



Food and Agriculture  
Organization of the  
United Nations

**MULTI-SECTORAL STUDY ON THE AGRIBUSINESS  
VENTURE ARRANGEMENT (AVA) POLICY AND  
IMPLEMENTATION UNDER THE COMPREHENSIVE  
AGRARIAN REFORM PROGRAM**



**Multi-sectoral study on the Agribusiness Venture Arrangement policy and implementation under the  
Comprehensive Agrarian Reform Program**

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Rome, 2016

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Pineapple is one of the major crops covered by agribusiness venture arrangements in the Philippines



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## ABOUT THIS DOCUMENT

This multi-sectoral study on the Agribusiness Venture Arrangement (AVA) policy and implementation under the Comprehensive Agrarian Reform Program is a joint undertaking of FAO and the Philippines' Department of Agrarian Reform (DAR). This research presents an in-depth analysis of the issues and challenges confronted by agrarian reform beneficiaries and rural cooperatives as they enter into AVAs. The study focuses on leasehold and growerships (contract farming) as the most common agribusiness arrangements in the Philippines.

All names and identifying details of cooperatives agrarian reform beneficiary organizations and investor-companies have been changed to protect anonymity and confidentiality.

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## ABBREVIATIONS AND ACRONYMS

ACPC	Agricultural Credit Policy Council
ADB	Asian Development Bank
AFMA	Agriculture and Fisheries Modernization Act
AMFCP	Agro-Industry Modernization Credit and Financing Program
AO	Administrative Order
APCP	Agrarian Production Credit Program
ARB	Agrarian reform beneficiary
ARBO	Agrarian reform beneficiary organization
Art	Article
ATI	Agricultural Training Institute
AVA	Agribusiness venture arrangement
AVATAR	Agribusiness venture arrangement task force appraisal and review
BARBD	Bureau of Agrarian Reform Beneficiaries Development
BOD	Board of Directors
BOT	Build, operate and transfer
BPI	Bureau of Plant Industry
BSP	Bangko Sentral ng Pilipinas
CARD	Center for Agriculture and Rural Development
CARL	Comprehensive Agrarian Reform Law
CARP	Comprehensive Agrarian Reform Program
CBA	Collective bargaining agreement
CDA	Cooperative Development Authority
CFD	Commercial farm deferment
CFS-RAI	Committee on World Food Security-Responsible Agricultural Investments
CLOA	Certificate of land ownership award
CRS	Catholic Relief Services
CSO	Civil society organization
DA	Department of Agriculture
DAR	Department of Agrarian Reform
DARAB	Department of Agrarian Reform Adjudication Board
DOJ	Department of Justice
DOLE	Department of Labor and Employment
DTI	Department of Trade and Industry
EDSA	Epifanio de los Santos Avenue
EO	Executive Order
FAP	Foreign assisted projects
FARMCOOP	Foundation for Agrarian Reform Cooperatives in Mindanao

FBS	Farm business school
FFB	Fresh fruit bunches
FGD	Focus group discussion
FO	Farmers' organization
GDP	Gross domestic product
Global GAP	Global good agricultural practice
HVCC	High value commercial crops
HVCDP	High value crops development programme
ICE	International commodity exchange
IFAD	International Fund for Agricultural Development
ILO	International Labour Organization
JVA	Joint venture agreement
LANDBANK	Land Bank of the Philippines
MFO	Major final output
NAEC	National AVA Evaluation Committee
NATCCO	National Confederation of Cooperatives
NCMB	National Conciliation and Mediation Board
NGO	Non-governmental organization
NLRC	National Labour Relations Commission
No	Number
PARC	Presidential Agrarian Reform Council
PARC ExCom	Presidential Agrarian Reform Council Executive Committee
PARCCOM	Provincial Agrarian Reform Coordinating Committee
PARPO	Provincial Agrarian Reform Program Office
PBD	Program Beneficiaries Development
PCIC	Philippine Crop Insurance Corporation
PCNC	Philippine Council for NGO Certification
PHP	Philippine Peso
PSA	Philippine Statistics Authority
RA	Republic Act
RFA	Request for assistance
S	Series
SARED	Sustainable, area-based rural enterprise development
SEADO	Single entry approach desk office
Sec	Section
SEDPI	Social Enterprise for Development Partnerships, Inc
SEnA	Single-entry approach
SILCAB	Social infrastructure and local capability building

SUC	State Universities and Colleges
TASS	Technical Advisory Support Services
UNCTAD	United Nations Conference on Trade and Development
USD	United States dollar
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure
WIBI	Weather index-based insurance
WTO	World Trade Organization

## EXECUTIVE SUMMARY

The agribusiness sector in the Philippines has contributed immensely to gross national product and job generation, especially in rural Mindanao. Many large national and international corporations have partnered with agrarian reform beneficiaries (ARBs) on tracts of land, both large and small, for the production of high value crops such as bananas, cacao, oil palm and pineapples.

Agribusiness arrangements with ARBs began with the lands owned by the National Development Company in the late 1980s. When the Commercial Farm Deferment Program of the Government of the Philippines ended in 1998, these commercial farms were covered by the Comprehensive Agrarian Reform Program.

This study makes an assessment of the agribusiness venture arrangements (AVAs) between agribusiness firms and the ARBs, focusing on banana, cacao, oil palm and pineapple plantations in Mindanao. With both temporal and financial constraints, the study focused only on leasehold and contract growing arrangements which are the predominant modes of AVAs. As an approach, the study conducted a review of literature, interviewed key informants and conducted six focus group discussions (FGDs) in Cagayan de Oro and Davao, where representatives of farmers groups, business investors and government/private stakeholders met separately to assess the state of their agribusiness arrangements. After analysing the outcomes of these FGDs, the study conducted a national workshop to report and to validate recommendations for the agribusiness sector.

The study has revealed that while AVAs have been in existence in the Philippines for 26 years, there are still very few examples of successful agribusiness arrangements between ARBs and investor-companies. The study found out that most ARBs are not aware of their obligations and entitlements under their contracts, for most of these provisions are written in a language that they do not understand.

Their lack of understanding is exacerbated by insufficient legal representation and transparency issues from their own cooperative leaders. The capacity of farmers' organizations to run and operate their farms, make collective decisions, understand financial statements and enter into intelligent negotiations with regard to the terms and conditions of their agreements was also identified as a major shortcoming.

An analysis of existing AVAs indicates the need to improve and renegotiate for fairer contract provisions. For lease agreements, there is currently no objective standard for the determination of market rates for land. While various figures were suggested based on annual land amortizations, real property taxes and the poverty threshold, a market study is recommended to inform policy on reasonable lease rates. As farmers cannot rely solely on lease payments to improve their living conditions, additional on-farm and off-farm income (such as employment and income generating projects) must be sought to supplement their income stream from the land. The research team proposes that automatic and yearly increase in the land lease rates based on core inflation be utilised to avoid the erosion of the value of the land lease.

One-sided provisions on lease agreements were also flagged. Renewals of lease agreements should be mutual and not unilateral. As a matter of policy, ownership of permanent improvements made during the lease term should accrue to the ARB at the end of the lease. Force majeure should not be a reason for the non-payment of the lease since the investor is in a better position to absorb the uncertainties of nature. The duration of leases should be well negotiated and should not take long periods to avoid dis-incentivizing ARBs from becoming independent managers of their land and other productive resources.

In the case of contract growing, it was found out that *business as usual*, where prices are fixed prior to the delivery of products, is no longer tenable, for world commodity prices and the prices of inputs are in a constant state of flux. ARBs and investors need to collaborate more closely within the value chain to achieve efficiencies in inputs and outputs and to share more equitably the risks inherent in global food supply chains. Clauses in the contracts, which allow investors to take-over the management of the farm and the exclusive right to provide and charge the cost of the inputs to ARBs, need to be revisited to make the process more mutually acceptable and transparent. ARBs and investors need to learn how to deal with side-buyers to avoid pole vaulting and assure a continuous and harmonious relationship within the supply chain. Mechanisms for the social protection of ARBs such as crop insurance to protect against revenue losses should be seriously explored.

The study concludes with various recommendations for the government, cooperatives and the investors. The study strongly supports building the capacity of ARBs and their cooperatives in various aspects of business, legal, institutional governance and financial management. To achieve this, a capacity-building fund may be set-up by the DAR, Department of Agriculture and the Land Bank of the Philippines to finance capacity-building activities for ARBs and their cooperatives.

The study emphasizes the need to invest resources in making ARBs more capable of understanding and renegotiating their contracts. This can be done through legal education and representation, rather than the review and approval process which DAR is currently focused on. The study recommends a highly decentralized process of approval and review at the regional level for all agreements with the default scenario of approval within 90 days if the contract is not acted upon by DAR. This puts the onus on DAR to strengthen its review processes and to put to an end to the uncertainty created by delays in the review and approval process, especially for contracts that have to be approved at DAR Central Office.

Finally, the study encourages adherence to the Voluntary Guidelines on the Responsible Governance of Tenure and the Principles for Responsible Agricultural Investments as endorsed by the United Nations Committee on Food Security. These best practice guidelines are being promoted by the Food and Agriculture Organization of the United Nations and a wide range of other stakeholders to ensure a sustainable and environmentally sound partnership between smallholder farmers and companies investing in agribusiness enterprises.

# I. BACKGROUND ON THE COMPREHENSIVE AGRARIAN REFORM PROGRAM AND COMMERCIAL FARMS

Agriculture continues to play an important role in the Philippine economy, generating 12 percent of the gross domestic product (GDP) in 2013 and employing some 32 percent of the country's work force (World Bank 2013). Furthermore, agriculture is the key driver of the economy in rural areas where the majority of the population resides (ADBa 2013) and where more than 38 percent of the population live below the poverty line (IFAD 2015).

While more than half of the country's total farmland was devoted to major agricultural crops like *palay* and corn, plantation crops dominate the exports of both fresh and processed fruit and vegetable products and provide a major source of livelihood to farmers and farm workers nationwide. These plantation crops include banana (USD 1.03 billion), pineapples (USD 425 million) and coconut (USD 223 million), with sugarcane contributing an additional USD 345 million (PSAa 2014). Government statistics show that in 2013, agricultural exports exceeded USD 6.4 billion (11.3 percent of total exports), driven primarily by fresh and processed fruit and vegetable products (USD 1.97 billion); animal and vegetable oils and fats (USD 1.35 billion); and fish and fish preparations (USD 1.16 billion) (PSAa 2014).

Traditionally, the majority of plantations have been owned by some of the Philippines' most influential families or leased by large multinational companies. This tradition can be traced back to the Spanish occupation (1521-1898), when vast parcels of land amounting to hundreds and sometimes thousands of hectares were distributed under royal land grants or *encomiendas* to the Church and local elite (Navarro 2007). As Spain opened the Philippine economy to the world, the *encomiendas* evolved into the *hacienda* system – a form of ownership that provided the Spanish colonizers with a steady supply of raw materials for export (DARa 2013).

The Philippine Bill of 1902, which was passed during the American occupation (1898-1935) established regulations on the disposal of public land. To address the social unrest of that era, the 1902 bill limited individual and corporate land ownership to 16 hectares (ha) and 1 024 ha respectively (DARa 2013). Since then, the Philippine Government (from the Commonwealth years of President Manuel Quezon until the martial law era under the administration of Ferdinand Marcos) enacted various legislations on agrarian reform. At that time, agrarian reform was used to discourage insurgency in rural areas by landless peasants.

Following the 1986 EDSA<sup>1</sup> uprising, the establishment of a new democratic government and the election of President Corazon Aquino, a new Constitution was adopted. The 1987 Philippine Constitution contained salient provisions on comprehensive rural development and agrarian reform. This was supported by Proclamation No 131, which provided for an Agrarian Reform Fund (ARF) that aimed to

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<sup>1</sup>EDSA is an acronym for Epifanio de los Santos Avenue. EDSA was the convergence site of peaceful mass uprisings that resulted in the overthrow of the Ferdinand Marcos administration

cover the estimated cost of the agrarian reform programme for the following ten years (1987-1997). This was immediately followed by Executive Order (EO) 229, which provided policies and general procedures for land acquisition and distribution, compensation of landowners, payment by beneficiaries, and credit support to new agrarian reform beneficiaries (ARBs).

These policies were followed by the passage of the State's landmark legislation on agrarian reform – Republic Act (RA) 6657 or the Comprehensive Agrarian Reform Law (CARL) of 1988. At that time, CARL was seen as a progressive piece of legislation, envisioned to advance social justice, spur greater agricultural productivity and increase farmers' income in all types of crops. The law created the Comprehensive Agrarian Reform Program (CARP) and was part of a set of progressive social legislations that provided land to tenant farmers and better opportunities for the rural poor.

Fundamentally, CARP involves the transfer of land ownership from large individual landowners or corporations to their tenant farmers or farm workers (Navarro, 2007). However, aside from the transfer of land ownership, CARP was also intended to provide support services to ARBs to ensure that they were able to make the lands awarded to them fully productive. These support services were to include small to medium-scale investments in infrastructure, organization of farmers' cooperatives, extension of credit for agricultural inputs and assistance in the marketing of agricultural products. The Department of Agrarian Reform (DAR) is the lead implementing agency of CARP.

While considered a "landmark" legislation, CARL was also deemed to be a product of compromise – an amalgamation of various interests of society and their points of view on agrarian reform. One of these compromises include the provision on commercial farm deferment (CFD) (Section 11, RA 6657) where a ten-year deferment was implemented to allow firms to recoup their investments in commercial farms. After this period, these farms were to be subjected to immediate compulsory acquisition and distribution. The law defined a "commercial farm" as private agricultural land devoted to commercial livestock, poultry and swine production, aquaculture (including salt beds, fishponds and prawn ponds), fruit farms, orchards, vegetable and cut-flower farms, and cacao, coffee and rubber plantations. The rule was made applicable to all commercial farms, except those that were operated by Dole Philippines, Del Monte and Guthrie plantations. These lands were owned by the National Development Corporation, a subsidiary of the Government's Department of Trade and Industry (DTI) and were therefore not exempted by the early coverage of CARP in 1989.

By the end of the ten-year deferment period in June 1998, around 35 635 ha of various commercial farms were under CFD (DARb 1998). Many of these farms have since been covered by agrarian reform and already turned over to farmer associations and cooperatives.

Almost from the beginning of CARP implementation, ARBs began to enter into business arrangements involving their land in the hope of further increasing household income. These business arrangements were often done with large-scale companies or with the former landowner. These Agribusiness Venture Arrangements (AVAs) were supported by CARL:

In general, lands shall be distributed directly to the individual worker beneficiaries. In case it is not economically feasible and sound to divide the land, then they shall form a workers' cooperative or association which will deal

with the corporation or business association or any other proper party for the purpose of entering into a lease or growers' agreement and for all other legitimate purposes (Section 29, RA 6657).

However, it was only in the post-CFD period in 1998 that the creation of AVAs was formalized<sup>2</sup>. This was due to the pressure to optimize and preserve the operating size of farms to achieve the economies of scale. Since then, several hundred AVAs have come into effect. The vast majority of these are categorized into two business models: (1) leases where ARBs (either individually or jointly through farmer cooperatives) rent their land to a large company which operates the land as a corporate farm; or (2) a growership arrangement where ARBs grow crops like bananas, pineapple, cacao or oil palm and sell the product to a buyer, usually also a large company. Thus, there is a need to ensure that these business models in particular and AVAs in general, work to the best interest of ARBs and their organizations. AVAs have the potential to promote the fair and equitable sharing of the benefits arising from the commercial utilization of food and agriculture resources, *if* there are responsive policies that can secure ARBs' property rights and protect their best interest.

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<sup>2</sup>The first Administrative Order governing joint economic enterprises such as leases and growership arrangements can be found in DAR Administrative Order (AO) No 2 S 1999 entitled *Rules and regulations governing joint economic enterprises in agrarian reform areas*. The subsequent rule governing AVAs can be found in DAR AO No 9 S 2006, *Revised rules and regulations governing AVAs in agrarian reform areas*.

## II. PURPOSE AND METHODOLOGY OF THE STUDY

This *multi-sectoral study on the AVA policy and implementation under CARP* is a joint project of DAR and the Food and Agriculture Organization of the United Nations (FAO). This project aims to develop and recommend more responsive policies and guidelines for AVAs that are appropriate to the needs of both the farmers and the private sector and which are acceptable and beneficial to both parties. With improved policies, it is expected that the implementation of AVAs will contribute to increasing the productivity and income of smallholder farmers and labourers, farmer organizations (FOs) and provide an adequate return on investments made by the private sector.

AVAs have produced mixed results. As agribusiness arrangements were already in existence prior to the issuance of AVA guidelines by DAR, agreements were often not in line with these guidelines and were not considered equitable for FOs. These problems were especially prominent in lease type arrangements where the land rental is minimal (ranging from PHP 5 000 to 15 000 per year for each ha), the lease period is long (ranging from 10 to 30 years) and renewable, subject to agreements by the two parties. In some extreme situations, like palm oil plantations for example, the lease rental rates are so low that they contribute little to improving the livelihood conditions of the ARBs.

The study team has looked into the following areas of concern:

- Problems and issues in contractual arrangements between the investors and FOs, smallholder farmers and labourers (e.g., contract duration, pricing arrangements, etc.);
- Indebtedness status of FOs, cooperatives and smallholder farmers from investors, banks and other lending institutions;
- Government policies and programmes in related industries and commodities under AVAs;
- Agricultural productivity of lands devoted to AVAs;
- Competitiveness of commercial farms and plantation crops in relation to export market demand and the effect and impact of the incoming tariff regime<sup>3</sup>;
- Investor confidence and interest in the AVAs;
- Labour status, requirements and arrangements of ARBOs, cooperatives, smallholder FOs and investors in AVA-covered areas; and

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<sup>3</sup>The implementation of the ASEAN Free Trade Area Agreement (AFTA), which aims to achieve *single market and production base* affects the competitiveness of some local agricultural crops. With the reduction of tariffs and the improved price competitiveness of foreign farm commodities, smallholders face the challenge of more competition in mainstream markets.

- Continuing awareness of FOs, cooperatives and smallholder farmers on the nature of governance issues that confront a juridical entity (including but not limited to relationships between officers, members, employees and title holders).

The study was conducted from 1 December 2015 to 30 April 2016. The research team made use of the following approaches to gather relevant information on the subject of AVAs:

- Desk review of relevant documents such as inventories, case studies and reports;
- Key informant interviews with investors, farmers, government persons and representatives of civil society organizations (CSOs) and academia;
- Focus group discussions (FGDs) with farmers, investors, government officials, academia and CSOs<sup>4</sup>; and
- National workshop where key stakeholders at a high level of policy making discussed the recommendations of the study team.

The research team focused on studying agribusiness arrangements in agrarian reform areas in Mindanao. Whilst there are other AVAs in other parts of the country, the great majority of these are found in Mindanao.

This study does not purport to make an assessment of the totality of the effectiveness of agrarian reform over the years. This study is designed only to make an assessment on the effectiveness of the various AVAs in selected crops and regions in the pursuit of the broad objectives of agrarian reform.

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<sup>4</sup>The study team had two batches of its FGD series (one session for each stakeholder in each batch) in Cagayan de Oro and Davao City.

## III. THE LAND TENURE SITUATION IN THE AVA SECTOR

### A. CARP coverage in the AVA sector

According to the Philippine Statistics Authority (PSA), 212 892.33 ha of agricultural land were devoted to plantation crops (PSAb 2014). Meanwhile DAR's 2015 inventory of agrarian reform landholdings show that only 52 000 ha of agrarian reform areas have some form of AVA. Of these, 42 467.50 ha are planted with Cavendish banana, cacao, oil palm and pineapple (see Table 1). CARP lands cover only about 25 percent of all agribusiness operations, while the remaining 75 percent are comprised of other types of land tenure. This may include non-ARB and holders, public land claimants and indigenous peoples.

**Table 1:** Land use for selected agribusiness crops for ARB and non-ARB areas, Philippines (based on DAR inventory)

Type of crop	Total area planted (ha) (PSAb, 2014)	Total area planted (ha) (ARB landholdings)	Number of AVAs in ARB areas
<b>Banana Cavendish and other banana varieties</b>	84 132.76	14 501.07 <sup>5</sup>	326
<b>Oil palm</b>	12 034.00	12 453.57	44
<b>Cacao</b>	55 083.00	1 327.71	11
<b>Pineapple</b>	61 642.57	14 185.15	24
<b>Total</b>	212 892.33	42 467.50	405
<b>Other crops</b>		9 858.36	28
<b>Grand total</b>	212 892.33	52 325.86	433

Table 1 shows that there are significant discrepancies between the magnitude of the total ARB areas and the total areas (both ARB and non-ARB) planted with plantation crops. Because DAR only takes care of ARB areas, the Government has yet to identify which agency will monitor the welfare and interests of non-ARB smallholders engaged in AVAs.

### B. Unique characteristics of land tenure under CARP

Findings in the FGD sessions conducted with investors show that some companies prioritize AVAs in non-CARP areas because they are "more simple." Indeed, agrarian reform areas present certain peculiar elements which an investor has to take into consideration. These include:

<sup>5</sup>This includes exportable and non-exportable banana, Cavendish banana and banana (bongolan organic)

1. **Payment of land amortization:** CARP beneficiaries are obliged to pay land amortizations to the Land Bank of the Philippines (LANDBANK). Land amortizations are annual payments (at an instalment basis of 30 years). This is perceived as an additional cost from the point of view of the investor, especially when the value of land is deemed high (as in the case of banana plantations).

2. **Government intervention:** The execution of leases, contract growing arrangements and other AVAs are subject to DAR regulations. An investor needs to seek the review and approval of DAR after the execution of contracts with farmers in ARB landholdings.

3. **Collective Certificates of Land Ownership Award (CLOA):** Under RA 6657, collective CLOAs were issued to FOs or cooperatives, rather than to individual beneficiaries. While this allowed for easier title registration, it also resulted in a few issues, which in turn, created additional bottlenecks in the execution of AVAs. This will be discussed more exhaustively in the succeeding section.

## C. Collective CLOAs, cooperatives and individual shares

Lands distributed under CARP can be titled either individually or collectively. Collective titles or CLOAs are governed by section 25 of RA 6657, which states, "The beneficiaries may opt for collective ownership, such as co-ownership or farmers' cooperative or some other form of collective organization: Provided, That the total area that may be awarded shall not exceed the total number of co-owners or member of the cooperative or collective organization multiplied by the award limit above prescribed, except in meritorious cases as determined by the PARC<sup>6</sup>. Title to the property shall be issued in the name of the co-owners or the cooperative or collective organization as the case may be."

This was done to fast track the process of land distribution and was facilitated in areas where production will be affected by economies of scale<sup>7</sup>, as in the case of sugarcane and other plantation crops. However, this also means that no subdivision survey was done to define the boundaries of individual landholdings. Usually, collective CLOAs are issued to FOs and cooperatives as juridical entities. These however, resulted in several modalities of titling that had implications on ownership, cooperative governance and entitlement to employment. These modalities include:

**MODALITY A:** *CLOA is in the name of an association or a cooperative, with a finite set of members annotated in the title*

This modality ensures that the total area in the title is owned by beneficiaries who have three hectares or less of ownership, even if their shares are undivided at the time the title is issued. This also ensures one important criteria of the law, which is that each beneficiary should own no more than three hectares of land. The system of recording the names of the beneficiaries likewise provides some level of continuity in their rights because their names are in the title. ARB families are also entitled to substitute/replace names written in the CLOA in the event of death or other such circumstances.

<sup>6</sup>Presidential Agrarian Reform Council

<sup>7</sup>The economies of scale mentioned in this paper pertain to the need to consolidate inputs for production, processing and post-harvest mechanisms to augment smallholder incomes. Economies of scale are in no way relevant to the reconsolidation of distributed landholdings.

**MODALITY B:** *Title is in the name of an association or a cooperative, but without annotations on the names of the individual members.*

This modality does not show whether the beneficiaries own less or more than the three hectare limit. While the membership list is usually written on a separate sheet of paper, the list can be easily changed and may result into confusion over ownership rights. As a legal requirement, an FO or cooperative cannot legally own more than three hectares of land; hence, the ownership of collective landholdings should inure to a specified set of beneficiaries.

**MODALITY C:** *Title is collective, but is not under a juridical entity (such as a cooperative or FO). The title contains a simple list of farmer-beneficiaries (co-ownership)*

Although this modality may appear simple, maintenance of an AVA contract with a group of persons (rather than a juridical entity) is challenging, as there is no assurance of continuity of succession of the property in the event of death, disability, or change of location of the farmers. Moreover, since there is no juridical entity, there is no legal conduit for financing schemes. As a matter of policy, LANDBANK only lends to FOs – preferably cooperatives and does not consider financing requests from individual smallholders.

**MODALITY D:** *Title is individual, but the agribusiness company has consolidated the use of the land through a lease or a growership agreement.*

In this case, the agribusiness company actively seeks out land which they can use, and recruits a group of farmers to participate in the venture (usually a lease agreement) and is able to secure the use of a substantial land tract from individual farmers. This seems to be a feasible mode for investors, since they deal with individual farmers directly, and could skirt problems of governance of cooperatives or associations. However, this can be disempowering from the farmers' point of view, since they are not able to collectively manage their farms and scale up their level of entrepreneurship.

Based on the inception workshop conducted by the research team in January 2016, 47 percent of 73 farms that were identified by the DAR AVA focal persons were consolidated by the investor (modality D), while 37 percent were under the names of associations/cooperatives with a list of members in the title (modality A). Under modality D, the investor usually consolidates a mix of ARB and non-ARB landholdings, often including smallholders, occupants of public lands with pending claims, or even indigenous peoples with or without pending claims for ancestral lands.

Modality A is often applied in plantations, where production needs to be consolidated and farm workers were considered as employees before the land was subjected to agrarian reform. In this case, most members were forced to become members of the cooperative that bore the name of their collective CLOA in order to gain ownership of the land and be entitled to land rent (in the case of leaseback arrangements) or be part of a growers' scheme (in the case of growership arrangements). Because organizational membership is a requirement that must be fulfilled rather than an initiative for solidarity and mutual help, farm workers often find themselves having much difficulty in the land ownership transition. This issue will be discussed more exhaustively in a later section of this paper.

## D. Breakdown of the types of AVAs under the DAR watch

DAR AO No 9 series of (s.) 2006 lists several types of AVAs in which ARBs and agribusiness firms may engage under certain conditions. These include:

1. **Joint venture agreement (JVA):** A JVA is “an AVA scheme where the ARBs and investors form a joint venture corporation (JVC) to manage farm operations” (section 3.9, AO No 9 s. 2006). ARBs work on the land and/or contribute to the maintenance and improvements of common facilities; while the investors provide capital, technology and the construction or rehabilitation of infrastructures and facilities (Sec 3.9, AO No 9 s. 2006).
2. **Production/contract growing/growership/marketing contract:** This is “an AVA scheme wherein ARBs commit to produce certain crops, which the investor buys at pre-arranged items” (Sec 3.14, AO No 9 s. 2006).
3. **Lease agreement:** This agreement binds beneficiaries “to give the investor (often the former landowner) general control over the use and management of land for a certain amount and for a definite period” (Sec 3.9, AO No 9 s. 2006). Lease agreements are governed by certain conditions, including: (1) leaseback arrangement to be a last resort in undertaking AVA; (2) land use to be devoted solely to agricultural production; (3) investors to provide all the necessary capital, technical and management services
4. **Management contract:** This is usually applied for high value crops. ARBs hire investors to assist them in the management and operation of their farms in exchange for a fixed wage or commission (Sec 3.9, AO No 9 s. 2006).
5. **Service contract:** In this scheme, ARBs outsource production and processing services to a contractor for a fee (Sec 3.9, AO No 9 s. 2006).
6. **Build-Operate-Transfer (BOT):** In this scheme, the “investor builds, rehabilitates or upgrades, at his (sic) own cost, capital assets, infrastructure and facilities applied to the production, processing and marketing of agricultural products and operates the same at his (sic) expense” (Sec 3.9, AO No 9 s. 2006). Ownership will then be transferred to the ARBs after an agreed period.

According to the 2015 inventory of DAR<sup>8</sup>, the preferred mode of AVA is the lease agreement (see Table 2). About 63 percent of the total land area in the inventory is devoted to some form of lease arrangement, and a total of 77 percent of the contracts pertain to lease.

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<sup>8</sup>A summary of the inventory of AVAs done by DAR, by region, crop and AVA type is found in Annex A.

**Table 2:** Classification of AVAs by type, number and area covered (based on DAR inventory)

Type of AVA	Number of AVAs	Total area
<b>LEASE AGREEMENTS</b>		
Lease agreement	222	22 015.11
Lease contract	90	6 570.63
Leaseback agreement	22	4 431.19
<b>SUB TOTAL</b>	<b>334</b>	<b>33 016.93</b>
<b>GROWERSHIP AGREEMENTS</b>		
Marketing contract	4	4 458.00
Growership	33	4 391.82
Growership/ contract growing	37	940.12
Growership/ contract growing (agro-forestry)	1	272.00
Contract growing	9	1 246.60
Banana production purchase agreement	1	27.00
Banana supply and marketing agreement	3	1 269.72
<b>SUB TOTAL</b>	<b>88</b>	<b>12 605.27</b>
<b>OTHER AGREEMENTS</b>		
Joint venture agreement	4	5 602.44
Marketing with incentives	2	846.00
Contract of development agreement	1	57.40
Management contract	2	54.25
Rice retailing	1	30.00
Not indicated	1	59.00
<b>SUB TOTAL</b>	<b>11</b>	<b>6 649.09</b>
<b>TOTAL</b>	<b>433</b>	<b>52 271.29</b>

However, this arrangement undermines the discourse on the empowerment of farmers, as well as on the need to increase their capacity to manage their own farms. There are two legal provisions in the agrarian reform law that highlight this point. According to section 8 of RA 6657, farmers must be empowered to learn new technologies during their transition as new land owners:

During the transition period, the new owners shall be assisted in their efforts to learn modern technology in production. Enterprises which show a willingness and commitment and good-faith efforts to impart voluntarily such advanced technology will be given preferential treatment, where feasible.

However, while the law speaks about preferential treatment, there are still no operational guidelines on or incentive systems being offered to agribusiness firms that capacitate farmers within new farm technologies.

The second legal provision is more explicit: the law frowns upon lease agreements as a matter of State policy. In discussing the role of the Provincial Agrarian Reform Coordinating Committee (PARCCOM) in handling applications for leases and growership agreements, section 44 (3) of RA 6657, as amended by RA 7905<sup>9</sup> states:

The PARCCOM shall coordinate and monitor the implementation of CARP in the province. It shall provide information on the provisions of CARP, guidelines issued by the PARC and on the progress of CARP, in the province. In addition, it shall recommend to the PARC: ... (3) Continuous processing of applications for lease back arrangements, joint-venture agreements and other schemes that will optimize the operating size for agricultural production and also promote both security of tenure and security of income to farmer beneficiaries: Provided, *that lease back arrangements should be the last resort.*

This policy statement is further amplified in the rules governing AVA issued by the DAR, to wit:

The lease agreement shall only be intended to enable the ARBs or their organization to develop the skills necessary to assume general control and management of the farm. As such, the lease agreement, after the expiration of the lease contract, may shift to other options/arrangements or the lessor may opt to immediately assume full control and management of the land (section 5.3.9, DAR AO No. 9, S 2006)

In spite of these, lease agreements outnumber growership arrangements by a ratio of 2:1. Problems and prospects arising from leases and growership arrangements will be further discussed in the following sections of this report.

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<sup>9</sup>In 1995, RA 6657 was revised by RA 7905 or "An act to strengthen the implementation of the Comprehensive Agrarian Reform Program and for other purposes."

## IV. THE AVA CONTRACT PROCESS

Investors and ARB organizations (ARBOs)/cooperatives go through five major steps in securing an AVA. These include (Figure 1):

### A. Contract negotiation

For existing plantations, contract negotiation involves potential investor firms negotiating the terms of the AVA with the cooperative. The negotiation may include discussions on the required planting area, preferred crops and the responsibilities and entitlements of both parties. Usually, there is huge pressure from both sides to come to a quick agreement in order for the farm operations to continue. As an incentive for signing the agreement, investors commonly offer a five-year cash advance to ARBs. As arrangements are usually done between two juridical entities (the investing firm and the cooperative/ARBO), firms face the temptation of bypassing governance procedures of the cooperative and to deal directly with the Chairperson or the members of the Board, often without consensus from the ordinary members. This is further exacerbated by the fact that when the cooperatives were formed for the purpose of acquiring the land (see section on collective CLOA), new ARBs were often largely unaware of the full responsibilities and entitlements of being members of an economic organization. As new landowners, most ARBs have yet to develop entrepreneurial skills and most often than not, to shift paradigms from being subsistence farm workers to smallholders who can make informed decisions over their land and livelihoods. This scenario thus makes ARBs relatively unprepared for entering into business agreements with firms that are already very familiar in conducting business with smallholder farmers.

Based on the results of the FGDs conducted with ARBs in selected AVAs, the team found that farmers were generally unfamiliar with the terms and conditions of their respective AVAs, and were largely dependent on what their leaders said. This puts ARBs at a disadvantage, as they are vulnerable agree to unfavourable contract provisions written in legal jargon. During this period, ARBs would benefit from the presence of lawyers, who can translate contracts and provide farmers with legal advice on their rights, responsibilities and entitlements.

Figure 1: Stages in the contract process



## B. Contract signing

After parties agree on the terms of the agreement, both parties will sign the contract. For ARB areas, DAR will be a party to the agreement, subject to the review and endorsement of the National AVA Evaluation Committee (NAEC) or the AVA Task Force (TF) at the DAR Provincial Office (section 4.6, AO No 9 s. 2006).

Based on estimates from the NAEC, 433 contracts had been executed between various ARBs/ARBOs and agribusiness companies by December 2015. However, these are not reflected in DAR records. At the present, contracts being approved by DAR provincial offices are not regularly submitted to the central office for consolidation and recording. This, however, contravenes AO No 9, s. 2006, which mandates DAR to review and approve all AVA contracts. In reality, very few investors and ARBs submit their agreements to the jurisdiction of DAR to hasten agribusiness operations.

To ascertain a reasonable sample of AVAs to be used in this study, the research team had to collect data manually from DAR provincial offices. Overall, 57 AVA contracts were secured out of the 433 agreements (just 13 percent of the perceived population) estimated by NAEC.

Based on this information, most contracts do not have board resolution attachments. A board resolution indicates that the decision to enter into an agreement was deliberated and agreed by the members of the cooperative/ARBO. Most AVA contracts were signed by just one representative (usually the Chairperson or the President) of the ARBO/cooperative. Additionally, an attachment that confirms the authority of the Chairperson or the President of the ARBO/cooperative to enter into a legally binding agreement on behalf of its ARB members was also non-existent. This means that there is nothing to indicate that the contract was a product of consensus among the ARBOs/cooperatives.

Moreover, approval by the proper authority within the DAR structure is largely absent in the contracts. While a notation by a local DAR official such as the Regional Director is present in some contracts, Sec. 4.5 of DAR AO 9, s. 2006 stipulates that AVAs (except leases) shall be approved by the Provincial Agrarian Reform Programme Officer (PARPO), while leases shall be submitted for approval to the PARC or PARC Executive Committee (PARC ExCom). All of these will be executed upon the endorsement of the PARCCOM and the NAEC.

## C. Review and approval by DAR

Based on DAR AO 9, s. 2006, all AVAs are supposed to be reviewed, approved and monitored by DAR. In instances where parties disagree, the Department of Agrarian Reform Adjudication Board (DARAB) is authorized to rule over petitions for revocation. As cited by section 3, RA 6657, the jurisdiction of the DARAB "involves interpretation and enforcement of an agribusiness agreement or an agrarian dispute". However, as mentioned in the previous section, very few contracts are actually reviewed and approved by DAR, because companies tend to feel very proprietary about their agreements. In addition, DAR personnel have limited technical capacities to review the validity and desirability of the AVAs. Although from a strictly legal point of view, contracts which have not been approved by the DAR are null and void, in accordance with section 4.9 of DAR Administrative Order No 9 s. 2006, this provision has not been strictly enforced by DAR nor the parties involved.

## D. Continuous monitoring by DAR

After the signing of the contract, DAR field personnel are supposed to monitor compliance of both parties to the AVA. Monitoring is done mostly through the AVA task force at the provincial level. The rules mandate that the task force should conduct visits to the concerned agribusinesses at least once a year; and require the company to submit a list of its beneficiaries, the benefits provided to them and copies of their annual reports. The task force is also mandated to check if there are any issues or problems in the arrangement; and to recommend dispute resolution processes such as mediation, arbitration or even the filing of cases for rescission at the DARAB or PARC (DAR AO 9, s. 2006).

## E. Amendment, renegotiation and revocation

The last step in this process is amendment, renegotiation or revocation of the terms and conditions of the contract. The rules on AVA contain a specific provision on renegotiation of the terms of the contract:

4.14 To allow for some changes in the economic assumptions and/or the prevailing economic conditions at the time of AVA application and processing, as well as changes on the physical attributes of the land, the critical terms of the contracts (i.e., duration and amounts involved) shall be periodically reviewed and/or renegotiated by the contracting parties. The review and/or renegotiation shall be undertaken upon request or petition of any of the parties on the following grounds: (1) extraordinary increase of inflation rate; (2) drastic change in price fluctuation on both input and output; (3) declaration of the areas as calamity or disaster areas due to force majeure; and (4) other meritorious grounds (section 4.1.4, DAR AO No 9, s. 2006).

In practice, lease prices are already predetermined at the beginning of the term, with built-in increments at a usual period of every five years. It is common for growership contracts to provide for an economic review to assess trends in world prices and how these affect stipulated prices. Some companies also agree to renegotiate prices upon request, or unilaterally to raise prices if market conditions are favourable.

The preferred modes of dispute resolution are mediation and arbitration as these require the least resources (time, effort and money). In addition, DAR lawyers are routinely being asked to mediate certain disputes in the implementation of contracts. However, rescission of the agreement is also an option, especially if the disagreements over the provisions of the contract are already complicated and multidimensional. In fact, in accordance with the Department of Justice (DOJ) Opinion LML-L-7d15-490, rescission is a preferred mode of dispute resolution, since AVAs, by nature, is governed by a public policy, which cannot be compromised. If the agreement has been approved by PARC, then the proper forum would also be PARC. Otherwise, the DARAB has the power to revoke contracts under certain circumstances (see section 19, DAR AO 9, s. 2006). This is also affirmed by the DOJ Opinions LML-L-30G14-997 issued on 30 July 2014 and LML-L-7d15-490 on 7 April 2015.

## V. AVA LEASES BETWEEN ARBs AND INVESTORS

### A. Overview

Leases are the most common type of agribusiness arrangement between ARBs and investors. According to DAR, 63 percent of the land area covered by AVAs are devoted to some form of lease arrangement and 77 percent of all contracts are leases. These contracts go by different terms, including “lease agreement”, “lease contract”, “leaseback agreement” and even “land use management agreement.” However, in essence, all of these fit the classic definition of a lease, where a land rights holder (the lessor) grants another party (the lessee) rights to use a plot of land for a particular period of time in return for periodic payments (International Financial Reporting Standards 2015).

Companies appear to prefer leases to growership arrangements because they give them complete control over the entire farming operations. This corporate farming model is far less complicated and prevents farmers from pole-vaulting, a local term for the side-selling of produce to buyers other than the contracted investor so as to obtain higher prices (Vorley, Cotula & Chan 2012). It is cited as a major problem in other types of AVAs because it results in lower returns on the investments the firm may have made, such as pre-financing or the provision of technological support. As a result, companies are increasingly shying away from growership agreements in favour of simple leases. In one of the FGDs conducted by the research team with investor firms, at least one company admitted it was actively seeking to dissuade ARBs from engaging in growerships.

Generally speaking, this trend towards leasing does not seem to be beneficial for ARBs. Although comprehensive data is lacking, anecdotal evidence suggests that ARBs who have

**Box 1.**  
**BUSINESS PARTNERSHIP BETWEEN THE COOPERATIVE AND THE COMPANY (Tagkawayan Agrarian Reform Beneficiaries Employees Cooperative)**

In 1988, the Government acquired more than 8 000 hectares of agricultural land under CARP. ARBs of this landholding organized the Tagkawayan Agrarian Reform Beneficiaries Employees Cooperative (TARBECO). TARBECO members are regular employees of ANANAS, a leading pineapple producer in the Philippines. TARBECO entered into a leaseback arrangement with ANANAS for more than 30 years. Their AVA is considered as one of the most successful leasehold partnerships among large investment companies and smallholders to date. According to TARBECO members, ANANAS has provided continuing support to TARBECO by building its members’ technology and management expertise. Because of this, TARBECO was able to take advantage of available business opportunities and diversified their sources of income. Its assets more than tripled in more than two decades and its members’ equity reserve rose to PHP 55 million (around USD 1.19 million). To date, the cooperative has more than 9 000 members and is engaged in other profitable businesses, including consumer stores, loans and savings services, tree plantations, papaya farming, tractor and trucking services, a commercial arcade and water refilling station, among others. It was also the first in the country to build homes for its corporate beneficiaries. The 300-unit subdivision offers affordable housing facilities to its cooperative members and retirees.

TARBECO’s success as a cooperative can be attributed to its strong partnership with ANANAS. The cooperative also admitted supervisory employees as ARBs, and therefore the management of the cooperative has been professionalized and sustained over the years. The cooperative also employs a legal counsel to help it navigate on various issues on agrarian reform law and comply with the Cooperative Code.

opted to lease their land to investors have not fared as well financially as those who are involved in growership arrangements. A recent DAR study found that of the AVAs included in the study, ARBs who entered into lease agreements had poorer economic results than those who were involved in joint ventures or growership arrangements. Lessors generally saw no improvement in their socio-economic conditions over the duration of their AVAs (DARe, n.d.). Anecdotal reports from the FGDs also support this conclusion. However, there are some exceptional cases where the ARB cooperative was able to thrive under a lease agreement by developing other business opportunities (see Box 1).

Theoretically, ARBs entering into lease arrangements should be better off financially, as they will receive additional income from the lease on top of their wages as farm workers. However, this assumes that the income received from the lease exceeds their land amortization and real property taxes. According to the DAR integrative study, the low lease rental rates and long duration of lease agreements entered into by most ARBs have deprived them and their families from enjoying the benefits of being CARP beneficiaries. As lease agreements fail to improve the socio-economic conditions of the ARBs, the goal of alleviating poverty through agrarian reform is also undermined. Findings from the FGDs with ARBs support this conclusion.

## B. Analysis of key AVA lease terms

While not all leases are unfavourable to ARBs, many contain specific provisions that are problematic at best. The most important of such provisions are discussed in this section.

### 1. Duration

One of the most important objectives of CARP is to give ARBs control of their land and empower them to manage it. According to section 5.3.9, DAR AO No 9, S 2006, leases are only supposed to enable ARBs to develop their capacity to manage their land productively and sustainably, thereby suggesting a preference for terms as short as possible. This preference is further reinforced by the requirement in section 5.2.11, DAR AO No 2, s. 2008, which states that investor-lessees should implement, within one year of the beginning of the lease a “transfer of technology and management programme” for ARBs to enable them to assume responsibility of the land at the end of the lease period. However, access to farm capital remains a major constraint:

Although some ARBs are technically capable to cultivate and manage their own lands, they remain farm labourers in the lands awarded to them due to lack of farm capital. Thus, the intent of CARP to give control of land to the ARBs and empower them to become managers of their own lands have not been achieved (DARe, n.d.).

This is especially true with leases of long duration, because ARBs are deprived of the opportunity to manage their own land for a long period of time. A review of the lease agreements collected by DAR reveals the existence of AVA leases of up to 44 years or more. One of these agreements stipulates a lease duration of 30 years with a lessee option to renew or extend the contract for another 30 years. This means that the lease agreement could last for a total of 60 years. Further examination of these agreements also showed that some leases include especially problematic clauses that allow the lessee to unilaterally extend the agreement. All of the contracts reviewed for this study have lease durations of 25 to 44 years. Half of these are renewable at the option of the lessee.

In the FGD conducted by the research team in Davao, an ARB stated that he and adjacent landowners hold a 20-year lease and they are currently in negotiation with the company to extend the term for an additional 50 years.

While generally preferring leases, some companies recognize that these arrangements are inconsistent with the overriding objective of CARP. One company representative observed: “for ARBs to fully benefit from the plantation, they should take part in the company’s operation. Land rental should be discouraged if we want farmers to uplift their economic wellbeing” (FGD Cagayan de Oro 2016).

This is not to say that leasing arrangements are bad for all ARBs. To the contrary, leasing may be the most appropriate arrangement when an ARB does not wish to be involved in the active management of his/her land—or is unable to do so because of age or disability. There is no “one-size-fits-all” arrangement. However, it is clear that for ARBs who desire to transition from farm worker to farm operator, long-term leases are not the ideal option.

What then should be the appropriate duration for a lease? Should DAR establish a mandatory ceiling on lease terms? As circumstances may vary considerably among AVAs, including the capacity of ARBs to manage their land, their personal circumstances and the crop involved (for example, it takes much longer to develop an oil palm plantation than a banana farm), a mandatory lease duration that will apply in all cases cannot be recommended.

However, it is important that the investors comply with the existing legal obligation to establish and carry out the “transfer of technology and management programme.” DAR should therefore be able to ensure that this requirement is properly monitored and enforced.

**Recommendations:**

- Encourage investors and ARBs to execute shortest reasonable lease terms
- Provide mechanisms for review of longer lease terms. The review should focus on guaranteeing that the terms of the contract will promote the best interest of ARBs and the proposed length of time is justified. Prohibit clauses (within the contract) that give the lessee the unilateral right to renew
- Rigorously enforce (and monitor for outcomes) the required “transfer of technology and management programme” provisions in section 5.2.11, DAR AO No 2, s. 2008

All recommendations are consistent with the overall goals of CARP, which is to enable ARBs to assume control and management of the farm as soon as reasonably possible (section 5.3.9, DAR AO No 9, s. 2006).

## 2. Lease rental rates

Based on the FGDs, ARBs usually struggle with low lease rates and the minimal contribution they make to improve their economic conditions as new landowners. Overall, the rates vary widely, are often very low and may not reflect market prices. In some cases, payments do not even cover the annual land

amortization payment and real property taxes for which ARBs are legally responsible. This is contrary to section 5.3.4, DAR AO NO 9, S 2006, which states that the amount of lease must, at the minimum, cover those costs. Similarly, DAR AO No 5, s. 1997 requires that lease rates applicable to oil palm lands should equal or exceed yearly land amortization and real property taxes.

Often, companies hire ARBs as workers or employees and pay them standard wages. These are on top of payments that they receive as lessors of the land. The employment of ARBs or their immediate family members are often stipulated in lease contracts, while other contracts mention that priority will be given to ARBs in employment. This "prioritization" is consistent with the provisions of section 5.3.8, DAR AO 6, s. 2006. This arrangement, however, negates the essence of CARP, which is to allow farmworkers to gain control over their economic resources. The arrangement also tends to perpetuate the employment relationship of ARBs to their former land owner or to a new investor firm.

As lessors, some ARBs also benefit from the agreement in other ways: these include hospital and death benefits and incomes derived from consumer operations like convenience stores, gas stations, cable television and internet services to area residents, along with other business opportunities such as trucking and providing contract labour to the lessee (Nozawa, 2011).

In a few cases, AVA leases include provisions that encourage ARBs to transition from leasing to growership. One of the agreements studied by the research team stated that the investor company will relinquish the right to lease 2 000 ha of land after five years and will help the ARBO utilize that land under a growership arrangement (with the company/lessee acting as buyer of the products). Such an arrangement is ideal because it upholds the spirit of CARP by educating farmers through transfers of technological knowledge, supporting this education by providing them with financing support and bridging the land-to-market gap by providing ARBs with a ready market for their products.

Another common provision in AVA leases are those that provide for "signing bonuses" in the form of advanced lease payments. The contracts often provide for an initial, lump-sum payment equal to five years of the agreed lease amount. These large payments can be enticing to ARBs with immediate cash needs. However, this also results in reduced annual income over time. In some cases, there were also drastic reductions in the lease rates for the final five years of the lease period. According to ARBs, these terms force them to agree to lease extensions and receive another "signing bonus" or advanced lease payments. The cycle thus continues.

Examples derived from specific lease agreements sampled in the study reflect the range of lease rates (see Table 3). According to a DAR study on agreements involving land used for oil palm, the amounts mentioned in Table 3 "hardly sustain the basic household needs of the ARBs" (DARc 2005). In addition, the lease amount is far less than that required by DAR AO No 5, s.1997, which states, "in no case shall the lease rental be less than the yearly amortization and taxes to be paid by the lessor on the land, or the computations based on section 34 of RA 3844<sup>10</sup>, whichever is higher."

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<sup>10</sup>RA 3844 or the Agricultural Land Reform Code was passed on 1963, which sought to abolish the tenancy system and channeled capital into industries.

**Table 3:** Sample Terms and Conditions of Lease Contracts

Code	Lease duration	Contract year	Payment per hectare		Other "benefits"
			In PHP	In USD <sup>11</sup>	
<b>Contract A</b>	34 years (including extensions)	1996	635	13.50	Additional payment of PHP 2 685 (USD 57.09) as economic benefits <sup>12</sup>
<b>Contract B</b>	34 years (including extensions)	1998	635	13.50	Additional payment of PHP 2 685 (USD 57.09) as economic benefits <sup>13</sup>
<b>Contract C</b>	25 years (renewable at the option of the lessee)	1998	5 000	106.16	PHP 35 000 (USD 743.11) per hectare provided as compensation for crops that need to be cleared
<b>Contract D</b>	25 years (renewable at the option of the lessee)	2005	15 000	319.08	Lease rate increases by PHP 200 per hectare (USD 4.25) for every two years after the 5 <sup>th</sup> year of the lease
<b>Contract E</b>	25 years (parties can renegotiate terms after 10 years)	1998	8 000	169.85	Production bonus of PHP 500 per hectare
<b>Contract F</b>	30 years (including 15-year extension)	2001	12 000	255.27	Lease rate increased to PHP 13 800 (USD 293.56) during the 6 <sup>th</sup> -10 <sup>th</sup> year and then to PHP 15 870 (USD 337.59) for the 11 <sup>th</sup> -15 <sup>th</sup> year, through 2016  Advanced lease payment for the first five years of contract renewal
<b>Contract G</b>	25 years (renewable at the option of the lessee)	2002	5 000	106.36	Lease rate will increase to PHP 10 368 (USD 220.55) for the 21 <sup>st</sup> until the 25 <sup>th</sup> year.

However, in the absence of reference data and because of the unique situations of AVAs, this report cannot recommend a standard lease rate for these arrangements. Section 4.3, DAR AO No 2, s. 2008 contains suggested inclusions in determining lease rates in AVAs. Essentially, the AO provides that the lease rental should at least cover land amortization, real property tax and factor in the applicable annual per capita poverty threshold. While the terms used in the AO do not indicate a rigid lease rate minimum, it

<sup>11</sup>Exchange rate used is PHP 1 = USD 0.021

<sup>12</sup>In vague terms, these economic benefits were defined in the contract as "one percent of net sales and ex-factory, as sales of produce" (DARc 2005)

<sup>13</sup>In vague terms, these economic benefits were defined in the contract as "one percent of net sales and ex-factory, as sales of produce" (DARc 2005)

is considered by stakeholders (in the FGD conducted by the research team) to be reasonable in establishing a minimum lease rate. According to statements from DAR representatives in one of the FGDs conducted, if this formula were to be used, the 2016 annual lease rates should average around PHP 40 000 per ha (USD 850.59). This is significantly higher than the current average rate of about PHP 15 000 per ha (USD 319.08) (Davao CSO FGD 2016).

As mentioned, there is no one perfect methodology to use in determining an equitable AVA lease rate. However, one approach is to set a rate that is based on prevailing market rates in the area. This is only possible *if* there are similar properties and accurate, available data on local lease rates. While the LANDBANK performs land valuations and has statistics on land values, there is no indication that they are done on a regular basis. In addition, the study was unable to determine if local data is available in AVA areas in Mindanao.

Rates can also be derived from the land expectation value (LEV). LEV is “an approach of calculating land value on the basis of the value of future net income stream that will be generated from productive activities taking place on the piece of land” (FAOa 2000). This includes calculations based on the present value per unit area over a certain period of projected costs and revenues from crop production, starting with bare land, translated into a fixed, annual payment. The value is thus linked to the crop and the type of land and is based on actual experience (Deininger, et al. 2011). With this method, the lease price equals the net return to land after all other factors (labour, capital and management) have been adequately remunerated.” However, there is a need to further examine whether this information can be locally generated.

In the absence of extensive land market pricing information or other applicable financial data, there are two fundamental policy statements articulated in DAR AO No 9, s. 2005, which should guide the development of a formula for a minimum lease rate standard: (1) An AVA can only be approved if it will lead to an increase in the ARB’s income and ensures the economic viability of the farm; and (2) AVAs should promote the goal of enabling ARBs to operate their farms independently as soon as possible.

In relation to the first policy pronouncement, one could argue that in the course of increasing ARBs’ income and promoting the economic viability of the farm, the additional values derived from wages and potential returns from various ancillary business activities resulting from the lease should also be considered. However, this assumption ignores the fact that there are retired or disabled ARBs, who are unable to supplement their lease income with employment income. Additionally, consideration of wage income reveals little or nothing about the long-term economic viability of the farm. It is also very difficult to predict whether a lease agreement will result in profitable ancillary business activities. In the absence of any sort of technical and management training, an AVA lease may also mean further delay in preparing ARBs to run the farm by themselves. Thus, non-lease income and ancillary benefits should not be considered in assessing the contract’s impact on the financial viability of the farm.

**Recommendations:**

- Commission a study of market lease rates in AVA areas to be used as a reference in future lease rate negotiations
- Refer to DAR AO No 2, S 2008 in ascertaining minimum lease rates, unless and until reliable market rate data becomes available. This will ensure that ARBs can pay annual land amortization and real property taxes and still have an additional amount to support their livelihood. While this minimum rate is not mandatory, it should be a point of reference for DAR contract reviewers in assessing whether a lower lease rate is justified
- Evaluate lease impacts on the basis of the adequacy of the lease rate alone and not on values derived from potential incomes from wages and ancillary business activities

### 3. Periodic increases in lease rates

Most AVA leases provide for rate increases over time in amounts fixed in the contract. As such, they are not linked to any external inflation factor or objective measure of land lease price increases. In many agreements, this fixed rate is relatively small or, in a few cases, non-existent. AVA lease rates that are not adjusted over time are inconsistent with section 4.5, DAR AO No 2, s. 2008, which requires parties to renegotiate lease rates at least every five years during the lease period. The AO also specifies that renegotiated rates cannot be lower than the previous rate.

Each AVA lease should provide for minimum annual increases that are linked to a relevant and easily computed external inflation factor. A number of inflation factors could be used. Ideally, one would use an inflator that is directly tied to the land lease or local land sale prices. However, as indicated above, such information is seldom available.

The measure that is most familiar to the general public is the “headline inflation” factor which “refers to the rate of change in the Consumer Price Index, a measure of the average price of a standard ‘basket’ of goods and services consumed by a typical family” (Bangko Sentral ng Pilipinas 2016). However, while headline inflation tends to be an accurate measure of costs incurred by an average Filipino household, it would be relatively difficult to use it as basis for determining lease rates. This is because headline inflation is based on the prices of a “standard basket of goods,” which includes often volatile food and oil prices.

Another measure is the “core inflation” rate. It “measures the change in average consumer prices after excluding from the Consumer Price Index certain items with volatile price movements” (Bangko Sentral ng Pilipinas 2016). It seems more appropriate to use the less volatile core inflation rate so that the investor-lessee is less likely to have to deal with unpredictable rates of increase. Moreover, this will mean that rates are less subject to unreasonable adjustments if the month in which the increase occurs happens to be a month of unexpected price volatility.

**Recommendation:**

- In the absence of an inflation factor that measures land rental or market prices, include provisions on core inflation rate (as determined by Bangko Sentral ng Pilipinas [BSP]) as basis for annual rate adjustments in all AVA leases

#### 4. Right to Ownership of Improvements

Most of the AVA leases give the investor-lessee the right to make improvements on the land. These can include permanent improvements such as buildings, roads, irrigation facilities and non-permanent items such as equipment. Many leases give the investor ownership of and the right to remove all improvements, including permanent improvements, at the end of lease. While this is permitted by section 5.1.4, DAR AO No 2, s. 2008, which states that the lessor becomes the owner of any permanent improvements at the end of the lease unless the contract specifically provides otherwise, it expressly violates section 5.3.7, DAR AO No 9, s. 2006, which clearly states that ARBs should become owners of all permanent improvements.

In the review of sample contracts, the team found that in one contract, the investor-lessee has the right to remove any improvements it makes to the property, including buildings and equipment at the end of the lease. By contrast, another contract expressed that permanent improvements made by the lessee become the property of the cooperative-lessor at the end of the lease. However, the lessee can remove non-permanent improvements such as equipment. Policy interpretations thus vary. This may cause further confusion in the event that both parties assert the right to the ownership of improvements done during the lease period.

**Recommendation:**

- Revise section 5.1.4, DAR AO No 2, s. 2008 to be consistent with section 5.3.7, DAR AO No 6, s. 2006. Require AVA lease agreements to include ownership by the ARB of permanent improvements after the lease as a standard provision

#### 5. Sub-leases and assignments

Section 6.2.4, DAR AO No 2, s. 2008 prohibits investor-lessees from sub-leasing or assigning their rights under AVA leases even with the consent of the lessor. However, many of the contracts reviewed for this study give the lessee the unilateral right to "assign" the land to another company without the permission of the lessor. This is a clear violation of the DAR rule, even assuming that there may be circumstances when such "assignments" or sub-leases are in the ARBs' best interest.

**Recommendation:**

- Revise section 6.2.4, DAR AO No 2, s. 2006 to permit subleases or assignments only with express written consent from the lessor. Require AVA lease agreements to include this as a standard provision

## 6. Force majeure clauses

These provisions essentially give a party the right not to perform specific obligations under the contract if events beyond that party's control make it impossible or illegal to do so. Such clauses appear to be relatively common in AVA leases, often giving the investor/lessee the right to withhold lease payments in the event of natural disasters such as typhoons and other similar calamities. This means that ARBs would have to bear the brunt of coping with losses in the aftermath of calamities or misfortunes. Such clauses are prohibited by section 5.3.3, DAR AO No 9, s. 2006<sup>14</sup>.

### **Recommendation:**

- Provide strict enforcement and monitoring of contracts to ensure that as stipulated in section 5.3.3, DAR AO No 9, s. 2006: "Notwithstanding crop failure due to natural calamities or force majeure, the lessee shall ensure payment of lease rental as stipulated in the contract." Require AVA lease agreements to include this as a standard provision

## 7. Termination clauses

Many AVA leases contain provisions that allow the lessee to terminate the agreement prior to the end of the contract term, even without cause. Others provide for termination only for specified causes. The contracts likewise vary as to whether the lessors are permitted to retain any advanced rental payments.

One especially problematic example is found in Contract D, which gives the investor/lessee the right to pre-terminate the contract if the business becomes unviable, thus placing the entire business risk on the ARB/lessor. Generally speaking, and unless the agreement says otherwise, real property law requires a lessee to continue paying rent if it terminates the lease, except for a specific cause set forth in the lease agreement. The obligation to pay continues until the lessor is able to find a new tenant or until the pre-agreed period of termination stipulated in the lease agreement.

### **Recommendation:**

- Prohibit lease provisions that give lessees the unilateral right to terminate without cause and on minimal notice. Include appropriate clauses in AVA lease agreements

## 8. Contract review and renegotiation

Many AVA leases include provisions requiring parties to review and renegotiate the lease agreements or particular clauses (often the lease rate or "economic benefits") at specified intervals such as every five or ten years. In one of the FGDs, one investor representative stated that his company's lease requires renegotiation of all "benefits" every five years.

<sup>14</sup>While Art 1174 of the Civil Code states that, "Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen, or which, though foreseen, were inevitable;" DAR AO 9, S 2006 provides an exemption on the general rules on force majeure, and places the burden on lease payments on the lessee.

While the spirit of these provisions may suggest an intention to be able to address changed circumstances, the changes often do not lead to tangible amendments in the contract. Legally, such clauses oblige the parties to do nothing but discuss changes in the contract in good faith. Often, actual changes were neither required nor encouraged. In reality, if the parties do not agree to make an adjustment in the contract, nothing happens. Put another way, these provisions are nothing more than a contractual commitment to try to agree. If the parties cannot agree on a new lease rate, the rate will not change, despite the "renegotiation." ARBs reported experience with this very result.

It is rare to find clauses in AVA leases that require contract adjustments based on specified factors or events. Thus, it would be better to tie these changes with objective measures, such as inflation rates, as discussed above.

**Recommendations:**

- Continue to include clauses requiring parties to review and renegotiate the economic terms of the contract every three to five years for longer term leases
- Encourage parties to include lease clauses stating that, in all renegotiations that occur after an initial period of perhaps 10 years, either party can terminate the lease if they are unable to agree on new economic terms

### 9. Model lease

While section 4.1, DAR AO No 2, s. 2008, provides a sample lease agreement form, DAR has not sought to encourage or require AVA parties to use this form as a basis or model for AVA contracts. During the FGDs and the national workshop, participants indicated support (or in some cases, there was no opposition) for the idea of creating a model lease form that parties to AVA leases would be required to use. This would minimize unfavourable provisions that may have been surreptitiously included in the contract.

**Recommendations:**

- Develop a model lease form that is consistent with existing AOs, including mandatory provisions set forth in the above recommendations, guidance for parties on lease duration and lease rates that reflect earlier recommendations (see sections 1-8). A proposed model lease is attached to this report as Annex B
- Distribute copies of the model lease as an educational tool for ARBs with existing contracts and for those who are planning to engage in or renew their contracts

## 10. Legal and technical assistance

To ensure the promotion of their best interest, ARBs and ARBOs' officers need to have a better understanding of the terms of their agreements. This requires education and improved capacity. As DAR has observed:

The officers of most cooperatives lack the necessary skills and capabilities to negotiate with potential business partners. This resulted in low lease rental (sic) compared to the prevailing lease rental rate in the area and the long duration of the agreement (DAR n.d.).

### **Recommendations:**

- Require participation of DAR lawyers, legal officers or external legal advisors in all AVA lease negotiations
- Require contracts to be written and negotiations be conducted in English and in the local language of ARBs

## C. Employment law issues in leases/ leasebacks

While ARBs are provided with further income opportunities by being employed in the company leasing their land, hiring practices, typically unwritten, vary. According to ARBs (as mentioned during the FGDs conducted by the research team in Davao and Cagayan de Oro), some companies hire on the basis of the size of land leased — usually at the proportion of one employee (ARB or a relative) for every hectare of land while others hire ARBs based on the operational needs of the company.

These arrangements imply the same industrial relations issues prevalent in the manufacturing and service sectors: the identification of the real employer coupled with correct classification of employment status. While investor corporations hire regular employees, they also resort to illegal labour-only contracting which is prohibited under Department Order No 18-A, s. 2011, which in turn was issued pursuant to Article (Art) 106 of the Labor Code. In order to amplify this point, Art 106 is quoted in full below:

Art 106. Contractor or subcontractor. Whenever an employer enters into a contract with another person for the performance of the former's work, the employees of the contractor and of the latter's subcontractor, if any, shall be paid in accordance with the provisions of this Code.

In the event that the contractor or subcontractor fails to pay the wages of his employees in accordance with this Code, the employer shall be jointly and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him.

The Secretary of Labor and Employment may, by appropriate regulations, restrict or prohibit the contracting-out of labour to protect the rights of workers established under this Code. In so prohibiting or restricting, he may make appropriate distinctions between labour-only contracting and job contracting as well as differentiations within these types of contracting and determine who among the parties involved shall be considered the employer for purposes of this Code, to prevent any violation or circumvention of any provision of this Code.

There is "labour-only" contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. In such cases, the person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.

The rules regarding valid and invalid contracting are spelled out in Department Order No 18-A, s. 2011 issued by the Department of Labor and Employment (DOLE):

**Section 4. Legitimate contracting or subcontracting.** Contracting or subcontracting shall be legitimate if all the following circumstances concur:

- The contractor must be registered in accordance with these Rules and carries a distinct and independent business and undertakes to perform the job, work or service on its own responsibility, according to its own manner and method, and free from control and direction of the principal in all matters connected with the performance of the work except as to the results thereof;
- The contractor has substantial capital and/or investment; and
- The Service Agreement ensures compliance with all the rights and benefits under Labor Laws.

**Section 5. Trilateral relationship in contracting arrangements; Solidary liability.** In legitimate contracting or subcontracting arrangement there exists:

- An employer-employee relationship between the contractor and the employees it engaged to perform the specific job, work or service being contracted; and
- A contractual relationship between the principal and the contractor as governed by the provisions of the Civil Code.

In the event of any violation of any provision of the Labor Code, including the failure to pay wages, there exists a solidary liability on the part of the principal and the contractor for purposes of enforcing the provisions of the Labor Code and other social legislation, to the extent of the work performed under the employment contract.

However, the principal shall be deemed the direct employer of the contractor's employee in cases where there is a finding by a competent authority of labor-only contracting, or commission of prohibited activities as provided in Section 7, or a violation of either Sections 8 or 9 hereof.

**Section 6. Prohibition against labor-only contracting.** Labor-only contracting is hereby declared prohibited. For this purpose, labor-only contracting shall refer to an arrangement where:

(a) The contractor does not have substantial capital or investments in the form of tools, equipment, machineries, work premises, among others, and the employees recruited and placed are performing activities which are usually necessary or desirable to the operation of the company, or directly related to the main business of the principal within a definite or predetermined period, regardless of whether such job, work or service is to be performed or completed within or outside the premises of the principal; or

(b) The contractor does not exercise the right to control over the performance of the work of the employee.

**Section 7. Other Prohibitions.** Notwithstanding Section 6 of these Rules, the following are hereby declared prohibited for being contrary to law or public policy:

A. Contracting out of jobs, works or services when not done in good faith and not justified by the exigencies of the business such as the following:

(1) Contracting out of jobs, works or services when the same results in the termination or reduction of regular employees and reduction of work hours or reduction or splitting of the bargaining unit.

(2) Contracting out of work with a "Cabo".

(3) Taking undue advantage of the economic situation or lack of bargaining strength of the contractor's employees, or undermining their security of tenure or basic rights, or circumventing the provisions of regular employment, in any of the following instances:

(i) Requiring them to perform functions which are currently being performed by the regular employees of the principal; and

(ii) Requiring them to sign, as a precondition to employment or continued employment, an antedated resignation letter; a blank payroll; a waiver of labor standards including minimum wages and social or welfare benefits; or a quitclaim releasing the principal, contractor or from any liability as to payment of future claims.

(4) Contracting out of a job, work or service through an in-house agency.

(5) Contracting out of a job, work or service that is necessary or desirable or directly related to the business or operation of the principal by reason of a strike or lockout whether actual or imminent.

(6) Contracting out of a job, work or service being performed by union members when such will interfere with, restrain or coerce employees in the exercise of their rights to self-organization as provided in Art 248 (c) of the Labor Code, as amended.

(7) Repeated hiring of employees under an employment contract of short duration or under a Service Agreement of short duration with the same or different contractors, which circumvents the Labor Code provisions on Security of Tenure.

(8) Requiring employees under a subcontracting arrangement to sign a contract fixing the period of employment to a term shorter than the term of the Service Agreement, unless the contract is divisible into phases for which substantially different skills are required and this is made known to the employee at the time of engagement.

(9) Refusal to provide a copy of the Service Agreement and the employment contracts between the contractor and the employees deployed to work in the bargaining unit of the principal's certified bargaining agent to the sole and exclusive bargaining agent

(10) Engaging or maintaining by the principal of subcontracted employees in excess of those provided for in the applicable Collective Bargaining Agreement or as set by the Industry Tripartite Council.

B. Contracting out of jobs, works or services analogous to the above when not done in good faith and not justified by the exigencies of the business.

In the case of *COCA-COLA BOTTLERS PHILS., INC. v, ALAN M. AGITO, et. al.* (G.R. No. 179546; 13 February 2009) the Court reiterated the prohibition against labour – only contracting and stated that in such cases the principal employer will be treated as the real employer:

“On the other hand, labour-only contracting is an arrangement wherein the contractor merely acts as an agent in recruiting and supplying the principal employer with workers for the purpose of circumventing labour law provisions setting down the rights of employees. It is not condoned by law. A finding by the appropriate authorities that a contractor is a labour-only contractor establishes an employer-employee relationship between the principal employer and the contractors' employees and the former becomes solidarily liable for all the rightful claims of the employees (GR No 179546 2009).

This practice of labour-only contracting means that workers actually working for the company and performing activities which are usually necessary and desirable in their usual business are not directly hired but instead are deployed by manpower agencies, who then function as the employer of these workers. In effect, the investor-corporation refuses to recognize the existence of the employer-employee relationship and tries to evade the risks and responsibilities associated with being an employer (such as payment of insurance and benefits), despite the fact that the investor-corporation retains the right to control the ways and means of the work (See Box 2).

In the case of *ARIEL L. DAVID, DOING BUSINESS UNDER THE NAME AND STYLE “YIELS HOG DEALER” vs JOHN G. MACASIO* (G.R. No. 195466, 2 July 2014) the Supreme Court reiterated the rule for determining the existence of employer-employee relationship:

“To determine the existence of an employer-employee relationship, four elements generally need to be considered, namely: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employee's conduct. These elements or indicators comprise the so-called “four-fold” test of employment relationship.”

Among these four, the last one is the most important, which is also known as the control test, reiterated by the Court in the case of *LOLITA LOPEZ, vs BODEGA CITY* (G.R. No. 155731; 3 September 2007).

The Constitution of the Philippines, Art XIII, Section 3, clearly provides that “[t]he State shall afford full protection to labor” and that they shall be “entitled to security of tenure, humane conditions of work, and a living wage”. Thus, the provisions above in the Labor Code and the Department Order.

However, in order to violate the constitutional right to security of tenure, many employers resort to various schemes in order to deny the existence of employer-employee relationship and/or, while admitting that they are the employers, treat their regular workers as “contractual” or “casual” employees who are purportedly under a fixed-term “contract”, upon the expiration which the employees are allegedly not dismissed from work but are not longer entitled to work since their “contract” has “ended”. Thus, the term “ENDO” or end-of-contract has since become a household word here in the Philippines.

The rampant use of contractualization in the Philippines has prompted the current administration to wage an all out war against this current practice. For a couple of decades, it has since gone worse.

Art 280 of the Labor Code provides that despite a written contract or a verbal agreement to contrary, an employee will be treated as a regular employee if the work is necessary and desirable to the trade or business of the employer, or if the position being occupied has been in existence for more than a year:

Art 280. Regular and Casual Employment. – The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.

In the case of POSEIDON FISHING/TERRY DE JESUS vs NATIONAL LABOR RELATIONS COMMISSION and JIMMY S. ESTOQUIA, (G.R. No. 168052; 20 February 2006) the Court explained the rationale for Art 280:

In the case under consideration, the agreement has such an objective - to frustrate the security of tenure of private respondent- and fittingly, must be nullified. In this case, petitioners’ intent to evade the application of Article 280 of the Labor Code is unmistakable. In a span of 12 years, private respondent worked for petitioner company first as a Chief Mate, then Boat Captain, and later as Radio Operator. His job was directly related to the deep-sea fishing business of petitioner Poseidon. His work was, therefore, necessary and important to the business of his employer. Such being the scenario involved, private respondent is considered a regular employee of petitioner under Article 280 of the Labor Code...

Moreover, in the case of INNODATA PHILIPPINES, INC. vs JOCELYN L. QUEJADA-LOPEZ and ESTELLA G. NATIVIDAD PASCUAL (G.R. No. 162839; 12 October 2006) reiterated the Court’s aversion towards contracts forced upon workers in order to deny the constitutional right to security of tenure:

In the interpretation of contracts, obscure words and provisions shall not favour the party that caused the obscurity. Consequently, the terms of the present contract should be construed strictly against petitioner, which prepared it.

Art 1700 of the Civil Code declares:

Art 1700. The relations between capital and labour are not merely contractual. They are so impressed with public interest that labour contracts must yield to the common good. Therefore, such contracts are subject to the special laws on labour unions, collective bargaining, strikes and lockouts, closed shop,

wages, working conditions, hours of labour and similar subjects.

Indeed, a contract of employment is impressed with public interest. For this reason, provisions of applicable statutes are deemed written into the contract. Hence, the parties are not at liberty to insulate themselves and their relationships from the impact of labour laws and regulations by simply contracting with each other. Moreover, in case of doubt, the terms of a contract should be construed in favour of labour.

The Court went further by taking exception to the business necessity rationalization of the employer:

Lastly, petitioner claims that it was constrained by the nature of its business to enter into fixed-term employment contracts with employees assigned to job orders. It argues that inasmuch as its business is that of a mere service contractor, it relies on the availability of job orders or undertakings from its clients. Hence, the continuity of work cannot be ascertained.

Petitioners contentions deserve little consideration.

By their very nature, businesses exist and thrive depending on the continued patronage of their clients. Thus, to some degree, they are subject to the whims of clients who may decide to discontinue patronizing their products or services for a

variety of reasons. Being inherent in any enterprise, this entrepreneurial risk may not be used as an excuse to circumvent labour laws; otherwise, no worker could ever attain regular employment status.

Those who resort to these illegal practices, often called contractualisation (or casualization in the Philippines), typically argue that with the advent of globalization, these forms of atypical work arrangements are essential to improve competitiveness. Whether or not this contention is valid on a purely commercial level, it is obvious that such an economic argument cannot be used to justify clear violations of settled law and jurisprudence. Similarly, one cannot make an economic argument that the corporate tax rate in the Philippines is so high that firms should be allowed to cheat to remain competitive, or yet another economic argument that workers can steal since wages are too low.

In cases of hiring through an agency, whether legal or otherwise, both the agency and the principal

**Box 2.**  
**CONTRACTUALIZATION IN THE RURAL SECTOR**  
**(Bulalakaw Farmers' Cooperative)**

In 1989, Mountain Range Corporation applied under the Voluntary Offer to Sell (VOS) program of the CARP some 81.5 hectares of its coffee plantation. Farmer-beneficiaries of this plantation were organized to form the Bulalakaw Farmers' Cooperative (BFC). ARB members eventually decided to operationally subdivide the land into corn, cassava and vegetable farms.

After a decade as landowners, there was very minimal improvement in the lives of ARBs. Most households still find themselves unable to make both ends meet. Worse, they were unable to pay their annual land amortization to LANDBANK. This forced them to enter into a lease arrangement with ANANAS Corporation, one of the top producers of pineapple products in the Philippines. Fifteen ARBs under BFC entered into a lease contract with ANANAS, under the verbal condition that ANANAS will pay BFC's land amortization in full and without interest charges, through deductions from its lease payments to BFC. BFC leased more than 25 ha of its farmland to ANANAS for a 25-year period.

Under the lease agreement, BFC members receive an equivalent annual lease payment of PHP 5 150 (USD 111.03) per ha and other fringe benefits. ANANAS promised ARBs that they will be hired as regular farm workers. This would have been an important addition to their household income, since the annual lease payments are barely sufficient to meet their basic needs. However, only six of the 15 ARBs were actually employed and only as seasonal workers. The rest also find it difficult to seek regular employment as the lessee resorted to labour-only contracting from willing service providers. This has resulted in the hiring of some 30 contractual laborers, more than the six seasonal workers that have been retained by the company.

employer (in this case the investor/corporation), are liable (Art 109, Presidential Decree [PD] 442) for unpaid wages and other benefits. However, to ensure that the totality of their rights as workers is protected, it is crucial that ARBs assert that the real employer is the investor/corporation. This is because in the absence of complainants, the investor will simply continue to deny the existence of employer-employee relationship and misclassify regular workers as mere casuals. In fact, President Rodrigo Duterte (the newly elected President of the Philippines) himself recently said that the government simply does not have the resources to inspect all of the employers. He then asked employers to comply or face closure.

While these arrangements are clearly contrary to the Labor Code<sup>15</sup>, the corporation and the labour-only contractor/agency would argue, albeit without legal basis, that it has a so-called "service contract" with the investor-corporation. This means that once such contract is terminated, the employment of the worker, whether ARB or not, would likewise be terminated, even in the absence of just or legal causes.

Securing the tenure of workers' employment entails the establishment of employer-employee relationship with the investor/corporation (as it should be, following Supreme Court decisions<sup>16</sup>); and the correct recognition of the principal employer (investor/corporation) of the workers' regular employment status, as stipulated under Article (Art) 280 of the Labor Code.<sup>17</sup> The law also prohibits employment dismissal, except on just or authorized causes (Art 282-284, PD 442).

In addition, regular employment with the investor/corporation would enable employees to exercise their right to self-organization including the right to form labour unions and collective bargaining, both of which are guaranteed by the Constitution and the Labor Code, as well as the International Labour Organization (ILO) Convention No 87 - freedom of association and protection of the right to organize and ILO Convention No 98 - right to organize and collective bargaining, where the Philippines is a signatory.

It should be mentioned too that after establishing the real employer and while ARBs would typically be considered as regular employees, the law also allows valid classification of employees as casual, project, or seasonal (Art 280, PD 442).

The labour-only contracting problem becomes even more peculiar when the ARB cooperative itself creates its own manpower agency and becomes the supplier of labour to the investor/corporation with which it has an AVA. This is akin to an "in-house agency" type of labour-only contracting, which is considered to be blatantly illegal. According to the DOLE Department Order No 18-A, s. 2011, this type of

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<sup>15</sup>The Labor Code of the Philippines or PD 442 is a consolidated code of labor and social laws that "afford protection to labour, promote employment and human resources development and ensure industrial peace base on social justice" (Preliminary title, PD 442).

<sup>16</sup>WILLIAM L. TIU, petitioner, vs NATIONAL LABOR RELATIONS COMMISSION and HERMES DELA CRUZ, respondents. [G.R. No. 95845. February 21, 1996].

<sup>17</sup>Art 280. Regular and casual employment. The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season.

An employment shall be deemed to be casual if it is not covered by the preceding paragraph:

Provided, That any employee who has rendered at least one year of service, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue while such activity exists.

labour-only contracting is one of the forms of subcontracting that is prohibited for being against public policy.

In spite of this prohibition, it was found that manpower agencies of some ARB cooperatives also provide agency workers to other investor companies. It could be argued that this is a case of illegal labour-only contracting proscribed by the Labor Code<sup>18</sup> and Department Order No 18-A, s. 2011. Unfortunately, some ARBOs, who are the direct beneficiaries of social justice provisions in the Constitution and agrarian reform laws, were the ones hindering ordinary workers from enjoying the constitutional right to security of tenure, freedom of association, the right to self-organization and the right to collective bargaining. Tragically, this denial by the ARBs of the regular status of farmworkers could also potentially prevent the latter from becoming ARBs themselves - considering that the Constitution specifically provides that farmers and regular farmworkers are the intended beneficiaries of land reform (section 4, Art 13, 1987 Philippine Constitution). If they are not considered as regular farmworkers, it would be easy for opponents of land reform to argue against their (farm workers') right to become agrarian reform beneficiaries since the Constitution provides that those entitled to own land under the agrarian reform program are "farmers and regular farmworkers who are landless."

The State shall, by law, undertake an agrarian reform program founded on the right of farmers and regular farmworkers who are landless, to own directly or collectively the lands they till or, in the case of other farmworkers, to receive a just share of the fruits thereof. To this end, the State shall encourage and undertake the just distribution of all agricultural lands, subject to such priorities and reasonable retention limits as the Congress may prescribe, taking into account ecological, developmental, or equity considerations, and subject to the payment of just compensation.

However, it could also be argued that the use of the word "regular" farmworkers in the Constitution should not be strictly construed against the farmworkers who are illegally misclassified as "casual" or "contractual", and that they should not be disqualified from becoming ARBs just because they were illegally denied regular status.

Equally unfortunate is the fact that the manpower agency business generated by the cooperatives becomes an undeclared consideration, or a sweetener, for the signing of the AVA. Thus, the cooperatives may be more willing to enter into an AVA even if the rate of the lease is low, since its manpower agency would augment their income through illegal labour-only contracting.

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<sup>18</sup>Art 106, PD 442 states that, "there is 'labour-only' contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. In such cases, the person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him."

## VI. AVA GROWERSHIP ARRANGEMENTS BETWEEN ARBOS OR ARBs AND INVESTORS

### A. Overview

Under section 3.14, DAR AO 9, s. 2006, a growership is defined as an AVA scheme where the ARBs commit to produce certain crops which the investor buys at prearranged terms (volume, quality standard and selling price). These AVAs include a variety of production and processing agreements including contract growing, exclusive marketing agreements, production and marketing contracts and supply and marketing agreements.

Smallholder farmers engage in growerships because these enable them to achieve higher yields, diversify into new crops and increase household income (Bijman, 2008). Production risks can be minimized as most contracts include arrangements for the provision of appropriate inputs and technical assistance to help farmers raise productivity and product quality. Some contracts may reduce marketing risks for they usually provide a guaranteed market with a minimum price. Unlike leaseholder schemes where ARBs are simply engaged as farm labourers, for those growers who are prepared to work hard and to undertake prescribed activities in a timely manner, production and quality incentives can lead to a higher financial return on the farmer's labour.

For the investors, growerships reduce both transaction costs and coordination costs. Through production and marketing agreements, investors are able to gain access to a predictable quantity of product, which is expected to meet some prescribed quality standard. This enables investors to enter into forward selling arrangements with downstream customers or to make appropriate investments in downstream processing facilities in the knowledge that they have an assured supply of raw product (Bijman 2008).

Given the capital constraints that most smallholder growers experience, the majority of these agreements make some allowance for investors to supply inputs, which may be in the form of planting materials, chemicals and fertilizers; infrastructure such as packing sheds, air strips and cable ways; and technical advice.

Where significant capital investments have been made, either directly or indirectly, through their cooperative, individual ARBs will be responsible for maintaining the infrastructure and may, in some instances, be responsible for the payment of some annual fee on the agreed value of the investment. These payments are generally deducted from the purchase price of the product, prior to distributing a lump sum to the cooperative for subsequent distribution to individual ARBs. As the investor will invariably seek to recover the capital value of their investment over time, the members of the cooperative will be required to enter into a long term contract, which is typically of ten years duration, with an automatic right of renewal for at least another five years.

Over the duration of the contract, prices for the crop may be fixed or variable. Where prices are fixed, provisions will be made in the agreement for a periodic review of prices or when significant shifts in the external environment, such as rapidly rising input prices demand it. For growers, as the fixed price is usually based on the anticipated costs of production to deliver a predetermined quantity of product, there is a guaranteed minimum price. The disadvantage however, is that growers are unlikely to benefit to the full extent from a marked increase in commodity prices.

Where output prices are variable, they are usually based on a formula derived from one or more international commodity trading platforms, such as the International Commodity Exchange (ICE), which establishes a price for commodities such as cacao and oil palm, but not bananas or pineapple. However, while growers have the opportunity to capture premium prices when the market moves upward, returns may be insufficient to recover the costs of production when the market moves downward. Furthermore, unless there is a competitive market, investors may be unable or unwilling to pass on any price premium derived from the production of superior quality product. There may be instances however, when the company unilaterally increases the buying price of bananas when the world market price is good (See Box 3).

## B. Issues experienced with growerships in Mindanao

### 1. Duration of the contract

From the investors' perspective, a contract duration of 15-20 years is considered necessary to adequately recover the costs of any significant investments in infrastructure. From a marketing and sales perspective, a three to five-year contract should be sufficient in providing assurances to downstream customers that the investor has a sufficient quantity of good quality product. The same period is also sufficient to recover the costs associated with the provision of technical support services.

However, from the ARBs' perspective, a contract of 15-20 years binds the growers into an agreement within which prices are predetermined. While, this is beneficial when market prices are low, the exclusive nature of these agreements prevents ARBs from transacting with other buyers who may be able to offer higher prices.

#### Box 3.

##### **EMPOWERING FARMERS THROUGH GROWERSHIP (Pulilan Agrarian Reform Beneficiaries Cooperative)**

PLATANO, a private company and a major producer, exporter and processor of banana and pineapple operates 660 hectares of banana plantation through a growership arrangement with three major cooperatives in Mindanao. One of these is the Pulilan Agrarian Reform Beneficiaries Cooperative (PARBENCO), with more than 300 members owning more than 500 hectares of banana plantation. Estimates from PLATANO showed that each ARB household owned about 1.5 hectares of banana farm land and 0.7 hectares of coconut farm land.

PARBENCO had the opportunity to avail of the assistance of DAR during its negotiations with the investor firm. The negotiation lasted for two years. Updates on the negotiation were regularly disseminated among the members and the final draft of the contract was presented through a General Assembly.

PARBENCO started its partnership with PLATANO in 2009 and while the supply agreement between them was set for a duration of 25 years, contract reviews (conducted every two years) enabled periodic adjustments of agreed floor prices. The cooperative also reported that their investor company sometimes unilaterally increased the price per box when the world market prices were good, and when the market is not so good, the company stuck to the agreed price.

Since 2009, ARBs reported an increase in incomes as contract growers in the plantations. An ARB family now receives a low of PHP 40 000 to a high of PHP 150 000 per month net income based on the various grades of banana sold to PLATANO. The farmers have adopted an Individual Farming System where each member is assigned to manage a specific plot of land, though the use of family labor or help-outs. Aside from this, ARBs benefit from PARBENCOS' diversified income sources. These include income from cash crops, a cooperative consumer store and the sale of banana products such as banana chips and banana cake.

During the FGD conducted by the research team, the farmers noted that growership arrangements are the best form of AVA for CARP areas. This is because growerships provide better opportunities for farmers to participate fully in the value chain. Farmers are also trained to ensure the good quality of their produce and are therefore able to compete well in the markets.

In other instances ARBs may be required to make payments to the investor for the disposal of product that exceeds requirements, or is rejected because it fails to meet prescribed quality standards. At the time of signing a growership agreement, the widely accepted practice is for the investor to present each of the ARBs with a "signing-on" bonus<sup>19</sup>. This bonus constitutes an unrestricted fund which the farmer may use any way s/he pleases and is not tied up to the production process. However, in most cases, this is not an outright payment but a loan, which ARBs will be required to repay in instalments over the duration of the contract, usually at an agreed annual rate of interest. As these instalments are deducted from the proceeds of sales, this will reduce the value of payments to the ARBs, thus making alternative offers from other buyers more attractive. This is important, for in most of the growership agreements, clauses have been inserted by the investors which prevent ARBs from terminating the contract until all loans have been repaid in full. Unless the cooperative has some alternative means of refinancing any outstanding loans, ARBs will have little choice other than to renew their contract with the investor.

## 2. Productivity

In some growership contracts, price agreements are based on some estimate of production costs, which include some anticipated estimate of yield. Achieving this level of productivity is important, for if the production falls below the anticipated level of output, ARBs will be unable to recover their production costs. Conversely, where through good management and good husbandry practices the ARB is able to exceed the prescribed level of output, the ARB will earn more *if* there is a market for the surplus product.

For a variety of reasons, both internal and external to ARBs and their organizations, ARBs often fail to meet the prescribed level of output. Internally, many ARBs lack the technical expertise to produce export quality products. Unless investors are willing to provide extension and advisory services as part of the contract, the situation is unlikely to change. This is because most ARBs do not have the financial resources to engage private consultants. Furthermore, most ARBs lack the capital to make the prerequisite investments in inputs (improved seed varieties, chemicals and fertilizers) that are necessary to achieve the desired levels of productivity. As a result, many ARBs are locked into input supply agreements with the investor, where the costs of the inputs, with an appropriate rate of interest, are deducted from the proceeds of sales.

Because of the need to minimize the variation in quality between growers, ARBs are often contractually required to follow prescribed production practices. This can often result in the application of inputs that are either unnecessary or surplus to requirements.

The other internal element that will have a significant impact on the levels of productivity and the resultant quality of the product is the level of motivation and commitment of ARBs. Regrettably, some ARBs fail to complete activities in a timely manner. To save on production costs, some substitute prescribed inputs with lower priced ones – often of poorer quality. These actions increase the risk of not meeting prescribed quality standards in the import market. Where chemical residues exceed permissible levels or indicate a violation of prescribed practices, provisions in many of the contracts allow the investor to call for a suspension of cutting and harvesting until the problem is resolved.

When product prices are high, individual ARBs may also find that they are unable to meet the prescribed levels of output because of the increased prevalence of product theft. This especially applies in

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<sup>19</sup>This is similar to the practice of making substantial up-front payments under the lease agreements discussed above.

areas where boundaries between individual landholdings are poorly defined (as in the case of collective CLOAs with pending subdivision surveys).

Externally, productivity is related to basic resource endowments such as soil types, climate and water. As there can be a significant variation in soil types within a prescribed area of land, some ARBs struggle to reach the prescribed targets where the soil is too light, excessively heavy or where drainage may be impaired. However, the most significant factor that impacts productivity is the year-to-year variation in climate.

Differences in rainfall patterns may stress the crop from a deficiency or excess of water. Typhoons, which historically have travelled to the north of Mindanao, have the potential to completely destroy standing crops. The variability in climate also has a direct impact on the incidence and severity of pest and disease outbreaks. While the need for additional control measures for pests and diseases results in increased costs, failure to control leads to lower yields, lower quality and a higher rate of rejection. In most cases, ARBs shoulder this kind of risk; and they expose themselves to rising levels of indebtedness, particularly in instances when crop inputs are in the form of loans and must be repaid to investors.

Moreover, when the industry faces significant disruption from the potential introduction of exotic pests and disease, both investors and ARBs complain about the complete absence of any government support in either controlling or in containing the threat. Given the significant contribution that the export of agribusiness products makes to the GDP, the lack of government involvement in protecting biosecurity is a significant constraint to the development of agribusinesses in the Philippines.

### 3. Pricing

The issue of pricing is perhaps the most problematic for growerships, with issues arising in both the input market and the output market.

In the input market, conflict arises from the non-competitive pricing of production inputs supplied by the investors, which, under prescribed management practices and exclusive supply arrangements, ARBs are required to apply as instructed. From the investors' perspective, it is desirable to be the exclusive supplier of inputs because they can be assured that: (i) the desired levels of productivity will be achieved; and (ii) that the chemicals and fertilizers used are unlikely to contain any contaminants which might otherwise result in the rejection of product in the import market.

Theoretically, given their superior purchasing power, investors should be able to purchase inputs at a significantly lower price than the ARBs or their cooperatives. Passing these savings on would enable ARBs to be more cost-competitive by reducing the costs of production. However, it seems that many investors prefer to apply a significant mark-up to establish a second income stream. For example, in the case of aerial spraying (for banana), the price charged by the investor for engaging a subcontractor can be significantly higher than the rate at which the cooperative can purchase the service directly, especially where the investor has applied a margin on the purchase of the chemicals. Furthermore, where the ARBs must borrow from the investor to purchase the inputs, not only is a third income stream established, but there is now a means by which ARBs can be bound in the agreement.

Another potentially problematic practice associated with the supply of inputs relates to input quantity. This arises primarily when the investor provides products that are purchased in bulk, such as fertilizers. All too often, ARBs find it difficult to confirm that the appropriate quantity (as invoiced by the

investor) of fertilizer has been delivered. This is because the delivery of inputs often occurs several months before growers are invoiced and the amounts deducted from their sales receipts. The ARBs sometimes find it challenging to maintain accurate records to confirm that the invoices are accurate.

In the output market, the key issues are price transparency and the means by which prices are determined under the contract. For products such as oil palm and cacao, both of which are traded on the ICE, the purchasing price can be determined by deriving a farm gate or factory door price based on the world market price. From this, the cost of processing, transport and handling are deducted, with an appropriate adjustment made for the exchange rate, since prices on the ICE are quoted in USD.

While the use of some international reference price as a mechanism for price establishment greatly improves the transparency of price determination, ARBs often face the risk of receiving prices that are insufficient to recover the costs of production. This invariably results in higher levels of indebtedness. Furthermore, there is some evidence to suggest that in the derivation of the pricing formula, prices may fail to reflect appropriate incentives for quality or efficiencies in the processing sector. In the cacao industry, significant price premiums exist for beans certified as Fairtrade or which meet a number of sustainable agriculture initiatives such as Global Good Agricultural Practice (Global GAP), Rainforest Alliance or UTZ certified. As the market for chocolate becomes more sophisticated, price premiums may also exist for cacao produced from specific varieties grown in a geographic area, which have been found to produce superior quality beans. Where this is the case, ARBs may not be appropriately rewarded unless such price premiums are factored into the formula.

In the case of oil palm, poor investments in technology may result in diminished returns for ARBs, since the extraction of condensate from the processing of fresh fruit bunches (FFBs) is dependent on the efficiency of the processing plant. Where the investor fails to make an appropriate investment in technology, returns to the ARBs will diminish through no fault of their own.

In the case of pineapple and banana, there are no international reference prices. Thus, returns to the ARBs are fixed and determined by the costs of production. While fixed prices based on the costs of production ensure that ARBs will recover their costs of production and thus receive some return for their labour, such pricing mechanisms fail to consider the dynamics of the market or buyer demand. In the case of banana, a significant price premium exists in the spring months (March to May), especially in the Japanese market (FAOb 2015). As fixed pricing mechanisms obscure these market signals, ARBs do not know that they should employ alternative production technologies through which they could harvest a greater quantity of fruit during the peak pricing season.

Given the oligopolistic nature of the banana industry in Mindanao and the knowledge that most ARBs are under exclusive contracts, a rise in prices as a result of some shortfall in global supply, is rarely reflected in the price premiums paid to ARBs. However, when prices decline, investors are able to minimize their losses through instituting "cutting down"<sup>20</sup> orders and rigidly enforcing quality standards. Under cutting down orders, ARBs receive only 50 percent of the agreed price for Class A bananas, the quantity of which is calculated from the preceding three to four weeks' delivery to the packing shed.

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<sup>20</sup>Cutting down orders in the banana industry refer to instructions given by the investor for ARBs to cut down ratoon that are ready to be harvested, thus destroying the fruit and removing it from the market.

Invariably, where prices are fixed, the agreement will make various provisions for a regular review of prices, generally every two years. From the ARBs' perspective, a marked increase in input prices (greater than five percent) may be sufficient to engage the investor in discussions to renegotiate prices.

Even so, it is widely recognized that input prices generally increase at a much faster rate than output prices (Moss 1992). This creates a situation that is commonly described as the cost-price squeeze. Traditionally, growers have been able to combat the cost-price squeeze by increasing productivity and harnessing the benefits derived from the economies of scale. However, with diminishing marginal returns, further gains in productivity are achieved only through the more intensive use of inputs. Potentially, this exposes ARBs to greater risk should the crop be destroyed by extreme weather events or diseases. Furthermore, as it becomes increasingly difficult to sustain continuous improvements in productivity, diminishing returns will begin to affect livelihoods and erode the growers' standard of living.

Irrespective of the manner in which prices are determined, the other major issue associated with pricing relates to the manner in which quality is assessed, the disposal of reject and/or surplus products and the costs that may be incurred in selling these products to other buyers (particularly when investors have provided production loans). Quality standards, by their very nature, are highly subjective. It is widely acknowledged that when prices are high and the supply of product is short, quality standards will be relaxed; but when the supply is plentiful, quality standards will be rigidly enforced (Batt, et al 2013). As the ARBs receive different prices for different quality levels - such as Class A, small and Class B bananas - the actual application of quality standards can have a significant impact on the ARBs' net returns. To reduce conflict, it is generally agreed that the final determination of quality in the packing shed should be made when a representative of both the ARBs and the investor are present. However, appropriate mechanisms for handling disputes are less evident in the areas visited by the research team.

#### 4. Pole vaulting

The issue of "pole vaulting" or side selling arises when the output prices negotiated between the investor and the ARBs are found to be lower than the prevailing market price. This causes the ARBs to sell to a third party buyer, who offers a much higher price, in violation of exclusive growership arrangements made between the ARBs and the investor firm. This situation can arise where: (i) prices are fixed all year round; (ii) investors are too slow or reluctant to raise prices in the output market when there is an increase in demand or short supply; (iii) investors need to recover costs associated with the provision of infrastructure, production inputs or credit advances; or (iv) ARBs choose to sell direct to non-contracted buyers thereby bypassing the cooperative and avoiding the deduction of a commission or fees associated with managing the cooperative.

Irrespective of the reason(s) why ARBs engage in pole vaulting, such opportunistic trading practices destabilize the ARB's relationship with the cooperative, with the investor and with LANDBANK. For example, in instances where cooperatives manage a fruit packing operation, the unit cost of packaging (carton) is derived from the anticipated throughput. Thus, if the anticipated quantity of fruit is not received, the unit cost of packaging may need to be increased to offset the fixed costs. Otherwise, the cooperative will incur a loss.

Additionally, the repayments the cooperative makes to LANDBANK may also fall into arrears if the ARB chooses to avoid selling through it. This particularly applies in situations where the land amortization payment is deducted by the cooperative or the investor from the proceeds of the sale.

From the investor's perspective, a reduction in the quantity of fruit that are available for sale may undermine their reputation as a reliable supplier of good quality fruit. With the need to potentially procure additional fruit from non-contracted growers, transaction costs will increase.

However, of more immediate concern is the investor's inability to recover the costs associated with the repayment of any credit advances or production inputs. In a manner similar to the given example on managing a fruit packaging operation (see above) investors will spread the ARB's principal and interest repayments across the anticipated supply, thereby protecting the household from any unanticipated increase in repayments. In other situations, especially where investors provide the packing materials at no cost, losses at the packing shed will amount to theft. Because all banana exporters use the same box, ARBs only need to change the top portion of the carton to engage in pole vaulting. To both monitor and control such opportunistic practices, the investor will make an allowance for the loss of packing materials between one-half to one percent. Anything beyond this is indicative of pole vaulting, unless it can be otherwise shown that the losses are attributed to some other external influence.

In the banana industry, the incidence of pole vaulting has markedly increased in recent years as a result of spot buyers or 'strikers' entering the market. The strikers are most active during the spring months when prices in the export market are at their highest level. As the strikers have no need to recover any credit advances, they can offer significantly higher prices. However, for the ARBs, there is no guarantee that the strikers will purchase fruit all year round. Furthermore, as there is no expectation of an on-going relationship, ARBs will make whatever fruit they have available to the strikers, irrespective of quality. This raises the very real possibility that the fruit will ripen prematurely in transit, thereby undermining the international reputation of the Philippines as a supplier of good quality fruit. Furthermore, it was reported in the Davao FGDs that where spot buyers enter the farm without observing established biosecurity protocols, there is a greater likelihood of introducing pathogens such as Panama disease.

For oil palm, where a new investor has either purchased an existing processing plant or built a new one without having made any credit advances to ARBs, the new market entrant will be able to offer a higher price for the fresh fruit bunches and thus secure supply.

In the emerging cacao industry, there is some evidence to suggest that ARBs do not need to supply more than 75 percent of their anticipated harvest to the investor. Potentially, this enables the ARBs to transact with other potential buyers who may be able to offer a higher price, without compromising their anticipated supply to the investor. In promoting cluster farming among smallholder vegetable farmers in the Philippines, the Catholic Relief Service (CRS) have adopted a similar approach. CRS requires growers to supply no more than 60 percent of their anticipated harvest to the cluster and thus to the focal customer (CRS 2007).

## 5. Risk of loss

Under the growership contracts reviewed for this study, ARBs are responsible for any financial losses which may arise from the outbreak of disease or the partial or complete destruction of the farm and its products from extreme weather events. For the ARBs, not only will this result in a significant reduction in household income, but it will also seriously impair their capacity to repay input loans from investors and to meet their land amortization payments to LANDBANK.

Crop insurance is the best way for ARBs to protect themselves from such losses. However, few are able to afford the premiums and there is some evidence to suggest that even when a claim is made, the amount of compensation received is well below the sum necessary to rehabilitate the farm (see Table 4).

Of more immediate concern however, are provisions within the growership agreements that enable investors to continue to charge interest against credit advances even in instances of loss that are beyond the ARBs' control.

**Table 4:** Insurance coverage for AVA plantation crops

Crop	Estimated total cost of production/ha. (PHP)	Amount of cover ceiling/ha (PHP) (PCIC, 2016)	Premium rate (%) (PCIC, 2016)
<b>Banana</b>	550 000 (Buguis 2014)	300 000	3.5
<b>Cacao</b>	45 500 (DA-RFO IX 2014)	60 000	3.0
<b>Oil Palm</b>	68 900 (PCA 2015)	46 000	2.0
<b>Pineapple</b>	124 780 (DA 2015)	70 000	2.5

On numerous occasions, there are provisions within an agreement, particularly for bananas, by which investors are able to shift a substantial portion of market risk to the ARBs. This issue relates primarily to the harvesting and packing of immature fruit that may breakdown in transit and cause premature ripening of an entire shipment. Not unexpectedly, such shipments will be rejected by the buyer. Despite the fact that the investor has the right to inspect the fruit on arrival at the packing shed and to inspect the fruit again both during and at the end of the packing line, under some contracts ARBs are required to replace the fruit at no charge and even to pay a proportion or all of the costs associated with packing, loading, transporting, unloading and disposing of the reject fruit. In one extreme case, provisions have been inserted into the agreement whereby the ARB is responsible for any losses in transit. This may include losses from a breakdown of the refrigeration plant aboard the vessel and the inability of the investor to sell the fruit because of an oversupply in the target market. In these instances, because the fruit has been purchased outright by the investor, ARBs should not be subject to these kinds of liabilities.

#### 6. Investor take-over clauses

Embedded within many of the growership agreements is a clause which gives investors the right to assume management of the property where ARBs consistently fail to use production inputs in the prescribed manner, meet anticipated levels of productivity or meet prescribed quality specifications. Such provisions, based on the assumption that ARBs do not have the appropriate technical skills, are designed to provide an opportunity for investors to recover the cost of any outstanding credit advances or interest repayments. Once invoked, the investor may charge whatever expenses they incur in managing the property to the ARBs.

Under these circumstances, ARBs are particularly vulnerable to exploitation. Investors may at their discretion employ one or more farm managers at whatever level of remuneration they choose and charge all production costs, plus a purchasing and handling margin for inputs, to the cooperative. Furthermore, the investor may, if they so choose, dismiss the ARBs and make alternative arrangements for the employment of labour. All of these costs will then be deducted from the proceeds of sale. Presumably, where output prices are derived from the costs of production, there should be a positive cash flow. However, where the costs of managing the farm exceed the revenue generated, interest charges will accrue against the outstanding debt, which without intervention, will continue to grow. As the management of the farm does not revert back to the ARBs until all loans and credit advances have been fully paid, there is little incentive for the investor to relinquish control.

### 7. Issues at the cooperative level

Unlike leasehold agreements where the land is collectively passed to the investor to manage as one property, growerships are comprised of multiple individual parcels of land or collective CLOAs. As the income that each ARB is able to derive from their parcel of land is dependent on the productivity of the land, differences in soil type, drainage and related aspects can have a direct impact on household income. Unless there is a transparent, independent, fair and equitable means for allocating the parcels of land to individual ARBs, conflict and dissension within the cooperative will inevitably arise.

Even after the land has been allocated to individual ARBs, additional problems often arise within the cooperative. One of these problems is in relation to the utilization of land held by non-participating ARBs who have retired, who are no longer farming or deceased. These lands need to be maintained as they provide a source of contagion for the spread of pests and diseases.

While each ARB may be responsible for their own parcel of land, most ARBs will transact with the investor through a cooperative. In the banana industry, individual ARBs will typically deliver their fruit to the cooperative for packing. Accurate records will be kept on the quantity and quality of the fruit delivered, as this will be the basis for payment to each ARB. From the investor, funds from the proceeds of sale are generally disbursed to the cooperative. The cooperative then deducts its expenses from the proceeds of sale. These may include: costs associated with the repair and maintenance of drains, roads and cable ways; operating the packing shed; and any costs associated with production, such as aerial spraying, plus an overhead management fee. As a result of financial mismanagement, poor communication and poor leadership, some ARBs may feel that they have been disadvantaged. In cases when a sufficient number of ARBs lose confidence in the management of their cooperative, it may be in their best interests to establish an alternative group if the situation cannot be reconciled.

## C. Labour issues in growership arrangements

In growership agreements, the ARBs themselves grow the crops, which they then turn over to their cooperative, who then sells to the investor. While typically, the ARBs themselves work on the land, they often employ "help-outs" (i.e. individuals known to them) and family members, both of whom are considered as "helpers" purported "to assist" the ARBs. In these situations, the 'help-outs' and the family members are

seldom treated as employees of the individual ARBs. However, even if there is no expected compensation and there is no fixed number of hours or days of work, it is clear that under the law, these help-outs and family members are employees of the ARBs. While it is unlikely that family members will raise employment law issues, it cannot be totally discounted that unrelated help-outs will seek to correctly assert that they are in fact employees of the ARBs and are entitled to all applicable labour laws, even though they work only in only part-time and seasonal.

The Labor Code clearly provides for the definition of employee, employer, employ and even agriculture.

#### Chapter I

#### PRELIMINARY MATTERS

Art. 97. Definitions. As used in this Title:

a. xxx

b. "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and shall include the government and all its branches, subdivisions and instrumentalities, all government-owned or controlled corporations and institutions, as well as non-profit private institutions, or organizations.

c. "Employee" includes any individual employed by an employer.

d. "Agriculture" includes farming in all its branches and, among other things, includes cultivation and tillage of soil, dairying, the production, cultivation, growing and harvesting of any agricultural and horticultural commodities, the raising of livestock or poultry, and any practices performed by a farmer on a farm as an incident to or in conjunction with such farming operations, but does not include the manufacturing or processing of sugar, coconuts, abaca, tobacco, pineapples or other farm products.

e. "Employ" includes to suffer or permit to work.

The "help-out" is employed by the ARB because by rendering service to the ARB, s/he is suffered or permitted to work by the ARB.

Note that the law, in determining whether a person is an employee, does not make any distinction (whether part-time or full-time or whether year-round work or seasonal work). They are all considered employees. Neither is there any reference on how the person was engaged to work, nor the type of compensation received.

Thus, under labour laws, help-outs are considered employees, except that they invariably do not seek enforcement of labour laws. As employees, they are also entitled to other benefits under current labour standards, like vacation leaves, holiday pay and the like. In any event, since they do not seek compensation, they consider themselves as unpaid volunteers, even as there is no legal impediment for them to assert that they should be considered as employees.

With regard to cooperatives, they may very well employ only a handful of people to work as clerks, managers, supervisors, bookkeepers, messengers, and other kinds of jobs. It is hoped that these employees will not be hired through manpower cooperatives or manpower agencies; instead, in accordance with labour laws, directly hired as regular employees of the cooperative.

## D. Recommendations applicable to growerships

### 1. Establish a market oriented price-setting mechanism

With the recent entry of 'strikers' into the Philippines export banana industry, it appears that the existing system whereby ARBs are paid a fixed all year price will need to be reviewed. Free from the need to deduct the costs associated with any capital investments or cash advances which investors may have made, strikers are able to offer higher prices. Furthermore, payments are often made in cash, and as the strikers have no authority to be present on the property, they are unable to inspect the quality of the fruit on arrival at the pack house or at the time of packing. Not only will this undermine current efforts by the investors to instil a quality culture, but many investors are now offering a spring bonus (or an anti-pole vaulting premium) to secure supply during the high price period (February-April).

With only a limited understanding of the market post farm gate, most ARBs fail to realize that the investors are themselves subcontracted to downstream customers, with buyers expecting a regular and reliable supply of good quality fruit that consistently meets prescribed specifications. Prices are generally fixed in advance of shipment, but will vary on a weekly, fortnightly or monthly basis, depending on supply and demand, and the frequency with which prices are renegotiated.

In facilitating the export of Philippine bananas, significant economies of scale are realized through the coordination of shipments, usually by chartered vessel; the construction; purchase or leasing of ports and refrigerated warehouses; transport; the implementation and auditing of quality assurance systems; the preparation of export documentation and the management of foreign exchange rates. As barriers to entry for small independent exporters are significant, investors can be expected to use their established positions to extract additional margins.

At this point, no independent analysis of the costs along the export banana supply chain has been undertaken. Not only would this show where efficiencies might be made to improve returns to ARBs, but with a greater understanding of the activities investors undertake and the risks involved in facilitating exports, the ARBs long-term relationship with their investor should improve, with a commensurate reduction in pole vaulting.

Furthermore, there is an immediate need to undertake an independent study to determine whether individual ARBs would be financially better off or worse off under a variable pricing model rather than the current fixed price model that operates under most existing growership arrangements.

Because bananas are a perishable product, the product is not traded on any of the world's major commodity markets. Hence, it is difficult to establish a reference price as basis for determining local fixed (or variable) prices. While numerous websites report a Central American and Ecuador banana spot price, which is reported in USD per tonne (fob), these prices do not reflect the highly competitive nature of the Asian market. Similarly, while the FAO (2014) report wholesale market prices in China, Japan and Korea, for the majority of the fruit imported from the Philippines, most sales occur within a closed, vertically integrated supply chain, where the majority of buyers are subsidiary companies and where the price at which the fruit is eventually sold to customers is by private negotiation.

**Recommendations:**

- Commission an independent study into the pricing of bananas
- Provide cooperatives with a market training program
- In collaboration with the investor, invite selected graduates from the market training programme to walk the supply chain from the farm gate to the customer's warehouse in the target market

## 2. Establishing safeguards for low commodity prices

With the competitive forces present in the Philippine banana industry indicating that a shift to variable pricing may be more appropriate, there is a very real danger that when prices decline, ARBs may fail to recover their costs of production. For oil palm, where prices are determined on a daily basis by the ICE, there is some evidence to demonstrate that returns to ARBs for FFBS have already fallen below the costs of production. Consequently, ARBs are struggling to meet their financial repayments to investors, to LANDBANK and to ensure that they have sufficient income to feed their families.

Given that the primary reason for instituting the agrarian reform agenda was to reduce the incidence of poverty among smallholder farmers, there may be sufficient grounds to petition the government to establish by statute, a minimum producer price for selected export commodities. However, the payment of a direct subsidy, irrespective of whatever social benefits it may deliver, is likely to contravene the rules under the World Trade Organization (WTO). Other problems that are likely to emerge include determining how long any price support mechanism should be maintained (as a low price may indicate that there is little demand for the product and producers would fare better by planting alternative crops in the long term). The other danger is that artificial price support mechanisms may be utilized to support a non-competitive industry, effectively stifling innovations that would otherwise enable the industry to improve efficiency.

Others have proposed statutory industry boards to establish a minimum price. However, establishing an export price based on the costs of production fails to take into consideration the price at which competitors may be able to produce and deliver the fruit.

Furthermore, as several Central and South American countries have been able to negotiate preferential access into traditional markets, exports from the Philippines are expected to become increasingly less price competitive.

Where statutory marketing boards are in operation, accompanying legislation is usually enacted to establish quality specifications which export quality fruit must meet. Regrettably, where compliance to these quality standards is rigidly enforced, exporters may not be able to respond to changes in consumer demand or to the emergence of new market segments.

It would appear that the most appropriate mechanism to protect producers from falling prices is through crop revenue insurance. However, an interview with the Philippine Crop Insurance Corporation (PCIC) has revealed that the scope of their charter is currently limited to insurance for natural calamities. Through government support, premiums could be established at rates that ARBs could afford and would provide protection from both a price reduction and the complete or partial destruction of their crops from extreme weather events.

During times of financial hardship, additional relief to ARBs should be possible through encouraging LANDBANK to make adjustments to the ARBs' land amortization payment schedule.

**Recommendation:**

- (For PCIC) Conduct a feasibility study on crop revenue insurance against price drops. If found feasible, propose proper legal amendment to Congress.

### 3. Input pricing

For those contracts which include provision for an exclusive supply agreement, investors are likely to enter into negotiations with potential suppliers to secure the desired quality inputs at the best possible price, but few it seems are willing to pass these cost savings on to ARBs.

For the ARBs, the requirement to use prescribed inputs that are not competitively priced increases their costs of production, often to such an extent that they are no longer profitable. Should the investor then offer to advance a loan, ARBs may become entrapped and unable to break the cycle of debt.

In business today, where the majority of transactions are conducted through integrated supply chains, the central driver for improving efficiency is value. While each member within the chain will use its market position and negotiating power to secure a higher margin - as investors are currently doing by providing inputs at grossly inflated prices - the performance of the value chain is compromised, for the chain is only as good as its weakest link. If the ARBs are not profitable, they will not have the capital to invest in improved on-farm management practices that will increase productivity, improve quality and improve efficiency. This will undermine the international competitiveness of the industry for, in the long-term, competitive advantage develops from cooperation and collaboration rather than short-term opportunism and exploitation.

**Recommendations:**

- Explore provisions in the AVA to ensure that ARBs have access to competitively priced inputs
- Issue an AO requiring investors in exclusive supply agreements to reveal the true cost of procuring inputs for ARBs. From this cost, the investor will be entitled to add a five percent administration fee
- Issue an AO preventing investors from imposing penalties to ARBs for procuring inputs of comparable quality.

#### 4. Separate marketing arrangements from financial arrangements

The current method of extending finance to ARBs requires a tripartite agreement between the cooperative, the investor and LANDBANK. For LANDBANK, advancing the loan through an investor provides not only an appropriate mechanism to facilitate the repayment of the loan through the revenue received, but also ensures that the funds advanced are expended for the purpose for which they were intended. While this practice might mitigate some of the risk for LANDBANK, for the ARBs it can lock them into a long-term agreement with an investor who may not provide the highest price nor, through exclusive supply agreements, with cost competitive inputs.

Experience with financing vegetable clusters in Mindanao (Real, et al 2011) demonstrates that in advancing loans directly to the cooperative, producers both individually and collectively are more aware of their financial obligations, more committed to the repayment of their loan and more empowered. Conversely, where the repayment of loans is tied to product sales, unless a detailed breakdown of each transaction is provided showing the price at which the product was sold, the quantity of product sold by grade, and the value of any deductions, producers are more inclined to pole vault.

Advancing the loan to the cooperative will break the cycle of dependence, thereby enabling ARBs, without encumbrance, to negotiate with potential downstream buyers for the highest price. Similarly, through their cooperative, ARBs can negotiate with input suppliers for the provision of the most cost effective products and services. For LANDBANK, should there be an unexpected reduction in the market price or an extreme weather event that reduces productivity, the cooperative, for and on behalf of its members, can negotiate directly with LANDBANK for a revised repayment schedule for any loans extended and land amortization.

However, there is a risk that without appropriate management controls funds may be expended for purposes other than the purchase of production inputs or investments in infrastructure to improve the efficiency of on-farm operations. At the cooperative level itself, there may be some difficulties in repaying loans where individual ARBs leave the cooperative, retire and or pass away. Where the cooperative itself becomes directly responsible for the repayment of any loans, it may be necessary for the cooperative to take out crop insurance for and on behalf of the ARBs.

##### **Recommendation:**

- (for LANDBANK) Explore alternative means by which production loans might be advanced directly to cooperatives rather than through investors

#### 5. Risk sharing

While the majority of AVAs make some provisions where both ARBs and investors are unable to meet their obligations as a result of external factors (*force majeure*), there are three important scenarios under grower-ship agreements where the ARBs alone must shoulder the responsibility and associated costs:

- Where ARBs are required to take out crop insurance to protect investors from losses associated with the provision of planting materials, production inputs or loans.

- Whereas an investor may terminate the contract at any time should it prove to be unprofitable, ARBs and their cooperatives will fall into more debt if production costs exceed revenue.
- Even when the investor takes possession of harvested fruits at the packing shed, ARBs often remain liable for any quality defects in shipping and distribution (premature ripening), market access (chemical residues) and in some situations, the inability of the investor to sell the fruit because of low demand in the market.

The more widespread use of crop insurance has already been recommended as a means of protecting ARBs from low prices and from the impact of extreme weather events. However, just as investors have the right to terminate an AVA should it prove to be unprofitable, ARBs should also have the right to engage with alternative buyers and/or input suppliers if the prices offered by investors are not competitive.

Having taken possession of the fruit at the packing shed, prior to or immediately after packing and palletizing, the investor should immediately assume ownership and thus the risk of loss due to any and all claims made against the fruit. To protect themselves from the risk of premature ripening or rejection from the presence of chemical residues, investors need to build a quality culture among the ARBs. However, a quality culture cannot be imposed on an organization: a quality culture develops when there is trust, open and transparent communication, and when both ARBs and investors recognize that profit can only be maximized when they work together (Batt, et al 2013). At the farm level, training will be required to reinforce the need to use inputs as directed and to perform activities in a timely manner. Post farm gate, engaging the ARBs in market training programs and inviting them to meet with customers in target market countries will greatly assist in overcoming the institutional impediments that currently exist. For ARBs, education and training must highlight the importance of quality management in reducing costs rather than striving for a price premium, for prices in the market will always be determined by supply and demand.

**Recommendations:**

- Ensure that ARBs are released from any obligations for the performance of the product in the market beyond that point at which the investor takes possession of the product
- Provide cooperatives with quality management training

## 6. Limitation or prohibition on company taking over the operation of the farm

To enable companies to protect and recover their own investments, there are provisions in many of the AVA agreements, which enable investors to take over the management of the property if ARBs have shown themselves to be incapable of achieving productivity targets or of delivering the desired quantity of good quality products over time. The principal concerns associated with these provisions relate to:

- circumstances under which investors can assume management responsibility for the property;
- the short period within which ARBs are informed by investors of their intention to take over the management of the property;
- ARBs' rights to challenge the investors grounds for assuming management responsibility;
- length of time the investors will have to manage the property;

- the terms and conditions under which the property will be returned to ARBs; and
- fees that investors may charge to the ARBs for managing the property.

While there may be circumstances when it is necessary for the investor to assume management of the farm, this should not happen without the approval of DAR. Initially, DAR would be expected to convene a meeting between the ARBs and the investor to determine if there are sufficient grounds for the takeover. Where the parties decide that a takeover is the most appropriate course of action, a revised contract would be drafted to outline the conditions of the takeover, the parties' responsibilities and the duration of the takeover.

In the past, experience has shown that investors do not necessarily employ the best management practices. Rather than to reduce the debt, the appointment of a corporate management team, full cost recovery, plus a handling margin for the purchase of inputs and low product prices can cause the ARBs' debt to escalate. To ensure that such management practices cannot and will not occur again, DAR will appoint an independent administrator, who shall approve the purchase of all inputs and product sales (see Box 4).

**Recommendations:**

- Require approval from DAR, all decisions of investor take-over.
- Appoint an independent administrator who shall approve the purchase of all inputs and product sales.

**Box 4.**  
**GROWERSHIP TURNED SOUR**  
**(Simunul Agrarian Reform Beneficiaries Cooperative)**

In 1996, 724 ARBs formed the Simunul Agrarian Reform Beneficiaries Cooperative (SARBCO) and collectively managed more than 600 hectares of banana farmland covered by CARP. SARBCO entered into a 10-year banana sales and marketing agreement with Equatorial Fruits Corporation, an export company of tropical fresh produce. This contract growing agreement was extended for 14 years after the initial period of 10 years has expired.

Under the contract, SARBCO agreed to sell all the Cavendish bananas that it produced at a fixed price, regardless of the season, provided that the produce met agreed specifications and quality. However, the contract also contained a "takeover clause," which allowed Equatorial to take over the management of the farm if SARBCO failed to follow Equatorial's "prescribed cultural practices" to the extent that in the opinion of the Buyer, the success of the crop is endangered". The contract is very vaguely worded and does not specify which the prescribed cultural practices are to enable the takeover clause to commence.

The take-over in fact happened, as an exercise of management prerogative. However, in spite of the takeover, the management of the farm continues to encounter income losses. As of July 2012, SARBCO owed more than PHP 175 million to Equatorial (more than USD 3.7 million). A review of the contract showed that this heavy financial dependence was brought by arbitrary increases in production costs since the cooperative is obliged to purchase all inputs from Equatorial and the inability of SARBCO to source other means of income using its land. The farmers are now asking for an audit of the indebtedness to make sure that the ascribed expenses are legitimate.

SARBCO has been effectively divided into a group that still allows Equatorial to continue the marketing and sales agreement and a group that refuses to do so. This led to some violent confrontations and a petition to PARC to nullify the contract, now pending with the DAR Adjudication Board. Negotiations are still on-going to date. During the FGD in Davao, the study team was informed that the debt had ballooned to PHP 500 million and was still increasing. The farmers are at a complete loss on how to be able to repay this debt.

## VII. NATURE OF THE CONTRACT / DISPUTE RESOLUTION MECHANISMS IN AVAS

### A. Contracts imbued with public interest

The preceding sections amply illustrate the complexities of AVAs, especially leases and contract growing arrangements. Ideally, these arrangements should result in both the ARB and the investor making a handsome profit. However, some contracts may result in the further impoverishment of the ARB, while increasing the wealth of the company. Who is now to judge whether the contract is fair and equitable? By what standards should these contracts be assessed and who is the appropriate arbiter in these kinds of disputes?

AVA contracts are imbued with public interest, and that public interest is found in a high constitutional mandate on social justice, human rights and agrarian reform:

The State shall, by law, undertake an agrarian reform program founded on the right of farmers and regular farmworkers who are landless, to own directly or collectively the lands they till or, in the case of other farmworkers, to receive a just share of the fruits thereof. To this end, the State shall encourage and undertake the just distribution of all agricultural lands, subject to such priorities and reasonable retention limits as the Congress may prescribe, taking into account ecological, developmental, or equity considerations, and subject to the payment of just compensation (section 4, Art XIII, 1987 Philippine Constitution).

The State has therefore mandated that insofar as contracts which impinge on the rights of ARBs are concerned, these are then deemed as agrarian reform matters and are within the exclusive jurisdiction of DAR:

DAR is hereby vested with the primary jurisdiction to determine and adjudicate agrarian reform matters and shall have exclusive original jurisdiction over all matters involving the implementation of agrarian reform (section 50, RA 6657).

The power of the State to review and intervene in these arrangements is further explained in DAR AO No 9, s. 2006. Under this AO, DAR has the power to revoke these contracts:

#### Revocation/Cancellation of AVA Contracts Implementation. —

Pursuant to Art II, Section 4, Item 4.24 of this Order, the PARC or the PARC ExCom or the DARAB, after due process, may revoke/cancel and terminate the implementation of the AVA contracts based on the following grounds:

19.1 Gross violation or non-compliance of the terms and conditions of the contract such as, but not limited to:

- 19.1.1 Non-implementation of the human resources development plan provisions;
- 19.1.2 Non-employment of the ARBs;
- 19.1.3 Concealment of the true financial status of the enterprise; and
- 19.1.4 Fraud.

19.2 When, without justifiable reasons, the AVA fails to provide benefits and incentives stipulated in the approved/witnessed AVA contracts, such as but not limited to, dividends accruing to ARB's equity shares, production and quality incentives. For this purpose, situations/conditions beyond the control of the investor such as force majeure are considered justifiable reasons;

19.3 When the AVA is no longer financially and economically viable;

19.4 When a portion of the commercial farm subject of the AVA is converted or fragmented into non-agricultural use without prior written consent of the general membership of the cooperative or association or a majority of the ARBs;

19.5 Action resulting to the transfer of ownership of the landholding subject of AVA to the investors; or

19.6 Other meritorious grounds (sec 19, DAR AO No 9, s. 2006)

DOJ Opinion LML-L-7D15-490 in one of the cases reviewed by the study, went further to say that arbitration is not the proper mode for dispute resolution since historically this is limited only to commercial transactions. When there is a public policy at stake, in this case the leaseback AVA and the applicability of agrarian reform, then RA 9285 (or the Alternative Dispute Resolution Act of 2004) is not applicable, since the matter of agrarian reform cannot be compromised and is a matter of public policy.

All these policy statements point to the idea that these contracts are indeed imbued with public interest. Hence even if the contracts have already been signed and sealed, the State imposes certain standards by which these agreements are measured, and are enforceable through action by DAR. The proper forum for its revocation or cancellation is DAR, more specifically either PARC or DARAB.

## B. Dispute resolution in labour law

Both substantive and procedural labour laws make no distinction between agricultural and non-agricultural workers. Thus, depending on its nature, every conceivable type of labour dispute could be referred to the various offices of the DOLE, voluntary arbitrators or the National Labor Relations Commission (NLRC). All adjudicated cases could also be taken (by way of appeal) to the Court of Appeals and then to the Supreme Court. However, just like ordinary non-agricultural workers, very few farmworkers have access to resources needed to assert their rights in those fora, especially as cases literally take years to finish.

Enforcement of judgments can often be challenging as well: some cases even go back to the Supreme Court with respect to the issue of computation of back wages, reinstatement or separation pay.

The NLRC has jurisdiction over unfair labour practice cases; termination disputes; if accompanied with a claim for reinstatement, those cases that workers may file involving wages, rates of pay, hours of work and other terms and conditions of employment; claims for actual, moral, exemplary and other forms of damages arising from the employer-employee relations; cases arising from any violation of Art 264<sup>21</sup> of the

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<sup>21</sup>Prohibited activities that may be committed by employers, unions, and employees such as launching a lock-out or strike without notice and without a vote; violence in the picket line; use of strike-breaker, etc.

Labor Code, including questions involving the legality of strikes and lockouts; and - except claims for Employees Compensation, Social Security, Medicare and maternity benefits - all other claims arising from employer-employee relations, including those of persons in domestic or household service, involving an amount exceeding five thousand pesos (PHP 5 000) regardless of whether accompanied with a claim for reinstatement (Art 217, Jurisdiction of the labour arbiters and the commission).

Under his/her visitorial and enforcement power, the Secretary of DOLE or his/her duly authorized representatives may determine violations and may enforce any labour law, wage order or rules and regulations issued, and issue compliance orders (Art 128, PD 442).

The voluntary arbitrator or panel of voluntary arbitrators shall have original and exclusive jurisdiction to hear and decide all unresolved grievances arising from the interpretation or implementation of Collective Bargaining Agreement (CBA) and those arising from the interpretation or enforcement of company personnel policies (Art 261, Jurisdiction of voluntary arbitrators or panel of voluntary arbitrators). Any dispute arising from wage distortions shall be resolved through the grievance procedure under their CBA and, if it remains unresolved, through voluntary arbitration (Art 124, Standards/criteria for minimum wage fixing). The parties may, upon mutual agreement, bring any other labour case to the voluntary arbitrator of their choice, which could include the Secretary of Labor.

In cases when there are grounds for strikes or lock-outs, the union or the management may file with the National Conciliation and Mediation Board (NCMB) of DOLE a notice of strike or lock-out, or a notice of preventive mediation (Bureau of Labor Relations n.d.).

In 2011, the DOLE Secretary issued "The rules of procedure of the single-entry approach (SEnA)". A SEnA is "an administrative approach to provide a speedy, impartial, inexpensive and accessible settlement procedure of all labour issues and conflicts to prevent them from ripening into full blown disputes" (DOLE Department Order No 107, s. 2010). Under this system, except for those cognizable by the voluntary arbitrators and the NCMB, any worker or employer may fill-out a "Request for Assistance (RFA)" form, asking the Single Entry Approach Desk Office (SEADO) to conduct conciliation-mediation proceedings to assist parties to arrive at a settlement. The process can also be initiated by a mere letter or email (even anonymously). The SEADO will conduct conciliation proceedings in order to give the parties the opportunity to settle. If no settlement is reached within 30 days, the SEADO shall issue a "referral" to the appropriate DOLE office or agency, including the NLRC. If the parties agree, the referral may also be addressed to a voluntary arbitrator.

## VIII. ISSUES AND CHALLENGES WITHIN ARB COOPERATIVES

### A. Introduction

The aggregation and concentration that continues to take place within the global food industry is shifting the basis of competition between firms in the value chain to competition between value chains. Acting independently, smallholder farmers will find it difficult to engage with downstream buyers, for they are generally unable to provide a sufficient quantity of good quality product at a competitive price (FAOc 2007). However, by learning to work collaboratively, smallholder farmers can collectively improve the quality of their produce and thus their participation in the institutional market.

In the Philippines, the preferred means of collaboration is through the formation of cooperatives. This was affirmed by the passage of the Agrarian Reform Code in 1969, which mandated that cooperatives be utilized as primary conduits for credit, supply and marketing services to ARBs (Araullo 2006). Aside from these services, DAR has also utilized cooperatives as the main channel for the distribution of agricultural lands under CARP.

A cooperative is a “duly registered association of persons with a common bond of interest, who have voluntarily joined together to achieve a lawful common social or economic end, making equitable contributions to the capital required and accepting a fair share of the risks and benefits of the undertaking in accordance with universally accepted cooperative principles” (Art 3, Cooperative Code of 2008). These principles include: (i) voluntary and open membership; (ii) democratic member control; (iii) member economic participation; (iv) autonomy and independence; (v) education training and information; (vi) cooperation among cooperatives; and (vii) concern for community (International Cooperative Alliance 1995). Not all cooperatives follow all of these principles, but the key difference that distinguishes them from investor owned firms is that members have two roles in the organization: (i) as patrons (i.e. selling or marketing through the cooperative) and (ii) as investors (i.e. the major source of investment funds). Inherently, these two roles are the source of both the strengths and the weaknesses of cooperatives (Murray -Prior 2007)

At the farm level, cooperative marketing by farmers has operated with varying degrees of success in the input market, the output market, or both. O’ Connor (2004) identifies three primary motivations for collective action:

- Consolidation at the farm level enables smallholder producers to overcome problems associated with transport, storage and asymmetric information, but perhaps most importantly, to negotiate more favourable prices with input suppliers and institutional buyers;
- An opportunity to engage in downstream processing or to capture a greater share of added value; and
- Capture some of the benefits derived from operating under a cooperative structure, for in most countries, cooperatives benefit from exemptions under competition law and more favourable taxation arrangements.

- A cooperative organized under the Code must register with CDA to acquire juridical personality. This is deemed acquired only after the Authority issues a certificate of registration under its official seal (Art 16, Cooperative Code of 2008).

The highest policy-making body of a cooperative is the general assembly, composed of the regular members who are entitled to vote as provided in its articles of cooperation and by-laws (Art 32, Cooperative Code of 2008), while the day-to-day direction and management of its affairs is vested on a five to 15-member BOD, who are elected by the general assembly, and who serve for a term of two years (Art 37, Cooperative Code of 2008). The chairperson and vice-chairperson of the cooperative are elected from members of the BOD. Other offices are elected or appointed from outside the board in accordance with its by-laws (Art 42, Cooperative Code of 2008). The other officers include the members of the different committees, who are elected, and the manager or chief executive officer, secretary, treasurer and other officers that may be provided by the by-laws, who are appointed by the BOD.

The Code mandates that the by-laws of a cooperative create committees for the efficient conduct of its affairs. These include an executive committee, which are delegated with powers and duties by the BOD, and the audit, election, mediation and conciliation, ethics and other committees that may be deemed necessary by the cooperative (Art 43, Cooperative Code of 2008). Only the members of the audit and election committees are elected by the general assembly. The BOD appoints the members of all other committees.

In practice, an education committee is always created by the by-laws of a cooperative to handle the provision of the Code for the "education and training for members, elected and appointed representatives, managers and employees so that they can contribute effectively and efficiently to the development of the cooperative" (Art 4(5), Cooperative Code of 2008). To push further the need for education, the Code mandates that up to ten percent of its net surplus is set aside as a cooperative education and training fund, one half of which is to be remitted to a union or federation in which it is a member (Art 86 (2), Cooperative Code of 2008), where it can access education and training support.

As of 31 December 2014, there were 24 642 registered cooperatives in the Philippines, of which 116 or 0.5 percent were purely agrarian reform cooperatives. More than half (or 14 912) were classified as multi-purpose cooperatives, which may also include agrarian reform beneficiaries as members (CDA 2014).

## B. Issues and challenges within cooperatives

Despite the many benefits that arise from collective action, history shows that the majority of cooperatives fail because of:

- a lack of understanding of the actual constraints smallholder farmers face (small scale production, high levels of illiteracy, low levels of human capital, ill health, low social and political status, and poverty);
- insufficient emphasis on the internal prerequisites of leadership, management experience and technical know-how; and
- the lack of external prerequisites in the form of physical infrastructure, market information, regulatory institutions, technology, and pricing policies towards commodities and capital (Lele 1981).

In the Philippines, cooperatives tend to fail because of the absence of loyal membership support, lack of economic justification, insufficient capital, poor management, insufficient volume of product, political interference and competition, opposition from established business and vested interests, a lack of understanding of cooperative principles and aims, and the improper use of credit (Velasco 1975). These were supported by a recent study, which further included inadequacies in education and training and government support (Sibal 2011). Given that these problems remain even after several decades, much needs to be done for the cooperative sector to grow and to be considered as the most viable option for the AVA program, if not for poverty alleviation.

Most collaborative marketing groups operate under the democratic principle of "one man one vote." This largely ignores the scale of the different contributions members may either choose to make or be able to make. Additionally, collective action (such as the organization of cooperatives) requires time, effort and a significant number of resources (Bernard, Spielman, Taffesse, & Gabre-Madhin 2010). These requisites grow and become even more complex as the membership increases and the members' interests expand. This becomes a problem when the cooperative, as an organization, fails to keep up with these changes. Not only may the management team lack appropriate management experience and expertise (O'Connor 2004), individual members seldom have the skills to adequately supervise the activities of management (Murray-Prior 2007).

Within the Philippines and more specifically within the context of agrarian reform, many of the problems experienced by cooperatives hinge on the knowledge that they were non-existent in communities at the time the lands were distributed. As no cooperative was present, there was a rush to organize them, often with the help of NGOs.

### C. Capacity gaps in governance

Based on the FGDs conducted and a review of secondary information, poor governance is the biggest single problem confronting cooperatives. This has a number of components:

- a. Lack of understanding on the principles of cooperatives.

A high level of commitment by the members is essential in the success of any organization. No matter how well-intentioned the objectives of the organization may be, its success is ultimately dependent on the extent to which its members "buy-in".

In the FGDs, some ARBs stated that they were required to join an ARBO so that their names could be included on the list of beneficiaries at the time the land was distributed. The Cooperative Development Authority (CDA) requires that a pre-membership seminar be held for all prospective members prior to the formation and registration of a cooperative or prior to acceptance as members. All too often, this seminar was not held or was conducted hastily. Thus, ARBs were neither informed nor prepared when they joined cooperatives. Unfortunately, this was an unforeseen consequence of the government's desire to fast-track the implementation of CARP, which was done in partnership with several non-government organizations (NGOs).

In addition, not enough in-depth discussions on the universal principles of cooperatives were done during the cooperative pre-membership seminars. While most leadership training was conducted by CDA-

authorized mentors, there was little if any discussion on the cooperative principles. New members therefore, were not properly oriented about the meaning of cooperativism, with many simply seeing it as a hurdle that had to be overcome to gain access to the services being offered.

This relatively weak internalization of cooperative principles has an impact on the level of cooperation among members and undermined the ability of the cooperative to comply with its commitments under the AVA contract. It also leads to waning interest of the members, particularly in the absence of immediate economic benefits. The lack of commitment fosters pole vaulting, with individual or household financial gains taking precedence over collective benefits.

**Recommendation:**

- (For CDA) Require education committees of cooperatives to reinforce the universal principles of cooperatives in regular refresher courses for all members and officers

b. Electing or hiring of officers who lack integrity

Dishonesty and a lack of integrity among cooperative officers can be a serious problem. Some officers are dishonest from the beginning and join the cooperative solely with the intention of leveraging their position for personal gain. Others may begin with honest intentions, but change when they are put in a position of responsibility that requires them to manage the cooperatives funds.

ARBs cited numerous examples where officers of the cooperative were seen driving expensive cars and displaying other material possessions that they could not otherwise afford. This led to a presupposition that officers were engaged in corrupt practices. Additionally, some cooperative officers were suspected of colluding with the investor in relation to the negotiation of AVA contracts. When ARBs see their leaders attending social functions with company officials, this leads them to suspect that their officers are putting their own interests ahead of the cooperative. In some instances, officers of the cooperative have been able to secure lucrative side contracts with the investors by providing complementary services such as hauling or trucking services.

These issues lead to mistrust, which arises from the lack of transparency. Some officers were reported to be unable or unwilling to share information about AVA related matters, including contract details. In other instances, officers of the cooperative had entered into contracts on behalf of the cooperative without consulting the ARBs. Such behaviour threatens the very existence of the cooperative.

Another cause of distrust in officers arises when these officers or their close relatives occupy management positions in the investor company. In some cases, this can lead to a perception that the officers are working for the welfare of the company rather than the welfare of the cooperative. On the other hand, those who occupy relatively senior positions in the investor company can bring significant expertise to their positions as ARBO officers.

The election of officers who lack integrity can be minimized if the Election Committees seek to broaden the choices during cooperative elections. This can be done by encouraging more reputable members to run for office and lengthening the period of the campaign to allow the members to know the candidates' capabilities and character.

In addition, it would also be helpful to encourage more women to become officers. In the Philippines, women have played a central role in the development strategies of many cooperatives. There is a common appreciation among cooperatives that women can facilitate the delivery of development goals more effectively and more equitably than men (Teodocio 2009).

All officers of cooperatives, both elected and appointed, are required by the CDA to undergo two mandatory training courses: (1) fundamentals of cooperatives and (2) governance and management of cooperatives. Ideally, these aim to develop more competent and responsible officers. However, there is a need to revisit the modules to ensure the training meets the specific needs of the cooperative.

Cooperatives are also legally required to have an Ethics Committee, which develops, promotes and implements a Code of Governance and Ethical Standards to be observed by the members, officers and employees of the cooperative (Art 43, Philippine Cooperative Code of 2008). It is up to the Ethics Committee to ensure that this code is followed and that members and officers who do not follow the guidelines are penalized.

**Recommendations:**

- Supplement mandatory trainings with more need-based courses for officers. This can be funded by the Education and Training Fund of the cooperative
- Require the Election Committee to ensure that there is a wide range of choices for candidates, including women, and to adopt measures to ensure the fairness of the elections of the cooperative
- Orient the Ethics Committee members about their functions as committee members, and provide incentives for developing/updating and enforcing the Code of Governance and Ethical Standards of the cooperative
- Require the management and all elected officers of the cooperative to sign a pledge of commitment to their cooperative's Code of Governance and Ethical Standards
- Encourage cooperatives to discuss the Code of Governance and Ethical Standards with prospective members in the pre-membership seminar, and at least once a year in the general assembly
- Require cooperatives to limit the number of members who occupy senior positions in the investors' company from becoming officers in the cooperative, to prevent the perception of conflict of interest

c. Inadequate financial management skills, internal controls and transparency

Issues cited in the FGDs point to the lack of basic internal control measures to prevent fraud. Inadequate internal controls, coupled with the absence of transparency in the conduct of cooperative transactions can lead to mistrust, theft and even bankruptcy.

A set of cooperative management standards has been established by CDA through the Cooperative Performance Questionnaire (CDA Memorandum Circular No 15, s. 2013). This questionnaire has 14 items on internal audit, including questions on whether internal audits are conducted periodically and if management acts upon internal audit observations and comments immediately. The cooperative submits the results of this self-assessment to the CDA at the end of each year. The CDA then review and validates the findings in these reports.

Transparency in transactions can be improved if the members participate in deliberations or exercise their right to examine the books and records of the cooperative and to demand explanations where transactions are perceived as doubtful or unclear.

However, this right is seldom practiced as many ARBs are unaware that they can do so. Furthermore, with limited schooling, many ARBs are unable to read or to comprehend the contents of a financial statement. Training is required as many members of ARBO Audit Committees lack knowledge and experience as most officers are farmers, not accountants.

**Recommendations:**

- Strengthen cooperatives' audit committee capacities in doing audit work and performing regular functions. Encourage BODs to require audit committees to prepare a report at least on a quarterly basis
- Train BODs in risk management and internal control, as well as in understanding and analysing financial statements
- Train BODs on policy formulation to implement Manual of Operations
- Encourage BODs to require regular submission of month-end financial statements. Ensure that these discussions are included as a permanent agenda in all BOD meetings
- Encourage cooperatives to hire bookkeepers with accounting background and commit to strictly follow the by-laws specified by CDA. This can be done by shared recruitments (one bookkeeper serving two or more cooperatives)
- Encourage cooperatives to hire reputable external auditors or auditing firms that can provide quality work. Require external auditors to provide regular suggestions for internal control improvements in the cooperative

c. Term of Directors and Officers

Many investors have spoken of problems associated with the regular turnover of elected officers. This prompts the need to revisit, and in some instances, to renew pre-existing arrangements. The 2008 Cooperative Code has limited elected members of the BOD of cooperatives on a two-year term unless

otherwise provided in its by-laws. Although the Code removed the limits on re-election, there is no guarantee that the members of the board who signed the agreement will not be re-elected.

While the two-year policy was no doubt instituted to prevent or to limit opportunities for individuals to seize power and thus use the cooperative as a means to advance self-interest, it did introduce a number of unforeseen consequences in terms of business continuity and in the capacity to engage with investors. Both the investors and ARBs need some stability in their interactions with the cooperative.

**Recommendations:**

- Encourage staggered term for BODs to be incorporated in the cooperative by-laws. This would mean that 50 percent of the elected members of the Board would be elected every year, providing the investors with some continuity in whom they can transact
- Encourage cooperatives to include in their by-laws limits for re-election to avoid possibilities of unnecessary or disadvantageous collusion with investors. Limits to re-election will also foster a new generation of leaders

## D. Capacity gaps in business management

### a. Inadequate basic business management skills

On numerous occasions, investors have spoken of the difficulties they experience in negotiating with the cooperatives. Few cooperatives have appropriate financial and management skills despite the large amounts of money that they handle for and on behalf of the ARBs. Not unexpectedly, this can result in some very poor decisions being made, which can have significant long-term implications for the cooperative.

Some cooperatives engaged in AVAs lack the capacity to effectively manage a farm business and other associated businesses in which their organization may engage. They lack training and experience in financial management, pricing, supply chain management and negotiating skills, and their financial records are not organized or updated. This not only threatens the viability of the ARBO, but it also puts the managers of the ARBOs at a disadvantage when negotiating with investors, thus affecting the incomes of the cooperative and its member-ARBs. It may also undermine the sustainability of the partnership.

**Recommendations:**

- Provide cooperatives with regular access to appropriate business training from the private sector, with assistance from appropriate government agencies with business development training programmes
- Employ regular business consultants when financially able

In many cases, ARBs are the owners of land growing commodities that they do not know how to grow. Although some ARBs are capable of cultivating and managing their own land (DARd 2011), most ARBs are given very minimal training on very specific farm technologies that can boost productivity. Most training approaches were limited to a particular phase of a farm task and usually through short “instructional-demonstration” sessions (FGD with DAR-AVA focal group 2016). This is especially disadvantageous for cooperatives in contract growing schemes, as they have to fend for themselves and rely on their limited experience as farm workers prior to land ownership.

A recent investor-entrant in the AVA sector in Mindanao is implementing a comprehensive technical skills development programme that trains farmer-leaders to become para-extensionists. As para-extensionists, their role is to provide extension services on crop technologies under the AVA. Based on this specific agreement, smallholders and investors are partners in the contract-growing and buy-back guarantee scheme. By providing extension support, the company expects the supply of products to be more reliable and of better quality.

**Recommendations:**

- Encourage investors to provide technical training for their partner-cooperatives
- (for DA and DAR) Work collaboratively in training a group of subject matter specialists on high value crops in the AVA sector under the High Value Commercial Crops Development Programme of DA

b. Lack of adequate support services in legal information and education

In the absence of any legal support services, ARBOs are at a distinct disadvantage in being able to negotiate for fairer and more equitable contract terms. It was repeatedly mentioned in the FGDs that little effort has been made by the government to assist ARBs and their cooperatives on legal matters.

While investors believe that DAR does not need to be present during any contract negotiations between ARBs and their investors, it is abundantly clear that most contracts are disadvantageous for the ARBs and are therefore not well-negotiated (FGD Cagayan de Oro 2016) (FGD Davao 2016).

DAR established its Program Beneficiaries Development (PBD) lawyering or enterprise lawyering programme in 2013 to respond to the need for a more holistic counselling approach in the negotiation of contracts. This holistic approach centres on providing support – not only in the legal aspects of ownership, but also in the business-related provisions of AVA contracts. The PBD lawyering scheme aims to develop the skills of ARBs and their organizations through a team of support services and legal staff from DAR’s provincial and regional offices. With these, DAR aims to ensure sustainability of the farms awarded to the ARBs by improving their knowledge in negotiating contracts, enabling them to access financial services and investments from diversified sources, strengthening their ability to mitigate various kinds of business risks and manage their farms as business enterprises.

However, the FGD results indicate that DAR’s PBD Lawyering Program was not sufficient to cover all AVA cooperatives. Moreover, the program was only started in 2013 at a time when many of the contracts had already been signed.

**Recommendations:**

- Conduct an information drive to improve ARBs' awareness on the availability of the PBD Lawyering programme and how ARBs will benefit from it
- Assist cooperatives in the renegotiation of their AVAs with investors. To address manpower limitations, legal advisors may be outsourced from alternative legal groups (such as law firms, the Integrated Bar of the Philippines, and other NGO legal service organizations)

c. Inability of farmers and their cooperatives to share information about their contracts

Whether to protect their intellectual property or to confuse, obfuscate or otherwise prevent ARBs from seeking independent advice, a number of contracts contain confidentiality clauses or clauses of non-association. It is widely acknowledged that in understanding their obligations under various growership agreements, ARBs are at a significant disadvantage. Contracts are often written in English rather than their vernacular, and while the ARBs obligations are clearly specified, the investor's obligations under the agreement are sometimes vague and obscure (IDEALS 2013).

To help ARBs better understand their contracts and their obligations and to ensure that they receive all the benefits to which they are entitled, DAR could sponsor inter-cooperative dialogue sessions to facilitate the exchange of information and good practices among cooperative groups. A confederation of cooperatives could also be organized to provide a more systematic means for information sharing. For AVAs, a confederation of cooperatives would also enable the ARBs to meet and to collectively discuss prices, thereby ensuring that they were better informed at the time they enter into negotiations with investors to renew or revise their AVAs.

**Recommendation:**

- Sponsor inter-cooperative dialogues to facilitate discussions on AVA terms, input prices and output prices without fear of reprisal from the investor companies and with the participation of DAR officials and lawyers

## E. Succession and transfer

Another challenge facing the cooperatives is the issue of succession – what will the cooperative do when a member retires, or dies, changes location, goes abroad permanently or violates any obligations under CARP? What happens to his/her rights and entitlements under CARP Law and the Cooperative Code?

These were prominent issues during the FGDs conducted by the study team. However, it was not as important as ensuring a steady and sustainable livelihood over time. Notably, those groups that flagged these issues were those cooperatives that have been long-established and were now experiencing second-generation challenges like succession and transfer.

DAR and CDA issued joint AO No 9, s. 2008 or the revised rules and regulations on ARB membership status and valuation and/or transfer of paid-up share capital in agrarian reform plantation-based cooperatives. However, there is a need to translate this AO into a language that can be easily understood by the ARBs.

Another issue related to succession pertains to the labour and hiring policies of the company, especially in situations where the land is under lease. According to the joint DAR-CDA AO No 9, s. 2008, the cooperative can refund the share capital of the farmer to the heirs, and the land can be transferred to another qualified ARB if the farmer has no successor (spouse or children) that would like to take up farming or continue their involvement in agriculture. However, if the labour policy of the company leans toward the hiring of contractual labour, then the ranks of the regular farmworkers will become less and less over the years, and there will be fewer qualified ARBs to choose from over time. In the long-term, this may result in

**Recommendation:**

- Include discussions on the challenges and opportunities that the current rules around succession in ARB cooperatives in capacity-building activities. Because of the peculiar nature of farmers' entitlements under CARP, this can only be done by DAR. However, it is also necessary that these activities be integrated with the larger capacity-building efforts of DAR, DA and local agriculture offices.

## F. Dissolution and fracturing of cooperatives

Given the increasing diversification of memberships among cooperatives, there is a need to train cooperative leaders in the proper handling of conflict. In some instances, where conflicts can no longer be resolved, one or more groups of ARBs elect to separate from the cooperative and form an alternative group. In most cases, these problems arise from financial decisions made by board members or attempts by elected board members to secure a permanent position on the board. While such divisions can be disruptive in the short term, fracturing of cooperatives to preserve a more cohesive group may prove to be a more viable long-term solution.

**Recommendation:**

- Provide legal and similar forms of assistance to large cooperatives that want to break into smaller cooperatives. This especially applies to cooperatives that aim to preserve cohesive groups in the course of carrying out partnerships under AVAs.

## IX. ISSUES AND CHALLENGES FOR THE GOVERNMENT

### A. Department of Agrarian Reform

#### 1. The context of AVA regulation and recommendations

In terms of AVAs, DAR needs to define its role in the legal, technical, financial and organizational aspects of capacity building of farmers and their associations. There is also a need for DAR to position its role in the regulation of contracts entered into by ARBOs and investor firms.

The caveat to this challenge is that not all AVA partnerships are within the jurisdiction of DAR. As previously mentioned, only around 25 percent of lands covered by agribusiness arrangements are lands distributed under agrarian reform. Thus, DAR is a minor but important player in the development and sustenance of agribusiness ventures in the country. The DA, on the other hand, should be able to support the remaining 75 percent of AVAs and protect the interest of the farmers that they cover.

This is easier said than done, especially if one takes into consideration that DA is a devolved agency while DAR is not. However, the government needs to find areas of collaboration, if only to ensure that the needs of farmers in the AVA sector are properly addressed.

One strategy may include institutionalizing support services within the scope of DA, thereby enabling DAR to concentrate on the regulatory and dispute resolution aspects of agrarian reform. However, it must also be considered that DAR's mandate in the regulation of AVA contracts is limited to ARBs and their activities do not extend to other smallholder farmers. Looking at this narrow focus for the time being, the challenge is defining which intervention point in the process would be most efficient in terms of utilizing scarce resources, and effective, in terms of long term impact.

DAR has a limited capacity to regulate contracts, as the regulatory framework emphasizes a review-approval-monitoring process after the contracts have been signed and sealed (rather than when contracts are still on the negotiating table). The provisions under DAR AO No 9, s. 2006 stating that contracts without DAR's approval shall be rendered null and void, further complicates the process as this "approval" occurs only after the contracts are signed and sealed and therefore produces uncertainty in commercial transactions.

#### **Recommendations:**

##### **For future contracts:**

- Decentralize and simplify the process of approval through the Regional Director, with the assistance of the Chief of the Legal Division at the Region and the Head of Beneficiaries Development. The application shall be deemed approved if within 90 days from filing, no action has been taken by the DAR
- Provide special training to DAR lawyers to enable them to assist the farmers and cooperatives involved in AVAs. This can be done as a transition measure, while the capacity building programme is being rolled out

- Strengthen the capacity of DARAB in the review of AVAs
- Strengthen the PBD Lawyering approach through :
  - Consolidating all the learnings of this study in a manual on best practices in AVA contracts, identifying what kinds of provisions to avoid or renegotiate. Use this manual as a guide in training the trainers for farmers in the AVA sector
  - Developing training modules on how to simplify and adapt the rules on succession to the farmer associations. This can be in the form of popular education materials, or popular education training approaches
  - Looking into the possibility of outsourcing this expertise to lawyers who work for the public interest

**For existing contracts:**

- Provide an amnesty period of six months wherein all existing contracts not yet approved by the DAR can be filed for review and approval, with the caveat that if no action is taken within 90 days from filing, the same is deemed approved

## 2. The context of capacity building and the role of DAR

DAR also provides capacity building interventions for cooperatives. It has a full range of capacity building activities under the support services component of CARP. Through the agrarian reform community (ARC) approach, DAR provides interventions for the continuous development of cooperatives. In turn, cooperatives are viewed as conduits of activities and services geared towards the development of ARCs.

At the start of CARP, the support services provided by DAR were largely for community development. Capacity building on technology for ARBs was supposed to be accessed from CARP-implementing agencies like DA (for production) and Department of Trade and Industry (DTI) (for processing). It was only during the implementation of foreign-assisted projects (FAPs) that DAR directly delivered technology training to address productivity concerns. The FAPs allowed the hiring of staff with production and processing technology capacity, as well as those with business and marketing capabilities. These personnel were responsible for training ARBs. However, agrarian reform lands with existing AVAs were not part of the priority areas of all FAPs.

During this period, the bulk of funds and the needed expertise for support services rested with the other agencies. The prime strategy of DAR is to strengthen its collaboration and complementation with appropriate agencies that will bring about increased productivity, increased incomes and improvement of ARBs well-being. To achieve this, organizations are being provided with the necessary support.

In recent years, one of the major final outputs (MFO) of DAR in its budget is the Technical Advisory Support Service (TASS). The TASS specifies development interventions from DAR and other government agencies, through training programmes and the construction and rehabilitation of infrastructure facilities. To ensure a more holistic support to ARBs, DAR's coordinative task to access basic social services is also included in this MFO.

Under DAR, there are two major projects for capacitating ARBOs. These are social infrastructure and local capability building (SILCAB), and sustainable, area-based rural development (SARED). SILCAB is geared towards providing training and other learning activities to strengthen the management of cooperatives, while SARED is concerned with ARBs agricultural production for food security and basic needs sufficiency.

DAR has also adopted the Farm Business School (FBS) as a model for providing farmers with a season-long training programme on making farms more profitable by enabling farmers to learn about business. Introduced in the Philippines through the project “Capacity building of small farmers in entrepreneurship development and market access project” (TCP/PHI/3402) of the Food and Agriculture Organization of the United Nations (FAO), it promotes the adoption of a market-oriented extension scheme in the public sector. The Agricultural Training Institute (ATI) of DA and DAR has started the FBS implementation in all regions of the country.

DAR also has a successful partnership with CRS in a project called “Linking ARBs to corporate supply chains.” Under the CRS eight-step plan for agro-enterprise development, CRS worked with cluster members to develop four interrelated plans to prepare ARBs for market entry. These include marketing plans, production plans, management plans and financial plans. Key areas for capacity building should include business management, contract negotiation, market research, supply chain analysis, record keeping and farm enterprise decision making in order to link smallholder farmers to markets (Shepherd 2007). However, it is important to consider that training needs vary and the skills required are very much dependent on the skills (or lack thereof) ARBs may have already acquired from their previous employers.

Based on interviews with DAR support services officials, cooperatives with AVAs are given less priority in the targeting for its PBD projects. This is built on the assumption that business partners in the AVA scheme provide the necessary support to cooperatives to ensure that production targets are met. Because the budget for support services provision is very limited, DAR has to calibrate its targets well to ensure that outcomes are efficiently achieved.

For ARBs to engage with investors in a meaningful manner there is a need to improve technical skills and management skills. In the past, the CDA has required all newly elected board members to participate in nine training modules. Today, presumably because of financial constraints, this has been reduced to only two: the fundamentals of cooperative law; and good governance. However, this ignores the need for any capacity building activities in marketing, contract negotiation, business planning, communication and record keeping, leadership and financial management.

Capacity building activities need not be done exclusively by DAR or DA but can be outsourced to private providers, subject to compliance to audit regulations.

**Recommendations:**

- Collaborate with DA to create a capacity-building fund, with the assistance of the donor community, that will target ARBs and non-ARBs and will increase capacity of farmers on the following areas:
- Business and legal skills (to improve awareness and understanding on their rights and obligations under the AVA contracts, guided by certain key principles on best practices). This shifts the emphasis

and the investment of resources on the empowerment of the farmers before the contracts are signed, and avoids to a certain degree the difficulty of having to review-approve-monitor contracts which have already been signed.

- Organizational development, as well as dispute resolution;
  - Financial management and accountability measures for good governance;
  - Business planning, including marketing; and
  - Leadership
- Undertake an audit of the professional and management training needs of ARBOs and cooperatives engaged in AVAs
  - Develop training modules based on the needs assessment, in conjunction with ARBs, investors and service providers.
  - Develop a list of approved training providers for the delivery of the training modules
  - Continuously evaluate the performance of approved training providers to meet the ARBs' anticipated needs

## B. Department of Agriculture

The role of DA in the AVA sector falls into these headings:

- Training and extension services
- Research and development
- Infrastructure support

The extension service of the government, led by the DA is largely focused on rice and corn. The passage of R.A. 7900, known as the High Value Crops Development Act of 1995, paved the way for boosting programs for the high value crops. The activities of the High Value Crops Development Program (HVCDP) of DA and the extension activities of DA's Agricultural Training Institute (ATI) were enhanced to include high value vegetables and fruits. However, the plantation crops were not the priority areas, much less the areas already covered with AVA.

Compounding the problem of lack of access to extension services for the AVA sector is the present structure of Philippine extension services. Extension workers providing technology training and advice to farmers are under the supervision of municipal local government units (LGUs). Often, LGU extension workers have limited access to information and education resources. More often than not, most crop resources available at DA and ATI are focused on rice and corn. Only a few extensionists can adeptly provide services for commercial crops like banana, pineapple and oil palm.

Ironically, where access to training entails costs, cooperatives have very few resources to spare. Usually, cooperatives rely on free or subsidized training, mostly from government. Although DA has established a division for agribusiness and marketing in its Regional Field Offices to provide training and coaching to smallholders, no services (on farm business and marketing) have been extended to AVA areas to -date.

Budget constraints are a problem, especially because much of DA functions have been devolved to the local government and therefore fall under the discretion of local chief executives. With other issues competing for funding at the local level, providing extension services is not always included in the list of priorities.

In the area of research and development, DA does not currently have a robust programme for the agribusiness sector. During the FGDs, the most notable interventions of DA in this area have been limited to the development of a Cavendish banana variety that is resistant to Panama Disease and the regulation of export packing plants through the Bureau of Plant Industry (BPI).

The same can be said for infrastructure support, which is generally absent in the high value crops sector. Ironically, the high value sector provides a huge contribution to the export earnings of the country

**Recommendations:**

- DA and the DAR should collaborate on the capacity building of small holders to include legal, technical and financial management of their associations, in order to take the best advantage of opportunities available in the sector
- Increase the support to the agribusiness sector through farm infrastructure - including farm to market roads, financing for farm equipment and collaboration in the installation of irrigation infrastructure
- Continue and expand research and development in the area of pest control in the banana, cacao, pineapple and oil palm industries to reduce threats to biosecurity
- Work with DAR for the development of agricultural extension for AVA crops within the HVCCDP. Outsource similar services from state universities and colleges (SUC) and other technical agriculture agencies

## C. Cooperative Development Authority (CDA)

Most business management skills needed by the cooperative can be provided by the CDA through its accredited capability building service providers. The CDA even prescribes the curriculum and the minimum number of hours of training that cooperative officers must undergo.

However, CDA has recently lessened the number of required trainings from 14 (CDA Memorandum Circular No 14, s. 2011) to just two (CDA Memorandum Circular No 9, s. 2015), and reduced the number of

hours for each module, in consideration of the financial constraints of cooperatives. However, it is the view of this multi-sectoral study that requiring the cooperatives to participate in as much training as necessary to boost the cooperatives' chances of remaining sustainable is warranted.

A look at the training course outline prescribed by the CDA reveals that the minimum number of hours per module may not be sufficient. For example, the minimum number of hours required to tackle the topic, "Governance and management of cooperatives" is only eight hours for micro-cooperatives and 16 hours for larger cooperatives. Governance and management covers a wide area of subjects and a two-day training course may not be sufficient, especially considering that most cooperatives are managed by farmers and non-business oriented people. In addition, cooperatives of all sizes need to know the same principles and areas of governance and management.

Another example is in the area of financial management where reading and understanding financial statements, as well as budgeting are taken up in just six hours. As ARBs do not have a business background and many are not numerate, six hours is too short a time for ARBs to develop the required skills.

The CDA accredits auditors to service the external audit requirement of the cooperatives. Too often, these auditors churn out audited financial statements that are inaccurate (i.e., balance sheets with huge discrepancies and accounting items that do not follow the standard chart of accounts). Often, BODs approve the release of these flawed audited financial statements simply because they do not understand or are not able to read and analyse financial statements thoroughly.

In addition, CDA has accredited only a small number of auditors and only a limited number of auditors are willing to work to advance ARBs interests. In the CARAGA region for example, there is only one accredited individual external auditor for Agusan del Norte, only one in Agusan del Sur, and none in the Dinagat Islands (CDA 2016). In addition, cooperatives cannot usually afford the fees of reputable auditors. Hence, getting reliable audited financial statements remains a problem for most cooperatives.

In strengthening all cooperatives, not only those with AVAs, the CDA plays a significant role, not only because it is the regulatory body for cooperatives but also because it has the mandate to develop cooperatives. CDA is aware of what needs to be done and how it should be done with the most efficient use of resources.

**Recommendations:**

- Revisit bills that seek the amendment of RA. 6939, otherwise known as the Charter of the CDA. Improve the organization of the CDA by providing programmes for the development and regulatory needs of more than 25 000 cooperatives in the country

*For the immediate term:*

- (for the Government) Provide CDA with sufficient budget to enable it to deliver genuine and meaningful service;
- (for CDA in collaboration with the DAR and the DA) Develop an integrated capacity building program that targets cooperatives in the AVA sector; the program should also revisit the training course outline on governance and management and make necessary improvements to improve the financial literacy of cooperatives

## D. The Land Bank of the Philippines

Pursuant to CARPER, the Agrarian Production Credit Program (APCP) was developed by DA and DAR in partnership with LANDBANK. This programme aims to make credit more accessible to ARBOs. The programme has a nationwide coverage, with cooperatives, farmers' organizations and individual ARBs recommended by DAR as eligible borrowers. The APCP is a soft loan that can be used to finance farm inputs in growing crops, working capital for agro-enterprise and livelihood projects and funds to facilitate the purchase of tools, equipment and machinery.

In spite of the programme's good intentions, drawdowns were less than expected. This is because of farmers' and ARBs natural aversion to seek loans from formal sources. Other causes may be the limited information drive about the programme and the lack of updated financial records on ARB cooperatives, which makes them ineligible to access loans.

The Agro-Industry Modernization Credit and Financing Program (AMCFP) is DA's umbrella credit programme for agriculture and fisheries. It aims to provide an efficient, responsive and sustainable credit delivery system for smallholder farmers, including those ARBs in AVAs, and fisherfolk. The Agricultural Credit Policy Council (ACPC) serves as the oversight body of the AMCFP and as such is tasked to steer program implementation, address policy issues and monitor and evaluate fund utilization and overall program performance.

All government credit programmes are accessed through LANDBANK. LANDBANK classifies the cooperatives into five categories (A to E). Higher category cooperatives are given lower interest rates. This provides an incentive for cooperatives to improve their rating based on LANDBANK's accreditation criteria.

To finance more cooperatives, LANDBANK lending centres are required to provide financing to new cooperatives every year. Cooperatives that do not qualify under this financing scheme may still avail of bank financing through special windows that are specifically established for ARBs, smallholders and fisher folk.

It must be noted that LANDBANK does not lend exclusively to cooperatives. Farmer associations can also avail of loans from the bank. If the amount is not significant, associations are referred to rural banks. However, the interest rates charged by rural banks and thrift banks are rather high, which increases the farmers' cost of production and their exposure to risk.

To qualify under LANDBANK's formal credit facility, cooperatives need to have a minimum of three years track record in accessing and repaying loans. This automatically disqualifies newly-formed cooperatives. Aside from this, the evidence shows that application requirements for LANDBANK's credit facilities are difficult to comply with. Others cite the tedious manner of payment, as ARBOs or cooperatives are required to surrender promissory notes when doing payments – sometimes on a weekly basis.

### **Recommendations:**

- Combine capacity-building activities with the loan programme. Capacity-building activities can be financed through the national budget or through official development assistance (ODA). In doing this, there will be more opportunities for small cooperatives to avail of loans. To protect itself from risks of non-payment, where the loan ceiling is low, the business will be subject to various forms of capacity building activities (farm planning, bookkeeping, financial controls, organizational development, among others)

- Develop a systematic way of building capacities through active lending. LANDBANK should be ready to absorb the risk if the enterprise fails and support the cooperatives to try again (with evidence that the cooperatives will initiate the necessary reforms and adopt good practices)
- Diversify service providers, to include academia, the business community, NGOs and more mature cooperatives that can provide “handholding and mentoring”
- Conduct more information activities to improve farmers’ awareness on the availability of credit programmes, especially the APCP
- Simplify documentary requirements for ARB cooperatives or provide technical assistance so they can comply with the requirements
- Implement appropriate training for all officers and BOD members with an AVA. This will improve cooperatives’ credit-worthiness through improving capabilities to govern and manage affairs independently

## E. Philippine Crop Insurance Corporation

PCIC is the government agency responsible for the provision of crop insurance. Established in 1978, its capitalization was increased with the passage of RA 8175<sup>22</sup> in 1995. However, the agency has made little progress in its mandate to provide protection on crops against losses caused by natural calamities, earthquakes, typhoons, drought, volcanic eruptions and pest infestations. In 2012, PCIC’s penetration rate was only four percent, equivalent to 311 388 farmers, fisher folk, livestock raisers and other stakeholders. In 2013, it improved to eight percent as PCIC was able to provide agricultural insurance to 732 654 stakeholders (Teves 2014).

PCIC has also come up with a High-Value Commercial Crops Insurance Programme that extends insurance protection to farmers against losses in high-value commercial crops (HVCCs) due to natural calamities, plant pests and diseases, and accidental fire. The object of insurance are the standing crops planted/grown in the farmland described in the insurance application and which the insured farmer has an insurable interest for as long as the project is economically feasible. HVCCs include those that are the focus of the AVAs - banana, cacao, oil palm and pineapple. The insurance covers the cost of production inputs as agreed upon by PCIC and the insured, including a portion of the value of the expected yield (at the option of the farmer) but not to exceed 120 percent of the cost of production inputs.

The insurance coverage is on an annual basis for annual, biennial and perennial crops, or in case of short-duration crops which mature in less than one year, the period of coverage is from planting to harvesting, subject to some stipulations such as waiting-period and pre-harvest termination of cover for some crops.

<sup>22</sup>RA 8175 is also known as the charter of PCIC

The PCIC has set insurance premiums for crops ranging from two to seven percent of the total sum insured, subject to deductible and co-insurance provisions, solely borne by the insured. However, this premium is not affordable for most smallholder farmers, considering that the cost of inputs for the crops is high. For example, PCIC (2015) sets a premium of 3.5 percent for Cavendish banana that costs PHP 10 500 (USD 222.93) per ha.

An alternative insurance product being piloted by PCIC is the weather index-based insurance (WIBI). WIBI is an innovative form of coverage that depends on weather-related index that are highly correlated with crop yields such as rainfall and temperature. WIBI relies on the objective definition of the index and on the assessment of associated climate risks (WFP & IFAD 2011).

Payment of indemnities is deemed faster with WIBI, because of the use of an objective indicator of risk due to weather such as rainfall and temperature provided by accredited weather stations, instead of on-farm assessment of damages. Assessment of potential insurance clients is also limited which lowers transaction costs. IFAD (2011) lists some other advantages of WIBI such as: transparency of transactions where the policyholder may have direct access to the information on which the pay-outs will be calculated; elimination of adverse selection, i.e. when potential insured parties have hidden information about their risk exposure that is not available to the insurer; and lack of moral hazard which occurs when engaged in hidden activities that increase their exposure to risk as a result of purchasing insurance, or attempt to influence the claims outcome. However, WIBI has also some disadvantages related to basis risk, limited hazards or perils, the need to replicate and adjust the index, and inadequacy of available weather data for the cropped areas (Lansingan 2014).

One of the main problems for PCIC is its high overhead cost. While mandated to serve farmers in the remotest areas, it cannot recover its operating cost solely from insurance premiums. In addition, its investment fund is not sufficient to cover its operations, because of the high rate of claims resulting from regular calamities. Compounding the problem is the farmers' aversion to paying insurance premiums and the common perception of insurance as an added cost.

According to an interview with senior staff of the PCIC, including its President, crop revenue insurance schemes cannot be covered by PCIC for the corporation is mandated only to provide insurance against natural calamities.

**Recommendations:**

- (for PCIC) Consider further streamlining its processes to be able to reduce its costs to make the premium more affordable to the farmers
- Consider expanding the WIBI programme which is also relevant to non-rice and corn crops
- Conduct an in-depth study of the feasibility of revenue insurance for the Philippine setting and make a legislative proposal to include such kinds of insurance in the current PCIC charter, if warranted
- Collaborate with the DAR and the DA in the raising of awareness of farmers and their associations on the benefits of crop insurance and the roles and responsibilities of government and the farming sector

## F. Department of Labor and Employment and National Labor Relations Commission

An end to the contractualisation/casualization of employment, with the corresponding recognition of regular employment, is a promise that was a popular platform for governance during the campaign period, thus highlighting an emerging national consensus to address these illegal practices of denying the constitutional right to security of tenure under the Labor Code. . As mentioned above, this is also the primary employment issue, especially with respect to lease agreements, and to a lesser extent with respect to growerships.

Payment of minimum wage, overtime pay, holiday pay, and other labour standards should be ensured as well.

### **Recommendations:**

- Promote the Single Entry Approach. Inform workers of their right to initiate the dispute resolution process by simply writing a letter or an email to the DOLE. Capacitate the Single Entry Approach Desk Officers to:
  - a. understand basic labour relations issues in AVAs, both for growership and leaseback; and
  - b. In case of failure to settle, process filing of cases at the Regional Offices and the NLRC
- The Bureau of Workers with Special Concerns (BWSC) of DOLE provides livelihood assistance to the “informal sector”, which should include seasonal and contracted out farmworkers, including “help-outs”. The BWSC should then coordinate with DAR in order to identify farmworkers who could benefit from its programmes
- (for the DOLE) Create a database that would contain data on labour standards, compliance in AVAs and other work arrangements involving farmworkers, whether ARBs or not
- The AVAs should contain “labour clauses”, like those proposed or included in international trade agreements, which provides that both parties to the agreement shall follow all labour laws, including laws prohibiting labour-only contracting, illegal casualization and contractualisation, jurisprudence that provides for criteria for determining the existence of employer-employee relationship, and rules on the recognition of regular status, when appropriate. The labour clause should likewise provide that the parties shall deal only with entities that comply with local minimum labour standards

## X. ISSUES AND CHALLENGES FOR NGOS

### A. Background

CSOs and NGOs continue to play a prominent role in the development sector in the Philippines (ADBb, 2008). In many cases, they evolved from movements clamouring for change during the Marcos dictatorship. After the EDSA revolution in 1986, the government “formally recognized” the roles of NGOs and CSOs in Filipino society (Soledad 2006).

The NGO and civil society sector in the Philippines have come a long way in the past three decades. This is largely due to the generally positive government and presidential support they have received (Songco 2007). NGOs have been able to network and create partnerships, campaign for reform, and spur sustainable development, (ADBb 2008) which is why the “Philippines is now said to have the most active civil society in Asia” (Soledad 2006).

### B. Current challenges for CSOs/NGOs supporting ARBs and ARBOs in the AVA sector

#### 1. Support to ARBs and cooperatives

A number of CSOs and NGOs provide services to ARBs and cooperatives that are involved in AVAs. The Foundation for Agrarian Reform Cooperatives in Mindanao (FARMCOOP) helps cooperatives in the banana industry in their struggle to renegotiate or terminate their contracts and negotiations with new investors (IDEALS 2013). Cooperatives with AVAs in the banana industry have received legal and organizational support from FARMCOOP in the areas of cooperative development, farm planning, accounts management, health and safety, and environment (Leonard, Osorio, & Menguita-Feramil 2015).

IDEALS, an alternative non-government law group, through a project with Oxfam International, provided legal advice and support on the actions and strategies in two cooperatives in their petition for the revocation of an “onerous” contract that their organization signed with an investor company. Such assistance included preparation of legal documents and administrative preparations for the filing of the case to PARC. They also sent a letter of appeal to President Aquino (IDEALS 2013).

Another NGO providing legal service to ARBs in AVA areas is the *Sentro ng Alternatibong Lingap Panligal* (SALIGAN). It is a legal resource NGO doing developmental legal work with women, farmers, workers, the urban poor, the indigenous peoples and local communities. SALIGAN seeks to effect societal change by working towards the empowerment of women, the basic sectors, and local communities through the creative use of the law and legal resources.

Both IDEALS and SALIGAN work with Oxfam International, in providing sustained services to ARBs and cooperatives in AVA areas. Oxfam is an international NGO that partners with local communities in more than 90 countries, employing practical and innovative ways to eradicate poverty around the globe (Oxfam International 2016).

A host of other reliable NGOs provide service to ARBs through the projects handled by the DAR-Bureau of Agrarian Reform Beneficiaries Development (BARBD). These include CRS for enterprise development and the National Confederation of Cooperatives (NATCCO), the Center for Agriculture and Rural Development (CARD) and Social Enterprise for Development Partnerships Inc. (SEDPI) for microfinancing for ARBs and their organizations.

## 2. Inadequate funding for continuous services

One of the greatest challenges NGOs face in providing support to ARBs is lack of continuous funding. DAR has engaged the services of NGOs for capacitating cooperatives in AVA areas. However, their services are usually contracted within specific projects of government, international agencies or international NGOs, so that, when the project is finished and the funding is exhausted, the services are discontinued.

Songco (2007) offers an explanation for the inadequacy of funding among Filipino NGOs. He posits that NGOs became heavily dependent on donor grants during the time when the newly opened democratic space in the mid-80s brought them millions of dollars. Many were caught unprepared when much of this funding began to disappear due to the shifting geographic focus of international donors. As a middle income country, the Philippines is no longer deemed to be an "attractive" funding space for donors.

## 3. Competence of NGO staff

Speedy and continuous turnover of competent NGO staff is another problem for NGOs. This is due in part to low salaries. In addition, the ADB study (2007) found that many Philippine NGOs are highly dependent on the influence and reputation of visionary founders or dynamic leaders. When these key figures move on, for example, to accept appointments in government, the NGOs often experience major internal organizational challenges. Usually, these dynamic leaders take with them their most competent staff, leaving their NGOs with new and less competent staff members. Their performance declines, which leads to a decline in public support and undermines their ability to compete for more funds and projects from donors and government.

The mixed reviews in the experience of the Agrarian Reform Community Connectivity and Economic Support Services (ARCESS) project of DAR supports the above findings. Under the ARCESS project, NGOs were hired as service providers to provide agri-extension and business development services to ARBOs nationwide. However, bottlenecks in the selection and implementation processes were rampant. These were caused by some NGOs that "lack institutional systems and mechanisms, have resource constraints in terms of staffing and counterpart contributions which prevent them from being fully accountable for their projects and are unable to make their projects sustainable because of their dependence on external funding, narrow-mindedness or parochialism and lack of capacity to scale up their projects" (Songco, 2007)

## 4. Limited coordination among NGOs leading to duplication of services

There are also cases of NGOs providing the same kind of service or training to ARBs in the same region, resulting in duplication and unnecessary waste. This is a common phenomenon in the Philippines where NGOs target the same population and where coalitions and networks result in overlapping membership. These practices lead to competition for funding and duplication of efforts (ADBb 2008).

**Recommendations:**

- (for NGOs that have passed the evaluation of the Philippine Council for NGO Certification (PCNC) and are working in AVA areas) Formulate a three-year integrated capacity building plan for submission to the government and international institutions for funding
- Pursue a more stable partnership and collaboration with DAR to leverage resources. DAR, as the lead agency in the implementation of CARP, should enhance its outsourcing of critical capacity building services for AVA ARBs and cooperatives from the NGO sector. While this will need to follow the provisions for competitive bidding of the Philippine Procurement Law (RA 9184), NGOs that have a good track record and have proven their competence could easily pass the requirements of the law and have the best chance for long-term service provision. The entry of competent and dedicated NGOs is especially critical now with the many issues that plague the sector
- Devise an incentive system to implement a big brother – small brother mentoring system to enable organizationally mature cooperatives to share their knowledge and develop expertise with other cooperatives

# XI. ISSUES AND CHALLENGES FOR INVESTORS

## A. Overview

The production and export of high-value fruit grown in the Philippines are dominated by several companies. The banana and pineapple industries, in particular, are largely controlled by multinational companies such as Del Monte, Dole, Sumifru and Unifrutti. Domestic firms, such as Marsman-Drysdale, Lapanday Food Corporation, Kenram Industrial & Development Inc., Kennemer Foods and Musahamat Farms, also play a prominent role as buyers of AVA commodities. These same firms are engaged in a great many AVA leases and growership arrangements with ARBs.

This section discusses some of the most important issues and challenges facing the industry in relation to AVAs. It reviews the extent to which the investors appear to be aware of and committed to following international best practices on responsible investment in agriculture. This report also makes a number of recommendations on how investors can address the particular challenges they face and improve their operational policies and practices.

## B. Key challenges facing investors in AVAs

In the FGDs and other communications, representatives of investors cited a number of important problems that they face in their dealings with ARBOs and ARBs. Those problems are discussed in this subsection.

### 1. Pole vaulting

Companies engaged in growerships frequently described pole vaulting as a very significant problem. As discussed earlier, the practice has become more common as banana exports to China have increased. Company representatives stated in FGDs that this practice is undermining their AVA contracts with the farmers and either causing them to lose supply or forcing them to pay more than is provided in the agreements.

#### **Recommendations:**

- Adopt the recommendations listed above to make growership pricing more equitable
- Take ARBO representatives on study tours and engage them in other awareness-building activities so that they have a better understanding of international markets and pricing
- Be more transparent about costs and pricing (see discussions in the growerships section)
- Actively encourage and facilitate the provision of legal advice to ARBOs by DAR lawyers (or other sources of legal aid) who can help the ARBO officers negotiate better contracts and understand why they should not engage in pole vaulting
- Consider taking legal action against the traders who encourage pole vaulting and thus may be engaged in tortious interference with contractual relationships

## 2. Lack of capacity in the ARBOs and among individual ARBs

Investor representatives stated that many ARBOs and individual ARBs lack the knowledge, training and experience to effectively manage their AVAs with the companies. As explained in more detail in this report, ARBO leaders often do a poor job of managing the business and finances of their cooperatives. Similarly, many individual ARBs do not manage their own land and money well.

This creates a number of problems for the investors. Internal conflict within a cooperative can undermine productivity. Poor financial management can lead to new demands for financial assistance from the investor, such as where advanced lease payments are not well managed. Inexperienced managers have difficulty negotiating fair contracts, putting companies in the position of trying to help their contracting partner or face external criticism. Cooperative managers who do not understand their contracts or the law may be more likely to engage in pole vaulting.

### Recommendations:

- Support efforts to provide technical, financial and management training to officers and directors of the cooperatives, as described more fully in the Cooperatives section of this report. Companies can go further and provide such training directly in keeping with the requirement of Sec 5.2.11, DAR AO No 2, s. 2008. Under this AO, investor-lessees are mandated to provide such training within one year of beginning an AVA lease. This could also include study tours to foreign markets to help farmer leaders gain a better understanding of the value chain, including the critical role of exporters who must provide downstream buyers with a regular and reliable supply of good quality fruit (see Box 5)

### Box 5

#### Cacao Doctors: Investing in the Technical Expertise of the Farmers

In 2010, Chocolatier, a multinational company started partnering with smallholder farmers to produce, source and market fermented cacao beans. By providing farmers with access to high-yielding plant materials and inputs, training and other appropriate means of support, Chocolatier is assured of a steady supply of cacao beans to meet the increasing demand for high quality chocolates in the global market.

Chocolatier sought to expand its partnership with agrarian reform beneficiary organizations (ARBOs) in Mindanao in 2013. To facilitate this partnership, Chocolatier and the Department of Agrarian Reform (DAR) signed an agreement to source and develop 10 000 hectares of farms, provide training, capital and appropriate infrastructure support to ARBOs and create sustainable livelihood for 35 000 smallholder farmers and their households by the year 2020. To ensure that smallholders' interest are protected, DAR facilitated access to credit through LANDBANK, crop insurance through the Philippine Crop Insurance Corporation (PCIC), business development and enterprise lawyering services and subsidies for farmers who were willing to undergo Cacao Masters' Training through the Chocolatier's cacao doctors project.

The AVA utilizes a growership and buy-back guarantee scheme, which stipulates that Chocolatier will guarantee purchase of fermented cacao at not less than 70 percent of the world market price. The AVA also guarantees equal sharing among farmers and Chocolatier of the risks, profits and rewards associated with the production and marketing of the product. This is to be assured by providing ARBOs with a steady supply of market and related information and capacitating farmer leaders to become cacao doctors. These cacao doctors will consolidate fermented beans under the buying programme of Chocolatier, distribute inputs and other materials and extend pruning and rehabilitation support services to the ARB clusters that they cover.

Aside from ARB lands, Chocolatier also works with indigenous communities to develop cacao farms. These farms create employment and other livelihood opportunities for the village members, without the threat of being displaced from their ancestral landholding. As of June 2015, Chocolatier has already trained 287 cacao doctors. This number is expected to increase as the number of contract growers increase over the coming years.

- Ensure that contracts and negotiations are conducted both in English and the local language so that ARBs will be more likely to understand what they have agreed to. Here again, supporting legal aid efforts will also advance this objective

## 2. Delays in DAR AVA contract approval process

While not all AVA agreements are submitted to DAR for approval, company representatives reported that DAR frequently does not act on those that are submitted for a very long time and sometimes not at all. The FGDs and desk research revealed many examples of agreements sent to DAR several years ago upon which the agency has yet to act. This creates uncertainty among the investors (as well as the ARBOs) as they are aware that AVA agreements that are not approved by PARC or PARCCOM are “null and void” (section 4.9, DAR AO No 9, s. 2006; section 4.1, DAR AO No 2, s. 2008)

### **Recommendation:**

- The research team’s recommendations with respect to the DAR approval process are set forth in the Government section. Investors should support these changes. In particular, companies should strive to ensure that AVA agreements are fair and comply with all DAR requirements to facilitate prompt review and approval. They should also see to it that new or amended contracts are filed with DAR on a timely basis.

## C. Improving policies and operations to be more consistent with VGGT and CSF-RAI

In the past several years, governments, consumers, NGOs and the private sector have become increasingly interested in how to ensure that companies invest and operate in ways that are socially responsible and financially sustainable. The international community has developed a number of guidelines and principles to help companies invest responsibly in a broad range of sectors, including agriculture. For example, most of the nations of the world approved the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forest in the Context of National Food Security (VGGT), which were unanimously endorsed by the United Nations Committee on World Food Security in 2012 (FAO 2014). While aimed primarily at governments, the VGGT include a number of important provisions that can help the private sector invest more responsibly in land. The basic principles underlying the VGGT are set forth in Box 6.

While the VGGT is increasingly seen internationally as a set of minimum best practices for investment in land, forests and fisheries, the guidelines focus primarily on issues of tenure which, while very important to ensuring responsible investments in agriculture, are not the only issues of concern. A broader set of applicable issues are addressed by the recently approved Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI). The CFS-RAI principles encompass the entire range of activities involved in the production, processing, marketing, sale, consumption, and disposal of goods that originate from agriculture (see Box 7). Like the VGGT, the CFS-RAI principles are voluntary and non-binding, but they represent the first time that governments, the private sector, civil society organizations, UN agencies, development banks, foundations, research institutions and academia have agreed on what constitutes responsible investment in agriculture and food systems that contribute to food security and nutrition.

**Box 6.**

**Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forest in the Context of National Food Security (VGGT)**

The VGGT is the most comprehensive set of international standards for protecting land tenure holders and sets out requirements for responsible land governance. The basic principles underlying the VGGT include:

- Recognizing, respecting and safeguarding legitimate tenure rights and the people who hold them;
- Engaging in inclusive consultation and participation;
- Respecting the right of free, prior and informed consent (FPIC) for indigenous peoples;
- Promoting gender equity and avoiding discrimination;
- Providing access to justice and grievance mechanisms to deal with infringements of tenure rights;
- Preventing tenure disputes, violent conflicts, and opportunities for corruption;
- Transparency; and
- Respecting human rights, including the right to food and promoting food security.

Setting out a list of very detailed recommendations for AVA investors on how to become more responsible investors as defined by the principles of CFS-RAI and the VGGT is beyond the scope of this project. Moreover, specific actions will differ from company to company. However, it is possible to make some general recommendations applicable to AVA investors, as set forth immediately below:

#### Recommendations:

- Embrace and adopt the recommendations on lease and growerhip contracts set forth in this report so that AVA contract terms and practices are more equitable
- Avoid the use of unfair business practices such as pressuring farmers to sign blank contracts; insisting that farmers hand over their titles as a form of security for loans made by the company; and applying undue pressure to cooperative officers who are also employees of the company to make decisions that favour the company
- Improve transparency by sharing more information about their businesses so farmers can have more assurance that companies are complying with contracts. This specifically includes records showing the costs of procuring inputs and services (such as aerial spraying) that the company provides to farmers to justify the price the company charges the farmers
- Engage in internal and industry-wide awareness building so company leaders and staff will gain a better understanding of what it means to be a responsible investor

#### Box 7.

#### Principles for Responsible Investment in Agriculture and Food Systems

Endorsed by the Committee on World Food Security (CFS) in 2014, the Principles for Responsible Agricultural Investment in Agriculture and Food Systems (CFS-RAI) address all types of investment in agriculture and food systems, with emphasis on providing support to smallholders.

The CFS-RAI Principles are:

*Principle 1:* "Contribute to food security and nutrition," covering food safety, nutrition, the efficient use of water, etc.

*Principle 2:* "Contribute to sustainable and inclusive economic development and the eradication of poverty." This principle addresses fair labor practices, wages, improved working conditions, avoiding child labor; training and equitable partnerships.

*Principle 3:* "Foster gender equality and women's empowerment."

*Principle 4:* "Engage and empower youth."

*Principle 5:* "Respect tenure of land, fisheries, forests and access to water." This principle essentially incorporates the VGGT by reference, especially VGGT Chapter 12 on private investment.

*Principle 6:* "Conserve and sustainably manage natural resources, increase resilience, and reduce disaster risks," includes avoiding negative environmental impacts, minimizing greenhouse gas emissions, etc.

*Principle 7:* "Respect cultural heritage and traditional knowledge, and support diversity and innovation." This principle addresses the rights of indigenous peoples, the use of and rights to seeds and other genetic resources, promotion of the use of technologies and introduction of appropriate new technology, increasing diversity of plants to increase resiliency and adapt to climate change, etc.

*Principle 8:* "Promote safe and healthy agriculture and food systems."

*Principle 9:* "Incorporate inclusive and transparent governance structures, processes, and grievance mechanisms." This covers corruption, transparency and the need for fair and accessible dispute resolution and grievance mechanisms.

*Principle 10:* "Assess and address impacts and promote accountability." Principle 10 covers environmental and social impact assessments, tracking and labeling products from farm to table to increase accountability and help consumers buy responsibly and monitoring and reporting (CFS-RAI, n.d.)

- Revise the company's internal principles, guidelines and operational procedures to make them consistent with relevant provisions of the VGGT and the CFS-RAI
- Support the development of a set of voluntary guidelines that are consistent with VGGT and CFS-RAI and are adapted to Philippine context. Commit to adopting them and to developing internal plans for implementation
- Support the creation of and then participate in a multi-stakeholder forum to engage in ongoing discussions of challenges arising from AVA agreements. The forum should be made up of representatives of investors, ARBOs, relevant government agencies, civil society and academia

## CONCLUSION

The study has underscored the vital importance of the agribusiness sector as a driver for economic growth. However, in order for this growth to be more inclusive and sustainable, the relationship between the investor companies and farmer associations needs to be improved, to enable farmers to lift themselves out of poverty, whilst providing the investors with a steady supply of high quality value crops for the world market.

Lease arrangements should be entered into with the view to making farmers and their associations more and more independent in managing their own farms. This will require capacity building efforts to be provided both by the government and the private sector in the areas of technical, financial and organizational expertise. Further, the study makes specific recommendations in order to make the relationship more equitable:

- The duration of lease agreements should be negotiated in such a way as to afford the investor sufficient time to recoup his investments, but also at the same time, with a view to ensuring the transfer of technology and other capacity building initiatives be done by the investors
- The lease rate should be based on current market rates for the lease of agricultural lands. In the absence of an updated study on this matter, leases should be able to cover at the very minimum the land amortizations and the real property taxes on an annual basis plus some contributions to family livelihood. Additional income such as employment benefits should be built into the lease agreements in order to assist the farmers during the lease period
- The lease rate should be adjusted annually according to objective criteria that will obviate the need for periodic renegotiation. The study suggests that the adjustment be made based on the core inflation rate
- Permanent improvements to the land should accrue to the farmers at the end of the lease, and the sub-leasing of the property should be done only with the consent of the lessor
- The termination of the lease agreement should not be left alone to the discretion of only one party, but should be a mutually agreeable decision

- The occurrence of force majeure should not be a reason for the cessation of lease payments, but should be shouldered by the lessee who is in a better position to absorb the losses due to unforeseen calamities

Growership agreements present a more complex issue, since the ability to deliver good quality produce in sufficient volumes rests primarily on the capacity of the farmer's association. However, productivity is not the only issue, for the prices of both inputs and outputs play an important role in this relationship. The study makes several key recommendations, as follows:

- Farmers need to understand the dynamics of the international market. The study has recommended a study on the pricing of bananas, and also training programmes for farmers to understand the value chain from seed to shelf
- Mechanisms that protect the farmer from sudden drops in world market prices are needed. A study into the possibility of crop revenue insurance through the PCIC is highly recommended
- Farmers should be allowed to procure their own inputs for production and in cases where the investors prefer to do so for the farmers, a transparent procedure should be in place
- Financing should be facilitated through the cooperatives directly as much as possible, in order to avoid conflict of interest and transparency issues when the finance is sourced through the investor company
- Clauses in growership agreements that place the risk on the farmer after the product has been accepted by the investor should be prohibited.
- Take over clauses in growership agreements should only done with the approval of the DAR, since this requires a drastic change in farm management and is subject to all kinds of burdens that may be assumed by the cooperative

The key recommendations for government, academia and civil society organizations is to assist the farmers and their groups in the long road to full empowerment by providing legal, organizational, financial and technical support. This could be done through a concerted effort among the stakeholders, including the investors, and the setting up of a capacity building fund. Improvements in the content of the training courses delivered to cooperatives and governance structures are outlined in the study. Government is also encouraged to adopt the principles of responsible agricultural investments embodied in the VGGT and the CFS RAI in its rule making, and also in its actual operational policies.

The study advocates a two pronged approach in the negotiation, conclusion and approval of the AVAs. Resources should be shifted to assisting farmers in the process of negotiating their contracts, through legal education and adequate legal representation. The process of review and approval by DAR should be simplified by decentralizing all review and approvals at the regional level, and providing a deadline for action of 90 days, barring which the contract will be deemed approved even without any action from DAR. This last principle hopes to eliminate the uncertainty that is created by the prolonged process of review and approval of AVAs that has been experienced in the past.

Lastly, the welfare of the agricultural workers should be the focus of attention of the DOLE. Greater cooperation between the DAR and the DOLE in sharing information about AVAs could trigger increased monitoring by the labour officials at the field level to ensure compliance with existing labour laws. A joint circular could be issued that reiterates the laws, rules and standards that govern the relationship of agricultural labour to the investors, as well as employees of farmer cooperatives and other help-outs in the commercial farming sector. "Labour clauses" are highly recommended to be included in the AVAs to ensure compliance with existing labour standards that will benefit the rural farming sector.

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# ANNEXES

## A. Summary of AVA inventory

Summary by Region		
Region	Number of AVAs	Total Area
II	1	272.00
V	3	876.00
VI	2	3 700.83
IX	10	1 305.60
X	93	6 650.15
XI	72	11 396.20
XII	60	17 707.15
XIII	192	10 363.36
	433	52 271.29

Summary by Crop		
Crop	Number of AVAs	Total Area
Pineapple	24	14 185.15
Oil Palm	44	12 453.57
Banana	265	10 452.67
Banana (Cavendish)	45	2 065.08
Banana (Cavendish) (Exportable)	14	1 928.72
Banana (Bongolan, Organic)	2	54.60
Sugarcane; Mixed Fruit Trees	1	3 324.23
Sugarcane	3	452.97
Rubber	1	2 000.00
High Value Fruit Crops Production	1	1 879.50
Cacao	11	1 327.71
Rice	3	876.00
Papaya	2	352.50
Corn	1	335.00
Jatropa,G-Melina,Fruits and forest trees	1	272.00
Pomelo	4	92.41
Sweet Corn	1	41.00
Avocado	1	14.00
Citrus, Bellpepper, Lettuce, Cucumber	5	9.13
Crop for Validation	3	152.04
For DOLE Facility	1	3.00
	433	52 271.29

<b>Summary by AVA Type</b>		
<b>Type of AVA</b>	<b>Number of AVAs</b>	<b>Total Area</b>
Lease Agreement	222	22 015.11
Lease Contract	90	6 570.63
Joint Venture Agreement	4	5 602.44
Marketing Contract	4	4 458.00
Leaseback Agreement	22	4 431.19
Growership	33	4 391.82
Growership/Contract Growing	37	940.12
Growership/Contract Growing (Agro-Forestry)	1	272.00
Contract Growing	9	1 246.60
BSMA	3	1 269.72
Marketing with Incentives	2	846.00
Contract of Development Agreement	1	57.40
Management Contract	2	54.25
Rice Retailing	1	30.00
Banana Production Purchase Agreement	1	27.00
Not indicated	1	59.00
<b>Totals</b>	<b>433</b>	<b>271.29</b>

## B. Model lease agreement

### **LEASE AGREEMENT**

This agreement executed and entered into this \_\_ day of \_\_\_\_ (month and year) \_\_\_\_\_, by and between:

\_\_\_\_\_, an agrarian reform beneficiary (ARB), with residence and postal address at \_\_\_\_\_, as evidenced by hereto attached Certificate of Land Ownership Award {CLOA}/Emancipation Patent {EP} (or other similar tenurial instruments, as the case may be) No/s. \_\_\_\_\_, issued in his/her name pursuant to the pertinent provisions of Republic Act (R.A.) No. 6657, covering the landholding subject of this Lease Agreement, herein referred to as the LESSOR-ARB; *(Note: this phraseology shall apply if the Lessor is an individual ARB)*

or

\_\_\_\_\_, a duly organized and registered cooperative/association with principal office address at \_\_\_\_\_, represented herein by its President/Chairman of the Board of Directors, \_\_\_\_\_ duly authorized by virtue of a Board Resolution/Special Power of Attorney from the agrarian reform beneficiaries who are members of the abovementioned cooperative/association, dated \_\_\_\_\_, a copy of which, consisting of \_\_\_ pages, is hereto attached as "Annex A", and made an integral part hereof, herein referred to as the LESSOR-ARB/s; *(Note: this phraseology shall apply if the Lessor is a cooperative or association)*

and

\_\_\_\_\_, a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at the \_\_\_\_\_, represented herein by its President, \_\_\_\_\_, duly authorized by its Board of Directors, by virtue of Resolution No. \_\_\_\_\_, dated \_\_\_\_\_, a copy of which and consisting of \_\_\_\_\_ pages, is hereto attached as "Annex B" and made an integral part hereof, herein referred to as the LESSEE-INVESTOR;

### ***WITNESSETH*** That

**WHEREAS**, pursuant to Sections 8 and 29 of R.A. No. 6657, the Department of Agrarian Reform (DAR) has caused the distribution of lands subject of lease, directly to the qualified individual ARBs or to the ARBs cooperative/association by transferring to his/her/them (as the case may be) ownership of the land/Leased Property subdivided/undivided described as follows:

TCT/OCT No.	:	_____
ASP No./Survey No.	:	_____
Total Area per Title	:	_____
Location	:	_____

#### Technical Description:

**WHEREAS**, the LESSOR-ARB is recipient of the subject land by virtue of the agrarian reform program pursuant to R.A. No. 6657, as amended, or *a cooperative/association composed of ARBs who own the subject landholdings, and have organized themselves into a cooperative or association for the purpose of representing them on all matters pertaining to the Leased Property*; (Note: if cooperative or association, the italicized phrase should apply)

**WHEREAS**, the LESSEE-INVESTOR is a duly organized juridical person who shall be responsible for the agricultural production of the Leased Property in accordance with the stipulations and terms and conditions herein set forth in this Lease Agreement;

**WHEREAS**, the DAR, as the government agency mandated to lead the implementation of the Comprehensive Agrarian Reform Program (CARP), and pursuant to DAR Administrative Order (A.O.) No. 09, Series of 2006 entitled, "*Revised Rules and Regulations Governing Agribusiness Venture Arrangements (AVAs) in Agrarian Reform Areas*", and other relevant issuances, has authorized the lease of the subject awarded lands for purposes specified in this Lease Agreement, provided that it shall closely monitor proper compliance of this Lease Agreement and shall impose sanctions for non-compliance thereof;

**NOW THEREFORE**, for and in consideration of the foregoing premises, the parties hereby agree, stipulate and covenant as follows:

#### THE SUBJECT

- 1.1 The LESSOR-ARB/s hereby lease/s unto the LESSEE-INVESTOR the Leased Property, for a period of \_\_\_\_\_ years commencing on \_\_\_\_\_, 20\_\_ and ending on \_\_\_\_\_, 20\_\_.<sup>23</sup>
- 1.2 The Leased Property shall be used solely for agricultural purposes, devoted principally to the cultivation/production of \_\_\_\_\_ (specify crop/s planted) unless the parties shall in agree in writing to substitute an alternative crop/s, and the LESSEE-INVESTOR covenants that it shall not use or allow the use of the Leased Property for illegal or prohibited purposes or other purposes not covered under this Lease Agreement.

#### RENTALS AND OTHER REMUNERATION

- 2.1 In consideration of this Lease Agreement, the LESSEE-INVESTOR shall pay the LESSOR-ARB/s the following annual rental: \_\_\_\_\_<sup>24</sup>  
The foregoing rental shall be paid in Philippine currency within \_\_\_\_\_ (specify period/date of payment) of each calendar year by the LESSEE-INVESTOR. The annual rental amount shall increase each year on the anniversary date of this Lease Agreement by a percentage equal to the annualized Core Inflation Rate most recently published by Bangko

<sup>23</sup>The lease term should be as short as possible, enough to enable the farmers to gain technical expertise and manage their association well (if applicable) and at the same time, should also give due consideration for the recovery of investment costs for the investor. This should be the product of negotiations between the farmers and the investors, with the aid of the DAR lawyers or other lawyers working in favor of the farmers.

<sup>24</sup>In the absence of a thorough market study on the rates of the lease of agricultural lands, the provisions of DAR Administrative Order No. 2-2008 could be used as a starting point in the negotiation of the lease rental rates.

Sentral ng Pilipinas. The LESSEE-INVESTOR shall ensure payment of lease rental as stipulated in the Lease Agreement, notwithstanding crop failure due to natural calamities, force majeure or any other cause/s.

While the Lease Agreement is still in force, the LESSEE-INVESTOR shall provide funds necessary to ensure ecological protection of both the farm and its workers, particularly for the conservation and maintenance of the land quality, proper handling, storage and disposal of hazardous residues and waste products, and proper protective and acceptable safe methods of application of fertilizers and other chemicals.

### **RENEGOTIATION**

Pursuant to Sec. 4.5 of A.O. No. 2, Series of 2008 entitled, "Guidelines Governing Lease of Lands under Agribusiness Venture Arrangement (AVA) in Agrarian Reform Areas and the Determination of Lease Rental Thereof", the amount of lease rental on the leased lands or any other provisions of the Lease Agreement shall be renegotiated by the contracting parties every five (5) years or earlier, if any of the following grounds under Sec. 4.14 of DAR A.O. No. 09, Series of 2006 arise: (1) extraordinary increase in inflation rate; (2) drastic change in price fluctuation on both production input and output; (3) declaration of the areas as calamity or disaster area due to *force majeure*; and (4) other meritorious grounds. The renegotiated lease rental and terms and conditions of the Lease Agreement shall be subject to approval by the Regional Director.

### **USE, MANAGEMENT AND OPERATION OF THE LEASED PROPERTY**

- 4.1 The LESSEE-INVESTOR agrees to use the Leased Property in accordance with the rules and regulations provided under A.O. No. 2, Series of 2008. The LESSEE-INVESTOR shall have the discretion in the manner of operating the plantation, the method of cultivation, harvesting and marketing of the farm produce.
- 4.2 The LESSOR-ARB/s hereby recognize/s that the crops/trees planted in, and the fruits produced by, the Leased Property within the period of effectivity of this Agreement, properly belong to the LESSEE-INVESTOR and that the LESSOR-ARB/s has/have no interest in the same.
- 4.3 The LESSEE-INVESTOR shall comply, in good faith, with its duty to pay the rent and to observe and perform all other obligations contained in this Lease Agreement. The LESSOR-ARB, in turn, warrants that the rights of the LESSEE-INVESTOR under this Lease Agreement shall be unaffected by any changes in membership of the LESSOR-ARB's cooperative or association or by any distribution made or to be made in said membership.
- 4.4 In the conduct of its business operations, the LESSEE-INVESTOR may plant new crops/trees, and construct new improvements necessary for the farm operations on the Leased Property for its business in consultation with the LESSOR-ARB/s; Provided that such improvement shall in no case decrease the aggregate agricultural area to the extent of lowering the land rental and other privileges accruing to the LESSOR-ARBs. In case the LESSEE-INVESTOR wishes to conduct experimental project(s) not directly related to the production of (specify crop/s

planted), he/she shall secure the advance written consent of the LESSOR-ARB/s. The LESSOR-ARB/s hereby agree/s not to unreasonably withhold his/her/their consent, provided the experimental project/s: (1) is necessary for sound agricultural production; (2) will not lessen soil fertility and pose any hazard/risk to the ARB/s and workers on the land; and (3) will not result to the conversion of lands to non-agricultural use.

- 4.5 The LESSEE-INVESTOR agrees to manage and care for the Leased Property and shall assume its undertakings properly and efficiently and in accordance with sound agricultural, administrative, business and financial practices, including, if necessary, any cut back in production and abandonment of certain areas. The LESSEE-INVESTOR, however, shall incur no liability to the LESSOR-ARB/s for any decrease in production in any given year as long as the LESSEE-INVESTOR performs, in good faith, its duties under A.O. No. 2, Series of 2008 and this Lease Agreement.

#### **RIGHTS OF THE ARB-LESSOR AND THE LESSEE-INVESTOR IN THE EVENT OF DISSOLUTION/INSOLVENCY AND/OR LIQUIDATION OF THE COOPERATIVE (PARTITION OF THE LEASED PROPERTY)**

- 5.1 The Leased Property shall not be physically segregated and partitioned by the LESSOR-ARB/s within the period of effectivity of this Lease Agreement. This Lease Agreement shall be respected for the entire duration of its term, and any extension thereof shall be in accordance with the terms and conditions herein provided. In the event the LESSOR-ARB's members, by the required vote specified in their Articles of Cooperation/Association and By-Laws, or in the absence thereof, two-thirds (2/3) of the general membership, agree to dissolve and liquidate their cooperative/association, or agree to partition the Leased Property, the LESSEE-INVESTOR shall be entitled to the benefits granted by law to registered leases, and any and all of the LESSOR-ARB's members who become individual owners of any portion of the Leased Property as their share in the liquidation and/or partition thereof pursuant to Articles 64, 70, and 71 of the Cooperative Code of the Philippines and Rule 8 of the Rules and Regulations Implementing Certain Provisions of the Cooperative Code of the Philippines.
- 5.2 In the event that the LESSOR-ARBs are compelled to go into a process of dissolution, liquidation and/or partition and distribution of its assets, including the Leased Property, by virtue of and in compliance with the provisions of the Cooperative Code of the Philippines or of its Articles of Cooperation/Association and By-Laws, such process shall be conducted by the LESSOR-ARBs in a manner which shall not prejudice the LESSEE-INVESTOR's operations on the Leased Property nor interfere with the LESSEE-INVESTOR's day to day conduct of its business affairs. Further, the LESSOR-ARBs shall, prior to actual partition and distribution of any portion of the Leased Property to its members, elect and/or designate a Trustee or any person or group of persons who shall be authorized to receive payment of the rental due on the Leased Property for the entire duration of this Lease Agreement, including its renewal.

#### **EMPLOYMENT AND OTHER BENEFITS**

- 6.1 The LESSEE-INVESTOR warrants that the ARB/s, who is/are LESSOR/s, presently under his/its

- employ, shall continue to enjoy whatever status and benefits they presently enjoy under the Labor Code and other existing laws and under their Collective Bargaining Agreement (CBA).
- 6.2 In the event that there will be job vacancies and/or openings connected directly or indirectly with the operations of lands covered by the Comprehensive Agrarian Reform Program (CARP), the LESSOR-ARB/s, and/or his/her/their direct dependent/s, shall be given priority in employment in the enterprise, provided he/she/they are qualified and physically fit for the job.
- 6.3 As part of the human resources development plan/program, the LESSEE-INVESTOR shall ensure that the employed ARBs are trained through involvement in the management of the farm and in various aspects of operations and marketing. The LESSEE-INVESTOR shall prepare and provide to the LESSOR-ARB/s a written human resources development plan, a copy of which shall be attached to this Lease Agreement. The LESSEE-INVESTOR shall also furnish the LESSOR-ARB/s pertinent data and documents relative to farm operation, method of cultivation, harvesting and marketing of the farm produce, including yields, production costs and financial statements.
- 6.4. The parties shall explore on a best efforts basis other means of generating income for the farmers, which shall include but not limited to allocation of vacant lots for subsistence farming, providing services to the LESSEE INESTOR such as a cooperative store, cafeteria services, trucking and other similar services.

#### **EXPENSES, TAXES AND INSURANCE**

- 7.1 All expenses for production, cultivation, harvesting and marketing of products within the Leased Property shall be for the account of the LESSEE-INVESTOR.
- 7.2 The LESSEE-INVESTOR shall also be liable for all expenses and charges necessary for the conduct of the business operations.
- 7.3 All taxes due on the improvements on the Leased Property except those improvements on the area that the LESSOR-ARB/s shall have utilized shall be for the account of the LESSEE-INVESTOR.
- 7.4 The LESSEE-INVESTOR may, for its own account, obtain insurance on all lease improvements, including the crops/trees. In the event of loss, all proceeds from such insurance shall accrue to the LESSEE-INVESTOR.

#### **LESSOR-ARB'S COVENANTS**

The LESSOR-ARB/s hereby represent/s and undertake/s to the LESSEE-INVESTOR as follows:

- 8.1 The LESSOR possesses an EP/CLOA/other similar tenurial instruments to the Leased Property and has the power and authority to lease the same to the LESSEE-INVESTOR.
- 8.2 All appropriate and necessary corporate and legal action authorizing the execution and performance of this Lease Agreement have been taken.

- 8.3 The LESSEE-INVESTOR shall be held free and harmless from any and all claims of third parties to ownership of, or right of possession over, the Leased Property, and the LESSOR-ARB/s shall indemnify the LESSEE-INVESTOR for all damages resulting from its eviction, in the event such third parties successfully maintain their claims. However, this excludes any and all cases/claims on the property prior to its transfer to the LESSOR-ARB/s.

#### **REVOCATION/CANCELLATION/TERMINATION**

- 9.1 This Lease Agreement shall be revoked and/or terminated at the close of business hours on \_\_\_\_\_ (hereinafter, the "Termination Date"). The LESSEE-INVESTOR may, by written notice served to the LESSOR-ARB/s as early as one (1) year prior to and no less than six months prior to the Termination Date, request to extend this Lease Agreement for an additional period of \_\_\_\_\_ years. In response to such a request, the LESSOR-ARB/s shall either (a) decline to extend the Lease Agreement or, (b) agree to enter into negotiations on the terms and conditions of a new agreement. The new agreement will take effect only if the parties are able to mutually agree on all terms and conditions thereof. The new agreement shall be subject to review by the Regional Director of the DAR where the property is located.
- 9.2 Prior to the expiration of its term, this Lease Agreement may be revoked and/or terminated by the LESSOR-ARB/s for any of the following causes:
- The LESSEE-INVESTOR fails to fully pay the stipulated rental or any other amount due from the LESSEE-INVESTOR under this Lease Agreement, for a period longer than 180 days from the date specified in Item 2.1 of this Lease Agreement, without necessity of demand or notice. Interest charges shall be paid fourteen (14) days after due date on all due and unpaid amounts at an interest rate of twelve percent (12%) per annum or the prevailing legal rate, whichever is higher.
- ii) The LESSEE-INVESTOR shall have intentionally failed in the performance of any act required herein, or is intentionally in breach of any of its obligations and covenants.
- 9.3 The revocation of the lease contract shall be considered an agrarian reform dispute and shall be adjudicated by the DAR Adjudication Board at the provincial level.
- 9.4 Upon revocation and/or termination of this Lease Agreement, the LESSEE-INVESTOR shall peacefully return the use and possession of the Leased Property to the LESSOR-ARB/s, and shall promptly pay all rentals due up to the date of termination.
- 9.5 A statutory lien on movables belonging to the LESSEE-INVESTOR for unpaid rentals and other amounts due the LESSOR-ARB/s arising out of this Lease Agreement shall subsist. The LESSEE-INVESTOR may, upon revocation and/or termination hereof, remove all of its trade or professional fixtures, equipment, movable improvements and other similar properties from the Leased Property, at its own expense, provided, however, that the LESSEE-INVESTOR shall repair any and all damages which may be caused to the Leased Property by reason of such removal.
- All fixed and permanent improvements, such as roads and \_\_\_\_\_ (specify

crop/s planted) introduced on the Leased Property, shall automatically accrue to the LESSOR-ARB/s upon revocation and/or termination of this Lease Agreement without need of reimbursement.

#### **GENERAL PROVISIONS**

- 11.1 The parties to the Lease Agreement shall, in the exercise of their respective rights and in the performance of their corresponding duties, act with justice, mutually give what is due, and observe honesty and good faith.
- 11.2 The party hereto who, contrary to law and the stipulations herein, willfully or negligently causes damage to the other party, shall indemnify the latter for the same.
- 11.3 The party to this Lease Agreement who willfully causes loss or injury to another party in a manner that is contrary to morals, good customs or public policy shall compensate for the damage on the injured party.
- 11.4 In all instances, the LESSEE-INVESTOR shall not assign its rights and obligations under this Lease Agreement nor sub-lease the leased premises to any person or entity without the express written consent of the LESSOR-ARB/s. Any violation hereof shall give rise to the termination of this Lease Agreement and the LESSEE-INVESTOR shall bear whatever losses that may be incurred by reason thereof.
- 11.5 The LESSOR-ARB/s shall ensure that the lessee enjoys full, peaceful and quiet enjoyment, possession and utilization of the subject landholdings in accordance with the agreed terms and conditions on the Lease Agreement. Any violations of this particular obligation by the LESSOR-ARB/s shall cause the termination of this Lease Agreement and the LESSOR-ARB/s shall bear whatever losses that may be suffered as a consequence thereof.
- 11.6 The LESSEE INVESTOR shall continue to pay any and all lease rentals due to the LESSOR ARB even in the event of force majeure such as typhoons and pestilence.

#### **DAR APPROVAL AND LEGAL ACTIONS**

- 11.1 Upon the signing of this agreement, the parties shall ensure that each one shall have a copy of the final and signed agreement.
- 11.2 Any of the parties to this agreement may file a copy with the Regional Office of the DAR, and the DAR shall review and approve the same in accordance with approved guidelines and procedures. In the event that there is no action by the DAR within a period of ninety days from filing, then the contract shall be deemed approved.
- 11.3 Without prejudice to the proceedings for mediation and arbitration which the parties agree to submit themselves to, any legal action or proceeding arising out of or connected with this Lease Agreement and involving a matter not determinable by mediation or arbitration shall be brought before the DAR Adjudication Board at the provincial level.

**ANNOTATION**

This Lease Agreement shall be annotated at the back of the Transfer Certificate of Title (TCT) and Emancipation Patents (EPs)/Certificates of Land Ownership Award (CLOAs) or other similar tenurial instruments (i.e., Free Patents, Homestead Patents, etc.) on file with the Registry of Deeds (ROD) after its approval by Regional Director.

**SEPARABILITY CLAUSE**

In the event that any of the provisions of this Lease Agreement is declared with finality as unlawful, inoperative or ineffective by DAR Adjudication Board or any of its provincial or regional adjudicators, the validity of the other provisions hereof not so affected, shall continue to be in full force and effect provided it can stand on its own mandate.

**EFFECTIVITY**

The Lease Agreement shall be effective after ninety days without any action from the DAR, or upon the approval of the same by the Regional Director. . It shall be binding upon all the LESSOR-ARB/s and his/her/their heirs, assigns and successors-in-interest. It shall be unaffected by any change in the membership or distribution made or to be made in the membership of the cooperative/association.

**IN WITNESS WHEREOF**, the parties herein have hereunto set their hands this \_\_\_\_ day of \_\_\_\_\_, 200\_\_ at \_\_\_\_\_.

\_\_\_\_\_  
(LESSOR-ARB)

\_\_\_\_\_  
(LESSEE-INVESTOR)

Signed in the presence of:

\_\_\_\_\_



## C. Summary of recommendations

### RECOMMENDATIONS ON AVA LEASES

#### A. Analysis of key AVA terms

##### 1. Duration of AVA contracts

- Encourage investors and ARBs to execute shortest reasonable lease terms
- Provide mechanisms for review of longer lease terms. The review should focus on guaranteeing that the terms of the contract will promote the best interest of ARBs and the proposed length of time is justified. Prohibit clauses (within the contract) that give the lessee the unilateral right to renew
- Rigorously enforce (and monitor for outcomes) the required “transfer of technology and management programme” provisions in section 5.2.11, DAR AO No 2, s. 2008

##### 2. Lease rental rates

- Commission a study of market lease rates in AVA areas to be used as a reference in future lease rate negotiations
- Refer to DAR AO No 2, s. 2008 in ascertaining minimum lease rates, unless and until reliable market rate data becomes available. This will ensure that ARBs can pay annual land amortization and real property taxes and still have an additional amount to support their livelihood. While this minimum rate is not mandatory, it should be a point of reference for DAR contract reviewers in assessing whether a lower lease rate is justified
- Evaluate lease impacts on the basis of the adequacy of the lease rate alone and not on values derived from potential incomes from wages and ancillary business activities

##### 3. Periodic increases in lease rates

- In the absence of an inflation factor that measures land rental or market prices, include provisions on core inflation rate (as determined by Bangko Sentral ng Pilipinas [BSP]) as basis for annual rate adjustments in all AVA leases

##### 4. Rights to ownership of improvements

- Revise Sec. 5.1.4, DAR AO No 2, s. 2008 to be consistent with Sec. 5.3.7, DAR AO No 6, s. 2006. Require AVA lease agreements to include ownership by the ARB of permanent improvements after the lease as a standard provision

#### 5. Sub-leases and assignments

- Revise Sec. 6.2.4, DAR AO No 2, s. 2006 to permit subleases or assignments only with express written consent from the lessor. Require AVA lease agreements to include this as a standard provision

#### 6. Force majeure clauses

- Provide strict enforcement and monitoring of contracts to ensure that as stipulated in Sec. 5.3.3, DAR AO No 9, s. 2006: "Notwithstanding crop failure due to natural calamities or force majeure, the lessee shall ensure payment of lease rental as stipulated in the contract." Require AVA lease agreements to include this as a standard provision

#### 7. Termination of clauses

- Prohibit lease provisions that give lessees the unilateral right to terminate without cause and on minimal notice. Include appropriate clauses in AVA lease agreements

#### 8. Contract review and renegotiation

- Continue to include clauses requiring parties to review and renegotiate the economic terms of the contract every three to five years for longer term leases
- Encourage parties to include lease clauses stating that, in all renegotiations that occur after an initial period of perhaps 10 years, either party can terminate the lease if they are unable to agree on new economic terms

#### 9. Model lease

- Develop a model lease form that is consistent with existing AOs, including mandatory provisions set forth in the above recommendations, guidance for parties on lease duration and lease rates that reflect earlier recommendations (see sections 1 to 8). A proposed model lease is attached to this report as Annex B
- Distribute copies of the model lease as an educational tool for ARBs with existing contracts and for those who are planning to engage in or renew their contracts

#### 10. Legal and technical assistance

- Require participation of DAR lawyers, legal officers or external legal advisors in all AVA lease negotiations
- Require contracts to be written and negotiations be conducted in English and in the local language of ARBs

## RECOMMENDATIONS ON GROWERSHIPS

### 1. Establish a market-oriented price setting mechanism

- Commission an independent study into the pricing of bananas
- Provide cooperatives with a market training program
- In collaboration with the investor, invite selected graduates from the market training programme to walk the supply chain from the farm gate to the customer's warehouse in the target market

### 2. Establishing safeguards for low commodity prices

- (For PCIC) Conduct a feasibility study on crop revenue insurance against price drops. If found feasible, propose proper legal amendment to Congress

### 3. Input pricing

- Explore provisions in the AVA to ensure that ARBs have access to competitively priced inputs
- Issue an AO requiring investors in exclusive supply agreements to reveal the true cost of procuring inputs for ARBs. From this cost, the investor will be entitled to add a five percent administration fee
- Issue an AO preventing investors from imposing penalties to ARBs for procuring inputs of comparable quality

### 4. Separate marketing arrangements from financial arrangements

- (for LANDBANK) Explore alternative means by which production loans might be advanced directly to cooperatives rather than through investors

### 5. Risk-sharing

- Ensure that ARBs are released from any obligations for the performance of the product in the market beyond that point at which the investor takes possession of the product
- Provide cooperatives with quality management training

### 6. Limitation or prohibition on company taking over the operation of the farm

- Require approval from DAR, all decisions of investor take-over
- Appoint an independent administrator who shall approve the purchase of all inputs and product sales

## RECOMMENDATIONS FOR GOVERNMENT AGENCIES

### A. Department of Agrarian Reform

#### 1. For future contracts:

- Decentralize and simplify the process of approval through the Regional Director, with the assistance of the Chief of the Legal Division at the Region and the Head of Beneficiaries Development. The application shall be deemed approved if within 90 days from filing, no action has been taken by the DAR
- Provide special training to DAR lawyers to enable them to assist the farmers and cooperatives involved in AVAs. This can be done as a transition measure, while the capacity building programme is being rolled out
- Strengthen the capacity of DARAB in the review of AVAs
- Strengthen the PBD Lawyering approach through :
  - ⇒ Consolidating all the learnings of this study in a manual on best practices in AVA contracts, identifying what kinds of provisions to avoid or renegotiate. Use this manual as a guide in training the trainers for farmers in the AVA sector
  - ⇒
  - ⇒ Develop training modules on how to simplify and adapt the rules on succession to the farmer associations. This can be in the form of popular education materials, or popular education training approaches
  - ⇒ Look into the possibility of outsourcing this expertise to lawyers who work for the public interest

#### 2. For existing contracts:

- Provide an amnesty period of six months wherein all existing contracts not yet approved by the DAR can be filed for review and approval, with the caveat that if no action is taken within 90 days from filing, the same is deemed approved

## B. The context of capacity building and the role of DAR

- Collaborate with DA to create a capacity-building fund, with the assistance of the donor community, that will target ARBs and non-ARBs and will increase capacity of farmers on the following areas:
  - ⇒ Business and legal skills (to improve awareness and understanding on their rights and obligations under the AVA contracts, guided by certain key principles on best practices). This shifts the emphasis and the investment of resources on the empowerment of the farmers before the contracts are signed, and avoids to a certain degree the difficulty of having to review-approve-monitor contracts which have already been signed.
  - ⇒ Organizational development, as well as dispute resolution;
  - ⇒ Financial management and accountability measures for good governance;
  - ⇒ Business planning, including marketing; and
  - ⇒ Leadership
- Undertake an audit of the professional and management training needs of ARBOs and cooperatives engaged in AVAs
- Develop training modules based on the needs assessment, in conjunction with ARBs, investors and service providers.
- Develop a list of approved training providers for the delivery of the training modules
- Continuously evaluate the performance of approved training providers to meet the ARBs' anticipated needs

## C. Department of Agriculture

- DAR and the DA should collaborate on the capacity building of small holders to include legal, technical and financial management of their associations, in order to take the best advantage of opportunities available in the sector
- Increase the support to the agribusiness sector through farm infrastructure - including farm to market roads, financing for farm equipment and collaboration in the installation of irrigation infrastructure
- Continue and expand research and development in the area of pest control in the banana, cacao, pineapple and oil palm industries to reduce threats to biosecurity

- Work with DAR for the development of agricultural extension for AVA crops within the HVCCDP. Outsource similar services from state universities and colleges (SUC) and other technical agriculture agencies

#### D. Cooperative Development Authority

- Revisit bills that seek the amendment of RA. 6939, otherwise known as the Charter of the CDA. Improve the organization of the CDA by providing programmes for the development and regulatory needs of more than 25 000 cooperatives in the country

For the immediate term:

- (for the Government) Provide CDA with sufficient budget to enable it to deliver genuine and meaningful service;
- (for CDA in collaboration with the DAR and the DA) Develop an integrated capacity building program that targets cooperatives in the AVA sector; the program should also revisit the training course outline on governance and management and make necessary improvements to improve the financial literacy of cooperatives
- Adopt stricter accreditation and monitoring of trainers and auditors to ensure better quality training and auditing

#### E. The Land Bank of the Philippines

- Combine capacity-building activities with the loan programme. Capacity-building activities can be financed through the national budget or through official development assistance (ODA). In doing this, there will be more opportunities for small cooperatives to avail of loans. To protect itself from risks of non-payment, where the loan ceiling is low, the business will be subject to various forms of capacity building activities (farm planning, bookkeeping, financial controls, organizational development, among others)
- Develop a systematic way of building capacities through active lending. LANDBANK should be ready to absorb the risk if the enterprise fails and support the cooperatives to try again (with evidence that the cooperatives will initiate the necessary reforms and adopt good practices)
- Diversify service providers, to include academia, the business community, NGOs and more mature cooperatives that can provide "handholding and mentoring"
- Conduct more information activities to improve farmers' awareness on the availability of credit programmes, especially the APCP

- Simplify documentary requirements for ARB cooperatives or provide technical assistance so they can comply with the requirements
- Implement appropriate training for all officers and BOD members with an AVA. This will improve cooperatives' credit-worthiness through improving capabilities to govern and manage affairs independently

#### F. Philippine Crop Insurance Corporation

- (for PCIC) Consider further streamlining its processes to be able to reduce its costs to make the premium more affordable to the farmers
- Consider expanding the WIBI programme which is also relevant to non-rice and corn crops
- Conduct an in-depth study of the feasibility of revenue insurance for the Philippine setting and make a legislative proposal to include such kinds of insurance in the current PCIC charter, if warranted
- Collaborate with the DAR and the DA in the raising of awareness of farmers and their associations on the benefits of crop insurance and the roles and responsibilities of government and the farming sector

#### G. Department of Labor and Employment and National Labor Relations Commission

- (For DAR, NLRC, and DOLE) Conduct a joint learning session on the labour relations intricacies of AVAs, and thereafter issue a joint Administrative Order:
  - ⇒ Introducing the concept of AVAs;
  - ⇒ Reiterating the applicability of the Labor Code to agricultural workers;
  - ⇒ Stating the typical work arrangements and labour relations aspects of AVAs, including red flags on possible illegal use of labour-only contracting, casualization and contractualization, non-payment of minimum wage, and other labour standards violations; and
  - ⇒ Emphasizing the need to resolve all labour cases in a timely manner
- (For DAR) Provide DOLE with all copies of the AVAs that it has received. The DOLE regional offices, in coordination with the DAR, should then conduct massive information drives among parties to the AVAs, all of the subcontractors of these parties, ARBs, farm workers, employees and other persons working in whatever capacity on the premises or under the direction of the investors or the cooperatives/farmers. In other words, all workers and employees should be included, regardless of how they are classified and despite the allegation that there is no

employer-employee relationship

- (For DOLE Regional Offices) Use their Visitorial and Enforcement Power under Art. 128 of the Labor Code to ensure compliance with labour standards
- Promote the Single Entry Approach. Inform workers of their right to initiate the dispute resolution process by simply writing a letter or an email to the DOLE. Capacitate the Single Entry Approach Desk Officers to:
  - ⇒ understand basic labour relations issues in AVAs, both for growership and leaseback; and
  - ⇒ In case of failure to settle, process filing of cases at the Regional Offices and the NLRC
- The Bureau of Workers with Special Concerns (BWSC) of DOLE provides livelihood assistance to the “informal sector”, which should include seasonal and contracted out farmworkers, including “help-outs”. The BWSC should then coordinate with DAR in order to identify farmworkers who could benefit from its programmes
- (for the DOLE) Create a database that would contain data on labour standards, compliance in AVAs and other work arrangements involving farmworkers, whether ARBs or not
- The AVAs should contain “labour clauses”, like those proposed or included in international trade agreements, which provides that both parties to the agreement shall follow all labour laws, including laws prohibiting labour-only contracting, illegal casualization and contractualisation, jurisprudence that provides for criteria for determining the existence of employer-employee relationship, and rules on the recognition of regular status, when appropriate. The labour clause should likewise provide that the parties shall deal only with entities that comply with local minimum labour standards

## RECOMMENDATIONS FOR THE COOPERATIVE SECTOR

### 1. Capacity gaps in governance

#### a. Lack of understanding on the principles of cooperative

- (For CDA) Require education committees of cooperatives to reinforce the universal principles of cooperatives in regular refresher courses for all members and officers

#### b. Electing or hiring of officers who lack integrity

- Supplement mandatory trainings with more need-based courses for officers. This can be funded

by the Education and Training Fund of the cooperative

- Require the Election Committee to ensure that there is a wide range of choices for candidates, including women, and to adopt measures to ensure the fairness of the elections of the cooperative
- Orient the Ethics Committee members about their functions as committee members, and provide incentives for developing/updating and enforcing the Code of Governance and Ethical Standards of the cooperative
- Require the management and all elected officers of the cooperative to sign a pledge of commitment to their cooperative's Code of Governance and Ethical Standards
- Encourage cooperatives to discuss the Code of Governance and Ethical Standards with prospective members in the pre-membership seminar, and at least once a year in the general assembly
- Require cooperatives to limit the number of members who occupy senior positions in the investors' company from becoming officers in the cooperative, to prevent the perception of conflict of interest

c. Inadequate financial management skills, internal controls and transparency

- Strengthen cooperatives' audit committee capacities in doing audit work and performing regular functions. Encourage BODs to require audit committees to prepare a report at least on a quarterly basis
- Train BODs in risk management and internal control, as well as in understanding and analysing financial statements
- Train BODs on policy formulation to implement Manual of Operations
- Encourage BODs to require regular submission of month-end financial statements. Ensure that these discussions are included as a permanent agenda in all BOD meetings
- Encourage cooperatives to hire bookkeepers with accounting background and commit to strictly follow the by-laws specified by CDA. This can be done by shared recruitments (one bookkeeper serving two or more cooperatives)
- Encourage cooperatives to hire reputable external auditors or auditing firms that can provide quality work. Require external auditors to provide regular suggestions for internal control improvements in the cooperative

d. Terms of Directors and Officers

- Encourage staggered term for BODs to be incorporated in the cooperative by-laws. This would mean that 50 percent of the elected members of the Board would be elected every year, providing the investors with some continuity in whom they can transact
- Encourage cooperatives to include in their by-laws limits for re-election to avoid possibilities of unnecessary or disadvantageous collusion with investors. Limits to re-election will also foster a new generation of leaders

2. Capacity gaps in business management

a. Inadequate business management skills

- Provide cooperatives with regular access to appropriate business training from the private sector, with assistance from appropriate government agencies with business development training programmes
- Employ regular business consultants when financially able
- Encourage investors to provide technical training for their partner-cooperatives
- (for DA and DAR) Work collaboratively in training a group of subject matter specialists on high value crops in the AVA sector under the High Value Commercial Crops Development Programme of DA

b. Lack of adequate support services in legal information and education

- Conduct an information drive to improve ARBs' awareness on the availability of the PBD Lawyering programme and how ARBs will benefit from it
- Assist cooperatives in the renegotiation of their AVAs with investors. To address manpower limitations, legal advisors may be outsourced from alternative legal groups (such as law firms, the Integrated Bar of the Philippines, and other NGO legal service organizations)

c. Inability of farmers and their cooperatives to share information about their contracts

- Sponsor inter-cooperative dialogues to facilitate discussions on AVA terms, input prices and output prices without fear of reprisal from the investor companies and with the participation of DAR officials and lawyers

### 3. Succession and transfer

- Include discussions on the challenges and opportunities that the current rules around succession in ARB cooperatives in capacity-building activities. Because of the peculiar nature of farmers' entitlements under CARP, this can only be done by DAR. However, it is also necessary that these activities be integrated with the larger capacity-building efforts of DAR, DA and local agriculture offices

### 4. Dissolution and fracturing of cooperatives

- Provide legal and similar forms of assistance to large cooperatives that want to break into smaller cooperatives. This especially applies to cooperatives that aim to preserve cohesive groups in the course of carrying out partnerships under AVAs

## RECOMMENDATIONS FOR NGOs

### 1. Current Challenges for CSO/NGOs Supporting ARBs and ARBOs in the AVA sector

- (for NGOs that have passed the evaluation of the Philippine Council for NGO Certification (PCNC) and are working in AVA areas) Formulate a three-year integrated capacity building plan for submission to the government and international institutions for funding
- Pursue a more stable partnership and collaboration with DAR to leverage resources. DAR, as the lead agency in the implementation of CARP, should enhance its outsourcing of critical capacity building services for AVA ARBs and cooperatives from the NGO sector. While this will need to follow the provisions for competitive bidding of the Philippine Procurement Law (RA 9184), NGOs that have a good track record and have proven their competence could easily pass the requirements of the law and have the best chance for long-term service provision. The entry of competent and dedicated NGOs is especially critical now with the many issues that plague the sector
- Devise an incentive system to implement a big brother – small brother mentoring system to enable organizationally mature cooperatives to share their knowledge and develop expertise with other cooperatives

## RECOMMENDATIONS FOR INVESTORS

### A. Key challenges facing investors in AVAs

#### 1. Pole-vaulting

- Adopt the recommendations listed above to make growership pricing more equitable
- Take ARBO representatives on study tours and engage them in other awareness-building activities so that they have a better understanding of international markets and pricing

- Be more transparent about costs and pricing (see discussions in the growerships section)
- Actively encourage and facilitate the provision of legal advice to ARBOs by DAR lawyers (or other sources of legal aid) who can help the ARBO officers negotiate better contracts and understand why they should not engage in pole vaulting
- Consider taking legal action against the traders who encourage pole vaulting and thus may be engaged in tortious interference with contractual relationships

## 2. Lack of capacity of ARBOs and among individual ARBs

- Support efforts to provide technical, financial and management training to officers and directors of the cooperatives, as described more fully in the Cooperatives section of this report. Companies can go further and provide such training directly in keeping with the requirement of Sec 5.2.11, DAR AO NO 2, s. 2008. Under this AO, investor-lessees are mandated to provide such training within one year of beginning an AVA lease. This could also include study tours to foreign markets to help farmer leaders gain a better understanding of the value chain, including the critical role of exporters who must provide downstream buyers with a regular and reliable supply of good quality fruit (see Box 5)
- Ensure that contracts and negotiations are conducted both in English and the local language so that ARBs will be more likely to understand what they have agreed to. Here again, supporting legal aid efforts will also advance this objective

## 3. Delays in DAR AVA contract approval process

- Our recommendations with respect to the DAR approval process are set forth in the Government section. Investors should support these changes. In particular, companies should strive to ensure that AVA agreements are fair and comply with all DAR requirements to facilitate prompt review and approval. They should also see to it that new or amended contracts are filed with DAR on a timely basis.

## B. Improving Policies and Operations to be more Consistent with the VGGT and CFS-RAI

- Embrace and adopt the recommendations on lease and growership contracts set forth in this report so that AVA contract terms and practices are more equitable
- Avoid the use of unfair business practices such as pressuring farmers to sign blank contracts; insisting that farmers hand over their titles as a form of security for loans made by the company; and applying undue pressure to cooperative officers who are also employees of the company to make decisions that favour the company
- Improve transparency by sharing more information about their businesses so farmers can have

more assurance that companies are complying with contracts. This specifically includes records showing the costs of procuring inputs and services (such as aerial spraying) that the company provides to farmers to justify the price the company charges the farmers

- Engage in internal and industry-wide awareness building so company leaders and staff will gain a better understanding of what it means to be a responsible investor
- Revise the company's internal principles, guidelines and operational procedures to make them consistent with relevant provisions of the VGGT and the CFS-RAI
- Support the development of a set of voluntary guidelines that are consistent with VGGT and CFS-RAI and are adapted to Philippine context. Commit to adopting them and to developing internal plans for implementation
- Support the creation of and then participate in a multi-stakeholder forum to engage in ongoing discussions of challenges arising from AVA agreements. The forum should be made up of representatives of investors, ARBOs, relevant government agencies, civil society and academia

The *Multi-sectoral study on the Agribusiness Venture Arrangement (AVA) policy and implementation under the Comprehensive Agrarian Reform Program* was conducted by the Food and Agriculture Organization of the United Nations in close collaboration with the Department of Agrarian Reform



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