Human Rights and Agricultural Land Investment Contracts – Part Two

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In my first essay, I provided some examples of how ALIC has significantly advanced the debate about the relationship between business' capital investments and peoples' human rights. After reading ALIC and its concomitant nest of documents, I am convinced that anyone who still wants to argue that peoples' human rights should not substantively determine financial and commercial decisions will find themselves in the ditches of international legal debates.

ALIC draws from the 2011 UN Guiding Principles on Business and Human Rights and treats human rights as a set of obligations that create a business risk (due to legal liability and political unrest). Such a definition of risk reminds businesses that they must deeply investigate local socio-political conditions. ALIC also implicitly increases local communities' leverage in their human rights

claims when dealing with their own government and foreign investors.

Among the human rights that are closely linked to agriculture land investment contracts, one of the most central is the right to food. The right to food has been very well developed by the food sovereignty movement and through FAO. The result is that the right to food brings with it a particular understanding of risk. Not only would ALIC better align with human rights if it incorporated some these particular notions, but it would also provide businesses and local communities better tools to manage their negotiations and potential relationship.

Today, there is a global consensus amongst the food sovereignty movement, right to food experts, and many people at the FAO, that one of the most effective ways to progressively realize the right to food is through agroecological practices. The parties are in midst of global debate and dialogue over the practical, political, and legal meaning of agroecology. Even with competing conceptions at play, ALIC can still take away some basic principles from the global consensus about the right to food's inherent link to agroecological practices.

Agroecology is not new. It is a recent technical term reflecting communal practices that have spanned generations. It assumes that how we eat and make food is an everyday dialogue and transaction amongst all beings. It is a way of always appreciating how we are always within nature and does away with the arrogant assumption that we can control, exploit, or overcome nature – a defining and dangerous assumption in international law. Agroecology also eschews analytical distinctions amongst the different spheres of life and treats questions of fairness and biodiversity as intertwined constitutional concepts.

Agroecology draws from the knowledge of food-makers who regularly interface through different biomes, whether they be farmers, workers, hunters, or cooks. These are the people that understand the give-and-take of interspecies transactions and environmental change. Now, due to new patterns in the climate, people need to adapt to change at faster rates and at an unprecedented scale. This rapid change means that a growing number of people are living in new biomes without moving from their location, or have to

leave their homes because of political and social responses to climate change. This also means that shared understandings of risk are quickly changing every day.

As a result, ongoing disclosure duties are more necessary than ever to ensure that the relationship between investors and rights-holders remains as transparent, beneficial, and fair as possible. So, impact assessments are only going to become more important. ALIC identifies four types of impact assessments relevant to agricultural land investment contracts: (a) human rights (b) environmental (c) social (d) economic [as a drafting quibble, it would be nice if paragraph 2.95 reflected the order in which they appear later in the text].

In practice, each of these impact assessments would be conducted by a different type of expert. Separating out these assessments as different, however has unfortunate legal and analytical implications. As a legal matter, each impact assessment derives from a different source of authority and a different degree of obligation. This creates a hierarchy of impact assessments in terms of how mandatory they are. Here they are in ascending order in terms of investor impact assessment obligations:

1. **human rights assessments** must be conducted as a matter of legal responsibility and duty (and not just part of risk management) (2.106);
2. **economic assessments** may be used, but then the same provision notes that according to the Voluntary Guidelines and CFS-RAI Principles an investment in land *should be subject* to an economic assessment – this discrepancy between permissive and normative language should be addressed and be made consistent with the Voluntary Guidelines and CFS-RAI Principles (2.115);
3. **environmental assessments** are encouraged as per the CFS-RAI Principles (2.111); and
4. **social assessments** are least mandatory and are described in the aspirational terms of “less common but …growing in practice” (2.113).

As a practical matter, it is easier to deal with one system of authority than multiple ones. As a doctrinal matter, human rights should be central to all assessments. The Voluntary Guidelines consistently references social,

economic, cultural, environmental rights and concerns as a singular commitment reflecting human rights' inseparability. In fact, ALIC's language addressing environment and social assessments include provision for determining and respecting local parties' rights. It is legally inconsistent, however, that ALIC's description of economic impact assessments makes no reference to rights.

It is also analytically problematic that all the different types of assessments are broken up. Multiple assessments, that may or may not be completed, conducted over different times of year by different professionals creates a disjointed understanding by all parties and a headache as a matter of project management. Agroecological practices derive from integrative thinking and do not promote separating distinctions. Even though ALIC is specific as to what types of questions each type of assessment may address, the most actionable type of knowledge in this context is the kind that includes all spheres of life, presented in a cohesive and concise style, and can be readily operationalized by food-makers.

My final point is about how the economic impact assessment is defined very narrowly. Not only does it not include any reference to rights, but it mostly measures effects in terms of price, value, and profit. An economic impact assessment, in order to be more complete, must include an institutional analysis. Such an analysis examines how certain large-scale transactions may alter existing economic institutions such as households, local and global markets, and public administration. Such an evaluation should also look to how a project may exacerbate or create new inequalities that cut across categories of gender, race, and class (and not just a measure of income difference or a matter of advantages/disadvantages). The way ALIC is now drafted, parties are still able to rely on economic assessments that treat things like human rights, environmental, and social concerns as externalities; this can create a narrow assessment of parties' interests. A human rights analysis, however, requires that such concerns be assessed as a whole pushing parties to understand each other's expectations and interests as fully as possible.

I recommend that ALIC put forward that investment in land should be subject to a comprehensive human rights impact assessment and that all on-going

effects, responsibilities, and duties be continuously monitored. The task would then be to spell out what a comprehensive human rights report should comprise. For example, ALIC already includes some excellent language about the integral role that results from environmental impact assessments can play in determining whether a deal will happen (3.115), affirming that parties have the duty to cooperate during the monitoring of all contract obligations (3.122), and encouraging parties to determine in advance what reports should be made publicly available and what information should be confidential (3.161; 3.166).

The general principle that reflects broad international consensus is that a comprehensive human report must address and interlink an account of social, cultural, economic, and environmental rights and interests. If ALIC framed a comprehensive human rights impact assessment in those terms, it would connect to growing research that already examines issues in those terms. ISO 2600 and 1400 are also good places to start.

Such an integrative human rights impact assessment should not be taken as an opportunity to reduce transaction costs or cut corners. It requires collaboration amongst different types of knowledge-holders and professionals. If ALIC aligns all these disclosure requirements, it may generate a more globally robust and coherent impact assessment practice that is responsive to climate change. In sum, it is more legally sound, analytically useful, and logistically efficient for all parties to work together to produce an integrated human rights impact assessment on a regular basis instead of a disjointed set of impact assessments at different times of year.

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