

## Policy pointers

**Changes in law and society** are reshaping land relations and international law plays an increasingly important role.

**Public policy can** protect rights and create spaces for inclusive choices.

**This requires concerted action** at local to global levels: securing land rights at the grassroots is unlikely to achieve results without addressing the international dimensions.

**Important political dimensions** call for greater citizen participation in decision making; research can help inform public participation and policy choices.

## Land rights, international law and a shrinking planet

As the media spotlight on 'land grabbing' wanes, there are new opportunities to interrogate the deeper-level transformations in control over natural resources at local to global levels. The effects of some land deals are now visible on the ground. Lands previously used for common grazing or foraging have been converted to monoculture, although only a fraction of the land acquired has been cultivated. Other, less tangible but equally important, changes are also taking place. These are shifting the balance between competing natural resource claims — for example, between local land rights and commercial land concessions — and between private interests and public authority. Developments in international law are shaping these shifts while also creating new spaces for contestation and accountability.

### A profound reconfiguration of property

As economic globalisation intensifies and expands its reach, the mirror image of this increased economic interdependence is a shrinking planet. Changing global consumption is placing the world's natural resources under unprecedented pressure. Petroleum and minerals are extracted in previously marginal sites; and agribusiness developments have extended to lands that previously hosted natural habitats or non-intensive forms of resource use.

The concept of property — broadly defined as a set of relations among people with regard to valuable resources — is at the heart of the way societies manage competing claims to land and natural resources. Developments in law and society are having far-reaching implications for natural resource relations that link governments, businesses and rural people.

In many places, socio-cultural change has eroded long-established local accountability mechanisms, and traditional authorities are claiming greater rights over resources. Historical legacies and recent reforms profoundly affect the national laws governing land relations. There are cases of traditional authorities and national laws facilitating the allocation of land to local and national elites and outside commercial operators. Meanwhile, international trade and investment treaties can foster the commercialisation of property relations and protect foreign investors' property rights.

### Growing reliance on international law

In a globalised world, property is increasingly shaped by international regulations. The spread and deepening of economic globalisation has highlighted the ever-closer connections

## *Investment treaties can protect foreign investors against legitimate land claims of indigenous peoples*

between international legal arrangements governing the global economy on the one hand, and claims to land and natural resources on the other. As pressures on valuable lands grow and land relations become more transnational, struggles over land increasingly rely on international law.

Indigenous peoples have taken cases of intrusions on their ancestral lands to international human rights

bodies. Peasant movements are campaigning to get international recognition for peasant land rights, their resolve strengthened by concerns about 'land grabbing'. And UN Special Rapporteurs have clarified the property implications of fundamental human rights — for example, showing that access to land and natural resources can be instrumental in realising the right to food.

Soft law instruments are making inroads into areas where international lawmakers would previously not venture. The Voluntary Guidelines on the Responsible Governance of Tenure, endorsed in 2012 by the UN Committee on World Food Security, provide international guidance on land tenure — an issue that has traditionally fallen within the exclusive preserve of domestic jurisdiction.

The rise of investor–state arbitration, based on international investment treaties between two or more states to promote cross-border investment flows, has produced the most far-reaching developments in the international protection of property.

Investment treaties set standards of treatment that are primarily aimed at protecting foreign investment and any associated natural resource rights, allowing investors to seek compensation for state conduct that breaches those standards.

Over the past few years, investors have used these treaties to bring a growing number of international arbitrations against states. Some investors have sought significant compensation when challenging the legality of state conduct linked to land governance, including redistribution, restitution of property, handling of farm occupations, valuation, zoning regulations and termination of land transactions.

Investors have also used investment treaties to challenge land reform before the national courts, and governments have invoked them to resist indigenous peoples' land restitution claims targeting land owned by foreign investors. These many legal developments are redesigning spaces for land claims at local and national level.

International human rights law recognises the important sociocultural dimensions of land and ties property relations to self-determination and the realisation of socioeconomic rights. International investment law, on the other hand, conceptualises land primarily as a commercial asset, expressing its value in monetary terms. These two bodies of law also offer different standards of protection, legal remedies and interpretive approaches: broadly speaking, investment law provides more stringent protections than human rights law.

In many places, there is growing pressure on land from mining and petroleum projects, agribusiness investments, special economic zones, tourism developments and infrastructure projects. This can bring into contest different property concepts and claims — for example, where a government allocates commercial concessions in areas claimed by indigenous peoples or rural communities, or where land restitution or redistribution claims target property held by foreign investors. The recent wave of large-scale land deals for plantation agriculture, many under the protection of investment treaties, could result in more investors bringing claims for land-related disputes.

### **Box 1. Sawhoyamaxa indigenous community v Paraguay**

In 1991 the Sawhoyamaxa community began legal proceedings to claim restitution of their ancestral lands, taking the case to national courts first and then to the Inter-American Court of Human Rights. The Paraguayan government resisted these claims, partly on grounds that they “collide[d]” with a property title held by a foreign investor protected under an investment treaty.

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

In 2014 after 23 years of legal wrangling, Paraguay passed a law providing for the expropriation of the land and its restitution to the Sawhoyamaxa community. Paraguay's Supreme Court of Justice rejected a constitutionality challenge against this law in late 2014. It remains to be seen whether the implementation of the law will give rise to investor-state arbitration claims based on the investment treaty, and with what consequences.

## Land rights and investment treaties

In establishing standards of treatment to protect foreign investment against adverse state conduct, investment treaties reinforce international policy guidance that sets parameters for quality in land governance and reform processes.

But important issues of distribution are also at stake. Investment treaties can protect foreign investors' landholdings against legitimate land claims of indigenous peoples, small-scale rural producers, and landless and other poor and marginalised groups.

While typically investment treaties recognise that states have the right to expropriate land to implement land reform, they can, at the same time, establish compensation requirements that go beyond the standards set under national and international human rights law. At scale, application of these more stringent requirements, without consideration of historical injustices and without the flexibility of international human rights law, can make it more costly and so difficult for states to redistribute or reconstitute 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. 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.

The doctrine of legitimate expectations — developed through the arbitral interpretation of investment treaties — could also expose governments to liability for promises that public officials made to investors before consulting communities. As states and non-state actors take measures to tackle 'land grabbing', the public purse may have to shoulder the full costs that these measures create 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.

### Box 2. Trade preferences and land concessions in Cambodia

Cambodia has granted large-scale land concessions since the 1990s, when national law provided little guidance. The 2001 Land Law and 2005 Sub-Decree 146 established the legal framework for land concessions. As a least-developed country, Cambodia has access to EU markets under the latter's 'Everything But Arms' (EBA) initiative — a system of trade preferences set up in 2001 whereby products are imported into the EU free of duties and quotas, with the exception of armaments.

The Cambodian legal reforms have underpinned substantial increases in the volume of land concessions. Official figures indicate that, between 1996 and 2012, the government awarded land concessions for more than 1.2 million hectares of land, though activists suggest that the real figure may be significantly higher.<sup>1</sup> This includes sugar plantations exporting to the EU and set up by investors from countries not eligible for the EBA. Land concessions have been accompanied by concerns about negative impact and human rights abuses.<sup>2</sup>

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.

### Tackling the trade dimension

Trade law — including international treaties and unilateral measures — affects important aspects of this global reshaping of property. One reason is that trade liberalisation can foster changes in land relations. As economies become more integrated and agriculture more commercialised, local land relations often become more commercialised too — because new market opportunities tend to increase land values. Much evidence shows that agricultural commercialisation can make local land relations more monetised and individualised.

The connection between trade and property can be more direct, too. Many recent economic treaties bundle together trade preferences, investment protection and recognition of intellectual property rights. Trade preferences and improved access to export markets can also be important drivers of large-scale land deals, by increasing incentives for agribusiness investments that target those markets.

Large land deals have also been associated with trade restrictions. When some big food exporters introduced a ban on exports in the wake of the food price hike of 2007–08, some food-

importing countries acquired land overseas to have greater control over their food supplies. Some land acquirers targeting domestic markets have also sought tariff protection from imports.

## The changing nature of property

Local-to-global transformations are driving a big reconfiguration of property. These drivers include long-term socioeconomic change — for example, in customary tenure systems. But policy choices, including national law reform and international treaty making, also play a central role. In a globalised world, international law provides an increasingly important arena for renegotiating property.

Increased investment and market access can improve livelihood opportunities in contexts where there is demand for change. But as pressures on resources increase, poorer people risk being squeezed out. There is much that policy can do, such as establishing systems to protect rights, creating space for inclusive decisions and reorienting the direction of travel.

Addressing these issues requires concerted action at multiple levels. At the grassroots level, there is a need to secure local land rights and strengthen collective capacity to exercise them. But such interventions are unlikely to achieve significant results unless the global dimensions are also addressed. There is a need to address imbalances in legal protection under international human rights and investment law and to set effective safeguards to ensure that trade preferences do not foster abuses.

International and transnational arrangements provide new spaces for public action. Civil society and social movements can use, and increasingly have been using, these spaces. We have already

mentioned the growing recourse to international human rights law, but transnational routes also provide options. For example, after NGOs took alleged human rights violations in Cambodia to the EU authorities and called for the suspension of trade benefits to Cambodian sugar imports, the European Commission announced the development of mechanisms to audit claims in relation to sugarcane plantations in Cambodia.

Policy choices about property are ultimately political, because they can involve trade-offs among multiple policy goals, affect competing claims to resources and define the standards of review to which public action may be subjected. This political dimension calls for more effective approaches to enable people to participate in policy choices.

Trade and investment treaties are often negotiated with little public and parliamentary oversight. But spaces for citizen engagement are evolving rapidly, as people become more aware of the stakes and avenues for influence. Sharing lessons from innovation can help adapt and more widely replicate promising approaches.

Research can play an important role, too. The combination of sensitive political choices and complex technical issues calls for an informed and inclusive debate. As developments in law and society reconfigure control over natural resources, there is much scope for new collaborations that harness research and advocacy to enable citizens to have greater say on whose rights should be protected and how.

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## Knowledge Products

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This research was funded by UK aid from the UK Government, however the views expressed do not necessarily reflect the views of the UK Government.



## Notes

<sup>1</sup> See [www.opendevelopmentcambodia.net/briefing/economic-land-concessions-elcs/](http://www.opendevelopmentcambodia.net/briefing/economic-land-concessions-elcs/) / <sup>2</sup> See [www.cleansugarcampaign.net](http://www.cleansugarcampaign.net)

This briefing note summarises findings from: Cotula, L. 2015. Property in a shrinking planet: fault lines in international human rights and investment law. *International Journal of Law in Context* 11(2): 113–134. See <http://tinyurl.com/nkwd9p4> / Cotula, L. 2015. Land rights and investment treaties: exploring the interface. IIED. See [www.iied.org/legal-tools/](http://www.iied.org/legal-tools/) / Cotula, L. 2015. Democratising international investment law: recent trends and lessons from experience. IIED. See [www.iied.org/legal-tools/](http://www.iied.org/legal-tools/) / Cotula, L. 2014. Addressing the human rights impacts of 'land grabbing'. European Parliament, Subcommittee on Human Rights. See <http://tinyurl.com/oaw8rzf> / Cotula, L. 2013. Tackling the trade law dimensions of land grabbing. IIED blog, 14 November 2013. See [www.iied.org/blogs/](http://www.iied.org/blogs/) / Cotula, L. 2013. The new enclosures? Polanyi, international investment law and the global land rush. *Third World Quarterly* 34(9): 1605–1629, [www.tandfonline.com/doi/pdf/10.1080/01436597.2013.843847](http://www.tandfonline.com/doi/pdf/10.1080/01436597.2013.843847) / Cotula, L. 2011. Land deals in Africa: what is in the contracts? IIED. See [www.iied.org/legal-tools/](http://www.iied.org/legal-tools/) / Cotula, L. 2007. Legal empowerment for local resource control: securing local resource rights within foreign investment projects in Africa. IIED. See [www.iied.org/legal-tools/](http://www.iied.org/legal-tools/) / Cotula, L (ed). 2007. Changes in 'customary' land tenure systems in Africa. IIED/FAO. <http://pubs.iied.org/> / Cotula, L and Oya, C et al. 2014. Testing claims about large land deals in Africa: findings from a multi-country study. *Journal of Development Studies* 50(7): 903–925. See <http://tinyurl.com/nmp6l8l> / Cotula, L et al. 2009. Land grab or development opportunity? Agricultural investment and international land deals in Africa. IIED/FAO/IFAD. See <http://pubs.iied.org/> / Polack, E et al. 2013. Accountability in Africa's land rush: what role for legal empowerment? IIED/IDRC. See <http://pubs.iied.org/>