

Private Law and Responsible Agricultural Investment *Select Legal Issues for Consideration by UNIDROIT*

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I. – INTRODUCTION

At its 88th session in 2009, the UNIDROIT Governing Council considered possibilities for new work in private law to promote social and economic development, and specifically agricultural investment to support global food security.

As we know, this investment is absolutely essential. As a recent Chicago Council report notes:

“Recent estimates by the FAO call for an average annual net investment of \$83 billion to support expanded agricultural output in developing countries. Because funding of this magnitude does not appear feasible through public finance and overseas development assistance, both donor governments and governments in developing countries have focused more on leveraging investments from private companies. The for-profit sector is now a critical player in the shift from subsistence agricultural economies, where poverty and uncertainty perpetuate hunger, toward well-functioning commercial systems, where farmers can afford needed inputs and reach cash markets. Private-sector engagement is also essential for “scaling up” government-financed development projects, and for sustaining these projects after government funding is reduced or withdrawn.¹

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¹ C. HEBEBRAND, *Leveraging Private Sector Investment in Developing Country Agrifood Systems*, Policy Paper Series, International Food and Agricultural Trade Policy Council (IPC) (May 2011), <<http://www.thechicagocouncil.org/UserFiles/File/GlobalAgDevelopment/Report/CCGA%20GADI%20Private%20Sector%20Policy%20Paper%20FINAL%20VERSION.pdf>> .

As the Food and Agriculture Organization (FAO) Investment Center points out:

“the share of Official Development Assistance (ODA) to agriculture has dropped significantly, falling from a peak of 17 percent in 1979, the height of the Green Revolution, to a low of 3.5 percent in 2004. It also declined in absolute terms: from USD 8 billion in 1984 to USD 3.5 billion in 2005. In 2004, agriculture-based economies still applied only 4 percent of their public spending to the sector. Far less than the 10 percent Asia spent during its growth spurt of the 1980s ... however recent years have seen improvements. Official Development Assistance to agriculture rose to 5.5 percent in 2007.”

Although ODA and investments by national governments are increasing, there is agreement that more private sector investment is needed. As the 2009 World Investment Report on Transnational Corporations and Agriculture issued by the United Nations Conference on Trade and Development (UNCTAD) highlights:

“FDI flows in agricultural production tripled to \$3 billion annually between 1990 and 2007, driven by the food import needs of populous emerging markets, growing demand for biofuel production, and land and water shortages in some developing home countries. These flows remain small compared to the overall size of world FDI, but in many low-income countries agriculture accounts for a relatively large share of FDI inflows, and the latter are therefore significant in capital formation in the industry. Moreover, FDI in the entire agricultural value chain is much higher, with food and beverages alone representing more than \$40 billion of annual flows.²”

Private sector investment will be particularly important in Africa, where agricultural productivity is significantly lower than in other regions, so the potential gains that investment could bring to Africa and Africa’s farmers are substantial.

Parallel to this, UNIDROIT and other international organizations have taken note of the fact that, on the one hand, private investment must be increased if we are to reach food security goals, and on the other hand, that many international large-scale private investments in agriculture are being seen as “land grabbing,” or generally as not resulting in desirable benefits. The UNIDROIT colloquium is, in part, a response to persistent, largely negative

² See <http://www.unctad.org/en/docs/wir2009fas_en.pdf>.

attention from the media, CSOs, and donor agencies to the issue of large-scale land acquisitions.

I believe there are a number of ways in which UNIDROIT could have a positive impact on this problem, including considering developing legislative guidance for law and policy-makers to improve the domestic legal framework supporting private property rights for individuals, communities and legal persons, and guidance supporting transparent investment to enhance agricultural productivity.

In this paper, I should like to (1) talk about the nature of the problem regarding large-scale agricultural investment as reported by the media and civil society organizations, and (2) propose suggestions where UNIDROIT might effectively engage in this area.

II. – WHAT IS THE NATURE OF THE PROBLEM?

1. What do we know about these investments?

There is increasing interest in large-scale land acquisitions for a variety of purposes, including commercial farming, biofuel production, mining, forestry, and conservation. The data on these large-scale investments is, at best, confusing and, at worst, unreliable and contested. Some examples:

(1) The International Food Policy Research Institute (IFPRI) has suggested that between 15 and 20 million hectares have changed hands since 2006.

(2) The International Land Coalition (ILC) is also tracking the phenomenon through its “Commercial Pressures on Land” project and has identified over 1,200 arrangements to transfer land to investors in 96 countries.

(3) The World Bank conservatively reported in 2011 that as much as 56 million hectares around the world had been acquired for large-scale investment.

(4) Oxfam reported in 2011 that “as many as 227 million hectares of land – an area the size of Western Europe – has been sold or leased since 2001, mostly to international investors. The bulk of these land acquisitions has taken place over the past two years, according to on-going research by the Land Matrix Partnership.”³

³ See <<http://www.oxfam.org/sites/www.oxfam.org/files/bp151-land-power-rights-acquisitions-220911-summ-en.pdf>>.

(5) Recently, in October 2011, at the Committee for Food Security's annual plenary meeting, Civil Society Organizations (CSOs) tracking this issue reported that the figure could be as high as 250 million hectares of land.

Most of these acquisitions are in Africa, but many are also reported in Asia (Indonesia) and South America (e.g., Guatemala, Honduras). Frequently in the reporting it is unclear as to whether or not these land "acquisitions" are confirmed or are in process, or simple statements of intent to acquire land. It is also difficult to separate those which are legal (regardless of whether they are sound investments) from the extra-legal.

No matter whether it is 20 or 50 million hectares, the important point is that around the world contracts to lease or buy enormous tracts of land are being negotiated. There is a measurable trend in place that potentially impacts millions of people.

2. What is driving this process?

There are at least five different forces fuelling this trend:

(1) Global financial stress, particularly in equity markets, over the last few years is leading to shifts in investments to "hard assets" in land, forests, mineral assets, etc.

(2) Food price volatility and a desire to (a) improve food security and (b) capture profits associated with higher food prices.

(3) Expansion of biofuel production (according to the FAO, biofuels accounted for the fastest-growing market for agricultural products around the world and is a billion-dollar business; in 2010 a Friend of the Earth report suggested that there may be as much as 5 million hectares of land acquired or proposed for acquisition by large firms in Africa to produce bio-fuels).

(4) Environmental and climate changes, and programs to address these such as REDD Plus, are leading countries to acquire large tracts of forest land to comply with international obligations to reduce or offset emissions with carbon-sequestering forests.

(5) Expansion of emerging markets (estimates suggest that 70% of global economic growth is coming from emerging markets, and 40% of that from India and China), with concomitant needs for natural resources and food production.

3. What are some of the impacts of these acquisitions and who are the most affected by them?

(1) Loss of land rights and displacement of some to more marginal land or into growing cities – exacerbating problems of food insecurity in some countries (e.g., in Sudan, Madagascar, Mozambique, Ethiopia, to name but a few).

(2) In some cases, if land is used to produce items other than food – such as biofuel – this may increase food prices. For example, we know that in the United States every fourth row of corn planted in 2011 was destined for ethanol production rather than for livestock feed or for human consumption – this cut in supply translates into higher prices for consumers if not offset by increases by other producers. The FAO has estimated that the amount of the world’s arable land devoted to biofuel production could rise from 1% today to 3% by 2030. Similarly, when land is put “off limits” for food production and used instead for conservation or forestry, this also limits opportunities to grow more.

(3) The most affected are usually women and women-headed households and the most marginal groups, including indigenous people and pastoral groups.

(4) The World Bank looked at the impact of these issues in its 2011 report “Rising Global Interest in Farmland” and concluded:

(a) Some investors are public-sector but in many cases investors come from the private sector – agribusinesses and institutional investors play important roles.

1. Domestic investors are typically more prevalent than foreign investors
2. Projects are smaller than initially reported in the media
3. New employment and physical investment were often below expectations
4. Countries with weak formal recognition of rural land tenure tended to attract more investment interest (some of the most questionable investments have taken place where governance is weakest)
5. Farm activities were initiated in only 21% of announced projects.

4. What are some of the responses to these impacts?

To date, multilateral institutions, the private sector and civil society organizations have responded to these challenges. There are five notable accords:

(1) Voluntary Guidelines (VG) for Tenure of Land Fisheries and Forests (CFS-led negotiated process to adopt guidelines on best practice), and parallel to the Voluntary Guidelines, the

(2) Responsible Agricultural Investment (RAI), led by the World Bank, FAO, UNCTAD and the International Fund for Agricultural Development (IFAD), creating investment principles and promoting best practice so that the interests of both investors and local communities are protected.

Both the VGs and the RAI have a strong focus on human rights, and there is an emerging trend in both that is anti-investment. This is unfortunate given the need for private investment. Nevertheless, the Voluntary Guidelines still include solid recommendations to guide the development of public policy supporting property rights. The private sector is also undertaking efforts to improve practice related to agricultural investment. For example,

(3) The World Economic Forum (WEF)'s "New Vision for Agriculture" is an attempt to develop sustainable public-private partnerships that will improve productivity and access to markets, reduce rural poverty, and address problems of food insecurity. This effort is focused on getting better inputs to farmers, improving value chains, increasing access to technology and to credit. Although the WEF recognizes the need for a legal and regulatory framework that is non-arbitrary and transparent, the WEF is not focused on legal or regulatory reform.⁴

(4) Principles for Responsible Investment in Farmland, also known as the Farmland Principles. A group of institutional investors currently representing US\$1.3 trillion in assets have signed on to the Principles for Responsible Investment in Farmland to improve sustainability, transparency and accountability of investments in farmland.

Moreover, CSOs have also worked to address these concerns.

(5) Recently more than 600 CSOs signed the "Dakar Appeal Against the Land Grab" to encourage national governments to prevent large-scale land acquisitions.

⁴ Accessible at <http://www3.weforum.org/docs/IP/AM11/CO/WEF_AgricultureNewVision_Roadmap_2011.pdf>.

III. –IN WHAT WAYS MIGHT UNIDROIT HELP TO ADDRESS THIS CHALLENGE?

Although there are a number of actors/donors working in this area, there remain unaddressed needs for legal guidance – particularly surrounding private-sector contracting and especially the protection of private property rights – whether held by individuals, by communities, or by legal persons. It is in this area – addressing concerns in the existing legal framework – that UNIDROIT might make the most valuable contribution.

In my view, there are four areas that UNIDROIT might eventually address. These are:

(1) providing legislative guidance to help improve contracting between smallholder farmers and investors by focusing on improving domestic contract law norms and principles to reduce asymmetries between these parties;

(2) providing guidance to States to support effective and mutually beneficial collaborative contracting between smallholder farmers and investors, which may involve providing guidance to improve smallholders' capacity to contract;

(3) providing guidance to States on how best to improve the interface between the customary land laws and formal property laws. This is a critical concern and an area in which UNIDROIT could make a particularly important contribution;

(4) providing guidance to address weaknesses in formal-sector leasehold laws. In particular, States should be encouraged to clarify, record, and otherwise strengthen the rights of private individuals and communities in the developing world to lease the land (or other resources to which they have legitimate rights) to investors of their choosing.

First, a bit of background might be useful. Although it is widely recognized that having secure rights to property is important to promote stability, predictability, and economic growth, in many developing countries these rights are insecure. Why is this? In part, because of the complex nature of the legal framework in developing countries, especially those in sub-Saharan Africa; in part, because governments lack capacity to build effective land governance systems; and in part, because vested interests may prefer property insecurity to property security.

So, there is a need to address two sets of problems related to the property law framework in developing countries:

(1) There is a need to improve land governance systems and institutions, making these more transparent and accountable, more accessible to users.

This is what the CFS-led Voluntary Guidelines for Tenure of Land, Fisheries and Forests are designed to do.

(2) There is a need to clarify and strengthen private rights to property.

Private property rights can be held by individuals or legal persons but they may also be held by communities. Communal land in the developing world may be thought of as private property much as apartment cooperatives are private property. And communal land is subject to property rules and principles of customary law – a body of private law. Ensuring that communities have clearer, stronger rights to use and transfer their land, other natural resources will reduce asymmetries in contracting, create positive incentives to invest in productivity enhancing inputs, and will protect families and communities from illegal or improper displacements/evictions.

However, because communal land is governed by principles of customary law, not by formal law, there is a critical disjuncture in the legal environment. Protections that the formal law might offer are often not available under customary systems; and *vice versa*, rights that the customary system provides may not be recognized by the formal system. This contributes to problems of insecurity, which in turn reduces incentives to invest by large and small firms. In addition, this insecurity, or ambiguity, makes it very difficult for groups or individuals in the customary system to contract with potential outside investors. Governments have largely usurped these opportunities. A case in point is Africa, a region where investment in agriculture is particularly needed. Here, most large-scale land acquisitions take the form of long-term leases. Parties contract with the public sector because governments own or exert control over much of the land – including communal lands

These leases may not involve participatory discussions with local communities, may lack clauses to benefit locals or may not be enforceable by local people affected by these arrangements. There is, therefore, a strong need to improve the transparency of such contracts, perhaps to improve the capacity of government agencies to negotiate more favorable terms for use of land; and to improve the manner in which communities participate in and benefit from these contracts.

While it may be beyond the scope of UNIDROIT's charge to address government contracting, UNIDROIT might focus on the need to encourage/require more equitable contracts between investors and smallholder farmers or other local community members. The UNIDROIT Principles of International Commercial Contracts should guide agricultural investments as they guide other international contacts; however, as the contract parties are likely to have

very different levels of bargaining power, UNIDROIT might consider how best to address disparities/asymmetries in contracting capacity and power that often seem to lead to fraud and threat.

In other words, how can UNIDROIT address the needs of smallholders and other community members through private-law channels? How can UNIDROIT work with States to strengthen the contracting environment so that these members of society have more meaningful protection against fraud and threat? How can good faith and fair dealing become a more vibrant thread in the fabric of developing-world societies? UNIDROIT might provide legislative guidance to improve domestic contracting norms and principles so that these asymmetries are reduced.

UNIDROIT might also consider developing guidance to support private efforts to develop what we call “collaborative contracting models”, for out-grower contracting, equity-sharing models or use of land trusts. This might involve UNIDROIT in providing guidance to States on how best to improve smallholders’ capacity to contract. (These are the questions that lawyers should focus on – I am a land tenure professional and focus on property rights questions.) But there are other things that UNIDROIT might do to increase investment.

Next, UNIDROIT might provide guidance on how to improve the interface between customary and formal legal rules and norms related to the use and transfer of land and other resource rights. This might help to address this gap and reduce the insecurity associated with property and land tenure rights in the developing world, which would create more positive incentives to invest.

As noted above, customary law principles establish rights and duties related to land use and transfer; it is a separate body of law from the formal legal system.

Investors are familiar with the formal legal system but may know little (or be wholly unaware) of the informal rules and institutions that apply in rural areas where “available” lands are often located.

Conversely, rural residents, smallholder farmers, etc., are not likely to be familiar with formal rules/laws related to property *or* to contracting.

The result is that customary law applies to and is recognized by people on the ground, formal law is often not accessible and not recognized as legitimate. However, investors work in, and rely on, this formal system. So a question is, how might UNIDROIT assist to build bridges between these legal systems so that private rights to property are made more secure? Is it possible to harmonize property rules in these systems? What would that involve?

Best practice suggests a nuanced approach for recognizing customary/informal property rights through statutes/public law. For example, in Mozambique public law now recognizes private community-held land rights. In Kenya, the United States Agency for International Development (USAID) is implementing a similar program, assisting government to develop public law that recognizes private communal land rights. In Namibia, USAID worked with government to help communities in a Community-Based Natural Resource Management (CBNRM) program recognize immovable and movable property rights (in this case, wildlife).

This is a critical area and one very much in need of sustained attention. UNIDROIT, with its access to legal experts, might be well-positioned to address this need.

Finally, UNIDROIT might focus on addressing weaknesses in formal sector leasehold laws – strengthening or improving the rights of private individuals and communities in the developing world to lease the land and resources they hold to investors of their choosing. As USAID has seen in its work in Ethiopia, when leasehold rights are strengthened and extended to all smallholders, some farmers lease out land, some lease in land. Women in particular benefit from this change to the legal environment as they develop a new livelihood strategy – leasing rather than farming land.

I would like to applaud UNIDROIT's efforts in this very important area, and conclude by noting that creating conditions for sustainable and long-term agricultural investment will require not only more responsible, transparent and participatory contracting between rural people and investors – it will, critically, require more secure private rights to property for these rural people. Strengthening the interface between private customary law and the formal legal system will be an important part of this effort.

III