

ECONOMIC AND PRIVATE SECTOR

PROFESSIONAL EVIDENCE AND APPLIED KNOWLEDGE SERVICES

HELPDESK REQUEST

Laws and Regulations Concerning Reporting of Foreign Investment in Land

Oliver Walton

Governance and Social Development Resource Centre

January 2013

EPS-PEAKS is a consortium of organisations that provides Economics and Private Sector Professional Evidence and Applied Knowledge Services to the DfID. The core services include:

- 1) Helpdesk
- 2) Document library
- 3) Information on training and e-learning opportunities
- 4) Topic guides
- 5) Structured professional development sessions
- 6) E-Bulletin

To find out more or access EPS-PEAKS services or feedback on this or other output, visit the EPS-PEAKS community on <http://partnerplatform.org/eps-peaks> or contact Yurendra Basnett, Knowledge Manager, EPS-PEAKS core services at y.basnett@odi.org.uk.

Disclaimer Statement:

The views presented in this paper are those of the authors and do not necessarily represent the views of Consortium partner organisations, DFID or the UK Government. The authors take full responsibility for any errors or omissions contained in this report.

Contents

	Contents	ii
1	Overview	3
2	Extraterritorial obligations of states over overseas businesses	4
3	Other relevant international Principles, Guidelines and Instruments	5
4	References	6
5	Additional Information	6

1 Overview

Based on a brief review of the available literature, this report finds that there appears to be no available literature providing recommendations on how the UK could change its laws and regulations to require UK companies investing in land in developing countries to report relevant data. A literature review conducted by Global Witness et al (2012) states that there is little sustained focus on the extraterritorial obligations of states over overseas business enterprises. Most of the available literature and policy material on transparency in land investment focuses on the following policy areas:

- Facilitating community engagement in planning decisions and enhancing the rights of communities.
- Upgrading the obligations or capacities of host governments to improve regulation of foreign-funded land deals.
- Developing international normative frameworks to improve transparency in land deals.

This focus is confirmed by a range of other documents reviewed for this report that address international efforts to promote responsible investment in agriculture (see, for example, International Working Group 2011, Smaller & Mann 2009). A report by the International Institute for Sustainable Development states that there is a ‘significant lack of concrete and verifiable’ empirically-based policy and legal work on the issue of foreign investment in agricultural land (Smaller & Mann 2009, 2).

Smaller and Mann (2009, 8) note that in many host states (such as the UK) ‘there is either no, or insufficient or unclear domestic law concerning land rights, water rights, pollution controls for intensive agriculture, human health, worker protection and so on. On the other hand, the international law framework provides hard rights for foreign investors’. This report notes that there are two primary sources of international law relating to this issue: international contracts, which are commercial in nature; and international treaty law on investment. Both bodies of law start from a commercial perspective and focus on the economic interests of the foreign investor, rather than social or environmental dimensions (Smaller & Mann 2009).

As discussed in the next section, the UN’s Guiding Principles for Business and Human Rights (UN 2011) address the extraterritorial obligations of states over overseas business enterprises. These principles do not, however, provide any detailed discussion of the UK case, or of timeframes and costs. The next section provides an overview of **the available literature on the extraterritorial obligations of states over overseas businesses**. Section three discusses some other relevant international guidelines, principles and instruments.

2 Extraterritorial obligations of states over overseas businesses

A report by Global Witness, the Oakland Institute and the International Land Coalition identifies four key entry points for improving transparency in decision-making over large-scale land acquisition: transparent land and natural resource planning; free, prior and 'informed' consent; public disclosure of all contractual documentation; multi-stakeholder initiatives, independent oversight and grievance mechanisms' (Global Witness et al 2012). The report also notes a range of additional entry points for future policy work and campaigning, which includes addressing the 'extra-territorial obligations of states over overseas business enterprises'. It stresses that 'further analysis is needed to identify the benefits and opportunities of each entry point, as well as potential limitations, challenges, and risks around future campaigns which would need to be addressed from the start'. It notes that there is currently a gap between the extent to which individual states fulfil their obligations to regulate businesses overseas, and 'the extent to which such regulations cover transparency and information disclosure' (Global Witness et al 2012, 48).

The UN's Guiding Principles for Business and Human Rights, written by the former UN Special Representative to the Secretary General for Business and Human Rights, Professor John Ruggie (UN 2011) provide some discussion of how business enterprises need to undertake human rights due diligence. The Principles suggest that states 'should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'. It notes that 'at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis' (UN 2011, 7).

The report notes that some states have introduced domestic measures with extraterritorial implications. 'Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs' (UN 2011, 7).

The UN's Guiding Principles (UN 2011) propose that 'contracts should always be publicly disclosed when the public interest is impacted; namely cases where the project presents either large-scale or significant social, economic, or environmental risks or opportunities, or involves the depletion of renewable or non-renewable natural resources' (Global Witness et al 2012, 30). Global Witness et al (2012) state that governments and businesses often claim that confidentiality is necessary because it protects commercially sensitive information contained in investment contracts.

3 Other relevant international Principles, Guidelines and Instruments

The Global Witness et al (2012, 12) report details a **number of international instruments** that 'create obligations and responsibilities throughout all stages of decision-making around large-scale land investments'. These include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Universal Declaration of Human Rights (UDHR). Several thematic binding agreements are also examined in the report: the 1992 Convention on Biological Diversity (CBD) and the 1994 Convention to Combat Desertification (CCD).

The **OECD guidelines for multinational enterprises** provide voluntary principles and standards for responsible business conduct for multinational corporations operating in or from countries adhering to the OECD Declaration on International Investment and Multinational Enterprises, including detailed guidance concerning information disclosure (OECD 2011). The UK encourages companies to abide by these Guidelines. These guidelines do not, however, provide any specific recommendations on land.

The Global Witness et al (2012) report also finds that 'a number of instruments offer companies the opportunity to associate themselves with a set of **principles or goals that demonstrate corporate social responsibility (CSR)**'. It finds that most of these are largely 'declarative'. Overall, the report notes that although these various instruments 'recognise secrecy and lack of access to information to be a problem, they give almost no detail as to how it should be tackled in practice, nor do any mandatory provisions yet exist to ensure such an implicit aspiration is met' (Global Witness et al 2012, 19).

4 References

Global Witness, Oakland Institute, International Land Coalition (2012) 'Dealing with Disclosure: Improving Transparency in Decision-Making over Large Scale Land Acquisitions, Allocations and Investments', Global Witness, Oakland Institute, International Land Coalition

http://www.globalwitness.org/sites/default/files/library/Dealing_with_disclosure_1.pdf

International Working Group on the Food Security Pillar of the G20 Multi-Year Action Plan on Development (2011) 'Options for Promoting Responsible Investment in Agriculture', Report to the High-Level Development Working Group

http://archive.unctad.org/sections/dite_dir/docs//diae_dir_2011-06_G20_en.pdf

OECD (2011) 'OECD Guidelines for Multinational Enterprises', 2011 Edition, Organisation for Economic Co-operation and Development.

<http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>

Smaller, C. and Mann, H. (2009) 'A Thirst for Distant Lands: Foreign investment in agricultural land and water', International Institute for Sustainable Development

http://www.fao.org/fileadmin/templates/est/INTERNATIONAL-TRADE/FDIs/A_Thirst_for_distant_lands.pdf

UN (2011) 'Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie', Human Rights Council Seventeenth session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/HRC/17/31

<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

5 Additional Information

Key websites:

Global Witness <http://www.globalwitness.org/>

LandPortal.info <http://landportal.info/>

International Land Coalition <http://www.landcoalition.org/>

Suggested citation:

Walton, O. (2013), 'Laws and Regulations Concerning Reporting of Foreign Investment in Land', Birmingham, UK: Governance and Social Development Resource Centre, University of Birmingham.