TRANSNATIONAL LAND ACQUISITIONS IN SUB-SAHARAN AFRICA: COMPETING CLAIMS AND THE ROLE OF (INTERNATIONAL) LAW

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Abstract

Over the last decade, there has been a dramatic surge in large-scale acquisitions of farm land, popularly referred to as 'land grabs', mainly in the Global South. Roughly two-thirds of these land acquisitions have occurred in sub-Saharan Africa (SSA). This thesis critically analyses the shaping of legal relationships around transnational large-scale acquisitions of land in SSA. It considers the interaction of domestic and international laws against the background of historical patterns of land ownership in Africa. The study focuses on Ethiopia, though many of the observations are generalisable to other countries in Africa, and perhaps elsewhere. By employing a critical-doctrinal analysis of the laws at play, the thesis argues that the legal regimes shaping the relationships around transnational land acquisitions in countries such as Ethiopia privilege (foreign) investors as compared with destination countries' host people, particularly prior land users. By conferring restricted land rights on people who are legally required to give way to investors, the law generally facilities these land deals and inhibits measures aimed at leveraging them for local needs such as addressing the prevalent hunger challenges in SSA host states, or reversing their adverse effects. This occurs despite some recalibration exercises in international investment law in recent years and the potential corrective role of human rights law. The global responses to 'land grabs' aimed at alleviating the social and environmental problems associated with large-scale acquisitions of land in SSA also leave largely unaddressed many of the structural issues embedded in domestic and international laws that shape relations around these land acquisitions. The implication of this is that although transnational land deals are often justified in terms of various development promises such as enhanced food security, the way they shape legal relations are likely to

perpetuate hunger in investor host states like Ethiopia. Therefore, the role of the law needs to be considered more seriously in the debates around the growing number of transnational land acquisitions in Ethiopia and across Africa.

Declaration

I certify that:

(i) the thesis comprises only my original work towards the PhD in Law except where indicated in the preface;

(ii) due acknowledgement has been made in the text to all other material used; and

(iii) the thesis is fewer than 100,000 words, exclusive of bibliographies and appendices

Gashahun Fura

Preface

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Table of Contents

Abstract 2

Declaration 4

Preface 5

Acknowledgments 6

Table of Contents 8

Acronyms and Abbreviations 12

CHAPTER 1 INTRODUCTION 16

1.1. Transnational 'Land Grabs' in Africa: Context 16

1.2. Local Resistances and Global Responses 32

1.3. Interrogating the Promises of 'Land Grabs' and the Role of (International) Law…… 38

1.4. Research Methodology 54

1.5. Thesis Overview 58

CHAPTER 2 TRANSNATIONAL LAND ACQUISITIONS IN AFRICA: AN HISTORICAL CONTEXTUALISATION 63

2.1. Introduction 63

2.2. Imperial and Colonial Roots 65

2.2.1. The Late 19th Century Colonisation of Africa 67

2.2.2. The Ethiopian 'Exception' 76

2.3. Post-Colonial Trends 85

2.3.1. Decolonisation and Land Reform in Africa: Between 'Affirmative' and 'Transformative' Approaches 86

2.3.2. The 1974 Revolution of Ethiopia and its Response to the Land Question ... 91

2.4. Convergence towards Market –Oriented Tenurial Reforms in Africa since 1990s…. 94

2.4.1. Context 94

2.4.2. Tenurial Reform, Agricultural Development Strategy and the Ostensible Role of the Private (Foreign) Investment in Ethiopia 96

2.5. Conclusion 103
CHAPTER 3 CONTEMPORARY LARGE-SCALE LAND ACQUISITIONS AND GLOBAL RESPONSES 105
3.1. Introduction 105
3.2. Scale and Geography 106
3.3. Push Factors 112
3.3.1. 'Scarcity' and 'Crises' 112
3.3.2. The Agency of Home States 115
3.4. Pull Factors (and Discursive Justifications) 119
3.4.1. The 'Underused Land' Narrative 119
3.4.2. The Agency of Host States 121
3.5. Local Resistances and Major Global Responses 126
3.5.1. Food Sovereignty 130
3.5.2. Voluntary Guidelines 132
3.5.3. 'Minimum Human Rights Principles' 135
3.6. Conclusion 139
CHAPTER 4 (INTERNATIONAL) INVESTMENT LAW AS A FACILITATOR OF TRANSNATIONAL LAND ACQUISTIONS 141
4.1. Introduction 141
4.2. Domestic Laws 144
4.3. Farmland Investment Contracts 149
4.3.1. The Negotiation Process 152
4.3.2 Features and Terms of the Contracts 155
4.3.3. Domestic Food Supply 158
4.3.4. Revenue Generation: land rent, and income tax and export duties 162
4.3.5. Employment and Related Benefits 163
4.3.6. Water Use 165
4.4. International Investment Law 167
4.4.1. The Evolution of International Investment Law 169
4.4.2. Ethiopia's BITs 181
4.4.3. Scope of Investor and Investment 183
4.4.4. Umbrella Clause 185

4.4.5. Fair and Equitable Treatment ('FET') Standard 189
4.4.6. Indirect Expropriation 193
4.4.7. Performance Requirements Provisions 196
4.4.8. Exception Clauses 198
4.5. Conclusion 200
CHAPTER 5 THE FLEXIBLITIES AND LIMITS OF INTERNATIONAL TRADE LAW 202
5.1. Introduction 202
5.2. Relevance of International Trade Law to Transnational Land Acquisitions 204
5.3. The Flexibility and Limits in WTO Law and Jurisprudence 212
5.3.1. Quantitative Restrictions 214
5.3.2. Export Duties 222
5.3.3. Developments in the Doha Round Negotiations 224
5.4. Reading WTO Law Flexibility through International Investment Law (BITs) 228
5.4.1. Quantitative Export Restrictions 228
5.4.2. Export Duties (Taxes) 232
5.4.3. Exception Clauses 233
5.5. Conclusion 240
CHAPTER 6 HUMAN RIGHTS LAW AND LARGE-SCALE LAND ACQUISITIONS 242
6.1. Introduction 242
6.2. Human Rights Aspects of the Global Responses to 'Land Grabs' 246
6.3. Human Rights (Law) Against 'Land Grabs': Substantive and Procedural Norms 250
6.3.1. The (Human) Right to Land 254
6.3.2. Human Rights Associated with Land 260
A. Right to Self-Determination 261
B. The Right to Food 267
C. Right to Property 270
6.3.3. Remedial Dimensions 272
6.4. Human Rights Law's Interaction with Other Laws Shaping Transnational Land Acquisitions 278
6.5. Recent Proposals towards a Normative Shift 288

6.6. Conclusion 291
CHAPTER 7 CONCLUSIONS 294
7.1. Continuity and Discontinuity 296
7.2. Convergence and Divergence 299
Bibliography 305
A. Articles/Books/Reports 305
B. Cases 335
C. Legislation 337
D. Treaties 338
E. Others 342
Appendices 345
Appendix I: Interview Guide for Government Officials 345
Appendix II: Interview Questions for Foreign Investors 347

Acronyms and Abbreviations

AB	Appellate Body
ACHPR	African Charter on Human and Peoples' Rights (Banjul Charter)
ACHR	American Convention on Human Rights
ADLI	Agricultural Development-Led Industrialisation
AfDB	African Development Bank
AILAA	Agricultural Investment Land Administration Agency
AoA	Agreement on Agriculture
ASEAN	Association of Southeast Asian Nations
AUC	African Union Commission
BIT	Bilateral Investment Treaties
BWI	Bretton Woods Institutions
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CETA	Comprehensive Economic and Trade Agreement
CFS	Committee on World Food Security
DfID	UK Department for International Development
ECA	Economic Commission for Africa
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EPRDF	Ethiopian People's Revolutionary Democratic Front
FAO	Food and Agriculture Organisation

FDI	Foreign Direct Investment
FDRE	Federal Democratic Republic of Ethiopia
FET	Fair and Equitable Treatment
FIAN	FoodFirst Information and Action Network
FPIC	Free, Prior and Informed Consent
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GRAIN	Genetic Resources Action International
GTP	Growth and Transformation Plan
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
ICS	Investment Court System
ICSID	International Centre for the Settlement of Investment Disputes
IFAD	International Fund for Agricultural Development
IIAs	International Investment Agreements
IIED	International Institute for Environment and Development
ILC	International Law Commission
ILC	International Land Coalition
IMF	International Monetary Fund
ISA	Investor State Arbitration

ISDS	Investor-State Dispute Settlement
ITO	International Trade Organisation
MIA	Multilateral Investment Agreement
MNCs	Multinational Companies
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
ODA	Official Development Assistance
PASDEP	Plan for Accelerated and Sustainable Development to End Poverty
PBS	Ethiopia's Promotion of Basic Services policy
PRAI	Principles for Responsible Agricultural Investment
PSNR	Permanent Sovereignty over Natural Resources
RAI	Principles for Responsible Investment in Agriculture and Food Systems
SADC	Southern African Development Community
SAP	Structural Adjustment Program
SDPRP	Sustainable Development and Poverty Reduction Program
SSA	Sub-Saharan Africa
TPP	Transpacific Trade Pact
TRIMs	Trade Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme

UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VCLT	Vienna Convention on the Law of Treaties
WFP	World Food Program
WTO	World Trade Organisation

CHAPTER 1 INTRODUCTION

1.1. Transnational 'Land Grabs' in Africa: Context

Over the last decade, there has been a dramatic surge in large-scale acquisitions of land, popularly referred to as 'land grabs', mainly in the Global South.[1] Roughly two-thirds of these land acquisitions have occurred in sub-Saharan Africa (SSA)—Africa to the South of the Sahara Desert. According to the World Bank, of the 56.6 million hectares of land deals reported between 2008 and 2009, 39.7 million hectares are in sub-Saharan Africa.[2] Sub-Saharan Africa has one of the largest proportions of hungry people in the world: in 2014–16, about one in every four people (23.2 percent of the population of the region) is estimated to be undernourished.[3] These transnational land acquisitions are often justified by various development promises such as improved food security[4] in destination countries through the enhanced productivity and rise in income resulting from technology and skills transfer, infrastructure developments, employment and

[1] For discussions on this trend see, for example, GRAIN, 'Seized!: The 2008 Land Grab for Food and Financial Security' (GRAIN, 2008) 2 <https://www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security>; Klaus Deininger and Derek Byerlee, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?* (World Bank Publications, 2011); Michael Kugelman and Susan Levenstein (ed), *The Global Farms Race: Land Grabs, Agricultural Investment, and the Scramble for Food Security* (Island Press, 2012).

[2] Deininger and Byerlee, above n 1, 51. Similarly, the Land Matrix Partnership (a partnership of civil society and intergovernmental organizations) documented that out of the 33.9 million hectares of land deals between 2008 and 2011, 60% happened in sub-Sub-Saharan Africa; see The Land Matrix Partnership, *The Online Public Database on Land Deals* <http://www.landmatrix.org/>.

[3] FAO, IFAD and WFP, 'The State of Food Insecurity in the World 2015: Meeting the 2015 International Hunger Targets: Taking Stock of Uneven Progress' (FAO, 2016) 14 <http://www.fao.org/3/a-i4646e.pdf>; according to the report, undernourishment is a 'state, lasting for at least one year, of inability to acquire enough food, defined as a level of food intake insufficient to meet dietary energy requirements' and hunger is defined as being synonymous with chronic undernourishment; see Ibid 53.

[4] According to FAO, food security is 'a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life'; see FAO, IFAD and WFP, above n 3, 53.

export earnings.[5] Critics, on the other hand, dismiss these claims by arguing that the social and environmental costs to host people often outweigh their benefits.[6]

The thesis critically analyses the shaping of legal relationships around large-scale acquisitions of land in SSA, and the implications of these legal shapes for addressing social concerns such as hunger in host states. It considers the interaction of domestic laws, farmland investment contracts, and international (investment, trade and human rights) laws against the background of historical patterns of land ownership in Africa. The study focuses on Ethiopia, though many of the observations are generalisable to other countries in Africa, and perhaps elsewhere. Ethiopia is among the top destination countries of these land deals[7] and hosts the largest number of hungry people in this region.[8] Thus, despite its historical particularity,[9] Ethiopia is nonetheless typical in SSA in particular and Africa in general with respect to the structure of and justifications given for large-scale acquisitions of land by foreign investors. The thesis argues that the legal regimes shaping transnational land acquisitions in countries such as Ethiopia privilege (foreign) investors over host countries' people, particularly prior land users, despite some recalibration exercises in

[5] See, for instance, FAO, 'From Land Grab to Win-Win Seizing the Opportunities of International Investments in Agriculture' (Policy Brief 4, FAO, June 2009) <ftp://ftp.fao.org/docrep/fao/011/ak357e/ak357e00.pdf>; Deininger and Byerlee, above n 1, 2; Levenstein, above n 1.

[6] See, for instance, Olivier De Schutter, 'How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland' (2011) 38(2) *The Journal of Peasant Studies* 249; Charles Geisler, 'New Terra Nullius Narratives and the Gentrification of Africa's" Empty Lands"' (2015) 18(1) *Journal of World-Systems Research* 15; Saturnino Borras Jr and Jennifer Franco, 'From Threat to Opportunity-Problems with the Idea of a Code of Conduct for Land-Grabbing' (2010) 13 *Yale Human Rights and Development Law Journal* 507.

[7] See, for example, Felix Horne, 'Understanding Land Investment Deals in Africa : Country Report, Ethiopia' (The Oakland Institute, 2011) 1; estimating the size of land transfers between 2008 and 2011 at 3,619,509 hectares, and Deininger and Byerlee, above n 1, 62; reporting the transfer of 1.2 million hectares between 2004 to 2009.

[8] See FAO, IFAD and WFP, above n 3, 44; noting that between 2014-16, 32.1 million Ethiopians (slightly one in every three people) were undernourished. Tanzania and Nigeria follow with 16.8 and 12.9 million undernourished people respectively; Ibid 44–5.

[9] For a discussion on this, see Chapter 2, section 2.2.2.

international investment law in recent years and the potential corrective role of human rights law. The global responses to 'land grabs' aimed at alleviating the social and environmental problems associated with large-scale acquisitions of land in SSA also leave largely unaddressed many of the structural issues embedded in domestic and international laws that shape relations around these land acquisitions. The implication of this is that although transnational land deals are often justified in terms of various development promises such as enhanced food security, the way they shape legal relations are likely to perpetuate hunger in investor host states like Ethiopia.

The global 'land grabs' have generated a burgeoning literature, with contributions from the media, policy makers, multilateral institutions, civil society organisations, and academia; however, the appropriate epistemological and methodological approach to understanding them remains highly controversial. Edelman, Oya and Borras have succinctly captured this difficulty:

> The period between 2007 and 2012 is what we can call the 'making sense period': media, NGOs, policy experts and academics were grappling with basic questions: what is happening, where and when, who is involved, how much land is involved, and how many people are being expelled from their land? How do we define land grab? How do we count? How do we interpret our sources? Perhaps unsurprisingly, to this day [November 2013] there is no consensus on these fundamental epistemological and methodological questions.[10]

Carving out 2007-2012 as the 'making sense period' of the contemporary 'land grab' may itself be debatable given that there is still much analysis needed if we are to make sense of the issues around transnational land acquisitions. In fact, as Genetic Resources Action International (GRAIN),an international Non-Governmental Organisation (NGO) based in Spain, notes in its 2016 report, the

[10] Marc Edelman, Carlos Oya and Saturnino M Borras, 'Global Land Grabs: Historical Processes, Theoretical and Methodological Implications and Current Trajectories' (2013) 34(9) *Third World Quarterly* 1517, 1519.

farmland grab 'is in many ways deepening, expanding to new frontiers'[11]—a trend that may, according to some projections, continue, given the rising demand for food and renewable energy sources.[12] And yet, as even some of the most recent (2017) researches suggest, questions such as what constitutes 'land grabbing' remain highly contested.[13]

It is nonetheless fair to acknowledge that for several reasons, the year 2007 marked a turning point in the renewed global interest in farmland acquisitions. Firstly, 2007 was marked by the global financial crisis which prompted various investors, including private companies and institutional investors (investment banks, sovereign wealth funds, hedge funds, private equity groups, and pension funds) to look for 'safer' investments, which led to increasing investments in agricultural commodities and land.[14] The year saw a rise in the price of oil, generating further demand for renewable energy sources such as biofuel, which in turn meant chasing more arable land.[15] It was further marked by spike in food prices (which escalated even further in 2008), making food unaffordable to many people in many countries, and sparking a new wave of

[11] GRAIN, 'The Global Farmland Grab in 2016: How Big, How Bad?' (GRAIN, 2016) 2 <https://www.grain.org/article/entries/5492-the-global-farmland-grab-in-2016-how-big-how-bad>.

[12] For instance, The World Bank predicts that between 18 to 44 million hectares of land will be required for biofuel production by 2030; see Deininger and Byerlee, above n 1, 15. FAO has also reported that the 'surging global population and growing demand for food pose major challenges for agriculture, which in the years to come will need to produce more food using fewer natural resources while at the same time coping with a changing climate'; FAO, 'FAO Initiative Brings Global Land Cover Data under One Roof for the First Time' (FAO, 2014) <http://ht.ly/uJSou>.

[13] See, for example, Stefan Mann and Elisabeth Burgi Bonanomi, 'Grabbing or Investment? On Judging Large-Scale Land Acquisitions' (2017) 34 *Agriculture and Human Values* 41.

[14] See Deininger and Byerlee, above n 1, xxv; noting that 'together with the reduced attractiveness of other assets due to the financial crisis, the boom led to a "rediscovery" of the agricultural sector by different types of investors and a wave of interest in land acquisitions in developing countries.' See also Patrick E McNellis, 'Foreign Investment in Developing Country Agriculture – The Emerging Role of Private Sector Finance' (28) (FAO Commodity and Trade Policy Research Working Paper No 28, 2009).

[15] See for instance, James Fairhead, Melissa Leach and Ian Scoones, 'Green Grabbing: A New Appropriation of Nature?' (2012) 39(2) *Journal of Peasant Studies* 237.

'food riots' in over 40 countries.[16] Around this time, a number of grain exporting countries began banning exports of grain and introducing high export tariffs,[17] producing a growing realisation that the global market was no longer reliable as a source of cheap food. This combination prompted relatively rich countries with shortage of arable land and/or water to join the race for farmland elsewhere to produce food. Thus, without losing sight of other forms of ongoing commercial pressure on rural land (including urbanisation, industrialisation and ecotourism),[18] the convergence of food, energy and financial crises (along with the associated speculative tendencies by different types of investors) could be regarded as the factor triggering contemporary transnational land acquisitions.

These land acquisitions are often effected through outright purchases or long-term leases (of up to 99 years). In fact, '[l]and leases, rather than purchases, are predominant in Africa'.[19] In the case of Ethiopia, as the Constitution outlaws the sale of any land,[20] lease ('land rent contractual agreement'[21]) remains the exclusive mode of land transfer to private investors. Thus, in this thesis, the term 'land acquisitions' refers to land transfers to private investors through either purchases or leases.

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[16] Editorial, 'The Food Crisis' *New York Times*, 24 February 2011 <http://www.nytimes.com/2011/02/25/opinion/25fri2.html?_r=2&>.

[17] For the list of countries that introduced export restriction measures (including export ban), see OECD, *The Economic Impact of Export Restrictions on Raw Materials* (OECD Publishing, 2010) 77–8. The legality of these measures was not formally challenged; but as shown in Chapters 4 and 5 such tolerance maybe unlikely where the food (grain) in question belongs to a foreign investor.

[18] See Annelies Zoomers, 'Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab' (2010) 37(2) *The Journal of Peasant Studies* 429.

[19] Lorenzo Cotula et al, 'Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa' (IIED, 2009) <https://www.ifad.org/documents/10180/a2ea06a0-d0b2-4e99-a9b4-1f23e0491afb>.

[20] *A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia No 1/1995* ('*The FDRE Constitution*') art 40(3).

[21] For a detailed discussion on these agreements (farmland investment contracts) see Chapter 3, Section 4.3.

The literature on the recent global 'land grabs' and related practices does not provide a conclusive definition as to what counts as 'land grabbing' or 'large-scale' land acquisition, despite the normative assumptions implicit in these terms. Indeed, most sources do not mention what is being counted as such, but often use the terms 'large-scale land acquisitions', 'land grabbing' or 'land grabs', and 'land deals' interchangeably—although, as we shall see in the following section, there is a tendency by particular groups to prefer one or the other term. Is it the identity of the investor, the size of land, the manner of transfer, the effect(s) of land transferred on local people and communities, or all or a combination of these considerations, that makes a given land acquisition a 'land grabbing'? According to the earliest reports on global trends in these large-scale land acquisitions, 'land grab' was understood as large-scale acquisitions of land by mainly foreign entities for production of food or biofuel for export.[22] But subsequent reports have documented that in many cases these land acquisitions are by domestic investors, and neither may all production be targeting international markets.[23] In terms of size, while most of the recent transnational land deals are often in thousands of hectares, the precise threshold that makes a given land acquisition 'land grabbing' or 'large-scale' land acquisition is far from clear. One attempt at setting a threshold is that of Land Matrix, a major online public database on large-scale land acquisitions often cited in the global 'land grabs' literature. The dataset documents land deals of 200 hectares or more that 'imply the potential conversion of land from smallholder production, local community use or important ecosystem service provision to commercial use'.[24] In the case of Ethiopia, as in many other countries, there is no official reference as to what constitutes 'large-scale'

[22] GRAIN, above n 1.The term 'land-grabbing' is originally employed by Karl Marx (his translators) in 1867 in reference to the English enclosure movement; see Laurence Roudart and Marcel Mazoyer, 'Large-Scale Land Acquisitions: A Historical Perspective' (2015) 6(1) *International Development Policy* 3, 3.
[23] Deininger and Byerlee, above n 1.
[24] Partnership, above n 2.

farming; but the fact that the Ethiopian Agricultural Investment Land Administration Agency was given the mandate to administer land investments involving 500 hectares or more could be taken as an indication of what the Ethiopian government considers as 'large-scale commercial farming'.[25] In practice, though, most of the land acquisitions administered by the Agency are of much higher size: based on available data in April 2017, average land acquisition is about 12,000 hectares.[26] Yet scholars have already cautioned against the using area of land acquired as a defining characteristic of 'land grabbing'. Edelman, for instance, argues that 'fetishization of the hectare…as the most important defining characteristic of land grabbing is fraught with conceptual problems and leads researchers and activists to ignore other, arguably more significant, issues of scale,'[27] including 'the capital applied to the land, the control of supply chains, and the labour relations grounded or brought into being on those hectares.'[28] Another attempt at providing a relatively comprehensive definition of 'land grabbing' comes from the International Land Coalition, a global alliance of civil society and farmers' organisations, intergovernmental organisations, and research institutes.[29] In its Tirana Declaration, the outcome of its 2011 conference held in Tirana, Albania, the Coalition defined 'large-scale land grabbing' as acquisitions or concessions that are one or more of the following:

> *(i) in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users;(iii)*

[25] Interview with Bezuayehu Bekele, 'Director of Land Administration Directorate at the Ethiopian Agricultural Investment Land Administration Agency' (26 December 2014).
[26] Author's computation based on information provided by the Ethiopian Ministry of Agriculture and Natural Resources; see *Land Leased Information* ('*The Contracts*').
[27] Marc Edelman, 'Messy Hectares: Questions about the Epistemology of Land Grabbing Data' (2013) 40(3) *Journal of Peasant Studies* 485, 488; see also Mayke Kaag and Annelies Zoomers, 'Introduction: The Global Land Grab Hype – and Why It Is Important to Move beyond' in Mayke Kaag and Annelies Zoomers (ed) (Zed Books, 2014) 1, 3–4.
[28] Edelman, above n 27, 488.
[29] At the time of writing (April 2017) the Coalition has 206 members: IGOs represented include the World Bank and FAO; see ILC, 'About ILC' <http://www.landcoalition.org/en/about-ilc>.

> *not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.*[30]

Given the divergence of the views on large-scale land acquisitions (Section 1.2), how the practice is defined often depends on the outlook of who defines it. With its stated mission to 'promote secure and equitable access to and control over land for poor women and men through advocacy, dialogue, knowledge sharing and capacity building',[31] the ILC may be sceptical of the promises of large-scale transfers of land to investors. Yet, in view of the fact that the Coalition also has as its members such intergovernmental organisations as Food and Agriculture Organisation (FAO) and the World Bank, which normally encourage large-scale land investments, the ILC's definition may be presumed to be accepted by a wide range of non-state actors. Of course, some of the parameters of the ILC's definition are fairly vague—for instance, what constitutes 'thorough assessment', 'effective democratic planning', 'independent oversight', and 'meaningful participation' are all highly contingent. Perhaps the most straight forward parameter in this definition is whether a given land acquisition is 'based on transparent contracts that specify clear and binding commitments about … employment'. Measured against this parameter, most of the recent transnational land deals in Ethiopia are highly likely to fall into the category of 'land grabbing', for (as we shall discuss in Chapter 4) relevant farmland investment contracts do not provide for any such employment commitments. If one follows the ILC's framing, such land acquisitions should be 'denounced'.[32] Yet, even if a contract requires the employment of a certain

[30] International Land Coalition (ILC), 'Tirana Declaration' (2011) [4] <http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>.
[31] See ILC, above n 29.
[32] International Land Coalition (ILC), above n 30, [4].

number of people and the land acquisition complies with the other elements of the ILC's definition, it does not necessarily follow that the beneficiaries are those directly affected by the land acquisition unless they are expressly provided for. And even in the latter case, wages may not be commensurate to the livelihood lost (see Chapter 4). However, where land acquisition does not involve displacement of locals (and hence the need for employment by an investor is not self-evident) and thus the contract does not provide a commitment regarding employment, but involves transfer of suitable technology, or infrastructure developments, it might be too hasty to denounce such land acquisition for want of employment clauses in the contracts. For as Ofodile notes, '[t]he question is not simply whether countries in SSA [sub-Saharan Africa] should reject or support agro-FDI';[33] rather, '[t]he more critical and more complex question is whether SSA countries are positioned to seize the opportunities that FDI in land offers and to manage potential risks, dangers, and challenges.'[34] Thus, in this thesis, I will use the term 'land acquisitions', and refer to 'land grabs' or 'land grabbing' in inverted commas.

The nature and origins of investors are also highly diverse. While the early reports on global 'land grabs' focused on investors from mainly Asian and the Gulf countries[35] subsequent reports pointed to a significant role of investors from North America and Europe, as well as domestic investors either alone or in joint ventures with foreign investors.[36] Furthermore, various levels of support from their home governments blurs the distinction between public and private international investors. The precise share of domestic and foreign investors is,

[33] Uche Ofodile, 'Managing Foreign Investment in Agricultural Land in Africa: The Role of Bilateral Investment Treaties and International Investment Contracts' (2014) 7(2) *The Law and Development Review* 329, 330–1.
[34] Ibid 331.
[35] See, for example , GRAIN, above n 1.
[36] Deininger and Byerlee, above n 1, xxxiii; Saturnino Borras and Jennifer Franco, 'Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis' (2012) 12(1) *Journal of Agrarian Change* 34, 48.

however, difficult to establish, owing to the lack of reliable statistics and secrecy around these land deals (see Chapter 3). In the case of Ethiopia, the World Bank's survey of land transfers to private investors from 2004 to 2009 documented that 49 percent of these acquisitions were by domestic investors,[37] although data over a longer time span suggests a lesser share of domestic investment.[38] There is also what Borras and Franco call a 'transnational-*regional*' dimension to the origins of investors: as shown by key role played by, for example, 'Vietnamese and Thai companies in Cambodia and Laos, South African companies in Africa, and Brazilian companies in South America'.[39] By and large, intra-regional land acquisitions in Africa, however, remain minimal. In the case of Ethiopia, thus far only a handful of investors from Africa (North Sudan, Egypt and Djibouti) have participated in these land acquisitions.[40] In this thesis, 'transnational' refers to investments of both international and regional origins. While no assumption is made that land acquisitions by domestic investors are necessarily always beneficial, the regulation of transnational investments poses peculiar challenges to host states such as Ethiopia in terms of leveraging these investments for domestic and/or local necessities and mitigating their adverse impacts. This is due to, among other things, the legal protection these investments often enjoy under international investment law.[41] Thus, this study mainly focuses on *transnational* land acquisitions: land acquired by investors that have been incorporated in countries other than Ethiopia. Following the vernacular of international investment law, I shall refer to the

[37] Deininger and Byerlee, above n 1, xxxiii.

[38] See, for instance, George, noting that out of total area of about 2.3 million hectares of farmland reportedly acquired by private investors between 1992 and 2010, the share of domestic investors constitute only about 34 percent.

[39] Borras and Franco, above n 36, 48 (emphasis in original).

[40] George Schoneveld and Maru Shete, 'Modernizing the Periphery: Citizenship and Ethiopia's New Agricultural Investment Policies' in Mayke Kaag and Annelies Zoomers (eds), *Global Land Grab: Beyond the Hype* (Zed Books, 2014) 17, 25.

[41] For more on this see generally, Joseph E Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2008) 23(3) *American University International Law Review*.

country of incorporation as 'home' state and the destination country as a 'host' state.

Although the immediate trigger of contemporary transnational 'land grabs' is the convergence of global financial, food and energy crises, this study suggests that contemporary land relations in SSA and the shaping of legal relationships around transnational land deals in the region cannot be understood in isolation from their historical contexts—including the legacies of colonial and/or imperial encounters and postcolonial practices that have greatly contributed to shaping institutional and legal frameworks. Broadly, agricultural production in colonial Africa was along two modes: smallholder farming in the 'peasant colonies' such as those in western Africa, and plantation agriculture[42] in 'settler colonies', most notably in southern Africa. In the 'peasant colonies', value extraction by colonial powers took the form of taxation and manipulation of commodity prices instead of direct expropriation (dispossession) of land.[43] However, there is no clear line between the two modes of colonial agriculture. In both settler and non-settler colonies in Africa, there were large-scale agricultural plantations that were directly tied into European industrialisation and consumption patterns.[44] Of the two modes of farming, colonial powers preferred plantations. Rodney writes that although all colonial regimes sponsored some scientific research into tropical agriculture, 'the research was

[42] In broad terms, plantation refers to a mode of farming covering at least 5 hectares of land that: (1) grow one main cash crop; (2) require capital investment; (3) are larger than an average-sized holding although some land may be left uncultivated; (4) rely on hired resident or non-resident labour, often including migrant labour; and (5) are centrally managed, irrespective of the mode of ownership; see Rebecca Smalley, 'Plantations, Contract Farming and Commercial Farming Areas in Africa: A Comparative Review' (Working Paper 55, Future Agricultures, 2013) 7; See also *Protocol to the Convention Concerning Conditions of Employment of Plantation Workers 1982*, 68th ILC session (18 June 1982).

[43] Lorenzo Cotula, *The Great African Land Grab? : Agricultural Investments and the Global Food System* (Zed Books, 2013) 19.

[44] Anthony John Weis, *The Global Food Economy: The Battle for the Future of Farming* (Zed Books, 2007) 89.

almost entirely devoted to cash crops, it was limited in scope, and it was more easily adaptable by plantations than by African peasants who had no capital.'[45]

In the decades after independence (from 1960s to the late 1980s), African governments—partly guided by the need to promote agricultural development and partly by the interest in controlling this sector— actively intervened in the agricultural sector, although these interventions were not uniform throughout Africa.[46] Thus, particularly in agriculture based countries such as Malawi and Tanzania, the state provided agricultural services such as agricultural research, extension services, input supply and credit. They also controlled prices of most staple food crops and export crops through state owned marketing boards or cooperatives either 'to keep food prices for urban consumers at an affordable level, or to skim off the difference between farm-gate and world market prices as government revenue'.[47] Yet these agricultural services 'have often been frustrated by an overall lack of resources, by competing claims on government expenditures and complicated by neo-patrimonial criteria for selecting recipients.'[48] In African countries rich in mineral resources such as Nigeria, on the other hand, there was minimal state interest in the agricultural sector,[49] although price control mechanisms were in place in those countries too. Thus,

[45] Walter Rodney, *How Europe Underdeveloped Africa* (Pambazuka Press, 2012) 221.
[46] Theo Rauch, 'Fundamentals of African Agriculture' (2011) 1 *Quarterly Journal of International Agriculture* 9, 16.
[47] Ibid 16–7.
[48] Erik Millstone, 'Chronic Hunger: A Problem of Scarcity or Inequality' in Lyla Mehta (ed), *The Limits to Scarcity: Contesting the Politics of Allocation* (Earthscan, 2010) 179, 190. Broadly, 'neopatrimonialism' refers to a system of dominance wherein the distinction between the private and the public, at least formally, exists and is accepted, and public reference can be made to this distinction (but not necessarily observed) as opposed to 'patrimonialism' in which all power relations between ruler and ruled, political as well as administrative relations, are personal relations; see Gero Erdmann and Ulf Engel, 'Neopatrimonialism Revisited – Beyond a Catch-All Concept' (GIGA-WP-16/2006, German Institute of Global and Area Studies (GIGA), 2006) 18. Thus, while colonial governments in Africa were, for the most part, patrimonial, post-colonial ones share feature of neopatrimonialism to varying degrees.
[49] Rauch, above n 46, 16–7.

under the prevailing price and exchange rate regimes, it became difficult for African farmers to compete on domestic as well as export markets.[50]

African governments' intervention in the sector shifted significantly during and after the late 1980s, particularly following the introduction of 'Structural Adjustment Programs' (SAPs) in much of Africa by the International Monetary Fund (IMF) and World Bank.[51] Some of the major measures taken as part of this program include: currency devaluation, tariff reduction (liberalisation), privatisation and deregulation, and liberalisation of the investment regime.[52] As a result of these policies, 'agriculture was largely abandoned: the state institutions that were directing its development were dismantled, and the support given to farmers removed.'[53] Given the declining prices of agricultural commodities on international markets, neither were private investors interested in the sector, with the exception of certain tropical commodities.[54] This was accompanied by a declining proportion of official development assistance (ODA) going to agriculture.[55] As commentators have observed, the result was: 'rural poverty on a large scale, a wide segment of the farming population relegated to subsistence agriculture, and governments that have become almost irrelevant to the lives of many small-scale farmers.'[56] The imposition of SAPs that weakened states along with declining flows of aid 'subsequently propelled many African governments and their political elites to seek foreign alliances

[50] Ibid 17.
[51] Structural Adjustment Programs (SAPs) could be understood as 'the process whereby the economies of the third world are being reshaped to be more market oriented' through IMF and World Bank loans which are based on conditions (conditionality) pre-determined by these institutions; see Bob Millward, 'What Is Structural Adjustment?' in Giles Mohan, et al (ed), *Structural Adjustment: Theory, practice and impacts* (Routledge, 2000) 24.
[52] Alemayehu Geda, 'Policy Dialogue about Africa's Economic Crisis: SAP in African Context' (1998) 1(3) *Bulletin of Ethiopian Economic Association* 3.
[53] De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 250.
[54] Ibid 250–1.
[55] Ibid 251.
[56] Ibid.

and investments in agriculture.'[57] Land law reforms were considered as one means of encouraging foreign investment in the agricultural sector. Thus, since the early 1990s African governments have embarked on land law reforms; as Manji notes, 'one country after another [has] succumbed[ed] to the process of review of land laws and enactment of new legislations'.[58] Despite the lack of a uniform pattern and sequencing of land reform across Africa, the main thrust of the changes is remarkably similar everywhere:

> Africa's new land laws—whether they have already been passed, are under consideration or will be on the books in the foreseeable future—will fundamentally alter land relations on the continent. The main thrust of the new land laws is to liberalize land tenure to enable land to be held individually rather than communally. The aim is to provide for and encourage foreign investment in land.[59]

While Ethiopia does not share a typical colonial past with most other African countries, the foregoing contextual account remains relevant for it too. Indeed, as Teshale Tibebu in his study of *The Making of Modern Ethiopia (1896—1974)* observes: 'That Ethiopia was not first colonised, then decolonised, and at last neocolonised, as was the rest of Africa, does not change the nature of the neocolonial'[60] economic experience of the country. Although Ethiopia escaped European colonial rule (excepting a brief occupation by Italy), following the southward expansion of Abyssinia in the late 19th century (at the same time as the European scramble for Africa) that led to the formation of present day Ethiopia, peasants and pastoralists were dispossessed of their land which was mainly redistributed to new 'landlords' from the north (Abyssinia).[61] As a

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[57] William G Martin and Ravi Arvind Palat, 'Asian Land Acquisitions in Africa: Beyond the "New Bandung"or a "New Colonialism"?' (2014) 3(1) *Agrarian South: Journal of Political Economy* 125, 135.

[58] See Ambreena S Manji, *The Politics of Land Reform in Africa : From Communal Tenure to Free Markets* (Zed Books, 2006) 43; see also generally Patrick McAuslan, *Land Law Reform in Eastern Africa : Traditional or Transformative? : A Critical Review of 50 Years of Land Law Reform in Eastern Africa, 1961-2011* (Routledge, 2013).

[59] Manji, *The Politics of Land Reform in Africa*, above n 58, 45–6.

[60] Teshale Tibebu, *The Making of Modern Ethiopia : 1896-1974* (The Red Sea Press, 1995) 163.

[61] Ibid 38–47.

result, as Tareke observes, 'a sturdy and self-sufficient peasantry' were reduced to 'an immiserated tenantry'.[62] This system remained intact throughout most of the long reign of Emperor Haile Sellassie I (1916-1974). While it took decolonisation to restore land to African governments (and/or people), in Ethiopia, it took the 1974 revolution, which was largely triggered by a popular uprising under the slogan 'land to the tillers!' to end the monarchical regime and to some extent restore land to the tillers, if only in the form of usufractuary rights. Like many post-colonial African governments, the socialist government that was in power from 1974-1991 experimented with large-scale state farms, although the productivity of these farms remained low.[63]

The incumbent government of Ethiopia which came to power in 1991, again like many other African countries of the time (and indeed, of the Global South), had to undertake a Structural Adjustment Program. As part of the privatisation commitment of the Program, the government privatised numerous state run large-scale farms and embarked on a different agricultural development strategy. The 1993 agricultural development strategy of the government, officially known as 'Agricultural Development-Led Industrialisation' (ADLI), called for commercialisation of hitherto predominately subsistence smallholder agriculture and the development of large-scale commercial agriculture (this time, by private investors).[64] Subsequent development plans have been anchored in this commitment. The 2003 Rural Development Strategy Policy noted that efforts to attract foreign investment were 'almost exclusively directed

[62] Gebru Tareke, *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century* (Cambridge University Press Cambridge, 1991) 80.
[63] Gebru Mersha, *State Farms in State-Centred Accumulation Strategies in Socialist Africa: The Rationale and a Critique* (PhD Thesis, Institute of Social Studies, 1995) 215.
[64] United Nation Economic and Social Council, 'Development Strategies That Work: Country Experiences Presented at the ECOSOC Annual Ministerial Review: Ethiopia' <http://webapps01.un.org/nvp/indpolicy.action?id=124>.

towards non-agricultural sectors',[65] and strongly recommend prioritising the promotion of foreign investment in agriculture. In the words of the strategy document:

> It is a priority matter to ensure that there is a conducive environment for foreign investment [in agriculture]. Both the Federal Government and regional administrations will coordinate efforts and work together to constantly review policies and strategies to increase their *instrumentality* to attracting private investment in agriculture.[66]

The latest manifestation of this constant review of strategies to attract private (foreign) investment into the agricultural sector is the 2010 Growth and Transformation Plan, which went as far as quantifying the amount of land that should be transferred to private investors—the Plan aimed to transfer over 3 million hectares of land to investors before the end of 2014.[67] By some estimates, this was accomplished.[68]

In line with these policy commitments for creating a 'conducive environment for investment' in agriculture, since the mid-1990s, the Ethiopian government has adopted various pieces of pro-investor legislation. The 1995 Constitution, while maintaining public ownership of land inherited from the previous regime—entitling peasants and pastoralists to use (not own) land free of charge—goes further and recognises that investors have the right to obtain land upon payment of appropriate compensation.[69] Subsequent legislations have taken a clear pro-investor approach, including entitling investors to various incentives and better protection over their land holdings (compared to peasants

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[65] Ministry of Finance and Economic Development (MoFED), 'Government of the Federal Democratic Republic of Ethiopia Rural Development Policy and Strategies (April 2003)' 52.
[66] Ibid.
[67] Ministry of Finance and Economic Development (MoFED), 'Growth and Transformation Plan (GTP) 2010/11-2014/15' 49 <http://www.mofed.gov.et/English/Resources/Documents/GTP%20English2.pdf>.
[68] See Asefa Mideksa, 'Gov't Provides Over 2.3 Million Hectares of Land for Investors in Agriculture' *Ethiopian News Agency*, 13 May 2015 <http://www.ena.gov.et/en/index.php/economy/item/772-gov-t-provides-over-2-3-million-hectares-of-land-for-investors-in-agriculture#sthash.QsygZHve.dpuf>.
[69] *The FDRE Constitution*, Proclamation No.1/1995, Federal Negarit Gazeta 1st Year No.1, art 40.

and pastoralists).[70] Apart from domestic legislative reforms, since the mid-1990s the government has also signed dozens of Bilateral Investment Treaties (BITs),[71] with a view to further extend protections on foreign investment (including those in agriculture).

Far from being passive recipients of an externally imposed programme, governments have considered FDI in agriculture as a vital component of their economic aspirations and been proactively courting such investments, including through a series of law reforms, since at least the beginning of the 1990s. It is thus instructive to note that, by triggering the demand for farmland, the convergence of global financial, food and energy crises of 2007/8 marked the convergence of interests of investors and their host governments in farmland investment. Yet inasmuch as these land acquisitions are seen as opportunities, they also pose risks and challenges, particularly to the people of the 'host' state. Some of the global responses to the discontent created by transnational land deals are ostensibly prompted by the need to address such risks and challenges.

1.2. Local Resistances and Global Responses

Despite the usual claim by investors and their host governments that these lands are 'empty' or 'wasteland',[72] in a manner almost akin to the colonial *terra*

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[70] See generally *Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005* ('*Expropriation of Landholdings Proclamation 2005*'), Federal Negarit Gazeta, 11th Year No. 43; *Investment Proclamation No. 769/2012* ('*Investment Proclamation 2012*'), Federal Negarit Gazeta, 18th Year No. 63; *Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 270-2012* ('*Investment Incentives Regulation 2012*'), Federal Negarit Gazeta,19th Year no. 4.

[71] For list of Ethiopia's BITs, see UNCTAD, 'Ethiopia: Bilateral Investment Treaties (BITs)' <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67#iiaInnerMenu>.

[72] See Anthony Young, 'Is There Really Spare Land? A Critique of Estimates of Available Cultivable Land in Developing Countries' (1999) 1(1) *Environment, Development and Sustainability* 3, 3; noting that existing estimates 'greatly exaggerate the land available, by over-estimating cultivable land, under-estimating present cultivation, and failing to take sufficient account of other essential uses for land.'

nullius narrative,[73] large-scale land transfers in sub-Saharan Africa often happen through displacement of the local communities for whom that same land is often the only source of livelihood.[74] For instance, FAO's 2012 report 'questions the assumption that investments are mostly focused on non-utilized land and serve to bring it into production'[75] and finds that '[w]hile a number of studies document the negative impacts of large-scale land acquisition in developing countries, there is much less evidence of its benefits to the host country, especially in the short term and at local level.'[76] Other studies have also echoed similar concerns.[77] It is no wonder, therefore, that these land deals have generated both local resistance and a variety of global responses.

The first large-scale land acquisition that brought contemporary 'land grabbing' to global attention happened in Madagascar. In November 2008, the South Korean business group Daewoo Logistics leased for 99 years, 1.3 million hectares of land (roughly a quarter of the country's arable land) from the Malagasy government to produce rice to be exported back to Korea, despite Madagascar's dependence on UN food aid.[78] A popular riot against the deal culminated in the overthrow of President Ravalomanana, and the new

[73] John C Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (McGill-Queen's Press, 2003) 133–77; Geisler, above n 6.

[74] See generally Olivier De Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of Land Users' (2011) 52 *Harvard International Law Journal* 503, 504; Lorenzo Cotula, 'Land Deals in Africa : What Is in the Contracts?' (Report, International Institute for Environment and Development(IIED), revised ed, 2011) 145. See also Horne, above n 7, 26; noting that: 'However, the criterion of "lack of human settlement" is clearly arbitrary. In the case of Gambella, the lands that are identified as part of the federal land bank contain numerous small settlements of Nuer and Anuak, ranging from a few scattered households to villages of up to 1,000 people.'

[75] Pascal Liu et al, *Trends and Impacts of Foreign Investment in Developing Country Agriculture: Evidence from Case Studies* (FAO, 2013) 7.

[76] Ibid 336.

[77] See, for example, Cotula, above n 43, 145; noting that '[a]s a broad generalization, local livelihoods tend to be disrupted in ways that are not offset by the new agricultural venture'. See also generally Borras Jr and Franco, above n 6.

[78] Andrianirina Ratsialonana Rivo et al, 'After Daewoo? Current Status and Perspectives of Large-Scale Land Acquisition in Madagascar' (International Land Coalition, 2011) xiii–ix.).

government axed the deal in March 2009.[79] A similar story has been unfolding in Ethiopia. As noted earlier, over the last few years, the government of Ethiopia has been leasing large swathes of land mostly to (foreign) investors targeting their home and/or international markets, although millions of people still depend on foreign food aid. This is despite the magnitude of the local discontent against, and resistance to these acquisitions of land. For example, on 28 April 2012, unidentified gunmen killed five and wounded eight farm workers of Saudi Star, a Saudi Company that acquired 10 thousand hectares of land in Gambella Regional State for production and export of rice to Saudi Arabia—those attacked included five foreign nationals (Pakistanis), including one of the dead.[80]

Amidst local discontent against large-scale land acquisitions in the country, two years later, in 2014, the government of Ethiopia announced the Addis Ababa City expansion plan that aimed at incorporating 17 districts from the Oromia Regional National State, largely inhabited by the Oromos—the largest ethnic group in the country, who have historically experienced political and economic marginalisation. Prompted by prior experiences of land dispossessions (including for transfers to investors), the Oromos residing in those districts and beyond protested against the Plan. In response, the government security forces have reportedly killed over 500 people and detained tens of thousands of others.[81] The government was eventually forced to scrap the Plan, but beyond its initial calls against land dispossessions, the protest has evolved into a struggle for freedom and justice—forcing the government to declare a country-

[79] Ibid.

[80] See, Lester R Brown, *Full Planet, Empty Plates: The New Geopolitics of Food Scarcity* (WW Norton & Company, 2012) 112; See also, The Africa Report, 'Five Including Pakistani Killed in Ethiopia Attack' *The Africa Report*, 30 April 2012 <http://www.theafricareport.com/East-Horn-Africa/five-including-pakistani-killed-in-ethiopia-attack.html>.

[81] John Aglionby, 'Ethiopia Admits Death Toll in Anti-Regime Protests May Exceed 500' *Financial Times*, 11 October 2016 <https://www.ft.com/content/dce3c340-8fe6-11e6-a72e-b428cb934b78>.

wide, six-month long State of Emergency in October 2016. Although this protest did not culminate in what was seen in Madagascar, it has proven to be the most vehement popular resistance the incumbent government has faced in its quarter century of rule. These cases are but a few examples of the kinds of local resistance generated by an increasing number of large-scale land acquisitions by foreign and domestic investors (and governments) in Africa in recent years.[82]

As even peaceful local resistance is often met with violence by governments hosting transnational land investments, there has been an increasing call to the 'international community' for some kind of intervention. This appeal to the 'international community' signifies both a lack of confidence in domestic actors and an affirmation of the potency of international norm setting institutions (even when this practice casts doubt on the 'sovereignty' of the host states). Of course, the 'international' nature of the norms called for 'is no proof of their moral value', but one that is ostensibly based on the assumption that these norms represent 'the regulative ideas of universal community, independent of particular interests or desires'.[83] However, the 'fragmented' nature of the 'universal community' and of its 'interests or desires', meant that different actors have framed (and responded to) these land deals in varying ways. Three distinct responses at the global level to contemporary large-scale land acquisitions can be identified. These are: (1) the Food Sovereignty Response, which comes mainly from peasant movements;[84] (2) the Human Rights

[82] For further discussions on the nature of resistances the global 'land grabs' have generated see, Ruth Hall et al, 'Resistance, Acquiescence or Incorporation? An Introduction to Land Grabbing and Political Reactions "From Below"' (2015) 42(3–4) *The Journal of Peasant Studies* 467.

[83] See Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) *The Modern Law Review* 1, 30. Although Koskenniemi employs this view in the context of international law, it is equally relevant in this context.

[84] The Declaration of Nyéléni, which was written by a transnational group of peasant groups, La Via Campesina, defines food sovereignty as 'the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems'; see La Via Campesina, 'The Forum for Food Sovereignty, The Declaration of Nyéléni' (27 February 2007) <http://nyeleni.org/spip.php?article290>.Thus food sovereignty puts the needs of farmers and

Approach, which was mainly advocated by the former UN Special Rapporteur on the right to Food, Olivier De Schutter;[85] and (3) Voluntary Guidelines, a typical example of which is the Principles for Responsible Investment in Agriculture and Food Systems (RAI), which was initiated by the World Bank and three other UN agencies: Food and Agriculture Organisation (FAO), International Fund for Agricultural Development (IFAD) and United Nations conference on Trade and Development (UNCTAD), and later endorsed by the Committee on World Food Security (CFS).[86] I shall explore the ramifications of these responses in detail in Chapter 3, but in a nutshell: food sovereignty calls for a halt to 'land grabs'; the minimum human rights standards approach calls for adherence to human rights based standards in undertaking large-scale land acquisitions; and the RAI initiative views large-scale land acquisitions as win-win opportunities (and hence encourages them)—as long as they are done 'responsibly'. The food sovereignty approach calls for a radical departure from large-scale industrial agriculture and shifting of the authority to decide food matters to local levels,[87] although it lacks significant political support among key actors. The minimum human rights approach is largely a reinterpretation of 'existing' human rights obligations of mainly host states (and to a limited extent investors and their home states). RAI, on the other hand, can be understood as a

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consumers at the heart of policymaking, rather than the demands of markets and corporations; ibid.

[85] See Olivier De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge' (28 December 2009), Human Rights Council, 10th sess, agenda item 3, UN Doc. A/HRC/13/33/Add.2(28 December 2009) .

[86] 'Principles for Responsible Investment in Agriculture and Food Systems (RAI)' (CFS, 2014) <http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf>. For closely rated classification: '(a) regulate to facilitate land deals; (b) regulate to mitigate negative impacts and maximize opportunities; and (c) regulate to stop and rollback land grabbing', see Saturnino M Borras Jr, Jennifer C Franco and Chunyu Wang, 'The Challenge of Global Governance of Land Grabbing: Changing International Agricultural Context and Competing Political Views and Strategies' (2013) 10(1) *Globalizations* 161, 168;

[87] See generally Lucy Jarosz, 'Comparing Food Security and Food Sovereignty Discourses' (2014) 4(2) *Dialogues in Human Geography* 168.

code of conduct for key players in large-scale land acquisitions (mainly investors and their host and home states).

Perhaps unsurprisingly, it is the third approach (voluntary guidelines) which has garnered the strongest political support among the most powerful key actors in large-scale land acquisitions, including investors (and their home and host states) and various intergovernmental organisations (including the WB, FAO, UNCTAD, and WFP). This is in part due to the shared ideological (and at times pragmatic) support for large-scale farming and the fact that voluntary guidelines do not impose any concrete obligation on these players. Indeed, while envisaging respect for human rights as one of its key objects, RAI stresses that the principles shall not be understood to affect existing obligations of states under international law, particularly international investment and trade laws.[88] This approach thus leaves unchecked the important structural issues in international laws ordering 'land grabs'. As Jennifer Clapp observes, 'there is a strong likelihood that voluntary governance initiatives for responsible agricultural investment will shift discourse more than they will change practice.'[89] On the other hand, while conceptually different from the voluntary guidelines, the promotion of the minimum human rights standards as a solution to the social and environmental risks associated with large-scale land transfers could be misleading, unless seen in the context of how the human rights law (on which these principles draw) interacts with the international economic (investment and trade) laws in shaping these 'land grabs'. Indeed, following these responses, the debates over land grabs at international fora have receded as 'land grabbing' is deepening and expanding to new frontiers.

[88] See 'Principles for Responsible Investment in Agriculture and Food Systems (RAI)', above n 86, [33].
[89] Jennifer Clapp, 'Responsibility to the Rescue? Governing Private Financial Investment in Global Agriculture' (2017) 34(1) *Journal of Agriculture and Human Values* 223, 223.

1.3. Interrogating the Promises of 'Land Grabs' and the Role of (International) Law

This study is in part motivated by an unease with the promises of large-scale transnational land acquisitions to host countries' people and their explicit and implicit assumptions, including improved food security, and the nature of international responses to local resistance against global 'land grabs' that leave largely unaddressed many of the structural issues in the laws applicable to these land acquisitions. Specifically, it asks what role law (domestic law as well as the interaction of various branches of international law) plays in shaping the competing rights and interests around transnational land acquisitions in SSA. In order to tackle this larger question, I will consider the following specific questions:

a. What are the historical precedents of the recent transnational land acquisitions in SSA, and what continuities and discontinuities can be observed with those precedents, specifically with respect to the shaping of relations over land?

b. What are the major drivers and discursive justifications of the recent transnational land deals in SSA, and what roles do investors' home and host states play in this process?

c. How have global debates over 'land grabs' framed and responded to the recent transnational land deals in Africa (and beyond), and how do these responses relate to the legal regimes that shape these land deals?

d. How are farmland investment contracts being negotiated in Ethiopia, and what commitments have investors and the host government undertaken in these contracts?

e. How do international (investment, trade and human rights) and domestic laws interact in shaping the competing rights and interests over contemporary land investments, including food (security)?

The broader claim is that the legal regimes shaping the relationships around transnational land acquisitions in countries such as Ethiopia privilege (foreign) investors as compared with investors' host people, particularly prior land users. This implies that although transnational land deals are often justified in terms of various development promises such as enhanced food security, the way the laws at play shape legal relations are likely to perpetuate hunger in investor host states like Ethiopia.

While the analysis in this study is relevant in the context of other SSA countries, and perhaps even beyond this region, the study mainly focuses on Ethiopia, which is one of the major destinations of the recent transnational land deals in the region, and is also one of the countries that has experienced the most frequent hunger challenges. However, although Ethiopia provides an illustration of the problem, the study does not purport to draw sweeping generalisations from its experience. The focus on the interaction of domestic and international laws is motivated by seeking to reveal how the law actually shapes the competing interests and rights surrounding these land deals which would be obscured were I to analyse a single strand of law, whether domestic or international, in isolation from the others.

Historically, (international) law has come be regarded as complicit in transnational land acquisitions in Africa: the scramble for Africa was in large measure facilitated by the Berlin Conference Act,[90] which as Anghie argues,

[90] *General Act of the Berlin Conference on West Africa 1885* (signed 26 February 1885).

transformed 'Africa into a conceptual *terra nullius*'.[91] Similarly, Wily argues that in sub-Saharan Africa 'land rushes past and present have relied upon legal manipulations which deny that local indigenous ('customary') tenures deliver property rights, thereby legalizing the theft of the lands of the poor subject peoples.'[92] She further argues that the colonial roots of the law and subsequent liberalisation through land reform oriented towards privatisation which eroded communal land tenure 'is to blame' for the land rush in Africa.[93] She thus stresses that while the law may not be a driver of 'land grabs' by itself it 'is the culpable hand-maiden or enabler of policies which foster capitalist transformation through conventional dispossessory routes, and in the case of Africa, in conditions where governments were hardly impersonal arbiters.'[94] In exploring the role of law in transnational land acquisitions in sub-Saharan Africa, the present study closely examines how the various genres of applicable laws interact in this process, and points out that while the law generally facilitates transnational land acquisitions, it can also simultaneously serve as a site for challenging these land deals.

A typical transnational investment is subject to both national laws of host states, investment contracts and international (particularly investment) law.[95] Farmland deals in sub-Saharan Africa are commonly effected through long-term leasehold contracts (for up to 99 years), principal instruments that define the respective rights and obligations of investors and their host states, and as such deserve particular attention. After all, such contracts have historically been

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[91] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 91; for competing views on the legal significance of the Act see Chapter 2.

[92]Liz Alden Wily, 'The Law Is to Blame: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa' (2011) 42(3) *Development and Change* 733, 733.

[93] Ibid.

[94] Ibid 752.

[95] See generally Jeswald Salacuse, *The Three Laws of International Investment Law: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press, 2013).

used for covert purposes beyond investment.[96] In this regard, in one of the early assessments of selected farmland investment contracts in Sub-Saharan Africa, Cotula alerts us that 'there are real concerns that some contracts underpinning the recent wave of land acquisitions may not be fit for purpose. A number of the contracts reviewed appear to be short, unspecific documents that grant long-term rights to extensive areas of land.'[97] Cotula calls for further comprehensive research into the terms of such contracts. While this study does not purport to undertake a comprehensive review of these farmland contracts signed by sub-African governments, it does illuminate some of these issues through a review of the terms of 38 farmland investment contracts from Ethiopia. One may, of course, argue that the terms of investment contracts should not be much of a concern as host governments can always re-open them for negotiation. Raymond Vernon observed in his study of US multinational corporations' raw materials ventures abroad in the 1960s, that host states often opened up the ventures for re-negotiation 'repeatedly – almost predictably',[98] a phenomenon he termed '*obsolescing bargain*.'[99] Yet, unlike the 1960s, today 'obsolescing' (even modest modification) of the terms of investment agreements (contracts) by host states is much more difficult as it engenders serious political and legal consequences. As Stiglitz pointed out in 2007, multinational companies (MNCs) 'often leverage their own economic power with the power of their governments, to ensure even better terms.'[100] Particularly in host states which often depend on foreign aid, MNCs pressure their governments to, for

[96] For instance, the British used long term lease contract to gain possession of colonies such as Hong Kong; Kanaga Dharmanaga SC and Leon Firios (ed), *Long Term Contracts* (The Federation Press, 2013) 350.
[97] Lorenzo Cotula, *Land Deals in Africa: What Is in the Contracts?* (IIED, 2011) 1.
[98] Raymond Vernon, *Sovereignty at Bay : The Multinational Spread of U. S. Enterprises* (Basic Books, 1971) 53.
[99] Ibid; emphasis in original.
[100] Joseph E. Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2008) 23(3) *American University International Law Review* 477.

example, 'renegotiate a money-losing contract, as a result of underbidding…but will not offer to renegotiate when contract shows excessive profits as a result of overbidding.'[101] Secondly, and perhaps more importantly, MNCs now enjoy an additional layer of protection under international investment law, mainly through bilateral investment treaties (BITs) and, to some extent, regional trade and/or investment treaties.

From their emergence in the late 1950s,[102] BITs now form an important arm of international investment law, granting substantial, if not exclusive, protection to foreign investors. The evolution and expansion of BITs is associated with capital exporting countries' concern for better protection of foreign investments,[103] in the face of capital importing countries' emerging claims for Permanent Sovereignty over Natural Resources, and more broadly, for the establishment of the New International Economic Order.[104] Currently, according to UNCTAD, there are nearly 3000 BITs, over 2000 of which are in force.[105] Contemporary transnational land acquisitions that broadly aim to control land and water resources involve competing (if at times converging) interests between foreign investors and their host governments and people, the mediation of which may trigger the application of such BIT standards as (indirect) expropriation, fair and equitable treatment (FET), and non-discrimination standards (national treatment and most favored nation

[101] Stiglitz, above n 41, 477.
[102] The first BIT was signed between Germany and Pakistan in 1959.
[103] For a succinct account of the origin and incessant evolution of BITs, see Jürgen Kurtz, 'The Shifting Landscape of International Investment Law and Its Commentary' (2012) 106 *The American Journal of International Law* 686, 686.
[104] For a nuanced analysis of this, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); see also Anghie, above n 91; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010).
[105] UNCTAD, 'International Investment Agreements' <http://investmentpolicyhub.unctad.org/IIA>; reporting a total of 2960 BITs (of which 2369 are in force) in April 2017.

treatments).[106] Thus, in the light of the pro-investor BITs signed by Ethiopia and other African countries hosting such investments,[107] attempts to interfere with farmland investments even in response to social concerns such as addressing hunger or local water use may breach various BIT standards, and hence trigger costly investor state arbitration (ISA) that forces host governments to ignore or defer such measures.

International trade law is also relevant to several aspects of these land acquisitions. On the one hand, trade rules that improve access to export markets can increase incentives for large-scale agricultural investments that target those markets. On the other hand, trade restrictions can also encourage land grabs: for example, export bans and duties introduced by some major food exporters in the wake of the food price hike of 2007/08[108] are among the factors that propelled food-importing countries to join the race for farmland abroad. Thus, World Trade Organisation(WTO) Agreements such as the General Agreement on Tariffs and Trade (GATT) 1994,[109] the Agreement on Agriculture (AoA),[110] the

[106] Amnon Lehavit and Amir N Licht, 'BITS and Pieces of Property' (2011) 36 *Yale Journal of International Law* 115, 132; noting that the typical definition of the term 'investment' in BITs as comprising a list of rights in assets that effectively encompass the entire range of objects of property rights will lead to 'a complicated tension between BIT (international) property law, domestic property law, and other sources of law on either the local or supranational level, as well as to a "horizontal" tension between property provisions in different BITs that apply to assets within the same host country.'

[107] For instance, Ethiopia has so far signed about 32 BITs, 20 of these treaties are already in force; for the list of Ethiopia's BITs, see UNCTAD, 'Ethiopia: Bilateral Investment Treaties (BITs)', above n 71. Virtually all of the BITs contain an MFN clause, and some of them contain an umbrella clause that potentially elevates contractual breaches to treaty breaches.

[108] For the list of countries that introduced export restriction measures (including export ban) see OECD, above n 17, 77–8.

[109] *General Agreement on Tariffs and Trade* ('*Agreement on Tariffs and Trade 1947*'), opened for signature 30 October 1947 (entered into force 1 January 1948). Note that, subject to some modifications, the GATT 1947 now forms part of the GATT 1994 ; see *Marrakesh Agreement Establishing the World Trade Organization* ('*General Agreement on Tariffs and Trade 1994*'), opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A .

[110] *Marrakesh Agreement Establishing the World Trade Organization* ('*The Agreement on Agriculture*'), opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A.

Agreement on Trade Related Investment Measures ('TRIMs'),[111] and regional trade agreements, are among relevant WTO laws forming part of the wide array laws ordering transnational land acquisitions. As I will explore further in Chapter 5, the provisions in these agreements interact in complementary ways.

Another strand of international law that potentially relates to transnational farmland investment is international human rights law. International human rights law recognises the rights of ownership and possession of indigenous people over the lands which they traditionally occupy and that any relocation shall be effected only with their free and informed consent.[112] There is also a more indirect way in which human rights law relates to the current race for farmland—that is, through the recognition of certain rights whose realisation is closely associated with access to and control over land, such as the rights to: self-determination,[113] an adequate living standard which includes the right to food and water,[114] adequate housing,[115] and the right to property.[116] Indeed,

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[111] *Marrakesh Agreement Establishing the World Trade Organization* ('*Trade-Related Investment Measures (TRIMs) Agreement*'), opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A.

[112] *Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries* ('*ILO Convention 169*'), 76th ILC session, opened for signature 27 June 1989 (entered into force 5 September 1991), art 14(1) cum.16(2). See also the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'), GA/RES/61/295, adopted 2 October 2007.

[113] See the common article 1 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), opened for signature16 December 1966, 999 UNTS 17 (entered into force 23 March 1976); and *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'), opened for signature 16 December 1966, 993 UNT 3 (entered into force 3 January 1976); and the identical provisions in art 47 of the ICCPR and art 25 of the ICECSR which establish a general rule of interpretation in favor of 'the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.'

[114] See *The Universal Declaration of Human Rights* ('*UDHR*'), UNGA Res 217A (III), UN Doc A/810, adopted 10 December 1948, art 25; and Committee on Economic, Social and Cultural Rights (last), 'General Comment No. 12 (1999): The Right to Adequate Food (Art. 11)' UN doc. E/C.12/1999/5 (12 May 1999).

[115] See *ICESCR* art 11; Economic, Social and Cultural Rights Committee (ESCRC), 'General Comments on The Right to Adequate Food (Art.11)' (E/C.12/1999/5, 12 May 1999) paras 4-7.

[116] See *UDHR*, art 17 (1); stating, 'Everyone has the right to own property alone as well as in association with others' and art 17(2), stating, 'No one shall be arbitrarily deprived of his property'; *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*'), opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January

some of the global responses to 'land grabs' draw on international human rights law to varying extents. As further argued in Chapter 6, international human rights law provides openings for both the contestation and legitimation of 'land grabbing'.

Transnational land deals are subject to a plurality of both domestic laws and 'functional regimes'[117] of international law.[118] A clearer picture of the role of law in large-scale transnational land acquisitions, therefore, requires scrutinising how the various genres of relevant laws interact in the process. The interrelationships between international investment, trade and human rights laws 'often remain contested among jurisdictions.'[119] Scholars have increasingly examined these interrelationships through theoretical debates about unity and fragmentation of international law. Since the late 1990s, regime interaction in international law and/or fragmentation of international law has attracted considerable attention in international legal scholarship.[120] For instance, Sir R.

1969) art 5(e).
Convention on the Elimination of Discrimination Against Women ('*CEDAW*'), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); and *African Charter on Human and Peoples' Rights* ('*ACHPR*'), opened for signature 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (entered into force 21October 1986) art 14.

[117] Koskenniemi, 'The Fate of Public International Law', above n 83, 1.

[118] Note that one could also think of international environmental law regime with respect to the long term ecological implications of these land deals, although this regime may not be as closely and readily interconnected to the former three regimes in ordering land deals.

[119] Ernst-Ulrich Petersmann, 'Human Rights, Trade and Investment Law and Adjudication: The Judicial Task of Administering Justice' in Jansen Calamita, David Earnest and Markus Burgstaller (eds), *The Future of ICSID and the Place of Investment Treaties in International Law: 4 Investment Treaty Law Current Issues* (British Institute of International & Comparative Law, 2013) 3, 10.

[120] For examples of such works, see Sir R Jennings, 'The Role of the International Court of Justice' (1998) 68 *British Yearbook of International Law* 60; Jonathan I Charney, 'Is International Law Threatened by Multiple International Tribunals?' in Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law* (Brill, 1998) vol 271; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15(03) *Leiden Journal of International Law* 553; Koskenniemi, 'The Fate of Public International Law', above n 83; BS Chimni, 'The Past, Present and Future of International Law : A Critical Third World Approach' [2007] *Melbourne Journal of International Law* 499; Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Bloomsbury Publishing, 2011); Margaret A Young (ed), *Regime Interaction in International Law: Facing*

Jennings, writing in 1998, warned that there was 'still the danger that international law as a whole will become fragmented and unmanageable'.[121] And about a decade later, this fear was shared by an increasing number of international lawyers. Chimni, for instance, observes that international law 'has now come to be broken into self-enclosed legal regimes such as international trade law, international environmental law, and international humanitarian law and so on. It has become the mirror image of humanity divided by global capitalism to extend its dominance.'[122] Other scholars also emphasise the divergence between, for example, international investment and human rights, in terms of both normative (treaty formulation) and interpretative approaches.[123]

Some scholars view the 'fragmentation' of international law as a 'stumbling block to promoting a peaceful and just world'.[124] Thus, Chimni, arguing from a third world perspective, notes that 'the concerns of ordinary people may fall between the fractures that mark the separate regulatory spheres.'[125] On the other hand, others regard concerns around fragmentation of international law as a manifestation of 'the anxiety of traditional international lawyers who cannot come to terms with the world that has dramatically changed.'[126] According to

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Fragmentation (Cambridge University Press, 2012); Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press, 2014);

[121] Jennings, above n 120, 60.

[122] Chimni, above n 120, 508.

[123] See for example, Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 97; Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law Bringing Theory into Practice* (2014) 143;Ursula Kriebaum, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 219.

[124] Chimni, above n 120, 508.

[125] Ibid 509.

[126] Ibid 508.

this latter group, fragmentation 'simply has to be lived with and reforms sought in separate functional spaces.'[127]

This is not to suggest, however, that there is consensus on the 'fragmented' nature of international law itself. As, for example, Eslava and Pahuja argue regarding trade, human rights and development:

> These ostensibly distinct functional concepts, institutionalised in 'regimes', work together to shape constantly and normatively the ways we organise and (can) imagine our global politics (and polity). This occurs regardless of their often contradictory aspirations and modes of practice, or their cumulative effects on the regulation of life. In other words, what might look like *'fragmentation'* from above looks a lot more like *proliferation* from below.[128]

From a doctrinal point of view as well, for some scholars (and practitioners), the fragmentation of international law is only an illusion. As Judge Greenwood in the *Diallo* (Compensation) case justifying the court's resort to the jurisprudence of other international courts and tribunals states:

> International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusion.[129]

Similarly, from an empirical point of view as well, some scholars suggest that 'the problems of fragmentation [of international law] have been overstated.'[130] Indeed, in recent years, scholars have been pointing to the convergence in public international law more generally,[131] and between specific strands of

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[127] Ibid.

[128] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) *Law and Politics in Africa, Asia and Latin America* 195, 8; (emphasis added).

[129] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),Judgment on Compensation, Declaration of Judge Greenwood* [2012] ICJ 8.

[130] See Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper Series No. 2016-19, 2016) 22.

[131] Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015).

international law such as investment and human rights laws,[132] and trade and investment laws.[133]

In one of the most comprehensive studies on the convergence and cross-fertilisation of investment and trade laws, Jürgen Kurtz argues that despite their distinct evolutionary pathways that have led to variances in treaty form, institutional culture and centralisation, a combination of economic, legal and sociological factors are now pushing the two systems together.[134] In a departure from both a strongly pluralist premise that views international trade law and international investment law as distinct normative systems, and a full convergence between the two fields, Kurtz adopts the metaphor of a double helix and argues that 'the twin strands of international trade and investment law represent a pair of congruent geometrical helices with the same axis.'[135] In this model, those twin strands 'do not simply exist to supply analogical guidance or reasoning from source to target domain…[but] are partly constituted by, and will increasingly cohere, around that unifying core.'[136] The common *telos* uniting both systems is, according to Kurtz, the fundamental promise to extend and safeguard competitive opportunities to foreign traders,

[132] For example, Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 45; emphasising the commonality between international human rights and investment in terms of their concern (about protecting private actors against arbitrary state action) and normative content (including non-discrimination, denial of justice, and protection against expropriation).

[133] See for example, Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016).

[134] Kurtz identifies five factors behind the convergence between international trade and investment laws: (1) common legal terrain and shared subject matters of regulation such as those on non-discrimination; (2) overlapping jurisdictions and parallel adjudications (3) increasing interdependence between cross-border trade and investment; (4) cross-fertilization of jurisprudence; (5) movement of actors ('agents of diffusion')—scholars, practitioners and adjudicators—across the two fields; see Ibid 1–20.

[135] Ibid 24.

[136] Ibid.

service providers and investors.[137] Of course, there are deep public policy goals implicated in the disciplines of investment and trade laws that have been one area of divergence between the two systems, with the old generation of BITs in particular leaving little room for regulation in the public interest. One area where future investment agreements could benefit from this convergence is, according to Kurtz, the incorporation of flexibilities akin to those of the WTO law.[138]

Despite the relatively rich literature on the fragmentation of international law and emerging works on its convergence, scholars are still calling for further study to better understand its dynamics. Thus Andenas and Bjorge suggest that 'there is still need for empirical study to understand the impact of fragmentation on the system of international law'[139] and also 'to understand the emphasis on coherence and unity in developing international law and its general method and principles, and increasingly also in finding answers to legal questions as seen in the practices of the courts.'[140]

As already noted, the emerging phenomenon of transnational deals is one of the areas that traverse various strands or regimes of international law. Given their nascent stage, there are no notable international dispute settlements involving contemporary land deals, despite some emerging contestations which are emblematic of the nature of arbitration claims around these transnational land acquisitions.[141] Of course, as Young notes, 'regime interaction is not simply a matter for international judicial tribunals who seek to interpret conflicting

[137] Ibid.
[138] See Ibid 168–228.
[139] Andenas and Bjorge, above n 131, 3.
[140] Ibid.
[141] For instance, an Indian multinational Karuturi Global reportedly threatened to trigger investor state arbitration against the government of Ethiopia; see William Davison, 'Karuturi Challenges Ethiopia['s] Decision to Cancel Farm Project' *Bloomberg*, 11January 2016 <http://www.bloomberg.com/news/articles/2016-01-11/karuturi-challenges-ethiopian-decision-to-cancel-farming-project>.

norms, but is a constant feature in the setting of agendas for new negotiations, the ongoing norm elaboration within regimes and even the domestic policy coordination between state ministries and departments.'[142] Thus, this work navigates through various guidelines and standards of varying normative values to applicable domestic and international legal instruments and jurisprudence on closely related areas, which can inform the potential direction of legal disputes relating to transnational land deals. This is of course without losing sight of the indeterminacy of (international) law on both linguistic and substantive grounds.[143] As Koskenniemi notes:

> [I]rrespective of indeterminacy, *the system still de facto prefers some outcomes or distributive choices to other outcomes or choices*. That is to say, even if it is possible to justify many kinds of practices through the use of impeccable professional argument, there is a *structural bias* in the relevant legal institutions that makes them serve typical, deeply embedded preferences, and that something we feel that is politically wrong in the world is produced or supported by that bias.[144]

This structural bias, as Koskenniemi further notes, is not a scandal in itself, but when it 'works in favour of those who are privileged, against the disenfranchised, at that point the bias itself becomes "part of the problem"'.[145]

Indeed, there have been some scholarly works that point to the uneven nature of the obligations and responsibilities in the governance of foreign agricultural investments. Häberli and Smith, for instance, argue that the governance of agricultural foreign direct investment at regional and international levels

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[142] Young, above n 120, 1.

[143] For a succinct discussion on the indeterminacy of international law from perspectives of both critical and doctrinal legal scholarship, see James Crawford, *Chance, Order, Change : The Course of International Law, General Course on Public International Law* (Brill, 2014) 113–35. While 'linguistic indeterminacy'—many cases being incompletely determined by the relevant rules which leads to some creative law-making by judges—is common to law in general, 'substantive indeterminacy' mainly pertains to international law in a sense that there is no standard case in international law, and legal rules are only one of the elements of the legal arguments that (competent) international lawyers use to press for one or another outcome; Ibid 114–5.

[144] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006) 606–7; (emphasis in original).

[145] Ibid 608–9.

'unevenly distributes obligations and responsibilities between the weak host state, the investor and its home state in such a way that there is over protection of the investor and under regulation of the investment.'[146] Of course, on one level, the notion of 'weak state' as lacking capacity to effectively negotiate land deals or monitor investors may be more apparent than real. In the case of Ethiopia, for example, as Schoneveld and Eshete observe, the government's lack of consideration for local community engagement and impact mitigation 'is not necessarily a product of poor monitoring and enforcement capacity, but rather of a focused government strategy to modernize "backward" rural practices',[147] or perhaps more accurately, the urge for economic growth through increased FDI in the agricultural sector.[148]

In a similar vein, Uche Ofodile has examined the human rights and investment law dimension of transnational acquisitions in the context of Africa, with a particular focus on Ethiopia.[149] Ofodile challenges the dichotomisation between the international investment law regime and human rights law regime, and examines their interaction by closely analysing several farmland contracts and bilateral investment treaties signed by the government of Ethiopia and relevant investment decisions along with human rights laws (and jurisprudence). Her work highlights 'the obstacles and limitations to addressing the human rights challenges raised by FDI in agricultural land through the lens of both regimes'.[150] Elsewhere, she observes that 'most BITs that countries in Africa have concluded do not address the social and environmental issues that are implicated in agro-FDI and have the potential to constrain the ability of

[146] Christian Häberli and Fiona Smith, 'Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid "Land Grab"' (2014) 77(2) *The Modern Law Review* 189, 192.
[147] Schoneveld and Shete, above n 40, 34.
[148] For more on this, see Chapter 2, Section 2.4.2.
[149] See Uche Ofodile, 'Foreign Investment in Land and the Clash of Regimes: Mapping the Role of International Investment Law and International Human Rights Law' (2013) 7 *Human Rights and International Legal Discourse* 56.
[150] Ibid 57.

governments to regulate agro-FDI in the public interest.'[151] She further observes that these countries 'are not presently using the contracts to distribute the risks, costs, and benefits associated with agro-FDI or to limit exposure to liability under the BITs that they have concluded.'[152] I shall draw on several aspects of Ofodile's analysis of farmland investment contracts and BITs signed by the government of Ethiopia. My analysis of the investment contracts, however, includes 28 more publicly available contracts, as well as addressing the negotiation process of these contracts which sheds light on the agency of various actors in shaping the terms of these contracts. It also brings on board international trade law.

Compared to the investment law-human rights law interface, the interaction of international investment and trade laws in shaping transnational land acquisitions remains underexplored. For instance, Howse and Josling, in their research examining the export restriction measures taken by some countries following the rise in food prices since 2008 in the light of WTO laws, suggest that 'consideration also needs to be given to the disciplines that currently exist in regional trade agreements and bilateral investment treaties […] containing direct or indirect disciplines on agricultural export restrictions',[153] which they regard as 'a large task'.[154] Clearly, the examination of such disciplines in the context of transnational land acquisitions can help explain their impacts and the overall relevance of law. Some scholars point to the complicity of both international investment and trade laws in facilitating 'land grabbing'. According to these scholars, the current system of international trade law that allowed the sale of highly subsidised European and American agricultural products in parts of the Global South and swept away local competition in the

[151] Ofodile, above n 33, 331.
[152] Ibid.
[153] Robert Howse and Tim Josling, 'Agricultural Export Restrictions and International Trade Law: A Way Forward' (International Policy Council, 2012) 21.
[154] Ibid 22.

affected countries, along with the World Bank's policy that forced these countries to open up their agricultural sector to foreign investors, is complicit in transnational land acquisitions.[155] For other scholars, in contrast to international investment law, international trade law has the potential to halt 'land grabbing'. Brilmayer and Moon, for instance, argue that 'because trade law concerns the cross border flow of products, it has the potential to de-incentivize food from leaving land grabbed states and deter similar transactions in the future' through social activism in importing states.[156] However, as the discussions in Chapter 5 suggest, this approach is open to debate on both jurisprudential and pragmatic considerations.

There are also scholars who have considered the trade-investment-human rights law nexus in ordering transnational land acquisitions through the prism of the right to food. For instance, Gonzalez argues that the realisation of the human right (to food) will require, among others, 'a holistic re-conceptualization of international law that integrates human rights, environmental protection, and trade and investment law rather than relegating them to separate spheres.'[157] In her view, such 'a vision must be premised on the hierarchical superiority of human rights norms and must regard trade and investment as means toward the realization of human rights and environmental objectives rather than as ends in themselves',[158] through explicit incorporation of human rights into trade and investment agreements, 'rather than raised defensively for the first time

[155] See Jochen Von Bernstorff, 'Who Is Entitled to Cultivate the Land? Sovereignty, Land Resources and Foreign Investments in Agriculture in International Law' in Francesca Romanin Jacur, Angelica Bonfanti and Francesco Seatzu (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill Nijhoff, 2016) 56, 60; see also De Schutter, 'How Not to Think of Land-Grabbing', above n 6; Carmen G Gonzalez, 'The Global Food Crisis: Law, Policy, and the Elusive Quest for Justice' (2010) 13 *Yale Human Rights and Development Law Journal* 462, 468–71.
[156] Lea Brilmayer and William Moon, 'Regulating Land Grabs: Third Party States, Social Activism and International Law' in *Rethinking Food Systems: Structural Challenges, New Strategies and the Law* (Springer, 2014) 123.
[157] Gonzalez, above n 155, 477.
[158] Ibid.

before dispute resolution tribunals.'[159] In this research, I share most of Gonzalez's concerns regarding the historic and current practices rooted in international law that are contributing to hunger in the Global South. My aim, however, is not necessarily to find solutions in the harmonisation of various strands of international law, but to explore and explicate how these bodies of law—both individually and taken together—relate to the emerging phenomenon of 'land grabbing' and its impact, particularly on prior land users who are legally required to give way to investors, in countries such as Ethiopia. The originality of this thesis thus stems from the fact that it looks to how three fields of international law—investment law, trade law, and human rights—operate on their own, and interact with each other and domestic laws of Ethiopia, in manner that accounts for different sites and scales of authority.

1.4. Research Methodology

The research is based on analysis of both primary and secondary data sources. The primary documentary sources include domestic laws of Ethiopia and international laws. Ethiopian laws examined include the 1995 Federal Democratic Republic of Ethiopia's Constitution, various land and investment related legislations, farmland investment contracts and Ethiopia's bilateral investment treaties. Relevant provisions of international human rights instruments[160] including the UDHR, ICCPR, and ICESCR and regional human rights instruments, the African Charter on Human and Peoples' Rights (ACHPR) and related jurisprudence,[161] have been considered. Further, WTO

[159] Ibid.

[160] According to the FDRE Constitution: 'The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia'; see *The FDRE Constitution* art 13(2).

[161] See *ACHPR*: By virtue of Article 50 or 60 of the Charter, the African Commission on Human and Peoples' Rights can draw on relevant regional and international human rights jurisprudence.

Agreements (specifically the GATT 1994, the Agreement on Agriculture, and the Agreement on Trade Related-Investment Measures (TRIMs)) as well as relevant reports of the WTO's Appellate Body and Panels[162] have been analysed. Although Ethiopia is not yet a member of the WTO, the consideration of the WTO law and jurisprudence is still relevant given that Ethiopia is engaged in the process of accession, and that by virtue of the concept of 'single undertaking'[163] which this membership engenders, there is little or no room for the country to escape from the terms of the agreements under consideration. (In fact, as I shall elaborate further in Chapter 5, there is a tendency to require newly acceding countries to undertake more onerous obligations than original WTO members have assumed – commonly referred to as a 'WTO-plus' commitment[164]).

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[162] Although, as in other areas of international law, there is no rule of stare decisis in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases, it is not uncommon for the WTO panels and the Appellate Body to consider relevant prior rulings—in fact, this approach has been encouraged by the Appellate Body. In *Japan — Taxes on Alcoholic Beverage,* for instance, the Appellate Body stated that: 'Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute'; see *Japan—Taxes on Alcoholic Beverages II* AB Report, Japan—Taxes on Alcoholic Beverages II, WT/D, B/R ; WT/DS10/AB/R ; WT/DS11/AB/R (4 October 1996) [14]; Recalling this ruling, the Appellate Body confirmed the applicability of this reasoning 'to adopted Appellate Body Reports as well' in the US — Shrimp (Article 21.5 — Malaysia); see AB Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products ('US — Shrimp')* WT/DS58/AB/RW, (22 October 2001) [109].

[163] 'Single undertaking' is a WTO negation principle which was innovated during the Uruguay Round of Trade Negotiation which requires that: 'Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately'; or 'Nothing is agreed until everything is agreed'; see WTO, 'How the Negotiations Are Organized' <https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm>.This principle applies to all the multilateral (as opposed to plurilateral) trade agreements such the GATT 1994 and the Agreement on Agriculture.

[164] See *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995). According to Article XII:1 of the WTO Agreement: 'Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreement may accede to this Agreement, *on terms to be agreed between it and the WTO*' (emphasis added). This opens a room for newly acceding countries to assume more cumbersome obligations than incumbent members assumed, and hence 'WTO –plus obligations'.

The research also draws on various secondary sources including publications and reports of intergovernmental organisations such as the FAO, World Bank, WTO, and UNCTAD; and various NGOs working on land issues; governmental and media reports. Given that large-scale land acquisitions are cross-disciplinary in nature, I will also draw on relevant scholarly writings on the subject from various disciplines, including: law, history, agrarian and peasant studies, economics and anthropology.

Another set of primary source for the research is empirical data gathered from interviews conducted in Ethiopia with relevant government officials, foreign investors, and land policy experts. The main goal of the interviews was to understand the major drivers, origins and nature of investors, and roles of home and host states in contemporary transnational land deals in SSA, and how the terms of international farmland investment agreements (contracts), being the primary instrument for transfer of land to foreign investors, are shaped. This would in turn help to identify the competing goals and interests in transnational land acquisitions, and inform the analysis of how the law mediates and shapes these interests and rights. Interviews were conducted with 25 people including foreign and domestic investors, independent experts with extensive experience on land policy and practice in Ethiopia, and government officials at the Ethiopian Agricultural Investment Land Administration Agency, the Ethiopian Investment Commission, and Oromia Regional State Investment Commission. Semi-structured interview guidelines were prepared to reflect research questions framed through analysis of the relevant literature, with interviews conducted between August 2014 and February 2015.[165] The interviewees were selected on the basis of the purposive sampling method[166] in

[165] Research Ethics clearance was obtained for the fieldwork from the Law Human Ethics Advisory Group (Ethics ID: 1442517) on 4 August 2014.

[166] Purposive Sampling or 'purposeful sampling' is one of the sampling techniques employed in qualitative legal research methods that enables a 'researcher to seek out key people or events

order to involve participants who were likely to provide information relevant to the various aspects of transnational land acquisitions which the research grapples with. Oromia regional state is the focus for this study because it is not only the largest among the federated states of Ethiopia and one of the top sites of 'land grabbing' in the country, but it also provides relatively easy access to relevant government offices.[167] In line with human ethics guidelines for research, where participants chose not to be identified (which in some cases was the condition for their participation), I have kept their names and other identity markers anonymous.

The primary method I have used is a critical doctrinal analysis of the interaction of the various branches of (international) law at play. In the context of this thesis, "critical doctrinal analysis" refers to the analysis of the laws and jurisprudence—*the law as it is*—applicable to transnational land deals, without, however, necessarily sharing the normative assumptions of the proponents of the doctrines. The goal is to understand how the law shapes and mediates competing rights and interests around transnational land deals in SSA, against the background of historical patterns of land ownership in the region.

The study mainly focuses on Ethiopia, which, although historically particular in Africa, is nonetheless typical in SSA with respect to the structure of and justifications given for large-scale acquisitions of land by foreign investors. This is, however, neither to draw sweeping generalisations from the Ethiopian experience nor to present African countries as a monolithic entity in relation to the practice of large-scale land investments.

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that are likely to provide rich sources of information or data'; for more on this, see Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 934.

[167] Note that Oromia Regional State shares Addis Ababa as its capital city with the federal government.

1.5. Thesis Overview

The thesis is divided into seven chapters. This Chapter (1) sets the scene: providing background to the thesis; introducing my argument, the key research questions, methodology, and providing an overview of the thesis as a whole.

In Chapter 2, I will provide an account of the historical precedents of 'transnational land acquisitions' in Africa to show the ways in which land relations were shaped. This runs against accounts of 'land grabbing' in Ethiopia which portray the current land rush as an entirely new phenomenon. Colonialism in Africa vested ownership of the land largely with colonial states, and eventually their settlers and companies. 'Colonial custom' interpreted customary land rights as mere usufruct, and often applicable only to farmland (cultivated land), and simultaneously bolstered the power of local chiefs who were collecting taxes from the peasantry who increasingly had to engage in the production of cash crops. Upon decolonisation, post-colonial states in Africa, by and large, embarked on land reforms that affirmed this legacy: in most cases, they assumed ownership of land as had the colonial state, continuing with a narrow interpretation of customary land rights. In this chapter, I further demonstrate that although Ethiopia does not share a typical colonial past with the rest of African countries, it shares with them much of the colonial and post-colonial realities at least as far as land relations are concerned. The land tenure system that was instituted in the country in the late 19th and early 20th century—at the same time as the European 'scramble for Africa'—brought large chunks of territory under the government of Abyssinia (which was later to transform itself into Ethiopia), and this practice turned smallholder farmers and pastoralists in the southern part of the country to mere tenants of new landlords from the north. An attempt at radical land reform following the 1974 revolution that ended the monarchical rule in the country, while ending landlord-tenant relations, merely extended usufructuary rights to peasants and pastoralists. The

current government, which assumed power in 1991, also largely continued with this land policy. Thus, be it in 'post-colonial' Africa, or 'non-colonial' Ethiopia, governments are now spearheading contemporary transnational land acquisitions with little or no legal barriers, even where these land acquisitions may not necessarily address local needs such as the prevailing hunger in host states, as I will demonstrate in subsequent chapters.

In Chapter 3, I will analyse the scale and drivers of the recent transnational land deals in sub-Saharan Africa, including the role that international institutions and investors' home and host governments play in this process. I shall also explore the resistances and global responses these land acquisitions have generated. I demonstrate that while the convergence of the global financial, food and energy crises was a major trigger for transnational land acquisitions, it also marked the convergence of interest of foreign investors and their host governments such as that of Ethiopia, which were actively courting foreign investments into agriculture long before the triple crisis. The global debates around transnational 'land grabs' are also highly polarised. Some of the instruments (standards and principles) resulting from these debates are less potent than they often appear in terms of tackling the risks and challenges these land acquisitions pose to people in 'host' countries, particularly when considered in light of the interaction of the various laws that actually shape these land deals.

In Chapters 4–6, I will examine how relevant local and international legal norms of investment, trade and human rights interact in shaping the competing interests surrounding transnational land deals.

In Chapter 4, I will deal with the position of (international) investment law with regard to 'land grabbing'. I will argue that the domestic and international investment laws at play essentially facilitate 'land grabbing' in sub-Saharan

Africa. In this chapter, I shall critically examine various investment-related legislation from Ethiopia, the terms of 38 farmland investment contracts signed by the government of Ethiopia, and select BITs from Ethiopia in their historical context. I will demonstrate that the design of the investment contracts that seem to have been inspired by the government's uncritical faith in foreign capital, coupled with the country's BITs (most of which are old generation BITs that extend expansive (almost exclusive) protection to investors), not only encourage these land deals but also pose a particular challenge for taking corrective measures.

In Chapter 5, I will examine how international trade and international investment laws interact in shaping the outcomes of transnational land deals. The major focus of this chapter is the disciplines on food export restrictions. Restrictions of grain exports were among the factors that contributed to the global food crisis of 2008 and consequent transnational 'land grabs'. Export restriction measures also remain relevant in terms of leveraging transnational agricultural investments for domestic food supply in host states, particularly in light of the prevailing hunger in SSA. I will thus first account for the flexibilities international trade law may offer to host states in this regard, and consider how this flexibility plays out when read in conjunction with relevant disciplines of international investment law. The analysis in this chapter suggests that while the norms under the two strands of international law do not necessarily contradict each other in terms of the regulation of export restrictions, the flexibility international trade law offers to host states tends to diminish when considered in conjunction with relevant disciplines under international investment law.

In Chapter 6, I will critically analyse how human rights norms are being mobilised in relation to transnational land acquisitions. In a departure from some of the literature on the global 'land grabs' that suggests human rights are

the solution to the risks that land acquisitions pose to host countries' people, I argue that human rights law actually plays a double role of both facilitating contestation of land acquisitions and legitimising them. While international human rights in its emancipatory sense provides for an important opening for contesting 'land grabs', in its legalistic sense, it tends to facilitate the practice.[168] Although land rights are framed as a self-standing human right only in the context of indigenous peoples and rural women, the realisation of a number of human rights such as the right to self-determination, the right to food, protection against forced eviction, and property right closely relate to (and in certain cases presuppose) access to land. Yet, existing jurisprudence and practice suggests that claims around these rights by communities affected by transnational land acquisitions rarely succeed, particularly in situations where there is no independent judiciary and there is little tolerance for human rights activism; and where they do succeed, there is little guarantee of their enforcement. The potential use of human rights norms to counter 'land grabs' further diminishes when considered in conjunction with other laws ordering 'land grabs' such as international investment and trade laws, wherein the investor's (private) interest (for example in the form of legitimate expectation) is often given more protection than the 'public interest' purportedly advanced by human rights laws (for example, re-regulation of land and water rights in the interest of local people).

Finally, in Chapter 7, I will provide a summary and concluding remarks. This study suggests that there is a structural bias in the legal regime shaping transnational land acquisitions in countries such as Ethiopia that favours the foreign investors vis-à-vis the often marginalised local communities in their host states, despite some recalibration exercises in international investment law

[168] For an account of the double quality of human rights, see Sundhya Pahuja, 'Rights as Regulation: The Integration of Development and Human Rights' in Bronwen Morgan (ed), *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Ashgate, 2007) 167.

in recent years and the potential corrective role of human rights law. This bias has serious ramifications, particularly for prior land users who are legally required to give way to private investors.

CHAPTER 2 TRANSNATIONAL LAND ACQUISITIONS IN AFRICA: AN HISTORICAL CONTEXTUALISATION

2.1. Introduction

The focus of this thesis is on contemporary 'land grabs' but no assumption should be made that they are a uniquely modern phenomenon. In fact, a sensible account of contemporary 'land grabs' can hardly be made without attending to their historical context. In this chapter (2) I will outline key aspects of the historical precedents to contemporary land deals in sub-Saharan Africa. In this regard, I draw on some of the recent works which have approached these land deals with an historical sensibility.[169] This account suggests that 'land grabs' during imperial and colonial expansions were mainly about securing markets, raw materials and strategic routes—the national security of colonial states. And (international) law seems to have continuously been used to secure the latter often at the expense of host peoples. Curiously, post-independence governments also largely maintained laws that put land under their custody, and often opted for tenurial reforms which, instead of redistributive reforms towards full ownership of land, granted only usufructuary right to people. And the legacy of colonial and postcolonial land relations is felt to varying degrees in contemporary transnational land deals.

Against this backdrop, in section 2, I shall trace the imperial and colonial roots of 'land grabbing' in Africa particularly during the period of 'high imperialism' of the late 19th century to early 20th century.[170] Not only was this the period of

[169] For examples of recent works on the global 'land grabs' with an historical sensibility, see Derek Byerlee, 'Are We Learning from History' in Michael Kugelman and Susan Levestein (ed), *The Global Farm Race: Land Grabs, Agricultural Investment, and the Scramble for Food Security* (Island Press, 2013); Nancy Lee Peluso and Christian Lund, 'New Frontiers of Land Control: Introduction' (2011) 38(4) *Journal of Peasant Studies* 667; Cotula, above n 43, 15–34; Geisler, above n 6; Mazoyer, above n 22.

[170] This period generally runs from 1870 to 1914, although some confine it to the two decades from the 1884 partition of Africa to the end of the Boer War in 1902; see Mark F Proudman,

'high imperialism' but Africa was at its epicentre. The late 19th century was also a very significant period in the formation of the Ethiopian state that is both similar to and different from the colonial experience in the rest of African countries. Although Ethiopia managed to escape the European 'scramble for Africa', during the same period, the southward expansion of Abyssinia under the leadership of Emperor Menilik II in the late 1880s resulted in the formation of modern Ethiopia (Abyssinia plus newly incorporated regions in the south), [171] resulting in the institution of a land tenure system akin to that of colonial powers in Africa. Crucially, these same regions are also important sites of contemporary 'land grabbing' in Ethiopia. In section 3, I shall discuss the legacy of colonialism as it relates particularly to agricultural and land relations, and its implications for contemporary 'land grabs'. If decolonisation in the rest of Africa often resulted in land transfer from colonial powers to post-independence governments, in the case of Ethiopia, the 1974 revolution, with 'land to the tiller' as its central motto, resulted in nationalisation of land (with only use rights accorded to the peasantry). Section 4 explores the convergence in market oriented land tenure reforms across Africa since the 1990s and the broader context in which these reforms happened. As with the rest of African governments of the 1990s, the current government of Ethiopia which came into power in 1991 introduced pro-market reforms. Despite its free market ethos, the government maintained public ownership of land. The 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution states that the right to ownership of rural and urban land, as well as of all natural resources 'is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or

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'Words for Scholars: The Semantics of "Imperialism"' (2008) 8(3) *Journal of the Historical Society* 395, 398.

[171] The term Abyssinia was used to refer to present-day Ethiopia (including at international level); following the formation of the UN in 1948, however, the name Abyssinia was abandoned in favour of Ethiopia.

to other means of exchange.'[172] The Constitution accords peasants and pastoralists only use rights.[173] The Constitution also requires the government to 'ensure the right of private investors to the use of land on the basis of payment arrangements established by law.'[174] The agricultural development strategy of the government also encourages private (foreign) investment in the country.[175] This has in turn allowed the government to spearhead the transfer of land to investors through the constitutional and legislative edifices that makes these transfers legal, even in the face of resistance from local land users. I shall conclude, in section 5, by highlighting the key aspects of the historical precedents relevant to contemporary land deals.

2.2. Imperial and Colonial Roots

The acquisition of land, often through dispossession of indigenous people, has been an important feature of imperial and/or colonial expansion, ranging from the Roman Empire through enclosure in Britain (in reference to which Karl Marx originally coined the term 'land grabbing'[176]) to the European colonisation of the Americas, Australia, Asia and later Africa. Conceptually, 'colonisation', understood as 'the establishment and extension of the political sovereignty of one nation over alien peoples and territories',[177] or 'the implanting of settlements on distant territory'[178]—could be taken as one mode of 'imperialism': 'the process or policy of maintaining an empire' which can be

[172] *The FDRE Constitution* art 40(3).
[173] Ibid art 40(4) and (5).
[174] Ibid art 40(6).
[175] See Section 2.4.2 below.
[176] Marx argued that, the enclosure facilitated the formation of a class of individuals who owned the means of production (land) and a class of footloose workers who had to sell their labour in order to survive; see Mazoyer, above n 22, 3.
[177] Benjamin J Cohen, *The Question of Imperialism : The Political Economy of Dominance and Dependence* (Basic Books, 1973) 10.
[178] Edward Said, *Culture and Imperialism* (Vintage Publishing, 1993) 9.

achieved by force or other means'.[179] But, particularly towards the end of the 19th century, imperialism and colonialism were almost synonymous. By the turn of the 20th century, and with the end of formal colonisation, however, the meaning of imperialism seems to have shifted to encompass relations of domination not only in political but also economic and other spheres. This is expressed in the shift from colonial to post-colonial theory. Thus, as post-colonial scholars such as Edward Said argue, while colonialism, which is almost always a consequence of imperialism has largely ended, imperialism 'lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic, and social practices.'[180] It is thus worth noting that, whereas transnational acquisition of land through violence was a major aspect of colonialism *per se*, the continuation of the practice on various scales in the post-colonial period, largely via legal means, could be understood as one practice of imperialism.

In the context of Africa, an early example of securing the metropole through foreign land acquisition was the establishment of large estates in North Africa during the Roman times for provisioning Rome.[181] Later, Arab conquest brought northern Africa under Islamic control in the 8th century.[182] The Portuguese occupied strategic parts of the African coast, notably, present-day Angola and Mozambique, in the 15th century.[183] The Dutch (who later became Afrikaners) settled in present-day South Africa in the 17th century (1652), later formally

[179] Michael W Doyle, *Empires* (Cornell University Press, 1986) 45. Perhaps even more broadly, Edward Said defines imperialism as 'the practice, the theory, and the attitudes of a dominating metropolitan centre ruling a distant territory'; see Said, above n 178, 9.
[180] Said, above n 178, 9. Said further argues that: 'neither imperialism nor colonialism is a simple act of accumulation and acquisition. Both are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people require and beseech domination, as well as forms of knowledge affiliated with domination'; Ibid.
[181] Byerlee, above n 169, 22.
[182] Cotula, above n 43, 16.
[183] Jane Burbank and Frederick Cooper, *Empires in World History : Power and the Politics of Difference* (Princeton University Press, 2010) 154–5.

colonised by the British, whose settlers joined them in claiming agricultural land[184]. But it is the late 19th century European colonisation which produced a comprehensive 'scramble for Africa'.[185] It is perhaps against this background that some refer to the recent global land deals as 'neo-colonialism'.[186] Such a description stands in contrast to alternative framings such as 'win-win' investment opportunities.[187] Setting aside the discussion on the implications of these framings for the global responses to these land deals for Chapter 3, in the discussion which follows, I focus on tracing the historical (colonial) precursors to contemporary land grabs. The temporal focus is late 19th century and early 20th century; as flagged earlier, this is both the period of the European 'scramble for Africa', as well as a significant phase in the building of the Ethiopian state. The broader aim here is to give context to the discussions on contemporary land deals in the subsequent chapters, and not to give a full account of the contested stories surrounding the practices and legacies of colonialism or imperialism.

2.2.1. The Late 19th Century Colonisation of Africa

Ever since the Roman times, 'Europe had been nibbling at the mysterious continent [Africa] to the south',[188] yet as late as early 1880s Europeans' encroachment into Africa had been limited to the trading posts on the coastal fringe, with strategically important colonies in Algeria and South Africa, covering not more than ten percent of the continent.[189] As part of this encounter, Europeans engaged in, among others, enslavement and transportation of Africans overseas. However, what is regarded as the 'classic high

[184] Burbank and Cooper, above n 183.
[185] Cotula, above n 43, 17.
[186] See, for example, Jacques Diouf, 'The Food Crises and the Wrong Solutions'' *Inter Press News Agency*, 28 July 2008 <http://www.ipsnews.net/2008/07/the-food-crisis-and-the-wrong-solutions/>; Nikhil Aziz, 'The Neo-Colonial Land Grab in Africa' *Commons Magazine*, 15 April 2011 <http://onthecommons.org/neo-colonial-land-grab-africa>; see also GRAIN, above n 1.
[187] See for example FAO, 'From Land Grab to Win-Win Seizing the Opportunities of International Investments in Agriculture', above n 5.
[188] Thomas Pakenham, *The Scramble for Africa : 1876-1912* (Weidenfeld & Nicolson, 1991) xv.
[189] Ibid.

imperialism'[190] of the late 19th century and early 20th century, ushered the 'second wave of European imperialism'[191] in general and the 'scramble for Africa' in particular. There is still no generally accepted explanation for this rush. Yet historians point out that the high imperialism came about through four intertwining economic and political processes: (a) increasing world economic integration (early 'globalisation'), (b) new technologies of intervention and domination, (c) the collapse of mechanisms to preserve the peace in the European system of states; and (d) the rise of social-Darwinist interpretations of international politics,[192] leading to competition among the colonial powers (if at times even weaker European powers were also given a share of the imperial cake, as in the case of King Leopold II maintaining Congo Free State as his private colony).[193] In particular, the economic argument of imperialism considered imperial venturers as a matter of necessity. As John Hobson, in *Imperialism: A Study*, a 1902 account which even contemporary historians such as Osterhammel regard as 'a profound and partly prophetic diagnosis of the times [the 19th Century]'[194], observes, for proponents of British imperial expansion of the time:

> However costly, however perilous, this process of imperial expansion may be, it is necessary to the continued existence and progress of our nation; if we abandoned it we must be content to leave the development of the world to other nations, who will everywhere cut into our trade, and even impair our means of securing the food and raw materials we require to support our population. Imperialism is thus seen to be, not a choice, but a necessity.[195]

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[190] Proudman, above n 170, 398.

[191] Charles W Kegley and Lindsey Blanton, *World Politics : Trend and Transformation ; 2010 - 2011 Edition* (Wadsworth Cengage Learning, 2010) 107; the 'first wave of European imperialism' being the late fifteenth century, when the Dutch, English, French, Portuguese, and Spanish had used their naval power to militarily conquered overseas territories for increasing their power and wealth; Ibid 105; Cohen, above n 177, 20.0.

[192] Jürgen Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century* (Princeton University Press, 2014) 432.

[193] Ibid.

[194] Ibid 431.

[195] John Hobson, *Imperialism: A Study* (James Pott and Company, 1902) 78.

As 'most frontiers of imperial expansion—across North America, between Russia and China—had been closed, and Africa was the only large and populated space that was not part of somebody's empire',[196] Africa stood out as a major target. Thus, Parkenham writes,

> Africa was sliced up like a cake, the pieces swallowed by five rival nations—Germany, Italy, Portugal, France and Britain (with Spain taking some scraps)—and Britain and France were at each other's throats. At the centre, exploiting the rivalry, stood an enigmatic individual and self-styled philanthropist, controlling the heart of the continent: Leopold II, King of the Belgians.[197]

Despite their rivalry, Europeans agreed to make their competition 'a rule-bound exercise' in the Berlin Conference on West Africa of 1884-85.[198] As Burbank and Cooper rightly observe, contrary to conventional accounts, the Conference did not talk of partitioning Africa, at least in express terms.[199] Indeed, the preamble of the Final Act of the Conference was couched in such noble terms as: 'Wishing, in a spirit of good and mutual accord, to regulate the conditions most favourable to the development of trade and civilisation in certain regions of Africa… and concerned as to the means of furthering the moral and material well-being of the native populations…'[200] The only part of the Act dealing with the territorial occupation is Chapter VI, which set out the key principle for the competition—'the essential conditions to be observed in order that new occupations on the coasts of the African continent may be held to be effective'.[201] Thus, Articles 34 and 35 of the Act provide:

Article 34

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[196] Burbank and Cooper, above n 183, 314. Perhaps the importance of a 'populated' space in this context is for the labour it offers to colonial powers.

[197] Pakenham, above n 188, xv.

[198] Burbank and Cooper, above n 183, 316.

[199] Ibid.

[200] *General Act of the Berlin Conference on West Africa 1885* , singed 26 February 1885, Chapter VI, para 1 and 2; the Act was signed by the representatives of the United Kingdom, France, Germany, Austria, Belgium, Denmark, Spain, the United States of America, Italy, the Netherlands, Portugal, Russia, Sweden-Norway, and Turkey (Ottoman Empire)—only the US reserved the right not to accept the conclusions of the Conference.

[201] See *General Act of the Berlin Conference on West Africa 1885*, Chapter IV.

> Any Power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.
>
> Article 35
>
> The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon.

The Act thus takes for granted the possibility of taking possession of African territory by a Signatory Power, the only requirement being a retrospective notification of other Signatory Powers, and establishment of authority 'sufficient to protect existing rights' of the Signatory Powers—not of the natives of those territories. To the ostensible benefit of the natives, as expressed in the preamble and Article 6 of the Act, the Signatory powers were 'to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being'. However, what followed within few years was the colonisation of Africa: brute subjugation of Africa and its people, and, of course, the remaking of world geography.[202]

But what was the precise role of the Berlin Act in the colonisation of Africa? International lawyers such as John Westlake (writing in as far back as the decade following the Conference) and Antony Anghie (writing in the 21st century from a different perspective) argue that the Conference and its General Act had created a legal and political framework for the subsequent colonial scramble for Africa.[203] Thus, according to Anghie, 'its effect was to transform Africa into a conceptual *terra nullius*' so much so that 'only dealings between European states with respect to those territories could have decisive legal

[202] Burbank and Cooper, above n 183, 321.
[203] See John Westlake, *Chapters on the Principles of International Law* (Cambridge : Cambridge University Press, 1894) 129–89; Anghie, above n 91, 90–97.

effect'.[204] Of course, in contrast, some historians downplay the legal significance of the Conference (and its final Act) in terms of facilitating the partition, arguing that the scope of the Act was confined to Central Africa and even then ineffective—'the guarantees given by the powers amounted to little more than a simple promise to notify the acquisition of any given piece of territory, after it had been acquired.'[205] This divergence could be understood, as Craven suggests, more in terms of emphasis in that the Act was 'both anti- and pro-colonial, as an instrument that fostered partition while apparently opposing it': colonial rule 'arrived as a consequence of the internationalisation of the territory whose overt purpose was to prevent colonisation taking place.'[206] Once it arrived, though, colonial rule in Africa established a distinct structure of domination particularly in regards to access to land.

The colonialists deployed the 'civilising mission' and the *terra nullius* narrative (that Africa was unowned) to not only assert rulership in the form of 'political sovereignty' over the territories they conquered but also assert and acquire ownership of vast areas of land.[207] Across Africa, as Berry notes, 'French and British authorities claimed that "by right of conquest," all "vacant and ownerless" land belonged to the colonial state'.[208] Thus, on the basis of cursory inspection or none at all, during the late 19th and early 20th centuries, vast tracts of land had been judged 'vacant and ownerless'—and through legislations enacted in one colony after another, the ownership of these lands was vested in the colonial state or an institution representing it.[209] As the (new) owners, the

[204] Anghie, above n 91, 91.
[205] See Sybil Crowe, *The Berlin West African Conference 1884-1885* (Longmans Green & Co, 1942) 4–5.
[206] Matthew Craven, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3(1) *London Review of International Law* 31, 35–6.
[207] Liz Alden Wily, 'The Law and Land Grabbing: Friend or Foe?' (2014) 7(2) *The Law and Development Review* 207, 215; Cotula, above n 43, 17.
[208] Sara Berry, 'Debating the Land Question in Africa' (2002) 44(4) *Comparative Studies in Society and History* 638, 641–2.
[209] Cotula, above n 43, 17.

colonial powers began distributing these lands on absolute or long term lease titles to their settlers, and consortia of home companies which were tasked with performing policing or tax collection duties on their behalf.[210] In settler colonies of Southern and Eastern Africa, European settlers came to own a significant portion of land, which in the case of Southern Rhodesia (now Zimbabwe) amounted to about half of the country's land.[211] Typical examples of concessions to home companies, on the other hand, were to be found in French colonies of Central and Western Africa: 'By 1900, more than 70% of modern Gabon and the Republic of Congo were divided into 42 French company concessions.'[212]

However, the transfer of 'vacant' land to the colonial state through legal techniques was not entirely smooth. Indeed, land takings and associated coercion of labour for European enterprises were met with protests, boycotts of European goods, refusal to sell food to European traders and mission stations, and rebellions.[213] And, in a few cases, local elites were able to play with the same legal techniques employed by the colonisers to secure land themselves. For example, in the Gold Coast (now Ghana), attempts by the British colonisers to enact legislation vesting vacant lands with the Crown failed due to resistance from local elites and/or customary chiefs who managed to register land in their own names.[214] Local resistance in Southern Nigeria also led to a similar outcome.[215] Consequently, in 1921, the Privy Council in London ruled that natives should be compensated when their settled lands were taken for public

[210] Wily, above n 207, 216; broadly, the British and German administrations favoured granting absolute or long term lease titles to individuals, while the French and Belgians preferred consortia of home companies.
[211] Colonial settlers also owned about 7 and 6 per cent of land in Kenya and Botswana respectively; Cotula, above n 43, 18.
[212] Wily, above n 207, 216.
[213] Ibid.
[214] Ibid; Cotula, above n 43, 18.
[215] Wily, above n 207, 216.

purposes.[216] This, however, did not apply to unsettled lands, reinforcing the treatment of uncultivated lands as ownerless.

It is worth noting that even in cases where colonial expansion did not result in physical dispossession of natives, colonial powers had significantly weakened local land rights, in part, through the manipulation of local law called at best 'customary' by the coloniser. Indeed, this is a distinctive feature of African colonisation. As Mahmood Mamdani in his widely cited work on contemporary Africa and the legacy of 19th and 20th century colonialism notes, as distinct from the colonial experience elsewhere, 'European rule in Africa came to be defined by a single-minded and overriding emphasis on the customary'.[217] This was due to a shift from 'a conviction that Europe had a "civilising mission" in the colonies to a law-and-order obsession with holding the line', a change from progress to power.[218] While in British colonies in Asia, such as India, this shift (towards preserving native custom) to prevent 'the society from dissolution' was curative, in the case of Africa it was preventive—in a sense that it took place early in Africa's colonial history.[219] Yet, the preservation of native law and custom was not conceived as an end in itself, 'but a transitional stage by which Africans may in their own right become members of the civilised world, not as individuals but as communities.'[220]

A key aspect of the overriding emphasis on the customary in colonial rule Africa was the question of *land.* Thus, unlike colonial practice in Asian colonies, the domain of the customary in Africa extended beyond personal relations such as marriage and succession to also govern access to land.[221] As the bearer of

[216] Ibid 216-217.
[217] Mahamood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996) 50.
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Ibid 50–51.

custom was said to be the tribe, the more custom was enforced, the more the colonised subject population was frozen into so many tribes restructured and conserved as autonomous but not independent, each under the fist of its own Native Authority.[222] Perhaps counterintuitively, the extended scope of the 'customary' was not a concession for letting things stay as they had always been, as '[c]olonial custom was enforced with a whip, by a constellation of customary authorities—and, if necessary, with the barrel of gun, by the forces of the central state'[223] rather than through social sanctions. The fact that in most African colonies land was defined as a communal and customary possession meant that instead of being divided into peasant freehold units or the possessions of a landed class, land came to be controlled by customary authorities subservient to colonial powers.[224] Also, to the extent that peasant households remained in customary possession of land (which was understood as precluding the right to alienate), it remained outside of the scope of the market.[225] Thus, while customary access to land defined the free peasantry in colonial Africa, a regime of force—'extra-economic coercion'[226]—simultaneously breached and marked the limits of that freedom in the name of indirect rule.[227] As the continuity of access to land was conditional upon paying taxes to their chiefs, peasants had to engage in cash crop production.[228] This essentially remoulded the existing patronage relationship between a subject and a chief, mainly based on political allegiance and supply of military services, into an economic relationship between a landlord and a tenant.[229] Further, and perhaps more importantly, the customary systems were readapted to facilitate land acquisition by colonial settlers and companies. For example, customary law was

[222] Ibid 51.
[223] Ibid 50.
[224] Ibid 51–52.
[225] Ibid 52.
[226] Ibid 19.
[227] Ibid 52.
[228] Cotula, above n 43, 19.
[229] Ibid.

interpreted as establishing only use rights, rather than ownership, over land.[230] Even in the later colonial laws of the French and the Portuguese that recognised customary land (ownership) rights, the scope of the latter was confined to individual rights over land used for housing or cultivation, excluding other forms of customary land estate that supported local communities' livelihoods (including land use for grazing, hunting or gathering) and lands set aside for future generations.[231] The legacy of 'colonial custom' that recognises only usufruct right over land, as we shall see later, became characteristic of post-independence land reforms in Africa that is also felt in the current 'land grabs' in Africa.

As noted in Chapter 1, agricultural production in colonial Africa took the form of small holder farming in the 'peasant colonies' of western Africa on the one hand, and plantation agriculture[232] in 'settler colonies' of southern Africa on the other. However, between the two modes of farming in colonial Africa, colonial powers encouraged plantations. Although in the case of Western African colonies the production of export oriented cash crops predated the colonial encounter, the latter further expanded it as payment of tax to local chiefs, which entailed the preference for production of cash crops (such as cocoa, coffee and cotton) to staple crops. In both settler and non-settler colonies of Africa, there were large-scale agricultural plantations that were directly tied into European industrialisation and consumption patterns.[233] For example, in the 1920s, the British developed the Gezira irrigation scheme in Sudan to grow cotton between the Blue and White Nile rivers which covered about 126,000 hectares

[230] Ibid.
[231] Ibid.
[232] In broad terms, plantation refers to a mode of farming covering at least 5 hectares of land that: (1) grow one main cash crop; (2) require capital investment; (3) are larger than an average-sized holding although some land may be left uncultivated; (4) rely on hired resident or non-resident labour, often including migrant labour; and (5) are centrally managed, irrespective of the mode of ownership; see Smalley, above n 42; *Protocol to the Convention Concerning Conditions of Employment of Plantation Workers 1982*, 68th ILC session (18 Jun 1982).
[233] Weis, above n 44, 89.

of land (and was later expanded to cover some 880,000 hectares).[234] Similarly, an American company established a 'million-acre' rubber plantation in Liberia.[235] It is worth noting though that 'in many of these large ventures, only a fraction of the land taken was actually cultivated.'[236] Research into agriculture in colonial Africa was almost entirely devoted to cash crops.[237]

Peluso and Lund are thus right in challenging the novelty of the current race for farmland, pointing to their colonial precursors in the following words:

> But what is so new … about 'land grabbing'? Dutch, French, Spanish, Portuguese, and English colonizers were heavily engaged in both land grabbing and the creation of private property… The ways officials implemented land controls differed from one colony to another, or differed by crop, by region of a colony, or by legal logic, and often changed over colonial times.[238]

2.2.2. The Ethiopian 'Exception'

Ethiopia does not share a typical colonial past with other African countries save for the brief period of Italian occupation between 1936 and 1941. Along with Liberia (which, however, had been a US colony) Ethiopia managed to elude the European scramble for Africa. Yet the southward expansion of Abyssinia under the leadership of Emperor Menilik II in the late 1880s which led to the creation of modern Ethiopia is akin to colonialism, at least with respect to the land tenure system it instituted in the southern regions of the country. The formation of the modern state in Ethiopia, as Teshale Tibebu notes, involved three processes: centralisation of power in the northern predominantly Christian Kingdom (Abyssinia), the southward territorial expansion of Abyssinia under Menelik II; and 'collusion and collision of

[234] Herve L Plusquellec, *The Gezira Irrigation Scheme in Sudan : Objectives, Design, and Performance* (World Bank, 1990) 1.
[235] above n 43, 18.
[236] Ibid.
[237] Rodney, above n 45, 221.
[238] Peluso and Lund, above n 169, 672.

interest between Ethiopian rulers and European powers engaged in the scramble for Africa'.[239] These processes coincided in several ways. It was through his encounter with Europeans that Menelik obtained more arms than his competitors, with which he managed to first consolidate his power within Abyssinia and then conquer new territories in the south. In turn, the human and material gains from the latter were critical in Ethiopia's successful resistance against the European scramble for Africa—Ethiopia successfully resisted Italy's colonial adventure twice; first in 1989 during the reign of Emperor Menelik II, and later in 1935 during the reign of Emperor Haile Selassie I. The first Italian invasion ended with the defeat of Italy at the Battle of Adwa, which was of both historic and symbolic significance. However, given Italy's military might (compared to Ethiopia) and the approval from other European powers, the second Italian invasion of 1935 endangered the sovereignty of Ethiopia more fundamentally. It took continued resistance from Ethiopian patriots, coupled with the support of the British who, following the outbreak World War II were fighting against Italy, to finally draw out Italian forces from Ethiopia in 1946. Curiously, after the withdrawal of Italy, the British, too, wanted to remain in Ethiopia, particularly insisting on maintaining the possession of the provinces of Eritrea in the north and Ogaden in the east. As Ethiopian diplomat and historian Zewde Reta observes, it was Emperor Haile Selassie's government's diplomatic engagement with the United States (a then emerging global superpower) that persuaded the British to remove these territories from its sights.[240] Apart from the 'collusion and collision of interest between Ethiopian rulers and European powers', Tibebu notes, it may be argued that Ethiopia's encounter with the United States also contributed to maintaining its territorial integrity. Thus, without losing sight of the mutually

[239] Tibebu, above n 60, 37–54.
[240] Zewude Retta, *The Government of Emperor Haile Selassie I (1930-1955* (Shama Books, Amharic Edition, 2012) 445–524.

reinforcing nature of the processes at play in the formation of the modern state in Ethiopia, in line with the focus of this thesis, in the remaining part of this section I briefly explore only one of these processes: the southward expansion of Abyssinia during the late 19th century and its effect on the land tenure system of the country.

Two key concepts epitomise, as Tibebu notes, Menelik II's late 19th century conquest of the southern territories of present day Ethiopia: *Agar maqnat,* and *dar agar*.[241] Thus:

> *Agar maqnat* refers to colonisation, cultivation, (and Christianisation) of land defined as "empty", waiting to be made use of. *Dar agar* (frontiers) pertains to the end of horizon of the expansion, the boundary of colonisation. Accordingly, the term "Galla agar" (Galla country) came to be identified with a fictitious empty land. With that came the idea of the idle, lazy Gallas" not working on the land they possess, a land wasted for lack of hard-working people, a land occupied by "infidels"…The concept of empty land was not meant to be understood literally. It was a metaphor for land to be occupied by force, if necessary, and rights on it transfereed to the new occupying authorities. If the land was to be occupied by force and the "natives: dispossessed of their previous rights, then the land became "empty"; it became ownersless ex post facto.

In some sense then, the justificatory logic of Menelik's conquest is very much analogous to European colonial discourses: the civilising mission (Christianisation) and the *terra nullius* narrative. Perhaps, in contrast to the European colonial adventure, there was further legitimising ground to Menelik's territorial expansion southward: 'reunification'. According to this argument, the expansion was merely a reunification of Ethiopian territories 'through the reconquest of the former tributaries of the Christian Kingdom, cut off from the main Christian entity in the aftermath of the Oromo expansion'[242] of the 16th and 17th centuries. The Oromo expansion as far north as Gondar (northern Abyssinia) during this period is historically accurate, yet even by

[241] Tibebu, above n 60, 40.
[242] Ibid 41.(footnote omitted).

that account, the 'reunification' thesis seems farfetched, for a significant portion of the territories '(re)conquered' in the late 19th century had never been part of Abyssinia in the first place.[243] The effects of the southward expansion of Abyssinia in late 19th century were also qualitatively different to that of the northward expansion of the Oromos in earlier centuries. In this regard, Tibebu points out that while ' the Oromos had occupied *land*, for they were in search of grazing and settlement space; the Amhara [under Menelik II] "occupied" people, for their aim was tribute exaction, to enhance the life of the leisure class.'[244] Unlike the more egalitarian culture of the Oromos that easily assimilated non-Oromos, defeated or otherwise, 'the Amhara conquerors imposed a rigid class system of ruler and ruled'.[245] Perhaps the most conspicuous manifestation of this 'rigid class system of ruler and ruled' is the nature of land tenure it engendered.

Prior to the conquest, in both northern and southern Ethiopia, some variations notwithstanding, land tenure had had a communal character, with peasants enjoying usufructuary rights over the land.[246] The conquest, however, resulted in dual land tenure system in the country: maintenance of the *'rest'* system in the north (former Abyssinia) and establishment of the '*gebbar*' system in much of the newly conquered regions of the south. *Rest* is a lineage system of land ownership which entitles a peasant to communal land rights over a plot of land as long as he could trace his descent,[247] whereas the '*gebbar*' (servant, tax or tribute payer) system in much of the south required peasants to rent back *their own* land or work as labourers for their new landlords from Abyssinia. To be sure, the peasantry in the *rest* system of the north also had to pay tribute

[243] Ibid.
[244] Ibid 39.
[245] Ibid.
[246] Bahru Zewde, *A History of Modern Ethiopia, 1855-1974* (James Currey, Ohio University Press; and Addis Ababa University Press, 2nd ed, 2001) 89–90.
[247] Ibid 14.

such as tithe (*asrat*) and *gult*[248]—after all, as Crummey notes, '[t]he Abyssinian state rested firmly on the peasantry and on the produce of the land'[249]—and to that extent, the whole peasantry could be regarded as *gebbar*. Yet there was a marked difference between the peasantry in the north (*rest* holders) and those of the south that defies putting both under a common banner of *gebbar*. Tareke aptly captures this difference in the following words.

> Whereas the northern farmer was a tribute payer without legal ties to the soil or lord, his southern counterpart had been divorced largely from the means of substance, his condition scarcely better than that of the medieval European serf. State and landlord dominion in the south was ensured by their ability to intervene directly in the conditions of production through the control of land and labour. Tenancy arrangements were not regulated by law, and cultivators were at the mercy of capricious landlords. Contractual arrangements were causally terminated and without compensation.[250]

This system which reduced 'a sturdy and self-sufficient peasantry' to 'an immiserated tenantry'[251] remained intact during the long reign of Emperor Haile Sellasie I (1916- 1974). The attempts at land reform since the 1920s were repeatedly thwarted by members of parliament, the majority of whom were landlords themselves. The laws introduced in the 1930s and early 1940s, for example, were orientated more towards enhancing the state's extractive power than easing the burden of the peasants. Perhaps a noteworthy piece of progressive legislation was the 1944 Land Proclamation.[252] The proclamation converted multiple dues into a fixed tax (*qurt giber*) per *gasha* (40 hectares) of land, and accordingly provided three different tax rates depending on level of

[248] *Gult* refers to a non-hereditary right to collect tribute, bestowed on members of the nobility and clergy by the king; Ibid 276.
[249] Donald Crummey, 'Abyssinian Feudalism' (1980) 89 *Past & Present* 115, 122; typical tributes that peasants had to pay included *asrat* (tithe) and *gult (*a tributary right which a class of warrior lords had asserted to appropriate anywhere from a third to half a peasant's output).
[250] Tareke, above n 62, 78.
[251] Ibid 80.
[252] *Land Tax Proclamation 70/1944, Negarit Gazeta, Year 4, Number 2,* ('*Land Tax Proclamation 70/1944*').

fertility of the land.[253] The high tax rate that was largely attributed to the conversion of other forms of tributes such as tithe (*asrat*), however, doubled the tax obligations of peasants. Also, although the law repealed 'any other taxes, services and fees heretofore payable',[254] landlords and local governors continued extracting services from the tenants. Curiously, the proclamation did not impose same tax rate for all parts of the country. The Northern provinces were allowed to continue with their old system as their land was not yet measured in *gashas*—another manifestation of the endurance of dual land tenure system in the country even in the face of reformist gestures.

Other developments in the decades to follow such as the emergence of absentee landlordism, acceleration of privatisation of land, and the focus on commercialisation of agriculture further exacerbated the precarious position of the peasants mainly in the south. In the 1940s and 50s, the aristocracy (the social base of the monarchical state) that owned immense tracts of land, mainly in the southern regions, began to move from the countryside to cities, leasing their land to the peasantry. The leases mainly took the form of sharecropping.[255] The fact that such arrangements were, as flagged earlier, often subject to unilateral modifications by the landlords meant that not only did the tenants have to relinquish much of their produce but also had to bear the burden of paying land tax, with the failure to do so entailing eviction from their holdings. The acceleration of the privatisation of land mainly in the south since 1940s also went against the peasantry. As Zewude notes, this was effected through three interrelated processes: settlers from the north who had been given tributary

[253] Thus, for example, for such provinces as (Shoa, Arusi, Harar and Wollo) the amount set for fertile land was 35 Birr in lieu of tithe and 15 Birr in lieu of tax, for semi fertile land 30 Birr in lieu of tithe and 10 Birr in lieu of tax, and for poor land 10 Birr in lieu of tithe and 5 Birr in lieu of tax.

[254] *Land Tax Proclamation 70/1944*,art 4.

[255] In theory, share cropping entailed that the tenants should give between one-thirds and a half of their produce to the land lords, but in fact the tenants had to relinquish about three-fourth of their produce; Tareke, above n 62, 77–78.

rights over southern peasants became owners through purchases from distressed peasants or forceful seizure, the government granted extensive land to patriots (soldiers) and civil servants from its reserve of what was claimed to be government land, and at the same time, the government converted the land it gave to its employees in lieu of salary into freehold.[256] Although to a limited extent the government subsequently extended the grant to the landless and unemployed citizens, the major beneficiaries were 'those who served it in war and in peace'—of 'the nearly 5 million hectares allocated after 1941, only a few thousands reached the landless or the unemployed'.[257] The acceleration of privatisation of land led to the concentration of land in the hands of the few, and the concomitant rise of tenancy[258] in the decades to follow.

The development strategy of the monarchical government had also, for a long period, either neglected the agricultural sector, or prioritised the interest of its ruling class over the peasantry. For example, in 1967 only two percent of governmental expenditure was allocated to the sector.[259] When the government began paying attention to the sector in the third of its Five-Year plans, in 1968–1973, it prioritised *commercial* agriculture rather than peasant agriculture. Prior to this time, except for some of the absentee landlords who began 'converting parts of their estate into large-scale mechanised farms',[260] there had not been any serious engagement with large-scale commercial farming in the country. The World Bank, in its 1967 report (one of its early reports on Ethiopian economy), had lamented the 'very small number' of local landowners engaged in the commercial production of food grain crop, and recommended that '[a] greater interest in commercial farming by landowners would provide a much

[256] Zewde, above n 246, 191.
[257] Ibid.
[258] Ibid 192.
[259] The World Bank, 'The Economy of Ethiopia: Volume II, Agriculture' (Report No. AF-60a, 1967) 6. The
[260] Tareke, above n 62, 78.

needed impetus for agricultural development.'[261] The government seems to have heeded this advice in designing its agricultural development that prioritised commercial farming. Of course, this could make both economic and political sense to the government: apart from potentially higher revenue gains, in the face of increasing dissatisfaction from the peasantry, emphasis on commercial agriculture could sustain (if not broaden) the support from the landlords (the ruling class) which stood to gain from the scheme.

Thus, from the late 1960s until the end of the monarchical government in 1974, there was extensive commercialisation and mechanisation of farming. According to Zewude, there were three major agents behind this process: the state, private individuals (mainly landlords), and foreign investors (such as those from the Netherlands, Britain, Italy and Israel) who engaged in the production of cotton and sugar.[262] The expansion of commercial agriculture directly threatened the already precarious existence of the peasants in the south, often leading to their eviction; peasants became either wage-labourers on the commercial farms or migrated to the urban areas, only to join the ranks of the unemployed.[263] Similarly, the pastoralists and agro-pastoralists, whose grazing lands were taken over by commercial farms, were pushed to drier and less hospitable areas.[264] As a result not only did their stocks diminish rapidly, but some of them, such as the Gile Oromos, 'disintegrated and disappeared as a community.[265] Even worse, in 'the famine which followed the Ethiopian drought of 1972-74, an estimated 200,000 peasants and pastoralists lost their lives while the commercial farmers exported agricultural products.'[266] Yet, as

[261] The World Bank, above n 259, 6.
[262] Other origins of foreign capital during the period included: India, Japan, America, France, Greece, and Switzerland; Tibebu, above n 60, 163.
[263] Mekuria Bulcha, *Flight and Integration: Causes of Mass Exodus from Ethiopia and Problems of Integration in the Sudan* (Nordic Africa Institute, 1988) 47.
[264] Ibid.
[265] Tibebu, above n 60, 154..
[266] Bulcha, above n 263, 47.

Gebru notes, '[l]arge scale farming did not make any significant headway either in fundamentally altering the feudal agrarian structure or in increasing the sector's contribution to the economy since it marginalized peasants from the development process.'[267] To the contrary, the prevalence of famine and inequitable land distribution triggered the 1974 revolution of Ethiopia that ended monarchical government in Ethiopia.

The upshot is, irrespective of whether Emperor Menelik II's conquest of southern territories in the late 19th century amounted to colonisation *per se*, what is less controversial—and more relevant to this thesis—is that the practice of land tenure it instituted in those territories, was akin to colonial practices elsewhere in Africa of the time. As in much of colonial Africa, the peasants and pastoralists in the south had been dispossessed of their land which was then distributed mainly to new 'landlords' from the north (Abyssinia).[268] This practice was largely maintained during the long reign of Emperor Haile Selassie I (1931–74). Perhaps unlike colonial practice elsewhere in Africa, there were few attempts to use laws to legitimise them, but whenever laws were employed, they left no doubt they served the interest of the state (and its ruling classes of landlords and government servants) to the detriment of the peasants and pastoralists. The fact that the successive monarchies either neglected the agricultural sector dominated by the peasants, or preferred commercial to peasant farming, made the conditions of the peasantry even more precarious. If it took decolonisation to restore land back to African governments (and/or people), in Ethiopia, it took the 1974 revolution, which was largely triggered by popular uprising under the slogan 'land to the tillers!' that ended the monarchical regime and to some extent restored land to the tillers, if only usufructuary rights. As I will show in sections 3 and 4, the fact that subsequent

[267] Mersha, above n 63, 215.
[268] See Tareke, above n 62, 78.

regimes stuck to this partial response to the demand of 'land to the tillers' in part explains the vulnerability of local land users in contemporary 'land grabs' in the country.

2.3. Post-Colonial Trends

In section 3.1, I have shown how colonial expansion in Africa, which drew its justificatory power from the civilising mission and the *terra nullius* narratives, vested ownership of the land with colonial states, and eventually their settlers and companies, often leaving customary land holders as mere tenants or usufructuaries. I also explored how the concept of colonial custom—African custom as understood and/or (mis)interpreted by colonial powers—weakened customary land rights, which were interpreted as mere usufruct or applying only to farm (as opposed to uncultivated) lands, and simultaneously bolstered the power of local chiefs. One manifestation of the latter was entitlement to tax from the peasantry, which in turn entailed that the latter had to engage more in the production of cash crops. Agriculture in colonial Africa, be it plantation agriculture (often by companies and settlers) or small-scale farming by the peasantry, encouraged production of primary commodities of interest in colonial powers' home states, with a tendency towards specialisation on production of a single commodity (monoculture).

Thus, upon political independence, as most former colonies elsewhere, African countries continued specialising in the production of primary commodities (often agricultural) and relying on imports for manufactured goods. The effects of this specialisation in large-scale commercial farming were manifold. As Carmen Gonzalez notes: firstly, it diverted prime crop land 'from food production to cash crop production and encouraged reliance on food imports to satisfy domestic nutritional requirements'; secondly, given the large amounts of chemical pesticides and fertilisers utilised by monocultures, it degraded the

environment; thirdly, it subjected export earnings to the vagaries of the weather, volatility of world market commodity prices, and declining terms of trade; and finally, particularly in countries that practiced plantation agriculture, it concentrated land in the hands of rural elites and/or foreign and domestic agro-export enterprises, and thus relegated small farmers to marginal (ecologically fragile) lands.[269] As I will argue in subsequent chapters, the current 'land grabs' in Africa continue in this vein, with the associated adverse effects to the host people, in terms of local food insecurity, environmental costs, (unstable) revenue generation and land concentration, in a manner that sidelines local (indigenous) peoples—the remedying of which are also to a significant extent curtailed by (international) law. As a precursor to this account, though, in the following section, I will briefly explore how the newly independent African countries responded to the unequitable land distributions inherited from the colonial era and its implications for the current 'land grabs'.

2.3.1. Decolonisation and Land Reform in Africa: Between 'Affirmative' and 'Transformative' Approaches

Post-independence African governments inherited inequitable and unjust land distributions instituted during the colonial era. Addressing 'the land question'[270] thus stood as one of the daunting tasks for these governments. Each government followed its own path to land reforms, but a certain degree of generalisation is also possible. Scholars of African land laws often place these reforms into two different categories, depending on whether they address the

[269] Carmen G Gonzalez, 'Markets, Monocultures, and Malnutrition: Agricultural Trade Policy through an Environmental Justice Lens' (2006) 14 *Michigan State Journal of International Law* 345, 538.

[270] See Sam Moyo, *African Land Questions, Agrarian Transitions and the State: Contradictions of Neo-Liberal Land Reforms* (African Books Collective, 2008) 4; noting that 'variegated struggles at varying scales and localities over escalating unequal access to and control of land represent a real land question in both rural and urban Africa'. Tenurial reform concerns the terms on which the operational holding is held and worked, whereas redistributive reform is a more radical approach that involves redistribution of land and imposing ceilings on the size of holdings.

fundamental distributive questions or operate as more of a continuation of the colonial legacy. For example, Patrick McAuslan employs a distinction between 'traditional' vs 'transformative' change. The former refers to the type of reform that sustains ('affirms') colonial land relations and the latter to a reform that attends to the (unjust) distributive aspects of land relations.[271] Similarly, other scholars such as Ambreena Manji and Sam Moyo deploy the idea of 'tenurial' vs 'redistributive' land reform frameworks, and contend that despite some efforts towards redistributive reforms in the early period of independence, most African governments embarked on tenurial reforms whose goal is not necessarily strengthening local land rights.[272] In the book that draws on his extensive engagement with land reforms particularly in Eastern and South Eastern Africa, McAuslan concludes that land law reforms in the region have, instead of addressing the long-running injustices in relation to property (and hence being transformative), followed a traditional approach:

> that adopts and continues the colonial approach of vesting land in the state, maintains a dual system of land tenure and at the same time adopts an overall policy perspective of moving towards a land market based on registered title to land which…makes little or no effort to address the inequalities and injustices of the land tenure system inherited at independence.[273]

In fact, in developing his 'transformative' land reform framework, McAuslan in turn draws on Van der Walt's work in the context of South Africa. Van der Walt argues that transformative land reform was not achieved because of the property regime (including the current system of property holdings and the rules and practices that entrench and protect them). He further contends that the property regime:

> tends to insulate itself against change (including social and political transformation) through the security- and stability-seeking tendency of tradition and legal culture, including the deep assumptions about security

[271] McAuslan, above n 58.
[272] See generally Manji, *The Politics of Land Reform in Africa*, above n 58; Moyo, above n 270.
[273] McAuslan, above n 58, 14–5.

> and stability embedded in the rights paradigm. The rights paradigm tends to stabilise the current distribution of property holdings by securing extant property holdings on the assumption that they are lawfully acquired, socially important and politically and morally legitimate. This function of the rights paradigm tends to resist or minimise change, including change brought about by morally, politically and legally legitimate and authorised reform or transformation efforts.'[274]

Of course, the extent to which the rights regime hinders transformative land reform may well depend on the political ideology of a given government; for example, even after taking radical land reforms such as nationalisation without compensation, governments could still stop short of redistributing land. It is worth noting though that, whether due to the constraints imposed by the rights regime or otherwise, many post-independence African governments continued the application of colonial-era legislations. The fact that single-party regimes and military dictatorships of the decades after independence 'strengthened the extensive role of the state in control over land and the national economy', meant that '[d]ecolonization rarely resulted in stronger land rights for rural people.'[275]

It is worth noting, though, that the logic for an extensive role of the state in control over land was not the same in the colonial and post-colonial eras. If the colonial logic was rea as *exploitation,* the post-colonial logic was touted as *development*. In the face of the mushrooming of states (often with artificial boundaries) the decolonisation process engendered, and the tensions among the competing interests of the groups within them, the post-colonial states found the notion of development a force for national cohesion, and indeed, a source of legitimacy. As Partha Chatterjee observes, for these states, development represented 'a single will and conciseness—the will of the nation—pursuing a task that was both universal and rational: the well-being of the people as a

[274] Andries Johannes van der Walt, *Property in the Margins* (Hart Publishing, 2009) viii.
[275] Cotula, above n 43, 22.

whole.'[276] This is not to suggest that the newly independent African countries followed the same development paths. For example, 'Ghana experienced "African socialism" first and then capitalism. Mali went through socialism and then a military dictatorship. Tanzania experienced "African socialism", the ideal of self-reliant farming, and a policy of voluntary first, and then forced villagization (*ujamaa*).'[277] Mozambique, on the other hand, was ruled by a Marxist-Leninist regime and ravaged by a long civil war.[278] But as Cotula notes, despite the different political orientations, extensive government control of land and the economy was a recurring feature in the decades after independence. Thus,

> In socialist countries, the collectivization of the means of production was justified through socialist ideology. Legislation nationalized all land, for example in Mozambique. Colonial plantations became state or collective farms, and other lands were subject to villagization and cooperative experiences. On the other hand, the African countries that adopted a capitalist model of development justified the central role of the state with then fashionable economic theories on the 'big push'—whereby large-scale, state-led investment was needed to promote economic development. Here too, much land was owned by the government—or else the government exercised control over land in more indirect ways. [279]

Thus, despite the various development paths they followed, many post-independence governments of Africa considered the 'modernisation' of their agricultural sector as a central factor for their national economic growth. Broadly, this involved establishing (and maintaining already existing) large-scale farms, providing subsidised credit, machinery, and land.[280] One of the largest examples of such mechanised farming is sorghum and sesame

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[276] Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton University Press, 1993) 206.
[277] Cotula, above n 43, 22–3.
[278] Ibid 23.
[279] Ibid.
[280] Anthony M O'Connor, *The Geography of Tropical African Development : A Study of Spatial Patterns of Economic Change since Independence* (Pergamon Press, 1978) 54; Klaus Deininger and Derek Byerlee, 'The Rise of Large Farms in Land Abundant Countries: Do They Have a Future?' (2012) 40(4) *World Development* 701, 704.

production in Sudan, on 5.5 million hectares of land (with estimates of the area informally encroached upon being up to 11 million ha).[281] Although the idea had 'originated in attempts by financiers from the Gulf following the 1970s oil price spike, to transform the country into a regional breadbasket',[282] it attracted many civil servants and local entrepreneurs who acquired hundreds of thousands of hectares of farms within the scheme.[283] Despite the very favourable access to land and subsidised credit for machinery, partly due to tenure insecurity relating to serious conflict encroaching on traditional users' land rights, investment was low and most mechanised farms relied on low-level technology.[284] In Tanzania, mechanised rain-fed wheat farming on some 40,000 hectares of land that had previously been prime grazing grounds for pastoralists was found to be unprofitable after a $45 million investment.[285] Similarly, Nigeria's large-scale mechanised irrigated wheat schemes of the 1970s and 1980s have largely been abandoned. [286] Thus, efforts to introduce large-scale mechanised farms in most of African countries have generally been unsuccessful, with yields of only 0.5 tonne per hectare on average, and have been stagnant or declining relative to, for example, 4 tonne per hectare produced in a comparable agro-ecological environment in Australia.[287] This, coupled with little engagement from private investors and a lack of adequate support to smallholder farmers, meant that overall, agricultural productivity remained poor in 1960s and 1970s—and declined even further in the decades to follow.[288]

[281] Deininger and Byerlee, above n 280, 704.
[282] Ibid.
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Ibid 704–5; O'Connor, above n 280, 54–5.
[288] Martin and Palat, above n 57, 134; Deininger and Byerlee, above n 280, 704–5.

Post-independence African governments sustained colonial land laws and practices which left land ownership in the hands of governments.[289] Governments usually tinkered with tenurial reforms which essentially left a large proportion of land under the direct control of the state, which in turn enabled them to initiate large-scale mechanised farming, albeit unsuccessfully. Since 1990s, there has been considerable convergence in tenurial land reforms in Africa that has important ramifications for the current 'land grabs' in the continent. I will explore this in section 4, but before that, let us consider the story of land relations and agriculture in Ethiopia which is both similar to and different from the post-colonial experiences of other African countries.

2.3.2. The 1974 Revolution of Ethiopia and its Response to the Land Question

The story of land tenure in Ethiopia is, in some senses, similar to post-colonial practice in most of Africa. If decolonisation of other African states marked the end of formal colonial rule, popular defiance in Ethiopia that culminated in the 1974 revolution—which 'is regarded as the first "social revolution" in Africa'[290]—marked the end of an ancient monarchy in Ethiopia with the overthrow of Emperor Haile Sellassie I. One major effect of the revolution was that, it 'dispossessed an entrenched landed aristocracy, and distributed its lands to the tillers.'[291] This was only natural, for, unlike independence struggles elsewhere in Africa which had as their goal a broader claim to self-determination, inequitable distribution of resources (land) was the major trigger to this revolution: after all, 'land to the tiller!' was the principal slogan of the revolution. The revolution was ignited by students who were later on joined by a military group commonly referred to as the *Derg* (roughly translates as

[289] Cotula, above n 43, 20–7; see also generally Ambreena Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya' (2012) 50(03) *The Journal of Modern African Studies* 467.
[290] Tareke, above n 62, xiii.
[291] Ibid.

committee), that eventually assumed power. The new government had, through one of its early laws, nationalised rural land. The Preamble of the Proclamation to provide for the Public Ownership of Rural Land tellingly provides:

> WHEREAS, in countries like Ethiopia where the economy is agricultural a person's right, honour, status and standard of living is determined by his relation to the land; whereas… several thousand gashas [hectares] of land have been ***grabbed*** from the masses by an insignificant number of feudal lords and their families as a result of which the Ethiopian masses have been forced to live under conditions of serfdom…;[292]

Thus, the proclamation abolished all forms of private land ownership and declared that 'all rural land shall be the collective property of the Ethiopian people'.[293] It also prohibited the sale, lease or mortgage of rural land, entitling peasants only to usufructuary rights over their holdings, whose ceiling was set at 10 hectares.[294] The Proclamation's response to the revolution's slogan, while ending landlord-tenant relations, did not go as far as transferring full ownership of 'land to the tiller'. This has left a large portion of rural land, particularly in the southern part of the country, under direct state control, and with that, the leverage to control rural life. In this regard, Zewde, while acknowledging the fact that the proclamation had ended landlordism to the benefit of peasants and the landless as its 'major historical significance', observes that:

> But when it came to improving the lot of the peasant, the proclamation could hardly be judged as to have been an unqualified success. Not only did it fall short of making him the absolute master of his plot, but it was also accompanied by a series of unpopular measures that sought to regiment rural life. These measures ranged from state control of agricultural marketing—with the peasant required to supply produce at fixed government price—to forcible resettlement, collectivisation and villagisation or the relocation of peasant neighbourhoods to new sites selected by government cadres.[295]

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[292] Preamble to the *Public Ownership of Rural Lands Proclamation No. 31/1975* ('*Public Ownership of Rural Lands Proclamation 1975*') (emphasis added).
[293] Ibid art 3.
[294] Ibid art 3.
[295] Zewde, above n 246, 242–3.

Ironically, as we shall see in Chapters 3 and 4, it is widely claimed that the current government of Ethiopia, which by and large maintained public ownership of land, is reportedly using similar forcible 'resettlement' and 'villagisation' schemes to relocate indigenous people, particularly in the south-western part of the country, to make way for large-scale investors under the guise of social and economic provisions to the people.

The nationalisation of land did not spare large-scale commercial farming either. As noted before, large-scale commercial farming was booming in the last decade of the monarchy, but the rural land proclamation nationalised these farms (without compensation) and entrusted them to the new government.[296] Indeed, soon after, the government also nationalised all urban lands and confiscated extra houses, thereby putting a ceiling on private capital.[297] With the monopolisation of these economic resources, the military government had effectively transformed itself into a regime of Leviathan proportions. As the door to private (foreign) investment was essentially closed, there was no notable transnational land acquisition in the country until the end of the regime 17 years later.

In short, it could be argued that despite the fact that Ethiopia's land reform of 1974 was touted as one of the most radical in Africa, in retrospect, its major success remains dismantling the landed aristocracy. But as with most post-colonial reforms in elsewhere in Africa, it did not empower the peasantry as the state remained the sole 'owner' of land. Ironically, in the same way as the popular uprisings against, among other things, inequitable land distribution under the monarchical government led to its demise; the *Derg*'s rural policy

[296] In retrospect, most of these farms were found to be inefficient.
[297] There was a ceiling of 500,000; 300, 000; and 200, 000 Birr capital for private investments in industry, wholesale trade and retail trade respectively (by the time, 1 USD was equal to 2.07 Ethiopian Birr); Teferra Haile-Selassie, *The Ethiopian Revolution, 1974-1991: From a Monarchical Autocracy to a Military Oligarchy* (Routledge, 1997) 285..

turned the peasantry against it, which significantly contributed to its downfall in 1991. As I shall show in the next section, despite removing some of the rural policies of the *Derg*, the current government of Ethiopia which has been in power since 1991 has maintained a more or less similar land policy, which in effect means that local land users in the country are facing the current 'land grabbing' from a very weak legal position.

2.4. Convergence towards Market –Oriented Tenurial Reforms in Africa since 1990s

2.4.1. Context

Agriculture, by and large, was central to the economic growth agendas of the post-independence governments of Africa. As such, they had either directly engaged or indirectly supported large-scale farming to move towards import substitution industrialisation. However, with the introduction of the Structural Adjustment Programs (SAP) of the IMF and World Bank in the late 1980s,[298] 'agriculture was largely abandoned: the state institutions that were directing its development were dismantled, and the support given to farmers removed.' [299] Indeed, in retrospect, the fact that SAPs did not meet their claimed objective in Africa at large is widely acknowledged. For example, William Easterly argues that, '[i]f the original objective was "adjustment with growth", there is not much evidence that structural adjustment lending generated either adjustment or growth.'[300] To the contrary, Sundhya Pahuja argues that, through its

[298] Structural Adjustment Programs (SAPs) could be understood as 'the process whereby the economies of the third world are being reshaped to be more market oriented' through IMF and World Bank loans which are based on conditions (conditionality) pre-determined by these institutions; see Millward, above n 51.

[299] De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 250.

[300] William Easterly, 'What Did Structural Adjustment Adjust?: The Association of Policies and Growth with Repeated IMF and World Bank Adjustment Loans' (2005) 76(1) *Journal of development economics* 1, 22. See also Gareth Austin, 'African Economic Development and Colonial Legacies' (2010) 1 *International Development Policy* 11; noting that in addition to

discursive practices of conditionality, the IMF has been playing a (re)inscriptive or translational role in the relationship between North and South and that the 'practices used to manage the fears [relations] both belie their colonial roots and replicate colonial relationships.'[301] Thus, the imposition of SAPs that weakened states along with declining flows of aid 'subsequently propelled many African governments and their political elites to seek foreign alliances and investments in agriculture.'[302] This was to be effected through, among other things, land law reforms. Thus, since early 1990s, African governments have embarked on land law reforms; as Manji notes, 'one country after another [has] succumbed[ed] to the process of review of land laws and enactment of new legislations'.[303] Despite the lack of uniform pattern and sequence of land reform across Africa, the main thrust of the changes is remarkably similar everywhere: 'to liberalize land tenure to enable land to be held individually rather than communally. The aim is to provide for and encourage foreign investment in land.'[304]

These tenurial reforms happened in the context of a global neo-liberalism centred on, among others, property rights.[305] As such, these reforms were often initiated and/or supported by international financial institutions such as the World Bank and bilateral donors such as the UK Department for International Development (DfID), which were influenced by Hernando De Soto's work which presents the lack of *formalised property rights* as a reason for the failure of

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Botswana which had begun recording positive economic growth even before the introduction of SAP, Ghana and Uganda are the only two successful African counties under the Program.

[301] See Sundhya Pahuja, 'Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide' (2000) 13(4) *Leiden Journal of International Law* 749, 811.

[302] Martin and Palat, above n 57, 135.

[303] See Manji, *The Politics of Land Reform in Africa*, above n 58, 43;see also generally McAuslan, above n 58.

[304] Manji, *The Politics of Land Reform in Africa*, above n 58, 45–6.

[305] Ibid 1–50; see also generally Francis Fukuyama, *The End of History and the Last Man* (New York : Free Press ; Toronto : Maxwell Macmillan Canada ; New York : Maxwell Macmillan International, 1992).

non-western countries to develop.[306] From this perspective, rural land without formal title is regarded simply as a '*dead asset*' which, if titled and registered, could be revived and be used as collateral to borrow money from financial institution.[307] Thus, the World Bank not only advocated for full private rights to land (and where 'political or other considerations may preclude the award of full private property rights, credible commitment to 'lease contracts, giving users secure, transferable, long-term lease rights[308]), but also at times made loans conditional on pro-market (investment) land law reforms.[309] However, as Manji further contends, this 'legal-centric' (tenure reform) approach to African land reform has brought with it 'collateral damage'—neglect of difficult distributional choices and a failure to question what constitutes law, by focusing only on the law of the state, administered by a single set of state institutions and considering informal property rights as extralegal (social contracts) on property.[310]

2.4.2. Tenurial Reform, Agricultural Development Strategy and the Ostensible Role of the Private (Foreign) Investment in Ethiopia

As noted earlier, during seventeen years of 'socialist' government in Ethiopia (1974-1991), land was publicly owned and all foreign and domestic large-scale private farms were nationalised. Although a few economic sectors were open to

[306] See Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2000).
[307] Manji, *The Politics of Land Reform in Africa*, above n 58, 17; 127.
[308] Klaus W Deininger, *Land Policies for Growth and Poverty Reduction* (The World Bank and Oxford University Press, 2003) xxviii.
[309] For example in the case of Tanzania, the Bank made a forthcoming loan due to be released to Tanzania for poverty reduction conditional on the redrafting of a provision in the Land Act 1999 which granted courts power to reopen a mortgage if the lender had imposed terms that were disadvantageous to the borrower in comparison with the terms imposed on other borrowers if this had occurred mainly or only because of the sex of the borrower. For more on this, see Ambreena Manji, 'Eliminating poverty?"Financial Inclusion", Access to Land, and Gender Equality in International Development' (2010) 73(6) *The Modern Law Review* 985, 997–8.
[310] Manji, *The Politics of Land Reform in Africa*, above n 58, 19–20.

the private sector, there was a ceiling on both domestic and foreign capital.[311] That essentially closed-door policy to private investment significantly changed in 1991 when the regime was overthrown by the Ethiopian People's Revolutionary Democratic Front (EPRDF)[312] which has been in power since then. Although EPRDF's ideological orientation was initially socialist too, it succumbed to the post-1991 global order, one of triumphant neoliberalism,[313] through which it was born as a government. Thus, like other African governments of the time, the government embarked on the Structural Adjustment Program (SAP) of the IMF and World Bank, most notably during the transitional period (1991-94). Its measures included: currency devaluation, tariff reduction (liberalisation), privatisation of public enterprises, and liberalisation of the investment regime.[314] In line with the pro-market orientation of the government, the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution[315] recognises the right to ownership of private property (defined as 'tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of a person')[316] including the right to: acquire, use and dispose of such property by sale or bequest or other means of transfer.[317] The Constitution also allows the government to 'expropriate private

[311] See Haile-Selassie, above n 297, 285.
[312] The EPRDF is an alliance of four ethnic based parties: the Tigrian People Liberation Front (TPLF); the Oromo People Democratic Organisation (OPDO); the Amhara National Democratic Movement (ANDM); and the Southern Ethiopian Peoples' Democratic Front (SEPDF). TPLF is the senior Front that played instrumental role in the formation of the rest of the parties (and hence to date it is widely claimed that it is the one having decisive political power compared to the junior parties).
[313] See generally Fukuyama, above n 305. In fact, In fact, even in the absence of the global developments of the time such as the collapse of the Soviet Union and removal of the competing ideology of communism, it is not self-evident if the new government would take a different direction given the support it had been receiving from the US to topple the socialist government (D*erg*) in the context of the Cold War.
[314] See generally Geda, above n 52.
[315] *The FDRE Constitution*. The Constitution was promulgated in 1995 after about four years of transitional period; see *Transitional Period Charter of Ethiopia No. 1/ 1991, Negarit Gazeta 5th Year, No., 1* ('*The Transitional Period Charter*').
[316] *The FDRE Constitution*, art 40(1) and (2).
[317] Ibid art 40(1).

property for public purposes subject to payment in advance of compensation commensurate to the value of the property.'[318]

Curiously, despite its free-market ethos and the SAP measures it undertook, including privatisation of most of the public enterprises, the EPRDF government, like its predecessor, has maintained state ownership of land.[319] The FDRE Constitution declares that: 'The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.'[320] The retention of state ownership of land was criticised by free-market advocates; and indeed, it was one of the two most controversial issues on which the drafting Commission had to submit separate majority and minority opinions to the Constituent Assembly.[321] While retaining ownership right for the state, the Constitution also grants Ethiopian peasants and pastoralists the right to obtain land without payment for grazing and cultivation, and guarantees protection against dispossession.[322] Although the government had not gone as far as recognising private property right in land, it embarked on titling programs that aimed at ensuring tenure security.[323] Yet, by excluding land from the realm of private property and simultaneously maintaining private property as the only compensable property right in the event of expropriation, the Constitution does not recognise peasants' and

[318] Ibid art 40(8).
[319] Some key service sectors such as telecommunication have also remained wholly state owned while financial services (Banking and Insurance) are open to only to the government and domestic investors.
[320] *The FDRE Constitution*, art 40(3).
[321] See John Markakis, *Ethiopia: The Last Two Frontiers* (Boydell & Brewer Ltd, 2011) 238; the other far more controversial provision being Article 39 of the Constitution which recognises the right of 'Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession'.
[322] *The FDRE Constitution*, art 40(4) and (5); the Constitution leaves the details of such protection to subsidiary laws.
[323] Land titling was already completed in some of the regional states.

pastoralists' use right *per se* as compensable right—and this has significant ramifications in the context of the current race for farmland. In an unprecedented move in the constitutional history of the country, the Constitution also mandates the government to 'ensure the right of private investors to the use of land on the basis of payment arrangements established by law'[324]—already hinting at the significance the regime attaches to private investors (investment).

It is, however, important to note that, while vesting the right to ownership of land in the State and in the peoples of Ethiopia,[325] the Constitution also recognises the government as the sole *custodian* of this right. Thus, Article 89 of the Constitution (dealing with the economic objectives of the country) in part provides that, the '[g]overnment has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their *common benefit* and *development*.'[326] With this, the government has provided itself with a crucial legal edifice and the legitimacy to act as an agent of development, or, as Chatterjee observes in a different context, 'the well-being of the people as a whole.'[327] How this constitutional mandate of deploying land for 'common benefit and development' has been envisioned and implemented by the government in the context of farmland investment requires us to briefly explore the agricultural sector policy (strategies) of the government. Apart from providing context to the textual analysis of relevant laws in later chapters, this account also challenges the tendency in some of the recent global 'land grabs' to treat host governments as passive victims. I argue that although the 2008 food

[324] *The FDRE Constitution*, art 40 (6); this right is of course with a caveat: 'without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land.
[325] See Ibid, art 40(3); stating: 'The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.'
[326] Ibid, art 89(5).
[327] See Chatterjee, above n 276, 206.

crisis has triggered the recent 'land grabs' in Ethiopia (as elsewhere in Africa), the Ethiopian government has been actively pursuing (agricultural) development policy that provided a propitious opportunity for these 'land grabs'.

In 1993, the government of Ethiopia adopted Agricultural Development Led Industrialization (ADLI) strategy as an overarching economic policy that guides the country's economic development.[328] Agriculture being the mainstay of the Ethiopian economy (contributing about 45% to the country's GDP and employing 80% of the population), the policy envisages that agricultural development can fuel development in other sectors and thereby lead to industrialisation. In particular, the strategy document calls for: (i) commercialisation of smallholder agriculture through product diversification; (ii) a shift to higher-valued crops; (iii) promotion of niche high-value export crops; (iv) support for the development of large-scale commercial agriculture; (v) effective integration of farmers with domestic and external markets; and (vi) tailoring interventions to address the specific needs of the country's varied agro-ecological zones.[329]

This strategy thus foresaw the commercialisation of Ethiopian agriculture on two fronts: commercialisation of hitherto predominantly subsistence smallholder agriculture and the development of large-scale commercial agriculture. While the commercialisation of smallholder agriculture was to be carried out by the small hold farmers themselves, the development of large-scale commercial agriculture would ostensibly be by the private sector—as, in line with the SAP, the government had already privatised most of large-scale state farms under the previous regime (and it did not intend to establish new

[328] See United Nation Economic and Social Council, above n 64.
[329] Federal Democratic Republic of Ethiopia, Environmental Protection Authority, 'United Nations Conference on Sustainable Development (Rio+20), National Assessment Report of Ethiopia' (2012) <https://sustainabledevelopment.un.org/content/documents/973ethiopia.pdf>.

ones). Perhaps former Deputy Minister of Economic Development and Cooperation of Ethiopia, Mekonnen Manyazewal's remark speaks well to this claim:

> The Government has continued deepening of the reform process particularly in terms of liberalization and privatization. At the same time to prepare the ground for future growth of the economy, we have prepared a long-term development strategy oriented towards agricultural-development-led industrialization (ADLI). ADLI will use agriculture as the spring-board for the development of other sectors. It is envisaged that the private sector will play the leading role in economic activity. The role of the government will be essentially to provide social services and economic infrastructure. [330]

Indeed, the government's support for private investment in commercial agriculture is evident from subsequent development plans which draw on the ADLI strategy. For example, the 2002 Sustainable Development and Poverty Reduction Program (SDPRP) envisaged that '[w]hen private investors wish to engage themselves in agricultural activities, they can have access to land on a long-term lease basis' particularly in the lowlands where 'there are large unsettled tracts of land that can be developed with either rain-fed agriculture or irrigation as deemed feasible.' [331] But it is in the 2003 Rural Development Policy and Strategies document that the government was even more explicit regarding the need for private investment in agriculture, and pledged to be more proactive in soliciting particularly foreign investment into the sector. It stresses that:

> While underlying [sic] the importance of encouraging domestic private investment through well-conceived incentives, the focus of attention should be on attracting *foreign* investors. Historically, efforts made to attract foreign investment are almost exclusively directed towards non-agricultural sectors. This needs to change if Ethiopia is to achieve its agricultural objectives. ...

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[330] Mekonnen Manyazewal, 'Statement at The Hague Forum on International Conference on Population and Development (ICPD)+5' (The Hague, 7 February 1999) <http://www.un.org/popin/icpd/icpd5/hague/ethiopia.htm>.

[331] Ministry of Finance and Economic Development (MOFED), 'Ethiopia: Sustainable Development and Poverty Reduction Program Federal Democratic Republic of Ethiopia (FDRE) (2002)' <http://www.imf.org/external/np/prsp/2002/eth/01/073102.pdf>.

> Ethiopia should provide for organization, management and financial resources to establish connections with internationally known companies and consult with them on matters related to what *should* be done to encourage them to invest in the country. It is a priority matter to ensure that there is a conducive environment for foreign investment. Both the Federal Government and regional administrations will coordinate efforts and work together to constantly review policies and strategies to increase their *instrumentality* to attracting private investment in agriculture.[332]

This call for outreach to (foreign) investors and maximizing the instrumental role of policies and strategies for attracting foreign investment has also been reflected in more recent development plans. For example, the Plan for Accelerated and Sustainable Development to End Poverty (PASDEP) 2005/6–2009/10 envisages that the Plan 'carries forward important strategic directions pursued under the SDPRP' and that it 'also embodies some bold new directions. Foremost among them is a major focus on growth in the coming five-year period—with a particular emphasis on greater *commercialization of agriculture* and the private sector.'[333] Thus, in a bid for 'a massive push to accelerate growth', one of the eight pillars of the Plan, the government pledged 'to make land available where feasible for large-scale commercial farming.'[334] As we shall see in Chapter 3, more recently the government has capitalised even further on this. While this policy shift may be motivated by pragmatic concerns about the hitherto poor performance of the sector, whether it justifies the emergence of the type of mega-farms seen in recent years remains questionable at best.

It is thus instructive to note that the government's support for large-scale commercial farming goes back to the 1994 ADLI strategy, and has been

[332] Ministry of Finance and Economic Development (MoFED), 'Rural Development Policy and Strategies of Ethiopia', above n 65, 52, emphasis added.
[333] Ministry of Finance and Economic Development (MoFED), 'Ethiopia: Building on Progress A Plan for Accelerated and Sustained Development to End Poverty (PASDEP) (2005)' 45 <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Plan_for_Accelerated_and_Sustained_(PASDEP)_final_July_2007_Volume_I_3.pdf> .
[334] Ibid 47.

anchored into various development plans of the government since then. As such, it could be argued that, at least in the case of Ethiopia, the convergence of the global crises (financial, food and energy) in recent years has only triggered belated demand for the longstanding supply of 'abundant unutilized land' that the government was actively marketing. That trigger, however, is very significant—for, despite these plans and pro-investor laws, there had not been significant rise in large-scale land acquisitions up until 2008,[335] which points to the fact that these investments have been driven more by external crises (food, energy, financial, or the combination thereof) and hence the need for countries to ensure their 'securities'. But the fact that the government of Ethiopia (and many other governments of Africa), pursued land tenure systems that makes it the custodian (and de facto owner) of land means that there are few legal barriers to large-scale transfer of land to investors, even when these transfers involve the displacement of the local communities for whom land is often the only source of livelihood (security).

2.5. Conclusion

In this chapter, I have discussed the key aspects of historical precedents of contemporary land deals in Africa in general and Ethiopia in particular, and how this historical context shaped land relationships in the region. Colonialism in Africa vested ownership of the land largely with colonial states, and eventually their settlers and companies. 'Colonial custom' granted customary land rights as mere usufruct rights often applying only to farmlands (thus excluding uncultivated lands that are equally vital for indigenous people), and simultaneously bolstered the power of local chiefs who were collecting taxes from the peasantry that had to increasingly engage in production of cash crops.

[335] Indeed, there have been farmland acquisitions since 2000s particularly for floriculture; but these land acquisitions were of much smaller scale, often below 100 hectares, much less than most of individual large-scale land acquisitions in the post 2007 period.

Upon decolonisation, post-colonial states in Africa, by and large, embarked on land reforms that affirmed this legacy: in most cases, they assumed ownership of land as had colonial states while continuing with a narrow interpretation of customary land rights. Although Ethiopia does not share a typical colonial past with other African countries, it shares with them much of the colonial and post-colonial realities at least as far as land relations are concerned: the land tenure system that was instituted in the country in the late 19th and early 20th century brought large territories under the control of the government of Abyssinia (which was later to transform itself to Ethiopia), which turned smallholder farmers and pastoralists in the southern part of the country into mere tenants of new landlords from the north. The attempt at radical land reform which followed the 1974 revolution that ended monarchical rule in the country, while it ended landlord-tenant relations, merely extended usufructuary rights to peasants and pastoralists; the current government which assumed power in 1991 largely continued with this land policy. Thus, be it in post-colonial Africa or uncolonised Ethiopia, governments spearhead contemporary transnational land acquisitions with little or no legal barriers.

CHAPTER 3 CONTEMPORARY LARGE-SCALE LAND ACQUISITIONS AND GLOBAL RESPONSES

3.1. Introduction

In the preceding chapter, I have set out the historical antecedents to contemporary large-scale land acquisitions in Africa in general and Ethiopia in particular to show the ways in which these precedents shaped land relations in the region. In this chapter (3), I move to contemporary land acquisitions in Africa and examine the basic questions of the scale and drivers of the deals, and outline the global responses to the local resistance these land deals have generated, by drawing on the global 'land grabs' literature and the interviews conducted with government officials and investors from Ethiopia. The analysis in this chapter suggests that the astonishing surge in contemporary large-scale land deals in sub-Saharan Africa are largely driven by the strategy of outsourcing food and energy production initiated by a good number of home states, and related financial speculation, coupled with inducements by the governments of host states. The way in which these deals shape land relations in host states—including dispossessions of local communities, often with little or no compensation—has sparked local resistance and diverse global responses. Yet these global responses leave unaddressed many of the structural problems in the interaction of domestic and various branches of international laws that shape these land deals, which shall be explored in Chapters 4-6.

Despite the burgeoning global 'land grabs' literature, the scale, geography and drivers of contemporary transnational land acquisitions in SSA and beyond remain debatable. Thus, in Sections 3.2–3.4, I shall take stock of these questions. I shall examine the roles of home and host states as well as some international institutions such as the World Bank in facilitating or discursively justifying these land deals. In Section 3.5, I shall account for some of the global responses

to the local discontents and resistances against contemporary 'land grabs' in Africa. The contests surrounding contemporary transnational land acquisitions in Africa and beyond have stirred global policy debates. Different actors have framed and responded to these land deal in various ways. Three distinct global responses to contemporary large-scale land acquisitions could be identified. These are: (1) Food Sovereignty; (2) Voluntary Guidelines; and (3) Minimum Human Rights Principles. Broadly, Food Sovereignty calls for a halt to the global 'land grabs', while voluntary guidelines encourage the land deals as long as done responsibly and in compliance with the guidelines. The minimum human rights principles call for compliance with human rights in undertaking agricultural investments. It is worth noting that these responses draw on international human rights law to varying degrees. Food sovereignty could be understood as a sub-class of the right to self-determination. Similarly, the minimum human rights principles mainly draw on international human rights law including the right to food. Even some of the voluntary guidelines also envisage respect for human rights as one of their key objectives. Nevertheless, these responses leave unaddressed the structural problems in the interaction of various domestic and international laws shaping land relations, which shall be examined in Chapters 4-6, and hence their potency to tackle the social and environmental risks associated with large-scale land acquisitions remains weak. The chapter concludes with a brief summary (Section 7).

3.2. Scale and Geography

The earliest reports on the surge in (trans)national commercial land deals came from environmental–agrarian and human rights activists and the media. A report released in 2008 by the GRAIN, an international NGO based in Spain, was the first to declare the increasing trend in 'land grabbing'.[336] Other civil

[336] See GRAIN, above n 1.

society groups such as the FoodFirst Information and Action Network (FIAN), and various media outlets followed suit in highlighting the emerging trend in large-scale land acquisitions. Yet, except for the often contradictory reports coming from the media, most of these reports did not document the precise scale of these land acquisitions. One of the early attempts to estimate the scale of these land acquisitions was made in a collaborative study by the Food and Agriculture Organization (FAO), International Fund for Agricultural Development (IFAD) and the International Institute for Environment and Development (IIED). According to this oft-cited report in the 'land grabs' literature, in five African countries alone (Ethiopia, Ghana, Madagascar, Mali and Sudan), over 2.4 million hectares of land had been allocated for private investors between 2004 and 2009.[337] This was a conservative figure given that it excluded land deals below 1000 hectares as well as those pending approval.[338] A year later, Oxfam International offered a much higher estimate, noting that about '227 million hectares of land was sold, leased, licensed, or under negotiation in large-scale land deals since 2001, mostly since 2008, and mostly to international investors.'[339]

Amidst these increasing, and largely critical, reports on 'land grabs', the World Bank also commissioned a study tracking these land deals. According to the Bank's report of 2011, between October 2008 and April 2009 alone, 56.6 million hectares of land was transferred to private investors.[340] Although projects targeted 81 countries, 48 percent of projects covering some two-thirds of the total area (39.7 million hectares) involve sub-Saharan Africa, followed by East and South Asia (8.3 million hectares), Europe and Central Asia (4.3 million

[337] Cotula et al, above n 19, 41.
[338] Ibid.
[339] Bertram Zagema, 'Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land' (2011) 11(6) *Oxfam Policy and Practice: Agriculture, Food and Land* 114, 5.
[340] Deininger and Byerlee, above n 1, 51.

hectares), and Latin America and the Caribbean (3.2 million hectares).[341] Thus in the case of sub-Saharan Africa, compared to an annual rate of area expansion of some 1.8 million hectares in the 1961–2007 period, demand between 2008 and 2009 alone astonishingly jumped to some 39.7 million hectares—which is greater than the total agricultural land in Belgium, Denmark, France, Germany, the Netherlands, and Switzerland combined.[342]

FAO's report of 2012 agreed that 'foreign investment in agricultural land in developing countries has increased markedly over the past decade', although it conceded the methodological difficulty of quantifying the land deals.[343] The report further noted though that, 'more importantly, the lands acquired by foreign investors tend to be among the best ones, with good soil quality, high production potential, irrigation and proximity to infrastructure and markets.'[344]

Unlike the previous often one-off studies, there have also been some attempts at creating online databases that keep track of land deals. One such attempt is the Land Matrix's online public database which is tracking transnational land deals of over 200 hectares across the globe.[345] In 2013, for example, the Land Matrix, cautioning that most of the reports on global land deals (including its own earlier report that documented 83.3 million hectares of land acquisition between 2008 and 2011) might have overestimated the deals, reported 33.9 million hectares of actually concluded, 11.8 million hectares of intended and 5.6 million hectares of failed land deals.[346] Currently (June 2017), these figures stand at about 49, 20, and 7 million hectares of land respectively—and over 60% of the

[341] Ibid.
[342] Deininger and Byerlee, above n 280, 705.
[343] Liu et al, above n 75, 335.
[344] Ibid.
[345] Land Matrix Partnership, *Land Matrix Partnership Launches Second Phase of Its Global Observatory on Large Scale Land Acquisitions* <http://www.landmatrix.org/announcements/2013/06/10/launch-press-release/>.
[346] Partnership, above n 2.

reported these deals have happened in sub-Saharan Africa.[347] A related recent effort at creating a database of publicly available land deals contracts is Columbia Centre for Sustainable Investment's 'OpenLandContracts.org', which was launched in October 2015.[348] As a new initiative, the database contains information only for a handful of countries, but the fact that unlike most other data sources it aims to serve as a repository of actual contracts will enhance its reliability for relevant research and/or policy analysis.

What clearly transpires from these reports, publications and databases is that transnational land acquisitions in the Global South (and most importantly in sub-Saharan Africa) have markedly increased in recent years. Indeed, given the mutable nature of these deals, the actual size of land transferred to (foreign) investors can hardly be told with certainty. In the first place, the deals are often concluded in secret and as such it is difficult to access recorded documents.[349] This is particularly the case where public officials directly benefit from the deals. Recent pressure for scrutiny of 'land grabbing' has apparently increased the secrecy of the deals. In some cases, the size of land requested and actually granted also significantly differs, or deals might be abandoned after signing a memorandum of understanding but not a contract for transfer of land.[350] Consequently, the computation of the scale of land deals draws heavily on either official documents which reveal only a small percentage of such deals or media reports which often tend to overstate the deals. As Carlos Oya rightly

[347] Ibid. See also Liz Alden Wily, 'Looking back to See Forward: The Legal Niceties of Land Theft in Land Rushes' (2012) 39(3–4) *The Journal of Peasant Studies* 751, 752.
[348] Columbia Centre for Sustainable Investment, 'OpenLandContracts.org: A Database of Publicly Available Land, Agriculture and Forestry Contracts' <http://ccsi.columbia.edu/work/projects/openlandcontracts-org-a-database-of-publicly-available-land-agriculture-and-forestry-contracts/>.
[349] For more on this, see Emily Polack Côte Lorenzo Cotula and Muriel, 'Accountability in Africa's Land Rush: What Role for Legal Empowerment?' (IIED, 2013) <https://landportal.info/sites/landportal.info/files/accountability_in_land_rush_and_role_of_legal_empowerment.pdf>.
[350] See generally Ian Scoones et al, 'Politics of Evidence: Methodologies for Understanding the Global Land Rush' (2013) 40(3) *Journal of peasant studies* 469, 469.

noted, this has created 'a sense of false precision.'[351] In the case of Ethiopia, calculations of land transfers to investors range from about few hundred thousand to over 3.5 million hectares, depending on the sources used[352]—however, the recent report by the state owned media, the Ethiopian News Agency, seems to narrow these discrepancies (between 'official' and 'unofficial' figures).[353] Despite the discrepancies relating to the precise scale of land transfers to (foreign) investors in recent years, as Wendy Wolford et al. remind us, 'there is little doubt that something important is happening'.[354]

But who are the 'investors'? The origins and nature of investors are diverse. The recent investments in (farm)land are characterised by diversity of origins, in a manner that almost defies the conventional North-North or North-South (and even emerging South-South) flow of investments. The key origin regions are the Gulf States (Saudi Arabia, United Arab Emirates, and Qatar), South and East Asian countries (China, South Korea and India), North America and Europe.[355] There are also national and regional dimensions to the origins of investors. Although most of the large-scale land deals were by foreign investors, in some

[351] Carlos Oya, 'Methodological Reflections on "land Grab" Databases and the "land Grab" Literature "rush"' (2013) 40(3) *Journal of Peasant Studies* 503, 506.
[352] Part of the discrepancy has also to do with the differing time frames employed in these reports; see, for example, Deininger and Byerlee, above n 1, 62; reporting that total transfers in 2004–09 amounted to 1.2 million in Ethiopia; Dessalegn Rahmato, 'The Perils of Development from above: Land Deals in Ethiopia' (2014) 12(1) *African Identities* 26, 26; noting that: 'It is estimated that the total land ceded to investors from the mid-1990s to the end of 2011 may be in the order of 3.00–3.5 million hectares'; Horne, above n 7, 1; noting that: 'Our research shows that [since 2008] at least 3,619,509 ha[hectares] of land have been transferred to investors, although the actual number may be higher.' On the other hand, government officials play down this figure to about 460, 000 hectares; Interview with Bekele, above n 25. The latter figure does not include land deals of less than 500 hectares which are made at regional state levels, and little is known about these deals given 'poor reporting' from Regional States to the Federal Investment Commission; Interview with Tesfaye Gashaw, 'Expert at the Agricultural Investment Support and Monitoring Department of the Federal Investment Commission' (26 January 2015).
[353] See Mideksa, above n 68; noting that 'the government has distributed most of the 3.6 million hectares of land allotted by the government for investors.'
[354] Wendy Wolford et al, 'Governing Global Land Deals: The Role of the State in the Rush for Land' (2013) 44(2) *Development and Change* 189, 190.
[355] See also Dbyeeininger and Byerlee, above n 281.

of the host states, including those in sub-Saharan Africa, domestic investors also have a notable (at times even dominant) share.[356] Indeed, the distinction between foreign and domestic investors is blurred as is also the case with the public-private nature of investments directly supported by home states. With regard to the transnational-*regional* dimension, some studies suggest that in countries such as Cambodia, Laos and the Philippines, in addition to Chinese and Indian companies, Vietnamese and Thai companies play a key role.[357] Likewise, Brazilian companies seem to have a dominant role South America.[358] To some extent, this also applies to Africa. For example, South African companies have acquired land in Mozambique and Congo, as have Egyptian and Libyan companies in North and South Sudan.[359] As we shall see in the next section, to some extent, there is a link between the origin of the investors and the type (goal) of an investment.

In sum, despite divergence in the existing literature on the global 'land grabs', there seems to be agreement over the increasing trend in large-scale-land acquisitions, and that many of the acquisitions have been happening in sub-Saharan Africa. There is, however, considerable disagreement as to what exactly drives and/or facilitates these land acquisitions, and how they are framed in the ongoing policy debates—I shall now turn to these questions.

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[356] Deininger and Byerlee, above n 1; see also Borras and Franco, above n 36, 48; noting that ' it must be recognized that key actors in Brazilian, Malaysian, Cambodian, Philippine, Indian and Indonesian land grabs, among others, are mainly national capitals.'

[357] Borras and Franco, above n 36, 48.

[358] Ibid.

[359] For the case of Egypt and South Africa see generally Jeroen Warner, Antoinette Sebastian and Vanessa Empinotti, 'Claiming(back) the Land: The Geopolitics of Egyptian and South African Land and Water Grabs' in Tony Allan, et al (ed), *Handbook of land and water grabs in Africa : foreign direct investment and food and water security* (Routledge, 2013) 223. For the involvement of Libyan companies see GRAIN, above n 1, 2–3.

3.3. Push Factors

3.3.1. 'Scarcity' and 'Crises'

The story of what precisely has been driving the recent global land grabs is not settled but generally revolves around 'crises' and 'scarcity' narratives. The dominant view is that the current global 'land grabs' were, in large measure, triggered by the convergence of global financial, food, and fuel (energy) crises of 2007/8.[360] In 2008, several factors including the rising oil prices, depreciation of the US dollar, and rising biofuels demand resulted in a spike in food prices, resulting in a global food crisis.[361] Different countries responded to this phenomenon in different ways. Some countries have engaged in 'panic purchasing'. Other major grain exporters such as Russia and Argentina introduced export restriction measures—arguably, such measures could be justified under WTO laws although not always (see Chapter 5). On the other hand, a good number of food importing countries which did not act or acted late, witnessed widespread uprisings.

This situation has eroded the confidence of many food importing countries to rely on the global market as a source of reliable food supply, and propelled particularly relatively rich countries with shortage of arable land (and/or water) to think of an alternative strategy, outsourcing food production through purchase and/or lease of farmland abroad.[362] The increasing price of oil and

[360] See Smita Narula, 'Global Land Rush: Markets, Rights, and the Politics of Food' (2013) 49(1) *Stanford Journal of International Law* 101, 109. See also De Schutter, 'The Green Rush', above n 74, 515–23; additional drivers include carbon trading opportunity through afforestation or re-afforestation , mining and urbanization;
See also, generally, Fairhead, Leach and Scoones, above n 15.

[361] Derek Headey and Shenggen Fan, 'Anatomy of a Crisis: The Causes and Consequences of Surging Food Prices' (2008) 39 *Agricultural Economics* 375, 378. In departure from other reports, the authors challenge the view that the growth in demand from China and India has been one of the major causes of the crises.

[362] Deininger and Byerlee, above n 1; Levenstein, above n 1; noting that, the spike in food price and global population growth and water scarcity are pushing rich but resource-deprived

renewable energy imperatives resulting in biofuel demands has also provided many companies with the impetus to acquire farmland for biofuel production.[363] Thus, in the face of the global financial crises of 2007, an increasing number of private companies and institutional investors (investment banks, sovereign wealth funds, hedge funds, private equity groups, and pension funds) considered investment in land as a 'safer' venture.[364] Such speculation is also in line with the predictions of relevant international institutions. For instance, in 2014, FAO reported that a 'surging global population and growing demand for food pose major challenges for agriculture',[365] as 'world food production will need to increase by 60 percent by 2050.'[366] The World Bank also predicts that about 18 to 44 million hectares of land will be required for biofuel production by 2030.[367] Thus, without losing sight of other forms of ongoing commercial pressure on rural land (including urbanisation, industrialisation and ecotourism),[368] the convergence of food, energy and financial crises, and the associated speculative tendencies by different types of investors could be regarded as the major triggering factors for contemporary 'land grabs'.

It is worth noting though that although food and fuel (biofuel) are widely recognised as major (and indeed, competing) drivers of the recent transnational land acquisitions, their precise share is far from straightforward. While most of the early 'land grabs' reports presented food security (production) as a major driver, some recent works point to biofuels as having a major share. For

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nations in the Middle East, Asia and elsewhere to outsource their food production to places where fields are cheap and abundant.

[363] Narula, above n 360, 109; see also De Schutter, 'The Green Rush', above n 74.

[364] See Deininger and Byerlee, above n 1, xxv; noting that 'together with the reduced attractiveness of other assets due to the financial crisis, the boom led to a "rediscovery" of the agricultural sector by different types of investors and a wave of interest in land acquisitions in developing countries.'

[365] FAO, 'FAO Initiative Brings Global Land Cover Data under One Roof for the First Time', above n 12.

[366] Ibid.

[367] Deininger and Byerlee, above n 1, 15.

[368] See Zoomers, above n 18.

example, in one of its Policy Research Working Paper, the World Bank documents that '[d]ependence on food imports emerges as a strong driver of demand for land acquisition.'[369] In its recent report, GRAIN has also observed that although plain old profit-driven agribusiness expansion is now becoming the dominant agenda 'the food security agenda is still a factor driving farmland deals'.[370] On the other hand, the Land Matrix suggests that only about 14 percent of the land acquisitions in sub-Saharan Africa are for food production, while non-food production, multipurpose (several crops in different categories) and flex crops (crops with multiple uses across food, feed, fuel and industrial purposes) constitute 43, 30 and 13 percent respectively.[371] As long as the share in the 'multipurpose' and 'flex crops' is not provided, it is difficult to tell the absolute share of food and biofuel being grown. The share of the driving factors also differs from country to country. As we shall later see, in the case of Ethiopia for example, out of 38 farmland deals publicly available, only four land deals (but constituting 2/3 of the large-scale land acquisitions by foreign investors) are exclusively for food crop production, the remaining are for production of either agricultural raw materials such as cotton or a mix of food and non-food crops. What blurs the food-fuel distinction further is the fact that some crops officially proposed for biofuel production (non-food category) can easily be shifted to food (animal feed) depending on the dynamics of demand (and/or profit)—maize and soybean are good examples here. The converse may not, however, be the case, since a shift from food to biofuel requires more investment in processing facilities. At any rate, the more arable land is used for biofuel than food production, the more pressure and competition over arable land in host states.

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[369] Rabah Arezki, Klaus Deininger and Harris Selod, 'What Drives the Global "Land Rush"?' (World Bank, Policy Research Working Paper 5864, 2011) <https://www.imf.org/external/pubs/ft/wp/2011/wp11251.pdf>.

[370] GRAIN, above n 11.

[371] Land Matrix,Partnership, above n 345.

3.3.2. The Agency of Home States

If the need for securing food, biofuel and finance are central to the transnational large-scale acquisitions of the last decade, home states have also important (but varying) roles in pushing these acquisitions. These roles range from direct negotiation of the deals with host governments (although they often use private companies as proxies to sign the deals) to indirect facilitation of the deals through, for example, providing financial and technical support to inventors engaged in overseas agricultural investments.

The Gulf States and Asian countries are commonly reported to have a more direct role in transnational large-scale land acquisitions. For example, Saudi Arabia has explicit principles in supporting 'private companies' that engage in transnational land deals for food import back home through, among others, funding (loans), signing offtake agreements with the companies, and signing BITs with host countries (where one does not exist) to ensure the protection of the investment.[372] As of 2008, South Korea also put in place a new food security strategy that aims to give the country greater control over agricultural commodities through 'establish[ing] overseas trading companies which could secure commodities and stabilize prices through the futures market' and 'support[ing] overseas agricultural production, processing and logistics'.[373] While the agricultural operations themselves are entirely in private hands, the

[372] See, Alshareef Taha, 'King Abdulla's Initiative for Agricultural Investment Abroad' (at the Food and Environmental Security: The Role of Food and Agricultural Trade Policy, Salzburg, Austria, 10 May 2009) <http://www.agritrade.org/events/documents/Alshareef.pdf>. The initiative sets out the following as Principles of Saudi Agricultural Investment Abroad: Identifying countries with agricultural investment capabilities; the Saudi private sector is the main investor; willingness of the Kingdom's Government to provide: finance / credit facilities, off take agreements and needed support to the investors; signing of Bilateral investment treaties (BITs) with host countries in order to guarantee safety of investments; guarantee of the investor's right to export crops in order to enhance Kingdom of Saudi Arabia's strategic food reserve (may leave some in host country if needed); the right to choose kinds of cultivated crops; investments are long term.

[373] See for example, Anders Riel Müller, 'South Korea: Food Security, Development and the Developmental State' in Ian Christoplos and Adam Pain (eds), *New Challenges to Food Security: From Climate Change to Fragile States* (Routledge, 2015) 295, 310.

government's involvement takes the form of funding, pre-screening, site valuation, training and technical assistance.[374]

Chinese and Indian governments are also commonly associated with transnational 'land grabs'. In the case of China, as part of its strategy to support domestic food security objectives, the Chinese Ministry of Agriculture is reported to have proposed a new policy on outward investment in agriculture with emphasis placed on those countries enjoying political stability and having strong relations with China.[375] Following the flurry of accusations against the proposal, particularly in the context of vulnerable African states, however, the Ministry denied that any new policy stance had been adopted: 'Chinese officials have since deliberately rebutted these claims, asserting that Beijing has no intention of acquiring land in Africa to provide for increased demand for agricultural commodities.'[376] A range of recent studies also suggest that China's share in the rising large-scale land acquisitions in sub-Saharan Africa is minimal, but significant in Latin America (mainly Brazil) for long-term contract farming (as opposed to land lease and/or purchase) of mainly soya.[377] The Indian government has also reportedly used a combination of trade policy and high-level commercial diplomacy to facilitate Indian agricultural investment overseas, in order to further its food security strategy.[378] Indian companies have thus engaged in large-scale land acquisitions, particularly in eastern African countries such as Ethiopia, Kenya, Madagascar and Mozambique.[379] However,

[374] Ibid 311.
[375] Simon Freemantle and Jeremy Stevens, 'China's Food Security Challenge: What Role for Africa? Investments' in Fantu Cheru and Renu Modi (eds), *Agricultural development and food security in Africa: The Impact of Chinese, Indian and Brazilian Investments* (Zed Books, 2013) 173, 187.
[376] Ibid.
[377] Ibid.
[378] Rick Rowden, 'Indian Agricultural Companies, "land Grabbing" in Africa and Activists' Responses' in Fantu Cheru and Renu Modi (eds), *Agricultural development and food security in Africa: The Impact of Chinese, Indian and Brazilian Investments* (Zed Books, 2013) 107, 111.
[379] Ibid. See also generally Dessalegn Rahmato, 'Up for Grabs: The Case of Large Indian Investments in Ethiopian Agriculture' in Fantu Cheru and Renu Modi (eds), *Agricultural*

as with most other governments, the Indian government dismisses complicity in 'land grabbing', yet critics maintain that, 'through direct and indirect facilitation, the Indian government is encouraging its corporations to turn into 21st century versions of the British East India Company.'[380]

Although much of the early literature on the global 'land grabs' tends to portray the Gulf States and Asian countries (such as China and India) as the major origins, an increasing number of reports suggest that a significant number of investors also hail from the USA and Europe. In fact, in the USA, even educational institutions (such as Harvard and Vanderbilt universities) reportedly joined the race for farmland investment in Africa.[381] Perhaps the distinction between the USA and the EU and other origin countries is only a matter of approach—they do not often directly engage with host governments with regard to such acquisitions, but indirectly encourage their companies through some policy measures. For example, the EU's 2009 Renewable Energy Directive mandates a target of at least 20% of energy from renewable sources in the EU's total energy needs, and at least 10% of energy from renewables in each member's transport fuels by 2020.[382] Similarly, in the USA, there has been an increasing trend towards renewable energy use. For example, in 2013, '40 percent of US's corn—15 percent of global corn supplies—was diverted to make ethanol, up from just 5 percent in 2000',[383] and there are further renewable

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development and food security in Africa: The Impact of Chinese, Indian and Brazilian Investments (Zed Books, 2013) 93.

[380] Rowden, above n 378, 121.

[381] See John Vidal and Claire Provost, 'US Universities in Africa "Land Grab"' *The Guardian*, 9 June 2011 <https://www.theguardian.com/world/2011/jun/08/us-universities-africa-land-grab>.

[382] See *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 and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC 2009* art 3(1) cum 3(4).

[383] See Timothy Wise and Marie Brill, 'Fiddling in Rome While Our Food Burns: The Rising Cost of Food Is Directly Related to the Diversion of Vital Foodstocks to Manufacture Biofuels' *Aljazeera*, 17 October 2013 <http://www.aljazeera.com/indepth/opinion/2013/10/fiddling-rome-while-our-food-burns-20131015132924285478.html>.

energy use targets in place.[384] As a number of studies suggest, such renewable energy (mainly biofuel) mandates 'will have sizable impacts on land use far beyond the countries where they operate.'[385] Indeed, by some estimates, the USA and the EU now stand as the major origins of large-scale land acquisitions targeting biofuel production in Africa.[386] Thus, at the risk of overgeneralisation, it could be maintained that, while investors from the Gulf States and Asian countries focus more on food production, those from Europe and the US tend to favour biofuel production,[387] in a manner that reflects their home states' policies.

Thus, as Mann and Smaller observe:

> the latest investment strategy is more strongly driven by food, water and energy security than a notion of comparative advantage in the large-scale production of indigenous crops for global markets, which has been more characteristic of foreign-owned plantations since the end of the colonial era. The current land purchase and lease arrangements are largely about shifting land and water uses from local farming to essentially long-distance farming to meet home state food and energy needs. It is, in practice, purchasing food [and energy] production facilities. This is not completely new, but the process of doing so mainly or exclusively for home country consumption is. In addition, the growing scale of this practice today, combined with the increasing economic and environmental concerns that are motivating this surge, are creating a new dynamic of global importance. It is no longer just the crops that are commodities: rather, it is the land and water for agriculture themselves that are increasingly becoming commodified, with a global market in land and water rights being created. [388]

These land deals thus aim 'to ensure a stability of supply for investors, whether public or private: they aim, not to serve the international markets, but rather to

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[384] For example, President Obama has recently announced his government's goal of generation of 20 percent of electricity from renewable sources(excluding large hydroelectric) in 2030; Kyle Ash, 'President Obama Announces New Renewable Energy Targets, but We Can and Must Do More' <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/President-Obama-renewable-energy-climate-legacy/blog/53473/>.

[385] Deininger and Byerlee, above n 1, 13.

[386] See Partnership, above n 2.

[387] Cotula, above n 43.

[388] Howard Mann and Carin Smaller, 'Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?' (Sustainable Development Innovations Briefs, Issue 8, January 2010) 1–2.

circumvent them, by tightening the control of investors from the place of production to the end consumer.'[389] In this sense, the investments resemble their historical antecedents (colonial 'land grabs' discussed in Chapter 2), yet unlike in the latter cases, which were often effected through coercion (violence), the role of home states in contemporary land grabs is often facilitative—including through diplomacy, designing incentive for imports, and ensuring legal protection (through, for example, signing BITs). In either case though, the effect on local communities who give way to investors remains similar.

3.4. Pull Factors (and Discursive Justifications)

3.4.1. The 'Underused Land' Narrative

The question of why and how large-scale land deals have been taking place mainly in sub-Saharan African countries cannot be fully explained only by the push factors discussed above. As I will argue below, while the convergence of global crises (food, financial and energy) are regarded as major triggers for an increasing global land grabs often reinforced by the policies of home states, the notion that sub-Saharan Africa region has 'abundant' underutilised land (propagated by some international institutions such as the World Bank (and echoed by host states) also serve as discursive justifications of land acquisitions in the region. For example, amidst increasing reports on global land grabs, the World Bank—a long time tutor of land policy in Africa[390]—has called for the conversion of a significant part of sub-Sahara's *Guinea Savannah zone* [391] to agriculture. In the words of the Bank:

[389]De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 250.

[390] The World Bank has had an active role in shaping land policies in Africa at least since 1980s; for more on this, see generally McAuslan, above n 58,. and Manji, *The Politics of Land Reform in Africa*, above n 58.

[391] Guinea Savannah Zone stretches across most of the sub-Saharan countries. See FAO, 'Guinea Savannah Zone Map' <http://www.fao.org/news/story/en/item/20987/icode/>.

> Although not the entire African Guinea Savannah zone is suitable for agriculture, clearly it represents one of the world's largest *underused* agricultural land reserves. There is no question that to *feed the world*… and generate the feedstuffs needed for production of *biofuels*, a significant share of this zone will eventually have to be converted to agriculture, probably under more intensive land-use systems than are currently prevalent.[392]

This account—of 'underused agricultural land reserves'—however, stands in contrast to the continent's self-assessment. For example, the African Union Commission (AUC)-Economic Commission for Africa (ECA)-African Development Bank (AfDB) Consortium notes:

> One of the key aspects of Africa's land question is that in spite of extensive dependence on farming, not much of the continent's land is arable or potentially arable… In many instances, unequal distribution of land has relegated a growing population of small farmers onto marginal areas leading to increasing physiological pressure and land and resource degradation including deforestation.[393]

It appears that the classification/and or quantification of 'underused land' in the case of the World Bank partly emanates from a problematic technique of measurement: satellite imagery which tends to overlook the presence and use rights of indigenous people particularly—pastoralists, herders, and hunters—whose livelihoods are based on such uncultivated ('underused') lands.[394] As noted in Chapter 2, this is very much akin to the *terra nullius* narrative of conquest and colonisation which justified the acquisition of indigenous peoples' owing to lack of 'effective control' or statutory tenure rights.[395] It is also worth noting that the World Bank's vision of Africa's 'underused' land is, among others, 'to feed the world' (ensure global food security) and 'generate the feedstuffs needed for production of *biofuels'* (ensure energy security). This

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[392] The World Bank, *Awakening Africa's Sleeping Giant: Prospects for Commercial Agriculture in the Guinea Savannah Zone and beyond* (World Bank Publications, 2009) 171 (emphasis added).

[393] African Union Commission (AUC) - Economic Commission for Africa (ECA)-African Development Bank (AfDB) Consortium, *Frameworks and Guidelines on Land Policy in Africa* (ECA, 2010) 5.

[394] See Geisler, above n 70; for a historical account of the tendency of overestimating the spare land, see Young, above n 72.

[395] See Weaver, above n 73, 133–77.See also Anghie, above n 91.

account, coupled with other policies of the Bank set on encouraging large-scale agriculture, including the voluntary guidelines for responsible agricultural investment—which it co-initiated with FAO and UNCTAD (to be discussed in later sections)—could arguably be regarded as tacit approval, and hence pulling factor of 'land grabs' in the region.

3.4.2. The Agency of Host States

Despite the fact that the African regional institutions noted above provide a narrative contrary to that of the World Bank with regard to availability of 'underused' land in Africa, at national level most African governments are greatly enchanted with (farm)land investments. As discussed before, these land acquisitions tend to respond to the demands in home states and/or international market, yet host governments often consider these land acquisitions as opportunities. In this section, I shall briefly consider the steps that host states such as Ethiopia have been taking to court these investments. Although much of the early literature on the global 'land grabs' portrayed host countries as passive victims,[396] at least in the case of Ethiopia, the government has played a proactive role in luring investors.

As flagged in Chapter 2, the incumbent government of Ethiopia has an agricultural policy that encourages commercialisation of agriculture and private investment into the sector, and indeed since the early 2000s, the government expressly committed itself to reaching out to potential foreign investors who, compared to domestic investors, ostensibly have better (financial and technological) capability. Yet, except for some small-scale (often less than 20 hectares) floriculture farms, there was no notable increase in foreign large-scale agricultural investments in the country prior to 2007. In this context, the rise in

[396] Notable exceptions that articulated the active roles of the state include: Wolford et al, above n 354, ; Sandra Evers, Caroline Seagle and Froukje Krijtenburg (eds), *Africa for Sale?: Positioning the State, Land and Society in Foreign Large-Scale Land Acquisitions in Africa* (Brill, 2013).

demand for land that the convergence of global financial, food, and energy crises of 2007/8 engendered, was considered as an opportunity by the government of Ethiopia (and many other sub-Saharan African governments) which soon began setting aside huge tracts of land for (foreign) investors.[397]

The 2010 Growth and Transformation Plan (GTP) 2010/11–2014/15, the latest among the successive development plans discussed in Chapter 2, stipulates 'the promotion of private large-scale commercial farms in areas that are *not occupied* or *utilized* by people' as one 'element of the agricultural development strategy'.[398] Unlike the previous plans, it also quantifies the amount of land that needs to be transferred to commercial farming investors. It sets a target for the transfer of 3.3 million hectares of land before the end of 2015.[399] The Plan also envisages the establishment of an agency exclusively tasked with administering large-scale land investments. Accordingly, in 2013, the Agricultural Investment Land Administration Agency was established under the auspices of the Ministry of Agriculture and Natural Resources to administer agricultural land investments exceeding 500 hectares. Further, the Plan prioritises the produce from large-scale commercial farms, potential market and/or end use. Thus:

> While supporting private investment in large-scale farms, government's focus is to ensure that the products from these farms are primarily for *export* or *raw materials* for domestic industries. For these reasons, emphasis will be put on cotton, date palm, tea, rubber tree and similar types of crops. Double cropping systems of production will be encouraged [The Amharic version of the last sentence roughly translates as: 'additionally the production of food crops through double cropping system will be encouraged'].[400]

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[397] See Cotula, above n 43; noting that several African countries have engaged in designating land for foreign investors.

[398] Ministry of Finance and Economic Development (MoFED), 'Growth and Transformation Plan (GTP) 2010/11-2014/15', above n 67, 23.

[399] Ibid 49.

[400] Ibid 54; (emphasis added). See also Ministry of Finance and Economic Development (MoFED), 'Growth and Transformation Plan (GTP) 2010/11-2014/15[Amharic Version]' 64 <http://www.phe-ethiopia.org/pdf/GTP_Amharic.pdf>.

The fact that the plan encourages export-oriented large-scale farm investments provides additional incentive for foreign investors eyeing regional and international markets. Moreover, as further discussed in Chapter 4, the government offers a wide range of support for investors in the sector including tax-holiday, duty-free import, full equity ownership, and guarantee of repatriation of profit.

To showcase its new policy and ensure a better investor turnout, the government embarked on investor outreach, with Tefera Deribew, the Ethiopian Minister of Agriculture, travelling to India in 2011 to bring to the attention of Indian investors 'the opportunity of vast farming land set aside by his country for commercial farming and grow pulses and edible oil crops for export to India.'[401] It is no wonder, then, that currently over half of the foreign large-scale land investors in Ethiopia hail from India.[402]

As the government's development plans are ostensibly shaping some of the regulatory instruments of farmland investments (such as farmland investment contracts discussed in Chapter 4), there are at least two aspects of particularly the GTP that are noteworthy in the context of the thesis. One is the characterisation of *underutilisation* of land. In a manner akin to the colonial *terra nullius* narrative,[403] the Plan (as with the earlier development plans) interchangeably employs such terms as: '*not occupied or utilized,*'[404] '*not inhabited*,'[405] '*abundant extensive land*'[406] in reference to potential sites of large-scale private commercial agriculture. Indeed, as noted before, some

[401] See Press Information Bureau, Government of India, 'Ethiopia Invites Indian Farmers for Commercial Farming' (1 February 2011) <http://pib.nic.in/newsite/erelease.aspx?relid=69492>.
[402] For indicative list of large-scale land acquisitions in Ethiopia, see *The Contracts*.
[403] Weaver, above n 73, 133–77; Geisler, above n 6, 17–20.
[404] Ministry of Finance and Economic Development (MoFED), 'Growth and Transformation Plan (GTP) 2010/11-2014/15', above n 67, 23.
[405] Ibid 54.
[406] 'Large scale farming will be undertaken by private investors in lowland areas where abundant extensive land exists […] in the next five years'; Ibid.

international financial institutions such as the World Bank also similarly target the underutilisation of sub-Saharan Africa's land, and call for the unearthing of its hidden potential like the Cerrado region of Brazil.[407] These terms, however, are more legitimising discourses to seize resources through dispossession and/or displacement local land users (often without alternative livelihood) than representations of reality. Particularly, given the practice of using satellite imaging for purpose of determining whether land is utilised,[408] for state actors (planners), land uses other than cultivation could be, in James Scott's words, 'illegible' or 'invisible'.[409] In fact, as we shall see later, even when local land uses are visible to state actors, they can still be obscured by existing property relations, such as the requirement for formal title which is simply lacking in some of the Regional States of Ethiopia that are major sites of 'land grabbing'.[410]

The second issue is the Plan's questionable approach to the relationship between large-scale transfer of land to private investors and hunger challenges the country is facing. By prioritising the production of non-food crops over food crops (the latter is envisioned to be produced only through double cropping),[411] the Plan clearly relegates production of food crops to a secondary position. As such, it seems to envisage only an *indirect* link between these farms and the alleviation of hunger in the host country: via the mediation of the (international) market. Indeed, some government officials are explicit on this point. For example, Abera Deressa, Ethiopia's former State Minister for Agriculture, stresses that: 'the most important area [in which] we [the Ethiopian

[407] See for example, The World Bank, above n 392.
[408] Geisler, above n 6; James et al Keeley, 'Large-Scale Land Deals in Ethiopia: Scale, Trends, Features' and Outcomes to Date' (IDRC and IIED, 2014).
[409] James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1999).
[410] For example, Gambella and Binishangul Regional States are yet to introduce formal land titling that other States have been undertaking over the last decade which means that local land users have little chance of resisting land transfers to investors.
[411] Ministry of Finance and Economic Development (MoFED), 'Growth and Transformation Plan (GTP) 2010/11-2014/15', above n 67, 54.

government] want our foreign investors to enter into the business is exportable commodities; what we want is market oriented-development…; if you have enough money, you can buy food from anywhere in the world.'[412] But, given that it is the lack of confidence in the international market that has in the first place propelled most investor countries to acquire land abroad, one wonders what insulates host states like Ethiopia from the vulnerability of this same market. As shown in Chapter 4, relevant legislation and investment contracts which draw on these development plans may also further this vulnerability by facilitating (and legitimising) these land acquisitions without leveraging them for domestic food supply and/or access.

Thus the tendency, in much of the global 'land grabs' literature, to portray host governments as 'passive victims' of the global 'land grabs' in the aftermath of the 2008 global food crisis is less convincing at least in the case of Ethiopia. As Borras et al. rightly note, host governments actively facilitate land grabs through a combination of: invention (justification) of the need for large-scale land investments; definition, reclassification and quantification of what is marginal, under-utilised and empty lands; identification of these particular types of land; acquisition (appropriation) of these lands; and reallocation/disposition of these lands to investors.[413] Crucially, law is one means of effecting these goals (see Chapter 4). In the case of Ethiopia, as the government's support for large-scale commercial farming goes back to the 1994 ADLI strategy, and has been anchored into various government development plans since then, it could be argued that the convergence of the global crises (financial, food and energy) has only triggered the demand for the long overdue supply of 'abundant unutilised land' that the government had been

[412] 'Planet for Sale: The New World Agricultural Order', *Press TV*, 3 May 2011 <https://www.youtube.com/watch?v=IU1-PpxqeZc>. Indeed, other officials also share similar views; Interview with Bekele, above n 25.
[413] Borras Jr, Franco and Wang, above n 86, 167.

actively marketing. That trigger, however, is very significant—for, despite these plans and pro-investor laws, there had not been significant uptake of large-scale land acquisitions prior to 2008, which points to the role of the crises and the resulting need to ensure 'securities'. Despite these push factors, the role of African governments is evident—underestimating their role may exaggerate the agency of other actors (relevant international institutions, and investors and their home states) and risk missing the fault line between governments and their citizens.

3.5. Local Resistances and Major Global Responses

Although foreign investors, states (often both home and host), and by and large, international development institutions have regarded the surge in interest for farm(land) as a 'win-win opportunity',[414] this phenomenon has also generated resistance particularly from the people who are displaced in the process, and severe criticisms from others—including civil society groups, the media, and lately some in the academic circle. Indeed, discontent and tensions seem to inevitably follow foreign investments, particularly in the natural resources sector.[415] In the context of Africa, as James Ferguson notes, natural resource (oil and mining) investments of both the colonial and contemporary period remained socially '*thin*'—most of the mining and oil investments have been enclaves 'sharply walled off from their national [host] societies'.[416] Burbank and Cooper also observed similar trends: 'Mining—copper in central Africa, gold in the south—was controlled by European corporations, which created enclaves of

[414] See for example FAO, 'From Land Grab to Win-Win Seizing the Opportunities of International Investments in Agriculture', above n 5.
[415] For instance, Raymond Vernon in his study of US multinational corporations operating abroad (mainly in Latin America, Europe and Asia) in the natural resources sector, point out that even where investments had contributed to the welfare of people in the host countries, '[t]ension, it should hardly be necessary to point out, is just as commonly associated with constructive forces as with those make a negative contribution'. See Vernon, above n 98, 34.
[416] James Ferguson, *Global Shadows : Africa in the Neoliberal World Order* (Duke University Press, 2006) 35–6, 201–208.

wage labour.'[417] Additionally, settler agriculture in particularly Western and Southern Africa led to dispossession and displacement of indigenous people, and 'generating labour for settlers usually meant restricting opportunities for African producers'.[418] The skeptics of the current race for farm(land) in Africa seem to have these experiences in mind. For instance, in 2008, the then Director General of FAO, Jacques Diouf, warned that such investments risk the creation of 'a neo-colonial pact for the provision of non-value added raw materials in the producing countries and unacceptable work conditions for agricultural workers.'[419]

Indeed, as some of the available preliminary assessment of the recent farmland deals suggest, the concerns relating to contemporary large-scale land acquisitions are not far-fetched speculations. For instance, the World Bank, despite its support for these land deals reported that 'in many cases, potential benefits from such [large-scale farmland] transfers are not realized or [are] outweighed by negative impacts.'[420] FAO's report also notes that '[w]hile a number of studies document the negative impacts of large-scale land acquisition in developing countries, there is much less evidence of its benefits to the host country, especially in the short term and at local level.'[421] Similarly, Cotula observes that '[a]s a broad generalization, local livelihoods tend to be disrupted in ways that are not offset by the new agricultural venture'[422] due to shortcomings in social impact assessments and compensation regimes, the

[417] Burbank and Cooper, above n 183, 319.
[418] Ibid.
[419] Diouf, above n 186. Jacques Diouf was the Director General of Food and Agriculture Organization (FAO) for nearly two decades, from 1 January 1994 – 31 December 2011. Perhaps it is by virtue of his leadership of an Organization whose central effort is to achieve food security for all that his take on the issue has been widely quoted in publications relating to the global farm race emerging since then.
[420] Deininger and Byerlee, above n 1, 5.
[421] Liu et al, above n 75, 336.
[422] Cotula, above n 43, 145.

mismatch between the livelihood opportunities lost and created, and the uncertainties about the viability of the new ventures in the longer term.[423]

Thus, these 'land grabs' are more of a continuation in the specialisation of agro-export with its associated drawbacks (see Chapter 2), in that they: (a) are not necessarily for food production, and even when so, not necessarily for domestic markets; (b) come at significant environmental cost resulting from intensive use of chemical pesticides and fertilisers (particularly, given the weak environmental standards in place in most of the host states); (c) the revenue benefits derived from these land acquisitions (be it from land rent or tax) are often less than claimed and/or local communities in host states may not benefit fairly from these revenues; and (d) encourage land concentration in the hand of few (investors) or local elites in a manner that weakens local land rights. Indeed, the relevant laws tend to not only facilitate these land deals but also further reinforce the effects noted above by, inter alia, curtailing possible corrective measures. I will further explore these points through analysis of the terms of investment contracts and domestic and international laws at play in Chapters 4 – 6, but for now I will take stock of the global responses to the concerns relating to the risks associated with large-scale land deals, and the potency of these responses in the light of the legal regimes shaping the interests and rights relating to these land deals.

Nearly a decade after the dramatic surge in these acquisitions, there is still much debate regarding how to understand them, and hence respond to the associated discontent. The usual response of African host state governments has been to downplay the existence of 'land grabbing'. Where there were positive responses, they have been in the form of reducing the size of land to be offered

[423] Ibid.

to investors as, for instance, in Ethiopia and Tanzania.[424] Of course, state actors and domestic elites are not necessarily neutral agents of social change—and they may actually benefit from investors' unregulated behaviour and as such have little incentive to protect existing land users' rights.[425] In other words, there is an agency problem in contemporary 'land grabs' in Africa. In Kenya, for instance, illegal or irregular allocation of public land (in-country, local 'land grabbing') have been made possible through what Manji regards as 'administrative and professional corruption'.[426] The Kenyan experience is not an exception. 'Land grabbing' through the complicity of local elites is visible across sub-Saharan Africa.[427] Local anger against land grabs has taken the form of protests against the government and/or investments, including at times violent measures against the latter. On the other hand, as even peaceful local resistance is often met with violent crackdown by governments of host states, there have been increasing calls to the 'international community' for policy intervention against the problems associated with increasing farmland deals in the Global South. This appeal to the 'international community' signifies both lack of confidence in domestic actors and an affirmation of the potency of international norm setting institutions.

Different actors have framed and responded to these land deals in different ways. Three major global responses to contemporary large-scale land acquisitions can be identified. These are: (1) Food Sovereignty; (2) Voluntary

[424] Sophia Murphy, 'Land Grabs and Fragile Food Systems' (Institute for Agriculture and Trade Policy Report, 2013) <http://iatp-web.us/iatp/files/2013_02_14_LandGrabsFoodSystem_SM_0.pdf>.

[425] See generally Scott, above n 409; Narula, above n 360; Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25(1) *International Review of Law and Economics* 107.

[426] See, Manji, 'The Grabbed State', above n 289.

[427] See Laura German, George Schoneveld and Esther Mwangi, 'Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?' (2013) 48 *World Development* 1.

Guidelines; and (3) Minimum Human Rights Standards. I shall now briefly discuss each response.

3.5.1. Food Sovereignty

GRAIN and other civil society groups working on peasant activism such as La Via Campesina and FIAN shaped the early debates on contemporary large-scale land acquisitions. This group framed these land acquisitions by mainly foreign entities for production of food or biofuel as 'land grabbing'—it is a process through which 'fertile agricultural land is becoming increasingly privatised and concentrated' and this could, 'if left unchecked… spell the end of small-scale farming, and rural livelihoods, in numerous places around the world.'[428] For these organisations, the surge in 'land grabbing' is problematic on various grounds: (1) it encourages speculative behaviour (resulting from lack of faith on the market driven by demand and supply) that creates artificial scarcity which could, as seen in 2008, exacerbate food crises; (2) workers, farmers and local communities will inevitably lose access to land for local food production, as the lands transform 'into large industrial estates connected to large far-off markets', and in effect thwarts future effort at realising food sovereignty; (3) it is unclear if local communities could benefit from not just foods produced on these lands but also the profits generated from their sale on the international market, particularity in the absence of strategies that ensure such investments contribute to rural development in host countries; (4) it can further entrench the inequitable land distributions already prevailing in some of the host states; and finally (5), these deals will further entrench export-oriented agriculture that harms the poor who cannot afford the purchase of food at international market prices, and even where part or all of the produce is for the local market, they nevertheless 'promote an industrial model of agriculture that has been creating poverty and environmental destruction, and exacerbating loss of biodiversity,

[428] GRAIN, above n 1, 1.

pollution from farm chemicals and crop contamination from genetically modified organisms.'[429]

The policy response of this group to 'land grabbing' is to advocate food sovereignty. According to its main proponent Via Campesina,[430] which introduced the term at the World Food Summit in 1996, food sovereignty 'is the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity'.[431] Advocates of food sovereignty contend that the concept of food security—commonly defined as 'when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life'[432]—does not address the social control of food production and the relations of power that characterise decisions about how food security should be attained, or the politics of the international food regimes.[433] Thus, food sovereignty deliberately 'puts the aspirations and needs of those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations.'[434] Similar to food security, however, the concept of food sovereignty has gradually evolved, but at times with contradictions which are attributable to diversity within Via Campesina itself. For instance, while the initial understanding of food sovereignty was closely associated with food self-sufficiency (production of all food within the boundary of a state) as opposed to food-self-reliance (which

[429] Ibid 9–10.
[430] Via Campesina is a coalition of over 148 organizations advocating for family farm based sustainable agriculture; see La Via Campesina, 'International Peasant's Movement' <http://viacampesina.org/en/>.
[431] La Via Campesina, 'The Right to Produce and Access to Land, Food Sovereignty: A Future without Hunger' (1996) <http://www.voiceoftheturtle.org/library/1996%20Declaration%20of%20Food%20Sovereignty.pdf>.
[432] FAO, 'Food Security Statistics' <http://www.fao.org/economic/ess/ess-fs/en/>.
[433] Raj Patel, 'Food Sovereignty' (2009) 36(3) *The Journal of Peasant Studies* 663, 664.
[434] La Via Campesina, 'The Forum for Food Sovereignty, The Declaration of Nyéléni', above n 84.

involves purchase from wherever cheapest to supplement domestic food supplies),[435] it has gradually recognised trade as an essential element.[436] The 2002 version of the definition, for instance, provides that: 'Food sovereignty does not negate trade, but rather, it promotes the formulation of trade policies and practices that serve the rights of peoples to safe, healthy and ecologically sustainable production.'[437] Food sovereignty poses a potent challenge to the view (widely held in mainstream economics) that the location of capital ownership is irrelevant to assessing its potential impact in a host country and the structural issues historically involved in agricultural development and trade. Yet scholars have observed that while it challenges existing international trade structures, 'on the whole its official position on trade remains ambiguous.'[438] Also, the contours of the evolving notion of food sovereignty—as analytical tool or global social movement—still vary depending on who is promoting it,[439] and thus far it has not been fully articulated how it can be realised in the contemporary world.

3.5.2. Voluntary Guidelines

An alternative framing to large-scale land acquisitions as 'land grabs' comes from what could be regarded as a mainstream economic view, mainly promoted by international institutions such as the World Bank and FAO,

[435] Ibid. See also Alexander Chandra and Lucky Lontoh, 'Regional Food Security and Trade Policy in Southeast Asia : The Role of ASEAN' (Policy Report 3, Trade Knowledge Network, 2010) <https://www.iisd.org/sites/default/files/publications/regional_food_trade_asean.pdf>.
[436] Chandra and Lontoh, above n 435.
[437] FAO, 'Can Trade Work for the Poor? A View from Civil Society' (FAO, 2005) <http://www.fao.org/docrep/008/a0050e/a0050e08.htm>.
[438] See Kim Burnett and Sophia Murphy, 'What Place for International Trade in Food Sovereignty?' (2014) 41(6) *Journal of Peasant Studies* 1065.
[439] See, for example, Alonso-Fradejas Alberto et al, 'Food Sovereignty: Convergence and Contradictions, Conditions and Challenges' (2015) 36(3) *Third World Quarterly* 431. see also the collections in International Institute of Social Studies, 'Food Sovereignty: A Critical Dialogue' <https://www.iss.nl/research/research_programmes/political_economy_of_resources_environment_and_population_per/networks/critical_agrarian_studies_icas/food_sovereignty_a_critical_dialogue/>.

bilateral development agencies, investors, and host and home governments. This view frames the land deals as 'international land acquisitions', or (foreign) direct 'investments' taking place based on the imperatives of market (demand and supply of factors of production). As such, according to this narrative, these land deals allow land-scarce but capital-rich countries (companies) to invest in land-abundant but capital-poor countries, which is a 'win-win opportunity'.[440] It also associates the transition from small to large-scale farming with economic development. Thus, for host states, increased FDI into the agricultural sector ostensibly contributes towards job creation, technology and skills transfer, public infrastructure, and improved food security through enhanced productivity (efficiency) in the agricultural sector and/or rise in incomes.[441]

For the proponents of this view, the 'rising global interest in farmland' is not problematic in itself; the problem, if any, has to do with poor implementation. For example, as noted before, according to the World Bank's own assessment, while farmland investment presents potential opportunities for both investors and host states (even local people), the experience prior to 2011 suggests that 'in many cases, potential benefits from these [large-scale land] transfers are not realized or [are] outweighed by negative impacts.'[442] To remedy these negative impacts, this approach prescribes good governance—and this comes mainly in the form of voluntary guidelines. Thus, the World Bank, along with three UN agencies (FAO, UNCTAD and IFAD) took the first initiative, by adopting the 'Principles for Responsible Agricultural Investment' (PRAI) in 2010.[443]

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[440] FAO, 'From Land Grab to Win-Win Seizing the Opportunities of International Investments in Agriculture', above n 7.

[441] Klaus Deininger, et al, above n 256, 2.

[442] Ibid 5.

[443] 'Principles for Responsible Agricultural Investment That Respects Rights, Livelihoods and Resources [PRAI]' (FAO et al, 2010) <http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf>.
OECD's 'Policy Framework for Investment in Agriculture' also closely relates to this initiative , although it's focus is on how host governments can attract investment in the sector and maximise the benefits thereof by aligning measures in other sectors with these investments.

Nonetheless, PRAI faced fierce criticism from states engaging in either buying or selling of land on the grounds that they were not involved in the process of negotiating the Principles, whereas for the grassroots organisations, particularly those representing small farmers, the principles were mere checklists that were not capable of slowing down 'land grabs'.[444] Consequently, its re-negotiation within the framework of FAO's Committee on World Food Security (CFS) was suggested. Accordingly, in 2012, the CFS mandated a sub-committee that was to lead the re-negotiation of the document—and on 15 October 2014, after two years, the Committee adopted the revised version of PRAI—*Principles for Responsible Investment in Agriculture and Food Systems* (RAI).[445]

The general objective of the Principles, as stated in the document, 'is to promote responsible investment in agriculture and food systems that contribute to food security and nutrition, thus supporting the progressive realization of the right to adequate food in the context of national food security.'[446] The instrument contains 10 principles dealing with: the respect for human rights, social protection and equality (Principles 1-4); the relationship of local communities and indigenous peoples to natural resources (Principles 5-8) and good governance (Principles 9-10).[447]

Yet, even at a conceptual level, given its narrow focus on enhancing productivity and on addressing governance issues (transparency and participation of relevant parties in land deals), this approach loses sight of the

[444] De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 254.
[445] See 'Principles for Responsible Investment in Agriculture and Food Systems (RAI)', above n 86. For a corresponding initiative at African level, see African Union Commission (AUC) - Economic Commission for Africa (ECA)-African Development Bank (AfDB) Consortium, above n 393; enshrining principles addressing: human rights of communities, responsible governance of land, social acceptance by affected communities, gender equality and women access to land ownership, cost-benefits study and mutual accountability, and national strategies for sustainable agriculture.
[446] 'Principles for Responsible Investment in Agriculture and Food Systems (RAI)', above n 86 [10]..
[447] Ibid [21-30].

fundamental (historical) structural problems in both FDI and (agricultural) trade regimes (see Chapters 4 and 5). Of course, as 'voluntary guidelines', the principles are hortatory, and as is often the case with corporate social responsibility instruments, their implementation cannot be taken for granted. In fact, unlike even related guidelines,[448] RAI does not envisage a monitoring and reporting system; it simply encourages regional and international organisations to support the CFS as a platform for sharing experiences related to responsible agricultural investment.[449] Instead of addressing the risks associated with large-scale land deals, these principles may, as some critics argue, serve as 'checklist of how to destroy the global peasantry responsibly.'[450]

3.5.3. 'Minimum Human Rights Principles'

The third category in the policy debate on the global 'land grabs' is the minimum human rights principles. This approach relates to 'large-scale land acquisitions or leases' in terms of their impact on human rights, particularly the right to food. One of the most influential proponents of this approach is Oliver De Schutter, former UN Special Rapporteur on the Right to Food. As with the second approach discussed above, this approach also does not consider the rise in large-scale land acquisitions (leases) as problematic in itself. In view of the fact that '[f]or many years, agriculture has been neglected both in domestic public policies and in development cooperation, and has failed to attract foreign direct investment, particularly in Sub-Saharan Africa',[451] it acknowledges that

[448] See, for example, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (CFS, 2012) <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>. The scope of this guideline goes beyond land (tenure), yet it also considered as one of the responses to the global race for (farm)land.
[449] 'Principles for Responsible Investment in Agriculture and Food Systems (RAI)', above n 86 para 44.
[450] De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 275.
[451] De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', above n 85 [13]. See also John Raggie, 'Principles for Responsible Contracts : Integrating the Management of Human Rights Risks into

'[l]arge-scale investments in farmland can work to the benefit of all parties concerned'.[452] Yet this approach also sees the risks associated with these land deals in host countries: that the loss of ownership and/or loss of land may impede the human rights to food, the rights of land users (and indigenous peoples in particular), the human rights of agricultural workers, and the right to self-determination and development of local populations. Thus, De Schutter argues that '[w]hat is *required* is to insist on governments complying fully with their *human rights obligations*, including those related to the right to food, and to the right of all peoples to freely dispose of their natural wealth and resources and not to be deprived of their means of subsistence.'[453] He further argues that, since the Principles on Responsible Agricultural Investment (PRAI, the precursor to RAI) ignore human rights, they 'neglect the essential dimension of accountability.'[454]

Of course, apart from critiquing the content of PRAI, this approach also implicates the policies that in the first place contributed to 'land grabs' and make agreements regulating them (such as RAI) 'look like a desirable option':

> [T]he rush towards farmland in developing countries is the result of our own failures. We have failed in the past to adequately invest into agriculture and rural development in developing countries, particularly sub-Saharan Africa.

State-Investor Contract Negotiations, Guidance for Negotiators (Report of Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises)' (UN Human Rights Council, 11 May 2011) <http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf>.

[452] De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', above n 85 [33]. Elsewhere, De Schutter dissects 'all parties' into: 'the investor, the host State, and the local population concerned', and in that sense he envisages potential 'win-win-win' outcome, compared to the 'win-win' outcome between investor(home state) and host state envisaged in the framing of the World Bank and FAO (see section 7.2) ; see Oliver De Schutter, 'Large-Scale Land Acquisitions and Leases: A Set of Core Principles and Measures to Address the Human Rights Challenge' (Statement, June 2009) <http://www2.ohchr.org/english/issues/food/docs/BriefingNotelandgrab.pdf>.

[453] De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 274 (emphasis added).

[454] Ibid.

> We have failed to promote means of agricultural production which do not deplete the soils and exhaust groundwater reserves. And we are failing today to establish well-functioning and more reliable global markets for agricultural commodities. It would be unjustifiable to seek to better regulate agreements on large-scale land acquisitions or leases, without addressing also, as a matter of urgency, these circumstances which make such agreements look like a desirable option.[455]

Meanwhile, though, as long as these land deals happen, this approach recognises their potential benefits, the realisation of which 'presupposes that an appropriate institutional framework is in place'.[456] To this end, in 2010, De Schutter proposed 'Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases'.[457] These principles call for transparency in land deals and the proactive assessment of their impact on the realisation of human rights in host states (Principle 1); the requirement for free, prior and informed consent (FPIC) of local communities (Principle 2); ensuring the rights of local communities will be safeguarded at all times including through adopting relevant legislations (Principle 3), benefit-sharing by local populations (Principle 4); under certain circumstances, the establishment and promotion of farming systems that are sufficiently labour-intensive to contribute to employment creation (Principle 5); ensuring that the modes of agricultural production respect the environment (Principle 6); clearly defined and enforceable obligations of investors (Principle 7); in case of a net food importing host state, a certain minimum percentage of the crops produced shall be sold on local markets (Principle 8); *ex ante* assessments of the investment's impacts on the right to food (Principle 9); adherence to internationally recognised rights of indigenous people (Principle 10); and the protection of waged agricultural

[455] De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', above n 85, [7].
[456] Ibid [33].
[457] De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', above n 85, annex.

workers (Principle 11).[458] The normative (doctrinal) idea behind these principles is that: 'Agreements to lease or cede large areas of land should under no circumstances be allowed to trump the human rights obligations of the States concerned.'[459] It places the obligation to protect such rights on host states and requires investors to respect the same. Under certain circumstances—'where the investor is a private entity and the host State is unable or unwilling to act in accordance with its obligations, the home State of the investor must ensure that these obligations are complied with.'[460] On balance, the principles place much of the responsibility on host states.

Yet, in view of the general substantive and procedural limitations of (international) human rights law on which they draw,[461] one wonders how far these principles can go in tackling the risks associated with large-scale land deals. As we shall see in Chapter 6, the (human) right to land is recognised only in few human rights instruments, although the realisation of certain human rights is closely linked to land. Also, investors can employ the same language of human rights to property to avoid compliance with these principles. More importantly, as these principles do not call for the revision of relevant existing laws (such as international investment law), the protection (foreign) investors enjoy under these laws may impede the application of the principles, even if investors' host governments opt to introduce some corrective measures (that otherwise are consistent with these Principles). There are also limited avenues for holding home states accountable for their 'share' of responsibly under these Principles.

[458] Ibid, annex.
[459] Ibid [33].
[460] Ibid.
[461] See Jochen von Bernstorff, 'The Global "Land-Grab", Sovereignty and Human Rights' (2013) 2(9) *ESIL Reflections* 1; Priscilla Claeys and Gaëtan Vanloqueren, 'The Minimum Human Rights Principles Applicable to Large-Scale Land Acquisitions or Leases' (2013) 10(1) *Globalizations* 193; Narula, above n 360.

3.6. Conclusion

As the analysis in this chapter suggests, the global 'land grabs' literature remains inconclusive on questions ranging from the precise scale of the land deals to the factors behind them, as well as how to understand and respond to them. Despite the growing attempts to calculate the scale of the 'land grabs'—including through one-off studies (reports) and online databases dedicated to tracking the land deals as they happen—these accounts still suffer from 'a sense of false precision',[462] not least because of the secretive and mutable nature of the land deals. There is, however, agreement about the fact that there is a surge in (transnational) land deals particularly in sub-Saharan Africa, and that 'something important is happening.'[463]

The causal factors of contemporary 'land grabs' in sub-Saharan Africa are multiple and complex. While the policy responses of home states to the converging global food, energy and financial crises of 2007/8 could be regarded as major driving factors, the role of investors' host countries (as in the case of Ethiopia) also weighs heavily in facilitating the process. Thus, unlike their historical precedents (colonial 'land grabs') which were to a large extent effected through coercion (Chapter 2), contemporary 'land grabs' involve a convergence of interests among investors and their home state governments, host state governments (local elites), and some international institutions. Modern day land grabs are effected through a combination of diplomacy, financial incentive (support) schemes, and legal frameworks that guarantee their protection. In either case, though, the effect on local people (communities) who must give way remains similar—dispossession and displacement.

The review of international responses to the global 'land grabs' also shows the political nature of the debates that are framing the narratives about and

[462] Oya, above n 351, 506.
[463] Wolford et al, above n 354, 190.

responses to the 'land grabs'. A closer look at these responses suggests that the call for a halt to 'land grabs' by the proponents of food sovereignty lacks the political support of major actors (international institutions, and investors and their host and home states), leaving resistance as its major means. On the other hand, despite the wide support they enjoy, the role of the global governance instruments for 'land grabs' recently introduced such as the RAI are essentially appeals for social responsibility, and do not envisage even the reporting and monitoring mechanisms that are available in similar instruments. In fact, global complacency with these principles as effective responses to the prevailing 'land grabbing' likely legitimises 'land grabs' by obscuring the role of relevant laws that foreclose the enforcement of these principles (Chapters 4 and 5). On the other hand, although conceptually different from the voluntary principles in that they draw on international human rights law, the role of the 'minimum human rights principles' can equally be questioned in the light of the substantive and procedural limitations of international human rights law itself (Chapter 6).

CHAPTER 4 (INTERNATIONAL) INVESTMENT LAW AS A FACILITATOR OF TRANSNATIONAL LAND ACQUISTIONS

4.1. Introduction

In 2010, Karuturi Agro Products PLC acquired 100,000 hectares of land in Gabella Regional State of Ethiopia, and was further promised additional 200,000 hectares of land based on satisfactory performance.[464] As various reports documented, this land acquisition involved displacement of local people in the form of 'villagisation' under the guise of better provision of social and economic services by the government, and any resistance was quashed by force, as is often the case.[465] Six years down the line, the company cultivated only about 1200 hectares (slightly over 1 percent) of the land it acquired. Following the government's warning of termination of contract, and a local bank's announcement of foreclosure against the farm, the investor made the following remarks in his interview with a local newspaper, the Ethiopian Reporter:

> As far as the law is concerned, I have rights that I have not enforced…The bilateral investment protection agreement between India and Ethiopia protects me. Touch me, then you will see the power of India. This is a threat because enough is enough. I don't have to defend myself… [If officials of the Ministry of Agriculture and Natural Resources] touch my land…then they will face the consequences in the international court of justice.[466]

A few days later (on 28 December 2015), the Ministry of Agriculture and Natural Resources' Agricultural Investment Land Administration Agency (AILAA) notified Karuturi of the cancellation of its contract, claiming, in part, that as '"development" occurred on only 1, 200 hectares. [Therefore] The rest

[464] See *Land Rent Contractual Agreement Made between Ministry of Agriculture and Rural Development and Karuturi Agro Products PLC* ('*Karuturi Contract*'), (singed 25 Deceember 2010).
[465] See, for example, Horne, above n 7.
[466] Birhanu Fikade, 'Touch Me, Then You Will See the Power of India' *The Ethiopian Reporter*, 26 December 2015 <http://www.thereporterethiopia.com/content/%E2%80%9Ctouch-me-then-you-will-see-power-india%E2%80%9D>.

[98, 800 hectares] will return to a "land bank" for investment.'[467] The investor, in response, has claimed that 'the termination amounts to expropriation, which the bilateral investment treaty says must be accompanied by market-value compensation', and that he 'is prepared to seek international arbitration on the matter.'[468] However, the Ethiopia-India BIT of 2007 is yet to enter into force. Whether Karuturi takes this case to international arbitration (assuming the BIT enters into force soon enough and covers the investment) remains to be seen. But this case already points to the nature of contests surrounding nearly a hundred such large-scale land acquisitions in the country, and thousands of them in many other African countries.

Farmland investments are ordered by a set of domestic laws, and in the case of investments of foreign origin by additional sets of laws (mainly international investment law). As noted in the preceding chapters, as part of its commitment to promote private (foreign) investment in agriculture via the instrumental use of legislation, the government has enacted a number of pieces of legislation, including investment and rural land laws. Since the late 1990s, the government has also intensified the signing of BITs. The latest legal embodiments of the government's commitment to advance private commercial agriculture are farmland investment contracts, signed at both regional and federal government levels, depending on the size of the land in question.

In this chapter (4), I will give an account of the role of investment laws in shaping legal relations with respect to 'land grabbing' in Ethiopia. I will argue that the interaction of national and international investment laws (investment legislations, farmland investment contracts and BITs) not only facilitate large-scale land deals in the country, with disproportionate effects on the host people

[467] Davison, above n 141. It is worth noting here that, even after possible termination of an investment contract, the land in question will never be returned to former local users; rather, it awaits another willing investor.
[468] Ibid.

(particularly local people and indigenous communities), but also inhibit possible corrective measures by the host government. This chapter also lays the groundwork for the analysis presented in Chapter 5 of the thesis, in which I advance the claim that such expansive protection of (foreign) investors under (international) investment law can also erode the limited flexibility international trade law provides to host states with respect to addressing food insecurity and the alleviation of hunger. These laws can inhibit, for example, the adoption of export restriction measures. This in turn leads into Chapter 6 of the thesis in which I examine the role of human rights law in shaping land relations. In that chapter I argue that although human rights norms ostensibly safeguard the interests of local people against the potential adverse consequences of 'land grabbing', including exacerbation of hunger, in practice they cannot protect rival claims against investors' rights under other relevant laws, particularly investment law.

The Chapter is organised into 4 sections. Following this introductory section, in Section 4.2, I shall deal with the role of relevant domestic legislations. This discussion suggests that existing laws provide substantial incentives to private investors in the agricultural sector, and at times extend preferential treatment to them (as compared with peasants and pastoralists). Section 4.3 explores the context in which transnational land acquisitions are being negotiated, and closely scrutinises select terms of farmland contracts. Section 4.4 explores the role of international investment law in general and Ethiopia's BITs in particular. It starts by providing a brief history of international investment law, highlighting the contestation around the rationale and contours of this body of law and their implications for the governance of contemporary transnational land investments in host countries such as Ethiopia. Despite efforts towards the recalibration of international investment law (particularly, regional and bilateral investment treaties) in recent years, virtually all of Ethiopia's BITs

provide protection to foreign investors, with significant ramifications for the potential to address the social, economic and environmental risks associated with large-scale transnational land acquisitions. I shall conclude in Section 4.5, pointing to the particular ways in which domestic and international investment laws interact in shaping the legal relations around transnational land acquisitions.

4.2. Domestic Laws

Under the Ethiopian legal system, private property is recognised and protected by the FDRE Constitution, the Civil Code (1960), the Commercial Code (1960), the Criminal Code (2004), and a series of specific legislations including laws governing rural land, urban land, expropriations, investment, water resources and intellectual property. However, the most relevant domestic laws regulating farmland investment which are worth discussing here are legislations on rural land, investment, and expropriations— these laws have significantly complemented and/or amended the provisions of earlier codes dealing with private property and domestic and foreign investments.

As noted earlier, in the FDRE Constitution ownership of land 'is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.'[469] The Constitution entitles peasants and pastoralists to use (not own) land free of payment, although the particulars of each right were left for subsequent laws.[470] In a departure from previous constitutions of the country, the FDRE Constitution also allows private investors to acquire land upon payment of necessary compensation. As anticipated by the Constitution, the Federal legislature enacted its first rural

[469] *The FDRE Constitution*, art 40(3).
[470] Ibid, arts 40(4) and (5).

land legislation in 1997,[471] which among other objectives, aimed at guiding the content of land laws to be issued by regional states.[472] That brief proclamation[473] which neither addressed private investment in agriculture nor provided any guidance for regional states in this regard was repealed by the Rural Land Administration and Land Use Proclamation of 2005[474] which is currently in force. Unlike its predecessor, this Proclamation aims at, among other things, encouraging private investment in the agricultural sector.[475]As such, it stipulates that '[p]rivate investors that engage in agricultural development activities shall have the right to use rural land in accordance with investment policies and laws at federal and regional levels'.[476] Moreover, in the event of expropriation, an investor is entitled to 'compensation proportional to the development he has made on the land and the property acquired, or shall be given substitute land thereon.'[477] Further, and perhaps more importantly, the Proclamation extends *preferential* treatment to private investors. For example, unlike peasants and pastoralists who in principle have lifetime land use rights, it entitles private investors to use their lease right as collateral.[478] The Expropriation Proclamation also extends similar preferential treatment to private investors in terms of reducing the likelihood of expropriation of land: private investors' lease holding shall not be expropriated unless a lessee has failed to honour the

[471] See *Federal Rural Land Administration Proclamation No. 89/1997, Negarit Gazeta 3rd Year, No. 34* ('*Federal Rural Land Administration Proclamation 1997*').
[472] The power to administer rural land belongs to Regional States; *The FDRE Constitution*, art 52(d).
[473] The Proclamation is only 4 pages long, arranged into 10 arts.
[474] *Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No, 456/2005, Federal Negarit Gazeta, 11th Year No. 44* ('*Federal Rural Land Proclamation*'). The Proclamation shall apply to any rural land in Ethiopia; Ibid, art 4.
[475] Paragraph 6 of the Proclamation in part provides that whereas it 'has become necessary to establish a conducive system of rural land administration … encourages private investors'.
[476] *Federal Rural Land Proclamation*, art 5(4) (a). Investors can even lease land from peasant farmers, semi-pastoralists and pastoralists who are given holding certificates, provided that the lease does not lead to displacement, subject to the approval of competent local authorities; Ibid art 8(1) (2). The duration of lease is determined by regional state laws; Ibid art 7 (2).
[477] *Federal Rural Land Proclamation* art 6(3).
[478] Ibid art 8(4).

obligations he assumed under relevant law or the land is required for development works to be undertaken by *government*. In contrast, peasants' and pastoralists' landholdings can be expropriated even for large-scale farming by private investors and hence are more likely to be expropriated.[479]

There is also other domestic legislation that provides specific incentives and protection for investments in the agricultural sector. For example, the 2012 Investment Proclamation amended the 1960 Civil Code of Ethiopia which prohibited foreign ownership of immovable property[480], to entitle a foreign investor 'to own a dwelling house and other immovable property required for his investment.'[481] Investors are also entitled to a host of other incentives. For example, those investing in the agricultural sector are entitled to an income tax exemption for up to six years (where the investment is in remote areas, and where it exports over 60% its produce, the investor is entitled to reduced income tax for an additional six years).[482] Other incentives include: customs duties exemption for capital goods, construction materials and vehicles; [483] unrestricted remittance of funds;[484] and a guarantee against arbitrary nationalisation and expropriation.[485] Indeed, similar pro-investor legislative reforms were made in other sub-Saharan African countries. As Ambreena Manji puts it: 'one country after another succumb[ed] to the process of review of land

[479] *Expropriation of Landholdings Proclamation 2005* art 3(2).
[480] *The Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960, Negarit Gazeta , 19th Year, No.2* ('*The Civil Code*'),arts 390-393.
[481] *Investment Proclamation 2012* art 24.
[482] Investments in relatively less developed infrastructure are entitled to 30% income tax exemption for three consecutive years after the expiry of the initial exemption period; *Investment Incentives Regulation 2012*, art 5 and 7 cum. schedule, sec 2.
[483] *Investment Proclamation 2012* art 23; *Investment Incentives Regulation 2012*, art 13 and 14.
[484] *Investment Proclamation 2012*, art 26.
[485] Ibid art 25 (1) (2); the Proclamation envisages that no investment may be nationalised or expropriated except for public interest, and then in conformity with the requirements of law; and with advance payment of 'adequate compensation, corresponding to the prevailing market value'.

laws and enactment of new legislations'[486] with the view to, among others, attracting foreign large-scale agricultural investment.

In addition to the above incentives, foreign investors who engage in large-scale commercial farming in Ethiopia can access loans from domestic banks. As long as a foreign investor could produce a financial statement for 25 percent of the initial capital of the investment, he could automatically borrow the remaining 75 percent from domestic banks—without any verification requirement or depositing the money in a block account.[487] Indeed, the practice suggests that virtually all foreign investors have been borrowing from domestic banks accordingly,[488] although whether the loans have actually been used to develop the farms remains doubtful.[489]

On the other hand, existing domestic legislation neither effectively protects local land users (peasants and pastoralists) from displacement (or dispossession), nor ensures payment of adequate compensation in the event of displacement or expropriation. Given the expansive definition of 'public purpose' under relevant laws and the broad discretion state actors enjoy to decide what constitutes 'public purpose', large-scale commercial farms could easily be construed as serving 'public purpose', justifying expropriation of

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[486] See Manji, *The Politics of Land Reform in Africa*, above n 58, 43; some of these countries include: Eritrea, Ethiopia, Rwanda, Tanzania, Uganda, Malawi, Zambia, Mozambique, South Africa and Namibia, Ibid 1.. See also generally McAuslan, above n 58.

[487] Interview with Assefa Amede, 'Head of Legal Services at the Ethiopian Investment Land Administration Agency' (26 December 2014).

[488] Ibid; another interviewee also affirms that since domestic borrowing minimises risks, every investor would want to use this scheme; Interview with Anonymous, 'Managing Director of a Foreign Farm Investment' (5 February 2015).

[489] Most of the large scale farmland investments have not performed up to the government's expectations; see for example, Berhanu Fekade, 'Karuturi under the Spotlight' *Ethiopian Reporter*, 7 January 2015 <http://www.thereporterethiopia.com/index.php/news-headlines/item/3045-karuturi-under-the-spotlight>. In fact it is alleged that some foreign and local investors might have used the loan for other projects with far more quick returns; Interview with Anonymous, 'Local Farm Investor' (4 February 2015).

(farm)land.[490] The law neither requires prior declaration of the existence of public purpose nor provides landholders or other interested third parties with an opportunity to challenge the existence of such purpose. Thus, peasants' and pastoralists' landholdings can easily be transferred to commercial investors through expropriation as long as government authorities believe such transfer serves public purpose (often understood as economic development), unlike private investors' lease right, which can only be subject to expropriation for development works undertaken by the government.

The vulnerability of local land users is further exacerbated by the compensation scheme under existing domestic laws. For example, the Federal Rural Proclamation envisages that farmers and pastoralists are entitled to compensation for the 'development made' on the land and the 'property acquired'.[491] Nonetheless, since the FDRE Constitution itself precludes land from the realm of private property (and at the same time recognises only private property as compensable) the Proclamation does not recognise land *use* right per se as compensable. Thus, despite the ostensible constitutional guarantee against the displacement and dispossession of peasants and pastoralists, details of such protection were left for subsequent legislation. And these legislations do not entitle peasants (who do not have crops on a piece of land at the time of transfer to investors) and pastoralists to compensation for the use right lost due to transfer of land to private investors. That said, the Expropriation Proclamation does some justice to land use rights in the event of expropriation where a rural landholder is permanently displaced, allowing

[490] The Proclamation defines 'Public Purpose' as 'the use of land defined as such by the decision of the appropriate body in conformity with an urban structure plan or development plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio- economic development'; *Expropriation of Landholdings Proclamation 2005*,art 2(5).

[491] A '[h]older of rural land who is evicted for public use shall be given compensation proportional to the development he has made on the land and the property acquired, or shall be given substitute land thereon'; Ibid, art 4(3).

compensation which 'shall be equivalent to ten times the average annual income he secured during the five years preceding the expropriation of the land'.[492] In effect, what emerges here is the constitutionally recognised life time use right of peasants and pastoralists being 'legally' translated into a monetary value of the use right for ten years: under the *custodial* power of the government, and often in the name of *development*. In practice, land acquisitions are happening with payment of symbolic amounts or even without compensation.[493] Yet, the whole process can be regarded as legal under existing domestic laws, often foreclosing the contestation of the legitimacy of the deals.

4.3. Farmland Investment Contracts

Transnational land acquisitions are often effected through (international) investment contracts.[494] Theoretically, the terms of investment contracts are determined to a significant extent through negotiations of the parties concerned—unlike domestic legislations, and BITs (which are often designed on the basis of a model developed by one of the parties).[495] Also, arguably as with other natural resource seeking investments, farmland investments contracts can always be (re-)negotiated—a phenomenon Raymond Vernon in the context of raw material ventures famously termed 'obsolescing bargain'.[496] Seen in this light, farmland investment contracts should not be much of a concern for host governments and their people. Nonetheless, investment contracts may not necessarily represent a mutually beneficial compromise between the interests of

[492]Note that under this proclamation too, in principle payment of compensation is due only for 'for property situated on the land and for permanent improvements he [land holder] made to such land'; Ibid, art 7(1).
[493] See Horne, above n 7, 1; noting that 'displacement from farmland is widespread, and the vast majority of locals receive no compensation'.
[494] See Cotula, *Land Deals in Africa*, above n 97; and Alden Wily, above n 347.
[495] Salacuse, above n 95, 39.
[496] Vernon, above n 98, 53; based on the study of USA's multinational corporations' operations abroad in the raw materials venture in the 1960s, Vernon observes that host states often opened up the ventures for re-negotiation 'repeatedly—almost predictably'.

the affected parties, particularly given the agency problem these land deals often involve. State actors and domestic elites are not necessarily neutral agents of social change,[497] and may actually benefit from investors' unregulated behaviour, and as such have little incentive to protect existing land users' rights.[498] In Kenya, for instance, illegal or irregular allocation of public land ('in-country land grabbing') has been made possible through what Manji regards as 'administrative and professional corruption'.[499] On the other hand, in today's global order, possible 'corrective' measures, even by host state actors, through re-negotiation of foreign investment contracts, often entails monetary compensation and/or the stigma of unlawfulness. It is therefore crucial to scrutinise the terms of farmland investment contracts.

A comprehensive account of the recent large-scale farmland investment contracts is still lacking, not least because the deals are often concluded in secret and as such it is difficult to access recorded documents.[500] Yet, from preliminary review of selected farmland contracts in sub-Saharan Africa, Lorenzo Cotula suggests that 'there are real concerns that some contracts underpinning the recent wave of land acquisitions may not be fit for purpose.'[501] Cotula notes that a number of the contracts reviewed appear to be 'short, unspecific documents that grant long-term rights to extensive areas of land', and calls for further research in this regard.[502] Similarly, Uche Ofodile from her examination of select farmland investment contracts observe that 'countries in SSA [sub-Saharan Africa] are not presently using the contracts to distribute the risks, costs, and benefits associated with agro-FDI or to limit exposure to liability under the BITs

[497] See generally Scott, above n 409.
[498] Ginsburg, above n 280.
[499] See Manji, 'The Grabbed State', above n 289.
[500] Côte, above n 349.
[501] Cotula, *Land Deals in Africa*, above n 97, 43.
[502] Ibid.

that they have concluded.'[503] Other researchers also argue that many of the negative impacts of large-scale farmland investments—such as those documented in a recent World Bank report[504]—could have been resolved through better contracts between states and foreign investors, and more robust monitoring and evaluation of projects after the contracts were signed.[505] In what follows, therefore, I shall explore the terms of farmland investment contracts signed by the government of Ethiopia in recent years to show the ways in which these contracts shape the rights and interests of the host government, investors and local communities around transnational land acquisitions. By the end of December 2014, the Federal Government had admitted to having signed at least 80 contracts with foreign and domestic investors involving the transfer of about 460,000 hectares farmland,[506] although as noted in Chapter 3, other sources claim much higher figures. The analysis in this Section focuses on 38 publicly available contracts signed with 25 foreign and 13 domestic investors.[507]

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[503] Ofodile, above n 33, 331.

[504] The Report by and large positively appraises the practice of large scale farmland investments, but also notes some negative impacts in relation to: access to land, access to water employment, environment, outgrower schemes, food security, infrastructure, technology transfer, resettlement, and access to markets. See The World Bank, 'The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments: Implications for Corporate Performance and Impact on Local Communities' (World Bank Report Number 86175-GLB, 2014) xiv.

[505] Carin Smaller, 'Foreign Investment in Farmland and Water: 10 Steps for Better Contracts' *ICSID Investment News*, 14 May 2014 <http://www.iisd.org/itn/2014/05/14/foreign-investment-in-farmland-and-water-10-steps-for-better-contracts/>.

[506] Interview with Bekele, above n 25; Although it is claimed that regional states alone have transferred over two million hectares of farmland to domestic and foreign investors over the last ten years, neither the Agency nor the Federal Investment Commission have precise data on this due to 'poor reporting' from Regional States to the Federal Investment Commission; Interview with Gashaw, above n 352.

[507] Contracts for 38 land leases are available online; *The Contracts*. An additional 40 contracts signed between 2012 and 2015 are not yet made public. According to Interview with Bezuayehu Bekele, above n 22, this is due to 'lack of capacity including scanner and IT personnel to continuously upload the documents online', although one finds this hardly convincing; the latter category of contracts tends to be of lesser scale (maximum of 5000 hectares) compared to those signed prior to 2012 which go up to 100,000 hectares since 'the government is now more cautious and would like the investors to acquire additional land depending on performance'; Ibid.

I will, however, begin with a brief account of the negotiation process of farmland investment contracts in the country so as to shed some light on how the terms of these contracts are shaped in the first place.

4.3.1. The Negotiation Process

Prior to 2009, farmland investment contracts in Ethiopia used to be negotiated and signed only by regional state governments (and their local administrative divisions) as part of their constitutional mandate for administering rural land.[508] But with the surge in demand for farmland, at the request of the federal government, regional state governments purportedly 'delegated' to the federal government the power to administer and monitor land acquisitions exceeding 500 hectares on their behalf, owing to the alleged lack of capacity of some of the regional states[509]—although the constitutionality of this 'delegation' is debatable.[510] Since then, any request for farmland investment exceeding 500 hectares has been negotiated at federal level through the Agricultural Investment Land Administration Agency.[511] Moreover, regional states are required to transfer to the Federal 'Land Bank' administered by the Agency any plots of land that exceed 500 hectares, if such plots are deemed better

[508] *The FDRE Constitution*, art 51. Addis Ababa and Dire Dewa City Councils, as autonomous Administrative interties could also sign investments contracts relating to their respective jurisdictions—though farmland investment by default often happens in rural areas(and hence in Regional States).

[509] Although the alleged lack of capacity was in particular with respect to the Gambella and Benishangul Regional States, even those believed to be more 'capable' such as the Oromia Regional State gave the delegation; Interview with Kuma Daba, 'Vice Commissioner of Oromia Regional State Investment Commission' (26 December 2015).

[510] While art 50 (9) of the FDRE Constitution envisages the possibility for the Federal government to delegate its mandates to Regional States, no such explicit constitutional provision exists to the vice versa.

[511] Interview with Bekele, above n 25.

developed by private investors.[512] However, land deals of lesser scale are still negotiated and signed at various levels of regional governments.[513]

The procedure of land acquisition negotiation thus depends on the scale (land size) and origin of the investment. Foreign investors are required to obtain an investment permit from the Federal Investment Commission. After issuing an investment permit, the Commission writes a letter of cooperation on behalf of the investor either to the Federal Agricultural Investment Land Administration Agency (if the requested land size exceeds 500 hectares) or to an Investment Bureau of a Regional State where an investor wants to invest (if the requested land is below 500 hectares). If an investor is referred to the Agency, having assessed relevant documents, the Agency will suggest a suitable investment site from the land within its 'land bank', and if the investor is comfortable with the suggestion, he will be accompanied by the experts from the Agency and local officials for a site visit. If the investor is satisfied with the suggested land, he will then sign a contract with the Director of the Agency.[514] On the other hand, if a foreign investor is referred to a Regional State Investment Bureau, the Bureau assesses relevant documents and arranges a field visit to relevant investment site(s). Once the investor has in principle accepted the offer, the request will be forwarded to the State's Investment Board[515] for approval. Domestic investors also pass through similar procedures except that unlike foreign investors they obtain an investment permit directly from the concerned region's investment bureau, instead of the Federal Investment Commission.[516] Reportedly, the

[512] Reportedly, over three million hectares of land has already been registered in the 'Land Bank'; Ibid.
[513] Interview with Daba, above n 509.
[514] Earlier contracts (before the establishment of the Commission) were signed mostly by the Minister of Agriculture.
[515] In the case of Oromia Regional State for example, the Board is chaired by the President of the State whereas the Investment Commissioner of the State serves as the secretory; Interview with Daba, above n 509.
[516] Interview with Genet Sibani, 'Director of the Contracts Administration Directorate of the Federal Investment Commission' (26 December 2014).

negotiation (land acquisition) process is often rather swift[517] —perhaps not surprising, given the government's decades-long interest in the promotion of large-scale private (foreign) investment into the agricultural sector.

What is often missing from this process, though, is the involvement of local people and communities in investment sites. This seems to be of less concern for some of the officials in charge of land transfers to private investors. According to Bekele, for example, this is because 'large-scale land investments are happening in areas that are unoccupied, but investors are encouraged to cooperate with local people (communities) in surrounding areas to create goodwill.'[518] Such mode of land negotiation which sidelines local users (and occurs in a non-transparent manner), as Collier and Dercon observe in a different context, not only opens a door for corruption by government officials negotiating the deals, but also tends to undervalue the assets (land)—both of which leave society receiving less than the full social value of the land.[519]

Part of the problem here has to do with how the term 'vacant' or 'unoccupied' is understood. In the first place, these designations are often based on the use of technologies of governance such as satellite imaging which renders existing land use for the purpose of, for example, grazing, gathering, and hunting invisible.[520] The property regime—specifically, lack of formal title over land in question—is another factor that renders it 'vacant', even where the use of that land by local communities is visible. For example, local residents in Bako Zone in Oromia Regional State where Karuturi acquired 11,000 hectares of land in 2009 claim that: 'Over 1500 farmers had been using this land for farming and

[517] Interview with Anonymous, above n 488.
[518] Interview with Bekele, above n 25; probed about various reports that suggest that the land transfers had actually involved displacement, he suggested that 'in one or two instances that involved expropriation, locals were given adequate compensation.'
[519] Paul Collier and Stefan Dercon, 'African Agriculture in 50 Years: Smallholders in a Rapidly Changing World?' (2014) 63 *World Development* 92, 98.
[520] Geisler, above n 6.

grazing purposes. When the investor came, local administrators told us that since no one has certificate [formal title] over this land, the land belongs to the government.'[521] This story is not an outlier. There are various reports pointing to dispossessions and displacements of local farmers and pastoralists in other Regional States such as Gambella[522] through the legal creation of 'vacant land' due, in large part, to lack of formal title.

4.3.2 Features and Terms of the Contracts

Here is a summary of the key features of the contracts. Most of the contracts were signed between the government of Ethiopia, represented by the Ministry of Agriculture, and private investors (companies); although, given the support foreign investors often receive from their home states, the private versus public nature of these investments is rather ambiguous. Foreign investor countries under the available contracts include: India, Saudi Arabia, Israel, Turkey, China and Pakistan, although other sources indicate a long list of investor countries[523]. The contracts are generally short (about nine to eleven pages long often organised into 19 to 21 articles). The key terms of the contracts examined are identical, save for minor differences relating to, for example, the identity and origin of investors, size and location of land, and rental price. In fact, the contracts appear more of a template designed by the host government—which may suggest that the government has had a negotiation upper hand. Yet, given the investor outreach program of the government that aimed *inter alia* to establish 'connections with internationally known companies and consult with them on matters related to what should be done to encourage them to invest in

[521] Interview with Teferi Mosisa et al, 'Residents of Bako, Oromia Regional State' (6 February 2016).
[522] See for example, Horne, above n 7; Rahmato, above n 352; Fouad Makki, 'Development by Dispossession: Terra Nullius and the Social-Ecology of New Enclosures in Ethiopia' (2014) 79(1) *Rural Sociology* 79.
[523] Additional investor countries, for example according to the Land Matrix, include: USA, UK, Italy, Malaysia, Singapore, Iran, France, Germany, Denmark, Austria, United Arab Emirates, Nigeria and Djibouti; see Partnership, above n 2.

the country'[524] as far back as 2003, and from a closer look at the terms of the contracts, one can sense that they are essentially (if not exclusively) based on the needs of potential investors. The leases are for periods ranging from 20 years to 50 years, but renewable for additional years mutually agreed between the parties. As envisaged in the GTP, the contracts stipulate the cultivation of different agricultural products, mainly: industrial crops (especially cotton and sugar cane); biofuel crops (such as palm oil, Jatropha curcas, and castor beans); flex crops (such as oil seeds, soya, and maize); and to a very limited extent food crops (mainly rice).[525] The contracts generally call for immediate but gradual development of the leased land.[526] All the contracts stipulate that the lessor shall 'deliver and hand over the vacant possession of leased land free of impediments to the lessee'[527] and ensure that the lessee shall enjoy during the life of the contract 'peaceful and trouble free possession of the premises and it shall be provided adequate security, free of cost, for carrying out its entire activities in the said premises, against any riot, disturbance or any turbulent time other than force majeure, as and requested by the lessee.'[528]

[524] Ministry of Finance and Economic Development (MoFED),'Rural Development Policy and Strategies of Ethiopia', above n 65.
[525] Only the contract with Saudi Star Farm is exclusively for rice production; see *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and Saudi Star Agricultural Development Plc* ('*Saudi Star*') (signed 25 October 2010) art 1(2).
[526] For example, Whitfield is expected to develop one fourth of the land within the first year and the entire plot in 4 years; *Land Rent Contractual Agreement Made Between Ministry of Agriculture And Rural Development and Whitefield Cotton Farm Pl* ('*Whitefield*'), signed 8 January 2010, art 4.4 ; whereas Ruchi Agri Plc. is required to develop 10 percent of the land within the first year and the entire plot within 4 years; *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and Ruchi Agri Plc* ('*Ruchi Contract*') signed 5 April 2010, art 4.4 ; CLC is required to develop one tenth of the land within 1 year and the entire plot within 7 years; *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and CLC Industries Plc* ('*CLC Contract*') (signed 26 December 2009) art 4.4. On the other hand, Karuturi is required to develop half of the farm within the first year and the remaining half 'within a period of not more than 20 years'; *Karuturi Contract*, art 4.4.
[527] See art 6.1 of *The Contracts*.
[528] *The Contracts* art 6.5.

All the contracts envisage the laws of Ethiopia as governing law[529] and the 'Ethiopian Federal Court' as the forum for resolution of disputes arising out of the contracts that could not be settled amicably,[530] although some of the contracts also stipulate investor-state dispute settlement (ISDS) through ICSID.[531] S&P Energy Solutions Plc's contract, for example, provides that:

> In the event of a dispute arising between the lessor and the lessee arising out of or in connection with this Land Lease Agreement, both parties will do their utmost to resolve the dispute amicably and to their mutual satisfaction through negotiation; and if they are unable to achieve such a settlement within a period of three moths the dispute shall be referred to the International Center for Settlement of Investment Dispute under the rule governing Additional Facilities for Administration of Proceeding by Secretariat of the Center. Such proceedings shall be in the English language.[532]

Although ISDS clauses are found only in some of the contracts, arguably even contracts without ISDS clauses may entitle an investor to similar rights, particularly if the investor's home state has a BIT with Ethiopia that envisages ISDS. Moreover, and perhaps more importantly, where relevant BITs with ISDS also contain umbrella clauses (as do some of Ethiopia's BITs),[533] reference to domestic courts as final arbiters of disputes arising from the contracts (and BITs) is more likely ineffective. And this, as we shall see in later sections, may significantly inhibit the host state's policy space.

In line with the focus of the thesis, I shall now examine the contractual terms regarding (local and/or domestic) food supply and other related issues such as employment, water use, and environment, which have either a direct or indirect relationship with addressing hunger in the host state. Although agricultural

[529] Ibid art 12.
[530] Ibid art 17.
[531] *Land Rent Contractual Agreement Made Between Ministry of Agriculture and Rural Development and S&P Energy Solutions Plc.], Executed 1 March 2010, Art 17* ('*S&P Contract*'), signed on 1 March 2010, art 17; *CLC Contract* art 17; *Ruchi Contract* art 17.
[532] *S&P Contract* art 17.
[533] For discussion on this, see the section on umbrella clause.

investments can ostensibly bring yield increases, the extent to which these investments benefit food availability (and thus access) in host states in part depends on the terms of investment contracts. Indeed, emerging research warns that, if not properly managed, such investments may actually have a long term negative impact on food security in host states.[534] The examination of the contracts at hand also points to the questionable relevance of transnational land acquisitions to addressing hunger in Ethiopia.

4.3.3. Domestic Food Supply

The overwhelming majority of the contracts examined envisage the production of principally non-food (industrial and biofuel) crops, and food crops only as supplementary production. Out of the 38 farmland deals examined, 34 land deals envisage the production of either agricultural raw materials such as cotton or a mix of food and non-food crops, and only four land deals (but which in terms of size involve two-thirds of the total land acquisitions represented in these contracts) envisage exclusive food crop production. In fact, some investors claim that the host government prescribes the production of non-food crops as a precondition for acquiring land.[535] The contractual practice of the government thus suggests that food production has been relegated to a secondary priority. Of course, in some cases the food versus non-food distinction is somewhat blurred, given the fact that some crops officially proposed for biofuel production (non-food category) can easily be shifted to food (or animal feed) depending on the dynamics of demand (profit)—as in the case of, for example, maize and soybean. Although the contracts in principle require investors to exclusively use the land for the cultivation of crops specified in the contracts, they also leave room for crop shifting upon the request of the investor and

[534] See, for example, De Schutter, 'How Not to Think of Land-Grabbing', above n 6; Ofodile, above n 33, 337–9; Cotula, above n 43.
[535] Interview with Anonymous, above n 488.

written consent from the relevant authority.[536]This could be the case when, for example, the land in question is found to be unsuitable for the crop originally proposed.[537] The extent to which this flexibility works the other way round, however, is not self-evident from the contracts. Absent any provision to this effect, the host government may have a hard time forcing an investor who was given land for production of a non-food crop to shift to production of food crops, particularly when this runs counter to the dynamics of the market. This can be the case where land is acquired for production of biofuel to be exported to a home state (as is often the case with most of European investors) with a potentially higher return. For a country of nearly 100 million people (the second most populous country on the continent) a significant number of whom are struggling against hunger, it may not be farfetched to foresee the need for measures such as prioritising the production of staple crops as the circumstances demand and introducing export and water use restrictions. Yet there is no provision in the examined contracts to this effect. Without any such contractual provision, particularly in the case of foreign investors, such possibility may be significantly hindered by the legal protection these investments enjoy under international investment law, as will be further discussed in later sections. In fact, the practice of prescribing certain non-food crops suggests that it may not be easy to force even local investors to produce crop(s) other than those they originally agreed to.[538] Needless to say, the more arable land is foreclosed for production of non-food crops than food, the more pressure on the remaining arable land for production of food, with significant

[536] See articles 1(2) cum. 4(9) of *The Contracts*.
[537] Interview with Bekele, above n 25.
[538] For example, in 2011 the government wanted some local investors in the western part of Oromia Regional State to shift to the cultivation of sesame which the investors successfully resisted on ground of the estimated low return from this shift, comparted to what they had been hitherto producing; Interview with Gurmesa Debelo, 'Investment Bureau of East Welega Zone of Oromia Regional State' (4 February 2015).

environmental and social ramifications, including exacerbation of hunger in the host country.

On the other hand, neither is there a guarantee that even the limited amount of food (crops) produced stay in the Ethiopian market. One possible way of balancing this could be, as Oliver De Schutter (former UN Special Rapporteur on the Right to Food) suggests, through a requirement to sell part of the produce locally.[539] Again, apart from activities relating to the cultivation and harvest of the products,[540] the contracts do not envisage what the investor may or may not do with the harvest. The only limitation the contracts impose on investors in this respect is that the investor shall not make unauthorised use of the leased land beyond the predetermined purpose or objective or plan without express prior consent of the lessor in writing.[541] Neither do the contracts mention the possibility of export restrictions even under exceptional circumstance, for example, where there is local food crisis. Indeed, Essayas Kebede, former Director of the Agricultural Investment Support Directorate at the Ethiopian Ministry of Agriculture, argues that: '[i]t's not our task to take revenue away from investors. …We want to increase the purchasing power of our people so that they can afford to buy corn from Karuturi [one of the farmland investors in Ethiopia]. If the investors can get a good price here in this country, they will sell here.'[542] The idea is that, as the former State Minster of

[539] De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', above n 85, principle 8.
[540] The lessee [investor] has the right to '[d]evelop and cultivate the land and harvest the crop and carry on all other activities by mechanization or such other means that the lessee shall in its own discretion deem fit and proper in the circumstances'; *The Contracts*, art 3.4.
[541] See Ibid, art 4.10.
[542] Essayas Kebede, cited in Elias N Stebek, 'Between "Land Grabs" and Agricultural Investment: Land Rent Contracts with Foreign Investors and Ethiopia"s Normative Setting in Focus' (2011) 5(2) *Mizan Law Review* 175, 210.

Agriculture of Ethiopia suggests, Ethiopia can always buy food from the international market provided that there is enough money.'[543]

This approach of Ethiopian government driven by the export-oriented agricultural policy of the country seems to have strong faith in the (international) market, with all its vulnerabilities, is in contrast to the practice in some other countries in sub-Saharan Africa region. Cotula notes the Liberian policy of granting the investor the right to export rice 'provided domestic consumption demands are met,' while in Madagascar, a contract determines export and domestic market quotas for specified crops (rice, wheat, and maize), though all pulses are for export and the contract allows exceptions where the 'situation or circumstances otherwise demanded.'[544] While the reserving of the right to include export restrictions in farmland contracts—or the imposition of export restrictions in themselves—may not be a panacea for addressing local food shortage (in terms of both availability and access),[545] at times, particularly when there is local food crisis, these measures might be considered more a necessity than an optional policy response. The fact that these contracts are silent on this issue evokes doubts as to whether it was seriously considered during the negotiations which transferred large tracts of land to foreign investors for periods of up to half a century.

[543] Ibid.

[544] Cotula, *Land Deals in Africa*, above n 97, 38.

[545] See Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press, 1983); demonstrating that nationwide food availability does not necessarily translate into household food access. See also Christian Haberli, 'Food Security and WTO Rules' in Baris Karapinar and Christian Häberli, (eds), *Food Crises and the WTO : World Trade Forum* (Cambridge University Press, 2010) 297, 319; noting that: 'Food security under export restrictions may temporarily increase for domestic consumers, but it can have a negative impact on domestic production.'

4.3.4. Revenue Generation: land rent, and income tax and export duties

It is widely claimed that even where large-scale land acquisitions may not directly increase domestic food supply, they can at least enhance food security in host states through generation of revenue. Generally, this revenue ostensibly comes through land rent, income tax and export duties. Yet this claim is questionable, at least in the context of Ethiopia. Land rent is extremely cheap, the annual lease rate per hectare ranging from Birr 20 (USD 0.87)[546] to Birr 665.85 (USD 29.09);[547] although in some cases the lessor 'reserves the right to revise the lease payment rate as the need may arise.'[548] Except for the Saudi Star and Karuturi contracts, the other contracts analysed provide for three to five years' grace period for payment of the land rent (this seems to be due to costs involved in preparing land for cultivation and underdevelopment of the land and infrastructure). In terms of income tax, as already discussed in relation to domestic legislations, investors in the agricultural sector are entitled to an income tax exemption for up to six years (where the investment is in remote areas, and where it exports over 60% of its produce, the investor is entitled to reduced income tax for an additional six years).[549] The focus seems to be on long-term revenue benefit that comes in the form of export tax (duties), which also aligns with the export-oriented economic policy of the country. Yet, contrary to that reasoning, the contracts do not impose adequate export performance requirements to ensure generation of foreign currency either. It could be possible to demand such performance from domestic investors and, from foreign investors at least to the extent that they are consistent with other

[546] *Karuturi Contract*, art 2.2.1. (The rate is based on exchange rate on 23 April 2017).
[547] *CLC Contract*, singed 24 December 2009. (The rate is based on exchange rate on 23 April 2017).
[548] See for example, *Saudi Star*, 25 October 2010, art 2.2.4 ; *Karuturi Contract*, art 2.2.4.
[549] *Investment Proclamation 2012* art 24.Moreover, investments in relatively less developed infrastructure are entitled to 30% income tax exemption for three consecutive years after the expiry of the initial exemption period; *Investment Incentives Regulation 2012*, art 5 and 7 cum. schedule, sec 2.

laws (such as relevant BITs) at play.[550] Needless to say, to 'buy food from anywhere in the world' as some of the government officials suggest requires money—in fact, hard currency if food is to be imported. Given the very cheap land rental prices and generous tax holidays, the often claimed revenue (hard currency) benefits of these large-scale land acquisitions to ensure domestic food availability and/or access (assuming that the revenues are even used for this purpose) are questionable at best. In fact, in practice it appears that most of the projects have not even taken off—even after borrowing millions of dollars from domestic banks.[551] According to a government commissioned study, out of 630,518 hectares acquired by both local and foreign companies in the Gambella Region, only 64,010 has been covered with crop and another 68,054 has been cleared.[552]

4.3.5. Employment and Related Benefits

Employment is one of the most commonly claimed potential benefits of large-scale land acquisitions, and one that is also closely related to local and household food access.[553] Even in the face of projects that displace local land use and threaten the livelihood of local people, government officials would have a quick justification—that the land is 'vacant' and in case of displacement (dispossession), there is always an alternative livelihood created by the new investment, with enhanced 'purchasing power' via employment. In terms of Amartya Sen's conception of *entitlement*, it is just a shift from 'production-based entitlement' (growing food), to 'own-labour entitlement' (working for food) and/or 'trade-based entitlement' (buying food).[554] At the risk of

[550] Of course, if Ethiopia accedes to the WTO this may conflict with TRIMs.
[551] A typical example of such projects is Karuturi's farm noted earlier.
[552] Seyoum Asrat and Wudineh Zenebe, 'Barren Farmlands' *Ethiopian Reporter*, 31 December 2016 <http://www.thereporterethiopia.com/content/barren-farmlands>. According to the report this is 15.8 percent of the plot that should have been covered with crops; Ibid.
[553] Deininger and Byerlee, above n 1.
[554] Sen, above n 545.

oversimplification, though, the way this shift unfolds in the context of the recent farmland investment carries the risk that jobs may not actually be created, or where created, may not be adequate to substitute for the lost livelihood. In the case of Karuturi's Bako farm, for example, locals who had been displaced and were employed by the company, complain that they are paid only 10 Birr (USD 0.44) a day which hardly covers their living expenses.[555] One way to balance this could be, as some commentators suggest, through negotiating contracts with employment-creation clauses which also guarantee a 'living wage', as far as waged employment is concerned.[556] Nonetheless, none of the contracts examined have a clause on job creation. Indeed, as noted earlier, investors have substantial discretion with regard to the development and cultivation of their farmland.

The other commonly claimed benefits of large-scale land transfers which are thought, at least indirectly, to enhance domestic food production are the building of infrastructure and technology transfer.[557] However, most often these claimed benefits rarely happen. Timothy Wise argues from the Tanzanian experience that 'it has become clear that companies can make whatever false promises they need to make to secure land, knowing that once they get the land they can renege on the promises.'[558] This was also the case at the Bechera

[555] Interview with Mosisa et al, above n 521; the amount is based on exchange rate on 23 April 2017.
[556] De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', above n 85, principle 5.
[557] See generally Levenstein, above n 1. At least three large scale farm investors claim that they do transfer technology to small holder farmers, but when probed how such transfer happens they mention that the farmers can purchase improved seeds from them, which depends on the farmers' ability to buy, not to mention the potential dependency this may create.
[558] Timothy Wise, 'Picking up the Pieces from a Failed Land Grab Project in Tanzania' *GlobalPost*, 27 June 2014 <http://www.globalpost.com/dispatches/globalpost-blogs/rights/picking-the-pieces-failed-land-grab-project-tanzania>.

Agricultural Development Project, owned by Karuturi Agro Products Plc in Ethiopia.[559]

In spite of habitual pre-investment promises, none of the contracts examined oblige investors to deliver these benefits. There is no doubt that such promises can defuse opposition from people affected by these acquisitions, yet once investments are made they enjoy both physical protection by the government security apparatus[560] and legal protection from investment contracts and an array of laws that often foreclose any 'arbitrary' measure against the project.

4.3.6. Water Use

While the increasing large-scale land acquisitions in the past few years across Africa have been popularly known as 'land grabbing', as some commentators note, they could just as well be understood as 'water grabbing',[561] for these investments are driven as much or even more by the need for water to grow crops than by the need for land.[562] Indeed, when land is acquired for import of either food or non-food (biofuel and industrial) crops, it involves an import of water in virtual form.[563] As has already occurred in some of the countries from which transnational investments originate, intensive agricultural farming can

[559] Messele Fisseha, 'A Case Study of the Bechera Agricultural Development Project, Ethiopia' (ILC, 2011) 31.
[560] See *The Contracts*.
[561] Jennifer Franco, Lyla Mehta and Gert Jan Veldwisch, 'Are African Land Grabs Really Water Grabs?' *CNN*, 22 March 2013 <http://www.cnn.com/2013/03/22/opinion/water-grabs-africa/>.
[562] Woodhouse Philip and Santos Ganho, 'Is Water the Hidden Agenda of Agricultural Land Acquisition in Sub-Saharan Africa? 6-8 April 2011' (International Conference on Global Land Grabbing Institute of Development Studies, University of Sussex) <http://www.environmentalhealthnews.org/ehs/news/2013/africa-water-grab.pdf>. See also, Carin Smaller and Howard Mann, 'A Thirst for Distant Lands: Foreign Investment in Agricultural Land and Water' (IISD, May 2009).
[563] Arjen Y. Hoekstra et al, *The Water Footprint Assessment Manual: Setting the Global Standard* (Earthscan 2011, 2011) 47; Antoinette Sebastian and Jeroen Warnerb, 'Geopolitical Drivers of Foreign Investment in African Land and Water Resources' (2014) 12(1) *African Identities* 8.

degrade groundwater resources.[564] Unlike land which has a distinct spatial boundary, water use depends on flows through the landscape, where restriction or interruption of flows of water in one area can have a potentially widespread impact downstream,[565] an effect increased in the case of large-scale agriculture. Despite this inherent interconnection between land and water, the contracts under consideration seem to underestimate the immediate and potential adverse effects of large-scale commercial farming on existing local water users.

A relevant provision common in the contracts examined states that the lessee has the right to:

> Build infrastructure such as dams, water boreholes, powerhouses, irrigation system, roads, bridges, offices, residential buildings, fuel/power supply stations/outlets, health/hospitals/dispensaries, educational facilities, at the discretion of Lessee upon consultation and submission of permit request with concerned offices subject to the type and size of investment project whenever it deems so appropriate;[566]
>
> [d]evelop and cultivate the land and harvest the crop and carry on all other activities by mechanization or such other means that the lessee shall in its own discretion deem fit and proper in the circumstances.[567]

These provisions confer expansive right on investors without any mention of other competing water uses. The only requirement is submission of a permit request to the concerned office (the type and size of investment seems to be the factor for granting the permit). Unless carefully managed, building of infrastructure, construction of dams and irrigation system, as well as absolute discretion relating to the manner of cultivation and harvest, without *ex post* impact assessment[568] by an independent body, may have significant ecological

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[564] Alan Macnald, Richard Taylor and Helen Bonsor, 'Groundwater in Africa: Is There Sufficient Water to Support Intensification of Agriculture from "land Grabs"?' in John Allan et al (ed), *Handbook of Land and Water Grabs in Africa : Foreign direct investment and food and water security* (Routledge, 2013).
[565] Philip and Ganho, above n 562. As noted in Chapter two, this is particularly true of the Gulf Countries.
[566] *The Contracts*, art 3.2.
[567] Ibid, art 3.4.
[568] As per the contracts the lessees are only required to conduct environmental impact assessment and deliver the report within three months of the execution of the agreement; Ibid, art 4.1(d).

and social ramifications. Indeed, the famine story of Ethiopia itself has partly been explained in terms of the state's economic development projects that had little regard for existing local water uses. For example, the 1972/73 famine in Afar region of Ethiopia which resulted in the death of nearly 20,000 pastoralists and peasants was partly attributed to the adverse ecological effects of the construction of numerous dams on Awash River for large-scale commercial farming of cotton and sugar cane.[569]

The fact that the investment contracts (and other domestic laws) do not address issues such as export restriction, competing water uses, job creation, and are loose on environmental standards is very disconcerting. Even more disconcerting, though, given the existence of international dispute settlement clauses in some of the contracts and the architecture of Ethiopia's BITs, is that possible corrective measures by the host state that violate a contract may also constitute breach of relevant BITs standards, entailing costly international adjudication (discussed further below). For the host state that has an ingrained interest in large-scale land transfers to investors, this might well engender (re)regulatory restraint—'regulatory chill'—at the expense of local people affected by these transfers.

4.4. International Investment Law

The recent large-scale land acquisitions in much of the global South are of both domestic and foreign origin. In the case of Ethiopia, foreign investments have a larger share both in terms of number and scale.[570] Compared to domestic investments, investments of foreign origin enjoy another layer of protection

[569] Helmut Kloos, 'Development, Drought, and Famine in the Awash Valley of Ethiopia' (1982) 25(4) *African Studies Review* 21.

[570] According to the data from the Ministry of Agriculture and Rural Development, out of the farmland investments exceeding 500 hectares, two thirds (roughly 300,000 hectares) have been by foreign investors; *The Contracts*.

from international investment law which mainly comes in the form of international investment agreements (IIAs) between investors' home and host governments, and to a limited extent customary international law.[571] Although currently there is no fully-fledged internationally applicable multilateral investment agreement (MIA),[572] there are thousands of bilateral and regional IIAs. According to UNCTAD, as of April 2015 there were 3271 IIAs of which 2926 are Bilateral Investment Treaties (BITs).[573] Since intra-regional land acquisitions in Ethiopia and much of sub-Saharan Africa are minimal (see chapter 3), compared to regional investment agreements,[574] BITs with origin countries outside the region are more relevant in regulating transnational land acquisitions in Ethiopia. Thus, in this section, I shall discuss the role of international investment law in relation to transnational farmland investments in Ethiopia, with a particular emphasis on BITs. I will argue that the architecture of Ethiopian BITs further reinforces transnational land acquisitions and inhibits possible measures the government may take to mitigate the potential adverse impacts of these land acquisitions on the host people, including exacerbation of hunger. I shall, however, begin with a brief account of the evolution of international law on foreign investment, not so much to delve into the complex historiography of this body of law, but to highlight the

[571] For example, the requirement for payment (not standards) of compensation for non-regulatory takings by a state can be regarded as rooted in customary international law. Nonetheless, the extent to which customary international law and general principles of law serve as sources of international investment law is still debatable; see for example Sornarajah, above n 104, 82–7.

[572] Historically, efforts to create MIA have repeatedly failed in major part due to diverging interests among capital exporting and importing states. Investment agreements with relatively large membership such as WTO's Trade Related Investment Measures (TRIMS) cover only a very limited aspects of the protection of foreign investment; Ibid 79–82, 257–67.

[573] 2227 BITs and 132 other forms of International Investment Agreements are already in force; see UNCTAD, 'Investment Policy Hub' <http://investmentpolicyhub.unctad.org/IIA>.

[574] Ethiopia is a member of regional investment agreements such as Common Market for Eastern and Southern Africa's (COMESA) Common Investment Area Agreement; see UNCTAD, 'Investment Agreement for the COMESA Common Investment Area' <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092>.

controversies surrounding its evolution with the aim of giving structural context to the textual analysis of relevant aspects of Ethiopia's BITs.

4.4.1. The Evolution of International Investment Law

The history of international law on foreign investment, according to Sornarajah, could be traced back to early European institutional writings on the treatment of aliens by their host states which generally took the view that the law should be designed to further the free movement of trade and investments across state boundaries.[575] These writings, however, slightly differed on the nature and/or standard of protection a host state owes to aliens.[576] As Sornarajah further notes, in the eighteenth and nineteenth centuries, foreign investments were largely made in the context of colonial expansion, and there was no significant need for the development of international law on foreign investment during this period—for the colonial legal systems which were integrated with those of the imperial powers gave sufficient protection for these investments.[577]

The protection of investments that had occurred outside the colonial context were mainly through customary international norms on state responsibility, which arguably obligated host states to treat foreign investment in accordance with an international minimum standard.[578] However, many states that had not been colonised, or were already decolonised, most notably Latin American countries, started to counter the externally assessed standards of protection of

[575] Sornarajah, above n 104, 19.
[576] Thus, for example, while Vitoria suggested that the alien trader must be given equality with the national, Vattel and Grotius required that aliens be treated in accordance with some external standard, which was higher than the national standard, Ibid.
[577] Ibid.
[578] Most international economic agreements between the late 18th century and end of WW II such as US's 'Friendship, Commerce and Navigation' (FNC) treaties were primarily concerned with trade relations, though these agreements sometimes included some provisions on the protection of property (not necessarily investment)—leaving customary international law as the major source of rules for protection of foreign investment; Kenneth Vandevelde, 'A Brief History of International Investment Agreements' (2005)' (2005) 12(1) *Davis Journal of International Law &Policy* 157, 157–59.

foreign investments through doctrines such as the 'Calvo Clause' and the theory of unequal treaties.[579] The Calvo clause (named after Carlos Calvo, an Argentinian foreign Minister and jurist) was inserted into series of conventions, laws, and constitutions of Latin American countries, to the effect that treating foreign investors in the same way as nationals satisfied the requirements of international law.[580] On the other hand, the USA which had shared a similar view in the early period after its independence from the British Empire in the 18th century, but which was now a major capital exporter to its Latin American neighbours, insisted that foreign investors be treated in accordance with international minimum standards.[581] Thus, following Mexico's nationalisation of private property for purpose of land reform in the late 1930s, the USA responded that the taking of a foreign property must be accompanied by 'prompt adequate and effective compensation', which is often referred to as the 'Hull Formula', (named after USA Secretary of State of the time who articulated this position).[582] Yet Latin American countries continued resisting this formula and its institutionalisation. The proposed Regional Economic Agreement among the American States (Bogota Economic Agreement of 1948) failed to come into effect in major part because Latin American countries rejected the USA's proposal of the clause in the Agreement.[583]

The divergence over the standards of protection of foreign investments continued in the post-colonial era; [584] in particular, the period between the 1950s

[579] Pahuja, *Decolonising International Law*, above n 104, 106.The theory of unequal treaties regards any treaty negotiated under duress as void *ab initio;* Ibid. For more on this, see also generally, Ingrid Detter, 'The Problem of Unequal Treaties Quarterly' (1966) 15 *International and Comparative Law* 1069.

[580] Sornarajah, above n 104, 21; Vandevelde, above n 578, 159.

[581] Sornarajah, above n 104, 21.

[582] Ibid 36.

[583] Pahuja, *Decolonising International Law*, above n 104, 155, 107–108.

[584] For brief historical debates over the standards (national versus international) on the treatment of foreign investment, see James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012) 612–16.

and 1970s saw a struggle for the universalisation of the respective views. The USA's approach found considerable support among the European states which gave up their colonies and yet sought to protect their (citizens') investments in their former colonies.[585] Opposing them, the newly independent states of Africa and Asia, hoping that their newly acquired sovereignty would allow them to leverage their natural resources for economic development, espoused the Calvo doctrine.[586] Indeed, these latter countries, along with the rest of the Third World, sought the universalisation of the Calvo doctrine through the claim to Permanent Sovereignty over Natural Resources (PSNR), and other instruments associated with the creation of the New International Economic Order (NIEO).[587] The creation of the NIEO was advanced through a series of UN resolutions[588] which it was hoped would lead, as Bedjaoui writes, to the 'spontaneous formation of custom and the declaration of general principles of law'[589] that could undo the inequality that was sustained by traditional international law.

The doctrine of PSNR was one of the principal mechanisms by which the Third World states hoped to regain control over their own resources and promote development.[590] As Pahuja argues, it was 'an attempt to assert political control over the economic sphere via the deployment of national sovereignty'[591] that former colonial territories had just obtained. Yet this claim generated a number of complex debates about several doctrines of international law including

[585] Sornarajah, above n 104, 37.
[586] Ibid.
[587] Ibid. For more on NIEO see, generally, Mohammed Bedjaoui, *Towards a New International Economic Order: New Challenges to International Law* ((Holmes & Meier Publishers, 1979).
[588] These include: *The Charter of Economic Rights and Duties of States* ('*GA Res 3281*') , GA Res 3281(xxix), UN GAOR, 29th Sess, Supp No 31 (12 December 1974);and *The Declaration on the Establishment of a New International Economic Order* ('*UN GA Res 3201*'), GA Res 3201, Sixth Spec Sess GAOR, Supp 1, UN Doc A/9559 (1 May 1974).
[589] Bedjaoui, above n 587, 179.
[590] Anghie, above n 91, 211.
[591] Pahuja, *Decolonising International Law*, above n 104, 96.

sovereignty, state responsibility, acquired rights, state succession and sources of law, the discussion of which goes beyond the scope of this work, but has been well-articulated by other scholars.[592] But to simplify, the claim to PSNR revolved around three major but interrelated arguments. Firstly, Third World peoples' sovereignty over their natural resources preceded the colonial encounter, and continued during the colonial period (and hence this sovereignty survived international laws relating to colonialism); secondly, concessions granted by colonial powers to trading companies for the exploitation of resources in the colonies must in principle end with decolonisation, and survive only at the express wish of the new government; and finally, compensation for nationalisation was to be determined according to national rather than international standards.[593] The West, for its part, countered each of these arguments by claiming that: firstly, the Third World (decolonised) states would acquire sovereignty only on the basis of Westphalian international law which recognises nation states as the only entity capable of acquiring sovereignty and hence decolonised territories had no such status that survived colonisation (and hence had no sovereignty over resources); secondly, the new states were bound by established international law which (based on the doctrines of state succession and acquired rights) requires them to preserve obligations entered into by a predecessor state,[594] in effect, suggesting that the new states were obliged to honour the concessionary agreements signed prior to their independence;[595] and finally, nationalisation of property is legitimate

[592] For a through account of this, see Ibid 95–171; Anghie, above n 91, 211–244. See also generally, Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997).

[593] Anghie, above n 91, 212–13.

[594] Indeed, as Pahuja notes, the assertion 'that newly decolonising states should be bound by existing law, was a key conceptual weapon deployed in the battle against the claim to PSNR.' See Pahuja, *Decolonising International Law*, above n 104, 137.

[595] Indeed, in some cases, honouring such rights was made a pre-condition for independence. Thus former colonial powers such as France signed agreements with colonies shortly before their independence, requiring the newly independent states to respect all rights acquired within

only if it is, among other things, accompanied by compensation determined according to (customary) international rather than national standards (as supported by the sources doctrine).[596]

Thus the final version of the 1962 UN Resolution on PSNR,[597] which is sometimes regarded as the Third World's foundational resolution,[598] while asserting States' right to expropriate or nationalise private property, requires payment of 'appropriate compensation', 'in accordance with international law,[599] suggesting the Third World countries' acquiescence to the traditional law of state responsibility they had been questioning. The Resolution further stipulates that 'Foreign investment agreements entered into by or between sovereign States shall be observed in good faith'[600]—critics point out that, by recognising agreements 'by' sovereign States (which encompasses agreements with corporations), the Resolution has also empowered MNCs.[601] The fact that the much hoped-for development did not materialise in the newly decolonised countries even decades later had, however, once again eroded these countries' confidence on the promises of decolonisation and international cooperation. Subsequent UN Resolutions associated with the establishment of the NIEO have retreated from externally assessed compensation. While the Declaration on the Establishment of the NIEO does not mention the term 'compensation' at all, the 1974 Charter on the Economic Rights and Duties among States provides for payment of 'appropriate compensation' in the event of nationalisation or expropriation.[602] The Charter states that 'in any case where the question of

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their territory prior to their independence; the USA and the Netherlands have also used similar method with respect to the Philippines and Indonesia respectively; Anghie, above n 91, 215.

[596] Ibid 213–4.

[597] See *Permanent Sovereignty over Natural Resources* ('*GA Res 1803*'), GA Res 1803 (XVII), UN GAOR, Supp No17, UN Doc A/5217 (14 December 1962).

[598] Anghie, above n 91, 240.

[599] *GA Res 1803* [4].

[600] Ibid [8].

[601] Anghie, above n 91, 221.

[602] *GA Res 3281* [2(c)].

compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless other peaceful means is freely and mutually agreed by all States concerned'[603]—however, what constitutes 'appropriate compensation' was still open to competing interpretations.[604] Thus, as Pahuja observes, although acceptance of the principle of compensation itself seems to have suggested that the claim to nationalisation was aberrant,[605] the rejection of externally assessed compensation and competing interpretations over what constitutes 'appropriate compensation' meant that there has never been a doctrinal resolution over the standard (and extent) of compensation for nationalisation and/or expropriation of foreign investment.[606] Indeed, as Anghie observes, 'it would seem that whatever the failures of the NIEO, it did at least serve the purpose of challenging the Western view of state responsibility.'[607]

It is in the face of such doctrinal irresolution—and as a counter move to the calls for PSNR and the establishment of the NIEO—that capital exporting countries began introducing other mechanisms for the protection of foreign investment. One such, and indeed major, mechanism was the introduction of bilateral investment treaties (BITs) which impose standards for state behaviour towards investors (and generally not the other way round) beginning from the late 1950s.[608] Simultaneously, as Pahuja argues, by (re)characterising the Third

[603] Ibid [2(c)].
[604] Sornarajah, above n 104, 412–450.
[605] Pahuja, *Decolonising International Law*, above n 104, 157.
[606] See, for example, Sornarajah, above n 104, 412–13; noting that 'there is no clear principle as to compensation for nationalisation in international law at the present time [2010]. Though most investment treaties require the payment of full market value as compensation, there is as yet no sufficient uniformity of practice to indicate a set pattern on this matter.'
[607] Anghie, above n 91, 236.
[608] Sornarajah, above n 104, 173. As Vandevelde notes, from a different perspective, the introduction of BITs was mainly motivated by the fact that capital exporting countries found customary international law inadequate for protection of foreign investment because of three major reasons; firstly, the existence of international minimum standard on the treatment of foreign investment was disputed; secondly, even where it was agreed that such standard

World states' claim to PSNR which was essentially a political claim as 'international, economic and developmental,' the West managed to push issues relating to foreign investment away from the UN system which was dominated by Third World countries due to its operating on the principle of one-member, one-vote, to the Bretton Woods Institutions (BWIs). In the process, the BWIs were able to introduce the West's proposal of 'appropriate compensation' in the case of nationalisation and other mechanisms to facilitate and protect foreign investment (including BITs) through aid/loan conditionality.[609] Following a proposal by the World Bank, the International Centre for the Settlement of Investment Disputes (ICSID) was established in 1966 to provide 'facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States'[610] of the ICSID Convention,[611] and hence an institutional support for the enforcement of one of the BITs most important innovations: investor-state dispute settlement (ISDS).[612] The Centre naturally emerged as a major forum for resolution of investment disputes arising from the growing number of BITs and regional investment-related treaties (and to some extent even investment contracts).

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existed, its content was vague and arguably not particularly demanding; and, finally, in the absence of an agreement by the host state to submit the dispute to arbitration, the only mechanism offered by customary law for enforcement of customary norms was espousal which was often an unsatisfactory remedy; Vandevelde, above n 578, 159–160. In this sense the purpose behind the introduction of BITs was not merely to maintain the norms of advanced by traditional customary international law, but one that goes beyond it.

[609] Pahuja, 'Technologies of Empire', above n 301, 168–9.

[610] See World Bank, 'International Center for the Settlement of Investment Disputes (ICSID)' <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/intro.htm>. Relatedly, the Bank also created multilateral investment guarantee agency (MIGA) in 1988 to 'promote foreign direct investment (FDI) into developing countries' by ensuring investments form political risks; see Multilateral Investment Guarantee Agency (IMIGA), 'Who We Are' <https://www.miga.org/who-we-are>.

[611] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ('*ICSID Convention*'), opened for signature 18 March 1965 (entered into force 14 October 1966), art 45.

[612] Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 92–3.

The number of BITs grew phenomenally in the 1980s and 1990s as large numbers of countries in the global South entered into BITs, despite their resistance to the norms advanced by BITs at the multilateral fora (eg. the UN). Thus, as Kurtz observes: 'Paradoxically perhaps, despite the change in underlying attitudes of states that would mainly host foreign investment, the classic model BIT (formed during the inception period [the late 1950s and 60s]) was simply rolled out and replicated in large numbers.'[613] This was, in large measure, based on the premise that BITs would facilitate the flow of foreign investment into host states and promote economic growth and development, an assumption that was further reinforced through the BWIs—although this assumption has increasingly been questioned.[614] Given the universe of investment treaties (mostly BITs) which also often shape domestic laws of the parties thereto, and an effective investor state dispute settlement (ISDS), some commentators have gone to the extent of claiming that some of the international investment rules emerging in that regime have evolved into customary international law; and as such, even states that are not parties to these treaties may now be subject to such rules.[615] While this claim sounds a bit far-fetched, it is fair to note that since the 1980s there has been increasing harmonisation of the investment regime in accordance with the norms preferred by traditional capital exporting countries. Yet, even those commentators who recognise that

[613] Kurtz, 'The Shifting Landscape of International Investment Law and Its Commentary', above n 103, 686.

[614] See, for example, Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997) 38 *Virginia Journal of International Law 639*; Mary Hallward Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit … and They Could Bite' (World Bank Policy Research Working Paper, 2003). For the claim that BITs do increase the inflow of FDI, see Eric Neumayer and Laura Spess, 'Do BITs Increase FDI in Developing Countries?' (2005) 33 *World Development 1567*. For inconclusive claims, see generally Karl P Sauvant and Lisa E Sachs (ed), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009).

[615] See for example Jose Alvarez, 'A BIT on Custom' (2009) 42 *New York University Journal of International Law & Policy* 17, 77; noting that the investment regime demonstrates the two elements of customary international law—state practice and *opinio juris*.

this harmonisation has evolved into customary international law maintain that this move should not be seen as 'as a triumph of the Global North over the South or of the interests of investors over those of host states', because 'the BIT and FTA ([Free Trade Agreement] regime is too universal in scope and includes too many prominent first movers from the "Global South" to continue to be seen in such terms, despite its origins.'[616] However, the fact that countries from the global South have entered into BITs and FTAs may not necessarily suggest that they are architects of the regime of which they are part. It could more plausibly be held that this relative harmonisation[617] may well point to the triumph of capital, for even when BITs are made among developing countries themselves, most often one of these countries is an exporter of capital vis-à-vis the other.[618]

International investment law even in its recent form has never been stable. Since the mid-2000s, the stability resulting from convergence in the preceding decades began to unravel again due to 'recalibration' of investment treaties. The early movers in this regard include the USA and Canada which, despite their expectations to the contrary, found themselves in the uncomfortable position of being respondents to arbitration claims under North American Free Trade Agreement (NAFTA) investment chapter.[619] Thus, most of the 'recalibration' measures in the USA's BIT and FTAs since 2004 have been in the direction of narrowing investors' rights and expanding the host state's 'policy space', including the narrowing of the fair and equitable standard, 'balanced' clauses on indirect takings, and emphasising self-judging essential security clauses. In the case of Canada, recalibration involved the introduction of a broader list of

[616] Ibid 78.

[617] It is worth noting the variations in some of the BITs concluded by these countries—for example, China's early BITs did not include investor-state arbitration until China emerged as a major capital exporter itself.

[618] Sornarajah, above n 104, 177.

[619] Kurtz, 'The Shifting Landscape of International Investment Law and Its Commentary', above n 103, 686.

exceptions (modelled on article XX of the General Agreement on Tariffs and Trade (GATT) and article XIV of the General Agreement on Trade in Services (GATS), and exceptions for new 'prudential' measures aimed at protecting the banking system.[620] Some South East Asian and African countries have also engaged in similar recalibration exercises, notably with regard to investment chapters of regional economic agreements.[621] Meanwhile, disenchanted with the ISDS, three Latin American countries have exited ICSID: Bolivia and Ecuador in 2009, and Venezuela in 2012.[622] More recently, South Africa and Indonesia have signalled wholesale termination or revision of their BITs.[623] Thus, the otherwise apparent convergence of investment treaty practice of earlier periods seems to have been disrupted by varying levels of 'recalibration' exercises.

On the other hand, as some commentators argue, a successful conclusion to the negotiations of mega-treaties such as the Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU,[624] and the Transpacific Trade

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[620] Jose' E Alvarez, 'Why Are We "Re-Calibrating" Our Investment Treaties?' (2010) 4(2) *World Arbitration and Mediation Review* 143, 143–4.

[621] For example ASEAN Comprehensive Investment Agreement (ACIA) of 2009 and COMESA (Common Market for Eastern and Southern Africa) Investment Agreement of 2007, among others, introduced general exceptions modelled on article XX of the GATT and article XIV of the GATS. See *ASEAN Comprehensive Investment Agreement* ('*ASEAN CIA*'), signed 26 February 2009 (entered into force 29 March 2012)art 17; and *COMESA (Common Market for Eastern and Southern Africa) Investment Agreement* ('*COMESA Investment Agreement*'), opened for signature 23 May 2007, art 22.

[622] See Sergey Ripinsky, 'Venezuela's Withdrawal From ICSID: What It Does and Does Not Achieve' *Investment Treaty News*, 13 April 2012 <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

[623] For the case of Indonesia, see for example, Ben Bland and Shawn Donnan, 'Indonesia to Terminate More than 60 Bilateral Investment Treaties' *Financial Times*, 26 March 2014 <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3aToxXwmu>.
For South Africa's experience, see Mohammed Mossallem, 'Process Matters: South Africa's Experience Exiting Its BITs' ((The Global Economic Governance Programme (GEG) Working Paper 2015/97) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562417>.

[624] For more on this see Isabelle Fraser, 'What Is TTIP and Why Is It so Controvercial?'' *The Telegraph*, 11 June 2015 <http://www.telegraph.co.uk/finance/11664750/What-is-TTIP-and-why-is-it-so-controversial.html>.

Pact (TPP) among the US and 11 other Pacific-Rim countries[625] might lead to the harmonisation of (recalibrated) investment treaties—for when the big markets set the rules, the small markets (of mostly the global South) will succumb to such rules.[626] As part of the TTIP negotiation, the EU proposed an investment court system (ICS) which to some extent departs from the existing ISDS.[627] Pending the TTIP negotiation, the EU and Canada Comprehensive Economic and Trade Agreement (CETA) has already stipulated ICS as its dispute settlement mechanism.[628] However, there are still concerns with regard to the scope of application of protection standards, dispute settlement and a lack of clear affirmation of a right to regulate, even in some of these recalibrated treaties. Despite developments pointing to potential convergence of the US and EU on protection of foreign investments along the lines of the recalibrated approach,[629] there seems to be little incentive for European countries to follow similar approaches with countries to which there is still mainly one-way flow of capital, such as is the case with most of African countries. And the continued application of the non-recalibrated treaties between European and low income countries, as will be discussed in later sections, has significant implications for the investment treaties these countries (have) conclude(d) with 'emerging' major capital exporters such as China and India.

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[625] The Transpacific Partnership (TPP) is regarded as one of the largest economic treaties in history, including countries that represent more than 40 per cent of the world´s GDP (the United States, Japan, Mexico, Canada, Australia, Malaysia, Chile, Singapore, Peru, Vietnam, New Zealand and Brunei); see Kevin Granville, 'The Trans-Pacific Partnership Trade Deal Explained' *The New York Times*, 11 May 2015 <http://www.nytimes.com/2015/05/12/business/unpacking-the-trans-pacific-partnership-trade-deal.html?_r=0>. Nonetheless, it is worth noting that the United States has already withdrawn from the TPP negotiations.

[626] Thomas Cottier, 'International Economic Law in Transition from Trade Liberalization to Trade Regulation' (2014) 17 *Journal of International Economic Law* 671, 675.

[627] Laura Puccio and Roderick Harte, 'From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules' (European Parliamentary Research Service (EPRS), 2017) 1.

[628] Ibid.

[629] See Filippo Fontanelli and Giuseppe Bianco, 'The Inevitable Convergence of the US and the EU on the Protection of Foreign Investments–BITs, PTAs, and Incomplete Contracts (European Society of International Law (ESIL) Conference Paper No 7/2013, Amsterdam, 23-25 May 2013)' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364074>.

In summary, the foregoing history suggests that the evolution of international investment law has been closely associated with colonialism and imperialism. Thus, it was not coincidental that an articulation of a different vision (version) of international (investment) law constituted one aspect of the struggle against colonialism and/or imperialism. Central to this struggle has been a debate on the standard of treatment of foreign investors and adjudication of investment disputes. Whereas traditional capital exporters (most of which were also former colonial powers) asserted that a foreign investor is entitled to international minimum standards (which in effect were derived from their domestic laws) and international dispute settlement mechanisms, capital importing countries of the Global South (the overwhelming majority of which were also former colonies) articulated that treating a foreign investor in the same way as a domestic investor satisfies the requirement of international law. The latter attempted to institutionalise this claim through such principles as the doctrine of Permanent Sovereignty Over Natural Resources (PSNR), and more broadly, the claim to the establishment of New International Economic Order (NIEO). Yet these claims have been successfully subverted through the institutionalisation of investment protection through, among others, a complex network of (mostly bilateral) investment treaties (BITs) enforceable through investor state dispute settlement. The consequent convergence and stability witnessed in this area of international law since the 1980s, however, began to come undone once again in the mid-2000s due to recalibration of investment treaties, mostly by the same capital exporters which initiated the strongly pro-investor terms of BITs and FTAs. While the substantial change in the direction of flow of investment in recent years might have rendered the traditional North-South, or First World-Third World categories porous (at least with regard to treatment of investments), host countries for which the flow of FDI is still mainly inward (which includes most countries in sub-Saharan Africa) have remained by and large 'paradigm receivers.' For these countries, the protection

of foreign investment often comes at the expense of narrowing their regulatory space, which inhibits their ability to introduce socially desirable measures, which has significant implications in the context of transnational land acquisitions. I shall further elaborate this claim in the following section through analysis of specific aspects of Ethiopian BITs and relevant jurisprudence.

4.4.2. Ethiopia's BITs

Ethiopia's first BIT was concluded with Federal Republic of Germany in 1964. It remained the country's only BIT in place for the following three decades, mainly because of the socialist economic policy pursued by the government of Ethiopia between 1974 and 1991. When the current government whose economic policies are more orientated towards the free market came to power in 1991, it embarked on a structural adjustment program (SAP) and hence liberalised the investment regime. As a result, like many other sub-Saharan African governments of the time, it began signing BITs.[630] Thus, between 1994 and 2016, the government signed 34 BITs (21 of which are already in force) with both traditional capital exporters of the West and emerging economies of Asia such as China and India.[631] Despite the recalibration of investment treaties in recent years, Ethiopia's BITs, and indeed those of most sub-Saharan African countries'[632] still afford expansive protection to foreign investments. According to Genet Sebani, Director of the Contract Administration Directorate at the Ethiopian Investment Commission, the Commission is at the final stage of preparing a model BIT for the country, although so far there is no plan for

[630] See Alec R Johnson, 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2009) 59 *Emory Law Journal* 919.
[631] For the list of Ethiopia's BITs, see UNCTAD, 'Ethiopia: Bilateral Investment Treaties (BITs)', above n 71.
[632] One major exception can be South Africa which, as noted earlier, has recently embarked on wholesale BIT termination (or re-negotiation).

revising the existing ones (including those with the home countries of recent transnational land investors in Ethiopia).[633]

Despite variations in the specific provisions of individual investment treaties and the extent to which they restrict a host government's actions, as Salacuse notes, 'virtually all investment treaties address the same issues and they generally follow a similar structure.'[634] Thus, the investment treatment standards to which host states are committed in BITs can be categorised into 'general', which 'apply to all facets of an investment's activities in the host country', or 'specific', which 'concern particular matters relating to investment'.[635] The main standards in the general treatment category include: (a) fair and equitable treatment; (b) full protection and security; (c) protection from unreasonable or discriminatory measures; (d) treatment no less than that accorded by international law; (e) the requirement to respect obligations made to investors and investments; and (f) national and/or most-favoured-nation treatment.[636] The first five standards are absolute in the sense that they do not require a comparator for their application, unlike national and most-favoured-nation treatment standard whose application is contingent on the treatment of other investors. Examples of specific standards, on the other hand, include provisions dealing with such matters as money transfers, expropriation, and investor rights in times of war, revolution, or civil disturbance.[637] Virtually all of Ethiopia's BITs contain both general and specific investment treatment standards despite variations in the wordings of these standards. In the following sub-sections, I shall deal with a few such standards which have significant ramifications for transnational land acquisition in the country—particularly when read in conjunction with domestic legislation and farmland

[633] Interview with Sibani, above n 516.
[634] Salacuse, above n 612, 126.
[635] Ibid 205.
[636] Ibid 126.
[637] Ibid 205–6.

investment contracts. These are: definition of investment and investor, the requirement to respect obligations made to investors and investments (commonly referred to as an 'umbrella clause'), the standards of fair and equitable treatment, indirect expropriation, and performance requirements.

4.4.3. Scope of Investor and Investment

A successful BIT breach claim needs to pass the test of whether the claimant (investor) and its investments are covered under the alleged BIT. Typically, all BITs contain clauses that define these elements. The term 'investor' often refers to any national (natural or legal person) of a BIT State party who claims to have made an investment in the host State party to the same BIT.[638] Some of Ethiopia's BITs contain one of the broadest definitions of the term 'investor'. While under most BITs, including those of Ethiopia, natural persons that qualify as investors are nationals or citizens of a State party to a BIT, some of Ethiopia's BITs provide for a broader coverage. Under the Ethiopia-Malaysia BIT, for instance, not only a citizen (national) but any natural person 'permanently residing in the territory of a Contracting Party' can also be an investor protected under the BIT.[639] According to the Ethiopia-Kuwait BIT, an 'investor' shall mean a natural person holding the nationality of each Contracting State in accordance with its applicable law,[640] and:

> The government of that Contracting State and any juridical person or other entity legally constituted under the laws and regulation of that Contracting State, such as institutions, development funds, authorities, foundations, establishments, agencies, enterprises, cooperatives, partnerships, corporations, companies, firms, organisations and business associations or similar entities irrespective of whether their liabilities are limited or otherwise; and any entity established outside the jurisdiction of a

[638] Khawar Qureshi, *Bilateral Investment Treaty Claims: The Essentials* (Wildy, Simmonds and Hill Publishing, 2016) 11.
[639] Ethiopia-Malaysia BIT, art 1(b)(i).
[640] See *Agreement between the Federal Democratic Republic of Ethiopia and The State of Kuwait for the Encouragement and Reciprocal Protection of Investments* ('*Ethiopia-Kuwait BIT*'), singed 14 September 1996 (entedred into force 12 November 1998) art (2)(a).

> Contracting State as a juridical person, which such Contracting State or any of its nationals or any entity established within its jurisdiction owns or controls.[641]

Apart from foreign nationals mostly captured by the definition in the Ethiopia-Kuwait BIT above, a good number of investors in farmland in Ethiopia are 'diaspora' community members, some of whom still hold Ethiopian citizenship but permanently reside abroad.[642] If their country of residence has a BIT with Ethiopia, by virtue of the Ethiopia-Malaysia BIT above and the operation of MFN clause in Ethiopia's BIT with their country of residence BIT, these Ethiopians could trigger a BIT breach against their 'home' country.

Similarly, virtually all of Ethiopia's BITs employ rather broad definitions of protected 'investments', often comprising 'every kind of asset' followed by various formulations that give an indicative list of such assets. For instance, the Austria-Ethiopia BIT of 2005 provides that 'investment by an investor of a Contracting Party means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party'.[643] Thus, even an investor who is a minority shareholder in a locally incorporated entity or who invests indirectly through its subsidiary could be protected under relevant BIT.[644] Similar formulations are enshrined under other BITs of Ethiopia.[645] Despite these broad formulations, the contribution of these 'assets' to economic development in a host state, for instance, is not generally considered as constitutive of the definition of investment. For instance, the ICSID Tribunal in *Electrabel S.A v Republic of Hungary*, noting the lack of unanimity between tribunals regarding the elements of an investment, held that 'the economic development of the host State is one

[641] Ibid, art 2(b).
[642] See *The Contracts*.
[643] See Austria-Ethiopia BIT, art 1(2).
[644] Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2nd ed, 2015) 200–206.
[645] See, for instance, Germany-Ethiopia BIT, art 1(1) and Switzerland-Ethiopia BIT, art 1(2).

of the objectives of the ICSID Convention and a desirable consequence of the investment, but it is not necessarily an element of an investment.'[646] What this suggests in our context is that, even where transnational land acquisitions may not positively contribute to the development goals of a host state, they can still be protected under relevant BITs, provided that other usual requirements—such as proof of 'asset' and compliance with the host state's law at the time of investment—are met. In other words, even what otherwise constitutes 'land grabbing' within the meaning of the Trina Declaration (see Chapter 1, Section 1.1) can qualify as a lawful agricultural investment under international investment law. That which is regarded as 'land grabbing' from point of view of human rights activism can be regarded as a legal investment from the point of view of international investment law.

4.4.4. Umbrella Clause

Another crucial clause with significant ramifications in Ethiopia's BITs is an umbrella clause. Under the traditional rules on state responsibility, it is generally recognised that a breach of a contract by a state does not give rise to direct international responsibility on the part of that state. However, this seems to have changed with the evolution of BITs, most of which contain provisions providing a blanket protection for foreign investment, including activities under a contract with a foreign investor, commonly referred to as an 'umbrella clause' (sometimes also called a 'mirror', 'parallel effect' or *pacta sunt servanda* clause).[647] Indeed, scholars trace the idea of the umbrella clause to Elihu Lauterpacht's recommendation regarding a proposed settlement of the Anglo-Iranian Oil Company's claim against Iran in 1954 (although the company settled its claim by a different arrangement) and later the Abs-Shawcross Draft Convention on Investments Abroad, from which it has found its way into BITs

[646] *Electrabel SA v Hungary (Award)*, (ICSID Arbitral Tribunal, Case No ARB/07/19, 25 November 2015) [5.43].
[647] Salacuse, above n 612, 276.

alongside other standards such as the fair and equitable treatment (FET).[648] A significant number of investment treaties contain umbrella clauses,[649] although recent investment treaties tend to exclude umbrella clauses.

One of Ethiopia's BITs which contains an umbrella clause is the UK-Ethiopia BIT of 2009, which provides that '[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.'[650] Similarly, the Germany-Ethiopia BIT of 2004 provides that: 'A Contracting Party shall adhere to any other obligation deriving from a written commitment undertaken by it in favour of an investor of the other Contracting Party with regard to an investment in its territory.'[651] Compared to the Germany-Ethiopia BIT which refers to 'written commitment' which implies investment contracts, the UK-Ethiopia BIT's umbrella clause seems more expansive in that it requires the host state to 'observe any obligation' which might be construed to include even pre-contract oral representations. The obligation is essentially for Ethiopia to fulfill, given the one way flow of investment between the two countries, at least for the foreseeable future.

Although not all of Ethiopia's BITs contain an umbrella clause, an umbrella clause in one BIT can be extrapolated to other BITs with no such clauses through the operation of MFN clauses in latter BITs. Of course, the potency of a given BIT's MFN clause to import more favorable conditions (treatments)—including an umbrella clause—from another BIT depends on its exact wording

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[648] Ibid.

[649] See for example, Bilateral Investment Treaties, *Treaties 1995-2006: Trends in Investment Rulemaking* (UNCTAD, 2007) 73, reporting that 40 percent of all BITs contain umbrella clauses.

[650] See *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments* ('*UK-Ethiopia BIT*'),singed 19 November 2009 (not yet in force) art 2(2) .

[651] *Treaty between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia Concerning the Encouragement and Reciprocal Protection of Investments* ('*German-Ethiopia BIT*'), singed on 19 January 2004 (entered into force on 4 May 2006) art 8(2).

as well as the scope of the application of the basic treaty containing the clause.[652] Arbitral case law is divided as to whether a MFN clause only covers substantive provisions, or whether it allows an investor to invoke provisions only from other investment treaties that are 'compatible in principle'.[653] Also, the potency of an MFN clause to attract procedural rights such as dispute settlement clauses from other BITs is much contested among arbitral tribunals.[654] Yet there are several cases in which tribunals have allowed investors to 'import' substantive provisions from other BITs entered into by host states.[655] The *Bayindir v Pakistan* tribunal, for instance, allowed the investor to invoke a fair and equitable treatment clause from another BIT via the MFN clause of the Turkey-Pakistan BIT.[656] Subsequent tribunals have also generally followed suit.[657] Similarly, the *CME v Czech Republic* tribunal held that the investor could rely on an expropriation provision from another BIT to determine the standard of compensation.[658] This, arguably, implies that, as long as a host country has

[652] See Jürgen Kurtz, 'The MFN Standard and Foreign Investment: An Uneasy Fit' (2004) 5 *Journal of World Investment & Trade* 861, 872–3; noting that: 'The breadth of operation of a particular MFN clause will depend to some degree on its exact wording in a given investment treaty. The MFN clauses in most treaties do not use identical language and, as a result, offer potentially different interpretative options for arbitral tribunals.' See also Schill, above n 490, 523; noting that 'the scope of application of MFN clauses is regularly also restricted indirectly by the scope of application of the basic treaty itself.'

[653] See Lauge Skovgaard Poulsen, 'The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis' (2010) 30 *Northwestern Journal of International Law & Business* 101, 127; noting that: 'Whether the *ejusdem generis* principle implies that the clause only covers substantive provisions … [or, whether it] only allows an investor to invoke provisions from other investment treaties that are "compatible in principle," and if so, how that applies in terms of limiting its application' is unclear from existing case law.

[654] Kurtz, *The WTO and International Investment Law*, above n 133, 250–1. This uncertainty has prompted some states to employ more explicit choices as to whether MFN extends to the dispute settlement provisions; Ibid.

[655] Stephan W Schill, 'Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses' (2009) 27 *Berkeley Journal of International Law* 496.

[656] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan (Final Award)* [2005] ICSID Arbitral Tribunal Case No ARB/03/29 (14 November 2005) ('*Bayindir v Pakistan*').

[657] For analysis of this, see Patrick Dumberry, 'The Importation of the FET Standard through MFN Clauses: An Empirical Study of BITs' (2016) 32(1) *ICSID Review-Foreign Investment Law Journal* 116, 120–28.

[658] *CME Czech Republic BV v Czech Republic (Final Award)* (Unreported, UNCITRAL, 14 March 2003) ('*CME v Czech Republic*').

signed at least one BIT containing an umbrella clause, all of its other BITs with MFN clauses—depending on the wording of the clause and the scope of application of the treaty containing the clause—can attract arbitral claims based on this obligation.

The outer limits of umbrella clauses, however, remain one of the most controversial issues in investor-state arbitration. For example, the *SGS v. Pakistan* tribunal, which was one of the early ICSID tribunals to rule on an umbrella clause, rejected that an umbrella clause automatically elevates an alleged breach of a reshipment contract between SGS (a Swiss company) and Pakistan to a breach of the Swiss-Pakistan BIT, arguing that:

> Considering the widely accepted principle with which we started, namely, that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant. Clear and convincing evidence of what? Clear and convincing evidence that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT. We do not find such evidence in the text itself of Article 11. We have not been pointed to any other evidence of the putative common intent of the Contracting Parties by the Claimant.[659]

A few months later, the *SGS v Philippines* tribunal which involved the same claimant and transaction but different respondents reached a contrary decision criticising *SGS v Pakistan* tribunal on the ground that:

> not only are the reasons given by the Tribunal in SGS v Pakistan unconvincing: the Tribunal failed to give any clear meaning to the "umbrella clause". … It [the umbrella clause] does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the

[659] *Societe Generate de Surveillance SA v The Islamic Republic of Pakistan (Jurisdiction)* [2003] ICSID Arbitral Tribunal Case No ARB/01/13 (6 August 2003) [167].

> Philippines to international law. Article X(2) addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained.[61] It is a conceivable function of a provision such as Article X(2) of the Swiss-Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments—in effect, to help secure the rule of law in relation to investment protection. In the Tribunal's view, this is the proper interpretation of Article X (2). [660]

There are still uncertainties surrounding the interpretation of this clause.[661] Thus, while some of Ethiopia's transnational farmland contracts already contain investor-state arbitration clauses, the existence of umbrella clauses in Ethiopia's BITs further spawns the possibility of elevating the breaches of even those contracts with no ISA clauses to breaches of BITs, with potentially costly international adjudication the country hardly affords. For example, measures host states take in response to local hunger such as local peoples competing interests over water use, export restriction, and environmental protection may easily run the risk of breaching various contractual provisions to this effect.[662] Simultaneously, such measures could also easily trigger treaty arbitral claims based on such standards as fair and equitable treatment (FET) and (indirect) expropriation.

4.4.5. Fair and Equitable Treatment ('FET') Standard

Virtually all BITs contain the FET standard. Indeed, scholars regard the FET standard as 'the broadest and most prominent standard in investment

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[660] *Societe Generate de Surveillance SA v Republic of the Philippines (Jurisdiction)*, (ICSID Arbitral Tribunal, Case No ARB/02/6, 29 January 2004) [125-6].

[661] See, for instance, M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) 131.

[662] See also Lehavit and Licht, above n 106, 132; noting that the typical definition of the term 'investment' in BITs as comprising a list of rights in assets that effectively encompass the entire range of objects of property rights will lead to 'a complicated tension between BIT (international) property law, domestic property law, and other sources of law on either the local or supranational level, as well as to a "horizontal" tension between property provisions in different BITs that apply to assets within the same host country.'

treaties'[663], 'the "golden rule" of investment treaties',[664] and 'an almost ubiquitous presence'[665] in investment litigation. Yet the substantive content of this standard remains amorphous as the treaties themselves often do not define it. Efforts to give content to this standard have taken generally two approaches. The first is that the FET standard does not add anything more to the international minimum standard but merely affirms it, whereas the second holds that the standard expands the scope of the international minimum standard by allowing future tribunals to create new standards when the situation demands.[666]Accordingly, particularly where the FET standard is not tied to customary international law in a given treaty, tribunals ventured into creating content for the standard in a way that goes beyond customary international law standard. Based on a review of arbitral awards, UNCTAD has recently compiled five possible contents for the standard: legitimate expectations, manifest arbitrariness, denial of justice and due process, discrimination, and abusive treatment.[667] Other commentators have, again based on review of arbitral awards, come up with slightly different list,[668] while also submitting that legitimate expectations is 'the central pillar in the understanding and application of the FET standards'[669]—indeed, others regard

[663] Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2013) 12 *Santa Clara Journal of International Law* 7, 10.
[664] Salacuse, above n 612, 218.
[665] Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' [2005] *The International Lawyer* 87.
[666] Sornarajah, above n 104, 349.
[667] UNCTAD, *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD, 2012) 61–83.
[668] See for example Dolzer, above n 663, 15; listing good faith in the conduct of a party, consistency of conduct, transparency of rules, recognition of the scope and purpose of laws, due process, prohibition of harassment, a reasonable degree of stability and predictability of the legal system, particularly, recognition of the legitimate expectation on the part of the investor, arbitrariness and discrimination as possible contents of the standard; for similar lists see also Salacuse, above n 612, 227–243.
[669] Dolzer, above n 663, 17.

the recognition of 'legitimate expectation' as the only innovation (accomplishment) of the autonomous reading of the FET standard.[670]

The creation of expansive content to investment treaties through arbitral awards and the writings drawing on the same has generated penetrating criticism from other scholars. Sornarajah, for example, observes that 'the effect of the interpretation of the fair and equitable clause as an autonomous, free-standing provision protecting foreign investment is that a rule of protection extending beyond the contractual protection is created. This goes well beyond the intention of the parties.'[671] As such, narrowing the scope of the FET standard has been one of the targets of recalibration in investment treaties in recent years—one approach to this being tying the FET standard to customary international law.[672]

In the case of Ethiopia, most of the BITs employ FET standards that can be considered as one of the 'broadest' types, susceptible to susceptible to an expansive interpretation, as noted earlier. For example, the Ethiopia-Denmark BIT states that:

> Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state, whichever is the more favourable from the point of view of the investor.[673]

Even for the few of Ethiopia's BITs which tie the FET standard to 'the principles of international law', this may not automatically narrow the scope of this treatment either. In this regard, the France-Ethiopia BIT extends the FET standard to investors and investments of the nationals of the contradicting

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[670] Sornarajah, above n 661, 256.
[671] Sornarajah, above n 104, 355.
[672] See for example the *ASEAN CIA*.
[673] *Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments* ('*Ethiopia-Denmark BIT*'), signed 24 April, 2001(entered into force 21August 2005) art 3(1).

parties 'in accordance with the principles of international law';[674] yet the additional interpretative protocol to the BIT 'which shall be regarded as an integral part of the said Agreement [the BIT]' seems to do away with the ostensibly narrowed scope of the FET standard that results from reference to 'the principles of international law'. The protocol in relevant part provides that 'any restriction on the purchase or transport of raw materials …, as well as the means of production and operation of all types, any hindrance of the sale or transport of products within the country and abroad, as well as *any other measures* that have a similar effect' constitute 'de jure or de facto impediments to fair and equitable treatment.'[675] Thus the BIT ties the FET standard to the principles of international law, but then proceeds to carve out extensive acts that constitute the breach of the standard. So, in the presence of express interpretative protocol which suggests a broader view of the standard, reference to customary international law or the principles of international law seems to add little value in narrowing the scope of the standard. This is in line with the ILC Study Group's Conclusions, that in general terms there is a positive presumption that 'parties are taken to refer to customary international law and general principles of law for all questions which [the treaty] does not itself resolve in express terms'.[676] Of course, a related negative presumption is that, 'in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States'.[677] Neither do the kinds of expansive lists of measures by investors' host governments that constitute breach of the FET standard in the France-Ethiopia BIT run against this 'negative presumption'

[674] *Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments* ('*Ethiopia-France BIT*'), singed 25 June 2003 (entered into force 7 August 2004) art 3.
[675] Ibid, Protocol, Sec.3 (Emphasis added).
[676] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (Report of the study group of the international law commission, 2006)[465 (a)].
[677] Ibid [465 (b)].

either. At any rate, even if an explicit reference to customary international law can arguably narrow the scope of the FET standard, given the absence of such reference in the overwhelming majority of Ethiopia's BITs, foreign investors in Ethiopia can always resort to the broadest FET standard through the operation of MFN clauses.

4.4.6. Indirect Expropriation

Virtually all BITs, including those of Ethiopia, protect investors against expropriation or 'wealth deprivation' which may take different forms: it could be direct, wherein an investment is directly expropriated through formal transfer of title or outright physical seizure, or indirect, in which case the taking is implicit in other measures.[678] Ethiopia's BITs contain clauses on both types of expropriations. For instance, the Ethiopia-Kuwait BIT stipulates that investments 'shall not be nationalized, expropriated, disposed or subjected to direct or indirect measures having effect equivalent to nationalization, expropriation or dispossession.'[679] Further, with respect to indirect expropriation, it states that the term 'expropriation' shall also apply to acts of sovereign powers and to 'interventions or regulatory measures by a Contracting State such as the freezing or blocking of the investment, levying of arbitrary or excessive tax on the investment … or other comparable acts or measures, that have a de facto or expropriatory effect….'[680]

While direct expropriation claims often revolve around the standard (amount) of compensation, indirect expropriation claims require establishing the occurrence of (defining) expropriation that entails payment of compensation

[678] UNCTAD, 'Expropriation: UNCTAD Series on Issues in International Investment Agreements II' (2012) 6–12.
[679] *Ethiopia-Kuwait BIT* art 6(1)(a).
[680] Ibid, art 6(4).

from non-compensable governmental regulatory measures.[681] Existing case law does not address the matter in a sufficiently consistent manner. Nevertheless, a close examination of arbitral decisions reveals a certain pattern of criteria for establishing indirect expropriation. At the centre of these criteria is the issue of whether the government measure in question should be judged solely on the basis of its effect on the investment ('sole effect doctrine') or on a more holistic analysis of the effect as well as context and purpose of the measures in question ('purpose test').[682]

A typical sole effect test approach was employed by, for instance, the Iran–United States Claims Tribunal in the *Tippetts* case.[683] The claimant established a partnership with an Iranian engineering firm. After the Iranian revolution in 1978, the Iranian government appointed a new manager for the partnership.[684] The claimant's argument that the measures amounted to an expropriation was accepted by the Tribunal, which held that:

> A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact. [685]

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[681] UNCTAD, 'Expropriation: UNCTAD Series on Issues in International Investment Agreements II', above n 678, 57–103.
[682] Ibid 68-72; 76-77.
[683] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA (Award)* (Unreported, 1984) ('*Iran–US CTR*') (1984) 6 Iran–US CTR 219.
[684] Ibid 224.
[685] Ibid 225–6.

In the *LG v Argentine Republic,*[686] the Tribunal called for employing a balanced approach (considering both the causes and effects of measures in question) in dealing with indirect expropriation claims. In the words of the Tribunal:

> It is the Tribunal's opinion that there must be a balance in the analysis both of the causes and the effects of a measure in order that one may qualify a measure as being of an expropriatory nature. It is important not to confound the State's right to adopt policies with its power to take an expropriatory measure. "This determination is important because it is one of the main elements to distinguish, from the perspective of an international tribunal between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance. [687]

Dismissing the claim for indirect expropriation, the tribunal held that:

> [t] hus, the effect of the Argentine State's actions has not been permanent on the value of the Claimants' shares', and Claimants' investment has not ceased to exist. Without a permanent, severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment, the Tribunal concludes that these circumstances do not constitute expropriation. [688]

Even though the LG case seems to suggest a balanced approach, in the end the tribunal still ruled on the effect (i.e., how severely the investment has been interrupted). In other words, it seems the tribunal did apply the effect doctrine, but the effect of the host government's measure was not intense enough to justify expropriation.

In recent years, as Perkams observes, tribunals seem to have been following three general approaches in establishing indirect expropriation: sole effect, exclusion of non-discriminatory bona fide regulations, and weighing the public

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[686] *LG & E v Argentine Republic (Decision on Liability)* ('*LG&E v Argentina*'), (ICSID Arbitral Tribunal Case no ARB, 02/1, 3 October 2006) .
[687] Ibid [194].
[688] Ibid [200].

interest protected against the effect of the measure.[689] Nevertheless, '[n]one of these tests is currently prevailing and it is hard to predict how a tribunal will approach the issue of indirect expropriation.'[690] And this uncertainty persists. As recent cases in the energy sector show, investor-state tribunals still tend to support the broad reading that prioritises the effects of the measures, looking mainly at the effects of measures and examination of their severity and duration, even when they attempt to employ a conciliatory approach that considers the effect of the measure (effect test) together with the purpose of the measure (purpose test).[691]

Of course, as part of the recalibration of investment treaties underway in recent years, there are attempts at narrowing the scope of provisions on indirect expropriation, including through express delineation of certain governmental measures.[692] Yet no such move is evident in the case of either Ethiopia or of many other African countries. It is thus not farfetched to warn that these countries are susceptible to legal risks arising from the type of expansive definition of indirect expropriation such as that of the Ethiopia-Kuwait BIT entails, if and when measures such as water use restrictions, export restrictions, or increasing tax rates are introduced against transnational land investments.

4.4.7. Performance Requirements Provisions

Provisions prohibiting performance requirements are also important BIT disciplines that deserve close scrutiny in relation to foreign investment in general and those in the agricultural sector in particular. Of course, not all BITs

[689] Markus Perkams, 'The Concept of Indirect Expropriation in Comparative Public Law—searching for Light in the Dark' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 124.
[690] Ibid.
[691] For more on this see Mojtaba Dani and Afshin Akhtar-Khavari, 'The Uncertainty of Legal Doctrine in Indirect Expropriation Cases and the Legitimacy Problems of Investment Arbitration' (2016) 22 *Widener Law Review* 1, 30.
[692] UNCTAD, 'Expropriation: UNCTAD Series on Issues in International Investment Agreements II', above n 678, 86–90.

contain provisions prohibiting performance requirements: for instance, most EU BITs do not prohibit performance requirements, while the US Model BIT does.[693] Provisions guaranteeing against performance requirements for investors also feature in some Ethiopian BITs. The Ethiopia-Kuwait BIT, for instance, stipulates that:

> Neither Contracting State may impose on the investors of the other Contracting State mandatory measures, which may require or restrict the purchase of materials, fuel or of means of production, transport or operation of any kind or restrict the marketing of products inside or outside its territory, or any other measures having the effect of discrimination against investments by investors of the other Contracting State in favour of investments by its own investors or by investors of third states.[694]

Scholars have already observed that such restrictions on use of performance requirements in BITs limit the ability of governments to leverage FDI for advancing public interest. Ofodile, for instance, notes that such provisions will make it extremely difficult for host governments 'to adopt laws such as local content laws, local hiring laws, transfer of technology laws, or laws mandating diversity considerations in hiring.' [695] Indeed, as previously noted, transnational land acquisitions are claimed by investors to offer a range of benefits to a host country's people including, employment, infrastructure development, and technology transfer. (Foreign) investors habitually make these promises often before the acquisition of land, knowing that they evade these promises once they sign a contract that does not feature these promises—as was observed in Karuturi Farm in Bako Zone in Ethiopia, and farmland investment contracts in Ethiopia more generally. It is very difficult, if not impossible, for the host government to require a foreign investor that enjoys protection from relevant BITs prohibiting performance requirements to deliver on these promises. This is yet another instance that casts doubt on the often claimed benefits of

[693] See *2012 US Model Bilateral Investment Treaty*, art 8.
[694] Ethiopia-Kuwait BIT, art 3(5).
[695] Ofodile, above n 33, 351.

transnational land acquisitions to host people in general and prior land users in particular and the complicity of the law therein.

4.4.8. Exception Clauses

While BITs are often drafted (and interpreted) in the interest of foreign investors, it is possible to accommodate, to some extent, host states' legitimate regulatory interests through the use of exceptions (general or special).[696] Of course, the wording and hence scope of these clauses varies from one instrument to another, as does their interpretation by investment tribunals, even when their formulations and the factual circumstances surrounding a given set of cases are similar. General exceptions—those applying to all of the obligations of a BIT—are often formulated in terms of 'essential security interests,'[697] although some BITs also employ alternative formulations including 'public security' and/or 'public order.'[698] Special exceptions, on the other hand, apply only to a limited number of BIT obligations—most commonly national and most–favored-nation treatment obligations.[699] The question to ask is, then, to what extent can BITs' exception clauses (measures) be employed to justify a host state's measures in the case of a local food crisis (food insecurity)? Most of Ethiopia's BITs (those with Algeria, Austria, China, Iran, Libya, North Sudan, Kuwait, Malaysia, Spain, Russia, Sweden, Yemen, The Netherlands, and

[696] Kenneth J Vandevelde, 'Rebalancing Through Exceptions' (2013) 17 *Lewis and Clark Law Review* 449, 449–450.
[697] Ibid 449.
[698] Other formulations include: measures aimed at protecting human, animal, and plant life and health; environmental measures; measures to fulfill a party's obligations with respect to the maintenance of international peace and security; measures with respect to financial services taken for prudential reasons; measures related to monetary or exchange rate policies; measures of taxation; and measures to promote cultural or linguistic diversity; Ibid 450. See, however, OECD, 'International Investment Perspectives: Freedom of Investment in a Changing World' (OECD, 2007) 99; noting that exceptions on ground of essential security interests may at times apply to specific treaty obligations (such as expropriation/nationalization, non-discrimination, dispute settlement, and application of host-country-law to foreign investment), and in that sense become a special exception clauses as opposed to general exception.
[699] OECD, 'International Investment Perspectives: Freedom of Investment in a Changing World', above n 698, 99.

Turkey) do not provide for any general (public order and/or security) exception clause.[700] There is also no state treaty practice or arbitral case law confirming the direct application of existing investment treaty exception clauses (general or special) to food (in)security issues. Indeed, in recent years, some scholars have called for the incorporation of such clauses in investment agreements. Häberli and Smith, for example, advocate for a public interest clause for food security either in a BIT or regional treaty.[701] Given that food (in)security is largely an issue for countries that are paradigm receivers when it comes to international investment law formulation, the realisation (and operationalisation) of such a clause does not largely feature in the current recalibration process of investment treaties.

That said, to date, no real case has emerged concerning host states' measures specifically relating to the recent transnational farmland investments within the framework of international investment law—understandable, given the incipient nature of the investments. This, however, does not necessarily imply that no such case would appear in the future, particularly given the competing interests involved in large-scale transfers or leases of land, often for about half a century. Indeed, as I shall discuss in Chapter 5 in the context of the interaction of investment and trade laws, there are investment arbitration cases in different contexts that are emblematic of the contentions around, for instance, export restriction measures that host states may wish to introduce against agricultural produce primarily aimed for export to investors' home state market, and/or the international market. Likewise, as will be considered in Chapter 6, certain

[700] See also Vandevelde, above n 696, 451; noting that a 'majority of BITs do not yet contain any general exceptions, albeit special exceptions applicable to the national and most-favored-nation treatment provisions are extremely common.'

[701] See, for example, Häberli and Smith, above n 146, 221; proposing a public interest clause for food security**:** 'In view of the specific situation of weak host states, their strong international commitments under BITs and other instruments, and comparing these commitments with the soft law principles applicable to home states and investors, we conclude our analysis in this art with a proposal for a public interest clause for food security which could be incorporated into the binding commitments of the host state and the investor, either in a BIT or regional treaty.'

corrective measures that host states may introduce to comply with their human rights commitments present particular fault lines in investment, trade and human rights disciplines ordering transnational land acquisitions in countries such as Ethiopia.

4.5. Conclusion

In this chapter, I have argued that the interaction between domestic investment legislation, farmland investment contracts and international investment law (particularly BITs) is facilitative of large-scale 'land grabs' in Ethiopia. These arrangements have a disproportionate effect on local people, particularly on the communities who depend on the land being transferred to investors. Such effects include dispossession, and hunger.

The mode of interaction between the investment oriented laws in this process could be summarised as follows: the Constitution recognises the investors' right to obtain land (with payment) and recognises the government as the *sole* custodian of land, a power which it uses to facilitate state-to-investor land transfers in a manner that sidelines existing land users. Domestic legislation extends attractive incentives to (foreign) investors in the agricultural sector, and once such investments take place, guarantees their protection. Farmland contracts, the main legal instruments for transfer of land to foreign investors, also do not impose any legal obligation on investors with respect to domestic food supply, limits on water use, employment creation and infrastructure. BITs, with their expansive standards, embrace and further consolidate the host country's commitments (as expressed in these laws and contracts), and shield the foreign investor from possible corrective measure by the government. Indeed, some of the elements of farmland investment contracts discussed in the chapter, such as investor-state arbitration clauses and umbrella clauses in Ethiopia's BITs, are reminiscent of the type of commitments

(internationalisation of contracts and international settlement of investment disputes) that Third World countries have been resisting for decades, if not longer (although today even some of these countries are employing these techniques).

Thus (international) investment law facilitates these land acquisitions by making them legal (if not necessarily legitimate). It also prioritises the protection of the acquisition of land when they pose recognised risks (including livelihood insecurities) to local people and communities. These communities are often dispossessed and/or displaced as a result of land transfers to private investors. And even if the host government is willing to take corrective measures, their commitments arising particularly from international investment law may inhibit the introduction of these measures.

CHAPTER 5 THE FLEXIBLITIES AND LIMITS OF INTERNATIONAL TRADE LAW

5.1. Introduction

As discussed in chapters 3 and 4, contemporary transnational land acquisitions in Ethiopia and many other countries in Africa are often negotiated between (foreign) investors and governments hosting their investments. As described in the preceding chapter, in the Ethiopian example, and also more widely, the interaction between local and international investment laws both facilitates and cements these land transfers. This occurs to the detriment of people living on the land who are legally required to give way to investors. In this chapter (5), I will continue to examine the interaction of local and international laws around the large-scale acquisition of land, this time with a focus on international trade law—mainly WTO laws. I generally argue that while international trade law may not facilitate 'land grabs' outright it does indirectly enable the practice. This account departs from some of the recent contributions in the global 'land grabs' literature which suggest that international trade law may actually halt 'land grabs'.[702] Moreover, the flexibility international trade law offers to host states in case of critical shortage of food diminishes in regards to transnational farmland investments, given the application of international investment law to such investments. This is the case, for instance, when neither domestic laws nor farmland investment contracts provide for the possibility of export restrictions, and where the international market offers higher prices than domestic market. Under such circumstances, the introduction of export restriction measures may constitute a breach of both investment contract and—through the operation of umbrella clauses—relevant BITs standards, triggering arbitral claims that indirectly inhibit the introduction of such measures by a host state.

[702] See, for example, Brilmayer and Moon, above n 156.

It is worth noting from the outset though, that Ethiopia is not a member of the WTO, although it has been in the process of accession since 2003.[703] Thus, the consideration of role of international trade law (WTO law) in transnational land acquisitions in Ethiopia is predicated on the likely completion of the accession process. Nevertheless, the analysis in this chapter can equally explain the situation of other African host countries, most of which are already members of the WTO.[704] The broader context of international trade policy and practice in which transnational land acquisitions are happening in Ethiopia—and many other African countries—such as trade liberalisation policies under the auspices of the World Bank, and IMF and administration of farm subsidies in the Global North—also remains relevant irrespective of Ethiopia's WTO membership. Further, given the principles of the WTO accession negotiation, including the principles of 'single undertaking',[705] and as the experience of recently acceded WTO members suggests,[706] there is little chance that the country would obtain a better concession than those enshrined in the WTO laws analysed in this chapter.

The chapter is organised as follows. Following the introduction, in section 5.2, I shall establish the relevance of international trade law to transnational land acquisitions, pointing to how trade law and policies may not only trigger land deals but also shape the outcome of these land deals. In section 5.3, I will critically examine the flexibilities and limits of international trade law (mainly WTO law) in relation to host states' ability to interfere with these investments in

[703] After having stayed as an observer for about 6 years, Ethiopia formally applied for membership at the WTO in January 2003, and it has since been going through the accession negotiations; WTO, 'WTO Accessions: Ethiopia' <https://www.wto.org/english/thewto_e/acc_e/a1_ethiopia_e.htm>.

[704] As of July 2016, except for Djibouti and South Sudan, all African countries are either members or observers of the WTO; see WTO, 'WTO Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

[705] WTO, 'How the Negotiations Are Organized', above n 163.

[706] Giovanni Anania, 'Agricultural Export Restrictions and the WTO: What Options Do Policy-Makers Have for Promoting Food Security?' (ICTSD Issue Paper 50, 2013) 18.

order to address local hunger. In section 5.4, I shall explore the interface between international trade and investment laws applicable to transnational land investments though examination of export restriction measures such as quantitative restrictions and export duties—measures that are disciplined under both trade and investment laws. In section 5.5, I provide a summary and concluding remarks pointing to the convergence between international trade and investment laws in shaping legal relations around transnational land investments, often in a manner that constrains the ability of host states to leverage transnational land investments for local needs such as addressing hunger. This in turn will provide a basis for Chapter 6 of the thesis, in which I will examine the relationship between international human rights law and trade and investment laws in order to ask, specifically, what role human rights law can play in relation to the effects of those investment and trade laws on local people.

5.2. Relevance of International Trade Law to Transnational Land Acquisitions

In this section, I shall establish the relevance of international trade law to contemporary 'land grabs'. I will begin this account with a brief theoretical backdrop. International trade is often advocated on the basis of the putative mutual benefit it accords to each trading partner. As, for example, the prominent economist and Noble laureate Paul Samuelson argues, 'there is essentially only one argument for free trade, or freer trade, but it is an exceedingly powerful one';[707] that is: 'free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe.'[708] Such arguments for free trade (interntional trade without any traiff or non-tarrif

[707] Paul Samuelson, *Economics* (McGraw-Hill, 11th ed, 1980) 651.
[708] Ibid 692.

restrictions) have also been further backed up by various theories that encourage international trade more generally, most notably by the theory of comparative advantage. Developed by British political economist David Ricardo in early 1880s, this theory generally asserts that it is mutually beneficial for two countries to trade, each of them specialising in the production of goods it can produce less inefficiently than the other country.[709] This departs from Adam Smith's theory of absolute advantage which suggests that a country needs to trade only where it has an absolute advantage over its trading partner. The theory of comparative advantage has remained one of the most influential (if not necessarily intellectually persuasive) justifications for liberal trade policies and laws, including the GATT/ WTO system. As John Jackson notes, the fact that the Preamble of the GATT 1947 (and more recently the Marrakesh Agreement establishing the WTO) provide for 'raising standards of living by, among other things, expanding…exchange of goods' points to the underlying assumption about the benefit of liberal trade grounded on this theory.[710]

It is, however, worth noting that economically advanced countries have always maintained significant policy space to support their agricultural sector both under the GATT 1947 and the WTO framework, in a manner that defies the theory of comparative advantage.[711] Thus, on the one hand, agricultural products in the Global South produced with more efficiency have been subjected to protectionist measures such as high tariff barriers and/or complex non-tariff barriers in those markets, and on the other, the sale of highly subsidised European and American agricultural products in many countries of

[709] See David Ricardo, *On the Principles of Political Economy and Taxation* (Batoche Books, [3rd ed, 1821], 2001) 85–103.
[710] John Howard Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT press, 1997) 8.
[711] See generally Melaku Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (Kluwer Law International, 2002).

the Global South has swept away local competition, paving way for reliance on the volatile global market.[712]

Indeed, the theory of comparative advantage has also been challenged on both technical and structural grounds. Technically, the theory makes several assumptions that hardly characterise the reality of international trade relations.[713] But more importantly, it also sustains a structural bias against the countries of the global South that—according to this theory—are destined to produce agricultural raw materials and other primary commodities in return for manufactured products that puts them under a perpetual trade imbalance. As, for example, Erik Steiner argues, 'the theory of comparative advantage actually may lock poor countries into a poverty trap, into primitivization: specialising in being poor'.[714] Indeed, given that the economic policy at the time of Ricardo prohibited manufacturing in the colonies, with the articulation of this theory, 'for the first time colonialism was made morally defensible'[715]—till then, economists thought that colonies were kept poor on purpose and that they would likely rebel in order to industrialise (as did the US in 1776).[716] Although during the 19th century most of today's rich countries defied this theory until they had industrialised themselves, the colonies continued specialisation in production of primary commodities (often agricultural products). And, as considered in Chapter 2, upon political independence, most African countries continued specialising in the production of primary commodities (often

[712] See, for example, Oxfam, 'Rigged Rules and Double Standards: Trade, Globalisation, and The Fight against Poverty' (Oxfam, 2002) <http://policy-practice.oxfam.org.uk/publications/rigged-rules-and-double-standards-trade-globalisation-and-the-fight-against-pov-112391>.

[713] Among others, the theory assumes that: the world economy is a process of bartering of labour hours; there are no transport costs; there are only two economies producing two goods; that traded goods are homogeneous (identical); factors of production are perfectly mobile; there are no tariffs and non-tariff barriers; there is perfect knowledge (all buyers and sellers know where the cheapest goods can be found internationally; for more on this, see Erik S Reinert, *How Rich Countries Got Rich ... And Why Poor Countries Stay Poor* (Constable, 2008) 302–4.

[714] Ibid 304.

[715] Ibid.

[716] Ibid.

agricultural) and relying on import for manufactured goods. The effects of this specialisation were manifold. As, for example, Gonzalez notes, these include: diversion of prime cropland from food production to cash crop production engendering reliance on food imports; environmental degradation owing to the practice of monoculture; subjecting export earnings to the vagaries of the weather, volatility of world market commodity prices, and the declining terms of trade; and relegation of small farmers to marginal (ecologically fragile) lands.[717] The recent practice of transnational 'land grabs' in Africa by relatively rich (foreign) investors, which involve the commodification of productive resources (land and water) often at near give-away price, can thus be regarded as more of a continuation of this trend, aided by domestic and international law, including international trade law.

International trade law is relevant to several aspects of contemporary transnational land acquisitions. On the one hand, trade rules that enhance improved access to export markets can increase incentives for large-scale agricultural investments that target those markets. On the other hand, trade restrictions can also encourage land grabs: for example, export bans and duties introduced by some major food exporters in the wake of the food price hike of 2007/08[718] are among the factors that propelled food-importing countries to join the race for farmland abroad. Apart from trade law measures that potentially encourage 'land grabs', international trade law also regulates various aspects of transactions relating to 'land grabs'. For example, when land is acquired for purpose of food production to be exported back home, as for example in the case of the Gulf States, the very act of export falls within the domain of relevant international trade law disciplines, of course, assuming that investors' host and home states are members to a given trade agreement. Also, when food is sold in

[717] Gonzalez, above n 106, 538.
[718] For the list of countries that introduced export restriction measures (including export ban) see OECD, above n 17, 77–8.

markets other than that of the host State, it invites the application of international law that discipline the activities of the investor (exporter) and importing country. International trade laws also have similar relevance when it comes to 'land grabbing' for biofuel production in relation to certain (both behind-the-border and border) measures the investors' host state may introduce.

Despite the paucity of works on the role of international trade law in contemporary 'land grabs', a few scholars who have contributed to the debates suggested that international trade (WTO) law could be used to regulate (discourage) contemporary 'land grabs'. For example, Lea Brilmayer and William Moon have explored how international (trade) law may regulate large-scale leases and acquisitions of land ('land grabs').[719] Drawing on 12 case studies of African countries' rankings of democracy, corruption perception, physical property rights, and dependence on food aid indices, they observe that lessor (host) countries 'are almost invariably states plagued by corruption, lack of democracy, dependence on food aid, and weak property rights.'[720] Given these agency problems, they caution that 'it cannot be assumed that these transactions will work to the local population's advantage'.[721] Accordingly, they propose regulatory intervention by third party states, particularly through labelling laws and import restrictions. They argue that 'international investment law is not equipped to police these transactions [land grabs], and that 'because trade law concerns the cross border flow of products, it has the potential to de-incentivize food from leaving land grabbed states and deter similar transactions in the future.'[722]

[719] Brilmayer and Moon, above n 156, 123.
[720] Ibid.
[721] Ibid.
[722] Ibid.

While their suggestion is worth considering, it also leaves a number of questions unanswered. For starters, their observation of agency problems with African governments in relation to 'land grabs' and the prevalence of hunger (and hence dependence on food aid) in most of the host states is in line with other similar works we noted before.[723] But one has to also be cautious of the conclusions drawn from such characterisations of host states as lacking democracy which prompted the authors to look for external solutions from third states. As Sally Engle Merry cautions us, measurements derived from indicators that rely on ranks and numbers 'typically conceal their political and theoretical origins and underlying theories of social change and activism' for they 'rely on practices of measurement and counting that are themselves opaque'.[724] An index of democracy is no exception. For instance, as Anne Orford puts it, 'ownership of the term 'democracy' by states like the United States depends upon the selective erasure or 'motivated forgetting' [after Michael Rogin] of non-democratic or anti-democratic features of those ideal democratic states, both in the past and in the present.' [725]

Even the potential limitations of the measurements aside, however, the suggested measures are of limited relevance to farmland acquisitions aimed at export of food to home states of investors (as noted before, a good number of transnational land deals fall to this category) in which case the products may simply not reach third country markets and their consumers. Of course, one would not expect these home states to take (allow) these types of measures against *their* own products. Moreover, even assuming that the labeling requirement passes the WTO law consistency test, which is not self-evident, and

[723] See for example Manji, 'The Grabbed State', above n 289; German, Schoneveld and Mwangi, above n 427.
[724] Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 *Current Anthropology* 583, 584.
[725] Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38(2) *Harvard International Law Journal* 443, 643.

that other countries (consumers) are willing to take and/or comply with the measure, its indiscriminate application to all products originating from the set of host states which are ostensibly sites of 'land grabbing' poses practical problems to smallholder farmers.[726] The other suggested measure, import restriction from 'land grabbing' countries, is also subject to the WTO legality test. In the *EC – Seal Products* case, for instance, Canada and Norway challenged the European Union's regulation of seals ('EU Seal Regime') that generally prohibited the importation and placing on the market of seal products, with certain exceptions.[727] The Panel found the regulation inconsistent with, among other WTO laws, the GATT 1994 art I:1 (most-favoured nation treatment) and art III:4 (national treatment-domestic regulation),[728] which was also upheld by the Appellate Body.[729] Selective application of import restrictions on agricultural products originating from certain WTO members is therefore likely to be challenged under various WTO laws. The justification of the proposed measure under GATT general exception clause (for example art XX:b) also presupposes the proof of harm that 'land grabs' caused to local people, for example, exacerbation of food insecurity (hunger) which resulted in undermined 'human health' within the meaning of GATT Article XX. And yet, as the authors themselves concede, the extraterritorial application of this provision remains controversial in the WTO jurisprudence,[730] which thus casts doubt on the feasibility of this approach.

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[726] Even the authors allude to the cost implications of similar measures in the context of other jurisdictions although they seem to have overlooked the practical burden and cost this may shift to local communities, not necessarily, host governments which are meant to be disciplined.

[727] Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* ('*EC – Seal Products*') WT/DS400/R WT/DS401/R (25 November 2013)[2].

[728] Ibid [8.3].

[729] AB Report ibid, WT/DS400/R WT/DS401/R (24 May 2014) [6.1(b)].

[730] Brilmayer and Moon, above n 156, 143–45.

What if, instead of counting on 'third states' and their consumers, who are far removed from the alleged effects of 'land grabs' anyway,[731] the move for halting 'land grabbing' comes from within, as in the case of Madagascar in 2009, or more recently in Ethiopia? Will international trade law offer a better solution in cases where, for instance, host governments—willingly or after being 'coerced' by their people—interfere with foreign farmland investments already in the production stage? Will it leave flexibility to investors' host governments to introduce measures that aim to address, for example, local hunger? Brilmayer's and Moon's work does not offer an answer to this question for two reasons. One is the agency problems they identified with host governments—they are, understandably, focusing on external solutions through third party states and consumers. Second, approaching the role of international trade and investment laws in either/or fashion may be problematic, at least as regards transnational investments which are subject to the disciplines of both legal regimes. As I demonstrate in the remaining part of this chapter, like international investment law, international trade law in principle offers protection to foreign investors against a host state's measures. For instance, according to the disciplines under the TRIMs Agreement, a WTO member may not require an investor from another member state to sell part or the whole of its production in the domestic market or to sell a certain amount of its produce in the international market to generate a certain amount of foreign currency.[732] In a way, this augments the protection for foreign agricultural investors, particularly where such measures are not captured by performance requirement clauses under relevant BITs, which in turn points to how trade law, similar to investment law, incentivises transnational land acquisitions. As shall be considered in the following sections, the prohibition of non-discrimination and export restriction measures under the

[731] Indeed, they concede that the 'labeling laws' depend for their efficacy on political commitments of consumers ; Ibid 139.
[732] *Trade-Related Investment Measures (TRIMs) Agreement* art2 cum. annex art 2(c).

GATT 1994[733] and the WTO Agreement on Agriculture (AoA)[734] also tend to cement 'land grabs'. Although by way of exception, international trade law leaves some flexibility to host states when there is critical shortage of food, this flexibility also diminishes when considered in conjunction with relevant disciplines under international investment law that afford further protection to these investments.

5.3. The Flexibility and Limits in WTO Law and Jurisprudence

The International Trade Organisation (ITO) was meant to regulate international trade relations alongside the other major global economic institutions of the post-WWII period, the World Bank and the IMF. Yet its creation never materialised, [735] and hence the ITO is often referred to as the missing the third 'leg' of the Bretton Woods Institutions. Thus, the General Agreement on Tariffs and Trade (GATT) of 1947 [736] which was meant only to form part of the ITO Agreement remained a principal legal quasi-institution regulating the world trading system for nearly half a century—until 1995, when the WTO was established. At least for most of the major economies, agriculture had largely remained outside the scope of the GATT 1947 through various mechanisms, including waivers from certain GATT disciplines, and blocking the adoption of panels or implementation of decisions that threatened their agricultural policy.[737] Thus, while global average tariffs on industrial goods have

[733] *Agreement on Tariffs and Trade 1947*, opened for signature 30 October 1947 (entered into force 1 January 1948). Note that, subject to some modifications, the GATT 1947 now forms part of the GATT 1994 ; see *General Agreement on Tariffs and Trade 1994* ,opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A .

[734] *The Agreement on Agriculture*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A.

[735] This is primarily attributed to the US Congress's refusal to approve the Charter establishing the Organisation.

[736] See generally Desta, above n 711.

[737] See Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (Taylor and Francis, 4th ed, 2013) 435. Note that under the GATT 1947, decisions are made

'progressively fallen from above 40 percent down to below 4 percent, agriculture has experienced a reverse development for [the] most part of the lifetime of the GATT.'[738] However, with the introduction of the AoA[739] during the Uruguay trade negotiations (1986 –1994), agricultural trade has to some extent come under the discipline of the WTO agreement. Thus, apart from modest disciplines on domestic support and export subsidies, the conversion of all non-tariff agricultural import barriers into their tariff equivalents (referred to as 'tariffication') and the binding of the resulting tariffs was praised as 'one of the most significant "systemic" achievements of the Uruguay Round'.[740] Yet, given the discretion given to Member States on tariffication, some members chose data that would allow the highest possible tariff (binding their import tariffs far beyond the non-tariff equivalents), what is often referred to as 'dirty tariffication'.[741] Such high tariffs and the consequent high tariff dispersion between products (tariff peaks) have been observed as two of the most notable limitations of the market access commitments undertaken under the AoA.[742]

Indeed, agricultural trade remains one of the acrimonious issues even under the current Doha round of trade negotiations. Although not as contentious as domestic support and export subsidies, market access related measures such as export restriction measures are among the areas of divergence in agricultural trade negotiations. This issue deserves particular attention in the context of the recent transnational 'land grabs' for a number of reasons. Firstly, export restrictions of various sorts by a number of countries in response to the food price spikes in 2007-2008 reportedly exacerbated the food crisis. Part of the

with positive consensus, thus even a single member (and hence and respondent state) can block the adoption of a decision to establish a panel or adopt its decisions.

[738] See Desta, above n 711, 7.

[739] *The Agreement on Agriculture*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A.

[740] OECD, *The Uruguay Round : A Preliminary Evaluation of the Impacts of the Agreement on Agriculture in the OECD Countries* (OECD, 1995) 29.

[741] Desta, above n 711, 62.

[742] Ibid.

explanation for this pervasive use of export restrictions is that the World Trade Organization (WTO) law discipline on export restrictions is too weak to restrain exporting countries from introducing and maintaining these measures. As such, agricultural export restrictions have gained some attention in various regional and global fora that have been calling for tighter disciplines, although to date there is little progress to this effect. Secondly, and relatedly, agricultural export restriction measures have also been one of the push factors for increasing acquisition of farmland abroad in recent years—with a growing realisation that the international market is not a reliable source of food, many relatively rich countries joined the race for farmland abroad (for export back home)—while other investors (that target regional and international markets) might have been driven by the potential profit to be generated from the inexorable rise in food prices (see Chapter 3). Hence, possible export restriction measures by host states, even when dictated by local necessities, would be a counter move to these goals, and likely lead to tensions between the competing interests of foreign investors and host states (local communities) that also involves the interplay of international trade and investment laws. By taking export restriction measures (quantitative restrictions and export duties) as common areas of regulation, in the remaining parts of this chapter I shall explore, in turn, the GATT/WTO disciplines on export restrictions and their interaction with the disciplines under investment law in ordering transnational land grabs.

5.3.1. Quantitative Restrictions

Within international trade law (mainly WTO law) framework, agricultural export restrictions are disciplined under the GATT 1994,[743] the AoA and the

[743] *Agreement on Tariffs and Trade 1947*, opened for signature 30 October 1947 (entered into force 1 January 1948). Note that, subject to some modifications, the GATT 1947 now forms part of the GATT 1994 ; see *General Agreement on Tariffs and Trade 1994* ,opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A .

Agreement on Trade Related Investment Measures (TRIMs).[744] The GATT generally prohibits quantitative import and export restrictions but, by way of exception, allows members to introduce such restrictions, among others, to address critical local food shortages.[745] The AoA provides for procedural requirements that a member introducing export restriction measures shall comply with.[746] The TRIMs Agreement, on the other hand, prohibits trade related investment measures that are inconsistent with GATT Article III (national treatment or Article XI (quantitative restrictions).[747] And, as I will explore further, these provisions interact in important ways.

Thus, Article XI:I of the GATT 1994, which provides for a general elimination of quantitative restrictions, in relevant part states: '[n]o prohibitions or restrictions other than duties, taxes or other charges… shall be instituted or maintained by any contracting party on the importation… or on the exportation or sale for export of any product…'[748] The scope of 'prohibitions or restrictions' envisaged under Article XI is very broad. As the panel in *India-Quantitative Restrictions* set out:

> [T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges.' As was noted by the panel in *Japan—Trade in Semiconductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes, or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a

[744] *Trade-Related Investment Measures (TRIMs) Agreement*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A.
[745] See *General Agreement on Tariffs and Trade 1994* art XI:1 and XI:2(a).
[746] See *The Agreement on Agriculture* art 12.
[747] See *Trade-Related Investment Measures (TRIMs) Agreement* art 2.
[748] *Agreement on Tariffs and Trade 1947* art XI:1.

limitation on action, a limiting condition or regulation' (internal citations omitted).[749]

A WTO Member, therefore, may not introduce or maintain any export (and import) restriction and/or prohibition measures (other than duties, taxes or other charges). By way of exception, however, as provided under Article XI:2(a), a WTO member is allowed to take '[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.'[750] Also, at least theoretically, the general exception provisions (Article XX) of the GATT, notably paragraph (j) which allows restrictions that are 'essential to the acquisition or distribution of products in general or local short supply'[751] could also be invoked to justify export restriction measures—especially on products which can be used as food or raw material (for example, for production of biofuel)—such as maize and soybean. In order to justify export 'prohibition or restriction' measure on grounds of food security, the measure needs to meet both the substantive requirements of GATT Article XI:2(a)—including the existence of 'critical shortage' of foodstuffs and the 'temporary' application of the measure—and the procedural requirements (of notification and consultation) under the AoA Article 12. Thus, an export restriction measure that is justified under GATT Article XI:2(a) indiscriminately applied to both domestic and foreign producers (exporters) in compliance with the AoA Article 12 shall be deemed to be consistent with the TRIMs, as the latter only prohibits TRIMs that are inconsistent with the GATT Article III (national treatment) or Article XI (quantitative restrictions).[752]

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[749] See Panel Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* ('*India Quantitative Restrictions*'),WT/DS90/R (22 September 1999)[646] - [647].
[750] *General Agreement on Tariffs and Trade 1994* art XI:2(a).
[751] Ibid art XX.
[752] Note also that Article 2 of the TRIMs Agreement which prohibits a trade related investment measure that is inconsistent with the provisions of Article III or Article XI of GATT 1994 is qualified by the opening phrase 'Without prejudice to other rights and obligations under GATT

Nonetheless, what constitutes 'critical,' 'shortage,' or 'temporary' application under GATT 1994 Article XI: 2(a) is far from straightforward. Apart from a mere reference to the term 'food security,' neither does the AoA, which sets the procedural requirements for the application of GATT Article XI:2(a), provide for precise definition of the conditions that justify the invocation of this provision. In fact, this omission seems intentional. Smith observes that '[t]he omission of a definition of food security appears to be deliberate and implies that food security is not a matter for the rules per se, but is something separate which is to be determined by other international agreements and/or by the WTO Member.'[753]

There is also no adequate GATT/WTO jurisprudence guiding the interpretation of GATT Article XI:2(a)—to date, the GATT/WTO Dispute Settlement Body has considered only a few cases relating to export restrictions.[754] Among these cases, it is in the *China-Raw Materials* case that the panel has directly dealt with some of the key terms under GATT Article XI:2(a)—albeit in the context of raw

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1994', which is indicative of the fact that a measures justified under exception clauses in the GATT shall not be inconsistent with TRIMS Agreement.

[753] Fiona Smith, 'Food Security and International Agricultural Trade Regulation: Old Problems, New Perspectives' in Melaku Desta and Joseph Mcmaho (eds), *Research Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law* (Edward Elgar Publishing, 2012) 57; Smith further notes that: 'It is then for the Member to decide what is most appropriate for the needs of its domestic population in food security terms. Whether the policies work and the Members' population benefits are not relevant considerations for the current international agricultural trade rules'.

[754] See GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc L/6268-35S/98 (20 November 1987, adopted 22 March 1988); GATT Panel Report, *Japan – Trade in Semi-Conductors*, GATT Doc L/6309 - 35S/116 (24 March 1988, adopted 4 May 1988); Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Doc WT/DS155/R (16 February 2001); Panel Report, *US – Measures Treating Export Restrictions as Subsidies*, WTO Doc WT/DS194/R(29 June 2001); Panel Report, *China – Measures Related to the Exportation of Various Raw Materials* ('*China-Raw Materials*') WTO Doc, DS394, DS395, DS398 (5 July 2011); AB Report, *China – Measures Related to the Exportation of Various Raw Materials* ('*China-Raw Materials*'), WTO Doc DS394, DS395, DS398 (30 January 2012); Panel Report, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* ('*China-Rare Earth*'), WTO Doc WT/DS431-433 (26 March 2014); AB Report, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* ('*China -Rare Earth*'), WTO Doc WT/DS431-433 (7 August 2014).

materials (as opposed to foodstuff). In the *China-Raw Materials* case, the issue was whether China's export duties on certain commodities (bauxite, coke, fluorspar, magnesium, manganese, silicon metal, zinc and yellow phosphorous) were inconsistent with paragraph 11.3 of China's Accession Protocol. Although the measure at issue was thus not quantitative restriction *per se*, this case is significant because it is the case in which the elements of article XI:2(a) were considered at the WTO dispute settlement tribunal.

Thus, with regard to what constitutes 'critical shortage', the Panel ruled that:

> The meaning of 'shortage' as a deficiency in the quantity of goods appears to be common ground with the parties and the Panel also considers this to be its meaning as used in Article XI:2(a). In the Panel's view, the term 'critical' indicates that a shortage must be of 'decisive importance' or 'grave,' or even rising to the level of a 'crisis' or catastrophe. Article XI: 2(a) states that measures in the form of restrictions or bans may be used on a temporary basis to either outright 'prevent' or otherwise 'relieve' such a shortage.[755] The Panel is persuaded by the complainants' argument that the requirement that measures be applied 'temporarily' contextually informs the notion of 'critical shortage.' In this sense, as noted by the European Union, if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis. If a measure were imposed to address a limited reserve of an exhaustible natural resource, such measure would be imposed until the point when the resource is fully depleted. This temporal focus seems consistent with the notion of 'critical,' defined as 'of the nature of, or constituting, a crisis.'[756]

Thus, from the reading of *China-Raw Materials* Panel's report, it transpires that 'critical shortage' refers to a shortage that is of 'decisive importance,' 'grave,' or of such a nature that amounts to a 'crisis'. Of course, what constitutes 'decisive importance,' 'grave,' or 'crisis' begs for further interpretation of whoever is invoking (and/or challenging) the measure in question.

With regard to the temporality of the measure the panel noted:

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[755] Panel Report, *China-Raw Materials* [7.296].
[756] Ibid [7.297].

> The Panel observes that the ordinary meaning of 'temporarily' is 'for a time only' and 'during a limited time. The term 'limited time' means 'appointed, fixed' and 'circumscribed within definite limits, bounded, restricted.' These definitions suggest a fixed time-limit for the application of a measure. Thus, on its face, Article XI:2(a) would appear to justify measures that are applied for a limited timeframe to address 'critical shortages' of 'foodstuffs or other products essential to the exporting contracting party.'[757]

In the Panel's view, on the basis of textual interpretation, 'temporarily' means a 'limited timeframe,' implying that members' export restriction measures under Article XI:2(a) shall specify the duration of the measure, precluding indefinite and long-term export restriction measures. The panel further strengthened this textual interpretation with contextual interpretation, maintaining that otherwise interpretation of 'temporarily' under Article XI:2(a) would undermine the import of GATT Article XX: (g).[758]

In response to China's appeal, the Appellate Body (AB), while generally upholding the panel's report reversed the panel's interpretation of the term 'temporarily' as referring to 'fixed time-limit'. Thus the AB held that:

> In our view, a measure applied "temporarily" in the sense of Article XI:2(a) is a measure applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need. It must be finite, that is, applied for a limited time. Accordingly, we agree with the Panel that a restriction or prohibition in the sense of Article XI:2(a) must be of a limited duration and not indefinite.[759] The Panel further interpreted the term "limited time" to refer to a "fixed time-limit" for the application of the measure. To the extent that the Panel was referring to a time-limit fixed in advance, we disagree that "temporary" must always connote a time-limit fixed in advance. Instead, we consider that Article XI:2(a) describes measures applied for a limited

[757] Ibid [7.255].

[758] Ibid [7.298]; the Panel argued that if Article XI:2(a) is interpreted in such a way that it permits the long-term application of measures in the nature of China's export restrictions on refractory grade bauxite, 'the import of Article XX(g) would be very much undermined, if not rendered redundant. Thus it is important that effect be given to the differences between Article XX (g) and Article XI: 2(a); Ibid.

[759] Appellate Body Report, 'China — Measures Related to the Exportation of Various Raw Materials' (WT/DS398/AB/R, AB-2011-5, 30 January 2012) [330].

> duration, adopted in order to bridge a passing need, irrespective of whether or not the temporal scope of the measure is fixed in advance.[760]

As with most WTO disputes, the taint of protectionism[761] seems to have influenced the Panel's strong legal approach to this case. Although a WTO adjudicator faced with a true food security crisis may not necessarily approach Article XI:2(a) in the same way as the Panel in *Raw Materials*, given the fact that this is the first case in which this provision is seriously engaged in the WTO dispute settlement, it may have important implications for understanding potential export restriction measures applicable to transnational farmland investments (produces). As noted before, in most of the sub-Saharan African countries which are the principal destinations of the recent farmland investments, food shortage is, rather, a perpetual problem. Thus, in light of the Panel's report, such shortages may defy the qualification of 'critical shortage' which draws its strength from the *temporary* nature of the problem (that can be prevented or alleviated by temporarily restricting food exports), making the justification under GATT Article XI:2(a) difficult, if not impossible.

Even when an export restriction measure is *prima facie* justified under Article XI:2(a), as noted before, compliance with further procedural requirements under the AoA is still necessary. Thus, AoA Article 12 requires any Member instituting new export prohibition or restriction on foodstuffs 'to give due consideration to the effects of such prohibition or restriction on importing Members' *food security*.'[762] Moreover, before instituting such measure, the member shall also notify, in writing, the Committee on Agriculture as to the nature and duration of the measure, and shall, upon request, consult with and

[760] AB Report, *China-Raw Materials* [331] (internal citation omitted).
[761] For example, although China had pleaded for environmental justification (that raw materials were an exhaustible natural resource and thus restrictions on production/consumption were required), its measures were not even-handed –it has not reduced levels of domestic consumption of those essential industrial inputs whose price had dropped significantly with the export restraints.
[762] *The Agreement on Agriculture*, art 12:1(a) (Emphasis).

provide necessary information to any other member having a substantial interest as an importer, with respect to any matter related to the measure in question.[763] A developing country member, however, is exempted from these requirements unless it is a net food-exporter of the specific foodstuff concerned.[764] The requirements under AoA Article 12 are, however, akin to 'soft law' that a concerned exporting country can easily eschew.[765] The experience to date also suggests that these provisions have not effectively restrained members from using export restrictions.[766]

On the other hand, as the *China–Raw Materials* case suggests, the WTO discipline on export restriction may not be completely ineffective. As, for example, Robert Howse and Tim Josling contend, on the basis of the outcome of this case, food exporting countries may not respond to local food crisis in a manner that is indifferent to the food security impacts on import-dependent countries.[767] They further suggest that there is room for the WTO to collaborate with another international organisation which is primarily focused on questions pertaining to international and national food security[768] to assess whether there are grounds that justify export restriction as provided under WTO laws.[769] Given the sensitive nature of hunger (food security) and the protection the agricultural sector has been accorded historically, however, it may not be easy to imagine WTO members entrusting the mandate to determine the existence of 'critical shortage of foodstuff' in their territory to an external body.

Notwithstanding the fact that few countries that have recently acceded to the WTO accepted stricter export restriction commitments, the so-called 'WTO

[763] Ibid art 12:(b).
[764] Ibid art 12:2.
[765] See, for example, Anania, above n 706, 16.
[766] Ibid.
[767] Josling, above n 153, 11.
[768] Robert Howse and Tim Josling, 'Agricultural Export Restrictions and International Trade Law: A Way Forward' (International Food and Agriculture Trade Policy Council, 2012) 11.
[769] Ibid 13.

plus' commitments,[770] the WTO disciplines on export restrictions (including on grounds of food security) remain very loose. This is manifested partly in the interpretive difficulty of the key, yet indeterminate and subjective terms—including 'critical,' 'shortage,' and 'temporarily'—envisaged under GATT Article XI: 2(a) are compounded by the AoA's essentially hortatory procedural requirements. But what explains the 'under-regulation' of export restrictions? One explanation is that WTO members 'did not feel at the time [of the negotiation of the AoA that] there were good reasons to be concerned about the possibility of countries finding it convenient to restrict their exports.'[771] Another explanation has to do with the prevailing asymmetry of [bargaining] power among countries during the Uruguay Round—agricultural trade negotiation remained largely and firmly in the hands of net food exporting developed countries, for whom high international prices and their impact on food security is a low priority compared to making markets more open and profitable for their exports.[772] It is thus worth considering what, if anything, has changed under the current Doha Round of trade negotiations, but before that I will briefly address another export restriction measure that a host state may introduce to address domestic food shortage, namely export duty (tax).

5.3.2. Export Duties

Unlike import duties, export duties are not prominent in the contemporary world trading system, simply because countries would want to maximise their export (earnings). Yet, in recent years, export duties have been pervasively used. As Van den Bossche and Zdouc note, '[a]t present, export duties are most commonly imposed on raw materials and agricultural products, which are in

[770]The countries that had to accept obligations which go beyond, to different extents, existing WTO rules (and hence 'WTO-plus' commitments) include: China, Mongolia, Russia, Saudi Arabia, Ukraine and Vietnam. For more on this, see Anania, above n 706, 18.
[771] Ibid 17.
[772] Ibid.

short supply in the world market.'[773] Like import (customs) duties, export duties could serve two major purposes: as a source of revenue for governments and protection (promotion) of domestic industries which use these raw materials,[774] and export duties on agriculture could be used to ensure domestic supply of food products particularly at times of global food crises.[775] Thus, excessive export duties may have the same effect—or in the parlance of international trade law, is equally trade restrictive or distortive—as outright export ban (or quantitative restrictions) on food products. In fact, as noted in earlier chapters, a number of major food exporting countries imposed high export duties following the 2007/08 global food crisis, although the legality of these measures was not challenged.

Indeed, the WTO agreements do not specifically prohibit or regulate export duties (customs duties or other charges on exports)—unlike import duties. As provided under Article II:(a) of the GATT, each Member state is required to 'accord to the *commerce* of the other [Members'] treatment no less favourably than that provided for in the appropriate Part of the appropriate schedule annexed to this Agreement.'[776] The term 'commerce' has been construed as referring to both imports and exports.[777] This provision is particularly relevant where a WTO Member has particularly committed itself not to impose export duties or raise them beyond a specified level in its schedule of commitments, which is uncommon for original GATT/WTO members.[778] But, as noted earlier, some of the countries that have recently acceded to the WTO have specifically committed to either not to impose export duty or raise it beyond an agreed level

[773] Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization : Text, Cases, and Materials* (Cambridge University Press, 2013) 470.
[774] Ibid 471.
[775] Ibid.
[776] Ibid.
[776] See *Agreement on Tariffs and Trade 1947* art II: 1(a).
[777] Van den Bossche and Zdouc, above n 773, 472.
[778] For example, Australia agreed not to apply export duty with respect to certain products; Ibid.

in their protocol of accession, what is often referred to as a 'WTO-plus' commitment. Two major examples here are China and Russia. In fact, the *China-Raw Materials* case noted earlier epitomises this—China's export duty on certain raw materials was found to be inconsistent with its undertaking in its protocol of accession. The fact that even economically less advanced countries such as Cambodia were requested to justify their export restriction measures[779] suggests that Ethiopia may also potentially shoulder similar obligations. Should that eventuate, the imposition of export duties or raising their amount even during times of food crises would need to pass the test of GATT Article XI:2(a) and the AoA Article 12, as discussed earlier. If the introduction of new export duties or raising existing rates beyond an agreed level passes that test, in principle the measure will not be challenged at least before the WTO dispute settlement body. But that is only part of the story, for as I show later, even a measure that is *prima facie* legitimate under WTO agreements may still be challenged under international investment law applicable to transnational agricultural investments. Before that, however, I will briefly explore some of the recent developments in international trade negotiations regarding export restriction measures.

5.3.3. Developments in the Doha Round Negotiations

Agricultural (and hence food) export restrictions have been the subject of discussions under the Doha Round of Trade Negotiations ('Doha Development Agenda Round') launched in November 2001.[780] Indeed, even before the launch of the round, several countries (and groups of countries) suggested the need to introduce more stringent regulations of export restrictions in their initial

[779] WTO, 'Report of the Working Party on the Accession of Cambodia' (WT/ACC/KHM/2, August 2003).
[780] Van den Bossche and Zdouc, above n 773, 472.

proposal on the basis of the AoA inbuilt negotiation agenda (Article 12).[781] It was, however, the food crisis of 2007-2008 which was arguably exacerbated by the export restriction measures of some major exporters that revived the issue in the context of the agricultural negotiations.

For example, in April 2008, as part of the ongoing effort to find an agreement which could bring the Doha Round to an end in later months, Japan and Switzerland jointly circulated an informal paper calling for stricter WTO rules on the introduction of export restrictions for food products and on the consultation and notification procedures.[782] The paper, among other things, proposes that 'any new export prohibition or restriction be limited to the extent strictly necessary' for the country imposing it, taking into account production, stocks, and domestic consumption.[783] The proposed rules also require countries seeking to restrict exports to give 'due consideration' to importers' food security, and look at how trade would have flowed in the absence of restrictions.[784] Moreover, members would need to show how the measure may affect food aid for net food-importing developing countries. Procedurally, the proposal requires members taking export restriction measures to notify the WTO Committee on Agriculture before instituting export restrictions, explaining the nature, duration, and reasons for the measures.[785] Further, governments would be required to consult with importers about 'any matter

[781] See, for instance, the proposal by the Carins Group (including Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay); WTO, 'WTO Negotiations on Agriculture – CAIRNS Group Negotiating Proposal' <https://www.wto.org/english/tratop_e/agric_e/ngw93_e.doc>. Other countries which tabled initial proposal on export restriction are: Japan, Switzerland, Rep. Korea, Democratic Republic of Congo and Jordan.

[782] See International Centre for Trade and Sustainable Development (ICTSD), 'Japan, Switzerland Propose Stronger WTO Curbs on Use of Food Export Restrictions' (ICTSD) <http://www.ictsd.org/brIbidges-news/brIbidges/news/japan-switzerland-propose-stronger-wto-curbs-on-use-of-food-export>.

[783] Ibid.

[784] Ibid.

[785] Ibid.

related to the proposed' export restriction, and delay the implementation of the planned measure pending the consultations.[786] If the differences could not be resolved within a certain period of time, the proposed export restriction would be referred to binding arbitration by a 'standing committee of experts.'[787] This proposal was not, however, accepted by WTO members.

On the other hand, the Doha Draft Modalities of 2008 also provides for a modest proposal on disciplining agricultural export restrictions.[788] The Draft Modalities text would require members to notify the WTO about the export restrictions (including the reasons for taking the measure) within ninety days after the imposition of the measures, and 'shall consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the proposed measure' and provide, upon request, the interested importing Member with necessary information, including relevant economic indicators.[789] Export restrictions would 'not normally be longer than [twelve] months' unless otherwise agreed by 'affected importing Members.'[790] Nonetheless, despite the increasing calls for tighter disciplines on export restrictions even within other multilateral settings,[791] due to the Doha Round stalemate, there has not been further progress on this issue as yet.

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[786] Ibid.
[787] Ibid.
[788] Committee on Agriculture, 'Revised Draft Modalities for Agriculture' (WTO) <http://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDIQFjAC&url=http%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fagric_e%2Fagchairtxt_dec08_a_e.pdf&ei=iVRPVLjvGovLaOHegpgH&usg=AFQjCNFz8I8SBIr82aaNm8br3k2U9YLEZQ&bvm=bv.77880786,d.bGQ>.
[789] Ibid [174]. The modalities also include an exemption from these requirements for least-developed and net food-importing countries.
[790] Ibid [179].
[791] As part of food security discussions since 2007, different levels of stricter export restriction disciplines have been suggested in multilateral settings such as G-8, G-20, and FAO.

A few WTO members, such as India, have recently embarked on public stockpiling of grains as a food security strategy,[792] which has sparked a huge debate among WTO members—and has almost risked the collapse of the already shaky Doha Round trade talks. The Indian National Food Security Bill, which was introduced in 2013, allows the government to buy food, including grains, from farmers and stockpile it for a public distribution system, where it is sold at government-run stores at subsidised prices—the subsidy is estimated to be available to 75 percent of India's rural population and 50 percent of the urban population.[793] However, some WTO members, including the United States and Pakistan, have expressed fears that the scheme runs the risk of exceeding the 10 percent domestic support allowed under the WTO rules, that India was accumulating too much grain, and that India might eventually release the surplus on the world market, lowering prices for other producers.[794] In the face of India's insistence in defending its policy, even threatening to veto the multilateral agreement on trade facilitation which was part of the Bali Package, WTO members have agreed to a temporary solution in which developing countries would not be penalised for breaching their subsidy levels until a permanent solution was found by 2017.[795] If the eventual 'permanent' deal ensures further tolerance for public stockpiling tied to domestic support, and thereby extends the level of domestic support currently allowed under the WTO, it can also in effect allow further export restriction flexibility without the need to resort to the justification under GATT Article XI:2(a). At any rate, agricultural trade in general and food export restrictions in particular remain among the key contentious issues which have led to the Doha Round impasse.

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[792] World Bank, 'Using Public Food Grain Stocks to Enhance Food Security' (World Bank Report No.71280-GLB, September 2012).
[793] Neha Bagri, 'U.S.-India Agreement on Stockpiles of Food Revives a Trade Deal' *New York Times*, 13 November 2014 <http://www.nytimes.com/2014/11/14/business/international/us-india-agreement-clears-way-for-global-trade-deal.html?_r=0>.
[794] Ibid.
[795] Ibid.

5.4. Reading WTO Law Flexibility through International Investment Law (BITs)

5.4.1. Quantitative Export Restrictions

As the foregoing section suggests, the WTO laws leave some flexibility with regard to agricultural export restrictions which in principle apply to both domestically and foreign owned food produced in member states hosting transnational farmland investments. Yet, as Chapter 4 reveals, transnational agricultural investments enjoy an additional layer of protection from international investment laws, and that certain measures that host states may take in response to, for example, local hunger, could potentially be interfered with by investors' property rights as recognised under relevant laws including BITs. Thus, such measures as restrictions on exports and water use, or performance requirements regarding export, employment and infrastructure, may potentially breach various BITs standards. Among the stated measures, export restriction stands out as one of the most relevant issues that potentially falls under the domain of international trade and investment laws. In this Section, I shall further flesh out how agricultural export measures that *prima facie* pass the legality test of international trade law will be treated under international investment law, with a particular focus on whether relevant BITs' exception clauses leave any room for these restrictions.

As discussed in Chapter 4, certain measures host states may take against transnational investments can potentially breach various substantive BIT standards such as fair and equitable treatment (FET), full protection and security, and indirect expropriation. To date, no real case has emerged concerning host states' measures (including export restrictions) relating to the recent transnational farmland investments within the framework of international trade (nor investment) law because of the incipient nature of the

investments. This, however, may not imply that no such case would appear in the future. In fact, as Van Heukelom argues, given the competing interests food security oriented farmland deals involve, the 'real test' to these land deals comes when there is local food shortage in host states.[796] But given that local food shortage already exists in much of sub-Saharan Africa, leading to intermittent export bans of cereals,[797] one may rather think that the 'real test' is likely to come when there is a shortage (or perceived shortage) of food in investors' home states which would make them want to secure access to such food, or where sales in international markets offer better returns to investors than local markets. Particularly, where the only motivation of the investment is for export (supply) of food to the investor's home state (as is often the case with Gulf States' agricultural investments in Africa), 'export restrictions and even export taxes will significantly impact on such a business or state model (where the investor is a state-owned entity), with a real risk of attracting breach of investment treaty obligations.'[798] In fact, there are investment arbitration cases in primary sectors other than agriculture that are indicative of how investment arbitration tribunals may deal with host states' export restriction measures relating to transnational agricultural produce.

For example, in *Venezuela Holdings et al. v Venezuela*[799] the ICSID tribunal examined whether Venezuela's production and export curtailments of oil were incompatible with the fair and equitable treatment standard of The

[796] Tim Siegenbeek van Heukelom, *Food as Security: The Controversy of Foreign Agricultural Investment in the Yala Swamp, Kenya* (PhD Thesis, University of Sydney, 2013).
[797] For example Ethiopia banned export of major cereals between 2006 and 2010, see OECD, 'The Economic Impact of Export Restrictions on Raw Materials' (OECD, 2010) 77 <http://www.oecd.org/publications/the-economic-impact-of-export-restrictions-on-raw-materials-9789264096448-en.htm>.
[798] Kurtz, *The WTO and International Investment Law*, above n 133, 2017–8.
[799] *Venezuela Holdings et al v Venezuela, Award* ('*Venezuela Holdings v Venezuela*'), (ICSID Arbitral Tribunal, Case No. ARB/07/27, 9 October 2014).

Netherlands-Venezuela BIT.[800] The Tribunal argued that the FET 'standard may be breached by frustrating the expectations that the investor may have legitimately taken into account when making the investment. Legitimate expectations may result from specific formal assurances given by the host state in order to induce investment.'[801] It thus held that 'the production and export curtailments imposed from November 2006 were incompatible with the Claimants' reasonable and legitimate expectations, and thus breached the fair and equitable standard contained in Article 3(1) of the BIT.'[802] Not all tribunals require an explicit assurance from the host government in order to find the violation of the legitimate expectation of an investors and hence the breach of a FET. The *Toto v. Lebanon* tribunal, for example, took a broader view when it stated that legitimate expectations 'may follow from explicit or implicit representations by the host state, or from its contractual commitments.'[803] Thus, where the right to freely export (dispose) is recognised or where there is no reservation to this right under relevant laws or investment agreements, as is the case in Ethiopia and many other host states, possible export restriction measures relating to transnational farmland produce would likely violate investment contracts and breach the relevant BIT, even when such measures could be *prima facie* justified under WTO law.

Similarly, in *El Paso v Argentina*,[804] the ICSID tribunal considered, among other issues, whether Argentina's ban on oil and gas export following the economic crisis of 1999 was compatible with the Fair and Equitable Treatment Standard

[800] *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela* ('*Netherlands and Venezuela BIT*'), signed 22 October 1991 (entered into force 1 November 1993).
[801] *Venezuela Holdings v Venezuela* [256] .
[802] Ibid [264].
[803] *Toto Costruzioni Generali SPA v The Republic of Lebanon (Award)* [2012] ICSID Arbitral Tribunal Case No. ARB/07/12 (7 June 2012) ('*Toto v Lebanon*') [159].
[804] *Continental Casualty Company v Argentine Republic (Award)* ('*Continental v Argentina*'),(ICSID Arbitral Tribunal, Case No ARB/03/15, 31October 2011).

under the US-Argentina BIT of 1992.[805] The tribunal noted that the investor's right to freely export could be drawn either from a host state's laws or an investment agreement signed by the host state and foreign investor,[806] and where the host state's law provide for the possibility of export restrictions, a foreign investor may not be entitled to an absolute right of export.[807] In the tribunal's words:

> Concerning CAPSA [Compañías Asociadas Petroleras], in the Tribunal's view, the right to export freely that was granted by law was not unrestricted. As any right, it was subject to reasonable restrictions decided by the Government for reasons of public interest, for example in order to satisfy the domestic market. This was provided for by Article 377 of the Mining Code, incorporated in Law 12,161 of 1 April 1935, applicable to CAPSA's concessions.[808]

According to the tribunal, the same logic applies where the right to freely export is granted in an investment contract (concession agreement), because the texts granting powers of regulation to the State were also incorporated in the concession.[809] The *El Paso* ruling, on the one hand, suggests that an investor's right to freely export its products granted by a host state's law or investment contract is not absolute—a host state may legitimately introduce export restriction measures, provided that the conditions that dictate the introduction of the measure exist. On the other hand, this case also suggests (as in *Venezuela Holdings*) that where no reservation to the investor's right to export freely is envisaged under either investment contract or other laws of the host state, a restriction of exports runs the risk of interfering with the property right of an investor, often protected under both domestic laws and international investment law (BITs). The implication for transnational land deals in countries

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[805] *Treaty between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment* ('*US-Argentina BIT*'), adopted 14 November 1991 (entered into force 20 October 1994).
[806] *El Paso Energy International Company v The Argentine Republic (Award)* ('*El Paso v Argentina*'),(ICSID Arbitral Tribunal, Case No. ARB/03/15, 31 October 2011) [432].
[807] Ibid [433].
[808] Ibid.
[809] Ibid [436].

like Ethiopia is no different. Where neither domestic laws nor farmland investment contracts provide for the possibility of export restrictions even by way of exception, and particularly where the international market offers higher price than domestic market, the introduction of export restriction measure may constitute a breach of both investment contract and—through the operation of an umbrella clause—relevant BIT standards.

5.4.2. Export Duties (Taxes)

As discussed in Section 3.2, international trade law does not outlaw export duties, unless a member specifically commits not to introduce such duties or raise the same beyond an agreed level. Yet, even where such commitments exit, like in the case of quantitative export restriction discussed above, a Member state can deviate from this commitment during domestic food shortage if justified under relevant WTO agreements. While such justification may spare the state concerned from challenge under WTO law, the measure can still be challenged under investment law. Particularly if the state concerned has not retained the right to introduce such duties in the investment contract, investors can invoke contractual breaches—and via umbrella clauses—various BIT standards to challenge this measure (as with quantitative export restrictions). Thus, the introduction of a new export duty or raising duty beyond the level existing at the time of investment may trigger the invocation of the Fair and Equitable (FET) standard, for an investor may argue that such a measure negates its legitimate expectation.

Depending on the extent to which the export duty affects its property right, an investor may also invoke an indirect expropriation clause. Some BITs leave ample room for this. The Ethiopia-Kuwait BIT, for example, defines expropriation very broadly, such that any 'interventions or regulatory measures by a Contracting State such as levying of arbitrary or excessive tax on the

investment, compulsory sale of all or part of the investment, or *other comparable acts or measures,* that have a *de facto* or expropriatory effect' amounts to indirect expropriation,[810] which entails payment of compensation to the investor. In the *El Paso v Argentina* case considered earlier, for example, the investor claimed that the introduction several tax measures (export duties) constituted indirect expropriation of the investment. The tribunal dismissed this claim arguing that 'the creation of export duties on oil and gas is *a reasonable governmental regulation within the context of the crisis*'.[811] According to the tribunal, 'the tax measures had only *a limited impact on Claimant's property rights...* under no circumstances may a tax of under 20% on exports be characterised as expropriation of an investment.'[812] While the tribunal has been even-handed in its assessment of this claim, implicit in its analysis is also the fact that where the level of export duty in question neutralises the property right of an investor, such a measure can constitute indirect expropriation. Thus, as with quantitative restrictions, high export duties applied to transnational agricultural investments in response to local food crisis—even when justified under the WTO law—can nonetheless be challenged under international investment law (BITs).

5.4.3. Exception Clauses

Although BITs are often drafted with the view to protecting foreign investors from host states measures 'arbitrary' measures, as considered in Chapter 4, it is possible to accommodate, to some extent, host states' legitimate regulatory interests through the use of exceptions (general or special).[813] The question to ask is, then, to what extent can BITs' exception clauses (measures) be employed to justify food export restrictions on the grounds of a local food crisis (food

[810] *Ethiopia-Kuwait BIT*, signed 14 September 1996 (entered into force 12 November, 1998) art 6(4).
[811] *El Paso v Argentina* [295] [emphasis in original].
[812] Ibid [298][emphasis in original].
[813] Vandevelde, above n 696, 449–450.

insecurity)? In other words, could general exceptions—commonly referring to measures aimed at protecting 'national security, public security or public order,'[814] 'public security and order,'[815] and 'essential security interests'[816] of a party—be invoked to justify a host state's export restriction measures taken in response to local food crisis (food insecurity)?

The answer to this question is far from straightforward. One source of difficulty has to do with the interpretation of the aforementioned terms (subjects) of treaty exception. Indeed, as Arnold Wolfers cautions, 'political formulas' like national security 'may not mean the same thing to different people' and 'may not have any precise meaning at all.'[817] In the context of international investment law, there have been limited instances in which arbitral tribunals have grappled with the interpretation of these terms. One such instance was in the aftermath of Argentina's financial crisis of 2000-2001 when a number of foreign investors brought arbitral claims against Argentina's regulatory response to the crisis. In its defence, Argentina attempted to justify its measures, among others, through invocation of the 'public order' and 'essential security interests' exceptions to its BIT obligations. Nonetheless, as for example Jürgen Kurtz's analysis of the first five of these awards reveals, 'the rulings engage fundamentally different and at times conflicting methods of interpreting the relationship between the operative treaty exception and relevant customary law.'[818]

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[814] See for example *UK-Ethiopia BIT*.
[815] See for example *German-Ethiopia BIT*.
[816] See for example *Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments*, signed 26 November 2003 (entered into force 22 March 2004).
[817] Arnold Wolfers, '"National Security" as an Ambiguous Symbol' (1952) 67(4) *Political Science Quarterly* 481, 481.
[818] See Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 *International and Comparative Law Quarterly* 325, 331.

The *Continental* Tribunal, which largely ruled in favour of Argentina on its invocation of treaty exception,[819] for instance, dismissed the claimant's submission that *public order* is synonymous with *public policy*, which more narrowly refers 'to measures necessary to maintain the public policies, laws and morals that define the country's society'.[820] The Tribunal interpreted 'public order' instead as a broad synonym for 'public peace,' 'which can be threatened by actual or potential insurrections, riots and violent disturbances of the peace… [including] due to significant economic and social difficulties.'[821] Viewed in this light, where food crisis (shortage) in host states results in, among others, riots or other disturbances that may threaten the legal order (rule of law) in a host country—as was for example widely seen following the 2007-2008 food crisis—a response through export restriction could be justified through the invocation of 'public order' treaty exception, provided of course that the restriction is *necessary* in the circumstances.

This brings us to the other commonly used general BIT exceptions of 'national security' and/or 'essential security interests,' and particularly to the question of whether host states' agricultural export restriction measures could be justified under these exceptions. As a starting point, whether 'essential security interests' and 'national security' refer to the same thing or whether they are significantly different is not clear from existing case law. However, as the UN Conference on Trade and Development (UNCTAD) points out, given the prefix 'essential,'

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[819] See *Continental v Argentina*, Award, ICSID Case No ARB/03/9, Sept 5, 2008. Among the other four Tribunals, three (CMS, Enron and Sempra) Tribunals ruled against Argentina while the LG&E Tribunal partially finds in favour of Argentina on its invocation of the exceptions; Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis', above n 818, 333.

[820] *Continental v Argentina* [171].

[821] Ibid [174]. Although the *Continental* tribunal considers 'public order' exception as distinct from 'essential security interests' exception, as UNCTAD notes, whether 'public order' exception is more directed towards disturbances of the internal legal order or whether it covers any kind of threat to national security is not clear from exiting arbitral awards. See UNCTAD, 'The Protection of National Security in IIAs' (UNCTAD, 2009) 74.

'essential security interests' could be understood as being narrower than the more general term 'national security.'[822] However, whether Contracting Parties, by choosing one of these alternatives, actually intend to introduce such a distinction is far from obvious.[823] Further, and perhaps more importantly, whether the notion of essential security interests is confined to its traditional understanding of a state's measures directed to counter external threats (often military) to its territorial integrity or whether it also captures the more evolving notion of *human security* is also not self-evident.[824]

Human Security is the latest in a long series of attempts to broaden traditional conceptions of security (other such attempts include: global security, societal security, common security, comprehensive security and cooperative security).[825] The notion was first articulated in the 1994 United Nations Development Programme (UNDP) Human Development Report which called for the broadening of the conception of security 'from an exclusive stress on territorial security to a much greater stress on people's [human] security' which encompasses seven different dimensions: economic, food, health, environmental, personal, community, and political security.[826] Indeed, about two decades later—building on the works of the UN Commission on Human Security—the UN General Assembly passed a Resolution that aims at creating a common understanding on the notion of human security.[827] The Resolution conceptualises the notion as, *inter alia*, 'the right of people to live in freedom

[822] UNCTAD, 'The Protection of National Security in IIAs', above n 821, 73.
[823] Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis', above n 818, 361–2.
[824] Ibid.
[825] Keith Krause, 'Towards a Practical Agenda of Human Security' (DCAF Policy Paper No. 26, Geneva Centre for the Democratic Control of Armed Forces – DCAF, 2006).
[826] United Nations Development Program, *Human Development Report 1994 : New Dimensions of Human Security* (Oxford University Press, 1994).
[827] *UN General Assembly Resolution 66/290, Follow-up to Paragraph 143 on Human Security of the 2005 World Summit Outcome* ('*UN General Assembly Resolution 66/290*'), GA Sixty-sixth session (25 October 2012).

and dignity, free from poverty and despair'[828] and as one calling for 'people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people and all communities.'[829] Further, the Resolution concedes that 'human security does not replace State security.'[830] As BITs' exception clauses often employ 'national security' and/or 'essential security interests' (instead of human security), the task of interpreting these clauses either narrowly (with a focus on territorial integrity) or broadly (in line with the evolving notion of human security) is left for tribunals. The *Continental* Tribunal, for example, seems to have taken the latter approach when it considered the effects of the economic crisis (such as near collapse of the domestic economy, the leap in unemployment, and the immediate threats to the health of young children, the sick and the most vulnerable) would qualify as a situation in which the essential security of Argentina as a state and country was vitally at stake.[831]

Thus, a case can arguably be made for (shortage of) food as a 'security' matter. As Lester R. Brown argues, for example, 'it is no longer possible to separate food security and security more broadly defined;'[832] indeed, the security equation is simple: 'by denying access to food, life can be threatened.'[833] A situation in which the acuteness of local food shortage threatens lives may trigger the invocation of 'essential security interests' and/or 'national security' treaty exception to justify host state's possible response measures such as export restrictions. For, while export restrictions may not guarantee access to food, they can contribute to access by enhancing local food availability. Nonetheless, current 'understanding of food as a matter of security remains ad

[828] Ibid [3(a)].
[829] Ibid [3(b)].
[830] Ibid [3(e)].
[831] *Continental v Argentina* [180].
[832] Brown, above n 80, 121.
[833] Peter Wallensteen, 'Scarce Goods as Political Weapons: The Case of Food' (1976) 13(4) *Journal of Peace Resolution* 277, 277.

hoc.'[834] Neither has this nexus (food as a matter of 'security') found its way into hard international law to aid tribunals engaging with the interpretation of treaty exception. Indeed, if—as mandated by the Vienna Convention on the Law of Treaties (VCLT)[835]—BITs (exception clauses) are to be interpreted in the light of the parties' obligations under other international agreements such as the International Covenant on Economic Social and Cultural Rights (ICESCR),[836] a host state's duty to realise its people's right to adequate food could create the food-'essential security interests' link.[837] This approach seems appealing, even if it also raises a more complex issue of the interplay between international investment and human rights law (see Chapter 6); in general terms, the extent to which tribunals are willing to take this road is not clear from existing case law. It is also worth mentioning that, even where food shortage (insecurity) may be understood as a threat to the essential security interests of the host state invoking a treaty exception, it is still incumbent upon that state to prove the existence of the condition (food shortage) that triggers the measure (in our case, export restriction) and that the measure is a necessary response that is applied only as long as conditions demand.[838]

[834] See Heukelom, above n 796, 77.

[835] See *The Vienna Convention on the Law of Treaties* ('*VCLT*'), opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(c); which requires a treaty interpreter to take into account 'any relevant rules of international law applicable in the relations between the parties'.

[836] *ICESCR*, 993 UNTS 3, opened for signature 16 December1966 (entered into force 3 January 1976, art 11[1]; in relevant providing, 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food…'

[837] Kurtz, for example, suggests similar interpretative approach in the context of analysing tribunals' ruling on Argentina's invocation of 'essential security interests' exception to justify its regulatory responses to the economic crisis; see Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis', above n 818, 363–4.

[838] For more on these conditions, see Ibid 364–5; see also Vandevelde, above n 696, 356.

In sub-Saharan Africa, including Ethiopia, most of the BITs do not provide for exception clauses.[839] Neither do these BITs contain food security related (specific) exception clauses. As noted before, in classic BITs, specific exceptions commonly pertain to non-discrimination in the application of a given measure, whether the introduction of the measure itself is justified in the first place or not. Despite the calibration efforts in recent years via including exceptions on grounds of public purpose, not many BITs (if any) recognise food security exceptions. And absent dedicated exceptions treaty clauses, tribunals would rarely engage with the task of rebalancing the interests of the investor and host state. Indeed, some scholars contend that, such an engagement would not be appropriate,[840] although others consider that such a tendency of construing protection of foreign investment as a sole or dominant purpose of the investment system can 'distort critical interpretive choices'.[841] In recent years, some scholars have recommended the incorporation of such clauses into BITs—Christian Häberli and Fiona Smith, for example, recommend a 'public interest clause for food security'.[842] While these exceptions, if implemented, could go some distance, the interpretative approach a given tribunal takes is still far from certain, although there is a general tendency for a pro-investor finding.

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[839] See {Citation}noting that a 'majority of BITs do not yet contain any general exceptions, albeit special exceptions applicable to the national and most-favored-nation treatment provisions are extremely common.'

[840] See Dolzer, above n 663, 28; noting that: 'BITs are drafted in a one-sided manner with the aim to provide an investor-friendly climate and to attract foreign investors; absent a special treaty clause, a rebalancing of interests in the case of a dispute by a tribunal would not be appropriate.'

[841] See Kurtz, *The WTO and International Investment Law*, above n 133, 170.

[842] See Häberli and Smith, above n 146, 221; proposing a public interest clause for food security**:** **'**In view of the specific situation of weak host states, their strong international commitments under BITs and other instruments, and comparing these commitments with the soft law principles applicable to home states and investors, we conclude our analysis in this article with a proposal for a public interest clause for food security which could be incorporated into the binding commitments of the host state and the investor, either in a BIT or regional treaty.'

5.5. Conclusion

In this chapter, I have explored the role that international trade law plays in the context of transnational land deals. I have argued that international trade law, in principle, encourages these land deals at least in two ways. On the one hand, trade policies and laws that guarantee market access incentivise investors to acquire (farm)land, targeting both domestic and international markets. On the other hand, restrictive trade laws and practices such as export bans or excessive export tax may erode food importing states' confidence on international market and thereby trigger competition for control over productive resources such as land (water), as was seen in the aftermath of the 2008 global food crisis. Once land is acquired, for the production of, for example, food for export to an investor's home state or the international market, international trade law further regulates various aspects of these land deals. As the discussions in this chapter suggest, the flexibility that international trade law offers to host states to leverage transnational land investments for, for example, addressing local hunger through export restriction measures is limited, particularly given the fact that these investments are also subject to the disciplines of (international) investment law which afford expansive protection to foreign investors. While both international trade and investment laws do not foreclose export restriction, they likely force a host state to buy food from a foreign investor at international (regional) market price, particularly when the latter is higher. Thus, even after transferring a significant portion of its farmland to foreign investors for food production, such a host state likely remains vulnerable to the volatility of the international market, which casts doubt on the feasibility of reliance on transnational land acquisitions to, for example, address hunger in host states. Thus, in their cumulative application, international investment and trade laws tend to facilitate transnational land deals while at the same time limiting the

ability of host states to introduce certain corrective measures such as those aimed at, for example, responding to local hunger.[843]

It may, of course, be argued that international human rights law can counter the excesses of international investment and/or trade laws in relation to these land deals. I shall further scrutinise this claim in the next Chapter (6) including through exploring how human rights law interacts with investment and trade laws in shaping legal relations around transnational land deals.

[843] Note also that, at times, international trade policies could be used to enforce investment law (arbitral decisions); for more on this, see Charles B Rosenberg, 'The Intersection of International Trade and International Arbitration: Suspending Trade Benefits to "Encourage" Compliance with ICSID Awards' (2014) 11(3) *Transnational Dispute Management* 1.

CHAPTER 6 HUMAN RIGHTS LAW AND LARGE-SCALE LAND ACQUISITIONS

6.1. Introduction

In the preceding two chapters, I have demonstrated how domestic laws and international investment and trade laws interact in important ways to shape legal relations with respect to transnational land deals. It was argued that, on the whole, (international) investment and trade laws tend to facilitate 'land grabs' which are often to the detriment of prior land users and their communities. In this chapter (6), I shall examine how (international) human rights law is being mobilised as a response to 'land grabs'. In a departure from a growing body of literature on the recent 'land grabs' that suggests a human rights approach as a solution to 'land grabs',[844] I argue that human rights law actually plays a double role in relation to shaping the legal relations around transnational land acquisitions: while individuals and communities affected by large-scale land acquisitions could invoke human rights to contest the practice, private investors could also invoke the human rights language to sustain it. Yet, given its current architecture, human rights law cannot effectively protect rival claims against investors under either human rights law or other applicable laws such as international investment law.

The origin of human rights is highly contested.[845] Nevertheless, as for example Baxi argues, unlike 'modern'(18th and 19th Centuries) human rights that largely

[844] See, for example, Borras Jr and Franco, above n 6; Christophe Golay and Irene Biglino, 'Human Rights Responses to Land Grabbing: A Right to Food Perspective' (2013) 34(9) *Third World Quarterly* 1630; Claeys and Vanloqueren, above n 461; Rolf Kunnemann and Sofia M Suarez, 'International Human Rights and Governing Land Grabbing: A View from Global Civil Society' (2013) 10(1) *Globalizations* 123; Semahagn Gashu Abebe, 'The Need to Alleviate the Human Rights Implications of Large-Scale Land Acquisitions in Sub-Saharan Africa'' (2012) 4(3) *Goettingen Journal of International Law* 873;

[845] For a linear progress narrative of human rights from ancient times to present—rooting human rights in western 'civilisation' by particularly pointing to the influence of religion (Christianity) and Western philosophy in human rights activism, see for example, Micheline R Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of

regarded large-scale imposition of human suffering as just and *right* in pursuit of a Eurocentric notion of human 'progress', the 'contemporary' (post-WWII) human rights paradigm renders problematic the very notion of the politics of cruelty.[846] This is of course not to suggest that contemporary human rights necessarily alleviates human suffering. Indeed, as Baxi further notes '*even* human rights instruments, regimes, and discursivity legitimate hierarchies of pain and suffering'[847]—by, for example, authorising military interventions in the name of securing human rights and yet causing massive human rights violations, and promoting 'obstinate division between the exercise of civil and political rights on the one hand, and that of economic, social and cultural rights on the other'.[848] This division of rights into 'generations' of civil and political rights (first generation) with immediate enforcement, and social, economic and cultural rights (second generation) such as the right to food to be implemented *progressively* by a state concerned, would in effect legitimise indifference to hunger (of nearly a billion people) amidst surplus global food production. Nevertheless, as Baxi further suggests, unlike modern human rights which was essentially exclusive in the sense that it was based on institutionalised racism, 'contemporary human rights is based on the premise of radical self-determination'[849] and as such is 'endlessly inclusive as far as norms and standards are concerned. In this paradigm, governance may no longer be based

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California Press, 2004) 47 – 58. For accounts of the polycentric origins of human rights, see for example Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 3rd ed, 2008); Christof Heyns, 'A "Struggle Approach" to Human Rights' in Arend Soeteman (ed), *Pluralism and the Law* (Springer, 2001) 171, 176; Philip Alston, 'Does the Past Matter? On the Origins of Human Rights'[Review of Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law (Oxford University Press, 2012]' (2013) 126 *Harvard Law Review* 2042. Yet, for scholars such as Samuel Moyn, for example, human rights 'emerged in the 1970s seemingly from nowhere'; see Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010) 3.

[846] Baxi, above n 845, 57–8.

[847] Ibid 31.

[848] Ibid.

[849] Ibid 53.

on conquest or confiscation of peoples, territories and resources'.[850] More importantly, '[r]ights languages, no longer so exclusively at the service of the ends of governance, thus open up sites of resistance and struggle.'[851]

It is in this dual nature of contemporary human rights that I aim to make sense of the invocations of human rights in relation to 'land grabbing' that I examine in this chapter. For example, local communities dispossessed of their land (territory) may invoke the human rights to food and/or self-determination to challenge 'land grabs'. Likewise (foreign) investors can recast property rights as a human right to safeguard their projects from potential 'arbitrary' measure by a host state, even where such measures are taken in the interest of local people and communities.[852] In fact, as some of the latest research suggests, '[p]roperty rights remain an exception to the risk of neglect of HRL [human rights law] in ISDS [investor–state dispute settlement]'.[853] Thus, the discussions in this chapter will reveal that human rights claims in their legalistic sense (of being based on customary norms or treaties) are often less potent in countering the problematic effects of investment and trade laws, which as discussed in Chapters 4 and 5 interact to facilitate 'land grabs'. But human rights also have an emancipatory—or what Pahuja calls 'political'—quality which 'arises in concrete terms in the gap between the body of human rights norms in international law at a given time, and the imaginative appeal of human rights which will never be coincident with the rights "on the books"'.[854] People can thus make claims in the

[850] Ibid.
[851] Ibid 54.
[852] Despite the omission of property from the two major international human rights covenants, the grant of personhood to corporations (investors) with implied entitlement to human rights means that investors can invoke property rights as human rights; see José E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 *Santa Clara Journal of International Law* 27; Vivian Kube and Ernst-Ulrich Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) 11(1) *Asian Journal of WTO & International Health Law and Policy* 65.
[853] Kube and Petersmann, above n 852, 93.
[854] Pahuja, 'Rights as Regulation: The Integration of Development and Human Rights', above n 168, 168.

name of human rights 'either in terms of rights which are yet to be "recognised" as law or with respect to the identities that are excluded from the terms of a particular existing right.'[855] Thus, despite the limitations in the strictly legalistic mobilisation of human rights, large-scale land acquisitions could potentially be contested by (on behalf of) affected communities through claims to human rights.

Following this introductory section, in Section (6.2), I shall broadly explore the human rights aspects of the global responses to land deals. In Section 6.3, I shall establish the substantive and procedural human rights norms emanating from international, regional and national human rights instruments applicable to large-scale land deals, with emphasis on Ethiopia. This discussion suggests that, although land rights are framed as a self-standing human right only in the context of indigenous peoples and rural women, the realisation of a number of human rights such as the right to self-determination, the right to food, protection against forced eviction, and property right closely relate to (in certain cases presuppose) access to land. Yet, most claims of these rights by affected communities before human rights monitoring bodies rarely succeed, and even where they do, they are often poorly enforced, in contrast to property rights claims by (foreign) investors before arbitral tribunals. In Section 6.4, I will explore how human rights norms interact with international investment law in shaping legal relations around transnational land deals, which suggests that the potential use of human rights norms to counter 'land grabs' further diminishes when considered in conjunction with other laws ordering 'land grabs', including trade and investment laws. In my argument, this is because investment law and practice tends to advance the investor's (private) interest (for example in the form of legitimate expectation), which is often at the

[855] Ibid; see also Costas Douzinas, 'The End(s) of Human Rights' (2002) 26 *Melbourne University Law Review* 445, 463; noting human rights' potential to limit and stretch the boundaries of law.

expense of the 'public interest' potentially advanced by human rights laws (for example, re-regulation of land and water rights in the interest of local people). This differential protection afforded to investors vis-à-vis affected local peoples not only cements 'land grabs' but inhibits the realisation of certain corrective human rights measures. In Section 6.5, I shall review the recent proposals by some scholars for normative shifts in international law to overcome the limitations in the current architecture of human rights law, through, for example, including food security exception clauses in investment and trade agreements, or more sweeping formulations that subject investment and trade agreements to international human rights law. In Section 6.6, I shall provide a brief conclusion suggesting that despite the potential use of the rights language for contestation of 'land grabs', the way international human rights law shapes land relations around transnational land acquisitions implies that human rights law cannot effectively protect rival claims against investors' rights under other relevant laws, particularly investment law.

6.2. Human Rights Aspects of the Global Responses to 'Land Grabs'

As discussed in Chapter 2, historically, control of rights to land has been an instrument of oppression and colonisation, and this land question has been a persistent issue for most countries even after decolonisation. The emergence of global 'land grabs' in recent years has only complicated this issue further through increasing dispossession of local land users. Thus, a number of social movements began articulating land rights as human rights, with the view that such an articulation would 'push for the protection and the promotion of a key social issue: the recognition that local people do have a right to use, own and

control the developments undertaken on their own lands.'[856] This is partly reflected in the outcomes of the global policy debates on 'land grabs'. As noted in Chapter 3, three major categories of global responses to the phenomenon of increasing large-scale land acquisitions can be identified: (1) Food Sovereignty; (2) Voluntary Guidelines (Principles); and (3) Minimum Human Rights Standards. While the recommended minimum standards applicable to large-scale land acquisitions exclusively draw on human rights,[857] the Food Sovereignty Approach advocated mainly by peasant and/or civil society activists is also closely associated with the notion of self-determination which is a (collective) human right, as recognised under the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR).[858] Even Voluntary Guidelines relating to large-scale land acquisitions such as the Principles for Responsible Investment in Agriculture and the Food Systems (RAI) also envisage respect for human rights as a key objective.[859]

The earliest draft of the RAI, the Principles for Responsible Investment in Agriculture (PRAI), which were jointly developed by the World Bank and three UN Agencies (FAO, UNCTAD, and IFAD) in 2010 made only marginal reference to human rights by stating that 'responsible investors respect human rights'[860] as enshrined in the UDHR and the UN's Global Compact. This

[856] Jeremie Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 10(18) *SUR International Journal on Human Rights* 115, 116.
[857] The most relevant human rights treaties in this regard are: *ICESCR*; *ICCPR*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*'), opened for signature 10 December 1984, G/A/RES 39/46 (entered into force 26 June 1987) art 16; arguably forced eviction may amount to 'inhuman or degrading treatment' in the sense of art 16.
[858] See *ICCPR*, art 1; and *ICESCR*, art 1.
[859] 'Principles for Responsible Investment in Agriculture and Food Systems (RAI)', above n 86.
[860] 'Principles for Responsible Agricultural Investment That Respects Rights, Livelihoods and Resources [PRAI]', above n 443. OECD's 'Policy Framework for Investment in Agriculture' also closely relates to this initiative , although it's focus is on how host governments can attract investment in the sector and maximise the benefits thereof by aligning measures in other sectors

marginal reference to human rights was severely criticised by social movements, human rights activists and scholars. For example, the then UN Special Rapporteur on the Right to Food, Olivier De Schutter contended that, '[b]ecause they ignore *human rights*, the Principles on Responsible Agricultural Investment [PRAI] neglect the essential dimension of accountability.'[861] Similar criticisms from social movements, civil society organisations and other stakeholders regarding the content and the non-inclusive nature of the process that led to that draft have propelled the re-negotiation of the document under the auspices of FAO's Committee on World Food Security (an umbrella institution for all the UN food security and agriculture agencies) that allows for relatively greater participation by relevant non-state actors. Thus the final version of PRAI was adopted as *Principles for Responsible Investment in Agriculture and Food Systems* (RAI) in October 2014—with far more references to human rights.[862] Indeed, as noted in the conceptual framework section, the document is among others 'based on' the UDHR and other 'human rights treaties which are binding for the respective State Parties'.[863] The stated general objective of the Principles is also 'to promote responsible investment in agriculture and food systems that contribute to food security and nutrition, thus supporting the progressive realization of the right to adequate food in the context of national food security.'[864] The Principles further declares 'all intended users' responsibility to respect human rights.'[865] Curiously, despite its numerous references to human rights, the document's aspiration for respect of human rights has been framed as a 'responsibility', not an obligation of intended users. More importantly, the document envisages an express disclaimer to the effect

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with these investments. See OECD, 'Policy Framework for Investment in Agriculture (PFIA)' (OECD, 2014) <http://www.oecd.org/daf/inv/investment-policy/PFIA-July-2014.pdf>.

[861] De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 274; emphasis added.

[862] See 'Principles for Responsible Investment in Agriculture and Food Systems (RAI)', above n 86.

[863] Ibid [19] A (i).

[864] Ibid [10].

[865] Ibid [21].

that '[n]othing in the Principles should be read as limiting or undermining any legal obligations to which a State may be subject under international law.'[866]

Of course, the tendency to avoid stronger human rights clauses is not peculiar to RAI. For instance, in the context of the negotiation of the Voluntary Guidelines on Governance of Land Tenure, Fisheries and Forests[867]—a closely related guideline that was adopted two years earlier—FIAN International, a key coordinator of civil society organisations at the negotiations notes that:

> Particularly striking was the widespread hostility of states to recall their human rights obligations related to land, fisheries and forests. Fearing that the Guidelines will create new obligations or become too prescriptive, many governments did all they can to weaken the language and the recommendations of the Guidelines…It took several hours of negotiation with Canada and the USA to move them to accept in the text of the Guidelines the incorporation of the indigenous peoples' right to free, prior and informed consent (FPIC) as enshrined in UNDRIP [United Nations Declaration on the Rights of Indigenous Peoples].[868]

Nevertheless, many scholars, civil society organisations and social movements still strenuously argue for the human rights-based approach to the problems posed by 'land grabs'.[869] Borras and Franco, for example, contend that 'prioritizing truly pro-poor outcomes would require adopting a *human rights-based approach*, including taking seriously the right to food and the right to land'.[870] In a similar vein, De Schutter advocates that '[w]hat is required is to insist on governments complying fully with their human rights obligations,

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[866] Ibid [13].

[867] FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012) <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>.

[868] Food first Information Action Network (FIAN) International, 'Negotiations of the Voluntary Guidelines to Continue in October: Civil Society Will Have to Redouble Efforts' (FIAN International, 2011) <http://www.fian.org/en/news/article/negotiations_of_the_voluntary_guidelines_to_continue_in_october_civil_society_will_have_to_redouble_efforts/>.

[869] See, for example, Borras Jr and Franco, above n 6; De Schutter, 'How Not to Think of Land-Grabbing', above n 6; Golay and Biglino, above n 844; Claeys and Vanloqueren, above n 461; Kunnemann and Suarez, above n 844; Abebe, above n 844.

[870] Borras Jr and Franco, above n 6; (emphasis added).

including those related to the right to food, and to the right of all peoples to freely dispose of their natural wealth and resources and not to be deprived of their means of subsistence.'[871] But if and how such hopes are vindicated on the ground is far from straightforward. Thus, in the remaining sections of this chapter, I interrogate this potency of human rights by exploring the links between human rights and land (and associated) rights, and how human rights norms interact with trade and investment laws (as considered in Chapters 4 and 5).

6.3. Human Rights (Law) Against 'Land Grabs': Substantive and Procedural Norms

In this section, I shall closely examine how human rights law shapes competing rights and interests around transnational land acquisitions, through analysis of both substantive and remedial dimensions of the human rights norms at international, regional and national levels. International human rights law has its sources in customary international law, general principles of law, and treaties. The contours of human rights originating from the first two sources (and the related hierarchical relationship) are still debatable, but there is less ambiguity with respect to treaty. In 1945, the UN Members reaffirmed their 'faith in fundamental human rights'[872] and recognised the protection and promotion of human rights as a purpose of the United Nations[873] and its various organs—the General Assembly,[874] the Economic and Social Council,[875] as well as the trusteeship system.[876] Soon after, the Commission on Human Rights drafted the Universal Declaration of Human Rights (UDHR), which was eventually

[871] De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 274.
[872] *Charter of the United Nations*, 1 UNTS XVI, opened for signature 24 October 1945 (entered into force 26 June 1945), Preamble.
[873] Ibid; art 1[3], art 55[3], art 56.
[874] Ibid art 13[1(b)].
[875] Ibid art 62 [2].
[876] Ibid art 77 [c].

adopted by the UN General Assembly in 1948.[877] (Today, it is widely recognised that most of the rights enshrined under the UDHR have evolved into customary international law). Based on the UDHR, member States concluded two major treaties: the ICCPR and ICESCR.[878] These treaties, along with seven other human rights treaties (dealing with specific forms of human rights violations or devoted to the protection of specific groups)[879] constitute the normative core of the UN human rights system.[880] Except for the ICESCR, all the core human rights treaties set up bodies of independent experts tasked with monitoring and progressively clarifying the obligations of States under each treaty—in the case of ICESCR, the Committee on Economic, Social and Cultural Rights that was established in 1985 plays similar role. On the other hand, since 1950s, a number of regional human rights instruments establishing supervisory and/or adjudicatory organs have been developed, constituting what is commonly called the regional human rights systems.[881] Such instruments include: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950,[882] the American Convention on Human Rights (ACHR) of 1969,[883] the African Charter on Human and Peoples' Rights (Banjul

[877] *UDHR*.
[878] See *ICCPR*; *ICESCR*; the ideological debates behind the separate adoption of these instruments are beyond the scope this work.
[879] These are: *ICERD*; *CEDAW*; *CAT*; *Convention on the Rights of the Child* ('*CRC*'), opened for signature 20 November 1989, 577 UNTS 3 (entered into force 18 November 2000); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ('*ICMW*'), opened for signature 18 December 1990 , 2220 UNTS 3 (entered into force 1 July 2003); *Convention on the Rights of Persons with Disabilities* ('*CRPD*'), opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, UN Doc A/61/488 (entered into force 23 December 2010).
[880] Mehrdad Payandeh, 'Fragmentation within International Human Rights Law' in Mads Andenas and Eirik Jorge (eds), *Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015) 301.
[881] *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*'), opened for signature 4 November 1950, CETS No.005 (entered into force, 3 September 1953).
[882] *American Convention on Human Rights* ('*ACHR*'), opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).
[883] *ACHPR*.

Charter) of 1981,[884] the Arab Charter on Human Rights of 2004; and more recently, the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration of 2012.[885]

Many African countries (including Ethiopia) have ratified most of the core UN human rights instruments as well as the regional human rights instrument—the African Charter on Human and Peoples' Rights (ACHPR).[886] The ACHPR established an African Commission on Human and Peoples' Rights (within the Organisation of African Unity—now African Union) as a monitoring body for the rights enshrined in the Charter.[887] As set out in Chapter IV of the Charter, which outlines its principles, the 'Commission shall draw inspiration from international law on human and peoples' rights', including from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity [now the African Union], and other instruments adopted by the United Nations (and its agencies) and by African countries in the field of human and peoples' rights.[888] ACHPR further mandates the Commission to 'take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organisation of African Unity [African Union]' as well as 'customs generally accepted as law, general principles of law recognized by African

[884] *Arab Charter on Human Rights*, opened for signature 22 May 2004 (entered into force 15March 2008).
[885] *Association of Southeast Asian Nations (ASEAN) Human Rights Declaration*, adopted 18 November 2012.
[886] For the list of international human rights instruments to which Ethiopia is a party, see Minnesota University Human Rights Library, 'Ratification of International Human Rights Treaties-Ethiopia' <https://www1.umn.edu/humanrts/research/ratification-ethiopia.html>. Except for South Sudan (which was founded in 2011 through independence from Sudan), all the remaining 53 African countries are parties to the ACHPR; see African Commission on Human and Peoples' Rights, 'Ratification Table: African Charter on Human and Peoples' Rights' <http://www.achpr.org/instruments/achpr/ratification/>.
[887] See *ACHPR* art 30.
[888] Ibid art 60.

states as well as legal precedents and doctrine.'[889] Thus, by virtue of articles 60 and 61 of the ACHPR, the African Commission on Human and Peoples rights has the mandate to borrow relevant principles even from human rights instruments to which African countries are not a party, which suggests an expansive human rights commitment by member states. Moreover, with a view to strengthening the Commission's monitoring role, ACHPR member states adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights in 1998.[890] The Court (unlike the Commission) renders final and binding decisions with regard to those States party to the Protocol, although about half of African countries (including Ethiopia) have not yet ratified the Protocol.

Nationally too, most African constitutions contain bills of rights in one form or another. As, for example, Christof Heyns in his account *A Struggle Approach to Human Rights* suggests, this could be attributed to 'the struggles that gave birth to these notions.'[891] Heyns further observes that in 'a relatively new development [since the 1990s], a number of these constitutions also recognise a right (and in some cases a duty) of resistance in defence of the constitutional order and specifically in defence of human rights'.[892] This reflects the prominence of human rights movements at that time but also the experience of African countries that states cannot always be relied upon to uphold human rights. Ethiopia's constitutional history also reflects this general trend. In a departure from the country's previous written constitutions,[893] the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE) which is

[889] Ibid art 61.
[890] *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, opened for signature 9 June 1998 (entered into force 25 January 2004).
[891] Heyns, above n 845, 176.
[892] Ibid.
[893] Previously, the country had three written constitutions (those of 1931, 1955, and 1987) all of which recognise, to varying degrees, certain fundamental rights, yet the 1931 and 1987 constitutions did not refer to the term 'human rights'.

currently in force, dedicates about a third of its provisions to fundamental rights and freedoms (about half of which expressly deal with human rights).[894] The Constitution stipulates that '[a]ll Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce' these provisions.[895] The FDRE Constitution further mandates that the fundamental rights and freedoms specified in the Constitution 'shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.'[896]

6.3.1. The (Human) Right to Land

Despite these national, regional and international human rights obligations, land rights (broadly understood as rights to use, control, and transfer a parcel of land[897]) have rarely been considered as self-standing human rights. Indeed, out of the nine 'core' international human rights treaties noted earlier, only CEDAW recognises land rights (and even then only in the context of women's rights in rural areas).[898]Another notable instrument that is worth considering at some length is the ILO Convention (No. 169) on the Rights of Indigenous and Tribal Peoples.[899] The Convention stipulates that:

> the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised' and that in addition, 'measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. States parties are required to pay 'particular attention

[894] See *The FDRE Constitution* arts 14-44.
[895] Ibid art 13(1).
[896] Ibid art 13(2).
[897] See, generally, FAO, 'Land Tenure Studies 3: Land Tenure and Rural Development' (FAO, 2002) <http://www.fao.org/3/a-y4307e.pdf>.
[898] See CEDAW, art 14.
[899] See ILO Convention 169,76th ILC session, opened for signature 27 June 1989 (entered into force 5 September 1991).

> […] to the situation of nomadic peoples and shifting cultivators in this respect.[900]

The Convention allows relocation only when it is considered 'necessary as an exceptional measure' and subject to free and informed consent or, where such consent cannot be obtained, 'following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned'.[901] Unless return to the land is possible,[902] the people relocated should be provided with lands 'of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development', except if they express a preference for compensation in money or in kind;[903] furthermore, they are to be 'fully compensated for any resulting loss or injury'.[904]

Yet not many countries have ratified the ILO Convention on Indigenous and Tribal Peoples—at the time of writing (June 2017), only 22 countries have ratified the Convention (and the only African country in this list is Central African Republic, which ratified the convention in 2010).[905] Thus, in the African context, the Convention has a limited normative value. To some extent, this is offset by the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007[906] which 'may be seen as expressing the understanding by the

[900] Ibid art14 (1).
[901] Ibid art 16(2).
[902] Ibid art 16(3).
[903] Ibid art 16(4).
[904] Ibid 16(5).
[905] For list of countries that have ratified the Convention see, ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (ILO) <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>.
[906] *UNDRIP*.

international community of the existing customary law on this issue'[907] and the fact that the African Charter on Peoples' and Human Rights also authorises the Commission to draw on human rights instruments adopted by the UN (and hence also UNDRIP). The Declaration, under several provisions, reinforces the provisions of the ILO Convention on the Rights of Indigenous and Tribal Peoples. For instance, in the same vein as the Convention, the Declaration affirms that 'indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired', which they may 'own, use, develop and control'; and that 'States shall give legal recognition and protection to these lands, territories and resources […] with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'.[908] The Declaration also prohibits 'any action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources'.[909] Further, '[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return'.[910]

Relevant jurisprudence also suggests that indigenous peoples' rights to their territory (land) have increasingly been recognised and/or enforced, albeit at varying paces among different jurisdictions. In this regard, the Inter-American Court of Human Rights stands out with its progressive interpretation of the American Convention on Human Rights and other regional international human rights treaties applicable to indigenous peoples. Thus, Elisa Ruozzi observes:

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[907] Oliver De Schutter, 'The Emerging Human Right to Land' (2010) 12 *International Community Law Review* 303, 311. Canada for example has recently announced that it is going to incorporate the Declaration into its domestic law

[908] *UNDRIP* art 26.

[909] Ibid art 8(2).

[910] Ibid art 10.

> As regards the substantive content of the right to land and to natural resources, the approach of the IACtHR [Inter-American Court of Human Rights] stands out in the human rights landscape due to its full recognition of indigenous land rights, granted independently from the existence of any national provision, and also to the precise articulation of consultation obligations and of the constituent elements of the right to life…[which could] 'inspire' other human rights and regional tribunals to adopt a more enlightened view of collective rights.[911]

Indeed, the recent jurisprudence of the IACtHR points to the Court's sensitivity to the particular vulnerability of indigenous people and the centrality of land (and associated resources) for their existence as people.[912] Curiously, at times, the Court went as far as extending its jurisprudence on indigenous people to other 'tribal' communities. For example, in the *Saramaka* case the Court held that:

> [T]his Tribunal declares that the members of the Saramaka people are to be considered a tribal community, and that the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival.[913]

Some commentators suggest that such cases can serve as a source of inspiration for enhancing the protection of the rights of other (non-indigenous) natural resource users who are equally vulnerable: herders, pastoralists, artisan fishers, and small holder farmers with precarious tenure security.[914] To be sure, as we shall see later, even the rulings of IACtHR stumble at the implementation stage,

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[911] Elisa Ruozzi, 'Land Grabbing and International Human Rights: The Jurisprudence of the Inter-American Court of Human Rights on the Rights of Indigenous Peoples' in Ancesca Romanin Jacur, Angelica Bonfanti and Francesco Seatzu (eds), *Natural Resources Grabbing: An International Law Perspective* (BRILL, 2015) 92.

[912] See, for example, *The Saramaka People v Suriname* [2007] Inter-American Court of Human Rights 172 (28 November 2007) ('*Saramaka v Suriname*'); *The Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* [2013] Inter-American Court of Human Rights 270 (20 November 2013); *Xákmok Kásek Indigenous Community v Paraguay* [2010] Inter-American Court of Human Rights 214 (24 August 2010); *The Kichwa Indigenous People of Sarayaku v Ecuador* [2012] Inter-American Court of Human Rights 245 (27 June 2012) ('*Sarayaku v Ecuador*').

[913] *Sarayaku v Ecuador* [2012] Inter-American Court of Human Rights 245 (27 June 2012) [86].

[914] See De Schutter, 'The Emerging Human Right to Land', above n 907, 314..

particularly where compliance with rulings involving restitution of land (territory) in question to indigenous groups entails a payment of significant compensation as required under a relevant BIT—and this is one reason why it is important to look at the role of human rights law in 'land grabbing' in conjunction with other relevant laws, as this thesis suggests.

When it comes to the African (regional) human rights system, there have been only a few instances in which the African Commission handed down judgments in relation to indigenous peoples' rights to land. To begin with, the African Charter on Human and Peoples' Rights makes no mention of the term indigenous people—as the Commission 'did not initially regard the term applicable to Africa.'[915] It was only in 2000 (following the growth of a global indigenous peoples' movement) the Commission established a Working Group of Experts on the Rights of Indigenous Populations/Communities.[916] Accordingly, in 2003, the Working Group finalised its report, which the Commission endorsed as its 'official conceptualisation of, and framework for, the issue of the human rights of indigenous peoples' and regarded it as 'a highly important instrument for advancing the situation of indigenous peoples' human rights.'[917]

In this report, the Commission asserted the applicability of the notion of indigeneity in the context of Africa in the following terms, worth quoting at length:

> [One major] misconception is that the term 'indigenous' is not applicable in Africa as 'all Africans are indigenous'. There is no question that all Africans are indigenous to Africa in the sense that they were there before the

[915] See Gabrielle Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples Rights and the Endorois' 111(442) *African Affairs* 24, 37.
[916] Ibid 38.
[917] African Commission on Human and Peoples' Rights, 'Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa' (ACHPR and IWGIA, 2006) 9 <http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf>.

> European colonialists arrived and that they were subject to subordination during colonialism. The ACHPR is in no way questioning the identity of other groups. When some particular marginalized groups use the term 'indigenous' to describe their situation, they are using the modern analytical form of the concept (which does not merely focus on aboriginality) in an attempt to draw attention to and alleviate the particular form of discrimination from which they suffer. They do not use the term in order to deny all other Africans their legitimate claim to belong to Africa and identify as such. They are using the present-day broad understanding of the term because it is a term by which they can very adequately analyse the particularities of their sufferings and by which they can seek protection in international human rights law and moral standards. … Collective rights to land and natural resources are one of the most crucial demands of indigenous peoples – globally as well as in Africa – as they are so closely related to the capability of these groups to survive as peoples, and to be able to exercise other fundamental collective rights such as the right to determine their own future, to continue and develop their mode of production and way of life on their own terms and to exercise their own culture.[918]

Indeed, the Commission's endorsement of the applicably of indigeneity to Africa seems to have encouraged some groups and human rights activists to consider it as an important avenue for claims to indigeneity and associated rights. Thus in 2003, the Endorois Community of Kenya, with the support of two NGOs (Centre for Minority Rights Development, Kenya, and Minority Rights Group International) took a case to the Commission, challenging the Kenyan government's establishment of Baringo National Reserve through dispossession of their land. After seven years of litigation, in February 2010, the Commission held that the government of Kenya acted in violation of several provisions of the African Charter on Human and Peoples' Rights.[919] Perhaps more significantly, the Commission argued that 'the "public interest" test is met with a much higher threshold in the case of encroachment of indigenous land

[918] Ibid 13–14.

[919] *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v Kenya* (Unreported, African Commission on Human and Peoples' Rights, 25 November 2009) [267 – 298]; the Commission found that the Kenyan government violated Articles 1, 8, 14, 17, 21 and 22 of the ACHPR.

rather than individual private property.'[920] Thus, among others, the Commission recommended that the government of Kenya should: (a) recognise rights of ownership to the Endorois and restore Endorois ancestral land; (b) ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle; (c) pay adequate compensation to the community for all the loss suffered; and (d) pay royalties to the Endorois for existing economic activities and ensure that they benefit from employment possibilities within the reserve.[921] This decision has been hailed as a 'landmark ruling on indigenous land rights'[922] and 'the Commission's most substantive and radical decision to date, with important implications for international jurisprudence, national politics, and local strategies—as well as potential socioeconomic realities and inter-communal relations.'[923] However, six years down the line, the ruling has not yet been implemented. Perhaps the Commission's latest call for better protection of indigenous populations and communities in Africa[924] was prompted by such inaction on the part of member States.

6.3.2. Human Rights Associated with Land

International human rights law, as already considered, recognises a self-standing right to land only in the context of indigenous people and rural women (in the case of CEDAW), yet it is important to note that the realisation of a number of other human rights significantly depend upon individuals' and/or peoples' access to control over land. For example, it is hard to conceive the realisation of the right to self-determination as recognised by two major

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[920] Ibid [2012].
[921] Ibid [Recommendations].
[922] Human Rights Watch, 'Kenya: Landmark Ruling on Indigenous Land Rights' (2010) <https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>.
[923] See Lynch, above n 915, 24.
[924] African Commission on Human and Peoples' Rights, 'Resolution on Indigenous Populations /Communities in Africa - ACHPR/Res. 334 (EXT.OS/XIX)' (25 February 2016) <http://www.achpr.org/sessions/19th-eo/resolutions/334/>.

international human rights instruments (ICCPR and ICESCR)[925] isolated from a particular territory (land). Likewise, the right to adequate living standards, which includes the right to food and water as recognised by the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[926] as well as the right to adequate housing, hinges upon control over and/or access to land, particularly in rural settings (which is where large-scale acquisitions of land often happen).[927] Finally, the right to property as recognised under UN and some regional international human rights instruments[928] also significantly relates to land. Thus, depending on the nature of land acquisitions in question, the effects of large-scale acquisitions of land could be challenged in terms of these rights, invoked separately or jointly. Of course, to lump all these rights together in addressing their relation to land would be simplistic, given important differentiations among them, and differing conceptualisations of even the same right (such as the right to property) across human rights instruments. In the remaining paragraphs of this section, I shall briefly address the potency of invoking each of these rights to counter large-scale acquisitions of land and their adverse effects, including exacerbation of hunger in host states.

A. Right to Self-Determination

Originally articulated in the context of decolonisation, the right of self-determination, as recognised under the ICCPR and ICESCR, allows all people to 'freely determine their political status and freely pursue their economic,

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[925] See the common article 1 of the *ICCPR* and *ICESCR*; and the identical provisions in art 47 of the *ICCPR* and art 25 of the *ICECSR* which establish a general rule of interpretation in favor of 'the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.'

[926] See *UDHR* art 25 and *ICESCR* art 11 and Committee on Economic, Social and Cultural Rights (last), above n 114.General Comment 12 of *CESCR*.

[927] See *ICESCR* art 11 cum. GC 4 and 7.

[928] See *UDHR* art 17 (1); stating, 'Everyone has the right to own property alone as well as in association with others' and art 17(2), stating, 'No one shall be arbitrarily deprived of his property'; *ICERD* art 5 (e); *CEDAW* art 14(2)h; and *ACHPR* art 14.

social and cultural development'. Indeed, the original draft of this provision granted 'permanent sovereignty over natural resources' which was resisted by Western capital exporting states.[929] Consequently, the modified version of the provision granted all people the right to 'freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation… and international to law.'[930] As discussed in relation to the evolution of international investment law in Chapter 4, this qualification was mainly meant to protect the economic interests of former colonial powers (and their companies). Although many states and some scholars expected that the right to self-determination would expire upon decolonisation, the continuity of this right in the post-colonial states (period) was subsequently re-affirmed. For example, in 1994, the UN Human Rights Committee clarified that the right 'applies to all peoples and not merely to colonized peoples.'[931] Yet the Committee has rarely been willing to entertain claims to the right of self-determination. In this regard, Jochen von Bernstorff observes:

> In view of the semantic ambivalences reigning in the field of the right to self-determination and the hard-fought *Travaux Préparatoires* regarding art. 1, it is not surprising that the UN Human Rights Committee over the last fourty years did not really make an effort to integrate this collective dimension into its jurisprudence. In effect, the Committee in the past seems to have avoided implementing article 1 at almost any price. Hence, cases regarding ancestral lands of indigenous peoples were being dealt with by the Committee under the minority rights provision in art. 27 even though art. 1 infringements had been claimed. Moreover, the Committee interpreted claims of minorities under art. 27 as individual claims of group members in order to avoid the recognition of any notion of collective entitlements under the ICCPR.[932]

Indeed, one observes similar ambivalence in the African (regional) human rights system too. The ACHPR recognises peoples' right to self-determination. Article 20(1) of the Charter in relevant part provides that all

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[929] See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 2005) art 1[36].
[930] See *ICCPR* and the *ICESCR* arts 1(2).
[931] UN Human Rights Committee, 'Human Rights Committee Annual Report to the U.N. General Assembly, Concluding Remarks on Azerbaijan' (U.N. Doc. A/49/40 vol. 1, 1994) [296].
[932] Bernstorff, above n 155, 67; (citations omitted).

peoples 'shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.'[933] Thus far, there were two instances where the Commission had to rule on the right to self-determination. The first one is in *Katalnase v Zaire*,[934] wherein the Katangese Peoples' Congress requested the African Commission on Human and Peoples' Rights to recognise the independence of Katanga from Zaire on the basis of the right to self-determination as recognised under the ACHPR. In its brief ruling, the Commission noted the various ways in which the right to self-determination can be exercised (including 'independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity'[935]) and ruled that:

> in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13.1 of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[936]

Thus, although the Commission did not recognise Katanga people's claim for independence, it did suggest that the right to self-determination could mean either internal (remedial) or external (independence) from a respondent State. Yet, in a later case of *Kevin Mgwanga Gunme et al v Cameroon* (the Southern

[933] *ACHPR* art 20(1).
[934] African Commission on Human and Peoples' Rights, 'Katangese Peoples' Congress v Zaire (Communication 75/92, African Commission 8th Annual Activity Report)' (1995) <http://www.achpr.org/files/sessions/16th/comunications/75.92/achpr16_75_92_eng.pdf>.
[935] Ibid [4].
[936] Ibid [6].

Cameroon Case),[937] the Commission seems to have conflated internal and external self-determination, and held that the 'African Charter [on Human and Peoples Rights] cannot be invoked by a complainant to threaten the sovereignty and territorial integrity of a State party'.[938] The Commission thus interpreted the right to self-determination claim in its 'external' (statist) sense if only to dismiss it on ground of its incompatibility with 'the sovereignty and territorial integrity' of State parties.[939] And this approach seems to be shared by other tribunals which tend to maintain the status quo of post-colonial states' territorial integrity and sovereignty[940]—despite the arbitrary colonial borders. In its advisory opinion to the African Union on the Declaration on the Rights of Indigenous Peoples, the Commission again suggested that self-determination could encompass a series of rights in a manner that is 'compatible with the unity, and territorial integrity of State Parties.'[941]

Large-scale transfers and long-term lease of land to foreign (and in some cases domestic) investors clearly impede the exercise of the right to self-determination, for it deprives local people of control over their land (territory), and the benefits thereto including related livelihoods. In Ethiopia, the tendency by the federal government to roll back the constitutional rights of the federating states—that were mostly ethnic based, and hence their creation was inspired by

[937] *Kevin Mgwanga Gunme et al v Cameroon* (Unreported, ACHPR),Communication 266/2003, (45th Ordinary Session of the ACHPR 13-27 May 2009).
[938] Ibid [191].
[939] See African Commission on Human and Peoples' Rights, 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' (2007) <http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf> [27].
[940] For example, the ICJ, in Burkina Faso v. Mali, argued that 'the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice'; see ICJ, Burkina Faso v. Mali (22 December 1986) Frontier Dispute, Judgment, I.C.J. Reports 554, 567.
[941] African Commission on Human and Peoples' Rights, 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples', above n 939 [27].

the notion of internal self-determination—to administer land, through the establishment of a federal agency (agricultural land investment agency) that streamlines large-scale transfers of land to private investors, points to the self-determination issues relating to these land transfers. In fact, in one instance, although local authorities terminated an investment contract with a foreign investor, the federal government ordered the reinstatement of the contract on the grounds that as a matter of national policy, investors need to be given more time even when they fall behind the schedule stipulated in the farmland contract.[942] Indeed, some of the local responses to increasing dispossessions of land in Ethiopia could be understood in terms of self-determination claims. For example, in the 2014 protests by Oromos against the Addis Ababa Master Plan, protesters were chanting such slogans as 'Oromia [Oromo land] is not for sale!' and 'Oromia is for Oromos!' which was clearly aimed at challenging the domination and marginalisation that in-country and foreign 'land grabs' entail. However, since human rights activism is hardly tolerated in the country, there appears be no attempt at formally invoking the right before local or regional tribunals. Given that these land acquisitions are often duly signed by 'sovereign' governments, coupled with—as noted above—the tendency by human rights monitoring bodies to dismiss (internal) self-determination and subjecting the exercise of external self-determination to the 'sovereignty and territorial integrity of states parties', the efficacy of challenging large-scale acquisitions of land via the right of self-determination at regional and international level is not self-evident.

Yet this approach still features in the global policy debates on 'land grabs' in the form of claims to, for example, 'food-sovereignty'. Indeed, the notion of sovereignty can both facilitate and impede 'land grabs'. For example, Von Bernstorff argues, '[s]overeignty in its static notion as an attribute of

[942] Interview with Mosisa et al, above n 521.

governments acting on behalf of their states in the Global South facilitates the global "land grab" in various, complex and unforeseen ways.'[943] As noted in Chapter 2, by assuming exclusive competence over territory (land) based on the notion of sovereignty, post-colonial governments have maintained a land tenure system that often sidelines local land users and now enables them to spearhead large-scale transfers of land to investors. On the other hand, '[s]overeignty claims in their dynamic notions aspire to a collective right to end external domination and to establish self-rule.'[944] It is in this second sense that social movements and civil society organisations employ the notion of food sovereignty, among others, as a way of resisting not only external domination in the traditional sense of the term, which refers to colonial powers and their extractive industries, but also 'executive branches, international institutions and foreign and public and private investors and their complex interactions.'[945] The invocation of the right to food sovereignty is thus rooted in permanent sovereignty over natural resources (PSNR), a claim which during decolonisation was construed as a right to resist and end foreign economic domination. As noted before, PSNR was later moderated in the human right to self-determination recognising the right of all people to freely dispose of their natural wealth and resources. Claims to food sovereignty thus potentially push back the boundary of the human rights to self-determination, and can thus be taken as an instance of invocation of human rights in its dynamic (emancipatory) sense.

It is only to a limited extent that the food sovereignty principles (claims) have been reflected in global 'regulatory' responses to 'land grabs'. For example, during the debates on the two UN voluntary guidelines relating to land tenure governance and investment, the proponents of food sovereignty have pushed

[943] Bernstorff, above n 155, 61.
[944] Ibid 69.
[945] Ibid.

for the extension of the principle of free, prior and informed consent (FPIC)—which was hitherto recognised only in the context of the right of indigenous people—to other non-indigenous local communities. However, due to resistance from such countries as Canada, this principle was reduced to 'active, free, effective, meaningful and informed participation,'[946] which falls short of voting out large-scale land acquisitions. The unwillingness to extend the FPIC principle to non-indigenous communities who are equally vulnerable in relation to 'land grabs' thus seems to undermine the inspiration that the relatively progressive human rights jurisprudence on indigenous peoples (such as that of the Inter-American Court of Human Rights) offers.

Apart from the foregoing collective human rights, there are also individual human rights whose realisation is closely related to the access and/or control over land, and as such could be potentially invoked in response to large-scale acquisition of land. In the following sections I shall explore two of such rights: the right to food and property rights.

B. The Right to Food

The right to food, as a component of the right to an adequate standard of living, is recognised under at least two UN human rights instruments: the UDHR[947] and the ICESCR.[948] Although the right to food is affirmed in these 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 others. Thus, as the Committee on Economic, Social and Cultural Rights interpreted, the right to food requires that each individual,

[946] See 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security', above n 448 part 3.B.3; RAI [29(3].
[947] See *UDHR* art 25(1); in relevant part stating,' Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food…'
[948] See the *ICESCR*, above n 9, art 11(1); in relevant providing, 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food…'

alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.[949] Like any other human right, the right to food ostensibly imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil.[950] States shall abstain from measures that may deprive individuals of access to productive resources which they depend on when they produce food for themselves (obligation to respect); protect such access from encroachment by other private parties (obligation to protect); and seek to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security (obligation to fulfil). Finally, States may be under an obligation to provide food where 'an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal'.[951] Thus, States' obligation to protect existing access to productive resources essential for a decent livelihood may include individuals' and groups' access to land, water, grazing or fishing grounds, or forests—irrespective of the quality of such existing access in terms of property right—particularly where there is no alternative means of producing food or of earning income that enables them to purchase food.

In the particular context of increasing transnational 'land grabs' in recent years, the former UN Special Rapporteur on the right to food, Olivier De Schutter reported that:

> The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply-priced food,

[949] Committee on Economic, Social and Cultural Rights (last), above n 114 [6].
[950] Ibid [15]
[951] Ibid.

> produced on the more competitive large-scale plantations developed thanks to the arrival of the investor.[952]

Thus, one may challenge these land deals through invoking the right to food, particularly where these land deals leave no alternative sources of livelihood. Under such circumstances, as commentators suggest, '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'[953] including through 'cash compensation, employment or livelihood opportunities.'[954]

As the case of local people of Bako district in Ethiopia considered in Chapter 4 suggests, the livelihood lost as result of the acquisition of 10,000 hectares of land was not substituted by an alternative source of livelihood, for example, employment that generates adequate income to, amongst other things, purchase food. Under such circumstances the residents—although their access to (use of) land was not recognised by the formal property regime—could in theory invoke the right to food to challenge land dispossessions. Yet, apart from practical difficulties linked to geographical, language and monetary barriers working against such communities, 'the realities of a technical culture of rights application'[955] which likely opens room for trade-offs between the 'development' justification of these land deals vis-à-vis the right to food of concerned groups, casts doubt on the efficacy of the right to food *per se* as a path to challenging such land deals, both locally and at regional fora such as the African Commission on the Human and Peoples' Rights.

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[952] See De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', above n 85 [33].

[953] Lorenzo Cotula and Nicole Weisfelt, '"Land Grabbing" in the Shadow of the Law: Legal Frameworks Regulating the Global Land Rush' in Rosemary Rayfuse (ed), *The Challenge of Food Security International Policy and Regulatory Frameworks* (Edward Elgar Publishing, 2012) 206, 225.

[954] Ibid.

[955] Bernstorff, above n 155, 72.

C. Right to Property

The right to property is recognised by various international and regional human rights instruments. At an international level, the UDHR,[956] (and in the context of non-discrimination, ICERD[957] and CEDAW[958]) recognises the right to property. Due, in major part, to ideological differences on property', the ICCPR and ICESCR which were meant to implement the UDHR do not affirm this right—making it, as Schabas observes, 'the only article in the Universal Declaration [of Human Rights] with no counterpart in the multilateral treaties which were intended to give it a binding effect.'[959] Various regional human rights instruments also recognise the right to property, albeit with some variations in their conceptualisation of the right. Thus, Protocol 1 of the European Convention on Human Rights (ECHR),[960] the American Convention on Human Rights (ACHR);[961] and the African Charter on Human and Peoples' Rights (ACHPR)[962] all recognise the right to property.

Historically, NGOs and social movements have been reluctant to engage with the right to property which many perceive to protect existing possessions of the powerful (the landed), as opposed to the right to acquire possessions in land.[963] In recent years, however, some regional human rights bodies have increasingly

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[956] See UDHR, art 17 (1); stating, 'Everyone has the right to own property alone as well as in association with others' and art 17(2), stating, 'No one shall be arbitrarily deprived of his property.'

[957] ICERD, art 5 (e).

[958] CEDAW, art 14(2)h.

[959] William A. Schabas, 'The Omission of the Right to Property in the International Covenants' (1991) 4 *Hague Yearbook of International Law* 135, 136.

[960] In fact, protocol 1 of the ECHR protects 'peaceful enjoyment of possessions', but the ECtHR has interpreted this expression as equivalent 'in substance' to the right to property; see for example, *Marckx v. Belgium*, Judgment, 2 EHRR 330, 13 June 1979, para. 63.

[961] See ACHR, art 21(1) stating 'Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society'; and 21(2) stating, 'No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.'

[962] See ACHPR, art 14.

[963] See Gilbert, Land Rights as Human Rights, 117; see also generally Schabas, above 106.

recognised the (collective) right to property, particularly in the context of indigenous peoples, in a way that goes beyond protecting 'existing' possessions. Thus, in the African context, local communities and producers who have some form of tenure over land (to be) transferred to private investors can invoke the ACHPR which pledges that 'right to property shall be guaranteed'.[964] However, the Charter also allows that this right maybe 'encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'[965] And, as discussed in Chapter 4, where the domestic legal system does not extend adequate protection to land rights of peasants and pastoralists as in the case of Ethiopia, the mere recognition of the right to property by supranational human rights instruments such ACHPR offers little help to challenge large-scale land acquisitions. On the contrary, foreign investors are aggressive when it comes to the right to property as a human right, as will be addressed in subsequent sections.

Indeed, many commentators view inadequate protection of the rights of land users in most regions where 'land grabbing' occurs as a major problem that should be addressed by strengthening property rights, through for example transforming informal use rights into formalised property rights.[966] Titling of land has been advocated since the 1990s as a development tool that, in Hernando de Soto's view, transforms a 'dead asset' into capital that can be, among others, mobilised for investment.[967] Yet the extent to which this formalisation of title aimed at commodification of land (that ostensibly catalyses rural development) provides security to rural land users in the long

[964] *ACHPR*, art 14.
[965] Ibid, art 14.
[966]Olivier De Schutter, 'The Role of Property Rights in the Debate on Large-Scale Land Acquisitions' in (Eds)' in Christophe Gironde, Christophe Golay and Peter Messerli (eds), *Large-Scale Land Acquisitions Focus on South-East Asia* (Brill Nijhoff, 2015) 53, 54.
[967] De Soto, above n 306, 6.

term has already been questioned—both theoretically and empirically—pointing to alternative ways that better safeguard rural land users from dispossession than transposition of Western conceptions of property rights.[968] Of course, even where relevant domestic legislations recognise alternative property rights such as collective (customary) land rights, large-scale land acquisitions encroaching on these rights can still be justified on the ostensible assumption that they are ' in the interest of public need or in the general interest of the community'—these general interests often being interpreted as economic development. Thus, as with the right to food, 'the realities of a technical culture of rights application' likely opens room for trade-offs between 'development' and property rights, undermining the latter.

6.3.3. Remedial Dimensions

As the foregoing sections suggest, in principle, individuals and people affected by large-scale land acquisitions may potentially invoke human rights against dispossession from their land (territories) and related resources on which they depend, with varying degree of success. Yet, even where human rights bodies may find a respondent state responsible for the alleged violation of human rights, the implementation of such rulings can hardly be taken for granted, particularly in African countries such as Ethiopia.

For a start, Ethiopia has made reservations[969] against most human rights provisions that give competence to relevant human rights monitoring bodies to receive individual or collective complaints against states parties—except for the

[968] De Schutter, 'The Role of Property Rights in the Debate on Large-Scale Land Acquisitions' in (Eds)', above n 967, 70–1.

[969] A reservation is 'a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State' (see *VCLT* art 2(1)(d). Of course, there is an inconclusive debate as to whether a different treaty reservation applies to the human rights treaties; for more on this, see Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010)96-123.

African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. Of course, the country submits periodic progress reports for review by relevant UN Committees. The extent to which such reviews help prevent large-scale land acquisitions or remedy those affected by the same is, however, very limited. In fact, the Committee on Economic Social and Cultural rights, in its concluding observation on Ethiopia's progress review report of 2012, expressed its concern regarding government resettlement programs (that were reportedly to facilitate large-scale land acquisitions by investors) in the following words:

> The Committee is concerned about reports that the Voluntary Resettlement Program, as described in the State party report, entails the forced eviction of thousands of people in various regions of the State party, who are relocated to villages that lack basic infrastructure, such as health clinics, clean water supplies and schools, as well as agricultural assistance or food assistance (art.11). The Committee thus urges the State party to ensure that the relocation of people is done on a voluntary basis, following prior consultation, to provide adequate compensation or alternative accommodation to those people that have been forcibly evicted, and to guarantee that people living in relocation sites are provided with basic services (including drinking water, electricity, and washing, sanitation and transportation facilities) and adequate facilities (including schools and health-care centres). The Committee draws the State party's attention to its general comments No. 4 (1991) on the right to adequate housing and No.7 (1997) on forced evictions.[970]

For what it is worth, the Observation confined itself to forced evictions resulting from the resettlement program, despite the Committee's own earlier statement that it 'had received information to the effect that the Government rented large areas of arable land to other countries for exploitation' [971] and that 'the practice should not infringe the right of the local people to a decent

[970] Committee on Economic, Social and Cultural Rights (CESCR), 'Concluding Observations of the Committee on Economic, Social and Cultural Rights Ethiopia'48th sess, UN E/C.12/ETH/CO/1-3 (31 May 2012)[21].
[971] Committee on Economic, Social and Cultural Rights (CESCR), 'Combined Initial and Second and Third Periodic Reports of Ethiopia (Continued)' UN E/C.12/2012/SR.1 (9 May 2012) [21].

standard of living',[972] which is broader than what forced eviction might entail. Obviously, even large-scale land transfers (dispossessions) that do not necessarily involve resettlement (evictions) can equally infringe the right of local people: for example, where only part of land is transferred to a private investor and a remaining portion is not enough to gather or produce enough food. By focusing on evictions resulting from the resettlement program, the Committee seems to have overlooked—or perhaps condoned—others forms of dispossessions with similar effects.

Even the supranational human rights monitoring body which has the competence to receive individual or group complaints against Ethiopia—the African Commission on Human and Peoples' Rights—has a very poor record of implementation of its rulings (which, although authoritative, are not binding). For example, the case of the Endorois Community of Kenya considered earlier (section 6.3.1), while signaling 'new' openings for addressing indigenous rights at the African Commission on Human and Peoples' Rights, also points to hurdles in the implementation of the Commission's recommendations. In fact, it is only in very limited instances that states fully comply with the recommendation of the Commission. As, for example, Frans Viljoen's and Lirette Louw's appraisal of the Commission's rulings from 1994 to 2004 reveals, 'in only six of the forty-four communications (or 14 percent) did state parties comply fully and in timely fashion with the recommendations of the African Commission.'[973] And there are no indications of improvements in the enforcement of the recommendations of the Commission since then—on the contrary. As noted before, the fact that more than half of African countries (including Ethiopia) have never ratified the protocol establishing the African

[972] Ibid [21].
[973] Frans Viljoen and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101(1) *American Journal of International Law* 1, 5.

Court on Human and Peoples' Rights that aims to strengthen the monitoring role of the African Commission on Human and Peoples' Rights through rendering final and binding decisions, may well point to African governments' continuous reluctance to submit to more effective scrutiny of supranational human rights bodies.

The remaining avenues for pursuing land rights along the human rights path is thus domestic courts, or in the cases of foreign investments, home states. Despite having laws in place (and to some degree institutional frameworks) dealing with human rights, Ethiopia (and many other African countries) are not best known for their respect and/or protection of human rights. As under virtually all human rights instruments states are principal duty bearers, effective human rights protection requires strong institutions such as an independent judiciary that can challenge the executive branch. In the case of Ethiopia, the judiciary is often criticised for being subservient to the executive's politics, contrary to what the doctrine of separation of powers would demand.[974] Thus domestic courts rarely render decisions that seriously confront executive decisions. Particularly given that, from point of view the host government, large-scale land acquisitions are often justified in development terms, courts (judges) may defer to the executive's will of land transfers by dispossession, lest they risk political repercussions for being 'anti-development'.

As Hall et al. observe, '[h]uman rights-based responses to global land grabbing can gain traction only through a concerted effort by state and non-state actors operating at international, national and local levels'.[975] Yet the Ethiopian government has significantly restricted the conditions for human rights activism in recent years. For example, the Charities and Societies Proclamation

[974] For an account of the judicial independence in Ethiopia see for example, Siye Abraha, *Freedom and Justice in Ethiopia* [Amharic Trans] (Signature Book Printing, 1st ed, 2010).
[975] Hall et al, above n 82, 480.

of 2009 allows only 'Ethiopian Charities' (those formed under Ethiopian law and wholly controlled by Ethiopians, and raise not more than 10% of their income from foreign sources) to take part in the advancement of human and democratic rights.[976] Critics argue that, with limited domestic funding, the funding requirement stifles human rights works in the country,[977] including inhibiting them in efforts to present as *amici curiae* or to assist the initiation and litigation of human rights violation cases at regional levels.[978] This no doubt diminishes the likelihood of the government of Ethiopia being scrutinised, either at home or abroad.[979] Although the government claims to exercise a 'self-check' through state organs such as the Ethiopian Human Rights Commission, critics suggest that the government is in fact mobilising the commission to legitimise its practices that are actually violating human rights.[980]

On the other hand, despite an increasing call for optimism about the role of investors' home governments in checking human rights violations by their investors,[981] that path, too, remains less travelled, even at a normative level. Although under customary international law and human rights law, states can, to some extent, be held responsible for extraterritorial human rights violations attributable to them, the extent to which states could be held responsible for

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[976] See *Charities and Societies Proclamation (Proc. no.621/2009)* art 2(3) cum 14(5).

[977] Amnesty International, 'Stifling Human Rights Work: The Impact of Civil Society Legislation in Ethiopia' (Report: Amnesty International, March 2012) 7.

[978] For more on such role of NGOs, see De Schutter, *International Human Rights Law*, above n 969, 32.

[979] For example, it was with the support of an NGO that, in a rare gesture, the African Commission on Human and Peoples Commission has recently ordered Ethiopia to pay 150, 000 dollars in compensation for a 13 years rape victim whose case was found to be mishandled by domestic courts—of course, given the poor enforcement records of the recommendations of the Commission, whether the government of Ethiopia complies with the ruling remains to be seen.

[980] For example, in its two reports on the death of hundreds of people following the protests that have been, in large part, triggered by domestic and transitional land acquisitions in the country, the Commission found the measure taken by the government as 'proportional'.

[981] See for example, Kaitlin Y Cordes and Anna Bulman, 'Land Investments and Human Rights: How Home Countries Can Do More' (2015) <http://ccsi.columbia.edu/files/2013/10/No-169-Cordes-and-Bulman-FINAL.pdf>.

their investors' acts is less clear.[982] Of course, where a foreign government is directly implicated in aiding 'land grabs' (projects that facilitate 'land grabs') its actions can be directly challenged before its own courts. For example, in 2014, an Ethiopian farmer (anonymously referred to as Mr 'O') with the help of the Human Rights team of a UK based Law Firm, Leigh Day, sued the UK government, alleging that the UK's aid contributions to Ethiopia's promotion of basic services (PBS) programme—a £3.2 billion project run by the World Bank and designed to boost education, health and water services—were being used by the Ethiopian government to help fund a villagisation programme which displaced the claimant's family along with over a million other rural families.[983] In 2015, the UK's Department for International Development (DfID) announced that it had ended its financial support to the program, although it insisted that the measure 'was not linked to any development relating to the CDP [community development program—villagisation] or any allegations of violations of human rights in that context.'[984] As a result, the claimant eventually withdrew the case. However, the extent to which similar routes could be used to challenge foreign investors in their home states, or home states themselves, for alleged investment related human rights violations in host states, is generally limited. This is in contrast to 'forum shopping' that is often available to foreign investors in their claims against host governments,[985] and

[982] See Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011); for a recent restatements on the exterraterritorail obligation of investors home states see ETo Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012); for a commentary on the principles, see generally Olivier Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34(4) *Human Rights Quarterly* 1084.

[983] Sam Jones, 'Ethiopian Farmer Drops Case Alleging UK Aid Helped Fund Evictions' *The Guardian*, 7 March 2015 <https://www.theguardian.com/global-development/2015/mar/06/ethiopian-farmer-drops-case-dfid-alleging-aid-money-helped-fund-evictions>.

[984] Ibid.

[985] An apt example for this is *Pacific Rim Mining Corp v El Salvador*, in which Pacific Rim, a Canadian-based multinational firm, whose gold exploration permit in El Salvador was rejected

their ability to recast their property right as a human right, as shall be further explored in the following section.

6.4. Human Rights Law's Interaction with Other Laws Shaping Transnational Land Acquisitions

Foreign investment in (agricultural) land is subject to both domestic laws and various strands of international law. As I have already considered (in Chapters 4 and 5), on balance, while (international) investment law facilitates 'land grabs', the flexibility international trade law offers to host states to leverage foreign agricultural investment for addressing local problems such as hunger also diminishes when considered in conjunction with the disciplines under international investment law. The preceding sections of this chapter also suggest that the success of a human rights approach in countering 'land grabs' is highly constrained by the limitations relating to the substantive standards and legal remedies available under this body of law. In this section, I shall push this latter claim further, arguing that the potential use of human rights norms to counter 'land grabs' further diminishes when considered in conjunction with other laws ordering 'land grabs' including trade and investment laws. I argue that this is because of the privileged position of foreign investors in investment law and practice that tends to advance the investor's (private) interest (for example in the form of legitimate expectation), often at the expense of the 'public interest' purportedly advanced by human rights laws (such as re-regulation of land and water rights in the interest of local people). Given that large-scale land acquisitions in their recent form are at their incipient stage, there are not many international law disputes concerning them that involve the interaction (and tensions) between international human rights, trade and

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by the host government in 2004. In 2009, the Corporation filed arbitral claim under the US-Central America Free Trade Agreement (CAFTA) through its subsidiary in Nevada (USA), although it has no operations in the United States.

investment laws. However, the contentions surrounding related cases about other natural resources point to the significance of exploring how these laws interact in ordering the phenomenon of 'land grabbing' and related effects. For instance, potential host states' measures relating to transnational farmland investments that are in line with and/or required under international human rights law but potentially interfere with investors' rights under international investment law and/or investor host states' rights under international trade laws, are treated by relevant bodies in charge of the interpretation and application of these laws.

Indeed, it is increasingly understood that ISDS [Investor State Dispute Settlement] does not only determine *inter partes* disputes, as 'the outcome of many cases also impacts on the human rights situation of third party individuals, communities and entire populations.'[986] For the most part, however, investment arbitral awards seem to rarely pay attention to such human rights impacts. As Martti Koskenniemi notes, in any institution (set of rules and procedures) or institutional context 'there is always a structural bias, a particular constellation of forces that relies on some shared understanding of how the rules and institutions should be applied. That itself is not a scandal.'[987] '[Yet] when this bias works in favour of those who are privileged against the disenfranchised, it becomes "part of the problem"'.[988] Hence, given a bias in the laws ordering transnational 'land grabs' which tend to favour foreign investors vis-à-vis affected local communities that are often marginalised even by their own states with the effect of, amongst other things, perpetuating local hunger, this bias (and attempts to reveal it) becomes significant. I shall now briefly explore relevant literature on the interaction of international human rights,

[986] Kube and Petersmann, above n 852, 68.
[987] See Koskenniemi, above n 144, 608.
[988] Ibid 608–9.

investment and trade laws at a theoretical level, and then move to analysing how this interaction plays out in the context of transnational 'land grabs'.

As Petersmann observes, '[w]hile the modernisation of most arbitration rules reflects an increasing harmonisation of arbitral procedures in international commercial and investment disputes, the interrelationships between HRL [human rights law], trade and investment law often remain contested among jurisdictions.'[989] Indeed, in recent years, scholars have increasingly examined these interrelationships often around theoretical debates about unity and fragmentation of international law. In regards to the relationship between international human rights law and international investment law, some of this literature emphasises their commonality while others point to their divergence. For example, Dupuy and Francioni emphasise on their commonality in terms of their concern (about protecting private actors against arbitrary state action) and normative content (including non-discrimination, denial of justice, and protection against expropriation).[990] Other scholars, on the other hand, emphasise the divergence between international investment and human rights, in terms of both normative (treaty formulation) and interpretative approaches.[991]

The International Law Commission (ILC) in its 2007 report opined that, 'human rights and humanitarian law treaties (as well as, for example, environmental treaties) form a special class of non-bilateral ('integral' or 'interdependent') instruments that cannot be operated through the same techniques as 'ordinary'

[989] Petersmann, above n 119, 10.

[990] See generally Dupuy, above n 132, 45–62; Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20(3) *European Journal of International Law* 729.; and Lorenzo Cotula, 'Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law' (2015) 11(2) *International Journal of Law in Context* 113, 113–134.

[991] For examples of these works, see Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', above n 123; Hirsch, 'The Sociology of International Investment Law', above n 123, 143–167; Kriebaum, above n 123, 219–245.

treaties creating bilateral relationships.'[992] Yet, the extent to which the conflict-of-norms techniques discussed in the ILC study on fragmentation—such as *lex specialis*, *lex posterior* and *lex superior*—are helpful in resolving the potential tensions between human rights and investment (and trade) laws is not self-evident. Clearly, *lex specialis*, and *lex posterior* are less relevant in conceptualising the relationships between these laws. Lex superior also becomes of little use given that the protection of human rights relating to land (including right to property, water, and housing) hardly constitute a *jus cogens*—except the right to self-determination,[993] (although, as noted before, even human rights monitoring bodies (let alone arbitral tribunals) often shy away from effectively recognising this right). An important related approach that tribunals dealing with issues at the intersection of different strands of international law can resort to is 'systemic integration' as envisaged under Article 31(3) (c) of the Vienna Convention on the Law of Treaties, which requires them to take into account '[a]ny relevant rules of international law applicable in the relations between the parties'.[994] Theoretically, systemic integration can allow an arbitral tribunal deciding on a land-related investment dispute to consider (international) human rights and trade laws; and hence, allowing different tribunals to reach similar conclusions on disputes over the same subject matter.[995] Arbitral tribunals have already achieved a degree of integration through cross references to different human rights and related international law disciplines, at

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[992] International Law Commission,Martti Koskenniemi, *Fragmentation of International Law : Difficulties Arising from the Diversification and Expansion of International Law / Report of the Study Group of the International Law Commission ; Finalized by Martti Koskenniemi* (Helsinki : Erik Castrén Institute of International Law and Human Rights, 2007) 250.

[993] The list of human rights constituting *jus cogens* norms is in constant evolution, defying any an authoritative classification; yet at a minimum the list includes: prohibition of aggression, slavery and slave trade, genocide, racial discrimination, apartheid, torture, as well as the basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination; see De Schutter, *International Human Rights Law*, above n 969, 64–5.

[994] *VCLT* art 31(3)(c).

[995] For further discussion on this see Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights' [2011] (3) *International and Comparative Law Quarterly* 573.

times by going beyond the requirement under VCLT which is confined to the treaties (international law) 'applicable in relations between the parties'.[996] Such cross-fertilisation, however, still depend, amongst other things, on the wording of treaties in question as well as the 'sociological'[997] background and/or 'institutional bias'[998] of the judges (arbitrators) in charge of particular cases. Yet as Moshe Hirsch notes, although investment tribunals often recognise treaty interpretation rules such as those of the VCLT and the ILC rules on State Responsibility, 'they adopt a quite consistent approach with regard to the non-significant role of international human rights law in investment disputes.'[999] With few exceptions, 'investment tribunals have declined to grant significant weight to provisions of international human rights instruments invoked by the parties.'[1000] The most recent study confirms this approach.[1001] This suggests that there is a continuing trend in sacrificing human rights values in favour of investment protection and/or trade liberalisation.[1002]

Against this backdrop, in the remaining part of this section, I shall aim to explore a few key examples of human rights and arbitral tribunals' rulings relating to access to land (and related resources), which have important ramifications for transnational agricultural investments. One such case is *Sawhoyamaxa vs. Paraguay* in which the Sawhoyamaxa Indigenous Community of the Enxet People brought an action against the government of Paraguay

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[996] For more on this, Stephan W Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' (2012) 27(1) *ICSID Review - Foreign Investment Law Journal* 87, 87–119.

[997] Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', above n 123.

[998] Koskenniemi, above n 144.,

[999] See Hirsch, 'The Sociology of International Investment Law', above n 123, 150.

[1000] Ibid.

[1001] See Kube and Petersmann, above n 852, 69; noting that:' Arbitral tribunals are more open towards human rights as due process rights, as methodology and as principles of procedural fairness and balancing than towards a right-based approach — a "right based approach" meaning the integration of human rights as an authoritative legal regime consisting of legally enforceable entitlements.'

[1002] See, generally, Anne Orford, 'Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice' (2005) 18(2) *Leiden Journal of International Law* 179.

before the Inter-American Commission on Human Rights, alleging that the government violated the American Convention of Human Rights, including the right to property.[1003] The Sawhoyamaxa community, consisting of 100 indigenous families, has its traditional territory in the eastern part of the Chaco region of Paraguay. After having lived scattered in different places, the Sawhoyamaxa community attempted to gain legal title to 14,400 hectares of their traditional land. In 2001, after national legal remedies were exhausted, the Sawhoyamaxa brought their case to the Inter-American Human Rights system. The community argued that the government had failed to complete its own initiative to recover part of the ancestral lands of the tribe of over 14,000 hectares in the Chaco region of Paraguay, owned by a German citizen since the 1970s, even though Paraguayan law recognises the right of indigenous peoples to preserve their way of life in their habitat and to protect the claimed lands. As a result, community members had to live in inhumane conditions, resulting in a number of deaths due to lack of food and medical care. The government, on the other hand, contended that although it was committed to solving the matter, the 'claimed lands have been conveyed from one owner to another "for a long time" and are duly registered' and that the current 'owner's right "is protected under a bilateral agreement between Paraguay and Germany [which] has become part of the law of the land."'[1004] The government thus pleaded that the refusal by the land owner to sell the lands to the Paraguayan Institute for Indigenous Affairs for eventual transfer to the Sawhoyamaxa Community 'has proven to be a stumbling block.'[1005]

[1003] *Sawhoyamaxa Indigenous Community v Paraguay* [2006] Inter-American Court of Human Rights Ser.C. No. 146 (29 March 2006) ('*Sawhoyamaxa v Paraguay*'). As noted in the preceding sections, by virtue of Article 50 or 60 of The African Charter on Human and Peoples' Rights, relevant regional and international human rights jurisprudence (involving the interface between human rights and investment) can potentially inform rulings on in human rights claims under the Charter.

[1004] Ibid [137].

[1005] Ibid [34(a)].

In 2006, the Court ruled in favour of the community, arguing that the government's recognition of the tribe's rights to traditional lands remains 'meaningless in practice if the lands have not been physically… surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right… are lacking.'[1006] The Court noted that it cannot 'decide that Sawhoyamaxa Community's property rights to traditional lands prevail over the right to property of private owners or vice versa', a power which the Court views as vested exclusively in the Paraguayan State.[1007] It nevertheless maintained that it has the competence to analyse 'whether the State ensured the human rights of the members of the Sawhoyamaxa Community'.[1008] The Court argued that the BIT between Germany and Paraguay does not outlaw nationalisation of investment for 'public purpose or interest' and, more interestingly, went on to clarify the normative relationship between human rights and 'commercial' (investment and trade) treaties, noting that:

> the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.[1009]

This ruling clearly recognises human rights treaties as 'normatively' superior to 'commercial' (investment and trade) treaties which are based on reciprocity of rights and obligations between states, implying that in the event of conflict between these treaties and human rights treaties, the latter shall prevail. Yet, almost a decade down the line, at the time of writing (May 2017) the ruling is yet to be implemented.[1010] One possible explanation for the government's

[1006] Ibid [143].
[1007] Ibid [136].
[1008] Ibid [136].
[1009] Ibid [140].
[1010] See Mendieta Miranda and Cabello Alonso, 'Advancing Indigenous Peoples' Rights through Regional Human Rights Systems: The Case of Paraguay' (IIED, 2017) 4

reluctance to implement the decision (which of course necessitates an expropriation of the land in question) has been the issue of compensation due to the investors as required under relevant BITs. Back in 2000, for example, reportedly, the German Embassy in Paraguay had warned the Paraguayan government that expropriation of land owned by German citizens would be a breach of the Germany–Paraguay BIT that could lead to international arbitration, and apparently the government heeded the warning.[1011] Thus, even host states' measures aimed at the protection of human rights (in this case, indigenous people's right to their traditional land—territory) and informed by the normative superiority of human rights could be beset by the need to comply with competing rights (interests) of investors under investment law (BIT).

Indeed, even where domestic laws do not recognise the right to a particular property, (foreign) investors can still file property rights claims under supranational (human rights) instruments. In Zimbabwe, for example, since the early 2000s the government has embarked on what was called 'fast-track-land reform', whereby land owned by white farmers since colonial times was to be nationalised and redistributed to black farmers. To this effect, the Zimbabwean parliament passed two amendments to the Constitution of Zimbabwe on 19 April 2000 (Amendment 16) and on 14 September 2005 (Amendment 17) authorising the seizure of white-owned farmlands without compensation, and ousting the jurisdiction of the courts to entertain any challenge concerning such acquisitions of agricultural land.[1012] Between 2000 and 2016, the government acquired more than 14 million hectares of land through this program

<http://pubs.iied.org/pdfs/17602IIED.pdf>; noting, 'the definitive land titling process is yet to be finalised.'

[1011] Javier Perez, Myriam Gistelinck, Dima Karbala, 'Sleeping Lions: International investment treaties, state investor disputes and access to food, land and water' (Oxfam Discussion Paper, May 2011).

[1012] See Constitution of Zimbabwe Amendment No. 16, Act 5 of 2000; and Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005.The latter in part provides that 'no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired'; see section 16 B(2)(b).

(reportedly the resettlement program is now almost complete).[1013] Perhaps not surprisingly, those people affected by the compulsory acquisitions of land began challenging the measure at both domestic, regional and multilateral fora. Thus, in 2007, Mike Campbell (Pvt) Limited, a Zimbabwean registered company, and William Michael Campbell commenced legal action in the Supreme Court of Zimbabwe, the country's highest court, challenging the acquisition of their land by the state.[1014] Concurrently, on 11 October 2007, the two Applicants filed an application with the Southern African Development Community (SADC) Tribunal, alleging that their property rights in agricultural lands had been infringed by a provision in the Zimbabwean Constitution which authorised compulsory acquisition of certain agricultural lands, and the racial discrimination in the application of the provision. As 77 other applicants followed suit, the tribunal consolidated the case in *Mike Campbell and others v. Republic of Zimbabwe*.[1015] On 22 February 2008, the Supreme Court of Zimbabwe dismissed the two Applicants' claims entirely, whereas, on 28 November 2008, the SADC Tribunal ruled that the expropriations of agricultural lands by the Zimbabwean government were illegal because they were based on racial discrimination and did not compensate the applicants.[1016] Although it was not at issue in this case, arguably the government of Zimbabwe's Land Reform Resettlement Programme could be justified as one for 'public purpose' to the extent that the land in question is redistributed to the landless mass (as opposed to among political elites as alleged by the applicants). The tribunal's finding of racial discrimination may of course be questioned. As Sornarajah notes, post-colonial expropriations carried out to end the economic domination of the

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[1013] Zvamaida Murwira, 'Fast-Track Land Reform over: Mombeshora' *The Herald*, 8 February 2016 <http://www.herald.co.zw/fast-track-land-reform-over-mombeshora/>.

[1014] *Mike Campbell (Pvt) Ltd. et al. v. The Minister of National Security Responsible for Land, Land Reform and Resettlement and the Attorney-General* (SC 49/07) (2007).

[1015] See generally, *Mike Campbell and others v. Republic of Zimbabwe*, SADC (T) No. 2/2007

[1016] *Agreement on encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands*, singed on 11 December 1996, (entered into force on 1 May 1998) 6(2).

nationals of the former colonial power does not constitute racial discrimination in foreign investment law,[1017] an exception which the tribunal seems to have disregarded. On the other hand, the tribunal's finding on compensation seems to conform to contemporary international investment law's requirement for compensation for non-regulatory takings. In fact, in a closely related case, *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, an ICSID tribunal held Zimbabwe responsible to pay compensation due to the claimants on the basis of the Dutch-Zimbabwean BIT.[1018] This shows that even where host states are willing to undertake some form of redistribution that can advance human rights (of, at least, the landless people or smallholder farmers), such a measure is subject to the rights of (foreign) investors as recognised under relevant bilateral and/or regional investment agreements. As long as such redistributive measures qualify as compensable regulatory takings, the host state is due to pay compensation which they would normally eschew when taking measures which advance human rights. This has significant ramifications for large-scale acquisitions and/or long-term leases of (agricultural) land in Ethiopia and most other host states which have a significant proportion of landless and near-landless rural poor.

In theory, as De Schutter contends, large-scale land transfers 'should under no circumstances be allowed to trump the human rights obligations of the states concerned.'[1019] Evidently, this call is for compliance with *existing* human rights obligations of states which may not necessarily be adequate to safeguard those affected by these land acquisitions. Yet, as the foregoing cases suggest, even where there are no direct inconsistencies between investment and human rights

[1017] SSornarajah, above n 104, 106.

[1018] *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe* (ICSID case No. ARB/05/6), Award,

[1019] See De Schutter, 'Report of the Special Rapporteur on the Right to Food Mr Olivier De Schutter, Agendum: Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', above n 85 [33].

norms, and a state is willing to take measures that contribute to the realisation of human rights of local people (through, for example, reinstating lands acquired by foreign investors to former users), full compliance with the disciplines of international investment law may create what is referred to as a 'regulatory chill' on state measures aimed at realising human rights.[1020] It therefore appears that in many cases 'overlapping but narrow interests of investors and host governments trump human rights'[1021] and are 'insuperable, at least for the foreseeable future.'[1022] In recent years, some scholars have argued for a normative shift as a way out of this conundrum, which I will explore in the following section.

6.5. Recent Proposals towards a Normative Shift

While there have been debates around the relationship among the various functional regimes of international law for a long time, the increasing number of transnational land acquisitions which normally traverse legal regimes have generated further debates along this line. For example, in her work that examines the historic and current practices that have contributed to food insecurity in developing countries in the context of the increasing acquisitions of land in the Global South, Carmen Gonzalez recommends several steps that could be taken to promote the fundamental human right to food.[1023] Among other things, she argues that 'foreign acquisition of Southern agricultural lands must be carefully regulated to make sure that these transactions benefit affected communities, uphold the fundamental human right to food, and utilize natural

[1020] See Luke Peterson and Kevin Gray, 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration' (International Institute for Development, 2003) <https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf>.
[1021] Poul Wisborg, 'Human Rights against Land Grabbing? A Reflection on Norms, Policies, and Power' (2013) 26(6) *Journal of agricultural and environmental ethics* 1199, 1217.
[1022] De Schutter, 'How Not to Think of Land-Grabbing', above n 6, 251–2.
[1023] Gonzalez, above n 155, 462.

resources in a sustainable manner.'[1024] In particular, she suggests two steps that need to be taken towards better regulation of such acquisitions.

> The first step is to strengthen the domestic law of the host state, including property law, water rights law, environmental law, tax law, and the laws governing foreign direct investment, and to ensure that the host state has the capacity to enforce these laws. The second step… is to develop international investment agreements that impose substantive human rights… on the foreign investor and the foreign investor's home state.[1025]

We have already seen (in Chapter 4) that, at least in the case of Ethiopia, domestic laws are assigned a premium role of facilitating (foreign) land acquisitions in a broader policy context that fetishises development. And for that reason it may be unlikely, if not impossible, for the Ethiopian government to leverage such laws to the benefits of local people affected by these land acquisitions, particularly if strengthening these laws is perceived to hinder further investments. But more relevant in the context of this chapter is the normative argument with regard to human rights. Gonzalez remarks that the vindication of the human right (to food) will require 'a holistic re-conceptualization of international law that integrates human rights, environmental protection, and trade and investment law rather than relegating them to separate spheres.'[1026] She further explicates that:

> Such a vision must be premised on the hierarchical superiority of human rights norms and must regard trade and investment as means toward the realization of human rights and environmental objectives rather than as ends in themselves. This integrated vision of international law must be explicitly incorporated into trade [and investment] agreements rather than raised defensively for the first time before dispute resolution tribunals. [1027]

Gonzalez suggests a number of ways in which this superiority of human rights norms could be effected, including through: clauses that give priority to human rights norms in the event of a conflict with the terms of trade and investment

[1024] Ibid 476.
[1025] Ibid 476-7; (citations omitted).
[1026] Gonzalez, above n 155, 477.
[1027] Ibid.

agreements; broad human rights exceptions akin to GATT Article XX; requirement of *ex ante* human rights and impact assessments and simplified waiver procedures in the event that these agreements subsequently conflict with human rights considerations; [1028] sunset clauses akin to Article 20 of the WTO Agreement on Agriculture; and specifying the rights and obligations of the foreign investor, the host state, and the home state with human rights and sustainable development as overarching objective.[1029] These recommendations have far-reaching consequences on the interaction of human rights law with other branches of international law, in departure even from abstract reference to 'mainstreaming human rights'—which as some critics contend is 'a project for seizing institutional power that is profoundly ambiguous in its effects.'[1030] Yet, the extent to which the factors that reinforce the existing norms may allow for such a (radical) normative shift is not clear.

Other scholars have also argued for subjecting large-scale land acquisitions to human rights, albeit in more modest reforms. In regards specifically to the food (in)security implications of large-scale land acquisitions, for instance, Christian Haberli and Fiona Smith call for the incorporation of an exception clause into relevant bilateral and/or regional investment agreements, contending that:

> In view of the specific situation of weak host states, their strong international commitments under BITs and other instruments, and comparing these commitments with the soft law principles applicable to home states and investors, we [propose] a public interest clause for food security which could be incorporated into the binding commitments of the host state and the investor, either in a BIT or regional treaty.[1031]

[1028] The suggestion of waiver procedures is inspired by least developed countries' experience with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in cases of national medical emergencies.

[1029] Gonzalez, above n 155, 478–9.

[1030] See Martti Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 47, 47.

[1031] Häberli and Smith, above n 146, 221.

Apart from the lack of capacity on the part of so-called weak states to negotiate relevant terms in a manner that enhances domestic food supply (and access), there also seems to be a lack of policy commitment to directly linking these land acquisitions to food security in host states. As considered in Chapter 3, at least in the context of Ethiopia, the primary concern is with development (economic growth) through, among other means, foreign investment—from which food security putatively 'trickles down' in the form of, for example, enhanced export earnings and rising income for citizens. As experiences suggests though, this has rarely been realised for locals dispossessed of their land (see Chapter 4). Thus where the insertion of human rights clauses (in the form of domestic food security clauses ultimately aimed at enhancing the realisation of the human right to food) appears to impede the flow of foreign investment due to the perceived or real constraint this may impose on foreign investor, host states such as Ethiopia seem to prefer foregoing human rights for investment. This arguably renders the normative call to subject investment norms to those of human rights in relation to large-scale land deals in such countries less practicable. The support of other parties—foreign investors and/or their home states—also cannot be taken for granted, particularly where the investment are aimed at food export back to investors homes states. In fact, at least for now, there is no significant progress towards such a normative shift either based on the superiority of human rights in general or the introduction of exception clauses in investment and trade agreements aimed at enhancing food security (right to food) in investors' host states.

6.6. Conclusion

In this chapter, I have discussed how human rights laws (and related standards) are being mobilised as a response to the global 'land grabs' and the way in which international human rights law mediates rival rights and interests

involved in transnational land acquisitions. This discussion revealed that despite the strong faith from some quarters in human rights at both the global and local levels, far from effectively countering 'land grabs' and the risks it poses to local people, human rights law and practice can, at times, be used to sustain the practice.

The right to land has been recognised as a self-standing human right only in two major human rights treaties with respect to two specific groups: the ILO Convention no 169 (for indigenous and tribal peoples) and the CEDAW Convention (for rural women). Efforts to extend some of the standards enshrined in these instruments to other groups equally vulnerable to the risks of large-scale land acquisitions have often been fiercely resisted during some of the global debates on land grabs. However, the realisation of a number of human rights such as the right to self-determination and the right to food are closely related with access to (and control over) land. Thus, in principle, human rights could be invoked either to prevent large-scale land deals or remedy related risks, as also suggested in some of the regulatory responses to the global 'land grabs'. Nevertheless, the success of such invocation is not self-evident. In the case of Ethiopia, reservations to the provisions in major human rights instruments mandating monitoring bodies to entertain individual and group complaints has left periodic review as the major (at times only) monitoring mechanism. Even setting aside the dubious role of such reviews, as the analysis in this chapter has shown, the Economic, Social and Cultural Rights Committee (a monitoring body of the ICESCR) has taken a selective approach to addressing reports on alleged human rights violations facilitated by large-scale land deals in Ethiopia, downplaying the complex nature of 'land grabs' and related risks it poses particularly to local people. Even the African Commission on Human and Peoples' Rights—the only regional human rights monitoring body that has a competence to entertain individual and collective complaints against Ethiopia—

does not seem a promising avenue for invoking human rights as a counter to 'land grabs', particularly given a very poor record of enforcement of its rulings.

On the other hand, as relevant arbitral awards suggest, investment tribunals are reluctant to take human rights claims competing with investors' (property) rights seriously. Even where host governments opt to introduce some corrective measures (that are otherwise consistent with or required by human rights laws and related standards), the structural bias that characterise the human rights-investment law interaction would inhibit the introduction of such measures. There are also limited avenues for holding home states accountable in relation to their investors' practices that violate human rights in host states.

The recent calls by some scholars for a normative shift based on the 'superiority' of human rights in general and introduction of food security (right to food) exception clauses in investment and trade agreements aims to remedy some of these concerns. Whether and to what extent this shift may or may not occur is yet to be seen, as no significant progress is documented yet. Thus, despite the pervasive use of the rights language in the global responses to 'land grabs', the way international human rights law shapes land relations around transnational land acquisitions implies that human rights law cannot effectively protect rival claims against investors' rights under other relevant laws, particularly investment law.

CHAPTER 7 CONCLUSIONS

This thesis has been motivated by an unease with current approaches to the question of large-scale land acquisitions by foreign investors, and the ways in which they might relate to hunger in the states which 'host' the investments. It addresses this unease through a critical analysis of the way in which the interaction between national laws and international law in its various guises shapes the legal relationships around such deals. It has conducted this analysis through a detailed examination of the situation in Ethiopia which, although historically particular in Africa, is nonetheless 'typical' in sub-Saharan Africa (SSA) in particular and Africa in general with respect to the structure of and justifications given for large-scale acquisitions of land by foreign investors.

There is agreement in the global 'land grabs' literature about the fact that there has been a surge in (transnational) land deals particularly in sub-Saharan Africa, and that 'something important is happening.'[1032] Yet this literature remains inconclusive on questions ranging from the precise scale of the land deals, their effects, and how to understand and respond to them. Proponents of transnational land acquisitions assert that they offer 'host' people such benefits as enhanced food security through technology transfer, employment creation, and export earnings. Critics, on the other hand, dismiss such claims on the grounds that the social and environmental costs of these 'land grabs' often outweigh their benefits to people in the host state, or that the benefits do not flow to the people affected. While host governments often deny claims of 'land grabbing' and related social and environmental problems, the global responses aimed at alleviating these problems leave largely unaddressed many of the structural issues embedded in domestic and international laws shaping such land acquisitions. This thesis has sought to contribute to the debate by asking what role law (domestic law as well as various branches of international law)

[1032] Wolford et al, above n 354, 190.

plays in shaping the competing rights and interests around transnational land acquisitions in SSA. It has argued that the legal regimes shaping the relationships around transnational land acquisitions in countries such as Ethiopia privilege (foreign) investors over host countries' people, particularly prior land users. This implies that although transnational land deals are often justified in terms of various development promises such as enhanced food security to host people, the way the laws at play shape legal relations is likely to perpetuate hunger in investor host states like Ethiopia.

In order to advance this argument, I have demonstrated, first, that although recent transnational land acquisitions in the region have in large measure been triggered by the convergence of recent global crises (food, financial, and energy crises of 2007/8), and may in that sense they appear new, understanding them as novel is undermined by an historical account. The broader policy context in which contemporary land deals are happening has been greatly shaped by colonial and post-colonial policies and practices in the region. This historical account points to both continuity and discontinuity between contemporary land deals and their historical precedents. Secondly, I have argued that a better understanding of the role of (international) law in this process requires an analysis of how the various laws at play interact with one another, rather than either a reference to law in general terms, or through a focus on a single regime or juridical scale (national/international), both of which would obscure the interactive role law plays in shaping the relationships between investors, states and those who are hungry. Accordingly, I have critically analysed how domestic investment laws, and international law (including investment law, trade law and human rights law) interact in shaping these land deals and their potential outcomes. This account points to both convergence and divergence among the laws at play, including in defining what counts as 'land grabbing' vis-à-vis 'investment,' and the particular ways in which certain interests and

rights are promoted and protected as opposed to others. This has important policy and jurisprudential implications.

7.1. Continuity and Discontinuity

Historical precedents to contemporary large-scale land acquisitions in Africa have made a significant contribution to shaping land relations in the region, which are reflected in the competing claims around contemporary land deals. Colonial conquest in Africa—the scramble for Africa in late 19th and early 20th century, as with other colonial adventures, found its justification in the *civilising mission*, *free trade* and the *terra nullius* narratives; although in reality colonial adventures were largely after securing raw materials, food, markets, and strategic routes, elements which in contemporary terms would be collectively referred to as the 'national security' of colonial powers. The Berlin Conference Act (international law) facilitated colonialism in Africa by turning the continent into, as Anghie notes, 'conceptual *terra nullius*',[1033] and setting the rules of the game among colonial powers.

A 'single-minded and overriding emphasis on the customary'[1034]—whereby the scope of the customary extended beyond personal relations (such as marriage and succession), and governed access to land—was a distinct feature of colonial practice in Africa. 'Colonial custom' interpreted customary land rights as granting merely usufructuary rights, and even then often applicable only to farmland (as opposed to uncultivated land, which was equally important for the livelihood of local people and communities). Crucially, the legacy of 'colonial custom' that largely construed local land rights in terms of usufruct became characteristic of post-independence land reforms in Africa. Post-colonial states in Africa, by and large, assumed ownership of land as did

[1033] Anghie, above n 91, 91.
[1034] Mamdani, above n 217, 50.

colonial states—which was now justified in terms of furthering *development* as opposed to *exploitation*—and continued with a narrow interpretation of customary land rights. Although Ethiopia does not share a typical colonial past with other African countries, it shares with them many colonial and post-colonial realities at least as far as land relations are concerned. The land tenure system that was instituted in the country in the late 19th and early 20th century—at the same time as the European 'scramble for Africa'—followed the conquest of southern territories by Abyssinia (which was later to transform itself into Ethiopia) turned smallholder farmers and pastoralists in these regions into mere tenants on their own land. The 1974 revolution that ended monarchical rule (and its landlord-tenant relations) ended up merely extending usufructuary rights to peasants and pastoralists—as did decolonisation in many African countries. The current government which assumed power in 1991 has largely continued with this land policy. Beginning from the late 1980s and 1990s, many African governments, including that of Ethiopia, undertook the structural adjustment programs (SAP) of the World Bank/ IMF, as part of which they had to liberalise their investment regime. One component of this was the revision and/or enactment of new land laws with the goal of attracting foreign investment in the agricultural sector. These reforms were more tenurial in the sense that they aimed to turn communal lands to private land holdings through measures such as land titling schemes, than redistributive reforms aimed at granting lands to the landless or small holders, or converting usufructuary rights to full ownership. Indeed, these reforms did not result in immediate surge in transnational land acquisitions. The latter waited for a major push factor: the convergence of global financial, food, and energy crises of 2007/8. Local people and communities thus often face contemporary challenges to their land rights from a weak legal position.

Unlike their historical precedents (colonial expansions) which were to a large extent effected through violence, contemporary 'land grabs' are effected through a combination of diplomacy, financial incentive (support) schemes from home states and international financial institutions, and legal frameworks that guarantees their protection. Whereas colonial 'land grabbers' in Africa were mainly foreigners (Europeans)—coming as conquerors, traders or investors, and at times even missionaries—contemporary transnational 'land grabbers' are foreigners originating from all continents who usually come in the name of the investor. The drivers of contemporary 'land grabs' in sub-Saharan Africa are multiple and complex, but generally revolve around food security, biofuel for energy security, and profit. In either case, though, the effect on local people who must give way to investors often remains similar—dispossession or displacement, often with no or inadequate alternative means of livelihood. However, contemporary land acquisitions are often discursively justified by the existence of abundant 'underutilised', 'unutilised' 'empty', 'not occupied', 'not inhabited' land in SSA, in a manner that is akin to the colonial *terra nullius* narrative. This narrative is propagated by some international institutions such as the World Bank (and echoed by host states).

Global policy debates with their highly polarised narratives have resulted in three main approaches to contemporary transnational land acquisitions. One such response is *food sovereignty*. Advocated mainly by civil society and social movements, food sovereignty calls for a halt to transnational land acquisitions. Unsurprisingly, this call lacks political support from key actors (investors and their host and home states and relevant international institutions) although it can offer reinforcement to local sites of resistance against transnational land acquisitions. The second set of global responses to 'land grabs' are voluntary guidelines, a typical example of which is the *Principles for Responsible Investment in Agriculture and Food Systems* (RAI) that had been initiated by the World Bank,

FAO, IFAD and UNCTAD, and was later endorsed by FAO's Committee on World Food Security. The principles encourage large-scale transnational land acquisitions, as long as done responsibly; that is, in a manner that reduces the associated social and environmental risks. However, as the norms ordering these land deals reside elsewhere, particularly in (international) investment law that remains unchallenged by the principles, global complacency toward these principles as effective responses to the prevailing 'land grabbing' amounts to tacit approval of the deals and their lack of accountability. After all, unlike comparable corporate social responsibility instruments, no monitoring mechanism is envisaged in the document. The *Minimum Human Rights Principles Applicable to Large-Scale Land Acquisitions and Leases*, initiated by Olivier De Schutter, is yet another global regulatory response to 'land grabs'. These principles, coming as they do from a human rights perspective, are more sympathetic to local people and communities affected by large-scale land acquisitions, even as they also acknowledge the potential opportunities of these land acquisitions. However, the extent to which these principles shape land relations in ways that could prevent or remedy the risks large-scale land acquisitions pose to local people and communities—including dispossession—is not self-evident, given the substantive and procedural limitations of international human rights law itself.

7.2. Convergence and Divergence

In Chapters 4-6, I turned to the question of what role domestic and international laws play in shaping the legal relations around transnational land acquisitions and their outcomes, with Ethiopia in focus. Thus, in Chapter 4, I argued that the mutually reinforcing domestic investment legislations, farmland investment contracts and international investment law (particularly BITs) are essentially facilitating large-scale land acquisitions, often with disproportionate effect on

local people and communities whose livelihoods depend on the land transferred to investors. I began with the position of domestic laws. Under the FDRE Constitution, land belongs to the State and peoples of Ethiopia, and shall not be subject to sale or other means of exchange. The Constitution grants lifetime land use (not ownership) to peasants and pastoralists free of charge, but also recognises private investors' right to obtain land (upon necessary payment). Yet the Constitution also makes it the duty of the government to 'hold, on behalf of the People, *land* and other natural resources and to deploy them for their *common benefit* and *development*.'[1035] This constitutional recognition of the government as the sole custodian of land, coupled with other domestic legislations that grant extensive incentives and protection to (foreign) investors, gives the government crucial leverage to facilitate state-to-investor land transfers, which are mainly effected through long-term farmland lease contracts. The negotiation process of these contracts suggests that prior land users usually have little or no say over the decisions to transfer land to investors and/or in shaping the terms of the transfers (contracts). The examination of the terms of these contracts also casts doubt on the often claimed benefits of transnational land investments to host people, including domestic food supply (security), employment, infrastructure development, technology transfer and revenue generation because they do not include investors' commitments with regard to any of these matters. As such, the contracts give substantial discretion to foreign investors as to how to farm, who to employ, and what to do with the produce, but with limited social or environmental responsibilities. Ethiopia's BITs, with broad definitions of the terms 'investor' and 'investment', the inclusion of umbrella clauses that require the host state to comply with any commitment it has assumed in favour of a protected investor, as well as common standards of BITs such as fair and equitable treatment and a

[1035] *The FDRE Constitution*, art 89(5); (emphasis added).

prohibition on unlawful expropriation or performance requirements, consolidate the host state's commitments (as expressed in domestic laws and investment contracts) but not those of investors. The substantive rights of foreign investors are further backed up by effective investor-state-arbitration, a principal dispute settlement mechanism under these BITs. This not only consolidates investors' rights but also potentially inhibits possible measures by the host state aimed at addressing competing claims of local people and communities against transnational land acquisitions.

As the discussions in Chapter 5 suggest, international trade law may not have as direct a role in facilitating transnational land deals as international investment law, yet it does contribute to the process. Trade policies and laws that guarantee market access provide incentive to investors to acquire (farm) land, targeting the rising demand for food and biofuel, and hence profit, in both domestic and international markets. One major area of potential regulation by international trade law in relation to transnational land acquisitions is export restriction. Restrictive trade laws and practices such as export bans or excessive export tax by major grain exporting countries can erode food importing states' confidence in the international market and thereby trigger competition for control over productive resources such as land (water) abroad, as was seen in the aftermath of the 2008 global food crisis. International trade law (mainly WTO law) in principle outlaws quantitative restrictions on both agricultural and non-agricultural products. But by way of exception it does offer Member States the flexibility to temporarily introduce export restriction measures to address critical shortages of food. Yet, as argued in Chapter 5, the flexibility that international trade law offers to host states to leverage transnational land investments for addressing local hunger through export restriction measures is diminished by the applicability of international investment law to these investments. The fact that a host state's export restriction measure passes the

WTO law test does not necessarily spare that state from being challenged under the disciplines of international investment law, particularly where the international (or home) market offers significantly higher prices, such that the measure could amount to indirect expropriation. This implies that, even after transferring a significant portion of its farmland to foreign investors for food production, such a host state is likely to remain vulnerable to the volatility of the international market, which casts doubt on the feasibility of reliance on transnational land acquisitions to address hunger in host states. Even when there is enough food grown locally to resolve a critical need, states may be prevented from temporarily diverting food to the domestic market to prevent hunger. Thus, in their cumulative application, international investment and trade laws tend to facilitate transnational land deals while at the same time limiting the ability of host states to leverage these investments to address competing needs and claims of local people and communities.

Of course, as reflected in some of the works on recent global ' land grabs', there seems to be an assumption that international human rights law will be able to counter the excesses of international investment and/or trade laws in relation to these land deals. Yet as the examination of the role of international human rights in Chapter 6 suggests, despite the prevalent use of the human rights language to countering transnational land acquisitions and/or remedying associated social and environmental risks, at times, human rights law and practice can actually sustain the practice. One limitation of international human rights in this regard has to do with the recognition of land as human rights. The right to land has been recognised as a self-standing human right only in two major human rights treaties with respect to two specific groups: the ILO Convention no 169 (for indigenous and tribal peoples) and the CEDAW Convention (for rural women). This means that other groups affected by 'land grabs' who opt to challenge it through human rights language would need to

look for other rights closely associated with land, such as the rights to self-determination, food and property. Nevertheless, the practice suggests that the success of such invocation is not self-evident. Investors, too, have rights to property which tribunals consistently uphold. Procedurally, too, countries like Ethiopia have made reservations to the provisions in major human rights instruments mandating monitoring bodies to entertain individual and group complaints, leaving periodic review as a major (at times only) monitoring mechanism. Even the African Commission on Human and Peoples' Rights—the only regional human rights monitoring body that has the competence to entertain individual and collective complaints against Ethiopia—has a very poor enforcement record for its rulings. Likewise, the extent to which home states are accountable in relation to their investors' practices that violate human rights to land (and associated with land) in host states remains moot even at normative level.

On the other hand, as relevant arbitral awards suggest, investment tribunals are often reluctant to find in favour of human rights claims since they would override investors' human rights to property. Even where host governments opt to introduce some corrective measures (that otherwise are consistent with or required by human rights laws and related standards), the structural bias that characterises the human rights-investment laws interaction would inhibit the introduction of such measures. Thus, transnational land acquisition involving violating human rights through disregarding the right to land (of indigenous people) or the right to food of affected individuals or groups, can still be considered as a legitimate 'investment' from point of international investment law (for example, BITs which often broadly define 'investment' as 'every kind of asset'—irrespective of the effects of the investment), pointing to the constitutive (but diverging) role of these laws in defining land acquisitions.

Thus, despite the pervasive use of rights language in global responses to 'land grabs', the way international human rights law shapes land relations around transnational land acquisitions implies that human rights law cannot effectively protect rival claims against investors' rights under other relevant laws, particularly investment law. In recent years, some scholars have called for ways of remedying this limitation through proposals ranging from the introduction of food security (right to food) exception clauses in investment and trade agreements to a more radical normative shift based on the 'superiority' of human rights. However, whether and to what extent this shift may or may not occur is yet to be seen—for no significant progress is documented yet.

Although the law is invoked to contest large-scale land acquisitions, the way domestic and international laws are designed and implemented renders them less beneficial to host people, particularly prior land users. By upholding restricted land rights for people who are legally required to give way to investors, the law facilitates these land deals and inhibits measures by host states to divert produce grown on their own agricultural land to the domestic market, in order to address persistent hunger even in times of crisis, and thereby save lives of its citizens. Therefore, the role of the law needs to be considered more seriously in the debates around the growing number of transnational land acquisitions in Ethiopia and across the Global South.

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Appendices

Appendix I: Interview Guide for Government Officials

1. Can you briefly tell me the role of your office in the process of agricultural investment?
2. How much land has Ethiopia (Oromia Regional State) transferred to foreign investors to date?
3. What is the proportion of the projects that have entered the implementation and production phase?
4. Where are investors originating from?
5. What goals do federal and/or regional governments aim to achieve with large scale farmland investments?
6. How would these goals relate to addressing hunger (food insecurity) in Ethiopia?
7. What policy and legal mechanisms are in place to advance these goals, and address the potential social and ecological impacts of these investments (land transfers)?
8. Can you explain the process of land transfer to investors including relevant preconditions and the role of local people, if any, and various layers of governments?
9. What happens to local people that maybe displaced in the process of large scale farmland investments?
10. The agricultural investment contracts that Ethiopia has signed with foreign investors do not provide for any restriction regarding, for example, export (of both food and non-food products) and water use. Wouldn't this constrain possible governmental response to local hunger and related competing needs/claims?

11. How do you monitor an investor's compliance with relevant standards and laws (including the terms of a contract)?
12. What challenges are often reported by local people, investors and other stakeholders in relation to large scale farmland investments, and how have these challenges been addressed?
13. Has there ever been any dispute between investor and the government, or investor and local people in relation to these investments? If so, what was the basis of the dispute and how was it resolved?

Appendix II: Interview Questions for Foreign Investors

1. What motivated you to embark on farmland investment in Ethiopia?
2. How much land have you acquired and for how long?
3. What was the nature of the land before you acquired it?
4. Can you explain the land acquisition process including relevant preconditions and the role of local people (communities), if any, and various layers of governments?
5. What do you produce, and for which market(s)?
6. Are you allowed to shift to other products, if you want?
7. Do you receive any support from your home government or any other body? If so, are there any conditions attached to this support?
8. What are your major legal commitments to the host country?
9. In what way would your investment benefit the local people in particular and the host country in general?
10. Have you faced any challenges relating to your investment so far? If so, what are these challenges and what did you do to overcome them?
11. What would you do if the host (Ethiopian) government take measures that potentially interfere with your investment such as export and water use restrictions?