

# International Guidelines: solutions to problems underlying large-scale land deals?

A critical review of the World Bank, FAO and Rights-based guidelines on large-scale land transfers

Fantu Farris Mulleta<sup>1</sup>



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*While concerns are mounting over the social, economic and political challenges of large-scale agricultural land transfers that are recently intensifying in many developing countries, the international community is moving onto a code of conduct approach that aims to mitigate such challenges through the designing of multi-level regulatory instruments. This article calls into question the depth and effectiveness of such a regulatory approach arguing that problems underlying large-scale land deals are so deep constituting socio-institutional problems of power asymmetry, exclusion and invisibilization, than just investment externalities or regulatory challenges.*

AGTER. Association for Improved Land, Water and Natural Resource Governance. 45 bis avenue de la Belle Gabrielle, 94736 Nogent sur Marne Cedex. Tel : 33 (0)1 43 94 72 59 [agter@agter.org](mailto:agter@agter.org) <http://www.agter.asso.fr/>

## Introduction

With recent intensification of large-scale agricultural land transfers in many poor Sub-Saharan African countries with the highest risk of food insecurity, debates are stirring on the equity and poverty reducing impacts of such transfers in these poor countries. While some praise recent land deals for having a potential to “inject much-needed investment into agriculture” and thus enhance the scale of agricultural production, local employment opportunities, social infrastructural development as well as government earnings (Von-Braun and Meinzen-

Dick, 2009: 1; Deininger and Byerlee, 2011), others heavily criticize the deal for carrying unwarranted economic promises but real socio-economic and cultural challenges.

As to the critic, widespread transfer of rural land to investors mostly comes at the expense of use or control rights of local people over their ancestral land and with a resulting loss of land-based livelihood (Fisseha, 2011). This has the effect of placing the balance of social power further away from local communities given the socio-institutional role of land in defining social identity and power relations

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<sup>1</sup> Associated researcher at the Institute of Development Policy and Management (IOB). She holds LL.B from Jimma University, Ethiopia; LL.M in International Trade and Investment Law from University of the Western Cape in South Africa; and M.Sc in Globalization and Development Policy from IOB, University of Antwerp. Her areas of research interest include trade and investment policies in developing countries, legal pluralism and land rights, as well as development policy and cooperation. [fantufarris@yahoo.com](mailto:fantufarris@yahoo.com)

especially in rural areas (Merlet, 2007). To make things worse, recent land deals are mostly carried out without effectively consulting and compensating local land users which is made possible through a discourse and power based invisibilization of local claims by states (Merlet and Bastiaensen, 2011). Indeed, while customary land use rights of local communities is largely overlooked by many host states, the central and multi-functional role of land to local communities, especially pastoralists, is also ignored with states' labeling of all land not being used for crop cultivation as 'idle' and thus open for investment transfer, even if other claims may exist over such land (Borras et al., 2012; Wily, 2011). As such, the term 'land grabbing' is used by many to refer to the unjust taking of land away from local communities or "the extraction of resources by external actors [including investors and states] at the expense of local populations" (Lavers, 2012: 795).

Many also challenge recent land deals for being driven by extra-territorial food, energy and financial security concerns that are extractive by character and least accommodative of local interests (White et al., 2012; Anseeuw et al., 2011; Cotula et al., 2009). In particular, the export-oriented, agrofuel-driven and/or speculative nature of most land transfers is highly denounced for threatening the reliability of food access to local consumers and thus, compromising the 'food sovereignty' of host countries most of which are already chronically food insecure (Rosset, 2011).

In view of such and various other challenges related with large-scale land transfers, a policy advance is lately taken by actors, both at international and national levels, to respond to such challenges through a 'regulatory' or 'code of conduct' approach – an approach that calls for mitigation of the challenges through the designing of multilevel regulatory frameworks.

Such a regulatory approach is neither a recent finding nor unique to large-scale land transfers. It rather is an extension of the long-established 'middle path theory' on the administration of investments by multinational corporations wherein such investments are considered of being intrinsically good to host states, provided that they are regulated through 'codes of restrictive business practices' that maximize the benefits and reduce the risks associated to it – an approach favouring a mix of regulation and openness (Sornarajah, 2004: 64).

Hence in the context of land deals, the regulatory approach does not question the very existence of

large-scale land transfers; it rather promotes its continued existence with a minimized risk – the main focus being governance of investment externalities as if recent large-scale investments in farmland are like any other forms of investment (Borras and Franco, 2010: 7). Accordingly, many proponents of the regulatory approach consider large-scale agricultural land transfers as "an opportunity to overcome long term underinvestment in agriculture" which can be rendered both socially and environmentally sustainable through "guidelines or principles for good land governance and responsible investment in agriculture" (Liversage, 2011: 7-8). It is with this view that Von Braun and Meinzen-Dick describe such large-scale investments in farmland as a measure of 'necessity' for rural development which can be made 'virtuous' thorough the use of codes of conduct and other appropriate policies aiming to seize the benefits and mitigate the challenges (Von Braun and Meinzen-Dick, 2009: 3). On a same regard, the World Bank has identified lack of strong legal and institutional frameworks in host countries as a key limitation in the "moving from challenges to opportunities" with large-scale agricultural land transfers (Deininger and Byerlee, 2011: Xiii).

Of the major initiatives taken lately at an international level to regulate large-scale land deals, one is formulation of international guidelines including the World Bank Principles for Responsible Agricultural Investment; the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests as well as; the Minimum Core Human Rights Principles of the UN Special Rapporteur on the Right to Food. This article briefly examines these international regulatory instruments from a legal pluralistic or socio-institutional perspective of land rights wherein multiple claimants, arguing their claim from different legal orders, exist over same land – rendering state's legal order only a small piece of the diverse social relations over land and rather putting emphasis on the role of social power in determining losers and winners from negotiations among the multiple claimants over land (Merlet and Bastiaensen, 2011).

### *The World Bank Principles and FAO Voluntary Guidelines*

The first and most publicized international guideline comes from the World Bank which indeed is a leading actor in supporting the use of regulatory instruments to deal with problems of large-scale land transfers. With the assumption that recent large-scale investments in farmland carry some risks,

which however “correspond to equally large opportunities” (Deininger and Byerlee, 2011: 142), the World Bank came up with a list of principles and policy prescriptions that aim to minimize the risks and seize opportunities through the regulation of such farmland investments.

The FAO Voluntary Guideline on the Responsible Governance of Tenure, endorsed by the Committee on World Food Security in May 2012, is another widely publicized and the most recent global initiative for the regulation of land tenure in general and large-scale farm investments in particular. The FAO guideline is more inclusive than the World Bank principles in its formulation process (White et al., 2012); it is also a lot more ‘holistic’ in its approach whereby land rights are characterized of being “inextricably linked with access to and management of other natural resources” (Preface of the FAO Voluntary Guidelines, 2012). This is an important approach in the context of current land deals wherein loss of land use rights by local communities brings a wide range of consequences in terms of loss of access to various other natural resources, including water, fisheries and forest woods, on which local livelihoods highly depend.

However, both the World Bank and FAO guidelines suffer from several flaws in their appreciation of underlying problems as well as in their policy prescriptions. The first common flaw is their voluntary disposition in that they do not give rise to enforceable rights and responsibilities on actors involved in land deals. Some justify such voluntary nature arguing that mandatory international regulations are “more difficult to negotiate; take longer to agree; are sometimes diluted as a result; and are often more difficult to enforce” (Liversage, 2011: 9). While that is generally true, also voluntary guidelines are hardly enforceable especially when it comes to disciplining business entities or investors (White et al., 2012). Indeed in the absence of a mandatory regulatory regime, it is hardly imaginable for investors to voluntarily subject themselves to restrictive business practices which are costly in terms of corporate interests. As such, the voluntary guidelines have lightly assumed that corporate interests of investors can easily be streamlined with local interests, which however is an over simplification of the power dynamics and discursive struggle actors go through, especially in the context of the recent land deals which involve conflicting claims and interests among the different actors including the state, investors and local communities (Merlet and Bastiaensen, 2011).

One possible way of enforcing of such voluntary international guidelines is through their incorporation into state laws which then give rise to statutory rights and responsibilities. This however reinforces the state-centric approach in the governance of land deals; since it gives the ultimate discretion for states to decide on whether or not to incorporate such principles into state law, and thus opt for or against their applicability. Indeed, given the use of land transfers as an instrument of political patronage in many Sub-Saharan African countries (Wily, 2011; The Oakland Institute, 2011a), and also invisibilization of local claims through operation of state power, it is questionable if states in Sub-Saharan Africa have the necessary political will to voluntarily incorporate and stick to such principles.

Besides their voluntary disposition, the other common flaw of the World Bank and FAO guidelines is their legal centralistic or state-centric orientation wherein states are regarded as key actors in redirecting large-scale land transfers into a ‘responsible investment’ or ‘win-win outcome’. Indeed, both the World Bank and FAO guidelines heavily emphasize on a top-down state legislative innovation as a means of addressing problems around land deals. For instance, the FAO Voluntary Guideline uses the phrase ‘states should’ 164 times in a 40 page document, which is a clear indication of its state-centric disposition.

Such an approach simplifies problems around land deals into mere investment externalities and regulatory failure which thus is within the regulatory control of states; and less of a socio-institutional issue. It therefore underestimates the potential role of other non-state actors in (re)shaping the institutional landscape around land deals and, most importantly, ignores the need for restructuring of the prevailing power asymmetries in socio-institutional relations around land issues that renders local claims invisible in negotiating arenas.

Also, the trust that states are neutral actors which always strive to harness social benefit is subject to contestation, especially when it comes to land deals where states play an active role in the invisibilization of local claims and the use of such deals for political patronage. As such, it becomes questionable whether and to what extent the state, which is part of the problem, can be a main agent of change as regarded under the World Bank and FAO guidelines.

Practicability of the World Bank and FAO policy prescriptions for state regulation of large-scale in-

vestments in farmland is also constrained by the prevalence of other ideologically opposing international principles and state obligations which limit the regulatory power of states on investment undertakings. There are indeed several international instruments which grant investors, especially foreign, with a protection against host state regulatory interventions, of which instruments the major are: the two decade long World Bank Guideline on the Treatment of Foreign Direct Investment, Agreement of the World Trade Organization (WTO) on Trade-related Investment Measures (TRIMs), and Bilateral Investment Treaties (BITs), among others.

It is indeed interesting to note that the World Bank already has a guideline on the treatment of foreign investors, drafted in 1992, which propagates for free admission of investors without any prerequisite or performance requirements (Paragraph 2.3 of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992). Such guideline also calls for a flexible or autonomous use of domestic labour and goods markets by foreign investors with least intervention from host states. It is in fact within the working mandates of the World Bank group, especially the International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA) and International Centre for Settlement of Investment Disputes (ICSID), to promote the corporate interests of foreign investors and facilitate their activities in host states. Indeed the 1992 World Bank Guideline on the Treatment of Foreign Direct Investment is a reflection of this stand – it pressing for the utmost security and protection of corporate interests of investors, while paying lesser attention to socio-economic concerns of host states and the need for regulation of investment undertakings.

Particularly in the context of current land deals, some blame the World Bank for ‘enabling’ such transfers mainly through shaping/influencing the legislative environment of host states in a way that allows for the signing of “streamlined and lucrative investor contracts” than that of setting rigorous regulatory frameworks (The Oakland Institute, 2011b: 1).

Also under most BITs signed between home and host states, investors are entitled to an ‘investment freedom’ which is a protection against host state intervention in the management, operation, maintenance, use and enjoyment of investments. Moreover, some BITs define expropriation of investment property very broadly to also include any loss in-

vestment interests as a result of state’s regulatory measure – what is commonly referred to as ‘indirect taking of investment property’ or ‘regulatory taking’ (Cotula, 2011; Sornarajah, 2004). In such cases, the host country holds a responsibility of paying compensation for any loss of corporate interests resulting from its application/enforcement of a regulatory measure, even if such is primarily meant to promote public interest.

Also, most BITs entitle multinational corporations with a treatment that is no less favourable than that provided for domestic investors in all aspects of investment undertakings including in the marketing of products outside the host country. This makes it hardly possible for the host state to separately regulate multinational corporations, for instance those engaged in large-scale agrofuel production, from small and medium sized domestic investors of same product, despite the difference in their welfare impact.

All these add to the discourse base of investors in challenging regulatory interventions of host states for the promotion of local employment, technology transfer, provision of public goods and other policy prescriptions suggested under the World Bank Principles. As such, the World Bank and FAO guidelines are neither coherent nor the only piece of international norms governing investments in farmland; other ideologically competing international norms also exist which entitle investors with a better base of claim and discourse against state’s regulatory measures – allowing investors to do forum shopping among the different international norms while constraining applicability of the World Bank policy prescriptions towards a ‘win-win’ regime of large-scale investments in farmland.

#### *A human rights-based approach*

Another international response to the challenges of large-scale land deals comes from Oliver De Schutter, Special Rapporteur of the UN on the Rights to Food, with his formulation of a set of core international principles which are meant to address the human rights challenges of large-scale land deals – a human rights-based approach to land deals (De Schutter, 2011). Such a human rights-based approach is developed improving on the fundamental flaws of the World Bank and FAO guidelines.

To start with, it recognizes the pitfalls in the voluntary nature of the World Bank and FAO guidelines, and thus recommends on the need to hold states responsible to international human rights obliga-

tions which give rise to state accountability (De Schutter, 2011). It also recognizes weaknesses of the World Bank and FAO guidelines in presenting blueprint policy prescriptions as measures sufficient to redirect large-scale land transfers into a win-win outcome. As such, it suggests a list of guiding principles which are “minimum principles in the sense that a large-scale investment in land will not necessarily be justified even though it may comply with the various principles listed” (De Schutter, 2011: 256). Hence unlike the code of conduct approach of the World Bank and FAO, the human rights-based approach does not simplify problems around land deals into mere investment externalities which can be sufficiently dealt through state regulatory measures. It indeed goes beyond the superficial problems on the technicalities of land deals, and touches up on some intrinsic problems on the nature and impact of large-scale investments in farmland (Stephens, 2011). As rightly stated by De Schutter himself “it would be unjustified to seek to better regulate agreements on large-scale land acquisitions or leases without addressing also, as a matter of urgency, [the] circumstances which makes such agreements look like a desirable option” (Paragraph 6 of the Core Principles and Measures to Address the Human Rights Challenges, 2009).

However, such human rights-based approach shares some common flaws with the voluntary guidelines of the World Bank and FAO, especially when examined from a legal pluralistic perspective. The most important of such flaws are its purely rights-based legal orientation and also its excessive focus on the state as a main actor responsible for social change.

As the name itself indicates, the human rights-based approach is a purely legal approach whose relevance in the context of current land deals can be put into question given the predominant operation of social power and negotiations, than that of legal entitlement, in the politics of land relations. Its relevance becomes more uncertain when looking at it from a socio-institutional perspective that “rights cannot be enforced so long as the fundamental inequalities [or power asymmetries] in which social relations are grounded remain intact” (Hall in Cousins, 2009: 901-902). Hence a focus on legal rights does not fully touch the core socio-institutional or relational problems underlying land deals and thus promises no fundamental change on its own – a call for restructuring of power in socio-institutional processes (social empowerment) as a precondition for successful operationalization of legal entitlements of

weaker groups.

The other flaw of the human rights-based approach relates to its state-centric disposition wherein almost all of the prescribed principles call host states to take one or another measure to minimize the human rights challenges of large-scale land transfers. As such, all the critics made above about the practicability of a top-down or state-centered legislative innovation also applies here to the human rights-based approach. After all the minimum human rights principles are another list of blueprint standards whose realization on the ground heavily depends on the political will and institutional capacity of host states. In the words of Li (2011: 292), the minimum human rights principles are “still limited to a technical fix: [whose] tools are naming, shaming and enjoining relevant authorities to be proactive in the protection of rights... [which however] cannot change the political economic context that translates paper rights into real ones”. Indeed, most of the human rights principles and state measures suggested by De Schutter have already been covered under pre-existing and largely accepted international instruments, including the International Covenant on Economic, Social and Cultural Rights of the UN, whose realization on the ground is however a longstanding problem.

### *Conclusions*

To conclude, the policy approach taken by the international guidelines proposed so far is quite shallow in that problems around land deals are conceived as merely market and/or legal problems and less of socio-institutional problems of power asymmetry, exclusion and invisibilization. Also, practicability of most of the policy prescriptions suggested under the different guidelines is limited by their top-down or state-centric disposition where trust is placed on legislative innovation of states despite limitations in the latter to be an automatic determinant of social change (Moore, 1973; Bastiaensen et al., 2005). Besides, active involvement of states in the invisibilization of local claims and facilitation of land deals further undermines the creditability of a state-centered regulatory regime in dealing with problems of land deals.

As such, what is more pressing than a blueprint policy prescription and/or legal empowerment is the need for social empowerment - restructuring of the power balance in socio-institutional relations more in favour of local communities so that their claims become more visible in negotiating arenas. In particular, initiatives being taken by international de-

velopment agents to address challenges of large-scale land transfer need to transcend well beyond the designing of blueprint standards. Such initiatives should rather try to identify and redress underlying socio-institutional forces which always put the poor at the losing end of the bargain. This includes enhancing the voice/agency power of the local poor as

well as changing the existing socio-institutional power asymmetries, so that local communities can be more visible and their rules more applicable/influential in negotiations.

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