Systematizing the threat of land contracts to transform them into an opportunity

By:

Tomaso Ferrando

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In 2010, Saturnino Borras Jr. and Jennifer Franco denounced the way in which the multiplication codes of conduct, codes of best practices and 'good governance' efforts represented an attempt to domesticate the narrative around large-scale investments in land. In their piece, they identify six reasons why non-mandatory recommendations, nudging and the use of the win-win-win rhetoric (where communities, the host state and the investor are the three 'lucky' participants) disempower actors who claimed that this kind of agricultural projects represent a threat to people and the planet while reinforcing the position of those who consider agri-business as essential to the future of food security and an opportunity for employment and infrastructures' development. The UNIDROIT-FAO-IFAD *Legal Guide on Agricultural Land Investment Contracts* is no exception - and it is aware of it.

It is enough to look at Preamble 3 and point 10 (*Investment options*), to read

that “investments involving transactions of tenure and related rights to investors are not the preferred option for setting up an agricultural project, and the Guide does not promote such transactions.” Why, therefore, spending more than one-hundred and forty-five pages trying to suggest the most appropriate way of drafting a contract that is – at best – a second option for both communities and host states, and that the drafter themselves do not support? Why including several references to human and environmental rights (including the right to food) if these projects have a high probability of not delivering what is truly needed? Probably because investments in land are happening and state-investors concessions continue to be drafted. Certainly because of the conviction that small and large can coexist, which dismisses how they would be competing for both resources and markets. Maybe because lawyers are more comfortable with drafting clauses than with addressing openly political questions concerning the way in which law determines the distribution of resources and the reproduction of inequality. Possibly because some among us are still intimately convinced that a properly drafted contract, the rule of law and effective implementation can make up for all the problems generated by power imbalance, economic incentive, corruption and competition for foreign capital.

Yet, hoping that a properly negotiated contract can fill the gap of the national legal system and provide socio-environmental benefits to all parties involved is a political statement. It is the manifestation of the decision to dismiss states’ financial dependency on Foreign Direct Investments, the colonial legacy, the joke of international debt, the imbalance in legal understanding and support that characterizes the state-investors-communities dynamics, the fall in Official Development Aid, the inequality of power among the parties involved, and the depletion of soil and water, which makes good agricultural land increasingly scarce and precious. The *Legal Guide*, although legally well-drafted, conscious of its own limits and broad in scope, must thus be read through the lenses of threats that become opportunities and as another attempt to normalize of the inherent limits that characterize large-scale investments in land. Having this in mind, I believe that there are still valid reasons to engage with the *Guide* and get the best out of it.

Let’s not throw the baby with the bathwater I had the privilege to provide

legal support to local communities whose access to land, livelihood and tenure rights (to soil, trees, wood, water, holy places, etc.) had been made invisible by the conclusion of investment contracts. From past and ongoing resistance on the ground, I learned the importance of taking the state-investors contracts seriously and the weight that they can have in crystallizing a situation that is often irreversible – or that can be reversed but only with strong political will and significant resources (especially if the contract is covered by a bilateral investment treaty).

Most of the contracts were signed without any form of participation or involvement of the local communities. Others contain clauses where customary and occupied land was defined as state land and empty. I was asked to comment on contracts providing unlimited access to water to the investor, especially during the dry season and with priority over conflicting rights, while imposing almost no cost for the rent, offering a full tax-break and guaranteeing full capital mobility. I also had to deal with concessions where the state assumed the obligation to protect the investor against any form of protest and any action that could negatively affect the operations. Because this is how existing contracts look like and future contracts are likely to be drafted, not all the content of the *Legal Guide* shall be thrown away with the bathwater.

The limited space of this blog does not offer me the possibility to discuss the way in which the *Guide* deals with participation, information, consent, and grievance. These are central and thorny issues, and it gives hope seeing that the *Guide* strongly advocates for them, including with the possibility of introducing clauses in favor of third-party beneficiaries that could be actioned by them. Yet, the focus on inclusion does not consider the cost of this involvement (both financial and organizational) and the fact that neither states nor investors ever show particular interest in facilitating the participation of actors that are often seen as obstacles to the smooth unfolding of the project.

Rather, I want to focus on the *Legal Guide's* merit to broaden the scope of legal attention and to clearly recognize that land contracts are not only about land, a point that I make in a chapter for the forthcoming volume *Beyond Development* edited by Sam Adelman and Abdul Paliwala, and that I am glad to see recognized in the document. In the *Guide*, land contracts are about more than

land: they are about water, oil, wood and other tenure rights that may be subtracted from the communities, trigger multiple conflicts between communities and investors, be over-exploited or not properly accounted for when the value of the rent is defined (see, e.g., 2.89, 2.90, 2.91, 3.14, 3.17 and 3.18). Thus, negotiations should consider much more than just the land and recognize the complexity of the concession as a space where multiple values (material, immaterial, spiritual, etc.) coexist.

Similarly, the Legal Guide does a good job recognizing the importance that clauses concerning tax rates, transfer pricing, export and import duties and freedom of movement of capital have in the definition of the contract. Yet, different from what section 3.66 of the *Legal Guide* proposes, contracts are not the way to "establish safeguards to ensure that taxes due are indeed paid – including by requiring transactions between the investor and affiliated companies to be at an arm's length basis, and the investor to keep and disclose accurate contemporaneous data and records." These contracts are the legitimation and crystallization of corporate conducts that erode the base on which states exercise their fiscal powers, shift profits away from the host state and significantly impact on financial ability of public authorities to fulfil their human rights obligations. The OECD, the IMF, Tax Justice Network and the other actors interested in strengthening states' fiscal positions should pay attention to the content of land concessions and push for an leverage the Guide to push for a strong and pro-public revenues agenda.

Finally, it is interesting to notice that the *Legal Guide* recognizes that contracts are also about the privatization of police power, i.e. they often contain clauses that formalize states' obligations to exercise due diligence in minimizing the damage caused to the investor by the civil disturbance or the recognition of the investors' right to have their own private security exercising police powers within the boundaries of the concession (and sometime, beyond it). Even when not covered by a Bilateral Investment Treaty (BIT), these clauses are particularly important because of the way in which they legalize a communion of interests between the state and the investors in opposition to anyone who may not fit in the legal and economic framework defined in the concession (for example, herders who want to take their cattle through the concession or communities who reclaim their access to land, water, wood or holy places).

Disagreement, protests and non-compliance become potential costs for both the investor and the state, and both will do everything needed in order to avoid it.

Here, the *Legal Guide* appears ambivalent: it takes for granted that it is the role of the state to defend the private property of the investor against any disturbance, but also recognizes that physical protection of the investment should occur within the limits set by the Voluntary Principles on Security and Human Rights (s. 3.137) and that investor's contribution to the state's breach of duty shall be taken into consideration to reduce the recoverable damages or – if provided in the contract – to deny the possibility of an action (s. 4.45).

At a time characterized by the escalation of violence against community members, environmental and human rights activists and people who raise their voices against large-scale projects – including agricultural ones – the *Guide* shouldhave been bolder. Because the *Guide* is the systematization of the underlying consensus on principles and practices, and because human rights (along with environmental protection, social protection, etc.) are one of these pillars, should not the *Guide* be based on the legal assumption that no state can and should be bound by a contract whose performance is linked with breaches of its international – and national – obligations ? Thus, why not suggesting the integration of a human rights' clause allowing the state to immediately terminate a contract tainted by violence and human rights' violations? This could also be linked with the innovative proposal of a clause in favor of third-party beneficiaries and offer a straightforward and much needed opportunity to communities who are often victims of both public and private violence.

And such clear subordination of the contracts to the fundaments of international law should not only concern breaches of human rights caused by physical harm or threat, but also those contracts that allocate land, water, tax revenues and other precious resources in a way that deprive communities of their basic rights. On the contrary, breaches of the contract for human rights' (and environmental) violations are not discussed in the *Guide*, significantly limiting the role that they can play in improving the condition of human rights and environmental defenders on the ground (s. 4.86). Can the communities and activists truly be empowered by a contract that may continue operating above

the principles of international law and the broad consensus around business and human rights? Can they effectively challenge the appropriation of land, water, fiscal resources and other tenure rights when their opposition is presented as a cost and when the state has an obligation to make them inoffensive? Should the *Guide* recognize that the protection, respect and fulfillment of human rights require the presence of a termination clause as an effective legal threat that victims of human rights' abuses can trigger, or that can be at least triggered by the state?

Three suggestions for a tactical, bottom-up and value chain-based use of the *Guide* The *Guide* is a finely drafted document that tries – with some gaps and reservations- to push the boundaries of the legal engagement with the complexity of land concessions. Yet, it is not – nor pretends to be - emancipatory, subversive or transformative of the state-investors-communities dynamics in the way in which local communities, environmental activists and human rights' defenders would hope. In particular, the technical approach and the limited power analysis contained in the document suggest that negotiation of these agreements is a matter of knowledge, understanding and representation, not of competitiveness, dependency and regulatory race to the bottom.

In the absence of strong political will and a space effective party autonomy – also guaranteed by a different international development scenario and the proposal of alternative pathways of 'development' for the states-, the *Guide*will hardly become the parties' term of reference for future contracts. Yet, the lack of direct recognition does not mean that the Guide could not be relevant and strengthen bottom-up legal resistance. In particular, there are at least two reasons why the *Guide* could empower bottom-up movements and be appropriated as a new tool in the political and legal struggle against large-scale land concessions as the mainstream development paradigm. Even in the context of large-scale land investments as an anti-poor solution and in the absence of straightforward termination clauses that clearly subordinate the contracts to the protection, respect and fulfilment of human rights.

On the one hand, if the *Guide* is assumed as a generally accepted term of reference for good faith and fair dealing, non-conforming clauses could be

challenged not only for their socio-political implications but also for their departure from the legal standard and require states to provide stronger justification; on the other hand, it could be used to thoroughly challenge the support provided by the home states of the investors, international financial institutions, private investors, third parties (including NGOs that may support large-scale 'green agri-projects') and all the actors involved in the value chain that has its origin in the land concession.

I would like to conclude this blog with some reflections on the latter point, i.e. the possibility of using the *Guide* to embed the state-investor-communities relationships in the broader context of law and global production in order to multiply potential co-responsibilities and identify new leverage points (which I call 'legal chokeholds' and that is at the center of the work on land rights realized by the Global Legal Action Network). At a time of the global food system where trade and investments are considered the most effective tools to guarantee national food security, land contracts cannot be seen in isolation but must be understood as the central piece of a long chain of capital, labor, natural resources and legal frameworks that is rooted into the land but is geographically wider than the land itself.

Firstly, if we think of private or public investors we cannot disentangle their actions from the extraterritorial obligations (ETOs) that their home states have to guarantee that no national is involved in the violation of human and environmental rights abroad (in particular, when home states are asked to exercise jurisdiction over a tort committed abroad). Secondly, the capital intensive nature of large-scale land investments often requires access to public or private financing (or both): if this is the case, the *Guide* can be used to hold to account financiers who have agreed to support or are about to support a project whose contractual terms and conditions are incompatible or worse than the term of reference. And the same could be done with institutional investors (like pension funds) holding shares in the company that has concluded the disputable contract: the Guide shows that certain contractual provisions may pose a material financial risk to investors, and this risk must be assessed and integrated not to be passed to the shareholders.

Thirdly, the content of the *Guide* could be used to challenge any actor profiting

from an investment that is not aligned with it. Providers of seeds or agri-tech, traders who buy and distribute the fruits of the land, food processors that transform it and retailers that sell it to businesses or consumers would all benefit from the 'original sin' of a land concession that is or may be detrimental to people and the planet. In this context, the 'best practices' collected in the *Guide* could be a useful support to soft-law approaches (like mobilizing CSR, the OECD national contact point, or naming and shaming to obtain public support) or to legal actions brought outside of the host jurisdiction and against actors who are not directly involved in the concession (like the tort of conversion case filed against Tate & Lyle for possessing sugar produced on land illegally subtracted to the communities in Cambodia).

Unfortunately, the *Guide* appears to be blind to the way in which conceiving land and tenure rights in the context of global vale chains can multiply the relevant spaces of engagement and challenges the traditional notion of jurisdictional spaces and fragmentation. Luckily, communities, activists and lawyers acting on the ground have come to this realization long ago, and I believe that they will find the best way to use a document that aims to normalize large-scale investments but can also open new interesting spaces for political and legal resistance.

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