Sleight of Land: The Socioenvironmental Impacts of Global Land Trade in the International Investment System

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INTRODUCTION

Global land trade has become a subversive form of neocolonialism that obscures environmental exploitation and human rights abuses. It involves the importation and exportation of land in the international market through purchase or lease. Most of the land that is foreignized through this process is in the Global South.[1] Since the beginning of the twenty-first century, interest in undeveloped land in South America, Africa, and Asia has increased.[2] The targets are often, although not exclusively, less-developed former colonies in the Global South that have land to trade and rely on foreign capital for economic development. In the current free-market economic climate, foreign investors can acquire large tracts of land through Foreign Direct Investment ("FDI") deals that convert these lands into foreign property.[3]

This modern global land trade, sometimes described as "contemporary land grabbing,"[4] involves a complex web of public and private

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1 The term Global South generally refers to Latin America, Africa, Asia, and the Caribbean and Pacific Islands, with some exceptions. The global north-south divide is political and socioeconomic, rather than strictly geographical, as countries like Australia, Israel, and Japan—which are politically, socially, and economically more aligned with the wealthy western nations—are included in the Global North. While the Global South is not exclusively former colonies, much of it was subject to colonial rule and today it mostly consists of developing nations and emerging economies.

2 Jootaek Lee, *Contemporary Land Grabbing: Research Sources and Bibliography*, 107 L. LIBR. J. 260, 260 (2015).

3 J.W. Seaquist et al., *Architecture of the Global Land Acquisition System: Applying the Tools of Network Science to Identify Key Vulnerabilities*, 9 ENV'T RSCH. LETTERS 1, 1–2 (2014).

4 *See* Lee, *supra* note 2, at 262.

stakeholders, and different sources of domestic and international law.[5] Land foreignization has evolved from the state-sanctioned conquest of the colonial era to corporate-led land acquisition in a complicated and opaque international investment system. But the end goal—exploitation of land and resources—is the same.

For decades, FDI has been promoted as a means of supporting economic development in the Global South while giving foreign investors stable access to unutilized land,[6] but this outcome is the best-case scenario, not a foregone conclusion. Placing global land trade within the realm of international contract and investment law prioritizes the capitalist interests of investors over a host state's economic development and public interest regulation. The institutions involved in FDI tend to support investors and promote the liberal economic policies driving current global land trade trends.[7] And the private nature of investment contracts conceals project details,[8] shielding the practice from international law and making it harder to compel investors to prioritize the economic development of poor nations over their own profits.

While the investment treaty system operates under the capitalist neoliberal guise of sovereign equality in consent-based transactions, the parallels to colonialism are inescapable. Land in capital-poor states is being exploited to the detriment of local indigenous communities for the benefit of foreign populations in developed and emerging markets.

Meanwhile, the legal regime governing FDI turns a blind eye to mass land dispossessions and forced relocations while protecting foreign investors from host states' socioenvironmental regulations. Foreign investment disproportionately targets former colonies in the Global South.[9] The majority of these countries are in or near tropical forests. As a result, some of the world's most important ecological zones are being diminished and converted into cash crops.[10] Private investors, most often wealthy and powerful multinational enterprises ("MNEs"), now drive the

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5 *Id.*

6 MUTHUCUMARASWAMY SORNARAJAH, DEVELOPING COUNTRIES IN THE INVESTMENT TREATY SYSTEM: A LAW FOR NEED OR A LAW FOR GREED?, INT'L INV. LAW AND DEV.: BRIDGING THE GAP 43 (Stephen W. Schill et al. eds., 2015); FRÉDÉRIC MOUSSEAU ET AL., OAKLAND INSTITUTE, DRIVING DISPOSSESSION: THE GLOBAL PUSH TO "UNLOCK THE ECONOMIC POTENTIAL OF LAND" 3 (2020).

7 Amnon Lehavi, *Land Law in the Age of Globalization and Land Grabbing*, COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES 290, 304–05 (Michele Graziadei & Lionel Smith eds., 2017); *see* MOUSSEAU ET AL., *supra* note 6, at 3–4.

8 Lehavi, *supra* note 7, at 291.

9 *Id.*

10 Kyle Frankel Davis et al., *Tropical Forest Loss Enhanced by Large-Scale Land Acquisitions*, 13 NATURE GEOSCIENCE 482, 482–83 (2020).

foreignization of land. The modern global land trade system functions as a form of corporate colonialism with support from a pro-investment neoliberal legal system. The implications for the environment and human rights are severe.

This Note explores the changing landscape of global land trade, how international investment came to govern land trade, and opportunities for reform. Part I explores different modes of global land trade and its socio-environmental impacts. Part II sets out the legal framework governing global land trade, the development of the international investment system, and the key problems with this framework. Part III explores possible reforms to the international investment system and discusses recent legal developments that may improve global land trade issues.

I. SOUTHWARD EXPANSION

Land is a global commodity of ever-increasing value that is being carved up between foreign investors from developed nations and emerging markets. Between 2000 and 2016, more than 42.2 million hectares of land is estimated to have been traded through large-scale transnational deals.[11] Many states both import and export land to some degree, but there is a clear economic divide between the main importers and exporters. The majority of land exporters are low-income states in Africa, South America, and parts of Asia that have abundant undeveloped land and limited capital; whereas land importers include high-income and former colonial powers, as well as middle-income states like the Persian Gulf and BRICS[12] states.[13] While the importers are not confined to the Global North, the loss of land to foreign powers is concentrated in the Global South.

A complex set of interrelated geopolitical and economic factors motivate the increase in global land trade affecting the Global South. The increased production of biofuels—a renewable energy source derived from biomass like corn or other plant crops—is one of the biggest factors.[14] In

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11 KERSTIN NOLTE ET AL., INTERNATIONAL LAND DEALS FOR AGRICULTURE. FRESH INSIGHTS FROM THE LAND MATRIX: ANALYTICAL REPORT II, at vi, 1 (2016).

12 The BRICS states include Brazil, Russia, India, China, and South Africa.

13 Seaquist et al., *supra* note 3, at 5; Umut Özsu, *Grabbing Land Legally: A Marxist Analysis*, 32 LEIDEN J. INT'L L. 215, 216 (2019).

14 CARIN SMALLER & HOWARD MANN, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER 1 (2009); Andre M.N. Renzaho et al., *Biofuel Production and Its Impact on Food Security in Low and Middle Income Countries: Implications for the Post-2015 Sustainable Development Goals*, 78 RENEWABLE & SUSTAINABLE ENERGY REVS. 503, 507 (2017).

response to market volatility in traditional energy sources, the United States and the European Union ("EU") encouraged an incentivized biofuel production, spurring the biofuels boom early in the twenty-first century.[15] But energy producers disproportionately looked to undeveloped land in the Global South for production capacity. This increased demand made biofuel production one of the leading drivers of large-scale land acquisition ("LSLA").[16]

Food insecurity also drives global land trade. In the wake of the global food crisis beginning in 2008, investors in agri-business saw the purchase of cheap land in the Global South as a response to the increase in global food prices.[17] Food suppliers in import-dependent states sought greater control of agricultural production to stabilize domestic food supply and cost, rather than continuing to rely on the global market as a source of food security.[18] Capital-rich Persian Gulf states that lack arable land led the rush to invest in foreign agricultural land.[19] Emerging economies with rapidly growing populations like China and India also looked to the Global South for access to agricultural land, water resources, and lower production costs.[20]

Access to water is another key motivation behind global land trade.[21] Commercial agriculture and biofuel MNEs need more than just land, they need land with water access to profitably irrigate their investments.[22] Some scholars have suggested that "land grabs are inherently water grabs."[23] Despite being such an obvious motivator, water resource management is often absent from investment contracts, leaving foreign investors free to tap into water sources traditionally used for domestic production.[24]

International economic policies also facilitate global land trade. In response to the global food crisis, international organizations pushed FDI

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15 Lehavi, *supra* note 7, at 291.

16 Renzaho et al., *supra* note 14, at 507.

17 SMALLER & MANN, *supra* note 14, at 1.

18 Lehavi, *supra* note 7, at 291.

19 JAOCHIM VON BRAUN & RUTH MEINZEN-DICK, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, "LAND GRABBING" BY FOREIGN INVESTORS IN DEVELOPING COUNTRIES: RISKS AND OPPORTUNITIES 1 (2009).

20 *Id.*

21 SMALLER & MANN, *supra* note 14, at 5.

22 Ellis A. Adams et al., *Land Dispossessions and Water Appropriations: Political Ecology of Land and Water Grabs in Ghana*, 87 LAND USE POL'Y 1, 1 (2019).

23 *Id.* at 3; *see* Christian Häberli & Fiona Smith, *Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid 'Land Grab'*, 77 MOD. L. REV. 189, 196 (2014).

24 Häberli & Smith, *supra* note 23, at 196.

as a means of increasing food security in developing countries by providing capital and technology transfers.[25] Agricultural land markets became more attractive to foreign investors hoping to move away from the volatile banking and property sectors.[26] With agricultural land prices expected to rise in the wake of increasing food prices, the relatively cheap and arable land in the Global South was seen as a safe investment.[27] Moreover, the Kyoto Protocol's Clean Development Mechanism allowed MNEs to plant forests in developing countries to meet emissions-reduction requirements, also contributing to the increase in LSLAs.[28] These factors make cheap and arable land in the Global South more attractive and motivate the use of foreign investment to achieve this southward expansion.

A. Global Land Trade and Foreign Direct Investment

This Note looks at two forms of FDI in land acquisition: large-scale land acquisition and resource-seeking bilateral lending. According to the Organisation for Economic Co-operation and Development, FDI involves cross-border investments in which "an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy."[29] This could include an MNE buying a controlling interest in an established foreign enterprise, leasing land to create a new corporate entity in another country, or financing foreign infrastructure projects through a bilateral loan. While LSLA is more clearly interested in securing foreign land, resource-seeking bilateral lending also has serious implications for global land trade that is cause for major concern. Both lack adequate controls in the international legal system and have far-reaching implications for environmental security and human rights.

1. Large-Scale Land Acquisition

The resurgence of FDI in land through LSLA is concentrated in the agricultural sector for the cultivation of food crops and non-food agricultural commodities like biofuels.[30] LSLA is generally defined as the acquisition of at least 200 hectares of foreign land through purchase or long-

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25 Lehavi, *supra* note 7, at 291.

26 SMALLER & MANN, *supra* note 14, at 4.

27 BRAUN & MEIZEN-DICK, *supra* note 19, at 1.

28 Lehavi, *supra* note 7, at 292.

29 *Foreign Direct Investment (FDI)*, OECD ILIBRARY, https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en (last visited Apr. 13, 2021).

30 Renzaho et al., *supra* note 14, at 507.

term leases, although acquisitions often exceed 10,000 hectares.[31] Lease periods generally run from between fifty to ninety-nine years.[32] There is little reliable data on LSLAs as these deals are mostly private,[33] but available open-source data and anecdotal evidence paint an alarming picture of the trends in global land trade over the past two decades.[34]

Importers and exporters in the global land trade network are economically divided. Land-importing countries are concentrated in North America, the Middle East, Western Europe, and wealthier parts of Asia, whereas land-exporting countries are concentrated in Africa, South America, Southeast Asia, and Eastern Europe, and mostly consist of the least-developed nations.[35] The main importers of land are China, the United Kingdom, the United States, Germany, and Singapore, while the main exporters are Ethiopia, Madagascar, the Philippines, Brazil, and Mozambique.[36]

Ethiopia, which exports land to twenty-one different countries,[37] has been subject to significant LSLAs with an estimate of 1.4 million hectares of land transferred to foreign entities.[38] Looking to attract foreign capital, the Ethiopian government has made millions of hectares of land available for commercial agricultural investment, claiming that the land is underutilized or idle.[39] In reality, many pastoralists and rural communities rely on the land for subsistence farming, and reports suggest that forced evictions are occurring to make way for foreign investors.[40]

Ethiopia is not the only country exporting large portions of its arable land. The Democratic Republic of the Congo has allocated over 10 million acres to foreign entities for biofuels and export crops.[41] And the Philippines has leased out more than seventeen percent of its total land area.[42]

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31 Seaquist et al., *supra* note 3, at 1; SMALLER & MANN, *supra* note 14, at 6.

32 SMALLER & MANN, *supra* note 14, at 6.

33 Lehavi, *supra* note 7, at 291.

34 *See* NOLTE ET AL., *supra* note 11; HUMAN RIGHTS WATCH, "WAITING HERE FOR DEATH": FORCED DISPLACEMENT AND "VILLAGIZATION" IN ETHIOPIA'S GAMBELLA REGION (2012), https://www.hrw.org/sites/default/files/reports/ethiopia0112webwcover_0.pdf.

35 Seaquist et al., *supra* note 3, at 5.

36 *Id.* at 4–5.

37 *Id.* at 5.

38 Logan Cochrane & Danielle D. Legault, *The Rush for Land and Agricultural Investment in Ethiopia: What We Know and What We are Missing*, 9 LAND 1, 2 (2020).

39 Tsegaye Moreda, *Large-Scale Land Acquisitions, State Authority and Indigenous Local Communities: Insights from Ethiopia*, 38 THIRD WORLD Q. 689, 700 (2017).

40 Cochrane & Legault, *supra* note 38, at 5; *see also* HUMAN RIGHTS WATCH, *supra* note 34.

41 Renzaho et al., *supra* note 14, at 507.

42 *Id.*

These alarming statistics are likely underestimates compiled from disparate sources that do not reflect the true extent of land foreignization.[43]

While agriculture and biofuel production are the main drivers, there are still other resources that motivate LSLAs. A 2020 report from the Oakland Institute found that in Nicaragua, "[a] handful of transnational corporations have taken control over the country's vast mining concessions," with the major investors coming from Canada, Australia, the United Kingdom, and Colombia.[44] Due in large part to the Nicaraguan government encouraging mining exploitation, the amount of land under foreign mining concessions more than doubled in 2017 to include about 2.6 million hectares of land—more than twenty percent of Nicaragua's total land area.[45] LSLA deals occurring increasingly across the Global South are divesting local communities in these regions of land, food sources, natural resources, and any means of economic development.

2. Resource-Seeking Bilateral Lending

Resource-seeking bilateral lending involves a loan agreement between a single borrower and a single lender in which debt can be traded for control of resources. This trend is limited, but it can have severe impacts on capital-poor states that rely on FDI to stimulate their economies. The pattern is simple: a capital-rich state provides a large-scale loan to a capital-poor state that cannot repay the loan, giving the lender insurmountable bargaining power over the debtor. The loan terms vary, but a unifying feature is that the loans account for such a large portion of the debtor's gross domestic product that the prospect of repaying the loans on schedule is unfeasible.

The loans are generally granted for financing infrastructure or development projects. When it becomes clear that the recipient cannot repay the massive debt, the lender can negotiate effective control over the project area. Ironically, in many instances, the debtor uses these loans to pay state-owned enterprises ("SOEs") from the lending country that have contracts in the underlying projects.[46] This seems dangerously equivalent to a foreign nation paying its own SOEs to develop and eventually control foreign land through the architecture of FDI.

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43 Cochrane & Legault, *supra* note 38, at 2.

44 OAKLAND INSTITUTE, NICARAGUA'S FAILED REVOLUTION: THE INDIGENOUS STRUGGLE FOR *SANEAMIENTO* 6 (2020).

45 *Id.*

46 Amsalu K. Addis et al., *Chinese and Indian Investments in Ethiopia: Infrastructure for 'Debt-Trap Diplomacy' Exchange and the Land Grabbing Approach*, 16 INT'L J. EMERGING MARKETS 4 (2020).

The Paris Club—an organization whose members include the major global sovereign creditors—somewhat curbs the danger of resource-seeking lending. The organization's members have committed to ensuring transparent lending practices and sustainable repayment solutions for debtors. But noticeably absent from the Paris Club's membership are China and India—the two main drivers of resource-seeking bilateral lending. Although China was the largest recipient of World Bank loans in the eighties and nineties, it is now one of the biggest lenders and has loaned more to developing nations in the past few years than even the World Bank.[47] Because resource-seeking loans are less direct than acquiring land through LSLAs, the implications for global land trade have yet to be fully realized. But troubling examples from recent years show that these loans can lead to foreignization with little recourse for the indebted recipients.

The controversy surrounding Sri Lanka's Hambantota Port is a cautionary tale for any state currently accepting bilateral loans. Sri Lanka turned to China for assistance in completing its Hambantota Port project. Despite negative feasibility studies and the refusal of other lenders to engage in the project, China continued to finance loans for the project.[48] During construction, lending terms became more burdensome and Sri Lankan officials sought to refinance and renegotiate timelines.[49] When the project failed to increase economic activity in the port, Sri Lanka was left with massive debt to China and none of the expected revenue from the project to help repay its debts.[50] By 2017, Sri Lanka owed more than $8 billion to Chinese SOEs, and "Chinese demands centered on handing over equity in the port rather than allowing any easing of terms."[51] Lacking the financial means to pay off the debt, Sri Lanka accepted a deal to eliminate $1.1 billion of its debt in exchange for a ninety-nine-year lease on the Hambantota Port.[52] In addition to the port itself, the Chinese firm managing the project demanded 15,000 acres of surrounding land to develop an industrial zone.[53]

Tajikistan serves as another cautionary example. In 2011, Tajikistan ceded more than 115,000 hectares of its territory in the Pamir Mountains

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47 Anja Manuel, *China Is Quietly Reshaping the World*, ATLANTIC (Oct. 17, 2017), https://www.theatlantic.com/international/archive/2017/10/china-belt-and-road/542667/.

48 Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html.

49 *Id.*

50 *Id.*

51 *Id.*

52 Kai Schultz, *Sri Lanka, Struggling with Debt, Hands a Major Port to China*, N.Y. TIMES, (Dec. 12, 2017), https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html.

53 Abi-Habib, *supra* note 48.

to China in exchange for forgiveness on its massive outstanding debt, reportedly to the tune of hundreds of millions of dollars.[54] The ceded region contained gold and mineral deposits, as well as significant saltwater and freshwater reserves.[55] As of October 2020, Tajikistan still owes more than $1 billion to China.[56]

This predatory process has been gaining more attention, with the media and governments describing the lending scheme as "debt-trap diplomacy."[57] But the secrecy of loan details makes the motivations and consequences of bilateral lending difficult to discern. Many have disputed this "debt-trap" rhetoric;[58] but, the mere possibility that bilateral lending could be used to take over foreign land with little transparency is highly problematic.

Even more concerning is China's massive infrastructure project that seeks to build new trade routes across the historic Silk Road. The two-pronged plan includes the overland Silk Road Economic Belt and the Maritime Silk Road, collectively referred to as the Belt and Road Initiative ("BRI").[59] Since its unveiling in 2013, China's BRI has quickly become one of the world's most ambitious multi-national infrastructure projects.[60]

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54 *Tajikistan: Chinese Company Gets Gold Mine in Return for Power Plant*, EURASIANET (Apr. 11, 2018), https://eurasianet.org/tajikistan-chinese-company-gets-gold-mine-in-return-for-power-plant; *After Ladakh, Nepal & Bhutan, China Now Claims Territory in Tajikistan*, EURASIAN TIMES (Aug. 8, 2020), https://eurasiantimes.com/after-ladakh-nepal-bhutan-china-now-claims-territory-in-tajikistan/.

55 *Living in Debt: To Whom and How Much Does Tajikistan Owe?*, CENT. ASIAN BUREAU FOR ANALYTICAL REPORTING (Feb. 17, 2021), https://cabar.asia/en/living-in-debt-to-whom-and-how-much-does-tajikistan-owe [hereinafter CABAR]; Alexander Sodiqov, *Tajikistan Cedes Disputed Land to China*, EURASIA DAILY MONITOR (Jan. 24, 2011), https://jamestown.org/program/tajikistan-cedes-disputed-land-to-china/.

56 CABAR, *supra* note 55.

57 *See id.*; Brahma Chellaney, *China's Debt Trap Diplomacy*, PROJECT SYNDICATE (Jan. 23, 2017), https://www.project-syndicate.org/commentary/china-one-belt-one-road-loans-debt-by-brahma-chellaney-2017-01; Ajit Singh, *The Myth of 'Dept-Trap Diplomacy' and Realities of Chinese Development Finance*, 42 THIRD WORLD Q. 239, 240 (2021); MATT FERCHEN & ANARKALEE PERERA, CARNEGIE-TSINGHUA CTR. FOR GLOBAL POL'Y, WHY UNSUSTAINABLE CHINESE INFRASTRUCTURE DEALS ARE A TWO-WAY STREET 1 (2019).

58 Roland Rajah et al., *Ocean of Debt? Belt and Road and Debt Diplomacy in the Pacific*, LOWY INST. (Oct. 21, 2019), https://www.lowyinstitute.org/publications/ocean-debt-belt-and-road-and-debt-diplomacy-pacific; Deborah Brautigam & Meg Rithmire, *The Chinese 'Debt Trap' Is a Myth*, ATLANTIC (Feb. 6, 2021), https://www.theatlantic.com/international/archive/2021/02/china-debt-trap-diplomacy/617953/.

59 Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELATIONS (Jan. 28, 2020), https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative.

60 *Id.*

As of January 2021, a reported 140 nations have joined the BRI by signing a Memorandum of Understanding with China.[61]

China often provides BRI countries with funding for vital infrastructure projects through bilateral loans that place poorer states at risk of debt distress.[62] Djibouti is one of the most vulnerable to debt distress. It has borrowed nearly $1.4 billion from China in recent years—approximately seventy-five percent of its gross domestic product—for new infrastructure projects that may prove fruitless in generating revenue to meet its debt service requirements.[63] Considering China's actions in Sri Lanka and Tajikistan, the possibility of China taking control of underlying projects in Djibouti and other debt-vulnerable BRI countries through these unsustainable loans should be closely monitored as the BRI progresses.

India also provides unsustainable loans to capital-poor countries. India loaned $640 million in credit to Ethiopia to finance three sugar plantation projects. These plantations have failed to meet Ethiopia's domestic demand and export hopes.[64] With Ethiopia nearing debt crisis, it is highly unlikely that it will be able to repay these loans. India will then be poised to take control of the plantations, which represent the majority of Ethiopia's sugar production capacity.[65] Regardless of whether land acquisition motivated these loans, this legal blind spot should not be ignored. And with FDI in land increasing, the socioenvironmental effects of these deals should be highlighted.

B. Socioenvironmental Impacts of Global Land Trade

The foreignization of land in the Global South has profound effects on the environment and peoples in FDI areas. To understand these effects, the following two aspects of global land trade should be noted. First, the environment and human rights are inextricably intertwined. More specifically, protecting the rights of indigenous peoples is a crucial component of caring for the environment. Indigenous communities have a spiritual connection to their traditional lands; they act as stewards for a majority of the Earth's land area, and they protect globally important ecological zones

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61 *Countries of the Belt and Road Initiative (BRI)*, GREEN BELT AND ROAD INITIATIVE CTR., https://green-bri.org/countries-of-the-belt-and-road-initiative-bri/ (last visited Apr. 28, 2021).

62 JOHN HURLEY ET AL., CENTER FOR GLOBAL DEVELOPMENT, EXAMINING THE DEBT IMPLICATIONS OF THE BELT AND ROAD INITIATIVE FROM A POLICY PERSPECTIVE 5 (2018).

63 *Id.* at 16–17. Notably, Djibouti recently became host to China's first overseas military base.

64 Addis et al., *supra* note 46, at 24. A lack of cooperation from the Indian firms contracted to work on the sugar plantations contributes to the poor return on these projects.

65 *Id.* at 23–24.

from corporate encroachment.[66] But the process of decolonization that imported colonial borders and notions of individual property into the Global South left these communities with no legal rights over their traditional lands.[67] These communities feel the harmful effects of land foreignization far more acutely than those watching from a distance. It is not just the global environment that is harmed in the FDI process, it is their ancestors, homes, and livelihoods. Thus, the environmental and human rights impacts of global land trade must be addressed holistically as inseparable socioenvironmental impacts.

Second, the negative socioenvironmental impacts are not an inherent feature of global land trade but a reality in the current market. FDI is necessary to support sustainable development in the Global South, as global inequality leaves poorer nations with insufficient capital to invest in economically viable green infrastructure or renewable energy projects. FDI is featured heavily in sustainable development strategies because international organizations continue to view the investment-development paradigm as the preeminent model for sustainable development.[68] But while investment is necessary for sustainable development, the international investment framework governing FDI is concerned with contractual and treaty obligations, not socioenvironmental issues.

The lack of available data distorts the true socioenvironmental impacts, which are often a secondary concern to investors and host states.[69] The full impacts of global land trade remain unclear, but studies suggest that some of the main socioenvironmental impacts include deforestation, loss of biodiversity, increased greenhouse gas ("GHG") emissions, greater reliance on fossil fuels, increased food insecurity, and displacement of local populations.

1. Deforestation and Biodiversity Loss Due to Land-Use Changes

One of the most obvious environmental implications of global land trade is deforestation and biodiversity loss due to land-use changes. Most LSLAs occur in tropical regions that contain a large percentage of the world's remaining tropical forests and biodiversity hotspots.[70] These

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66 MOUSSEAU ET AL., *supra* note 6, at 3.

67 Jacques Wilfried Kenfack Kenjio, *Decolonizing Land Tenure Systems in Sub-Saharan Africa: The Path to Modern Land Policy Reforms*, 7 J. LAND MGMT. & APPRAISAL 1, 2–3 (2020).

68 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015). Five of the seventeen sustainable development goals mention investment as a means of achieving that goal.

69 Frankel Davis et al., *supra* note 10, at 482.

70 *Id.* at 483.

regions are incredibly important for global carbon storage, biodiversity, and other ecosystem services.[71] The untapped economic potential of such undeveloped lands is also attractive to investors from land-poor countries.

A survey of LSLA deals conducted between 2000 and 2018 in fifteen states across sub-Saharan Africa, Southeast Asia, and Latin America suggests that at least some deforestation is associated with LSLA, which occurs disproportionately in forested areas.[72] This deforestation can occur when forests are cleared for agriculture or biofuel production that diminishes the natural biodiversity of these areas. Half of the investments were associated with significant increases in deforestation, and the rates of forest loss were considerably higher in LSLA areas than in comparable non-LSLA areas.[73]

In Indonesia, between 2000 and 2014, LSLA concession areas experienced higher rates of forest loss than similar land in non-concession areas.[74] Forest fragmentation was also higher in LSLAs than in comparable non-LSLA areas.[75] Similarly, in Cambodia—where more than two million hectares were leased to both foreign and domestic investors by 2014—the annual rate of forest loss in LSLA areas was "between 29% and 105% higher than in comparable land areas outside concessions."[76]

Investment projects that require complete land conversion, such as palm oil plantations, wood fiber concessions, and new tree plantations, also appear to cause significantly higher rates of deforestation.[77] Proponents of FDI in land argue that it is beneficial because it helps convert idle land into productive land. This argument fails to consider the ecological importance of natural systems.[78] Forested areas within LSLAs provide critical habitat for species, as well as important watersheds and carbon stores.[79]

The intensive agricultural production typical of LSLAs requires large-scale land clearing for monoculture, chemical fertilizer application,

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71 *Id.* at 482.

72 *Id.* at 484.

73 *Id.* at 483.

74 Maria Cristina Rulli et al., *Interdependencies and Telecoupling of Oil Palm Expansion at the Expense of Indonesian Rainforest*, 105 RENEWABLE SUSTAINABLE ENERGY REV. 499, 503 (2019).

75 *Id.*

76 Kyle Frankel Davis et al., *Accelerated Deforestation Driven by Large-Scale Land Acquisitions in Cambodia*, 8 NATURE GEOSCIENCE 772, 772 (2015).

77 Frankel Davis et al., *supra* note 10, at 484.

78 *Id.* at 482.

79 Renzaho et al., *supra* note 14, at 513.

and irrigation systems that diminish water supply for locals.[80] In Southeast Asia alone the demand for biofuel production has replaced more than thirteen million hectares of rich biodiverse land with palm oil crops.[81] Because these land-use changes disregard the importance of maintaining natural habitats in ecologically sensitive areas, they present a serious threat to biodiversity.

2. Increased Greenhouse Gas Emissions

Although biofuels are considered a renewable source of energy, their production may ultimately increase carbon emissions overall. For example, the conversion of tropical forests into palm oil plantations in Malaysia increased carbon dioxide emissions, whereas the conversion of rubber plantations into palm oil plantations decreased emissions.[82] The many LSLAs in tropical forests used for biofuel production deplete important carbon-stores, replacing them with monoculture that does not provide the same ecological service.

Increasing biofuel production could result in one million hectares of deforestation annually, which would generate far more GHG emissions than the resulting decrease in emissions from reduced fossil fuel combustion.[83] Biofuel combustion releases less GHGs than fossil fuel combustion, but the land-use change associated with biofuel production may actually cause a net increase in emissions compared to fossil fuels.[84] This is especially so when forests rich in biodiversity are replaced with monoculture for biofuel production.[85] The depletion of these forests is a far greater loss to the planet than an inability to produce more biofuels to meet energy demands in wealthy countries, especially when cleaner sources of energy are available.

3. Increased Reliance on Fossil Fuels

Resource-seeking bilateral lending may also increase reliance on fossil fuels in host states. This will make it even harder for these states to repay debts as fossil fuel combustion continues to become less cost effective. While the growing global focus on environmental sustainability has

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80 SUE MBAYA, AFRICAN WILDLIFE FOUNDATION, LARGE SCALE LAND ACQUISITIONS IN ETHIOPIA: IMPLICATIONS FOR BIODIVERSITY AND COMMUNITIES 30 (2015).

81 Renzaho et al., *supra* note 14, at 513.

82 Faradiella Mohd Kusin et al., *Greenhouse Gas Emissions During Plantation Stage of Palm Oil-Based Biofuel Production Addressing Different Land Conversion Scenarios in Malaysia*, 24 ENV'T SCI. & POLLUTION RES. 5294, 5301 (2016).

83 Renzaho et al., *supra* note 14, at 513.

84 *Id.*

85 *Id.*

encouraged states to adopt policies to reduce their own carbon emissions, states do not make the same commitments on behalf of their MNEs operating abroad. The EU has even acknowledged that "Europe is currently living on emission and resource credits provided by other parts of the world."[86]

Overseas investing and lending do not always align with national commitments. For example, China is a global leader in the transition to renewable energy, investing $132 billion in clean energy in 2017 alone, [87] but it continues to invest in new coal power projects overseas.[88] National emissions reduction targets under the Paris Agreement do not extend beyond a country's borders, allowing China and others to export carbon emissions without impacting their national reductions targets.[89]

In Southeast Asia, most of China's BRI investments in energy infrastructure focus on coal-fired power plants, hydropower dams, and power transmission lines.[90] Approximately twenty-three percent of BRI coal-fired power projects are located in Southeast Asia. These new plants may provide short-term economic benefits to developing nations, but can also lock them into detrimental high-emissions energy pathways.[91] For less-developed BRI states struggling with debt repayment, being locked into less efficient sources of energy will only worsen their debt vulnerability in the future. Moreover, prioritizing short-term financial goals over sustainable growth is contrary to global efforts to curb GHG emissions.

4. Increased Food Insecurity

Global land trade increases food insecurity in host states because local food producers cannot compete with MNEs for agricultural land. The conversion of arable land into export crops and monoculture reduces the space and resources available to locals for subsistence and small holder farming, and many LSLAs occur in regions already susceptible to food

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86 LISE SMIT, ET AL., STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN, FINAL REPORT PREPARED FOR THE EUROPEAN COMMISSION 214 (2020) (quoting Arnold Tucker, et al., *Environmental and Resource Footprints in Global Context: Europe's Structural Deficit in Resource Endowments*, 40 GLOBAL ENV'T CHANGE 171, 179 (2016)).

87 Jerry Harris, *Can China's Green Socialism Transform Global Capitalism?*, 19 CIVITAS 354, 355 (2019).

88 Mingpeng Xiong et al., *Environmental Stress Testing for China's Overseas Coal Power Investment Project*, 11 SUSTAINABILITY 1, 2 (2019).

89 *Id.*

90 CHEN-SHEN HONG & OLIVER JOHNSON, MAPPING POTENTIAL CLIMATE AND DEVELOPMENT IMPACTS OF CHINA'S BELT AND ROAD INITIATIVE: A PARTICIPATORY APPROACH 2 (2018).

91 *Id.*

insecurity.[92] The majority of these occur in agrarian-based economies of Sub-Saharan Africa where rain-fed agriculture and traditional cultivation methods dominate local food production.[93]

When foreign investors enter the picture, local farmers are either shut out of their traditional farming and cattle grazing lands completely or allocated small plots without guaranteed water access.[94] Most are forced out of production because it is not economical for local producers to cultivate the land under such conditions, even when they have permission to do so.[95] Biofuel plants and export crops that diminish available land do nothing to increase local food supply or production capacity. Moreover, FDI-related employment opportunities are often too limited, inconsistent, or underpaid to be a viable substitute for traditional land cultivation.[96] FDI that competes with local food production decreases community-based sources of food and increases local food insecurity. FDI in land can improve domestic food supply in these regions, but it is only strong regulation and oversight that will achieve this, not corporate goodwill.

5. Displacement of Local Communities

The lack of well-protected land rights in many land-exporting states facilitates the displacement of local communities for FDI projects. In 2012, Human Rights Watch conducted more than 100 interviews of relocated persons in Ethiopia's Gambella region to investigate the effect of foreign land acquisition on rural populations.[97] The report detailed the forced relocation of local communities to make room for foreign investors.[98]

Although Ethiopia was never formally colonized, it still suffers from extreme internal colonialization that fails to protect indigenous land rights. Residents of the Gambella region—mainly indigenous Anuak and Nuer communities—lack formal title to their traditional lands, which allows the government to declare that the "completely uninhabited land" is available for lease or purchase.[99] This false claim that makes these communities legally invisible is disturbingly reminiscent of the *terra nullius* claim that

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92 Maria Cristina Rulli & Paolo D'Odorico, *Food Appropriation Through Large Scale Land Acquisitions*, 9 ENV'T RSCH. LETTERS 1, 2 (2014).

93 Renzaho et al., *supra* note 14, at 507–508.

94 Häberli & Smith, *supra* note 23, at 196.

95 *Id.*

96 Renzaho et al., *supra* note 14, at 508.

97 HUMAN RIGHTS WATCH, *supra* note 34.

98 *Id.* at 18.

99 *Id.*; *see also* MOUSSEAU ET AL., *supra* note 6, at 6.

justified Great Britain's colonization of Australia.[100] It allows the host state and foreign investors to circumvent the requirement for free, prior, and informed consent from the displaced communities, in violation of international human rights norms.[101]

Moreover, the Gambella Regional Government premised its relocation program on empty promises to these communities. The "Villagization" plan relocated communities after promising clear, arable land adjacent to the new villages, food assistance for up to eight months after relocation, training in farming techniques necessary to cultivate the new land, and input provisions like seeds.[102] However, of the sixteen relocated communities from which HRC obtained anecdotal evidence, only two communities had a minimal amount of land cleared in the new village and none of the communities received any input provisions.[103] Moreover, while one-third of the villages received about two weeks' worth of food, the remaining two-thirds received no food assistance at all.[104]

FDI can benefit land-exporting states when the investment-development nexus is balanced, such that investors are required to support development in a meaningful way.[105] But without strong regulation, FDI can also allow foreign investors to gain possession of foreign land in private deals that do not protect the environment or peoples that rely on those lands. The geopolitical and economic factors that motivate wealthy states to acquire land in the Global South are important to understand, but in isolation they do not justify the "neocolonial-land-grabbing" rhetoric surrounding global land trade.[106] Crucial to the success of this neocolonial global land market is the underlying legal framework.

II. SUPPLY CHAIN COLONIES

The fragmented international investment framework that governs global land trade accepts and even encourages these sleight of land tricks,

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100 SORNARAJAH, *supra* note 6, at 50.

101 *See* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 10 (Sept. 13, 2007) (declaring that "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.").

102 HUMAN RIGHTS WATCH, *supra* note 34, at 41.

103 *Id.* at 45.

104 *Id.*

105 STEPHAN W. SCHILL ET AL., INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: FRIENDS OR FOES?, INT'L INV. LAW AND DEV.: BRIDGING THE GAP 3, 5–7.

106 Lehavi, *supra* note 7, at 292.

which essentially create corporate colonies along MNE supply chains. This complicated framework cements the dominance of neoliberal policies that favor wealthy nations in binding treaty agreements. It perpetuates unbalanced economic and political relationships and it conceals nefarious practices through private enforcement mechanisms.

During the period of decolonization following World War II and the signing of the UN Charter, a massive wave of government expropriations in newly independent states deprived foreign investors of property without compensation.[107] Because there were no settled legal principles in international law protecting alien property rights, these expropriations had a chilling effect on foreign investment.[108] While treaties addressing foreign investment and alien property rights did exist, the first formal bilateral investment treaty ("BIT") was a 1959 agreement between Germany and Pakistan. It was not until the late 1980s that BITs and other international investment agreements ("IIAs") began to proliferate after the fall of the Soviet Union and the rise of unfettered capitalism as the dominant global ideology.[109]

By the 1990s, many post-colonial and developing states were facing debt crises, and international organizations saw foreign investment as the answer.[110] However, the capital-exporting countries—unsatisfied with the World Trade Organization's ("WTO") investment policies of the early nineties—wanted stronger protections from expropriations for their nationals investing in foreign countries.[111] After years of negotiations, and a previous unsuccessful attempt, the Organisation for Economic Co-operation and Development states failed to adopt a multilateral investment treaty with settled investment policies.[112] States turned instead to BITs to facilitate foreign investment and to determine the rights of investors and obligations of host states with regard to investment.[113]

What exists today is more an optical illusion than a legal system. Thousands of BITs, as well as other regional trade and investment treaties, regulate global land trade with little transparency or uniformity. Properly regulated and administered FDI is necessary to foster sustainable economic development in the Global South,[114] but that is not the reality in the

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107 *Id.* at 304.

108 *Id.*

109 *Id.*

110 *Id.* at 304–05.

111 FRANK J. GARCIA ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY 23 (2018).

112 *Id.*

113 *Id.* at 23–24.

114 *See* Schill et al., *supra* note 105, at 3.

current global land trade system. Instead, the convoluted legal framework allows foreign investors to make economically motivated deals in private and at the cost of environmental sustainability and respect for human rights.

A. Legal Misdirection: The Global Land Trade Legal Framework

The three main sources of law regulating FDI are: domestic law, IIAs, and international investment contracts ("IICs"). Domestic legislation relating to foreign investment sets the climate for IIAs, which determine the investor rights and host-state obligations that will apply to all IICs. One of the difficulties in regulating global land trade is the diversity of stakeholders. The privatization of key players imposes private contract law and dispute resolution onto a public interest issue. These sources of law interact without any sort of centralized administration or oversight ensuring compliance with global socioenvironmental goals. These are distinct sources of law, each with their own complexities, that make up the global land trade legal system.

1. Domestic Law

Domestic law in the host state is the primary source of law regulating FDI—this is where the stage is set for FDI based on national policies and priorities. The relevant domestic laws cover a range of policy issues related to "the admission of foreign investors, laws and regulations on incentives for foreign direct investment (FDI), taxation, property law, water rights and rates," and other laws potentially impacting FDI such as environmental, labor, and health and safety laws.[115] Domestic laws related to FDI vary widely. For example, some states may require an environmental impact statement or benefit-sharing agreements with local communities before FDI projects can take place. In many cases, however, these are either nonexistent or unenforced.[116] This is especially true in states with weak governance or widespread corruption.[117]

Despite the negative socioenvironmental impacts disproportionately affecting the Global South, a welcoming investment climate helps states compete for FDI, and the overall trend in these regions is greater liberalization of investment policies.[118] The United Nations Conference on Trade

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115 SMALLER & MANN, *supra* note 14, at 9.

116 *Id.*

117 *Id.*

118 U.N. Conference on Trade and Development (UNCTAD), *World Investment Report 2020: International Production Beyond the Pandemic*, at 97, U.N. Doc. UNCTAD/WIR/2020 (2020).

and Development's ("UNCTAD") World Investment Report ("WIR") 2020 showed that in 2019, fifty-four states introduced 107 new domestic policy measures that affect FDI.[119] Overall, seventy-six percent of the new measures favored promotion and liberalization. More than half of the new policies in developed countries reinforced FDI restrictions and regulations, whereas the majority in developing countries liberalized investment.[120] For example, the Philippines relaxed its mandatory local employment requirements. Algeria introduced new tax incentives to attract FDI in oil and gas. And Bahrain changed its laws to allow full foreign ownership in oil and gas drilling activities.[121]

UNCTAD's WIR 2021 showed a significant shift in domestic policy trends. Likely due to COVID-19 economic disruptions, the ratio of new liberalization and promotion measures in 2020 decreased to fifty-nine percent—the lowest on record.[122] The decrease in global FDI flows in 2020 "triggered a rise in the number of promotion and facilitation measures in numerous developing countries[,]"[123] with Asia and Africa accounting for the majority of these measures. [124] Many states simplified administrative procedures for FDI and some increased investment incentives to attract foreign investment in the wake of decreased FDI flows.[125] Although wealthy countries are increasingly more restrictive of FDI, poor Global South countries that need capital continue to liberalize FDI policies.

2. International Investment Agreements

Within the parameters of domestic law, states can then enter into binding treaty agreements that determine the relationship between investors and the state parties. Treaties are consent-based legal instruments that create binding legal obligations through mutual agreement. The purpose of IIAs is to provide foreign investors with "special protections" under international law.[126] They can be regional and plurilateral, but the most common IIAs are bilateral. These BITs are agreements between two states that create rights and remedies to protect foreign investors in the host state and apply to all FDI flows between the two states.[127]

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119 *Id.*

120 *Id.*

121 *Id.* at 100–02.

122 UNCTAD, *World Investment Report 2021: Investing in Sustainable Recovery*, at 110, U.N. Doc. UNCTAD/WIR/2021 (2021).

123 *Id.* at 116.

124 *Id.* at 111.

125 *Id.* at 110.

126 SMALLER & MANN, *supra* note 14, at 11.

127 SORNARAJAH, *supra* note 6, 46–47.

The fact that states must consent to IIAs does not make them fair. Proponents believe that IIAs make investing more secure because it protects investors from host-state action and changes in domestic law, which in turn attracts more FDI to capital-poor states. But the strongest opponents believe that IIAs are premised on a lie and that the true purpose is to "plunder under the cloak of a law made through the instrumentality of power."[128] Lack of transparency and corporate accountability make it difficult to determine underlying motivations. But on a practical level, unequal bargaining power means that wealthy nations favoring free-market principles can dictate the terms of IIAs to less-developed nations that need foreign capital.

While an IIA looks like a neutral agreement providing equal benefits to state parties on its face, its provisions favor the foreign investor. Three common IIA terms provide a clear example. First, many include national treatment and most-favored-nation requirements that prevent host states from treating domestic and foreign investors differently.[129] This helps attract FDI, but it can also prevent host states from supporting domestic industries like small-scale farming.[130] Second, IIAs often give investors the right to export products from FDI areas; this allows them to displace local farmers without contributing to local food supply.[131] Finally, most IIAs mandate arbitration through the investor-state dispute settlement ("ISDS") process.[132] Such clauses allow investors to bring private claims against host states that may challenge public interest legislation in a private forum suited to commercial disputes. This is the only binding enforcement mechanism in international law that allows non-state actors to directly bring claims against a state.[133] Because capital does not flow equally in both directions, this means IIAs favor wealthy capital-exporting states while creating obligations that disproportionately burden poor land-exporting states.

3. International Investment Contracts

After states conclude IIAs, investors can negotiate individual investment contracts so long as they are consistent with IIA provisions. IICs outline the details of individual FDI deals and govern the relationship between investors and FDI recipients. In addition to specific project details, IICs address contractual issues like investment incentives, export rights in

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128 *Id.*

129 SMALLER & MANN, *supra* note 14, at 11–12.

130 *Id.*

131 *Id.*

132 *See infra* section II(B).

133 SMALLER & MANN, *supra* note 14, at 12–13.

production, import rights in labor, and other important logistics.[134] But while parties are free to contract within the parameters of domestic law and IIAs, treaty provisions such as arbitration clauses are non-negotiable because IIAs make them mandatory for all IICs.

IICs may also set out specific socioenvironmental requirements, but if these issues are not addressed, domestic law will apply.[135] The applicability of domestic law allows investors to target less-developed nations with weaker governance structures to take advantage of lenient socioenvironmental regulations and enforcement mechanisms. MNEs can move production abroad to circumvent their home state's public interest regulations while imposing the negative externalities that such regulations address on local communities in host states.

Stabilization clauses in IICs give investors the ability to lock in these weaker socioenvironmental regulations or require compensation if policy changes affect their investments. These clauses address changes in host-state laws that affect the value of investments during the life of the project.[136] They may make new laws inapplicable to investment areas or require compensation for the cost of complying with new laws. [137] For investors, stabilization clauses are a "risk-mitigation tool" that shields them from many risks associated with foreign investments such as arbitrary or discriminatory legislation, expropriations, nullification of contracts under domestic law, and other economic issues.[138] For host states, these clauses are necessary to attract foreign investment.

Changing socioenvironmental policies at both the national and international levels has encouraged investors to use stabilization clauses. These clauses allow MNEs to lock in lax socioenvironmental policies and protect investments from costs associated with public interest policy changes for lease periods of up to ninety-nine years.[139] Stabilization clauses effectively excuse investors from complying with socioenvironmental policies designed to protect the environment and local populations or require host states to pay investors for compliance.

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134 *Id.* at 9.

135 *Id.*

136 ANDREA SCHEMBERG, STABILIZATION CLAUSES AND HUMAN RIGHTS: A RESEARCH REPORT CONDUCTED FOR IFC AND THE UNITED NATIONS SPECIAL REPRESENTATIVE TO THE SECRETARY GENERAL ON BUSINESS AND HUMAN RIGHTS 4 (2008).

137 Lehavi, *supra* note 7, at 304.

138 Schemberg, *supra* note 136, at 4–5.

139 *Id.* at 4; Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L. J. 216, 230–31 (1996).

B. Private Methods, Public Interests: The Investor-State Dispute Settlement System

Arbitration clauses place enforcement over global land trade issues in the hands of commercial arbitrators that are better suited to resolving purely commercial disputes. There are two distinct forms of arbitration at play in the global land trade system. The first is international commercial arbitration, which involves a dispute between private parties or governmental entities acting in a private capacity arising under the terms of an IIC.[140] The second is investor-state arbitration under the ISDS system, which involves a dispute between a foreign investor and a host state in its sovereign capacity arising under the terms of an IIA.[141] This Note is concerned with investor-state arbitration as it "often may involve a challenge or assessment of the consequences of government policy," which can undermine the sovereign independence of host states and their ability to regulate in the public interest. The fact that this is done free from public scrutiny further implicates the integrity of the legal framework governing global land trade.[142]

The biggest ISDS organization is the International Center for Settlement of Investment Disputes ("ICSID"),[143] an investment arbitration organization in the World Bank Group. The ICSID Convention has 163 signatories, 155 of which are contracting members that have ratified the treaty, giving them access to ICSID's arbitration system.[144] From 1987 to 2017, sixty-one percent of known ISDS cases were conducted under ICSID rules, with thirty-one percent conducted under the United Nations Commission on International Trade Law ("UNCITRAL")[145] arbitration rules.[146]

According to UNCTAD's WIR 2020, foreign investors from developed countries brought about seventy percent of new known arbitration ISDS disputes.[147] Consistent with previous years, about seventy-five

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140 James Allsop, Chief Justice, Fed. Court Austl., Keynote Address at the International Council for Commercial Arbitration Congress 2018: Commercial and Investor-State Arbitration: The Importance of Recognizing Their Differences, ¶ 21 (Apr. 16, 2018).

141 *Id.*

142 *Id.*

143 SORNARAJAH, *supra* note 6, at 47.

144 *List of Contracting States and Other Signatories of the Convention (as of June 9, 2020)*, ICSID, https://icsid.worldbank.org/sites/default/files/ICSID-3.pdf (last visited Sept. 30, 2021).

145 The United Nations body responsible for facilitating international trade and investment.

146 Allsop, *supra* note 140, ¶ 17.

147 UNCTAD, *supra* note 122, at 130.

percent of new cases were brought against developing states and transition economies.[148] However, because the very existence of a dispute can be kept private, the total number of ISDS cases is unknown. This lack of transparency is one of the key problems with ISDS arbitration. Some of the many other perceived shortcomings of the ISDS system include democratic illegitimacy due to the lack of public accountability; potential bias of arbitrators with private commercial backgrounds; lack of consistency and predictability due to private awards that cannot contribute to a system of precedent; and limited ability to review the substance of awards.[149]

One of the most concerning problems with the ISDS system is its impact on sovereign equality and independence. Mandatory ISDS arbitration clauses in IIAs force matters of great public interest into this private realm, making the host state's obligations towards a foreign investor stronger than its obligations towards its citizens. ISDS is the only area of international law in which a non-state actor has a right of action against a sovereign state. This is remarkable as foreign investors, which are not themselves parties to the IIAs, can challenge a sovereign state's public interest regulation as a treaty violation in a private setting. This makes the host state directly liable to the foreign investor.

On the other hand, host-state governments are also liable to their citizens and are expected to regulate in the public interest. The soft law instruments[150] that attempt to regulate global land trade "single out the [host] state as the primary bearer of responsibilities."[151] The World Bank acknowledges the potential risk of agricultural FDI in states with weak governance structures and attributes the potential negative impacts to host-state governments.[152] Because international law regulates states and not private citizens, host states are liable for human rights abuses associated with global land trade, rather than the private actors responsible for the actual violations.

The problem with this is that host states are left with conflicting obligations—they are financially liable to foreign investors and politically liable to their citizens. The affected indigenous communities, often rural and low-income communities with limited access to justice, lack the resources and political capital to challenge these abuses. Whereas foreign

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148 *Id.* at 129.

149 Allsop, *supra* note 140, ¶ 3.

150 Soft law instruments generally include agreements, principles, and declarations that are persuasive but not legally binding.

151 Ntina Tzouvala, *A False Promise? Regulating Land-Grabbing and the Post-Colonial State*, 32 LEIDEN J. INT'L L. 235, 236 (2019).

152 *Id.* at 237 (discussing the World Bank Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources).

investors—generally wealthy MNEs with teams of legal professionals devoted to such issues—have a direct treaty right to challenge host-state action. The combination of mandatory ISDS arbitration clauses and host-states' need to attract FDI gives foreign investors financial and legal leverage over host states. This dynamic gives a host state's obligations towards foreign investors much stronger legal force than its obligations to its own citizens.

C. Profitable Investment Versus Sustainable Development

The existing global land trade framework—from domestic law to dispute settlement—pits investment goals against sustainable development goals. It is unsurprising that international investment law, which is concerned with protecting foreign investors in host states, is not best suited to protect environmental and human rights. The legal framework that subjects these issues to international investment law when they occur in FDI areas—rather than the home- or host-state socioenvironmental laws—strips host states of the ability to prioritize these concerns.

The goal of investing is generally to turn a profit, but sustainable development, environmental protection, and upholding human rights are not always profitable endeavors. International investment law is "premised on a development nexus," but international investment institutions and jurisprudence rarely focus on or even meaningfully consider development goals.[153] As ardent critic Muthucumaraswamy Sornarajah, notes: "The World Bank created [ICSID] on the basis of its ideological preference for the view that secure investment tribunals will promote foreign investment flows."[154] IIAs then included provisions requiring arbitration through ICSID, solidifying this neoliberal ideology.[155]

The host state's lack of bargaining power and pro-investor biases in the investment regime may dissuade host states from implementing stronger socioenvironmental policies to avoid ISDS disputes. Even when environmental issues are part of an arbitration claim, arbitration bodies often marginalize and sometimes altogether avoid the environmental concerns in arbitration proceedings.[156] Though limited and underenforced, environmental protections have become more common in IIAs since the

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153 Schill et al., *supra* note 105, at 3–5 (internal citation omitted).

154 SORNARAJAH, *supra* note 6, at 47.

155 *Id.*

156 Jorge E. Viñuales, *Foreign Investment and the Environment in International Law: Current Trends*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 12, 20 (Kate Miles ed., 2019).

1990s; however, human rights considerations are still largely absent from IIAs.[157]

Environmental and human rights concerns are inseparable. Including one without the other will not fix the issues with global land trade. For example, requiring an investor to offset GHG emissions associated with land-use change in an FDI project would not prevent displacement of local communities that cannot then rely on local food sources which are more sustainable. Such short-term environmental considerations, even if enforced, cannot compare to holistic and long-term sustainable development that integrates environmental and human rights considerations.

Moreover, international organizations concerned with sustainable development have no authority over foreign investment. This means that environmental and human rights organizations can suggest ways to improve FDI and make it more responsive to sustainable development needs, but they have no force to compel consideration for sustainability. Similarly, international instruments like the UN Guiding Principles on Business and Human Rights emphasize the need for stronger domestic legislation from both the home and host state, as well as corporate due diligence along global supply chains.[158] But these nonbinding soft-law instruments require domestic implementing legislation to have any force. This leaves enforcement of the investment-development nexus—which is used to justify the unbalanced neoliberal policies governing global land trade in the first place—to pro-investment arbitrators and organizations.

III. REFORMING THE GLOBAL LAND TRADE SYSTEM

Foreign investment in land should be a system of cooperative and mutually beneficial land sharing. It should not be a system in which the commercial benefits of land in the Global South are taken from unprotected indigenous communities and exported to wealthy foreign populations. The current system is not one of sovereign equality, despite the appearance of consent in treaty agreements; it is a system of sovereign economic dependence that benefits the wealthy nations, many of which are the former colonizers responsible for much global economic disparity. Any international investment system that seeks to address socioenvironmental concerns must be cognizant of this economic and power disparity.

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157 Elliot Luke, *Environment and Human Rights in an Investment Law Frame*, RSCH. HANDBOOK ON ENV'T & INV. L. 150, 153–54 (2019).

158 Office of the U.N. High Comm'r for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

Realizing the potential mutual benefits of FDI requires shifting the focus of FDI from development for the sake of investment to investment for the sake of development.

Three key reforms can help transform the global land trade system into a cooperative land sharing system. Some recent progress has been made in these areas, but far more is needed. First, a multilateral investment agreement and accompanying administrating body can give land-exporting states the bargaining power to address domestic regulatory concerns in a transparent and consistent manner. Second, corporate due diligence and supply chain management must be required through domestic legislation to start placing some of the responsibility for these socioenvironmental abuses on the massive MNEs that profit hugely from them. Finally, the ISDS arbitration system that holds host states hostage to investors' financial interests must become more transparent and responsive to the sustainable development concerns that FDI is predicated on.

A. Adopting a Multilateral Agreement and Establishing an Administrative Body

A multilateral investment agreement that establishes an administrative body is required to give land-exporting states collective bargaining power and create consistency in international investment. Unlike other international legal regimes, international investment law operates in a vacuum; it has "no hierarchy, no central organizing body, and no historical genesis or originating document commonly acknowledged by all."[159] Such an agreement and administrative body could bring three key improvements to global land trade.

First, it could provide a forum for land-exporting states to insist on an investment-development nexus that gives due consideration to development and stops putting profit before people. This is a crucial step towards combating exploitation in global land trade. It would allow for the development of safeguard mechanisms to provide host states with exceptions to investment obligations in appropriate circumstances, such as limiting the export of food when faced with domestic food shortages. This might look like the WTO provisions that address exceptions for national security, public health, animal or plant health, and the conservation of

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159 JULIE A. MAUPIN, TRANSPARENCY IN INTERNATIONAL INVESTMENT LAW: THE GOOD, THE BAD, AND THE MURKY, TRANSPARENCY IN INT'L INV. L. 143 (Andrea Bianchi & Anne Peters eds., 2013).

exhaustible natural resources.[160] Bringing these issues to a governing administrative body would force member states to deliberate on such issues in a more transparent manner. This would not extinguish the protections afforded to foreign investors, but a transparent forum would at least ensure that investment principles consider host states' obligations to their citizens.

Second, it could improve transparency and data collection, which would support empirical research. One of the biggest issues with global land trade is the lack of transparency that shrouds the investment process in secrecy.[161] For the most part, the data available on global land trade are not based on well-defined or globally consistent metrics, they are both overlapping and full of holes. This makes it impossible to ascertain the extent of socioenvironmental harm that global land trade causes. An administrating body could record contracts and acquire data from home and host states to provide a clearer picture of global land trade without necessarily disturbing substantive laws.

Third, a transparent group forum could offer a form of social enforcement that the fragmented web of investment treaties cannot provide. Multilateral organizations use "outcasting" as a method of passive enforcement to regulate undesirable behavior.[162] If a member to a treaty body fails to act in accordance with accepted international norms, it can be excluded from participating in forums or have voting rights suspended.[163] For example, the WTO can authorize governments to suspend trade concessions and retaliate against members that adopt illegal trade measures, even though it cannot force members to change the underlying measures.[164] The World Health Organization restricts benefits, such as voting on global health regulations in the World Health Assembly, when members fail to meet mandatory financial contributions.[165] A multilateral investment body could adopt a similar approach to enforcement. While a multilateral agreement is by no means a perfect solution, it is about filling in the legal gaps in the current fragmented framework. Even if a multilateral agreement was

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160 *See* Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 87, art. XIX, XX (1994).

161 SMALLER & MANN, *supra* note 14, at 3.

162 Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, 305 (2011).

163 *Id.*

164 Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 1869 U.N.T.S. 401, art. 22 (1994).

165 Hathaway & Shapiro, *supra* note 162, at 306.

adopted, much more is needed to address the deeper-rooted issues of global land trade.

B. Corporate Due Diligence

The privatization of stakeholders in global land trade cannot continue to prevent meaningful regulation. There is no reason why private actors that benefit from globalization and the ability to transact across borders should be allowed to continue circumventing socioenvironmental regulations and exporting the negative consequences to the Global South.

Without legally binding policies and enforcement mechanisms, compliance relies on corporate self-regulation and private social auditing processes. These social auditing processes are highly distortive. This is due to the financial relationship between corporations and private auditors, reliance on corporate records and disclosures, and distance between corporate decision makers and actual practices in host states.[166] Currently, social auditing processes are a smokescreen that allow MNEs to promote an image of social responsibility while ignoring socioenvironmental abuses in their global supply chains.

Requiring MNEs to systematically assess and respond to socioenvironmental abuses in their supply chains is one solution. But while the UN Guiding Principles on Business and Human Rights set out best practices for corporate due diligence in managing global supply chains,[167] these principles are not binding. Compelling MNEs to actively manage their supply chains requires domestic legislation. France and Germany—the EU's two biggest economies—have both adopted corporate due diligence legislation to require MNEs to actively manage global supply chains.[168] France enacted its Law on the Duty of Vigilance of Parent Companies and Ordering Companies ("Vigilance Law") in 2017.[169] And Germany recently passed its Corporate Due Diligence in Supply Chains legislation on

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166 Genevieve LeBaron et al., *Governing Global Supply Chain Sustainability Through the Ethical Audit Regime*, 14 GLOBALIZATIONS 958, 960 (2017).

167 *See* OHCHR, *supra* note 158.

168 Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des enerprises donneuses d'ordre [Law 2017-399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 [hereinafter Law on the Duty of Vigilance]; Unternehmerischen Sorgfaltspflichten in Lieferketten [Corporate Due Diligence in Supply Chains], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 19/28649, as amended by vom Ausschuss für Arbeit und Soziales geänderten Fassung [the Committee on Labor and Social Affairs], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 19/30505 (Ger.) [hereinafter Corporate Due Diligence Law].

169 *See* Law on the Duty of Vigilance, *supra* note 168.

June 11, 2021.[170] These are the only national laws that incorporate due diligence into domestic law so far.

France's Vigilance Law is considered the "best known and most far reaching" mandatory human rights due diligence framework.[171] Corporations covered under the Vigilance Law have a legal obligation to "adhere to a standard of reasonable care, while performing any acts that could foreseeably harm human rights or the environment."[172] They must elaborate on, disclose, and implement vigilance plans, with stakeholder participation, to "adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment."[173] The Vigilance Law also provides a civil right of action and fines as penalties for noncompliance.[174] More domestic legislation that requires greater transparency from corporations and active supply chain management will undoubtedly help improve some issues. The EU is even considering EU-wide due diligence legislation[175] that could encourage due diligence legislation worldwide. Domestic legislation cannot be the only answer, as there is nothing but political and public pressure to force states to adopt legislation, but these laws are important progressive steps towards greater reform that will influence other states.

C. Investor-State Dispute Settlement Reform

ISDS remains a serious barrier to transparent investment practices and improving global land trade, but some important reforms are being considered. UNCITRAL's Working Group on Investor-State Dispute

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170 *See* Corporate Due Diligence Law, *supra* note 168; *see also German Parliament Passes Mandatory Human Rights Due Diligence Law,* BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/ (last visited June 16, 2021).

171 OHCHR, UN HUMAN RIGHTS "ISSUES PAPER" ON LEGISLATIVE PROPOSALS FOR MANDATORY HUMAN RIGHTS DUE DILIGENCE BY COMPANIES 3 (2020), https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

172 Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 318–19 (2017).

173 Law on the Duty of Vigilance, *supra* note 168, at n. 1, art. 1, ¶ 3; *see also* Cossart et al., *supra* note 172, at 320.

174 Cossart et al., *supra* note 172, at 321.

175 *See Proposal for an EU Wide Mandatory Human Rights Due Diligence Law*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/proposal-for-an-eu-wide-mandatory-human-rights-due-diligence-law/#timeline (last visited July 8, 2021); *see also Commission Work Programme 2021*, annex, at 3, COM (2020) 690 final (Oct. 19, 2020) (European Commission 2021 Work Programme including a legislative proposal for a directive on sustainable corporate governance).

Settlement Reform is currently considering changes to the UN's investor-state arbitration system.[176] At its fortieth session, the Working Group considered two important reforms. The first is the creation of a standing body for the selection and appointment of adjudicators.[177] A standing mechanism would make the selection of arbitrators in ISDS a similar process to the selection of judges in existing international courts and tribunals. This would allow contracting states to select a pool of arbitrators in a permanent framework, but not the appointment of arbitrators to disputes in which they are a party. The result would be greater consistency and independence of arbitrators.

The Working Group emphasized the importance of "ensuring balanced representation and diversity to promote legitimacy, accountability, independence and procedural fairness," as well as the need for adjudicators to be "attentive to the sustainable development policies of the respondent State."[178] This would combat pro-investor biases in the current system, which relies on a small number of arbitrators and law firms to maintain the status quo.[179] While this reform may introduce an element of politics to the selection of arbitrators,[180] a political element may actually help to bring more attention to ISDS.

The second reform is an appeals process for ISDS tribunals decisions. The Working Group found that an appellate mechanism could enhance the "correctness and consistency" of ISDS tribunal decisions.[181] It identifies a number of issues in designing such a mechanism for ISDS. These include costs, caseload management, consistency with the current fragmented regime, the need for more empirical data regarding ISDS tribunal decisions, and procedural considerations like the scope and standard of review that an appellate mechanism would adopt.[182] Notably, one of the suggestions for the standard of review was that "cases relating to critical issues, such as public health and environmental law, should be subject to de novo review."[183]

Although there are still many unanswered questions and roadblocks, integrating an appellate mechanism into the current ISDS framework

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176 UN Comm'n on Int'l Trade Law (UNCITRAL) Working Group III (Investor-State Dispute Settlement Reform), Rep. on the Work of its Fortieth Session, U.N. Doc. A/CN.9/1050, at 6 (2021).

177 *Id.* at 5–11.

178 *Id.* at 9–10 (parenthesis omitted).

179 SORNARAJAH, *supra* note 6, at 47.

180 UNCITRAL, *supra* note 176, at 10.

181 *Id.* at 12.

182 *Id.*

183 *Id.* at 14.

could have an important impact on international investment law. The presence of an appellate body at the international level may encourage greater consistency, predictability, and independence in ISDS if tribunal decisions are subject to appellate review. While these reforms are very much in the exploratory phase, they show that institutions like UNCITRAL are attempting to reform the current system. If UNCITRAL maintains its commitments to ensuring diversity in the adjudicator selection process and de novo review for cases on critical issues, a future appellate mechanism may better address socioenvironmental concerns. However, even without these features, these reforms would encourage stronger multilateral cooperation, which the current framework lacks.

CONCLUSION

The global land trade system is full of legal blind spots. The foreign investors engaged in global land trade are shielded from domestic, host-state, and international socioenvironmental policies. International environmental and human rights law cannot improve global socioenvironmental conditions if MNEs continue to exploit land under the cover of this legal smokescreen. Clinging to the idea that neoliberal, free-market policies will eventually lead us toward global sustainable development is not only naïve but also incredibly harmful to the planet and its most vulnerable populations. While there has been some improvement of the international investment system, such a complicated and fragmented framework is not easily reformed—a few states cannot do it alone. FDI injects capital into developing countries, but there is no assurance that the host state or local communities will benefit from the investment. Supporting sustainable economic development in capital-starved countries through FDI requires planning, coordination, stakeholder engagement, and, above all, commitment. We cannot just accept that multinational for-profit corporations will be committed to supporting sustainable development because FDI can support sustainable development. We need a legal system that either demands commitment from states and foreign investors to support sustainable development goals or sanctions them if they fail. The current system is little more than a smoke and mirrors act that perpetuates the effects of colonialism through a corporate regime.