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Land investments and human rights: how home countries can do more

by

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The past decade has witnessed heightened corporate interest in large-scale land-based agricultural and forestry investment by foreign investors. This commonly involves the transfer of use rights for large tracts of land from governments to investors. These investments can have positive effects for local communities, such as providing employment. They also, however, can have devastating impacts on human rights, including through forced displacement and loss of livelihoods necessary to secure rights to food and housing.

Host countries, through their actions or inactions, play a primary role in rights violations. Government actors may forcibly evict land users to make way for concessions, provide abusive security forces to protect concessions, divert important water supplies, or otherwise enable investors to undertake projects that negatively affect human rights. At other times, host countries are simply unable to protect human rights in the face of such investments, having insufficient resources to monitor and enforce laws or investment agreements.

International law is currently an imperfect tool for addressing such rights abuses. Two separate areas of law address concerns. Investors seek redress under international investment law, while individuals harmed by investments rely on mechanisms provided under international human rights law. Under these systems, the protections afforded to affected local persons are greatly inferior to the protections granted to investors.¹ Moreover, the relatively stronger enforcement mechanisms of international investment law may persuade a host government to prioritize its obligations under investment law over its obligations under human rights law. Developments in international human rights and investment law may eventually address these imbalances, e.g., new avenues for redress of rights violations, or improved investment treaties that better address rights impacts. Yet, a more equitable system remains a long way off.

The current failure of host governments and international law to protect human rights in the context of land investments highlights the need to employ other mechanisms, such as home country measures.² Setting aside questions of whether home countries have legal obligations to address human rights impacts abroad,³ home countries have good reasons to encourage more rights-supportive outward investment – such as upholding commitments under the Sustainable Development Goals – and have shown willingness to enact laws with extraterritorial reach.⁴

To start, home countries can ensure that domestic policies, such as those promoting biofuels, do not inadvertently promote land deals with negative rights impacts. Governments have several options for addressing problematic policies: rescinding if the risks are too high, modifying to alleviate risks or introducing safeguards. In particular, safeguards might include requiring outward investors to undertake human rights impact assessments and denying related benefits when negative impacts are revealed.

Home countries that support outward investors engaging in land deals can condition their financial or diplomatic support on compliance with human rights-related standards or processes. For example, under Canada’s outward investor corporate social responsibility policy,⁵ extractive companies choosing not to participate in disputes referred to Canada’s National Contact Point for the OECD Guidelines face withdrawal of government advocacy support and potential implications for financial support.

Finally, home countries can establish disclosure requirements for outward investment. Such requirements encourage investors to mitigate reputational risks by advancing more responsible operations and can be coupled with due diligence obligations. Examples from the extractive industry are the United States Dodd-Frank Act⁶ and the European Union Accounting Directive,⁷ which impose disclosure, assessment and reporting obligations. To encourage more responsible land investments, similar requirements could be created for companies investing in foreign agricultural and forestry projects.

These measures provide avenues through which home countries can seek to influence outward investment in this area. Particularly when combined with redress mechanisms, such as entertaining tort claims against domiciled entities for abuses committed overseas, home countries can encourage more rights-consistent investments that benefit all stakeholders: home countries’ outward investors, host countries receiving the investment and the local communities affected by such investment.

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¹ See, Lorenzo Cotula, “Law at two speeds: legal frameworks regulating foreign investment in the global South”, *Columbia FDI Perspectives*, No. 73, June 29, 2012.

² Although some soft law instruments discuss the role of home countries (see, e.g., Committee on World Food Security, *Principles for Responsible Investment in Agriculture and Food Systems*, CFS 2014/41/4 Rev. 1, paras 32-33), the importance of home country measures is not uniformly endorsed. For example, the recent New Alliance “Analytical Framework for Responsible Land-Based Agricultural Investments” notes the importance of host country action but fails to mention home countries (available at <http://new-alliance.org/resource/analytical-framework-responsible-land-based-agricultural-investments>).

³ Many legal scholars assert that governments have human rights obligations beyond their own borders. See, e.g., The Maastricht Centre of Human Rights and the International Commission of Jurists, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (September 28, 2011), available at <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm>.

⁴ See Columbia Center on Sustainable Investment, *Home Country Measures (HCM) Taxonomy* (November 7, 2014) available at <http://ccsi.columbia.edu/files/2014/01/CCSI-Taxonomy--Nov-10.pdf>

⁵ Canadian Ministry of International Trade, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad*, (November 14, 2014), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.

⁶ US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, sections 1504, 1502.

⁷ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013.

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