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

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October 9, 2019

The UNIDROIT/FAO/IFAD draft guide on Agricultural Land Investment Contracts is an exciting addition to existing guidance and norms surrounding investor-state (and other) contracts for agricultural projects. One potentially transformative feature is the guide's discussion of multi-actor contracts (also known as "tripartite contracts"), which would include land-holding communities and other legitimate tenure rights holders as a party. Why is this a good idea? What challenges do we face in encouraging more multi-party contracts? And when are such contracts likely to facilitate the fulfillment a community's right to give or withhold its free, prior and informed consent (FPIC) and to meaningfully participate in decision making? This submission considers these questions.

Investor-state contracts for natural resource investments continue to proliferate. In many countries, especially in the global south, governments use

agricultural land investment contracts with companies as vehicles to authorize agricultural production. Such contracts also set out conditions concerning each project's scope and production requirements, environmental and social protections, and taxation requirements (and exemptions), among many other terms.

While there is increasing focus on the substance of such agreements (including guides and models, principles, and studies of specific clauses), less attention has been given to innovations to make *the negotiation* of such contracts more inclusive. The draft guide's discussion of multi-actor contracts is therefore a welcome development. Expanding the parties to a concession agreement can potentially create opportunities for: communities to influence negotiations to protect their rights and interests; all parties to forge consensus and shared expectations; and companies to achieve stable working environments (and avoid the costs and risks associated with community conflict).

Making contract negotiations more inclusive

Communities have long been sidelined from contract negotiations. Their exclusion is very concerning for human rights and for democracy, given the radical effects land contracts can have on laws, lands and lives. Yet inclusion in negotiations will not *per se* address other barriers communities experience when trying to understand and influence the terms of investment contracts. These contracts are technical and often inaccessible, making it hard for communities and their allies to identify entry points for change—both before and after the contract is signed. (Through our OpenLandContracts.org tool, and accompanying guidance, including a recent briefing for grassroots organizations, we try to support local organizations to navigate these challenges.) In addition, communities may not immediately focus on contract negotiations as the key "moment" for protecting their interests, given that: (a) communities usually will quite reasonably want to be involved in decision-making around proposals much earlier than the contract negotiation stage, and (b) if a community perceives a project as creating an unacceptably high risk of negative impacts, it may wish to halt the project altogether, not negotiate a contract that facilitates it.

Multi-actor contracts, then, should not be seen as synonymous with FPIC, which is a right that applies iteratively at every stage of decision-making around an investment. These contracts only offer the possibility of facilitating the granting of FPIC at the *contract negotiation stage* of an investment; FPIC processes will also be needed at much earlier stages of decision making, as well as on an ongoing basis during the operation of the investment if it proceeds. Nonetheless, if communities are open to exploring the potential for hosting an agricultural investment, multi-actor contracts can theoretically give them more influence. (In jurisdictions like Sierra Leone and Ghana, where communities already have the right to authorize agricultural projects on their lands through leases, whose terms can be negotiated, multi-actor contracts won't usually be necessary, and could even reduce the community's influence.) Multi-party contracts can also help to avoid companies and governments thinking of community consent as a binary "yes or no" signal that, once obtained, eviscerates community entitlements to influence and help shape the conditions under which an investment takes place on an ongoing basis.

What else is needed to achieve inclusively negotiated multi-actor contracts in practice?

There will be practical challenges to achieving the multi-actor contracts described in the draft guide. Governments will not easily cede power in jurisdictions that traditionally have excluded communities from negotiations. Extensive organizing, advocacy, and solidarity among communities and their allies will likely be needed. Even where governments decide to respond to pressure to open up negotiations to communities, they may do so with policies or promises that subtly preserve government power while slowing momentum for reform. Vigilance and attention to detail will therefore be needed.

We should also not assume that communities having a seat at the negotiation table equates to an even distribution of power between communities, the government and the company. Companies and, to a lesser extent, host governments usually have extensive experience and access to specialized legal and technical expertise, which they can use to dominate negotiations and secure disproportionate gains from communities. (In one case in Liberia, communities were pressured during negotiations to hand over land to an oil palm company in exchange for benefits as negligible as six toilets.) The

community, on the other hand, may have never negotiated with an investor and may lack sufficient time and resources to properly understand the project's potential impacts and adequately prepare for negotiations.

Given these inevitable power imbalances, multi-actor contract negotiations should be conducted in faithful compliance with FPIC norms. In advance of negotiations, the community must have already provided its FPIC to continue discussions and commence negotiations regarding the proposed project. The negotiation process should then have the express objective of achieving an agreement to which the community provides its FPIC, and all parties should commit to respect any community decision not to consent to project proposals. Like earlier consultations and decision-making, contract negotiations should incorporate: sufficient time for the community to deliberate internally; legal empowerment support to enable community members to understand their rights and what is at stake, and to collectively decide what will best suit the needs of the community's current and future generations; technical support for the community as a whole and for those representing the community in the negotiations; and other support or resources requested by the community. Thought may need to be given to innovative ways for funding technical support to the community. Negotiations must also take place in a culturally sensitive and accessible manner for community members. In addition, trusted and impartial observers may be needed to monitor power dynamics during the negotiations and whether community negotiators are faithfully reporting back to, and representing the concerns of, their community members.

Despite the challenges, multi-actor contracts hold promise for communities wishing to protect their rights and interests by actively influencing the governance of agricultural projects. Unlike many voluntary benefit agreements, multi-actor contracts could endow communities with legally enforceable rights to hold investors to account. This could include the right to revoke the company's authorization to conduct the project for any material breaches of the contract—a consequence any agribusiness would take very seriously. Relatedly, unlike third party beneficiary clauses, multi-actor agreements might enable the community to more concretely influence the framing and substance of contracts, rather than inheriting third party rights whose scope may or may not have been subject to community consultation and co-creation.

As with jurisdictions that respect the right of communities to decide whether or not to lease their land to agribusinesses, the use of multi-actor contracts in other jurisdictions may help communities retain control over their lands and resources. Such contracts can therefore help advance the human rights of communities and/or community members to give or withhold their free, prior and informed consent, as well as rights to self-determination, public participation and information, among others. With the right framing and accompanying interventions, the multi-actor agricultural land contracts suggested in the draft guide could be a game-changer.

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