Re-thinking Large Scale Agricultural Land Acquisition through a Contract Model

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October 4, 2019

The triumph of capitalism and its impact, post-cold war, is manifest in diverse ways and sites in the global south, especially Africa. Perhaps the most prominent consequence of the post-cold war capitalist strangle-hold is the phenomenon of globalization. In its legal and economic gradient, globalization has yielded unprecedented spate of legal harmonization and capitalist structuring, opening up of markets under the trade liberalization mantra. In the midst of this linear ideological dominion, the developing and least developed countries, especially African countries, are coerced on board with assurances that their quest for development is best realized under a free market economic framework. To this end, they were co-opted into the new World Trade Organization (WTO)- supervised global trading order.

One of the significant features of the WTO is the TRIPS Agreement -- a consolidation of existing international agreements on intellectual property (IP)

under a stronger framework with enforcement mechanisms. TRIPS is designed to constrain the ability of countries to exercise national discretion with regard to the degree and extent of protection accorded to specific forms of innovation in their jurisdictions. Ideally, as its foundational logic, IP is an artificial monopoly designed as an exception to free trade. Under TRIPS, however, the IP logic was flipped 360. The US and OECD countries made stronger protection of IP the prerequisite for countries, including African countries, to participate in the new global economic order. A key feature of that order is that it supervised a transition from iron-and-steel, brick-and-mortal industrial innovation model to one driven by intellectual or intangible assets encapsulated in information and its digital escalations.

As a consequence, African countries were invited to participate in a new global economic space conceived and designed by industrialized regions, notably, US, Europe, and allies on the premise of one-size-fits-all that does not regard asymmetric levels of innovation and industrial sophistication amongst regions and countries. Thus, African countries only received assurances of tokenism in the nature of “free access” of their produce into the western markets, the flimsy promise of technology transfer, and continued support by the West to build and adapt African institutions to enforce IPRs of industrialized countries. Other promises came in the form of so-called “wiggle room” or highly circumscribed concessions that can be applied to side-step insensitive IP laws to tackle contextual contingencies. So far, no country in Africa has successfully tapped into those concessions save South Africa which seized upon the Doha Declaration on TRIPS and Public Health to procure patented HIV-AIDS drugs.

Aside from health, agriculture and food security are sites where the new global IP order has significant ramifications for Africa. TRIPS Agreement brought all innovations, including those relating to genetic resources and agriculture, under strong IP protection, leaving countries the wiggle room to protect plant genetic resources for food and agriculture by patents or other potential sui generis options. African countries initiallysought African specific approaches to the protection of agricultural innovation. In 2000, the African Union adopted the African model legislation on the protection of the rights of local communities, farmers and breeders and for the regulation of access to biological resources. The significance of this approach is the recognition that in Africa, there is no

distinction between farmers and breeders, reflecting the reality that farming in Africa is communal and farmers are the bedrock of agricultural production and the continent's food security.

Unfortunately, fifteen years after the AU took the initiative, not able to resist external pressures, regional and national governments reverted to breeder-focused protection regimes in compliance with the International Union for the Protection of New Varieties of Plants (UPOV). The UPOV standard was designed for countries with head start in plant breeding and, of course, agricultural biotechnology. The embrace of UPOV is a consequence of unrelenting political pressures that require a standard of IP protection above TRIPS. Without surprise, the two regional IP organizations in Africa, the OAPI and ARIPO, are actors in facilitating the reversal of the 2000 AU position which represented a roadmap for African food security. An analyst likens this form of institutional infiltration as a system of elite socialization and "(re)production of [western] intellectual property rights".

In the grander scheme of things, amidst the crisis of climate change in which the vulnerability of Africa continues to unravel, Africa remains a preferred choice of FDI in agriculture for the export of green energy and for food. This situation raises concerns about displacements, conflicts, shrinking traditional landraces and continental food security writ large. The traction for agricultural FDI comes through the scheme of large scale agricultural land acquisitions, which activists framed as agricultural "land grabs". Through the activities of international development finance agencies and intergovernmental entities, there has been critical appraisal of large scale agricultural land acquisitions with a view to how best they can be structured to accommodate multi-stakeholder interests in complex national settings under a win-win model.

Recently, a path-breaking UNIDROIT project conducted in conjunction with FAO and IFAD has resulted in a comprehensive "Legal Guide on Agricultural Land Investments Contracts." This manual addresses, in practical ways, virtually all conceivable concerns over how to ensure that FDIs in large agricultural lands are harnessed into opportunities to tackle the prevailing structural defects and asymmetries in globalization of agricultural production. With the right political will to implement it, the contractual model promises to be a pragmatic way to

tackle the unrelenting siege on African countries which have failed, so far, to rise to the challenge. It complements existing instruments such as UN Guiding Principles on Business and Human Rights, the voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security, and the Principles for Responsible Investments in Agriculture and Food Systems. According to James Gatthi, one of the expert resource persons on the project, “the Guide responds to the need for greater and more responsible investment in agriculture, which incorporates necessary safeguards to enhance food security and nutrition and to protect legitimate tenure right holders, human rights, livelihoods and the environment and, in turn, reduces investment risks.”

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