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Responsible agricultural investment: is there a significant role for the law to promote sustainability?

by

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The world food situation is back in the headlines as price levels surpass 2008 peaks, confirming the rising trend in food markets.¹ Higher prices pose challenges to both food importing and exporting countries. One serious barrier to increasing food output remains the lack of necessary capital and technology in countries that have the potential to increase production rapidly.² To avoid a food crisis, international organizations and several governments have increasingly turned to promoting foreign direct investment (FDI) by multinational enterprises (MNEs) in agriculture. This may be an effective solution, but some obstacles stand in the way of the establishment of such projects and, more importantly, their long-term sustainability.

Agriculture is a socially very sensitive area, and foreign investors should expect its regulation to change frequently.³ This political risk, however, is only one side of the story. All too often, for host countries and their populations FDI has been associated with land grab, dispossession and damaging environmental fallout.⁴ Many food-import-dependent countries have recently acquired large tracts of land to secure their food supplies. This strategy has created some skepticism due to the potential effects of these projects on the local population, which could

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¹ “A special report on feeding the world. The 9 billion-people question,” *The Economist*, February 24, 2011 available at <http://www.economist.com/node/18200618>.

² FAO, “Foreign direct investment: win-win or land grab?,” available at <ftp://ftp.fao.org/docrep/fao/meeting/018/k6358e.pdf>.

³ UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009), pp. 96-97.

⁴ Lorenzo Cotula, Sonja Vermeulen, Rebeca Leonard, and James Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa* (London/Rome: IIED, FAO and IFAD, 2009).

suffer loss of livelihood despite increases in production. Against this complex backdrop, the challenge lies in promoting sustainable and responsible FDI, permitting private investors to enjoy a reasonable profit while also ensuring that all investment inflows benefit host populations.⁵

The need for such a compromise has been acknowledged by international organizations. The Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD), UNCTAD, and the World Bank are working together on an initiative aimed at convincing all stakeholders that foreign investment projects in agriculture should consider social and environmental sustainability. The most important objective of this joint effort is to recommend a set of voluntary guidelines based on the “Principles for Responsible Agricultural Investment that Respect Rights, Livelihoods and Resources” (“the Principles”).⁶ Investors are invited to adhere to and abide by the Principles, which include respecting land and resource rights, ensuring food security and assuring social and environmental sustainability. These goals embody desirable objectives, particularly from a public perspective; however, the future success of the Principles will depend more on the support of states and international organizations than on a declaration of good intentions. The implementation and legal effects of the Principles remain in question.

It is frequently noted that international investment agreements lack obligations on the part of the investor, instead focusing mainly on the protection of MNEs and facilitating their operations. Moreover, it is argued that guidelines and voluntary codes constitute a deficient counterbalance because they are not legally binding and thus cannot be enforced. MNEs’ main motivation for adhering to the Principles, however, is the improvement of their corporate reputation, as they show their social and environmental commitment to the international community, consumers and their own employees. Nonetheless, despite the non-binding nature of these corporate commitments, the international community should be able to expect MNEs that have agreed to observe the Principles to stick to their promises. This proposition would be consistent with the position in international investment law that representations made by a state, i.e., assurances provided by host countries that were reasonably relied on by an investor, should be respected.⁷

This legal approach could prove positive for the purposes envisaged by the drafters of the Principles. When investors commit to observe the Principles, they do not assume a legal obligation; still, it is worth considering the role the Principles can play in shaping investors’ legitimate expectations – typically one of the most contentious issues in arbitration. If investors in legal dispute argue that their expectations were not met, and these expectations are clearly at odds with the Principles, investment tribunals could not easily find them legitimate. The Principles could contribute to defining the scope of regulatory authority, helping states to pass new regulations, for instance, when there is sound evidence of environmental and social risks. In

⁵ Olivier De Schutter and Peter Rosenblum, “Large-scale cross-border investments in land: the interaction between foreign direct investment and land rights”, in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy, 2010/2011* (New York: Oxford University Press, 2011 forthcoming).

⁶ See generally <http://www.responsibleagroinvestment.org/rai/node/256>.

⁷ This position was adopted by the arbitrators in *Waste Management Inc. v. Mexico* (Number 2), ICSID Case N° ARB(AF)/00/3 (NAFTA), award (April 30, 2004), at 98, and has been endorsed by other tribunals.

this manner, the Principles could strike a balance between investors and host country populations' concerns, promoting sustainable FDI in agriculture as a partial solution to the present food situation.

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