International instruments influencing the rights of people facing investments in agricultural land

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SOMO
INTERNATIONAL LAND COALITION

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A global alliance of civil society and intergovernmental organisations working together to promote secure and equitable access to and control over land for poor women and men through advocacy, dialogue, knowledge sharing and capacity building.

Our Vision

Secure and equitable access to and control over land reduces poverty and contributes to identity, dignity and inclusion.

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ILC would appreciate receiving copies of any publication using this study as a source.

Foreword

The International Land Coalition (ILC) was established by civil society and multilateral organisations who were convinced that secure access to land and natural resources is central to the ability of women and men to get out of, and stay out of, hunger and poverty.

In 2008, at the same time as the food price crisis pushed the number of hungry over the one billion mark, members of ILC launched a global research project to better understand the implications of the growing wave of international large-scale investments in land. Small-scale producers have always faced competition for the land on which their livelihoods depend. It is evident, however, that changes in demand for food, energy and natural resources, alongside liberalisation of trade regimes, are making the competition for land increasingly global and increasingly unequal.

Starting with a scoping study by ILC member Agter, the Commercial Pressures on Land research project has brought together more than 30 partners, ranging from NGOs in affected regions whose perspectives and voices are closest to most affected land users, to international research institutes whose contribution provides a global analysis on selected key themes. The study process enabled organisations with little previous experience in undertaking such research projects, but with much to contribute, to participate in the global study and have their voices heard. Support to the planning and writing of each study was provided by ILC member CIRAD.

ILC believes that in an era of increasingly globalised land use and governance, it is more important than ever that the voices and interests of all stakeholders – and in particular local land users - are represented in the search for solutions to achieve equitable and secure access to land.

This report is one of the 28 being published as a part of the global study. The full list of studies, and information on other initiatives by ILC relating to Commercial Pressures on Land, is available for download on the International Land Coalition website at www.landcoalition.org/cplstudies.

I extend my thanks to all organisations that have been a part of this unique research project. We will continue to work for opportunities for these studies, and the diverse perspectives they represent, to contribute to informed decision-making. The implications of choices on how land and natural resources should be used, and for whom, are stark. In an increasingly resource-constrained and polarised world, choices made today on land tenure and ownership will shape the economies, societies and opportunities of tomorrow's generations, and thus need to be carefully considered.

Madiodio Niasse

Director, International Land Coalition Secretariat

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Acronyms and abbreviations

AB	Appellate Body
ACtHPR	African Court on Human and Peoples' Rights
AoA	Agreement on Agriculture (WTO)
ASEAN	Association of Southeast Asian Nations
ATCA	Alien Torts Claims Act
AU	African Union
BIT	Bilateral Investment Treaty
CAO	Office of the Compliance Advisor Ombudsman (IFC/MIGA)
CDM	Clean Development Mechanism
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CORE	Corporate Responsibility Coalition
CSO	Civil society organization
CSR	Corporate social responsibility
EBRD	European Bank for Reconstruction and Development
ECCJ	European Coalition for Corporate Justice
ECHR	European Convention on Human Rights
ECOWAS	Economic Community Of West African States
ECtHR	European Court of Human Rights
EDFIs	European Development Financial Institutions
EJC	European Court of Justice
EITI	Extractive Industries Transparency Initiative
EP	Equator Principles
FAO	Food and Agriculture Organization of the United Nations
FDI	Foreign direct investment
FIDH	International Federation for Human Rights

FSC	Forest Stewardship Council
FTA	Free trade agreement
GC	Global Compact
GRI	Global Reporting Initiative
GSP	Generalized System of Preferences
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Disputes
IFC	International Finance Corporation (World Bank)
IFI	International financial institution
IFPRI	International Food Policy Research Institute
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
INEF	Institut für Entwicklung und Frieden
LDC	Least developed country
MDG	Millennium Development Goal
MIGA	Multilateral Investment Guarantee Agency (World Bank)
NAFTA	North American Free Trade Agreement
NCP	National Contact Point
NGO	Non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
PCJ	Permanent Court of Justice
RAID	Rights and Accountability in Development
RSPO	Round Table for Sustainable Palm Oil
RTRS	Round Table on Responsible Soy

SP	Special Product
SPS	(WTO Agreement on the Application of) Sanitary and Phytosanitary Measures
SRSG	Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
SSM	Special Safeguard Mechanism
TBT	(WTO Agreement on) Technical Barriers to Trade
TNC	Transnational corporation
TRIPS	(WTO Agreement on) Trade-Related Aspects of Intellectual Property Rights
TUC	Trades Union Congress
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Programme
UN PRI	UN Principles for Responsible Investment
UNYB	Max Planck Yearbook of United Nations Law
UPR	Universal Periodic Review
USDA	United States Department of Agriculture
VCLT	Vienna Convention on the Law of the Treaties
WCED	World Commission on Environment and Development
WFP	World Food Programme
WTO	World Trade Organization

Introduction

Increasing land use shifts

In recent years private investors and governments have increasingly acquired or leased on a long-term basis large portions of agricultural land in countriesother than their own. The targeted countries are mostly located in the developing world. The phenomenon of "land grabbing" will bring about many changes in land use and ultimate crop destination, beyond the steady global trend of increasing land use for commodities. To reap the benefits of increased investment flows to the agricultural sector in developing countries, these investments need to be responsible, which presumes an enabling policy environment. This is, however, often not the case in the land-grabbing deals at hand, and also not the case in the general global trend of increasing land use for commodity trading.

This has a number of possible negative social impacts. Subsistence farming is the mainstay of many people in developing countries. The recent development of large-scale land investments might cut off people, including pastoralists, from access to the land upon which they depend for their livelihoods. Other negative social impacts of such investments (other than losing access to land) may be that local people suffer from price effects resulting from shifts in production (from local use to export) or that small-scale farmers suffer due to the arrival on domestic markets of cheaply priced food, produced on more competitive large-scale plantations.

Weak governance in developing countries

Many developing countries have a complex array of traditional and state systems governing the rights of land users. However, these systems are often not enforced, and victims of land rights abuses might experience difficulties in obtaining access to remedy within their own countries. In short, land governance is weak in many developing countries.

With regard to the right to food, many countries have entered into obligations on a national, regional, or global level. For example, most states have ratified the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), which stipulates the right to adequate food. In practice, however, countries often have no development plan on food security in place and do not systematically assess in advance any possible negative social impacts of specific land investments. Quite often, they also lack policy space to do so adequately.

This study: international perspective

The focus of this study is on international instruments that influence the food and land rights of people facing investments in agricultural land. There are many valid reasons for looking at this issue from an international perspective. First, in most cases of land investment there is another state/region or a foreign company involved. In some cases, interna-

tional financial institutions (IFIs) may be involved through their financing of investments. All these parties have a duty to protect and respect the food/land rights of local people.

Second, agreements with foreign parties potentially overrule national laws of host states. Examples include International Investment Agreements (IIAs) between states, the investment contract that a host state signs with an investor, and human rights conventions of the United Nations, whenever ratified by host states. Finally, the problematic large-scale investments are also caused by the structures of international trade law, comprising the WTO Agreement on Agriculture (AoA) and other bilateral or regional trade agreements. This study links investment practices with the international trade regime and explores how more responsible trade regulation could promote more responsible investment in agriculture.

Objective of this study

This study aims to:

- Give insights from an international perspective into the array of existing legal and non-legal instruments influencing the land/food rights of people facing investments in agricultural land;
- Identify the strengths and weaknesses of these instruments in safeguarding land/food rights;
- Provide recommendations to enhance the safeguarding of land/food rights from an international perspective.

Contents of the four reports

Reports 1, 3, and 4 are produced by the World Trade Institute (http://www.wti.org). Report 2 is produced by SOMO, the Netherlands-based Centre for Research on Multinational Corporations (http://www.somo.nl). Most of the SOMO report was made possible by funding from Oxfam Novib.

Report 1: Human Rights Mechanisms to Safeguard the Food/Land Rights of People Facing Land Use Shifts

This report covers avenues provided by human rights law at the national, regional, and UN levels to prevent and remedy violations of relevant human rights, such as the right to adequate food and the right to property. These human rights instruments are only binding on states when they have ratified them. For people facing land use shifts, there are options available to seek access to remedy from states on the basis of the instruments described. However, each instrument has its own weaknesses and strengths and there may be obstacles, such as the exhaustion of domestic remedies or the fact that the state in question has not ratified the optional protocol to the relevant convention that would allow for individual complaints. While the human rights instruments create the obligation on states to protect their citizens from corporate human rights abuses, they create few direct obligations for private investors. The complaints mechanisms at different levels can

be used to enforce states' obligations to prevent breaches of food/land rights and to seek remedies, but there are very limited options under international human rights law that address private investors directly.

Report 2: Company Commitment Instruments to Safeguard the Food/Land Rights of People Facing Land Use Shifts

This report covers instruments that companies may apply to safeguard the food/land rights of people facing land use shifts. All these company commitment instruments are developed for companies, and companies can – usually voluntarily – commit to them. The report distinguishes between commodity-specific instruments (certification); general CSR instruments (OECD Guidelines, Global Reporting Initiative, UN Global Compact); and instruments specific to the financial sector. The report concludes that, to date, these instruments have generated some, though little, benefit for people confronted with land use shifts.

Report 3: Trade Law and Responsible Investment

Report 3 looks at the international body of trade law and how it influences investment practices. The report is based on the assumption that responsible investment flows presume a trade regime that contributes to the prudent development of the agricultural sector in developing countries. In this sense, the trade regime builds one of the "channels" through which investments flow. A prudent, sustainable trade regime will at the same time promote investments in the agricultural sector that benefit people living in poverty and the environment. From this perspective, suggestions are made for a sustainable trade regime.

Report 4: Responsible Investment in Land through International Investment Law: Addressing Rights Asymmetries through Law Interpretation and Remedies

This report sketches out asymmetries in international investment law with regard to investors' and peoples' rights. It proposes a sustainable development approach to the interpretation of investment law to allow for a meaningful integration of peoples' rights into current international investment law. The report covers a number of judicial and non-judicial remedy mechanisms, such as the possibility for complainants to address private investors through extra-territorial court cases, the non-judicial remedy that may be provided by the OECD guidelines for multinational enterprises, and the non-judicial remedy mechanisms that the World Bank has established (IFC ombudsman, Inspection Panel).

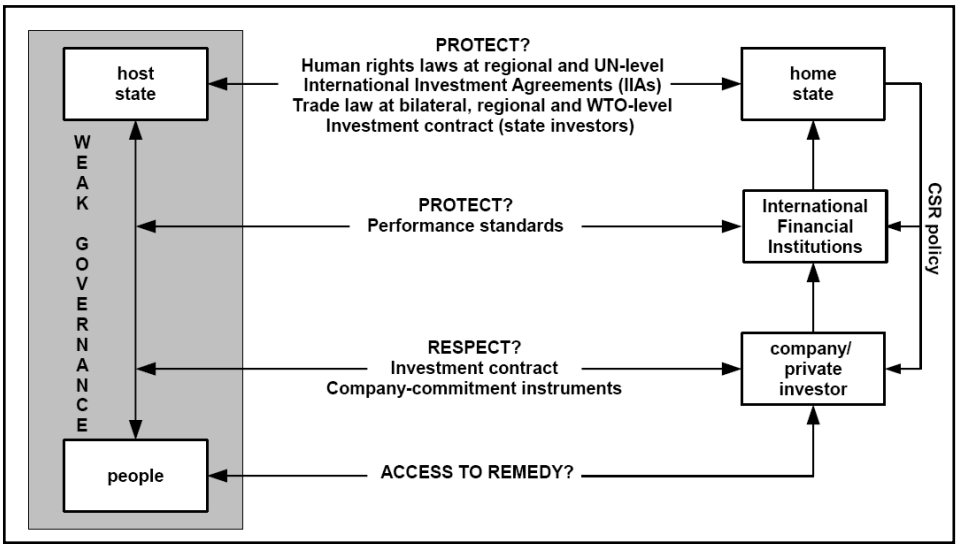
Overview of all instruments

The figure below shows, in a simplified way, the international instruments influencing the rights of people confronted with investments in agricultural land. The figure is made according to the Ruggie framework. Professor John Ruggie is the Special Representative

of the United Nations Secretary-General on Business and Human Rights, and has been working for some years on a framework to enhance the enforcement of human rights. The recent UN "Protect, Respect, Remedy" framework is made up of three pillars:

- The state's duty to protect against human rights abuses by third parties, including business;
- The corporate responsibility to respect human rights, which means avoiding infringements on the rights of others;
- Greater access for victims to effective remedy, judicial and non-judicial (Ruggie 2010).

Figure 1: International instruments influencing the food/land rights of people facing investments in agricultural land (simplified), according to the Ruggie Framework



Human Rights Mechanisms to Safeguard the Food/Land Rights of People Facing Land Use Shifts

Prepared by:
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1 Introduction

This report focuses on the question of whether, and how, human rights mechanisms can provide an avenue to safeguard the food and land rights of people confronted with land use shifts. After exploring the linkages between human rights and investment in agriculture, it takes stock of the existing human rights mechanisms that civil society organizations (CSOs) can use to prevent and/or remedy human rights violations generated through large-scale investment in agriculture. After the national mechanisms, avenues at the regional and UN levels are described, before some conclusions are put forward.

2 Investment in agriculture and human rights

Investments in large-scale land acquisitions and leases can affect a range of human rights. These can range from labour rights, such as the right to just and favourable remuneration, the freedom of association, or the abolition of child labour, to human rights, such as the right to an adequate standard of living and the protection of property rights.[1]

Human rights affected by large-scale investment in agriculture

The Special Rapporteur on the right to adequate food, Olivier De Schutter (2009), suggested a set of minimum principles and measures to address the human rights challenge through large-scale land acquisitions and leases. In the same report, De Schutter analyzed the human rights that could be infringed by large-scale land acquisitions and leases. Those that offer the best prospects for access to a remedy mechanism are summarized below.

Right to adequate food

The right to food has been recognized as a human right in numerous binding and non-binding legal instruments since it was first established in 1948 as part of Article 25(1) of the Universal Declaration of Human Rights (UDHR).[2] Of all these documents, Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 contains the most important codification of the right to food: "The States Parties [...] recognize the right of everyone to an adequate standard of living [...] including adequate food."[3]

The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 12 defines the right to food as being "realized when every man, woman and child,

[1] For a comprehensive overview of human rights possibly affected by transnational and other business enterprises, see SRSG Ruggie 2008

[2] UDHR, UN Document A/810. 10 December 1948. Article 25(1). See e.g. 1989 Convention on the Rights of the Child, 1577 UNTS 3, Articles 24(2), 27; 1979 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 513, Article 12; 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Article 6.

[3] ICESCR (1966). Article 11(1), 993 UNTS 7.

alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement".[4]

According to the CESCR, "states parties [to the Covenant] *should take steps to respect the enjoyment of the right to food in other countries*, to protect that right, to facilitate access to food and to provide the necessary aid when required".[5] General Comment No. 12 also stipulates that a right to food violation can occur through the "failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations" (para. 19).

Violations of the right to food can occur through "failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others" (para. 19). Furthermore, General Comment No. 12 recommends that "[t]he private business sector – national and transnational – should pursue its activities within the framework of a code of conduct conducive to respect the right to adequate food, agreed upon jointly with the Government and civil society" (para. 20). Hence, a host state of agricultural investment can violate the right to food not only through direct action but also by insufficiently regulating private entities.

Courts throughout the world have dealt with a range of different claims related to the right to food, sometimes directly invoking this right, sometimes framing violations to duties stemming from the right to food as violations of other rights such as, *inter alia*, the right to life, the respect for human dignity, the right to health, the right to an income, the right to land, the respect for ethnic and cultural rights, the right to housing, and consumer rights (Courtis 2007, 337).

Property rights

Although the Universal Declaration of Human Rights proclaimed in 1948 in its Article 17 that "(e)veryone has the right to own property alone as well as in association with others", and that no one shall be deprived of his property", both the International Covenant on Civil and Political Rights (ICCPR) and the ICESCRare silent on the right to property.

The right to property appears *inter alia* in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[6] in most regional human rights instruments,[7]in different forms in most national constitutions, and in soft law instruments such

[4] CESCR, General Comment 12, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Document E/C.12/1999/5, 12 May 1999, para. 6. For the 160 states parties to the Covenant, General Comment 12 constitutes an authoritative interpretation of their obligation to progressively realize the right to adequate food, as enshrined in Article 2(1) and Article 11 of the ICESCR.

[5] Ibid., para. 36 [emphasis added].

[6] CEDAW Articles 15(2) and 16(1)(h) proclaim equal treatment of women and men in respect of ownership of property.

[7] African Charter on Human and People's Rights, Article 14; American Convention on Human Rights, Article 21; Arab Charter on Human Rights, Article 31; European Convention on Human Rights, First Protocol, Article 1.

as the Basic Principles and Guidelines on Development-based Evictions and Displacement developed by the UN Special Rapporteur on the right to adequate housing.[8]

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The right to property appears *inter alia* in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[9] in most regional human rights instruments,[10]in different forms in most national constitutions, and in soft law instruments such as the Basic Principles and Guidelines on Development-based Evictions and Displacement developed by the UN Special Rapporteur on the right to adequate housing.[11]

The right to property is a human right in itself, but is also essential for the protection of the dignity of the right-holder as it contributes to the realization of economic and social rights, including the rights to housing, to food, and to social security. On the other hand, this right may be limited in order to resolve social injustices and to advance the economic, social, and cultural rights of specific disadvantaged individuals or groups.[12]

The protection of property rights can also be an indirect judicial protection of the right to food if land traditionally used for farming or grazing can be judicially protected (Courtis 2007, 323-33). One difficulty to using property rights to have access to legal remedies is that in many developing countries, and particularly in sub-Saharan Africa, the rights of land users are not properly secured (De Schutter, 2009, 10).

However, access to land for indigenous peoples has been given specific forms of protection under international law. Articles 13–19 of ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries relate to land rights. Article 14 recognizes the rights of ownership and possession of the peoples concerned over the land they traditionally occupy, and the state's obligation to identify this land and guarantee effective protections of their rights of ownership and possession. In the same vein, the UN Declaration on the Rights of Indigenous Peoples stipulates that states should provide effective mechanisms for prevention of, and redress for, any action that has the aim or effect of dispossessing indigenous peoples of their lands, territories, or resources (Article 8b) and that no relocation should take place without the free, prior, and informed con-

[8] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari. UN Document A/HRC/4/18. 5 February 2007.

[9] CEDAW Articles 15(2) and 16(1)(h) proclaim equal treatment of women and men in respect of ownership of property.

[10] African Charter on Human and People's Rights, Article 14; American Convention on Human Rights, Article 21; Arab Charter on Human Rights, Article 31; European Convention on Human Rights, First Protocol, Article 1.

[11] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari. UN Document A/HRC/4/18. 5 February 2007.

[12] See e.g. European Court of Human Rights, *James and others v. The United Kingdom*. Application No. 8793/79, Judgment of 21 February 1986, para. 47.

sent of the indigenous peoples concerned and after agreement on just and fair compensation (Article 10).[13]

The Food and Agriculture Organization of the United Nations (FAO) is currently elaborating Voluntary Guidelines on Responsible Governance of Tenure of Land and other Natural Resources. The Voluntary Guidelines intend to provide practical guidance on responsible governance of tenure as a means of alleviating hunger and poverty, and will emphasize human rights, participation, accountability, non-discrimination, transparency, gender equity, and the rule of law (FAO 2009b). The preparation for the Voluntary Guidelines builds on multi-stakeholder consultations that offer a good opportunity for CSOs to contribute their perspectives to their elaboration.

Rights of workers employed on farms

There are currently nearly half a billion waged agricultural workers globally, many of whom work under dire conditions. Their rights are protected, at a very minimum, under the International Labour Organization (ILO)'s core conventions. An important criterion to judge whether aninvestment will be a "win-win" situation is whether it creates decent employment for the local population. One way to ensure that minimum standards are respected is to incorporate compliance with the ILO's core conventions into the host government agreement, together with measures to handle complaints and sanctions foreseen. However, as the compliance with worker rights comes into play only once the investment has been established, this study will not focus on workers' rights or their corresponding grievance mechanisms.

Extra-territorial obligations under human rights law?

One recurring question is whether the home state of the investment has any extra-territorial obligations towards the host state. The starting point of international human rights law is that the national government is primarily responsible for ensuring that human rights, including economic, social, and cultural rights, are met. However, it would be misleading to conclude that extra-territorial obligations exist only in cases where national governments do not fulfil their "primary obligations" (Gondek 2009, 351). In particular, the obligations stemming from the ICESCR are always in place for the third state in parallel with the territorial state's obligations. Their exercise may, however, depend on whether the territorial state is able and willing to fulfil its human rights obligations.

[13] United Nations Declaration on the Rights of Indigenous Populations. UN Document A/Res/61/295. 13 September 2007. Note that four states with significant indigenous population (Australia, Canada, New Zealand, and the USA) voted against the resolution.

There are two significant grounds on which it can be argued that the ICESCR does not contain territorial limitations in its obligations, and thus also enshrines extra-territorial obligations for state parties. First, there is an absence of any mention of territorial or jurisdictional limitations in Article 2(1), which describes the general obligations that apply to all of the rights of the Covenant. While Article 2(1) of the ICCPR contains an express reference to the territory and jurisdiction of the state party,[14] there is no such mention in article 2(1) of the ICESCR.[15] Second, apart from the absence of any reference in article 2(1) of the ICESCR to territorial or jurisdictional limitations of its application, there is a reference in the article to international assistance and cooperation as a means to achieve the full realization of the rights provided by the Covenant. Such references are not made in the equivalent provision of the ICCPR. Moreover, the reference in Article 2(1) of the ICESCR to international cooperation and assistance is not isolated: similar references are in fact repeated throughout the instrument (Sepúlveda Carmona 2009, 88).[16]

Thus, it can be concluded that the ICESCR is an instrument whereby the full realization of the rights that it recognizes is not exclusively a function of the action or inaction of state parties in isolation, but also of the interaction between states. The exact content of any extra-territorial obligations derived from ICESCR remains, however, controversial.[17] While scholars and CSOs push ahead, states are divided in their attitude and some still go as far as rejecting the legal nature of the obligation of international cooperation and assistance (Gondek 2009, 363).

Access to remedy

The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, SRSG Ruggie (2008, 22-28) focused on three types of grievance mechanism that can provide avenues for remedy: company-level mechanisms and both non-judicial and judicial state-based mechanisms. Part 1 of this report focuses on legal mechanisms, including the UN human rights system, while Part 2 (by SOMO) focuses on non-legal mechanisms in its exploration of possible remedies for human rights violations through large-scale land acquisitions. However, it

[14] Article 2(1) ICCPR: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" [emphasis added].

[15] Article 2(1) ICESCR: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[16] Besides Article 2.1, see e.g. Articles 11(2), 15(4), 22, and 23.

[17] The International Court of Justice in the "Wall Opinion" (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICK Reports 2004, 136) affirmed the ICESCR's applicability beyond state territory. However, the "Wall Opinion" was concerned only with the relatively uncontroversial aspect of the applicability of the Covenant in an occupied territory controlled by a state party. The "Wall Opinion" affirms, however, that control is one of the possible bases for extra-territorial applicability of the Covenant.

should be kept in mind that non-judicial mechanisms may provide a more immediate, accessible, affordable, and adaptable point of initial recourse (SRSG Ruggie 2008, 22). Available remedies also vary, depending on the mechanism used. Remedies can include compensation, restitution of damage, guarantees of non-repetition or cessation of business operations, disclosure of information, changes in relevant law, and public apologies (SRSG Ruggie 2008, 22).

In a later report, Ruggie (2010, 5) identified five priority areas through which states should strive to achieve greater policy coherence and effectiveness as part of their duty to protect from corporate human rights violations. One of them is to examine the cross-cutting issue of extra-territorial jurisdiction.[18] Ruggie (2010, 11) has proposed a matrix that yields six types of extra-territorial measures, on the basis of which he will continue to address the highly politicized category of extra-territorial jurisdiction.

In human rights law, the right to a remedy is considered a separate human right[19] that should be available in case of breaches of obligations pertaining to all human rights (Coomans 2006, 2). CESCR General Comment 12 encourages states to develop and maintain mechanisms to monitor the implementation of the right to food – including access to courts, tribunals, human rights commissions, or ombudsmen – and remedies for the violation of this right. General Comment 12 stipulates further that victims of violations of the right to food "should have access to effective judicial or other appropriate remedies at both national and international levels" and that "courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant" (General Comment 12, paras. 32-33).

Access to justice was also recognized as a component of the FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (Guideline 7). Guideline 7.2 leaves the choice of remedies open, which means that administrative, quasi-judicial, or judicial remedies may be envisaged, but they should in any case be adequate, effective, and prompt, and accessible to vulnerable groups. The sections below discuss the legal mechanisms available for individuals and communities at the national, regional, and UN levels.

[18] In addition to states (a) safeguarding their own ability to meet their human rights obligations; (b) considering human rights when they do business with businesses; (c) fostering corporate cultures respectful of rights at home and abroad; (d) devising innovative policies to guide companies in conflict-affected areas, Ruggie also recommended to states that they (e) examine the cross-cutting issue of extra-territorial jurisdiction (SRSG Ruggie 2010, 5-6).

[19] See e.g. Article 8 of the UDHR; Articles 2(3), 9(5), and 14(6) of the ICCPR; Article 6 of the Committee on the Elimination of Racial Discrimination (CERD); and CESCR General Comment 3.

3 National mechanisms

Since for most regional and UN-level human rights mechanisms, national remedies have to have been exhausted before they are invoked, the first step is to examine the role and potential of national mechanisms to prevent and remedy human rights violations through large-scale investment in agriculture. It is beyond the scope of this study to analyze the jurisprudence of national courts on cases that could be relevant for human rights violations through such investment, such as on the right to food or on forced evictions. A comprehensive overview of social rights jurisprudence in 13 national jurisdictions is provided, for example, by Langford (2008). For the purposes of this study, the example of national mechanisms for violations of the right to food is described and two cases serve as examples.

Excursus: non-judicial mechanisms

Macdonald (2009, 8) finds in an evaluation of the effectiveness of existing systems providing access to remedy that the majority of them are situated in the countries hosting investments. Although this study focuses on judicial mechanisms, the increasing number of extra-judicial mechanisms including state-based non-judicial mechanisms, such as national human rights institutions or the National Contact Points for the OECD Guidelines for Multinational Enterprises, may be more promising avenues to seek remedy than the court system. They may be particularly significant in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy (SRSG Ruggie 2008, 22).

Example: the right to adequate food

The right to food is enshrined in 29 national constitutions.[20] In some constitutions the right to food is included in constitutional provisions protecting a broader right, such as that of an adequate standard of living, dignified life, or the right to social security, which includes the right to food. Finally, some constitutional provisions refer to international

[20] Those of Brazil, Colombia, Congo, Costa Rica, Cuba, Ecuador, Ethiopia, Guatemala, Guyana, Haiti, Iran, Malawi, Moldova, Namibia, Nicaragua, Nigeria, North Korea, Pakistan, Paraguay, Peru, the Philippines, Puerto Rico, South Africa, Sri Lanka, Suriname, Uganda, Ukraine, Macedonia, and Russia. See FAO Legislative Database, available at: http://www.fao.org/righttofood/kc/legal_db_en.asp?lang=EN

treaties, international conventions, and the Universal Declaration of Human Rights (Jonsén and Söllner 2006, 6).

If there is no express constitutional basis for the right to food, and there is no clear statutory basis either, directly arguing a case on the basis of the text of the ICESCR and on corresponding soft law documents before domestic courts can be a highly uncertain undertaking. This is the case even in monistic legal systems, i.e. in systems in which international law is directly part of domestic law and can be directly invoked before courts. Difficulties increase in dualistic systems, where international law is not automatically incorporated into domestic law (Courtis 2007, 322-23).

In legal systems in which the right to food has no constitutional recognition or is generally not granted a complaints mechanism, judicial protection of the right to food has been channelled mainly through its interconnection with civil and political rights or with general human rights principles – such as the prohibition of discrimination.[21]

India

While the Indian constitution does not expressly enshrine the right to food, the Supreme Court of India decided in *People's Union For Civil Liberties v. Union of India* that state failure to implement food schemes and distribution in cases of starvation and risk of starvation, even when there were grain stocks available, amounted to a violation of the right to life, and issued a number of interim measures prompting the state to implement the Famine Code and detailing a number of measures to be complied with, especially in relation to vulnerable groups.[22] The former Special Rapporteur on the right to food, Jean Ziegler (2006, 10), went as far as stating that India provides one of the best examples in the world in terms of the justiciability of economic, social, and cultural rights, with the right to life interpreted extensively by the Supreme Court to include the right to food. For the Court, "(the) right to life guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter" as well as "the right to water" and "the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition" (Ziegler 2006, 10).

Colombia

Another illustration is provided by the Colombian Constitutional Court. While the 1991 Colombian Constitution does not expressly recognize the justiciability of economic, social, and cultural rights, the Court has considered food security and the right to food based on the interdependence of these rights with civil and political rights and on the obligation of the state to protect the rights of vulnerable persons or groups (FAO 2009a, 55). In a considerable number of cases, the Court has included components related to the

[21] See FAO (2009a) for an overview of cases on the right to food and access to justice.

[22] See Supreme Court of India, *People's Union For Civil Liberties v. Union of India and Others*, 28 November 2001, No. 196/2001.

right to food in the description of the complex picture of violations caused by forced displacements, and in the kind of remedies ordered.[23] The Columbian Constitutional Court has also declared an environmental licence to build a dam illegal for failure to conduct consultation with indigenous communities, finding violations of rights to participation, to due process, to the survival of the community, and to the respect of its ethnic, cultural, social, and economic integrity.[24]

[23] See e.g. Colombian Constitutional Courts Decisions T-025/2004 , T-09712005, T-086/2006 , T-585/2006.

[24] Colombian Constitutional Court, Decision T-652/1998.

4 Regional mechanisms

The second approach to safeguarding the right to access to justice of the local population, besides through national mechanisms, is by recourse to regional mechanisms, whenever they are available and are open to individual recourses.

In a concrete case, circumstances will determine whether the regional or the UN human rights mechanisms are the more promising avenue. Regional mechanisms do not have to be exhausted before recourse to the UN-level mechanisms, and which one to approach will be a question of strategy formed after evaluation for the different formal requirements and remedies available.

African human rights system

Instruments

The **African Charter on Human and Peoples' Rights** of 1981 (also known as the Banjul Charter) is the principal regional instrument protecting human and peoples' rights in Africa. It incorporates a wide range of socio-economic rights, including the rights to property, to work under favourable conditions and equal pay for equal work, to health, to education, family rights, and the right to self-determination.[25]

While it does not expressly recognize the right to food nor the right to an adequate standard of living, Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the Charter. One of these special protocols is the Protocol on the Rights of Women in Africa, adopted in 2003, which stipulates in Article 15 the right to food security, including access to the means of producing nutritious food.[26] Additionally, the African Charter on the Rights and Welfare of the Child explicitly requires states to "ensure the provision of adequate nutrition" (Article 14).

Complaints mechanisms

The **African Commission on Human and Peoples' Rights** is mandated to monitor the Protocol through states' submission of periodic reports under the African Charter, but the

[25] The African Charter is available at: http://www.achpr.org/english/_info/charter_en.html

[26] Article 15 reads: "States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; b) establish adequate systems of supply and storage to ensure food security."

African Court on Human and People's rights is responsible for matters of interpretation. According to Article 62 of the African Charter of Human and Peoples' Rights, states must submit a report every two years. The examination of such reports was not included in the original mandate of the African Commission on Human and Peoples' Rights, but the Commission sought permission to do so from the Assembly of Heads of State and Government, and it was authorized to proceed. However, many states have not submitted a single report and little is known about the real impact that the procedure may have had in the past (Tomuschat 2007, 170-71).

Furthermore, the African Commission is tasked with receiving communications, from states or "others" (Articles 47-59). There has been only one instance of a state submitting a case against other states.[27] The rest of the African Commission's case load has been the result of submissions mostly by NGOs, sometimes by individuals, and in a few cases peoples, alleging violations of the African Charter on Human and Peoples' Rights (Murray 2007, para. 16). Additionally, some of the most important work of the African Commission has consisted in the appointment of Special Rapporteurs and the creation of Working Groups on specific themes, such as the Working Group on Economic, Social and Cultural Rights.[28]

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the **African Court on Human and Peoples' Rights** (ACtHPR)[29] entered into force on 25 January 2004. Article 2 of the Protocol states that the ACtHPR complements the protective mandate of the African Commission on Human and Peoples' Rights. The ACtHPR is entitled to apply the provisions of the African Charter as well as any other relevant human rights instruments ratified by the states concerned (Article 7). Note that the omission of "African" in the formulation implies that the Court may adjudicate on any human rights treaties to which AU members are parties. States can make a declaration accepting the competence of the ACtHPR to receive cases by individuals (Articles 5(3) and 34(6)). Furthermore, the Protocol (Article 27(2)) confers on the ACtHPR the competence to issue interim measures in cases of extreme gravity and urgency and when necessary to avoid irreparable harm.

The Inter-American Commission may also hear petitions alleging violations of human rights recognized in the American Declaration on the Rights and Duties that are committed by member states of the Organization of American States which have not ratified the American Convention on Human Rights (Article 20, Statute Inter-American Commis-

[27] African Commission on Human and Peoples' Rights, 2006. Democratic Republic of Congo v Burundi, Rwanda and Uganda.

[28] See http://www.achpr.org/english/resolutions/resolution78_en.html

[29] Available at: http://www.african-court.org/fileadmin/documents/Court/Court%20Establishment/africancourt-humanrights.pdf

sion).[30] This represents a further avenue for protecting the right to food; however, cases based on the American Declaration cannot be referred to the IACtHR in the event that the Inter-American Commission is unable to settle the matter (Article 50, Regulations Inter-American Commission).

Examples of case law

An important precedent of action taken by local communities to counteract the harmful impact of foreign investments is the 2001 case of *Social and Economic Rights Action v Nigeria*, where the African Commission on Human and Peoples' Rights affirmed its jurisdiction to hear a complaint that foreign oil and gas investments were causing serious health and environmental harm to the Ogoni people in the Niger delta. The African Commission found that no effective remedies had been made available to the complainants by the Nigerian authorities and held that the oil exploration and production activities by foreign investors had caused an intolerable level of pollution, severe environmental degradation, and serious health damage, so as to threaten the very existence of the Ogoni people.

More directly in relation to the right to food, the African Commission found that the right to food is implicitly recognised in provisions such as the right to health, the right to life, and the right to economic, social, and cultural development. It noted that "the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work, and political participation".[31] The Commission found that the Nigerian government had failed to regulate the harmful activities of oil companies by allowing them to destroy food sources of the Ogoni people.[32]

In another decision from 2009, concerning Sudan, the African Commission followed the complainant's reasoning that forced evictions and accompanying human rights violations constituted violations by the respondent state of the right to adequate food, and found the Sudanese government responsible for large-scale forced evictions and violations of a wide range of human rights, including the right to food.[33]

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[30] See e.g. Inter-American Commission on Human Rights, Wayne Smith et al. v. United States, Report No. 81/10 (12 July 2010). The Inter-American Commission found that some aspects of US immigration law violate the American Declaration of the Rights and Duties of Man (note that the US has not ratified the American Convention on Human Rights).

[31] The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and People's Rights, Communication No. 155/96 (2001), para. 68.

[32] Ibid.

[33] Centre for Housing Rights and Evictions and The Sudan, African Commission on Human and People's Rights, Communication No. 296/05 (May 2009).

Arab Charter of Human Rights

Instruments

The Revised Arab Charter of Human Rights entered into force on 15 March 2008. Its Article 38 protects the right of every person to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food.

Complaints mechanisms

The Charter provides for an Arab Human Rights Committee, an expert treaty body consisting of seven independent experts (Article 45(1)), who are tasked with discussing the reports submitted by states on the implementation of the Charter, comment thereon, and make the necessary recommendations in accordance with the aims of the Charter (Article 48(4)). It states that the Committee's reports, concluding observations, and recommendations shall be public documents which the Committee shall disseminate widely (Article 48(6)).

The Arab Committee held its first session in April 2009 and decided that it would hold four sessions each year (Rishmawi 2010, 173); the documents from these early sessions have yet to be made public. The Arab Committee hopes in 2010 to start examining state party reports and to determine the subject and format for thematic discussions, including the elaboration of general comments (Ibid., 175). The Committee promised regular access for NGOs to its sessions, although it did not make any commitment for NGOs to attend the meetings with state officials at which state party reports are considered (Ibid., 174).

Although there are no provisions in the Charter for individual or state communications or for complaint mechanisms, the entering into force of the Arab Charter on Human Rights and the establishment of a treaty body open up new avenues to NGOs that should not be marginalized when discussing regional human rights instruments.

Inter-American human rights system

Instruments

The American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the San Salvador Protocol are the three principal human rights instruments in force on the American continent. The right to food is mentioned in Article XI of the American Declaration, which protects the right to the preservation of health and to well-being. The American Convention on Human Rights does not mention the right to food directly, but enshrines interdependent rights such as the right to life (Article 4), the right to humane treatment (Article 5), and the right to property (Article 21). Finally, the San Salvador Protocol of 1998 explicitly provides for the right to food. Its Article 12 states

that "[e]veryone has the right to adequate nutrition which guarantees the possibility to enjoy the highest level of physical, emotional and intellectual development".

Complaints mechanisms

The Inter-American Commission on Human Rights is a principal organ of the Organization of American States under Article 106 of its Charter and is one of the two supervisory organs of the inter-American system of human rights. The other supervisory organ is the Inter-American Court of Human Rights, created by the American Convention on Human Rights.

The Inter-American Commission may hear petitions on violations of the American Convention on Human Rights submitted by individuals, groups of persons, or NGOs (Article 44, American Convention). If the Inter-American Commission declares a petition admissible, no amicable solution can be found between the state and the petitioning party, the recommendations of the Inter-American Commission are not observed, and the state has accepted its jurisdiction, the case may then be referred to the Inter-American Court of Human Rights (IACtHR).[34] It is only the Inter-American Committee and the member states that can refer a case to the IACtHR; individuals have no standing to submit a case. Article 28 of the American Convention on Human Rights sets out the requirements for the consideration of petitions and which information they should contain.[35]

The Inter-American Commission may also hear petitions alleging violations of human rights recognized in the American Declaration on the Rights and Duties that were committed by member states of the Organization of American States which have not ratified the American Convention on Human Rights (Article 20, Statute Inter-American Commission).[36] This represents a further avenue for protecting the right to food; however, cases based on the American Declaration cannot be referred to the IACtHR in the event that the Inter-American Commission is unable to settle the matter (Article 50, Regulations Inter-American Commission).

Examples of case law

The Inter-American Commission renders over 100 decisions every year. The majority relate to civil and political rights, while a small portion refer to petitions alleging violations of the right to food enshrined in Article XI of the American Declaration on the Rights and Duties of Man or the right to food as recognized in rights provided for in the American

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[34] See Article 45 of the Rules of Procedure of the Inter-American Commission on Human Rights, available at: http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm

[35] The webpage of the Inter-American Commission also provides detailed instructions and a form to file petitions. Available at: https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E

[36] See e.g. Inter-American Commission on Human Rights, Wayne Smith et al. v. United States, Report No. 81/10 (12 July 2010). The Inter-American Commission found that some aspects of US immigration law violate the American Declaration of the Rights and Duties of Man (note that the US has not ratified the American Convention on Human Rights).

Convention on Human Rights, in particular the right to life and the right to property (FAO 2009a, 42).

One of the most important precedents is the decision of the Inter-American Court of Human Rights in the case of *AwasTingni v Nicaragua*. This case arose out of a dispute between the indigenous community of AwasTingni and the government of Nicaragua as a consequence of the Nicaraguan government's decision to grant a foreign company a concession for logging in an area claimed by AwasTingni as ancestral land subject to traditional tenure. After a complex series of litigations before Nicaraguan courts, the matter was brought before the Inter-American Commission of Human Rights and subsequently before the IACtHR. The result of these proceedings was the cancellation of the logging concession by the government of Nicaragua and the recognition by the IACtHR that, under the American Convention on Human Rights, the customary right of the AwasTingni community over the disputed land had to be respected, together with their right to the preservation of their cultural integrity. Nicaragua was found responsible for the violation of Article 25 of the Convention, which guarantees the right to judicial protection via simple and prompt recourse, or any other effective recourse, for protection against acts that violate people's fundamental rights.[37] The Court also ordered the state to implement measures to delimit, demarcate, and recognize the land titles of the communities, with their full participation and in accordance with their values and customary law.[38]

The Inter-American Court of Human Rights has followed this approach in a number of cases regarding indigenous peoples' right to the recognition and titling of traditional communal lands.[39] The Court stresses that access and security of legal tenure to ancestral lands are particularly important in the case of indigenous peoples, as means to survive, obtain food, carry out their traditional productive activities, and maintain their own culture. Thus, the court has developed a broad interpretation of the right to property enshrined in Article 21 of the American Convention on Human Rights, reading it in the light of Convention No. 169 of the ILO, in order to highlight the special link that indigenous peoples have with their traditional land. Judicial enforcement of access and proper legal recognition of ancestral lands can therefore be seen as a way to guarantee the access and cultural adequacy of food for indigenous peoples (Courtis 2007, 333).

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[37] *Inter-American Court of Human Rights. Mayana (Sumo) Awas Tigni Community v Nicaragua*. 31 August 2001, paras. 148-153, 164, 173.4.

[38] Ibid., paras. 176, 173.4.

[39] See Inter-American Court of Human Rights, Yakye Axa Indigenous Community v. Paraguay, 17 June 2005, paras. 131, 132, 135, 136, 137, 140, 143, 146, 147, 154, and 155; Sawhoyamaxa Indigenous Community v. Paraguay, 29 March 2006, paras. 118, 119, 120,131, 132,133, 139, and 143.

European human rights system

Instruments

The right to food as such is not enshrined in the European Convention on Human Rights (ECHR). The European Social Charter establishes a number of interdependent rights such as the right to just conditions of work (Article 2), a fair remuneration (Article 4) or to social security (Article 12), or the right to protection against poverty and social exclusion (Article 30).

While the protection of property was not originally included in the ECHR, the First Protocol to the Convention from 1952 introduces the right to peaceful enjoyment of possessions (Article 1). This right is qualified when deprivation is in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Complaints mechanisms

The European Social Charter provides for a monitoring procedure based on national reports. Under a protocol opened for signature in 1995, which came into force in 1998, complaints of violations of the European Social Charter may be lodged with the European Committee of Social Rights.[40] National and international labour organizations and certified NGOs are authorized to enter complaints in cases of violations of established rights. The conditions governing admissibility are more flexible than those applied by other regional oversight mechanisms, to the extent that petitioners are not required to have exhausted all internal legal remedies.

Of all the specialized regional courts for the protection of human rights, the European Court of Human Rights is the most important institution, not only because of its long existence and its large membership, but also and mainly because of its widely extended case law and the effectiveness of its mechanisms. Given that the application of the ECHR is confined to the jurisdiction of the Contracting Parties (Article 1)[41] and the principle of subsidiarity, i.e. that all domestic remedies have to be exhausted (Article 35(1)), it is the domestic judicial system that will first deal with any alleged human rights violations through large-scale agricultural investment within the member states of the ECHR.

Examples of case law

The European Court of Human Rights has considered violent interference with housing rights and with assets necessary to produce food to be violations of political and civil

[40] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No.158

[41] But see *Issa and Others v. Turkey*, ECHR Judgment, 16 November 2004, para. 65-71 (discussing the criterion of overall control for extra-territorial application of the ECHR).

rights. It has held in a number of cases that forced evictions,[42] forced displacements, and destruction of homes and property may amount to a violation of the right to privacy, family life, and home, to a violation of the right to property,[43] and even to inhuman and degrading treatment.[44]

[42] See e.g. European Court of Human Rights, *Connors v. the United Kingdom*, 27 May 2004, paras. 85-95; Prokopovich v. Russia, 18 November 2004, paras. 35-45.

[43] See e.g. Aakdivar and Others v. Turkey, 16 September 1996, para. 88; *Ayder v. Turkey*, 8 January 2004, paras. 119-121.

[44] See e.g. European Court of Human Rights, *Moldovan and Others (2) v. Romania*, 12 July 2005, paras. 111, 113-114.

5 UN-level mechanisms

The third approach of safeguarding the right to access to justice of the local population, besides national and regional mechanisms, is recourse to mechanisms of the United Nations for the protection of human rights. This section distinguishes between UN Charter-based mechanisms, i.e. those that have grown under the UN Charter and therefore apply to all member states and those that are based on human rights treaties and thus apply to the state parties to the relevant treaties. Each procedure has its own requirements, advantages, and limitations. These need to be carefully considered before deciding which one(s) to use: (a) individual complaints can be submitted under five of the core international human rights treaties; (b) individual communications operate under the thematic and geographic mandates of the special procedures of the Human Rights Council; and (c) the Human Rights Council's complaint procedure addresses consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.

UN: human rights complaint procedures

There are three mechanisms for bringing cases of alleged human rights violations to the attention of the UN:

- Individual complaints under the international human rights treaties (petitions);
- Individual communications under the special procedures of the Human Rights Council;
- The complaints procedure of the Human Rights Council.

(OHCHR, 2008, 153)

UN-Charter based

The UN Charter-based mechanisms are mainly based on the Human Rights Council with the Universal Periodic Review, the mandating of Special Rapporteurs, and the competence to convene Special Sessions.

Universal Periodic Review

The Universal Periodic Review (UPR) is based on the UN Charter, the Universal Declaration of Human Rights, human rights instruments to which a state is party, and voluntary

pledges and commitments made by states, as well as international humanitarian law.[45] Thus, not only states that are parties to the International Covenant on Economic, Social and Cultural Rights can be reviewed in their progress on realizing the right to food, but also the voluntary pledges and commitments that states have made in other forums. Thus, for example, all 191 FAO member states could be reviewed on their progress in implementing the Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security. The same applies to the Millennium Declaration containing the Millennium Development Goals and other soft law instruments.

The objectives of the UPR are, *inter alia*, the improvement of the human rights situation on the ground and the assessment of positive developments and challenges faced by the state.[46] The assessment of positive developments is particularly suited to review economic, social, and cultural rights, as they have – with the exception of their core content – to be fulfilled progressively.[47] Progressive realization implies moving "as expeditiously as possible" (CESCR 1999, para. 14) towards this goal. The concept of progressive realization thus requires governments to take immediate steps to continuously improve the enjoyment of the right to adequate food. This also implies the "principle of non-regression": if state parties worsen access to food through policy or legislation without implementing compensatory measures, those policies or laws would be inconsistent with the obligations under the Covenant.[48]

NGOs in their separate contributions to the UPR can raise awareness of right to food violations that may occur due to large-scale investment in agriculture. For example, in the summary of stakeholders' information for Indonesia's UPR, the NGO Society for Threatened Peoples stated that, because there are no procedures for land entitlements for traditional indigenous land, the land is often considered as state land and allocated to companies for large-scale plantations. According to the NGO, extensive plantations are leading to possible food shortages because the traditional food sources of indigenous peoples are being destroyed.[49]

There is, apart from the state and NGO reports, also a compilation of UN information that serves as a basis of the UPR. For example, while Indonesia did not mention the right to food in its UPR national report, this is pointed out in the report compiled by the Office of

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[45] Human Rights Council, Institution-Building of the United Nations Human Rights Council, UN Document A/HRC/RES/5/1. 18 June 2007. Annex, at 1-2.

[46] Ibid., Article 4.

[47] Article 2(1) ICESCR. The core content of the right to adequate food is the freedom from hunger: Article 11(1) ICESCR.

[48] Compare CESCR 1991. The Right to Adequate Housing: CESCR General Comment 4, UN Document E/1992/23 (1991), Article 11(1).

[49] UPR Indonesia. Summary of Stakeholders' Information. UN Document A/HRC/WG.6/1/IDN/3, 6 March 2008, para. 39.

the High Commissioner for Human Rights.[50] Paragraph 11 reads: "…CEDAW urged Indonesia to take measures to eliminate all forms of discrimination against women heads of households in access to housing or food aid in the wake of natural disasters or emergencies". Paragraph 34 also points out that: "[a] challenge is ensuring that the poor population, especially women and young children, have adequate nutritious food at an affordable price". And paragraph 35 notes the allegation "that the implementation of a presidential regulation threatened access to land and livelihoods of the individuals concerned, and may have led to mass forced eviction, without compensation".

With regard to the UPR, it is noteworthy that NGOs have also started to scrutinize state obligations to protect the right to adequate food vis-à-vis third parties. For example, in the summary of stakeholders' information for Ghana's UPR, the FoodFirst Information and Action Network (FIAN) Ghana and the Wassa Association of Communities affected by Mining (WACAM) reported that large areas of land, amounting to 40% of the total surface area in some regions, have been given out for surface mining, displacing several thousand farmers.[51] According to FIAN, compensation provided to farmers for their plantations has been grossly inadequate, and in some cases farms have been destroyed without the consent of the farmer, depriving them of their homes and, in most cases, of their means of earning a living. FIAN continues that "mining activities often involve the destruction of forests which provide families with food or fire wood. This poses a severe threat to their right to food, health and education" (paragraph 35).

To sum up, the added value of the UPR is the comprehensive basis of the review, including relevant stakeholders and thereby opening an avenue for NGOs and other stakeholders to hold governments accountable for the progressive realization of the right to food and their duty to protect from corporate violations of this right.

Special Procedures

Special Procedures are independent mechanisms established by the Commission of Human Rights and inherited by the Human Rights Council to examine, monitor, advise, and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide. The procedures can be called Independent Expert, Special Rapporteur, Special Representative, or Working Group and the mandate-holders serve in their individual capacities.

These experts submit reports to the relevant UN bodies. They undertake country visits, which are the subject of separate reports and, in addition, they correspond with governments through "urgent appeals" and "letters of allegation". Although only about a third of them elicit responses from governments, even where faxes or letters are dismissed it is

[50] UPR Indonesia. Compilation of UN Information. UN Document A/HRC/WG.6/1/IDN/2, 31 March 2008.

[51] UPR Ghana. Summary of Stakeholders' Information. UN Document A/HRC/WG.6/2/GHA/3, 2 April 2008, para. 34.

clear that the process of putting governments on notice that the UN's watchdogs have been alerted has led in some cases to changes of policy (Clapham 2009, 92).[52]

The specific tasks of the Special Rapporteur on the right to adequate food *include inter alia* (a) to seek, receive, and respond to information on all aspects of the realization of the right to food, including the urgent necessity of eradicating hunger; (b) to establish cooperation with governments, intergovernmental organizations, and non-governmental organizations on the promotion and effective implementation of the right to food; and (c) to identify emerging issues related to the right to food worldwide.[53]

Jean Ziegler was appointed the first Special Rapporteur on the right to food in 2000. By March 2008 he had been elected as a member of the Advisory Committee of the Human Rights Council and his Special Rapporteur functions were taken over by Olivier De Schutter as of 1 May 2008.[54] By mandate, the Special Rapporteurs work closely with the FAO, the World Food Programme, national governments, and NGOs, as well as with the Special Rapporteurs on the right to health and on the right to adequate housing. With the above-mentioned report on large-scale land acquisitions and leases containing a set of minimum principles and measures to address the human rights challenge, the Special Rapporteur (De Schutter 2009) made an important contribution to the debate on large-scale investments in agriculture.

All individuals, or others acting on an individual's behalf, can submit individual cases to the Special Rapporteur on the right to adequate food. As stated above, the Special Rapporteur may send communications to governments, called "letters of allegation", in urgent cases brought to his/her attention by reliable sources. Since this is a UN treaty-based mechanism, cases may be brought regardless of the state in which they occur and of whether that state has ratified any of the human rights treaties. It is also not necessary to have exhausted all domestic remedies before using the special procedures, and a complaint may be lodged simultaneously before a human rights treaty body and a special procedure (OHCHR 2008, 157). However, special procedures are not legally binding mechanisms and it is at each state's discretion to comply with the recommendations of special procedures mandate-holders (OHCHR 2008, 158).

Special Sessions

The Human Rights Council held its first ever Special Session on economic, social, and cultural human rights, on "the negative impact on the realization of the right to food of

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[52] In 2008, Special Procedures mandate-holders sent 911 communications to 118 countries. Communications sent dealt with the cases of 2,206 individuals, 20% of whom were women. Governments replied to 34% of communications, and 15% of all communications were followed up by mandate-holders (OHCHR 2009).

[53] The full mandate of the Special Rapporteur is contained in Human Rights Council Resolution A/HRC/6/L.5/Rev.1, 26 September 2007.

[54] During its 7th session on 25 March 2008, the HRC adopted, without a vote, the list of candidates for Special Procedures mandate-holders proposed by the President of the Council.

the worsening world food crisis, caused inter alia by the soaring food prices", on 23 May 2008.[55] While Special Sessions are convened at the request of a member state to the Human Rights Council with the support of one-third of the membership, NGOs in consultative status may contribute to the Special Sessions.[56]

To sum up, the main UN Charter-based mechanisms such as the UPR, the work of the Special Rapporteurs, and the Special Sessions are not dependent on a country's ratification status of human rights treaties and offer many possibilities for NGOs to intervene.

Treaty-based

There are currently eight core UN-based human rights treaties with treaty bodies. The treaty bodies perform a number of functions in accordance with the provisions of the treaties that created them. These include the consideration of state parties' reports and the consideration of individual complaints or communications. They also publish their interpretation of the content of human rights provisions in general comments[57] and organize discussions on related themes.

State reporting

States must submit periodical reports to the treaty bodies on how rights are being implemented. In addition to the government report, the treaty bodies may receive information on a country's human rights situation from other sources, including NGOs, UN agencies, other intergovernmental organizations, academic institutions, and the press. In the light of all the information available, the Committee examines the report together with government representatives. Based on this dialogue, the Committee publishes its concerns and recommendations, referred to as "concluding observations".

In 2007, the Committee on the Elimination of Racial Discrimination (CERD) noted with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the rights to land, health, living environment, and the way of life of indigenous peoples living in these regions. CERD called on Canada to "…take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable."[58]

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[55] Human Rights Council. Report of the Human Rights Council of its Seventh Special Session. UN Document A/HRC/S-7/2. 17 July 2008.

[56] See e.g. Written Statement Submitted by the International Federation of Rural Adult Catholic Movements (FIMARC). UN Document A/HRC/S-7/NGO/1. 16 May 2008.

[57] http://www2.ohchr.org/english/bodies/treaty/index.htm#gc

[58] CERD. Concluding Observations, Canada. UN Document CERD/C/CAN/CO/18, 25 May 2007, para. 17.

Complaints mechanisms

In addition to the reporting procedure, some of the treaty bodies may perform additional monitoring functions through three other mechanisms: the inquiry procedure, the examination of inter-state complaints, and the examination of individual complaints. Five of the Committees can, under certain conditions, receive petitions from individuals who claim that their rights under the treaties have been violated.[59]

The procedural avenues for individual communications under the different treaties establish certain conditions for admissibility, such as the exhaustion of internal legal remedies or whether communications may be submitted by or on behalf of individuals or groups of individuals. The Office of the High Commissioner for Human Rights (OHCHR) provides detailed guidance on the complaints mechanisms and on how to submit individual complaints.[60]

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) was adopted in 2008 and provides an individual complaints mechanism for violations of any of the economic, social, and cultural rights set forth in the Covenant. Once it enters into force, the OP-ICESCR will thus grant the CESCR the competence to receive and consider communications regarding violations of, *inter alia*, the right to adequate food (Article 11 ICESCR).[61]

There are some examples from the Human Rights Committee (the treaty body for the ICCPR) of cases in which indigenous communities have sought protection of their right to food via the right of minorities to their own culture. In *Länsman et al. v. Finland*, the Human Rights Committee found that the mining activities in question had been undertaken without consulting the indigenous population and that the destruction of their way of life and means of subsistence constituted a violation of the right to enjoy their own culture as enshrined in Article 27 of the ICCPR (FAO 2009a, 35).

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[59] The International Covenant on Civil and Political Rights under its First Optional Protocol; the Convention on the Elimination of All Forms of Racial Discrimination under its Article 14; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under its Article 22; the Convention on the Elimination of All Forms of Discrimination against Women under its Optional Protocol; and the Convention on the Rights of Persons with Disabilities under its Optional Protocol.

[60] See FAQ about Treaty Body Complaints Procedure. http://www2.ohchr.org/english/bodies/petitions/individual.htm.

[61] There were 33 signatories and two State Parties as of 1 August 2010. The OP-ICESCR will enter into force three months after deposition of the tenth instrument of ratification or accession (Article 18 para.1 OP-ICESCR).

tence to receive and consider communications regarding violations of, *inter alia*, the right to adequate food (Article 11 ICESCR).[62]

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[62] There were 33 signatories and two State Parties as of 1 August 2010. The OP-ICESCR will enter into force three months after deposition of the tenth instrument of ratification or accession (Article 18 para.1 OP-ICESCR).

6 Conclusions: gaps in existing mechanisms and way forward

Conventional human rights mechanisms are addressed towards states. While under certain circumstances they provide access to justice, significant governance gaps remain in holding private investors accountable. The state of extra-territorial obligations under human rights law is currently being explored, *inter alia*, by SRSG Ruggie to address some of these gaps.

Access by individuals and groups to international mechanisms of human rights protection remains dependent on specific treaty regimes. While there are different mechanisms on the national, regional, and UN levels providing a forum to prevent and/or remedy abuses or wrongful damage caused by the investor to the local population, they all have their own prerequisites, weaknesses, and strengths.

CSOs can support individuals seeking redress from human rights violations by preparing, submitting, or lodging a complaint on their behalf. However, anyone submitting a complaint on behalf of an individual should ensure that they obtain the consent of that individual and that the individual is aware of the implications of making a complaint. Also, the requirements for each procedure should be carefully followed to ensure that the complaint is admissible.

One of the ways forward will certainly be the individual complaints mechanisms provided for in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights that was adopted on 10 December 2008 by the UN General Assembly. Once it has entered into force, the Protocol will allow individuals to seek justice for violations of their economic, social, and cultural rights, including the right to adequate food, at the UN level through the establishment of a communications procedure and an inquiries procedure.[63]

On the other hand, justiciability is not necessarily a panacea and courts only deal with very specific factual cases. Other potential strategies such as mobilization, political negotiation, and civil society participation in the formulation, implementation, and monitoring of public policies should not be neglected. Possible avenues are, for example, to get involved in the elaboration of the FAO Voluntary Guidelines on Responsible Governance

[63] The OP-ICESCR had 32 signatories as of 26 July 2010. On the OP-ICESCR, see Langford 2009.

of Land Tenure or to lobby for transparent and participatory human rights impact assessments prior to the conclusion of any bilateral investment agreement or host government agreement.

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Company commitment instruments to safeguard the food/land rights of people facing land use shifts

Prepared by:
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1 Introduction

This is one in a series of four reports, together covering all international instruments that influence the food/land rights of people facing investments in agricultural land. The other three reports (produced by the World Trade Institute (WTI)), deal with human rights laws, trade laws, and investment laws. This report looks at company commitment instruments. These are instruments developed for companies to use; companies can, usually voluntarily, commit themselves to using them.[64]

Objectives

The objectives of this study are to:

- Give insight from an international perspective into the various existing company commitment instruments that influence the food/land rights of people facing investments in agricultural land;
- Identify the strengths and weaknesses of these instruments in safeguarding food/land rights;
- Provide recommendations to enhance the safeguarding of food/land rights from an international perspective.

Overview of all instruments

There are many instruments influencing the food/land rights of people facing investments in agricultural land. This section briefly describes all the instruments available, in order to place company commitment instruments within the context of all instruments.

Ruggie framework

The Special Representative of the United Nations Secretary-General on Business and Human Rights, Professor John Ruggie, has been working for some years on a framework to enhance the enforcement of human rights. The recent UN "Protect, Respect, Remedy" framework is made up of three pillars:

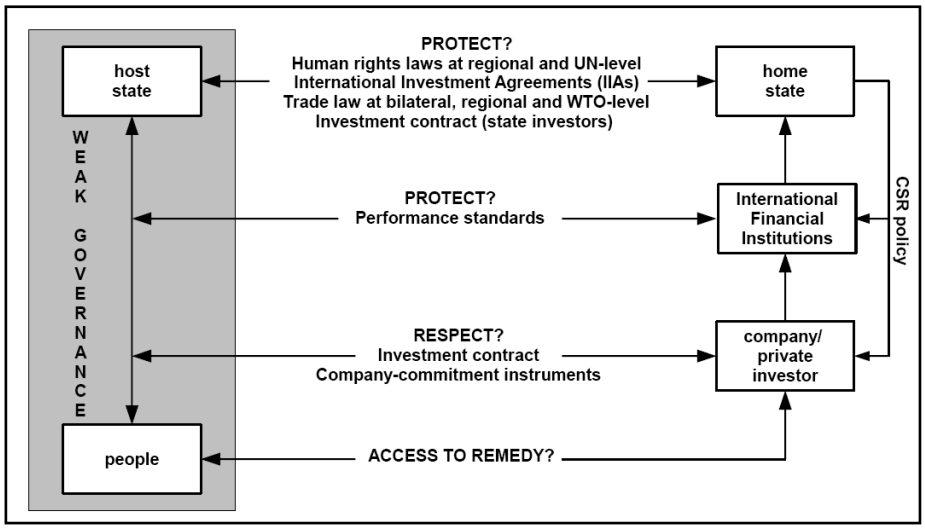
- The state's duty to protect against human rights abuses by third parties, including business;

[64] The authors would like to acknowledge the substantial input to this report of Ward Anseeuw, CIRAD and Gine Zwart, Oxfam Novib.

- The corporate responsibility to respect human rights, which means avoiding infringements on the rights of others;
- Greater access for victims to effective remedy, judicial and non-judicial (Ruggie 2010).

Figure 1 shows, in a simplified way, the international instruments influencing peoples' rights, according to the Ruggie framework.

Figure 1: International instruments influencing the food/land rights of people facing investments in agricultural land (simplified), according to the Ruggie Framework



All instruments in brief

This section provides a short description of the instruments shown in the simplified Figure 1, plus some others that are not included there.

Human rights laws at regional and UN level; international investment agreements (IIAs); trade laws at bilateral, regional, and WTO levels

In general these instruments are binding on states that have signed them. Some instruments may influence the food/land rights of people in a positive way; others may have a negative impact. While the instruments create obligations on states, they create few direct obligations for private investors. Some of them may provide the opportunity for people to seek access to remedy from states, though obstacles remain. All these instruments are reviewed in the three reports by the WTI, as part of this larger study.

Performance standards for international financial institutions (IFIs)

A number of state-controlled banks and agencies benchmark projects against the Performance Standards[65] of the International Finance Corporation (IFC, part of the World Bank group): 32 export credit agencies from the OECD, the Multilateral Investment Guarantee Agency (MIGA), European Development Financial Institutions (EDFIs), and to a large extent also the European Bank for Reconstruction and Development (IFC 2009). The IFC performance standards state that, for projects with significant adverse impacts on affected communities, the process should ensure their free, prior, and informed consultation (though not necessarily consent). Also, a mechanism needs to be established for concerns and grievances raised by individuals or groups from among communities affected by such projects.

The WTI report on international investment law (Part 4 of this document) covers the procedures of some of the grievance mechanisms of the state-controlled banks and agencies mentioned above. Some private sector banks have adopted the IFC performance standards for specific project finance loans. Their efforts are reviewed in this report on company commitment instruments.

[65] IFC. "Performance Standards IFC", http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards. In September 2009, the IFC launched a process to review and update its performance standards. The process was expected to last until October 2010 and the updated framework to be released by January 2011.

Investment contracts

The contract between the host state and the investor will set out details of the deal and a number of conditions that will be applicable. Investment contracts may also contain "stabilization" clauses. These are clauses that either preclude the application of, or require compensation for, new or changed regulatory measures that affect the investment. Where the contract does not specify details, the domestic law of the host state is applicable. In addition to their law-making function, investment contracts also determine which law applies to the interpretation of contracts in the event of a dispute, and which court or tribunal will be responsible for resolving a dispute arising under the contract (Smaller and Mann 2009). The Special Rapporteur to the United Nations on the Right to Food, Olivier De Schutter, stipulates that when host states enter into negotiations with an outside entity, whether private or governmental, there is a real risk that the interests and rights of people will not be taken into account, unless procedural safeguards are scrupulously complied with. He recommends that the negotiations leading to investment contracts (and also IIAs between states) should be conducted with the participation of the local communities whose access to land and other productive resources may be affected as a result of the investment contract. Any shifts in land use should take place only with the free, prior, and informed consent of the local communities concerned (De Schutter 2009).

Company commitment instruments

These are the instruments reviewed in this report. Company commitment instruments are developed for companies to use, and are usually voluntary. The report divides them into three kinds of instrument:

- Commodity-specific instruments (certification: FSC, RSPO, RTRS, etc.);
- General corporate social responsibility (CSR) instruments (OECD Guidelines, Global Reporting Initiative, Global Compact);
- Financial sector-specific instruments (UNEP FI, UN PRI, Equator Principles).

Some extra instruments are also covered (not included in Figure 1):

Domestic laws of host states

This study by SOMO and WTI focuses on the possibilities for foreign states and private investors to provide protection, respect, and access to remedy with regard to peoples' food/land rights. There are many valid reasons for looking at international instruments. First, in most cases of land investment, other states/regions or foreign companies are involved. Second, agreements between the host state and foreign parties may very well overrule the national laws of host states. Third, a more progressive attitude on the part of

foreign countries and companies would be in the interests of the people and would strengthen governance by host states.

However, it is also very important to retain a perspective on enhancing the national laws of host states (including enforcement). For example, land and water rights could be better defined for individual and community land users. At present, a foreign investor's entitlement under its contract may be seen as a hard contractual right, while a subsistence farmer in the same area may have ill-defined rights of land tenure. Impact assessments could also be required prior to the conclusion of an investment agreement (Smaller and Mann 2009). Communities should have a serious role in the process by which foreign parties acquire or lease land, and corruption should end. Last but not least, host states should be more transparent about the land investments taking place and the foreign parties involved (*Financial Times* 2010).

Regional laws and policies

Laws and policies in certain regions may also affect the situation of people facing land investments. The EU's Renewable Energy and Fuel Quality directives provide one example: the quantitative goals contained in these directives to use more biomass for fuel will drastically increase the demand for biofuels/bioliquids produced in sunnier parts of the globe. The growing demand for such products will increase the extent of biofuel monocultures and may increase land conflicts and human rights violations. Though not a company commitment instrument, the EU directives are therefore also reviewed in this report.

Apart from the EU, organizations that have regional laws/policies that may affect people living in poorer regions include ASEAN, the African Union (AU), the Mekong River Commission (MRC – Cambodia, Laos, Thailand, and Vietnam), and the Economic Community Of West African States (ECOWAS). Of course, regions may also instigate laws or policies that may to some extent safeguard the food/land rights of people.

Laws and policies of home states

The home state of an investor may have a number of laws or policies in place that could direct investors towards safeguarding people's food/land rights. For instance, home countries could ask for adherence to the OECD guidelines whenever a company needed government help with an investment. Home countries can also make it less difficult for affected communities to bring a court case against an investor in its home country. Home states may also have policies and laws similar to the EU directives described above.

2 Company commitment instruments

0verview

This section examines 11 different instruments and analyzes their strengths and weaknesses in terms of how they benefit people confronted with land investments. SOMO draws a distinction between three kinds of company commitment instrument:

1) Commodity-specific instruments;

2) General CSR instruments;

3) Financial sector-specific instruments.

1) Commodity-specific instruments

Some commodities have their own certification schemes for socially justified and environmentally sound production. In the areas of land acquisition/lease and expanding land use for commodities, the most important certification schemes are the Forest Stewardship Council (FSC) for the sustainable production of wood and paper, the Round Table for Sustainable Palm Oil (RSPO), and the forthcoming Round Table on Responsible Soy (RTRS). These instruments cannot reduce the pressures on land due to the developed world's increasing demand for biofuels/bioliquids, economic growth in emerging countries, or population growth. They might, however, take into account the rights of land users and the local/regional food economy, in contrast with continuing with "business as usual". The FSC, RSPO, and RTRS schemes are voluntary. It is not possible to legally enforce the use of certified products, although to some extent this can be encouraged by governments.

Other commodities also have certification schemes. Examples include:

- UTZ certified (coffee, cocoa, and tea). The name UTZ is derived from the word *utz*, which means "good" in the Mayan language QuichÚ;
- Rainforest Alliance certified (coffee, cocoa, tea, and bananas; the total area of certified farms amounts to 530,000 hectares);[66]
- Fairtrade/Max Havelaar, which enable small producers in developing countries to improve their position in international trade;[67]

[66] Rainforest Alliance. "Sustainable Agriculture". http://www.rainforest-alliance.org/agriculture.cfm?id=main

- The Better Sugar Cane Initiative.[68] This initiative is in the process of developing a certification system, and is an associate member of the ISEAL Alliance;[69]
- Trademarks for agricultural products that are certified as "organic".

For this study, however, these certification schemes have not been analyzed.

In this category of commodity-specific instruments, SOMO has also reviewed the EU sustainability criteria on biofuels/bioliquids. Another instrument reviewed is the Extractive Industries Transparency Initiative (EITI), which focuses on the oil, gas, and mining sectors. These instruments cover specific business sectors, and are focused on both countries and companies.

Those instruments reviewed are:

- Forest Stewardship Council (FSC)
- Round Table for Sustainable Palm Oil (RSPO)
- Round Table on Responsible Soy (RTRS)
- EU sustainability criteria on biofuels/bioliquids
- Extractive Industries Transparency Initiative (EITI).

2) General CSR instruments

There are several instruments that aim to encourage corporate social responsibility amongst companies. The instruments apply to multinational corporations in commodity sectors as well as to the financial sector.

The OECD Guidelines are meant for multinational enterprises based in 42 countries and/or with activities in these countries. The guidelines cover standards on labour rights, human rights, the environment, consumer protection, and corruption. The Global Reporting Initiative (GRI) and Global Compact (GC) are, as their names imply, global initiatives. The GRI aims to improve companies' transparency. It offers a comprehensive and comparative framework setting out what companies should report in order to enable stakeholders to assess the value of their CSR efforts. The GC is an initiative of the United Nations. Companies may sign up to ten universally accepted principles in the field of human rights, labour, environment, and anti-corruption. Participation in the GRI or the GC is

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[67] Fairtrade Labelling Organizations International (FLO): http://www.fairtrade.net/; Max Havelaar: http://www.maxhavelaar.nl/english

[68] The Better Sugar Cane Initiative, http://www.bettersugarcane.org/governance.html

[69] ISEAL Alliance. "Full Members". http://www.isealalliance.org/portrait/full%20member. The ISEAL Alliance is a collaboration between labelling initiatives. Its members' compliance with the ISEAL Code of Good Practice indicates that these initiatives are backed by credible standards and are capable of delivering social and environmental change. Full members of the ISEAL Alliance are: Fairtrade Labelling Organizations International (FLO), Forest Stewardship Council (FSC), International Federation of Organic Agriculture Movements (IFOAM), International Organic Accreditation Service (IOAS), Marine Aquarium Council (MAC), Marine Stewardship Council (MSC), Rainforest Alliance/Sustainable Agriculture Network (SAN), Social Accountability Accreditation Services (SAAS), Social Accountability International (SAI), and the Union for Ethical BioTrade.

voluntary, although – as with the OECD guidelines – some governments might gently encourage companies to sign up to these instruments.

Those instruments reviewed are:

- OECD Guidelines for Multinational Enterprises
- Global Reporting Initiative
- Global Compact.

3) Financial sector-specific instruments

The financial sector has several sub-sectors: banks, insurance companies, pension funds, government investors, hedge funds, and private equity funds. All might – directly or indirectly – invest in land acquisition/lease and/or in expanding land use for commodities.

The financial sector has some company commitment instruments that could potentially be relevant to land issues. The first are the Equator Principles (EPs). In total, 68 financial institutions from 27 countries have signed up to the EPs, which in practice means that, for specific project finance loans, they promise to live up to a number of standards, mainly those of the International Finance Corporation (IFC), the private sector arm of the World Bank.

Other instruments focused on the financial sector include the UN Principles for Responsible Investment (UN PRI – meant for institutional investors such as pension funds) and the UNEP Finance Initiative (meant mainly for banks and insurance companies).

Those instruments reviewed are:

- Equator Principles
- UN Principles for Responsible Investment
- UNEP Finance Initiative.

Research approach

All the 11 instruments reviewed have been subjected to analysis on a number of features. The table below explains these features and provides a description of the boundaries of the review (i.e. what is described and what is not).

The instrument

Features for analysis	**What is described and what is not**
Website	Website of the instrument
Description	Initiative taker(s), sector, decision-making process, defined standards.
Market scope	To what extent does the instrument control the market? To which companies does the instrument apply? Who are the participants, from a geographical perspective?
What does it say about land use?	Focus on land rights of people: To what extent does the instrument include the protection of food/land rights of people while land acquisition/lease or expanding land use for commodities is taking place? Is there free, prior, and informed consent for local communities? Some instruments may have some indirect benefits for people, in the form of excluding land from being converted. These will also be mentioned. Not mentioned are aspects such as possible health impacts on communities or labourers' working conditions.
Compliance verification and access to remedy	Is compliance in practice (on the ground) verified? Are there mechanisms for grievances, complaints, and conflicts?
Impact of the instrument on peoples' rights	Is there any proven positive impact? To what extent does the instrument have a connection with land use issues?
Strengths/weaknesses in safeguarding peoples' rights	Judgement of the instrument, based on the description of the items. Plus (+) sign for strengths. Minus (-) sign for weaknesses.

For some instruments (Equator Principles, FSC, Global Compact, and OECD Guidelines), NGO experts were consulted for comments during the compilation of this report. Conclusions were drawn based on the review and analysis of the 11 instruments and on the description of the context (i.e. which companies are active in the field of land acquisition/lease and expanding land use for commodities? Do the instruments apply to them?).

3 Review of the instruments

Forest Stewardship Council (FSC)

Forest Stewardship Council (FSC)

Website	www.fsc.org
Description	The Forest Stewardship Council (FSC) is an NGO established in 1993 and initiated by a group of timber users, traders, environmental organisations, and human rights organizations. The FSC uses certification to improve social and environmental practices in forest management worldwide. The FSC does not certify forests itself, but has a procedure to approve specialized certification bodies. Buyers are able to recognize FSC-certified products for wood and paper through the FSC label. The highest decision-making body is the General Assembly of FSC members. The General Assembly is made up of three membership chambers: environmental, social (both CSOs), and economic (companies), which are further split into the sub-chambers North and South. The board of directors is made up of nine individuals, elected from each of the chambers for a three-year term. Every component of the FSC system – from governance to defining responsible forest management – is developed through consensus.
Market scope	As of 15 June 2010, FSC-certified forests accounted for around 6% of the world's forests under active human influence (2.3 billion hectares) and 3.5% of the total global forest area (3.9 billion hectares).[70] More than 80% of the FSC-certified forests are located in Europe and North America (FSC 2010). In Asia, Africa, and South America, FSC-certified forests cover around 1% of the total forest area.[71] The main barriers to FSC certification in these regions include the massive involvement of Asian governments in forestry; corruption; unwillingness of producers to participate (FSC was set up from a buyers' perspective); and a small buyers' market for FSC-labelled products. Customers of FSC-labelled wood and paper are located mainly in Europe, the USA, and Japan. Buyers' markets in Asia, South America, and Africa are small.[72]
What does it say about land use?	The FSC Principles and Criteria (ten principles and 56 criteria) form the basis for all FSC forest management standards. Based on the ten principles, the FSC has developed specific requirements. It has two principles on land rights: Principle 2 demands demonstrated and uncontested, clearly defined, long-term land tenure and use rights, and Principle 3 demands recognition and respect of indigenous peoples' rights.

[70] FSC-certified forest cover: Forest Stewardship Council. "Global FSC certificates: type and distribution". July 2010, http://www.fsc.org/fileadmin/web-data/public/document_center/powerpoints_graphs/facts_figures/Global-FSC-Certificates-2010-06-15-EN.pdf. World forest cover: UNECE/FAO. "Forest Products Annual Market Review 2007-2008", 113. http://timber.unece.org/fileadmin/DAM/FPAMR2008.pdf

[71] Ibid. Forest cover per region: FAO. "Global Forest Resources Assessment 2010, key findings". March 2010. http://foris.fao.org/static/data/fra2010/KeyFindings-en.pdf

[72] A regional overview on the FSC website of the number of companies that are allowed to trade and process wood and paper from FSC-certified forests and plantations shows that the wood-consuming markets in South America, Africa, and Asia (except for Japan) are far less interested in FSC wood than markets in Europe and the USA.

Forest Stewardship Council (FSC)

Compliance verification and access to remedy	Verification of compliance by FSC certification bodies is carried out through an ongoing accreditation programme. Each FSC-accredited certification body is subject to annual office and field audits. The FSC has an official complaints and disputes procedure. Stakeholders can make their concerns known.	
Impact of the instrument on peoples' rights	In sub-Saharan Africa, Malaysia, and Indonesia, there is hardly any FSC-certified timber/paper production. Land rights are little recognized in these regions. In South America too only a few forests and plantations have been FSC-certified. However, where there is FSC certification a more stable situation is created, with forests remaining intact and land rights acknowledged.[73]	
Strengths/weaknesses in safeguarding peoples' rights	+	Principles protect land rights and indigenous peoples' rights.
	+	Strong involvement of CSOs in decision-making.
	-	Small buyers' markets for FSC-labelled wood and paper in Asia, South America, and Africa.
	-	Little progress to date with forest certification in Asia, Africa, and South America.

[73] Some benefits experienced by smallholders of forestland are outlined in a recent report by FSC. FSC International Center GmbH. "FSC User-Friendly Guide to FSC Certification for Smallholders – Make more out of your forests!". November 2009. http://www.fsc.org/fileadmin/web-data/public/document_center/publications/FSC_Technical_Series/FSC_smallholder_guide-EN.pdf

Round Table for Sustainable Palm Oil (RSPO)

Round Table for Sustainable Palm Oil (RSPO)

Website	www.rspo.org
Description	The Round Table for Sustainable Palm Oil (RSPO) was officially established in 2004 to develop and implement standards for palm oil. It has eight principles and 39 criteria, finalized in October 2007, with 123 specific national indicators. The RSPO does not certify oil palm plantations itself, but has a procedure to approve specialized certification bodies. The RSPO has an executive board of 16 members, appointed by the General Assembly for a period of two years. The allocation of seats is as follows: four growers, two processors and/or traders, two consumer goods manufacturers, two retailers, two banks/investors, two environmental/nature NGOs, two social/development NGOs. The board takes its decisions by consensus (de Man 2010).
Market scope	By 2006, almost 9 million hectares of palm oil were planted in South-East Asia (Malaysia and Indonesia) and 4 million hectares in Africa (World Bank/Deininger 2010). The area in Africa is mainly for local markets. At present in Indonesia and Malaysia, land is being rapidly converted into large palm oil plantations. As of July 2010, palm oil and palm kernels from about 435,000 hectares of land were RSPO-certified. This represents around 3% of the total of 13 million hectares planted worldwide (RSPO 2010).[74] The availability of certified palm oil exceeded demand in the first six months of 2010. RSPO palm oil is bought mainly by European consumer goods manufacturers and retailers.[75]
What does it say about land use?	For RSPO compliance, growers must meet a number of criteria related to land rights: 2.2: The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights. 2.3: Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior, and informed consent. 6.4: Any negotiations concerning compensation for loss of legal or customary rights are dealt with through a documented system that enables indigenous peoples, local communities, and other stakeholders to express their views through their own representative institutions. 7.5: No new plantings are established on local peoples' land without their free, prior, and informed consent, dealt with through a documented system that enables indigenous peoples, local communities, and other stakeholders to express their views through their own representative institutions. 7.6: Local people are compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior, and informed consent and negotiated agreements.[76] Even if only one concession within a company group is seeking RSPO certification, all its concessions must meet certain minimum criteria, which include no significant land conflicts; no replacement of high conservation value areas since November 2005; no labour disputes.[77]

[74] RSPO. "Certified Growers". July 2010. http://www.rspo.org/?q=node/520

[75] Commodity Online. "Sustainable palm oil expands in 2010". 21 July 2010. http://www.commodityonline.com/news/Sustainable-palm-oil-expands-in-2010-30213-3-1.html; Reuters. "RSPO firms up green palm oil buys as debate rages". 7 April 2010. http://www.reuters.com/article/idUSTRE6363YB20100407; Jakarta Post, letter by WWF Malaysia and WWF Indonesia. "Letter: Questioning RSPO credibility". 26 May 2010. http://www.thejakartapost.com/news/2010/05/26/letter-questioning-rspo-credibility.html

[76] RSPO. "Principles and Criteria for Sustainable Palm Oil Production Including Indicators and Guidance". October 2007. http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf

[77] RSPO. "Certification Systems, Final Document Approved by RSPO Executive Board". June 2007. http://www.rspo.org/files/resource_centre/RSPO%20certification%20systems.pdf

Round Table for Sustainable Palm Oil (RSPO)

Compliance verification and access to remedy	Field audits are carried out by third-party certification bodies. The executive board checks annually whether approved certification bodies are living up to the RSPO rules, based on information provided by the certification body and any complaints received.[78] A pilot scheme with accreditation of certification bodies by Accreditation Services International will start shortly. There is a procedure for complaints and grievances, for addressing both certification bodies and RSPO members. In addition, a Dispute Settlement Facility is being developed. There are many land disputes ongoing, some of which involve RSPO members.[79] The Indonesian NGO SawitWatch, which monitors the palm oil sector, has, through its own independent network of contacts, identified 630 land disputes between palm oil companies and local communities in Indonesia. In the state of Sarawak, Malaysia, about 50 land disputes concerning oil palm are currently going through the courts.[80]	
Impact of the instrument on peoples' rights	The rapid expansion of large monoculture palm oil plantations has a huge negative impact on the land rights of people in Indonesia and Malaysia. As an instrument for respecting customary rights to land, RSPO has had little positive impact to date, as only a relatively small area of palm oil plantations has been certified and land disputes are still ongoing.	
Strengths/ weaknesses in safeguarding peoples' rights	+	Legal/customary land rights and free, prior, and informed consent in the principles and criteria.
	+	Certified palm oil is available on the market.
	+	The main producing companies are members.
	+	All members have to fulfil minimum requirements for all concessions.
	-	Demand for certified palm oil is still low; no restrictions on marketing non-certified palm oil.
	-	Land use issues poorly monitored by RSPO; land disputes ongoing.

[78] Ibid.

[79] For example, see Facebook. "Information and complaint regarding actions committed by PT Sukajadi Sawit Mekar [Musim Mas Group] against villagers of Kenyala and Tanah Putih villages, Talawang sub-district, Kotawaringin Timur district, Central Kalimantan". 21 May 2010. http://www.facebook.com/note.php?note_id=394638628369

[80] Forest Peoples Programme and Sawit Watch. "Joint Statement of Indigenous Peoples, Smallholders and NGOs to IFC Consultation on Palm Oil". May 2010. http://www.forestpeoples.org/documents/ifi_igo/ifc_wbg_ngo_palm_oil_may2010_eng.pdf

Round Table on Responsible Soy (RTRS)

Round Table on Responsible Soy (RTRS)

Website	www.responsiblesoy.org
Description	The Round Table on Responsible Soy (RTRS) is a multi-stakeholder initiative founded in 2006 that promotes responsible production of soybeans, through commitment of the main stakeholders in the soy value chain and through a global standard for production. Participatory membership is open to organizations belonging to one of three constituencies: 1) producers; 2) industry, trade, and finance; 3) civil society organizations. The General Assembly is the highest decision-making body. Decisions are made on the vote of members, with each constituency having a voting power of one-third of the total votes. The executive board is responsible for operational activities and for most decision-making. It is elected by the General Assembly and is composed of the three constituencies. The main producers and industry/trader companies (Monsanto, ADM, Bunge, Cargill, Syngenta, Louis Dreyfus, etc.) are members of the RTRS. At the RTRS General Assembly in June 2010, members approved RTRS Standard Version 1.0. Each soy-producing country will be encouraged to make a national interpretation of the principles and criteria which, once endorsed by the RTRS, will provide the basis for certification in that country. The global soybean harvest in 2008 involved a land area of 97 million hectares, of which 70% was in the main soy-producing countries – the USA, Brazil, and Argentina (FAO). In the past 25 years expansion of large-scale soybean plantations in the southeasternCerrado region of Brazil has added 20 million hectares to the total. During the same period, expansion globally amounted to 25 million hectares, with Argentina also expanding its area (World Bank/Deininger 2010). Soybean plantations have also been established in the Amazon Biome, the massive rainforest area in the northern and western parts of Brazil.
Market scope	According to RTRS, RTRS-certified soy will be available in the market place for the first time at the beginning of 2011.[81]
What does it say about land use?	In June 2010 the members at the RTRS General Assembly approved RTRS Standard – Version 1.0. The following criteria within the standard relate to land use:[82] 1.2: Legal use rights to the land are clearly defined and demonstrable. 3.1: Channels are available for communication and dialogue with the local community on topics related to the activities of the soy farming operation and its impacts. 3.1.1: Documented evidence of communication channels and dialogue is available. 3.1.2: The channels adequately enable communication between the producer and the community. 3.1.3: The communication channels have been made known to the local communities. 3.2: In areas with traditional land users, conflicting land uses are avoided or resolved. 3.2.1: In the case of disputed use rights, a comprehensive, participatory, and documented community rights assessment is carried out. 3.2.2: Where rights have been relinquished by traditional land users there is documented evidence that the affected communities are compensated subject to their free, prior, informed, and documented consent.

[81] RTRS, "Did You Know That". http://www.responsiblesoy.org/index.php?option=com_content&view=article&id=123%3Adid-you-know-that&catid=4%3Anoticias&Itemid=3&lang=en

[82] RTRS. "RTRS Standard for Responsible Soy Production Version 1.0". 10 June 2010. http://www.responsiblesoy.org/index.php?option=com_docman&task=cat_view&gid=71&Itemid=40&lang=en

Round Table on Responsible Soy (RTRS)

Compliance verification and access to remedy	3.3: A mechanism for resolving complaints and grievances is implemented and available to local communities and traditional land users. 3.3.1: The complaints and grievances mechanism has been made known and is accessible to the communities. 3.3.2: Documented evidence of complaints and grievances received is maintained. 3.3.3: Any complaints and grievances received are dealt with in a timely manner.[83]	
Impact of the instrument on peoples' rights	Expansion of soy farming frequently generates social conflict and tensions between producers and local communities concerning land rights and rural migration. Since there is at present no RTRS soy on the market, RTRS has not yet mitigated any negative impacts by the industry on land use. Some positive effects may have been achieved by the current moratorium on soy trade from areas in the Amazon Biome deforested after July 2006 (for forest dwellers who have not lost their livelihoods). This moratorium, initiated by CSOs and the industry (with many of the same parties involved as in the RTRS), has been extended until July 2011 (ABIOVE 2010). The RTRS faces many criticisms from CSOs worldwide, including allegedly encouraging the expansion of soy monocultures, promoting the planting of GM soy, and having formulated principles and criteria that are too weak (GMWatch 2010).	
Strengths/weaknesses in safeguarding peoples' rights	+	Recognition of traditional land users.
	+	The main market players are member of the RTRS.
	-	There is no RTRS-certified soy yet on the market.
	-	There is little support for the initiative from CSOs.

[83] Ibid.

EU sustainability criteria on biofuels/bioliquids

EU sustainability criteria on biofuels/bioliquids

Description	In June 2009 the Renewable Energy Directive (RED), a new EU directive on the promotion of the use of energy from renewable sources, entered into force. This directive requires member states to achieve a 20% overall share of energy from renewable sources by 2020; this includes a 10% share of energy from renewable sources in transport.[84] At the same time, a renewed Fuel Quality Directive entered into force, which includes a 10% reduction target for greenhouse gas emissions for transport fuels by 2020.[85] Bio-energy is an important option for meeting these goals, specifically biofuels for transport. It was decided to include a set of sustainability criteria for biofuels, both in the Renewable Energy Directive and the Fuel Quality Directive. The criteria also apply to bioliquids used in the heating or electricity sectors. Member states of the EU are not allowed to set stricter sustainability criteria than the ones laid down in the EU directives. In 2008 the main producers of biofuels were the USA (42% of global production, primarily from corn), Brazil (29%, primarily bio-ethanol from sugar cane), and the EU (18%, with Germany and France leading, mainly biodiesel from rapeseed and sunflower) (Biofuels Platform 2008; USDA). As the use of biofuels is heavily stimulated by the EU directives, it is expected that production in Latin America, Malaysia, Indonesia, and, to a lesser extent, Africa will increase rapidly and will be imported into the EU.
Market scope	The EU directive will drastically increase imports into the EU of biofuels/bioliquids produced in sunnier parts of the globe.
What does it say about land use?	The sustainability criteria do not provide for any direct recognition of customary land rights or for free, prior, and informed consent. Social criteria are not included within the sustainability requirements. The sustainability criteria focus on biodiversity and greenhouse gas emissions. The sourcing of raw materials from land with areas of high biodiversity and land with high carbon stock is limited. Furthermore, for every biofuel and bioliquid production pathway, the greenhouse gas emissions have been calculated (taking into account all emissions from cultivation to consumer distribution). The criteria include a bonus for land that was not in use for agriculture or any other activity in January 2008, and for land that was severely degraded or heavily contaminated. Though not within the criteria, the directives state: "It is appropriate to monitor the impact of biomass cultivation, such as through land-use changes, including displacement, the introduction of invasive alien species and other effects on biodiversity, and effects on food production and local prosperity."

[84] Official Journal of the European Union. Renewable Energy Directive. 5 June 2009. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0016:0062:EN:PDF. Energy from renewable sources is defined as energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal, and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogases. The mandatory 10% target for transport (excluding aviation and marine transport) is defined as that share of final energy consumed in transport which is to be achieved from renewable sources as a whole, and not from biofuels alone.

[85] Official Journal of the European Union. Fuel Quality Directive. 5 June 2009. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0088:0113:EN:PDF. In this directive oil companies, the suppliers of fuel, are targeted to reduce their well-to-wheel emissions. A 6% reduction should be obtained through the use of biofuels, alternative fuels, and reductions in flaring and venting at production sites. Subject to a review, it should comprise a further 2% reduction obtained through the use of environmentally friendly carbon capture and storage technologies and electric vehicles and an additional further 2% reduction obtained through the purchase of credits under the Clean Development Mechanism (CDM) of the Kyoto Protocol.

EU sustainability criteria on biofuels/bioliquids

Compliance verification and access to remedy	Member states must require economic operators to show that biofuels and bioliquids comply with the sustainability criteria. Economic operators have three methods for compliance: Provide the member state with the data it requires according to the EU directives; Use a voluntary scheme assessed and recognised by the European Union; Be part of a bilateral or multilateral agreement assessed and recognized by the European Union. Member states have to require that economic operators arrange for serious independent auditing of the information submitted. However, where economic operators use a voluntary scheme or a bilateral/multilateral agreement, an audit is not needed as one will already have been conducted by the EU in its process of recognition (European Commission 2010). There is no complaints mechanism or conflict resolution. The directives and criteria may be open to changes within the political process of the EU (including consultation of CSOs).	
Impact of the instrument on peoples' rights	The EU directives will stimulate the expansion of biofuel monocultures. This may increase land conflicts and human rights violations. The sustainability criteria do not deal with people's food/land rights when faced with investments involving the land they use. The EU directives comprise concerns about climate change and biodiversity. The exclusion of areas of high biodiversity and the bonus for land that is not used may put less pressure on the food security of some communities, although the European market is only one of the global regions using biofuels.	
Strengths/weaknesses in safeguarding peoples' rights	+	The EU directives comprise concerns about land use in so far as land investments may increase climate change and decrease biodiversity.
	-	The EU directives stimulate the expansion of biofuel monocultures, and may increase land conflicts and human rights violations.
	-	No recognition of people's customary land rights.
	-	No concept of free, prior, and informed consent for communities.

Extractive Industries Transparency Initiative (EITI)

Extractive Industries Transparency Initiative (EITI)

Website	www.eitransparency.org
Description	The Extractive Industries Transparency Initiative (EITI) aims to strengthen governance by improving transparency and accountability in the extractives sector. The EITI supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas, and mining. The EITI Board consists of members from governments, companies, and civil society, and is appointed at the bi-annual global conference. The EITI principles and criteria are the most concise statement of the beliefs and aims of the Initiative. A validation methodology was finalised by the EITI Board in 2007. So far only Azerbaijan, Liberia, and Timor-Leste are compliant countries. There are 27 candidate countries: Afghanistan, Albania, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Ghana, Iraq, Kazakhstan, Kyrgyz Republic, Madagascar, Mali, Mauritania, Mongolia, Mozambique, Niger, Nigeria, Norway, Peru, Republic of the Congo, Sierra Leone, Tanzania, Yemen, and Zambia.[86]
Market scope	None, as far as is related to land use.
What does it say about land use?	The EITI initiative is not concerned with land use. It deals with governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas, and mining. In a leaked draft report, to be officially published in the autumn of 2010, the World Bank advocated the launch of a Land Transparency Initiative modelled on the Extractive Industry Transparency Initiative. The draft said: "By establishing a consistent format for reporting on land acquisition and monitoring [the] process over time, it could provide access to information sorely missing" (*Financial Times* 2010).
Compliance verification and access to remedy	No relation to land use.
Impact of the instrument on peoples' rights	No relation to land use.
Strengths/weaknesses in safeguarding peoples' rights	- The EITI initiative is not concerned with land use.

[86] EITI website. "EITI Countries". http://eiti.org/implementingcountries

OECD Guidelines for Multinational Enterprises

OECD Guidelines for Multinational Enterprises

Website	Guidelines at: http://www.oecd.org/dataoecd/56/36/1922428.pdf
Description	The Organisation for Economic Co-operation and Development (OECD) is an alliance of 30 prosperous countries. The OECD aims to coordinate the countries' social and economic policies, and in 2000 developed guidelines for the operations of multinational enterprises around the globe. The OECD Guidelines, to be revised in 2010/2011, cover a wide range of standards on labour rights, human rights, the environment, consumer protection, and corruption. The OECD and a number of adhering countries expect multinational enterprises operating in/from their territories to uphold the OECD Guidelines.
Market scope	Besides European countries, OECD members include countries such as the USA, Japan, Mexico, South Korea, and Australia. There are 12 adhering countries, including Brazil, Argentina, Peru, and Chile in Latin America. Many multinational enterprises are not based in the 42 countries that recommend the OECD Guidelines, nor have activities in these countries. They are not subject to the OECD Guidelines. This applies especially to many Asian multinational enterprises (except for those in Japan and South Korea).
What does it say about land use?	There is no reference to land rights or to free, prior, and informed consent in the OECD Guidelines. However, the guidelines contain some general aspects that might be explained to apply also to specific cases of land acquisition/lease or expansion of land use for commodities i.e. those that: Contribute to economic, social, and environmental progress; Respect human rights consistent with the host government's international obligations and commitments; Encourage local capacity-building through close cooperation with the local community.
Compliance verification and access to remedy	There is no verification of compliance with the OECD Guidelines, although some countries may require compliance when companies need government help with their international investments. There is a complaints mechanism. All of the 42 countries have to set up a National Contact Point (NCP). These NCPs handle complaints from organizations and individuals concerning alleged violations of the guidelines. At the end of mediation between the bringer of a complaint and the defendant company, the NCP may publish a final statement with its judgment on the alleged violation of the OECD Guidelines. As of January 2010, 90 complaints had been filed by NGOs. About 15 of these were related to forced evictions and resettlement, mostly due to mining activities and the construction of dams. The quality of complaints handling by the NCPs can differ substantially. Also, the final statement of the NCP may have little impact. For example, a complaint brought by Oxfam Canada against the First Quantum Mining company regarding forced evictions in Zambia resulted in an agreement between both parties. Later, however, it became clear that the company had breached all parts of the agreement.[87]
Impact of the instrument on peoples' rights	Compliance with the OECD Guidelines is not legally enforceable. Even if a company has stated it will act according to the guidelines, there are few chances for redress if its behaviour does not match up. Therefore the instrument has little positive impact on people's land rights. A few cases have resulted in a positive outcome and a change in corporate behaviour, but these are few and far between.[88]

[87] OECD Watch. "Oxfam Canada vs. First Quantum Mining". http://oecdwatch.org/cases/Case_19

[88] OECD Watch. "Status search of all the cases". http://oecdwatch.org/cases/advanced-search/status/casesearchview?type=Status

OECD Guidelines for Multinational Enterprises

Strengths/weaknesses in safeguarding peoples' rights	+	Mediation opportunity for NGOs and affected communities.
	-	Little access to remedy.
	-	Little verification of compliance.

Global Reporting Initiative (GRI)

Global Reporting Initiative (GRI)

Website	www.globalreporting.org
Description	The Global Reporting Initiative (GRI), based in Amsterdam, aims to facilitate transparency and accountability by organizations (companies mostly, but also some governmental and non-profit organizations) and to provide stakeholders with a comparative framework from which to assess the value of disclosed information. The GRI has developed a framework for sustainability reporting through a consensus-seeking process with participants drawn globally from business, civil society, labour, and professional institutions. Its development is an ongoing process, and includes, for example, sector supplements. The so-called GRI G3 reporting framework, published in 2006, tells companies how to report and what to report. The GRI has identified performance indicators in the following categories: economic; environmental; labour practices and decent work; human rights; society; and product responsibility. There are core and additional indicators. Core indicators are assumed to be material for almost all reports and to be of interest to most stakeholders. There are three application levels. C is the introduction level; B (better) and A (best) require reporting on additional indicators. Organizations must self-declare their application level.
Market scope	Though still young, the GRI is already the world's most widely used sustainability reporting framework. On its website, it presents an updated spreadsheet every week. The spreadsheet lists the companies (1,300 as of February 2010) that have made a sustainability report in accordance with GRI guidelines.[89] In July 2009 the GRI published information on how many organizations per country reported under the GRI system. The top ten countries were: Spain; USA, Brazil; Australia; Great Britain; Japan; Germany; South Africa; Italy; Canada. GRI reporting organizations include many of the biggest multinational enterprises, listed on stock exchanges. As yet, the GRI is poorly used by Asian multinational enterprises.
What does it say about land use?	Core indicators of the GRI that are related to land use or might include land use issues: EN11: Location and size of land owned, leased, managed in, or adjacent to, protected areas and areas of high biodiversity value outside protected areas. HR1: Percentage and total number of significant investment agreements that include human rights clauses or that have undergone human rights screening. HR2: Percentage of significant suppliers and contractors that have undergone screening on human rights and actions taken. SO1: Nature, scope, and effectiveness of programmes/practices that assess and manage the impacts of operations on communities, including entering, operating, and exiting. Additional indicator: HR9: Total number of incidents of violations involving rights of indigenous people and actions taken.
Compliance verification and access to remedy	Reporting organizations are not obliged to have their compliance to the GRI system verified. For some reports, compliance is verified by the GRI itself or by an external auditor. The GRI does not have complaint or conflict resolution mechanisms.
Impact of the instrument on peoples' rights	The instrument has little positive impact on people's land rights. Though sustainability reporting may have some positive influence on practices on the ground (i.e. to measure is to manage), bad practices on the ground may continue while being excellently reported by companies.

[89] Global Reporting Initiative. GRI Reports List. http://www.globalreporting.org/ReportServices/GRIReportsList/

Global Reporting Initiative (GRI)

Strengths/weaknesses in safeguarding peoples' rights	+	Comparative framework on disclosed sustainability information by companies.
	+	Global initiative.
	-	Market scope of GRI is still small.
	-	Bad practices on the ground may continue, even though reported by companies.
	-	Compliance verification is still weak.

Global Compact

Global Compact

Website	http://www.unglobalcompact.org/
Description	Launched in 2000, the United Nations Global Compact instrument seeks to align business operations worldwide with ten universally accepted principles in four core areas: human rights; labour rights; environment; anti-corruption. The UN Global Compact is not a regulatory instrument, but is voluntary. Any company joining the initiative is expected to: Make the UN Global Compact and its principles an integral part of its business strategy and day-to-day operations; Engage in partnerships to advance broader development objectives (such as the Millennium Development Goals); Annually describe the ways in which it implements the principles and supports broader development objectives (also known as the Communication on Progress). The added value of participation is that the Global Compact is globally recognized as a policy framework to manage risks/opportunities related to the four core areas.
Market scope	As of February 2010, about 2,000 companies with more than 250 employees had signed the Global Compact. Of the FT 500 (the Financial Times' list of the world's largest companies), 160 companies are signatories (Schanzenbächer 2010). Being a global initiative, the Global Compact also attracts multinationals that are not located in countries that adhere to the OECD Guidelines for Multinational Enterprises. For example, China, Colombia, and Indonesia are in the top 20 host countries with the highest number of multinationals signatory to the Global Compact.
What does it say about land use?	The ten principles of the Global Compact do not specifically mention the issue of land use. There are also no further specific requirements other than fulfilling the ten principles. Indirectly, some of the principles of the Global Compact relate to the issue of land acquisition. The first two principles deal with human rights. Businesses should support and respect the protection of internationally proclaimed human rights (Principle 1) and make sure that they are not complicit in human rights abuses (Principle 2). The right to food is an internationally proclaimed human right. Free, prior, and informed consent of communities and the recognition of customary land rights are not clearly internationally proclaimed.
Compliance verification and access to remedy	Companies have to send an annual Communication on Progress to the Global Compact secretariat, otherwise they will be removed form the list of participants in the initiative. There is no complaints mechanism or conflict resolution mechanism when a company is alleged to have violated the principles of the Global Compact.
Impact of the instrument on peoples' rights	Because there are no mechanisms for redress in place and the guidelines themselves are not specifically on land use, the instrument has presumably very little positive impact on the land rights of people facing land investments. However, signatories have created expectations that they will live up to the ten principles of the Global Compact. If a signatory is allegedly complicit in human rights abuses due to land acquisition, affected stakeholders have a strong argument if they accuse the company of being unable to adhere to the principles it has signed up to.
Strengths/weaknesses in safeguarding peoples' rights	+ Outreach to companies in countries that do not adhere to the OECD Guidelines for Multinational Enterprises. - Membership is of little relevance to land use issues. - No compliance verification or access to remedy.

Equator Principles

Equator Principles

Website	www.equator-principles.com
Description	The Equator Principles (EPs) provide a benchmark for managing social and environmental risk in project finance by the financial industry. Project finance is a specific type of loan, a "non-recourse" loan which must be repaid from the revenues generated by the project for which the loan is obtained. The EPs can be adopted by financial institutions (FIs), in which case they become EPFIs. The EPs were published in 2003 and extensively revised in July 2006.[90]EPFIs should ensure that financed projects are developed in a socially and environmentally responsible manner by providing loans only to projects that conform to the ten principles. EPFIs use a system of categorization to reflect the risk magnitude of projects: "A" projects have significant adverse social or environmental risks, "B" projects have limited risks, and "C" projects have minimal risks. Each category triggers a different set of conditions to be applied to a loan.
Market scope	To date, 68 financial institutions from 27 countries have adopted the Equator Principles. Most of the financial institutions originate from OECD (or candidate) countries.[91] In general, EP adoption is at a low level but is growing among financial institutions based in Asia, Africa, and South America. Only four banks that are legally based in Asia, five African banks, and nine South American banks have adopted the EPs. It is important to stress that project finance is a niche market; the impact of the EPs on the overall activities of a bank is therefore limited. Project finance provides well under 5% of capital raised through commercial lending and investment banking (BankTrack 2009).
What does it say about land use?	Principles 2, 3, and 4 state that for A and B projects the borrower should conduct a social and environmental assessment. For all projects in non-OECD countries, the assessment needs to be based on IFC performance standards[92] and IFC industry guidelines on environment, health, and safety. The application of these guidelines and standards is the backbone of the EPs. Finally, an action plan and a management system must be prepared. Principle 5 states that for all A projects and some B projects the government, borrower, or a third party expert should consult affected communities in a structured and culturally appropriate manner. For projects with significant adverse impacts on affected communities, the process should ensure their free, prior, and informed consultation (though not necessarily consent).

[90] The Equator Principles. July 2006. http://www.equator-principles.com/documents/Equator_Principles.pdf

[91] OECD. "Member Countries and Non-Member Economies". http://www.oecd.org/countrieslist/0,3351,en_33873108_33844430_1_1_1_1_1,00.html

[92] IFC. http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards. In September 2009, the IFC launched a process to review and update its Performance Standards. This process was expected to last until October 2010 and the updated framework should be released by January 2011.

Equator Principles

Compliance verification and access to remedy	Principle 7 states that for all A projects and some B projects an independent expert should review the social and environmental assessment, action plan, and consultation process documentation in order to assess EP compliance. Principle 9 requires ongoing monitoring and reporting over the life of the loan by independent experts. Principle 6 states that for all A projects and some B projects the borrower should establish a mechanism for handling concerns/grievances raised by individuals or groups from among communities affected by projects. The borrower should ensure that the mechanism addresses concerns promptly and transparently, in a culturally appropriate manner, and is readily accessible to all segments of affected communities. Many CSOs question the achievements to date of the EPFIs when it comes to transparency and accountability. Most project reports by EPFIs are not publicly available, it is not publicly known which projects are being financed under EP rules, and many EPFIs have not established grievance mechanisms or fully informed affected communities (BankTrack 2010). In short, many EPFIs do not live up to their own principles.	
Impact of the instrument on peoples' rights	Since it is not known which projects are being financed "under Equator", it is not possible to determine the impact so far of the EPs on people's land rights.	
Strengths/weaknesses in safeguarding peoples' rights	+	The EPs include mechanisms for free, prior, and informed consultation of communities (though not consent) and grievance mechanisms for high-risk projects.
	-	Many EPFIs do not live up to their own principles.
	-	Project finance is a relatively small niche market for financial institutions.
	-	Most land grab deals are not financed through project finance involving large commercial banks; therefore the Equator Principles do not apply.

UN Principles for Responsible Investment

UN Principles for Responsible Investment

Website	www.unpri.org
Description	In early 2005 the Secretary-General of the United Nations invited a group of the world's largest institutional investors to join a process to develop the Principles for Responsible Investment (PRI). The PRI emerged in 2006 as a result of meetings by a 70-person multi-stakeholder group of experts from the investment industry, intergovernmental and governmental organizations, civil society, and academia. The Principles have been developed in partnership with the UNEP Finance Initiative and the UN Global Compact.
Market scope	While reflecting the core values of large investors whose investment horizon is generally long and whose portfolios are often highly diversified, the Principles are open to provide support to all institutional investors, investment managers, and professional service partners. As of February 2010, the PRI had been signed by 199 asset owners, 364 investment managers, and 134 professional service partners. The great majority of the signatories originate from OECD member countries, while the emerging countries of Brazil (37 signatories) and South Africa (27) also have many signatories. However, there are very few signatories based in Asia (except for Japan and South Korea), Latin America (except for Brazil), or Africa.
What does it say about land use?	The principles describe in a rather generic fashion how institutional investors should work towards investment decisions while taking into account environmental, social, and governance (ESG) issues. The principles do not contain anything specific on land use, but read as follows: 1. Incorporate ESG issues into investment analysis and decision-making processes. 2. Incorporate ESG issues into ownership policies and practices. 3. Seek appropriate disclosure on ESG issues by the entities in which investment is made. 4. Promote acceptance and implementation of the Principles within the investment industry. 5. Work together to enhance effectiveness in implementing the Principles. 6. Report on activities and progress towards implementing the Principles.
Compliance verification and access to remedy	Participation in the PRI's annual reporting and assessment survey (after an optional one-year grace period) is the one mandatory requirement for all signatories. Each year one-third of participants in the survey are verified through one-hour telephone calls from the PRI Secretariat. Once verification calls are completed, all responses are aggregated to create the annual Report on Progress. Signatories who do not fulfil the requirement of completing the survey will be publicly delisted from the initiative. The PRI does not have mechanisms for complaints or conflict resolution.
Impact of the instrument on peoples' rights	It is not clear whether this instrument has helped to safeguard people's land rights. It may have encouraged some institutional investors to pay more attention to ESG issues.
Strengths/weaknesses in safeguarding peoples' rights	+ Instrument may have encouraged some institutional investors to pay more attention to ESG issues. - Very few signatories based in Asia (except for Japan and South Korea), Latin America (except for Brazil), or Africa. - Instrument does not require any level of ESG performance.

UNEP Finance Initiative

UNEP Finance Initiative

Website	www.unepfi.org
Description	UNEP FI is a global partnership between the United Nations Environment Programme (UNEP) and the financial sector. UNEP FI works closely with about 180 financial institutions (banks, insurance companies, etc.) which are signatories to the UNEP FI statements. Through peer-to-peer networks, research, and training, the initiative works to improve the environmental and sustainability practices of financial institutions. By signing up to the statements, financial institutions openly recognize the role of the financial services sector in making economies and lifestyles sustainable and commit to the integration of environmental considerations into all aspects of their operations.
Market scope	As well as being based in OECD-related countries, some signatories originate from less expected countries, such as Nigeria (seven), the Philippines (three), and India (two).
What does it say about land use?	The statements for financial institutions (dated 1997) and the insurance industry provide only general commitments to sustainable development, environmental management, public awareness, and communications. They do not mention land use issues specifically.
Compliance verification and access to remedy	Signatories have to submit a brief report annually, on sustainable development policies and measures that have been implemented or are planned. There is no standard to conform to, so there is no verification compliance or access to remedy.
Impact of the instrument on peoples' rights	Not known, but probably quite small.
Strengths/weaknesses in safeguarding peoples' rights	- Instrument is of little relevance to land use issues.

4 Conclusions and recommendations

Some, though little, benefit for people facing land use shifts

For this study, 11 company commitment instruments were reviewed, in order to measure their impact on safeguarding the food/land rights of people facing investments in agricultural land. The following features of the instruments were analyzed: their market scope; their contents and objectives in relation to land rights; and to what extent they provide for compliance verification and access to remedy. Based on the analysis, it is concluded that these instruments have so far generated some, though little, benefit for people confronted with land use shifts.

The study had some limitations. First, surprisingly few in-depth impact evaluations (which could have been incorporated into this study) have been made of the instruments with regard to land rights. Second, some company commitment instruments (notably the RSPO and RTRS) are still in too early a stage of development to judge whether they have actually yielded positive impacts. Third, some instruments might have had positive effects beyond the commitment of the companies involved, but this could not be measured. For example, the commodity-specific instruments might have created a more positive attitude towards land rights among producers and governments in developing countries, even if they are not directly cooperating in the instrument. Similarly, company interest in CSR issues has increased over the years, but it remains unclear how much of the increase can be attributed to the CSR instruments discussed, and even less whether this has actually resulted in positive impacts on food/land rights.

Company commitment instruments in the context of all instruments

Two big limitations of company commitment instruments are that they do not apply to governments and that companies may usually decide voluntarily whether to commit to them. States have a vital role to play in protecting people's food/land rights, ensuring that companies respect these rights, and providing for access to remedy. However, states hosting land investments may have weak systems of governance (e.g. many African countries) or may be supportive of land investments (e.g. Malaysia and Indonesia regarding palm oil plantations and states in Latin America regarding soy and sugar cane). Home states of private investors (including Europe and the USA) and states with an interest in foreign lands (e.g. Asian and Gulf states) may also be supportive of land investments.

States' interest in large-scale land investments has a negative influence on their respect for people's food/land rights. In general the Ruggie framework, to "respect, protect, and remedy" is not yet being fulfilled by states internationally. States are not sufficiently encouraging each other to respect food/land rights, and are not ensuring that companies do not infringe on rights. Extra-territorial access to judicial and non-judicial remedy is still in a poor state.

In this context, and also due to the fact most company commitment instruments do not oblige companies to conform (there will always be laggards), the potential positive impact of such instruments to safeguard people's food/land rights is subject to serious limitations.

Three categories of company commitment instrument

For this study the instruments were categorized into three groups: commodity-specific, general CSR, and financial sector-specific. For each category the overall strengths and weaknesses of each group of instruments in relation to safeguarding people's food/land rights are described below, including recommendations to enhance their efficacy.

Financial sector-specific instruments are too vague to be effective

Land acquisition/lease and expanding land use for commodities has been initiated or at least supported by private investors such as pension funds, banks, hedge funds, and private equity groups. The financial sector has almost no company commitment instruments to safeguard the food/land rights of people facing investments in agricultural land. In some cases, the individual policies of financial institutions may include free, prior, and informed consultation of people potentially affected. To what extent these individual cases are having an effect is not clear, as levels of transparency in the financial sector are generally low. The sector-specific instruments should seek more transparency from the financial sector as a first step towards enabling a more fully-fledged multi-stakeholder approach that encourages social and environmental benefits.

General CSR instruments might help, but apply only to a narrow group

The general CSR instruments reviewed have been adopted mainly by companies from OECD countries, although companies in emerging countries such as Brazil and South Africa are increasingly participating. Many companies that are driving forces in land acquisition/lease deals – including Asian companies (except for those in Japan and South Korea) and companies in the Gulf states – are not subject to the OECD Guidelines for Multinational Enterprises and do not participate in the Global Reporting Initiative or the Global Compact. Within OECD countries, many investors and companies involved in commodity supply chains might also not participate, as there are few repercussions for those not committing to these general CSR instruments. Only large, well-known listed companies might feel compelled to endorse such instruments. To what extent this leads to actual changes on the ground is not clear.

One of the main problems of the general CSR instruments is that the verification of compliance is quite weak (especially for the UN Global Compact). For the Global Reporting Initiative, enhancing the verification of compliance (i.e. whether companies actually report according to the GRI reporting framework) would be a huge improvement, as this instrument looks promising and might in fact end up being more useful than the Global Compact.

The non-judicial access to remedy provided for by the OECD Guidelines has so far had severe limitations. The OECD Guidelines would function better if there were minimum criteria for the quality of complaints-handling by the NCPs. Also, even if a company has stated that it will act according to the OECD Guidelines, there are currently few opportunities for redress if its behaviour fails to match up to its promises. Home states could do more in making adherence to the principles a condition for government support of companies operating abroad. Also, there should be consequences whenever it is established that a company has breached the OECD guidelines.

Commodity-specific company commitment instruments might help sometimes

Of the three kinds of instrument, the greatest protection of food/land rights can be expected from the commodity-specific ones. With regard to land investments, the most important existing certification schemes are the Forest Stewardship Council (FSC, sustainable production of wood and paper), the Round Table for Sustainable Palm Oil (RSPO), and the Round Table on Responsible Soy (RTRS).

As it is very difficult to reach 100% certification, these instruments cannot reduce the pressure on land due to increasing demand for biofuels/bioliquids in the developed world, economic growth of emerging countries, and population growth. They might, however, take into account the rights of land users and the local/regional food economy in certain areas, in contrast with "business as usual". The FSC, RSPO, and RTRS schemes are voluntary. It is legally not possible to enforce the use of certified products, although to some extent the procurement of certified products can be encouraged by governments.

FSC certification of forests generally means that a more stable situation is created, with forests remaining intact and land rights acknowledged. The main disadvantages are that demand for FSC-labelled wood and paper in Asia, South America, and Africa (though not in Europe) is still quite small, and many producers in developing countries do not feel the need to certify their forests and plantations.

The RSPO and RTRS are relatively new instruments. A huge difference between them and the FSC scheme is the involvement of major producers. On the other hand, the RTRS has little support from CSOs, partly because it might include genetically modified soy in its certification system.

In the case of the RSPO, producers are subject to minimum requirements for their oil palm plantations, certified or not. For instance, a grower may not be involved in significant land conflicts. However, verification of compliance with such criteria and/or their enforcement are still very problematic, as many growers are still involved in land conflicts. Another problem that the RSPO faces is the marketing of certified palm oil. Demand for it is relatively low, while producers face no problems in marketing non-certified palm oil.

Certified RTRS soy, with the new land use criteria, is expected on the market in 2011; it is too early yet for RTRS to have mitigated any negative impacts of the industry on land use.

For the commodity-specific instruments, credibility remains an important issue. Due to the costs of, for example, verification mechanisms and other management systems, certified products are usually more expensive than non-certified products. These costs are incurred to assure buyers that these products have genuine social and environmental benefits, compared with non-certified products. As the commodity-specific instruments are all market-based, the buyers' market consequently should be large and receptive enough to encourage positive impacts from certification. However, as this study has shown, the buyers' market for certified products is generally still small in Asia, South America, and Africa. Hence a good way to enhance the company commitment instruments could be to (further) promote buyers' markets for certified products, focusing on the main users.

The EU sustainability criteria on biofuels/bioliquids (which are not in fact a company commitment instrument) do not provide any direct recognition of customary land rights or of free, prior, and informed consent. Social criteria are not included in the sustainability requirements. The quantitative goals to use more biomass contained in EU directives will drastically increase the demand for biofuels/bioliquids produced in sunnier parts of the globe. The rising demand for such products will increase the extent of biofuel monocultures and may increase land conflicts and human rights violations. In addition, biofuels/bioliquids from certain areas, where land investments may increase climate change and decrease biodiversity, will be excluded only from entering the European market.

The Extractive Industries Transparency Initiative (EITI) was also reviewed, but it was found not to be relevant for land issues. EITI deals with governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas, and mining activities. Perhaps the experiences to date with this instrument could be useful in obtaining greater transparency on land investments taking place in developing countries.

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Trade law and responsible investment

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1 Introduction

The challenge of large-scale investment in agriculture cannot be dealt with in isolation. Investments in agriculture are part of a bigger picture that includes a whole set of international, regional, and national rules. The UN Special Rapporteur on the Right to Food commented on the unsustainable rush towards farmland in developing countries as the result of past regulatory failures: "We have failed in the past to adequately invest into agriculture and rural development in developing countries […]. We have failed to promote means of agricultural production which do not deplete soils and do not exhaust groundwater resources. And we are failing today to establish well-functioning and more reliable global markets for agricultural commodities" (UN Special Rapporteur on the Right to Food 2009, 15).

But what would a well functioning, more reliable global market for agricultural commodities look like? What instruments would contribute to a more equitable, reliable global market?

Global agricultural markets are shaped by many factors, not least by international trade rules. Hence not only specific investment policies, but also trade policies influence investment practices. Taking this into account, this report will discuss how trade rules could provide an enabling environment for responsible investment.

2 Responsible trade regime as precondition for responsible investment

There is broad international agreement that investment flows to the agricultural sector in developing countries need to be increased (FAO Roundtable, 2009[93]). And there is broad agreement that, from a sustainable development perspective, such investments need to be responsible, and that they will only be responsible and beneficial to the poor if they contribute to the prudent development of the agricultural sector.

Following from the above, this report is based on the assumption that responsible investment flows presume a responsible trade regime i.e. a trade regime that contributes to the prudent development of the agricultural sector in developing countries. A prudent, sustainable trade regime will at the same time promote investments in the agricultural sector that are responsible to the people involved and to the environment. It builds the "channel" through which investments flow.

[93] "Participants all agreed that increasing investment in agriculture is vital to achieving higher productivity and greater food production, thereby ensuring global food security and poverty reduction. […] Participants from developing countries emphasized their efforts to attract investment in and for their agriculture sectors, with a view toward improving food security, yields, output, and value added, while benefiting from additional farm and firm income, direct and indirect employment, productive infrastructure, technology transfer, new product development, and better access to attractive markets."

3 Sustainable development of the agricultural sector: basic requirements

Prudent, sustainable development of the agricultural sector requires that its economic viability is not undermined, that environmental assets are carefully dealt with, and that human needs are respected and fulfilled.

Inclusion of the small-scale sector

As experience shows, sustainable agricultural development in developing countries necessitates that the small-scale farming sector is not left out, but is appropriately included in the process of raising agricultural productivity.

Indeed, the process of development necessarily entails the movement of workers from low-productivity, low-income subsistence farming to higher-productivity small- or large-scale agriculture, and requires an increase in work opportunities in sectors such as manufacturing and services in order to absorb excess agricultural labour (Polaski 2005, 4). However, "even under the most favourable domestic and international conditions, […] moving large numbers of people from low-productivity farming to higher-productivity agriculture, manufacturing, and other occupations has taken decades" (Ibid.). Taking account of this large employment effect of small-scale agriculture is a key element of poverty reduction (World Bank 2008).

In terms of economic efficiency, it is generally assumed that subsistence farmers will lose out in competing with larger production systems, as the latter can produce at lower costs, due to economies of scale, mechanization, and capitalization, among others (Ibid., 5). What is certainly true for subsistence farming, however, is not necessarily true for small-scale agricultural production per se. It has been argued increasingly in recent years that production at small scale might be economically even more favourable, given that economies of scale are less relevant in the production of agricultural produce than they are in processing and marketing (Taylor 2009, 8). "Family-operated farms are widely accepted to be economically much more efficient than plantations operated by wage labour" (Ibid.).[94] Environmental concerns might be handled better, too. In consequence,

[94] Essentially, the comprehensive International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD) (UNDP et al. 2008) promotes family farming as a central pillar of future agricultural production.

various alternative modes of cooperation between agribusiness firms and family-operated farms have been promoted as being also in the investors' interest, such as out-growing strategies.[95]

While it is necessary to increase efficiency of the small-scale sector, the phenomenon of feminization of small-scale agriculture in poorer countries needs to be considered (Zammit 2008; UNCTAD 2004). As a result of marginalization of the sector, men have tended to migrate in search of more lucrative jobs, while women stay with the family on the farm. While this implies more income opportunities for women, it also means an increased workload, as women continue to provide the care work. Strategies that target economic efficiency of the agricultural sector therefore need to include an analysis of the sharing of the burden of work, in order to ensure that time poverty is not increased (as this constitutes an important element of individual well-being (Bieri 2009; Razavi 2007).

Irrespective of whether, in certain cases, small-scale production may become the most efficient option, adequate policies need to be in place to ensure that such upgrading and inclusion happen in an equitable way.

Prudent policy orientation towards trade in agriculture

Adequate balance

Suitable policies will, among other things, imply a prudent policy orientation towards trade in agriculture. Although still very contentious, a slight move away from neoclassical trade concepts can be observed, while looking for more nuanced approaches that may consist of an adequate balance between export orientation and focusing on local markets. As a consequence of this, the suggestions made in this report will be based on the following basic assumptions:

Market opening

Engagement in trade in agriculture generally leads to higher rates of economic growth and is associated with less hunger: "The proportions of undernourished people and underweight children tend to be lower in countries where agricultural trade is large in proportion to agricultural production" (Mechlem 2006, 132). However, there are many disparities, as not all developing countries with similar levels of trade experience the same amounts of hunger and poverty. This depends not least on the institutional environment upon which the trade policy is based: "If trade policy is to contribute to food security, it

[95] See also European Commission 2010, 3: "Evidence shows that investments in the smallholder sector yield the best returns in terms of poverty reduction and growth."

needs to be embedded in a coherent and well-sequenced national development strategy and complemented by appropriate pro-poor companion policies" (Ibid.). Therefore sequencing is of particular importance, in the sense that trade reforms should only be implemented once the appropriate domestic policies are in place.

Vulnerability and reliable local markets

Such a trade-friendly starting point is put into perspective by the recognition that intensive export orientation might increase vulnerability as a result of price volatility, and that reliable local or regional food markets are a key prerequisite of a viable small-scale farming sector (e.g. FAO 2005, 27). Such reasoning is prominently defended, for example, by the UN Special Rapporteur on the Right to Food, who claims that states should avoid excessive reliance on international trade: "Their short-term interest in procuring from the international market the food which they cannot produce at lower prices should not lead them to sacrifice their long-term interest in building their capacity to produce the food they need to meet their consumption needs" (UN Special Rapporteur on the Right to Food 2008, 20).

Focus on processed products with added value

In order not to simply prolong the dependence of developing countries on low-productivity agriculture (Polaski 2005, 9), but instead to contribute to an increase in agricultural productivity, diversification of agricultural production and engagement in value-adding processes are of key importance. Not only domestic but also international economic policies must be shaped in such a way as to ensure that the gains that accrue along the value chain are distributed in an equitable way.

4 Sustainable trade policy on the domestic level

The trade strategy of a country or region indicates the direction in which the corresponding agricultural sector will develop. Ideally, the chosen strategy should complement the domestic food security strategy, which – according to the Rome Declaration 2009, Principle 1 (FAO 2009) – should be country-owned and country-specific, and should constitute an integral part of the overall poverty reduction strategy.

Trade strategies influence how investments are practised. Ideally, they reflect the trade decisions of domestic governments, by providing information about the intended degree of export orientation, the diversification and value-adding policies that will be pursued, or the policy tools that will be chosen to protect and integrate the small-scale sector. The chosen approach can be either more or less conducive to sustainable investment.

Taking the above-mentioned basic assumptions into account, and always depending on the context, a domestic agricultural trade strategy should seek to get the domestic agricultural sector integrated – at least partly – into the international export market, and at the same time to maintain a lively and predictable local market. Thereby, the inclusion of the small-scale agricultural sector should be regarded as a key element of the development process, and environmental assets need to be conserved.

5 Sustainable trade policy on the international level: in general

The international trade regime, on the other hand, strongly influences domestic trade choices. International trade rules set the stage of each country's policy space (i.e. "What protective policy measures are allowed?"; "What trade incentives frame the remaining policy space?"). Importantly, international trade rules define to what extent developed countries' market policies are disciplined. As such, they have a significant impact on investment flows.

WTO Agreement on Agriculture (AoA) providing for the multilateral legal framework

The WTO Agreement on Agriculture (AoA) constitutes the main multilateral legal framework in the field of agriculture, although a proliferation of bilateral and regional trade agreements can be observed. While the following reflections will be limited to the AoA and to traditional trade instruments such as tariffs and subsidies, the arguments are also valid for both bilateral and pluri-lateral trade agreements. The line of argument can also be drawn further to other non-tariff barriers that influence trade flows.

WTO and the coherence principle

The preamble to the Marrakesh Agreement establishing the World Trade Organization (WTO) states that international trade law shall be "in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of development". With this, the WTO is committed to the concept of sustainable development that encompasses the principle of coherence.[96] This principle requires international trade law to be coherent with international human rights and environmental legal standards (Gehne, forthcoming; Gehring/Cordonier 2005).

Such legal coherence is attained if a) the various international agreements do not formally contradict each other (formal coherence),[97] and b) the *de facto* impact of one agreement does not undermine, but rather promotes the implementation of the other agreement (substantive coherence). Hence, in order to be "coherent", a trade agreement

[96] The principle of coherence is also referred to as the principle of integration (ILA 2002).

[97] This is not often the case as *prima vista* conflicts can generally be resolved through exemption clauses.

must not undermine but rather promote the implementation of international human rights and environmental obligations. Importantly, the dynamics that result from the implementation of a trade agreement have to be taken into account (Bürgi, forthcoming). This necessitates in-depth assessments of trade impacts. Not least, such assessments are also required by the human rights framework and its extra-territorial coverage (see Report1 of this study on human rights mechanisms).

Today, *ex ante* comprehensive assessments, which examine the likely impacts of trade measures on various stakeholders and on the relevant social, environmental, and economic assets, are undertaken in only a few cases (UNEP 2002; Kirkpatrick 2006). Such proceedings imply a process of negotiation that is not driven by the short-term self-interest of the negotiating parties, but by the desire (or the obligation) to look for a trade framework that will come up with the optimal results in both the short and the long terms.

6 Sustainable trade policy on the international level: the three duties

From such a perspective of coherence, two of the objectives of the international trade framework would be a) to promote investments in the agricultural sector in developing countries, and b) to be conducive to responsible investment, while discouraging irresponsible investment.

The duty to discipline developed countries

Tariffs

The still high trade barriers in Organisation for Economic Co-operation and Development (OECD) countries are imposed to discourage foreign investments from flowing into the agricultural sector of developing markets.[98] All these market barriers in developed countries have contributed to years of under-investment in the agricultural sector of developing countries (UNCTAD 2009, 183). A study by UNCTAD (2009) highlights that a shift in agricultural production towards developing countries would be accompanied by a shift in investment flows. According to this study, strategies to promote export-oriented FDI in the field of agricultural goods will be successful only if both export tariffs and import tariffs in the exporting country are kept low. In this regard, preferential treatment under non-reciprocal agreements (such as the Generalized System of Preferences) are of particular interest (UNCTAD 2009, 182). For example, "investments in banana production in Angola and other African, Caribbean and Pacific (ACP) countries have been encouraged by the duty-free access of ACPs and LDCs to the EU" (UNCTAD 2009, 182). Hence improved market access to developed countries' markets for agricultural goods from developing countries remains an important issue.

Above all, particular emphasis should be laid upon improved market access for processed agricultural products. Such products (including chocolate, instant coffee, orange juice, and cigarettes) come with an added value for the exporting country. For the moment, investment in food processing for exports is discouraged by particularly high tariffs and

[98] See the Producer Support Estimates (PSE) of the OECD (OECD 2004).

non-tariff barriers imposed on processed products as opposed to those on raw materials. This phenomenon is known as "tariff escalation" (UNCTAD 2009, 182; Elamin 2003). Accompanying measures would have to make sure that the additional benefits are well distributed along the value chain.[99]

To improve market access to OECD countries, import tariffs on products from developing countries need to be lowered. This may be best achieved through improved and reliable preferential access. While in most wealthier countries LDCs already benefit from zero or low import tariffs, this is not the case for all developing countries or countries in transition, in particular for those that have significant offensive export interests (such as India, Brazil, or Argentina). For a shift of agricultural production towards developing countries in general, however, reliable preferential access for all developing countries would be required (Shaffer 2005). In such a scenario, the preference erosion for LDCs would remain problematic, although new opportunities in South–South trade could arise. The negative impacts would need to be offset by significant compensations.

Subsidies

Also, subsidies provided to farmers in importing countries discourage investment flows to countries offering lower or no subsidies, since the subsidies provide a direct price-cost advantage for producers (UNCTAD 2009, 183). As all kinds of domestic or export subsidies may distort market prices and make market access more difficult, the distinction between distorting (e.g. export subsidies and amber box subsidies) and non-distorting subsidies (e.g. decoupled green box subsidies) is problematic (IATP 2007).

Instead of thinking in boxes, transparency could be improved. Case by case, the subsidy programmes could be tested for proportionality. There could be a careful assessment of what aim is to be achieved by a specific subsidy, whether the targeted objectives are legitimate (in view of internationally agreed social or environmental standards), what the impact on developing countries' market access is, whether there would be effective measures with minor impact, and how the negative impacts could be offset or compensated for (Bürgi 2009).

An issue that arises with the suggestion of reducing subsidies is that many developing countries are currently net importers of subsidised food. This results in cross-subsidisation of developing countries' food bills by developed countries. In consequence, a decrease in subsidies comes with higher food bills. Effective strategies would therefore be required to mitigate the adjustment costs, *inter alia* particular support for increasing the countries' own agricultural productivity, and also compensation.[100]

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[99] For a new approach see e.g. the proposal of Canada: WTO Committee on Agriculture, 2006/2.

[100] See the "Marrakesh Decision of 1994 on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries"; this still lacks effective implementation.

Further non-tariff barriers

The rules that regulate sanitary and phytosanitary measures and technical barriers to trade (in particular the WTO SPS[101] and TBT[102] Agreements, as well as the standards of the Codex Alimentarius) have regularly been criticised for not having been assessed in terms of their negative impact on developing countries' market access (Häberli 2008).[103] Such cost–benefit analysis could suggest a reshaping of the existing rules.

Impact on developed countries' agricultural sector

Such disciplining of developed countries' trade policies would pressure the agricultural sector of the countries concerned. While reduction formulae and green box measures are much debated, an international debate about the degree to which developed countries should be able to maintain farming structures and food processing industries by applying protective measures is lacking. While it is not a question of losing everything, a consistent and well-targeted cutback of trade barriers could lead from heavily intensive to rather extensive, more environmentally sound farming patterns. The adjustment process would, however, be painful, particularly in the food processing industry.

The duty to allow for necessary policy space

In general: allow for nuanced approaches

Besides disciplining developed countries' markets, the international trade framework must also allow policy space to member countries where such policy space is needed for the implementation of human rights and environmental policies. Only an optimal balance of limiting and enabling policy space will ensure long-term legitimacy of the international trade system.

Taking the internationally recognized principle of common but differentiated responsibilities into account (ILA 2002), the policy space that member countries are entitled to could differ between countries and could depend on their development needs (see also section above on developed countries). "Country-owned" development strategies will often depend on the possibility to choose (reliable) "country-owned" trade policies. The approaches that are currently being discussed, however, allow for only limited flexibility.

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[101] WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[102] WTO Agreement on Technical Barriers to Trade.

[103] E.g. despite duty-free access, agricultural imports from LDCs to Switzerland have not significantly increased. This is mainly due to sanitary and phytosanitary measures that are biased towards the interests of Swiss consumers.

Export restrictions

An issue that has often been raised in order to illustrate the incoherency of trade and investment regimes is the question of export restrictions. While trade law allows for export restrictions when national food security is at risk (for instance, in the case of an acute drought),[104] investment treaties do not (Smaller 2009, 12). For example, the International Food Policy Research Institute (IFPRI) postulates that "when national food security is at risk, domestic supplies should have priority. Foreign investors should not have a right to export during an acute national food crisis" (Braun, 4).[105]

Existing policy space

The WTO AoA already offers flexibilities. For example, AoA Article 4 limits the use of tariffs, whereby members agree to bind their tariffs at a specific rate. However, in many cases, countries have chosen to set the applied tariffs below the bound rate. Such leeway between applied and bound rates can be made use of. This, however, requires that the respective countries are not otherwise compelled to give up such flexibility, e.g. by bilateral trade agreements or structural adjustment obligations that come with financial assistance. Also in the field of subsidies, the AoA offers considerable flexibilities (e.g. development box).[106]

Special products and special safeguard mechanisms

The safeguard provision of the AoA, which allows for protection against immediate import surges (AoA Article 5), is of only restricted use to developing countries, as its application is limited to countries that have undergone a tariffication process (AoA Article 4 para. 2) (ICTSD 2005). This is why a Special Safeguard Mechanism (SSM) with a broader scope is seriously advocated in the Doha Round by the G33, consisting of developing countries with a still significant small-scale agricultural sector, such as India, Indonesia, or Kenya (ICTSD 2008).

Such countries propose that the SSM is complemented by a specific "Special Product" (SP) provision that would allow developing countries to refrain from reducing tariffs on specific agricultural products that are particularly important for the small-scale sector and for rural livelihoods. As such protective concepts are in conflict with the trade liberalization paradigm that underlies the Doha Round, and as they would impair export opportu-

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[104] Export restrictions have been a very controversial topic of debate in recent years, as they further increase food prices.

[105] See also Smaller (2009, 18), who understands food export restrictions as a key policy tool for host states in the event of food shortages, a possibility that is limited by investment treaties: "The use of trade measures including export taxes and export restrictions, permissible under international trade law, can create problems for host governments if they negatively affect investor rights. This is particularly pertinent for contracts where agricultural production is for export to the home country only."

[106] But not necessarily the most appropriate ones.

nities, they have been among those elements that most hamper a successful conclusion of the Round.[107]

While opponents want to limit SPs to only a few tariff lines and to narrow the scope of the SSM, human rights activists in particular have pointed out the necessity of keeping the provisions broad in order to maintain political flexibility: "Developing countries should be allowed to designate as 'special products' all crops that are cultivated by their small-scale farmers and farmworkers. These products should be exempted from any further reductions in tariffs or increases in import quotas. […] There should be no numerical limit on the number of products that can be designated, provided they are cultivated by small-scale farmers and farmworkers" (Polaski 2005, 8).

Such safeguard instruments might be important particularly for maintaining the viability of domestic agricultural markets, a prerequisite for sustainable development of the agricultural sector. It has been argued that "investment agreements should include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets", in order to mitigate the risk of food insecurity that might build up "as the result of increased dependence on international markets or food aid" (UN Special Rapporteur on the Right to Food 2009). Such clauses in investment agreements would, however, presume that the trade framework allows for commensurate restrictions.

However, some developing countries[108] have also raised objections to the inclusion of broad protective tools. They argue that such market protection would impede the ability of their small-scale farmers to export to developing country markets, and that it would therefore become harder for rural populations to secure a livelihood in such previously exporting regions (WTO Committee on Agriculture 2006 and 2007). UNCTAD points out the danger of safeguard measures reducing predictability of market access, which again might discourage FDI.

Winners and losers

Every new trade rule comes with adjustment costs, and generates winners and losers. As a result, the proposed protective instruments should not be dismissed, but should be designed carefully after balancing all the benefits and costs attached to them. It is necessary to seek the most favourable solution that might also exist in a flexible approach (Malhotra 2003).

Such a careful assessment of the impacts of trade instruments might even conclude that further protective tools are necessary, for example, in order to ensure *in situ* conservation of biodiversity that requires the existence of a variety of farming systems (see International Treaty on Plant Genetic Resources for Food and Agriculture, Article 6).

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[107] In the Doha Declaration, the Round was proclaimed a "development round".

[108] Such as Thailand and Pakistan.

The duty to positively shape

Adequate incentives, in general

Whereas market opening promotes investment flows, the trade framework should also contribute to investments happening in a sustainable manner, by not overturning historically grown structures. This necessitates a trade regime that includes adequate market incentives.

Internationally, trade rules generally offer an incentive for the cheapest means of production. Much discussion has taken place on how to include sustainable incentives, but the debate has mainly centred on the inclusion of social and environmental standards or on product differentiation according to the process and production methods concerned. Conditionalities have, so far, mainly entered the General System of Preferences (Shaffer 2005). Further, product differentiation has been advanced by the use of labels or the promotion of geographical indications.

For many years, developing countries have been reluctant to accept the inclusion of social and environmental incentives in the trade regime, as such incentives might reverse achievements in market opportunities. Therefore, incentives need to be shaped carefully, taking all the various contexts into account, and must in no way hamper market access to the markets of developed countries – thus remaining a core element of a responsible agricultural trade regime. Importantly, it is not up to the trade negotiators to set their own social or environmental standards. Rather, reference has to be made to existing standards of other international regimes (Perrez 2006).

Qualified market access

In recent years, the concept of qualified market access has been introduced into the debate (Ecofair Trade Dialogue 2006; European Commission 2008). It implies that market access for the produce of developing countries is significantly facilitated, although this is mainly for products that have been produced in a sustainable manner. By focusing in particular on qualified market access, investment in such sustainable production would be promoted. Of course, it all depends on how sustainable production is defined, and whether all the various contexts of developing countries are taken into account.

Impact of trade rules on domestic legal frameworks

Trade rules may also influence states' behaviour by requiring member countries to comply with certain criteria if they are participating in international trade. Such criteria may lie beyond domestic economic policy.

For example, Article VI of the WTO General Agreement on Trade in Services requires domestic policy to comply with procedural rules.[109] Hence, such procedural requirements could also be included in the AoA. Countries could be required to follow transparent and fair procedures while negotiating investments in agricultural assets, e.g. by promoting "alternative models of agricultural investment that do not involve transfers of land ownership" (Taylor 2009, para. 4) and ensuring a fair sharing of the benefits.[110] One may also envisage references to International Labour Rights, or obligations to engage in responsive governance of land tenure.

A WTO legal framework for the protection of local property rights?

Whereas the WTO framework includes an agreement for effective protection of intellectual property rights,[111] no legal framework has been established so far for the protection of local land property rights.[112] As the protection of rights and obligations over land and resources constitutes a key pillar of responsible investment policy,[113] an effective international legal framework might be supportive. The challenge, however, would be to focus primarily on the land rights of those who are most in need of protection, and to take adequately into account all forms of property systems (Razavi 2003).

[109] See e.g. the obligation that "each member shall maintain […] as soon as practicable judicial, arbitral or administrative tribunals" which shall provide for the prompt review of decisions affecting trade in services.

[110] Such references could draw from the evolving "Roundtable Principles" on responsible investment, according to which investments are considered responsible if a) they are based on investment treaties that recognize and respect existing rights to land and natural resources; b) they do not jeopardize, but rather strengthen food security; c) processes for accessing land are transparent, monitored, and ensure accountability; d) participation of those materially affected is ensured; e) the projects are economically viable; f) they generate desirable social and distributional impacts and do not increase vulnerability; g) they ensure sustainable use of resources (FAO 2009).

[111] WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[112] This might reflect the "institutional bias" of the WTO.

[113] See e.g. EU, 4: "Secure access to land and secure land tenure and use rights are prerequisites for higher productivity of small holder farmers."

7 A comprehensive approach: further issues

If the issue of an unbalanced agricultural trade system were to be approached more comprehensively, many more areas would have to be touched upon. Competition rules might be introduced to deal with the issue of a highly concentrated intermediary sector (South Centre 2008), regulations for commodity future markets would need to be strengthened (e.g. Newman 2008), and food aid programmes be re-shaped (Heri 2009), among other factors.

Further, from a comprehensive perspective, price volatility and instruments to prevent this would have to be dealt with. Past structural adjustment programmes have weakened the role of marketing boards and commodity stabilization funds (UNCTAD 2009, 183). Alternatives would need to be discussed, such as the establishment of shared public grain stocks and further measures to mitigate the risks associated with price volatility (Bürgi 2009).

8 Conclusion and recommendations

All the measures described above would not ensure, but could significantly contribute to, a well-balanced, fair, equitable, and environmentally sound international food system. Once such a system is in place, it will promote responsible investment in agriculture.

Many of the measures that have been listed are not yet in force, and some of them are only rarely discussed. It is not the aim of this study to go into further details. However, it is important for advocates of responsible investment policies not to lose sight of the bigger picture. They should understand the linkages between trade and investment policies and should be informed about the domestic and international trade debate. Advocates should know how to make use of the policy space that a particular country already has. In addition, they should reflect on the claims that should be made, in coalition with others. The WTO regime does not include many entry points for non-state actors, as trade negotiations and the dispute settlement system are reserved for national governments. However, lobbying for adequately balanced mandates not only at the domestic, but also at the international level, is pivotal, as is the supplying of *amicus curiae* briefs in dispute settlement procedures (3D, Dommen 2004). Last but not least, the thinking about new approaches is crucial and should not be omitted.

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Responsible investment through international investment law: Addressing rights asymmetries through law interpretation and remedies

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1 Introduction

Responsible investment in agriculture means ensuring a due balance of interests, meeting investors' business interests, and responding to the interests of peoples and host countries in social welfare and livelihoods (FAO et al. 2010; De Schutter 2009; Smaller and Mann 2009). This balance of interests is reflected in the concept of sustainable development, as developed by the World Commission for Environment and Development (WCED) in 1987, and adopted by the UN General Assembly as the development strategy for the 21st century.[114] The concept provides guidance for all policy levels to enable them to meet "the needs of the present generations without compromising the ability of future generations to meet their own needs" (WCED 1987, 43). Most reports and declarations in relation to the concept of sustainable development emphasize the importance of foreign direct investment (FDI), which provides growth-enhancing capital flows, mainly to developing countries. On the occasion of the Rio Earth Summit in 1992, a large majority of states highlighted the importance of FDI for developing countries in enabling them to foster their ability to meet people's basic needs.[115]

The Monterrey Consensus, the outcome of the International Conference on Financing for Development in 2002, states that "private international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts", mainly to achieve "sustained economic growth over the long term". In the sustainable development context, this is, however, not an isolated statement, but part of the sustainable development management task to duly reconcile and mutually reinforce economic priorities and environmental and social concerns. The current call for responsible investment in agriculture reflects this: on the one hand, there is widespread consensus that agricultural investment is vital to ensuring global food security and poverty reduction. On the other, several initiatives emphasize the importance of these investments being made in such a way as to take into account land rights of people, food security, participatory processes, and social and distributional impacts in order to achieve sustainable development (FAO et al. 2010; De Schutter 2009).

Although embedded in the development context, international investment law has not yet integrated this comprehensive economic, social, and environmental management approach. The majority of international investment agreements (IIAs) provide a high standard of protection for investors without clarifying the scope of host states' regulatory discretion in the public interest and people's rights. There is no practice imposing obligations on investors to do no harm or on investors' home states to ensure that their nation-

[114] UN General Assembly: Resolution 42/187. 11 December 1987. "Report of the World Commission on Environment and Development".

[115] See Report of the United Nations Conference on Environment and Development. A/Conf.151/26/Rev.1 (Agenda 21), at para. 2.23.

als comply with international human rights or environmental standards abroad. This causes an "asymmetry" (Newcombe 2007, 365) in regard to access to remedy for investors and people. It is only recently that some countries have introduced model treaties that integrate references to standards for health, environmental protection, or labour rights.[116]

The current asymmetry in international investment law is a product of history. The host state's permanent sovereignty over natural resources, and over its people, implies a potential threat to investors' property rights, assets, and interests. International investment law is a response to this sovereign power. It is influenced by bad expropriation experiences of foreign investors in the 1960s and 1970s, when newly created states that had achieved independence from colonial powers took advantage of their sovereignty (Newcombe and Paradell 2009, 18). Moreover, communist approaches to property carry risks for foreign investors. This was a politicized issue in the time of the cold war.

During the past 20 years, development agencies have increasingly promoted legal security through IIAs as an important means to attract investors. IIAs concentrate on imposing "good governance" standards of treatment for investors (e.g. national treatment or fair and equitable treatment), while other international legal frameworks, such as human rights and international environmental law, are supposed to promote good governance in the social and environmental sphere. The economic and non-economic realms of international law have thus been designed separately. This seems logical, as the primary purpose of international investment standards is to protect investors against risks related to unjustifiable and arbitrary state action. This is why today's international investment law is basically neutral with regard to legitimate state regulation in favour of livelihoods, human rights, or environmental protection (Krajewski 2007, 195). It is the state that has the responsibility of regulating in the best interests of its people's welfare and livelihoods within the framework of its international obligations.

However, economic, environmental, and social interests are closely inter-related, with a high potential for triggering trade-offs (e.g. environmental harm) as well as mutual gains (e.g. employment, rising standards of education, infrastructure). These interdependencies make it difficult to regulate in such a way that different issue areas of public interest are treated in "clinical isolation".[117] International investment law has grown tremendously over the past 20 years. With more then 2,500 bilateral investment treaties (BITs) and numerous free trade agreements (FTAs) containing investment rules, international investment law standards are fairly widespread (Newcombe and Paradell 2009, 58). This is why

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[116] See, for example, US Model Treaty, available at: http://ustraderep.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf; Canada Model Treaty: http://www.ccil-ccdi.ca/index.php?option=com_content&task=view&id=89&Itemid=86. See also the EU-CARIFORUM agreement, available at: http://www.esf.be/new/?page_id=4584. Moreover, investor–state contracts often contain environmental or social standards, or refer to domestic law in this sense (Smaller and Mann 2009, 9); for model treaties in terms of sustainable development, see Fichtner 2006, IISD 2006.

[117] WTO Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R. 26 April 1996.

it is highly probable that large-scale FDI in agriculture would fall under the scope of one or another international investment law regime and could thus become a subject of arbitration.

Additionally, important investments are likely to be accompanied by investor–state contracts, based on the same tradition of isolated investment protection standards and principles. This implies a significant potential of regulatory constraints for host states (Smaller and Mann 2009); especially as the conceptual constructs of foreign capital raising income and welfare and of state sovereignty being responsible for creating a due balance between environmental, social, and economic needs are rather theoretical in nature: not least in the field of investment in agriculture. Countries of potential interest for foreign investors in Asia, Africa, or Latin America tend to struggle with weak governance capacity and to suffer from corruption and/or a lack of appropriate legal frameworks.

Against this backdrop, it is not an easy task to implement principles that have been identified as preconditions for responsible investment in agriculture. If investments in land are not framed in a way that they respect from the beginning principles of responsible investment, there is a risk that the application of these principles is ruled out by prevailing investment protection provisions enforced by international arbitration, triggering large amounts of compensation. This report is intended to give a brief insight into the challenges arising from paradigms and practice of international investment law. It aims to advocate a sustainable development approach, and to map the lights, shadows, and gaps with regard to international remedies relevant for civil society initiatives.

2 Imbalances with regard to today's international investment law

Tensions between the international investment law regime and peoples' rights and interests in livelihoods pose problems, mainly where the governance capacity is weak or host states are governed by authoritative regimes. Where a rights-securing legal framework is lacking at the national level, where the regulatory situation is insufficient or its enforcement weak, or where treaty negotiations have led to far-reaching international contractual rights in favour of investors, there is an increased risk of an unbalanced "asymmetrical" regulatory situation. Under these conditions, states may face difficulties in reacting appropriately to regulatory challenges in fields of public interest that touch upon foreign investors' rights, and citizens may face major obstacles to claiming their rights when corporations violate national or international law.

Thereby, the asymmetry is twofold: on the one hand, access to remedy for investors and people in the context of international economic law is unbalanced. While strong arbitration instruments are available to protect investors' rights and to enforce trade law (e.g. the WTO dispute settlement body), peoples' access to remedies to enforce their rights outside the boundaries of their states is indirect, difficult in practice, and limited in scope.[118] On the other hand, substantive international economic law in regard to safeguarding and balancing conflicting human rights and legitimate public interest is unclear, although almost all member states of the WTO or signatories to IIAs are generally bound to at least one of the core human rights instruments (Choudhury et al. 2010; Hirsch, 2009).

International investment arbitration rules, such as those established by the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL), provide independent recourse instruments for investors to directly claim and enforce damages for infringement of treaty obligations. The majority of investment law regimes exempt investors from the duty to exhaust local remedies (Lorz 2009, 43 et seq.), and awards are enforceable against state assets within the territory of a signatory state of the ICSID convention.[119] Conversely, people's access to remedy in the context of human rights instruments remains comparatively indirect and

[118] See Part 1 of this study above, by Simone Heri, on human rights mechanisms.

[119] Articles 53-55 of the ICSID Convention.

weak.[120] Although international investment arbitration does not generally exclude states to institute arbitration proceedings against investors, not every arbitration clause is favourable to this "reverse paradigm" (Laborde 2010, 97). To date, only few cases have dealt with "reverse" requests (Toral and Schultz 2010). This reflects the traditional investment law perspective that "it is the conduct of host states, rather than that of investors that needs to be kept in check" (Laborde 2010, 98).

Adjudicatory review tends to have a broad scope; under the ICSID convention it extends, for instance, to "any legal dispute arising directly out of an investment".[121] "Investment" here is mostly understood in a broad sense (as comprising shares, stock, rights conferred by law and under contract, among others). Furthermore, international investment standards, such as national treatment, fair and equitable treatment, the most-favoured nation principle, or full compensation for direct and indirect expropriation, allow for manifold claims. Expropriation can, for example, occur through "regulatory takings" that undermine the investment's commercial viability (Cotula 2009, 3). An often cited example of investment treaty obligations interfering with human rights-related legislation is the case of the South African Black Economic Empowerment (BEE), which aimed to overcome socio-economic impacts of the former apartheid regime (Petersen 2006).

Regulation in regard to land issues, food security, or the situation of workers that affects the commercial situation of the investor potentially enters into the scope of investment protection standards. Other regulatory constraints concern the host state's ability to protect or enhance vulnerable economic entities (Petersen 2006, 17), such as small-scale farmers who play an important role in stabilizing sustainable agricultural production patterns.[122] The national treatment standard requires, for example, that foreign investors in "like circumstances" receive treatment no less favourable than that accorded to the domestic investor. But is a large-scale commercial farmer comparable with a small-scale farmer who has only a few hectares? If the national treatment standard is applied in a rigorous way, this could be deemed the case, as they are, for example, producing the same sort of food crops. This interpretation would make it extremely difficult for a host state to regulate in favour of small-scale farmers or impose special requirements (e.g. health and labour rights) on large-scale investments (Smaller and Mann 2009, 11).

The general character of investment law leaves it to a large extent up to international arbitration courts to determine the scope and reach of these provisions in terms of other standards of international law, and to establish standards of deference to national regulatory space. International arbitration rules do not provide particular guidance on overlapping fields of international law that may be reflected in states' regulatory actions in the public interest. Falling back on general international law, existing interpretational rules in

[120] See Part 1 above.

[121] Article 25 of the ICSID Convention; for UNCITRAL rules, see Article 1.

[122] See Part 3 of this study above, by Elisabeth Bürgi Bonanomi, on trade law and responsible investment.

international law, such as those embodied in the Vienna Convention on the Law of Treaties (VCLT), leave many questions open (Cottier et al. 2010). Preambles to investment treaties which provide guidance on treaty interpretation (Article 31 (1) VCLT[123]) often stress investment protection as the main treaty objective, thereby favouring an isolated approach to international investment law (Newcombe and Paradell 2010, 114).

Article 31 (3) (c) VCLT[124] states that "there shall be taken into account […] any relevant rules of international law applicable in the relations between the parties". However, the extent of this provision remains highly contested (Koskenniemi 2006; McGrady 2008; McLachlan 2005). Some hold that only binding rules applicable between the parties to the dispute are to be taken into account (Pauwelyn 2004), and some promote that all relevant rules "in relation between the parties" should be applied, regardless of their binding effects (Howse and Teitel 2007). The International Court of Justice (ICJ) seems to argue for a broader interpretation of the provision, stating that "the application of the relevant rules of international law relating to this question [use of force] forms an integral part of the task of interpretation" in the light of Article 31 (3) (c) VCLT.[125]

Narrow approaches may limit interpretational techniques to deal with inconsistencies in overlapping investment, environmental, and human rights fields of international law. A distinction could be made between "applicable" (soft law) standards informing law interpretation, and "rules applicable in the relation between the parties" according to Article 31 (3) (c) VCLT. The latter would be applicable as "hard law" between the parties, while the former would as soft law standards only inform law interpretation, and by this could contribute to more coherence.[126]

Investment arbitration is historically rooted in commercial arbitration; another factor that suggests an isolated understanding of investment law adjudication and supports a tendency towards a self-contained regime focus on the commercial relationship between the investor and the state. This view ignores the fact that international investment law has over recent years become a strong mechanism for the review of public regulatory authority of the host state (van Harten 2006, 123), and thus demands a more comprehensive reading of the matter. Today, legal uncertainty involved in broad investment protection standards, combined with a lack of legal security regarding interpretational standards, carries the risk of "regulatory chill" in host states, with governments refraining from regulating in favour of the public interest because they fear international arbitration triggering high costs and imposing high amounts of compensation.

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[123] Vienna Convention on the Law of the Treaties. International investment tribunals do not apply the VCLT in a consistent and consequent manner (Newcombe and Paradell 2010, 110 et seq.).

[124] Applicable as customary law or through states parties' commitment to the Convention.

[125] International Court of Justice Case. Oil Platforms (*Islamic Republic of Iran v. United States of America*). ICJ Reports 2003, 161.

[126] In relation to "soft law standards", see section 4 below.

3 Doctrinal and political challenges

The current asymmetry or isolation of international investment law is not least an expression of predominant premises of liberal economic theory in the 20th century that are being challenged today (Scherer and Palazzo 2010). Among these is, for instance, the separation between politics and economics as it was established by early classical liberal economic theory: i.e. the role of business firms is to focus on profits only, while the state's mandate is to regulate the economy in such a way that business activities contribute to the common good (Smith 1789). In this regard mainly being challenged is the paradigm of self-regulating markets, which holds that private interests free of government interference best promote the common good (Friedman 1962).

As the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG) observes: "History teaches us that markets pose the greatest risks – to society and business itself – when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well" (Ruggie 2008, para. 2). With the increasing impact and importance that international investment law has gained as a "species of global administrative law" (van Harten 2006), and the human rights and public interest challenges this implies, holding onto the isolation of international investment law is to ignore its increasing "legitimacy crisis" (Franck 2005).

In recent years awareness has increased regarding the need to strike a suitable balance between legitimate business expectations and states' legitimate need to regulate in favour of the public interest, including on human rights and the environment (Markert 2010). Many state parties of investment agreements realize only now, with increasing pressure through international arbitration, to what extent these treaties carry the potential to reduce their regulatory space. It is becoming more and more evident that the historically narrow perspective of investment law on the protection of foreign investments will no longer suffice to provide appropriate answers to conflicts arising from unbalanced legal situations in terms of investors' and peoples' rights. Global problems are interdependent; economic, social, and environmental public and private interests are interwoven; and this requires appropriate answers to organizing the international legal system.

The pressure of public opinion points to imbalances when it comes to economic benefits gained at the cost of human rights or environmental harm. The threat of public protest weighs on investors, states, and arbitrators alike. A legal system can hardly function effec-

tively if potential conflicts of norms, notably of public concern, are subject to legal uncertainty, and if protests signalling legitimacy gaps are being ignored. If the international investment regime refrains from dealing with these issues, it loses credibility, thereby jeopardizing its important function of providing the rule of law in international investment relations (Markert 2010; Franck 2005; van Harten 2008).

Some arbitration tribunals have taken into account a due balancing of public and investors' interests against the backdrop of international law standards.[127] There are, however, major inconsistencies in international arbitration awards, depending on the interpretational approach taken by the arbitrators. Therefore the approach to interpretation plays a crucial role in duly balancing the public interests of investors' business and governments, placing a heavy burden on arbitrators (Markert 2010). The general challenge in international investment law is thus to achieve more legal certainty through mainstreaming the interpretation of international investment law, including interpretational schemes that require the balancing of investors' and peoples' rights against the backdrop of international human rights and environmental standards.

In this regard, legal approaches to coordinating investment, human rights, and environmental regimes, such as those related to the concept of sustainable development, could contribute to more coherent and predictable application of international investment law, and sustain the legitimacy of the investment regimes. This is not about undermining investment protection against the backdrop of normative hierarchies based on a human rights-based ideological bias. This is about developing legal and institutional mechanisms which allow for investment protection while carefully balancing conflicts of norms and legal systems on a case-by-case basis, informed by norms and standards of international law.

[127] For example, *S.D. Myers, Inc. V Government of Canada, First Partial Award on Merits*, 13 November 2000, para. 247; *Southern Pacific Properties Limited v. Egypt*, ICSID Case, ARB/84/3, 20. May 1992, para. 154.

4 A sustainable development approach to international investment law

The requirement of duly balancing economic and societal interests regarding environmental protection and human rights is expressed in the concept of sustainable development. The following section sheds light on normative guidance provided by the concept of sustainable development. It then sketches out how this could inspire the balancing of interests of investors, states, and people in international investment law.

The concept of sustainable development: a normative guideline

The core normative content of the concept of sustainable development is relatively uncontested.[128] Sustainable development requires managing the interdependence of social, economic, and environmental priorities and objectives, exploring win-win constellations and mitigating trade-offs, to ensure the prosperity of present and future generations (Schrijver 2009; Cordonier-Segger and Gehring 2004; Gehne 2010b).[129] The normative confusion accompanying sustainable development is mainly due to the continuing debate about the "right means" of implementation (Gehne 2010a).

Since the 1980s, several earth summits (e.g. in Rio, Copenhagen, Beijing, and Johannesburg), world reports (e.g. *Our Common Future* and *Our Global Neighbourhood*), UN General Assembly resolutions, states' conference declarations, and multilateral agreements (e.g. UN Framework Convention on Climate Change (UNFCCC), Convention on Biodiversity (CBD), UN Convention against Corruption (UNCAC)) have sketched out social, economic, environmental, and future-oriented standards informing the concept of sustainable development, thereby building upon earlier concepts carved out in the UN development process (Gehne 2010b). This is why standards, principles, and conceptual linkages draw a relatively clear picture of established normative contents related to sustainable development today (Schrijver 2009). The International Law Association (ILA)'s Committee on the

[128] See Introduction above.

[129] Johannesburg Declaration on Sustainable Development, adopted at the 17th Plenary Meeting of the World Summit on Sustainable Development, 4 September 2002. Available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm

International Law on Sustainable Development has identified seven core principles that are widely recognized in relation to sustainable development:

1. The duty of states to ensure sustainable use of natural resources;
2. The principle of equity and the eradication of poverty;
3. The principle of common but differentiated responsibilities;
4. The principle of the precautionary approach to human health, natural resources, and ecosystems;
5. The principle of participation and access to information and justice;
6. The principle of good governance;
7. The principle of integration and inter-relationship, in particular in relation to human rights and social, economic, and environmental objectives.

The principle of integration and inter-relationship forms the backbone of the sustainable development concept, while the other principles inform its application with regard to "how to integrate and what, and under which conditions" (Grosse Ruse-Kahn 2010, 10; Gehne 2010b). The ILA's list is not exhaustive. The field of sustainable development is dynamic and evolutionary.[130] It basically comprises standards that can be related to the economic, social, and environmental field in a constellation of trade-offs or tensions between these fields in a given situation. Standards play an important role in law application; they form part of legal reasoning. While the concrete case decision will be borne by the "hard law" rules applicable to a case, standards as non-binding elements of law serve as propositions of reasoning, bolstering up the often slender hard law foundation of the decision (Riedel 2003, 27).

According to traditional legal theory of law, only "hard law" norms that have been recognized as binding are applicable as law. These are, however, accompanied by a "deep structure" of norms of aspiration providing normative guidance when hard law norms need interpretation. These are labelled "soft law" (Riedel 2003; Gehne, 2010b; Guzman 2009). In international law, these standards play a vital role. Although they are anchored in non-binding declarations or instruments, they reflect a standard of non-binding, but still agreed, norms in a certain field of law (Riedel 2003). In terms of law interpretation, it is not important whether standards are binding or non-binding, or only binding to some states. The important aspect is that they matter normatively in a case, as aspirations that have been created through consent or behaviour. At this point, there is a link to the principle of good faith, upon which the application of soft law standards could be normatively based, or even connected to the system of (hard) law.[131]

Looking more closely into the economic, social, and environmental fields of sustainable development, each can be related to some internationally established standards. The

[130] ICJ. Gabcikovo-Nagymaros (*Hungary v Slovakia*). Judgment of 25 September 1997, ICJ Rep 1997, para. 140, available at: http://www.icj-cij.org/docket/files/92/7375.pdf

[131] For the legal theory background, see Cottier et al. 2010, Gehne 2010b.

economic component of sustainable development is normatively rooted in the Havana Charter, initiated after the Second World War. This led to the GATT and later to the WTO legal framework, conveying principles of a liberal approach to international trade. As to international investment law, principles are reflected in the standards of non-discrimination and of fair and equitable treatment, including compensation for expropriation, and the overall objective of fostering international investment through a high level of investment protection to achieve growth and welfare. Some of these standards can be related to human rights law, such as the right to own property, to non-discrimination, and to economic freedoms (Petersmann 2000, 1).

Standards related to the social component of sustainable development go back mainly to the preconditions of a peaceful world order as they have been laid down in the preamble and Articles 55–56 of the UN Charter. This has given rise to what is called "international social law" (CordonierSegger and Khalfan 2002, 23). The Universal Declaration of Human Rights (1948) and the international human rights covenants, as well as regional human rights instruments, constitute the backbone of this normative field, establishing social, economic, and cultural rights as well as civil and political rights. A large majority of states has adopted at least one of the core human rights instruments.[132] Moreover, social standards comprise principles of good governance, such as the rule of law and combating corruption (Olaya 2010). Some of these are also part of human rights law, such as the principles of participation and access to jurisdiction and information (Gehne 2010b). Other normative elements derive from international development law dealing with questions of international equity between developed and developing states, including, for example, the principle of common but differentiated responsibilities (Schrijver 2009). Standards forming part of the social component of sustainable development are to a large extent unified under the umbrella of the right to development. In the 1986 Declaration on the Right to Development, this right was recognized as an "inalienable human right",[133] and forms part of today's established human rights doctrine.[134]

The environmental component of the sustainability concept is composed of norms and principles that have been shaped during 40 years of international environmental law, aiming, for example, at the protection of forests and biodiversity, action against climate change, or international waste management (Schrijver 2009). Among the key environmental principles are the sustainable use of natural resources, the prevention of environmental harm, the "polluter pays" principle, and the precautionary principle (Birnie et al. 2009). Standards of environmental protection are also linked to human rights, notably because they are inextricably related to the right to health (Fung 2006; Toebes 1999).

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[132] For the core agreements, see: http://www2.ohchr.org/english/law/index.htm - core. For ratification statistics, see: http://www2.ohchr.org/english/bodies/ratification/

[133] Declaration on the Right to Development, adopted by General Assembly Resolution 41/128, adopted 4 December 1986, Article 1. See: http://www2.ohchr.org/english/issues/development/right/index.htm

[134] See: http://www2.ohchr.org/english/issues/development/right/index.htm

In sum, the normative function of the concept of sustainable development is two-fold: on the one hand, it requires integrating and balancing economic, environmental, and social concerns in a mutually reinforcing way, and on the other it sets a normative framework of standards and principles providing guidance and benchmarks for this balancing exercise. The large majority of states have on several occasions committed themselves to the concept of sustainable development, most taking an active part in sustainability monitoring through international bodies, such as the UN Commission on Sustainable Development. The World Bank, the OECD, and other key actors in the field of international investment and development have acknowledged the UN concept as a leading principle for action.

Potential guidance for international investment law

The interpretative prism of sustainable development sets conceptual benchmarks that could help to identify criteria for duly balancing the interests of investors with the public interest.

Guidance from case law

Important cases that shed light on the role of the concept in international law are the Gabcikovo-Nagymaros case decided by the International Court of Justice (ICJ),[135] the decisions by the WTO dispute settlement body related to the US–Shrimp case,[136] and the Arbitral Award of the Permanent Court of Arbitration for the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway.[137] The ICJ holds that "new norms and standards have been developed, set forth in a great number of instruments during the last two decades". These "have to be taken into consideration", and "given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the

[135] ICJ. Gabcikovo-Nagymaros (*Hungary v Slovakia*). Judgment of 25 September 1997, ICJ Rep 1997, 7–84, available at: http://www.icj-cij.org/docket/files/92/7375.pdf (ICJ, Gabcikovo-Nagymaros).

[136] See WTO Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (adopted 6 November 1998) and WTO Panel Report, United States – Shrimp – Recourse to Article 21.5 by Malaysia, WT/DS58/RW (adopted 15 June 2000) (WTO-AB, US-Shrimp).

[137] Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium/The Netherlands), Permanent Court of Arbitration – Award of the Arbitral Tribunal (24 May 2005), available at: http://www.pca-pa.org/showpage.asp?pag_id=1155 (PCJ, Iron Rhine).

past".[138]According to the ICJ, "this need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[139]

In the US-Shrimp dispute, the WTO Appellate Body referred to the sustainable development objective in the Preamble to the WTO Agreement and stated that this objective "must add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement".[140] According to the Appellate Body, this concept "has been generally accepted as integrating economic and social development and environmental protection".[141] The arbitration panel in the Iron Rhine Railway case stated that "environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm".[142] Referring to the ICJ Gabcikovo-Nagymaros case, the court held that "this duty has now become a principle of general international law".[143]

These decisions suggest that the concept of sustainable development applies to cases where conflicting environmental and developmental or economic legal positions are at stake, and requires that these are reconciled in a mutually reinforcing way. The main legal effect involved in the concept in the Gabcikovo-Nagymaros decision is the duty of the parties to the conflict to find a "satisfactory"[144] solution with due regard to standards and norms that have been recognized in the field of international economic and environmental law.[145] This reflects the principle of cooperation and recourse to diplomacy which is well established in the normative context of sustainable development law (WCED 1987, 39 et seq; Schrijver, 265).[146]

Additionally, the ICJ accords the concept of sustainable development interpretational weight as a norm that has to be considered when applying the international treaty provi-

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[138] ICJ, Gabcikovo-Nagymaros, para. 140. The ICJ built on these findings in a recent case: see ICJ, Pulp Mills on the River Uruguay (*Argentina v Uruguay*), Judgment of 20 April 2010, para. 75 et seq., available at: http://www.icj-cij.org/docket/files/135/15877.pdf

[139] ICJ, Gabcikovo-Nagymaros, para. 140. In its recent Pulp Mill case, the ICJ stressed the economic pillar of sustainable development, holding that sustainable development takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States". ICJ. Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Provisional Measures, Order of 13 July 2006, ICJ. Reports 2006, 133, para. 80.

[140] WTO-Appellate Body, US Shrimp, para. 153.

[141] Ibid., para 129, Fn. 107.

[142] PCJ. Iron Rhine, para. 59.

[143] Ibid.

[144] ICJ. Gabcikovo-Nagymaros, para. 140.

[145] In his Separate Opinion to the Gabcikovo-Nagymaros decision, Judge Weeramantry included in this balancing requirement the right to development as part of the concept of sustainable development (Weeramantry 1998).

[146] WTO Appellate Body, US-Shrimp, para. 167.

sions.[147] The arbitration panel in the Iron Rhine case similarly characterized the identified "principle of general international law" as an interpretational standard. In the US-Shrimp case, the main effect of the sustainable development concept was its interpretative role as an objective of the WTO legal order. Here, the conflicting positions are interpreted against the backdrop of the "colour, texture and shading" that the normative implications of the sustainable development concept provide. WTO dispute settlement organs should thus take into account the economic, environmental, and social standards at stake in a given case.[148]

Presuming that the sustainable development concept thus in the first place opens law interpretation up to standards of norm interpretation integrating sustainability standards,[149] a sustainable development approach mainly implies a Trojan Horse effect: the matrix of standards coming together with the concept of sustainable development is imported into law application; hence changing and mainstreaming the "colour" of law interpretation. This is important mainly with regard to the traditional tendency towards interpreting investment law with regard to the predominating objective of investment protection.

Secondly, the principle of sustainable development requires reconciling the conflicting economic (investor) and social or environmental (public interest) positions at stake. When it comes to reviewing a measure by a state impacting on investors' rights, the measure has thus to constitute a means that efficiently reconciles the social, environmental, and economic objectives at stake. In this regard, states pursuing legitimate environmentally or socially motivated objectives have to choose their measures in a way that best accommodates investors' rights and legitimate interests. If this can be deemed the case, the chosen measure would be in line with the sustainable development requirement.

A sustainable development approach to international investment law would thus on the one side soften a one-sided interpretation in favour of investment protection, providing criteria colouring interpretation in terms of international standards on the environment, human rights, and other sustainable development issues. At the same time, it would emphasize due regard for investors' interests as expression of the economic rationale of the sustainability concept, equally important with regard to sustainable development.

The balancing exercise

How could conflicting trade-off issue areas be balanced in law? Legal techniques to deal with conflicting principles that are to be "optimized" through application of law have been theoretically traced in relation to German constitutional law (Hesse 1999, 20). The legal technique for dealing with these conflicts is the principle of proportionality (Alexy

[147] ICJ. Gabcikovo-Nagymaros, para. 140.

[148] Ibid., para. 153 et seq.

[149] This would add to the coherence principle anchored in Article 31 (3) (c) VCLT.

1989, 100 et seq.). It is applied as a pattern of legal scrutiny that operates with two reference levels. First, the level of facts: is the measure appropriate to achieve the goal? Are there alternative measures – including flanking measures – that would impact less on the opposing trade-off position and achieve the regulatory goal equally effectively? Second, the level of normative discretion: is the goal pursued legitimate with regard to the legal order at stake? Is the measure proportional with regard to the normative value of the legal positions it is impacting on?

While German constitutional law allows for far-reaching legal review, under international law, environmental management and social rules are primarily an issue of the sovereignty of states.[150] Accordingly, it is the state that determines how to balance the conflicting environmental, social, and economic issue areas (Newcombe 2007, 366). In this regard, the arbitration panel should refrain from determining which measure appropriately balances the interests at stake. Here, the demarcation line of legal control can be determined through recourse to the principle of *abus de droit* as an expression of the principle of good faith (Panizzon 2006). On this issue, the WTO Appellate Body states in terms of "the need to maintain a balance of rights and obligations" that is expressed in Article XX GATT:

> "This principle [good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably'. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting."[151]

Against this backdrop, the above-mentioned pattern of legal scrutiny regarding the optimization of trade-off positions (level of facts, level of normative discretion) could be applied through the prism of good faith, with regard to a high level of deference to the sovereign decision of states and in the light of the sustainable development normative context. The Appellate Body emphasizes that "additional guidance" for law interpretation with regard to good faith is to be drawn "as appropriate, from the general principles of international law" (WTO Appellate Body, US-Shrimp, para. 158).[152] According to the ICJ, new norms and standards are to be taken into account when interpreting international law, among those the standards involved in the concept of sustainable development.

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[150] 1992 Rio Declaration on Environment and Development, Principle 2. http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163

[151] WTO Appellate Body, US-Shrimp, para. 158.

[152] ICJ. Gabcikovo-Nagymaros, para. 140. In WTO law, the sustainable development concept has effect through the preamble of the WTO agreement in the light of Article 31 (1) VCLT.

In principle, the decision of the WTO Appellate Body in US-Shrimp employed similar legal reasoning. Although it declared the US measure to protect sea turtles as "unjustifiable" and as being "arbitrary discrimination" inconsistent with Article XX GATT, this was not due to the negligence of environmental norms or issues at stake. The US had failed to seek international coordination on the matter, and the measure was too inflexible to allow turtle protection devices which would have equally effectively served the environmental objective. International cooperation to address trade-off fields of tensions in the context of sustainable development is one of the paramount principles of international sustainable development law (Schrijver 2009). The inflexibility argument reflects the proportionality test (level of facts): a more flexible measure would have constituted a means with less impact on international trade, which would have served the regulatory goal equally effectively. The absence of flexibility has a discriminatory effect that is incompatible with good faith.

Specific standards would need to be developed as criteria to detect good faith inconsistencies and to frame the normative basis of legitimate expectations in the international investment law context. It is beyond the scope of this review to elaborate further on the concrete standards this could imply. Inspiration for good faith standards can be drawn from international law (estoppel, acquaintance)[153] and legal dispute settlement, particularly if related to economic law systems that imply aspects of weighing and balancing of trade-off positions in an economic context (e.g. European Community law, WTO law). Typical legal scrutiny could comprise, for example, a manifest error of discretion with regard to the facts, misuse of power, or clear (normative) excess in the bounds of discretion.[154]

An example of a potential good faith criterion is the legitimacy of a regulatory measure to protect the environment or human rights in relation to the extent of the investor's protected economic "legitimate expectations" (Newcombe 2007, 376; Krajewski 2007, 200). While in regard to the fair and equitable treatment or expropriation standard "legitimate expectations" are today mainly interpreted with regard to good faith of investors (Petersen 2009, 13; Newcombe and Paradell 2009, 279 et seq.), this criterion could as well be assessed against the backdrop of standards related to other sustainable development issue areas such as human rights (Wythes 2010, 246). In this context, an alleged duty of companies to respect human rights and environmental standards, as reflected in international norms for transnational corporations – for example, the OECD Guidelines for Multinational Enterprises, the Global Compact, or the normative framework elaborated by the SRSG – could play an important role. This could narrow down the extent of legitimate expectations of investors to the level of standards falling under their duty to respect human rights (Cernic 2010).

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[153] For an in-depth analysis, see Panizzon 2006.

[154] See, for example, the ECJ review of legality (Craig and De Burca 2008, 570).

As to the extent of this duty to respect, the SRSG's 2008 report explains:

> "To respect rights essentially means not to infringe on the rights of others – put simply, to do no harm. Because companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts. There are situations in which companies may have additional responsibilities – for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations" (Ruggie 2008, para. 24).

Another gateway for balancing the legal positions of investors and states could be to link the legal reasoning of proportionality to the amount of compensation to be paid by the state. This applies mainly if investment law does not require "full market-value" compensation but provides for "just", "fair", or "appropriate" compensation (Petersen 2009, 37). Criteria such as the importance of the normative value motivating regulation, or the availability of alternative, but equally effective measures, with less impact on investors, could, for instance, determine the extent to which states have to compensate for regulation in the public interest (Petersen 2009, 37 et seq.; Markert 2010). This might even go as far as zero compensation in situations of manifestly "illegitimate expectations" of investors, such as legislation sanctioning the violation of core labour rights.

In cases of land reforms in the interest of people, including, for example, for purposes of racial redress, this can be of paramount importance, as full market value compensation could otherwise constitute an "overwhelming financial burden" (Petersen 2009, 37). In this regard, good faith behaviour of host states, for instance through initiatives seeking prior consultation with the investor to negotiate solutions, and a high degree of transparency, information, and consistency in terms of its policies, could be considered in favour of the host state. Conversely, this could act to the detriment of the investor, when refusing cooperation.

The case of stabilization clauses

Balancing the legitimate expectations of investors and states implies that there is discretionary space. However, many investor–state contracts contain so-called "stabilization clauses", a subject that is often referred to as being particularly harmful to a state's ability to appropriately protect human rights and the environment (Cernic 2010; Shemberg 2009). Stabilization clauses protect investment projects from risks implied in changes in legislation. They "aim to 'stabilize' the terms and conditions of an investment project" (Cotula 2008, 5) over time (in face of fiscal and regulatory risks). In international investment law, stabilization clauses take different forms. Some "freeze" the law of the host state in respect to the investment. Subsequent law of the host state thus does not apply to the investment. Other clauses focus on the "economic equilibrium" of the investment. If the regulatory situation alters, the host state has to provide compensation for the eco-

nomic loss implied for the investor. Thereby, the economic equilibrium can be restored in many ways, allowing for a flexible approach to be negotiated between the investor and the host state. So-called "hybrid clauses" require the state to secure the same position that the investor would have had without changes in the law; this through exemptions in law or through compensation.

In regard to stabilization clauses, the principle *pacta sunt servanda* generally leaves no discretionary space for host states to regulate in the public interest; even though, for instance, economic equilibrium clauses allow for a flexible management of the regulatory situation, they trigger compensation. Through the prism of the concept of sustainable development, this situation could be remedied by imposing on the conflicting parties the task of negotiating a waiver that respects standards and principles reflected in international human rights and environmental law.

This would weaken the role of stabilization clauses as an instrument to accommodate investors' interests in minimizing economic risks. Apart from potential law conflicts between human rights/environmental standards and international investment law, this issue is rather philosophical: should investors be protected to an extent that their legitimate profit interests comprise situations to the detriment of international standards protecting people and the environment? Legally, this implies the problem that such an approach would soften the *pacta sunt servanda* obligation that is one of the core principles of public international law. However, in the context of sustainable development, this idea is not new. In the Gabicikovo-Nagymaros decision, the ILC states:

> "Owing to new scientific insights and to a growing awareness of the risks for mankind for present and future generations of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."[155]

According to the ICJ, conflicting parties have the obligation to renegotiate the contract to find a "satisfactory solution" to the environmental concerns at stake, even though these were not the subject of the treaty. The WTO Appellate Body and the arbitration panel in the Iron Rhine case applied a similarly "evolutionary" interpretation.[156] The ICJ did not clarify what would happen if renegotiations failed. If the evolutionarily softened *pacta sunt servanda* principle is trumped to the extent that the contested issue is subject to a satisfactory waiver, the logical consequence would be that the treaty obligation is not applicable as long as this condition is not fulfilled. However, good faith criteria would

[155] ICJ. Gabcikovo-Nagymaros, para. 140.

[156] See section 3 above.

need to provide further guidance (e.g. on the abuse of rights by the state). Good faith standards that have been developed in private law with regard to the legitimacy of contractual provisions could inspire argument here.

5 Peoples' access to legally binding and non-binding remedies

Access to remedies is critical to achieving good and responsible governance. Today, international investment arbitration provides a strong recourse mechanism for use by investors to claim and enforce their rights, thereby fostering good governance behaviour of states. When it comes to the legitimacy crisis of international investment law, criticism of IIAs mainly calls for regulatory space for host states to allow for environmentally and socially motivated regulation. The focus is thus on the investor–state relationship, and specifically on the question of how to resolve these conflicts legally (Markert 2010; Newcombe 2006, 365).

From a systemic bird's eye view, however, investors' business interests often coincide with states' macroeconomic interests in attracting capital and generating growth. An extreme case of common investor-state interest is corrupt governance regimes that directly and personally profit from investments. What happens when investors do harm, abuse their rights, carelessly and harmfully exploit people and natural resources, or use and bribe corrupt government regimes in host states? Or when host states do not do their job balancing the public interest and protecting human rights? "Laggards – States as well as companies – fly below the radar" (Ruggie 2008, para. 5) of international legal mechanisms designed to promote good governance relations between states, investors, *and* people.

Numerous initiatives, private and public, provide non-binding guidelines and mechanisms.[157] However, as the SRSG states, "even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness" (Ruggie 2008, para. 9). While checks and balances work for the investment protection case, they are lacking for peoples' rights. In this regard, access to remedy for people on the international level could provide a counterweight (Francioni 2009).

The following section gives a short overview of legal and non-legal remedy mechanisms, highlighting positive effects as well as inconsistencies and asymmetries. These remedy mechanisms could be used by individuals and civil society initiatives to gain influence over large-scale investment projects in the agricultural domain, not only to claim rights,

[157] See Part 2 of this report by SOMO.

but also to expose projects in such a way that they risk their reputation if they fail to respect the principles of responsible investment in agriculture.

Extra-territorial jurisdiction

A binding remedy mechanism allowing people to file a claim against corporations operating abroad is recourse to the court system of the company's home state (extra-territorial jurisdiction).[158] The SRSG highly recommends strengthening these mechanisms (Ruggie 2010, para. 46 et seq.). The state's duty to protect includes the prevention of human rights abuses by corporations on its territory and/or within its jurisdiction. States have to provide remedy, including investigation, punishment, and redress for such abuses.

It is, however, difficult to draw obligations from existing human rights instruments to provide extra-territorial jurisdiction. Several human rights scholars argue in this vein, and commentaries issued by UN treaty bodies in the field of economic, social, and cultural rights suggest that states should prevent third parties from violating rights abroad (von Bernstorff 2010).[159] Currently, many countries have imposed formal restrictions on extra-territorial jurisdiction, such as the lack of legal standing of non-citizens, *forum non conveniens*,[160] or costs may simply be prohibitive (Ruggie 2008, para. 89).[161]

In the US, extra-territorial jurisdiction is provided under the Alien Tort Claims Act (ATCA). Established by the First Congress in 1789, it came to life in 1980 when the US Supreme Court was confronted with an ATCA case.[162] The Court held that the ATCA establishes jurisdiction for claims against alleged torts "committed anywhere in the world against aliens in violation of the law of nations" (Ochoa 2006, 3). On this basis, foreign plaintiffs have filed actions against corporations for human rights violations and environmental harm in host states. Examples include the Royal Dutch/Shell Oil litigation, which dealt with complicity in human rights violations in Nigeria, the *Aguinda v. Texaco* case, which was initiated by indigenous people for violation of their rights, and *Roe v. Unocal Corp*, which held Unocal responsible for complicity in human rights violations, such as disloca-

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[158] For an overview, see Gondek 2008.

[159] See also general comments 14 and 15 with regard to the right to health and the right to water: UN-EcoSoc, 2000, para. 39, General Comment No 14, right to health; UN-EcoSoc 2003, General Comment No. 15, para. 31, right to water.

[160] This means that a court may reject its jurisdiction if another court's jurisdiction seems to be more appropriate because it is better suited to deal with the case – for instance, when the damage or the event giving rise to the damage occurred in another country.

[161] For a recent positive example in the Netherlands regarding the case of Nigerian farmers and fishermen versus Shell for compensation for oil leakages, see: http://www.milieudefensie.nl/wat-wij-doen/themas/internationaal/projecten/shell/olielekkages/the-people-of-nigeria-versus-shell

[162] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) Filártiga, 630 F.2d at 876.

tion, torture, rape, and murder, committed by the Burmese military during the construction of a pipeline (Ochoa 2006).

Due to exceptions and broad scope, the ATCA criteria still suffer from legal uncertainty. Under the Bush administration, the US government, acting as *amicus curiae*, called the ATCA into question, and recently a US Court of Appeals upheld that corporate liability in general "is not a discernable – much less universally recognized – norm of customary international law" that could apply under the Alien Tort Statute.[163] The Supreme Court in *Sosa v. Alvarez Machain*[164] had set up limiting criteria, such as a strict limitation to definable, universal, and obligatory rights, and the consideration of potential adverse effects on US external relations (FIDH 2010, 181; Ochoa 2006, 9). These criteria would make it generally difficult to invoke rights related to responsible investment in land, such as environmental protection standards, participatory or land rights, or aspects related to the right to food (FIDH 2010, 181).

In the EU, the member states have with the 1968 Brussels Convention set up a common regime on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, amended by the EC Council Regulations 44/2001 and 864/2007 (Rome II). This framework generally "enables jurisdiction within the courts of EU Member States for cases against companies registered or domiciled in the EU in respect of damage sustained in third countries".[165] According to Article 60 of the Regulation 44/2001, a company is domiciled in a EU member state if it has his statutory seat, central administration, or principal place of business in this state.

On this basis, for instance, South African workers have sought remedy against a British company that worked with asbestos in South Africa (FIDH 2010, 206). In this case, the UK court did not accept the case for reasons of *forum non conveniens*, arguing that more appropriate jurisdiction was with the courts in South Africa, where the damages occurred, although the South African plaintiffs could not get legal aid there. In its decision in *Owusu v. Jackson*, the European Court of Justice ruled that the courts of EU member states should refrain from referring to *forum non conveniens* when foreigners seek remedy against companies operating abroad.[166] In the case *Guerrero v. Monterrico Metals*, a UK court rejected the companies' argument of *forum non conveniens*, referring to this decision.[167]

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[163] *Kiobel v. Royal Dutch Petroleum*, 06-4800-cv, 06-4876-cv, decided on 17 September 2010, p.2. The US Supreme Court will now have to decide if corporations can in future be held liable under the ATCA.

[164] *Sosa v. Alvarez-Machain* was argued on 30 March 2004 and decided on 29 June 2004. See Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

[165] See European Parliament resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366-C5-0161/2002 - 2002/2069 (COS), 30 May 2002, §50.

[166] ECJ. *Owusu v. Jackson* [2005] ECR-I-1283.

[167] *Guerrero v. Monterrico Metals plc. & Rio Blanco Copper SA* [2009] EW HC 2475 (QB), para. 23.

The law applicable to cases dealing with foreign claims against EU-domiciled companies is either the law of the place where the damage occurred (*lex loci damni*) or the law of the place where the causal behaviour occurred (the law of the EU member state). Regulation 864/2007 harmonized the applicable law to non-contractual obligations in a way that, generally, the law of the place where the damage occurs applies (Article 4 (1)), provided that is not manifestly inconsistent with the public policy (*ordre public*) of the state which has jurisdiction (Article 26). In this regard, the extra-territorial remedy provided by the EU is broader in scope. As most developing country laws provide for environmental and social standards, lawsuits in the EU could be better suited to file claims against investors violating local laws.

One of the most discussed problems regarding claims against transnational corporations causing damages abroad is the issue of the "corporate veil", which encompasses the question of the accountability of a parent company for infringements committed by subsidiaries or other entities acting in its supply chain. If the parent company actively takes part in the decision causing harm or fails to prevent harm, the concept of direct or joint liability applies (Muchlinski 1995, 323). However, if the implication of the parent company is only indirect, and the parent company is a separate legal person from the one that has directly caused harm, it is difficult to hold the parent company liable for damages.

Only under certain exceptions can this "corporate veil" be pierced, depending on the degree of de jure or de facto control the parent or principal company exercises over the latter (FDHI 2010, 224). Under the US ATCA, for example, US courts have acknowledged that a parent company as a principal can be held liable for the damages caused by a subsidiary, even if acting outside the scope of the duties authorized.[168] However, the questions of "piercing the corporate veil" are far from being settled, and the uncertainty of whether a US court will accept jurisdiction over a foreign multinational enterprise "is real" (FIDH 2010, 233).

In the EU context, there are two possibilities of establishing a EU parent company's liability: de facto influence of the company on its subsidiary or sub-contractors, or failure to exercise due diligence in regard to the subsidiary/sub-contractor. The latter is in line with the SRSG's concept of due diligence (Ruggie 2008), which could come into play here. In the *Guerrero v. Monterrico Metals* case, a UK court had to decide about the liability of Monterrico with regard to detention, sexual abuse, and homicide that occurred during demonstrations regarding a copper mine in Peru. The plaintiffs were successful in alleging the British parent's involvement and liability, invoking its close relationship with the subsidiary and its possibility to intervene.[169]

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[168] *Bowoto v Chevron Texaco*, 2007 WL 2349336 (N.D. Cal. 2007), 15-16.

[169] *Guerrero v. Monterrico Metals* plc. op. cit., para. 16 et seq.

The ongoing Shell Nigeria case before Dutch courts concerns a claim filed by Nigerian farmers against Shell for damages caused by oil leakages. Although Shell had direct influence on Shell Nigeria, the defendants hold that there was not sufficient connection between the two legally separate companies to establish Dutch jurisdiction. The plaintiffs invoked Article 6 § 1 of Regulation 44/2001, which allows for jurisdiction in a single court if one of the companies is domiciled there, provided that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". On these grounds, "it is possible to bring joint action against a parent company and its subsidiary for harm caused by activities abroad" (FDHI 2010, 208).[170] The Hague district court decided that it had jurisdiction over the case.

Extra-territorial jurisdiction is subject to critique, as it implies risks for corporate activities abroad. The scope of responsibility for human rights violations is not yet clarified; criteria such as the "sphere of influence"[171] are broad and may include, for instance, supply chain human rights abuses or acts committed by private security firms (Ruggie 2008b; Wood 2010).[172] Furthermore, in countries with authoritative government regimes, cooperation with the government itself could already constitute complicity and thus imply the risk of being confronted with lawsuits.[173] Additional risks of being taken to court increase costs for companies, due to risk assessment activities that are necessary to prevent harm. Companies may thus decide to relocate their headquarters or assets to states that refrain from extra-territorial jurisdiction.

However, even though at first glance economic harm might be involved, companies are, in the end, not interested in harming their own reputations with regard to human rights violations. Those which struggle to comply with human rights obligations may even have an interest in establishing a level playing field (Aaronson 2007, 636). If they are blamed by NGOs or by negative press reports, legal scrutiny of a case could also be of advantage for corporations, as this gives them a forum to defend themselves. To avoid reputational risks or pressure by civil society, companies have to act responsibly. Likewise, states are confronted with civil society pressure to establish a legal framework that ensures that corporations behave responsibly.

The problem of legal uncertainty for companies could be remedied by defining predictable criteria regarding responsible risk management for enterprises, through international agreements, guidelines, or standards, such as ISO norms. Business risk assessments are already common instruments, mainly with regard to large-scale investments. Thus, why

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[170] See ECJ. *Freeport plc v Arnoldsson* [2007], (C-98/06), para. 38 et seq.

[171] This criterion is part of the UN Global Compact principles and the UN Norms on the responsibilities of transnational corporations and other business enterprises.

[172] For legal arguments in favour of headquarters' accountability, see ECCJ 2008.

[173] For the concepts of sphere of influence and complicity, see Ruggie 2008b.

not include in them aspects of human rights and sustainability? In the end, these criteria are equally business-related, as they can have significant impact on the company if problems occur. Financial institutions, such as the International Finance Corporation (IFC), require sustainability impact assessments as a precondition for financial support.[174] The concept of due diligence, as put forward by the Ruggie framework, also points in this direction (Ruggie 2010, para. 56).

Extra-territorial jurisdiction could constitute an efficient instrument to put pressure on corporations to assess and prevent activities that could potentially cause harm. The recognition of the decisions of some countries' courts may, however, pose problems with regard to good governance and criteria of the rule of law. Additionally, due process requires a range of basic procedural principles to be taken into account, including, for instance, access to corporate information or legal aid. Another problem is that it is not always easy to judge a foreign case, as access to evidence may prove difficult.

Resolving these challenges would make it necessary to develop new idiosyncratic procedural facilities and ways of inter-state cooperation, but should not be deemed impossible or inequitable from the outset. Efficient remedy mechanisms require state cooperation in order to define minimum standards of extra-territorial legal remedy, to allow for support regarding evidence, to establish criteria for mutual recognition, and to monitor good practices. In this regard, states should seek to agree upon basic rules or guidelines for international extra-territorial jurisdiction.[175]

OECD National Contact Points

Under the auspices of the Organisation for Economic Co-operation and Development (OECD), states have adopted the Guidelines for Multinational Enterprises (OECD Guidelines). These are part of the 1976 OECD Council Declaration and Decision on International Investment and Multinational Enterprises, an instrument that aims to foster FDI. "The Guidelines are recommendations addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable."[176]

However, state parties to the Guidelines are committed to a binding formal procedure that comprises the establishment of "National Contact Points" (NCPs) serving, among other things, as mediation mechanisms in cases of alleged violations of the Guidelines.

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[174] See: http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards

[175] The Ruggie framework defines such criteria for non-binding remedy mechanisms (Ruggie 2008, para. 92).

[176] OECD Guidelines, Chapter I, Concepts and Principles, para. 1.

Victims of adverse effects of corporate activities and NGOs can file complaints against TNCs with NCPs in 30 OECD and nine adhering countries within the scope of the Guidelines.[177] The Guidelines include respect for human rights "of those affected by business activities",[178] contribution to social and environmental progress with a view to achieving sustainable development,[179] respect for labour rights,[180] environmental management standards, including impact assessment and respect for intellectual property rights,[181] anti-corruption standards,[182] and, lastly, standards of competition law and taxation law.[183] The NCP dispute resolution is guided by the so-called "specific instances" procedure.[184] According to this procedure, "the NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances".

The procedure is based on a multi-stakeholder approach: "The NCP will offer a forum for discussion and assist the business community, employee organizations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law." Countries are free to organize NCP work at the national level, which leads to various approaches, functionalities, and efficiencies.[185] In many countries, NCPs are barely functional, mainly due to the lack of financial resources. In some countries, however, NCPs work quite effectively (McLeod 2010, 101; Cernic 2008, 83 et seq.). One criticism of NCPs is that most of them are attached to state parties and are thus subject to political decisions and supervision. Procedures are not very transparent and there is often inadequate participation of stakeholders, contrary to the OECD Guidelines' multi-stakeholder approach.

Among the functioning NCPs, those of the UK and the Netherlands are referred to as models of success, working with independent experts, having multi-stakeholder involvement, and achieving greater transparency, e.g. through publications of the NCP final statements. OECD Watch calls for establishing a "model national contact point". This is not a one-size-fits-all mechanism, but a conglomerate of good practice modules which the NCP should adapt according to its national specificities (Feeney 2007).

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[177] And in other countries that have adhered to the Guidelines, such as Argentina, Chile, Brazil, and the Slovak Republic.

[178] OECD Guidelines, Chapter II, General Policies, para. 2.

[179] Ibid, para. 1.

[180] OECD Guidelines, Chapter IV, Employment and Industrial Relations.

[181] Ibid., Chapter V, Environment.

[182] Ibid., Chapter VI, Combating Bribery.

[183] Ibid., Chapters IX, X, Competition, Taxation.

[184] Ibid., Procedural Guidance.

[185] See "2008 Annual Meeting of the National Contact Points: Report by the Chair", available at: www.oecd.org

The Ruggie framework sets out criteria for effective non-judicial instruments: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency (Ruggie 2008, para. 92). This includes "in essence" that they "ought to be independent, non-discriminatory, fair and with clearly defined procedures" (McLeod 2010, 91). The criteria sound familiar in regard to rule of law principles. Looking at today's NCP performance, there is much to be done to ensure that the NCPs meet these criteria more coherently and operate more efficiently (OECD Watch 2009; Ruggie 2008, para. 98).

Most NCPs serve as reconciliation mechanisms only. However, some are starting to assume a court-like position by stating human rights violations. An example is the Afrimex case with which the UK NCP had to deal. After mediation had failed, the NCP made a determination referring to the due diligence concept developed by the Ruggie framework, stating that Afrimex had breached various provisions of the Guidelines (MacLeod 2010, 103).[186]

The NCP procedure is, however, "expressly non-judicial in nature". The UK NCP is empowered to make determinations regarding the behaviour of UK-registered companies. But recommendations made cannot be enforced (MacLeod 2011, 22). Nevertheless, non-binding procedures play an important role as instruments promoting good corporate governance behaviour (deterrence through reputational risk, mainstreaming, awareness-raising, and monitoring to ensure good practices). NCPs can "proffer guidance about appropriate CSR standards which business actors are expected to implement" (MacLeod 2011, 19). They can significantly contribute to accountability of corporate governance and can be especially effective in relation to business activities in host countries where there is no functioning judicial system.

The implementation of NCP recommendations remains, however, subject to good will and carries risks of arbitrariness. As there is no procedure to enforce NCP decisions, and no binding obligation to compensate for harm, NCP procedures cannot substitute for judicial grievance mechanisms. "If the reputational carrot is insufficient to engage business with human rights standards then effective sticks need to be explored" (McLeod 2010, 107). "State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses" (Ruggie 2008, para. 82). This is why, for instance, British NGOs propose complementary mechanisms, such as a Commission for Human Rights, The Environment and Business "with powers to sanction and impose penalties" (RAID/CORE/TUC 2008, 22). However, it remains an issue to be discussed whether sanctions and penalties are, or should be, the right instrument, rather than compensation. "Sticks" that could work within the structure of NCPs could be related to linking export credit benefits, public procurement, or the corporate status with compliance (McLeod 2010, 107).

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[186] Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008, URN 08/1209, available at: www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html

Currently, the OECD Guidelines are under revision and will be updated with regard to established international standards and good practices. Revision has been envisaged, for instance, in terms of the "investment nexus" discussion concerning the degree to which enterprises are supposed to manage responsible business conduct in their supply chains. The Terms of Reference for an Update of the Guidelines are oriented towards the due diligence concept proposed by the SRSG.[187] Another issue could be the structure and mandate of the NCPs, mainly in regard to the enhancement of their efficiency in implementing the guidelines. Importantly, the update is supposed to develop more guidance on human rights, including, if deemed appropriate, a separate human rights chapter.

The World Bank Inspection Panel

The accountability issue occurs not only in private investments operating abroad, but also in respect to international organizations (IOs) supporting or investing in projects that have a potential impact on local people and livelihoods. In 1993, the World Bank's Executive Director created a new type of complaints procedure, the "Inspection Panel", after facing strong criticism regarding adverse effects of World Bank projects (Umana 2000). Globalization and new cross-border information technology exposed the Bank's practice, making it accessible to civil society and thereby impacting on constituencies in all parts of the world.

The Inspection Panel has the mandate to investigate complaints filed by private parties in countries to which the World Bank is lending money. The reference standards and procedures, and thus the scope of the inspection, consist in the World Bank's accountability to its own social and environmental policies and procedures. The panel is not an independent adjudicatory body, but rather an investigative entity, and is part of a broader high-level process of compliance monitoring. Nevertheless, it assumes a quasi-judicial mandate when issuing statements on compliance with World Bank policies. To ensure the independence of the three panel members, the procedure sets criteria such as on eligibility as a panel member after a minimum of two years of World Bank employment or non-eligibility for employment with the World Bank after having served on the panel, and limited mandates (five years).

The procedural guidelines provide an initial assessment of whether the claim meets the eligibility criteria and merits further investigation; the panel assesses the case and submits recommendations to the World Bank's Executive Directors, who then decide as to further proceedings. If further inspection is accepted, the panel investigates the case and reports on the relevant facts and on compliance with World Bank policies and procedures. The report is submitted to the Bank's President and the Executive Directors. Based on the

[187] Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, p.3, available at: http://www.oecd.org/document/43/0,3343,en_2649_33765_45356907_1_1_1_1,00.html

reports of the Panel and the Bank's management, the Executive Directors take a final decision, and inform complainants about subsequent steps that will be taken to remedy the situation.[188] Since 1993, about 56 requests have been filed with the Inspection Panel.

Civil society plays an important role in initiating and filing complaints. With the establishment of the Inspection Panel, NGOs gained influence over World Bank operations (Roos 2001, 487; Clark 1999). Their work is no longer limited to simple campaigning, but has been extended to quasi-legal representation and provision of expertise. NGOs are also involved in the Bank rule-making process (Roos 2001, 492).

Looking through the prism of the "effective remedy" benchmark set out by the Ruggie framework for non-binding instruments, the inspection panel procedure more or less meets these criteria: it is in essence legitimate, accessible, predictable, equitable, rights-compatible, and transparent, based on clearly defined procedures and investigation by independent experts. Shortcomings can, however, be noted as to the accessibility, independence, and rights compatibility of the Inspection Panel. Parties filing claims have little information regarding their claim, and no remedy if it is not accepted for investigation (Carrasco and Guernsey 2008, 32 et seq.). The panel is an in-house mechanism depending on the decision of World Bank management that determines the terms of reference for investigation, thereby having influence on the scope of investigation (Clark 1999, 16). For example, in the China Western Poverty Reduction case, the Panel was not allowed to visit the project site in India and had no access to the resident mission (Clark 1999, 15).

In terms of rights compatibility, the World Bank's own policies and procedures will probably be more or less congruent with standards of international human rights and environmental law. The operational directive 4.20 requires, for instance, "full respect for dignity, and human rights" in regard to indigenous people. There is, however, no full human rights-based approach to World Bank policies. To ensure consistency with international law standards, human rights should play a role in World Bank strategies and in interpreting World Bank policies.[189]

The Inspection Panel is a non-binding internal administrative review (Nurmukhametova 2006, 398), and not a legal recourse mechanism. Its decisions are not enforced, and affected parties are not granted relief. Given the principle of access to justice (Francioni 2009, 730), mainly regarding the non-judicial character of the Panel and the difficult legal remedy situation in many developing countries, the restricted scope of the Inspection Panel's work is subject to criticism (Carrasco and Guernsey 2008, 27). Aspects of redress[190] are, however, involved in monitoring compliance, such as additional credits to mitigate adverse effects, amendment of policies, or local monitoring schemes (Roos 2001, 519).

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188 See Resolution Establishing the Inspection Panel and Inspection Panel Operating Procedures IBRD Resolution No. 93-10/IDA 93-06. For an excellent overview of the procedure and a guide for CSOs, see Clark 1999.

189 With regard to the role of human rights in World Bank policies, see Ball 2008.

190 According to the Ruggie framework, these include "compensation, restitution, guarantees of non-repetition, changes in relevant law and public apologies" (Ruggie 2008, para. 83).

Some scholars propose international arbitration mechanisms as appropriate means to deal with complaints about World Bank activities, as the complaining parties can base their claim on the fact that they suffered injury as a consequence of a wrongful act committed by the borrowing country or the World Bank. They suggest the Permanent Court of Arbitration as an appropriate mechanism to "offer a suitable framework for settling such disputes" (de Feyter 2003, 129 et seq.). However, the Inspection Panel's non-binding role as compliance monitoring mechanism should be carefully distinguished from other possible complementary ways of binding legal remedy related to alleged World Bank violations of international law. The non-binding remedy could thus be complemented, but should not be substituted by a legally binding remedy. The UN-SGSR stresses the need of a mixture of effective legal and non-legal remedy mechanisms, which play distinct roles to foster compliance with human rights obligations by transnational enterprises (Ruggie 2008, para. 84).

The IFC and MIGA compliance mechanisms

The activities of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) are not covered by the World Bank Inspection Panel mechanism. Since 1999 these institutions have provided a similar recourse mechanism, the IFC/MIGA Compliance Advisor/Ombudsman (CAO).[191] The offices' mandate is to "help MIGA and the International Finance Corporation address complaints by people affected by projects in a manner that is fair, objective and constructive, and to enhance the social and environmental outcomes of projects in which these organizations play a role" (MIGA 2009, 61).

According to the CAO operational guidelines,[192] the CAO has three distinct functions: (1) ombudsman role: to respond to complaints by individuals, groups, communities, or other entities affected by adverse social and environmental impacts of IFC/MIGA-supported projects and to help resolve the issues through a mediation and negotiation process; (2) compliance role: to conduct audits at the request of the President of the World Bank, the CAO Vice President, or CAO Ombudsman to "ensure compliance with policies, guidelines, procedures, and conditions for IFC/MIGA involvement and thereby improve social and environmental performance";[193] (3) advisory role: to provide advice to the President and management of IFC/MIGA.

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[191] See: www.cao-ombudsman.org. For an assessment and comparison of the mechanisms, see Bradlow 2005.

[192] Available at: http://www.cao-ombudsman.org

[193] CAO operational guidelines, para. 3.1.

The operational guidelines foresee several procedural steps concerning the assessment of eligibility of a complaint, the assessment of the case in terms of "the CAO's mandate to address environmental and social impacts of IFC/MIGA investments",[194] and the investigation, mediation, or facilitation of the matter as a response to the claim. The procedure is less about non-compliance with IFC/MIGA's social and environmental policies – although these have to be addressed when filing the complaint – and more about reconciliation. If no consensus can be achieved, the procedure continues with the compliance role of the CAO, ensuring the project's compliance through an auditing procedure.

As representatives of claimants, civil society plays an important role in the ombudsman process. Additionally, stakeholders are involved in regard to the investigation and assessment phase. Unlike the Inspection Panel, the CAO is independent of the IFC/MIGA management, and follows a policy of careful balancing of confidentiality and disclosure.[195] Since 2009, 110 complaints have been filed, and 67 accepted for further consideration within the ombudsman procedure. In regard to fostering responsible investment, the procedures have potential to allow for a "canary in the coal mine". For instance, after an internal audit initiated by NGOs and indigenous groups, the World Bank suspended IFC funding of the palm oil sector to ensure that investments do not undermine social and environmental standards.[196]

[194] Ibid., para. 2.

[195] Ibid., para. 1.5.

[196] See: http://news.mongabay.com/2009/0909-palm_oil_ifc.html.

An indirect voice: *amicus curiae*

Another rather indirect way to give people a voice in investment arbitration is to grant civil society the opportunity to submit *amicus curiae* briefs to investment arbitration panels.[197] These allow individuals or entities who are not parties to the dispute to convey facts and legal opinions to investment arbitration panels. *Methanex Corp. v. United States*, a North American Free Trade Agreement (NAFTA) case operating under UNCITRAL[198] rules, marked a breakthrough for civil society participation in investment tribunals (Dumberry 2002).[199]

Canadian NGOs had asked the tribunal to allow a written *amicus curiae* contribution "on critical legal issues of public concern",[200] oral statements, and observer status for the NGO consortium. The complainant, Methanex, strongly opposed the request, invoking Chapter 11 of the NAFTA agreement and Article 25 (4) of the UNCITRAL rules. The tribunal stated that: "…there is nothing in either the UNCITRAL Rules, or Chapter 11, section B, that either expressly confers upon the Tribunal the power to accept amicus submissions or expressly provides that the Tribunal shall have no power".[201] Its discretion under Article 15 (1) of UNCITRAL rules would, however, not allow for adding "a person as a party to the dispute nor to accord to this person rights and privileges of a disputing party".[202]

The tribunal held that in the circumstances of the arbitration, which involved, to a great extent, public interest and therefore extended beyond mere commercial arbitration questions, it was appropriate to use its discretion to accept *amicus curiae* submissions. Even though it was concerned with imbalances between the dispute parties' positions, it explained that:

> "[the] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm".[203]

The tribunal emphasized that, while it was allowing *amicus curiae* submissions, it fully reserved its discretion as to the "admissibility, relevance, materiality and weight" of the

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[197] The Latin phrase *amicus curiae* means "friend of the court". See Bartholomeusz 2005; for an overview, see Levine 2010.

[198] United Nations Commission on International Trade Law, see: www.uncitral.org.

[199] *Methanex Corporation v. United States of America*. Decision of the Tribunal on Petition from Third Persons to Intervene as 'Amici Curiae', 15 January 2001.

[200] Ibid, para. 30.

[201] Ibid, para. 24.

[202] Ibid, paras. 27, 29.

[203] Ibid, para. 49.

petitioners' input.[204] Subsequently, other tribunals operating under UNCITRAL rules have argued along the same lines to allow for *amicus curiae* submissions (Newcombe 2007, 385). In October 2003, the NAFTA Free Trade Commission (FTC) released the "Statement on non-disputing party participation".[205] The statement clarified that "no provision of the North American Free Trade Agreement (NAFTA) limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party" and set out procedures for *amicus curiae* requests.

Under International Centre for the Settlement of Disputes (ICSID) arbitration rules, a tribunal initially refused *amicus curiae* submissions.[206] Subsequent ICSID tribunals, however, stated that they had the power to allow for third party submissions. Similar to the UNCITRAL tribunals, criteria such as appropriateness of the subject matter, which mainly concerns the public interest involved, and suitability and due procedures of the *amicus curiae* submissions governed the decisions (Newcombe 2007, 387). The ICSID rules were amended in 2006; Article 37 (2) of the amended ICSID rules allows non-disputing parties to file a written submission with the tribunal, and provides criteria that should determine the tribunal's decision, such as the capacity of non-disputing parties to clarify facts and provide legal opinions, or their independence and interest regarding the matter. Recent Canadian and American model bilateral investment treaties (BITs) both contain provisions that allow tribunals to accept submissions by non-disputing parties.[207]

One of the main issues with regard to civil society participation in investment arbitration is access to information concerning the case. Traditionally, confidentiality has played a key role in investment arbitration. However, given the trend towards acknowledging public interest involved in arbitration cases, the in camera character of arbitration has been loosened. In 2001, the NAFTA FTC clarified that:

> "Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal."[208]

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[204] Ibid, para. 36.

[205] Statement of the Free Trade Commission on non-disputing party participation, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf

[206] *Aguas dal Tunari SA v. The Republic of Bolivia*. ICSID Case No. ARB/03/02, 21 October 2005.

[207] Canada, Model Foreign Investment Protection Agreement, Article 39, available at: http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf . United States, Model Bilateral Investment Treaty, Article 28(3), available at: www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html

[208] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, para. 1 (a). Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en

The parties have agreed to "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal", except for confidential business information, information otherwise protected from disclosure under the party's domestic law, and information that must be withheld pursuant to the relevant arbitration rules.[209] In the non-NAFTA arbitration context, the situation is less clear. Generally, if the parties do not agree, ICSID does not publish documents, including the decisions of the tribunal (e.g. award, procedural orders).[210] Under UNCITRAL rules, Article 34 (5) provides that awards can only be published with the parties' consent, and Article 28 (3) foresees an in camera procedure for hearings.

In regard to confidentiality, in the case *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, the ICSID tribunal addressed the issue of confidentiality in relation to the disclosure of procedural orders to a third party. The tribunal held that "there is no provision in the ICSID arbitration rules which expressly provides for the confidentiality of pleadings, documents or other information submitted by the parties during the arbitration".[211] It also held that the issue is subject to a balance between the need for transparency in treaty proceedings and the need to protect the procedural integrity of the arbitration.[212] It noted, however, that "limitations to transparency are logically time-limited. Once the arbitration is concluded restrictions would normally not continue to apply" (Newcombe 2007, 390). In terms of an alleged "duty to provide the public with information concerning governmental and public affairs",[213] Tanzania had the right to disclose procedural information. In terms of sustainable development issues, the role of public participation and access to information is crucial to allow for informed and balanced decisions, taking into account all relevant social, economic, environmental, and future related aspects of a case. In this regard, "transparency in investment treaty arbitration should trump" (Newcombe 2007, 390) the interest in confidentiality, except for justifiable circumstances (e.g. business confidentiality).

[209] Ibid., para. 1 (b) (ii).

[210] ICSID Administrative and Financial Regulations, Regulation 22.

[211] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB(05/22, Procedural Order No. 3, 29 September 2006, para. 125.

[212] Ibid., para. 112.

[213] Ibid., para. 149.

6 Conclusion

Today, the widespread global network of international investment agreements (IIAs) provides a strong standard of treatment shielding investors from loss related to the risk of investing in a foreign country. It is crucial for responsible investment in agriculture that host states possess regulatory frameworks and governance systems that efficiently set, protect, and balance the economic, social, and environmental interests at stake (Cotula 2010). However, potential host states of important investments in land are suffering from weak governance or authoritative regimes, often not in a position to watch out for the careful balancing of interests.

If not framed well at the national level, current international investment protection standards bear significant potential for constraining host states' regulatory power. As some scholars and practitioners note, reconciling investors' and states' legitimate interests in regulating for the public interest will constitute one of the key challenges of future IIAs (Markert 2010). However, the interests of states and investors may match one another, to the detriment of people. Apart from states' and investors' interests, there is a third interest at stake when it comes to responsible FDI: peoples' rights and livelihoods. A systemic view on international investment law should therefore be based on a triangular good governance perspective, taking into account the interests of investors, states, *and* people.

Mainly due to historically rooted reading and understanding of investment law as basically commercial law with the main purpose of protecting investors from harm, there is a tendency towards imbalances of international investment law in favour of the investor's position. This has an impact on the arbitration process. A sustainable development approach to international investment law could help in bridging the different economic and societal interests on each side of the triangular relationship (state, investor, and people) that is at stake in international investment law. Sustainable development requires reconciling economic, social, and environmental objectives, as well as concerns of present and future generations in such a way that they reinforce each other. The balancing exercise involves standards and principles of international law in the field of economic, social, and environmental law. It could be structured by legal techniques with regard to the proportionality principle and the concept of good faith that could help in mainstreaming benchmarks and criteria for more predictable law interpretation.

A sustainable development interpretative focus could support a reading of investment provisions that encompass responsibility and sustainability in regard to development and people, while performing their purpose to protect the investors' legitimate economic interest at stake. Principles of law interpretation, such as a sustainable development objective in the preamble of IIAs (Grosse Ruse-Khan 2010), or providing for investors' duties to respect human rights, could legally anchor or support such an approach. Including interpretation principles in model treaties or arbitration rules could have the additional

advantage of promoting coherence in adjudication of international investment law in general.

Given that there is no comparable international remedy mechanism for individuals to directly claim rights against harm that has been caused by TNCs operating abroad, there is an asymmetry in access to remedy for investors and people. This is mainly true for host states with weak governance systems and no adequate access to justice. Concerning the "asymmetry" in regard to access to remedies, civil society pressure has in recent years induced and dynamized binding and non-binding remedy mechanisms, such as the ATCA, European extra-territorial jurisdiction, the World Bank Inspection Panel, the MIGA/IFC CAO, and the OECD National Contact Points. In times of globalization, when states are no longer capable of regulating cross-border issues on their own, it has become increasingly difficult to ignore civil societies' call for accountability, rule of law, and respect for human rights in the stateless international sphere. Non-binding remedy mechanisms and admittance of *amicus curiae* briefs are first attempts at an answer to this.

The interest in these mechanisms is a signal that the international policy system is opening up to more accountability. Non-binding remedies can, however, only allow for listening to peoples' voices and reconciliation: they do not provide access to legal remedy and compensation. There is a need for binding and enforceable legal remedies fostering good governance for peoples' rights in the investment sphere. These only start occurring through mechanisms such as the ATCA or the extra-territorial jurisdiction cases in Europe.

To effectively allow for peoples' access to remedy in international investment law, unfamiliar and idiosyncratic legal instruments in multi-layered private and public law making, opening up legal systems and legal reasoning, should be considered and discussed. States should, for instance, cooperate in identifying good practices in extra-territorial jurisdiction. International investment arbitration opening up to peoples' claims may also be an issue to be discussed; leaving behind old institutional dogmas and carefully exploring institutional challenges and opportunities. International investment law needs to seek overall (investor, states, and people) effectiveness, efficiency, and legitimacy to maintain its stability and contribute to an overall welfare effect of foreign direct investment. This implies a huge challenge of mainstreaming good legal practices and reforming institutions. Large-scale investments in land are a perfect example of the need for processes that respect overall societal welfare and provide access to justice.

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This report is part of a wider initiative on Commercial Pressures on Land (CPL). If you would like further information on the initiative and on the collaborating partners, please feel free to contact the International Land Coalition.

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