

4-1-2015

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Recommended Citation

Nicholas Dorf, *Making an Offer They Can't Refuse: Corporate Investment in Africa and the Divestment of Indigenous Land Rights*, 38 B.C. Int'l & Comp. L. Rev. 65 (2015), <http://lawdigitalcommons.bc.edu/iclr/vol38/iss1/3>

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MAKING AN OFFER THEY CAN'T REFUSE: CORPORATE INVESTMENT IN AFRICA AND THE DIVESTMENT OF INDIGENOUS LAND RIGHTS

NICHOLAS DORF*

Abstract: International investment in African land is booming. In many circumstances, investors target land occupied by indigenous populations without official title. National laws providing protection for the land rights of these indigenous populations have proved rare and ineffective due to the driving need for investment and the perceived impediment to investment such laws create. The international humanitarian legal regime likewise provides an insufficient forum for effective protection. Bilateral investment treaties (BITs) should instead be modified to impose affirmative humanitarian obligations on investing corporations to ensure the preservation of indigenous land rights.

INTRODUCTION

In 1884, the counts, barons, colonels, and kings of thirteen European nations sat down in front of a large map of Africa in Chancellor Bismarck's Berlin residence.¹ By February 1885, they had partitioned the map of the African continent piecemeal into colonies over which they would claim ownership.² They based these claims on the fiction that Africa was *terra nullius* and thus open for conquest.³ The following half-century saw a concerted effort to plant the flags of Europe in African soil.⁴ Through decolonization in the second half of the twentieth century, however, those states gradually emerged as independent.⁵

While the traditional foreign claims to Africa on the political stage have ended, corporations have nonetheless continued annexing African land into the

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¹ See ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA 84 (1998).

² See *id.*; DAVID BIRMINGHAM, DECOLONIZATION OF AFRICA 1 (1995).

³ See JÉRÉMIE GILBERT, INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS 27 (2006). See generally BLACK'S LAW DICTIONARY 1701 (10th ed. 2014) (defining *terra nullius* as the term for territory not belonging to any particular country).

⁴ See BIRMINGHAM, *supra* note 2, at 1.

⁵ See *id.*

modern era through economic investment.⁶ With indigenous, informal forms of property ownership vulnerable to exploitation, foreign developers and investors have engaged in an international “land grab” of vast tracts of African land.⁷ Corporations are often able to collude with the government to acquire the formal rights to such occupied land, and the incentive to do so is considerable: the estimated value of such land in the developing world that is held and occupied, but not legally owned, weighs in at \$9.3 trillion.⁸

While the threat of foreign corporations to the property rights of indigenous peoples has recently gained recognition as a growing issue, there has been little effective national legislation or protection implemented within African states to address it.⁹ In addition, there has been no international regional instrument for Africa governing the rights of indigenous peoples.¹⁰ Furthermore, the international instruments at a universal level are less integrated into the African human rights system than that of other regions.¹¹

Part I of this Note explores the nature and scale of the indigenous agrarian communities in several African states, as well as the state of foreign investment in these areas and its impact on indigenous communities. Part II analyzes the current body of international law on the property rights of indigenous peoples, as well as the development of national laws in Africa. Part III first demonstrates that the current national legislation and international treaties are unlikely to protect the land rights of indigenous peoples effectively due to a lack of national incentive and the insufficiency of the international framework. Part III further argues that instead, an effective solution should come from the home states of corporate actors, in the form of modifications to the bilateral investment treaties to impose affirmative human rights obligations on corporations.

⁶ See Claire Provost, *New International Land Deals Database Reveals Rush to Buy Up Africa*, GUARDIAN (Apr. 27, 2012), <http://www.theguardian.com/global-development/2012/apr/27/international-land-deals-database-africa>, archived at <http://perma.cc/QA49-VMWK>.

⁷ See *id.*; Stefaan Smis, Dorothee Cambou & Genny Ngende, *The Question of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources*, 35 LOY. L.A. INT'L & COMP. L. REV. 493, 497 (2013).

⁸ See Milt Reimers, *Stuck in "No Man's Land": How Developing Countries Can Allocate Property Rights as a Means to Improve Their Citizen's Welfare and Grow Their Economies*, 11 LOY. J. PUB. INT. L. 1, 2 (2009); Korir Sing' Oei A. & Jared Shepherd, *'In Land We Trust': The Endorois' Communication and the Quest for Indigenous People's Right for Africa*, 16 BUFF. HUM. RTS. L. REV. 57, 62 (2010); Smis et al., *supra* note 7, at 497; see also Saturnino Borrás Jr. & Jennifer Franco, *From Threat to Opportunity? Problems with a "Code of Conduct" for Land Grabbing*, 13 YALE HUM. RTS. & DEV. L.J. 507, 509 (2010).

⁹ See Smis et al., *supra* note 7, at 531.

¹⁰ See *id.* at 493.

¹¹ See *id.*

I. BACKGROUND

A. *The Nature of African Communal Property into the Modern Era*

To understand fully the extent and impact of foreign purchases of land in African nations on indigenous communities, it is helpful to examine the traditional nature of property rights in rural African communities as compared to the formal institutions of titling and ownership associated with modern corporate transactions.¹²

At the end of the 19th century, before the encroachment of European political powers, most land resources in Africa were used primarily as commons.¹³ The characteristics of the commons defy Western ideas of private property owned by individuals: it is held as a trans-generational asset, managed by the community at different levels of social organization, and used in function-specific ways such as grazing, recreation, cultivation, and transit.¹⁴ The commons area formed private property owned by the group, but it defied the traditional requirement of title granted from a national authority.¹⁵

The lack of formal ownership of land permeated pre-colonial society across the continent.¹⁶ In South Africa, for example, the concept of individual ownership of land was quite limited.¹⁷ The system operated according to status relationships between individuals and their obligations to one another with regard to communal property, rather than by an individual's ability to assert property claims against others.¹⁸ In Kenya, the Endorois people maintained a semi-nomadic pastoral community under this customary system of tenure into the modern, post-independence era.¹⁹ Similarly, the Himba people maintained a general communal system of grazing throughout Namibia.²⁰ In these communities, each family owns the land around its immediate household, with land rights stretching back in time and respected by all.²¹ Although the members

¹² See *infra* notes 13–52.

¹³ See Okoth Ogenido, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, in LAND REFORM AND AGRARIAN CHANGE IN SOUTHERN AFRICA 2002, at 3 (Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, Paper No. 24, 2002).

¹⁴ See *id.*

¹⁵ See *id.* at 4.

¹⁶ See *id.* at 3–5.

¹⁷ See WJ du Plessis, *African Indigenous Land Rights in a Private Ownership Paradigm*, 14 POTSCHEFSTROOM ELEC. L. J. 45, 49 (2011).

¹⁸ See *id.*

¹⁹ See Sing' Oei A. & Shepherd, *supra* note 8, at 60.

²⁰ Sidney L. Harring, "God Gave Us This Land": *The OvaHimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa*, 14 GEO. INT'L ENVTL. L. REV. 35, 42 (2001).

²¹ See *id.*

often do not hold official title, the community respects local customary law, which establishes individual rights to land.²²

Pastoral systems like these remain very common in south and central Africa today.²³ Widespread attempts to modernize state practice in the past half-century, however, have led to the implementation of European systems of formal titling within the legislature of many nations, although with mixed success.²⁴ These programs of formalization have proceeded partially on the theory that such titling will spur economic growth by allowing the creation of a land market and thus, incentivize owners to invest in their land given the added protection of a formal title.²⁵ Inherent conflicts have arisen in the clash between traditional, community-established rights to property and these attempts to establish formalized systems, even to the point of not accepting the state-imposed system.²⁶ The Maasai tribes present an example of this systemic conflict: the Kenyan government established formal group ranches with formal borders; however, because those borders conflicted inherently with the traditional migratory patterns, the tribes have disregarded the property boundaries and maintained their previous semi-nomadic patterns.²⁷

While there may be unavoidable problems in the reconciliation of these two systems, a formal system of modern property laws is not inherently inimical to the nature of the customary land rights of indigenous communities: a number of states have indeed incorporated recognition of communal and customary land rights into their formal systems.²⁸ Instead, the real threat to these land rights stems from the ease with which joint corporate and government actors can exploit these modern legal procedures when the system does not provide adequate oversight and protection.²⁹

B. The Extent of Corporate Investment in African Land

In what has been termed a second “scramble for Africa,” corporations over the past decade and a half have been contracting with African states to invest in large swaths of untitled land for the purpose of developing natural

²² See *id.* at 78.

²³ See *id.* at 42.

²⁴ See Lorenzo Cotula, Camilla Toulmin & Ced Hesse, *Land Tenure and Administration in Africa: Lessons of Experience and Emerging Issues*, INT’L INST. FOR ENV’T & DEV. 1, 3 (2004), available at <http://pubs.iied.org/pdfs/9305IIED.pdf>, archived at <http://perma.cc/7MBF-GNLA>.

²⁵ See *id.*

²⁶ See Lindsey L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims*, 54 DUKE L.J. 1061, 1068 n.40 (2005).

²⁷ See *id.*

²⁸ See Cotula et al., *supra* note 24, at 5.

²⁹ See *infra* notes 47–52.

resources, farming, and other economic purposes.³⁰ These tracts, however, are often occupied by indigenous populations.³¹ While this phenomenon has been occurring in developing nations with indigenous populations worldwide, the effect has been particularly pronounced in Africa, where the majority of such land deals take place.³²

Since 2000, investors have bought or leased almost 5 percent of Africa's arable land.³³ In 2010 alone, between 51 and 63 million hectares of land became part of land deals, whether finalized or in negotiation, in twenty-seven African states.³⁴ Some of the deals are staggeringly large and have appeared numerous across some of Africa's poorest states.³⁵ In Madagascar, a South Korean company entered into a contract which would have given the government \$6 billion in exchange for a 99-year lease on half of the nation's arable land to grow corn and palm oil.³⁶ In South Sudan, the government granted a Norwegian company a similar 99-year lease on 179,000 hectares of land at a cost of just \$0.07 a hectare.³⁷ In Guinea, an American company acquired 100,000 hectares of land,³⁸ and in Gabon, a Belgian company purchased 300,000 hectares.³⁹

The relatively recent appearance of such acquisitions in Africa on such an unprecedented scale is a result of a confluence of factors unique to the continent revolving around the production of food and farmable resources.⁴⁰ Between 2007 and 2008, Africa witnessed a global food crisis resulting in widespread social unrest in many developing countries.⁴¹ As a result, the World Bank Group has been providing incentives to invest in agribusiness such as direct financing, advisory services, and aid in legislative and policy reform to remove barriers to foreign direct investment.⁴² Given these incentives and the rising demand for food in the wake of the food crisis, Western investors have

³⁰ See Jeremie Gilbert & David Keane, *The New Scramble for Africa: Towards a Human-Rights Based Approach to Large-Scale Land Acquisitions in the Southern Africa Development Community Region*, in *SOUTHERN AFRICAN DEVELOPMENT COMMUNITY LAND ISSUES* 143, 145 (Ben Chigara ed., 2012); Smis et al., *supra* note 7, at 497.

³¹ See Gilbert & Keane, *supra* note 30, at 145; Smis et al., *supra* note 7, at 497.

³² See Provost, *supra* note 6.

³³ See *id.*

³⁴ See Cecelie Friis & Anette Reenberg, *Land Grab in Africa: Emerging Land System Drivers in a Teleconnected World*, *GLOBAL LAND PROJECT INT'L PROJECT OFFICE* 1, 11 (2010).

³⁵ See *infra* notes 36–38.

³⁶ See Scott Baldouf, *Hunger and Food Security: Is Africa Selling the Farm?*, *CHRISTIAN SCI. MONITOR* (Feb. 6, 2011), <http://www.csmonitor.com/World/Global-Issues/2011/0206/Hunger-and-food-security-Is-Africa-selling-the-farm>, archived at <http://perma.cc/GB8H-DC65>.

³⁷ See Provost, *supra* note 6.

³⁸ See Smis et al., *supra* note 7, at 497.

³⁹ See *id.*

⁴⁰ See *infra* notes 42–45.

⁴¹ See *infra* notes 42–45.

⁴² See Smita Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 *STAN. J. INT'L L.* 101, 110 (2013).

begun to see agricultural investment as relatively safe while other traditional fields of investment have declined in security after the financial crisis.⁴³ Additionally, states with quickly growing populations such as China and South Korea have begun to use foreign investment in agriculture as a means to secure their own food supply.⁴⁴ While the demand for food products drives investment from South Asia and the Middle East, states in Europe and North America without such food scarcity are similarly investing due to the perception that there will be a long-term demand for biofuels in industrialized countries.⁴⁵

These global trends in agricultural investment have resulted in the gravitation of investors towards Africa as a particularly irresistible market for development.⁴⁶ The soil on the arable land in many African states is particularly rich and fertile, ensuring the success and growth of agricultural development.⁴⁷ Not only is the farmland itself of good quality, it is quite abundant, with states such as Madagascar and Mozambique potentially possessing over 16 million hectares of land suitable for cultivation.⁴⁸ The proximity of these large swaths of available land to Europe is particularly attractive to northern investors, while the ability of the farmland to produce palm oil is attractive to those from the east due to the growing scarcity of land in Malaysia and Indonesia, the largest palm oil growing countries.⁴⁹ While these factors alone would make these untitled farmlands sufficiently attractive to foreign investment, the governments of many African states are going to great lengths to make this land even more lucrative for investors, such as offering state-acquired land at very cheap prices or allowing 100 percent of produce to be exported.⁵⁰ To further encourage investment, many African nations, particularly in sub-Saharan Africa, have entered into bilateral investment treaties (BITs) with capital exporting states to further encourage investment.⁵¹ These treaties are designed to promote foreign direct investment in the African state by offering two attractions to foreign investors: substantive rights and protections, and dispute settlement procedures.⁵² The host state prom-

⁴³ See *id.*

⁴⁴ See *id.* at 112.

⁴⁵ George Schoneveld, *The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa* 8 (Ctr. for Int'l Forestry Research, Working Paper No. 85, 2011), available at http://www.cifor.org/publications/pdf_files/WPapers/WP85Schoneveld.pdf, archived at <http://perma.cc/SAN5-ME2F>.

⁴⁶ See *supra* notes 42–45; *infra* notes 47–52.

⁴⁷ See Smis et al., *supra* note 7, at 495.

⁴⁸ See Schoneveld, *supra* note 45, at 13.

⁴⁹ See *id.* at 9.

⁵⁰ See 'Land Grab'—Boon or Curse? Several Foreign Countries Have Long-Term Leases on Vast Swatches of Land in Africa to Grow Crops for Their Own Consumption or for Biofuels. What Implication Does This Have on the Continent's Development Strategy?, AFRICAN BUSINESS, Aug./Sept. 2010, at 32, 32.

⁵¹ See Alec R. Johnson, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa*, 59 EMORY L.J. 919, 919 (2010).

⁵² Marc Jacob, *International Investment Agreements and Human Rights*, in INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 2010, at 8 (Inst. for

ises to provide protection against certain conduct, such as expropriation and discriminatory treatment; investors are given confidence in these protections through the ability to access international arbitration to settle investment disputes.⁵³ This provides a stable environment for foreign direct investment, and likewise signals to investors that the host state has a credible commitment to protecting foreign direct investment.⁵⁴ BITs have become “the primary legal mechanism governing [foreign direct investment].”⁵⁵

II. DISCUSSION

A. National Legislation Protecting Indigenous Rights

The issue of corporate acquisition of untitled indigenous lands has not been ignored within the legal frameworks of affected African nations, both at the constitutional and legislative level.⁵⁶ The constitutional frameworks of several African states contain provisions that address indirectly the rights of these indigenous people by protecting the communal property they often occupy.⁵⁷ The Rwandan constitution contains a provision that renders the right to private property inviolable, even if the land is owned collectively rather than individually.⁵⁸ Such a provision protecting collective property is found in the laws of a number of nations, including Chad, Egypt, South Africa, and Uganda.⁵⁹ While not specifically offering a normative basis for the rights of indigenous populations, this type of provision nonetheless indirectly offers protection to such communities, as the communal property protected is likewise often untitled.⁶⁰

While these states have taken the path of indirectly protecting indigenous populations by promoting the related field of communal land rights, some have taken the opposite route of indirectly protecting land rights through the recognition and promotion of indigenous rights.⁶¹ One method taken to achieve this has been to ensure indigenous representation within the government.⁶² Kenya, for example, since 2010 has reserved seats in the national assembly for representatives from vulnerable groups, and Burundi expressly requires that three

Dev. & Peace 03/2010), available at http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf, archived at <http://perma.cc/N5KN-JXUF>.

⁵³ See *id.*

⁵⁴ See Johnson, *supra* note 51, at 925.

⁵⁵ See *id.* at 924.

⁵⁶ See Jernej Letnar Cernic, *State Obligations Concerning Indigenous Peoples' Rights to Their Ancestral Lands: Lex Imperfecta?*, 28 AM. U. INT'L L. REV. 1129, 1143 (2013).

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.*; Smis et al., *supra* note 7, at 531.

⁶² See Smis et al., *supra* note 7, at 531.

members of the national assembly come from a particular indigenous population.⁶³

Of the nations that have begun implementing such reforms, the Republic of the Congo has taken particularly advanced steps in implementing official protection of indigenous rights, specifically with regard to land and property.⁶⁴ In February of 2011, the “Law 5-2011 On the Promotion and Protection of the Indigenous Population” attempted to comprehensively address the rights of the indigenous pygmy population.⁶⁵ The pygmy population of the Republic of the Congo has in the past been marginalized to an exceptional degree in terms of inclusion in the political process and the protection from basic human rights violations.⁶⁶ This indigenous population is comprised of 300,000 individuals, or approximately 10 percent of the total population of the state; therefore, this legislation seems starkly necessary in light of the sheer size of the population involved.⁶⁷ The law specifically provides the indigenous population with a comprehensive set of human rights, and a large portion is indeed dedicated to the right to property.⁶⁸ First, the law grants indigenous communities the right to own, possess, access, and use the lands and natural resources they have traditionally used or occupied for their subsistence, pharmacopeia, and work.⁶⁹ Additionally, the state must legally recognize land rights based on customary ownership, even where indigenous peoples do not possess any kind of formal title.⁷⁰ Furthermore, this law goes a step further than its counterparts by officially recognizing, to some extent at least, the potential issues that may arise from a lack of formal title for indigenous populations in particular.⁷¹

More importantly, the law institutes requirements for the conditions under which indigenous land may be expropriated by the state to corporate actors.⁷² Article 33 states that indigenous populations can only be displaced for the public interest, and the following Article provides for the “benefits provided by

⁶³ See *id.*

⁶⁴ See *id.* at 532.

⁶⁵ See *id.*

⁶⁶ See Congo: NGO Denounces Widespread Violation of Pygmy Rights, IRIN HUMANITARIAN NEWS & ANALYSIS (Feb. 16, 2004), <http://www.irinnews.org/report/48596/congo-ngo-denounces-widespread-violation-of-pygmy-rights>, archived at <http://perma.cc/59HD-QFHE>.

⁶⁷ See *Indigenous Peoples in the Republic of Congo*, INT’L WORK GROUP FOR INDIGENOUS AFFAIRS, <http://www.iwgia.org/regions/africa/republic-of-congo> (last visited Oct. 29, 2014), archived at <http://perma.cc/WX2D-K5JD>.

⁶⁸ See Smis, et al., *supra* note 7, at 532.

⁶⁹ See Act No. 5-2011 of Feb. 25, 2011, *Portant Promotion et Protection des Droits des Populations Autochtones* [On the Promotion and Protection of Indigenous Populations], art. 31 (Dem. Rep. Congo), available at http://www.iwgia.org/iwgia_files_news_files/0368_Congolese_Legislation_on_Indigenous_Peoples.pdf, archived at <http://perma.cc/6XNV-N863> [hereinafter Act No. 5-2011].

⁷⁰ See *id.* art. 32.

⁷¹ See *id.*; Cernic, *supra* note 56, at 1143.

⁷² See Act No. 5-2011, *supra* note 69, arts. 33–38.

law” in the case of such an expropriation.⁷³ In addition, the law provides substantial rights for the indigenous peoples throughout the process of any project, whether government or private, conducted on the land.⁷⁴ Article 35 requires an impact assessment for any project on the lands occupied or utilized by the indigenous populations; Article 36 grants indigenous populations the “rights to define the priorities and strategies for development, utilization and control of their lands and other re-sources” in such a project; and Article 38 requires that “the indigenous populations are consulted before the formulation or establishment of any project having effect on the lands and resources which they possess and use traditionally.”⁷⁵ The Republic of the Congo was the first African country to pass such a law that includes these types of legal protections, through which both the legality of expropriation as well as treatment of indigenous rights during the subsequent projects are addressed.⁷⁶

The Congolese law represents the first advanced attempt at protection of land rights specifically tailored to indigenous peoples, and a number of other nations in the wake of the growing publicity surrounding indigenous rights have begun to implement similar comprehensive systems for protecting untitled lands.⁷⁷ Ghana, Mozambique, and Tanzania all have progressive laws that require approval of land transfers by the communities or customary leaders residing on them, and have additional requirements for providing access rights and just compensation.⁷⁸ The Mozambique Land Act requires that such approval and consent take place whether or not the land is officially titled to ensure that negotiation of benefit-sharing agreements occurs between the investor and the local groups.⁷⁹ Other states, such as Madagascar and Ethiopia, have systems that require consultation before investment.⁸⁰ These systems, in theory, should protect the interests of the indigenous populations in their own land.⁸¹

⁷³ *Id.* arts. 33–34.

⁷⁴ *See id.* arts. 35–38.

⁷⁵ *Id.*

⁷⁶ *See Congo: New Law to Protect Rights of Indigenous Peoples*, IRIN HUMANITARIAN NEWS & ANALYSIS (Jan. 7, 2011), <http://www.irinnews.org/report/91564/congo-new-law-to-protect-rights-of-indigenous-peoples>, archived at <http://perma.cc/UTC8-NK94>.

⁷⁷ *See id.*; Sonja Vermeulen & Lorenzo Cotula, *Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa*, 37 J. PEASANT STUD. 899, 907 (2010).

⁷⁸ *See Vermeulen & Cotula, supra* note 77, at 907.

⁷⁹ *See id.* at 908.

⁸⁰ *See Smita Narula, The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 STAN. J. INT'L L. 101, 115 (2013).

⁸¹ *See supra* notes 77–80.

B. International Instruments Protecting Indigenous Rights

The necessity for legal protection of the land rights of indigenous populations has gained recent recognition within the international legal framework as well, both at the regional and global level.⁸² Regionally, there has not been any international instrument that codifies the rights of indigenous populations in Africa.⁸³ The African Charter on Human and Peoples' Rights, however, has nonetheless been extended into the role of monitoring the rights of indigenous peoples within the region.⁸⁴ The Charter is a treaty that has been ratified by fifty-three African states, and every state in the African Union, barring the newly created South Sudan.⁸⁵ Like other regional human rights instruments, the Charter establishes the basic human rights owed to every individual and imposes duties upon nations to uphold those rights.⁸⁶ It is somewhat unique, however, in that it provides human rights for groups and peoples collectively in addition to the rights of individuals.⁸⁷

Article 19 guarantees that distinct peoples have the right to equality, and Article 20 guarantees the right to self-determination for these peoples.⁸⁸ These Articles generally establish the fundamental equal recognition needed for indigenous peoples to assert the rights granted by the subsequent Articles, which are more pertinent to the specific issue of land rights: Article 21 allows groups to freely dispose of their natural resources; Article 22 grants the right to economic, social, and cultural development; Article 23 guarantees the right to peace and security; and Article 24 provides for a "general satisfactory environment favorable to their development."⁸⁹

The Charter established the African Commission on Human and Peoples' Rights as the investigative and enforcement mechanism connected to the rights and duties of the treaty, which was established "to promote human and people's rights and ensure their protection in Africa."⁹⁰ To assess and address the rights of indigenous populations in particular, the Commission established the

⁸² See *infra* note 84; Smis et al., *supra* note 7, at 498.

⁸³ See Smis et al., *supra* note 7, at 493.

⁸⁴ *Working Group on Indigenous Populations/Communities in Africa: About*, AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS (Oct. 29, 2014), <http://www.achpr.org/mechanisms/indigenous-populations/about>, archived at <http://perma.cc/32ZQ-65JV> [hereinafter *Working Group: About*].

⁸⁵ *Ratification Table: African Charter on Human and Peoples' Rights*, AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS (Oct. 29, 2014), <http://www.achpr.org/instruments/achpr/ratification/>, archived at <http://perma.cc/S34F-HLAQ>.

⁸⁶ See generally African (Banjul) Charter on Human and People's Rights, 21 I.L.M. 58 (1982), (entered into force Oct. 21, 1986) [hereinafter *African Charter*].

⁸⁷ See Roland Adjovi, *Understanding the African Charter on Human and Peoples' Rights*, THINK AFRICA PRESS (Nov. 5, 2012), <http://thinkafricapress.com/international-law-africa/african-charter-human-peoples-rights>, archived at <http://perma.cc/YXL5-R3AG>.

⁸⁸ *African Charter*, *supra* note 86, arts. 19–20.

⁸⁹ See *id.* arts. 21–24.

⁹⁰ See *id.* art. 30.

Working Group on Indigenous Populations/Communities in 2000.⁹¹ The initial mandate of the Working Group was to release a report on the status of the rights of indigenous peoples on the continent, and the Group has since been permanently established with the tasks of gathering information pertaining to violations of indigenous people's rights, providing recommendations and proposals to prevent such violations, and cooperating with other international human rights mechanisms and organizations.⁹²

While the Working Group operates as an advisory body on the issue of indigenous rights, the African Charter does indeed provide for judicial enforcement mechanisms to prosecute violations of the duties and rights enumerated in the Charter.⁹³ A protocol to the Charter, which was adopted in 1998 and came into force in 2004, established the African Court of Human and Peoples' Rights as a body tasked with rendering judgments on states' compliance with the duties of the Charter.⁹⁴ Although the court's inaugural judgment was rendered in 2009, its first judgment concerning the land rights of indigenous peoples was not until March of 2013.⁹⁵ The justices' holding effectively banned land transactions in the Mau Forest Complex of Kenya, which is occupied by some 15,000 indigenous Ogiek families.⁹⁶ The Kenyan government recently threatened the Ogiek with eviction under the pretense of environmental protection, and additionally lifted restrictions over land transactions in the forest in November of 2012, allowing those who had illegally gained title over occupied land to sell.⁹⁷

The Commission itself, as a quasi-judicial body, also has the ability to hear communications and render recommendations on the claims of indigenous groups that believe their rights under the charter have been violated.⁹⁸ Articles 56 through 59 allow communications to the Commission concerning an alleged violation of the Charter's rights, and if the case meets the procedural

⁹¹ See *Working Group: About*, *supra* note 84.

⁹² See *id.*

⁹³ See *infra* notes 94–95.

⁹⁴ *Establishment of the Court*, AFRICAN COURT OF HUMAN RIGHTS, <http://www.african-court.org/en/index.php/about-the-court/court-establishment>, archived at <http://perma.cc/8RK3-W2XP> (last visited Oct. 8, 2014).

⁹⁵ *African Court in Brief*, AFRICAN COURT ON HUMAN & PEOPLES' RIGHTS (Oct. 29, 2014), <http://www.african-court.org/en/index.php/about-the-court/brief-history>, archived at <http://perma.cc/JT83-H23X>; *African Court Issues Historic Ruling Protecting Rights of Kenya's Ogiek Community*, MINORITY RIGHTS GROUP INT'L (Mar. 20, 2013), <http://www.minorityrights.org/?lid=11822>, archived at <http://perma.cc/K6W5-AZY8> [hereinafter *African Court Issues*].

⁹⁶ See *African Court Issues*, *supra* note 95.

⁹⁷ See *id.*; Chelsea Purvis, *Displacement and Resistance: The Ogiek of Kenya*, THINK AFRICA PRESS (Mar. 22, 2013), <http://thinkafricapress.com/kenya/mau-ogiek-displacement>, archived at <http://perma.cc/QBR-92UB>.

⁹⁸ See Smis et al., *supra* note 7, at 526; *Communications*, AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS (Sept. 28, 2014), <http://www.achpr.org/communications/>, archived at <http://perma.cc/PVT6-T766>.

qualifications, the Commission will render a decision on the substance of the case.⁹⁹ The case of the Endorois people of Kenya reached the merits with their communication of 2009, and the Commission issued a landmark decision concerning the rights of indigenous peoples the following year.¹⁰⁰ The Endorois people occupied land that was under the guardianship of the government based on the Native Land Trust Act, which left them vulnerable to local authorities colluding with the central government to abuse this relationship.¹⁰¹ In this particular communication, the Endorois claimed in the Kenyan national courts that they had been illegally evicted from and left out of the profit sharing structure of the national park on which they resided, but when this was denied, they then sought redress with the African Commission, claiming that the Kenyan state breached the African Charter by violating their right to property, culture, religion, and the development of natural resources.¹⁰² The Commission found that the Kenyan government had in fact violated Articles 8, 14, 17, 21, and 22 of the Charter, and recommended restitution of the lands, recognition of their right to ownership, and compensation for harm.¹⁰³

The creation of international protections for indigenous peoples has occurred not only within the region of Africa, but also globally among the nations that make up the world's most prevalent international institutions.¹⁰⁴ The first global treaty to address the rights of indigenous peoples was the International Labor Organization's Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, ratified in 1957.¹⁰⁵ Viewed as somewhat assimilationist and paternalistic, this was replaced by ILO Convention No. 167 in 1989, which contained improved procedural mechanisms for the protection of land rights.¹⁰⁶

Perhaps the most important international global instrument concerning the rights of indigenous peoples to date is, however, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁰⁷ The UN Working Group on Indigenous Populations began working on the declaration in 1985, the first draft of which was presented to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities eight years later in 1993.¹⁰⁸

⁹⁹ See *African Charter*, *supra* note 86, arts. 56–59.

¹⁰⁰ See Smis et al., *supra* note 7, at 526.

¹⁰¹ See Sing' Oei A. & Shepherd, *supra* note 8, at 62.

¹⁰² See *id.* at 62–63.

¹⁰³ See Smis et al., *supra* note 7, at 526.

¹⁰⁴ See *id.* at 498.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *United Nations Declaration on the Rights of Indigenous Peoples*, GALDU RES. CTR. FOR THE RIGHTS OF INDIGENOUS PEOPLES (Oct. 29, 2014), <http://www.galdu.org/web/index.php?sladja=50&vuolitsladja=89&giella1=eng>, archived at <http://perma.cc/YQ47-MJSJ>.

The Declaration in its final form was adopted fourteen years after that in 2007.¹⁰⁹ The United States, New Zealand, Canada, and Australia voted against the declaration and initially opposed its implementation, but by 2010 all had changed their position and announced their support.¹¹⁰

The Declaration is especially important to the issue of land rights because of its focus and emphasis on the distinct relationship between indigenous peoples and the land that they have traditionally used and possessed.¹¹¹ Article 26 specifically addresses the rights of indigenous peoples to land and resources, and in many ways appears similar to the previously described articles of the African Charter.¹¹² The first subsection of this Article provides the general right of indigenous people “to lands, territories, and resources which they have traditionally owned, occupied, or otherwise used or acquired,” and the second subsection guarantees “the right to own, use, develop, and control the lands, territories and resources they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”¹¹³ To facilitate retention of control over the process by which they exercise their right to land and resources, Article 32 guarantees the right of the indigenous peoples “to determine and develop priorities and strategies for the development or use of their lands or territories and other resources,” and requires that states consult and cooperate with the indigenous population prior to the approval of any project.¹¹⁴ This instrument represents the current state of universally accepted international sentiment on the general rights of indigenous peoples.¹¹⁵ Unlike such explicitly humanitarian treaties, BITs have not functioned as a vehicle for the protection of the rights of indigenous peoples, since they rarely (if ever) address humanitarian concerns, and instead focus on providing protections for foreign investors.¹¹⁶

III. ANALYSIS

While there may indeed be some form of legal protection in effect for indigenous populations at both the national and international levels, these protec-

¹⁰⁹ *See id.*

¹¹⁰ *See US: Obama Announces US Support to the UNDRIP*, INT’L WORK GROUP FOR INDIGENOUS AFFAIRS (Dec. 17, 2010), http://www.iwgia.org/news/search-news?news_id=79, archived at <http://perma.cc/ZN3H-MRLF> [hereinafter *Support to the UNDRIP*].

¹¹¹ Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VAND. J. TRANSNAT’LL. 785, 819 (2012).

¹¹² *See id.*; *African Charter*, *supra* note 86, arts. 20–25.

¹¹³ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 26, U.N. Doc. A/RES/61/295 (Sep. 13, 2007).

¹¹⁴ G.A. Res. 61/295, *supra* note 113, art. 32.

¹¹⁵ *See Support to the UNDRIP*, *supra* note 110.

¹¹⁶ *See Jacob*, *supra* note 52, at 8–11.

tions have thus far proved inadequate.¹¹⁷ National regulation is hampered by the lack of indigenous representation as well as the close connection between development needs and the goals of foreign investment.¹¹⁸ International instruments, on the other hand, have not been able to provide accessible and effective forums for enforcement.¹¹⁹

A. The Present and Future Inadequacy of National Laws Protecting Indigenous Rights to Land

Despite the relatively recent movement by a number of African nations to protect the rights of indigenous peoples, the current laws are inadequate in providing that protection and are unlikely to improve in practice due to national dependence on outside investment.¹²⁰

The inability of representative minority legislators to advocate loudly for the rights of minority indigenous groups is an apparent example of the inadequacies of these laws. As described above, there have been attempts by some nations, notably Kenya and Burundi, to implement requirements for minority representatives in the national assembly.¹²¹ The realities of elected politics, however, severely limit the ability of these legislators to effectuate change.¹²²

The inadequacy of these attempts to provide a voice for minority groups is particularly evident in Kenya.¹²³ The dominance of political parties as gatekeepers in the choosing of candidates has been the first major hurdle.¹²⁴ While the 2010 constitution does have a new provision that allows independent candidates to run, the candidates that are party-sponsored among those that are competing for minority seats will likely remain dominant.¹²⁵ Therefore, while indigenous representatives may be present within the political system, if party policy does not support indigenous interests, it may be difficult to effectively address those interests.¹²⁶

The costs of an electoral contest are a second major hurdle that influences the ability of both these parties and candidates to remain separate from the in-

¹¹⁷ See *infra* notes 121–86.

¹¹⁸ See *infra* notes 121–65.

¹¹⁹ See *infra* notes 166–86.

¹²⁰ See *infra* notes 121–65.

¹²¹ See Smis et al., *supra* note 7, at 531.

¹²² See Jill Cottrel-Ghai, Yash Ghai, Korir Sing'oei & Waikwa Wanyoike, *Taking Diversity Seriously: Minorities and Political Participation in Kenya*, MINORITY RIGHTS GROUP INT'L 2–5 (Jan. 28, 2013), <http://www.minorityrights.org/11721/briefing-papers/taking-diversity-seriously-minorities-and-political-participation-in-kenya.html>, archived at <http://perma.cc/X5HP-ZMS4>; Adams Oloo, *Elections, Representations and the New Constitution 7* (Soc'y for Int'l Dev., Working Paper No. 7, 2011), available at <http://www.sidint.net/docs/WP7.pdf>, archived at <http://perma.cc/R6B9-PWVW>.

¹²³ See Oloo, *supra* note 122, at 7.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

terests of international investors.¹²⁷ In Kenya, many indigenous groups are severely impoverished, and winning an election requires financial resources that are simply not available to them.¹²⁸ Therefore, indigenous candidates must necessarily rely instead on funding from the economically dominant groups, and when elected, they are likely to serve the interests of those groups rather than the uninhibited interests of the indigenous communities.¹²⁹ Kenya does indeed have a ban on direct donations to political parties from foreign interests, however, the dominant economic groups to which these candidates are beholden will almost invariably have ties to foreign investors.¹³⁰ Additionally, more than 35 percent of African states including major investment centers like South Africa do not have any ban on such foreign contributions to political campaigns.¹³¹ This increases the likelihood of foreign influence on the party policy because access to foreign funds may create a long-term reliance and dependency that restricts policy autonomy.¹³²

Finally, the ability of the indigenous representatives within the government to pass effective protective legislation may be severely limited simply by their minority status on the legislature.¹³³ While Kenya has been one of the most progressive states in implementing representation of politically bankrupt indigenous groups, the constitution guarantees only twelve seats out of 290 for candidates from “special interests.”¹³⁴ Additionally, the process of selecting “special interest” candidates renders it possible that there will in fact be no seats guaranteed for indigenous minority representatives.¹³⁵ While a holding of the Kenya High Court allows small, marginalized communities to be considered among these special interests, the method of selection makes no guarantees for particular groups: each party submits a list of special interest candidates from which a certain number will be selected depending on the party’s percentage of the vote, and the nature of what constitutes a special interest is entirely determined by the party.¹³⁶ The fact that the party controls who sits in these special interest seats further ensures that the representatives toe the party

¹²⁷ See Cottrel-Ghai et al., *supra* note 122, at 2.

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *Is There a Ban on Donations from Foreign Interests to Political Parties?*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/political-finance/question.cfm?field=246®ion=2> (last updated July 18, 2012), archived at <http://perma.cc/3B69-B73D>.

¹³¹ *See id.*

¹³² Kristina Weissenbach & Karl Rudolph Korte, *Analyzing Party Finance Regimes: Best Practice for Dominant Multi-Party Systems in ‘New Democracies’?*, in *PAYING FOR POLITICS: PARTY FUNDING AND POLITICAL CHANGE IN SOUTH AFRICA AND THE GLOBAL SOUTH* 137, 150 (Anthony Butler ed., 2010).

¹³³ *See infra* notes 134–38.

¹³⁴ Cottrel-Ghai et al., *supra* note 122, at 2, 4, 8.

¹³⁵ *See id.* at 6.

¹³⁶ *See id.*

line in terms of policy.¹³⁷ Outside of these guaranteed seats, an electoral system can make it very difficult for indigenous populations to muster enough communal support to elect their candidate.¹³⁸ Constituency boundaries are drawn with factors such as “community of interest, historical, economic, and cultural ties” only assuming secondary importance, while the size of the constituency is the primary concern.¹³⁹

Despite the potential inability of representative legislators to effectively advocate the rights of indigenous groups, there has nonetheless been limited legislation passed in recent years precisely to protect the land rights of indigenous peoples.¹⁴⁰ These laws, however, have for the most part failed to effectively curb the deprivation of indigenous rights to land due to the collusion between the government and corporations.¹⁴¹ Since the fundamental cause of this failure is likely the continuing, insatiable need for foreign direct investment, it is unlikely that national laws will remedy this failure.¹⁴²

African states are going to great lengths to attract foreign investment, through both national regulations, like Morocco’s 100 percent export proposal, as well as international BITs.¹⁴³ These efforts to attract investment stem not from a simple desire to integrate themselves into the global economic stage, but are rooted more deeply in a fundamental need for such investment to combat the inherent problems of rapid development.¹⁴⁴ The population of Africa is the fastest growing of any continent in the world, with estimates that the total population of the continent will double by 2036 and will reach two billion by 2050.¹⁴⁵ This population growth is causing great concern that there will be serious negative economic consequences if it is not met with increased investment.¹⁴⁶ In terms of energy needs alone, the European Union’s Special Repre-

¹³⁷ See *id.*; Oloo, *supra* note 122, at 7.

¹³⁸ See Cottrel-Ghai et al., *supra* note 122, at 5.

¹³⁹ See *id.*

¹⁴⁰ See *supra* notes 52–78.

¹⁴¹ See *infra* notes 161–67.

¹⁴² See *infra* notes 150–67.

¹⁴³ See *supra* notes 45, 51.

¹⁴⁴ See *Africa Needs \$40 bn Investment Annually to Meet Energy Target—EU*, BUSINESSDAY ONLINE (Feb. 12, 2014), <http://businessdayonline.com/2014/02/africa-needs-40-bn-investment-annually-to-meet-energy-target-eu/>, archived at <http://perma.cc/T7GV-XP46> [hereinafter *Africa Needs \$40 Billion*]; Gordhan: *Africa Needs Quality Investment*, FIN24 (Sept. 27, 2013), <http://www.fin24.com/Economy/Gordhan-Africa-needs-quality-investment-20130927>, archived at <http://perma.cc/DM8N-C9VG> [hereinafter *Gordhan*].

¹⁴⁵ Simplicia A. Asongu, *How Would Population Growth Affect Investment in the Future? Asymmetric Panel Causality Evidence for Africa*, in MUNICH PERSONAL REPEc 2011, at 5 (African Governance & Dev. Inst., MPRA Paper No. 43863), available at http://mprapa.ub.uni-muenchen.de/43863/2/MPRA_paper_43863.pdf, archived at <http://perma.cc/6UMP-ENEH>; *Africa Needs \$40 Billion*, *supra* note 144.

¹⁴⁶ See Asongu, *supra* note 145.

sentative to the African Union stated that the continent will require \$40 billion annually to reach the energy sufficiency goal set for 2040.¹⁴⁷

The need for investment does not necessarily imply a need for the specific type of agricultural and land-purchase investment that is threatening indigenous populations.¹⁴⁸ For example, there is need for investment in the areas of consumer demand and business financing, which would likely pose no threat to indigenous land rights.¹⁴⁹ Some of the continent's greatest needs, however, lie in infrastructure development and employment, which are indeed intimately tied to corporate land investment given the improvements promised by corporations.¹⁵⁰ General urban infrastructure is fatally underfunded in terms of dealing with growth and represents the continent's largest hurdle to keeping pace with the population growth and urbanization.¹⁵¹ The World Bank estimates that sub-Saharan Africa has only been spending approximately \$40 billion of the estimated \$75 billion needed to develop and maintain adequate roads, transportation, electricity, water, and other vital infrastructure elements.¹⁵² Many African nations also have a quickly growing middle class that can increase the demand for basic infrastructural improvements; the growth of a middle class thereby compounds the demand for investment.¹⁵³ Unemployment, particularly among the youth, is also a major problem for many African nations.¹⁵⁴ South Africa, for example, saw unemployment rise to 25.2 percent in 2013, and youth unemployment in Africa is as high as 30 percent.¹⁵⁵

¹⁴⁷ See *Africa Needs \$40 Billion*, *supra* note 144.

¹⁴⁸ See Dapo Okubadejo, *Foreign Direct Investment in Africa*, KPMG (Jun. 1, 2012), <http://www.kpmg.com/africa/en/issuesandinsights/articles-publications/pages/foreign-direct-investment-in-africa.aspx>, archived at <http://perma.cc/6ATA-HVET>.

¹⁴⁹ See *id.*

¹⁵⁰ Calestous Juma, *Poor Infrastructure is Africa's Soft Underbelly*, FORBES (Oct. 25, 2012), <http://www.forbes.com/sites/mfonobongonsehe/2012/10/25/poor-infrastructure-is-africas-soft-underbelly/>, archived at <http://perma.cc/X2EY-NATT>; *When Others Are Grabbing Their Land*, ECONOMIST (May 5, 2011), <http://www.economist.com/node/18648855>, archived at <http://perma.cc/HWQ9-WK6K>.

¹⁵¹ See Juma, *supra* note 150; Okubadejo, *supra* note 148.

¹⁵² See Juma, *supra* note 150; *Fact Sheet: Infrastructure in Sub-Saharan Africa*, WORLD BANK, <http://go.worldbank.org/SWDECPM5S0> (last visited Oct. 29, 2014), archived at <http://perma.cc/C54P-9ZB2>.

¹⁵³ See *Gordhan: Africa Needs Quality Investment*, *supra* note 144; Sanusi Lamido Sanusi, Key-note Address at the 3rd Infrastructure and Regulatory Commission PPP Stakeholders Forum: The Role of Development Finance Institutions in Infrastructure Development: What Nigeria Can Learn From BNDES and the Indian Infrastructure Finance Company 7 (July 18, 2014), available at http://www.cbn.gov.ng/out/speeches/2012/gov_ppp%20stakeholder%20forum_160712.pdf, archived at <http://perma.cc/KX55-9CTL?type=pdf>.

¹⁵⁴ See Kingsley Ighobor, *Africa's Youth: A "Ticking Time Bomb" or an Opportunity?*, AFRICA RENEWAL ONLINE (May 2013), <http://www.un.org/africarenewal/magazine/may-2013/africa%E2%80%99s-youth-%E2%80%9Cticking-time-bomb%E2%80%9D-or-opportunity>, archived at <http://perma.cc/CM82-YL24>.

¹⁵⁵ See *id.*; *South Africa: Unemployment Rises in First Quarter of 2013*, ALLAFRICA (May 6, 2013), <http://allafrica.com/stories/201305070498.html>, archived at <http://perma.cc/8HGA-YMDK>.

This need for infrastructure development and employment opportunities closely mirrors the promised benefits of large corporate land transactions.¹⁵⁶ In order to efficiently develop land, corporations often promise to create essential housing, roads, schools, and other improvements that will facilitate the creation of an economically viable project, although whether or not they follow through on these promises is far more varied.¹⁵⁷ In addition, they almost invariably promise the creation of much-needed rural employment for the local population.¹⁵⁸ While the projects themselves will in fact bring capital to the state, African governments tend to evaluate projects on these broader economic benefits of employment generation and infrastructure development.¹⁵⁹

African states going forward have this driving need for capital and infrastructural development that is satisfied by investment in land.¹⁶⁰ Thus, the governments of those states will likely avoid either enacting or enforcing national laws that make it difficult for such investment to occur—this may include laws that protect indigenous populations.¹⁶¹ With widespread investment across the continent there is a great likelihood of such a “race to the bottom,” where states will avoid creating real humanitarian protection in order to remain competitive in attracting investment.¹⁶²

Whereas this is already evident in the glacial progress of African states to even enact laws, the avoidance of effective enforcement is likewise apparent in the states that have instituted such laws.¹⁶³ One of the principle mechanisms for guaranteeing the rights of the indigenous populations is consultation with and approval of the local community.¹⁶⁴ While this appears effective in theory, it is easily abused in practice to prevent any resistance to investment.¹⁶⁵ Meetings are often with community leaders or members of local government that have already had preliminary meetings with investors to promote investment,

¹⁵⁶ See *infra* notes 157–59.

¹⁵⁷ *When Others Are Grabbing Their Land*, *supra* note 150.

¹⁵⁸ *Id.*; Saturnino M. Borras Jr., David Fig & Sofia Monsalve Suárez, *The Politics of Agrofuels and Mega-Land and Water Deals: Insights From the ProCana Case, Mozambique*, 38 REV. AFR. POL. ECON. 215, 220 (2011); Ben White et al., *The New Enclosures: Critical Perspectives on Corporate Land Deals*, 39 J. PEASANT STUD. July–Oct. 2012, at 619, 633.

¹⁵⁹ See Vermeulen & Cotula, *supra* note 77, at 910.

¹⁶⁰ See *supra* notes 150–60; *infra* notes 164–69

¹⁶¹ See *supra* notes 150–60; *infra* notes 164–69.

¹⁶² KLAUS DEININGER & DEREK BYERLEE, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? at xxxii (The World Bank 2011), available at http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf, archived at <http://perma.cc/G9NX-NNXB>.

¹⁶³ See *infra* notes 165–69.

¹⁶⁴ See Vermeulen & Cotula, *supra* note 77, at 907.

¹⁶⁵ See Laura German, George Schoneveld, & Esther Mwangi, *Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?*, 48 WORLD DEV. 1, 9 (2013); Vermeulen & Cotula, *supra* note 77, at 909; Friis & Reenberg, *supra* note 34, at 32.

and communities rarely have full access to information about a project.¹⁶⁶ The requirements of the law for consultation and approval, even in progressive countries such as Mozambique, do not in practice include all affected individuals in the process; instead, too often they vest the power in local authorities to declare that satisfactory consultation occurred.¹⁶⁷ Often the corporation is able to engage with a legally illiterate community directly, while local authorities act as middlemen who are not necessarily interested in providing protection.¹⁶⁸ Other legal frameworks, such as Kenya's guardianship relationship, are open to abuse by the central government through collusion with the local authorities to privatize the land without regard to the needs of the local communities.¹⁶⁹

B. The Inadequacy of the Current International Framework in Protecting Indigenous Rights to Land

Given the failure of national law to provide effective protections for the land rights of indigenous populations, the potential forum for protection may instead lie in the realm of international law.¹⁷⁰ Despite its theoretical goal of protection, however, the current body of international law also fails in practice to effectively guarantee indigenous peoples' rights to land.¹⁷¹ As with the implementation of national law, international mechanisms provide an aspirational framework that does not reflect the realities on the ground.¹⁷²

The first major issue with the international legal framework within Africa is its lack of accessibility, particularly by indigenous groups.¹⁷³ The African Commission on Peoples' and Human Rights has only ever rendered a single decision in favor of an indigenous community as to the right of development, despite the recognition of such a right since the ratification of the African Charter.¹⁷⁴ In fact, there have only been seven total decisions rendered by the Commission on the right of development, and only eight on the right to free disposal of natural resources.¹⁷⁵ The procedural hurdles to having a communication heard are difficult to overcome, particularly due to the requirement that

¹⁶⁶ See Vermeulen & Cotula, *supra* note 77, at 909.

¹⁶⁷ See German et al., *supra* note 165, at 9; Vermeulen & Cotula, *supra* note 77, at 909.

¹⁶⁸ German et al., *supra* note 165, at 10.

¹⁶⁹ See Sing' Oei A. & Shepherd, *supra* note 8, at 62.

¹⁷⁰ See *supra* notes 164–69; Adjovi, *supra* note 87.

¹⁷¹ See *infra* notes 174–78.

¹⁷² See *infra* notes 174–78.

¹⁷³ See *infra* notes 174–78.

¹⁷⁴ See Rhodri C. Williams, *The African Commission "Endorois Case"—Toward a Global Doctrine of Customary Tenure?*, TERRA NULLIUS BLOG (Feb. 17, 2010), <http://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/>, archived at <http://perma.cc/TGY2-YHQV>; *Decisions on Communications*, AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/communications/decisions/?a=878> (last visited Oct. 29, 2014), archived at <http://perma.cc/GXB6-VK4A>.

¹⁷⁵ See *Decisions on Communications*, *supra* note 174.

national remedies be exhausted before bringing a claim before the Commission.¹⁷⁶ Similarly, the African Court on Peoples' and Human Rights has only rendered a single decision protecting the land rights of indigenous peoples.¹⁷⁷ Whatever the reason, when contrasted to the sheer number of massive land transactions in Africa over the past decade, the relative lack of representation of indigenous claims in the regional international system is indicative of a failure to provide an accessible forum.¹⁷⁸

Simply because there have not been many cases before the court as of today does not necessarily mean that there will not be more in the future.¹⁷⁹ Even if the court and the Commission manage to become a popular forum to champion the rights of indigenous peoples, however, the system will likely still be burdened by the classic failing of international adjudicatory bodies: the lack of an ability to enforce judgments against states effectively.¹⁸⁰ This is not a problem unique to the enforcement of human rights in Africa: other international adjudicatory bodies, even those with almost universally ratified establishing treaties, have faced serious issues in effectively enforcing judgments.¹⁸¹

Regional human rights courts in particular have had trouble convincing national courts to enforce their judgments.¹⁸² The Inter-American Court on Human Rights, for example, rendered a final decision on 105 cases as of 2008, and ninety-four of those were still under the court's jurisdiction awaiting compliance.¹⁸³ The African Commission is likely to be plagued by a lack of effective enforcement of its decisions, particularly because of its own admission that its judgments are not binding.¹⁸⁴ For example, with regard to its decision in the Endorois case, the Commission simply encouraged Kenya to adopt measures in conformity with its holdings, and Kenya is not necessarily bound to carry them out.¹⁸⁵ Indeed, over three years after issuing its recommendations, the Commission was still calling on Kenya to conform to the decision as

¹⁷⁶ Sing' Oei A. & Shepherd, *supra* note 8, at 65.

¹⁷⁷ See *African Court Issues*, *supra* note 95.

¹⁷⁸ See *supra* notes 34–39, 174–77.

¹⁷⁹ See *supra* notes 174–77.

¹⁸⁰ See *infra* notes 181–89.

¹⁸¹ See Maryam Jashidi, *The Enforcement Gap: How the International Criminal Court Failed in Darfur*, AL JAZEERA (Mar. 25, 2013), <http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html>, archived at <http://perma.cc/M55D-PUXB>.

¹⁸² See *infra* note 183.

¹⁸³ See Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L. J. 493, 504 (2011).

¹⁸⁴ Judith Murphy, *Extending Indigenous Rights by Way of the African Charter*, 24 PACE INT'L L. REV. 158, 188–89 (2012).

¹⁸⁵ See *id.*

it was “concerned by the lack of feedback from the Government of Kenya on the measures it has taken to implement the Endorois decision.”¹⁸⁶

The African Court on Human and Peoples’ Rights does not limit its rulings to encouragements and recommendations, but rather issues decrees that it transmits to Member States and Council Ministers of the African Union with the intention that they monitor their execution.¹⁸⁷ Despite this intention, however, the court is still plagued with roadblocks to actual effective enforcement.¹⁸⁸ One of the main issues is the inability of the court to deal with urgent human rights violations, as it operates on a part-time basis.¹⁸⁹ In addition, even if the court orders sanctions on a state to pay fair compensation or implement other measures, there is the likelihood that the state will simply refuse to comply.¹⁹⁰ There is, indeed, evidence that Kenya has thus far failed to halt evictions of the Ogiek tribe in accordance with the court’s ruling in 2013.¹⁹¹ Because of the aforementioned need for continued investment on a large scale, this may be an increasingly likely reaction.¹⁹²

Finally, the nature of the international system’s allocation of responsibility is flawed in its ability to create lasting protections.¹⁹³ States are the primary subjects of law in the international order, and as such the claims made in international human rights bodies are brought against states to ensure that they comply with norms.¹⁹⁴ While decisions such as the court’s 2013 ban on land transactions in a certain area may affect corporations, they do not directly place accountability on the corporation; instead, the international system places responsibility on the state, and corporations are only indirectly subject to state enforcement.¹⁹⁵ This state-centric regime creates a glaring lack of accountability for corporations who may in fact never experience direct reprimand for violations of human rights.¹⁹⁶

¹⁸⁶ African Commission on Human and Peoples’ Rights Res. 257, 54th Sess., Oct. 22–Nov. 5, 2013 (Nov. 5, 2013), available at <http://www.achpr.org/sessions/54th/resolutions/257/>, archived at <http://perma.cc/L3QJ-669Y>.

¹⁸⁷ Timothy Fwa Yerima, *Comparative Evaluation of the Challenges of African Regional Human Rights Courts*, 4 J. POL. & L. 120, 123–24 (2011).

¹⁸⁸ See *infra* notes 190–92.

¹⁸⁹ See *infra* notes 190–92.

¹⁹⁰ See *infra* notes 190–92; Carolyn Scanlon Martorana, *The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples’ Rights?*, 40 GEO. WASH. INT’L L. REV. 584, 602–03 (2008).

¹⁹¹ *Ogiek Are Violently Evicted from Ancestral Home in Kenya*, SURVIVAL INT’L (Feb. 15, 2014), <http://www.survivalinternational.org/news/9969>, archived at <http://perma.cc/9BD4-6MVC>.

¹⁹² See *supra* notes 187–91.

¹⁹³ See *infra* notes 194–95.

¹⁹⁴ See Lillian Aponte Miranda, *The Hybrid State–Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 163 (2007).

¹⁹⁵ See *id.* at 183.

¹⁹⁶ See *id.*

C. The Potential for BITs to Guarantee Indigenous Rights in Africa

It is because protection emanating from within the legal framework of the African continent is not likely to be forthcoming, whether from the national or international sphere, that it must come from without.¹⁹⁷ By imposing human rights obligations on corporations through BITs, the home states of corporations purchasing land in Africa may be able to regulate the deprivation of land rights of indigenous populations.¹⁹⁸

While African states have a strong incentive to avoid implementing protections, capital exporting states provide an environment much more amenable to limiting the freedom of corporations.¹⁹⁹ Within many of these investor states, there is a strong tradition of corporate social responsibility.²⁰⁰ Particularly in the European Union, there has been a concerted effort in the past decade to address the human rights responsibilities of corporations, with attempts to pass sweeping continent-wide rules and regulations.²⁰¹ It must be recognized that the survey of states investing in Africa on a large scale is not a uniform collection, and there are some major players such as China that do not have a strong tradition of implementing regulations that impose human rights obligations on private actors.²⁰² While the environment in investor states is thus far from perfect, it is important that the potential impetus is slanted towards protection as compared to the internal African impetus that is likely to resist protection.²⁰³

If capital exporting states are thus willing to enact reform, a potential option could be the implementation of human rights protections in BITs.²⁰⁴ Currently, the protection of BITs generally extends to the foreign investor to guarantee fair and equitable treatment and prevent expropriation without just com-

¹⁹⁷ See *supra* notes 119–90.

¹⁹⁸ See Miranda, *supra* note 194, at 176; Patrick Dumberry & Gabriel Dumas Aubin, *How to Incorporate Human Rights Obligations in Bilateral Investment Treaties?*, INT'L INST. FOR SUST. DEV. (Mar. 22, 2013), <http://www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties/>, archived at <http://perma.cc/Z3YG-5VTC>; Jacob, *supra* note 52, at 33.

¹⁹⁹ See *infra* notes 200–03.

²⁰⁰ Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 771 (2005); *South Korea: The Role of CSR*, CSR WELTWEIT, <http://www.csr-weltweit.de/en/country-profiles/profile/republik-korea/index.html> (last visited Oct. 29, 2014), archived at <http://perma.cc/TSJ2-MA7B>.

²⁰¹ Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. U. J. INT'L HUM. RTS. 262, 263 (2008); Jeremy Fleming, *European Apathy Spells End for Corporate Social Responsibility Rules*, GUARDIAN (Nov. 19 2013), <http://www.theguardian.com/global-development/2013/nov/19/european-corporate-social-responsibility-eu>, archived at <http://perma.cc/V48W-RT7M>.

²⁰² *China: The Role of CSR*, CSR WELTWEIT, <http://www.csr-weltweit.de/en/country-profiles/profile/china/index.html> (last visited Oct. 29, 2014), archived at <http://perma.cc/3MJH-LSG2>.

²⁰³ See *supra* notes 121–65, 200–02.

²⁰⁴ See *infra* notes 204–22.

pensation.²⁰⁵ This paradigm of protection regime can be reversed to provide protections to the indigenous peoples occupying purchased land.²⁰⁶ The protections provided in standard model BITs are one-sided; providing financial guarantees to the private actor, the corporation, whereas provisions which promote the interests of the other side, the state receiving investment, are scarce.²⁰⁷ This type of protection, however, can be implemented on the other side of the agreement to provide human rights guarantees to the indigenous population, and hold corporations responsible for breaches of these guarantees.²⁰⁸

The issue of human rights guarantees has arisen within the context of these treaties.²⁰⁹ It has been limited, however, to disputing or defending a domestic human rights law over the claim that it violates a provision of the treaty.²¹⁰ For example, a corporation's claim for unjust expropriation was brought to arbitration in South Africa over a law that required 26 percent of companies in the mining industry to be owned by "Historically Disadvantaged Black Africans."²¹¹ Thus, these treaties have served as a forum for indirectly addressing indigenous rights, but only because they provided a potential avenue for corporate avoidance.²¹² Express mention of human rights within the language of BITs, on the other hand, has been almost non-existent—exceptional treaties that do in fact make reference to human rights do so without creating any substantive obligations and instead, mention human rights in the preamble or as an aid to interpretation.²¹³

The next step is to present these treaties as an affirmative protection of indigenous rights by modifying them to impose obligations on corporate actors to maintain certain standards.²¹⁴ By making a corporation itself legally accountable at the international level, it will serve as a significant deterrent to engaging in the type of behavior that has caused the failure of domestic systems, such as cursory and ineffective consultations.²¹⁵ Unlike a state, which might dodge the payment of sanctions due to lack of enforcement, a corpora-

²⁰⁵ See Johnson, *supra* note 51, at 928.

²⁰⁶ See *infra* notes 207–08.

²⁰⁷ See Johnson, *supra* note 51, at 921.

²⁰⁸ See Miranda, *supra* note 194, at 179; Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, INT'L INST. FOR SUST. DEV., Apr. 2003, at 1, 36; Dumbery & Aubin, *supra* note 198.

²⁰⁹ See Dumbery & Aubin, *supra* note 198.

²¹⁰ Javier Perez et al., *Sleeping Lions: International Investment Treaties, State-Investor Disputes and Access to Food, Land and Water*, OXFAM DISCUSSION PAPERS 1, 21 (May 2011), <http://www.oxfam.org/sites/www.oxfam.org/files/dp-sleeping-lions-260511-en.pdf>, archived at <http://perma.cc/VJD8-Q4U8>.

²¹¹ See *id.*

²¹² See *id.*

²¹³ See Jacob, *supra* note 51, at 8–11.

²¹⁴ See *id.* at 33.

²¹⁵ See Miranda, *supra* note 194, at 179.

tion is far more unlikely to avoid payment of an international arbitral award.²¹⁶ First, most parties to binding arbitrations voluntarily comply with the award.²¹⁷ Second, depending on the law of the home country, there will likely be a ready mechanism for enforcement in the form of either summary enforcement under the home country's laws, or the ability to sue on the award in the national courts.²¹⁸ The home state may even intervene in the arbitration against a domestic corporation, indicating its willingness to enforce the award domestically.²¹⁹ Because awards would be enforceable under this model, corporations would likely be far more rigorous in ensuring that human rights are respected in order to avoid a claim.²²⁰ An ideal system would allow an indigenous population to bring a claim directly to an arbitral tribunal against a corporation of the capital exporting state.²²¹ This would surmount the procedural hurdles that plague the African international adjudicatory system.²²²

The modification of BITs to contain these protections may face some hostility from African states as trespassing on a state's sovereign ability to set its own social policy.²²³ The fundamental need for investment, however, may nonetheless ultimately force accession to such modifications, because not signing would result in negative signals about the stability of the investment climate and likely discourage investment to an even greater degree.²²⁴ Many African nations desperately needing economic growth have no alternative to relying on such external financing, and therefore may feel forced to accept the lesser of two evils and sign agreements containing express corporate responsibilities for human rights.²²⁵

²¹⁶ See *infra* notes 217–19.

²¹⁷ Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 887 (1995).

²¹⁸ See *id.* at 888.

²¹⁹ See Luke Eric Petersen & Kevin R. Grey, *International Human Rights in Bilateral Investment Treaties, and in Investment Treaty Arbitration*, INT'L INST. FOR SUSTAINABLE DEV. 20–21 (Apr. 2003) http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf, archived at <http://perma.cc/5G7H-E75Y>.

²²⁰ See *supra* notes 214–19.

²²¹ See Miranda, *supra* note 194, at 179.

²²² See Sing' Oei A. & Shepherd, *supra* note 8, at 65.

²²³ Glyn Moody, *South Africa Plans to Terminate and Renegotiate Treaties that Include Corporate Sovereignty*, TECHDIRT (Nov. 8, 2013), <http://www.techdirt.com/articles/20131107/09591825170/south-africa-leads-moves-to-terminate-renegotiate-bilateral-investment-treaties.shtml>, archived at <http://perma.cc/3M5B-PAYB>.

²²⁴ See Kenneth J. Vandeveld, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 526 (1998).

²²⁵ See Johnson, *supra* note 51, at 927–28.

CONCLUSION

Indigenous peoples without title to their lands are an inherently vulnerable group, and yet the danger of corporate predation on these indigenous lands has only become recognized at both the national and international level in recent years. Governments and international organizations have made attempts to provide the necessary protections to these peoples, yet these attempts have proved glaringly inadequate within the African continent. The explosion of foreign interest in developing African real estate has fortuitously paralleled the need for infrastructure development in many African states. This has created a powerful incentive for national regimes to collude with corporate actors in massive purchases and developments that are often exceptionally destructive to the rights of the indigenous inhabitants. The sparse legislation in place at a national level has proved generally ineffective at overcoming the incentive of development, and the international regime has been unable to provide an accessible and comprehensive forum that adequately addresses the scale of the problem. Protections may, however, originate from the home states of the corporate actors, which are not bound by the need for foreign investment. By altering bilateral investment treaties between these capital exporting states and the African states to include human rights protections, communities could be able to hold corporations directly responsible for their violations of indigenous land rights.

