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

By:

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The UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts (The Guide) is a tool to promote responsible agricultural foreign investment. Many international organisations insist that more private investment is needed to meet the sustainable development goals (SDGs). Agricultural foreign investment, particularly, is central to a world with no poverty (SDG 1) and no hunger (SDG 2) (The Guide 2019, 10, 13), but the link between foreign investment and these goals should not be taken for granted. Foreign investment can probably promote these and other SDGs; however, it also creates costs and risks.

A perennial policy question in Global South countries is how to maximise the benefits and minimise the costs and risks of foreign investment (Sagafi-nejad

2008, p. 51). Amongst others, this question is addressed at law and development scholars, posing real challenges yet to be resolved. It is undisputed that the law is implicated in the distribution of benefits, costs and risks associated with foreign investment. But the challenge is how to help host states and local communities to achieve a fairer distribution through law. Some options include designing mechanisms to promote responsible investment, increasing the bargaining power of host states and local communities, or making the law more responsive to the costs and risks of host states and local communities.

The Guide addresses this developmental challenge directly. A problem of international investment legal scholarship is the excessive interest on investor-state dispute settlement (ISDS) and the resolution of individual cases (Koskenniemi 2017, 343). Even when the discussion is broader, focusing on the political economy of ISDS, it often misses the broader developmental challenge. Moral hazard and regulatory chill resulting from ISDS are significant questions from a law and development perspective. The problem, however, is that the focus remains on the cases, ie the systemic implications of ISDS, as opposed to the distribution of benefits, costs and risks associated with foreign investment. ISDS is just the tip of the complex transnational system governing foreign investment. In this regard, the Guide represents a significant step in the right direction. The detailed discussion of agricultural land investment contracts focuses on several issues that are central to ensuring that foreign investment contributes to the SDGs.

Two of these issues are the interaction of different laws and the role of non-state local actors. Salacuse (2013) talks about the three laws of foreign investment: international law, domestic law and contracts. In reality, today, the plurality of laws is even more complex, involving also voluntary guidelines, codes of conduct and other private orders. A web of treaties, laws, contracts and guidelines delineates how law is implicated in the distribution of benefits, costs and risks. The Guide takes this plurality of laws seriously. It focuses on agricultural land investment contracts, but does not overlook other laws, accepting several disadvantages of a transactional model for governing agricultural foreign investment. It also discusses the need to rethink these contracts, criticises their excessive rigidity, and highlights the importance of

mandatory rules (The Guide 2019, 14-5, 18-9, 22-4).

The Guide, moreover, underscores the need to protect tenure rights and local communities from irresponsible investors and global market pressures. For long, non-state local actors were ignored when discussing foreign investment policy questions (Perrone 2016, 383; Perrone 2019, 171). The Guide fills this gap. It examines the interaction of agricultural land investment contracts with local consultation, social licences, impact assessment studies and free, prior and informed consent (FPIC) (The Guide 2019, 35-7). But it does not stop there. It also discusses more dynamic forms of local participation and cooperation before, during and after the investment project (The Guide 2019, 13-6, 27-30). The fundamental advantage of these alternative structures is that control is distributed more evenly, between foreign investors, host states and local communities, creating an incentive for foreign investors to take into account local needs. Perhaps without enough detail, I will come back to this point below, the Guide looks at some participatory alternatives for agricultural investment (The Guide 2019, 15, 31-3).

Unquestionably, the Guide provides host states and other local actors with a comprehensive view of the problems and potential solutions related to agricultural foreign investment. A problem of this broad approach, as it happens quite regularly, is that some aspects cannot be developed in detail. There are three that might deserve more analysis. One is the relationship between agricultural land investment contracts and other laws. Striking a fairer distribution of benefits, costs and risks in the contracts may be pointless if, for instance, investment arbitrators privilege foreign investors' certainty and *pacta sunt servanda* when resolving disputes. Some awards have minimised requirements that make to the existence of investment contracts, such as parliamentary approval (*Bankswitch Ghana Ltd v. Ghana*), or mechanisms to ensure a minimum of state control, like the prohibition to transfer rights without state approval (*Occidental v. Ecuador 2*). ISDS may also block or difficult renegotiations. The Guide cannot change international investment law, but it could be more explicit about the challenges posed by some investment awards and other legal orders.

Closely related is the question of using contracts as a governance tool. The use

of contracts poses the risk of consolidating a transactional paradigm, whereby foreign investors and states are put at the same level when bargaining or when arbitrators interpret the terms of a transaction. A rigid transactional model can be problematic. It may increase the rigidity of the governance structure and clash with domestic law mandatory rules. A transactional model also opens the door for foreign investors to demand – and states to grant – too many regulatory givings, such as tax incentives, normalising exceptions (Cotula 2017, 424). The Guide acknowledges some of these issues, recognising that domestic law would address them better (The Guide 2019, 11). At the same time, perhaps it could go further and elaborate on an alternative domestic law model, which could be contractually supplemented in special circumstances and after complying with specific formalities.

Another weakness of a transactional model relates to the limited or no participation of host states and local communities in foreign investment projects. Foreign investment is generally a dynamic process where information is asymmetrically allocated. State approval, impact assessments, social licences, consultation, or FPIC may serve to give the green light to a project. But these tools may not be enough to ensure a good relationship and cooperation during and after the project. The Guide highlights that structures, whereby host states and local communities have more participation, should be preferred over models where participation is limited to the beginning of the project (The Guide 2019, 13, 15). Joint ventures are just one example. On the other hand, it does not provide detailed examples of participatory and cooperative structures. Discussing these options further might be a first and necessary step to their potential implementation.

The need to explore new governance structures leads, almost inevitably, to the role of the state in foreign investment governance. In international investment law, there is often the assumption that if investment arbitrators got states' right to regulate right, most of the problem would be resolved. An issue, however, is that states usually make decisions that favour foreign investors and domestic elites to the detriment of people's well-being. This dual role of states – as facilitators and regulators of foreign investment – deserves more attention in international investment law scholarship. If states need to comply with minimum standards when dealing with foreign investors, similar standards

should also exist to ensure that natural resources promote people's well-being. The latter is also part of customary international law (GA Resolution 1803/1962). The Guide will promote better public decision-making in the field of agricultural foreign investment, but other initiatives and appropriate enforcement mechanisms might also be necessary.

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