

Land rights and investment treaties: exploring the interface

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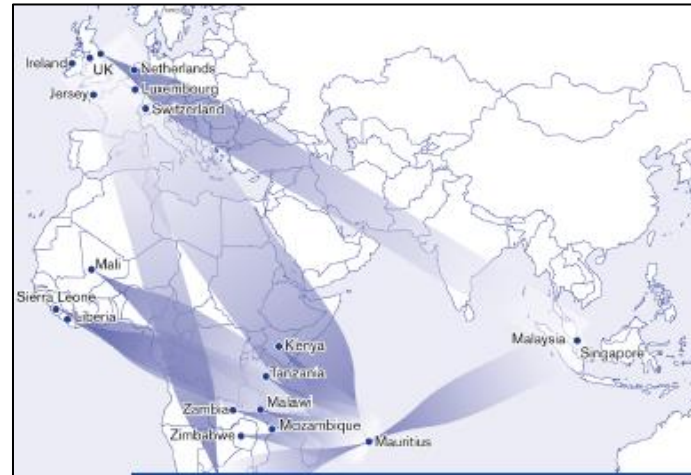
International Institute for Environment and Development (IIED)



Land rights and investment treaties

Exploring the interface

Lorenzo Cotula



Land deals and investment treaties

Visualising the interface

Lorenzo Cotula and Thierry Berger

Land rights and governance

In many low and middle-income countries, land basis for livelihoods, food security, social identify, spiritual value, collective sense of justice

Growing pressure on valuable lands, wide range of drivers. Recent wave of large-scale land deals for agribusiness investments

Depending on context – insecure land rights, “legal pluralism”, inequitable land distribution, land & conflict, gender...

International consensus on responsible land governance: VGGT and, regionally, AU Framework & Guidelines

Guidance on land redistribution, restitution and tenure reform, tightening standards in investment processes – possible costs for business

International investment treaties

No comprehensive multilateral WTO-style treaty. Rather, over 3000 bilateral or regional treaties, diverse formulations but recurring features

To promote foreign investment, treaties protect foreign investment from adverse state conduct. Eg conditions for legality of expropriation, transfers

Openly worded standards, significant room for discretion in interpretation – eg “fair and equitable treatment”

Diverse approaches on admission: pre and post-establishment

Broad definitions of “investment” would typically cover landholdings and agribusiness, growing number of land-related cases

Investor-state arbitration

Treaties commonly enable investors to bring disputes against states to international arbitration

Some 700 *known* treaty-based arbitrations challenging state action in wide-ranging policy areas

Arbitral tribunal often composed by three private individuals, largely appointed (directly/indirectly) by the parties

If claim successful, tribunal awards compensation, can be substantial amounts

Widely ratified multilateral treaties assist enforcement, eg enabling investors to seize overseas assets

Investment treaties and land policy

Arbitrations stemming from redistribution but also land privatisation, occupations, (tenure reform), zoning, real estate conversion, land-related environmental measures

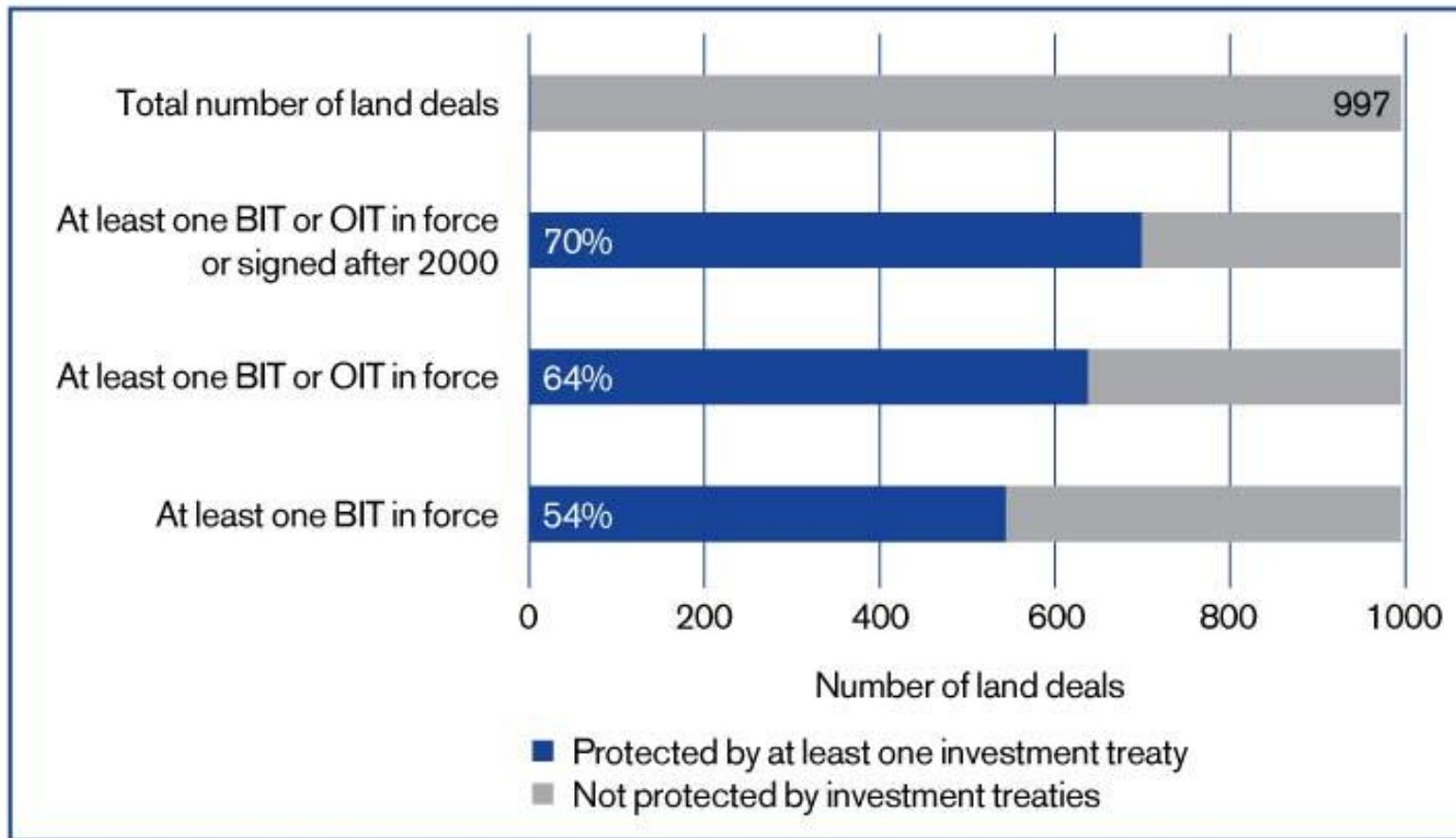
Concerns recently raised about land restitution in post-conflict (Colombia) or democratic transition (Myanmar)

Treaties set parameters of quality for state conduct – but can also have distributive effects

Often, ‘prompt, adequate and effective’ compensation based on market value vs more flexible approaches in some national constitutions and international human rights law. Some investment treaty standards may have no direct equivalents in national or human rights law

More costly for governments to act, ‘regulatory chill’ debate

Figure 1. Number of land deals for agribusiness investments covered by investment treaties



Source: Cotula and Berger, 2015, based on Land Matrix and UNCTAD IIA Navigator data. Covers land deals 2000-2015

Investment treaties and recent wave of agribusiness deals

No *known* arbitrations as yet – but one publicly reported threat of arbitration

Many land deals in relatively short time, significant treaty coverage, (at least some) poorly designed contracts, many failed investments, calls for tightening standards, capacity challenges and political nature of land – would all tend to increase exposure to arbitration risk

Grassroots advocacy or direct action, court litigation, government action to terminate, renegotiate, regulate

Compounding shortcomings of national governance?

What if investments comply with national law but not in line with VGGT, dispossess rural people?

“Fair and equitable treatment” interpreted as protecting investors’ “legitimate expectations” based on representations from government – what if made before consulting communities?

Typically require compensation at market value – what if investor acquired land below market value?

Moving forward

Land governance – local to *international* levels, make the links and bridge communities of practice

States key actors in land governance and investment treaty making – consider policy choices on whether to conclude investment treaties and how to formulate them; expedite efforts to improve land governance *for all*; ensure they have the capacity to comply with any treaties they sign

But also important roles for parliament, social movements, NGOs. Research agenda to improve (case study) evidence base

Donor support to local, national and int'l action and coordination, 'policy coherence for development' agenda

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Thank you!

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