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

By:

Bayo Majekolagbe

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The impact of land use on biodiversity and climate change has received increased attention from scholars and policy makers alike. For years, stakeholders have waved the red flag on the dangers posed by unsustainable agricultural and forestry practices and trends. Recently, it was shown that cattle farming and oil seed production have led to major biodiversity losses. While the domains of loss are predominantly in Africa, Asia, Central and Southern America, they were substantially informed by demands in other parts of the world. Any doubt as to the linkage between unsustainable agricultural practices, biodiversity, and climate change should, ordinarily, be put to rest in the light of the findings of 107 leading scientists published by the Intergovernmental Panel on Climate Change (IPCC) in its 2019 special report on climate change and land. They find, in part, that one-quarter to one-third of the

global net primary production (NPP) is, presently, used for food, feed, fibre, timber and energy; one-quarter of the Earth's ice-free land is being degraded by humans; and 23% of total anthropogenic greenhouse gas (GHG) emissions are from Agriculture, Forestry and Other Land Use (AFOLU). It is, therefore, hardly overboard to conclude that global sustainability will remain elusive until common sense sustainable and responsible agricultural land use orientations and practices are developed and adopted.

Promoting responsible agricultural investment is one of the objectives of the Legal Guide on ALIC (the Guide). The Guide elaborates on subjects, ranging from tenure rights to human rights, which should be covered by grantors and investors in Agricultural Land Investment Contracts. While diverse issues arise from the Guide, this blog post focuses on issues with direct bearing on the environment, particularly, impact assessment, biodiversity and ecosystem services, and climate change mitigation and adaptation. I consider the strengths and loopholes of the Guide on the highlighted issues and suggest possible inclusions. Prefatorily, considering that 'sustainability' is a recurrent theme in the Guide and foregrounds most of its provisions, the absence of what this means in the context of ALIC is a minus. 'Sustainability' is not a buzzword to be thrown around, it must be deliberately and thoughtfully applied. Failure to do this informs either a sub-optimal or inconsistent application. The Guide's definition of ALIC also does not specifically reference agricultural lands neither did the Guide provide a working definition of what constitutes agricultural lands. Do they include lands for agricultural bioenergy or are they limited to food agriculture? Bioenergy from agriculture has its peculiar issues, particularly the tension with food security. Despite being one of the most burning issues in exploring the nexus between agriculture and climate change, the Guide is silent on agricultural bioenergy.

Impact assessment (IA) is perhaps one of the most prominent terms in the Guide, appearing 98 times. This is appropriate as IA, properly construed, does not only provide a tool for the appraisal of future effects, but also serves as the confluence of various dimensions of effects, ranging from the environmental to the social. Hence, the Guide explicitly caters to the human rights, environmental, social, and economic dimensions of impact assessment. This approach mirrors John Elkington's triple bottom line (TBL), which itself is a

reiteration of 1987 Brundtland's report's conceptualisation of sustainable development as entailing the society, economy, and ecology. This TBL approach to IA has, however, been criticized as being divisive, making integration difficult, and centering trade-off. More recently, Elkington has advocated for a rethink of the TBL approach he developed and propagated in favour of a more comprehensive framework. Such framework, according to Gibson, *inter alia*, emphasises the interdependence of biophysical and socio-economic concerns, mainstreams the precautionary principle, focuses on encouraging positive steps rather than mitigating negative effects, sets and enforces inviolable limits, relegates trade-offs as options of last resort and insists on multiple reinforcing and durable gains. These are the central components of what is described as Sustainability Assessment which is now gaining global traction.

As drafted, the Guide falls short of the requirements of Sustainability Assessment (SA). For example, its emphasis is the avoidance of negative impacts rather than the advancement of positive outcomes. Although, the Guide mildly refers to going beyond the mere avoidance of negative impacts, its reference to positive effect was limited to creating "mutually beneficial economic relationships with the affected communities". This again lays bare another disadvantage of a TBL approach to IA, as it results in the prioritization of the 'economy' over the environment and other social concerns. The Guide's reference to "mutually beneficial economic relationships" discountenances the fact that land is more than its economic worth to many communities in developing countries. In lieu of its reference to four distinct types of IA, I argue that the Guide should focus on SA, which in turn will provide a platform for the integrated consideration of the various layers of IA. While trade-off is a last resort in SA, it is recognized that it is, often, inevitable. The Guide, however, has not paid attention to how such trade-off should be dealt with in the context of its sustainability mandate. Again, Gibsonprovides us with helpful trade-off rules which can be contextually applied in the ALIC's context. The non-recognition of the need to consider cumulative, regional, and life-cycle effects in the conduct of ALIC IA is also problematic. Hence, the Guide, following the VGGT, calls for "independent impact assessments … in large-scale agricultural land investments". While what constitutes "large-scale investments" is undefined, the wisdom of cumulative assessment is that otherwise benign

investment could be malignant when taken alongside other existing investments. The question, therefore, is not necessarily whether this investment is harmful, but that when its effects are combined with other existing projects or investments, if such can be considered positive and/or unharmful. The Guide seems unpoised to answer this critical question.

Applying SA to ALIC begins with the identification of context specific sustainability objectives. This should be jointly done by grantors, tenure right holders, community stakeholders, and the investors taking a cue from existing framework like Gibson's rules. The idea is to paint a picture of what a community considers as sustainability. An idea which more likely than not would entail concerns which blend the environmental, social, and economic. This collectively designed framework should inform the determination of the need(s) for which an agricultural project is designed and alternatives through which the objectives can be met. The alternatives may pertain to the site, scope or how an agricultural project would operate. A no-project option must also be on the plate. The SA process is even more essential in the ALIC context given than ALIC is fundamentally an economic concern. It is different from community utility projects like a hydro generating plant or road. Invariably, the primary benefit of an ALIC project would be economic. In estimating cost and representing pecuniary benefits, it is necessary to internalize externalities. The cost of an ALIC project must include 'indirect' costs in terms of biodiversity loss and other social implications. This more robust picture as to cost will assist in choosing between alternatives and opting for more sustainable options which might be less expensive when compared to a proposed project with internalized costs.

The Guide further states that the "intersections between climate change and agriculture should be considered when negotiating and implementing … contracts". While highlighting 'mitigation' and 'adaptation', there appears to be more focus on adaptation, hence, the admonition to engage in "climate-resilient agricultural land investment". No doubt, adaptation is crucial piece when considering the climate change – agriculture nexus. However, attention must also be paid to the role of agriculture in mitigating climate change. As noted earlier, a substantial part of global GHG emissions (23%) is from AFOLU. There is an obligation to embark on climate-enhancing agricultural practices

catering both to net zero emissions and/or the sequestration of GHG. Although reference has been made to the Paris Agreement, more specific consideration of initiatives including the Koronovia Joint Work on Agriculture and the 4 per 1000 initiative is necessary. The joint work on agriculture focuses on the improvement of soil carbon, soil health and fertility, improved nutrient use etc., while 4 per 1000 initiative, more specifically, admonishes partners to annually increase the world's soil organic carbon stock by 0.4% in the top 30-40 cm of agricultural soils. These are specific inclusions that can be advised in the Guide in addition to its recommendations on low to zero tillage and multi-cropping. At a more strategic level, it is important that State parties consider the implications of agricultural projects on their nationally determined contributions (NDCs) under the Paris Agreement. The Guide should reflect contribution to the actualization of a State's NDC as one of the considerations which should be considered when entering an ALIC.

The Guide paid limited attention to conservation and deforestation. While forest and forestry appear a few times in the Guide, concepts like deforestation, afforestation, and reforestation are completely missing. This is surprising considering that agricultural use is primarily responsible for deforestation, and consequently, climate change and biodiversity loss. The Guide, which appears to have taken a broad-brush approach to conservation, should discourage deforestation and the cultivation of areas with high and long-term carbon sequestration potentials like peatlands. The increasing competition for land and its implications for sustainability and food security is also unmentioned in the Guide. This concern mandates an innovative approach to contracts for agricultural lands. Contract models allowing for integrated and/or efficient use of lands should be incorporated into the Guide. One way this can be done is for grantors to convey use-specific rights to investors, while retaining the right to subsequently donate rights for other compatible usages. Sustainable use-based conveyance will not only ensure efficiency and limit further encroachment on uncultivated and forested lands, it would also likely result in more profit for landowners.

One of the three objectives referenced in the introductory paragraph of the Guide is to provide Guidance for ALICs to promote "responsible agricultural investment" (RAI). I have made some observations in this blog. I reiterate a

few. The working definitions of sustainability and agricultural land in the context of ALIC are needed in the Guide. While reference to RAI as an objective is positive, it is necessary to make sustainable investing an explicit objective given its relative specificity compared to responsible investment. Arguably, responsible investment is not the same as sustainable investing. Financial return is the substance of the former, while the latter centres sustainability, particularly, ecological integrity. A sustainability objective will foreground sustainability-based assessment in lieu of a traditional impact assessment mode which is founded on the triple bottom line approach. Centering 'sustainability' as a key objective, also, makes a no-contract decision a necessary option when it is shown that a prospective project endangers the environment or at-risk-ecosystems. This option appears not to have been considered in the Guide. The Guide on ALIC provides an opportunity to rethink land use agreements from the ground-up. A wholesale adoption of traditional models will not suffice in a world in dire need of sustainability. Encouraging a more efficient and integrated use of land and promoting a contract model that supports such integrated use is one way to align land contracts to sustainability imperatives. In rethinking this type of agreements, we must not forget to include or encourage the inclusion of clauses which will protect the earth for its own sake and not necessarily the 'services' humans benefit therefrom.

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