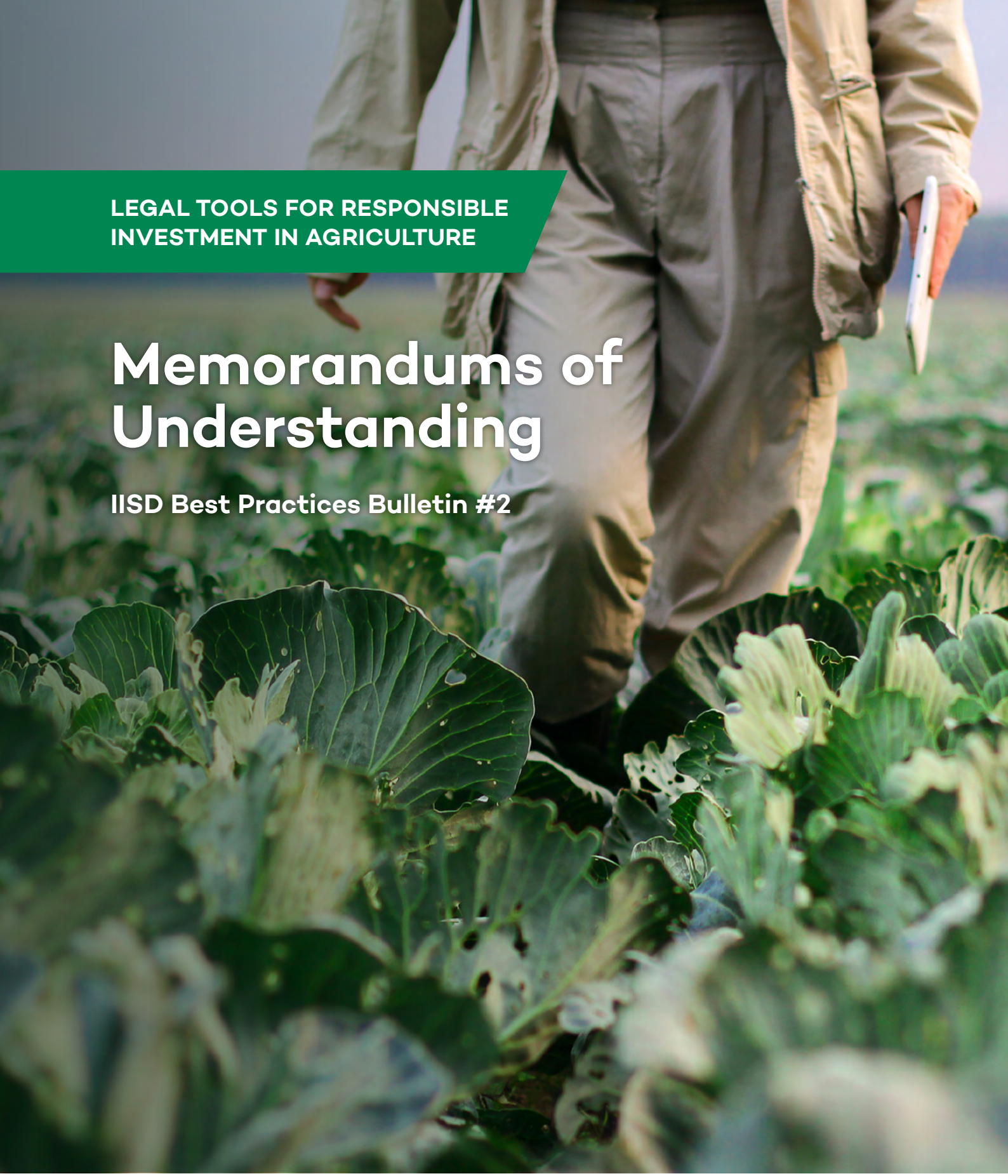

LEGAL TOOLS FOR RESPONSIBLE INVESTMENT IN AGRICULTURE

Memorandums of Understanding

IISD Best Practices Bulletin #2

Sarah Brewin

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International Institute for Sustainable Development

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In this best practices series on legal tools for responsible investment in agriculture, the International Institute for Sustainable Development (IISD) analyzes key legal and policy issues arising from the legal instruments that states use to govern responsible investment in agriculture and food systems. These bulletins are designed to help government policy-makers and agricultural investment negotiators understand the benefits, limitations, legal risks, and policy issues raised by different legal tools for investment in agriculture. The analysis and guidance in these bulletins are drawn from legal research as well as IISD's experience working with governments and the insights provided by government partners.

IISD hopes that the information provided here will support agricultural investment negotiators, government lawyers, and policy-makers in deciding whether and how to use a certain legal tool to help achieve their country's sustainable development objectives for investment in agriculture and food systems. By doing so, IISD aims to level the playing field in agricultural investment negotiations and ensure access to the latest thinking and approaches.

The guidance in this bulletin does not replace specific legal and financial advice from local experts, a close understanding of the domestic law, or the development of a rigorous business case for why a legal tool is appropriate for a given agricultural investment project.

1.0 Introduction

A memorandum of understanding (MOU) is often the first formal step toward a collaboration between a host government and a private, typically foreign investor for an investment project. In the context of agribusiness investments in developing countries, this early phase is a crucial one, as there are many important precontractual steps needed to ensure that the investment is made and operated responsibly, in a way that respects legitimate tenure rights and safeguards the interests of local communities. Despite this, many MOUs are rushed or not carefully vetted, as they are seen as "soft" agreements that do not bear legal consequences and that mostly serve to provide comfort or assurances to the investor. This practice represents a missed opportunity.

Like all legal instruments, the way MOUs are developed and used and the details they contain or omit will determine their benefits, limitations, and risks. Depending on how they are drafted, MOUs can create unexpected risks and unwanted legal effects for host governments. Conversely, host governments can carefully craft MOUs to minimize these risks and help promote effective governance for responsible investment in agriculture. Host governments can use MOUs to create a roadmap for key pre-contractual due diligence steps which can support better outcomes for all stakeholders in responsible agribusiness investment projects.

This Best Practices Bulletin provides guidance for host governments on how to avoid legal risks associated with using MOUs and how to use MOUs to help govern and promote responsible investment in agriculture.

2.0 What Is an MOU?

An MOU is an agreement that sets out the terms of an intended collaboration or common understanding between two or more parties. It is either non-binding or only binding for certain non-substantive elements (more on this below). An MOU will typically set out the goals of the collaboration and define the parties' roles and responsibilities, the scope of the project, and its expected outcomes, with an aim to facilitating further negotiations toward a more comprehensive binding agreement.

In the context of investment in agriculture, these parties are typically an agribusiness investor and a government department, ministry, or agency responsible for investment in agriculture. An MOU can also be called a "letter of intent," a "letter of potential interest," "heads of agreement," or a "term sheet" (Parnes, 2017). An MOU usually contains the terms of a collaboration or understanding "in principle." This means it sets out the general idea for a project before all the finer details have been agreed (Victorian Government Solicitors Office, 2008).

3.0 Why Do States and Investors Use MOUs?

An MOU can be a useful document for a host government. It can provide a roadmap or framework for future negotiations with an agribusiness investor and help ensure that the investor and the host government are aligned in terms of the broad concept and framework for the project. The process of concluding an MOU can also help to flag any major differences in commercial expectations between the investor and host government at an early stage. It can also spell out initial project details or plans in a way that supports cross-government collaboration on a project—something which is often needed in the context of agricultural investment. For example, input and buy-in for an agribusiness investment project may be needed from the ministries responsible for agriculture, land, water, and rural development, as well as the investment board, tax authorities, and other key economic institutions. Having a clear blueprint on paper for the development of the project can facilitate this complex cross-government engagement process.

In some cases, government officials favour having an MOU for an investment project that is in its early stages—for example, with a new and unknown investor or where the concept for the project is not yet proven. An MOU is often more appropriate and well adapted for this situation. A carefully drafted MOU presents a relatively low-risk, less resource-intensive way to "test the waters" for a project's viability, to signal intentions and overall commitment to collaboration, to align expectations, and to build trust and credibility between the parties. Given most governments' internal approval processes and procurement rules, an MOU is likely to be simpler to negotiate and conclude than an investor–state contract, which may in any event be premature and ill-suited to a project in its early stages.

Some agribusiness investors seek MOUs at an early stage of a potential agricultural investment project. Foreign investors, in particular, may seek the reassurance of a written agreement with a host government, which can instill a sense of confidence that there is a clear and transparent process that may lead to a detailed, binding investment contract. This is especially important to international investors in their dealings with an unfamiliar foreign government. In some cases, investors seek an MOU to help attract additional partners, investment, or financing for a project. An MOU can also be a way of getting publicity for a project or an investor; sometimes they are signed at a special ceremony to which the press is invited.

4.0 What Are Some Risks of MOUs and How Can They Be Managed?

Because a properly drafted MOU is not legally binding in material ways, an MOU is often seen as a document that can be agreed and signed in a rushed way, without the usual legal vetting process. Some government officials describe feeling pressured to sign an MOU by foreign agribusiness investors who are on a brief trip to explore investment opportunities in the country. When the investor prepares the text of the MOU (a problematic practice that occurs in some countries), the host government's lawyers may not always be given enough time to review it. But signing an MOU entails certain legal risks for a host government. A government may unintentionally create a legally binding commitment if they sign an MOU that has all the legal elements of a contract (McNair, 2016). An MOU can also create "legitimate expectations"—a type of international legal right that could be enforced under an international investment treaty.[1] This section explains in greater detail what these legal risks are and how they can be minimized or avoided.

4.1 Avoiding Unintended Binding Legal Obligations

The law of contracts is different everywhere, but in most legal systems, certain essential elements must be in place to create a valid, binding contract. For example, one party must offer to do something, and the other party must accept that offer (International Institute for the Unification of Private Law [UNIDROIT], 2016). In legal systems based on English law, "consideration" (a promise to pay or give something of value) and intention to create legal relations are also essential elements for a binding contract (Allen & Overy, 2016).

In many legal systems, when deciding if a document is a binding contract, the law favours substance over form. This means that a court (if asked to decide whether a document is a binding contract) is more interested in what is inside the document—whether all the essential elements of a binding contract are included—rather than what the document is called.

Importantly, if an MOU contains all the elements required for the formation of a binding contract in the relevant jurisdiction, it may not matter that the document is called an MOU. A court may decide that the MOU is, in fact, a binding contract and may hold the host government contractually liable for the commitments made in the MOU. Therefore, it is important that an MOU is drafted in a way that clarifies the legal positions of the parties to the agreement in light of the local legal tradition (Freiberger Haber LLP, 2019).

One way to do this is to include an explicit blanket statement that the parties do not intend for the MOU to create binding legal relations. For example, the MOU could incorporate language such as that included in a 2008 MOU between the government of the Democratic Republic of Timor-Leste (also referred to as Timor-Leste and Timor Leste in this paper) and an investor in a sugarcane project:

[1] There are also other risks associated with MOUs. These include a sense of "moral" or "psychological" obligation to stick to the terms originally agreed, as well as, in many civil law jurisdictions, a binding duty of "good faith." We do not go into these risks in detail in this commentary.

> This MOU is not intended to create any legal obligations by either party. The proposed project is subject to and conditional upon GTLESTE BIOTECH (sic) meeting all legal requirements set out by the laws of the Democratic Republic of Timor-Leste with respect to the proposed project. *(MOU between the Government of Timor Leste and Gtleste Biotech,* 2008, page 3, paragraph V)

Another way to clarify the legal positions of the parties is to clearly define those provisions intended to be legally binding and those that are not (Victorian Government Solicitors Office, 2008). Instead of a blanket statement that the whole MOU is non-binding, an MOU can set out some clauses which are intended to have legal effect. These are usually "ancillary" (or supporting) provisions rather than clauses containing substantive commitments from either party. It can be useful for both parties for such clauses to have binding legal effects. Some MOU clauses that are often expressed as binding include provisions that cover costs[2] and exclusivity (Parnes, 2017).[3]

Dispute resolution, governing law, and confidentiality are three other MOU provisions that are often expressed as legally binding and that are particularly important to get right from the government's perspective:

- **Dispute resolution.** An MOU typically includes a provision setting out how the parties will settle a disagreement that arises under the binding provisions of the MOU. This should ideally involve alternative dispute resolution within the host state, such as mediation, and, failing that, should resort to the domestic courts of the host state.
- **Governing law.** An MOU will usually have a clause identifying which country's law will govern the terms of the MOU and apply in the case of a dispute. This should always be the law of the host state.
- **Confidentiality.** MOUs often include a clause on "confidentiality." International best practice on the transparency of contracts is increasingly moving away from blanket confidentiality provisions in favour of provisions embedding the principle of transparency and supporting public disclosure.[4] This principle can apply equally to MOUs. A confidentiality provision should state that the existence and terms of the MOU are public information that can be publicly disclosed by the parties, except for sensitive commercial information that can be carefully (and narrowly) defined (Aizawa & Mann, 2021).

In common law jurisdictions (those based on English law), a statement from the parties that an MOU is not intended to be legally binding will usually be enough to ensure that

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[2] For example, an MOU might specify that each party is responsible for paying their own costs of carrying out the MOU, such as paying for advisors, preparing documents, practicing due diligence, and preparing feasibility and other studies.

[3] An MOU could contain a clause stating that for a defined period (e.g., 18 months) the parties will not engage in activities that could undermine or conflict with the common understanding expressed in the MOU. This might include, for example, not engaging in negotiations with third parties for the same or a similar project, or not selling or leasing the proposed project land (Parnes, 2017).

[4] See, for example, the Ghana Petroleum Register (https://www.ghanapetroleumregister.com/), Nigeria's public-private partnership contracts disclosure web portal (https://www.icrc.gov.ng/services/ppp-contracts-disclosure/), and Liberia Extractive Industries Transparency Initiative (https://www.leiti.org.lr/).

the MOU will not be interpreted by a court to be a contract (Ashurst, 2016). But in some civil law jurisdictions, this kind of statement may not be enough. In these cases, the MOU may be construed as a binding early-stage agreement that can trigger an obligation to act in good faith (Parnes, 2017). "Good faith" is a broad-ranging obligation that can give rise to legal liabilities.[5] In these jurisdictions, it is particularly important for government officials to proceed with caution, and with legal advice from national lawyers, when using MOUs.

4.2 Avoiding Overly Broad Government Commitments

In addition to explicitly clarifying the non-binding nature of an MOU, or distinguishing binding from non-binding provisions, it is important that an MOU avoids overly broad or generous commitments from the host government to the investor. Avoiding these types of commitments can reduce the risk that the investor may attempt to argue in court that the MOU is a binding contract and can reduce the host government's legal liability if the MOU is found to constitute a binding contract. This approach can also minimize the risk associated with any interaction between the MOU and the host state's international investment treaty obligations (explained further below in Section 4.4).

There are several assurances that an investor may seek to include in an MOU at an early stage of an agribusiness investment project, including in relation to land tenure rights, operating permits and licences, and fiscal or tax incentives (Fiedler et al., 2021). These are three key areas where a host government should be especially careful to avoid making overly broad, generous, or unqualified commitments in an MOU.

A) Land Tenure Rights

An agribusiness investment contract will often entail a lease of land or some other transfer of tenure rights to an investor. As such, investors often seek commitments from the host government that it will help the investor to identify potential areas of land that could be suitable for the project, or even that it will "provide" or "make available" such land. It is understandable that an investor would seek this kind of assistance and facilitation, especially in an unfamiliar country where the land tenure system may be seen as complex or opaque. However, given the inextricable link between land and tenure rights, human rights, and food security, it is crucial that any provisions as to land be properly framed with deference to these critical issues.

It is important not to draft an overly simplistic MOU provision that gives an investor the impression that the host government will choose from several unencumbered plots of arable land and hand the title over to the investor. Rather, the MOU should clarify that the process of identifying possible areas of land for the investment project will be carried out in consultation with legitimate tenure rights holders, members of the local community, Indigenous peoples, relevant levels of government, and other stakeholders likely to be impacted by the project (Food and Agriculture Organization of the United Nations [FAO],

[5] For example, per Article 1.8 of the UNIDROIT Principles, the obligation of good faith requires a party to refrain from acting inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

2022). It should be specified that the process of identifying potential land for the project will be done transparently, in line with relevant national sectoral policies, and in accordance with national laws (FAO, 2022). Where any subsequent transfer of tenure rights would be subject to authorization processes, such as parliamentary approval, this should be clearly stipulated in the MOU provision (FAO, 2022). Doing so will help to safeguard against the violation of tenure rights, as well as managing an investor's expectations as to the appropriate processes with regard to land, mitigating against potential misunderstandings or disputes with the host government.

B) Permits and Licences

The host government may consider it appropriate to agree to support an investor in getting the necessary operational permits for an agribusiness project—a key concern of many foreign companies investing in an unfamiliar regulatory environment. This is a provision that needs to be drafted with care and in a way that could not be read as an entitlement for an investor to be granted a permit. For example, the MOU could state that the host government will, "upon request by the investor, endeavour to assist the investor to obtain an applicable permit, subject to the investor making a timely application and paying any applicable fees, in accordance with the applicable laws" (Smaller et al., 2014).

Such a provision could add, "For greater certainty, this provision does not create any right or expectation of the investor to obtain any applicable permit, the issuance of which shall be decided in accordance with the applicable law" (Smaller et al., 2014).

C) Incentives

Fiscal, tax, and other investment incentives are another key area where an investor may seek commitments from the host government in an MOU. It is important that the host government carefully retain the policy space to a) make investment incentives contingent upon any key criteria and application processes set out in the law and b) change the laws providing an incentive, in order to phase it out or to revise it. The MOU should avoid overly broad language that reads as an absolute right of the investor to obtain an investment incentive. An example of such overly broad language can be found in a 2013 MOU between the Government of Sierra Leone (GOSL) and Genesis Farms:

> GOSL agrees that GENESIS FARMS' (sic) whole business is recognized as an agricultural enterprise and that GENESIS FARMS *will be granted* benefits and incentives at least equivalent to those enjoyed by any other business operating in the agriculture, forestry or bio-energy sectors [emphasis added].[6]

An MOU should also avoid setting out in detail any fiscal, tax, or other incentives as provided for in the law, as the substance or even the title of that law may later need to change. For example, a clause of an MOU providing that "all Fixed Assets shall be subject to capital

[6] *MOU and Agreement Between the Government of the Republic of Sierra Leone and Genesis Farms Sierra Leone Ltd.* (2013). Section 4, Open land contracts. https://www.openlandcontracts.org/contract/ocds-591adf-6561806963/view#/pdf

allowance up to 40% as provided for in the Income Tax Act 2000 (as amended)"[7] could instead be stated as "All fixed assets shall be subject to any capital allowance as provided for in the applicable law governing taxation, as may be amended from time to time."

4.3 Ensuring the MOU Does Not Constitute a Binding "Agreement to Agree"

It is equally important to ensure that an MOU is not drafted in a way that could be construed as a binding "agreement to agree," or an enforceable commitment on the part of the host government to enter into a contract with the investor in the future. This can happen in some jurisdictions, especially if an MOU has a "term sheet" or a list of indicative terms that a future contract will include (Andrews et al., 2019).

Language that could be interpreted as a binding agreement to agree includes the following examples:

> Insofar as GENESIS FARMS *(sic)* considers it necessary, GOSL agrees this Memorandum will be given further affect *(sic)* to or implemented in further detail by GOSL entering into such further agreements and taking such further action as GENESIS FARMS may reasonably by request *(sic)*.[8]

> "GOSL supports the Project and agrees to provide such assistance and enter into such agreements to ensure the successful implementation of the project and its funding as [the Company], its shareholders or the funders may reasonably require from time to time."[9]

A host government may have any number of valid reasons to walk away from a proposed investment project. For example, legitimate tenure rights holders in respect of the proposed project land or members of the local community may withhold their consent to the project; the feasibility study may show that the project is not technically or financially feasible; or environmental and social impact assessments may identify major social or environmental harms that cannot be prevented or mitigated. Host governments should retain the right to withdraw support for a proposed project under these types of circumstances.

In addition to avoiding language such as the above that expressly binds the host government to conclude a future agreement, an MOU can include a further clarifying statement such as the following: "For greater certainty, nothing in this MOU constitutes a binding commitment on the part of either Party to enter into negotiations for, or to conclude, a definitive agreement."

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[7] *MOU and Agreement Between the Government of the Republic of Sierra Leone and Sierra Land Development Ltd.* (2013). Page 9, section 7(f), Open land contracts. https://www.openlandcontracts.org/contract/ocds-591adf-2317427356/view#/pdf

[8] *MOU and Agreement Between the Government of the Republic of Sierra Leone and Genesis Farms Sierra Leone Ltd.* (2014). Section 5, Open Land Contracts. https://www.openlandcontracts.org/contract/ocds-591adf-6561806963/view#/pdf

[9] *MOU and Agreement Between the Government of the Republic of Sierra Leone and Sierra Land Development Ltd.* (2013). Appendix, paragraph 1, Open land contracts. https://www.openlandcontracts.org/contract/ocds-591adf-2317427356/view#/pdf

4.4 Avoiding the Creation of "Legitimate Expectations" Under International Investment Treaties

Depending on the nationality of the investor (as well as its shareholders, holding company, and individual owners), the investor may be entitled to legal protections contained in a bilateral investment treaty (BIT) or other investment agreement.[10] BITs create powerful rights for investors to sue host governments using a dispute resolution process called international investment arbitration. This can be a slow, expensive, and unpredictable process that can lead to high financial liabilities for the host government in terms of multi-million-dollar (sometimes even multi-billion-dollar) compensation awards (Bonnitcha & Brewin, 2020). Some of these treaty-based investment disputes have involved commitments made by host governments to investors in MOUs.[11]

One of the rights usually provided in BITs is the right to "fair and equitable treatment" (FET). The concept of FET has been broadened over the years, expanding it beyond notions of denials of justice, abuse of rights, and discrimination, to include much broader and vaguer concepts, such as an investor's "legitimate expectations" (Malik, 2009). Many arbitral tribunals that hear BIT claims have found that specific representations made by a host government to an investor, including in a written contract or agreement like an MOU, will give rise to "legitimate expectations" that are protected by the FET clause and enforceable through arbitration.[12]

The upshot of this is that an MOU should explicitly exclude this concept of "legitimate expectations." This will help to prevent an investor from using a BIT's FET clause to argue that the MOU gave rise to a legitimate expectation—for example, the investor's expectation of a contract being negotiated, a permit or approval being awarded, or an incentive being given. This could be done through language such as the following: "The investor expressly acknowledges that the host government is not creating any legitimate expectations to induce the investor to make its investment."[13]

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[10] For more information on international investment treaties in the context of agricultural investments, see Brewin, S., Berger, T., & Coleman, J. (2018). *Agricultural investments under international investment law.* https://ccsi.columbia.edu/content/agricultural-investments-under-international-investment-law

[11] See, for example, *Ras Al Khaimah Investment Authority (RAKIA) v. India (2016) UNCITRAL, PCA;* Williams, Z. (2017). *Emirati investor files UNCITRL BIT arbitration against India.* IAReporter (subscription required). https://www.iareporter.com/articles/emirati-investor-files-uncitral-bit-arbitration-against-india/; *Impresa Pizzarotti & C. S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/19/14;* Garrigues. (2019, June). Regional overview: Middle East and Africa. *International Arbitration Newsletter.* Lexology. https://www.lexology.com/library/detail.aspx?g=1ffee77b-fc46-49e0-9712-3aa054182ee9; *KazTransGas JSC v. Georgia, PCA Case No. 2017-22.* UNCTAD Investment Dispute Settlement Navigator. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/821/kaztransgas-v-georgia; *Legacy Vulcan LLC v. United Mexican States, ICSID Case No. ARB/19/1;* Bohmer, L. (2019). *US investor in Mexican limestone quarry makes good on earlier threats to initiate NAFTA arbitration.* IAReporter. https://www.iareporter.com/articles/us-investor-in-mexican-limestone-quarry-makes-good-on-earlier-threats-to-initiate-nafta-arbitration/ (subscription required).

[12] See, for example, *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15 and MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7.*

[13] This language is adapted from language contained in Order 88631 In the Matter of the merger of AltaGas Inc. and WGL Holding Ltd., April 4, 2018, Public Service Commission of Maryland, Case 9449, as cited in Aizawa and Mann (2021).

For even greater certainty, to protect the host government's right to regulate in order to address new challenges that come up in the future and to try to avoid FET-related challenges to new regulations, the following language could be included in an MOU:

> Notwithstanding any other provision of this MOU, the parties recognize that the host government retains the full right to enact bona fide laws and regulations that may impact the investment intended to be made by the investor both before and after the investment may be made. Nothing in this MOU restricts or alter *(sic)* these rights or creates or implies any limitation on the host government with respect to future measures in this regard. (See Footnote 12.)

Arbitral tribunals have found that "legitimate expectations" can also be created through oral statements or other written commitments from the host government to the investor, especially those made by senior government officials.[14] These types of statements may form part of an exchange between a government's officials and an investor before they conclude an MOU. As such, an MOU can contain a clause that aims at cancelling out anything said in those previous exchanges, and confirming that the terms of the MOU capture the whole understanding between the parties:

> This MOU constitutes the entire agreement and understanding between the Parties hereto and their affiliates with respect to the subject matter contained herein, and supersedes all prior or contemporaneous agreements, representations, warranties and understandings of such parties (whether oral or written). No promise, inducement, representation or agreement, other than as expressly set forth herein, has been made to or by the Parties hereto.[15]

[14] *Duke Energy Electroquil Partners & Electroquil S. A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award* (18 August 2008), para 327.

[15] Memorandum of Understanding between the Government of Timor Leste and Gtleste Biotech (2008).

5.0 How Can Governments Use MOUs to Promote Responsible Investment in Agriculture?

As outlined above, the use of MOUs can involve unintended legal effects and entail risks for states. In addition to using careful language to minimize these risks, host governments can also design and use MOUs positively, to better govern early-stage agribusiness investment projects in a way that can help promote responsible investment in agriculture.

5.1 Setting Out Pre-Contractual Steps: Screening the investor[16]

An MOU can map out the steps required of both parties before any binding contract is considered. This can include the investor providing information that the host government needs to be able to undertake timely, thorough, and systematic due diligence and screening of the investor. This step is important because evidence shows that agricultural investment projects have a high rate of failure, especially those led by investors without sufficient and relevant experience (World Bank & United Nations Conference on Trade and Development [UNCTAD], 2018a). Relevant experience includes a track record in the host country and in the same or similar crops or business models, working closely with local communities and legitimate tenure rights holders (World Bank & UNCTAD, 2018a).

Determining whether the investor has access to adequate and properly structured financing for the project is also a critical step in screening the investor (World Bank & UNCTAD, 2018a). In addition, knowing the details of the investor's corporate organization is important to determine if the investor is likely to be covered by an investment treaty or an international tax treaty (UNIDROIT & International Fund for Agricultural Development (IFAD), 2021). This will be important information for the tax authorities to help prevent "self-dealing" or "transfer pricing"—types of tax avoidance that happen between related companies (Smaller et al., 2014, section 7.6.). This information is also needed to allow the host government's lawyers to carefully draft the "change of control" provisions in any investment contract that is later signed (International Senior Lawyers Project & Columbia Centre on Sustainable Investment, 2016, section 2.17; UNIDROIT & IFAD, 2021, section 6.21).

By setting these requirements out in an MOU, the state can reassure the investor that the screening process is well-structured, systematic, transparent, and non-discriminatory. By setting timeframes to produce these key documents and data, the government can ensure it has all the relevant information it needs to make a timely decision as to whether to proceed with its support of the project and to enter into negotiations for a binding agreement. The provisions of the MOU should reflect the host government's screening processes, but could, for example, require the provision of key documents, such as the following:

[16] For a detailed guidance on the screening process, see Bulman et al. (2023).

- Curricula vitae of the project's proposed managers and a description of the investor's previous experience in commercial agriculture or projects like the one being proposed
- Sources of finance for the proposed project, such as audited financial statements of the investor and its affiliates or letters of credit from financing institutions or other funders
- Details of the investor's corporate organization, including the identity of directors and senior company officials, affiliate companies like parent or "sister" companies, and "beneficial owners"—that is, shareholders with a certain amount of influence over the company—as well as the jurisdictions in which those affiliated companies are registered.

The MOU can also include a "catch-all" provision, in which the investor agrees to respond in a timely way to all requests for information, documents, and data reasonably required by the host government to facilitate relevant decisions relating to the project and the government's due diligence procedures.

5.2 Setting Out Pre-Contractual Steps: Screening the investment project

An MOU can also detail the pre-contractual steps for the host government to screen the project proposal itself and to determine the extent of all impacts of the proposed project. According to the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO, 2012), such steps should identify "the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment" (paragraph 12.10, p.22).

Such provisions should be drafted with reference to what is required in the domestic laws and could include requirements for

- A feasibility study for the project (UNIDROIT & IFAD, 2021, section 4.98).[17]
- A detailed business plan based on the findings of the feasibility study (Smaller et al., 2014).
- An environmental and social impact assessment, and a climate vulnerability or climate risk exposure assessment (World Bank & UNCTAD, 2018b; Voluntary Guidelines, para 12.10).

[17] See, for example, the MOU between Timor Leste and Komor Enterprise Ltd. (2008), at https://www.openlandcontracts.org/contract/ocds-591adf-2330745782/view#/pdf.

These documents are essential to ensuring that the agribusiness investment project can be socially, environmentally, and economically successful.[18] The MOU should use careful language to avoid any implication that these documents, once produced by the investor, will be automatically accepted, or approved by the host government. The following language from an MOU between the government of the Democratic Republic of Timor-Leste and an investor for a biofuel project provides a good example of this approach:

> KOMOR *(sic)* Enterprise will prepare a feasibility study of the proposed corn plantation to demonstrate to the Government the profitability of the venture.
>
> The Government will *give due consideration to the review of the feasibility study* and business plan presented by KOMOR Enterprise and will endeavour to facilitate the successful implementation of the proposed venture [emphasis added]. (See Footnote 17.)

[18] Extensive guidance is available on the importance of these documents, how they should be developed, and what they should contain. See, generally, Smaller et al. (2014), section 6.1 (Feasibility study and business plan), and section 6.2 (Impact assessments and management plans); Aizawa and Mann (2021), p. 35 (Sequencing of assessments, approvals, and licences and permits) and p. 33 (The role of the ESIA in due diligence); Cotula, L. (2016). *Foreign investment, law and sustainable development* (2nd ed.). International Institute for Environment and Development, section 4.2 (Environmental and social impact assessment), https://pubs.iied.org/sites/default/files/pdfs/migrate/12587IIED.pdf; International Senior Lawyers Project & Columbia Center on Sustainable Investment (2016), section 2.12.1 (Environmental impact assessments and management plans); Szoke-Burke, S., Knight, R., Cordes, K. Y., Mebratu-Tsegaye, T., & Brinkhurst, M. (2020). *Community-investor negotiation guide 2: Negotiating contracts with investors.* Section 9 (Impact assessments and compensation for known or expected damages), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1077&context=sustainable_investment_staffpubs; UNIDROIT & IFAD (2021), Chapter 3, Part IV (Impact assessments) and section 3.25 (Business plans).

6.0 Conclusion

This Best Practices Bulletin has provided a brief overview of some important issues that agricultural investment negotiators, state lawyers, and policy-makers—especially those from developing countries—may wish to consider when using MOUs to guide investment projects in agriculture through their early stages. It demonstrates how host governments can carefully draft an MOU to avoid creating unintended binding legal obligations, including "legitimate expectations," under international investment law; how to avoid making overly broad commitments; and how to ensure an MOU is not a "binding agreement to agree." It also explains how host governments can use MOUs to map out and support their due diligence processes of screening the investor and proposed project, to help increase the likelihood that the project will be successful for all stakeholders, including legitimate tenure rights holders, local communities, Indigenous peoples and their communities, the host government, and the investor.

It is hoped that this guidance will assist developing-country governments that wish to use MOUs to do so more effectively, in a way that minimizes the legal risks and maximizes the potential benefits of these instruments.

As previously noted, this guidance does not replace the need for local legal and financial advice tailored to a given agribusiness project and national jurisdiction.

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