Unregulated Land Grab Through Legal Processes

A review of the different claims to land

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1. Acronyms

TNC – Transnational Corporation  
FDI – Foreign Direct Investment  
VGGT – The Voluntary Guidelines on the Responsible Governance of Tenure  
PRAI – Principles for Responsible Agricultural Investment  
BIT – Bilateral investment treaty  
NGO – Non-governmental organization  
FAO – Food and Agriculture Organization of the United Nations  
RGP – The Ruggie Guiding Principles  
OECD Guidelines for MNC – Organization for Economic Co-operation and Development guidelines for Multinational Enterprises

2. Definitions

**Soft law:** No legal duties, only recommendations and guidelines on how to invest sustainably in relations to human rights. Soft laws are non-binding. ¹

**Land grabbing:** Large-scale land acquisitions, the buying or leasing of large pieces of land by either domestic and transnational companies, governments, or individuals. ²

**Hard law:** Entitlements that can be imposed through legal processes. General statement of principles does not fall under hard laws. Determines laws on social relations in the prospect of TNC’s governments and local groups.³

**Weak Governance:** In the land sector includes lack of tenure security for local communities and lack of transparency regarding land transactions, both of which facilitate land grabbing because local communities cannot effectively defend their properties interests.⁴

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³ Ibid. P, 102-103.  
⁴ Ibid. P, 93.
The host state: Is the state where the investment takes place.

Weak states: Are defined here as; states which have difficulties with carrying out acceptable macroeconomic or fiscal policies that effectively manage the state’s natural resources and the protection of smallholder’s rights. Land and water are included within natural resources, private enterprise activity carried on within the state is also included.  

3. Introduction

The rise and deepening of economic globalization has highlighted a closer connection between international arrangements that govern global capital flow on the one hand, and acquisition of land and natural resources on the other. These shifts of political economy underpin how international investment law has created contrasting social dimensions of how land rights remain embedded in many societies.  

As national and international regulations reflect the governance of land, the legitimacy to mediate among competing land claims will depend much on how these regulations can recognize the different values that society and actors attaches to land. Accordingly, this research will examine the multilevel system of governance covering the growing actions of commercialized land relations in developing countries. By looking at the interface between smallholder’s rights to land and large-scale land deals there is a growing concern that this relationship creates asymmetric rights in favor of the investor. With a closer inspection, it is also crucial to understand the host state’s facilitation of the investment as it determines to a high degree the outcome of land allocation processes.

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4. Setting the scene – A background of landgrab

In 1885, the treaty ‘general act’ was founded in Berlin. It was a conference hosted by the superpowers in Europe with the purpose of dividing Africa within European countries that were assumed to possess the greater economic relations. In the preamble of the treaty it says the following: *Wishing, in a spirit of good and mutual accord, to regulate the conditions most favourable to the development of trade and civilization in certain regions of Africa and concerned as to the means of furthering the moral and material well-being of the native populations.*  

These words illustrate how even the most brutal acts can be transformed into noble language.

The colonization of Africa was the first large land grab of Africa’s land. The colonizers readapted customary systems to make it easier for settlers and companies to acquire land. For instance, customary laws were interpreted as establishing only use rights, rather than ownership, over land. It is possible to draw some parallels between the colonization of Africa and the land grabbing of Africa that occurs today. The colonial land deals have left profound scars that still shape important aspects of today’s land deals. Important features of colonial land legislation, such as the central role of the government in land relations, the framing of local land rights as mere use rights subject to proof of productive occupation and the legal devices to make land available to outside investors illustrates African land law.

The second large land grab was state led land acquisitions by the independent governments and not by the colonial regimes. The state farms and the expropriations occurred in the 70s and 80s, a couple of years after, most of the countries in Africa had gain their independence. The decolonization rarely resulted in stronger land rights for rural people. Many African countries provided legal systems that were geared towards centralizing resource control in the hands of the states and opening up resources for outside investors rather than protecting the lands right of the

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8 Ibid. P, 16.
local people. Even in some countries the local people's right to land became worse than during the colonial period. After the independence, many of the African countries became single party-regimes or military dictatorship. During this time, many African states took control over the land and the national economy, eroding the land rights claimed by the rural people. Many of the newly independent states used the same legal fictions and devices that the colonizers used to weaken the land claims made by the rural people.

In recent years, the competition for high valuable land has increased. Landholdings has become more common and the social differentiation between small-scale producers has increased. In recent time, local elites and urban groups have manipulated legal processes and customary systems to grab land. These processes of land grabbing from below are different from the large-scale land grabs that was triggered by colonial and post-independence policies. This is a result of deep-rooted socio-economic changes more than deliberate government policy.

Today’s transnational land deals enter local arenas characterized not by united, undifferentiated communities but rather by highly stratified groups with different interests. Differentiated arenas basically means that the land deals will tend to produce different outcomes, with some groups being better place to capture the benefits and others will lose. The existence of powerful local chiefs that gains from the land deals for personal gain is an important factor of today’s large scale land acquisitions. It was first until mid-2000s that African land attracted large interests from outside investors. Many companies rushed to sign large land deals for plantation agriculture. Weak African institutions has made it possible for investors to take advantage and acquire land, the lease contract that is signed often is for 99 years. Western companies remain a big player in African land deals but new powers have come to rise such as, China, India, and Brazil. The global rush for African land triggered a profound reconfiguration of local land dynamics and of international relations among sovereign states and transnational corporations.

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10 Ibid. P, 22.
11 Ibid. P, 24
12 Ibid. P, 33
13 Ibid. P, 34
Throughout the history, the law has enabled the most powerful states to seize common lands or legalize illegal land grabs. Karl Polanyi discuss in his book “The great Transformation” how the legal processes assist the progress of artificial reconfiguration of land and labor as tradable commodities before the industrial revolution and during. This resulted in setting aside elites of land earlier held in common enclosures and in the creation of capitalistic labor markets. Because of today's global land rush spreads, the law provides different possibilities for negotiation and contestation between competing actors and authorities. Local tenure systems, national legislation, international law and transnational legal processes frame these legal platforms.

Many of the large-scale land deals in Africa today are TNC-driven and in some cases foreign-government driven. They are almost always in close partnership with the national government. There are even cases when national governments actively are searching around for possible land to investors. Due to the food crises in the mid-2000s a revaluation of land has occurred. Land has now a more economic value which do not bode well for poor rural workers in Africa.14

5. Theory – Polanyi’s Great Transformation

“Seven decades after its first publication, Karl Polanyi’s Great Transformation remains one of the most insightful readings about the socioeconomic changes associated with the industrial revolution, and the ways in which law facilitated, or countered moves towards the commodification of land at that time” 15 Following this statement by Cotula, the global commodification of land today, includes competing claims into contest which can be analyzed through the same kind of patterns - how different laws transacts into the society. Therefore, Polanyi work may still show some relevance as followed by this thesis.

From the beginning, or for most of human history, Polanyi reasoned that the economy was a part of the society. Economic relations were not assumed to be driven by rational individual maximization or profit, nor did they mainly correspond to free markets and market prices.

15 Ibid. P, 1607.
Polanyi argued that economic relations were rather subordinated to non-commercialized modes of social integration. For example, the larger part of the consumption was based on sustenance farming and production. Market exchanges always existed, but demand and supply created routes driven through the wider socio-political relations between groups. These dynamics varied across time and so did the importance of having economic organizations, but primarily, the economy only played a part of the society. 16

The Great Transformation argues that the profound changes that took place in England in the 18th and 19th century answered for new dynamics in history of humanity, not only because it brought technology into new ideas but also because it changed the structure of how human societies were organized. Government interventions in land, transformed the conventional characteristics of close connections between society and people towards land ownership concentrated by elites. The emergence of the capitalist economy and the political interventions placed markets in the center which developed new mechanism for sourcing goods and services. As this had major implications, Polanyi argues that the society (social relations) were now embedded within the economy in order to function according to the market system. This created commercialized tensions on land as it could be freely bought and sold on the market. According to Polanyi, this was further exercised through lawmaking and establishment of several acts, including legal reforms which extended the freedom of contract to land, especially for elites, to legitimize their claims. 17

Furthermore, Polanyi sees law making as the emergence of a particular form of interventions by the established authorities in economic relations. Firstly, to facilitate the creation of commodities, and then secondly to reinstall market forces into the society. This two-folded undertaking frame the relationship between law and social change, as it can both facilitate and restrain commodification. Interestingly, legislative efforts only, may cause unproductivity and social processes to stagnate. Instead, to reach social acceptance of these efforts, it should also be driven

16 Ibid. P, 1607-1608.
17 Ibid. P, 1607-1608.
by strong political forces (trade unions and land governance institutions etc.) that pushes either
towards social inclusion or commodification. 18

This hints towards that in order to secure legislative action, the law has to be connected to
mobilized masses which will hinder attempts by lawmakers to reverse their decision out of fear of
losing public support.

Some scholars have criticized Polanyi’s historical interpretation, arguing that he did not see the
full picture of market relations in pre-industrial societies and that much of the non-market
organizations across history could still be explained in terms of rational economics and
transactions. This includes that markets processes have rarely been empty of social relations and
thus culture and politics are also important domains of these processes. Rather, the organization
of economies have had multiple shifts, withdrawals, and advancements, in different markets
which is reflected in patterns of both social inclusion and commodification. Critics therefor argue
that social inclusion and commodification may coexist and are usually a matter of context rather
than contradicting factors. 19

In our own words, Polanyi’s historical interpretation of the role of law in the matter of land
focused much on national legislation. In present time, transnational land deals represent the same
commodified tendencies but in a globalized world with international investment law as a case
point. Concerns about land ownership and market are nevertheless still regulated in a great
manner by national land laws, as it plays an important role in mediating between social inclusion
and commodification. It is therefore in the interest of this paper to build from Polanyi’s work, but
to extend it, beyond the implications of only national laws. By also analyzing how international
laws can shape reconfigurations of social inclusion or commodification. This study will also
attempt to challenge the theory to find out if national laws as the mediator, in relation to
international laws can provide both inclusion and commodification, rather than effects of
contradictions.

18 Ibid. P, 1608.
19 Ibid. P, 1609 -1610.
6. Methodology

The methodological approach of this research focuses on thoughts related to an existing theory to frame a deductive study of combining legal and social studies. By analyzing hard and soft laws, politics, and social relations, it is in the interested of this research to understand how it practically applies to the imbalances of law regulating different actors. To do so, we will examine a few case studies where land grabbing implies multiple factors of both positive and negative results. But as we will talk in terms of laws and guidelines that regulates the land grab phenomena, case studies will mainly be used as a model to strengthen our thesis.

As this research will work through chosen academic journals, legal texts, laws, guidelines, and case studies our interpretation will answer for the epistemological product of this study. When it comes to laws and mainly guidelines (soft laws) we will use a critical discourse analysis on a macro-level as it empathizes societal power relations through language. The discourse also contributes towards a deeper understanding of social identity as well as the process of knowledge.

Extensively, this kind of approach often sets out with a view that the society or the global system is unequal and that is the main idea when interpreting texts. In other terms related to this research, one can argue that the language used in soft laws for responsible investment can be broad and vague, and therefor left to interpretation in its natural form. In fact, investors can use these soft laws to either show positive incentives towards the host state or neglect them, as soft laws explain a certain activity. Either way, this will have impacts on both local and national level. In this study, we have chosen to critically examine the practical implementation of how investors adhere to them. However, since states and investor rely on hard laws as well, we will

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use the lens of an analytical jurisprudence to see the relationship between law and power/sociology. This approach involves investigating the essence of law, by differentiate it from other systems as norms, guidelines, and ethics (non-laws).  

It is also important to stress that this research, as it follows our perception on how the social world can be studied, are not essentially linked to the complete picture that the field of land grab comprehends. As it is derived from a qualitative study, it will rather illustrate a general conclusion of subjective knowledge related to our problem formulation outlined in the introduction.

In further terms, this methodological approach can be descriptive and context specific, but can however be too vague in explaining quantitative global trends that stretches to other regions, as this study focuses only on a small number of countries in Africa. Nor does our approach comprehend the scope of any statistical observation, but is rather limited to ‘on ground’- text observations.

7. Result – The investor & host state

The result of this research which will be categorized into two sections (the investor & host state) will outline how actors rest on different norms to back their claim to land. It is therefore imperative to understand these dynamics and thus the different frameworks that reflects transnational land deals. The host state for example, mobilizes their formal ownership to land under national laws in order to attract foreign investment that promotes development. At the same time, they have the responsibility to mediate with the public consent to not undermine human rights. Meanwhile the investor utilizes these opportunities under national law, non-binding principles and the protection provided by international investment law to acquire long-term practices over the right to land. This indicates also that investors can limit opposing public action if smallholders get segregated from the affairs.

21 Internet Encyclopedia of Philosophy. Online: http://www.iep.utm.edu/law-phil/
The investor

*International investment law – a safeguard*

Investors do need effective safeguard against arbitrary treatment, as international law explains that the symmetry of power belongs to the host state. Moreover, since it has the sovereign right to change and enact laws, implicate policies, or operate to such an extent that it can adversely impact investors behaviors, this notion is also emphasized by adjudicators in tribunals.\(^{22}\)

In further terms, international investment law works to protect foreign investment from host-state interference with the purpose of encouraging investment flows. It is grounded on international treaties and customary (*opinion juris*) international law. International treaties are mainly conducted between two states (BIT’s), but have also been increasingly involved in regional agreements that includes an investment chapter. The text of investment treaties differs, but generally it involves state obligations to respect foreign investment to specific legal standards and provisions. These standards also allow investors to get compensation through investor-state arbitration, leading to a binding arbitral decision if the host state would impact the investment in negative ways.\(^{23}\)

Many treaties illustrate comparable linguistics and a pattern of the same underlying standards and provisions. Commonly used terms of treatment include:

- *National treatment and most-favored-nation* clauses which normally require the host state to treat foreign investors no less favorably than their own nationals or companies under similar services. This also implies to nationals of other states.

- *Fair and equitable treatment* clauses is another one which rests almost under the same category as the above principle. Extensively, it stresses that the host state needs to treat foreign investors


\(^{23}\) Ibid. P, 10.
according to standards of equality, regardless of the rules that applies under national law or if the laws are deficient.

- **Full protection and security** clauses, require, and are commonly interpreted, to ensure that the host state take measures to ensure the physical integrity of foreign investors.

- **Stabilization** clauses are not widely used in all investment treaties but in contracts that are more sophisticated it works to protect the foreign investor from adverse law implications. The notion is emphasized so that the investor’s project would not be harmed if the host state wants to change it laws to protect the public interest. 24 25

- **Intervention and expropriation** clauses, works to limit the host state capability to act with measures that can negatively impact the foreign investor. If the host state feels that the investor lack commitment in accordance with the agreement and want to take measures, it must be based on specific public purposes, be non-discriminatory and follow standards of (prompt, adequate & effective) compensation linked to market value. However, once a deal is established it can be very difficult for the host state to adverse the impact of the investment due to sensitive political questions and economic resources. 26

Furthermore, with exception to these treaties, international investment law tends to stress land as a commercial asset, tradeable, and therefore conceptualized in monetary terms. This method to define property rights has also been highlighted in arbitral tribunals with the notion that international investment law protects the interests and rights of all features that can be evaluated in financial and economic terms. The tribunal in *Amoco International Finance Corp v Iran* for example, noted explicitly “expropriation [...] may extend to any right which can be the object of a commercial transaction, i.e. freely sold and bought, and thus as a monetary value” 27

This case concerned the expropriation of oil, but does illustrate how the defining nature of

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24 Ibid. P, 10.
property rights are protected under international investment law and how it can be transacted into monetary terms.

In addition to how land is conceptualized, there is also two other aspects that need to be considered regarding international investment law. The first one relates to which extent it can facilitate the acquisition of land by foreign investors. Customary international law tells us that the host state has the sovereign right to regulate admission of foreign investors within their territory. These regulations are assumed to be the drivers of land relations and state sovereignty, as it can restrict and admit the right of foreign investors to acquire land. In that sense, investment treaties are only a concern once a deal is established. However, some investment treaties can create enforceable duties on the host state to facilitate the entry of foreign investors with regards to the clauses mentioned above. Specifically, in a pre-establishment treaty, it requires the host state to treat the foreign investor no less favorable than its own nationals, and to nationals of other states with respect to the establishment, acquisition, or expansion of an investment model. These clauses do not constitute itself as the case point of liberalization of investment flows, however, these dynamics means that in practice they are entitled the same rights as provided by nationals and thus trigger a transformation in landholding patterns.  

The second part to mention of international investment law concerns the greater protection of it and the host state’s regulatory power. As mentioned in the intervention and expropriation clause, investment treaties protect foreign investor against adverse conduct from the host state. If the host state takes measures that disturb the investment in any way, they would have to compensate the project. However, since in many developing countries the public finances are scarce, it could instead hinder the host state from taking measures. This can imply regardless if it concerns the protection of human rights or other features that the investor violates in the agreement.  

The fair and equitable treatment clause exemplifies further the tensions between regulations of the host state and investment protection. This clause by investment treaties stands for most of the

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28 Ibid. P, 1620.
29 Ibid. P, 1621.
claims brought forward in tribunals against states. Typically, it dictates the host state to treat foreign investors to a minimum international standard of fairness, which needs to apply regardless of how the host state adhere to domestic investment under its national law. This also works as a safeguard for the investor if the domestic laws are deficient.  

When it comes to assessing, what is *fair and equitable* it can be a question of debate. In some tribunals, this clause has been interpreted extensively with the decision to put a penalty on the host state to compensate the foreign investor due to adverse business impact. The decision, or the central requirement of what is fair and equitable often follows the notion that there are certain legitimate expectations that the investor rests on when doing an investment. The host state should therefor adhere to principles of transparency of government conduct, and predictability and stability of a regulatory framework. However, some observers have proclaimed concerns about these broad interpretations of clauses, since it can to a large degree constrain the practice of sovereignty in a host state. If the host state emphasizes regulatory powers that tries to pursue legitimate action for the public security and interest but at the same time undermines investor’s expectations it could be a matter of government inconsistency. In these terms, international investment law could hinder the ability of a host state to regulate factors of commodification or social inclusion. But, as some critics would argue, these dynamics could also be used by a host state in a strategic way to justify inaction, thus fading their limited political will and interest of changing the scene.

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31 Ibid. P, 1621-1622.
32 Ibid. P, 1622.
The responsibilities of the investor – non-binding principles

The investor does need to respect domestic laws, thus also respecting human right laws. However, this has been much debated since there is tendency that the investment takes place in countries were governance infrastructure is reflected by weak legal procedures and a lack of enforceable institutions to protect citizens. In that sense, international investment law overprotects the investment, meanwhile there is a lack of enforceable instrument that can regulate the investment. As Cotula proclaims “International human rights law is still far from offering people a degree of legal protection comparable to that which international law accords to foreign investment [...] The resulting legal regime is more geared towards enabling secure transnational investment flows than it is towards ensuring that these flows benefit local people in recipient countries” It is clear from this that international investment law and human right laws works at different speeds and different levels. There are however a series of non-binding guidelines and principles that the investor is assumed to adhere and respect.

The VGGT specifically requires large scale investors to respect human rights and tenure rights, which goes in line with also the right to food and indigenous people’s rights. This guideline further proclaims that the investor should conduct appropriate management assessments during the processes of the investment in order monitor its activities so they are not violating these rights. This also includes that the investor should put in grievance procedures for any local smallholder so they can file complaints. The PRAI is another guideline that also suggests that the investor should actively participate in monitoring the positive and negative effects of the investment. Other guidelines that also stresses the importance of a sustainable investment project is Global Compact which recommends investors to work towards fulfilling the broader UN goals. That is in this concept, right to food, indigenous people’s rights and property rights which is further extended within the FAO’s principles. The RGP too advocates responsibility on foreign investments with respect to addressing adverse impacts, violations human rights before it occurs.

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and commit to a high level of management in all sectors.  

Lastly, the OECD Guidelines for MNC’s recommends that foreign investors respect the human rights of local smallholders and indigenous peoples affected by their actions. They also encourage local capacity building by integrating communities of their work, in order to increase employment opportunities, as well to provide technology to increase local production. This also implies that the investor should respect the local food demand and sustenance farming.

Interestingly, this guideline also argues that the investor should not push for fallacies or gaps in the BIT to protect themselves from national human rights legislation and should complement this by having a monitoring system that controls the implementation. Extensively, foreign investors and TNC’s should have their own public policy on human rights which tells how they are going to conduct their project activities in accordance with smallholders. This policy should however go beyond the national legislation on human rights of the host state, moreover, it should also comply with internationally recognized human right obligations and be approved by specific authorities that stipulates these questions.

Despite the considerable effort of all these soft laws, none impose legally binding obligations on foreign investors to conduct their activities in a way which does not adversely impact the host state’s citizens. In this context, the structural features of hard law which has the varying abilities to exercise rights matter more than guidelines in the matter of competing claims of resources. As Cotula argues, “entitlement that can be credibly enforced through legal processes, not general statements of principles, determine the shadow that law cast on social relations – and on negotiations between companies, government, and local groups”.

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37 Ibid. P, 216.
38 Ibid. P, 216.
It should still be noted though, that these general statements could still put a large degree of moral pressure on the investor if it tends to ignore them, especially in cases where activities infringe human rights.  

The Host state

The responsibilities of the host state and its implication

Land grabbing has become a large problem in recent years, developing countries has seen their land been sold out by their own governments and the one which suffer from it is their own population, especially the small-scale farmers. One of the reason to this has been a rising world population which has put pressure on the small-scale farmers due to the demand of food has increased. Developing states had to alleviate this pressure and they did that by attracting foreign investors.  

Though this is a risk for the host state. The outcomes of foreign investment differ, the positive aspects are, tax income, new technologies, higher land productivity and foreign currency from the investment and debt free growth. The negative aspects of foreign investments outplay the positive aspects.

Many investors fail to commit to the investment guidelines, they abide the domestic legislation and relocate farmers from their land and leaving only marginal land for domestic production. 

Basically, the farmers lack tenure rights. The host state is often maltreated due to bad structure and the lack of legitimate political institutions. The requirements that the investor put on the host state are often too much due to ineffective administrations from the host state. The result of this

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41 Ibid. P, 189.

42 Ibid. P, 190.
lack of capacity at the host state leads to that fundamental rights of citizens within the host state is violated such as their physical security and social welfare.\(^{43}\)

Article 25 paragraph 1 of the universal declaration of human rights state: (1) *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*\(^{44}\)

The citizens right to food are imposed in international human rights law. The host state’s duty is to ensure that everyone or in a community always have access to adequate food or procurement of food. This basically means that it is imposed in international human rights law that every citizen of a country should have the right to food and that also mean that the producers/farmers have the right to use their land and exploit natural resources on that land for feeding themselves.\(^{45}\)

Article 17 of the universal declaration of human rights states: (1) *Everyone has the right to own property alone as well as in association with others.* (2) *No one shall be arbitrarily deprived of his property.*\(^{46}\)

There exist regional charters to protect indigenous people economic, social, and cultural rights. Such as the African charter on human and peoples right called the Banjul charter adopted by the African union. Article 14 of the Banjul charter recognize the right to property. Which include protecting any local farmer from land grabbing. This state that the farmer should have land tenure rights. The problem is that this article also conclude that it is possible for the state to encroach

\(^{43}\) Ibid. P, 192.


these rights if it is in the states interest. When this occur, the affected citizens should be effectively compensated for their loss in accordance with national law. 47

Article 17 paragraph 3 of the Banjul charter requires state to respect cultural and traditional ways of life. This includes the use of specific agricultural productions methods.48

Carefully managed foreign investment can alleviate weak host states food security but the problem is that such states often lack strong domestic governance structures to manage the foreign investor, and therefore restricting the ability for the state and its citizens to fully benefit from the investment. The result of this can be a net reduction in national food security within the weak state. Other problems can also arise. Such as the impact of the weak states food security when the foreign investor supports the growth of cash crop that substitute local food production.49

This problem occurs when the growth of cash crop exports does not generate enough jobs and foreign exchange to enable the state to buy food to offset the loss of its domestic production. Another problem that occurs is when large tracts of land are uncultivated.

In many of the cases land may be uncultivated because it is unsuitable for cultivation rather then it has yet been exploited by the host states agricultural producers which the investor thinks. An important aspect of this is that “uncultivated” is often used as a synonym for unoccupied from the investor. In many cases this kind of assumption are false, the problem is more that it is difficult for the people to assert their right to the land. One of the reason to this could be that the land has been used collectively for the benefits of local communities and where the ownership of the land has not been historically delineated between the state and farmers or different indigenous groups.50

50 Ibid. P, 195.
International human rights law confirms that universal rights are linked to human dignity. When large agricultural investments occur, human rights law should protect the rights of the farmers affected by the investments. Still the legal arrangements establish to protect the farmers remain less effective than those provided by international trade and investments laws. Though it has been shaped new human rights treaties that is supposed to held governments accountable for violations of human rights, it works badly in practice.51

The number of cases concerning human rights and land rights are few, despite that land grabbing is common. International human rights law is far from offering farmers legal protection comparable to which international law do for foreign investment. For the majority of the rural population, international protection is undermined in substantive rules and legal remedies.52

The facts are that international human rights law provide weak protection for local landholders. These local landholders may have their land expropriated to agricultural investments. The right to property is a human right which is affirmed in the universal declaration of human rights. Unfortunately, the right to property is absent in the international covenant on civil and political rights and from the international covenant on economic, social, and cultural rights and those are the cornerstone of the global human rights treaty law.53

Convention number 169 of the international labor organization recognize the rights of indigenous people and tribal people the right to their land and natural resources. The problem is that only one African country has ratified this convention.

Disputes between foreign investment and local rights appear, international human rights law makes it possible for local rights holders to go to international bodies if they feel their human rights has been violated. Such as the African commission of human and people’s rights and

52 Ibid. P, 104.
African court on human and peoples right. But it requires that you have been to the domestic court first and gone through all the instances there. This Usually takes a long time.\textsuperscript{54}

The African commission on human and people’s rights only handle non-binding decisions and the African court on human and peoples right only handles binding decisions. If the human rights claimant wins the case it may only have limited legal or practice influent. Because only half of the African states are parties to the courts protocol. That means that the court is inaccessible for around half of the African states. When a judgment of the African court is determined against a government it is ultimately dependent on political action rather than legal reprisals. Further arbitral awards are legally binding. If the host government of the investment resist the arbitral award the investor can seize the assets that the host state holds abroad. One thing to have in mind though is that immunity rules may restrict this option. These awards are generally more effective than those provided by human rights law.\textsuperscript{55}

The impacts on local food security are certainly bad when local farmers are removed from their land because of the acquisition of large pieces of their agricultural land where they used to grow crops or where their cattle used to graze.\textsuperscript{56}

An important political dimension of this problem is that the host state often has full control over the land and can decide if the land is unused and ready for leasing out. Governments often use this tactic to allocating long-term lease deals with companies to consolidate their control over areas where their authority has been limited. In many African countries, the state owns the land in accordance with national laws to be able to allocate resources rights to commercial operators. The Negotiations between governments and companies are usually held behind closed doors, where local landholders have no says in those negotiations. In these circumstances, the gap between legality and legitimacy exposes local groups to the risk of dispossession and investors to that of contestation.\textsuperscript{57}

\textsuperscript{54} Ibid. P, 106.
\textsuperscript{55} Ibid. P, 107.
\textsuperscript{56} Ibid. P, 85.
\textsuperscript{57} Ibid. P, 94.
In situations where both land acquires and affected people address to international law, international capital are favored over the rural poor. Large investments project commonly involves major capital injections that requires effective legal protection. Farmers have more to lose from weak protection than investors. A loss of land makes farmers vulnerable to famine and a loss of their social identity. Their human rights and human dignity are directly at stake. The rules of foreign property expropriation are to be found in minimum international standard which belongs to the core traditional rules of states responsibility or the treatment of aliens. The minimum international standard consists of two rules of customary law about expropriation. The first rule is that the expropriation must be for public purpose, inter alia it must not be an act of spite or a means of adding to the rulers’ private fortune. The second rule states that even when expropriation is for a public purpose, it must be accompanied by payment of compensation or the full value of property or as it is expressed; prompt adequate and effective compensation. It also states that no compensation need to be paid when property is seized as a punishment for breaking an obligation imposed by local law. If the local law does not fall below the minimum international standards.

The resolution on permanent sovereignty over natural resources from 1962 conclude that foreign ownership of the means of production should not deprive a state its sovereignty or more specifically of its power of economic planning. The resolution also conclude that states are free to restrict or prohibit the import of foreign capital. Paragraph 4 of the resolution states:

“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures and in accordance with international law”.

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58 Ibid. P, 110.
60 Ibid. P, 236.
Analysis

Land governance can be viewed as a matter of international as well as national regulation since allocation of land intensifies in a globalized world. On the one hand, transnationalized relations has highlighted the multifaceted characteristics of investment treaties and on the other it has redesigned the patterns for land claims at local to international level. There is a greater concern that large scale investments can dispossess local farmers which potentially triggers negative relations. These relations will depend much on the struggles that can be mobilized through national enforcement.

As in the process described by Karl Polanyi, law makings can both facilitate commodification of land or social inclusion. But differently from Polanyi’s reflections which focused only on national law, today’s rush of land, illustrate contradictions with commodification and social inclusion, as the shifts within international investment law and human rights law works at different levels. The framework that circles around the foreign investor creates asymmetric rights. First, investor does only have soft laws to obey the fundamental rights of citizens. Secondly, conceptualization of land as a commercial asset valued in economic terms along with the power spectrum of international investment law makes it difficult to reach tribunals awards for smallholders. In these terms, scrutinizing the contracts of an investment proofs very important.

While many TNC’s states promising commitments to respect the integrity of the local culture it is still the contract that underpins the reality. Nevertheless, public scrutiny can help to answer important questions such if the investment regulates social and environmental harm, loss of livelihoods, compensation of sustenance farming, legal promises to employment opportunities and modernization of technologies. The way the contract binds to these issues will demonstrate much of the practical nature and its potential to improve or undermine local livelihoods.  

In Liberia for example, every contract is posted online in order to show transparency, in fact, the public disclosure of natural resources is under national law, which makes it then easier for public action to hold decision-makers accountable. But in general terms, the lack of transparency and

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negotiations behind closed doors illustrates the greater corruption with deals that are not proved to be for the public interest. In time of an investment, local smallholders are rarely consulted about the terms and less likely are they to get a real opportunity to raise important question about the project. Even in countries where consultation with locals are legally required, many of the agreements has proved to not illustrate local smallholder’s expectation of the project. 

In Mozambique during the most highlighted projects, the consultations were more aimed at selling a good view of the project rather than discussing with them if they think the investment would be a positive incentive. Box 1 illustrates another strategy where the local population where not consented throughout the investment deal.

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**Box 1. A strategy for commodification through national regulations**

Ethiopia is an example were the government relocated the rural population into other settlements to make way for foreign investment. This was made through extensive legislation on land by the state in order to attract commercial operators.

The process of relocate these farmers is called villagization by the Ethiopian government. These villagization programs has deprived farmers from the houses and they have been forced to move in to concentrated permanent settlements without any compensation. This is clearly a violation of article 17 in the universal declaration of human rights, which recognizes everyone’s right to property, but it is also a violation of regional human rights law such as Banjul charter article 14. Additionally, since Ethiopia has not recognized the African Court on Humans and Peoples Right it is impossible to bring a case against Ethiopia for violating international and regional human rights law. It is also impossible for the rural population, even if they could with the limited resources they possess, to go court. In terms of commodification and social inclusion, this is a case where land relations became a commercial asset at the cost of the rights of the farmers.

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63 Ibid. P, 113.


65 American Association for the Advancement of Science. Documentation of Villagization: Gambella Region Ethiopia. Online: [https://www.aaas.org/content/documentation-villagization-gambella-region-ethiopia](https://www.aaas.org/content/documentation-villagization-gambella-region-ethiopia)
In these terms, in order to decrease the governance issues from all levels, the host state should claim a more important role in shaping investment treaties by using any constitutional power they may possess in relation to treaties. Furthermore, to declare its legitimacy, the host state could bring up debates, raising issues, and support grievances declared by social movements and civil society. 66 It is easy to say that the host state should legislate and facilitate better domestic governance structures related to tenure reforms and other aspects of land grab, but the problem is more complex than that, and therefore shouldn’t be limited to an analysis around political governance efficiency. All agreements that are included in a contract, whether they are binding investment treaties, national laws or non-binding guidelines matter less than the actual mechanisms to enforce entitlements that the agreement creates. 67

Nevertheless, civil society, including NGO’s of rural people and producers can work as an important role in representing and enforcing concerns around national and international policy processes. Mainly because collective action has proven to leverage strength and have a central role in reconfigurations. This sort of unity, may also raise space for deliberations on different development strategies and ensuring that policy choices from relevant authorities relates to local views on land management, thus promoting social inclusion. Furthermore, civil society organizations should not be limited through this, they would also prove relevant to proclaim advocacy on investment treaties and their implications on land rights. 68 Concerns about this, remain scarce, especially in low-income countries. It is therefore imperative for NGO’s that highlights these issues remain strong and educate local smallholders on their rights and different implications that investment treaties could have. One example where local capacity building has proven effective is in Mali where lectures from a law faculty facilitates discussions and educate rural people on their rights and how investment treaties works in relation to national laws. 69  This can be an important tool from a farmer’s

perspective, since the right to adequate compensation for example can make a huge impact on their living conditions.

It should be mentioned though in context to this, that some contracts do features better terms. A deal in Mali involved a joint-venture project whereby the substantial part of it was on the basis for poverty reduction. The foreign investor also brought expertise to develop relevant facilities, as well international social and environmental standards was applied. Other deals in Mali which have proven to be effective had a strategy of including the Ministry of Land and Habitat, Ministry of Agriculture and other agencies that stresses awareness of sustainable land management. In absence of legal enforcement mechanisms from both the smallholder and the host state, the significance of integrating these agencies in relation to the foreign investor put pressure on them to adhere to the guiding principles on land governance. The greater part of these deals is that the foreign investor has followed the different soft laws that applies and in turn led to both commodification and social inclusion. However, it is not clear whether the investor incentives to commit to these guidelines or if the host state’s facilitation of putting pressure on them is the result of commodification and social inclusion.

\[70\] Ibid. P, 122.
Box 2. A strategy for commodification and social inclusion through national regulations

In Tanzania, investors can only lease ‘village land’ if it is properly consented with the rural population. The land is nationalized under domestic regulation, but has been conceptualized differently to safeguard its locals. Depending on the utilization, the allocation of land requires different processes. ‘General land’ only requires a land permission, meanwhile ‘village land’ requires extensive negotiation with smallholders.

Foreign investors in Tanzania must first get its credential from relevant national authorities in order to begin negotiations with smallholders if they seek to invest in ‘village land’. Then they must get the permission and the consent of the local community. After this has been accepted, the investor must have the request for land granted by the village council. The village council consists of the elderly in the community and does often have a good local view of current land relations. If the village council approves the investment, it is then up to the village assembly to mark the final decision of whether the deal can bring positive incentives to the locals. A commodification of land occurs with the approval of the local community, but at the same time the social inclusion is leveraged by the locals.

Extensively when a deal has been made, thus also transferring ‘village land’ to ‘general land’ there is a legal requirement that the smallholders gets compensated fairly by the government based on relevant market prices.

Box 2, illustrates a case where the state used a firm strategy to keep its regulatory power in balance in relation to the investor, and at the same time integrated the local population in the process.

As mentioned earlier, proper safeguard against adverse host state conduct are important for foreign investors in terms of landholdings, but the same protection affects the legitimate claims of indigenous peoples, marginalized groups, and smallholders. Depending on the context, the attitude that the investor has could lead to commodification where land plays important part of the social and cultural identity. It is therefore important to alleviate these dynamics before the investment takes place, as showed in box 2. There is however, limited consensus on the actual extent to which investment treaties facilitates land relations.

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One way of looking at it, is an analysis of the legal framework that this research comprehends. Another way of looking at it in brief terms are the growing investor v. state arbitrations to see the international connection of investment treaties to local land rights. This indicates that the host state takes the full cost of land governance issues in the context of social grievance. It also highlights the bigger contrast between foreign investment protection and legal insecurity of smallholders. As different claims are into contest of land allocation, it raises sensitive questions about whose rights are being protected and how. Why does foreign investor enjoy more protection than those applicable to international human rights law for example? As stated, foreign investors earn protection because it is assumed that the power and the political representation rests on the host state. However, this view of political influence does not necessarily demonstrate the multifaceted nature of globalization and politics of how foreign investors can greatly harm and affect different contexts, even though they cannot vote.

Furthermore, a part of the citizens in low-income countries have also not the possibility to vote due to lack of identity cards and other practical issues, particularly in rural communities. In these terms, it should not be assumed that the rural populations benefit or interests are better represented than those of foreign investors. The investment often reflects a high input of capital flow that may need a more complex set of legal protections, but the loss suffered by the rural population affected by the investment may implicate more concerns in relative terms. Partly because a lost piece of land may destruct entire livelihoods, but also because it makes them exposed to poverty, food insecurity and loss of social identity. In this context, people should deserve legal protection too.

Those people that utilizes land as a part of their everyday life deserves crucial realization of their human rights, including, the right to property, which further entails the protection of customary land rights of indigenous people (and to their ancestral territories), local communities, the right to housing, and the right to food.

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73 Ibid. P, 43-45.
74 Ibid. P, 44.
75 Ibid. P, 45.
Finally, the connection between land rights of the poor, the host state and the foreign investment reflect tensions between different actors and different systems to claim property. The conceptualization as a commercial asset or a source of social and cultural value – from international treaties to local customary systems. Patrick McAuslan who was a legal professor fighting for the protection of traditional land tenure systems theorizes those connection in a great manner - which also sets the endnote to this research. “…There is a clash here of laws and cultures. At the formal national and international level, it is the culture of globalization that impels the development of laws and policies based on the free and equal opportunity to invest in land so as to facilitate land being used to its highest and best purpose without regard to such irrelevant matters as the nationality of the user. This sees land as an economic and only as an economic asset. At the informal, local, popular, customary, or traditional level... it is the culture that sees land as a social and political as much as an economic asset....A government that ignores the social aspect of land... does so at its peril. At best, there will be clashes on the ground between investor and locals; at worst, ignoring local beliefs and attitudes to land can lead and has led to widespread local violence and civil wars.” 76

Conclusion

This research has highlighted the multilevel of governance covering global land grab. Actors rests on different claims to land. This is done through different frameworks provided on local to international level. On the one hand, foreign investors have the safeguard of international investment law and on the other it utilizes weak domestic governance structures. This includes the power they also possess on smallholders since they have limited legal access to enforce their rights. The host state can adhere to different strategies to either show positive incentives towards their population or chose to neglect their social values and thus only foster commodification. In some cases, there is probing results where the host state succeeds to practically mediate national laws in order to protect its citizen but also to leverage the investor to follow thr non-binding principles. The civil society also plays a crucial part in international claims for land when the law

76 Ibid. Page, 45.
does not work properly. This has been exemplified through cases where promoting advocacy and local capacity building results in positive forms.

Nevertheless, the challenge that remains is to leverage both binding norms (hard laws) and non-binding principles (soft laws) to increase political pressure for changes in practice. Pushing for legal reforms through international guidance seems imperative and may shift imbalances in rights – thus moving towards a socially embedded ‘land grab’. 
10. References


