Climate Change, Land, and the UNIDROIT Legal Guide on Agricultural Investments

By:

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The UNIDROIT *Legal Guide on Agricultural Land Investment Contracts* (*ALIC Zero Draft*) was released for an online public consultation in June 2019. In this blog, I will reflect on the relationship between the *ALIC Zero Draft* and the findings of the August 2019 IPCC report entitled *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems (IPCC CCLR).* The *ALIC Zero Draft* adopts a pragmatic position with regard to a problem often described as 'land grabs' in which land is leased or bought by foreign investors for large-scale agricultural investment resulting in the export of food and other agricultural commodities from the Global South, including Africa, to the privileged in the Global North. The purpose, according to the *ALIC Zero Draft* (at p11, Preface 5) is to seek "to improve the contracting process" and so the quality of the agreements themselves, through the identification and equitable involvement of "all

relevant parties and stakeholders." The *ALIC Zero Draft* makes clear that it "does not promote the large-scale transfer of tenure rights", and excludes from its scope contracts that involve sale of agricultural lands (at p11, Preface 5). Nevertheless, as land investment contracts are currently being negotiated in a way that violates "legitimate tenure rights" and fails to adequately deal with dimensions of an environmental, social, or economic nature, the *ALIIC Zero Draft* provides guidance for better contracting. The ultimate aim is for investment in agriculture to be more responsible, operationalizing international consensus in instruments such as the 2011 UN Guiding Principles on Business and Human Rights (UNGPs), among others. This will "enhance food security and nutrition" as well as "protect legitimate tenure holders, human rights, livelihoods and the environment" (at p11, Preface 5).

The *IPCC Climate Change and Land Report (IPCC CCLR),* on the other hand, is the latest report produced by the United Nations body tasked with assessing climate change science. Consisting of seven scientific chapters, it begins with what is termed a "Summary for Policymakers" that attempts to translate the scientific assessment into more accessible servings for digestion by non-experts. The Summary begins with a section entitled "People, land and climate in a warming world". The first point [A.1], of clear relevance to the *AIILC Zero Draft,* is that "[L]and provides the principal basis for human livelihoods and well-being including the supply of food, freshwater and multiple other ecosystem services, as well as biodiversity. Human use directly affects more than 70% … of the global, ice-free land surface … Land also plays an important role in the climate system." The *IPCC CCLR* goes on to explain [A2] how climate change is increasing surface air temperatures of land and the intensity and frequency of extremes, with adverse impacts on "food security and terrestrial ecosystems," while also contributing to "desertification and land degradation." Yet, "[A]griculture, Forestry and Other Land Use (AFOLU) activities" also contribute to greenhouse gas emissions [A.3], even as land serves as a sink. Ultimately, 21-37% of emissions are associated with AFOLU including "pre- and post-production activities in the global food system."

The rest of the *IPCC CCLR* report considers in detail the relationship between climate change and land use. Topics addressed include the implications of different socio-economic development pathways on mitigation and adaptation

to climate change, as well as the implications of response options such as sustainable forest management to reduce land degradation while also providing long-term community livelihoods. The role of local stakeholders in governance and effective decision-making is identified in the *IPCC CCLR* as key to "the selection, evaluation, implementation, and monitoring of policy instruments for land-based climate change adaptation and mitigation." This is especially important for those "most vulnerable to climate change" including "Indigenous peoples and local communities, women, and the poor and marginalized." [C.4] Accordingly, the importance of including Indigenous and local knowledge in decision-making while also contributing to the empowerment of women by reducing "barriers to women's participation in sustainable land management" are highlighted.

The *IPCC CCLR* report is not the only climate report to receive attention of late. In late June, the UN Human Rights Council Special Rapporteur on extreme poverty and human rights, Philip Alston, released a report entitled *Climate Change and Poverty*. The report paints a devastating picture, including that by 2050, at least 140 million people in Sub-Saharan Africa, Asia and Latin America could be displaced by climate change (para 10). Yet while the report is highly critical of the extent to which the human rights community has been slow to grapple with the human rights implications of climate crisis, Alston's report is blind to business responsibilities for human rights, ignoring even the UN Human Rights Council's own Key Messages on Human Rights and Climate Change which clearly state that businesses are duty-bearers and "must be accountable for their own climate impacts".

The *ALIC Zero Draft* therefore provides an interesting case study. It does embrace business responsibilities to respect human rights through its commitment to operationalize the UNGPs, and, it cannot be said to be climate blind, with the some brief references to climate change treaties early on (1.13; 1.24), and further modest consideration in later parts dedicated to environmental issues (2.111; 2.112), and finally one whole paragraph dedicated to climate mitigation and adaptation (3.120), followed by two additional brief mentions (p82; p135). The dedicated paragraph on climate change contains some useful suggestions that appear in line with the*IPCC CCLR,* including endorsement of contractual obligations to adopt "climate-sensitive agro-

ecological approaches and climate-smart livestock farming practices" (3.120). Yet the discussion of climate change is never linked to the human rights implications of climate change, nor is there an attempt to determine what this might mean for business responsibilities under the UNGPs.

The relationship between business responsibilities for human rights and climate change is complex, but should not be ignored, particularly in a document of this depth and at this moment in time. Overall, while the *ALIC Zero Draft* embraces a human rights due diligence approach to the identification of local and Indigenous communities for the purposes of consultation or consent in stakeholder engagement (pp35-37), for example, it then proceeds to separate out human, environmental, social, and economic impact assessments with no attempt to understand the interrelationship between these constructs (pp43-48). This problematic separation of economic and social, from environmental concerns continues in the discussion of rights and obligations of the parties, completing failing to grapple with the fact that "good" jobs that are ecologically destructive are not even good for the workers themselves if workers are understood to have families, and live in communities that are dependent upon healthy local ecosystems (see more on the ecologically embedded relational individual here and here). It is also contrary to understandings of sustainability that accept that ecological limits constrain what is ultimately possible within the limit of planetary boundaries.

Treating climate change as a small subset of environmental issues which are then treated as if they can be balanced against economic or social concerns is highly problematic in a time of climate crisis. It is to be hoped that the final text of the *ALIC Zero Draft* will endeavour to more seriously grapple with the implications of climate crisis for agricultural land investment contracts, and pay close attention to the findings of the *IPCC CCLR.*

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