LARGE-SCALE LAND INVESTMENT IN AFRICA: AN ISSUE OF SELF-HELP AND SELF-DETERMINATION

Jared Wigginton[*]

ABSTRACT

This paper addresses the environmental and human rights implications arising from the global land rush in developing countries in Africa. It acknowledges both the potential benefits and costs of these large-scale land deals, and then analyzes the international community's current response: The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security ("the Guidelines"). This paper then examines the role of several legal instruments in human rights, international environmental law, and corporate social responsibility and accountability in addressing the costs associated with land deals. Specifically, it considers how these laws and principles constrain host states, transnational corporations ("TNCs"), home states, and the World Bank. Finally, the article offers several suggestions to ensure the benefits and limit the costs of land deals: (1) developing countries should take a regional approach to the problem; (2) the international community should develop an expert international institution responsible for establishing fair market values in land and overseeing land deals; (3) developing country host states should use their resultant increased bargaining power to negotiate for terms that will increase human development locally; and (4) there should be increased responsibility and accountability placed on TNCs and the World Bank for human rights and the environment.

---

* King Hall, Class of 2013. Deepest gratitude for my wife Lauren's love, example, and encouragement. Thanks to Professor Lin for his help in developing the topic and for his insightful feedback. Thanks also to King Hall for providing multiple courses in international law and fostering a global perspective. Finally, love to my brothers and sisters in Cameroon and Congo: on est ensemble.

I. INTRODUCTION: SEEING THE FOREST IN LARGE-SCALE LAND DEALS IN AFRICA

Private and state-owned businesses are gobbling up enormous tracts of arable lands in developing countries.[1] With 60 percent of the world's unused arable land,[2] foreign investors are targeting Africa, the continent with the highest rates of chronic undernourishment.[3] Over the last decade, two-thirds of the land acquired by rich-nation investors was in Africa.[4] Between 2000 and 2010, the International Land Coalition estimated that these transactions totaled 494 million acres, roughly 200 million hectares ("ha"), of land in

---

[1] *See* Damien McElroy, *Protest at the Great African Land Grab*, THE TELEGRAPH, Oct. 4, 2012, www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/9584931/Protest-at-the-great-African-land-grab.html.

[2] Alex Awiti, *Kenya: Africa's Land-Grab Disaster in Waiting*, THE STAR, Sept. 12, 2012, http://www.the-star.co.ke/news/article-2628/africas-land-grab-disaster-waiting.

[3] U.N. FOOD AND AGRIC. ORG. [FAO], THE STATE OF FOOD INSECURITY IN THE WORLD 2012, at 9 tbl.1 (2012), *available at* http://www.fao.org/docrep/016/i3027e/i3027e.pdf.

[4] McElroy, *supra* note 1.

sub-Saharan Africa.[5] The International Food Policy Research Institute estimates that large-scale land deals located mainly in Africa totaled $20-30 billion between 2006 and 2009.[6] In many cases, foreign investors look to secure arable land and water to provide for their population's food and energy supply.[7] In others, investors are engaged in speculation, leaving new investments fallow until markets ripen.[8]

Three primary purposes have driven these land deals over the past six years: (1) production of food; (2) biofuel; and (3) cash crops.[9] In 2010, these motivations accounted for 37, 21, and 21 percent of land deals, respectively.[10] The general impetus for this shift in international investment has come from an increase in energy and food prices.[11] Food security concerns have caused many food-importing countries with sufficient capital to invest in outsourcing food production.[12] For example, Qatar has purchased 40,000 ha in Kenya for crop production, and China has purchased 101,171 ha in Zimbabwe.[13] Daewoo Logistics Corporation even attempted to lease 1.3 million ha in Madagascar, nearly half of the country's arable land, to produce corn for South Korea.[14] In addition, increased demand for biofuels is evident in deals between the Malian and Senegalese governments and European and North American private investors for sugarcane and jatropha.[15] Because of their association with food production, some see water rights as the primary motivation of many land deals with long-term

---

[5] *FAO: Africa Land Grabs like Wild West*, UNITED PRESS INT'L, Nov. 2, 2012, http://www.upi.com/Business_News/ Energy-Resources/2012/11/02/FAO-Africa-land-grabs-like-Wild-West/UPI-21421351874853.

[6] Hany Besada & Ariane Goetz, *The Land Crisis in Southern Africa: Challenges for Good Governance*, *in* 1 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY LAND ISSUES 169, 169 (Ben Chigara ed., 2012).

[7] Jeremie Gilbert & David Keane, *The New Scramble for Africa: Towards a Human Rights-Based Approach to Large-Scale Land Acquisitions in the Southern African Development Community Region*, *in* 1 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY LAND ISSUES, *supra* note 6, at 144, 145.

[8] *See The Finance of Land Grabs: Peasants, Herders, Fishers Dispossessed by Corporate Investors*, GLOBAL RESEARCH (June 26, 2012), http://www.globalresearch.ca/the-finance-of-land-grabs-peasants-herders-fishers-dispossessed-by-corporate-investors.

[9] *See* Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 503, 523 (2011); *see also* Kim Lewis, *Land Grab in Africa Threatens Food Security*, VOICE OF AMERICA, Oct. 5, 2012, http://www.voanews.com/content/land-grab-in-africa-threatens-food-security/1521168.html.

[10] Schutter, *supra* note 9, at 523.

[11] *See id.* at 513-14.

[12] *Id.* at 515.

[13] Gilbert & Keane, *supra* note 7, at 145.

[14] *Id.*

[15] LORENZO COTULA, LAND DEALS IN AFRICA: WHAT IS IN THE CONTRACTS 8-9 (2011).

leases.[16]

Beyond these demands, land speculation and international environmental efforts also contribute to competition for arable land. With the general increase in demand, speculators are snatching up land where they can and hoping to flip the investment for a profit.[17] Interestingly, the Clean Development Mechanism ("CDM") of the Kyoto Protocol is also having an effect.[18] The CDM permits industrialized Annex I countries[19] to reduce carbon emissions in developing countries in exchange for certified emissions reductions credits they can use in their home countries.[20] To obtain these credits, Annex I countries may invest in the cheapest fertile land to plant forests, despite the possible forced evictions of vulnerable communities and elimination of agricultural commons.[21] Similarly, the Reduced Emissions from Deforestation and Forest Degradation ("REDD+") scheme may pose a threat as state actors are tempted to appropriate the benefits of carbon sequestration.[22] For example, land for REDD+ in Mozambique already equates to 22 percent of its entire land area.[23] Additional pressures for land include efforts to protect the natural environment by creating wildlife reserves, national parks, and other protected areas.[24]

Common features of land deals that should cause concern include: (1) the transfer of large tracts of arable land; (2) the deal-making process; (3) the deal's substantive terms; and (4) the resulting risks facing host state residents. Unlike other forms of foreign investment, disparities in negotiating power are particularly problematic in land contracts because of the relationship between arable land and local food production, access to water, housing, and people's livelihoods. The externalities arising from one land deal can take away the means of survival for tens of thousands of people. For example, more than 20,000 Ugandans claim to have been

---

[16] *See* GRAIN, SQUEEZING AFRICA DRY: BEHIND EVERY LAND GRAB IS A WATER GRAB 14 (2012), *available at* http://www.grain.org/article/entries/4516-squeezing-africa-dry-behind-every-land-grab-is-a-water-grab.

[17] *See The Finance of Land Grabs: Peasants, Herders, Fishers Dispossessed by Corporate Investors*, *supra* note 8.

[18] *See* De Schutter, *supra* note 9, at 523.

[19] These include Australia, Germany, Japan, Spain, United States, and other industrialized and developed countries. *See List of Annex I Parties to the Convention*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php (last visited Nov. 8, 2013).

[20] Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 12(3)(a)-(b), Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

[21] De Schutter, *supra* note 9, at 523.

[22] *Id.*

[23] INT'L INST. FOR ENV'T & DEV. [IIED], REDD+: READY TO ENGAGE PRIVATE INVESTORS? 1 (2011), *available at* http://pubs.iied.org/pdfs/17112IIED.pdf.

[24] De Schutter, *supra* note 9, at 524.

forcibly evicted from their lands as a result of a land deal and have a case pending in the country's High Court.[25]

The negotiation process also reflects other serious concerns with land deals. Specifically, the process lacks transparency and public participation because most deal-making happens behind closed doors.[26] Even citizens actively seeking access to information have difficulties obtaining it.[27] This is especially alarming because land deals with foreign investors primarily involve host governments,[28] the parties with the greatest capacity and duty to ensure the best interest of their people. Given governmental corruption in developing countries, particularly in African nations,[29] transparency is a necessary check to protect a host state's citizenry. Citizens can hold their government accountable only if they are informed about its actions. Participation also plays an important role, ensuring that those affected by land deals can seek to protect their interests by communicating their concerns to the government. Overall, lack of transparency in deal-making fosters corruption and deals not in the public's best interest.[30]

The terms of land deals also pose problems for several reasons. First, for the few contracts publicly available, the terms and extent of detail vary,[31] including contracts as short as three pages and as long as fifty-six.[32] The shorter contracts tend to be unspecific despite granting long-term rights over large areas of land.[33] Second, most of the contracts involve long-term leases of land managed by the state.[34] For example, in Mali and Ghana, the majority of land leases are for terms of fifty years or longer.[35]

Unspecific terms and long-term leases result in increased vulnerability for host state citizens. Specifically, lack of detail in land contracts and failure to address contingencies puts host states and their citizens at risk of having to absorb externalized costs associated with land deals and their

---

[25] Elias Biryabarema, *Thousands Evicted in Uganda "Land Grab"*, THOMSON REUTERS FOUNDATION, Sept. 22, 2011, http://www.trust.org/alertnet/news/thousands-evicted-in-uganda-land-grab-oxfam.

[26] COTULA, *supra* note 15, at 1.

[27] LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY: AGRICULTURAL INVESTMENTS AND INTERNATIONAL LAND DEALS IN AFRICA 69 (2009), *available at* http://pubs.iied.org/12561IIED.html.

[28] *See id.* at 65.

[29] *See* Simon Rogers, *Corruption Index 2012 from Transparency International: Find out How Countries Compare*, THE GUARDIAN, Dec. 5, 2012, http://www.guardian.co.uk/news/datablog/2012/dec/05/corruption-index-2012-transparency-international.

[30] COTULA ET AL., *supra* note 27, at 7.

[31] *See* COTULA, *supra* note 15, at 21.

[32] *Id.* at 21.

[33] *Id.* at 1.

[34] *Id.* at 22.

[35] COTULA ET AL., *supra* note 27, at 77 & fig.3.1.

associated agricultural investments. Weak contracts render mechanisms to hold investors accountable ineffective.[36] In the few instances where strong contracts are in place, the state must properly implement the contracts for them to work.[37] Due to resource constraints, developing countries not only have difficulties in contract negotiations, but also often lack the administrative capacity to oversee and enforce even the best of contracts. Thus, increasing host-state negotiating power while ensuring participation, transparency, fair terms, and effective enforcement will be critical to protecting host-state and citizen interests.

Part II of this paper will examine some of the potential benefits and costs of land deals and their associated agricultural investment projects. Part III will analyze and critique the international community's most recent formal response to the land deal issue: The Voluntary Guidelines on the Responsible Governance of Tenure. Following the critique, Part IV will consider the roles of the four most critical actors related to this issue: (1) the host state; (2) TNCs; (3) the home state of TNCs; and (4) the World Bank. For each actor, there will be an exploration of relevant international law and its role in mitigating potential costs and ensuring potential benefits at the outset of land deal negotiations and during their implementation. Part IV will also include several suggestions for each actor to maximize the potential benefits of land deals. Part V concludes with a big picture look at the potential solutions to the issues associated with land deals and offers several areas in need of further exploration and development.

II. UNDERSTANDING THE DEBATE: APPREHENSION AND ENTHUSIASM

Not surprisingly, land deals have attracted significant attention in the international community. Given their magnitude and potential to help and hurt vulnerable host states, there is a flurry of debate between investors, non-governmental organizations ("NGOs"), host countries, and international institutions over these deals. Between 1998 and 2008, roughly 20 percent of the World Bank's total lending has been for projects with agricultural components, amounting to $45.2 billion.[38] And, in the last decade, the World Bank has tripled its lending to land deals to more than $8 billion.[39] Because of human rights violations associated with land deals, involving forced evictions, food and water security, and loss of livelihood without

---

[36] COTULA, *supra* note 15, at 10.

[37] *Id.* at 2.

[38] WORLD BANK, GROWTH AND PRODUCTIVITY IN AGRICULTURE AND AGRIBUSINESS 99 tbl.B.1 (2011), *available at* http://siteresources.worldbank.org/INTGPAA/Resources/AppendixB.pdf.

[39] McElroy, *supra* note 1.

compensation,[40] Oxfam has called on the World Bank to issue a moratorium on its land investments until the World Bank has adequately reviewed its policy and practice to prevent "land grabbing."[41] In response, the World Bank issued an official statement refusing to implement a moratorium, and instead emphasized critical benefits that come from agricultural investments related to land deals.[42]

A. Potential Benefits of Large-Scale Land Deals: Food Security and Development

With 48.5 percent of its population living on less than $1.25 per day in 2010,[43] and having the lowest amount of gross foreign direct investment ("FDI") compared to other geographic regions,[44] sub-Saharan Africa is understandably hopeful about the possibility of FDI for agricultural development. A recent article in *The Economist* suggests a correlation between FDI and development in Africa, associating improvements in school enrollment and health in Africa with increases in foreign investment.[45] Although there is currently no consensus about the relationship between FDI and economic development,[46] a recent study suggests FDI may contribute to poverty reduction when directed toward the world's least developed countries and associated with the creation of employment for unskilled workers.[47] In particular, FDI in the agricultural sector can contribute to poverty alleviation by enhancing development in rural areas, where poverty incidence is the largest.[48]

---

[40] OXFAM, 'OUR LAND, OUR LIVES': TIME OUT ON THE GLOBAL LAND RUSH 6 (2012), *available at* http://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf.

[41] *Id.* at 17.

[42] Press Release, World Bank, World Bank Group Statement on Oxfam Report, "Our Land, Our Lives" (Oct. 4, 2012), *available at* http://www.worldbank.org/en/news/press-release/2012/10/04/world-bank-group-statement-oxfam-report-our-land-our-lives.

[43] *Poverty & Equity: Sub-Saharan Africa*, WORLD BANK (2013), *available at* http://povertydata.worldbank.org/poverty/region/SSA (last visited Oct. 14, 2013).

[44] WORLD BANK, WORLD DEVELOPMENT INDICATORS 2012, at 368 tbl.6.10 (2012), *available at* http://data.worldbank.org/sites/default/files/wdi-2012-ebook.pdf.

[45] *See Africa Rising: A Hopeful Continent*, ECONOMIST, Mar. 2, 2013, http://www.economist.com/news/special-report/21572377-african-lives-have-already-greatly-improved-over-past-decade-says-oliver-august.

[46] KYLA TIENHAARA, THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING THE FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY 18 (2009).

[47] Liesbeth Colen et al., *Foreign Direct Investment as an Engine for Economic Growth and Human Development*, *in* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 70, 115 (Olivier De Schutter et al. eds., 2013).

[48] *Id.*

Thus, large land deals and their associated FDI may have the potential to significantly benefit host countries. Such investment may produce an increase in jobs on the farm with labor needs and off the farm with processing, packaging, and transporting needs.[49] Ideally, these jobs will transfer both physical capital (technology and infrastructure, including modern machinery, improved seed varieties, and roads) and intellectual capital (irrigation and farming techniques along with machinery skills).[50] And, based on the investor's production and exportation of agricultural products, various taxes could be assessed and used for public benefits.[51] Moreover, there would be increased efficiency from putting underutilized land to use. Finally, to the extent that land deals lead to a more stable system of land tenure in host states, investor confidence would likely increase, attracting new investments. Together, these potential benefits could also culminate into food and energy security for foreign-state beneficiaries, and domestic food security and sustainable development for host states.

To date, the greatest benefits host states have are investor commitments on investment level, employment creation, and infrastructure development.[52] In Ethiopia, Ghana, Madagascar, and Mali, there is empirical evidence of increased investor commitments.[53] However, the enforceability of these commitments in documented land deals appears to be weak.[54]

B. Threatened Costs of Large-Scale Land Deals: A Human Rights and Ecological Bust

Perhaps the greatest concern about large land deals is the possibility that even after significant agricultural investment, Africa will remain equally or become increasingly food and water insecure. The idea of foreign nations entering, irrigating, and farming African lands only to export the food while Africans are chronically undernourished seems perverse. The alternative possibility of foreign investors introducing their commercial farm produce into domestic markets also raises concerns. *Squeezing Africa Dry*, a report by GRAIN,[55] asserts that agricultural land deals are not only jeopardizing

---

[49] De Schutter, *supra* note 9, at 520.

[50] *Id.*

[51] These taxes can include income tax, turnover tax, customs duties, export taxes, and taxation on dividends. COTULA, *supra* note 15, at 28.

[52] COTULA ET AL., *supra* note 27, at 46, 101.

[53] *Id.* at 46.

[54] For example, a biofuel investor in Madagascar initially promised to pursue a labor-intensive business model and then decided to focus on an increase in mechanization. *Id.* at 82, 101.

[55] GRAIN is an international non-profit organization dedicated to ensuring community-controlled and biodiversity-based food systems. GRAIN, http://www.grain.org (last visited

food, but also water security of African host states.[56] With a third of Africans already living in water-scarce environments and the impending effects of climate change,[57] land investments, often located in fertile areas of major river basins with access to irrigation, pose an additional threat to African water security.[58] Comparing the irrigation potential (i.e., what is already irrigated) and the leased-out areas from land deals with their potential irrigation in Ethiopia, Sudan, South Sudan, and Egypt, the report shows a deficit of irrigation potential of 5,493,318 ha (an area that represents over half of the irrigation potential between these four countries), and dubs the situation "hydrological suicide."[59] The pending unsustainable water use threatens local populations with irreversible salinization in aquifers, loss of livelihoods, and loss of rivers and associated ecological, economic, and health benefits.[60]

Other potential costs relate to the effects of importing a generic Western property regime to reformulate existing systems of land tenure. Under current conditions, many Africans, including fishers, gatherers, and pastoralists, depend on access to the commons and on communal ownership of land for their livelihoods.[61] A Western property regime of privatization would especially hurt those persons by reducing their access to necessities like water and food. According to Olivier De Schutter, U.N. Special Rapporteur on the Right to Food, the strict adoption of a Western property regime will also likely lead to increased corruption, unrepresentativeness, and social inequity.[62] Absent participation and transparency, the process of implementing a new titling system is more likely to be corrupt and captured by local elites.[63] This means that the benefits from investments will likely be concentrated among community leaders and men, not distributed equally to residents of the areas affected.[64] In addition, even when land changes hands, it is often sold back to wealthy former owners if markets are left unregulated.[65] This reconcentration of land reduces individual access to resources and increases opportunities for prospectors to purchase large tracts

---

Mar. 29, 2013).

[56] *See* GRAIN, *supra* note 16, at 11 tbl.2a.

[57] *Id.* at 3.

[58] *See id.*

[59] *Id.* at 7, 8 tbl.1.

[60] *See id.* at 3-5.

[61] De Schutter, *supra* note 9, at 533-34, 537.

[62] De Schutter, *supra* note 9, at 528.

[63] *Id.*

[64] *Id.*

[65] Marie-Claire Cordonier Segger et al., *Land Tenure Reform in the Drylands: Hopes and Challenges*, *in* SUSTAINABLE JUSTICE 163, 179 (Marie-Claire Cordonier Segger & C.G. Weeramantry eds., 2005).

of land.

Land rush critics also fear the effects such agricultural investment might have on domestic markets and ecosystems. Allowing foreign commercial farmers to introduce their produce into the host state's markets may lead to a decrease in the price of domestic agricultural products, depressed rural incomes, an increase in poverty and unemployment, greater food insecurity, and an increase in migration from rural to urban areas.[66] The production of homogenous food staples, biofuels, and cash crops also poses several social and ecological problems. Specifically, this production increases food insecurity and environmental degradation by relegating local farmers to less productive and ecologically fragile lands because prime lands are devoted to export production.[67] Furthermore, crop specialization encourages chemical-intensive, monocultural farming techniques that cause serious ecological harm, including a reduction of agricultural productivity, soil degradation, biodiversity loss, and contamination and depletion of freshwater reserves.[68]

Another major concern is conflict. Shifting land uses caused by commercial farming development have already created conflict.[69] Food and water scarcity, poverty, and sudden changes in rights of access necessary for survival will increase the chances of serious conflict.[70] Thus, land deals, especially those giving one host state's investors access to natural resources shared with another state, such as sharing an aquifer, pose significant risks of conflict.

The international community has determined that many of these potential costs can be attributed to insecure land tenure rights and weak governance.[71] Both of these concerns are deeply rooted in Africa. The World Bank estimates that across Africa, only between two and ten percent of the land is held under formal land tenure.[72] Furthermore, the 2012 Transparency International Corruption Index showed that 90 percent of sub-Saharan African countries are considered significantly corrupt,[73] and that six of the eighteen most corrupt countries in the world are in sub-Saharan Africa.[74]

---

[66] Carmen G. Gonzalez, *Markets, Monocultures, and Malnutrition: Agricultural Trade Policy through an Environmental Justice Lens*, 14 MICH. ST. J. INT'L L. 345, 346-47 (2006).

[67] *Id.* at 352.

[68] *Id.* at 352, 354.

[69] Cordonier Segger et al., *supra* note 65, at 185-86.

[70] *See* GRAIN, *supra* note 16, at 18.

[71] *See* FAO, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY, at iv-v (2012) [hereinafter VOLUNTARY GUIDELINES], *available at* http://www.fao.org/docrep/016/i2801e/i2801e.pdf.

[72] Gilbert & Keane, *supra* note 7, at 150.

[73] Rogers, *supra* note 29.

[74] *Id.*

III. THE VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE

To ensure the potential benefits and mitigate the potential costs of land deals discussed above, the Food and Agricultural Organization of the United Nations ("FAO") drafted The Voluntary Guidelines on the Responsible Governance of Tenure. The Guidelines are designed to enhance the governance of land tenure, fisheries, and forests as a means of achieving food security and ensuring the right to adequate food, sustainable livelihoods, poverty eradication, rural development, social stability, housing security, environmental protection, and sustainable social and economic development.[75] The Guidelines assert that a state's establishment of secure tenure rights will help achieve these goals by decreasing vulnerability, hunger, poverty, conflict, and environmental degradation.[76] The benefits and importance of a secure tenure system are generally accepted,[77] and the Committee on World Food Security endorsed the Guidelines on May 11, 2012.[78]

A. General Background and Guiding Principles of the FAO's Voluntary Guidelines

The Guidelines call primarily for the development of stable systems of tenure and means by which to protect newly established rights. In a non-discriminatory and gender-sensitive fashion, states must identify and record all legitimate tenure rights holders, including indigenous and other holders of customary or informal tenure rights not currently protected by law.[79] However, the Guidelines also establish that no tenure rights are absolute.[80] Instead, tenure rights are limited by the rights of others and by state measures for public purposes, such as promotion of general welfare, environmental protection, and other actions consistent with a state's human rights obligations.[81]

This new tenure system that includes the rights of all legitimate tenure

---

[75] VOLUNTARY GUIDELINES, *supra* note 71, at 1.1.

[76] *Id.* at iv-v.

[77] *See* Francesca Romana, *Forest Tenure Changes in Africa: Making Locally Based Forest Management Work*, FAO (2007), http://www.fao.org/docrep/010/a1346e/a1346e03.htm. *See generally IFAD Policy on Improving Access to Land and Tenure Security*, INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (Sept. 11, 2008), http://www.ifad.org/gbdocs/eb/94/e/EB-2008-94-R-2-Rev-1.pdf.

[78] Press Release, FAO, Countries Adopt Global Guidelines on Tenure of Land, Forests, Fisheries (May 11, 2012), *available at* http://www.fao.org/news/story/en/item/142587.

[79] VOLUNTARY GUIDELINES, *supra* note 71, at 1.1, 4.4, 5.3, 9.1 & 10.1.

[80] *Id.* at 4.3.

[81] *Id.*

holders leaves multiple questions unanswered. For instance, who is a legitimate tenure holder? Clearly those that currently hold some kind of formal title would qualify, but the Guidelines also identify customary and informal tenure rights holders. What is the scope of customary and informal rights? Would the pre-colonial customary rights of the Idejo chiefs of Lagos be included?[82] Strictly applied, the breadth of this definition would create overlapping and conflicting rights. For example, in most African nations, indigenous and other peoples have established their lives and livelihoods on both government and privately-owned lands. When there are multiple claims to property rights, how should states resolve them? Is there some formulaic approach to determine when a legitimate informal tenure right exists and how to divide land based off competing claims?

Because complying states will be forced to resolve these kinds of conflicts, presumably by reallocating rights, the Guidelines should be somewhat understood as a means of land redistribution. But its approach appears to be distinct from other land redistribution efforts implemented in Zimbabwe[83] and South Africa[84] because it attempts to account for a high level of nuance in allocating rights fairly. This nuanced approach creates the competing claims to tenure rights mentioned above. The Guidelines do not explicitly say how states should resolve these conflicts, but do suggest a primacy of general welfare, human rights, and environmental protection in their limitations on individual tenure rights.[85] Even with this implied prioritization, a significant ambiguity remains about how to apply these three concepts and their associated principles.

---

[82] Prior to the signing of the Treaty of Cession in 1861 through which Oba Dosunmu did "give, transfer, and . . . grant" the port city of Lagos to the British queen, it was believed that the Idejo chiefs had ownership and stewardship over all of the land in the kingdom. *See* Kristin Mann, *African and European Initiatives in the Transformation off Land Tenure in Colonial Lagos, in* NATIVE CLAIMS: INDIGENOUS LAW AGAINST EMPIRE 1500-1920 223, 225 (Saliha Belmessous ed., 2012).

[83] Under the authority of the Land Acquisition Act, the Zimbabwean government seized land for redistribution and then implemented an eviction program, reducing the number of white farms from four thousand to a few hundred. *See* Robert Home, *The Colonial Legacy in Land Rights in Southern Africa, in* 1 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY LAND ISSUES *supra* note 6 at 8, 8.

[84] In 2004, South Africa passed the Communal Land Rights Act with the goal of realizing its constitutional provision of providing either legally secure tenure or equitable redress to persons and communities whose tenure of land is legally insecure because of past racially discriminatory laws or practices. To achieve this, the Act transfers title from the state to traditional communities where a traditional council administers the land and represents the community as owner. *See* Christina Murray & Richard Stacey, *Tagging the Bill, Gagging the Provinces: the Communal Land Rights Act in Parliament, in* LAND, POWER & CUSTOM: CONTROVERSIES GENERATED BY SOUTH AFRICA'S COMMUNAL LAND RIGHTS ACT 72, 76-77, 83 (Aninka Claassens & Ben Cousins eds., 2008).

[85] VOLUNTARY GUIDELINES, *supra* note 71, at 4.3.

Given the inevitable competing claims to tenure rights, the relationship between tenure rights and livelihoods, and the state discretion to resolve those conflicts, procedural safeguards are necessary to ensure fair outcomes. The Guidelines suggest that states should consult all parties with legitimate tenure rights that could be affected.[86] This consultation requires a state to acknowledge existing power imbalances between different parties and guarantee free, effective, meaningful, and informed participation.[87] Complementary to consultation and participation is a tenure holder's right of access to impartial, competent judicial and administrative bodies in a timely, affordable, and effective fashion when there is a tenure dispute.[88] This requires serving even the most remote populations,[89] simplifying procedures,[90] providing materials and services in all languages and dialects,[91] and ensuring that rights are clearly defined and publicized.[92] Beyond these specific provisions, the Guidelines call upon the state to prevent corruption.[93]

These procedural safeguards are essential in protecting legitimate tenure-rights holders from the negative effects of large land deals. By requiring consultation and participation, the Guidelines impose a significant duty on states to identify and reach out to potentially affected parties with legitimate tenure rights,[94] and to provide them with opportunities for effective, meaningful, and informed participation.[95] Thus, for a land transaction, this would seem to require the government to provide affected parties with information about the terms of the deal, rights of redress, and the direct and indirect effects, along with an opportunity to be heard by relevant state officials.

With clear definitions of tenure rights and procedural protections in place, the Guidelines call for state facilitation of efficient and transparent markets that provide equal conditions and opportunities for mutually beneficial transfers of tenure rights.[96] These mutually beneficial transfers: (1) reduce conflicts and instability; (2) promote the sustainable use of land, fisheries, and forests and conservation of the environment; (3) promote the fair and equitable use of genetic resources associated with land; (4) expand

---

86 *Id.* at 3B.6, 4.4.

87 *Id.* at 3B.6.

88 *Id.* at 4.9.

89 *Id.* at 6.4.

90 *Id.*

91 *Id.* at 9.4.

92 *Id.* at 8.2.

93 *Id.* at 5.8, 6.9, 10.5 & 21.5.

94 *Id.* at 3B.6, 4.4.

95 *Id.* at 3B.6.

96 *Id.* at 11.2.

economic opportunities; and (5) increase participation by the poor.[97] To ensure mutually beneficial transfers, a state should simplify its administrative procedures to avoid discouraging market participation by the poor.[98] At the same time, states must prevent the undesirable impacts of land speculation, land concentration, and abuse of customary forms of tenure.[99]

B. Interactions of Free Markets with Newly Distributed Tenure Rights

Perhaps the Guidelines' most ambitious and problematic suggestion is calling for markets that provide equal conditions and opportunities for mutually beneficial transfers of tenure rights. Calling for a free market in newly distributed tenure rights that will decrease conflict and instability while also charging states to reduce the impacts of land concentration and speculation is inconsistent. Either the state will paternalistically establish safeguards, such as restraints on alienation, or it will do no more than ensure the free flow of information and inexpensive procedures for transferring title. In the latter case, existing asset and knowledge disparities, both within a host state and globally, allow for leveraging by wealthy market participants. At the same time, many Africans are some of the world's most vulnerable people, facing untreated sickness, hunger, and other ailments associated with poverty.[100] Because of their unique physical and social hardships, being less versed in free-market economics, and dealing with wealthy participants, a free market in Africa will at best prolong the reconcentration of land and associated large-scale land deals.[101]

Observing the potential negative effects associated with a free market in newly established tenure rights, state governments should use appropriate mechanisms to compensate for economic and knowledge disparities. One option would be to restrict the transfer of newly-established property rights for a time period sufficient to administer a campaign focused on educating tenure holders about their new rights, the true value of their property, the relationship between their livelihood and property, and the community threats associated with land concentration. Another option, more favorable to transfers, would be a centralized system of disclosure requirements. This would ideally occur through a government agency that would, on an individual level, explain the fair market value of the land in question as well as the potential costs and benefits of the proposed transaction based on its

---

[97] *Id.*

[98] *Id.* at 11.3.

[99] *Id.*

[100] *See* Roger E. Kasperson et al., *Vulnerable People and Places*, *in* 1 ECOSYSTEMS AND HUMAN WELL-BEING: CURRENT STATE AND TRENDS 143, 153 tbl.6.2 (Rashid Hassan et al. eds., 2005).

[101] *See* De Schutter, *supra* note 9, at 529.

terms. Assuming a reduction in corruption, centralized governmental disclosures have the potential to increase the likelihood of accurate information and decrease the likelihood of fraud, thereby ideally reducing the number of disputes resulting from transfers.

Two other relevant sets of provisions involve TNC responsibility and FDI. First, non-state actors, including TNCs, are charged with the responsibility to respect and to act with due diligence to avoid infringing on human rights and legitimate tenure rights.[102] This requires business enterprises, including TNCs, to establish non-judicial mechanisms to provide remedies where they have infringed on the aforementioned rights.[103] Second, the Guidelines suggest that home states have roles to play in ensuring TNCs are not involved in abuses of human rights or legitimate tenure rights.[104]

The Guidelines also provide for a series of recommendations regarding land investments. Generally, the Guidelines call for responsible investment[105] that should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, respect human rights,[106] and protect food security.[107] To mitigate potential costs of land deals, the Guidelines again recommend transparency, consultation, and participation.[108] Furthermore, the Guidelines call for safeguards to protect human rights, legitimate tenure rights, livelihoods, food security, and the environment from risks arising from these deals.[109] Suggested safeguards include ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved.[110] Additionally, states should procure independent third-party assessments on the impacts large deals have on tenure rights, food security, and the progressive realization of the right to adequate food, livelihoods, and the environment.[111] Finally, states should effectively monitor impacts arising from large-scale transactions and take corrective action where necessary to enforce agreements and protect tenure and other rights.[112]

---

102 VOLUNTARY GUIDELINES, *supra* note 71, at 3A.2.

103 *Id.*

104 *Id.*

105 *Id.* at 12.1.

106 *Id.* at 12.4.

107 *Id.* at 12.12.

108 *Id.* at 12.3, 12.9.

109 *Id.* at 12.6.

110 *Id.*

111 *Id.* at 12.10.

112 *Id.* at 12.14.

C. *Shortcomings of the Voluntary Guidelines and the Aura of Colonialism*

It is important to note that the Guidelines are voluntary[113] and thus soft law, meaning that endorsing states have no legal obligation to follow them. On the one hand, soft law's flexibility demonstrates respect for developing country sovereignty and allows participating states to choose and prioritize the most relevant provisions in crafting their country's solution. This flexibility allows for regional agreements that offer a means of addressing common issues faced by multiple states and can help prevent a race to the bottom in land prices, human rights, and environmental standards.[114] On the other hand, the Guidelines' nonbinding nature renders the duties assigned to TNCs, their home states, and host states unenforceable, leaving these burdens for other domestic and international laws to address.

Another criticism of the Guidelines is their aura of colonialism. Historically, international law during colonization served as a tool to justify the dispossession of communities by colonial states.[115] According to a British Surveyor-General in the late 1800s, the main object of the colonial survey was to give the settler possession of a definite piece of land that could never be overridden by a rival claim.[116] The pressure by a Western-dominated international community to adopt a Western system of tenure that creates rights easily transferable on the market is arguably colonialism, one step removed. The formalization of tenure systems in colonized states was imperative to legitimizing colonizer ownership and control of newly acquired land. The formalization of tenure proposed by the Guidelines will likely have a similar effect: Western control by state-owned or private enterprises of African resources cloaked in the legitimacy of a transaction on the free market. In the 1890s, British officials interestingly stopped their push for the development and distribution of private property rights when they realized the diffusion of land control undermined their ability to rule their growing African empire indirectly.[117] Still, implementing a Western tenure system today would likely lead to land concentration[118] and result in foreign control over large tracts of land in Africa.

---

[113] *Id.* at 2.1.

[114] *See generally* ECON. COMM'N FOR LATIN AM. & THE CARIBBEAN [ECLAC], LATIN AMERICA AND THE CARIBBEAN IN THE WORLD ECONOMY 2008-2009 79-104 (2009), *available at* http://www.eclac.org/publicaciones/xml/7/36907/Latin_America_and_the_Caribbean_in_the_World_Economy_2008_2009_vf.pdf (summarizing opportunities for regional cooperation and integration in Latin America and the Caribbean).

[115] Gilbert & Keane, *supra* note 7, at 151.

[116] Home, *supra* note 83, at 11.

[117] *See* Mann, *supra* note 82, at 239-40.

[118] *See* Cordonier Segger et al., *supra* note 65, at 179.

A foreign system of tenure also brings with it associated foreign concepts and customs. Prior to colonial influence, setting aside land for security was rarely practiced as a custom in Africa.[119] Land was too precious, too symbolically charged, and too fundamental to lineage and continued life.[120] By the 1950s, land transactions were common,[121] and it became clear that despite its purpose of increasing security of tenure, titling could reduce that security by creating the temptation to gamble with mortgages and by vesting family rights into individual hands.[122]

One scholar describes current foreign direct investment as neocolonialism because while the former colonized state is theoretically independent and sovereign, its economic and therefore political systems are externally directed.[123] Former International Court of Justice ("ICJ") Judge Christopher G. Weeramantry validated this idea when he said that economic power can break through the walls of sovereignty.[124] Similar arguments are made that modern international law is a form of neocolonialism.[125] For the purposes of this article, the degree to which these propositions are true is less important than the recognition that both investment and international law do have vestiges of colonialism. The non-coercive and flexible characteristics of the Guidelines might represent a consciousness of this truth and perhaps a small measure of corrective justice. However, to the extent that international donors and institutional actors make their assistance contingent upon the adoption of the Guidelines, a colonial aura will remain.

Given these critiques, it is worth asking whether the importation of a foreign system of tenure and associated concepts are problematic and whether realistic alternatives are available. Abstractly, land deals and the Guidelines can potentially lead to agricultural and cultural monocultures. First, the Guidelines support an unregulated system of tenure that will eventually allow for land reconcentration, perpetuating agricultural investments for the commercial farming of a small number of food staples, thus reducing biodiversity. Second, the Guidelines propose taking a predominantly Western approach in establishing land tenure, despite existing

---

[119] *See* PARKER SHIPTON, MORTGAGING THE ANCESTORS: IDEOLOGIES OF ATTACHMENT IN AFRICA 135 (2009).

[120] *Id.*

[121] *Id.* at 149.

[122] *Id.* at 154.

[123] Gilbert & Keane, *supra* note 7, at 154.

[124] C.R. Weeramantry, *Achieving Sustainable Justice Through International Law*, *in* SUSTAINABLE JUSTICE, *supra* note 65, at 15, 19.

[125] *See generally* Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT'L L.J. 459 (2005) (arguing that certain "postcolonial" aspects of international law paradoxically account for both international law's imperializing effect and anti-imperial tendency).

customary tenure systems. Thus, by advocating for the dominant tenure approach based on market liberalization, there is a potential loss in cultural diversity. One might ask, as did historian Howard Zinn, how certain can we be that what is destroyed and lost is inferior to what existed before?[126]

In light of such sentiment, one might consider customary alternatives to the individual tenure system approach taken by the Guidelines. As Kojo Amanor explains, "customary" is often understood as something utopian, characterized by communal and egalitarian values, based on group solidarity, and rooted in spiritual and moral values.[127] In Ghana, there has been a recent strengthening of "customary" community-based institutions revolving around chieftaincy (a trustee-type relationship), giving chiefs increased control of local development.[128] Despite this "customary" approach, contemporary notions of customary relations are changing based on relations between these local power elites and the state. The legitimacy of such claims to custom enables chiefs simultaneously to claim control over land, to redefine land relations, and to absolve the state from blame for expropriating the rural poor.[129] In particular, Ghanaian chiefs have used their leverage to gain disproportionate returns from cocoa farming and other land-based enterprises.[130] One report also found that 100 percent of the land deals in Ghana were done through chiefs.[131] Thus, by appealing to the underlying ideals associated with customs, those in power are able to use customary alternatives as rhetorical devices to impose control and redefine interests.[132]

Those in power during the colonial period also defined customary practice. For example, in the *Oluwa* appeal to the Privy Council in London, the court found that individual ownership was foreign to native ideas and that land was vested in communities or families, but not individuals.[133] One scholar suggests this determination was rooted in European philosophical notions more than empirical evidence.[134] If true, this suggests that true customary systems of tenure could only come from a pre-colonial history of

---

[126] HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT, at 18 (Harper Perennial rev. ed. 1995).

[127] Kojo S. Amanor, *The Changing Face of Customary Land Tenure*, *in* CONTESTING LAND AND CUSTOM IN GHANA: STATE, CHIEF AND THE CITIZEN 55, 55 (Janine M. Ubink & Kojo S. Amanor eds., 2008).

[128] *Id.*

[129] *Id.* at 78.

[130] Sara Berry, *Ancestral Property: Land, Politics and 'the Deeds of the Ancestors' in Ghana and Cote D'Ivoire*, *in* CONTESTING LAND AND CUSTOM IN GHANA: STATE, CHIEF AND THE CITIZEN, *supra* note 127, at 27, 50.

[131] COTULA, *supra* note 15, at 78.

[132] Amanor, *supra* note 127, at 79.

[133] *Id.* at 61.

[134] *Id.*

land tenure. Tapping into that historical practice and attempting to employ it would only be possible in a culturally impervious world. Globalization and modern technology would not allow for such a thing, but a hybrid version appears to be possible in some circumstances.[135] Thus, even with its colonial aura, it appears that deconcentration and redistribution of land control might be the best alternative to ensure individual autonomy and self-determination.

Overall, the Guidelines represent a noble effort to globally cultivate a Western property regime that attempts to account for the nuances in developing countries across Africa, South America, and Southeast Asia. By promoting secure individual tenure, participation, consultation, and transparency, the Guidelines are attempting to increase host-state accountability to its people. In doing so, these provisions are creating potentially irreconcilable conflicts and failing to provide substantive options and direction where they are most needed. Left greatly undeveloped in the Guidelines, possibilities for reducing the externalities associated with land deals need to be explored. To that end, it is worth examining other international laws that could alleviate these concerns.[136]

IV. THE POTENTIAL ROLE OF OTHER EXISTING INTERNATIONAL LAW AND PRINCIPLES IN COMBATTING THE POSSIBLE EXTERNALITIES OF THE GLOBAL LAND RUSH

Having recognized some of the strengths and weaknesses of the Guidelines in addressing potential issues surrounding large land deals, the next step is to consider what other solutions might be available. The first approach involves existing legal constraints in the form of international law. A second approach is to consider other tools or methods that can be adopted internationally, regionally, or domestically. In considering these possibilities, the primary focus will be on exploring and ensuring host state, TNC, home state, and World Bank accountability related to potentially

---

[135] Under the Alaska Native Claims Settlement Act, title to land of 44 million acres was transferred to twelve regional native corporations and over two-hundred village corporations. ALASKA DEP'T OF NAT. RESOURCES, LAND OWNERSHIP IN ALASKA 2 (2000), *available at* http://dnr.alaska.gov/mlw/factsht/land_own.pdf. In addition, the Act provided for a payment of nearly $1 billion to be shared among the tribes coming from both the federal treasury and oil revenue-sharing. *Id.* Scholars have critiqued the replacement of tribal, reservation, and trust relationships with corporate ones, arguing that this structure has led to a priority of seeking profit over preserving culture. Harvey M. Jacobs & Brian H. Hirsch, *Indigenous Land Tenure and Land Use in Alaska: Community Impacts of the Alaska Native Claims Settlement Act* 13-19 (Land Tenure Ctr. at the Univ. of Wisconsin-Madison, Working Paper No. 16, 1998), *available at* http://minds.wisconsin.edu/handle/1793/21937. While that might be the case, one could argue that the established structure empowered Alaska Natives with a source of revenue, allowing them to determine their own future. *See id.* at 15.

[136] VOLUNTARY GUIDELINES, *supra* note 71, at 2.2.

problematic land deals.

A. Host States

Host states have the primary responsibility in addressing land deal issues. They should take a preventative approach, focusing their efforts first at the negotiations stage and second at the implementation stage. Along with considering specific strategies host states might employ, the following section identifies and assesses international constraints that already exist on host-state behavior.

1. International Human Rights Law

For host states that are parties to them, international human rights treaties are often legally binding and have various enforcement mechanisms. Of particular relevance here are treaties relating to the rights to food, development, and protection against forced evictions. The Universal Declaration of Human Rights ("UDHR"), considered by some to be customary law,[137] provides that all persons have the right to an adequate standard of living, including food.[138] The International Covenant on Economic, Social and Cultural Rights ("ICESCR") expands upon this by expressing a right to *adequate* food.[139] The Committee on Economic, Social and Cultural Rights explains that "adequate" includes sufficient quantity and quality of food for dietary needs that is free from adverse substances, culturally acceptable, sustainable, and does not interfere with other human rights.[140]

Two soft law instruments may constrain host state behavior by providing emerging rights to development and protection from forced evictions. First, the U.N. Declaration on the Right to Development ("UNDRD") provides that development is an inalienable human right and that all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development.[141] States must focus on policies that seek constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free, and

---

[137] Sigrun I. Skogly, *The Human Rights Obligations of the World Bank and the IMF*, *in* WORLD BANK, IMF AND HUMAN RIGHTS 45, 51 (Willem van Genugten et al. eds., 2003).

[138] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 25 (Dec. 10, 1948) [hereinafter UDHR].

[139] International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

[140] Gilbert & Keane, *supra* note 7, at 146.

[141] G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/128, art. 1 (Dec. 4, 1986).

meaningful participation in development and in the fair distribution of the resulting benefits.[142] Although the UNDRD is not binding, similar principles bind African countries party to the African Charter of Human and Peoples' Rights.[143]

Second, the UDHR states that everyone has the right to own property and that no one shall be arbitrarily deprived of his property.[144] States have other binding obligations to refrain from forced evictions.[145] In an attempt to mitigate the negative effects of forced evictions, the Special Rapporteur on Adequate Housing produced the Basic Principles and Guidelines on Development-Based Evictions and Displacement.[146] In the event of evictions, these guidelines place the burden on "competent authorities" to ensure that those evicted have access to food, water, shelter, clothing, medical services, livelihood sources, fodder for livestock, and access to education and childcare facilities.[147]

Having established the three binding rights of food, development, and protection against forced evictions on African states party to the respective treaties and charter, it is necessary to consider the implications and realities of these rights with regard to land deals. Given their binding nature, all three rights should be considered and meaningfully addressed by host states before signing land contracts. States should specifically be restrained from entering into any deal that reduces or threatens to reduce food security or housing. Thus, the sale of land where informal tenure holders reside would be prohibited, unless the host state acted in conformity with the Guidelines on Development-Based Evictions and Displacement.[148] Additionally, land deals that jeopardized resident farmers' access to water or arable land would

---

[142] *Id.* art. 2(3).

[143] Gilbert & Keane, *supra* note 7, at 156. For a list of states that have ratified the African Charter, see *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and People's Rights*, AFRICAN UNION, http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf (last updated Apr. 2, 2010). Potentially overlapping rights include: right to freedom of movement and residence, property, participate freely in government, enjoy best state of physical/mental health, right to economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind, right to satisfactory environment favorable to their development. *See id.*

[144] UDHR, *supra* note 138, art. 17.

[145] ICESCR, *supra* note 139, art. 11(1); *Forced Evictions*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS [OHCHR], http://www.ohchr.org/EN/Issues/Housing/Pages/ForcedEvictions.aspx (last visited Mar. 28, 2013).

[146] Special Rapporteur on Adequate Housing, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, OHCHR, U.N. Doc. A/HRC/4/18 (2007), *available at* http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf.

[147] *Id.* art. V, para. 52.

[148] *See id.* art. I, para. 4.

be prohibited absent sufficient mitigation measures. At the same time, the ICESCR requires states to improve methods of production, conservation, and food distribution, which should also go into the decision calculus.[149] The right to development might even require states to adopt only policies improving their citizen's well-being, suggesting that decisions simply maintaining the status quo would be insufficient. This would mean that states should only enter into land deals that could guarantee an overall benefit to the host state's citizens.

The right to food, development, and protection from forced evictions would also be relevant during the implementation stage. If any of these rights were jeopardized, such violation would be a breach of contract that could be addressed locally by the host state's government. In the absence of host-state enforcement, citizens should be able to seek redress in their country's courts. However, the accessibility, adequacy, and integrity of judiciaries where the host state refuses to hold a TNC accountable seem problematic.

2. International Environmental Law

In addition to international human rights law, international environmental laws and principles arguably have an important role to play in preventing and mitigating the externalities of land deals. Given the intersection between land deals, development, and the associated human and environmental impacts, the principle of sustainable development should be considered. Sustainable development meets the needs of the present without compromising the ability of future generations to meet their own needs.[150] The non-binding Rio Declaration enshrined this and other emerging principles in the field of international environmental law.[151] The ICJ has validated the Rio Declaration in cases involving interstate disputes.[152] The Rio Declaration also acknowledges the centrality of humans in achieving sustainable development,[153] and charges states to cooperate to conserve, protect, and restore the health and integrity of the Earth's ecosystem.[154]

A final feature mandated by the Rio Declaration worth mentioning is

---

[149] ICSECR, *supra* note 139, art. 11(2)(a).

[150] United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, at princ. 3 (Aug. 12, 1992) [hereinafter Rio Decl.].

[151] *Id.*

[152] *See* Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25); *see also* In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belg. v. Neth.), 28-29 (Perm. Ct. Arb. 2005).

[153] Rio Decl., *supra* note 150, at princ. 1.

[154] *Id.* at princ. 7.

the precautionary principle.[155] The principle states that lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation where there are threats of serious or irreversible damage.[156] Some have criticized the precautionary principle for potentially depriving society of opportunities or benefits that could prevent greater harm than that prevented by initial regulation under the principle.[157] Others argue the precautionary principle is useful because of its flexibility: it encourages the assessment of potential harms and lets states regulate them in a logical fashion.[158] For example, the European Communities call for scientific evaluations that identify the degrees of uncertainty.[159] In the case of regulation, measures taken are to be proportional, non-discriminatory, consistent, based on a cost-benefit analysis, and subject to review.[160]

The principles of sustainable development, ecosystem protection, and precaution are part and parcel to the constraints imposed by international human rights law in the context of land deals. Although nonbinding, these principles should merit some consideration in both the negotiations and implementation stages given their relationship to the right to food and other human rights involving health and welfare. Prior to signing a land contract, a host state should consider whether the deal helps ensure current and future food security and a healthy environment for its citizens.

It is unclear how a court or arbitration panel would decide a dispute between a host state and investor, where the host state invokes the aforementioned environmental principles. The ICJ's adoption of sustainable development as a guiding principle in an interstate dispute suggests at least its potential applicability in the event of a breach of contract or expropriation in land deals.[161] Accordingly, host states should not rely on such claims, but incorporate them with those related to human rights.

3. Domestic Laws and Policies

In addition to invoking human rights law and international environmental principles, a host state should consider other broad

---

[155] *Id.* at princ. 15.

[156] *Id.*

[157] Robert V. Percival, *Who's Afraid of the Precautionary Principle?*, 23 PACE ENVTL. L. REV. 21, 28 (2005) (citing CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 26-32 (2005)).

[158] *Id.* at 29 n.44 (citing John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 13, 19-20 (2002) (internal citations omitted)).

[159] *Id.* at 34-35.

[160] *Id.*

[161] *See* Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25).

approaches for addressing the problems of land deals in a preventative fashion. Generally, a host state should use its domestic law to address as many of the aforementioned issues as possible, including adequate transparency, means of public participation, human rights, and environmental protection. Complementary to strengthening its domestic laws in these areas, a host state should develop its administrative capacity for enforcement.[162] Effectively negotiating and establishing fair terms that ensure investor accountability in land contracts should also be a focal point of host states.[163] Substantively, host states should strive to include terms providing flexibility, such as provisions for revisitation or shorter leases with renewability subject to mutual agreement. Ensuring this flexibility will allow host states to renegotiate more favorable terms in the case of price increases in arable land rights based on unforeseen shortages. Exacting more defined terms to guarantee host-state benefits should also be a focus. Specifically, host states should clearly define land fees, required job opportunities for citizens, terms of taxation, and other beneficial provisions, including joint-ventures and partnerships. States should also ensure that they have a means of enforcing them.[164]

Host states should also incorporate human rights and environmental protection provisions. Doing so creates a foundation for holding investors accountable and could help states fulfill their international treaty obligations. Additionally, empirical evidence shows that investors are more likely to invest in countries with strong human rights and environmental protection records.[165] Host states should also seek an objective third-party assessment of a land deal's impacts.[166] Instead of incurring the costs itself, a host state should choose the third-party and require the foreign investor to pay for the assessment. Through the inclusion of protective terms and a third-party assessment, a host state can effectively shift substantial burdens onto potential investors to provide for human rights and environmental protection.

Another viable option that host states should consider in negotiations with foreign investors is the implementation of something similar to the Build, Operate, and Transfer Industrial Policy Implementation ("BOT"). Instruments like BOT recognize that regardless of good intentions, outsiders

---

[162] If resources do not allow for broad enforcement, a host state might consider concentrating oversight over foreign investor operations. To mitigate the potential of corporate flight, a host state could wait until enough capital has been invested in a project sufficient to ground the TNC.

[163] COTULA, *supra* note 15, at 42.

[164] Where specific terms are not met, host states could include provisions allowing for increases in land fees, taxation, or other financial repercussions on TNCs.

[165] Colen et al., *supra* note 47, at 114.

[166] VOLUNTARY GUIDELINES, *supra* note 71, at 12.10.

lack the stake and knowledge necessary to assess the complexities of local conditions and to make critical choices.[167] Under the BOT approach, private sponsors are authorized to build or develop a project, which they then operate and maintain for a negotiated period of time before they transfer control to local owners.[168] The duration of the time given to sponsors to manage and operate the plant will vary with the size of the debt, risks associated with the venture, and its projected cash flow.[169] It should be enough time for the project to pay for itself and provide the investors with a reasonable return.[170] Transfer of control might be complete ownership or simply a controlling share. In either situation, investors could then reinvest money earned in new projects, while potentially receiving continual dividends from operating projects. The BOT approach has been an attractive instrument for funding infrastructural projects, such as power generation plants, toll roads, and tunnels.[171]

Applying the BOT approach to land deals and associated agricultural investments is ideal for several reasons. Negotiating for such an approach would provide guaranteed jobs to citizens and ensure that these employees would receive sufficient training for the point of transfer. Additionally, the period of foreign control should be less than the fifty to ninety-nine year leases commonly found in land deals,[172] depending on the risk and amount of investment required. Best of all, it guarantees that both intellectual and physical capital will stay in the host country after the foreign investor has recouped costs with a reasonable profit. Finally, citizen employee influence and ultimate local ownership may help alleviate human rights and environmental concerns.

4. Regional Approaches

Given developing host states' weak negotiating power, it is reasonable to inquire how they could guarantee these kinds of provisions. Until now, it has been accepted that to keep or gain investments, countries will "race to the bottom" to lower labor, health, and environmental standards.[173] A possible solution would be the development of regional treaties in the areas where the bulk of land deals are occurring. Countries of a region tend to show similar trends in country risk, terms of trade, FDI attraction, and

---

[167] Kojo Yelpaala, *Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries*, 30 NW. J. INT'L L. & BUS. 23, 72 (2010).

[168] *Id.* at 73.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] COTULA ET AL., *supra* note 27, at 77.

[173] TIENHAARA, *supra* note 46, at 22.

ranges of economic growth.[174] A regional approach would also support national efforts to promote competitiveness, leverage benefits, and achieve more ambitious goals.[175] Another potential benefit includes progress towards unification of markets in the region by stimulating intraregional trade and investment, improving the region's international position, and addressing social challenges and asymmetries.[176] Moreover, regional agreements could increase economies of scale, local supply capacity, access to markets, management of shared natural resources, and harmonization of transboundary issues.[177] Finally, such an approach can build trust that promotes equitable and fair regional economic development, increases interdependence and cost of potential conflict, and ultimately serves as an escalation prevention mechanism.[178]

These regional treaties would be used to set minimum standards for large land deals. These standards might include limitations on foreigner's ownership rights,[179] price floors,[180] limitations on access to water rights, obligations to ensure human rights and environmental concerns, caps on the amount of land that can be sold,[181] procedural safeguards, and any other stabilizing tools that would prevent a potential race to the bottom. To ensure state accountability, regional treaties should include a judicial body. The joint nature of such an approach would allow for a sharing of costs in establishing such an expert body. With 60 percent of the world's unused arable land, Africa would seemingly stand to benefit significantly from such an approach.[182]

With regional agreements in place, regional competitions may emerge

---

[174] ECLAC, *supra* note 114, at 103.

[175] *Id.*

[176] *Id.*

[177] *Regional Integration in Africa: Overview*, WORLD BANK, http://go.worldbank.org/GT6RFXKWZ0 (last visited Oct. 14, 2013).

[178] MOIRA FEIL ET AL., INITIATIVE FOR PEACEBUILDING [IFP], REGIONAL COOPERATION ON ENVIRONMENT, ECONOMY AND NATURAL RESOURCES MANAGEMENT 8 (2009), *available at* http://www.initiativeforpeacebuilding.eu/pdf/Synthesis_Regional_cooperation_on_environment_economy_and_natural_resource_management.pdf. Weaknesses in regional approaches, such as lack of symmetry between participants in power relations, benefits, communication, and information, lack of trust, and lack of ownership would have to be addressed. *Id.*

[179] *See* GRAIN, LAND CEILINGS: REINING IN LAND GRABBERS OR DUMBING DOWN THE DEBATE? 2 (2013), *available at* http://www.grain.org/article/entries/4655-land-ceilings-reining-in-land-grabbers-or-dumbing-down-the-debate (noting that foreigners will only be able to hold minority shares in land in Algeria).

[180] Subject to an objective evaluation of fair market land values based on relevant indicators, including risk, access to water, soil conditions, etc.

[181] GRAIN, *supra* note 179, at 5.

[182] Awiti, *supra* note 2.

that could arguably lead to a similar "race to the bottom." An alternative or supplementary approach would involve the creation of an expert international institution, whether independent or part of an existing organization. This expert body would gauge the fair market value of certain types of land and leases with associated water rights. Such valuations might take multiple forms, including general valuations of a unit of arable land with its accompanying access to a finite amount of water. More complex valuations may be based on the length of leases, purposes of the land use (given that different uses exhaust land and water resources at varying levels), country stability, degree of environmentally degrading activity, and other relevant factors. Similarly, such a body could be used to provide the previously recommended third-party assessment of potential land deals. While free-market rhetoric stands to oppose this possibility, such an appeal should be tempered by the reality that markets are imperfect and constantly regulated.

Such an approach would allow host states a base from which to bargain and a means for preemptively externalizing costs coming from social and environmental damage. Such an institution could also generate best practices in approaches to land investment with a greater emphasis on regulating TNC behavior. Together, regional treaties harmonizing minimum requirements and an international institution providing fair-market values could provide the bargaining power that developing countries need to meet their human rights and environmental obligations while raising the living standard among their people.

B. Transnational Corporations

TNCs are the most powerful non-state actors in the world.[183] The Institute for Policy Studies found that of the 100 largest economies in the world, 51 are corporations, while only 49 are countries.[184] These facts suggest a great need for corporate social responsibility and accountability. Corporate social responsibility requires corporations to integrate environmental and social considerations along with traditional economic considerations in their production and governance practices.[185] Corporate accountability is the requirement that corporations explain and accept responsibility for their actions.[186] Assuming TNCs are self-interested and

---

[183] Bennett Freeman, Address at the United Nations: Converging Corporate Responsibility and Human Rights Agendas: Three Reasons (June 1, 2001), *available at* http://www.commdev.org/userfiles/files/734_file_corporate_responsibility.pdf.

[184] Michael Kerr & Marie-Claire Cordonier Segger, *Corporate Social Responsibility: International Strategies and Regimes*, *in* SUSTAINABLE JUSTICE, *supra* note 65, at 135, 136.

[185] *Id.*

[186] *Id.*

incapable of effective self-regulation outside of their business pursuits, host states are in the best position to guarantee corporate social responsibility and accountability through the means described above. Beyond that, international law, TNC home states, and the World Bank have roles to play in ensuring land deals provide an overall benefit for host states.

Interpretations of international legal instruments have attempted to place binding duties on TNCs to respect human rights. For example, advocates have cited the preamble of the UDHR that imposes a duty on "every organ of society" to promote respect for human rights.[187] The guidelines produced by the U.N. Special Rapporteur on Adequate Housing mentioned above place duties on "competent authorities," putting primary responsibility on states, though explicitly recognizing corresponding duties owed by international institutions, TNCs and other corporations, and private landlords.[188] The Guidelines, too, impose explicit duties on TNCs to protect against human rights violations and environmental damage.[189]

Unfortunately, binding international human rights law exists only with regard to states and their respective people, seemingly exonerating TNCs and their home states of meaningful responsibility. This generally reduces TNCs' accountability to themselves and host states. Because developing country host states are often in weaker negotiating positions, they will likely be pressured to provide more commitments to protect investors.[190] These protective terms favoring TNCs increase developing country host-state vulnerability to human rights violations and environmental degradation.[191] Further, developing countries face a lack of administrative capacity to monitor and enforce potential violations of laws by TNCs. Thus, TNCs' foreign activities are left largely unchecked because they are not bound by international law in developing countries and they hold positions of power in land-deal negotiations with host states.

One well-known international attempt to keep corporations responsible and accountable is the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises ("OECD Guidelines"). The recently amended OECD Guidelines contain aggressive recommendations for addressing human rights violations, environmental protection, and corruption. TNCs are specifically encouraged to respect human rights, even where host states fail to enforce relevant domestic and international law or where they act contrary to such laws.[192] Regardless of

---

187 UDHR, *supra* note 138, at preamble.

188 Special Rapporteur on Adequate Housing, *supra* note 146, art. II, para. 11.

189 VOLUNTARY GUIDELINES, *supra* note 71, at 3.2.

190 TIENHAARA, *supra* note 46, at 16.

191 *See id.* at 25, 262.

192 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD],OECD

the state context, TNCs must uphold the International Bill of Human Rights.[193] Additionally, TNCs must take adequate measures for the identification and prevention of human rights violations, including mitigation and remediation where relevant.[194] Lastly, TNCs must avoid causing or contributing to adverse human-rights impacts and have an affirmative duty to use their leverage where possible to stop other actors from violating human rights (e.g., host states, other business entities in supply chain or with which it has a relationship).[195]

In the environmental context, the OECD Guidelines call on TNCs to take due account of the need to protect the environment, public health, and safety, and to conduct their activities in a manner contributing to sustainable development.[196] TNCs are to assess and address foreseeable environmental, health, and safety-related impacts associated with their processes, goods, and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them.[197] Where these proposed activities may have significant environmental, health, or safety impacts, and are subject to a competent authority, TNCs are to prepare an appropriate environmental impact statement.[198]

Other substantive provisions of the OECD Guidelines also address corporate accountability. Specifically, the OECD Guidelines provide for a system of National Contact Points ("NCP") that can hear grievances from any interested party.[199] If a complaint merits further attention according to the OECD Guidelines,[200] the NCP acts as a mediator and seeks advice from relevant parties.[201] If there is a resolution, the NCP issues a report, identifying the issues raised, procedures taken, and, if the parties agree, the terms of the agreement.[202] Finally, in the event of no agreement, the NCP will publish a similar statement with its recommendations based on the OECD Guidelines.[203]

Although the OECD Guidelines have been criticized for lacking the binding force necessary to hold TNCs directly responsible for their

---

GUIDELINES FOR MULTINATIONAL ENTERPRISES, art. IV, para. 38 (2011), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf.

193 *Id.* art. IV, para. 39.

194 *Id.* art. IV, para. 41.

195 *Id.* art. IV, paras. 42-43.

196 *Id.* art. VI.

197 *Id.* art VI, para. 3.

198 *Id.*

199 *Id.* at Procedural Guidance I(C).

200 *Id.* at Procedural Guidance I(C)(1).

201 *Id.* at Procedural Guidance I(C)(2)(a-d).

202 *Id.* at Procedural Guidance I(C)(3)(b).

203 *Id.* at Procedural Guidance I(C)(3)(c).

actions,[204] these guidelines do create a forum of accountability through transparency of complaints filed and non-confidential resolutions. Such a forum, granting standing to all interested parties, has the potential to rectify the problem of host-state failures to challenge foreign-investor actions related to land deals. While there are no instances of interested parties using the NCP process to address externalities associated with land deals, there are comparable examples in challenges to foreign mining operations.

For example, in the BHP-Billiton-Cerrejon dispute, an Australian lawyer lodged a complaint on behalf of a Colombian legal practitioner and multiple affected residents.[205] The complaint alleged violations of the human rights and environmental provisions of the OECD Guidelines.[206] Specifically, the complaint alleged that the owners and operators of the Cerrejon coal mine attempted to depopulate an area by destroying the township of Tabaco and through forced expulsion of its population.[207] The complaint also alleged that five other communities suffered from the effects of a policy designed to making living in the area unviable.[208] Through NCP mediation and consultation with a third-party expert body, the parties reached an agreement whereby BHP-Billiton agreed to pay indemnities of $1.8 million and a further $1.3 million for sustainable projects.[209] BHP-Billiton also agreed to ensure that Cerrejon will provide environmental information to the local communities in a meaningful way that is consistent with international best practices.[210]

There are multiple other examples where the NCP process has provided resolutions between TNCs violating the OECD Guidelines and interested complainants.[211] In the context of land deals, the NCP system provides a meaningful avenue for redress at the implementation stage, allowing any interested party to raise concerns relating to human rights and environmental protection. However, in Africa, where there are only two NCPs, in Egypt

---

[204] TIENHAARA, *supra* note 46, at 31.

[205] Statement by the Australian National Contact Point, BHP Billiton – Cerrejon Coal Specific Instance, at para. 1 (June 12, 2009), *available at* http://www.oecd.org/daf/inv/corporateresponsibility/43175359.pdf.

[206] *Id.* at para. 2.

[207] *Id.* at para. 3.

[208] *Id.* at para. 4.

[209] *Id.* at para. 15.

[210] *Id.* at para. 32.

[211] *See* Statement by the Netherlands National Contact Point, Final Report of the National Contact Point for the OECD Guidelines in the Netherlands on the Specific Instance Notified by CEDHA, INCASUR Foundation, SOMO and Oxfam Novib Concerning Nidera Holding B.V., at 1-2 (Feb. 3, 2012), *available at* http://www.oecd.org/daf/inv/mne/Netherlands_final_statement_nidera_03-02-2012.pdf (alleging non-observance of health and safety conditions and wages, and resolving the issue through Nidera's adoption of a human rights policy that includes a human rights due diligence procedure).

and Morocco,[212] there will be limitations on individual access.

The problems arising from lack of TNC accountability continue to be difficult. International law, including the OECD Guidelines, has a role to play, but its efficacy has not been determined for land deal issues. Some advocates have suggested TNCs should monitor themselves. Others have argued that consumers should keep TNCs accountable. While these two approaches may have some value, alone they are insufficient. As suggested, assuming increased negotiating power, host states are in the best position to ensure TNC responsibility and accountability in their jurisdiction. Similarly, home states and the World Bank should be meaningful checks on TNCs.

C. Home States and the World Bank

The role of home states and international institutions in monitoring TNCs remains elusive. Each of these actors has some incentive and opportunity to help protect human rights and the environment as they relate to land deals, but their political will and effectiveness are questionable. Interestingly, TNC home states are often regular advocates for human rights and environmental protection. This suggests that, to maintain their international reputation, these states have an incentive to appear to be properly regulating their TNCs. For example, consider the United States' Alien Tort Claim Act ("ATCA") and Foreign Corrupt Practices Act ("FCPA"). The ATCA grants the federal court jurisdiction over any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States.[213] The FCPA deters improper inducements to foreign officials by TNCs organized under U.S. law or whose principle place of business is in the United States.[214] Both acts appear to provide for some TNC accountability via home state regulation. The ATCA can levy potentially enormous judgments for tort claims, and the FCPA contains penalties per violation as high as $2 million for entities and up to $100,000 with five years of imprisonment for an individual.[215]

While laws like these have potential relevance in redressing externalities associated with land deals, including human rights violations, environmental protection, and corrupt practices, their impact will likely be minimal because of the costs associated with enforcement. Specifically, requiring TNCs to maintain higher standards relating to human rights, the environment, and corruption equates to less profit for TNCs and less revenue

---

[212] *See National Contact Points*, OECD, http://www.oecd.org/daf/inv/mne/2013NCPContactDetails.pdf (last visited Mar. 28, 2013).

[213] 28 U.S.C. § 1350 (2012); *see also* Kerr & Cordonier Segger, *supra* note 184, at 141.

[214] STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 3 (2d ed. 2010).

[215] *Id.* at 80.

in taxes and an associated reduced economic power in the global arena for home states. Another cost comes from diverging state priorities. For example, one home state TNC might be domestically required to protect against human rights violations and environmental degradation, while a competing TNC from a different home state might have no similar obligations, giving it a competitive advantage. This creates a "race to the bottom" regarding the degree of liability that will be imposed by home states on their TNCs for their actions abroad.

Another potential pressure facing home states is the risk of creating global incorporations of convenience. This means that when domestic compliance costs for TNC actions abroad grow to a certain point, there will be an incentive for the TNC to uproot itself from its current home state and replant itself in the most beneficial jurisdiction.[216] In other words, the more pressure a home state places on a TNC, the more likely the entity is to relocate, explaining why well-intentioned laws that impose liability on TNCs may not be adequately enforced. In fact, the Supreme Court of the United States recently held that the ATCA no longer applies extraterritorially, gutting its potential relief in this context.[217] Thus, while home state regulation could have a partial role in redressing the negative effects from land deals, in reality this role will be almost non-existent.

The World Bank's significant role as a substantial lender for agricultural investments associated with land deals puts it in a unique place to demand accountability from TNCs. Yet, neither the Consultant nor Procurement Guidelines impose any human rights or environmental obligations on applicants.[218] As a result, scholars have offered a clear prescription modeled after the world's largest multilateral lending institution,[219] the European Investment Bank ("EIB"). The EIB must integrate European Union ("EU") laws related to human rights and

---

[216] See flags of convenience with fisheries as an example. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 808-10 (4th ed. 2011). Note, this effect might be preventable through a jurisdictional hook like the principle place of business standard in the FCPA. *See* DEMING, *supra* note 214, at 11.

[217] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013).

[218] *See* WORLD BANK, GUIDELINES SELECTION AND EMPLOYMENT OF CONSULTANTS BY WORLD BANK BORROWERS (rev. ed. 2010), *available at* http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ConGuid-10-06-RevMay10-ev2.pdf; WORLD BANK, GUIDELINES PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS (rev. ed. 2010), *available at* http://siteresources.worldbank.org/ INTPROCUREMENT/Resources/ProcGuid-10-06-RevMay10-ev2.pdf.

[219] Nicolas Hachez & Jan Wouters, *The Role of Development Banks: The European Investment Bank's Substantive and Procedural Accountability Principles with Regard to Human Rights, Social and Environmental Concerns*, *in* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS, *supra* note 47, at 292, 302.

environmental protection in its policies, programs, and projects.[220] Accordingly, signatory banks can only legally finance projects that comply with the human rights and environmental principles found in EU law.[221]

In an effort to achieve a similar goal, a group of experts developed the Tilburg Guiding Principles for the World Bank, IMF and Human Rights.[222] These principles assert that as an international legal person, the World Bank has an international legal obligation to take full responsibility for human rights respect related to its projects, policies, and programs.[223] This legal obligation arises from member states' obligations to comply with international human rights.[224] Such an approach would include integrating human rights considerations into all aspects of their operations and internal functioning,[225] requiring the World Bank not to finance projects that contravene applicable standards.[226] Finally, it would require the World Bank to evaluate the human rights impact of their projects and policies, both *ex ante* and *ex post*.[227] The adoption of this approach is ideal because it would offer host states protection from human rights violations at both the negotiation and implementation stages of land deals.

VI. CONCLUSION

For better or worse, free-market economics is penetrating the most remote regions on Earth. Developing countries are facing a sink or swim scenario, and FDI has the potential to be a life preserver. Understanding that attracting capital alone is insufficient to achieve human development, this article has attempted to identify and address both specific and broad problems associated with land deals in Africa. It has done so by taking a hard look at the implications associated with the adoption of the Voluntary Guidelines on the Responsible Governance of Tenure as well as the role existing international law might play. This article has offered specific suggestions to mitigate the potential externalities of land deals and maximize potential benefits, focusing on empowering host states through domestic and regional tactics and the creation of an expert international body. At the same time, this article has focused on methods for taming TNCs and the World Bank into protecting human rights and the environment and ensuring fair

---

220 *Id.* at 338.

221 *See id.* at 307-16.

222 Willem van Genugten, *Tilburg Guiding Principles on World Bank, IMF and Human Rights*, in WORLD BANK, IMF AND HUMAN RIGHTS, *supra* note 137, at 247, 247-55.

223 *Id.* at para. 5.

224 *Id.* at para. 27.

225 *Id.* at para. 24.

226 *Id.* at para. 30.

227 *Id.* at para. 38.

land deals in developing countries. Collectively, these analyses have confirmed that ensuring land deals and their associated agricultural investments result in an overall benefit for human development in host states will require concerted and complementary efforts by each of the key actors considered, especially the host states.