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# Making Land Acquisitions Responsible through Soft Law

## The Limitations and Potentials of the Responsible Agricultural Investment Initiative

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# Abstract

Land acquisitions have increased significantly over the last decade and claims have been made that these actions are both neo-colonial and wrong. Others claim that there are benefits to be gained for all parties, directly and indirectly involved. When land is being sold or leased from poor farmers to rich corporations what are the potentials and what are the limitations? Are livelihoods, displacement and food insecurity, new employment opportunities, increased revenue and FDI, and transfer of technology reality in the same process? This thesis discusses land acquisitions as a phenomenon and puts forward the controversial debate that has arisen. It pays particular attention to one of the responses and proposals made in order to make land acquisitions responsible, namely the Responsible Agricultural Investment (RAI). This initiative is examined from a soft law perspective in order to evaluate the probability of RAI serving its purpose. The conceptual framework used is a combined framework which incorporates two dimensions to be able to examine RAI in its form, whether RAI as a concept of soft law possess leverage, but also in its content, whether the principles of RAI are relevant.

This thesis is conducted mainly based on secondary material aside from the RAI initiative which serves as the primary material.

*Key words: land acquisitions/land grabs, Responsible Agricultural Investment (RAI), soft law, food security, land rights, livelihoods*
Words: 10327

# Acronyms

| | |
|---|---|
| CSO | Civil Society Organisation |
| CSR | Corporate Social Responsibility |
| EU | European Union |
| FAO | Food and Agriculture Organisation of the United Nations |
| FSC | Forest Stewardship Council |
| GDP | Gross Domestic Product |
| IFAD | International Fund For Agricultural Development |
| IFI | International Financial Institution |
| ILO | International Labour Organisation |
| MEA | Multilateral Environmental Agreement |
| NGO | Nongovernmental Organisation |
| RAI | Responsible Agricultural Investment |
| TNC | Transnational Corporation |
| UNCTAD | United Nations Conference On Trade And Development |
| WB | World Bank |

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# 1 Introduction

The phenomenon land acquisitions emanates from a series of crises that has struck the world in recent years. Food crisis, energy crisis, financial crisis, increasing populations and urbanisation are the main reasons behind land acquisitions that are taking place in developing countries today (Cotula et al 2009). Now that the world is expected to reach 9, 1 billion people in 2050, an increase of 34 per cent which is forecasted to occur in developing countries, food production must increase with 70 per cent to cope with future food demands (FAOa). Such worrying figures become even more aggravated when arable land, which is needed to produce and meet such demands, are being sold or leased on long-term contracts to foreign investors that produce to export in order to meet their own domestic food demand. As a matter of fact there is a very high correlation between countries with some of the highest global hunger scores and countries being net sellers of land, including countries such as the Democratic Republic of Congo, Ethiopia, and Sierra Leone among others (Robertson – Pinstrup-Andersen 2010). Simultaneously the sellers or lessors of land in host countries are nowhere near fulfilling the concept of food security and are losing livelihoods and land rights along with it. This fact does not imply any causation, but the empirical material does point to the fact that there is an existing complex of problems which are directly related to land acquisition (Robertson – Pinstrup-Andersen 2010, Parulkar 2011, Cotula et al 2009).

The organisation GRAIN, working to support small farmers and social movements have been prominent in raising awareness of land acquisitions, also called land grabbing, around the world. In 2011 they together with Via Campesina declared that "it's time to outlaw land grabbing, not to make it 'responsible' " (GRAINa). This was stated against the backdrop of the recent developments and proposals for a soft law introduced as Responsible Agricultural Investment (RAI) that are said to respect rights, livelihoods and resources when acquiring land. The issue has created two polarized camps where the World Bank, IFAD, UNCTAD, FAO (RAI 2010) are seen as the proponents of land acquisitions which if dealt with correctly, through the RAI initiative, will lead to win-win situations for both parties. The other camp consisting of civil society organisations, farmers' organisations and other social movements are strictly opposed to such actions including the RAI initiative (GRAINa, "Great Land Grabs" 2010).

## 1.1 Purpose and research question

The purpose of this thesis is to introduce the reader to land acquisitions and the debate that has arisen due to it and examine whether measures taken to make land acquisitions responsible are adequate measures. The thesis will particularly examine one of the responses made to that phenomenon and thus the main purpose is to evaluate the RAI initiative and put forward both the potentials and the limitations in using that framework to make land acquisitions responsible. The objectives are firstly, to discuss the initiative and evaluate its form to be able to say something more about how such an initiative could work in more general abstract terms and secondly, to examine its content to be able to evaluate the relevance of the principles of RAI. To pursue this purpose I ask; what are the potentials and limitations of RAI in making land acquisitions responsible?

# 2 Methodological considerations

## 2.1 Method and material

This thesis is a case study and a secondary analysis of land acquisitions and one of the responses made to it. It is a case of using soft law which is used as a tool to mitigate negative effects and make land acquisitions responsible. The thesis is based mainly on secondary sources and uses and analyses already existing secondary texts and data (Bryman 2008:296). The RAI initiative serves as the primary material. Further collection and selection of data was made in a balanced and objective manner and the material was chosen in order to bring both for and against arguments in order to provide a nuanced picture (Punch 2005: 187). The thesis will consist of material such as journal articles and edited books. Because it is a very controversial issue it is crucial to be aware of authors' objectives. However, as stated both perspectives will be included to get the fuller picture of the phenomenon.

In determining which type of theoretical literature to use, I had to evaluate what the RAI initiative is essentially about. I established that it all comes down to who the guidelines are meant to guide, the public, the private or both. RAI is a very problematic set of principles because it deals with an issue which is global in character and which involves parties such as investors, private and state owned companies, and at times governments (Cotula et al 2009). Labelling RAI as a form of CSR would therefore be incorrect since CSR only addresses corporate bodies'. Hence why I determined to lift the theoretical discussion and consider the initiative as soft law, because soft law includes and is more often discussed in relation to states and organisations. It could be seen as a limitation that the thesis only concerns soft law and not CSR given that many of the investors are actually corporate bodies; nevertheless, this thesis argues that soft law is more suitable for an overall discussion on RAI. Literature on soft law can be written from numerous perspectives and in various disciplines. I have chosen to use literature which is discussed in relation to forces of globalisation and global governance. Some of the literature written empirically concerns responses made on environmental issues and given that environmental issues are indeed global in character it could be argued to be relevant and appropriate references when establishing a conceptual framework for the thesis.

The choice of examining RAI, even though it is not implemented, is based on a my belief that in the era of globalisation, general global governance and CSR-promotion, as well as the fact that RAI is being jointly promoted by global institutions, RAI is a stronger force in the debate of land acquisitions. Therefore it serves as a suitable point of departure to address and question the development of land acquisitions. RAI will at times be referred to as the initiative.

The conceptual framework is grounded in the literature on soft law, as an indication and a measuring stick on the possibilities of making land acquisitions responsible by using soft law measures. The conceptual framework was developed based on identifying relevant and important indicators and dimensions. These were systematically generated from data collected by others (Strauss, 1987) and are now used as a tool to further understand the potential of RAI. The negative implications foreseen by the critical literature on land acquisitions are incorporated as a set of indicators to examine the relevance and whether RAI corresponds to those concerns. The critique which amounts to the indicators (which measures relevance) was selected by an aggregate measure of how many times the topic had been addressed as an important issue and a consequence to land acquisitions in the literature.

When applying the conceptual framework to RAI the study will critically examine the material using a holistic perspective to the utmost extent.

Measuring efficiency of RAI is a very difficult task and to a large extent impossible, if there are neither cases to investigate nor any measurable indicators, nor time or possibility to perform a fieldwork. As a consequence it will delimit the thesis since it will not be able to state fully and in detail what of RAI works and what does not work. It will however, be able to point to a direction and create awareness around RAI as a soft law instrument, if, how and perhaps to what extent it will function, but not how effective it is or will become. Even though it will delimit the thesis I do not believe it will hinder a thorough analysis of RAI as a tool, rather I believe that RAI will be relevantly analysed considering the early stage it is in.

## 2.2 Disposition

Chapter 1 and 2 have now introduced you to the importance of the topic and explained the thesis' method and material. The following chapter (3) will provide the background and empirical material on land acquisitions and the several responses made to the phenomenon. Chapter 4 will provide a conceptual framework built on soft law theory which will be analysed together with the empirical material in chapter 5. The last chapter (6) concludes with some final reflections and answers to the research question; what are the potentials and limitations of RAI in making land acquisitions responsible?

# 3 Land acquisitions – what is the puzzle?

This chapter will introduce the reader to the subject of land acquisitions, what it is, why it has occurred, where and when. It will also deal with the diverging responses made by the world community and it will highlight the two camps of opinions that have created a polarised situation.

## 3.1 Land acquisitions: contextual matters and driving forces

Land acquisitions, frequently referred to as land grabs in media as well as in academic literature, has increased significantly over the past decade and specifically the last five years. However obvious the connotation is in using the term land grabs there might be something to it. Land acquisitions are in essence an act where an investor purchases or leases (30-99 years) large tracts of fertile land in natural resource-rich developing countries for agricultural production – food or biofuel (Cotula et al 2009, Robertson – Pinstrup-Andersen 2010, Graham et al 2011, Zoomers 2010).

Land acquisitions involve two parties or more, generally resource-poor but capital-rich countries, TNCs and private investors make land deals frequently and globally. This land is acquired from a host government or at times local communities or private land-owners (Cotula et al 2009). The current major international investors include the Gulf States, China and South Korea and the major European investors include Italy, Norway, Germany, Denmark, the United Kingdom and France (Graham et al 2011). The countries in which land is being sold stretches across the globe but primarily in African countries including Sudan, Ethiopia, Democratic Republic of the Congo, Tanzania, Ghana, Madagascar, Mali and many more (Robertson – Pinstrup-Andersen 2010, Cotula et al 2009). Land acquisitions are usually made up of several contracts between numerous actors in the "multiple stages of preparing, negotiating, contracting and operationalizing the project" (Cotula et al 2009:66).

Furthermore Zoomers (2010) highlights that land acquisitions are much "broader and deeper than assumed" [1] (Zoomers 2010:430). Currently there are three main global events which can be seen as the driving forces behind land acquisitions, thus the financial crisis, the food crisis and the energy crisis.

A century of food price declines, due to expansion of agricultural production eventually hit its bottom and the world experienced immense price hikes and a financial crisis in 2007-2008. This event led to food insecurity in vast parts of the world and as a result states began to invoke land acquisitions into their national food security strategy. Considering that population growth, urbanisation and changing diets due to a wealthier middle class has been and still is pushing the demand for food, the world was put before an alarming situation. Because food production depends on oil for transport and production of nitrogen fertiliser, the world was put before yet another crisis, namely the energy crisis. Not only did this lead to exacerbated food insecurity due to increased prices, it also diverted land use from food production to an increase in biofuel production. This has in turn diverted the motives of land acquisitions away from food security to energy security (Cotula et al 2009).

In addition to security issues, land acquisitions have increased due to expected profitable returns from agricultural production and land serving as a secure investment, not only avoiding the need to buy from the market but also expecting the currently cheap land to increase in value. While these events can be seen as external ones there are a couple of internal incentives and decisions that continue to facilitate and drive the process of land acquisitions. It is not only the investor that drive the land acquisitions, and even if they are reported to target countries with weak recognition of land rights (Parulkar 2011), some host governments facilitate for foreign investors and improve conditions for smooth land transfers and have established so called one-stop shops for prospective investors. While the Tanzania Investment Centre is a very progressive type, similar agencies can be found in Mozambique, Ghana and Mali (Cotula et al, 2009). This is done in the belief that agriculture will bring revenue, employment and growth to the state when foreign investors come in with new technology and infrastructure. It is thought that investors will in addition contribute to national food security. However, what often occurs is that investors produce to export rather than to internal market of host countries (Zoomers 2010, Cotula et al 2009, Robertson – Pinstrup-Andersen 2010, Kachika).

[1] Zoomers (2010) argue that there are deeper more structural processes driving land acquisitions, though the three crises discussed above are the most immediate ones. Zoomers (2010) argue that globalisation has made the world more interconnected and has facilitated for humans to easier move longer distances at a shorter amount of time than before, thus making such action easier and likelier. Market liberalisation, propagated for in the 1990s has commoditised land and natural resources and through land policies and has made land markets more accessible and transparent to investors. Foreign direct investment have introduced new types of actors that now use and control land e.g. exploitation of minerals or food and biofuels.

## 3.2 Diverging responses

This section will deal with the diverging responses, the critique and the benefits, as an effect of land acquisitions. A large community of NGOs, CSOs, smallholders, farmers' organisations as well as scholars have criticised land acquisitions significantly and are regarded as the opponents. They contend that inadequate land rights and titles, lost livelihoods and displacement of people, and national food insecurity are the most immediate negative implications to local people. Similarly, environmental concerns, contract and compensation issues are concerns that opponents address as major problematic issues. Not only do opponents believe that land acquisitions are out-right wrong, they also question the structures of acquisitions to be neo-colonial in character; once again are developing countries, and specifically Africa being invaded by outsiders who do as they please. However, as they say there are always two sides to a coin. Proponents of land acquisitions consisting of government officials and global institutions deem them to be a development opportunity full of win-win situations. It is often not spoken of in negative terms, rather the positive is being put forward and attempts are being made to mitigate negative implications (Cotula et al, 2009, Robertson – Pinstrup-Andersen 2010).

### 3.2.1 Proponents

Land acquisitions as a wording has turned from being a phrase used by opponents to a phrase used by proponents, in the attempt to turn it into a phenomenon considered to be like any other globally traded good. The rationale of the proponents is not to undermine the force of land acquisitions but to make them more responsible and thereby legitimising those (Borras – Franco 2010).

Proponents believe that the potentials of land acquisitions are manifold and it is all about seizing the opportunities ahead to make the most of it for both sides. It is recognised that investments in agriculture are needed for rural development and poverty alleviation and also that there is a lack of development aid and insufficient investments into the agricultural sector in developing countries. Due to this land acquisitions should be viewed as a positive phenomenon because it has the potential of providing unique opportunities to invest capital into agricultural sectors. Proponents state that investors will improve returns in agriculture and the value of land and will indeed serve as a catalyser for economic development in local communities. It is also believed that investments will raise local living standards and improve livelihoods in rural areas on a micro-economic level. Infrastructure, schools, and health clinics are said to be part of those benefits and local people will receive employment both as farm and factory labourers. (Cotula et al 2009, Robertson – Pinstrup-Andersen 2010, Ekpott 2011) On a macro-economic level, land acquisitions are said to benefit the host country.

Opportunities consist of increased economic relations between Africa and the world through increased FDI and potentially new export markets through biofuel production (Ekpott 2011, Cotula et al 2009). GDP growth, increased government revenues, access to capital, technology, knowhow and markets are some of the benefits further mentioned (Cotula et al, 2009).

Irrespective of any claimed benefits, there is still recognition that local communities might be neglected in the process of land acquisitions, that there is a risk for lost livelihoods, rights and resources (RAI 2010). Due to this the WB, IFAD, UNCTAD and FAO are trying to legitimise and make land acquisitions clean so as to avoid negative consequences. They have introduced a form of soft law consisting of seven voluntary principles to make agricultural investments responsible. These principles are said to avoid irresponsible conduct if all stakeholders involved, investors, governments and affected communities, adhere to them. The following section will account for the RAI initiative on a general basis. A more detailed account will be made in the analysis in chapter five.

### 3.2.2 RAI – a proponent response

RAI is or will most probably become the stronger force in the debate on land acquisitions, given the fact that RAI is being jointly promoted by global institutions in an era of globalisation and general global governance and CSR-promotion.

The seven principles of RAI are based on the fact that "investment to increase productivity of owner-operated smallholder agriculture has a very large impact on growth and poverty reduction" (RAI 2010:1). It is of their belief and opinion that any investment, private or public, domestic or foreign, will prove beneficial to Africa and other regions. The opportunities are that many countries will assume better access to capital, technology and skills, increased employment and productivity increases. The risks, on the other hand, can be many in cases of weak governance and if vulnerable groups are not given voice. They acknowledge that displacement of locals, undermined rights, lost livelihood, increased corruption, environmental degradation and food insecurity are some of the risks, just to mention a few. Due to these risks, the aforementioned organisations have assembled a set of seven principles to avoid irresponsible land acquisitions and leases by private entities. The seven principles are made to ensure that 1) land and resource rights, both customary and statutory, are recognised and respected and identified before considering any land investments to avoid disruption of livelihoods and dislocation of communities, 2) investments will not jeopardise food security but rather strengthen it. It will assure access to food for local or directly affected populations and whenever a proposed project is large enough to affect national food security its impact will be considered, 3) processes for accessing land and other resources are made transparent and stakeholders are made accountable through transparency, good governance and proper enabling environment. This is made to ensure that communities and individuals are given knowledge on their rights and obligations, governments are able to attract desirable investments and investors are able to negotiate directly with rights holders instead of with government agencies, 4) all materially affected parties must be consulted in a participatory manner and

compensation must be given, 5) projects must respect the rule of law, be economically viable and act responsibly as a business. The projects must result in durable shared values and investors must adhere to global best practices for transparency, accountability and corporate responsibility, 6) investments must generate desirable social and distributional impacts and mitigate unwanted social consequences. The interest of vulnerable groups and women and generation of local employment are important measures, 7) investors must lastly minimise risks of negative environmental impacts. Investors and government need to collaborate to ensure e.g. that the most appropriate production system is selected, good practices are kept in agriculture, and that environmental management monitors regularly (RAI 2010).

The document is settled with a conclusion and next steps where it establishes that the principles contained therein are "essentially the right ones" (RAI 2010:20) although details will be supplemented. It is stated that suggestions, analytical input and research should be drawn from a range of stakeholders including civil society and support should be generated from all major countries. The initiative will then have to be "translated into actions for investors, governments, donors and international agencies" (RAI 2010:20). Though acknowledging numerous challenges; the scale and scope of the phenomenon, diverging economic context, the need of governments to establish legal, regulatory and institutional changes, the need of governments to facilitate an enabling environment for the private sector, finding out how agricultural investment ought to be used in order to contribute to national strategies of poverty reduction – the initiative is written in a very optimistic manner with few concerns, believing the initiative to be both feasible and correct. It is also stated that in ensuring that principles are not just empty words, independent monitoring will be critical for compliance as well as help from civil society to ensure transparency and raise concerns for those with no voice (RAI 2010).

### 3.2.3 Opponents

The positive view on land acquisitions is being countered by a large community strictly opposing these actions. Local communities, farmers and global civil society organisations are in this dispute to make land acquisitions unlawful (GRAINa, b). The opponents fear that the costs are far too many in comparison to any claimed benefits. Though there are numerous concerns, this subsection elaborates on three of the most spoken of and most immediate negative implications. These concerns will serve as indicators and form part of the conceptual framework to be explained in the next chapter. A brief background will be provided to facilitate for a longer analysis in chapter five.

This first issue relates to many of the concerns made by critics. Many smallholder farmers cultivate their land which they by customary law very much own, but have no legal title to. An inherent risk is that farmers will become dispossessed of their land and lose both livelihoods and food security. It is a dangerous situation for poor farmers and a goldmine for acquirers because on paper it looks as if land is unused and as if that has been the case for centuries, whereas in reality it is land that has been cultivated by numerous generations. As a result of not having a statutory title, farmers have nothing to say in land deals made on their land and as a consequence vast areas of customary

owned land are lost haphazardly. There is therefore a need to secure local customary land rights as well as ensuring that land, customary or statutory, is registered to the farmers in order to avoid easy dispossession (Robertson – Pinstrup-Andersen 2010, Cotula et al 2009, German et al 2011). At the same time critics are questioning whether registering and recognising customary and statutory titles of local farmers will deal with the actual problem. Will recognising and respecting titles on land protect them from dispossession? The critics thus question the concrete problem of land acquisitions of losing one's land, more than anything else.

Because land is so central to farmers and local people (Cotula et al 2009) the following concerns are direct consequences of lost lands.

Increased food insecurity is a huge risk for many African countries now that smallholders – the bread basket – are being dispossessed of their land. Conversely some of the hungriest countries in the world (e.g. Ethiopia, Eritrea, Sierra Leone, and the Democratic Republic of Congo) are also the countries which dispossess most farmers through land acquisitions (Robertson – Pinstrup-Andersen 2010). Food security is a concept comprising of four dimensions. Firstly, the sufficient availability of food through production, imports, or aid. Secondly, the access to food by individuals or access to resources to gain access. Thirdly, proper utilisation of food through adequate measures (sanitation, water, diet and health care) and lastly, a stable availability and access to food at all times, be it individual, household or population (FAOb). Had it not been that the majority of investors are in it to secure their own home countries' food supply and that close to little of food produce are kept for the internal market, then claiming food security had not been all too relevant. However since farmers are being dispossessed off their land there are no possibilities for smallholders to produce for individual and national demands. Another dire consequence, of production being export oriented is that it will expose countries to a larger risk of food price volatility as markets become scarce of food. Food insecurity is likewise being expedited by bad contracts in which investors are allowed to export all food to their home countries without export duty payment, thus losing opportunities to invest in national food security (Robertson – Pinstrup-Andersen 2010, Guttal et al 2011). Another aspect which has not been recognised as much is the violation of the human right to food that land acquisitions enact on people when exploiting the soils of others to feed their own (Parulkar 2011).

Rural populations depend on access to land for their existence and thus the main concern is that livelihoods will be lost. Not only will current but also future generations of agriculturally dependent communities lose their way of providing food, fresh water and income for themselves and their communities. The economic losses will be greater than any petty compensation or scarce employment opportunity could offer, as oftentimes employment will decrease over time when investors move on to less labour-intensive and more capital-intensive production. The change from subsistence farming to semi-subsistence or wage-labour will thus result in overall unsustainable development and along with it loss of valuable indigenous farming practices. In connection to and as a result of lost livelihoods is displacement of people, which in turn complicates the lives of farmers. It is realised that local communities must find alternative livelihoods as old ones disappear. The problem is that many of these communities have cultivated their land for centuries and is thus their only means to make a living. Finding new land to live on and new sources of income, which are

sustainable, are difficult when and if neither support nor enough compensation is provided either by governments or investors. Once people have been evicted of their land, alternatively sold or leased it and livelihoods have been lost there is a huge risk that communities fall into poverty, malnutrition and hunger. What is said to be essentially wrong and unsustainable is that people are becoming puppets of large TNCs and investors and singlehandedly losing all what they knew and had which used to support and develop themselves and their communities (Guttal et al, 2011, Robertson – Pinstrup-Andersen, 2010:276, Cotula et al, 2009, Parulkar, 2011).

An analysis on these concerns and how they are addressed in RAI will be given in chapter five, but first the following chapter will provide a conceptual framework for the analysis.

# 4 Soft law: a tool for responsible conduct

This chapter consists of a combined conceptual framework gathered from theoretical literature on soft law. The immediate following section explains the conceptual framework which will be applied to the RAI initiative in understanding its form and content. This is followed by the definition of soft law and an elaboration of the framework to be used.

## 4.1 The conceptual framework

The conceptual framework can be seen in figure 1 below and is a combination of two dimensions which is structured as followed. The first *conceptual* dimension, explains if and how soft law functions in its form and as a whole concept. This will be grounded in the literature on soft law, as an indication and a measuring stick on the possibilities of making land acquisitions responsible. The second *relevance* dimension explains who the initiative can be said to benefit and how relevant the content is. This dimension is based on the reviewed literature in section 3.2.3 (opponents) as well as literature on soft law. It will examine the principles' content to establish whether the initiative corresponds to the concerns raised.

| **Figure 1** Conceptual framework | |
|---|---|
| DIMENSIONS | ELABORATION |
| **Concept**:<br>a) Compliance<br>b) Enforceability | The concept on soft law and the scholarly debate indicates that compliance and enforceability are important aspects in ensuring good conduct. The purpose of the concept dimension is to determine the functionality of RAI as a soft law instrument through these two aspects. |
| **Relevance**:<br>a) Beneficiaries<br>b) Correspondence:<br>i. Land rights and dispossession<br>ii. Food (in)security<br>iii. Livelihoods and displacement | The scholarly debate on soft law questions who the beneficiaries are – the weak or the strong?<br><br>The critique made by the opponents of RAI will be able to examine if the principles correspond to the critique and to what extent the principles of RAI are relevant.<br>What considerations and aspects do the principles address? |

Had RAI been an implemented initiative, measuring compliance likelihood extensively would have been a relevant instrument in understanding whether the principles possessed any leverage, as pointed out by Kolk and Van Tulder (2005)[2]. However, since it is not fully developed, measuring compliance likelihood and how well these can be monitored would have produced an unfair and biased result. Nevertheless, interpretations and comments will be made on the aspect of compliance and monitoring, yet having in mind the early stage RAI is in.

I choose to use both dimensions because I believe that the thesis will be able to in a more holistic way understand the RAI initiative, as the two dimensions each examine a different level of RAI, both its form and content. The reason for this is that one does not function without the other. If the whole concept of soft law proves to be valuable as a tool to make land acquisitions responsible, but it is later realised that the principles in itself do not address the negative implications, then in the end the initiative ends up lacking leverage. Equally, if the principles are found to be of great value while the concept of soft law is unable to solve the problem it was designed to do we achieve no result. Thus both dimensions depend on each other to function.

## 4.2 Soft law

*"In other words, "soft" law is a trouble maker because it is either not yet or not only law"*

- Dupuy (1990:420)

In similar vein Mörth explains that "the problem is not how to distinguish soft law from hard law but how to distinguish it from law." (Mörth, 2004:5) Accordingly, soft law is a paradoxical term since it does not obey under the rule of law and it is in that view non-existent. In essence, soft law is a way of creating goals, which are not legally binding, to be achieved by involved parties, rather than precise duties, contracts and obligations. Soft law is not merely a "normative sickness" (Dupuy, 1990:422) but actually a contemporary development. Although a development that might stem from fears of hard law being too rigid and the awareness of the fact that often "the softness of the instrument corresponds to the 'softness' of its content" (Dupuy, 1990:429).

Firstly, soft law guidelines, if numerous, show the cumulative and joint opinion of the world community which might create custom and convention. Secondly it defines good behaviour in an international context of governance; thirdly, it serves as reference models for national legislation. Dupuy (1990) concludes that soft law does exist, it is real, and it is a social phenomenon and a product of multilateral cooperation, as a result of an ever globalising world.

Some scholars address the issue of soft law in the light of globalisation. Non-state actors have arisen as a consequence of globalisation, which in turn has led to a

[2] Kolk and Van Tulder (2005:9, 20) believe that compliance mechanisms and monitoring systems are crucial for codes of conduct in order to ensure compliance among actors.

"reassessment of traditional sources of international law" (Redgwell 2006:90) and creation of new ones. Certain areas, specifically human rights, environment and trade have become global in character and thus non-state actors have naturally entered into the field of governance which transcends the nation state, both regarding conflict and solution. The solution has thus evolved as a global solution based on soft law, rather than hard law. A reason for this is that there are no global structures or entities that are able to legislate and create hard law on issues that are cross-border (Redgwell, 2006, Mörth, 2004).

### 4.2.1 The conceptual dimension

The disputable and critical aspect which concerns the functionality of soft law as compared to its hard law counterpart in the attempt of solving problems will be discussed below. There is an importance and relevance in discussing soft law in a comparative manner not only because it gives a deeper understanding of the law as such but also because critics question how an instrument based on soft law – and not hard – will actually be conformed to.

Scholarly opinions diverge on soft law versus hard law functionality and suitability. Soft law is more flexible and can easier adapt to changing conditions and is thus more innovative in its character. It is "easier and faster to achieve and enters into force immediately". It allows for state cooperation on shared problems and still maintains state sovereignty, a very sensitive issue which reduces legalised commitments. Due to that laws are not enforceable but only serve as guidelines for involved parties it is thus able to be more precise and ambitious in its nature. It is therefore an easier alternative, easier to agree on both in terms of content and scope (Köppel 2009, Bayne 2004, Abbot – Snidal 2000). Then again, due to soft law being flexible and non-enforceable soft law can also be a way of avoiding sanctions and full commitment as it does not possess the rigidness that hard law benefits. It makes it possible for companies to edit the rules, make individual interpretations and comply with whichever part they prefer, since the codes will most probably be formulated in general terms and without any ability to enforce or sanction (Bayne 2004, Sahlin-Andersson 2004). Accordingly, Dashwood (2004) states that voluntary measures are necessary but insufficient on its own to properly solve trans-boundary problems. Instead he contends that there is a need for an international regulatory framework to deal with companies' conduct in order to reach across countries as a response to an ever globalising world. On the other hand though soft law does not offer the benefits that hard law does, it lowers the cost of achieving some sort of law in the first place (Abbott – Snidal 2000).

The hard law counterpart, in contrast "has the greatest potential and produces the most far-reaching results" according to Bayne (2004:350) as it is more durable, predictable and transparent in nature. Even though hard law is not the most commonly used international legal arrangements it is still the type of law that is more credible and comes with a force that increases compliance – something that soft law lacks (Abbott – Snidal 2000, Köppel 2009, Shaffer – Pollack 2009). Abbott and Snidal (2000) establish that hard law should be used "when the benefits of cooperation are great but the potential for opportunism and its costs are high" (Abbott – Snidal 2000:429) which

normally occurs in trade or investment agreements that are reciprocal with unequal performance. Hard law should also be used in order to increase the credibility of an agreement especially when noncompliance of a set of codes is difficult to identify. The only disadvantage to it – and perhaps a strong reason for why it is not or cannot at times be used – is that it decreases state sovereignty and therefore is a less viable option when states must act on trans-boundary issues. Due to these reasons hard law is a very demanding type of law that is not always easy to establish consensus around (Bayne 2004, Abbot – Snidal 2000).

Using soft law over hard law is a change that emanates from globalisation and companies increased influence. As such, a debate concerning the interconnectedness of the two types has proven to be inevitable. Because codes of conduct are more and more being incorporated into and forming part of companies' objectives soft law can now be said to complement and reinforce hard law. A necessary point made by Dashwood (2004) is that both hard law and soft law are necessary in conjunction with international agreements. It is no longer an either or question, because a contemporary regulatory framework must reflect how globalisation influences business behaviour in relation to states and societies, thus a framework of both hard and soft law is preferable. Bayne (2004) concludes in examining institutions based on either hard or soft law that they serve different purposes and complements one another and soft law can and will most probably work as a mobiliser, guidance and even facilitator for future legislation. At the same time, for soft law to influence behaviour, goodwill of all involved actors is required (Köppel 2009, Dashwood 2004, Bayne 2004). Other literature suggests and concludes that soft law is not enough to handle "genuine conflicts" and is in itself insufficient to deter abuses or to enforce compliance (Redgwell 2006, Sahlin-Andersson, 2004).

It is of interest to discuss and analyse how the use of soft law in relation to hard law has the potential in making land acquisitions responsible and what the limitations are. This will be done in the next chapter based on two concepts which have been concretely drawn from the above text. It will discuss *compliance*; is it seen as an aspect of RAI? If so, how much and in relation to what? *Enforceability*; how does it relate to enforceability currently and in the future?

### 4.2.2 The dimension of relevance

Firstly, relevance will be discussed in the light of who the initiative can be said to benefit, who is it relevant for? The debate on the weak and the strong questions who benefits from which type of law. There are two views; the traditional scholars contend that legislation benefits weak states, while critical scholars distinguish between hard and soft legislation and contend that it is only hard law that protects the weak from the powerful (Abbott – Snidal, 2000). Due to this, small states seek hard law solutions that are more certain and credible in nature, which in turn becomes a better source of protection from larger more powerful states. Because stronger states have more to say in international contexts, hard law is not a necessity for them, but merely shows the distribution of power. Hence, for weak states, hard law provides and facilitates for a better regulated and balanced symmetric relation between weak and strong states. The

costs that such law incur is often balanced off to weak states as hard law offers better protection in return if and when disputes or conflicts arise (Abbott – Snidal, 2000). Even though this is theorised on states and no other institutions I believe it to be applicable to various parties and entities. The essence of it is not based on the type of entity but rather the asymmetry and unequal power distribution among those entities.

The relevance of specific principles within the initiative will be examined by using the opponents concerns in the reviewed literature in section 3.2.3 to evaluate its relevance. The three concerns serving as indicators are first, *land rights and dispossession*, second, *livelihoods and displacement* and third, *food security*. These have been selected according to how many times the topic has been addressed as an important issue and as a consequence to land acquisitions in the literature. This dimension is theoretically entrenched in the soft law literature which states that soft law is, in contrast to its hard law counterpart, flexible, adaptable and innovative. Due to that soft law serves as guidelines for all involved parties rather than obligations, it is also stated that soft law is able to be more precise and ambitious in its principles. This is so because without sanctions there is no fear of not being able to comply with principles; hence parties are more willing to aim high and produce more ambitious principles (Köppel 2009, Bayne 2004, Abbot and Snidal, 2000). Based on this notion, the three concerns will be used in order to see if the principles in RAI correspond to the concerns made by the critics, and if so to what extent. What considerations and aspects do the principles address? In the following chapter an extensive elaboration is made on this to establish whether the principles are likely to mitigate any negative implications of land acquisitions.

# 5 RAI as a soft law tool – concept and relevance

Though the seven principles of RAI are said to avoid ill conduct, and if adhered to they might actually change business conduct, there have been raised voices, claiming that the principles lack leverage all together. The question is, irrespective of whether land acquisitions are deemed as right or wrong, if the codes of RAI are forceful enough as a soft law tool but also to actually solve the problem it is designed to do. If both soft law generally, and RAI specifically fails in fulfilling its intended goals, there is no good in actually following through such intentions. They both depend on each other to function and if one fails then land acquisition will not assume any win-win possibilities or opportunities. To find out, the following section will critically analyse and evaluate the initiative's suitability as a soft law instrument and the relevance of its principles. In this section, I as the writer and researcher feel free to critically analyse and interpret RAI with support from the conceptual framework and empiricism, but also based on the one sentence in the RAI document which asserts that the principles of RAI are "essentially the right ones" (RAI 2010:20).

## 5.1 RAI as a concept: compliance and enforceability

Because soft law lacks enforceability and the possibility to sanction it becomes harder to ensure compliance of principles. If a soft law initiative aims at having their principles adhered to then some considerations on compliance and monitoring must be given, if not there is a huge risk that companies and investors will edit the rules, make individual interpretations and comply with whichever part they prefer. Though, as mentioned before one cannot evaluate the compliance likelihood of RAI, but it is interesting to examine to what extent compliance and monitoring is taken into account. If there are no considerations for compliance mechanisms or monitoring system then one can never assume the effectiveness of RAI in the future either.

There is no real pattern or consistency in where and when compliance or monitoring is used and applied in RAI. On the few occasions that it is mentioned it was written vaguely with no precise instruction on who should conduct monitoring of compliance or when in the process of project implementation it should be done. In those aspects when it is mentioned responsibility to monitor compliance is to be put with the local government in addition to "taking measures to encourage compliance" (RAI 2010:9). In relation to consultation and participation of land owners (principle 4) it is elusively stated that methods to enforce or sanction in case of non-compliance "should be specified" (RAI 2010:10). Compliance with environmental agreements on the other

hand seems to be considered a more important issue and in this case monitoring of compliance is equally regarded (RAI 2010), even though there are no specifications as to whom and when such monitoring should occur. In the last paragraphs it is concluded that compliance is possible and is in many cases a long-term interest for investors who care about their reputation. It seems like the initiative, in terms of compliance at least, is written for the sake of the investors and that not complying means bad business for investors rather than increased poverty for farmers.

In more general terms monitoring – which is also considered as being a "critical" aspect (RAI 2010:21) – is the shared responsibility of governments and investors to make sure that projects are well designed and implemented. Governments must have "a transparent process for independent public screening of project proposals" (RAI 2010:15) at least regarding public land. It is also stated that "decentralised monitoring through civil society and local government" (RAI 2010:19) is an alternative as well as a complement to public institutions. Though compliance and monitoring is mentioned, it is merely that, a mentioning of words and not of importance. Nothing indicates that institutionalising monitoring bodies to ensure compliance is critical for adherence of RAI even though the initiative is said to be able to change behaviour *if* – and only if – adhered to. Either, the initiative has not developed to that stage so as to address those aspects or it is not in their interest to make sure that they are.

In more specific terms, it is stated that when making investments, investors are expected to "comply with laws, regulations, and policies applicable in the host country (and ideally with all relevant international treaties and conventions)" (RAI 2010:13). This statement is of course included due to the soft aspect of soft law; that it lacks enforceability and that it is in itself insufficient to deter abuses or to enforce compliance. Naturally it needs to rest on a foundation of relevant international treaties, conventions and commitments. In section 5.2.1 of the initiative, relevant treaties and conventions are listed, examples being the United Nation's Universal Declaration of Human Rights, ILO's Declaration on Fundamental Principles and Rights at Work and best practices in food safety (Codex Alimentarius). As such, RAI is a complement and a guide on norms and conduct, as soft law is regarded to be. However, as stated, for such an instrument to be useful in its context of land acquisitions and not only useful in a globalisation context with numerous actors involved it requires the good will of all involved to function properly. Hence, the current potential of RAI depends on the reference it makes to international treaties and conventions and to which extent good will is applied by involved actors. Though it is impossible to depict future happenings and though it is held that soft law cannot handle genuine conflicts, theory indicates that soft law is able to in the present function to mobilise, guide and reaffirm norms within a specific area and simultaneously provide some sort of legal foundation which facilitates for future hard law. Perhaps until a global entity with the right to legislate appears, this is the best law can do in this moment in time.

## 5.2 The relevance of RAI: who are the beneficiaries and do principles correspond?

The RAI initiative, a proposal by global institutions has till this date has not been supplemented by any other entities, in ensuring full vertical participation. As such it has evolved as a top-down initiative consisting of principles that are constructed not in the presence of governments of developing countries and spokespersons for the poor but by people and institutions that already have voice in the international arena and are not afraid to state their opinion. Such asymmetries could be mitigated had the initiative as a whole allowed for a participatory planning process in constructing the principles. At the moment, participation is certainly not a buzzword used in the document to ensure that locals and grass root organisations are part of the process of making land acquisitions responsible and in ensuring win-win situations that will benefit all.

### 5.2.1 Beneficiaries

From a theoretical point of view and according to traditional scholars the RAI initiative is a type of regulation that benefits the weaker party, in this case farmers and local people. However, critical scholars are more precise in their judgement and distinguish hard from soft law and believe that it is only *hard* law that protects the weak from the powerful. In this view the farmers and locals are thus not protected by RAI. Given that small entities usually seek hard law solutions that are more certain and credible in nature, it is in line with these arguments both apparent and true that RAI has not been produced by any of the more vulnerable nor weaker entities. The weaker groups would probably not have felt secure in having soft law as means of protection from larger powerful TNCs and investors. Likewise, the more powerful global institutions are not as concerned with this issue given that they are more able and more probable to use their power and voice in the international context – and more likely to get heard and recognised. A hard law agreement on land acquisitions would have facilitated for a better solution and regulatory framework for the weaker parties and balanced off the asymmetric relations that are naturally inherent in the global structure. Albeit the costs that hard law incurs, the weak states would most likely be compensated as hard law offers better protection in return and as such less land will be lost along with better means to avoid negative consequences. Therefore based on the theoretical discussion one could say that in this case, the RAI initiative does not benefit the weak because it is a soft law instrument with no means to enforce anything upon anyone. If we move to the empirical material and its content and ask who RAI is for, a more detailed and less abstract interpretation is given.

### 5.2.2 Land rights and dispossession

The title of the document "principles for Responsible Agricultural Investment that respects rights, livelihoods and resources" indicates that the initiative is principles constructed to ensure respect. Respect is a very ambiguous word as it is an individual interpretation which depends on one's own perspective of what deserves respect, which in turn determines to which extent respect is given. Accordingly respect does not infer loyalty or a sense of duty for someone else's rights, resources or livelihoods. It does not protect farmers from any bad contracts being signed, petty compensations being given and other aspects that regard the actual transfer. More is required to assure those aspects.

In examining the wording of the text in the first principle (respecting land and resource rights) one can see that there is a huge emphasis on recognising and respecting ownership of land, customary or statutory, and that land considered as empty or marginal are in the majority of cases not unoccupied as is often believed. Secondly it is seen as important to negotiate with land owners and to offer fair payment when dealing with land transfers (RAI, 2010). So far so good. What is not discussed however is whether such land transfers are desirable at all for farmers and local communities. The point of departure and assumption made in the document seem to be that land sales and leases are desirable, irrespective of circumstances (RAI 2010). No attention is given to identifying situations and circumstances where local people would actually benefit from keeping their land holdings and by so doing maintain their means of survival. Any attention is neither given to the landless people and future generations whose opportunity to buy land decreases as investors purchase arable land. Therefore, there is a huge risk that it will make little difference that investors recognise and respect land and pertained titles, because when land is transferred, land titles and livelihoods are lost along with it irrespectively.

What this principle mainly does is that it reduces the risk of investors being held accountable for purchasing land that customarily belonged to a farmer. Once the land title is recognised it facilitates for an easy and lawful transfer from the farmer to the investor, with no wrong making on the investors behalf. Transfers deal only with administrating the physical plot of land and not with what that plot of land actually meant to the farmer in terms of food, income and livelihood. Investors cannot be traced to be held accountable for poverty increases as a consequence of land acquisitions but only for unlawful land transfers. This problematizes the first principle and suggests that it is not made to protect the weak but rather to protect the powerful, therefore in this situation it seems that power has been unevenly distributed. As a result marginalised people, women, indigenous people, peasant and pastoralists who lack voice in the process of allocating land rights, along with landless people and future generations will be neglected if this principle is adhered to.

### 5.2.3 Food (in)security

RAI acknowledges that one of the risks is increased food security (RAI, 2010). It is stated that to avoid adverse effects, policy-makers – not investors – are put with the responsibility to balance off the adversities caused by the investors. They are urged to ensure equivalent access to food, create off-farm employment, take dietary preferences into account in choice of produce, and stabilise the supply of food. Because investors come in with various objectives – producing food or biofuel, for processing, export or the internal market – RAI points out that it is difficult to generalise about impacts on food security and that "nothing should be assumed; everything should be analysed" (RAI 2010:6). A simple analysis however, will indicate that there are problems that relate land acquisitions to exacerbated food insecurity.

Ones farmers have been dispossessed off their land they stop serving its country with food stuff for individual and national demands and because food is more often than not for export, the host country will now have to turn to importing or in worst cases rely on food aid to feed its population. Had investors produced at least to match up to previous yields then the question of exacerbated food insecurity would not have been an equally central issue claimed by critics. RAI addresses food insecurity and states that there are cases of particular concern, e.g. when land is being used for biofuel, when produce is for export or when converting to monoculture. One solution on these cases is proposed to be a "call option" which hinders investors from exporting large volumes of food when "specific market conditions occur" and in that way countries could according to RAI use land acquisitions to "actually improve food security" (RAI 2010: 7). The question is whether a country has to be under specific market conditions, which probably implies an acute situation, before the people can keep what is being produced in a country's soil and land. The initiative fails to recognise the most central problem, because irrespective of measures being taken to make investments consistent with national agricultural policy, irrespective of improved local markets, irrespective of local dietary preferences being taken into account, it all boils down to the last stage in a supply chain, which market the investors are targeting, the domestic or the international market. If it is the latter, the problem of food insecurity persists.

A further contemplation concerns the concept of food security and whether it allows for a narrower interpretation of the problem. Because food security talks of availability of food (through production, imports, or aid) it does not pay any attention to or acknowledges the importance of being able to produce domestically and increasing the levels of – not food security – but food self-sufficiency. Similarly is does not regard who, where and how it is produced and this leads to a wrongly perceived reality. Instead of using food security as a concept, critics call for a change to use the human right to food as articulated in the General Comment No. 12 of the UN Covenant on Economic, Social and Cultural Rights (Parulkar, 2011, FIANa).

So even though food security is a principle on its own it does not manage to address the critical issue that lies at the very core of food insecurity when it is exacerbated as a result of land acquisitions.

### 5.2.4 Livelihoods and displacement

Livelihoods and displacement as concepts are mentioned throughout the text but not as principles on their own, which is understandable due to that it is not an isolated concept but part and parcel of the consequences of land acquisition.

When mentioned it is stated that investors must protect and improve livelihoods and not undermine current or future livelihoods for displaced people, because it is seen as one of "the largest negative impacts of these projects" (RAI 2010:17) and can affect people directly or indirectly (RAI 2010). To avoid this, investors should ideally include locals in investments decisions, create local jobs, transfer of technology and improve local infrastructure. In addition they emphasise that fair and adequate compensation for losses must be given to allow farmers and local communities to maintain or improve their previous livelihoods and standard of living (RAI 2010). RAI seems to believe that the main solution for displacement and losses of livelihoods is compensation. The question is how much compensation is enough. In one of the examples given in RAI concerning a specific project (2010, Box 10, p.18) people who were going to be displaced as a result of land acquisition were given their yearly income for a life time of years, whereas affected people were provided with "skills training courses that would allow them to find new sources of livelihoods" (RAI 2010:18). While this may be the best of good practice it was recently reported from Sierra Leone that poor farmers had been convinced to lease their land for 50 years ahead for an annual fee of $3 and 20 cents per acre (FIANb). So while there are good examples of compensation there are an equal amount of really bad ones. If RAI really does see the importance in land and compensation there must be better and more specific instructions on what a proper amount of compensation amounts to. Such an instruction must take into account not only the actual value of land per year but also value of yields, loss of livelihood, compensation for being forced to move and disrupting a whole community's way of living.

RAI addresses the issue of new employment opportunities but fails to address that, due to their self-proclaimed transferral of technology, employment is not certain when machinery takes over production. In relation to that it fails to address the risk of losing indigenous farming practices as new technology comes in. Though RAI touches upon the central concerns of lost livelihoods it does not address the issue to the extent that it becomes a solved issue, not for current nor for future generations. It needs to address how and under what circumstances lost livelihoods will be replaced with new ones and who are to support those processes, along with compensation and long-term sustainable employment.

# 6 Potentials, limitations and final reflections

In terms of being a soft law instrument RAI has both potentials and limitations. The main limitation of RAI is that it lacks the power to enforce its principles of involved actors, and as such it becomes a relatively weak instrument to deter abuses of any kind. It must thus rely on international conventions and treaties in order to act with some sort of control. Due to this, RAI is able to function as a guide of norms of conduct for investors who are acquiring land but as such it also depends on the good will of those actors for principles to be adhered to. A dependency which neither RAI nor anyone external to investors can control as long as RAI is soft law. On the other hand, RAI is able to in the meantime function as a legal foundation for future hard law and is therefore an important instrument in making land acquisitions responsible. Nevertheless it is dependent on that all stakeholders, IFIs, CSOs and others are given the right to participate and contribute to the content of the initiative, to ensure vertical participation and to avoid a top-down constructed document. Hence at the moment this is a clear limitation to the potential of RAI.

Theoretically, RAI is not constructed for the weak, because no asymmetries are balanced off by using soft law and thus the weak are not protected. Using the word respect to consider someone's rights, livelihoods and resources is not enough as it does not ensure that those possessions are not being lost in the process of land acquisitions. On the other hand, respect is probably the most correct and applicable word as it does not involve any form of coercion. Furthermore, the first principle is lacking because it assumes that leasing or selling land is desirable for farmers and local communities and does not recognise that land is crucial for their lives too. In this sense the first principle of RAI (respecting land and resource rights) is limited and fails to address the real problems.

The second principle, ensuring food security, is limited because it does not manage to address the core of why food insecurity occurs in relation to land acquisitions. The fact that land is transformed into biofuel production will most probably delimit food production but specifically the fact that most food produced is for export will delimit food availability and access and thereby exacerbate food insecurity. The only potential in increasing food security relies on the proposed 'call option' which entails a situation with specific market conditions before food produced in a country can also be consumed within its borders.

Lost livelihoods which are seen as the most critical concern is addressed by RAI but the limitations are many. It fails to reflect on land acquisitions and what land has meant and means in the broader context of historical and political structures and independency. It addresses the issue of compensation but fails to specify on what grounds such an amount should be specified, a specification which is probably needed given the

numerous investors that are involved. It fails to reflect on that local farmers are making a backward journey from being self-employed and entrepreneurs to being a puppet wage-labourer to large investors and because it only addresses current issues such as direct and indirect employments and increased wages it fails to address social sustainability long-term.

RAI touches upon central concerns of lost livelihoods but limits itself in that it does not address the issue to the extent that it becomes a solved issue, not for current nor for future generations. Fundamentally it lacks a discussion on whether the benefit of acquiring land is higher than the cost of displaced people and lost livelihoods.

In summary, RAI has more potential as a form and being soft law than it has in its content concerning principle relevance. Dupuy's (1990) misgivings are true; the softness of RAI corresponds to the 'softness' of the principles. As a result RAI will not be able to make land acquisitions responsible because both dimensions depend on each other to function. Since RAI is based on the belief that land acquisitions are desirable not only for investors but from local people's point of view as well it is destined to fail. Had RAI showed more awareness of land acquisitions and discussed it from a normative and developmental perspective then RAI would have been honest about its limitations and thus also opened up for better solutions and enhanced its potential. One might argue that it is impossible to holistically include all aspects and stakeholders in such a problematic issue and that it is only feasible to include stakeholders here and now, affected by the acquisitions. However, if the issue is so problematic that all perspectives and stakeholders actually involved, now and future ones, cannot be taken into account, perhaps proponents should reconsider what actions they are actually trying to legitimise.

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