



Paper title: *The foreign land purchases or the legal rights and the obligations of the major players in the context of sustainable development in Africa*

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“African ties to the land transcend economic and utilitarian considerations“  
(Chido Makunike)

The foreign land purchases (FLP) or the « Foreignization of land » can be portrayed as a logical component of globalization of the economy. Firstly, it reflects the liberalization and deregulation of land markets encouraged in the 80s and 90s by most States in the context of the Washington Consensus to attract FDI (foreign direct investment). Moreover, it results as well from the recent world financial crisis and the need to secure FDI in much less-risky investments such as lands, food commodities (acquisition of large lands to develop bio-fuels but also intensive agriculture like cereals) or metals in the world markets in connection with a strong demand for all those goods. On the other hand, sustainable development has been acknowledged as a principle of international law that can articulate with a certain sophistication perceived antagonist interests, namely the protection of the environment with the promotion of trade and investments, on the basis of the mutual supportiveness theory<sup>1</sup>. With regard to sustainable development, the 1987 Brundtland Report gave a holistic definition: « Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future »<sup>2</sup>. From this definition intrinsically supporting the integration of both environmental policies and development strategies, one may easily conclude to a potential harm caused by the massive FLP to the developing countries insofar as the necessity to ensure the respective production and conservation processes and allowing all the sections of the current and the future population to have access to food is not met. Just as the Brundtland report represented a new approach to international development in its time<sup>3</sup>, there is by now a need to reconcile FLP to all branches of international law (environment law, human rights and investment law) that encompasses the principle of sustainable development.

The very first part of my paper will tackle the increase of the risks linked with the FLP phenomenon such as the food security considerations coupled with the “financiarization” of the agricultural commodities. Thus, the efforts deployed by the international organisations (FAO, IFAD) to identify and regulate this practise will be considered. The second and the third sections of this paper will instead address the legal rights and obligations of both players: States and investors (private corporations, investment and pension funds, sovereign wealth funds). In this respect, it will support the idea of a new deal preserving more the interests of States and the respect of investors’ rights. The suggested components for a new deal include for instance the insertion of clauses on exceptions (such as national defence or public order

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<sup>1</sup> Riccardo Pavoni, « Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate? », *The European Journal of International Law* Vol. 21 (3), (2010) 649-679

<sup>2</sup> World Commission on Environment and Development, *Our Common Future*, A/42/427, at 43

<sup>3</sup> The Brundtland Report also stated that « the essential needs of vast numbers of people in developing countries for food, clothing, shelter, jobs - are not being met, and beyond their basic needs these people have legitimate aspirations for an improved quality of life ».

considerations) and a strengthened cooperation with existing international organizations (FAO, IFAD, UNCTAD, World Bank).

#### 1) The subsequent risks generated by the foreign land purchases

Several factors can justify the development of the foreign land purchases in the last couple of years. A major driver is food security for wealthy and emerging economies with scarce arable lands which peaked during the food price hikes of 2007 and 2008, followed as well by the biofuels boom. These new investments include business opportunities and industrial demand for agricultural commodities, coupled with expectations of rising food prices and land values, but also a potential transfer of technology, know-how, infrastructure that could finally lead to an economic development in rural areas of these countries<sup>4</sup>. As such, the significance of this development associated to the different risks will be addressed below in the light of an ironical assertion made in 2009 by the British newsmagazine the Economist: “Yet while governments celebrate these investments, the rest of the world might reasonably ask why, if the deals are so good, one of the biggest of them helped cause the overthrow of the government that signed it»<sup>5</sup>.

##### 1.1) The significant rise of the foreign land purchases

According to UNCTAD, the total flows went from less than USD 1 billion per annum between 1989 and 1991 but in 2007, FDI to sub-Saharan Africa amounted to over US\$ 30 billion, a new record level – up from the records of about US\$ 22 billion in 2006 and US\$ 17 billion in 2005.<sup>6</sup> The connection between the significant development of FDI in the region and the land deals phenomenon is confirmed by a report of the UN Special Rapporteur on food security listing the main target countries in Africa as Cameroon, Ethiopia, the Democratic Republic of Congo, Madagascar, Mali, Somalia, Sudan, Tanzania and Zambia<sup>7</sup>. In this context, it is not surprising that the share of agriculture in the foreign direct investment (FDI), led by various players such as sovereign wealth funds<sup>8</sup>, States<sup>9</sup>, transnational corporations, investment and pension funds<sup>10</sup> or individuals, may by now reach a relevant proportion in some African countries endowed with a strong agricultural sector<sup>11</sup>. Therefore, the African continent offers a less restrictive framework:

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<sup>4</sup> “ ‘Land grabs’ in Africa: can the deals work for development? “, *IIED Briefing*, September 2009, at: , at 2

<sup>5</sup> “Cornering foreign fields “, *The Economist*, (21 May 2009), available at: <http://www.economist.com/node/13697274>

<sup>6</sup> United Nations Conference on Trade and Development, *World Investment Report 2009*, (July 2009) at 111

<sup>7</sup> “Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge”, Report of the Special Rapporteur on the right to food, Addendum, A/HRC/13/33/Add.2, (28 December 2009), at 5-6

<sup>8</sup> In simple terms, SWF are large pools of assets and investment funds owned and managed (directly or indirectly) by governments. It is estimated that SWF have \$3 trillion under management in 2010.

<sup>9</sup> The foreign land acquisitions deal is the latest practise of wealthy countries and companies trying to secure food supplies from the developing world. See “Qatar looks to grow food in Kenya”, *The Guardian*, (Tuesday 2 December 2008), available at: <http://www.guardian.co.uk/environment/2008/dec/02/land-for-food-qatar-kenya>

<sup>10</sup> The New York-based investment fund Jarch Capital has leased between 998,000 and 2.47 million acres in southern Sudan from the warlord Paulino Matip. See “Food and Water Drive African Land Grab“, (29 April 2010), available at: <http://thenaturaleye.wordpress.com/2011/01/30/africa-land-grab/>

<sup>11</sup> The FDI going to the agricultural sector is between 6% and 9% for countries like Tanzania, Mozambique or

contrary to Asian and Latin American countries that restricted foreign investment in the production of food crops, African countries chose instead to actively encourage foreign private investors participation in the sector, including the staple food crops<sup>12</sup>. Furthermore, the FAO estimates that from 2007 to 2010, 20 millions of hectares have been acquired by foreign interests in Africa, even though the proportion of land under foreign control remains a relatively small proportion of total land areas<sup>13</sup>.

Land leases instead of purchases predominate in Africa, with various durations ranging from short-term to 99 years<sup>14</sup>. In fact, the foreign land purchases expression should be mitigated and be replaced in the context of Africa by the more accurate legal notion of land leases. Land leases are both preferred by both governments and investors owing to the fact that the first category of actors is bound by the legal framework of some States that prohibit or restrict the sale of lands to private individuals or corporations<sup>15</sup> and to foreigners<sup>16</sup>, whereas the latter category is stimulated owing to several factors<sup>17</sup>: limitation of the overall costs of the first investments, the cash-flow immobilisation and ultimately the risks of social unrest linked to the symbol of a land surrender by the most nationalist portion of the population. This is even exacerbated especially if we identify what is intrinsically to the land such as housing, agriculture or access to natural resources.

At this time, the major challenge Africa is or will face is remarkably portrayed by the point that many land deals seem to have been settled between the investor and the host State without taking into account whether investment benefits would be beneficial or not to the local population. It is done in such a way that experts and international organizations

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Ethiopia.

<sup>12</sup> United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2009, Geneva, (July 2009), at 98; E.Aryeetey, "African Land Grabbing: Whose Interests Are Served?", Brookings, June 25, 2010, available at: [http://www.brookings.edu/articles/2010/0625\\_africa\\_land\\_aryeetey.aspx](http://www.brookings.edu/articles/2010/0625_africa_land_aryeetey.aspx)

<sup>13</sup> "Land grabbing in Kenya and Mozambique: A report on two research missions and a human rights analysis of land grabbing" (2010) at 2, available in: [www.rtfw-watch.org/.../Land\\_grabbing\\_in\\_Kenya](http://www.rtfw-watch.org/.../Land_grabbing_in_Kenya)

<sup>14</sup> *Ibid*

<sup>15</sup> L.Cotula, S.Vermeulen, R.Leonard and J.Keeley, "Land grab or development opportunity? Agricultural investment and international land deals in Africa", IIED/FAO/IFAD, London/Rome, (2009) at 74, available in: [www.ifad.org/pub/land/land\\_grab.pdf](http://www.ifad.org/pub/land/land_grab.pdf)

"In several African countries, land is nationalised or otherwise mainly controlled by the state. For instance, land is nationalised in Ethiopia (under Proclamation No. 31 of 1975 and the 1995 Constitution), Mozambique (at independence in 1975, and more recently under the 1990 Constitution and the Land Act 1997) and Tanzania (after independence and more recently under the Land Act 1999 and the Village Land Act 1999). In these cases, outright purchases are outlawed although some African countries have introduced private ownership where this was previously ruled out (e.g. Burkina Faso in the 1990s), or enabled transfers of "underdeveloped" state lands even if radical title ultimately remains vested with the state (e.g. in Tanzania, under article 6 of the Land (Amendment) Act 2004). Other countries do allow private land ownership, which may be acquired through land registration procedures (in Kenya, Madagascar and Mali, for example). In Ghana, part of the land is owned by the state but most of it belongs to private entities such as customary chiefdoms, extended families and individuals".

<sup>16</sup> *Ibid*. Specific restrictions on the acquisition of certain land rights by foreigners exist. In some countries, they face considerable restrictions on land ownership (in Ghana, under the article 266 of the 1992 Constitution) and on resource use (for example, in Tanzania foreigners may acquire land rights only for the purpose of an investment project under the Tanzania Investment).

<sup>17</sup> P.Burrod, "Appropriations Foncières: Après l’Affaire Daewoo, que se passe-t-il à Madagascar?", (June 2011), at 4, available in: <http://www.ceri-sciences-po.org>

refer to the concept of “land grabbing”<sup>18</sup>. A potential definition given to this phenomenon is the “large-scale acquisition of land or land-related rights and resources by a corporate, non-profit or public buyer for the purposes of resource extraction geared towards external consumers” (whether external simply means off-site or foreign)<sup>19</sup>. Extraction and alienation are essential to this definition rather than the type of capital invested, the intended market or the act of commodification/privatization *per se*. This challenge calls for the identification of the main sources of risks in the land leases that will be listed and assessed.

### 1.2) The food security consideration

Land deals could potentially have a direct effect on the food security of the local population of the host State where the investment ends up if, for instance, most of the food produced in the targeted land is finally exported to the home state of the investor. In order to address adequately the land deals issue, one has to get a definition of food security. The contemporary concept of food security was probably framed at the 1996 World Food Summit during which the World Food Summit Plan of Action stated that: “Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life”<sup>20</sup> (emphasis added).

Contrary to past approaches on food security, it does now focus on individuals instead of the national reserves or household supplies and therefore emphasizes on access to food, both physical and economic<sup>21</sup>. In the context of food security, the “land grabbing” affects agricultural land and more generally rural areas where food is produced and where nonetheless the majority of the hungry are still to be found. In this regard, States have to provide an answer so as to ensure that the human rights of the local populations, including the right to adequate food, are respected<sup>22</sup>.

### 1.3) The “financiarization” of the agricultural commodities and the problems arising from speculation

The increasing pressure to produce biofuels as an alternative to the more polluting fossil fuels generated an artificial demand for crops and a need to acquire more lands. Such phenomenon is likely to persist in the future beyond the usual length of a so-

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<sup>18</sup> L.Cotula, S.Vermeulen, R.Leonard and J.Keeley, *supra* note 13; J.Von Braun and R.Meinzen-Dick, “Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities“, *IFPRI Policy Brief* 13, (2009) 1-9; E.Aryeetey, *supra* note 12

<sup>19</sup> International Conference on Global Land Grabbing organized by the Land Deals Politics Initiative (LDPI) in collaboration with the Journal of Peasant Studies and hosted by the Future Agricultures Consortium at the Institute of Development Studies, University of Sussex, (April 6 – 8 2011), available in: <http://www.iss.nl/Menupages/Research-Networks/The-Land-Deal-Politics-Initiative-LDPI/LDPI-news-and-events/Update-from-the-International-Conference-on-Global-Land-Grabbing>

<sup>20</sup> World Food Summit Plan of Action, World Food Summit, Rome, Italy, (13-17 November 1996), available at: <http://www.fao.org/docrep/003/w3613e/w3613e00.htm>

<sup>21</sup> F.Snyder, *Toward an International Law for Adequate Food*, in *Food Security and Food Safety*, (A.Mahiou, F.Snyder eds, Martinus Nijhoff publishers 2006) at 93

<sup>22</sup> See section 2.2 on the States’ obligations with regard to its population

called “commodity boom” cycle<sup>23</sup>, provoking the massive reallocation of food crop into cash crop for agro fuels and reducing the amount of land affected to ensure food security. As a key actor in the foreign land acquisition phenomenon and as the largest expanding economy in this period, China naturally seeks raw materials to fuel its domestic infrastructure and manufacturing growth<sup>24</sup>. For instance, it is said that it acquired 2.8 million hectares in the Democratic Republic of the Congo to create the world’s largest oil palm plantation<sup>25</sup>. Besides, agriculture provides a hedge against inflation and contributes to portfolio diversification while some investors consider agricultural investments to be the « perfect antidote to their otherwise glass-and steel-encased urban lives »<sup>26</sup>.

Nevertheless, an even more concerning development arises from speculation on food commodities. According to a report made by the US-based organization Institute for Agriculture and Trade Policy (IATP), \$317 billion had been invested in commodities index funds<sup>27</sup>, led by major traders like Goldman Sachs and American Insurance Group by July 2008<sup>28</sup>. During the 2008 food crisis, prices for a number of commodities fluctuated too wildly within such limited timeframes for such price behaviour to be attributable to the more traditional factors such as the result of movements in supply and demand<sup>29</sup>. Thus, the 2008 food price crisis arose because a deeply flawed global financial system worsened the impacts of supply and demand movements in food commodities. In this respect, Olivier de Schutter, the Special Rapporteur on the right to food, suggests for a reform of the global financial system as part of the agenda to achieve food security, particularly within poor net food-importing countries<sup>30</sup>. What about the international organizations activities in charge of development, agriculture and food security in the field of the foreign land acquisitions?

#### 1.4) Efforts deployed by the international organisations to identify and regulate this practise

In respect to their mandate, international organizations contribute, *inter alia*, in collecting data information, drafting working papers, identifying the phenomenon, organize conferences and roundtables and eventually suggesting solutions. This

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<sup>23</sup> Land grabbing in Kenya and Mozambique: A report on two research missions and a human rights analysis of land grabbing, FIAN International Secretariat, (2010) at 3

<sup>24</sup> M.Farooki, “ China’s Structural Demand and the Commodity Super Cycle: Implications for Africa “, Paper prepared for Research Workshop China – Africa Development Relations, (February 2009), available at: , at 2

<sup>25</sup> *New Zealand Herald*, (14 May 2009)

<sup>26</sup> G.R.Blumenthal, “Investors’ Perspectives on Farmland “, in *Land Grab? The Race for the World’s Farmland*, edited by Michael Kugelman Susan L. Levenstein, Woodrow Wilson International Center for Scholars, (2009) at 57

<sup>27</sup> Commodity index funds bundle futures contracts of up to 24 agricultural and non-agricultural commodities, including oil, energy, base and precious metals.

<sup>28</sup> Commodity market speculation played major role in food crisis, *South-North Development Monitor*, (24 November 2008), available at: <http://www.twinside.org.sg/title2/susagri/susagri062.htm>

<sup>29</sup> J. Ghosh, “The Commodity Price Roller Coaster” (2008), at 4. For instance, wheat prices, rose by 46% between 10 January and 26 February 2008, fell back almost completely by May 19, increased again by 21% until early June, and began falling again on August.

<sup>30</sup> O.de Schutter, “ Food Commodities Speculation and Food Price Crises: Regulations to reduce the risks of price volatility “, Briefing note n°2, (September 2010) at 6

paragraph will review some relevant activities developed in this regard.

The Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD) and the International Institute for Environment and Development (IIED) edited together in 2009 a study titled “Land Grab or Development Opportunity?”<sup>31</sup>, in which they analyzed the land acquisitions of 2000 acres or more between 2004 and 2009<sup>32</sup>. Furthermore, joint efforts made by the World Bank, FAO, IFAD and UNCTAD are to be mentioned. They are involved to a broader consultative process that will eventually lead in the future to an agreement on the principles and the framework regulating the foreign land purchases and its symptomatic consequence, the so-called land grabbing. A roundtable titled “Promoting Responsible International Investment in Agriculture” was convened in New York on 23 September 2009 under the leadership of the Government of Japan, the World Bank, the FAO, IFAD and UNCTAD with representatives from 31 governments and 13 organizations<sup>33</sup>. The overall consensus among the participants agreed to the idea that an increase of the agricultural investment was crucial to achieve higher productivity<sup>34</sup> and greater production levels that will ultimately benefit to host countries<sup>35</sup>. There is, however, a clear necessity to mitigate it through a careful governance of these investments in order to avoid “unintended negative impacts in terms of political stability, social cohesion, human security, sustainable food production, household food security or environmental protection for the host country »<sup>36</sup>. In other words, such governance would include the adoption of non-binding guiding principles on investments that can be read as follows<sup>37</sup>:

- 1) the respect of existing land and resource rights,
- 2) the strengthening of food security,
- 3) the transparency, monitoring and accountability of procedures concerning land

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<sup>31</sup> L.Cotula, S.Vermeulen, R.Leonard and J.Keeley, supra note 11

<sup>32</sup> The acre is equal to half of an hectare

<sup>33</sup> The participants included representatives from the Governments of Australia, Belarus, Brazil, Bulgaria, Cameroon, Canada, Central African Republic, Comoros, Denmark, Egypt, French, Germany, Republic of Ghana, Holy See, India, Indonesia, Italy, Japan, Luxembourg, Moldova, Pakistan, Papua New Guinea, Sao Tome and Principe, Saudi Arabia, South Africa, Korea, Sweden, Switzerland, Tanzania, United Kingdom, United States of America, European Union, Food and Agriculture Organization of the United Nations (FAO), International Fund for Agricultural Development (IFAD), International Food Policy Research Institute (IFPRI), Organisation for Economic Co-operation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), World Bank, United Nations World Food Programme (WFP), International Institute for Sustainable Development, International Land Coalition, Rabobank International and Yara International.

<sup>34</sup> “ From Land Grab to Win-Win Seizing the Opportunities of International Investments in Agriculture “, FAO, June 2009, in *Pressures on West African land Reconciling development and investment policies*, Bamako (Mali), 9 December 2009, *Recent studies and declarations*, at 33, «The agricultural sector in developing countries is in urgent need of capital. In order to halve the world’s hungry by 2015, as targeted by the 1996 World Food Summit, FAO calculations showed that at least US\$ 30 billion of additional funds are required annually».

<sup>35</sup> According to the roundtable, FDI will bring in the field of agriculture additional farm and firm incomes, employment opportunities, infrastructure, technology transfer...

<sup>36</sup> “ Promoting Responsible International Investment in Agriculture “ (Government of Japan, World Bank, FAO, IFAD and UNCTAD), Roundtable concurrent with the 64th United Nations General Assembly, in *Pressures on West African land Reconciling development and investment policies*, *Recent studies and declarations*, Bamako (Mali), (9 December 2009) at 46

<sup>37</sup> *Ibid*

investment,

- 4) the consultation and participation of the parties affected by investments,
- 5) the economic viability and the responsibility (in terms of the respect of rule of law, industry best practice, etc.) of investment,
- 6) the social sustainability of investments, and
- 7) the environmental sustainability of investments.

Finally, the participants to the same roundtable suggested to refer to the past good practices and experience gained in other sectors such as relevant guidelines, standard schemes or codes of conduct, whether they result from a public or private initiative<sup>38</sup>. Moreover, participants also discussed the best suitable legal way to facilitate the formulation of more equitable investment contracts and selection of suitable business models<sup>39</sup>, as well as appropriate legislative and policy frameworks in hosting countries<sup>40</sup>.

#### 1.4.1) New and future soft instruments offering a framework for the practise of foreign land acquisitions

At some point, some organizations specialized in the agriculture ended up with the adoption of non-binding instruments on land deals. In this light, we will consider existing or future instruments aiming at setting up a framework on the examined challenge.

##### 1.4.1.1) The IFPRI Code of conduct on foreign land acquisition

As a research institute, the IFPRI 's mission consists in "identifying and analyzing policies for meeting the food needs of the developing world"<sup>41</sup>. Pursuant to its mandate, the IFPRI adopted a code of conduct on foreign land acquisition. This non-binding instrument aims at regulating such a phenomenon through core principles linked one to each other, in combination with other international arrangements and laws applicable not only in the country-target of the instrument but also the home State of the investor<sup>42</sup>. The principles refer firstly to the key component of the transparency of the negotiations. It provides for the information and the participation of existing local landholders to land deals, notably the indigenous people and other marginalized groups. In this respect, the media and civil society can play a key role in making information available to the public. Secondly, the respect for existing land rights, including customary and common property rights, implying in legal terms that any loss of land suffered by

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<sup>38</sup> Relevant examples include the Ecuador Principles, the Extractive Industry Transparency Initiative (EITI), Santiago Principles, OECD Guidelines for Multinational Enterprises, and numerous commodity or theme specific schemes.

<sup>39</sup> It includes, *inter alia*, joint ventures, farming contracts and outgrower schemes. See L.Cotula and R.Leonard, "Alternatives to land acquisitions: Agricultural investment and collaborative business models", Highlights from an international lesson-sharing workshop (Maputo, 17th-18th March 2010)

<sup>40</sup> « Promoting Responsible International Investment in Agriculture » (Government of Japan, World Bank, FAO, IFAD and UNCTAD), Roundtable concurrent with the 64th United Nations General Assembly, in *Pressures on West African land Reconciling development and investment policies: Recent studies and declarations*, Bamako (Mali), (9 December 2009) at 47

<sup>41</sup> See IFPRI website, available at: <http://www.ifpri.org/>

<sup>42</sup> J.Von Braun and R.Meinzen-Dick, *supra* note 13, "Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities, *IFPRI Policy Brief 13*, (April 2009) at 4



smallholders and farmers should be compensated and rehabilitated to an equivalent livelihood<sup>43</sup>. The principle of the sharing of benefits suggest the choice of contract farming or out-grower schemes insofar as they give the possibility for smallholders to maintain the control on their land and at the same time deliver output to the outside investor in a win-win operation. The principle of environmental sustainability corresponds to the necessity to make the future agriculture production sound and sustainable in the light of sustainable development. This involves, inter alia, a careful environmental impact assessment and monitoring but also to maintain practises protecting from the depletion of soils, loss of critical biodiversity, increased greenhouse gas emissions, significant diversion of water from other human or environmental uses. Lastly, a safeguarding framework should allow for instance domestic supplies to take precedence on foreign investors in the context of a threat to the food security such a severe drought.

#### 1.4.1.2) The FAO Voluntary Guidelines on Responsible Governance of Tenure of Land and Other Natural Resources

The FAO is preparing future Voluntary Guidelines to enhance governance of tenure of land and other natural resources. Pursuant to its objective, « the Voluntary Guidelines intend to provide practical guidance on responsible governance of tenure as a means of alleviating hunger and poverty, enhancing the environment, supporting national and local economic development, and reforming public administration<sup>44</sup>. Although the foreign land acquisition is not expressly mentioned as an issue to be included in the process, one may envisage that it will be part of the discussions insofar as we can no longer artificially distinguish the tenure of land from land deals associated to foreign investors in many countries by now. In any case, the future guidelines will set out principles and internationally accepted standards. The guidelines should be implemented through 2012 after the consultative process and due consideration by FAO governing bodies<sup>45</sup>.

In order to contain the different risks associated to land deals, international organizations and some research centers recently displayed activities to provide an answer to the challenges caused by land deals. At some point, they even created instruments containing principles suggesting new behaviors in the future for both States and investors.

#### 2) The legal rights and obligations of States in the light of sustainable development

As indicated earlier, land was and still is considered sometimes as a precious good not to be let in foreign hands. In legal terms, the very status of foreigner was deemed not to be appropriate recipients of full rights of land ownership and use. In a globalized context characterized by the growth of international trade and foreign investment, many States do therefore offer to foreign investors the same treatment as their own citizens,

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<sup>43</sup> The IFPRI referred to the standards of the World Commission on Dams

<sup>44</sup> FAO Voluntary Guidelines on Responsible Governance of Tenure of Land and Other Natural Resources, available <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>

<sup>45</sup> Ibid

pursuant to bilateral investment treaties concluded between the home state of the investor and the host state of the investment<sup>46</sup>. Is this trend applicable today to land deals? The answer is not black or white because many states still restrict its ownership and use by foreigners<sup>47</sup>. In fact, the answer will reflect the peculiar local circumstances. In such a context, this paragraph will aim at addressing the rights and obligations of the main players, on the assumption of an investment legally established in an African country.

## 2.1) The rights of the State

As a subject of international law, States do have a certain number of rights intrinsically attached to the exercise of their respective sovereignty within a territory. One of the most significant principle related to such an exercise is the sovereignty of countries over their natural resources, which include the exploration and exploitation of resources contained in their land. This principle was regularly confirmed as a major principle of international law by the U.N before<sup>48</sup> and after the decolonization process<sup>49</sup>. It is derived from this principle that States can freely determine their legal and economic order, including the adoption of a restrictive legislation regarding the acquisition or the use of land. This freedom given to the States remains the rule unless a commitment is made in any international treaty to allow foreign investment in any given sector<sup>50</sup>. Moreover, States can freely make deals with public entities such as States or private ones provided that core human rights will be respected. Moreover, when deals are enforced, they will, depending on the nature of the land deal, be subject to international arbitration tribunals such as the one established on the ICSID Convention or the UNCITRAL arbitration rules<sup>51</sup>.

## 2.2) The State obligations with regard to its population

The vast majority of African states did ratify two major human rights instruments: the International Covenant on Civil and Political Rights & the International Covenant on Economic Social and Cultural Rights. In the regional context, the African Convention on Human Rights protect some human rights having a connection to land.

### 2.2.1) The human right to adequate food

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<sup>46</sup> S.Hodgson, C.Cullinan and K.Campbell, “ Land Ownership and Foreigners – A Comparative Analysis of Regulatory Approaches to the Acquisition and use of Land by Foreigners “, *FAO Paper Online*, (December 1999) at 1

<sup>47</sup> Ibid

<sup>48</sup> Resolution 626 (VII), 21 December 1952, available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/080/60/IMG/NR008060.pdf>;

<sup>49</sup> Resolution 1803 (XVII), 14 December 1962, available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/194/34/IMG/NR019434.pdf>; Resolution 3281 (XXIX), 12 December 1974, available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/740/42/IMG/NR074042.pdf?OpenElement>

<sup>50</sup> On the other hand, if a treaty commitment is made, it becomes very difficult to reverse it through domestic policy changes or when potential emergencies arise. The underlying philosophy behind those provisions is to “lock in” liberalization measures.

<sup>51</sup> This assertion is applicable to land deals only between a private investor and the host State.

The Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right to adequate food<sup>52</sup>. In charge of supervising its implementation, the UN Committee on Economic, Social and Cultural Rights interpreted it through the General Comment n°12 as the situation « when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement »<sup>53</sup>. As such, the ability of individuals or rather farmer communities to cultivate land is therefore part of the basic content of the right to adequate food that must be respected, protected and fulfilled by States<sup>54</sup>. In other words, every State is obliged to ensure for everyone under its territory access to the minimum essential food which is sufficient, nutritionally adequate, and safe to ensure their freedom from hunger and to prevent others — in particular private actors such as firms — from preventing on the exercise of its regulatory powers<sup>55</sup>. As an economic and social right, the right to adequate food will have to be realized progressively even if States have a core obligation to take the necessary action to mitigate and alleviate hunger, even in times of natural or other disasters<sup>56</sup>. One way would consist for states to defend the development of more sustainable farming approaches which will support ultimately the right to food, owing to the obvious link existing between the state of the environment and food production. Sustainable farming approaches suggest that « both investors and host States should cooperate in identifying ways to ensure that the modes of agricultural production respect the environment, and do not accelerate climate change, soil depletion, and the exhaustion of freshwater reserves »<sup>57</sup>.

### 2.2.2) The human right to housing in connection with local land rights

The African continent is characterized by the very diversity of land tenure<sup>58</sup>. As such, the land tenure system is divided between the customary rights<sup>59</sup>, the registered customary rights<sup>60</sup> and the land rights deriving from: land redistribution policies<sup>61</sup>,

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<sup>52</sup> More than 160 states ratified it.

<sup>53</sup> General Comment 12, art. 6 as pronounced by the UN Committee on Economic, Social and Cultural Rights in 1999 on the Right to Food, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G99/420/15/PDF/G9942015.pdf?OpenElement>

<sup>54</sup> This is regardless on the basis of ownership or other form of tenure

<sup>55</sup> “Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge”, Report of the Special Rapporteur on the right to food, Addendum, A/HRC/13/33/Add.2, 28 December 2009, at 3

<sup>56</sup> Article 11 para.2 of UNCESCR

<sup>57</sup> “Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge”, supra note 56, at 10

<sup>58</sup> R.S.Knight, “Statutory recognition of customary land rights in Africa: An investigation into best practices for law-making and implementation », FAO Legislative Study (2010) at ; T.Ngaido, ” Reforming Land Rights in Africa”, *IFPRI Brief* 15, (2004) at 3

<sup>59</sup> In Botswana, Malawi, Mali, Morocco, Niger, and Zambia, customary land rights are the dominant tenure system. This tenure system offers many opportunities to poor households because they are easily acquired through group membership, land contracts are based on risk-sharing strategies between landowners and tenants. See T.Ngaido, supra note 59, at 2-3

<sup>60</sup> Registered customary private rights are the dominant land rights in North Africa and countries like the Central African Republic, Kenya, Mali, and Niger. Registration can rely on simple, local registration processes to define the boundaries of individual or group-owned lands.

<sup>61</sup> Policies to reduce inequality involving redistributing lands confiscated from foreign and large landholders, were widely implemented in Algeria, Guinea-Bissau, Ethiopia, Libya, South Africa, Zimbabwe.

market-based land reform policies<sup>62</sup> or subsidized market-based land reform policies<sup>63</sup>. Therefore, and regardless of the type of land tenure enforceable in a country, the major challenge with land deals concerns the complex situations where the land users have no property titles to the land they cultivate or a patchwork of property rights and users' rights results in a situation in which those who cultivate the land do not own it, although they may or may not be paying rent in cash or kind or may or may not have a formal agreement with the nominal owner. What would happen to smallholder farmers without land titles, potentially affected by a forced displacement pursuant to a land deal negotiated between the government and a foreign investor? The danger of this situation is connected to the fact that the absence of a land title will prevent those farmers or land workers access to courts for legal remedies and will ultimately not receive any compensation after the eviction from the land they cultivate.

Article 11 of the ICESCR guarantees the right to adequate housing as a part of the right to an adequate standard of living. The General Comment 4 of the ICESCR interprets the right to adequate housing as encompassing the right to live in a location in security, peace and dignity and the underlying obligation for the state to guarantee security of land tenure and to refrain from undertaking or promoting practices of forced evictions and arbitrary displacement<sup>64</sup>. Besides, the Guidelines on development-based evictions and displacement were presented in 2007 by the former Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living<sup>65</sup>. These guidelines are based on the principle that no eviction shall take place unless:

- “(a) authorized by law;
- (b) carried out in accordance with international human rights law;
- (c) undertaken solely for the purpose of promoting the general welfare;
- (d) reasonable and proportional;
- (e) regulated so as to ensure full and fair compensation and rehabilitation; and
- (f) carried out in accordance with the ... guidelines”.

Therefore, some African countries adopted national regulations to protect local land rights, including customary rights according to the 2009 FAO-IFAD-IIED study on “Land Grab or Development Opportunity”<sup>66</sup>. Customary rights are for instance protected under 2000 Mali's Land Code<sup>67</sup>, 1997 Mozambique's Land Act<sup>68</sup>, Tanzania's Land Act and 1999 Village Land Act<sup>69</sup>, and 1998 Uganda's Land Act<sup>70</sup>. However, this legal protection may be

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Those lands are therefore owned by the state.

<sup>62</sup> This tenure system was experienced by Namibia and Zimbabwe. In the case of Zimbabwe, it was shown that the white population acquired more land between 1996 and 2001 than the disadvantaged black and ended up with changes in government approaches to land reform.

<sup>63</sup> It is a subsequent variant of the market-based reform option. Governments subsidize reform by paying part of the cost of the land purchased. South Africa applied this option with the support of the World Bank.

<sup>64</sup> Forced evictions are only justifiable in the most exceptional circumstances pursuant to the General Comment 7. See General Comment No. 7, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument)

<sup>65</sup> A/HRC/4/18, Annex I

<sup>66</sup> L.Cotula, S.Vermeulen, R.Leonard and J.Keeley, supra note 11, at 91

<sup>67</sup> Articles 43-48

<sup>68</sup> Articles 12 (a) and (b), 13(2) and 14(2) protect use rights based on customary law or good-faith occupation for more than ten years.

<sup>69</sup> Tanzania's Village Land Act 1999 states that customary rights of occupancy have “equal status and

conditioned to “productive use” as specified in some legislation like Mali and Tanzania. The absence of a clear definition on the notion of « productive use » may give rise to broad administrative discretion and ultimately, to abuses that would undermine the security of local land rights<sup>71</sup>.

### 2.2.3) The rights of Indigenous Peoples

The absence of food security can be triggered by dispossession of lands and some populations were and are still affected by these practises: the indigenous peoples. If governments enter into negotiations with a foreign investor, whether private or governmental, there is a potential risk that their interests and rights will not be taken into account. Indigenous peoples are therefore protected today by international law. The article 8 paragraph 2 (b) of the United Nations Declaration on the Rights of Indigenous Peoples stipulates that “States shall provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources<sup>72</sup>. Moreover, the article 10 of the Declaration guaranteed them the right not to be forcibly removed from their lands or territories, and no relocation shall take place without their free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return. Additionally, the articles 25 and 26 of the same Declaration recognize the distinctive spiritual relationship of indigenous peoples with their traditionally owned or otherwise occupied and used lands, and that they have the right to own, use, develop and control these lands. States must therefore give legal recognition and protection to these lands, territories and resources, with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. As a declaration, this instrument is a soft law instrument or non-binding but is therefore adopted by States in good faith, and thus has a strong moral and political value<sup>73</sup>.

### 2.3) The State obligations with regard to the investors

The obligations of the states with regard to investors are contained in two legal instruments composed by the international investment agreements or BITs and the land deals<sup>74</sup>. Insofar as land deals can refer to principles developed and contained in BITs, it is important to assess them as main provisions governing the land deals with their potential implications.

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effects” to statutory rights (section 18(1)).

<sup>70</sup> Article 9

<sup>71</sup> L.Cotula, S.Vermeulen, R.Leonard and J.Keeley, supra note 11, at 91

<sup>72</sup> United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, available at: <http://www.un.org/esa/socdev/unpfii/eng/drip.html> The 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries relate to land rights is the other international instrument related to the Indigenous Peoples.

<sup>73</sup> The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on Thursday 13 2007 September by a large majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). From the African continent, only 3 countries did not adopt it.

<sup>74</sup> International investment agreements or BIT are concluded between the host state of the investment and the home state of the investor.

### 2.3.1) The requirement of national treatment

It is a commitment made by the host state to treat foreign investors that are “in like circumstances” to domestic investors in a manner no less favourable than the domestic investors. What is involved by the term “in like circumstances”? Shall we consider a large commercial farmer with thousands of hectares of land be “in like circumstances” to a small-scale farmer with only a few acres? If so, the government would have to treat both farmers similarly.

### 2.3.2) The requirement of most-favoured nation treatment

This provision extends the treatment provided to the most-favoured foreign investor to all other foreign investors<sup>75</sup>. It was interpreted by the case-law to include not just the treatment under domestic law but also under other investment treaties.

### 2.3.3) The requirement of fair and equitable treatment

It is a broadly conceived standard including procedural and substantive elements such as government transparency in decision-making, the prohibition of arbitrary or discriminatory acts or the denial of justice by local courts. In many instances, tribunals have considered the “legitimate expectations” of the investor as part of the standard even though there is no consensus at this time as to what this legal principle might encompass<sup>76</sup>.

### 2.3.4) The safeguarding clauses

In the new generation of BITs, exceptions exclude from their obligations measures adopted to protect a country’s essential security interests or to maintain public order. They include exceptions on measures necessary to protect health, safety or the environment, to regulate financial services, or to preserve cultural patrimony, industries<sup>77</sup>. Some BITs include provisions that authorize the host state to limit the export of capital by the investor in the event of an economic crisis having an effect on the balance of payments<sup>78</sup>. Such provisions were not extended to other types of crisis such as domestic food shortages. With regard to national security, many BITs have provisions allowing this ground to supersede other treaty obligations. The scope of this exception clause has generally thought to mean national security in a police and military perspective. As many of these provisions are self-judging by the invoking state, the limits are unclear. Without a clear definition of its substantive content, the national security exception could be eventually used by host states in the event of a serious food crisis.

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<sup>75</sup> Exceptions in BITs have been made to this principle in the context of customs union or free trade agreement. The purpose of this exception is to prevent non-members from free riding on special concessions made to members of a regional economic integration like EU. See “International Investment Arrangements: Trends and Emerging Issues“, *UNCTAD Series on International Investment Policies for Development*, 2006, at.23

<sup>76</sup> See infra section 3.2.1 on Protecting the legitimate expectations of the investor

<sup>77</sup> “International Investment Arrangements: Trends and Emerging Issues“, supra note 61, at.24

<sup>78</sup> Article 7 of the 2006 French model of BIT, article 8.5 of the 2009 Belgium-Madagascar BIT,

We could assume that such an invocation would exclude the wrongfulness of the prohibition of food exports, as would do the state of necessity in international law<sup>79</sup>. In any case, these provisions reflect the increased awareness of the complexity involved in balancing different public policy objectives and the BITs obligations.

3) The legal rights and obligations of investors in the light of sustainable development

International law generally does not give foreign investors rights to invest in land and water in another state. The capacity of a foreign investor to acquire land, and notably agricultural land will be a matter of domestic law within each state<sup>80</sup>. Nevertheless, international law provides a procedural and a substantial protection to them.

### 3.1) A procedural protection

The investor protections found in BITs are very effective through a powerful international dispute settlement. By this mechanism, the investors can launch claims against the host state for alleged violations of the treaty provisions. The most used international arbitration mechanism is the one established under the 1965 Washington Convention, known as the International Center on the Settlement of Investment Disputes (ICSID)<sup>81</sup>. The jurisdiction of ICSID requires an investment dispute of a legal nature between a state party to the convention and a national of another state that is also a party to the convention<sup>82</sup>. Today, investors can claim the ICSID jurisdiction by directly invoking the BIT provisions related to the dispute settlement<sup>83</sup>.

### 3.2) A substantive protection

The rights of the investor are conferred to the investment established in the host State as an operation containing obvious economic & commercial risks, the so-called transaction-cost. As such, this investment is logically vested an extensive legal protection from expropriation through the main principles of international investment law to be observed by the host state.

#### 3.2.1) Protection from an expropriation whether it is a direct or an indirect one

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<sup>79</sup> Article 25 of the International Law Commission project on state responsibility

<sup>80</sup> H.Mann & C.Smaller, « A Thirst for Distant Lands: Foreign investment in agricultural land and water », IISD, Foreign Investment for Sustainable Development Program 2009, at.17

<sup>81</sup> The other major arbitration institutions for the settlement of investment disputes are the following: the Paris International Chamber of Commerce, the London Court of International Arbitration and the Permanent Court of Arbitration.

<sup>82</sup> The article 25.1 of the Washington Convention provides that "the jurisdiction of the Centre shall extend to legal disputes between a Contracting State (or any subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State". However, parties to dispute can use the ICSID additional facility, where either the host state or the investor's home state is not a party to the ICSID Convention.

<sup>83</sup> *Asian Agricultural Products Limited v/Sri Lanka*, ICSID Case N°ARB/87/3, Award, 27 June 1990

As a matter of principle, the property of foreign investors cannot be taken without adequate compensation whether it's made for public purpose or not<sup>84</sup>, confirmed by the positive attitude of states in the world toward foreign investment. BIT provisions require for a prompt, adequate and effective compensation for expropriation<sup>85</sup>. Katia Yannaca-Small indicated the emergence of disputes related to foreign investment regulation or "indirect expropriation" replacing the disputes on direct expropriation which were mainly related to the nationalizations occurring in the 70s and 80s<sup>86</sup>. But the debate moved recently from the application of indirect expropriation to regulatory measures aimed at protecting the environment, health or any public policy issues. Thus, the borderline between indirect expropriation and governmental measures not requiring compensation has not been really set and will depend on the factual circumstances, contributing to uncertainty. Such a situation encouraged some governments to introduce new language into future BIT in order to provide the fact that legitimate regulatory measures will rarely be characterized as indirect expropriation under an investment treaty<sup>87</sup>. For instance, the article of the new Canadian BIT model stipulates that "except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation »<sup>88</sup>.

### 3.2.2) Protecting the legitimate expectations of the investor

In addition to international investment law principles defined above, the principle of legitimate expectations is to be read in connection with the principle of fair and equitable treatment for an effective protection of the investment. Actually, the investor's legitimate expectations rely on firstly the legal framework, consisting of a set of instruments including the legislation, treaties (bilateral or multilateral), decrees licenses or any contractual undertakings<sup>89</sup>. Secondly, it is based on any undertakings and representations made from the host state, whether they were explicit or implicit, and a reversal of commitments by the host state leading to "legitimate expectations" will be viewed as a breach of the principle of fair and equitable treatment<sup>90</sup>. Having said that, the application of the "legitimate expectations" principle will be depending on the

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<sup>84</sup> C.McLachlan, L.Shore, M.Weiniger, *International Investment Arbitration: Substantive* (Oxford University Press 2007); A.Newscombe & L.Paradell, *Law and Practise of Investment Treaties: Standards of Treatment* (BV The Netherlands, Kluwer Law International 2009), A.Reinisch, Expropriation, in *The Oxford Handbook of International Law* 407-450 (P.Muchlinski, F.Ortino, C.Schreuer eds, (Oxford University Press 2003)

<sup>85</sup> These conditions endorsed the Hull formula, stated by the former US Secretary of State in reply to the nationalization of the Mexican oil industry made of US corporations in 1936.

<sup>86</sup> K.Yannaca-Small, "Indirect Expropriation and the Right to Regulate: How to Draw the Line?", in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, at 445-446 (K.Yannaca-Small eds, Oxford University Press 2003)

<sup>87</sup> L.Peterson, *Human Rights & Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration*, (Rights & Democracy 2009) at 16

<sup>88</sup> Annex B.13 (1).c of the Canadian model of BIT

<sup>89</sup> R.Dolzer & C.Schreuer, *Principles of International Investment Law*, (Oxford University Press, 2008), at 134; W.M.Reisman & M.H.Arsanjani, "The Question of Unilateral Government Statements as Applicable Law in Investment Disputes" (2004) 19 *ICSID Review* 328

<sup>90</sup> Ibid



expectations fostered by the local laws as they stand at the time of the investment. The international arbitration tribunals delimited more precisely the content of this principle<sup>91</sup>. In *Tecmed v/Mexico*, the dispute concerned the replacement of an unlimited licence by a licence with a limited duration for the operation of a landfill. Relying on the principle of fair and equitable treatment, the arbitral tribunal held that “the claimant was entitled to expect that the government’s actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly”<sup>92</sup>. In consequence, the tribunal concluded that the investor’s fair expectations were frustrated by the contradiction and uncertainty by authorities<sup>93</sup>. Thus, consistency, stability and transparency are the key elements of the legitimate expectations.

### 3.3) The right to export food commodities

Investment agreements provide investors with the capacity to operate their investment in accordance with their own needs. One illustration of this is the ability for the investor to export what is produced. This broad provision is also consistent with the general approach found in the WTO Agreement on Trade Related Investment Measures, which prohibits measures to constrain exports by foreign investors. This is especially important in the agricultural field, where the right to export all or almost all of the production is presumed to be a part of most land contracts.

### 3.4) Emerging obligations toward the investor

While investment treaties impose some limits on how governments may treat foreign investors or foreign-owned businesses by providing legal standards, they provide much less countervailing obligations to investors. In his 2008 report to the UN Human Rights Council, the UN Special Representative on Business and Human Rights, John Ruggie, complained the situation in which the legal rights of transnational corporations have expanded greatly while the legal framework regulating those same corporations has not expanded in a similar fashion<sup>94</sup>. The underlying philosophy to this practise is based on the presumed superiority of the sovereign and the powers conferred to States in comparison to a private investor such as a David versus Goliath. However, one may wonder if this rule is still applicable where a worldwide corporation negotiates with a weak developing country land deals at a large scale. Are they still on the equal footing? Conversely, some analysts argued that some investor responsibilities are implicit in standard investment protection treaties. For instance, Professor Peter Muchlinski has argued that the “fair and equitable treatment” protection offered by host governments to foreign investors can be read so as to impose jointly certain duties on those same

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<sup>91</sup> *SPP v/Egypt*, Award, 30 August 1992, para.82-83; *Maffezini v/Spain*, Award on the Merits, 13 November 2000, para.83; *Occidental v/Ecuador*, Award, 1 July 2004; *LG&E v/Argentina*, Decision on Liability, 3 October 2006, para.131

<sup>92</sup> *Tecmed v/Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para.167

<sup>93</sup> In *Tecmed v/Mexico*, the Mexican authorities were sentenced to pay the amount of US\$ 5,533,017.12.

<sup>94</sup> Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, (7 April 2008) at par. 12.

investors, including the duty to refrain from unreasonable conduct<sup>95</sup>. In our view, foreign investors should recognize the local consequences of their investments and consider labour, social and environmental standards; stakeholder involvement; and food security concerns – not because they are obliged to do so, but because it minimizes their investment risks<sup>96</sup>. The recent experience showed that more inclusive strategies would have probably offered a solution and would have certainly avoided social unrests as the ones that occurred in Madagascar<sup>97</sup>.

The most recent developments in the field of investment and sustainable development indicate the adoption of new instruments of high relevance for the issue of land deals, as a potential source of inspiration for future land deals' models. The first one is the Model Mining Development Agreement (MMDA), launched in April 2011 by the International Bar Association Mining Law Committee<sup>98</sup>. As a model, it suggests to supersede the old-fashioned « zero-sum game» approach by a new negotiating paradigm for the mutual benefit of the investor, local community and government<sup>99</sup>. To do so, the model agreement provides for a range of options toward negotiators to choose insofar that investor-state contracts must be tailored to the unique circumstances of each negotiation.

The second instrument is the “Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators” and was endorsed by the Human Rights Council on 16 June 2011. The UN “Principles for responsible contracts” represents the second instrument that chose a broader approach to integrate human rights considerations, as a component of any investment contract<sup>100</sup>.

We can consider that both documents provide for contracting models where social and economic development are based on preliminary human rights and social impacts assessments, as well as environmental assessment and management components. Those components should also be included in the land deals and the key element for future successful land deals is the negotiating capacity of many developing countries. As stressed by Howard Mann, this gap is not only in terms of legal capacity, but also finance, environmental and other and will represent a long-term challenge for many governments

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<sup>95</sup> Peter Muchlinski, “Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard”, 55 *International and Comparative Law Quarterly*, July 2006, 567-598

<sup>96</sup> “ From Land Grab to Win-Win Seizing the Opportunities of International Investments in Agriculture “, FAO, June 2009, in *Pressures on West African land Reconciling development and investment policies, Recent studies and declarations*, Bamako (Mali), (9 December 2009) at 34

<sup>97</sup> The government of Madagascar tried to lease 1.3 million hectares of land to South Korean investors, led by the Daewoo conglomerate. Ultimately, this ended with the overthrow in 2008 of the former President of Madagascar, Marc Ravalomanana.

<sup>98</sup> Model Mining Development Agreement, 4 April 2011, available at: [http://www.mmdaproject.org/presentations/MMDA1\\_o\\_110404Bookletv3.pdf](http://www.mmdaproject.org/presentations/MMDA1_o_110404Bookletv3.pdf)

<sup>99</sup> H.Mann, “ Foreign investment contracts and sustainable development: The new foundations begin to emerge “, 4 *Investment treaty news* (July 2011), at.9

<sup>100</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators, 25 May 2011, available at: <http://www.business-humanrights.org/media/documents/ruggie/report-principles-for-responsible-contracts-25-may-2011.pdf>

and development agencies<sup>101</sup>.

## Conclusion

The land deals in Africa are characterized by few key elements such as the significant boom of the number of land allocations for agriculture purposes (food commodities and bio fuels) as foreign investments, but this phenomenon is to be put in connection with risks such as the impact on food security potential claims arising from land users dispossessed by land deals, and the speculation on agricultural commodities. In this respect, some international organizations are developing potential instruments aiming at creating a framework such as the IFPRI Code of conduct on foreign land acquisition and the FAO Voluntary Guidelines on Responsible Governance of Tenure of Land and Other Natural Resources. The two codes of conduct call for a legitimate and efficient framework for the foreign land acquisitions including the satisfactory involvement of local actors, the clarification of rights and responsibility vis-à-vis community/state and ultimately the improvement of international food market information systems<sup>102</sup>. Other forms of investment such as joint ventures or contract farming and out-grower schemes or investments in key stages of value chains could provide as well security of supply to investors<sup>103</sup>.

In the field of foreign investment, the relationship between states and investors is known as “asymmetric” insofar as it provides treaty obligations toward states and not investors. In the context of land deals, we identified state obligations to two major recipients: the local population and the foreign investors. Each of those recipients enjoys rights enshrined in international legal instruments such as the right to adequate food and housing and the protection of the investors’ legitimate expectations. At the same time, investors are facing the emergence of new kind of obligations that would be applicable to them, such as the Model Mining Development Agreement and the UN Principles for responsible contracts are very interesting legal developments in this respect.

Thus, the worship of secrecy, common feature attributed to many land deals and done at the expense of international law instruments protecting human rights, investments and the environment, should be set aside for good.

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<sup>101</sup> H.Mann, *supra* note 83, at.9

<sup>102</sup> « From Land Grab to Win-Win Seizing the Opportunities of International Investments in Agriculture », FAO, June 2009, in *Pressures on West African land Reconciling development and investment policies, Recent studies and declarations*, Bamako (Mali), (9 December 2009) at 34

<sup>103</sup> D.Hallam, Promoting responsible international investment in agriculture, Conference, OECD VIIth Global Forum on International Investment, 7-8th of December, at.6

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