Commentary on the UNIDROIT Legal Guide on Agricultural Land Investment Contracts

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December 16, 2019

1.0. Introduction

Food security is at the very core of human existence. Agriculture is thus a critical part of sustainable development. It is estimated that Agriculture contributes about 33% of the world's gross-domestic product. A significant number of countries with the most arable land belong to the categorization of low to middle income nations, while a significant number of the high-income nations are dependent on food imports from the former. As a result, domestic and foreign agricultural land investment contracts are common as countries seek to achieve food security. The UNIDROIT/FAO/IFAD Legal Guide to Agricultural Land Investment Contracts (ALIC) is thus a welcome framework for ensuring that these investments contribute to the sustainable development goals. On the overall, the legal guide provides comprehensive instrument that effectively highlights the critical components of such agricultural land contracts

and is thus commendable.

2.0. Context, Purpose and Scope

The legal guide sets out an ambitious overall goal, which is to respond *to the need for greater and more responsible investment in agriculture, which incorporates the necessary safeguards to enhance food security and nutrition and to protect legitimate tenure right holders, human rights, livelihoods and the environment and, in turn,* (to reduce)*investment risks*. This wide arching goal contributes to the complexity of the guide. The guide proposes to address the concerns affecting the variety of stakeholders, that is, the *investors, governments and local communities*, as well as *any legitimate tenure right holders that might be affected*. In the attempt to be comprehensive, the guide may not be very user-friendly to all its intended users. Given the differing capacities of the various stakeholders, the creation of a single document that speaks to them is an onerous a task. In its current form, the guide is very useful for legal professionals, as well as some stakeholders. Local communities who are often the legitimate tenure holders and communities affected by the investment, may not benefit from the guide, as they are not likely to afford the expenses of engaging professional legal representation. One of the ways, to address this challenge would be to consider developing a summary guide with an FAQ section that summarizes the main issues. One of the ways suggested for dealing with the stakeholder who may be disadvantaged in the negotiation of such contracts is to require investors to bear the cost of legal representatives for legitimate tenure holders who may be the local community. Whereas this could solve the problem, the risk of conflict of interest for such lawyers would be high. The legal guide comprehensively addresses the legal framework for agricultural land investment contracts, from the source of law, to the identification of the parties to the contract, their contractual obligations, the remedies for non-performance and modes of dispute resolution. The guide also provides for the transfer and return of user rights upon completion of the contract. The guide does a very good job of highlighting the key themes and the possible challenges. The guide also appreciates the importance of context, and recognizes its limitation given that certain aspects of these contracts remain in the domain of domestic law. The guide is also commendable in so far as it is characterized by an underlying effort to seek the delicate balance of the

economic, environmental and social development needs amidst the demands of the terms of the contract.

3.0. Analysis of the Guide in the Context of Kenya's Legal Framework

This commentary seeks to contextualize some of the aspects of the guide to the Kenyan legal framework in a bid to test its applicability in context.

3.1. Applicable Laws

There is a myriad of laws applicable to ALICs in Kenya. In the first place, the *Constitution of Kenya 2010* provides a comprehensive guiding principle through its provisions on land tenure, its explicit guarantee of human, environmental and socio-economic rights. The Constitution is also replete with provisions safeguarding communities particularly the marginalized. Other laws applicable to these contracts include, Kenya's Law of Contract which is based on the common law principles of contract and which would be the main source of law governing ALICs. All land related laws including; the *Land Act, Community Land Act, Land Control Act*, etc. would also apply to these types of contracts. All Agricultural related laws would also govern these contracts. The laws are varied and include *Crops Act, Agriculture, Fisheries and Food Authority Act, etc.* ALICs would also be guided by the legal framework for environmental management, which include The *Environmental Management and Coordination Act* (*EMCA), Biosafety Act*, etc. Other natural resource laws may also be applicable to ALICs such as the *Water Act, Forest Conservation and Management Act, Fisheries Management and Development Act*, etc. Other laws dealing with the economic aspects of such contract include, Investment Promotion Act, Foreign Investment Protection Act and other finance related legislation. An important source of law for ALICs is customary law. Customary law is recognized in Kenya's constitution as a source of law. It is of particular importance in the governance of community land on which many of the ALICs would be based. Customary law presents a challenge as a source of law given the fact that it is very context specific and is also a living and dynamic source of law. Article 2 of the *Constitution* recognizes the general rules of international law as part of Kenya's laws. Further, ratified treaties and conventions are also regarded as a source of law.

3.2. Parties to the Contracts

The guide's emphasis of the need for due diligence in the identification of the parties to the contract is very relevant and critical in the Kenyan context. Apart from the investors, guarantors and the legitimate tenure holders, the Guide also points out to the fact that there may be other stakeholders who though not obvious parties to the contract, have an interest in the contract in so far as it may affect them. The guide anticipates that apart from the formal tenure holders recognized by written or formal law, there may be other legitimate tenure right holders who are recognised under customary law. The Constitution in article 61, vests the ownership of all land in the people of Kenya collectively as a nation, as communities and as individuals. Land is classified as public, community or private. It is important for investors to take notice of the fact that where one of the parties to the contract is the national or county governments, such land is held in trust for the people of Kenya. ALICs involving community land, require thoroughness in the conduct of due diligence so as to identify the tenure holders. As provided by article 63(1) of the *Constitution*, *community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest*. By this provision, the tenure holder of community land is the community itself. This raises challenges for investors in ALICS, when they have to identify the legitimate representative of the community. The council of elders which often is the representing body of the community, may not allow for representation of women and youth in its constitution. Nonetheless, the guide rightly highlights their being stakeholders and thus legitimate parties to the contracts. The guide's distinction between formal tenure holders and the legitimate tenure right holders is particularly relevant in the context of ALICs involving community land. As noted above, the formal tenure holders as per the *Constitution* and the *Community Land Act* are the respective communities. However, communities may in accordance with customary law recognise the rights of access or fluid grazing rights, especially in times of drought, granted to members from other communities. Reference to the importance of identifying parties with such rights is noted as part of the due diligence required during ALICs negotiation. In identifying the tenure holders, the guide ought to highlight a caution against the risk of elite capture, political interference, bad faith occupants and the dynamics of conflict between communities over land tenure. In a bid to be comprehensive in the stakeholder

mapping, the guide includes a requirement to engage with other stakeholders apart from those above and who are defined as any party affected by the contract. Such a broad definition of stakeholders may deter potential investors as the determination of any affected party, could open up an endless list of stakeholders. The guide may thus need to provide a limit to its recommendations regarding the mapping of stakeholder requirements.

3.3. Consultation and Balance of Information and Power

The guide aptly recommends the importance of seeking consent of all the parties to the contract. As noted above, the guide's broad definition of 'other stakeholders', would make the process of seeking consent of parties to contract very difficult. The complexity of ensuring that there has been free, prior and informed consent of the parties to the contract, is acknowledged as a challenge for ALICs. The guide proposes various modes of ensuring that the consent of the parties is based on sufficient understanding of the impact of the ALICs. Based on the Kenyan experience, the guide could consider requiring investors to prepare FAQs with the main terms and conditions. The guide could also add as a means to addressing the challenges of language barriers, that notices for public consultation should be made in vernacular radio stations. The guide makes recommends the engagement with local advisor at the community level. While this may be an effective way of providing information and seeking consent, the guide could consider including a caution of the risk of such advisors being disengaged from the communities. A further risk the guide may consider highlighting, is the political manipulation that is rampart in negotiation investment contracts in general.

3.4. Beyond Contractual Basic Requirements to Socio-economic and environmental obligations

One of the most commendable characteristics of the guide is its reference to the need for ensuring that ALICs go beyond fulfilment of the basic contractual elements. The guide's articulation of the socio-economic and environmental obligations that must be considered in entering into ALICs is in tandem with the growing appreciation for social investment enterprise. The guide points to the fact that there may be legislative gaps in the countries in which ALICs are negotiated and recommends that investors seek international best practice

rules to fill the gaps rather than exploit these in their favour. The guide could refer the investors to the provisions of 'neo constitutions' such as the Kenyan one which has clear provisions on the socio-economic and environmental obligations of all including government. Some of the provisions of Kenya's legislative framework following the enactment of the *Constitution of Kenya* in 2010 are set out below as a basis for enriching the guide.

3.4.1. The complexity of Land

One of the most emotive issues during the consultation for the 2010 Constitution was the 'land question'. In Kenya land is not merely a financial asset but rather, a socio-cultural concept that touches on the very identity of its peoples. It is a source of local cohesion but can also be the cause of explosive discord. Colonialism and its consequent 'historical injustices' relating to land introduce a complexity for ALICs which parties to such contracts should appreciate. The guide refers to the need to safeguard the socio-cultural rights relating to the land forming part of the ALICs. Based on the experience of Kenya, which experience is common in many former colonies, it may be useful to include the need to investigate these silent but salient issues impacting on ALICs.

3.4.2. The Environmental Obligations surrounding ALICs

The Kenyan Constitution provides a good basis for enriching the guide's provisions relating to environmental obligations contained in ALICs. Kenya's legal framework for environmental and natural resource governance is well articulated in the Constitution and in the respective natural governance legislation. Some of the learnings that could be considered in enriching the guide is to require the inclusion of the environmental management plan arising from the EIAs, as a contractual obligation for ALICs. The guide could also consider making reference to the need for Strategic Environmental Assessments in the case of ALICs made at regional, national or county level. This provision is articulate in the 2015 revision of *EMCA.*

4.0. Conclusion

The guide provides an invaluable tool for ensuring sustainable development in the context of ALICs. Given the fact that it would have no binding legal effect,

there may be no incentive for parties to ALICs to comply with its recommendations. However, the guide is founded on principles of sustainable development which constitute a moral obligation for all. In order to highlight the importance of complying with the guide, the drafters could consider developing a preamble akin to ‘Our Common Future’. It is hoped that such a preamble would reiterate the importance of abiding by the best practice as set out in the guide in the context of ALICs. The preamble could also highlight that the objective of the guide is not to simply provide a minimum standard to which parties must comply but rather to provide a basis for a pro-active approach to ensuring ALICs contribute to sustainable development.

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