Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

UKaid from the British people

LAND DEALS AND THE LAW:

GRIEVANCES, HUMAN RIGHTS, AND INVESTOR PROTECTIONS

KAITLIN Y. CORDES, LISE JOHNSON
AND **SAM SZOKE-BURKE**

BRIEFING NOTE

MARCH 2016

KEY POINTS

› Land-based investments can create significant grievances for local individuals or communities that are adversely affected. Host governments (and investors) have good reasons to address these “land grievances,” but sometimes confront substantial obstacles to doing so.

› Legal obligations arising from international and domestic law, as well as from investor-state contracts, are relevant to governments’ efforts to address land grievances.

› Governments can undertake specific actions to resolve problems triggered by a particular investment, as well as general measures to implement more systemic change or minimize liability under international investment treaties.

Host governments seeking to address the grievances of people adversely affected by land-based investments must navigate a complicated landscape of legal obligations and pragmatic considerations. This briefing note provides an overview of practical solutions for governments confronting "land grievances,"[1] considered in the context of the constraints and obligations imposed by international investment law, international human rights law, domestic law, and investor-state contracts.

Host governments and investors alike have good reasons to address land grievances, which often stem from serious impacts on lives and livelihoods. Given their severity, land grievances may trigger protests, legal cases, international advocacy campaigns, or violent conflict. These grievances can thus increase operational costs and create reputational or legal risks. Addressing grievances as they arise can help mitigate, rather than exacerbate, their impacts.

Despite the strong reasons to address land grievances, government entities sometimes confront substantial obstacles in their pursuit of remedies. These include: a frequent lack of clarity over the best solution; disagreements among government entities or opposition from an investor; and a complex web of legal obligations.

1 This briefing note, which draws from a longer report by the Columbia Center on Sustainable Investment, uses "land grievances" to refer to concerns raised by local individuals or communities in response to the actual, perceived, or potential negative impacts of land-based investments, particularly in agriculture or forestry. The report and related documents are available at http://ccsi.columbia.edu/work/projects/land-grievances.

This material has been funded by UK aid from the UK government; however the views expressed do not necessarily reflect the UK government's official policies.

LAND GRIEVANCES

Land-based investments have given rise to scores of grievances around the world. While grievances are specific to the project and the community, certain issues are particularly likely to generate or exacerbate grievances for local individuals and communities:

- Displacement and related issues, such as: a lack of consultation or free, prior, and informed consent; a failure to provide sufficient (or any) compensation; forced evictions; and correlated negative impacts on livelihoods and wellbeing when displacement occurs;
- Negative effects of projects on the environment or cultural sites;
- Failure to realize expected or promised benefits from projects;
- Violence, ranging from physical assaults to killings, as well as repression of protests and inappropriate detention or arrests; and
- Corruption, non-compliance with legal requirements, or a lack of transparency.

LEGAL FRAMEWORKS AND OBLIGATIONS

Legal obligations relevant to land-based investments can be found in international law, domestic law, and, when applicable, in investor-state contracts. With respect to international law, two bodies of law are especially relevant: international investment law and international human rights law.

International investment law, which arises from a network of more than 3,000 investment treaties, is a particularly powerful force regulating governments' treatment of foreign investors. Most investment treaties provide foreign investors with the right to sue their "host" governments in international investment arbitration. These treaties may be relevant even when not anticipated by a host government, as corporations can sometimes maneuver to gain the protection of a treaty that would otherwise not apply, such as by (re)structuring their holdings or using a parent or intermediate company to secure coverage. If an investment arbitration tribunal finds that the government violated the treaty, it typically orders the government to pay monetary damages to the investor, which may cover both past losses and lost future profits. Some awards have been for staggering sums, and even a government that prevails in arbitration may expend significant time and resources in defending itself.

Investment treaties commonly impose a core set of obligations on governments. These include the obligations:

- To not treat foreign investors less favorably than domestic investors (the "national treatment" obligation) or less favorably than foreign investors from another country (the "most-favored nation" obligation);
- To ensure any expropriation is both lawful and accompanied by payment of just compensation;
- To provide foreign investors "fair and equitable treatment" (FET);
- To provide foreign investors "full protection and security" (FPS); and
- To adhere to any commitment entered into or owed to foreign investors (the "umbrella clause").

Each of these obligations has ramifications for governments' options for addressing land grievances. However, while understanding the risks that arise under investment treaties can help a government better assess its options, such risks should not dissuade a government from taking good faith actions designed to address land grievances or comply with its obligations under human rights law.

These human rights obligations often create countervailing pressures for governments in the context of land-based investments. Like investment treaties, human rights treaties provide mechanisms for those whose rights are violated to seek redress from governments.

Governments have three types of obligations related to human rights: to respect human rights (by refraining from violating them), to protect human rights (by preventing third parties from violating them), and to fulfill human rights (by taking steps, when applicable, to progressively realize them). The human rights most commonly affected by land-based investments include:

- The right to free, prior, and informed consent for indigenous peoples;
- The right to property;
- The right to housing and the prohibition of forced eviction;
- The rights to food, water, health, and a healthy environment;
- The right to self-determination;
- The rights to peaceful assembly and freedom of expression;
- The right to liberty and security of person (including the prohibition of arbitrary arrest or detention), and the right not to be deprived arbitrarily of one's life; and
- Rights related to labor and employment, such as the right to form trade unions and the right to just and favorable conditions of work.

In addition to international law, domestic laws and regulations are also relevant for host governments seeking to take action on land grievances. Domestic legal frameworks shape how land-based investments are undertaken and regulated, providing processes and rules to be followed. One distinction from international investment law and international human rights law is that domestic law frequently creates obligations for investors, rather than just for governments.

In countries where the government sells, leases, or otherwise grants access to land for investment projects, legal obligations may also arise from investor-state contracts. Among other obligations for both governments and investors, these contracts occasionally include a stabilization clause limiting the ability of the government to change laws or policies that would negatively affect the project, or requiring it to pay compensation to the investor in such cases. These contracts also frequently provide for arbitration under the same or similar rules that govern arbitration arising from investment treaties. Yet, while only an investor can bring a claim for breach of an investment treaty obligation, both the investor and the government can bring claims in domestic courts or under commercial arbitration for breach of a contractual obligation (depending on the contract's dispute resolution provisions).

INTERACTION BETWEEN LEGAL OBLIGATIONS

Governments' obligations under these different legal frameworks and agreements interact in various and complex ways. They may, at times, also conflict.

Investor-state contracts, for example, are generally subordinate to domestic law. However, a stabilization clause in a contract may seek to shield the investor from having to comply with or incur the costs of changes in the domestic law. This may be acceptable in some jurisdictions, but may be unenforceable in others. Yet, even where a domestic court deems a stabilization clause invalid, an investment arbitration tribunal may adopt a different view, enforcing it under the umbrella clause and/or fair and equitable treatment obligation. (And even in the absence of a stabilization clause, some investment arbitration tribunals have determined that promises of legal stability can be implied in certain circumstances.)

An investment treaty can potentially protect a contract that might otherwise be illegal or unenforceable under domestic law: for example, if the government entity that signed the contract did not have the authority to do so. Moreover, some investment arbitration tribunals have interpreted treaties in a way that effectively creates new property rights that might not exist under domestic law, by determining that the fair and equitable treatment standard protects investors' rights and their mere "legitimate expectations"—essentially turning these expectations into enforceable property rights.

Investor-state contracts and international investment law can also interact with international human rights law to create potentially conflicting obligations for host governments. For example, a contract granting a concession that would displace land users and violate their rights to food or housing would place the government's human rights obligations in conflict with its contractual obligations. Similarly, a broadly framed stabilization clause in an investor-state contract may be in tension with a government's human rights obligations to the extent that the clause limits the applicability to the underlying investment of new laws or policies necessary to respect, protect, or fulfill human rights. An applicable investment treaty can create additional tensions between the government's obligations under the investment treaty and under relevant human rights treaties. To date, international courts and tribunals have not provided much assistance in resolving potential conflicts between these treaty obligations, tending either to avoid finding that a conflict exists or to resolve a dispute based only on one set of legal obligations.

In some situations, a government's legal obligations are not easy to reconcile. Thus, governments seeking to redress land grievances should take into account the full range of their legal obligations, and how such obligations may reinforce or conflict with each other, as they consider the options at their disposal.

SPECIFIC OPTIONS FOR ADDRESSING GRIEVANCES

A government that hosts land-based investments may need to address distinct land grievances that have been triggered by a particular investment or investor. The following options are actions that a host government can take to do so; each has its own set of advantages, risks, and accompanying considerations.

REQUESTING INVESTOR ACTION

A government can ask an investor to modify its actual or planned operations to help address related grievances. When the investor is exercising rights given to it under a contract, license, or other authorization, such a request would be for voluntary action, but there are pragmatic reasons why an investor might comply. This type of request is likely permissible under international investment law, although investment arbitration tribunals have found governments liable for efforts to force or pressure investors into giving up their contractual rights. This strategy thus depends on agreement by the investor.

SHAPING OR RESHAPING CONCESSION BOUNDARIES

In limited contexts, a government may be bound by an investor-state contract that does not explicitly delineate the specific boundaries of the land the investor will use. This potentially allows the government to "shape" concession boundaries in a way that minimizes negative impacts on local communities and thus reduces grievances. Additionally, even when the concession boundaries have already been

established, a government may seek to "reshape" the boundaries to address grievances over land allocation. This may require a full renegotiation of the investor-state contract, or could be documented through a side letter or a simple amendment to the contract. Efforts to shape or reshape boundaries should be undertaken in consultation with, and with the consent of, potentially affected individuals or communities. As with the option to request investor action, international investment law may constrain a government's ability to seek renegotiation, while overuse of this strategy may also create reputational risks.

FACILITATING DISPUTE RESOLUTION PROCESSES FOR AFFECTED INDIVIDUALS OR COMMUNITIES

A government can facilitate a range of efforts to resolve disputes, including through establishing, supporting, or helping affected individuals or communities to access dispute resolution processes. These include courts and tribunals, as well as "non-judicial" mechanisms, which are not meant to replace domestic courts, but can provide additional ways to address concerns. While such processes come in many forms, four types are particularly relevant for land grievances: non-judicial public institutions; government-supported mediation and facilitation between communities and companies; project-level grievance mechanisms established by the investor, either voluntarily or in compliance with government requirements; and external grievance mechanisms, such as those provided by certification schemes or development finance institutions. Although dispute resolution processes can help minimize conflict and foster solutions, they can also compound conflicts and grievances when not designed and implemented according to best practices.

RESTITUTING PROPERTY TO DISPLACED INDIVIDUALS OR COMMUNITIES

Grievances flowing from land-based investments are often related to displacement from land; in some cases, restitution of property to those who were displaced may be the best way to address grievances and comply with human rights obligations. However, restitution of land already allocated to an investor may not always be possible (for instance, if it has been irreversibly damaged), or may not be deemed appropriate (for example, when the land was considered to have been expropriated for a public purpose). Restitution of land previously given to an investor may also raise risks related to a government's legal obligations under a contract or an applicable investment treaty. A government seeking to take land from an investor and return it to displaced individuals or communities should thus first determine whether the investor has valid rights to the land, and, if so, follow requirements set by domestic and international law regarding expropriation of property.

COMPENSATING AFFECTED INDIVIDUALS OR COMMUNITIES

Compensating individuals or communities that have been or will be negatively affected by a land-based investment is another option for addressing land grievances. While compensation is often an insufficient remedy, at times it may be the most appropriate option available. When provided, compensation—which can include the provision of land, goods, services, and/or money—should be determined in consultation with those affected, and should seek to restore project-affected individuals or communities to a position that is as favorable as, or more favorable than, their position before the harm causing the grievance occurred. Where a community remains on the land and the grievance concerns future impacts of an investment, compensation will be less appropriate, unless the community has provided its free, prior, and informed consent. A government otherwise seeking to "resettle and compensate" may violate its legal obligations under human rights law, or risk inflaming community discontent that could lead to disruption of the investment project or other negative outcomes.

RENEGOTIATING WITH THE INVESTOR

When land grievances arise from the legal terms of the investor-state contract or the scope of the investor's rights and obligations under that contract, a government might explore renegotiation of the investor-state contract. Renegotiations can be challenging, however, particularly if an investor is unwilling to give up rights previously secured or to take on new obligations. Efforts to understand the investor's strategy and culture can be helpful for assessing whether it might agree to a renegotiation request. If a government tries to exercise political pressure and takes or threatens sovereign action to force renegotiation, however, this can raise the risk of liability under a contract or investment treaty. Because of this risk, a government seeking to renegotiate should try to do so using only the weight that a normal contracting party would use.

TERMINATING AN INVESTOR-STATE CONTRACT

Another option for addressing land grievances related to an investor-state contract is to terminate the contract. Typically, the terms of the contract and domestic law will specify the grounds on which one or both parties may or must terminate the contract, as well as any related remedies. Even if a government has concluded that it has valid rights to terminate the contract, however, the investor may nevertheless seek to challenge the termination through domestic courts, commercial arbitration, or investment arbitration. In addition, a government may occasionally decide that contract termination is in its best interests even when not permitted; in such a case, it may simply plan to terminate and then compensate the investor and/or face legal actions.

REVOKING AUTHORIZATIONS NECESSARY FOR INVESTOR OPERATIONS

Similarly to terminating a contract, a government may decide to address land grievances in certain cases by revoking or terminating existing permits or other authorizations that are necessary for investor operations. While revoking authorizations can benefit a government and communities in certain situations—for example, if the revocation was due to harms caused by the investor—such an action may pose legal, economic, and political challenges. At the domestic level, it may prompt negative reactions from stakeholders affected by the action. At the international level, a foreign investor's home state may use diplomatic channels to seek reversal of the decision, or the investor may challenge it under an international investment treaty or the investor-state contract. If government officials complied with substantive and procedural legal requirements, revocations are more difficult to challenge. However, neither good faith nor compliance with domestic law will necessarily immunize permit revocations from successful challenges under investment treaties.

GENERAL OPTIONS FOR ADDRESSING GRIEVANCES

Host governments may also seek to improve their overarching approach to addressing land grievances by implementing more systemic change or by minimizing their general liability under investment treaties. Taking proactive and general steps can be advantageous at times, and a host government concerned about protecting its citizens from the negative impacts of investments may wish to explore the options below either before or after problems arise.

DEVELOPING A NATIONAL STRATEGY FOR LEGAL AND POLICY REFORM

Land grievances will often center on issues that require comprehensive solutions, such as through law or policy reform. A government may develop a national strategy for reforming laws or policies to better protect against the negative impacts of investments or other business operations. National Action Plans on business and human rights ("NAPs") are one example of a national policy strategy that can be undertaken. NAPs do not have any legal force, but are intended to guide legal and policy reform. They also can improve coordination among government departments, enhancing the government's ability to regulate investments. In addition, the process of developing a national policy strategy may potentially help a government avoid or succeed in an investment dispute, by assisting the government in establishing that any related reforms were reasonable, legitimate, and considered.

ADOPTING CHANGES IN THE LAW

Grievances regarding land-based investments may arise because of inadequate domestic laws that create, exacerbate, or fail to protect against harms. If so, changes to the legal framework, including to the constitution, to laws, or to regulations or administrative policies, may help to holistically address concerns. However, in addition to opposition from certain stakeholders and associated political hurdles, these changes may face legal challenges regarding their consistency with other legal norms and obligations. Contractual stabilization clauses and international investment treaties are two such potential sources of conflict: an investor benefiting from a stabilization clause may either be freed from, or be entitled to compensation for the costs of, having to comply with changes in the law, while an investment arbitration tribunal may find that promises of stability in the legal framework can be inferred even in the absence of such a clause.

REQUESTING AN ADVISORY OPINION FROM A HUMAN RIGHTS TRIBUNAL

A host government under the jurisdiction of either the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights could seek an advisory opinion on complying with its human rights obligations in the context of other legal obligations, such as those contained in international investment treaties. Such guidance would generally focus on overarching issues, rather than on specific investments or grievances. Advisory opinions are not binding, but their persuasive character render them important sources for clarifying international legal rights and corresponding government obligations. While an advisory opinion will not be binding on an investment arbitration tribunal, the existence of one may give pause to investors contemplating a claim.

INTERPRETING INVESTMENT TREATIES

A host government may wish to assess how its investment treaty obligations would be interpreted in any future disputes brought before an investment arbitration tribunal. Although a government cannot unilaterally change these obligations (except by pulling out of a treaty altogether), it can take steps to assist future tribunals in interpreting such obligations. Two mechanisms for doing so are through establishing "subsequent agreement" and "subsequent practice" on the meaning of its treaties. This includes using inter-state agreements and domestic practices to demonstrate its understanding of investment treaty obligations. Although subsequent agreements and subsequent practice do not generally bind tribunals, they provide governments with an opportunity to help shape the interpretations given to a treaty.

DECLINING TO CONCLUDE NEW TREATIES, AND TERMINATING OR NOT RENEWING EXISTING TREATIES

Some governments concerned about the implications of international investment treaties on their ability to address land grievances may decide to review their treaty policies, place moratoria on the negotiation of new investment treaties, or terminate existing treaties. While these strategies can help reduce the risk of claims and liability for conduct that affects the rights or expectations of foreign investors, they may not necessarily eliminate exposure to such risk. For instance, even when an investment treaty has been terminated, it may have a survival clause that keeps it and its investment arbitration provisions in force for a set period of time. And even if a government decides not to conclude new treaties, it will still remain vulnerable to claims and liability under existing treaties. This may be a significant limitation, given the ability of investors to structure their investments in order to gain the protection of investment treaties.

CONCLUSION

Dealing with grievances related to land-based investments can be complicated for host governments. The web of legal obligations that bind a government can limit its options, rendering it difficult to achieve optimal solutions in all cases. Moreover, the investor and project-affected communities will often have opposing perspectives on how to resolve grievances. In spite of these complications, host governments have at their disposal a range of options to address land grievances. Not all options are suitable for every situation, and some entail risks. The risk of doing nothing, however, will often be greater—for governments, investors, and affected individuals and communities.

Kaitlin Y. Cordes is Head of Land and Agriculture at the Columbia Center on Sustainable Investment.

Lise Johnson is Head of Investment Law and Policy at the Columbia Center on Sustainable Investment.

Sam Szoke-Burke is a Legal Researcher at the Columbia Center on Sustainable Investment.

Columbia Center on Sustainable Investment

435 West 116th Street
New York, NY
10027

Email: ccsi@law.columbia.edu
Website: www.ccsi.columbia.edu