Human Rights and Agricultural Land Investment Contracts – Part One

By:

Michael Fakhri

October 1, 2019

The UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC) resolves a number of long-standing debates in international law. The biggest one it responds to is: what is the relationship between human rights and the transboundary movement of capital? This question is addressed in theoretical terms during discussions about the relationship between private and public law.

In this first part, I share with you how I read the zero draft of ALIC as an answer to this question. ALIC is intended to guide tenure rights holders, commercial lawyers, business people, and governments through contract negotiations between foreign investors and local communities in a way that encourages fair and transparent agricultural land investment transactions. And it does so with an unprecedented commitment to human rights. I provide two examples that

reflect ALIC's commitment to human rights.

In my second part, I draw from a right-to-food perspective, critically push, and provide some constructive drafting suggestions. I appreciate the amount of hard work put into this draft, so my suggestions are meant to work within and build upon the spirit of the document.

It is important to understand ALIC as nested within a series of documents that build upon each other in slightly distinguished ways and from different institutional contexts. You can also appreciate ALIC's accomplishments if you understand it as a document that reflects how UNIDROIT quickly and adeptly filled in the void left by the social bankruptcy of international investment treaties. While discussions at UNCTAD Working Group III are trying to resuscitate investor-state dispute settlement under international investment treaties, this process has yet to address significant global inequalities of wealth and asymmetries of power. Investment treaties as a whole destabilized food security in many host countries and there are some good ideas on how to reform these treaties. But food security is not on the agenda of any investment treaty negotiations. Whereas UNIDROIT has brought forward a workable set of legal principles that can address international investors concerns and also commits to respecting local peoples' rights – before any deal is even agreed to.

UNIDROIT also filled a policy void in international economic law when it responded to the 2007-2008 world food crisis. During this same time people in social movements, NGOs, and the FAO were thinking about the issue in terms of "land grabs" and developing new human rights policies and instruments in response. All this contrasts the work coming out of the WTO under the leadership of Pascal Lamy; as WTO Secretary General, Lamy dismissed any claim that existing international economic institutions may be part of the problem, hardened the categorization of food security as a "non-trade" issue, and disparaged calls to at least reform the WTO. Meanwhile, the UNIDROIT Governing Council in 2009 discussed food security and the Secretariat under the leadership of José Angelo Estrella Faria published *Private Law Aspects of Agricultural Finance* soon after.

Two very different instruments emerged during all this. The *Voluntary*

Guidelines on the Responsible Governance of Tenure of Land, Fisheries in the Context of National Food Security was the product of the reinvigorated Committee on Food Security – which through the support of the FAO had become *the* global place where governments and civil society could give concepts such as food security, right to food, food sovereignty, and agroecology legal and political meaning. The food sovereignty movement had every right to declare the Voluntary Guidelines to be a part of their victory because the social movement achieved what very few have: they negotiated a document through an intergovernmental platform that gave human rights enough substantive meaning to increase local people's leverage in transnational commercial negotiations. Finally, the world had a document that articulated a way to promote multilateral commercial interests but through and not against local laws that secure tenure rights and equitable access to land, fisheries, and forests. It can be understood as a legal instrument that lies somewhere between lex mercatoria and soft law.

From a transnational business perspective, the 2011 UN Guiding Principles on Business and Human Rights, which came out of the UN Human Rights Council, was a success. Starting in the 1970s, multinational corporations felt that they were under assault by human rights campaigns and litigation. This became more acute in the 1990s as people mounted more public campaigns and lawsuits against multinationals, making human rights a necessary part of business risk assessments. The Guiding Principles encouraged multinational corporations to prevent and respond to human rights claims to some degree. A good example is Coco-Cola's first human rights report published in 2016-2017 which opens with a "steadfast" commitment to human rights and explicit alignment with the Guiding Principles. The Guiding Principles established that businesses had a responsibility to respect human rights and encouraged businesses to make human rights integral to internal functions and processes. It, however, left open the question of whether human rights could recalibrate the power imbalance between foreign investors and local communities.

This was the institutional landscape before UNIDROIT when it committed to partnering with FAO and IFAD to address world food security. FAO brought its experience in agricultural development, right to food, and agroecology. IFAD brought experience in finance and investment. And UNIDROIT, which created

the document's Working Group, set the agenda in terms of private law. All documents from this partnership had to align with each institution's doctrines and values. This in effect meant that all ensuing document had to align with both the Voluntary Guidelines and the UN Guiding Principles. These two documents represented the discursive boundaries of the dialogue.

The first document from this partnership was the 2015 Legal Guide on Contract Farming. Even though it primarily relied on international sales law, it nevertheless put human rights in a significant relationship to commercial decision-making. The language is brief but clear and worth transcribing:

> Among the human rights that are closely linked to contract farming, one of the most central is the right to food. … Contract farming's impact on the realisation of the right to food, as well as the impact of the right to food on contract farming, will indirectly depend on how governments incorporate their international human rights obligations into their domestic policies and regulatory frameworks, and directly depend on how contractors and producers include clauses conforming with the right to food in their contracts. As mentioned earlier, *businesses have their own independent responsibility to respect human rights, and this should be reflected in the best contractual practices implemented in the field.* [emphasis added]

In other words, contracts, which outlines parties' expectations and responsibilities to each other, had to conform to things like the right to food. What remained unclear was what international economic and commercial law would look like if it treated human rights not as an external threat but rather as a defining concern.

ALIC, the second publication from this partnership, is in many ways an answer to that question. Here are two examples:

First, ALIC repeatedly emphasizes that land acquisition – especially at large scales – is very risky and socially problematic. ALIC walks through a delicate compromise by not endorsing large-scale land acquisitions but acknowledging that land acquisitions continue to occur. This is a rare international economic legal instrument that does not assume that the transboundary movement of

capital is by definition a good thing. Like the Guiding Principles, ALIC includes human rights as a risk factor. But ALIC provides investors with specific ways they can reduce risk by treating human rights as a matter for contractual safeguards. ALIC also implicitly provides local communities leverage to argue for more time and resources to study an investor's offer and maintain the ability to refuse a deal.

Second, ALIC defines "legitimate tenure right holders" very broadly. Unlike a popular approach at the World Bank (drawing from the work of Hernando De Soto), ALIC does not suggest that existing land tenure systems need to be formalized in a way that makes it easier to buy and sell land. Instead, ALIC, aligning with the Voluntary Guidelines, takes existing formal and customary land rights as a fact that must be respected. For instance, ALIC requires investors to acquire free, prior, and informed consent from indigenous peoples as per the UN Declaration on the Rights of Indigenous Peoples. ALIC takes consent to mean that "indigenous peoples have agreed to the activity that is subject to the consultation." This brings ALIC closer to human rights doctrine than some governments are. For example, the Government of Canada continues to try to empty that doctrine of meaning by interpreting "free, prior, and informed consent" as a duty to notify and not a duty to substantively dialogue or negotiate with indigenous peoples.

In business terms, ALIC teaches businesses to think of land tenure rights in interlegal terms (to use Bonaventura Santos's concept). ALIC does this by explaining how it is in a business's financial and legal interest to "identify the potential influence of factors such as the rights of legitimate tenure right holders or other stakeholders who, while not holding legal tenure rights, have legitimate claims on the land by virtue of customary, indigenous, occupational rules or practices or by the operation of another source of claim over the land."

By bringing forward this interlegal sensibility, ALIC invites the investor to think of their own best interest in broad term and to take the time to understand already-existing, pluralist socio-legal expectations and practices. It also implicitly reminds the investor to take the time to build a relationship with local communities that is buttressed by an iterative understanding of fairness (a core tenet of commercial law). Without such a relationship and appropriate due

diligence, ALIC in effect recommends to the investor and the local community to not pursue the deal – no one benefits from a land transaction that is only made possible by disrupting local people's lives or dislocating them from their homeland.

View online: Human Rights and Agricultural Land Investment Contracts – Part One

Provided by Afronomicslaw