



Columbia Center
on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

A photograph of a vast agricultural field with rows of green crops under a blue sky with scattered white clouds. A dirt road runs along the right side of the field. A semi-transparent blue rectangular box is overlaid on the lower-left portion of the image, containing the title and subtitle text.

AGRICULTURAL INVESTMENTS

**A PRIMER FOR HOST GOVERNMENT LAWYERS
AND LOCAL LAWYERS IN PRIVATE PRACTICE**

PRIMER OCTOBER 2019

Loading sugar cane
on truck in Tay Ninh,
Vietnam.

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INTRODUCTION

Attracting investment in agriculture has been a key policy goal of governments in the global south. Development partners have supported these policies. But what do governments hope to achieve by attracting investment in the agricultural sector? Why are companies interested in investing? What is in it for local communities? And what is the role of lawyers? This primer provides an introduction to some of the key issues that arise in the negotiation of contracts linked to investments in agriculture, and practical guidance for how to approach common issues.¹ **Section 1** of this primer outlines the typical goals of three important stakeholders – the government, companies, and communities who live on or near land on which a project will take place – along with the risks that each type of stakeholder faces. **Section 2** discusses the role of contracts² and lawyers, provides tips for negotiations, and includes resources for further reading.

FOOTNOTES

1. An earlier country-specific version of this primer was presented at a workshop co-organized by the Columbia Center on Sustainable Investment, the Sierra Leone Bar Association, and Namati Sierra Leone. The workshop, attended by Sierra Leonean lawyers in private practice and government lawyers, was held in July 2019.
2. The terms 'agreement' and 'contract' are used interchangeably throughout this primer.

SECTION

1. STAKEHOLDERS: GENERAL OBJECTIVES AND RELEVANT RISKS

GOVERNMENTS

In seeking to attract investment into the agricultural sector, governments hope to translate such investments into increased food security as well as increased revenue for the government (primarily through levying taxes or fees on a company's operations). Governments may also expect investments will create jobs, encourage linkages between the agricultural sector and other parts of the economy, and promote infrastructure development. Achieving these aims requires carefully crafted policies and laws, as well as sufficient government capacity and will to implement those policies and laws. Governments face a number of potential risks in promoting investment in agriculture, including the risk of conflict over land, environmental degradation, and failure to realize fiscal and non-fiscal benefits and objectives.

COMPANIES

A company's primary aim is to make a profit through its business ventures. This could be through growing and producing agricultural products and selling such products locally or on the international market. Or it could be through acquiring rights in land to later sell those rights at a profit when the value of the land appreciates. For companies to realize their profit aim they generally need secure access to land that can feasibly support their operations. Companies favor contexts with a strong rule of law so that obligations related to taxes, labor, and protection of the environment, among others, are clear and universally applied. Some common risks that companies face include conflict over access to land, which may lead to loss of production or assets and to reputational damage; financial risks linked to change in commodity prices; and

corruption risks, which may be regulated by anti-bribery legislation of the company's home country, with non-compliance resulting in prosecution, in addition to being regulated by anti-corruption laws in the country in which the investment takes place.

LOCAL COMMUNITIES

Local communities may or may not be willing to discuss whether they wish to allow a company to use community or family land for the company's business purpose. In the cases where communities are open to negotiation, community members' goals may be varied: for example, they may aim to secure jobs, and/or bargain for forms of compensation that could include monetary payments and the provision of social infrastructure. Various factors affect the likelihood of community priorities being realized through investment, including: the presence or absence of genuine good-faith commitment by companies to provide that which is bargained for; whether the agreed bargain is concretized in a legally binding contract that clearly details each party's rights and obligations; and whether communities have access to independent and quality legal and other technical support on an ongoing basis. Risks that communities may face include loss of access to their lands without their informed consent; forced displacement from their lands without adequate compensation; and failure by the relevant company to provide promised benefits, among others. These issues may lead to violations of community members' human rights, affect communities' abilities to sustain their livelihoods, and lead to conflict. Environmental degradation is also a key risk that communities face.

HOW TO REALIZE THE BENEFITS AND MITIGATE THE RISKS?

Although governments, companies, and communities could all potentially benefit from increased investment in agriculture, the desired benefits do not accrue automatically. The implementation of good laws and contracts can play an important role in mitigating risks associated with investments in land. However, at times relevant laws go unimplemented and contractual obligations go unfulfilled. Where substantively sound laws and contracts are in place, a failure to implement relevant laws or contracts may in part be explained by low institutional capacity to monitor company

operations, and may also be explained by fundamental misalignment between institutional incentives and what the law requires. These realities should inform how future policies, laws, and contracts related to agricultural investments are structured and monitored so that policies, laws, and contracts are designed to create incentives for each stakeholder to act in ways that avoid the potential risks associated with such investments. Governments' role in this regard is particularly important, given their multiple goals and responsibilities. Not only do Governments have the task of attracting investment in agriculture to promote food security and economic growth, but they also have the responsibility to do so in a sustainable and rights-respecting manner.



Palm oil plantation in Asia.

SECTION

2. THE ROLE OF CONTRACTS

Domestic law, contracts, and international law all form part of the legal framework that governs investments in agriculture. Depending on the country, domestic law may regulate aspects of investment in land and agriculture to varying degrees, with greater or less reliance on contracts and other agreements to set the terms – both between the company and the state and between the community and the company.

Ideally, laws should regulate most aspects of how investments in the sector operate, with contracts (if considered necessary) dealing only with project-specific issues. If contracts are used as the main legal instrument for regulating the agricultural sector, Governments risk creating a fragmented sector that is difficult to regulate and monitor, with different rules applying to different companies. In addition, too great an emphasis on contracting could lead to the Government and/or communities ending up with a poor deal due to perceived or actual asymmetries in bargaining power between stakeholders, or asymmetries in information about the sector or the proposed business. Companies also benefit from clear and detailed laws and regulations that are universally applied.

WHAT TYPES OF CONTRACTS ARE RELEVANT TO THE AGRICULTURE SECTOR?

In some countries, contracts are concluded between the community or family with legitimate tenure rights over the land in question and the company that intends to use the land for its operations. These “community-investor contracts” may take the form of lease agreements, which give companies the rights to use land for a specified period of time in return for different forms of compensation, or benefit-sharing agreements if the family or community does not have the ability to transfer rights in land but will otherwise be affected by the investment.

A second type of agreement used in some countries is the “investor-state contract,” which is an agreement between the State and a company. These agreements can include provisions that transfer rights in land (if the government has the right to do so); regulate the tax and environmental responsibilities of companies; agree on how disputes will be resolved; and set local content requirements, including provisions on employment, training, and procurement, among others.



An Acacia Pennata plantation in Thailand.

CONSIDERATIONS FOR THE COMPANY LAWYER WHO NEGOTIATES COMMUNITY-INVESTOR CONTRACTS AND INVESTOR-STATE CONTRACTS

As in every other client-lawyer relationship, a lawyer's role is to provide the client with a clear understanding of the legal landscape, the risks involved, and the choices available. In addition, and especially in the context of foreign companies investing in land, a local lawyer can play the important role of providing advice on the local context more generally so that the client can make informed decisions. In order to do this, it is useful for lawyers to consider the client's short- and long-term goals, and to have an understanding of the sector involved. Client goals and risks may vary. Yet one overarching consideration that lawyers, and in particular company lawyers, should bear in mind when advising clients investing in land is that one-sided contracts that heavily privilege the interests of one party over the other often lead to discontent that can potentially risk the viability of a company's operations. Therefore, the starting point for a negotiation should be oriented toward creating long-term and mutually reinforcing relationships between parties (parties to the contract, as well as parties who stand to be affected by an investment), recognizing that the goodwill of the government, landowners, and land users is key to the success of an investment project. The following subsections outline considerations for company lawyers who negotiate investor-state contracts and community-investor contracts.

Sector specificities and risks

For companies to realize their profit goal, secure access to land is a pre-requisite. Because agricultural projects are generally **long-term** and **site-specific**, gaining secure access to land on which to grow or source the relevant crop or product requires companies to form and maintain good relationships with those living on or around the land to be used for a project. Community-investor contracts and investor-state contracts can shape how those relationships will play out over the long-term. How the agreement is negotiated, as well as the terms

that make it into the contract, are thus integral to forming and maintaining good relationships between all interested stakeholders.

Inclusive engagement

Investor-state contracts are often negotiated without the inclusion of those who live on or around the relevant land. The typically exclusionary nature of the investor-state negotiation process has the potential to increase the risk of land-related conflict, especially if the agreements transfer interests in land without the knowledge or consultation of the affected communities. In the case of community-investor contracts, a similar dynamic can exist: who the company negotiates with and how the engagement is conducted is critical to building and maintaining the sustainable relationships with landowners and land users that are necessary to further a company's long-term goals. Broad-based consultation is essential to ensuring that those who have an interest in the land have the opportunity to influence decision-making and to communicate whether they consent to the company's plans or not. Communities have not taken kindly to waking up to a company on their doorstep without consenting to the company's presence, and companies should be aware of the value of broad-based consultation even if the law does not explicitly require it. Inclusive engagement strategies can also help to mitigate corruption risks that may arise if negotiations are conducted behind closed doors without broader community involvement.

Equitable benefit sharing

What might seem like a win for a company client – for example, inclusion of vaguely drafted local content obligations or loosely worded compensation provisions (so as to retain flexibility for the company)– may in practice create the type of risk that jeopardizes the ability of a company to operate. For example, not specifying a payment date in the contract may create uncertainty for the payment beneficiaries, which in turn may create friction when expectations between the payor and payee on timing do not align. Such risks can be mitigated by including specific, feasible, and time-bound obligations

that are agreed on as part of an inclusive negotiation process and that provide certainty and predictability for the landowners, land users, company or government. On the other hand, verbal promises that do not make it into the contract, or contractual terms that are drafted in a way that is inconsistent with one or both parties' understanding or expectations, can lead to ill will resulting in conflict or otherwise undermining the ability of companies to maintain good relationships with surrounding communities or with the state.

Respecting human rights

The responsibility of companies to respect human rights is set out in the [United Nations Guiding Principles on Business and Human Rights](#) (“UN Guiding Principles”) - “the authoritative global standard on business and human rights, unanimously endorsed by the UN Human Rights Council in 2011.”³ The UN Guiding Principles is a go-to resource for company lawyers looking to understand and advise clients on how to mitigate human rights risks, including during the pre-negotiation and contract negotiation stages, especially where domestic laws are weak or lacking in detail.

A range of human rights can be negatively impacted by an agricultural operation. These include the right to property, the right to food, and the right to water, which are often closely linked to and dependent on proper respect for land rights. Short excerpts of two of the operational principles included in the UN Guiding Principles are set out below.

HUMAN RIGHTS DUE DILIGENCE

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;**

REMEDIATION

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Source: Excerpts from the UN Guiding Principles.

Social and [human rights impact assessments](#) can provide a framework for human rights due diligence, and importantly, for collecting data that can be used to inform engagement strategies and risk management plans.

Some other key resources include: the [Principles for Responsible Contracts](#), and the [IBA Practical Guide on Business and Human Rights for Business Lawyers](#) (see box). The [IFC Performance Standards](#) – which is principally a risk mitigation tool – may also be looked to for additional guidance.

Lawyers who advise companies on a wide variety of corporate and commercial contracts – such as host state investment agreements, joint venture agreements, merger and acquisition agreements, supply chain agreements – should be aware of and understand how those contracts can be structured to help prevent and mitigate human rights harm.

The right contractual terms can create strong incentives for other parties to respect human rights, where the other party has the capacity to do so.

Conversely, contract terms that increase human rights risks or constrain the ability of the other party to address such risks, jeopardise the business's own responsibility to respect human rights. However, the insertion of boilerplate human rights provisions into contracts, which the parties do not understand and regard as formality, will likely not lead by themselves to improved human rights performance.

Source: IBA Practical Guide on Business and Human Rights for Business Lawyers, 2016.

3. Shift, *UN Guiding Principles on Business and Human Rights*, available at: <https://www.shiftproject.org/un-guiding-principles/>.

Practical considerations

1. Advise clients of the short-, medium-, and long-term risks of different approaches to acquiring rights in land.

a. This includes advising them on what the law requires and the appropriate steps to ensure compliance, and, importantly, advising when going beyond what the law requires may be in their long-term interests. For example, advise clients to **comprehensively determine who the landowners and land users are in the desired area for investment**. This is important so that the client includes all potentially affected parties in the negotiations, rather than solely negotiating with community leadership or the government. A more inclusive engagement strategy can help to avoid the problems that arise when companies fail to consult the appropriate rights holders.

b. Another way to manage some of the risks associated with acquiring rights in land is to **advise clients about the benefits of ensuring that the community has impartial legal and other professional representation throughout the process**. This is important so that information and power asymmetries in any negotiation process are mitigated. Without proper representation, there is a risk that communities' understanding of the impacts of an operation may be incomplete, and that expectations may not be properly managed. In the long term, failure to meet expectations may lead to mistrust and consequent problems.

2. Advise clients to be clear from the outset on the area of land that they are interested in using. Often communities are left in the dark about exactly which areas of their land a company plans to use, which can lead to tensions or misunderstandings. When drawing up the community-investor agreement or investor-state contract, make sure to explain to your client why it is important to be specific about the area needed for the client's project, and why including landowners and land users in the process of identifying and demarcating land is important. Communities should

have the opportunity to decide which areas of land they wish to allow companies access to and which areas they will retain full access to. Including the community in the process of creating a map of the land can also help in the process of explaining how a landowner or land user's ability to access land may be impaired or limited by operations in the future.

3. Be realistic with your client about the time it will take to negotiate an agreement. Companies may want to move quickly. While understandable, the corners cut in favor of efficiency often lead to problems down the line. Given the site-specific nature of agriculture, a company cannot afford to have hostile landlords. The timetable for negotiations should account for the time required by communities to understand their rights and to make internal decisions. It should also build in flexibility for the twists and turns that negotiation with a community may take.

4. Manage expectations and advise your client not to overpromise. Inflated expectations that later go unfulfilled are likely to lead to bad feelings, and possible disruptions to a company's operations. Advise clients to be clear and specific about what they can offer landowners and land users in return for the use of their land. This includes being clear on *when* and *how* relevant compensation will be exchanged or otherwise furnished.

5. Help your client think about the logistics for how benefits will be delivered, now and in the future. When dealing with large numbers of landowners and land users the logistics of payments, the process of hiring workers, and the delivery of other benefits can be an involved undertaking, so it is important to iron out the details from the outset in order for the company to realistically assess its ability to deliver on its promises and put in place processes to ensure that it does.

CONSIDERATIONS FOR THE GOVERNMENT LAWYER WHO NEGOTIATES INVESTOR-STATE CONTRACTS

Alignment with the law

Where the government seeks to enter into an agreement with a company, government lawyers should take care to ensure that any agreement between the State and a company aligns with, and does not deviate from, the law. Although a straightforward point, foreign companies have sometimes sought to use investor-state contracts to exclude the application of certain laws or future changes in laws; this should be avoided. Where the law already regulates a particular issue that is also included in the contract, contractual terms should only raise the standards with which companies must comply, rather than lowering standards below those already required by the law (which may be prohibited by law in any event). Some laws that may be relevant to investments in agriculture, and therefore relevant for government lawyers to review if such topics are covered by the investor-state contract, include laws on tax, the environment, local content, labor, land, water, human rights, agriculture, forestry, access to information, and investment, among others. To ensure that contractual terms do not inadvertently conflict with existing laws, a provision could be included in the agreement that explicitly states that in the event of any conflict with any laws, the relevant law will prevail.

Alignment with existing government responsibilities and goals

In the context of investments in agriculture, the government's overarching responsibilities to "protect and provide"⁴ are engaged when:

1. the government sets terms upon which a company may operate; and
2. when it regulates the behavior and operations of such companies.

These responsibilities require ensuring that the country gets a fair deal and that investment activities align and contribute to economic development without compromising the environment or the well-being of citizens. In the context of agricultural investment, "getting a fair deal" includes securing certain fiscal benefits through setting and collecting appropriate tax revenues, which can be invested to increase the welfare of the people. It also includes developing and implementing laws that maximize the linkages with other parts of the economy. Importantly, governments have legally binding human rights obligations under international law, and to comply with those obligations, the government must ensure proper regulation of investment activities. These considerations are relevant to lawyers representing governments in any investor-state contract negotiation, as such agreements can be used as an instrument to advance or undermine the government's ability to fulfill these responsibilities.

Principles of good practice include:

Aligning incoming investments with development planning to ensure that investments contribute to a broader strategy that supports the sustainable development of the country's economy.

Respecting the rights of landowners and land users, which includes facilitating meaningful participation of potentially affected people in decision making. Meaningful participation includes creating opportunities for communities to make informed decisions around the use of family- or community-owned land, free of coercion or duress.

Respecting, protecting, and fulfilling constitutional and international human rights legal obligations. Protecting against human rights harms requires governments to, among other measures, implement appropriate safeguards in law and contracts, actively monitor ongoing investments, and provide mechanisms to remedy any abuse that does occur.

4. Anne-Marie Slaughter, *3 Responsibilities Every Government Has Towards Its Citizens*, World Economic Forum, available at: <https://www.weforum.org/agenda/2017/02/government-responsibility-to-citizens-anne-marie-slaughter/>.

Practical considerations

1. In conjunction with relevant Government agencies, **support the government client to consider whether the details of a particular investment fit in with broader development plans.** To do this, it is good practice for government lawyers to prepare the first draft of the contract to make sure it aligns with domestic law and with government goals, policies, and responsibilities from the start.
2. **Consider how the fiscal and non-fiscal benefits that the government anticipates are reflected in law or in contract** to ensure that the legal framework that governs an investment supports the delivery of anticipated benefits in clear, detailed, and legally binding language.
3. **Consider the extent to which the law adequately regulates investments in agriculture, and what might need to be negotiated in a contract (if anything).**
 - a. Relevant questions to consider include: do laws, including land laws, adequately safeguard against the potential negative impacts of agricultural investment on land rights and human rights? For example, do the laws ensure the participation of affected communities in decision-making around the use of their lands? Do laws sufficiently protect communities from the dispossession of their lands without their consent? Do the laws sufficiently regulate environmental impacts of agricultural investments and protect against environmental degradation? Are effective remedies available if companies do not comply with the laws? If not, **consider whether it is desirable for the contract to supplement existing laws with higher standards or measures.** This could mean including details in the contract on the measures that must be taken to anticipate, protect against, measure, and if needed, remedy the potential or actual human rights and environmental impacts of the investment.
 - b. Does the contract support or at least not undermine the government in fulfilling its human rights obligations to its people?
4. **Resist attempts by companies to use contracts to stabilize, alter, or preclude the application of existing laws.** This may include resisting the inclusion of contractual provisions that seek to exclude the application of certain laws, or of future changes in laws, as well as carefully considering whether any deviations from general tax laws, including by the grant of tax holidays or incentives, are in the country's best interest.
5. **Advise the government client to set clear expectations early on so the company has clear parameters for its operations, and systematically monitor operations on an ongoing basis.** This should include expectations that the company will comply with all laws, and act in accordance with principles of responsible agricultural investment, including relevant principles in the [Voluntary Guidelines on the Governance of Tenure](#) and the [UN Guiding Principles](#).



Workers harvest oil palm fruit in Malaysia.

SOURCES & GUIDANCE DOCUMENTS

- » [Guiding Principles on Large Scale Land Based Investments in Africa, AU, ADB, UNECA](#). “The Guiding Principles on Large Scale Land Based Investments (LSLBI) are the outcome of the desire by African Union Member States to ensure that investments in land benefit Member States and key stakeholders...The Guiding Principles seek to ensure the observance of international human rights declarations and conventions as well as regional declarations in the manner in which LSLBI are conducted.”
- » [IBA Practical Guide on Business and Human Rights for Business Lawyers](#). “In order to help bar associations and lawyers better understand [business and human rights], the IBA has prepared a Practical Guide for Business Lawyers on the Guiding Principles that would ‘set out in detail the core content of the UNGPs, how they can be relevant to the advice provided to clients by individual lawyers subject to their unique professional standards and rules (whether they are in-house or external counsel acting in their individual capacity or as members of a law firm) and their potential implications for law firms as business enterprises with a responsibility to respect human rights themselves.’”
- » [IFC Performance Standards](#). “IFC’s Environmental and Social Performance Standards define IFC clients’ responsibilities for managing their environmental and social risks. The eight Performance Standards establish standards that the client is to meet throughout the life of an investment by IFC:

Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts. Performance Standard 2: Labor and Working Conditions. Performance Standard 3: Resource Efficiency and Pollution Prevention. Performance Standard 4: Community Health, Safety, and Security. Performance Standard 5: Land Acquisition and Involuntary Resettlement. Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources. Performance Standard 7: Indigenous Peoples. Performance Standard 8: Cultural Heritage”

The IFC Performance Standards are widely used by non- IFC client companies and others to inform the management of environmental and social risks.
- » [Principles for Responsible Contracts, UN](#). “This publication identifies 10 key principles to help integrate the management of human rights risks into contract negotiations on investment projects between host State entities and foreign business investors.” These principles were appended to the UN Guiding Principles, and thus should be read in conjunction with them.
- » [Responsible Governance and the Law, A Guide For Lawyers and Legal Service Providers, FAO](#). “This technical guide aims to assist implementation of the [Voluntary] Guidelines [on the Responsible Governance of Tenure]. It provides guidance on how to use the law to promote responsible governance of tenure of land, fisheries

and forests.” This guide covers: “i) how to appraise legal frameworks to assess the extent to which they are in line with the Guidelines; ii) how to prepare or revise legislation where needed; iii) how to ensure that legislation is duly implemented; and iv) how to use the Guidelines in the context of dispute settlement.”

- » [United Nations Guiding Principles on Business and Human Rights](#). The Guiding Principles provide guidance on steps to be taken in order to safeguard human rights in the context of business enterprises. “The Guiding Principles are grounded in recognition of:
 1. States’ existing obligations to respect, protect and full human rights and fundamental freedoms;
 2. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
 3. The need for rights and obligations to be matched to appropriate and effective remedies when breached.
 These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”
- » [Voluntary Guidelines on the Responsible Governance of Tenure, FAO](#). “The purpose of these Voluntary Guidelines is to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security.” Chapter 12 provides guidance on responsible investment in land.

Other resources

- » [Open Land Contracts guides and resources, CCSI](#). OpenLandContracts.org is an online repository of publicly available contracts for large-scale land, agriculture, and forestry projects. The repository includes the full text of contracts; plain language summaries (also referred to as “annotations”) of key social, environmental, human rights, fiscal, and operational terms in contracts; and tools for searching and comparing contracts. The website also includes resources and guidance relevant to contracts governing investments in land.
- » [Negotiation Support Portal, CCSI](#). This Portal aims to strengthen the accessibility and visibility of available tools, resources, and technical support to assist host governments planning, preparing for, negotiating, monitoring, and implementing large-scale investment projects in certain sectors, including the agricultural sector.



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About the Author

Tehtena Mebratu-Tsegaye is a Legal Researcher at the Columbia Center on Sustainable Investment.

ccsi.columbia.edu

Columbia Center on Sustainable Investment

Jerome Greene Hall
435 West 116th Street
New York, NY 10027
Phone: +1(212) 854-1830
Fax: +1(212) 854-7946