

Licensed to grab

How international investment rules undermine agrarian justice



Over the past two decades a complex web of more than 3,200 investment agreements has developed, mostly in the form of Bilateral Investment Treaties (BITs). These have become the backbone of a corporate rights regime that protects the US\$20 trillion of Foreign Direct Investment (FDI) that now flows worldwide.¹

These treaties grant investors far-reaching rights, limiting state control over transnational capital and constraining governments' policy-making space. This trend is all the more concerning against the backdrop of the global land and water grab. In many cases of land and water grabs, FDI – in the form of large-scale land deals packaged as 'investments for rural development' – captures land and its associated resources. The general rules of the global investment regime are facilitating this process, thereby undermining a human rights-based approach to land governance.

A key provision in many of the investment agreements is a controversial mechanism that allows foreign investors to sue governments in private international arbitration tribunals outside the regular national court system. Investors' claims through 'investor-state dispute settlements' (ISDS) have skyrocketed by more than 400% in recent years.² These ISDS cases increasingly challenge public interest environmental and health policies and include cases (in the global north and south) where the corporate world is using the ISDS framework to limit governments' ability to address land and water grabbing.

This brief analyses and illustrates how international investment rules thwart the struggle for land and food sovereignty. It puts forward the case that – in sharp contrast to a grassroots-led, human rights-based land and food governance that is emerging to counter land grabs – the global investment regime:

- hinders necessary and important land redistribution and restitution;
- fosters land commodification;
- impedes the reversal of abuses of illegitimate and unjust land (and water) deals; and
- limits the scope of progressive agrarian and agricultural policies that protect small-scale farmers and public health.

Land grabs: 'investments' for whom?

The interpretation and use of global investment regime rules by corporations is particularly damaging when it comes to the current global rush for land and related natural resources. Driven by large-scale capital and its desire for profit, this land rush privileges large-scale (agro)industrial and other extractive ventures which capture access to, use of, and control over the benefits of use of land and associated natural resources. Powerful economic actors increasingly capture crucial decision-making around these resources, including the power to decide how they will be used, by who, for what purposes and who will reap the benefits. These actors' deeds are protected and facilitated by the current design of BITs, especially under their investment protection clauses.

Large-scale foreign capital in the form of FDI, packaged as 'investment for rural development', is strongly supported by the myth that export economies are the solution for national economic development. It is rooted in a development narrative promoted by influential international development agencies such as the World Bank, whereby states' agricultural investment priorities are forced to focus on prioritising commercial crops for export and the integration into global value chains. This narrative in turn is increasingly justified by another myth – the existence worldwide of a huge amount of so-called 'marginal', 'idle', and 'degraded' 'wasteland', which on aggregate is being considered a vast reserve of land available for new investments that would benefit companies, governments, and society at large.

Based on these myths, states seeking FDI increasingly compete to attract foreign large-scale capital, and have to fall in with the terms of the global investment regime and provide large-scale capital with the legal environment that best fits its economic needs. This results in recipient states being forced to open up to competition from foreign investors, and to reduce public control over transnational capital while extending the advantages they have to

provide in the ever increasing web of BITs and other investment or trade agreements (see Table 1, *What governments agree to when they sign an investment treaty*).

Land is then commodified and traded like any other economic asset, despite the complex set of political, social and ecological factors that land embodies.³ It is not uncommon to find concession agreements where the state assumes the obligation to provide a special regime of full tax exemption, unlimited access to water, or even the possibility for investors to benefit from military protection.⁴ Mozambique has been reported to offer fertile land for US\$1 per hectare, triggering Ethiopia to outbid with US\$0.5 per hectare, including water; the Central African Republic trumped both of these, saying it could give land away for free.⁵ States' rush to obtain whatever money in exchange for allowing natural resource extraction often comes at the expense of local, rural, poor communities, whose livelihoods depend on access and use of those resources. Cameroon has been reported to be leasing land for US\$1.25 per hectare per year – 73,000 hectares of prime dense forest and land for an agro-export oriented palm oil plantation – thereby jeopardising the livelihoods of 14,000 villagers.⁶

As a result, a fundamental revaluation of resources is currently underway. The meaning and use of land and the way it is used to produce food is changing, usually from small-scale, labour-intensive uses such as peasant farming, fishing and grazing for local consumption and local markets, towards capital-intensive, resource-depleting uses such as industrial monocultures and raw material extraction, integrated into a growing infrastructure of global industry and markets.⁷ This revaluation signals an attempt to wrest food, land, water, fisheries, forests and their related resources away from their traditional social and cultural roots, and to drive them into narrow economic functions rooted in market-driven and privatised approaches.⁸ Land as a resource, territory and landscape providing social and ecological benefits is reduced to being purely a means of economic production.

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TABLE 1

What governments agree to when they sign an investment treaty

The provisions	Translation: what it means in practice ⁴³
Define what kind of investment is protected, what is considered to be an investment	All-encompassing approaches of ‘investor’ and ‘investment’ determine the extent and coverage of who/what is accepted as foreign capital. Not only does the acquisition of land rights, in its various forms, qualify as an investment, but so do all related licenses, permits, authorisations, etc. including future expectations of profits.
Investors should receive ‘fair and equitable treatment’ (FET)	A catch-all provision most relied on by investors when suing states. The interpretation usually given is that the state cannot unilaterally modify its legislation in a way that creates an economic prejudice for the investment. It is created to protect investors’ ‘legitimate’ expectations from policy changes that they consider unpredictable and affecting the stability of the regulatory framework. This could have a cooling effect on policy-makers when the time comes for legislation.
States should guarantee the free mobility of capital in(out)flows by investors	This provision allows the investor to withdraw all investment-related capital at any given time; in general, governments are banned from applying restrictions to capital flows. This supremacy of transnational capital over state sovereignty is all the more hazardous in times of macroeconomic turmoil and financial crises, when governments see their ability to deal with balance-of-payments problems reduced.
States are required to provide investors with treatment of the Most Favoured Nation (MFN)	MFN requires that states provide investors with treatment no less favourable than the treatment they provide to other investors under other agreements. It opens a gateway to ‘forum’ or ‘treaty shopping’ by investors. ⁴⁴ Via subsidiary and mailbox companies they can choose between different countries when they want to sue, selecting the one with the highest level of protection for investors. Most of the 50 ISDS cases filed by so-called Dutch investors are in fact mailbox companies, sometimes suing their own state.
Investors should be protected against ‘direct and indirect expropriation’	From an investor-friendly interpretation, almost any law or regulatory measure can be considered an ‘indirect expropriation’ when it has the effect of lowering future expected profits. This makes the concept a very slippery one. Several arbitrator tribunals have interpreted legitimate environmental and other public policies in such a way.
Investors should have the right to ‘just or equitable compensation’	Usually, investors demand compensation when they are affected by ‘direct or indirect’ expropriation, as described above. The estimation of the value implies that it overrides national legislation providing less than market-value compensation. Second it introduces a system of positive discrimination for foreign investors because national ones do not have access to it.
National Treatment of Foreign Investors: parties shall provide investors from the other party no less-favourable treatment than that given to national investors	States cannot apply measures that imply special taxes, constraints, or selection by strategic sectors, qualitative or quantitative limits that target foreign investors. No incentive, exemption or special measure to promote national enterprises, small or medium, can be adopted by the state for national capital.
States must accept binding investment arbitration – in the form of ISDS	This provides investors with a system of international legal protection that guarantees extended rights while it does not establish any regulation of their obligations (see Box A).

In that process, the people occupying and using these places, often for generations, are reduced to expendables, left without any viable vision or claim to their land. Amidst persistent widespread hunger and rural poverty across the globe, this trajectory often spells devastating social and economic consequences for rural working people, because it excludes them from accessing or benefitting from the resources they traditionally depended on for their livelihoods. There are many cases of small-scale producers, fishers, pastoralists and forest dwellers seeing their control over resources – or their autonomy of production – disappear in new economic arrangements structured in favour of large-scale, capital-intensive projects.

The struggle for land and food sovereignty

People's resistance to this adverse process and the quest for alternatives is increasingly gathering momentum under the banner of food sovereignty. Food sovereignty is a vision, a political project and a praxis targeting governance structures to ensure true democratic control over local and regional food systems – including their production, consumption and distribution arrangements – by the very people who depend on these resources for their livelihoods. It entails “the rights of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agricultural systems”.⁹

The practical and cultural management of land and related resources is embedded in agro-ecological farming practices, farmer-to-farmer network building and sharing local and regional knowledge, and localised markets and food systems. Such systems safeguarding the livelihoods, dignity and lifestyle of rural working people, especially poor and marginalised groups such as small farmers, pastoralists, fishers and forest dwellers, are asserted as viable alternative practices to the industrial production model. Progressive agrarian policies such as land reforms and the protection of small-scale farmers play a critical role in realizing food sovereignty.¹⁰

This alternative paradigm was developed 20 years ago by the transnational agrarian movement La Via Campesina to address food (in)justice in the global agricultural production and trade regime. With the recent upsurge of land and water grabs that threaten to destroy

the social fabric of rural societies and escalate levels of poverty and hunger, food sovereignty has expanded its scope; it now asserts the right of states to food policy autonomy to produce food and to protect small-scale producers themselves, including their access to, use of and control over the resources upon which they depend.

The core principle underpinning food sovereignty is to treat food and land governance as a matter of *human rights*, and not as business matter. Resisting the (private) *rights-based* mainstream approach of natural resources being controlled by individual and private tenure regimes and left to market forces, the peoples' right to land and food sovereignty embraces an holistic approach to tenure regimes anchored in collective, communal and customary status.¹¹ It further acknowledges land as not a mere commercial productive asset but a 'rights-fulfilling' one, cutting across civil, social, political and economic rights. It highlights benefits such as human dignity, capacity development and empowerment, and enhanced social cohesion; and as such it enables the formulation of alternatives to governance currently biased in favour of corporate interests.

Land as a matter of human rights

This approach is now embedded to varying extents in the international human rights law portfolio, which is increasingly engaging with food and land governance issues.¹² Contrary to most of the guidelines and codes of conduct promoted by financial institutions, these instruments attempt to look beyond large-scale land investments. Building on the actually existing diversity of small scale farming and fishing practices that exist and thrive beyond the mainstream economic development paradigm, they try to identify human rights-based starting points, approaches, actions and policies that prioritise marginalised rural groups, especially small-scale food producers, by protecting and improving their access to, use of and control over land and natural resources.

Despite remaining with weak binding or sanctioning mechanisms, the strength of these instruments arises from two things: first, from their legitimacy and organic nature, as products of interaction – whether dialogue or struggle – between social movements and international law-making bodies; and second, from their readiness and appropriateness to engage with issues related to land conflict.

Current efforts to embed the international human rights framework, with a land and food sovereignty perspective, into land governance regimes and agricultural policies include:

- **The consolidation of ‘food sovereignty’ in national constitutions** of states such as Venezuela, Bolivia, Ecuador, Honduras, Senegal, Mali and Nepal.
- **Jurisprudence from regional court systems** – the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights both asserted indigenous people’s special connection and rights over land enclosures in several cases related to extractive industries.¹³
- **The progressive and politicised interpretation of the right to food**, as the result of a continuous engagement by agrarian social movements.¹⁴ Several landmark UN reports, especially from the former Special Rapporteur on the Right to Food, have actively advocated for agricultural production models that protect and enhance small producers’ access to productive resources, and have also critically identified the consequences of large-scale land deals as violating the right to food.¹⁵
- The FAO Committee on World Food Security (CFS)’s **Land Tenure Guidelines** are the first international instrument dedicated to promoting and defending the special needs and interests of marginalised and vulnerable rural working groups.¹⁶ They stress the importance of applying a human rights-based approach to the governance of land, fisheries and forests as a prerequisite for the right to food. Their enhanced legitimacy lies with the inclusive and participatory process through which social movements played a role in shaping the content of the guidelines – the result of a long and arduous process of negotiation with the FAO and other key stakeholders.
- A **Declaration on the Rights of Peasants and Other People Working in Rural Areas** has been under discussion in the UN Human Rights Council since 2013. This initiative directly builds on La Via Campesina’s 2009 *Declaration on the Rights of Peasants – Women and Men* calling for an International Convention on the Rights of Peasants.

Through its comprehensive scope and inclusion of small-scale fishers and other groups it aims to complement the UN Declaration on the Rights of Indigenous People (UNDRIP) which refers only to the right to land of indigenous people.

The impact of the investment protection regime on agriculture

The progress of ongoing efforts such as those described above for *human rights-based* policies that support food sovereignty and curtail land grabs is threatened by the design and practice of the international investment law framework as permitted by current trade and investment agreements. In the context of the dramatic surge of conflicts over access, control and use of natural resources triggered by land grabs globally, the rules of the investment regime are skewed, ensuring corporate and powerful interests over agrarian justice, public interest and democracy (see Box A, *Investment arbitration: legalising the illegitimate*). The rules give investors far-reaching investment protection, curtailing, or threatening to curtail, governments’ ability to regulate for progressive agrarian and agricultural policies.

Investment protection rests upon the Investor-State Dispute Settlement (ISDS) clause used in most international investment agreements or investment chapters within free trade agreements. This arbitration mechanism allows a foreign investor to bypass national court systems and settle a dispute with a state at secretive international arbitration panels. Investors are enabled to claim damages if they deem their profits are adversely affected by changes in a regulation or policy. Evidence shows that the mere threat of an investor-state dispute can have a cooling effect on governments’ willingness to regulate, with corporations using the threat of legal action to kill off legislation that hampers their ‘right to profit’.

This instrument is becoming increasingly controversial following a surge of cases lodged against public policies that companies see as reducing the value of their investment, i.e. their expected profits. For example, the Swedish energy giant Vattenfall is seeking €4.7 billion from Germany in compensation after the country voted to phase out nuclear power;¹⁷ Pacific Rim, a Canadian-based mining company is demanding more than US\$300 million in compensation from El Salvador after the government

refused permission for a potentially devastating gold mining project;¹⁸ French corporations Vivendi and Suez launched three cases against Argentina, all together seeking more than US\$1.1 billion, following the country's attempt to get the management of its water services back in public hands;¹⁹ and Lone Pine Resources is suing Canada for Cdn\$250 million over a fracking moratorium in the Canadian province of Québec.²⁰

Specific pitfalls and examples of where investment protection thwarts progressive land and food policies include:

- **Limiting land redistribution.** Agrarian reform programmes benefiting the landless rural working poor play a prominent role in addressing rural poverty in

many countries. Yet, in situations where foreigners own tracts of land, as a result of colonial times, to be distributed to landless citizens, ISDS enables these foreigners to claim economic compensation for what they consider expropriation – based on the 'compensation and legitimate expectations' clauses of investment agreements. Compensation has to be aligned with current full market price and often involve expectations over future profits, even though investors may have acquired rights over land way below full market price in first place. This is particularly burdening for developing countries with limited public budget. This threat is currently illustrated with ISDS lawsuits – detailed below – involving land reforms in Zimbabwe, Paraguay and Namibia.

Box A

Investment arbitration: legalising the illegitimate

Several striking features of the investor-state arbitration reveal its bias towards corporate interests as well as the right to reap profits over public interest.

Foreign investors are given extended rights but no responsibilities. The mechanism is one-sided. Only investors can sue government; the state cannot issue a complaint against the investor at the same tribunal. While investors can seek compensation, the state is not entitled to receive any, and as such always loses out. In the best-case scenario, when the state is not ordered to pay compensation to the investor, it might still have to cover the legal costs of the lawsuit. These amount on average to over US\$8 million.²¹

The independence and transparency of this system are not adequately ensured. Arbitrators overseeing these lawsuits have an intrinsic motivation to rule in favour of the only party that can file cases – the investor – and develop a business-friendly interpretation of international law. Contrary to tribunals in regular systems, with full-time judges and hearings and decisions available to public, investor-state arbitration is not open to public scrutiny and disputes are handled by arbitrators who are part of a small club of private lawyers riddled with conflicts of interest.²²

Investment arbitration explicitly ignores and is ill-disposed to address the complex nature of public law. Arbitrators usually come from a commercial and investment law background rather than a human rights one, despite the strong public dimension of these lawsuits. In a case involving Argentina's right to water, the tribunal stated "people's right to water must not be exercised by a public authority in an absolute manner that would defeat the investor's BIT rights".²³ A tribunal arbitrating one of the claims in Zimbabwe following its land reform concluded that the "consideration of rights of indigenous people under international law... was not part of the tribunal's mandate under either the ICSID [International Centre for Settlement of Investment Disputes] convention or the applicable BITs".²⁴

Unequalled privileges exceeding public law are conceded to private investors. These include: (i) private investors do not have to exhaust remedies within national courts or inter-state legal systems, whereas other claims from states or related to human rights issues do; (ii) claims can challenge the very exercise of public authority, while conventional international commercial arbitration is limited to the states' trade sphere; (iii) these arbitration courts do not have to abide by the jurisprudence of domestic courts; (iv) awards gained by investors are enforceable against assets of the losing state in national and international courts – a binding feature not available in the rest of public international law.²⁵

- **Locking-in onerous land deals.**

In situations where land formally belongs to the state but is occupied by communities under unofficial customary rights, the acquired 'rights' of the investor over that land prevail over informal tenure regimes. Investors benefit from extended protection, with the option of lodging an ISDS lawsuit calling upon the expropriation and compensation clause. In cases where domestic court systems re-assert communities' legitimate tenure, the state cannot unilaterally reverse the deal and would have to extensively compensate investors – including future expectation of profits – even if they had acquired rights of land way below the market price.

- **Disempowering local legal resistance.**

Affected communities can only file lawsuits in the national court system to challenge foreign investors in cases of abuse, while ISDS enables investors' frivolous claims to bypass the regular national judicial system. Chevron's US\$700 million-plus interests award against Ecuador for alleged violation of contract cynically came after the local court condemned the company to pay US\$19 billion in damages to the 30,000 Amazon residents in Lago Agrio for environmental destruction leading to widespread health issues. The National Court of Justice of Ecuador upheld the conviction but lowered the compensation to US\$9.5 billion.²⁶

- **Hindering the scope for food policies.**

Companies have used the 'national treatment' clause in arbitration courts – whereby states shall not provide less favourable treatment to foreign investors than that given to national investors – to contest public policies and standards affecting their profit. States can be challenged when adopting policies favouring small-scale food producers against large-scale agro-export ventures for instance. Under the vague notion of 'legitimate expectation' included in the fair and equitable treatment clause, modifications in the regulatory framework deemed to affect foreign capital are subject to ISDS lawsuits. Cases lodged against Mexico, Canada and Poland (and further explained below) illustrate how higher food policy standards triggered multi-million dollar claims from investors.

ISDS lawsuits against agrarian and food policies

Making Fast Track Land Reform in Zimbabwe burdensome.

Zimbabwe's Fast Track Land Reform programme marked a decisive break with historical patterns of unequal land ownership. Learning from past experiences that the 'willing buyer – willing seller' mechanism significantly reduces the amount of land that can be redistributed to the landless, farm workers and small-scale farmers, Zimbabwe carried out its land reform in a radical manner, breaking from colonial times. Although Zimbabwe is known more recently for political abuses and human rights violations, extensive study of its land reform programme show that its Fast Track land reform programme has in fact led to an important transition to a new model of agricultural production and agrarian structure that one might see as more progressive.²⁷ Small-scale, mixed farming now predominate and make positive contributions to local food security and rural economies.²⁸ However, BITs signed by Zimbabwe have been used to bring the state to court and to challenge the reforms.

Using the Netherlands-Zimbabwe BIT at the ICSID, 14 claimants alleged that Zimbabwe had not guaranteed the proper protection to investors.²⁹ They were not disputing the right of the state to expropriate the land, but they challenged the way in which the expropriation was conducted, with compensation below full market prices. The tribunal ruled the supremacy of the BIT compensation provision over national law, and went further, saying that compensation should always reflect market value.

If the Zimbabwe example sets a precedent in cases of land expropriations, decisions by any government to terminate an existing concession and redistribute land to its population would likely trigger a lawsuit to obtain the payment of the full market price of the investment. Such a level of compensation would transform land reforms into a burdensome operation, depriving them of their potential to be an effective means of redistribution.

Reinforcing colonial land distribution patterns in

Namibia. In 2008, the High Court of Namibia affirmed that the state's decision to expropriate four farms owned by three Germans since the time of apartheid was contrary to the rights protected in the existing BIT between Namibia and Germany.³⁰ Rather than supporting the compulsory

expropriation of land owned by absentee foreign owners since the pre-independence period, the court upheld the unequal proprietary structure created by colonisation and foreign control, and used the BIT to create a legal continuum between the colonial and post-colonial period.

Hampering Paraguay's agrarian reform. Two examples from Paraguay illustrate how the mere invocation of lodging a complaint under investor-state arbitration has a powerful chilling effect.³¹ First, deep inequalities are running through land ownership in Paraguay. While a small number of landlords control most agricultural land and do not even farm it, most farmers and agricultural workers have little access to land. Palmital is a settlement of 120 landless families who for more than 10 years have occupied an idle 1,000 hectare estate owned by several German nationals resident in Germany. The Palmital families eventually applied for a transfer of the land title under the agrarian reform provisions that allow owners to be expropriated if they refuse to sell. However, when the agrarian reform authorities took action towards expropriation, the Senate as well as the German embassy in Paraguay blocked the move, alleging it would violate the BIT between Germany and Paraguay. The threat succeeded, as the people then have been forcefully evicted, and some detained, while many suffered hunger homeless after eviction – undermining Paraguay's efforts to implement its agrarian reform legislation. Eventually, a settlement outside court was reached, allowing the families to stay on the land.

Second, the case of Sawhoyamaxa involves a 14,000 hectare estate owned by a German landlord. In the early 1990s, 100 indigenous families of the Enxet people who had traditionally lived in the area initiated move under the agrarian reform law to reclaim their territory and obtain legal title to the land. For twenty year, the government did not dare to proceed in expropriating the land, fearing the German owner would file a case in name of the Germany-Paraguay BIT, after protests from the German embassy. The land has still not been returned even though the Paraguayan authorities recognised the legitimacy of indigenous peoples' claim to Sawhoyamaxa. In 2006, the Inter-American Court of Human Rights confirmed this claim and rejected the use of BIT as an argument not to expropriate.³² Despite multiple requests, the German government never publicly commented the ruling. Only in June 2014 did the state finally grant the restitution of the 14,000ha to the indigenous community of Sawhoyamaxa.³³

The sour taste of sugar under NAFTA in Mexico.

When the Mexican government attempted to protect local sugar producers by taxing imports of controversial high-fructose corn syrup (HFCS), the American corporation Cargill struck back with a US\$77 million lawsuit under Chapter 11 of the North American Free Trade Agreement (NAFTA). Mexico's decision in 2001 to impose a 20% tax on soft drinks and other beverages that contained sweeteners other than sugar was rooted in the fact HFCS imports were compounding the country's sugar sector problems at that time, in particular, widespread peasant displacements.³⁴ In addition, there were concerns about the public health impacts of using HFCS. In 2004, Cargill launched a lawsuit using ISDS. Part of Mexico's defence was that the HFCS tax was partly a countermeasure taken in response to prior US violations of NAFTA. Mexico's appeal was subsequently rejected and the government is now under orders to pay the US\$77 million plus interest and legal fees – including US\$2 million for Cargill's own lawyers' costs – to one of the world's biggest multinational food corporations for protecting its small-scale farmers.³⁵ Another US company, Corn Products International, also challenged Mexico for more than US\$325 million for the same matter, under an ICSID court.³⁶ The latter ruled that Mexico was indeed liable, not disclosing to public to amount of the award.³⁷

The BITing taste of sugar in Poland. In 2008 Cargill won a second sweetener-related case, this time in Poland. The company lodged a US\$130 million ISDS lawsuit in 2004 under the US-Poland BIT after the country imposed a national quota on isoglucose production – a sweetener used for soft drinks and confectionery – as part of its efforts towards EU accession.³⁸ Cargill claimed that its investment in isoglucose processing facilities was adversely affected by a policy privileging sugar production over sweetener production. In 2008 “the tribunal issued its final award in which it held that Poland's actions breached its treaty obligation of fair and equitable treatment, as well as the treaty's prohibitions against discriminatory treatment and national treatment, and awarded Cargill damages plus compound interest”.³⁹

Investor rights trump democracy in Canada.

In 2009, the giant US seed and agro-inputs Dow AgroSciences filed an investor-state lawsuit against Canada under NAFTA, seeking a US\$2 million

compensation for the ban of a particular pesticide by Québec. The province's decision to ban the highly toxic herbicide ingredient 2,4-D was based on its extensively documented link to cancer and other health problems such as birth defects. Yet, 2,4-D is to Dow Agro what RoundUp is to Monsanto – a key pesticide for herbicide-tolerant genetically engineered corn plants. In 2011, the tribunal ruled Québec was not to pay any compensation and could maintain its legislation. However, the government had to officially recognise that “products containing 2,4-D do not pose an unacceptable risk to human health or the environment, provided that the instructions on their label are followed”.⁴⁰ As such, Dow AgroSciences called it a victory. Other provincial Canadian governments may be discouraged from following the same path and banning pesticides harmful to the environment but profitable for corporate industry.

Concluding remarks: moving forward

By granting foreign ‘investors’ far-reaching rights and excessive protection, the rules of the global investment regime constrain governments’ policy-making space for a human rights-based framework for land governance. As such, corporate use of international investment law hinders the struggle for land and food sovereignty, including efforts to roll back land grabbing. In order to address this matter and strengthen the effectiveness of agrarian social movements’ campaigns to resist land grabbing, this brief suggests two broad types of tactical political positioning – one defensive and one pro-active.

Rejecting trade and investment agreements as part of peasants’ struggles. The twin threats of enhanced investment protection and investor-state arbitration mechanisms are growing as the network of Bilateral Investments Treaties and other agreements expands. But civil society’s resistance to these is also growing. Food sovereignty movements can now join ongoing campaigns to derail the currently negotiated Free Trade Agreements between EU-Canada (CETA), the EU and the US (TTIP) or the Trans-Pacific Partnership (TPP) to name a few. They can also take advantage of the expiration of many treaties to ask for their renegotiation and/or cancellation. Since the end of 2013, more than 1,300 Bilateral Investment Treaties have become eligible to be terminated or renegotiated with lower standards of investment protection, while a further 350 will expire by 2018.⁴¹ This provides another important campaigning opportunity to loosen the grip of the ISDS.

Reclaim the meaning and regulation of agricultural ‘investment’.⁴² Fighting a framework that favours FDI – often packaged as ‘investment for rural development’ – also involves highlighting the counter-narrative for what type of investment best addresses rural poverty and hunger, and what type of governance framework best regulates competing claims over land. It includes on one hand strengthening the efforts for states to recognise and alternatively support small-scale food producers as the primary investors in agriculture rather than large-scale land transactions for agro-export industrial ventures; and on the other hand, pursuing engagement with legitimate human rights-based instruments such as the FAO Tenure Guidelines and UN Right to Food.

Endnotes

- 1 United Nations Conference on Trade and Development (UNCTAD) (2012) *World Investment Report*. Geneva: UNCTAD.
- 2 TNI (2013) *A Transatlantic Corporate Bill of Rights*, <http://www.tni.org/briefing/transatlantic-corporate-bill-rights>
- 3 Cotula L. (2013) 'The New Enclosures? Polanyi, international investment law and the global land rush', *Third World Quarterly* 34(9): 1605-29.
- 4 Ferrando T. (2013) 'Legalized Dispossession: How Investment Law Enhances and Protects the Triple Accumulation of Land, Water and Fiscal Revenues', http://www.academia.edu/3855902/Legalized_Dispossession_How_Investment_Law_Enhances_and_Protects_the_Triple_Accumulation_of_Land_Water_and_Fiscal_Revenues [06-02-14]
- 5 In his book, Stefano Liberti provides insights on investor-state conventions where representatives of recipient states take the word in front of the investors, and promise to handle them their land for better and cheaper conditions than the other countries. Liberti, S. (2011) *Come il mercato delle terre crea il nuovo colonialism*. Rome: Minimum Fax.
- 6 Ramzi N.D. (2013) 'Who Owns the Land? Cameroon's Large-Scale Land-Grabs', <http://thinkafricapress.com/cameroon/who-owns-land-cameroon-large-scale-land-grabs> [05-02-14]
- 7 TNI (2013) *The Global Land Grab: A primer*, <http://www.tni.org/primer/global-land-grab>
- 8 Borrás S.M. and J.C. Franco (2013) 'Global Land Grabbing and Political Reactions From Below', *Third World Quarterly* 34(9): 1723-47.
- 9 'Declaration of Nyéléni' (2007), <http://nyeleni.org/spip.php?article290>
- 10 More detailed analysis and examples of such policies can be found in Kay S. (2014) *Reclaiming Agricultural Investment : Towards Public-Peasants Investment Synergies*, <http://www.tni.org/briefing/reclaiming-agricultural-investment>
- 11 Künnemann R. and S.M. Suarez (2013) 'International Human Rights and Governing Land Grabbing: A View from Global Civil Society', *Globalizations* 10(1): 123-40.
- 12 Suarez, S.M. (2013) 'The human rights framework in contemporary agrarian struggles', *Journal of Peasant Studies* 40(1-2): 239-90
- 13 Golay, C. and I. Biglino (2013) 'Human Rights Responses to Land Grabbing: a right to food perspective', *Third World Quarterly* 34(9): 1630-50.
- 14 La Via Campesina's contribution to this process is discussed more thoroughly in Claeys P. (2014) 'Via Campesina's Struggle for the Right to Food Sovereignty: from Above or from Below?' in Lambek N.C.S. et al. (eds.) (2014) *Rethinking Food Systems: Structural Challenges, New Strategies and the Law*, London: Springer.
- 15 See examples in Golay, C. and I. Biglino (2013) 'Human Rights Responses to Land Grabbing: a right to food perspective', *Third World Quarterly* 34(9): 1630-50.
- 16 An example of Tenure Guidelines-based human rights analysis of communities affected by land grabbing can be found in FIAN (2014) *Accaparement des terres et droits humains au Mali*, http://www.fian.org/news/article/detail/land_grabbing_and_human_rights_in_mali/
- 17 TNI (2013) *A Transatlantic Corporate Bill of Rights*, <http://www.tni.org/briefing/transatlantic-corporate-bill-rights>
- 18 Mackey D. (2013) 'The Rights Clash: mining in El Salvador exposes the contradiction between human rights and corporate rights under the international investment regime', <http://justinvestment.org/2013/07/the-rights-clashmining-in-el-salvador-exposes-the-contradiction-between-human-rights-and-corporate-rights-under-the-international-investment-regime/> [19-07-2013]
- 19 Suez and others v. The Argentine Republic, ICSID Case ARB/03/19, Decision on Liability, July 30, 2010, para. 57.
- 20 TNI et al. (2013) *The right to say no*, <http://www.tni.org/briefing/right-say-no>
- 21 TNI (2013) *A Transatlantic Corporate Bill of Rights*, <http://www.tni.org/briefing/transatlantic-corporate-bill-rights>
- 22 See Olivet C. and P. Eberhardt (2012) *Profiting from injustice*, <http://www.tni.org/briefing/profitting-injustice>
- 23 SAUR International SA v. Republic of Argentina, ICSID Case ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, paras. 330-332.
- 24 Bernhard Von Pezold and others v. Zimbabwe, ICSID Case ARB/10/15, and Border Timbers Limited et al v. Zimbabwe, ICSID Case ARB/10/25, Procedural Order No. 2, June 26, 2012, para. 59.
- 25 Harten G.V. and M. Loughlin (2006) 'Investment Treaty Arbitration as a Species of Global Administrative Law', *European Journal of International Law* 17(1): 121-50.
- 26 Anderson S. and M. Perez-Rocha (2013) *Mining for Profits in International Tribunals*. Washington: Institute for Policies Studies, p10; and see also Garberi I. (2014) 'Chevron, inunca más!', <http://apoya-al-ecuador.com/en/chevron-never-again/> [05-02-14]
- 27 Scoones I., N. Marongwe et al. (2011) *Zimbabwe's Land Reform: A summary of Findings*. Brighton: IDS.
- 28 Cliffe L. et al. (2011) 'An overview of Fast Track Land Reform in Zimbabwe: editorial introduction', *Journal of Peasant Studies* 38: 907-38.
- 29 Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe, ICSID Case ARB/05/6, Award, April 22, 2009.
- 30 Guenther Kessl and others v. Ministry of Lands and Resettlement and others, Case (P) A 27/2006, Judgment of March 6, 2008, <http://www.lac.org.na/news/inthenews/pdf/judgment-expropriation.pdf> [06-02-14]
- 31 Künnemann R. (2009) 'Chapter IV: Foreign investment and the right to food' FIAN (2009) *The Global Food Challenge: towards a human rights approach to trade and investment policies*, Heidelberg: FIAN, pp. 50-9.

- 32 Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, March 29, 2006.
- 33 Cabello Alonso J. (2014) 'Sawhoyamaya and the Path towards Dignity', *FIAN Right to Food Journal* 9(1): 13.
- 34 Rodriguez-Gomez, G. (2013) 'The debate over food sovereignty in Mexico', International Conference Food Sovereignty: a critical dialogue. Yale University, September 14-15, 2013.
- 35 Public Citizen (2011) 'Cola Wars Beat Drug Wars', <http://justinvestment.org/2011/03/cola-wars-beat-drug-wars/> [18-07-13]
- 36 U.S. Department of State 'Corn Products International, Inc. v. Mexican States', <http://www.state.gov/s/l/c/11548.htm> [18-07-13]
- 37 Whitsitt, E. (2009) 'Tribunal rejects the Defense of Countermeasures in recently published Corn Products International Inc. v. The United Mexican States award', <http://www.iisd.org/itn/2009/04/28/tribunal-rejects-the-defense-of-countermeasures-in-recently-published-corn-products-international-inc-v-the-united-mexican-states-award/> [18-07-13]
- 38 International Institute for Sustainable Development (2007) 'Poland defending arbitration claim over agricultural quotas' in *Investment Treaty news*, April 13, 2007.
- 39 Sidley Austin LLP 'Representative engagements in investor-state arbitration', <http://www.sidley.com/Recent-Investor-State-Arbitrations/> [7-10-14]
- 40 Council of Canadians (2011) 'Dow Agrosiences used and abused NAFTA in pesticide spat, says Council of Canadians', <http://www.canadians.org/media/trade/2011/27-May-11.html> [05-02-14]
- 41 UNCTAD (2013) *IIA Issues Note 4: International investment policymaking in transition: challenges and opportunities of treaty renewal*. Geneva: UNCTAD.
- 42 For a more detailed analysis, see Kay S. (2014) *Reclaiming Agricultural Investment : Towards Public-Peasants Investment Synergies*, <http://www.tni.org/briefing/reclaiming-agricultural-investment>; and Kay S. (2012) *Positive Land Investment Alternatives*, <http://www.tni.org/briefing/positive-land-investment-alternatives>
- 43 UNCTAD's World Investment Report 2012 gives a good overview of the risks of certain investment protection provisions and how they could be addressed.
- 44 Harten G.V. and M. Loughlin (2006) 'Investment Treaty Arbitration as a Species of Global Administrative Law', *European Journal of International Law* 17(1): 121-50.

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One of many concerned citizens in her contribution to the public TTIP consultation in the US



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