



INVESTMENT CONTRACTS FOR AGRICULTURE:
MAXIMIZING GAINS AND MINIMIZING RISKS

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LIST OF ABBREVIATIONS

CFS	Committee on Food Security
ESIA	Environmental and Social Impact Assessment
FAO	Food and Agriculture Organization
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation

IISD	International Institute for Sustainable Development
OECD	Organisation for Economic Co-operation and Development
PRAI	Principles for Responsible Agricultural Investment
UNCTAD	United Nations Conference on Trade and Development

CHAPTER ONE

INTRODUCTION

Private investment in agriculture in developing countries, both domestic and foreign, has been on the rise for nearly two decades. This paper focuses on large-scale agricultural projects in developing countries, involving the lease of farmland, which rose sharply after the food crisis of 2008. It is important that such investments are sustainable not only in the long term, but also beneficial in the short term with minimal risks or negative effects. This paper looks at one approach to achieving this, namely, carefully devised contracts with investors, and in doing so offers a number of concrete solutions.

The paper marries two substantial bodies of research to show how investment contracts can be set up to promote sustainable development. The paper presents the top five positive outcomes and the five downsides from private sector investments in large-scale agricultural projects. This is derived from empirical evidence gathered by the United Nations Conference on Trade and Development (UNCTAD) and the World Bank after visiting large-scale agricultural projects (UNCTAD and World Bank 2014). The paper then proposes legal options to maximizing the main positive outcomes and minimizing the main downsides through better drafting of contracts between investors and governments for the lease of farmland.¹ This is derived from work conducted by the International Institute for Sustainable Development (IISD), which studied almost 80 contracts and produced a guide to negotiating contracts for farmland and water, including a model contract (Smaller 2014a).

Investment contracts are one of a number of tools and exist within a broader decision-making process. This includes different stages in the investment process, which require proper sequencing, prioritizing of issues, and an understanding of the economic context. Getting this right can be decisive for the success of the investment and can determine the extent to which a contract can contribute to generating positive sustainable

¹ In this context, most often the contract will be between a national government and an investor; however, depending on the federal structure and land tenure system of a country, it may be between an investor and another party such as a state government, a communal leader, or a customary land holder. The configuration of parties thus needs to be adapted to different contexts.

outcomes for governments, communities, and investors. Above all, the relationship between investments and sustainable development requires a careful adherence to key principles, such as the investment policy framework for sustainable development (IPFSD), and contractual provisions therefore must be carefully drafted (UNCTAD 2012).

Similarly, leasing farmland, especially on a large scale—albeit often at the heart of an agricultural investment—is not the only option for investment in agriculture. There is a range of farming and business models that can be economically profitable or more socially and politically acceptable than farmland investments (IFAD and Technoserve 2011; UNCTAD 2009). They should be considered, either as alternatives or in conjunction with farmland investments, both by governments and investors, and through engagement with communities. Joint ventures, farmer-owned cooperatives or businesses, management contracts, contract farming or “outgrower schemes,”² and revenue-sharing arrangements can provide farmers with secure income while allowing them to maintain ownership over their land and water resources.

Local communities are critical at all stages of the investment process: prior to and during the negotiation process, and through the life of the project. The long-term success of an investment project is dependent on the acceptance of the terms of the deal by the local community. Achieving success is tied closely to the contract negotiation and a sense in the community that members’ interests are taken seriously throughout the process. This is particularly important because community wishes and interests are not always well aligned with those of the host government or the investor.

This paper contributes to the growing body of international norms and guidance on the conduct of responsible

agricultural investment to help governments, investors, and communities turn investor interest into an opportunity for rural development and poverty reduction. For instance, the Principles for Responsible Agricultural Investment (PRAI), drafted by the Food and Agriculture Organization (FAO) and the International Fund for Agricultural Development (IFAD), UNCTAD, and the World Bank, guided the policy research of UNCTAD and World Bank, which is presented in this paper, as well as other work by the four agencies. More recently, the UN Committee on World Food Security (CFS) endorsed 10 Principles for Responsible Investment in Agriculture and Food Systems. The CFS is the top UN forum for reviewing and following up on policies related to food security. Other recent initiatives include the African Union’s Guiding Principles on Large-Scale Land Based Investments in Africa, and the work of the Organization for Economic Co-operation and Development (OECD) and FAO to provide guidance to the private sector on Responsible Business Conduct Along Agricultural Supply Chains, among a range of others (Smaller 2014b).

This paper is one element of a programmatic approach being undertaken by the interagency working (IAWG) group of UNCTAD, the World Bank, FAO, and IFAD that aims to operationalize the responsible conduct of agricultural investment through practical guidance. The IAWG has embarked on a new phase of field research, working with 12 to 16 early stage investors in Africa to infuse responsible business principles and practices into operations from the outset. This will involve establishing good practices in implementing responsible business practices in agriculture; providing demonstration effects for other investors; and developing concrete tools for their use in early phases of other future investment.

² An outgrower scheme is “a contractual partnership between growers or landholders and a company for the production of commercial products” (Mead 2001, 7).

CHAPTER TWO

THE ROLE OF CONTRACTS IN PROMOTING RESPONSIBLE AGRICULTURAL INVESTMENTS

There are three areas of law that are relevant to foreign investment in agriculture: domestic law, contracts, and investment treaties. The best guarantee to achieve positive benefits from foreign investment is a solid foundation of domestic laws that are properly enforced. For example, where rights to land, water, and other natural resources are clear and recognized in domestic law, rights holders will be entitled to have a say in how to allocate those resources to investors. Domestic laws also govern any other issues that may arise in relation to an investment, such as customs procedures for importing machinery and exporting finished products, taxes, permits for using chemicals and fertilizers, and employment.

In many developing countries, however, the necessary domestic laws may not be in place or may not be sufficiently detailed. Even when they are in place, they may not be implemented or enforced. Domestic laws for environmental and social impact assessments (ESIAs), for example, exist in most countries, but are either not undertaken or treated as a box-ticking exercise (Deininger and Byerlee 2011; UNCTAD and World Bank 2014). Ideally, domestic laws will develop to address all issues that may arise in relation to an agricultural investment. For now, though, many states still do negotiate investment contracts with investors to lease farmland, so they remain a relevant and important legal tool.

The second source of law is contracts signed between governments and investors, also known as host government agreements. Contracts can help fill the gaps in domestic laws by providing more detailed guidance on what should be contained in the assessments, and using international standards and best practice as the reference point. However, contracts need to be drafted carefully to maximize benefits and reduce risks. This includes clearly defined rights and obligations, benefit-sharing arrangements, a plan for what happens if things go wrong, and measures to take if one of the parties does not fulfill their commitments. A key challenge when drafting an investment contract is to ensure it works in harmony with existing domestic laws. The contract should not become a vehicle to bypass or undermine domestic laws, or prevent the development

of new laws. Readers, however, need to be aware that no matter how carefully a contract is drafted, ultimately the success of the arrangement depends on the relationship, in particular the level of trust between all stakeholders.

A highly controversial provision found in many investment contracts, particularly in developing countries, is known as a “stabilization” provision. These are clauses in the contracts that freeze domestic laws at the time the contract is signed. This means that the investor is either exempt from applying new laws, or that the investor can request compensation for new laws that increase costs or decrease profits. This can include, for example, new environmental measures to protect against runoff of pesticides and fertilizers, chemical bans, or increases to the minimum wage. Stabilization provisions can also discourage governments that wish to enact new legislation but that fear being sued in international arbitration.

Broad stabilization provisions that include all areas of government regulation are now widely considered to be unacceptable. There is, however, still some support for limited stabilization provisions on certain fiscal issues, most commonly taxes, to protect investors from arbitrary or discriminatory acts by the host government (International Bar Association 2011).

The third area of law relevant for agricultural investments is investment treaties. These are agreements signed between states that provide investors from one state investing in the other state with special protections under international law (Bernasconi-Osterwalder and others 2011). There are now more than 3,000 bilateral

investment treaties and investment chapters in free trade agreements (UNCTAD 2014, UNCTAD IIA Database). Treaty rights are layered over domestic law and the contract. Importantly, they provide an international arbitration process through which an investor’s rights can be enforced, a process that has been used by investors against states nearly 600 times to date (UNCTAD 2014). It is advisable to refer to domestic courts as the forum of choice for disputes arising under the contract, rather than resorting to international arbitration. Investment treaties should not become a vehicle used to bypass domestic laws or courts. Treaties should play the smallest role in the investment process, dealing essentially with egregious violations, for example, in the case of a government expropriating an investor’s land without paying any compensation.

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

CHAPTER THREE

THREE KEY STAGES IN THE CONTRACTING PROCESS



There are three key stages in the contracting process: (1) preparing for contract negotiations; (2) negotiating the contract; and (3) monitoring and enforcement of the contract. Figure 3.1 provides an overview of key issues to be dealt with in each stage. These issues are elaborated in chapters 4 and 5 of this paper.

Preparing for the negotiations requires a proper assessment of the suitability and availability of land, soil, and water; meaningful inclusion of communities living on or around the proposed site; the preparation of feasibility studies and business plans; and prescreening or vetting of prospective investors by the host country government.

Negotiating the contract involves defining the rights and obligations of the investor and the government, stating the applicability of domestic laws, including assignment and termination clauses to deal with potential failures, engaging with local communities in drafting terms and contract provisions, and defining what information about the investment will be made public.

Monitoring and enforcement can be the most challenging stage for governments because of limited resources and capacity. The UNCTAD–World Bank study found that monitoring by host governments was weak, especially where allocation of land had proceeded at a fast pace. Visits by and reporting to government officials tended to focus on productivity issues rather than monitoring the socioeconomic and environmental impacts.

Setting out clear reporting requirements and indicators in a contract ensures that governments and communities can regularly track whether an investor is fulfilling its obligations and commitments to the local community. Setting aside a percentage of the revenue from the project for implementation issues will help ensure that the government has the capacity to monitor and evaluate the project effectively. Transparency is a key part of the process of implementing and monitoring the obligations of the parties to a contract. Transparency also enables local communities and civil society organizations to keep an eye on how the investment is actually playing out on the ground and whether promises made in the contract are being kept.

FIGURE 3.1. STAGES IN THE CONTRACTING PROCESS AND KEY ELEMENTS



Source: Smaller 2014a.

CHAPTER FOUR

TOP FIVE POSITIVE OUTCOMES FROM FARMLAND INVESTMENTS

UNCTAD and the World Bank conducted a field survey of 39 large-scale, mature agribusiness investments in Sub-Saharan Africa and Southeast Asia (UNCTAD and World Bank 2014). The study found that some of these investments have generated positive outcomes for host countries and local communities, particularly in terms of employment creation. But the benefits were not automatic or guaranteed. There were significant negative impacts in some investments, particularly related to land rights. The majority of investments were generating a combination of positive and negative outcomes.

This section summarizes the key positive findings from the UNCTAD–World Bank study and shows how they can be enhanced through provisions in the contract. It is about turning the investor’s promises into reality. The legal options indicated are not intended to be a blueprint. Rather, the aim is to create a “wish list” for governments, investors, and communities, which will be agreed to in the context of a negotiation. The wish list will be different for each project and depend on the size and nature of the project, the domestic legal systems, and the country’s needs and realities. Consultation with communities is essential to ensure their voice is heard in developing a wish list that matches local needs and priorities.

EMPLOYMENT CREATION (1)

Positive outcome 1: Employment creation

- Employment creation is the key benefit, and can involve provision of housing, education, and health care for employees and their families.
- More is needed to improve working conditions, better integrate women, build the skills of the workforce, and increase employment of nationals in senior positions.

Legal options:

- Give preference to projects that prioritize women’s employment when preparing for contract negotiations.
- Reference domestic and international labor laws in the contract, including conventions for health and safety and the use of forced or child labor.
- Include a provision on employment with specific targets and requirements to employ locally, hire a percentage of nationals for senior positions, and train the workforce.

Employment is the top outcome from the UNCTAD–World Bank study. The 39 projects, *directly* employed around 39,000 people in host countries (with 150,000 employed indirectly), often in rural areas where the population had few other opportunities for formal employment. For example, a rubber project in a postconflict country in Africa generated more than 1,500 permanent jobs and 2,000 seasonal jobs in a remote community. Furthermore, employment of local communities contributed to better relations with the investor, and hence provided a greater chance of the operation being a commercial success.

Most employees interviewed were appreciative not only of the income and ability to shift from subsistence farming but also of ancillary benefits such as provision of food, housing, and education and access to health services. Foreign investors tended to pay better and offer superior working conditions compared with local employment options. Where housing, education, and health benefits are part of the business plan, these elements should be converted into contractual obligations, including standards for construction and service provision, eligibility, timelines, and budgets.

However, employment benefits were not guaranteed and did not materialize in all investments studied. People residing in the immediate vicinity of the investment were not always employed or were restricted to relatively low-skilled or casual jobs. Management and supervisory positions tended to be held by expatriates from the home country.

In these situations, the contract can play an important role. An employment provision can be included in the contract with specific targets for number of jobs created, based on the results of the feasibility study and business plan (see chapter 5, *Weak Assessment of Commercial Viability*), as well as requirements to employ locally, unless it is not possible to do so. The contract can also include targets for filling management positions with nationals. A number of contracts reviewed from West Africa contain employment provisions whereby the investor can hire only nationals from the host state for unskilled positions and must give preference to them for all skilled and managerial positions. In one country, the contracts contain specific targets for the investor to ensure that within 5 years at least 50 percent of the 10 most senior management positions are held by nationals, and within 10 years at least 75 percent of positions are to be held by nationals.

BOX 4.1. EXAMPLE OF TRAINING AND SKILLS DEVELOPMENT PROGRAMS FOR A PALM OIL PLANTATION

In a contract for a palm oil plantation reviewed by IISD, the investor is required to prepare detailed plans and programs for on-the-job training. The timetable and schedule are listed in the contract. Vocational training and adult literacy programs are available to all employees as well as the local community. The investor is required to contribute at least US\$20,000 per year for vocational training programs and US\$40,000 per year for scholarships for members of the local community to attend a nearby technical college. The investor is required to provide job training and teach employees new techniques, which would allow them to take on more senior-level and skilled positions in the company.

Source: Smaller 2014a.

Employment of local people can be challenging in rural areas where people may not have the required skills. In some cases, preference was given to migrants from neighboring countries or from other regions within the host country because of perceptions that the local workforce did not have the requisite skills or experience with formal employment, especially in postconflict zones. This led to tensions between the local community and migrant workers. To address this problem, the contract can build in provisions for dedicated training programs to assist with local communities' integration into the workforce. Box 4.1 provides an example of how a contract for a palm oil plantation incorporates training and skills development.

A gender imbalance in employment was evident in most investments studied. Overall, around 35 percent of employees were women. Women were more likely to be given temporary, low-skilled jobs and were largely absent from higher levels of company management. They were paid less. There were few policies or programs to promote better inclusion of women. The contract can specify preferences for employing women, but none of the contracts reviewed by IISD contained such preferences. This issue may be better addressed when screening investors and preparing for negotiations. The government may decide to prioritize investments in crops that are more suited to women's employment or may choose a location where women's skills and participation in the workforce is stronger.

In a very few investments studied, wages and working conditions were not sufficient for employees to maintain an acceptable standard of living. Around half the jobs created were temporary, offering limited stability and typically worse terms and conditions than permanent jobs. To address these problems, the contract should state the applicability of domestic labor laws and occupational health and safety laws. To improve standards even further, the contract can make reference to international standards, such as the Occupational Safety and Health Convention (1981), the Safety and Health in Agriculture Convention (2001), and the International Labour Organization's Code of Practice for the Agriculture Sector. The investor should also establish and maintain effective systems for monitoring and reporting on health- and safety-related incidents, and notify appropriate government bodies of incidents. Only one of the contracts reviewed by IISD included specific provisions on labor standards and health and safety. For this contract, the focus was on preventing the use of forced labor and child labor.

Finally, it is important to require the investor to report annually on whether the organization is achieving employment targets and the implementation of training programs. This will help to monitor the results and ensure promises are kept.

INTEGRATION OF LOCAL FARMERS (2)

Positive outcome 2: Integration of local farmers

- Investments in land that also integrated nearby farmers (through outgrower schemes) were the most successful business model and the only investments in which there was a significant transfer of technology.

Legal options:

- Include a provision in the contract requiring the establishment of an outgrower scheme with local farmers alongside the land investment.
- Create a separate contract between investors and outgrowers, linked to the main lease agreement.
- Specify who should be included, the support and assistance to be provided, and how to establish a fair price-setting mechanism.
- Give preference to outgrower schemes that prioritize women and marginalized farmers.

The most successful land investments contracted with nearby small-scale farmers to sell their produce to the plantation or processing plant. This is known as an outgrower scheme. A third of the projects from the UNCTAD–World Bank study had outgrower schemes as part of the investor's business model, and contracted with almost 150,000 outgrowers. These investments were well received because the presence of a reliable buyer for local farmers' produce contributed positively to increasing rural incomes. Outgrowers generally thought they received better prices for produce as well as useful training and technical support from the investor.

The projects with outgrower schemes were also the best business model for the transfer of technology and know-how, such as technical advice on growing practices and disease minimization, preparing the land, setting up demonstration plots, irrigation methods, and better yielding seed varieties. Outgrower schemes allow farmers to retain control over their land and can create more employment than what is available on a pure land investment. Investments with outgrower schemes created one job for every 3 hectares of land, whereas pure land investments created one job for every 19 hectares of land.

However, the gender impacts from outgrower schemes were poor. Only 1.5 percent of outgrowers were women. Another challenge is in how to include more marginalized farmers rather than those that are already relatively well off. One option is to include outgrower schemes that prioritize women and marginalized farmers as part of the Community Development Agreement (see further information in chapter 4, Establishment of Community Development Programs).

Establishing outgrower schemes usually requires a separate contract between the investor and the farmer that is not necessarily linked to the main contract. Nevertheless, to ensure that the outgrower scheme comes into force, there should be a provision in the contract that requires the establishment of an outgrower scheme. The lessons from palm oil plantations in Southeast Asia show that if the government insists on including outgrowers in the project then outgrowers are included, but if they do not, then the companies are unlikely to pursue this option in their business plans.

Outgrowers need to be integrated at the appropriate time. Given the high risks of new investments, it is unwise to

incorporate outgrowers before the production model and market are fully tested. If outgrowers are integrated too early, they can be exposed to financial risks they may be unable to bear. One of the vitally important roles of large private investors is that they have the means and capacity to shoulder early stage investment risks.

However, this does not mean risks should not be taken. In some instances, an agricultural investment has a pioneering, catalytic impact whose benefits extend far beyond the investment in question. For example, the Commonwealth Development Corporation (CDC) was instrumental in introducing smallholder tea production to Kenya and palm oil to East Asia. But it was particularly important in these cases that the investor bore the risks associated with new practices or crops and resolved the business model before outgrowers were introduced (Tyler and Dixie 2012).

The provision in the contract should define the basic framework of rules, rights, and responsibilities that will govern the outgrower scheme. For example, the contract can give preference to outgrowers from the local community, particularly women. The contract can also require the investor to provide support and assistance to outgrowers in the form of equipment, machinery, seeds, fertilizers, and training on improved production methods. The contract can define at what point it would be appropriate to conclude a separate agreement with outgrowers to shield them from excessive risk.

Five contracts reviewed by IISD contain provisions requiring investors to set up outgrower schemes. Two of the contracts specify the amount of money that the investor will put into these schemes. Box 4.2 provides a description of the way in which an outgrower scheme is integrated into a contract for a rubber plantation in Africa.

The UNCTAD–World Bank study found that despite investors’ efforts to be transparent, many outgrowers did not understand how prices were set and voiced concerns about how their produce was quantified and assessed for quality. The contract can provide a framework for establishing a fair price-setting mechanism between the outgrowers and the investor that is appropriate, inclusive, and transparent. In Indonesia, for example, prices for palm oil are set on a monthly basis by the investor, government, and outgrowers. When the price is agreed each month, the three parties sign a formal notification requiring the price

BOX 4.2. EXAMPLE OF INCLUDING OUTGROWER SCHEMES IN A CONTRACT FOR A RUBBER PLANTATION

In a contract for a rubber plantation reviewed by IISD, the investor is required to set up an outgrower scheme within three years. The government agrees to provide land for the outgrowers, select the outgrowers, secure the financing, and address all environmental and social issues that might arise. The investor agrees to manage and develop the land, assist the government in securing finances, provide support and assistance for the purchase of equipment and fertilizers, provide technical knowledge and management skills to outgrowers, and purchase all the produce. The government also provides a guarantee to the investor that the outgrowers will become members of a cooperative, pay certain fees, participate in training programs, and accept the working methods and standards set by the investor.

Source: Smaller 2014a.

to be honored by all parties. Pricing formulas, when applicable, are valuable, as they can remove the power element in negotiation. The contract should also require the company to report annually to the government on the implementation of the outgrowers’ scheme, which will help to monitor performance and resolve issues that might arise.

EXPANSION OF MARKET OPPORTUNITIES (3)

Positive outcome 3: Expansion of market opportunities

- The investors who set up a processing facility were perceived more favorably.
- A number of investments provided new markets for local contractors and suppliers of fuel, fertilizer, and machinery.

Legal options:

- Prioritize investments that involve the establishment of processing facilities. The contract can specify the details for setting up such facilities.
- Require the investor to set up a local business development plan to promote the integration of local contractors and suppliers. First preference should be given to local goods and services.
- Report annually on the implementation of the processing facility and local business development plan.

Closely linked to outgrower schemes are the creation of processing facilities and the possibility of adding value to primary production. Of the 39 projects in the UNCTAD–World Bank study, seven of them were pure processing operations and were directly responsible for the creation of 2,665 jobs. These investments were perceived more favorably than other business models, primarily because of the absence of negative effects associated with land acquisition.

Priority should be given to investments that add value to production and include processing facilities. This can be done at the stage of screening and selecting potential investors. The contract can include a provision for establishing such facilities. Of the 80 contracts that IISD reviewed, six—for rubber, palm oil, and rice—require the investor to build processing facilities. In three of the contracts the provisions contained significant loopholes. Two of the contracts required only that the investor “explore the possibilities” of establishing a processing facility. One contract required only that the investor build a processing facility if the investor deemed it commercially viable. However, two other contracts required the investor to build a processing facility within a specified time period, and even indicated how many tons the facilities should process per hour. The sixth contract specified the amount of money to be invested in the processing facility and the number of people to be employed.

Creating knock-on effects to the broader economy is another important contribution that foreign investment can bring to a country. The UNCTAD–World Bank study found positive market spillovers for local suppliers of fuel, fertilizer, and machinery. But these spillovers did not occur in areas where competent local suppliers did not exist in the first place. Indeed, most investors imported inputs because of unavailability of local supplies at competitive prices.

Preparing a Local Business Development Plan is one way for the investor to better integrate local contractors and suppliers into the project. The provision in the contract can require the investor to give first preference to goods produced in the host state and services provided by host state citizens or businesses. This should be subject to technical acceptability and availability. The investor can keep

a list of local suppliers in the company offices and the government can help identify local suppliers and contractors. The investor will then report annually on the implementation of the Local Business Development Plan and the government will monitor the situation.

ESTABLISHMENT OF COMMUNITY DEVELOPMENT PROGRAMS (4)

Positive outcome 4: Establishment of community development programs

- Where investors built relations with the community, and provided social and economic development programs, they were more likely to be financially successful.

Legal options:

- There is a need for enforceable community-based agreements that are integrated into the contract. The contract can define the parameters for a separate agreement between the investor and the community that is annexed to the contract.
- Failure to subsequently set up a community agreement and comply with the terms should amount to a material breach of the contract.

The UNCTAD–World Bank study found that investors who were financially and operationally successful tended to have the most positive impact on their host economies and surrounding communities. Similarly, those investments that were well integrated with the host country and surrounding community were most likely to be financially successful. The possibility of establishing a virtuous cycle was one of the most important insights in the report. In one case, the investor operated a financially inclusive business model in which the revenues from the project are explicitly shared with the community. For example, a rice plantation in Ghana pays 2.5 percent of monthly turnover into a community trust, which the community can spend on development projects at its own discretion.

A number of investors put in place community development programs. These typically included building medical centers, schools, housing, water pumps, or community infrastructure such as town halls or crop storage facilities. The construction of roads in particular was seen as a key benefit and improved access to markets.

There was, however, an important variation in the extent to which local communities were consulted about the community development programs, and the extent to which investors made a binding commitment. The most successful programs were those in which the local community had been consulted, had a say both in terms of the choice of project and how funds were spent, and had a written agreement signed by both parties. Unfortunately, the inclusion of gender issues was lacking in the design and choice of programs provided.

These findings point to the need for enforceable community-based agreements, as part of the principal contract to ensure an effective outcome. Such agreements are commonly referred to as Community Development Agreements and are standard practice in the mining sector. The contract should contain a provision for the investor to enter into a Community Development Agreement with the local community. Such a provision can define the process and parameters for the agreement, such as who should be included and consulted, what should be included, how decisions should be made, how much money will be put aside, appropriate grievance mechanisms, and a requirement for annual reports on the implementation of the agreement. Gender considerations can be integrated throughout to ensure that women are represented in decision making, have an equal voice, and are beneficiaries of the activities. For example, one investor set up a community liaison committee and insisted that youth and women were represented on the committee. Furthermore, the contract can include a provision whereby failure to conclude a Community Development Agreement and to comply with the terms of the agreement amounts to a material breach of the contract and can lead to termination if not remedied.

A number of the contracts reviewed by the IISD contain provisions related to community development, but they remain vague and largely unenforceable. There were two countries in Africa, however, where the provisions were detailed, with a specific list of activities, quantifiable indicators, a time period for completion, and a budget. In one contract, the Community Development Agreement was annexed to the contract, ensuring that it was part of the overall contract. Box 4.3 describes the Community Development Agreement for a tree plantation in Central Africa.

BOX 4.3. EXAMPLE OF A COMMUNITY DEVELOPMENT AGREEMENT FOR A TREE PLANTATION IN CENTRAL AFRICA

In one contract in Central Africa reviewed by the IISD, the Community Development Agreement sets out a timeline for what is required in five-year intervals. The agreement specifies how many classrooms, houses, offices, toilets, and boreholes should be built. It even specifies the number of soccer balls and volleyballs to be given to the primary school each year. The main obligations fall to the investor, but there are also obligations for the community to help maintain rural infrastructure, such as roads.

Source: Smaller 2014a.

INCREASED INCOMES IMPROVE FOOD SECURITY (5)

Positive outcome 5: Increased incomes improve food security

- Some investments had a positive impact on food security because of increased incomes for those employed or contracted by the project.
- However, only a third of investments were producing food crops for the host country market, and there were also negative impacts on food security.

Legal options:

- Promoting food security should primarily take place in the preparatory phase. Potential negative impacts, such as through changes in access to land, should also be identified and addressed.
- Prioritize and select investors who will help achieve the national food security goals and strategies. This can be determined based on crop choice, business model, or proposed location of the investment. Give preference to business models that include outgrower schemes and expand local employment and incomes.

Investments in agriculture affect local food security in different ways. The most direct way is through food production for the host country market. One-third of investors surveyed fell into this category. Some investments also had a positive impact on local food security because the rise in rural incomes derived from direct employment and outgrower schemes improved people's purchasing power.

Many of the issues related to food security should be dealt with in the preparatory phase of the contract negotia-

tions. National food security strategies are crucial. They will help government negotiators identify the target areas, groups, and crops to promote and prioritize to strengthen food security. Identifying potential impacts on local food security prior to entering into negotiations is also crucial to avoid or minimize the potential for harm to existing food security.

But there were also negative impacts on food security, mainly from investments in which access to land was reduced and where this land had previously been used to

grow food, or was relied on by pastoralists to graze cattle. One female community member explained that she and other women in the village used to collect wild spinach and a variety of other edible plants on land to which they no longer had access because the investor erected an electrified fence. These issues should be identified and dealt with in the preparatory phase of the negotiations when the investor and government are identifying suitable and available land, conducting impact assessments, and determining who is either living on or using the land that is being considered for investment.

CHAPTER FIVE

TOP FIVE DOWNSIDES TO FARMLAND INVESTMENTS

There were a number of negative impacts identified in the UNCTAD–World Bank study. Some of these negative impacts could have been avoided or minimized through better preparations prior to negotiating the contract, through improved drafting of contract provisions, or through better monitoring and enforcement. This section examines the top five downsides from the UNCTAD–World Bank study and how they can be addressed through the contracting process.

LOSS OF LAND AND POOR RESETTLEMENT PLANS (1)

Downside 1: Loss of land and poor resettlement plans

- The standout negative impact on local communities was reduced access to land, coupled with poorly executed resettlement plans.

Legal options:

- Map out and identify formal and informal land rights before contracts are signed, using the results of the social impact assessment to assist.
- Verify through the consultation with communities that no residual land disputes exist before operations commence.
- Design a proper resettlement plan, in consultation with resettled persons, that is annexed to the contract and binding on the parties.

The standout negative impact on local communities was reduced access to land. The most common source of conflict was between an investor who was granted formal rights to land by the government and the local people who had been living and working on land for years, but with rights to land that were typically not surveyed/demarcated and/or formally registered. The rights of pastoralists were also seldom recognized and therefore a source of conflict. Many investors were spending significant time and resources dealing with land disputes, which could and *should* have been identified earlier through a proper preparatory process. Land disputes were closely and directly

related to other negative impacts or community consultations, social impacts, and grievance mechanisms.

For every land-based investment, clear land tenure arrangements are essential for determining the terms and conditions in the contract. The rights of local landowners and users must be clearly identified before the contract is negotiated. Where land tenure systems are well developed and where rights are clear and vested in local owners or users, they will be entitled to have a say in how the land and water will be allocated to the investor. They will be able to participate in the contracting process, either directly with the investor or as a party to an investor-state negotiation.

Where land rights are not clear or properly surveyed or registered, it is essential to identify, recognize, and map out all legitimate land tenure rights holders before the contract is signed, in close consultation with local communities. This includes not only people living on the land but also those using it for grazing livestock, as shifting cultivators, or as routes to access water, firewood, or other forest products. It should include both formal and informal rights to land, whether formally recorded or not. The process of community consultations will also help verify whether land disputes exist that need to be resolved before operations commence. A map with geographical boundaries that has been verified by the government, investor, and the local community should be annexed to the contract. Some positive examples of investors following processes that respecified local rights and helped advanced the land tenure system were seen in the field research (box 5.1).

A number of global initiatives have been established to provide useful guidance for investment negotiators who want to avoid negative impacts, most notably the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests and the African Union Framework and Guidelines on Land Policy in Africa.

Another issue related to land disputes are cases in which resettlement was undertaken, but the process was not sufficiently consultative or transparent. However, there were some positive outcomes. Several investors arrived on site to unexpectedly find communities living there and decided to work with or alongside them, rather than resettling them. But in most cases, resettled persons felt they

BOX 5.1. CONSULTATIVE LAND ACQUISITION PROCESS

The steps outlined here describe a Zambian domestic investor's path to acquiring land through a consultative process. These discussions took place over a three-year period, involving multiple stakeholders.

1. Investor approached the District Council—the local government—in search of land.
2. Council directed the investor to an area with agricultural potential that the local government perceived as underutilized. The Council requested a meeting with the chiefs.
3. The chiefs consulted with the local people through sub-chiefs and village headmen who represented the people.
4. After an initial and broad acceptance to allocate an area of land for the development of a plantation, a Community Development Trust was formed. It was made up of the local community and leaders.
5. The Community Development Trust, the investor, and the district council worked together to establish a value for the property and crops of people that needed to be relocated.
6. The Ministry of Agriculture carried out the tree and crop valuation. Government experts on buildings and construction carried out the valuations of houses, huts, and other buildings.
7. Agreements were reached between the investor and individuals about compensation for assets and crops.
8. A memorandum of understanding was signed by the investor, trust, and local community.

Source: UNCTAD and World Bank 2014.

were in a worse living situation as a result of moving. In one case, they still had not been paid compensation five years after the resettlement.

Resettlement should be avoided or minimized to the maximum extent possible. Where resettlement is deemed necessary, provisions should be made for developing a plan, having regard for global principles and standards. Persons who may be resettled must consent, and must be provided with necessary information. The livelihoods of resettled persons must be restored to a minimum equivalent level or better, including adequate housing and secure land tenure. And they must be paid fair and reasonable compensation. The resettlement plan should be annexed to the contract and be binding on the parties.

LACK OF OPENNESS AND ENGAGEMENT WITH LOCAL COMMUNITIES (2)

Downside 2: Lack of openness and engagement with local communities

- Lack of transparency surrounding land deals and inadequate consultation with local communities led to a sense of fear, mistrust, and resentment, and created operational and financial difficulties for investors.

Legal options:

- Engage with the community prior to and during the negotiations in an open and transparent way.
- Establish a Community Development Agreement.
- Include a disclosure provision that makes the contract a public document.

In many cases, there was inadequate consultation and engagement with local communities. It was particularly dangerous for investors to assume that the host government had adequately conducted consultations and resolved all community issues prior to the arrival of the investor. It led to project delays, increased costs, and worsened relations with local communities, which affected operational and financial viability. One investor arrived on site having been told that local government had conducted consultations and “prepared the land” for the investor. It was subsequently discovered that the local people had been coerced into moving with the promise of jobs and were irate with the investor for not providing them.

Real engagement with the community is important prior to and during the negotiation process. Engagement is only possible when a deal and the process leading to it are transparent. Situations in which there was a lack of publicly available information about investments created a sense of fear, mistrust, and resentment in local communities about the investor’s intentions and activities. It worsened working relationships between the investors and local communities. Information was particularly sparse regarding the terms and process of land acquisition and incentives provided to foreign investors. In one community stakeholder interview, a smallholder asked researchers whether the investor planned to take his land, which is illustrative of a total lack of communication between the investor and communities.

The Community Development Agreement can create a framework for ongoing engagement, dialogue, and discussion with the community, particularly in the event of conflict or grievances. It can also provide for periodic reviews of the project and its impact on the community and surrounding environment.

Some investors noted that their ability to be transparent was complicated by the controversy surrounding “land grabs” and the tendency of the media and civil society to manipulate the information, focusing only on the negatives. Other investors, however, used greater transparency as a way to counter fallacious reporting about the investment. A rubber producer in Liberia chose to make an extensive public disclosure about its operations in response to a critical third party report, which had alleged serious human rights violations.

It is important to include a disclosure provision in the contract that makes the contract and all related documents (such as environmental and social impact assessments and management plans) public and open to inspection at the state’s offices, the investor’s offices, and on a website. This should be subject to the redaction of truly confidential business information.

There are governments that have taken important steps toward more openness, Liberia being the leader. It publishes all payments, contracts, and licenses with investors on an official website. Ethiopia’s ministry of agriculture publishes many agricultural contracts on its online Ethiopian Agriculture Portal. Government taking the lead in being more open also reduces the likelihood of a situation in which one investor can be singled out. However, information must be reliable, accurate, and up to date.

WEAK ASSESSMENT OF COMMERCIAL VIABILITY (3)

Downside 3: Weak assessment of commercial viability

- Many projects fail or are struggling because of factors that could have been identified by better preinvestment screening, feasibility studies, and due diligence.

Legal options:

- Conduct feasibility studies to test the commercial viability of the project and prepare a business plan based on the outcomes.
- Ensure that the feasibility study and business plan are verified by an independent third party and subject to government approval.
- Include provisions on returning unused land, assignment (transfer of rights), and termination to deal with project failure or significant delays in commencing operations.

A significant number of agricultural investments fail, particularly when they are new investments. In the UNCTAD–World Bank study, around half of investors were unprofitable and behind operation schedules at the time of survey. In another World Bank study, half the projects were classified as failures or moderate failures in financial terms (Tyler and Dixie 2012).

Most failed because the concept was flawed, for example, because of wrong location, wrong crop, or overly optimistic planning assumptions. A coffee plantation in Vanuatu failed because of exposure to cyclones. An operation to supply the UK with Gambian eggs failed because it did not anticipate that UK consumers would be reluctant to buy Gambian eggs. A rubber plantation in Cambodia was struggling because of unsuitable soil even though surrounding communities were quick to point out that the soil was more suited to other crops, such as cassava.

Around one-quarter of investors were using less than 10 percent of the land allocated to them. This was sometimes owing to poor business planning, leading to operational difficulties such as land disputes or unexpected environmental conditions. In other cases, it was owing to insufficient financial resources to develop the operation once the land was acquired for a small amount. In the worst examples, it appeared possible that there was no serious intention to develop the land as agreed—that it was either being held for speculative purposes or that it was used for other purposes than that to which it had been agreed with the host government (for example, for timber from forests rather than crop production).

BOX 5.2. ELEMENTS TO INCLUDE IN A FEASIBILITY STUDY

- A market survey or analysis to determine whether there is demand for the product
- Technical feasibility to determine whether the environmental, hydrological, and climatological conditions are favorable in the location and with the chosen crop
- Financial feasibility to know how much capital is needed, costs and projected income, staffing requirements, and contingency plans for unforeseen events
- Social and environmental feasibility to determine whether land disputes might arise and the environmental risks, which could threaten the project
- Organizational feasibility to determine the most appropriate business model for that particular project

Source: Smaller November 2014a.

Most of these examples and reasons for failure could have been identified at the outset of the project through better screening of prospective investors by the host government and better due diligence and planning by investors.

Feasibility studies are essential. They principally address the commercial and technical viability of the proposed project. They also address the key social and environmental factors, such the probability of cyclones or the quality of soils, which may undermine commercial viability. Box 5.2 presents some key elements to include in the feasibility study. Feasibility studies should be conducted by the investor and verified by an independent third party before the contract is signed. The results of the feasibility study are to be used to develop a business plan. Both the feasibility study and business plan should be approved by the government prior to concluding contract negotiations. There was one reference to feasibility studies in a contract for a sugar plantation reviewed by the IISD. It commits the investor to finance technical studies but does not specify the terms of such a study and would be difficult to enforce.

Some domestic laws and regulations make projects contingent on feasibility studies and business plans. However, in most cases the laws do not exist. Furthermore, even when laws exist, they tend to be undermined by weak monitoring and implementation.

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

A number of countries in Africa and Asia are currently in the situation in which they gave away too much land too quickly. At least one East African country and one Southeast Asian country are considering caps on how much land can be allocated to an investor in the initial contract. Both these countries would like the investors to first prove they can be successful on a smaller plot of land before giving them a larger surface.

Assignment—the transfer of rights from one company to another—and termination provisions in the contract are also essential to provide the government and the investor with an exit strategy if the project fails or is struggling financially. The contract can give the investor the possibility to transfer its rights to an affiliate or a third company. But this must be on condition that the new investor assumes all the obligations under the contract and is subject to prior approval by the government.

The contract can provide for termination if commercial operations do not begin at a specified date, if rent is not paid, or if the company goes into bankruptcy. The contract can also be terminated if there is a material breach of the key provisions of the agreement by the government or investor.

POOR MANAGEMENT OF ENVIRONMENTAL AND SOCIAL IMPACTS (4)

Downside 4: Poor management of environmental and social impacts

- Impact assessments are treated as “box-ticking” exercises and not translated into management plans and not monitored.

Legal options:

- Integrate impact assessments and management plans into the contracts with specific instructions and guidelines about what needs to be assessed and included in the management plans.
- Ensure verification by an independent third party and government approval.
- Failure to conduct impact assessments and develop management plans should amount to a material breach of the contract and be grounds for termination.

The good news is that 70 percent of investors conducted an environmental and social impact assessment and almost 50 percent developed an environmental management plan. The bad news is that in most cases they were treated as “box-ticking” exercises, meaning they were largely symbolic and not incorporated into the contract. The quality of environmental management plans was weak and they were for the most part not informing business plans or operations.

The result was that investors often missed important recommendations, which in turn had consequences for the investment. For example, a rice farm in Ethiopia had its crop repeatedly eaten by birds and had to hurriedly employ 500 bird chasers. The presence of a large endemic bird population was identified in the impact assessment, but it was conducted by a consultant and sat on the shelf at the head office in Addis Ababa, without the farm managers ever having seen or read it. Another World Bank study found that “implementation of environmental and social impact assessments is deficient in many settings. Even where they are required by law, environmental and social impact assessments are often not conducted” (Deininger and Byerlee 2011, 57).

Stakeholders interviewed mentioned various negative environmental impacts, most commonly water pollution from chemical drift and the transfer of conservation areas to make way for agricultural investments. The study found that in around half the investments, water use by the investor was totally unregulated. One local community complained that at the investors’ present extraction rates, local water sources would be exhausted within

months. Water issues, such as extraction and chemical pollution, must be identified in the impact assessments and management plans.

These shortcomings combined with the frequency of project failures point to the need for paying more attention to integrating impact assessments and management plans into investment contracts. The UNCTAD–World Bank study found the most effective impact assessments were those conducted by the investor, with monitoring and verification from the host country government and an independent third party.

In principle, before a contract is signed and implemented, an environmental and social impact assessment should take place. It can involve more than one stage to avoid excessive delays. An initial high-level screening can determine whether launching a formal assessment is needed and can define the scope of issues to be covered in a more rigorous assessment. The contract negotiations can then be adapted based on the findings of the ESIA. The possibility of an ESIA leading to abandoning the project should not be ruled out. The investor should use the results of the ESIA to develop management plans, one for environmental issues and the other for social issues. Box 5.3 outlines the key elements to include in the environmental and social management plans.

In practice, impact assessments are often done after the contract is signed but before the investor starts construction and operations. This is not the ideal situation, but at a minimum, the investor should not be granted the licenses or permission to start production until the ESIA and management plans are completed, independently verified, and approved by the government, in accordance with the applicable laws.

Failure to comply with these conditions must amount to a material breach of the contract. The contract should also contain a requirement for annual reporting on the implementation of the two plans, with the reports to be made public and accessible to local communities.

BOX 5.3. ELEMENTS TO INCLUDE IN ENVIRONMENTAL AND SOCIAL MANAGEMENT PLANS

Some elements that can be included in the environmental plan are the following:

- Main areas of environmental concern
- Plans for managing impacts on biological diversity, surface water and groundwater, and soils
- Plans to minimize greenhouse gas emissions and adapt to climate change
- Plans for handling and storing chemicals, pesticides, fertilizers, and fuel
- A plan to restore the area postinvestment
- A description of the monitoring and assessment mechanism

Some elements that can be included in the social plan are the following:

- Recognition of existing land owners and users and their rights to continue using the land for subsistence purposes
- Plan to avoid or minimize displacement or involuntary resettlement
- Plan to avoid or minimize unreasonable interference in living conditions of people living on or around the project site
- Plan for resettlement, which includes consultation, disclosure of information, how the investor will replace or restore livelihoods, and payment of fair and reasonable compensation

Source: Smaller 2014a.

INSUFFICIENT MECHANISMS TO RAISE GRIEVANCES (5)

Downside 5: Insufficient mechanisms to raise grievances

- There were insufficient mechanisms for local communities to raise grievances and seek redress.

Legal options:

- Include a provision in the contract for the establishment of company grievance mechanisms based on International Finance Corporation (IFC) Performance Standards.

In most cases, people negatively affected by an investment did not have sufficient means to raise grievances with the investor or government and to seek redress. This is a key means through which local communities and other stakeholders have a voice. Many stakeholders who mentioned grievances during interviews said they had no way of raising those grievances. Some positive examples did exist, such as a Community Liaison Committee at a palm oil plantation in Ivory Coast.

Investor grievance mechanisms are an important tool that allows the investor to receive and resolve concerns and grievances by local communities on social and environmental issues. It should be designed in consultation with the community and should be understandable, accessible, transparent, and culturally appropriate. There should be an ongoing and open communication

channel between the investor and local community to deal with issues quickly and before they escalate. Nevertheless, there are incidents that may be beyond the scope of the grievance mechanisms that are in place. Therefore, it is also important that the grievance mechanism does not prevent access to judicial or administrative remedies, such as mediation and arbitration. Grievance mechanisms are also an important tool for employees and a separate grievance mechanism should be set up to deal with employee grievances.

The IFC's Performance Standards 1, 2, and 5, provide guidelines for setting up proper grievance mechanisms. These guidelines should be incorporated as provisions in the contract and the investor should report annually on grievances that have arisen and how they have been addressed.

CHAPTER SIX

CONCLUSIONS



Given the right legal and policy frameworks, investments in farmland can generate benefits and minimize risks for local communities, host states, and investors. The right legal framework can help those benefits materialize and act as a buttress against potential negative impacts. Investment contracts are one tool among a range of other legal and policy instruments available. Tables 6.1 and 6.2 summarize the findings of this paper in terms of the ways in which the different stages of the contract process can be used to maximize the benefits and minimize the risks identified by field research. The key message is that decisions should be made based on sound evidence and research about what works and what does not. This foundation of knowledge should then be translated into concrete and detailed provisions in contracts or through other legal frameworks and mechanisms applying to the investment. A significant amount of groundwork is needed prior to entering into negotiations. Even more work is needed after the investment has begun to ensure both parties live up to their commitments. Getting all this right is an important step in generating positive sustainable outcomes for governments, communities, and investors.

TABLE 6.1. HOW TO MAXIMIZE KEY BENEFITS OF AGRICULTURAL INVESTMENT THROUGH THE CONTRACT PROCESS

	Preparing for Contract Negotiations	Drafting the Contract	Monitoring and Enforcement
Employment creation	• Give priority to business models that maximize job creation. • Consider likely composition of employees and jobs, for example, local/national people, gender, permanent/temporary jobs. • Consider investor plans for training, employee benefits.	• Include targets for employment of locals and/or nationals. • State applicability of domestic labor, health and safety laws. • Require training programs for local staff. • Ensure commitments for employee benefits (housing, education, health benefits, and so on) are included.	• Monitor adherence to domestic labor, health and safety laws. • Monitor job creation, training, and employee benefit commitments. • Require annual reporting on employment targets and training programs.
Integration of local farmers	• Give priority to investors that have outgrower schemes. • Ensure the business model is resolved before outgrowers are introduced. • Treat new crops, technology, business models with caution, but do not exclude them entirely.	• Include provision requiring establishment of an outgrower scheme. • Set requirements for technical support or provision of inputs to outgrowers. • Set framework for establishment of a fair, transparent pricing mechanism.	• Monitor outgrower scheme and support provided. • Require annual reporting on the performance of outgrower schemes. • Participate in and monitor price-setting mechanisms.
Expansion of market opportunities	• Give priority to investors that will set up local processing facilities, where commercially viable. • Consider whether the investor plans to import inputs or purchase them locally.	• Establish commitments for setting up a processing facility. • Require the investor to give preference to local suppliers, where available. • Require the investor to establish a local business development plans.	• Monitor adherence to local business development plan. • Monitor development of processing facility. • Require annual reporting on implementation of local business development plan and processing facility.
Establishment of community development programs	• Consider investors' plans for community development programs. • Give priority to financially inclusive business models. • Ensure proper consultation, engagement, and access to information for local community.	• Require investors to establish community development agreements that are annexed to the contract. • Establish terms of and process for community development agreements or financially inclusive business models.	• Monitor adherence to community development agreements and financially inclusive business models. • Failure to set up and comply with community development agreement amounts to a material breach of the contract. • Require annual reporting on implementation of community development agreement.
Increased incomes improve food security	• Consider all food security implications of investments. • Give priority to investors whose operations support local and national food security strategies.	• Include a provision on local community food programs. • Require a certain percentage of food crops to be sold in the national market, where appropriate.	• Monitor adherence to local community food program commitments. • Monitor impact of investment on local food security.

TABLE 6.2. HOW TO MINIMIZE KEY RISKS OF AGRICULTURAL INVESTMENT THROUGH THE CONTRACT PROCESS

	Preparing for Contract Negotiations	Drafting the Contract	Monitoring and Enforcement
Loss of land and poor resettlement plans	• Map out and identify all existing users of the land, including formal and informal rights. • Verify through community consultation that no residual land disputes exist. • Consider investor plans for resettlement and/or working with existing users of the land.	• Define rights of investor to use and access the project site. • Annex map with geographical boundaries and special features to be left intact. • Prepare resettlement plan, if needed, with consent of resettled persons.	• Monitor that investor remains within allocated land and uses land for the agreed purposes. • Create mechanism for local community to raise grievances about land issues. • Require investor to report on land disputes that arise.
Lack of openness and engagement with local communities	• Conduct full and transparent consultations with communities prior to negotiations. • Ensure transparency about the process for investors to access land and make investments.	• Engage with local communities during the design of the project and drafting terms of the contract. • Include a disclosure provision that outlines what documents will be made public.	• Make contracts and other related documents public, excluding confidential business information. • Ensure commitments made during consultations with communities are upheld.
Weak assessment of commercial viability	• Screen investors with respect to their technical and financial capabilities. • Give priority to business models that are most likely to be a financial and operational success. • Conduct business feasibility studies and prepare a business plan based on outcomes. • Ensure feasibility studies and business plans are approved by government and verified by an independent third party.	• Specify elements to be included in the feasibility study • Incorporate milestones of the business plan. • Require that material changes to the business plan be reported. • Include assignment and termination clauses to address potential failure.	• Failure to prepare feasibility studies and business plans is a material breach of the contract and is grounds for termination. • Monitor financial and operational performance of the project. • Report changes to the business plan. • Design contingency plans for cases in which investors fail, including return of unused land, transfer of rights to a third party, or contract termination.
Poor management of environmental and social impacts	• Conduct social and environmental impact assessment and incorporate findings into management plans and wider business plan. • Ensure assessments and management plans are approved by government and verified by an independent third party.	• Supplement domestic legislation with specific guidance for elements to be included in assessments and plans. • Incorporate findings of impact assessments and management plans. • Include social and environmental impact assessments as binding obligations.	• Failure to conduct impact assessments and prepare management plans amounts to a material breach of the contract and is grounds for termination. • Require annual reporting on implementation of social and environmental plans. • Monitor water quantity and quality, soils and changes in climatic conditions.
Insufficient mechanisms to raise grievances	• Design grievance and redress mechanisms in line with the community consultations. • Establish ongoing channel of communication between investor and community.	• Include a provision for establishment of grievance and redress mechanism, based on IFC performance standards.	• Report annually on grievances and how they have been addressed.

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