

## Agribusiness and Human Rights: Briefing for Social Movements



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## 1. The Need for Responsible Investment

Investment in agriculture is urgently needed. Agriculture is the main source of livelihood for people living in hunger in developing countries, 50% of whom are smallholder producers, a further 25% are workers in the food industry, and others include indigenous and forest dwellers. The importance of this sector to hunger reduction and poverty alleviation should not be underestimated. The *kind* of investment needed, however, is an issue which is currently at the heart of many international policy debates on food security and nutrition.

Over the last 30 years we have seen a concerted withdrawal of public support to agriculture and today we are witnessing the detrimental effects of that neglect. With the global financial crisis, dependence on donors is proving to be a risky strategy and the private sector has been identified as an important partner, resulting in its increased involvement in development, particularly agriculture, as governments struggle to find the financial resources to support the sector. Ultimately the question arises as to what should be **the role of the private sector** in agricultural investment in developing countries. Can their involvement be used to realise the right to adequate food, rather than merely as a business opportunity?

In this briefing we ask what global business & human rights standards should be applied to agricultural investment in order to reach the ultimate objectives of achieving the right to food, alleviating poverty, enhancing sustainable food production and creating decent employment conditions for agricultural workers. Our aim is to outline the obligations of States and the responsibilities of business with regard to agricultural investment, by highlighting how these are defined within existing international mechanisms. The briefing is aimed at civil society organisations, particularly social movements that are affected by the impacts of business investment in their communities. As smallholder food producers bear the highest risks from these investments, the briefing seeks to provide tools to hold governments to account for their duty to protect these rights holders. It is intended to provide an overview of existing business & human rights standards that can be applied to a broad range of international agricultural policy initiatives.

## 2. The Need for Coherent Global Food Governance

Smallholder agriculture is the largest provider of food and raw materials at the global level; it is also the largest provider of jobs in the world.<sup>1</sup> Ironically, smallholders are also the first to be food insecure. Hence, investing in this sector is not only necessary for global food security but also essential for the eradication of poverty. Investment in small-scale food producers via agro-ecological approaches can produce multiple dividends, simultaneously increasing food production, and food and income security, as well as enhancing resilience to shocks and reducing greenhouse gas emissions.<sup>2</sup>

Most investment in smallholder agriculture is made by smallholders themselves.<sup>3</sup> The public sector also plays an important role in enabling and maximising smallholders' own investment through extension services, research & development, infrastructure development, support for collective bargaining and access to credit, amongst other initiatives. Whilst there is certainly a place for support from private investors, they are often made up of a vast and diverse range of actors with varying interests which do not always align with poverty alleviation and food security.

<sup>1</sup> Committee on World Food Security High Level Panel of Experts on Food Security and Nutrition (2013), Investing in smallholder agriculture for food security, <http://www.fao.org/cfs/cfs-hlpe/en/>

<sup>2</sup> CIDSE (2012), Agriculture: from Problem to Solution, <http://www.cidse.org/resources.html>

<sup>3</sup> Committee on World Food Security High Level Panel of Experts on Food Security and Nutrition (2013), Investing in smallholder agriculture for food security, <http://www.fao.org/cfs/cfs-hlpe/en/>

Therefore, public policies should accompany and regulate such investment so as to strengthen smallholder production systems and facilitate achieving the objective of a resilient, smallholder-based, sustainable food system.<sup>4</sup>

### The Committee on World Food Security

The Committee on World Food Security (CFS) is the most inclusive international and intergovernmental platform for all stakeholders, ensuring coordination in global food governance and food and nutritional security.<sup>5</sup> Civil society organisations and social movements are well represented in the CFS through the Civil Society Mechanism (CSM), making it the most participatory forum giving those most affected by food insecurity a voice in the policies that affect them. The CFS is currently conducting negotiations on responsible agricultural investment (rai) which will provide guidance on agricultural investment aimed at increasing positive investment in agriculture. These rai principles are being developed by an Open-Ended Working Group, the CFS Secretariat and the CFS Bureau through an inclusive, multi-stakeholder consultation process. The expected outcome of this process will be a set of principles to promote investment in agriculture which contributes to food security and supports the progressive realisation of the right to adequate food. It is anticipated that these principles will be adopted in October 2014.

In addition to this CFS-led process, a variety of other agricultural investment policy discussions are taking place in forums such as the World Bank, the G8 and the Organisation for Economic Cooperation and Development (OECD). Having multiple processes all going on at the same time is confusing and fragments policy coherence, compromises coordination and dilutes impact. As the only international body with a clear mandate to work on food security and nutrition, the CFS rai process should be the **primary reference** for States and international organisations with regard to investment in agriculture to which all other principles should align. The CFS rai process can be considered important because it:

- Provides coherence in global food policy, recognising the CFS as the most legitimate platform for policy decisions on food security and nutrition;
- Provides investment policy frameworks which support small-scale food producers and providers;
- Could potentially serve as a monitoring mechanism for investment by the private sector and ensure it upholds the right to adequate food;

### 3. Risks: What's at stake?

The motivations that induce stakeholders such as transnational corporations to invest often have common roots. Such motivations can include, though may not necessarily be limited to, the financial gains that corporations can potentially achieve and the profit they can generate by capturing market share, expanding distribution channels, securing new business partners and brand recognition. This can eventually lead to market concentration and the creation of oligopolies.<sup>6</sup> Market concentration in the food chain is a matter of grave concern in poor nations where international companies compete with local supply, thus compromising opportunities for **local economic development**. The issue of investment is therefore relevant not just to production but also the whole food chain. Other dangers include: land and resource grabbing,

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<sup>4</sup> International Food Security & Nutrition Civil Society Mechanism (2012), Briefing Note on the Background and Consultation Process on Responsible Agriculture Investment (2012), [http://www.csm4cfs.org/files/SottoPagine/59/en\\_csm\\_agri\\_invest\\_briefing\\_note\\_oct\\_11.pdf](http://www.csm4cfs.org/files/SottoPagine/59/en_csm_agri_invest_briefing_note_oct_11.pdf)

<sup>5</sup> <http://www.fao.org/cfs/en/>

<sup>6</sup> World Economic Forum (2008), The Business Role in Achieving the Green Revolution for Africa, [https://members.weforum.org/pdf/BAACH/Business\\_Role\\_in\\_Achieving\\_a\\_Green\\_Revolution\\_for\\_Africa.pdf](https://members.weforum.org/pdf/BAACH/Business_Role_in_Achieving_a_Green_Revolution_for_Africa.pdf)

displacement of small-scale food producers from their local markets, environmental damage and the plundering of natural resources and labour rights abuses.<sup>7</sup>

In many cases, the acceleration of private investment in developing countries is leading governments to modify domestic policy in order to attract them. Part and parcel of the concessions governments make to attract foreign investment is an attractive “business climate” where companies benefit from tax breaks, long-term leases on land, use of natural resources and access to cheap local labour. Investment protection comes at the expense of State sovereignty (due to issues such as stability clauses, protection against direct and indirect expropriation<sup>8</sup> and free transfer of funds) and sometimes at the expense of the rights of the population (evidenced by the reduction in rights in Special Economic Zones). For instance, in the context of the G8’s *New Alliance for Food Security and Nutrition in Africa*, we see that governments have actually adopted legislation and favourable investment codes or even signed economic agreements to ‘improve’ their economic and legal environment for investors. Such changes to national law are often made without consulting the population or impact assessments to clarify or prevent the deleterious consequences on human rights of some forms of investment.<sup>9</sup>

#### 4. Beyond Economic Growth and Towards the Right to Food

It cannot be denied that investment in agriculture is at the very core of the contrasting visions of food production models and systems of food provision being discussed internationally. Thus, what governments and the private sector choose to invest in is of critical importance. Currently, great emphasis in the food debate is placed on increasing yields to eradicate hunger, yet we are growing more food than ever before and still hunger persists.<sup>10</sup> Access to food is closely related to access to justice and the drive to increase yields alone – whilst creating business opportunities and spurring economic growth – takes no account of the root causes of hunger, thus rather missing the target.

For CIDSE, investment must prioritise reinforcing **local food systems** and agro-ecological smallholder food production, with particular regard to women, and increasing resilience to natural disasters, economic shocks and conflict. The objective must be the right to adequate food and not just increasing the agricultural sector’s contribution to Gross Domestic Product (GDP).

##### We define positive investment as that which:

- Incorporates the human rights context, is compliant with human rights standards and not only respects but also contributes to the achievement of the right to food
- Supports small-scale, family-based smallholder agriculture, artisanal fisheries, livestock keepers and herders and small- and medium-sized entrepreneurs, as the groups most vulnerable to hunger
- Is based on the re-localisation of economies and local food production systems via improved production and distribution capacity, thus contributing to local economic development and making them more resilient to world market shocks
- Supports agro-ecological models of production that are more resilient to climate change and less harmful to the environment
- Enables vibrant rural livelihoods, income and decent employment conditions

<sup>7</sup> EcoFair Trade Dialogue (2011), Right to Food: Impact Assessment of the EU-India Free Trade Agreement, <http://www.boell.de>

<sup>8</sup> Impacting, for example, the right to water; See: Marc Jacob, INEF (2010), International Investment Agreements and Human Rights, [http://www.humanrights-business.org/files/international\\_investment\\_agreements\\_and\\_human\\_rights.pdf](http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf)

<sup>9</sup> For example with regard to seed policies and land use rights systems in Mozambique and land reform in Côte d’Ivoire; See CIDSE (2013), Whose Alliance? The G8 and the Emergence of a Global Corporate Regime for Agriculture, <http://www.cidse.org/resources.html>

<sup>10</sup> The growth rate of world agricultural production per capita is the highest it has been in the last 50 years (1.3 percent a year). See: Committee on World Food Security High Level Panel of Experts on Food Security and Nutrition (2011), Price volatility and food security, <http://www.fao.org/cfs/cfs-hlpe/en/>

- Is gender sensitive, promotes gender equality and benefits and empowers women
- Ensures that control over productive resources and decision-making processes remains in the hands of local producers
- Complements and supports rural social protection schemes that go beyond food and employment to include health, infrastructure and education
- Allocates more public resources to strengthen local food production systems
- Allows small-scale food producers to invest and reinvest in their own development and asset base (including land, infrastructure, price regulation and social services)
- Is transparent, by including and consulting with communities at all stages of the process
- Supports farmers' organisations and cooperatives
- Ensures fair prices and market conditions, allowing reinvestment in production, processing and marketing/distribution channels.
- Increases the capacity to conserve food and ecological and genetic resources on farm
- Is labour intensive in countries where agriculture is the main source of employment and/or income
- Supports diversification of crops and income
- Is efficient in terms of land productivity
- Prioritises investments in marginalised areas

**We understand negative investment as that which:**

- Does not respect human rights
- Leads to land and resource grabbing
- Exacerbates inequality, including land concentration
- Stimulates and fuels conflict over natural resources
- Incentivises unsustainable models of production such as large-scale mono-cropped systems
- Make smallholders depend on one commodity and compromise their resilience
- Is done in a non-transparent manner
- Encourages corruption
- Incentivises or benefits from non-transparent land deals, tax exemption and money laundering
- Leads to the corporate shifting of profits which are re-directed outside the local area
- Is exploitative and unfairly remunerated or which places the health and wellbeing of agricultural workers at risk, eg through exposure to chemicals and dangerous practices
- Does not allow the producer to ascend the value chain
- Edges out local enterprises
- Is extractivist in nature and which leaves pollution and degradation in its wake
- Takes no account of the needs of future generations and degrades the natural asset base.

**5. Role and Responsibilities of Agribusiness**

Populations must be safeguarded from potential abuses and they should also be empowered and enabled to respond to such abuses via national and international legal mechanisms. The private sector has a role to play in development but not without clear regulations. The motivation of the private sector will always be driven by the bottom line. Within that context they can contribute to just and equitable social progress but it must not be assumed that this will happen automatically. As noted by the United Nations Food and Agriculture Organisation (FAO), “care

must be taken in the formulation of investment contracts and selection of business model. Appropriate legislative and policy frameworks need to be in place”.<sup>11</sup> This requires the ability to **direct investments towards the right types of project**. The role of States and international bodies is therefore extremely important. Many governments and international organisations do recognise the risks and realities posed by the unfettered activities of transnational corporations and other investors. Though some progress has already been made as regards frameworks and guidelines to help avoid violations, much more is needed. Unfortunately, these frameworks are not binding and thus do not effectively hold companies to account for any social and environmental damage they cause as a result of their business activities.

## 6. Agricultural investment: Why talk about business & human rights standards?

Responsible public and private agricultural investment is essential to improve food security. At the same time, there have been many cases where private agricultural investment has led to violations of human rights, including labour rights and rights to land, livelihood, health and a clean environment, and even to the killing of human rights defenders.<sup>12</sup>

### Rights violations: France-Cameroon palm oil investment

In 2010, the legal association Sherpa (France), CIDSE member MISEREOR (Germany) and its environmental partner organisations CED and FOCARFE (Cameroon), filed a complaint with the OECD against the French company Bolloré and three of its corporate partners in Belgium and Luxembourg regarding breaches of OECD Guidelines for Multinational Enterprises. The complaint concerned violations of the right to land and livelihood in communities surrounding the Bolloré subsidiary SOCAPALM palm oil plantation, as well as the buying arrangements with local planters and the right to decent working conditions on the plantation itself. The complaint documented breaches in harvesting agreements with local planters and for plantation workers, exposure to injury due to unsafe transport, lack of protective equipment, unsanitary housing conditions, precarious subcontracting arrangements and denial of the right to collective bargaining. In June 2013 the French National Contact Point issued its final statement, concluding that through their relations with SOCAPALM, all four companies violated the OECD Guidelines and recommending that the companies implement an action plan for remediation.<sup>13</sup>

Public-private initiatives on agricultural investment currently make little reference to human rights frameworks or corporate regulation. Both in relation to these initiatives and particularly now that the CFS is developing responsible agricultural investment (rai) principles, **evidence of human rights violations shows that business & human rights standards must be taken into account**. These include notably the 2008 United Nations (UN) Protect, Respect and Remedy Framework and the 2011 Guiding Principles on Business & Human Rights for the Framework’s implementation. The Guiding Principles, despite their gaps and weaknesses, constitute a useful international minimum standard.<sup>14</sup> The UN has committed to take account of the Guiding Principles within its entities.<sup>15</sup>

<sup>11</sup> David Hallam, FAO (2009), “Foreign Investment in Developing Country Agriculture.”

<sup>12</sup> For example, as documented in cases under the U.S. Alien Torts Claims Act against Coca-Cola, Nestlé, Archer Daniel Midlands, Cargill, Chiquita, Del Monte ([www.business-humanrights.org](http://www.business-humanrights.org)) and in OECD complaints against Neuman Kaffee Gruppe, Nidera, Dole, Cermaq, Nutreco ([www.oecdwatch.org](http://www.oecdwatch.org)).

<sup>13</sup> See: MISEREOR et al. (2010), The Impact of the Privatization of SOCAPALM on Communities and the Environment in Cameroon Briefing paper and OECD Watch Quarterly Update (June 2013). During mediation, the parties agreed that the action plan for remediation would cover community dialogue, reduction of environmental nuisances, public services, local development, workers’ rights and conditions of work, transparency and compensation of local communities for their loss of resources and land.

<sup>14</sup> CIDSE (2013), The UN Protect, Respect and Remedy Framework and the Guiding Principles: Driving Change?, <http://www.cidse.org/resources.html>. The Framework consists of 3 ‘pillars’: the State’s duty to protect human rights, corporate responsibility for respecting human rights and access to remedy when abuses occur.

<sup>15</sup> UN Secretary-General Report A/HRC/21/21.

## 7. How are business & human rights addressed within existing FAO and CFS frameworks?

The rai principles should build upon existing FAO and CFS standards, including the 2004 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines) and the 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT). The Right to Food Guidelines address the private sector only in a very general way. The VGGT, finalised after the adoption of the 2011 UN Guiding Principles on Business & Human Rights, contain both a guiding principle on business enterprises and a chapter on investment. Below, we refer to these Guidelines and look at how business & human rights standards complement and/or go beyond these texts.

## 8. What key elements of business & human rights standards should apply?

### 8.1. Voluntary and mandatory approaches

#### Corporate regulation

*Is there any obligation for States to regulate in the context of private agricultural investment?*

International human rights treaties establish the legal obligation of States to protect human rights in general, independently of specific Guidelines or Principles.<sup>16</sup> The Right to Food Guidelines recommend only that States put in place an enabling environment to attract external resources for productive investment, while encouraging corporate social responsibility (4.3, 12.4). The VGGT highlight the need for safeguards to ensure that investments respect human rights and also refer generally to laws that encourage responsible investment (12.4, 12.8).

Whereas the approach of corporate social responsibility allows a company to choose freely the issues it will address, the Guiding Principles go further, recognising **those affected by corporate abuses as rights holders** with reference to the UN Declaration of Human Rights and key treaties. The State duty to protect human rights implies an **active regulatory role for States**, including steps to prevent, investigate, punish and redress corporate abuses through effective policies, legislation, regulations and adjudication, and to **enforce laws** requiring business enterprises to respect human rights (1, 3). Governments should use a **“smart mix”** of regulatory measures together with, but **going beyond, voluntary approaches** and guidance alone.

#### Extraterritoriality

*In the context of significant agricultural investments by transnational corporations, what is the role for “home States” in preventing human rights abuses beyond their borders?*

The VGGT underline that home States, where transnational corporations are based, have roles to play in assisting both corporations and host State, in which company activities take place, to ensure that businesses are not involved in the abuse of human rights and legitimate tenure rights (3.2). In the Guiding Principles, the State should set out the expectation that all businesses domiciled in their territory and/or jurisdiction respect human rights throughout their global operations. At the same time, the interpretation of the duty of the State is ambiguous: home States can take steps to prevent abuse abroad by business enterprises within their jurisdiction but they are not explicitly required to do so (2).

<sup>16</sup> See: Office of the High Commissioner for Human Rights (2012), Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-21\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-21_en.pdf). Problems often lie at the level of implementation of the treaties in national legislation.

A further source of international law, the 2011 **Maastricht Principles** on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights<sup>17</sup> set out a robust interpretation: wherever they are in a position to do so, **States must take measures** to ensure that transnational corporations do not impair the enjoyment of these rights (24). This applies for instance in cases where the harm or threat of harm originates in the State's own territory, or **where the corporation or its parent or controlling company is domiciled** or registered in the State concerned, or has its centre of activity in that State's territory (25).

### Implementation of the frameworks

*Frameworks may contain fine words but, in practice, do they really drive change on the ground?*

The Right to Food Guidelines and VGGT are voluntary recommendations on how to implement legally binding rights. The Right to Food Guidelines mention an institution with monitoring mechanisms to oversee application of the guidelines. The VGGT refer to implementation by multi-stakeholder platforms, while the CFS Secretariat should report regularly, evaluating the impact of the Guidelines on improving tenure governance; however, details of implementation on the ground are still unclear.

The Guiding Principles do not represent a new legal obligation but an elaboration of the implications of existing standards and practices for States and businesses.<sup>18</sup> They are **endorsed by the UN Human Rights Council and include mechanisms** for implementation. Reporting annually, the UN Working Group on Business & Human Rights is responsible for promoting their implementation and identifying lessons learned. As well as receiving information regarding cases of violation, it can undertake country visits and issue recommendations. An Annual Multi-stakeholder Forum addresses trends and challenges to implementation.<sup>19</sup> Governments are encouraged to develop national Action Plans – the European Union has asked its Member States to do so by end 2013 – with the objective of conducting an annual survey on uptake of the Guiding Principles by governments and corporations.<sup>20</sup>

### 8.2. Policy coherence

*Corporations can powerfully influence government policies to create an “enabling environment” for private agricultural investment: what about coherence with States’ human rights obligations?*

This issue is not addressed as such within the Right to Food Guidelines and VGGT. The Guiding Principles stress the need for governments to ensure policy coherence so that the **State duty to protect against human rights abuses by businesses is not undermined by economic agreements**, such as trade and investment agreements or contracts for investment projects. States should ensure they retain sufficient ability through policy and regulation to protect human rights under the terms of such agreements (10).

### 8.3. State-business nexus

*Given the growing number of public-private initiatives, what kind of conditions should apply to State support for private agricultural investment?*

Drawing on the Guiding Principles, the VGGT recommend that States take additional steps to protect against abuses of human rights and legitimate tenure rights by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies; and that States ensure that foreign investment is consistent with the protection of legitimate tenure rights and the promotion of food security (3.2, 12.15). The Guiding Principles

<sup>17</sup> A legal commentary prepared by human rights experts from universities, the UN and civil society organisations.

<sup>18</sup> Introduction to the Guiding Principles (14), A/HRC/17/31.

<sup>19</sup> UN Human Rights Council Resolution A/HRC/RES/17/4.

<sup>20</sup> 26 States responded to the first pilot survey, A/HRC/22/32/Add.2 (April 2013).

further specify relevant state agencies, such as export credit agencies and official investment insurance or guarantee agencies and additional steps including **requiring human rights due diligence** (4). CIDSE argues that States should make investment and guarantees by national financial institutions conditional upon meeting human rights, social and environmental requirements.

#### Criteria for State support: Labour standards in US investment insurance

The United States Overseas Private Investment Corporation screens projects applying for insurance against a set of criteria that includes labour standards (organising and collective bargaining rights, minimum employment age, prohibition of forced labour and acceptable working conditions). Misrepresentations and failure to disclose information could lead to cancellation of insurance.<sup>21</sup>

### 8.4. Human rights due diligence

*What should be required of business, to prevent and address negative impacts on human rights resulting from agricultural investment?*

Under the Guiding Principles, **all businesses must respect all human rights**, using as minimum references the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.<sup>22</sup> This applies over and above national laws, irrespective of whether or not the State is meeting its duty to protect (11, 12). Human rights due diligence is recommended as the main approach to meet this corporate responsibility to respect.

The VGGT state that businesses should act with due diligence to avoid infringing the human rights and legitimate tenure rights of others and should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights (3.2). In the Guiding Principles, human rights due diligence is defined as the company's responsibility:

- to identify and assess human rights risks;
- to prevent and mitigate adverse human rights impacts, and
- to account for how it addresses human rights impacts.

CIDSE argues that **States must require businesses to undertake human rights due diligence wherever they operate**, by integrating the elements below into their legal and regulatory frameworks.<sup>23</sup> Examples exist globally of these types of due diligence measures regarding corruption, money laundering, human trafficking, conflict minerals, worker safety, and consumer and environmental protection.<sup>24</sup>

#### Impact assessments

Coverage in the Right to Food Guidelines of assessments by businesses of the human rights impacts of their investments is limited to encouraging States to ensure that training in safe practices is available to food business operators so that their activities neither lead to harmful residues in food nor cause harm to the environment (9.6). The VGGT recommend that States should strive to make provision for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have on tenure

<sup>21</sup> De Schutter et al. (2012), *Human Rights Due Diligence: The Role of States*, p. 35, <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>

<sup>22</sup> Consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work (12).

<sup>23</sup> CIDSE (2013), *Human Rights Due Diligence: Policy measures for effective implementation*, <http://www.cidse.org/resources.html>

<sup>24</sup> 100 country examples from *HRDD: Role of States* searchable at <http://hrdd.accountabilityroundtable.org/>.

rights, food security and the progressive realisation of the right to adequate food, livelihoods and the environment (12.10). The Guiding Principles specify that **businesses should identify and assess risks and impacts both from their own activities and as a result of their business relationships (supply chain)** (18). CIDSE argues that the regulatory process for approval of licences and permits should include binding guidelines on human rights due diligence, including the obligation to undertake **human rights impact assessments** and obtain community consent, sharing all information needed. Impact assessments should meet the key criteria of transparency, external participation and verification, monitoring and review.<sup>25</sup>

### Community consent

The VGGT recommend that assessments of risks to human rights be conducted through consultation with all affected parties (taking into consideration power imbalances). Projects should be based on an effective and meaningful consultation with indigenous peoples, in order to obtain their free, prior and informed consent and with other affected communities. Contracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations (3B6, 9.9, 12.7, 12.10-11). The Guiding Principles state that impact assessments should be undertaken at regular intervals and involve meaningful consultation with affected groups and stakeholders (18). CIDSE argues that community consent should include extending Free, Prior and Informed Consent beyond indigenous populations to all affected groups, stakeholder dialogue should continue throughout the life cycle of a project; and governments should **ensure access to all information on social, environmental and human rights impacts** of planned company operations.

### Security of human rights defenders

The VGGT recommend that States protect the civil and political rights of defenders of human rights and observe their human rights obligations when dealing with individuals and associations acting in defence of land, fisheries and forests (4.8). According to the Guiding Principles, States should ensure that the legitimate and peaceful activities of human rights defenders are not obstructed (26). CIDSE argues that if social protest in relation to projects does occur, due diligence means that the company should not be complicit in its criminalisation, but respect and take social protest seriously as a legitimate expression of affected rights holders.<sup>26</sup> Companies have the responsibility to avoid any negative impact on human rights defenders, including action by security guards. States should provide for corporate liability for crimes and harmful impacts on human rights where they fail to act with due diligence, especially regarding the security of human rights defenders.

### Liability for harm to human rights defenders: Switzerland-Colombia dairy investment

In 2012, the European Centre for Constitutional and Human Rights (Germany) and the Colombian trade union, SINALTRAINAL, supported by MISEREOR, filed a criminal complaint in Switzerland against Nestlé, alleging negligence in the 2005 killing of trade unionist Luciano Romero by paramilitaries. A former employee of Nestlé's Cicolac powdered milk factory in Colombia, Romero had been falsely accused of being a guerrilla combatant by his employers. Despite being informed of the threats made against Romero, Nestlé senior managers failed to use the resources at their disposal to prevent the murder.<sup>27</sup>

<sup>25</sup> University of Warwick Law School (2012), An Evaluation of the Institutionalisation of Corporate Human Rights Due Diligence, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2117924](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117924)

<sup>26</sup> See CIDSE et al. (2012), *The criminalization of human rights defenders in Latin America - An assessment from international organisations and European networks*, <http://www.cidse.org/resources.html>

<sup>27</sup> ECCHR and MISEREOR (2012), 'Special newsletter on the criminal complaint against Nestlé in the case of the murdered Colombian trade unionist Luciano Romero.' The complaint was dismissed by the office of public prosecution, which delayed proceedings until the matter could be declared as having exceeded the statutory time limit. This decision has been appealed.

## Corporate reporting

The VGGT recommend that all types of transaction regarding tenure rights as a result of investment in land, fisheries and forests should be transparent (12.3). The Guiding Principles state that business enterprises whose operations or operating contexts risk causing severe human rights impacts should report formally on how they address them (21). CIDSE argues that mandatory reporting on human rights and environmental risks and impacts should include transparency with regard to business models, including contracts and their impact on the rights of workers and sub-contractors.

### Reporting on human rights and land purchases: US corporate investments in Myanmar

Since May 2013, the United States government has required that, as a condition for receiving a license to operate in Myanmar, U.S. companies in all sectors investing more than \$500,000 there (including Coca-Cola) must report on matters including human rights, labour rights, land rights including details of land transactions, community consultations and stakeholder engagement, environmental stewardship, anti-corruption, security arrangements, risk and impact assessment and mitigation.<sup>28</sup>

## 8.5. Remedy and grievance mechanisms

What recourse is available for human rights violations in the context of agricultural investment? The VGGT recommend that States take corrective action to enforce agreements and protect tenure and other rights and provide mechanisms whereby aggrieved parties can request such action (12.14). According to the Guiding Principles, States should provide effective access to remedy, including both **judicial and non-judicial mechanisms**. They should facilitate access to effective non-State-based grievance mechanisms – based on a set of criteria<sup>29</sup> – administered by a company with stakeholders, by an industry association or a multi-stakeholder group. Moreover, States should pay particular attention to the specific needs of vulnerable and marginalised groups who face additional cultural, social, physical and financial impediments to using these mechanisms (25-8, 31). Where businesses have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation (22). CIDSE argues that States must enact **parent company liability** for human rights violations by a company's subsidiaries and the subcontractors in its **supply chain and** that they should establish redress mechanisms in the context of State-supported investments.

The **OECD Guidelines for Multinational Enterprises**, endorsed by 44 countries, imply a role for signatory home States where transnational corporations are based, with regard to their operations globally. Its non-judicial complaint mechanism can increase public pressure on companies and governments to address adverse human rights impacts, via the mediation role of OECD National Contact Points – and there are cases of successful results. At the same time, outcomes are not binding and the independence of the mediator is not always guaranteed – certain National Contact Points are linked to the government ministry responsible for trade and investment.<sup>30</sup>

The **Roundtable on Sustainable Palm Oil** (RSPO) is a multi-stakeholder initiative with dispute mechanisms. The RSPO New Plantings Procedure allows for parties to call for improved measures or remediation before plantings and was used successfully with Sime Darby (Malaysia) and Golden Agri-Resources (Singapore) in Liberia. At the same time, studies have assessed the RSPO Complaints Panel as being slow to respond, lacking in clarity and

<sup>28</sup> Burma Responsible Investment Reporting Requirements, Department of Treasury General License No. 17

<sup>29</sup> The effectiveness criteria for non-judicial grievance mechanisms are that the mechanisms be: legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning (31).

<sup>30</sup> OECD Watch (2010), 10 Years On: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct, <http://oecdwatch.org/publications-en/publications>

reluctant to apply sanctions on companies and verify outcomes of conflict resolution processes. A development bank complaint mechanism used for agricultural investments is the **World Bank International Finance Corporation's Compliance Advisory Ombudsman (CAO)**. Cases mediated with good results in the palm oil sector include land disputes concerning Wilmar (Singapore) in Indonesia, however this did not address systemic problems in the company's wider operations.<sup>31</sup>

A number of other mechanisms exist for citizens, groups or communities who have experienced human rights abuses, including, for example, bringing a court case against a company using national or regional courts, out-of-court negotiations for compensation,<sup>32</sup> working with a UN Special Procedure or Human Rights Treaty Body, or contacting national human rights institutions.<sup>33</sup>

## 9. Key points to consider in relation to the CFS rai principles

As the CFS begins consultations and negotiations on the rai principles, the following points should be considered to ensure issues of business and human rights are adequately addressed:

### Precise definition of businesses' responsibility to respect all human rights

Specific mention of the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.

### A State regulatory role for effective human rights due diligence by business

Require businesses to undertake human rights due diligence throughout their global operations, including subsidiaries and subcontractors, through integration of the following elements into legal and regulatory frameworks and particularly as a condition of State support for investment.

- *Human rights impact assessments* and ensuring access to all information on impacts
- *Free, Prior and Informed Consent* for indigenous populations and affected communities
- Ensuring security of *human rights defenders*
- *Corporate reporting* on human rights and environmental risks and impacts, including transparency on contracts

### State mechanisms for remedy

Redress mechanisms for State-supported investments, as well as broader State-based judicial mechanisms and non-judicial mechanisms that meet the Guiding Principles' effectiveness criteria.

### Robust implementation of the principles

Elements include: identification of entities with responsibility for implementation, monitoring, reporting and recommendations, and complaints mechanisms.

<sup>31</sup> Forest Peoples Programme, 'Conflict or Consent? Oil palm expansion and community rights'; Paper prepared for the Annual World Bank Conference on Land and Poverty, April 2013; and 'Resolving Land Disputes: Emerging lessons from the RSPO,' Presentation by Marcus Colchester, 30 October 2012.

<sup>32</sup> MISEREOR (2012), Making Corporations Respond: Strategic approaches to compensation and corporate accountability,

<sup>33</sup> The Special Procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective (Special Rapporteurs, Special Representatives, Working Groups). Treaty Bodies are committees of independent experts that monitor implementation of the human rights treaties. See: Trócaire (2010), Business and Human Rights Advocacy Manual, <http://www.cidse.org/content/publications/business-a-human-rights.html>

## **10. Conclusions**

Investing in agriculture is one of the most effective strategies for the reduction of poverty and alleviation of hunger. Governments must not shy away from investing in public goods and developing policies which will enable small-scale food producers and processors to build on their investments and access their own markets. Private sector investments will only contribute to the realisation of the right to adequate food if they are made within binding legal frameworks which places human rights and social gains as the central objective. It is therefore imperative that governments implement proper mechanisms which require human rights due diligence by companies, so that all investments are screened for their impact on their social, economic, environmental, human and cultural rights of local communities, as well as their broader impact on society and future generations.

### Appendix: rai Principles, Draft zero 1.8.13

<b>Voluntary and mandatory approaches</b>	
<i>Corporate regulation</i>	In creating such an enabling environment, States are encouraged to: incorporate into their legislation internationally recognised human rights obligations and international core employment standards as well as obligations relating to International Labour Organization standards relevant to investment in agriculture and food systems (6)
<i>Extraterritoriality</i>	States of origin of transnational investors are encouraged to ensure that companies investing overseas are not involved in abuse of human rights and legitimate tenure rights, that they respect international core employment standards and operate according to the highest environmental management standards (9)
<i>Implementation of the frameworks</i>	CSOs are also expected to have a key role in reviewing and reporting on implementation of the principles. The CFS should be the global platform where relevant stakeholders learn from each other's experience and where lessons learnt from implementation can be generated and disseminated. (12)
<b>Policy coherence</b>	
States of origin of transnational investors are encouraged to: promote national and regional international investments policies, laws and treaties to support foreign investments in agriculture and food systems that are consistent with their own policies, laws and international human rights obligations as well as commitments to food security and nutrition, and sustainable development. Furthermore States are called to respect, adhere to, apply and promote their respective obligations under international law, especially when negotiating investment treaties with other countries. (9)	
<b>State-business nexus:</b> None	
<b>Human rights due diligence</b>	
Investors are called to: respect human rights, international core employment standards, farmer's rights (ITPGR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and comply with relevant national policies, laws and regulations (7) Investors are encouraged to: adhere to high standards in terms of accountability and undertake due diligence to the best of their ability (12)	
<i>Impact assessments</i>	States are encouraged to establish and implement: rules and procedures for assessment and review of impacts of investment in agriculture and food systems and policies, laws and regulations and accountability mechanisms that will enable them to undertake improvements, remedial action or change. Investors are encouraged to: follow the rules and procedures for assessment and review of impacts of investment in agriculture and food systems and to make the necessary adjustments. (12)
<i>Community consent</i>	States are encouraged to: <ul style="list-style-type: none"> <li>- promote meaningful participation in policy-making of representatives of all stakeholders involved in or affected by investment in agriculture and food systems;</li> <li>- promote the establishment and respect of procedural requirements for consultation, participation and negotiation in decision-making on investment</li> </ul>

	planning and implementation, based on transparency and disclosure of meaningful information (12)
<b>Security of human rights defenders:</b> None	
<i>Corporate reporting</i>	States of origin of transnational investors are encouraged to: request companies investing abroad to provide transparent and meaningful information on their activities and ensure that standards and safeguards are implemented to protect local communities, livelihoods and the environment. (9)
<b>Remedy and grievance mechanisms</b>	
<p>States are encouraged to:</p> <ul style="list-style-type: none"> <li>- establish, as appropriate, impartial, competent judicial and administrative bodies and mechanisms for timely, fair, effective, accessible and affordable resolution of disputes related to investment in agriculture and food systems;</li> <li>- provide guidance and oversight on non-judicial mechanisms;</li> <li>- provide effective remedies as required and promote the appropriate enforcement of such remedies</li> <li>- ensure equal, non-discriminatory access to relevant bodies and mechanisms for all affected individuals and groups (12)</li> </ul> <p>Investors are encouraged to:</p> <ul style="list-style-type: none"> <li>- cooperate in non-judicial mediation mechanisms to provide remedy;</li> <li>- set up operational-level grievance mechanisms that are timely, fair, transparent, legitimate, effective, accessible, affordable and accountable while ensuring that operational-level grievance mechanisms are not a substitute for, or act as an impediment to, legal alternatives (12)</li> </ul>	



CIDSE members



Austria



Belgium



Belgium



Canada



England and Wales



France



Germany



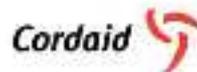
Ireland



Italy



Luxembourg



the Netherlands



Portugal



Slovakia



Sweden



Spain



Switzerland



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