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Trading Away Land Rights: TPP, investment agreements, and the governance of land

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In 2009, the government of Mozambique put a moratorium on large-scale land acquisitions, a belated response to a wave of protests triggered by so-called "land grabs" by foreign investors. The moratorium, which lasted two years and restricted only land deals larger than 25,000 acres (10,000 hectares), calmed tensions while the government sought to resolve the inconsistencies between the great land giveaway and the country's progressive land law, which recognizes farmers' land rights even when they do not hold formal titles.

Some of those investors were from the United States, and it is a wonder that they didn't sue the Mozambican government for limiting their expected profits. They could have under the Bilateral Investment Treaty (BIT) between the United States and Mozambique.

As U.S. trade negotiators herd their Pacific Rim counterparts toward the final text of a long-promised Trans-Pacific Partnership Agreement (TPP), the investment chapter remains a point of contention. Like the 1994 North American Free Trade Agreement (NAFTA) and most U.S. trade agreements since, the TPP text includes controversial provisions that limit the power of national governments to regulate incoming foreign investment and give investors rights to sue host governments for regulatory measures, even those taken in the public interest, that limit their expected returns. A host of BITs with a far wider range of countries, including Mozambique, contain similar provisions.

The impact of such agreements on land grabs and land governance has received scant attention until recently. As new research from the [International Institute for Environment and Development \(IIED\)](#) and Tufts University's [Global Development and Environment Institute \(GDAE\)](#) shows, the kinds of investment provisions in the TPP and in most BITs can severely limit a government's ability to manage its land and other natural resources in the public interest. They can also interfere with the implementation of newly adopted [international guidelines on land tenure](#).

As GDAE's research shows, there are alternatives to such restrictive investment rules. Mozambique, for example, could withdraw from its BIT with the United States and instead draw on the less constraining investment provisions offered by the Southern African Development Community (SADC).

The Threats to Land Governance

GDAE's new background paper, ["Trade Agreements and the Land,"](#) by Rachel Thrasher, Dario Bevilaqua, and Jeronim Capaldo, examines the implications of proposed agreements, such as the TPP, for regulating land grabs. Lorenzo Cotula of IIED, in his report, ["Land Rights and Investment Treaties:](#)

[Exploring the Interface,](#)” looks beyond land grabbing to consider other important aspects of land governance, including land redistribution. Both identify key provisions common to U.S. investment treaties that constrain land governance.

Perhaps most well known is the Investor-State Dispute Settlement (ISDS) process whereby private investors can sue states in a private arbitral tribunal – a glaring exception to the traditional sovereign immunity granted to states. Land grabs have not yet been the subject of dispute under these treaties, but other land conflicts show how they might in the future.

Beyond the onerous ISDS provisions, investment treaties universally require compensation in the case of expropriation. Traditionally, that compensation must be “prompt, adequate and effective.” Countries have faced claims for expropriation in a wide variety of land-related cases – mostly in response to state efforts to correct past injustices or reform land tenure. Zimbabwe, in the wake of its fast-track land-redistribution program, Albania’s privatization in the transition from socialism, and South Africa’s mining legislation to benefit disadvantaged groups after apartheid all faced investor disputes claiming expropriation.

The standard for compensation in these treaties is often based on the market value of the investment and does not take into account a fair balance between interests. Indeed, in the draft TPP several negotiating countries have explicit footnotes and annexes specifying that the compensation must be at market value (Art. 11.7, Annex II-C). As Cotula points out, investors can demand such compensation even if they got the land at low prices and even if government action simply interferes with or delays their profit-making activities.

Treaties also often require that foreign investors be treated with “full protection and security.” In some cases, where domestic individuals or groups have taken action against foreign investors, the countries have been on the hook for not acting with “due diligence” to protect them.

Many investment agreements also demand “fair and equitable treatment” for foreign investors. In investment jurisprudence this has come to include the “legitimate expectations” of the investor based on negotiations with governments. Any promise of access to land and resources, or even the speedy handing over of such land, can be disputed as a violation by investors.

Sometimes, even before an investor enters the country, these investment treaties threaten land governance by extending the “right of establishment” to investors from partner countries. This means that under the TPP and most modern BITs, host countries must treat foreign investors on par with domestic investors, giving no priority to nationals even in sensitive areas such as land, minerals, and other natural resources.

These investment provisions can have a marked “chilling effect” on governments. Cotula points out, for example, that many provisions of investment treaties would conflict with efforts by a government to implement the Voluntary Guidelines on the Governance of Land Tenure (VGGT) from the FAO, now the gold standard for appropriate recognition of land rights. The guidelines call for the restitution of land to those from whom it was taken and the redistribution of land in land reform efforts. To the extent those efforts impede the profitability or expected profitability of a foreign investment, the government may

find itself liable for unaffordable market-rate compensation in settlements that can include the recouping of expected profits by investors. Such agreements therefore make it more difficult for governments to implement this groundbreaking new international land tenure agreement.

Notably, many of Cotula's recommendations involve ways that governments can protect themselves by legislating the VGGT in national law and ensuring that investment treaties recognize such obligations.

TPP – No way forward

The TPP is expected to be finalized in the coming months. For countries like Viet Nam, which was not previously bound by any international investment treaties, this could create large unexpected obstacles to domestic land regulation. Currently, the United States is negotiating investment treaties with what amounts to 80 percent of global GDP. Between the TPP, the TTIP, and BITs with India and China, U.S. style investment treaties are poised to become the *de facto* international legal regime for the treatment of foreign investors.

AS GDAE's background paper shows, there are other investment treaty models out there. The Southern African Development Community drafted a model BIT with some of these threats to governance in mind. Its Model BIT begins by explicitly recommending that countries not extend rights to investors before establishment. Instead, countries are encouraged to admit investments in a good faith application of their laws. The model also limits ISDS provisions, recommending either that disputes should be kept between States, or at the very least, that States should be able to bring counterclaims against the investor in the same tribunal.

Expropriation is approached differently as well. Rather than a standard of non-discrimination and "prompt, adequate and effective" compensation, it acknowledges that almost all expropriations are discriminatory and suggests a "fair and adequate" standard for determining compensation. This is more in line with other approaches looking to create an "equitable balance" between interests in deciding how much compensation is owed.

Finally, the language of "full protection and security" and "fair and equitable treatment" is downgraded such that it requires only "fair administrative treatment." By doing this the SADC text emphasizes that this is a procedural, rather than a substantive standard and reserves the rights of states to make regulatory changes in response to important public policy.

As Cotula concludes, "Protecting the land claims of some, without also taking action to protect different and potentially competing land claims, can entrench imbalances in both legal rights and power relations. In the longer term, solutions should lie less in legal arrangements that insulate foreign investment from shortcomings in national legal systems, and more in establishing fair and effective land governance that can cater for the needs of all."

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