

## THE GLOBAL LAND GRAB: A HUMAN RIGHTS APPROACH

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### I. INTRODUCTION

On 16 May 2009, 3D → Trade - Human Rights - Equitable Economy and the Project on Economic, Social and Cultural Rights<sup>1</sup> at the Geneva Academy of International Humanitarian Law and Human Rights organized *The Global Land Grab: A Human Rights Approach*<sup>2</sup>, which was co-financed by Brot für die Welt and Brot für Alle. The international seminar –the first in Switzerland to look specifically at large-scale land acquisitions (LSLAs) for offshore food and biofuel production – brought together over 50 people, including UN human rights experts, members of social movements and representatives from various development NGOs. The objective of this seminar was to share on-going research into this trend and talk through the potential and actual consequences of LSLAs on the realization of human rights. Participants also discussed how the actors involved in land grabbing could be held to account and explored ways to promote human rights-consistent investment in land.

#### **The importance of context: what role do small-scale farmers play in the future of agriculture?**

A recent IIED-FAO-IFAD report confirms the reality of LSLAs, at the very least in the five countries analyzed in the study.<sup>3</sup> While it may be happening, this trend is not new. The global land grab is but the latest manifestation of the on-going struggle of people all over the world to retain access to the land they use and depend on for their livelihoods.

Contextualizing LSLAs requires governments, NGOs and intergovernmental agencies to start with one key question: what role do small-holder farmers play in the future of agriculture?<sup>4</sup> The recent spate of LSLAs is touted as a possible step towards much needed investment in developing country agriculture, with benefits relating to infrastructure development, dissemination of new technologies and market access. Even if these benefits materialize, the radical changes these deals are likely to bring to both modes of production and agricultural supply chains means they may be yet another nail in the coffin for small-scale agriculture.

Taking a broader approach is also essential if this is to be understood as inextricably linked to the food crisis. A number of governments have cited loss in confidence in international food markets as a result of the export restrictions imposed during 2008 as a key motive behind their moves to outsource food production. Decisions on how to address the structural problems behind the food crisis – including decades of underinvestment in small-holder agriculture, price volatility and OECD subsidies – will also fundamentally affect how we respond to LSLAs. Debates remain highly polarized but, as emphasized in the most comprehensive international study on agricultural

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<sup>1</sup> Information about the Project on Economic, Social and Cultural Rights can be found at [http://www.adh-geneva.ch/research/research.php?id\\_recherches=2](http://www.adh-geneva.ch/research/research.php?id_recherches=2)

<sup>2</sup> A number of resources from the seminar, including presentations, are available on 3D → THREE's website, <http://www.3dthree.org/en/complement.php?IDcomplement=51&IDcat=19&IDpage=51>

<sup>3</sup> This study, a collaborative effort between the International Institute for the Environment and Development (IIED), the UN Food and Agriculture Organization (FAO) and the International Fund for Agriculture and Development (IFAD) investigated approved and proposed LSLAs in five African countries (Ethiopia, Ghana, Madagascar, Mali and Sudan). Lorenzo Cotula et al., *Land grab or development opportunity? Agricultural investment and international land deals in Africa*, 2009, <http://www.iied.org/pubs/display.php?o=12561IIED>

<sup>4</sup> Michael Taylor, *The global 'land grab': Mitigating the risks and enhancing the opportunities for local stakeholders*, International Land Coalition, 2009, [http://www.3dthree.org/pdf\\_3D/MichaelTaylor\\_ILC.pdf](http://www.3dthree.org/pdf_3D/MichaelTaylor_ILC.pdf) (PowerPoint)

issues to date, “the way the world grows its food will have to change radically to better serve the poor and hungry if the world is to cope with a growing population and climate change while avoiding social breakdown and environmental collapse.”<sup>5</sup>

## II. THE POTENTIAL CONSEQUENCES OF LSLAs ON HUMAN RIGHTS

The profound changes brought about by LSLAs may have major consequences for the realization of human rights. Loss of access to land and resources has potential consequences for the right to an adequate standard of living – which includes the right to food, housing, and water<sup>6</sup> – as well as the right to self-determination, the right to development and the right to participate in cultural life. Civil and political rights – such as the right to participate in public affairs and the right to receive information – are also threatened if the negotiation, implementation and monitoring of these deals is opaque and non-participatory. To give one example:

### The right to participate in cultural life

A number of human rights bodies, including the Inter-American Court of Human Rights, have recognized land as a fundamental basis of culture.<sup>7</sup> If people are forced off – or have reduced access to – their land as a result of LSLAs, they may no longer be able to participate in cultural practices. In Madagascar, for example, land is inextricably linked to identity and there are a number of ancestral ceremonies associated with land, which would have been affected if the Daewoo deal had gone through.<sup>8</sup>

## III. HUMAN RIGHTS RESPONSES TO LSLAs

Discussions are taking place in a number of fora regarding a code of conduct to regulate LSLAs. However, given the fact that many of the land deals are South-South partnerships, such an instrument could be interpreted as yet another Northern imposition. Crucially, a code of conduct would be voluntary, whereas international human rights covenants are legally binding. In almost all cases of LSLAs, at least one of the States involved has ratified at least one of the existing international human rights covenants. This means that in the majority of land deals, at least one of the States is legally bound by human rights commitments. These obligations apply in both the negotiation and implementation of land deals.

Human rights law does not provide policy prescriptions for how to approach LSLAs or mandate the type of agricultural model governments should follow. Nevertheless, it does require that a

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<sup>5</sup> See the various documents of the International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD) at [http://www.agassessment.org/index.cfm?Page=About\\_IAASTD&ItemID=2](http://www.agassessment.org/index.cfm?Page=About_IAASTD&ItemID=2)

<sup>6</sup> For more on how LSLAs may affect the rights to food and water, see Nicola Colbran, *Human Rights Implications of Land Grabs: Palm Oil in Indonesia*, Indonesia Programme, Norwegian Centre for Human Rights, 2009, [http://www.3dthree.org/pdf\\_3D/NicolaColbran\\_Indonesia.pdf](http://www.3dthree.org/pdf_3D/NicolaColbran_Indonesia.pdf) (PowerPoint) and Olivier De Schutter, Special Rapporteur on the right to food, *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*, 2009, <http://www.srfood.org/images/stories/pdf/otherdocuments/22-srftflarge-scalelandacquisitions-hrprinciples-9.6.09-2.pdf>

<sup>7</sup> *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgement of the Inter-American Court of Human Rights, 31 August 2001, para.149, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf). See also Articles 25 and 26 of the *UN Declaration on the Rights of Indigenous Peoples*, UN General Assembly, adopted 13 September 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>

<sup>8</sup> Ralava Beboarimisa, *Répercussions au niveau local et national de l'accaparement des terres*, Collectif Pour la Défense des Terres Malgaches, 2009, [http://www.3dthree.org/pdf\\_3D/Ralava\\_malgachepresentation.pdf](http://www.3dthree.org/pdf_3D/Ralava_malgachepresentation.pdf) (PowerPoint) For more information about the Collectif Pour la Défense des Terres Malgaches, see <http://terresmalgaches.info/>

government's agricultural, trade and investment policies promote the realization of human rights. If, through field research, LSLAs are found to negatively affect the enjoyment of human rights, human rights law requires action from the government to rectify this situation.

Much work needs to be done to implement laws and policies that promote the realization of human rights and improve enforcement and redress mechanisms to ensure such laws and policies are upheld. However, steps to strengthen the realization of existing human rights obligations may be better placed than adding another tool to the international legal architecture.

### **Immediate need for accurate information**

Research into both the scale and size of this trend as well as its impacts on the ground is imperative. Work needs to be undertaken on a case by case basis – taking into account specific local conditions and the different sets of actors involved in each deal.<sup>9</sup> Particular attention must also be paid to the effects of this trend on vulnerable groups, such as women or indigenous communities. On-going research by a number of organizations may help to fill the information gap in coming months.<sup>10</sup>

### **Securing land and resource rights**

If the human rights of rural populations are to be realized, it is fundamental that measures are taken to help ensure that land and resource rights are strengthened. Possible avenues for action include:

#### **At the community level:**

→ **Strengthening legal awareness** – Efforts to increase the negotiating power of communities, either through pooling resources to hire a lawyer or through legal literacy training camps,<sup>11</sup> may enable communities to reach fairer agreements with investors. The Sustainable Agriculture Network Timor Leste (HASATIL) ensures that its members in Timor Leste are aware that the constitution prohibits foreign ownership of land. In one case, this enabled coffee farmers to resist the take over of their land by a Portuguese investor.<sup>12</sup>

→ **Supporting communities' ability to organize and network** – It is important to recognize the limitations of rights-based approaches to land grabbing and that in many cases it may be more useful to help communities' capacity to resist forced displacement.<sup>13</sup> This could involve building solidarity within communities, along with supporting efforts to form alliances with local, national, regional and international groups – from church groups to La Via Campesina.

#### **At the national level:**

→ **Adopting and enforcing human rights-consistent legislation against forced evictions** – The *Basic Principles and Guidelines on Development-Based Evictions and Displacement* elaborated by Miloon Kothari, the former Special Rapporteur on the right to adequate housing, offer extremely useful guidance for States in this field.<sup>14</sup>

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<sup>9</sup> The International Land Coalition (ILC) in collaboration with AGTER has developed an analytical framework, useful for both internet-based and field research on LSLAs. ILC in collaboration with AGTER, *Commercial Pressures on Land Initiative*, 2009, [http://www.landcoalition.org/cpl-blog/wp-content/uploads/09\\_04\\_cpl\\_initiative\\_full\\_version.pdf](http://www.landcoalition.org/cpl-blog/wp-content/uploads/09_04_cpl_initiative_full_version.pdf)

<sup>10</sup> See 3D → THREE's website for information about and links to on-going research projects <http://www.3dthree.org/en/page.php?IDpage=51&IDcat=19>

<sup>11</sup> See, for example, the "Legal tools for citizen empowerment" programme at the International Institute for the Environment and Development (IIED) <http://www.iied.org/legal-tools/programme-overview>.

<sup>12</sup> For more information, contact Arsenio Pereira Da Silva, Sustainable Agriculture Network Timor Leste (HASATIL) and La Via Campesina [arsen\\_ctl@yahoo.com.au](mailto:arsen_ctl@yahoo.com.au)

<sup>13</sup> Bridges Across Borders South East Asia (BABSEA), an international grassroots organization, has helped some Cambodian communities stay on their land in this way.

<sup>14</sup> Miloon Kothari, 'Annex 1: Basic Principles and Guidelines on Development-based Evictions and Displacement,' in *Report of the Special Rapporteur on adequate housing as a component of the right to an*

→ **Lobbying governments to recognize the existing rights of land users** – be they customary, collective, individual, seasonal etc. It is crucial that governments do not only recognize individual claims on land, but also collective rights to land as well as the multiple and overlapping rights that exist in many areas, for example in cases where land is used by both small farmers and pastoralists at different times of the year. Comprehensive titling schemes would help clarify the misconception that much of the land involved in these LSLAs is “wasteland” or marginal land. Countries with collective titling programmes, such as Tanzania and Mozambique, and the FAO *Voluntary Guidelines for Good Governance in Land and Natural Resource Tenure*<sup>15</sup> could be consulted here. However, it should be noted that land titling is not without its risks and may lead to some claimants being favoured over others, e.g. individual over collective. Even if communities are able to register their land collectively, it is highly possible that local elites will dictate the “interests” of the community. Critical debates on community titling are essential if such arrangements are to benefit all members, particularly the poorest and most marginalized.

→ **Implementing mechanisms to protect the land rights of marginalized groups** – Legislation and policies that specifically target marginalized and vulnerable groups – such as women and indigenous peoples – are essential if the human rights obligation of non-discrimination is to be upheld.

### **At the international level:**

→ **UN Special Procedures**<sup>16</sup> – In addition to urgent appeals and country visits, the Special Rapporteurs regularly submit reports to the Human Rights Council. These reports contribute to the development of international human rights law, which in turn may help secure land rights. For example, following the identification of a normative gap in international human rights law relating to the right to land,<sup>17</sup> the Special Rapporteur on the right to food, the Special Rapporteur on adequate housing and the Special Rapporteur on indigenous peoples’ rights are currently preparing a joint report on access to land issues, which will provide guidance for States seeking to ensure their land policies are human rights-consistent.

→ **UN treaty monitoring bodies**<sup>18</sup> – The human rights consequences of palm oil plantations in Indonesia have already been raised at the Committee on the Elimination of Racial Discrimination (CERD), with strong responses from Committee members.<sup>19</sup> The Committee on Economic, Social and Cultural Rights (CESCR) offers another useful forum for holding governments to account in

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*adequate standard of living*, 2007,

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/106/28/PDF/G0710628.pdf?OpenElement>

<sup>15</sup> Expected 2009. See also Sofia Monsalve Suárez et al., *Voluntary Guidelines for Good Governance in Land and Natural Resource Tenure: Civil Society Perspectives*, FIAN International and Hakijamii (Economic and Social Rights Centre), 2009, <http://www.fian.org/news/news/new-publication-voluntary-guidelines-about-land-and-natural-resource-tenure/pdf>

<sup>16</sup> Detailed information on how to submit information to these Rapporteurs and Experts can be found by clicking on the link of the relevant mandate from

<http://www2.ohchr.org/english/bodies/chr/special/themes.htm>. See also Office of the High Commissioner for Human Rights (OHCHR), *Working with OHCHR: A Handbook for NGOs*, 2006,

<http://www.ohchr.org/Documents/Publications/NgoHandbook/ngohandbook.pdf>

<sup>17</sup> Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, 2007,

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/106/28/PDF/G0710628.pdf?OpenElement>

<sup>18</sup> There are eight human rights treaty bodies that monitor implementation of the core international human rights treaties. Information on the UN treaty monitoring bodies, as well as the lists of countries they are due to examine in the coming years can be found at

<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.

<sup>19</sup> See the CERD’s Concluding Observations

<http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.IDN.CO.3.pdf> as well as Perkumpulan Sawit Watch et al., *Request for Consideration of the Situation of Indigenous Peoples in Kalimantan, Indonesia*, Submission to the Seventy-First Session of the CERD, 2007,

[http://www2.ohchr.org/english/bodies/cerd/docs/ngos/urgent\\_action.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/urgent_action.pdf)

relation to LSLAs.<sup>20</sup> The CESCR may also be the most productive arena for raising issues relating to extraterritorial obligations (see Section IV below).

→ **Universal Periodic Review (UPR)**<sup>21</sup> – making submissions through the UPR at the UN Human Rights Council may be worth exploring, particularly for States involved in LSLAs which have not ratified international human rights covenants.

→ **Participate in the Committee on Food Security** – The Committee on Food Security (CFS) at the FAO provides a forum within the UN system for discussing both the future role for small-holder agriculture and responses to the global food crisis, to which LSLAs are inextricably linked.

→ **Support the global campaign for the International Convention of the Rights of Peasants** – members and allies of La Via Campesina are working on a number of different levels to promote the inclusion of an international convention on peasants' rights in the UN system.<sup>22</sup>

#### **IV. HOLDING STATES AND PRIVATE ACTORS TO ACCOUNT: THE POTENTIAL OF EXTRA-TERRITORIAL OBLIGATIONS**

Extra-territorial obligations (ETOs) refer to the obligations States have to ensure that their actions – or lack of action – do not undermine the human rights of people in other countries.<sup>23</sup> The legal foundations of ETOs lie in Articles 1, 55 and 56 of the UN Charter<sup>24</sup> and in the International Covenant of Economic, Social and Cultural Rights (ICESCR), Articles 2, 11 and 15. The UN treaty monitoring bodies, in particular the Committee on Economic, Social and Cultural Rights,<sup>25</sup> may be the best arena to raise issues relating to ETOs.

With regards to LSLAs, it remains the primary obligation of the State leasing or selling its land to uphold the human rights of its citizens. However, ETOs place an obligation on the investor State to ensure that its investment does not undermine the realization of human rights in the host country. If the investor is a company, the home State of that company has an obligation to regulate its actions.

Of course, many States pay little regard to the human rights of their own citizens, let alone the citizens of other countries and emphasis should be placed on encouraging States to recognize their domestic obligations.

#### **Corporations**

Regulating corporations is one of the critical issues at stake and relates to domestic, foreign, public and private companies – all of whom could play a role in LSLAs. There is a clear need to implement laws, policies, enforcement and redress mechanisms at a domestic level to hold corporate actors involved in LSLAs to account. However, there are clearly huge obstacles relating to the political will and capacity of governments to regulate corporations.

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<sup>20</sup> Indeed, the CESCR raised its concerns about LSLAs when reviewing Cambodia. See 3D → THREE, *Holding the Actors Involved in the Global Land Grab to Account: The Committee on Economic, Social and Cultural Rights Urges Action from Cambodia*, 2009, [http://www.3dthree.org/pdf\\_3D/3DCESCRCambodia-Kuwait\\_June09.pdf](http://www.3dthree.org/pdf_3D/3DCESCRCambodia-Kuwait_June09.pdf)

<sup>21</sup> For more information about the UPR, see <http://www.ohchr.org/EN/HRBODIES/UPR/Pages/UPRMain.aspx>

<sup>22</sup> For more about the campaign, see [http://www.viacampesina.org/main\\_en/index.php?option=com\\_content&task=view&id=633&Itemid=40](http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=633&Itemid=40). The text of the Declaration can be found at <http://viacampesina.net/downloads/PDF/EN-3.pdf>

<sup>23</sup> See the ETO Consortium, a project involving NGOs and academic institutions which aims to develop empirical knowledge about how States actions affect enjoyment of human rights in other countries, plus legalistic theoretical aspects of ETOs <http://www.lancs.ac.uk/fass/projects/humanrights/>

<sup>24</sup> *Charter of the United Nations*, 26 June 1945 (date of adoption), 24 October 1945 (entry into force), <http://www.un.org/en/documents/charter/> See Chapter I: Purposes and Principles and Chapter IX: International Economic and Social Co-operation.

<sup>25</sup> C.f. the paragraph on UN treaty monitoring bodies in Section III above

ETOs could also usefully be employed with regard to corporations as the home State has an obligation to regulate their corporations' conduct in other States. ETOs were successfully applied by FIAN in the case of a German tyre company in Mexico, found to be violating Mexican labour laws. The German government was violating its ETOs through its failure to regulate the actions of the company and this led to the company's closure.

If working conditions are found to be exploitative, it is possible that civil liability law cases could be taken to court in the home State of the investor company. This mechanism exists in all EU member States and in a number of other jurisdictions. Further discussions on how to regulate corporations with regard to LSLAs should involve companies and the International Labour Organization (ILO) if practical and applicable solutions are to be found.

### **Sovereign wealth funds**

Although there is no single definition of sovereign wealth funds (SWFs), they can be summarized as large pools of assets and investments which are owned and managed directly or indirectly by governments.<sup>26</sup> SWFs lack the technical and managerial expertise for managing farming operations and, despite initial media claims, SWFs have had very little direct involvement in LSLAs. If they do get involved, SWFs are likely to favour a joint-venture approach, investing in agricultural land through a national subsidiary. This may offer opportunities for holding such actors to account through domestic laws in the host State (i.e. where the SWF is investing).

In addition, SWFs are bound by ETOs – at least in cases where the SWF is from a country that has ratified an international human rights covenant. However, given the lack of democratic control over SWFs, coupled with unaccountability of governments in many countries with SWFs, it may be difficult to use ETOs to regulate these funds. That said, it is important to recognize that SWFs are no less opaque or unaccountable than most financial institutions and calls for greater transparency and regulation of SWFs should be coupled with demands on all financial institutions – hedge funds, private equity companies – to do the same.<sup>27</sup>

## **V. THE DEALS GOVERNING LSLAs: CONSISTENT WITH THE REALIZATION OF HUMAN RIGHTS?**

### **Negotiations**

In order to be consistent with the realization of human rights, all potentially affected communities must be able to participate in the negotiations. The principle of free, prior and informed consent (FPIC), which has been developed in a number of different international legal contexts,<sup>28</sup> provides benchmarks for how such participation could be structured.

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<sup>26</sup> SWFs are generally sourced by surplus foreign exchange reserves (e.g. China), commodity exports (e.g. Gulf States oil money) or proceeds of privatization and fiscal surpluses (e.g. Malaysia and Singapore). SWFs aim to diversify and improve return on investments, as well as protect the domestic economy from fluctuation in commodity prices. For more information see Kavaljit Singh, *Sovereign Wealth Funds and Land Grabbing: Macro Overview and Some Policy Concerns*, Public Interest Research Centre, 2009, [http://www.3dthree.org/pdf\\_3D/Kavaljit\\_PIRS\\_India.pdf](http://www.3dthree.org/pdf_3D/Kavaljit_PIRS_India.pdf) (PowerPoint)

<sup>27</sup> Kavaljit Singh, *Sovereign Wealth Funds: Frequently Asked Questions*, 2008, <http://www.thecornerhouse.org.uk/pdf/briefing/SWFFAQs.pdf>

<sup>28</sup> This includes the *UN Declaration on the Rights of Indigenous Peoples*, Art. 32, UN General Assembly, adopted 13 September 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement> and the *Convention on Biological Diversity, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*, Montreal, 2002, <http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>

However, given the reality that many governments have antagonistic or simply ambivalent relationships with the indigenous communities, small-scale farmers and other marginalized groups that stand to lose their land, much work needs to be done to implement the concept of FPIC in practice.

If a government refuses to disclose information about a deal or if the negotiations are being undertaken in a non-transparent way, Special Procedures – such as the Special Rapporteur on the right to food or the Special Rapporteur on indigenous peoples’ rights – could submit an urgent appeal or a letter to the government in question, formally requesting information.

Another option may be to use regional or international human rights courts.<sup>29</sup> The Inter-American Court of Human Rights recently ruled that the Chilean government had violated its obligations under the American Convention on Human Rights for failing to provide information regarding a forestry concession in Patagonia. The court ruled that “failure to disclose information hindered the public’s ability to exert democratic supervision or “control” over the actions of the state.”<sup>30</sup> Although these cases often take years to conclude, they may constitute the only means of accessing justice on access to information issues. In addition, such rulings can help bring about changes in national legislation or normative practices relating to the disclosure of information.

### Impact assessments

There will never be a consensus on what a “good” land deal should look like and indeed, human rights law provides no specific requirements regarding the content of international land deals. However, given the magnitude of the effects that land deals are likely to have, not just on local communities but for the country as a whole, impact assessments – based on human rights principles or social and environmental criteria – should be carried out prior to signing, following implementation and periodically for the entire duration of a LSLA.

Questions that could be included in an impact assessment:

- What effects will the LSLA have on the accessibility, adequacy and availability of food – both for local communities and the country as a whole?
- What if a land deal is found to deprive people of their access to land and water, thus violating their right to food? What kinds of local/national redress mechanisms exist? Could affected people take such a case to national courts?
- If commitments of job creation are made in the deal, will the salary and conditions of these jobs enable people to earn enough to feed themselves and their families? Will agricultural workers be able to maintain the highest standards of physical and mental health working in the conditions envisaged?
- What measures are in place to ensure that investor commitments (of job creation, infrastructure development) can be monitored and enforced? Are the local and national government equipped to hold the investor to account?

Impact assessments are also a useful way for evaluating the different farming models proposed by investors. Contract farming is being proposed in many circles as a potential “win-win” solution for LSLAs, enabling farmers to retain access to and use of their land while at the same time providing the investor with a guaranteed supply of food. However, such “win-win” solutions must be assessed carefully. Given the power imbalances omnipresent in agricultural supply chains, the ability of farmers to negotiate contractual arrangements that are human rights-consistent is questionable.

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<sup>29</sup> NB: The potential of regional and international human rights courts to hear cases relating to violations of human rights resulting from land deals or LSLAs is by no means limited to access to information cases.

<sup>30</sup> Luke Eric Peterson (Rights & Democracy), *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration*, 2009, [http://www.dd-rd.ca/site/\\_PDF/publications/globalization/HIRA-volume3-ENG.pdf](http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf), p.42

## Public oversight of investment arbitration processes

Contracts governing LSLAs will often be “locked in” by bilateral investment treaties (BITs) that provide international legal protection for foreign investors. Crucially, if the foreign investor deems there has been a breach of an investment treaty on the part of the host government, BITs allow for the investor to override domestic law and take the case to an international dispute settlement tribunal. The lack of transparency in these forums makes it extremely difficult to track the range of on-going cases. This is extremely worrying, given the major financial and public policy consequences these rulings can have.

Even if a government expropriates land or regulates the use of land for reasons of public interest, this may violate the terms of the BIT and be grounds for compensation to the investor.<sup>31</sup> BITs have the potential to drastically limit the policy space available to governments and their ability to adopt measures to fulfil international human rights commitments. The loopholes in international investment law that enable domestic legislation and human rights obligations to be overridden must be addressed. This could include taking steps to clarify the legitimate expectations of both parties during the drafting of a BIT through provisions that outline the rights of both parties to take measures to uphold their legally binding human rights obligations – and that such measures would not constitute a breach of the BIT.

Ways to promote more transparency in investment arbitration processes include:

- Systematically insisting that BITs are interpreted in the light of States parties’ human rights obligations. In cases of conflict between international investment law and human rights law, the legal principle of the primacy of human rights law is now sufficiently well established. However, in investment arbitration tribunals this notion is still in its embryonic stage.
- Allowing human rights lawyers and experts to track<sup>32</sup> and contribute to international investment arbitrations involving human rights violations as arbitrators may not have the appropriate legal training. This would also help ensure claims of actions taken on the part of the host government for the purpose of realization of human rights that human rights motivations are valid and not simply justifications of expropriation for elite benefit.
- Ensuring that people who claim to have suffered violations of their human rights as a LSLA have access to accountability and redress mechanisms, possibly in investment arbitration tribunals. Access of victims to such procedures under BITs needs to be analyzed by human rights experts, such as members of the UN treaty monitoring bodies or Special Procedures.
- Exploring options – if a ruling in an investment arbitration tribunal forces a government to pay compensation to a foreign investor as a result of a measure undertaken in the public interest, options need to be explored as to whether the government could take the case to international or regional human rights courts or other human rights fora.

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<sup>31</sup> Carin Smaller and Howard Mann, *A Thirst for Distant Lands: Foreign investment in agricultural land and water*, International Institute for Sustainable Development (IISD), 2009, <http://www.iisd.org/publications/pub.aspx?id=1122>

<sup>32</sup> Governments may refrain from certain legislative or policy changes relating to a LSLA because of threats of legal action on the part of the foreign investor. Such legal claims (or threats thereof) are difficult to monitor, but could have important human rights implications. Contact Luke Eric Peterson at [editor@iareporter.com](mailto:editor@iareporter.com) for more details.