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The IISD Guide to Negotiating Investment Contracts for Farmland and Water

PART 1: Preparing For Negotiations
PART 2: Model Contract

Carin Smaller with contributions from Howard Mann, Nathalie Bernasconi-Osterwalder, Laszlo Pinter, Matthew McCandless and Jo-Ellen Parry

November 2014

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EXECUTIVE SUMMARY

The IISD Guide to Negotiating Investment Contracts for Farmland and Water is a legal and policy tool for governments and communities that are involved in negotiating investment contracts with foreign investors. The guide focuses on a particular type of contract involving long-term leases of farmland. Part I, *Preparing for Negotiations*, is designed to assist in the preparatory phase. Part 2, *Model Contract*, is structured like an investment contract for the lease of farmland and proposes model provisions.

This type of investment contract is part of a broader legal framework for foreign investment, which operates within three areas of law: domestic law, investment contracts and international investment treaties. Domestic law is the foundation for any potential investment and should govern most of the issues arising, including the legal instrument to be used, such as a lease, licence or permit. The contract will then identify a narrower subset of issues specific to that particular investment, like the size, duration and lease rates. Investment treaties should play the smallest role, dealing essentially with egregious violations such as an expropriation without any compensation.

However, many states do not have all the necessary domestic laws in place and end up negotiating contracts that include a wide range of economic, social and environmental issues that would normally be governed by domestic law. Given this reality, the guide provides options for ensuring that contracts contribute to long-term benefits for all stakeholders and promote sustainable development.

Part 1 covers the preparatory phase. Ensuring adequate time and resources during this phase is a precursor to success in any negotiation. It includes the following steps:

(1) Identifying the country's rural development and food security needs.

(2) Understanding and mapping the land tenure and water rights systems at the proposed site.

(3) Understanding the economics behind the proposed project, including the value of the natural resources.

(4) Conducting a thorough screening of the investor. This includes assessing the investors' financial capacity, business plan, technical expertise, agricultural experience, experience in dealing with local communities and their ability to conduct impact assessments.

(5) Engaging with the community living on and around the proposed project site.

(6) Conducting a high-level screening of potential economic, social and environmental impacts and defining the scope of issues to be covered in a more rigorous assessment.

Part 2, *Model Contract*, is structured like an investment contract. Each section starts with a commentary and then proposes a model provision. The commentary introduces the issue and explains why it is important to include in the contract. The model provisions are inspired by the Model Mine Development Agreement and the almost 80 agricultural contracts that were reviewed for this guide. The majority of contracts (71) are from Africa, six are from Asia and one is from Latin America.

One of the key tools in this guide is the contents page for Part 2. It provides a "checklist" for negotiators of the range of issues that may arise. Negotiators can use this checklist when deciding what to include in their contracts. Where domestic law is fully developed for a given issue on the checklist, there is no need to include the issue in the contract. The contract can simply state the applicability of domestic law. Where domestic law is weak or not yet fully developed, the contract can fill the gap.

Part 2 covers the following issues:

(1) **Rights and ownership.** This section sets out the date and duration of the contract. It defines the rights of the investor to use and access the project site. It includes provisions for a map with geographical boundaries of the project site. The amount of land given and the purpose of the project need to be clearly spelt out and based on proper screening and assessment. The state has the right to access and inspect the project site as needed.

(2) **Feasibility study and impact assessments.** These are the steps the investor needs to undertake before they get possession of the land and permission to start construction and operations. It includes the investor's feasibility study and business plan. It also includes the environmental and social impact assessments and plans for managing those potential impacts. These documents should be prepared by the investor, verified by an independent third party and approved by the government before the contract is signed.

(3) **Financial issues.** Such as land rents, taxes, customs duties, accounts, audits, the debt-equity ratio and transfer pricing.

(4) **The investor's commitment to contribute to economic and social development.** Specifying the investor's development obligations is an important element of the investment contract from a sustainable development perspective, and the one that is most often neglected. This is the part of the contract where the investors turn their promises into legally binding commitments.This includes employment, training the workforce, integrating local farmers through outgrower schemes, establishing processing industries, transferring appropriate technology, purchasing local goods and services, and selling part of the production to the local market. It also includes commitments to the local community through the establishment of a legally binding community development agreement and a local business development plan. The specific approach taken will vary for each investment, and demands on the investor should remain realistic and achievable. There is a danger of imposing expectations or obligations on the investor that are too onerous.

(5) **Environmental obligations**, particularly the obligation to apply existing environmental laws and regulations; a commitment to continuous improvement in production methods; water-use permits and fees; maintaining soil quantity and quality; and managing pollution, particularly from chemical and fertilizer use.

(6) **Stabilization provisions.** These are clauses in investment contracts that freeze domestic laws at the time the contract is signed. The guide recommends against the use of stabilization provisions but understand that some governments might decide to include a limited fiscal stabilization provision and therefore provide an option for a model provision.

(7) **Grievance mechanisms and dispute settlement.** Grievance mechanisms allow the investor to receive and resolve concerns and grievances by local communities and employees. They should be designed in consultation with the community and should be understandable, accessible, transparent and culturally appropriate. Dispute settlement concerns disputes arising between the host state and the investor. From a host state perspective, it is advisable to refer to domestic courts as the forum of choice for disputes arising under the contract, rather than international arbitration. In instances where international arbitration is unavoidable, it should be preceded by an effort to settle the dispute amicably first.

(8) **Terminating the contract or transferring rights to a third party (assignment).** There is a high rate of failure in agricultural projects. Many first-time investors lose money and many first-time projects fail. It usually takes two or three changes in ownership and new injections of capital for the project to become profitable. Given this reality, the sections dealing with termination and transfer of rights to third parties are critical. They guarantee that both the state and investor have a proper exit strategy, if needed.

The IISD guide also emphasizes the importance of transparency. At a minimum, all investment contracts and other relevant documentation should be made public, subject to the redaction of truly confidential business information. Where government takes the lead in setting national standards for transparency, there is a greater chance of acceptance by investors to disclose information because the same standards apply to everyone. If contracts are made public, there is a much greater chance that the terms of the deals will be more fair and balanced. Transparency also reduces the risk for corruption and bribery, and increases the likelihood for community support.

Designing the right contract is only the starting point. There is no guarantee that commitments made will be implemented by the investor and enforced by the government. As with weak enforcement of domestic laws, implementing the commitments and obligations contained in the contract is a much tougher and longer-term challenge, particularly with limited capacity, as is often the case in developing countries. Governments should not underestimate the time and cost involved in monitoring agricultural investments and implementing commitments. Communities and civil society organizations play an important role in monitoring and reporting on government and investor activities and should be assisted through access to information and open channels of communication.

Improving the legal and policy frameworks for investment will help governments maximize the benefits and minimize the risks associated with investment in agricultural land and water. They will support efforts to strengthen food security and achieve sustainable rural development. This guide is one tool to help achieve those ends.

INTRODUCTION

The IISD Guide to Negotiating Investment Contracts for Farmland and Water is a legal and policy tool for government officials and communities that are involved in negotiating investment contracts with foreign investors. The guide focuses on a particular type of contract between states and foreign investors involving long-term leases of farmland. Almost 80 contracts were reviewed for this guide. The majority of contracts (71) are from Africa, six are from Asia and one is from Latin America.

Part 1 is designed to assist in preparing for negotiations. It explains the role of contracts in the broader investment framework; the key issues that governments, investors and communities must grapple with prior to negotiations; and some processes to assist in improving the effectiveness of negotiations.

The most important step to ensuring positive impacts of foreign investment is the ongoing development of domestic laws and regulations. This is the best legal mechanism to ensure a strong reflection of the national interest. However, in the existing reality, contracts negotiated between a state and an investor play a major role in managing government-investor-community relationships.

Part 2, *the Model Contract*, is structured like an investment contract for the lease of farmland and proposes model provisions. It does not create a blueprint for every situation. Each contract will necessarily be different, depending on the nature and location of the project, the domestic legal systems, and the country's needs and realities. The approach in the *Model Contract* is to be comprehensive and cover the range of issues that might arise, but in practice, each country will defer to its own domestic laws to determine what to include in their contracts. The range and detail of issues covered may also not be relevant to all sizes of investment. In this respect, the contents page serves as an important "checklist" for negotiators. Deciding what to include in each contract is the job of the parties both before and during the negotiations.

Importantly, leasing farmland is not the only option for investment in agriculture. There are alternative farming and investment models that have proven to be economically profitable and more socially and politically acceptable than large-scale land investments. They should be thoroughly explored before pursuing large-scale land deals, and incorporated in government investment strategies for the agriculture sector. Joint ventures, farmer-owned cooperatives or businesses, management contracts, contract farming or "outgrower schemes,"[1] although not without their own drawbacks, have become a preferred farming model for many agribusinesses and supermarket retailers. These models provide farmers with secure income and allow them to maintain ownership over their land and water resources (Veurmeulen & Cotula, 2010; Cotula & Leonard, 2010).

Nevertheless, the reality is that contracts are being signed between states and investors (or between local chiefs and investors). This guide provides options for ensuring that such contracts contribute to long-term benefits for all stakeholders involved.

[1] An outgrower scheme is "a contractual partnership between growers or landholders and a company for the production of commercial products" (Mead, 2001, p.5).

The IISD Guide to Negotiating Investment Contracts for Farmland and Water

PART 1
Preparing For Negotiations

Carin Smaller with contributions from Howard Mann,
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1.0 THE LEGAL FRAMEWORK FOR INVESTMENT CONTRACTS

Investment contracts are part of a broader legal framework for foreign investment, which operates within three principal sources of law:

- Domestic laws of the state where the investment takes place (the host state)
- Investment contracts between the investor and the host state (also known as the host government contract)
- International investment treaties between two states: the host state and the home state of the investor (including bilateral investment treaties and investment chapters in trade agreements)

This guide focuses on investment contracts. For a more detailed explanation of the two other areas of law, please see Smaller and Mann (2009).

1.1 Domestic Law

Domestic law is the primary source of law that governs foreign investment. It is also the most important. Domestic laws should spell out what foreign and local investors can and cannot do, as well as how they operate. This might typically include laws and regulations relating to the admission of foreign investors, incentives for foreign direct investment (FDI), taxation, land laws, water rights and rates, requirements for community consultation and an array of laws relating to the potential impacts of the investment on the environment and surrounding community.

Domestic laws can ensure that investment makes a positive contribution to economic development, while at the same time respecting the environment. For example, land laws that provide clear and vested tenure rights will ensure that local communities are not displaced against their will and without compensation. Water laws will ensure an equitable distribution of acceptable quality water to different users without depleting the water source. Environmental laws that regulate the use of chemicals, pesticides and fertilizers will ensure that waterways are not polluted from intensive agricultural production and that soils are not depleted. They will also ensure that chemicals are stored, used, applied and disposed of safely. Labour laws will ensure that protective equipment is available on the job.

Where domestic laws and regulations are fully developed, this should help promote the positive impacts of FDI, and act as a buttress against its negative impacts. But, in many instances, domestic laws governing land, water, chemical use and pollution are often weak. In some countries, the most developed area of domestic law is that which provides protection for investor rights. Even when the necessary array of laws exists, there is often limited oversight and enforcement. For example, most countries have domestic laws for environmental and social impact assessments, but either they are not undertaken for agricultural projects (Deininger, Byerlee et al., 2011), or they are poorly implemented (Mirza, Speller, Dixie, & Goodman, 2014).

1.2 Investment Contracts

In most places where investments in agricultural land and water are taking place, the role of the contract is critical. The contract will set out not just the price, quantity and duration for leasing the land, it will, in most cases, also address a range of other issues. These include taxation and investment incentives for the investors, rights to export products, rights to import equipment and personnel, any associated infrastructure or logistics requirements (e.g., road, rail, shipping), access to and use of water, and other operational matters. In short, the investment contract will identify the key elements of the fiscal and economic bargain relating to the investment. They should also set out the key sustainable development elements: economic, environmental, social and human rights.

Ideally, domestic laws will evolve and develop to take into account all of these issues so that the country can arrive at a situation where the government no longer needs to negotiate investment contracts. For now though, investment contracts play an important role in many countries. Where contracts are adopted in domestic law by the legislature, they can prevail over existing domestic laws. These contracts can undermine existing domestic laws by displacing them with less effective contract provisions, or frustrate the possibility to improve or develop new laws through the use of stabilization provisions described below. If there is an investment treaty, the investor can also rely on the treaty to enforce a contract that is contrary to domestic law, especially if the contract is clear on any given issues and domestic law is not.

Investment contracts also determine which law applies to interpret the contract in the event of a dispute and which court or tribunal will be responsible for resolving a dispute arising under the contract. The three main choices are: (1) the courts of the host state; (2) arbitration in the host state under domestic law; or (3) an international arbitration process. In many instances, investors choose international arbitration to avoid possible biases in the domestic courts and tribunals.

A highly controversial provision found in many investment contracts, particularly in developing countries, is known as a "stabilization" provision. These are clauses in the contracts that freeze domestic laws at the time the contract is signed. This means that the investor is either exempt from applying new or amended laws and regulations or can request compensation from the state for new or amended laws

and regulations that affect the investment. Stabilization provisions may apply for a certain period, or for the full life of the contract and any renewal period.

The most significant independent study on stabilization clauses was prepared in 2008 for the UN Special Representative of the Secretary General on Business and Human Rights and the International Finance Corporation arm of the World Bank. They found that Africa is the region where stabilization clauses were most prevalent. It was also noted that such clauses could vary in scope of coverage (from narrowly defined fiscal issues to all laws and regulations) and degree of impact (either precluding the application of new or changed laws or requiring compensation for them) (Shemberg, 2008).

Stabilization clauses can take the form of freezing clauses (that freeze the law applicable to an investment at the time the investment was made) or equilibrium clauses (that require government compensation for any costs incurred in meeting the new legislation or a waiver from meeting them). In practice, the impact of both types of clauses is the same since most developing country governments cannot afford to pay foreign investors to comply with changes in domestic law applicable to the investment. Both have significant impacts on the ability of governments to enact new legislation in the pursuit of sustainable development. This can include, for example, new environmental measures to protect against runoff of pesticides and fertilizers, chemical bans or increases to the minimum wage. Stabilization clauses also have a chilling effect on governments who wish to enact new legislation for fear of being sued in international arbitration. Non-compliance with stabilization clauses can lead not only to assertions of breach of contract but also to assertions of breach of an investment treaty. Several of the known investor-state arbitrations have concerned changes in environmental laws, zoning laws, royalty levels and the like. The issue is discussed further below in Section 1.3 and in Section 10 of Part 2.

1.3 International Investment Treaties

Investment treaties between states are intended to provide investors from one state investing in the territory of the other state with special protections under international law (Bernasconi-Osterwalder, Cosbey, Johnson, & Vis-Dunbar, 2011). They come in the form of bilateral investment treaties (BITs) or investment chapters in trade agreements. According to the United Nations Conference on Trade and Development (UNCTAD, n.d.), there are now over 3,000 BITs and investment chapters that have been signed. Given the proliferation of investment treaties and chapters, it is likely that a significant percentage of foreign projects in agriculture fall under the scope of an investment treaty. When this is so, the treaties provide a range of rights and remedies for the investor that are additional to those in domestic law or the contract. These rights are layered over the domestic law, which must comply with the terms of the treaty. The investor can challenge any laws or other government activity inconsistent with the treaty (Smaller & Mann, 2010).

Investment treaties have been designed to protect foreign investors from a range of governmental measures. The theory is that they make investments more secure, which helps increase investment flows to developing countries. It is by no means clear that this goal has been met: after 50 years of the use of these treaties, no empirical link between investment treaties and investment flows has been clearly established (Bernasconi-Osterwalder et al., 2011; Poulson, 2010; Sauvant & Sachs, 2009). But it is clear that investment treaties, with their often broadly stated rights for foreign investors, do have a wide range of other potential implications by limiting the policy space of governments to enact new laws and regulations, especially in developing countries (Bernasconi-Osterwalder, Cosbey, Johnson, & Vis-Dunbar, 2011). While the treaties generally include no or very limited obligations for the investors, they usually provide an arbitration process through which their rights can be enforced, a process that has been used by companies against their host state some 600 times to date.

In the agriculture sector, investment treaties may provide foreign investors with additional rights aimed at securing not only title to the land but also its operations. One typical provision found in investment treaties is "fair and equitable treatment." It has become a broadly conceived standard that includes elements of government transparency in decision-making and a prohibition against arbitrary or discriminatory acts. In many instances, tribunals have considered the "legitimate expectations" of the investor as part of the standard. The legitimate expectations can arise from the investment contract or from other forms of commitments given by government officials to an investor. In agriculture, this may mean that by accepting a foreign investment, the host government accepts that they will provide the means for the investor to operate; for example, to draw water for agricultural production, even if it conflicts with existing or future local needs for potable water, small-scale farming, small industries or subsistence uses (Smaller & Mann, 2010).

Investment treaties usually impose a requirement for compensation to be paid if investor rights are expropriated. The international obligation for compensation can also apply to government measures that significantly reduce the operations of the investment without expropriating the land itself. This may create a much larger financial obligation for compensation than under domestic law in developing countries. The matter becomes less clear where

critical rights for operating the enterprise are reduced but not fully taken away. This is a foreseeable situation in relation to agricultural investments, all of which rely upon the availability of water, and many of which are for 50–99-year lease periods. If water resources drop to a level below the requirements of the investment, the host state will not be able to do much, and no compensation could be foreseeable. However, if there is sufficient water available, but the amount allocated to the investor is reduced to meet the needs of other users, reducing water allocations to the investor may be defined by a tribunal as an expropriation of the right to operate the business. It could also constitute a breach of the fair and equitable treatment standard by frustrating the legitimate expectation of the investor (Smaller & Mann, 2010).

One reason the issue of expropriation is so unpredictable is that there are two contradictory directions in international arbitration case law on whether regulatory measures enacted for legitimate public policy objectives, including public health, safety and the environment, can be considered an indirect expropriation and therefore subject to compensation, or a breach of the fair and equitable treatment obligation. This is due to an ideological difference between arbitrators that have decided the cases and the absence of any process to reconcile these competing lines of argument. As a result, it is impossible to determine in advance if a regulation will be classified as an expropriation if it is challenged under a treaty. To a significant extent, it has become a question of who the arbitrators are, and their views of the role of the state and the "normalcy" of adopting new regulatory measures after an investment is made (Smaller & Mann, 2010).

One factor in this area seems to be the extent of the financial impact of a regulatory measure on a foreign investor. Where it is large, there is a higher risk that the arbitration panel will award compensation to the foreign investor. The banning of certain chemicals or pesticides, for example, may require an investor to pay millions more to change agricultural production methods or may result in financial losses from lower yields. While newer treaties often clarify that the degree of economic impact alone should not be determinative of this issue, the great majority of existing investment treaties are silent on this issue (Smaller & Mann, 2010). Governments and communities should be aware of these realities when entering into contracts to lease land to foreign investors.

1.4 The Relationship Between the Sources of Law

The relationship between the three sources of law is critical (see Figure 1). Absent any investment contracts or treaties, foreign investors would be treated the same as a domestic investor under the applicable domestic law. However, when a contract between the state and investor is in place, the investor may acquire, depending on the terms of the contract, additional rights not set out in domestic law relating, for example, to water use, land tenure rights and the right to export all products of the investment. The contractual rights may also replace parts of the generally applicable domestic law. Moreover, where there is a stabilization clause in the contract, the investor may be able to avoid complying with domestic laws that come into force after the date the contract was entered into. The investment treaty may then provide the investor with additional rights aimed at securing not only title to the investment but also its operations—for example, the right to draw water for agricultural purposes. Foreign investors may also acquire additional protections from an investment treaty (Smaller & Mann, 2009).

Ideally, domestic law governs most of the issues arising out of any investment. The contract will then identify a narrower number of issues specific to that particular investment, like the size of the investment, the lease rates, environmental assessment, or management and community-related issues. The contract should not be used to bypass or undermine existing laws. Stabilization provisions should not be used to prevent the application of new laws. Investment treaties should then play the smallest role, dealing essentially with egregious violations such as an expropriation without any compensation.

However, where domestic laws are weak or not adequately enforced, contracts and treaties can have a broader legal reach than the domestic law, and serve to displace or undermine those existing laws. Furthermore, it is often in these circumstances that one finds the largest range of stabilization provisions in contracts, which then restrict governments from adding to the domestic law base, at least as it applies to the investor.

Given these dynamics, it is increasingly important today for developing countries to ensure the ongoing development of their domestic law, which is the best legal mechanism to ensure a strong reflection of the national interest in relation to agricultural investment. Contracts in this respect are not the first best option. However, they are a significant option and one that continues to play a major role in managing government-investor-community relationships. In this respect, the approach of the Model Mine Development Agreement (MMDA) reflected in this guide is to be comprehensive in initial outline, while deferring to domestic law on those issues where it exists.

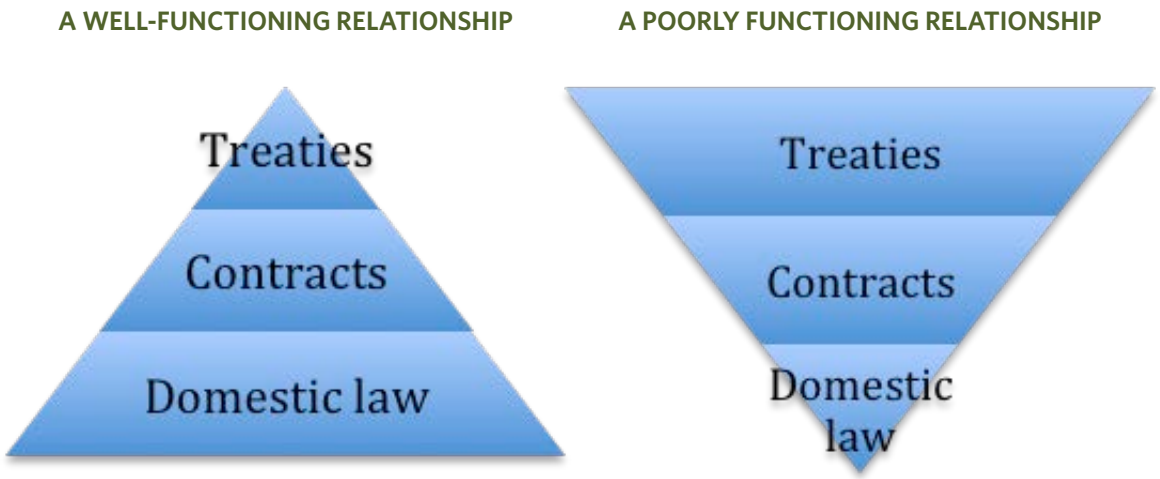

FIGURE 1. THE RELATIONSHIP BETWEEN THE THREE SOURCES OF LAW IN A PYRAMID

1.5 Learning from the MMDA

In April 2011 the International Bar Association's Mining Law Committee published *MMDA 1.0* to help developing country government officials and investors draft mining contracts that promote sustainable development (International Bar Association, 2011). It was developed with civil society, industry and government inputs over several consultative meetings and two rounds of web-based comments on draft documents.

The MMDA is an important reference for people drafting contracts for agricultural investments. There are some striking similarities in the contracts that are being signed by investors from the mining sector and those seeking land for agricultural production. They both involve transfer of land to the investor with the corresponding concerns about rights of local land users. They both involve significant use of water resources and potential pollution of waterways. They both include financial considerations, including payment of rent, royalties, customs duties, taxation, financing and accounting. They also both include trade considerations, including applicable tariffs, allowances for importing machinery and manpower, and the export of goods. This guide builds on the MMDA experience.

One of the most important features of the MMDA is the table of contents. Not everything in the table of contents should be included; however, it provides a checklist for negotiators about what to include and what not to include in the contract. Where issues are already well covered by domestic law, they should be applicable to the investor. Where there are gaps, they can be filled, either in the contract or through a related community development agreement. Other issues may simply not be appropriate for the country's particular circumstances. In other words, the table of contents can be used in the preparatory phase to define the scope of the negotiations.

1.6 Global and Regional Initiatives on Foreign Investment in Farmland

In the past few years, a number of global and regional initiatives have emerged to help governments respond to the massive wave of investor interest in land and water. All of these are voluntary for both investors and governments. Some require annual reporting, but most do not involve an oversight or monitoring role. Nevertheless, they establish important principles that help decision-makers ensure responsible agricultural investments that are transparent, involve communities, respect land rights, contribute to food security, boost employment, and sustainably use land, water and other natural resources. They provide important benchmarks to test investment contracts and monitor projects on the ground. Table 1 provides an overview of the initiatives and the key principles (Smaller, 2014).

TABLE 1. GLOBAL AND REGIONAL INITIATIVES ON LAND AND FOREIGN INVESTMENT

WHAT?	WHOSE INITIATIVE?	KEY PRINCIPLES
Principles for Responsible Investment in Agriculture and Food Systems, 2014	Committee on World Food Security (CFS). The CFS is the top UN forum for reviewing and following up policies on world food security.	Principles to promote investments in agriculture that contribute to food security and nutrition and support the progressive realization of the right to adequate food.
Guiding Principles on Large-Scale Land Based Investments in Africa, 2014	African Union, UN Economic Commission for Africa and African Development Bank	Guidelines for African heads of state on large-scale land investment in the agriculture sector in Africa.
Policy Framework for Investment in Agriculture, 2013	Organisation for Economic Cooperation and Development	Proposes questions in 10 policy areas to help host countries evaluate and design policies to mobilize private investment in agriculture. The 10 policy areas are: 1. Investment policy 2. Investment promotion and facilitation 3. Infrastructure development 4. Trade policy 5. Financial sector development 6. Human resources, research and innovation 7. Tax policy 8. Risk management 9. Responsible business conduct 10. Sustainable use of natural resources and environmental management
Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, 2012	Committee on World Food Security (CFS)	Includes the following goals: 1. Improve tenure governance by providing guidance and information on internationally accepted practices for tenure systems. 2. Contribute to the improvement and development of the policy, and legal and organizational frameworks regulating the range of tenure rights. 3. Enhance the transparency and improve the functioning of tenure systems. 4. Strengthen the capacities and operations of implementing agencies: courts; local governments; organizations of farmers and small-scale producers, fishers, forest users, indigenous peoples; the private sector; civil society; and academia.
Principles for Responsible Contracts, 2011	Professor John Ruggie, UN Special Representative of the Secretary General on Business and Human Rights	Ten principles for governments and investors when negotiating contracts: 1. The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations. 2. Responsibilities for the prevention and mitigation of human rights risks associated with the project should be clarified before the contract is finalized. 3. The laws, regulations and standards governing the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts. 4. Stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the state's efforts to meet its human rights obligations. 5. Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the state's human rights obligations and the investor's human rights responsibilities. 6. Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards. 7. The project should have an effective community engagement plan through its life cycle, starting at the earliest stages. 8. The state should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference. 9. Individuals and communities affected by project activities should have access to an effective non-judicial grievance mechanism. 10. The contract's terms should be disclosed, and the scope and duration of exceptions should be based on compelling justifications.

WHAT?	WHOSE INITIATIVE?	KEY PRINCIPLES
Principles for Responsible Investment in Farmland, 2011	Private sector initiative—pension funds and private equity funds	This initiative was launched by five pension funds. It subsequently opened up to private equity funds as well. Five principles were prepared by eight investment funds for the financial sector: 1. Promote environmental sustainability 2. Respect land and human rights 3. Respect existing land and resource rights 4. Uphold high business and ethical standards 5. Report on activities and progress
Framework and Guidelines on Land Policy In Africa, 2010	African Union, UN Economic Commission for Africa and African Development Bank	Explains why the land sector has not played its primary role in the development process in Africa and the potential role it can play. It lays out key operational processes and measures to develop comprehensive land policies and to track progress.
Principles for Responsible Agricultural Investments, 2009	World Bank, UN Conference on Trade and Development (UNCTAD), Food & Agriculture Organization, International Fund for Agriculture Development	1. Existing rights to land and associated natural resources are recognized and respected. 2. Investments do not jeopardize food security, but rather strengthen it. 3. Processes for accessing land and other resources and then making associated investments are transparent and monitored, and ensure accountability by all stakeholders, within a proper business, legal and regulatory environment. 4. All those materially affected are consulted, and agreements from consultations are recorded and enforced. 5. Investors ensure that projects respect the rule of law, reflect industry best practice, are economically viable and result in durable shared value. 6. Investments generate desirable social and distributional impacts and do not increase vulnerability. 7. Environmental impacts due to a project are quantified and measures are taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them.
Large-scale land acquisitions and leases: a set of minimum principles and measures to address the human rights challenge, 2009	Professor Olivier de Schutter, UN Special Rapporteur on the Right to Food	A set of 11 core principles and measures for host states and investors: 1. Negotiations should be conducted in a fully transparent manner, and with the participation of local communities. 2. Any shifts in land use can only take place with the free, prior and informed consent of the local communities concerned. 3. States should adopt legislation protecting local communities, specifying the conditions according to which shifts in land use, or evictions, may take place. 4. The local population should benefit from the revenues generated by the investment agreement. 5. Host states and investors should establish and promote farming systems that are sufficiently labour-intensive to contribute to employment creation. 6. Host states and investors should ensure that agricultural production does not accelerate climate change and soil depletion or exhaust freshwater reserves. 7. Obligations of the investor should be defined in clear terms and be enforceable. 8. Investment agreements with net food-importing countries should include a clause for a certain minimum percentage of crops to be sold on local markets. 9. Impact assessments should be conducted prior to the completion of the negotiations. 10. States shall consult and cooperate in good faith with indigenous peoples concerned. 11. Waged agricultural workers should be provided with adequate protection, consistent with the applicable International Labour Organisation instruments.

2.0 CHANGING THE NEGOTIATING DYNAMIC

2.1 Meeting the Interests of Key Stakeholders

Investment negotiations should be about both parties getting the best deal possible. The problem starts when one party has an information advantage or better negotiating skills and capacity than the other. This is often the case when well-resourced foreign investors negotiate with developing country host states, particularly for natural resources such as land, water, minerals, oil and gas. There are a number of factors that can affect the results of a negotiation process, including access to information, negotiating skills, resources and time pressure. If the consequence of this imbalance means that one party loses out on too many aspects of the deal, this will not be the best outcome for either party in the long run.

Negotiations can take place in a different context, one where the interests of all parties are adequately taken into account. This requires a shift from a rents-based negotiation (where the sole focus is maximizing profits and minimizing costs) to an interests-based negotiation (where each party has their interests reflected without jeopardizing the others). Table 2 shows in broad terms the various stakeholders and their interests:

TABLE 2: STAKEHOLDERS AND INTERESTS

Investor	Strong return on investment; stable economic, social and political environment, good long-term relations with the community and government.
Government	Rural employment, economic development, improvement in people's livelihoods, increased revenues and maintenance of a sustainable environment for future generations.
Community	Inclusion and consultation on the project plans, social and economic development, including recognition of the human rights of the community members and protection of the environment.

We try to ensure that all of these interests are reflected in the second part of this publication, the *Model Contract*, and that they are binding on the parties. By moving from a rents-based approach to an interests-based approach, there is much more room to negotiate constructive results that contribute to the achievement of all the interests involved. This does not mean that financial profits are unimportant, and indeed, for the investor, they are the bottom line. Rather, it means other interests are also important, and failure to deal with these can threaten the viability of the project, and therefore need proper attention.

2.2 The Value of the Resources

Many countries do not know the real value of the natural resources they are planning to allow to be developed. In other cases, countries may know the value of the resources, but they lack the capital or know-how to develop those resources. Meanwhile, investors have often spent time and money assessing the economic value of the resource they wish to invest in, yet governments cannot expect a potential investor to declare the full value of the resource. Companies negotiate rates of return with governments and will often under-state the true value of the resource to maximize the rates of return and incentives they receive. It may not always be easy to assess the true value of land and water resources, especially when it is perceived to be in abundance. Nevertheless, it is up to the government to take steps to have the best assessment possible, using sound, fact-based knowledge of the value of the resource under negotiation. Those countries that do have mechanisms in place to assess the value of their natural resources are in a much stronger position in the negotiating process.

2.3 Understanding the Needs of the Investor

It is important to understand the needs of the investor to be able to respond properly to the negotiating demands. These may include:

- The returns on investment
- A predictable regulatory environment (rule of law)
- Secure land tenure for the project
- Well-functioning infrastructure (for road, rail and port facilities, storage, water, electricity)
- Access to government services, for example, health and education
- A secure operating environment
- A properly functioning ecosystem

These and other needs are legitimate in the abstract. In practice, achieving them must be balanced with the interests and needs of the state and other stakeholders. It is important for governments to be able to distinguish between the legitimacy of certain needs and the means for meeting those needs. For example, wanting a level of regulatory predictability does not mean that a regulatory stabilization clause is required in the contract.

2.4 The Contract is the Starting Point

Many negotiators understandably focus on the completion of negotiations, and view the signing of the contract as the end-point. In fact, it is simply the starting point of establishing a long-term relationship between the state, investor and community. Negotiators should have this fact in mind. Taking that perspective leads to making long-term interests the key factor, and processes to protect and nurture them become much easier to envisage. A negotiation that adopts this view is much more likely to lead to a successful long-term relationship than one that simply takes the completion of the negotiations as the goal.

3.0 PRE-NEGOTIATING ENVIRONMENT

Investment contract negotiations take place in complex political, socioeconomic and environmental settings. Understanding the relevant pre-negotiating conditions and how they relate to the specific investment contract is critical. It affects the ability of the host country to recognize, articulate and protect its interests, both in the short and long terms.

Some aspects of the pre-negotiation environment are a given, such as agro-climatic conditions. Others, such as availability and suitability of land, must be identified and verified by the host government and the investor prior to the start of negotiations. This section reviews aspects of the pre-negotiating environment that may be relevant and points out their possible links to the negotiation process and the contract itself.

3.1 Priorities for Rural Development and Food Security

Most countries have a national rural or agricultural development strategy. This document outlines the country's strategy for securing their food and agriculture needs, developing the agriculture sector and creating rural employment. The strategy is often linked to broader development objectives, including poverty reduction, food security and rural livelihoods. It typically includes a mix of boosting domestic production for the local economy and expanding exports. A rural or agricultural development strategy is a key input in the investment process. It can help negotiators identify the target areas, groups and crops to promote and prioritize. It can also help determine the appropriate type of investment to attract to the sector: private or public, domestic or foreign, land-based or production-based investments, or a mix.

During negotiations, governments should consider the following issues, among others:

- Rents from the agricultural operations (for land, water and other natural resources)
- Employment creation and training of local persons
- Training for higher skilled employment
- Ensuring new technologies are used and transferred to local persons
- Economic linkages for the purchase of goods and services by the company
- Creation of processing industries and value addition
- Gender equity issues and opportunities
- Health considerations in the community
- Education considerations in the community
- Water management, reviews and allocation
- Environmental protection
- Other social and economic benefits, including improved housing facilities and sanitation for employees and the local community

Setting priorities in a realistic manner is important. Again, the negotiation takes place in a commercial context, governed by market rules on investment. Demands that are too onerous and that price all investors out of the market may be short sighted. At the same time, governments should not shy away from seeking a realistic level of social and economic benefits from the project. There are investors that take social and economic issues into account when preparing their business plans and therefore governments are in a position to require this standard of conduct from other investors as well. Setting out the negotiating goals and objectives will also require careful consideration of what is set out in domestic law and what should be in the contract.

3.2 Screening the Investor

Section 3.1 is about identifying what type of investment is required. This section is about choosing who you want as an investor. Screening investors prior to commencing negotiations will help host governments find high-quality investors and determine whether the investor has the necessary technical experience and financial resources to make the project operational. It is not in the interests of the host government to accept any investor on any terms. There is a high rate of failure of large-scale agricultural investments and it is worth spending some resources to conduct a thorough due diligence of the investor's business model and implementation plan before entering into negotiations. This would require an assessment of the following issues:

(a) The financial capacity of the investor (including cash flow and available funds)

(b) The agricultural experience and technical expertise of the investors (are they first-timers to agriculture or do they have experience with similar crops and sized operations?)

(c) Investor experience dealing with local communities and conducting impact assessments (including the budget to finance these activities)

(d) The suitability and commercial viability of the business plan (Does it match the government's rural development and food security goals? What benefits are expected in terms of employment, production and prices?)

(Mirza et. al, 2014)

Identifying which ministries and government representatives can be involved in screening the investor is crucial. If there is no capacity within the government then it is advisable to use an independent third party.

3.3 Land Tenure Systems

For every land-based investment, the land tenure system is the starting point for determining the terms and conditions in the contract. The issue of land rights is one of the most vexing in relation to agricultural investments. The rights of local landowners and users must be clearly identified before the contract is negotiated. Where land tenure systems are well developed and where rights are clear and vested in local owners or users, they will be entitled to have a say in how the land and water will be allocated to the investor. They will be able to participate in the contracting process, either directly with the investor or as a party to an investor-state negotiation. If the government determines that an investment should take place despite the opposition of a local landowner or user, expropriation might be possible, subject to the relevant laws and compensation requirements. However, it must also be noted that in some countries expropriation laws are controversial, especially if land is expropriated from local farmers to facilitate private agricultural investments.

The bigger problem is that in many states land tenure rights are often not formally recognized, vague, based on local customs or simply non-existent. Instead, title is often vested in the government, in local chiefs or other community structures. This can lead to a situation in which the investor is allocated secure land rights, while local communities are left with weak or non-existent rights.

There is a growing number of reported cases where local communities have been evicted from their land and resettled to make way for an investor, without the necessary consultation and compensation (Deininger, Byerlee, et al., 2011; Human Rights Watch, 2012; Zagema, 2011). Part of the problem here is that national expropriation laws may not recognize the right to compensation for land rights and uses that are important to local communities.

A number of global initiatives have been established to address such scenarios, providing useful guidance for investment negotiators who want to avoid negative impacts on the land rights of local land users and owners. For example, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests propose that:

> States should ensure that existing legitimate tenure rights and claims, including those of customary and informal tenure, are systematically and impartially identified, as well as the rights and livelihoods of other people also affected by the investment, such as small-scale producers (CFS, 2012, paragraph 12.10).

The Framework and Guidelines on Land Policy In Africa (African Union, UN Commission for Africa, & African Development Bank, 2010) proposes "the documentation and codification of informal land rights regimes" (section 3.1.3).

3.4 Water Resource Management

The motivation for investment in farmland is often driven by water needs in the capital exporting country and availability in the host state. Sound domestic water management policies and clear water-use and allocation rights are vital to ensure responsible and sustainable use of water resources in states looking to attract investment to the agricultural sector.

Importantly, the current global regime of investment treaties and contracts provide foreign investors with the legal guarantee needed to safeguard their investment (and to take states to international arbitration if they do not honour these agreements). By accepting a foreign investment, host governments generally accept that they will provide the means for them to operate, for example by drawing sufficient water for agricultural purposes. Unless domestic law clearly provides for periodic reviews of water allocation rights, the right to have access to the necessary means of production may become a guaranteed right of the foreign investor, even if it conflicts with other users (Smaller & Mann, 2009).

Managing water resources usually requires following a water basin management approach where the rights and responsibilities of different actors are defined with the different uses of water in mind. The group of water users may be diverse, and it may include not only domestic but also international partners in the case of shared water basins. They may include both those with formal legal rights and traditional or customary indigenous water rights. It is important to carefully map the range of potentially affected parties and take into account their perspectives as early as from the feasibility study stage of the investment, to avoid unpleasant surprises and conflict.

3.5 Community Engagement

The long-term success of an investment project is dependent on the acceptance of the terms of the deal by the local community. Achieving success here is tied closely to the contract negotiation and a sense in the community that their interests are taken seriously throughout the process.

It has become clear that the relationship between the investor and the local community is of paramount importance to the chances of long-term success or failure

of the project. There is a strong financial and social case for proper consultations with communities, especially when transfer of land is involved (Mirza et.al, 2014). Thus, real engagement with the community is important prior to and during the negotiation process. Engagement is only possible when a deal and the processes leading to it are transparent. Community engagement without access to information is not possible.

Investors and host governments should recognize the importance of community involvement and have appropriate meetings with the local community to ensure a coherent result that the community can support. Such meetings will also help with understanding priorities on many of the critical social, environmental and economic development issues. Primary responsibility should rest with the investor, with appropriate support and oversight by local and national government, and other stakeholders, such as lawyers or civil society representatives (Mirza et. al, 2014). Many communities may not be equipped to engage meaningfully in the consultations and it is in the interest of both the investor and state to ensure the communities have the capacity to engage in the consultation process and properly understand and defend their interests.

Defining who should be included in the consultations is also critical. Only consulting with people who are going to be relocated or those who have legal title to the land can be short sighted. Consultations must include all people affected, including those who may not reside permanently in the area, such as pastoralists or shifting cultivators, and those whose legal rights to the land may not be recognized, but who may have customary rights or traditional claims to the land (Mirza et. al, 2014).

Engagement is not simply a notion of consultation with local communities. There is a need for enforceable community-based agreements, either as part of the principle contract or related to it to ensure enforceability (see Part 2, Section 8.5 for further details). Investors should have a plan prepared prior to the contract negotiations detailing how they intend to, or how they have already, engaged with local communities. This should be presented to the government for verification and approval.

In the *Principles for Responsible Contracts*, the UN Special Representative on Business and Human Rights proposes an effective community engagement plan through the project's life cycle, starting at the earliest stages (Principle 7) (Ruggie, 2011). This includes:

- An inclusive plan with clear lines of responsibility and accountability.
- Consultation with affected communities and individuals before the finalization of the contract.
- Disclosure of information about the project and its impacts as part of meaningful community engagement.
- Knowledge about the history of any previous engagement efforts carried out by either of the parties with the local community regarding the investment project.
- Community engagement plans aligned at a minimum to the requirements of domestic and international standards. For example, free prior informed consent or consultation with those potentially affected may be required.

The Special Representative proposes the following checklist, which is also useful for negotiators (Ruggie, 2011):

- Identify potentially affected communities and individuals before the contract is finalized.
- Agree on the scope of community engagement for different parties, including respective roles, responsibilities and accountability for these efforts.
- Agree on methods of communicating information that is relevant to human rights to affected communities, while adequately protecting proprietary information.
- To the extent possible at the contracting stage, properly cost and provide resources for preparing the community engagement plan.

3.6 Identifying Land and Water for Investment

3.6.1 Availability and Suitability of Land

Identifying suitable and available land for investment requires relevant and credible data. Data can exist in many different forms—statistical databases, maps or qualitative evidence—and it can be scattered across a range of different ministries and agencies. Where national-level government data is not available or the quality of data is poor, it is still possible to get access to information about land suitability from international organizations, online resources and through discussions with local experts and stakeholders, including communities, academics, government researchers, landholders and farmers. Collecting and assessing relevant data and using it both to inform investment strategies and to frame the case for (or against) a particular investment project are essential.

The most significant international tool for identifying suitable agricultural land is the Agro-Ecological Zoning (AEZ) methodology (see Box 1). It was developed by the Food and Agriculture Organization and the International Institute for Applied Systems Analysis in order to assess crop and land suitability. An online data portal can easily be accessed here: http://gaez.fao.org/Main.html.

BOX 1. USING THE AEZ TOOL

The World Bank used the AEZ methodology to undertake a global and country-level assessment of available rainfed land resources in order to help identify the countries where investment was most needed and where it would yield the best results. They identified suitable land for five key crops (wheat, sugarcane, oil palm, maize and soybeans) and linked it to current land use, population density, infrastructure access and other variables, given the current climate. The research found:

- The largest amount of potentially suitable land for rainfed agriculture is in sub-Saharan Africa, followed by Latin America and the Caribbean.
- There is no need to expand into forests to cope with projected increases in demand for agricultural commodities and land.
- Much of the suitable land is located far from infrastructure or in environments that lack technology, thereby proving a challenge for large-scale investments
- There is significant potential for increasing yields on land that is currently under cultivation (rather than bringing new land under production), particularly in sub-Saharan Africa

The World Bank cautions that, for their findings to be relevant, for actual decision making it must be assessed with data on other types of land uses, for example biodiversity, which might be available at the country level. Furthermore, the assessment does not include projections under different climate scenarios.

Source: Deininger & Byerlee (2011)

However, just because land has been identified as suitable for investment does not mean that it is available. Identifying land solely through a technical approach often leads to problems. Land that appears "empty" from aerial photos or satellites is almost never truly empty and can be fundamentally important for local livelihoods. For example, the AEZ methodology does not fully take into account the actual use of land in a given country or region; for instance, it is not clear how land under shifting cultivation and fallow systems are included in the measurements. The availability of fertile land should not be taken for granted. It is unlikely that there is fertile land lying around that is not claimed by somebody (Cotula, Vermeulen, Leonard, & Keeley, 2009).

3.6.2 Availability of Water

One of the first and simplest steps is to track water use in the area where the project is planned. This can be relatively straightforward. A simple meter can be placed on pumps or channels to calculate flow. A slightly more advanced step is to hire an independent consultant to develop a hydrological model to estimate flows (i.e., how much is currently being used and will be used in the future). Some local data will be required to calibrate the consultant's model. It may not be necessary for the study and model to be complicated—simply gauging total available supply and then the major users' impacts would be sufficient. This model could then determine how much water the investors could sustainably withdraw with minimal impact on other users. This information is useful for the relevant ministry, as it sets out specific policies related to water and considers pricing.

Advances in access to information from satellites are making this work easier and cheaper to conduct in poorer countries. For example, in 2011 IISD was contracted with a team of hydrologists from the University of Niamey to develop a watershed model for a wetland complex in central Niger at a cost of US$40,000. The work was done in around four months. In the Dominican Republic, IISD commissioned the Stockholm Environment Institute and the Dominican Hydraulic Institute to apply their Water Evaluation and Planning system for a water basin at a cost of around US$35,000. Capacities within water ministries vary greatly from country to country, but consultants and researchers should be available everywhere. There are also regional research institutes that can take on or facilitate this type of work. Completing these steps will create a baseline for water use, which can then help establish a fee system.

It is important to establish a clear protocol for water allocation priorities under periods of water stress, to make sure minimum safe water supply standards for the local population can be met. In the same way, provisions may be needed for dealing with excess water, which could be due to flooding.

3.6.3 Ecosystem Services in the Area

An ecosystem is a community of living things (plants, animals) and non-living things (air, water, soils) interacting together. Ecosystem services are the benefits people obtain from a healthy functioning ecosystem.[2] Farmland, for example, is part of an ecosystem and produces a multitude of services: it captures carbon dioxide and water flows, it produces food, etc. Intensive agricultural production may prioritize food production, but can reduce other ecosystem services (Foley et al., 2005).

[2] Ecosystems are classified into four categories: (1) supporting services include the cycling of elements through the geosphere, biosphere and atmosphere including carbon, nitrogen and hydrologic cycles; (2) provisioning services result in the goods humans use, including food, fresh water, wood, fibre and fuel; (3) regulating services are about how the environment regulates climate, floods, diseases and water purification; and (4) cultural services describe the social effects that ecosystems have, including aesthetics, spiritual services, educational services and recreational services (Millennium Ecosystem Assessment, 2005).

Knowing which ecosystem services are produced on the land under negotiation and how these might be altered is essential. Other people living in the area or other investors in the area may be dependent on the ecosystem services from the land under negotiation. Understanding how new investments will alter conditions for other stakeholders in the region will help negotiators assess potential liabilities.

3.6.4 Potential Impacts of Changing Land Use

Converting land use from its natural state to intensive cultivation, or even shifting from one type of cultivation to another, will have immediate and longer-term impacts. Finding ways to quantify such impacts is important, although a challenging task for many developing country governments. There are tools being developed to enable governments to project land and water use and also how this will interact with potential climate change scenarios. One such model being used for large-scale farming is the Variable Infiltration Capacity model, which has been mostly used to simulate the water flow of large river basins (Deininger, Byerlee et al., 2011; Richey & Fernandes, 2007). Another, widely used model is the Soil and Water Assessment Tool (Douglas-Mankin, Srinivasan, & Arnold, 2010).

3.6.5 Potential Impacts on Local Food Security

Introducing new investments into an area can have negative impacts on local food security. Direct impacts can arise from the introduction of new crops, production methods or scales of production that focus on one or two crops, which make the area more susceptible to pests and diseases, as well as to declining commodity prices (Mirza et al., 2014). Negative impacts can also arise from the investor restricting access to land that is being used by pastoralists, shifting cultivators or local communities to collect water or gather firewood.

Host governments and investors should conduct a preliminary assessment to identify potential negative impacts on local food security. The environmental and social impact assessments will allow investors and the host government to do a deeper investigation of potential impacts on local food security and develop a plan to address those impacts. If the local food security impact is too great, the parties should not rule out the possibility of abandoning the project.

3.6.6 Potential Impacts from Climate Change

A different side of the environmental equation is understanding how agriculture is vulnerable to environmental changes. This is especially so for climatic variability and weather extremes (Rosenzweig & Parry, 1994; Smith et al., 2007). Climate change impacts include changes in average temperature and precipitation, altered seasonality, and changes in the frequency and severity of extreme events such as floods and droughts. It will affect different regions in different ways, with some places experiencing increases in precipitation, and other places experiencing decreases along with higher temperatures (Trenberth et al., 2007).

Understanding the potential impacts of climate change on the location of the planned project is critical for its medium and long-term success. Climate risk assessments will help governments and investors understand relevant climate hazards, the exposure to hazards, sensitivity to climate impacts and the capacity to adapt when events arise.

Predictions for climate change impacts on agricultural productivity may be estimated using crop models (White & Hoogenboom, 2010). One that has been used extensively is the Decision Support System for Agrotechnology Transfer (DSSAT) (Jones et al., 2003). DSSAT uses climatic information in combination with the production patterns of different crops. It will take information regarding historic and projected changes in temperature and precipitation, estimate the availability of water for crops at different times of the year, and then take the crops' growing requirements to estimate changes in production over time. The model is designed to be location specific (i.e., you insert climate and crop production data for the area you are examining). The user selects the climate information that is appropriate for the location in question and links this information into the DSSAT modelling tool. The possibility of using DSSAT for different locations is therefore influenced by (1) the availability of climate data (historic and future projections) and (2) the range of crops for which modelling parameters have been developed.

The IISD Guide to Negotiating Investment Contracts for Farmland and Water

PART 2
Model Contract

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4.0 LEGAL DEFINITIONS

"Action Plan" means the plan required to be produced and submitted to the State by the Company under Section 6.2 of the present contract.

"Adequate Housing" means secure, safe and suitable accommodation, including secure tenure, with regular supply of clean and safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage and waste disposal.

"Affiliates" means any entity that directly or indirectly controls, is controlled by, or is under common control with the Company. For the purposes of this definition, "control" means ownership greater than 50 per cent of the Company and/or power to direct, manage or exercise voting power over the Company.

"Agreement" means the present contract.

"Applicable Law" means the laws and regulations of the host State.

"Approved Business Plan" means the business plan developed under Section 6.1, verified by an independent third party and approved by the government.

"Business Plan" means the plan required to be produced and submitted to the State by the Company under Section 6.1 of the present contract.

"Company" is the party to the contract, which is a duly authorized and constituted corporation existing under law and qualified to do business in the State.

"Dependent" is the spouse or unmarried minor child of an employee of the Company or determined to be a dependent by a binding agreement between the employee and the Company.

"Effective Date" is the date the agreement comes into force as stated in the contract.

"Environmental Impact Assessment" means the process of identifying, predicting, evaluating and mitigating the environmental effects of the proposed Project, as described in Section 6.2 of this contract.

"Environmental Management Plan" means the plan required to be produced and submitted to the State by the Company under Section 6.2 of the present contract.

"Feasibility Study" means the study required to be produced and submitted to the State by the Company under Section 6.1 of the present contract.

"Good Agricultural Practices" means practices that address environmental, economic and social sustainability for on-farm processes, and result in safe and quality food and non-food agricultural products

"Good Industry Practices" means the exercise of that degree of skill, diligence, prudence and foresight that would reasonably and ordinarily be expected to be applied by a skilled and experienced person engaged in that agricultural industry.

"Host State" is the State where the Project takes place.

"Independent Expert" means an individual from a recognized consulting enterprise or organisation, competent in the specified field.

"Notice" is the notification made or given by one of the parties to the other in writing and delivered.

"Outgrower Scheme" means a contractual agreement between a farmer or farmers and the Company for the production and sale of agricultural goods.

"Parties" means the Company and government of the host State.

"Person" means any private individual or Company.

"Project Area" means the total area allocated to the Company as described in Section 5.1 of the present contract and subject to modifications based on the results of the Environmental Impact Assessment and Environmental Management Plan and the Social Impact Assessment and Action plan.

"Project Map" is the map showing the total area that constitutes the geographical boundaries of the Project Area, including any features on the land that would have to be left intact, or restrictions on the Project activities close to streams and rivers.

"Project Operations" means all activities undertaken in relation to the Project.

"Social Impact Assessment" means the process of identifying, predicting, evaluating and mitigating the social effects of a proposed Project.

"State" is the party to the agreement, which is the duly authorized representative of the government where the investment takes place.

"Tax" means any levy imposed by the State on income, goods and services.

"Tax Law" means Applicable Law of the State pertaining to any tax.

"Water-Use Permit" is the permission granted by the State to the Company to use water for agricultural purposes, as described in Section 9.3.

5.0 TENURE AND OWNERSHIP

5.1 Term and Rights

The section on tenure sets out the date and duration of the contract plus any extensions. It defines the rights of the investor to use and access the project site. It states the total area of land under concession plus options to expand or reduce the area. The amount of land given is of critical importance. A few countries in Africa and Asia are in the situation where they gave away too much land too quickly. At least one East African country and one South East Asian country are now considering caps on how much land can be allocated to an investor in the initial contract, and then providing more land if the investor can prove they are operating successfully. Investors are cautious about this approach for fear of rent-seeking behaviour by public officials when the investor comes back for additional land. In Section 15, "Termination of Contract," we propose an option for return of unused land to deal with this situation.

In other cases, investors simply extract the timber from the land, rather than producing crops, as required by the contract. To address this, we propose a provision in Section 15 "Termination of Contract" for terminating the contract if the investor is not using land in accordance with the terms of the contract.

A map should be annexed to the contract. It should include clear geographical boundaries for the project area, associated rivers or streams, plus any special features on the land that would have to be left intact (for example forests, wetlands, climate-sensitive areas, riparian areas and sites of spiritual significance). This section can also include any requirements for licenses, permits or other authorizations needed to implement the project.

Most contracts reviewed included information on the size of land allocated to the investor, the date and duration of the project, including any extensions. Some included maps with the geographical boundaries, although this was not the norm. In a few instances there were vague indications of where the investor's land was located, for example, in between village A and village B. Ensuring that clear boundaries are defined and all necessary features are indicated on the map is essential to know the full scope of the project and its potential relationships with other stakeholders.

MODEL PROVISION

Term of this Agreement

This Agreement takes effect on [X], the Effective Date, and shall remain effective for [X] years, so long as:

(i) It remains possible to cultivate the Project Area at the end of such [X] year period, and
(ii) This Agreement has not been sooner terminated in accordance with its terms.

The Parties shall have the option to renew this Agreement up to [X] time(s), each for an additional period up to [X] years, on terms and conditions that the Parties may then agree upon, to reflect conditions existing at the time of renewal, and conditions foreseeable in the future. This Agreement shall remain in effect for the period during which the Parties are negotiating the terms of any such renewal, provided that the negotiations take place within a reasonable period of time, as defined by the two Parties at the start of the negotiating period.

Grant of Rights

The State hereby grants to the Company access to the Project Area, subject to Applicable Laws and the terms of this Agreement, including the rights to:

(a) Engage in production of [specify crops];
(b) Market, sell and export such crops within the State and internationally, provided that the Company shall sell [X] percentage of production in the local market on an annual basis;
(c) Construct, install, maintain and/or repair, at its own expense, infrastructure, buildings, machinery and other facilities within the Project Area, provided that:

(i) It complies with Applicable Laws,
(ii) The work is part of the original Approved Business Plan, [OR, was not part of the original Approved Business Plan, but is subject to approval of change in the Business Plan], and
(iii) The Company has obtained prior written approval of the State concerning the design, location, size, and environmental and social impact of any construction;

(d) Construct and install infrastructure, at its own expense, outside the Project Area, provided that:

(i) It complies with Applicable Laws,

(ii) The work is part of the original Approved Business Plan, [OR, was not part of the original Approved Business Plan, but is subject to approval of change in the Business Plan], and

(iii) The Company has obtained prior written approval of the State concerning the design, location, size, and environmental and social impact of any construction.

Such infrastructure shall, upon completion and within a specified time frame, become public property, and the Company shall have the right to use such infrastructure. The [specify Company or State] shall be responsible for all maintenance and repairs to the infrastructure;

(e) Take and use specified quantities of water from waterways, as defined in Section 9.3 "Water-Use Permits and Fees," for the purposes of primary agricultural production;

(f) Construct and maintain houses, buildings, amenities and incidental facilities for the use of the Company, its contractors, agents and its employees and Dependents, provided that it complies with Applicable Laws and first obtain prior written approval of the State in accordance with the Applicable Laws concerning the design, location, size, and environmental and social impacts of any construction.

The State reserves the right to construct infrastructure within the Project Area. If the State intends to construct infrastructure within the Project Area it shall first so inform the Company by Notice, and the right of the State shall not unreasonably or materially interfere with Company activities or rights.

Geographical Boundaries

The Company shall prepare, or contract for preparation, a Project Map showing the total area that constitutes the Project Area, including any features on the land that would have to be left intact, or restrictions on the Project activities close to streams and rivers. The Company shall cover the costs for preparing such a map. The Project Map is subject to State approval. The Project Map is attached to the current agreement and is binding on the Parties.

Permits, Licenses and Other Authorization

Subject to the recognition that this article does not create any rights of the investor or its investment to obtain a permit, license or other authorization, the State shall assist the Company, subject to Applicable Laws, to obtain licenses, permits or other authorizations required by law to engage in the foregoing activities.

5.2 Exclusion of Mineral Rights

Investments tend to cover large areas of land and are often located in countries and regions that are known to have rich mineral deposits, and where there is a strong possibility that mineral and other natural resources, including oil and gas, may be discovered during the contract period.

There is a provision in one of the reviewed contracts where the lease covered an area of one million hectares in a country known to have significant mineral deposits. The host state gave the investor the rights not only to produce agriculture but also to any minerals and other natural resources found in the project area. This should be treated as a warning to other countries, as it can constitute a complete giveaway of mining or other natural resources, whether intended or not. Preserving all rights to minerals and mining is critical for governments.

MODEL PROVISION

Exclusion of Mineral Rights

The State reserves the exclusive right to explore for and develop all subsoil resources within the Project Area, including, but not limited to, minerals, metals, quarry stone, petroleum, natural gas, shale gas and other resources, and to grant such exclusive rights to any other Person. If the State (or any other Person under the grant from the State) intends to explore for, develop or exploit mineral resources in the Project Area, it shall first so advise the Company by Notice.

5.3 Inspection of Project Site, Books, Records and Other Information

The ability of the government to inspect project operations and activities is a crucial part of the post-contractual phase. It is part of the monitoring role that relevant government agencies and ministries play throughout the duration of the project. This will help to ensure that the investor complies with the terms and implements its obligations under the contract. Host governments should not underestimate the time and cost involved in monitoring projects and should have a clear plan and system in place to ensure sufficient resources and time to carry out monitoring activities (see Section 16 for further information).

MODEL PROVISION

Inspection of Project Site, Records and Other Information

The State shall have the right to visit and inspect, during normal business hours on any day, all sites, plants, facilities, warehouses, offices and records of the Company and to visit and question personnel associated with those activities, to ensure that all Project Operations are carried out in accordance with this Agreement and the provisions of Applicable Law. The State shall not unduly interfere with Company activities or production.

5.4 Security

Not every investment project will require provisions for private security. Where the state has a well-functioning law enforcement system that is consistent with the protection and promotion of human rights, this will provide the necessary assurances for the investor. However, private security for the investor can be important in protecting the safety and security of commercial business operations, employees and other individuals connected to the project. However, where private security is poorly regulated by the state, this can create serious problems. The experience of the activities of private security companies is mixed and can have negative consequences on the local population and the ability of the host state to uphold the rule of law. The key is the regulatory framework. Private security companies must be carefully regulated. They must be subject to applicable laws in the host state and international standards and codes of conduct. If these laws are weak or not fully developed, extra care must be taken when drafting this provision. In the model provision below, we refer to relevant domestic law, as well as an international code of conduct and voluntary principles for security providers. The parties may want to annex these documents to the contract to ensure their applicability.

MODEL PROVISION

Security

The Company shall have the right, in keeping with the provisions of Applicable Law, to directly or under contract with other persons, establish and maintain its own security force for the purpose of protecting its staff or maintaining security within the Project Area, with power both (i) of detention (any detained person to be handed over to the appropriate State authorities within [specify time frame based on Applicable Law]), and (ii) of exclusion from the Project Area for safety or security reasons. Any such security force will be subject to Applicable Law at all times and shall not have the power of interrogation. The Company shall ensure and monitor that the security force at all times will conduct itself in accordance with Applicable Law (including all Laws relating to apprehension and detention and human rights), the International Code of Conduct for Private Security Service Providers and the Voluntary Principles on Security and Human Rights.

6.0 FEASIBILITY STUDY AND IMPACT ASSESSMENTS – PRE-CONSTRUCTION PHASE

6.1 Feasibility Study and Business Plan

Feasibility studies principally address the commercial and technical viability of the proposed project. They should also address the key social and environmental factors that may undermine commercial viability. Feasibility studies should be conducted by the investor, verified by an independent third party and approved by the government before the contract is signed. Its milestones should be incorporated into the contract. The results of the feasibility study will assist the investor in developing its business plan, which should also be verified by an independent third party and approved by the government. The investor may not want to share all the information in the business plan, particularly information about costs, but commercially sensitive information can be omitted from the document submitted to the government.

Governments can get support to review a potential investor's business plan, such as the Food and Agriculture Organisation's (FAO's) investment centre or independent consultants. The government can make a distinction between different types of investments. Where the investor is repeating a successful business model or taking over an existing operation (i.e., lower risk), this may require a less rigorous verification and approval process than for an investor who is starting a new plantation or introducing a new business model that has not been thoroughly tested (i.e., higher risk).

The investor should continue to submit business plans to the host state on a regular basis based on changing market conditions or other circumstances. The contract should also build in a degree of flexibility for the investor to be able to rapidly modify plans if there are changes in the market, price or agronomic conditions. However, if the investor needs to materially alter the business plan, this should be subject to approval by the host state.

The importance of conducting proper feasibility studies and preparing business plans cannot be overstated. Research now shows that the failure to properly conceive the project and determine its viability is the main cause of the high failure of agricultural investments. In 2012 the World Bank reviewed 179 agricultural projects in 32 countries. They found that 50 per cent of the projects were classified as failures or moderate failures in financial terms because the "concept was fatally flawed, for example wrong location, wrong crop, or over-optimistic planning assumptions" (Tyler & Dixie, 2012, p. 7). In a United Nations Conference on Trade and Development (UNCTAD) and World Bank study of 39 large-scale agricultural investments, around half of the investors were unprofitable or behind operation schedules (Mirza et al., 2014).

Some domestic laws and regulations make projects contingent on feasibility studies and business plans. However, in most cases the laws do not exist. Furthermore, even where laws exist, they tend to be undermined by weak monitoring and implementation. The World Bank found that, at the host state level in developing countries, there was "a limited capacity to assess a proposed project's technical and economic viability" (Deininger, Byerlee, et al., 2011, p. XIV). Only one of the contracts reviewed made reference to feasibility studies. It commits the investor to finance technical studies but does not specify the terms of such a study. There are some tools that can assist governments to create guidelines for conducting feasibility studies (see, for example, Holz-Clause & Hofstrand, 2009; Fellows, 1997).

MODEL PROVISION

Feasibility Study and Business Plan

(a) The Company shall have a Feasibility Study prepared by (i) an independent third party or (ii) by the Company and verified by an Independent Expert, on the basis of sound engineering and economic principles in accordance with Good Agricultural Practices.

(b) The Feasibility Study shall include [elements as the Parties may agree, such as the following]:

(i) A market survey or analysis[3]

(ii) Technical feasibility[4]

(iii) Financial feasibility[5]

(iv) Social and environmental feasibility[6]

(v) Management/organizational feasibility[7]

(c) The Company will prepare a Business Plan based on the results of the Feasibility Study. The initial Business Plan will be approved by the State prior to the entry into force of this agreement. The Company may alter the Approved Business Plan. All changes to the Approved Business Plan and all subsequent Business Plans shall be subject to review and comment, but not for approval or modification, by the State, except where such Business Plans materially alter the Approved Business Plan. On or before [specify date] of each succeeding year during the term of this agreement, the Company shall submit a rolling five (5) year Business Plan.

(d) The Approved Business Plan will include a timeline for commencement of operations, including the date by which specified areas of land will be put under production. The timeline can be revised by agreement between the Parties. The Company shall report annually on the implementation of the timeline. Any unused land may be repatriated to the State, in accordance with Section 15 "Termination of contract."

(e) The Company may make material changes to the Approved Business Plan, subject to approval by the State.

(f) A significant and persistent failure to comply with the Approved Business Plan, as may be amended from time to time, constitutes a material breach of this Agreement.

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[3] Is there a demand for the product? Who else is producing similar products and at what price? What are the sales projections? Do price figures match up to what they have been historically? (Holz-Clause & Hofstrand, 2009; Fellows, 1997)

[4] What is needed to make the product? What assumptions are being made about environmental, hydrological and climatological conditions? Are crops and techniques appropriate for existing and future environmental conditions? Are yield assumptions sensible? How sensitive is the project to changes in environmental parameters? Will the project affect people's exposure and vulnerability to climate?

[5] What is the total capital requirement? What is the cost of producing the product? What are the requirements associated with obtaining required permits, including the estimated cost of compliance and implementation of the Environmental Management Plan? What are the expected costs and returns for various scenarios? What is the most suitable business model? What is the likely profit? (Holz-Clause & Hofstrand, 2009; Fellows, 1997)

[6] This should include consultations with the local government and people who might be affected by the project. What are the expected impacts of the project (positive and negative) on the community within and near to the geographical scope of the project? What are the expected environmental risks posed by the project? How are the social and environmental risks expected to change over the lifetime of the project?

[7] What is the business structure? What is the most appropriate business model? (Holz-Clause & Hofstrand, 2009; Fellows, 1997)

6.2 Impact Assessments and Management Plans

Closely related to feasibility studies are the potential social and environmental impacts of the project. Environmental Impact Assessments (EIAs) are now firmly established practice for projects in a wide range of economic sectors. About two thirds of the approximately 110 developing countries had enacted some form of EIA legislation by the mid-1990s (Wood, 2003). Social Impact Assessments are less common but increasingly becoming part of EIA process and practice. Generally agreed-upon principles for social impact assessments are lacking, but the International Association for Impact Assessment has published a coherent set of guidelines (see Vanclay, 2003). Other variants include sustainability assessments that integrate social, economic and environmental perspectives or cumulative impact assessments (see Pope, Annandale & Morrison-Saunders 2004; Smit & Spaling 1995). There is a growing practice of conducting environmental and social impact assessments together. The approach in this model contract is to separate the two but the process can be combined, depending on the requirement of domestic laws and the needs of the state.

Despite their widespread use in many other sectors, in the sample of investment contracts that IISD examined, Environmental and Social Impact Assessments (ESIAs) were only mentioned on a few occasions. There was no reference to management plans. The World Bank found that "implementation of environmental and social impact assessments is deficient in many settings. Even where they are required by law, environmental and social impact assessments are often not conducted" (Deininger, Byerlee, et al., 2011, p. 57). These shortcomings "prevent effective implementation of environmental regulations and legal frameworks" (Deininger, Byerlee, et al., 2011, P. 121). Even when ESIAs were conducted, "their quality was weak, and they were not publicly available" (Deininger, Byerlee, et al., 2011, p. 121-2).

The UNCTAD-World Bank survey of 39 investments had different findings. In this sample, around 70 per cent of investors conducted an environmental impact assessment and almost 50 per cent developed an environmental management plan. But only 25 per cent publicly disclosed information. And ESIAs were largely treated as "box-ticking" exercises. Investors were not implementing the recommendations or changing practices based on the findings of the impact assessments. The management plans were not used in the operations. Impact assessments were generally a one-off exercise and not accompanied by ongoing monitoring (Mirza et al., 2014).

The shortcomings described above, combined with the frequency of project failures, points to the need for paying more attention to integrating ESIA protocols into investment contracts, specifically by referring to domestic legislation where it exists, and taking relevant global guidelines and international best practices into account.

In principle, before a contract is signed and implemented, an ESIA should take place. The contract negotiations can then be adapted based on the findings of the ESIA. The possibility of an ESIA leading to abandoning the project should not be ruled out.

In practice, however, ESIAs in developing countries are often done after the contract is signed but before the investor starts construction and operations. The investor should, at least, use the results of the ESIA to develop an environmental management plan and social action plan. The investor should not be granted the licences to start production until these steps are complete and the government has approved the plan in accordance with the applicable laws.

The ESIA process can involve more than one stage to avoid excessive costs and delays. An initial high-level screening can determine whether launching a formal assessment is needed and can define the scope of issues to be covered in a more rigorous assessment. Some countries have implemented "strategic risk assessments" in which an environmental authority conducts an ESIA in a region to identify areas that are suitable for agriculture and areas that need to remain intact (Mirza et al., 2014).

To make ESIAs more effective, the results and subsequent management plans must be incorporated as legally binding obligations in the contract or implemented through permits, approvals or licences under domestic law. Failure to comply must amount to a material breach of the contract. The contract should also contain a requirement for annual reporting on the implementation of the two plans, with the reports to be made public and accessible to local communities. Importantly, the model provision below creates cumulative contractual obligations on the investor to respect all domestic laws as well as to comply with the terms of the provisions.

MODEL PROVISION

Environmental Impact Assessment and Environmental Management Plan

(a) The Company shall have an Environmental Impact Assessment prepared (which, if prepared by the Company, is verified by an independent environmental consulting firm recognized as having expertise in agriculture) in accordance with Applicable Law [and/or the International Financial Corporation's (IFC's) Performance Standard 1 and the International Organisation on Standardization's ISO 1400 standard for environmental management], and subject to approval by the State. Based on independently verifiable data, the Environmental Impact Assessment shall establish a baseline of environmental conditions, including climate parameters, existing at the Effective Date and assess the Project-related environmental effects and impacts, including an assessment of the Project location to foreseeable climate change projections.

(b) The Company shall have an Environmental Management Plan prepared (which if prepared by the Company is verified by an independent environmental consulting firm recognized as having expertise in agriculture), based on the Environmental Impact Assessment, in accordance with Applicable Law [and/or IFC Performance Standard 1 and the International Organisation on Standardization's ISO 1400 standard for environmental management], and subject to approval by the State. The Environmental Management Plan shall include [elements as the Parties may agree, such as the following]:

(i) Main areas of environmental concern;

(ii) Plans for the management,[8] control and rehabilitation of all environmental aspects of the Project, including the historic environmental matters, including:

(A) A plan to avoid, minimize, mitigate, rehabilitate and offset, where appropriate, impacts on biological diversity within the Project Area;

(B) A plan to avoid, minimize, mitigate, rehabilitate and offset, impacts on surface and groundwater quality and quantity to ensure the Project does not cause excessive harm or destruction to human or animal life or vegetation;

(C) Identification of opportunities for the improved management and conservation of natural resources in the Project Area;

(D) A plan to effectively manage soil resources to ensure parameters of soil quality are maintained and/or enhanced over the period of the lease;[9]

(E) A plan to avoid or minimize greenhouse gas emissions (as defined by the Intergovernmental Panel on Climate Change (IPCC)) from the Project taking into account economically and commercially feasible technology and ability to access Global Environment Facility (GEF) funding for climate sensitive technologies;

(F) A plan to reduce the vulnerability of the proposed operations to climate change impacts; and

(G) A plan for handling, storing and disposing of chemicals, pesticides, fertilizers and fuel, and for managing residues of bio hazardous materials.

(iii) A description of the monitoring and assessment mechanism for the Environmental Management Plan;

(iv) A commitment to continual improvements in methods of production in response to the availability of new information and technology, including to reduce the end exposure to pesticides and fertilizers, increase water-use efficiency or improve technologies to control soil erosion; and

(v) A plan to restore the Project Area for future agricultural activities.

(c) The Environmental Impact Assessment and Environmental Management Plan shall be made publicly available in a language and in a form that is accessible to affected communities in the Project Area.

(d) The Environmental Management Plan shall be updated prior to any major change to the Project plans or the Approved Business Plan. The Environmental Management Plan shall be revised if monitoring of environmental aspects shows unforeseen risk or negative Project impacts outside of an acceptable range.

(e) The Company shall comply with the environmental laws of the State in force at any time during the period of this Agreement [including any provincial and local laws], including laws relating to protection of water quality, air quality, the emission of greenhouse gases, land, the preservation of living natural resources, the protection of biodiversity, and the disposal of hazardous and non-hazardous wastes. A significant and persistent failure to comply with environmental laws, the terms of environmental licences or permits, or of the terms contained in the Environmental Management Plan, as the same may be amended from time to time, constitutes a material breach of this Agreement.

(f) The Company shall report annually on the implementation of the Environmental Management Plan.

[8] Examples for managing areas of environmental concern may include: maximum allowable concentration of specific chemicals in the environment, maximum allowable levels of pesticide residues in waterways, maximum allowable hectares of forest to cut down, annual water withdrawal and maximum allowable soil erosion.

[9] Specifically, soil organic carbon, nitrogen, phosphorus, potassium and salinity levels should be managed.

Social Impact Assessment and Action Plan

(a) The Company shall have a Social Impact Assessment prepared (which if prepared by the Company is verified by an independent consulting firm recognized as having expertise in social assessments), in accordance with Applicable Law [and/or IFC Performance Standard 1 and/or the Social Impact Assessment Principles of the International Association for Impact Assessment], and subject to approval by the State. The Social Impact Assessment shall establish a baseline of social conditions existing at the Effective Date and assess the Project-related effects and impacts on the people living on or around the Project Area.

(b) The Company shall have an Action Plan prepared (which if prepared by the Company is verified by an independent consulting firm recognized as having expertise in social assessments), based on the Social Impact Assessment, in accordance with Applicable Law [and/or IFC Performance Standard 1 and/or and the Social Impact Assessment Principles of the International Association for Impact Assessment], and subject to approval by the State. It shall include [elements as the Parties may agree, such as the following]:

(i) Provisions to:

(A) Recognize the rights of landowners, the rights of Indigenous or Tribal Populations, or other people living within the Project Area or using resources from the Project Area;

(B) Recognize the rights of land owners to continue utilizing land within the Project Area for subsistence purposes, including grazing livestock, using water, cultivating crops, hunting game, and collecting fruits and fuel wood, provided that such subsistence use would not be unsafe and does not substantially interfere with Project Operations; and

(C) Avoid or minimize displacement of persons or involuntary resettlement.

(ii) Provisions to prevent or minimize the potential adverse impacts of the Project operations on the individuals and communities resident in and around (A) the Project Area and (B) other areas affected by the production, processing or transport of agricultural products whether using Company-owned infrastructure or infrastructure provided by the State or third parties;

(iii) Provisions to prevent or minimize unreasonable interference with the living conditions of the population lawfully settled within the Project Area and surroundings, and to cause the Company's employees and contractors to respect the customs of the local populations;

(iv) If, after complying with sections (i) – (iii), resettlement is necessary, include provisions for developing a plan of resettlement, having regard to global principles and IFC Performance Standard 5, as the same may from time to time be amended, including provisions to;

(A) Conduct full consultation with local governments and all persons who may be displaced or relocated, with the goal of developing a resettlement program to which they consent;

(B) Mitigate adverse social and economic impacts by ensuring that resettlement activities are implemented with appropriate disclosure of information and consultation;

(C) Replace or restore the livelihoods of displaced persons at a minimum equivalent level or better, to ensure in all material respects the availability of means of livelihood to maintain an adequate standard of living in the community, including through the provision of adequate housing with security of tenure; and

(D) Ensure payment of fair and reasonable compensation to the displaced persons.

(c) The Social Impact Assessment and Action Plan shall be made publicly available in a language and in a form that is accessible to affected communities in the Project Area.

(d) The Action Plan shall be updated prior to any major change to the Project plans or Approved Business Plan. The Action Plan shall be revised if monitoring of social aspects show unforeseen risk or negative Project impacts outside of an acceptable range.

(e) The Company shall report annually on the implementation of the Action Plan.

7.0 FINANCIAL ISSUES

7.1 Rent (and Royalties)

Annual rental payments on land allow the state to establish a market value on the land that is being leased and can help create incentives to keep land in productive use. It discourages speculative holding of land and water rights. Annual rental payments are a common feature of most contracts. We encourage the government to include a provision on rental payments. Rates should be determined through sound economic analysis to capture the true value of the leasehold. Rates should then be published on the relevant ministry's website and periodically adjusted to reflect changing economic factors. If the government is not able to publish rates on their website, there should still be an agreed pricing formula that is applicable to all investors.

Another option for generating revenues on the land is to pursue a financially inclusive business model, such as revenue-sharing arrangements with the local community. For example, an UNCTAD-World Bank study described two revenue-sharing arrangements where the investor uses community land and, instead of paying a fixed rent, the investor gives a percentage of the monthly turnover to the community (Mirza et al., 2014).

MODEL PROVISION

Rent

The Company shall pay to the [name of Ministry/agency] and/or [landowners and/or other users and/or local government] an annual surface rental fee of [X] per hectare of land included in the Project Area, on or before [X] date, [in accordance with Applicable Law]. Such payments shall be adjusted every [X] years, in accordance with [choose appropriate indicator].

A NOTE ON ROYALTIES

A few of the contracts reviewed contained provisions for royalty payments, in addition to the rental payments. The role of a royalty in an agricultural land lease contract is not immediately evident. The origins of royalties lie in mining, oil and gas and to a lesser extent forestry. These sectors do not transfer easily or directly to agriculture.

Royalties in the mining sector can be based on three things: production value, sales or profits. While the investor is charged with undertaking the appropriate bookkeeping to pay the correct royalty, it is important that the proper payment be verifiable by the government as well.

A royalty on production can be set at x% per tonne in mining, which might translate to x% per bushel or tonne in agriculture, depending on the commodity. The producer verifies the volume of production and records this, and the royalty is paid at the established amount on this basis. Generally, in mining, it is possible to monitor or verify production volumes with relatively high levels of accuracy.

A royalty on sales is generally calculated on the value of the sales. However, it has been found that this has often led to transfer pricing in practice, where the producer sells the production to a related company below market price in order to reduce the royalty it will pay (as well as its profits and tax on those profits). To avoid this problem, many mining contracts require the royalty to be paid based on the global market price for that commodity on the day of the sale. This becomes a deemed price and the royalty is paid on the volume sold multiplied by the deemed rate. For agricultural products, there may be both a global price for all exported production and a local price for internally sold or used production (see Section 7.6 "Transfer Pricing" for further information).

A royalty on profits is essentially an additional level of profits tax. We recommend against such a royalty as it becomes extremely unpredictable in many cases, where companies can vary their level of profit through transfer pricing, profit shifting, overstating costs, generous write-offs or write downs, and other forms of tax avoidance or, in some cases, tax evasion. Thus, if the State is considering a royalty, we recommend a choice between a production royalty and a sales royalty. In practice, the difference is relatively small between them because both are ultimately based on deemed prices at global or local market levels.

An additional issue that may have relevance is a windfall profits tax, such that if the price of a commodity rises quickly to unexpected levels, a certain amount of additional tax is applied to that "windfall" amount. In an agricultural context, the windfall tax might be applied to all sales and then re-circulated to shield domestic consumers from the price shock, especially for basic foods.

7.2 Tax Incentives and Customs Duties

Financial incentives and tax breaks are a common feature of many countries' investment promotion strategies and often enacted in domestic laws and regulations. Their effectiveness is highly debated, but there is an emerging consensus that few incentives achieve their economic goals despite the fact that they have significant costs to governments. Some say incentives contributed to the rapid economic growth of Korea, Mauritius and Singapore. But most argue there is little evidence to suggest that incentives contribute to increased investment flows. There is, however, evidence to suggest that the broader investment climate—which might include the ease of issuing permits, macroeconomic stability and suitable infrastructure—plays a determining role, and can in some specific cases make tax incentives effective. Still, evidence of the effectiveness of tax holidays (i.e., complete tax exemptions) was much less robust (James, 2009).

Investment incentives can also create an uneven playing field between foreign and domestic investors. Some incentives end up attracting investors who have very little technical and financial capacity to develop the land and yet still pursue the investment because the incentives are so generous. Generous incentives can actively encourage speculative investments on the expectation of rising land values. Furthermore, the cost of incentives, in terms of denying developing countries much needed tax revenues, can undermine government efforts to invest in the local economy, in improved access to social services or in environmental conservation.

In some cases, the contract contains a provision that alters the tax and customs laws with respect to the investor to offer even more generous tax incentives and reductions or exemptions from customs duties. In most cases, however, the contract contains a provision, which states that in relation to taxes and customs duties, the investor will comply with applicable domestic laws. We strongly recommend this latter option. No provision is strictly needed—where the contract is silent, domestic laws apply—but if a provision is desirable for clarity it could state:

> *Applicable Laws governing taxation and customs duties apply to the current Agreement.*

7.3 Accounts and Records

Accounts and records provide information and evidence about the company's financial situation. They keep track of business transactions on a daily basis, including sales, purchases, revenue, expenses and assets. They are important for tax purposes and for annual audits.

MODEL PROVISION

Accounts and Records

(a) The Company is responsible for maintaining accurate accounting records in local currency following Good Industry Practice, in order to comply with Applicable Law and this Agreement and to support all fiscal returns or any other accounting reports required by the State in relation to the Project.
(b) The Company must keep in the territory of the State complete, accurate and up to date technical and commercial books and records of all agricultural operations under this Agreement.
(c) The Company must supply and file such technical and commercial information, reports, returns and statements at such times and in such form as may be required by the present Agreement and Applicable Law.
(d) All books and records must be maintained and made available for inspection by an auditor appointed under and in accordance with this Agreement for six (6) years following the calendar year in which the books and records were created or, if longer, the relevant period required by Applicable Law.
(e) The Company shall maintain all financial, employment, commercial and other books and records and comply with all other reporting and filing obligations under Applicable Law and shall conduct its activities in accordance with Applicable Law, regulations and directives.

7.4 Audit

Many countries require companies by law to conduct and publish annual audits. Audits are an important tool to verify the company's claims about its financial situation and provide independent insight into how well the project is running. They help to ensure that companies are operating fairly and legally.

MODEL PROVISION

Audit

(a) The State has the right to audit the Company's accounts, books and records maintained under this Agreement and Applicable Law for each calendar year within two (2) years from the end of each such calendar year. Any such audit will be at the State's sole cost and risk, performed by and through a technical inspector or an independent professionally qualified auditor, completed within twelve (12) months of its commencement, and conducted in a manner that will result in the minimum amount of inconvenience to the Company.
(b) The State's inspector or auditor shall have the right, in connection with such audit, to visit and inspect, during normal business hours on any day, all sites, plants, facilities, warehouses and offices of the Company directly or indirectly serving its activities under this Agreement and to visit and question personnel associated with those activities in accordance with Applicable Law.
(c) The State shall, and shall ensure that any inspector or auditor shall, use such information only for the purpose for which it was disclosed and not for any other purpose and shall keep confidential all information provided to it or any of its agents, advisors, representatives, officers, directors or employees by or on behalf of the Company or otherwise obtained by it or any of its agents, advisors, representatives, officers, directors or employees in connection with the audit which relates to the Company or the business of the Company.

7.5 Debt-Equity Ratio

The debt-equity ratio is the company's proportion of debt to equity and can be used to evaluate the financial health of a company. If the debt-equity ratio is high it means the company has been using a lot of debt to finance its growth and can put the company at higher risk if the costs of the debt outweigh the returns. But it can also allow the company to generate more profit than would have been possible without this additional financing (Investopedia, 2014). When interest rates are low, higher debt may be appropriate, but if rates increase, this can get the investor into trouble.

MODEL PROVISION

Debt-Equity Ratio

The ratio of the Company's debt to equity must not at any time exceed [__/__].

For the purposes of this Section:

(a) "Debt" shall mean the aggregate, on a consolidated basis, of all outstanding obligations (whether present or future, or actual or contingent) for the payment or repayment of moneys that have been borrowed or raised by the Company or any subsidiaries; and
(b) "Equity" shall mean the sum of the issued paid up ordinary shares of the Company (including any share premium account) plus (or minus) the Company's retained earnings (or accumulated deficit).

7.6 Transfer Pricing

Transfer pricing is a practice where two related companies establish a price for buying and selling goods and services from each other. The practice is legal but can be misused as a way to hide real profits and avoid or reduce taxes. It can also be used to reduce the royalty that a company may pay on production, particularly in the mining sector. To prevent this, the contract can specify that all transfers of production between related companies must be deemed as sales either at the global or local price. Where a land lease is not tied to a processing facility as well, all transfers of production must be deemed as sales at either the global or local price. Otherwise, there are built-in loopholes. In addition, where an investor does not sell the production but transfers to its own home state facility (or third state facility) for further processing or packaging, the transfer must also be deemed as a sale, at the global market rate. All transactions between related parties must be fully disclosed and subject to audit by the state.

There are different estimates about how much tax revenue is lost annually as a result of companies misusing transfer pricing. It is more prevalent in other sectors but still could be relevant for agriculture. Global Financial Integrity estimates the amount at several hundred billion dollars annually (Tax Justice Network, n.d.). The "arms-length" principle helps address the misuse of transfer pricing, and is considered by the Organisation for Economic Co-operation and Development (OECD) and UN Tax Commission to be acceptable for tax purposes (Tax Justice Network).[10]

MODEL PROVISION

Affiliated Company Transactions

Sales, leases, licences and other transfers of goods and services between the Investor and its Affiliates shall be at an arm's-length fee basis negotiated between the Parties in substantial accordance with the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations or subsequent substantive guidelines having a similar purpose agreed to by the Parties.

Any discounts or commissions allowed in transactions between the Investor and its Affiliates shall be no greater than the prevailing rate so that such discounts or commissions will not reduce the net proceeds below those which it would have received if the Parties had not been Affiliates. Upon request of the State, the Investor shall provide to the State documentation of the prices, discounts and commissions, and a copy of all contracts and other relevant documentation related to transactions with Affiliates.

[10] The "arms length" price is the market prices that will generally result if two unrelated companies trade with each other.

8.0 ECONOMIC AND SOCIAL DEVELOPMENT OBLIGATIONS

Specifying the investor's development obligations is an important element of the investment contract from a sustainable development perspective, and the one that is most often neglected. This is the part of the contract where the investors turn their promises into legally binding commitments. This includes promises to contribute to creating employment, training the local workforce, integrating local farmers through outgrower schemes, establishing processing industries, transferring appropriate technology, purchasing local goods and services and selling part of the production to the local market, among others. The more specific and detailed a contract is on what is expected from the investor in terms of development contributions, the higher the chance that the project will lead to the expected benefits. Identifying these benefits is also closely tied to the pre-negotiating environment in Part 1 of this guide, where the government identifies their priorities for rural development and food security.

The UN Special Rapporteur on the Right to Food importantly states:

> *It is essential that the obligations of the investor be defined in clear terms, and that these obligations be enforceable … The obligations of the investor … should include clear and verifiable commitments. … In particular, such commitments may relate to the generation of local employment and compliance with labour rights, including a living wage as far as waged employment is concerned; to the inclusion of smallholders through properly negotiated outgrower schemes, joint ventures or other forms of collaborative production models; and to the need to make investments in order to ensure that a larger proportion of the value chain can be captured by the local communities, for instance by the building of local processing plants. (De Schutter, 2009, Principle 7)*

While we agree with all of the above, the specific approach taken will vary for each investment, and demands should remain realistic and achievable. We offer a wide range of options in this section, in the full knowledge that they will not be applicable to every project, and will largely depend on the size of the operation. For example, we include provisions for employee housing, education and medical facilities, but not every project will require these facilities. There is a danger of unrealistic expectations or obligations that are too onerous on the investor. Requiring an investor to set up processing facilities that can never become competitive will set the project up for failure from the outset. Knowing where economic opportunities lie is key. The results of the feasibility study and impact assessments will contribute to identifying realistic obligations on the investor.

8.1 Employment

Employment creation is one of the most highly sought-after benefits from foreign investment. Indeed, it was the key benefit arising from the 39 investments in the UNCTAD-World Bank study, which generated direct employment for 39,000 people (Mirza et al., 2014).

But not all agricultural investment leads to job creation and employment can be limited to relatively low-skilled and casual jobs. Other World Bank research on large-scale land investments found that most projects were highly capital intensive and failed to generate employment (Deininger, Byerlee et al., 2011). Crop choice and the organization of production will also affect employment creation. Oil palm and sugarcane cultivation, for example, can generate between 10 and 30 times more jobs per hectare than large-scale mechanized grain farming (Deininger, Byerlee et al., 2011). Including specific targets for employment creation, based on the results of the feasibility study and business plan, as well as requirements to employ locally, can help strengthen the employment benefits.

Most of the contracts reviewed make no reference to employment creation. In two of the reviewed contracts there are employment provisions, but they are either too vague or create loopholes for the investor to avoid complying with the employment obligations. In another contract, the investor is required to provide an employment plan for increasing the percentage of employment, but it does not specify what should be contained in the plan nor the percentage of employment required.

8.1.1 Employment Criteria

MODEL PROVISION

Employment Criteria

(a) Employment practices of the Company shall conform to Applicable Law.
(b) The Company shall hire citizens or residents from the host State for unskilled labour positions.
(c) The Company shall give preference for employment at all levels of financial, accounting, technical, administrative, supervisory and senior management positions and other skilled positions to qualified citizens or residents of the host State as and when they become available, it being the objective of the Parties that the operations and activities of the Company under this Agreement should be conducted and managed primarily by citizens or residents of the host State.
(d) Subject to availability of qualified applicants, the Company shall ensure that citizens or residents of the host State hold at least [X] per cent of the ten most senior management positions within [X] years of the Effective Date, and at least [X] per cent of such positions within [X] years of the Effective Date.
(e) Subject to (a)–(d), the Company shall have the right at all times to freely choose its senior management and the State shall facilitate such Persons promptly obtaining, in accordance with the Applicable law, including on immigration, the necessary work permits as well as visas for themselves and their spouses and children.
(f) The Company shall report annually on compliance with provisions (b)–(d)

8.1.2 Training and Skills Development

One of the difficulties with generating local employment, particularly in remote areas, or in post-conflict areas, can be the lack of locally qualified staff with the required skills (Mirza et al., 2014). There is no easy solution to this problem, but the contract can build in provisions for dedicated training and skills development programs to assist with local communities' integration into the workforce and to qualify them for employment on the project site.

The Principles for Responsible Investment in Farmland, which were drafted and signed by pension funds and private equity funds, commit to establishing a training program for employees with the goal of better implementing social, environmental, health and safety measures (United Nations Principles for Responsible Investment, 2011, Annex 2). Most of the sample contracts reviewed, however, do not include obligations on investors to train the local workforce. In two cases, the provisions are not specific or concrete enough to create a binding legal obligation. We recommend an approach where the investor agrees on a fixed sum for training programs. The commitments may need to be reviewed on a periodic basis and adjusted based on the investor's ability to pay ongoing costs.

MODEL PROVISION

Training and Skills Development

(a) The Company shall provide training for citizens or residents of the host State in order to qualify them for the positions described in Section 8.1.1 "Employment Criteria." The Company shall also provide on-the-job training, utilize vocational training facilities in the State, and undertake whatever other measures are necessary and reasonable to achieve the objectives stated in Section 8.1.1 "Employment Criteria."
(b) The Company shall:
(i) Develop and implement training for host State citizens in order to qualify them for technical, administrative and managerial positions;
(ii) Provide a total of [X] annually in scholarships for citizens or residents of the Host State through a program to be administered by the Company;
(iii) Provide [X] annually in support to the [nominate a relevant national research or academic institution];
(iv) Prepare (and revise when necessary) detailed plans and programs for meeting each of these obligations, including schedules, and shall report on these plans and on their implementation annually.

8.1.3 Labour Standards

Labour conditions on agricultural plantations can be very poor. Making reference to applicable domestic labour laws and International Labour Organization (ILO) agreements can help to address this, as can regular monitoring and evaluation of labour conditions on the project site.

MODEL PROVISION

Labour Standards

(a) The Company shall adhere to provisions of Applicable Law on labour.
(b) The Company, its affiliates, contractors and subcontractors shall observe guidance provided by Good Agricultural Practices, as well as internationally recognized labour standards in relation to all International Labour Organization agreements or any other international agreement to which the State is or shall be a Party of, and shall respect as provided therein the right of its employees to organize.
(c) The Company, its Affiliates, contractors and subcontractors shall not utilize forced labour, nor shall the Company, its affiliates, contractors and subcontractors utilize child labour, as outlined in the International Finance Corporation Policy Statement on Forced Labour and Harmful Child Labour of March 1998.
(d) The Company shall adopt a health and safety management system that shall meet or exceed IFC Performance Standard 2.
(e) The Company shall not engage in or support discrimination in hiring, remuneration, access to training, promotion, termination, or retirement based on race, national or social origin, caste, birth, religion, disability, gender, sexual orientation, family responsibilities, marital status, union membership, political opinions, or age.

8.1.4 Health and Safety

Agriculture is one of the most hazardous economic activities (ILO, 2011). The investor can ensure the health and safety of its employees by applying existing national laws related to occupational safety and health or by using international standards, such as the Occupational Safety and Health Convention (1981), the Safety and Health in Agriculture Convention (2001) and the International Labour Organization's Code of Practice for the Agriculture Sector. Relatively few countries have ratified the agriculture-specific convention, but it provides important standards, which include: (1) informing employees of health hazards and strategies for mitigating these hazards; (2) allowing employees to participate in design and implementation of occupation safety and health measures; (3) training in the use of machinery, equipment and tools; (4) access to protective equipment. In addition, emergency preparedness plans should be developed. The investor should also establish and maintain effective systems for monitoring and reporting health and safety-related incidents, and providing notification to appropriate government bodies.

MODEL PROVISION

Health and Safety

(a) The Company shall adhere to Applicable Laws and observe Good Industry Practice for the protection of the general health and safety of its employees, other persons contracted by the Company on the Project Area, and all other persons near the Project Area whose health and safety are affected by Project activities, in line with or exceeding IFC Performance Standard 4.
(b) The Company shall install and utilize such recognized modern safety devices and observe such recognized modern safety precautions as are provided for under Applicable Law and observed under Good Industry Practices. The Company shall maintain in a safe and sound condition for the duration of this Agreement all infrastructure and equipment constructed or acquired in connection with the Project and required for ongoing operations.
(c) The Company shall train its employees in accordance with Applicable Law and generally accepted health and safety procedures and practices such as those associated with the management of chemicals, pesticides and fertilizers and the operation of agricultural machinery, equipment and infrastructure.
(d) The Company shall prepare and submit to the host State an emergency preparedness program, including disaster risk reduction measures such as early warning and evacuation, prior to the commencement of operations and based on prior consultation with the local government and community.

8.1.5 Clean Water

MODEL PROVISION

Clean Water

(a) The Company shall ensure a regular supply of clean and safe drinking water for its employees.
(b) The Company shall ensure that:
(i) All employees' residential communities within the Project Area are being supplied on a regular basis with clean and safe drinking water; and
(ii) All common water sources are easily accessible for employees' homes within the Project Areas.
(c) Potable water provided pursuant to this section shall meet or exceed standards established by Applicable Law.

8.1.6 Housing

Should the project require the provision of on-site housing for its workers, the contract should provide clear parameters regarding the expected quality and design of the housing. The contract should address requirements for both the planned housing and the wider design of the planned community. A holistic approach to housing should aim to promote the well-being of workers and their families. Some elements for consideration include:

- *Ensuring adequate access to safe and reliable energy for cooking and lighting. Where possible, efforts should be made to encourage the use of renewable energy sources, such as through the construction of solar, wind or biogas energy (which typically uses agriculture waste as the feedstock.).*
- *Ensuring a regular supply of clean and safe drinking water.*
- *Establishing appropriate sanitation facilities for households and community buildings, including ensuring that sewerage is properly treated.*
- *Articulating a clear plan for the management of waste generated by the community, such as through the establishment of waste disposal locations with appropriate controls to minimize the potential for contamination of the surrounding water, land and air.*
- *Ensuring that building codes are aligned with the hazard profile of the area, including climate-proof construction*

MODEL PROVISION

Housing

(a) The Company shall provide Adequate Housing for each of its employees and their Dependents.
(b) All housing plans shall be subject to Applicable Law and submitted to the State through the [relevant Ministry] for review and approval by the [relevant Ministry]. Such approval shall not be unreasonably withheld. Once approved by the State, the housing plans will be annexed to this Agreement and shall be binding on all Parties.

8.1.7 Education

MODEL PROVISION

Education

The Company will ensure the availability of education, free of charge or at affordable rates, for each person who is registered with the Company as a Dependent child of an employee, including, if necessary, building facilities and providing books, equipment and supplies, in accordance with Applicable Law. But the Company shall not be responsible for administering the school, which will remain the responsibility of the State.

The Company shall contribute [X] annually to a government administrated and operated adult education program in the Project Area, with priority for employees and Dependent spouses. The Company will make available its education facilities for the use of such adult education programs at such times that the Company is not otherwise utilizing such facilities.

8.1.8 Medical Facilities

MODEL PROVISION

Medical Facilities

The Company shall construct, maintain, and operate a [hospital or clinic or center or other facility] to serve its employees and their Dependents [and the local community], using modern health devices and equipment and practicing modern health procedures and precautions, in accordance with Applicable Law, and accepted international medical standards.

8.2 Outgrower Schemes

Some of the most successful agribusiness investments studied to date contracted with nearby smallholder farmers to sell their produce to the plantation or processing plant. This is known as contract farming or outgrower schemes. A third of the 39 projects surveyed by UNCTAD and the World Bank involved outgrower schemes, and contracted with almost 150,000 outgrowers (Mirza et al., 2014). Outgrower schemes allow farmers to retain control over their land and can create more employment than what is available on plantations. The UNCTAD-World Bank study found that outgrower schemes create one job for every three hectares of land whereas plantations created one job for every 19 hectares of land (Mirza et al., 2014). Outgrower schemes are also the best business model for the transfer of technology and know-how, such as technical advice on growing practices and disease minimization, preparing the land, setting up demonstration plots, irrigation methods and better yielding seed varieties (Mirza et al., 2014).

There should be a provision in the contract that requires the establishment of an outgrower scheme. The lessons from palm oil plantations in South East Asia show that if the government insists on including outgrowers in the project then it happens, but if they do not, then the companies are unlikely to pursue this option in their business plans (Tyler & Dixie, 2012; Mirza et al., 2014). However, the inclusion of outgrowers needs to be done at the appropriate time. If outgrowers are incorporated before the production model and market is fully tested, this can expose them to financial risks they are unable to bear. One of the vitally important roles of large private investors is that they have the means to shoulder risk in the early stages of investment. Furthermore, in some areas, surrounding communities may not have the level of knowledge or experience needed to be able to be part of an outgrower scheme, and imposing such a scheme may be counter-productive.

A few of the sample contracts reviewed included provisions for outgrower schemes. Provisions related to outgrower schemes typically involved a separate contract between the investor and the farmer or farmers. This can be an attractive business strategy that allows the investor to secure additional raw materials for processing industries or for exports. If the contracts are equitable they can also provide the farmer with a secure and fixed income. In some cases, the local community negotiates to include provisions for outgrower schemes in the Community Development Agreement. The more successful outgrower schemes occur where the farmers are part of cooperatives. Being part of a cooperative improves access to credit, strengthens collective bargaining power, ensures better deals on agrochemicals and fertilizers, and allows farmers to sell to bigger buyers (Mirza et al., 2014).

MODEL PROVISION

Outgrower Scheme

(a) The Company shall establish an Outgrower Scheme in the Project Area within [X] years of the Effective Date, the details of which shall be included in the Approved Business Plan. The Outgrower Scheme shall be introduced once the Company's production model and market are fully tested. The Company shall have the rights to, and commits to, purchase produce harvested from the Outgrower Program.

(b) The Company agrees to collaborate with the State and the local community to identify potential Outgrowers

(c): The Company agrees to

(i) Purchase all the produce from the Outgrowers provided that the produce meets agreed quality standards;

(ii) Support and assist (including where agreed, providing finance for) Outgrowers with the purchase of equipment and fertilizer and the purchase of planting materials appropriate to the location, skills and needs of the Company and the Outgrowers;

(iii) Provide Outgrowers with technical knowledge and management skills; and

(iv) Ensure Project timeliness in accordance with the Approved Business Plan.

(d) The Company agrees to collaborate with the State and the Outgrowers to establish an inclusive price setting mechanism

(e) The Company will enter into a separate agreement with the Outgrowers outlining the terms of the contract.

(f) The Company shall report annually on the implementation of the Outgrower Scheme.

8.3 Creation of Processing Facilities

Closely linked to outgrower schemes are processing facilities. Evidence now exists of successful investments that establish processing facilities for value addition using inputs from outgrowers. Of the 39 projects surveyed by UNCTAD and the World Bank, seven of them were pure processing operations and were directly responsible for the creation of 2,665 jobs (Mirza et al., 2014).

But again, it is important to be realistic with demands. Not every project nor every crop will be suited to the creation of processing facilities. Some crops, such as sugar, oil palm and rubber, are better suited to value addition on the project site, than others (Mirza et al., 2014). Some host governments may not yet have the necessary infrastructure in place to be able to support such industries. Most of the contracts reviewed make no reference to the creation of value-added or processing industries.

MODEL PROVISION

Creation of Processing Industries

Based on the results of the Feasibility Study and Business Plan, the Company commits to setting up a processing facility on the Project Area, subject to Applicable Law and the necessary licences, permits and authorizations. The Company shall commence operations when the commercial viability of the processing facility is assured. The Company shall report annually on the performance of the processing facility.

8.4 Local Business Development Plan

Creating knock-on effects to the broader economy is an important contribution that foreign investment can bring to a country. This means limiting the amount of goods, equipment, machinery and services that are imported from abroad and using local goods and services, to the extent possible. The government can set up the necessary policy and legal framework to achieve this result. Including a provision in the contract can also strengthen these efforts. Requiring the investor to prepare a Local Business Development Plan is one avenue to integrate local providers of goods and services into the investment project. One of the contracts reviewed makes a vague commitment to use local suppliers from time to time and on the terms and conditions that the investor identifies. Once again, however, it is important to be realistic with demands. If the costs or delays associated with purchasing locally or using local service providers are too prohibitive, this could threaten the commercial viability of the project. The model provision below balances the interests of the host government to promote broader economic development with the interests of the investor to make the operations profitable.

MODEL PROVISION

Local Business Development Plan

(a) The Company shall develop a local business development program to promote economic development and growth in the area of communities affected by the Project. The plan shall be submitted to the State for approval. Such a program shall be modified from time to time to fit the existing circumstances related to the particular operating phase (development, construction and operation) of the Project.
(b) When purchasing goods and services related to Company activities, the Company shall give first preference to goods produced in the host State and services provided by citizens or residents or businesses of the host State, subject to technical acceptability and availability of the relevant goods and services in the host State. In addition, the Company agrees to include in each contract with its major contractors and other associates a provision requiring them to adhere to the requirements of this Section, and to require their sub-contractors to do so, with respect to any activities undertaken in the host State by such associates and major contractors (and their sub-contractors), on behalf of the Company.
(c) A listing of local suppliers for consumables and capital items, and local contractors for services, will be maintained at the Company offices, with a particular emphasis on local small and medium enterprises. The State will encourage local suppliers to register for inclusion in the listing.
(d) A quarterly posting will be made at the Company's offices in the State and at the local municipality offices to provide information to potential suppliers and contractors of potential goods and services requirements for the Project.
(e) A listing of bids currently being considered will be maintained at the Company's offices for review by contractors and suppliers. The same such listing will also be published in local municipality offices and newspapers in the affected region, thereby giving suppliers and contractors the earliest possible notification of tenders.
(f) The Company shall report annually on the implementation of the Local Business Development Plan.

8.5 Community Development Agreement

Setting up a Community Development Agreement (CDA) can help create a legal framework for engagement between the investor and local community. The CDA should be negotiated and concluded prior to signing the contract and included in the final contract. The process of negotiating and drafting the CDA is as important as the economic or social benefits that may result. It requires an inclusive and participatory approach. In order to avoid leaving out key stakeholders whose interests may be fundamentally compromised by the project—and who may in turn compromise the project's viability—a systematic stakeholder mapping approach may be used. The method is well established and provides a step-by-step, qualitative approach to identifying actors most relevant for the particular case (Gómez et al., 2007; Glicken, 2000). Identifying all affected groups is key.

The CDA should include an agreed amount for the investor to put into a community development fund for a range of economic and social activities, which the community defines, and may include health, education, housing, sanitation, infrastructure and skills training. A committee with representatives from the investor and community can be nominated to make decisions about how funds are spent. The CDA can create a framework for ongoing dialogue and discussion with the community in the event of conflict or grievances (see Section 11.1 "Grievance Mechanisms" for further information). It can also provide for periodic reviews of the project and its impacts on the community and surrounding environment. A number of resources and handbooks exist to help investors and communities negotiate the CDA and can be consulted, including Sustainable Development Strategies Group's CDA Library; World Bank (2012); Center for Social Responsibility in Mining (2011); Otto (2010); Gross, Leroy & Janis-Aparicio (2005).

In the contracts reviewed, a number of approaches were adopted to CDAs. In a few of the contracts, the investor makes vague commitments to contribute to the improvement of the livelihood of the local community. This would be difficult to enforce. One contract focuses only on education. The best contracts were detailed and specific about the contribution of the investor, the time periods for completion and quantifiable indicators for different activities.

MODEL PROVISION

Community Development Agreement

(a) Prior to commencing operations, the Company shall conclude one or more Community Development Agreements with communities living on or around the Project Area, who are affected by the Project. The aim of the Community Development Agreement is to promote sustainable development and enhance the general welfare and quality of life of inhabitants, as well as to recognize and respect the rights, customs, traditions and religion of the local communities.
(b) The Company shall consult with the State and with the community to establish a process, plans and programs for the implementation of the Community Development Agreement. The Company shall cooperate with the State and with the community with regards to its efforts concerning the realization of such plans and programs.
(c) A material breach by the Company of the terms of the Community Development Agreement shall be considered to be a breach of this Agreement, and the State shall be entitled to terminate this Agreement upon the failure of the Company to diligently and consistently pursue a course of action that is reasonably intended to remedy the breach within sixty (60) days of being notified in writing by the community of the breach.
(d) Each Community Development Agreement shall be subject to Applicable Law, and shall:
(i) Address what development opportunities are presented by the Project, and how the local communities can take advantage of those opportunities;
(ii) Specify the amount the Company will pay to a Community Development Fund, how funds for local development shall be spent and reporting obligations on the Community to show how money has been spent.
(e) The Company shall report annually on the implementation of the Community Development Agreement.

9.0 ENVIRONMENTAL OBLIGATIONS

9.1 Domestic Environmental Laws

All developing countries have domestic environmental legislation that will be applicable to the investor. Specifically referring to the relevant legislation in the contract is strongly advised. However, in some developing countries, environmental regulations for the type of impacts associated with large-scale agricultural operations may not yet exist. Due to their scale and approach to production, these operations may represent a new class of projects for the country. This carries potential positive outcomes (jobs, revenue, etc.), but also potential negative implications. The project might introduce new inputs, such as seeds, fertilizers, pesticides and new production methods such as monocultures and water and energy-intensive production. Even if the inputs are not new, the scale of use may lead to environmental impacts beyond critical thresholds, such as excessive drawing down of water tables, the mining of soil or disruption in the migration patterns of pastoralists.

New laws or amendments to existing laws may need to be drafted to account for the new types of production methods and inputs. If environmental laws and regulations still need to be developed, the investment contract can temporarily help to fill that gap by imposing an environmental standard that reflects the potential impacts. This should be an interim step while adequate laws and regulations are developed. The host state can include a provision in the contract to ensure the applicability of future environmental laws and regulations.

The model provision here demonstrates how a host state can ensure the investor is subject both to domestic environmental laws and contract obligations concerning the specific environmental issues that may arise during the life of the project based on the Environmental Impact Assessment and Management Plan, including its provision for continuous monitoring and reporting of the project's social and environmental performance.

MODEL PROVISION

Domestic Environmental Laws

The Company shall comply with the environmental laws of the State in force, amended or introduced, at any time during the period of this Agreement [including any provincial and local laws], including laws relating to protection of water quality, air quality, quality of land, the preservation of living natural resources, the protection of biodiversity, and the disposal of hazardous and non-hazardous wastes.

9.2 Commitment to Continuous Improvement of Production Methods

Domestic laws will provide the starting point for determining the type of production that the investor is allowed to engage in. The contract can help to fill the gap where the investor's proposed production methods are not covered by domestic laws and regulations.

Local agricultural knowledge and techniques are also a useful resource for investors. And yet there is evidence to suggest that if investors had spoken to local farmers, about issues like crop, soil and fertilizer suitability or rain patterns, a number of production problems could have been averted. To date, there is little evidence that investors have investigated or learned from local agricultural knowledge and techniques. And yet there is evidence to suggest that if investors had spoken to local farmers about issues like crop and soil suitability or rain patterns, a number of production problems could have been averted. For example, a 60,000 hectare rubber plantation was struggling because the soils were not suitable. The local community knew that the area was more suited to cassava production. A sesame plantation was failing due to unexpected heavy rainfall that was known by the community (Mirza et al., 2014).

The contract can also raise standards by requiring a commitment to constantly upgrading and improving production methods in the interest of reducing the environmental impact. Continuous improvement in production methods may be necessary for several reasons. First, due to the inherent complexity of agro-ecosystems and production methods, the host country always faces the possibility of significant impacts due to multiple risks to the environment and social well-being. Significant impacts can be due to single events, such as an accident, or due to a management measure, such as the clearing of a forest. However, very often impacts are incremental (small increments of the same type of impact may lead to a significant result once crossing a critical threshold) and also cumulative (different types of individually insignificant impacts leading to significant risk when simultaneously present). A common feature of these types of impacts is that they are hard, if not impossible, to anticipate. Given that these contracts can apply for up to 50 years and often cover a wide range of activities on a large part of the landscape, there is scope for incremental impacts to build up to significant negative results. Under such conditions, continuous improvement makes good business sense from the point of view of risk reduction and long-term viability of the project.

While the specific areas of focus and technical mechanisms of continuous improvement may not be possible or necessary to identify in specific terms, the investment contract can provide guidance with regard to how these areas of focus and practices could be identified and deployed.

MODEL PROVISION

Commitment to Continuous Improvement of Production Methods

The Company commits to continuous improvements in methods of production, in response to the availability of local knowledge, resources and techniques and new information and technology, in order to reduce the end exposure to pesticides and fertilizers, increase water efficiency, increase nutrient use efficiency, control soil erosion and protect biological diversity. The Company shall outline in the Environmental Management Plan the specific priority areas, a list of indicators and time-bound targets, to improve methods of production. The Company will monitor and introduce best management practices where applicable to the given production systems and agro-ecological conditions, including based on investigation of local agricultural knowledge and techniques. The Company will review and update the priority areas, indicators and time-bound targets, on a bi-annual basis. The Company will report annually to the State on measures undertaken to comply with this provision, including the quantitative results

9.3 Water-Use Permits and Fees

Potential negative impacts on water sources or water rights of other users are included in Section 6.2 "Impact Assessments and Management Plans." However, assessing and managing negative impacts is only part of the water equation. Water-use rights and fees for the investor are another part.

In many of the countries experiencing an influx of foreign investment in agriculture, the legal guarantees to water for investors are not counter-balanced with adequate regulations to safeguard the access and rights to water for other users. Where the right to withdraw water is granted or implied, it should be balanced against that of other water users, both licensed and unlicensed. Where water management policies do exist in domestic legislation, it is important to state the applicability of these laws in the investment contract. In almost half the 39 investments studied by UNCTAD and the World Bank, the use of water was totally unregulated (Mirza et al., 2014).

In a number of contracts reviewed, the government gives the investor rights to unlimited water resources without any corresponding obligations to act responsibly and consider the potential impacts on other users. In these contracts, there is also no reference to whether the water source is able to withstand the additional demands from the investment project. In some contracts, the investor is given the water for free. In other contracts there are water fees or levies, but the amounts payable are symbolic rather than a reflection of the economic value of water. There are a few contracts where some key aspects of the water equation are taken into account, including the rights of other users. There are also contracts that take into account the potential limits of the water source during the dry season.

We recommend a system of water permits or licences with clear provision on the terms and quantity allocated, and with regular reviews to account for changing water availability.

It is also desirable to have the investor become accustomed to paying for their water as early as possible. If the state is providing any of the infrastructure that the investor requires to operate (pipes, channels, pumps, treatment) then there can and should be a fixed (annual) fee for the infrastructure use. Beyond that, best practice is to charge water users by "blocks" of water used, for example, per 1,000 cubic metre. To encourage water efficiency, this could be structured as an "increasing block tariff" (IBT).

Determining the fee to be paid is likely to be more policy-dependent than the granting of allocations. Some questions that would come up are: Is the fee to be paid by all water users or just this investor? Is the fee to be based on flow or a flat rate? Will the fee vary by season (for example, is the price higher in the dry season? Is it cheaper, or even free, during the wet season)?

MODEL PROVISION

Water-Use Permits and Fees

(a) The Company will apply to the [name of relevant Ministry] for a Water-Use Permit, for which approval shall not be unreasonably withheld. The Water-Use Permit shall include the rights to remove specified quantities of surface water from waterways and to withdraw and use specified quantities of groundwater. The Company has the right, subject to written government approval in accordance with Applicable Law, to construct water-related infrastructure such as pipes and conduits and to alter the natural flow patterns by building dams, weirs and reservoirs.

(b) The Company shall report annually on the quantity of water used and released. The Company shall report annually on water quality and availability in and around the Project Area, as well as the impact of Company activities on water quality and availability for local communities. Testing of water quality shall be subject to Applicable Laws and verified by an independent third party.

(c) The State commits to grant the Company a Water-Use Permit, subject to the following conditions:

  (i) The Company shall not use water in such a way as to deny, deprive or otherwise impede access to water for existing water users, whether they are licensed or unlicensed; and

  (ii) The Company shall not endanger aquatic or terrestrial ecosystems on or nearby the Project Area.

(d) The State shall review the Water-Use Permit(s) every five years. The State reserves the right to restrict or withdraw the Water-Use Permit in exceptional circumstances such as acute water shortages, flooding or drought, to adapt to or mitigate the impacts of climate change, or as a result of unforeseen circumstances.

(e) The State shall charge a fee of [X] per cubic decametre of water.

(f) These rights are all subject to Applicable Laws.

9.4 Soil Management

Agricultural projects require good soils. Soils, especially in the tropics, are always susceptible to degradation in the form of erosion and loss of quality. Management practices should ensure that soil quality is being maintained. Prioritizing short-term crop productivity can lead to degradation of soils and compromise crop productivity in the long term (Lal, 2009; Smith et al., 2007). Including a provision for the maintenance of soil resources will help ensure crop productivity for the duration of the project.

Ensuring soil organic carbon levels may have implications for countries in terms of their national greenhouse gas accounts. Soils can be either a source or a sink of carbon dioxide. Besides fighting climate change, ensuring soils remain a sink of carbon dioxide protects countries' abilities to control greenhouse gas emissions, potentially also a source of revenue through certified carbon reductions under the Clean Development Mechanism.

MODEL PROVISION

Soil Management

(a) The Company shall comply with the environmental laws of the State in force at any time during the period of this Agreement [including any provincial and local laws] as they apply to soil resources.
(b) The Company agrees to maintain soil quantity and quality, and manage negative impacts on salinity, organic carbon and nutrient levels.
(c) Every five (5) years, the Company shall monitor and report soil quality indicators (soil organic carbon, total nitrogen, total phosphorus, total potassium, conductivity, pH, bulk density, soil depth) and ensure that soil resources are not compromised through erosion or other degradation means.

9.5 Pollution and Chemical Management

The use of chemicals in agricultural operations can be extremely hazardous and pollute water resources, soils, air and the wider ecosystem. The most commonly arising issues from the UNCTAD-World Bank study were related to agrochemical use, including water pollution, chemical drift and aerial spraying (Mirza et al., 2014). But there were also a number of cases where investors were taking environmental responsibility seriously and implementing measures to reduce pollution. In fact, 70 per cent of the project studies by UNCTAD and the World Bank had taken specific measures regarding chemical use. A palm oil plantation that was causing air pollution due to their waste treatment system was able to install a mechanism to capture methane emissions and use it for energy production. A rice plantation was using rice husks for bioenergy. Despite these positive signs, there were still some deplorable practices, notably an investor who discharged untreated waste into a local river, which was the only water source for surrounding communities (Mirza et al., 2014).

MODEL PROVISION

Chemical Management

Agricultural operations will conform to all Applicable Laws regarding the handling, transport, storage and use of all chemicals used in the operation (including fertilizers, fumigants, fungicides, pesticides and herbicides). This will include, where applicable, laws and regulations governing worker safety and human health as well as environmental protection. The operators will ensure individuals working with chemicals are trained and certified (where applicable) in their handling and use. Additionally the operators will follow manufacturer's guidelines and directions regarding dosage, dilution, application and expiry dates. All accidents or spills must be reported to relevant authorities.

10.0 STABILIZATION PROVISIONS

A common demand of investors, particularly in developing countries, is the inclusion of stabilization provisions. These are clauses in investment contracts that freeze domestic laws at the time the contract is signed. The effect is that governments either have to preclude the application of, or compensate investors for, new or changed laws and regulations that affect the investments. They may apply for a certain period, or for the full life of the contract and any renewal period. They may extend to a narrow range of fiscal issues or to all new laws and regulations. The Special Representative on Business and Human Rights categorized stabilization provisions in terms of two broad categories: fiscal issues (taxes, royalties, rents, rates of payment for services provided, etc.) and non-fiscal issues (such as environment, labour, health and safety) (Shemberg, 2008). Broad stabilization provisions that include non-fiscal issues are now widely considered to be unacceptable, but continue to be used. Also, there is some support for limited stabilization provisions for certain fiscal issues, particularly to protect from arbitrary or discriminatory acts by the government.

The MMDA project accepts limited stabilization provisions for tax issues (see model provision below). It is important to note that the provision is restricted to a fixed period of time, the "stability period," and only applies to taxes, not other fiscal issues. In addition, if the tax law does change during the stability period, the new law is still applicable to the investor, but the parties agree to enter into a negotiation about how to fairly compensate the investor.

A number of the contracts reviewed include stabilization provisions that cover a broad range of laws and regulations and could undermine efforts by government to regulate in the public interest.

We recommend against the use of stabilization clauses altogether, particularly those that cover all laws and regulations, but also fiscal stabilization clauses. If the government decides to include a limited fiscal stabilization provision, it should not override or conflict with domestic law, but may form part of the fiscal bargain in the contract.

MODEL PROVISION

Tax Stabilization Clause

(a) "Stability Period" means that period of time beginning on the Effective Date and ending on the [5th][10th] anniversary of the Effective Date.

(b) During the Stability Period, the provisions of this Agreement shall prevail.

(c) If, during the Stability Period, a provision of the Tax Law in existence at the date of the State's signature on this Agreement is changed or repealed, or new or increased fiscal impositions in the nature of a Tax or duty on the Company or a royalty or Tax on Agricultural Goods or on the production of Agricultural Goods are made by the State, except for changes expressly provided for in this Agreement, and as a result the Company is adversely and significantly financially affected or its liabilities are materially increased, the Parties must agree on a fair and reasonable method to compensate the Company for those changes or new fiscal impositions.

(d) The State shall reimburse the Company as soon as is practicable (or at the State's option, make offsetting changes in any law, statute, regulation or enactment applicable to the Company) to ensure the Company is fully and fairly compensated for any losses, costs or other adverse effects incurred by the Company by reason of a failure by the State to comply with the foregoing provision.

11.0 GRIEVANCE MECHANISMS AND DISPUTE SETTLEMENT

11.1 Grievance Mechanisms

Investor grievance mechanisms are important tools that allow the investor to receive and resolve concerns and grievances by local communities on social and environmental issues and by employees on workplace issues. Grievance mechanisms should be designed in consultation with the community and should be understandable, accessible, transparent and culturally appropriate. The investor should commit to ongoing and regular communication with local communities, particularly women and youth. If a grievance escalates beyond the remit of the mechanism there should be an attempt to resolve disputes through mediation. But it is also important that the grievance mechanism or alternative dispute resolution mechanisms do not prevent access to judicial or administrative remedies.

In the UNCTAD-World Bank study, most investors had a mechanism for employee grievances, and employees were generally satisfied with these processes. But grievance mechanisms for the local community were lacking and they did not know how to raise grievances or seek redress with the investor (Mirza et al., 2014).

The IFC's Performance Standards 1 (paragraph 35), 2 (paragraph 20) and 5, provide guidelines for how to set up proper grievance mechanisms. These guidelines should be incorporated into the contract and the investor should report annually on grievances that have arisen and how they have been addressed.

MODEL PROVISION

Company Grievance Mechanisms

Local Community and Resettled Persons

(a) The Company shall, at its own expense, promptly respond to affected communities' concerns related to the Project as outlined in paragraph 35 of IFC Performance Standard 1 and paragraph 11 of IFC Performance Standard 5.
(b) Where not established under the Community Development Agreement, the Company will establish a grievance mechanism to receive and facilitate resolution of the affected communities' concerns and grievances about the Company's environmental and social performance. The grievance mechanism should be established in consultation with the communities who are anticipated to use it, through an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, at no cost to the affected communities and without retribution. The mechanism should not impede access to judicial or administrative remedies. The Company shall inform the affected communities about the mechanism in the course of its community engagement process.
(c) The Company shall receive and address specific concerns about compensation and relocation raised by displaced persons or members of host communities in a timely fashion, including a recourse mechanism designed to resolve disputes in an impartial manner.

Employees

(a) The Company shall, at its own expense, provide a grievance mechanism for employees (and their organizations) to raise workplace concerns, as outlined in paragraph 20 of IFC Performance Standard 2.
(b) The Company will inform the workers of the grievance mechanism at the time of recruitment and make it easily accessible to them. The mechanism should involve an appropriate level of management and address concerns promptly, using an understandable and transparent process that provides timely feedback to those concerned, without any retribution. The mechanism should also allow for anonymous complaints to be raised and addressed. The mechanism should not impede access to other judicial or administrative remedies that might be available under the law or through existing arbitration procedures, or substitute for grievance mechanisms provided through collective agreements.

11.2 Dispute Settlement

Dispute settlement concerns disputes arising between the host state and the investor. It is an important element in the contract. From a host state perspective it is advisable to refer to domestic courts as the forum of choice for disputes arising under the contract, rather than international arbitration. In instances where international arbitration is unavoidable, it should be preceded by an effort to settle the dispute amicably first. In the option below, the possibility for arbitration is included, but only subject to further written agreement by the parties.

It is also advisable for developing countries to require a specific choice of forum in the contract, which will prevail over any other forms of dispute settlement, including under investment treaties. This will prevent multiple recourses to different dispute settlement mechanisms and ensure that a fair, balanced approach to the specific type of legal dispute at issue will take place.

MODEL PROVISION

Dispute Settlement (Without International Arbitration)

(a) The Parties to this Agreement shall provide notice to each other in the event of any dispute and shall seek to amicably resolve any such dispute concerning the application or interpretation of the Agreement.
(b) The Parties may, by agreement, and without prejudice to any legal rights or obligations, seek independent mediation of the issues in dispute.
(c) For issues in dispute of a technical nature, the Parties may seek, by agreement, independent determination of the issues in dispute, including through the following procedure:

(i) The Parties may submit any controversy or dispute relating exclusively to technical matters to an Independent Expert by Agreement.
(ii) Each Party will have ten (10) days after the selection of the Independent Expert to submit its positions in writing to the Independent Expert.
(iii) The Parties shall decide if there is a further need to present the arguments in an oral hearing. The Independent Expert may decide to call such an oral hearing as well.
(iv) The decision of such Independent Expert must be rendered within thirty (30) days after the completion of the arguments as set out above.
(v) Such decision shall be final and not subject to appeal.
(vi) In addition to the preceding paragraphs, the Independent Expert shall act on the following basis:

(A) The Independent Expert shall act as expert and not as arbitrator;
(B) The items or items in dispute shall be notified to the Independent Expert in writing by the Parties within ten (10) days of the Independent Expert's appointment;
(C) The Independent Expert shall decide the procedure to be followed in the determination;
(D) The determination of the Independent Expert shall (in the absence of manifest error) be final and binding on the Parties; and
(E) The costs of the determination, including fees and expenses of the Independent Expert, shall be borne equally between the Parties.

(d) Where the dispute has not been resolved by amicable means in accordance with the preceding paragraphs, any Party may submit the dispute to the courts of [host State] for resolution. The law of [host State] shall be the governing law for such dispute.
(e) The Parties hereby wave any rights whatsoever, and irrespective of their origin in the Applicable Law or under international law, including international treaties, to additional or alternative dispute settlement processes for any matters relating to the interpretation or implementation of this Agreement or any act by either Party alleged to be in breach of this Agreement.

OPTIONAL: Additional Provisions for International Arbitration

(f) Where the matter has not been resolved by the courts of [host State] or if the Parties otherwise determine alternative dispute settlement is required, the Parties may, by further written agreement, submit the dispute to international arbitration under Rules to be agreed at the time. For greater certainty, this provision does not constitute an agreement to arbitrate any dispute in relation to this Agreement.

12.0 DISCLOSURE

Transparency is a key part of the investment process (see Section 16.1 for further information). At a minimum, all investment contracts and other relevant documentation, such as impact assessments, management plans, feasibility studies, business plans and community development agreements, should be made public. This should be subject to the redaction of truly confidential business information. Local communities who are affected by the investment should have access to information at an early stage in the negotiations, for example, during the community engagement process. Where land rights are clear and vested in local owners or users, they should be entitled to have a say in how the land and water will be allocated to the investor. They might be able to participate in the contracting process, either directly with the investor or as a party to an investor-state negotiation.

Transparency and improved access to information will also enable local communities and civil society groups to monitor and report on investor activities when the project starts, which could be a vital support to governments who may not have sufficient resources to regularly monitor investments. In addition to third party monitoring and reporting, there are a number of annual reporting requirements throughout the model contract (particularly on environmental issues and the economic and social development obligations). It is vital that all reports submitted by the investor to the government are made public. Local communities and civil society groups will also need to be able to access relevant government officials to voice complaints and request assistance if problems arise.

MODEL PROVISION

Disclosure

(a) This Agreement and the documents required to be submitted under sections 6, 8, 9 and 11, by any past and present Parties, are public documents, with the exception of truly sensitive commercial information contained in the Approved Business Plan. They shall be open to free inspection by members of the public at the appropriate State office and at the Company's office in the State during normal office hours, and shall be made available on an Internet web site accessible in the State.
(b) All annual reports submitted by the Company to the State, in accordance with this Agreement, shall be made public and available on an Internet web site accessible in the State.

13.0 PERIODIC REVIEW

Periodic review clauses allow the state and the investor to properly consider and amend the contract, if needed, as a result of changing economic, social or environmental conditions that could affect the ability of the parties to comply with the rights and obligations in the original contract. This type of clause is desirable for both long-term leases and for agricultural projects, where market conditions and environmental constraints can have major implications for the choice of crop, production methods, and business models. Periodic review clauses are already built into the model contract in sections 6.1 "Feasibility Study and Business Plan," 9.2 "Commitment to Continuous Improvement of Production Methods," and 9.3 "Water-Use Permits and Fees." This model provision extends this possibility to all issues covered in the contract.

MODEL PROVISION

Periodic review

This Agreement shall, upon written request of a Party, be subject to periodic review once every five (5) years after the effective date for the purpose of good faith discussions to consider any proposed modification(s) to this Agreement as may be necessary or desirable in the light of any substantial changes in circumstances that may have occurred during the previous five (5) years, or experience gained in that period.

14.0 ASSIGNMENT

Assignment is the transfer of rights from one company to another. Many first-time investors lose money and many first-time projects fail. It usually takes two or three changes in ownership and new injections of capital for the project to become profitable (Tyler & Dixie, 2012). The quicker the process for new investors to be able to take over from failing investors, the more likely the project will become successful quickly, thus avoiding a situation where the investor, host government and community all lose out. While facilitating a quick transfer of rights can help avoid losses all round, it is also important that new investors do not avoid the obligations undertaken in the initial contract with the state. The model provision on assignment below helps to achieve this end.

MODEL PROVISION

Affiliated Company Assignment

The Company shall have the right to assign all (but not less than all) its rights and interest under this Agreement to an Affiliate subject to notification to the State, provided that the Affiliate acknowledges and agrees to assume all of the obligations of the Company under this Agreement and has the capacity to perform those obligations.

Third Party Assignment

The Company shall have the right, with the prior written approval by the State, to freely assign all its rights and interest under this Agreement to a third party, provided that the third party acknowledges and agrees to assume all of the obligations of the Company under this Agreement and has the capacity to perform those obligations.

Capacity of Successors and Assigns

No assignment of any or all of the Company's rights hereunder shall be made, and none shall be effective, where the government determines that the assignee lacks the technical, financial and managerial capacity to honour the obligations in this Agreement.

Release

On any effective assignment of this Agreement to a third party approved by the State, the Company shall be released from liabilities under this Agreement to the extent assumed by the third party.

No Assignment by State

The State shall not transfer or assign its rights or obligations in this Agreement or create or permit to be created any encumbrance or claim on its rights in this Agreement.

15.0 TERMINATION OF CONTRACT

A World Bank study of 179 agribusinesses found that 50 per cent of the projects were classified as failures or moderate failures in financial terms (Tyler & Dixie, 2012). The UNCTAD-World Bank survey found that 45 per cent of projects were not yet profitable, and either in financial difficulty or struggling to make the project operational (Mirza et al., 2014). Given the high rate of failure of agricultural investments, the termination clause in the contract is of critical importance. It guarantees that both the state and investor have a proper exit strategy, if needed. The model provision provides options for termination based on certain events, such as bankruptcy, or if one of the parties commits a material breach of the contract.

Partial termination may also be desirable where the project is not a total failure, but the investor is only using part of the land allocated. Indeed, in a significant number of cases in the UNCTAD-World Bank study, investors were using only a small portion of the land allocated to them, or worse, acquiring the land for its timber without any intention of using the land for the purpose set out in the contract. In 30 of the large investments studied, almost one quarter were using less than 10 per cent of the land allocated to them (Mirza et al., 2014). In this situation, the state may want retrieve unused land so it can be used for other productive purposes. We suggest a model provision below for returning unused land.

MODEL PROVISION

Termination on Certain Events

The State may terminate this Agreement, without prejudice to any other rights that the State may have, if any of the following events occur:

(a) The date of commencement of commercial production does not occur on or before the end of the [x] month following the Effective Date;
(b) The Company significantly and persistently fails to use the land in accordance with Section 5.1 "Terms and Rights";
(c) The Company fails to make a payment, as provided under Section 7.1 "Rent" and Section 9.3 "Water-Use Permits and Fees," and then fails to make said payment within sixty (60) days after the State gives a Notice of the failure to make said payment; and
(d) The Company dissolves, liquidates, becomes insolvent, files for bankruptcy, makes an assignment for the benefit of creditors, petitions or applies to any tribunal for the appointment of a trustee or receiver for itself, or commences any proceedings concerning itself under a law concerning bankruptcy, or insolvency other than for the purposes of corporate reorganization.

Termination on Breach

The State may terminate this Agreement without prejudice to any other rights it may have if the Company commits a material breach of this Agreement and fails or neglects to either diligently and consistently pursue a course of action that is reasonably intended to remedy that breach or failure within sixty (60) days (or a longer period as is reasonable in the circumstances) after the State gives a Notice requiring that the breach be remedied or the provision be complied with or observed.

Termination by the Company

The Company may terminate this Agreement without prejudice to any other rights it may have if the State commits a material breach of this Agreement and fails or neglects to diligently and consistently pursue a course of action that is reasonably intended to remedy that breach or failure within sixty (60) days (or a longer period as is reasonable in the circumstances) after the Company gives Notice requiring that the breach be remedied or the provision be complied with or observed.

Return of Unused Land

The Company and State shall agree to a timeline for commencing production on the Project Area within [X] months of the Effective Date, subject to Section 6.1 "Business Plan." The Company shall notify the State of any delays in implementing the agreed timeline. The Company shall report annually to the Government on how much land has been put under production. Any land in the Project Area that is not used according to the timeline agreed, subject to reasonable delays, and with the exception of land that has to be left intact as indicated on the Project Map, may be repatriated, at the discretion of the Government.

16.0 MONITORING AND ENFORCEMENT

16.1 Transparency and Public Information

Transparency and access to information are key. There is now a broad consensus in favour of investment contracts being made public, subject to the redaction of truly confidential business information. In addition, and in line with norms that are now commonly accepted as part of the Extractives Industry Transparency Initiatives, there is also broad consensus for the publication of revenues paid by a company to a government.

In 2011 both the International Bar Association and the UN Special Representative on Business and Human Rights explicitly called for transparency in contracts. The UN Special Rapporteur on the right to food calls for full transparency in land leases and purchases. The non-governmental organization Grain is making a major contribution to the drive for transparency by regularly publishing investment contracts on their website. And the UN's Committee on World Food Security is currently negotiating a set of principles on responsible agricultural investment that will likely call for contract transparency.

Importantly, there are a few governments that have started publishing contracts or improving legislation on transparency. Where government takes the lead in setting national standards for transparency, there is a greater chance of acceptance by investors to disclose information, because the same standards apply to everyone. Liberia is leading the way. In 2009 Liberia introduced the Liberia Extractive Industry Transparency Initiative Act (the LEITI Act), which requires all payments by individual companies, operating contracts and licenses to be published and reviewed on the LEITI website.

Ethiopia's Ministry of Agriculture set up an online Ethiopian Agriculture Portal, which publishes most of their land lease agreements with foreign and domestic investors. The Democratic Republic of Congo has a website on mining that includes mining concessions and other relevant information about mining activities in the country. Cambodia's Ministry of Agriculture, Forestry and Fisheries publishes certain information on projects, including the location, size, crop, investor and the stage of production. The Republic of Guinea put all its mining contracts online in 2013. Ghana started publishing contracts in the oil sector, and countries such as East Timor, Peru and Ecuador have started making certain contracts public. A number of countries—for example, Sierra Leone, Ghana and Liberia—require large investment projects to be ratified in parliament, ensuring a layer of public scrutiny. These initiatives are all important steps in the right direction, although it is crucial that the information provided is accurate, reliable and up-to-date.

While certain provisions in contracts can contain commercially sensitive information that may require a degree of confidentiality, this can be resolved through restricted confidentiality clauses. It does not justify keeping all information about large-scale agricultural projects outside the public domain. In fact, the scale of these projects and the extensive use of land and water resources go beyond simple business transactions. They form the basis of the host country's economic and social development strategy, and therefore require public participation and scrutiny. If contracts are made public, there is a much greater chance that the terms of the deals will be more fair and balanced. There is less risk for corruption and bribery, and more likelihood for community support. Ensuring that foreign investment operates within a sound economic, legal and public policy framework is essential. Being open and transparent is a good starting point.

16.2 Reporting, Monitoring and Implementation

Designing the right contract is only the starting point. Implementing the commitments and obligations contained in the contract is a much tougher and longer-term challenge, particularly with limited capacity, as is often the case in developing countries. Host governments should not underestimate the time and cost involved in monitoring large-scale agricultural projects. For example, in one country it took 21 government officials three working days to monitor compliance with the contract provisions of one agricultural investor (Mirza et al., 2014, p 13).

Setting aside a percentage of the revenue from the project for implementation issues will help ensure that the government has capacity to monitor and evaluate the project effectively. Setting out clear reporting requirements and indicators in the contract will ensure the government can regularly track whether the investor is fulfilling its development and environmental obligations and its commitment to the local community. Governments should only enter into agreements that they are able to monitor on an ongoing basis. Transparency is a key part of the process of implementing and monitoring the obligations of both parties to a contract.

CONCLUSION

The right legal and policy framework will help governments maximize the benefits and minimize the risks associated with investment in agricultural land and water. It will support efforts to strengthen food security and achieve sustainable rural development. A significant amount of groundwork is needed prior to entering into negotiations. This groundwork is essential for the long-term viability of the project. Understanding the legal environment and the relationship between the different sources of law will allow negotiators to draft contracts that create benefits for all stakeholders involved. Conducting a proper assessment of the economic value and limits of the resources to be developed is crucial. So is the work around identifying suitable and available land, both from an environmental perspective—water availability, soil quality, potential climate change impacts—and from a land rights perspective—are there competing claims to the land, either by formal or informal land rights holders, or are there other users, such as pastoralists, shifting cultivators, or women who use the land to access water and firewood? The process requires meaningful consultations with communities living on and around the proposed project site. It also means proper screening of the potential investors by assessing the business feasibility of the proposed project and the business plan. Operating within an open and transparent environment will minimize the risk of corruption and ensure greater acceptance by those affected. Finally, effective reporting, monitoring and implementation will help ensure the investment lives up to its commitments and creates long-lasting benefits for all involved.

REFERENCES

African Union, UN Economic Commission for Africa and African Development Bank. (2010) *Framework and guidelines on land policy in Africa*. Retrieved from http://www.au.int/fr/dp/rea/sites/default/files/Framework%20and%20Guidelines%20on%20Land%20Policy%20in%20Africa.pdf

Bernasconi-Osterwalder, N., Cosbey, A., Johnson, L. & Vis-Dunbar, D. (2011). *Investment treaties and why they matter to sustainable development: Questions and answers*. Winnipeg, MB: IISD. Retrieved from http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf

Committee on World Food Security, (2012) *Voluntary guidelines for responsible tenure of land, fisheries and forests*. Rome, Italy: FAO. Retrieved from http://www.fao.org/nr/tenure/voluntary-guidelines/en/

Cotula, L., Vermeulen, S., Leonard R. & Keeley J. (2009), *Land grab or development opportunity? Agricultural investments and international land deals in Africa*. Retrieved from ftp://ftp.fao.org/docrep/fao/011/ak241e/ak241e.pdf

Cotula, L. & Leonard, R. (eds). (2010). *Alternatives to land acquisitions: Agricultural investment and collaborative business models.* London/Bern/Rome/Maputo: IIED, SDC, IFAD and CTV. Retrieved from http://www.ifad.org/pub/land/alternatives.pdf

Deininger, K. & Byerlee, D., with Lindsay, J., Norton, A., Selod, H. & Stickler, M. (2011, September). *Rising global interest in farmland: Can it yield equitable and sustainable benefits?* Retrieved from http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf

De Schutter O., (2009) *Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge.* UN Special Rapporteur on the Right to Food (A/HRC/13/33/Add.2). Retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-33-Add2.pdf

Douglas-Mankin, K.R., Srinivasan R., & Arnold J.G. (2010, Sept-Oct), Soil and water assessment tool (SWAT) model: Current developments and applications. *Transactions of the ASABE*, 53(5).

Fellows, P. (1997). *Guidelines for small-scale fruit and vegetable processors*. FAO. Retrieved from http://www.fao.org/docrep/W6864E/w6864e09.htm

Foley, J.A., DeFries, R., Asner, G.P., Barford, C., Bonan, G., Carpenter, S.R., & Snyder, P.K. (2005). Global consequences of land use. *Science, 309*, 570–574.

Glicken, J. (2000). Getting stakeholder participation 'right': A discussion of participatory processes and possible pitfalls. *Environmental Science and Policy, 3*(6): 305–310.

Gómez, R., Galarza, E., Bubb, P., Mafuta, C., Nagatani, K., Rajbhandari, P. et al. (2007). National IEA process design and organization. *IEA Training Manual: A training manual on integrated environmental assessment and reporting, Training Module 2*. Nairobi: UNEP. Retrieved from http://www.unep.org/ieacp/_res/site/File/iea-training-manual/module-2.pdf

Gross J., Leroy G., & Janis-Aparicio M. (2005). *Community Benefits Agreements: Making development projects accountable*. Good Jobs First and California Partnership for Working Families. Retrieved from http://www.communitybenefits.org/downloads/CBA%20Handbook%202005%20final.pdf

Holz-Clause, M. & Hofstrand, D. (2009). *Feasibility study outline*. Agricultural Marketing Resources Center. Retrieved from http://www.extension.iastate.edu/agdm/wholefarm/html/c5-66.html

Human Rights Watch (2012). *Waiting here for death: Displacement and "villagization" in Ethiopia's Gambella region*. Retrieved from http://www.hrw.org/sites/default/files/reports/ethiopia0112webwcover_0.pdf

International Bar Association (2011). *MMDA 1.0: Model mine development agreement*. Retrieved from http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf

International Labour Organization. (2011). *Code of Practice on Safety and Health in Agriculture*. Geneva: ILO. Retrieved from http://www.ilo.org/global/publications/books/WCMS_159457/lang--en/index.htm

Investopedia (2014). *Debt/equity ratio.* Investopedia. Retrieved from http://www.investopedia.com/terms/d/debtequityratio.asp

Jones, J.W., Hoogenboom, G., Porter, C.H., Boote, K.J., Batchelor, W.D., Hunt, L.A., & Richie, J.T. (2003). The DSSAT cropping model system. *European Journal of Agronomy, 18*, 235–265.

Lal, R. (2009). Laws of sustainable soil management. *Agronomy for Sustainable Development, 29:* 7–9.

Mead, D.J. (Ed.). (2001). *Forestry out-grower schemes: A global view.* Rome, Italy: Food and Agriculture Organization of the United Nations. Retrieved from http://www.fao.org/docrep/004/ac131e/ac131e03.htm

Millennium Ecosystem Assessment. (2005). *Ecosystems and human well-being: General synthesis.* Washington, D.C.: Island Press. Retrieved from http://www.millenniumassessment.org/documents/document.356.aspx.pdf

Mirza, H., Speller W., Dixie, G. & Goodman, Z. (2014, April) *The practice of responsible investment principles in larger-scale agricultural investments: Implications for corporate performance and impact on local communities.* Washington, D.C.: World Bank Group and New York: United Nations. Retrieved from http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/04/25/000456286_20140425145714/Rendered/PDF/861750RAI0P1253560Box385174B00PUBLIC0.pdf

Otto, J. (2010, June). *Community development agreements: Model regulations and example guidelines.* Prepared for the World Bank. Retrieved From http://www.sdsg.org/wp-content/uploads/2011/06/CDA-Final-Report-Otto-June-2010.pdf

Pope, J., Annandale, D., & Morrison-Saunders, A. (2004). Conceptualizing sustainability assessment. *Environmental Impact Assessment Review, 24*(6): 595–616.

Poulson, L.N.S. (2010, January). The importance of BITs for foreign direct investment and political risk insurance: Revisiting the evidence. *Yearbook on International Investment Law and Policy 2009/2010*, 539–574. Retrieved from http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge_poulsen

Richey, J., & Fernandes, E.C.M. (2007). Towards integrated regional models of transboundary river basins in Southeast Asia: Lessons learned from water and watersheds. *Journal of Contemporary Water Research and Education, 136*(1), 28–36. Retrieved from http://onlinelibrary.wiley.com/store/10.1111/j.1936-704X.2007.mp136001004.x/asset/j.1936-704X.2007.mp136001004.x.pdf?v=1&t=hir4axap&s=f60e667a177c3919d26e96e6205ab9b980a03493

Rosenzweig, C., & Parry, M.L. (1994). Potential impact of climate change on world food supply. *Nature, 367*, 133-138, doi: 10.1038/367133a0.

Ruggie, J. (2011) *Principles for responsible contracts*. UN Special Representative of the Secretary General on Business and Human Rights (A/HRC/17/31/Add.3). Retrieved from http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf

Sauvant, K. & Sachs, L., (eds.). (2009) *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties and investment Flows.* Oxford: Oxford University Press.

Shemberg, A. (2008, March 11). *Stabilization clauses and human rights*. A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights. Retrieved from http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf

Smaller, C. (2014, April). *The global response to foreign investment in agriculture.* International Institute for Sustainable Development. Retrieved from http://www.iisd.org/sites/default/files/publications/global_response_foreign_investment_ag_en.pdf.

Smit, B. & Spaling, H. (1995). Methods for cumulative effects assessment. *Environmental Impact Assessment Review, 15*(1): 81–106.

Smaller, C. & Mann, H. (2009). *A thirst for distant lands: Foreign investment in agricultural land and water*. International Institute for Sustainable Development. Retrieved from http://www.iisd.org/pdf/2012/land_grabs_africa_en.pdf

Smaller, C. & Mann, H. (2010). Foreign land purchases for agriculture: What impact on sustainable development? *UN Sustainable Development Innovation Briefs (8)*, 1–8. Retrieved from http://www.un.org/esa/dsd/resources/res_pdfs/publications/ib/no8.pdf

Smith, P., Martino, D., Cai, Z., Gwary, D., Janzen, H., Kumar, P. et al. (2007). Agriculture. In B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (Eds.), *Climate change 2007: Mitigation*. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge, U.K.: Cambridge University Press.

Tax Justice Network (2012). *Transfer pricing*. Tax Justice Network website. Retrieved from http://www.taxjustice.net/topics/corporate-tax/transfer-pricing/

Trenberth, K.E., Jones, P.D., Ambenje, P., Bojariu, R., Easterling, D., Klein Tank, A., et al. (2007). Observations: Surface and atmospheric climate change. In S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, et al. (Eds.), *Climate change 2007: The physical science basis*. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge, U.K.: Cambridge University Press.

Tyler G. & Dixie G. (2012). *Investing in agribusiness: A Retrospective view of a development bank's investments in agribusiness in Africa and Southeast Asia.* Washington, D.C.: World Bank. Retrieved from http://www.responsibleagroinvestment.org/sites/responsibleagroinvestment.org/files/features/Findings_Agribusiness_CDC.pdf

UNCTAD (n.d.) IIA database. Retrieved from: http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx

United Nations Principles for Responsible Investment. (2011). *The principles for responsible investment in farmland*. Retrieved from http://www. unpri.org/areas-of-work/implementation-support/the-principles-for-responsible-investment-in-farmland

Vanclay, F. (2003). *Why have principles of social impact assessment?* IAIA Special Publication Series No. 2. Fargo, N.D.: International Association for Impact Assessment. http://www.iaia.org/publicdocuments/special-publications/SP2.pdf

Vermeulen, S. & Cotula, L. (2010). *Making the most of agricultural investment: A survey of business models that provide opportunities for smallholders.* Retrieved from http://www.ifad.org/pub/land/agri_investment.pdf

White, J.W. & Hoogenboom, G. (2010). Crop response to climate: Ecophysiological models. *Advances in Global Change Research 37*, 59–83.

Wood, C. (2003). *Environmental impact assessments in developing countries: An Overview*. EIA Center, University of Manchester. Retrieved from http://www.sed.man.ac.uk/research/iarc/ediais/pdf/Wood.pdf

World Bank. (2012, March). *Mining community development agreements, source book*. World Bank. Retrieved from http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf

World Bank, UN Conference on Trade and Development (UNCTAD), Food & Agriculture Organization, International Fund for Agriculture Development. (2009). *Principles for responsible agricultural investments.* Retrieved from http://www.responsibleagroinvestment.org/rai/node/256

Zagema, B. (2011, September). *Land and power: The growing scandal surrounding the new wave of investments in land.* Oxfam Briefing Paper, 151. Retrieved from http://www.oxfam.org/sites/www.oxfam.org/files/bp151-land-power-rights-acquisitions-220911-en.pdf

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