Investors running wild on land: the threats posed by international investment agreements

Against the backdrop of the ever-present challenge of food security in the 21st century, large tracts of land are being bought up by foreign investors around the globe with little attention being paid to the governance of these deals. Known by different names – land acquisitions, agricultural investment or land grabs – these deals are regulated by international contracts and agreements which are heavily skewed in favour of investors. The agreements themselves are increasingly criticised by many countries, fearing that they seriously undermine their ability to regulate investments in the public interest. Countries and development agencies need to pay attention to the risks they pose for food security.

Between 2000 and 2011, large-scale land deals covered an estimated 203 million hectares of land worldwide, equivalent to over eight times the size of the United Kingdom.[1] Land is mainly acquired in developing countries, with African countries being targeted the most as they account for one quarter of global land acquisitions.[2] These land deals are governed by a mix of domestic laws, investment contracts and international investment agreements, with important implications for how conflicts around the use and ownership of land can be managed. Mounting evidence suggests that these land deals often lead to human rights violations, displacement of communities and contribute little to domestic food security. On the contrary, many of the countries leasing large amounts of land to foreign investors also have some of the highest percentages of hungry people in the world including the Democratic Republic of Congo, Ethiopia, Kenya, Madagascar, Mozambique, Sudan and Tanzania.[3] About two-thirds of foreign land investors in developing countries intend to export everything they produce on the land.[4] In many countries while food is exported, hundreds of thousands of people continue to go hungry as domestic food crises persist.

International Investment Agreements (IIAs) are becoming increasingly controversial as a result of the excessive protection they offer to investors while simultaneously limiting the ability of host countries to regulate this investment. This creates a challenging environment for national and international policy-makers to address food security concerns and safeguard human rights. With the scales tipped strongly in favour of the investor, foreign investment is heavily protected but responsibilities and obligations to the host economy, and their people, are far and few between.

'Most of these investments occur with a complete lack of transparency, without proper consultation of the local communities concerned. They will benefit investors and perhaps some of the local elites – but they will create much less employment, and contribute much less to rural development than would policies supporting small farmers and ensuring their access to land.' Olivier De Schutter, UN Special Rapporteur on the Right to Food.

Are UK investors buying up land?

- At least 25 British firms/high-net worth-individuals are involved in large scale land acquisitions in Africa and Asia accounting for at least 3.2 million hectares of land.
- An investigation into the role of Private Equity funds in land acquisitions shows that the UK is the leading EU investor in land deals.[5]
- The UK has signed Bilateral Investment Treaties (BITs) with most of the countries where investment takes place; investors are able to take advantage of the protection granted under these treaties should their investment ever be challenged.

How land deals are regulated: the institutional and regulatory framework of foreign investment

Foreign investment in land is typically governed by three layers of law: domestic laws and regulations, international investment contracts, and international investment agreements. All of these can help shape whether an investment in land is beneficial to food security and respects human rights.

Domestic laws cover the protection of investors as well as land, water, environmental and labour rights amongst others. They all contribute to the regulation of foreign investment.

- In many instances this array of laws or their enforcement does not exist[6]; as a result land, social and environmental rights are not well protected. This is especially true for many countries with weak land tenure security. World Bank and IMF research has shown that most of the land being sold off is in the poorest countries with the weakest protection of people's land rights.[7] Land rights are especially difficult to enforce when, as is the case in many African countries, most land is under customary tenure which means that land is formally held by the state; states sometimes sell land even if in reality it has been used by communities for generations.

International investment contracts are agreed between the host state and the investor in relation to a particular land purchase or lease. The contract will set out not only the terms and conditions of the transaction but also details relating to taxation, export production, infrastructure requirements etc., and can include provisions around the environment and development[8].

- Investment contracts can become a legal code for the investment which prevails over domestic laws by including 'stabilisation clauses' - under which the government promises not to change rules that affect the investment, or to compensate the investor if it does.[9] Investment contracts are frequently opaque, negotiated behind closed doors and are not publicly available. A review of 12 land contracts in Africa suggested that they are often 'short, unspecific documents that grant long-term rights to extensive areas of land, and in some cases priority rights over water, in exchange for seemingly little public revenue and/or apparently vague promises of investment and/or jobs.'[10]

International Investment Agreements (IIAs) serve as the legal basis for international investment cooperation. They include bilateral investment treaties (BITs) between two countries, investment chapters in bilateral and regional trade agreements as well as multilateral agreements such as sectoral agreements like the Energy Charter Treaty.[11] In practice, they act as an additional and final layer of investment protection.

- Originally intended to protect foreign investors in a post-colonial context, the BIT framework has come under scrutiny for the extensive protection awarded to investors. As many countries are realising, the terms of these treaties are often so vague and far-reaching that they allow foreign investors to undermine their sovereignty and ability to regulate: domestic laws, from commercial regulation to environmental and health legislation, have been subject to challenges by foreign investors.[12]

Bilateral Investment Treaties

BITs are the most widespread form of IIAs. Globally, there are 3,164 IIAs of which 2,833 are BITs (as of the end of 2011)[13]; EU member states have over 1,200 BITs with third countries and the UK alone has an estimated 98 individual BITs in force.

Investor-to-state arbitration: taking countries to court

Investor-to-state arbitration clauses in investment contracts and agreements have allowed investors to take countries to private arbitration tribunals for a breach of contract or treaty terms.

- By the end of 2011, there were 450 known cases up from 15 in 2000 (and many more unknown cases)[14]. In 2010, 51 cases were filed against developing countries compared to 17 against developed countries[15]; overall more than half of BIT challenges are against developing countries[16]. For developing countries, signing up to a BIT is especially problematic as many of their laws and regulations associated with social and environmental goals are either still evolving or their enforcement is limited. And the cost of defending, settling or paying a multimillion (if not billion) dollar award has a disproportionately detrimental effect on their budgets. For example in 2012, ICSID ordered Ecuador to pay $1.77 billion in compensation to Occidental Petroleum for terminating an oil exploration contract - an award equivalent to Ecuador's entire education budget.[17]
- Investors can also take states to court for 'indirect expropriation', such as through a regulatory change which reduces the potential profit from an investment - even if the regulation was in the public interest. Recently Philip Morris International has taken both Uruguay and Australia to an arbitration tribunal for their public health decision to introduce plain cigarette packaging, arguing its investment and intellectual property have been expropriated.[18] This shows the extent to which public policy decisions, reached through a democratic process, are vulnerable to investor challenges.
- A decision made by an arbitration tribunal can even override a decision made by a domestic court. In 2009 Chevron took Ecuador to arbitration in The Hague under the US-Ecuador BIT. They argued that a judgement by an Ecuadorian court ordering Chevron to pay multiple billions of dollars in damages for the environmental destruction and widespread health problems caused by oil drilling in the Amazonian region was reached in a fraudulent manner.[19] The case is still pending.

To date, there is only one known BIT case involving a land dispute[20]. But lack of transparency in investment disputes means that there may have been many more unknown cases. In any case, with the recent scale of land acquisitions, we can expect that conflicts of land use will intensify and government decisions over land will face investor challenges as land investments mature.

International investment arbitration: costly, secretive and arbitrary

While affected communities have no recourse to challenge the investor for its impacts on their livelihood at the ICSID (International Centre for Settlement of Investment Disputes) or any other international tribunal, investors benefit from a special court for their grievances.

An international private arbitration tribunal is normally a three-judge panel made-up of commercial arbitrators. Decisions are taken behind closed doors and, with the exception of cases heard by the ICSID, it is not possible to ascertain why rulings are made or awards granted. Arbitrary interpretations occur frequently. Opportunities to challenge tribunal awards are very limited.

At the same time the costs are high and in most cases borne by each party. The average hourly rate of hiring one of the four main law firms is between $500 and $1000 per hour; the average costs of hiring a panel runs to $400,000. Ecuador's legal costs merely to defend themselves in the Chevron case have already amounted to $18 million; costs of this nature are not normally awarded even if the investor loses the case.

Bilateral Investment Treaties and development

BITs can affect development especially negatively when they grant far-reaching rights to investors and limit the ability of governments to intervene in regulating investments:

'Regulatory chill' occurs when the threat of a claim by an investor against a policy decision stops the implementation of that policy.

- For example, if a country were to decide to introduce land reform measures to redistribute land to small-scale producers and if this would affect land which is owned by foreign investor, the threat of a claim for compensation by an investor for current and future losses could lead to a situation where the government decides to self-censor its own policy initiative.

Locking-in liberalisation can happen as a result of commitments under an investment treaty which require compensation for policy changes that would restrict or roll-back liberalisation.

- For example, if an investment agreement includes a prohibition on export restrictions, a country cannot choose to introduce an export restriction or tax in order to tackle food crises without breaching the terms of the treaty.

Restricting preferential treatment of domestic firms and setting conditions on foreign investment: broad non-discrimination clauses compel governments to treat all investors equally, preventing them from promoting domestic industries.

- In 2007 a group of Italian/Luxembourg investors took the South African government to court arguing that the South African Black Economic Empowerment programme (which required the transfer of a greater proportion of company shares to black investors) violated the obligation to guarantee 'fair and equitable' treatment to foreign investors.[21] The case was settled in 2010 with the South African government paying an undisclosed sum in settlement.

Inflicting high costs on budgets: countries face huge legal costs when defending their policy decisions in international arbitration tribunals.

- In 2011, the American Lawyer magazine reported on 113 BITs cases that involved costs of at least 100 million dollars.[22]

Investment agreements and land deals - what are the potential pitfalls?

Land reform: One key factor in improving rural development for the poor is to pursue a more equitable distribution of land. If a government decides to buy back or appropriate land which has been leased or sold to a foreign investor, they are vulnerable to demands for high levels of compensation. The level of compensation, when decided by an international arbitration tribunal, is often higher than what is awarded in domestic courts (in addition to the cost of arbitration). Many of the current large-scale land acquisitions take place at very low cost (there are reports of foreign land investors paying lease fees from as little as seven cents per hectare [23]) and for very long periods (often up to 99 years). Buying back the land on the other hand, would have to be at current market rates and could include compensation for sunk costs and even future profits, making it almost impossible for a new government to address land reform issues.

Reversing a land acquisition: land deals often involve displacing small holders or farmers with custodial rights. The farmers can mount a domestic legal challenge; however even if they are found to be the rightful owner, the government will have to pay compensation to reverse the land acquisition – the cost of which could be a factor of deciding against reversing a land deal.

Entrenching rights for investors: Treaties often provide for companies to have 'legitimate expectations' through a so-called 'fair and equitable treatment' clause. Once an investor has formed a legitimate expectation, it becomes a legal entitlement and the investor can therefore claim for compensation. For example in the case of water rights: once an investor uses water sources on an acquired piece of land and the investment contract or domestic law does not stipulate periodic reviews of this, the investor will have legitimate expectations that they are able to use these water resources continuously[24]. If a government decides that it needs to restrict the water use by the investor, for example to provide more access to local communities, or charge for it, it could be challenged in international tribunals for a breach of terms.

Food security: Domestic food security concerns could become secondary to commitments under an investment agreement. Currently, much of the land acquired for investment lies idle – bought for speculative purposes. Under investment agreements, governments often give up the right to impose performance requirements to ensure it is used for agricultural purposes. Likewise, when the land is brought into use, the agreement often presumes that the investor has the right to export all of its production[25]- whereas a sensible development policy might require the investor to produce a certain amount for domestic consumption.

Changes in environmental laws or other public policies can lead to investors claiming for compensation when this affects their investment negatively. For example, a stronger environmental standard can mean higher costs for the investor. Under an investment agreement, the firm could argue that this amounts to indirect expropriation of their investment. This undermines the right of a new government to change policies - especially bearing in mind that land deals can last for decades.

Reforming investment agreements

As the current wave of foreign investment in land (and the associated threats to development and human rights) shows no sign of abating, reform of the current regulatory and institutional framework governing foreign investment is urgently needed. The 2011 UN Guiding Principles on Business and Human Rights recognise that "the terms of international investment agreements may constrain states from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so.[26]

The investment governance framework is outdated. Countries, think tanks and civil society are pushing for reforms of a framework which currently allows investors to challenge democratic public policy decisions and risks undermining development objectives.

Reform options vary, but include:

Rethinking BITs

Brazil, a country with high levels of foreign investment, has never signed a BIT. As a result of challenges to their public policy decisions, countries as diverse as Australia, Ecuador, Norway, Venezuela, and South Africa have decided against signing up to new investor-to-state clauses in BITs, or to abandon BITs all together.

Introducing measures to better safeguard policy space

Countries can safeguard some policy space by carefully negotiating treaty terms with more exact definitions. It is important to clarify the scope and meaning of vague treaty provisions such as 'fair and equitable treatment' and 'expropriation' and include specific flexibility mechanisms through exceptions and reservations.[27] The USA and Canada, following their experience of investor claims against their policies under NAFTA, have followed elements of this approach.

Countries can include clauses that allow for temporary measures to stimulate certain sections of the economy (for example the UK BITs with Nigeria and Tanzania). BITs today can also be suspended on the grounds of financial or economic crisis – this type of exception could be applied to the situations of food insecurity and land dispute.

Holding investors to account for sustainable development outcomes

The biggest gap in most BITs is that investors cannot be held to account for the social, human rights or environmental impact of their operations. There are some attempts to change this. The model United States BIT has a binding obligation that government will not relax environmental or labour laws when dealing with foreign investment. More broadly still, the Southern African Development Community model BIT includes provisions on environmental and social impact assessments; measures against corruption, standards for human rights, environment and labour; and the right by host states to regulate and pursue their development goals.

UN Guidelines on the Responsible Governance of Tenure of Land…[28]

The Committee on World Food Security (CFS) endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in May 2012.

The specific aim of the guidelines is to promote food security and sustainable development by improving secure access to land, fisheries and forests and protecting the rights of millions of often very poor people. They provide principles and practices that governments can refer to when making laws and administering land, fisheries and forests rights.

The guidelines are based on an inclusive consultation process started by FAO in 2009 and included participation of government officials, civil society organisations, private sector representatives, international organisations and academics.

IIAs and specifically BITs as well as WTO rules on investment, must be revised to address food security concerns:

1. A requirement to carry out an independent human rights impact assessment to identify potential issues for communities using the land.
2. A requirement to obtain free and prior informed consent by affected communities in writing and after a comprehensive presentation of costs, benefits as well as risks has been made.
3. Performance requirements to ensure that land is being utilised (i.e. not lying idle) and that production contributes to the local economy.
4. Safeguard measures (such as exceptions and reservations) which allow the host state to suspend treaty obligations in case of food security issues.
5. Investor obligations to meet environmental standards.
6. Investor obligations to meet labour and human rights standards.
7. Restrictions on expropriation to allow for redistribution of land when required and in a reasonable time frame.

Our Recommendations

- The UK should push for reform of the BIT system to ensure it is coherent with the right to regulate and the right to development. This should be reflected in the UK's new cross government strategy on business and human rights.
- BIT reform needs to include a better balance of rights and obligations for investors.
- The UK should ensure that arbitration disputes are made more transparent.
- The UK should require UK investors to publish their contracts involving land acquisitions abroad.
- Food security should be included as a ground for suspending rights granted in a BIT.
- The UK should make export credit support conditional on compliance with the UN Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests.
- Land disputes should not be subject to investor-to-state arbitration and other investor rights should be made conditional on acting in accordance with the UN guidelines.

Endnotes

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