounters are related to the main and ancient issue and struggle between different ideas of what local best farming practices are, the exogenous ignorance or explicit censure of local work patterns, perspectives and rights, even more among small farmers.

These discrepancies and frictions are not just "caused" by development actors, nor just expressions of "local problems" (Long, van der Ploeg 1989), but they are the main consequences of the encounter between different cultural and political logics in agricultural modernization, They become "problems", and even conflicts and dynamics of violence, in the moment in which the diversity of perspectives and ideas of change do not acquire terms of *recognition*, or on the contrary, are explicitly censured, as in authoritarian contexts of development. But an ancient tradition of rural development, which has been striking back in the last decades through neoliberal paradigms of resource management, is delimiting agriculture as a technical and economic world of meaning, delinking it, in policy making and implementation, from wider social, political and local realities and resources. This has widely become the main de-politicisation pattern that on the

one hand impedes the comprehension of, and effective "partnership" with, local actors and their knowledge patterns; on the other, it excludes intensively marginalized small peasantry, whose economic "life-worlds" are either misunderstood or transcended.

The case of the "super-green revolution" in the Jordanian Jordan Valley based on intensive irrigation has been a laboratory of Middle East modernization: this will help in highlighting some main discrepancies between policy making and local peasant realities. Different disjunctures between policy making and farming will be dealt with: the disjuncture between agricultural intensive modes of production and the local social and environmental contexts; the disjuncture of the exogenous understanding of models of change and local rights on resources, legal pluralism and local patterns of resource management; the disjuncture between the policy understanding of the "farmers" and local dynamics in search of autonomy or struggling against marginalization. In short, the question is how policy-making is sustaining these patterns of autonomy of a most vulnerable and vast peasant population, or, willingly or unwillingly, is fighting against it.

2. Farming policies, farming livelihoods: some main disconnections

The processes of agriculture globalization with increased inputs of private capital, of intensive technology and new regimes of commercial inputs are seen as the only solution to the problems of low productivity, lack of fertility, water shortage and overall conditions of poverty of wide rural areas in the Middle East. Indeed, rural modernization has acted also in the Middle East as a "production of disconnections", where agriculture has been decontextualized from its social and environmental context: the case of tropical bananas or even intensive irrigated horticulture in the semi-arid Jordan Valley (JV) are a clear example, like many others.

This has been possible by "making the peasantry invisible" (van der Ploeg 2008): their patterns of resource management,

their local heterogeneity, their *savoir-faire* has been traditionally perceived as an obstacle more than a resource in conceiving change. Besides, an idealized model of rational farmer as an efficient, individual entrepreneur manager has been set as the reality to export onto the field, superimposing a stereotyped ideal of farmer in local realities; the invention of the "Jordanian farmer" in the JV substituting the realities of *fellah* (peasant) economy or *Bedu* (pastoral) resource management is a clear case (Van Aken 2012).

Moreover, understanding the meanings of food and farming resources in the contemporary world relates to the deep disjuncture between food (and who consume it), the territories where it has been produced (more and more distant and unknown) and the cultural systems (like patterns of knowledge and work, the symbolic and political relationships of agricultures). Food is often isolated from its land and resources and from the work pattern that produces its diversity, sustainability and multiplicity of cultures and environments.

If the outsourcing of production in the globalization of food is one of the main strategies in agribusiness, amplifying and hiding the food chain among territories within a process of 'refashioning food' as a main engineering endeavour, rural realities are often pictured as anchors of authenticity, of local identities, of the "nature" of food. This rural idealization avoids taking into account peasant realities characterized, in van der Ploeg words, as "an ongoing struggle for autonomy and progress in a context characterized by multiple patterns of dependency and associated processes of exploitation and marginalization" (2008:1). And often, both in the European context as much as in the Middle East, this local search for autonomy is based on distancing strategically from wider market dependencies, by investing in local cooperative patterns of labour, farming knowledge and local techniques, multiple economy and "on sustained use of ecological capital and oriented towards improving peasant livelihoods"(2008:II). Many agricultural local systems do not produce just crops but need to reproduce soil fertility, to restate and adapt local cooperative patterns and water sustainability, in striking contrast with the mod-

ernization models that have "freed" themselves from the environment, leading to a widely-recognized destruction of ecosystems. Access to food is more and more a question of equitable access to land and water, to autonomy in seed reproduction, to the sustainability, social and environmental of the models of production at local levels.

2.1 Agricolture disconnected from ***agri/culture***

A long tradition of rural planning models continuously view farming and food production as a mere economic issue: this imposes models of development and resource use which are based on "virtual farmers", mainly as rational economic individual farmer operators, often detached from actual farming experiences and local power relations, which should, on the contrary, be tackled in view of a real change.

As Vasavi well shows (1994 2015), agriculture is first of all a world of diversities of *agri/cultures* and the possibility to transcend this basic aspect has been at the core of the erosion of local knowledge patterns and destructuring local commons, as communal system of resource management: systems of values, of belonging, of local expert systems and knowledge patterns linked to local "savoir faire" and incorporated knowledge, all elements which are at the base of the production of "diversity" (cultural, economic and ecologic). Agricultural policies rarely take into account local management patterns and values, local techniques in water use, local cooperative and institutional patterns in farm labour, moral and aesthetic patterns related to farming, which remain generally "invisible" and unknown, or are viewed as obstacles to agricultural modernization.

As Vasavi states,

> "in the context of the growing uncertainties and risks of agriculture (fluctuating markets, increasing costs of production, unreliable climate, etc.), such individualisation of agriculture has largely been responsible for making agriculture an intensely

> distressing experience. The death by suicide of more than two hundred thousand agriculturists since 1997 in India is testimony to this" (2015:225).

Rural policy is too often conceived as directed to an individualized, de-socialized "farmer", in a process of

> "increasing pathologisation of agrarian citizens who are mostly considered either as patients who must be treated with various regimes of high technology or science inputs, or as supplicants who must be appeased with populist policies or governed through welfare measures" (ibid:229).

This invisibility is what leads to a denial of agrarian citizenship, as happened in Jordan:

> "The denial of agriculturists' rights and well-being represents the erosion of the agrarian citizenship of agricultural peoples. Such citizenship, which goes beyond civic and political citizenship and recognizes the land, agriculture, and resource-based rights of agriculturists, is increasingly denied to a vast number of agriculturists." (ibid:229).

2.2 Policy discourse as a community of interpretation: putting development actors back on the map

Policy-making should be brought back on the map: the discourses, paradigms, labels of development policy are not external to the project fields, they do not just implement as if they were external actors of planned change, but are active in local political dynamics and problems although they conceive of themselves as "out of the map". The disconnection between policy discourse and their "clients" is part of the local problems: the labelling of the local farming population in the JV as homogeneous "farmer-operators", the diagnosis of local problems based on a mere technical understanding, their definitions of needs restricted by the "a-social" client category

or the depoliticization of land and water issues and rights through discursive patterns, are time-worn aspects studied in policy discourse and action (Grillo:1997, Hobart:1993, Wood:1985). In the case of the JV, the invention of the "modern farmer" as a client category, has been an explicit project of society, in the attempt to censure a local definition of communities, like Palestinian refugees, tribes, Bedouins, Egyptian migrant labourers or marginal women labourers: since they became invisible, their needs and patterns of inequality have not been tackled.

The East Bank of the JV was planned and reshaped by rural modernization as if it were empty of people. Following the emergency of the Palestinian refugee dislocation and inflow in 1948 and again in 1967, the irrigation projects were meant to localize, settle and control a mobile population. Indeed, irrigation modernization offered a social and technical instrument in reshaping a territory by extending intensive agriculture. This, in turn, set up a new spatial organization through village planning, land distribution and control of the territory according to the new water infrastructure and in order to support the government's attempt to domesticate a border area. The East Ghor Canal, begun in 1957, conveys the water of the Yarmuk River at the northern border with Syria by means of gravity, and has allowed the "super-green revolution" of the valley, through the intensive cultivation of vegetables and fruit trees. It is not just water that has started to flow through this new extended network, but also social projects, moral values and new ideas of place and community, elements that are indeed present in the self-perception of the local—though mainly displaced—population of today. In the present day's market crisis and water shortage, development policies have shifted from a vertical model to new rhetoric of participation through a local adaptation of a global model of PIM (Participatory Irrigated Management) in framing water and land use. Indeed, local irrigators, be they Palestinian, Bedu, Pakistani or Egyptian labourers, already participate in irrigation management to a large extent, but not in the desired direction according to administrative plans. Defying the authoritarian model of change applied in this valley, irrigators have historically manipulated, redirected and circum-

vented the planning processes.

The social, political and cultural dimensions of rural development, which had been excluded in decades of hegemonic technocratic and "economicist" approaches summed up by Scott under "authoritarian modernism" (1998), have become fashionable and have contaminated development jargon, policy rhetoric and development practices at different levels. Although presented as a paternalistic novelty in the top-down development tradition, both meanings of the new participative development jargon as much as the practices that it legitimizes remain highly ambiguous or reproduce old patterns of power relations. They highlight the difficulties, or the explicit censure, of policy making in understanding the current water practices and representations at the local level that define the power struggle in the JV and in the wider Middle East. Multiple and heterogeneous stakeholders desire and promote "participation" but reproduce at the same time a wide gap of comprehension, or a "construction of ignorance" (Hobart 1993) of the local dynamics of inequality, notwithstanding this apparently "new" grassroots and populist shift in policy models.

The Jordan Valley has witnessed in the last fifty years huge socio-environmental changes: water has been "developed", inserted in new logics and institutions, and a new spatial organisation has been set up according to the new hydraulic infrastructure (Van Aken 2012). This process has taken place as if previous institutions, patterns of local knowledge, irrigation practices, systems of labour cooperation did not exist or were labelled "traditional" and consequently identified as obstacles. The new hydraulic, efficient technical order of the irrigation network is characterized today by continuous disorder: continuous stealing of water, manipulation of valves and sabotage of water meters by a great part of local irrigators. Water has become, indeed, a focal point of both a local and wider struggle, and of local appropriation and manipulation of the technical order. These daily practices are not just "illegal" actions or obstacles to the efficiency of the system, as they are daily labelled and censured, but insert the conflictual relationship between the local population and the state directly

within the production system of agribusiness.

Today, access to water faces a continuous unpredictability, due to increasing water cuts, due to the lack of transparency and rigidity of the bureaucratic distribution system in contrast to the need for frequent, reliable turns and quantity of water, notably during sensitive periods in spring and autumn.[2] This unreliability of water is linked to the local perceptions of not having control over the resource linked also to the invisibility itself of the new network, which has gone underground and water is rarely visible.

Rural policies on land and water over the last fifty years have had three main roles in the JV, three main social consequences that were much more important than the economic low performances and which highlight the effects of technicization patterns on rural modernization. First of all, they have constituted crucial *politics of location,* where new definition of place have been the core of political change and power relations. Since the 1950s, several international organisations have launched sedentarisation programmes for Bedouin tribes linked to agricultural irrigated plans, viewed as an essential step to economic integration, stability building, control of rangeland (the *badia*) and "detribalization" as the first steps towards modernization. This bias against "tribal" and mobile populations is recurrent in the history of planning in the Jordan basin and wider Middle East, where "tribal" or "local patterns" often stand for primitive, obstacles to change, inefficient management of resource, not as possible agents of change. Though Bedouins did indeed settle and cultivate in the JV, tribal solidarity did not fade away; on the contrary, it has reinforced and readapted in the new socio-technical environment, while genealogical solidarity shapes today many local patterns of resource distribution.

Secondly, water projects have been imposed as a solution for the Palestinian refugee influx in order to resettle them through agricultural rooting and economic integration on a Jordanian

2. In furrow-irrigation, large amounts of water are supplied less frequently; on the contrary, micro-irrigation requires smaller volumes, more frequently, with less labour involved.

border. Both pastoral populations as refugees should have been transformed into a "Jordanian farmer community". Through irrigation ideologies, the idea of rooting a "new farmer community" through agricultural work has been introduced, in parallel to the attempt to secure and domesticate land.

Further, water planning in the JV has put the region under a new spatial organisation: this area, along with the western valley and the occupied West Bank, is probably the most photographed and planned region in the world, where planning and mapping have themselves been crucial in freezing conflicts rather than solving them, often acting as a substitute for politics. Irrigated agriculture absorbs today 70% of available water resources in Jordan, where the JV constitutes the main water consumer. This in a context where the country is rapidly going towards a lack of water autonomy in the coming decades – previsions indicate 2025 at the present national water use – and where competition for this limited resource is sharply increasing between the high irrigation consumption – a consequence of the last half-century's agricultural policies – and the expanding and more "water-productive" urban use.

Since planning in the decades has reproduced an image of technical reality in order to avoid social dynamics that leads to poverty and marginalization, where do policy makers stand in this context? Indeed, policy and agricultural discourses, even more based on water policies, are not out of the map, out of projects but in Jordan, on the contrary they are part of the local issues local dependencies, of devaluating farmers, of impoverishment of the farming population and the degradation of resources. Besides, policy makers are indeed a "community of interpretation". Policy-making in social life, is often *impossible* to implement (Mosse 2004), even more in highly vertical and authoritarian settings like Jordan since the representations – both problems or resources of farmers – are far from the local realities.

The representations of local needs follow more donors' needs and projections, to which local clients have to adapt, and do not recognize local diversities and, even more important, local power relations. Development policy is surely important for the inter-

national community, in order to facilitate *their* internal cohesion, hiding multiple political and economic interests and contrasting agendas and representing change for "the others". Thus, policy remains crucial for the transnational community in restyling development models, in changing frames and paradigms, in building consensus and legitimacy, but, willingly or unwillingly, without really changing the local political patterns that farmers face. A policy shift is often an important change in the representation of reality, through labelling practices, changes in frameworks, but is often not followed by changes in the reality perceived by marginalized farmers in the JV, according to their effective access to water, to land, to seeds, to market: their being really recognized as agrarian citizens.

Participatory techniques, for example, which have spread since the 1990s in development jargon and models, allow and legitimize the most diverse changes, but, first of all, *within* the development world and actors. An example is given by the regular workshops held around water optimization and water irrigation techniques over the last decade in Jordan. Indeed, they represent important development rituals, where a sense of "community" side by side with some main values (participation, change) and goals (water optimization facing scarcity) are performed. They compose a *mise-en-scène* of the new jargon and the new actors joining together in policy-making around water: stakeholders and decision-makers negotiate here, NGOs turn up, donors, bureaucrats and administrative staff from ministries, representatives, all join the new ambiguous language of devolution and participation.

Notwithstanding the multiple and contrasting interests and goals of the different and asymmetrical actors involved, these contexts perform a "representation" of a common policy-makers' community, where the notion of participation is tantamount to shaping this new community. As Mosse has stated in the Indian context, "development projects need interpretative communities" that recruit support and consensus, and establish ideas of order in a "constant work of translation" (2004:646). Although discussing and planning for "local" irrigators in the JV, these events have a main and primary goal for the policy-makers' community.

They perform acts of coherence of frequently incoherent projects and are the *acts of translation* of divergent agendas and political interests. Mosse's analysis allows us to approach seriously policy-making by understanding local reality and the social life of planning through three main points:

- "Policy primarily functions to mobilize and maintain political support that is to legitimize rather than to orientate practice" (2004:648), arguing how the logic of political mobilization and the logic of operations are always different;
- "Development interventions are driven not by policy but by the exigencies of organizations and the need to maintain relationships" (2004:650), which reveals how policy-making is often inevitably self-centred on development organization, bureaucratic interests, political agendas and therefore, the participatory projects, as they are designed, are inevitably *unmanageable*, since they may reproduce and hide, rather than challenge, power relations;
- "Development projects work to maintain themselves as coherent policy ideas, as systems of representations as well as operational systems" (2004:655): one main practical effect for policy-makers is both securing reputation and funding as much as securing a "significant interpretation" of events. In the case of the Jordan valley, local dynamics around irrigation, like water stealing, are perceived as highly incoherent or just illegal, and participation allows local power relations and conflicts to be transcended in an apparently coherent and stable framework.

What is striking in these ritualized workshops on irrigation, held generally far away from the JV in Amman in some military-secured hotel, is the metamorphosis of internal seminars into communication events with the crucial help of a facilitator whose role is to co-opt the different "actors" into discussing in a show-like setting.[3] Critical problems facing water governance are focused, targets identified, actors to be involved prioritized, im-

3. This professional role, delegated to western professionals, organizes the communication through different techniques (role–play, focus-group discussion, consensus making, brain-storming), often without any specific knowledge of the issues at stake.

porting a new pattern of communication and political encounter, which highly differs from other ancient patterns of communication present among farmers in the valley, like *diwan* (the institution of hospitality), where holding the *kalam* ("holding the word", speaking) is quite an important, strategic act.

The show-like setting has one main target: exhibit the convergence of opinions, of targets and of methods between heterogeneous, asymmetrical and multiple actors that de facto convey different, even antagonistic interests, in water and agricultural planning.

Interestingly, the main boycotted issue, has been often the "participation" itself of farmers to irrigation management. Jordanian bureaucrats for example expressed disapproval for this Western "invention" that could not function in Jordan, while Western professionals saw that opposition as a form of national institutional conservationism, while at the same time they ignored or transcended completely the local and social dynamics around water (like tribal solidarity, class segmentation or farm labour stigmatization), in which aid and experts are embedded. Although divergent positions of stakeholders were present, the ritualized pattern was preserved. Participation was an epistemic way to represent themselves as the legitimized development community with a common language and goals: the necessity of technical aid, the reproduction of aid industry, and the common agenda of the policy-makers' community, notwithstanding the asymmetrical positions.

A second important aspect that participation models legitimized was the complete absence of analysis of the political relations around water, like the issues of water stealing by irrigators. In short, the debate around water conflict was transcended and depoliticized. What participation models legitimized at this stage was the construction of a development community out of heterogeneous and divergent interests. In short, talking about JV farmers' participation allowed local farmers to be transcended and, while at the same time, it helped to build a community of policy makers through participatory jargon which contains, within its wide ambiguity, multiple and divergent positions. When the po-

litical hierarchy around resources is not put to question, policy models are "good to think" for planners, but not "good to implement" on the fields, and exclude effective involvement of part of local population.

2.3 The disconnection of small farmers from their social and political "battlefields"

One of the main problems facing water distribution in the JV is that the technical network implemented is too hierarchical, too hidden and too centralized for participation and decentralization. Besides, the bureaucratic management has been too opaque towards irrigators. A technical network is never a discrete and neutral change and setting, since the technical infrastructure and bureaucratic management does often not allow on the ground a real devolution of responsibilities and wider space of manoeuvre for irrigators.

A technical network is always a social and political network.[4] In a development context, the network constitutes often the encounter of multiple cultural and social networks, between exogenous ideas of local change in relation to water, and local knowledge and agricultural practices.

Besides, water relations have become invisible or have fragmented the public spaces around water. The 100km long open-canal, renamed afterwards King Abdullah Canal as an evident monument of the nation, which extended irrigation from the northern frontier of Syria up to the Dead Sea, is today joined by additional water supplies from dams built in the side valleys during the last fifty years. From an initial surface irrigation system, visible, "public" and linked to traditional *savoir-faire* and knowledge of local populations, micro-irrigation linked to a underground pressurized-network have increasingly changed the social world of water and land.

4. The notion of *socio-technical network* has been introduced in literature in the attempt to link social and political relations mediated by water through a technical reality.

A main feature of this transformation has been the new management of the irrigation system: the genealogical-based, visible, localized system of distribution has given way to a distant, invisible underground centralised planning of water. The state also centralized the control and knowledge of water appropriated in the hands of hydraulic engineers and policy experts, setting aside local institutions. Besides, the shift from surface to micro-irrigation linked to pressurized pipelines has radically changed in a very short time the ways of thinking and practising water, while fragmenting local water and land neighbourhoods. Strikingly, micro-irrigation (the simple, small black drip-irrigation pipes) has introduced all of a sudden a macro-dependency: a wider technical apparatus in terms of pumps, filters, fertilizers, pesticides has introduced new economic inequalities and high capital input. This has shaped the general process of delegation of authority away from local representatives, as previously *sheikh* (tribe or lineage representatives), *mukhtars* (village representatives) or water mediators, to technical experts and has led to competing knowledge claims and competing authority roles. Water has become a national and military affair, while local population at a different stage has attempted to "re-socialize" it through their own pattern of resource use.

2.4 The disconnection from local agricultural knowledge and environment

This disconnection of agricultural policies also originates in the neglect of local resources 'rights and legal pluralism, from the local patterns of knowledge of water limits and flexibility, of local political institutions in resource management that often do not enter in "civil society" rhetoric and governance, and thus remain invisible or an "obstacle" to be overcome.

For example, all rural policy-making is based in the Middle East on notion of scarcity and water stress, while at the local level no notion of scarcity was present in the past but rather of *unpredictability* and *variability* of waters. Scarcity however is based on

an exogenous view in relation to western notion of abundance, while ancient local experience focused more on the features of water to which agricultural production had to be tied and limited, and engendered flexible social strategies of pastoral/agricultural shift, of mobility, of multi-purpose economy, of migration, or, based on the notion that water is a finite resource, cultivating according to waters available and not according to market demand.

Four main cultural and political transformations are thus tied to this hydraulic change as a cultural encounter that we witness in much other farming if the "developed" world. A first major change was the transition from a concept of water allocation based on the household heads and representatives in the past, towards a water allocation according to the crops in the fields. The idea is that the amount of water to be allocated is calculated according to what is planted and not according to 'who' plants it, where the irrigator (and his family and family labour) is depersonalized. A second general change is the shift from a distribution of water according to a tribal pattern, where water refers inevitably to local patterns of cooperation, to a tribal territory (*dirah*), to the *sheikh* as agent in solving water disputes, towards its centralization under a distant water administration. This is linked to a third main issue: the water-turn (the amount of water delivered by administrative allocation) was, and still is in local practice, measured in terms of "social time" through the local notion of *dor*, as a time flux of water related to the local social context and communal arrangements. From a temporal and social dimension as the base of its distribution (its exchange, its relationships, its deviation according to families variable needs) water has been translated into a definition of quantity (cubic meters) and pressure flow. This inevitably has taken water out of its social and local dimension and inevitably ignores the social life in which it is still embedded. Water shares, when counted as social measurement, could be sold or exchanged in order to adapt the time-share system to local needs in flexible ways, a crucial flexibility that is reproduced today vis-à-vis the rigidity of the water bureaucracy. A fourth main aspect is the political reality of water scarcity, in relation to basin closure, where the current high competition between urban and

agricultural water needs leads to a closer interdependence and competition of the national and regional water systems. If more JV water, as happens, is pumped to the capital, less water will be available for local irrigators, if more water is "hidden" in a district, less water will be available for the other districts' irrigators: a political arena of water where the rules of negotiation and rights are hidden. Water, from an infinite notion of abundance through technological optimism, has been "discovered" lately as finite and limited resource, which has always been common knowledge in the local, arid context.

Facing environmental change, water-competition and global heating, the attempt to reconnect the overlapping patterns of disjuncture in which policy is embedded may be one of the main steps in thinking of sustainable and less unequal futures: but this means integrating the claims for agrarian citizenship of the vulnerable part of farming population and also learning from local knowledge patterns, the flexible institutions of more marginalized peasants and their relationship, which is not ideal and frozen but is local.

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Marcel Djama, Shaufique Fahmi Ahmad Sidique, Syahaneem Mohamed Zainalabidin[1]

MALAYSIA PALM OIL EXPANSION ON A GLOBAL SCALE

Abstract

Malaysia and Indonesia are the major palm oil producers in the world. In this paper, through a brief description of the Malaysia palm oil industry, while documenting this expansion, we stress the trade-off that palm oil industry has to address between development and environment. So while we take stock of the undeniable successes in the Malaysia rural development model and its outstanding achievements in its fight against rural poverty, we denounce its dark sides, with its negative environmental externalities.

1. Introduction

Malaysia is – along with Indonesia – the major palm oil producer in the world. Both countries contribute to more than 80% of the world production for that commodity. But Malaysia has a specific position within the industry.

All along its development pathways, the country has progressively invested all segments of the value chain, from upstream (seeds, farming practices…) to downstream (refinery, agro-food, oleo-chemical, biofuels, research, marketing, branding…). This upgrading process reflects a general pattern of the economic growth of the Southeast Asian tigers, based on a rapid industriali-

1. Marcel Djama is a Senior Research Fellow at the International Research Centre in Agriculture for Development (CIRAD, France) and a Senior Research Fellow at Universiti Putra Malaysia, Institute for Food and Agricultural Policy (Malaysia). Shaufique Fahmi Ahmad Sidique is Associate Professor at Universiti Putra Malaysia and head of the Institute for Food and Agricultural Policy (Malaysia). Syahaneem Mohamed Zainalabidin is a Researh fellow at at Universiti Putra Malaysia, Institute for Food and Agricultural Policy (Malaysia) and a Phd candidate at University Paris 1 Sorbonne [This essay has not undergone the blind peer-review process].

zation driven by a developmental state mixing neoliberal strategies (mostly on topics related to international trade) and state interventions.

The palm oil industry in Malaysia has evolved from being a substitute crop replacing the country's economic dependence on rubber and tin in the 1950s, to one of major contributors to the country's economy. The rise of palm oil in Malaysia is mostly attributed to the policies introduced by the government, which encouraged lots of initiatives to satisfy the global demand for this important cash crop. The relative profitability of oil palm compared to rubber coupled with low taxes on the crop contribute significantly to the vast growth of the industry.

Malaysia is also becoming a global player in palm oil as many national corporations are expanding far beyond their borders in their quest for land and labour.

The expansion of palm oil started in East Malaysia because of the unavailability of suitable land in Peninsular Malaysia, and is currently active in tropical areas all over the world. Palm oil plantations owned fully or partially by Malaysian firms have been established in countries like Indonesia, Papua New Guinea, Solomon Islands, Cambodia, Congo, Liberia and Ethiopia

In this paper, we aim to document this process of expansion, highlighting its success, challenges and limitations. The first part will briefly describe Malaysia developmental state-driven policies. The second and third parts will address palm oil expansion both at home and on a global level. The last part will briefly discuss how controversies and sustainability issues have led to the rise of new regulatory tools challenging the developmental state.

2. Foundation of a developmental state

Malaysia occupies an area of just over 330,000 km² in South Asia, consisting of two land masses separated by the South China Sea. Peninsular Malaysia covers 131,000km², bordered to the north by Thailand, Singapore to the south, the Strait of Malacca to the west and the South China Sea to the east. The island of Borneo

is the other territorial component of Malaysia, with Sarawak and Sabah states. In Borneo, Malaysia shares a common border with the Sultanate of Brunei and Indonesia.

Designated in the 1980s as one of the Asian tigers for its performance in terms of economic development, Malaysia still remains nowadays among the most dynamic economies in ASEAN.

With a GDP of 312.4 billion US dollars, a gross income per capita of $US 10,400 and a 1.7% poverty rate, the country has been classified by the World Bank in the top part of middle-income countries.

Over the past three decades, Malaysia has experienced an average growth of about 7% a year, while its population increased by 2.6% per year (from 9,000,000 at independence in 1957, to nearly 30 million in 2014). Despite the international slowdown, it is currently credited with a 5% growth.

The tertiary sector contributes to more than half of the GDP, followed by industry and mining (23% and 10%) and agriculture (9.3%). This last sector is dominated by the weight of the palm oil sector, which contributes 90% of the training of agricultural GDP.

A special feature of Malaysia development is that its insertion into globalization was achieved through a strong state intervention, while for most countries globalization has been associated with state withdrawal (Jomo et al. 2004).

Under British colonial rule, the economic foundation of Malaya as a colony was based on mining (tin) and rubber production. These labour-intensive activities led the British colonial authorities to organize the massive immigration of Chinese workers (mostly for mining) as well as Indian workers (especially as a work force on rubber estates), while the Malay indigenous population remained assigned to subsistence farming. The colonial administration assigned each ethnic group an economic role, thus institutionalizing racial and social segregation for access to jobs, economic activities, and education (learning English for example was only possible for children of the Malay nobility). To some extent, this colonial ethnic engineering legacy still frames contemporary Malaysia. Indeed, at independence in 1957, there

was a coalition of ethnic parties organized around the United Malay National Organization (UMNO), the Malaysian Chinese Association (MAC) and the Malaysian Indian Congress (MIC) which took power. This coalition is still governing Malaysia.

According to some analysts, the need to maintain social order and national cohesion in a context of social and ethnic inequalities shape political choices and main orientations for economic development (Lafaye de Micheau 2012). At independence – in 1957 – the new government engaged a development policy based on natural resources exploitation and on import substitution.

The political and economic turning-point came in 1969, in the wake of bloody riots between the Malay and Chinese communities. After these riots, the ruling coalition institutionalized a political and economic agenda targeting the economic promotion of the Malay communities, especially in rural areas.

Indeed, the New Economic Policy (NEP) introduced in 1970 is backed by a policy of positive discrimination in favour of Malays. It grants them many privileges, such as priority access to public service employment and to higher education, as well as preferential access to credit, for business operating licenses and public procurement for Malay companies.

It was also during this period that the government changed its initial development policy based on a strategy of import substitution. The Second Malaysia Plan (1971-1975) inaugurated the policy that would ensure the country's economic take-off in the 1980s and in the years that followed. It was based on an export-oriented strategy, the mobilization of foreign capital, and a specialization in electronics.

This positioning in international trade took place without any loss of state sovereignty, as it was driven by a developmental and an entrepreneurial state. Thus, the implementation of NEP was mainly carried out by public companies. The share of these public enterprises in GDP accounted for 30% of the total GDP in the late 1980s. And it does not appear that the wave of privatizations from 1986 have fundamentally changed the state's influence on large corporations.

This state capitalism articulated an extroverted economy (re-

lying heavily on external demand and foreign capital flows) to a political project of national cohesion. At the same time the Malaysian authorities expressed a will for sovereignty in the implementation of these economic choices, sometimes freeing them from international norms (Lafaye de Micheau 2012).

Malaysia's rejection of the International Monetary Fund's prescriptions during the crisis that hit the Asian economies in 1997 is a successful illustration of this position. This sovereign strategy against the tide of orthodoxy advocated by the IMF has actually paid.

3. Building the Malaysian palm oil industry

Originating in Africa and introduced into Southeast Asia in the 19th century, the oil palm tree (*Eleaeis guineensis*) slowly took root in Malaysia, as rubber production dominated in colonial period. The palm oil industry only emerged at the end of the 1960s, in a context of declining rubber prices.

In the early 1970s, the government's support to the development of oil palm farming was a component of the oriented rural Malay framework within the New Economic Policy. The aim was to revitalize the rural economy by ensuring the economic advancement of the majority of the Malay population. It was also part of the industrialization program and export oriented policy s adopted by Malaysia.

Through the mobilization of FELDA (Federal Land Development Authority) established by the British in 1956 to implement land reforms and facilitate the development of commercial family farming, the Malaysian authorities engaged in a program of rural resettlement for poor rural Malays.

FELDA settlements brought together smallholders within vertically integrated structures covering land access, technical support, farming, storage and primary processing.

Meanwhile, the government bought at market prices the most important European commercial estates and granted licenses to Malays to establish new businesses. The development policy was

based on a gradual upgrading of state-supported agents within the palm oil value chain. It relied on a system of differential taxes and incentives applied all along the chain to support added value segments.

A set of institutions regulated the growth of the sector. In the late 1970s the Palm Oil Registration and Licensing Authority (PORLA) and the Palm Oil Research Institute of Malaysia (PORIM) were created. The first organization aimed to regulate the production and primary processing sector through quality inspection and issuance of accreditation, mainly for export-oriented enterprises. The second was created to develop research on plant genetics and oleo chemical processing. In 2000, these two organizations merged into the Malaysian Palm Oil Board (MPOB). Another organization, the Malaysian Industrial Development authority (MIDA) oversaw oil refining as well as processed food (Teoh 2002).

In the early 1980s, corporations and research organizations started to work on the production of biofuels to diversify outlets. In 1984, a pilot plant for biodiesel production from palm oil was built in partnership with Petronas, the national oil company. With the implementation of the Eighth Malaysian Plan (2001-2005), an energy diversification program was eventually launched. In 2006 the "National Biofuel Policy" was enacted with a production plan and the construction of a commercial plant for biodiesel production (Chin 2011).

By the late 2000s, Malaysia was exporting about 230,000 tons of biodiesel to the European Union and the United States.

4. The global frontier: expanding the palm oil industry

At the turn of the millennium, Malaysia was the largest producer of palm oil, then overtaken by Indonesia in terms of volume of CPO (Crude Palm Oil) and acreage.

However, Malaysia remains the global dominant player in palm oil industry, if one considers that a significant part of the expansion in Indonesia (and now Africa) is performed by

Malaysian-owned corporations and capital.

Actually, according to the Land Matrix data base, Malaysia is the world largest investor in large scale land acquisition. In 2015, Malaysian investors were involved in 10% of all identified projects, representing a total area of 3.5 million hectares, (see Table 1).

	Number of Projects	Area (in ha)
World	*1028*	*37,503,168*
Malaysia	*96 (9%)*	*3,590,976 (10%)*

Tab.1 Malaysia's share in world land acquisition as registered in land matrix (http://www.landmatrix.org/en acceded 17/05/2015)

Malaysian overseas land acquisitions are mostly located in Southeast Asia. While only 5% of the projects are located in Africa, the acreage obtained by Malaysians investors is very important and represent 25% of the total area acquired by Malaysia. Papua New Guinea is also an important target.

Palm oil farming accounts for 78% of all land acquisition projects. But the global expansion of Malaysia in the palm oil industry is not limited only to land acquisitions. Compared to Indonesia, Malaysian main corporations managed to position themselves in the high value-added segments of the industry.

Corporations like Sime Darby (No.1 worldwide in the sector) and FELDA are nowadays conglomerates with diversified portfolios involved – beyond oil palm industry – in real estate, the food industry, car industry, tourism, among others. Within the palm oil industry, in addition to upstream production, they control refineries in Asia and Europe, and are present in oleo chemicals, food industry, biofuels, branding and research.

Region Countries	Number of Projects	Area (ha)
Africa	*5*	*890,240*
Liberia	*2*	*339,240*
Ethiopia	*1*	*31,000*
Congo	*2*	*520,000*
America	*1*	*4,096*
Guyana	*1*	*4,046*
Asia	*62*	*1,633,554*
Malaysia	*1*	*200*
Lao	*2*	*1,500*
Indonesia	*50*	*1,560,059*
Cambodia	*9*	*71,795*
Oceania	*28*	*1,063,136*
Papua New Guinea	*28*	*1,063,136*
Total	*96*	*3,590,976*

Tab. 2 Regions and countries targeted by Malaysian Land-acquisition (http://www.landmatrix.org/en acceded 17/05/2015)

5. Challenging the developmental state: the rise of transnational private regulation.

For many rural Malays, development promises supported by oil palm have been fulfilled. Indeed, estimated at nearly 38% in 1976 (and 46% in rural areas), the poverty rate would have fallen to 1.7% by 2012, according to UNDP.

But the expansion of palm oil industry has undeniably had a high environmental cost, particularly in terms of deforestation (Jomo et al. 2004). Moreover, in documented cases, palm

oil expansion has also contributed to land expropriation of local communities in Southeast Asia and overseas, as well as exploitation of estate workers (mostly migrants), fuelling the NGO campaigns (Colchester 2011).

To address the many criticisms and controversies caused by the negative impacts of globally traded commodities, new regulatory instruments have emerged in last two decades, such as the sustainability standards (Bartley 2007, Djama, Fouilleux and Vagneron 2011). These standards seek to define, and then put into practice, principles and criteria for environmentally and socially sustainable production.

The Roundtable for Sustainable Palm Oil (RSPO) is the instrument adopted by the industry to regulate the conditions of production of palm oil.

RSPO was initiated in 2001-2 by a coalition of Europeanised downstream companies (retailers, food processors and end-users of palm oil), NGOs and consultants in standard setting, in an attempt to tackle some of the negative side-effects associated with oil palm agriculture. In 2003, forty participants agreed to a joint declaration to implement and promote a sustainability standard for the production of palm oil. Early in 2004, the RSPO became an association under Swiss law, with its head office in Zurich, a secretariat in Malaysia and liaison office in Indonesia. The development of the RSPO is seen by many within the industry as a "business to business" way to address the environmental and social challenges of oil palm agriculture. An Executive Board coordinates the steering process of RSPO, with 16 members elected for two years and representing different stakeholders (See Table C).

The main decisions are made at plenary meetings during an annual general assembly to which all members are invited. Members have the opportunity – prior to the annual general meeting – to submit motions on which votes will be held. The Executive Board examines applications for membership, implements decisions made during plenary meetings, organizes working groups, and manages finances.

Sector	Number of seats
Oil palm growers	*4*
Palm oil processors and/or traders	*2*
Consumer good manufacturers	*2*
Retailers	*2*
Banks and investors	*2*
Environmental / nature conservation NGOs	*2*
Social / development NGOs	*2*

Tab. 3 Allocation of seats on RSPO's Executive Board[2]

Within a few years of its establishment, the RSPO had succeeded in instituting a complete cycle of regulation, from the establishment of its core principles and criteria for operations, to the mobilization of control and traceability procedures for certified products. In the decade since its inception the RSPO has rapidly expanded, certifying 18 per cent of globally traded palm oil by 2014.

Despite its success, however doubts remain about RSPO's ability to effectively tackle deforestation on oil palm expansion frontier.

To many analysts, the environmental effectiveness of its principle and criteria, as well as its enforcement capacities is limited (Laurence et al. 2010, Greenpeace 2011, Ruysschaert, Salles 2014). Moreover, the growth of sustainable palm oil remains far below the growth of the global demand for vegetable oil, especially within rapidly developing countries.

Finally, to date private standards such as RSPO do not associate the governments of the producing countries and, to some extent they have been perceived as operating against these States.

Indeed, the rise of private sustainability standards has been celebrated as a major institutional innovation of the last twenty years. For many, such private standards successfully

2. The growers or producers are divided into four components who are allocated one seat each: Indonesian, Malaysian, growers from the "rest of the world" and smallholders.

question the supremacy of traditional states arrangements and reflect the increasing role of non-state actors in world affairs (Pattberg 2007).

However, in a context where the developmental state remains a powerful player, the scope of private standards may be limited.

6. Conclusion

Through this brief description of Malaysia palm oil industry's journey, our aim was to take stock of the undeniable successes in the Malaysia rural development model and its outstanding achievements in its fight against rural poverty.

This model has however its dark sides, including negative environmental externalities. Many NGO campaigns denouncing land grabbing or poor working conditions in some plantations recall that many have been left behind by the success story.

In spite of their limitations, private sustainability standards like RSPO have the merit of giving these issues some international recognition and visibility.

Indeed, one of the side-effects of the challenging transnational regulation of palm oil industry is that it advertises conflicts and provides new political arenas to affected communities.

NGO campaigns and the rise of private standards are also experienced by producing countries' governments as an attack on national sovereignty and the right to development. Such a view may not be entirely misplaced.

Indeed, the strong pressure exercised on tropical commodities producers exempts northern consumers from their own obligations toward genuine and fair global environmental governance.

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Michael Morden[1]

First Nations and Comprehensive Land Claims in Canada

Abstract

Canada is presently seeking to position itself as a global resource superpower, and most resource extractive activity occurs on lands to which Indigenous groups claim Aboriginal and treaty rights. This paper provides an overview of the historical re-emergence of recognition of Indigenous land rights and title, and a discussion on the function of comprehensive land claims – central mechanisms for the reconciliation of Aboriginal land rights and state interests. Comprehensive land claims create a policy avenue for Indigenous peoples to benefit concretely from their Aboriginal rights. However, the process remains infused with power relations, and requires a degree of legal concession which many Indigenous groups feel cannot be justified.

1. Introduction

For the past forty years, Canada has been undertaking a political and legal transition which has incrementally increased recognition of the presence of Indigenous rights and title to land. This has had the effect of marginally increasing Indigenous participation in decision-making with respect to land use and resource extraction. There have been two primary engines behind this change: successive rulings of the Supreme Court of Canada, which first acknowledged and then gradually strengthened the application of Aboriginal rights; the mobilization of Indigenous peoples in Canada, who have successfully come to occupy a central place in national politics, primarily through direct action outside of institutions. Despite this, Indigenous

1. Research Associate, Mowat Centre at the University of Toronto.

peoples remain largely disempowered in the Canadian political system today.

At the present, Canada's federal government has embarked on an ambitious project to position Canada as a global resource superpower by pursuing aggressive development in several resource sectors, including oil and gas and mining. Canada is investing its economic future in resource development, and much of this will occur on or near the traditional territories of Indigenous people. As a result, one of the most pressing issues in Canadian politics today is the relationship of Indigenous people to lands and resource development.

Since the mid-1970s, the primary instruments for managing conflicting claims to land and resources have been comprehensive land claims (CLCs). CLCs are modern treaties, which typically require First Nations people to surrender explicit or *de facto* title to their ancestral lands, in return for various forms of compensation, including money, lands held in reserve and cooperative management of certain lands and resources. The federal government's CLC policy has achieved middling success as an institution of conflict management. CLC negotiations are generally glacially slow and fraught with political obstacles. Since 1973, only 26 agreements have been reached between Indigenous nations and the Canadian government through the CLC process, while there are close to 100 claims still outstanding. Successful claims have required decades of negotiation. They are viewed by some First Nations as vehicles for entering a more consensual and mutually beneficial relationship with the Canadian state, and by others as instruments for the termination of Indigenous rights.

This paper will proceed in four stages. First, it will provide an overview of Indigenous political mobilization in the modern period, and its effects on recognition of Indigenous claims to rights, land and title. I will emphasize the importance of mobilization outside of institutions, via several specifically powerful repertoires of contentious action, including road blockades and physical occupations of disputed territory. Indigenous peoples in Canada were early to mobilize relative to other Indigenous groups globally, and mobilization within Canada was an important "initiator

movement" (McAdam 1996), which was echoed in other contexts. The simple point here is that while great emphasis is often placed on legal and policy changes foisted on and adopted by the Canadian state, the mobilization of Indigenous peoples themselves was an essential precondition to the gradual recognition of Indigenous land rights.

Second, the paper will provide a summary of the evolving jurisprudence on "Aboriginal and Treaty rights" in the Canadian judicial system – from the first instance of recognition by the Supreme Court in 1973, to explicit formalization in the written constitution of 1982, to recent rulings that have substantially broadened the application of Aboriginal rights. Here, it will be demonstrated that while the courts have clearly followed behind Indigenous mobilization, they have led the political sphere in the direction of greater recognition of Indigenous rights.

Third, the paper will provide a discussion of the comprehensive land claims system. As described above, the CLCs were created as a formal mechanism for resolving land title disputes in the mid-1970s, after the first judicial recognition of existing Indigenous land rights. Presently, the federal CLC policy is in flux. It faces some legitimacy challenges amongst Indigenous peoples, and is subject to a major review by the federal government. The paper will offer some thoughts on the efficacy of CLCs to date, and will highlight some political challenges that accompany state-led efforts to recognize Aboriginal title. In particular, non-elite non-Indigenous peoples continue to evidence low levels of comprehension about Indigenous title, and their opposition to elite efforts to recognize Indigenous rights is a growing social and political challenge.

The paper will conclude with some general thoughts about how the Canadian Indigenous land rights picture impacts on the European Union, and how, in turn, the European Union may exercise leverage to ensure that Indigenous land rights are respected. There is a lengthy tradition of Indigenous peoples in Canada making direct appeals to the European powers to support their efforts for recognition. Though these appeals have not achieved concrete success in the past, the European Union is currently well-

positioned to lend moral and material international force to the pursuit of Indigenous rights. This is particularly true currently, as Canada and the European Union negotiate the Comprehensive Economic and Trade Agreement – which would become the largest free trade agreement that Canada has ever entered into, and a key pillar for its economic development.

2. The re-emergence of Aboriginal title

2.1 Indigenous mobilization

When the story of the re-recognition of Aboriginal title is told, the traditional academic and popular narratives root this change in developments originating with the Supreme Court of Canada. The conventional explanation is as follows: in 1973, the Supreme Court of Canada handed down a decision in *R. v. Calder* which dismissed an Indigenous nation's claim to existing title to lands in the province of British Columbia for which no treaty had ever been made between settlers and First Nations. However, in the decision a majority of judges recognized for the first time the existence of unextinguished "Aboriginal title to land". This forced the federal government to revise its approach to Aboriginal rights in the country, and so introduced a new era. It would be preposterous to dispute the significance of the *Calder* ruling or future decisions of the Supreme Court,in the development of "Aboriginal rights" in the modern context. However, there is a danger in over-emphasizing the degree to which the Supreme Court acted in isolation from its societal context. In particular, this account threatens to diminish the role that Indigenous people themselves played in reasserting their claims to the land. This paper therefore begins with a brief discussion of the Indigenous political mobilization which presaged and prompted jurisprudential developments.

In the period immediately before and after WWII, there was modest political development on the part of Indigenous groups in Canada (Miller 2004). Following a model established earlier in the century, some provincial organizations were founded that

would allow individual tribes to cooperate politically. But these organizations were in a nascent state, lacking the material and human resources to pose a true challenge to the Canadian state or effectively advocate for the recognition of Aboriginal rights. The political context was transformed in 1969, when the federal government announced a proposed policy shift that would radically transform the relationship of the Canadian state to First Nations. In what would become known simply as the "White Paper", the Minister of Indian Affairs described an end to different status in law for First Nations people, and end to the band and reserve system – effectively, the absorption of Indigenous people into the Canadian body politic as undifferentiated citizens. This policy shift, produced out of ideological developments internal to government (Weaver 1981), proved to be a critical juncture in the political mobilization of Indigenous people.

The response was shock and anger. For the first time in modern history, the Indigenous peoples adopted repertoires of mass contentious direct action. The next few years witnessed marches, demonstrations, sit-ins and alliance-building with other Indigenous radical activists, including US Native Americans active in Red Power and the American Indian Movement. At the same time, establishment Indigenous political organizations acquired new material support, and were positioned to articulate powerful opposition to the government's agenda on the national political stage. These political developments had international as well as domestic impact. The mobilization of Indigenous people in Canada came before the international Indigenous rights movement had properly launched. In fact, the leaders who emerged to contest the White Paper in Canada became critical agents in the development of an international Indigenous rights discourse, visiting with other Indigenous groups in Europe, Oceania, and Central and South America (Minde 1996). The Canadian mobilization was an important "initiator movement", which produced "spin-off movements" (McAdam 1996:217) amongst other Indigenous nations around the world from the 1970s to the 1990s.

The federal government, for its part, wholly unprepared for a bitter fight with mobilized Indigenous peoples, retreated rap-

idly. Prime Minister Pierre Trudeau practically apologized in 1970, admitting "…we were very naïve" (Weaver 1981:185). The policy was formally retracted in 1971, but a new path had been established in the relationship between Indigenous groups and the Canadian state. Both institutionalized peak advocacy organizations and *ad hoc* direct action would remain fixed features in Indigenous politics, and would intensify their challenge to the Canadian state over the next few decades.

The impact of these political changes on the emergence of an Aboriginal rights legal discourse cannot be understated. It is important to recognize that on the eve of the first judicial recognition of Aboriginal rights, the Canadian state stood poised to eliminate any special recognition of First Nations in Canada. The ruling of the Supreme Court doubtless reflected the re-assertion of an Indigenous presence in national politics; this relationship between societal developments and Supreme Court jurisprudence has been identified elsewhere, including in the context of Aboriginal rights (Radmilovich 2010). Moreover, a recent examination of cabinet documents reveals that the federal government was contemplating establishing avenues for negotiation respecting Aboriginal title even before the *Calder* ruling (Scholtz 2006). The simple point, then, is that before jurisprudential developments and before comprehensive land claims, Indigenous people themselves punctured and destabilized a long-standing practice of overlooking Aboriginal title.

2.2 Aboriginal rights jurisprudence, policy change, and the constitution

Despite the above, Aboriginal title cannot be understood without reflection on the central role that the Supreme Court of Canada has played in evolving the Canadian legal imagination. *Calder* was one of several incremental steps in a transformational direction. This section will provide a brief overview of legal developments that have produced and then impacted the CLC process.

Historically, the Crown sought treaties with First Nations, first to formalize economic, political, and military relationships and

later to seek the surrender of land, in exchange for promises such as the creation of permanent reserves and treaty annuities to band members. The last treaty of the historical period was concluded in 1921, after which the federal government suspended the negotiation of treaties. This was despite the fact that many Indigenous groups – particularly in the western-most province of British Columbia, as well as in regions of the North – were not covered under the treaty. The federal government adopted coercive measures to put the land question to rest, including making it illegal to hire or raise money for a lawyer to advance an Indigenous land claim (this measure was retracted in 1951). The First Nations did not cease to advocate on outstanding land-related grievances, but no formal avenues existed through which to advance these claims.

Calder created such an avenue. Though the Court was divided on application, it acknowledged for the first time that the Aboriginal title had existed, and could continue to exist where it had not been surrendered through treaty. The federal government responded in the same year, releasing a policy statement which pledged its new willingness to negotiate and offer compensation to Indigenous groups, in return for their surrender their interests in the traditional lands they made claim to. The Comprehensive Land Claims process was created.

In 1974, the first modern treaty was concluded, between Canada, the Province of Quebec, and the Crees of the James Bay region of Quebec. That agreement established a template for modern treaty-making. The federal legislation confirming the treaty had the effect to "extinguish all native claims, rights, title and interests of all Indians and all Inuit in and to the Territory" (2.6). In return, the Treaty created new space for Indigenous decision-making over land use in the region. In particular, it created three categories of land use – Category 1 lands, which were reserved for the exclusive use of the Indigenous peoples in the region, Category 2 lands, where Indigenous groups continued to exercise hunting and trapping rights, and jointly managed resource extraction decisions, and Category 3 lands, where Indigenous groups claimed some minimal rights to hunting and harvesting.

In 1982, an agreement was reached between the federal government and nine of ten provinces to "patriate" the constitution. This rid the Canadian constitution of a final significant political vestige of the colonial period, which required the Parliament at Westminster to confirm any constitutional amendments. The same constitutional package introduced a Charter of Rights and Freedoms, and entrenched the Aboriginal rights that had been recently recognized by the Supreme Court. Section 35 of the *Constitution Act* 1982 established that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". This further formalized recognition of Aboriginal rights and title, and guaranteed it against simple extinguishment by Acts of Parliament.

At the time of enactment, there was considerable ambiguity about what practical effect these provisions would carry. Four constitutional conferences were held over the following five years, to seek a consensual understanding of the new constitutional ornament. That consensus proved elusive, and after the final conference in 1987, the prime minister effectively declared defeat.

In the absence of any political accord on the meaning of Section 35, the Supreme Court once again assumed a place in the conceptual lead. Successive rulings clarified and then began to strengthen the implications of that section, and Aboriginal rights generally. For example, in *Sparrow* (1990), the Court determined a test for determining where an infringement of Aboriginal rights has occurred, and whether that infringement is justifiable. In *Delgamuukw* (1997), the Court affirmed the ongoing existence of Aboriginal title in the province of British Columbia, which is largely uncovered by historical treaties, and that Aboriginal title includes a right to land (Eyford 2015:6). In *Haida Nation* (2004) and elsewhere, the Court engendered the important notion of a "duty to consult" and accommodate Indigenous groups where Aboriginal rights have been claimed or demonstrated.

In 2014, the Court rendered the *Tsilhqot'in* decision, hailed by most as a transformative ruling. First, it positively affirmed for the first time the existence of Aboriginal title to a specific tract of land in the interior of British Columbia. It also affirmed that

Aboriginal title existed in all lands that were used historically – for example, for fishing and hunting – by an Indigenous group as opposed to only those lands that were used intensively (for example, villages). Finally, it established more strenuous conditions which the Crown must meet if it is to infringe on claimed or proven Aboriginal title. The Court continues to treat Aboriginal title as non-absolute; the Crown may still infringe upon it when it has fulfilled its duty to consult, when that infringement serves "a compelling and substantial public purpose", and the purpose is proportionate to any adverse effects on Aboriginal title. There is considerable debate about when precisely these conditions are met, and clarity on this point will likely have to await future court decisions.

4. Reflections on the Comprehensive Land Claims process

Thus far the paper has discussed CLCs in the context of evolving jurisprudence on Aboriginal title – and certainly, the two processes are inextricably bound up in each other. It will now provide a more focussed discussion on the CLC process itself, its success in managing conflict over lands and resources and specific concerns held by Indigenous people about its efficacy for protecting their interests.

The CLC negotiations process is initiated when an Indigenous group which is not covered under an historical treaty submits a claim. The claim is intended to demonstrate that the rights of the Indigenous party to a traditional territory have never been extinguished, that it has historically and exclusively used the lands to which it makes a claim, and that it is a recognizable Aboriginal group (Alcantara 2013:15). When these conditions are deemed to be met by the Minister of Aboriginal Affairs and Northern Development, the claim is accepted for negotiations, and the parties – the federal government, provincial or territorial government and Indigenous representatives – begin to negotiate a framework agreement which sets out the parameters for negotiation. The next step is to negotiate an Agreement-in-Principle,

which is not binding to the parties. From this, a final agreement is negotiated and ratified.

There are several challenges inherent in the CLC process, which are regularly cited by Indigenous groups as sources of grievance, distrust and scepticism. In the first place, progress to resolving title disputes through CLCs is painfully slow. Since 1973, 122 claims have been accepted for negotiation, but only 26 treaties have been concluded. According to a recent evaluation of the CLC program, the average negotiating time to reach a final settlement is 15 years, but treaties have taken up to 30 years to finalize (Eyford 2015). This creates logistical challenges that are more acute for the Indigenous participants in negotiations, typically band councils representing small communities (completed treaties range in the number of individual beneficiaries from approximately 1,000-35,000) (ibid.). Sustaining negotiations over decades and throughout political turnover requires a massive investment of governance focus and will, which can negatively affect the quality of governance in other areas. It also creates resource pressures on all governments, but especially Indigenous governments. The latter receive contributions from the federal government to fund their participation, but they come primarily in the form of loans. The present debt load for Indigenous parties to CLC negotiations is over $800 million (approx. €580,000,000), with an average loan of about $10 million (approx. €7 million) per negotiating table (idem:61). This can amount to a crippling debt burden for small Indigenous communities seeking CLCs, in part as instruments to escape structural poverty. As loans become repayable upon completion of negotiations and successful ratification of a final agreement, the debt load also presents a perverse incentive for concluding.

With respect to the content of treaties, no single dimension presents as great a normative challenge as the provisions governing extinguishment and certainty. As noted above, early modern treaties, such as the James Bay and Northern Quebec Agreement and the Inuvialuit Final Agreement, required Indigenous groups to agree to a blanket extinguishment of their pre-existing Aboriginal rights in exchange for the specific entitlements set out in the agree-

ment. This provision was an ongoing source of controversy and resulted in the unwillingness of several Indigenous groups to participate. Moreover, several studies and reviews of the CLC policy recommended that the Crown cease to pursue extinguishment as an objective of treaty-making. Consequently, the Crown was required to evolve its approach. Several iterations of the policy have sought "certainty" – assurances that Aboriginal rights will not, in effect, re-appear after a treaty has been made – without requiring that Indigenous groups acquiesce to explicit extinguishments of Aboriginal rights. These approaches include representing a rights exchange, where existing Aboriginal rights are extinguished and replaced with specific rights and entitlements expressed in treaty, "modification of rights" (Eyeford 2015:73) agreements, which hold that Aboriginal rights are not extinguished but set out in their entirety in the rights and entitlements enumerated in the treaty, and the "non-assertion technique" (ibid.), in which Indigenous parties pledge not to assert any continuing Aboriginal rights which exist outside the treaty. There are legal and theoretical differences between an agreement that extinguishes rights, and one which obligates one party simply to never exercise those rights. But for many Indigenous people and other observers, the distinction is abstract – and somewhat dubious. As a result, some Indigenous peoples continue to strongly resist the CLC process precisely because it endangers the Aboriginal rights they have exercised – in theory – since first contact between Indigenous and settler sovereignties. One prominent Kanien'kehá:ka observer has famously named the ongoing CLC negotiations "termination tables" (c.f. Idle No More 2014). The challenge of how to achieve the Crown's interest in certainty, without requiring Indigenous peoples to compromise their legal and political status for the future, remains unresolved politically and intellectually.

Implementation must also be cited as a challenge for the CLC policy. It is a second-order problem, only because so few treaties actually achieve fruition. Nonetheless, it is a source of friction between those Indigenous communities that have concluded treaties and the federal and provincial governments. It is indicative that they founded, in 2003, the Land Claims Agreements

Coalition, with the stated goal of ensuring "agreements are respected, honoured and fully implemented in order to achieve their objectives" (Land Claims Agreement Coalition n.d.). The Coalition has complained that the responsibilities undertaken by the Crown in modern treaties have been shirked, shunted to the Department of Aboriginal Affairs and Northern Development and in effect bureaucratized, rather than engaging all parts of the Crown and the appropriate senior officials, as was originally intended (Land Claims Agreement Coalition 2006). Perhaps most challenging from a governmental perspective is the insistence of the Coalition that:

> "There must be a federal commitment to achieve the broad objectives of the land claims agreements and self-government agreements within the context of the new relationships, as opposed to mere technical compliance with narrowly defined obligations" (ibid.).

Here is a re-emergence of the argument commonly made by First Nations under historical treaties, which claims that the conduct of the Crown departs fundamentally from the spirit of the agreements that were entered into. It is discouraging that interpretive disputes of this nature already generate challenges within the modern treaty relationships, which are so recently negotiated.

It should be noted, too, that the Coalition is not alone in identifying implementation failures. Reports from Canada's Auditor General as well as the Standing Senate Committee on Aboriginal Peoples and UN Special Rapporteur on Indigenous peoples have urged the federal government to make improvements to its implementation policy. Despite this, an interim update to the CLC policy, published in 2014 by the federal government, devotes very little discussion to the challenge of implementation. While failing to appropriately implement either the letter or spirit of modern treaties is intrinsically problematic, this issue, and its impact on the condition of trust between Indigenous peoples and the Canadian state, also threatens to repel other Indigenous groups from entering negotiations.

A final challenge to cite from this profoundly non-exhaustive list is one which has gone largely unacknowledged in both scholarly and political discussions of CLCs. This is the obstructionist role that can be played by a non-Indigenous public, in instances when the state seeks to recognize Aboriginal rights. Recently, some research has shifted attention to the role of non-elite non-Natives in the relationship (Sabin 2014, Morden 2013). It has been found that non-Indigenous Canadians can often oppose efforts at accommodating Indigenous peoples for normative and instrumental reasons, and this can create political obstacles to reconciliation. There is little direct evidence of this in the specific context of CLCs, which typically occur away from general public attention, and – to this point – largely deal with regions of the country that are geographically remote from major population centres.

But a recent example points to the potential for this dynamic. In the province of Ontario, an agreement-in-principle was reached in 2013 for a modern treaty with the Algonquins, who were never captured under the historical treaties that encompass all of Ontario geographically. Fear was expressed in some quarters – for example, by non-Native hunters and anglers, and cottage owners in the regions under discussion – about what effect transferring land rights back to the Algonquins would have. Though many of these concerns were addressed in the agreement-in-principle, there continues to be low-level oppositional mobilization amongst local non-Natives, which could produce effects at the level of political negotiations. The point here can be made succinctly: Canada has benefited from the role that the judiciary has played in advancing recognition of Aboriginal rights, but legal decisions do not make a social contract. The supporting norms have not necessarily been inculcated amongst mass non-Natives, and the potential for a backlash against what has been described as and is often perceived to be an Indigenous "legal winning streak" (Gallagher 2014) is real.

5. A role for Europe?

Much of the above may appear quite remote to the European reader. Modern Europe is less directly implicated than in other instances where questions of Indigenous land tenure may arise, for example in the developing world. There is, in fact, a history of Indigenous leaders from Canada advancing appeals for support from the great European powers. It is a surprisingly lengthy history. Most famously, Deskaheh – the Speaker of the Haudensaunee Confederacy, an ancient Indigenous multinational federation now centred in the Canadian province of Ontario and in New York State – was dispatched to the League of Nations to apply for membership in 1924. He was a minor celebrity in Europe, and earned a sympathetic hearing from some European nations, including Ireland and Estonia. Ultimately, the Canadian and British delegations to the League of Nations successfully conspired to prevent any serious action on the part of European delegates in support of the Haudenosaunee.

In the modern context, Indigenous peoples in Canada have been more inclined to build solidarity networks with other Indigenous peoples around the world. They have also leveraged institutions of multilateralism to advance claims nationally. For example, when for a period Canada was one of only four nations that refused to endorse the UN Declaration of the Rights of Indigenous People, First Nations used this fact strategically to embarrass the Canadian government. It is difficult to imagine a scenario in which Europe comes to significantly influence the relationship of the Canadian state to Indigenous peoples.

Nonetheless, it can be noted in concluding that this is an auspicious moment in Canada-EU relations, a kind of high watermark in diplomatic and economic relations between the two polities. In 2014, Canada and the EU announced that they had completed negotiations for the Comprehensive Economic and Trade Agreement (CETA), and would proceed to translation and then ratification. Canada's Ministry of Foreign Affairs, Trade, and Development describes CETA as "by far Canada's most ambitious trade initiative, broader in scope and deeper in ambition than the historic

North American Free Trade Agreement" (Foreign Affairs, Trade, and Development Canada 2014). The impact on the economy of EU member states would be necessarily less profound; nevertheless, Canada represented in 2014 the EU's 12th most important trading partner, and CETA's far-reaching content would eliminate almost all trade tariffs, in addition to opening each economy to the other in additional ways (European Commission 2015).

In short, at this political moment EU-Canada relations occupy an unusually prominent place in each public sphere. Theoretically, this could create space for a European discussion about Indigenous land rights in Canada. To date, the EU's limited engagement has focused primarily on the seal trade in Canada, a significant economic and cultural practice for the Inuit. Public criticism of the seal hunt in Europe brought European and Indigenous interests into conflict, until a 2014 agreement created an exemption to the EU seal-trade ban for Indigenous harvesters (Nunatsiaq News 2014). Nonetheless, the opportunity remains for European elites and their publics to critically examine the treatment of Indigenous land rights in Canada, the function of comprehensive land claims and other mechanisms for reconciling competing claims, and the relationship that the EU's enthusiastic economic partner is cultivating with the Indigenous peoples of Northern North America.

6. Conclusions

It is easy to succumb to present-mindedness, and fail to properly recognize the degree to which the activism, jurisprudence, and policy changes of the past forty years have profoundly changed the way that Indigenous rights and title are observed, understood, and managed in Canada. Nevertheless, the comprehensive land claims process is riddle with problems. This paper has named just a few: the costs they impose on First Nations governments, the pace of resolution, normative and political contention on the question of rights extinguishment, incomplete implementation, and the potential for backlash from the non-Indigenous public.

Conceivably, there are fixes for each of these problems in isolation – though they are not in all cases obvious. Collectively, however, they point to one singular and insurmountable problem, which is an inequity in power relations. This is the context in which Indigenous-state relations does and must occur, and this places inherent limitations on the prospects for just and consensual management of competing claims to lands and territories. Though it is certainly no panacea, the international arena provides opportunities to Indigenous peoples for coalition building, and international actors – including possibly the EU – could theoretically play some role in bringing new pressure to bear.

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Alexandra Tomaselli[1]

INDIGENOUS PEOPLES' RIGHT(S) TO LAND IN LATIN AMERICA

Abstract

In the frame of the conference's theme, this paper aims to give an overview on the right(s) to land of indigenous peoples in Latin America. Firstly, it shortly discusses why the right(s) to land is of the utmost importance those peoples, what it signifies for them and its multiple natures. Secondly, the international protection system of such a right is presented. Nowadays there is a wide range of international actors that monitor and pledge to safeguard indigenous rights, and thus, their right(s) to land. General human rights instruments may also guarantee indigenous rights. However, there are two instruments of international law that specifically protect the rights of indigenous peoples, namely the International Labour Organization's Convention No.169 of 1989 ("Convention concerning indigenous and Tribal Peoples in Independent Countries"), and the United Nations Declarations on the Rights of Indigenous Peoples of 2007. Hence, the provisions regarding the right(s) to the land of the indigenous peoples through these instruments are discussed. These apparatuses provide Indigenous peoples with a number of relevant rights and set the standard for their protection, however, their implementation is left to the state. The majority of Latin American countries fail to apply both the rights contained in the two above-mentioned international instruments, and their constitutional protection vis-à-vis indigenous peoples. This has caused, and continues to cause, land disputes in which indigenous peoples are often not in the position to protect their right(s) to land due to a set of causes that will be explored. Due to the failure of states to comply with their obligations, Indigenous peoples have resorted to taking their cases before domestic and international (human rights) courts. In particular, in 2001, the Inter-American Court

1. Alexandra Tomaselli (PhD in Public International Law) is a human rights lawyer and a Senior Researcher at the European Academy of Bolzano (EURAC), where she coordinates the program "Indigenous Peoples: Political Participation, Movements and Land Disputes". Since 2007, she has been working in research and international cooperation projects involving indigenous issues in Latin America. She is also one of the co-founders of the Network of Multidisciplinary Meetings on Indigenous Peoples – Red de Encuentros Multidisciplinares sobre Pueblos Indígenas (Red EMPI).

of Human Rights started creating interesting and evolving jurisprudence regarding the right(s) to land of indigenous peoples. A number of landmark decisions of the Court are thus illustrated. The paper finalizes with some conclusions and recommendations. As required by the conference, this paper attempts to highlight the potential role of the European Union in ensuring a proper application of indigenous land right(s) in Latin America, and to draw on these lessons for the European context.

1. Introduction

Currently, a wide range of international actors monitor and pledge for the safeguard of indigenous rights, and thus their right(s) to land.[2] Apart from the so-called *grundnorm* to protect minority and indigenous peoples (art.27 of the International Covenant on Civil and Political Rights – ICCPR), there are two instruments of international law that specifically protect indigenous peoples. These are the International Labour Organization's Convention No.169 of 1989 ("Convention concerning Indigenous and Tribal Peoples in Independent Countries"), and the United Nations Declarations on the Rights of Indigenous Peoples of 2007 (hereafter, ILO Convention 169 and UNDRIP, respectively). Both apparatus are particularly relevant in the context of Latin America. In fact, the majority of the countries in the sub-region ratified the ILO Convention 169 (see *infra*). Additionally, Bolivia was the first and only state that has "ratified" and implemented the UNDRIP as a domestic, binding legislation (with Law No.3760 issued on 7 November 2007).[3]

Against this background, this paper aims to give an overview on the international and domestic protection of the right(s) to land of indigenous peoples in Latin America. First, it shortly discusses why the right(s) to land is of utmost importance for Indigenous peoples, what it signifies for them and its multiple

2. For instance, the UN Committee on the Elimination of Racial Discrimination (CERD), the UN Permanent Forum on Indigenous Issues – UNPFII, the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, and the UN Expert Mechanism on the Rights of Indigenous Peoples.
3. Ley Núm.3760 del 07 Noviembre 2007, Gaceta N° 3039 del 08 Noviembre 2007.

aspects. Second, the international protection system of right(s) to land is addressed by analysing the provisions regarding the right(s) to land of indigenous peoples of both the ILO Convention 169 and the UNDRIP. These instruments provide indigenous peoples with a number of relevant rights and set the standard for their protection, however, their implementation is left in the hands of the states. Regrettably, the majority of the Latin American countries fail to apply the rights contained in the two above-mentioned international instruments, or in their own constitutions. This has caused and continues to cause land disputes in which indigenous peoples are often not in the position to protect their right(s) to land, due to a set of causes that will be explored. Due the failure of the states to comply with their obligations, indigenous peoples have resorted to bring their cases before domestic and international (human rights) courts. In particular, the Inter-American Court of Human Rights commenced interesting and evolving jurisprudence since 2001, especially with regard to the right(s) to land of indigenous peoples. A number of landmark decisions of the court are thus illustrated. The paper finalizes with some conclusions and recommendations. As required by the conference, they try to highlight what may be the potential role of the European Union to ensure a proper application of land right(s) in Latin America, and to draw on these lessons for the European context.

2. A few facts on indigenous peoples and the Latin American context

The term Latin America refers to the extensive territory from the *Tierra del Fuego* in the south to Mexico in the north, subdivided into 20 States (apart from those not speaking a Latin language, i.e. Belize, French Guyana, Guyana, and Suriname). The subcontinent reflects a complex variety of geographic, demographic and cultural systems. The total population in 2012 was estimated to amount to a little less than 600 million (not including the

Caribbean islands; CEPAL-CELADE 2013:33, table 1),[4] of which between 30 and 50 million (5-9% of the total population) were indigenous (Del Popolo et al. 2010:68-69, 71).[5] Indigenous peoples live in very different environments in Latin America: coastal areas, the Andes, the Amazon, etc., but are increasingly in urban areas (Del Popolo et al. 2010:54-59). The richness of their cultures is extensive. At least 400 different linguistic varieties are spoken among the indigenous peoples in the subcontinent (Bello 2004:51). However, this data does not reflect the degree of heterogeneity. For instance, in Colombia alone, where indigenous peoples make up 1.61% of the total population, (approximately 500,000 people), there are no fewer than 80 different indigenous peoples (Bello 2004:52-53). In broad terms, Indigenous peoples are among the poorest sectors of the society. As is widely known, there are immense inequalities in terms of wealth within Latin American societies, although in recent years the situation has improved slightly (Bárcena 2011). Additionally, Indigenous peoples are at the mercy of internal conflicts, due to the drug trade or paramilitary groups, as is the case of Colombia (see *infra*).

In terms of politics, the Latin American political climate is characterized as being particularly lively. Far from offering an exhaustive analysis of Latin American political arenas, it suffices here to stress two recent and opposing phenomena. On the one hand, the recent extended presidencies suggest a new tendency to centralize and monopolize political power in the hands of a few very charismatic leaders. This is valid in both the apparently "indigenous-friendly" cases, such as Rafael Correa in Ecuador, Evo Morales in Bolivia, and the departed Hugo Chavez in Venezuela, and the

4. The total population of Latin America is estimated to be 593,637,000 (CEPAL-CELADE 2013: 33).

5. These are estimates for three main reasons. First, in the list of questions within a census, a query on self-identification as an indigenous person is not always included. Second, although much has changed recently, indigenous peoples are more likely to self-identify as such compared to the past, though this is also due to the merging of the social sectors of "peasants" during the agrarian reforms from the 1960s onwards. Finally, some areas are extremely remote, both in the Andes and in the Amazon rainforest, and not all indigenous peoples may have been reached. On these issues, see Giraudo and Martín Sanchez 2008.

less (or not at all) "indigenous-friendly" Lula da Silva and Dilma Rousseff of the Workers' Party (*Partido dos Trabalhadores*, PT) in Brazil, and the Kirchner family in Argentina. Paradoxically, many of these leaders were supportively elected by the population due to their anti-neoliberal agendas (Harris 2008:90). Nevertheless, they continue to build clientelism networks and centralize power, thus ignoring both the rules and the citizenry's demands (Tedesco and Diamint 2014:43).

On the other hand, many protest movements are continuing in the subcontinent, some of which have had a major impact (Martí i Puig 2012). They include the 2011 students' protest in Chile, the increasing indigenous protests regarding rights,[6] and the recent social protests started by students' movements in February 2014, which spread among the population, fighting against social inequalities fuelled by the opponents of Hugo Chavez's successor, Nicolas Maduro.[7]

3. The importance and the significance of indigenous peoples' land right(s)

The right to land of indigenous peoples is a broad concept. Indigenous peoples' traditional vision of, and attachment to, an area of land imply a range of rights far beyond the mere right to property or ownership. This concept has been introduced explicitly in the ILO Convention 169, art.13, which states that the term "land", in the Convention, "shall include the concept of territories, which covers the total environment of the areas, which the peoples concerned occupy or otherwise use".

The need for a broader conceptualization was raised during discussions on the revision of the former ILO Convention No.107, "Convention concerning the Protection and Integration

6. The best known among these indigenous protests are the marches that began in 2011 in Bolivia, targeting the construction of a highway on TIPNIS (*Territorio Indígena y Parque Nacional Isiboro-Secure*).
7. These events are too recent to be properly assessed, but see the brief and concise analysis by Triviño 2014.

of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries", adopted in 1957.[8] According to the indigenous representatives present at the discussions and supported by the Workers' members and governments, the term "land" alone was too restrictive (International Labour Office 1988:4). On the one hand, it did not embody the spiritual relationship between indigenous peoples and the territories they use or occupy, and it did not refer to elements such as the sea ice for polar indigenous peoples, or the environment as a whole, including flora and fauna, which are concepts inherent to the term "territory". On the other hand, the term "territory" raised concern with regard to the states' sovereignty (ibid.). A compromise was found in the above-mentioned formulation of art.13 at the following 76th session of the International Labour Conference in 1989, during which the ILO Convention 169 was eventually adopted.

The importance of land right(s) has often been highlighted by indigenous leaders. *Inter alia*, two quotations are particularly telling on the spiritual relationship that indigenous peoples have with their land. The first is taken from the Kari-Oca Declaration (I), adopted during the homonymous conference held in the Kari-Oka village in Brazil from 25 to 30 May 1992, prior to the United Nations Conference on Environment and Development held in Rio de Janeiro on 3-14 June 1992 (better known as the Rio Conference), and states:

> "*We [indigenous peoples] cannot be removed from our lands*. We, the Indigenous peoples are connected by the circle of life to our lands and environments." *[Emphasis added]*.

The following quotation is taken from the so-called Kari-Oca

8. According to art.36.2 and art.43.2 of ILO Convention 169, the Convention No.107 is still in force for the countries that did not ratify the following ILO Convention No.169. See ratifications at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252:NO. The Convention No.107 is thus still in force for Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Syrian Arab Republic, and Tunisia.

Declaration II adopted on 17 June 2012 (under the Future We Want, 4) during the United Nations Conference on Sustainable Development Rio+20, and affirms that:

> "Our lands and territories are at the core of our existence – *we are the land and the land is us; we have a distinct spiritual and material relationship with our lands and territories* and they are inextricably linked to our survival and to the preservation and further development of our knowledge systems and cultures, conservation and sustainable use of biodiversity and ecosystem management." [Emphasis added].

Hence, the indigenous concept of land includes the indigenous view of the world (*Cosmovisión*), the surrounding environment, water, air space, lakes and the sacred sites for ceremonies (Kari-Oca Conference Indigenous Peoples Earth Charter 1992: paras.17, 26, 34 and 89).

This also explains why it cannot be framed as a unique right, but rather as a plurality of land rights or land-related rights, as mirrored in the recognition provided by the ILO Convention 169 and the UNDRIP discussed below.

According to the relevant literature, the right(s) to land, finally, has implications with other rights, e.g. the rights to consultation and participation; to use and management of the land and natural resources; to restitution and relocation; the right not to be internally displaced (like the right to free movement) and the right to return (Xanthaki 2007:252-267). Another author highlighted that the right(s) to land embodies a cultural right as well as subsistence rights aimed at the collective existence of indigenous peoples (Gilbert 2006:115-128), since the use of the land means access to livelihood (e.g. fishing or herding). "… [T]he recognition of indigenous peoples' land rights has to be seen as one of the most pressing issues for the survival of indigenous peoples" (Gilbert 2006, xiv). Thus, the right to land is also an aspect of the right to existence for indigenous peoples.

4. The protection of land right(s) at international level (ILO Convention 169 and UNDRIP)

There is nowadays a wide range of international actors that monitor and pledge for the safeguard of indigenous rights, and thus their right to land.[9] General human rights instruments also serve to guarantee indigenous rights.[10] However, there are two instruments of international law that specifically protect indigenous peoples, namely the International Labour Organization's Convention No.169 of 1989 ("Convention concerning Indigenous and Tribal Peoples in Independent Countries"), and the United Nations Declarations on the Rights of Indigenous Peoples of 2007 (hereinafter, ILO Convention 169 and UNDRIP, respectively). Finally, regional human rights courts, such as the Inter-American Court of Human Rights, are playing an increasing role in safeguarding indigenous rights (see *infra*).

The ILO Convention 169, as it is widely known, is a binding international treaty. The revised text and the adoption of the ILO Convention 169 represented a milestone, especially in the Latin American context, seeing that 15 States ratified it, albeit at different times.[11] For the purposes of this paper, it suffices to note here

9. For instance, the UN Committee on the Elimination of Racial Discrimination (CERD), the UN Permanent Forum on Indigenous Issues – UNPFII, the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, and the UN Expert Mechanism on the Rights of Indigenous Peoples.
10. The International Covenant of Civil and Political Rights – ICCPR (1966), with particular reference to arts.1.2 and 27; the International Covenant of Economic, Social and Cultural Rights – ICESCR (1966), with particular reference to art.1.2 and 2.2; the International Convention on the Elimination of all the forms of Discrimination – ICERD (1969); the International Convention on the Rights of the Child (1989); the Convention on the Elimination of All Forms of Discrimination against Women-CEDAW (1979); etc.
11. The first Latin American country to ratify the ILO Convention No.169 was Mexico in 1990. Bolivia and Colombia followed in 1991, then Paraguay and Costa Rica in 1993. After, there was a domino effect: Peru in 1994; Honduras in 1995; Guatemala in 1996; Ecuador in 1998; Argentina in 2000; Brazil; the Dominican Republic and Venezuela in 2002; lastly, Chile in 2008 and Nicaragua in 2010. See the ratifications at http://www.ilo.org/dyn/ normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO.

that the ILO Convention 169 contains, among others, relevant provisions on indigenous peoples' right to participation and consultation (arts.6 and 7), and those relating to land and territory, as well as to natural resources (arts.13-19), which were considered the "soul" of the Convention (Sambo Dorough 2015:254). Additionally, thanks to the mechanism of Representations under art.24 of the ILO Constitution, indigenous peoples gathered in unions to demand the application of these rights.[12] Most importantly, ILO Convention 169 sealed the recognition of collective rights for indigenous peoples (Xanthaki 2007:30), particularly of land rights, also later recognized by the Inter-American Court of Human Rights in the case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (see *infra*).

UNDRIP is a *sui generis* international document that, in principle, has no binding effects upon the signatories. Despite that, the UNDRIP represents a "radical novelty" with "a value different from other Declarations" (Clavero 2008: paras.15 and 16, as cited by Rodriguez Piñero-Royo 2009:316). Moreover, it contains rights that are enshrined also in other binding treaties.[13] UNDRIP was adopted with 143 votes in favour, 4 against and 11 abstentions (General Assembly 2007). However, all the states that had voted against eventually endorsed UNDRIP as follows: Australia on 3 April 2009 (Minister Macklin 2009), New Zealand on 20 April 2010 (New Zealand Ministerial Statements 2010), Canada on 12 November 2010 (Government of Canada 2010), and the USA on 9 December 2010 (US Department of State 2010). Though having an unclear status under public in-

12. The mechanism of representations under article 24 of the ILO Constitution consists in the adoption of recommendations by an ad hoc appointed tripartite committee, which then submits them to the Committee of Experts on the Application of Conventions and Recommendations.
13. E.g. in the ICCPR, ICESCR, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child, Convention Against Torture, International Convention on the Elimination of All Forms of Racial Discrimination against Women, ILO Convention No.169, etc. On this, see the extensive and excellent work of Rodriguez Piñero-Royo (2009), in particular, the tables comparing the rights enshrined in UNDRIP and in other treaties (Rodriguez Piñero-Royo 2009:320-322 and 324-327).

ternational law, these endorsements did give UNDRIP a virtual universal support (Graham and Friederichs 2012:2).

ILO Convention 169 devoted the second part of the treaty to land rights. The provisions dealing with indigenous peoples' land right(s) comprise several aspects: Ownership: rights to land ownership, possession and/or traditionally occupied, including the obligation of the state to safeguard the lands traditionally accessed by indigenous peoples, especially nomadic and shifting peasants (art.14.1). Demarcation: duty of the state to demarcate traditionally occupied lands ("steps necessary to identify…") (art.14.2). Natural resources: states' obligation to safeguard indigenous peoples' rights to natural resources, and right to participate in the use, management and conservation of such resources (art.15.1), excluded the sub-surface resources if retained by the state (art.15.2). Relocation and compensation: (although, general) Prohibition of relocation (art.16.1), free and informed consent prior to removal (art.16.2), right to return (art.16.3), and right to compensation (art.16.4 and 5).

UNDRIP, thanks to the direct participation of indigenous representatives during the drafting sessions,[14] takes a wider approach and enumerates further land-related rights. *Inter alia*, it recognizes to indigenous peoples the right to maintain their spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources (art.25); the right to land territories and resources owned, occupied, used or acquired (art.26); and the right to conservation and the protection of the environment and the productive capacity of their lands or territories and resources (art.29.1). It further affirms the duty upon states to establish a process to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources (art.27); to take effective measures to avoid storage of hazardous material without indigenous peoples' free, prior and informed consent (art.29.2);

14. Thanks to the openness of the members of the UN Working Group on Indigenous Populations (WGIP), the number of participants during the WPIG sessions – including indigenous, state and other NGO representatives – grew extraordinarily to a total of 1,000 (Willemsen-Diaz 2009: 27-28).

and to avoid that military activities take place on indigenous lands or territories (art.30.1). Finally, similarly to art.16 of the ILO Convention 169, UNDRIP contains a number of provisions with regard to land dispossessions and relocations suffered by indigenous peoples. Hence, it states that states shall prevent such dispossession or provide indigenous peoples with a mechanism of redress in case of land dispossession (art.8.2b); that indigenous peoples shall not be forcibly removed from their lands or territories, and that no relocation shall take place without their free, prior and informed consent and after agreement on just and fair compensation, including the option of return (art.10); and that indigenous peoples have the right to redress for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent (art.28).

5. Constitutional recognition of land right(s) in Latin America

Many Latin American states have recognized, at constitutional level, indigenous peoples' right to land, together with a number of co-related rights. The adoption of the pioneering Brazilian Constitution of 1988, the Colombian Constitution of 1991 and the reforms to the Bolivian Constitution of 1967, in 1994, marked the beginning of what has been defined as the Latin American "multicultural constitutionalism" (Van Lee Cott 2000:17).

In particular, the 1994 constitutional reform in Bolivia established that it was a multi-ethnic and pluri-cultural state (art.1), while the Colombian Constitution of 1991 recognized indigenous territories as administrative territorial units equal to others (e.g., the provinces/*departamentos*, art.286), the use of customary law in these territories (art.246) and two reserved seats for indigenous peoples in the senate (art.171).

Other constitutional recognitions followed in a domino effect. The recognition of the existence of indigenous peoples, the

right to their cultural identity and also to the ownership or use of lands or territories, together with, in many cases, the collective nature of their rights and the use of customary law were introduced in the constitutions of the following countries: Paraguay in 1992 (artt.62-64, 66-77, 140 and 268); Nicaragua in 1993 and 2000 (artt.5,8,11, 89-91, 180-181); Peru in 1993 (artt.2, 17, 48, 89, 149); Argentina in 1994 (art.75); Ecuador in 1998 (artt.3,24,62,83-84, 97, 161, 224, 228 and 241); and Mexico (art.2), as reformed in 2001. The reform of the Honduran Constitution of 1999 foresaw only a general duty to protect indigenous peoples (art.346).

Notwithstanding such developments, a constitutional recognition of indigenous peoples is still lacking in Chile, Cuba, Costa Rica, Puerto Rico, Dominican Republic and Uruguay. Costa Rica, as per the respective reforms of 1999, foresees the duty of the state to only protect indigenous languages.[15]

The constitutional recognition of indigenous right(s) to land is further restricted to only ten Latin American countries. The protection provided may be broadly subdivided into five main categories of land right(s): Right to/recognition of collective inalienable and imprescriptible lands; Right to land demarcation; Prohibition of relocation; Participation in case of exploitation of natural resources; and Lands governed by own (indigenous) institutions. The following table summarizes the main land-related rights recognized in each Constitution:[16]

15. Law No.7878/1999 that reformed art.76 of the 1949 Costa Rican Constitution.
16. This summary is inserted here with the aim of giving an overview of the land-related right(s) recognized in the various Latin American Constitutions. The overall aim and the word-limit of this article regrettably does not allow an analysis of each provision. Indeed, the author is conscious that, in such a summary, many aspects have been overlooked, and thus invites readers to check the content of each single cited article. All the texts for the cited Constitutions have been accessed online, mainly on the website of the Miguel de Cervantes Virtual Library [http://www.cervantesvirtual.com/portales/constituciones_hispanoamericanas/catalogo_paises].

Which land-related right was recognized	By which Constitution
Right to/recognition of collective inalienable and imprescriptible lands (mainly in terms of property/ownership right – use of natural resources in case of Mexico, Ecuador and Bolivia)	*– Brazil: arts. 231 (1988 Const.)* *– Paraguay: art.64 (1992 Const.)* *– Colombia: art.329 (1991 Const.) [only inalienable]* *– Peru: art.89 (1993 Const.)* *– Argentina: art.75.17 (1994 Const., but via legal personality)* *– Venezuela: art.119 (1999 Const.)* *– Nicaragua: art.5 (1987 Const., ref 2000)* *– Mexico: art.2 (1917 Const. ref. 2001 ff.)* *– Ecuador: art.57 (2008 Const.)* *– Bolivia: arts.30, 394-5 (2009 Const.)*
Right to land demarcation	*– Brazil: arts. 231 (1988 Const.)* *– Venezuela: art.119 (1999 Const.)*
Prohibition of relocation	*– Brazil: arts. 231 (1988 Const., but with the exception in case of danger or contrary "referendum")* *– Paraguay: art.64 (1992 Const.)*
Participation in case of exploitation of natural resources	*– Brazil: art.231 (1988 Constitution)* *– Colombia: art.330 (1991 Constitution)* *– Venezuela: art.120 (1999 Const.) [incl., the right to consultation]* *– Ecuador: art.57 (2008 Const.) [incl., the right to consultation and benefit-sharing]* *– Bolivia: art.30 (2008 Const.) [incl., the right to consultation and benefit-sharing]*
Lands governed by own (indigenous) institutions	*– Colombia: art.330 (1991 Constitution)* *– Nicaragua: art.5 (1987 Const., ref. 2000) [incl., autonomy with reference to the Atlantic Coast]* *– Mexico: art.2 (1917 Const. ref. 2001 ff.) [incl., the right autonomy for indigenous peoples]* *– Ecuador: art.57 (2008 Const.)* *– Bolivia: arts.289-291 (2009 Const.) [incl., the right autonomy for indigenous peoples]*

In addition to the constitutional provisions, a number of Latin American states have adopted domestic legislations aimed either at implementing constitutional norms or, in their absence, at providing indigenous peoples with a minimum protection of their rights. Many countries have also established national commissions and tasked them with primary implementation powers on matters involving indigenous interests.[17] Notwithstanding these extensive constitutional and domestic provisions, their application remains uncertain and far from guaranteed. In general, a lack of rule of law in many Latin American societies plays a negative role vis-à-vis the protection of indigenous rights (Aguilar et al. 2009:104).

6. Implementation gaps and causes of land disputes

The majority of Latin American countries fail to apply both the rights contained in the two above-mentioned international instruments, and their constitutional protection vis-à-vis indigenous peoples. This has caused and continues to cause land disputes in which indigenous peoples are often not in the position

17. Inter alia, in chronological order, see: Lei 6.001/73 "Estatuto das Sociedades Indígenas" in Brazil (still in force); Ley N.904/81 "Estatuto de las Comunidades Indígenas" in Paraguay (reformed in 1991 by Ley N.125/91, in 1996 by Ley N. 919/96, and in 2003 by Ley N.199/03); Ley N.23.302/85 "Protección de Comunidades Aborígenes" in Argentina; Ley N.19.253/93 "Protección, Fomento y Desarrollo de los Indígenas" in Chile; Ley N.38344/2005, "Ley Orgánica de Pueblos y Comunidades Indígenas" in Venezuela. Regarding the national commission, apart from the above-mentioned case of Mexico and the Interamerican Indigenist Institute transformed in 2003 into the Comisión Nacional para el Desarrollo de los Pueblos Indígenas (CONADEPI), other bodies are: Comisión Nacional de Asuntos Indígenas in Costa Rica since 1992; Corporación Nacional de Desarrollo Indígena (CONADI) in Chile since 1993; Consejo Nacional de Planificación y Desarrollo de los Pueblos Indígenas y Negros (CONPLADEIN) in Ecuador since 1997, and the Consejo de Desarrollo de las Nacionalidades y Pueblos del Ecuador (CODENPE) since 1998; Consejo Nacional de Desarrollo Indígena (CNDI) and the Comisión Permanente de Asuntos Indígenas de la Asamblea Legislativa in Panama since 2000; la Comisión Permanente de Pueblos Indígenas de la Asamblea Nacional e la Comisión Nacional de Demarcación y Garantía del Hábitat y Tierras de los Pueblos Indígenas in Venezuela, also since 2000. This list was compiled by Bello (2004:68).

to protect their right(s) to land due to a set of causes that are therefore explored here.

Among the obstacles that hinder the protection of indigenous right(s) to land, and that in turn trigger land disputes, there are a number of indirect and direct causes. Among the former, land right(s) may be denied on the base of demanding formalities, such as the requirement of evidence of ancestral presence on a specific land, or its immemorial occupation or use by indigenous peoples. Such evidence is very difficult to prove, and/or in many cases, the documents get lost.

For instance, in the case of Colombia, arts. 286 and 287 of the 1991 Constitution, respectively, define the territorial units (departments, districts, municipalities, and the indigenous territories), which are autonomous (also according to art.1). It thus inserted the notion of "Indigenous Territorial Unit" (*Entitad Territorial Indígena*), known as *resguardos indígenas* (art.329). Indeed, the *resguardos* system was a Hispanic institution that found some kind of recognition in 1890 by Law No.89 of the 25 November 1890 (Rodríguez Piñero-Royo 2010:329-330). Chapter XIV of Law No.160 regulated in 1994 the Indigenous Territorial Units. More recently, art.1 of Decree No. 441 of 2010, pursuant to art. 85 of Law No.160 of 1994, ordered completing the process of recognition of the "Indigenous Territorial Units" within 31 December 2011. As far as the old *resguardos* were concerned, traditional authorities claimed that many of the original property titles granted according to Law No.89 adopted in 1890 had been lost or burnt, as more than a century has passed (Zuluaga 2010 2263-2264). This de facto denied many indigenous peoples proper protection of their land right(s).

The case of the system of (Peasant Farmer Native) indigenous autonomies (*Autonomía Indígena Originaria Campesina*) is similar. These indigenous autonomies have been recognized by the 2009 Bolivian Constitution in arts. 289-304 and further regulated by the Autonomy Law (*Ley Marco de Autonomías y Descentralización* No.031) enacted in July 2010. In this complex case,[18] suffice it to

18. For a recent analysis, see Tomaselli 2015.

highlight here that all the territorial entities that can convert into indigenous autonomy would have to prove the "ancestrality" of their territory. Such evidence in itself may be extremely difficult to obtain, but also emitted arbitrarily. It must first be released by the Ministry of Autonomy and then submitted together with a number of other documents. This is just one of the first steps to request other certificates that are required in order to request the start of the conversion procedure (Tomaselli 2015:12, 19). For instance, one of the most recent municipalities that began the process to convert into an indigenous autonomy (Curca, La Paz) waited for three years before getting (just) this document (Tomaselli 2015:19).

The rush and the exploitation of both renewable and non-renewable natural resources are other indirect causes of land disputes. Indigenous peoples may be denied access to clean water due to the pollution caused by oil drilling, as in the recent notorious case of the American oil company Chevron-Texano that contaminated a large part of the Ecuadorian Amazon rainforest.[19] Moreover, indigenous means of livelihood (e.g. fishing) may be undermined because of construction of dams and the consequent loss of biodiversity, as in the case of the Endesa company in Chile in 2004 (Tomaselli 2012:166-168).

In other instances, indigenous peoples are at the mercy of internal conflicts due to the drug trade or paramilitary groups, as is the case in Colombia, and they suffer attacks by the *Fuerzas Armadas Revolucionarias de Colombia*/Revolutionary Armed Forces of Colombia–FARC (Bello 2004:66). Even after the beginning of the "Peace Process" (i.e. the negotiations between the government and the FARC leaders), according to the National Indigenous Organization ONIC (*Organización Nacional Indígena de Colombia*), 35 indigenous individuals were displaced every day. They also reported that one indigenous person was murdered every 40 hours (Survival International 2014).

Among direct causes of land disputes, the above-mentioned

19. See the decision of the Ecuadorian Court of Nueva Loja-Lago against Chevron of 14 February 2011 (*Corte de Nueva Loja-Lago Agrio contra Chevron-Texano*).

Bolivian case of indigenous autonomies is an example also of (direct) denial of control over natural resources. In fact, such autonomies have only implementation powers vis-à-vis key competences such as (non-renewable) natural resource policies, which are left to the state (arts.303-304 of the 2009 Bolivian Constitution). This deprives indigenous peoples of the control over these (crucial) aspects of their land right(s).

The lack of respect for land demarcations is another direct cause of land disputes, as will be discussed below in the case of the Awas Tingni community in Nicaragua that was eventually decided by the Inter-American Court of Human Rights. Despite the adoption of this landmark decision, its implementation is still far from being certain.[20]

Last but not least, the current rush to natural resources and new exploitations practices, such as fracking, pose a real threat to the effective protection of indigenous land right(s).

In the face of such misapplications of their land right(s), indigenous peoples have therefore resorted to bringing their cases before both national and international (human rights) courts. For the aim of this paper, the jurisprudence of the Inter-American Court of Human Rights is particularly relevant, and will be – albeit briefly – discussed below.

7. The landmark decisions of the Inter-American Court of Human Rights on indigenous peoples' land right(s)

The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have increasingly played a relevant role in the protection of indigenous rights. These bodies have adopted truly landmark decisions particularly vis-à-vis their right(s) to land, notwithstanding the absence of any type of provision on indigenous peoples in the Charter of the Organization of American States (OAS) of 1948, the American Declaration on the Rights and Duties of Man also of 1948, or in the bind-

20. On this, see Gomez 2013.

ing American Convention on Human Rights – Pact of San José (ACHR) of 1969.[21]

The decision of the Inter-American Court of Human Rights on the case of *Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua* marked the beginning of such jurisprudence. In 2001, the Awas Tigni indigenous people of Nicaragua claimed the demarcation or their land according to art.5.3 of the Nicaraguan Constitution. *Inter alia*, the Court recognized that the indigenous community had a collective right to land within the general property right enshrined in art.21 of the Inter-American Convention of Human Rights.[22] The IAtHR confirmed its precedent in subsequent cases, including *Comunidad Yakye Axa v. Paraguay* (2005), *Moiwana Community v. Suriname* (2005), *Comunidad Indígena Sawhoyamaxa v. Paraguay* (2006), *Comunidad Indígena Xákmok Kásek v. Paraguay* (2010); *Saramaka People v. Suriname* (2007); and *Kichwa Ingenous People of Sarayaku v. Ecuador* (2012). Additionally, the Commission recalled the *Awas Tingni* case on the right to collective land in the cases of *Mary & Carrie Dann v. United States* (2002) and *Comunidades Mayas v. Belize* (2004).

In particular, in the case *Comunidad Yakye Axa v. Paraguay* (2005) the court stated that land deprivation suffered by indigenous peoples is comparable to a violation of the right to life (para. 176). In the case *Moiwana Community v. Suriname* (2005), the court reiterated that land deprivation for indigenous peoples affected their physical, mental and social well-being (para.103). In the following case *Saramaka People v. Suriname* (2007), the court developed the principle of the "three safeguards" in the case of construction of large-scale projects - the effective participation of the members of the indigenous people concerned; a reasonable benefit for indigenous peoples from such projects; and no conces-

21. The Inter-American Democratic Charter was the sole OAS treaty that explicitly mentioned indigenous peoples until the adoption of the 2013 Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance. The adoption of the American Declaration on the Rights of Indigenous Peoples is still pending.
22. Inter-American Court of Human Rights, *Comunidad Mayangna (Sumo) Awas Tingni v. Nicaragua*, para.148.

sion without a prior environmental and social impact assessment (para.129). Finally, in the case *Kichwa Ingenous People of Sarayaku v. Ecuador* (2012), the court affirmed that the protection of property rights and the use and enjoyment thereof is necessary for ensuring the survival of indigenous peoples (para.146). Finally, it stated that the right to consultation of indigenous peoples prior to any measure likely to affect them is a principle of international law (para.164).

8. Conclusions and recommendations

This paper argued that right(s) to land are composed of other related rights and are of utmost importance for indigenous peoples. Indigenous peoples enjoy a good level of protection of their right(s) to land in both international law and the Latin American Constitutions. Moreover, the evolutionary jurisprudence of the Inter-American Court of Human Rights further safeguarded them. Nevertheless, such recognition is profoundly undermined by the misapplication and the huge implementation gaps vis-á-vis these rights. They have further provoked land disputes, which have pushed indigenous peoples to resort to bringing their cases before both domestic and international (human rights) courts.

In this frame, the European Union may play an important role via its local delegations and its funding the EuropeAid program run by the Commission's Directorate-General for International Cooperation and Development (DG DEVCO).[23] This program includes the "European Instrument for Democracy and Human Rights",[24] which aims to fund a variety of human rights actions in different countries. In Latin America, this instrument has funded few actions addressed to indigenous peoples. The program could therefore be enhanced to include, for instance, yearly calls for funded initiatives vis-à-vis indigenous rights, and particularly

23. See general information on this program at http://ec.europa.eu/europeaid/general_en.
24. Regulation No.1889/2006 of the European Parliament and Council of 20 December 2006.

their land right(s). Moreover, the Delegations of the European Union in each country may act as promoters of indigenous land right(s) or mediators between the state and an indigenous people in vulnerable situations.

Vice versa, in Europe, the jurisprudence of the Inter-American Court of Human Rights may serve as example for the European Court of Human Rights, which, instead, tends to have a rather self-restrained attitude on indigenous rights, notwithstanding its jurisdiction over the Nordic countries as well as Russia, where many indigenous peoples live.[25]

More broadly, another recommendation for both the European Union and Latin American countries regards the need to combat stereotypes and prevent social tensions among indigenous and non-indigenous sectors of the society. Apart from a proper application of indigenous land right(s), this may be achieved via, for example, (true and effective) intercultural educational programs.

Finally, I have a plea for the academia, but also for practitioners in both the civil society as well as state and international sectors. We need to further debate and fine-tune those concepts closely related to indigenous right(s) to land. Such rights are currently widely recognized. The scholarly debate and the jurisprudence of the Inter-American Court of Human Rights have highly contributed to settle their conceptualization. Less so are other two crucial and interlinked rights, namely the right to consultation and to free, prior and informed consent.[26] There is particular need for a systemic but also emic (i.e. including indigenous visions) elaboration as well as for a common and settled interpretation of such concepts. Their unsettled understanding, from the perspective of both states and the civil society, may actually hinder – rather than secure – the effective application of indigenous peoples' right(s) to land.

25. For an overview, see Koivurova 2011.
26. Among recent works on these rights, see Alva Arévalo 2014, Doyle 2015, Rombouts 2014 and Tomaselli 2013.

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Roberto Cammarata[1]

INDIGENOUS PEOPLES' RIGHTS IN BOLIVIA

Philosophy, law and politics in a pluri-national state

Abstract

In recent decades, indigenous groups in Bolivia have gained strength, reclaiming their identity as Indigenous Peoples and First Nations, and increasing their levels of organization and participation in the democratic process. The new Bolivian Constitution has been seen by many experts as one of the most comprehensive constitutions for indigenous rights and autonomy in the world, but the political scenario in Bolivia is highly complex, as certain sectors are resistant to the effective implementation of these rights. According to many critical voices, notwithstanding the legal changes, these rights very often fail to be respected and enforced in practice. This brief intervention offers a snapshot of the recognition of indigenous rights in Bolivia and the challenge they have to face, in particular as far as land rights are concerned.

1. "After 514 years…". The end of colonization according to Evo Morales.

Bolivia is the Latin American state with the highest percentage of indigenous population (although with a large variability in the official statistics: 62% according to UNDP, 2006, and only 41% according to the last national census, 2012). The majority of these peoples are Quechua (50.3% / 45,6%) and Aymara (39.8% / 42,4%). To a lesser degree, although distributed across extensive territories, are lowland peoples such as the Chiquitano (3.6%) and Guaraní (2.5%). Indigenous groups have gained strength in recent decades, reclaiming their identity as Indigenous Peoples and First Nations, and increasing their levels of organization and participation in the democratic process.

1. Roberto Cammarata is Researcher of Political Philosophy, University of Milan, Department of International, Legal, Historical and Political Studies - DILHPS.

Bolivia ratified the ILO Convention No. 169 in 1991 and also upholds other national regulations that recognize indigenous rights to their native communal lands, to a share of natural resource profits, and to consultation. Bolivia has also made the United Nations Declaration on the Rights of Indigenous Peoples a binding piece of legislation.

On 12 October, 2014, Bolivians elected Evo Morales president for a third time. In office since 2006, Morales has served the longest tenure of any democratically elected government in Bolivia since the military coup of 1982. Since his first election, Morales has represented a profound change for Bolivia. Not only he is the country's first indigenous president, but he also came to power promising a better deal for the nation's indigenous people.

When he was elected in 2006, Morales was the leader of the union of *cocaleros,* a federation of coca cultivators of both Quechua and Aymara origins. A powerful wave of mobilization against privatization and the handing over to foreign multinationals of natural resources such as gas and water, made him into a successful candidate. His first act as president consisted in a traditional investiture ceremony performed by indigenous people that made him officially the carrier of the 'original power of command'. On the occasion, he declared: "After 514 years we have put an end to colonization".

A few weeks after the ceremony, Morales aired his intention to summon a Constitutional Assembly and re-found Bolivia. The Constitutional Assembly, made up of a majority of indigenous representatives, started its work on 6 August 2006. This date has been called *jacha uru*, which in Aymara means "The day of the beginning", implying the beginning of the re-foundation of the state.

After nearly two and a half years, on 25 January 2009, the new Constitution, inclusive of comprehensive rights for Bolivia's indigenous communities identified as 36 groups, passed, thanks to a referendum where 61.49% of voters expressed a favourable opinion. Over the first three years, Morales had to withstand a secessionist attempt in the eastern province of Santa Cruz (a region rich in natural resources and dominated by a powerful creole oligarchy) and a referendum about his presidency.

2. Law in the books: a new constitution for a new state.

The Constitution explicitly recognized the indigenous peoples' cultural identities, customs and languages, as well as their collective ownership of land, the granting of more regional and local autonomy and - controversially - their right to carry out community justice under their own legal system. The Bolivian Constitution is seen by many experts as one of the most comprehensive constitutions for indigenous rights in the world.

The text of the new Constitution is unambiguously groundbreaking as it innovates and transforms the structure of the state. It also renames the country as the Pluri-national State of Bolivia. Here are some of the most important innovations:

> Art. 1. Bolivia is constituted as a Unitary Social State of Pluri-National Communitarian Law (Estado Unitario Social de Derecho Plurinacional Comunitario), which is free, independent, sovereign, democratic, inter-cultural, decentralized and with autonomies. Bolivia is founded on plurality and on political, economic, juridical, cultural and linguistic pluralism in the integration process of the country.
>
> Art. 2. Given the pre-colonial existence of nations and rural native indigenous peoples and their ancestral control over their territories, their free determination, consisting in the right to autonomy, self-government, their culture, recognition of their institutions and consolidation of their territorial entities is guaranteed within the framework of the unity of the state, in accordance with this Constitution and the law.
>
> Art. 3. The Bolivian nation is formed by all Bolivians, the native indigenous nations and peoples, and the inter-cultural and Afro-Bolivian communities that, together, constitute the Bolivian people.
>
> Art. 4. The state respects and guarantees freedom of religion and spiritual beliefs, according to views of the world. The state is independent of religion.
>
> Art. 5. I. The official languages of the state are Spanish and all the languages of the rural native indigenous nations and peoples,

> which are Aymara, Araona, Baure, Bésiro, Canichana, Cavineño, Cayubaba, Chácobo, Chimán, Ese Ejja, Guaraní, Guarasu'we, Guarayu, Itonama, Leco, Machajuyai-kallawaya, Machineri, Maropa, Mojeñotrinitario, Mojeño-ignaciano, Moré, Mosetén, Movima, Pacawara, Puquina, Quechua, Sirionó, Tacana, Tapiete, Toromona, Uruchipaya, Weenhayek, Yaminawa, Yuki, Yuracaré and Zamuco.
>
> II. The Pluri-National Government and the departmental governments must use at least two official languages. One of them must be Spanish, and the other shall be determined taking into account the use, convenience, circumstances, necessities and preferences of the population as a whole or of the territory in question. The other autonomous governments must use the languages characteristic of their territory, and one of them must be Spanish.

The value attributed to diversity and intercultural dialogue is clear all the way through the Constitution. Article 9, however, is particularly important:

> The following are essential purposes and functions of the state, in addition to those established in the Constitution and the law: 1. To construct a just and harmonious society, built on decolonization, without discrimination or exploitation, with full social justice, in order to strengthen the Pluri-National identities. 2. To guarantee the welfare, development, security and protection and equal dignity of individuals, nations, peoples and communities, and to promote mutual respect and intra-cultural, inter-cultural and plural language dialogue. 3. To reaffirm and strengthen the unity of the country, and to preserve the Pluri-National diversity as historic and human patrimony.

Article 9 can be considered a true celebration of diversity. It sanctions the switch from a modern rule of law ("Estado de derecho") to what Bartolomé Clavero describes as a new form of "Estado de derechos": from the state inherited from European philosophy and political praxis to another one free from colonial hangovers

and the fictions of the independent republic aptitude for uniformity and homologation (Clavero 2002:559). The state now defines itself intercultural by constitution, a state with 38 official languages, a nation formed by many nations, including the "intercultural and African-Bolivian communities" (the descendants of the slaves whose bonded labour characterised the first period of the colony), who have shared the fate of domination and exploitation of the indigenous people in spite of their being foreign.

If we think of the story of the Tower of Babel in the Bible, we can see the similarities with the fiction of the modern state. The tower was initially built thanks to the cultural and linguistic uniformity of the people who started the project. In the same way, the modern state as we define it in Europe is a construct built by or on behalf of peoples who share common traits and see themselves as different from others because of those very traits. The modern state can then be thought of as a kind of totem that includes similarity and excludes difference. Following the metaphor, the new Bolivian constitution is then the antithesis to Babel. The new construct is, in fact, founded *on* cultural and linguistic diversity; diversity is the corner stone that is elevated as the founding value to respect and promote in the spirit of unity and equality. The state thus becomes intercultural in order to recognize and respect the multicultural society from which it originates (Cammarata, 121).

The 21st century members of the Bolivian Constituent Assembly are very much aware of the historical challenge they engage with: they are challenging the concept of the modern nation state as it had been elaborated in the liberal thinking over the last three centuries. The new Bolivian constitution looks beyond that horizon and takes the responsibility for proving to the world that it is possible to think without the categories that we have deemed fixed and unchangeable.

The state contemplated by the new constitution is a new construct, built on a new institutional scaffolding that at the same time preserves some fundamental principles of liberal democratic thought (popular sovereignty, separation of powers into different branches of government, equal protection of human rights, civil rights, civil liberties and political freedoms for all people), and un-

dermines others in its attempt to shape a progressive form of inclusive democracy that I would also define realist. Since dismissing the ideological-juridical fiction of "one people, one nation, one state" by recognizing Bolivian plurality and the indigenous communities as intermediaries between the state and its citizens, the state in this form has renounced a monopoly of juridical production and has acknowledged legal pluralism (Cammarata, 122).

Such pluralism is deferred to both in law and rights. The new constitution dedicates an entire chapter[2] to the list of freedoms

2. Chapter IV – Rights of the Nations and Rural Native Indigenous Peoples. Article 30 - I. A nation and rural native indigenous people consists of every human collective that shares a cultural identity, language, historic tradition, institutions, territory and world view, whose existence predates the Spanish colonial invasion. II. In the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights: 1. To be free. 2. To their cultural identity, religious belief, spiritualities, practices and customs, and their own world view. 3. That the cultural identity of each member, if he or she so desires, be inscribed together with Bolivian citizenship in his identity card, passport and other identification documents that have legal validity. 4. To self-determination and territoriality. 5. That its institutions be part of the general structure of the State. 6. To the collective ownership of land and territories. 7. To the protection of their sacred places. 8. To create and administer their own systems, means and networks of communication. 9. That their traditional teachings and knowledge, their traditional medicine, languages, rituals, symbols and dress be valued, respected and promoted. 10. To live in a healthy environment, with appropriate management and exploitation of the ecosystems. 11. To collective ownership of the intellectual property in their knowledge, sciences and learning, as well as to its evaluation, use, promotion and development. 12. To an inter-cultural, intra-cultural and multi-language education in all educational systems. 13. To universal and free health care that respects their world view and traditional practices. 14. To the practice of their political, juridical and economic systems in accord with their world view. 15. To be consulted by appropriate procedures, in particular through their institutions, each time legislative or administrative measures may be foreseen to affect them. In this framework, the right to prior obligatory consultation by the State with respect to the exploitation of nonrenewable natural resources in the territory they inhabit shall be respected and guaranteed, in good faith and upon agreement. 16. To participate in the benefits of the exploitation of natural resources in their territory. 17. To autonomous indigenous territorial management, and to the exclusive use and exploitation of renewable natural resources existing in their territory without prejudice to the legitimate rights acquired by third parties. 18. To participate in the organs and institutions of the State. III. The State guarantees, respects and protects the rights of the nations and the rural native indigenous peoples consecrated in this Constitution and the law. Article 31 - I. The nations and the rural native indigenous peoples that are in danger of extinction, in voluntary isolation and not in contact, shall be protected and

and specific rights that make the concept of self-determination in article 2 very concrete. They complete the vision of an original form of multiculturalism sanctioned and guarded by the constitution. The rationale behind such a list is that the collective dimension of rights must be recognized so as to innovate the liberal constitutional doctrine that has so far defined them both intellectually and in practice. In this way the constitution has been successful in carrying out the demand of the Teotihuacan Declaration to Latin American States to tranfer to national level the great innovations produced by the indigenous peoples' mobilization in the field of international law.

3. Law in action: lights and shadows in the implementation of indigenous rights.

Notwithstanding the legal changes, the political scene in Bolivia is highly complex, as certain sectors are resistant to the effective implementation of indigenous rights. For example, indigenous lowland peoples have not only encountered difficulties in being represented in La Paz; lowland nations such as Guaranís and Chiquitanos have been subject to hydrocarbon and mining activities without prior consultation. The affected Mojeño, Trinitario, Yuracaré and Chimanes peoples have not participated in decisions on the large-scale infrastructure project in their territories.

So, according to many critical voices Bolivia's Constitution and laws technically guarantee a wide range of human rights, but in practice they very often fail to obtain respect and enforcement.

But, despite the many possible examples in the symbols of government, the clauses of the new Constitution and the rhetoric

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respected with respect to their forms of individual and collective life. II. The nations and the rural native indigenous peoples that live in isolation and out of contact enjoy the right to maintain themselves in that condition, and to the legal definition and consolidation of the territory which they occupy and inhabit. Article 32 The Afro-Bolivian people enjoy, in everything corresponding, the economic, social, political and cultural rights that are recognized in the Constitution for the nations and the rural native indigenous peoples.

of the political leaders, there is one thing – I think – that stands out as the most concrete advance: awarding collective titles over land to self-governing regional indigenous organizations.

Indigenous land rights have come at the initiative of the hemisphere's active and intensely networked indigenous peoples' movement, which has transformed a long-repeated call into action over the past four decades. In Bolivia, this goal reached centre-stage in national politics long before the rise of Evo Morales and the dramatic revolts of the 2000s, including the "water war", a series of protests in Cochabamba from December 1999 to April 2000 in response to the privatization of the city's municipal water supply company, and the so-called "gas war", a social confrontation peaking in September/October 2003, centring on the exploitation of the country's vast natural gas reserves.

The leading proponent of these mobilisations was the lowland indigenous confederation CIDOB. CIDOB was founded in 1982 as the Indigenous Confederation of the Bolivian East, and grew to include lowland groups in the Amazon and Chaco in a Confederation of Indigenous Peoples of Bolivia.

> "In 1990, CIDOB brought the demand for territorial rights to the capital La Paz on the March for Territory and Dignity, the first of many trans-Bolivia marches it would lead. The embrace of CIDOB marchers by tens of thousands of highland peasants was legendary: it marked a coming of age for both CIDOB and the Katarista movement's call for an ethnically conscious, self-organized peasantry, and the beginning of government recognition of indigenous rights" (Carwil 2011).

The 1990s only yielded a small start to the recovery of indigenous territory. Four so-called Native Community Lands (TCOs) were recognized by decree in 1992, and a formal mechanism for titling the land in such territories was created in the 1996 Agrarian Reform Law. But, as Carwil points out,

> "the 'clearing' of land titles (or 'saneamiento') was a long process, involved extensive bureaucracy and the recognition of titles for

> third party residents of these lands. Despite promising flourishes of rhetoric, the entire process limped along under the neoliberal governments that ruled Bolivia through 2005: just 2.8 million hectares as of 2000, and a total of 5.7 million by 2005" (Carwil 2011).

Following the first election of Evo Morales, things genuinely changed. With the help of Danish development aid and technical assistance, a massive effort to generate secure titles for hundreds of TCOs has been started. In its first year, the Morales administration titled over 1.9 million hectares, but much more was to come. By February 2011, it had nearly tripled the previous decade's titling work in six years. The total area of Native Community Lands reached now over 20 million hectares, about 20% of the entire country (Carwil 2011).

In particular, in the lowlands native title has been a revolutionary shift in power. The most dramatic stories come from the Chaco, where the pre-2008 situation was the unpaid servitude of local indigenous peoples (more than Guarani 600 families) on massive ranches.

The Inter-American Commission on Human Rights confirmed this situation: it found debt bondage and forced labour, which are practices constituting contemporary forms of slavery. Guaraní families and communities were clearly subjected to a labour regime in which they did not have the right to define the conditions of employment, such as working hours and wages; they worked very long hours for meagre pay, in violation of the domestic labour laws; and they lived under the threat of violence, which also led to them being afraid of, and absolutely dependent on, their employers.

The Commission recommended the adoption of

> "a comprehensive plan for the territorial reconstitution of the Guaraní indigenous people with special attention to the rights to collective property, self-government, education, health, housing, and training services in the area of agriculture and other economic activities; ensure that all the measures taken by the

> State for the restitution of the territory of the Guaraní people, such as clearing title, expropriation, and reversion of lands, be taken with the consensus of the Guaraní people, in keeping with their own procedures for consultation, values, uses, and customary law; ensure that the tracts of land received by the communities belonging to the Guaraní indigenous people are sufficient to ensure the maintenance and development of their own ways of life; ensure that the Guaraní communities that receive territory as part of the process of territorial restitution obtain the political, technical, or financial support they need to exercise their rights to autonomy, self-government, and political participation guaranteed by the Political Constitution" (OEA 2009)

Bolivia's agrarian reform law allows the full reversion of the ranches that use forced labour to their liberated workers.

The Assembly of the Guarani People, supported by local and international organizations, began buying land that was given to the people to cultivate. Free communities were founded. The agriculture mainly consists of small plots for the production of products for community use. But, where indigenous people were until recently enslaved on private haciendas, inequalities persist. Today, TCOs are still fragmented and unfinished, with most land in the hands of private, non-indigenous ranchers. Once again, even when indigenous rights are recognized in law, entrenched colonial power relations may prevent their implementation.

However, the meaning of indigenous access to land is vital to many agricultural communities. As Carwil reports, "fully 42.3% of titled TCO lands are in the Altiplano or central valleys, organized in 135 separate entities. Collectively governed agricultural communities have been given a big boost across the country" (Carwil 2011).

Critical limitations on the territorial rights offered by Native Community Lands throw the value of these titles into question: a TCO can be overlaid by government-authorized concessions of logging rights, oil and gas exploration and extraction zones, and mining concessions. The Seventh CIDOB march's demand "that forest, mining, and other concessions that affect indigenous peoples and their territories be annulled" was not heeded. TCOs

can also be diced up by official recognition of third parties' de facto control over longstanding indigenous territories, such as the Cocaleros's encroachment into the Isiboro Sécure National Park and Indigenous Territory (TIPNIS) and large-scale agribusiness in the Chiquitanía and Gran Chaco.

In a 2012 report, Amnesty International complained that the Bolivian authorities had made decisions about the construction of a highway across the TIPNIS without consulting the indigenous peoples who live there. This lack of consultation resulted in a good deal of confusion and conflict, with some indigenous people supporting the road and others opposing it, and the government reversing its plans more than once. Plans to build the road remained on hold, following a controversial consultation with the affected indigenous communities in 2012.

On the other hand, this year, a new mining law recognizes that holding a native title impacts other mining rights. There is therefore a need to uphold consultations with the Indigenous Peoples about prospecting and exploring mining activities and to recognize the principle of free, prior and informed consent to projects that are going to have an impact on them.

Finally, the presumed right of indigenous communities to control their own territories is a subject of national political debate in today's politics. The widely discussed Law on the Rights of Mother Earth remains stuck in the Bolivian legislature. A major point of contention is the right of indigenous peoples to freely consent to or reject megaprojects on their lands. The question is "Can the indigenous peoples stop others from taking advantage of the natural resources?" An indigenous proposal for a general law on consultation and consent has recently been presented by CONAMAQ to the government. And the conflict over the highway planned through Isiboro Sécure has elicited numerous statements from Morales' government suggesting that the indigenous communities have no right to veto what goes on in their lands (Sturtevant 2015).

This is one of the reasons why the most critical Bolivian indigenous movements now say that while Morales proclaims himself a champion of indigenous resistance on an international stage, at

home his government is applying the very measures of progress and advancement that have been used against indigenous people throughout the history of Colonialism. They say that the Plurinational State "is in the constitution but the government is not practicing it. They've just continued with building a nation-state, just as the previous governments did" (Watson 2014).

4. Conclusion

In this brief essay I have analysed the complex challenge to the implementation of new indigenous rights in Bolivia. Bolivia must avoid the danger of championing indigenous rights only as "paper rights" (Guastini 1994:168), or worse still as "fraud-rights" (Tincani 2011:108-123). The danger of the former is that rights recognized in the Constitution will not be upheld by a system of legal guarantees for their implementation; the danger of the latter lies in the quality of such a system, for example, when a legal sanction exists but is ineffective in implementation.

Tincani argues that sometimes "active citizenship has sufficient impetus to gain constitutional successes and protect them through political engagement, but it may happen that it lacks the power to force government and civil servants to implement them" (Tincani 2011:125). I think it is still early days to apply this to Bolivia, especially as so far the indigenous movements have proved that they are proficient at 'rights construction', and they are aware that their work does not end in the Constitution, but it must continue through collective and individual political action to protect and implement them.

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Chiara Scardozzi[1]

BETWEEN RIGHTS AND EXPROPRIATION

A case study about land restitution process in the semi-arid region of the Argentine Gran Chaco

Abstract

Socio-environmental conflicts are one of the most important issues in contemporary Latin American contexts, due to competitiveness in getting control over thr natural resources (mainly lands, waters and forests) which are found in far-reaching regions inhabited mostly by indigenous people and peasants (campesinos). One of those regions is the semi-arid terrain known as the Gran Chaco, the largest Latin American forest area after the Amazon. It is the biggest woodland area in Argentina and the most affected by policies irrationally exploiting the environmental heritage and natural resources. The sustainable management of the area is crucial for the maintenance of food security and biodiversity conservation at a global level (UNEP 2000), thus exposing local populations to global challenges.

Historically considered an enormous unproductive desert as a result of national economies based on the exportation of agricultural products, the Chaco region has been left outside national interests.

In recent decades the rediscovery of this area for the exploitation of natural resources directed at external markets (transgenic soy plantations, hydrocarbons, timber, intensive livestock farming) has caused irreversible environmental changes due to predatory action (deforestation and desertification), with dramatic ecological and social impact, putting at risk the survival of rural populations. Perceived as "unproductive" for the purposes of a development model oriented at monoculture and business, the local people are threatened and expelled from the inhabited territories.

Currently the Gran Chaco appears as an area affected by an important social and environmental transition with many unpredictable outcomes; a "territory in dispute" where,

1. Phd Student in Cultural Anthropology (University of Rome "La Sapienza"). In 2014 she won the "Francesca Cappelletto Grant" for the best MA thesis in Applied Anthropology from the University of Verona. Her research interests revolve around socio-environmental conflicts and resilient practices in semi-arid regions of Latin America.

within a precarious and difficult political balance, various stakeholders coexist, cooperating or struggling to ensure control of space and resources, by defining certain specific interests from various locations and different perceptions of what we generically call "land". However, ethnographic research about the restitution land process in Salta Province involving indigenous communities and peasant families shows the existence of local resilient strategies centred on collective knowledge for living in habitats characterized by vulnerability and scarcity (especially water resources), and policy management of socio-environmental conflicts. This is thanks to an innovative process of political participation that allows local actors together to legally resist incursions by outsiders such as agribusiness corporations, seekers of a "no man's land" in which to invest capital, a phenomenon spread globally and known as "land grabbing".

As demonstrated by the participatory mapping experience narrated here, the fight for land rights is also a struggle for the socio-cultural specificities of the groups and their territories.

1. Between the inclusive political-juridical frame and the exclusivist "agrarian order"

In 2012 the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, highlighted the fact that despite the great effort that Argentina had made towards recognizing native peoples' rights, "greater efforts" were necessary.

The last constitutional reform in 1994 recognised the "pre-existence" of native people in the national territory and acknowledged their rights to community ownership of land and bilingual education (article 75, subparagraph 17).

> Article 75. The Congress shall have power:
>
> 17. To recognize the ethnic and cultural pre-existence of indigenous Argentine peoples.
>
> To guarantee respect for their identity and their right to bilingual and intercultural education; to recognize the legal standing of their communities, and the possession and community property over lands they have traditionally occupied, and to regulate the transfer of other lands fit and sufficient for human development—none of which may be alienable, conveyable or susceptible to encumbrances or attachments. To assure their par-

> ticipation in the related administration of their natural resources and of other interests affecting them. The Provinces may exercise these powers concurrently.

In 2000, with Law No. 24.071, Argentina ratified the ILO Convention number 169, where self-identification is considered a fundamental criterion for the identification of indigenous and tribal peoples.

The same criterion of self-identification was used in the most recent 2010 census, which indicates that nearly one million people out of 41 million consider themselves of native descent (INDEC 2010).

In 2006 Law No. 26.206 was enacted about bilingual and intercultural education to ensure an education promoting indigenous cultures and languages.

In 2006 too, concerning the property and possession of land traditionally occupied by native indigenous communities, Emergency Law No. 26.160 (Ley de Emergencia en materia de posesión y propriedad de las tierras) was passed, because of conflicts between land owners and indigenous communities and evictions related to territory disputes.

This law, extended until 2013, orders The National Institute of Indigenous Affairs (INAI-Instituto Nacional de Asuntos Indígenas, which is a governing organization dependent on the Ministry of Social Development, to make a national territorial survey about indigenous communities, unfortunately never completely carried out.

At the present moment the majority of indigenous Argentinian communities are still waiting for legal recognition of their land and traditional territories. The implementation of land titling is a problematic issue mainly because of a serious lack of coordination between INAI and provinces over implementing national legislation - some provinces do not recognize indigenous rights. There is also a lack of indigenous participation in decision-making processes and an absence of consultative processes with indigenous peoples that meet the international level. Moreover, when consultative processes are carried out, they are affected by irregularities.

In most cases when communities have been able to negotiate with companies granting benefits (such as jobs, drinking water supply, school or road building, etc.) they are negotiating their "rights" issues, which should be the state's responsibility.

Consequently, the Argentinean context features a general juridical insecurity about indigenous land rights, also due to the promotion of industrial and agricultural extractivism inside or around their traditional territories, due to the 1990s liberalization policies and provincial concessions granted in the last decade.

Many studies have highlighted the fact that global areas with the highest index of biodiversity are those inhabited by the indigenous peoples and peasants (Toledo and Barrera-Bassols 2008).

These areas are the most subject to the irrational appropriation of natural resources, which exposes rural communities to global disputes. Their livelihoods are destabilized by socio-environmental conflicts that in many case evolve in a permanent political crisis, with them losing governance of their land.

In Argentina, extractivism is the principal cause of rights being violated, and without any legal protection, communities are at the mercy of local expropriators, administrators and authorities (Aranda 2015).

The advance of the agricultural frontier causes the loss of vast land surfaces; families and communities are being evicted, pushed into unproductive areas or forced to live on the outskirts of the cities.

Thousands of hectares are being deforested for the transgenic production of soybeans and corn or intensive livestock. This causes the loss of traditional territorialities and the destruction of self-sufficient food production; lack of access to, and availability of hunting, fishing and gathering, for house-building materials.

It is not only land, of course, but the entire environment that is being threatened; air and water are also contaminated by mining/oil activities and chemical spraying, so causing serious damage to animals and human beings.

Very often, in case of territorial disputes, provincial courts favour private owners and when communities have tried to stand up against eviction, they are criminalized by the state, and become victims of police violence and other.

In 2007 a step forward was made: the adoption of the Forestry Law[2], in response to the drastic levels of deforestation, where over 70% of Argentina's original forest areas had been cleared. Despite this, deforestation is ever on the increase, and between 2006 and 2011 almost two million (1,779,360) hectares of virgin forest were lost and almost one million of hectares were cleared after the Forestry Law. It is estimated that, in northern Argentina, 32 hectares are destroyed every hour, for which the official justification is the "development" of the country. Post 2007, almost 400,000 hectares were cleared, 100,000 of which in protected zones (REDAF 2010)

The most affected area is the Gran Chaco, the largest forest area in Latin America after the Amazon, which is the biggest woodland in Argentina.

The Chaco region is clear-cut evidence of the contradiction between the inclusive political-juridical frame and the exclusivist "agrarian order".

Between 2000 and 2008 the cultivable surface of Argentina increased by more than 30%, passing from 24 to 32 million hectares, and soybean production was the cause of 77% of this growth. At the same time, the deforestation rate oscillated between 1.5 and 2.5%, much more than the Latin American average (0.51%) and the global average (0.20%) (Seghezzo et al. 2011).

2. "Ley 26.331 de Presupuestos Mínimos de Protección Ambiental de los Bosques Nativos" (OTBN)

Fig. 1 Elaborated by WWF

The map (Fig. 1) shows a comparison with the eco-region of Gran Chaco, which includes Argentina, Bolivia, Paraguay and a small part of Brazil.

2. Territorial restitution in the Chaco region

Since 2009 I have been carrying out fieldwork in Salta province, in the Chaco region. Salta is one of the provinces with the highest presence of indigenous populations, the second with the most extensive level of deforestation, and it is at the top of the land concentration index (REDAF, cit.).

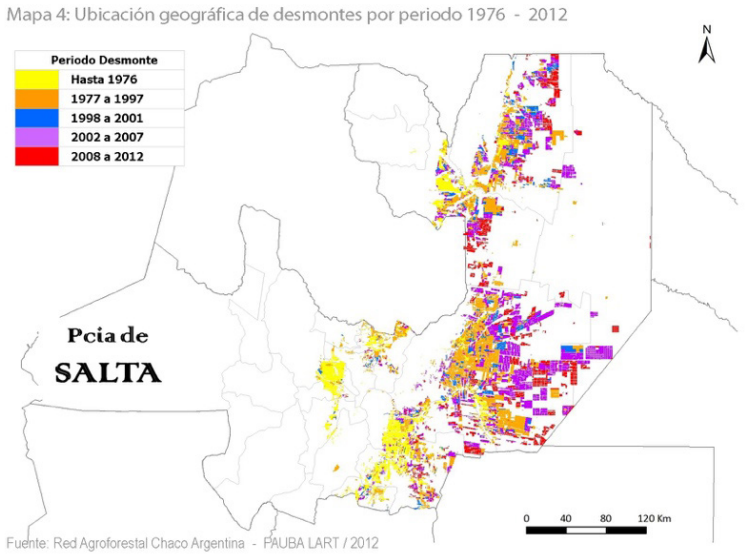

Fig. 2 Elaborated by REDAF and FAUBA

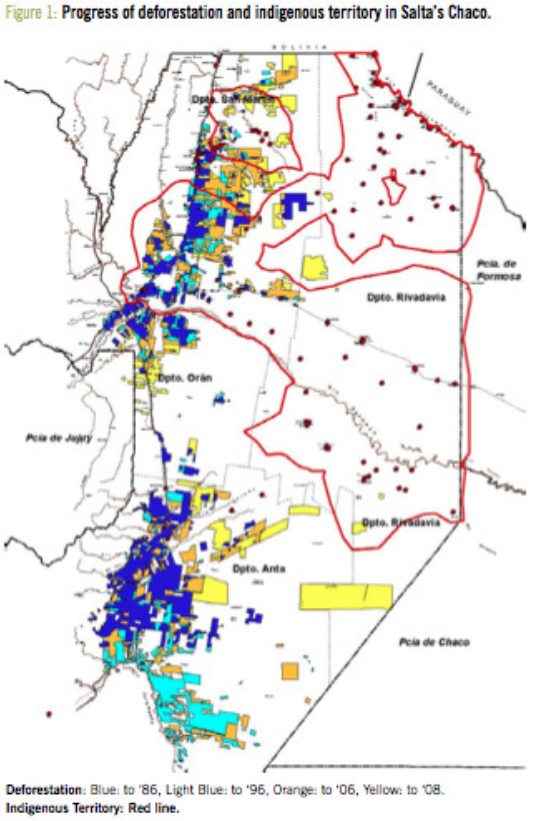

Fig. 3 Elaborated by Greenpeace

The first map shows the expansion of the agricultural frontier in Salta Province, up to 2012. The red line on the second map, shows the deforestation rates in indigenous territories up to 2008.

The Chaco region is, at the same time, an example of both a threatened and resistant territory. The fight for land is not exclusively a history of rights usurpation. My ethnographic study about Chaco region of Salta, reveals stories of courage, creativity, negotiation, decision making and political participation.

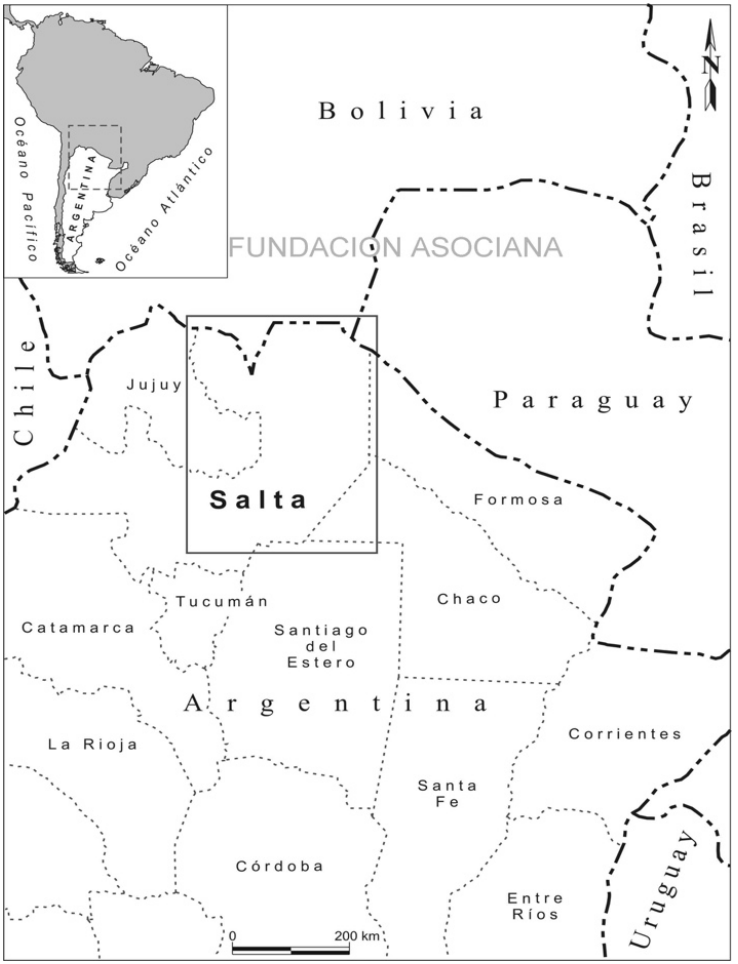

Fig 4 North Rivadavia Department

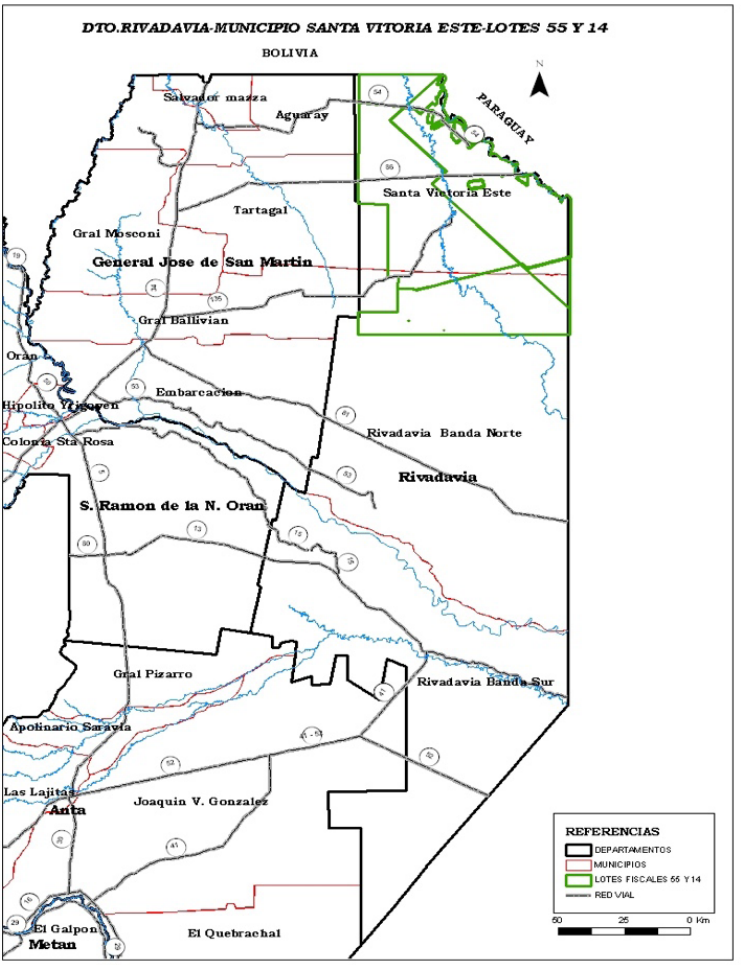

Fig. 5 North Rivadavia Department

As is highlighted in the maps above, I will talk about the northern part of Rivadavia Department, lots number 55 and 14 that were fiscal until 2014. It is a territory of around 643,000 hectares surrounded by private property.

This area, bordering on Bolivia and Paraguay, was historically left outside economic interests: firstly, during the Spanish colonization period, because of the absence of precious metals; secondly, when the Argentinean national state was consolidated, because it was considered unproductive for an economy based on the exportation of agricultural products. The officials described it as a desert. This kind of image was that of a kind of *carte blanche*, licensing any sort of action in Chaco.

A kind of geographical isolation and social marginalization stayed with the area, which nowadays is classed as the poorest in Argentina by the "Basic Unsatisfactory Necessities" index.[3] It is now inhabited by 15,000 indigenous people belonging to five ethnic groups scattered throughout in the territory in more than fifty communities, the largest of which has settled on the Pilcomayo River.

These indigenous groups have been classified according to ethno-linguistic criteria: Wichí (Mataco), Iyjwaja (Chorote), Niwakle (Chulupí) of the Mataguayo linguistic group; Komlek (Toba) of the Guaycurú language group; a small percentage of Tapy ' y (Tapiete)-Tupi-Guaraní language group. The livelihood of these peoples was historically based on hunting, gathering and fishing (today mixed with different forms of paid work)

In 1902 groups of settlers (*campesino*s or *criollos* in Spanish) reached the region from the neighbouring provinces, in search of pasture for their animals. It is important to consider that the migration was promoted by the national government to protect and populate the national border f, but the title on land that the government promised was never legalized,.

The livelihood of the *Criollo* settlers is mostly based on animal breeding on open land, so since they came to the area, they have lived in small self-sufficient family holdings spread throughout the territory (there are more than 600 in the lots, located at a distance of several kilometres from one other).

Despite the conflicts rising from the occupation of the same territory (due to different practices for the use of the land) and

3. The NBI Index –Necesidades Básicas Insatisfechas- was elaborated by the Instituto Nacional de Estadistica y Censo- INDEC in 2013.

the asymmetry of power generally in favour of the Creoles, the two groups have created relations of various types of trade, producing unique, culturally hybrid forms, based on economic exchange, knowledge, practices and specializations related to the environment (Scardozzi 2013).

The spatial overlap in an area that is difficult to inhabit, due to a permanent water deficit, but possessing plenty of extractable natural resources such as oil, gas, hardwoods, has over time put the populations in a difficult position when faced by challenges transcending the local reality of the two groups.

In the 1980s, the indigenous communities began to claim their territory with greater force. The Government of Salta created the "Honorary Advisory Commission" to start the territorial regularisation of fiscal lots 55 and 14, but the proposed regularizations were incompatible with the livelihood of the local actors, and the crisis between the indigenous people, the criollo settlers and the state grew deeper.

In the 1990s the conflict with the state became more evident when the provincial government implemented an ambitious plan for infrastructures without consulting the indigenous communities. The plan included a major international paved road through the territory and a bridge connecting Argentina to Paraguay. The intention was to create a land connection between the Atlantic Ocean and the Pacific for the exportation of soybeans.

The indigenous communities presented a claim to the Inter-American Commission on Human Rights (IACHR), denouncing the Argentine government for the violation of their rights[4]. The Commission initiated an amicable settlement process, inviting the three parties to find a solution for both the indigenous communities and the criollo settlers with a definitive territorial regularisation.

Local actors organized themselves to form two associations: the Aboriginal Community of Lhaka Honhat ("Our Land") and the Organisation of Criollo Families (OFC). The first step was map out the territory to prove their use of it.

4. Petition 12.094

With operational support from the non-governmental organizations Asociana[5] and Fundapaz[6], each group started a process of participatory mapping[7]. With GPS technology the indigenous communities recognized almost 9,000 points that corresponded to sites for gathering, hunting, fishing, plus old cemeteries, sacred places and more. The criollos too, marked more than 8,000 points used for breeding cattle, hunting, houses, cemeteries, etc.

In a second step the maps were completed with a socioeconomic analysis and studies of the condition of the natural resources and hydrological studies of the area. The participatory mapping revealed that the territories of the indigenous communities measured 530,000 hectares, while the criollo settlers had 500,000.

Why was this participatory mapping important? Because of the above-mentioned epistemological conviction of unproductivity. The officials' rhetorical question was, "why do they want so much land?" So the maps were used as a political instrument to answer that question and were essential for further dialogue and the final agreement.

In addition, I have to note that an extraordinary dialogue started between the indigenous and criollo settlers:, for they started to establish a strategic partnership and elaborate a strategy together to find a solution in common.

The claims of the indigenous people became those of the entire collectivity, which shared the same territory with different territorialities and lasting ways.

Among local actors, the perception of relations between them has changed, due to their new knowledge about different types of rights, with civil rights for the criollos and international rights for indigenous people - according to international law the latter have priority over land titles.

In 2005 the amicable settlement process with the state failed and the case was taken to the Inter-American Court of Human

5. Acompañamiento Social de la Iglesia Anglicana del Norte Argentino.
6. Fundación para el Desarrollo en Justicia y Paz.
7. This project was a part of the so-called Pilcomayo Programme, which was financially supported by the Germans (Misereor and Brot für die Welt).

Rights in 2006. While the case was there, in 2007 the two associations (Lhaka Honhat and OFC) signed an agreement that called upon the state to distribute 643,000 hectares between the indigenous communities (400,000 hectares) and the criollo families (243,000 hectares), without any form of compromise. In 2009, the state accepted and institutionalised the dialogue and the participatory mapping methodology as a tool to reach agreement over distributing the land.

Finally, in 2014, a decree (Decree 1498/14) definitively transferred the ownership of 400,000 hectares and 243,000 hectares to the indigenous peoples and the criollo settlers, respectively.

3. Conclusion

Currently the Chaco Salteño is an area affected by an important social and environmental transition with many unpredictable outcomes; a "territory in dispute" where, within a precarious and difficult political balance, various stakeholders coexist, cooperating or struggling to ensure the control of space and resources by defining certain specific interests from various locations and different perceptions of what we generically call "land".

The case of lots 55 and 14 is considered the biggest process of territorial restitution in Latin America, where the word restitution is intended in a political way: a historical process of "something that was taken is given back".

The political and juridical process that started with territorial claims also became a metaphorical space where it is possible to re-think the identity of groups in the light of a formal institutionalisation of parties, organized into associations as a political subjectivity (Scardozzi 2015).

The case offers a good example of how the empowerment of indigenous and campesino organizations and the promotion of political participation provide the possibility of solving the conflict in a formal way, though bottom-up.

The fight for land rights is also a struggle for the socio-cultural specificities of the groups and their territories. It was an incred-

ible way to demonstrate other possible logics of livelihood. Of course, actually a new process has begun nd it concerns the future of the region and its populations, but looks at the problem in accordance with the local perspective and helps the understanding of possible strategies and cultural relations between populations and territories and among different groups.

Distinct practices of transformation and appropriation of space and nature should be considered for a truly sustainable and shared development, local and original, therefore including rights.

The challenges ahead for local populations lie in future territorial management, hoping that the long struggle undertaken by local groups, NGOs and the state will create real decision-making for the future local territories.

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Best practices

Securing Rights: efforts from below

"SOWING THE FUTURE": DISSEMINATION AMONG YOUNGSTERS AS A CORPORATE TASK

The "Sowing the future" project aims to create awareness of food sovereignty, food and critical consumption among primary and secondary school students and all the civil society in Lombardy. The project promotes the exchange of ideas and shared solutions on the issues of food in line with the core theme of Expo 2015 "Feeding the planet, energy for life".

Food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agricultural systems. Food sovereignty is also connected to choices of consumption. In this moment in history, nine hundred million people suffer from malnutrition while an equal number suffer from the effects of overeating and poorly-disciplined diets; young people have a little knowledge about the links between human beings and their environment. The project proposes activities in the schools, communities and on the web to talk about the right of the communities to define their food and agricultural systems, in order to guarantee to everybody a healthy and culturally appropriate food. Through the achievement of its results this project will promote a shift in the perception of the community toward nutrition, strengthening the awareness of the civil society, and encourage it to take more responsible choices about food.

During the conference "Land, Water and Resources Rights" two instruments created through the project will be presented: an exhibition on the principles of food sovereignty and applications

for smart phones and tablets for discovering the places of food sovereignty in Milan.

One of the instruments created through the project is an exhibition on the principles of food sovereignty. The exhibition features a selection of comic strips that participate in the competition "Da mangiarsi con gli occhi" (To devour with your eyes).[1] The competition, open to students and comics lovers, requires the participants to express the right of peoples to healthy and culturally appropriate food produced through ecologically and sustainable methods, and their right to define their own food and agricultural systems.

More than 160 contributions participated in the competition, several classrooms from different provinces in Lombardia sent in their comic strips.

With its inspiring principles, the exhibition helped spread awareness about food sovereignty.

The ten principles of food sovereignty are described through a selection of comic strips and information/ data on the phenomenon.

"Cibo giusto Milano"[2] (the right food Milan style) is an easy, interactive map to peruse and discover centres of food sovereignty in Milan: vegetable gardens, soup kitchens, farmsteads, restaurants, shops, markets and fair trading groups.

1. [http://www.seminiamoilfuturo.org/concorso/]
2. [http://www.seminiamoilfuturo.org/mappa/]

Fides Marzi Hatungimana[1]

DUKORERE HAMWE ONLUS - "WORKING TOGETHER"

An association to safeguard land in Burundi

Burundi is a small country in the heart of Africa, covering an area of 27,834 square kilometres, with a population of around 10 million. Therefore, its population density of 370 inhabitants per square kilometre is one of the highest in Africa.

The predominant economic activity is agriculture, followed by cattle, goats, poultry breeding. The land cultivated by each family is becoming smaller and smaller. For this reason, it ought to be used rationally in order to ensure enough food, but also to guarantee protection of soil itself.

Since 2006, our association - Dukorere Hamwe Onlus - has formed in Burundi mainly young people, aged 18 to 30, belonging to families of farmers with limited economic means.

The education and training of these people consist in annual activities, during which they are taught craftsman jobs that will allow them an income with which to supplement their farming activity. At present, owing to the limited availability of money in the rural world, it is difficult to earn from craftsmen's activity; therefore, these jobs cannot be full time occupations.

Our association considers it important to give economic independence through craftsmen's jobs and to improve farming abilities that ensure food supply, but also keep in mind that land is a resource to be protected and that water, forests, trees have to be exploited sensibly.

We have been cooperating with the Faculty of Agriculture of the State University in Milan, sending a graduating student to study the soils and identify suitable crops and the most appropriate forms of organization of work. Other forms of cooperation are ongoing.

1. Fides Marzi Hatungimana is the President of the Italo-Burundese Association "Dukorere Hamwe-Lavoriamo Insieme"

For us it has become crucial to have a twofold education for young people, leading them towards economic independence and helping them to safeguard the environment they exploit with their activities. They use charcoal to cook. We advise them to plant a tree for every two sacks of charcoal they use up.

Keeping in contact with the local public authorities permits us to inform them about our activities and encourage them to engage in similar practices. We have been involved in this activity for ten years now and are convinced about continuing with this small-scale methodology.

Our association, although small, believes that by educating and forming every young person to live and work sustainably, a part of the world might be changed and enjoyed in the best way by future generations.

Education, training, awareness and protection of the Earth (soil, water and natural resources) are essential in today's society, especially in Africa.

Luckily for the inhabitants of the nation, strong demographic pressure, spread over the entire country, does not create extensions large enough to lure big companies with large capital, which may purchase the lands. The problem of land-grabbing is in fact less serious in Burundi than in other African countries.

Strong demographic pressure must necessarily induce the population to exploit knowingly and sensibly this non-renewable resource, which ensures agricultural produce to Burundians all year round, thanks to an optimal climate.

The aim and task of the association consist in making the young people we train aware of the precious resources available in Burundi and of the importance of protecting them in such a way that future generations may profit from their own land.

I am an agronomist for the association of breeders in the Province of Sondrio, situated in the Alps. They are very proud of themselves and of their hard work as guardians of the territory.

Marc Ona Essangui[1]

LES PLANTATIONS DE PALMIER À HUILE ET D'HÉVÉA, CAUSE DE L'ACCAPAREMENT DES TERRES AU GABON

1. La situation gabonaise

La plus grande partie de la population ne bénéficie que d'une sécurité foncière limitée en Gabon. Les droits traditionnels sur la terre et les ressources ne sont pas respecté et les voies officielles d'accès à la proprietè légitime sont limitées dans leur portée et inaccessibles à la majorité pour ce qui est de la procédure y afferente.

Le droit foncier et relatif aux ressources est imparfait, rétrograde et injuste dans ses grands principes, et faiblement respecté.

Les principales sources d'injustice consistent dans le refus que des droits coutumiers ou d'autres droits de longue date sur la terre et les ressources confèrent plus que des droits occasionnels d'occupation et d'utilisation

Ces conditions font de l'État le plus grand propriétaire terrien au Gabon, avec jusqu'à 90 % de la superficie du pays non seulement sous son contrôle, mais largement définie en tant que « domaine privé du gouvernement ».

La réforme foncière est confrontée à un énorme défi au Gabon. Ce défi n'est pas des moindres, dans la mesure où le régime actuel d'occupation favorise les élites privilégiées et les intérêts transnationaux privés et qui bénéficient du soutien des gouvernements étrangers participants.

Sérieuse menace pour les populations rurales, le développement de plantations agro-industrielles risque de compromettre les efforts de conservation de la diversité biologique. Selon les observations faites aussi bien à Kango, Mouila que dans la région de Bitam/Minvoul, il s'avère que l'on assiste en ce moment à des

1. Marc Ona Essangui is President of a network of environmental NGOs and founder of the NGO Brainforest in Gabon.

opérations de déforestation intensive rarement observées dans le massif forestier gabonais. En dépit de leurs incertitudes, la plupart des études menées jusque-là indiquent que ces plantations auront de lourdes conséquences aussi bien sur la ressource que sur les activités anthropiques. Par conséquent, des conflits sociaux pourraient éclater.

Comme sa consœur en charge de la régulation des activités forestières, la législation foncière du Gabon se fonde sur le principe de domanialité intégrale. En clair, partant du principe que le territoire national est un espace où ne s'exerçait aucun droit avant l'érection de l'État moderne, la loi fait de la puissance publique le gestionnaire exclusif des terres et ressources. Elle divise ainsi le domaine national en un domaine public et un domaine privé. L'espace national gabonais étant avant tout considéré comme un massif forestier, la loi 16/01 portant Code forestier consacre l'existence d'un Domaine forestier permanent de l'État et d'un Domaine forestier rural.

2. Un processus opaque, politise et controverse

Tel qu'il se déroule depuis son lancement, le processus de développement des plantations agro-indus- trielles d'hévéa et de palmiers à huile est d'abord le résultat d'interactions entre l'État gabonais et les investisseurs privés Olam et SIAT Gabon. Donnant l'impression d'être apeurées ou de craindre d'hypothétiques représailles, les populations locales abordent cette situation avec beaucoup de réserve.

2.1 Le processus d'attribution des terres

Bénéficiaire d'un engagement du gouvernement visant la mise à disposition de terres pour le développement de plantations agro-industrielles de palmiers à huile et d'hévéa, Olam a d'ores et déjà obtenu le droit d'exploiter 87.274 hectares pour une période de cinquante (50) ans, renouvelable. L'accord porte sur une superfi-

cie totale de 300.000 hectares

De fait, ayant, contre toute attente, également obtenu le droit de procéder elle-même à l'identification des terres, la multinationale doit mener des études complémentaires.

2.2 Adaptation du cadre juridique et institutionnel

Le cadre juridique et institutionnel doit correspondre aux objectifs du moment. Il doit s'adapter à la situa- tion créée par le développement des plantations agro-industrielles. Il s'agit de lutter contre le phénomène de conversion des forêts, clarifier les différents domaines forestiers, le statut des villages. Bien entendu, les formes d'organisation sociale, le transfert effectif des compétences vers les collectivités locales, le lien de ces entités avec les populations, leur capacité d'action et les impôts locaux sont aussi des thématiques qui méritent réflexion.

2.3 Mise en place d'un cadastre rural

L'affectation des terres ne doit plus appréhender le foncier uniquement sous l'angle technique impliquant l'immatriculation et les procédures juridiques. Elle doit plutôt repenser la question foncière, en la mettant en lien avec la lutte contre la pauvreté, la réalisation de la sécurité alimentaire et la décentralisation afin de permettre aux utilisateurs et détenteurs de terres rurales de mener leurs activités traditionnelles sans risque de se les voir contester. La nouvelle vision du foncier doit marquer une rupture avec la logique domaniale intégrale et le monopole étatique sur la terre.

3. Partenariat Brainforest – Alisei

Le lancement du projet «On mange local» cofinancé par l'Union Européenne en partenariat avec les ONG BRAINFOREST et ALISEI, a eu lieu mardi 05 novembre 2013. Cette important pro-

jet donne le pouvoir à la population des agriculteurs locaux et fait la promotion des cultures saines pour une alimentation propre. Il est important pour barrer la route au phénomène d'accaparement de terre de privilégier ce type d'agriculture qui privilégie la gestion durable des écosystèmes et le respect des droits des populations à posséder les terres agricoles.

C'est l'exemple d'un projet intégrateur qui mérite de multiplier sur tout le pays avec des produits comme le cacao comme c'est le cas à Sao Tomé.

4. Conclusion

La sauvegarde du mode de vie des populations dans un contexte d développement des agro-industries au Gabon se heurte à trois faits majeurs que sont: (i) l'absence de terres agricoles préalablement identifiées, (ii) l'absence de normes nationales d'exploitation et (iii) la forte politisation du dossier.

Les projections et extrapolations sur les l'évolution de la situation née de l'installation de plantations agro-industrielles prédisent un environnement plus hostile dont les impacts probables sur les sociétés, les moyens d'existence et les modes de vies des populations seront particulièrement dévastateurs.

Federico Pezzolato[1]

DO MULTINATIONAL COMPANIES CARE FOR LOCAL COMMUNITIES?

Abstract

Media reports, academic studies and institutional discussions are increasingly documenting the rise in foreign direct investment in agricultural land.[2] *In this context, there is growing concern over the subsequent impact of land acquisitions on local communities' property rights and regional food security.*

This short piece will therefore provide an overview of the emerging trends, raise stakeholder concerns, highlight business risks and opportunities and provide a summary of Vigeo's related findings following our review of the food sector: only a few multinational companies have tackled the issues adequately and there is still relevant room for improvement, in terms of both commitment and management systems.

1. Background

According to the United Nations Food and Agricultural Organization, the world will need to produce 70% more food in order to feed the forecast global population in 2050 (UN Food and Agriculture Organization 2009). Food price volatility, general scarcity of resources and growing interest in using agricultural products like biofuels drive to increasing land acquisitions, too.

Regions attracting the greatest interest are those with substantial uncultivated agricultural land and weak protection of land

1. Federico Pezzolato is Senior CSR Consultant at Vigeo, European rating agency expert in the assessment of companies and organizations with regard to their practices and performance in environmental, social and governance ("ESG") issues.
2. "In total, says the International Food Policy Research Institute (IFPRI), a think-tank in Washington, DC, between 15m and 20m hectares of farmland in poor countries have been subject to transactions or talks involving foreigners since 2006" (*The Economist*, 2009)

rights, such as the African continent. In this context, local communities and small-scale farmers are unlikely to have formal documentation of land ownership and are thus extremely vulnerable to dispossession, often without consultation or compensation. Considering the frequency of subsistence living in these regions, the loss of land usually means loss of livelihoods. In addition to these direct impacts, such events can also affect regional food security, as agricultural resources become a global commodity – meeting the demands of the market rather than the needy.

In response to stakeholder concerns, the 'Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources' (FAO, IFAD, UNCTAD, World Bank 2010) have been promoted since January 2010 by the World Bank, the International Fund for Agricultural Development, the United Nations Conference on Trade and Development and the UN Food and Agriculture Organisation. The aim of these guidelines is to provide recommendations for host governments to help in the creation of domestic legislation and to advise investors in decision making processes. The Special Rapporteur on the Right to Food has also developed eleven core principles to address the human rights challenges associated with large scale land acquisitions and leases (Schutter 2009). In 2012, the UN Food and Agriculture Organisation also adopted the 'Voluntary Guidelines On The Responsible Governance of Tenure Of Land, Fisheries, And Forests In The Context Of National Food Security' (UN Food and Agriculture Organisation 2012).

Besides these risks, it has also been advocated that community involvement, as opposed to community imposition, can actually represent a business opportunity for agricultural investment. For instance, in a 2010 World Bank report 'Rising Global Interest in Farmland', the writers argue that the assets of investors (capital, technology and markets) can be combined with the assets of local communities (land, labour, local knowledge and social acceptance) to optimise operational productivity (World Bank, 2011).[3]

3. A similar argument was elaborated in Oxfam, 2011.

Such investment models, which are also advocated in the 2012 International Land Coalition publication (International Land Coalition 2012), not only provide opportunities for growth for small-scale famers, considered to be crucial factor in ensuring future food security, but also represent business opportunities for investors.

2. Main issues

According to Vigeo's methodology, the issues at stake are analysed in two sustainability drivers:

2.1 Respect for human rights standards and prevention of violations

Food and water are precious resources, high and competitive demand from companies, local communities and governments. Such demands lead to concern over how those with a limited voice are negatively affected by the actions of the more powerful. As a result, respect for human rights standards and prevention of violations in society are important issues in the food sector.

Respect for the rights of indigenous people in bio-prospection

Indigenous peoples have enhanced protection under International Law and according to the 'United Nations Council's Declaration on the Rights of Indigenous people', companies shall prevent "any action which has the aim or effect of dispossessing them of their lands, territories or resources". Some local populations are potentially vulnerable to these practices. Companies are expected to avoid the unilateral patenting of plants, genes and the traditional practices and medicines of indigenous populations after bio-prospecting missions. Such Human Rights are protected also by the 'UN Convention on Biological Diversity' which recognizes the sovereignty of states and communities over their resources.

Multinationals have been accused of "bio-piracy" in certain regions of the world by NGOs representing the rights of farmers or

of autochthones, worried about the development of patenting on their livings. Vigeo considers whether companies consult indigenous people or provide compensation for affected populations.

Prevention of cruel, inhuman, or degrading treatment caused by private security agents.

Once land is acquired, steps are often taken to ensure that these valuable assets are secure. For example, the Earth Policy Institute reported in July 2010 that Pakistan is offering to provide a security force of 100,000 men to protect the land and assets of investors (Brown 2011). Such developments bring about concerns for the protection of the human rights of local citizens. Vigeo considers how companies address this specific concern, for example through the training of security providers or reporting public security abuses to host governments.

2.2 Prevention of complicity in human rights violations

Under the Ruggie Framework (Ruggie 2008), companies have a clear responsibility to respect all human rights entrenched in the Universal Declaration of Human Rights, and also prevent their employees from perpetuating any human rights violations. Risks should be monitored, plus training and audits can be implemented to decrease occurrence of such violations.

2.3 Respect for property rights

Land acquisitions have become a key political issue in many emerging economies. For instance, particular concern has recently emerged over allegedly un-compensated land acquisitions in Cambodia as a result of the booming sugar industry. Vigeo analyses whether there is a company policy or measures in place to avoid connections with produce that results from land grabs.

2.4 Promote social and economic development

Promoting the social and economic development of areas where companies have operations is embedded in the OECD Guidelines for Multinational Enterprises, that state that "enterprises should encourage local capacity building through close co-operation with the local community, including business interests". Also the UN Tripartite declaration of principles concerning multinational enterprises and social policy foresees that "multinational enterprises, particularly when operating in developing countries, should endeavour to increase employment opportunities and standards [...] and should also, where possible, take part in the development of appropriate technology in host countries."

In developing countries, where the primary sector's role in the economy is often crucial, the way the agriculture and food industry develop and share technologies and skills has major impacts on the local social and economic development. One of the most efficacious ways to address rural poverty is by empowering smallholding farmers. The food companies are in a strong position to play a role in this empowerment. Companies also have a responsibility to ensure that their extensive direct or indirect use of local resources (land, water) does not affect the local community's own capacity for social and economic development by depriving them of the necessary resources to develop their own efficient agriculture and (food) industry.

Food industry implantations are significant for the local employment (including local suppliers). This sustainability driver therefore considers how companies are both optimizing their operations to enhance social and economic development, as well as how they mitigate the negative effects these operations could have on such development. Of note, Vigeo looks for independent assurance of certification schemes, which is judged by a scheme endorsed by international, independent associations or NGOs.

3. Vigeo's findings for the food sector

Since April 2014, Vigeo has analysed the food companies listed in the STOXX 1800 Global Index, headquartered worldwide: Europe (17 companies, analysis delivered in February 2015), Asia Pacific (16, July 2014), North America (16, April 2014), Emerging Markets (35, September 2014), for a total of 84 companies.

Vigeo has analysed corporate policies and tools aimed at managing and reducing the impacts linked to the issues described above. Implementing due diligence measures and developing industry self-regulation can mitigate risks and enhance opportunities. It should therefore be seen as being in the business interests of all associated companies.

However, results are still quite disappointing: indeed, analysing in particular the fourth issue ("Respect property rights"), only 10% of 84 global companies consider this theme relevant, having developed an appropriate corporate policy. For instance, Associated British Food's Supplier Code of Conduct contains a commitment to adhere to the principle of free, prior and informed consent when acquiring land and respect the rights of communities to access land and natural resources. Nestlé, Unilever, Bidvest Group, Kellogg make a similar generic commitment to respecting human rights of indigenous populations.

In terms of implementation systems, the picture is slightly better: 12% of the companies analysed (data available for Europe and Asia Pacific areas) adopt some forms of tools, such as:

- Awareness-raising programmes
- Training programmes
- Risk mapping/impact assessments
- Monitoring /grievance mechanisms
- Internal audits/verification
- External audits/verification
- External investigation of allegations
- Consultation of indigenous people
- Ensuring the compensation of affected populations
- In particular, Nestlé, Danone, Unilever and Kellogg state they

carry out regularly human rights risk mapping, besides train employees (Nestlé).

Notwithstanding the tools adopted, Unilever, Ebro Foods, Nestlé, Associated British Food, Kellogg, Cargill and Bunge have all faced allegations linked to land grabbing in the periods under review.

Regarding the mitigation and optimisation of their impacts on the territory, 25% consider such issue and 69% have adopted some form of cooperation with local communities, basically focused on:

- financial resources,
- actions to support local production.

Such data should not be surprising: companies look to acquire a licence to operate in many forms and the hiring of local personnel, as well as the business run with local suppliers, are the easiest way to be accepted by communities. Thus, following a review of the CSR performance of the global food sector, it appears up to the present that only a few companies are taking action in order to adequately handle these risks.

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Pietro De Marinis[1]

WHEN A STATE COMPETES WITH ITS PEOPLE OVER RESOURCES. WHAT KIND OF COOPERATION? WHAT KIND OF PARTNERSHIP?

What role for universities and how do they react to this issue?

Abstract

Resources are the key point of our relationship with the planet Earth and the tuning of this relationship is the core goal of every human activity claiming to be sustainable. In this context, there is growing concern over the paradigm on which International Cooperation (IC) is currently working.

Universities have a role to play in shaping and spreading the new "development" paradigm. From this point of view, each component of a university should take action. University cooperation, always in collaboration with civil society, could fill the emerging gap between the states who follow the direction of the global economic system[2] *and populations, more and more in need of the proper tools to get an equally diffused, grassroots ecological development.*

This short paper will argue this point of view by presenting a small student association born inside the Faculty of Agronomy in Milan.

1. Background

The Earth provides all that we need to live and thrive. So what will it take for humanity to live within the means of one planet?

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1. Pietro De Marinis is a Ph.D. candidate at the Department of Agri-environmental Sciences, University of Milan. He is also the president of the Association "Dévelo – Laboratorio di Cooperazione Internazionale" (A.P.S. Dévelo – Laboratorio di Cooperazione Internazionale, via G. Matteotti 52/1 Peschiera Borromeo – Milan, Italy).
2. "In total, says the International Food Policy Research Institute (IFPRI), a think-tank in Washington, DC, between 15m and 20m hectares of farmland in poor countries have been subject to transactions or talks involving foreigners since 2006" (*The Economist*, 2009).

Individuals and institutions worldwide must begin to recognize ecological limits. We must begin to make ecological limits central to our decision-making and use our human ingenuity to find new ways to live within the Earth's bounds. This means investing in technology and infrastructure that will allow us to operate in a resource-constrained world. It means taking individual action and creating public demand for businesses and policy makers to join.[3]

In this context, there is growing concern over the paradigm on which IC is currently working. Since the 1990s, the model of Cooperation to Development has been through a renovating process[4], giving birth to coordinated and integrated programs consisting in the coexistence of complementary phases: the research and analysis phases are interlaced with the intervention and the operational partnership actions.

The role of universities in Cooperation has grown, thanks to rejection of the transfer process (technology, financial resources, skills) in favour of an endogenous growth, capacity building through the sharing of knowledge, aiming the development of a new and original cultural synthesis.

University intervention answers:

- The need to improve the efficiency and efficacy of projects (through analysis and research).
- The need to boost the growth of local human capital through training, student/teacher exchanges, agreements between universities (operational partnerships, long lasting interests (Sali et al. 2015).

One of the very practical results of university participation in development projects has been the processing of new methodologies for intervention based upon the concept of appropriate technologies.

This is a way of conceiving technology transfer which is not modelled on efficiency criteria of industrialized countries, but capable of adapting to local structural constraints. Universities

3. *Global Footprint Network* 2015.
4. "La Conoscenza per lo sviluppo: criteri di orientamento e linee prioritarie per la cooperazione allo sviluppo con le Università e i Centri di Formazione e Ricerca", Comitato Direzionale DGCS 2014.

operate in accordance with their mission and competences. They valorise and qualify cooperation projects, acting as a hinge between problem identification and the programming of solving strategies.

A side feature, that could give a big added value, is offered by the presence, or absence, of students in this field - IC attracts more and more students as a stage for their practical internships. At the same time the experience in IC allows students to face the "delicate theme of human development" on their own skin, as it is a core concern in everybody's everyday life.

At the State University of Milan, inside the Faculty of Agronomy, a new-born association called "Dévelo" is now carrying the voice of the students who are interested in and who want to get involved in this field.

2. Main issue

The role of universities is linked to the concept of a *territorial approach,* which nowadays inspires IC worldwide.[5]

In this context universities answer the need for more and more locally adapted cooperation, based on "long period, common interests" partnerships aimed at high efficiency capacity-building interventions.

This is the case of partnerships between universities, signed with the overall goal of keeping a collaboration framework open to potential practical ad-hoc collaborations.

If we look at a university as a sample of the educated population who should be able to find new, smart paradigms in the context of the global crisis, it appears clear how the ability of the academic world to fulfil this task relies completely upon the willingness of each component of the university to discuss, interact and push for a community-leading vision, a general asset of values, connected with competences and skills that can withstand

5. Proceeding of the congress CUCS2015, Biconne R., Dipartimento di Architettura, Università degli studi di Firenze.

the global crisis and promote new paradigms of development.

In this light, universities are one of the environments where our ability to reason arrives at the highest degree and where we learn how to face multifaceted problems, comparing different models and behaviours and choosing the appropriate one. This real moment is the one that forces us, teachers or students, to face the consequences of "our way of development". This is the real moment when we really identify the core issue of IC and where universities really have to be, in order to give their contributions, but also to use the same moment as a chance for people to compare with real, global contexts, with positive consequences on their own training and formation.

University teaching will in fact allow students to approach situations, experiences and researches in various areas of the world and on different problems and emergencies. For example, social sciences studies, specifically the study of development anthropology, allow students to develop a critical point of view, rather than an ethnocentric and a collaborative one.[6]

At the end of the day universities are institutional organisms, with a well recognized social and cultural role, who can elaborate their own strategies in a democratic and transparent way in order to use their credibility to drive their policy agenda (advocacy).

3. Conclusions

Several "memoranda of understandings" have been signed during last year between universities. As we have seen, the universities can provide the IC with labour, knowledge and know-how, but their main role is to shape different models of action, different paradigms for development.

Universities can fill the gap between the need of governments to place public stakeholders inside IC projects and the need for qualified specialists on the ground. Universities could inspire pro-

6. Proceeding of the congress CUCS2015, Casella Paltrinieri A., Facoltà di Scienze della Formazione, Università Cattolica del Sacro Cuore, Brescia e Milano.

jects implementation by using their social and institutional mission as a reference. Universities will never take the place of other NGOs in cooperation because their tasks will always be different: the interaction between NGOs and universities in cooperation projects offers important opportunities for sharing knowledge and competencies. Thus academics can increase operational and professional skills while providing NGOs with the possibility to research and exploit innovative tools and methodologies. This relation, if adequately structured, has a huge potential in incrementing the value of partners' works and actions carried out in international projects.[7]

Universities and NGOs can also profitably cooperate in supporting each other in order to provide the governments or international lenders, with a core asset of competences, knowledge and ethical values.

Student participation in this field is essential in order to:

- have young professionals working on the ground, giving their energy and valorising the experience in their training;
- hear the students' voice about researches and actions undertaken by their university;

So, IC is definitely an exchange situation if the research-action is conducted with a participatory methodology. In this case, it allows defining processes, strategies and actions of management, by studying and enhancing the self-knowledge of participants on both sides.

The overall conclusion is about our Association, called "Dévelo", whose role is to act in favour of the academic internationalization, namely regarding participation of students and professors in IC projects and valorise the result of these exchanges in order to make better training for other students and professors in Italy. In fact, empirical research shows that contacts and interactions between different groups are the best way of positively changing possible negative prejudices, and help cooperation.[8]

7. Proceeding of the congress CUCS2015, Domini M., CeTAmb LAB, DICATAM, University of Brescia.
8. Proceeding of the congress CUCS2015, Lazzari F., Università degli Studi di Trieste.

Our action is a clear symptom of the willingness of students to get more and more involved in IC and a clear clue of the readiness of students to provide a solid values base in the discussion and implementation of different paradigms of human development.

Further investigation should be addressed to test students' knowledge level on IC and to identify the best practices for them to play their part.

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