

OpenLandContracts.org

A NEW GLOBAL REPOSITORY

Large-scale land, agriculture, and forestry contracts

SELF-STUDY TRAINING MODULE THREE

Understanding Land Contracts and Land Investments



Columbia Center
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY



UKaid

from the Department for
International Development

Module Objectives and Outline

- 🔥 Objectives of Self-Study Module Three:
 - 🔥 Understand the need for OpenLandContracts.org by exploring the characteristics and implications of land-based investment
 - 🔥 Improve or refresh understanding of relevant legal frameworks and land contracts
- 🔥 Part One: Implications of Land-Based Investment
- 🔥 Part Two: Legal Framework
- 🔥 Part Three: The Significance of Land Contracts
- 🔥 Part Four: Lack of Transparency
- 🔥 Key Takeaways



Part One

1. Implications of Land-Based Investment



1. Implications

- Land-based investment has **profound and diverse implications** for the lives of affected communities and individuals, and for host states and their citizens



1. Implications

- 🔥 In excess of **75% of people suffering from extreme poverty** and **80% of the world's hungry** live in rural areas, where dependency on land is highest
- 🔥 The food and agriculture sector forms the primary means of subsistence for **2.5 billion people** in developing countries
- 🔥 **1.5 billion** of those people are dependent on small-scale agriculture – rendering access to land particularly important
- 🔥 Small-scale agriculture provides approximately **80% of the food supply** in Asia and sub-Saharan Africa

Sources: UN Doc. A/HRC/19/75 (2012); FAO, Smallholders and Family Farmers (2012) <bit.ly/1gsC43t>



1. Implications

- 🔥 Land-dependent individuals and communities often have strong **social and cultural connections** to their land
- 🔥 Land can influence the **relationship** between individuals, communities, and the **state**
- 🔥 **Conflict** of various degrees and forms has often been sparked or exacerbated by land grievances, including those related to investment



1. Implications

- 🔥 Land-based investment is also strongly related to the **sustainable development priorities** of host states



1. Implications

- 🔥 Improved governance of land and land-based resources underpins several of the UN Sustainable Development Goals (**SDGs**)
- 🔥 **See for example:** SDG1 (target 1.4); SDG2 (target 2.3); SDG 5 (target 5.a); SDG12, SDG13, SDG15
- 🔥 In March 2016, a specific **land rights indicator** was endorsed by the UN Statistical Commission as part of the broader SDG Indicator Framework



1. Implications

- Given its profound and diverse implications, the potential for land-based investment to make **both positive and negative contributions** to host states and affected individuals/communities is significant



1. Implications

- 🔥 Potential benefits of land-based investment include:
 1. Local employment creation and provision of employment benefits
 2. Integration of (and thus benefits to) local farmers through outgrower schemes
 3. Creation or expansion of markets for local contractors, and of opportunities along the supply chain
 4. Establishment of social and economic community development programs
 5. Increased income levels and improved food security

Source: World Bank, Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks (2015) <<http://bit.ly/1MTOb3N>>



1. Implications

- 🔥 However, these benefits are **not automatic**
- 🔥 If not properly structured and well-governed, land-based investment can result in negative consequences for host states and affected communities



1. Implications

🔥 Potential risks of land-based investment include:

1. Displacement, loss of land, and resulting loss of livelihood for people who depend on the land
2. Increased poverty levels among rural land-dependent communities, particularly where benefits of employment creation are not realized
3. Creation of mistrust and instability where the free, prior, and informed consent (FPIC) of affected communities is not obtained
4. Failure or abandonment of projects where risks regarding commercial viability or tenure security are not assessed or adequately addressed
5. Disruption of the social and cultural structure of land-dependent communities with strong connections to their lands
6. Detrimental consequences for the environment, including risks to water sources



1. Implications

The screenshot shows the top navigation bar of The Guardian website. It includes links for 'sign in', 'become a supporter', 'subscribe', and a search icon. The 'the guardian' logo is prominently displayed. Below the logo is a horizontal menu with categories: 'US', 'politics', 'world', 'opinion', 'sports', 'soccer', 'tech', 'arts', 'lifestyle', 'fashion', 'business', 'travel', and 'environment'. A 'browse all sections' button is located on the right side of this menu. A secondary navigation bar below shows 'home > world > africa' and a list of regional sub-sections: 'australia', 'cities', 'development', 'UK', 'europe', 'americas', 'asia', and 'middle east'.

Ethiopia
Guardian Africa network

Ethiopians talk of violent intimidation as their land is earmarked for foreign investors

New report gives damning indictment of the government's mandatory resettlement policy carried out in a political climate of torture, oppression and silencing

David Smith

Tuesday 14 April 2015 07:14 EDT

The screenshot shows the top navigation bar of the Reuters website. It features the 'EDITION: UNITED STATES' dropdown menu and the Reuters logo. The navigation menu includes: 'Business', 'Markets', 'World', 'Politics', 'Tech', 'Commentary', 'Breakingviews', and 'Money'.



WORLD NEWS | Tue Oct 7, 2014 | 1:28pm EDT

Cambodian land grabs are 'crime against humanity', lawyers tell ICC



By Chris Arsenault

WORLD NEWS | Wed Mar 16, 2016 | 3:55pm EDT

'Losing our land like losing our lives', Brazil activist tells World Bank



By Chris Arsenault



1. Implications

- 🔥 **Even where these risks are mitigated**, poorly structured and monitored land-based investments can fail to result in benefits reaching affected communities – or even host states more generally



Part Two

2. Legal Framework



2. Legal Framework: Introduction

- 🔥 Land-based investment is governed by a **complex, multi-layered** legal framework
- 🔥 The legal framework plays a **critical role in determining the impact** of land-based investment, i.e. whether land-based investment contributes positively or negatively to the host state and affected individuals and communities
- 🔥 The legal framework **allocates** rights and obligations, and **assigns** risks and benefits
- 🔥 If well-developed, balanced, monitored, and enforced, the legal framework can help to **promote** the benefits (and mitigate the risks) of land-based investment



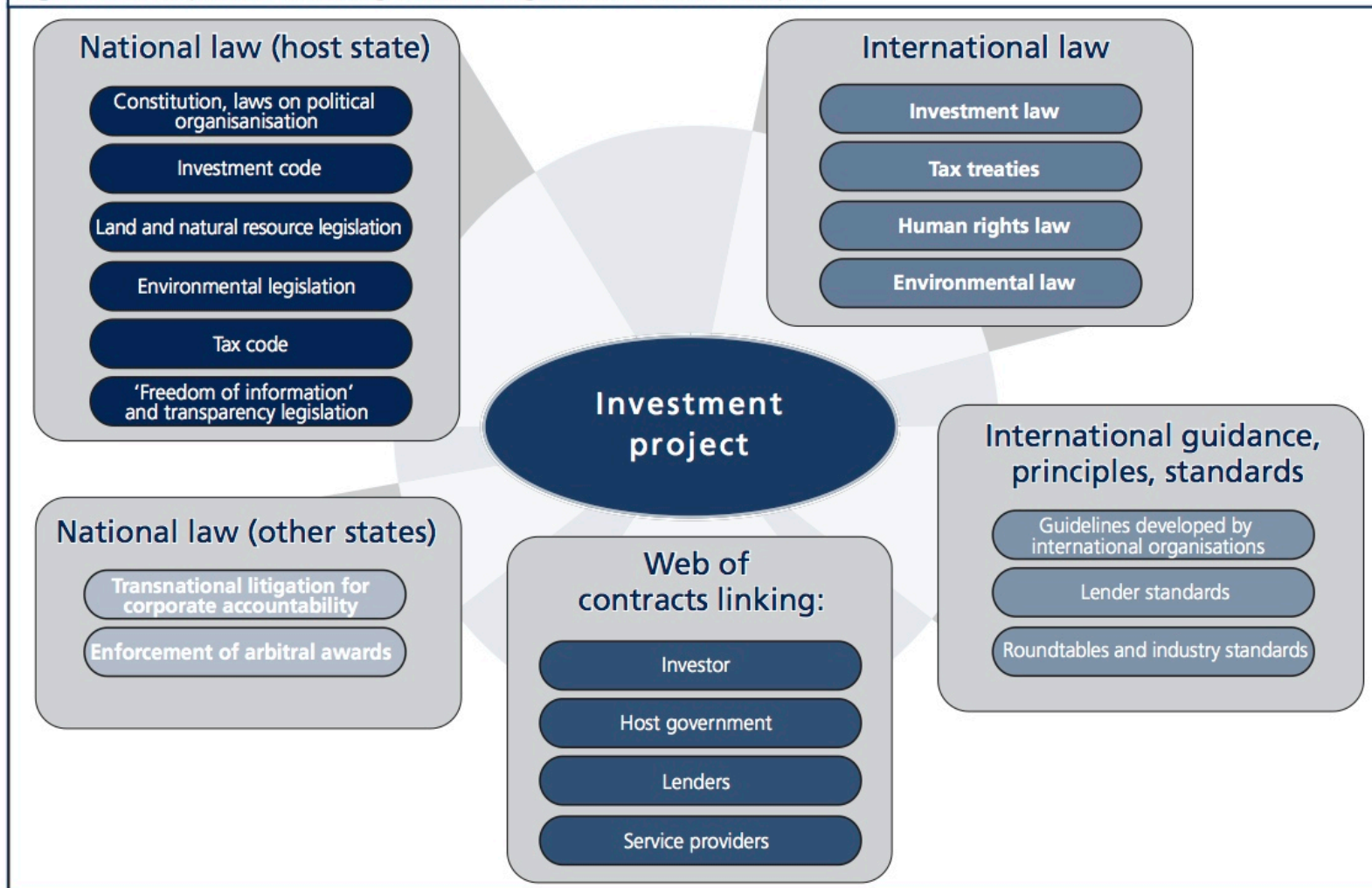
2. Legal Framework: Introduction

- 🔥 Domestic (or national) law, international law, and land contracts are **three of the key sources** of law within the legal framework that governs land-based investment
- 🔥 **Other principles, standards, and guidance** (both binding and non-binding) may also be relevant
 - 🔥 The following slide highlights the multiplicity of relevant rules and regulations that often apply to the governance of land-based investment
 - 🔥 For the purposes of OpenLandContracts.org, users should be aware that land contracts must be read **in the context** of these multiple sources of rules and regulations



2. Legal Framework: Introduction

Figure 1. Multiple sources of regulation and guidance - some examples



Source: Lorenzo Cotula, *Foreign Investment, Law and Sustainable Development* (IIED 2014), p. 11
<<http://pubs.iied.org/pdfs/17513IIED.pdf>>



2. Legal Framework: Domestic Law

- 🔥 The domestic (or national) law of the host state should be the **primary source** of law governing land-based investment
- 🔥 This includes the host state's constitution, legislation, regulations, and other relevant laws and policies
- 🔥 Customary law is also often applicable in the context of land-based investment
- 🔥 Domestic law as a whole can regulate a range of important matters, including:
 - 🔥 Use, ownership of, and control over land; taxation; access to and use of water; investor-community relations; development of and/or access to infrastructure; and liability for damage to the environment



2. Legal Framework: International Law

- 🔥 **Several bodies of international law** are relevant to the governance of land-based investment, including: human rights law, environmental law, and investment law
- 🔥 The role played **by international investment law** in governing foreign investment, including land-based investment, has attracted increased attention in recent years
- 🔥 Investment law has evolved rapidly since the 1990s, and today consists of a complex web of **over 3,000 investment treaties** (also referred to as “international investment agreements,” or “IIAs”)



2. Legal Framework: International Law

- Investment treaties are agreements concluded between states that require the parties to provide foreign investors and investments **certain standards of treatment and protections**
- These are typically **asymmetrical**, i.e. they provide protections to investors, and place corresponding obligations on states
- Free trade agreements** can also include investment chapters, which often provide for the same standards and protections as investment treaties
- Where applicable, investment treaties can give investors direct access to **international investment arbitration**
 - This mechanism can enable investors to challenge host state measures and conduct, and can result in significant financial implications for states

Source: Lise Johnson, "The Impact of Investment Treaties on Governance of Private Investment in Infrastructure" (Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2014/32, 2014) <<http://ccsi.columbia.edu/2014/04/29/the-impact-of-investment-treaties-on-governance-of-private-investment-in-infrastructure-robert-schuman-centre-for-advanced-studies-research-paper-no-rscas-201432/>>



Part Three

3. The Significance of Land Contracts



3. Significance of Land Contracts

- 🔥 In many countries, contracts form a **third crucial source** of law that governs land-based investment
- 🔥 OpenLandContracts.org features **investor-state contracts** for large-scale land, agriculture and forestry projects
- 🔥 The relationship between domestic law, international law, and land contracts is complex and **varies** according to the circumstances of each host state



3. Significance of Land Contracts

- 🔥 The **stronger** and more detailed a host state's domestic law, the more likely that it will govern a majority of the key fiscal, operational, social, and environmental issues affecting land-based investment
 - 🔥 In this scenario, the land contract and international law might play less critical roles in governing land-based investment
- 🔥 The **weaker** a host state's domestic law, or the greater the gaps in the law, the more likely that the land contract and international law will heavily influence, or indeed determine, these key issues



3. Significance of Land Contracts

- 🔥 In many of the host states **targeted** for land-based investment, domestic law is **weak** or still developing
- 🔥 Being able to access, read, understand, and critically evaluate land contracts is thus crucial for **assessing, monitoring, and improving the governance** of land-based investment



Part Four

4. Lack of Transparency



4. Lack of Transparency

- 🔥 Despite their significance, land contracts are **rarely publicly available**
- 🔥 In fact, this lack of transparency tends to **permeate the entire contracting process** around land-based investment
 - 🔥 Contracts are often negotiated behind closed doors without the involvement of all relevant stakeholders
 - 🔥 Once concluded, contracts are rarely accessible to affected communities, civil society, and the general public

Source: CCSI and OCP, Transparency in Land-Based Investment: Key Questions and Next Steps (2016) <<http://bit.ly/1QZYpSK>>



4. Lack of Transparency

- 🔥 Greater transparency **benefits** a range of stakeholders, and provides a solid foundation for:
 1. Increased accountability for, and good governance of, land-based investment
 2. Negotiation of improved land deals
 3. Greater protection and fulfillment of rights
 4. Reduced risk of instability and conflict around investment projects
 5. Accurate assessment of the implications of land-based investment

Source: CCSI and OCP, Transparency in Land-Based Investment: Key Questions and Next Steps (2016) <<http://bit.ly/1QZYpSK>>



4. Lack of Transparency

- 🔥 OpenLandContracts.org thus seeks to **promote greater transparency and facilitate disclosure** of land contracts
- 🔥 The tools, resources, and plain-language summaries of key contractual provisions also **increase the accessibility** of land contracts hosted on the repository, by helping users to read and understand the contracts
- 🔥 OpenLandContracts.org Self-Study Training Module Four goes into more detail on the benefits and limits of land contract transparency



Key Takeaways

- 🔥 Land-based investment has profound **implications** for the lives of those affected, and for the development of the host state
- 🔥 The **legal framework** governing land-based investment plays a key role in determining the nature of those implications, i.e. whether they are positive or negative
- 🔥 **Land contracts** form part of the legal framework that governs land-based investment, and in many cases play a central role within it
- 🔥 Despite their significance, land contracts are **rarely made publicly available**; even where they are disclosed, the meaning and practical implications of their terms can be **difficult to understand**
- 🔥 OpenLandContracts.org seeks to respond to these characteristics



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Questions?

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