



## **Tainted Lands:**

### **Land, Corruption, and Human Rights**

The International Corporate Accountability Roundtable (ICAR) is pleased to announce the launch of the “Land, Corruption, and Human Rights Project.” This Project seeks to articulate regulatory measures and enhanced investor guidance for land deals, to ensure that land is acquired or leased in ways that respect human rights protections and without the taint of corruption.

#### *Context*

We witnessed in recent years an unprecedented rise in the sales or leases of large areas of farmland, particularly in developing countries. The regions concerned are those where land suitable for cultivation and water is abundant, workforce cheap, and access to the global markets relatively easy. The investors are either the local elites or, increasingly, foreign investment funds or agribusiness corporations. But they also include governments of cash-rich but resource-poor countries seeking to outsource food production in order to ensure a stable and reliable supply of food for their populations.<sup>i</sup>

Of course, the recent wave of large-scale acquisitions or leases of farmland is not entirely unprecedented. But the speed at which the phenomenon has been developing recently and its overall scope are. In addition, the significance of the current tide is different from what was seen in the past: In many cases, rather than investing in countries that present certain comparative advantages in agriculture in order to supply the international markets at the most competitive conditions, the buyers or the lessees of land seek to ensure access to a stable supply of agricultural commodities, in order to circumvent the international markets which have become increasingly unreliable. A global market for land and water rights is thus rapidly taking shape.<sup>ii</sup>

The main problem, as many commentators see it, is that in many of the regions targeted by these new investments, the rights of land users are not properly secured. As a result of systems of tenure inherited from colonial rule, much of the land in rural areas is formally owned by the government, and the land users have no property titles on the land they cultivate. This situation creates legal uncertainty. It also implies that land users will not have access to legal remedies, and will not receive adequate compensation, if they are evicted from the land they cultivate, for instance, after the government has agreed that foreign investors take possession of the land.

The answer to the threat of “land grabs,” it would seem then to follow, is to strengthen property rights or to transform informal use rights into formalized property rights. Titling schemes could be implemented, in

order to protect land users from the risks of unjustified eviction or eviction without a fair compensation. Titling their property would allow land users to decide at which conditions they want to sell, and to whom; and it would ensure that, if their land is taken by the government for reasons of public interest, they will have access to courts in order to challenge the conditions under which this expropriation has taken place.

We now understand that such an approach underestimates the challenges associated with the commodification of land rights. One major problem -- though largely underestimated and to a certain extent taboo in international discussions -- is that of corruption. Corruption may be involved at multiple levels. First, the investor (whether local or foreign) may be tempted to bribe officials or community leaders in charge of negotiating land, in order to obtain favorable conditions or to be allocated land in violation of the rights of the local communities -- the land users who depend on access to land for their livelihoods. Second, corruption may affect the titling scheme itself, when the elites (whether urban elites or large rural landowners) manage to capture the titling process at the expense of actual land users (typically, small-scale farmers relying on subsistence agriculture) by illegal means including bribery. Third, the investor may seek to corrupt remedial schemes or rely on weak rule of law to block access to remedy for rights violations.<sup>iii</sup>

Corruption can increase the vulnerability of individuals to abuse, including displacement without adequate compensation or access to basic necessities like food and water,<sup>iv</sup> and the targeting and killing of land defenders.<sup>v</sup>

Corruption has been a concern of the international community since the mid-1990s. The Inter-American Convention against Corruption was adopted in Caracas on 29 March 1996; it entered into force the following year and has now been widely ratified across the Americas. The OAS Member States which ratified the Convention have committed to make it a criminal offense to bribe any government official or any person who performs public functions, by promising advantages "in exchange for any act or omission in the performance of his public functions"; or, for any public official or person performing any public function, to solicit or accept such advantage. In 1997, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). This instrument is now binding on 34 OECD member countries and seven non-member countries - Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa. The States have committed to make it a criminal offense to offer or promise rewards to a foreign public official, "in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business" (art. 1(1)). A few years later, the African Union Convention on Preventing and Combating Corruption was adopted -- it was signed in Maputo on 11 July 2003 -- with the explicit intention to strengthen the "mechanisms required to prevent, detect, punish and eradicate corruption and related offenses in the public and private sectors," and to improve cooperation between the States parties in this sector, with a view to "promoting socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights" (art. 2). The United Nations Convention against Corruption (UNCAC) was adopted soon thereafter, on 9 December 2003: it entered into force on 14 December 2005, and has now been ratified by 174 countries across the globe.

However, serious questions remain as to the willingness and ability of States to comply with these

expectations. Large-scale land acquisitions or leases (or the accumulation of transfers of smaller plots of land resulting in comparable large-scale investments) are in fact a new version of the exploitation of an extractive resource, resulting in largely the same set of incentives. As we know, the exploitation of mineral resources typically takes the form of large-scale projects in which a small number of individuals control vast amounts of wealth. The capture of the benefits can therefore be highly unequal, unless affirmative measures are taken to ensure that they will be fairly distributed across a large number of individuals. Moreover, natural resources are non-renewable: they are “assets in the ground” whose value depends on technology, market prices, and political risk. The exploitation of mineral resources thus should be seen as the consumption of capital, rather than only as a stream of incomes.<sup>vi</sup> The temptation is thus huge for those in power both to exploit those resources in order to create as much wealth as possible within the shortest possible time (for they do not know for how long they will stay in power), and to sell off the right to exploit resources to the highest bidder (in order to cash in immediately the equivalent of all future income streams that could result from exploiting the resource). As a result, the leaders holding power may be reluctant to cede it to rivals (for instance, by organizing fair and transparent elections and accepting their results when they are voted out of office), simply because the exploitation of natural resources represents such an opportunity for fast personal enrichment. Together, these factors contribute to what came to be known as the “resource curse”: the paradox of countries that suffer from weak governance and poor human development, not only despite of, but *because of*, having a subsoil rich in natural resources.<sup>vii</sup>

In addition to recommendations addressed to States, private investors are now facing a new set of expectations, some of which are also related to the question of corruption in land deals. The Guiding Principles on Business and Human Rights approved by the Human Rights Council at its seventeenth session on 16 June 2011<sup>viii</sup> provide corporations should “act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.”<sup>ix</sup> This implies that they set up a “human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.”<sup>x</sup> Thus, investors are expected to proactively seek information about whether or not the land they intend to buy or lease was legally acquired by the seller, and is untainted by violations of the rights of the local communities.<sup>xi</sup>

In the specific area of agricultural investment, the Principles for Responsible Investment in Agriculture and Food Systems (RAI Principles) adopted by the 41st session of the Committee on World Food Security on 15 October 2014 aim at clarifying the responsibilities of private investors in land and agrifood systems. They include a reference to the duty of responsible investors to “abide by national legislation and public policies, and incorporate inclusive and transparent governance structures, processes, decision-making, and grievance mechanisms, accessible to all,” through, inter alia, “respecting the rule and application of law, free of corruption.”<sup>xii</sup> In defining the Roles and Responsibilities of Stakeholders, the RAI Principles refer to due diligence: “Business Enterprises involved in agriculture and food systems should apply the Principles with a focus on mitigating and managing risks to maximize positive and avoid negative impacts on food security and nutrition, relevant to their context and circumstances. Business enterprises have a responsibility to comply with national laws and regulations and any applicable international law, and act with due diligence to avoid infringing on human rights.”<sup>xiii</sup>

## *Project Description*

Taking into account this background, the Project will aim to identify (i) the conditions under which corruption by the investor itself may have to be treated as a criminal offense under relevant international instruments (adopted within regional organizations or the United Nations); (ii) the scope of the due diligence duty of the investor to inquire about the conditions under which the land that it intends to buy or to lease was acquired by the direct seller, and how such due diligence obligation may be effectively enforced; and (iii) the best practices that would effectively prevent and address corruption in land deals.

**This project will examine the question of “tainted lands”: land that has been obtained by corrupt means by the investor, whether that investor itself has bribed public officials or community leaders in charge of allocating land on behalf of the community, or whether it has not ensured that the land was acquired by the seller through means that are legal and transparent, i.e., untainted by corruption. It will include a discussion of corruption of judicial officials, insofar as such corruption may affect access to remedies for victims of illicit land acquisitions.**

We have commissioned Professor Olivier De Schutter to formulate regulatory measures and enhanced investor guidance for land deals, to ensure that land is acquired or leased in ways that respect human rights protections and without the taint of corruption. Professor De Schutter will consider what opportunities are available and feasible, and will discuss them in the context of potential arguments against their implementation. Professor De Schutter will conduct independent research and online and in-field consultations as he develops his report and recommendations.

## *Project Timeline*

- April 2015 – Professor De Schutter begins research;
- 29 May 2015 – Consultation and meeting held in Washington, D.C.;
- 2 July 2015 – Consultation and meeting held in London;
- 15 July 2015 – Consultation and meeting held in Tanzania;
- Summer 2015 – Online consultations;
- November 2015 – Report and Recommendations launched;
- December 2015 – Advocacy strategies implemented around Report recommendations.

## *Expert Biography*

### ***Professor Olivier De Schutter***

Professor Olivier De Schutter served as the UN Special Rapporteur on the Right to Food from May 2008 to May 2014 and has now been elected a member of the UN Committee on Economic, Social and Cultural Rights (2015-2018). He currently teaches at the University of Louvain and at Sciences Po (Paris). Since 2004, and until his appointment as the UN Special Rapporteur on the Right to Food, he was the General Secretary of the International Federation of Human Rights (FIDH) on the issue of globalization and human rights. Prof. De Schutter’s most recent book is *International Human Rights Law* (Cambridge Univ. Press, 2nd ed. 2014). He received his Ph.D. from the University of Louvain and LL.M from Harvard Law School.

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<sup>i</sup> S. Haralambous, H. Liversage and M. Romano (2009). *The growing demand for land: Risks and opportunities for smallholder farmers*. IFAD Discussion Paper, International Fund for Agricultural Development; L. Cotula, S. Vermeulen, R. Leonard and J. Keeley (2009). *Land grab or development opportunity? Agricultural investment and international land deals in Africa*. International Institute for Environment and Development (IIED), Food and Agriculture Organization of the United Nations (FAO) and International Fund for Agricultural Development (IFAD); K. Deininger, D. Byerlee, et al. (2010). *Rising global interest in farmland: Can it yield sustainable and equitable benefits?*. World Bank, Washington, D.C.; M. Kugelman and S.L. Levenstein, eds. (2009). *Land grab? The race for the world's farmland*. Woodrow Wilson International Center for Scholars, Washington, D.C.; Center for Human Rights and Global Justice (2010). *Foreign land deals and human rights: case studies on agricultural and biofuel investment*. New York University School of Law, New York.

<sup>ii</sup> H. Mann and C. Smaller (2010). *Foreign land purchases for agriculture: What impact on sustainable development?*. Sustainable Development Innovation Briefs, Issue 8.

<sup>iii</sup> M. MacInnes, Global Witness, *Corruption and Large-Scale Land Acquisitions: An Analysis of the Role High Level Corruption Plays in Enabling Elite Capture of Land 3-4* (2012), available at <http://www.cornell-landproject.org/download/landgrab2012papers/macinnes.pdf>.

<sup>iv</sup> See, e.g., Oxfam, *'Our Land, Our Lives': Time out on the global land rush* (2012), available at [http://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en\\_1.pdf](http://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf).

<sup>v</sup> Observatory for the Protection of Human Rights Defenders, *"We are not afraid" Land rights defenders: attacked for confronting unbridled development* (2014), available at [https://www.fidh.org/IMG/pdf/obs\\_2014-uk-web2.pdf](https://www.fidh.org/IMG/pdf/obs_2014-uk-web2.pdf).

<sup>vi</sup> Humphreys, M., J. Sachs, and J. Stiglitz, eds., *Escaping the Resource Curse* (New York: Columbia University Press, 2007: 8).

<sup>vii</sup> Collier, P. and A. Hoeffler, "On economic causes of civil war," 50 *Oxford Economic Papers* 563 (1998), pp. 563--573; Sachs, J.D. and A.M. Warner, "Natural resource abundance and economic growth," NBER Working Paper no. 5398 (originally 1995, revised 1997, 1999); Van der Ploeg, F. "Challenges and opportunities for resource rich economies," CEPR Discussion Paper no. 5688 (2006).

<sup>viii</sup> A/HRC/17/4.

<sup>ix</sup> A/HRC/17/31, para. 6.

<sup>x</sup> *Ibid.*, Principle 15. Principles 17-21 elaborate further on the content of the due diligence requirement. For a review of due diligence requirements relating to human rights, see De Schutter, O. et al., ICAR, *Human Rights Due Diligence: The Role Of States* (Dec. 2012), available at <http://accountabilityroundtable.org/analysis/hrdd/>.

<sup>xi</sup> The OECD Guidelines on Multinational Enterprises, following their revision in 2011 to insert a human rights chapter (chapter IV), also include due diligence in the definition of the responsibility of business enterprises to respect human rights.

<sup>xii</sup> Principle 9, para. 29, (i).

<sup>xiii</sup> Para. 50.