

Land Grabbing, Investors, and Indigenous Peoples: New legal strategies for an old practice?

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Abstract

This article examines how new legal strategies need to be adopted by indigenous peoples to react to the increasing phenomenon of ‘land grabbing’ taking place across the globe. In examining the specificity of the ‘land grab’ and how it particularly affects indigenous peoples, it analyses how new legal strategies targeting the investors need to be adopted by communities to mitigate some of the negative aspects of land grabbing. It argues that since the current ‘land grab’ is driven by investors it is important that indigenous peoples, and their supportive organisations, target investors and lending institutions which are behind the massive investments in land acquisitions.

Introduction

In the last few years, the proliferation of land investments mainly in developing countries has given rise to an increased reference to ‘land grabbing’, term which has now entered the international lexicon. This ‘land grab’ is driven by the increased marketization of ‘land’ and its potential production. This is the result of many related phenomenon including the globalisation of agricultural production; the quest for food security by countries lacking arable lands; the strive for investment in energy and biofuel security ventures and other climate change mitigation strategies;

and recent demands for resources from newer hubs of global capital. The combined food and financial crisis of 2007/08 have been key triggers to the recent wave in large-scale land investments with equity investors and pension funds seeking new asset classes for investments. While commodity prices soon returned to more moderate levels, investors' interest in land persisted, leading to a proper 'land rush'. Since then investments in lands for agricultural and food production have been seen as a key area for safe, fast, and reliable investments by many public and private investors. The pace and scale of land acquisitions have dramatically increased as a result of changes in commodity markets, agricultural investment strategies, land prices, and a range of other policy and market forces which has resulted in massive investments in land acquisitions across the globe. In parallel to this process, the increased investments in the production of biofuels have also had a very significant impact on the global 'land rush'.

This 'global land rush' is very often negatively impacting indigenous peoples who are seeing a drastic loss of access to their own lands and territories. Due to imbedded discrimination, lack of recognition of land tenure and extreme marginalisation, this land rush particularly negatively affects them. While the current 'land grabbing' could be seen as the continuation of an historical process of constant infringement on indigenous peoples' lands, it nonetheless seems that we are witnessing a significant increase in the appropriation of land in a very large scale over the last few years. The drivers, but also the legal frameworks funnelling these land deals, are different and as such require a different and novel approach. After examining to what extent this 'land grab' is different from previous land dispossession (section 1), this article analyses how it does particularly affects indigenous peoples (section 2), before analysing how new legal strategies are necessary to address such 'land grabbing' phenomenon (section 3).

Is 'Land Grabbing' New?

'Land Grabbing' has received many different definitions, but all these definitions have in common the idea that it involves the acquisition of large scale of land for commercial or industrial purposes, such as agricultural and biofuels production (TNI, 2013). Most definitions agree that it involves acquisition of more than 200 hectares,

some even pushing for a threshold of 1000 hectares, many involving more than 10,000 hectares and several more than 500,000 hectares. In any case it concerns large-scale land acquisition. It also involves land being acquired by investors rather than producers, and often, foreign investors, though the distinction between national and foreign investors could something being blurred by the partnership organised between national and foreign entities.

There have been some debates to define if 'land grabbing' is truly a new phenomenon or rather if this is the follow up of the colonial endeavours of grabbing foreign lands to ensure marketization of natural resources (Wily, 2012). Arguably land grabbing is not a new phenomenon, since forced land dispossession of local populations to ensure the commercial exploitation of their natural resources is sadly part of our global history, but this current wave of land grab is nonetheless based on important shifts in terms of land usage and agricultural production. While at the local levels there might be some variations, the overall global picture shows that there is a current movement towards the large-scale acquisition of land by investors with the aim of either: (1) converting local forms of so-called 'unproductive' domestic food production to large-scale agricultural export of food; (2) or converting lands (often forest lands) to ensure the production of biofuels for export (Borras & Franco, 2012). Hence what seems to demarcate this current wave of land grabbing from the previous ones is its relatively fast and global pace driven largely by the new investments strategies focused on food and biofuels production.

Agribusiness investments into food production and biofuel production as sources of investments seem to be the key drivers of this new wave of land grabbing. Agriculture, and more particularly agribusiness, animal feedstock, agro-fuels seem to be the main drivers of the land rush. The land rush is driven by some profound and long-term changes to the fast-growing demand for food. As noted by Transnational Institute, the expanding volume and changing diet and consumption patterns of fast-growing, large economies and notably the "meatification of diets" which requires ever increasing use of land to produce animal feedstock has a huge impact on the demand for land (TNI, 2013). In turns this attracts investments in land to produce soya and corn for animal consumption. Likewise, the emergence of 'flex crops' has also had a major impact as land is been acquired at a fast pace to produce such crops to the detriment of local food production.ⁱ

The other big shift relates to so-called ‘green gabbing’, which refers to the dramatic increase in the acquisition of lands for the development of ‘green’ markets such as forestry for carbon offsetting, biofuels, and ecotourism. The current land rush is largely driven by ‘green investments’ in biofuels and carbon offsetting measures notably. These ‘green investments’ have a dramatic impact on the land rush as lands that could be used for green production are seen as great and reliable source for investors. The forestry sector also has a big impact in the accelerating large-scale acquisition of land notably through the fast-growth industrial tree plantations (ITPs). A very significant change regarding the forestry industry comes from the very large acquisition of forestlands that have been turn into production of biofuels, notably for the production of palm oil, but also so called ‘valuable’ trees such as eucalyptus and pine that are commonly used for their commercial value throughout the world (Kroger, 2012).

These investments in biofuels have also been fostered by the adoption of inter-States initiatives to develop green energy and carbon offsetting markets, such as the EU targets on biofuels in its Renewable Energy Directive, as well as carbon markets and offsets schemes such as the European Trading Scheme. It also includes international agencies initiatives that support the development of green investment or the development of a carbon market such as for example the World Bank’s Forest Carbon Partnership Facility (FCPF). These different targets for emission reduction emerging at national, regional and global levels mean that the demand for biofuels will only increase in the next few years. One of the largest global initiatives emerges from the UN Reducing Emissions from Deforestation and Degradation (REDD+) program, which aims to curb carbon emissions by paying developing countries to protect forests. The program has been re-developed several times over the last few years, but has now reached an important milestone last year when delegates at the United Nations climate negotiations in Warsaw adopted a framework allowing REDD+ programs to move forward. Despite the fact that this program is meant to ensure that local communities are not negatively impacted by the development of such a large-scale carbon market, reports from the ground clearly indicate that the reforms that have been put in place by most government so far have had a very negative impact. So far the REDD+ programme has done very little to help secure tenure rights for local forest communities, despite warnings from civil society groups that local land rights would be critical for REDD’s success (RRI, 2014).

What also seems to be quite specific about this current wave of land grabbing relates to its scale and timing. The land acquisitions are usually done under very long term 'leases' or contracts to use the land (very often 99 years leases) and over very large tracks of lands (some of the deals have included more than 30,000 ha deals). It is hard to get an exact figure on the scale of the phenomenon, notably due to the lack of transparency of most of the land deals (Scoones & all, 2013). Nonetheless several studies on the scale of the phenomenon have been undertaken. Figures from 2012 mentioned that at least 80 million hectares of fertile farmland have been leased to foreign investors, involving some US\$100-140 billion in Africa alone.ⁱⁱ A 2011 report from Oxfam refers to 227 million hectares acquired since 2000 (OXFAM, 2011). But overall it is very hard to get a precise and global picture on how much land has been 'grabbed' since 2007/08, apart from the fact that these investments are extremely significant both in terms of the land area covered and the scale of the investments (Cotula & Polack, 2013). It is also a truly global phenomenon. While clearly the continent which is witnessing the larger scale of land grabbing is Africa, similar extensive take over of large tracks of land by foreign investors have also been taking place in Asia, Latin America, and the former Soviet countries.

In terms of the investors, media and civil society reports largely point towards the large investments emerging from China, India, South Korea and the Gulf States which are among those at the forefront of this agricultural expansion, as they seek to produce food overseas for their growing populations. According to a 2009 analysis from the United Nations Conference on Trade and Development, the biggest country investors in terms of outwards foreign direct investments (FDI) stock in agriculture are, in descendent order: the United States, Canada, China, Japan, Italy, Norway, Korea, Germany, Denmark and the United Kingdom (UNCTAD, 2009). However, it is worth bearing in mind that most deals are private investments; this notably includes many western banks and financial investors seeking alternatives to volatile international financial markets. Also, in terms of the relationship between investors, financial institutions, agribusiness, and governments, it is often hard to get a clear picture on who is who between grabbers, investors, and destination markets as in most situations the land deals are lacking transparency and also involves multi-layers of different actors.

Overall, it is hard to differentiate all the sources of land grabbing, as there is a huge diversity of contexts at the local levels, but it seems that the global movement

for the fast, large-scale and long term acquisition of lands is driven mainly by the agribusiness, forestry, biofuels and tourism industries which are pushed and supported by a massive investments on land acquisition. Investors see investments in food and green energy productions as promises to long-term reliable and solid return. A 2010 study by the World Bank highlights that the vast majority of the investments in land are thought to be for production of food crops for foreign markets, but about one-third are understood to be for plantations of crops for biofuels (World Bank, 2010). A global report commissioned for G20 leaders in 2011, which was conducted by 10 international organisations, including the FAO, World Bank, OECD and World Food Programme, found that the demand for food and feed crops and for the production of biofuels is a significant factor in rising food prices and food price volatility globally.ⁱⁱⁱ

Indigenous Peoples and Land Grabbing

Local communities, fishermen, pastoralist, peasants are all directly affected as their land are often sold or leased to investors for little, if any, compensation. But it seems that the global rush for land investments particularly affects indigenous peoples. The current international understanding of indigenous peoples is defined via a variety of characteristics: self-identification; historical continuity with pre-colonial societies; a strong link to territories; a distinct social, economic, or political system; a distinct dialect/language, culture, and beliefs; non-participation as a dominant group in national society; and possessing a resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples (Anaya, 2004 and Thornberry, 2002). The cultural and spiritual connection between a territory and indigenous peoples is also a very strong marker of indigenous peoples' identity which has been put forward globally by indigenous representatives. As noted by the Inter-American Court of Human Rights, 'the close ties of indigenous peoples with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival ... their relations to the land are not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy even to preserve their cultural legacy and transmit it to future generations.'^{iv} What make indigenous peoples especially vulnerable to 'land grabbing' relates to the fact that in most societies they are usually extremely

marginalised and are facing strongly embedded forms of racism from other more dominant communities (Gilbert, 2007).

This position of extreme marginalisation, is particularly affecting their rights to land. Indigenous peoples often do not hold formal title to their lands and their land rights are therefore not recognized or protected by governments. The large scale land deals usually translates into the curtailing of customary or community access rights to lands, forest or natural resources, resulting in the loss of access to common land and waterways, such as hunting, gathering, forest products, fishing, and grazing. While many local communities across the globe, and especially in Africa, do not hold formal title to their lands, indigenous peoples are especially vulnerable to the lack of recognition of their rights to land and natural resources. As noted by the United Nations Inter-Agency Support Group: “the lack of formal State recognition of traditional tenure systems marginalizes indigenous peoples further from the dominant society and leaves them more vulnerable to rights abuses” (UNIASG, 2014, p. 4) Hence when an investor, or a corporation, negotiate a lease with a government the rights of indigenous peoples are simply ignored. For example, in the case of Peru, a Korean company, ECOAMERICA, had applied for the registration and titling of more than 72,000 ha of land for crop production, logging and livestock raising on land registered by two Shawi and one Kechwa communities. The fact that the land were used by indigenous peoples, lacking formal title and being in a marginalised position, meant that their rights to land were simply ignored (FPP, 2014). This is not an isolated situation as indigenous peoples are facing similar situations across the globe, notably in Ethiopia, Cameroon, Myanmar, India, Indonesia where reports of large scale land grabbing have been reported (IWGIA, 2014). In March 2015, the EU Parliament adopted a resolution condemning the practice of land grabbing taking place in the Loliondo region of Tanzania, highlighting that indigenous peoples are particularly vulnerable to such practice.^v Even when national legislations do recognise the rights of indigenous peoples to their traditional territories, it seems that land grabbing driven by large scale investments will trampled these rights. For example, despite the existence of a law recognising customary native title in Malaysia, an indigenous community from Sarawak lost its land when it acquired grabbed by a palm oil company, despite the fact that the community’ rights were legally established (PAN, 2013). For many indigenous peoples across the globe, the current wave of land grabbing is adding another chapter to the previous centuries of land dispossession.

This approach relates the colonial narrative on “empty”, “vacant” or “unused” lands. Historically indigenous peoples have been the main victims of such rhetoric based on the idea that their land was “unoccupied” or “unproductively” used. In many ways the current land grabbing is basing itself on the same premises that saw the occupation of land by indigenous peoples as not “civilised” enough to constitute “proper” tenure of the land. This fiction labelled ‘*terra nullius*’ during the colonial time has been rejected as being racist and discriminatory by most legal system across the world. However it seems that despite such rejection the theory that some land are not occupied just because indigenous peoples live on it seem to be coming back under the precepts of ‘unused’ or ‘vacant’ land used to justify the forced removal of indigenous peoples to give space to commercial and industrial developments.

This notion of productivity of the land which is meant to support the flow of foreign investments and support large scale export industries particularly affects many of the indigenous communities whose system of livelihood production are based on sustainable methods of land usage that have been perpetuated across centuries. The drive being these investments in land acquisitions are based on the perception that large-scale plantations are needed to ‘modernise’ agriculture. These investments are based on the precept that ‘good’ and ‘productive’ use of the land is based on large scale industrialised farming technics. This idea of large-scale agricultural development is dominant in many governments and international institutions circles. For many indigenous communities who have developed a very sustainable and small-scale use of the natural resources, these large-scale investments make them a direct victim of the global land rush. Due to the scale of this movement of massive investments for the acquisition of lands it seems essential that indigenous organisations, organisations supporting indigenous peoples, but also organisations which are not traditionally working to support indigenous peoples’ rights do realise that this chapter of global ‘land grabbing’ could prove to be extremely detrimental to all the advances that have been achieved recently when it comes to the recognition and protection of indigenous peoples’ land rights.

The international community through the United Nations (UN) recognised the legitimacy of the claims to land rights and self-determination of indigenous peoples with the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007. Ironically, the food and financial crisis of 2008 gave rise to a new wave of massive land grabbing which badly affects the respect of indigenous peoples’ rights

proclaimed in the new declaration. For many indigenous communities the huge investments in the acquisition of lands for commercial and industrial purposes is not only denying them access to their primary source of livelihood, but is also leading to the deforestation and alteration of biodiversity of their ancestral lands and territories. Forest reliant communities are badly affected as large areas of the forest are been cleared to give space to the large-scale production of food or biofuels. Some of the most prominent cases involve physical harassment, intimidation and violence against indigenous peoples. Many indigenous communities have been using international human rights law as a medium to counteract these negative aspects of land grabbing. This involves reference to some of the main human rights which are at stake when it comes to the loss of land and access to livelihoods. For example, the connection between land grabbing and indigenous peoples has been specifically exposed in the context of the right to food. The former UN Special Rapporteur on the Right to Food, Olivier de Schutter, has directly connected the right to food with the question of large-scale land acquisitions.^{vi} He has proposed eleven minimum principles which are addressed to investors, home states, host states, local peoples, indigenous peoples and civil society. Two of the proposed principles are directly concerned with land rights:

3.1. Transfer of land-use or ownership can only take place with the free, prior and informed consent of the local communities. This is particularly relevant to indigenous communities given their historical experience of dispossession.

3.2. States should adopt legislation protecting land rights including individual titles or collective registration of land use in order to ensure full judicial protection.

Other human rights norms such as the protection against forced eviction have also been invoked. The connection between forced eviction and violation of land rights played an important role in the decision of the African Commission on Human and Peoples Rights in the case of the Endorois community against Kenya. The Commission highlighted how the non-recognition and respect of the land rights of the indigenous community in their displacement led to their forced eviction in violation to Article 14 of the African Charter.^{vii} However, it is worth highlighting that these legal strategies are mainly focusing on the role of the State. Even though there is increasing emphasis put on the role of non-states actors when it comes to human rights

violations, human rights law remains predominately concern with the relationship between States and their citizens (Clapham, 2006). It seems that due to the specificity of the 'land grab' which is led by investors rather than States, it might be necessary to revise these legal strategies focusing on State action only.

New legal strategies: Targeting the investors?

As highlighted earlier what is specific about the current 'land grab', is the predominant role played by investors, this include many different types of investors such as sovereign wealth funds, private equity funds, and other key investors in the food and agribusiness industry. It also appears that lending institutions play an important role in supporting such massive investments. The implication of these different actors means that a multi-layer of different legal frameworks will apply, as laws regarding investment laws, contractual obligations, bilateral investments treaties, and environmental agreements will all play a role. This multi-layer of legal frameworks makes the analysis of the legal situation extremely complex. On a perhaps more positive note, it also means that the legal ways to challenge the negative aspects of land grabbing are also more diverse. While the human rights of indigenous peoples are directly affected, there is a necessity to look beyond a purely human rights based approach and examine how the other legal frameworks could provide some potential avenues for legal remedies. Furthermore, land grabbing also involves complex legal approaches relating to the obligations of non-states actors when it comes to human rights law.

One of the first areas that could be targeted relates to the laws governing investments. The legal framework governing international investment law has been drastically expanding over the last few years, arguably becoming one of the most prolific areas of international law. In particular, the multiplications of bilateral agreement treaties (BITs) is noteworthy, these treaties notably aim at providing the highest possible level of protection for foreign investors and their assets when investing in a foreign country. Typically, these investments treaties protect foreign investors against expropriation, and provide protection and security for the investors. These investment treaties generally include "stabilization" clauses which preclude the

application of new regulatory measures that could affect the investments. They also determine which law applies to interpret the contract in the event of a dispute. Most of the investments agreements incorporate some form of remedial mechanisms to allow investors to take disputes to arbitration. Investor-state arbitration settles disputes between an investor and a host state using an international arbitral tribunal. These are very efficient tribunals which compares to other international mechanisms receive a very high level of implementation by both States and investors. While until recently these mechanisms were mainly used by investors to protect their investments, over the past few years, civil society organisations have started to get involved in investor-state arbitration proceedings to highlight the need to integrate public interest factors in these natural resource investments (Peterson & Gray, 2005).

There is a general increased push to get more inclusion of the concerned of the local citizens in the regulations of investments. Concerns have increasingly been raised regarding the balancing of the investment protection with public interests, including the human rights protection of the local communities (Dupuy & all, 2009). This could be extremely relevant in the contest of land grabbing. However, it should be noted that so far most of these arbitrations have in the best-case scenarios only pay lip service to the inclusion of human rights of the local indigenous communities (Gazzini & Radi, 2012). One of the limitations relates to the fact that these tribunals only apply investment law with little, if any, regards to indigenous peoples' rights. As noted by a tribunal arbitrating a claim made by investors following the land reforms that took place in Zimbabwe, the "consideration of rights of indigenous people under international law... was not part of the tribunal's mandate (..)".^{viii} This statement is representative of the approach that most arbitral investment tribunals will have regarding indigenous peoples' human rights (ERRC, 2012). However, it is not impossible to imagine that, in a near future, arbitration tribunals will pay more attention to human rights law, as a relevant branch of international law that could be applied to investments disputes. As a positive development, the Inter-American Court of Human Rights, in a 2006 judgement, has rejected the argument put forward by the States that allowing the restitution of the land to an indigenous community might be in violation of the investment treaty signed between Paraguay and Germany.^{ix} In that case the court ruled that human rights law should prevail over such investments. This ruling offers another avenue to challenge investment treaties which might be

incompatible with human rights obligations. It also shows that human rights law could, and should apply to investments disputes.

Apart from the legal issue regarding the integration of human rights law within investments disputes, the other problematic area relates to the fact that indigenous communities cannot take parts to the arbitral proceedings. Indigenous peoples can only appear as a non-disputing party, as only the investors and the government are parties to these disputes. Nonetheless, indigenous peoples have been able to play a part using *amicus curiae* (friends of the court), which can allow local communities to voice their concerns into the investment dispute. However, the practice of the tribunals regarding the inclusion of *amicus curiae* has been erratic, with many tribunals rejecting them. Nonetheless, it seems that more recent decisions have been increasingly relying and accepting *amicus curiae* by indigenous peoples. This was the case in a dispute between Glamis Imperial Corporation and the United States, which was examined by the UNCITRAL Arbitration in 2009.^x In that case, the government notably justified the expropriation of the investments by the mining company based on the need to protect the sacred sites of the local Native Americans (Quechan Nation). The tribunal accepted to receive the evidence transmitted by the Quechan Nation in support to the case, which played an important role in supporting the government's defence. This case is interesting not only regarding the positive role played by the evidence submitted by the indigenous community, but also concerning the relationship between the government and the community. It highlights how communities and governments could become allies in front of the investors' claims. In the context of arbitration launch by foreign investors against a State, it is worth thinking that, for once, governmental and indigenous peoples' interests might be going in the same direction. New alliance of interest between the government, which is trying to avoid having to pay large sum of money to compensate foreign investors, and indigenous peoples might appear as new ways to challenge the overprotection that exist under investments treaties. To confirm that such alliance might be possible, a 2015 decision from the Permanent Court of Arbitration was based on the fact that Canada rejected the right of a foreign investors to develop a quarry notably arguing that such investment would damage create damages to 'aboriginal traditional knowledge'.^{xi} Overall, challenging land investments using arbitration mechanisms remains an arduous task as indeed these investments arbitration principally rely on investments treaties, which, by their nature favour the investors rather than the rights

of the local communities. However, on the positive side, whereas a few years ago it was clear that investors-States arbitration mechanisms were mainly in place to ensure that investors were provided protections against investment risks, more recent cases are showing that in the name of the public interest, governments could act for the protection for indigenous peoples, as in the case Glamis Imperial Corporation against the United States. While this case is not directly related to land grabbing, it is an illustration of the fact that the adoption of legislation that protects indigenous peoples' cultural heritage could be viewed as an acceptable focus of protection against investments. Under these mechanisms, there might be scope to challenge some of the investments that are directly resulting in indigenous peoples loss of lands and access to natural resources. Again, it is worth bearing in mind that despite the recent cases that are pointing towards potential alliance between governments and indigenous peoples, it is true that by and large governments are still backing up large-scale investments without any regards to indigenous peoples' land rights.

The other potential actors who could be targeted are the lenders. As land acquisitions often involve long-term (and expensive) investments, the investors often seek the support of lending institutions. Lenders include both private and public institutions; these could be intergovernmental, multilateral and bilateral organisations. It is important to distinguish between the two, private and public institutions as the rules applicable are not the same. Increasingly public donor agencies are focusing on economic growth and providing substantive support to the private sector to support green-growth and developmental activities notably supporting agribusiness developments. These agencies play a very important role as they provide funds either as equity participation, loans or guarantees, on a commercial/for-profit basis, to foreign or domestic investors in sectors or countries in which traditional commercial banks are often reluctant to invest. Many of these agencies have provided support to large-scale investments in agribusiness production. The European development agencies have been especially proactively, investing very large sums in supporting agribusiness (APRODEV, 2013). By channelling finance into private equity, investments, hedge funds or funds-of-funds to the private sector and supporting investments in agribusiness, these public institutions could be involved in supporting projects that might result in land grabbing. In the context of the European aid agencies, the EU Council and Parliament have adopted a EU Land Policy Guidelines

that represents a common framework to interact with developing countries bilateral and multilateral donors. The aim is to provide some guidelines to EU governments and donors when they are engaged in supporting land policy design and land policy reform processes in developing countries.^{xii} While these guidelines are not binding legal principles, they are nonetheless based on more legally enforceable principles. They notably rely and refer to some of the human rights norms proclaimed in international treaties. As such these could represent important mechanisms to target developmental agencies based in Europe. While it is true, that most of these institutions have very weak internal guidelines and oversight mechanisms, since they are quasi-public institutions acting on behalf of their national governments, they should, at a minimum, respect international human rights obligations ratified by their own States. An argument that should be used more widely notably by civil society organisations.

In terms of the private lenders and the financial sector more generally, there has been a multiplication of commodity and private sector roundtables and ‘safeguard’ mechanisms adopted over the last few years, notably in the sectors of forestry and palm oil. There has been an avalanche of initiatives and guidance issued by multilateral organisations that have adopted some voluntary commitment instruments that could potentially be relevant to land issues. One examples of such commitment are the Equator Principles (EPs). In total, 68 financial institutions from 27 countries have signed up to the EPs, which in practice means that, for specific project finance loans, they promise to live up to a number of standards, mainly those of the International Finance Corporation (IFC), the private sector arm of the World Bank. A number of state-controlled banks and agencies benchmark projects against the Performance Standards of the IFC.^{xiii} The IFC performance standards state that, for projects with significant adverse impacts on affected communities, the process should ensure their free, prior, and informed consultation (though not necessarily consent). Interestingly, the IFC offers a mechanism to seeks remedies when such standards have not been respected. The Compliance Advisor Ombudsman (CAO) can receive complaints regarding the IFC failure to follow its own performance standards when involved in supporting investments. While it not a judicial grievance mechanism per se, the CAO can provide a mechanism for mediation between the IFC investors and the local communities. As such it can play a positive role, especially when local

remedies are not available, and when companies are not engaging. Recently, a few indigenous communities from Cambodia, Indonesia, and Mongolia have submitted complaints to the CAO.^{xiv} In the three situations, the CAO complaint mechanism appeared as the only way to get some form of remedies as at the local level the legal systems failed to provide any form of remedies, or worst were used as tools to support the land grabbing. What is interesting to note is that such situations, the corporations, which were involved in the land grabbing, did not react to any of the complaints of the communities until the involvement of the CAO. By approaching the CAO, the pressure is then put on the investors which have supported the corporations involved in land grabbing, and this pressure often proves more efficient than directly targeting the companies. The situation in Cambodia offers a vivid illustration of such situation. Hoang Anh Gia Lai (HAGL) is a Vietnamese rubber company operating in Cambodia, notably in the Ratanakiri province where many indigenous peoples live. Their operation have led to serious land grabbing in the region leading to loss of access to natural resources for many local indigenous communities (Global Witness, 2013). Despite having trying to engage the local government and other national mechanisms for redress, the situation did not change until the communities started to approach the CAO. Due to the pressure put on the investors, as the project was part financed by the IFC, the company had then to engage with the process, which led to the adoption of mediation agreement (Mane Yun, 2015). While this process is still slow and demanding on the communities, it nonetheless shows that engaging with the IFC process and putting pressure on the investors rather than the government, or the involved corporations, can lead to a much more engaged process from the corporation which otherwise would not have reacted to the situation.

It is also worth noting that the World Bank Group, the FAO, the International Fund for Agricultural Development (IFAD), and the U.N. Conference on Trade and Development (UNCTAD) have supported the adoption of a set of “Principles for Responsible Agricultural Investment that Respect Rights, Livelihoods and Resources”. This a set of seven keys principles, which notably include the fact that investments have to respect rights to land that local communities should be consulted, and agreements from consultations are recorded and enforced. Overall, there is an emergence of more and more guidelines from multilateral organisations, both public and private, regarding investments in agriculture and regarding land investments in general. These guidelines reflect on the importance of the land rights of the local

indigenous communities. Whilst, these are ‘only’ guidelines, it is important to bear in mind that they also represent a reflection on some of the binding international human rights principles. As such they are bringing human rights arguments into the sphere of investments. The road might be long and windy before concrete and positive outcomes emerges from these platforms, however it is important to realise that these developments offer new platform for action to target the investors and their supporting lending institutions.

Conclusion

It is important to frame the current ‘land grabbing’ in an historical perspective – as land grabs are not a recent phenomenon. However, it is important to take the current land grabbing for what it is. It is a new phenomenon in terms of land dispossession marked by the global focus on investments in agribusiness and biofuels production. Investors see land and food production as safe, sound and long-term financial placements. Moreover this land grab is fed by the ever-increasing demand for biofuels. The focus on climate change offsetting measures by governments and international institutions will only increase this pressure on land acquisitions. In many of the countries concerned by the land grab, access to justice for indigenous peoples within the local settings is often an illusory option, either due the fact that indigenous peoples’ land rights are not formally recognised under the local or national legal frameworks, or by lack of such remedies, or due to a weak judiciary processes. The application of international human rights so hardly won at the international level, remains a very far fetch goal for most indigenous communities. Even when international, or regional, forums can be reached it seems that implementation of these decisions remains unreliable. In that context, some new legal strategies might be necessary. The fact that land grabbing involves many non-states actors, such as investors and lending institutions calls for new strategies. The targeting of the investors using the legal frameworks regulating investments might offer other platforms of action for local indigenous communities. This article does not argue against using traditional human rights remedies, to the contrary, it argues that such arguments should be used in other legal forums. It means that to address the

negative aspects of land acquisitions taking place, indigenous peoples, and their supportive organisations, need to adopt a much broader legal strategies targeting the investors and their lending institutions. The legal frameworks governing investments are extremely specialised, technical, and opaque, and have be designed to protect the investors, not the local communities. Nonetheless, as highlighted in this article, there are remedial mechanisms that increasingly include the need to balance protection of investments against the public interest. Under these recent developments, there are some indications that targeting the investors, and not only the direct investors but also the lending institutions, could allow communities to get access to some new forms of remedies. This approach calls for new alliance between organisations and professions not used to work together as it should involve legal practitioners specialised in investment arbitrations and more traditional pro-human rights organisations.

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ⁱ Flex crops are crops that have multiple uses (food, feed, fuel, industrial material) that can be easily and flexibly inter-changed: soya (feed, food, biodiesel), sugarcane (food, ethanol), oil palm (food, biodiesel, commercial/industrial uses), corn (food, feed, ethanol).

ⁱⁱ For detailed figures see the Land Matrix Project, see: <http://www.landmatrix.org/en/>

ⁱⁱⁱ Price Volatility in Food and Agricultural Markets: Policy Responses, Policy Report including contributions by FAO, IFAD, IMF, OECD, UNCTAD, WFP, the World Bank, the WTO, IFPRI and the UN HLTF (2 June 2011)

^{iv} The Mayagna (Sumo) Awas Tingni Community v Nicaragua, Inter-Am Ct HR (Ser C) no.79 (2001), para 149.

^v European Parliament resolution on Tanzania, notably the issue of land grabbing (2015/2604(RSP))

^{vi} Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, 'Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge', UN Doc. A/HRC/33/13/Add.2., para. 4.

^{vii} African Commission on Human and Peoples Rights, Communication 276/2003, Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) (on behalf of the Endorois) v Kenya (decision of Feb., 2010), see para. 200.

^{viii} Border Timbers Limited et al v. Zimbabwe, ICSID Case ARB/10/25, Procedural Order No. 2, June 26, 2012, para. 59.

^{ix} Inter-American Court of Human Rights, Case of the Sawhoyamaya Indigenous Community v. Paraguay: Judgment of March 29, 2006 (para. 140)

^x International Centre for Settlement of Investment Disputes, Glamis Gold Ltd. v. United States of America, 2009

^{xi} Bilcon of Delaware et al v. Government of Canada, Permanent Court of Arbitration (2015)

^{xii} The guidelines are available at:

http://ec.europa.eu/development/icenter/repository/EU_Land_Guidelines_Final_12_2004_en.pdf

^{xiii} This includes 32 export credit agencies from the OECD, the Multilateral Investment Guarantee Agency (MIGA), European Development Financial Institutions (EDFIs), and to a large extent also the European Bank for Reconstruction and Development.

^{xiv} Cambodia: VEIL II-01/Ratanakiri Province; Mongolia: Oyu Tolgoi/Southern Gobi; Indonesia: Wilmar Group/Jambi; Indonesia / PT Weda Bay Nickel