



FACULTY OF LAW  
Lund University

Lotte van der Vaart

The Contractualization of Human Rights –  
State-Investor Contracts in the Agri-Business Sector

JAEM03 Master Thesis

European Business Law  
30 higher education credits

Supervisor: Radu Mares

Term: Spring 2017

# Table of Contents

- Summary ..... 4
- Preface ..... 5
- List of abbreviations..... 6
- 1. Introduction ..... 7
  - 1.1 Background ..... 7
    - 1.1.1 The run on land..... 7
    - 1.1.2 Investment: a key to development? ..... 8
    - 1.1.3 The gap in legal protections accompanying large-scale agricultural investments..... 9
    - 1.1.4 State-investor contracts ..... 11
  - 1.2 Purpose and research question..... 12
  - 1.3 Methods and materials ..... 12
  - 1.4 Delimitations ..... 13
  - 1.5 Outline..... 13
- 2. Analysis of State-investor contracts ..... 14
  - 2.1 The role of the contract within the legal framework of investment..... 14
    - 2.1.1 Domestic law ..... 14
    - 2.1.2 State-investor contracts ..... 14
    - 2.1.3 International Investment Treaties ..... 15
  - 2.2 Contract analysis..... 16
    - 2.2.1 Lack of transparency ..... 16
    - 2.2.2 Introduction and side notes..... 17
    - 2.2.3 Contract analysis..... 18
    - 2.2.4 Concluding remarks..... 22
- 3. Soft law in the context of State-investor contracts..... 24
  - 3.1 Soft law on human rights protection..... 24
    - 3.1.2 Policy initiatives in the area of soft law and contracts..... 26
  - 3.2 Analysis of two guides for negotiators ..... 26
    - 3.2.1 The different stages of the contracting process..... 27
    - 3.2.2 Pre-negotiation stage - general recommendations ..... 28
    - 3.2.3 Pre-negotiation stage and the integration of soft law mechanisms..... 29

3.2.4 Contract negotiation stage - general recommendations .....	36
3.2.5 Contract negotiation stage and the integration of soft law principles .....	38
3.2.6 Concluding remarks.....	40
4. Consequences of the contractualization of soft law on human rights.....	41
4.1 Opportunities to the contractualization of human rights norms .....	41
4.2 Challenges to the contractualization of human rights norms .....	42
4.3 Relativization.....	43
5. Case study .....	45
5.1 The Golden Veroleum Company in Liberia.....	45
5.1.1 Liberian State-investor contracts.....	45
5.1.2 The agreement with the Golden Veroleum Company.....	46
5.1.3 Reference to soft law .....	47
5.1.4 Role of the contract.....	47
5.1.5 The situation in practice .....	47
5.1.6 Effects of the contractualization of human rights .....	48
5.1.7 Concluding remarks.....	49
6. Conclusion .....	50
Bibliography .....	52

## Summary

An increase in large-scale agricultural investment in land has been going on since the global food crisis in 2008. Import-dependent countries have acquired large plots of land to secure food supplies. The investments had disastrous impacts on the local communities living on the land before the investment took place. Many have been expropriated and evicted from their lands, affecting their human rights to property, livelihood, access to food and many other interrelated rights. Meanwhile, it remains hard to hold companies accountable for their business conduct, although soft law in the form of the Guiding Principles has imposed a duty to respect human rights on business enterprises. Analyses of the State-investor contracts that regulate the investments show that many of these contracts do not take into account the risks for human rights. In reaction to these deficient contracts, policy initiatives in the form of guides for negotiators have been developed because the contract can influence the impacts on human rights. They recommend, in fact, to integrate soft law mechanisms into the contracts.

This thesis investigates the extent to which the combination of soft law and contract can provide better protection for the human rights risks that come with large agricultural investments. It identifies the role of the contract on the investment project and explores the value of soft law in the particular context of State-investor contracts. Focus is limited to sub-Saharan Africa.

The findings of this thesis indicate that the role of the contract is significant for human rights protection, especially when domestic law is weak. Soft law on human rights provides useful guidance on how the adverse impacts for human rights can be prevented and mitigated. Its value increases in the specific context of contracts, because the effect of integrating soft law in the contract means that the commitment to comply with soft law becomes a binding obligation on the parties, in fact, a 'contractualization' of human rights. The integration of soft law in the contract pushes forward respect for human rights, in the spirit of the Guiding Principles. However, a shortcoming lays in the fact that the contract does still need to be performed. This remains a challenge in practice, partly due to capacity constraints to effectively monitor and enforce compliance by the State, but also due to conflicts of interest. The contractualization of human rights can thus contribute to better protection to the extent to which it is adequately performed and enforced in practice.

## Preface

I would like to thank my supervisor Radu Mares for whom I am grateful that he introduced me to the topic of Corporate Social Responsibilities, and for his useful input and guidance during this research period. I also want to thank my family for their unconditional support during my studies, as well as for giving me the opportunity to study abroad, which was a dream come true.

Lund, August 2017

*Lotte van der Vaart*

## List of abbreviations

BIT	Bilateral Investment Agreement	IIA	International Investment Agreement
CAO	Compliance Advisor Ombudsman	IISD	International Institute for Sustainable Development
EIA	Environmental Impact Assessment	ILC	International Land Coalition
EITI	Extractive Industries Transparency Initiatives	IMF	International Monetary Fund
EPA	Environmental Protection Agency	MMDA	Model Mine Development Agreement
ESIA	Environmental and Social Impact Assessment	MNE	Multinational Enterprise
EU	European Union	NCP	National Contact Point
FAO	Food and Agriculture Organization of the United Nations	OECD	Organization for Economic Cooperation and Development
FDI	Foreign Direct Investment	RSPO	Roundtable on Sustainable Palm Oil
FPIC	Free, Prior and Informed Consent	SRSG	Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
GDP	Gross Domestic Product	UDHR	Universal Declaration of Human Rights
GP	Guiding Principle	UN	United Nations
GVL	Golden Veroleum	UNCTAD	UN Conference on Trade and Development
ICCPR	International Covenant on Civil and Political Rights	UNDRIP	UN Declaration on the Rights of Indigenous People
ICESCR	International Covenant on Economic, Social and Cultural Rights	VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests
ICSID	International Centre for the Settlement of Investment Disputes		
IFC	International Finance Corporation		

# 1. Introduction

## 1.1 Background

### 1.1.1 The run on land

Since the food crisis of 2008 there has been a large increase on the run for agricultural land.<sup>1</sup> Global food prices rose dramatically, which caused political and economic instability in both developed and poor countries.<sup>2</sup> The crisis made many import-dependent countries aware of their vulnerability to food insecurity. As some governments were concerned about the stability of food supplies, they saw the acquisition of farmland as a good alternative to purchasing food from international markets.<sup>3</sup> This caused their augmenting interest in land acquisitions in developing countries.<sup>4</sup>

It is hard to tell how much land has been acquired over the past years. Several databases collect and present an overview of the intended, concluded and failed land acquisitions. The Land Matrix initiated by the International Land Coalition is one of these. Although they update numbers daily, it remains hard to give an accurate number because of the ongoing basis of the land deals and the fact that land deals are un-transparent. Their numbers are therefore most likely an underestimation.<sup>5</sup> To give an impression of the amount of land that is transferred, in august 2017, the Land Matrix had information about 1345 deals that cover a number of over 49 million hectares worldwide.<sup>6</sup> A significant amount of this land is used for food and agriculture.<sup>7</sup> Africa is the region with the highest land area size under contract.<sup>8</sup>

There is a large variety of land acquirers. There are private agri-business deals by companies and investment funds<sup>9</sup> but deals are also signed directly between two

---

<sup>1</sup> <<https://www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security>>, retrieved 31-07-2017.

<sup>2</sup> 'Land Tenure Rights: The Need for Greater Transparency Among Companies Worldwide', *GRI* 2016, p.4-5.

<sup>3</sup> Cotula, Lorenzo et al., *Land grab or development opportunity? Agricultural investment and international land deals in Africa*, IIED/FAO/IFAD, London/Rome, 2009, p. 15.

<sup>4</sup> K. Deiniger & D. Byerlee, 'Rising Global Interest in Farmland – Can it Yield Sustainable and Equitable Benefits?', *The World Bank*, Washington D.C. 2011, p. 25.

<sup>5</sup> <<http://landmatrix.org/en/about/#where-does-the-information-come-from>>, retrieved 9-8-2017.

<sup>6</sup> <<http://landmatrix.org/en/>>, retrieved 9-8-2017.

<sup>7</sup> <<http://landmatrix.org/en/get-the-idea/agricultural-drivers/>>, retrieved 9-8-2017.

<sup>8</sup> C. Althoff et al., "Land grabs" operationalized?, presentation to the Annual World Bank Conference on Land and Poverty, Washington DC, 14-18 March 2016.

<sup>9</sup> Cotula 2009, p. 37-38.

governments, as well as through state-owned enterprises.<sup>10</sup> Investors come from all over the world, but most frequent from Western countries, the Gulf states and Asia.<sup>11</sup>

### 1.1.2 Investment: a key to development?

Research conducted by the UNCTAD and the World Bank shows that large-scale agricultural investments could bring significant benefits to a host-country and its people.<sup>12</sup> In many cases, it could lead to GDP growth and bring government revenues due to rental fees and income tax at macro-level. In most cases, the investor also brings technology, know-how and market access and it could bring economic development to rural areas.<sup>13</sup> The top five positive outcomes of agricultural investment identified by the UNCTAD and World Bank are employment creation, integration of local farmers, expansion of market opportunities, the establishment of community development programs and increased incomes that improve food security.<sup>14</sup> As these benefits are catching, many African countries try to attract investors to their country, as it is often seen as a key to development.

On the other hand, agricultural investments are also associated with human rights abuses. The loss of land and poor resettlement plans have been mentioned as the standout negative impact on farmland investments. It relates to the most common source of conflict between the investor who has been granted formal rights to the land by the State, and the local people who had been living on the land for many years, but who did not have rights that were formally registered.<sup>15</sup> Land tenure and access to land are extremely important, as it is the key on which ultimately all livelihoods and human wealth, well-being and culture are dependent, as well as their access to food, water, and other natural resources.<sup>16</sup> When people get evicted from their lands, or when they are subject to inadequate resettlement plans, this often leads to an abuse of their right to property, livelihood, food and many interrelated rights. An investment which has this effect often results in increased poverty instead of bringing development. These are the kind of deals

---

<sup>10</sup> Cotula 2009, p. 35-36.

<sup>11</sup> <<http://landmatrix.org/en/get-the-idea/web-transnational-deals/>>, retrieved 9-8-2017.

<sup>12</sup> C. Smaller & W. Speller, with H. Mirza, N. Bernasconi-Osterwalder, and G. Dixie, 'Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks', Washington, D.C.: World Bank Group; New York: United Nations; and Winnipeg: International Institute for Sustainable Development (IISD) 2015, p. 7.

<sup>13</sup> Cotula 2009, p. 15.

<sup>14</sup> Smaller & Speller 2015.

<sup>15</sup> Smaller & Speller 2015, p. 15.

<sup>16</sup> Vhugen, Darryl, 'Large-Scale Commercial Investment In Land: Seeking to Secure Land Tenure and Improve Livelihoods', *Haramaya Law Review* 2012, Vol. 1 No.1, p. 13.

that have been called 'land grabs'.<sup>17</sup> In these situations, even a deal that may be economically beneficial to the country as a whole, may have disastrous impacts on human rights when they are not adequately taken into account.<sup>18</sup>

According to the world bank, the top 5 adverse impacts of large-scale agricultural investments relate to the loss of land, lack of openness and engagement with local communities, weak assessment of commercial viability, poor management of environmental and social impacts and insufficient mechanisms to raise grievances.<sup>19</sup>

### **1.1.3 The gap in legal protections accompanying large-scale agricultural investments**

The question rises whether companies cannot just be held accountable for their infringements on human rights, or whether they can be forced to take into account human rights when investing. The protection of human rights during these large-scale agricultural investments is in many cases weak. In the first place because the domestic law may not be fully developed for what regards human rights protection, and when it is in place, developing country governments may not always have the capacity to enforce these laws effectively.<sup>20</sup> Conflicts of interest also occur, where the government prioritizes the attraction of investment projects even though these may be detrimental to the human rights of local people. Furthermore, neither the law of the home country of the investor where it is incorporated can offer protection if it could, because it does usually not reach extraterritorially. In addition, protection of human rights has been regulated by several human rights treaties,<sup>21</sup> but companies can neither be held accountable under

---

<sup>17</sup> The definition of a land grab is defined by the ILC as land acquisitions or concessions that may be subject to one or more of the following criteria: i) In violation of human rights, particularly the equal rights of women; ii) Not based on the free, prior, and informed consent (FPIC) of the affected land-users; iii) Not based on a thorough assessment or in disregard of social, economic, and environmental impacts, including the way these impacts are gendered; iv) Not based on transparent contracts that specify clear and binding commitments about activities, employment, and benefits-sharing; and/or v) Not based on effective democratic planning, independent oversight, and meaningful participation. Source: 'Tirana Declaration: Securing Land Access for the Poor in Times of Intensified Natural Resources Competition', International Land Coalition 2011. Available at: <<http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>>, retrieved 13-8-2017.

<sup>18</sup> Cotula 2011, p. 30.

<sup>19</sup> Smaller & Speller 2015, p. 25.

<sup>20</sup> C. Smaller, 'The IISD Guide to Negotiating Investment Contracts for Farmland and Water', *International Institute for Sustainable Development (IISD)*, 2014, p. 5.

<sup>21</sup> The UDHR, the ICCPR and the ICESCR are relevant human rights treaties.

international law, as these duties to protect human rights contain only binding obligations on States.<sup>22</sup>

To try to fill this gap of corporate accountability in the law, the Guiding Principles (GPs) were published in 2011, by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG), John Ruggie.<sup>23</sup> The GPs impose on business enterprises a duty to respect human rights when they conduct business. “They should avoid infringing on the human rights of others, and they should address adverse human rights impacts with which they are involved.”<sup>24</sup> The GPs also propose how this respect can be achieved. This duty is the basic expectation that society has of business in relation to human rights.<sup>25</sup> However, the GPs are soft law. This is partly because a binding document was not yet a realistic option because the different stakeholders find it extremely hard to agree on a binding document on business and human rights.<sup>26</sup>

Another soft law initiative that contributes to human rights protection is the OECD Guidelines for Multinational Enterprises, which contains recommendations on responsible business conduct.<sup>27</sup> The governments that adhere to the guidelines are required to set up a National Contact Point (NCP), which contains a grievance mechanism to resolve cases through mediation or conciliation between a complainant and a company, usually about alleged non-observance of the Guidelines.<sup>28</sup> However, as the NCP is not a court, they cannot impose penalties on companies, and they don’t have any powers of enforceability.<sup>29</sup> Nevertheless, they can publish a report on their website which has a naming and shaming function that can cause reputational damage to the company.<sup>30</sup>

---

<sup>22</sup> <<http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/>>, retrieved 14-8-2017.

<sup>23</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, 2011. John Ruggie is a professor of human rights and international affairs at Harvard University, who had previous experience at the UN.

<sup>24</sup> Guiding Principles A/HRC/17/31, Principle 11, p. 13.

<sup>25</sup> United Nations Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5, 2008, p. 5.

<sup>26</sup> J. Ruggie, ‘A UN Business and Human Rights Treaty?’, 28 January 2014.

<sup>27</sup> OECD, ‘OECD Guidelines for Multinational Enterprises’, *OECD Publishing* 2011.

<sup>28</sup> ‘Frequently Asked Questions – National Contact Points for the OECD Guidelines for Multinational Enterprises’, OECD 2017, p. 1.

<sup>29</sup> S. Marshall, ‘OECD National Contact Points: Better Navigating Conflict to Provide Remedy for Vulnerable Communities’, *Non-Judicial Redress Mechanisms Report Series 16*, 2016, p. 6.

<sup>30</sup> ‘Frequently Asked Questions – National Contact Points for the OECD Guidelines for Multinational Enterprises’, p. 2.

Stronger protection for human rights only exists when the investor has asked for loans, guarantees or assistance of the International Finance Corporation.<sup>31</sup> The IFC has made a strategic commitment to sustainable development, for which they have developed 8 Performance Standards that are directed towards clients, who are required to apply these standards to manage the environmental and social risks and impacts to enhance development opportunities.<sup>32</sup> The performance of the protections laid down in the standards is then supervised by the IFC and the Compliance Advisor Ombudsman (CAO).<sup>33</sup> The same goes for clients that receive loans from banks that have signed up to the Equator Principles, which are based on the IFC Performance Standards and which the clients will have to comply with.<sup>34</sup>

#### 1.1.4 State-investor contracts

State-investor contracts are the agreements concluded between an investor and the host-State, and are an important part of the investment legal framework.<sup>35</sup> Analyses of State-investor contracts currently in force have revealed shocking information. There are examples of investment contracts that concern the lease of enormous amounts of land that are being transferred by a contract of barely 6 pages.<sup>36</sup> The land transfers concluded in these contracts could pose severe risks to human rights. In many cases, human rights were not taken into account, and no safeguards could be found in the contracts. When nothing is regulated about human rights, it is not surprising that adverse impacts on them are likely to happen.

In reaction to the revelation of these deficient contracts, and because of the recognition that the human rights impact of business operations could be affected by investment

---

<sup>31</sup> The IFC is an international financial institution that provides services in the form of financial resources, technical experience, global experience and innovative thinking to help their clients, private investors in developing countries, with financial and operational challenges. Source: <[http://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/about+ifc\\_new](http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new)>, retrieved 27-07-2017.

<sup>32</sup> IFC, *IFC Performance Standards on Environmental and Social Sustainability*, January 2012.

<sup>33</sup> <<http://www.cao-ombudsman.org/about/whoweare/>>, retrieved 11-8-2017.

<sup>34</sup> Equator Principles, *The Equator Principles* June 2013, p. 2. Available at: <[http://www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf)>, retrieved 3-8-2017

<sup>35</sup> Other names for the same type of agreement are also common, such as: 'Host Government Agreements; Host Country Agreements; Production Sharing Agreements; Concession Contracts and Licence Agreements'. Source: <http://blogs.lse.ac.uk/investment-and-human-rights/connections/regulating-investment/state-investor-contracts/>, retrieved 26-06-2017.

<sup>36</sup> Investment agreement between the Republic of Mali and La Grande Jamahiriya arabe Libyenne populaire et socialiste of 2008, available at: <<https://www.farmlandgrab.org/wp-content/uploads/2010/07/Convention.pdf>>, retrieved 17-8-2017.

contracts,<sup>37</sup> soft law initiatives that try to improve protection for human rights in these contracts have been developed in the form of guides for negotiators.<sup>38</sup> These focus on drafting contracts that will lead to responsible, sustainable investment projects, and make recommendations for what to include in the contract to create safeguards for human rights. These recommendations often imply the inclusion of a strategy or mechanism<sup>39</sup> for human rights protection developed in other soft law documents, sometimes even by referring directly to these.

## 1.2 Purpose and research question

This thesis tries to investigate the potential effectiveness of combining soft law and contract, on which the guides for negotiators, in fact, are based. The central question of this thesis sounds therefore:

1. 'To what extent can soft law and State-investor contracts combined provide better protection for the human rights risks that come with large agricultural investments?'

To answer this question, two sub-questions are relevant:

- a) 'What can be the role of a State-investor contract for the protection of human rights?'
- b) 'What is the specific value of soft law in the context of State-investor contracts?'

The fact that so many human rights are at stake, and that so many people find their rights infringed by an investment project, makes that it is worth examining how these risks can be prevented and mitigated, and what strategies will be effective to achieve this.

## 1.3 Methods and materials

This research is based on a legal analysis of hard and soft law instruments, and State-investor contracts. Additionally, a case study has been conducted based on web research and publicly available documents.

---

<sup>37</sup> Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators, Addendum 3 to the Report, A/HRC/17/31/Add.3, 2011, p. 4.

<sup>38</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011 and Smaller 2014.

<sup>39</sup> 'Mechanism' in this thesis refers to the concrete strategies and policies that soft law has developed to prevent and mitigate adverse impacts on human right. Examples are a due diligence or a grievance mechanism.

## 1.4 Delimitations

First, although land grabs and the connected human rights abuses occur not only in relation to agricultural investments and may happen worldwide, this research will be limited to the adverse impacts in the agri-business sector in sub-Saharan Africa. Second, more specific focus will lay with the top 5 adverse impacts of agricultural investments identified by the World Bank, and with the human rights abuses that follow with these adverse impacts. Third, despite the fact that most relevant instruments and initiatives also cover positive impacts of such investments and aim for improving sustainable development in general, which means that they try to maximize the gains while minimizing the risks, focus in this thesis will be on mitigating the adverse impacts on human rights. Finally, the thesis will be limited to Foreign Direct Investment (FDI).<sup>40</sup>

## 1.5 Outline

In order to answer the central question, chapter 2 will be concerned with the first sub-question, that tries to analyze the role of a contract for the protection of human rights. For this purpose, the legal framework of investment and a contract analysis will be conducted. Chapter 3 will discuss how a combination of contract and soft law is made in current policy initiatives in the form of guides for negotiators. It will analyze what specific mechanisms are proposed and how soft law can contribute to better protection of human rights. This relates to the second sub-question that tries to identify the value of soft law in the context of State-investor contracts. Chapter 4 will subsequently consider the effects of combining soft law and contract and will discuss challenges and opportunities. Chapter 5 contains a case study, where the available contract and the references that it makes to soft law will be compared with what has been found 'on the ground'. This will show what consequences the integration of soft law in a contract has in practice, and where shortcomings lay. Finally, the central question will be answered to what extent this combination is (potentially) successful in achieving better protection for human rights.

---

<sup>40</sup> FDI has been classified by the IMF as "a category of international investment that reflects the objective of a resident in one economy (the director investor) obtaining a lasting interest in an enterprise resident in another economy (the direct investment enterprise). Source: International Monetary Fund, 'Foreign Direct Investment Trends and Statistics', *IMF* 2003, p. 6. Available at: <<http://www.imf.org/external/np/sta/fdi/eng/2003/102803.pdf>>, retrieved 17-8-2017.

## **2. Analysis of State-investor contracts**

This chapter will identify the role of the contract. First, its position within the legal framework will be studied. Subsequently, a contract analysis will be conducted to see what kind of clauses current State-investor contracts contain.

### **2.1 The role of the contract within the legal framework of investment**

As many agricultural investments result in land grabs, it is interesting to know what legal framework is applicable to these investments. These may all influence the outcome of the project. The desired hierarchy of sources of law that apply to an investment project is respectively domestic law, followed by State-investor contracts and at last International Investment Treaties.<sup>41</sup> The following part will explain why this hierarchy is relevant.

#### **2.1.1 Domestic law**

Domestic law is considered as the most important source of law for investment. If fully developed, it should be able to achieve the positive benefits of foreign investment while functioning at the same time as a buttress against the negative impacts.<sup>42</sup> Domestic law typically regulates the admission of foreign investors, taxation, land laws, requirements for community consultation as well as laws that govern the potential impacts of an investment on the environment and local communities.<sup>43</sup> The issues regulated by domestic law do not need to be included in the contract. A well-developed domestic law is beneficial for the government, because it will bring stability and equality for what applies to investment projects in a country.

#### **2.1.2 State-investor contracts**

After domestic law, the contract is most relevant. The contract forms the basis of the relationship between the parties and shapes what the investment will look like. The contract usually contains the most project-specific needs, and will lay down the way risks, costs and benefits are distributed at project level.<sup>44</sup> When domestic law is well-developed, the contract will only have to delineate the issues specific to the project such as the duration of the lease, price, and quantity.<sup>45</sup>

---

<sup>41</sup> Smaller 2014, p. 7.

<sup>42</sup> Smaller 2014, p. 5.

<sup>43</sup> Smaller 2014, p. 5.

<sup>44</sup> Cotula 2011, p. 1.

<sup>45</sup> Smaller 2014, p. 5.

The increasing role of the State-investor contract when domestic law falls short

Although preference is given to domestic law as the primary source of law that governs the investment,<sup>46</sup> this is often not possible in practice. In reality, in many developing countries it is not possible to rely entirely on domestic law, because it may either not be in place, or because it is not sufficiently developed and detailed. In case it is in place, it may not be implemented or adequately enforced.<sup>47</sup>

This increases the role of a State-investor contract. Apart from only dealing with project-specific issues, it will now also have to include other aspects, such as taxation, export rights and many more things that relate to “the key elements of the fiscal and economic bargain relating to the investment”.<sup>48</sup> In addition, the contract may also have to take up clauses that regard to the possible adverse impacts such as the impact on the environment and human rights. This makes the contract a critical document for what regards the possible outcome of the project and increases the relevance of a well-drafted State-investor contract.

In many cases, the contract will thus fill the governance gap created by shortcomings of domestic law in the host country. This could both have advantages and disadvantages. In a good situation, the contract could apply higher international standards on the investment project, provide guidance on what assessments could contain and it could point to best practice as the reference point.<sup>49</sup> On the other hand, the contract could undermine or displace domestic law, or even frustrate it through the use of stabilization clauses. These clauses may be included as a protection for the investor to be exempted from any new law imposed by the government, and that may be to their disadvantage.<sup>50</sup> This is an important reason why preference is given to domestic law.

### 2.1.3 International Investment Treaties

International Investment Agreements (IIAs) are signed by States to protect and promote foreign investment and should be of least influence on investment projects. Protection and stability are desirable because investing in another country is not without risks. The investors put themselves under the rule of a foreign government, but this regime could

---

<sup>46</sup> Smaller 2014, p.5.

<sup>47</sup> Smaller & Speller 2015, p. 3.

<sup>48</sup> Smaller 2014, p. 5

<sup>49</sup> Smaller & Speller 2015, p. 3.

<sup>50</sup> Smaller 2014, p. 5.

potentially treat them unfavorably.<sup>51</sup> A widespread fear relates to expropriation of the investor by the host-country. For this reason, the capital-exporting countries have since the beginning of foreign investment created IIAs with the purpose to address the risks of a long-term investment.<sup>52</sup> Rules for the treatment of aliens have been central.

The most common type of IIAs are Bilateral Investment Treaties (BITs), which are concluded between two states. The advantage of a BIT is usually the promotion of economic cooperation and capital flows, and on the other hand protection for the foreign investor in the host State.<sup>53</sup> Besides, it often provides for dispute settlement through investor-state arbitration, either before a Centre for the Settlement of Investment Disputes (ICSID) tribunal<sup>54</sup> or through another kind of arbitration.<sup>55</sup> Capital-importing countries (host states) usually sign these BITs because they want to attract investment and create an investment-friendly climate.<sup>56</sup>

## 2.2 Contract analysis

Because State-investor contracts will in many cases play a significant role in regulating the investment, it is interesting to analyze what these contracts exactly look like and what is included in them.

### 2.2.1 Lack of transparency

Analyzing State-investor contracts is however not an obvious thing to do. In most cases, the State-investor contracts are kept secret and negotiation processes usually take place behind closed doors. What exactly can be found in contracts is therefore relatively unknown.<sup>57</sup> The reason why contracts are usually kept secret is because, on the side of the investor, there is a fear to give away commercially sensitive information to competitors. Meanwhile, the host State may be afraid of a 'race to the bottom'.<sup>58</sup> This

---

<sup>51</sup> J. Wouters, S. Duquet & N. Hachez, 'International Investment Law, The perpetual search for consensus', in: O. de Schutter, J. Swinnen & J. Wouters (eds), *Foreign direct investment and human development - the Law and Economics of International Investment Agreements*, New York: Routledge 2013 Wouters, Duquet & Hachez 2013, p. 25.

<sup>52</sup> R. Dolzer & C. Schreuder, *Principles of International Investment Law*, Oxford: Oxford University Press 2012, p. 22.

<sup>53</sup> Wouters, Duquet & Hachez 2013, p. 35.

<sup>54</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington DC on 18 March 1965, entry into force on 14 October 1966.

<sup>55</sup> Dolzer & Schreuder 2012, p. 13.

<sup>56</sup> Wouters, Duquet & Hachez 2013, p. 36.

<sup>57</sup> Cotula 2011, p. 5.

<sup>58</sup> Rosenblum & Maples 2009, p. 13.

implies that a commercial advantage given to one competitor could also be asked for by the next investor, but that they might not want to offer this time. This could affect their bargaining power negatively.<sup>59</sup> Nevertheless, reports from the past decade has provided us with a bit more insight in these contracts.

### 2.2.2 Introduction and side notes

The following part will analyse a number of State-investor contracts that are still in force today, and will scrutinize where risks for human rights and opportunities for protection can be identified. This will provide us with an overview of the current situation around State-investor contracts. The analysis is mostly based on a report that analyzed 12 modern contracts for agricultural investments in sub-Saharan Africa and the associated remarks by the researcher.<sup>60</sup> When discussing stabilization clauses, the observations also rely on a research conducted by the IFC and the Special Representative.<sup>61</sup> Where available, the discussed contracts can be found back in footnotes. However, not all of them were available or findable.

Some short side notes need to be made beforehand. It needs to be realized that land deals may come in many different shapes. There can be just one contract, but a deal can additionally constitute of several project documents and legal instruments, which might not always have been available to the researcher. The second note is that the contract always needs to be read in the light of the bigger legal framework under which the investment is made, such as international laws and the domestic law to the particular country where the investment is made. The clauses can therefore not be judged in isolation.<sup>62</sup> This makes that the analyses made by the researchers may inevitably be preliminary and incomplete. These differences in legal options for regulating the investment also makes the contracts neither always comparable, for example as some contracts also relate to renegotiations, which may therefore look different and perhaps less comprehensive. However, research on State-investor contract is still relevant since the aim is to promote debate on the issues that are presented and learn from practice.<sup>63</sup>

---

<sup>59</sup> L. Cotula & K. Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development', in: K. Sauvant (ed), *Yearbook on International Investment Law & Policy 2011-2012*, Oxford: Oxford University Press 2013, p. 287.

<sup>60</sup> Cotula 2011.

<sup>61</sup> Shemberg 2009.

<sup>62</sup> Cotula 2011, p. 7.

<sup>63</sup> Cotula 2011, p. 10.

### 2.2.3 Contract analysis

#### Overall contract outlook

When it comes to the overall outlook of the contracts analysed in this research, it is striking that contracts for certain deals that involve the allocation of large areas of land are extremely short, (6 pages for 100.000 hectares).<sup>64</sup> This deal is likely to have major economic, social and environmental impacts, although “the lack of specificity may arguably undermine safeguards to ensure that risks will be properly managed and that expected benefits will materialize”, which is worrisome.<sup>65</sup> Even though this does not imply that a longer contract will, without doubt, take better care of certain risks and other important aspects, a short contract does in most cases simply not leave space to regulate all possible risks to human rights.

#### Transfer of local land rights

An important issue in the contract relates to what safeguards are in place when land is transferred, to which local people had land rights. As described in the introduction, other fundamental human rights might also get affected when the land on which they lived or relied is being transferred. These relate to the human right to property, the right to food, housing and the rights of indigenous peoples over their ancestral lands.<sup>66</sup> To mitigate these adverse impacts, safeguards should be included in the contract.

In most African countries, all land is owned by the state. Nevertheless, in many areas customary land tenure systems are in place and perceived as legitimate by the people who rely on the presumption that the land is ‘theirs’.<sup>67</sup> In this regard, it is important to note that the human right to property has consistently been interpreted as to include also collective and customary rights, even where these have no legal recognition under national law.<sup>68</sup>

However, despite this right, the local people often remain in a vulnerable position because they do not have certificates that prove their ownership of the land.<sup>69</sup> In addition to this,

---

<sup>64</sup> Investment agreement between the Republic of Mali and La Grande Jamahiriya arabe Libyenne populaire et socialiste of 2008, article 3. Available at: <<https://www.farmlandgrab.org/wp-content/uploads/2010/07/Convention.pdf>>, retrieved 17-8-2017.

<sup>65</sup> Cotula 2011, p. 22.

<sup>66</sup> Cotula 2011, p. 32.

<sup>67</sup> Cotula 2011, p. 16.

<sup>68</sup> Cotula 2011, p. 32.

<sup>69</sup> Cotula 2011, p. 33.

almost all countries have legislation that enables the government to take their rights compulsorily if this is in the public interest, usually under a requirement to pay compensation. Moreover, in Africa, many private investments that involve the acquisition of land have also been legislatively deemed to be of public interest, so that land rights were taken.<sup>70</sup> Property rights are thus often weak and easily set aside. The effect of this is that local people were often worse off, even in situations where the investment had been considered to be beneficial to the country as a whole.<sup>71</sup>

Good practice in this regard consists of clauses which regulate that the investor will pay annual rent not only to the government, but also to the local community (Sudan), or where local landholders are given a share in the produce of the land (Madagascar), or where a community development fund was established (Liberia).<sup>72</sup> Other safeguards for human rights consist of principles that come from soft law, such as resettlement action plans contained in the IFC Performance Standards. In many cases, such safeguards are included when international lenders are involved and who require that the project must comply with these criteria.

Moreover, an outstanding factor in the contracts that affects the people and their land rights is the often long duration of the investment contracts. Common practice seems to be a duration for about a century, often in the form of a renewable 50-year term.<sup>73</sup> This will inevitably have a significant impact on the people that live on the lands that will be leased, as they might be separated from it for generations.<sup>74</sup> Another outstanding matter is the fact that some contracts don't include specific GPS locations for the land that will be leased, beyond some broad geographical references. This is not beneficial to both the host country and a possibly affected community, as the investor can in that situation 'pick and choose' the land it wants to operate on.<sup>75</sup>

---

<sup>70</sup> Cotula 2011, p. 33.

<sup>71</sup> Cotula 2011, p. 34.

<sup>72</sup> Cotula 2011, p. 34.

<sup>73</sup> Cotula 2011, p. 23. See for example clause 6 in the Investment agreement between the Republic of Mali and La Grande Jamahiriya or clause 3 in a Senegalese 'Contract for the Exclusive Utilisation of Land' between AgroAfrica AS (AA) and La Communauté Rurale de Koukane (CRK) of 7 March 2008, available at: <<https://www.farmlandgrab.org/wp-content/uploads/2010/07/Agroafrica-contrat-senegal-.pdf>>, retrieved 17-8-2017.

<sup>74</sup> Cotula 2011, p. 23.

<sup>75</sup> Cotula 2011, p. 23. See for example the Investment agreement between the Republic of Mali and La Grande Jamahiriya, clauses 3 and 4.

### Safeguards for local people and the environment

What should be aspired to achieve, is that the contract will take into account risks for human rights and the environment. These risks are often identified through an environmental and social impact assessment (ESIA), that aims to identify and mitigate the risks of a project prior to a land transfer deal. Some of the analyzed contracts made reference to such an ESIA. Other contracts required 'feasibility studies' based on national law, without explicit mentioning of an ESIA. The problem is, however, that national law might lack exact criteria for approving of failing land deal applications. In addition, they may often neither be available for public scrutiny.<sup>76</sup>

Best practice in this field refers to contracts that refer to international soft law instruments, such as the Equator Principles which include impact assessment requirements.<sup>77</sup> The only uncertainty is the extent to which the host state will in certain cases be able to ensure enforcement of these standards.<sup>78</sup>

### Food security

In many contracts no mention was made of food security, or safeguards for food security. This contrasts with the policy objectives to improve food security on which some countries justify the settling of investors.<sup>79</sup> Good practice would relate to clauses that granted the investor the right to export "provided domestic consumption demands are met".<sup>80</sup>

### Host country benefits

The first common benefit of the lease of land often constitutes rental fees, paid to the government, although these may be quite low. Exemption for the first couple of years of the investment happens as well,<sup>81</sup> as might the fees sometimes be periodically adjusted (for example in the light of inflation).<sup>82</sup> Some of the contracts analysed did not mention

---

<sup>76</sup> Cotula 2011, p. 30.

<sup>77</sup> Cotula 2011, p. 31. Concession Agreement between the Republic of Liberia and ADA Commercial Inc, of 11 June 2008, Section 13, available at: <https://www.scribd.com/document/152412349/An-Act-Ratifying-the-Concession-Agreement-between-the-Republic-of-Liberia-and-ADA-Commercial-Inc>, retrieved 17-8-2017.

<sup>78</sup> Cotula 2011, p. 31.

<sup>79</sup> Cotula 2011, p. 38.

<sup>80</sup> Cotula 2011, p. 38.

<sup>81</sup> Cotula 2011, p. 25. This appeared in an Ethiopian contract, however only available to the author of the research.

<sup>82</sup> Cotula 2011, p. 25. Land Lease Contract between Republique du Cameroun and La Société Sucriere du Cameroun (Sosucam) of 20 April 2006, article 3. Available at: <https://www.farmlandgrab.org/wp-content/uploads/2010/09/Cameroon-contract.pdf>, retrieved 17-08-2017.

any payment of land fees, which suggests that the investor would get the land for free. However, instead of rental fees, the host country might also be compensated in the form of other investor commitments to contribute capital and develop infrastructure in the host country. This can be beneficial to a country when the government has not enough resources to do this themselves.

There are two major problems related to this. The first thing is that land might be transferred below market price. The other problem is that compensation in the form of investment contributions needs to have clear clauses in the contract where the investor's commitments are precisely described. The same goes for the host state capacity to monitor compliance of these commitments and to sanction non-compliance. It seems important that the investor needs to make clear when, where and of what quality these contributions will be.<sup>83</sup> The same goes for commitments on employment creation. The expected benefits may be hard to enforce if no clear numbers of jobs or required skills are included in the contract, while employment creation can in principle be a valuable benefit of an investment project.<sup>84</sup>

#### Stabilization clauses

When signing a contract with the State, the investor faces political risks that can be described as "the State's use of regulatory authority after the negotiation of the contract to change the conditions applicable to the contract."<sup>85</sup> While it is understandable that the investor wants to protect himself against arbitrary action that may adversely affect the investment project, or even against expropriation, stabilization clauses are considered as controversial, and usually not in the interest of human rights.

Research published by the IFC together with the Special Representative in 2009, shows that stabilization clauses have been found in many contracts.<sup>86</sup> They appear in different forms: freezing clauses, which 'freeze' the law of the host state for the duration of the investment project, economic equilibrium clauses, which require the investor to comply

---

<sup>83</sup> Cotula 2011, p. 26.

<sup>84</sup> Cotula 2011, p. 26. In the Senegalese contract between AgroAfrica AS (AA) and La Communauté Rurale de Koukane (CRK) it is merely required to "contract local farmers to plant, maintain and harvest [jatropha] plants" (clause 2c).

<sup>85</sup> <<http://blogs.lse.ac.uk/investment-and-human-rights/connections/regulating-investment/state-investor-contracts/>>, retrieved 26-06-2017.

<sup>86</sup> Shemberg 2009, p. 17. Research has been performed based on 76 modern contracts and 12 modern contract models from all over the world, as well as a literature review and interviews with negotiators of contracts. (p. 9).

with new laws but to be compensated for the costs of compliance, and hybrid clauses, which combine aspects of the two mentioned above.<sup>87</sup>

Research on stabilization clauses has pointed out that these clauses can stand in the way to improve the situation for human rights, as these clauses can be used to limit the state's ability to implement new social and environmental laws to long-term investments.<sup>88</sup> If a stabilization clause is included in the contract, these higher standards under national law cannot be imposed on the investor as they may, for example, be exempted from "any new law".<sup>89</sup> As contracts often run for several decades, the host State's effort to improve safeguards for human rights may not apply to the large-scale investment projects carried out in their country, where higher protection standards are beneficial to human rights. Stabilization clauses are thus hindering the ability of the State to protect human rights. They also hinder the State's ability to fulfill their duty under international law. This may be detrimental to the development of protection of human rights.

Stabilization clauses have a bigger impact when they are drafted vaguely. Best contractual practice is therefore considered to make sure that social and environmental matters are not stabilized and to clearly define the scope of the clauses.<sup>90</sup>

#### The negotiation process of contracts

Irrespective of contract clauses, the process behind it is also important. As most land in Africa is owned by the State, contracts are usually concluded with the central government. Even though the transfer may be completely legally concluded, local people with legitimate land rights may find themselves dispossessed and find their human rights infringed.<sup>91</sup> In most cases, they do not have a say in the negotiations. A key aspect relates therefore to the extent to which local landholders can influence decisions that affect their land.<sup>92</sup> Good practice would therefore involve the consultation of the local communities.

#### 2.2.4 Concluding remarks

Even though domestic law ought to be the most important instrument to regulate investment, it is in many cases not possible to rely entirely on it because it may not be

---

<sup>87</sup> Shemberg 2009, p. 7.

<sup>88</sup> Shemberg 2009, p. 10.

<sup>89</sup> Cotula 2011, p. 39.

<sup>90</sup> Cotula 2011, p. 40.

<sup>91</sup> Cotula 2011, p. 2.

<sup>92</sup> Cotula 2011, p. 42.

fully developed, particularly in regard to human rights. The contract may then become an important document where safeguards for human rights could be included.

Analysis of contracts currently in force show, however, that irrespective of the state of domestic law, safeguards for human rights are absent in many cases, and some clauses may pose risks to human rights. The expressed concern by one of the researchers that “some contracts underpinning the recent wave of land acquisitions may not be fit for purpose”<sup>93</sup> is therefore understandable. Contracts are considered to be too short and unspecific and only include vague promises, while safeguards for local people are weak.<sup>94</sup> These facts justify the need to improve future contracts and to make negotiators aware of the role of a contract for human rights protection.

---

<sup>93</sup> Cotula 2011, p. 43.

<sup>94</sup> Cotula 2011, p. 43.

### 3. Soft law in the context of State-investor contracts

This chapter will contain an analysis of policy initiatives to create State-investor contracts that are more sustainable, in particular to human rights. It will analyze how soft law and contract are combined in these initiatives and how applying soft law would lead to better protection of human rights. First, there will be a short elaboration of the corporate duty to respect, to understand under what framework these different types of soft laws are created.

#### 3.1 Soft law on human rights protection

The efforts to prevent and mitigate the adverse impacts on human rights during business activities are usually a performance of the corporate duty to respect human rights, developed in the Guiding Principles. The second pillar of the GPs state that business enterprises should respect human rights, in a way that they do not infringe on the human rights of others and that they should address adverse human rights impacts with which they are involved.<sup>95</sup> This duty exists independently of what the State does to perform its obligation to protect human rights. This implies that when a State has not implemented international human rights in national law, business enterprises are still required to respect internationally recognized human rights, to a minimum those expressed in the International Bill of Human Rights and the rights in the ILO Declaration of Fundamental Principles and Rights at Work.<sup>96</sup>

As some companies are more likely to affect particular human rights due to their activities in a specific industry or context, they should pay specific attention to these rights, according to the GPs.<sup>97</sup> In the case of agricultural investments, this means that for example rights to livelihood and property of land need special regard. Moreover, the size, sector, operational context or ownership of the business enterprise doesn't matter, as: "the responsibility to respect human rights applies fully and equally to all business enterprises."<sup>98</sup>

As regards the scope of human rights issues that companies should address, the main goal

---

<sup>95</sup> Guiding Principles A/HRC/17/31, Principle 11, p. 13.

<sup>96</sup> Guiding Principles A/HRC/17/31, Principle 12, p. 13.

<sup>97</sup> Guiding Principles A/HRC/17/31, Principle 12, p. 13.

<sup>98</sup> Guiding Principles A/HRC/17/31, Principle 14, p. 14.

in respecting human rights is that companies will “a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”<sup>99</sup>

The GPs also lay down how companies are expected to fulfill the duty to respect. This is through adopting a policy commitment, conducting a human rights due-diligence process to identify, prevent and mitigate their impacts on human rights, and through enabling for remediation of any adverse human rights risk that may still occur, despite these efforts.<sup>100</sup> The principle idea is thus that potential impacts should be addressed through prevention and mitigation, while human rights abuses that have already occurred should be subject to remediation.<sup>101</sup> In addition to the GPs, other soft law has been created to support the efficacy of this duty, some of these even with a specific focus on human rights related to land transfers. They provide guidance and benchmarks for companies.

The GPs are a soft law document, because attempts to create a binding document was not yet realistic, as the different stakeholders had very different views on the topic of business and human rights. However, this did not mean that any international legal development was completely out of reach.<sup>102</sup> Indeed, soft law can make an important contribution as a first step. The GPs now constitute an authoritative framework for which there is much respect in global society. Beyond the Human Rights Council, they have been endorsed by Governments, business enterprises, and associations, by civil society, national human rights institutions and investors.<sup>103</sup>

A question that may remain is the extent to which business enterprises will voluntarily comply with the GPs, as it concerns a soft law document. Nevertheless, many States have legislated the duty for companies to respect human rights in their domestic law. As companies are bound by this, respecting human rights is not merely voluntary under national law. Another example where the GPs have become hard law is through the EU Directive on disclosure of non-financial and diversity information, where the GPs are

---

<sup>99</sup> Guiding Principles A/HRC/17/31, Principle 13, p. 14.

<sup>100</sup> Guiding Principles A/HRC/17/31, Principle 15, p. 15.

<sup>101</sup> Guiding Principles A/HRC/17/31, p. 16.

<sup>102</sup> Ruggie 2014, p. 4.

<sup>103</sup> Guiding Principles A/HRC/17/31, p. 4.

integrated.<sup>104</sup> Another way through which companies may be obliged to respect human rights is when this duty has been incorporated in contractual clauses between companies and their business partners. Furthermore, companies may be subject to what has been called the ‘court of public opinion’. When a company does not respect human rights, they could suffer reputational damage, which will in many cases also have financial consequences.<sup>105</sup>

### **3.1.2 Policy initiatives in the area of soft law and contracts**

The SRSG identified that investment contracts are an important instrument through which States and business enterprises could affect the human rights impact of business activities and investments.<sup>106</sup> After several analyses of State-investor contracts, also other stakeholders felt that there was a need to improve the deficient contracts. In reaction to this, soft law in the form of guides for negotiators have been created, in order “to help integrate the management of human rights risks into investment project contract negotiations between host State entities and foreign business investors.”<sup>107</sup> These guides aim to create responsible, sustainable investment contracts by recommending what should be included in such a contract. In fact, for many issues, this comes down to the integration of different protection mechanisms created in other soft law, into the negotiation process of the contract. This implies that soft law and contracts are combined in an attempt to improve protection for human rights. The following part will analyze two of these guides for negotiators to see how this is done.

## **3.2 Analysis of two guides for negotiators**

The first guide whose recommendations will be discussed are the Principles for responsible contracts,<sup>108</sup> created by the SRSG in 2011 as an addendum to the GPs. A clear reliance on them can therefore be remarked. The document contains ten main principles. In general, one could say that the guide reflects the general responsibilities of the State and the investor to protect and respect human rights and makes recommendations of how

---

<sup>104</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

<sup>105</sup> FAQ about the Guiding Principles HR/PUB/14/3 2014, p. 9.

<sup>106</sup> Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators, Addendum 3 to the Report, A/HRC/17/31/Add.3, 2011, p. 4.

<sup>107</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, §1, p. 4.

<sup>108</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011.

this can be achieved when drafting an investment contract. Next, it recommends to include some of its well-developed mechanisms that contribute to ensuring respect for human rights, such as a due diligence and a grievance mechanism.

The second document that will be discussed is The IISD Guide to Negotiating Investment Contracts for Farmland and Water.<sup>109</sup> This document has a focus on long-term leases of farmland and was inspired to a large extent by the Model Mine Development Agreement<sup>110</sup> and 80 other agricultural contracts that were analyzed. The document includes amongst others a checklist of common issues that may arise, and that the parties can consider to include in their contracts.<sup>111</sup> Besides, it makes explicit references to agriculture-specific soft law. It is therefore a good example of how this guide tries to encourage negotiators to include soft law mechanisms in their contracts.

The analysis will focus on what specific soft law mechanisms are recommended to include in the contracting process, and will identify how human rights protection would be achieved. Besides, it will also analyze what general recommendations for contract drafting are made in these guides, as they contain essential recommendation to create sustainable contracts.

### **3.2.1 The different stages of the contracting process**

Both guides distinguish different stages of the contracting process, for which they try to create awareness. They identify a pre-negotiation stage, before the real contract negotiation stage. Subsequently, the project has to be implemented, after which a monitoring and enforcement stage begins. The figure on the next page graphically illustrates what the contracting process will look like according to the SRSG. When potential risks are identified at an early stage, this can assist the parties in establishing clear roles and responsibilities for the prevention and mitigation of the impact, and it can help them to facilitate cooperation and effective management throughout the life-cycle of the project. These efforts will then contribute to increasing the positive outcomes of the benefits, also for human rights.<sup>112</sup>

---

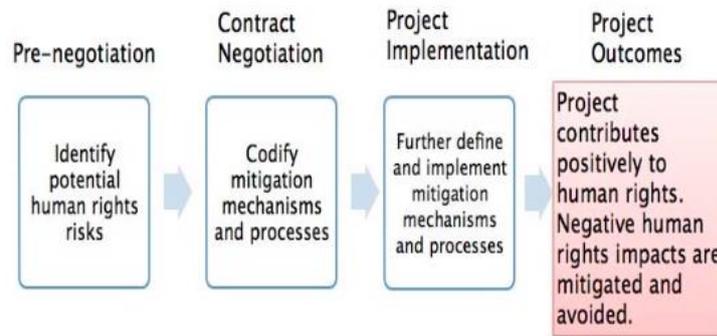
<sup>109</sup> Smaller 2014.

<sup>110</sup> MMDA 1.0 Model Mine Development Agreement. *International Bar Association* 2011.

<sup>111</sup> Smaller 2014, p. 1.

<sup>112</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011. p. 6.

### Integrating the management of human rights risks into investment project negotiations



113

#### 3.2.2 Pre-negotiation stage - general recommendations

The pre-negotiation stage is considered as an essential phase. The following part will discuss some general recommendations that the guides make and that are necessary to create better contracts.

##### Adequate preparation of the parties

It is recommended that the parties prepare themselves adequately before they enter negotiations. Preparation means that they identify the possible benefits and risks for human rights of the investment, and assess if they have the capacity to properly address the human rights implications of the project.<sup>114</sup> This is necessary because only then the parties will know what issues need to be negotiated and where safeguards need to be included. At this stage, access to information and expertise is essential to make informed decisions on different aspects of the deal, such as economic, legal, technical, as well as human rights issues. For states, this might be available through international development cooperation.<sup>115</sup> In general, the State and the investor should have a clear idea of how the project objectives, opportunities, and risks relate to its responsibility to protect or respect human rights.<sup>116</sup> They should enter the negotiations both having the aim to ensure that the adverse impacts of human rights will be avoided and mitigated.<sup>117</sup>

<sup>113</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 7.

<sup>114</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 7.

<sup>115</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 8-9.

<sup>116</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 7.

<sup>117</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 8.

#### Awareness of the role of the contract

Preparation also includes the identification of the role that the contract will play. Parties need to know the content of domestic law. When domestic law is weak and undeveloped, like in many developing countries, the investment contract will have to be more comprehensive. In many cases, it necessarily also delineates taxation, export rights and access to water, next to sustainable development elements such as economic, environmental, social and human rights.<sup>118</sup>

#### Negotiation dynamics

The parties may have different bargaining power. A wealthy investor may have better resources, expertise and negotiation skills than a developing-country government. However, the IISD guide recommends that focus should be on getting the best possible deal for both parties, in fact an interest-based negotiation where all stakeholders find their interests reflected without jeopardizing the others. This is considered necessary, as a deal that neglects to take into account certain interests may at a later stage threaten the viability of the project.<sup>119</sup> Besides, the State needs to assess whether they consider the investor as a reliable business partner. They can do this by screening the investors' business plan, financial resources, and previous agricultural experience.<sup>120</sup>

#### Priorities for Rural Development and Food Security

The first issue that the State should identify is how the investment can be linked to its national rural or agricultural development strategy. This can help the parties to determine the crops, target areas and groups that will be promoted or prioritized. In this way, it can be assured beforehand that the investment will contribute to development and food security.<sup>121</sup>

### 3.2.3 Pre-negotiation stage and the integration of soft law mechanisms

The following part will describe which soft law mechanisms are desirably integrated into the pre-negotiation stage of the investment, and how this should be done according to the guides.

---

<sup>118</sup> Smaller 2014, p. 5.

<sup>119</sup> Smaller 2014, p. 11.

<sup>120</sup> Smaller 2014, p. 12.

<sup>121</sup> Smaller 2014, p. 12.

## Due Diligence

The Principles for responsible contracts state that the parties need to be aware of the actual and potential adverse impacts that could follow with an investment. They should get to know this through due diligence, feasibility studies, and other impact assessments.<sup>122</sup> Due diligence with particular regard to human rights has been developed as a mechanism in the GPs.<sup>123</sup> It can best be described as: “the continuous process of identifying and addressing the human rights impact of a company across its operations and products, and throughout its supplier and business partner networks.”<sup>124</sup> Due diligence is considered to be an effective way of mitigating human rights risks. Moreover, the concept of due diligence is well-known to businesses, as enterprises usually continually carry out risk assessment processes to maximize their profits. This experience probably helps them to understand its meaning.<sup>125</sup>

The human rights due diligence should try to clarify the specific impact that the business activity may have on specific people, in a specific context of operations. The individual aspects that have to be identified are mainly the human rights context prior to the proposed activity, the people that may be affected, the human rights that are at risk and how this particular activity could have an adverse impact on these people and their human rights.<sup>126</sup> To make this assessment, they have to make use of internal and/or external human rights expertise. Next, they will also have to rely on meaningful consultation with people that might potentially be affected by their operations, as well as other stakeholders.<sup>127</sup>

Due diligence has to be carried out at the earliest stage of a new project before negotiations have even started, but also during the life-cycle of the project, because risks may change over time as the operations continue.<sup>128</sup> The benefits of doing a human rights due diligence at the pre-negotiation stage are that potential risks can be identified and that subsequently during contract drafting, the contract can delineate who is responsible

---

<sup>122</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 9.

<sup>123</sup> Guiding Principles A/HRC/17/31, Principle 17, p. 16.

<sup>124</sup> FAQ about the Guiding Principles HR/PUB/13/3 2014, p. 27.

<sup>125</sup> M. Taylor, L. Zandvliet & M. Forouhar, ‘Due Diligence for Human Rights: A Risk-Based Approach’, *Corporate Social Responsibility Initiative Working Paper No. 53*. Cambridge, MA: John F. Kennedy School of Government, Harvard University, p. 2-3.

<sup>126</sup> Guiding Principles A/HRC/17/31, p. 17.

<sup>127</sup> Guiding Principles A/HRC/17/31, Principle 18, p. 17.

<sup>128</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 9-10.

for doing periodical impact assessments on human rights, and who bears responsibility and accountability for preventing and mitigating the identified risks. For this, a plan for the integration of the findings will have to be devised, as well as how these mitigating efforts will be financed, for which a financial mechanism fund may have to be set up. Besides, the guidance also states that the parties will also have to create a plan for how to communicate the identified risks with the people whom it may potentially affect, to involve them in the development of the prevention and mitigation strategies.<sup>129</sup> Carrying out a human rights due diligence before the contract drafting stage is thus necessary to be able to divide responsibility for preventing risks in the contract appropriately.

#### Environmental and Social Impact Assessments

Another type of due diligence and identifying risks and impacts beforehand can be done through ESIA (Environmental and Social Impact Assessment). The IISD Guide requires that the company shall have an ESIA prepared, in accordance with either domestic law or IFC Performance Standard 1. Here another reference to soft law is found.

The Performance Standards constitute an authoritative piece of soft law and have generated much prestige as they are frequently referred to in other soft law documents. They could even be found back in contracts where parties were not IFC clients.<sup>130</sup> The Performance Standards are 8 in total and provide guidance on how to identify risks and impacts, and how to avoid and mitigate these as well as how to carry out business sustainably.<sup>131</sup> With each standard comes an additional Guidance Note with more extensive explanations.

Performance Standard 1 is concerned with an environmental and social risk assessment. It states the importance of an assessment of the environmental and social risks and opportunities of the project. It also elaborates on how effective community engagement should be conducted through informing them about the project. Besides, it establishes how a company should manage the environmental and social performance through the life-cycle of the project.<sup>132</sup>

---

<sup>129</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 9.

<sup>130</sup> Cotula 2011, p. 31.

<sup>131</sup> IFC 2012, p. 2.

<sup>132</sup> IFC 2012, p. 3.

The ESIA will in principle have to be carried out before the contract is signed and implemented so that the contract negotiations can then be adapted based on the outcomes of the ESIA. The ESIA should lead to the investor creating an environmental management plan and social action plan, which the State will have to approve.<sup>133</sup> The action plan should include issues such as recognition of the rights of land owners and rights of Indigenous or Tribal Populations. It should avoid and minimize displacement of persons or involuntary resettlement. Furthermore, it should include provisions to prevent and minimize the potential adverse impact of the project on other potentially affected people. In case resettlement is necessary, the investor needs to develop a resettlement plan in accordance with IFC Performance Standard 5.

Performance Standard 5 is concerned with land acquisition and involuntary resettlement. Resettlement can have disastrous impacts on livelihoods if not properly managed and often relates to the abuse of many human rights. This standard establishes a comprehensive resettlement plan.<sup>134</sup> In principle, forced evictions will have to be prevented, but when they are unavoidable, livelihoods need to be fully restored or improved.<sup>135</sup>

Finally, annual reporting of the implementation of the action plans is required. The ESIA and the action plan always need to be publicly available.<sup>136</sup>

#### Feasibility Studies

A feasibility study could also be part of due diligence. It identifies the viability of the project. This is important, because many agricultural investments fail, often because investors were unprofitable.<sup>137</sup> An important aspect of the feasibility study is the identification of the land for investment. Before entering negotiations, it needs to be clear if the land is suitable for the intended investment project, as well as the availability of the land.<sup>138</sup> When the wrong crop is planted on unsuitable soil, the investment is only meant to fail.<sup>139</sup> Another aspect that needs to be assessed is what kind of impact a change in land use will have on local food security. Both the cultivation of a certain crop and restricting

---

<sup>133</sup> Smaller 2014, p. 16.

<sup>134</sup> IFC 2012, p. 31.

<sup>135</sup> IFC 2012, p. 32.

<sup>136</sup> Smaller 2014, p. 27.

<sup>137</sup> Smaller & Speller 2015, p. 18.

<sup>138</sup> Smaller 2014, p. 14

<sup>139</sup> Smaller & Speller 2015, p. 18.

access to land that was used by pastoralists may have implications. When the impact on local food security seems too big, the parties should consider not to continue the project.<sup>140</sup>

Due diligence seems thus extremely important to secure the existing rights to property and food security. It is meaningless if humans are negatively affected while a project does not have any potential to become successful in any way.

#### Identification of Land Tenure Systems

When it comes to what a due diligence would have to investigate, an important aspect with agricultural investments is the identification of the particular land tenure system of the country where the investment takes place, as well as other rights of local landowners. This has to be the starting point for determining the terms and conditions of the contract.<sup>141</sup>

However, the identification of land tenure systems is often a difficult task as in many African countries no clear system exists. A key aspect of the problematics concerning land rights is the fact that most land in developing countries is formally owned by the state, while at the same time indigenous peoples and other communities may have customary tenure systems that give them legitimate tenure rights to their ancestral lands.<sup>142</sup>

A result that is often seen is that the investor is given secure rights to the land, while the local people have been expropriated or have lost access to their land.<sup>143</sup> These forced evictions relate to the most severe adverse impacts of agricultural investment, as many related human rights can be infringed. Proper identification of who has rights to what land is thus of significant importance to be able to prevent human rights abuses and should highly influence the content of the contract.

For this part of the preparatory phase, the IISD guide refers explicitly to the Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries, and forests in the context of national food security (VGGT).<sup>144</sup> This document was created by the Committee

---

<sup>140</sup> Smaller 2014, p. 16.

<sup>141</sup> Smaller 2014, p. 13.

<sup>142</sup> VGGT 2012, p. 15.

<sup>143</sup> Smaller 2014, p. 13.

<sup>144</sup> Smaller 2015, p. 13. '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* Rome 2012.

on World Food Security in 2012. It addresses how States and companies can improve the governance of tenure of land and is useful to follow when parties want to avoid negative impacts that have to do with land disputes, which relate to essential human rights, such as the right to food.

The VGGT assigns a significant part of the responsibility to the State. In its general principles, it mentions that “the State should recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights.”<sup>145</sup> An important part of the guideline is the requirement that the State has to provide legal recognition for legitimate tenure rights that are not currently protected by law.<sup>146</sup> Subsequently, it requires that the State has to safeguard these legitimate tenure rights against threats and infringements.<sup>147</sup>

To prevent problems when land is transacted, the guide requires that the State should define the categories of rights that it considers to be legitimate. These have to be widely publicized. All forms of tenure that it recognizes should give the persons a degree of tenure security, which protects them against forced evictions. The state then has to protect these rights and make sure that they are not extinguished or infringed.<sup>148</sup>

The VGGT also provides guidance on the transfer or reallocation of land. It states that when the government transfers the land, it has to take into account what the consequence of this will imply for food security. It thus recommends that any investment is carried out in a way that contributes to responsible investment.<sup>149</sup> Moreover, States have to ensure that all actions that they take with regard to tenure are compliant with their existing obligations under national and international law, as well as the voluntary commitments they have made.<sup>150</sup> To protect land tenure rights and other potentially affected human rights adequately, it will have to identify risks before any transaction is made. This should be done through due consultations with the affected communities, where existing legitimate tenure rights have to be identified.<sup>151</sup> Additionally, it requires the entire

---

<sup>145</sup> VGGT 2012, p. 3.

<sup>146</sup> VGGT 2012, p. 6.

<sup>147</sup> VGGT 2012, p. 3.

<sup>148</sup> VGGT 2012, p. 6.

<sup>149</sup> VGGT 2012, p. 20.

<sup>150</sup> VGGT 2012, p. 6.

<sup>151</sup> VGGT 2012, p. 22.

process of land transactions to be transparent. Affected people should be provided with comprehensive information.

The role of business enterprises is to respect national law as well as human rights and legitimate tenure rights.<sup>152</sup> They are required to carry out due diligence to avoid infringements on human rights and legitimate tenure rights of others.<sup>153</sup>

### Community Engagement

Moreover, an important aspect of due diligence is the consultation of the local community before the start of the negotiations. In the first place, it needs to be assessed which communities can potentially be affected. They need to be consulted to identify their interests, which can then be taken into account in negotiations. Consultation of the community as part of a community engagement plan is also required by the Principles for responsible contracts.<sup>154</sup> It also refers to the principle of free, prior and informed consent (FPIC), on which soft law is also available.<sup>155</sup> This principle relates to an international human rights standard for indigenous people to self-determination as well as to their lands, territories and other properties. According to the UN Declaration on the Rights of Indigenous People (UNDRIP), States have a duty to obtain the FPIC before any activity that affects them can be conducted.<sup>156</sup>

After community engagement in the pre-negotiation stage, an effective community engagement plan through the life-cycle of the project is required to be set up. The contract should state clear responsibility and accountability for the engagement plan.<sup>157</sup> It has been recognized that acceptance of the terms of the deal by the local community is crucial for the long-term success of the project. Through this mechanism, communities may feel that their interests are taken seriously.<sup>158</sup>

---

<sup>152</sup> VGGT 2012, p. 23.

<sup>153</sup> VGGT 2012, p. 4.

<sup>154</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 18.

<sup>155</sup> FAO, 'Respecting Free, Prior and Informed Consent, Practical Guidance for Governments, Companies, NGOs, Indigenous Peoples and Local Communities in Relation to Land Acquisition', FAO 2014.

<sup>156</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, October 2007, article 32.

<sup>157</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 18.

<sup>158</sup> Smaller 2014, pp. 13-14.

### 3.2.4 Contract negotiation stage - general recommendations

What should now be clear, is that both guides require that the parties have identified the potential benefits, risks, and impacts of the investment project. Based on the findings, it requires that it takes into account these risks when drafting the terms. What is important at this contracting stage is that the parties divide the responsibility and accountability for the mitigation of the impacts, as well as who will stand for the costs.<sup>159</sup> These will then become binding obligations on the contracting parties.

The second part of the IISD document is constructed like an investment contract and advises what should be laid down during the contract negotiation stage. The contents page of this model contract provides a comprehensive checklist for negotiators of the different issues that may arise with an agricultural investment, and that they are encouraged to include in their contracts.<sup>160</sup>

The table of contents provides that an agricultural investment contract includes: legal definitions, tenure and ownership (duration, geographical boundaries, grant of rights to the investor), feasibility study and impact assessments, financial issues (rent and taxes), economic and social development obligations (employment), environmental obligations, stabilization provisions, grievance mechanisms and dispute settlement, disclosure, periodic review, assignment, termination of the contract and monitoring and enforcement.<sup>161</sup> Below, the issues that are not already described above will shortly be elaborated.

#### Stabilization Clauses

The guides recommend the parties to overthink the drafting of stabilization clauses carefully. The Principles for Responsible Contracts recognize the investor's legitimate wish to protect itself against arbitrary, discriminatory action by the State, but mentions at the same time that 'freezing clauses'<sup>162</sup> are not considered to be a reasonable way of doing this. They recommend that stabilization clauses, if they are used, have to be drafted very carefully, so that the protections for the investor do not hinder the State's *bona fide* efforts to implement policies and laws on human rights, to fulfill its duties under

---

<sup>159</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 9.

<sup>160</sup> Smaller 2014, p. 18.

<sup>161</sup> Smaller 2014, p. 18.

<sup>162</sup> Freezing clauses 'freeze' the law of the host state concerning the investment project. They can be included in order to make new laws inapplicable to the investment. Source: Shemberg 2009, p. 5.

international law.<sup>163</sup> This recommendation is thus important for the development of human rights protection in general.

#### Project Monitoring and Compliance

The contract should delineate responsibility for compliance with the standards to protect human rights that apply to the contract. To ensure enforcement of this compliance, the contract should establish the State's right to monitor this compliance, while the investor has to adhere to the standards.<sup>164</sup> This right of the State is in line with their obligation to protect human rights and to ensure respect for their laws. When the State lacks the capacity to do this adequately, it should enable itself with external expertise.<sup>165</sup>

#### Transparency/Disclosure of Contract Terms

According to both guides, the contract terms have to be disclosed.<sup>166</sup> When this is not the case, this should be based on compelling justifications, and the contract should state clearly the scope and duration of this exception.<sup>167</sup> It is recommended that the State standardizes its practice for disclosing contracts with all investors. In this way, investors may be more willing to accept disclosure if it affects their competitors in the same way.<sup>168</sup>

Transparency is significant and considered essential for the responsible management of natural resources, that goes together with the potential for growth and economic development that these resources can provide.<sup>169</sup> When contracts are disclosed, government officials cannot seek their own interests over the population's but may be watched and pressured to negotiate a good deal.<sup>170</sup> It could also be effective against corruption.<sup>171</sup>

Furthermore, it may take away suspicion by other stakeholders of what is in the contract and may promote trust. It could even be considered that citizens have a right to know how their government is selling their resources.<sup>172</sup> The fact that the contract can be seen as a

---

<sup>163</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 12.

<sup>164</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 20.

<sup>165</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 21.

<sup>166</sup> Smaller 2014, p. 53, Principles for Responsible Contracts A/HRC/17/31/add.3, p. 23.

<sup>167</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 23.

<sup>168</sup> Smaller 2014, p. 53.

<sup>169</sup> P. Rosenblum & S. Maples, 'Contracts Confidential: Ending Secret Deals in the Extractive Industries' *Revenue Watch Institute* 2009, p. 15.

<sup>170</sup> Rosenblum & Maples 2009, p. 57.

<sup>171</sup> Rosenblum & Maples 2009, p. 16.

<sup>172</sup> Rosenblum & Maples 2009, p. 15.

public policy document would legitimate public disclosure. Contracts may indeed contain clauses that directly affect citizens when the contract delineates how they will be protected against any risks that may arise, or when the contract contains sections on land use and rights, as well as resettlement provisions.<sup>173</sup>

Moreover, disclosure of contract terms enables the parties to communicate transparently with the affected communities, and should even be viewed as part of the community engagement plan.<sup>174</sup> The condition for meaningful transparency requires though that the information is accessible.<sup>175</sup>

The EITI Standard<sup>176</sup> is one of the soft law initiatives that suggests reforms to strengthen transparency and accountability in the extractive industry sector. It has been created by governments, companies and civil society organizations.<sup>177</sup> The EITI Principles<sup>178</sup> have also been used for agricultural investments as they may both be concerned with the lease of land, natural resources, development objectives and risks for human rights.

Besides, institutes such as GRAIN (farmlandgrab.org) contribute to transparency and public scrutiny through publishing State-investor contracts on their blog. Another initiative is openlandcontracts.org, by the Columbia Center on Sustainable Investment.

### **3.2.5 Contract negotiation stage and the integration of soft law principles**

#### **Physical Security for the Project**

Another recommendation on which the Principles state that the contract should delineate clear responsibility is the physical security for the project's facilities, installations or personal. This has to be provided in a way consistent with human rights principles and standards. This is recommended because some of the most severe human rights abuses related to business have involved security personnel. The contract should include a protocol to manage the security forces to prevent and mitigate human rights abuses.<sup>179</sup>

---

<sup>173</sup> Rosenblum & Maples 2009, p. 15.

<sup>174</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 24.

<sup>175</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 25.

<sup>176</sup> Available at: <[https://eiti.org/sites/default/files/documents/english-eiti-standard\\_0.pdf](https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf)>, retrieved 28-07-2017.

<sup>177</sup> <[https://eiti.org/sites/default/files/documents/eiti\\_factsheet\\_en.pdf](https://eiti.org/sites/default/files/documents/eiti_factsheet_en.pdf)>, retrieved 28-07-2017.

<sup>178</sup> Available at: <<https://eiti.org/sites/default/files/documents/eiti-standard-principles.pdf>>, retrieved 28-07-2017.

<sup>179</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 17.

It is crucial that security services are taken into account in the contract, as any violence committed by these, could lead to the investor being complicit in a human rights abuse because they have hired these forces. The Principles therefore also recommend that operational-level grievance mechanisms and remedies should be available for anyone who claims to have suffered from negative human rights impacts.<sup>180</sup> They also refer to The Voluntary Principles on Security and Human Rights and The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials.<sup>181</sup>

#### Grievance Mechanisms for Non-Contractual Harms to Third Parties

Despite best efforts, not all adverse impacts can always be prevented, but one of the top 5 adverse impacts of investments identified by the World Bank relates to the insufficient mechanisms to raise grievances on the impacts.<sup>182</sup> Both guides for negotiators therefore require that an (operational-level) grievance mechanism is set up.<sup>183</sup>

The Principles for responsible investment refer directly to the GPs, where grievance mechanisms have been developed for individuals and communities who have been adversely impacted by the investor. The GPs distinguish State-based grievance mechanisms (both judicial and non-judicial) from non-State-based grievance mechanisms. This last category may be administered by the business enterprise and is often in the form of an operational-level grievance mechanism.<sup>184</sup>

This type of access to remedy has some significant advantages. The first advantage is that it is, in fact, part of the on-going due diligence, as affected people can raise their concerns directly when they believe that they will be or are adversely affected (the risk in itself is thus enough to make a complaint). Patterns in complaints can in that way easily be tracked. The second advantage is that the impacts can be remediated at a relatively early

---

<sup>180</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 17.

<sup>181</sup> Voluntary Principles on Security and Human Rights, available at: <[http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary\\_principles\\_english.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf)>, retrieved 31-07-2017 and The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, available at: <<http://www.ohchr.org/Documents/ProfessionalInterest/firearms.pdf>>, retrieved 31-07-2017.

<sup>182</sup> Smaller & Speller 2015, p. 20.

<sup>183</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 21, Smaller 2014, p. 47.

<sup>184</sup> Guiding Principles A/HRC/17/31 2011, Principle 29, p. 25.

stage and directly by the enterprise before harms will have the chance to escalate.<sup>185</sup> Extra benefits are thus speed to access, but also reduced costs.

However, to ensure the effectiveness of the operational-level grievance mechanisms, it should reflect the following criteria. The mechanism should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue.<sup>186</sup> Remedies can include apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions, and guarantees of non-repetition.<sup>187</sup>

Besides the GPs, the IISD guide refers directly to IFC Performance Standards 1,2 and 5,<sup>188</sup> that also contain guidelines for how to set up a grievance mechanism.<sup>189</sup> Including the establishment of a grievance mechanism in the contract makes it a binding obligation for the company to have this in place. It is required that the contract states clearly who is responsible for the establishment of an operational grievance mechanism.<sup>190</sup>

### 3.2.6 Concluding remarks

Soft law can contribute to human rights protection because it proposes how companies can ensure that human rights are protected and respected. Agriculture-specific soft law reminds the companies of what issues they need to think of during agricultural investments and propose guidelines that can be followed to fulfill the corporate duty to respect.

---

<sup>185</sup> Guiding Principles A/HRC/17/31 2011, p. 25.

<sup>186</sup> Guiding Principles A/HRC/17/31 2011, Principle 31, p. 26-27. Further elaboration on these criteria can be found in this principle.

<sup>187</sup> Guiding Principles A/HRC/17/31 2011, p. 22.

<sup>188</sup> IFC 2012, §35 of Standard 1, §20 of Standard 2 and §11 of Standard 5.

<sup>189</sup> Smaller 2014, p. 47.

<sup>190</sup> Principles for Responsible Contracts A/HRC/17/31/Add.3, 2011, p. 22.

## **4. Consequences of the contractualization of soft law on human rights**

Where the previous chapter discussed how soft law and contract are combined in policy initiatives in the form of guides for negotiators, this chapter will discuss the effect of this combination for human rights protection.

### **4.1 Opportunities to the contractualization of human rights norms**

When the recommendations of the guides for negotiators would be followed, then the contract could (for example) state that before the project may commence, an ESIA will have to be conducted and a management and action plan will have to be set up, all in accordance with IFC Performance Standard 1. As this required conduct is now included in the contract, it has become a legally binding obligation between the parties. This means that a principle from soft law on human rights has become ‘contractualized’.

The soft law documents or mechanisms that are referred to are then no longer voluntary to implement. A failure to perform the obligation will amount to a breach of contract. As the soft law initiates better respect and protection for human rights, this would presumably lead to better conditions for human rights in practice. Moreover, the contractualization makes the soft law stronger and more effective. This is especially where a direct reference is made to a certain soft law document, which means that the parties have to comply with the particular conduct described in that document. This is also the value of soft law in the specific context of contracts.

However, to ensure that particular conduct in favor of human rights is performed, it is important that the contract establishes who is responsible for performing what particular soft law mechanism that they have agreed on to apply. Only then, they can hold one another accountable for not performing the commitments.

The inclusion of clauses that are designed to prevent and mitigate human rights risks accords to many of the Guiding Principles. These require the State to protect human rights, and the business enterprise to respect. Moreover, GPs 5 and 6 state explicitly that the State has to exercise adequate oversight to meet their obligation to protect human rights when they contract with business enterprises and that they should promote respect for human rights by business enterprises with which they conduct commercial

transactions.<sup>191</sup> Including the GPs in the contract would thus push forward the respect for human rights, which would be a welcome development.

Besides a reflection of GPs in the contracts, an effort to achieve an even greater accommodation of human rights in the contracts can recently be identified. This relates to commitments in the contracts that rise above the 'respect' pillar of the GPs.<sup>192</sup> Examples are employment creation or a promise to build infrastructure.

Furthermore, the contractualization of human rights can also accomplish that a higher standard of human rights protection will be applicable on a certain investment project in a country where domestic law is not yet as far developed. In this situation, the contractualization of human rights can probably also have an impact on the deployment of human rights standards in host countries.<sup>193</sup>

#### **4.2 Challenges to the contractualization of human rights norms**

Notwithstanding these benefits, there are still a few issues that might stand in the way to make the commitments fully effective in practice, and which would thus partly hinder the enhancement of protection for human rights through the contractualization of human rights norms and soft law in State-investor contracts.

The first challenge relates to the applicability of the contractual clauses on third parties. In principle, the contract does only create rights and obligations between the parties of the contract, which means that only they can hold each other accountable. Third-party beneficiaries, which may often be affected people and communities, may have a hard time to make those contractualized human rights meaningful and effective, despite the fact that these benefits have been created for them.<sup>194</sup>

To overcome this impotence, third parties should be given the opportunity to hold the investor accountable for its obligations in the contract. This could be solved by including in the contract that third-party beneficiaries can enforce terms of the contract. However,

---

<sup>191</sup> Guiding Principles A/HRC/17/31 2011, Principles 5 and 6, p. 8.

<sup>192</sup> Y. Farah, 'Improving accountability through the contractualisation of human rights', *The Business and Human Rights Review* 2013, Issue 2, p. 13.

<sup>193</sup> Office of the High Commissioner for Human Rights (OHCHR), 'Strengthening the Global Trade and Investment System for Sustainable Development. E15Initiative' Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015, p. 5.

<sup>194</sup> Farah 2013, p. 13.

it is not very likely that an investor will accede to such a mechanism, as he could then be held accountable by a lot of unknown claimants.<sup>195</sup>

The second challenge relates to the issue whether the contractualization of human rights is compatible with the classical features of contract law. Especially the due diligence mechanism as proposed in the GPs poses a challenge, as it is described as “ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operation and operating context evolve.”<sup>196</sup> The management of the risks would have to be taken into account, but the fact that these may change would affect the contractual stability and certainty. However, it would probably be legitimate to let a change of contract supersede to respond to developments that affect human rights.<sup>197</sup>

Another contractual issue concerns contract law that may be applicable and that would tell the consequences when a clause is breached. In many cases, the primary remedy for non-performance will be the award of damages in the form of compensation.<sup>198</sup> However, when it concerns adverse impacts for human rights due to particular conduct, specific performance (change of conduct) may be more desirable instead of money.<sup>199</sup> Moreover, a situation where one party will receive money, and the victims whose human rights have been abused receive no remedy at all may create to reputational risks.<sup>200</sup>

### 4.3 Relativization

The contract that contractualizes soft law on human rights has thus potential to push forward respect for human rights through the creation of obligations. However, it needs to be acknowledged that the contract remains at the same time merely a contract, which stays dependent on the actual implementation of the commitments by the investor, and the enforcement by the government, for which there is no guarantee. Enforcement remains a long-term challenge, especially in developing countries where capacity may be limited. Governments should not underestimate the importance, the time and the costs that the monitoring of the implementation commitments takes.<sup>201</sup> To materialize the

---

<sup>195</sup> Farah 2013, p. 14.

<sup>196</sup> Guiding Principles A/HRC/17/31, 2011, Principle 17 c), p. 16.

<sup>197</sup> Farah 2013, p. 14.

<sup>198</sup> A. Crockett, ‘Human Rights Clauses in Commercial Contracts’, 4 June 2014. English contract law is an example.

<sup>199</sup> Farah 2013, p. 14.

<sup>200</sup> Crockett 2014.

<sup>201</sup> Smaller & Speller 2015, p. 4.

commitments, it is thus essential that the parties follow the recommendations described in the guides for negotiators about the monitoring and enforcement of the contract.

Besides, the situation in practice remains that while it is unlikely that investment on bad terms will lead to a sustainable investment that improves the situation for human rights, there are still examples of bad contracts that led to quite good investment projects. At the same time, there are examples of well-drafted contracts that resulted in investment projects with lots of adverse impacts to human rights.<sup>202</sup> This means that the contract is just one piece of all aspects that will lead to a sustainable investment project.

---

<sup>202</sup> Cotula 2011, p. 44.

## 5. Case study

It would be interesting to analyze what the effects of the contractualization of human rights have meant for human rights protection in practice. However, this is not an easy task as it requires both a contract that is publicly available and that contains references to soft law and mechanisms, and subsequently information on the current situation on the ground due to the investment project, for which this thesis is dependent on reports of others. Case study opportunities that discuss this are therefore limited in this research. Moreover, no information is findable online on how many projects have followed the recommendations in the guides for negotiators. Information on how they have experienced this and if this has led to better protection would be welcome.

When looking for contracts at webpages as [farmlandgrab.org](http://farmlandgrab.org), [openlandcontracts.org](http://openlandcontracts.org) and searching engines, it became clear that at least in the contracts that were publicly available and that concern agricultural investments, references to soft law were scarce. The almost only mechanism that appeared now and then and that could be beneficial to human rights were protections of the environment through the requirement of an EIA. The following case study will discuss an EIA requirement.

### 5.1 The Golden Veroleum Company in Liberia

#### 5.1.1 Liberian State-investor contracts

Liberia is an interesting country to analyze because Liberian State-investor contracts are referred to as examples of good practice.<sup>203</sup> The efforts to create responsible, sustainable investment contracts are part of a bigger development by the Liberian government to renegotiate investment projects at the time, by a strong government negotiating team with the assistance of the International Senior Lawyers Project,<sup>204</sup> a pro bono initiative that supports low-income country governments with legal expertise for large-scale development issues.<sup>205</sup> Liberia has also implemented the EITI transparency requirements. All their State-investor contracts for extractive industries, but also some agricultural ones are available online.<sup>206</sup> Additionally, all Liberian State-investor contracts have to be ratified by parliament. This gives every member of parliament the ability to

---

<sup>203</sup> Cotula 2011, p. 2.

<sup>204</sup> <<http://islp.org/our-story/#what-we-do>>, retrieved 10-07-2017.

<sup>205</sup> Cotula 2011, p. 44.

<sup>206</sup> <[www.leiti.org.lr](http://www.leiti.org.lr)>.

assess whether a particular deal has the potential to be beneficial to the country and its people.

### 5.1.2 The agreement with the Golden Veroleum Company

A closer look will be taken at the 2010 Concession agreement between the Liberian government and Golden Veroleum (GVL).<sup>207</sup> GVL is backed by Golden Agri-Resources, which is the world's second biggest palm oil producer. It needs to be kept in mind that this contract was concluded before the publications of the GPs and most of the other soft law.

The contract seems very comprehensive, with about 126 pages including annexes, and is very detailed. An annex with the exact land that is concerned is provided. The contract does contain a clear grant of rights, although it states that the concession area shall be "free and clear of all encumbrances,"<sup>208</sup> despite the fact that the Liberian government has the obligation to respect the customary land rights of citizens.<sup>209</sup> It also contains provisions on resettlement, which are allowed to take place if "the existing settlement and its inhabitants would impede Investor's development of the concession area and would interfere with Investors activities."<sup>210</sup> Sole responsibility for the resettlement lays with the State. Besides, it contains clauses about employment. It makes direct reference that GVL will refrain from hiring minors, and respect the United Nations Convention on the Rights of the Child.<sup>211</sup> Priority for employment of Liberian nationals for unskilled labor positions must be given.<sup>212</sup>

While this contract covers some of the aspects that are nowadays required in a contract according to the IISD guide, many issues are also lacking, for example feasibility studies and social impact assessment requirements and no grievance mechanism can be found. Although this contract seems to have been written with care, it seems quite much in favor of the investor who is accommodated by the government, no matter if human rights will

---

<sup>207</sup> Concession Agreement between the Republic of Liberia and Golden Veroleum (Liberia) Inc. 16 August 2010, available at: <<https://www.scribd.com/document/152067402/An-Act-to-Ratify-The-Concession-Agreement-Between-The-Republic-of-Liberia-and-Golden-Veroleum-Liberia-Inc-September-1-2010>>, retrieved 30-07-2017.

<sup>208</sup> Concession Agreement 2010, Article 5.1.

<sup>209</sup> Global Witness, 'The New Snake Oil? The Violence, Threats and False Promises Driving Rapid Palm Oil Expansion in Liberia', July 2015, p. 14.

<sup>210</sup> Concession Agreement 2010, Article 4.3 a.

<sup>211</sup> Concession Agreement 2010, Article 12.1 a.

<sup>212</sup> Concession Agreement 2010, Article 12.a.

be affected. The government will remain responsible for some significant possible adverse impacts.<sup>213</sup>

### 5.1.3 Reference to soft law

References to soft law can be found when it comes to environmental protection: GVL will have to prepare an EIA Study Report and an Environmental Management Plan that will have to be approved by the Environmental Protection Agency (EPA) beforehand.<sup>214</sup> GVL will also have to comply with the Principles of the Roundtable on Sustainable Palm Oil (RSPO), to which it is a member. The RSPO Principles also require an EIA.<sup>215</sup> In addition, the RSPO refers to other soft law (mechanisms) which GVL will have to comply to.

### 5.1.4 Role of the contract

The development of domestic Liberian law for the agricultural sector is far behind, which makes that agricultural investments take place in a legal vacuum.<sup>216</sup> As of 2016, there were no laws that are specifically created for the concessions that relate to agricultural investments, and to what kind of safeguards for human rights these concessions should be subject.<sup>217</sup> This means that the role of the contract increases, as it will have to regulate aspects that are not regulated by domestic law.

### 5.1.5 The situation in practice

A recent report by Global Witness<sup>218</sup> shows that affected communities pay a high price of the oil palm investments, and find their land rights abused. The 2010 contract between the government and GVL is valid for 98 years and converts 2,600 km<sup>2</sup> of land into palm oil plantations. However, 41,000 people lived on this land and relied on the land for their food and livelihoods.<sup>219</sup> The report carried out on Liberia shows that it is actually on the

---

<sup>213</sup> The government remains responsible for the setting up of a resettlement action plan, and stands in principle for the costs (Concession Agreement 2010, Article 4.3.a). The same goes for Community Programs. While the parties agree that production shall make sure that the communities around the area will be assured continuing economic and social viability, the government is responsible for any additional plans and programs (Concession Agreement 2010, Article 15.1).

<sup>214</sup> Concession Agreement 2010, Article 16.

<sup>215</sup> Roundtable on Sustainable Palm Oil, Principles and Criteria for the Production of Sustainable Palm Oil, 25 April 2013, Principle 5, p. 24. These criteria are a revision of the 2008 principles. The RSPO is an association that promotes the production of sustainable palm oil.

<sup>216</sup> Global Witness 2015, p. 12.

<sup>217</sup> Global Witness 2015, p. 12.

<sup>218</sup> Global Witness is an NGO that aims to stop environmental and human rights abuses related to the exploitation of natural resources. Source: <<https://www.globalwitness.org/en/about-us/>>, retrieved 2-8-2017. Report: Global Witness 2015.

<sup>219</sup> Global Witness 2015, p. 5-6.

edge of a land grabbing crisis.<sup>220</sup> Especially GVL has been connected to adverse impacts due to agricultural expansion.

The main problem in Liberia is that the government is convinced that the expansion of palm oil plantations is a key to development and that it will bring jobs, food, and infrastructure to their country.<sup>221</sup> To ensure the continuation of GVLs operations in Liberia, and to grant expansions of the plantations, the government has created a climate of fear and intimidation. The government and the company do seek prior ‘consultations’ and free, prior, and informed consent (FPIC) by making the locals sign a ‘Memoranda of Understanding’ where they give away their land. However, Global Witness is concerned whether the people have enough information to know what they are signing. Also, they are subject to government officials who watch them sign, so that they have no choice but to give their consent. The benefits, on the other hand, were negligible.<sup>222</sup>

The government gives thus priority to the palm oil industry instead of protecting human rights, and violence has been used to those who protested against the expansion of GVLs plantation areas. These people are considered as ‘anti-development’.<sup>223</sup> The following quote from the former president, Ellen Johnson-Sirleaf, in the Liberian press illustrates this: “You are trying to undermine your own government. You can’t do that. If you do so all the foreign investors coming to Liberia will close their business and leave, then Liberian [sic] will go back to the old days.”<sup>224</sup>

#### **5.1.6 Effects of the contractualization of human rights**

The contract contains thus reference to the soft law mechanism of EIAs, which relates to a contractualization of duties that are beneficial to human rights. It is unclear whether the GVL has fulfilled its duty to report to the EPA, but GVL pledges to meet the voluntary environmental and social standards created by the RSPO that requires respect for customary property rights and ensure that plantations can only be accessed through the FPIC procedure. However, the affected communities do not find the RSPO to be an

---

<sup>220</sup> Global Witness 2015, p. 5.

<sup>221</sup> Global Witness 2015, p. 5.

<sup>222</sup> Global Witness 2015, p. 6.

<sup>223</sup> Global Witness 2015, p. 6.

<sup>224</sup> ‘Ellen Ends Deadlock in Grand Cape Mount County... Maintains Sime Darby Must Be Allowed To Operate’, *The Inquirer*, <[http://www.theinquirer.com.lr/content1.php?main=news&news\\_id=156](http://www.theinquirer.com.lr/content1.php?main=news&news_id=156)>, retrieved 2-8-2017.

effective way of protecting their rights.<sup>225</sup> This may be influenced by the fact that the affected communities had raised complaints to the RSPO, of which most were rejected. Also Liberian NGOs stated that the RSPO Complaints Panel fell short of a sufficient response.<sup>226</sup>

The fact that the affected communities do not consider the RSPO to be an effective way of protecting their rights, implies that the particular mechanism or particular soft law document which is integrated into the contract matters a great deal. If the particular soft law document included does not contain any meaningful conditions for human rights protection (or when it is not considered to be effective), the contractualization of human rights will not lead to an improvement of protection for human rights. The combination of soft law and contract will not be effective.

This case study shows as well that compliance will always remain important. How well-drafted the contract may be, and to whatever voluntary standards a company may have committed itself, adequate protection will only be ensured when they are performed. Also the effectiveness of the contractualization of human rights remains dependent on adequate enforcement, but therefore third parties usually remain dependent on the State. Conflicts of interest between accommodating the investor and fulfilling their duty to respect are realistic. They might possibly stand in way to enforce the contract adequately.

#### **5.1.7 Concluding remarks**

What can be concluded is that there is space for improvement for what regards Liberian agricultural State-investor contracts. This case study shows that a relatively well-drafted contract does not plainly lead to a good outcome. As people find their rights abused, because the contract terms put human rights at risk, the State has failed in its obligation to protect human rights. GVL has neither fulfilled its duty to respect human rights.<sup>227</sup> Also, it suggests that the particular soft law that is referred to matters for the protection that can be achieved through contractualization of human rights.

---

<sup>225</sup> Global Witness 2015, p. 12.

<sup>226</sup> Global Witness 2015, p. 13.

<sup>227</sup> T. Lomax, 'Human Rights-Based Analysis of the Agricultural Concession Agreements Between Sime Darby and Golden Veroleum and the Government of Liberia', *Forest Peoples Programme*, December 2012, p. 32.

## 6. Conclusion

This thesis has investigated the extent to which the combination of soft law and State-investor contracts could provide better protection for the human rights risks that come with large-scale agricultural investments. This is relevant because land grabs still happen frequently, and because the contract can influence the impact on human rights. The combination of soft law and contract can be found in policy initiatives in the form of guides for negotiators, which try to improve State-investor contracts.

Two sub-questions were relevant to investigate the central issue. Regarding the first question, that related to the role that the contract could play for human rights protection, it can be concluded that the contract will become more important in case domestic law is not fully developed, especially for what regards human rights protection. The contract can then fill this gap, and in some cases even apply higher standards for human rights protection. As the contract terms directly influence the outcome, the contract could be of influence on human rights protection.

The second sub-question related to the value of soft law in the specific context of State-investor contracts. Soft law and soft law mechanisms are valuable because they provide useful guidance on how human rights can be protected and mitigated. The Guiding Principles have clarified that business enterprises are under a duty to respect human rights. A shortcoming of soft law lays in its voluntary basis, but the value of soft law in the specific context of contracts becomes clear when the parties integrate soft law in their contracts. They can do this by stating that it is applicable or that certain practice has to be conducted in accordance with a particular soft law standard.

In fact, soft law has then become 'contractualized'. It is important that the contract establishes who is responsible for the performance. The commitment to comply with the particular soft law standard has become a binding obligation between the parties. Non-performance will therefore lead to a breach of contract. Soft law will thus become more effective, and the binding nature would presumably result in better human rights protection. The only aspect is that the parties will need to include soft law in the contract. This relates to the duty of the State under international law to protect human rights

actively, also when they contract with business enterprises.<sup>228</sup> The contractualization can in this way push forward respect for human rights.

While the binding nature of commitments on human rights protection poses favorable conditions in theory, improved protection for human rights through contractualization remains theoretically still dependent on the performance of the commitments in practice. Also, third parties are in most cases not able to rely directly on the terms of the contract. Subsequently, effective protection remains dependent on the monitoring and enforcement of the contract by the State. Due to the frequent incapacity of developing countries to monitor and enforce adequately, and sometimes due to conflicts of interest, contracts are not always effectively enforced.

To answer the central question: the combination of soft law and contracts can provide better protection for human rights to the extent to which the commitments in the contract are actually performed and effectively enforced in practice. Because performance and enforcement are often deficient, the contractualization of human rights will only be effective to a limited extent. When State capacity to effectively monitor and enforce would be increased, maybe through the assistance of developing agencies, better protection for human rights due to this strategy may be within reach.

---

<sup>228</sup> Guiding Principles A/HRC/17/31 2011, Principles 5 and 6, p. 10.

## Bibliography

### *Hard law and soft law instruments*

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

Equator Principles, *The Equator Principles* June 2013.

FAO, 'Respecting Free, Prior and Informed Consent, Practical Guidance for Governments, Companies, NGOs, Indigenous Peoples and Local Communities in Relation to Land Acquisition', *Food and Agriculture Organization of the United Nations* Rome 2014.

FAO, '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* Rome 2012.

IFC, *IFC Performance Standards on Environmental and Social Sustainability*, January 2012.

OECD, 'OECD Guidelines for Multinational Enterprises', *OECD Publishing* 2011.

United Nations General Assembly, *Universal Declaration of Human Rights*, Paris 10 December 1948.

United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.

United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 2007.

United Nations Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 2008.

United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 2011.

United Nations Human Rights Council, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, Addendum 3 to the Report, A/HRC/17/31/Add.3, 2011.

## Agreements

Land Lease Contract between Republique du Cameroun and La Société Sucriere du Cameroun (Sosucam) of 20 April 2006, article 3. Available at:

<<https://www.farmlandgrab.org/wp-content/uploads/2010/09/Cameroon-contract.pdf>>, retrieved 17-08-2017.

Concession Agreement between the Republic of Liberia and ADA Commercial Inc, of 11 June 2008, available at: <<https://www.scribd.com/document/152412349/An-Act-Ratifying-the-Concession-Agreement-between-the-Republic-of-Liberia-and-ADA-Commercial-Inc>>, retrieved 17-8-2017.

Investment agreement between the Republic of Mali and La Grande Jamahiriya arabe Libyenne populaire et socialiste of 2008, available at:

<<https://www.farmlandgrab.org/wp-content/uploads/2010/07/Convention.pdf>>, retrieved 17-8-2017.

'Contract for the Exclusive Utilisation of Land' between AgroAfrica AS (AA) and La Communaute Rurale de Kounkane (CRK) of 7 March 2008, available at:

<<https://www.farmlandgrab.org/wp-content/uploads/2010/07/Agroafrica-contrat-senegal-.pdf>>, retrieved 17-8-2017.

Concession Agreement between the Republic of Liberia and Golden Veroleum (Liberia) Inc. 16 August 2010, available at: <<https://www.scribd.com/document/152067402/An-Act-to-Ratify-The-Concession-Agreement-Between-The-Republic-of-Liberia-and-Golden-Veroleum-Liberia-Inc-September-1-2010>>, retrieved 30-07-2017.

## Articles

A. Crockett, 'Human Rights Clauses in Commercial Contracts', 4 June 2014, available at: <<http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/6667/>>, retrieved 12-8-2017.

Y. Farah, 'Improving accountability through the contractualisation of human rights', *The Business and Human Rights Review* 2013, Issue 2.

J. Ruggie, 'A UN Business and Human Rights Treaty?', 28 January 2014, available at: <<https://sites.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>> retrieved 31-07-2017.

M. Taylor, L. Zandvliet & M. Forouhar, 'Due Diligence for Human Rights: A Risk-Based Approach', *Corporate Social Responsibility Initiative Working Paper* No. 53. Cambridge, MA: John F. Kennedy School of Government, Harvard University.

D. Vhugen, Large-Scale Commercial Investments in Land: Seeking to Secure Land Tenure and Improve Livelihoods, *Haramaya Law Review* 2012, Volume 1 No. 1.

## Books

L. Cotula & K. Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development', in: K. Sauvart (ed), *Yearbook on International Investment Law & Policy 2011-2012*, Oxford: Oxford University Press 2013.

R. Dolzer and C. Schreuder, *Principles of International Investment Law*, Oxford: Oxford University Press 2012.

O. de Schutter, J. Swinnen & J. Wouters (eds), *Foreign direct investment and human development - the Law and Economics of International Investment Agreements*, New York: Routledge 2013.

## Reports

C. Althoff et al., "'Land grabs" operationalized?', presentation to the Annual World Bank Conference on Land and Poverty, Washington DC, 14-18 March 2016, available at: <[https://www.conftool.com/landandpoverty2016/index.php/Althoff-674-674\\_paper.pdf?page=downloadPaper&filename=Althoff-674-674\\_paper.pdf&form\\_id=674&form\\_version=final](https://www.conftool.com/landandpoverty2016/index.php/Althoff-674-674_paper.pdf?page=downloadPaper&filename=Althoff-674-674_paper.pdf&form_id=674&form_version=final)> retrieved 9-8-2017.

L. Cotula, 'Land grab or development opportunity? Agricultural investment and international land deals in Africa', *IIED/FAO/IFAD*, London/Rome 2009. Available at: <<http://www.fao.org/3/a-ak241e.pdf>>, retrieved 17-8-2017.

L. Cotula, 'Land deals in Africa: What is in the contracts?', *IIED*, London 2011. Available at: <<http://pubs.iied.org/pdfs/12568IIED.pdf>>, retrieved 17-8-2017.

K. Deiniger & D. Byerlee, 'Rising Global Interest in Farmland – Can it Yield Sustainable and Equitable Benefits?', *The World Bank*, Washington D.C. 2011. Available at: <<https://siteresources.worldbank.org/DEC/Resources/Rising-Global-Interest-in-Farmland.pdf>>, retrieved 17-8-2017.

Global Witness, 'The New Snake Oil? The Violence, Threats and False Promises Driving Rapid Palm Oil Expansion in Liberia', July 2015, available at: <<https://www.globalwitness.org/en/campaigns/land-deals/new-snake-oil/>>, retrieved 31-07-2017.

GRI, 'Land Tenure Rights: The need for greater transparency among companies worldwide', *GRI* 2016. <<https://www.globalreporting.org/resource/library/GRI-G4-Land-Tenure-Rights.pdf>>, retrieved 17-8-2017.

International Land Coalition, 'Tirana Declaration: Securing Land Access for the Poor in Times of Intensified Natural Resources Competition', *International Land Coalition* 2011, available at: <<http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>>, retrieved 13-8-2017.

International Monetary Fund, 'Foreign Direct Investment Trends and Statistics', *IMF* 2003. Available at: <<http://www.imf.org/external/np/sta/fdi/eng/2003/102803.pdf>>, retrieved 17-8-2017.

T. Lomax, 'Human Rights-Based Analysis of the Agricultural Concession Agreements Between Sime Darby and Golden Veroleum and the Government of Liberia', *Forest Peoples Programme*, December 2012. Available at: <[http://www.forestpeoples.org/sites/fpp/files/publication/2012/12/liberiacontractanalysisfinaldec2012\\_0.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2012/12/liberiacontractanalysisfinaldec2012_0.pdf)>, retrieved 17-8-2017.

MMDA 1.0 Model Mine Development Agreement. *International Bar Association* 2011.

S. Marshall, 'OECD National Contact Points: Better Navigating Conflict to Provide Remedy for Vulnerable Communities', *Non-Judicial Redress Mechanisms Report Series 16, 2016*, p. 6. Available at: <[https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/580d7b7bb3db2b51a441a6e8/1477278601503/NJM16\\_OECD.pdf](https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/580d7b7bb3db2b51a441a6e8/1477278601503/NJM16_OECD.pdf)>, retrieved 17-8-2017.

OECD, 'Frequently Asked Questions – National Contact Points for the OECD Guidelines for Multinational Enterprises', *OECD* 2017. Available at: <<http://mneguidelines.oecd.org/OECD-Guidelines-for-MNEs-NCP-FAQ.pdf>>, retrieved 13-8-2017.

Office of the High Commissioner on Human Rights, *The Corporate Responsibility to Respect Human Rights – An Interpretative Guide*, UN HR/PUB/12/02, United Nations: New York and Geneva 2012  
<[http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf)>, retrieved 17-8-2017.

Office of the High Commissioner on Human Rights, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, United Nations HR/PUB/13/3, New York and Geneva 2014  
<[http://www.ohchr.org/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf)>, retrieved 17-8-2017.

Office of the High Commissioner for Human Rights (OHCHR), 'A Turn to Responsible Contracting: Harnessing Human Rights to Transform Investment.' E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2015. Available at: <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-OHCHR-Final.pdf>, retrieved 17-8-2017.

P. Rosenblum & S. Maples, 'Contracts Confidential: Ending Secret Deals in the Extractive Industries' *Revenue Watch Institute* 2009.  
<<https://resourcegovernance.org/sites/default/files/RWI-Contracts-Confidential.pdf>>, retrieved 17-8-2017.

Roundtable on Sustainable Palm Oil, 'Principles and Criteria for the Production of Sustainable Palm Oil', 25 April 2013, available at: <<http://www.rspo.org/key-documents/certification/rspo-principles-and-criteria>>, retrieved 3-8-2017.

O. de Schutter, 'Tainted Lands: Corruption in Large-Scale Land Deals', International Corporate Accountability Roundtable (ICAR) & Global Witness, 2016. Available at: <<https://www.globalwitness.org/en/campaigns/land-deals/tainted-lands-corruption-large-scale-land-deals/>>, retrieved 31-07-2017.

A. Shemberg, *Stabilization Clauses and Human Rights – a research project conducted for the IFC and the UN Special Representative to the Secretary General on Business and Human Rights*, United Nations, 2009, available at: <<http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>>, retrieved 17-8-2017.

C. Smaller, 'The IISD Guide to Negotiating Investment Contracts for Farmland and Water', *International Institute for Sustainable Development (IISD)*, 2014. <[https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water\\_1.pdf](https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf)>, retrieved 17-8-2017.

C. Smaller & W. Speller, with H. Mirza, N. Bernasconi-Osterwalder, and G. Dixie, 'Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks', Washington, D.C.: World Bank Group; New York: United Nations; and Winnipeg: International Institute for Sustainable Development (IISD) 2015. <<https://www.iisd.org/sites/default/files/publications/world-bank-agri-investment-contracts-web.pdf>>, retrieved 17-8-2017.

World Bank, 'The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments – Implications for Corporate Performance and Impact on Local Communities', *The World Bank*, Washington D.C. 2014. <[http://unctad.org/en/PublicationsLibrary/wb\\_unctad\\_2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wb_unctad_2014_en.pdf)>, retrieved 17-8-2017.

### **Online resources**

<<http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>>, retrieved 14-04-2017.

<http://blogs.lse.ac.uk/investment-and-human-rights/connections/regulating-investment/state-investor-contracts/>>, retrieved 26-06-2017.

<<http://islp.org/our-story/#what-we-do>>, retrieved 10-07-2017.

<<https://www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security>>, retrieved 31-07-2017.

'Ellen Ends Deadlock in Grand Cape Mount County... Maintains Sime Darby Must Be Allowed To Operate', *The Inquirer*,

<[http://www.theinquirer.com.lr/content1.php?main=news&news\\_id=156](http://www.theinquirer.com.lr/content1.php?main=news&news_id=156)>, retrieved 2-8-2017.

<<https://www.globalwitness.org/en/about-us/>>, retrieved 2-8-2017.

<<http://landmatrix.org/en/about/#where-does-the-information-come-from>>, retrieved 9-8-2017.

<<http://landmatrix.org/en/>>, retrieved 9-8-2017.

<<http://landmatrix.org/en/get-the-idea/web-transnational-deals/>>, retrieved 9-8-2017.

<<http://landmatrix.org/en/get-the-idea/agricultural-drivers/>>, retrieved 9-8-2017.

<<http://www.cao-ombudsman.org/about/whoweare/>>, retrieved 11-8-2017.

<<http://mneguidelines.oecd.org/OECD-Guidelines-for-MNEs-NCP-FAQ.pdf>>, retrieved 13-8-2017.

<<http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/>>, retrieved 14-8-2017.

<<http://www.openlandcontracts.org/countries>>, retrieved 18-8-2017.

<[https://www.farmlandgrab.org/home/post\\_special?filter=contracts](https://www.farmlandgrab.org/home/post_special?filter=contracts)>, retrieved 18-8-2017.