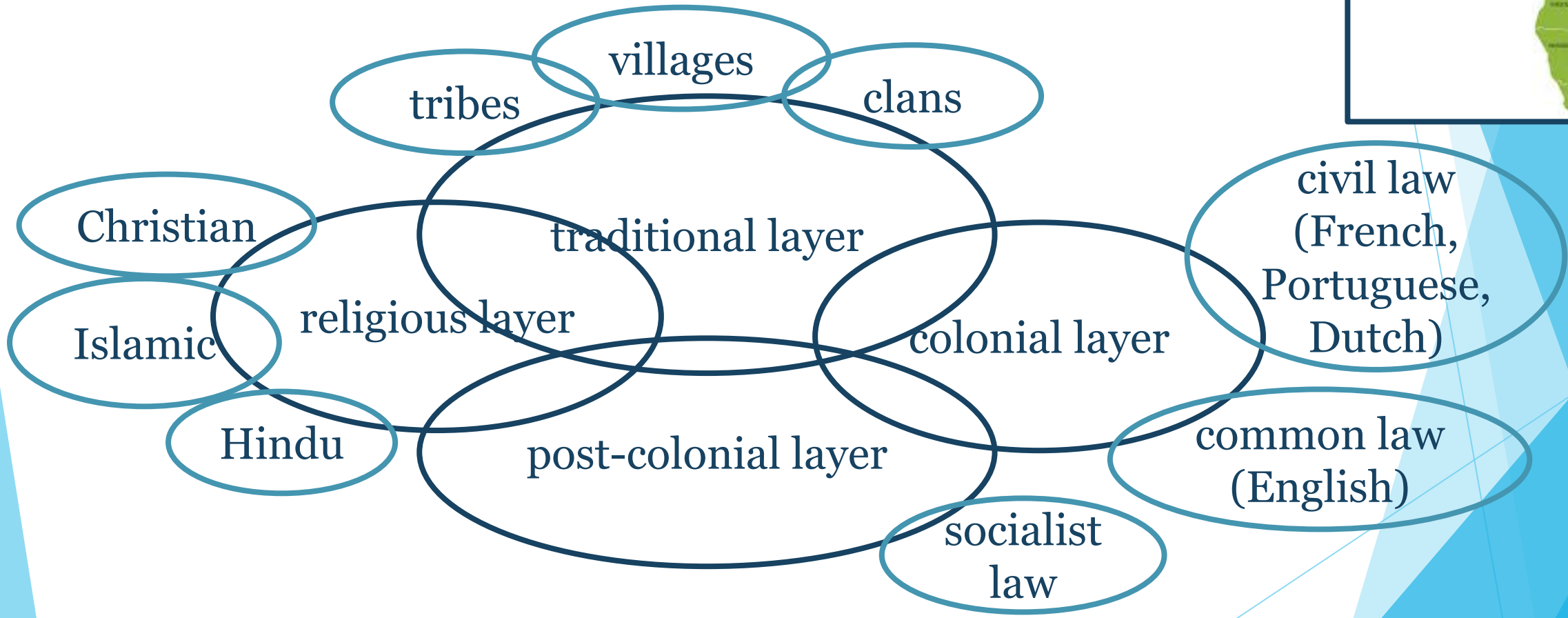
9. The Afr ion

The African continent is a patchwork of traditional, religious, Western law (common law and civil law).

9. The African (Sub-Saharan) Legal Tradition

Historical layering **[Sacco 314]**



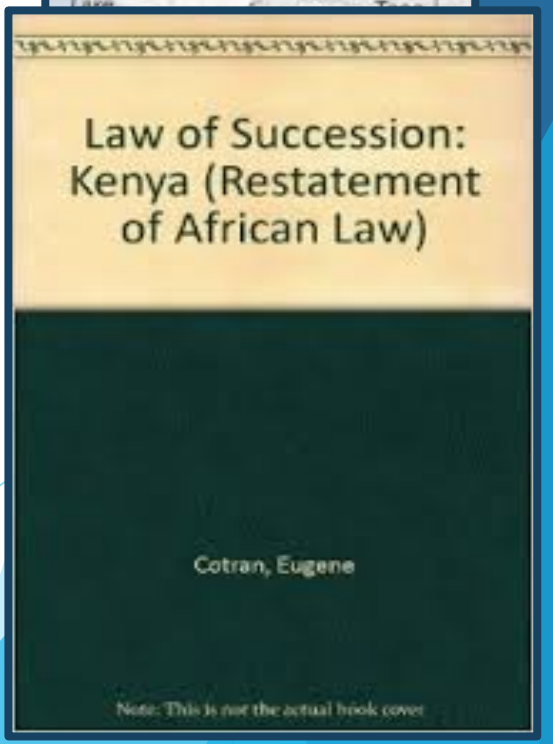
9. The African (Sub-Saharan) Legal Tradition

Meddling with Sub-Saharan African law

Ethiopia > art. 3347(1) of Civil Code (1960): "Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code shall be replaced by this Code and are hereby repealed" (for some repealed in 1995).

- Many rules contained in the code assumed the availability of institutional structures that were simply missing.
- The code, first drafted in French, was then translated to English and to Amharic, with no commentaries available in Amharic.
- Amharic language was spoken by less than 1/5 of the population.

9. The African (Sub-Saharan) Legal Tradition



Meddling with Sub-Saharan African law

Kenya > under colonial rule, there was a tripartite judicial systems, made up of common law courts, customary courts, and Islamic courts. Customary courts were abolished in 1967.

To provide common law courts with materials on customary law, the Londonese School of African and Oriental Studies produced a 'Restatement of African law'.

As a result:

- common law courts were disempowered;
- Kenyans were driven to Islamic courts or unofficial mechanisms of dispute resolution.

9. The African (Sub-Saharan) Legal Tradition

<u>Meddling with Sub-Saharan African customary law</u>

OHADA (Organisation pour l'Harmonisation du Droit des Affaires en Afrique) > West-Central Africa francophone countries

Modernization and harmonization of business law on the basis of customary, international and French laws.

Yet …

- texts are written in French and English
- rules aim to supplant official law only, while the unofficial market produces from 40% to 60% of these countries' GDP

9. The African (Sub-Saharan) Legal Tra

Meddling with Sub-Saharan African customary law

OHADA (Organisation pour l'Harmonisation du Droit des Affaires en Afrique)

Niger customary law

Tolmé: security right over movables

- the asset should be handed over to the creditor
- the creditor can use the asset (with no reduction of the debt)
- the debtor pays 'when able to'

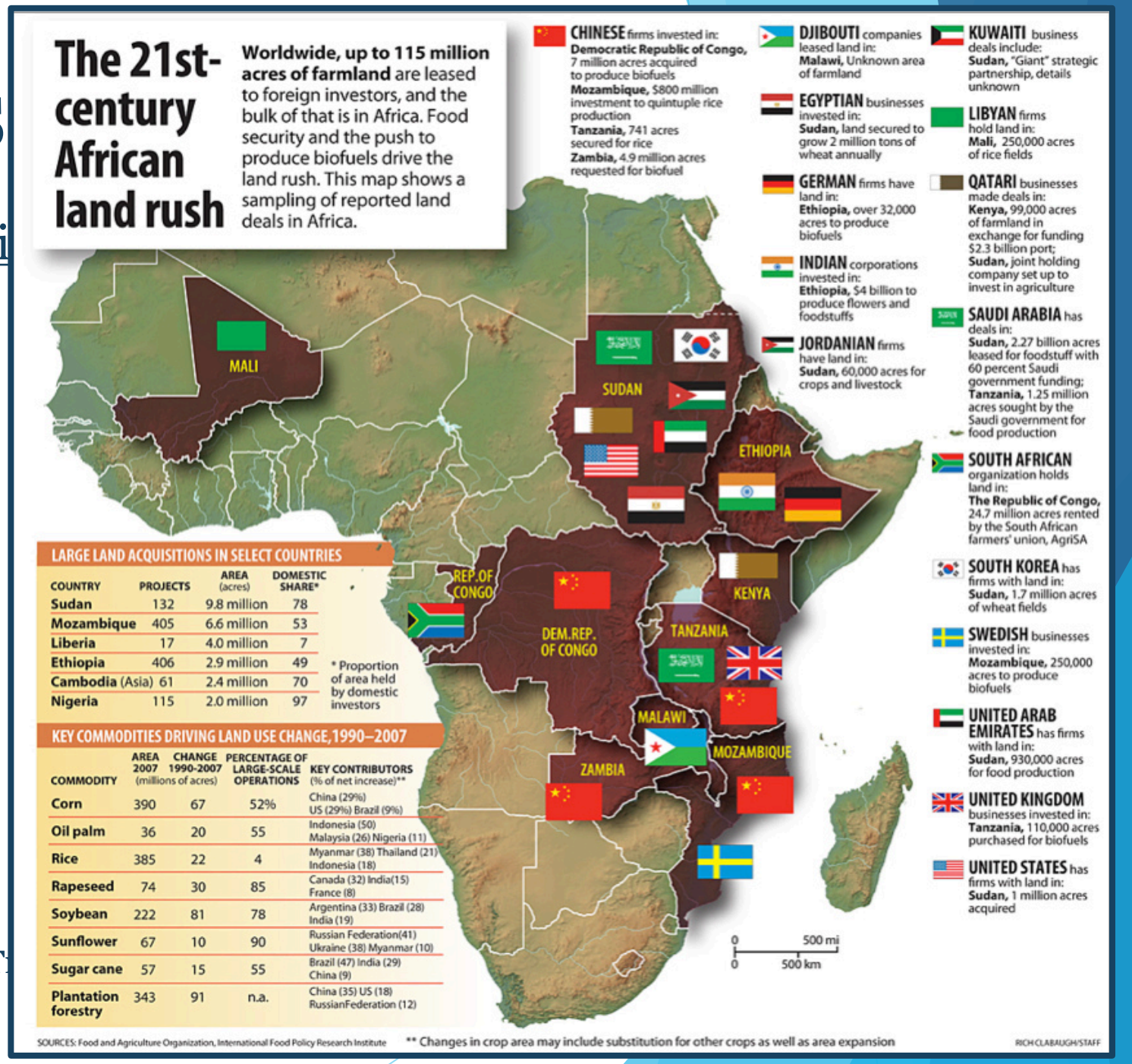
OHADA Uniform Act on General Commercial Law, 1997 (arts. 19 and ff.):

security rights over movables are constituted without dispossession through registration in a computerized registry

9. The African (Sub-S

Meddling with Sub-Saharan Afri

Land-grabbing: practice by which investors, led by cash-rich but food-insecure states (particularly from the Gulf Region and Asia), Western agribusinesses, and private equity funds, move feverishly in pursuit of (African) land resources



Part II – Comparative Law Across Legal T

9. The African (Sub-Saharan) Legal Tradition

Meddling with Sub-Saharan African law

African customary law establishes communal property rights on rural land, giving tribe chiefs the power to allocate land for the community.

Official law usually recognizes private ownership over land, often under the control of the state, and allows the transfer of title.

For contracts of land tenure transferring rural land, African customary law should apply. Yet investors prefer to frame the contract under official law.

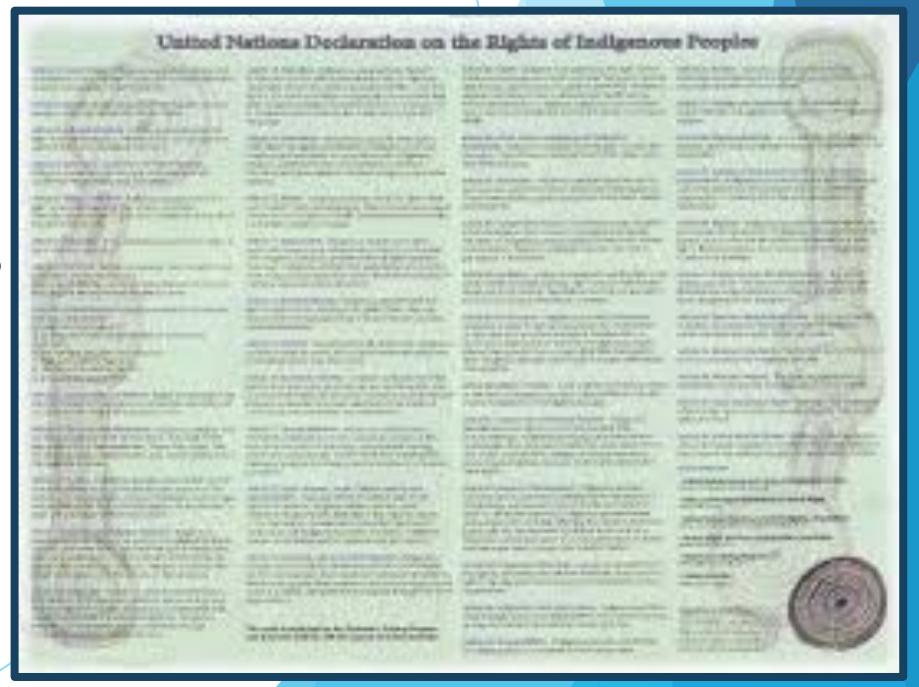
Typically the government of the country where land is located sells the land to the investor, thus trumping collective customary land rights of communal use without the consent and participation of the population.

9. The African (Sub-Saharan) Legal Tradition

Meddling with Sub-Saharan African law

UN Declaration on the Rights of Indigenous People (2007), Article 26:

"(1) Indigenous people have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.
(2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
(3) States shall give recognition and protection to these lands, territories and resources".



9. The African (Sub-Saharan) Legal

<u>Meddling with Sub-Saharan African law</u>

European Union > "The EU connected with those former colonies of its members which constituted the African, Caribbean, and Pacific group of States by means of the Yaoundé, Lomé, and Cotonou conventions" **[Sacco 326]**

International Monetary Fund > conditioning aid to legal reforms

World Trade Organization > Generalized System of Preferences (GSP), under which a system under which 'developed' countries might apply special and preferential tariff programs to 'developing' countries, subject to defined requirements