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Andrea K. Bjorklund

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CHAPTER 7

‘LAND GRABBING’ AND INTERNATIONAL INVESTMENT LAW: TOWARD A GLOBAL RECONFIGURATION OF PROPERTY?

LORENZO COTULA*

INTRODUCTION

The past few years have witnessed heightened concerns that the pressures that humankind is placing on the world’s ecosystems may be reaching a tipping point,¹ and that access to natural resources may be increasingly associated with social and political tensions.² The issue is not necessarily whether, in biophysical and aggregate terms, the world hosts sufficient resources to meet humankind’s growing needs. Notions of resource scarcity and availability have formed the object of contestation and polarized views. These diverging views are driven by difficulties in predicting trends in the complex and interlinked forces that shape the global supply and demand of commodities and resources; by different analyses on the potential for technological innovation, consumption choices, and policy reform to shift the parameters of resource scarcity and availability; and more generally, by different political and conceptual paradigms

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1. Johan Rockström and others, ‘A safe operating space for humanity’ (2009) *Nature* 461, 472–475.

2. Bernice Lee and others, ‘Resources futures’ (2012) Chatham House, 7, <<http://www.chathamhouse.org/publications/papers/view/187947>>.

based on contrasting assumptions.³ Recent slumps in global commodity prices highlight how rapidly transitions can occur in the forces affecting demand and supply for commodities. And some observers have noted that, while the pressures on the world's natural resources are real, narratives of resource scarcity can be used for political ends.⁴

But it is the social and environmental implications of expanding and intensifying resource extraction that have caused sustained public concern. The past ten years have witnessed the interplay of the structural factors that fuel the global demand for food, energy, and commodities. These factors include demographic growth, the evolving consumption patterns associated with socioeconomic change, and rising urbanization that increases the share of the global population depending on food purchases for their sustenance.⁵ In response to these changing socioeconomic fundamentals, petroleum and minerals have been extracted in previously marginal sites, and agribusiness developments have extended their reach to lands that previously hosted natural habitats or nonintensive forms of resource use. These developments have raised hopes for new opportunities to transform livelihoods, particularly in low- and middle-income countries striving to attract foreign investment for economic development. But they are also bound to have significant environmental implications affecting habitats and species, as well as important social and distributive dimensions.⁶

Indeed, the commercial exploitation of natural resources can bring into contest competing claims to land and resources, advanced by different actors involved in uneven power relations—from indigenous peoples to transnational corporations. Parallel to, and intertwined with, the pressures that humankind is placing on the environment is a global 'resource squeeze' that is reshaping control over the world's natural resources.⁷ A recent wave of large-scale land deals for agribusiness investments in low- and middle-income countries epitomizes these trends. Dubbed 'land grabbing' by the critics, this wave of land deals has raised widespread concerns that commercial operations may dispossess poorer and more marginalized groups. A more recent collapse in global commodity prices, partly linked to a changed outlook in key emerging economies, is affecting the pace of new investments in the extractive industries and agriculture. At the grassroots, however, rural people in many parts of the world continue to feel the pressure of ongoing commercial operations, and in the longer term socioeconomic transformations are projected to continue driving global demand for commodities and cropland expansion in tropical ecosystems.⁸

3. World Economic Forum, 'The future availability of natural resources: A new paradigm for global resource availability' (2014) 10–15, 18–20, <http://www3.weforum.org/docs/WEF_FutureAvailabilityNaturalResources_Report_2014.pdf>.

4. For a discussion of these issues, see Ian Scoones and others, 'Narratives of Scarcity: Understanding the "Global Resource Grab"' (2014) Future Agricultures Consortium Working Paper No. 76, <<http://www.plaas.org.za/plaas-publication/FACwp76>>.

5. World Economic Forum (n 3) 21; OECD/FAO, 'Agricultural outlook 2015–2024' (2015) 29–34 (Agricultural Outlook 2015–2024). Whether supply can meet the increased demand has been a key dividing line in debates about resource availability in aggregate terms.

6. World Economic Forum (n 3) 24, 45.

7. On the notion of 'resource squeeze', see IIED, 'Strategy 2009–2014' (2009) 7, <<http://pubs.iied.org/G02532.html>>; IIED, 'Engaging for change: IIED strategy 2014–2019' (2014) 6, <<http://pubs.iied.org/G03759.html>>.

8. UNEP, 'Assessing global land use: Balancing consumption with sustainable supply' (2014) 61, <[http://www.unep.org/resourcepanel/Portals/50244/publications/Full_Report-Assessing_Global_Land_UseEnglish_\(PDF\).pdf](http://www.unep.org/resourcepanel/Portals/50244/publications/Full_Report-Assessing_Global_Land_UseEnglish_(PDF).pdf)>; OECD/IEA, 'World energy outlook' (2015), <<http://www.worldenergyoutlook.org/weo2015/>>. With regard to continuing local-level pressures, see for example, recent reports of evictions in connection with mining operations in Guinea. Hub Rural, 'Guinée. Des soldats pour déguerpir les habitants de Kintinian et des

It is widely recognized that, beyond the biophysical aspects, pressures on resources are importantly shaped by political and institutional parameters affecting how the world's resources are managed and how competing demands are met. The ability of humankind to handle resource issues wisely matters a great deal. Legal frameworks play an important role in managing competing claims to resources. The law defines formal authority in decision-making, shapes legal rights to natural resources and creates arenas for contestation and negotiation. Relevant law ranges from the national and international instruments governing international trade in commodities to the international human rights norms affirming the principle of self-determination and the rights of indigenous and tribal peoples to their ancestral lands. Broadly defined as the set of legal relations among people with regard to control over valuable resources, the concept of property is at the heart of the law mediating demands on natural resources. In a globalized world, property is framed not only by national law but also by international law, including the internationally recognized human right to property and the protection provided by international investment law.

This chapter discusses how transitions in the local to global legal configuration of property are accompanying the changing real-life pressures on the world's natural resources. It explores the strong but often neglected interlinkages between evolving local land tenure systems, national legislation on land and investment, and developments in international investment arbitration and treaty-making. The central argument is that, in each of these arenas, and in the interface between arenas, historical legacies and recent developments are reconfiguring property relations, and redefining control over natural resources. As commercial pressures on resources increase, this evolving legal architecture exposes some of the world's poorest people to the risk of dispossession. Depending on the jurisdiction, this risk may originate from shortcomings affecting the substantive and procedural safeguards applicable under national law. However, international investment law can compound the effects of those shortcomings, by protecting rights or expectations that foreign investors may have acquired under contested circumstances. Charting possible ways forward requires a holistic understanding of the interplay of national and international law. It also requires going beyond conventional accounts that conceptualize natural resource investments exclusively in terms of a bilateral relationship between an investor and a government, and considering more fully the rights that third parties may claim to the land and resources at stake.

To articulate this argument, the chapter first reviews the evidence on the changing pressures on natural resources, focusing on the recent wave of large-scale land deals for agribusiness investments in low- and middle-income countries. While nuancing some earlier generalizations about the scale of land acquisition, this analysis finds that substantial volumes of deal-making have compounded pressures on natural resources and enhanced the transnational dimensions of property relations. The chapter then explores in greater depth the concept of property and its relevance to natural resource rights and investments, drawing on 'classical' property jurisprudence and on the arbitral jurisprudence developed under international investment law. This analysis charts the national and international legal arenas that shape the regulation of property. Building on research about the 'investment chains' that link the diverse actors involved in agribusiness investments, the analysis also highlights how large-scale land deals for plantation agriculture involve the negotiation and renegotiation of property rights affecting not only land and natural resources but also multiple assets located along the investment chain, including shareholding in land-acquiring companies and beneficial interests in farmland funds.

The chapter then discusses two dimensions of property that are particularly relevant to managing pressures on land from agribusiness investments. The first relates to the *allocation* of property—that is, the norms defining the conditions under which investors can acquire land and resource rights. Despite the rise of international regulation in property matters, these issues remain primarily governed by national law. Focusing on trends in sub-Saharan Africa, the chapter argues that structural features of property under national law and transformations in local (‘customary’) tenure systems tend to facilitate land allocations for commercial developments without adequate protection of affected third-party rights, and without adequate opportunities for transparency, participation, and accountability. These features create some of the root causes of contestation about ‘land grabbing’.

The second dimension concerns the *protection* of property—that is, the rules sheltering the land and resource rights acquired by investors from adverse public action. While national law provides important normative references, growing recourse to international law is changing the balance between public authority and multiple private interests. Specifically, the chapter discusses how evolutions in international investment law are reconfiguring the protection of property, and how this protection can come into play in disputes about large-scale land deals. The chapter also argues that, in protecting foreign investments, international investment law is still ill-equipped to disentangle contestation of those investments that is ultimately rooted in weak national governance. Unless these issues are properly addressed, investment law risks ‘hardening’ shortcomings in national governance, potentially protecting ventures initiated with little consultation and extensive dispossession.

The conclusion distills key implications at local to global levels, including legal, distributive, and political economy considerations. It also calls for concerted action at multiple levels—from securing local land rights, to rethinking aspects of international investment law, through to increasing accountability in relations between citizens and the public authorities responsible for managing common resources, for enacting laws, and for negotiating treaties.

A. ‘LAND GRABBING’ AND PRESSURES ON RESOURCES: A BIRD’S-EYE VIEW OF THE EVIDENCE

The changing pressures on natural resources are driven by diverse forces and shaped by variable actors and contexts. Despite the interconnectedness of commodities (for example, as oil prices can have knock-on effects on agricultural commodity prices), the international political economy of different sectors (petroleum and agribusiness, for example, or even different agricultural commodities) differs in important ways, influenced by variable commodity cycles and diverse constellations of actors and supply chain relations. This diversity notwithstanding, recent debates about ‘land grabbing’ have come to epitomize many of the issues and concerns associated with the wider resource squeeze.

In many agrarian societies, contestation over land dates back a long time. Colonization reshaped land use patterns and tenure systems, and in some colonies it involved extensive land dispossession. Decades of socioeconomic, political, and cultural change since independence have fostered further shifts in tenure systems. In many locations, growing competition for land, driven by both endogenous and exogenous forces, has exacerbated tensions among multiple land users—for example, between migrants and first occupants, herders and farmers,

and youths and the elderly.⁹ But while land has long been a very important issue for billions of rural people worldwide, it has remained a relatively marginal concern at the global level. In many low- and middle-income countries, rural land arenas were primarily populated by local and national actors. The period since the mid-2000s has witnessed significant changes in this landscape. A global rush for land was unleashed, reshaping relations among sovereign states, and between states, citizens, and businesses.

Figures of scale and trend are contested, and it is virtually impossible to develop accurate estimates for the recent wave of large-scale land deals. This is due to lack of transparency and constrained data access, conceptual and methodological challenges,¹⁰ and fast-paced evolutions that make figures rapidly outdated. Despite these uncertainties, all evidence indicates that there has been an increased volume of land deals for agribusiness investments in the period starting from 2005, and with renewed momentum following the food price hike of 2007–2008, including in sub-Saharan Africa, Southeast Asia, and Latin America. Figures also indicate that deal-making subsided after 2011.¹¹

This surge in deal-making followed earlier waves of land acquisition dating back to colonial times, particularly in Africa.¹² It represented a shift in corporate agrifood production, with some companies that had traditionally focused on processing and trading now taking more direct control over agricultural production.¹³ This shift responded to both policy and market forces. Many expect land values to rise in several low-income countries, in connection with urban expansion, infrastructure developments, productivity increases, and economic, demographic, and climatic transformations.¹⁴ Higher and more volatile agricultural commodity prices shifted the distribution of risks and returns in global value chains: farming became a more attractive business proposition, and relying on open markets to source agricultural commodities presented greater supply risks.¹⁵ Technological innovation has made it easier for companies to manage large farms.¹⁶ Increasingly stringent quality, safety, and traceability

9. See for instance Pauline E Peters, 'Inequality and social conflict over land in Africa' (2004) 4 *Journal of Agrarian Change* 269.

10. Carlos Oya, 'Methodological reflections on land "grab" databases and the land "grab" literature "rush"' (2013) 40 *Journal of Peasant Studies* 503.

11. See, among the many quantitative assessments, Klaus Deininger and others, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?* (World Bank 2011); George C Schoneveld, 'The geographic and sectoral patterns of large-scale farmland investments in sub-Saharan Africa' (2014) 48 *Food Policy* 34; Ward Anseeuw and others, *Transnational Land Deals for Agriculture in the Global South: Analytical Report Based on the Land Matrix Database* (CDE/CIRAD/GIGA 2012); Land Matrix, 'Newsletter No. 3' (October 2014), <http://www.landmatrix.org/media/filer_public/b2/48/b24869d1-ff17-4cb2-8bc3-5c55ef6a3e0c/lm_newsletter_3-4.pdf>; Lorenzo Cotula and others, 'Testing claims about large land deals in Africa: Findings from a multi-country study' (2014) 50(7) *Journal of Development Studies* 903.

12. Liz Alden Wily, 'Looking back to see forward: The legal niceties of land theft in land rushes' (2012) 39(2) *Journal of Peasant Studies* 751; Kojo S Amanor, *Land Governance in Africa: How Historical Context Has Shaped Key Contemporary Issues Relating to Policy on Land* (David Wilson ed, International Land Coalition 2012).

13. UNCTAD, 'World Investment Report 2009' (2009) Sales No. E.09.II.D.15, 105–106.

14. Hardman and Co, 'The world agriculture industry: A study in falling supply and rising demand' (2010), <<http://farmlandgrab.org/14012>>; Savills World Research: International Rural, 'Spotlight: African farmland' (2013), <<http://pdf.euro.savills.co.uk/rural---other/spot-africa-lr.pdf>>.

15. Angus Selby, 'Institutional investment into agricultural activities: Potential benefits and pitfalls' (Conference on 'Land governance in support of the MDGs: responding to new challenges', Washington, DC, World Bank, 9–10 March 2009).

16. Klaus Deininger and Derek Byerlee, 'The rise of large farms in land abundant countries: Do they have a future?' (2012) 40(4) *World Development* 701, 706–708.

requirements in global supply chains have created incentives for companies directly to control farming activities, or to source supplies from few large producers.¹⁷ Many states have adopted policies to promote agribusiness investment and make ‘idle’ land available to commercial operators on favorable terms, leading some nongovernmental organizations (NGOs) to denounce what they dubbed ‘land reform in reverse’.¹⁸ These evolutions fostered a renewed business interest in developing country agriculture, and underpinned the surge in land acquisition.

While the evidence suggests that ‘land grabbing’ has been a phenomenon of significant magnitude by historical standards, the latest figures of aggregate scale are considerably smaller than earlier estimates. In the case of one widely used database, improved accuracy over time has resulted in considerable downscaling of aggregate data—from ‘cross-checked’ deals for over 70 million hectares worldwide between 2000 and late 2011, to a total of 43 million hectares up to May 2016.¹⁹ At the country level, the scale of land acquisition may account for a very small share of national land suitable for agriculture. For example, total land transacted in the period 1 January 2005 to 31 August 2012 was estimated to account for between 1.1% and 1.9% of land suitable for rain-fed agriculture in Ethiopia, Ghana, and Tanzania.²⁰ Figures are constantly subject to revision, but these findings put into perspective claims that ‘land grabbing’ signals a rapid, transformational transition from small to large-scale farming. Long-term local-level demographic and socioeconomic change can have a greater impact on evolving land relations than the much-publicized large-scale land deals.

However, even a smaller aggregate scale of land acquisition can significantly increase pressures on land. Single land deals can be very large, with top-end figures for palm oil concessions being as large as 350,000 hectares.²¹ Deals for suitable farmland at this scale are likely to involve at least some compression of existing land claims. In addition, the deals are often concentrated in specific districts or regions, and can therefore exacerbate competition for land in high-value locations.²² Further, agribusiness investments may intervene in contexts where demands on land are already increasing from other sources, including localized demographic pressures and extractive industry developments. And quantitative measures of land acquired say little about differences in the quality, value, and use of the land transacted, and about the implications of the deals for socioeconomic change in local and national contexts.²³

Evidence suggests that the surge peaked in 2009–2010, with a slowdown in the pace of deal-making in subsequent years.²⁴ New large-scale land deals are still being signed, but the

17. For a discussion of standards in agricultural value chains, see for example Catherine Dolan and John Humphrey, ‘Changing governance patterns in the trade in fresh vegetables between Africa and the United Kingdom’ (2004) 36(3) *Environment and Planning A* 491.

18. GRAIN, ‘Asia’s agrarian reform in reverse: Laws taking land out of small farmers’ hands’ (2015), <<http://www.grain.org/article/entries/5195-asia-s-agrarian-reform-in-reverse-laws-taking-land-out-of-small-farmers-hands>>.

19. Data from Land Matrix, *The Online Public Database on Land Deals*, <<http://www.landmatrix.org>> as of November 2011 and May 2016.

20. According to systematic national inventories discussed by Cotula and others (n 11) 907. The inventories only covered land deals over 1,000 hectares.

21. Contracts available at the *Liberia Extractive Industries Transparency Initiative* website, <<http://www.leiti.org.lr>>.

22. See e.g., Moussa Djiré and others, *Agricultural investment in Mali: Context, trends and case studies* (International Institute for Environment and Development 2012).

23. Scoones and others (n 4).

24. See e.g., Anseeuw and others (n 11) 6; Cotula and others (n 11) 911–912.

global rush for land appears to have slowed, at least for now. While more research on the causes of this slowdown is needed, lower oil and agricultural commodity prices,²⁵ the disappointing results of many agribusiness investments, policy change in some countries, and greater awareness about the reputational risks associated with contestation over 'land grabbing' all seem to be relevant factors. In some recipient countries, political instability (e.g., Mali) and epidemics (e.g., Liberia, Sierra Leone) have also affected existing projects and cooled enthusiasm for new ones.

However, global demand for agricultural commodities is expected to rise in the longer term, albeit at a slower rate than in recent years, and agricultural commodity prices are projected to remain higher than in the years before the price hike of 2007–2008.²⁶ This trend is linked to ongoing structural transformations at both national and global levels: population is growing, rising incomes in sections of society increase demand for resource-intensive commodities, growing urbanization expands the share of the population that depends on purchases of agricultural commodities, and climate change can exacerbate bottlenecks in agricultural supplies. In this context, policy priorities and structural factors both upstream (such as easier access to international finance) and downstream (for example, concentration in processing and distribution) of agricultural production tend to favour large agribusiness over small-scale producers, so expanding production to meet demand for agricultural commodities may involve further shifts toward large-scale farming; there are continuing reports of transnational large-scale land deals, albeit more sporadically and with the focus partly shifting to geographies deemed less prone to public contestation about 'land grabbing' (such as Europe, North America, Australia and Central Asia); some governments are reportedly considering compensating revenue shortfalls from the extractive industry slump through expanding the agricultural frontier; and plans for ambitious public-private partnerships to promote commercial agriculture in low- and middle-income countries—including large-scale farming and integration of small-scale producers in commercial supply chains—could create opportunities to transform local livelihoods, but have also raised concerns about pressures on valuable lands.²⁷

While much international attention has focused on transnational land deals, systematic national inventories of deals in selected countries have pointed to the important role played by local nationals (politicians, civil servants, and entrepreneurs, but also parastatals), reflecting longer-term processes of social differentiation and capital accumulation in national societies.²⁸ Where

25. Lower oil prices reduce the competitiveness of biofuel ventures, which were a major driver of land acquisition.

26. Agricultural Outlook 2015–2024 (n 5) 15, 29; Lutz Goedde and others, *Pursuing the Global Opportunity in Food and Agribusiness* (McKinsey&Company, 2015), <<http://www.mckinsey.com/industries/chemicals/our-insights/pursuing-the-global-opportunity-in-food-and-agribusiness>>.

27. See, e.g., the numerous recent reports of agribusiness deals, particularly in Europe, North America, Australia and Central Asia, collected at Farmlandgrab.org, *The Global Rush for Farmland and Peoples' Struggles Against It*, <<http://www.farmlandgrab.org/>>. See also Land Matrix, 'Newsletter' (November 2015), <http://www.land-matrix.org/media/filer_public/95/1c/951c640e-3cda-4a0b-821c-3c5142b901b7/7365_up_ispa_land_matrix_newsletter_261115.pdf>. For an analysis of the land deals in the light of structural transformations in global agriculture, see Deininger and Byerlee (n 16). For an example of policy discussions about expanding cultivation to compensate shortfalls in extractive industry revenues, see Bolivia Information Forum, *Bolivia: Big Changes Planned for Agriculture* (16 June 2015), <<http://lab.org.uk/bolivia-big-changes-planned-for-agriculture>>. For an advocacy report raising concerns about pressures on land from public-private partnerships in agriculture, see ActionAid, 'New alliance, new risk of land grabs: Evidence from Malawi, Nigeria, Senegal and Tanzania' (2015), <http://www.actionaid.org/sites/files/actionaid/new_alliance_embargoed_2.pdf>.

28. Deininger and others (n 11) 61, 63; Cotula and others (n 11) 912–913.

foreign investment is involved, Western companies have played a central role in land acquisition, particularly in biofuels investments, and especially in Africa.²⁹ These findings challenge enduring perceptions that investors from China and the Middle East have been leading land acquirers. Many reported Chinese deals in Africa have proved inflated, nonexistent, or discontinued,³⁰ although China is an important land acquirer in Southeast Asia.³¹ Indian and Southeast Asian companies have also acquired significant amounts of land in Africa.³²

Patterns of land acquisition vary significantly in different contexts. Land tenure is a key driver of these patterns. Where land is mainly or wholly owned or controlled by the state, as in many African countries and in the Mekong region, land deals have primarily involved long-term leases or concessions allocated by government agencies. However, where much land is owned by clans and families, as in Ghana, customary chiefs have led the deal-making, again primarily in the form of land leases;³³ while private land purchases and complex financial transactions appear to be more common in Latin America.³⁴ Even where they are not party to the deals, governments often play an important role through providing incentives, establishing investment promotion schemes, and enacting law reforms that facilitate land access for commercial operators.

Rigorous assessments of the long-term socioeconomic outcomes of large land deals remain limited. However, the evidence available thus far points to disappointing outcomes, at least in the short term. The failure rate of these agribusiness ventures appears to have been high, though impossible to quantify with precision, and slow implementation has marred ongoing investments. Available data suggest that only 3.7 million hectares, out of a total of some 40 million hectares transacted since 2000, are under cultivation,³⁵ indicating that overall levels of implementation remain low. These findings offer a cautionary tale on the potential of large land deals to contribute to poverty reduction and inclusive development in recipient countries.

What is clear, however, is that large-scale land deals can increase pressures on land and resources. There have been numerous reports of land dispossession, at different scales and under diverse terms, associated with 'land grabbing', for example in Cambodia,³⁶ Ethiopia,³⁷ Ghana,³⁸

29. One study found that European companies account for 40% of all land acquired in Africa since 2005, followed by North America with 15%. According to this study, the United Kingdom, the United States, and Norway were the world's first, second, and fourth largest acquirers of Africa's land. See Schoneveld (n 11) 7.

30. See the extensive work of Deborah Bräutigam on her website, *China in Africa: The Real Story*, <<http://www.chinaafricarealstory.com/>>.

31. See e.g., Kevin Woods, 'Ceasefire capitalism: Military-private partnerships, resource concessions and military-state building in the Burma-China borderlands' (2011) 38(4) *Journal of Peasant Studies* 747.

32. For a fuller discussion of these trends, see Lorenzo Cotula, *The Great African Land Grab? Agricultural Investments and the Global Food System* (Zed Books 2013).

33. George C Schoneveld and others, 'Land-based investments for rural development? A grounded analysis of the local impacts of biofuel feedstock plantations in Ghana' (2011) 16(4) *Ecology and Society* 10, 15.

34. On 'land grabbing' in Latin America, see Sergio Gómez (ed), *The Land Market in Latin America and the Caribbean: Concentration and Foreignization* (Food and Agriculture Organization of the United Nations 2014).

35. Land Matrix (n 26).

36. See e.g., UNHRC, 'Report by Special Rapporteur Surya P Subedi on the situation of human rights in Cambodia: A human rights analysis of economic and other land concessions in Cambodia' (2012) UN Doc A/HRC/21/63/Add.1, paras 129, 138–145.

37. See e.g., Oakland Institute, 'Understanding land investment deals in Africa—country report: Ethiopia' (2011) 39–44, <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Land_Investment_report.pdf>.

38. See e.g., Schoneveld and others (n 33) 16–18.

Laos,³⁹ Liberia,⁴⁰ Mozambique,⁴¹ Uganda,⁴² and Tanzania.⁴³ There has also been significant contestation at local, national, and international levels, with local-to-global alliances of affected people, social movements, and NGOs opposing the deals or seeking inclusion under better terms.⁴⁴

As the media headlines about 'land grabbing' wane, fine-grained analyses are emerging on the deeper, more fundamental transitions at play. At a deeper level, large-scale land deals embody a reconfiguration of property, reflected in transitions from communal tenure for grazing or foraging to exclusive rights for commercial developments; in the growing transnationalization of land relations in low- and middle-income countries; and in shifting relations between public authority, citizens, and foreign capital. While the pace of deal-making has slowed, these more profound transformations are still ongoing, driven by shifts in the local to international legal regimes that frame the regulation of property relations. It is to a discussion of property that I now turn.

B. PROPERTY AND THE GLOBAL RESOURCE SQUEEZE

Property is a multifaceted concept. In common parlance, property is often taken to mean 'things' or 'assets'. In law, it primarily refers to rights and obligations concerning things, and as discussed it is broadly defined here as legal relations concerning control over valuable resources. Traditionally, jurists have defined property as a relationship between a person and a thing, reflected in the Roman law concept of rights *in rem*.⁴⁵ But some more recent legal scholarship has emphasized the relational nature of property, framing property as the web of 'relations [. . .] among persons or other entities with respect to things'.⁴⁶ Either way, property is

39. See e.g., Miles Kenney-Lazar, 'Plantation rubber, land grabbing and social-property transformation in southern Laos', (2012) 39(3-4) *Journal of Peasant Studies* 1017, 1026-1032.

40. See e.g., Deininger and others (n 11) 122-123.

41. See e.g., Isilda Nhamumbo and Alda Salomão, *Biofuels, Land Access and Rural Livelihoods in Mozambique* (International Institute for Environment and Development 2010) 27-29, 31-32; FIAN, 'The human rights impacts of tree plantations in Niassa Province, Mozambique' (FIAN International 2012) 18-23.

42. See e.g., Oxfam, 'Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land' (2011) Oxfam Briefing Paper, 15-16, <http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp151-land-power-rights-acquisitions-220911-en_4.pdf>.

43. See e.g., Emmanuel Sulle and Fred Nelson, *Biofuels, Land Access and Rural Livelihoods in Tanzania* (International Institute for Environment and Development 2009) 46-54.

44. See e.g., Emily Polack and others, *Accountability in Africa's Land Rush: What Role for Legal Empowerment?* (International Institute for Environment and Development 2013); Ruth Hall and others, 'Resistance, acquiescence or incorporation? An introduction to land grabbing and political reactions "from below"' (2015) 42(3-4) *Journal of Peasant Studies* 467.

45. For a more recent articulation of this way of conceptualizing property, see James Penner, *The Idea of Property in Law* (Clarendon Press 1997).

46. Stephen R Munzer, *A Theory of Property* (Cambridge University Press 1990) 16. The relational concept of property draws on the work of analytical jurist Wesley N Hohfeld, 'Fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 16. It has been considerably developed in legal anthropology and sociolegal studies. See for instance, Franz von Benda-Beckmann, 'Anthropological approaches to property law and economics' (1995) 2 *European Journal of Law and Economics* 309.

widely considered an important mechanism for the allocation of scarce resources in society.⁴⁷ Property is ‘the legitimate cloth of wealth’, because ‘property systems structure the ways in which wealth can be acquired, used and transacted’.⁴⁸ In addition to this important economic dimension, property is embedded in a country’s political and social relations. There is a strong connection between property and power, not least because ‘differences in property holdings can produce great imbalances of power’.⁴⁹ In many societies, property is linked to social identity, cultural, or spiritual values and the collective sense of justice, especially where ‘emotive’ assets such as land and natural resources are at stake. As a result, property has never been just a technical legal issue, but a political one, affecting the fundamentals of social and economic organization and the relationship between private interests and public authority.⁵⁰

Legal opinion on ways to conceptualize property is divided—for example, between those who defend a ‘unitary’ concept of property presenting relatively standardized characteristics, and those who consider property to involve variable ‘bundles of rights’ the content of which needs to be assessed on a case-by-case basis. The bundle theory has proved particularly influential in US jurisprudence,⁵¹ and in the work of scholars studying property relations in non-Western societies.⁵² Other thinkers have recognized the validity of the bundle theory but also the effectiveness of the unitary theory to describe property in Western legal traditions. These authors have sought to identify the defining features that distinguish property from other legal relations.⁵³ Depending on the author, the distinctive features of property typically include, in varying degrees of importance, three sets of rights: ‘possessory’ rights to use assets and withdraw benefits;⁵⁴ the right to manage and transfer assets;⁵⁵ and the right to exclude others⁵⁶

47. Armen A Alchian and Harold Demsetz, ‘The property right paradigm’ (1973) 33(1) *Journal of Economic History* 16, 16.

48. Franz von Benda-Beckmann and others, ‘The properties of property’ in Franz von Benda-Beckmann, Kebeet von Benda-Beckmann, and Melanie G Wiber (eds), *Changing Properties of Property* (Berghahn Books 2006) 2. For a different take on the relationship between property and wealth, see Hannah Arendt, *The Human Condition* (University of Chicago Press 1958–1998) 58–67.

49. Munzer (n 46) 178.

50. Francesco Amirante, ‘Il Diritto di Proprietà nella Giurisprudenza Costituzionale’ (Il diritto di proprietà nella giurisprudenza costituzionale: incontro trilaterale delle corti costituzionali italiana, spagnola e portoghese seminar, Lisbon 8–10 October 2009), <http://www.cortecostituzionale.it/documenti/convegni_seminari/Amirante_8-10.10.2009.pdf>.

51. See e.g., *Kaiser Aetna v United States*, 444 US 164 (1979) 176; *Loretto v Teleprompter Manhattan CATV Corporation*, 458 US 419 (1982) 436.

52. See e.g., Jean-Philippe Colin, ‘Disentangling intra-kinship property rights in land: A contribution of economic ethnography to land economics in Africa’ (2008) 4(2) *Journal of Institutional Economics* 231; Philippe Lavigne Delville, ‘Registering and administering customary land rights: PFRs in West Africa’ (World Bank Conference on Land Policies and Legal Empowerment of the Poor, Washington DC, 2–3 November 2006), <http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S4_Lavigne.pdf>.

53. Anthony M Honoré proposed 11 ‘incidents’ of property, including, for example, the rights to use, exclude, manage, and transfer. See ‘Ownership’ in Anthony G Guest (ed), *Oxford Essays on Jurisprudence* (Clarendon Press 1961) 107, 113–124.

54. Edella Schlager and Elinor Ostrom, ‘Property-rights regimes and natural resources: A conceptual analysis’ (1992) 68(3) *Land Economics* 249, 250–252 (writing about common property resources). See also Adam Mossoff, ‘What is property? Putting the pieces back together’ (2003) 45 *Arizona Law Review* 371, 400–403.

55. Penner (n 45) 152 (referring to ‘the right to determine the use or disposition’); Mossoff (n 54) 400; Schlager and Ostrom (n 54) 251–252.

56. Penner (n 45) 68–104; Mossoff (n 54) 397–403; Schlager and Ostrom (n 54) 251–252; Thomas W Merrill, ‘Property and the right to exclude’ (1998) 77 *Nebraska Law Review* 730.

and to enjoy legal protection of possessory and management rights. Much of the discussion in subsequent sections of this chapter hinges on the relationship among these three sets of rights.

Irrespective of the conceptual approach followed, it is clear that jurists talk of property to mean not only ownership, but a wider range of rights; that the boundaries between proprietary and nonproprietary rights are blurred and may vary in different jurisdictions;⁵⁷ that there are important differences in the conceptualisation of property in different legal traditions, including not only common law and civil law but also non-Western traditions;⁵⁸ and that positive law may involve considerable departures from conceptual constructs.⁵⁹ While much property theorising is most directly relevant to national law, property concepts developed in some jurisdictions have found their way into international law. One example is provided by the influence of the US Supreme Court's jurisprudence on the framing of expropriation clauses included not only in US investment treaties but also in treaties not involving the United States.⁶⁰

Historically, there have been major changes in the relative importance of different objects of property. While land was traditionally the main asset, the development of capitalist economies and the emergence of the welfare and regulatory state have resulted in property concepts being applied to more wide-ranging assets. Long-term historical data for major industrialized economies shows the much-reduced importance of farmland, and the substantially greater role of housing stocks, industrial capital, and financial instruments such as equity shares or sovereign debt.⁶¹ While similar data are not systematically available for low- and middle-income countries, it is commonly believed that farmland accounts for a significant share of national wealth in many agrarian societies, although profound socioeconomic transformations are changing the nature and distribution of wealth in many contexts. That said, the recent wave of large-scale land deals suggests that land remains a significant 'asset class', the relative importance of which varies with changing global fundamentals.

The development of legal concepts concerning property has traditionally evolved hand in hand with these shifts in socioeconomic and political realities. Parallel to the changing relative importance of different asset classes has been a transition toward more dynamic concepts of property. While a static concept emphasises control over assets, a more dynamic notion emphasises expectations and revenue generating potential. The historical unfolding of the Industrial Revolution and the rise of enterprise vis-à-vis landed property was accompanied by the growing centrality of dynamic notions of property in national legal systems.⁶² This shift was already

57. Munzer (46) 24; Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Greenwood Press 2000) 12.

58. On customary land tenure in Africa, see e.g., Sara Berry, 'Hegemony on a shoestring: Indirect rule and access to agricultural land' (1992) 62(3) *Africa* 327; Jean-Pierre Chauveau and Jean-Philippe Colin, 'Customary transfers and land sales in Côte d'Ivoire: Revisiting the embeddedness issue' (2010) 80(1) *Africa* 81; Peters (n 9).

59. See e.g., legislation that limits the 'right to exclude', such as in the United Kingdom the codification of 'access rights' under Part 1 of the Land Reform (Scotland) Act of 25 February 2003.

60. See Vicki Been and Joel C Beauvais, 'The global fifth amendment? NAFTA's investment protections and the misguided quest for an international "regulatory takings" doctrine' (2003) 78 *New York University Law Review* 30; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press 2008); Lorenzo Cotula, 'Expropriation clauses and environmental protection: Diffusion of law in the era of investment treaties' (2015) 24(3) *Review of European, Comparative & International Environmental Law* 278.

61. Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014) 116–117, 141, 151, 157.

62. For a discussion of court jurisprudence in nineteenth-century United States, France, and Italy on tensions between static and dynamic property, reflected for instance in damage caused to landed property by

evident in some nineteenth-century jurisprudence, captured in the statement attributed to Jeremy Bentham that '[p]roperty is nothing more than the basis of a certain expectation'.⁶³

This dynamic notion of property emerges clearly in contemporary arbitral jurisprudence under international investment law. In *Methanex Corp v. United States of America*, the arbitral tribunal argued 'the restrictive notion of property as a material "thing" is obsolete', and is replaced by a 'contemporary conception which includes managerial control over components of a process that is wealth producing'.⁶⁴ In addition, a dynamic notion of property is reflected in arbitral awards that have used deprivation of a 'reasonably-to-be-expected economic benefit of property' as a criterion to determine whether an expropriation has occurred.⁶⁵ It is also reflected in the multiple awards that have used forward-looking valuation methods in a compensation context.⁶⁶

Property issues are ubiquitous in the global resource squeeze, including in large-scale land deals for agribusiness investments. These deals involve the acquisition of long-term rights to land, and possibly rights to water and other natural resources. While land deals in many low- and middle-income countries typically involve long-term concessions or leases, rather than outright purchases, these concessions and leases can involve important proprietary elements, including possessory rights, excludability, and possibly a degree of transferability and mortgageability.⁶⁷ Property relations in 'land grabbing' are not limited to rights to land and resources, however. Research on the complex 'investment chains' underlying transnational land deals highlights the multiple actors, relations, and processes that are involved in the design, financing, and implementation of agribusiness investments. Relevant actors range from the ultimate owners of the capital invested in the venture (such as institutional investors or high-net worth individuals), to fund managers, lenders, and a range of service providers and intermediaries, through to contractors and suppliers. These actors are connected by a network of contractual and other relations, which together constitute the investment chain.⁶⁸

In effect, large-scale land deals create mediated encounters among complex constellations of actors—from local land users in Africa to the centers of global finance. Multiple property

industrial installations, see Stefano Rodotà, *Il Terribile Diritto: Studi sulla Proprietà Privata* (2nd edn, Il Mulino 1990) 149–171.

63. Jeremy Bentham, *Theory of Legislation* (Etienne Dumont ed, Charles Milne Atkinson tr, Humphrey Milford, Oxford University Press 1802–1914) 145, <https://archive.org/stream/benthamstheoryof01bent/benthamstheoryof01bent_djvu.txt>.

64. *Methanex Corporation v United States of America* (Final Award of the Tribunal on Jurisdiction and Merits, 2005) UNCITRAL (Methanex), [IV.D.17].

65. *Metalclad Corporation v The United Mexican States* (Award, 2000) ICSID Case No ARB(AF)/97/1, [103] (Metalclad).

66. For a discussion, see Thomas W Wälde and Borzu Sabahi, 'Compensation, damages and valuation in international investment law' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1049–1124; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011).

67. The existence of proprietary elements is exemplified by the *bail emphytéotique*, a type of land lease used for agribusiness investments in some civil law jurisdictions. See e.g., Mali's Decree No 96-188 (1996) arts 44–52. For an analysis of a few contracts, see Lorenzo Cotula, *Land Deals in Africa—What is in the Contracts?* (International Institute for Environment and Development 2011).

68. Lorenzo Cotula and Emma Blackmore, *Understanding Agricultural Investment Chains: Lessons to Improve Governance* (Food and Agriculture Organization of the UN/International Institute for Environment and Development 2014).

assets lie along these investment chains, including majority and minority shareholdings held directly or indirectly (that is, through intermediary companies) and, where a farmland fund is structured as a trust, beneficial interests.⁶⁹ These characteristics of agribusiness investment chains require an integrated consideration of the various assets involved, casting 'land grabbing' within the wider context of property relations concerning not only land and natural resources but also the finance and assets mobilized to acquire and exploit those resources.

In this context of increasingly transnationalized property relations, the balance between national and international regulation is shifting. National law continues to play a central role in the normative frameworks governing property. However, international lawmaking affecting property has accelerated in recent decades. Large numbers of investment treaties and investor-state arbitrations have made international investment law one of the most dynamic branches of international law. Indigenous peoples and local communities have appropriated the human right to property in their struggles over natural resources, resulting in significant developments in international human rights law jurisprudence.⁷⁰

In addition, soft-law instruments are making inroads into areas where international lawmakers would previously not venture: the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) provide comprehensive international guidance on land governance—an issue that has traditionally fallen within the exclusive preserve of domestic jurisdiction.⁷¹ In linking tenure rights to food security and human rights, the VGGT call for the legal protection of all 'legitimate tenure rights' and for transparency, participation, and accountability in land governance. They also provide specific guidance on land restitution, land redistribution, land tenure reform, agribusiness investments, and land administration, among other issues.

As a result of these multiple developments, an appraisal of the legal arrangements shaping property in the global resource squeeze needs to consider the interplay between national and international instruments. On the ground, many rural people in low- and middle-income countries continue to access land and natural resources through local, 'customary' systems of property that have been undergoing profound transformations as a result of socioeconomic, cultural, and political change.⁷² These customary systems establish land claims that may be perceived as socially 'legitimate' at the local level, but that enjoy varying degrees of legal recognition under national law. Important connections exist between normative sources at local to global levels. For example, implementing international law and guidance may require reforming national law, as illustrated by VGGT provisions calling on states to protect 'legitimate' customary rights that may currently have no legal recognition under national law.⁷³

69. For a discussion of property issues in funds, see Penner (n 45) 110, 133–138.

70. See for instance the following Inter-American Court of Human Rights cases: *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgment) Inter-American Court of Human Rights Series C No 79 (31 August 2001); *Yakye Axa Indigenous Community v Paraguay* (Judgment on the Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005); *Sawhoyamaxa Indigenous Community v Paraguay* (Judgment on the Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006) (Sawhoyamaxa); *Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 172 (28 November 2007).

71. Food and Agriculture Organization of the United Nations and Committee on World Food Security, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (Food and Agriculture Organization of the United Nations 2012) (VGGT).

72. Lorenzo Cotula (ed), *Changes in 'Customary' Land Tenure Systems in Africa* (International Institute for Environment and Development 2007).

73. VGGT (n 71) paras 3A, 4.4, 5.3, among others.

The relevance of international investment law to property and ‘land grabbing’ deserves further discussion. Two conceptual issues need to be addressed. First, investment treaties typically protect investment, rather than property. There are important conceptual differences between property and investment. While the mere holding of rights to an asset could qualify as property, investment is a dynamic concept connected to the running of a business enterprise and usually involving capital contributions, a duration, the taking of risks, and the aim of generating returns. In addition, investment treaties typically define investment broadly to encompass a wide range of assets, including in several cases claims to money under contracts. Therefore, not all investment constitutes property, and not all property constitutes an investment.⁷⁴ Some arbitral jurisprudence has elaborated on the characteristics of investment, relying on the criteria of contribution, duration, and risk to distinguish investments from commercial transactions for jurisdictional purposes.⁷⁵ However, the fact that many treaty definitions of investment focus on protected ‘assets’ would tend to increase the relevance of investment treaties to the protection of property,⁷⁶ as would the prevalent use of dynamic notions of property that emphasize expectations and wealth creation, discussed above.

Second, from an economic perspective the rules of international investment law are best characterized as ‘liability rules’, rather than ‘property rules’, meaning that the primary remedy for violations is an entitlement to compensation rather than restoration of property.⁷⁷ However, the conceptual implications of this consideration should not be overstated. International human rights courts have sometimes ordered states to return property, particularly in cases involving indigenous peoples.⁷⁸ But states have powers of eminent domain under most national legal systems, meaning that they can expropriate property even against the will of the property holder so long as certain requirements are met, including payment of compensation. In this context, the framing of international investment law in terms of liability rather than property rules primarily reflects the fact that investment law regulates relations with sovereign states. It does not undermine the relevance of international investment law to the protection of property.

Overall, there is little doubt that the protection of (dynamically defined) foreign property remains an important part of international investment law. The property dimensions of international investment law were particularly evident in the language used in some early legal drafting, including the Draft OECD Convention on the Protection of Foreign Property of 1967,⁷⁹ and in some early scholarship that explicitly framed investment law in property

74. Zachary Douglas, ‘Property, investment and the scope of investment protection obligations’ in Zachary Douglas, Joost Pauwelyn, and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 363–406, 374.

75. For example, in *Nova Scotia Power Incorporated (Canada) v Bolivarian Republic of Venezuela* (Award, 2014) ICSID Case No ARB(AF)/11/1, the arbitral tribunal held that the ordinary meaning of ‘investment’ requires contribution, duration, and risk even if these criteria are not explicitly referred to in the relevant investment treaty ([84]). The tribunal found that it had no jurisdiction to hear a claim based on coal supply contracts ([113]).

76. Douglas (n 74) 373.

77. Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) 58–62. The differentiation between property and liability rules is developed in Guido Calabresi and A Douglas Melamed, ‘Property rules, liability rules and inalienability: One view of the cathedral’ (1972) 85 *Harvard Law Review* 1089.

78. See e.g., *Sawhoyamaya* (n 70) [248(6)].

79. OECD, Convention on the Protection of Foreign Property (12 October 1967), <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=242&InstrumentPID=237&Lang=en&Book=>>>.

terms.⁸⁰ While property concepts subsequently went out of fashion in the investment law literature, recent scholarship suggests that a comeback might be underway.⁸¹ Some investment treaties explicitly tie safeguards against expropriation to property rights or property interests.⁸² And the concept of property was central in some recent investor-state arbitrations, where tribunals elaborated at length on whether the investor held property rights under applicable national law which could form the object of an expropriation.⁸³

There is also little doubt that international investment law has a direct bearing on property relations at stake in large-scale land deals for plantation agriculture. Land-based investments would usually be covered by broad definitions of investment that investment treaties tend to provide. Several asset types typically mentioned in investment treaties are particularly relevant—including immovable property, company shares, and natural resource concessions. Immovable property would cover proprietary interests in land and installations. Natural resource concessions would cover land concessions or leases, which as discussed can present important proprietary elements, and some investment treaties explicitly refer to 'concessions to search for, *cultivate*, extract or exploit natural resources'.⁸⁴ Company shares would typically protect the majority and minority shareholdings,⁸⁵ and the direct and indirect

80. See for instance George C Christie, 'What constitutes a taking of property under international law?' (1963) 38 *British Yearbook of International Law* 307; Francis J Nicholson, 'The protection of foreign property under customary international law' (1965) VI *Boston College Law Review* 391; Rudolf Dolzer, 'Indirect expropriation of alien property' (1986) 1 *ICSID Review—Foreign Investment Law Journal* 41.

81. Ursula Kriebaum and Christoph Schreuer, 'The concept of property in human rights law and international investment law' in Stephan Breitenmoser, Bernhard Ehrenzeller, and Marco Sassoli (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Nomos 2007) 743–762; Nicolás Marcelo Perrone, 'The international investment regime and foreign investors' rights: Another view of a popular story' (PhD thesis, London School of Economics and Political Science 2013), <<http://etheses.lse.ac.uk/776/>>; Douglas (n 74) 369–380; and for my own work, Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (Routledge 2012).

82. See e.g., Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (released 20 April 2012) Annex B, s 2 (US Model BIT of 2012); ASEAN Comprehensive Investment Agreement (entered into force 29 March 2012) Annex 2, s 1.

83. *Emmis International Holding BV v Hungary* (Award, 2014) ICSID Case No ARB/12/2, [158]–[255] (Emmis); *Bayview Irrigation District and Others v The United Mexican States* (Award, 2007) ICSID Case No ARB(AF)/05/1, [109]–[122].

84. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments (signed 19 November 2009) art 1(a)(v) (UK-Ethiopia BIT), emphasis added. Other UK treaties use similar formulations. See e.g., Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lao People's Democratic Republic for the Promotion and Protection of Investments (entered into force 1 June 1995) art 1(a)(v) (UK-Laos BIT); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments (entered into force 2 August 1996) art 1(a)(v) (UK-Tanzania BIT); Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia (signed 17 March 2010) art 2(a)(v) (UK-Colombia BIT). So do some treaties concluded by Malaysia—for example, the Convenio entre el Gobierno de Malasia y el Gobierno de la República de Chile sobre la Promoción y Protección de las Inversiones (entered into force 4 August 1995) art 1(a)(v) (Malaysia-Chile BIT).

85. The first-ever treaty-based investor-state arbitration concerned a 48.2% minority shareholding in a shrimp farm: *Asian Agricultural Products Limited v Republic of Sri Lanka* (Award, 1990) ICSID Case No ARB/87/3, [91]–[98] (Asian Agricultural Products). See also *CMS Gas Transmission Company v The Argentine Republic*

shareholdings,⁸⁶ that may be found in agribusiness investment chains, and there is a vast international jurisprudence on the extent to which shareholders can bring claims for losses suffered both directly (for instance, lower dividends or share prices) and indirectly (that is, via losses suffered by the company).⁸⁷ Preliminary evidence indicates that a large share of agribusiness investments initiated during the recent surge in land deals are protected by investment treaties.⁸⁸

Patterns in investment dispute settlement confirm the relevance of international investment law to plantation agriculture. Land and agricultural plantations have formed the object of international dispute settlement since the early twentieth century, for example, where agrarian reforms or land occupations in Latin America affected land owned by foreign nationals.⁸⁹ In the 1930s, the expropriation of land owned by US nationals as part of Mexico's agrarian reform triggered celebrated diplomatic correspondence between the US and Mexican governments. In that correspondence, US Secretary of State Cordell Hull argued that customary international law required states to pay prompt, adequate, and effective compensation where foreign investment is expropriated.⁹⁰ This standard of compensation has come to be known as the 'Hull formula', and is widely used in contemporary investment treaties.⁹¹ These evolutions reflect the important role that land disputes played in the historical development of international investment law. In more recent times, the first ever investor-state arbitration brought under an investment treaty related to the destruction of a shrimp farm in an armed conflict situation.⁹² And while nowadays many investment disputes relate to services or extractive industries, agricultural investments continue to be a source of investment disputes—including

(Decision of the Tribunal on Objections to Jurisdiction, 2003) ICSID Case No ARB/01/8, concerning a minority shareholding of 29.42% ([36]–[65]); *Gami Investments Incorporated v The Government of the Mexican States* (Final Award, 2004) UNCITRAL, concerning a minority shareholding of 14.18% ([26]–[43]). See also the arbitrations brought by Yukos minority shareholders: *RosInvest Company UK Limited v Russian Federation* (Final Award, 2010) SCC Arbitration (later set aside by a Swedish court); *Quasar De Valores SICAV SA v Russian Federation* (Award, 2012) SCC Arbitration.

86. See e.g., *Ronald S Lauder v The Czech Republic* (Final Award, 2001) UNCITRAL; *Siemens AG v The Argentine Republic* (Decision on Jurisdiction, 2004) ICSID Case No ARB/02/8, [137]; *Hesham Talaat M Al-Warraq v The Republic of Indonesia* (Final Award, 2014) UNCITRAL, [511]–[517] (Al-Warraq).

87. Michael Waibel, 'Coordinating adjudication processes' in Zachary Douglas, Joost Pauwelyn, and Jorge E Viñuales (eds), *Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 499–530. On shareholdings as protected property under investment law and under the internationally recognized human right to property, see Kriebaum and Schreuer (n 81) 752–756.

88. It is difficult to measure with precision the extent to which the recent wave of land deal-making is covered by investment treaties because information about corporate structures is often not in the public domain. A recent study matching data on the global stock of investment treaties available in the UNCTAD database of investment treaties (UNCTAD, *International Investment Agreement Navigator*, <<http://investmentpolicyhub.unctad.org/IIA>>) and data on 997 land deals for agribusiness investments included in the Land Matrix (n 19) found that 64% of the land deals were protected by at least one investment treaty. See Lorenzo Cotula and Thierry Berger, *Land Deals and Investment Treaties: Visualising the Interface* (International Institute for Environment and Development 2015).

89. See e.g., *United States of America on Behalf of Marguerite de Joly de Sabla v The Republic of Panama* (Award, 1933) U.S.–Panama Arbitration Commission.

90. Department of State, 'Mexico–United States: Expropriation by Mexico of agrarian properties owned by American citizens' (1938) 32 *American Journal of International Law* 181, 181.

91. August Reinisch, 'Legality of expropriations' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) 196.

92. *Asian Agricultural Products* (n 85).

investments focused on agro-processing and trading,⁹³ and agribusiness plantations affected by land reform or occupation.⁹⁴

The upshot is that 'land grabbing' involves the negotiation and renegotiation of multiple property assets governed or protected by both national and international law, and that international investment law is an increasingly important part of the legal frameworks that shape the protection of property. Two dimensions are particularly important in conceptualizing property in large-scale land deals for agribusiness investments, reflecting two key moments in investment processes. The first relates to the *allocation* of property—that is, the norms defining the conditions under which investors can acquire land and resource rights. The second relates to the *protection* of property—that is, the rules sheltering the land and resource rights that investors have acquired. While conceptually separate and belonging to different constituent elements of property (rights to manage and transfer assets, and rights to exclude others and enjoy protection, respectively), these two dimensions are closely interrelated. For example, the norms regulating the allocation of resource rights to investors can affect the protection of third-party rights to the same resources. For convenience, allocation and protection are discussed separately in the next two sections. Given the important role of long-term historical trajectories in shaping both allocation and protection, the discussion will briefly place contemporary developments in their historical context.

C. NATIONAL LAW AND THE ALLOCATION OF PROPERTY

Control over land and natural resources is intimately linked to issues of territory, citizenship, and statehood.⁹⁵ In many societies, land is a highly emotive issue. As a result, the rules governing the allocation of property over land remain primarily shaped by national law, and several states have adopted legislation restricting the ability of foreign nationals to acquire ownership of land.⁹⁶ International law and guidance are increasingly making inroads into property allocation issues. For example, the Voluntary Guidelines on the Responsible Governance of Tenure provide extensive (if broadly worded) guidance on important aspects of allocation processes, calling for tenure allocation policies to be 'consistent with broader social, economic and environmental objectives', to promote equitable distribution of benefits from state-owned land,

93. See e.g., *Gustav F Hamester GmbH and Company KG v Republic of Ghana* (Award, 2010) ICSID Case No ARB/07/24, concerning a joint venture for the construction or upgrading of cocoa processing facilities in Ghana. See also e.g., the cases *Cargill Incorporated v The United Mexican States* (Award, 2009) ICSID Case No ARB(AF)/05/02; *Archer Daniels Midland Company and Tate and Lyle Ingredients Americas Incorporated v The United Mexican States* (Award, 2007) ICSID Case No ARB(AF)/04/05; *Ruby Roz Agricol LLP v The Republic of Kazakhstan* (Award on Jurisdiction, 2013) UNCITRAL.

94. See e.g., *Tradex Hellas SA v Albania* (Award, 1999) ICSID Case No ARB/94/2; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (Award, 2009) ICSID Case No ARB/05/6 (Funnekotter); *Bernard Von Pezhold and others v Zimbabwe* (Award, 2015) ICSID Case No ARB/10/15; *Border Timbers Limited and others v Republic of Zimbabwe* (Award, 2015) ICSID Case No ARB/10/25; *Vestey Group Limited v Bolivarian Republic of Venezuela* (Award, 2016) ICSID Case No ARB/06/4.

95. Christian Lund, 'Property and citizenship: Conceptually connecting land rights and belonging in Africa' (2011) 46 *Africa Spectrum* 71.

96. See e.g., Canada's Saskatchewan Farm Security Act 1988, art 84(1)–(2); Uganda's Land Act 1998, No 16, art 41; Cambodia's Land Law 2001, No NS/RKM/0801/14, art 8; Argentina's Law 2011, No 26737, arts 8–10.

and to establish transparent, participatory, and accessible mechanisms for the allocation of tenure rights.⁹⁷

The growing use of ‘preestablishment’ obligations in investment treaties, partly associated with the convergence between trade and investment treaties, is another case in point. Depending on formulation and subject to exceptions and reservations, preestablishment national treatment clauses could require states to remove restrictions on the acquisition of land rights that differentiate between foreign investors and local nationals. Several investment treaties explicitly exclude land tenure from the operation of preestablishment rules.⁹⁸ But other treaties do not feature land tenure reservations, so preestablishment obligations would in principle cover land rights.⁹⁹ In addition, preestablishment obligations may affect other sources of pressures on natural resources, including the extractive industries sector. In practice, the application of the typical investment law remedy for treaty violations (i.e., payment of compensation) to these preestablishment situations (i.e., before an investment has even been made) raises practical difficulties—not least because it is unclear how an arbitral tribunal would determine compensation. But while some investment treaties do not allow investors to bring arbitrations for alleged breaches of preestablishment provisions, recent arbitration claims invoking investment protection standards in relation to mining projects yet to receive development permits raise questions about the boundaries between pre and postestablishment contexts.¹⁰⁰

Overall, however, the rise of international regulation associated with the spread of economic globalization has not displaced the central role of national law in governing the ways in which property is allocated. One consequence is that there is substantial diversity in the law governing the allocation of property in different jurisdictions. This situation raises obvious challenges for a study that seeks to identify patterns across countries, and creates an imperative more clearly to delimit the geographic bounds of the discussion. Given the role of sub-Saharan Africa as an important destination in the recent wave of ‘land grabbing’, this section focuses primarily on that region (and uses ‘Africa’ as shorthand for ‘sub-Saharan Africa’), though some of the reflections may be relevant to other low-income countries as well. While recognizing the interconnectedness among natural resources and the multiple property objects involved in agribusiness investment chains, mentioned above, this section primarily focuses on control over land. The previous section identified the right to use assets and withdraw benefits, and the right to manage and transfer assets, among the constituent elements of property. The central argument in this section is that trends in national law reveal a fundamental dissociation in the construction of property—between rights to use and benefit, and rights to manage

97. VGGT (n 71) paras 8.6, 8.7, 8.9.

98. See e.g., Agreement between Canada and Mali for the Promotion and Protection of Investments (entered into force 28 November 2014) Annex I (Canada-Mali BIT). For Mali, reservations from liberalization commitments include the land code and the Agricultural Orientation Law. See also the Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (entered into force 8 January 2013) Annex II (Benin-Canada BIT); Agreement between Japan and the Lao People’s Democratic Republic for the Liberalisation, Promotion and Protection of Investment (entered into force 16 January 2008) Annex II(2) (Japan-Laos BIT).

99. See e.g., Cameroon’s schedule of reservations to the Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments (entered into force 3 March 2014) Annex I (Cameroon-Canada BIT), which does not appear to refer to Cameroon’s land legislation.

100. An example of treaty provision precluding arbitration for preestablishment claims is ASEAN Comprehensive Investment Agreement (n 82) art 32(a). The ongoing arbitration *Bear Creek Mining Corporation v Republic of Perú*, ICSID Case No ARB/14/21, involves investment protection claims in relation to a mining project at an early stage of implementation.

and transfer. This dissociation influences patterns in large-scale land deals, undermining local control over resources and facilitating the acquisition of large areas of land for commercial operations.

To properly understand today's property relations and transnational land deals in Africa, it is necessary to chart a long-term historical trajectory dating back to colonial times. This is because important aspects of the national land legislation applicable in many African jurisdictions are still influenced by historical legacies rooted in the colonial experience and in post-independence ideology. While European colonization in the Americas and small parts of coastal Africa dates back to the fifteenth century, the wholesale colonization of Africa took place from the late nineteenth century. The 1885 General Act of the Berlin Conference was a landmark event in this process.¹⁰¹ Contrary to widespread perceptions, the General Act did not carve out Africa among the participating powers—most of its content deals with freedom of trade and navigation on the Congo and Niger River basins. However, by setting rules for the occupation by European powers of coastal territories in Africa,¹⁰² the General Act did pave the way for what came to be known as the scramble for Africa. Within a few years, the European colonizers asserted political sovereignty over much of the African continent.

In many pre-colonial societies, prevailing sociocultural and spiritual beliefs underpinned property systems whereby land could be possessed and used but not exclusively owned. On the other hand, the colonial powers claimed ownership of vast areas of land, vesting with the colonial state, or with the Crown, lands deemed to be without visible occupation ('vacant' lands, *terres vacantes et sans maître* in French).¹⁰³ The colonial administrators recognized varying degrees of legal protection to preexisting land use rights accompanied by productive occupation. But they also used their control over land to open up Africa's resources for settlers and companies through systems of registered title and land concessions, which caused extensive dispossession in parts of Eastern and Southern Africa.¹⁰⁴ Elsewhere, colonial control over land was established in more indirect ways, namely through the manipulation of customary authorities. In Ghana, for example, colonial attempts to vest vacant land with the Crown were successfully resisted by powerful customary chiefs and by a national bourgeoisie that was itself interested in acquiring rural land for speculation. As a result, colonial administrators worked to strengthen the land tenure prerogatives of the chiefs as a means to control the rural population.¹⁰⁵

Independence in most African countries in the late 1950s and 1960s brought radical change to the continent's political landscape. Collective action by newly independent states resulted in the solemn international affirmation of the permanent sovereignty of states over natural resources.¹⁰⁶ However, the application of the principle of respect of borders existing on achievement of independence meant that the colonial legacy had a powerful influence on the formation of the newly independent states.¹⁰⁷ The continued influence of the colonial legacy

101. General Act of the Berlin Conference on West Africa (26 February 1885).

102. *ibid* arts 34–35.

103. See e.g., Wily (n 12) 756–760.

104. *ibid*.

105. Kojo S Amanor, *Global Restructuring and Land Rights in Ghana* (Nordiska Afrikainstitutet 1999).

106. United Nations, General Assembly Resolution 1803(XVII) on Permanent Sovereignty of States over Natural Resources (14 December 1962) UN Doc A/5217. See Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).

107. See Organization of African Unity (First Ordinary Session of Assembly of Heads of State and Government) Resolution AHG/Res 17(I) (OAU Addis Ababa 17–21 July 1964); the Constitutive Act of the African Union

was particularly evident in evolutions affecting national land laws: many post-independence legislators provided for the continued application of colonial-era land laws.¹⁰⁸ As a result, African states inherited legal systems that were geared toward centralizing resource control in the hands of the state and opening up resources for public authorities and outside investors, rather than toward protecting local land rights—although government powers were now to be used in pursuit of a development agenda, rather than for colonial exploitation. Consistent with the approach that had been taken by colonial legislation, much landownership continued to be vested with states. The land claims of rural people usually continued to be framed as use rather than ownership rights, and legal protection was often subject to evidence of productive use.¹⁰⁹

Much law reform has occurred since independence, and land legislation varies considerably in different jurisdictions. However, the important role of the state in landownership or control remains a defining feature of many national legal systems in sub-Saharan Africa—either because all land is owned by the state,¹¹⁰ or because legislation creates a presumption that untitled land is owned by the state and cumbersome titling procedures constrain access to private landownership for the majority of rural people.¹¹¹ The legal forms of state ownership or control vary considerably both within and between jurisdictions, encompassing concepts such as radical title, trusteeship, *domain public de l'état*, *domaine privé de l'état*, and *domain foncier national*, among others. As a broad generalization, however, it is often central government authorities that have the legal authority to formally allocate land. In Mozambique, for example, legislation empowers the government to issue long-term leases,¹¹² and comparable norms exist in other countries. In these contexts, land law is primarily conceptualized as part of administrative law, with often extensive legal provisions regulating the exercise of government powers, administrative procedures, and the relationship between land users and administrative authorities.

In most jurisdictions worldwide, powers of eminent domain allow government authorities to expropriate for a public purpose privately owned land and reallocate it even against the will of landowners. But vesting landownership directly with the state creates a more fundamental dissociation in the 'bundle of rights' constituting property: land users hold possessory rights to use the land and to derive benefits from it, but the right to formally allocate land to commercial operations is vested *ab initio* in the state as the legal owner of the resource. These recurring

(AU) (Lomé, 11 July 2000) art 4(b). See also *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep [22]; *Case Concerning the Frontier Dispute (Benin/Niger)* (Judgment) [2005] ICJ Rep 2005 [23]. For an analysis differentiating the *uti possidetis juris* doctrine developed at the time of independence in Latin America from the OAU/AU principle of respect of borders existing on achievement of independence, see *Case Concerning the Frontier Dispute (Burkina Faso/Niger)* (Separate Opinion of Judge Yusuf) [2013].

108. Patrick McAuslan, 'Only the name of the country changes: The diaspora of European land law in Commonwealth Africa' in Camilla Toulmin and Julian Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (Department for International Development/International Institute for Environment and Development/Natural Resources Institute 2000) 75–96, 77.

109. Liz Alden Wily, *The Tragedy of Public Lands: The Fate of The Commons under Global Commercial Pressure* (International Land Coalition 2011).

110. See e.g., the Constitution of the Federal Democratic Republic of Ethiopia (1994) art 40(3).

111. See e.g., Moussa Djiré, *Land Registration in Mali—No Land Ownership for Farmers? Observations from Peri-Urban Bamako* (International Institute for Environment and Development 2007).

112. Land Law No 19/97 (1997) art 12(c).

features of national legal systems are reflected in land deal-making: in many African countries, agribusiness investments tend to involve leases granted by the state,¹¹³ although patterns in the exercise of public authority, including the interplay between central and local government, vary significantly in different countries.¹¹⁴ In several jurisdictions, public authorities have taken steps to facilitate the acquisition of land rights by commercial operators, for example, through reforming the tenure rights that investors can acquire, establishing 'one-stop shops', or streamlining land allocation procedures—a process that, as discussed, some NGOs have dubbed 'agrarian reform in reverse'.¹¹⁵

At one level, the central role of the state in land relations and the legal devices empowering states to allocate land to large-scale investors respond to the perceived need of African countries to attract investment as a way to promote economic development, create employment, and generate public revenues. It is equally clear, however, that these features are rooted in the colonial legacy and are linked to the political economy of the African state. In practice, the ways in which states exercise their right to allocate land depends on the nature of government and of the sociopolitical contract underpinning it. Decisions to allocate land to agribusiness companies may be shaped, for example, by policy imperatives to promote economic development that effectively equate agricultural 'modernization' with large-scale, mechanised farming; by the prospect of higher and easier to collect public revenues, compared to the revenues collectable from numerous, dispersed, and 'informal' small-scale rural producers; by geopolitical considerations, whereby allocating long-term leases constitutes a way to reassert sovereignty over the national territory;¹¹⁶ or by direct or covert corruption.

The dissociation between use and allocation rights in the legal construction of property, and the policy thrust favoring land allocation to commercial operators, also need to be related to the political economy of natural resource investments. Depending on context, tensions may arise between local and national interests—because national elites in government and rural groups affected by the investment may have different visions of what constitutes 'development'; and because the costs and benefits of the investments may be distributed unevenly between local and national levels. These circumstances heighten the importance of the quality of governance in the management of public lands. In legal terms, two factors are particularly important: the degree of protection for use rights that stand to be affected by land allocation; and mechanisms for transparency, participation, and accountability in public decision-making concerning land allocation. The Voluntary Guidelines on the Responsible Governance of Tenure provide extensive guidance on both of these aspects. Respect for, and protection of, 'legitimate tenure rights' is a central pillar of the Voluntary Guidelines.¹¹⁷ This includes recognizing and respecting all legitimate tenure rights; safeguarding all legitimate tenure rights against threats and infringement; promoting and facilitating the enjoyment of legitimate tenure rights; and providing

113. See e.g., Cotula and others (n 11) 917.

114. *ibid* 915–918.

115. GRAIN (n 18). This report concerns Asia, rather than Africa, but raises issues of wider geographic relevance. For a discussion of measures to promote land-based investments in Africa, see Lorenzo Cotula and Camilla Toulmin, 'Investment promotion agencies and access to land: Lessons from Africa' in Annie Dufey, Maryanne Grieg-Gran, and Halina Ward (eds), *Responsible Enterprise, Foreign Direct Investment and Investment Promotion: Key Issues in Attracting Investment for Sustainable Development* (International Institute for Environment and Development 2007) 119–130.

116. Jason Mosley, 'Peace, Bread and Land: Agricultural Investments in Ethiopia and the Sudans' (2012) Chatham House 9–11, <<http://www.chathamhouse.org/publications/papers/view/181519>>.

117. VGGT (n 71) para 3.1.

access to justice to deal with infringements of legitimate tenure rights.¹¹⁸ In addition, the Voluntary Guidelines contain numerous provisions on transparency,¹¹⁹ participation,¹²⁰ and accountability¹²¹ in tenure decision-making. Yet, a review of trends in the law regulating the allocation of property reveals important problematic areas in relation both to the protection of tenure rights and to transparency, participation, and accountability in decision-making.

Let us start from a brief discussion of the first issue. In much of rural Africa, farmers, herders, and foragers tend to use land on the basis of local property systems. These systems are typically qualified as ‘customary’, because they are based on usually unwritten rules founding their legitimacy on tradition as shaped both by practices over time and by systems of belief. In reality, these systems have profoundly changed and have been reinterpreted, and in many cases weakened, as a result of population pressures, socioeconomic change, cultural interactions, and manipulation by colonial and post-independence governments.¹²² Despite considerable diversity, customary systems tend to create a strong connection between people and land, casting the latter as a foundation for cultural identity, social relations, and spiritual value. They also establish often elaborate rules for the management and allocation of land. While in many contexts customary systems remain relatively effective in managing land relations at the local level, the arrival of outside commercial investments tends to increase the importance of statutory recognition of claims based on customary law.

Following transitions toward multiparty politics in the early 1990s, some states, including Mozambique, Namibia, Tanzania, and Uganda, adopted diverse legislation that strengthened the legal recognition of customary land rights.¹²³ But some other states have not significantly revised their land legislation in decades, and the extent to which national law recognizes customary rights varies considerably depending on the context and the jurisdiction. In most cases, however, customary rights tend to be recognized as use rights, rather than ownership. Despite substantial diversity in national laws, several factors tend to undermine the legal protection of these use rights. These factors include legislative gaps and inconsistencies; productive use requirements that undermine claims to land used for grazing or foraging, or to land set aside for future generations (which taken together may account for the majority of a village’s customary landholdings); extensive powers of compulsory acquisition through broadly defined public purpose requirements that allow expropriation of property for commercial projects; compensation requirements limited to improvements (such as crops or buildings) and inadequate to restore livelihoods; and, importantly, shortcomings in the implementation of progressive law reforms, partly linked to issues of political will, vested interests, and budget constraints, but also to legislative design at odds with the reality of administrative capacity on the ground.¹²⁴

118. *ibid.* Recognition, respect, and protection of legitimate tenure rights are also referred to in numerous other provisions of the VGGT, e.g., paras 4.4–4.5, 5.3, 7.1, 8.2, 8.4, 8.7, 9.4–9.5, 11.6, 12.4, 12.6, 12.10, 12.15, 14.1, 16.1.

119. *ibid.* e.g., paras 1.2.3, 3B.8, 6.9, 7.4, 10.5, 15.9, 18.3, 19.3.

120. *ibid.* e.g., paras 3B.6, 4.4, 6.9, 7.3, 8.6–8.7, 9.9, 9.12, 12.5, 12.7–12.10, 15.6–15.7, 16.2, 16.8, 23.3, 24.3.

121. *ibid.* e.g., paras 3.1.4, 3B.9, 6.9, 7.3, 21.6.

122. On colonial manipulation, see e.g., Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985); Mahmood Mamdani, *Citizen and Subject—Contemporary Africa and the Legacy of Late Colonialism* (James Currey 1996).

123. For a commentary, see Rachael Knight, *Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Law-Making and Implementation* (Food and Agriculture Organization of the United Nations 2011).

124. For example, where implementation requires establishing costly bureaucracies and procedures. For a fuller discussion of these issues, see Wily (n 109) 42–57; Cotula (n 81) ch 4.

Weaknesses in the legal protection of local use rights are compounded by widespread shortcomings in the arrangements to ensure that public decisions on land allocation respond to local and national aspirations. While some laws require governments or investors to consult local communities before concluding a land concession or lease,¹²⁵ others do not, and implementation has often fallen short of expectations.¹²⁶ And while a few states have introduced legislation promoting degrees of transparency, including contract disclosure,¹²⁷ lack of transparency and opportunities for public participation in decision-making has been a recurring theme in the 'land grabbing' literature. As a result of these trends, even in those countries that have adopted more progressive land legislation to secure local rights, land use rights remain fragile, and the ability of citizens to influence public decision-making remains limited.

In several jurisdictions, the role of states in landownership and control is less prominent, and customary authorities play a central role in both law and practice. In Ghana, for example, part of the land is owned by the state but most belongs to customary chiefdoms, extended families, and individuals.¹²⁸ This different legal context is rooted in history, particularly the above-mentioned arrangements that the British colonial administration established with customary authorities in the late nineteenth century and the early part of the twentieth century. One consequence is that, as already discussed, large-scale land deals in Ghana are often signed with customary chiefs rather than the central government.

In principle, the involvement of local authorities would be expected to provide opportunities for villagers to have their voice heard in land allocation, at least in terms of closer geographic proximity of decision-making to local land users. However, historical legacies are at play in relation to customary institutions too. The nature and powers of these institutions are the product of much colonial-era and post-independence intervention aimed at controlling rural populations.¹²⁹ In addition, agribusiness investments enter local arenas where socioeconomic change has had profound impacts on customary property systems. The content and legitimacy of customary rules and institutions are often hotly contested, with different groups putting forward competing interpretations, and with power relations between those groups shaping evolutions in customary law.¹³⁰

Similar to the ways in which some national laws vest control over land in the government, customary systems also tend to dissociate the rights to use and to allocate land, often vesting the power to allocate land with customary authorities. The strength of the claims of land users vis-à-vis traditional authorities tends to vary with their status—for example, whether the land

125. See e.g., Mozambique's Land Law No 19/97 (1997) art 13.

126. Christopher Tanner and Sergio Baleira, 'Mozambique's Legal Framework for Access to Natural Resources: The Impact of New Legal Rights and Community Consultations on Local Livelihoods' (2006) LSP Working Paper 28, <[ftp://ftp.fao.org/docrep/fao/009/ah249e/ah249e00.pdf](http://ftp.fao.org/docrep/fao/009/ah249e/ah249e00.pdf)>; Simon Norfolk and Christopher Tanner, 'Improving Security for the Rural Poor: Mozambique Country Case Study' (2007) LEP Working Paper 5, <[ftp://ftp.fao.org/sd/SDA/SDAR/sard/Mozambiquecase.pdf](http://ftp.fao.org/sd/SDA/SDAR/sard/Mozambiquecase.pdf)>.

127. See e.g., Liberia Extractive Industries Transparency Initiative Act (2009) art 5(3). This Act covers logging and agribusiness concessions as well as extractive industry contracts (art 5(4)).

128. Kasim Kasanga and Nii Ashie Kotey, *Land Management in Ghana: Building on Tradition and Modernity* (International Institute for Environment and Development 2001) 13–19.

129. Mamdani (n 122).

130. Pauline E Peters, 'Challenges in land tenure and land reform in Africa: Anthropological contributions' (2009) 37 *World Development* 1317. For a case study, see Lorenzo Cotula and Salmana Cissé, 'Changes in "customary" resource tenure systems in the inner Niger delta, Mali' (2006) 52 *Journal of Legal Pluralism* 1.

users are members of the local landholding family or descend from migrants, or whether they are youths or elders, or men or women.¹³¹ In many places, the traditional mechanisms to hold customary authorities to account have been weakened, and these authorities are reinterpreting their land management prerogatives from custodianship to ownership.¹³² Similar to patterns in national governance, multiple considerations may encourage customary authorities to make land available to commercial developments, including opportunities for land rental fees, social infrastructure, political patronage, and personal gain, and for reasserting radical title over contested lands.¹³³

This bird's-eye view of the law framing property over land in Africa indicates that historical legacies and recent developments affecting property tend to undermine the rights of land users and to facilitate the allocation of land to commercial operators. The dissociation between land use and transfer rights under both national and customary law creates a misalignment in the distribution of costs and benefits of land allocation—because those allocating the land are not those who bear the adverse consequences of land allocation, particularly loss of use rights. While the quality of land governance varies in different contexts and jurisdictions, farmers, herders, and foragers may have weak legal rights to the lands they claim as theirs, and limited options to influence decision-making processes affecting those lands. The dissociation between land use and transfer rights, coupled with weak use rights and shortcomings in transparency, participation, and accountability, creates opportunities and incentives for investments that, while approved by public authorities and compliant with applicable law, may conflict with local development aspirations.

This prevailing legal context exposes local land users to the risk of dispossession—a risk corroborated by the many reports of actual land dispossession, discussed above. It also establishes the root causes of the sustained contestation that many large-scale land deals have faced. Companies that sign land leases with governments or customary authorities in compliance with national law may still face contestation if the deals are perceived to trump local rights and aspirations. There is now growing recognition of this 'land tenure risk' (political, financial, reputational) in natural resource investments.¹³⁴ Grassroots action to claim land rights in the face of unpopular land allocations can adversely affect agribusiness investments, and so can government measures taken in response to grassroots pressures. For example, grassroots action and government measures can cause delays, higher costs, or even contract termination. In these cases, the handling of the situation on the part of public authorities could enter into tension with legal arrangements established to protect foreign investment. The rules regulating

131. Julian Quan, 'Changes in intra-family land relations' in Lorenzo Cotula (ed), *Changes in 'Customary' Land Tenure Systems in Africa* (International Institute for Environment and Development 2007) 51–63.

132. Janine Ubink, 'Tenure security: Wishful policy thinking or reality? A case from Peri-Urban Kumasi, Ghana' (2007) 51 *Journal of African Law* 215; Philippe Lavigne Delville, 'Changes in "customary" land management institutions: Evidence from West Africa' in Lorenzo Cotula (ed), *Changes in 'Customary' Land Tenure Systems in Africa* (International Institute for Environment and Development 2007) 35–50; Cotula and Cissé (n 130).

133. Festus Boamah, 'How and why chiefs formalize relationships with land users in recent times: Illuminating the politics of land dispossessions during land transactions for biofuels investments in Ghana' (International conference on 'Global Land Grabbing II', Ithaca, October 2012), <<http://www.cornell-landproject.org/papers/>>.

134. See e.g., Ramon de Leon and others, 'Global capital, local concessions: A data-driven examination of land tenure risk and industrial concessions in emerging market economies' (prepared for the Rights and Resources Initiative, The Munden Project Ltd, 2013), <http://www.rightsandresources.org/documents/files/doc_6301.pdf>.

the allocation of property shape land deals and their outcomes in important ways, but property protection can also have far-reaching repercussions. It is to the discussion of the protection of property that I now turn.

D. INTERNATIONAL INVESTMENT LAW AND THE PROTECTION OF PROPERTY

In a globalized world, the protection of property is shaped by both national and international law. Depending on the jurisdiction, national law may provide important safeguards, including any constitutional right-to-property provisions. However, recent years have witnessed growing recourse to international law in natural resource disputes. The growing leveraging of the human right to property by indigenous peoples and local communities struggling for land and resources has already been mentioned. Foreign investors have made growing use of investor-state arbitration, with the cumulative number of *known* arbitrations based on investment treaties now over 600,¹³⁵ and with the natural resource sector representing 30% of the caseload under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).¹³⁶ As discussed in Section B, above, while international investment law protects investment, rather than property, several factors compound the relevance of investment law to the protection of property in the context of investments affecting control over land and natural resources.

Given the growing recourse to international remedies, this section explores the ways in which evolutions in international investment law are contributing to a reconfiguration of property in the context of commercial pressures on natural resources. The main argument is that the historical development of international investment law has entailed important shifts in the protection of property, affecting not only control over the world's natural resources but also the boundaries for the lawful exercise of state sovereignty. Coupled with the shortcomings that may affect the national law regimes under which property is allocated, discussed above, the shifting contours of international investment law raise questions about whether international safeguards risk 'hardening' weaknesses of national governance.

In the decades following independence in Africa and Asia, the international protection of foreign investment was closely intertwined with debates about control over natural resources, and formed the object of much controversy between newly independent states and capital exporting countries. The outcomes of that controversy were, on the one hand, the solemn affirmation of the principle of permanent sovereignty of states over natural resources, discussed above,¹³⁷ and, on the other, the development of a vast network of bilateral investment treaties (BITs) aimed at protecting foreign investment in low- and middle-income countries. More recently, major investment treaty negotiations have covered investment flows between

135. UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2014' (2015) *IIA Issue Note No 2*, 1, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d4_en.pdf>.

136. ICSID, *The ICSID Caseload—Statistics* (International Centre for Settlement of Investment Disputes 2015) 12. The figure includes data for 'oil, gas and mining' and for 'agriculture, fishing and forestry'.

137. UNGA Res 1803 (XVII) (n 106).

high-income countries as well, an early and important example being the North American Free Trade Agreement (NAFTA).¹³⁸

Over the years, the historical pendulum has shifted between periods of state assertiveness and ‘resource nationalism’, and phases where concerns about investment protection appeared paramount—with shifts in resource cycles and changing commodity prices playing a role in promoting transitions between the two. Overall, however, multiple factors have tended considerably to extend over time the reach of international investment law. An exponential increase in the number of investment treaties (including investment chapters in wider trade and investment treaties), coupled with sophisticated corporate planning techniques, has expanded the share of global economic activity covered by investment treaties, particularly in low- and middle-income countries.¹³⁹ And while only a few decades ago investment disputes commonly involved direct expropriations, contemporary investor-state arbitrations have come to involve a much wider range of regulatory measures. These gradual expansions of the reach of international investment law have been underpinned not by multilateral codification, but by a highly dynamic process involving decentralized negotiation and contestation—including multiple bilateral treaty negotiations and the interplay between arbitral jurisprudence and treaty practice.¹⁴⁰

The role of arbitral jurisprudence in the development of international investment law is exemplified by the concept of legitimate expectations. While this concept was until recently not mentioned in investment treaties, arbitral jurisprudence has developed it into a key element of the standard of fair and equitable treatment—a standard that is routinely included in investment treaties and that has been extensively relied on in arbitration claims.¹⁴¹ Arbitral jurisprudence has also considerably elaborated on the notion of indirect expropriation, identifying the conditions under which regulation undermining the enjoyment of property,¹⁴² or the value of property,¹⁴³ requires states to compensate investors.¹⁴⁴ Investors have relied on fair and equitable treatment and/or indirect expropriation provisions to challenge a wide range

138. Examples of recent negotiations concerning investment flows between developed countries include the investment chapters of the Comprehensive Economic Partnership Agreement between the European Union and Canada, and of the proposed EU-US Transatlantic Trade and Investment Partnership. Some ongoing negotiations for mega-regional trade and investment treaties bring together both developed and developing countries. See e.g., the negotiations for the Trans-Pacific Partnership and the Regional Comprehensive Economic Partnership.

139. Important investment flows between the United States, Western Europe, and Japan have so far remained outside the cover of investment treaties, though as discussed this may change in the near future.

140. Joost Pauwelyn, ‘Regime composition, emergence, and change’ in Zachary Douglas, Joost Pauwelyn, and Jorge E Viñuales (eds), *Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 11–43.

141. The first explicit reference by an arbitral tribunal to ‘legitimate expectations’ in relation to fair and equitable treatment is in *International Thunderbird Gaming Corporation v The United Mexican States* (Award, 2006) UNCITRAL, [147] (International Thunderbird Gaming). However, some earlier awards referred to legitimate expectations in relation to expropriation claims, and to comparable concepts (e.g., ‘basic expectations’) specifically in relation to fair and equitable treatment. See *Técnicas Medioambientales Tecmed SA v The United Mexican States* (Award, 2003) ICSID Case No ARB(AF)/00/2, [122], [154] (Tecmed).

142. *Pope and Talbot Incorporated v The Government of Canada* (Interim Award, 2000) UNCITRAL, [100]–[102].

143. *Metalclad* (n 65) [103].

144. There is vast literature on fair and equitable treatment and on indirect expropriation. For a synthetic but effective overview, see Bonnitcha (n 77) 143–272.

of public measures, including action to sanction contractual breaches, environmental regulations, policies to remedy historical injustices, and measures to collect taxes or increase fiscal revenues.¹⁴⁵

This incrementally expanding reach of international investment law has redefined the boundaries between property protection and public authority. By setting minimum standards of substantive protection and providing international redress mechanisms, international investment law protects private property against adverse public action, imposing discipline on the exercise of sovereign powers. Indeed, states can lawfully take action encroaching on protected assets only if certain conditions are met. As pointed out by an arbitral tribunal in its discussion of an alleged expropriation, 'while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. [. . .] [T]he rule of law, which includes treaty obligations, provides such boundaries'.¹⁴⁶ Monetary compensation is by far the most common remedy for breaches of investment treaties. This means that states can still take measures so long as they pay compensation. But the exposure of states to investor claims for damages raises fundamental issues about the ways in which the costs of public action should be distributed between public and private actors. In addition, the large amounts that arbitral tribunals have awarded to some investors, the widely ratified multilateral conventions facilitating the enforcement of awards, and the broad range of measures challenged through investor-state arbitration have sparked concerns that investment protection standards could restrict the ability of states to regulate in the public interest.¹⁴⁷

Concerns about preserving regulatory space have led some states to seek a 'recalibration'¹⁴⁸ of their investment treaties. Early movers included the United States and Canada¹⁴⁹—two states at the receiving end of sizable arbitration caseloads in the context of NAFTA. Some South and Southeast Asian states have also taken more nuanced approaches to investment treaty-making,¹⁵⁰ as have some African states.¹⁵¹ This shift is reflected in new departures in treaty formulation, including for example more narrowly formulated fair and equitable treatment provisions tied to the minimum standard of treatment under customary international law,¹⁵² annexes clarifying the criteria to determine whether an indirect expropriation has occurred,¹⁵³

145. Nathalie Bernasconi-Osterwalder and others, *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers* (International Institute for Sustainable Development 2012) 7.

146. *ADC Affiliate Limited v Republic of Hungary* (Award, 2006) ICSID Case No ARB/03/16, [423].

147. See e.g., ECOSOC, 'Report of the High Commissioner for Human Rights—Economic, Social and Cultural Rights: Human Rights, Trade and Investment' (2003) E/CN.4/Sub.2/2003/9, para 35; Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press 2009).

148. José E Alvarez, 'Why are we "recalibrating" our investment treaties?' (2010) 4 *World Arbitration and Mediation Review* 143.

149. See e.g., Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (released 5 February 2004) (US Model BIT of 2004); US Model BIT of 2012 (n 82).

150. See e.g., ASEAN Comprehensive Investment Agreement (n 82).

151. Investment Agreement for the COMESA (Common Market for Eastern and Southern Africa) Common Investment Area (signed 23 May 2007) (COMESA Investment Agreement).

152. See e.g., Cameroon-Canada BIT (n 99) art 6.

153. See e.g., Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (entered into force 1 January 2012) art 5 (US-Rwanda BIT).

and general exceptions clauses modeled on Article XX of the General Agreement on Tariffs and Trade (GATT).¹⁵⁴

It has been argued that recalibrated treaties go a long way toward addressing concerns about excessive restrictions on regulatory space.¹⁵⁵ Other commentators have raised concerns about scope of application, protection standards, dispute settlement, and the lack of a clear affirmation of a right to regulate even in recalibrated texts.¹⁵⁶ There is still too little arbitral jurisprudence on several recalibrated standards, and the jury is out on whether these recalibrated standards adequately address concerns about regulatory space. In addition, these evolutions in treaty-making have increased diversity in the investment treaty landscape: there is significant diversity in the formulation of recalibrated treaties, and many states have continued to conclude investment treaties not featuring recalibrated elements. As a result, depending on applicable treaties arbitral tribunals could reach different conclusions on whether a given measure breaches treaty standards. The boundaries between property protection and public authority are historically determined and geographically contingent based on applicable investment treaties.

Opinions on acceptable levels of legal protection are divided. Ultimately, this issue cannot be solved on technical grounds alone. Choices are eminently political, and different governments can legitimately have different positions on acceptable balances between competing policy goals. Overall, however, there is little doubt that decades of investment treaty-making and the extensive arbitral jurisprudence developed over the past twenty years have fostered a reconfiguration of the protection of property at the global level. Over the years, investors have harnessed international investment law to challenge public measures and claim protection for property assets as diverse as landownership,¹⁵⁷ intellectual property rights,¹⁵⁸ broadcasting licences,¹⁵⁹ and shareholdings in banks,¹⁶⁰ and telecommunication companies.¹⁶¹

These global evolutions have direct implications for property relations in the recent wave of agribusiness investments. They would tend to increase the protection of property held by foreign investors, including rights to land and natural resources, but also direct and indirect shareholding in land-acquiring companies. While numerous investor-state arbitrations concern natural resource investments, there are no publicly known treaty-based investor-state arbitrations specifically concerning the recent wave of 'land grabbing' deals. However, that surge in deal-making has increased the exposure of states to the risk of potential arbitration claims for land-related investment disputes. This is due to several factors: first, the very large number of deals signed in a relatively short time—some 1,000 contracts worldwide since the

154. See e.g., COMESA Investment Agreement (n 151) art 22; ASEAN Comprehensive Investment Agreement (n 82) art 17.

155. Suzanne A Spears, 'The quest for policy space in a new generation of international investment agreements' (2010) 13 *Journal of International Economic Law* 1037.

156. See for example, the 'Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)' signed by numerous scholars and available at <http://www.kent.ac.uk/law/isds_treaty_consultation.html>.

157. See e.g., *Funnekotter* (n 94).

158. See e.g., *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA Case No 2012-12.

159. See e.g., *CME Czech Republic BV v The Czech Republic* (Final Award, 2003) UNCITRAL; *Emmis* (n 83).

160. See e.g., *Saluka Investments BV v The Czech Republic* (Partial Award, 2006) UNCITRAL; *Al-Warraq* (n 86).

161. See e.g., *Rumeli Telekom AS v Republic of Kazakhstan* (Award, 2008) ICSID Case No ARB/05/16.

year 2000, according to one global database;¹⁶² second, the poor quality of at least some of the investor-state contracts underpinning the deals,¹⁶³ leaving much room for diverging interpretations and renegotiation; third, the above-mentioned evidence suggesting that a large share of large-scale land deals is protected by investment treaties; fourth, vocal calls to terminate or renegotiate the deals, or to improve their social, environmental, and economic parameters, which could have adverse impacts on commercial operations; and fifth, the fact that many deals concern countries where land governance is weak, so public authorities may lack the capacity to act in ways that comply with investment treaties.

Disputes stemming from large-scale land deals could activate investment treaties through multiple channels. This includes a wide range of measures that public authorities might take to address the issues raised by large-scale land deals. Examples from existing arbitral jurisprudence would include refusals to issue or renew environmental permits,¹⁶⁴ and efforts to renegotiate concession contracts,¹⁶⁵ resist renegotiation initiated by the investor,¹⁶⁶ or terminate contracts to sanction the investor's unauthorized transfers of contract rights to third parties.¹⁶⁷ While publicly known arbitrations involving these measures have so far affected sectors other than agriculture, the underlying measures would be relevant to agribusiness investments too. It is therefore not inconceivable that, in the coming years, comparable disputes might arise in relation to 'land grabbing'.

In addition, some large-scale land deals have experienced significant levels of grassroots contestation.¹⁶⁸ This has been the case not only where allegations of corruption or other illegality accompanied deal-making, but even for land deals that broadly complied with national law. Contestation of lawful deals is partly linked to weaknesses in land governance, discussed above. In these contexts, grassroots demands that the contested land be returned to local communities could enter into tension with treaty commitments of the state to uphold the land rights acquired by the investors, or to compensate their loss at market value.

Arbitral jurisprudence developed over the years illustrates the multiple channels that can link grassroots action to investor-state arbitration. For example, direct action by villagers (e.g., farm incursions or occupations) has led to 'full protection and security' claims, with investors arguing that the state failed to exercise due diligence in protecting the investment,¹⁶⁹

162. Land Matrix (n 19).

163. See e.g., Cotula (n 67).

164. *Tecmed* (n 141); *William Ralph Clayton Bilcon et al. v Government of Canada* (Award on Jurisdiction and Liability, 2015) PCA Case No. 2009-04; *Pac Rim Cayman LLC v The Republic of El Salvador* (Decision on the Respondent's Jurisdictional Objections, 2012) ICSID Case No ARB/09/12.

165. See e.g., *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Republic of Argentina* (Award, 2007) ICSID Case No ARB/97/3 (Vivendi II).

166. See e.g., *PSEG Global Inc v Republic of Turkey* (Award, 2007) ICSID Case No ARB/02/05.

167. See e.g., *Occidental Petroleum Corporation v Republic of Ecuador* (Award, 2012) ICSID Case No ARB/06/11 (Occidental II); *Vannessa Ventures Limited v Bolivarian Republic of Venezuela* (Award, 2013) ICSID Case No ARB(AF)04/6. In January 2016, media reports cited an Indian investor as threatening to bring a treaty-based arbitration against the Ethiopian government over termination by the latter of a large land concession. See William Davison, 'Karuturi challenges Ethiopia decision to cancel farm project' *Bloomberg* (11 January 2016), <<http://www.bloomberg.com/news/articles/2016-01-11/karuturi-challenges-ethiopian-decision-to-cancel-farming-project>>. There is no publicly available information about any follow-up on these reports.

168. See e.g., Polack and others (n 44) and Hall and others (n 44).

169. See e.g., in one undisclosed arbitral award the tribunal reportedly found that South Africa breached the full protection and security standard for failure to protect the landholding of a foreign investor against incursions from nearby communities. See Luke E Peterson, 'Swiss investor prevailed in 2003 in confidential BIT

government action taken at least in part to respond to community opposition to investments has resulted in claims for damages based on fair and equitable treatment or expropriation clauses;¹⁷⁰ and court proceedings initiated by grassroots groups or NGOs to contest proposed investment projects have triggered expropriation claims.¹⁷¹ Again, it is not inconceivable that similar processes might also occur in relation to ‘land grabbing’ deals.

The relevance of the legal protections enshrined in investment treaties is not limited to cases where investors bring arbitrations against states. Investment treaties could affect a broader range of situations not involving formal legal proceedings. For example, investors might invoke investment treaties during negotiations with the host state. The negotiating parties would know that, should the case go to arbitration, the state might incur significant liabilities. The possibility cannot be ruled out that this circumstance might have a bearing on the outcome of the negotiation.¹⁷² Compared to publicly known investor-state arbitrations, these less formalized avenues for mobilizing investment treaties are more difficult to document. Sociolegal research is needed to shed light on these processes and their outcomes. But the point here is that the lack of publicly known arbitrations concerning the recent wave of ‘land grabbing’ deals does not in itself diminish the relevance of a discussion of how investment treaties can affect property protection in relation to agribusiness investments.

Should investment treaties be formally or informally activated in relation to ‘land grabbing’, questions would arise about whether the protections provided by those treaties might compound shortcomings in national legal frameworks. Given the limited protection of local use rights and the limited opportunities for transparency, participation, and accountability that may accompany the dissociation between possessory and management rights, discussed above, an unqualified application of international protections risks compounding injustices that may have occurred during the land allocation process. The question is whether and how documented shortcomings in national regimes for the allocation of property might affect the application of international protections. Space constraints prevent a comprehensive discussion of this complex question, and the lack of publicly known arbitrations linked to ‘land grabbing’ makes the discussion largely hypothetical. However, two examples can help to illustrate the issues. The first concerns whether an arbitral tribunal can consider the circumstances under which the investor acquired the land. The second relates to the application of the doctrine of ‘legitimate expectations’. I will briefly discuss each of these examples.

Depending on factual situations and arbitral approaches, consideration of the circumstances of land acquisition might help the state to: have the dispute thrown out due to lack of jurisdiction; influence the tribunal’s decision on the merits of the case; or reduce the amount

arbitration over South Africa land dispute’ *Investment Arbitration Reporter* (22 October 2008), <http://www.iareporter.com/articles/20091001_2>. The article is based on reading the award, which has not been made public.

170. See e.g., *Abengoa SA y COFIDES SA v Estados Unidos Mexicanos* (Award, 2013) ICSID Case No ARB(AF)/09/2, [192]–[297], [610], [624], [647]–[648] (Abengoa).

171. For example, the ongoing arbitration *Infinito Gold Limited v Republic of Costa Rica* (ICSID Case No ARB/14/5) concerns the alleged expropriation of a mining concession resulting from court action initiated by a nongovernmental organization.

172. On negotiations ‘in the shadow of the law’, see Robert H Mnookin and Lewis Kornhauser, ‘Bargaining in the shadow of the law: The case of divorce’ (1979) 88 *Yale Law Journal* 950–997. With specific regard to investment law, see Thomas Wälde, ‘Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law’ (2008) 1 *Journal of World Energy Law & Business* 55, 85; Peter D Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford University Press 2010) 392; Cotula (n 81) 1–3, 27–37, 136–143.

of compensation due to the investor. Relevant circumstances may include allegations that the investor acquired the land illegally, or on unduly favorable terms. With regard to the latter, the literature on 'land grabbing' has documented widespread allocation of land below market values. A World Bank study found land rental fees to be significantly below the 'land expectation values' that the Bank developed through valuation methods based on the land's ability to generate returns. In one Mozambican case, the annual land fee was US\$ 0.60 per hectare, compared to an estimated land expectation value of US\$ 9,800 per hectare.¹⁷³ Some contracts for land deals exempt the company from paying land fees for a few years, or even for the entire duration of the project.¹⁷⁴ Low land valuations may be linked to diverse factors, including capacity constraints in government administration and deliberate policy choices to attract agribusiness investment. The issue of land allocations below market value raises particularly pressing questions in the context of political transitions from authoritarian regimes: authoritarian governments may have used land allocation at favorable terms as a means to create political support for the regime, and newly elected democratic governments may seek to renegotiate those land transactions.¹⁷⁵

Land valuation issues have come up in some recent arbitrations, albeit not concerning 'land grabbing'. For example, controversy over allegedly investor-friendly valuation of land ceded by the investor to the government, and by the government to the investor, in a 'land swap agreement' for the development of a tourism resort project in Hungary was one key issue at stake in the recent arbitration *Vigotop Limited v. Hungary*.¹⁷⁶ Another arbitration, reportedly settled,¹⁷⁷ concerned controversy over the purchase price of land acquired by a foreign investor in Egypt. The investor acquired the land during the Mubarak regime, and Egyptian courts rescinded the transaction after the fall of that regime.¹⁷⁸ One issue is that investment treaties tend to require payment of compensation at market value, and they tend not to allow tribunals 'to adjust compensation in light of fairness considerations relating to the manner in which an investment was acquired'.¹⁷⁹ A mechanical application of treaty provisions could enable investors to obtain compensation at full market value, even though they acquired the land at less than market price.¹⁸⁰

Land valuation issues aside, the land allocation process might have involved, for example, inadequate community consultation or impact assessment studies, poorly compensated expropriations, or circumvention of rules restricting foreign landownership. Depending on circumstances and applicable law, these shortcomings could involve illegal conduct—for example, where the investor acquired land through corruption. Arbitral jurisprudence suggests that

173. Deininger and others (n 11) 40, 107–109.

174. For more details, see Cotula (n 67) 24–26.

175. On this issue, see Jonathan Bonnitcha, 'Investment treaties and transition from authoritarian rule' (2014) 15(5–6) *Journal of World Investment and Trade* 965.

176. *Vigotop Limited v Hungary* (Award, 2014) ICSID Case No ARB/11/22, [93]–[105], [112]–[122], [154]–[163], [194]–[198], [418]–[421], [525]–[543].

177. Islam Zayid, 'Egypt negotiates end to international disputes' *Daily News Egypt* (16 June 2013), <<http://www.dailynewsegypt.com/2013/06/16/egypt-negotiates-end-to-international-disputes/>>.

178. *Hussain Sajwani and others v Arab Republic of Egypt* (ongoing) ICSID Case No ARB/11/16. On this arbitration, see Jarrod Hepburn and Luke E Peterson, 'Panels selected in ICSID matters involving Moldova, Egypt, and the Central African Republic' *Investment Arbitration Reporter* (13 January 2012), <<http://www.iareporter.com/articles/20120113>>; Bonnitcha (n 175) 983.

179. Bonnitcha (n 175) 1007.

180. *ibid* 1005–1007.

property acquired through corruption would in principle be excluded from the protection of investment treaties.¹⁸¹ In addition, some investment treaties require compliance with applicable law in the making of an investment as a condition for legal protection, and some arbitral tribunals have considered investors' violations of applicable law even in the absence of such legality clauses.¹⁸² So investments made illegally could be excluded from protection. However, corruption tends to be difficult to prove. Legality requirements in investment treaties usually concern the making of an investment, so illegal conduct occurring during the operation of the venture would typically not exclude the investment from treaty protection.¹⁸³ Allegations of illegality may involve 'shades of grey' that are difficult to handle, for example, where systemic gaps in laws or regulations undermine the proper operation of national legislation; where investments formally comply with legislation but NGOs raise concerns about alleged violations of the 'spirit of the law';¹⁸⁴ or where issues are raised about the *quality* of measures taken by the investor to comply with national law (e.g., impact assessments, community consultation).

In addition, the fact that land-acquiring companies complied with national law has not sheltered them from contestation. As discussed, national law may fail adequately to protect the land rights of affected people, or to provide effective opportunities for transparency, participation, and accountability—for example, as assessed against the benchmark of the above-mentioned Voluntary Guidelines on the Responsible Governance of Tenure.¹⁸⁵ In these situations, even treaties that require compliance with national law could extend protection to landholdings that communities perceive investors to have acquired through an injustice.

The doctrine of 'legitimate expectations' further illustrates the risk that a mechanical application of investment treaty protections might entrench shortcomings of national governance. Widely considered to be a key element of fair and equitable treatment, the 'legitimate expectations' doctrine refers to a situation where the conduct of the host state creates reasonable expectations on the part of an investor, yet the state subsequently fails to honor those expectations causing the investor to suffer losses.¹⁸⁶ Arbitral tribunals have taken different approaches in determining the type of state conduct that can give rise to legitimate expectations on the part of the investor. For example, some tribunals emphasized the need for specific, tailored representations made by government officials to the investor,¹⁸⁷ while others found that generally applicable law can in itself generate expectations, particularly to legal stability.¹⁸⁸ However, there is widespread support in the arbitral jurisprudence for the proposition that government representations can, under certain circumstances, create legitimate expectations.

181. *World Duty Free Company Limited v Republic of Kenya* (Award, 2006) ICSID Case No ARB/00/7, [157]. See also *Bonnitcha* (n 175) 999–1000.

182. For a discussion of this jurisprudence, see Rahim Moloo and Alex Khachaturian, 'The compliance with the law requirement in international investment law' (2011) 34 *Fordham International Law Journal* 1473.

183. But see *Al-Warraq* (n 86), where the majority of the arbitral tribunal declared the investor's claim inadmissible due to breach of a peculiarly worded investor obligations clause in the underlying investment treaty ([645]–[648], [654]).

184. See e.g., Oxfam, *Divide and Purchase: How Land Ownership Is Being Concentrated in Colombia* (Oxfam GB 2013).

185. VGGT (n 71).

186. *International Thunderbird Gaming* (n 141) [147].

187. *ibid* [147]–[167].

188. See e.g., *Frontier Petroleum Services Limited v The Czech Republic* (Final Award, 2010) UNCITRAL, [285].

Therefore, representations made by public officials as part of efforts to attract agribusiness investments or during contract negotiation or land allocation procedures could be deemed to create legitimate expectations. These representations could include assurances to the investor that the land is available and 'free of any encumbrances', and promises that the necessary permits will be issued. In the line of jurisprudence that considers generally applicable legislation as a possible basis of legitimate expectations, investor reliance on national law could also be deemed to create legitimate expectations. In other words, the investor could argue that, having followed prescribed procedures and having lawfully obtained a land lease from the government, it has a legitimate expectation that the project will go ahead unimpeded.¹⁸⁹

Yet government officials may have made the representations to the investor before any local consultation has taken place on the proposed agribusiness investment. And as discussed, investor compliance with national law may not be enough to ensure that a land deal does not trump local aspirations and face contestation. Given the extensive and sustained reporting of contestation against 'land grabbing', there are arguably real questions as to whether an investor could reasonably claim to have legitimate expectations that the project will go ahead unimpeded based on government representations made without meaningful, prior community engagement; or even based on compliance with national law that does not adequately recognize 'legitimate tenure rights' or that provides limited opportunities for transparency, participation, and accountability—as called for by the Voluntary Guidelines on the Responsible Governance of Tenure.¹⁹⁰

At present, however, it is not clear how arbitral tribunals would deal with these issues, and what value they would attach to promises or assurances that government officials may have made before community engagement took place. One question concerns the extent to which arbitral tribunals might be able and willing to consider soft-law instruments such as the Voluntary Guidelines on the Responsible Governance of Tenure. This prospect faces a number of hurdles, including established legal concepts such as jurisdiction and applicable law.¹⁹¹ Unlike many soft-law standards of corporate conduct, the Voluntary Guidelines primarily target states, creating additional complexity—though some provisions are applicable to investors too.¹⁹² On the other hand, recent developments in arbitral jurisprudence, not related to 'land grabbing', suggest that arbitral tribunals might develop ways to consider circumstances that the investor was or should have been aware of when acquiring property. For example, the arbitration *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa EL Corporation v. Romania* partly concerns the restitution of a historic building to the descendants of the owners dispossessed by Romania's communist regime.¹⁹³ In this case, the tribunal dismissed most of the investor's claims relating to that contested property, on the ground the investors were aware of the risk of restitution when they acquired the property.

While this part of the *Awdi* arbitration concerns real estate, the tribunal's reasoning could be relevant to possible future cases concerning rural land.¹⁹⁴ One reading of this award

189. On this point, see *Abengoa* (n 170) [646].

190. VGGT (n 71).

191. Marc Jacob and Stephan W Schill, 'Going soft: Towards a new age of soft law in international investment law?' (2014) 8(1) *World Arbitration & Mediation Review* 1, 31–33.

192. VGGT (n 71) e.g., paras 12.1, 12.4, 12.12.

193. *Hassan Awdi and others v Romania* (Award, 2015) ICSID Case No ARB/10/13 (Awdi).

194. Luke E Peterson, 'Awdi v Romania case hinges on a contract promise by privatization agency and on handling of restitution of land to former pre-communist era owners' *Investment Arbitration Reporter* (9 March 2015), <<http://www.iareporter.com/articles/20150310>>.

suggests that awareness of tenure contestation could affect the extent to which investors could claim to have legitimate expectations about the property they acquire. However, in that case public authorities had made the tenure uncertainty clear to the investor. On the other hand, many ‘land grab’ deals involve government representations to reassure investors about their security of tenure. Also, the tribunal’s analysis hinged on the investor’s awareness of the prior existence of legal proceedings for the restitution of property. As such, it provides little insight into how a tribunal might deal with situations where no such proceedings existed and competing claimants are in practice excluded from the law and from legal remedies. Finally, the *Awdi* arbitral tribunal ordered the Romanian government to return to the investor the (relatively small) purchase price paid for the property. The tribunal devoted little space to explaining this decision—it merely stated that the investor had a ‘legitimate expectation’ to have the purchase price returned should the risk of restitution materialize. This decision raises questions, particularly given that the tribunal found that the risk of restitution had been factored into the ‘relatively low price’ paid for the property.¹⁹⁵

Scope for potential tensions between action to address ‘land grabbing’ on the one hand, and the legal protections provided by international investment law on the other, is compounded by two factors: the political nature of land and capacity challenges. For understandable reasons, arbitral tribunals have tended to frown upon politicization of the ways in which investments are handled—for example, in cases where governments appeared to take social or environmental measures for political ends.¹⁹⁶ Arbitral tribunals have particularly taken issue with ‘inflammatory’ statements, political rallies, and action taken against the backdrop of electoral campaigns. Yet land can raise highly emotive and inherently political issues, particularly in many low- and middle-income countries where land provides an important basis for livelihoods, social and cultural identity, political power, and the collective sense of justice. In these contexts, land-related investment disputes are likely to involve a degree of politicization, particularly where weak rights under national law make extra-legal strategies more relevant, and mobilization of political figures is a common strategy pursued by grassroots groups.¹⁹⁷

These considerations are particularly pressing in contexts where limited human, financial, or institutional capacity undermines the effectiveness of administrative or judicial systems. In interpreting treaty standards, arbitral tribunals have developed tests to assess the conduct of public authorities,¹⁹⁸ and found treaty violations in cases partly rooted in lack of coordination among multiple ministries,¹⁹⁹ or in delays in court proceedings.²⁰⁰ Depending on context, such

195. *Awdi* (n 193) [435]. The economics of risk can be complex, but a simplified hypothetical example can help to illustrate this issue. If a property is worth €100 and there is a 50% risk of restitution, and if as a result the buyer pays €50 for the purchase, the risk factor is already integrated in the reduced purchase price. So if the risk then materializes, requiring the seller to return the price to the buyer would effectively make the purchase a ‘guaranteed bet’ and could arguably encourage land acquisition in situations of tenure contestation.

196. See e.g., *Vivendi II* (n 165) [7.4.18]–[7.4.46], [7.5.8]; *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* (Award, 2008) ICSID Case No ARB/05/22, [497]–[500], [519]; *Abengoa* (n 170) [192]–[297], [610], [624], [647]–[648]. However, some tribunals have recognized that ‘it is normal and common that a public policy matter becomes a political issue’, and have held that politicisation does not necessarily result in arbitrary or discriminatory conduct. See *AES Summit Generation Limited and AES-Tisza Erőmű Kft v The Republic of Hungary* (Award, 2010) ICSID Case No ARB/07/22, [10.3.22]–[10.3.24], [10.3.34].

197. See e.g., *Polack and others* (n 44) 37–38.

198. *Tecmed* (n 141) [154].

199. *MTD Equity Sdn Bhd v Republic of Chile* (Award, 2004) ICSID Case No ARB/01/7.

200. *White Industries Australia Limited v The Republic of Indi* (Award, 2011) UNCITRAL.

coordination failures and judicial or administrative delays could be due to limited capacity, particularly in low-income countries. The capacity challenges faced by land governance systems in many low-income countries have been well documented, as have the major backlogs of land disputes pending before national courts.²⁰¹ As a result, public authorities may not be equipped to tackle technically complex and politically sensitive issues in ways that would not expose them to arbitration claims.

This analysis highlights the relevance of international investment law to struggles over resources linked to 'land grabbing' and the wider natural resource squeeze. Should investors bring arbitrations, they will not necessarily win. Some arbitral tribunals have stressed that investors should expect regulation to change over time,²⁰² though others have considered regulatory stability to be an important element of fair and equitable treatment.²⁰³ However, the legal protections enshrined in investment treaties risk compounding problems primarily rooted in shortcomings of national governance. For example, investments made illegally may be excluded from legal protection; but investment treaties could protect one-sided land deals that, while complying with national law, dispossess rural people. In addition, the doctrine of legitimate expectations could expose governments to liabilities for representations that officials may have made to the investor before consulting communities. Further, a mechanical application of investment treaties might lead arbitral tribunals to award compensation calculated on the basis of market value, even if investors acquired land below market prices. Political stakes and capacity constraints compound these issues. Unless these issues are properly thought through, international investment law risks 'hardening' shortcomings in national governance, potentially protecting ventures initiated with little consultation and with extensive dispossession against actions in pursuit of justice and accountability.

CONCLUSION

Against the backdrop of changing pressures on the world's natural resources, property is being renegotiated. Transnational land deals, and the wider resource squeeze, are taking place in legal environments consisting of multiple, interlinked legal arenas at local to international levels. A common thread links developments in customary land tenure systems to national law reforms, through to the international arenas where investment treaties are negotiated and investor-state disputes are settled. From the customary chiefs that are reinterpreting their custodianship of common resources to allocate land to outside investors; to national law reforms aimed at facilitating access to land for commercial operators; through to the international investment treaties that protect the property rights acquired by foreign investors, legal developments are fostering a profound reconfiguration of property, with

201. See e.g., Richard C Crook, 'Access to justice and land disputes in Ghana's state courts: The litigants' perspective' (2004) 50 *Journal of Legal Pluralism* 1; Godfrey E Massay, 'Adjudication of land cases in Tanzania: A bird eye overview of the district land and housing tribunal' (2013) 4(2) *Open University Law Journal* 167.

202. See e.g., *Parkerings-Compagniet AS v Republic of Lithuania* (Award, 2007), ICSID Case No ARB/05/8, [327]–[338].

203. See e.g., *CMS Gas Transmission Company v The Argentine Republic* (Award, 2005), ICSID Case No ARB/01/8, [274].

far-reaching implications for natural resource relations linking governments, businesses, and local landholders. While the pace of the recent wave of large-scale land deal-making has slowed, at least for now, these more profound, systemic transformations are ongoing and likely to continue.

The allocation and protection of property are shaped by varying combinations of national and international law—with national law playing a prominent role in regulating allocation, and international law being increasingly resorted to for property protection. Both the allocation and the protection of property are influenced by long-term historical legacies as well as recent sociolegal developments. Despite great diversity in contexts, applicable national and international rules present significant misalignments among key constituent elements of property—namely, the rights to use assets and withdraw benefits, to manage and transfer assets, and to exclude others and enjoy legal protection. These misalignments have underpinned patterns in the recent wave of large-scale land deals. A dissociation between the rights to use and to transfer, which emerges in many local and national systems, has facilitated the allocation of land to commercial operators, often without adequate safeguards for affected local rights and arrangements for transparency, participation, and accountability. At the same time, the increasingly resorted-to international protection of property risks crystallizing injustices that may have occurred in the land allocation process, redefining the boundaries of lawful public action and affecting space for contestation of large land deals.

In many places, the effects of the global resource squeeze are visible on the ground, as lands previously used for common grazing or foraging are now claimed through exclusive rights and have been converted to monoculture—though only a fraction of the land acquired has been cultivated. More intangible but equally important changes are shifting the boundaries between competing private interests, and between private interests and public authority. The ongoing reconfiguration of control over natural resources is not only linked to the many large-scale land deals for plantation agriculture that have been concluded over the past ten years. It is also linked to the ways in which evolving legal frameworks are redefining the allocation and protection of property at local to global levels.

This holistic consideration of the ongoing reconfiguration of property provides space for a more subtle understanding of the complex political economy of investment processes and investment law—going beyond simplistic generalizations that cast the state either as a benevolent regulator unduly constrained by international investment law, or as an opportunistic predator requiring international discipline. It highlights how vested interests, public-purpose considerations, and political manipulation can coexist, and how the exercise of public authority can be shaped by capacity challenges as well as deliberate policy choices.

The holistic consideration of property also challenges conventional approaches that conceptualize international investment law in terms of a bilateral relationship between an investor and a government—reflected for example in the structure of investor-state contracting and arbitration. Natural resource investments can involve or affect other actors too, including people who may lose land to business ventures, and it is important that the whole range of relations is considered. For example, the doctrine of legitimate expectations protects investors and their investments against adverse state conduct. Yet arguably citizens also have a ‘legitimate expectation’ that their government will manage public lands in the public interest, and they should have effective recourse when they feel their expectations have been frustrated.

This perspective enables an appraisal, however preliminary and imperfect, of the distributive consequences of evolving property relations as ‘land grabbing’ brings competing resource claims into contest: while international investment law provides relatively effective protection for international capital, weak safeguards for rural land rights, only partly compensated by

the protections available under international human rights law,²⁰⁴ expose some of the world's poorest people to the risk of dispossession. As socioeconomic transformations increase pressures on the world's natural resources, imbalances in the law regulating foreign investment raise probing questions about whose rights are being protected and how.

This analysis has important implications for public action. In large-scale land acquisition, much attention in accountability efforts has been focused on the companies acquiring land. This focus is partly driven by alleged corporate malpractices (from corruption to inadequate consultation or compensation) and available pressure points for influence (harnessing the leverage provided by reputational risk, for example). There is an important place for accountability strategies targeting companies. But this chapter has exposed the ways in which structural features and transformations in property are driving the deals and their outcomes. Even 'responsible' investors risk being caught up in conflicts that are ultimately rooted in the uneven playing field created by evolving local-to-global property regimes.

While considerable efforts are being made to develop international standards of good corporate conduct in land matters, the perspective taken in this article places law reform and implementation at center stage. The discussion of the dissociation between the right to use and the right to transfer does not necessarily call for the unification of the 'bundle of rights' in the hands of land users—in other words, for the establishment of private landownership—in contexts where concepts of property differ significantly from those prevailing in Western legal traditions. But it does bring to the fore the need for more effective protection of land use rights, and for increased transparency, participation, and accountability in relations between citizens and the public authorities responsible for managing common lands, enacting laws, and negotiating treaties. The Voluntary Guidelines on the Responsible Governance of Tenure provide important pointers on how to tackle these issues, and translating international guidance into real changes on the ground should be a key priority for the coming years.

The holistic consideration of the reconfiguration of property also highlights that tackling the challenges created by the global resource squeeze requires concerted action at multiple levels. There is an urgent need for interventions to secure rural land rights, yet these are unlikely to achieve significant results unless the global dimensions are also addressed. Equally, however, ongoing debates about reforming international investment law need to be placed in the wider context of a systemic rethinking of the national and international legal frameworks governing foreign investment. On the one hand, some of the concerns that have been raised in relation to international investment law may ultimately be rooted in, and best addressed by, other bodies of law. For example, international investment law may not be the most obvious arena for addressing shortcomings in the national law regulating public decision-making. On the other hand, there is much that can be gained from ensuring that developments in international investment law are informed by a solid understanding of the political economy of resource allocation in contested terrains.

These findings call for giving careful consideration to policy choices on whether to conclude, renegotiate, or terminate investment treaties, and in what form. If new investment treaties are concluded or existing ones are renegotiated, the findings also have implications for choices on treaty formulation—for example, giving careful consideration to scope of application and investment protection standards, and exploring options for investment treaties to require adherence to the Voluntary Guidelines on the Responsible Governance of Tenure.

204. Lorenzo Cotula, 'Property in a shrinking planet: Fault lines in international human rights and investment law' (2015) 11(2) *International Journal of Law in Context* 113.

Treaty provisions along these lines could establish commitments for states to implement the Voluntary Guidelines within their respective jurisdictions, but also to require their investors—or at least those receiving public support—to adhere to the Voluntary Guidelines when operating overseas.²⁰⁵ Consideration of the political economy of resource allocation would also be relevant to treaty interpretation in an investor-state dispute settlement context: for example, in relation to clarifying the conditions under which investors can reasonably claim to have ‘legitimate expectations’ when operating through bilateral deals with government that ignore or undermine local land claims.

Ultimately, the concerns raised by the resource squeeze cannot be reduced to property alone: access to land and resources may provide the basis for the realisation of human rights, and the role of public authorities in decision-making raises important issues about self-determination and democratic accountability. The limits of property must be fully acknowledged. Yet framing discussions about ‘land grabbing’ and investment law in property terms highlights the important conceptual and practical connections among seemingly unrelated assets and legal frameworks. The findings generate new insights on the deeper transformations at play, and open up new agendas for action and research.

205. On the role of home states, see VGGT (n 71) paras 3.2, 12.15. See also *Annex to the Leaders’ Declaration*, G7 Summit (Schloss Elmau, 7–8 June 2015) 11, <http://www.g7germany.de/Content/EN/_Anlagen/G7/2015-06-08-g7-abschluss-annex-eng_en.pdf?__blob=publicationFile&v=1>.