Essays

Functions of Soft Law in Transnational and Local Governance: A Case of the Land Rush in the Mekong Region

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Abstract

This paper analyzes land law history in the Mekong region, a recent land rush there, and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), a soft law measure on governance of tenure. This work will generally illustrate recent developments of land governance. Following a survey on the broader discourse and scholarship on the global land rush, it will argue for further analysis in soft law measures as a crucial element to understand and critique land governance in the Mekong Region. The VGGT is presented as a case study to show two possible functions of soft law: (1) it legitimizes the self-determination of countries in their policy reforms in the Mekong region and (2) it forms the basis for gradual policy changes toward dominant conceptions of 'clear and strong' property rights by reaching a minimal, but fundamental agreement while carefully avoiding controversial issues.

I. Introduction

The purpose of this paper is to analyze recent developments of land governance and its relevance to the Mekong region.[1] Although there are various important developments in the field of land governance,[2] this paper focuses on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), a non-binding measure developed by the Committee on World Food Security (CFS). The VGGT responded to the 2006 world food crisis and the subsequent phenomena of land rushes, a rapid and sharp increase in foreign land acquisitions.[3] Specifically, this paper asks if the VGGT is helpful to tackle the problem of the land rush in the context of the

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[1] For the purpose of this paper, the Mekong region is considered to include Cambodia, Vietnam, Laos and Myanmar.

[2] For a quick overview, see M. Margulis, N. McKeon and S. M. Borras eds, *Land Grabbing and Global Governance* (London: Routledge, 2014).

[3] This paper prefers the term 'land rush', rather than other common terms such as 'land grab' or 'land grabbing', because what is striking about the recent phenomenon of foreign land acquisitions is not its mechanism, but its scope and rapid expansion. In this regard, see T.M. Li, 'What Is Land? Assembling a Resource for Global Investment' 39 *Transactions of the Institute of British Geographers*, 589, 594-595 (2014).

Mekong region.

This study is situated in a theoretical debate of how legal instruments developed from one functionally differentiated field have an impact on historically constituted national legal order.[4] It intends to contribute to the current debate on governance and law by analyzing the favorable possibilities of soft law measures.[5] After the public debates in response to the 2006 food crisis, land governance has been increasingly considered in relation to transnational food security governance.[6] Therefore, this paper analyzes the relationship between land governance and food security governance. It also examines various efforts to regulate the land rush: public, private and hybrid, national, regional and transnational.[7] Although the VGGT was a response to transnational food security governance, it has also contributed to the discourse on land property regimes.

In order to analyze the effectiveness of the VGGT and its potential impact on the Mekong region, this paper adopts an analytical framework that enables a detailed treatment of soft law instruments. Soft law is herein defined as a wide range of international instruments that are legally non-binding. This general definition provides a starting point to construct an analytical framework. As described in Section IV below, the framework breaks down 'softness' of the soft law by discussing those elements of obligation, precision, and delegation, on the one hand, and emphasizing the importance of contexts in which certain soft law operates, on the other. Applying this framework, the implication and potential of the VGGT is discussed in detail. For example, in the context of transnational food security governance,[8] the VGGT has functioned to mark a preliminary agreement of the good practices of resource governance, and has thereby driven

[4] On the idea of functional differentiation and fragmentation at the global level, see G. Teubner and P. Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society', in M.A. Young ed, *Regime Interaction in International Law: Facing Fragmentation* (Rochester, NY: Cambridge University Press, 2012), 23-54; G. Teubner and A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25 *Michigan Journal of International Law*, 999, 1004-1017 (2004).

[5] As a similar endeavor, see, generally, T. Xu, 'Hidden Expropriation in Globalization and Soft Law Protection of Communal Property Rights' 16 *Queen's University Belfast Law Research Paper* (2014), available at https://tinyurl.com/ybj8lrzn (last visited 15 June 2017).

[6] D. Maxwell and K. Wiebe, 'Land Tenure and Food Security: Exploring Dynamic Linkages' 30 *Development and Change*, 825 (1999).

[7] For an overview of this approach, see M. Margulis, N. McKeon and S. M. Borras eds, n 2 above. For an overview of the land rush, see, eg O. Schutter, 'How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland' 38 *The Journal of Peasant Studies*, 249, 250-255 (2011); W. Anseeuw et al, *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project* (Rome: International Land Coalition, 2012), available at https://tinyurl.com/y6vpw4tx (last visited 15 June 2017); L. Cotula, *The Outlook on Farmland Acquisitions* (Rome: International Land Coalition, 2011), available at https://tinyurl.com/y9cfpart (last visited 15 June 2017).

[8] For a brilliant overview of interactions of these legal fields, see, generally, A. Orford, 'Food Security, Free Trade, and the Battle for the State' 11 *Journal of International Law and International Relations*, 1 (2015).

the policy debate forward.[9] Generally, this case study intends to show how certain soft law measures cannot be discredited merely by their non-binding nature and calls for a more nuanced understanding of them.

This paper further discusses the effectiveness of the VGGT in the context of the Mekong region. So far, most of the debates on the land rush have focused on Sub-Saharan Africa, and scholarly engagements have also mostly emphasized that region.[10] Much of the land rush discussions that focus on the Mekong or South East Asia have emphasized case studies of peoples' resistance from political or sociological perspectives.[11] Legal analysis of the land rush problem, however, has been limited.[12] As discussed in the following sections, there are institutional reasons explaining why it is difficult to address land rush problems in Asia from a legal point of view. This paper tries to fill the gap by analyzing a soft law and[13] using the above-mentioned framework. Specifically, it asks if the VGGT is helpful to improve the situation of land governance in the Mekong region. Additionally, this case study intends to highlight the emerging recursivity between the Mekong and transnational legal order, even without explicit commitments by regional institutions.[14]

This paper is organized as follows. First, it presents a brief overview of land governance and a recent history of the global land rush. Second, it surveys scholarly and policy responses to the land rush, thereby arguing that soft law measures are relatively underexplored despite their potential importance for the Mekong. Third, against this background, the paper deploys its analytical framework to investigate soft law measures and analyzes the VGGT's relevance to the Mekong Region. Finally, the paper draws theoretical conclusions and suggests further areas of study.

II. Recent History of Land Governance and the Land Rush

Given that there is already a wide range of publications regarding the

[9] See K.W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance' 54 *International Organization*, 421, 423 (2000). ('Importantly, because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization'.)

[10] See, eg L. Cotula, *The Outlook on Farmland Acquisitions* n 7 above.

[11] See, eg K.E. McAllister, 'Rubber Rights and Resistance: The Evolution of Local Struggles against a Chinese Rubber Concession in Northern Laos' 42 *The Journal of Peasant Studies*, 817 (2015).

[12] For a notable exception, see C. Carter and A. Harding, *Land Grabs in Asia: What Role for the Law?* (London: Routledge, 2015).

[13] Of course, this paper does not claim that an analysis of the soft law is more important than the traditional legal analysis. Rather, it considers that the analysis of the soft law is a necessary complement to consider the land governance in the Mekong region comprehensively.

[14] By recursivity, this paper means that discourses between different institutions within one transnational legal order (in the case of this paper, transnational food security governance) spark an evolution of legal orders by referring to each other. See, T.C. Halliday and G. Shaffer, *Transnational Legal Orders* (Cambridge: Cambridge University Press, 2015), 37-42.

history of land governance in general, this paper does not reproduce it, but instead presents only a short outline of the trajectory.[15] As developed more fully in subsequent sections, this paper takes the view that the recent land rush phenomenon is a structural problem caused in large part by the historical commodification of land and the deepening of globalization.[16] The commodification of land originally took place in the United Kingdom, forming the basic context for the evolution of land problems.[17] After the enclosure movement during the industrial revolution, disputes related to land have been connected to political, economic, and social conditions. Commoditized and traded in an era of globalization, land, like labor and currency, have been embedded in the globalizing political economy.[18] The commodification of land, coupled with the emerging global economy, trading practices, global capitalism, and the global value chain,[19] has created an enabling structure for land rushes.[20] Likewise, Lorenzo Cotula argues that investment arbitrations have played a crucial role in commoditizing land at the level of global market.[21] In short, after commoditization at the domestic market level long ago, land increasingly became a commodity in the global market.

The global food crisis beginning from 2006 and the subsequent land rush have triggered vibrant policy debates.[22] Those states concerned with food security

[15] For the African context, see L.A. Wily, 'Looking back to See Forward: The Legal Niceties of Land Theft in Land Rushes' 39 *The Journal of Peasant Studies*, 751 (2012); for the Asian context, see A.B. Quizon, *Land Governance in Asia: Understanding the Debates on Land Tenure Rights and Land Reforms in the Asian Context* (Rome: International Land Coalition, 2013), available at https://tinyurl.com/ybyj7u5m (last visited 15 June 2017).

[16] For a recent thoughtful elaboration on how land has become investible, see T.M. Li, 'What Is Land?' n 3 above, 592-597.

[17] K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (New York: Farrar & Rinehart, 1944), 325. ('What we call land is an element of nature inextricably interwoven with man's institutions. To isolate it and form a market out of it was perhaps the weirdest of all undertakings of our ancestors.')

[18] S. Frerichs, 'Law, Economy and Society in the Global Age', in A. Perry-Kessaris ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Abingdon, UK and New York, USA: Routledge, 2013), 36, 44.

[19] D. Held et al, *Global Transformations: Politics, Economics and Culture* (Cambridge: Polity, 1999).

[20] B. Müller and G. Cloiseau, 'The Real Dirt on Responsible Agricultural Investments at Rio+20: Multilateralism versus Corporate Self-Regulation' 49 *Law & Society Review,* 39, 44 (2015). ('While the agricultural crops produced in these investments are withdrawn from the global market and connected directly to the national economies of the investor countries, land and water themselves become globally traded commodities and thus objects of intense speculation'.)

[21] L. Cotula, 'The New Enclosures? Polanyi, International Investment Law and the Global Land Rush' 34 *Third World Quarterly*, 1605, 1612-1623 (2013).

[22] FAO Food Price Index provides a data of prices of five major food commodities (meat, cereal, dairy, vegetable oil and sugar cane) weighted with the average export shares of each of the groups for 2002-2004. According to the index, prices of these five commodities have raised around sixty per cent from 2006 to 2008. Data is available at https://tinyurl.com/6xlv3h (last visited 15 June 2017).

and the volatility of food prices went on to acquire foreign land on a large scale, especially in developing areas of the world: Africa, Latin America, and Southeast Asia. The rush for acquisition caused problems for people who were traditionally settled in the targeted areas, as they lost their lands without fair compensation.[23] A variety of actors are involved in the acquisitions, and it is a structural problem unable to be controlled by one country's domestic policy. According to the report published by the United Nations Conference on Trade and Development (UNCTAD) in 2013, there are several reasons for the land rush: volatile food prices, which, in turn are caused by climate change, food price speculation, and the direct link between fuel and food prices created by the growth of the biofuel industry.[24] A precise estimation of acquired land is hardly available. However, expanding populations, mounting demands for biofuel, and the decreasing amount of arable lands due to land degradation indicate trends for increasing demands for land.[25] The urgency of food security is still under debate,[26] but at least the problem of land rush has sparked vibrant discussions.[27] Various policy approaches from various actors, on different levels, and across sectors, such as the elaboration of 'right to food'[28] or additional soft regulations to the financial sector,[29] have been observed. The next section will illustrate various approaches to regulate the global land rush as an example of transnational governance.

Large-scale foreign land acquisition is understood as cross-border affirmation of the right to control land by public, private, or hybrid actors.[30] Compared with traditional, domestic land disputes, it is characterized by the variety of actors

[23] GRAIN, an international non-governmental organization (NGO), has framed the issue as land grabbing at the early stage. GRAIN, 'Seized: The 2008 Land Grab for Food and Financial Security' (Barcelona: GRAIN, 2008), available at https://www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security (last visited 9 June 2017).

[24] UNCTAD, 'Trade and Environment Review 2013: Wake Up Before It Is Too Late' (2013), available at https://tinyurl.com/mapb8wc (last visited 15 June 2017).

[25] Many international organizations and NGOs have provided their estimations of transferred land. For example, according to a report by International Land Coalition published in 2011, fifty-one – sixty-three million ha of land has been affected in twenty-seven African countries. L. Cotula, *The Outlook* n 7 above, 6; According to the estimation by the World Bank in 2011, fifty-six point five million ha has been affected through four hundred sixty-four projects. K. Deininger and D. Byerlee, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?* (Washington, DC: The World Bank, 2011), 51, available at https://tinyurl.com/yastbz7o (last visited 15 June 2017).

[26] J. Bruinsma ed, *World Agriculture: Towards 2015/2030. An FAO Perspective* (London: Earthscan Publications, 2003), available at https://tinyurl.com/y8q5dhqx (last visited 15 June 2017)

[27] Journal of Peasant Studies, for example, covers a lot of trajectories on land grabbing. Especially, see the special editions of 38(2), 39(3-4), 40(3).

[28] See, generally, C. Golay and I. Biglino, 'Human Rights Responses to Land Grabbing: A Right to Food Perspective' 34 *Third World Quarterly*, 1630 (2013).

[29] See, generally, P. Stephens, 'The Principles of Responsible Agricultural Investment' 10 *Globalizations*, 187, (2013).

[30] See L. Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (London: Routledge, 2012).

involved and the facilitative role of the state. For example, foreign investment actors vary in form, including multinational corporations, joint ventures, sovereign wealth funds, public-private partnerships and others. And land investment extends to such sectors as agriculture, infrastructure, and the extractive industries. The right to control land implicates many legal issues such as possible human rights abuses because of forced evictions without adequate compensations; infringement of a right to food; as well as global governance in terms of global food security, energy, and sustainable development.[31] In terms of the facilitative role of states, this paper draws on two historical threads. First, in the history of public international law, resource sovereignty has been asserted by the third world, resulting in series of United Nations resolutions. In line with this historical argument, the land rush is substantively a problem of sovereignty crisis in developing countries.[32] Second, from an era of colonialism to neo-liberal development policy, there has been a diffusion of western legal notions imposed on the East. In the context of land law, it took shape in two ways: the concept of private property from Locke, for whom improvement to land makes it the subject of private property,[33] and a belief in 'clear and strong' property rights as a prerequisite of development.[34] As a result, there has been a conflict between customary, pluralistic notion of land rights and western notions of property rights. Large-scale foreign land acquisition is, on these two grounds, closely related to each state's land and development policies.

III. Responses to the Land Rush

Faced with problem of the land rush, both practical and scholarly responses have emerged. This section analyzes these and shows how they may or may not apply to the Mekong. The global land rush has surprised the world by its temporality and scope, and it has garnered policy responses as well as scholarly attention.[35] Some scholars have called for modifications to the investment law regime by utilizing human rights.[36] Others consider transnational private litigation[37] or transnational corporations' corporate social responsibilities

[31] Recently adopted Sustainable Development Goals share this view by stipulating the importance of life on land in its Goal 15.

[32] S. Sassen, 'Land Grabs Today: Feeding the Disassembling of National Territory' 10 *Globalizations*, 25, 27-29 (2013).

[33] J. Locke, *Two Treatises of Government and a Letter Concerning Toleration* (Stilwell, KS: Digireads.com, 2005).

[34] See, generally, R.A. Posner, 'Creating A Legal Framework For Economic Development' 13 *World Bank Research Observer*, 1 (1998).

[35] T.M. Li, 'What Is Land?' n 3 above, 594.

[36] See, eg H. Muir Watt, 'The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal: The Missing Link', in W. Matteli and T. Dietz eds, *International Arbitration and Global Governance* (Oxford: Oxford University Press, 2014), 214.

[37] C.M. Scott and R. Wai, 'Transnational Governance of Corporate Conduct through the

and other soft law instruments as methods of restraint on the land rush.[38] Also, on the one hand, there are deep criticisms toward a notion of 'clear and strong' property law[39] and, on the other, there are arguments for the emergence of global property rights regime.[40] Regardless of the wide-ranging topics and approaches employed by scholars, there are two tendencies: first, a presupposition of certain legal institutional frameworks that is not necessarily applicable to the Mekong region, and second, the emphasis on the gap between policy practices, where soft law measures are blooming in response to the land rush, and scholarship, which is less engaged with soft approaches.

Criticism against the investment law regime is one of the most vibrant points of discussion. Given the widely accepted observation that the investment law regime has facilitated the ability of investors to secure their property rights on land in foreign countries, scholars have made various attempts to take human rights considerations into account. Horatia Muir Watt, from a viewpoint of private international law, for example, argues that the investment law regime is one-sided by emphasizing the strong protection for the property of foreign investors, a focus that results in 'a confiscation of local regulatory sovereignty, in fields as sensitive as taxation, public health, and environment'.[41] Based on this understanding, Muir Watt suggests that to make arbitrators in investment arbitrations pay due attention to human rights there should be an avenue to sue investors in violation of human rights in the domestic courts of the home state, based on the horizontal effect of the human rights.[42] This argument is founded on institutional analysis[43] and on the idea of human rights as disruptive vocabulary that triggers institutional change.[44] For these authors, there exists a necessity for a place for contestation that can reverse the one-sided decision making processes seen in investment arbitrations. Such a site may be a regional human rights court or transnational private litigation.

What is notable here, however, is that this approach of scholarly intervention takes specific institutional arrangements for granted, and therefore it has only limited applicability to certain areas such as the Mekong. Debates emphasizing

Migration of Human Rights Norms: The Potential Contribution of Transnational "Private Litigation" ', in C. Joerges, I. Sand and G. Teubner eds, *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004), 287.

[38] H. Kalimo and T. Staal, 'Softness in International Instruments: The Case of Transnational Corporations' 42 *Syracuse Journal of International Law and Commerce,* 363 (2015).

[39] See, generally, D. Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development' 1 *Accounting, Economics, and Law,* 36 (2011).

[40] A. Lehavi, 'Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property' 15 *Chicago Journal of International Law,* 452 (2015); J.G. Sprankling, *The International Property Law* (Oxford: Oxford University Press, 2014).

[41] H. Muir Watt, n 36 above, 219.

[42] ibid 235.

[43] See, generally, K. Pistor, 'Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change' 11 *Global Jurist*, 1-26 (2011).

[44] For an origin of the idea of disruptive vocabulary, see C.M. Scott and R. Wai, n 37 above.

the potential for interaction between investment law and human rights regimes usually presuppose the existence of a regional human rights court. However, such a human rights court does not exist in the Mekong region. In 2008, the Association of Southeast Asian Nations (ASEAN) Charter was adopted, and its Art 14 stipulates the future establishment of the ASEAN Human Rights Body. The ASEAN Intergovernmental Commission on Human Rights (AIHCR) was subsequently established in 2009. AIHCR further adopted ASEAN Human Rights Declaration, but the regional human rights court is yet to be created. To restate it differently, because of this institutional constraint, the Mekong region is a difficult place to observe transnational regulatory developments. For example, Tomaso Ferrando has argued that based on the jurisprudence of the Inter-American Court of Human Rights and the African Commission on Human and Peoples Rights, 'transnational property rights regimes can offer people an external platform to be used counter-hegemonically against the abuses of sovereign prerogatives, and to defend local diversities'.[45] However, given that there is no such external platform in the Mekong, this line of argument cannot be applied directly to this region.

Similarly, analysis of institutional change does not apply to the Mekong.[46] The concept of institutional change as exemplified by conflicts among multiple courts as a trigger of institutional change, presupposes the existence of sites where actors can assert property rights. Given the limited numbers of local court cases available, the Mekong region tends to appear as a regulatory vacuum, with fewer examples of law in action. Although some transnational human rights litigation has emerged from the region, such as the Unocal case[47] and the Song Mao case,[48] it is still minimal. The region appears to have little legal discourse on human rights incidents related to land acquisition.

This observation suggests two theoretical and methodological challenges. First, the debate on transnational governance evolving in the other regions, especially in the West, is less relevant in the Mekong region, where the legal arguments and courts proceedings are simply limited and institutional change triggered by such legal discourses is not apparent. Second, although this paper does not take a normative position regarding the establishment of human rights courts in the region, one can nonetheless perceive that the lack of such human rights courts makes the region isolated from the growing transnational property

[45] T. Ferrando, 'Global Land Grabbing', in H. Muir Watt and D.P.F. Arroyo eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014), 72, 86.

[46] K. Pistor, n 43 above.

[47] For an overview of the case, see C. Holzmeyer, 'Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal' 43 *Law & Society Review*, 271 (2009).

[48] For an overview of the case, see M. Mohan, 'The Road to Song Mao: Transnational Litigation from Southeast Asia to the United Kingdom' 107 *The American Journal of International Law*, 30 (2013).

rights regime.

Therefore, other pathways to critique the situation of the land rush in the Mekong are required. Most scholarly treatment of the land rush in the Mekong or South East Asia is predominantly based on empirical or political analysis related to the counter movements.[49] This paper argues, in this regard, that an endeavor toward a nuanced understanding of soft law measures is necessary to propel the debate forward. There is significant usage of soft law measures to regulate the land rush. Other than those instruments that will be discussed in the subsequent section, there are international, regional and national initiatives, either public or private, or hybrid. For example, in 2009 Oliver de Schutter, United Nations (UN) Special Rapporteur on the Right to Food elaborated Eleven Principles: Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases.[50] Moreover, the United States Agency for International Development (USAID) has prepared Operational Guidelines for Responsible Land-Based Investment, which discusses 'recommendations for best practices related to the due diligence and structuring of land-based investments'. Private sector initiatives include self-regulatory mechanisms that set certain guidelines for land investment, such as the Principles for Responsible Investment in Farmland[51] or Equator Principles.[52] More loosely, the Colombia Center for Sustainable Investment, a research institute, maintains a webpage called Negotiations Portal,[53] aimed at comprehensive information sharing at four stages of land management: Setting the Legal & Policy Framework, Pre-Negotiation Stage, Contract Negotiation Stage, and Contract Implementation and Monitoring Stage. This website, previously an independent initiative by one research institute, is now endorsed by G7's CONNEX Initiative, which aims at improving 'the quality of advisory support provided to low income country governments in their negotiation of complex commercial contracts'.[54]

However, generally scholars have not analyzed these soft regulatory instruments.[55] As a notable exception, Smita Narula has made a contribution

[49] See, eg conference papers of the recent international conference on 'Land Grabbing: Perspectives from East and Southeast Asia' held in 2015. The papers are available at https://tinyurl.com/yaytw4c7 (last visited 15 June 2017).

[50] This provides a set of eleven core principles and measures for host states and investors.

[51] This initiative was launched by five pension funds. It subsequently opened up to private equity funds as well. Five principles were prepared by eight investment funds for the financial sector.

[52] The Equator Principles is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects.

[53] See the website available at https://tinyurl.com/y9re247x (last visited 15 June 2017).

[54] G7 CONNEX Initiative was first launched at Brussels Summit in 2014 and then reaffirmed by the Schloss Elmau Summit in 2015.

[55] For a similar standpoint, see T. Xu, n 5 above, 20. ('Although soft law protection of communal property rights is alleged to have limited legal effect due to its "non-binding" nature and a lack of formal enforcement mechanisms, soft law may provide a timely response to

by discussing actual instruments through the analytical framework of the market-plus approach, represented by 'Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources', as well as the rights-based approach, represented by 'Eleven Principles: Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases'.[56] The market-plus approach maintains that large-scale land transfers can achieve a win-win relationship between the investor and host populations if properly regulated. The rights-based approach prioritizes a state's human rights considerations over any other considerations.[57] Land can be commodified under both approaches, but the rights-based approach allows only those land transfers that ensure protection of human rights, such as the right to food. Starting from this distinction,

> 'the market-plus approach tolerates and facilitates rights violations, whereas the rights-based approach sets a normative baseline that repudiates these impacts and addresses key distributive concerns'.[58]

There is another intervention explicitly focused on the importance of soft law, emphasizing its substantive function in the rule-making process. With a specific normative position supporting communal property rights,[59] it is argued that there is a

> 'need to inquire into the actual roles played by different actors in this "meta-power game", their role in making governance standards, and their willingness to be bound by these "soft" governance standards'.[60]

Here, the 'meta-power game' means the complex and expansive norm-making process characterized by soft law instruments. In this context, soft law measures are an important building block to uphold communal property rights, or in other words, 'the starting point for negotiating international binding commitments'.[61] This paper shares the view that soft law plays a complex role in norm creation in an interaction with hard laws, and to grasp such a norm creation one needs a refined analysis on soft law measures.

Besides these exceptional engagements with the soft law measures in the

global concerns and trends, and fill in gaps where hard law protection is ineffective or relevant policy is still being worked through.')

[56] S. Narula, 'The Global Land Rush: Markets, Rights, and the Politics of Food' 49 *Stanford Journal of International Law*, 101, 121-131 (2013).

[57] ibid 108.

[58] ibid 101.

[59] Her normative position is further elaborated in the recently published edited volume, which explores a possibility to uphold communal property right as a human right. See, T. Xu and J. Allain, *Property and Human Rights in a Global Context* (Oxford: Hart Publishing, 2016).

[60] T. Xu, n 5 above, 20.

[61] ibid.

field of land governance, there is a significant gap between practice and scholarly discussions. Although there are expanding numbers of soft law measures in the field of land governance, scholarly attempts to analyze them seem scant and yet necessary in order to engage with and provide critiques to real world legal practices. Moreover, when considering the specific context of the Mekong region, as mentioned above, these soft law measures have a higher importance.

IV. The VGGT and its Relevance to the Mekong Region

The preceding discussions should have demonstrated, among other things, the necessity to investigate carefully the relevance of soft law instruments to assess recent developments in land governance. This observation echoes with the recent discussions of global governance, where the proliferation of various types of soft law instruments, such as standards, guidelines, recommendations and multilateral agreements, are calling for renewed empirical[62] and theoretical[63] attention. Against this background, this section provides an analytical framework to examine soft law measures. It then examines in detail the possibilities and implications of the VGGT, the first global agreement on the issue of governance of tenure of land, fishery and forest, and its relevance to the Mekong region. By situating the VGGT into the history of policy developments in response to the land rush, and into the context of the Mekong, this case study describes how soft law can impact the management of transnational land deals and the property rights regime.

1. Analytical Framework

Among various possible approaches to analyze the VGGT,[64] this paper emphasizes its soft nature,[65] and supplements its analysis with a case study to draw empirical insights about its effectiveness and legitimacy. In this paper, *effectiveness* means how certain soft laws practically achieve the policy purpose behind such measures, and *legitimacy* denotes how far stakeholders will treat

[62] See S.E. Merry, 'Global Legal Pluralism and the Temporality of Soft Law' 46 *The Journal of Legal Pluralism and Unofficial Law,* 108 (2014).

[63] See M. Goldmann. 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' 25 *Leiden Journal of International Law,* 335 (2012).

[64] See, eg, an approach to the legislative process of the VGGT from the viewpoint of participatory governance, J. Duncan, *Global Food Security Governance: Civil Society Engagement in the Reformed Committee on World Food Security* (London: Routledge, 2015).

[65] As far as the author is aware, the sole existing research to approach the VGGT from the viewpoint of soft law is given by Xu. Her analysis of the softness of the VGGT is, in my view, close to the one presented in this paper. See T. Xu, n 5 above, 20. ('Soft law is a metaphor, denoting non-binding governance standards. We need to inquire into the actual roles played by different actors in this "meta-power game", their role in making governance standards, and their willingness to be bound by these "soft" governance standards'.)

certain soft laws as right, just or normative. Both terms are regarded as relative and descriptive concepts, enabling this paper to speak about 'low effectiveness' or 'high legitimacy' as drawn from the empirical insights. The analytical framework presented below guides the empirical case study by delineating which aspects in the case should be focused. To formulate the analytical framework, this work draws heavily on existing research and discussions on soft law.

Soft law has been discussed in different fields of law and in different contexts, and these discussions have been deeply embedded in the temporal and spatial contexts in which those debates operate. Soft law has been associated with specific political implications, first in the field of international law,[66] and then in the context of European regulations with different genealogies.[67] Most recently, an accumulation of soft laws is understood as one of the crucial characteristics of international governance.[68] Therefore, the current challenge is to evaluate the expansion of divergent soft laws at various levels and sectors of governance,[69] in relation to hard law on the one hand,[70] and to conceptual discussions of law itself, on the other.[71] Moreover, this problem of the blurring dichotomy of hard and soft law is found in the context of transnational governance, where in parallel, other blurring dichotomies of public law and private law, or conflict of laws and substantive law, are vigorously discussed.[72]

Keeping these debates in mind, this paper is consistent with the view that, given an accumulating amount of various soft law measures, the current challenge mainly revolves around how to better understand and analyze soft

[66] See, eg C.M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' 38 *The International and Comparative Law Quarterly,* 850 (1989).

[67] D.M. Trubek and L.G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-Ordination' 11 *European Law Journal,* 83 (2005); A. di Robilant, 'Genealogies of Soft Law' 54 *The American Journal of Comparative Law,* 499 (2006).

[68] See, among others, J.J. Kirton and M.J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (London: Routledge, 2004); A. Marx et al, *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Cheltenham: Edward Elgar, 2012); A. von Bogdandy et al, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2009).

[69] Background of this phenomenon is out of focus of this paper. This phenomenon is in parallel with an emergence of various non-state actors as regulator in a shift from government to governance. For a recent discussion of private regulations, see A. Marx, M. Maertens et al, *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Cheltenham: Edward Elgar Publishing, 2012).

[70] G. Shaffer and M.A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' 94 *Minnesota Law Review,* 706 (2010); G.P. Calliess and M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance' 22 *Ratio Juris,* 260 (2009).

[71] B. Kingsbury, 'The Concept of "Law" in Global Administrative Law' 20 *European Journal of International Law,* 23 (2009).

[72] See, generally, C. Joerges, 'Constitutionalism and Transnational Governance: Exploring a Magic Triangle', in Id, I. Sand and G. Teubner eds, *Transnational Governance* n 37 above (Oxford: Hart Publishing, 2004), 339.

law measures, as a prerequisite to the question of how one should re-conceptualize, if necessary, the conceptions of law.[73] Based on such understanding, the following will briefly discuss important building blocks, namely a regulatory approach and critical and anthropological insights.

a) Regulatory Approach: 'Softness' of Soft Law

What this paper calls the regulatory approach denotes those scholars who endeavor to bridge knowledge of international law and international relations, and concentrates on how to better understand and conceptualize various soft law instruments. To analyze abundant types of soft and hard instruments, a seminal study in this approach has provided three criteria: providing binding obligation; being precisely worded; and providing some type of delegation in the implementation of the law.[74] To elaborate, a more recent study has evaluated soft law through the concept of 'softness'.[75] From this viewpoint, the voluntary nature of soft law is only one component of softness in certain instruments. In refining the concept of soft law, it is argued that levels of 'softness' or 'hardness' are determined not only by the dichotomy of binding and non-binding, but with three additional criteria: obligation, precision and delegation. Under these criteria, for example, binding law without precision is not necessarily hard, but has certain 'softness'. The core of this regulatory approach counters the argument discrediting soft law due to its non-binding nature and unpacks varieties of soft laws. Then, a real challenge lies in how these criteria of softness correlate with *quality*, measured by effectiveness, legitimacy, dynamic efficiency, and others.[76]

A common, yet critical, criticism to the regulatory approach is relativism. That is, if one dissolves hard and soft laws using such a framework, then an inherent normativity built in (international) law will be eventually lost.[77] However, the purpose of the analytical framework explored here is not to directly re-conceptualize the dichotomy between hard and soft law based on the results of the empirical analysis. Such a re-conceptualization is a different question requiring different arguments, and the herein-presented framework serves only for the empirical analysis. The result of the empirical analysis only informs such conceptual debates.[78] Another difficulty is that evaluating the level of precision

[73] See, cf J. d'Aspremont, 'Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship' 46 *Vanderbilt Journal of Transnational Law*, 1119 (2013); G. Shaffer, 'The New Legal Realist Approach to International Law' 28 *Leiden Journal of International Law*, 189 (2015).

[74] K.W. Abbott and D. Snidal, n 9 above.

[75] H. Kalimo and T. Staal, n 38 above.

[76] ibid 397.

[77] From the standpoint of critical legal studies, see M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' 70 *The Modern Law Review*, 1, 27-30 (2007).

[78] In this regard, this paper is sympathetic with sociological jurisprudence. See the recent treatment B.Z. Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' 56 *William & Mary Law Review*, 2235 (2015).

or delegation is always relative, and such an evaluation is only subjective. As those subjectivities exist, this paper does not intend to claim that certain soft law measures are effective or legitimate. Rather, they provide only viewpoints for an analysis. Then, policy developments triggered by certain soft law instruments, analyzed as a case study, will illustrate how effective and legitimate certain soft law measures are.

b) Political Economic and Institutional Contexts

The idea of effectiveness and legitimacy brings the discussion to the second building block of the analytical framework, namely critical and anthropological insights. From a critical scholar's viewpoint, there is an implicit limitation for soft law, depending on the legal framework in which it is embedded. As typically shown in the case of corporate social responsibility[79] or United Nations Guidelines on Business and Human Rights (UN Guiding Principles),[80] soft law measures often operate merely within already-settled legal frameworks, developed through 'a process of hegemonic consolidation'.[81] For example, the UN Guiding Principles have been a compromise based on an understanding that liabilities of corporate misconduct cannot adequately be treated given the current constellation of laws on territoriality. According to David Kennedy, these surrounding legal frameworks are taken for granted merely as a fact, and not politically contestable.[82] This insight shows that when evaluating the effectiveness of soft law, one needs to be careful about the surrounding legal frameworks that impact current political and economic situations where certain soft law measures operate. In sum, the political and economic contexts constituted by legal institutions are an important target for case study analysis to evaluate effectiveness.

Another important element is an operationalizing technique residing in soft law, as recently revealed by anthropology scholars.[83] According to Sally Engle Merry, given the situation of global legal pluralism characterized by an array of laws, guidelines, recommendations, practice and standards, its temporality is important.[84] Namely, when the idea built into certain soft laws is translated into indicators, such as Human Development Index, to borrow her example, then such an idea 'can become a widely accepted perspective that influences policy-

[79] Cf A. Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-regulation and National Private Law* (Oxford: Hart Publishing, 2015).

[80] J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013).

[81] D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016), 37.

[82] ibid.

[83] See for a concise introduction to the issue, K.E. Davis, B. Kingsbury, and S.E. Merry, 'Indicators as a Technology of Global Governance' 46 *Law & Society Review*, 71 (Spring 2012).

[84] S.E. Merry, n 62 above.

makers and publics'.[85] Drawing from her insight, this paper asserts that the effectiveness of soft law measures needs to be considered in relation to the technique employed to operationalize the idea built into certain soft laws. Then, only by paying attention to the temporality, or process, the effectiveness and legitimacy of the soft law can be judged.

Indeed consideration for this technical operationalization in relation to relevant institutions overlaps with the analysis of the level of delegation, but here more emphasis is placed on actual techniques employed to operationalize the soft law. In the case study below, the discussion of relevant institutional contexts is included within the discussion of delegation, as far as it concerns the delegated authority of the soft law.

In sum, the analytical framework employed here analyzes soft law measures by focusing on their softness, consisting of obligation, precision, and delegation. Following the insights of critical and anthropological scholars, an assessment of their effectiveness and legitimacy takes into account contexts in which they operate with a temporality, or a process, in mind. The term *context* in this situation means two things: the political economic context that certain soft law measures address, on the one hand, and relevant institutions that operationalize the soft law, on the other. The following case study of the VGGT and its relevance to the Mekong region will be conducted focusing on these elements. This case study eventually illustrates the current effectiveness and legitimacy of the VGGT, particularly in the Mekong region.

2. The VGGT from the Analytical Framework of Soft Law

This section applies the analytical framework to the VGGT. The VGGT, although non-binding, has a moderate level of precision and clear delegation, and thereby shows the potential to have a high effectiveness in building transnational norms of land governance. Again, these three elements are discussed in order to characterize the VGGT among many other soft laws. And the actual effectiveness or legitimacy does not flow directly from these three elements. Rather, the analysis of the surrounding contexts of the VGGT illustrates its certain effectiveness and legitimacy.

After the land rush appeared as a problem that required an international response, private sectors, in collaboration with the World Bank and other international organizations, took the first initiative to make agricultural investment responsible and accountable.[86] After a series of seminal research studies,[87]

[85] ibid 109.

[86] As discussed above, this is what Narula called 'the Market-Plus Approach'. See, S. Narula, n 56 above, 121.

[87] The World Bank, *World Development Report 2008: Agriculture for Development* (Washington DC: The World Bank, 2007), available at https://tinyurl.com/yaxwmpoe (last visited 15 June 2017); K. Deininger and D. Byerlee, n 25 above.

which launched a vast amount of debates,[88] the World Bank, the Food and Agriculture Organization (FAO), UNCTAD and the International Fund for Agricultural Development (IFAD) prepared the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (PRAI). The PRAI is a voluntary, self-regulatory measure of responsible agricultural investment. However, after its issuance, it received much criticism.[89] The main critique arises from the alleged fact that lands classified as idle or underdeveloped, and therefore investable, were actually under traditional or customary usage by indigenous people or other local communities. In consequence, the PRAI, based on the findings of such research, has been criticized not just for its inability to regulate the land rush adequately, but also for facilitating or legitimizing the land rush.

Another regulatory measure was initiated by the UN related organization, the Committee on World Food Security (CFS). The CFS was established in 1974 as an intergovernmental forum to review policies on food security, reporting annually to the United Nations Economic and Social Council. In response to the food crisis, it reformed its organizational structure in 2009,[90] welcoming participation from relevant actors into the policy-making processes. Learning from the criticisms of the PRAI, the CFS formulated an inclusive policy-making process, with civil society organizations being organized and actively participating in the drafting of soft law measures.[91] Due to this inclusive mechanism of policy making, arguably, the CFS currently has sufficiently high legitimacy in the global policy making on food security.[92] In 2012, the CFS re-enforced the VGGT. Thanks to the reform of the CFS,[93] one of the acclaimed characteristics of the drafting process of the VGGT is the wide participation of relevant actors,[94] thereby ensuring high legitimacy from wide ranging stakeholders.

[88] See, eg, Tania Murray Li has provided a thoughtful criticism on the influential research by the World Bank. See, generally, T.M. Li, 'Centering Labor in the Land Grab Debate' 38 *The Journal of Peasant Studies*, 281 (2011).

[89] See, eg, S. Narula, n 56 above, 134.

[90] For a detailed description of the reform of the CFS, see J. Duncan, n 64 above, 84-122.

[91] B. Müller and G. Cloiseau, n 20 above, 43. ('For the first time in the UN history, at the CFS meetings in Rome, civil society organizations and private sector organizations were sitting with representatives of governments around the negotiating table to make proposals and negotiate about food policy issues'.)

[92] As discussed, there have been two strides of regulations of land rush: the Market-Plus approach and the Rights-Based approach. In case of land rush and its regulation, these two approaches broadly correspond with industries' self-regulation and UN based public regulation. A symbolic event to show that the UN based approach represented by the CFS has a higher legitimacy was the fact that promoters of PRAI have tried to have an endorsement by the CFS to secure its legitimacy. In the end, this move was not successful being faced with much criticisms by CSOs, and the CFS did not endorse the PRAI, but instead it stated 'taking note of the on-going process' of the PRAI. See P. Stephens, n 29 above, 190.

[93] For a detailed explanation of how this inclusive policy-making process has worked out, see J. Duncan, n 91 above, 123-152.

[94] P. Seufert, 'The FAO Voluntary Guidelines on the Responsible Governance of Tenure of

a) Softness: Obligation, Precision and Delegation

The VGGT has been prepared as a non-binding instrument. However, since it has a moderate level of precision and clear delegation, as shown below, the VGGT has the possibility of remaining relevant as a transnational norm of land governance.

First, the VGGT is not a mere declaration of aspiration, but is rather an instrument with clear subjects and statements of obligations and responsibilities. The rights and obligations it imposes on states and non-states' actors[95] and its delegation of authority to implement[96] are well stipulated. To contextualize, the VGGT first states that it operates within the framework of States' existing obligations under international law, including the Universal Declaration of Human Rights and other international human rights instruments.[97] It goes on to mention that it covers extensively not just land law, but all the institutions that enable land law instruments. The subject of the VGGT is not just state, but also non-state actors, which have a responsibility to respect human rights and legitimate tenure rights.[98]

To underscore one concrete element, for example, the VGGT explicitly accepts various patterns of land ownership. It stipulates:

> 'These Guidelines are global in scope. Taking into consideration the national context, they may be used by all countries and regions at all stages of economic development and for the governance of all forms of tenure, including public, private, communal, collective, indigenous and customary'.[99]

Further, in its Part 3, the VGGT acknowledges various types of property ownership. It addresses the governance of the tenure of land, fisheries, and forests with regard to the legal recognition of tenure rights of indigenous peoples and other communities with customary tenure systems,[100] as well as informal tenure rights.[101] It also speaks of the initial allocation of tenure rights to land, fisheries and forests that are owned or controlled by the public sector.[102] It is remarkable that the VGGT acknowledges not just customary tenure systems, but also informal tenure. It is more comprehensive and inclusive regarding a variety of tenure systems that exist in various contexts. In other words, it

Land, Fisheries and Forests' 10 *Globalizations*, 182 (2013).

[95] See especially, the VGGT, Part 3 and 4.

[96] See especially, the VGGT, Part 5 and 7.

[97] The VGGT, 1.1. This shows a clear contrast with the PRAI, the World Bank's measure for responsible agricultural investment, which does not make explicit mention to human rights obligations.

[98] ibid 3.2.

[99] ibid 2.2.4.

[100] ibid 9.

[101] ibid 10.

[102] ibid 8.

underlines the availability of multiple methods of governing land, fishery and forests. In this way, using detailed provisions, the VGGT presents its main ideas in a precise way.

Also, the VGGT delineates allocation of authority in terms of its implementation. As such, its delegation is clear. The Food and Agriculture Organization (FAO) mainly directs the implementation of the VGGT through advocacy, assistance for each country and regional organizations, and preparation of various technical guidelines for implementations.[103] These technical guidelines are detailed tools to implement the VGGT, covering such topics as gender, indigenous people, agricultural investment, and so on.[104] Moreover, the FAO has a legal team to facilitate such implementation, and they work on the preparation of database, called FAOLEX, which accumulates the relevant legal and policy data of each country.[105] The FAO also publishes the Land Tenure Journal to spark scholarly discussion.[106] When new issues emerge, they are first treated by the High Level Panel of Experts on Food Security and Nutrition,[107] which operates as a policy-science interface[108] of the Committee on World Food Security. Then this Committee decides if it needs to revise existing policies or formulate another policy, the outcome of which is again implemented by the FAO. The VGGT is embedded into this policy cycle, and as such, the delegation of the VGGT is clear.

b) Process: Political Economic and Relevant Institutional Contexts

Due to the effort by the FAO, which is charged with diffusing the VGGT, it has been endorsed by various organizations, ensuring its legitimacy. For example, G7, General Assembly of the UN, and other private companies including Cargill, Illovo Sugar, Nestlé, PepsiCo, the Coca-Cola Company, and Unilever have explicitly mentioned their commitment to the VGGT. Various organizations have already formulated policy guidelines with respect to the VGGT.[109]

Subsequently, based on the basic agreement on tenure governance of resources reached by the VGGT, further policy instruments came into being. The most prominent is the CFS-RAI, new principles on responsible agricultural investment. Recalling the PRAI's shortcomings, the CFS-RAI represented significant progress. Two elements are particularly important. First, the CFS-

[103] See https://tinyurl.com/ybot8kq9 (last visited 15 June 2017).

[104] Technical guidelines can be found at https://tinyurl.com/y8wmg494 (last visited 15 June 2017).

[105] The FAOLEX is available at https://tinyurl.com/y8gnc8p3 (last visited 15 June 2017).

[106] The journal is available at https://tinyurl.com/y79mhomq (last visited 15 June 2017).

[107] Available at https://tinyurl.com/manx59y (last visited 15 June 2017).

[108] P.M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination' 46 *International Organization*, 1 (1992).

[109] Updates of the implementation phase of the VGGT can be available at https://tinyurl.com/67a7tz5 (last visited 15 June 2017).

RAI explicitly builds upon the VGGT, thereby operating within the existing framework of other international instruments; the PRAI tends to operate rather distantly from surrounding instruments of human rights or resource governance.[110] Second, the CFS-RAI explicitly regards the traditional knowledge of indigenous people and communities and adopts Free, Prior and Informed Consent as a procedural approach. The PRAI only stipulates a consultation.[111] Although an implementation of the VGGT and the CFS-RAI is a matter of continuous work by relevant actors, and their relationship with the PRAI is ambiguous and calls for further examinations, these instruments are at least showing positive developments.

Additionally, there is another lesson to be learned from the trajectory of regulatory policies in response to the land rush, namely the PRAI, the VGGT, and the CFS-RAI. What is striking is the similarity of the area covered by the PRAI and the CFS-RAI. McKeon, who took part in the policy making process of the VGGT and the CFS-RAI, observes that the VGGT was a successful case of reaching agreement within a short time (almost two years) considering the participatory and inclusive mechanism being employed in the process.[112] She believes the agreement was possible because the VGGT carefully avoids most controversial issues such as free trade and detailed rules on investment.[113] The VGGT deals with governance of tenure of resources rather than marginal issues. Property 'rights truly are foundational for economic life and how you set them up powerfully inflects the development trajectory in a society'.[114] Subsequently, based on the VGGT with high precision and legitimacy, the CFS-RAI, an alternative measure on responsible agricultural investment, has been made possible. To summarize, the case of the VGGT illustrates one of the tactics that can be employed in an era of regulatory competition, where a firm and stable policy-based agreement, in this case governance of tenure, works as a powerful instrument to evolve further regulatory policies. The effectiveness of soft law measures cannot be judged solely by direct effectiveness, but rather a more contextualized understanding is necessary. At this stage, the non-binding nature of the VGGT has worked by lowering the hurdle to reach the agreement and producing a baseline for further policy discourses.

Although issues such as lack of transparency and perceptions of high level

[110] The CFS-RAI, 25-(i). ('Responsible investment in agriculture and food systems respects legitimate tenure rights to land, fisheries, and forests, as well as existing and potential water uses, in line with: (i) The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security, in particular, but not limited to, Chapter 12'.).

[111] ibid Principle 7. ('Respect cultural heritage and traditional knowledge, and support diversity and innovation').

[112] N. McKeon, *Food Security Governance: Empowering Communities, Regulating Corporations* (London: Routledge, 2015).

[113] ibid.

[114] D. Kennedy, 'Some Caution about Property Rights' n 39 above.

of corruption exist in the Mekong, this paper maintains that furthering the understanding of soft law measures in the context of law and development in developing countries is necessary and valuable. It submits that soft law measures are effective in developing countries by becoming a reference point in reviewing and improving national policies on land law. Also, by situating the VGGT between the two other policy instruments, the PRAI and the CFS-RAI, it may be suggested that the VGGT has functioned as a basis for gradual policy shifts.

Lastly, another operationalizing technique calls for attention, specifically the Land Governance Assessment Framework by the World Bank. There exists ongoing discussions that potentially the Land Governance Assessment Framework can be modified and utilized to facilitate implementations of the VGGT. The recent Implementation Manual of the Land Governance Assessment Framework mentions that '(i)nstruments for country level assessments, priority setting and monitoring are important for putting the VGGT into practice.'[115] A thorough analysis of this framework exceeds the scope of this paper, but sustained attention is needed, particularly cognizance of the strong influence that those frameworks would have on policy outcomes.[116]

3. Relevance to the Mekong Region

This section considers the relevance of the VGGT within the context of the Mekong region. After briefly explaining the historical background, this section analyzes regional implications from the viewpoint of the political economy. Then, it discusses how the VGGT has made an impact on the strategies and discourses of actors in the Mekong, especially the third sector actors. Lastly, actual impacts to the legal and political situations will be discussed, especially based on the experience from Myanmar.

a) Historical Background

The Mekong region is in danger of a land rush, and there are deepening controversies.[117] Although a comprehensive history of land governance in the Mekong is beyond the reach of this paper, a brief summary is still useful.[118]

[115] The World Bank, 'Land Governance Assessment Framework. Implementation Manual for Assessing Governance in the Land Sector' (Version: October 2013), available at https://tinyurl.com/ycjrffat (last visited 15 June 2017), 7. More information on the Land Governance Assessment Framework is available at https://tinyurl.com/y8syha2t (last visited 15 June 2017).

[116] See, eg K. Deininger, T. Hilhorst and V. Songwe, 'Identifying and Addressing Land Governance Constraints to Support Intensification and Land Market Operation: Evidence from 10 African Countries' 48 *Food Policy*, 76 (2014).

[117] For a useful overview of the regional context, see P. Hirsch and N. Scurrah, 'The Political Economy of Land Governance in the Mekong Region' (2015), available at https://tinyurl.com/y8k3r88l (last visited 15 June 2017).

[118] In writing this part of the situation of the Mekong, generally, the following studies, among others, have been valuable: Y. Kaneko, 'Ajia No Mondai Jyokyo (Problems in Asia)' 81

Land has been one of the areas of conflicts between states and society in the Mekong, and a dynamic relationship between the state and civil society has developed within the constraints of external factors.[119] All countries in the region have experienced a period of colonization by western countries. After the era of colonization, the Mekong has become one of the battlefields between capitalist and socialist views. Land governance has also been divided into two types, namely, privately owned and publicly owned lands.[120] Recent developments in each country of the Mekong show that they are becoming more open to foreign investment, and their lands are being turned into investable assets in the global market.

In Vietnam, the Party instituted economic reforms under the policy of Doi Moi in 1986 to address a growing economic crisis. Resolution 10 of 1988 gave peasant households usufruct rights to land for up to fifteen years for annual crops, and forty years for perennial crops. The Land Law of 1993 extended land tenure to twenty years for annual crops and fifty years for perennial crops. Although land remained the property of the state, peasants were given the right to inherit, transfer, lease, and mortgage their land use rights.[121] In Vietnam, the land rush is embedded in its 'search for its ideal balance between Communist control and a market-led economy'.[122]

Cambodia has had various land systems within a short period of time, due to the unstable political situation and civil war. Its recent history begins with French colonization and a return to monarchical rule (1953-1975), then continues with land collectivization under the Khmer Rouge (1975-1979), de-collectivization under Vietnamese occupation (1979-1989), and finally full privatization under a liberalized market economy (after 1989).[123] Currently, Cambodia's main land controversy centers on how to treat the economic land concessions[124] that have been facilitating the land rush.[125]

Hosyakaigaku (*Sociology of Law*), 27 (2015); P. Hirsch and N. Scurrah, n 117 above; A.B. Quizon, n 15 above.

[119] P. Hirsch and N. Scurrah, n 117 above.

[120] A.B. Quizon, n 15 above.

[121] H.L. Nguyen, 'Agricultural Land Tenure Security under Vietnamese Land Law: Legislative Changes and Improvements since the Economic Reform' 2 *Land Tenure Journal*, 67 (2013), available at https://tinyurl.com/y9ra3gr3 (last visited 15 June 2017); P. Hirsch, M. Mellac and N. Scurrah, 'The Political Economy of Land Governance in Viet Nam' (2015), available at https://tinyurl.com/ybp47u99 (last visited 15 June 2017).

[122] K. Hansen, 'Land Law, Land Rights, and Land Reform in Vietnam: A Deeper Look into "Land Grabbing" for Public and Private Development' (2013), Independent Study Project (ISP) Collection, available at https://tinyurl.com/y97l303s (last visited 15 June 2017); for discussions, see T. Markussen and F. Tarp, 'Political Connections and Land-Related Investment in Rural Vietnam' 110 *Journal of Development Economics*, 291 (2014).

[123] A.B. Quizon, n 15 above, 32.

[124] Royal Government of Cambodia, Sub-decree no 46 on Economic Land Concessions (2005).

[125] For discussions, see A.N.S. Touch and J. Chiengthong, 'The Politics and Ethics of Land Concessions in Rural Cambodia' 26 *Journal of Agricultural and Environmental Ethics*, 1085

Laos has abundant land, and most of its population has historically been rural. The war between royalist government and Pathet Lao revolutionary force (1964-1973) resulted in extensive population displacement.[126] After the 1986 Party Congress, Laos mobilized as an outward-oriented and market-based economy. The current Land Law was passed in 2003 and since then, there have been public concerns about the impact of large-scale land concessions.[127]

Lastly, in Myanmar, it is important to understand the colonial era to appreciate the current legal status of land.[128] Of particular note is the State's assumption of rights to land, on the one hand, and the relationship between the central government and the various ethnic-based states, on the other. Following the economic development of the late 1990s, the national elections in 2010 opened the country to foreign investments under President Thein Sein.[129] Most recently, Myanmar is revising its National Land Use Policy, which will be analyzed below.

Apart from each country's unique development, this paper is more focused on their common historical features of land governance. The recent histories of land, the technological revolution of agriculture, the Green Revolution, and the impact of policies taken by the International Monetary Fund (IMF) and the World Bank (and occasionally by the Asian Development Bank) have fostered privatization of land and have put pressure on traditional small-scale farmers in these countries.[130] Between 1965 and 1990, the Green Revolution resulted in a dramatic increase in three cereal crops: rice, wheat, and maize. It also gave rise to a tendency to favor large-scale, commercial farming which put pressure on small-scale farmers that are thought to be too inefficient for export-oriented farming.[131] Moreover, development policies by donor agencies have had a major impact on the land governance in the Mekong.[132] In the 1970s the World Bank strongly encouraged the establishment of a property rights system[133] as

(2013); S. Milne, 'Under the Leopard's Skin: Land Commodification and the Dilemmas of Indigenous Communal Title in Upland Cambodia: Land Commodification in Upland Cambodia' 54 *Asia Pacific Viewpoint*, 323 (2013); C. Oldenburg and A. Neef, 'Reversing Land Grabs or Aggravating Tenure Insecurity? Competing Perspectives on Economic Land Concessions and Land Titling in Cambodia' 7 *Law and Development Review*, 49 (2014).

[126] P. Hirsch and N. Scurrah, 'The Political Economy of Land Governance in Lao PDR' (2015), 2, available at https://tinyurl.com/y7n7vjcs (last visited 15 June 2017).

[127] For debates, see C. Lund, 'Fragmented Sovereignty: Land Reform and Dispossession in Laos' 38 *The Journal of Peasant Studies*, 885 (2011); K.E. McAllister, n 11 above.

[128] N. Scurrah, P. Hirsch and K. Woods, 'The Political Economy of Land Governance in Myanmar' (2015), 2, available at https://tinyurl.com/ybd5x9yo (last visited 15 June 2017).

[129] For discussions, see K. Woods, 'Ceasefire Capitalism: Military-Private Partnerships, Resource Concessions and Military-State Building in the Burma-China Borderlands' 38 *The Journal of Peasant Studies*, 747 (2011).

[130] Y. Kaneko, n 118 above; A.B. Quizon, n 15 above.

[131] A.B. Quizon, n 15 above, 52.

[132] Y. Kaneko, n 118 above, 32-33.

[133] See, R. Torrens, *An Essay on the Transfer of Land: By Registration Under the Duplicate Method Operative in British Colonies* (London: Cassell, 1882).

the key for improving agricultural productivity.[134] Around the end of the Cold War, the same policy was promoted because of its effectiveness in the transition to a market economy,[135] and such a policy was continued until recently.[136] The World Bank strongly pushed export-oriented development through a series of policy instruments including deregulation, the opening of domestic markets, and reducing or eliminating state subsidies. Through this process, countries in the Mekong have, to a varying degree, committed to the notion that property rights have an impact on investment and development.[137] This history of land governance has prepared the Mekong as another place for land rush.[138]

b) Political Economic Context

Based on this history, the crucial question must be asked: is the VGGT helpful to tackle the problem of the land rush in the context of the Mekong region? As discussed in section III, the Mekong region does not have a useful legal institution like a regional human rights court. However, this paper still submits that the VGGT and its apparently high legitimacy in relation to other relevant instruments, as discussed above, are useful for the Mekong region by triggering necessary policy changes, or at least providing an institutional forum. As indicated, the Mekong is committed to the notion that property rights have an impact on investment and development. To understand the political-economic meaning of this history, a review of the recent conceptualizations of the land rush will be helpful.

From the perspective of law and development, as well as legal pluralism, Ferrando has grafted the land rush narrative onto what he terms, 'three legal homogenizations'.[139] Central to his criticism against the land rush phenomenon

[134] The World Bank, 'Land Reform' (1975), available at https://tinyurl.com/ybqcbn66 (last visited 15 June 2017).

[135] R.A. Posner, n 34 above.

[136] K. Deininger, *Land Policies for Growth and Poverty Reduction* (Oxford: Oxford University Press, 2003), available at https://tinyurl.com/yd3poba9 (last visited 15 June 2017). See also the following policy papers: The World Bank, *Initiatives in Legal and Judicial Reform* (Washington DC: The World Bank, 2004), available at https://tinyurl.com/ybznfojh (last visited 15 June 2017); The World Bank ed, *Doing Business 2005: Removing Obstacles to Growth* (Washington DC: The World Bank, 2005).

[137] Land governance in the Mekong has another important factor. It is a field of transboundary water management of the Mekong river basin. Although this paper does not delve into the relationship between land governance and water management in the Mekong deeply, it needs to note that the water management of the Mekong has been one of the important fields to discuss effectiveness of soft law or transnational legal measures in the context of the Mekong. See, F. Johns et al, 'Law and the Mekong River Basin: A Socio-Legal Research Agenda on the Role of Hard and Soft Law in Regulating the Transboundary Water Resources' 11 *Melbourne Journal of International Law*, 154 (2010).

[138] See further, D. Hall, P. Hirsch, and T.M. Li, *Powers of Exclusion: Land Dilemmas in Southeast Asia* (Honolulu: University of Hawaii Press, 2011); D. Hall, 'Land Grabs, Land Control, and Southeast Asian Crop Booms' 38 *The Journal of Peasant Studies*, 837 (2011).

[139] T. Ferrando, n 45 above, 72.

is the fact that Foreign Direct Investment operates as a way both to ease access to land by national and international investors, while protecting their interests against the singularity of the local law.[140] Tomaso Ferrando argues that before the current situation that enabled the land rush, a process previously existed that replaced pluralism in the local context. Such a process originated in de-colonization, where all states appear as equal sovereigns, but in fact some are economically subordinated to others (the first legal homogenization). Then, the notion that the sovereign state has absolute power over its people and territory served as a pretext for the importation of a public/private dichotomy to property regime, replacing the legal pluralistic architecture that considered peripheral land (the second legal homogenization). These two processes of legal homogenization have paved the way for the land rush, where the singularity of the local law has been replaced through the coercive enforcement of the investment contract (the third legal homogenization).[141] Ferrando provides important insight, describing how these three legal homogenizations function as preparatory structures that frustrate the plurality of the property regimes in host countries.[142]

Drawing on development policies, a thesis has also been advanced that critiques 'clear and strong' property rights as a prerequisite of economic development.[143] Kennedy criticizes the importation of 'clear and strong' property rights to developing countries because they are deeply indebted to the particular experiences of developed countries.[144] Kennedy notes, for example, that

> '(p)roperty rights truly are foundational for economic life and how you set them up powerfully inflects the development trajectory in a society like China which has, over the last generation, substantially transformed the rules about who can do what to whom and with what'.[145]

Acknowledging 'the allocative role of law', he concludes that a property regime is 'all about choices'.[146] To apply these insights in the context of global land rush is insightful. From this angle, the central problem of the land rush is that the right to determine ownership and use of land is limited by legal and ideological constraints, namely, the structural impediment of 'clear and strong'

[140] ibid 71.

[141] ibid 89.

[142] ibid 74. ('However, it is my opinion that the continuous acceptance of FDI and the mounting cases of enclosure of land should not be interpreted as a contingent event, but rather as the rational response of nation-states to an international legal order based on fragmentation and competition'.)

[143] D. Kennedy, 'Some Caution about Property Rights' n 39 above; For a commonly cited argument for 'clear and strong' property rights, see H. Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

[144] ibid 3. ('This recipe is rooted in historical claims about the legal regimes of developed societies and analytic claims about the nature of property entitlements which are not compelling'.)

[145] ibid 36.

[146] ibid 55.

property rights. In an era of globalization, the most appropriate public space to determine the right to control lands becomes more difficult to identify. The land rush phenomenon is simply an expression by critical observers denoting the unfairness of the process of such determination. A criticism that people affected by the land rush are excluded from the land investment process is just one aspect of this fundamental problem.

Another problem is that land values are calculated solely in economic terms, and other metrics, such as cultural, religious, or political value, tend to be ignored. Sociological and anthropological interventions are helpful here.[147] Saskia Sassen observes that the extreme monetization of land triggers the land rush and subsequently causes 'further disassembling of national territory'.[148] This view stresses that transnational networks and deepening globalization have replaced a state's control over its land.[149] From a rather different perspective, one anthropologist elaborates a thoughtful consideration on what is special about land. Tania Murray Li maintains that 'what land is for a farmer is not the same thing as for a tax collector',[150] and underscores the materiality of land that is not movable, and provides a bundle of usages not limited to the economic use.[151]

These differing conceptualizations provide a framework to understand the historical importance of the VGGT. The Mekong region is at a crucial crossroad. Countries in the region must decide whether to preserve their traditional ways of land ownership or open the country to more investment. This decision has lasting effects, given that once the usage of land has been modified, it takes an extremely long time to revert to the old way.[152] Of course, it is ultimately a decision each country needs to make. Admittedly, this paper is inclined to the preservation, as the existing legal institutions cannot ensure adequate and fair compensations when a land rush takes place, as discussed in section III. Therefore, one can understand the formidable task of the VGGT in facilitating autonomous decision-making in its resource governance regime while also embedding a plurality of resource governance mechanisms from various countries. In other words, given that managing the land rush problem is made difficult by pressure for legal homogenization and an ideology of 'clear and strong' property rights, the VGGT has unique potential. It can mark an important shift for each country in the Mekong to retain some authority with which to decide its land

[147] For the former, see S. Sassen, n 32 above, and for the latter, see T.M. Li, 'What Is Land?' n 3 above.

[148] S. Sassen, n 32 above, 27.

[149] ibid 26. ('It is that the simultaneous privatizing and globalizing of market economies is producing massive structural holes in the tissue of national sovereign territory.')

[150] T.M. Li, 'What Is Land?' n 3 above, 589.

[151] ibid 592. ('Why do your arguments and forms of inscription (lines on a map, or words on paper) prevail against my arguments, my modes of inscription (the axe, the plough, the presence of spirits) and my need to sustain myself?')

[152] For a powerful presentation on this point, see S. Sassen, *Expulsions* (Boston: Harvard University Press, 2014).

governance.

c) The VGGT as a Trigger for Policy Discourses

It is also notable how the VGGT has shifted the strategies and discourses of land rush actors. Although there are no explicit commitments to the VGGT by regional international organizations surrounding the Mekong, such as ASEAN, Asian Development Bank or the Greater Mekong Subregion, the FAO has made partnerships with Cambodia, Myanmar, Laos and Vietnam bilaterally.[153] Through these bilateral networks, the FAO provides capacity development programs and coordinates policy discussions among stakeholders with the goal of optimal implementation of the VGGT.

More importantly, the formulation and implementation efforts of the VGGT have created dense networks among different actors, including state agencies, non-governmental organizations (NGOs), civil society organizations (CSOs) and research groups. The prominent research group, the Mekong Region Land Governance Project, now aims at promoting the VGGT principles related to transparency of land related information. Specifically, the Mekong Region Land Governance Project is currently working on building an online land data platform that will strengthen the security of small landholders' tenure rights.[154] Also, regional NGOs in the Mekong have actively participated in the discussions behind the VGGT formulation, as well as its subsequent implementation. The most notable example is the regional NGO, Focus on the Global South,[155] which provides continuous monitoring of VGGT implementation.[156]

The active participation of NGOs should not be underestimated. Their work here is a fruitful result of the institutional innovations of the Civil Society Mechanism for relations to the Committee on World Food Security (CSM), an international space for collaboration of CSOs in relation to food insecurity and malnutrition, employed in the VGGT drafting.[157] The CSM mechanism was created to facilitate civil society participation in policy processes of the

[153] R. Hall, I. Scoones, and G. Henley, 'Strengthening Land Governance: Lessons from Implementing the Voluntary Guidelines. LEGEND State of the Debate Report' (2016), 38, available at https://tinyurl.com/y96oyw2l (last visited 15 June 2017).

[154] ibid.

[155] The website of the NGO is available at https://tinyurl.com/59g7sk (last visited 15 June 2017).

[156] See the report by the Working Group on Monitoring of the Civil Society Mechanism, 'Synthesis Report on Civil Society experiences regarding use and implementation of the Tenure Guidelines and the challenge of monitoring CFS decisions' (2016), 29, available at https://tinyurl.com/yahu2pnk (last visited 15 June 2017). This report prepared for the Global Thematic Event during the forty-third Session of the Committee of World Food Security (CFS). Shalmali Guttal, a member of the Focus on the Global South, was also a part of the drafting team of this report.

[157] More information on the CSM is available at https://tinyurl.com/8xkcb3w (last visited 15 June 2017).

Committee on World Food Security. It helped unite NGOs, civil society organizations, and research groups to promote the value of the VGGT. The Mekong region has already witnessed its First Regional Land Forum organized by such networks.[158] Moreover, the political shifts are partly due, for example, to advocacy efforts in Cambodia. These have resulted in partial reduction in economic land concessions in Ratanakiri.[159] According to a report by the Mekong Region Land Governance Project, sustained commitments and efforts by multi-stakeholders to mediate the relationship between traditional communities and investors have been formidable. And these successful experiences are documented and circulated within the policy network. This emerging virtuous circle was made possible by the VGGT.

d) Positive Example: A Case of Myanmar

Lastly, this paper would like to highlight a recent practice in Myanmar. Myanmar presents the most advanced usage of the VGGT in the region. Other countries may well see it as a showcase in the future, as the government has moved to actively commit to the VGGT. Recent political transition and the process of land reforms in Myanmar illustrate this. After a series of drafts of its National Land Use Policy, the Myanmar government issued the Policy in January 2016. During the process to formulate the National Land Use Policy, a civil society partnership was established, framing an advocacy strategy consistent with the VGGT.[160] Moreover, international NGOs, Namati and Landesa, provided input to the policy process, also drawing on and referring to the VGGT.[161]

As a result of these collaborative efforts, the National Land Use Policy section 8-(d) states

> '(t)o adopt international best practices such as voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security and human rights standards'.[162]

Here, the VGGT, a soft instrument, has contributed significantly towards its implementation in Myanmar by being mentioned in the National Land Use Policy. In other words, since the National Land Use Policy provides a general

[158] More information is available at https://tinyurl.com/ybs2vdbv (last visited 15 June 2017).

[159] C. Work, 'Innovative approach to land conflict transformation', MRLG Capitalization Note Series #1. (Vientiane & Phnom Penh: Mekong Region Land Governance, Equitable Cambodia and Inclusive Development International, 2016), available at https://tinyurl.com/yddz8czd (last visited 15 June 2017).

[160] R. Hall, I. Scoones, G. Henley, n 153 above, 38.

[161] 'Recommendations for Implementation of Pro-Poor Land Policy and Land Law in Myanmar: National Data and Regional Practices' (2015), available at https://tinyurl.com/ycvug37s (last visited 15 June 2017).

[162] National Land Use Policy of Myanmar, 8-(d).

framework for subsequent discussions on legislating actual land law, the VGGT has become a starting point for formulating a land law regime for Myanmar. The National Land Use Policy further maintains,

> '(w)hen drafting National Land Law, take into consideration experiences of countries in the region and around the world, the unique characteristics of the country, issues being faced, and the interest of those using land and natural resources in the country, then inform the stakeholders and public, including media, through consultation events and other means, so that they may provide feedback'.[163]

Here, the VGGT, namely its recommendation for pluralistic, nationally contextualized land governance, is appreciated in the National Land Use Policy in Myanmar. The VGGT now functions as one of the reference points for Myanmar municipalities and civil society organizations to debate appropriate land policy. It demonstrates in detail which issues should be addressed and discussed. It also highlights options, for example, of forms of land ownership that may be considered legitimate.[164] Moreover, continuous policy discussions, a necessary element for just land governance in Myanmar, have been set based on the VGGT. This is, from this paper's point of view, an ideal realization of the VGGT.

4. Limitations and Further Issues

The previous sections analyzed the importance of the VGGT from the viewpoint of soft law, emphasizing that the VGGT, although not legally binding, has a sufficient level of precision and clear delegation, which makes it effective. Also the previous section has discussed the relevance of the VGGT, paying attention to its political-economic contexts, as well as current status and process of implementation. Now this last section proposes some preliminary thoughts on the relationship between soft law and regional institutions, and the problem of the scope of legitimacy. The main argument is that the VGGT's emphasis on plurality of tenure governance has the potential to support developing countries in improving their land governance by considering their respective national contexts.

a) The VGGT Implementation and Issues Ahead

There are observable differences in the level of implementation of the VGGT from region to region, from country to country.[165] As a collective regional

[163] ibid 77-(c)(ii).

[164] This draws its inspiration from the idea of 'recursivity' in the theory of transnational legal order. See, T.C. Halliday and G. Shaffer, n 14 above, 37-42.

[165] For a monitoring of how donor agencies are working on land governance issues all

effort, there are limitations in the implementations of the VGGT in the Mekong. Africa appears more active in implementing the VGGT than Southeast Asia. Regional entities, such as the African Union and the African Development Bank, have worked to implement the VGGT.[166] On the other hand, Southeast Asian regional institutions such as ASEAN, the Asian Development Bank, or the Mekong Commission have seemed less active. An interesting question emerges: what are the policy consequences of this difference? One could hypothesize that even though regional institutions are reluctant to be involved in political matters, each individual country is nevertheless influenced by transnational regulatory regimes through various channels.

Another limitation is the limited coverage of the VGGT, especially with regard to water governance. The Mekong from time to time faces water management issues. As Howard Mann points out, agricultural investment is essentially an extractive venture, as land is useless for agriculture without water. However, water is a limited resource that calls for a coordinated distribution.[167] The Mekong has been a place where trans-boundary coordination and management of the Mekong River is a long-lasting problem.[168] The VGGT does not extensively address the problem of water management, which may well be regarded as one of the major limitations of the VGGT. However, it does state that such issues need to be resolved by the states in their implementation of the VGGT.[169] If the Mekong Commission, an intergovernmental organization focusing on the management of the Mekong River, can interact with the policy matters sparked by the VGGT (in collaboration with state municipalities), it would mark another step toward better governance of land in the Mekong.

The two limitations described above are related to the issue of transnational decision-making sites for regional land governance.[170] A significant problem

over the world, see the website of Global Donor Working Group on Land available at https://tinyurl.com/y7oe2nqv (last visited 15 June 2017).

[166] See, eg 'Framework and Guidelines on Land Policy in Africa' has been published through the collaboration of African Union Commission, Economic Commission for Africa and African Development Bank. Also, 'Guiding Principles on Large Scale Land Based Investments in Africa' has been prepared by African Union, Economic Commission for Africa and African Development Bank.

[167] H. Mann, 'Foreign Investment in Agriculture: Some Critical Contract Issues' 17 *Uniform Law Review*, 129, 131 (2012).

[168] For a recent excellent treatment of this issue, B. Boer et al, *The Mekong: A Socio-legal Approach to River Basin Development* (London: Routledge, 2015).

[169] The VGGT, iv (Preface). ('It is important to note that responsible governance of tenure of land, fisheries and forests is inextricably linked with access to and management of other natural resources, such as water and mineral resources. While recognizing the existence of different models and systems of governance of these natural resources under national contexts, States may wish to take the governance of these associated natural resources into account in their implementation of these Guidelines, as appropriate.')

[170] On the general issue of the transnationalization of public sphere, see N. Fraser, 'Special Section: Transnational Public Sphere: Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World' 24 *Theory, Culture & Society*, 7,

with the land rush phenomenon, in the view of this paper, is that determination of who can use which land in what way has shifted from democratic decision-making institutions to decisions taken by a limited number of people. The shift exemplifies the 'partial disassembling of national territory'.[171] This paper has argued that the VGGT's framework embraces the idea that land management is a local problem, which requires a nuanced understanding of social, political, cultural considerations. It also has regarded that the VGGT is a starting point for many policy and legal instruments emerging from or based on it. Recent practices of community development agreements,[172] for example, manifest a potential to create a more inclusive investment than the current practice of state contracting.[173] Based on these basic instruments, further challenges lie in how one conceptualizes an appropriate public sphere to negotiate and renegotiate each land investment project. This inevitably impacts not only so-called 'affected people', but also affects other people in the country and even beyond.[174]

b) A Problem of the Scope of Legitimacy

Lastly, there may be a possible question regarding the scope of legitimacy. The VGGT's legitimacy derives from the CFS, the intergovernmental body for the functionally differentiated field of food security governance. It also draws legitimacy from the inclusive process of its policy-making. As such, the legitimacy of the CFS is not the same as democratic legitimacy. Such legitimacy is not an absolute one, and it can be questioned, for instance, when other normative claims emerge from different actors. One particularly interesting case study in this regard is the policy debate that occurred at the Rio+20 conference.[175] It took place in June 2012, after the issuance of the PRAI in 2010 and the VGGT in May 2012, and while the CFS was working on the CFS-RAI. Birgit Müller and

14-24 (2007).

[171] S. Sassen, 'Land Grabs Today' n 32 above, 27. ('The issue here is not one of nationalism versus globalism, but one of complexity: where once there was a prospect of democratic decision-making, now there is an expansion of opaque transnational networks that control the land'.)

[172] Community development agreements are one of emerging practices to incorporate local community's interest into an investment contract between state and investors. See further, I.T. Odumosu-Ayanu 'Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment' 65 *University of New Brunswick Law Journal*, 269 (2014).

[173] As Muir Watt correctly points out, it is too optimistic to assume that affected community's interest is already represented by the state: 'However, the assumption of alignment of governmental interests and those of local communities is clearly overly optimistic.' H. Muir Watt, n 36 above, 234. Based on this understanding, while Muir Watt goes on to make an argument that horizontal obligation of home state to respect human rights is necessary, this paper adds another aspect that negotiation and renegotiation of land investment contract is another space that we should further consider about sufficient public sphere to determine an allocation of land property.

[174] In this regard, one has to also imagine about those tribes whose livelihood have been torn into different countries.

[175] See, generally, B. Müller and G. Cloiseau, n 20 above.

Gilles Cloiseau have analyzed 'negotiating practices and power games' as a part of responsible agricultural investment. They have framed an issue in a way that

> 'two modalities of global governance clashed: the governance through a human rights based multilateral processes in the CFS and the idea of corporate self-regulation through PRAI',

and concluded

> 'the weakening of the role of the multilateral agencies of the UN bound by the mandate of advancing and promoting human rights and simultaneously the rise of self-governing instruments promoted by groups of states and international agencies without a multilateral legitimacy'.[176]

Their case study has shown that a further analysis of independent variables that correlate with the *ex post* legitimacy (a kind of legitimacy attained from the positive outcomes of certain governing tools)[177] is required. Also, the dichotomy between public and private in the field of transnational regulatory governance is blurring. There may be a need to explore such questions as legitimacy or effectiveness in each respective sector, such as food security governance, before forging a renewed theory of compliance, effectiveness, or legitimacy in an era of transnational governance.

The scope of legitimacy is also problematic when the VGGT has a substantial effect on neighboring functionally differentiated fields, such as energy governance, climate change governance, or labor governance.[178] Arguably, the scope of the legitimacy of the CFS may be limited within the sector of food security governance. Indeed, the VGGT mentions possible effects and responses to climate change in the context of governance of tenure in its Part 6. To investigate the interface between food security governance and labor governance, initially, one needs to have a nuanced contextual understanding of agrarian reform in each country. And the shape of agrarian reform cannot be assumed to be the same as what Western countries have experienced, as surrounding contexts can never be the same.[179] Further investigation of these interfaces between functionally differentiated policy fields is an essential task for the

[176] ibid.

[177] On the concept and discussions of '*ex post* legitimacy', K. Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation' 3 *Transnational Legal Theory*, 243 (2012).

[178] For a seminal introduction of this aspect of the problem, see T.M. Li, 'Centering Labor in the Land Grab Debate' n 88 above.

[179] See, eg the project to Open Agriculture at the Massachusetts Institute of Technology (MIT), aiming at 'creation of an open-source ecosystem of food technologies that enable and promote transparency, networked experimentation, education, and hyper-local production'. This kind of 'disruptive technology' has a potential to substantially change the pathways of agrarian reforms.

future. Where is the appropriate forum to manage such interfaces? Are such forums necessary in the first place? Who should be included in the policy discourses and in what way? What could be the influence of these policy-making processes in the local context? A continuous discussion to engage with these questions seems to be a necessary step.

V. Concluding Remarks

This paper has emphasized the historical importance of the VGGT as a soft law mechanism that advances the plurality of land governance in various countries, especially in the Mekong Region. Soft law measures are from time to time discredited because they do not have a binding legal effect.[180] This paper has taken a different view, especially of the possibilities of the VGGT to be understood in its facilitative influence to domestic, contextualized policy-making. Also, this paper has proposed that the VGGT functions as a basis for gradual policy change, by reaching a minimal but fundamental agreement whereby further policy discourses are derived. The viability of these arguments will be further tested in continuous and future implementation processes.

As a case study, this paper leaves many questions unanswered. This paper's initial examination of the VGGT calls for further sociological studies of each country in order to critically assess the implementation phase of the VGGT at a local level. It also explores the VGGT's effectiveness and legitimacy in relation to other relevant international soft and hard laws at a transnational level. Moreover, a profound study of the roles of regional actors in the implementation process will be particularly important. Arguably, the majority of current conceptualizations of regional transnational governance have been based on Western models, notably the European Union (EU). The Mekong region has different institutional landscapes, and that fact calls for a comparative analysis among regions.

Lastly, as briefly indicated in the presentation of the analytical framework, the analysis in this paper is situated in the current debate on theoretical clarifications of the concept law, by providing empirical knowledge on functions of soft law at various levels. Although a full theoretical treatment is beyond the scope of this work, it nonetheless considers questions for such theoretical debates. First, this paper should have suggested the importance of the empirical and contextualized knowledge to the theorization of fast growing legal order. This point runs in parallel with a recent turn to empiricism in theoretical discussion of law, as exemplified in New Legal Realism.[181] The meaning and function attributed to

[180] See, eg M. Antoine, 'A Post-Global Economic Crisis Issue: Development, Agriculture, 'Land Grabs,' and Foreign Direct Investment', in C.L. Lim and B. Mercurio eds, *International Economic Law After the Global Crisis: A Tale of Fragmented Disciplines* (Cambridge: Cambridge University Press, 2015), 356, 376.

[181] See, eg V. Nourse and G. Shaffer, 'Varieties of New Legal Realism: Can a New World

the VGGT differ significantly depending on legal and institutional contexts of regions. This paper submits that political-economic contexts attach additional meanings to certain legal instruments. The ideological significance of the VGGT can only be revealed against the background of historical development of land grabs. Such aspects are elusive when certain legal measures are analyzed in a manner that is detached from its context. In sum, this paper modestly maintains that the theoretical conceptualization of the transnational legal order cannot be detached from nuanced understandings of legal and institutional contexts, on the one hand, and political economic contexts, on the other.

Order Prompt a New Legal Theory' 95 *Cornell Law Review*, 61 (2009).