

Cordes, Kaitlin Y.; Bulman, Anna

Research Report

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

Columbia FDI Perspectives, No. 169

Provided in Cooperation with:

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

Suggested Citation: Cordes, Kaitlin Y.; Bulman, Anna (2016) : Land investments and human rights: how home countries can do more, Columbia FDI Perspectives, No. 169, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/254003>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 169 March 14, 2016

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Maree Newson (mareenewson@gmail.com)

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

by
Kaitlin Y. Cordes and Anna Bulman*

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.

* Kaitlin Y. Cordes (kaitlin.cordes@law.columbia.edu) is the head of the Land and Agriculture team at the Columbia Center on Sustainable Investment (CCSI); Anna Bulman (amb2407@columbia.edu) is an Australian lawyer and former legal intern at CCSI, now working as a David W. Leebron Human Rights Fellow at the Legal Resources Centre in South Africa. This *Perspective* is based on Kaitlin Y. Cordes and Anna Bulman, "Corporate agricultural investment and the right to food: addressing disparate protections and promoting rights-consistent outcomes," *UCLA Journal of International Law & Foreign Affairs* (forthcoming). The authors are grateful to Gabriel Bottini, Lorenzo Cotula and Amnon Lehavi for their helpful feedback. **The views expressed by the authors of this Perspective do not necessarily reflect the opinions of Columbia University or its partners and supporters.** *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.

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.

*The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Kaitlin Y. Cordes and Anna Bulman, ‘Land investments and human rights: how home countries can do more’ *Columbia FDI Perspectives*, No. 169, March 14, 2016. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.*

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Maree Newson, mareenewson@gmail.com.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

Most recent *Columbia FDI Perspectives*

- No. 168, Karl Sauvant and Daniel Allman, “Can India emulate China in attracting and benefitting from FDI?” February 29, 2016.
- No. 167, Nahom Ghebrihiwet, “Mining automation: threat or opportunity for FDI technology spillovers?” February 15, 2016.
- No. 166, Eric Neumayer and Peter Nunnenkamp, “Democracies conclude more and stricter international investment agreements – but why?” February 1, 2016.
- No. 165, Henry Loewendahl, “A new foreign direct investment accounting methodology for economic development organizations,” January 18, 2016.
- No. 164, Anne van Aaken, “International investment law and decentralized targeted sanctions: an uneasy relationship,” January 4, 2016.

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.