Introduction: Symposium on UNIDROIT/FAO/IFAD Draft Legal Guide on Agricultural Land Investment Contracts (ALIC)

By:

James Thuo Gathii

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Welcome to the Symposium on the *Zero Draft* of the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC) (hereinafter Legal Guide or *Zero Draft*). The Legal Guide, is being developed by a UNIDROIT Working Group in collaboration with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD). It provides detailed guidance to support the preparation, negotiation and implementation of agricultural land investment contracts that are fully consistent with the UN Guiding Principles on Business and Human Rights, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (VGGT), the Principles for Responsible Investment in Agriculture and Foods Systems (CFS-

RAI Principles) and other international instruments.

This online symposium is an integral part of an effort to raise awareness about the Legal Guide and to seek input from stakeholders, in order to ensure that it responds to the actual needs and reflects the best practices.

An excellent line-up of 9 experts have studied the Legal Guide and put to paper their reactions, critical and otherwise, as well as very insightful suggestions on how to improve it. In the interests of full disclosure, I served as an expert in the three-year consultative process during which the Legal Guide was crafted. I am therefore delighted to see this high level engagement on the draft from some of the thought leaders in this field.

To begin the symposium, Michael Fakhri's first of two posts argues that the Legal Guide is an invaluable tool for tenure rights holders, commercial lawyers, business people, and governments in their negotiations and drafting of agricultural land investment contracts. In his view, the Legal Guide fills the "void left by the bankruptcy of international investment treaties." He is particularly praiseworthy of how the Guide uses the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries in the Context of Food Security, the UN Guiding Principles on Business and Human Rights and indigenous rights such as that requiring investors to acquire free, prior and informed consent from indigenous peoples as required by the UN Declaration on the Rights of Indigenous Peoples. He notes that the Legal Guide adopts a broader definition of legitimate tenure right holders than does the World Bank. He notes that the Legal Guide provides investors with specific ways they can reduce risk by treating human rights as a matter for contractual safeguards. Michael Fakhri notes that the Legal Guide "walks through a delicate compromise by not endorsing large-scale land acquisitions but acknowledging that land acquisitions continue to occur."

Tomaso Ferrando begins his reflections by noting how non-binding codes of conduct, like the Legal Guide, represent a threat to people and the planet because they proceed from the premise that agri-business is essential to the future of food security and are an opportunity for employment and infrastructural development, rather than as a source of depletion of water and

soil and for increasing the scarcity of good agricultural land. Such Guides, Tomaso warns, risk normalizing the inherent limits that characterize large-scale investments in land. Tomaso foregrounds the imbalances in bargaining power between communities and small- scale farmers, on the one hand, and agribusiness investors, on the other. This imbalance, he argues, as well as corruption and competition for foreign capital are overtly political questions that cannot be adequately addressed by drafting legal clauses.

That said, Tomaso borrows from his own experience helping local communities protect their access to land, livelihood and tenure rights in contractual negotiations in large-scale land investments. Based on this experience, he argues because existing contracts are heavily weighed in favor of investors, "not all the content of the Legal Guide should be thrown away with the bathwater." He likes the Legal Guide's recommendation of third-party beneficiary clauses as well as its explicit recognition that land investment contracts are more than just about land but also extend to other issues including water, oil, woods and spiritual values. He recommends that the Legal Guide take into account: (i) the financial and organizational cost of involving local communities in contract drafting; (ii) to think more carefully about the role of the state in defending the private property of investors from any disturbance and consider whether a state should no longer be bound by a contract whose performance is linked with breaches of its international and national obligations. This would overcome characterizing local community challenges to land investment contracts as a cost to an investor rather than as constituting breaches of internationally and nationally protected rights; (iii) to embrace termination clauses that would allow a state to terminate a land investment contract that would be in breach of the protection, respect and fulfillment of human rights; (iii) to consider the extra-territorial obligations of private and public investors in their overseas land investment dealings. Tomaso ends his blog posts with reflections about how the Legal Guide can be used by activists and others as an additional tool of engagement and challenge to the nature of agricultural land investments.

Titilayo Adebola's post reflects on the Legal Guide from the perspective of access to food and intellectual property rights. While praising the proposed human rights impact assessment of land investment contracts, Titilayo argues

that the Guide seems to prioritize food crops produced in such investments be primarily destined for foreign as opposed to domestic consumption. She notes this concern is vital especially in Africa where many States are heavily dependent on food imports and food aid. For this reason, she argues that SDG Goals 1 and 2 should be prioritized in the Draft to ensure responsible and sustainable investments that improve local food security and that move the ball towards 'no poverty' and 'zero hunger'. For this reason, she recommends that the Legal Guide should have explicit provisions on the percentage of production from agricultural land investments be reserved for domestic consumption.

In addition, she notes the lack of attention to the potential impact of agricultural land investments on intellectual property rights – especially those relating to plant varieties. She notes how agricultural investments have promoted and propelled the introduction of strong forms of breeders rights such as the International Convention on the Protection of New Varieties of Plans, (1991(UPOV) at the expense the rights of small-scale farmers who are in turn precluded from saving, reusing, exchanging or selling farmed saved seeds. This constitutes a threat to their framing practices and livelihoods. This is inconsistent with the VGGT's goals of increasing sustainable food production especially of safe and nutritious food and the promotion of fair and transparent food systems. Titilayo therefore recommends that the Legal Guide should incorporate intellectual rights within its impact assessments to ensure the interests of traditional framing practices, traditional knowledge and access and benefit sharing and small-scale farmers are taken into account. She also recommends systematic attention in the Legal Guide to the impact of agricultural land investments on intellectual property rights alongside considerations such as legitimate tenure rights, human rights, livelihoods, food security and the environment. In her view, the Legal Guide should make provision that would oblige States not to expressly include intellectual property rights provisions in land investment contracts especially those that are favored by large-scale agricultural businesses. Instead, she recommends attention be paid to 'imaginatively designed' *sui generis* intellectual property rights regimes that favor the rights of small scale farmers such as the International Treaty on Plant Genetic Resources for Food and Agriculture 2001, the Convention on Biological Diversity, 1992, as well as the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their

Utilization to the Convention on Biological Diversity, 2010.

Like Titilayo Adebola, Chidi Oguamanam calls attention to the post-cold war consolidation of strong international frameworks for the protections and enforcement of intellectual property rights that favor northern industrial economies; that offer token wiggle room for developing countries and that are insensitive to African specific approaches to the protection of agricultural innovation. He gives the African Union's African Model Legislation on the Protection of Rights of Local Communities, Farmers and Breeders for the Regulation of Access to Biological Resources of 2000 as an alternative model. He regrets that external pressures on African governments from investors especially those involved in large scale agricultural land investments have adopted the pro-industry Union for the Protection of New Varieties of Plants (UPOV). He regrets this western reproduction of intellectual property rights that is inimical to the interests of communities affected by large-scale agricultural land investments. He hopes that the Legal Guide will go towards addressing this challenge.

Nicolás M. Perrone's contribution to the symposium notes that the Legal Guide is welcome because discussions on international investment law tend to focus too narrowly on the outcome of investor state dispute settlement cases. Such discussions he notes, fail to take into account "the distribution of benefits, costs and risks associated with foreign investment." Those benefits, costs and risks include how host states and local communities can achieve a fairer distribution of benefits and as such how to make the law more responsive to the costs and risks of host states and local communities. Perrone recommends three areas that the Legal Guide can develop in greater detail. First, the relationship between agricultural land investment contracts and other laws – here he has in mind the Guide being "more explicit about the challenges posed by some investment awards and other legal orders." Second, he is worried that a focus on contracts as a governance tool poses a risk of consolidating a transactional paradigm that reifies international investment law and therefore poses risks to the relevance of an alternative domestic law model for governing agricultural land investment contracts. While recognizing that the traditional contractual model leaves little to no scope for local community participation and the fact that the Legal Guide recommends creative ways of overcoming this, he argues

that “it does not provide detailed examples of participatory and cooperative structures,” which he considers a necessary first step before they could be implemented. Finally he notes that the dual role of States when they negotiate contracts as facilitators and regulators of foreign investment, is often in tension with the role of the state in ensuring its resources are used to promote the well being of their peoples. He argues that should receive more attention.

In his contribution to the Symposium, Sam Szoke-Burke welcomes the Legal Guide’s embrace of multi-actor contracts that would allow legitimate tenure rights holders to participate in authorizing contract negotiations. This would allow local communities to weigh in early in the decision-making process to help them influence the framing and substance of contracts especially and where a project may create an unacceptably high risk of negative impacts a community may be able to help local communities regain control over their land and resources. But he notes that multi-actor contracts should not be seen as synonymous with free prior informed consent (FPIC). He notes that FPIC applies at very stage of decision-making around an investment. Like Tomaso he notes that power imbalances would likely tilt the bargaining power in favor of investors even in the context of multi-party contracts. That is why he supports innovative ways of funding technical support to ensure that informed negotiations that are also culturally sensitive and that are accessible to community. Szoke-Burke argues that enforceable multi actor contracts, especially those that include a termination clause for material breaches of contracts would help in making investors liable. Ultimately he argues such contracts are likely to be game changers in the way they would help advance the human rights of communities and/or community members to give or withhold their free prior informed consent.

For his part, Philip Seufert of FIAN International, first contextualizes land investment contracts to the growing power and influence of global finance on the economy. The actors involved include banks as well as those that buy the produce grown. He emphasizes the complex investment structures adopted by these corporations must be taken into account in efforts to prevent and address the adverse human rights and environmental issues such as ecosystem destruction accompanied by their investments. In his view there are players not party to land investment contracts that are bear responsibility. For that reason,

he is skeptical that a purely contractual approach would reach all the responsible parties who are able to leverage their 'distant' relationship from the parties to such contracts to escape liability. He therefore calls for more transparency in the complex web of corporate actors involved in agricultural land investment contracts to more accurately reflect liability of the various players. This he says requires not merely transparency of all the actors involved, but accountability of all actors involved in cases of abuses or harm by they 'affiliates, financiers or actors that are linked to a land deal through the value chain.'

With regard to communities, Seufert argues that effective prevention and access to remedies is critical to deal with human rights abuses by corporate actors. The recommendation in the Legal Guide of grievance mechanisms, he argues risks having corporate actors use mechanisms they control at the expense of using state based quasi-judicial and judicial mechanisms which in his view could be more effective.

Sara L. Seck's contribution to this symposium reflects on the *Zero Draft* of the ALIC Legal Guide in light of 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).* After examining how the IPPC Special Report relates to agricultural land investments, Sara notes that the *Zero Draft* of the ALIC Legal Guide dedicates only a paragraph on climate change, but does not link this to the "human rights implications of climate change, nor is there an attempt to determine what this might mean for business responsibilities under the United Nations Guiding Principles on Human Rights and Business."

Sara is also critical about how the report separates out impact assessments (human rights, environment, economic, socio) without seeking to understand the interrelationship between them. This together with the fact that the *Zero Draft* treat climate change as a small subset of environmental that can be balanced against economic or social concerns is according to Sara 'highly problematic in a time of climate crisis." She therefore recommends that the final text of the *ALIC Zero Draft* should "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*."

Like Sara, Adebayo Majekolagbe is also critical of the ALIC *Zero Draft*'s fragmentation of impact assessments. This he notes departs from the close interdependence of biophysical and socio-economic concerns. He argues that the ALIC *Zero Draft* should focus on encouraging positive steps, relegate trade-offs and mitigation of negative effects as well as set inviolable limits while insisting on multiple reinforcing and durable gains. These are the central components of the type of a Sustainability Assessment that should be adopted in the final version of the Draft.

To round up the symposium, Michael Fakhri's second post also criticizes the separation of the impact assessments in the ALIC Zero Draft for the reasons that Sara and Adebayo allude to, but also because multiple assessments "may or may not be completed, [would be] conducted over different times of the year by different professionals [thereby creating] a disjointed understanding by all parties and a headache as a matter of project management." In addition he regrets that the economic impact analysis does not include institutional analysis about how large-scale agricultural land investments "may alter existing economic institutions such as households, local and global markets, and public administration." He calls for an integrative human rights impact assessment that would require collaboration amongst different types of knowledge-holders and professionals.

On behalf of UNIDROIT, FAO and IFAD as well as all the experts and stakeholders who have been involved in putting together the ALIC *Zero Draft* I would like to thank all the authors of this really great online symposium for the time they spent studying the draft and for their very insightful feedback. This feedback will greatly improve the quality of the final report.

Contributors

Michael Fakhri: Human Rights and Agricultural Land Investment Contracts – Part One

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

Titilayo Adebola: Access to Food and Intellectual Property Rights: Commentary on the Draft UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts

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

Nicolás M. Perrone: The Legal Guide on Agricultural Land Investment Contracts: Moving foreign investment governance in the right direction

Sam Szoke-Burke: Multi-actor contracts: A strategy for advancing community rights to free, prior and informed consent?

Philip Seufert: Land Deals, Contracts and Human Rights: Some Reflections

Sara L. Seck: Climate Change, Land, and the UNIDROIT Legal Guide on Agricultural Investments

Adebayo Majekolagbe: The Environment, Climate Change, and the Draft Legal Guide on Agricultural Land Investment Contracts

Michael Fakhri: Human Rights and Agricultural Land Investment Contracts – Part Two

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