Land Deals, Contracts and Human Rights: Some Reflections

By:

Philip Seufert

October 10, 2019

Introduction

The following reflections on the draft “UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC)” (henceforth “the draft Guide”) are based on Food First Information and Action Network’s (FIAN) long-standing work on land issues. Since its inception in 1986, FIAN has investigated and documented land conflicts and supported rural communities in the defense and struggle for their lands and other natural resources. FIAN was one of the first human rights organizations that began systematically applying a human rights-based approach to land issues and to conceptualize them as human rights obligations. FIAN’s work is based on case work in support of communities affected by human rights violations, in order to ensure accountability and justice. We also monitor food and land-related policy frameworks and their impact on marginalized groups.

Land deals and “agricultural investments” – some preliminary remarks

Land deals can raise serious human rights issues, particularly when they are carried out in settings where the process, immediate outcomes, and broader, long-term implications are such that they effectively deny land-dependent people from exercising or gaining access to land, water and forest to use for livelihoods or spaces to live in. In such cases, grassroots organizations, social movements and civil society organizations speak of land grabs. While this does not necessarily mean that all land deals are land grabs, it points to the fact that a lot of attention needs to be made to avoid adverse human rights impacts.

According to its preface, the draft Guide does not endorse large-scale land acquisitions, but acknowledges that land acquisitions continue to occur. It further states “that investments involving transactions of tenure and related rights to investors are not the preferred option for setting up an agricultural project” (Preface 3.), which echoes the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (par. 12.6). It is very important that the draft Guide underlines this, but it should further take into account the policy guidance developed by the UN Committee on World Food Security (CFS) in terms of what investment is best suited to benefit small-holder farmers, in particular the CFS Policy Recommendations "Investing in smallholder agriculture for food security" and "Connecting Smallholders to Markets". This guidance clearly calls to prioritize investments by and for smallholders in order to ensure sufficient economic space for them; and that this prioritization is not always compatible with large-scale land acquisitions. Given that the draft Guide uses “agricultural land investments” as a framework for land acquisitions, it is important to acknowledge that many forms of needed agricultural investments lie outside of its scope.

Some important features of land deals

In order to address the human rights issues that arise in the context of land deals, it is important to understand these, as well as their driving factors and actors. We will focus on two aspects, which have proven to be of crucial importance, based on FIAN’s work on concrete cases. We believe that it is important to take the reality of land deals and land grabs as a starting point for any initiative aiming at addressing the issues at stake.

The first aspect that needs to be highlighted is the fact that the current wave of land deals is happening in the context of globalization, or, the financialization of the global economy. By this, we refer to the growing power and influence of global finance on the economy, and its increasing domination over the productive economy. One expression of this is that "behind most large-scale agricultural projects is a web of global actors that make the project possible. These actors include banks and companies that are funding the project, and the companies that are buying the produce being grown or processed by it. All of these actors are necessary to the project's success, and all are aiming to earn a profit from it in one way or another." (Blackmore et al., 2015: 2) Some "investors" or companies are thus directly or indirectly linked to land deals via financing schemes and shareholder agreements, which often involve complex, cascading relationships. Complex investment structures – or investment webs – that involve several actors, subsidiary companies etc. are a key feature of the current rush for land and need to be taken into account for any effort to preventing and addressing human rights issues.

A second critical aspect in the context of land deals is the kind of abuses and violations that is typically linked to them. Our experience shows that in many cases, land deals result in serious impairment of human rights as well as environmental crimes and ecosystem destruction. Any attempts to provide guidance towards more "responsible" land investment projects and to put in place safeguards needs to take into account these patterns of violations.

Protecting human rights with contracts?

The draft Guide focuses on contract law to address the issues arising from large-scale land deals. The core assumption seems to be that getting the contract right allows to prevent harm – or, at least, to ensure remedy in case harm is caused. Such an approach can certainly address certain issues between the parties of a land deal contract. Good contracts can help making the relationships between contracting parties more equitable, and put in place important safeguards and mechanisms to ensure that parties of the contract abstain from certain harmful behavior. However, a narrow focus on contract law has some serious limitations, which are likely to limit the Guide's ability to address key issues related to land deals and ensure accountability in the

context described above.

In the case of transnational investment webs, an approach that focuses merely on the obligations, responsibilities and rights of contracting parties leaves out important actors of a given land deal. Furthermore, it does not address the power relationships within such webs. Simply put: the entity that operates on the ground – and is likely to be the contracting party – is not necessarily the entity that controls the investment. In the majority of cases, it is very likely that other actors that are not party to the contract play an important role, bear responsibilities, and therefore need to be held accountable for negative impacts of a given deal. The draft Guide recognizes to some extent that "investors" may be linked to other actors – paras. 2.12, 2.13 and 2.26 refer to "corporate organization", "affiliates", and "other stakeholders" including banks, insurers and "supply chain participants" – but it does not address the issue of how these can be held accountable. Basing accountability exclusively on the contractual relationship misses the fact that complex and opaque investment webs are used deliberately by transnationally operating actors ("investors") to distance themselves from any type of liability for the impacts of their operations. In practice, this puts the burden on affected communities or individuals to prove the responsibilities and power relationships within such webs in case of harm, which raises significant challenges. In a context of lack of transparency it is in many cases impossible for affected groups to prove the business relationships linked to a given land deal, as a basis for the determination of liability, and to get justice.

The draft Guide's focus on contract law also has limitations when it comes to addressing the impacts a land deal might have on people and communities. As the Guide rightly states, these impacts may well affect people or communities that are not parties to the contract (par. 6.1). In addition, as discussed above, land deals often adversely impact human rights and cause environmental harm, which, however, may not explicitly be part of the contract. As such, the guide's focus on contract law bears the risk to limit the access to remedy by affected communities or individuals, either because they are not contracting parties, or because the harm suffered does not refer to the object of the contract – according to the draft Guide "contractual non-performance" is the basis for remedies (chapter 4).

Effective prevention and access to remedy by affected communities, individuals and groups is a critical issue in the context of land deals. The power relations between an “investor” and communities – but also between a TNC and a developing state – are a key factor that needs to be taken into account in this context. An approach that puts a narrow focus on the contractual relationship between parties is therefore insufficient in order to deal with human rights abuses committed by (transnational) corporate land “investors” and their investment webs. Adding to this, the draft Guide’s proposals regarding grievance mechanisms and dispute settlement risk allowing corporate investors to use their own mechanisms to impede communities to access justice using state based quasi-judicial and judicial mechanisms which could me more effective.

Conclusion

The draft Guide addresses an important and complex issue. Providing guidance to improve land deal contracts is important, particularly wherever there are strong power asymmetries between the contracting parties (e.g. corporate transnational investors and governments of developing countries, or corporate transnational investors and local communities). However, its focus on contract law entails serious limitations that are likely to impede the achievement of the set objectives. In order to effectively respond to the reality of land deals, the draft Guide should thus broaden its approach to contracts, and beyond contract law.

A first element would be to extend the duties and responsibilities arising from a contract to all the existing business relationships that are involved in a land deal. This would mean to move from an approach that asks for transparency of the “corporate organization” (par. 2.12) to one that aims at accountability of all involved actors in case of abuses or harm, be it affiliates, financers or actors that are linked to a land deal through the value chain. In addition, the Guide should propose clauses that impede corporate investors from using internal non-judicial grievance mechanisms to obstruct access to justice by affected communities or people.

Furthermore, the Guide should better take into account that land deals and

their potential negative impacts go beyond contract law, and require a more consistent incorporation of human rights and environmental law. Even though strengthening legal frameworks and standards at national and international level might be outside of the Guide's scope, it needs to be clear about the institutional and legal context that is required to protect and guarantee human rights, as well as the importance of cooperation between states, including needed regulations in commercial and administrative law at national and international levels. This can also contribute to clarify situations of conflicts between sources of international law (e.g. between human rights and investment protection). We believe that also the draft Guide can and should contribute to ensuring the primacy of human rights.

---

[1] The author would like to thank Sofía Monsalve Suárez and Ana María Suárez Franco (both FIAN International) for their contributions to the following reflections.

View online: Land Deals, Contracts and Human Rights: Some Reflections

Provided by Afronomicslaw