International Institute for Environment and Development

INSIGHTS

MARCH 2023

Exploring environment and development challenges with the business community

SURYA ADVISORY

Sowing the seeds for a just transition

How food and agriculture investments can support fairer contracting

Insights

1. Investments in the food and agriculture sector are central to the eradication of poverty, hunger and gender inequality.
2. Contracts and contracting processes in agricultural value chains can connect development finance institutions and impact investors to adverse social and environmental impacts through their own investment and the activities of their investees.
3. Credible just transition strategies and best practice corporate sustainability require investors to systematically review their own contracts and contracting processes and those of their investees, to identify the risk of unfair outcomes.
4. By addressing unfair contract terms and contracting processes, investors can contribute to better outcomes for smallholders, helping to shape a just transition.

Sustainable markets; Law

Keywords:
Smallholder farmers, women farmers, value chains, corporate investment, agricultural development, international trade

Sustainable Development Goals:
5 GENDER EQUALITY; 10 REDUCED INEQUALITIES; 13 CLIMATE ACTION

Increased investment in the food and agriculture sector is central to achieving multiple Sustainable Development Goals, including gender equality, reduced inequalities and climate action. Yet IIED research shows that contracts and contracting processes used by companies operating in the food and agriculture sector in low- and middle-income countries can have an adverse impact on the lives and livelihoods of smallholder farmers. Contributing to a just transition requires investors to examine contracting processes and terms used in their investments and those of their investee companies. We explain how investors can identify and manage these risks and support rather than undermine a just transition.

Investing in food and agriculture for a just transition

Investing in the food and agriculture (F&A) sector is central to the eradication of poverty and can contribute to multiple Sustainable Development Goals (SDGs), including gender equality, action on climate and reducing inequalities.[1]

Smallholder farmers produce around a third of the world's food.[2] And a high proportion of smallholders are women — between 43 and 50% in Africa and Asia.[3] There is therefore immense potential for development finance institutions (DFIs), impact investors and their investees to help realise the SDGs by supporting smallholder-focused investments.

Through the SDGs and the Paris Agreement,[4] a just transition to a green and inclusive economy has evolved as a wide concept for all actors — including investors — to target gender equality, equity and human rights in their activities.[5] The G20 has highlighted the role of the financial sector in supporting a just transition through the Sustainable Finance Roadmap and Sustainable Finance Working Group.

What this means for investors

Threats to rural livelihoods have drastically increased in recent years, due in part to the triple global crises of climate change, the war in Ukraine[6] and COVID-19.[7] These have a disproportionate impact on individuals and communities who are most vulnerable to fluctuations in international trade and least able to respond. Global shocks are compounded by the architecture of international trade and investment, which those living in poverty have little or no prospect of influencing.

A large and powerful chunk of trade and investment takes place through processes that are familiar to investors — corporate policies and private contracts with standard terms and conditions — and the contracting processes that underpin them, including in-house compliance.

While the contracts and contracting processes along a supply chain are hugely varied, they both:

- Form part of investors' downstream business activities over which investors have direct or indirect influence, and
- Constitute business relationships that can connect a company to adverse social and environmental impacts, creating risks for a company and its investors.

Given the significant influence of DFIs and impact investors, contracts and contracting processes represent an opportunity for them to contribute to a just transition and corporate sustainability (environmental, social and governance; ESG). They can do this by considering investee business activities along entire supply chains from a social and environmental perspective. This includes reviewing contractual practices within business activity linked to smallholder farmers.

What is the problem?

IIED research[8] shows that many contractual terms and processes in agricultural value chains contain exclusionary features. Often, contracting does not consider producers' (particularly women's) concerns, priorities and social contexts (see Box 1). This is because, generally, smallholder farmers are contract takers.

This lack of influence and limited contractual terms can reduce the possibility for smallholder farmers to enter equitable trading arrangements and develop sustainable livelihoods. This therefore limits the potential for investments in smallholder-linked supply chains to support a just transition.

Negative impacts on people and their livelihoods can result from clauses that:

- Overburden producers with obligations on price and other risks that are unreasonable or unachievable given their resources
- Disproportionately shift risks to the contractual parties less equipped to bear them (for example, stakeholders in developing countries)[9]
- Impose strict provisions on rejection of produce or termination, with limited opportunity for farmers to negotiate when unforeseen events occur.

It is possible that strict buyer contract termination clauses could, for a smallholder, result in food insecurity. Perhaps the smallholder could not fulfil their obligations due to climatic events and the contracting arrangements made no allowance for their personal circumstances, indirectly resulting in human rights impacts.

Further, and importantly, some contract terms originate in end-buyer contracts and cascade down the contracting chain. Cascading contractual features further prevent smallholders from voicing their concerns about contracts and contracting processes that can adversely impact them.

Why DFIs and investors should care about contracts

The potential negative social and environmental impacts resulting from unequal contractual terms and processes could expose investors to legal, financial and reputational risks (Box 2).

How the risks of an unjust transition are sowed into contracts

Standard terms found in sale and purchase and supply agreements can have implications for smallholder lives and

Box 1. Contracting features contributing to the risk of an unjust transition

- Lack of producer **voice** and **options** in contracting
- Over burdensome contractual **obligations** for producers
- Limited ability for producers to respond to **risk**

Box 2. Risks to DFIs and investors

- **Legal risks** including from human rights and hardening reputational risks
- **Regulatory risks** including penalties for failing to comply with new regulations and requirements, such as mandatory due diligence laws
- **Labour risks** including lack of consideration for vulnerable groups such as women
- **Reputational risks** such as negative development impact ratings, poor corporate culture, greenwash and purpose-washing claims
- **Financial risks** including shareholder dissent, bad publicity, potential fines and costs of lawsuits (from, for example, communities along the supply chain).

Table 1. Just transition risks and solutions for standard sale, purchase and supply agreements

Clauses	Just transition issue	Solution
Strict payment and delivery	May not consider local context	Consider longer payment grace periods and flexibility in delivery terms, as well as non-financial actions for late payment or non-delivery, eg payment suspension and open communication channels Also see force majeure (FM) solutions below
Default interest rates cascading through contracts	Can increase debt, poverty and adverse human rights impacts	Draft model clauses that remove default interest
Standardised buyer environmental, social and governance (ESG)/human rights requirements	Disproportionate and unreasonable shifting of responsibility to communities Imposing detailed and inappropriate standards on smallholders without financial or technical assistance is unethical and inefficient	Conduct enhanced due diligence of supply chain contracts Explore more equitable smallholder model contract terms Include budget for training farmers' associations on locally appropriate ESG and human rights risks, including gender risks
Intellectual property rights	Risk that standard intellectual property clauses require licensing of traditional or Indigenous knowledge or processes	Explore exceptions in model clauses Conduct enhanced due diligence of your supply chain
Force majeure (FM)	Smallholders unable to discuss what events count as FM. Implications for resilience, poverty and adverse human rights impacts Typically, FM results in termination. Could be unfair for a smallholder given the unpredictability and regular occurrence of droughts and other extreme weather	Conduct enhanced due diligence targeted at better FM planning[10] Invest in dialogues with investee companies, local trade associations and civil society to explore this, build local capacity on FM and create more equitable FM clauses
Termination	Strict termination provisions may not be proportionate and appropriate, contributing to poverty, indebtedness and adverse human rights impacts Lack of clarity over the consequence of breaches for smallholders, especially ESG breaches	Consider more equitable model clauses for use in specific contexts, providing alternatives to termination remedies, for example, working with the counterparty to comply Invest in capacity building and training for smallholders
Remedies	Market-based remedies, eg immediate termination and payment of damages, may be unreasonable, disproportionate and have serious impacts for human rights and poverty, especially for women	Explore non-financial remedies, eg adequate assurances, injunctive relief, payment suspension, working with smallholders No consequential losses and all damages to be liquidated For breach of human rights obligations, provisions for any liquidated damages to be paid into a fund for victims rather than paid to the corporate counterparty

livelihoods that can affect their human rights and compound pre-existing vulnerabilities. Table 1 explores the issues and possible solutions.

Investor opportunities for promoting a just transition

There are multiple ways for investors and investees to contribute to social inclusion and better human rights outcomes for smallholders. Addressing contracting processes and contract terms are only one — albeit important — solution. Structural changes to global trade and investment architecture are ultimately needed.

For investors who want to contribute to a just transition and ensure smallholders can exercise agency, build resilience and counter overburdensome contractual obligations, we propose the following:

1. Raise awareness

Enlightened investors can use this briefing to raise awareness of why investors should examine contractual terms and processes to manage risk within their own and their investees' business operations, and to ensure they are contributing to a just transition.

2. Develop more equitable model clauses

Partner with peers and civil society, including producer organisations, to explore how best to systemically eradicate or counter unjust contract features.[11] Working together to hear how contractual terms and processes can affect the lives of smallholders, especially women, is essential for peer learning. Use the solutions in Table 1 to inform this process and develop model clauses to shape an enlightened and transformative approach to bankability.

3. Support a just transition platform specialising in smallholder contracts and contracting

Existing multi-actor responsible investor platforms may lack focus or expertise in the contracting aspects of agricultural investments from a just transition perspective. A new or strengthened existing platform that focuses on how contracts in F&A investments can allow for a just transition could generate dialogue, tools, guidance and best practices to improve outcomes for smaller producers. A platform could also provide a measurable way for F&A investors, along with other actors, to design farmer-centred and farmer-knowledge-based agricultural programmes and outputs that support fair agriculture contracts and a just transition. This can contribute to investors' own corporate sustainability commitments for the F&A sector.

To continue the conversation, contact the author Kinnari Bhatt (kinnari@suryaadvisory.com) or Emily Polack, senior researcher in IIED's Law, economies and justice programme, Natural Resources Group (emily.polack@iied.org)

References

1. International Agrifood Network, SDG Implementation, Case Studies. https://agrifood.net/iafn/projects/sdg-implementation
2. Lowder, S K, Sánchez, M V and Bertini, R (2021) Which farms feed the world and has farmland become more concentrated? *World Development* 142, 105455.
3. OECD (2021) Women and SDG 2 – Promoting sustainable agriculture. In: *Gender and the Environment: Building Evidence and Policies to Achieve the SDGs.* OECD Publishing, Paris.
4. United Nations Framework Convention on Climate Change (2015) Adoption of the Paris Agreement, 21st Conference of the Parties. The Paris Agreement emphasises the importance of delivering a just transition to net zero — putting people at its centre and leaving no one behind. See the preamble and Articles 2.2 and 4.1.
5. UN Global Compact (2022) Introduction to just transition. A business brief. www.unglobalcompact.org/library/6093. A just transition works to ensure that the transition to net-zero emissions and climate resilience is orderly, inclusive and just, creates decent work opportunities and leaves no one behind. This depends on a fair process built on social dialogue, stakeholder engagement and a universal respect for fundamental labour rights and other human rights.
6. FAO (2022) The importance of Ukraine and the Russian Federation for global agricultural markets and the risks associated with the war in Ukraine. Information Note.
7. Ingutia, R (2021) The impacts of COVID-19 and climate change on smallholders through the lens of SDGs; and ways to keep smallholders on 2030 agenda. *International Journal of Sustainable Development & World Ecology* 28(8), 693–708.
8. Cotula, L, Blackmore, E and Berger, T (2021) Contracts in commercial agriculture: Enhancing rural producer agency. IIED, London.
9. The Chancery Lane Project, Just transition resources. https://chancerylaneproject.org/toolkit/just-transition-resources
10. This requires due diligence on the question: what constitutes force majeure in the local context?
11. For further exploration of multi-actor engagement in reviewing contractual arrangements in value chains see various publications at: www.iied.org/empowering-producers-commercial-agriculture-epic

iied

International Institute for Environment and Development
Third Floor, 235 High Holborn, London WC1V 7DN, UK

T: +44 (0)20 3463 7399
@IIED
www.facebook.com/theiied

www.iied.org

ISBN 978-1-83759-027-8

IIED is an international policy and action research organisation delivering solutions to sustainable development challenges. Working with partners across the globe, we link local priorities to global challenges.

Surya Advisory supports stakeholders that are committed to the SDGs and the UN Guiding Principles on Business & Human Rights. Using legal and development expertise and working with partners, we stimulate do no harm and just transition for underserved people.

Funded by:

Irish Aid
Rialtas na hÉireann
Government of Ireland

Sida

This publication has been produced with the generous support of Irish Aid and Sida (Sweden).

Cover image:
Caption: rice farmer in Cambodia
Credit: David Dennis via Flickr, CC BY-SA 2.0

Knowledge Products