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Introduction

In an increasingly well-known phenomenon, state-owned and private corporations, as well as private investors of agricultural land have purchased or (where land is not sale-able) acquired long-term leases on large swathes of land for food and biofuel production (Smaller and Mann 2009). These transactions generally involve investors from the United States, the European Union, Arab or wealthy Asian states. The target countries, by contrast, are found in sub-Saharan Africa, Southeast Asia, Central and South America, and Eastern European countries in the former USSR (Saturnino et al. 2011; Smaller and Mann 2009).

In the expanding global trade regime, investor protection has become a priority for both investor home states and the host states that receive them[i]. Home states are invested (often literally) in the success of their investor. As they are promised development, new technology and economic growth through the work of these foreign investors. Evidence of growth from foreign direct investment (FDI) is mixed at best (Smaller and Mann 2009). However, research has found that FDI has a positive effect only where projects have shared domestic and foreign ownership (Javorcik 2004), where the country already has a human capital base able to absorb the new technology (Borensztein 1998), and in countries that are relatively more developed (Alfaro et al. 2009).

Despite plentiful evidence to the contrary[ii], developing host states continue to put faith in large-scale foreign investment to grow their economies. To induce investors to purchase/lease their land, governments offer extensive tax breaks for foreign corporations, sell/lease the land at below-market prices and even go as far as to clear their own citizens from the land to make room for large-scale plantations (Mousseau and Mittal 2011a, Mousseau and Mittal 2011b, Mousseau and Sosnoff 2011). This has led to a race among regulators, competing with each other to attract

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foreign capital, while, at the same time, loosening other policies aimed at protecting general interests (such as the environment, health, labor rights, and so on and so forth), which may conflict with or slow down investment. Because of the negative effects on local populations, commentators have called these transactions "land grabs"[iii], a phenomenon that has been documented extensively (Oakland Institute 2014). While promising economic growth, large-scale land investment deals have caused increased inequality, widespread displacement of people, and destruction of natural resources. Efforts at land reform through title and registration schemes have left local communities with increasingly tenuous and uncertain claims to their land. Indeed, the favorable conditions offered to foreign investors, even when coherent under the principle of formal equality, may produce substantial inequality towards local operators – which do not have the same economic and market powers to compete –, creating limits and barriers to local development and internal economies.

Like regulatory policies, the governance of investment activities and movement of capital has reached a global dimension. The need to set rules, to pose limits and to protect the investors (for instance from national expropriation) has significantly increased in recent years, above all on a global scale. As far as a company is entitled to make investments all over the world, it is useful to have common principles and common rules governing such activity: the legal harmonization of this field helps the movement of capital all around the world and encourages private investors to use their money to create growth.

Nonetheless, the presence of foreign investors can indirectly limit the domestic policies available to host states. In order to attract foreign investors, governments negotiate both investment treaties with other countries, promising favorable treatment of their investors, and investment contracts or concession agreements with private companies. Both of these instruments may produce a race to the bottom in public regulation, in which developing States may exchange their security/safety policies in order to encourage new foreign investment. Since concessions agreements are negotiated secretly and not made generally available. We focus here on the potential overlap between international investment agreements (IIAs) and land grabs.[iv]

IIAs have been criticized elsewhere for restricting policy space for developing nations by dictating or even indirectly suggesting which laws governments can and cannot implement. Such pressure, or moral persuasion, even if does not touch the formal sovereign powers of national states, produces a *de facto* sovereignty reduction as it diminishes the choice of national institutions when regulating a sector involved with the investment. Opening the markets for foreign investment could reduce domestic regulation over important areas such as environment, health, labor rights, and social safety nets, to name a few.

In the global context, the agreements that aim to increase free trade, competition and free movement of services and capital are more advanced and comprehensive than the ones aimed to protect weaker interests. In other words, we could say that while rules governing trade, competition and investment are becoming global norms, health and environmental protection, social and labor rights, and so on, still are mainly issues of international negotiation[v] and domestic regulation. This "double-speed" globalization facilitates the development of legal tools to protect foreign investment, but limits the tools for protecting social interests[vi]. In a globalized economy, as long as there is not a cultural and political consensus on the way states should protect such underrepresented interests, the economic ones will always prevail.

We find that, although land grabs have not given rise to treaty-related conflicts yet, the treaties have the potential to subject developing states to international arbitration for their domestic laws and may create a regulatory chill on development-promoting land policy in those states.

The present article is organized in four parts, as follows.

The first one consists of a general overview of IIAs, highlighting current negotiations taking place on the international stage.

In the second part, we focus on the sections of the treaties that have the most impact on land grabs, including establishment rights for investors, the minimum standard of treatment, performance requirements, transparency commitments, and investor-state dispute settlement.

The third part we dedicate to an analysis of the impact of land grabbing in four different developing states.

Finally, the conclusion faces the presence of a trilemma not yet solved. As we note, we cannot simultaneously pursue democracy, national determination and economic globalization. Governments must instead find ways of balancing these goals, by preserving the right to regulate and protect their land under IIAs, and by clarifying and limiting the reach of international tribunals in land investment cases.

International Investment Agreements

Bilateral Investment Treaties (BITs) have been commonplace since the 1950s. During the 1980s and 1990s, the number of agreements soared. In recent years, the trend is downward – not because countries are less likely to liberalize investment policies, but because investment is seen as so integral to liberalizing trade that it is included in most free trade agreements. The Transatlantic Trade and Investment Partnership (TTIP) on one side and the Trans Pacific Partnership (TPP) on the other are each attempting to secure commitments in services, investment, intellectual property, and financial services worldwide. Multilateral negotiations for the Trade in Services Agreement (TISA) (which includes commitments in "cross-border trade in services" or foreign direct investment) have begun between governments in favor of further liberalization in services sectors (Gallagher and Thrasher 2014).

In the following section, we take a look at the primary provisions in international investment agreements that could play a role in the land grab phenomenon. We compare the commitments under the most recent leaked TPP draft investment chapter (March 2015), the US Model BIT (2012) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (draft) with a Model BIT crafted for the Southern African Development Community (SADC) with assistance from Howard Mann, Senior International Legal Advisor at the International Institute for Sustainable Development. The former three documents represent the most recent position of both the U.S. and the EU with respect to investment treaty policy. Since these actors are leaders in the on-going cross-regional economic integration negotiations (TPP and TTIP), their investment provisions may represent the future of such treaties. The latter document presents an alternative model that could strengthen the negotiating position of developing countries. The SADC position is particularly relevant for three reasons: (1) several SADC countries have experienced large-scale agricultural investment and resultant conflicts between investors and the local population, (2) the SADC is engaged in region-wide economic negotiations with the EU for further liberalization and (3) Mozambique, a SADC member, has an active BIT with the United States that comes to the end of its first 10 year term in 2015, opening up the treaty to cancellation or renegotiation.

BIT Parts

The sections of the treaties that have the most impact on land grabs include: (1) establishment rights for investors, (2) the minimum standard of treatment, (3) performance requirements, (4) conditions for expropriation, (5) transparency commitments, (6) general and environmental exceptions to the treaty provisions, and (7) investor-state dispute settlement. Each of these pieces influences the presence and governance of transnational agricultural investors in a different way. Below we explore each in sequence.

Rights of establishment

In instances where host states give the "right of establishment" to foreign investors, they must allow foreign investors into the country on equal footing with domestic investors, and in some cases, third party investors as well. Both the U.S. Model BIT and the CETA include establishment rights. In the most recent draft of the TPP, the same language appears (TPP 2012), showing that the US position will likely continue to make its way into treaty texts.

The SADC Model BIT rejects establishment rights, instead adopting an approach where each partner agrees to admit investments "in accordance with" a good faith application of their laws (Art. 3). The principal difference between these two approaches in terms of land grabs is obvious: the SADC model allows countries to regulate incoming agricultural investment by limiting the type, purpose, quantity or location of foreign land purchases. The US/EU approach does not.

Minimum Standard of Treatment

The minimum standard of treatment under customary international law given to foreign nationals requires "fair and equitable treatment" with "full protection and security". All modern investment treaties include this or similar language. Due to the uncertain nature of the legal terms, many countries seek to clarify the meaning by taking one of two approaches: (1) confining "fair and equitable treatment" to mean only a recognition of basic due process requirements, and explicitly not granting "additional substantive rights", or (2) specifying fair and equitable treatment violations by listing examples. The TPP draft takes the former approach; the CETA takes the latter.

Under the CETA draft text, in addition to denial of justice and due process violations, the article states that, among other examples, the "legitimate expectations" of the investor should be taken into account. The article suggests that if a host state extends certain assurances to the investors that the investor relied on, then it would be a violation of fair and equitable treatment to renege on those commitments. In the context of land grabs, this article raises a red flag. Agricultural investors are always "extend[ed] certain assurances" by way of their concession agreement. This clause could effectively make a host state doubly liable, under both the private concessions agreement and the bilateral investment treaty, for withdrawing concessions or otherwise violating the private agreement.

The SADC BIT suggests an even more restrictive approach by changing the "fair and equitable" language to "fair administrative treatment". This limits the reach of the article to administrative, legislative and judicial processes, committing the parties to ensure that such processes are not arbitrary, nor do they deny justice or due process to foreign investors, "taking into consideration the level of development" of the parties (Art. 5.1). The SADC text makes it clearly a procedural, rather than substantive, standard. It reserves the rights of states to regulate, as long as the processes do not deny justice or due process to foreign investors. The TPP attempts to do the same (indeed, the US approach is an alternative text suggested in the SADC document), but with somewhat less clarity. The "fair administrative treatment" could provide the additional policy space needed for governments facing failed, under-performing, or conflict-ridden agricultural investments in their territories.

In this case, the goal is to harmonize – and therefore globalize – administrative procedures rather than substantive regulation. This could be considered a sort of harmonization 'lite', in which, instead of making uniform the *content* of the regulatory policies, which requires more discretion at the national level, it concerns only the *procedures* and the general principles governing the regulation.

This approach could result in a race to the top for procedural protections (as the most effective and efficient guarantees are usually the ones prevailing), formal equality and greater certainty of the rules. Still, such separation between formal and substantive is not always so neat. Even formal harmonization can become an intrinsic limit for public authorities, which reduces their capacity to correct market failures. The following section provides an example.

Performance requirements

Another common provision in modern BITs is a list of prohibited "performance requirements" – policies that host governments may not impose on foreign investors. The provision targets policies that all countries have put in place at one point or another to build up local industry, create backward and forward linkages within their economy, increase access to foreign currency and technology, and encourage a healthy trade balance.

These essentially constitute limits for domestic administrative policies. Even when such limitations are the results of negotiations and agreements, they end up interfering with both the procedure and content of regulatory policies. Some problematic issues also arise: who sets those limits? How democratic is the decision-making at a supranational level? Is it even possible to establish, in advance, common policies for all states, without considering domestic peculiarities?

Land grabs have involved both food and energy production. With foreign investors in control of part of a country's supply of food and energy, it makes sense that a host state would want a say in what quantity is exported or sold locally. Performance requirements provisions, present in both the TPP (Art. II.9) and the CETA (Art X.5), do not allow states to demand or limit exports.

Although not mentioned in the investment chapters of these agreements, countries have sometimes been protected from sudden shortages under EU and U.S. treaties (Thrasher and Gallagher 2010; DR-CAFTA Annex 3.2(F)). Since the shortages exceptions fall outside of the investment chapters, however, their application to the treatment of foreign investors is not clear. The SADC BIT elects to omit any mention of prohibited performance requirements, leaving these policies available to both parties. It further promotes policy space by preserving the "right to pursue development goals" (Art. 21). Under Article 21, the parties may grant preferential treatment to achieve development goals, including the support of local entrepreneur development, increasing productive capacity, employment, human resource capacity and training, research and development, technology transfer and addressing "historically based economic disparities". By addressing these needs directly, the SADC BIT demonstrates that restricting these policies is not a necessary part of encouraging foreign investment in the host state.

Expropriation with compensation

Occasionally, for domestic policy purposes, host states decide to take property back from a foreign investor, or impose laws that negatively impact the value of the investment. According to customary international law, countries may not directly or indirectly take ("expropriate") the property/investments of foreign nationals except (1) in a non-discriminatory way, (2) for a public purpose, (3) in accordance with due process, and (4) on payment of full compensation (Nicholson 1965, see also *Methanex* 2005). This standard has stood the test of time and can be found in most investment treaties in effect today. Taken as a whole, these criteria reflect a Western approach, focusing not on the reasons for the expropriation but on the way it is performed.[vii] This sort of "legal transplant"[viii] reveals a certain legal "superiority" in the way international law is crafted and applied. Still, relying on a consistent set of rules does increase legal stability for both the home and the host state.

Both the TPP and the CETA include this language and the CETA further clarifies that "[e]xcept in rare circumstances, non-discriminatory regulatory actions . . . designed and applied to protect public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations" (CETA Annex X.9). It further states that "rare circumstances" are those in which the measure's impact is "severe" and "manifestly excessive" (Annex para. 3). Despite all of these clarifying phrases, tribunals trying to determine whether there has been an indirect expropriation will have to weigh the evidence in favor or against a measure's severity or excessiveness.

Two examples indicate how countries can retain some greater measure of policy flexibility with respect to the expropriation standard. The TPP contains an annex with a different standard for land-based expropriations in Brunei, Malaysia and Singapore. The text states that where there is an expropriation *relating to land*, it "shall be for a purpose and upon payment of compensation in accordance with the applicable domestic legislation of the expropriating party" (Annex 12-E). This is clearly lower than the customary legal standard, allowing governments to determine the purpose, the payment and applicable laws when taking back land from foreign investors if they see a need.

Within the SADC BIT, the expropriation article omits the requirement of non-discrimination. The commentary points out that since expropriation is so often a specific act of taking property for government purposes, it can rarely be considered non-discriminatory, making the government legally liable in the event of a conflict. In the context of a modern land grab, were the host state to take back the land, or withdraw the long-term lease from an agricultural investor due to a land conflict or some other public purpose, it would almost always be considered a discriminatory act because that investor is treated differently from other investors. This type of conflict has not yet arisen in the investment arbitration tribunals. However, given the large number of land-related conflicts, which we discuss in more detail below, this may be only a matter of time.

Standard setting and Transparency

Transparency is a common area of concern in investment treaties. Certainly if laws and regulations were not widely known, if judicial and administration processes occur only behind closed doors, investors would be reluctant to enter the economy. Indeed, transparency is one area in which properly regulated foreign investment could have positive externalities. Thanks to the need for foreign investment, states are encouraged, when not forced, to open up their decision-making. In this way they become more transparent, more accountable and democratic, as the public has more chance to assess and control their activity. Although absent in the leaked TPP text, the US BIT, the CETA and the SADC BIT each contain a section committing the Parties to share relevant information, including laws and regulations, administrative proceedings and legal adjudications that might have an impact on the treaty terms or the rights of the investor.

The US BIT goes further, however, requiring that countries consult with foreign investors before establishing standards and regulations. Investors must be permitted to "participate in the development of standards and technical regulations" of a party just as a national of that party may. Where the standardizing body is non-governmental, the government must "recommend" that they allow persons of the other party to participate as well (Art. 11(8)). In short, foreign investors are allowed into the drafting process of domestic laws and regulations. In the context of land grabs, this would mean that foreign agricultural investors could have input with respect to agricultural regulations standards on the same level as citizens of the host country. If this provision were to make it into the TPP, it would greatly increase the political power of foreign investors within host states.

Exceptions: Policy Space Preserved

International investment agreements always contain some list of exceptions, which carve out specific protected areas for states to preserve their right to regulate. States are allowed to enforce laws for the protection of public security, human, animal and plant life and health, and, in some cases, the conservation of natural resources (CETA Art. X).[ix] In addition to general exceptions, many treaties make space for environmental and labor regulation. These sections commit the parties to enforce their respective laws and not lower their environmental or labor standards in an effort to attract investment (US BIT Art. 12).[x] The US BIT explicitly permits parties to adopt, maintain and enforce measures "to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns," provided they are otherwise consistent with the treaty (Art. 12(5)). Within the TPP draft, this same provision is extended to environmental, health and other regulatory objectives (Art. X.15).

The SADC BIT takes a very different approach to their environmental and labor sections. Instead of acting to bind only the States signing the treaties, they also provide obligations for the investors. They require that investors undertake environmental and social impact assessments in consultation with the local affected communities, employing the "precautionary principle" (better to be safe than sorry with respect to environmental degradation[xi]) in their assessments (Art. 13). As an enforcement issue, it is unclear how investors will be bound to obligations in a treaty to which they are not parties. Still, if these provisions were included in other investment agreements, they would undoubtedly strengthen parallel domestic law, which is often poorly enforced (e.g., Mousseau and Sosnoff 2011).

Private investment contracts, while outside the scope of this paper, pose an additional threat to environmental and labor regulation. Studies have shown that certain clauses, prevalent in these contracts ("stabilization clauses"), can protect the investor from changes in domestic law, even environmental and social measures, either by compensating them for their unexpected losses or exempting them from the laws entirely (Shemberg 2008). To the extent that host states allow stabilization clauses in their contracts, they should be sure to preserve their right to good faith changes in environmental and social regulation.

Even when states are entitled to invoke an exception to protect competing weak interests, it is unclear how much policy space they actually have. Most treaties that specifically mention environment and labor rights do not specify whose judgment determines the need for these protections. Who determines when the environment is put in danger? When should the precautionary principle be invoked? Who decides when an exception can be admitted? The answers to these questions lies largely within the purview of the *ad hoc* arbitral tribunals (discussed in more detail below) in investor-state disputes. As we've seen, these procedural limits tend to reduce national discretion in protecting weaker interests.

Investor-State Disputes

In almost every place where land grabs have occurred, local populations have resisted their presence (Mousseau and Sosnoff 2011, Mousseau and Mittal 2011a, Mousseau and Mittal 2011b). Land-based conflict is now the norm. In light of that, disputes between investor and host country have increasing importance.

Investor-state dispute settlement (ISDS), while unique to the international investment context, is a part of almost every BIT and investment chapter in effect in the world today. These provisions place the investor on equal footing with the host state, allowing the investor to sue the state outside of their own domestic courts in a private arbitration forum. This has been widely criticized (Ikenson 2014) but remains a staple in investment treaties worldwide (Gallagher and Thrasher 2010). Many believe it to be the only reasonable way, currently available, to guarantee rights that have been granted to the investors and states.

As we mentioned in the previous section, however, some problems arise with the role of the *ad hoc* arbitral tribunals. Arbitrators judge host states' discretion in social, environmental and labor policies. They may decide, for instance, that there is no risk of harm and therefore that public policies are illegitimate and should be lifted. Such a legal mechanism, although legitimate and possibly necessary for the fairness and the well-functioning of the regime, needs discipline in its jurisdictional reach as well as its ability to second-guess domestic policy choices[xii].

The SADC BIT provides a few alternatives. The document first recommends that investment treaties omit investor-state dispute settlement, leaving disputes to be resolved between the two state parties to the agreement. In the case where ISDS is included, the BIT provides that the host state may counterclaim against the investor for its violations of the agreement, or sue them directly in the host state courts for those same violations. These additional provisions would re-balance the obligations between investor and host state, implicitly preserving more policy space for nations to regulate the agricultural investment within their borders.

Country-Specific Implications

As hinted above, these commitments under investment treaties have some immediate and potential impacts on countries experiencing land grabs. In the following section, we take a closer look at the land grabs, resultant conflicts, and investment commitments of Ethiopia, Cameroon, Mozambique and Viet Nam. While some countries continue to place faith in the role of international investors, Mozambique, despite having a BIT with the United States has demonstrated the ability to, at least temporarily, halt land grabs and take more control of agricultural investments. As a negotiating party to the TPP, Viet Nam could have much to learn from the Mozambican experience in preserving its rights to regulate.

Ethiopia: On the Side of Investors

According to landmatrix.org, Ethiopia has experienced 54 recorded land grabs, since 2007, only three of which have been abandoned. Since 2008, the government has sold over 3.6 million hectares of land to investors with the hope of much needed foreign currency, food security and technology transfer (Mouseau and Sosnoff 2011). Ethiopian law requires the use of environmental impact assessments in consultation with local affected tribes. The laws are poorly enforced, however. There is no evidence of tribal consultations, nor of completed environmental assessments and no domestic environmental controls. The government, at best, seems to pay little attention to the agro-pastoralist patterns of land use prevalent in certain areas of the country. There is evidence that officials would actually prefer to dispense with the pastoralist communities that stand in the way of modernizing agriculture (Mousseau and Sosnoff 2011). Indeed the government has used the military to force tribal groups off their land, displacing them again and again to make room for foreign investors (Mittal 2013a).

Ethiopia is not a party to any BIT with the US or the EU (although it is with some members of the EU individually). It does belong to the Common Market for Eastern and Southern Africa (COMESA), which has signed a Trade and Investment Framework Agreement (TIFA) with the US. TIFAs generally represent only a commitment to negotiate and liberalize trade and investment in the future. As such, Ethiopia has the requisite policy space to mitigate the negative impacts of land grabs. However, as in other countries, Ethiopia's government "appear[s] to be [a] willing partner[] in the land grabbing phenomenon" (Mousseau and Mittal 2011b). Policy space, then, is not the only pre-requisite to protecting citizens from displacement resulting from land grabs.

Cameroon: Using Domestic Law For and Against Investors

Through proper enforcement of domestic laws, Cameroon has provided an example of how large scale agricultural investors can be accountable for their illegal actions. When SG

Sustainable Oils Cameroon (Herakles Capital), a US company, began operating in Cameroon, it quickly became apparent that it lacked required permits and licenses and that it used bribes to "facilitate [its] way" (Mousseau 2013). Herakles' failure to comply with national laws resulted in several court cases and a temporary injunction against its operations. Since the injunction was lifted (April 2012), the whole project seems to have fallen apart as production stalled and several members of the senior staff left (Mittal 2013b).

Despite what looks like a success of domestic legal processes, local resistance to the Herakles project has landed several activists in jail (Mousseau 2013). Furthermore, the original concession agreement with Herakles granted the company a private security force and allowed the agreement to reign where there was a conflict between the contract and national laws (Mousseau 2012). Cameroon signed a BIT with the US in 1986, which entered into effect in 1989 and remains today. That BIT, although not as comprehensive as the US Model BIT today, still extends establishment rights to US foreign investors, prohibits direct and indirect expropriation and contains ISDS provisions. If Cameroon were willing to re-negotiate the agreement, it could potentially reserve certain rights to social and environmental regulation and even to regulation for the purposes of development, as in the SADC BIT. A new investment treaty, would not, however, protect the country from the impacts of private investment contracts and concessions agreements. In order to truly limit the negative outcomes of land grabbing, Cameroon would have to also revisit concessions agreements with the protection of its citizens in mind.

Mozambique: Cancelling Concessions in Response to Conflict

As with many developing countries, domestic law requires that investors consult with nearby communities before acquiring a lease for "unused" land. In this instance, when investors have not made good on promises of employment or environmental protection, it has led to widespread land conflicts. In the wake of literally hundreds of these disputes, the government virtually halted new large-scale (more than 10,000 hectares) agricultural concessions from 2009 to 2011. Additionally, several projects have been cancelled due to the investors' failure to comply with the investment plan (Mousseau and Mittal 2011b). Landmatrix.org indicates that since 2010, there have been a few large-scale investments to take root – deals originating in India, China, Portugal, Singapore, and even the US. Thus, the evidence suggests that while

Mozambique did employ some policy flexibility to reconsider its investment strategy, it has not entirely abandoned its hope in foreign investment for development.

Interestingly, Mozambique signed a BIT with the US, which entered into effect in 2005. As a modern BIT, it contains all the usual constraints on policy. Mozambique was able to negotiate certain sectors left out of the scope of the agreement (listed in an Annex). The country may not impose performance requirements, *but* it is allowed to condition the receipt of an advantage on certain types of performance. Finally, there is a mention of Mozambique's land law, which requires, among other things, community consultations by foreign investors. In a letter exchanged between the parties, Mozambique agrees to "implement the provisions of its [Land Law], and any other provisions of law that relates to the same . . . subject matter, in a manner that" does not discriminate against US investors. Surprisingly, Mozambique's limitations on agricultural investment did not give rise to any investment disputes under the agreement.

Of even greater importance, the US-Mozambique BIT's initial 10-year term terminates in 2015. At that point, Mozambique would be free to withdraw from the agreement or suggest a renegotiation of such. As a member of the SADC, Mozambique could draw from the SADC Model BIT, which aims to preserve more policy space and protect sustainable social and economic development.

Viet Nam: Potential for Policy Space

As a developing country in current negotiations with the US for trade and investment liberalization, Viet Nam poses perhaps the best example of potential when it comes to policy space. The TPP Investment Chapter, so far, looks much like the US Model BIT, but Viet Nam should consider the experience of Mozambique and the warning that the African experience presents in general. Currently, the country is not bound by any investment treaties with the US or EU. It has experienced a small number of land grabs (11 documented), most of which come from Hong Kong (Landmatrix 2014). Its land law is not unlike land policy in other developing countries, allowing the government to extend long-term leases on the land, but not sell it. It provides some protection also to local communities through recognition and registration schemes.

Without considering the policy implications of US investment commitments, Viet Nam is putting the country at risk for disputes arising out of its regulation of foreign investments, in addition to other domestic industrial, social and environmental laws and regulations.

Resolving A "Trilemma"

All of these examples make clear the conflict between liberalizing investment policies and protecting the health and safety of people, as well as the environment. Dani Rodrik (2011) posits a "fundamental political trilemma of world economy: we cannot simultaneously pursue democracy, national determination and economic globalization" (Rodrik 2011, xviii). In the specific case of land investment policy, governments cannot simultaneously pursue democracy, national sovereignty over their land, and total investment liberalization. We must choose which of these we will prioritize over the others. Based on the concerns that have arisen out of the impacts of land grabs, and the expanding investment regime, giving investors ever greater influence over their host governments, governments must preserve the right to regulate (and in some cases, take back) their agricultural land, protecting the rights and well-being of their citizens. This could be accomplished in a number of ways.

First, legal harmonization should be confined to formal/procedural guarantees, ensuring that nation states still maintain their policy space in deciding the content of their public regulatory policies. Certain subjects (domestic environment, social safety nets and the like) must be left to the political discretion of the government in accordance with democratic consensus, rather than left to the market to regulate.

Second, the globalized world still needs to have a minimum of common principles and criteria for decision-making. This allows countries to define in advance the standards of common global regulation. Such minimum common principles should be informed and inspired by fundamental rights and general interests protection, in addition to prioritizing growth and development.

Third, the features, powers, and limits of global courts and tribunals should be determined in detail in advance. As these judges are called to analyze national policies on land grabbing their reach should be well-defined and limited to avoid undue interference with national policy-making.

More broadly speaking, the global governance of land investments must be democratized. It must be transparent, accountable, ruled by procedures and formalities, impartial and representative.

Endnotes

[i] On the legal matters pertaining investors protection see J. Fisher QC, J. Bewsey, M. Waters QC, E. Ovey (2003), *Law of the Investor Protection*, 2nd ed., London, Thomson Sweet and Maxwell. The literature on global administrative regulation is wide and growing. See, among others, S. Cassese, *Shrimp, Turtles and Procedure. Global Standards for National Administrations*, 2004, available at *http://www.iilj.org/courses/documents/HC2004.Cassese.pdf*; C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance And Social Regulation*, Oxford e Portland, Hart, 2006; B. Kingsbury, N. Krisch, R.B. Stewart, *The emergence of Global Administrative Law*, in *Law and contemporary problems*, 68, 3-4, 2005; J.H.H. Weiler, *The Geology of International Law–Governance, Democracy and Legitimacy*, in *Zeitschrift für Ausländisches Recht und Völkerrecht*, 64, 2004, n. 3, p. 547 ss.; J.-B. Auby, *La globalisation, le droit et l'Etat*, Montchrestien, 2003; A.C. Aman, *Administrative Law in a Global Era*, in *Administrative Law Review*, 2002, 54, 409; N. Krisch e B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, in *European Journal of International Law*, 17, 1, 2006, p. 1.

[ii] For instance, "the World Bank has estimated that between 2008-2010 at least 60 million hectares of fertile farmland were leased out or sold to foreign investors for the purpose of large scale agricultural projects, with more than half of this in Africa. These massive new agribusiness projects are throwing an incalculable number of small farmers, herders and indigenous people off their territories (see *http://farmlandgrab.org* for a range of published reports and day to day accounts). Yet no one seems to have a real grasp of how much land has changed hands through these deals over the last few years. The scores, possibly hundreds, of millions of hectares of agricultural land being taken away from rural communities are not yet captured in the official statistics that were available for this report", GRAIN, Hungry for Land. Small Farmers Feed the World with Less than a Quarter of all Farmland, May 2014, http://www.grain.org/article/entries/4929-hungry-for-land-small-farmers-feed-the-world-with-less-than-a-quarter-of-all-farmland. This, has said, produces the so called "land inequality", which has a significant impact on general equality and on resources distribution. On these issues see also: ECVC and HOTL, *Land concentration, land grabbing and people's struggles in Europe*, 17 April 2013; EJOLT, *The many faces of landgrabbing*, EJOLT briefing 10, 2014, *http://www.grain.org/e/4907*; and *www.eurovia.org/IMG/pdf/Land_in_Europe.pdf*

[iii] The concept of "land grabbing" is slightly different than simply investment: "the acquisition of vast areas of land for commercial production is, in itself, neither new, nor occurring through entirely novel arrangements. It is but the latest phase in historical processes of economic and social transformation. The new, enhanced level of demand for land-derived commodities is accelerating these processes. Where we observe harmful impacts, it is largely because of certain longstanding failures of governance, both at the national level and globally. These include the failure of land governance systems to recognize and protect the land interests of the rural poor and the political marginalization of smallholder production, which are themselves in part a legacy of histories of colonialism and political exclusion. What is new is the scale and intensity of commercial pressures on land resources, and the prospect of a new era in the struggle for, and control over, land in many areas of the global South. For a century or more, most of the world's rural poor have lived with insecure tenure over resources. With few significant threats to their continued access to such resources, their lack of legal entitlement to them did not previously

pose huge problems in most cases. However, many rural land users are now finally facing the prospect of dispossession. It is in this sense that this report argues that we are at a "tipping-point", or a crisis, for the future of family farming and rural societies", W. Anseeuw, L.A. Wily, L. Cotula, and M. Taylor, *Land rights and the Rush for Land. Findings of the Global Commercial Pressures on Land Research Project*, International Land Coalition, 2011, available at http://www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report_ENG.pdf, p. 10.

[iv] Cotula (2015) takes a more comprehensive approach in a recent report from the International Institute for Environment and Development, looking more broadly at the impact of investment agreements on land governance, including land reform.

[v] While international negotiations sometimes result in larger global norms, in these areas, international treaties are largely the result of negotiated compromises rather than legal harmonization.

[vi] On these issues see, *ex multis*, J.-B. AUBY, *La globalisation, le droit et l'Ètat*, Paris, Montchreistien, 2003, p. 67 ff..; J.E. STIGLITZ, G*lobalization and its discontents, W.W. Norton and Company, New York, USA (2002)*; L.M. WALLACH, *Accountable Governance in the Era of Globalization: the WTO, NAFTA and International Harmonization of Standards*, in *University of Kansas Law Review*, 2002.

[vii] The second part of the standard which requires a "public purpose" is arguably vague and provides little in the way of policy support for development nations.

[viii] A legal institute adopted in national legal orders is adopted by an international agreement and then applied for other national legal orders: the transplant is not direct from one state to another, but follows a complicated path, passing through an international treaty. On this issue see A. WATSON, *Legal Transplants*, Athens, University of Georgia Press, 1993.

[ix] The US BIT does not contain a section on General Exceptions, but US FTAs (where the BITs often appear as an investment chapter) usually have a separate chapter covering exceptions near the end of the agreement. See DR-CAFTA Article 21.

[x] CETA does not contain a provision on environmental or labor protection in its investment chapter (2013 draft), but will likely have separate chapters on labor, environment, and sustainability in the completed agreement (CETA draft 2011).

[xi] The literature on the precautionary principle is very broad. There is no common or unanimous view about the *status*, scope or definition of the precautionary principle in international law, As a general procedural principle, it expands jurisdiction and discretionary regulatory powers of public authorities in certain areas, characterized by scientific uncertainty and risk. It provides the administrations and judges with a methodological criteria to balance and evaluate all the involved rights and interests: In certain fields and if some conditions are met (scientific uncertainty, possibility of risk and temporariness of the regulatory measures), administrative authorities are allowed to use wider discretion, in stead of relying merely on scientific opinions. This stretches the rule of law and aims at balancing all the interests involved, while, at the same time, it could lead arbitrariness or the abuse of powers and, on the international stage, to disguised protectionist measures affecting international trade. On precautionary principle see,

among the others, J. Tickner, C. Raffensperger, and N. Myers, *The precautionary principle in action. A handbook,* First Edition, Science and Environmental Health Network, 2005; N. De Sadeleer, *Environmental Principles. From Political Slogans to Legal Rules*, Oxford, Oxford University Press, 2002; P. Harremoes & oth., *The Precautionary principle in the 20th Century. Late lessons from Early Warnings*, London, Earthscan, 2002; T. O'Riordan, J. Cameron, A. Jordan, *Reinterpreting the precautionary Principle*, London, Cameron May, 2001; D. Bevilacqua, *The Precautionary Principle in GMO Regulations: a vertical and horizontal comparison*, Poros project 2005-2007*: Eu-India Economic Cross Cultural Programme, European Public Law Series, Vol. LXXXIV*, December 2006.

[xii] For example, the legal mechanism governing such investor-host state relationships could be embedded with several pre-defined criteria – both procedural and substantial – limiting the reach of their jurisdiction and limiting the discretion they use in deciding disputes. Such a regime would need to make clear from the beginning what states can and cannot do, as well as what the investor can and cannot demand.

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