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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).
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. 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. 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.

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. In addition, there has been no international regional instrument for Africa governing the rights of indigenous peoples. Furthermore, the international instruments at a universal level are less integrated into the African human rights system than that of other regions.

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.

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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.\(^\text{12}\)

At the end of the 19th century, before the encroachment of European political powers, most land resources in Africa were used primarily as commons.\(^\text{13}\) 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.\(^\text{14}\) The commons area formed private property owned by the group, but it defied the traditional requirement of title granted from a national authority.\(^\text{15}\)

The lack of formal ownership of land permeated pre-colonial society across the continent.\(^\text{16}\) In South Africa, for example, the concept of individual ownership of land was quite limited.\(^\text{17}\) 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.\(^\text{18}\) In Kenya, the Endorois people maintained a semi-nomadic pastoral community under this customary system of tenure into the modern, post-independence era.\(^\text{19}\) Similarly, the Himba people maintained a general communal system of grazing throughout Namibia.\(^\text{20}\) In these communities, each family owns the land around its immediate household, with land rights stretching back in time and respected by all.\(^\text{21}\)

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\(^{12}\) See infra notes 13–52.


\(^{14}\) See id.

\(^{15}\) See id. at 4.

\(^{16}\) See id. at 3–5.


\(^{18}\) See id.

\(^{19}\) See Sing’ Oei A. & Shepherd, supra note 8, at 60.


\(^{21}\) 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.
25 See id.
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. These tracts, however, are often occupied by indigenous populations. 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.

Since 2000, investors have bought or leased almost 5 percent of Africa’s arable land. 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. Some of the deals are staggeringly large and have appeared numerous across some of Africa’s poorest states. 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. 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. In Guinea, an American company acquired 100,000 hectares of land; and in Gabon, a Belgian company purchased 300,000 hectares.

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. Between 2007 and 2008, Africa witnessed a global food crisis resulting in widespread social unrest in many developing countries. 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. Given these incentives and the rising demand for food in the wake of the food crisis, Western investors have

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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.
35 See infra notes 36–38.
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.
begun to see agricultural investment as relatively safe while other traditional fields of investment have declined in security after the financial crisis.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45}

These global trends in agricultural investment have resulted in the gravitation of investors towards Africa as a particularly irresistible market for development.\textsuperscript{46} The soil on the arable land in many African states is particularly rich and fertile, ensuring the success and growth of agricultural development.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{52} The host state prom-

\textsuperscript{43} See id.
\textsuperscript{44} See id. at 112.
\textsuperscript{46} See supra notes 42-45; infra notes 47-52.
\textsuperscript{47} See Smis et al., supra note 7, at 495.
\textsuperscript{48} See Schoneveld, supra note 45, at 13.
\textsuperscript{49} See id. at 9.
\textsuperscript{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.
\textsuperscript{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. See id. 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. See id. at 925. BITs have become “the primary legal mechanism governing [foreign direct investment].” See id.

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. 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. 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). The Rwandan constitution contains a provision that renders the right to private property inviolable, even if the land is owned collectively rather than individually. See id. Such a provision protecting collective property is found in the laws of a number of nations, including Chad, Egypt, South Africa, and Uganda. See id. 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.

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. One method taken to achieve this has been to ensure indigenous representation within the government. Kenya, for example, since 2010 has reserved seats in the national assembly for representatives from vulnerable groups, and Burundi expressly requires that three

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53 See id.
54 See Johnson, supra note 51, at 925.
55 See id. at 924.
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 tra-
ditionally 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 of-
ically 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 pub-
lic 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-
67 See Indigenous Peoples in the Republic of Congo, INT’L WORK GROUP FOR INDIGENOUS AF-
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 Popula-
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. 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. 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 resources” 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.” 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.

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. 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. 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. Other states, such as Madagascar and Ethiopia, have systems that require consultation before investment. These systems, in theory, should protect the interests of the indigenous populations in their own land.

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73 Id. arts. 33–34.
74 See id. arts. 35–38.
75 Id.
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.
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.\textsuperscript{82} Regionally, there has not been any international instrument that codifies the rights of indigenous populations in Africa.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{86} It is somewhat unique, however, in that it provides human rights for groups and peoples collectively in addition to the rights of individuals.\textsuperscript{87}

Article 19 guarantees that distinct peoples have the right to equality, and Article 20 guarantees the right to self-determination for these peoples.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{90} To assess and address the rights of indigenous populations in particular, the Commission established the

\textsuperscript{82} See infra note 84; Smis et al., supra note 7, at 498.

\textsuperscript{83} See Smis et al., supra note 7, at 493.


\textsuperscript{88} African Charter, supra note 86, arts. 19–20.

\textsuperscript{89} See id. arts. 21–24.

\textsuperscript{90} See id. art. 30.
Working Group on Indigenous Populations/Communities in 2000.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{91} See Working Group: About, supra note 84.
  \item \textsuperscript{92} See id.
  \item \textsuperscript{93} See infra notes 94–95.
  \item \textsuperscript{96} See African Court Issues, supra note 95.
  \item \textsuperscript{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.
\end{itemize}
qualifications, the Commission will render a decision on the substance of the case.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{108}

\textsuperscript{100} See Smis et al., \textit{supra} note 7, at 526.
\textsuperscript{101} See Sing\textsuperscript{\textdegree} Oei A. & Shepherd, \textit{supra} note 8, at 62.
\textsuperscript{102} See id. at 62–63.
\textsuperscript{103} See Smis et al., \textit{supra} note 7, at 526.
\textsuperscript{104} See \textit{id.} at 498.
\textsuperscript{105} See \textit{id.}
\textsuperscript{106} See \textit{id.}
The Declaration in its final form was adopted fourteen years after that in 2007.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{114} This instrument represents the current state of universally accepted international sentiment on the general rights of indigenous peoples.\textsuperscript{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.\textsuperscript{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-
tions have thus far proved inadequate. 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. International instruments, on the other hand, have not been able to provide accessible and effective forums for enforcement.

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.

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. The realities of elected politics, however, severely limit the ability of these legislators to effectuate change.

The inadequacy of these attempts to provide a voice for minority groups is particularly evident in Kenya. The dominance of political parties as gatekeepers in the choosing of candidates has been the first major hurdle. 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. 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.

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.
123 See Oloo, supra note 122, at 7.
124 See id.
125 See id.
126 See id.
terests of international investors. In Kenya, many indigenous groups are severely impoverished, and winning an election requires financial resources that are simply not available to them. 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. 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. 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. 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.

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. 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.” Additionally, the process of selecting “special interest” candidates renders it possible that there will in fact be no seats guaranteed for indigenous minority representatives. 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. The fact that the party controls who sits in these special interest seats further ensures that the representatives toe the party

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127 See Cottrel-Ghai et al., supra note 122, at 2.
128 See id.
129 See id.
131 See id.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{145} This population growth is causing great concern that there will be serious negative economic consequences if it is not met with increased investment.\textsuperscript{146} In terms of energy needs alone, the European Union’s Special Repre-

\textsuperscript{137} See id.; Oloo, supra note 122, at 7.
\textsuperscript{138} See Cottrel-Ghai et al., supra note 122, at 5.
\textsuperscript{139} See id.
\textsuperscript{140} See supra notes 52–78.
\textsuperscript{141} See infra notes 161–67.
\textsuperscript{142} See infra notes 150–67.
\textsuperscript{143} See supra notes 45, 51.
\textsuperscript{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.\footnote{See Africa Needs $40 Billion, supra note 144.}

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.\footnote{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.} 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.\footnote{See id.} 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.\footnote{See Calestous Juma, Poor Infrastructure is Africa’s Soft Underbelly, FORBES (Oct. 25, 2012), http://www.forbes.com/sites/mfonobongnsehe/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.} 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.\footnote{See Juma, supra note 150; Okubadejo, supra note 148.} 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.\footnote{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.} 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.\footnote{See Gordhan: Africa Needs Quality Investment, supra note 144; Sanusi Lamido Sanusi, Keynote 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.} Unemployment, particularly among the youth, is also a major problem for many African nations.\footnote{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.} South Africa, for example, saw unemployment rise to 25.2 percent in 2013, and youth unemployment in Africa is as high as 30 percent.\footnote{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. 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. In addition, they almost invariably promise the creation of much-needed rural employment for the local population. 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.

African states going forward have this driving need for capital and infrastructural development that is satisfied by investment in land. 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. 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.

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. One of the principle mechanisms for guaranteeing the rights of the indigenous populations is consultation with and approval of the local community. While this appears effective in theory, it is easily abused in practice to prevent any resistance to investment. Meetings are often with community leaders or members of local government that have already had preliminary meetings with investors to promote investment,

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156 See infra notes 157–59.
157 When Others Are Grabbing Their Land, supra note 150.
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.
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. 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. 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. 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.

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. 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. As with the implementation of national law, international mechanisms provide an aspirational framework that does not reflect the realities on the ground.

The first major issue with the international legal framework within Africa is its lack of accessibility, particularly by indigenous groups. 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. 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. The procedural hurdles to having a communication heard are difficult to overcome, particularly due to the requirement that

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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.
175 See Decisions on Communications, supra note 174.
national remedies be exhausted before bringing a claim before the Commission.\textsuperscript{176} Similarly, the African Court on Peoples’ and Human Rights has only rendered a single decision protecting the land rights of indigenous peoples.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{181}

Regional human rights courts in particular have had trouble convincing national courts to enforce their judgments.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{185} Indeed, over three years after issuing its recommendations, the Commission was still calling on Kenya to conform to the decision as

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\textsuperscript{176} Sing’ Oei A. & Shepherd, supra note 8, at 65.
\textsuperscript{177} See African Court Issues, supra note 95.
\textsuperscript{178} See supra notes 34–39, 174–77.
\textsuperscript{179} See supra notes 174–77.
\textsuperscript{180} See infra notes 181–89.
\textsuperscript{182} See infra note 183.
\textsuperscript{183} See Alexandra Huneeus, Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights, 44 CORNELL INT’L L. J. 493, 504 (2011).
\textsuperscript{185} See id.
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it was “concerned by the lack of feedback from the Government of Kenya on the measures it has taken to implement the Endorois decision.”\footnote{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.\footnote{187} Despite this intention, however, the court is still plagued with roadblocks to actual effective enforcement.\footnote{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.\footnote{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.\footnote{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.\footnote{191} Because of the aforementioned need for continued investment on a large scale, this may be an increasingly likely reaction.\footnote{192}

Finally, the nature of the international system’s allocation of responsibility is flawed in its ability to create lasting protections.\footnote{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.\footnote{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.\footnote{195} This state-centric regime creates a glaring lack of accountability for corporations who may in fact never experience direct reprisal for violations of human rights.\footnote{196}


188 See infra notes 190–92.

189 See infra notes 190–92.


192 See supra notes 187–91.

193 See infra notes 194–95.


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. 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. Within many of these investor states, there is a strong tradition of corporate social responsibility. 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. 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. 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.

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

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197 See supra notes 119–90.
199 See infra notes 200–03.
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.
209 See Dumberry & Aubin, supra note 198.
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. First, most parties to binding arbitrations voluntarily comply with the award. 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. The home state may even intervene in the arbitration against a domestic corporation, indicating its willingness to enforce the award domestically. 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. 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. This would surmount the procedural hurdles that plague the African international adjudicatory system.

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. 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. 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.

216 See infra notes 217–19.
218 See id. at 888.
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.
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.