

**Sustainable investment in land in the Global South:
What would it require from a coherence perspective?
The case of Sierra Leone**

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1. Introduction

Large scale acquisitions of land in the Global South have significantly increased since the millennium.¹ It is often the case that foreign investors are involved in such acquisitions, which are commonly aimed at facilitating the export of commodities.² These investments in land tend to transform conventional, rather small scale agricultural systems into large scale, industrial agricultural systems.³ While investment in agriculture in the Global South is much needed, large-scale investments in land often goes hand-in-hand with environmental and human rights related challenges. As a consequence, lawyers need to address questions of sovereignty over natural resources (this paper focuses in particular on land resources), to peoples' right to self-determination, to the responsibilities of the home and host states of the investors, including public-private relationships, and the role of international institutions who are involved, as well as relevant jurisprudence. This paper approaches these questions from the perspective of a theory on policy coherence for sustainable development.

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¹ Land matrix, available at <www.landmatrix.org/en/> (Land matrix).

² This paper focuses on large scale land acquisitions of this kind.

³ Land matrix.

2. *The responsibilities of States vis-à-vis their land based on the principle of sovereignty over natural resources*

When it comes to large-scale investments in land, the state within which the boundaries of the land is located has not only rights, but also bears *responsibilities* vis-à-vis its land, based on the principle of sovereignty over natural resources. This principle has evolved over the last decades.⁴ Primarily rights-based initially, it developed into a principle encompassing both rights and duties. While the rights perspective was related to the developmental dimension of the principle, the duty element was strengthened once environmental claims garnered more attention.⁵ Today, it is recognized that States are not fully free to manage their resources, but that they must also respect the interests of other States and the international community as a whole.⁶

This nuanced understanding is *inter alia* reflected in Principle 2 of the 1992 Rio Declaration.⁷ Accordingly, States have the sovereign right to exploit their own resources pursuant to their own environmental and also developmental policies. But the State also has ‘the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’. This more nuanced principle of sovereignty over natural resource rights has since provided guidance to many environmental treaties, such as for instance the Convention on Biological Diversity (CBD).⁸ Against the backdrop of the concept of sustainable development, this responsibility entails a ‘duty to ensure sustainable

⁴ N Schrijver, ‘Permanent Sovereignty over Natural Resources’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* vol 3 (OUP 2012).

⁵ *ibid.*

⁶ The notion of ‘sovereignty’ as such already entails elements of responsibility and cooperation. See FX Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer 2000).

⁷ UN Rio Declaration on Environment and Development, Annex I to the Report of the United Nations Conference on Environment and Development of 12 August 1992 (UN Doc A/CONF.151/26, vol I) available at <www.un.org/documents/ga/conf151/acnf15126-1annex1.htm>.

⁸ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) art 3, available at <www.cbd.int>. For an in-depth analysis, see N Schrijver, *Sovereignty over Natural Resource. Balancing Rights and Duties* (CUP 1997).

use'.⁹ 'Sustainable' use implies the maintenance of the resources for future generations, or as Edith Brown Weiss puts it: 'While states have sovereignty over their territory, this sovereignty is of necessity tempered by the requirements of intergenerational equity'.¹⁰ This implies for large scale acquisitions that host governments have the right to determine who invests in land, but must ensure that such investments imply a careful management of soil and biodiversity resources, but also respect peoples' right to self-determination and related social standards (which are also reflected in the term 'sustainable'; see para 2.3).¹¹

3. Who else bears the responsibility to use natural resources in a sustainable way?

3.1. Concepts capturing the sharing of responsibilities

In the debate about large scale land acquisitions (LSLAs), the focus is often on the responsibility of the country in which the investment is located (the host State). However, the question arises of whether the home State of the investor (the State where the investor is domiciled), international institutions and the investor as such, also bear responsibilities vis-à-vis the land in question.

Since 1970, different legal concepts have evolved which seek to capture shared responsibility. They include the concept of the common heritage of mankind, the concept of global commons, the concept of sustainable development or the concept of common concern. The concept of the common heritage of mankind holds that certain qualified elements of our common natural and cultural heritage should be held on trust for future generations, since they are of global interest. According-

⁹ ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (adopted 6 April 2002) Res 3/2002 (ILA New Delhi Declaration) available at <www.ila-hq.org>. See eg art 2 of the CBD for a definition of 'sustainable use'.

¹⁰ EB Weiss, *Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers 1989).

¹¹ Regarding 'peoples' right to self-determination', see F Romanin Jacur, 'Lights and shadows in the relationship between international law and sustainable investments: The challenges of 'natural resources grabbing' and their effects on State sovereignty' (2015) 21 QIL-Questions of Intl L 3-15.

ly, responsibility is a shared one.¹² The concept of global commons in contrast refers to common goods which can be owned neither by individuals nor states, such as those in Antarctica, deep sea resources, migratory species, the atmosphere, or the climate. In the case of global commons, sovereignty rights are restricted or do not exist, and responsibility is – implicitly – also a shared one.

The concept of sustainable development – as introduced in 1987 and shaped by the 1992 Rio Declaration – takes this one step further by evoking the principle of common but differentiated responsibilities as a core principle of sustainable development. The principle of common but differentiated responsibilities not only asks for a differentiated approach towards responsibilities, but also for responsibilities to be commonly shared.¹³ Similarly, the evolving concept of common concern – invoked in some international treaties¹⁴ – seeks to grasp the idea of shared responsibility in more detail. It goes beyond the concept of the common heritage of mankind and the concept of global commons and captures all uses of natural resources which are of common interest to the global community, independent from the resources being classified as heritage or not. Attempts to more closely define the concept of common concern are ongoing. Evolving theory suggests that it ought to be applied to problems related to natural resources which cannot be solved unilaterally. A common interest in resolving the issue should exist, and equity related questions should be concerned. Given all these premises, a general duty to cooperate is affirmed (even independent from being classified as ‘home’ or ‘host’), and – in the absence of common action – unilateral action can be taken.¹⁵

¹² It found legal foundation in the Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.

¹³ See Principle 7 of the 1992 Rio Declaration.

¹⁴ See eg the preamble to the International Treaty on Plant Genetic Resources for Food and Agriculture (adopted 3 November 2001, entered into force 29 June 2004) (ITPGRFA) available at <www.planttreaty.org/content/article-xiv>: ‘Cognizant that plant genetic resources for food and agriculture are a common concern of all countries, in that all countries depend very largely on plant genetic resources for food and agriculture that originated elsewhere’.

¹⁵ See eg T Cottier, ‘The Emerging Principle of the Common Concern: A Brief Outline’ in E-U Petersmann (ed), *Multilevel Governance of Interdependent Public Goods: Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century* (Eu-

If management of land was regarded as a common concern, a shared responsibility of home states, host states, business enterprises and the international community as a whole, would exist. Questions of whether *home country* regulation and *international law* also provide for an enabling environment for sustainable investments to occur, and of whether *the investor* as such behaves in a sustainable way, are of equal value from this perspective. This requires a shared responsibility, for instance, when aligning existing investment and agricultural policies with land related environmental and human rights standards (see para 4). Such thinking of land as a common concern is not utopian. Given the importance of land related resources for human society and their degree of degradation, it being used in a sustainable way becomes a concern of the whole of global society.¹⁶

3.2. A multi-layered governance perspective is needed

When outlining a ‘shared responsibility’ framework for LSLAs, it is helpful to complement the concept of common but differentiated responsibilities, respectively the concept of common concern, by a multi-layered governance perspective.¹⁷ This perspective suggests that various levels of governance interact and must be assessed jointly. It depends on different layers of governance as to whether investments in natural resources are carried out in a sustainable way. Accordingly, an enabling environment for sustainable investments is only ensured if all levels of governance are geared towards this aim.

It is generally up to the host state¹⁸ to define the role the investor should play in its regulation. Following the principle of good govern-

ropean University Institute 2012); J Wehrli, *A Single World. Intergenerational Justice and the Concept of Common Concern in Marine Resource Allocation* (forthcoming).

¹⁶ See G Schwilch, HP Liniger, *Saving soils at degradation frontlines: sustainable land management in drylands* (CDE policy brief 2015), available at <www.cde.unibe.ch/services/publications/policy_briefs/e98881/e213791/05_CDE_PB_Dry_land_Soils_eng.pdf>.

¹⁷ T Cottier, M Hertig, ‘The Prospects of 21st Century Constitutionalism’ (2003) 7 Max Planck YB UN 261-328.

¹⁸ In practice, a simple dichotomy between home and host countries may fail to account for existing complexities in value chains. In research, each stage should be assessed separately as a vertical activity of foreign direct investment, including related governance structures.

ance, home states must discuss investment policies in democratic processes, while assigning a key role to the local communities which are most concerned. Experience shows, however, that host state regulation is often too weak, particularly if other forces contravene. In order to get a more complete picture, it is necessary to assess how the policies of home states, regional policies, rules of international institutions and international law interact, to what extent they support host state's obligations, and whether they should be adapted to ensure that important lacunae are filled.

The concept of common concern – combined by a multilayered governance perspective – is not yet entirely reflected in existing hard law. But it is in part. Since LSLAs usually imply the transformation of traditional farming systems, human rights concerns and biodiversity issues are regulatory at stake. The following section will address the responses thus far taken by international law, highlighting in particular where a response is still needed.

4. Role of international law in the sustainable management of land

Both international human rights law and environmental law could contribute to sustainable investments in land if effectively implemented. While a range of almost universally accepted human rights and environmental treaties (and some international customary law) define boundaries of domestic resource use, experience shows that existing legal instruments are often not effective enough. In addition, the list of international regulation is not complete, and many gaps would still need to be covered.

4.1. International Human Rights Law

Those human rights treaties which are almost universally accepted – in particular the two Human Rights Covenants ICESCR and ICCPR¹⁹

¹⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1996) 993 UNTS 3 (ICESCR) available at <www.ohchr.org>; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) available at <www.ohchr.org>.

and the main ILO Conventions²⁰ – limit the freedom of States to manage natural resources. When it comes to LSLAs, human rights sensitive land tenure questions are often to the fore. Unfortunately, there is no binding international instrument (yet) specifically regulating protection of land tenure. But Human Rights treaties require States to ensure that land concessions are negotiated in an open, inclusive and non-discriminatory way, and that processes are established which ensure a careful balancing of public and private interests (while requiring consent in the case of indigenous communities), which promote inclusive management schemes and which ensure appropriate compensation in case land is legally expropriated.²¹ Article 17 of the ICCPR, for instance, specifically protects against forced eviction, while claiming that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence’.²² The respective ‘Eviction Guidelines’, drafted by the UN Special Rapporteur on Adequate Housing Miloon Kothari, establish strong criteria.²³ Accordingly, evictions shall only occur in exceptional circumstances and require full justification.²⁴ Importantly, the ‘forced eviction framework’ applies to all persons, ‘irrespective of whether they hold title to home and property under domestic law’.²⁵ Of particular relevance is also the right to adequate food which is enshrined in Article 11 of the International Covenant on Eco-

²⁰ ILO Conventions, available at <www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

²¹ C Golay, I Biglino, ‘Human Rights Responses to Land Grabbing: A Right to Food Perspective’ (2013) 34 Third World Quarterly 1630, 1650.

²² Art 17 of the ICCPR.

²³ UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, Basic Principles and Guidelines on Development-Based Evictions and Displacement (5 February 2007) UN Doc A/HRC/4/18 (Eviction Guidelines) available at <www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf>.

²⁴ According to para 21 of the Eviction Guidelines, ‘any eviction must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines’.

²⁵ Para 21 of the Eviction Guidelines. See also UN Special Rapporteur on the Human Rights of Internally Displaced Persons (former), Francis M Deng, Guiding Principles on Internal Displacement (11 February 1998) UN Doc E/CN.4/1998/53/Add.2 (Guiding Principles on Internal Displacement) available at <www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx>.

nomic, Social and Cultural Rights (ICESCR).²⁶ It implicitly covers land tenure issues to a certain extent. The right to food includes, *inter alia*, the obligation of the State to respect the ability of individuals and groups to feed themselves by access to land.²⁷ As recognized by most legal scholars, the international human rights covenants also include an extraterritorial angle.²⁸ Accordingly, while the primary duty lies with the state where the human rights violation takes place, states that are otherwise involved in any investments must ensure that their own activities do not result in human rights violations abroad. This requires from a home state – for instance – that it must only support investments (eg by investment treaties) if they adequately respect existing land tenure rights.

Accordingly, land tenure protection can be partly derived from the Human Rights Covenants. However, a more specific legal instrument would improve implementation. With the FAO Voluntary Guidelines on Land Tenure,²⁹ the international community has taken an important first step in this direction. The Guidelines call on governments to improve the governance of tenure of land, fisheries and forests, and to place particular emphasis on tenure rights of vulnerable and marginalized people, while requiring protection of both formal and informal tenure rights.³⁰

Further, the UN Guiding Principles on Business and Human Rights (Ruggie Principles, 2011)³¹ interpret the existing Human Rights Cove-

²⁶ ICESCR.

²⁷ Para I(1) of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge (28 December 2009) UN Doc A/HRC/13/33/Add.2, available at <www2.ohchr.org/english/issues/food/docs/BriefingNotelandgrab.pdf>.

²⁸ See eg the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (29 February 2012) available at <www.etoconsortium.org>, and the related commentaries.

²⁹ FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security, Food and Agriculture Organization (2012) available at <www.fao.org/nr/tenure/voluntary-guidelines/en>.

³⁰ It would not be the first time that international law regulates property rights (cf the TRIPS agreement of the WTO).

³¹ UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Final Report of the Special Representative of the Secretary-General on the Issue of Human Rights and

nants for business conduct. They spell out the duties of countries vis-à-vis business enterprises which are active within their boundaries, and the responsibility of the business enterprises themselves. Accordingly, host states have an obligation to ensure that ‘their’ business enterprises – companies who have a production site within their territory – act in a way that is consistent with human rights. The Ruggie Principles also have an extraterritorial angle, by suggesting that home states – the states where the headquarters are located – should regulate the external conduct of these enterprises in a human rights conducive way.³² Also, the *business enterprises as such* bear a ‘corporate responsibility to respect human rights’ and hence require a socially and environmentally responsible conduct.³³ In addition, the ILO-Conventions regulate labour rights which have to be regarded by States when they regulate business enterprises. It is here where today *home state regulation* is brought into focus given that it is not yet adequately adapted on a regular basis.³⁴

While international human rights pave the way for responsible business conduct in cases of LSLAs and – theoretically – provide affected people with legal instruments for redress, they often lack implementation in host States. As Golay and Biglino have indicated, most available literature concerns the question of whether human rights instruments *could* be used, but much less research has been undertaken on whether the instruments have been *effectively* used (see also the case study of Sierra Leone in para 4.2).³⁵

4.2. International Environmental Law

Environmental treaties also provide for environmental standards to which the member states should bind their investors. In particular, international standards of biological diversity are well advanced. For in-

Transnational Corporations and other Business Enterprises, John Ruggie (11 March 2011) UN Doc A/HRC/17/31 (Ruggie Principles) available at <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

³² Ruggie principles I.A.2.

³³ Ruggie 2011, Chapter II.

³⁴ See the National Action Plans which are currently elaborated upon in various European countries.

³⁵ Golay, Biglino (n 21). Such questions are examined in the ongoing research project R4D SNF Food Sustainability (<www.r4d.ch/modules/food-security/food-sustainability>).

stance, Article 6 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) constitutes an interesting entry point for a sustainability assessment of an LSLAs. It upholds the duty to pursue well-targeted agricultural policies which promote ‘diverse farming systems’. This is based on the suggestion that only a diversity in farming systems can ensure that biological diversity is maintained. For investments in land, this implies that a variety of investments following different patterns should be sought. Both the ITPGRFA and the CBD also include an extraterritorial angle and call for the establishment of enabling international regimes³⁶ (hence for regimes which promote a diversity of investments and farming systems).

The climate regime provides – to some extent contradictory – incentives for agricultural investments. On the one hand, it promotes climate friendly agricultural practices and ‘the art of doing agriculture’ by utilizing certain social, economic and environmental practices which are not only scientific, but also are traditionally knowledge based. Such practices are understood as mitigation measures which assist in reducing on-farm greenhouse gas emissions. On the other hand, the climate regime also promotes reduction of greenhouse gas emissions by eg tree planting for palm oil production, which is remunerated by emission trading mechanisms.³⁷ Experience shows that such activities may be drivers of problematic investments in land.³⁸

There are, however, still many gaps in international environmental law which would need to be covered. Lessons can be drawn from national and regional law. Experience with radical processes of land transformation in the last century in *Europe* brought forth legal instruments that ensured that land can serve the diverse interests of societies (including shelter and food production), and that soil resources are maintained. To the fore are spatial planning instruments, soil protection policies and different conceptions of tenure rights.³⁹ Experience with

³⁶ See eg art 22(1) of the CBD or the preamble to the ITPGRFA.

³⁷ E Bürgi Bonanomi, *Sustainable Development in International Law Making and Trade, international food governance and trade in agriculture* (Edward Elgar Publishing 2015).

³⁸ See M Dwyer, *The formalization fix? Land titling and land concessions in Cambodia* (CDE policy brief 2015) available at <www.cde.unibe.ch/services/publications/policy_briefs/e98881/e213657/04_CDE_PolicyBrief_Land_Titling_Cambodia_eng.pdf>.

³⁹ Bürgi Bonanomi (n 37).

LSLAs in the global south reveals that the problem spots are similar to those in Europe: while in certain contexts, a certain number of large scale investments in land may be beneficial if they help in reviving the local agricultural sector, such investments should not happen at the expense of the small scale farming sector. An effective spatial planning policy could secure such diversity of farming systems. But international minimum standards on spatial planning are absent. Similarly, large scale investments in land often negatively impact on soil resources given that land ecosystems are transformed into monocultures. If international environment law was to effectively require an environmentally sound treatment of soils, more sophisticated farming techniques would be incentivized around the globe. But also in relation to soil protection, international environmental law does not yet play the role it could play. The international instruments which directly or indirectly impact on the use of soils, such as the UNCCD,⁴⁰ the CBD or the ITPGRF, are not specific enough and have proven to be insufficient. Sustainability analysis of LSLAs makes apparent what further avenues international environmental law could take.

4.3. International Economic Law

The way that investments are framed also very much depends on the international economic regime. This regime – which includes the trade, investment and tax regimes – confines policy space of both host and home countries, by building the ‘channel through which investments flow’.⁴¹ Depending on the way it is shaped, it provides strong incentives for managing land resources in a sustainable or unsustainable way. But international economic regulation also has many gaps. They would need to be covered to promote sustainable investments in land. In the face of the pressure of market forces, the pertinent question is whether the economic regime is sufficiently aligned to serve human rights and environmental standards and to enable sustainable land use.

⁴⁰ UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3, available at <www.unccd.int>.

⁴¹ International Land Coalition et al (eds), *International Instruments influencing the Rights of People facing Investments in Agricultural Land* (2011).



It is often argued that international economic policies limit the competence of States to manage their resources in a way which is too restrictive. While this may be partly correct in the case of both trade, investment or fiscal regimes, the question is not only whether States maintain the ability to manage resources sustainably after having entered into such a regime, but whether States are encouraged, or rather dis-encouraged from managing resources sustainably by these regimes. This is based on the assumption that each economic regime comes with either incentives or dis-incentives regarding the non-economic policy sphere, and that there is no such thing as an ‘incentive-neutral’ economic regime. Accordingly, the following paragraph will delve into the theory of ‘alignment’, respectively ‘policy coherence’, and will explore to what extent the sustainable development framework can assist in operationalizing this theory for sustainable investments in land.

5. Alignment of economic regimes: An imperative of sustainable development law theory

5.1 Policy Coherence for Sustainable Development (PCSD) put into Law

In the debate on LSLAs, scholars and stakeholders increasingly recognize that there is a need to bring trade, investment and fiscal regimes, including agricultural policies, into alignment with human rights and land and soil related environmental policies. The call for an alignment and coherence of policies is founded in the sustainable development debate. It does not only address economic, but also addresses other regimes;⁴² however, economic regulation has always stood at the forefront given its strength and implications flowing from it.

Sustainable development law theory provides a theoretical underpinning for the alignment of legal regimes, respectively for coherence in international law. Since the Rio Conference in 1992, there have been several attempts to translate sustainable development into law. A prominent approach was presented by the International Law Association

⁴² For poverty reduction – for instance – it might be equally relevant that the climate regime is shaped in a human rights-sensitive way.

(ILA) in 2002, which identified seven core principles of international law which – taken together – provide the concept of sustainable development with concrete legal contours. The assumption is that a political process which respects all of the seven principles is geared towards sustainable development. The seven principles are listed in the New Delhi Declaration of the ILA,⁴³ and include (1) the principle of equity (encompassing both intra- and inter-generational equity); (2) the principle of common but differentiated responsibilities; (3) the duty of states to ensure sustainable use of natural resources; (4) the principle of precaution; (5) the principle of public participation; (6) the principle of good governance; and (7) the principle of integration and interrelationship.⁴⁴ The latter requires the integration of social, economic, environmental and human rights standards both in law making and law interpretation. All of the seven core principles of sustainable development are conceived as interrelated and complementary. Some of them have a firmly established legal status while others are emerging.

A more recent theory of sustainable development law has built upon the approach of the ILA but has gone one step further by affirming the existence of a legal principle of sustainable development.⁴⁵ This principle of sustainable development calls for systemic law interpretation and systemic law making. With respect to systemic law interpretation, the principle of sustainable development asks for open textured rules to be interpreted in a systemic way by referring to other legal regimes which are relevant in the context.⁴⁶ Systemic law making requires law making procedures that are shaped by the ‘duty to include’, the ‘duty to structure and weigh’ and the ‘duty to develop optimal options’.⁴⁷ Accordingly, in such a procedure, the impact of the negotiated proposal on society, on the environment and on the economy, at home and abroad, for

⁴³ ILA New Delhi Declaration.

⁴⁴ ibid.

⁴⁵ K Gehne, *Nachhaltige Entwicklung als Rechtsprinzip* (Mohr Siebeck, 2011).

⁴⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(c), available at <http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> and M Koskenniemi, *International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (2006) UN Doc A/CN.4/L.682, available at <<http://legal.un.org/docs/?symbol=A/CN.4/L.682>>.

⁴⁷ Bürgi Bonanomi (n 37).

current and future generations are assessed, trade-offs are made transparent and effectively debated and, based on these steps, optimal options are identified which live up to all the identified goals so far as is possible.

This theory is an expression of the fact that sustainable development policies are generally located ‘somewhere in between’, and it seeks to capture the *substantive coherence* of legal regimes (by asking for the dynamics released by a legal regime). It is here where terms such as an ‘enabling environment’ or ‘mutual supportiveness’ come in, and where certain policy instruments for integrative law making, such as sustainability impact assessments and deliberative consultation processes become relevant.⁴⁸ Accordingly, the recently adopted UN-Sustainable Development Goal (SDGs) 2 – which calls for achieving food security and promoting sustainable agriculture, and which is of particular relevance in the assessment of LSLAs – has to be interpreted in conjunction with SDG 17. SDG 17 addresses systemic issues and explicitly calls for the enhancement of ‘policy coherence for sustainable development’ (PCSD). The precise meaning of PCSD has yet to be defined, a task to which the theory of sustainable development law can significantly contribute.

5.2. A PCSD-perspective on a Sierra Leonian Case

When assessing LSLAs, there is a tendency to exclusively look at the *local impacts* of the given LSLA. While this perspective is a crucial one, there are also a range of systemic issues related to international economic regimes which should be addressed in sustainability assessments. The following findings, derived from a case study in Sierra Leone, illustrate how questions both related to local impacts and systemic implications can be framed, by taking a PCSD-perspective.

⁴⁸ S Rist et al, ‘Moving from sustainable management to sustainable governance of natural resources: The role of social learning processes in rural India, Bolivia and Mali’ (2007) 23(1) *Journal of Rural Studies* 23-37.

5.2.1. Investment in biofuels for export with contradictory local impacts

A Swiss-based inter-disciplinary research project assessed the investment of Addax Bioenergy in Sierra Leone and its impact on soil and land governance.⁴⁹ In 2010, the company, headquartered in Switzerland, concluded a Memorandum of Understanding (MoU) with the government of Sierra Leone about a bioethanol project in the Makeni area. Addax also finalized contracts with the landowners in the whole area about leasing 54,000 hectares, of which around 30,000 hectares have been relinquished to date. Until recently, approximately 10,000 hectares were effectively used for sugarcane pivots, which resulted in the production of biofuels destined for export (with some used for electricity for domestic use). 2,000 hectares are used for a farmer development program in which local smallholders are taught to grow rice in a semi-mechanized production system. On the remaining land, farmers grow their own crops while applying traditional slash-and-burn farming methods. For compensation, Addax has set up a rather complex reimbursement scheme under which both local chiefs and the landowning families benefit from the land rent, whereas the land users were not directly included in the schemes. In addition, Addax acted as an employer for a certain number of locals and immigrants. In 2013, Addax was awarded with sustainability certification by the Roundtable on Sustainable Biomaterials (RSB).⁵⁰

Concerning local impacts, findings revealed that even a project labeled as a best-practice example, risks not being adequately embedded in given societal structures. In the given case, the loss of natural resources and more reduced employment possibilities than expected has already had an impact on previously vulnerable groups. At the same time, their strategies of resistance negatively affected the project implementation.⁵¹ In addition, it was found that - in the absence of well-balanced public procedures –, investments may have undesired side-effects on land tenure systems, if they do not very carefully deal

⁴⁹ See <<http://p3.snf.ch/Project-143136>>.

⁵⁰ See <<http://rsb.org>>.

⁵¹ F Marfurt, F Käser, S Lustenberger, ‘Local Perceptions and Vertical Perspectives of a Large Scale Land Acquisition Project in Northern Sierra Leone’ (2016) *Homo Oeconomicus* (forthcoming).

with ownership structures including customary land tenure. Although the company tried to be respectful of national law and international guidelines that protect customary land systems, the findings showed that the formalization procedure, required to secure the land lease, emphasized traditional class-based inequalities, which led to the potential for new conflict amongst local land owners and users.⁵²

While such local knowledge is necessary to assess the costs and benefits of an LSLA, it does not yet provide for the full picture. While it is difficult to judge whether an LSLA is ‘good’ or ‘bad’, utilitarian approaches tend to lead to the conclusion that positive effects prevail, whereas deontological approaches lead to an emphasis on negative aspects. In this respect, it is important that a framework that focuses on the options of local residents is complemented by boundaries of acceptability through the core contents of human rights.⁵³ But the assessment does not stop there; in addition and very importantly, systemic implications on and of economic regimes, including agricultural policies, need to be regarded. It is not least here where the blind spots of private driven approaches to the capture of sustainability – such as the certification schemes of the RSB – become most apparent.

5.2.2. Systemic implications on and of economic regimes

In respect of systemic implications on and of economic regimes, the questions are twofold: on the one hand, it is relevant to assess to what extent the LSLAs impact on given economic regimes; given their large size, the investments will normally influence policy making. On the other hand, it is necessary to examine to what extent the current economic regimes co-determine the pattern of the investment. Concerning the case at hand, interviews with a range of Sierra Leonian stakeholders on the Addax case made apparent that the following systemic issues are at their heart, among others: Does the investment contribute to the development of an inclusive agricultural market, which does not miss out smallholders, but effectively involves them? Does the investment in-

⁵² P Bottazzi, A Goguen, S Rist, ‘Conflicts of customary land tenure in rural Africa: Is large-scale land acquisition a driver of ‘institutional innovation?’’ (2016) *Journal of Peasant Studies* (forthcoming).

⁵³ S Mann, E Bürgi Bonanomi, ‘Grabbing or Investment? On judging large-scale land acquisitions’ (forthcoming).

crease public revenue significantly? Does the investment encourage land policy reforms which are sensitive to local population needs? PCSD-related research can assist in structuring these questions and in broadening the picture.

Concerning investment policies, it is often debated whether investment treaties – which are negotiated between States – and investor contracts – which are negotiated between the investor and the government – unduly constrain the regulatory space of host countries.⁵⁴ In the given case, this can be affirmed. Sierra Leone has few investment treaties in place, and none with Switzerland (where Addax is headquartered). This implies that the negotiated investment *contract* does not only regulate the investment of Addax, but will probably also influence future investment policy making in Sierra Leone (the Addax case was often adduced by the government as a best practice example). From this perspective, it seems rather problematic that the MoU between Addax and the Government⁵⁵ includes a range of provisions which are deemed as not sustainable in respective debates. Para 13 of the Annex includes a ‘stabilisation clause’ stating that ‘if any law applied in Sierra Leone comes into effect or is amended, [...] which has a material adverse effect on the ability of ABSL’, then the Government ‘undertakes to grant to the Project [...] any exemption [...] necessary’. John Ruggie, in contrast, has argued that such stabilization clauses should ‘not interfere with the State’s *bona fide* efforts to implement laws [...] in a non-discriminatory manner, in order to meet its human rights obligations’.⁵⁶ Similarly, para 14 of the Annex promises ‘full compensation (including loss of profit) in case of expropriation’. The Investment Policy Framework for Sustainable Development (IPFSD) of the UNCTAD, in contrast, holds that compensation should be ‘equitable in light of the cir-

⁵⁴ L Cotula, ‘Do investment treaties unduly constrain regulatory spaces?’ (2014) 9 QIL-Questions of Int'l L 19-31; C Smaller et al, *Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks* (World Bank IISD 2015).

⁵⁵ Memorandum of Understanding and Agreement between the Government of the Republic of Sierra Leone, Addax Bioenergy Sierra Leone Ltd and Addax & Oryx Holdings BV (9 February 2010) (MoU) available at <<http://farmlandgrab.org>>.

⁵⁶ J Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to the Human Rights Council, Addendum, Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators (2011) UN Doc A/HRC/17/31/Add.3, principle 4.

cumstances of the case', and that 'recoverability of lost profits' should be limited.⁵⁷ The Arbitration Clause as included in para 7 of the Annex which states that disputes shall be resolved in London is also problematic seen through a sustainability lens.

Furthermore, there should be an assessment of what kind of investments are promoted through the investment policies of the host countries. In the case of poorer developing countries, these investment policies are regularly co-determined by donors and International Financial Institutions. The Sierra Leone investment and export promotion agency SLIEPA expressly promotes large scale investments in land, by holding that 'Sierra Leone has significant amounts of arable land, most of which remains uncultivated' and promising that 'the Government of Sierra Leone is prepared to take a head lease on provincial lands and sub-lease to foreign investors in order to mitigate risks'.⁵⁸ At the same time, the Ministry of Agriculture together with IFAD and other donors promote the Smallholder Commercialization Programme⁵⁹ which should support smallholder agriculture by increasing its productivity. Both programmes, however, are not shaped in a complementary way. Large scale investors are eg not required to include contract farming or to strive for other ways of cooperation with smallholders. A better alignment of these policies would help shaping investment patterns in a more sustainable way.

It is also important to examine whether trade policies are shaped in such a way as to support sustainable investments in agriculture. This would not least be the case if they supported smallholder inclusive farming systems. This again would presume that the adequate market incentives are in place, since the kind of farming systems which continue to exist are very much dependent on how markets are shaped.⁶⁰ But the interviews and the screening of investment related policy reports

⁵⁷ UNCTAD, *World Investment Report 2012, Towards a New Generation of Investment Policies* (2012) para 6.4.

⁵⁸ SLIEPA, Sector Profile, agriculture (2013). This leaflet was made with the support of the European Union.

⁵⁹ The Smallholder Commercialization Programme under the Global Agriculture and Food Security Programme (SCP-GAFSP).

⁶⁰ E Bürgi Bonanomi, 'Trade Law and Responsible Investment', in International Land Coalition et al (eds), *International Instruments Influencing the Rights of People Facing Investments in Agricultural Land* (2011) 68-88.



have indicated that a discussion on well-shaped trade related policies is almost absent in Sierra Leone, except for providing good conditions for commodity export. This might have something to do with the fact that tariff autonomy has been lost to a certain degree. As a member of the WTO, Sierra Leone would still have some flexibility in shaping markets; given that the current trade regime often restricts the policy space of member countries less than one tends to believe, as it is illustrated by WTO case law.⁶¹ Given uncertainty vis-à-vis current trade rules, however, member countries tend to refrain from taking trade measures which may *prima vista* violate prior trade commitments. In the given case, Sierra Leone has also become a member to the Economic Community of West African States (ECOWAS), restricting its tariff autonomy as long as such measures are not envisaged jointly. Such joint action for more enabling markets would, however, still be possible, even in the context of the European Partnership Agreement to which Sierra Leone will be a partner. Beyond maintaining regulatory space for developing countries, the trade regime could do more to provide an enabling environment for sustainable investments to occur. This includes the improvement of market access to OECD markets and the inclusion of sustainability requirements which do not exclude, but rather include processed goods from developing countries.⁶² Current international trade rules, however, do not yet ensure that ‘different forms of farming can coexist, each fulfilling a different function’; instead, ‘the balance has shifted almost entirely in favour of the large-scale export-led agricultural sector’.⁶³

With regard to tax issues, it is nowadays widely accepted that taxation should take place at the site of the production and actual added value and in such a way as to not erode the tax base.⁶⁴ From this perspective it is problematic that the MoU between the Government and Addax allows for very significant tax deduction and exemptions over

⁶¹ See eg WTO, *China: Measures Related to the Exportation of Various Raw Materials*, WT/DS394,395,398/R, Panel Report (1 April 2011), Report of the Appellate Body (22 February 2012), available at <www.wto.org>.

⁶² Bürgi Bonanomi (n 37).

⁶³ O De Schutter, former UN Special Rapporteur on the Right to Food, Final Report to the Human Rights Council (2014).

⁶⁴ See the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015) UN Doc A/69/L.82.

the period of 20 years.⁶⁵ The OECD has argued in a recent report that ‘tax incentives [...] may erode the country’s tax base with little demonstrable benefits’ and that there is a ‘need to assess the cost-benefit aspects of tax incentives’.⁶⁶ While this is an issue for the Government of Sierra Leone, it is also an issue for international law, which falls short in providing a level playing field and limiting aggressive tax competition. To counter aggressive tax avoidance practices, developing countries tend to keep the tax rates for active multinational companies very low. From a sustainability perspective, there are still many gaps which need to be filled, and imbalances which need to be tackled in international tax regulation.⁶⁷

These examples illustrate that private-led sustainability certification schemes – such as the one provided by the RSB – do not capture the full picture. From a sustainable law perspective, sustainability certification should only be awarded if underlying contracts are well-balanced and agricultural investment policies inclusive (which are – explicitly or implicitly – promoted by the investor). This again would require some public control over private-led initiatives and broadly based discussions on what is deemed sustainable. The Principles of Responsible Investment in Agriculture and Food Systems (RAI Principles) of the Committee on World Food Security (CFS)⁶⁸ provide an important reference point in this regard, since they were elaborated upon in a broad stakeholder process.

6. Conclusion

As a consequence, the common concern at land resources must be taken seriously. This requires that international law is shaped in such a

⁶⁵ MoU, para 9 of the Annex.

⁶⁶ OECD, *Part 1 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries* (2014) 5.

⁶⁷ See eg for Switzerland: W Thut, ‘Unlautere und illegale Finanzflüsse – Illicit financial flows’ (2014) 30 Jusletter; E Buergi Bonanomi, S Meyer-Nandi, ‘Schweizer Doppelbesteuerungsabkommen: Aktuelle Politik und Entwicklungsrelevanz’ (2014) 30 Jusletter.

⁶⁸ Committee on World Food Security CFS, *Principles for Responsible Investment in Agriculture and Food Systems* (CFS 2014) available at <www.fao.org>.

way as to enable local government to comply with the duties they hold in relation to sovereignty over natural resources. International law in the fields of human rights and environmental law already fulfil this function to a certain degree. But their effectiveness must be improved, not least by strengthening the requirements of home States aimed towards the investors domiciled in their territory. In addition, remaining gaps regarding the protection of land tenure and soil resources must be filled, by *inter alia* emphasizing instruments of spatial planning. Equally important is, however, that both international and national economic laws and policies – including investment, trade and tax policies – are brought in line with sustainability goals. It is in this area where there is the largest persistent deficit. Here, taking a ‘policy coherence for sustainable law’ perspective assists in capturing the full picture.

