

Large Scale Land Grabbing : The Role of Multinational Firms.

A focus on the legal framework and its weaknesses



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A. The Growing Interest in Agricultural Land

During the years 2007 and 2008, more and more medias have echoed the obtaining of public and private interest over land rights in vast areas of land in particular Africa, Latin America and Eastern Europe.

The members of the NGO GRAIN are among the first to shed light on the proliferation of press articles on this subject. In October 2008 they revealed to the public a compilation of information from the media, more or less crossed with others obtained through contacts in many countries.¹

These takeovers of land have immediately been linked with the desire of some states to secure their food supply and/or energy supplies and with an expected increase of the solvent demand on the markets of agricultural food and non-food products (especially in the so-called emerging countries: In-

dia, China, Brazil). The global financial crisis, caused by the mortgage crisis in the United States and the attempt to "dilute" the mortgages into new financial investment products (bought worldwide), was also highlighted as decisive for the explosion of this phenomenon. Indeed, it has led many investors to change their appreciation of the risk assessment they incur to place funds in the agriculture sector. Thus, in the year 2008, investment banks, pension funds, portfolio managers, hedge funds have organized capital raising and investment funds specifically oriented towards the agricultural sector. Some have quickly reached several hundred million dollars.

1. Investments", "transfer" and "acquisition" of land rights, "grabbing" ... What words to describe the ongoing process?

Ongoing takeovers of existing land do not all have a productive purpose. In many cases, the land is not exploited after the land has changed hands. Motivations are often pure speculation with a view to subsequent advantageous transfer of the obtained land rights. So, very often the takeovers of land only imply a minimal financial contribution. This may

¹ "Seized: The 2008 landgrab for food and financial security" GRAIN, October 2008

be the case even when exploitation of resources takes place. In fact, this can consist of a "mining" exploitation – as in the case of large scale cutting of woods only requiring modest means – which in a short time depletes the surface of the allocated resource. Thus, it is not always about bringing capital and materials to create a productive and sustainable long-term activity. The term investment is therefore inappropriate when defining the entire ongoing processes in general terms.

Its use blurs all the more the perception of citizens as regards the interest of these transactions for the society as a whole, often associated with being a priori positive. Nevertheless, even when a transaction results from a productive investment thought to last, the word does not designate an undertaking, which actions automatically fall back most favorable to society as a whole. But an operation that seeks only to ensure the best return on the invested capital and thus increases only the resources of the holders of this capital.

The terms "acquisition" and "transfer" of land or even "assets" make believe that the takeover of land is under an agreement of all parties concerned (sealed through a monetary transaction). The review of the projects shows that this is very far from always being the case. It is sufficient to observe the situation in some African countries to see that the States, which are in general the ultimate owners of the land, allocate territories to foreign public or private interest without regard to the peoples settled there for generations (and whose living conditions are directly dependent on land use).

In Latin America, even though the transaction takes place between the prior user of the landowner and the buyer, we know that the economic power relations (and in many cases physical) are so unbalanced that they can force anyone even the strongest opponent to sell. Thus, it is also dishonest to discuss these processes through expressions which make people believe that these transactions took place in a general agreement.

These processes often lead to a transition from a complex organization of collective rights to different resources at the same territory², to a system of private and exclusive right, where the whole land use rights are held by an individual or a single firm (the phenomenon appropriation). However, it can also involve an accumulation of many land titles in

² At some collect fruit from the trees, others culture the fields during part of the year, and others have the right to graze their herd here the rest of the time, etc.

the same hands already corresponding to individual and exclusive rights, but until then held by many small owners and tenants. In both cases, we are witnessing a concentration of deprivation of very large areas of land, always in the hands of less and less people. This is what strictly corresponds to the definition of the word "grabbing". Therefore, this word is the one that seems most accurate to describe the current phenomena. Indeed, we will see that the benefits to the community are rare, even when the land has not been used before.

2. *What Is the Scope of Land Grabbing?*

A research team from the World Bank has recently attempted to characterize and quantify the scope of land grabbing. Given the difficulties opposed to the collection of the necessary information (by states as well as by private actors), and despite more than a year of work, these researchers had to rely on newspaper articles in order to evaluate the scope on global scale³. On the basis of the information that journalists have been able to access worldwide, they counted that more than 56 million hectares of land have been involved within a few months⁴. This is 30 times more than the average increase of cultivated areas observed in the world every year between 1990 and 2007.

3. *The Issues*

Today one billion individuals suffer from malnutrition, not because of lack of food production but because of the difficulty for them to purchase these food products due to the lack of a sufficient and regular income. These individuals are, for the vast majority of them, rural people. Their source of income is more or less directly related to the use they can make of natural resources and the valorization of these. The grabbing can only lead to a worsening of the living conditions of these individuals. This is obvious when it involves evictions; either poorly compensated of the prior users of the resources or not compensated at all, but also in the case where the new installed operation re-employs a certain number of them, and even when they operate on unused land. As the grabbing generalizes industrial production methods, where the corollaries are minimizing the "costs" of labor for the employer (the number of employees and their wages), and in

³ The research team has analyzed items collected on a daily basis and put on line by GRAIN on the blog farmlandgrab.org in the period October 2008 to August 2009.

⁴ This corresponds in fact only to half of the projects identified by the press over this period, this do not arrange the exact details of the size of the other reported projects.

trade regimes still more liberalized, small holders, (who cannot compete as soon as prices are made uniform) will be eliminated at a distance.

We must also consider the irreversibility of these destructive processes to rural societies (their cultures, knowledge and know-how) and for societies as a whole (towards which income-generating activity and social stability will this rural flight lead these rural populations?). But also for the environment, as objective of maximum short-term profitability – which fuels these processes – leads the "investors" to turn to production practices inconsistent with the objective of maintaining the ecological conditions of the existence of human life.

4. *Who Are the Main Grabbers?*

The cited above World Bank team estimates, based on solid media data and an accurate census effort in fifteen countries, that these takeovers are primarily the result of 'domestic' economic agents (the nationals of the country in which the concerned land or the enterprises are registered). But immediately after having put forward this assertion in their study report⁵, the researchers add that it is impossible to identify the origin of capital raised in each project of large-scale land, and hence the share of investment abroad.

They are here faced with the great complexity of their capital structure. In fact, this sometimes implies set-ups involving many owners of the different amount of capital (stakeholders). When the owners are companies, they are themselves owned by various economic/individual entities. Hence, the source of the capital is lost in the construction of multinational groups.

In the view of the observations made in 2008 about the value of new financial powers considerable for agricultural land, we can assume that the role of transnational capital in large scale land grabbing is important.

How do the holders of this capital proceed? Through operations which economists call "foreign investment": they create, in other countries, new enterprises, buy backs, in whole or part (for example by buyback of shares), the existing companies or even bring them additional capital to develop them. Those procedures evoke to a return to the definition of a private multinational group. A Multinational Firm (MNF) is a set of private economic enti-

ties linked by the relations of ownership that allow their coordination to serve the same group of interest (the holding of parts of capital in an enterprise confers an influence more or less important to its decisions). The definition of the MNF also relates to these sets of businesses the ones linked through contractual commitment to respect requirements relatively to modes of production and/or volumes and prices of goods, which they exchange with each other..

Each entity of the constituted multinational group is legally separate from the other (it is a person, morally, and legally registered in a given country). But this judicial segmentation is in no way an obstacle to a coherent economic system, which the entities constitute together, or to the profitability of the group for the holders of its capital, quite the reverse. The MNFs fully benefit from the advantages offered in any country as well as from the absence of legal responsibility of each of their components regarding the conduct of others, which allows this international juridical segmentation.

B. **What Are the Frameworks for Foreign Investment?**

We consider three sources of foreign investment rules.

1. *Investment Codes*

The "investment codes" are established by the States, they have value of national laws. They specify the general conditions that the State reserves to foreign investment. These codes list in particular the tax, social and environmental rules applying to the investments and the economic activities, which these give rise to.

In terms of taxation, investment codes provide consistently favorable treatment to investors. They exempt their economic activities of many kinds of levies, and reduce others. The references made to the labor law in these documents do often allow the use of the most precarious statutory forms of work defined by national legislation. The environment rules are usually symbolic.

2. *International Investment Agreements (or "International Treaties of Promotion and Protection of Foreign Investment")*

Investment agreements are agreements between States. They establish the conditions applying to the investment, in one or more of the States "party" to the agreement, that will be realized by private investors from this or these other States.

⁵ See "Rising Global Interest in Farmland, Can it yield Sustainable and Equitable Benefits?", World Bank, Sept. 2010.

Thousands of worldwide investment agreements (and sections dealing with investment in economic and trade agreements) have been made since the 80ties. These texts arrange systematically important safeguards to achieve returns on investment. We can mention, for example, three clauses recurring in these international agreements in order to illustrate the guarantees they provide to investors:

- The clause called "the most favored nation" entails that a foreign investor cannot be subject to conditions less favorable than the conditions already granted by the host state to investors from other countries.

- The clause called "national treatment" guarantees that the foreign investor will not be subject to the same or better conditions than those granted to domestic investors.

- The clause on the protection of the investor against "expropriation without compensation" ensures that the investor in case of any possible future expropriation will be "duly" compensated by the host state of the investment.

The interpretation of this clause is commonly far beyond what the traditional meaning of the word expropriation may entail. Thus, this clause has led investors to obtain compensation in the case of strikes or demonstrations that have hurt their economic activity...

In fact, according to this rule, any event affecting negatively the return on the investment accomplished by the foreign investor can give rise to compensation even though this event is not within direct government action (even though it is not, for example, a withdrawal of the right to mining or land).

In addition, all of these provisions have a constant effect beyond the legal, regulatory and policy changes likely to happen later in the host country of the investment (after the decisions that a new government or a state official could take).

Often these international agreements identify the competent arbitration body to resolve the dispute, which an investor could oppose to the State in the country where the investment subject of dispute is located. It is frequently the International Centre for Settlement of Investment Disputes (ICSID) that is maintained by the parties.

3. *The Investment Contract*

This is the document that specifies the conditions for the conduct of a specific foreign investment, as well as the specific safeguards that are granted. It is

signed by the State or the public body competent to assign the investment and/or exploitation rights⁶, and by the moral person - foreign, private (business) or public (para-public enterprises, development agencies ...) - conducting the "investment".

In the case of investments involving taking over control of large-scale land, the investment contract may specify, for example, the surface of land involved and the nature of rights land, forest and / or mining that are allocated: their duration (a few years, 99 years, definitive..) their form (leasehold, long lease (*emphyteose*), concession, ownership ...), potential constraints affixed to the use of the resources, to which these rights apply.

When one is required by the host country, the consideration for the granting of exploitation rights may also be indicated: The amount of rent or purchase value of the land, or the nature of the infrastructure that the investor sometimes commit himself to construct in exchange for exploitations rights (road, port, buildings ...).

The rights granted to the investor in terms of access to other production factors can be mentioned (access rights to water, additional reductions or tax exemptions that can benefit the imports of materials and immediately necessary consumer goods..), as well as the rights to the flow of goods and capital from the production process (exemption or reduction of tariffs on goods and profit exports).

The investment contract may specify the international investment agreement constituting the general reference applicable to the concerned investment, and whether this agreement does specify the juridical or arbitration instance competent to resolve possible future disputes. In general, it is not instances related to the host country's state apparatus.

In fact, one observes a great heterogeneity in formalization of investment contracts. Some contain only a few pages and are evasive on points which are essential for the 'host'. In other cases, when the public authority is informed and when its action serving the public interest is more effective, the contract specifically regulates the activity of the investor. It may even arrange a profit sharing from the exploitation of natural resources to which it provides access.

These different sources of law applicable to the investment therefore largely determine the conditions

⁶ It may be public agencies or even local public authorities (state member of a federation of states, Province...)

of the profitability of foreign investments: the price of the rights of land use, mines and forest, tax deductions on economic activity (on income, on capital flows and goods, on exploited resources), rules on working conditions (security) and on work (wages, weekly working time, employment stability...), and environmental rules.

In most cases, countries affected by the process of land grabbing accept that these rules are highly favorable to investors, very often at the expense of the national community as a whole, as well as its environment. The researchers from the World Bank, like many other observers and analysts, clearly identify the State's economical, social and environmental race to the bottom in order to attract the investments as a threat⁷.

4. *The Right to Investment is a "Hard" Law*

How is the "international right to investment" secured?

Investments are secured through awards handed down by arbitral international tribunals. The International Centre for Settlement of Investment Disputes (ICSID) is one of them. Many international investment agreements refer to this as the competent structure in order to resolve such conflicts. It turns out that its sentences are mostly in favor of the interests of investors. This is no wonder that the "values" used by the arbitrator as benchmarks to guide his sentence (the content of the investment agreements and the investment contracts) only list the benefits promised by the host country.

This arbitrator is a very reliable guard of compliance with this investment law.

Based on the World Bank Group, which is an international donor fund for many countries dependent on international financial assistance, the ICSID easily obtains the payment of substantial compensation for investors filing complaints for breaches of the commitments of host countries.

If a US company requests Costa Rica to pay compensation for the part of territory, that it has taken back to create an ecological reserve, the ICSID will get Costa Rica to pay the equivalent amount deemed to its shortfall over the entire period of the procedure, that is around ten years and tens millions of dollars⁸.

⁷ The World Bank does not so far conclude so far that drastic management changes must be made (see below).

⁸ ICSID arbitration award of 17 February 2000, *Compania del Desarrollo Santa Elena / Republic of Costa Rica*. Comment Emmanuel Gaillard in the *Journal of International Law*, 2001, Number 1, page 150 and

5. *What About the Corporate Responsibility in terms of Fundamental Rights?*

The MNF (all firms belonging to a such group) has no legal existence for any State. It does not have legal international personality and is therefore not subject to international investment law (which concerns only the States and the "investors", i.e. companies with legal personality registered in any country) or international human rights law that only concerns states.

Thus, the groups of multinationals are not more than the firms that constitute them and taken individually, legally responsible to international law of human rights. This means, for example, to the right to food, to the right of access to natural resources, to the right to enjoy decent and proper housing... all rights stipulated by the major international covenants (like the Covenant on Economic Social and Cultural Rights for example).

By contrast, the national legal frameworks can define a certain legal responsibility for the firm, depending on the countries, with regards to a greater or lesser number of rules and rights. A firm subsidiary of multinational group providing, for instance, the exploitation of farmland in a given country is therefore, in principle, required to meet this responsibility.

But in countries most affected by land grabbing, there is often a great lack of judicial systems due to lack of budgetary resources, as well as the weakness of means for potential complainants. Corruption is, from one country to another, more or less present. Finally, one must keep in mind the fact that the investments usually have the full consent of the political power. Consequently, the lawsuits are complicated and the judicial decisions defaulting.

Does the legal frameworks in developed countries, where a number of "mother companies" of the FMN appears, offer appeals for people, whose rights have been violated directly by subsidiary firms or for their nationals who wish to complain on behalf of these? Although some devices exist in this sense in some countries, they are very marginal and limited in scope. Moreover, one could say that most of the countries where foreign investments come from widely arrange the legal irresponsibility of the mother companies under actions of their subsidiaries abroad.

Thus, such fundamental rights stipulated in the international covenants see their compliance by enti-

following.

ties such as the MNF, whose impacts on workers, human societies and the environment are considerable, not guaranteed by any instance of coercive power with a reward power or similarly to impose the payment of compensation. The values affecting the most fundamental aspects of human existence are "soft" law, while those defining the liberty and security of private investment are "hard" law.

C. The Proposed Guidelines Regarding Multinationals in the Fight Against Large-scale Land Grabbing

The diverse guidelines today proposed to respond to these current phenomena are characterized by a different relation to the idea of sovereignty.

For some, (including the World Bank, the Organization for Economic Cooperation and Development and numerous investors), private groups should not be assigned to obligations others than the commitments prescribed to them in agreements and investment contracts and rules established by national laws.

According to this approach, outside these frameworks, the actions of firms should only be inflected due to their own goodwill. Here one must rely on the voluntary "codes of conduct" to which they might choose to subscribe⁹. The vigilance of the public is, according to this approach, the best guarantee of improved investor behavior. The "reputational risk" is considered here as an unstoppable universal controller. Most of the subcontractors, while being anonymous, do yet not have much to fear. The renowned mother companies know how to convince the opinion that they can not monitor all the companies which they deal with... It can be said about this approach, considering the results of the actual framework, that it is intended to allow the multinational firm and the investor to exercise real sovereignty beyond the borders!

However, for others, it is absurd and scandalous that the law and the guarantees of investment belong to hard and compulsory justice (to which States can not evade), when the practice of fundamental human rights is not effectively protected. The indignation caused by this situation leads to proposals based on two different assessments of sovereignty. For some, it is only about maintaining national sovereignty. States, the national political

power, must according to this vision regain control over the economic powers and impose themselves against the influence of external political powers. The political civic action and the social movements must obtain a national collective will to impose on private economic actors and other States. This vision maintains the ideal of absolute subtraction of the nation to any external condition. Moreover, this ideal seems not, in the minds of its proponents, to be incompatible with the possibility for all countries to exercise their full sovereignty at the same time.

For others, the "sovereignty" is based on a part of an illusion. It neglects several insurmountable truths, to start with the unequal distribution of natural resources among peoples. The analysis of the current situation and the global historical evolution shows that the full exercise of national sovereignty by all States at the same time is impossible. Because, without a truly compulsory right at this scale, States will never be equal: some countries are more powerful than others and have the economic, technological, and military power to determine the choice of the latter, in particular concerning to the opening of access to their natural resources and investment guarantees. From this point of view, the principle of national sovereignty appears as an obstacle to the exit of a world "regulated" by the law of the strongest. Since compliance with this principle prohibits the imposition of a judge, who can impose its decision on a State.

From the perspective of the association AGTER and the working groups established around it (composed of representatives of social movements, government institutions, researchers)¹⁰, the issues attached to the use made of natural resources in a given place concern, to some respects, humanity. This dimension of common ownership of natural resources and land justifies the conferral to a minimum of rules related to the most essential issues the value of common non-derogable imperatives, and then to give to international and global judicial bodies the power to restrain States and businesses. This proposal seeks to enforce some rules for basic common life at global level and not to establish a "world government". Such a global government would always betray the diversity of societies and individuals because of the inextricable problem of representation it would raise. Therefore, it is certainly the construction of a subsidiarity at the world scale which may allow building commonality

⁹ Companies defining themselves, others presents more "collective" initiatives: the World Bank is currently promoting the "Principles for Responsible Agricultural Investment", the OECD revises the "OECD guidelines for multinational firms"

¹⁰ You can find a number of papers produced or assembled by the association at www.agter.asso.fr.

while ensuring greater human diversity. This would permit to articulate all the political spaces at different scale, letting the people of the higher level only having the power given to them through democratic debate at the lower levels.

Subsequently, these non-derogable rules can find other safeguards at all levels, including through taxation. The frameworks to be created must definitely result in that the exploitation of natural resources, for the sole account of a few at the expense of the local and the global community, turns out to be more expensive than the income earned by those who want to exploit them this way. To guarantee a common and sustainable benefit of natural resource implies making such limits to the grabbing.

It is certain that the concrete changes that the current situation urgently calls for will not take place without a wider involvement of civil society around the world in the field of policy to claim them and to reverse the established balance of power. Debating the possible direction for change, the horizons to aim for, is a part of this engagement. It is essential to consider that others modes of operations are possible, to find the most suitable solutions, and to revive the meanings of policy action by the desire to concretize these. Bringing more citizens into this debate will make possible the emergence of a collective will endowed with the power to realize the necessary changes.

For further reading

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