Land rights and investment treaties

Exploring the interface

Lorenzo Cotula

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Lorenzo Cotula

IIED Land, Investment and Rights series

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International Institute for Environment and Development
80-86 Gray's Inn Road
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United Kingdom

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Acronyms

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
CFS	United Nations Committee on World Food Security
COMESA	Common Market for Eastern and Southern Africa
ICSID	International Centre for Settlement of Investment Disputes
NGO	Non-governmental organisation
UK	United Kingdom
UN	United Nations
US	United States
UNCITRAL	United Nations Commission on International Trade Law
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

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About the author

Lorenzo Cotula is a principal researcher in law and sustainable development at the International Institute for Environment and Development (IIED), where he leads the Legal Tools Team and the Legal Tools for Citizen Empowerment programme (www.iied.org/legal-tools).

Executive summary

Land governance, local to global

The spread and deepening of economic globalisation has highlighted the ever closer connections between the international legal arrangements governing the global economy on the one hand, and claims to land and natural resources on the other. In a globalised world, land governance is shaped by international as well as national regulation. As pressures on valuable lands intensify and land relations become more transnationalised, increasing recourse to international investment treaties – the treaties concluded between two or more states to promote cross-border investment flows – is redesigning spaces for land claims at local and national levels.

Over the past few years, investors have relied on investment treaties to bring a growing number of international dispute settlement proceedings against states. In some of these proceedings, investors have challenged the legality of state conduct linked to land governance, and sought significant amounts in compensation. The measures challenged included land reform programmes, handling of farm occupations and termination of land transactions. Investors have also wielded investment treaties to challenge land reform before national courts, while governments have invoked them to resist indigenous peoples' restitution claims targeting land owned by foreign investors.

These connections between land rights and investment treaties are likely to become increasingly prominent in the coming years, compounded in many locations by the growing pressures on land from mining and petroleum projects, agribusiness investments, special economic zones, tourism developments and infrastructure projects. The recent wave of large-scale land deals for plantation agriculture in low and middle-income countries ("land grabbing" in the critical literature) could result in more investors bringing claims for land-related disputes.

Despite its growing importance, the interface between land rights and investment treaties remains poorly understood, caught between preconceived positions and limited in-depth analysis. A better understanding of that interface can help to rethink land policies and investment treaties, at a time when both are forming the object of much international debate.

This report sheds light on how investment treaties can affect land rights. It draws on the legal analysis of investment treaties and how international tribunals have interpreted them. The report finds that investment treaties can have far-reaching implications for land reform, for public action to address "land grabbing" and more generally for land governance frameworks. The report also charts directions for socio-legal research to explore how investment treaties are affecting land rights on the ground.

Land rights and investment treaties: a far-reaching interface

Investment treaties establish standards of treatment primarily aimed at protecting foreign investment against adverse state conduct. They allow investors to seek compensation for state conduct that breaches those standards, by bringing investor-state arbitration claims to international arbitral tribunals. In some respects, investment treaties reinforce international policy guidance setting parameters for quality in land governance and reform processes.

But important distributive issues are also at stake, because investment treaties can protect the landholdings of foreign investors against the legitimate land claims of indigenous peoples, small-scale rural producers, the landless and more generally poor and marginalised groups. By increasing the cost of land redistribution, restitution or tenure reform, or of public action to address "land grabbing", investment treaties could enter into tension with progressive land policies – including measures to implement recently developed and widely supported international guidance on responsible land governance.

Investment treaties typically recognise that states have the right to expropriate land in order to implement land reform. But they can also establish compensation requirements that go beyond the standards applicable under national law, and even international human rights law. At scale, applying these more stringent requirements without considering historical injustices that may have occurred, and without the flexibility allowed by international human rights law, can make it very costly, and in that sense more difficult, for states to redistribute or restitute land, or to reform land tenure regimes.

In relation to "land grabbing", the legal protections enshrined in investment treaties risk compounding any shortcomings in national governance. For example, investment treaties could protect one-sided land deals that comply with national law but dispossess rural people; a mechanical application of investment treaties might enable investors to obtain compensation at full market value, even if they acquired the land at less than market price; and the doctrine of "legitimate expectations" could expose governments to liabilities for promises that public officials made to investors before consulting communities. As states and non-state actors take measures to tackle "land grabbing" and improve governance, the public purse may have to shoulder the full costs that result for agribusiness companies.

Most investment treaties enable states to regulate the acquisition of land rights by foreign investors. But depending on their formulation, "pre-establishment" investment treaties can require states to remove restrictions on the acquisition of land rights that treat foreign investors differently from local nationals. This could foster commercialisation of land relations in places where land has important social, cultural and spiritual value. Investment treaties could also expose governments to liabilities for conduct caused by limited capacity in administrative or judicial authorities.

Some recent international jurisprudence provides pointers on how arbitral tribunals can consider the complexities of land relations in investment disputes – for example, by excluding from protection investments made through corruption or other illegality, or by considering whether investors were aware of the tenure risks when they made the investment. But important questions remain, and much depends on how these lines of jurisprudence will evolve in the coming years.

Empirical evidence on the actual extent to which investment treaties are affecting land rights on the ground remains limited, not least because information is not in the public domain and methodological challenges are at play. There is a need for socio-legal research on the operation of investment treaties, including in situations that do not result in publicly known arbitrations and as such remain below the public radar.

However, the analysis of legal frameworks and the growing body of investor-state arbitrations do highlight the multiple channels that can connect international investment treaties to local land rights. They indicate that investment treaties can affect how the costs of socially desirable land governance action are distributed among public and private actors. They also highlight the stark contrast between the legal protections accorded to foreign investment, and the legal insecurity to which many rural people are exposed worldwide.

As pressures on the world's natural resources bring competing land claims into contest, imbalances in the law regulating foreign investment raise probing questions about whose rights are being protected and how. Land rights are essential in realising human rights in many contexts, so addressing these imbalances is not just a matter of policy choice, but a human rights imperative.

Recommendations for governments

As the primary actor in land governance and investment treaty making, governments should:

- Carefully think through their policy choices about whether to conclude, terminate or renegotiate investment treaties, and in what form, including through systematic reviews of existing investment treaties and their actual and potential ramifications.
- Promote transparency in investment law and arbitration, to enable more inclusive policy choices and facilitate better monitoring of the ways in which investment treaties affect land rights.
- Consider the implications of existing investment treaties when designing and implementing land governance action, to avoid or mitigate liabilities through well-thought out conduct.
- Expedite and upscale efforts to improve national land governance, through implementing the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.
- If new investment treaties are negotiated, consider treaty formulations that align investment treaties to pursuit of sustainable development; that align compensation standards to national constitutions and international human rights law; that commit both host and home states to implement the Voluntary Guidelines on the Responsible Governance of Tenure; and that spell out investor obligations to comply with applicable law and possibly specified international standards.
- Ensure that they have the capacity to comply with any investment treaties they conclude; and where capacity challenges exist, consider treaty formulations that recognise the differentiated capacities of the states parties.

Recommendations for parliaments, social movements, civil society, researchers and donors

Land is eminently political, and often emotive. Choices on whether to conclude, terminate or renegotiate investment treaties, and in what form, are also political. Legitimacy of political choices rests on inclusive and informed debate. So addressing the interface between land rights and investment treaties is not a government job alone:

- Parliaments should claim an important role in investment treaty making, using any constitutional powers they may have in relation to investment treaties and more generally holding debates, asking questions, raising issues, tabling motions, expressing policy orientations and prompting the government to consider the issues raised by social movements and civil society.

- Social movements including organisations of rural people and small-scale rural producers can play a key role in representing and strengthening the voices of their constituents in national and international policy processes concerning both land rights and investment treaties.
- Civil society organisations should remain vigilant and step up advocacy on investment treaties and their implications for land rights. They can play a key role in promoting public awareness and debate; advocating and holding governments to account; and developing arrangements for international alliance building and lesson sharing. There is also growing experience with civil society submissions to raise public and grassroots concerns in investor-state arbitration proceedings.
- Researchers should strengthen the evidence base to facilitate informed policy debates and choices. There is significant scope and need for in-depth case studies on the ways in which investment treaties operate in real-life situations, including situations that do not result in publicly known arbitrations; on the bearing that these treaties can have, directly or indirectly, on decision-making processes; and on approaches to handle possible tensions between competing policy objectives.
- Donor agencies should support the efforts of governments, parliaments, social movements, civil society and researchers, through both technical and financial support.

Final remarks

The interface between land rights and investment treaties highlights the need to place discussions about investment treaties in a wider context. Investment treaties protect foreign investors and their investments, within a bilateral relationship between investor and government. But land-based investments can involve or affect other actors too, including aspiring land reform beneficiaries and people who may lose land to business ventures. Multiple national and international legal instruments apply, and an exclusive focus on investment treaties risks producing biased outcomes, even in reform efforts.

These considerations require giving proper thought to the overall legal frameworks that govern land and investment, of which investment treaties are but one important part. Protecting the land claims of some, without also taking action to protect different and potentially competing land claims, can entrench imbalances in both legal rights and power relations. In the longer term, solutions should lie less in legal arrangements that insulate foreign investment from shortcomings in national legal systems, and more in establishing fair and effective land governance that can cater for the needs of all.

1. Introduction

1.1 Land governance, local to global

On 23 September 2014, a high court in Medellin, Colombia, ordered the restitution of land to the Embera Katio, an indigenous community displaced by the armed conflict. The court also ordered government authorities to suspend mining concessions issued in the community's land, and to ensure that the Embera Katio are consulted before mining operations can resume.[1] This judgment is part of Colombia's wider land restitution programme – in turn an important part of the national process to deal with the return of the many displaced during the armed conflict, and to consolidate peace through transitional justice.[2]

In July 2014, the government of the United Kingdom (UK) ratified the bilateral investment treaty (BIT) it concluded in 2010 with the government of Colombia. With this ratification, the treaty entered into force. Like the hundreds of investment treaties currently in force worldwide, the Colombia-UK BIT establishes substantive standards of treatment and legal remedies to protect UK investments in Colombia, and vice versa.

These seemingly unrelated developments could soon come into closer contact. Some of the mining companies affected by the land restitution judgment have connections to the UK. Non-governmental organisations (NGOs) raised concerns that the Colombia-UK BIT might enable UK companies to sue the government of Colombia for losses suffered from land restitution, and that this could make it more difficult for Colombia to implement the land restitution programme (ABColombia, 2014; see also ABColombia and Traidcraft, 2014).

The NGO concerns received public attention (e.g. Provost and Kennard, 2014), but they did not halt the ratification process. However, they did have reverberations, leading to a parliamentary debate on the Colombia-UK BIT in the House of Lords – albeit after the treaty came into force. Concerns about land restitution featured prominently in that parliamentary debate (House of Lords, 2014).

Whether and how UK-based companies will activate the Colombia-UK BIT to seek compensation for land restitution, and how this will affect Colombia's land reform and peace building process, remain to be seen. And parliamentary debates about the interface between land rights and investment treaties remain a rare occurrence worldwide. But recent developments indicate that the issues are real and far-reaching.

1. *Resguardo Indígena Embera Katio de Alto Andágueda* case.
2. Victims and Land Restitution Law No. 1448 of 2011. On this legislation, see Summers (2012), Velásquez-Ruiz (2015) and, for a critical perspective, Martínez Cortés (2013).

Over the past few years, the spread and deepening of economic globalisation has highlighted the ever closer connections between the international legal arrangements for the governance of the global economy on the one hand, and claims to land and natural resources on the other. As pressures on valuable lands intensify and land relations become more transnationalised, struggles over land involve growing reliance on international law. In this context, investment treaties are redesigning spaces for land claims at local and national levels.

Foreign investors have relied on investment treaties to bring growing numbers of international dispute settlement proceedings against states. In some of these proceedings, investors have challenged the legality of state conduct linked to land governance, and sought significant amounts in compensation. The measures challenged included land reform programmes, handling of farm occupations and termination of land transactions. In other cases, investors have wielded investment treaties to challenge land reform before national courts. Governments have also invoked investment treaties to resist land restitution claims made by indigenous peoples and targeting land owned by foreign investors.

These developments have affected countries in different parts of the world, including Albania, Namibia, Paraguay, South Africa, Venezuela and Zimbabwe. Investment disputes with a land governance dimension have also affected Chile, Costa Rica, Egypt and Hungary. These developments illustrate the important bearing that investment treaties can have on land governance – depending on perspectives and circumstances, as a bulwark of the rule of law in the face of arbitrary state conduct, or as an obstacle to socially desirable land policies.

These connections between land rights and investment treaties are likely to become increasingly prominent in the coming years, compounded in many locations by the growing pressures on land from mining and petroleum projects, agribusiness investments, special economic zones, tourism developments and infrastructure projects. The recent wave of large-scale land deals for plantation agriculture in low and middle-income countries ("land grabbing" in the critical literature), often occurring under the protection of investment treaties, could result in many more investors bringing claims for land-related disputes.

Despite its growing importance, the interface between land rights and investment treaties remains poorly understood, caught between preconceived positions and limited research.[3] A better understanding of that interface can help to rethink land policies and investment treaties, at a time when both are forming the object of much international debate: there is growing international debate on ways to reform the investment treaty regime;[4] while efforts to rethink land policies received new momentum with the endorsement, in 2012, of the Voluntary Guidelines on the

3. Among the important exceptions, see Smaller and Mann (2009), Peterson and Garland (2010) and McAuslan (2010). For my own work on this topic, see Cotula (2007, 2011a and 2013).
4. See e.g. the expert meeting "Transformation of the International Investment Agreement Regime: The Path Ahead", United Nations Conference on Trade and Development (Geneva, 25-27 February 2015, http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=643).

Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT – see Box 1.1).

Box 1.1. The Voluntary Guidelines on the Responsible Governance of Tenure

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) are the first comprehensive global instrument that provides guidance to states and non-state actors on how to promote responsible land governance.

The Guidelines were unanimously endorsed on 11 May 2012 by the Committee on World Food Security (CFS), which is the top United Nations (UN) body in matters of food security. Endorsement by CFS followed two years of extensive multi-stakeholder consultations and one year of inter-governmental negotiations.

The VGGT call for the recognition and protection of all "legitimate tenure rights" and provide guidance on land restitution, land redistribution, land tenure reform, agribusiness investments and land administration, among other issues.

While not legally binding per se, the VGGT have received widespread expressions of high-level political support, including from the UN General Assembly, the G8 and the G20. Some VGGT provisions reflect binding international law, including provisions on gender equality and respect for human rights.

1.2. About this report

This report sheds light on the interface between land rights and investment treaties. It draws on the legal analysis of investment treaties and how international tribunals have interpreted them, in relation to selected land governance issues. Land rights have global relevance, but the report's main concern is about low and middle-income countries. The report primarily targets practitioners and researchers working on the governance of land and investment. It aims to promote debate about how investment treaties can affect land rights, and what can be done to address the issues raised.

The report argues that, in a globalised world, land governance is shaped by international as well as national law. Public action that neglects this international dimension can result in ill-informed policy choices, and potentially in significant liabilities. Investment treaties can particularly affect land governance in three interlinked areas, requiring careful thinking through: land reform, including redistribution, restitution and tenure reform; measures to address "land grabbing" and pressures on land; and more generally the functioning of land governance systems.

These findings identify the multiple channels through which investment treaties can affect land rights. They indicate that states may have to bear the costs of land governance action, compensating affected foreign investors for actual and

projected losses. Measuring the extent to which these channels affect public action in practice raises empirical questions requiring further socio-legal research – including in situations where reliance on investment treaties affects investor-state negotiations without resulting in publicly known arbitrations. The report identifies issues that might help to frame that socio-legal research, acting as a scoping study for a longer-term body of work. It also outlines recommendations for policy and practice, based on the findings of the legal analysis.

A few caveats are in order. First, investment treaties are not the only legal instrument that protects the landholdings of foreign investors. National law typically does that too, including through constitutional right-to-property provisions. International human rights law is also relevant, because the internationally recognised human right to property may protect property against redistributive action.[5] However, this report focuses on investment treaties because they are a neglected issue in the land governance literature; and because, as will be seen, investment treaties can establish more stringent requirements than national law and international human rights law.

Second, the interface between land rights and investment treaties raises sensitive socio-political issues. Land has important social, cultural and spiritual value in many societies. There are often polarised views on the merits and demerits of economic globalisation, of which investment treaties are an important enabler. Major economic interests are at stake in both land rights and investment treaties. And policy choices on both land rights and investment treaties are eminently political. The report recognises these sensitivities but focuses on technical legal issues. However, it also argues that the political sensitivities point to the need for greater public participation in policy making.

Finally, the legal issues involved are complex and dry, and it is easy to lose sight of the people whose livelihoods are at stake behind the intricacies of the legal norms. The report aims to keep the discussion accessible, without however compromising on accuracy, and while recognising that often "the devil is in the detail". However, the discussion of issues is inevitably synthetic and glosses over much technical complexity.

The remainder of the report is structured as follows. The next chapter provides a brief overview of key features of the investment treaty regime, and how it intersects with land governance. The subsequent three chapters discuss key issues at the interface between land rights and investment treaties: land reform, including redistribution, restitution and tenure reform; public action to address issues linked to "land grabbing" and pressures on land; and other issues concerning land governance. The conclusion summarises key findings and charts possible ways forward.

5. E.g. *James and Others v. United Kingdom* and *Holy Monasteries v. Greece*.

2. Setting the scene

2.1 Investment treaties in outline

International investment law is the body of international law concerning the treatment of foreign investment. There is no global treaty that sets standards of treatment for foreign investment, and there is no global institution comparable to the World Trade Organization. Rather, international investment law is centred on a network of over 3,000 bilateral or regional investment treaties. These treaties are concluded between two or more states, and aim to promote investment flows between the state parties by establishing obligations about how investments by nationals of one state will be admitted and protected in the territory of the other state.

Investment treaties must be distinguished from investment contracts. The latter may be concluded between an investor and a state for a specific investment project. Examples include establishment conventions, host government agreements and land concessions or leases. Investment treaties, on the other hand, are concluded between states and apply to all covered investors and investments. Most such treaties are bilateral investment treaties (BITs), but regional or bilateral trade agreements that contain an investment chapter are increasingly common. Because international investment law is dominated by bilateral and regional treaties, the law applicable to different investments may vary depending on their respective host and home states.

Many treaties present broadly comparable terms and significant uniformity of underlying principles (Schill, 2009). Yet the detailed wording can vary considerably, and so too can the specific standards of treatment to which investors are entitled. Commonly used standards of treatment include:

- "National treatment" and "most-favoured-nation" clauses that typically require states to treat foreign investors or investments no less favourably than investments in similar circumstances by their own nationals (national treatment) or by nationals of other states (most-favoured nation treatment).
- "Fair and equitable treatment" clauses that require states to treat foreign investment according to a minimum standard of fairness, irrespective of the rules they apply to domestic investment under national law.
- "Full protection and security" clauses, which are usually interpreted as requiring states to take steps to protect the physical integrity of foreign investment, but have in some cases been interpreted more broadly to cover legal protection too.

- Clauses that limit a government's ability to expropriate foreign investments. These often state that any expropriation must be for a public purpose, be non-discriminatory, and that governments must follow due process and pay compensation according to specified standards typically linked to market value.
- Provisions on currency convertibility and profit repatriation, which allow investors to repatriate returns from their activities.

Most-favoured-nation clauses can allow investors to claim more favourable treatment provided by treaties between the host state and states other than the country where investors are based. So in order to understand the full implications of one investment treaty, it is important to consider all the other treaties that the state may have concluded. In effect, most-favoured-nation clauses level the playing field upwards, because investors and investments operating in one state may be entitled to the most favourable treatment provided by any of the treaties ratified by that state.

As well as determining substantive standards of treatment, most investment treaties allow investors to choose to bring disputes against the host state to international investor-state arbitration, rather than national courts. There are several international arbitration centres, each with its own procedural rules. One prominent institution is the World Bank-hosted International Centre for the Settlement of Investment Disputes (ICSID). ICSID sees dozens of arbitrations per year. Arbitrations can also be carried out outside any standing institutions, often following the rules adopted by the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules).

In investor-state arbitration, the investor typically alleges that the state has violated the treaty, and will usually seek monetary compensation. In deciding the case, the tribunal issues a binding award – effectively a document similar to a judgment. If the tribunal finds treaty violations, it usually orders the state to compensate the investor.

Widely ratified multilateral treaties facilitate the enforcement of these awards.[6] If a host state fails to comply with an award covered by one of these multilateral treaties, the investor may seek enforcement in any signatory country where the host state holds interests, for instance by seizing goods or freezing bank accounts. Because in a globalised world virtually all states hold assets overseas, this type of legal action can be effective. In addition, governments are often under pressure to honour arbitral awards in order to keep attracting investment, although in recent years some states have refused to pay awards.

Traditionally, there has been little transparency in investor-state arbitration. There have now been major advances in some arbitration systems, including ICSID and new UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration ("Transparency Rules"). Several recent investment treaties also contain provisions

6. Namely, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, for ICSID awards, Article 54 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

promoting transparency in arbitration. However, transparency remains limited or non-existent in other areas: under some arbitration rules, it is still possible for the public not to be aware that a dispute exists, and access to arbitration documents remains constrained. For these reasons, this report only draws on *publicly known* arbitrations.

This ability of private actors directly to access international redress is unusual in international law. It constitutes an important difference compared to international trade law, for example, where only states can bring disputes about alleged treaty violations. International human rights law allows individuals to access international remedies, but (unlike most investment treaties) usually only after individuals have unsuccessfully pursued remedies available under national law.

Unlike investor-state arbitration based on contracts between investors and states, investment treaties effectively contain unilateral advance offers of consent to arbitration on the part of the states. As such, they expose governments to claims from an unknown and potentially large number of investors. And unlike many other international instruments, investment treaties and arbitration are assisted by relatively effective enforcement mechanisms, and as such they can have real bite and far-reaching financial implications for states.

There has been much controversy about the extent to which the risk of incurring liabilities based on investment treaties can restrict the ability of states to act in the public interest. The question is whether the prospect of having to pay substantial amounts in compensation and/or in legal costs might discourage states from taking desirable land governance action. Empirical evidence of this "regulatory chill" is difficult to find, partly because information is not in the public domain; because counterfactuals (whether authorities would have acted differently in the absence, or presence, of an applicable investment treaty) are not available; and because biases undermine the evidence base (e.g. we can more easily find out about the cases where authorities did act, resulting in publicly reported investor-state disputes; see Bonnitcha, 2014a).

However, reports that even high-income countries consider the risk of liabilities in their policy-making processes (e.g. Peterson, 2013) highlight the need not to be complacent about the restrictions that investment treaties can create, particularly in low and middle-income countries where public finances face harder constraints. And irrespective of any "regulatory chill", the financial implications of investment treaties raise real questions about how the costs of socially desirable public action should be distributed between public and private actors. So while follow-on socio-legal research can shed more light on "regulatory chill" in land governance, it is important to discuss the legal relationships between land rights and investment treaties even if it is still difficult to provide, based on publicly available evidence alone, systematic evidence of situations where investment treaties have prevented desirable land governance action.

2.2 Land in investment treaties

Investment treaties typically define the types of investments and investors they cover. The treaty clauses that define "investment" and "investor" determine the scope of application of the treaty. Most treaties include landholdings in the definition of investment. Indeed, investment treaties commonly adopt a very broad definition of investment, often centred on a general clause (e.g. "every kind of asset") and an illustrative list of assets, typically including immovable property and natural resource concessions.

Immovable property would cover proprietary interests in land, and natural resource concessions would cover land concessions or leases. Some treaties make this more explicit, by referring to "concessions to search for, *cultivate*, extract or exploit natural resources".[7] Some treaties restrict the application of some of their provisions to land rights. For example, some investment treaties exclude land from the application of aspects of the investment treaty protection against expropriation.[8]

Investment treaties typically consider company shares to constitute a covered investment, so the corporate structures through which foreign investors hold land would also be protected. Based on these provisions, foreign investors holding land rights would be entitled to the treatment provided by an applicable treaty – and also by other relevant treaties, by virtue of any applicable most-favoured-nation clause. They would also be entitled to bring land-related investment disputes with the host state to investor-state arbitration.

Land has formed the object of international disputes since the early 20th century, for example where agrarian reforms or land occupations in Latin America affected land owned by foreign nationals.[9] In the 1930s, the expropriation of land owned by United States (US) nationals as part of Mexico's agrarian reform triggered celebrated diplomatic correspondence between the US and Mexican governments.

In that correspondence, US Secretary of State Cordell Hull argued that customary international law required states to pay prompt, adequate and effective compensation where foreign investment is expropriated (Mexico-United States, 1938). This standard of compensation has come to be known as the "Hull formula", and is widely used in contemporary investment treaties (Reinisch, 2008). These evolutions reflect the important role that land disputes played in the historical development of international investment law.

7. Ethiopia-UK BIT 2009, Article 1(a)(v), emphasis added. Other UK treaties use similar formulations (e.g. Article 1(a)(v) of Laos-UK BIT 1995 and Tanzania- UK BIT 1999, and Article 2(a)(v) of Colombia-UK BIT 2010), as do some treaties concluded by Malaysia (e.g. Chile-Malaysia BIT 1992, Article 1(a)(v)).
8. E.g. ASEAN Comprehensive Investment Agreement of 2009, Article 14, footnote 10.
9. See e.g. *United States of America on Behalf of Marguerite de Joly de Sabla v. The Republic of Panama*. This arbitration was between the home and host states, as it was settled before the development of investment treaties and treaty-based arbitration.

In more recent times, the first ever investor-state arbitration brought under an investment treaty related to the destruction of a shrimp farm in an armed conflict situation.[10] While nowadays many investment disputes relate to sectors with limited connections to land rights (e.g. banking, telecoms), land continues to form the object of investment disputes – in relation not only to agriculture (which accounts for 4% of arbitration claims taken to ICSID; see ICSID, 2015) but also to extractive industries, real estate development or tourism (see Chapter 5).

With over 3,000 investment treaties concluded worldwide and over 600 publicly known investor-state arbitrations, the expanding reach of international investment law has redefined the boundaries for lawful public action. The range of land governance measures that could come under challenge through investor-state arbitration is very broad: from land expropriation for redistribution or restitution, to failure to protect landholdings from occupations or incursions and efforts to renegotiate land concessions, through to land zoning regulations and more generally shortcomings in land governance systems. State conduct may include action or inaction by local or central government agencies, but also legislation adopted by parliament or the conduct of national courts.

10. *Asian Agricultural Products Ltd v. Republic of Sri Lanka*.

3. Land reform

3.1 Framing the issue

For a long time, states have enacted multiple types of land reform in pursuit of diverse policy objectives – from addressing historical injustices to promoting more equitable land distribution, through to encouraging investment in agriculture and promoting political stability. Many states with highly concentrated land ownership structures have implemented redistributive land reforms for decades, although political momentum for reform has fluctuated over time. In fact, several states have recently enacted law reforms to facilitate land acquisition by larger-scale commercial operators, leading some NGOs to denounce what they dubbed "agrarian reform in reverse" (GRAIN, 2015). But land redistribution programmes are currently underway in several countries.

Political transitions since the early 1990s triggered major land restitution programmes, for example in some Eastern European, African and Latin American countries. Globally, there has been considerable activity in the area of land tenure reform – that is, reform aimed at changing the nature and content of land rights, for instance to make these rights more secure. The VGGT call for reform in important land policy areas, so implementing the VGGT may involve increased land reform activity in the coming years (see Box 3.1).

Land reform programmes can create some of the most obvious intersections between land rights and investment treaties. This can include situations where public authorities expropriate land held by foreign investors in order to reallocate it to disadvantaged groups (redistribution) or to people advancing historical land claims (restitution). But it can also include cases where reforms privatise state-owned enterprises that may have developed partnerships with foreign investors; where reforms affect the content of the land rights held by foreign investors (tenure reform); or where authorities fail to protect foreign landholdings from invasions or occupations, including by people advocating for land reform.

Box 3.1. Land reform in the VGGT

The VGGT contain numerous provisions on land redistribution, restitution and tenure reform. They provide that states should consider land redistribution "for social, economic and environmental reasons, among others, where a high degree of ownership concentration is combined with a significant level of rural poverty attributable to lack of access to land" (VGGT paragraph 15.3). Where states choose to implement redistributive reforms, they should clearly define the objectives of the reform programme and its intended beneficiaries, enact measures to make the reform sustainable and ensure that reform beneficiaries can earn an adequate standard of living from the land (VGGT paragraphs 15.5-6).

In addition, the VGGT provide guidance on the restitution of land to historically dispossessed people. States should consider providing restitution for the loss of "legitimate tenure rights"; restitution may involve actual return of the land or, where this is not possible, monetary or in-kind compensation (VGGT section 14).

Finally, the VGGT provide extensive guidance on land tenure reform. For example, the VGGT call for legal protection of all "legitimate tenure rights", including customary rights that in several countries may currently have no legal recognition (VGGT paragraphs 3A, 4.4 and 5.3, among others). The VGGT also contain detailed provisions on safeguarding all "legitimate tenure rights", including customary and unrecorded rights, in land allocation processes (VGGT section 7); protecting the land rights of indigenous peoples (VGGT section 9); and acknowledging informal tenure (VGGT section 10).

3.2 Typology of cases

a) Redistribution

Land redistribution programmes have given rise to several investor-state arbitrations. Investors have claimed that state conduct violated expropriation clauses included in applicable investment treaties. These clauses determine the conditions for the legality of expropriations. While the wording varies, these conditions typically include public purpose, non-discrimination and payment of compensation at specified standards. Investors have also relied on the fair and equitable treatment standard.

Publicly known investor-state arbitrations relating to land redistribution include *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe* – an arbitration concerning Zimbabwe's controversial fast-track land redistribution programme; *Bernard Von Pezhold and Others v. Zimbabwe* and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* – two ongoing arbitrations also concerning land redistribution in Zimbabwe; and *Vestey Group Ltd v. Bolivarian Republic of Venezuela* – an ongoing arbitration concerning the

expropriation of landholdings in Venezuela.[11] Landowners have also invoked investment treaties in litigation on land redistribution before national courts, for example in Namibia,[12] though scope for this depends on the extent to which national law allows courts directly to apply international treaties.

In line with the formulation of expropriation clauses in investment treaties, arbitral tribunals have recognised the right of states to expropriate property for land redistribution purposes, provided that legal requirements are complied with. In *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, the arbitral tribunal held that land expropriation breached the applicable investment treaty because the government of Zimbabwe had not paid just compensation as required by the relevant treaty clause. The tribunal ordered Zimbabwe to compensate the claimants.

Tribunals have also elaborated on how to determine compensation. Most investment treaties require compensation to be based on market value. The *Funnekotter* tribunal clarified that "the genuine value of the properties does not correspond to the value of the arable land plus the estimated value of the various buildings and equipments which are necessary for the operation of the farms. Genuine value must be determined on the basis of the market value of the whole farm at the time of expropriation" (para. 130).

b) Restitution

Investment treaties may come into play in land restitution programmes as well. There are no known treaty-based investor-state arbitrations directly relating to the restitution of rural land. But one recent arbitration concerning real estate in Romania – *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa EL Corporation v. Romania* – partly hinged on public action to return property confiscated during the communist era. This case is discussed further below (Chapter 4). The relationship between investment treaties and land restitution has also emerged in international human rights jurisprudence, for example in a case where a state resisted the restitution of land claimed by indigenous people partly on the ground that the land was now owned by foreign investors protected by an applicable BIT (see Box 3.2).

11. Initiated in 2006, this arbitration was suspended for six years, as the parties reported to have reached a settlement, but was resumed in 2012. See Hepburn and Peterson (2012a).
12. *Günter Kessl, Heimaterde CC and Martin Joseph Riedmaier v. Ministry of Lands and Resettlement and Others*. Much of the legal argumentation concerned alleged violations of human rights recognised by the Constitution, and of procedural safeguards established by national land law. But the applicants, all German nationals, also referred to the protection provided by the Germany-Namibia BIT 1997.

Box 3.2. Land restitution, human rights and investment treaties: *Sawhoyamaxa v. Paraguay*

In *Sawhoyamaxa v. Paraguay*, an indigenous community claimed restitution of their ancestral lands. Decades of colonisation by non-indigenous groups and penetration of the market economy had dispossessed the community of their land, leading to conversion to private ownership, land sales and the fencing of communal land.

The community initiated national law proceedings for land restitution in 1991, and eventually took the case to the Inter-American Court of Human Rights. The Paraguayan government resisted restitution, partly on grounds that the claim "collide[d] with a property title which has been registered", lastly with a German investor protected under the Germany-Paraguay BIT. The suggestion was that land restitution would infringe upon the investor's property, breaching the investment treaty (paras. 115(b), 125 and 137 of the judgment).

In its 2006 judgment, the Inter-American Court noted that the investment treaty did not prohibit expropriation – it merely subjected its legality to certain conditions, including public purpose. The Court also held that land restitution aimed at realising the collective right to property of indigenous peoples could constitute public purpose, and ordered land restitution within three years.

In 2014, after twenty-three years of legal wrangling, Paraguay passed a law providing for the expropriation of the land and its restitution to the Sawhoyamaxa community (Law No. 5194 of 12 June 2014). A constitutionality challenge brought by the companies owning the property was rejected by Paraguay's Supreme Court of Justice in September 2014 (Corte Suprema de Justicia, Judgment No. 981 of 30 September 2014). It remains to be seen whether the implementation of this law will give rise to investor-state arbitration claims based on the Germany-Paraguay BIT, and with what consequences.

c) Privatisation

Measures to privatise state farms have resulted in investor-state arbitration – for example, where land owned by state enterprises is transferred to local farmers. In *Tradex Hellas S.A. v. Republic of Albania*, a Greek investor established a joint venture with an Albanian state-owned enterprise to develop an agribusiness operation in Albania. The Albanian enterprise owned the land and contributed it to the joint venture. As part of its transition from a socialist regime, Albania established a programme to privatise the land owned by farming cooperatives. It later extended this programme to state-owned enterprises. So after the launch of the joint venture, Albanian authorities privatised a significant part of the joint venture's land. As a result, the parties dissolved the joint venture and authorities transferred the land to villagers in the area.

The investor claimed that the measures constituted an expropriation and filed an arbitration seeking compensation based on Albanian legislation and the Albania-

Greece BIT of 1991. However, the arbitral tribunal found that it only had jurisdiction to consider expropriation claims based on Albanian legislation, as the BIT was not in force at the time of the facts.[13] The tribunal also found that, based on the specific facts of the case, the contested measures did not amount to expropriation. It refused to award compensation and ordered each party to bear its own legal costs.[14]

d) Invasions and occupations

Arbitration claims have also arisen from alleged failures on the part of public authorities to protect landholdings against invasions, occupations or incursions, including those that rural people carried out to increase pressure for land redistribution, restitution or privatisation. Some arbitrations involved contestation around both land occupations and formal reform programmes (e.g. *Tradex Hellas v. Albania*).

Arbitral awards have interpreted the "full protection and security" standard included in many investment treaties as requiring states to act with due diligence in protecting landholdings held by protected foreign investors against encroachments, invasions or occupations by individuals or groups.[15] In one undisclosed arbitral award, the tribunal reportedly found that South Africa breached the full protection and security standard for failure to protect the landholding of a foreign investor against incursions from nearby communities (Peterson, 2008[16]).

e) Tenure reform

Land tenure reform can also adversely affect investments. As discussed, this type of reform involves changes to the nature and content of tenure rights. Examples may include reforms that alter the nature of the land rights held by investors, for instance converting land ownership into long-term leases or changing the duration of land leases. Tenure reform might also tighten compensation requirements applicable to the land expropriations necessary for implementing agreed investment projects. Where investors bear the costs of compensation, these new requirements could increase the operating costs of investments. In addition, reforms to introduce or tighten community consultation or consent requirements may delay investments.

Tenure reform may come under scrutiny for alleged violations of fair and equitable treatment and expropriation clauses. The latter typically cover regulatory measures that, while not transferring ownership title, substantially deprive investors of their property ("indirect expropriation").

13. *Tradex Hellas S.A. v. Albania*, Decision on Jurisdiction.
14. *Tradex Hellas S.A. v. Albania*, Award.
15. *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, paras. 49-50 and 67. This case does not concern land reform.
16. This article is based on reading the arbitral award, which is not publicly available.

Land tenure reform has not yet resulted in publicly known investor-state arbitrations. However, investors have brought arbitrations in relation to tenure reforms in the mining sector. In *Piero Foresti and Others v. The Republic of South Africa*, investors challenged South African mining legislation that changed the nature of the mining rights held by investors (as well as measures to transfer minority shareholdings to historically disadvantaged groups, as part of South Africa's Black Economic Empowerment programme). The investors ultimately discontinued this arbitration, so the arbitral tribunal did not decide on the tenure reform issue.

3.3 How investment treaties can affect land reform

The above discussion shows the diverse land reform issues that could arise in investor-state arbitration. It highlights that investment treaties recognise the sovereign right of states to implement land reform. For example, investment treaties allow states to expropriate the landholdings of protected investors so long as expropriation complies with certain conditions, including payment of compensation at specified standards. In the past, states have enacted various types of reform programmes in the presence of BITs.

In some respects, investment treaties reinforce the provisions of the VGGT, by providing safeguards against arbitrary state conduct. The VGGT consider respect for the rule of law to be a key "principle of implementation" (VGGT paragraph 3B.7). They state that land redistribution should "follow the rule of law", and that those who lose land to redistributive reform "should receive equivalent payments without undue delay" (VGGT paragraph 15.4). The VGGT also call for transparent and accountable reform processes, and for "due process and just compensation according to national law" (VGGT 15.9; see also VGGT paragraphs 16.1 and 16.3). In addition, VGGT provisions on land redistribution and restitution emphasise the need for states to act consistently with their obligations under applicable national and international law, which would include any relevant investment treaties (VGGT paragraphs 14.1 and 15.4).

However, by requiring payment of compensation at specified standards, allowing investors to bring claims to investor-state arbitration and providing relatively effective avenues to enforce arbitral awards, investment treaties can make it more costly for states to take action. As a result, concerns have been raised that investment protection risks crystallising historical injustices, particularly in low and middle-income countries where public finances may face harder constraints (Peterson and Garland, 2010; Vervest and Feodoroff, 2015). And where governments do not wish to implement land reform due to the interplay of vested interests and power relations, investment treaties could provide governments with legal arguments to legitimise political choices.

Other legal instruments can also protect the landholdings of foreign investors, including national legislation and international human rights law. But investment treaties tend to establish more stringent requirements, making these concerns particularly relevant. Take the issue of compensation for expropriations. Historically, this has been a much-debated issue in international law. The VGGT link compensation standards to national law (VGGT paragraphs 15.9, 16.1, 16.3), though as discussed the VGGT provisions on land redistribution and restitution also refer to international obligations (VGGT paragraphs 14.1 and 15.4).

Investment treaties set compensation standards that can go significantly beyond national law requirements. Many investment treaties require compensation at market value. Arbitral tribunals have defined fair market value as "the amount which a willing buyer would have paid a willing seller for the shares of a going concern".[17] For commercially viable businesses, compensation at market value usually includes loss of projected future profits as well as sunk investments. This exclusive emphasis on market value contrasts with the approach taken in some national constitutions, and even in international human rights law.

In Europe, for example, the right-to-property jurisprudence of the European Court of Human Rights is centred on the notion of a "fair balance" that must be struck between individual and collective interests. In determining whether national authorities have struck a fair overall balance, the Court considers all relevant circumstances. Compensation is but one important factor in this assessment. As a result, while compensation must be "reasonably related" to market value, it can be less than market value, provided that the overall balance struck is fair.[18] In addition, the nature of the public purpose pursued may be taken into account when determining compensation, potentially justifying compensation below market value.[19]

Similarly, some national constitutions refer to criteria other than market value in determining compensation. For example, the South African Constitution requires payment of "just and equitable compensation", which must reflect "an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances". These circumstances include the market value of the property, but also the current use of the property, the history of its acquisition and use, and the purpose of the expropriation.[20] Consideration of these factors may well result in compensation below market value. National constitutions might also allow a degree of flexibility on the timing of compensation, and on its form (e.g. cash vs bonds, local vs international currencies).

17. *Ina Corporation v. The Government of the Islamic Republic of Iran*, p. 380. See also *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, para. 96.
18. *James and Others v. United Kingdom*, para. 54; *Lithgow and Others v. United Kingdom*, para 121.
19. *James v. United Kingdom*, paras. 46, 54.
20. Constitution of the Republic of South Africa of 1996, Article 25(3).

By contrast, investment treaties usually make no reference to striking a "fair balance", or to a wider set of factors beyond market value. Expropriations must meet lawfulness conditions one by one (for example, compensation at market value, public purpose and non-discrimination),[21] leaving little room for consideration of overall fairness. One arbitral tribunal explicitly excluded that the nature of the public purpose could justify lower compensation.[22] As a result, investment treaties can require higher compensation than would be applicable under national constitutions or international human rights law. Many investment treaties also require compensation to be paid "without delay" and with interest, and to be "effectively realizable and freely transferable".[23]

Compensation requirements may prove particularly onerous in large-scale agrarian reforms, which may involve the expropriation of many properties. There has been debate about whether large-scale nationalisations may allow states to discount compensation amounts.[24] International human rights jurisprudence admits that large-scale nationalisation may result in lower compensation amounts for the individual properties expropriated.[25]

On the other hand, one recent investor-state arbitral tribunal has explicitly ruled out the possibility that states may discount compensation in large-scale agrarian reform programmes, noting that under the relevant investment treaty investors are entitled to market-value compensation "independently […] of the number and aim of the expropriations done".[26] The wording of investment treaties varies, and some authors have argued that the succinct reasoning of the tribunal in this recent case has not quelled debates about the merits of discounted compensation in the case of large-scale agrarian reforms (Peterson and Garland, 2010). However, there is little to suggest that future arbitral tribunals applying market value clauses in investment treaties would decide this issue in different ways.

Some states have raised explicit concerns about the compensation standards included in investment treaties, particularly in connection with agrarian reform. Brazil signed 14 BITs in the 1990s but did not ratify any of those. Opposition by Congress was a key reason for non-ratification. Among other issues, Congress deemed

21. See e.g. *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, para. 98.
22. *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, paras. 71–72. This arbitration was not based on an investment treaty.
23. E.g. Germany-Philippines BIT 1998, Article 4(2); Kenya-UK BIT 1999, Article 5(1); Rwanda-US BIT 2008, Article 6(2)-(3); Colombia-India BIT 2009, Article 6(3); Japan-Mozambique BIT 2013, Article 12(3).
24. In *Ina Corporation v. The Government of the Islamic Republic of Iran*, the tribunal held that customary international law could require less than full compensation for large-scale nationalisations, although the members of the tribunal disagreed on the meaning and implications of this statement. The tribunal went on to decide the case on the basis of an applicable treaty and ordered payment of full compensation (p. 378). See also the reference to debates as to whether "systematic large-scale nationalization, e.g., of an entire industry or a natural resource" may justify "less than full compensation" in *SEDCO Inc v. National Iranian Oil Co. & Islamic Republic of Iran*, p. 1264.
25. In *Lithgow and Others v. United Kingdom*, the European Court of Human Rights held that, so long an overall fair balance is struck, "the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property" (para. 121).
26. *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, para. 124.

aspects of the compensation requirements included in the BITs to be incompatible with the agrarian reform provisions of the Brazilian Constitution (WTO, 2013, para. 2.29). In 2015, Brazil concluded new "Investment Facilitation and Cooperation Treaties" with Angola and Mozambique that do not allow investor-state arbitration.[27]

Compensation issues aside, the interface between land reform and investment treaties has other dimensions too. For example, some arbitral tribunals have considered legal stability to be a key element of the fair and equitable treatment standard[28] – although other tribunals have recognised that investors should expect laws to change over time, especially when they operate in countries undergoing political transition.[29] Ambitious land reform programmes may involve multiple legal changes over time. In Namibia, for example, the Agricultural (Commercial) Land Reform Act No. 6 of 1995 was amended by the Agricultural (Commercial) Land Reform Amendment Acts No. 16 of 2000, 13 of 2002, 14 of 2003, 19 of 2003, 8 of 2013 and 1 of 2014.[30]

Depending on context, multiple legislative amendments may reflect political change, or the need to respond to issues arising from the judicial interpretation or practical application of legislation. Feedback loops from law implementation back to law making are important in all reform processes. They are particularly important in low and middle-income countries, where capacity to design complex reform programmes, and legislation to effect those programmes, may be more limited. However, multiple legislative adjustments over time could also expose states to investor-state arbitration claims based on the fair and equitable treatment standard.

3.4 To sum up

Investment treaties recognise the right of states to carry out land reform. They establish standards of treatment applicable to foreign investment in a land reform context. They reinforce VGGT provisions calling for respect for the rule of law, and for payment of compensation in case of land expropriation. But investment treaties can also have important distributive consequences, because they protect the landholdings of foreign investors potentially against the legitimate land claims of people who stand to benefit from land redistribution, restitution or tenure reform. They establish compensation requirements that can go beyond the standards applicable under national law, and even international human rights law.

27. Acordo Brasil-Moçambique de Cooperação e Facilitação de Investimentos (30 March 2015) and Acordo Brasil-Angola de Cooperação e Facilitação de Investimentos (1 April 2015). For a concise analysis, see Trevino (2015).
28. E.g. *CMS Gas Transmission Company v. The Argentine Republic*, para. 274; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, para. 124.
29. *Parkerings-Compagniet AS v. Republic of Lithuania*, paras. 327-338; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, paras. 9.3.29-34; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, paras. 625-629.
30. These are the amendments publicly available at http://faolex.fao.org/faolex/.

At scale, applying these more stringent requirements without considering historical injustices that may have occurred, and without the flexibility allowed by international human rights law,[31] can make it more costly for states to redistribute or restitute land, or to reform land tenure regimes, including as part of efforts to implement the VGGT. These financial implications could make it more difficult for public authorities to act, particularly in low and middle-income countries where public finances face harder constraints. The extent to which these considerations actually discourage authorities from taking action, or are used by authorities to legitimise political choices not to take action, is an empirical question requiring further socio-legal research.

31. E.g. compensation related to market value, but not necessarily equivalent to it; nature of the public purpose potentially affecting compensation; and potentially lower compensation in case of large-scale reform.

4. “Land grabbing”

4.1 Framing the issue

Agribusiness investments, mining and petroleum projects, special economic zones, tourism developments and infrastructure projects can all increase pressures on the world’s most valuable lands. Compressions of local land rights are often a primary source of disputes in these investment processes, and public action to deal with these disputes can give rise to investor-state arbitrations based on investment treaties.

Land issues have emerged indirectly in some arbitrations – for example, in one case where a mining company challenged environmental requirements aimed at protecting lands hosting the sacred sites of a native tribe.[32] In that arbitration, the tribe made a submission to the arbitral tribunal, arguing that, while they did not legally own the land, the area formed part of their ancestral “land base”; and calling on the tribunal to uphold international norms protecting indigenous peoples’ rights to land and resources.[33]

Commercial pressures on land are growing in many locations, increasing the likelihood that investment treaties might be activated more directly in relation to land rights. Debates about “land grabbing” epitomise this trend. Recent years witnessed a new wave of large-scale land deals for plantation agriculture in low and middle-income countries, including in sub-Saharan Africa, Southeast Asia and Latin America (see Box 4.1). The pace of transnational deal making slowed after 2011. In the longer term, however, demographic growth, climate change, urbanisation and changing consumption patterns are widely expected to continue fuelling demand for agricultural commodities and compounding pressures on valuable lands.

“Land grabbing” is a contested term that does not reflect the great diversity of contexts and practices. But it is likely to resonate with many readers, partly due to sustained media reporting. It is used here as shorthand for the recent wave of large-scale land deals for plantation agriculture in low and middle-income countries. The VGGT call for respect for all “legitimate tenure rights” in investment processes, as well as for transparency, social and environmental impact assessments, benefit sharing, community consultation and – where indigenous peoples are involved – free, prior and informed consent (VGGT section 12).

32. *Glamis Gold Ltd. v. United States of America*, Award.
33. *Glamis Gold Ltd. v. United States of America*, Application for Leave to File a Non-Party Submission and Submission of the Quechan Indian Nation.

Box 4.1. The global land rush

In the mid-2000s, changing agricultural commodity prices, expectations of rising land values and public policies to promote long-term food and energy security fuelled a surge in large-scale land deals for plantation agriculture in low and middle-income countries. Figures of scale and trend are contested. But all evidence indicates that there has been an increased volume of "land grabbing" deals in the period starting from 2005, and with renewed momentum following the food price hike of 2007-2008, including in sub-Saharan Africa, Southeast Asia and Latin America. Figures also suggest that transnational deal making slowed after 2011 (on trends in deal making, see e.g. Deininger and Byerlee, 2011; Locke and Henley, 2013; Land Matrix, 2014; Borras *et al.*, 2014; Schoneveld, 2014; and Cotula and Oya, 2014).

In many cases, the deals involve long-term concessions or leases on state-owned land, particularly in Africa and in the Mekong region where governments own or otherwise control much land. However, where much land is owned by clans and families, as in Ghana, customary chiefs have been leading the deal making (Schoneveld *et al.*, 2011), and private land purchases and complex financial transactions appear to be more common in Latin America (Gómez, 2014). Even where they are not a party to the deals, governments can play an important role, through providing incentives, establishing investment promotion schemes and enacting law reforms that facilitate land access for commercial operators.

Rigorous assessments of the long-term socio-economic outcomes of this surge in agribusiness investments remain limited. However, available evidence points to disappointing outcomes, at least in the short term. The failure rate of these agribusiness ventures appears to have been high, though impossible to quantify with precision, and slow implementation has marred ongoing investments. Available data suggests that only 4.1 million hectares, out of a total of 37.3 million hectares transacted since 2000, are under cultivation (Land Matrix, 2014), indicating that overall levels of implementation remain very low.

What is clear, however, is that large-scale land deals can increase competition for land and resources. There have been numerous reports of land dispossession, for example in Cambodia (e.g. Global Witness, 2013; Equitable Cambodia and IDI, 2013), Ethiopia (e.g. Oakland Institute, 2011), Ghana (e.g. Schoneveld *et al.*, 2011), Laos (e.g. Global Witness, 2013), Liberia (e.g. Deininger and Byerlee, 2011), Mozambique (e.g. Nhantumbo and Salomão, 2010; FIAN, 2012), Uganda (e.g. Oxfam, 2011) and Tanzania (e.g. Sulle and Nelson, 2009). There has also been significant contestation at local, national and international levels, with local-to-global alliances of affected people, social movements and NGOs opposing the deals or seeking to change their terms (Polack *et al.*, 2013; Hall *et al.*, 2015).

There are no publicly known treaty-based investor-state arbitrations concerning the recent surge in agribusiness deals. However, that surge has increased the exposure of states to potential arbitration claims for land-related investment disputes. This is due to several factors:

- The very large number of deals signed in a relatively short time – some 1,000 contracts worldwide since the year 2000, according to one global database (www.landmatrix.org);
- The poor quality of at least some of the investor-state contracts underpinning the deals (see e.g. Cotula, 2011b), leaving much room for diverging interpretations and renegotiation;
- Evidence suggesting that an unquantified but potentially significant share of large-scale land deals is protected by investment treaties (see Box 4.2);
- Vocal calls to terminate or renegotiate the deals, or to improve their social, environmental and economic parameters, which could have adverse impacts on commercial operations; and
- The fact that many deals concern countries where land governance is weak, so public authorities may lack the capacity to act in ways that comply with investment treaties.

As standards are improved and bad contracts terminated, there are questions as to who should bear the costs. This chapter explores how investment treaties can come into play. The argument is not that investment treaties are the main source of the problems associated with large-scale land deals. Rather, the chapter argues that, if not properly thought through, the protections provided by investment treaties could compound shortcomings in national land governance. Unlike the discussion of land reform in the previous chapter, which relied on several arbitral awards, the lack of publicly known investor-state arbitrations linked to “land grabbing” means that the analysis is at this stage more hypothetical. However, the chapter discusses the reasoning developed by arbitral tribunals in cases not concerning large-scale land deals, which would be relevant to possible future arbitrations relating to agribusiness investments.

Box 4.2. "Land grab" deals in the shadow of investment treaties

It is difficult to measure with precision the extent to which large-scale land deals for plantation agriculture in low and middle-income countries are covered by investment treaties. Determining whether an investment project is protected by a publicly known investment treaty (such as those available on the UNCTAD database of treaties: http://investmentpolicyhub.unctad.org/IIA) requires information about corporate structures that is often not in the public domain.

This is because a company based in one country and investing in another country can benefit from the protection accorded by an investment treaty concluded between the host country and a third country, by channelling the investment through a subsidiary incorporated in the third country. The company could pursue these "corporate planning" strategies if the host country has no treaty with its home country, or if the investment treaty between host and home countries provides less robust standards of protection.

Anecdotal evidence suggests that a number of land deals are indeed protected by investment treaties. For example, of a total of 28 foreign investments in agriculture (38 deals, minus duplications and deals led by local nationals) examined in Cotula (2011), Polack *et al.* (2013) and Cotula and Blackmore (2014), 13 would at first sight seem to be covered by BITs available on the UNCTAD database, merely based on the investor's home country (and in one case, based on immediately available information about the corporate structure).

Given the widespread use of corporate planning strategies, more of these 28 deals are likely to be covered by investment treaties, depending on corporate structures for which information is not publicly available. It is worth noting that Mauritius has concluded BITs with 20 other sub-Saharan countries. Evidence suggests that some land deals have been channelled via Mauritius, most likely for tax minimisation and investment protection purposes (see Cotula, 2012).

4.2 Typology of possible cases

a) Community contestation and public action

"Land grabbing" has involved significant levels of contestation about the circumstances of land acquisition. This has been the case not only where allegations of corruption or other illegality accompanied deal making, but even for land deals that broadly complied with national law. Contestation of lawful deals may be linked to weaknesses in land governance. Depending on country contexts, national law may vest with the government ownership or control of land over which rural people may claim customary land rights. In these cases, the government has the legal authority to allocate the land to investors. Protection of customary land rights may be absent or weak, or based on legal concepts of colonial origin that

contrast with local practice. Legislation may also condition legal protection to requirements that exclude the rights claimed by rural people.

For example, productive land use requirements tend to exclude from legal protection the lands that villagers use for shifting cultivation, grazing or foraging, or that they have set aside for future generations. Depending on context, these lands may account for the bulk of a village's customary landholdings (Alden Wily, 2011). National law may also provide limited opportunities for transparency and accountability, and may require minimal local consultation before land allocations are decided (see Vermeulen and Cotula, 2010; and Polack *et al.*, 2013).

In some contexts, authoritarian governments have imposed the deals and repressed dissent, including through restrictions on freedom of assembly and association and militarisation of land concessions (see e.g. Subedi, 2012). As a result of weaknesses in national governance, even deals that formally comply with national law may lack legitimacy in the eyes of local communities, or may be subject to scrutiny under international human rights law.

In these contexts, grassroots demands that the contested land be returned to local communities could enter into tension with treaty commitments for the state to uphold the land rights acquired by the investors, or compensate their loss at market value. Arbitral jurisprudence developed over the years illustrates the multiple channels that can link grassroots action to investor-state arbitration. For example:

- Direct action by villagers (e.g. farm incursions and occupations) has led to successful claims for damages based on "full protection and security" clauses, with investors arguing that the state failed to exercise due diligence in protecting the investment (see Chapter 3).
- Government action taken at least in part to respond to community opposition to investments has resulted in claims for damages based on fair and equitable treatment or expropriation clauses.[34]
- Court proceedings initiated by grassroots groups or NGOs to contest proposed investment projects have triggered expropriation claims.[35]

34. E.g. *Abengoa S.A. y COFIDES S.A. v. Estados Unidos Mexicanos*, paras. 192-297, 610, 624, 647-648.
35. For example, the ongoing arbitration *Infinito Gold Ltd. v. Republic of Costa Rica* concerns the alleged expropriation of a mining concession resulting from court action initiated by an NGO.

b) Public action to enforce or improve economic, social or environmental parameters

Even in the absence of community contestation, a wide range of measures initiated by public authorities could give rise to investor claims for compensation payouts from the public purse. Examples can be drawn from four sources. First, arbitral jurisprudence from sectors other than agriculture provides many examples of measures that have been challenged through investor-state arbitration. These include refusals to issue or renew environmental permits,[36] and efforts to renegotiate concession contracts,[37] resist renegotiation initiated by the investor,[38] or terminate contracts to sanction the investor's unauthorised transfers of contract rights to third parties.[39] All of these measures would be relevant to agribusiness investments.

Second, public action to implement the VGGT could adversely affect investments. For example, action to extend legal recognition to "legitimate tenure rights not currently protected by law" (VGGT paragraph 4.4; see also paragraph 5.3) could increase costs for investments that involve significant land acquisition. The introduction of ceilings on permissible land transactions (VGGT paragraph 12.6), of more stringent standards of local consultation and participation (VGGT paragraph 12.9) or of more robust impact assessment studies covering social impacts (VGGT paragraph 12.10) could affect or delay the implementation of investment projects. Application of free, prior and informed consent (VGGT paragraphs 9.9 and 12.7) could stall project implementation. Depending on the circumstances of the case, investors could seek compensation from the government, arguing that public action in these directions breached fair and equitable treatment clauses and (where impacts are particularly severe) expropriation clauses.

Third, the terms of the few publicly available land contracts provide pointers on issues that might activate the protections established by investment treaties. Some contracts provide investors with specific, extensive and enforceable rights, while leaving investor obligations limited or ill-defined. Some of the rights granted to investors can have substantial implications for third parties and might prove difficult to uphold in the longer term due to environmental constraints. For example, some contracts grant investors priority water rights, including in contexts such as Mali where the water resource base fluctuates considerably, even more so in the context of climate change (see Cotula, 2011b). Should governments seek to reopen these contracts, investors might rely on an applicable investment treaty to challenge the renegotiation or seek damages.

36. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*; *Pac Rim Cayman LLC v. The Republic of El Salvador.*
37. E.g. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina.*
38. E.g. *PSEG Global Inc. and. Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey.*
39. E.g. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela.*

Finally, the slow implementation and high failure rates of the recent wave of agribusiness investments may lead to governments terminating contracts. Research has already documented cases where states have renegotiated or terminated contracts (see e.g. Keeley *et al.*, 2014). Some countries have launched commissions of inquiry into alleged illegalities in land acquisition, resulting in findings of irregularities and in official recommendations for the government to terminate leases. One example is Papua New Guinea's Commission of Inquiry into the Special Agriculture and Business Leases, which published its final report in 2013.[40] Where contract termination affects foreign investments protected by treaties, it could lead to investor claims for damages.

The above analysis suggests that, depending on the circumstances, states may have to compensate investors for action taken by grassroots groups or public authorities – or at least they may have to go through costly and difficult arbitration proceedings to defend that action against investor claims. Investment treaties could also be relied on in negotiations between investors and governments, potentially affecting outcomes – an issue deserving further study through socio-legal research. As a result of these processes, states may have to shoulder the full costs of action to tackle "land grabbing". Much will depend on the facts and on technical issues that could come up should investors bring arbitrations. The remainder of this chapter discusses these issues.

4.3 The circumstances of land acquisition

Given the significant levels of contestation about many land deals, one important question is whether an arbitral tribunal can scrutinise the circumstances under which the investor acquired the land. Relevant circumstances may include allegations that the investor acquired the land illegally, or at unduly favourable terms. Depending on arbitral approaches, consideration of these circumstances could help the state to have the dispute thrown out due to lack of jurisdiction; influence the tribunal's decision on the merits of the case; or reduce the amount of compensation due to the investor.

The literature on "land grabbing" has documented widespread allocation of land below market values. A World Bank study found land rental fees to be significantly below the "land expectation values" that the Bank calculated through valuation methods based on the land's ability to generate returns. In one Mozambican case, the annual land fee was $0.60 per hectare, compared to an estimated land expectation value of $9,800 per hectare (Deininger and Byerlee, 2011). Some contracts for land deals exempt the company from paying land fees for a few years, or even for the entire duration of the project (see Cotula, 2011b). These low land valuations may be linked to capacity constraints in government administration, or to deliberate policy choices aimed at attracting agribusiness investment.

40. Official documentation available at www.coi.gov.pg/sabl.html.

The issue of land allocations below market value can raise particularly pressing issues in the context of political transitions from authoritarian regimes: an authoritarian government may have used land allocation at favourable terms as a means to create political support for the regime, and a newly elected democratic government may seek to renegotiate those land transactions (Bonnitcha, 2011b).

Land valuation issues have come up in some recent arbitrations, albeit not concerning "land grabbing". For example, controversy over allegedly investor-friendly valuation of land ceded by the investor to the government, and by the government to the investor, in a "land swap agreement" for the development of a tourism resort in Hungary was one key issue at stake in the recent arbitration *Vigotop Limited v. Hungary*.[41] Another arbitration, reportedly settled (Zayid, 2013), concerned controversy over the purchase price of land acquired by a foreign investor in Egypt. The investor acquired the land at the time of the Mubarak regime, and Egyptian courts rescinded the transaction after the fall of that regime.[42]

One problem is that investment treaties tend not to allow tribunals "to adjust compensation in light of fairness considerations relating to the manner in which an investment was acquired" (Bonnitcha, 2014b, p. 1007). As discussed, investment treaties tend to require payment of compensation at market value. A mechanical application of these provisions may require the government to compensate the investor at market value, even though the investor may have acquired the land well below market prices (Bonnitcha, 2014b).

Besides low land valuation, other issues affecting land acquisition might include inadequate community consultation or impact assessments, or circumvention of rules restricting foreign land ownership. Arbitral jurisprudence suggests that land rights acquired through corruption would in principle be excluded from the protection of investment treaties.[43] Also, some investment treaties require compliance with applicable law in the making of an investment as a condition for legal protection, and some arbitral tribunals have considered investors' violations of applicable law even in the absence of such legality clauses (for a discussion of this jurisprudence, see Moloo and Khachaturian, 2011). So if the investors acquired the land illegally (e.g. in breach of community consultation requirements), they could be excluded from protection. Breach of legality requirements in investment treaties could also allow states to make counterclaims – that is, to respond to an investor's arbitration claim not only through a defence, but also through seeking damages for harm caused by the investor's illegal behaviour.

41. *Vigotop Limited v. Hungary*, paras. 93-105, 112-122, 154-163, 194-198, 418-421, 525-543.
42. *Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt*. Information on this arbitration is based on Hepburn and Peterson (2012b) and Bonnitcha (2014b).
43. *World Duty Free Company Ltd v. Republic of Kenya*, para. 157. This arbitration was based on a contract rather than a treaty.

However, corruption tends to be difficult to prove. And even a broad definition of corruption may not capture the full range of relations that can underlie favourable land allocations. Many legality requirements in investment treaties only concern the making of an investment, so illegal conduct occurring during the operation of the venture may not exclude the investment from treaty protection. Allegations of illegality may involve "shades of grey" that are difficult to handle, for example where systemic gaps in laws or regulations undermine the proper operation of national law; where investments formally comply with legislation but civil society raises concerns about alleged violations of the "spirit of the law" (Oxfam, 2013); or where issues are raised about the quality of measures taken by the investor to comply with national law (e.g. impact assessments, community consultation).

In addition, the fact that land acquiring companies complied with national law has not sheltered them from contestation. As discussed, national law may fail adequately to protect the land rights of affected people, or to provide effective opportunities for transparency, local consultation and accountability (as assessed against the benchmark of the VGGT, for example). In these situations, even treaties that require compliance with national law could extend protection to landholdings that communities perceive investors to have acquired through an injustice. Investment treaties could protect landholdings acquired through lawful but questionable means against the land claims of dispossessed communities.

4.4 "Land grabbing" and "legitimate expectations"

The previous section discussed the concern that investment treaties could compound problems ultimately rooted in weaknesses of national governance, particularly where treaties protect landholdings acquired through questionable means. The doctrine of "legitimate expectations" further illustrates this point. Arbitral tribunals developed this doctrine on the basis of fair and equitable treatment clauses included in investment treaties. Widely considered to be a key element of fair and equitable treatment, the "legitimate expectations" doctrine refers to a situation where the conduct of the host state creates reasonable expectations on the part of an investor, yet the state subsequently fails to honour those expectations causing the investor to suffer losses.[44]

Arbitral tribunals have taken different approaches in determining the type of state conduct that can give rise to legitimate expectations on the part of the investor. For example, some tribunals emphasised the need for specific, tailored representations made by government officials to the investor,[45] while others found that generally applicable law can in itself generate expectations, particularly to legal stability.[46] However, there is widespread support in the arbitral jurisprudence for the

44. *International Thunderbird Gaming Corporation v. The United Mexican States*, para. 147.
45. E.g. *International Thunderbird Gaming Corporation v. The United Mexican States*, paras. 147-167.
46. E.g. *Frontier Petroleum Services Ltd. v. The Czech Republic*, para. 285.

proposition that government representations can, under certain circumstances, create legitimate expectations.

Therefore, representations made by public officials as part of efforts to attract agribusiness investments or during contract negotiation or land allocation procedures could be deemed to create legitimate expectations. These representations could include assurances to the investor that the land is available and "free of any encumbrances", and promises that the necessary permits will be issued. In the line of jurisprudence that considers generally applicable legislation as a possible basis of legitimate expectations, investor reliance on national law could also be deemed to create legitimate expectations. In other words, the investor could argue that, having followed prescribed procedures and having lawfully obtained a land lease from the government, it has a legitimate expectation that the project will go ahead unimpeded.[47]

Yet government officials may have made the representations to the investor before any local consultation took place on the proposed agribusiness investment. And as discussed, investor compliance with national law may not be enough to ensure that a land deal does not trump local aspirations and face contestation. Given the extensive and sustained reporting of contestation against "land grabbing", there are arguably real questions as to whether an investor could reasonably claim to have legitimate expectations that the project will go ahead unimpeded based on government representations made without meaningful, prior community engagement; or based on compliance with national law that does not adequately recognise "legitimate tenure rights" (as called for by the VGGT).

At present, however, it is not clear how arbitral tribunals would deal with these issues, and what value they would attach to promises or assurances that government officials may have made before community engagement took place. Some developments in arbitral jurisprudence, not related to "land grabbing", suggest that arbitral tribunals might develop ways to consider circumstances that the investor was or should have been aware of. One example is the arbitration *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa EL Corporation v. Romania*, which partly concerns the restitution of a historic building to the descendants of the owners dispossessed by Romania's communist regime. In this case, the tribunal dismissed most of the investor's claims relating to the contested property, on the ground the investors were aware of the risk of restitution when they acquired the property (see Box 4.3).

47. On this point, see *Abengoa S.A. y COFIDES S.A. v. Estados Unidos Mexicanos*, para. 646.

Box 4.3. Beware of contested property: *Awdi v. Romania*

In *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa EL Corporation v. Romania*, the claimants brought an arbitration partly concerning title to a historic building in Romania. The communist regime confiscated this property in the 1950s. In the 1990s, the Romanian authorities privatised the property and the claimants purchased it. However, authorities also established a programme to return confiscated properties to their original owners or their descendants. The restitution programme partly responded to judgments issued by international human rights courts: in the unrelated case *Brumărescu v. Romania*, the European Court of Human Rights found that Romania's failure to deal with the restitution of property violated the rights to property and to a fair hearing recognised by the European Convention on Human Rights.

As part of this restitution programme, Romanian courts ordered the restitution of the contested historic building to the descendants of the original owners. Having lost the property, the claimants brought the arbitration against the Romanian government. The claimants sought compensation, arguing that authorities violated the fair and equitable treatment and expropriation clauses of an applicable BIT.

The arbitral tribunal discussed at length the complex legal framework and political sensitivities associated with Romania's restitution programme. It noted that, when the claimants purchased the property, the descendants of the original owners were already pursuing restitution claims through the national courts. So the claimants knew that title of the property was contested and were aware of the risk of restitution. This risk was reflected in the contractual documentation for the transaction, and in the relatively low price paid for the purchase of the property.

Accordingly, the arbitral tribunal found that no expropriation had occurred. However, the tribunal held that the investor had a legitimate expectation to have the purchase price returned if the restitution risk materialised, and ordered reimbursement of that price.

While the *Awdi* arbitration concerns real estate, the tribunal's reasoning could be relevant to possible future cases concerning rural land (Peterson, 2015). One reading of this award suggests that awareness of tenure contestation could affect the extent to which investors could claim to have legitimate expectations about the land rights they acquire. However, in that case public authorities had made the tenure uncertainty clear to the investor. On the other hand, many "land grab" deals involve government representations to reassure investors about their security of tenure. Also, the tribunal's analysis hinged on the investor's awareness of the prior existence of legal proceedings for the restitution of property. As such, it provides little insight on how a tribunal might deal with situations where no such proceedings existed and local landholders are in practice excluded from the law and from legal remedies.

Finally, the *Awdi* arbitral tribunal ordered the Romanian government to return to the investor the purchase price paid for the property. The tribunal devoted little space to motivate this decision – it merely stated that the investor had a "legitimate expectation" to have the purchase price returned should the risk of restitution materialise. This decision raises questions, particularly given that the tribunal found that the risk of restitution had been factored into the "relatively low price" paid for the property.[48]

4.5 To sum up

The recent wave of "land grabbing" deals is yet to result in publicly known investor-state arbitrations based on investment treaties. But the signing of hundreds of land deals worldwide in a relatively short period of time, the poor quality of at least some of these deals and vocal calls for contract termination, renegotiation and better regulation have increased the exposure of states to potential land-related claims based on investment treaties. Requirements for states to pay damages to investors could mean that the public purse may have to shoulder the full cost of action that public authorities or grassroots groups take to tackle "land grabbing", including as part of efforts to implement the VGGT.

Should investors bring arbitrations, they will not necessarily win. As discussed in Chapter 3, some tribunals have stressed that investors should expect regulation to change over time, though some have emphasised regulatory stability. But the protections enshrined in investment treaties risk compounding problems rooted in shortcomings of national governance. For example: investments made illegally may be excluded from protection but investment treaties could protect one-sided land deals that, while complying with national law, dispossess rural people; a mechanical application of investment treaties might lead arbitral tribunals to award compensation calculated on the basis of market value, even if investors acquired land considerably below market prices (Bonnitcha, 2014b); and the doctrine of legitimate expectations could expose governments to liabilities for representations that officials may have made to the investor before any community consultation took place.

Some recent international jurisprudence provides pointers on how arbitral tribunals can consider the complexities of land relations in investment disputes – for example, by excluding from protection investments made through corruption or other illegality, or by considering whether investors were aware of the tenure risks when they made the investment. But important questions remain, and much depends on how these lines of jurisprudence will evolve in the coming years.

48. Paras. 435 and 440. The economics of risk can be complex, but a simplified hypothetical example can help to illustrate this issue. If a property is worth €100 and there is a 50% risk of restitution, and if as a result the buyer pays €50 for the purchase, the risk factor is already integrated in the reduced purchase price. So if the risk then materialises, requiring the seller to return the price to the buyer would effectively make the purchase a "guaranteed bet" and could arguably encourage land acquisition in situations of tenure contestation.

5. Other land governance issues

5.1 Introduction

The previous two chapters explored how investment treaties can affect two particularly important areas of land governance – land reform and public action to address "land grabbing". Given the topics covered, both chapters focused on agriculture. But investment treaties can also have much wider ramifications for land governance, potentially affecting a broad range of measures. These ramifications are not limited to agriculture: land is an important asset for investments in sectors as diverse as tourism, manufacturing, extractive industries and real estate. For example, land rights that investors acquired for tourism development projects have formed the object of several arbitrations, e.g. against Costa Rica, Egypt and Hungary.[49]

In discussing the wider ramifications of investment treaties for land governance, this chapter focuses on two issues: the conditions under which foreign investors can acquire land rights; and issues of quality and capacity in judicial and administrative systems for land governance.

5.2 Do investment treaties facilitate land access for foreign investors?

In many societies, land is a highly emotive issue. Land acquisition by foreign nationals can cause resentment and tensions. In the European Union (EU), the lifting of restrictions on foreign land ownership was a particularly sensitive issue when Central and Eastern European countries negotiated their accession to the EU, and all these countries negotiated transition phases before lifting the restrictions (McAuslan, 2010). Sensitivities can be particularly acute where historical legacies are at play, particularly a history of colonisation or foreign domination, for example in Africa.

In countries where significant land areas are held by indigenous peoples or under customary tenure, where landholdings have important social, cultural and spiritual connotations, and where limited capital stocks constrain domestic investments in commercial ventures, foreign investment involving large-scale land acquisition could foster transitions toward more commercialised forms of landholdings. Public concerns have also been raised that the unbridled operation of market forces can push poorer people off their land, increasing land concentration. These transitions

49. E.g. *Waguih Elie George Slag and Clorinda Vecchi v. Arab Republic of Egypt*; *Vigotop Limited v. Hungary*; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*; and *Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt.*

can have profound consequences not only for rural livelihoods, but also for the very fabric of society.

In response to varying combinations of these considerations, national law in many jurisdictions differentiates between nationals and non-nationals in the acquisition of land rights. For example, some national laws:

- Bar non-nationals from acquiring land ownership;[50]
- Require government authorisations for the acquisition of land rights by non-nationals;[51]
- Provide maximum or shorter lease durations for non-nationals;[52]
- Provide maximum land area ceilings for non-nationals, in aggregate terms as a percentage of national and/or subnational rural land and/or in relation to individual landholdings;[53] or
- Restrict the allocation of land rights to non-nationals to specified forms of land use.[54]

These restrictions are not necessarily very constraining in practice. It has been noted, for example, that "[t]wenty-five-year tourist leases for foreign investors in Maldives have not stopped an enormous level of investment from Europe and Asia in tourist resorts there since the mid- to late 1970s. […] Thirty-year leases did not inhibit Korean and Taiwanese investment in building factories in Lesotho to take advantage of the U.S. African Growth and Opportunity Act […]" (McAuslan, 2010, p. 197). Depending on the type of investment, foreign investors may not want to burden themselves with the costs, risks and obligations that may be associated with land ownership (McAuslan, 2010). The issue here is whether investment treaties can require states to lift restrictions on the acquisition of land rights by foreign investors.

Most investment treaties concern themselves with how foreign investment is treated only *after* it has entered the host state's territory. States can regulate the admission of foreign investment, including in relation to the acquisition of land rights for project implementation. But investment treaties following a "pre-establishment" model create obligations to admit foreign investment under certain conditions. Subject to exceptions and reservations, these treaties tend to apply national treatment and most-favoured-nation principles not just to the treatment of foreign investment, but also to its admission. In other words, they require states not to discriminate against foreign investors and investments in the issuance of permits,

50. E.g. Article 8 of Cambodia's Land Law of 2001; Article 266(1)-(2) of Ghana's Constitution of 1992; Article 237 of Uganda' Constitution of 1995, amended in 2005, and Article 41 of Uganda's Land Act of 1998.
51. E.g. Article 84(1)-(2) of Canada's Saskatchewan Farm Security Act of 1988, as amended; and Article 58 of Namibia's Agricultural (Commercial) Land Reform Act of 1995, as amended.
52. E.g. Article 266(4) of Ghana's Constitution of 1992.
53. E.g. Articles 8-10 of Argentina's Law No. 26737 of 2011.
54. E.g. Article 20(1) of Tanzania's Land Act of 1999; Article 10(2) of Uganda's Investment Code Act of 2000.

licences, authorisations or other formalities that may be required for the making of an investment.

This pre-establishment approach effectively constitutes a form of liberalisation of investment flows. While still featuring in a minority of investment treaties worldwide, pre-establishment provisions are increasingly common, particularly in integrated trade and investment treaties. Some treaties feature pre-establishment provisions but exclude these provisions from investor-state arbitration.[55]

Based on a pre-establishment national treatment clause, covered foreign investors would in principle be entitled to acquire the same types of land rights, and under the same conditions, as are applicable to local nationals. Measures that differentiate between nationals and non-nationals in the acquisition of land rights would violate the investment treaty. However, investment treaties often qualify pre-establishment national treatment provisions. For example, several treaties exclude existing non-conforming measures. Many treaties also explicitly exclude land tenure, thereby avoiding the application of pre-establishment commitments to both existing and future measures concerning land rights.[56] But other treaties do not exclude land tenure, so pre-establishment obligations would in principle cover land rights.[57]

Where pre-establishment national treatment clauses do apply to land rights, national legislation that treats foreign investors less favourably than local nationals would be inconsistent with international law. These pre-establishment clauses can facilitate the acquisition of land rights by foreign investors, including in the context of "land grabbing", because states would have a legal obligation to revise their legislation and ensure that foreign investors are treated as favourably as local nationals.

In practice, the application of the typical investment law remedy for treaty violations (i.e. payment of compensation) to these pre-establishment situations (i.e. before an investment has even been made) raises practical difficulties – not least because it is unclear how an arbitral tribunal would determine compensation. And as discussed, some investment treaties do not allow investors to bring arbitrations for alleged breaches of pre-establishment provisions. More research is needed on the actual extent to which pre-establishment investment treaties are driving change in land relations on the ground.

It is worth emphasising that the issue discussed here is not whether a state should differentiate between nationals and non-nationals in the acquisition of land rights. States may legitimately have different policies on this sensitive point. Rather, the issue is whether a state that wishes to liberalise land access should do this through

55. E.g. ASEAN (Association of Southeast Asian Nations) Comprehensive Investment Agreement of 2009, Article 32(a).
56. E.g. Canada-Mali BIT 2014, Annex I. For Mali, reservations from liberalisation commitments include the land code and the Agricultural Orientation Law. See also Annex II of the Benin-Canada BIT 2013 and Annex II(2) of the Japan-Laos BIT 2008.
57. E.g. Cameroon's schedule of reservations to the Cameroon-Canada BIT 2014 does not appear to include reference to Cameroon's land legislation.

an investment treaty. States can and often do eliminate differences of treatment between nationals and non-nationals by reforming national law. Should there be a policy change in future, a state can more easily change its own national law than renegotiate or terminate an investment treaty – not least due to the restrictions on termination contained in many investment treaties. In other words, enshrining pre-establishment commitments in an investment treaty tends to make a country's policy more rigid.

5.3 Quality and capacity in land administration

The quality of land administration may come under the scrutiny of investor-state arbitral tribunals. In interpreting the provisions of investment treaties, arbitral tribunals have clarified the standards of conduct that should be expected of public authorities. For example, arbitral tribunals have held that the fair and equitable treatment standard requires states "to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor".[58] Investor-state arbitral tribunals would assess the conduct of national land administration authorities in light of these standards. Conduct falling short of the standards could be found to violate an applicable investment treaty, and to require the government to compensate investors.

For example, in a case affecting land zoning regulations, the arbitral tribunal found that inconsistent government conduct partly caused by a coordination failure among multiple ministries involved in investment approval constituted a violation of investment protection standards (see Box 5.1). In another case linked to mining operations, the tribunal found that a five-year delay in proceedings before the Indian Supreme Court – a body catering for over one billion people in a country still hosting widespread poverty – breached investment treaty commitments.[59]

While not concerning land rights directly,[60] these cases illustrate the standards against which arbitral tribunals are likely to assess judicial and administrative systems for national land governance. The capacity challenges faced by land governance systems in many low-income countries have been well documented, as have the major backlogs of land disputes pending before national courts (e.g. Crook, 2004; Massay, 2013). Also, effective public action to administer land requires significant technical and institutional capacity, particularly where complex foreign investment projects are at stake. Ensuring consistency of state action on investments involving approvals from, or relations with, multiple government agencies at national and local levels also requires significant capacity.

58. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, para. 154.
59. *White Industries Australia Limited v. The Republic of India*.
60. However, *MTD Equity Sdn. Bhd. v. Republic of Chile* concerns conversion of agricultural land to urban developments. In many low and middle-income countries, urban expansion is an important driver of pressures on agricultural land.

Box 5.1. Lack of coordination among government authorities can breach investment treaties

MTD Equity Sdn. Bhd. v. Republic of Chile involved a dispute between Chilean authorities and a Malaysian company that had acquired land to develop real estate in the surroundings of Santiago, the capital city. Chile's Foreign Investment Commission approved admission of the proposed investment. At that stage, the ministry responsible for housing and urban development was not consulted.

When subsequently approached by the investor, this ministry refused to rezone the land from sylvo-agro-pastoral to residential use, because doing so would have been inconsistent with applicable urban development plans. This refusal caused the project to stall.

The arbitral tribunal found that the failure of Chilean authorities to act consistently breached the standard of fair and equitable treatment under the applicable investment treaty. However, the tribunal also reduced the damages awarded to the investor due to shortcomings in the investor's due diligence process.

In many low and middle-income countries, public authorities may not be equipped to take action in ways that would not expose them to arbitration claims. And while it could be argued that investment treaties can increase pressures for states to strengthen administrative and judicial procedures,[61] where resources are scarce there is a risk that governments might prioritise upgrading institutional infrastructure for foreign investment, for example through separate fast-tracked procedures, over citizens' needs. Some recent investment treaties require tribunals to consider a country's level of development when applying fair and equitable treatment.[62] Provisions of this type remain very rare, however, and it is as yet unclear how arbitral tribunals will apply them.

Another important governance issue is that arbitral tribunals have tended to frown upon politicisation of the handling of foreign investments – for example, in cases where governments appeared to take social or environmental measures for political ends.[63] Arbitral tribunals have particularly taken issue with "inflammatory" statements, political rallies and action taken against the backdrop of electoral campaigns. However, some tribunals have recognised that "it is normal and common that a public policy matter becomes a political issue", and have held that politicisation does not necessarily result in arbitrary or discriminatory conduct.[64]

61. Though it has also been argued that, by delocalising disputes, investment treaties can in fact reduce pressures to upgrade national systems.
62. E.g. COMESA (Common Market for Eastern and Southern Africa) Investment Agreement of 2007, Article 14(3).
63. E.g. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina ('Vivendi II')*, paras. 7.4.18-7.4.46 and 7.5.8; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, paras. 497-500 and 519; *Abengoa S.A. y COFIDES S.A. v. Estados Unidos Mexicanos*, paras. 192-297, 610, 624, 647-648.
64. *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, paras. 10.3.22-24 and 34.

Land rights can raise highly emotive and inherently political issues, particularly in many low and middle-income countries where land provides an important basis for livelihoods, social and cultural value, political power and the collective sense of justice. In these contexts, disputes involving agrarian reform or large concessions on contested lands are likely to involve a degree of politicisation. Mobilisation of political figures, in government or opposition, is a common strategy pursued by grassroots groups affected by "land grabbing" (see e.g. Polack *et al.*, 2013). In this context, the political nature of land could increase the exposure of states to investor-state arbitration and to adverse arbitration outcomes.

5.4 To sum up

Beyond land reform and "land grabbing", investment treaties can affect several important land governance issues. For example, pre-establishment investment treaties could require states to revise legislation that differentiates between nationals and non-nationals in the acquisition of land rights. The influx of commercial land-based investments could foster commercialisation of land relations in contexts where land may have important social, cultural and spiritual value. In addition, investment treaties could expose governments to liabilities for shortcomings in land governance that are rooted in the limited capacity of judicial or administrative authorities. This could include delays in the settlement of disputes and coordination failures among multiple government agencies.

6. Conclusion and ways forward

6.1 Land rights and investment treaties: a far-reaching interface

In a globalised world, land governance is shaped by international as well as national regulation. As pressures on land intensify and land relations become more transnationalised, increasing recourse to investment treaties and arbitration in land-related disputes is redesigning spaces for land claims at local and national levels.

Investment treaties can have far-reaching implications for land reform, for public action to address "land grabbing" and for the wider land governance frameworks. While in some areas those implications are still hypothetical, investor-state arbitral tribunals have already reviewed the legality of state conduct in relation to land redistribution, the restitution of property, land valuation, farm occupations, the termination of land transactions and land zoning regulations.

Effective safeguards against arbitrary state conduct are an important part of promoting the rule of law. But distributive issues are also at stake, because investment treaties can protect the landholdings of foreign investors against the legitimate land claims of indigenous peoples, small-scale rural producers, the landless and more generally poor and marginalised groups.

By increasing the cost of land redistribution, restitution or tenure reform, or of public action to address "land grabbing", investment treaties could enter into tension with progressive land policies – including action to implement the VGGT. "Pre-establishment" investment treaties could require states to remove restrictions on the acquisition of land rights that differentiate between local nationals and foreign investors. Depending on context, this could foster commercialisation of land relations in places where land may have important social, cultural and spiritual value. Investment treaties could also expose governments to liabilities for conduct caused by limited capacity in administrative or judicial authorities.

Some recent international jurisprudence provides pointers on how arbitral tribunals can consider some of the complexities of land relations in investment disputes – for example, by excluding from protection investments made through corruption or other illegality, or considering whether investors were aware of the tenure risks when they made the investment. But important questions remain, and much depends on how these lines of jurisprudence will evolve in the coming years.

Empirical evidence on the actual extent to which investment treaties are affecting land rights on the ground remains limited, not least because information is not in the public domain and methodological challenges are at play. There is a need for socio-legal research on the operation of investment treaties, including in situations that do not result in publicly known arbitrations and as such remain below the public radar.

However, the analysis of legal frameworks and the growing body of investor-state arbitrations do highlight the multiple channels that can connect international investment treaties to local land rights. They show that states may have to bear the full cost of socially desirable land governance action, compensating foreign investors for actual and projected losses.

They also highlight the stark contrast between the legal protections accorded to foreign investment, and the legal insecurity to which many rural people are exposed worldwide. As pressures on the world's natural resources bring competing land claims into contest, imbalances in the law regulating foreign investment raise probing questions about whose rights are being protected and how.

From a policy perspective, there is a case for international arrangements that protect landholders from arbitrary state conduct. But there are real questions as to why foreign investors should enjoy more stringent protection standards than those applicable to all under international human rights law; and why potentially identical lands should attract different compensation amounts purely based on the nationality of the landholder.

The stated objective of investment treaties is to promote investment flows between the states parties, through reassuring investors that they will reap the benefits of their investments. But evidence on whether the protections enshrined in investment treaties do promote foreign investment is mixed, partly due to methodological difficulties. For example, there is no conclusive evidence that compensation standards precluding consideration of the public purpose at stake or the circumstances of the investor's land acquisition play a key part in promoting investment.

It is often argued that foreign investors deserve special protection because they do not enjoy political representation in the host state.[65] However, this formalistic view of political influence does not reflect the multiple real-world channels that both foreign and domestic companies can use to affect policy – even though neither foreign nor domestic companies can vote.

This argument also implies a localised, insulated view of politics, and does not consider the effects of globalisation on politics and public action. Further, many citizens in low and middle-income countries are not able to exercise their right to vote due to lack of identity cards and other practical constraints, particularly in rural

65. See the European Court of Human Rights case *James v. United Kingdom*, para. 63, and the investor–state arbitration *Joseph Charles Lemire v. Ukraine*, para. 57.

areas. It should not be assumed that their interests are better represented than those of foreign investors.

Finally, while large foreign investments are often associated with higher economic stakes that may be thought to require more sophisticated legal protection, the loss suffered by people affected by those investments may be much greater in relative terms – because the loss of a small plot of land may entail the destruction of entire livelihoods, and may make people vulnerable to destitution and loss of social identity.

For many rural people, enjoyment of land rights is essential in realising fundamental human rights – including the right to property, which international human rights bodies have consistently interpreted as protecting the collective and customary land rights of indigenous peoples and local communities; the right to food, particularly where people depend on land for their food security; the right to housing; and the rights of indigenous peoples to their ancestral territories. These multiple considerations show that the land rights of rural people are at least as deserving of legal protection as is foreign investment.

Ultimately, the interface between land rights and investment treaties reflects an encounter and tension between different people – from the landless poor to commercial farmers and global capitalists; different systems of property claims – from local customary systems to international treaties; and different ways to conceptualise land – as a commercial asset, or a source of social, cultural and spiritual value. In the words of the late jurist Patrick McAuslan (2010, p. 203):

> *"There is a clash here of laws and cultures. At the formal national and international level, it is the culture of globalization that impels the development of laws and policies based on the free and equal opportunity to invest in land so as to facilitate land being used to its highest and best purpose without regard to such irrelevant matters as the nationality of the user. This sees land as an economic and only as an economic asset. At the informal, local, popular, customary, or traditional level (which exists as much in Europe and the USA as in the developing world), it is the culture that sees land as a social and political as much as an economic asset that resists land being parceled out to whoever can pay for it to exploit it as is seen fit. A government that ignores the social aspect of land – however retrogressive it may seem to devotees of the market – does so at its peril. At best, there will be clashes on the ground between investor and locals; at worst, ignoring local beliefs and attitudes to land can lead and has led to widespread local violence and civil wars."*

6.2 Recommendations for governments

Debates on economic globalisation are often framed in terms of "deregulation" and "retreat of the state". But states play a central role in shaping the legal regime for cross-border investment flows. Concluding investment treaties is a key part of this, and states are the primary actor in investment treaty making. States are also the primary actor in land governance, including through law making and implementation. Given the far-reaching implications that investment treaties can have in multiple land governance areas, governments should:

- **Carefully think through their policy choices about whether to conclude, terminate or renegotiate investment treaties, and in what form**. Some evidence suggests that governments did not always fully appreciate the implications of the treaties they were signing up to (Poulsen and Aisbett, 2013). Yet investment treaties can have far-reaching ramifications in many policy areas, requiring careful consideration. To enable informed choices, governments should carry out systematic reviews of their existing stock of investment treaties and of the actual or potential ramifications of these treaties, including for land governance.
- **Promote transparency in investment law and arbitration**, to enable more inclusive policy choices and facilitate better monitoring of the ways in which investment treaties affect land rights. This involves opening up policy making on investment treaties to public scrutiny and input, through creating spaces for parliaments, social movements, civil society and citizens to influence policy choices (see Section 6.3 below). It also involves ratifying the Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration, which was adopted by the UN General Assembly in 2014. The Convention is a mechanism for states to express their consent to apply the UNCITRAL Transparency Rules to disputes brought under investment treaties concluded before 1 April 2014. The Rules automatically apply to UNCITRAL arbitrations under treaties concluded after 1 April 2014.
- Given existing investment treaty stocks, **consider the implications of investment treaties when designing and implementing land governance action**. For example, ill-conceived land allocations to foreign investors could expose governments to liabilities stemming not only from the contracts but also from any applicable investment treaties. Investment treaties can also have a bearing when governments terminate, renegotiate or regulate land deals. These considerations should not discourage socially desirable public action, and foreign investors sometimes "overstate the reach of [investment] treaties in an effort to dissuade certain policy decisions" (Peterson and Garland, 2010, p. 16). But proper consideration of these issues may help governments to prevent or mitigate liabilities through well-thought out conduct.

- **Expedite and upscale efforts to improve national land governance**, through implementing the VGGT. Where investment treaties risk compounding problems rooted in shortcomings of national governance, an important part of the solution lies in national-level action. Depending on context, this may involve recognising and protecting land rights not currently protected by law and improving avenues for transparency, public participation and accountability.
- If new investment treaties are negotiated, **consider treaty formulations that help to address the issues raised by the interface between land rights and investment treaties**. With regard to compensation standards, for example, countries that have included considerations other than market value in constitutional right-to-property provisions may wish to negotiate similar considerations into investment treaties too. Governments should also align compensation standards to those applicable under international human rights law, which allow for greater flexibility than many investment treaties. Where investment treaties do depart from constitutional or human rights standards, governments should carefully think through the rationale for this differentiated approach.
- **Consider treaty clauses that commit the states parties to implement the VGGT**. This commitment could concern both the state in the territory of which the land is located, and the state from which the investor originates. The latter aspect would create a duty for home states to require their investors – or at least those receiving public support – to adhere to the VGGT when operating overseas (see VGGT paragraphs 3.2 and 12.15).
- **Consider investment treaty provisions that spell out investor obligations** to comply with applicable law and possibly with specified international standards of investor conduct in land matters. Depending on treaty formulations and the nature of violations, breaches of applicable law and standards could exclude the investment from treaty protection, or be a factor that arbitral tribunals must consider in deciding the merits of the case.
- More generally, **closely align any investment treaties they sign to pursuit of sustainable development**. A growing body of literature provides guidance on how this might be done, including through options to safeguard regulatory space (e.g. Mann *et al.*, 2005; UNCTAD, 2012). Reconsidering the formulation of new treaties is only effective if the most-favoured-nation clause does not allow investors to claim more favourable treatment provided by pre-existing investment treaties.
- **Ensure that they have the capacity to comply with any investment treaties they conclude**. National land governance might provide a test case for governments to assess their levels of capacity. Where capacity challenges exist, governments may want to ensure that investment treaty commitments are formulated in ways that recognise the differentiated capacities of the states parties.

6.3 Recommendations for parliaments, civil society and social movements

Land is eminently political, and often emotive. Choices on whether to conclude investment treaties, and in what form, are also political – different groups can have different positions on desirable economic policies and acceptable balances between competing policy goals. Legitimacy of political choices ultimately rests on inclusive and informed debate. So addressing the interface between land rights and investment treaties is not a government job alone:

- **Parliaments should claim an important role in investment treaty making**, using any constitutional powers they may have in relation to investment treaties (e.g. possible roles at treaty ratification stage) and more generally holding debates, asking questions, raising issues, tabling motions, expressing policy orientations and prompting the government to consider the issues raised by social movements and civil society.
- **Social movements including organisations of rural people and small-scale rural producers can play an important role in representing and strengthening the voices of their constituents** in national and international policy processes. They can act as a convenor and catalyst for collective action, leveraging strength in numbers and unity in communication. They can help raise public awareness of the interrelatedness of multiple policy areas, including land rights and investment treaties. They can also help create spaces for democratic deliberation about desirable development pathways and ensuing policy choices on land governance and investment treaties.
- **Civil society organisations should remain vigilant and step up advocacy on investment treaties and their implications for land rights**. Awareness on these issues remains limited, particularly in low and middle-income countries. Civil society organisations can play an important role in promoting public awareness and debate in these countries. They should develop practices and methodologies to advocate and hold governments to account. They should consolidate and expand arrangements for international alliance building and lesson sharing on ways to influence public policy on land governance and investment treaties. There is also growing experience with civil society submissions to raise public and grassroots concerns in investor-state arbitration proceedings.
- **Donor agencies should support the efforts of governments, parliaments, social movements and civil society**, through both technical and financial support, recognising that addressing the interface between land rights and investment treaties is an integral part of strengthening land governance and implementing the VGGT. This may involve mainstreaming of investment treaty issues into country programming and supporting platforms for international lesson sharing and documentation of best practice.

6.4 Reflections for a new research agenda

Legal research is often confined into neatly defined disciplinary spaces – international investment law, international human rights law and comparative land law, for example. But real-life situations often involve diverse bodies of national and international law. The interface between land rights and investment treaties illustrates the interrelatedness between seemingly distant policy areas.

That interface also illustrates the important limitations of the existing evidence base: there is much doctrinal analysis about investment treaty provisions; yet the practical implications of those provisions, including for land governance, remain poorly understood. As discussed, for example, legal analysis shows that stringent compensation requirements can make it more costly for states to implement land reform; but there is still little empirical research on the extent to which these requirements do in fact constrain land reform efforts.

Locating the discussion of investment treaties in specific issues or sectors can enable a more fine-grained analysis of how investment treaties affect other areas of law and practice, and how the ensuing challenges might be addressed. This may involve more legal analysis, but also in-depth case studies on the political economy of the operation of investment treaties.

Qualitative socio-legal research involving interviews with public officials, investors, civil society, grassroots groups and other stakeholders could shed new light on the ways in which investment treaties operate in real-life situations. This would include situations where reliance on investment treaties affects investor-state negotiations but does not result in publicly known arbitrations, and as such remains below the public radar.

Land governance can provide a fertile arena for this type of research. This report has charted some of the areas that follow-on socio-legal research could explore – namely, land reform, "land grabbing" and land governance systems. The findings can strengthen the evidence base and facilitate more informed policy debates and choices on often emotive and politically sensitive issues.

6.5 Final remarks

The interface between land rights and investment treaties highlights the need to place discussions about investment treaties in a wider context. Investment treaties protect foreign investors and their investments, in the context of a bilateral relationship between an investor and a government (reflected e.g. in the structure of investor-state contracting and arbitration). But land-based investments can involve or affect other actors too, including aspiring land reform beneficiaries and people who may lose their land to business ventures. Multiple national and international legal instruments apply, and an exclusive focus on investment treaties risks producing biased outcomes, even in reform efforts.

This situation calls for a more holistic approach to explore the operation of investment treaties, which considers their interplay with other national and international instruments and their implications for a wider range of actors. For example, it is often said that investors would be reluctant to invest in countries where legal systems are dysfunctional and judiciaries are biased and ineffective. Yet the people whose lives are turned upside down by ill-conceived investments often have little choice beyond their national legal system and courts.

Similarly, the doctrine of legitimate expectations protects investors and their investments against adverse state conduct. Yet arguably citizens also have a legitimate expectation that their government will manage public lands in the public interest, and they should have effective recourse when they feel their expectations have been frustrated.

These considerations require giving proper thought to the overall legal frameworks that govern land and investment, of which investment treaties are but one important part. Protecting the land claims of some, without also taking action to protect different and potentially competing land claims, can entrench imbalances in both legal rights and power relations. In the longer term, solutions should lie less in legal arrangements that insulate foreign investment from shortcomings in national legal systems, and more in establishing fair and effective land governance that can cater for the needs of all.

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Land rights and investment treaties: exploring the interface

The spread and deepening of economic globalisation has highlighted the ever closer connections between the international legal arrangements governing the global economy on the one hand, and claims to land and natural resources on the other. In a globalised world, land governance is shaped by international as well as national regulation. As pressures on valuable lands intensify and land relations become more transnationalised, increasing recourse to international investment treaties is redesigning spaces for land claims at local and national levels.

This report sheds light on how investment treaties can affect land rights. It finds that investment treaties can have far-reaching implications for land reform, for public action to address "land grabbing" and more generally for land governance frameworks. The report also charts directions for socio-legal research to explore how investment treaties are affecting land rights on the ground.

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