

Lights and shadows in the relationship between international law and sustainable investments: The challenges of ‘natural resources grabbing’ and their effects on State sovereignty

*Francesca Romanin Jacur**

1. *The nexus between investments in natural resources and sustainable development*

It is reasonable to enquire as to whether international law has evolved to require that today, investments in natural resources be carried out in compliance with a sustainable approach. A positive answer can be given in response to this question, based on the following considerations. In 1987, the Brundtland report provided what is now the famous definition of sustainable development, stating that it is: ‘development which meets the needs of the present without compromising the ability of future generations to meet their own needs’.¹ Subsequently, several legal instruments were adopted in the 1990s, *inter alia* the adoption of the Rio Conventions, the ‘restyling’ of the preamble of the WTO, the ‘greening’ of the World Bank policies and the restructuring of the Global Environment Facility (GEF). The sustainable development discourse finds its roots in these legal instruments, which call for a convergence between the three pillars of economic development, social equity and environmental protection. All these developments, across various sectors of international law, marked a decisive change in the approach taken to the exploitation of natural resources which meant mov-

* Adjunct Professor of International Environmental Law and Sustainable Development, Università degli Studi di Milano, Dipartimento di Diritto Pubblico Italiano e Sovranazionale.

¹ ‘Report of the World Commission on Environment and Development: Our Common Future’ (4 August 1987) UN Doc A/42/427, Annex (‘Our Common Future’), Part I, Chapter 2, section I (‘The Concept of Sustainable Development’).



ing towards a more sustainable path.² In light of these developments, generally speaking, it seems safe to say that any investment in natural resources must respect sustainable development criteria. ‘Zooming-in’ on what are the most relevant rules and principles that characterize an investment as being sustainable, the first that come to mind are participatory rights, such as public participation, access to information and justice in environmental-related decision-making, notably during environment impact assessment (EIA) procedures.³ On this path, more advanced guarantees like the Free Prior Informed Consent (FPIC) are being recognized by human rights instruments⁴ and by the recent entry into force of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, under the biodiversity regime.⁵

These procedural rules lie at the crossroads between environment and human rights protection and contribute to enhancing government accountability towards more sustainable behaviours. The recurrent endorsement of these procedural requirements and obligations by Multilateral Environmental Agreements (MEAs),⁶ as well as by international

² N Schrijver, ‘The Evolution of Sustainable Development in International Law: Inception, Meaning, and Status’ (2007) 329 *Recueil des Cours de l’Académie de Droit International* 217-412.

³ These are some of the principles identified by the International Law Association (ILA) as part of the concept of sustainable development. ILA Resolution 3/2002 ‘New Delhi Declaration of Principles of International Law Relating to Sustainable Development’, in *International Law Association Report the Seventieth Conference (New Delhi 2002)* (International Law Association, London, 2002).

⁴ See, for example, the 2007 UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly, UNGA Res 61/295 (13 September 2007) art 32: ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.’

⁵ Nagoya Protocol to the Convention on Biological Diversity, art 6, available at <www.cbd.int>.

⁶ Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1995) available at <www.unece.org/env/eia/welcome.html>; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) available at <www.unece.org/env/pp/treatytext.html>; Cartagena Protocol to the Convention on Biological Diversity, art 23, available at <www.cbd.int>.



human rights courts,⁷ their implementation by States and their adoption as benchmarks for projects to be eligible for financing by International Financial Institutions (IFIs)⁸ are all elements that contribute to the consolidation of new rules of international law, also of a customary nature, as in the case of EIA in a trans-boundary context.

While the normative framework is rich and comprehensive, serious loopholes are found when it comes to the implementation of these principles and norms in practice. There are several international legal tools that have an impact on the sustainability of investments and that characterize the difficult search for a balance between the economic development brought about by the exploitation of natural resources and the respect of fundamental human rights and of environmental protection. In this regard, a somewhat contradictory picture will be drawn in the following paragraphs: on the one hand, international law instruments challenge unsustainable natural resource practices and contribute to the avoidance or mitigation of their negative effects. On the other hand, the limitations on sovereign powers imposed by international law may exacerbate unsustainable investments and the so-called 'grabbing' of natural resources.

2. Looking for a better understanding of 'natural resources grabbing' practices

The term 'grabbing' is generally found with reference to land and is generally perceived as having a negative connotation. This is mainly because its use is associated with practices that not only fail to contribute to the sustainable development of the recipient countries, but also result in an adverse impact on human rights and the environment. Examples of 'natural resources grabbing' are large-scale leases of land for agricultural investment and the taking of resources such as water, forests and other resources essential for ensuring the livelihood of local peoples in developing countries, the taking from indigenous peoples of their an-

⁷ *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009).

⁸ World Bank Operational Policy 4.01 on Environmental Assessment; IFC, Performance Standard on Social and Environmental Sustainability, adopted by the IFC Board on 21 February 2006 and revised in 2011, available at <www.ifc.org>.



cestral lands and the massive and inhumane killing of endangered animal species in order to derive tradable products from them. The concept of ‘natural resources grabbing’ can be broken down into two dimensions, which may exist separately or contextually: a qualitative one that relates to the way in which these practices are carried out; and a quantitative one, which refers to the scale or gravity of the phenomenon. Besides looking at how natural resources are accessed or managed, ‘direct natural resources grabbing’ can be identified when the subject entitled to a natural resource is illegally deprived of it. This happens when natural resources – such as land, water, biological and genetic resources, forests, oil, gas and mineral resources, to name a few – are illegitimately obtained, being accessed in violation of the property rights of the owner and/or of the applicable procedural requirements. This is the case, for instance, of genetic resources which are accessed without obtaining the consent of the indigenous peoples who legitimately own them. ‘Indirect natural resources grabbing’, on the other hand, relates to the unsustainable management of the resources and encompasses situations where – even when the natural resources are legally accessed – their subsequent exploitation results in a negative effect on the environment, on the fundamental rights of the local communities and of the other stakeholders involved. This is the case, for instance, of investment contracts leading to long-term breaches of fundamental human rights and adverse environmental effects and the inadequate sharing of the benefits deriving from the exploitation of the natural resources with the local communities.

Despite its broad use, the complexity of the ‘grabbing’ phenomenon, means that at present, consensus on its constituent elements has yet to be reached among legal scholars, who have not yet been able to agree to a legal definition. A tentative definition of the ‘grabbing’ phenomenon with regard to natural resources could be the following:

‘the taking of natural resources that is decided and implemented in disregard of applicable procedural guarantees and that results in short or long-term adverse effects on human rights of local people and/or on the environment in the recipient country.’⁹

⁹ This definition has been outlined as a drawing together and conclusion of a collection of contributions discussing the ‘natural resources grabbing’ practices by F Romanin Jacur, A Bonfanti, F Seatzu, ‘Concluding Observations’, in F Romanin Jacur,



The generic word 'taking' is sufficiently broad to accommodate all the various forms that activities leading to 'grabbing' may take and indicates the main effect that they have, namely the dispossession or loss of control over the resources by their owners.¹⁰ Relevant activities may be private or public, foreign or national investments. They are often of a large-scale dimension, but they may also be smaller deals. The same can be said with regard to the legal structure of the deals, because a wide variety of options can be envisaged: acquisitions, concession agreements, project-financing and long-term leases are the first that come to mind. Relevant operations are not only the ones directly targeting land or other natural resources, as other activities may also result in the dispossession of natural resources, even those which pursue legitimate public interest objectives. One may think, for example, of the construction of roads to improve the communications within a certain area, which causes illegitimate expropriations of lands inhabited by local communities, or of the utilization of water from a river to provide electricity which significantly reduces access to water for agricultural purposes. Hence, the qualifying character rests on the effects linked to the activity carried out and in the modalities according to which it takes place. This definition then deals with the decision-making process according to which the 'taking' occurs. In this regard, the definition assumes that there are procedural steps and guarantees that need to be respected to make sure that all the stakeholders are adequately informed and able to participate in the process. These aspects will be further examined in depth here-under. Finally, the last part of the definition refers to the negative local impact on the human rights of people and on the environment deriving from these practices and provides for the time and geographical frame.

3. *The exercise of State sovereignty over natural resources*

The State's right to dispose freely of its natural resources means *in-*

A Bonfanti, F Seatzu (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill 2015) 427.

¹⁰ This term is largely used also by L Cotula, *Human Rights, Natural Resources and Investment Law in a Globalised World* (Routledge 2012).



ter alia the right to determine and control the prospecting, development, exploration, exploitation, use, and marketing of natural resources. These are some of the many rights that States can confer on foreign investors. States may exercise their sovereignty over natural resources by directly exploiting their resources, or by delegating the task of exploiting their resources to other subjects in exchange for an economic return, for instance by concluding concession contracts.

Permanent sovereignty over natural resources is not absolute and means that States in exercising it must also respect a series of duties: first and foremost, the pursuit of the national development and the wellbeing of the people. Furthermore, the exercise of sovereign power must be consistent with the international environmental and human rights obligations binding on the State and with the international law on the protection of foreign investments. Thus, permanent sovereignty over natural resources is a complex notion, embracing freedoms, rights and duties. While States are free to directly exploit their resources or to delegate this task to other subjects, they remain bound to comply with their international obligations and to respect the self-determination of their peoples.

When the exploitation or alienation of natural resources leads to the transfer not only of possession – but also of control over them, from the host State to foreign private or public investors, this may erode the effective exercise of state authority over lands and any related natural resources. This is typically the case in long-term land deals that lease large portions of a State's territory for periods of up to 99 years. Situations such as these suggest that an erosion of State sovereignty is, indeed, taking place from within the State: by leasing or selling these large portions of their lands, the governments of the affected countries lose their decision-making authority and damage the fundamental nexus between the central government, the management of the territory and the well-being of its inhabitants.

This phenomenon occurs notably with regard to land grabbing and gravely weakens State sovereignty, because while formally retaining ultimate jurisdictional control over the territory, foreign state entities or private investors gain the right to exploit the land and to dispose of its



agricultural products and to take control over vital land resources.¹¹

4. *The internationalization of human rights to enjoy natural resources and their effects on State sovereignty*

4.1. *The principle of self-determination*

The right to self-determination is recognized by art. 1 of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states:

- '1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (...)

Here, the right of internal self-determination, which empowers the people to decide over their economic, social and cultural future, including through the control over their lands and natural resources, is regarded as a collective right.¹² The 'internal' dimension of self-

¹¹ F Violi, 'The Practice of Land Grabbing and Its Compatibility with the Exercise of Territorial Sovereignty', in Romanin Jacur, Bonfanti, Seatzu (n 9) 25.

¹² The principle of self-determination has been described by the ICJ as the 'need to pay regard to the freely expressed will of people (...) in matters concerning their condition.' *Western Sahara* (Advisory Opinion, 16 October 1975) [1975] ICJ Rep 33. In the East Timor (Portugal v. Australia) case, the Court clarified the legal nature of self-determination by recognizing that it is 'one of the essential principles of contemporary international law' and that it is also a 'right' with 'an *erga omnes* character.' *East Timor (Portugal v Australia)* (Judgment, 30 June 1995) [1995] ICJ Rep 90, 102. While its importance and recognition as a fundamental customary principle of international law is far beyond doubt, differing views emerge when the principle further develops into more specific rules and norms. Scholars debate whether self-determination is a 'soft' legal principle that informs international law and its development, or whether it may also translate into justiciable autonomous rights. These issues are extensively discussed notably by A Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995); J



determination, namely the relationship between the peoples and the State where they live, is further developed in the context of the recognition of the rights of indigenous peoples, local communities and minorities by the African Commission, by the UN Human Rights Committee and by the UN Declaration on the Rights of Indigenous People (UNDRIP).¹³

Relevant human rights conventions have acknowledged the right of indigenous peoples to land, both by setting standards of substantive and procedural character. Thus, for example, under Article 27 of the ICCPR, a right of 'effective participation' in decision-making is provided and the ILO Convention 169 (27 June 1989) provides that the indigenous peoples shall be consulted with regard to measures, which may affect them directly. The consultations shall be conducted in good faith and 'with the objective of achieving agreement or consent to the proposed measures'.¹⁴ Furthermore, Articles 14 and 15 of the Convention go further in recognizing the substantive land ownership rights of indigenous peoples, which provides a negative right of protection against State interference, as well as positive rights to ownership and use.¹⁵ When indigenous rights on ancestral lands are recognized as being of a customary nature, they derive their legal basis from a source of law that is pre-existent and enjoys a certain degree of autonomy from the State.

Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in P Alston (ed.), *Peoples' Rights* (OUP 2001) 7.

¹³ UN Declaration on the Rights of Indigenous Peoples (n 4), art 19: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'

¹⁴ ILO Convention 169, art 6 paras 1 and 2; art 7.

¹⁵ ILO Convention 169, art 14: '1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned. See G Ulfstein, 'Indigenous Peoples' Right to Land' (2004) 8 Max Planck YB UN L 1-47.



From this perspective, the international recognition of people's rights over natural resources may be seen as a form of restriction of State sovereignty.

States are often unwilling or unable to adequately manage the challenge of resources grabbing within their territory, particularly when the economic national interests are not aligned with the interests and rights of their local communities and indigenous peoples. In these cases, States' governmental and administrative authorities often exercise their powers in ways which encroach upon self-determination and other fundamental human rights. Furthermore, it should be noted that many domestic legal orders do not provide for an effective protection of peoples' rights in respect of natural resources. In this context, international law may provide for a complementary protection, by upholding the substantive rights of peoples to their natural resources vis-à-vis their home States. The unsustainable exploitation of natural resources may lead to the violation of the principle of self-determination and of other human rights, and even lead to the suppression of their fundamental freedoms. Many controversial issues arise in this context, first and foremost because there is still uncertainty on the definition of 'people' in international law and on whether the rights on natural resources are individual or collective rights.¹⁶

4.2. *Access of individuals to international adjudication procedures*

International norms recognize the right of individuals and other non-state actors to access human rights Commissions and Courts and other quasi-judicial bodies, like the Compliance Advisor Ombudsman of the International Financial Corporation (IFC) to obtain remedies in case of violation of their rights. A key role is played by international human rights bodies, as reflected in the jurisprudence of the Inter-American Court of Human Rights¹⁷ and the African Commission on

¹⁶ Ulfstein (15).

¹⁷ The Inter-American Court of Human Rights recognized the right to access information when it found that the refusal by the Chilean Foreign Investment Committee to disclose information on a deforestation project was in violation of art 13 of the Inter-American Convention on Human Rights. (*Claude Reyes v Chile* (Judgment, 19 September 2006) IACtHR No 151).



Human and Peoples' Rights¹⁸ recognizing and strengthening peoples' rights vis-à-vis their home States.¹⁹ Beside the recognition of procedural and substantive human rights, such as the right to property, to food, and to freely dispose of natural resources, international human rights systems provide for the legal protection of these rights, thereby strengthening the enforcement of international norms. Through their jurisprudence they influence other international jurisdictions, as well as the decisions of national courts and in so doing, they inform the development of lawmaking at the national and international levels.

5. *International commitments shrinking State regulatory powers and hampering their capacity to adequately address the exploitation of natural resources*

State sovereignty might be limited by international law – this time with counter-productive effects on sustainable investments – when States are unable to effectively address these challenges, because they are engaged in international obligations arising from investment and trade agreements that have a shrinking effect on their domestic policy space. Thus, for example, the ability of WTO member States to implement regulatory measures aimed at protecting animals or managing their essential water and energy resources is heavily conditioned, if these measures encroach upon the WTO trade liberalization commitments. Analogous considerations apply in the investment context: Bilateral Investment Treaties (BITs), Free-Trade Agreements (FTAs) and the financial assistance agreements of IFIs and the European Union impose

¹⁸ For example, the African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (Decision 4 February 2010) Comm No 276/2003. In this case, the Commission found Kenya in violation of art 21 of the African Charter affirming peoples' right to freely dispose of their natural resources for not having undertaken proper consultation with the concerned indigenous community and not having obtained their consent. J Gilbert, 'Indigenous Peoples' Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) ICLQ 37.

¹⁹ On the international protection by the European and Inter-American Courts of Human Rights of property rights of indigenous people over their ancestral lands in the absence of formal title under national law, see Cotula (n 10) 13.



conditions upon recipient States that limit their sovereign prerogatives.

These are different phenomena that occur whenever States willingly consent to be bound by international treaties that limit their sovereign prerogatives. Though we maintain that these cases are, indeed, formal exercises of State sovereignty, nonetheless these situations may – and often do – result in *de facto* limitations of the State regulatory powers.

6. *The emergence of a legal regime on sustainable investment in natural resources*

Natural resources provide for the basic livelihood and sustenance of local people, but at the same time they are tradable goods and commodities with an economic value. This double-sided character is at the root of the inherent diverging interests of economic development, on the one hand, and human rights and environmental protection, on the other. The fundamental purpose of a legal regime that ensures the sustainability of investments in natural resources requires a balance to be struck between these interests, so as to combine the three pillars of sustainable development. First and foremost, States, who are still the main actors in this play, should exercise their sovereign prerogatives on natural resources in a functional manner in order to foster economic development and, at the same time, keep in mind their responsibilities to ensure the protection of human rights, as well as the well-being of people, the proper use of agricultural lands and the environment, by guaranteeing the sustainable access to – and the sound management of – natural resources.²⁰ To achieve these purposes, States should not only refrain from interfering with the enjoyment of human rights, but are increasingly required, *inter alia* pursuant to their international obligations under human rights and environmental treaties to adopt measures that enhance the protection and legal certainty of such rights.

From a normative perspective, looking across the relevant international legal instruments for basic rules and principles informing the le-

²⁰ In this vein, Francioni speaks of 'responsible sovereignty'. F Francioni, 'The private sector and the challenge of implementation', in P-M Dupuy, J Viñuales (eds) *Harnessing Foreign Investment to Promote Environmental Protection. Incentives and Safeguards* (CUP 2013) 34.



gal regime for sustainable investments on natural resources, some common essential elements may be found. They mainly relate to the ways in which natural resources are accessed and managed. With regard to access to natural resources, procedural guarantees are increasingly provided in favour of the legitimate owners of such resources. One may think, for instance, of the prior informed consent (PIC) requirements set by human rights instruments, such as the UNDRIP, by MEAs, such as the Convention on Biological Diversity (CBD) and its Nagoya Protocol, and by the operational policies of IFIs. These international instruments require States to adopt adequate domestic measures that improve the legal protection of property rights vis-à-vis the host State itself and third parties, such as foreign investors. These mechanisms include collective rights of participation and consultation with affected individuals and communities, and individual rights to access to justice and remedies for potential violations of these rights. The recognition of procedural rights has greatly advanced, but may further develop. For example, a veto power of local populations over the approval of projects that endanger food security, the environment, and/or their traditional livelihoods is not yet endorsed under the international instruments considered. Furthermore, the obligation to consult in good faith with peoples that could potentially be negatively affected by investments in natural resources could be taken in to account in the drafting of new BITs. Furthermore, when procedural or substantive obligations are recognized as being customary law or when the host and home States are Parties to human rights instruments that provide them, they could and should be taken into account by investment tribunals either as interpretative tools or as applicable law.²¹

Another fundamental tenet of this emerging legal regime is the sharing of the economic and non-economic benefits deriving from the exploitation of natural resources. This concept and its related rules derive from the principle of equity and are meant to reward the individuals and communities who own and sustainably manage the resources. In this regard, noteworthy advancements are found in the human rights

²¹ T Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) *J World Investment and Trade*, 929-963, at 963 optimistically sees a trend towards a better conciliation of the interests of the business community and those of the host State and of other stakeholders.



jurisprudence, which clarifies the normative content of such rights and expressly recognizes the importance of its cultural dimension. The recognition of the value of the special relationship between ancestral lands and their inhabitants and of traditional knowledge transmitted within indigenous communities concerning their natural resources represents another emerging trend.

In conclusion, natural resource grabbing has recently gained notoriety as a worrisome phenomenon of unsustainable investment that attracts attention and concern and that requires appropriate regulatory tools to contain its negative effects. The inherent double-headed nature of sovereignty over natural resources and the problems arising when its exercise by the governmental authorities is not aligned with, and encroaches upon, the peoples' rights are crucial aspects linked to grabbing practices that raise questions for which international law has yet to provide for satisfactory answers. The recognition of substantial and procedural rights and guarantees seems a well-established trend to address many of the hurdles posed by these challenges, and may be considered as the primary elements of this developing legal regime.