

OPERATIONAL GUIDELINES FOR RESPONSIBLE LAND-BASED INVESTMENT



USAID
FROM THE AMERICAN PEOPLE

ABOUT THIS REPORT

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Operational Guidelines for
Responsible Land-Based Investment

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ACRONYMS

AA	Acknowledgement Agreement
AFD	French Agency for Development
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
DFID	United Kingdom's Department for International Development
EIA	Environmental Impact Assessment
ESIA	Environmental and Social Impact Assessment
ETFRN	European Tropical Forest Research Network
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, Prior and Informed Consent
GIS	Geographic Information System
HLIA	Household Livelihood Impact Assessment
HRIA	Human Rights Impact Assessment
IIED	International Institute for Environment and Development
IISD	International Institute for Sustainable Development
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILO	International Labor Organization
ISO	International Standards Organization
ITFC	Integrated Tamale Fruit Company
IFC PS	International Finance Corporation Performance Standards on Environmental and Social Sustainability
KPL	Kilombero Plantation Limited
LGAF	Land Governance and Assessment Frameworks
LPI	Land Policy Initiative

MBSA	Mali Biocarburant SA
MOU	Memorandum of Understanding
NGO	Non-Governmental Organizations
NPV	Net Present Value
OHCR	Office of the United Nations High Commissioner for Human Rights
PIDRN	IFAD's Northern Regions Investment and Rural Development Programme
RAI	Principles for Responsible Investment in Agriculture and Food Systems
RUBADA	Rufigi Basin Development Authority
SALCRA	Sarawak Land Consolidation and Rehabilitation Authority
SERA	Strategic Economic Research and Analysis
TIC	Tanzania Investment Center
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGP	United Nations Guiding Principles on Business and Human Rights, also referred to as UN Guiding Principles
USAID	United States Agency for International Development

SUMMARY

ACKNOWLEDGEMENTS

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PURPOSE OF THIS GUIDE

USAID is increasingly partnering with the private sector through efforts such as the New Alliance for Food Security and Nutrition (New Alliance).¹ Some of these initiatives, particularly in the agriculture sector, involve land-based investments in countries where land governance is weak. In these environments, investors face land tenure risks associated with unclear or overlapping claims to land, lack of transparency, and land-based conflict. This guide discusses USAID's recommendations for best practices related to the due diligence and structuring of land-based investments, with the goal of reducing risks and facilitating responsible projects that benefit both the private sector and local communities. This guide is also designed to help companies identify practical steps to align their policies and actions with provisions of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (VGGT), the International Finance Corporation's Performance Standards on Environmental and Social Sustainability (IFC PS), and other relevant instruments, including the United Nations' Guiding Principles on Business and Human Rights (UNGP).

This guide does not endorse large-scale acquisitions of land. USAID strongly recommends that investors consider smaller-scale projects or alternatives that avoid or limit the transfer of land and resource rights, such as contract farming and smallholder out-grower schemes,² in place of large-scale investments. Increasingly, research shows that these alternatives can lead to positive economic and social outcomes.

¹ The New Alliance for Food Security and Nutrition was launched in 2012 by the G8 to support sustained and inclusive agricultural growth in Africa and help raise 50 million people out of poverty by 2022. The New Alliance is a partnership of governments, donors, and the private sector. Ten African governments have joined the Alliance. More information is available at: www.new-alliance.org.

² Some out-grower and contract farming models have not performed as well as hoped. Therefore, in pursuing alternatives to large-scale acquisitions, it is important to identify the best models for your particular project—these models are discussed in more detail below.

This guide recognizes, however, that large-scale land acquisitions are occurring, and will continue to occur, and in this context provides advice and highlights best practices related to structuring such acquisitions in the most sustainable way possible.

The recommendations are organized to follow the lifecycle of an investment, from the initial stages of conducting due diligence and assessments, to pre-project community engagement, to negotiating the contract, project operations, and post-project close-out. At different stages we note “break away” points—situations that, should they arise, may be a signal that the risks of the project outweigh the benefits, and that it is better to terminate negotiations or close a project.

Although the primary audience for this guide is a private sector company operating in one of the ten New Alliance countries, this guide is intended to more broadly inform land-based investments made by private sector companies operating in developing countries (and in particular, Sub-Saharan Africa). The questions and approaches described in this document are intended to help investors³ to not only “do no harm” when they acquire land, but to structure projects to achieve positive outcomes for affected parties. They are also intended to help investors adjust or amend corporate policies and processes in order to reduce land tenure risks and increase opportunities for sustainable and responsible investment in the agriculture sector.

In order to implement the suggestions outlined in these guidelines, we note that companies may need to hire additional staff and/or train staff at various organizational levels in the basics of land tenure, as well as in techniques for identifying, mitigating, and monitoring land tenure-related risks and impacts. Staff associated with project management, stakeholder engagement, and identifying, avoiding, and mitigating social, environmental, and governance risks associated with projects should have clear responsibilities and defined lines of authority. Companies may need to amend their internal policies (or create new ones), create or adjust monitoring and evaluation efforts, and modify reporting practices to align with evolving best practices related to land acquisitions and community engagement.

This guide is not intended to provide a template for structuring a project contract or a benefits or community development agreement. Nor does it address specific country-level and commodity-level land risks that may exist in a particular project. Nor should this guide should be taken as a replacement for a careful review of national or local law, and the specific requirements of that law. Rather, the approaches and practices described here should be viewed as complementary to the variety of legal requirements associated with many land investments (for more detail on these issues, see Cotula and Blackmore, 2014) and to the voluntary commitments, including voluntary standards and human rights commitments, many investors assume. This guide is also not intended as a replacement for the advice of counsel. Ideally, counsel advising a company in land-based projects such as the ones described here should understand national and local land laws, both statutory and customary, as well as local administrative and judicial practices and legal interpretations. We note that in many countries, very capable non-governmental organizations exist that work on land issues and that can provide extremely useful assistance, context and local insights. Finally, while this guide does not explicitly address concerns related to environmental considerations, modifying supplier codes of conduct, creating supplier score

³ By “investors” we mean private sector firms that are directly acquiring rights to use land and resources rather than institutional investors.

This guide is intended to assist these firms but can also be used by firms that have committed to supply chain transparency and to monitoring their suppliers in relation to the acquisition of land and resource rights.

cards, contract clauses, or supplier audits, it may help inform discussions around these issues and help align accountability and sustainability expectations.

EXECUTIVE SUMMARY

As global demand for food, biofuel, forest, and horticultural products rises, more companies are starting to invest—and will continue to invest—in developing countries, where land appears abundant and inexpensive. But with the promise of agricultural investment in developing countries comes several risks. Among these is **land tenure risk** associated with acquiring rights to land.

Although Africa is routinely cited as the location with the greatest amount of uncultivated arable land in the world, it is important for investors to understand that most land in Africa is not empty. On the contrary, it is often home to—or used by—groups of local people who have occupied the land for generations, even centuries.

“Far from being an ‘externality,’ land tenure can be a real threat to stable returns, and one that should be included in any risk assessment of a land-dependent investment... The financial risks posed are multiple, ranging from slippage in construction times and unexpected cash flow loss due to suspensions to expropriation of assets following the loss of insurance coverage... The impact of these risks ranges from substantial to catastrophic for the firm or investor involved”

—*The Munden Project LLC, 2012, p. 5.*

Responsible investors need to respect the rights of these local women and men, including their legitimate rights to land and other resources—which often arise out of customary practices—and avoid actions that lead to the loss of these rights and related harms. Whenever possible, investors should consider avoiding the large-scale transfer of tenure rights and look for alternatives that limit harm to local communities, such as contract farming and out-grower schemes.⁴ The goal of investments should be to find positive outcomes for all affected parties, including both the community and the investor.

International guidelines, performance standards, and voluntary standards call for the private sector to recognize, respect, and protect the land and resource rights of local communities, indigenous peoples,⁵ and others who hold legitimate rights to these assets. When a project fails to take adequate account of local land and resource rights, it can impose significant costs on local people, and on the project. It can inadvertently lead to costly delays, work stoppages, protests, and, in some cases, violence. Investors can face legal actions and suffer financial, brand, or reputational harm.

Several studies have found that failing to address land tenure risks can translate into tangible financial harm for a project. Among them:

- A 2012 report found that companies that ignore pre-existing or customary local land rights in the land acquisition process may incur financial damages ranging from a **29-fold increase** in operating costs to **outright abandonment of operations**.

⁴ A discussion of sourcing from smallholder farmers is available at: “Think Big. Go Small. Adapting business models to incorporate smallholders into supply chains,” Oxfam International, (2014).

⁵ Although there is no universally accepted definition of “indigenous peoples,” the UN points to a set of common characteristics: they self-identify as indigenous; they have historical continuity with pre-colonial or pre-settler societies; they have a strong link to territories and surrounding natural resources; they have distinct social, economic, or political systems; they have a distinct language, culture, or beliefs; they form a non-dominant group in society; and, they demonstrate a resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. See: http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

- A 2014 analysis found that “a major, world-class mining project with capital expenditure of between US\$3-5 billion will suffer roughly **US\$20 million per week of delayed production in Net Present Value** terms” due to land tenure issues.

Failing to address land tenure risks can also cause harm to communities and the environment:

- A 2012 report on large-scale acquisitions of land highlights many examples of cases where local communities lost rights and access to land resources, including grazing lands, wetlands, forests, and marshlands, as well as farm and residential lands. The report noted that: “**a major risk linked to commercial pressures on land is the potential loss of resident and residential-based assets. Such effects may be particularly severe when acquisitions are compulsory, rather than negotiated, and include non-consensual displacement of affected populations.**”
- Women may face special challenges. A 2014 study finds evidence suggesting that **women tend to benefit less and face more negative consequences from large land-based investments.**

However, research suggests that alternative investment models in agriculture can generate positive economic and social outcomes for all participants:

- A number of studies have found that contract farming can help participants become more effectively integrated into value chains, earn higher agricultural incomes, and be more productive.
- Contract farming often increases access to credit, as well as access to better quality inputs, information, and improved extension services, which increase participants’ investment and efficiency, which should enable farmers to accumulate more assets over time and improve livelihoods.
- In a recent study of contract farming in Ghana, researchers found that the contract arrangement had a positive effect on the asset endowments of households, on household’s perceived future security, on agricultural income, and on profit per acre.

A variety of international instruments create non-binding land tenure obligations for the private sector. Perhaps the most influential are the VGGT, which call on private sector companies to respect the legitimate tenure rights people and communities hold, including customary and informal rights. A number of companies, including Cargill, Coca-Cola, Unilever, and Nestlé, have voluntarily agreed to begin the process of bringing their business processes into alignment with the VGGT.

The IFC PS also provide important guidance on land tenure issues. For example, companies subject to the IFC PS must obtain Free, Prior, and Informed Consent (FPIC) if their project affects indigenous peoples (PS 7). Some companies are going even further and providing FPIC to all affected communities, not just indigenous peoples. The IFC PS also provide important guidance on environmental and social assessments, community engagement and consultation, and displacements and grievance processes.

Businesses are increasingly paying attention to important regional-level instruments such as the African Union’s (AU) Framework and Guidelines on Land Policy in Africa (2010) and AU Guiding Principles on Large-Scale Land Based Investment (2014). Finally, many businesses comply with sector-specific standards that guide large-scale land-based investments.

The practical guide presented below is part of this developing body of literature, and is designed to help companies mitigate land tenure-related risks and bring important benefits to local communities, including technology, access to markets, jobs, and broader “spillover” benefits. It identifies strategies that may help mitigate risks for stakeholders. These include:

- Ensure neutrality in discussions, dialogue, and negotiations;

- Develop a robust stakeholder analysis and stakeholder engagement framework;
- Embrace sustained project sensitization and information sharing;
- Hold bilateral and collective dialogues with relevant public and private sector stakeholders, and with traditional authorities and community members;
- Build solutions from the grassroots up by engaging local people;
- Support regular and extensive community consultations and engagements, use face-to-face interactions and virtual engagements;
- Build strategic alliances with local champions;
- Debrief teams regularly and revise strategies as needed; and,
- Ensure comprehensive documentation that is shared with stakeholders.

The main recommendations from this practical guide are summarized below.

1.0 DUE DILIGENCE

Investors must conduct robust land tenure due diligence prior to embarking on any project activities, and continue diligence through the lifecycle of a project.

Investors need to identify who might be affected by the land acquisition, and how—stakeholder mapping and analysis (explained below) are recommended to aid in this effort (IFC PS 1 & 7, VGGT Chapter 3.2).

In addition, investors should hire independent experts to conduct environmental and social impact assessments, as well as human rights impact assessments.⁶ Investors should publicly share information from assessments with affected parties (IFC PS 5, VGGT Chapter 12.11).

Investors also need to understand the local land tenure framework (including laws, customary rules, regulations, and bureaucratic processes associated with land), and any limitations on land use. (VGGT Chapter 12.12). It is important to note that, in many countries, land is governed by both formal and customary rules.

Finally, due diligence will make a preliminary identification, based on existing maps and land ownership data, of the proposed project site, and identify how the proposed land use will interact with current land use and occupancy.

2.0 STAKEHOLDER ENGAGEMENT

Prior to beginning formal contract negotiations, investors should engage in a participatory and transparent manner with stakeholders, particularly local communities and vulnerable groups⁷ to:

- **RAISE AWARENESS** of the investor about the community's needs, concerns, and desires, and also raise awareness among stakeholders about the investor; the proposed project design, scope, and timeline; the types of land and resource rights sought; and potential community impacts (risks and benefits). (IFC PS 7).
- **CONSULT** with local stakeholders about their interests in the land that may be used in the project and begin to align expectations about the proposed project (IFC PS 1, 5 & 7, VGGT 9.9). Engagements should be open, transparent, and accessible to stakeholders including indigenous

⁶ In many countries there are skilled local experts and very competent NGOs that can provide these services.

⁷ Vulnerable groups include those with limited social, economic, and/or political power and often include women, elderly, youth, minority groups, pastoralists, and indigenous people.

people, women, youth, elders, and other vulnerable groups. The use of FPIC in the context of interactions with indigenous populations is subject to varying interpretations within the international community; however, private sector firms are increasingly recognizing the FPIC rights of indigenous peoples, and some firms have gone further to advocate FPIC for all stakeholders affected by a proposed project.

3.0 MAPPING

Proposed project sites must be mapped to identify land claims, occupancy patterns, land uses, existing natural assets, and active land disputes. Local stakeholders should be a part of mapping exercises. Women and other vulnerable groups should be included in mapping exercises, to gain insight into their special claims over land and understanding of land use. Maps produced with different groups can be merged to develop a more nuanced understanding of how land and other natural resources are used in a proposed project location, and how local women and men understand their claims to these resources.

4.0 CONTRACT NEGOTIATIONS

Diligence processes will identify which groups have legitimate rights to land in the proposed project site and who should be party to any contract related to the acquisition. Investors should engage with a broad group of stakeholders during negotiations. As discussed below, “legitimate ownership” is not always the same as legal ownership. Even if the government legally owns the project land, the investor should make sure to engage actively with the communities who currently occupy and use the land, as these communities have legitimate land rights that must be respected. Community development agreements or memoranda of understanding should be negotiated to compensate for any losses associated with a project’s development. Negotiations with communities need to be conducted on a transparent and participatory basis, sharing information with community members. (IFC PS 1, 5 & 7, VGGT Chapter 12.3)

There are various models for land acquisition contracts, including concession, purchase agreement, fixed-price lease, and equity-based contract, where risks and benefits are shared by the parties.

A crucial part of contract negotiations will involve discussions about how best to compensate the local community for any losses to their land or land-related economic activities. Investors can draw on various types of compensation, both financial and in-kind (in-kind is often favored and preferred by IFC PS), and should work with the community to determine the most appropriate compensation structure. In addition, investors should consider the intergenerational impacts of investments and how these impacts may affect future generations. Investors may wish to go beyond the legal requirements for community engagement to seek solutions that are fair and well understood by local women and men and other affected parties.

5.0 PROJECT OPERATIONS

Investors should continue to interact with stakeholders during project operations through:

- **CONTINUING ENGAGEMENT:** Establish regularly scheduled meetings with an oversight committee comprising diverse stakeholders. Allow for ad hoc meetings to brief stakeholders on project progress and address any concerns during project operations. (IFC PS 1 and 5)
- **MONITORING:** Hire a neutral third party to monitor the project and allow for an independent evaluation to measure project impacts. (IFC PS 1, VGGT Chapter 3.2)

- **GRIEVANCE MECHANISMS:** Establish a grievance mechanism that is proportional, culturally appropriate, accessible, transparent, accountable, and that offers protection for communities. (IFC PS I, VGGT Chapter 3.2)

KEY RECOMMENDATIONS:

Land tenure risks are real and, if not properly addressed, can lead to substantial harms for local people whose lives are impacted by agricultural investments and for investors who may not be aware of the complex issues associated with acquiring rights to land. To avoid or mitigate these risks, investors should adopt the following strategies:

- Understand the national legal framework, including both formal and customary law, related to land and resource ownership, transactions and investment, as well as frameworks governing indigenous peoples and women's rights to land (including family law issues such as divorce, marital property, and inheritance).
- Consider alternatives to large land acquisitions, such as contract farming and out grower schemes and acquisition of smaller parcels.
- Avoid, if at all possible, takings of land or acquisitions that involve the resettlement of local people.
- Conduct a robust impact assessment that includes land tenure risks as part of the assessment process and share results publicly in a manner accessible to the local community.
- Learn about local people, and raise their awareness about the project.
- Create and implement an open door policy with the local community and other stakeholders.
- Ensure that consultations are participatory, transparent, and provide enough time and information for informed decisions to be made (identify migratory groups that may need special outreach). This may require special efforts to ensure traditional leaders and officials support such processes and that communities understand the goals and mechanisms involved in such processes.
- Conduct consultations in local languages, at times and places that are convenient for local people, including women and vulnerable groups, in both bilateral and collective dialogue sessions.
- Consult and negotiate in good faith and build community capacity to engage effectively as needed.
- Engage a broad set of stakeholders in consultation and negotiation, not just local leaders. In this regard, neutrality is important. Avoid any signals that create the impression of bias. If local leaders oppose open consultation, work to raise awareness of the benefits of participation and emphasize the need for transparency before moving forward, or consider locating the project elsewhere.
- Identify and map stakeholders, their interests, and their concerns using participatory mapping techniques.
- Ensure that community development agreements or lease agreements with local communities and villages include clear guidance and commitments related to the area of land being used, compensation to be provided, monitoring and evaluation, and grievance mechanisms.
- To the extent possible, make publicly available community development agreements, lease and concession documents to improve transparency.
- Create and support community participation in oversight committees and monitoring and evaluation.
- Provide accessible, appropriate, transparent grievance mechanisms.
- Ensure that all necessary rehabilitation actions are completed at the end of a project.
- Work to ensure that land rights revert to communities and local stakeholders at the end of a project rather than to the state.

INTRODUCTION

Land is an increasingly valuable resource. As global demand for food, biofuel, forest, and horticultural products rises, companies are investing—and will continue to invest—in Africa and other developing countries where land appears abundant and inexpensive.

But while the agriculture sector holds great promise, new agricultural investments can create substantial risks for both you as investor and local communities. In line with the VGGT (Chapter 12.12) and the Principles for Responsible Investment in Agriculture and Food Systems (RAI), investments should not create food insecurity for local women and men but rather should enhance food security (Principle 2).

One of the key risks of agricultural investments is **land tenure risk**—risk associated with acquiring and managing rights to land. The central element of land tenure risk is the failure to account adequately for local land rights.

Although Africa is routinely cited as the location with the greatest amount of uncultivated arable land in the world, it is important for investors to understand that most of this land is not actually empty; it is occupied or used by some group or groups, even if intermittently. When a project fails to take the land and resource rights of local people into account, it can face costly delays, work stoppages, protests, and, in some cases, violence. You may face legal actions and suffer financial, brand, or reputational harm. Communities and the local environment can be left substantially worse off, and local people may be much less willing to engage with prospective investors in future engagements.

Evidence from a number of land tenure-related studies quantifies the costs of poorly designed projects that fail to take adequate account of the rights, needs, and concerns of stakeholders—particularly local women and men who will be directly and indirectly affected by a project (see Box 1 on the following page).

Land tenure risk may arise when:

- There are overlapping claims to the same parcel of land;
- There is lack of clarity over who owns the land;
- Land governance systems are not transparent;
- Different systems and institutions allocate and enforce land rights;
- There are vulnerable groups whose rights are being violated;
- There are existing disputes, or a history of disputes, related to land rights; and
- There is corruption in the systems that allocate and enforce rights.

BOX I. THE LAND TENURE-RELATED RISKS OF LARGE-SCALE LAND INVESTMENT

Economic Risk

- A 2013 review by First Peoples Worldwide⁸ of 52 energy and mining companies listed on the Russell 1000 Index found that land-related conflicts are often long lasting and can seriously affect the operations of companies, leading to delayed operations and forced withdrawal, operational risks for their financiers, and adverse effects on a company's financial stability.
- Civil unrest, government instability, lack of transparency, disagreements with affected communities, and policy changes may cause financial losses.
- Civil unrest may lead to the physical disruption of operations and occupation of essential infrastructure such as roads and water sources and, in turn, disrupt operations and impair the commercial viability of the project.

Political Risk

- Investment in land is substantially affected by political risk factors, including government instability, corruption, internal and external conflict, ethnic tensions, propensity to breach contracts, sudden regulatory changes, and quality of bureaucracy.
- In many countries, limited screening of investment proposals, project approvals without due diligence, rivalries among government institutions, and a lack of transparency surrounding deals all create political risk.⁹
- Political risk is also associated with the political instability and violence that may result from community opposition to large-scale land acquisitions.
- Poor land investments can increase political instability, political risk, and opportunities for corruption, which can, in turn, further erode land governance and create more opportunities for unscrupulous transfers of land rights that harm local communities and further enrich local elites.

Conflict Risk

- Unclear land tenure arrangements and secrecy regarding the size of land purchased or leased reduces tenure security and increases the likelihood of conflict that may adversely affect the economic viability of investments.
- Projects that do not respect local land rights can lead to conflicts and violence against employees. For example, palm oil producer Sime Darby had to shut down operations in Liberia in 2011 after 700 contractors joined local communities in a riot in December, seizing equipment and endangering Sime Darby employees.

"Emerging markets are a very mixed bag when it comes to land rights and record-keeping. ...In these cases, an external actor arriving on the scene is unwittingly caught up in the structural tensions that exist between customary and cadastral systems. Indeed external claims to land can ignite conflict if local constituencies feel that their property rights, whether considered in legal or customary terms, have been ignored or abrogated."
– *The Munden Project LLC, 2012*

Reputational Risk

- Investors in large tracts of land put themselves at reputational risk associated with high-profile naming-and-shaming campaigns by civil society networks and the media targeting investment projects.
- The public criticism may lead to a need to halt a project entirely or divest. Public criticism can damage brand image, harm a company's ability to do business elsewhere, impact the actions of shareholders and/or affect the ability of fund managers to raise capital for projects.

There are steps you can take to reduce these risks, but they require more active and, in the short term, costly engagement with local communities and governments. The costs and time involved with implementing the approaches in this guide can vary depending on the local context and scale of the investment. Opportunities to partner with civil society organizations (CSO) and international donors can allow you to leverage their expertise in certain areas and even offset some of the costs associated

⁸ Indigenous Rights Risk Report for the Extractive Industry, First Peoples Worldwide (2013).

⁹ Klaus Deininger, D. Byerlee, J. Lindsay, A. Norton, H. Selod and M. Stickler, Rising global interest in farmland: can it yield sustainable and equitable benefits? World Bank Publications (2011).

with more thorough due diligence. In the long-run, following the steps outlined in the guide can save time and money, and may even allow for more favorable financing rates over the life of the investment.

At the early stages of a proposed land investment, companies need to identify who holds legitimate rights to lands under consideration. Even if a government claims that land is unoccupied and available for sale or lease, investors need to fact check the claim. You should also consider how the term of a lease will impact any local communities and be prepared to discuss these consequences with local women and men.¹⁰

You may experience difficulty identifying local women and men because their land and resource rights are not recorded in land registries or captured in cadastres. They rarely have title deeds to show an investor. And women and men who are not heads of households are even less likely to have documented rights. Instead, their rights are typically undocumented and come from long-standing, respected customary systems. National governments may or may not recognize these customary systems—though, increasingly, countries are passing legislation that affords legal status to customary rights.

Looking beyond deed or title registries to confirm who lives on and uses the land under consideration for development can be a difficult task. But, overlooking this step can have serious implications for how a project unfolds: if an investment plan is based on developing tracts of land but fails to recognize that people live on, farm, and use the land, the project will harm these women and men and their livelihoods. It will very likely face escalating costs to compensate displaced families and communities and perhaps, in a worst case, to resettle communities.

Open and transparent engagement needs to continue throughout the project lifecycle in order to align expectations about how a project will develop, what compensation or benefits local women and men can expect from the project, and how responsibility for the project is split between you and the government. You need to open channels of communication early and keep them open—particularly to resolve grievances and to report on progress made towards community-level commitments. And finally, investments should not create food insecurity for local people—as can be case when they are focused on export or on biofuel—but rather, as outlined by the VGGT and RAI, investments should enhance local food security.

Companies that ignore pre-existing or customary local land rights in the acquisition process may incur financial damages ranging from operating costs increased by as much as 29 times to outright abandonment of operations.

- *The Munden Project, LLC, 2012, p. 3.*

Why does this matter? Poor planning and engagement has imposed real harms on communities around the world and will create social and/or environmental risks. Related to this, inadequate consultation, compensation, and grievance processes are often key triggers of conflict that stall or halt a project. On the other hand, working collaboratively with local people and

government through the lifecycle of a project will build a stronger social license to operate.

An interview-based analysis of 25 mining cases around the world found that “a major, world-class mining project with capital expenditure of between US\$3–5 billion will suffer roughly US\$20 million per week of delayed production in Net Present Value (NPV) terms” due to land tenure issues.

- *Rachel Davis and Daniel M. Franks, The Costs of Conflict with Local Communities in the Extractive Industry, SRMining*

¹⁰ Affected communities need to know the term/length (among other elements of the contract) of a proposed leasehold in order to make an informed decision about the costs and benefits of any investment.

As noted above, a variety of international and regional guidelines now exist that create obligations for the private sector. Many investors are familiar with the IFC PS. The IFC requires clients to meet these standards throughout the lifetime of an IFC investment and, in cases where host country law and regulation is less stringent than IFC PS requirements, clients are required to comply with the more stringent guidance. Some of the key elements of the IFC PS that relate to land-based investments are presented in Box 2 below.

BOX 2. THE INTERNATIONAL FINANCIAL CORPORATION'S PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (IFC PS)

Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts

- Respect human rights and address any adverse human rights impacts caused by business activities or related to these activities.
- Manage environmental and social risks over the lifetime of a project (by creating and maintaining an Environment and Social Management System that, among other goals, limits disproportionate harms to vulnerable groups).
- Create corporate policies that identify environmental and social objectives and provide a framework for the firm's environmental and social assessment and management process.
- Conduct integrated assessments to identify the environmental and social impacts of projects.
- Mitigate or minimize any identified environmental and social risks.
- Engage and consult with affected local communities on project matters that directly affect them (creating a Stakeholder Engagement Plan).
- Provide indigenous peoples with rights of free, prior and informed consent.
- Respond to and manage grievances of affected communities.

Performance Standard 5: Land Acquisition and Involuntary Resettlement

- Avoid, to the extent possible, involuntary resettlements (which occur when affected parties do not have the right to refuse the land acquisition at issue or proposed restrictions on their ability to use land that result in physical and/or economic displacement).
- Minimize the adverse social and economic impacts associated with land acquisitions and restrictions on land use.
- Compensate affected parties that suffer losses.
- As needed, develop resettlement action plans.
- Implement resettlement action plans by disclosing information, consulting with affected parties, and acquiring the informed participation of such parties.
- Improve or restore the livelihoods and living standards of displaced persons.
- Provide adequate housing and tenure security at resettlement sites.

Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources

- Protect and conserve biodiversity.
- As needed, create biodiversity offsets.
- Ensure that those risks and impacts identified through the requirements of PS 1 consider the direct and indirect project impacts on biodiversity and ecosystem services.
- Work to avoid impacts on biodiversity and ecosystem services.
- Adopt adaptive management practices to mitigate potential harm throughout a project's lifecycle.
- Work with professionals to accurately assess these risks.

Performance Standard 7: Indigenous Peoples

- Assess the environmental and social risks and impacts of project on communities of Indigenous Peoples within project area.
- Identify and review all property interests, customary and formal, including traditional resource uses, PRIOR to purchase or lease of land.

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- Create a plan to address the requirements of PS 7.
 - Ensure that communities of Indigenous People are informed of their land rights under national law.
 - Avoid adverse impacts where possible and document these efforts.
 - Avoid relocating Indigenous Peoples from communally held lands.
 - Avoid impacts to areas and resources that are part of the critical cultural heritage of indigenous communities.
 - Minimize any unavoidable impacts and restore or compensate communities in a culturally-appropriate manner and document these efforts.
 - Conduct stakeholder analysis; plan to engage communities and disclose project information.
 - Ensure participation and consultation in a culturally-appropriate manner.
 - Obtain the Free, Prior, and Informed Consent of affected communities of Indigenous Peoples.
 - Provide land-based or in-kind compensation as opposed to cash compensation when feasible.
 - Provide for continued access to natural resources by identifying equivalent replacements, or provide compensation and identify alternative livelihoods if necessary.
 - Ensure fair and equitable benefit sharing.
 - Collaborate with appropriate government authorities to achieve outcomes that align with PS 7.
-

In addition to guidance provided by the IFC PS, the RAI offer guidance specifically for agricultural investments. The AU's Guiding Principles on Large Scale Land Based Investments in Africa provide important guidance on land governance and engagement with local communities. The VGGT, which entered into force in 2012, are also extremely important because they represent an international consensus on what constitutes best practice in the land sector (See Box 3).

A review of 52 energy and mining companies listed on the Russell 1000 Index finds that: "Over half of the companies (54 percent) are experiencing a medium to critical risk of reputational damage at 20 percent or more of their sites. This means they have either hit headlines, or are one well-organized activist campaign away from doing so, which can mobilize community opposition to a project and instigate a legal battle."

- *First Peoples Worldwide, 2013*

A number of companies, including Cargill, Coca-Cola, Unilever, and Nestlé, have voluntarily agreed to begin the process of bringing their business processes into alignment with the VGGT. These commitments also reflect company concerns to enhance "shared value" across and among stakeholders. The text of this guide discusses approaches for how to address relevant provisions of the VGGT

related to private sector investment and main points are listed in Box 3 on the next page. In addition, some investors are bound by obligations under performance standards, commodity-specific commitments, financial-industry specific commitments, and their own Corporate Social Responsibility commitments.

BOX 3. THE VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY (VGGT)

Chapter 3 (Guiding Principles on Responsible Tenure Governance)

- 3.2: Non-state actors, including business enterprises, have a responsibility to respect human rights and legitimate tenure rights.
- 3.2: Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others.
- 3.2: They should include appropriate risk management systems.
- 3.2: Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms.
- 3.2: Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved.

Chapter 9 (Indigenous Peoples and Other Communities with Customary Tenure Systems)

- 9.1: State and non-state actors should acknowledge that land, fisheries, and forests have social, cultural, spiritual, economic, environmental, and political value to indigenous peoples and other communities with customary tenure.
- 9.2: Indigenous peoples and other communities with customary tenure systems that exercise self-governance of land fisheries and forests should promote and provide equitable, secure, and sustainable rights to those resources, with special attention to the provision of equitable access for women.
- 9.9: States and other parties should hold good faith consultation with indigenous peoples before initiating any project; projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions, in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples; consultation and decision-making processes should be organized without intimidation and be conducted in a climate of trust.
- 9.12: States and non-state actors should endeavor to prevent corruption in relation to tenure systems of indigenous peoples and other communities with customary tenure systems, by consultation and participation and by empowering communities.

Chapter 12 (Investments)

- 12.3: All forms of transactions in tenure rights as a result of investments in land, fisheries, and forests should be done transparently.
- 12.4: Responsible investments should do no harm and safeguard against dispossession of legitimate tenure right holders and environmental damage; should respect human rights; strive to support local communities; enhance social and economic sustainable development; create employment; diversify livelihoods; and provide benefits to the country and its people, including the poor and most vulnerable.
- 12.11: Contracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in negotiations; negotiations should be non-discriminatory and gender sensitive.
- 12.12: Investors have the responsibility to respect national law and legislation, and recognize and respect the tenure rights of others. Investments should not contribute to food insecurity and environmental degradation.

BOX 4. A SELECTION OF OTHER INTERNATIONAL AGREEMENTS AND STANDARDS RELATED TO LAND TENURE

Conventions, Treaties, Principles	Other Commitments
Universal Declaration of Human Rights (Arts. 17 & 25)	IFC Performance Standards on Environmental and Social Sustainability
Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Elimination of All Forms of Racial Discrimination	Equator Principles
African Charter on Human and People’s Rights (Art. 14)	Roundtable on Sustainable Palm, Roundtable on Sustainable Biofuel, Forest Stewardship Council, Round Table on Responsible Soy
European Convention on Human Rights (Art. 1 of Protocol I)	ISO Standards 26000, 14000
Conventions on Economic, Social and Cultural Rights	FairTrade, Bonsucro, Rainforest Alliance, UTZ, SAN, etc.
United Nations Guiding Principles for Business and Human Rights (UNGPs)	Internal Corporate Social Responsibility (CSR) commitments
ILO Convention 169, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)	

I.0 DUE DILIGENCE

IDENTIFYING A POSSIBLE PROJECT LOCATION

The decision of whether or not to pursue a land-based project begins with the investigation of potential locations. In many countries, the national government will be your first stop for inquiries about lands that may be available for development. In some cases, special offices exist that work directly with investors to identify possible project sites and guide investors through the process of acquiring rights to use land.

Gathering this information from the government is essential. So too is gathering information from local leaders (e.g., government officials, traditional leaders) to corroborate the availability and status of land and discuss which lands local people believe could be used for development. Early site visits will allow you to analyze the social, political, and ecological dynamics associated with a particular area. Meetings with locals may also help you to identify any overlapping claims to land—for example, from a mining or forestry concession, or from customary claims to land.

If a government official identifies a proposed site as available for development but local people either do not know of the land's status or do not agree that lands are available for development, you should take time to clarify the availability and status of the lands. If local people disagree with government about these issues, or if the government discourages engagement or consultation with local people, investors should consider locating the project elsewhere.

During the course of identifying a possible project site, investors should take note of conditions on the land. If the land has poor soil, little or no access to infrastructure, contested boundaries, limited water sources; straddles two chiefdoms; or contains migratory routes or pastures used by pastoralists, developing the land may be quite costly or development might negatively affect local people. Understanding how the proposed land use will impact local people and the environment will help you develop a more realistic cost structure and risk profile for a proposed project.

Good Practice Examples:

- Conduct site visits to proposed project sites and prepare an initial inventory of man-made and natural assets on site, recognizing that local people may depend upon water sources, forests, pastures, and other natural resources to support their livelihoods. Loss of resources without adequate compensation may lead to future conflict or other problems.
- Request meetings with traditional authorities to discuss which lands, if any, local people feel may be most suitable for investment. Many local communities will welcome a well-crafted investment that provides meaningful benefits.
- Identify any overlapping claims to proposed land—mineral concessions, forest concessions, customary claims, and resolve—or consider an alternate site.

CARRYING OUT DUE DILIGENCE

Land-based investments require careful due diligence. The scope and depth of the diligence process will depend on the level of land tenure risk within a given country, as well as likely impacts and anticipated effects of the project under consideration. For example, if a proposed land acquisition will displace

current occupants, it will require extremely careful and detailed diligence, with clear understanding of costs to local people and the environment and potential costs to you. Displacements raise special concerns and should be avoided to the greatest extent possible. In other cases, proposed investments may have only limited impact on local people and the local environment. While diligence always needs to be approached with care, some projects will require more attention and review than will other projects.

Land-based investments in the developing world often take place under conditions of political, legal, and economic uncertainty. Due diligence should analyze political risk (including the likelihood of expropriation and nationalization of property), but it also needs to carefully analyze the land tenure-related risks that exist in the proposed project area and at the national level. These include risks associated with unclear, overlapping, or legitimately contested claims (see p. 9) that are typically not captured in land registries or in other public documentation as well as conflicts with other land-based investment projects in the area.

Businesses are required by the VGGT, the IFC PS, and the UN Guiding Principles, among other instruments, to respect the human rights of local people. You should look for an alternate project or not move forward with an investment if you risk violating these rights.

WHO?

Engagement with potentially affected communities is critical to this process, and should begin at the earliest possible stages of a proposed investment. Gather information directly from trusted, respected members of the local community (for example from the Village Council, or from the Village Chief) but do not stop there. Be sure to meet with a variety of people representing different concerns, including women, elders, indigenous groups, pastoralists, or other groups who use land in non-traditional ways. Migratory groups (e.g., pastoralists) may be present only sporadically at some project sites. If pastoral groups use resources at the proposed project site, be sure to identify and engage with them. Local non-governmental organizations (NGO) that work on issues related to natural resource management and on focused issues such as indigenous peoples' rights, women's right, or pastoralists' rights will also be a good source of information and can help you connect with migratory groups.

The goal of this diligence process is to understand how local women and men govern themselves and the resources they use; govern their economic activities; resolve the disputes they may have with other villages, other investors, and the government (among others); and, how they view and understand the project you are considering, including what lands they feel are appropriate for the proposed project. Note that the answers to these questions will vary depending upon whether you are asking women or men—answers from both groups deserve attention. In most cases local people will not have extensive documentation to prove what they earned over the past several years selling crops or other commodities, or what their land is worth, but you will need to understand, based on limited or no documentary evidence, how they have made a living and how they value their resources. While you may have one understanding of how your project will affect local women and men, they are likely to have a different understanding based on their past experiences and local knowledge of how resources are allocated and used.

CONDUCT STAKEHOLDER MAPPING AND ANALYSIS

Depending on the size and location of the project, an agricultural investment can affect hundreds or thousands of people, directly and indirectly. Understanding who will be affected and the range of likely

impacts is essential for effective stakeholder engagement and is required if your project affects indigenous people and is subject to the IFC PS (PS 7). In other cases you may be required by national law, by contract provisions, or by your own corporate policies and Corporate Social Responsibility commitments to undertake stakeholder assessments.

Stakeholder mapping and analysis will help you understand who your project will affect, what influence they will have (or not have) vis-à-vis the project, and how you should plan to engage with them. As a result, it can help you manage communications, expectations, and outreach to your stakeholders and may help you identify possible project champions. You can begin the process of identifying stakeholders by bringing your project team together to identify everyone with whom they will need to work on the project:

- Local communities
- Partners
- Suppliers
- Customers
- Government officials
- Employees
- Traditional authorities
- Migratory groups (pastoralists)
- Farmers' cooperatives
- Media

A **stakeholder** is: “a person with an interest or concern in something, especially a business.” Stakeholders can be internal to an organization or external and they can be “primary”—directly affected by a project—or “secondary”—indirectly affected by a project. Land-based investments will normally involve multiple stakeholders:

- Partners
- Government (at different levels, across ministries)
- Traditional authorities and religious leaders
- Vulnerable groups, including women, youth, elderly indigenous people and pastoralists
- Resource user groups (water users associations, forest users associations)
- NGOs and CSOs, among others

You can also ask partners and other investors to help you identify stakeholders you may be missing. A stakeholder map is a dynamic document that will grow as you conduct due diligence. For land investments, some often-overlooked stakeholders will include, but are not limited to:

- Local women and men who live on and use land and who may have legitimate customary rights to these resources;
- Local women and men or organizations that use land but are not customary “owners” (e.g., renters or tenants);
- Women and men or organizations who have cultural or spiritual ties to the area (e.g., indigenous peoples);
- People such as pastoralists who move through the area with some regularity but who are not settlers; and/or
- Women and men or organizations who have claims to resources in the area (they may have rights to harvest tree products for example) but who live outside the boundaries of the project area.

Be sure to include groups that are less likely to have strong representation—for example, women, youth, indigenous people, elderly, and pastoralists. Some of the questions that should be addressed in a stakeholder mapping and analysis for a land investment include those in Box 5.

BOX 5. IDENTIFYING STAKEHOLDERS AND THEIR INTERESTS: KEY QUESTIONS

- Have all stakeholders with interests in land and resources been listed (including migratory groups)?
- Have women and other vulnerable groups who use land and resources been identified?
- Have the interests of all stakeholders, including women and vulnerable groups, in land and resources been identified?
- Have all parties with legal rights to the land been identified? What about all parties with legitimate rights to the land?
- What conflicts over land and resources exist now? In the past?
- How might conflict over land and resources be exacerbated by the project?
- How do stakeholders value the land and the resources?
- If land use changes as a result of the project, what are the key concerns of all stakeholders?
- What are the expectations/needs/desires of stakeholders regarding the land and resources on the land?

A stakeholder analysis will help you target your outreach and communications efforts to best meet the needs and expectations of different groups. Stakeholders will have a variety of interests in your project and very different levels of influence and power. For example, a disaffected community may not have much formal political power or influence but will have a high level of interest in the project and might be able to bring it to a complete stop through effective protests or a social media campaign. In a case like this, a local community is a key group and, as these guidelines emphasize throughout, should be regularly consulted and engaged in decision-making around land and resource uses, compensation, and infrastructure development, among other issues. Other key groups will typically include government officials, partners, and creditors. By identifying and engaging with stakeholders, you can identify potential harms to the community resulting from your project. Stakeholder engagement may help reduce risks by identifying who your allies and potential adversaries are and what level of engagement may be needed to build trust and collaboration.

As a recent study of 39 large-scale agricultural investments by the United Nations Conference on Trade and Development (UNCTAD) and the World Bank found, land disputes are **the** key negative outcome of large-scale agricultural investments (2014, p. 35). Carefully identifying the rights, needs, and concerns of stakeholders, and working closely with them throughout the life of an agricultural project to limit harm, provide appropriate compensation, and redress grievances are the most important things investors can do to build trust, reduce land tenure risk, and increase the likelihood of a sustainable, responsible investment.

WHAT?

Diligence should include the following activities:

UNDERSTAND THE LEGAL FRAMEWORK

Complying with the formal law is always necessary but is often not a sufficient condition for a sustainable project. You need a clear understanding of the national legal framework related to land-based acquisitions for commercial agriculture projects and how that system does, and does not, connect to the customary legal system that most local women and men living in rural areas follow. The VGGT notes that businesses are responsible for respecting national laws and regulations (Chapter 12.12).

Land law is complex in any country, and this is certainly the case in the developing world, where two land systems often operate side by side: a formal, statutory system and a customary system.

International law may create yet another set of obligations related to land and resource rights. Depending on where an investment is located, you may need to understand all three systems. And, you will also need to be aware that in some countries, neither statutory systems nor customary legal systems accurately represent claims that women, pastoralists, and other vulnerable groups may have.

Some countries have weaker land governance systems and higher levels of land tenure risk than others. In addition, some aspects of the law may be unsettled or uncertain leading to practices on the ground that do not precisely track the letter of the law contained in codes or statutes. You should identify high-risk legal environments at this early stage

Anticipate the need to devise private and project-specific solutions in cases where policy gaps exist. This may require a commitment of time and money and should be incorporated into planning and budgeting for the investment.

Good Practice Examples:

- Working with local counsel, identify and review national land laws and associated implementing regulations. These will provide guidance on issues such as: permissible lengths of leaseholds; land use requirements; surveying and registering claims; fees for land rentals; need for Environmental Impact Assessments or other assessments; and processes and requirements for transferring rights and terminating leaseholds.
- Review national law for any specific requirements related to negotiating community development or social agreements with communities related to access and/or benefits (for example, Forestry Laws may require such agreements).¹¹
- Conduct a gap analysis to see if there are discrepancies between the formal legal framework and/or the customary legal system and international standards including VGGTs, IFC PS, and the UN Guiding Principles (and industry-specific commitments).

Other recommendations:

- Identify and review national investment laws and associated implementing regulations.
- Identify national, international, and customary laws, noting special provisions related to indigenous peoples.
- Identify national, international, and customary laws that govern women's and children's rights and access to land and other related family law issues, including divorce, inheritance, and succession.
 - Identify relevant investment treaties in place with the host country and what your rights are under such treaties.
- Clarify which category of land you are considering acquiring. Land laws should specify the categories of land that exist in a country (government land, freehold, leasehold, communal).
- Identify and review legal provisions related to compulsory acquisitions/ eminent domain and compensation for takings of land (in case the host government uses eminent domain proceedings to acquire lands for economic development purposes).

The formal legal system may not comply with international best practice, may be contradictory, or have important gaps. Countries may have weak enabling environments with a poor rule of law, poor contract enforcement capabilities, poor labor standards, and inadequate mechanisms to promote transparency and participation. In such environments you should look to, and be guided by, international best

¹¹ As pointed out in K. Rosenbaum, "Drafting Community Forestry Agreements," FAO Legal Papers (2011), p. 10.

practices whenever possible. This may mean engaging with government officials to go beyond legal minimums related to responsible investing, or it may mean considering shifting operations to another country if the legal foundation in a country does not support adequate engagement with and benefit to local women and men.

BOX 6. WOMEN'S RIGHTS TO PROPERTY

The rights of local and indigenous women to land and resources are protected by national and international laws (e.g., the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), by voluntary agreements such as the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT),¹² and by various industry standards. In practice, however, these rights are often weak and social norms may prevent women and girls from inheriting property, transferring property, or benefiting from the use of property. Investors are required to comply with the national law¹³ but can also play an important role in promoting gender equality by taking women's rights and their need to access resources into account as a project is developed, implemented, and terminated. More specifically:

- Women's names oftentimes are not listed on formal land rights documents but they may be co-owners, so work with local CSOs to ensure you have accurate information about who owns or has legitimate rights to land.
- Women are an important stakeholder group whose interests should be specifically identified during stakeholder mapping and analysis and assessments.
- Women access and use different resources from those that men use; gather information about the various resources women use and identify how the project will impact these uses.
- Women should take part in consultations at times and in locations that are convenient for them (it is often helpful to meet with women separately from men).
- Community capacity building can help to strengthen women's capacity to interact with traditional leaders and with project representatives.
- Women should participate in oversight, liaison, or monitoring committees.
- Communication efforts should target women as well as men (messages may need to be delivered to women in a different way—through local visits or by radio).
- Efforts should be made to employ and train women and otherwise include women in beneficial contracting arrangements (such as supporting women farmers' organizations).
- Consider how to ensure that women receive any financial benefits associated with a project—many women are heads of households and should receive benefits directly, but also consider ways to ensure that husbands and wives are co-recipients of any financial benefits.

Working with local counsel and checking against the experience of other investors or trusted partners can help identify gray areas. Note, however, that while local counsel can provide extremely valuable assistance navigating and interpreting the requirements of the national legal system, they may not be familiar with customary systems for allocating land and resource rights in rural areas across the country—this is one of the reasons why it can be particularly helpful to work with tenure experts during the assessment, feasibility, and implementation phases. Similarly, local counsel may not be fully familiar with international best practices.

¹² For much greater detail see the FAO's *Governing land for women and men: a technical guide to support the achievement of responsible, gender-equitable governance of land tenure* (2013).

¹³ The World Bank's "Women, Business and the Law" project provides detailed information on national laws related to women's ability to acquire, use and transfer property. The most recent report is available at: <http://wbl.worldbank.org/data/exploretopics/using-property>.

UNDERSTAND COUNTRY-LEVEL AND LOCAL TENURE RISKS

You can learn a great deal about the state of land tenure by reviewing detailed country-level material at USAID's Land Tenure and Property Rights Portal.¹⁴ The Food and Agriculture Organization of the United Nations (FAO) also maintains country profiles that discuss the agriculture sector and the national legal framework for the sector, as well as a Gender and Land Rights Database that discusses gender issues at the country level.¹⁵ The World Bank, through its Land Governance and Assessment Frameworks project (LGAF),¹⁶ is developing detailed country-level information, and, in some cases, regional- and municipal- level analysis of land sectors. Landesa and the World Resources Institute provide useful country-level information about tenure and land rights for most New Alliance countries at the Focus on Land website.¹⁷ This short list is not exhaustive, but it points out that there are resources available that can help you develop a stronger understanding of the unique tenure risks in a particular location and the history behind these risks.

WHERE?

Because due diligence involves engagement with multiple stakeholders, it needs to happen in a variety of locations. Desk research can happen at company facilities. Other diligence will require visits to national, regional, and local government offices, including investment offices, land registries, mapping or surveying offices, ministries of agriculture, and perhaps ministries of indigenous people, among others. As noted above, diligence should also involve field or scoping visits to project sites so that you can make a well-informed decision as to whether or not to move forward with the project.

WHEN?

An appropriate diligence process is necessary to determine if a project should move forward or not. If a project does move forward, diligence and community engagement should both continue so long as the project continues and, in the case of engagement, potentially longer. Diligence should be conducted when you expand or modify a project or when you bring in a new partner or supplier.

As noted above, early visits to the project area provide a valuable opportunity to identify and meet with the women and men who will be directly and indirectly affected by an investment, as well as other stakeholders. During these preliminary visits, solicit their opinions about what lands they believe might be appropriate for the proposed project. It allows you to gather information about potential or active land disputes (unresolved disputes can be a liability for a project, making it difficult to implement a project), identify possible overlapping land claims, identify likely allies and opponents and the reasons for their positions, and begin the process of identifying the likely impacts of an investment.

HOW?

¹⁴ USAID's Land Tenure Portal is available at: <http://www.usaidlandtenure.net>.

¹⁵ Land Governance Assessment Framework country-level materials can be found at the World Bank's website: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTARDR/EXTLGA/0,,contentMDK:23378317~pagePK:64168445~piPK:64168309~theSitePK:7630425,00.html>.

¹⁶ FAO's country profiles are available at: <http://www.fao.org/countryprofiles/en/> and its Gender and Land Rights Database is found at: <http://www.fao.org/gender/landrights/home/en/>.

¹⁷ The Focus on Land in Africa website is available at: <http://www.focusonland.com>.

Due diligence should be conducted through a combination of:

- Desk research;
- Engagement with government and local stakeholders, the affected community, local and international NGOs, and other CSOs who understand the community and the specific legal and political landscape; and
- Visits to proposed project sites.

Good Practice Examples:

- Conduct participatory, independent environmental and social impact assessments that clearly address land tenure concerns. You should strongly consider conducting human rights impact assessments as a complement to Environmental and Social Impact Assessments (ESIA). This is required by the IFC PS and will align your project with VGGT guidance.
- Make findings of ESIA and Human Rights Impact Assessments (HRIAs) available to the public and to stakeholders.
- Consult with independent experts including lawyers, sociologists, and gender and land tenure experts when conducting ESIA and HRIAs.

To acquire land rights and develop a project, your main contact may be with the Ministry of Agriculture but other ministries or offices may play a role in the approval process or have overlapping authority in an area. For instance, one entity may assist in identifying available land; another may be involved with the contract negotiations; and a third may be responsible for reviewing your environmental and social impact assessment. It is important to ensure that these offices provide accurate and up-to-date information (often a challenge). Government capacity to coordinate and complete these functions is sometimes weak; however, this does not reduce your responsibility in working with the correct parties involved to carry out these steps. At the same time, governments will sometimes have infrastructure to help guide investors looking to develop projects in their countries. The Tanzania Investment Centre is one example.

BOX 7. TANZANIA INVESTMENT CENTRE

The Tanzania Investment Centre (TIC) can help guide investors through the process of acquiring formal rights to land. As noted on TIC's website, these steps include:

- Submit an application for derivative or leasehold title;
- Obtain a payment letter;
- Pay for the land;
- Obtain a TIC payment receipt;
- Submit the receipt;
- Sign the derivative right and/or sub-title/leasehold right;
- Obtain the derivative right and/or sub-title leasehold title.

The TIC website also specifies the documents an investor will need to apply for a title, how much the process should cost and how long it takes.

Source: <http://www.tic.co.tz/procedure/253/134?l=en>

Conduct Environmental, Social and Human Rights Impact Assessments

If you determine it is appropriate to move forward, you should integrate findings from earlier due diligence activities into a more formal assessment process using a participatory ESIA, HRIA, and/or

Household Livelihood Impact Assessment (HLIA).¹⁸ If your project is subject to the IFC PS you will need to conduct an ESIA. The VGGT also recommend assessments. Note that while many countries require investors to conduct an Environmental Impact Assessment (EIA) before a project will be formally approved, rules related to the need to conduct a more expansive ESIA vary—though investors receiving funding from the IFC will be required to conduct an ESIA.¹⁹ Whether legally required or not, you should strongly consider conducting participatory ESIA that include land tenure components as this is rapidly becoming an industry best practice. A careful ESIA and HRIA will identify likely impacts of a project, including impacts on biodiversity. Particularly in cases when investments are associated with development of a monoculture crop, impacts on biodiversity can be substantial and negative. While this guide does not go into detail about environmental issues including biodiversity, water concerns, or other environmental impacts, the IFC PS do provide direction on these issues.²⁰

You can involve local community members, CSO representatives, and government officials in the ESIA by forming a review committee with representation from key groups. A committee can review terms of reference for assessments, participate in panels that oversee assessments, and hold public hearings where assessment findings are shared. Your ESIA should contain a monitoring and evaluation component (discussed in greater detail in section 5.0 Project Operations), which local CSOs can assist with. It is important that you make the findings from ESIA and other due diligence publically available and easily accessible to affected communities in order to increase transparency and improve communication. Note that the IFC PS requires clients to disclose relevant project information (PS 5 and 7) the VGGT also require that investments be transparent (Chapter 12.3). You should consider posting pertinent portions of documents in the local language in a central location or storing translated documents in a secure location within a local government or village office.

¹⁸ And note that if you receive project funds from USAID you must conduct an Environmental Impact Assessment.

¹⁹ Also referred to as Social and Environmental Impact Assessments (SEIA).

²⁰ For a detailed discussion see G. Kissinger, A. Brasser, and L. Gross (2013) Reducing Risks: Landscape Approaches to Sustainable Sourcing at: http://peoplefoodandnature.org/wp-content/uploads/sites/4/2014/06/reducing_risk_scoping_study.pdf.

2.0 STAKEHOLDER ENGAGEMENT

After you have conducted your initial due diligence,²¹ and completed the appropriate impact assessments, you will determine whether to move forward with the investment. If the project is found to have significant land tenure concerns, particularly if it poses harm to communities and the environment, consider not moving forward or identify an alternate project site. If the decision is made to move forward, and prior to beginning contract negotiations, you must take the following two steps:

- **RAISE AWARENESS** within the local community and among other stakeholders about the proposed project through dialogues, and educate yourself about the needs, concerns, and desires of the local community. Being transparent with stakeholders about the project has proved to be helpful and is required by the VGGT (Chapter 12.11) and by the IFC PS (1, 5, & 7); and,
- **CONSULT** with the local community and other stakeholders about their interests in the land that will be used in the proposed project, as well as several other factors discussed in the “Consultation” section below. Consultation is required by numerous international instruments including the VGGT (Chapter 9.9), IFC PS (1, 5 & 7), and the RAI (Principle 4).

ENGAGING STAKEHOLDERS throughout the lifecycle of an agricultural project builds community trust and support, thereby minimizing the chances of project disruption and allowing the community to share in the project’s benefits. Active and open consultation is at the center of these efforts. There is no rule for how much community engagement is “enough;” however as you continue to engage you should build a rapport and start to gain a natural understanding of the local community’s needs and desires, and also how attuned it is to your project. Taking the steps below should ensure that your pre-implementation engagement is not too cursory. It is important to note that women and men’s rights often depend on their age and their roles in families, thus community engagements should include women and men of different ages and of different status (e.g., widows, unmarried).

Creating the right process is essential. Failing to sufficiently engage with local women and men about the project, and incorporate their inputs in the process of considering, planning, and managing the project, can result in harm to local people and the environment, as well as protests, lawsuits, and acts of sabotage, ultimately driving up project costs or even halting operations.

RAISING AWARENESS

A great asymmetry of information exists between the investor and those likely to be affected by a project. By the time you complete your initial due diligence, you will likely know the project’s proposed geographic scope, project timeline, operational model, projected revenue, projected costs, project risks, externalities, local benefits expected, and key project milestones. The local community will likely have none of this information. Furthermore, the local community may not understand the basic nature of the proposed project or key terminology being used. Without this understanding, it is not possible to have

²¹ Due diligence is an ongoing process and will continue during the community engagement phase and periodically through the life of the project.

an effective dialogue with the local community, which cannot consent to a project if they do not understand what the project entails. Engaging with stakeholders up front reduces the likelihood of misunderstandings during the consultation stage and ultimately leads to more efficient and effective consultations.²²

WHO?

See “[1.0 Due Diligence — Understand Who Will Be Affected by the Investment and How](#)” to understand who should be included in awareness raising activities. The most critical stakeholder group to engage with is the community that will be directly impacted or affected by the proposed land acquisition. This includes women and men who own, lease, use, or otherwise occupy the land and resources that may fall into the project area or may be affected by project operations (including migratory groups). Because women and men may have different concerns you should provide each group with opportunities to discuss, ask questions, and raise concerns. It is important to educate as many of the stakeholder groups identified during the due diligence process as possible; the better educated all parties are about the project, the less potential for costly problems down the road. Note that women and men face different barriers accessing information as a result of differing norms related to mobility, access to media, literacy, and the extent and nature of social networks. Note also that in rural areas in the developing world, most of the local population will be very ill-equipped to manage risks and your project may impose substantial risks on them and their community. Engagement should help to reduce risks that local people and communities face and that you, as an investor, face.

WHAT?

The ultimate goal of awareness-raising activities is to close, to the extent possible, the information gap between the project team and anyone potentially affected by the project to improve transparency. The following factors are the most pertinent to community members, as well as local government officials, and should be shared. For those who are illiterate, illustrations and role playing in consultative meetings should be used:

- Background about the investor and the sector/commodity you operate in;
- The project’s purpose;
- The geographic scope of the project—what land is at issue;
- The type of land or resource rights you are seeking (e.g., leasehold or title, length of lease, whether water or other resource rights are included in the land transfer);
- The proposed business model (e.g., concession, out-grower scheme, contract farming);
- The project timeline, especially as it relates to land acquisition (for example, a project may acquire land in phases; this is important for the local community to understand);
- Project alternatives;
- The project’s social and environmental risks;
- The project’s operational and financial risks, and how these will be distributed among the investor, the government, and the local community;
- The project’s potential positive effects on the local community (e.g., expected revenue generation, infrastructure development, or employment creation);

²² Communities may not be familiar with these kinds of open and participatory processes and you may need to carefully introduce these approaches to lay a stronger foundation for your social license to operate. You may need to work with traditional leadership and local officials to encourage more open and participatory discussions. If resistance to participatory processes is strong, consider locating the project elsewhere.

- Compensation modalities in exchange for the land or other resources you are seeking;
- What will happen in case the project terminates early or is unsuccessful;
- Any grievance mechanisms that have been proposed to address community concerns; and
- The procedures in place for disposing of the land at the end of the project, both in terms of rights to and the condition of the land at closeout (e.g., will the land revert to the community or the government, or will it be sold/leased to another investor? Will the land be rehabilitated)?

WHEN?

Raising awareness should preface any consultation activities and continue concurrently with them. Build sufficient time into the project timeline to not only raise awareness and engage in dialogue with project-affected communities and other stakeholders, but also allow the information being disseminated to make its way to all individuals throughout the community. This means allowing time to address questions from stakeholders and otherwise follow up to ensure that information is being fully understood by as many community members as possible.

You should continue to raise awareness throughout the project lifecycle, with the goal of ensuring that as a project evolves, community members are as informed as possible about its structure and how it affects them. Consider working with the community to establish a continuing education plan to formalize ongoing information dissemination. This plan may identify who to educate, key topics to be covered, and the frequency and means of information sharing.

HOW?

To facilitate consultation and negotiation, take time to learn about the community you are engaging with, including migratory groups such as pastoralists who use resources in the proposed project site area. Understand how and when the area was settled, who holds influence, how resources are accessed and used, how disputes are resolved, and the basis of livelihoods. Acquiring this information will help to ensure you are engaging with the appropriate stakeholders and are aware of the challenges and opportunities within the geographic area under consideration. Social science research methods such as rapid rural appraisals or participatory rural appraisals are tools to help quickly and efficiently acquire this information about rural life and resources.

Good Practice Examples:

- Share written information with stakeholders in the appropriate local languages and, when there are issues of illiteracy, you can communicate project information through illustrations/pictograms and through presentations at workshops. These workshops should also be conducted in the appropriate local languages and it may be appropriate to hold separate presentations for women and men, and for vulnerable groups;
- Post project information in an easily accessible location where people are likely to see it. Some possible locations for posting include local government offices, a school, or a place of worship;
- Many people who live in rural areas listen to radio and creating material in the appropriate local languages for radio can be an effective way to reach many people—in some cases video might be sensible (for example to communicate with people in larger towns); and,
- Consider setting up a website in a local language.

Raising awareness among stakeholders can be time-intensive and complicated, especially in areas where populations are remote, nomadic, or speak a language with which you are unfamiliar. In these cases,

consider seeking the help of local CSOs who have a history of working with the community, have their trust, understand the most effective way of disseminating information, and can therefore be the most effective educators.

Another approach is the use of a cascade method—educating a few key leaders and empowering them to educate other stakeholders. In this approach, it is important to consider both formal and informal community leaders and a mix of women and men. For example, a community may be formally governed by a village council but may include elders or other opinion leaders who may hold more informal influence. Local CSOs can help identify these parties.

Provide information in a way that stakeholders can understand (e.g., in their local language) and access (e.g., reading material should be provided in hard copy, and disseminated in the community, as opposed to in the district capital). Make sure that information is available to non-literate community members, such as farmers cooperatives or women’s self-help groups, through mediums such as radio or informational meetings with community groups. Again, local CSOs can help identify these groups.

The level of information should be tailored to the audience. For example, CSOs or academics may have a different level of education and awareness of similar projects, while local communities may require more basic information about the project sector or the commodity that will be produced.

CONSULTATION

The purpose of consultations is to gather the concerns and desires of stakeholders who will be affected by the project and to align expectations of all parties. You should maintain neutrality during these consultations. These consultations are a natural continuation of the information gathering that takes place during the due diligence phase, but (1) involve a smaller group of stakeholders, and (2) are more narrowly concentrated on issues directly related to the project—including identifying appropriate land for a proposed project—and how it will affect local communities. Effective and participatory consultation will help you make a final determination as to whether to proceed with the project, and will also inform contract negotiations. The IFC PS and the VGGT place a strong emphasis on the need to carry out participatory, transparent, and informative consultations with affected people.

Taking the time to ensure proper consultations may mean that projects take longer to develop and cost more up front, but growing evidence suggests that costs associated with consultation pale in comparison to those associated with operational delays caused by disputes over land rights.

For example, in 2009, Sime Darby, the world’s largest palm oil producer, signed a 63-year concession agreement with the Government of Liberia for 220,000 hectares of land to be developed into oil palm and rubber plantations.

As a result of inadequate consultations, Sime Darby’s operations encountered repeated disruptions and delays due to land tenure disputes. Financial backers began to view the project as overly risky. Sime Darby had to suspend its operations in 2011, after 700 contractors joined local communities in a riot in December, seizing equipment and endangering Sime Darby employees.²³

²³ The Financial Risks of Insecure Land Tenure: An Investment View. Munden Project, December 2012.

WHO?

The following is a non-exhaustive but representative list of parties with whom you should consult:

- Local residents and others who may potentially be affected by the project;
- National authorities (e.g., the Ministry of Land, Ministry of Agriculture);
- Regional authorities (e.g., at the district or state level);
- Local authorities (e.g., the village council);
- Local or religious leaders (villages will often have an elected or appointed village council, as well as a wider village assembly, which includes all heads of household. Within this group, make sure to consult both formal and informal community leaders, as identified during the due diligence and awareness- raising phases); and
- Women’s groups, pastoralist groups, indigenous peoples’ groups and other vulnerable groups whose interests may not be well represented by formal or informal leaders.

BOX 8. TRADITIONAL AUTHORITIES

In many countries traditional authorities manage local land relations. They decide how to allocate land and resources, hear and resolve disputes related to land, and represent the community in dealings with outsiders. Community members hold family or individual rights to lands and resources that traditional authorities must respect. Normally there is a hierarchy of traditional leadership—from local headmen (who manage relations in a village or hamlet) to higher-level chiefs with responsibility for more people and territory. These leaders are revered figures who hold land in trust for the community and so, they have an important fiduciary duty to manage resources for the benefit of their community. As with many governance institutions, the degree of voice and participation of community members, women, and minorities can vary. In some cases, traditional authorities have been accused of violating their duties and transferring lands to investors, to the detriment of the community. One recent example comes from Cameroon where villagers in South West Cameroon filed a petition to the African Commission on Human and People’s Right claiming their chief wrongfully transferred 100,000 hectares of land.*

* See: Moki Kindzeka, “Cameroon: Protests as Traditional Chiefs Linked to Landgrab,” *AllAfrica*, October 31, 2014

The due diligence process will help you identify these parties. If you are still unsure of which parties to consult, enlist the help of trusted local CSOs or local elected or appointed officials to identify the relevant stakeholders with whom to speak. These parties can point out other change-makers and opinion leaders within the stakeholder group, as well as identify vulnerable or marginalized groups whose opinions you should be sure to take into account.

When identifying with whom to consult, pay special attention to representatives of women’s and indigenous peoples’ groups. Women may be prevented by patriarchal norms from joining broad consultations, and may require special outreach and national law and international norms may dictate a more stringent process for consulting with indigenous groups.

WHAT?

In general, good consultation processes share several characteristics:

- **They are voluntary**—consultation should be conducted free of coercion, manipulation, undue influence, or pressure. Be mindful of the political environment in which you are operating, and pressure that may be placed on communities by the government to arrive at decisions quickly, or accept potentially unfavorable project terms.
- **They are inclusive**—include all stakeholder groups, including women, indigenous people, pastoral, groups, and other vulnerable community members, in consultations (although you may wish to hold

consultations separately to encourage open discussions in a “safe” environment). See the “How?” section below for strategies to ensure consultations are inclusive as possible.

- **They are open and honest**—provide complete and unbiased information about the project, and ensure that all consultations are public, transparent, and documented.
- **Decisions are reached in a collaborative manner**—do not treat consultation as a box checking exercise. Listen carefully and respectfully to community concerns, and refrain from pressuring stakeholders into accepting your viewpoint.
- **Discussions are based on shared information**—this information, including the result of assessments, should be provided at the awareness-raising stage and in more detail as appropriate during the consultation stage.
- **There are opportunities for meaningful feedback**—develop a formal mechanism to receive feedback and questions about the project. Make sure questions are answered promptly.

Consultations should not be viewed as a “box checking” exercise but rather as an opportunity to gather critical information about the needs, desires, and concerns of stakeholders.²⁴ Consultations also offer the opportunity to share information to help communities make informed decisions about their role in the project.

In addition to the information above, there are many guides that discuss best practices for community consultations,²⁵ and some multi-stakeholder initiatives also provide guidance on effective consultation.

“Stakeholder consultation was most effective when it was the responsibility of the investor, with support—and oversight—provided by local and national government, as well as other independent parties, such as lawyers and civil society representatives. It proved perilous to leave consultations to the host government, or for the investor to assume that the land acquired was being provided by the government without any existing land disputes.”

Source: UNCTAD/World Bank (2014), p. 7.

WHEN?

Consultations should happen early and often, but not until after awareness-raising activities have commenced and local women and men and other stakeholders have developed a sufficient baseline understanding of the investor, the purpose and proposed scope of the project, and generally how the project may affect them.

They should be open, participatory, and sensitive to the needs of vulnerable groups.

HOW?

Consultations can take place through a mix of formal and informal means.

- **Find a good location:** Formal consultations should take place in an agreed-upon location that is convenient and accessible to stakeholders. Often, because of poor infrastructure and other

²⁴ For reference see also the IFC’s Handbook on Stakeholder Engagement, available at:

http://www.ifc.org/wps/wcm/connect/938f1a0048855805beacfe6a6515bb18/IFC_StakeholderEngagement.pdf?MOD=AJPERES.

²⁵ The following provide helpful information about best practices in community consultation: “Best Practices for Community Engagement and Public Consultations,” Canadian Wind and Energy Association: <http://canwea.ca/pdf/canwea-communityengagement-report-e-final-web.pdf>; “Investing in People: Sustaining Communities Through Improved Business Practice: A Community Development Resource Guide for Companies,” IFC: <http://www.ifc.org/wps/wcm/connect/1dc2e10048865811b3fef36a6515bb18/CommunityGuide.pdf?MOD=AJPERES>; “Best Practices for Consultation and Accommodation,” prepared for New Relationship Trust by Meyers Norris Penny LLP, (September, 2009): <http://www.newrelationshiptrust.ca/downloads/consultation-and-accomodation-report.pdf>; “Guidelines on Effective Community Involvement and Consultation,” RTP1 Good Practice Note 1: <http://www.rtpi.org.uk/media/6313/Guidelines-on-effective-community-involvement.pdf>; and, “Consultations with Civil Society: A Sourcebook,” World Bank Working Document, (February 2007) has a chapter on engaging in stakeholders: http://siteresources.worldbank.org/CSO/Resources/ConsultationsSourcebook_Feb2007.pdf.

limitations on travel, consultations need to take place several times in different locations to ensure all stakeholders can attend. Alternatively, for some groups, consider subsidizing the cost of transportation or providing food and beverages or childcare, in order to encourage attendance.

- **Publicize the meeting:** Make sure to publicize consultations well in advance through means that are accessible and accepted within the community (for example, via radio, community bulletin boards, or local religious services).
- **Make consultations inclusive:** Consultations should take place in the local language and at times that are convenient for women and men, youth and elders, and other vulnerable groups. You should consider holding consultations separately with different groups to encourage open discussion in a “safe” environment. Make arrangements to consult with all stakeholders, even if they are unable to attend consultation meetings. For example, consider using surveys to gather the opinions of community members who could not attend meetings. If pastoralists (livestock herders who may be nomadic or semi-nomadic) are part of the community, even intermittently, they should also be part of consultations; work with CSOs to understand how and when is best to contact these groups. If local leaders or officials create barriers to open and participatory consultations, try to raise awareness of the benefits of these processes and your requirements for openness, or consider relocating the project.
- **Make consultations open and honest:** Having a neutral facilitator who is familiar to and trusted by the local community conduct meetings may encourage open communication and reduce the likelihood of misunderstanding or misrepresentation. It will also help preserve your neutrality, and will guard against the perception that you favor one group over another. In addition, especially for the purposes of negotiating agreements and monitoring commitments, communities may choose to form representative committees (e.g., community oversight or liaison committees). Consider supporting these efforts, but be sensitive to conflict of interest concerns. Decisions made by committees in meetings with investors should always be shared with the broader community and stakeholders.
- **Respect community decisions:** If a community is substantially opposed to a project, you should strongly consider not engaging. Often, strong opposition at the consultation stage will translate into continuing opposition at the implementation stage. Opposition is an indication that local women and men fear harm from your project. As explained above, such opposition should be respected. Unless your project can be adjusted to legitimately allay fears, you should consider moving to a different location.
- **Multiple consultations:** Because a community’s needs, desires, and concerns will change over time, and because people need time to discuss and debate the full range of implications, merits, and costs of a proposed project, as noted above, plan to hold multiple consultations. One consultation at the start of a project is almost certainly not enough;

Free Prior Informed Consent (FPIC)

The use of Free, Prior, Informed Consent in the context of interactions with indigenous populations is subject to varying interpretations within the international community.

Private sector firms are increasingly committing to adopt corporate practices and policies that recognize the FPIC rights of indigenous peoples, and some firms have gone further and adopt an “FPIC for all” approach, advocating for obtaining free, prior, informed consent from all stakeholders affected by a proposed project.

According to the United Nations’ Declaration on the Rights of Indigenous People (Art. 32) “States shall consult and cooperate in good faith with indigenous peoples...in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or other resources...”

While there is no universally accepted definition of FPIC, stringent procedures must be followed to properly consult with indigenous people prior to embarking on a project that affects their livelihoods, land, territories or other resources.

regular consultations throughout the lifecycle of an investment are preferable. It may take communities longer than anticipated to arrive at decisions; be sensitive not to rush decision-making processes.

- **Open door policy:** In addition to formal consultations, maintain frequent and ongoing communication with key stakeholders. This means providing stakeholders with direct access (e.g., in person, by phone, and/or by email) and maintaining a meaningful “open door” policy that encourages local women and men to bring forward questions and concerns. Given the high rates of illiteracy in many areas suitable for agricultural investment, you may also consider establishing an on-site presence in the community to facilitate on-going dialogue.

INTERIM AGREEMENTS

Consultations may lead to interim agreements, such as memoranda of understanding (MOU), with local communities or other stakeholders. While these interim agreements are not normally binding, they memorialize the outcome of consultation and mapping exercises, lay out baseline expectations on the part of the investor and community, and guide contract negotiations.

Any interim agreements, such as MOUs, should be recorded and made publicly available, at least to all potentially affected stakeholders, including community members and the local government. Such agreements should include clear provisions related to enforceability. Box 9 lists examples of points that may be specified in interim agreements, such as MOUs.

BOX 9. POSSIBLE POINTS TO SPECIFY IN INTERIM AGREEMENTS

- The identity of parties to the agreement and points of contact
- The recognition of rights held by local communities, groups, and individuals
- The principles the parties will adhere to in future negotiations
- The process for future negotiations
- The language for future negotiations
- Substantive issues for negotiations
- The location for and timing of future negotiations
- Any compensation or support to be provided based on the interim agreement
- What constitutes a breach and consequences of breach or non-compliance
- A dispute resolution process, taking into account the needs of local communities for accessible and affordable dispute resolution

3.0 MAPPING

It's critical to understand who will be directly and indirectly impacted by a proposed investment. Having a good map of the area—one that shows who currently occupies, owns, and uses the land, as well as boundaries, water sources, livestock corridors, and other points important to the local community—will not only inform project design, but will help ensure that the rights of women and men are recognized, respected, and protected. Mapping the land and resources will also help identify how the proposed investment may impact the natural environment and food security within the project site and surrounding areas.

WHO?

Consider involving the following groups of people in mapping the project-affected area:

- **National or regional land authorities**—Most likely, the national or regional government has previously mapped the area. This map may be a starting point for participatory mapping activities, and the authorities who produced it may have unique knowledge of the landscape. Their involvement will legitimize and formalize the process and may be a legal requirement.
- **Local authorities**—These will most likely consist of representatives of the village council or other community-level governing body. Because land-use decisions in many developing countries are typically made at the local or village level, it is critical also to gather information from local women and men. If a community does not already have in place a land adjudication committee or other body directly responsible for land governance, consider assisting with the creation of such a committee; this committee will serve as your liaison and point of contact for future land-related questions.
- **Women**—In many developing countries, women have unique rights to, and knowledge of, the land and other natural resources. It may be sensible to work with women separately to capture their understanding of the rights they hold over natural resources in the proposed project area.
- **Elders**—In many societies, elders will have a unique knowledge of the history of the land and its uses.
- **Non-traditional land users**—These groups, including indigenous or pastoralist groups, will provide a different perspective on local land uses, as well as important areas of the land that the project should avoid acquiring (e.g., livestock corridors).

The Role of Women in Mapping

In many developing countries, women have unique rights to, and knowledge of, the land and other natural resources. It is important to capture and include information about these rights as a project develops. Options for doing so include identifying:

1. The key roles and responsibilities of women with regard to use and management of these resources;
2. The specific resources that women are expert at managing;
3. How women and men use resources differently;
4. Who benefits from the use of resources and how benefits are shared within the family and the community;
5. How women will be affected by proposed land use changes; and
6. The consequences of these impacts for women and men in the community.

WHAT?

Conduct a **participatory** mapping exercise that creates a complete inventory of the land and assets that will be affected by an investment.

Participatory mapping is a set of techniques that combine modern cartography with participation and knowledge of local communities. It is based on the premise that local inhabitants possess expert knowledge of the surrounding environment, and that this knowledge can be mapped onto a geographic framework that is universally understood.²⁶

An inventory based on local information, including information related to migratory groups such as pastoralists, should tie assets to the rights of particular women and men, groups, and organizations.

Prior to engaging in mapping, consider identifying the following:

- Baseline data, including existing property evidence (e.g., titles, tax receipts, photographic evidence of an occupant and his or her land plot), as well as existing maps, which may be available at the district or local level;
- Whether land-related issues identified earlier (e.g., active land conflicts, active land transfers) are still relevant (especially if the project has suffered delays);
- Which members of the community will participate in the mapping process (See the “Who?” section below to understand who should be included);
- Which intermediaries will facilitate mapping (e.g., local CSOs or other experts);
- Which tools and resources are available for mapping activities (e.g., GPS, geographic information systems (GIS), geographic reference points, high resolution imagery);
- How information will be shared with the community and stakeholders; and
- Whether local community members need to be trained to assist in mapping.

The mapping itself should at a minimum identify:

- The outside boundaries of each village or community;
- Any overlapping claims including protected areas or wildlife/conservation zones, watersheds, government forests, forest concessions, and mining/mineral concessions or exploration options;
- The proposed project boundary;
- Current ownership of the land (including individual/household ownership and common areas);
- Whether land ownership or occupation density has changed as a result of the proposed investment (i.e., is speculation or in-migration occurring). If speculation or in-migration is found to occur, discuss with the community how to address these challenges;
- Current occupancy and/or use of the land (this is often different from ownership);
- Whether land is being leased or otherwise allocated to third parties;
- What the land is currently being used for (e.g., type of crops being grown). Don't forget to consider seasonal and other intermittent land uses, such as fallows and/or grazing;
- The portion of land currently in active use;
- Natural boundaries, such as rivers;
- Location of common natural resources (e.g., hunting areas, forests, rivers, pastures);
- What uses the land is most suitable for (this may require more sophisticated equipment and the use of experts);

²⁶ Helpful guidance is available at: http://www.ifad.org/pub/map/pm_ii.pdf; http://www.mappingforrights.org/participatory_mapping.

- Current land-related disputes (both between and within communities);
- Important natural resources within the community (e.g., water points, forests);
- Man-made improvements (e.g., roads, bridges, irrigation systems);
- Sacred, historic, or spiritual sites;
- Livestock corridors or other areas used by transhumant groups; and
- Any other private sector operations in the area or areas directly contiguous; consider also activities upstream that may affect water availability in the project site.

If the local community does not have a land use plan in place, consider working with local authorities, donors, and/or CSOs to help them develop one. A land use plan will provide not only a snapshot of what land is currently being used for, but will also offer insight into the community's projected use for its land and therefore inform negotiations.

Similarly, if individual members of the community do not have title to their land, consider working with local authorities, donors, and/or CSOs to assist them in obtaining titles. These documents will provide individuals with the security that their land will not be taken without just compensation and will also provide a legal basis for negotiation for land acquisition.

BOX 10. MALI: NORTHERN REGIONS INVESTMENT AND RURAL DEVELOPMENT PROGRAMME

The International Fund for Agriculture Development (IFAD's) Northern Regions Investment and Rural Development Programme (PIDRN) works with local governments to reduce poverty in northern Mali. The vast northern region of Mali is afflicted by extreme poverty, which is exacerbated by a harsh natural environment typified by drought, desertification, and limited access to water. These factors all contribute to high levels of resource competition among local groups.

To help alleviate resource competition, PIDRN and local governments relied on participatory mapping to capture community members' information on natural resources and their management, as well as other socio-economic features within the commune territory. The mapping also allows for community members to project how their community and resources will be used 20 years into the future.

Source: The IFAD Approach to Participatory Mapping, 2010, p. 10.

WHEN?

Mapping is often a sensitive process. When outsiders arrive for a scoping trip, local women and men may, quite understandably, be reluctant to engage, share information, or have their lands mapped—they may worry that a mapping exercise is a precursor to a loss of their land and their rights. This is why it is critical to conduct awareness-raising and consultation activities prior to mapping to discuss:

- The nature of the project for which land is being sought, and its potential impact on local property ownership and livelihoods;
- The purpose of the mapping activity, why it is important, and how it will be used (e.g., help the local community safeguard its rights);
- The risks of mapping (e.g., potential to unearth dormant land disputes);
- Different mapping methods (include technology demonstrations);
- The process of creating a map (how much time, effort, and resources are needed);
- How the mapping will be financed and/or any compensation that will be offered for the time and resources spent by the community during mapping; and
- How the mapping results will be shared and validated.

Work with local partners and members of the community and civil society who can help with this process.

HOW?

It is particularly important that mapping exercises be done in an open and collaborative manner. Allow sufficient time for discussion among various members of the community. Newer technology has significantly reduced mapping costs so that high-resolution satellite imagery can be combined with material produced by local women and men to gain a clearer understanding of property boundaries and types of rights.

Good Practice Examples:

- Make sure participatory mapping is conducted through legitimate and locally recognized processes. For example, work within existing community by-laws, use existing community institutions, and comply with community laws and practices. Remember that the mapping process is a way to build community capacity and empowerment and not only a means to gather information.
- You can train local people to use GPS and geospatial technology (which can be made available on smart phones) to help with mapping. If you are working in any area where illiteracy is a concern, you can use icon- or pictogram-based GPS systems with pictures and color codes rather than text.
- Work with elders and other leaders to identify village boundaries, and ask neighboring leaders to confirm these borders. Within villages, it is important that neighbors validate individual or family boundaries.
- While it is not necessary in all contexts, it may be helpful to conduct mapping exercises with different stakeholders, for example with women or with pastoralists separately to capture their voices and concerns, then merge all maps together within the community mapping exercise.
- Once they are validated, participatory maps should be compared with government-issued maps to identify any overlapping claims or competing concessions in the proposed project site. This will also help to identify conflicting land uses.
- Be sure to post validated maps in a public location(s) for a reasonable period of time (several weeks may make sense) to ensure transparency. Leave a physical copy of the map with the appropriate local officials.

Be sensitive to the fact that participatory mapping may expose latent or dormant land conflicts. Be prepared to support the resolution of these disputes, either through dispute resolution mechanisms already available within the community, or through providing a locally recognized and sensitive dispute resolution mechanism. The government and local CSOs can help you determine what this mechanism could look like.

IMAGE 1. YOUTH MAPPING PROJECT IN CAP HAITIEN, HAITI



PHOTO CREDIT: KENDRA HELMERUSAID

4.0 CONTRACT NEGOTIATIONS

NEGOTIATION PROCESS

WITH WHOM TO NEGOTIATE?

Through the diligence and engagement process you will have identified the parties with whom you need to negotiate. These two questions will help identify who will need to be party to a formal transfer of land rights and who will need to be involved in other negotiations:

1. **Who has legal rights to the land you seek to acquire?** This entity will be party to the contract to transfer land rights (through sale/concession/lease).
2. **Who else holds legitimate rights to the land in question, even if these rights are not legally documented?** *International instruments, including the IFC PS and the VGGT, as well as industry best practices, require that parties whose tenure is affected by an investment be properly compensated through an agreement of some kind, such as a community development agreement.*

The specific signatories to the contract will depend on the tenure status of the land in question, while the other parties entitled to receive compensation will depend more on the local social, cultural, and governance context. While the signatory to the agreement to transfer land rights will be the entity with formal claims to the land, negotiations related to the development of a project should include local chiefs/elders, a representative group of all land users in the village, other specific interest groups, and vulnerable groups, such as women, youth, elderly, indigenous people, ethnic minorities, and pastoralists. If the tenure rights or access of these men and women are impacted, they should receive appropriate compensation *in addition* to what the legal landowner (most often the government) is entitled. Adequate compensation for affected communities is required by IFC PS 1, 5 and 7. The VGGT require investors to enhance social and economic sustainable development through their projects, create employment, and diversity livelihoods in order to provide benefits to both the country and its people, particularly the poor and vulnerable (Chapter 12.4).

Below are two common scenarios:

“An exclusive fast-track approach, dealing with either government or the overlord chief or allodial title holder, is very likely to create a wedge between the investor and the community and cause many more problems than it would solve.”

- De Wit and Norfolk, 2014

LAND LEGALLY OWNED BY GOVERNMENT, INCLUDING LAND LEGITIMATELY OWNED BY LOCAL COMMUNITIES

Most likely project signatories: (1) Investor; (2) Government (likely national government).

In many African countries, the government is the ultimate title holder and formally controls the process of allocating rights to land and other natural resources.²⁷ In addition, government is sometimes the only actor authorized to transact with foreign investors. In this case, the government would be the legal entity with whom you will negotiate and sign the land contract. You should anticipate working with government officials at multiple levels (local, regional, and/or national) and in several offices through the course of negotiations, and recognize that in some cases national and local level officials may have varying levels of capability and varying interests.

However, despite popular belief that significant areas of arable land, particularly in sub-Saharan Africa, are “unused” or “empty,” there is very little land in most countries that remains unclaimed or unused by one group or another, even if intermittently (such as for seasonal grazing or water access by pastoral groups). In many rural parts of Africa, land holdings are not titled; this means that land may have been legitimately occupied and cultivated for many generations—and may even be recognized through customary tenure systems—by people to whom it does not *legally* belong. These women and men can be called **legitimate landowners**, and they are an important party to include in negotiations, including compensation arrangements.

Excluding from negotiations and compensation discussions the parties who will be most directly impacted by the transaction may lead to widespread discontent and disenfranchisement of the local population, which can, in turn, lead to problems during project implementation. Take care to include in negotiations those who use or claim the land (as identified through “[3.0 Mapping](#)” above), even if their rights are not formally recognized.

Keep in mind that because the law in many African countries indicates that if the land is unregistered, then it belongs to the state, the government may have no legal obligation to include legitimate (but not legal) landowners in land lease or concession agreements. Even if the responsibility for involving local communities in concession agreements does fall on the government, the community will likely blame you for failing to involve them. This will lead to animosity, especially if community members fail to benefit from a concession on their land. Therefore, you have a responsibility to involve legitimate land rights holders even if not required according to national law. Government officials should be willing to support your efforts to engage these individuals. If they are not supportive, this may signal a problem and you should investigate further and/or consider locating the project elsewhere.

Alternatively, before beginning negotiations, consider helping legitimate landowners gain legal title to their land; this may pave the way to including local landowners as legal entities in the contract, and at the very least will give any agreement that is negotiated a stronger legal foundation. Methods for doing so include:

- Helping individuals or communities obtain legal title to their land, building off of the process described in “[3.0 Mapping](#)” above, and then negotiating directly with these individuals (or representative community bodies, as detailed in “Land Owned by Local Communities” below);
- Structuring a contract with the government that provides for legitimate landowners to acquire legal title over time. In this case, once individuals acquire legal title, lease payments would stop flowing to the government, and start flowing to them; and

²⁷ This is in contrast to other parts of the world, particularly Latin America and some Asian countries, where local women and men or communities are more likely to be legal owners.

- Structuring a tripartite contract that includes the legal landowner (the government) and the legitimate landowner (the individual or representative community body).

Agreements, such as memoranda of understanding, concluded during community consultation should inform, and be reflected in, negotiations with government officials, and their terms should be referenced in the land acquisition contract.

LAND OWNED BY LOCAL COMMUNITIES

Most likely project signatories: (1) Investor; (2) Community governance or managing entity (e.g., village trust).

Many countries, for example Ghana and Sierra Leone, are moving toward a legal system that recognizes communities, villages, or individuals as the ultimate title holders and authorizes them to negotiate directly with investors. In these cases, the party to the contract will be the owner of the land being acquired.

If communities or individuals within communities are the ones transacting for the land transfer, they will often need assistance to effectively negotiate an agreement. You should determine the level of local capacity and identify strategies to assist communities in negotiations (as noted below through support for independent legal counsel). To address transparency and equity concerns, communities may wish (if local laws permit) to aggregate the project land into a single managing entity such as a village trust. The village trust would be a representative and independent legal entity with power to sign agreements, manage pooled funds derived from the project, and otherwise speak for the community. This can reduce transaction costs on both sides, ensure that project benefits are equitably distributed, and streamline the negotiation process.

When negotiating, it is important to note that communities and villages are not homogenous entities—

“There is a widespread understanding in Liberia that a concession agreement, while it is issued for the purpose of exploiting resources with promises of economic benefits has not always benefited the local dwellers not to mention the entire population. In addition, areas granted as concessions in some counties have exceeded the area of the county itself. Frequently, the concession areas granted are larger than the area actually developed for agriculture... When the land concession becomes inaccessible for any other use, particularly to local communities for small-scale food production, it exacerbates already existing tensions between concessioners and local communities.”

- *Agricultural Land Concessions and Conflict in Liberia Policy Analysis Brief, Early Warning Early Response Working Group, 2012.*

people at the local level have a variety of interests and exercise power in different ways. By completing a stakeholder mapping and analysis exercise, you can (and should) understand these differences and address the disparate impacts investments may have on local women and men over the short and long term.

Understanding the interaction between these players will inform with whom you negotiate, when and how.

HOW TO NEGOTIATE

The same principles that apply to consultations apply to contract negotiations.

Equitable and transparent: Conduct negotiations in good faith and support efforts to ensure transparent, equitable negotiations with local groups. For example, consider supporting communities by providing access to independent legal counsel of the community’s choosing, or to responsible experts who can assist a community negotiating team.

Contracts need to be disclosed and terms and conditions

shared with negotiating parties. Take time to ensure that the local community understands what contract provisions mean, how their land is being valued, and different compensation options (see the “Compensation” section below). For transparency and monitoring purposes, consider making the terms of agreement public.

Inclusive and responsible: When acquiring land directly from communities, work with village authorities, local CSOs, women’s groups, and other community institutions to ensure negotiations adhere to customary norms and are conducted in a way the community accepts and understands. Take account of local practices and include migratory groups such as pastoralists.

Don’t fall prey to the “Take Me to Your Leader”

trap: Don’t limit yourself to negotiating with local elders, traditional authorities, or community leaders. In some countries, traditional authorities and elders are bound by strong fiduciary duties to their communities. In other countries, this relationship seems to be eroding. So, while they are very important community members, they may not have legal authority to transact land rights, and in some places these leaders may not represent the interests of all members of the community, particularly women and vulnerable groups such as minorities, and they may not support open and participatory processes. It is, however, important to ensure that all groups are consulted when negotiating agreements, and that community oversight committees or negotiating teams are fully representative of all community members and have the support they need to make informed decisions. Careful stakeholder analysis will help address these concerns. However, if local leaders block or frustrate efforts to promote an open, participatory process work to raise aware of the benefits of such processes, emphasize the need for transparency, or consider moving the project elsewhere.

“The frequent lack of contract transparency, combined with limited capacity to analyze and compare agreements, can result in a critical knowledge gap. Host governments miss the opportunity to learn from other countries’ experiences. Communities are less able to hold governments and investors accountable. And investors risk entering into deals for land that has already been allocated, imperiling the investment while increasing the potential for social tension and local conflict. When contracts are available in accessible form to the general public, all parties can build a climate of stronger accountability and trust.”

- *OpenLandContracts.org*

WHAT ARE LAND ACQUISITION ALTERNATIVES?

Prior to acquiring large areas of land, always explore viable alternatives to large-scale acquisition, especially if such acquisitions would involve resettlement or other disruption of local communities. The method and duration of acquisition (as well as conditions under which land can revert back to the seller) will be critical negotiation points. Outlined below are alternatives to acquisition:

A viable alternative to consider is an **out-grower scheme**, sometimes referred to as **contract farming**, through which a contractual partnership is established between a company and local growers or landholders for the production of a commodity.²⁸ This approach allows for vertical integration of the production process and enhanced quality control. It reduces the need to acquire rights over large tracts of land. The arrangement usually consists of a small “nucleus” farm owned by the company surrounded by a network of land parcels owned by local smallholders. The smallholders contract to sell their yields to the company, often at discounted prices, in exchange for training, equipment, input supplements, business development services, and assistance with credit and/or financing.

²⁸ The FAO’s definition of out-grower schemes is available at: <http://www.fao.org/docrep/004/ac131e/ac131e03.htm>.

As outlined in FAO's guidelines for responsible contract farming,²⁹ appropriate principles for contract farming and out-grower schemes include:

- Maintain an open dialogue with farmers;
- Develop a common purpose among farmers and investors;
- Follow the appropriate legal framework;
- Clearly and transparently document the agreement of the parties;
- Ensure that the agreement is accessible in the appropriate local language(s);
- Provide sufficient time for all parties to review and comment on drafts;
- Ensure transparency and fairness in clauses related to pricing and payments, quality, and input supply and use;
- Adopt fair risk sharing and *force majeure* clauses; and
- Develop grievance processes.

Out-grower schemes, contracting farming, or other investor-farmer partnerships vary considerably in the extent to which inputs, costs, risks, and benefits are shared between growers/landholders and companies. For example, often companies will provide smallholders with seeds, equipment, or training in improving yields, as well as access to financing, and in exchange will purchase outputs at lower prices.

The specific terms of an out-grower contract will greatly impact the ultimate success or failure of an out-grower scheme, so it is important to identify a structure for the partnership that meets all partners' risk and benefit expectations and capacity.

To reduce transaction costs, companies can work with representatives of smallholders, including farmers' organizations such as farmers' unions or cooperatives. It is important to ensure that if you work with a farmers' organization as an intermediary in an out-grower/contract farming scheme, you ensure that women and other vulnerable groups have some voice or representation in these organizations.

An out-grower contract can be structured either as a **requirements contract**, whereby the out-grower group agrees to supply as much of a good as is required by the company, in exchange for the company's promise to purchase exclusively from the out-grower group; or an **output contract**, where the out-grower group agrees to sell its entire production to the company, who in turn agrees to purchase the entire output.

For more information on structuring out-grower schemes, you may refer to the German Federal Ministry for Economic Cooperation and Development's Contract Farming Handbook (2013)³⁰ and Martin Prowse's Contract Farming in Developing Countries – A Review (2012).³¹

WHAT ARE MODELS FOR LAND ACQUISITION?

If an alternative to land acquisition is not viable, consider following one of the below acquisition models, the pros and cons of which are outlined.

²⁹ The Guiding principles for responsible contract farming operations (2012) are available at: <http://www.fao.org/docrep/016/i2858e/i2858e.pdf>.

³⁰ Available at: <http://www.giz.de/expertise/downloads/giz2013-en-handbook-contract-farming-manual-low-resolution.pdf>.

³¹ Available at: <http://www.afd.fr/webdav/shared/PUBLICATIONS/RECHERCHE/Scientifiques/A-savoir/12-VA-A-Savoir.pdf>.

Concession—A concession is a negotiated contract between a company and a government that gives the company the right to operate a specific business within the government's jurisdiction, subject to certain conditions. Concessions are more prevalent in extractive industries contracts, though they have been used in large plantation projects. Often, concessions will have a minimum duration. Keep in mind that concession agreements have had a spotty history because they often fail to consider benefits to local populations, and different government entities issuing concessions may not always coordinate—which can lead to multiple investors being issued overlapping concessions (e.g., timber, mineral, agricultural) on the same land.

Direct Purchase—This method may be unavailable because foreign investors are often forbidden from owning land in Africa. However, if available, you have the option to purchase land directly. The purchase will involve a detailed land valuation exercise, outlined in the “Land Valuation” section below.

Fixed-Price Lease—Land can be leased either directly from the government or, if owned by the community, directly from the community. The duration and conditions of the lease, as well as frequency of lease payments (e.g., monthly, quarterly, annually) will be negotiated. Fixed price leases are seen as less risky to the lessor, and allow for a stable return on land. However, they do little to align the incentives of the investor and the local community since lease payments are not tied to project success.

Land for Equity or other Benefit-Sharing Arrangement—In this scenario, the land rights holder(s) will take an equity stake in the venture, generally based on an agreed value of the land. Alternatively, lease payments are determined by project revenue or profit. In a land for equity model, the investor will assume general responsibility for project operations. However, as a shareholder, the land rights' holder will be entitled to a portion of the venture's profits and likely a seat on the venture's board of directors. Under land for equity and other benefit-sharing arrangements, the parties share the risk that a project will fail and also the benefits of its success. Land for equity arrangements may be seen by local communities as involving greater costs than benefits. If, for example, the community does not have enough of a stake to secure a seat on the board of directors, it will have little influence over project operations and will therefore be unable to manage risk or ensure a sound return. Land for equity arrangements may be more likely to benefit local communities if the communities develop independent, transparent local governance institutions (such as a village fund) that can represent their interests, monitor investor activities, and provide a meaningful opportunity for local women and men to voice concerns and aspirations.

BOX II. COLLABORATIVE CONTRACTING MODELS

Malaysia

In 1976, the Malaysian government created the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA). SALCRA, which has the legal authority to create and manage palm oil plantations, works with native customary landowners who provide rights to use their lands for the development of such projects. These local landowners are not given an equity stake in the palm oil company; rather, they receive annual net proceeds once the business is delivering a return, as well as technical assistance. Initial costs of establishing the plantation are provided by concessional government loans. SALCRA has also obtained commercial loans on the market. SALCRA was expected to provide local employment and build local capacity to manage plantation facilities. However, much of the employment is provided by migrant workers, although SALCRA continues to manage projects and local people do receive payments. Between 2007 and 2011, the average payment was \$485/hectare per year.³² Payments are based on the productivity of particular stakeholders' land, which depends on a number

³² Fadzilah Majid Cooke, Sumei Toh and Justine Vaz, “Community-investor business models: lessons from the oil palm sector in East Malaysia,” IIED (2011), p. 23.

of factors and can lead to significant variation in payment amounts across native landowners. Further, land titles and payments have been delivered to heads of households. It should be noted, however, that joint venture models such as this one have historically proven problematic; smaller scale models appear more practical and successful.

Mali

Mali Biocarburant SA (MBSA) is the holding company for Koulikoro Biocarburant and Faso Biocarburant. The companies, along with company foundations, work with over 8,000 smallholder farmers in Mali and Burkina Faso. Unlike the SALCRA model, smallholders do not provide land rights to the companies; rather, they work as contract farmers, selling jatropha to one of the MSBA companies. The farmers also become shareholders in the companies. In the case of Koulikoro Biocarburant, smallholders who organized into a farmers' union hold a 20% stake in the company. In the case of Faso Biocarburant, farmers hold a 30% stake the company. So, farmers benefit from the sale of jatropha and from dividend payments. Smallholders also hold positions on the board of directors and on advisory boards of the firms.

The two companies process jatropha nuts locally into oil using mobile presses, and the oil is processed into biodiesel, which supports local energy needs. The residual materials from pressing are made into seed cakes that are used locally as organic fertilizer and glycerin, which is used to make soap. Farmers intercrop jatropha with other crops, and the companies provide technical assistance to the smallholders to improve their farm management practices. Farmers involved in the process are experiencing increased crop yields that may be the result of a combination of access to technical assistance and the use of seed cakes as fertilizer. Also, as a result of the project, millions of jatropha trees have been planted. MBSA sells carbon offset credits on the voluntary market to interested organizations, including Kia Motors. These funds are used to cover costs and any remaining money is distributed in direct payments to farmers. This “light touch” model seems to offer many benefits to smallholders and so reduces land tenure risks as compared to many projects that acquire large tract of land.³³

Ghana

The Integrated Tamale Fruit Company (ITFC) of Ghana sells organic mangos to Europe and locally. The company has a 155-hectare nuclear farm and works with approximately 1,200 smallholders who have formed a farmers' association: the Organic Mango Outgrowers Association. The company decided to work with outgrowers in large part to avoid the problems and costs associated with acquiring rights to a large area of land. The company has also received support from NGOs and international donors to support its work with these smallholders. As part of its assistance, outgrowers receive a long-term, no-interest loan comprised of inputs (including seedlings, fertilizer, water tanks) to support farming a small plot for organic mangos, and technical assistance. Under the terms of their contract with ITFC, farmers agree to use their customary land to grow mangos. They provide the company with a sack of maize as a “registration fee.” The loan has a four-year grace period after which farmers pay 30% of their mango sales toward the repayment of the loan. After their loan is repaid, farmers are free to sell their mangos to any buyer; before that they must sell to ITFC. Any conflicts that arise under the contract are resolved using traditional community-based arbitration. Farmers are reported to incur total start-up costs of nearly \$7,000. The company anticipates that loans will be paid off after 14 years, at which point farmers are expected to earn approximately \$2,000 per year, compared to \$300 per year for non-outgrowers. The long-term commitment involved in growing mangos and paying back start-up costs creates risks; however, a report on this project by FAO notes that: “outgrowers were generally of the view that they are better off even when they are still indebted to ITFC than when they were ordinary farmers or labourers.”³⁴

Tanzania

Kilombero Plantation Limited (KPL) has employed a land for equity arrangement. KPL is a joint venture between the Rufiji Basin Development Authority, a parastatal institution commonly known as RUBADA, and a British-backed firm called Agrica Tanzania Limited. It is a rice-growing project known as the Mngeta Rice Farm on 5,000 hectares of unproductive, former state-owned land. RUBADA provided the land and existing equipment as its

³³ Foreign Land Deals and Human Rights: Case Studies on Agriculture and Biofuel Investments, Center for Human Rights and Global Justice, NYU School of Law (2010).

³⁴ Trends and impacts of foreign investment in developing country agriculture: evidence from case studies, FAO (2013), pp. 204-210.

capital contribution to the company. In exchange, RUBADA received an 8.3% stake in the venture. However, RUBADA's share is projected to decline to approximately 3% due to an additional investment of US\$20 million by Agrica.³⁵

COMPENSATION

When you acquire rights to use community land, even if the government owns the underlying title and you are paying a fee to the government, you must also provide **fair and adequate compensation** to the impacted community. National law may contain requirements for community compensation. This national requirement should, ideally, provide a **floor rather than a ceiling** for compensation rates. IFC PS 5 discusses requirements associated with compensating people who are economically displaced by an investment (even if not physically resettled). The RAI states that investments “should generate desirable social and distributional impacts and [should] not increase vulnerability” (Principle 6). Fairly and adequately compensating communities to mitigate harms to local women and men will protect them and help ensure the ultimate success of the investment.

Keep in mind that international best practice indicates that **compulsory land takings or involuntary resettlement, even with the provision of compensation, are strongly disfavored and to be avoided if at all possible**. Only in very exceptional cases will a project's benefits outweigh the financial, political, and goodwill costs of resettlement. Compulsory land takings are permitted in rare cases where there is a compelling public use for the land being taken, and there are no viable alternatives to the taking. Different governments have different interpretations of what constitutes a “compelling” public use; however, international best practice is quite stringent in this regard. For further guidance on involuntary resettlement, please refer to the IFC PS 5,³⁶ and the World Bank Operational Procedure 4.12.³⁷

LAND VALUATION

In order to determine fair compensation for land, you must first determine how much the land is worth. In some cases, it will be the government's responsibility to value the land—even in these cases, as for consultations, it is still in your best interest to ensure the most appropriate valuation methodology is used.

Local land markets are often underdeveloped, especially if land cannot legally be sold/leased, or if land transactions are undocumented or infrequent. Therefore, valuation exercises are much trickier than in a robust, developed market, where comparable sales methods are predominantly used. Furthermore, communities may place high cultural or spiritual value on their land or consider certain pieces of land to be unique and non-substitutable; for example, in many indigenous communities, the spiritual value of land is unquantifiable, and land is considered unique and non-fungible. This type of intrinsic value cannot be ascertained through traditional valuation methods; you will have to speak with the community to

³⁵ SERA Policy Report: Approaches to Agricultural Investment Models, Valuation and Support for Local Communities in Tanzania. USAID (2013). pp. 10.

³⁶ IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement, IFC, (January 1, 2012), available at: http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES.

³⁷ Operational Manual, “Involuntary Resettlement,” World Bank, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

understand the nuances of how it values its land, and what it views as the most appropriate compensation for any land lost to a project.

Still, it may be useful to consider one or a combination of the following valuation methodologies, which are admittedly imperfect in a thin land market but which may give you additional insight into local land values. Take care to explain these approaches to negotiating partners and encourage them to seek advice from independent sources regarding compensation concerns.

- **Comparable sales method**—uses data from sales or leases of similar properties as a basis for valuating your project land. While the most common method of property valuation, it may be impractical without an active and transparent land market.
- **Income approach**—the annual net income from the land divided by an estimated capitalization rate. In order to arrive at the annual net income, estimate the present value and future benefits of the land, including streams of income during the lifetime of the investment and proceeds from the sale of the property. The capitalization rate includes the discount rate (the present worth of all future incomes produced by the property) and a recapture rate (the annual amount needed to provide a return on the investment over the period the investment is held). Be sure to **include informal (non-marketed) income streams**, in particular from access to local natural resources, such as fish, water (surface/subsurface), grazing land, thatching grass, and/or wild foods. Local CSOs and community members can help identify the major income streams (livelihood sources) in the community and which natural resources support these incomes.
- **Residual method**—the residual value of investment returns after development and operational costs are accounted for. This is the difference between (i) the completed value of the project when it is developed and (ii) the total cost of carrying out that development.³⁸
- **Discounted cash flow**—the value of the property is the difference between (a) the present and anticipated cash inflow that will be generated during the entire investment/development period (taking into account anticipated inflation rate and appropriate discount rates) and (b) various development costs (e.g., infrastructure and building construction costs, professional/management fees, financing, project costs, and developer profits).
- **Fair market value**—the most rudimentary valuation method, this approach simply sets land value at the price at which the landowner will sell and the investor will buy. The danger of this approach is that the disparity in education and sophistication between the investor and the landowner, especially if land is owned at a community level, can render this method extremely inequitable and may therefore lead to conflicts with local landholders down the line.

Make sure to work closely with local community members to ensure that they understand and accept your valuation methodologies.

Communities may place high value on certain assets and resources; understanding which of these assets are most important to, and most valued by, which members of the community will help determine valuation. For example, women may particularly value having relatively close access to firewood or water (for safety reasons and to reduce their travel time to the source). They may bear a special burden if an investment impedes their access to these critical resources. Ideally, the investment plan should minimize impact on access to these key resources. If this impediment is unavoidable, compensation should take these additional burdens into consideration.

³⁸ SERA Policy Report, pp. 39-41.

TYPES OF COMPENSATION

The aim of fair and just compensation is not only to compensate communities for the direct financial cost of land affected by an investment, but also for any economic or social impacts resulting from projects that affect local land rights. Compensation may be in-kind or, in some cases, cash. It may be appropriate to identify land of equal or greater productive value and provide this as full or partial compensation (the preferred IFC PS approach). If cash makes up some portion of the compensation, it may take the form of a direct lease payment, as equity compensation, or as a benefit-sharing arrangement tied to project revenues, profits, or other indicators. In cases where cash is provided, consider building the recipients' financial management capacity. Tying compensation to a percentage of profits may be too risky, especially for local communities. Instead, payments might be structured as a fixed sum or a royalty payment based on the volume of output or the value of production. In cases where production is suspended, or before production begins, compensation should be based on a fixed sum. There is no "right" compensation model: the ideal compensation will depend on the situation and the parties' interests.

Compensation should be forward looking and include current and future impacts on the land, resources, and cultural assets (see Box 12 on the next page). Compensation should also be made in a form suitable to the local context. This means that a one-time, lump sum cash payment at the outset of the project is often inadequate and inappropriate. To begin with, many rural cultures do not make frequent use of money, and cash is not an important asset in their culture. In-kind payments (spread over time) may be more appropriate, especially in subsistence economies. Furthermore, one-time payments can lead to frustration and demands for renegotiation as landowners realize that they were underpaid for land that has generated a successful commercial venture. In addition, it is difficult to value the financial cost of depriving a landowner of his or her livelihood over a protracted period of time by virtue of acquiring their land (or key productive resources, such as water or grazing areas). For this reason, inflexible one-time payments are disfavored.

While compensation can be financial, it can and should also include non-monetary benefits that the community values, such as employment, training, and/or improvements to local infrastructure. If compensation includes commitments related to employment, specify targets and hiring preferences, as well as special efforts targeted at women and other vulnerable groups, such as youth, indigenous people, and ethnic minorities. If compensation takes into account project benefits (e.g., jobs created, infrastructure developed or improved), the value of these benefits should be specified and noted clearly.

DELIVERY OF COMPENSATION

Ensure that compensation mechanisms are culturally acceptable, as well as sustainable. For purposes of transparency and sustainability, consider establishing a village trust or other legal entity that will receive lease payments and distribute benefits to community members and other affected stakeholders. The entity responsible for collecting and distributing funds must be accountable: trustworthy, equitable in its distributions, transparent, and not susceptible to corruption. If these issues are a concern, consider mobile payment methods directly to beneficiaries.

Creating an accountable entity can help overcome problems that vulnerable groups, such as women, may have in receiving payments. If local leaders control distribution, disfavored or disadvantaged women

and men and groups may not be compensated as much, if at all. Communities may need assistance creating and managing such an entity (e.g., village fund, cooperative). Consider providing assistance to build this capacity.

A related issue concerns tenants who rent lands, but are residents of an affected community. Consider compensating tenants for the value of their lost access to land or resources.

BOX 12. EXAMPLES OF WHAT SHOULD BE COMPENSATED

Depending on the jurisdiction, the total compensation may be based on:

- The land itself
- Physical assets such as structures
- Improvements to the land, including crops
- The value of any financial advantage other than market value that the person may enjoy by virtue of owning or occupying the land in question
- Interest on unpaid compensation from the date of possession
- Expenses incurred as a direct and reasonable consequence of the acquisition
- Loss in value to other land owned by the affected owner due to the project (in some countries, the compensation will be reduced if the retained land increases in value as a result of the project, a condition sometimes referred to as “betterment”)
- Legal or professional costs, including the costs of obtaining advice and of preparing and submitting documents
- Costs of moving and costs of acquiring alternative accommodation
- Costs associated with reorganization of farming operations when only a part of a parcel is acquired
- Loss in value of a business displaced by the acquisition, or if the business is permanently closed because of the acquisition
- Temporary loss of earnings
- Personal hardship
- Other losses or damages suffered

Source: Food and Agriculture Organization of the United Nations. (2008). Compulsory Acquisition of Land and Compensation. p. 31

OTHER IMPORTANT CONTRACT PROVISIONS

Land acquisition agreements will likely follow a standard format specifying, among other things: parties to the agreement, obligations of each party, term/duration of the contract, termination provisions, location of the parcel/s, compensation and payment terms, renegotiation terms, provisions for assignment of rights, indemnity terms, notice, breach of contract provisions, and dispute resolution provisions.

In addition, agreements should:

- Consider phased acquisition if, after careful consideration and efforts to keep acquisition to the minimum amount possible, the area being acquired remains large. In some cases, it may be more economically and socially expedient to acquire rights to a smaller area. As production is scaled, so could access to additional tracts of land.
- Specify how project lands will be administered and managed (e.g., specify community representation on, and responsibilities for, project oversight committees).

- Specify how the project will interact with governance institutions at the local, regional, and national levels.
- Identify any rights the community, groups, or individuals will retain (e.g., easements, use of roads, water sources, grazing) and for how long (e.g., only until the project begins, or during its operations).
- Create protocols for voluntary information sharing.
- Specify how decision-making authority will be allocated among local groups or representatives.
- Specify how negative impacts will be mitigated (e.g., if new water holes will be provided if traditional water sources are blocked, if the investor will provide some pastures or some crop lands). This should include provisions for environmental monitoring and rehabilitation to ensure land is returned in good condition.
- Specify what grievance mechanisms will be available.
- Specify whether the investor will post bonds or other guarantees in case of malfeasance or failure to meet obligations.
- Identify methods and processes for the transfer or assignment of rights under the contract.
- Specify any resettlement procedures and related compensation, however, resettlement should be a last resort, and considered only in extreme cases.
- Consider adopting collaborative contracting models that provide meaningful opportunities for women and men in the community to partner more directly in the project, while sharing risks and benefits.
- Specify the value of project benefits (e.g., jobs created, infrastructure developed or improved) if compensation is being taken into account. Be careful when structuring this contract feature to ensure that project benefits flow equitably to those most affected.
- Ensure that grievance or other dispute resolution mechanisms are accessible (particularly to women, indigenous peoples and other vulnerable groups) and transparent.
- Identify and provide clear language related to remedies in case of contract breach.
- Specify how progress against community commitments will be monitored and reported (such as in annual reports).

Also be sure to clarify the process for relinquishing land rights at the end of the contract term. Be sure to note if the land will revert to the community or to another party, such as the state. Preferably, land rights should revert to the community and local stakeholders rather than the state. Ensure that local women and men understand the implications of these alternatives. If land reverts to the community or the state, specify the condition that the land must be in, and spell out steps to rehabilitate the land if necessary. Both you and project stakeholders will want to understand what will happen when a project begins and have clarity about commitments that are made in any agreement documents.

BOX 13. CASE STUDY: ADDAX BIOENERGY IN SIERRA LEONE

Addax Bioenergy, a Swiss-based energy company, is developing a renewable energy and agriculture project near Makeni, Sierra Leone that will produce bio-ethanol for export to Europe and for the generation of electricity for approximately 20 percent of the Sierra Leone national grid. The project, which began operations in late 2014, includes a 10,000-hectare sugarcane estate, an ethanol factory, and a renewable electricity plant that powers the ethanol factory.

Addax BioEnergy's Makeni Project has been a controversial project, criticized by numerous groups. It is an extremely valuable example of the many risks that a company may face throughout the planning and implementation processes of large-scale, land-based investments. Addax moved quickly at the beginning stage of its investment, creating problems that might have been avoided if a more stringent diligence, community engagement, and negotiation process had been in place. The project also highlights the ways that corporate management revised activities and approaches to local communities to address these problems. In particular, the case highlights the obstacles that Addax encountered in securing land rights; ensuring adequate community consultation; addressing food security; and responding to international criticism. The ways in which it approached and worked to mitigate these risks provides valuable insight for other companies wishing to engage in large-scale land-based investments in the future.

Securing Land Rights Through Land Lease: Ensuring the rights of individual land-owners

In May 2010, Addax BioEnergy entered into a 50-year lease for 50,000 hectares of land with the Government of Sierra Leone. Recognizing that the land lease with the Government was a necessary but not sufficient legal instrument to enable development of the land, particularly with regard to the impact of project designs on individual landowners and users, Addax introduced Acknowledgement Agreements (AA) to contractually confirm the rights of individual landowners and provide for the need for local consent. These additional agreements, though not legally required, were signed directly with individual landowners to ensure that they receive a fair share of the lease payments, and carry additional rent payments, separate from the lease. As a part of the AA process, Addax also charted the communities' lands and produced maps, which were later used to register for individual property deeds. The property deeds now serve to ensure that community members receive their annual lease payments.

Community Consultation: Ongoing Stakeholder Engagement

Recognizing the importance of ongoing community consultation, active stakeholder engagement in the project area continues. Structured village cluster meetings are held every month in the three Chiefdoms included in the project area attended by Chiefdom officials and the five-member Village Liaison Committee from each village. Every quarter, Addax attends a Multi-Stakeholder Forum that is attended not only by village and Chiefdom representatives but also civil society, government, and the press. The Quarterly Multi Stakeholder Forum includes representatives of the District Councils, Chiefdom Councils, landowners, CSOs, NGOs, women's organizations, unions, government, and media. Participants discuss issues of common interest directly with Addax Bioenergy and other stakeholders. Addax also holds many ad-hoc meetings with communities on a daily basis through local leaders and through its own Social Affairs Department. In addition, Addax established a formal grievance mechanism to receive and facilitate resolution of the communities' concerns and grievances.

Food Security

One of the key concerns surrounding biofuel projects is the so-called 'food versus fuel' debate, as land used for biofuels may displace real or potential food production and have an adverse impact on existing food production and security. In the case of the Makeni Project, both the Government of Sierra Leone and project financiers demanded a clear plan to ensure the project would mitigate any negative consequences.

In response to these concerns, Addax launched a Farmer Development Program, designed in cooperation with the Food and Agriculture Organization of the United Nations, the International Institute of Tropical Agriculture, and the Sierra Leone Ministry of Agriculture, Forestry, and Food Security. The Program is intended to promote food production and food security in the area, along with out grower sugar cane schemes for income generation. The Program currently supports over 2,100 households and is the largest food production program in the country.

International Criticism

Despite the considerable initiatives undertaken by Addax Bioenergy in the areas of community land rights, stakeholder engagement, and food security, local and international criticism of the project has been intense, particularly with regard to the use of the land for biofuels, the opportunity cost to food production, and the tenure arrangements agreed between Addax, the Government, Chiefdoms, and landowners. There are accusations of 'land grabs' reducing access to land, compromising livelihoods, and food security. The company has also repeatedly been accused of breaking promises and breaching many of the standards to which the DFIs hold it to account. Addax states that the allegations have been based on research of variable quality, yet whether or not the criticism will bring reputational harm to the company remains to be seen.

5.0 PROJECT OPERATIONS

The operations phase of an agricultural project may last for a few years or for many decades. Projects may begin slowly and gradually expand to put more land, water, and other resources to use. Throughout this stage, you will have continuing responsibilities to avoid harms to communities as well as a variety of mandatory contractual obligations to meet (both with respect to the land acquisition contract and the project contract itself).

Experience suggests that while it may be costly, investors that maintain an open-door policy and continue to consult and engage with stakeholders are more likely to identify and mitigate project-related harms than those who discontinue or significantly limit stakeholder engagement. In some cases, this may require re-negotiation of contract terms or, at times, cancellation of contracts to avoid unanticipated harms.

CONTINUING ENGAGEMENT

WHO?

The groundwork you laid prior to starting operations—due diligence, consultation, and negotiation activities—has helped you identify key project stakeholders, as well as community leaders. You have identified the parties who are most likely to be opinion leaders or to catalyze the rest of the community to take action. Continue to engage these parties, as well as other groups, including women’s organizations, pastoral groups, and other vulnerable people, as the project commences.

However, stakeholder engagement is not a static exercise: elected officials will change; new community leaders will be anointed; new groups may move into the project-affected areas (or project areas may shift and expand, encompassing new groups); new CSOs will spring up; and, depending on the duration of the project, entire generations of the affected community may be born and rise to adulthood. In addition, unanticipated harms may come to light.

Rely on your current contacts to help you understand when and how new stakeholders enter the picture. In addition, familiarize yourself with local and national election cycles, to know when major political changes—and with them, political appointees—may be coming.

WHEN?

Plan to engage with stakeholders throughout the lifecycle of the project, until after the project winds down.

HOW?

Arrange for a combination of regularly scheduled and ad hoc meetings with stakeholder groups. Consult with your stakeholders to determine the optimal frequency of regular meetings; these meetings should be held twice a year at a minimum.

In addition, appoint an oversight committee (or other monitoring committee) that includes stakeholder representatives to discuss the progress of the project, problems that the project is experiencing, and how you can address these problems. Plan to meet regularly with this group.

Meetings should allow for reasonable back and forth and be conducted in the local language at a time and place that is convenient for an array of stakeholders. It may be useful to provide short briefing materials for these meetings.

Consider instituting a “Continued Communication and Information Sharing” policy to institutionalize these practices within your company, and make sure that attrition does not lead to the abandonment or decline in regular communication. Share this policy with your stakeholders.

MONITORING AND EVALUATION

MONITORING SPECIFIC TO LAND CONSIDERATIONS

Monitoring adherence to the land acquisition contract and related community development agreements is critical to ensure compliance with social and environmental commitments. There are many approaches to monitoring and evaluating projects, project commitments, and project impacts.

Over the course of a project, consider supporting baseline monitoring by an independent third party (such as an auditor or a neutral CSO) to ensure that the project (i) complies with the terms of the land acquisition contract; (ii) complies with any regulatory obligations relating to the land acquisition not captured in the contract; and (iii) is not causing adverse social and environmental land-related impacts. It is important to track these social and environmental impacts so that you and stakeholders can see how the investment is affecting income, access to resources that support livelihoods, access to education, quality of life, and access to water.

If, during diligence, you find that your project will create adverse social or environmental impacts, you should create a mitigation plan. Both the IFC PS and the VGGT require investors to create mitigation plans. The mitigation plan may be created internally but should be shared with your oversight committee, and monitored by a neutral third party to ensure it is correctly and timely implemented.

GRIEVANCE MECHANISMS AND DISPUTE RESOLUTION

While all national governments have dispute resolution processes in place, they are often expensive, time-consuming, inefficient, or otherwise impractical or inaccessible to project-affected communities. Therefore, developing sound grievance or dispute resolution processes at the level of project operations is an essential component of a project that acquires rights to land in developing countries. Investors subject to the IFC PS (PS 1 and 7) are required to develop grievance processes.

An effective grievance process is important because it provides a way for communities to raise concerns and identify and address risks. It can also show you where policies and activities need to change to reduce risks and provide redress for those who have been harmed.

Investors may be legally obligated to provide grievance mechanisms, or they may have accepted voluntary obligations to provide grievance processes—for example, if they belong to the Roundtable on Sustainable Palm Oil or have adopted the VGGT. Additionally, the establishment of grievance

mechanisms is a core component of the UN Guiding Principles, and thus of the UN's Business and Human Rights framework. Best practices for these processes are outlined in Box 14.

ESTABLISHING A GRIEVANCE MECHANISM

According to the IFC,³⁹ a sound grievance mechanism should have the following characteristics:

- **Proportionality:** The scope, format, and level of complexity of a project's grievance mechanism should be proportionate to the potential impacts on, and interaction with, local communities. Use the results of your impact assessments to determine the level of impact on local communities, and therefore the scale of the grievance mechanism.
- **Cultural Appropriateness:** The grievance mechanism should take into account culturally-appropriate ways for resolving disputes and addressing community concerns. To achieve this, (I) seek input on culturally appropriate ways to address grievances from disparate groups within the affected community, (II) understand how customs and traditions can influence or impede the way community members express grievances (e.g., in some cultures women are discouraged from voicing concerns), and (III) agree with the community on the best way for its members (and different groups within the community) to access the grievance mechanism.
- **Accessibility:** If people perceive the grievance process to be unclear, difficult, or inappropriate, they are less likely to use it. Therefore, the grievance mechanism should be clear and understandable, and accessible to all segments of the affected community at no cost. Accessibility will depend on (I) the availability of easy to understand information about the grievance process and how the mechanism works; and (II) ease of use (simple, convenient, free, and culturally-appropriate ways of filing complaints).
- **Transparency and Accountability to All Stakeholders:** The grievance process should be predictable, consistent, and transparent. A grievance mechanism is transparent when members of the affected community (I) know who in the organization is responsible for handling complaints, overseeing the process, and communicating results, (II) have input into the development of the grievance mechanism, (III) understand how to access the grievance mechanism, and (IV) have power to ensure compliance with the process.
- **Appropriate Protection:** The grievance mechanism must prevent retribution, and also must not impede access by the community to other remedies. A grievance process will only be effective if community members are encouraged to share their concerns freely, with the assurance that they will not be subject to retribution (for example through a non-retaliation policy). In addition, even if you provide a well-designed grievance mechanism, affected communities may still choose to rely on a dispute resolution mechanism that they are more familiar with, and that they trust. Allow communities to make use of alternative grievance mechanisms, and let them know about external routes of redress available to them.

³⁹ Good Practice Note: Addressing Grievances from Project-Affected Communities. IFC (2009), available at: <http://www.ifc.org/wps/wcm/connect/cbe7b18048855348ae6cfe6a6515bb18/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES&CACHEID=cbe7b18048855348ae6cfe6a6515bb18>.

BOX 14. BEST PRACTICES RELATED TO GRIEVANCE MECHANISMS AND PROCESSES

International Finance Corporation: 5 Principles of a Good Grievance Mechanism

1. **Proportionality:** A mechanism scaled to risk and adverse impact on affected communities.
2. **Cultural Appropriateness:** Designed to take into account culturally appropriate ways of handling community concerns.
3. **Accessibility:** A clear and understandable mechanism that is accessible to all segments of the affected communities at no cost.
4. **Transparency and Accountability to All Stakeholders**
5. **Appropriate Protection:** A mechanism that prevents retribution and does not impede access to other remedies

International Finance Corporation: 5 Process Steps for Grievance Management

1. Publicize grievance management procedures
2. Receive and keep track of grievances
3. Review and investigate grievances
4. Develop resolution options and prepare a response
5. Monitor, report and evaluate grievance mechanisms

The UN Guiding Principles for Business and Human Rights (The Ruggie Principles): Effective Criteria for Non-Judicial Grievance Mechanisms

- **Legitimate:** Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.
- **Accessible:** Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access.
- **Predictable:** Providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.
- **Equitable:** Seeking to ensure that aggrieved parties have reasonable access to the sources of information, advice, and expertise necessary to engage in a grievance process on fair, informed, and respectful terms.
- **Transparent:** Keeping parties to a grievance informed about its progress and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.
- **Rights-compatible:** Ensuring that its outcomes and remedies accord with internationally-recognized human rights standards.
- **A source of continuous learning:** Drawing on relevant measures to identify lessons for improving the mechanism and preventing further grievances and harms.
- **Base operational-level mechanisms on dialogue and engagement:** Consulting the stakeholder groups, for whose use they are intended, on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

CLOSING A PROJECT

As an agricultural project comes to a close, engagement with stakeholders should continue. Earlier conversations and agreements, as well as the contract itself, should have specified what will happen to the land when the project ends or in the case that the project is terminated early. Prior terms should be set as to whether it will return to the control of the community or the legal entity representing the community or communities; whether it will revert to the government; whether it will stay with the investor (e.g., if the land was purchased); or if some other outcome is expected.

To the greatest extent possible, it is preferable to return land rights to local women and men rather than allowing the land rights to revert to the state. This may not always be feasible, given that in many countries the government is the ultimate title holder of land, but if it is feasible to return use rights to local women and men, this option should be pursued. Assuming that structures have

been built on the land, either remove these structures or consider transferring rights to these structures to local stakeholders in a transparent manner.

In addition to the central question of who will acquire rights to the land once the project ends, stay involved in decisions related to any environmental rehabilitation that needs to take place. Lands that people may once again rely on for their livelihoods should be returned to them in good condition, even if your contract releases you from land-related liability once the project has concluded. In some cases, monitoring for environmental impacts may need to continue even after the date the project closes. The goal for post-closure monitoring is to ensure that commitments related to environmental and other possible harms have been adequately addressed and any necessary mitigation measures have been successfully completed.

CONCLUSION

In many developing countries, land is the local population's most valuable asset. It represents not only their home and livelihood, but carries an important spiritual value and serves as the foundation for social identity. Best practices, international standards, and international obligations all require that land-based investments recognize and respect the legitimate land and resource rights of local women and men, conduct robust due diligence to assess the impact of proposed investments, consult inclusively and responsively with local stakeholders, and create risk management and grievance mechanisms in order to conduct business in a responsible manner.

The land acquisition process, especially in areas with weak land governance, or where land rights are not formalized, can be long and complex. Acquiring land in a transparent and responsible manner will involve significant time, resources, and patience on the part of the investor. However, research has shown that short cuts taken in this regard can prove extremely costly to communities and to an investor during project operations, and may even result in the premature closure of a project. Likewise, any land acquisitions that overlook or fail to engage with relevant stakeholders will create a wedge between the investor and the local population, and will likely be problematic. Taking the time to address community concerns and land tenure risks at the outset of the investment will pay dividends throughout the project lifecycle, and pave the way for more inclusive, responsible investments in the future.

ANNEX: ADDITIONAL RESOURCES

The following is a list of some of the resources that are available and provide additional information about the processes described in the guidelines

DUE DILIGENCE

Dealing with Disclosure: Improving Transparency in Decision-Making over Large-Scale Land Acquisitions, Allocations and Investments, International Land Coalition/Oakland Institute/Global Witness, April, 2012.

Guide to due diligence of agribusiness projects that affect land and property rights: Operational Guide, French Agency for Development (AFD), October, 2014.

Integrating human rights due diligence into corporate risk management processes, International Council on Mining & Metals, March, 2012.

Pritchard, J., F. Lejniewska, T. Lomax, S. Ozinga, & C. Morel. Securing community land and resource rights in Africa: a guide to legal reform and best practices, Fern UK/Forest Peoples Programme/Client Earth/Center for Environment and Development, December, 2013.

Taylor, M., L. Zandvliet & M. Forouhar. “Due Diligence for Human Rights: A Risk-Based Approach,” Working Paper No. 53, Corporate Social Responsibility Initiative, World Bank, October, 2009.

FAO’s technical guide on Respecting Free, Prior and informed Consent (2014), available at <http://www.fao.org/docrep/019/i3496e/i3496e.pdf> (p. 22 – 25).

PRE-IMPLEMENTATION COMMUNITY ENGAGEMENT

Conducting an Effective Human Rights Impact Assessment: Guidelines, Steps and Examples, BSR, March 2013.

Environmental and social impact assessment (ESIA) guidelines: Land and communities, Cement Sustainability Initiative, World Business Council for Sustainable Development, April, 2005.

K. Rosenbaum, “Drafting Community Forestry Agreements: From Negotiation to Signature, a Practitioner’s View,” FAO Legal Papers Online No. 86, (2011), available at http://www.fao.org/fileadmin/user_upload/legal/docs/lpo86.pdf.

Respecting Free, Prior and informed Consent, FAO, (2014), available at <http://www.fao.org/docrep/019/i3496e/i3496e.pdf>.

Good Practice Guide: Indigenous Peoples and Mining, International Council on Mining & Metals, 2008.

The IFAD Adaptive Approach to Participatory Mapping (2010), available at http://www.ifad.org/pub/map/pm_ii.pdf.

Lehr, A. “Indigenous Peoples Rights and the Role of Free, Prior and Informed Consent,” UN Global Compact, February 20, 2014.

RSB ESIA (environmental and social impact) Guidelines, Roundtable on Sustainable Biofuel, 2011.

GENDER ISSUES

FAO Gender & Land Rights Database <http://www.fao.org/gender/landrights/home/en/>

World Bank Gender & Agriculture Sourcebook, Module 4

<http://siteresources.worldbank.org/INTGENAGRLIVSOUBOOK/Resources/Module4.pdf>

UN Women and Office of the United Nations High Commissioner for Human Rights (OHCHR), Realizing Women’s Rights to Land and Other Productive Resources (2013) <http://www.unwomen.org/en/digital-library/publications/2013/11/realizing-womens-right-to-land>

Doss et al., 2013, Gender Inequalities in Ownership and Control of Land in Africa

<http://www.ifpri.org/publication/gender-inequalities-ownership-and-control-land-africa>

Behrman et al. Gender Implications of large scale land deals

<http://www.ifpri.org/sites/default/files/publications/bp017.pdf>

CONTRACT NEGOTIATIONS

Smaller, C., H. Mann, N. Bernasconi-Osterwalder, L. Pinter, M. McCandless and J. Parry, The International Institute for Sustainable Development (IISD) Guide to Negotiating Investment Contracts for Farmland and Water, International Institute for Sustainable Development, November, 2014.

D.C. Behr & K. Rosenbaum, “Supporting SFM through benefit-sharing arrangements,” European Tropical Forest Research Network (ETFRN) News, 54, December, 2012.

Lehr, A.K. & Gare A. Smith. Implementing a Corporate Free, Prior and Informed Consent Policy: Benefits and Challenges, Foley Hoag, July, 2010.

Gibson, G. & C. O’Faircheallaigh. IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements, Walter and Duncan Gordon Foundation, March, 2010.

Mining Community Development Agreements – Practical Experiences and Field Studies, Environmental Resources Management for the World Bank, June, 2010.

Investing in People, Sustaining Communities through Improved Business Practice: A community development resource guide for companies, International Finance Corporation, 2000.

PROJECT OPERATIONS

Rees, Caroline. Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned, CSR Initiative, Harvard Kennedy School, 2011.

Working With Smallholders: A Handbook for Firms Building Sustainable Value Chains, International Finance Corporation, 2012.

Prescott, D. Mapping in-country partnerships, Mining: Partnerships for Development/using resource endowments to foster sustainable development, International Council on Mining & Metals, February, 2010.

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