GUIDE TO LAND CONTRACTS:

AGRICULTURAL PROJECTS

INTERNATIONAL SENIOR LAWYERS PROJECT
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Columbia Center on Sustainable Investment
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ISLP: The International Senior Lawyers Project is a non-profit organization that seeks to foster just and accountable development that is sustainable, supportive of human rights, and strengthens the rule of law. It strategically mobilizes its unique network of highly skilled and experienced pro bono lawyers to assist, train, and empower civil society and governments around the world in ways that better enable the benefits from development and investment to be shared equitably with legitimate developing country governments and their people.

CCSI: The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is the only university-based applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. CCSI's mission is to develop practical approaches for governments, investors, communities and other stakeholders to maximize the benefits of international investment for sustainable development.

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HOW TO USE THIS GUIDE

This Guide was developed to assist non-lawyers in better understanding agricultural investment contracts, such as those available on OpenLandContracts.org. Agricultural investment contracts can be complex, and some provisions may be difficult to understand. This Guide aims to assist the reader in understanding technical provisions found in these contracts. This is not a guide to negotiating contracts, and does not provide model provisions.[1] Rather, this Guide provides explanations for common provisions, as well as a Glossary of certain legal and technical terms used herein. Terms that are included in the Glossary are italicized and bolded the first time they appear in the Guide.

1 INTRODUCTION

1.1 Overview

At its most basic level, agriculture is the practice of cultivating soil, growing and harvesting crops, and raising livestock in order to meet human needs. Large-scale commercial agriculture, which occurs throughout the world, involves the intensive production of crops, livestock, and livestock products (for example, meat, dairy, and eggs) for sale in domestic or foreign markets. As with most businesses, the main objective of companies engaging in large-scale commercial agriculture is to generate profit. This may be achieved through crop specialization; capital-intensive farming techniques; labor-saving technologies; maximization of crop yields through practices such as fertilization, hybridization, and irrigation; and economies of scale.

Foreign investments in commercial agriculture can generate economic benefits for ***host states***, such as additional revenues, increased employment opportunities for local populations and other citizens, and access to global value chains. However, if not properly managed, such investments can have significant impacts on the environment, including on water quality, soil quality, and biodiversity. Agricultural investments may also adversely impact communities on and around affected lands. This risk is heightened in states with weak governance[2] or with ambiguous or transitioning land tenure systems.

A central challenge for stakeholders concerned with large-scale agricultural investments—particularly in low-income countries—is to identify ways to balance national economic and agricultural development goals and the global demand for ***agricultural products*** with other important public policy considerations, including allocation of domestic resources, rural development, food security, water management, sustaining the land's ability to provide ***ecosystem services***, and safeguarding the rights of local individuals and communities. In some countries, domestic ***legal frameworks***—including the constitution, laws, and regulations—govern the terms of investments in a manner that balances these concerns. In other countries, however, legal frameworks fail to adequately address critical issues such as revenue production, allocation of

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[1] For readers seeking either a negotiating guide or model provisions, *see* Carin Smaller, "IISD Guide to Negotiating Investment Contracts for Farmland and Water," The International Institute for Sustainable Development (November 2014), available at: https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf (last visited Mar 7, 2016).

[2] The Organisation for Economic Co-operation and Development (OECD) has labeled as "weak governance zones" those areas that it defines as "investment environments in which governments cannot or will not assume their roles in protecting rights (including property rights), providing basic public services (for example, social programmes, infrastructure development, law enforcement and prudential surveillance) and ensuring that public sector management is efficient and effective. " OECD, "OECD risk awareness tool for multinational enterprises in weak governance zones," (June 8, 2006), p. 10, available at: http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf (last visited Mar 7, 2016).

risk, social benefit, and environmental protection. In either case, an investor's obligations regarding the development and use of farmland may be further elaborated in an agricultural investment contract between the investor and the relevant government. These contracts delineate the conditions upon which the government authorizes the investor to use land within its ***jurisdiction*** for purposes of agricultural production. These conditions usually include (1) payments by the investor to the government for use of the land and other needed resources and (2) commitments regarding the investor's management of the land, its operations, and—in some cases—its interactions with affected individuals and communities. The purpose of this Guide is to familiarize readers with these contracts.

1.2 Agricultural investment contracts, in brief

Agricultural investment contracts come in many varieties, cover a range of issues, and vary depending on the country context, the investor's objectives, and other factors. This Guide focuses on the written contracts—including ***concession*** agreements, land lease contracts, and similar legal documents—that frequently govern large-scale agricultural investments in low-income countries, through which governments grant investors the right to use and control farmland for purposes of commercial agriculture. For ease of reference, this Guide refers to these contracts as "agricultural investment contracts."

In addition to the rights granted to access, possess, and control the land (***tenure rights***), an agricultural investment contract typically provides the investor with a range of rights that facilitate an investor's agricultural operations. For example, a government may lease an investor a parcel of land to grow sugarcane for purposes of ethanol production. Additional rights may include the right to build a factory capable of converting raw sugarcane into biofuel; the right to import the equipment and skilled labor needed to operate the factory; rights to use existing ***infrastructure*** on and around the land to carry out the project (for example, irrigation or water supply systems); or ***rights of way*** through adjoining lands, which the investor may require to transport equipment to, or agricultural products from, the land.

In return for these and other rights, the investor will be required to make payments to the government, which may include concession fees or rents, taxes, customs duties, and other fees. Some of these payments will be required by domestic law (for example, taxes). Agricultural investment contracts may also require additional payments, or may include exemptions to taxes or other payments required by law, depending on what is negotiated between the investor and the government. In addition to these payments, the investor will commit to obligations that will define the parameters of its activities. These can take the form of affirmative obligations, such as obligations to maintain books and records, to source needed products domestically, or to provide certain financial and social benefits to local communities. They can also take the form of negative obligations: for example, restrictions on the use of certain chemicals or limitations on the amount of debt the investor can incur.

1.3 The impact of contract negotiation and drafting on agricultural investments

While agricultural investments can generate benefits for investors, host states, and local communities, these benefits can be difficult to realize. For instance, some investments may fail to significantly contribute to job creation or infrastructure linkages; other investments may struggle to remain financially viable. In addition, the benefits generated by agricultural investments may not flow through to local communities; in these situations, communities might instead only experience the investment's negative impacts.

Ideally, a country's domestic laws will regulate investments to ensure that various stakeholders realize meaningful benefits, and that the stakeholders who bear the brunt of an investment's negative impacts are adequately compensated. In practice, however, many governments negotiate investment governance into their contracts with investors, and such contracts may fail to effectively balance the interests of all affected stakeholders. Governments often face political pressures and—particularly in low-income states and emerging economies—may be at a disadvantage during contract negotiations because of a lack of access to the high-level legal expertise available to experienced multinational investors.[3] At the same time, investors may lack a nuanced understanding of the domestic political context, local land governance systems, and community dynamics particular to the area, all of which can make it difficult for the parties to negotiate viable deals that are adequately tailored to local conditions. Governments and investors may also limit, or vaguely define, obligations in the contract so as to expedite negotiations or to minimize potentially complex and expensive requirements that may delay operations.

When contract negotiations are imbalanced, or where key matters are not adequately addressed in the contract or by law, problems and disagreements between the parties—or with third party stakeholders, such as affected communities—may arise. Some potential issues include:

- Failure on the part of the government and/or impacted communities to collect a fair return on the value of the land and the crops produced thereon. This may, for instance, arise where legal frameworks or investment contracts permit inaccurate appraisal of the land or crop market, or provide for broad exemptions from tax; or where weak governance systems lead to a lack of capacity to adequately collect rents and other payments associated with the project, or facilitate bribery and corruption.

- Conflict over indigenous or other affected communities' rights to the farmland and the existing resources found on that land. For instance, when these rights are not clearly defined under law, or when the parameters of the ***contract area*** are not clear, there may be confusion and disagreement as to the nature of the rights and entitlements of the various stakeholders.

- Tension and conflict between investors and communities if and when economic or social benefits do not flow down to the local level. In countries where government decisions regarding investment are not made transparently or are influenced by corruption, tensions may be exacerbated if communities suspect that deals were negotiated unfairly or at the expense of local populations.

- Non-compliance with the contract by the parties, often facilitated by inadequate monitoring or enforcement. Contract violations may lead to a range of negative outcomes, such as degradation of the soil quality, irreversible environmental damage, loss of biodiversity, loss of revenues, and loss or degradation of the traditional lands of local and indigenous communities.

Notwithstanding these challenges, agricultural investment contracts often play a prominent role in regulating agricultural investment. This is particularly true where domestic law does not comprehensively address the wide range of potential benefits and impacts that agricultural investment can produce.

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[3] For example, Liberia's 1926 Firestone Concession Agreement was negotiated under intense pressure from the U.S State Department, granting Firestone almost unlimited rights to over one million acres of land and containing a provision requiring the Liberian government to take a five million dollar loan from a wholly owned Firestone subsidiary. The agreement has since been reviewed and renegotiated by the Liberian government in order to maximize benefits received and improve corporate governance under the agreement. *See* Raja Kaul, Antoine Heuty and Alvina Norman, "Getting a better deal from the extractive sector: Concession negotiation in Liberia, 2006-2008," Revenue Watch Institute (February 2009), available at: https://www.opensocietyfoundations.org/sites/default/files/liberia_20090302.pdf (last visited Mar 7, 2016); Nat Walker, Susan Megy, Varney Kamara and Mike Butscher, "Agricultural land concessions and conflict in Liberia policy analysis brief 2012," Early Warning Early Response (EWER) Working Group (June 15, 2012), available at: http://lern.ushahidi.com/media/uploads/page/3/EWERPolicyBriefLiberia (last visited Mar 7, 2016).

2 KEY PROVISIONS IN AGRICULTURAL INVESTMENT CONTRACTS

When reviewing any contract, it is essential to carefully consider the rights granted, and obligations imposed, by the contractual provisions. It is also important to consider what provisions may have been omitted or only described generally, and the possible consequences of that omission or brevity. For instance, a contract that defines the contract area only in terms of size (such as a specified number of hectares of farmland) and not with precise geographic coordinates may result in confusion and conflict over the exact boundaries of the land that is subject to the contract.

In addition, it is useful to keep in mind the interplay between the contract and the other legal frameworks that govern the investment. Agricultural investments are generally subject to domestic law—that is, the constitutional norms, laws, and regulations of the host state. Host states often also have international legal obligations that might affect the governance of agricultural investments or provide additional protections to an investor. Given this interplay, where there appears to be a conflict in legal obligations—such as between a contract's provisions and domestic law—it may be useful to consult with a lawyer to determine which obligations prevail.

The following subsections describe common provisions in agricultural investment contracts. They are organized in the general order that they often appear in contracts.

2.1 Definitions

The definitions section of an agricultural investment contract, which typically appears at either the beginning or the end of the document, sets out the key terms that will be used throughout the contract and explains what those terms mean. Key terms are often capitalized throughout a contract to signify that the capitalized word is a defined term. Defined terms help the parties achieve uniformity and clarity of meaning throughout the rest of the contract.

2.2 Parties

The ***parties*** to a contract are the ***legal persons*** who sign (or ***execute***) the contract. By signing the contract, each party agrees to assume certain rights and obligations as described under the contract. In agricultural investment contracts, one party to the contract typically will be the host state (often represented by a government minister or senior civil/public servant) and the other party typically will be the corporation or individual that plans to carry out the investment by growing, selling, or processing agricultural products.

This Guide refers to the government party as the 'Government' and the corporate (or individual) party as the 'Investor.' However, depending on the kind of agricultural investment contract, the Investor may be referred to as the 'Lessee,' 'Tenant,' 'Licensee,' 'Contractor,' 'Concessionaire,' or 'Grantee' in the contract; correspondingly, the Government may be referred to as 'Lessor,' 'Licensor,' 'Grantor,' or another term. Although the titles assigned to the parties in a particular contract may suggest that the contract conveys certain types of rights and obligations (for example, leasehold rights from a Lessor to a Lessee), ultimately rights and obligations are created by the contract's provisions; the titles used for each party simply provide a means to refer to the parties in a consistent manner throughout the contract. *See* Section 2.1, Definitions.

In some situations, the Investor may enter into the contract, or may conduct the project's operations, through a ***subsidiary*** or an ***affiliate***. For example, if the law of a particular jurisdiction only permits the host state to lease land to domestic companies, a multinational corporation that wishes to make an agricultural investment in that jurisdiction may need to establish a local subsidiary to be the contracting party. A multinational corporation may also decide to make the investment through a local subsidiary due to a range of business considerations, including tax benefits or ***liability*** concerns. Alternatively, a multinational corporation might enter into the contract itself, while establishing a local subsidiary to operate the project.

Third parties (including affected communities, non-governmental organizations, creditors, and guarantors) may also be involved in negotiations around an agricultural investment. Whether or not such parties have any ***enforceable legal rights*** under the related contract will depend on the specific terms of the contract (for example, if the contract has a ***third party beneficiary clause*** that explicitly precludes non-parties from enforcing any provisions of the contract) and the rules applying to contractual rights of third parties in the relevant jurisdiction.

2.3 Contract term

The ***term***, or duration, of an agricultural investment contract is the amount of time that the contract will be operative. The length of the term may depend on the particular circumstances applicable to the agricultural investment, the outcomes sought, and the economic considerations that must be weighed in light of the obligations imposed on the Investor. The rules governing minimum and maximum terms of agricultural investment contracts vary from country to country, with many countries providing for maximum terms between 50 and 99 years.[4]

The initial term of an agricultural investment contract will typically begin on the contract's ***effective date***, which may be the date the contract is signed by all parties (the ***signature date***) or the date that the parties meet certain negotiated conditions (the ***conditions precedent***). The term will then run for the length of the time specified in the agreement, unless one or both parties to the contract terminate the agreement as permitted by the contract's termination provision (described in Section 2.23, *Termination*). Agricultural investment contracts may also include provisions permitting renewal or extension of the term if the Investor meets certain conditions or performance targets, such as targets for labor productivity, crop production yields, and environmental management objectives.

2.4 Contract area

The contract area is the land identified in the agricultural investment contract where the Investor can conduct its operations. In some contracts, this may be equivalent to, and referred to as, the "concession area" or the "production area." In other contracts, the concession area or production area might include the land identified in contract as well as additional land transferred under other agreements.

Identification of the specific land that will come within the contract area prior to executing the contract increases certainty for all stakeholders. Domestic law may require that the precise coordinates of the contract area are recorded and made publicly available. Even where not required by law, the parties to the contract may choose to make precise coordinates publicly available to avoid any disputes that may arise due to vague understandings of the contract area boundaries. The parties may also supplement these coordinates with a description that is more easily understood by local populations—for example, a description that describes the contract area by reference to geographic markers, such as trees or rivers.

The provision that describes the contract area may also stipulate certain areas that are excluded from the contract area. These may include cultural heritage sites, mountains, reservoirs, traditional forests, land legally owned by residents, or protected areas. This provision may also

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[4] Howard Mann, "Foreign land purchases for agriculture: what impact on sustainable development?" *Sustainable Development Innovation Briefs* (January 2010), available at: https://sustainabledevelopment.un.org/content/documents/no8.pdf (last visited Mar 7, 2016).

specify how much land will be allocated to an outgrower program under the contract, as discussed in Section 2.13.4, Labor, health and safety, below.

Some contracts may not specifically indicate the contract area, instead stipulating that a piece of land be surveyed by a certain date and, upon receiving government approval, be designated the contract area after the contract is signed. In such cases, the contract may require a legal description of the contract area to later be annexed to the contract. If the boundaries of the contract area are described in an appendix to the contract or in an additional document—whether on the execution date or at a later time—the contract may point the reader to the document (or documents) where that information may be found.[5]

2.5 Rights granted and obligations imposed

An agricultural investment contract will include provisions describing the rights to the land and resources that the Government is granting to the Investor. The Investor's rights may be divided into "basic rights" and "incidental rights."

"Basic rights," which may also be referred to as "base rights" or "production and basic rights," are those rights that are central to the operation of the contract, and will typically include ***tenure rights*** (rights to enter, use, and control the contract area) and rights to undertake the agricultural operation. Details regarding the crops to be produced will also be included.

"Incidental rights" are those rights that are necessary for, but not central to, the agricultural operation. Examples of incidental rights include rights to construct, maintain, and repair the infrastructure necessary for the agricultural operation (for example, roads, telephone poles, and security gates);[6] rights to import supplies and equipment; rights to market, transport, and export agricultural products;[7] and rights to use specified resources (for example, water, clay, and stones) found in or near the contract area during the agricultural operation. They may also include the Investor's right to access and use utilities, specifying permitted use, rates, and responsibilities with regard to these utilities.

In many cases, persons other than the parties to the agricultural investment contract (for example, indigenous or other affected communities and other users holding licences for resources located within the contract area) may have pre-existing rights over the contract area. Those rights may be acknowledged or reserved in the grant-of-rights section. For example, the contract may specify that persons inhabiting the contract area have the right to remain there, or it may grant them the right to continue accessing resources that are necessary to maintain their cultures and livelihoods throughout the contract term. For a more detailed discussion regarding these issues, *see* Section 2.13, *Social obligations*.

A "rights withheld" provision may also be included to specify restrictions on the Investor's rights. For example, a rights withheld provision can prohibit the clearing or production of a particular species, or restrict the Investor's access to environmentally sensitive or protected areas of land. The Government may also reserve the exclusive right to conduct exploration and extract any mineral resources (for example, metals, minerals, oil, or natural gas) located beneath the contract area's surface.

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[5] Environmental Law Alliance Worldwide, "Natural resource contracts: A practical guide," (November 2013), p. 6, available at: https://www.elaw.org/system/files/Natural_Resource_Contracts_Guide.pdf (last visited Mar 7, 2016).

[6] An Investor's rights and obligations regarding needed infrastructure are further discussed in Section 2.7, *Infrastructure*.

[7] To ensure that the agricultural project does not adversely impact food security, the Government may require a certain percentage of agricultural products produced within a specified time frame to be sold locally. *See* Smaller, 2014, op. cit., p. 20.

2.6 Conduct of operations

Agricultural investment contracts often set forth requirements regarding the Investor's conduct of operations, which may address issues such as maintenance of the contract area, planting and replanting requirements, other permitted activities within the concession area, appointment of an operator, guidelines for transactions with affiliates, requirements for product sale to local populations, sale prices, and purchasing rights, among others. Furthermore, a contract may tie those requirements to generally accepted industry standards or standards promulgated by certification schemes, such as the Roundtable on Sustainable Palm Oil.[8]

The Government will usually include a provision in the contract that gives it the right to enter the contract area from time to time to inspect the Investor's activities (including the activities of any sub-contractors). This provision permits the Government to ensure the Investor is complying with its obligations under the contract as well as with all applicable laws and regulations. This provision will also typically allow the Government to review the Investor's books and records, including accounting records, production records, and other operational information. For a more detailed discussion regarding inspection and review, *see* Section 2.14, Monitoring and audits.

2.7 Infrastructure

Access to ancillary infrastructure can be critical to the viability of any agricultural investment. For instance, most agricultural investments cannot survive without access to roads, railways, or ports that will enable the Investor to transport produced goods; and where modern irrigation and drainage systems are accessible, production levels may be significantly higher.[9] Agricultural investment contracts may therefore include provisions that require the Government to provide the Investor with access to infrastructure that is necessary to the Investor's agricultural operations. In some cases, the contract may require the Investor to pay for its use of existing local infrastructure in its operations (for example, railways and irrigation systems) to ensure that the Investor is contributing to domestic economic growth.

Infrastructure provisions typically also address the Investor's rights to construct and install infrastructure, as well as its corresponding obligations to maintain and repair such infrastructure. These provisions may articulate permitting and licensing requirements associated with proposed infrastructure projects—which often mandate prior Government approval over the design, location, size, and potential environmental impacts of proposed infrastructure—as well as financing requirements for such projects. The contract may also include ancillary rights for the Investor to exploit secondary resources located in the contract area—such as timber—for the construction of infrastructure.

Alternatively, the Government may retain the right to construct infrastructure within the contract area under specific circumstances, provided that this does not interfere with the Investor's operations. The contract may also include conditions under which the government can authorize third party use of infrastructure, or require the Investor to make infrastructure available to local populations during the term of the contract, subject to reasonable and lawful restrictions imposed

[8] The Roundtable on Sustainable Palm Oil (RSPO) is a multi-stakeholder non-profit group founded in 2004 with the objective of "promoting the growth and use of sustainable oil palm products through credible global standards and engagement of stakeholders." *See* http://www.rspo.org/certification (last visited Mar 7, 2016); *see also* http://www.rspo.org/file/revisedPandC2013.pdf (last visited Mar 7, 2016).

[9] For example, in 2010 only three percent of arable land in Africa was irrigated, whereas an average of 47 percent of South Asia's arable land was irrigated. As a result, Africa's arable land produced an average of 1,300 kilograms of cereal per hectare—approximately half the yield per hectare as compared to South Asia. Kingsley Ighobor and Aissata Haidara, "All eyes on $1 trillion," *Africa Renewal Online*, Special Edition on Agriculture 2014 (2014), p. 22, available at: http://www.un.org/africarenewal/magazine/special-edition-agriculture-2014/all-eyes-1-trillion (last visited Mar 7, 2016).

by the Investor. Finally, infrastructure provisions may establish which party owns the infrastructure, both during the term of the contract and following expiration of the contract.

2.8 Security

Many agricultural investment contracts include a provision that addresses security to protect the Investor's agricultural operations. The provision may allow the Investor to hire private security forces, or, alternatively, may require the government to provide adequate security to protect the Investor's contractual right to peaceful possession of the contract area. If a security provision is included in an agricultural investment contract, it may define the parameters of security activities and use of force in the context of security duties. For instance, it may describe the circumstances under which private security forces can apprehend, detain, and/or evict persons from the contract area.

The provision may also set forth training and vetting requirements for private security personnel, Investor reporting requirements, the Government's monitoring rights, and requirements for security coordination with local and/or national law enforcement. Finally, some contracts may include an affirmative obligation for the parties to adhere to the Voluntary Principles on Security and Human Rights, which are principles developed among certain governments, private sector companies, and civil society groups to help companies ensure the safety and security of their operations while maintaining respect for human rights.[10]

2.9 Representations and warranties

Some agricultural investment contracts include sections dedicated to representations and warranties. In contracts without such a section, representations and warranties may still be included in other sections. Representations are statements of fact made by one party on a specific date (often the effective date) to convince the other party to enter into the agreement. The party making the representation will then often "warrant"—or guarantee—in the contract that the representation is true. If it is later established that the representation was not true on the date it was made, then the party who made the representation will be in breach of contract, meaning that it has not fulfilled its side of the agreement. If the other party suffers harms as a result of the false representation, it may be able to sue for money ***damages***.[11]

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[10] The Voluntary Principles on Security & Human Rights were primarily developed in response to issues in the extractives industry. However, the principles are also relevant to major agricultural projects; they have thus been included in some agricultural investment contracts. Voluntary Principles on Security & Human Rights (2000), available at http://www.voluntaryprinciples.org/ (last visited Mar 7, 2016).

[11] In the context of agricultural investment contracts, the party granting the interest in the land may not wish to make any representations or warranties, and will prefer to grant the interest in the land on an "as is" basis—that is, without warranty. Conversely, the party obtaining the interest in land will want to have as many reassurances as possible—by way of representations and warranties from the other party—so that they are aware of all relevant risks regarding the land. In such cases, one party may pay for land rights only to subsequently learn that the other party did not have the authority to grant such rights (particularly in countries with non-transparent land regimes). To avoid this concern in an agricultural investment contract, an Investor may require the Government to be transparent in its representations and warranties about all prior and co-existing claims to the land and resources that are the subject of the contract. Parties may conduct due diligence to confirm that the other party's representations are true prior to executing the contract. For instance, an Investor may consult with local communities to ensure congruity with the State's characterization of land ownership. Doing so may help the Investor avoid future conflicts with local communities or others who have the rights to the land and resources, and, in turn, better safeguard its investment.

Some common representations and warranties that may be provided in an agricultural investment contract include:

- that the land in the contract area is free of any encumbrances (meaning that there are no competing claims to all or any part of the contract area that would obstruct or prevent the Investor from exercising its rights to the contract area);[12]
- that the Investor is a corporation validly established under the governing laws of the jurisdiction in which it is formed;
- that the Investor has the necessary corporate power and authority to conduct its business and fulfill its obligations under the contract;
- that neither the Government nor the Investor has any litigation or court proceedings pending against it that could significantly affect rights or obligations under the contract;
- that the Investor has the necessary technical capabilities and financial resources to perform its obligations under the contract; and
- that the Investor has no obligations under other contracts, laws and regulations, or court rulings that might conflict with its obligations under the contract.

In addition to representations and warranties, this section may include "undertakings" (sometimes called "covenants")[13] from each party, which are promises one party makes to another about activities that the party will undertake or avoid during the term of the contract. These can be distinguished from representations and warranties in that, while representations and warranties are statements of fact made as of a specific date (for instance, the execution date), undertakings are forward-looking and relate to future performance, typically during the term of the contract. Standard undertakings may include:

- that (subject to other provisions of the agreement) the Government will not exploit or permit another person to exploit the contract area for commercial purposes;
- that the Government will not grant licenses to any third parties to operate competing businesses within a certain distance of the contract area;
- that the Government will hand the contract area to the Investor on a specified date without altering or harming the land in the interim period; and
- that the Investor will conduct all of its operations in compliance with all applicable laws and prudent business practice.

2.10 Capitalization; Permitted debt

In order to ensure that the Investor has sufficient financial resources to conduct its agricultural operations and to fulfill its obligations under the contract and to suppliers, employees, and other creditors, the Government may require the Investor to maintain a certain level of capital, or money value, in the agricultural project throughout the contract's term. It may do this by prohibiting the project from exceeding a defined ratio that measures the amount of debt that the

[12] Local communities may disagree with the Government's characterization of the land as free from any claims or encumbrances. This may result in conflict between the communities and the Investor and/or Government, which may impede progress on the agricultural project. The importance of community consultation and consent are explored further in Section 2.13.1, *Consultation and "free, prior and informed consent" (FPIC)*.

[13] Note that some contracts may use the terms representations, warranties, undertakings, and covenants interchangeably. Accordingly, provisions should be reviewed in light of the general principles described here to determine if they are statements of fact as of a given date or forward-looking commitments.

project has incurred to operate against its capital or equity value.[14] Contracts may include a debt-to-capitalization ratio, which is calculated by dividing the project's debt by its total capital (its equity value plus its debt) at a particular time. Alternatively, contracts may include a debt-to-equity ratio, which is determined by comparing the project's total debt to its total equity (meaning, its assets minus its liabilities) at a particular time. In either case, this requirement allows the Investor the flexibility it needs to finance the project's operations and to grow its business, while restricting it from incurring aggregate debts that may lead to the project's insolvency.[15]

If a contract includes this requirement, it typically will require the ratio to be calculated on a periodic basis throughout the contract's term, for instance, every fiscal quarter or fiscal year. The contract may exclude from this calculation certain categories of debt, such as non-interest bearing debt. Debt that is not factored into the ratio may be subject to certain requirements; for instance, the Government may require that any such debt is ***subordinated*** to any liabilities or obligations that the Investor or the project has to the Government or any claims that the Government has against the Investor or the project. This means that the Government will have a priority right to take ownership of the project's ***tangible assets*** and ***non-tangible assets*** to settle such liabilities, obligations, or claims before the holder of the subordinated debt (which may, for example, be a parent entity of the Investor) can seize the project's assets to settle debts and liabilities the Investor owes to them. Furthermore, the contract may prohibit the Investor from taking certain actions during any period in which the project has exceeded the ratio. For instance, it may prohibit the Investor from making any distributions to its equity investors or incurring additional debt for borrowed money during this time.

2.11 Rental fees, taxes, and other payments

Most agricultural investment contracts require Investors to pay the Government annual rental fees (sometimes called surface fees, land fees, or concession fees) in exchange for the right to access and use the land in the contract area. In some cases, the contract may only require payment of rental fees for the portion of the contract area that is actually used for production.[16]

In addition to rental fees, the Investor will usually be required by law to pay other taxes or fees, such as taxes on income and assets; ***customs duties***; ***export taxes***; or taxes on irrigation and drainage systems, machinery, or equipment. In some cases, the Government may grant the Investor exemptions from these payments; such exemptions may be built into law or established by contract. An agricultural investment contract thus may offer additional detail on payments to the Government, or may describe tax or fee exemptions that the Government has agreed to provide to the Investor.

2.12 Environmental obligations

Large-scale commercial agriculture involves the intensive use of land, pesticides, fertilizers, and natural resources, which can lead to negative—and sometimes devastating—environmental impacts if not managed carefully. Domestic laws often mandate a range of environmental protections. In some cases, additional environmental requirements may also be negotiated between the Government and the Investor to further mitigate potential adverse impacts, including any that are specific to the particular investment. Governments interested in proactively

[14] This is typically tested at the operating company level. If the Investor establishes a subsidiary to operate the agricultural project, then this ratio will be calculated based on the operating company's balance sheet.

[15] The term "debt" may be defined as debt for borrowed money, and thus would exclude other liabilities, like trade payables.

[16] Where this is at issue, the contract may include a mechanism that provides a basis for calculating a fee reflecting the true value of the tenure rights granted, which can discourage speculative holdings of the land and associated water rights. Smaller, 2014, op. cit., p. 29.

mitigating environmental risks may negotiate these obligations into the contract itself or require that a tentative environmental management plan be presented before the contract is signed.[17] Some of the principle considerations and associated mitigation obligations that may be required by domestic law or that may appear in contracts and/or environmental management plans are discussed below.

2.12.1 Environmental impact assessments and management plans

An Environmental Impact Assessment (EIA) is a systematic process undertaken to examine and evaluate the potential environmental impacts of a proposed project or activity. In some situations, this process is extended to include a Social Impact Assessment (SIA), which reviews the potential social impacts (such as relocation, disruption of livelihoods, and impacts on culture) of the project. These expanded assessments are commonly known as Environmental and Social Impact Assessments (ESIAs).[18] In many countries, EIAs or ESIAs are required by domestic law and/or policy to ensure that, prior to approving a project, decision-makers are informed about the potential environmental and/or social impacts and predicted outcomes of a proposed project, as well as measures that may be taken to mitigate potential adverse impacts.[19] Where not mandated by law, agricultural investment contracts nonetheless may require Investors to conduct this assessment.[20]

In addition to requiring an EIA, an agricultural investment contract may require the Investor to develop a context-specific Environmental Management Plan (EMP) that reflects the risks and related mitigation measures associated with the project. To ensure that the Investor takes appropriate mitigation measures as recommended by the EIA or EMP, the contract may require that the EMP be amended periodically to reflect changes in plans for environmental management as the project progresses. The contract may also describe monitoring obligations, such as periodic environmental audits, and may require the Investor to incorporate the results of such audits into the EMP or a rolling development plan.

Some contracts further elaborate EIA and EMP requirements by mandating a schedule for delivery of these documents. For instance, the contract may require that these documents be approved prior to any clearing or disturbance of the environment, or that the Investor submit the EIA and/or EMP within one year of the contract's effective date. Finally, the contract may stipulate who is qualified to prepare EIA and EMP documents and what constitutes government

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[17] Agreed mitigation measures may be made public for transparency and monitoring purposes. In addition, they may be shared with affected communities to ensure that those communities have access to accurate, up-to-date, and comprehensive environmental information in order to make informed decisions during consultative processes as discussed in Section 2.13.1, *Consultation and "free, prior and informed consent" (FPIC)*.

[18] Stakeholders may also carry out a Human Rights Impact Assessment (HRIA) to examine the project's potential human rights impacts on community members and individuals. The potential human rights and social impacts of agricultural projects are addressed in greater detail in Section 2.13, *Social obligations*.

[19] An FAO study of direct foreign investments in agriculture found a correlation between negative environmental impacts and the failure of investors to perform an adequate environmental impact assessment or implement a proper environmental management plan. World Bank, "The practice of responsible investment in larger-scale agricultural investments: Implications for corporate performance and impact on local communities," 86175-GLB (April 2014), p. 7, available at: http://unctad.org/en/PublicationsLibrary/wb_unctad_2014_en.pdf (last visited Mar 7, 2016).

[20] Other contributing stakeholders—including development finance institutions and institutional investors—may also require assessments to be conducted. For example, the International Finance Corporation (IFC) imposes quasi-regulation on prospective clients that are seeking IFC funding for their development projects. Prior to project review and approval by the IFC Board of Directors, an IFC investment team communicates with the client and other project stakeholders, travels to the project site, and analyzes potential social and environmental risks associated with the project to assess whether the project complies with IFC ESIA requirements. *IFC Project Cycle*, available at: http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/ifc+projects+database/projects/aips+added+value/project+cycle (last visited Mar 7, 2016).

approval of these documents. Usually, EIA and EMP documents must be prepared by a qualified independent environmental consultant and approved by the Government's environmental protection agency or its equivalent.

2.12.2 Pollution prevention

Pollution is the contamination of air,[21] water, or soil by the discharge of harmful substances, and includes anything that may detrimentally alter the quality of the surrounding environment, affect the safety or health of human beings, or harm wildlife. Pollution prevention is the reduction or elimination of pollution at the source. This is particularly important in large-scale commercial agricultural operations, in which chemicals, such as pesticides and fertilizers, tend to be used frequently.

Typically, domestic law will mandate pollution prevention measures. An agricultural investment contract may simply require that the Investor comply with these legal requirements, or it may reference other environmental standards with which the Investor must comply, such as the Equator Principles[22] or industry standards. Alternatively, the parties may include in the contract or the EMP pollution controls and waste management[23] practices that are tailored to the agricultural activity and the relevant ecosystem in an effort to lower operational and environmental compliance costs, prevent and reduce waste, and reduce long-term liabilities and cleanup costs. These controls may include requirements to provide appropriate training to all persons handling chemicals or disposing of waste; to adhere to all standards for usage established by chemical manufacturers; and to report significant events to authorities, such as chemical or waste spillage.[24] Finally, the contract may specify conditions under which the Government may suspend relevant permits or licenses—for instance, where a significant risk to life or the environment arises.

2.12.3 Watercourses and water management

In general, the term "watercourse" is used broadly, and can mean any level of the system of surface and groundwater channels, tributaries, and the water they contain, including rivers, lakes, aquifers, glaciers, reservoirs, canals, wetlands, and floodplains. In the context of large-scale commercial agriculture, fertilizers, livestock, and pesticides can pose serious threats to these watercourses by degrading water quality and/or by limiting or obstructing their flow. Poor irrigation may also lead to waterlogging (oversaturation of soil), salinization (the build-up of dissolved solids in soil), and build-up of nitrate fertilizers in ground and surface water, all of which can cause severe environmental damage and land degradation.[25] Such effects may harm

[21] Air pollution is a common concern with many agricultural practices, and its effects can have transnational impacts. In some countries, greenhouse gas emissions from agriculture projects constitute a significant share of national emission rates. FAO Food and Agriculture Organization Economic and Social Development Department, "World Agriculture: Towards 2015/203. An FAO perspective," (2003), p. 334, available at http://www.fao.org/docrep/005/y4252e/y4252e14.htm (last visited Mar 7, 2016). Biomass burning (also known as "slash-and-burn"), methane from livestock and rice production, nitrous oxide from manure and fertilizers, and ammonia from animal waste are four significant ways in which agriculture contributes to air pollution.

[22] The Equator Principles is a risk management framework adopted by financial institutions for determining, assessing, and managing environmental and social risk in projects. 83 Equator Principles Financial Institutions in 36 countries have currently adopted the Principles. The third revision of the Equator Principles was released in 2013. Equator Principles Association, Equator Principles III (June 2013), available at: http://www.equator-principles.com/resources/equator_principles_III.pdf (last visited Mar 7, 2016).

[23] Waste management is the practice of supervising and monitoring waste disposal, which is inextricably linked with the protection of watercourses, land, and air.

[24] Smaller, 2014, op. cit., p. 45.

[25] FAO, 2003, op. cit., p. 332-33.

surrounding ecosystems and negatively impact the health of local communities and their ability to sustain their livelihoods. Furthermore, watercourse degradation may lead to reduced crop yields, thus jeopardizing the viability of the investment.

As with pollution, domestic law often governs watercourse protection, and agricultural investment contracts may simply require the Investor to comply with such law. Given the adverse impacts that degraded watercourses may have on production levels and on the communities and ecosystems that depend on them, however, contracts or related EMPs may also include additional requirements (for example, restrictions on pesticides and controlled use of fertilizers) to ensure that Investors are mitigating potential harms wherever possible.

Because large-scale commercial agriculture typically involves heavy water usage—and because limited water resources can cause competition between industrial operations and local populations—domestic law, agricultural investment contracts, and EMPs may include restrictions on water usage and sourcing. Domestic law may set forth water permitting or licensing requirements (including quantity controls) and mechanisms to review water availability and usage over the course of the contract's term.[26] Provisions in contracts or EMPs may further limit the Investor's water rights in order to ensure adequate water supplies for local people. For instance, a provision might state that the Investor may take and use water necessary or useful for its operations, so long as it does not interfere with the rights of third parties or materially deprive villages, tribes, and local people of a reasonable supply of water where such water has customarily been available.

Contracts may also address: (1) whether the Investor may buy water at public rates in the concession area or use water free of charge, (2) if, by whom, and at what rates surplus water may be bought or sold by the Investor, and (3) whether the Government will charge licensing fees, taxes, or duties in connection with the exercise of water rights. Additionally, contracts may grant or deny the Investor rights with regard to development of water infrastructure. This might include listing water infrastructure development activities the Investor may or may not engage in, describing the circumstances under which the Investor must seek Government approval or licensing, and explaining the relevant steps for gaining such approval.

Finally, where operations associated with an agricultural investment contract may affect transboundary watercourses (that is, watercourses traversing one or more international borders), the agricultural investment contract may include an obligation to comply with any watercourse agreements that exist between the neighboring countries or under international law.

2.12.4 Land degradation

Land degradation refers to any reduction in the capacity of land to provide ecosystem services. Soil degradation—a particularly serious facet of land degradation—occurs when the health of soil declines, thereby reducing the soil's capacity to produce agricultural products and absorb carbon dioxide.[27] Land or soil degradation may result in a reduction in crop yields, increased use of potentially harmful fertilizers (to compensate for the loss of productivity), an increase in greenhouse gas emissions, loss of biodiversity, and serious socioeconomic consequences such as food insecurity and migration.

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[26] Smaller, 2014, op. cit., p. 43.

[27] European Commission, "Soil at the Interface between Agriculture and Environment," available at: http://ec.europa.eu/agriculture/envir/report/en/inter_en/report.htm (last visited Mar 7, 2016). A number of agricultural practices strongly influence the rate and instance of land and soil degradation. "Monocropping" (or "crop monoculture") refers to the practice of growing a single plant species in one area every year instead of rotating crops or practicing inter-cropping. Monocropping often results in reduced soil productivity and fertility.

It is often costly, if not impossible, to reclaim already degraded land and restore ecosystem services that are critical to the local society and development.[28] To mitigate this risk, agricultural investment contracts or related EMPs may require the Investor to take measures to maintain soil quality and quantity. For instance, they may require the use of appropriate farming methods to prevent soil erosion in sloping areas or may establish requirements for crop rotation or fallow management. Contracts may also require the Investor to monitor and report on soil erosion or degradation throughout the term of the contract.

2.13 Social obligations

At a minimum, the Government party to an agricultural investment contract must respect its international legal obligations regarding the human rights of workers and of project-affected communities and individuals, regardless of whether these obligations are explicitly referenced in the contract. Generally speaking, this includes requirements that the Government protect the rights of project-affected communities and individuals to physical security, liberty, and equal treatment,[29] as well as their rights to health, housing, food, an adequate standard of living, and participation in cultural life,[30] among other fundamental rights. Governments must also protect these rights, as well as other labor-related rights, for workers employed directly or indirectly by the agricultural investment.

Investors should respect human rights, and the UN Principles for Responsible Contracts provides guidance on integrating human rights into investment contracts.[31] Further guidance on respecting human rights is found in the UN Guiding Principles on Business and Human Rights.[32] An Investor may also have agreed to certain international standards, such as the UN Global Compact, which sets forth principles in the areas of human rights, labor, environment, and anti-corruption.[33]

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[28] Soil type, topography, land management and crop types all affect land degradation, making it difficult to measure and very site-specific. Due to difficulties often associated with measuring economic, social, and environmental impacts of land degradation, a number of detailed local and international assessments have been undertaken in recent years. Perhaps the most comprehensive of these, the FAO's Land Degradation Assessment in Drylands (LADA) Project, investigates soil and land degradation in six countries in order to better understand international best practice and provide informed policy advice at global, national, and local level. FAO, "LADA project findings and recommendations: Land degradation assessment in drylands," NR: EP/GLO/502/GEF (December 2011), available at: http://www.fao.org/nr/lada/index.php?option=com_docman&task=doc_download&gid=781&lang=en (last visited Mar 7, 2016).

[29] UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999 (December 16, 1966), p. 171, [hereinafter ICCPR], available at: http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (last visited Mar 7, 2016).

[30] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993 (December 16, 1966), p. 3, [hereinafter ICESCR], available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (last visited Mar 7, 2016).

[31] UN Office of the High Commissioner for Human Rights, "Principles for Responsible Contracts," HR/PUB/15/1 (2015), available at: http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf (last visited Mar 7, 2016).

[32] UN General Assembly, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Addendum- Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators", A/HRC/17/31/Add.3, (May 25, 2011), available at: http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf (last visited Mar 7, 2016). *See also* UN Office of the High Commissioner for Human Rights, "United Nations guiding principles on business and human rights: Implementing the United Nations 'Protect, Respect, and Remedy' framework," HR/PUB/11/04 (2011), p. 13-16 available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Mar 7, 2016).

[33] UN Global Compact, *The Ten Principles,* available at: https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Mar 7, 2016).

Some of these standards may be enshrined in the domestic laws of the host state, and the reach of those laws may extend beyond the Government to the Investor and the agricultural project. Furthermore, in some agricultural investment contracts, the parties may elect to elaborate further on the respective social obligations of the Government and the Investor. Contracts may address aspects of the agricultural project for which binding legal obligations exist under international law—such as resettlement—or aspects for which there is often no binding or clearly articulated legal standard, such as local employment and procurement, or other investor activities that typically fall under the banner of corporate social responsibility (CSR). Some of the most common social obligations addressed in agricultural investment contracts are explored below.

2.13.1 Consultation and "free, prior and informed consent" (FPIC)

Specific consultation practices vary from country to country. Some countries legally require the Government and/or Investors to consult with local communities in certain situations, such as when government or investor actions threaten to interfere with local lands, livelihoods, and traditional practices.[34] External standards, such as those imposed by certification schemes or by financial institutions, might also require either consultation with, or attaining the consent of, local communities.

Where the farmland is situated on the lands of indigenous or tribal peoples protected under international law,[35] the principle of "*free, prior and informed consent*" (FPIC) applies. FPIC entitles a project-affected indigenous or tribal community[36] to be consulted with and to provide or withhold their approval before the establishment of any project that stands to directly affect access to their lands, territories, or resources. Any consent obtained must be "free," occurring without undue pressure or manipulation; it must be obtained sufficiently "prior" to the commencement of the project or public measure; and it should be given after the community is sufficiently "informed" about all aspects of the project.

An agricultural investment contract that adheres fully to FPIC principles would include clear and specific language concerning (1) the scope of consultation, (2) the processes for obtaining community approval, and (3) what happens where the community withholds its consent. In practice, however, contracts that make reference to consultation and consent tend to do so in vague terms. In some cases, there may be a separately negotiated agreement with the community that seeks to clarify the scope of consultation. These side agreements are identified here as "community agreements," and are addressed in greater detail in Section 2.13.7, Agreements with local communities.

2.13.2 Resettlement

Commercial agricultural operations that displace communities involuntarily can have significant adverse effects upon the affected population. Displaced communities may lose access to income-generating land and resources or much-needed water reserves, and even short- to medium-term resettlement may be long enough for traditional and cultural practices to be eroded or lost altogether. To protect against these and other harms, such as general infringements on property rights, most jurisdictions have domestic legislation that prohibits land confiscation without due

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[34] *See e.g.*, Haida Nation v. B.C. (Minister of Forests), (2004) SCC 73, 3 S.C.R. 511, at para. 35 (Can.).

[35] The obligation to obtain the FPIC of indigenous and tribal communities is included in the International Labour Organization's *No. 169 Indigenous and Tribal Peoples Convention (1989)* (ILO 169), the United Nations Declaration on the Rights of Indigenous Peoples (2007) (UNDRIP), and the International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability (2012). While these international instruments are somewhat limited in that they are only intended to apply to indigenous or tribal populations, they nonetheless demonstrate a growing global recognition of the importance of community consultation and consent.

[36] Ensuring FPIC for all local communities, and not just for indigenous peoples, is increasingly viewed as best practice.

process and/or adequate compensation. With respect to indigenous populations, international law provides additional protection.[37]

Historically, agricultural investment contracts have often been negotiated between Governments and Investors with little regard to potential displacement. This was particularly likely in cases where the affected land was communally held, was considered to be "held in trust" for the community by the Government, or was used only during some parts of the year by nomadic or pastoral communities. In recent years, however, there has been growing recognition of the need to protect project-affected communities against forced eviction or resettlement.[38] Modern contracts may include a commitment to reduce or minimize displacement and resettlement. Where resettlement is necessary, these provisions typically identify who will be responsible for effectuating the relocation. In some cases, the Investor may receive a tax credit for any expenses incurred in resettling landholders.

2.13.3 Local employment and local procurement

Agricultural investment contracts sometimes impose obligations on the Investor to hire employees from local communities or to locally procure goods and services needed for the agricultural project's operations.[39] In some cases, these obligations are defined via quota requirements—stating, for instance, that a percentage of positions at a given skill level must be filled by locals, or that a percentage of goods and services required by the Investor must be supplied by local businesses.[40] Governments and Investors may opt to include these provisions in contracts to ensure that the agricultural project contributes positively to sustainable local development. Furthermore, where the Investor conducts value-adding processes locally rather than exporting raw materials, additional economic benefits may flow to the host state.

The meaning of "local," however, can be a matter of debate, particularly if the contract fails to clearly define the term. For instance, some contracts may reserve local employment and procurement benefits for members of project-affected communities, while others may interpret "local" to include anyone who is a citizen of the host state. In the latter case, the agricultural project may draw people from across the country to the project-affected area, potentially altering local economic or social conditions.

Some contracts also require Investors to provide specialized training or technical support to ensure that individuals from local communities or nationals of the host state can benefit from skilled positions.

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[37] ILO 169, for example, which is binding upon ratifying states, stipulates that "the peoples concerned shall not be removed from the lands which they occupy" except: (1) where "necessary as an exceptional measure" and (2) with FPIC, or if FPIC cannot be obtained, following procedures established by relevant national law. International Labour Organisation, *Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169)*, 72 ILO Official Bull. 59 (June 27, 1989) [hereinafter ILO 169], available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169 (last visited Mar 7, 2016).

[38] *See* Inter-Agency, "Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the "Pinheiro Principles," (March 2007), available at: http://www.refworld.org/docid/4693432c2.html (last visited Mar 7, 2016); *see also* UN Human Rights Council, "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari," A/HRC/4/18 (February 5, 2007), available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/28/PDF/G0710628.pdf?OpenElement (last visited Mar 7, 2016).

[39] Local employment and procurement requirements may risk running afoul of international obligations (for instance, obligations under bilateral investment treaties) not to give preference to domestic businesses over foreign ones. Where this is the case, the parties may be limited in their ability to embed robust employment and procurement provisions in the contract.

[40] Environmental Law Alliance Worldwide, 2013, op. cit., p. 35.

2.13.4 Labor, health and safety

In addition to promoting local employment and shielding local communities from the possible environmental/social harms associated with an agricultural project, there is a growing global recognition of the special need to protect the health and safety of workers, who may suffer heightened risks to their health and safety as a result of their employment by the project. This is particularly true of projects that require the use of toxic chemicals—as agricultural projects often do—or where workers must use potentially dangerous tools or machinery. Some agricultural investment contracts thus contain provisions dedicated to protecting workers' health and safety and to otherwise limiting potentially harmful or dangerous labor conditions. For instance, a contract might limit workers' hours; forbid or limit the use of certain chemicals deemed dangerous to workers' health; or require that the Investor implement certain safety precautions (e.g., the use of masks when spraying chemicals on crops, or the use of blade guards on industrial machinery). Some contracts might also include provisions requiring the Investor to provide regular safety training instructions to its employees; to provide basic medical care to its employees and their dependents; to build wells to supply clean and safe drinking water in the contract area; or to construct health facilities and schools for employees and their dependents.

2.13.5 Outgrower programs

Some agricultural investment contracts include an obligation to design and implement an outgrower scheme in partnership with local producers. In an outgrower scheme, the Investor typically commits to purchasing a fixed quota of agricultural products from local—often smallholder—farmers. Such schemes are designed to ensure that these farmers benefit from the project's presence while retaining access to their lands. From the Investor's perspective, these schemes can also enable the Investor to access additional, more secure, and, in some cases, cheaper raw materials. By supporting local residents' livelihoods, the Investor can also minimize the risk of community dissatisfaction.

When an agricultural investment contract includes a provision on outgrower schemes, the provision may identify the basic parameters of the scheme. For example, it may allocate responsibilities between the Government and the Investor to identify participating farmers (which may include preferences for women or other marginalized farmers); to develop the land; and to arrange for access to inputs (for instance, seeds, fertilizers, and necessary technologies), credit, and technical training for participating farmers. The contract may also describe the amount of land available for such schemes, or require the Government to identify the target lands. A contract might also establish a price-setting mechanism, or bind the Investor to monitoring and reporting requirements.[41] The parameters of the scheme set out in the agricultural investment contract are often then supplemented by separate agreements with participating farmers or cooperatives of farmers.

Carefully designed outgrower schemes can offer benefits for both the Investor and participating farmers. On the other hand, less considered schemes present significant risks. For example, outgrower schemes may result in a transition from multicropping (growing two or more crops in the same piece of land during a single growing season, or rotating crops seasonally) to monocropping (growing a single crop year after year on the same land), which may degrade soil quality. Monocropping may also create a risk of food insecurity as farming households are forced to generate higher incomes to purchase food that they were once able to grow. Outgrower schemes can also be problematic for participating farmers when the schemes shift the financial

[41] World Bank, "Agricultural Global Practice Discussion Paper, Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks," 03 94895-GLB (June 2015), p. 10, available at http://www.iisd.org/sites/default/files/publications/world-bank-agri-investment-contracts-web.pdf (last visited Mar 7, 2016).

risks of the investment onto farmers. Accordingly, contract provisions regarding outgrower schemes may be drafted to mitigate these risks.[42]

2.13.6 Corporate social responsibility and social development funds

Some agricultural investment contracts include further social obligations for the Investor. For instance, Investors may commit to providing certain goods or services to impacted communities and/or to employees and their descendants, such as health care, education, infrastructure, skills training, or access to food and improved water sources—commitments that might be broadly described simply as "community development activities."[43] Contracts may also include provisions to ensure that such activities are sustainable—for instance, ensuring that schools or health clinics will continue to be staffed and supplied in the Investor's absence, or ensuring that clean water access points are self-sustaining.

In some cases, Investors will also agree to the establishment of a Social Development Fund (SDF) (sometimes referred to as a Community Development Fund). The parameters of the SDF may be set out in the agricultural investment contract itself or, alternatively, in a separately negotiated agreement with the community (as addressed in greater detail in Section 2.13.7, *Agreements with local communities*). In some cases, management of an SDF will be assigned to a committee composed of community leaders, local government officials, and Investor representatives. The SDF may be used to fund some or all of the abovementioned community development activities, as well as to address other community needs as identified by the community itself.

2.13.7 Agreements with local communities

When an agricultural investment contract requires an Investor to undertake commitments to potentially affected communities, it may further require the Investor to articulate a plan to deliver upon those commitments through a community development plan or in enforceable side agreements between affected communities and the Investor. Such agreements go by various names, including memoranda of understanding (MOUs), community development agreements (CDAs), community benefit agreements (CBAs), impact benefit agreements, and local development agreements. Such an agreement might cover a range of matters, including compensation for lost land, loss of income, and property damage; commitments to train and hire locally; CSR commitments; joint oversight committees; and consultation and grievance mechanisms. In some cases, community agreements may also provide for royalties or other profits to accrue to the community (often in the form of a community development fund).[44]

2.13.8 Grievance mechanisms

A grievance mechanism is a routinized process through which an individual or group of people can bring complaints concerning any aspect of an investment and seek a remedy. Grievance mechanisms can be operated by the Government, the Investor, or other entities, such as financiers.

To date, agricultural investment contracts have not commonly included grievance mechanism provisions. When included, such provisions might provide certain rights or obligations regarding the resolution of grievances from local communities (such as allowing the Government to

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[42] *Id*.

[43] In addition to being included in the agricultural investment contract, these obligations may also arise from the Investor's own internal corporate social responsibility (CSR) policy or from negotiations with the affected community.

[44] These revenue-sharing schemes may be tied to the project's profits; however, from the community perspective, it may be preferable for such schemes to be tied to total revenue, thus ensuring a steady stream of benefits for the community.

suspend investment activities until problems are resolved), or might require the Investor to set up a site-based grievance process through which it can receive and resolve grievances from local communities or employees.

Best practices dictate that grievance mechanisms are designed and implemented in consultation with the community, and that engaging with such mechanisms should not prevent someone from subsequently seeking judicial or administrative remedies.[45]

2.14 Monitoring and audits

Monitoring the Investor's performance to ensure compliance with its obligations is critical. Agricultural investment contracts and/or domestic law often require an Investor to undergo various levels of monitoring, from internal reviews and self-reporting to government or third-party compliance evaluations. These may be scheduled as mandatory periodic reviews that occur throughout the term of the contract. Independent auditors may assess the results of any monitoring processes carried out by Investors or third parties to ensure objective assessment of the Investor's compliance with the contract's provisions and to ensure that the interests of all stakeholders are taken into account.

Many contracts require an Investor to maintain written books and records to account for the Investor's financial transactions and all matters involving its assets and business during a particular financial reporting period. These may include financial statements, cash receipts, bank statements, income tax statements, stock ledgers, and minute books, among others. The Investor often must maintain these records in a manner that conforms to commonly accepted accounting principles (such as the Generally Accepted Accounting Principles, or GAAP) as well as the laws of any country that has jurisdiction over the Investor (including the Investor's ***home state*** and the host state). A contract might also require the Investor to undergo an annual financial audit to ensure that its books and records are correct and complete.

2.15 Anti-bribery and corruption

As the international regulatory environment for cross-border businesses becomes more complex, anti-bribery and corruption provisions in investment contracts have become increasingly important in some sectors. Although such provisions are not yet standard in agricultural investment contracts, they may become more common as contracting parties incorporate or adapt model provisions, such as the ICC Anti-Corruption Clause, which was published by the International Chamber of Commerce in 2012 to assist companies seeking to embed anti-corruption principles into their contractual agreements.[46] The ICC Anti-Corruption Clause includes, among other things, representations from the parties that they have not engaged in any corrupt activities in connection with the relevant contract, promises from those parties that they will not engage in any such corrupt activities throughout the life of the contract, and provisions establishing measures to be taken if one party discovers that the other has engaged in such prohibited activities.

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[45] U.N. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework," U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), Principle 31(h) and commentary to Principle 29, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Mar 7, 2016).

[46] International Chamber of Commerce Commission on Corporate Responsibility and Anti-corruption, and the Commission on Commercial Law and Practice, "ICC anti-corruption clause," (2012), available at: http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Anti-corruption-Clause/ (last visited Mar 7, 2016).

Regardless of whether an anti-corruption provision is included in the contract, however, contracting parties must still guard against bribery and corruption as required by national and international law—including ***legislation*** in the Investor's home state (where the Investor is legally organized) and in the host state (where the agricultural operation is situated).[47]

2.16 Assignment and novation

Assignment and ***novation*** provisions deal with the transfer of benefits and obligations of a contract to a person or entity not party to the original contract.

Assignment is the transfer of the benefits of a contract to a new party, but not the obligations. Novation, on the other hand, essentially puts the new party into the shoes of the party novating (that is, transferring the contract), so that the new party is treated as if it had signed the original contract, thus assuming all of the rights and obligations the novating party had undertaken. In either case, if an Investor wants to transfer its rights or obligations under an agricultural investment contract to a new party, the contract (or relevant regulations) will likely require it to obtain the Government's consent—typically, in writing—before making any such transfer.

Governments typically limit an Investor's ability to transfer its rights and obligations to a new party for a range of reasons. Primary among these reasons are:

- The Investor's access to high value confidential information from the Government during the term of the contract. While the Government may be comfortable disclosing such information to the Investor, it may not want to disclose such information to any entity that may later become party to the contract via an assignment or novation.
- Reliance on the Investor's reputation, financial capability, or industry expertise when entering into the contract. These factors often influence the Government's decision to agree to the project as well as the terms it negotiates into the contract. Accordingly, prior to providing its consent to any assignment or novation, the Government may want to confirm that the proposed new party brings a reputation, financial strength, and industry expertise that are commensurate with the Investor's to ensure the continued viability of the project.

In addition to Government consent rights, assignment and novation provisions may also permit or prohibit certain types of transfers. These often include:

- Whether or not the Investor will be able to sub-contract. Agricultural investment contracts may allow the Investor to sub-contract with third parties during certain phases of the production process. If the Investor is allowed to sub-contract, the contract may set parameters for how the Investor does so.
- Whether or not the Investor will be able to assign its rights under the contract—including its rights to access and/or possess the agriculture land and exploit the land's resources—

[47] In the U.S., legislation requires that companies within its jurisdiction adhere to strict anti-bribery and anti-corruption standards when conducting business abroad. For instance, the U.S. Department of Justice has taken an expansive view of what cases fall under the *Foreign Corrupt Practices Act 1977* (FCPA). The FCPA prohibits U.S. companies from paying (or offering to pay) foreign officials to obtain business, and it further applies these restrictions to foreign entities and citizens who commit such acts while in U.S. territory. Engaging in any such activities is a criminal offense, and penalties for such offenses include severe fines and imprisonment. The UK *Bribery Act 2010* is also extensive in its application. Of most concern for many businesses is Section 7, which states that an entity associated with a person who has offered a bribe may be liable for an unlimited fine if it has not implemented adequate procedures to prevent corruption. The UK Ministry of Justice has stated that it considers contractual anti-corruption standards to be "adequate procedures" within the meaning of Section 7. United Kingdom Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (February 11, 2012), Section 9, p. 23, available at: http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (last visited Mar 7, 2016).

to a lender as security (or collateral) for a loan. In some situations, the Government may allow the Investor to pledge its interests in some or all of the contract area so that the Investor may obtain financing to carry out the operations contemplated by the contract. Where this is allowed, the contract may include a provision describing the Government's right and remedies if a lender forecloses on the collateral or otherwise exercises remedies in relation to it.

2.17 Change of control

An agricultural investment contract may require the Investor to obtain the Government's consent—typically, in writing—prior to any change in the ownership or management of the Investor. This change in ownership or management is often referred to as a "change of control." Events that constitute a change of control may include assignments, transfers, or sales of a majority of the stock or economic interests in the Investor (or a parent company); a sale of all or substantially all of the Investor's (or a parent company's) assets; or a change in the majority of the Investor's (or a parent company's) board members. If a change of control occurs without the Government's consent, a change of control provision may allow the Government to terminate the contract.

2.18 Confidentiality and publicity

Confidentiality provisions are designed to ensure that certain types of information shared between the parties to a contract remain confidential and not publicly available. These provisions usually require each party to protect the other party's trade secrets or other information that is conveyed under the understanding that it will not be made readily available to the public. While the confidentiality provision may be broad, it typically excludes certain categories of information, such as information that is already in the public domain or information that must be disclosed by law.

Generally, information covered by a confidentiality provision remains confidential for the life of the contract. In addition, some confidentiality provisions may also survive the termination of the relevant contract, which means that the parties must treat information covered by the provision as confidential even after the contract's term has ended.

Governments, Investors, and local communities may have different views on what constitutes confidential information and when confidentiality provisions should apply. For example, they may disagree on whether the agricultural investment contract itself should be made publicly available.[48] Relevant guidelines and principles indicate that transparency of these contracts, or of all non-commercially-sensitive provisions included in them, is best practice.[49]

2.19 Stabilization

A ***stabilization*** provision seeks to shield the Investor from having to comply with or incur the costs of changes in the domestic law.

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[48] This relates to issues of community access to information and public participation, referenced in Section 2.12, *Environmental obligations,* and Section 2.13.1, *Consultation and "free, prior and informed consent" (FPIC)*. Confidentiality provisions that are narrowly tailored to cover only information that genuinely needs protection for commercial reasons help the Government avoid any conflicting duties it may have with respect to confidentiality (with regards to the Investor) and transparency (with regards to affected communities and the general public). Limiting the scope of confidentiality provisions can also help the Investor avoid accusations of engaging in secret, closed-door deals with Governments, and disclosure of contractual terms that affect local communities may engender more trust within such communities.

[49] Columbia Center on Sustainable Investment, "Recommending Transparency in Land-Based Investment: A Summary of Relevant Guidelines and Principles" (March 2016).

Some stabilization provisions require the Government to refrain from doing certain things. For example, a provision might prohibit the Government from materially increasing taxes or royalties payable by the Investor under the contract. Other stabilization provisions exempt the Investor and its operations under the contract from compliance with laws or regulations adopted by the Government after the contract was executed, or require that the Investor be compensated for changes in the law affecting its investment.

Stabilization provisions can be grouped into five categories:

1. Intangibility provisions – these provisions prohibit the Government from nationalizing the operations covered by the project or amending the contract without the Investor's consent.
2. Consistency provisions – these provisions may be combined with another type of stabilization provision, and provide that legislation enacted by the Government will only apply to the Investor's operations under the contract if it is consistent with the contract.
3. Freezing provisions – these provisions "freeze" the legislation and regulations affecting the Investor and its operations under the contract to those that existed at the date of the contract. Freezing provisions generally state that legislation and regulations enacted after the commencement of the contract will not apply unless the Investor agrees to be bound by them. Freezing provisions can be either "full freezing provisions," covering all laws concerning the operations under the contract or "limited freezing provisions," which only freeze some laws (for example, relevant tax laws).
4. Economic equilibrium provisions – these provisions seek to ensure that the Investor is compensated for the costs of complying with any laws or regulations adopted after the contract begins. In contrast to freezing provisions, economic equilibrium provisions do not excuse the Investors from complying with the new laws or regulations. As with freezing provisions, economic equilibrium provisions may be either "full" or "limited." A full economic equilibrium provision protects the Investor against the economic consequences of all changes in legislation and regulations, whereas a limited economic equilibrium provision may only apply to certain laws and regulations, or may only be triggered if compliance costs exceed a certain amount.
5. Hybrid provisions – these provisions contain some elements of freezing provisions and some elements of economic equilibrium provisions and generally require the Government to restore the Investor to the material position it was in before the law changed. This could be through compensation or a special exemption from the law.

Stabilization provisions can be controversial given their potential impact on sustainable development and human rights, particularly when the provision does not create exceptions for changes in law related to labor, human rights, health and safety, the environment, or other social issues. Some stabilization provisions will explicitly carve out such areas, while others are written to only cover limited fiscal issues.

2.20 Dispute resolution

A contract's dispute resolution provisions describe the mechanisms that the parties must use to resolve disputes that may arise under the contract. These provisions may require the parties to employ negotiation, mediation, arbitration, [50] or court proceedings.

[50] Arbitrations are often perceived as offering efficient dispute resolution processes and adjudicators with high levels of expertise regarding international investment law and transactions. However, arbitration may involve costs beyond the limited financial capability of the parties, particularly when arbitration proceedings are held outside of the host

Where parties wish to save costs and time or want to ensure the continuation of the contract, the dispute resolution provisions may require the parties to negotiate before resorting to outside mediation or arbitration. These provisions may also require the use of mediation by an independent experienced third person in order to help the parties identify the issues in dispute, explore the options for resolution, and attempt to reach agreement. Additionally, or alternatively, dispute resolution provisions may specify the use of arbitration where the parties want disputes to be finally resolved by an arbitral tribunal. Often, where this is the case, the contract will identify where the arbitration will be located, which set of arbitration rules will apply, and how arbitrators will be selected. Finally, if the parties wish to invoke the power of a court to determine the issues and remedies according to law, then dispute resolution provisions will require the parties to resolve disputes through court proceedings; typically, the contract will identify a specific court system (for instance, English courts) where the parties must bring their claims.

2.21 Force majeure

Force majeure provisions are designed to apply when an event occurs that is outside the parties' control and that prevents one or both parties from performing their obligations under the contract.

There are two aspects to the operation of force majeure provisions:

- the definition of what counts as a force majeure event; and
- the operative provision that sets out the effect on the parties' rights and obligations if a force majeure event occurs.

The term "force majeure" does not have a universal definition, and is therefore open to interpretation by the courts of the relevant jurisdiction. For the avoidance of doubt, parties often clearly define what can constitute a force majeure event in the contract. Examples of potential force majeure events include strikes, war, civil unrest, epidemics, and extreme weather events. Often, force majeure provisions will take into account any potentially harmful situations that are more likely to arise in the particular country or region concerned.

If a party's obligations under an agricultural investment contract are rendered impossible to perform or are otherwise significantly affected by a force majeure event, then a party may rely on a force majeure provision as a defense to a claim that it has failed to fulfill its obligations under the contract. Parties may choose to specify the conditions for extension, suspension, or termination of the contract in the force majeure provision. For example, where a local land dispute occurs between an Investor and local communities, authorities may have the right to suspend the contract until the dispute has been resolved.

2.22 Indemnification

An indemnity is a contractual promise by one party to a contract to compensate for losses incurred by another party to the contract resulting from claims brought against the latter by a third party. Indemnities commonly cover losses arising from the following situations:

- breach of representation or warranty;

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country. Additionally, arbitration panels are often unable to adequately address considerations relating to other interested or affected relevant stakeholders (such as impacted affected local communities), and confidentiality rules governing arbitration can severely limit the amount of information those stakeholders receive regarding resolution of the dispute. In order to mitigate these concerns, contracts may stipulate that arbitration be used by the parties only after they have attempted to resolve their dispute using available domestic dispute resolution processes. Where this is the case, resolution of disputes through domestic systems may result in stronger precedent and jurisprudence governing agricultural investments and contract law, as well as more transparent communication of information to all affected parties.

- breach of other contractual obligations;
- violations of law;
- other losses incurred under specified conditions; and
- third party claims under specified conditions (for example, intellectual property infringement claims, product liability claims, or personal injury claims).

Agricultural investment contracts may feature reciprocal indemnities (meaning, indemnities running from each party to the other party) in relation to losses arising out of:

- negligence, carelessness, or willful misconduct by one party (often with the limitation that that negligence, carelessness, or willful misconduct, or the loss itself, must be connected in some way with the contract);
- accidents, damage to property, injury, or death suffered by any person occurring in or near the contract area and caused by the party giving the indemnity (or its employees or associated persons); and
- contractual breaches.

Some contracts include survival provisions, which identify certain provisions in the contract that will remain operative after expiration of the contract's term or early termination of the contract. These provisions may include indemnification obligations—if so, a party that agrees to indemnify another party for certain claims or liabilities that arise in connection with the contract may be obligated to indemnify the other party for claims and liabilities that arise after the project has concluded. In agricultural investments that involve high environmental risks, this may become relevant where environmental harms do not manifest until well after the project has come to a close. In such cases, if the Investor has agreed to indemnify the Government for liabilities arising from environmental harms (such as contamination of groundwater or adverse health impacts on communities), the Government may look to the Investor to settle liabilities for as long as the indemnification provision remains operative.

2.23 Termination

Termination provisions allow one or both parties to end the contract prior to expiration of the term if certain events occur. These can include:

- Breach of contract. Typically, if a party fails to comply with the terms of an agreement but the breach is immaterial (meaning that it does not prevent the continuation of the entire contract), the other party will not have a right to terminate the contract. Rather, termination usually results from a material breach (a breach that goes to the heart of the contract and negatively affects the outcome of the entire agreement). Even in light of a material breach, a termination provision might require that the breaching party be given a chance to correct its actions within a set period of time. However, there may be bad acts (or repudiations) that will give rise to an immediate right of termination (for example, breach of confidentiality, breach of anti-corruption legislation, change of control, invasion of protected areas, or materially exceeding allowed levels of consumption). In addition to termination rights, material breaches can give rise to different types of remedies; for instance, the party in breach may have to pay money damages or rectify the breach.
- Frustration of the contract, which may occur when an event outside of the control of either party makes it impossible to fulfill some or all of the contractual obligations (for example, a sustained force majeure event).

- Failure to meet performance criteria, such as a requirement to meet minimum levels of production or to develop a certain percentage of the concession area. If the performance criteria are not met, the Government may have the right to terminate the contract, or restore a portion of the concession, unless the breaching party makes a compensation payment or otherwise remedies the breach.
- Bankruptcy. The termination provision may allow the Government to terminate the contract if the Investor commences bankruptcy, reorganization, or similar insolvency proceedings, or if any such proceedings are initiated against the Investor by a third party. If such proceedings are brought by a third party, the contract may only allow the Government to terminate if such proceedings have not been dismissed after a specified period of time.

Termination provisions may also provide for termination by agreement between the parties or by the payment of a termination fee by one party to the other. This fee may be on a sliding scale, so that terminating early in the term triggers a higher fee than termination closer to expiration of the term. Some termination provisions will set out how parties must give notice of their intention to terminate, or may describe the consequences of termination due to a breach of contract—these consequences may include the availability of restitution or liquidated damages for the non-breaching party. These provisions often take into account any special laws or regulations around termination that exist in the relevant jurisdiction.

2.24 Disposition of assets

Disposition of assets provisions describe the process by which the Investor will dispose of the project's assets upon termination of the contract. These provisions often distinguish between ***movable assets*** and ***non-movable assets***.

Contracts often stipulate that all permanent non-movable tangible assets in the contact area that are not otherwise property of the Government will become the property of the Government without charge upon termination of the contract (for instance, rubber trees and oil palms are permanent non-movable tangible assets). In the event of a breach of contract by either party, the value of these non-movable assets may be taken into account when determining any award of damages. Regarding movable tangible assets of the Investor (for instance, machinery and tools), some contracts include provisions that provide the Government the first option to purchase any such assets that the Investor desires to sell.

2.25 Notice

A notice provision states how the parties to a contract will communicate with each other (usually in written form). The notice provision works in conjunction with other provisions of the contract that specify the circumstances when notice is required (for example, notice of certain material events, such as investigations or lawsuits affecting a particular party and/or its operations). Notice provisions can be very important if relations between the parties deteriorate and litigation is contemplated, or when one party needs to serve an important notice (for example, a termination notice, or a notice of an environmental harm) on the other.

2.26 Amendments; Periodic review

Most agricultural investment contracts include an amendment provision, which states whether and under what circumstances the parties may amend the contract. Generally, this provision will state that the contract is the entire agreement between the parties, and that any amendments or modifications are null and void unless made in writing and signed by both parties.

Contracts may also include a provision permitting a periodic review of the contract's terms. A periodic review process provides a systematized means for the Investor and the Government to discuss proposed modifications to a contract and to amend the contract. This process may be triggered after a certain amount of time has passed (for instance, every five years), or when environmental, social, or economic circumstances arise that substantially alter the conditions and assumptions that the parties relied on when they entered into the contract (for instance, a dramatic downturn in relevant commodity prices).

2.27 Governing law

Governing law provisions enable the parties to specify the system of law that will apply to determine the rights and obligations of the parties, the interpretation of the contract, and the provision's effect if a dispute arises. In some jurisdictions, however, a court interpreting the contract may choose to disregard this choice, depending on how the provision is worded and relevant conflict-of-law principles.

Governing law provisions do not indicate how disputes are to be resolved, which is why parties often include a separate dispute resolution provision in the contract.

3 GLOSSARY

This Glossary provides basic explanations of certain legal and technical terms that appear in this Guide. While these terms may also appear in some agricultural investment contracts, each contract typically has its own set of defined terms, which will be tailored to the relevant agricultural investment and will differ from the definitions here. For this reason, it is important when reviewing any agricultural investment contract to refer to that contract's definitions section (as described in Section 2.1, Definitions).

Agricultural products: Products derived or obtained as a result of agricultural activities, including crops and livestock, whether cultivated or not, as well as other products derived as a result of the processing of any of the above.

Affiliate: A legal person that, with respect to a second legal person, directly or indirectly controls, is controlled by, or is under common control with, that second legal person.

Breach of contract: A failure of a party to a contract to perform its obligations as set forth by the terms of such contract.

Concession: The grant of privileges by a government or controlling authority. In the context of agricultural investment contracts, it generally refers to the grant of rights to access a designated area of land and conduct agricultural activities on that land in order to make profit.

Condition precedent: A condition that one party to a contract is obliged to fulfill before another party to the contract is required to perform its own obligations under the contract.

Contract area: The area of land to which the agricultural investment contract applies.

Customs duty: A tax imposed on imports (and, sometimes, on exports) by the customs authorities of a country to raise state revenue, and/or to protect domestic industries from more efficient or predatory competitors from abroad. A customs duty is generally based on the value of goods or upon the weight, dimensions, or some other criteria of the item.

Damages: Monetary compensation that a court may order one contracting party to pay a second contracting party for loss or injury that the second party (or its property) suffers due to the fault or negligence of the first contracting party.

Ecosystem services: The benefits derived from ecosystems, including but not limited to: provisioning services (food and water), regulating services (climate and disease control), cultural services (spiritual and recreational use), and supporting services (nutrient recycling and crop pollination).

Effective date: The date upon which the contract takes effect. The effective date is frequently specified in the Definitions section of the contract and often refers to the point when all parties have signed the contract or when conditions precedent have been fulfilled.

Enforceable legal rights: Rights that are recognized by the law and can be enforced by law where necessary. If a legal person holds an enforceable legal right pursuant to the terms of a contract, the party obligated to respect that right pursuant to the contract can be forced or ordered to do so through a legal proceeding.

Execute: To make a document legal, binding, and enforceable by signature.

Export taxes: A monetary charge imposed by the Government on goods or services that become payable when the goods leave the economic territory or when the services are delivered to non-residents.

Force majeure: An event that produces a fundamentally different situation to that contemplated by the parties when entering the contract, rendering the contractual obligations incapable of being performed. War, natural disasters, blockades, and riots are often considered force majeure events. A force majeure provision suspends or removes liability when a force majeure event occurs. The suspension typically lasts for the duration of the event; however, a sustained force majeure vent may allow a contracting party to terminate the contract.

Governing law: The system of law designated by the parties to apply to the operation of the contract and any disputes arising from it.

Home state: The country in which an Investor is primarily based, headquartered, or incorporated (sometimes referred to as the home country).

Host state: The country in which an agricultural investment takes place (sometimes referred to as the host country).

Infrastructure: Basic physical and organizational structures and systems (for example, buildings, roads, water, and power supplies) required for the production of goods and services and the distribution of raw material and finished products.

Jurisdiction: The official power to interpret and apply the law, or to govern and legislate, which is granted to a formally constituted legal body, such as a court, or to a political leader. The term jurisdiction is also commonly used to refer to the geographical area over which such authority applies. (*See also* Section 2.27, Governing law.)

Legal framework: A broad system of rules that governs and regulates decision-making, agreements, and laws within a given jurisdiction.

Legal person: A human or non-human entity—such as an individual, corporation, or recognized organization—that is treated as a person for limited legal purposes. Such entities have legal rights and are subject to legal obligations, meaning that they can sue and be sued, own property, and enter into contracts.

Legislation: A body of laws that has been promulgated by a governing body and that has effect over a given jurisdiction.

Liability: Legal responsibility for the consequences of a legal person's act or omission, enforceable by civil remedy or criminal punishment.

Movable asset: An asset that can be moved from one location to another.

Non-movable asset: An asset that cannot be moved from one location to another, or that cannot be moved without destroying or altering it.

Non-tangible asset: An asset that is not physical in nature. Common non-tangible assets include intellectual property (such as patents, trademarks, and copyrights), goodwill, and brand recognition.

Party: A legal person who enters into a binding contract with other legal persons and thus assumes certain benefits and obligations as specified therein.

Right of way: The legal right, established by usage or grant, to pass along a specific route through grounds or property belonging to another.

Signature date: The date when a contract is signed by all parties.

Stabilization: A stabilization provision removes or limits the ability of the Government to alter an investor's obligations or entitlements with regards to a particular project by revising relevant legislation after the agricultural investment contract has been signed. A stabilization provision will maintain the legal status quo of the original contract by either exempting the Investor from the changes in law, or providing for compensation of the Investor for any losses resulting from the changes.

Subordinate (to): The act or process of moving something to a lower rank, position, or priority. With respect to claims a creditor may have to a debtor's assets, if those claims are subordinated to another creditor's claims, this means that the other creditor's claims are of a higher priority and will be settled in full before the subordinated claims are settled.

Subsidiary: A company that is owned or controlled by another company.

Tangible asset: An asset that is physical in nature. Common tangible assets include land, buildings, vehicles, machinery, inventory, and cash.

Tenure rights: Rights, whether legally or customarily defined, with respect to land and other natural resources. In the context of agricultural investments, tenure rights may, for example, take the form of "freehold" or "fee simple" ownership interests in the land (meaning complete ownership of the land) or concessions or leases over the land (which grant certain temporary rights to possess the land and exploit its resources).

Term: The period of time during which a contract is operative.

Third party: A person who is not party to a contract or agreement but has involvement and/or may be affected by the outcome.

Third party beneficiary provision: A provision in a contract that determines if any non-parties have any enforceable rights under the contract. In many cases, these provisions are drafted as "no third party beneficiary provisions"—that is, they state that non-parties do not have any rights under the contract.