

The Challenge of Food Security

International Policy and
Regulatory Frameworks

Edited by

Rosemary Rayfuse

*The University of New South Wales, Australia and
Lund University, Sweden*

Nicole Weisfelt

The University of New South Wales, Australia

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

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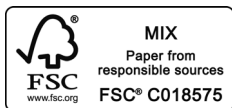
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11. 'Land grabbing' in the shadow of the law: legal frameworks regulating the global land rush

Lorenzo Cotula

11.1 THE GLOBAL LAND RUSH

Over the past few years, large-scale acquisitions of farmland in Africa, Latin America, Central Asia and Southeast Asia have made headlines in a flurry of media reports across the world. Lands that only a short time ago seemed of little outside interest are now being sought by international investors to the tune of hundreds of thousands of hectares. And while, in 2008, the failed attempt by a South Korean company to lease 1.3 million hectares of land in Madagascar attracted much media attention,¹ many other less publicised deals have led to large areas of land being acquired by international capital and national elites. According to the World Bank, about 10 million hectares of land were acquired between 2004 and 2009 in five African countries alone – Ethiopia, Nigeria, Mozambique, Liberia and Sudan.² Whilst reports of the scale of the global land rush are not always reliable due to rapidly changing contexts and limited data access, all quantitative evidence points to growing levels of land acquisitions, including in Africa.³ Private sector expectations of higher food and agricultural

¹ J Blas, 'Land Leased to Secure Crops for South Korea', *Financial Times*, 18 November 2008.

² K Deininger et al., *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* (Washington DC: World Bank, 2011), available at http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469382&piPK=64165421&menuPK=64166322&entityID=000334955_20110208033706.

³ L Cotula et al., *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa*, (Rome/London: Food and Agriculture Organization of the UN (FAO) / International Fund for Agricultural Development

commodity prices and government concerns about longer-term food and energy security are thought to underpin much recent land acquisition for agricultural investments.

Dubbed 'land grabbing' in the media, the global land rush has kindled much international debate, in which strong positions are taken on the impacts of such investments on food security, environment, rights, sovereignty, livelihoods, development, and conflict at local, national and international levels. Some commentators have welcomed these trends as a bearer of new livelihood opportunities in lower income countries and as an important step towards ensuring food security for a growing world population. Others have raised concerns about the commercial viability of many proposed investments, about the social and environmental impacts of large land deals, including loss of land for rural people and, more generally, about the risk that large-scale investments may marginalise family farming.

Legal frameworks greatly influence the processes underpinning the global land rush as well as its outcomes. National law defines who owns the land and who has the authority to transact agreements about it. International law protects foreign investment and affirms fundamental human rights that must be respected in project implementation. Contracts negotiated between investors and host governments define how the risks, costs and benefits of an investment are shared. A solid understanding of the issues raised by applicable rules is critical to identifying what needs to change. This chapter discusses the legal frameworks that regulate the global land rush, with a focus on Africa. It builds on and further develops analysis carried out by the author through a number of studies since 2007.⁴ The next section outlines

(IFAD) / International Institute for Environment and Development (IIED), 2009), available at <http://www.iied.org/pubs/display.php?o=12561IIED>; M Görgen et al., *Foreign Direct Investment (FDI) in Land in Developing Countries*, Eschborn, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) (2009), available at <http://www2.gtz.de/urbanet/library/detail1.asp?number=7529>; C Friis and A Reenberg, 'Land Grab in Africa: Emerging Land System Drivers in a Teleconnected World', *GLP Report* No. 1 (GLP-IPO University of Copenhagen, 2010), available at http://www.globallandproject.org/Documents/GLP_report_01.pdf; Deininger et al, above n 2; Oxfam, *Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land*, (Oxford: Oxfam, 2011), available at <http://www.oxfam.org/sites/www.oxfam.org/files/bp151-land-power-rights-acquisitions-220911-en.pdf>; W Anseeuw, et al., *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project*, (Rome: International Land Coalition, 2012).

⁴ Particularly L Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa*,

key concepts and maps out relevant law. The subsequent sections discuss customary land tenure systems, and trends in national and international law. A brief conclusion summarises key findings and identifies possible next steps.

11.2 THE LAND RUSH AND GLOBAL LEGAL PLURALISM

The legal frameworks regulating the global land rush are shaped by interplay between multiple bodies of law, including international law, the national law of several jurisdictions, and local ('customary' but continuously reinterpreted and adapted) resource tenure systems. Transnational contracts between investors and host governments may also be involved, and international guidelines, principles and standards have proliferated over the past few years. Scholars have talked about 'global legal pluralism' to describe the coexistence of multiple bodies of law regulating a single social phenomenon.⁵

International law sets the rules of international trade in agricultural products; protects foreign investment from adverse host state interference, including through a web of over 2700 bilateral investment treaties (BITs) and through international arrangements for investment arbitration; and affirms fundamental human rights that must be upheld in the design and implementation of agricultural investments.

National policy and legislation in an investor's home country may provide incentives and support for investors acquiring land overseas. This can include financial incentives, for instance under Saudi Arabia's 'King Abdullah Initiative for Saudi Agricultural Investment Abroad',⁶ or

(London: IIED, 2007), available at <http://www.iied.org/pubs/display.php?o=12542IIED&n=1&l=29&k=local%20resource%20control>; and L Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (London and New York: Routledge, 2011).

⁵ See for instance F Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and EU Law', in Snyder, F. (ed.), *Regional and Global Regulation of International Trade* (Oxford: Hart Publishing, 2002); and P Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007).

⁶ See: <http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/news/statements/Pages/NewsArticleID88796.aspx>.

China's 'Going Global' strategy.⁷ A range of incentives such as tax breaks, low-interest loans and customs preferences, allied to high-level diplomatic support, assist the implementation of the Going Global strategy.⁸ Mandates for renewable energy are another lever. In Europe, for example, the 2003 Biofuels Directive, now repealed, set a biofuels consumption target of 5.75 per cent of all petrol and diesel for transport by 31 December 2010.⁹ The more recent 2009 EU Renewable Energy Directive (RED) sets the target of increasing the share of energy from renewable sources to at least 20 per cent of gross final consumption and at least 10 per cent of the final consumption of energy in transport, all by 2020.¹⁰ With the expectation that biofuels are likely to be central to meeting the RED targets, European firms have responded to the promise of a guaranteed market with widespread investment in the production of biofuel feedstocks, not only in Europe, but also in Asia, Africa and South America. The Renewable Energy Directive is also increasing momentum for biomass energy, particularly energy plants fired (or co-fired) with wood chips or pellets, which is in turn fostering demand for wood and creating new interest in tree plantations in the global South.¹¹ In addition to encouraging investment overseas, legislation in the investor's home countries can also provide opportunities for corporate accountability, for instance by defining the conditions under which affected people in recipient countries can bring litigation against investor companies. In the United States, for example, the Alien Tort Claims Act¹² enables US courts to adjudicate on tort lawsuits involving alleged violations of international law,

⁷ http://www.gov.cn/node_11140/2006-03/15/content_227686.htm, accessed in Chinese, read through translation from Google Translate.

⁸ Xinhua News Agency, 'Fagaiwei: Wu Haiwai Duntian Jihua' ('NDRC: China Has No Plan to Acquire Land Overseas', in Chinese), 13 November 2008, available at http://news.xinhuanet.com/fortune/2008-11/13/content_10351772.htm; J Anderlini, 'China Eyes Overseas Land in Food Push', *Financial Times*, 8 May 2008, available at http://us.ft.com/ftgateway/superpage.ft?news_id=fto050820081438383016&page=2/.

⁹ Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the Promotion of the Use of Biofuels or Other Renewable Fuels for Transport, article 3(b)(ii).

¹⁰ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources, article 3.

¹¹ L Cotula, L Finnegan, and D Macqueen, *Biomass Energy: Another Driver of Land Acquisitions?* (London: IIED, 2011).

¹² 28 U.S.C. § 1350.

which in the past has enabled people affected by the activities of transnational corporations to sue the investor's parent company in the US.¹³

Policy efforts in host countries also matter. In recent years, many lower-income countries have taken steps to increase the attractiveness of the policy environment for agricultural investment. Measures include revising investment legislation to increase incentives for foreign investment, for instance through tax breaks, through legal protection of investors' assets or through streamlining investment promotion agencies; and, more generally, macro-economic policies to remove distortions penalising agriculture, such as overvalued exchange rates that lowered real agricultural prices.¹⁴ Governments like Mozambique and Tanzania have also developed initiatives to identify 'idle' lands within their territory, with a view to allocating them to agri-business operators. In this context, features of national law in host countries facilitate large land deals – particularly with regard to the extensive role that governments play in land ownership and administration in much of Africa, and the varying but often weak legal protection enjoyed by local land rights.¹⁵

Individual investment projects are regulated by multiple contracts, for instance between the investor and the host government, or between the investor and lenders, insurers, contractors and suppliers, or in some cases even between investors and local landholders.¹⁶ These contracts define the way in which the risks, costs and benefits of the relevant investment are shared among the multiple parties involved in or affected by it. In some cases, these contracts are 'transnational' in character, in that they are signed with a foreign investor, they are regulated, partly or wholly, by a law other than the host country's national law, and/or disputes are settled through international arbitration.

¹³ For examples of transnational litigation in the US, see <http://www.business-humanrights.org/LegalPortal/Home/Countrywherelawsuitfiled/Americas#71862>.

¹⁴ Deininger et al, *Rising Global Interest in Farmland*, above n 2.

¹⁵ Anseeuw et al, *Land Rights and the Rush for Land*, above n 3, refer to these features as the 'enablers' of the global land rush. See also L Alden Wily, *The Tragedy of Public Lands: The Fate of the Commons under Global Commercial Pressure* (Rome, International Land Coalition, 2011), available at <http://www.landcoalition.org/publications/accelerate-legal-recognition-commons-group-owned-private-property-limit-involuntary-land>.

¹⁶ For a more in-depth discussion of this, see L Cotula, *Land Deals in Africa – What is in the Contracts?* (London: IIED, 2011), <http://pubs.iied.org/12568IIED.html>.

Apart from these multiple bodies of law that ultimately draw their legitimacy from the state, in much of Africa rural people gain access to land and resources through customary tenure systems. Indeed, inadequate financial resources and institutional capacity in government agencies, lack of legal awareness, formal or informal socio-political deals between the state and customary authorities, and, often, the lack of perceived legitimacy of official rules and institutions all contribute to limit the outreach of state legislation, particularly in rural areas. In Mozambique, for example, it is estimated that 90 per cent of the rural population access land through customary rights.¹⁷ While these local systems may have limited or even no formal recognition under national law, they may enjoy legitimacy among local landholders, and the rights they create may be very real in local people's eyes.

Finally, the past few years have witnessed major developments in international principles and standards. Although these are not binding legal instruments, they can nevertheless provide useful markers in shaping government and corporate behaviour. In June 2011, the UN Human Rights Council endorsed the Guiding Principles developed by the UN Special Representative to the Secretary-General on Business and Human Rights, Professor John Ruggie. The principles spell out the implications of the state's duty to protect people from human rights violations by business entities and the responsibility of companies to respect human rights.¹⁸ Also in 2011, the Organisation for Economic Co-operation and Development (OECD) revised its Guidelines on Multinational Enterprises,¹⁹ and the International Finance Corporation (IFC) revised its Performance Standards.²⁰ Specifically in relation to agriculture, the World Bank, the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD) and the United

¹⁷ Deininger et al, *Rising Global Interest in Farmland*, above n 2.

¹⁸ Addendum to the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators', 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

¹⁹ *OECD Guidelines on Multinational Enterprises*, 2011 Edition, available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

²⁰ 'International Finance Corporation's Policy on Environmental and Social Sustainability', 2012 edition, available at [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Updated_IFC_SFCompounded_August1-2011/\\$FILE/Updated_IFC_SustainabilityFrameworkCompounded_August1-2011.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Updated_IFC_SFCompounded_August1-2011/$FILE/Updated_IFC_SustainabilityFrameworkCompounded_August1-2011.pdf).

Nations Conference on Trade and Development (UNCTAD) proposed a set of Principles on Responsible Agricultural Investment, which triggered lively debate.²¹ Meanwhile, the FAO has been developing a set of Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.²² The UN Special Rapporteur on the Right to Food developed a set of principles on large-scale land acquisitions.²³ A number of commodity-based bodies have also developed certification-based principles and standards, including for instance the Roundtable on Sustainable Palm Oil and the Roundtable on Sustainable Biofuels.²⁴ Some of these instruments open up opportunities for local people affected by investment projects to bring complaints to international or transnational bodies. For example, in a recent case brought before the Compliance Advisory/Ombudsman of the IFC, local communities and NGOs supporting them brought a complaint in relation to IFC investments in trading and processing companies that were sourcing produce from plantations in Indonesia that were alleged to have violated national law as well as applicable international standards.²⁵

11.3 NATIONAL LAW

Land policy and legislation in Africa are influenced by historical legacies rooted in the colonial system and in post-independence political choices. At least on paper, central governments tend to claim a significant degree of control over much of rural land. After independence, but largely following a colonial pattern, most African governments nationalised or otherwise took control over land. This was to promote agricultural development on the one hand, and to seize control of a valuable asset and a source of political power on the other. In Mozambique and Tanzania, for example, all land is owned

²¹ The principles were proposed in early 2010 and are available at <http://www.responsibleagroinvestment.org/rai/node/256>.

²² <http://www.fao.org/bodies/cfs/cfs37/en/>.

²³ Report of the Special Rapporteur on the Right to Food – Addendum, ‘Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge’, 28 December 2009, UN Doc. A/HRC//13/33/Add.2.

²⁴ See Roundtable on Sustainable Palm Oil, <http://www.rspo.org/> and Roundtable on Sustainable Biofuels, <http://rsb.epfl.ch/>, respectively.

²⁵ *Various community groups and International NGOs v Indonesia/Wilmar Group-01/West Kalimantan*, case filed July 1, 2007, http://www.cao-ombudsman.org/cases/case_detail.asp?id=76.

by the state.²⁶ Other countries have enabled or even promoted private land ownership. In Ghana, part of the land is owned by the state but most of it belongs to private entities such as customary chiefdoms, extended families and individuals.²⁷ Private ownership is also allowed in Mali.²⁸

But with a few country exceptions, private land ownership tends not to be widespread even where it is formally recognised – particularly in rural areas. This is partly due to the long and cumbersome procedures required to acquire it, particularly land registration. Because these procedures are not accessible in rural areas, very few rural people hold ownership rights. In addition, where customary tenure systems are functioning and perceived as legitimate, local landholders may feel they have sufficient tenure security under these systems without needing to seek formal title. According to the World Bank, only between 2 and 10 per cent of land in Africa was held under customary tenure as of the early 2000s.²⁹ This situation may have changed somewhat given fast-increasing rates of land registration by urban elites,³⁰ and as a result of the recent land rush, but titled land is still likely to account for a small percentage of overall land areas in Africa. Research in a rural municipality not distant from Bamako, Mali, found that while the number of title deeds had increased exponentially between 1996 and 2005, most titles were held by urban-based civil servants (about 44 per cent), by the state itself (about 35 per cent) and by businesses (about 19 per cent). Only 1.5 per cent of titles were issued to farmers.³¹ Because in many jurisdictions all untitled land is owned or otherwise held by the state (in

²⁶ Under Mozambique's Constitutions of 1975, 1990 and 2004 and the Land Act of 1997, and under the Tanzania Land Act of 1999 and the Village Land Act of 1999, respectively.

²⁷ Two Ghanaian experts estimated that 80 to 90 per cent of all undeveloped land in Ghana is held under customary tenure: K Kasanga and NA Kotey, *Land Management in Ghana: Building on Tradition and Modernity*, (London: IIED, 2001), available at <http://www.iied.org/pubs/display.php?n=4&l=5&a=N%20Kotey&x=Y>.

²⁸ Under the Land Code of 2000–02.

²⁹ K Deininger, *Land Policies for Growth and Poverty Reduction*, (Washington DC: World Bank, 2003).

³⁰ On Mali, see M Djiré, *Land Registration in Mali – No Land Ownership for Farmers? Observations from Peri-Urban Bamako* (London: IIED, 2007), Drylands Issue Paper No. 144, available at <http://www.iied.org/pubs/display.php?o=12538IIED>. On Ghana, see O Alhassan and T Manuh, *Land Registration in Eastern and Western Regions, Ghana* (London: IIED, 2005), <http://pubs.iied.org/12522IIED.html>.

³¹ Djiré, *Land Registration in Mali*, above, n 30, 4.

Mali, for instance), governments end up controlling much rural land even where the statute books devote numerous provisions to regulating private ownership.

With much control over land vested in the state and with a limited spread of private ownership, most groups and individuals in much of rural Africa enjoy various types of land use rights over land owned or administered by the state. In practice, most land users gain access to land on the basis of customary tenure systems. So a key issue is the extent to which rights based on those systems are recognised and protected by national law. In many countries, these rights tend to enjoy little legal protection. For example, customary land rights have no formal recognition under national law in countries like Cameroon and Ethiopia. Ghana, Mali, Mozambique and Tanzania, on the other hand, all provide some level of protection to customary rights.

In Ghana, this circumstance is rooted in history. Colonial attempts to suppress customary rights and vest 'waste' land with the Crown were successfully resisted by customary chiefs and other interest groups. The colonial administration subsequently changed tactics, working to strengthen the customary land rights of chiefs and use them as an instrument for indirect rule in rural areas.³² Today, article 11 of Ghana's 1992 Constitution specifically recognises customary law among the sources of law, while article 267 regulates the role of customary chiefs in land administration.³³

In Mali, Mozambique and Tanzania, on the other hand, the legal protection of customary land rights has been introduced or strengthened as part of a wave of law reforms since the early 1990s. In Tanzania and Mozambique, the Village Land Act of 1999 and the Land Act of 1997, respectively, grant customary rights the same legal status as state-issued rights.³⁴ Legislation in the three countries enables the recording of customary rights – for instance, in Mozambique, under articles 13 and 14 of the Land Act of 1997, and in Mali, under article 43 of the Land Code of 2000–02. Recognising the

³² KS Amanor, 'Night Harvesters, Forest Hoods and Saboteurs: Struggles over Land Expropriation in Ghana', in S. Moyo and P. Yeros, (eds.), *Reclaiming the Land – The Resurgence of Rural Movements in Africa, Asia and Latin America* (London and New York: Zed Books, 2005), 102–117.

³³ Constitution of the Republic of Ghana, available at <http://www.judicial.gov.gh/constitution/home.htm>.

³⁴ R Knight, 'Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Law-Making and Implementation', *Legislative Study* No. 105 (Rome: Food and Agriculture Organization of the UN (FAO), 2011), available at <http://www.fao.org/docrep/013/i1945e/i1945e00.htm>.

practical difficulties of documenting land rights across the national territory, Mozambique's Land Act formally protects customary and good-faith occupancy rights regardless of whether they have been registered or not (articles 13(2) and 14(2)), though in practice lack of registration makes land rights more insecure. In Mozambique, the Land Act of 1997 requires investors to consult local communities before obtaining land leases from the government. And in Tanzania, land management responsibilities for 'village land' – which accounts for the majority of rural lands – are vested with local villages. Legislation also requires payment of compensation for any compulsory taking of customary land rights. This is the case, for instance, of article 43 of Mali's Land Code.

But even where customary rights are legally protected, such recognition may be limited or qualified. This may be caused by gaps in legislation. In Mali, for instance, the implementing decree necessary to implement the protection of customary land rights is the only statutory instrument to the Land Code that has not yet been adopted. But legal provisions can undermine the security of local rights also in more explicit ways. Legal protection of local rights is often subject to visible productive use as, for example, in Mali and under article 29 of Tanzania's Village Land Act of 1999, and some forms of local resource use (fallow, pastoralism, hunting and gathering) are not seen to meet this requirement despite their importance to local livelihoods.³⁵ Land management institutions may be mandated to monitor productive use, and to reallocate land to third parties in case of non-use. This legal regime, coupled with lack of clear legal definition of what constitutes 'productive use', makes local land rights vulnerable to dispossession. Legislation can also be used to grant governments extensive powers of compulsory acquisition, meaning that they can take land on a compulsory basis to pave the way for commercial projects. A World Bank report has documented widespread use of these powers within the global land rush.³⁶ Moreover, there is usually no legal requirement to obtain free, prior and informed consent of local landholders before land is allocated to an investor; local consultation requirements, where they exist (as in Mozambique), rarely require conclusion of binding agreements and their

³⁵ For instance, in Mali customary rights can only be recorded if there is 'permanent and evident' use of the land, for instance through a building or regular cultivation (article 47): rangelands or land reserves for future generations would be outside this provision.

³⁶ Deininger et al., *Rising Global Interest in Farmland*, above n 2.

implementation may fall short of expectations.³⁷ Compensation, although often paid for loss of visible improvements, is not paid for loss of land. As a consequence, payments may be inadequate to restore livelihoods and no compensation may be paid for rangelands or for lands set aside for future generations. Loss of resources other than land, such as water and forest resources, is rarely compensable. Finally, environmental legislation adopted in much of Africa since the 1990s, requires environmental and social impact assessments to be carried out before an investment project is approved.³⁸ In theory, impact assessments provide an important safeguard for local interests that may be affected by the investment, especially where they include local or public consultation requirements.³⁹ In practice, however, major shortcomings in the implementation of this environmental legislation within the context of large investment projects have been documented in the literature. For example, some biofuels projects were started without proper impact assessments or environmental licences.⁴⁰

The overall result is a legal regime in which much power over land is centralised by the state, and safeguards for local rights are weak. This also applies to countries that have adopted some of the most progressive land legislation in Africa, such as Mozambique's Land Act of 1997 and Tanzania's Village Land Act of 1999. Even here, legal safeguards remain very fragile. In Mozambique, where legislation requires a consultation of local communities as a precondition for investors to acquire land from the government, an orchestrated consultation report signed by just three community members may be enough for local people to permanently lose their land.

³⁷ I Nhantumbo and A Salomão, *Biofuels, Land Access and Rural Livelihoods in Mozambique* (London: IIED, 2010), <http://pubs.iied.org/12563IIED.html>; S Norfolk and C Tanner, 'Improving Security for the Rural Poor: Mozambique Country Case Study', *FAO LEP Working Paper* No. 5. (Rome: FAO, 2007).

³⁸ In Mozambique, article 16 of the Environment Act of 1997 and article 26 of the Investment Act of 1993; in Mali, Decree No. 08-346 of 2008, amended by Decree No. 09-318 of 2009.

³⁹ In Mali, Decree No. 08-346 of 2008, amended by Decree No. 09-318 of 2009 (article 16); in Mozambique, Decree No. 45/2004 of 2004, article 14.

⁴⁰ Nhantumbo and Salomão, *Biofuels, Land Access and Rural Livelihoods in Mozambique*, above n 37, writing about Mozambique; GC Schoneveld, LA German and E Nutakor, 'Towards Sustainable Biofuel Development: Assessing the Local Impacts of Large-Scale Foreign land Acquisitions in Ghana', Paper presented at the World Bank Land Governance Conference, 26-27 April 2010, writing about Ghana.

In all jurisdictions, legal devices enable the government to make available to outside investors the land it owns or administers on behalf of the people. These devices include long-term leases, concessions and in some cases outright sales. Quantitative inventories of land acquisitions in a range of different jurisdictions suggest that most deals involve long-term land leases or concessions on state-owned land.⁴¹ In other words, while economic liberalisation has entailed a shift towards recognising private enterprise as a driver of economic development, in many countries the state retains a central role in making natural resources available to private operators.

Centralised control over land creates real risks that local people are marginalised in decision-making. Some land deals involve consultation and agreements with local communities but it is the government that usually calls the shots in contracting and land allocation procedures. Negotiations usually happen behind closed doors. Only rarely do local landholders have a say in those negotiations. Few contracts are publicly available.⁴² This limited transparency and public accountability creates a breeding ground for corruption and deals that do not maximise the public interest. In these conditions, the gap between legality (whereby the government may formally own the land and allocate it to investors) and legitimacy (whereby local people feel the land they have used for generations is theirs) exposes local groups to the risk of dispossession and investors to that of contestation.

The central role of the state in land relations, legal devices for the state to allocate resource rights to large-scale investors, and varying, but overall limited, protection for local resource rights are recurring features of national legal systems in Africa. These features respond to the perceived need for African countries to attract foreign investment as a way in which to promote economic development, create employment and generate public revenues. But benevolent strategic choices to promote economic development are only part of the story. The legal features of national legal systems are rooted in the colonial system and reflect Africa's integration into the world economy mainly as a supplier of commodities. They also respond to features of the political economy of the state in Africa. Some political scientists have emphasised the 'neo-patrimonial' nature of the African state,

⁴¹ Cotula et al, *Land Grab or Development Opportunity?* above n 3; Görgen et al, *Foreign Direct Investment (FDI) in Land in Developing Countries*, above n 3; and Deininger et al, *Rising Global Interest in Farmland*, above n 2.

⁴² An exception is Liberia, where land deals are available online, www.leiti.org.lr.

whereby national elites use their control over the state apparatus for personal gain and for rent redistribution through political patronage.⁴³ Others have talked of the 'political instrumentalization of disorder', in other words, 'the process by which political actors in Africa seek to maximize their returns on the state of confusion, uncertainty and sometimes even chaos, which characterizes most African polities'.⁴⁴ Yet others have developed sophisticated analyses of how state action is shaped by alliances and confrontations among different groups within national elites, from high government officials to business groups through to traditional elites. For these groups, seizing control of the state is central to strategies for gaining and consolidating hegemony within a country. The state is the main vehicle for accumulating power and wealth, including through government jobs and opportunities for rent seeking. In this context, attracting international capital provides national elites with opportunities for business activities, political patronage and personal gain.⁴⁵ While scholars have used different language and concepts, what all these analyses have in common is a realization that much government action is shaped by the interests of national elites, rather than by a concern for the rights of rural groups. The central role of the state in land relations enables national elites to control resources through their control of state institutions; conversely, it allows them to maintain their grip on state institutions by using resource allocation as a tool for political patronage. Keeping local land rights in check facilitates the unhindered deployment of these strategies. This is particularly so in rural areas, while politically more vocal, urban-based groups may be better placed to use the costly and cumbersome procedures provided by the law to secure land rights, as illustrated by the predominance of urban groups in ownership of registered land in countries like Mali and Ghana.⁴⁶

There are important exceptions to this predominant role of the central government in land allocations. As already mentioned, only a small share of the land in Ghana is owned or directly administered by the government;

⁴³ J-F Médard, 'The Underdeveloped State in Tropical Africa: Political Clientelism or Neo-Patrimonialism?', in C. Clapham (ed.), *Private Patronage and Public Power: Political Clientelism in the Modern State* (London: Frances Pinter, 1982).

⁴⁴ P Chabal and J-P Daloz *Africa Works: Disorder as Political Instrument* (Oxford: James Currey, 1999), xviii.

⁴⁵ J-F Bayart, *The State in Africa: The Politics of the Belly* (London: Longman, 1993).

⁴⁶ Djiré, *Land Registration in Mali*, above n 30, and Alhassan and Manu, *Land Registration in Eastern and Western Regions, Ghana* above n 30, respectively.

most of the land is managed by customary chiefs. While local control in theory provides greater opportunities for participation in decision-making, this is not necessarily so in practice. Deals behind closed doors and dispossession of local landholders may also happen when deals are negotiated by the chiefs, if mechanisms for downward accountability have been eroded. These issues deserve a fuller discussion.

11.4 EVER-CHANGING 'CUSTOM'

At the local level, the growing global interest in farmland unfolds in contexts characterised by complex 'customary' systems of land tenure and use. Rather than Western-style individual ownership, customary systems usually vest land in a collective entity. According to the dominant, if somewhat stereotyped, view of customary systems in Africa, land is usually held by clans or families on the basis of diverse blends of collective to individual rights, accessed on the basis of group membership and social status, and used through complex systems of multiple rights. In reality, customary systems vary considerably depending on factors such as ecology, population density and history. While customary systems are typically based on unwritten rules founding their legitimacy on tradition, in fact they have profoundly changed as a result of cultural interactions, population pressures, socio-economic change and manipulation by colonial and post-independence governments.

The current wave of agricultural investments is entering local arenas where rapid socio-economic change has had profound impacts on local tenure systems, including through growing contestation of the content or legitimacy of customary rules and institutions. Indeed, despite some perceptions that much land in Africa is 'idle' and available for allocation to outside investors, many parts of the continent have witnessed strong demographic growth that has increased competition for land: for example, between herders and farmers; between 'first occupants' and those who accessed land later through an arrangement with the first occupants (these people are often called 'migrants' even several generations after settlement); between the elderly who traditionally control land and youths who struggle to access increasingly scarce land; or between men and women. As a result, long-standing arrangements have been put into question, and land disputes are a recurring problem in rural relations. More generally, demographic growth and ensuing agricultural intensification, like the ones experienced in Ghana's cocoa-growing areas, tend to increase land values, and to

promote more individualised and monetised land tenure systems.⁴⁷ In this context, the global land rush is exacerbating pressures on more fertile and productive lands where resource-based livelihood strategies are already under strain.

The fast rates of urbanisation in the developing world are also affecting land relations in rural areas. Urban expansion drives conversion of agricultural land to residential use, and increases land competition and speculation in peri-urban areas and along newly constructed roads. In addition, increased demand for food in urban areas can promote agricultural intensification in the surrounding areas, especially where transportation to urban centres is fast and cheap. In peri-urban areas, customary land tenure is becoming increasingly individualised, informal land markets are growing, land values soaring and disputes increasing.

In many places, livelihoods are changing, including towards greater diversification, with many rural households increasingly relying on a range of off-farm activities and on income from urban areas. Improved access to monetised incomes can result in growing use of commercial land transactions in rural areas. Also, livelihood diversification may affect relations between hitherto complementary economic activities, with implications for land access relations. In Sahelian countries like Mali, for example, rural livelihoods have substantially diversified since the droughts of the 1970s and 80s. In order to manage risk better, many farmers have taken up herding, and herders farming. When a clear division of labour existed between herding and farming communities, arrangements were established to make the most of this complementarity. For example, 'manure contracts' enabled herders to access post-harvest fields for grazing, and farmers to access manure for their fields. But where farmers have acquired their livestock, they no longer need incoming herds for manure. Coupled with demographic pressure, these factors have eroded relations between herding

⁴⁷ In practice, matters are often more complicated: monetised land transactions like rentals or sales may emerge even in the absence of strong population pressures, while growing population pressure may perpetuate or even reinforce the collective elements of local land tenure systems. See J-P Chauveau and J-P Colin, 'Changes in Land Transfer Mechanisms: Evidence from West Africa' in L. Cotula, (ed.), *Changes in 'Customary' Land Tenure Systems in Africa* (London: IIED, 2007), 65–79, available at <http://pubs.iied.org/12537IIED.html>.

and farming communities and led to an increase in natural resource conflict.⁴⁸

In addition, local production systems are becoming more integrated into the global economy, with export crops expanding into areas previously used for locally-consumed products. The replacement of traditional food crops with cash crops for export tends to be associated with increases in land values, growing individualisation of land tenure, and land disputes.⁴⁹ Likewise, international remittances from migrants in Europe and North America may enable recipient households to purchase land, lease and rent land where sales are prohibited, and to secure their existing land rights, for example through paying for titling, or withdrawing land lent to others, for example, for direct cultivation through hired labour.⁵⁰ These processes tend to increase pressures on land, particularly for higher-value lands, and can fuel conflict where land is increasingly scarce.

Local contexts are hugely diverse. Rates of demographic growth or levels of integration in the global economy, for example, vary substantially across and within countries. The ways in which land relations react to a given change also vary, depending, for example, on the varying solidity and perceived legitimacy of customary authorities. But taken together, these processes of social transformation are pushing towards fiercer competition for higher-value land, towards greater individualisation of land rights and land management systems, towards the monetisation of resource access relations, and towards a renegotiation of the socio-cultural factors underpinning land access, including extended family structures.

In this context of profound and rapid change, the content of customary rules and the nature and distribution of customary rights are often hotly contested, with different social groups putting forward competing interpretations, and with power relations between those groups shaping the evolution of the content and application of customary law. Assertive customary chiefs are reinterpreting their guardianship powers as those of owners. The

⁴⁸ C Toulmin, C Hesse and L Cotula, 'Pastoral Common Sense: Lessons from Recent Developments in Policy, Law and Practice for the Management of Grazing Lands' (2004) 14 *Forests, Trees and Livelihoods* 243–262.

⁴⁹ E.g. on Ghana, see M Mortimore, 'History and Evolution of Land Tenure and Administration in West Africa', *Issue Paper No. 71* (London, IIED, 1997); and KS Amanor, *Global Restructuring and Land Rights in Ghana* (Uppsala: Nordiska Afrikainstitutet, 1999).

⁵⁰ L Cotula and C Toulmin (eds.), 'Till to Tiller: International Migration, Remittances and Land Rights in West Africa', *Drylands Issue Paper No. 132* (London, IIED, 2004), <http://pubs.iied.org/9508IIED.html>.

fragmentation of extended family units and the weakening of collective decision-making fora erode the mechanisms traditionally used to ensure the accountability of customary land and resource management authorities, as evidenced by research in Ghana and Mali.⁵¹ Land scarcity fosters tensions between older generations traditionally controlling land access and younger generations left with limited land access and few alternative livelihood options.⁵² In contexts of increased land pressures, men are reinterpreting customary rules to undermine women's land rights: for instance, women seclusion practices based on religion and custom have been 'rediscovered' as a way to keep women off the land.⁵³ These intra-family tensions may in turn foster tensions between groups, with first occupants seeking the return of land given to migrants in earlier generations, when land was more abundant.⁵⁴

These processes have direct implications for the way the global land rush unfolds at the local level. In places like Ghana, where much authority over land is vested with customary chiefs rather than the central state, local landholders are not necessarily more secure. In fact, the erosion and manipulation of customary systems makes local people as vulnerable to dispossession. There are plenty of examples where customary chiefs have given away collective lands for personal gain; in these contexts, local people may lose land and get little by way of compensation.⁵⁵ Researchers from Ghana have studied for a long time the complex alliances between customary chiefs, national elites and international capital as a driver for the dispossession of local groups.⁵⁶ The erosion of the traditional mechanisms to ensure the accountability of

⁵¹ Respectively, J Ubink, 'Tenure Security: Wishful Policy Thinking or Reality? A Case from Peri-Urban Kumasi, Ghana' (2007) 51(2) *Journal of African Law* 215–248; and L Cotula and S Cissé, 'Changes in 'Customary' Resource Tenure Systems in the Inner Niger Delta, Mali' (2006) 52 *Journal of Legal Pluralism* 1–29.

⁵² J-P Chauveau, et al., *Changes in Land Access and Governance in West Africa: Markets, Social Mediations and Public Policies: Results of the CLAIMS Research Project* (London: IIED, 2006).

⁵³ M Doka and M Monimart, 'Women's Access to Land: the De-feminisation of Agriculture in Southern Niger', *Drylands Issue Paper* No. 128 (London: IIED, 2004), <http://www.iied.org/pubs/display.php?o=9328IIED>.

⁵⁴ Chauveau and Colin, 'Changes in Land Transfer Mechanisms', above n 47.

⁵⁵ Schoneveld et al (2010), 'Towards Sustainable Biofuel Development', above n 40, writing about Ghana.

⁵⁶ Amanor, *Global Restructuring and Land Rights in Ghana*, above n 49.

chiefs vis-à-vis their communities compounds the vulnerability of local landholders.⁵⁷

In addition, the global land rush is promoting a shift in the relative importance of competing legal systems, including customary law and national law. Customary tenure systems that give primacy to the land rights of the first occupants vis-à-vis outsiders lose ground when outside investment raises the economic stakes and operates through relations with government under legal systems rooted in the state. While governments with limited resources to implement legislation in rural areas may have been willing to leave land of little interest to local management systems, incoming investment tends to change this situation. In a large agricultural investment, the legal order that matters for defining the terms of the investment is typically based on bodies of law that ultimately draw their legitimacy from the state, including national and international law, and contracts concluded by the government. Under these circumstances, the relative importance of customary systems in regulating land relations will tend to decrease. For local people to protect their claims through legal processes, it becomes even more important to have their rights properly recognised by national law.

11.5 INTERNATIONAL LAW: UNIVERSAL RIGHTS AND DIFFERENT RULES

Economic globalisation has been accompanied by rapid and extensive developments in the national and international norms that regulate transnational investment flows. Over the past twenty years, a large rise in the number of bilateral investment treaties (BITs), and growing use of international arbitration, have imposed greater discipline on the way in which host governments treat foreign investment. New international human rights treaties have provided more effective ways for people to hold their government to account,⁵⁸ and international human rights bodies have further

⁵⁷ On the weakening of traditional accountability arrangements in Ghana, see Ubink, 'Tenure Security: Wishful Policy Thinking or Reality?', above n 51.

⁵⁸ For instance, the 1998 African Court Protocol established the African Court on Human and Peoples' Rights; Protocol on the Establishment of an African Court on Human and Peoples' Rights ('African Court Protocol'), adopted by the Assembly of Heads of States and Government of the Organization of African Unity in Ouagadougou on 10 June 1998, entered into force on 25 January 2004, available at http://www.achpr.org/english/_info/court_en.html.

clarified the normative content and practical implications of state obligations under existing treaties. Although the number of cases remains small, people adversely affected by natural resource investments have increasingly resorted to international human rights courts to protect their rights, exercising fundamental human rights like the right to food or the right to property.⁵⁹ So international law contains norms that pursue different aims, and which lend support to different and possibly competing social interests. 'Emancipatory' human rights law and international investment law present some commonalities, because both involve the regulation of state action vis-à-vis private right holders. But they also reflect different philosophies. International investment law emerged out of economic considerations, as a tool for international capital to safeguard its interests and for poorer countries to attract foreign investment. On the other hand, human rights law protects the fundamental human rights that all human beings are entitled to. Its core value is the protection of human dignity. In a large agricultural investment, investment law would act to protect the rights and assets of investors; human rights law would mainly protect the rights of people who may be affected by the investment.

The problem is that legal developments in different branches of international law have not reached as deeply. For the vast majority of the rural population whose rights are mainly protected under international human rights law, legal protection is still undermined by shortcomings in substantive rules and legal remedies. For them, challenging adverse host government action at the international level remains very difficult. Investment law offers no absolute sanctuary against determined host state action that adversely affects an investment. But investment treaties, contracts and arbitration have gone a long way towards strengthening the legal protection of foreign investment and imposing discipline on the arbitrary exercise of state sovereignty. The resulting regime is more geared towards enabling secure transnational investment flows than it is towards ensuring that these flows benefit local people in recipient countries. A few examples can help illustrate these issues.

⁵⁹ See for example the cases *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and *Saramaka People v. Suriname*, both decided by the Inter-American Court on Human Rights (on 31 August 2001, <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>, and on 28 November 2007, www.forestpeoples.org/.../suriname_iachr_saramaka_judgment_nov07_eng.pdf, respectively), and the case *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, decided by the African Commission on Human and Peoples' Rights (Communication No. 276/2003).

Bringing a complaint to an international human rights court is marred by practical difficulties linked to geographical, language and monetary barriers. Legal rules exacerbate these practical constraints. International law requires petitioners to try all available remedies under national law first before accessing international courts. This may involve several degrees of appeal. If petitioners win the case, they may be left with a decision having limited legal or practical force. In Africa, for instance, petitioners can bring cases to the African Commission on Human and Peoples' Rights, which only issues non-binding decisions. The Commission may then bring the matter to the recently established African Court on Human and Peoples' Rights. The Court issues binding and enforceable judgments. But only about half the African states are parties to the Court's Protocol, so the Court is inaccessible for people in many countries. And even for the judgments of the African Court, enforceability against a government's determined resistance is in practice mainly dependent on political action, rather than legal redress.

Remedies aside, the substantive protection offered by international human rights law also presents shortcomings. For example, the African Charter on Human and Peoples' Rights affirms the right to property but does not require states to compensate right-holders for losses suffered; it merely requires compliance with applicable law. As a result, international law does not fill gaps in compensation requirements under national law. Other internationally recognised human rights are also relevant to the protection of local land rights. For example, the right to food can be interpreted as requiring that losses of resource rights that affect food security must be offset by compensatory measures that restore food security to pre-interference levels in a durable way. Such measures may include cash compensation, employment or livelihood opportunities. But while the right to food is affirmed in binding international treaties, its normative content has been developed by instruments the legal value of which is less solid, such as General Comments or voluntary guidelines adopted by UN agencies. And only one African country has ratified International Labour Organization Convention No. 169,⁶⁰ which protects the resource rights of indigenous peoples.

This situation contrasts sharply with the legal protection that states have been prepared to accord to foreign investors. Over the past few years, a

⁶⁰ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989, entered into force on 5 September 1991, available at <http://www2.ohchr.org/english/law/indigenous.htm>.

growing number of BITs (now over 2700 worldwide) and the extensive jurisprudence developed by international arbitral tribunals have granted investors much stronger protection for their property rights, including through wide-ranging safeguards against expropriation and through direct access to international arbitration as a way to settle disputes.

Safeguards against expropriation contained in BITs tend to include specific compensation requirements and standards, so that investors would be entitled to compensation at internationally agreed standards even where national law is deficient. Although compensation standards under investment law continue to form the object of much debate, many BITs anchor compensation amounts to market value, possibly through reference to the so-called 'Hull formula' of 'prompt, adequate and effective' compensation. And even where an investment treaty does not refer to these standards, 'most favoured nation' clauses would enable investors to claim more favourable compensation arrangements that may be provided by another treaty.⁶¹

Where investors take a dispute with the government to international arbitrators, they usually do not have to go through national courts first, as is required under human rights law. And where arbitrators decide in favour of investors, they can award large amounts of public money in compensation. Arbitral awards are legally binding, and arrangements for enforcing awards are generally more effective than those provided by human rights law. For example, by virtue of the ICSID and New York Conventions,⁶² where governments are unwilling to pay up, investors can seize assets that the host state holds abroad – though rules on sovereign immunity may be an obstacle. In addition, governments are often under pressure to comply with awards in order to keep attracting investment.

⁶¹ For a more thorough discussion of international investment law and a review of a sample of investment treaties, see Cotula, *Human Rights, Natural Resource and Investment Law*, above n 4.

⁶² Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'), adopted 18 March 1965, into force on 14 October 1966, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=RulesMain>; and Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), adopted 10 June 1958, into force 7 June 1959, and available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

11.6 CONCLUSION

As the global land rush unfolds, features of legal systems at local, national and international level raise major concerns about the impacts of land acquisitions on local landholders. At the local level, land acquisitions are intervening in contexts where profound socioeconomic transformations have undermined or changed the systems traditionally used to manage land. Breakdowns in the downward accountability of customary chiefs undermine the position of local landholders where investors conclude deals with chiefs or where chiefs are consulted as part of contracting processes led by the central government. At the national level, legislation, which is ultimately rooted in the colonial experience, gives the central government a strong role in land relations and allocations. National legislation also tends to prioritise making land available to larger-scale investors, and features varying, but often limited, degrees of protection for local rights. As a result, poorer landholders who stand to be affected by large land deals have little control over process and outcomes. International safeguards have become increasingly robust with regard to the protection of foreign investment, but much less so in relation to protecting the rights of people who may be affected by investment projects.

This legal context makes local people vulnerable to dispossession.⁶³ Once a piece of land becomes of outside interest, the legal options for local people to defend their rights and negotiate a fair deal with incoming investors are limited by their weak rights, whether under national or international law. While much effort has been put into developing international guidance and principles, reversing this situation requires a radical rethink of the legal frameworks that regulate the global land rush. International law must be more balanced, so that the protection it offers to investment is matched by equally strong safeguards for rights that may be affected by investment flows. National land law must be more democratic, meaning that local people must have stronger rights to their land and the right to say, 'No', to commercial developments affecting it. Contractual arrangements must be more inclusive, in terms of transparency and public accountability, and in terms of safeguards for local land rights where national law falls short of international standards.

⁶³ See also Wily, *The Tragedy of Public Lands*, above n 15.

And as rights are formally strengthened, capacity support by development agencies and collective action by producer organisations will be critical to giving real leverage to legal rights.