Food and Agriculture Organization of the United Nations

GOVERNANCE OF TENURE
TECHNICAL GUIDE

4

Safeguarding land tenure rights in the context of agricultural investment

A technical guide on safeguarding land tenure rights in line with the *Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, for government authorities involved in the promotion, approval and monitoring of agricultural investments

The FAO Governance of Tenure Technical Guides are part of FAO's initiative to help develop capacities to improve tenure governance and thereby assist countries in applying the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. The FAO Governance of Tenure Technical Guides are prepared by technical specialists and can be used by a range of actors. They:

- translate principles of the Guidelines into practical mechanisms, processes and actions;
- give examples of good practice – what has worked, where, why and how;
- provide useful tools for activities such as the design of policy and reform processes, for the design of investment projects and for guiding interventions.

For more information on the Guidelines and FAO's activities on governance of tenure visit: **www.fao.org/nr/tenure**

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FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

This publication is intended to support the use of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. It is not intended to contradict the language of the Guidelines as endorsed by the Committee on World Food Security on 11 May 2012 nor the role of States in their implementation.

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ISBN 978-92-5-108895-1

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Acknowledgements

This technical guide on *Safeguarding land tenure rights in the context of agricultural investment* has been prepared by Andrew Hilton, Babette Wehrmann and Elizabeth Beall, with contributions from Darryl Vhugen, Thomas McInerney and David Palmer, and under the direction of Andrew Hilton, David Palmer, Paul Munro-Faure and Francesca Romano.

The guide benefited greatly from comments and contributions from the participants of three regional workshops on preparation of the guide and from colleagues providing feedback on draft versions: Margret Vidar, Louisa Jansen, Paul Munro Faure, Martha Osorio, Pascal Liu, Astrid Agostini, Jesper Karlsson, Yannick Fiedler, Alexandre Ghelew, Anni Arial, Lorenzo Cotula, Teo CheeHai, Rebeca Leonard, Megan MacInnes, Hasako Attori, Susanne Väth, Bernd Schanzenbaecher and the German Working Group on Land hosted by the German Agency for International Cooperation (GIZ).

Editing of the guide was by Jane Shaw and layout by Luca Feliziani.

The Food and Agriculture Organization of the United Nations (FAO) thanks the Government of Switzerland and the Swiss Agency for Development and Cooperation (SDC) for funding the development and preparation of this technical guide.

Foreword

Investment in agriculture and food systems is essential for achieving food security and adequate nutrition. Lack of investment in agriculture over decades has led to low productivity and inefficient food systems in many developing countries. In recent years, apparently "vacant" or "underutilized" land in developing countries has attracted national and international investors resulting in the transfer of ownership of vast amounts of land, based upon the promise of jobs, infrastructure development, access to markets and increased food production. Yet experience has shown that many of these benefits have failed to materialize. Transaction prices and rental levels are often minimal and have encouraged widespread speculation with little or no development taking place; jobs are often seasonal and poorly paid, infrastructure development has been insubstantial; and food production, where it has increased, has often failed to reach local markets. Of even greater significance are the negative impacts that can be caused by these investments. Legitimate tenure rights have been overridden, families have lost their homes and livelihoods, in some cases environmental damage has taken place and disputes over tenure rights have escalated to violent conflicts resulting in deaths and political unrest.

Weak government policy, legal frameworks and institutions have played a significant part in this failure. Countries striving to transition into developed market economies have struggled with the complex requirements of modern land governance systems. Despite often ambitious economic development plans, many countries are constrained by historic land policies and laws, insufficient budgets, low professional and technical capacities, conflicting institutional responsibilities and resistance to change by local elites.

The endorsement of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) in May 2012 provided, for the first time, a reference point to guide governments towards the responsible and sustainable management of their country's natural resources. It achieves this by promoting the application of globally recognized principles at the national level, based upon the recognition and protection of legitimate tenure rights, multistakeholder consultation and safeguarding vulnerable groups and the environment.

This technical guide elaborates on specific aspects of the VGGT relating to agricultural investments by providing detailed guidance to government authorities and others on actions they can take to help them to create an enabling environment for responsible and sustainable investments. In following this guidance and applying the principles of the VGGT, governments will be more likely to achieve their economic development goals by maximizing the shared benefits of both private and public investments and mitigating negative impacts. In addition, by creating incentives for inclusive business models that share value with local farmers and that do not imply the transfer of large areas of land, governments will be instrumental in achieving better living conditions and greater social justice for their people – a prerequisite for peace and stability.

Acronyms

BIT	Bilateral Investment Treaty
CBD	Convention on Biological Diversity
CFS	Committee on World Food Security
DFID	United Kingdom's Department for International Development
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, prior and informed consent
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commission for Human Rights
SDC	Swiss Agency for Development and Cooperation
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UN-Habitat	United Nations Human Settlements Programme

Summary points

- This guide responds to the need for greater investment in agriculture and encourages all stakeholders – particularly the target audience of government authorities involved in investment promotion, approval and monitoring processes – to explore investment models that reduce or avoid the transfer of land tenure rights. The guide also provides guidance on how to transfer land or resource rights in ways that respect rights, foster sustainable livelihoods and do not harm local environments.
- Ensuring that all stakeholders can participate in decision-making processes and that their concerns, priorities and preferences are accommodated in investment design and approval processes reduces the risks of unrest and conflict, helping to attract further investment.
- Pursuing a human rights-based approach to land issues has economic advantages over time by fostering more equitable governance, management and use of land and other natural resources. Secure land tenure can also stimulate investments in land.
- Mobilizing investment that safeguards land tenure rights begins with providing a clear and consistent regulatory and policy environment that fosters the development of inclusive business models and ensures that investment contributes to development objectives.
- Where regulatory frameworks or policy guidance are weak or in the process of development, investment agreements and contracts can serve as mechanisms for safeguarding tenure rights if they are written in ways that allow legal enforcement and are accompanied by adequate enforcement mechanisms.
- Defining an overall investment strategy will help to target investments and ensure consistency with development and policy objectives. A strategy will also serve in guiding the identification of roles and responsibilities, and the establishment of criteria for screening, approving and monitoring investments.
- Safeguarding tenure is a continuous process throughout the investment cycle. Creating an enabling environment with a clear and consistent regulatory framework governing tenure rights provides the necessary foundation for tenure security. The process starts with promoting investment in business models that safeguard tenure rights, followed by ensuring that local stakeholders are consulted and participate in investment design, and, finally, by monitoring the effects of the investment on tenure rights over time.

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Introduction

1. Introduction

Large-scale investments in land are spreading faster than ever before across the global south. Often these investments target lands governed by customary rights that are not adequately recognized and protected under national laws, or sites where government investment, whether foreign or domestic, private or government-backed, plays a key role in financing agricultural growth. … Many participants underlined, on the other hand, the complexity of issues related to land and other resources, and pointed out that poorly conceived or executed investments, particularly those involving large tracts of land in developing countries, could have unintended negative impacts in terms of political stability, social cohesion, human security, sustainable food production, household food security or environmental protection for the receiving country …

Chair's summary, Roundtable on Promoting Responsible International Investment in Agriculture held concurrent with the 64th United Nations General Assembly, 23 September 2009 (Government of Japan/UNCTAD/World Bank/FAO/IFAD, 2009).

Responsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights. Such investments should be made working in partnership with relevant levels of government and local holders of tenure rights to land, fisheries and forests, respecting their legitimate tenure rights. They should strive to further contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable; and comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organization.

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, paragraph 12.4, Endorsed by the Committee on World Food Security (CFS) May 2012 (FAO, 2012c).

1.1 Background

Investment in agriculture and food systems is essential for achieving food security and appropriate nutrition. Decades of low levels of investments in agriculture have led to low productivity and stagnant production in many developing countries. Lack of investment has been identified as an underlying cause of recent food crises, and creates challenges for countries seeking to address food insecurity and malnutrition. According to FAO (2012b), an average net investment of US$83 billion per year will be needed to increase agricultural production by 60 percent and feed a global population of more than 9 billion people by 2050. This means that all stakeholders – public and private, large and small – have to promote increased investment in agriculture.

Investment in agriculture can take many forms. Achieving food security and nutrition for all will require an integrated approach with investments from both public and private actors to increase productivity; facilitate access to inputs, land, services, technologies and markets; provide social protection for the most vulnerable while strengthening their resilience to conflict and natural disasters; and foster the capacity of farmers, including smallholders, to make their own investments (FAO, 2014b). Investment in agriculture will be most effective in reducing extreme poverty and hunger when it involves smallholders, especially women, increases returns to labour and generates employment for the poor (FAO, 2012b). A wide range of types of agricultural investment is needed, but there is growing concern regarding investments that involve large-scale land acquisitions, particularly in areas with insecure tenure rights over land and other natural resources.

The increase in large-scale land acquisitions in developing countries has resulted largely from rising commodity prices; land reforms; food security concerns following the 2007–2008 food price crisis; growing interest in agriculture as a hedging strategy against inflation; and ecological stress such as water shortages and droughts, combined with environmental policy such as nature conservation and carbon sequestration projects, including Reducing Emissions from Deforestation and Forest Degradation (REDD+) and the European Union Emissions Trading Scheme. Concern about the impacts of these large-scale land acquisitions on local livelihoods and natural resources has also been growing (FAO, 2013c; Kaag and Zoomers, 2014; Liu, 2014; Mirza *et al.,* 2014; Schoneveld, 2013; IFAD, 2009).

At the same time, investment promotion activities have grown substantially over the last ten years, often because of the perceived benefits to national and regional

BOX 1:
Tenure and tenure rights

Societies define and regulate people's access to land and other natural resources through systems of tenure, which determine who can use which resources, for how long and under what conditions. Tenure systems may be based on written policies and laws, unwritten customs and practices, or a mixture of both.

Tenure systems usually allow different people or groups to hold different rights to the same parcel of land. For example, one person may hold the right to sell the land, another, the right to use the land through a lease and others, the right to travel across the land or to drive cattle to water at a river. The existence of multiple rights to one parcel has given rise to the concept of a "bundle of rights", with each right being pictured as a stick in the bundle.

The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* call for recognition, respect and safeguarding of all "legitimate tenure rights". The Guidelines recognize that tenure rights can be legitimate even when they are not recognized and protected by formal law. Such tenure rights have "social legitimacy" when they are recognized by local communities and others, as in many cases of customary tenure.

The Guidelines do not define which tenure rights should be considered legitimate because the definition is likely to vary from one country to another. However, they set out a consultative and participatory process for identifying legitimate tenure rights and recommend that legal protection is extended to any legitimate rights that are not currently protected by formal law (FAO, 2012c: paragraph 4.4).

competitiveness. More than 180 countries now have government agencies or authorities specifically for promoting investment (UNCTAD, 2012). The investment promotion activities of these agencies have focused on advertising the country in ways that respond to investors' demands. For example, surveys of firms investing in Africa listed "access to land" as an important criterion for investing in a particular country (Cotula *et al.,* 2009). Many countries then advertised "cheap and easily attainable" land, leading to so-called "land grabbing" by investors (Narula, 2013) with negative impacts on both the livelihoods of local people and the investors' licence to operate (First Peoples Worldwide, 2013). Gender and social inequalities were also exacerbated when investment agreements were drawn up between rural elites, most of whom are men with access to land, capital, organization, information and infrastructure.

However, while access to land remains a major attraction, investors are also concerned about the reputational risks, political risks, financial risks and project risks that result from weak institutional, policy or legal frameworks. Many investors state that they are more interested in stable and well-developed investment environments than offers of "cheap" land (Deininger *et al.,* 2010), and governments and private companies are increasingly aware that safeguarding tenure rights and providing clear and consistent rules and procedures for investing in land provide greater returns on investments for all parties involved (USAID, 2014; AFD, 2014; Coca-Cola, 2013; Cargill, no date). Investors' interest in having clear guidance and direction from governments provides opportunities for targeting investments to contribute to national development objectives.

Targeting of investment requires first identifying national priorities, then defining the types of investment that will help reach these priorities and establishing safeguards to minimize risks. Balancing the provision of enabling conditions for investors, such as investment protection, with the establishment of safeguards and inclusive decision-making to ensure the rights of local land users is challenging but can deliver win–win results (Mirza *et al.,* 2014). Each country should explore the many alternatives to large-scale land transfers and determine which investment models are best suited to its specific context and how to promote these models. For example, strong safeguards for local land users and owners may encourage investors to enter partnerships with local land users and owners rather than to acquire large tracts of land (Hilton, 2011).

In recent years, the focus has been on foreign investment, although domestic investors account for most investments in agriculture in most countries. Promoting domestic investments in agriculture, particularly by smallholder investors, can help secure tenure rights while supporting rural development, as long as the parameters of responsible investment behaviour also apply to these investors. However, restricting foreign investment or establishing different criteria for approval of foreign investments can encourage corruption and/or create conditions where tenure rights are put at risk. There is, therefore, a need to increase all types of investment and ensure that they all respect tenure rights.

Secure tenure rights provide the foundation for economic growth, enhanced food security and nutrition, reduced conflict and improved natural resource management. Safeguarding tenure rights improves the overall investment environment, thereby fostering increased investment.

1.2 Purpose of this guide

This guide has been developed in response to concerns regarding large-scale land acquisitions and the need to increase investment in agriculture. The guide supports application of the *Voluntary Guidelines on the Responsible Governance of Tenure for Land, Fisheries and Forests in the Context of National Food Security* (hereafter "the Guidelines") at the national level by providing technical guidance on how to safeguard tenure rights in the context of agricultural investments, including in land. It aims to provide additional guidance to government authorities engaged in the promotion, approval and monitoring of investments at all stages of the investment cycle. The guide also serves as a reference for implementation of the *Principles for Responsible Investment in Agriculture and Food Systems* (hereafter "the Principles") endorsed by the Committee on World Food Security (CFS) in October 2014 (CFS, 2014). The Principles address the broad range of issues when dealing with investment, and specifically draw on the Guidelines for guidance on land tenure matters (Principle 5):

Principle 5: Respect tenure of land, fisheries, forests and access to water

25. Responsible investment in agriculture and food systems respects legitimate tenure rights to land, fisheries and forests, as well as existing and potential water uses in line with:

i) *The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, in particular, but not limited to, Chapter 12.

ii) *The Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*.

The 10 Principles at a glance

1. Contribute to food security and nutrition
2. Contribute to sustainable and inclusive economic development and the eradication of poverty
3. Foster gender equality and women's empowerment
4. Engage and empower youth
5. Respect tenure of land, fisheries, forests and access to water
6. Conserve and sustainably manage natural resources, increase resilience and reduce disaster risks
7. Respect cultural heritage and traditional knowledge, and support diversity and innovation
8. Promote safe and healthy agriculture and food systems
9. Incorporate inclusive and transparent governance structures, processes and grievance mechanisms
10. Assess and address impacts and promote accountability

BOX 2:
How are the Guidelines and the Principles related?

In 2010, the Committee on World Food Security (CFS) considered tenure and responsible investment in agriculture as issues at its 36th Session. The committee agreed that while the two areas overlap, two separate guidance documents should be prepared as not all tenure and investment issues are related to each other. To ensure that the two documents complemented each other, CFS decided to prepare them sequentially, endorsing the tenure Guidelines in May 2012 and the investment Principles in October 2014. The Principles build on the Guidelines by addressing areas that are not related to tenure issues but are relevant to investment throughout the food system, including labour rights, food loss and waste, involvement of youth, innovation, technology transfer, health, safety and consumer choice. The Principles refer to the Guidelines on all areas related to land tenure. The Principles and the Guidelines are therefore complementary tools for addressing responsible investment in agriculture and food systems.

1.3 Target audience

The target audience for this guide includes technical staff of government ministries, ministers, investment promotion agencies, and national presidents or prime ministers. Government authorities involved in investment promotion, approval and monitoring can include the ministries of agriculture, land, environment, trade, economy, industry and foreign affairs. The nature, role and power of the government authorities and agencies concerned may vary from country to country (Dufey, Grieg-Gran and Ward 2008). For example, government roles related to tenure can range from facilitating contacts and arrangements between investors and customary authorities and communities, to being mandated to allocate land to investors.

Government authorities engaged in agricultural investment activities often attempt to balance their own policy objectives, including promoting investment that benefits local stakeholders, with the interests of investors. This unique bridging role enables them to advocate for policy or legislative reform that addresses the private sector's concerns (e.g. land lease risks) while raising private investors' awareness of local tenure rights and policy priorities. They can also facilitate constructive dialogue with civil society organizations and local communities, contributing to the overall investment climate of the country and supporting progress towards food security and nutrition goals. Roles of the government authorities engaged in investment promotion, approval and monitoring could include:

- advocacy within government on removing obstacles to investment or strengthening safeguards for land users;
- promoting the country as an investment destination;
- helping to solve the problems faced by existing or potential investors;
- communication and dialogue with local populations to address concerns regarding investment policy;
- targeting investments according to national development plans, goals or criteria.

This guide focuses on this last role, targeting investments to national development goals, such as safeguarding tenure and improving food security and nutrition.

1.4 Scope

The guide addresses agricultural land-related investment, including issues that are relevant to forestry, fisheries and other sectors that affect tenure rights, such as extractive industries.

The Guidelines acknowledge that responsible investments by the public and private sectors are essential for improving food security, and call for investments that safeguard land users and owners against the dispossession of legitimate tenure rights.

This guide, therefore, focuses on ensuring that appropriate safeguards are in place to protect legitimate tenure rights when agricultural investments are made. In particular, it addresses concerns that large-scale land acquisitions by private investors may put at risk the legitimate tenure rights on which some people depend for their livelihoods. Consistent with the Guidelines, this guide promotes types of investment that do not result in the large-scale transfer of tenure rights to investors in ways that infringe the legitimate tenure rights of other people, particularly those who are vulnerable. To avoid such cases, the guide promotes investments that encourage partnerships with local tenure right holders.

The guide emphasizes the need for safeguards to protect local tenure right holders, especially when they are vulnerable, such as when customary tenure rights are not legally recognized or when lack of formal education or other factors reduce right holders' negotiating power to protect their legally recognized rights to land from more powerful potential investors.

The guide also discusses investment proposals involving publicly owned land. Government authorities have a duty to manage the allocation of such land fairly, particularly when people and communities already have legitimate tenure rights to it, including through recognized customary tenure systems.

This guide is one of a series that follow on from the endorsement of the Guidelines. Other guides in the series include those on the private sector and agricultural investments; on gender; and on free, prior and informed consent.

1.5 How to use this guide

This guide is structured along the phases of an agricultural investment. While the target audience is government authorities engaged in investment promotion, approval and monitoring, each section may also be useful for other stakeholders. In general, stakeholders should consult the section that applies to the stage of investment in which they are currently engaged.

Chapter 2 on *Creating an enabling environment* outlines how to establish the conditions for fostering investments that safeguard tenure rights, in line with the Guidelines. Activities include defining an investment strategy that promotes

inclusive investment models, providing a supportive regulatory framework, and defining roles and responsibilities for the promotion, approval and monitoring of investments. This section calls for coordination and action by government authorities, with consultation and inputs from other stakeholders such as civil society organizations, private investors and landowners and users.

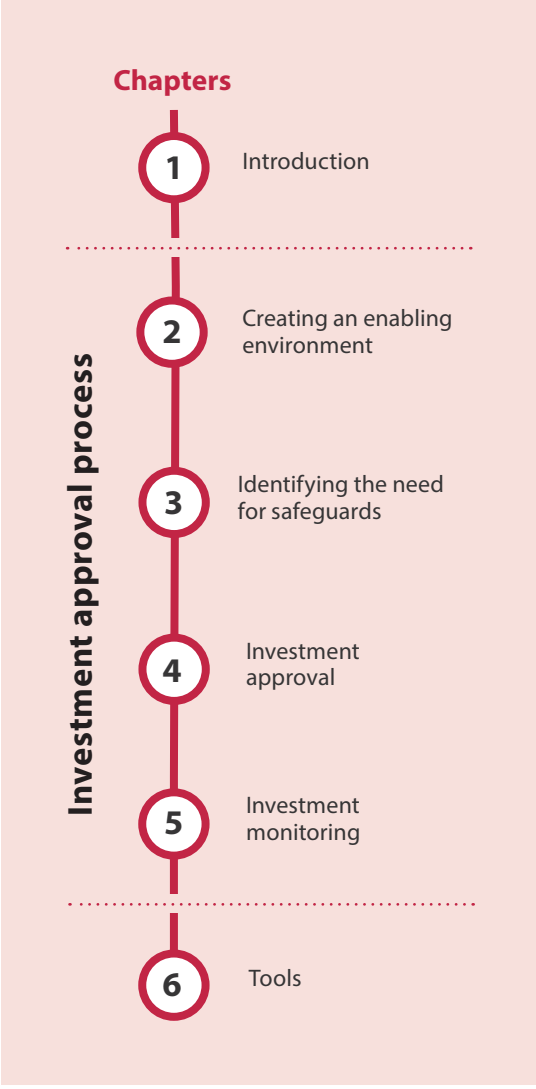
Chapter 3 on *Identifying the need for safeguards* outlines forms of investment that are particularly prone to damaging legitimate tenure rights and the livelihoods of their holders. Not all investments in agriculture threaten tenure rights, but some – particularly those that require access to land for production – can result in people losing access to their land. This section identifies forms of investment where government authorities should pay particular attention to establishing and enforcing safeguards.

Chapter 4 on *Investment approval* outlines the process for approving an investment, from registration to the signing of agreements. This section focuses on the steps that government authorities need to take to safeguard tenure within the investment approval process, but private investors will also find this information useful in identifying what governments might require from them. The section can also help local stakeholders and civil society organizations to develop community protocols and decide what to request from the government and from investors.

Chapter 5 on *Investment monitoring* outlines the steps in monitoring investments, ensuring accountability when remedial actions are necessary, and closing investments. This section is particularly relevant to government agencies with regulatory authority to enforce specific regulations, such as environmental regulations. However, all stakeholders have roles in monitoring investments and communicating to help resolve differences and identify solutions.

Chapter 6 on *Tools and additional resources* includes checklists for various stakeholders and templates for agreements between different stakeholders.

At the end of each section, key messages summarize the main points for government authorities at each stage of the investment process.



2

Creating an enabling environment

2. Creating an enabling environment

The Guidelines advocate for responsible investments in agriculture. Paragraph 12.4 describes responsible investments as those that do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and respect human rights. Such investments should involve partnerships between relevant levels of government and local holders of tenure rights, and should strive to contribute to the achievement of national policy objectives. The Guidelines use the word "strive" because the scope and scale of investments make it impossible for them to contribute to all of the policy objectives listed in paragraph 12.4. This list includes poverty eradication; food security and sustainable use of land, fisheries and forests; support to local communities; rural development; promotion and securing of local food production systems; social and economic sustainable development; employment creation; livelihood diversification; benefits to the country and its people, including the poor and most vulnerable; and compliance with national laws and international core labour standards.

Governments should work to create an enabling environment that fosters responsible investments. This requires understanding which types of investment to encourage and which to discourage. Prioritizing investment models that can reduce or avoid the large-scale transfer of tenure rights should be one element in an overall strategy that safeguards tenure rights while encouraging investment in inclusive business models. When the priorities and principles have been identified, they should be defined in strategies that can be implemented in the short term. Defining a strategy is important, not only in coordinating government policies and roles and allocating resources, but also in communicating to investors the priority areas for investment and the incentives for directing investment to those areas. Before defining a strategy, it is necessary to review existing policies and establish a multistakeholder dialogue to identify the concerns and priorities of all constituents regarding tenure rights, investments and development objectives.

A second aspect of an enabling environment is the provision of supportive legal and administrative frameworks for agricultural investments in the context of existing tenure rights. For example, land registration systems that show who holds tenure rights for an area of interest can facilitate investments by reducing the transaction costs of gathering that information, while the registration of rights can help safeguard the people who hold them. However, a functioning land registration system may not be available in some of the countries that are in the greatest need of safeguards, and it can take many years before a land registration system provides full national coverage.

2.1 Establishing priorities and defining a strategy

States should recognize that policies and laws on tenure rights operate in the broader political, legal, social, cultural, religious, economic and environmental contexts. Where broader contexts change, and where reforms to tenure are therefore required, States should seek to develop national consensus on proposed reforms.

The Guidelines, paragraph 5.9 (FAO, 2012c).

There are risks and opportunities associated with every type of investment model. The risks and opportunities vary according to the specific country context, the type of investor, the type of land use and many other factors. Certain investment models may be better suited to certain crops or stages of the value chain. To make informed decisions regarding which model may work best in a specific scenario, all stakeholders must be aware of the opportunities and risks, and the possible trade-offs between them. Any investment must be economically viable if it is to benefit local stakeholders and deliver wider environmental and social benefits.

Developing a framework of priorities and principles can help to ensure that risks and opportunities are addressed consistently. This section discusses the aspects that need to be considered when such a framework is being designed: investments that are inclusive and do not threaten tenure rights; safeguards to protect tenure rights from any threats resulting from investments; multistakeholder engagement; enhanced transparency; and clear roles and responsibilities. The priorities and principles should then be incorporated into a strategy for guiding decisions on promoting agricultural investments while protecting legitimate tenure rights.

Defining investments that are inclusive and do not threaten tenure rights

The Guidelines promote investment models that do not result in the large-scale transfer of tenure rights to investors, and that encourage partnerships between investors and the local people and communities who hold tenure rights (paragraph 12.6).

There are many inclusive investment models that enable smallholders to be active market participants while offering investors economically attractive opportunities, low risks and capacity for growth (Vermeulen and Cotula, 2010).

Worldwide, consumers are increasingly aware of and interested in the ethics and impacts of producing agricultural products. Connections to smallholders can provide domestic and global investors with competitive opportunities to increase production, attract conscientious consumers, reduce risks associated with land acquisition and promote rural development (Oxfam International, 2014). It is particularly important to consider gender issues in determining and designing inclusive investment models; contracts are often made with men, and women may lose rights to use land for food production when a male head of household accepts a contract for commercial crop production. These situations can be avoided by engaging both women and men landowners and users in negotiations of investment models.

Table 1 provides a summary of the main opportunities and risks, along with suggestions for determining which models work best. However, the business models presented in this section should not be viewed as mutually exclusive, as one or more models can often be interwoven, such as when a farmers' cooperative is involved in contract farming.

TABLE 1:
Examples of business models

Sources: FAO, 2012a; Vermeulen and Cotula, 2010.

BUSINESS MODEL	DEFINITION	OPPORTUNITIES	RISKS
Contract farming	Predetermined supply agreements between farmers and buyers	**Smallholders:** increased access to inputs (seeds, fertilizer, services, credit); access to markets, with risk mitigation; transfer of technology and expertise **Agribusiness:** improved security of supplies, in both quality and quantity; lower land acquisition risk	**Smallholders:** poor negotiating position; being locked into unprofitable contracts; breaching contracts **Agribusiness:** breaches of contract by smallholders; potentially higher transaction costs
Management contracts	Farmers or farm management companies contracted to work agricultural land belonging to someone else	**Smallholders:** higher returns; access to new economic opportunities **Agribusiness:** simple implementation; retaining control of production quality, etc.	**Smallholders:** being locked into long-term leases at flat rates **Agribusiness:** risks depend on land tenure context
Tenant farming/ sharecropping	Version of management contracts; individual farmers (smallholders) work land belonging to agribusinesses or larger farmers	**Smallholders:** income-generating opportunities for landless farmers **Agribusiness:** retain management control over resources	**Smallholders:** being locked out of landownership; weaker negotiation position **Agribusiness:** difficulties in ensuring compliance efficiency or sustainability standards
Joint ventures	Co-ownership of a business venture by two independent market actors, such as a farmers' organization and an agribusiness	**Smallholders:** receipt of dividends; participation in business decision-making **Agribusiness:** clear terms of engagement; legal framework	**Smallholders:** low dividends and equity percentages **Agribusiness:** Complex accounting and information-sharing structures
Farmer-owned businesses and cooperatives	Formally incorporated business structures in which farmers pool their assets to enter particular types of business	**Smallholders:** efficiency gains and stronger bargaining power; operating on equal legal terms with agribusiness **Smallholders and agribusiness:** predictable, regulated business environment	**Smallholders:** more complex legal and financial frameworks; higher capital costs

Contract farming

Contract farming is an agricultural production system based on an agreement between a buyer and farmers that establishes the conditions for producing and marketing a farm product or products (FAO, 2012a). Under the terms of the agreement, local farmers grow agricultural produce that satisfies agreed quantity and quality standards, and deliver the produce on an agreed date. The contract may also stipulate obligations on the buyer – which may also be an investor – to provide upfront inputs to the farmers, such as credit, seeds, fertilizers, pesticides and technical advice. The mechanism for pricing the produce is almost always agreed in advance and may involve negotiating a set price, relying on market prices, or establishing a system of bonuses and penalties, among other possible mechanisms. The costs of inputs provided by the buyer/investor are usually offset against the final purchase price. The many different types of contract farming have been categorized into broad typologies – such as centralized, nucleus estate, multipartite, informal and intermediary contract farming models – and applied in various global contexts with varying degrees of success.

BOX 3:
Essential elements to include in a contract with local farmers

- Communication mechanisms.
- Quality requirements.
- Method and timing of payments.
- Responsibility for input supply.
- Timing and location of delivery/collection.
- Responsibility for transporting goods.
- Responsibility for losses.
- Conditions for termination of contract.
- Dispute-resolution mechanisms.
- Risk-sharing mechanisms in the event of a shock or crisis.
- Laws governing contracts.

Case 1:
French bean contracts in Madagascar

A processing and exporting company has contracted more than 9 000 smallholder farmers – each with an average of 0.01 hectares growing mainly rice – to grow high-quality French beans in the rice off-season. In the contracts, the company stipulates standards for land preparation, composting and extension services, with weekly extension visits to each farmer. The company employs more than 200 people to work with the farmers to ensure that the beans meet the strict quality standards of European supermarkets. Many of the farmers now apply the techniques they have learned for beans to their other off-season crops, with significant increases in overall productivity from their plots. This case highlights that while quality standards are blamed for marginalizing smallholders, they can lead to significant benefits for both contracting parties when companies are willing to invest time and resources in providing extension services and inputs to their smallholder suppliers.

Source: Minten, Randrianarison and Swinnen, 2009.

Case 2:
Gender-inclusive contract farming

Worldwide, women's participation in outgrower schemes is generally very low, mainly because of women's insecure tenure – landownership is often a basic criterion for entering a scheme, and contracts are generally issued to the male head of household. Kaskol (Kaleya Smallholder Company Limited), an agribusiness company producing sugar cane in Zambia, has embedded an innovative "succession arrangement" into its outgrower scheme. Under the arrangement, family members can inherit a contract if

the household head dies. This arrangement has not only enabled many women to join the scheme, but has also enhanced the sustainability of outgrowing ventures in an area with high incidence of HIV/AIDS.

Source: Wonani, Mbuta and Mkandawire, 2013.

Management contracts

Management contracts are arrangements under which a farmer or farm management company works agricultural land belonging to someone else. The land can be private, State or community land. Management contracts may take the form of a lease or tenancy, but also imply a degree of stewardship in managing land on behalf of its owner. Contracts often entail some form of profit-sharing rather than a fixed management fee, to provide incentives for efficient farm management (see Case 3 on cocoa farmers in Ghana). Leases can also be established with communities through memoranda of understanding that guarantee employment of local farmers, sharing of profits and investment in benefits such as infrastructure, services and facilities.

Joint ventures

Joint ventures differ from contract farming in that farmers (or usually, farmers' organizations) co-own a business venture along with the investor. Ownership is usually apportioned through shares or percentages of the business. Co-owners share the financial risks, as well as the rewards and decision-making authority, in proportion to their equity shares. Joint ventures usually have a committee to act on behalf of the shareholders, taking longer-term, strategic decisions and – among other things – deciding whether to distribute or reinvest annual profits. The main strengths of the joint venture or equity model lie in its potential gradually to create genuine community ownership, with both economic and empowerment gains. On the downside, the initial gulf in capacity between an agribusiness and its community partners requires long-term commitment and the likely involvement of support agencies such as non-governmental organizations (NGOs).

Cooperatives and farmer-owned businesses

Farmers may decide to group together either formally or informally to facilitate business arrangements. The potential benefits of doing so include gaining access to finance, limiting the liability of individual owners and coordinating marketing efforts. Farmers' organizations include associations, trusts, enterprises and cooperatives (Boyd, 2005).

Cooperatives are jointly owned and democratically controlled entities that promote the shared interests and goals of their members. Cooperatives can involve individuals from all stages of the food system, from primary production through to retailing. There is no standard cooperative business model and cooperatives vary significantly. Common examples include marketing boards, processing companies, distribution agencies and service provision. Cooperatives and/or farmers' organizations are often the contracting parties in contract farming arrangements.

Case 3: A farmer-owned cooperative for cocoa production in Ghana

Kuapa Kokoo Farmers' Union is a farmer-owned cooperative for cocoa farmers in Ghana. Its 68 000 farmer members sell their cocoa to the Cocoa Marketing Board, a subsidiary of the Ghana Cocoa Board, which controls the export of cocoa. The farmers either own their land through inheritance or gain access to land through share cropping, whereby the tenant farmer plants cocoa on another person's land and obtains (in this case) a 50 percent share of the land and the cocoa at the time of first harvest – a tenure arrangement known locally as *abunu*. In other sharecropping *arrangements, farmers operate as* a caretaker maintaining and harvesting a farm owned and planted by another person, in which case the farmer obtains 30 percent of the harvest through an arrangement known locally as *abusa*.

Kuapa Kokoo is registered as a fair trade producer, so its members receive guaranteed prices with premiums paid for high-quality cocoa. To increase its profits from Western markets, Kuapo Kokoo has invested in the Divine Chocolate Company Ltd., a United Kingdom-based company that manufactures and distributes chocolate. Kuapa Kokoo owns 45 percent of the shares of Divine Ltd., and 33 percent of the shares in the newly established United States of America branch of Divine. Kuapa Kokoo sits on Divine Chocolate's board and receives dividends.

In 2000, about 8 000 cooperative members established the Kuapa Kokoo Credit Union, with support from Twin Trading and the United Kingdom's Department for International Development (DFID). The credit union facilitates members' access to "no frills" loans and helps them to repay debts on farms that have been mortgaged to money lenders.

Through their membership in Kuapa Kokoo Farmers' Union, which owns or controls the other business structures in the group, cocoa farmers have the strongest influence over management decisions. Five of the nine board members of Kuapa Kokoo Ltd. are cocoa farmers.

Source: Tagoe, 2010.

Principles for sustainable trading relationships

No matter what the investment model or type of transaction, there is clear evidence that inclusive investment models – those that incorporate small landholders and processors in domestic and global supply chains – can be commercially viable while also having positive impacts on development. Oxfam and the Sustainable Food Lab have identified the following five principles for inclusive business models that provide value for both investing businesses and smallholders.

1. **Collaboration and innovation along the supply chain:** This often means establishing communication lines from the retailer all the way to the primary producers. Collaboration is particularly important when there are traceability or food safety requirements. This type of collaboration often requires a "champion" in the chain who can identify and resolve both upstream and downstream problems. The champion may be a third-party facilitator who understands the constraints and objectives of different actors in the chain. Greater collaboration can also increase the likelihood of co-investment by government or other entities such as NGOs.

2. **Market linkages:** Intermediaries in supply chains play essential roles in aggregating supplies from smallholders and, often, in processing and transporting goods to buyers or retailers. Intermediaries are often criticized for taking large shares of smallholders' profits. Where smallholders profit from or share ownership of intermediary services, the development impact is likely to be greater. Intermediaries can also play significant roles in providing access to lower-cost inputs, insurance or training through their ability to purchase at larger scales.
3. **Fair and transparent governance:** The terms of relationships throughout the supply chain must be clear to all parties and negotiated fairly. Quality requirements and pricing should be agreed in advance to reduce the risk of conflict or misunderstanding later on. Farmers' organizations or groups increase smallholders' access to market information and enable them to negotiate as a group, helping to put them on a more equal footing with investors.
4. **Equitable sharing of costs and risks:** Risk-sharing strategies addressing weather-related risks, transport risks and changes in market demand help to spread the benefits more equitably along the chain. Risk-sharing mechanisms can include micro-insurance, risk management funds and shared investments for addressing problems in the value chain.
5. **Equitable access to services:** Facilitating access to services can help to enhance smallholders' capacity and ability to meet performance requirements, such as those for safety or sustainability. Services that are essential to smallholder development include technical support, business training, access to inputs and seeds, and access to financing.

These principles can provide the basis for building more inclusive investment models that deliver economic, social and environmental benefits.

Determining the investment model

Determining which investment model works best depends on: i) the degree of vertical integration in agricultural production; ii) the match between the landholder and the day-to-day management of operations; and iii) the relevance to different stages of the value chain from the producer to the consumer (Vermeulen and Cotula, 2010). In all cases there must be a clear business case with a comparative advantage such as access to land, access to cheaper services and inputs, and/or use of local agricultural knowledge (FAO, 2012a).

Government authorities exert a major influence over which investment models will be more or less competitive through their policy- and law-making regarding contract regulation, banking, tenure rights and their acquisition and transfer, gifts and legacies, and employment, among other areas. States may create incentives by reducing licence fees or taxes for investors that are more inclusive and that address development challenges. It is important to understand what motivates different types of business to engage in inclusive business models. Table 2 illustrates four types of business, but it is by no means exhaustive and businesses often incorporate a mixture

of characteristics from different categories. The overall motivations for engaging in inclusive business are to: i) maintain licences to operate by establishing good relations with communities, civil society and policy-makers; ii) reduce risks including reputational risk; and iii) promote new opportunities (UNDP, 2013).

TABLE 2:
Types of business that apply inclusive methods and their motivations
Source: UNDP, 2010.

BUSINESS TYPE	CHARACTERISTICS	MOTIVATION
Contract farming	• Global visibility • Global supply chains • Operations in several countries	• Subject to pressure and scrutiny from advocacy organizations • Seeks high quality and reliable suppliers • Seeks new growth opportunities
Management contracts	• Large local workforce • Embedded in local communities • Long relationships with public authorities	• History with community and accepts responsibilities for employees and families
Tenant farming/ sharecropping	• Close ties with employees, customers and business partners • Often geared towards local community	• Depends on established relationships • Needs a competitive niche

Instead of focusing on just one type of investment model to promote, such as contract farming, government authorities should focus on identifying the attributes that contribute to positive impacts overall while safeguarding tenure rights. The many terms used to describe investment models that address poverty reduction include "base of the pyramid investing", "inclusive business models", "social impact investing" and "partnership farming". Major attributes of all of these investment models include a focus on addressing social and environmental problems, and the inclusion and integration of low-income and vulnerable consumers, retailers, suppliers and/or distributors in core business activities.

BOX 4:
Major attributes of inclusive business models that safeguard tenure rights

- Communication mechanisms.
- No transfer of tenure rights or transfer of tenure rights only through agreements with local producers to provide primary production.
- Business model developed with local tenure right holders and other local stakeholders.
- Local tenure right holders are part or full owners of the business venture.
- Laws governing contracts.

It is important that government authorities do not confuse inclusive investment models with the corporate social responsibility efforts of investors. In an inclusive investment model, local communities are involved in the core business activity rather than in a side-effort or complementary initiative of the investing company. For example, an investor acquiring large tracts of land may engage in corporate social responsibility efforts by consulting surrounding communities on local development projects such as the provision of health services or schools. An inclusive investment model integrates local stakeholders into the main business, partly to reduce the transfer of tenure rights, such as by developing partnership agreements or supply contracts that make local stakeholders partners in achieving the core business objectives. This does not mean that government authorities should not encourage corporate social responsibility efforts, but rather that they should understand the differences when determining which investment models deliver the greatest benefits, given the country context and the needs and capacities of local stakeholders.

Safeguards to protect tenure rights from threats arising from investments

Where investments may result in large-scale transactions of tenure rights through the large-scale acquisition of land for agricultural production, the Guidelines identify various safeguards:

- Transactions involving tenure rights should be transparent, aligned with relevant national sectoral policies and consistent with the objectives of social and economic growth and sustainable development focusing on smallholders (paragraph 12.3).
- Transparent rules on the scale, scope and nature of allowable transactions of tenure rights should be developed in a consultative and participatory way, and what constitutes a large-scale transaction should be defined in the national context of each country (paragraph 12.5).
- Measures should be introduced to protect tenure rights. Examples include establishing ceilings on permissible land transactions, and regulating how transfers above a certain scale should be approved, such as by parliamentary approval (paragraph 12.6).
- The conditions that promote responsible investment should be determined, and policies and laws should be developed to encourage such investment. Laws should require that investment agreements define the rights and duties of the parties to the agreement, in compliance with the national legal framework and investment codes (paragraph 12.8).
- When investments involving large-scale transactions of tenure rights are being considered, the potential impacts on tenure rights, food security, livelihoods and the environment should be independently assessed. Existing legitimate tenure rights and claims, including under customary and informal

tenure, should be systematically and impartially identified (paragraph 12.10).

- All parties to the negotiations should be engaged and informed, and agreements should be documented and understood by those who are affected (paragraph 12.11).
- Professionals should undertake due diligence when providing services to the State, investors and the holders of tenure rights, irrespective of whether due diligence is specifically requested (paragraph 12.13).
- Agreements involving large-scale transactions of tenure rights should be monitored, and States should take corrective action to enforce agreements and protect tenure rights where needed (paragraph 12.14).

Ensuring multistakeholder engagement

Priorities and principles, and the strategies, policies and laws that incorporate them, depend largely on who has been involved in their identification and negotiation. The more inclusive the process, the more likely that the resulting strategy, policy, law, etc. represents the diverse interests of all stakeholders involved in or affected by tenure governance and investment in agriculture and food systems. It is particularly important to include traditionally marginalized or vulnerable groups, such as women and youth. Such groups often lack a voice in decision-making and can be the people most affected by decisions in these areas. Experience shows that policy reform on tenure issues can be participatory. An inclusive and equitable policy-making process can be fostered by:

- informing the public before the policy-making process starts through awareness raising and capacity development that informs local stakeholders about the different options for agricultural investment and the risks and benefits of each;
- involving representatives of all stakeholder groups and ensuring that they are informed about the policy-making process;
- involving representatives from the start of discussions to ensure that their concerns and recommendations are incorporated in the policy;
- establishing multistakeholder platforms or forums for dialogue at the local, regional and national levels;
- considering recommendations from these forums in the drafting of the policy;
- reviewing the draft policy with all relevant stakeholder groups;
- reviewing other relevant policies and proposing changes to ensure policy coherence;
- presenting the final policies for approval by government decision-making bodies.

Enhancing transparency

States should endeavour to prevent corruption, particularly through increasing transparency, holding decision-makers accountable, and ensuring that impartial decisions are delivered promptly.

The Guidelines, paragraph 10.5 (FAO, 2012c).

States and non-state actors should adhere to applicable ethical standards. They should publicize and monitor the implementation of these standards in the operation of markets in order to prevent corruption, particularly through public disclosure.

The Guidelines, paragraph 11.7 (FAO, 2012c).

In public administration, "transparency" means operating in a way that is honest, open and readily understood or accessible. Transparency in regard to agricultural investment means not only that the government discloses information related to investments to the public, but also that the people who are or may be affected by such investments are informed and can participate in decision-making regarding the investments. The transparent disclosure of information also enables stakeholders to challenge decisions that have been taken without their consent.

BOX 5:
International instruments and financial institutions that promote transparent investment projects

- *The Principles for Responsible Investment in Agriculture and Food Systems* address transparency under Principles 9 and 10. They call for "Incorporating inclusive and transparent governance structures, processes, and grievance mechanisms" under Principle 9, specifically by:
  - sharing information relevant to the investment at all stages of the investment cycle;
  - promoting access to transparent and effective mechanisms for mediation and grievance and dispute resolution, particularly for the most vulnerable and marginalized people.

  Principle 10 addresses "applying mechanisms that provide for independent and transparent assessments of potential impacts involving all relevant stakeholder groups, in particular the most vulnerable".
- *The Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development* (OECD, 2008) require that timely and accurate information is disclosed on all material matters regarding the activities, structure, financial situation, performance, ownership and governance of multinational enterprises. This information must be disclosed for the whole enterprise, as well as for specific business lines or geographic areas where appropriate.
- The Performance Standards of the International Finance Corporation (IFC) contain specific requirements for project-level transparency, determined according to the scale and intensity of the project. For example, the IFC Access to Information Policy requires that extractive industry projects disclose their contracts.

Constitutional due process principles, administrative procedures, national laws and international treaties governing investment, and anti-corruption laws often require investment authorities to exercise high degrees of transparency, particularly in disclosing information on proposed and concluded investments and in providing for public participation and redress. Where existing rules do not provide clear standards

of transparency applicable to agricultural investments involving land, investment authorities may need to apply ad hoc measures to ensure that transparency is upheld. Private-sector firms are subject to corporate governance standards requiring disclosure of their business activities, and a range of national and international laws prohibiting bribery and corruption. Accurate information should be managed and published in ways that make it accessible to relevant stakeholders, allowing them sufficient time for analysis, evaluation and engagement (Darby, 2010). Table 3 provides examples of the types of information that should be shared and how they should be shared.

TABLE 3: **Information sharing**

TYPE OF INFORMATION	SHARED BY	SHARED WITH	TIMEFRAME
Development objectives – plans, strategies and policies	Government	Public	Iterative
Registration of investment intent	Government	Public	At time of registration
Investment plans	Investor	Public, especially potentially affected stakeholders	Prior to consultation, with updates throughout consultation process
Impact assessments	Government and investors	Public	Prior to signing of investment agreement
Investment agreements – memoranda of understanding, etc. – that may have significant impacts on tenure rights	Parties to the agreement, with government facilitation	Potentially affected stakeholders	Prior to and during negotiations
Audits and reporting	Investor and government	Public	Throughout investment

In any investment transaction, transparency requires that all contracting parties provide comprehensive information on their intentions, to ensure that all relevant people are engaged and informed in the negotiations.

Transparency will be facilitated by local, regional and national government authorities disclosing their short-, medium- and long-term strategies, objectives and policies regarding the promotion, approval and monitoring of agricultural investments, including those using land and associated resources. Such transparency implies that all land-use and development plans, strategies and policies are developed in a participatory manner, are made public and are easily accessible. Land-use planning that is transparent and participatory helps ensure respect for the tenure rights, needs and interests of all legitimate tenure right holders.

A main reason for promoting transparency in investment promotion, approval and monitoring processes is to address the information asymmetries that may lead to economic inefficiencies and abuses. Information asymmetries arise when different amounts of information are available to different actors. They have various implications for agricultural investments involving land. Government authorities may not have full information on the effects of investment activities on development objectives or the potentially adverse effects of transactions on

communities. Communities may lack information on government or investors' plans, the economic value of transactions, or the future implications of investments. Investors may lack information on government plans and objectives, or the proper valuation for investment projects. Foreign investors are often unaware of local cultural norms or past investment experiences in the local context.

To alleviate asymmetries in information, government authorities may wish to provide information on many of the matters discussed in this guide in their materials for promoting investment. Examples include information on relevant laws, particularly customary laws that may not be readily ascertainable, and explanations of administrative and investment approval and monitoring procedures.

Effective dialogue and transparent exchange of information are impossible unless all parties understand each other and use shared terminology. This process of information exchange and mutual learning should continue throughout the investment cycle and be included in both the consultation plans and the signed agreements between investors and local stakeholders. Methods for exchanging information vary widely and a combination of several methods may be the most effective way of reaching a broad audience. Government authorities should decide what works best in their national contexts and should inform investors on how to communicate effectively with local stakeholders. Investors should be required to gather information from local stakeholders and to adjust their planning and investment designs to what they learn about the local context.

BOX 6:
Methods for disseminating information

- Using a language and format that the other party will understand.
- Posting information at public venues.
- Spreading information via radio or video.
- Establishing a Web site.
- Sharing information at meetings or workshops.

One way of facilitating more equitable information exchange is for local stakeholders to engage with government authorities on planning investments and defining the types of investment that they would welcome in their area. Community protocols are useful tools in stating communities' tenure rights, describing their expectations and providing guidance on how investors seeking to use, occupy or extract from the community's land and other natural resources should behave. This information can be very useful in helping governments and investors involved in investment planning and design to avoid potential "no go" areas before they reach the consultation stage. For example, a community may have clear preferences regarding the location of consultations, who is invited to participate and what records are kept.

BOX 7:
Community protocols
Source: Deng, 2012.

Community protocols are documents that outline the investment procedures that are acceptable to host communities. They can also list community development priorities, territorial boundaries, land use patterns and the location of natural resources. Once developed, they are made available to companies seeking to invest on community land. Most communities will require the support of a third-party facilitator to develop a community protocol. If sufficiently organized and resourced, however, communities may be able to develop community protocols for themselves. To avoid conflicts of interest, prospective investors should not be involved in the process.

When an investment has been made, transparency needs to be maintained by both the investor and the State. Investors should provide information on contract compliance, impacts and any measures taken or planned to mitigate negative impacts. Government authorities should keep investors informed of laws, expectations, changes in policies, fees, procedures and other relevant information.

Establishing roles and responsibilities in relation to tenure

States should place responsibilities at levels of government that can most effectively deliver services to the people. States should clearly define the roles and responsibilities of agencies dealing with tenure of land, fisheries and forests. States should ensure coordination between implementing agencies, as well as with local governments, and indigenous peoples and other communities with customary tenure systems.

The Guidelines, paragraph 5.6 (FAO, 2012c).

It is important to define specific roles and responsibilities, and allocate resources to support government authorities in carrying out their responsibilities for safeguarding tenure rights in the context of agricultural investment.

Lack of clear roles in promoting, approving and monitoring investment often results in the approval of investments that do not support development objectives or safeguard tenure rights. Roles and responsibilities are often mandated through legislation, but different line ministries are often responsible for different steps in investment promotion and approval processes, and may not communicate effectively with each other. The ministries involved and their correlated responsibilities will vary by country. The examples provided in Table 4 underline the importance of coordinating and clarifying roles to ensure consistency.

TABLE 4:
Government authorities and their potential roles

Government authority	LAND-USE MAPPING	LAND VALUATION	CROP VALUATION	IDENTIFYING PRIORITY CROPS AND REGIONS FOR INVESTMENT	ESTABLISHING CRITERIA FOR CONSULTATION	REGISTERING LAND TENURE RIGHTS	ESTABLISHING CRITERIA AND BASELINE DATA FOR IMPACT ASSESSMENT	GRANTING NATURAL RESOURCE PERMITS	DETERMINING AND GRANTING TAX INCENTIVES	SIGNING/APPROVAL OF OVERALL INVESTMENT AGREEMENTS
Ministry of Agriculture and Food Security	•		•	•					•	•
Ministry of Land	•	•		•		•		•		
Ministry of Environment					•		•	•		
Ministry of Water Resources					•			•		
Ministry of Trade and Investment				•					•	•
Ministry of Finance									•	•
Ministry of Rural Development	•			•	•					

• Shaded areas indicate the areas in which the ministry may have a role.

Many of the processes shown in Table 4 would benefit from greater coordination among government authorities. For example, the criteria and baseline data established for impact assessments will have significant implications on the monitoring of impacts, but different monitoring activities are often conducted by a range of ministries, with the environmental authority monitoring environmental impacts and the agriculture authority monitoring impacts on food security and nutrition. Streamlining the information requested in impact assessments and the monitoring of impacts will provide more accurate measurement of investors' compliance and better information for developing policy or measures for addressing impacts.

Establishing an interministerial working group of government authorities engaged in investment-related processes can help coordinate roles and responsibilities while providing a forum for discussing policy priorities and objectives, thereby enhancing consistency. When forming an interministerial working group and defining its objectives and working modalities it is necessary to:

- identify relevant ministries and their mandated roles and responsibilities;
- identify focal points for investment promotion, approval and monitoring in each ministry/agency, and appoint a lead ministry/agency;
- identify areas of potential overlap or inconsistency among ministries' roles and responsibilities;
- establish methods for addressing these overlaps or inconsistencies and enhancing synergies;
- prepare user-friendly information for investors and civil society on the roles and responsibilities of different government authorities in investment promotion, approval and monitoring processes;
- determine an institutional structure for managing coordination, with budget allocation for staff time and logistics;
- determine processes for incorporating feedback from investors and civil society as needed.

Once roles and responsibilities have been clearly defined and consistent overall processes for investment promotion, approval and monitoring are agreed, it is much easier to target investments to address policy objectives and development goals.

Developing a strategy for creating an enabling environment

Government authorities engaged in investment promotion, approval and monitoring have a role in advocating for policies that both safeguard tenure rights and contribute to overall national development by: i) creating an investment climate that attracts greater investment; ii) ensuring that greater benefits are extracted from investments; and iii) improving competitiveness (UNCTAD, 2008).

The priorities and principles related to tenure issues should be defined and addressed in an investment strategy that guides the promotion of agricultural investments while ensuring safeguards to prevent infringement of people's legitimate tenure rights.

In policy-making, the process of developing a policy often influences the contents of the policy. For example, a land or agricultural investment policy is more likely to reflect the interests of small-scale food producers if they have been involved in its development. The agricultural investment strategy should, therefore, be prepared in a consultative and participatory manner, consistent with the Guidelines and the Principles.

A strategy that covers agricultural investments and tenure will vary from one country to another. In some countries, investment strategies are comprehensive, multidimensional instruments that apply to all sectors. Some other countries have

specific sector strategies; for example, an agricultural investment strategy or an agricultural development strategy. In other countries, agriculture and investment priorities are integrated into national development strategies; for example, in an overall poverty reduction strategy.

Preparation of the strategy should draw on an understanding of the impacts that other policies have on agricultural investments and land tenure. Relevant policies may include those related to other investments, agriculture, rural development, the economy and trade, gender and youth, or land. Some of these policies will have an impact on land tenure. For example, policies for empowering and engaging youth may address inheritance rights related to land and other assets; employment policies may influence the conditions stipulated in leases and benefit-sharing agreements. Equally, land tenure policies may have an impact on agricultural investments; for example, regulations on land taxation for investors may influence the decision to buy or lease land.

One of the greatest challenges is ensuring that all strategies and policies contribute cohesively to achieving overall development objectives, including the safeguarding of legitimate tenure rights. There may be trade-offs among policy objectives, which need to be weighed carefully; for example, increasing employment opportunities should be weighed against decreasing own production. Any existing investment strategies and policies that have negative impacts on tenure rights should be identified so that inconsistencies can be resolved.

For example, there is a long-perceived conflict between pursuing market-oriented strategies versus poverty-reduction strategies. However, these two strategies should be complementary, especially when safeguarding tenure rights is integrated into broader development policy-making. Policies that promote inclusive business models and foster market linkages provide one example of how safeguarding tenure can be mainstreamed into policy-making and the achievement of development objectives.

Preparation of the investment strategy may also reveal tenure policies and procedures that should be revised. For example, where customary tenure systems exist, it may be necessary to mitigate their discrimination against women or youth while building on and improving their community-based land administration and management systems. This may lead to broader reforms that integrate aspects of customary tenure systems with formal land administration, but these are beyond the scope of this guide.

Any investment policy or law should be integrated with the strategy to ensure that investments are channelled to areas where they can increase productive capacity and competitiveness, and to maximize positive and minimize negative impacts. For example, if the national development strategy seeks to foster linkages between smallholders and markets, policies should aim to safeguard the tenure rights of smallholder farmers, develop their capacity to engage with larger processors/offtakers, and provide incentives for medium- and larger-scale processors and traders to engage with smallholders. Formulation of agricultural investment policy should be a continuing process that is monitored to ensure that the policy contributes to development objectives. Such a process is challenging and requires resources and management capacity for implementation.

Impact monitoring helps to ensure that investment policy remains relevant and effective, as discussed in Chapter 5.

BOX 8:
Key issues in policy-making

The main issues of concern will vary from country to country depending on the history, politics, economy, geography and culture of each. However, many themes related to policy-making for tenure governance and agricultural investments recur in most countries:

- food security and nutrition;
- land rights and land use;
- natural resource management and use – forests, water, biodiversity, etc.;
- infrastructure;
- employment and labour rights;
- health and safety;
- gender;
- youth;
- cultural heritage;
- trade and finance;
- dispute resolution.

The design of a strategy for mobilizing investment that safeguards tenure rights and contributes to development can be based on the following questions:

- What type of agricultural development should be pursued – small-, medium- or large-scale? What types of crop and which regions should it target?
- What existing resources and comparative advantages can be built on to pursue objectives? What is lacking?
- What are the roles of private and public investment?
- What incentives and instruments will encourage investors to use types of private finance that facilitate the achievement of development objectives? How might these incentives and instruments vary across sectors or types of agriculture or business model?
- What steps are needed to promote the desired types of investment?

Sources: Cotula, 2014; Kharas and McArthur, 2014.

Challenges to the design of national investment policy include:

- integrating investment policy into development strategies by:
  - channelling investments to areas where they can help build productive capacity and international competitiveness;
  - ensuring coherence with the many policy areas involved in overall development objectives;
- incorporating sustainable development objectives into investment policy by:
  - maximizing positive and minimizing negative impacts of investment;
  - fostering responsible investor behaviour;
- ensuring the relevance and effectiveness of investment policy by:
  - building stronger institutions to implement investment policy;
  - measuring the sustainable development impacts of investments.

Source: UNCTAD, 2012.

2.2 Providing supportive legal and administrative frameworks

States should provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests. These frameworks are dependent on and supported by, broader reforms to the legal system, public service and judicial authorities.

The Guidelines, paragraph 5.1 (FAO, 2012c).

States should ensure that policy, legal and organizational frameworks for tenure governance recognize and respect, in accordance with national laws, legitimate tenure rights including legitimate customary tenure rights that are not currently protected by law; and facilitate, promote and protect the exercise of tenure rights. Frameworks should reflect the social, cultural, economic and environmental significance of land, fisheries and forests. States should provide frameworks that are non-discriminatory and promote social equity and gender equality. Frameworks should reflect the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration.

The Guidelines, paragraph 5.3 (FAO, 2012c).

Responsible agricultural investments should be supported by appropriate legal and administrative frameworks. Good laws and administrative systems are needed to defend and enforce contract rights and tenure rights. However, the countries with the greatest need for safeguards are often also the countries with the weakest laws and legal systems, and the establishment of supportive legal and administrative frameworks may be beyond their reach. For example, if a country's land registration system has limited geographic coverage, it may take years or decades for tenure rights to be appropriately recorded in areas where investors are looking for land.

In the meantime, government authorities under pressure to promote agricultural and rural development may decide to encourage investments with safeguards that take into account the inadequacy of the existing legal and administrative frameworks. Governments making such decisions should recognize where current laws and regulations fall short of the standards described in the Guidelines, and should adapt their strategies and processes for promoting, approving and monitoring investments accordingly. Chapters 3, 4 and 5 provide guidance on these requirements.

Governments should also start the process of improving the legal and administrative frameworks to make them more supportive of responsible investments. Laws and regulations that fall short of the accepted standards should be amended, and new legislation introduced where necessary. Although the government authorities involved in investment promotion, approval and monitoring do not usually have the specialized knowledge to amend the legal and administrative frameworks themselves, they should be closely involved in this work. The Guidelines provide useful guidance on processes for creating more supportive legal and administrative frameworks.

This section provides an overview of the implications that international laws and treaties and national constitutions, legislation and land administration can have for tenure and investments. Detailed guidance for legal professionals can be found in the legal technical guide, *Responsible governance of tenure and the law: a practical guide for lawyers and other legal service providers.*

International investment law and treaty obligations

In many countries, the promotion, approval and monitoring of investments involving foreign investors implicate international investment agreements, including bilateral treaties and regional trade agreements. States that are parties to regional investment agreements or bilateral investment treaties (BITs) can start by reviewing their activities for agricultural land-related investment against these agreements, if the agreements include agriculture within their scope. If the agreements or treaties do not include provisions for protecting agricultural investments, governments can exercise a greater degree of discretion in controlling the terms on which investments are made.

Even when international agreements or treaties cover agricultural investments, governments should review the terms of the agreements and utilize provisions that are conducive to application of the Guidelines. For example, an international agreement or treaty may allow governments to require inbound foreign investment to uphold certain requirements of the Guidelines. At a minimum, most BITs allow governments to regulate the conditions for the entry of foreign investment, determine foreign ownership limits and establish performance requirements. For example, a BIT may allow governments: to restrict foreign investors' ownership of land; to specify the maximum proportion of foreign ownership in an investment; or to impose performance requirements such as job creation or the use of local production (Picciotto, 2011). BITs may also enable governments to set the terms for access to natural resources such as water. These issues are discussed in greater detail in section 4.1 on Registration of intent to invest and due diligence.

While international investment agreements and treaties may limit governments' ability to align their investment strategies with the Guidelines, it is important to recognize that governments retain substantial authority under many agreements. Such authority is often exercised during the investment approval process.

When international investment agreements or treaties encompass agricultural investments, it is important to establish adequate safeguards for investments before specific domestic investment agreements are finalized, such as contracts with local suppliers, land lease agreements, and impact and benefit agreements. Governments will also often be able to make investments in land conditional on contributing to wider development objectives. However, such measures must be established before any investment is made, to avoid giving rise to arbitral challenges on grounds such as denial of fair and equitable treatment. These concepts are discussed further in Chapter 4 on Investment approval.

International and regional human rights instruments bear on many of the considerations set forth in the Guidelines because the Guidelines were designed to be consistent with international human rights standards. Although the Guidelines are voluntary, States that have ratified human rights treaties have some legal obligation to apply and enforce these agreements. By applying the Guidelines to their investment promotion, approval and monitoring activities, actors may be able to comply with the requirements of their commitments under international law.

More specialized fields of international law may also affect agricultural investment. For example, States that have ratified the Convention on Biological Diversity (CBD) have to pay particular attention to upholding the rights of indigenous peoples. The Guidelines are consistent with these binding treaty obligations.

Constitutional law

National constitutions often contain provisions related to land tenure, but the nature of these provisions can vary considerably from one country to another. For example, constitutions may provide for State ownership of all land or allow both State and private ownership, and recognize customary tenure as a legal form of tenure. Constitutions often also have indirect links tenure; for example, in defining the fundamental rights of citizens, such as gender equality and standards for due process of law. Constitutions' direct and indirect connections to land tenure influence how agricultural investments involving land tenure may occur.

When constitutional reforms are being considered, the Guidelines can help raise the awareness of governments and other stakeholders regarding the relevance of principles that are not clearly developed in the constitution. The Guidelines' provisions on matters such as gender and indigenous peoples' rights provide examples of what constitutional norms can require, thereby helping governments to identify the constitutional reforms or measures needed for implementing international treaty obligations.

The Guidelines can also be used to help design measures for filling gaps in the constitution, including with regard to agreements between investors and local parties, such as contracts with local suppliers, land lease agreements and impact and benefit agreements. For example, efforts may be directed to protecting the rights and livelihoods of women in any transaction involving land. Even if practices under constitutional law or the application of treaties do not recognize gender equality, governments may take steps to address these concerns in their investment promotion strategies and activities. More detailed guidance on gender equity considerations can be found in the gender technical guide, *Governing land for women and men. A technical guide to support the achievement of responsible gender-equitable governance of land tenure*.

Other national laws, regulations and rules

Investment promotion, approval and monitoring activities that involve land are subject to many different legal provisions, which can be divided according to whether they affect tenure directly or indirectly.

Some legal provisions are directly linked to investments. For example, regulatory approval may be required when foreign owners wish to purchase agricultural land above a threshold area or value; or a ceiling on the maximum size of a holding that is permissible may be set to restrict land concentration by foreign or domestic owners.

The legal framework for land tenure is likely to affect investments that involve land even if it does not directly mention them. A wide range of laws, statutes and court decisions may apply, including laws governing landownership or use, land administration, forestry, agriculture and agricultural concessions, expropriation, environmental protection, and water. Laws on contracts, gender equality, inheritance, family matters and other topics may also condition the ways in which land can be used or exchanged through investments.

As well as laws that relate specifically to land tenure, governments should also implement the types of investment vehicle described in section 2.1 (under "Defining investments that are inclusive and do not threaten tenure rights") in conformance with the provisions of the country's overall legal framework as defined in contract law, commercial codes, notarial protocols, lender–creditor laws, etc.

In addition to formal law, many countries – particularly developing ones – have systems of customary or traditional law that apply to land tenure. Increasingly, countries are granting legal recognition to customary tenure systems, but this trend is not universal; in some countries customary tenure is not formally recognized and may not be clear to outsiders. Even in these cases, however, there is no justification for ignoring customary rights when agricultural investments could result in people and communities being evicted from land that they have customarily used for their livelihoods. Where customary law is not explicitly recognized in the formal legal system, efforts may be needed to ensure that customary or informal rights are respected through the investment promotion, approval and monitoring processes.

In promoting, approving and monitoring investments, governments need to ensure that rules are followed and they should identify any modifications needed to mitigate gaps or deficiencies in the existing legal framework. Governments can assess the adequacy of their existing legal and regulatory systems by reviewing them against the Guidelines, which may provide added impetus for undertaking broader reforms relating to governance and rule of law, including to improve the investment climate.

Where existing laws are inadequate, governments may need to adopt temporary measures to protect resource users while attracting needed investment that benefits all stakeholders, until the necessary legal reforms are completed. Governments introducing such measures will often need to obtain legal advice to ensure comprehensive due diligence. Much can be achieved in the short term with well-drafted and equitable contracts and agreements that are consistent with the principles and practices of the Guidelines. These should provide explicit protection of rights and interests, both generally and for specific categories of use (such as ritual sites and environmentally-sensitive areas).

Land administration

Land administration refers to the way in which land tenure rules are applied and made operational. While there is no universally recognized definition, Part 5 of the Guidelines (Administration of tenure) includes the recording of tenure rights (e.g. land registration), valuation and taxation, and regulated spatial planning within the scope of land administration; Part 5 also covers the resolution of disputes over tenure rights. Such dispute resolution is often seen as being within the jurisdiction of court systems and, thus, not part of land administration, although land agencies often have a role in settling disputes within their technical expertise. Land administration also includes the adjudication of land tenure rights, or the authoritative determination of what land tenure rights exist, who holds the rights, and what restrictions or limitations apply to the rights. Adjudication is addressed in Part 3 of the Guidelines, regarding the legal recognition of tenure rights and duties, and the safeguards that are needed. Part 2 of the Guidelines presents accepted practices for delivering land administration services.

Efficient land administration systems are important for providing tenure security to people who hold legitimate tenure rights, and they underpin the operations of land markets and other mechanisms through which tenure rights are transferred. However, formal land administration records – those that are administered by government land agencies – do not usually contain information on tenure rights that are considered legitimate but are not currently recognized by formal law. Particular care is needed in geographic areas targeted for investments where there are no publicly known records of the people who hold tenure rights. For example, the recording of customary tenure rights in a land registry may not be possible until legal reform has provided legal status to the rights and an adjudication process has established the information needed for the records. Similarly, the implementation of gender-neutral inheritance rights may be possible only after the necessary policy and legal reforms.

Full implementation of substantial reforms may take many years, such as when the coverage of publicly accessible records is extended to include new forms of legally recognized tenure rights, including customary tenure, and to record tenure rights throughout the whole country.

BOX 9:
Features of good land administration
Source: UNECE, 1996.

- ✓ Guarantees ownership and security of tenure.
- ✓ Supports land and property taxation.
- ✓ Provides security for credit.
- ✓ Develops and monitors land markets.
- ✓ Protects State lands.
- ✓ Reduces land disputes.
- ✓ Facilitates land reform.
- ✓ Improves urban planning and infrastructure development.
- ✓ Supports environmental management.
- ✓ Produces statistical data.

Recording land tenure rights

Systems for recording land tenure rights (such as land registration and cadastral systems) should provide clear and unambiguous information on who holds what tenure rights to which parcels of land, and under what conditions. Tenure security is improved when information on tenure rights is easily available to all, because people who do not know that a tenure right exists may inadvertently do something that infringes that tenure right. The recording or registration of tenure rights typically provides some form of legal protection to the person who holds the rights, although the nature of the legal protection depends on the legal framework so differs from one country to another.

Before tenure rights can be recorded or registered, they usually have to be identified and confirmed through a process of adjudication. The Guidelines indicate that adjudication should be systematic in providing legal recognition of tenure rights by progressing area by area, in accordance with national priorities (paragraph 7.4). The registration following an adjudication process is referred to as the "first registration" of tenure rights and the associated holders and parcels.

A difficulty in some countries is that land registration and cadastral services are found only in major urban centres, and there is little or no coverage in rural areas. As a result, records of tenure rights may not be available in areas where land is being sought for investment. The Guidelines caution that particular care should be taken to prevent the registration of competing rights in such areas (paragraph 17.2). Expanding land registration services to cover the entire country is thus an important part of ensuring that everyone is able to record her/his tenure rights and obtain information without discrimination on any basis.

The information in land registration and cadastral systems supports land markets by making it easy for a potential investor to identify who holds the tenure rights to the land. Transfers of tenure rights through sales and other transactions should be recorded in the land registration and cadastral systems, but the new holders of tenure rights are unlikely to register transactions if they perceive the burden of doing so to be greater than the benefits. In such cases, the information in the registries soon becomes outdated, and the investments in initial adjudication and registration are, in effect, wasted.

Regulated spatial planning

Regulated spatial planning defines the purposes for which land (including associated buildings and other structures) and other natural resources may or may not be used. The regulation of land use frequently reduces people's ability to use land in certain ways and thus places conditions on tenure rights. There are typically many competing demands for the use of an area of land, such as for agriculture, environmental preservation, housing, commerce and industry, recreation and transportation. Regulated spatial planning aims to manage these competing demands and resolve them in a coordinated manner. Where spatial planning defines legally binding land uses, it can be a useful tool for guiding rural development. For example, if a parcel of public land has been zoned as an environmental protection area, the land or parts of it cannot be allocated to agricultural use. Regulated spatial planning can, therefore, be used to define clearly where agricultural investment should take place and where it should not. Planning agencies should monitor and enforce compliance with the plans.

The planning process should be consultative and participatory, allowing time for the review of proposals to ensure that they reflect the priorities and interests of communities. Facilitating such participation may require providing additional support to some sectors of the community. Land-use plans should be updated regularly to take into account demographic and other changes. Some jurisdictions have a fixed timeframe for updating land-use plans, such as at least every ten years.

The land-use planning framework should be flexible enough to respond to new opportunities that arise after a plan has been approved and before the next update occurs. Requests for changing the regulated land use – from agricultural to urban use, for example – are common and can result in a substantial increase in the value of the land. Safeguards are, therefore, needed to prevent the improper use of spatial planning authority, and the mechanisms that land administration authorities use to change land should be transparent and accessible for review by all stakeholders. Requests for

a change in land use, including the erection of buildings or more intensive use of the land, typically trigger assessment of the proposed new use and its compatibility with adjacent land uses, impact on the environment, etc.

Property valuation

Valuation of land (including associated buildings and other structures) is important when land tenure rights are being acquired for agricultural investments. Valuation informs the negotiation process between parties, and appropriate systems should be developed to provide valuations that are fair and timely. These systems should be underpinned by national standards for valuation that are consistent with relevant international standards.

The processes for valuation should be transparent. Typically, sales prices and other relevant information are recorded, analysed and made accessible as the basis for accurate and reliable valuation. However, in rural areas, the value of a parcel of land may not be based only on information about the market value, but may also be based on other values – social, cultural, religious, spiritual or environmental. In areas where land is infrequently transferred, valuation may be challenging and should be based on a methodology that is discussed and agreed with all parties.

Land values can easily be manipulated if no valuation standards are respected. In such cases, values that serve as the basis for tax liabilities can often be under-declared, thus rendering the estimation of fair market valuation for all purposes – including taxation, lease rentals and compensation – very challenging. Some countries have advertised cheap land prices to attract investment, and landowners and their representatives who lack information and sophistication may have accepted low prices believing them to have been based on "fair market value".

Key messages:
Creating an enabling environment

Defining an investment strategy will help target investment to serve development and policy objectives.

Business models in which landowners and users are involved in decision-making and maintain control of the land are more likely to create shared value than large-scale land acquisitions.

All types of business models present risks and opportunities. Any investment should seek to minimize the risks to all parties and the surrounding environment, thereby reducing the risks of project failure and maximizing long-term opportunities and positive impacts.

Tenure rights vary by country and may include customary rights, ownership rights, lease rights, use rights, subsidiary tenure rights and others. Regardless of the type of tenure right, rules and procedures regarding the rights and their transfer to other parties should be clearly defined in the regulatory framework.

Laws pertaining to property, land registration, spatial planning, expropriation, contracts, concessions, inheritance, environmental protection, agriculture, forestry, water, gender, trade, investment, indigenous peoples and other issues depending on the country context should be reviewed to ensure consistency and coherence.

Local landowners and users and other stakeholders should be involved in spatial planning processes to determine and prioritize parcels of land for particular uses such as agriculture, environmental protection and cultural heritage.

Safeguarding tenure rights requires the cooperation of many ministries and non-government actors. It is important to establish clear roles and responsibilities to ensure consistency and accountability throughout the investment process and in all regions of the country.

The process for making a policy is as important as the contents of the policy and should be as transparent and inclusive as possible.

Transparency ensures that people who are or may be affected by investments have access to all relevant information to enable meaningful participation in decision-making.

It is important to establish clear rules and procedures concerning the disclosure and exchange of information. Information should be accurate and be shared in an accessible format allowing enough time for analysis, evaluation and engagement by all stakeholders.

3

Identifying the need for safeguards

3. Identifying the need for safeguards

Investments in agriculture are diverse, with some having no effect on tenure rights while others cause widespread harm. This chapter reviews the types of investment that should be of particular concern to government authorities responsible for promoting, approving and monitoring investment. While care should always be taken to protect people from dispossession of their legitimate tenure rights, priority should be given to providing safeguards where dispossession is most likely to occur.

3.1 Investments with little threat to tenure rights

Not all investments in agriculture pose threats to tenure rights. Examples include: smallholders' investments in their own farms (FAO, 2012b: xi); investments in agricultural value chains that improve linkages between farmers and markets while requiring no changes in the users and holders of tenure rights to the land parcel; and contract farming and similar investments that rely on farmers continuing to hold and use their land.

Investments that transfer agricultural land through the market do not threaten tenure rights if, for example, the land is held by a private owner and nobody else holds legitimate customary or other tenure rights to that land. In these cases, standard market transactions take place through a "willing buyer–willing seller" (or "willing lessee–willing lessor") arrangement, with the expectation that the transaction is voluntary – the buyer and seller are willing and are not coerced, pressured or forced – and informed, with the buyer and seller having reasonable knowledge of the relevant facts before and during the transaction.

However, it is always necessary for all co-owners to give their approval for the transfer. This is particularly important when a woman (e.g. wife) is legally recognized as a co-owner, but only the male head of household is shown as the owner in the land registry. Due diligence should be exercised to ensure that all co-owners give their consent in any market transaction, regardless of whether or not agricultural investments are involved. Legal and administrative reforms should provide for joint registration of spouses as co-owners where appropriate.

Even when the proposed transaction does not threaten existing tenure rights, regulatory review will be required if there are regulations governing the purchase of agricultural land above a threshold area or value, or if the proposed purchase would result in the buyer acquiring land in excess of a stipulated ceiling.

Other regulatory reviews may be required where investments cause changes in land use. Even when the primary use of the land remains agricultural, an investment proposal may include the construction of agricultural buildings or more intensive use of the land. Depending on the planning and development laws of the country, these changes may trigger environmental and other impact assessments, including consideration of whether the proposed use is compatible with uses on the surrounding land. If the assessment findings are negative, the investment proposal will be denied, even if it does not jeopardize any tenure rights.

3.2 Investments requiring safeguards

Some forms of investment, particularly those that involve access to large areas of land, require careful scrutiny as they may result in people being dispossessed of their land.

Investment proposals for the expropriation of privately owned land

Proposals for agricultural investments that require the expropriation of land should be viewed with caution.

Virtually all countries provide for governments' expropriation of land for public use or interest. Justifiable reasons for such expropriation are defined in constitutions and other legal instruments and vary widely among countries. In some countries, land can be expropriated from private owners only for public uses such as roads, railways, harbours, airports, hospitals, schools or electricity, water and sewage facilities. In other countries, expropriation can also be for other public purposes such as protection against flooding and the protection of water courses and environmentally fragile areas.

In a number of countries, expropriation has been used to transfer land from some private owners to others. For example, redistributive land reform policies are usually considered to be in the public interest, even if the beneficiaries are private farmers; such land reforms are often part of government programmes to address social injustices and promote agricultural and rural development. When a land reform is challenged, the government may have to prove that the redistribution of land from one private owner to another is ultimately beneficial to the community. Clear intent in legislation can help to diminish the potential for conflicting court decisions in such challenges.

There are also examples of expropriation being used to transfer land from some private owners to others for commercial investment projects, with the justification that increased taxes and other revenues represent a public benefit. However, such public benefits do not always materialize.

In most cases, expropriation brings great costs to the people whose land is being acquired: "It displaces families from their homes, farmers from their fields, and businesses from their neighbourhoods. It may separate families, interfere with livelihoods, deprive communities of important religious or cultural sites, and destroy networks of social relations. If compulsory acquisition is done poorly, it may leave people homeless and landless, with no way of earning a livelihood, without access to necessary resources or community support, and with the feeling that they have suffered a grave injustice" (FAO, 2008).

The power of expropriation can also be abused. Unfair procedures for expropriation and inequitable compensation for loss of land can reduce land tenure security, increase tensions between the government and citizens, and reduce public confidence in the rule of law. Unclear, unpredictable and unenforceable procedures create opportunities for corruption.

Evidence indicates that it is very difficult to expropriate land without having negative impacts on tenure rights and human rights, and expropriation has caused a significant number of land-related disputes. This guide, therefore, recommends avoiding expropriation and does not go into detail on processes for expropriation and related compensation. Where expropriation cannot be avoided, guidance on how governments can equitably acquire land for development can be found in FAO's guide on *Compulsory acquisition of land and compensation* (FAO, 2008).

Investment proposals for the use of publicly owned land

Proposals for investments on publicly owned land require attention because government authorities have a duty to manage the allocation of public land in a responsible manner. This duty is particularly important when people are already using the land, especially when they have tenure rights that are considered legitimate but that are not currently protected by formal law. Coordination is needed between the government authorities responsible for managing public land and those charged with investment promotion, approval and monitoring.

As part of the effective administration of public lands, governments should determine which lands to retain in the public sector, and which to allocate to the use of others and under what conditions. These decisions should take into account the tenure rights of people who are already using the land, and these people should receive due consideration in the reallocation of tenure rights. In allocating public land to other users, care should be taken to avoid threatening people's livelihoods by depriving them of their legitimate access to the land. The nature of the tenure rights being allocated will need to be determined, along with whether the State retains any control over the land that has been allocated. Allocation procedures should be transparent

and participatory, and people who are affected should know and understand the implications of the allocation. The land allocation should be monitored, and corrective measures introduced, if needed (see section 8 of the Guidelines).

Investment proposals that affect the land of people who may need additional safeguards

Investment proposals involving public land require particularly careful review when people are already using the land, for example, through customary tenure rights. Equally careful review is needed when proposals target land that is legally held by other people and communities who are vulnerable because they have limited experience and understanding of the law and their rights, and are in a weak position for negotiating fair transfers of tenure rights because of illiteracy, etc. In such cases, it is unlikely that both parties are fully informed, and transactions might not be fully voluntary, as required for standard market transactions.

The government authorities that promote investments should identify the people and communities who hold legally recognized tenure rights, such as customary tenure, but who may be at a disadvantage when negotiating with investors to ensure that they receive the support they need.

Key messages:
Identifying the need for safeguards

Government authorities should identify investments where safeguards will be needed to prevent people from losing their tenure rights.

Proposals for expropriating private land for private agricultural investments should be carefully reviewed and it is recommended that such expropriations be avoided.

Proposals for using public land should be assessed to determine whether they would affect the people who already use the land in ways that are considered legitimate.

Proposals for using the land of people who are considered vulnerable and have less negotiating power than investors should be carefully reviewed.

4

Investment approval

4. Investment approval

This and the following chapters focus on proposals for agricultural investment that require particular scrutiny to prevent people and communities from losing their legitimate tenure rights. As identified in Chapter 3, such people and communities include those who are using public land, as well as those who hold legally recognized rights to their own land but are considered to be particularly vulnerable.

An understanding of the overall legal and regulatory context and reform priorities can help government authorities to facilitate investments that optimize development benefits while upholding human rights and environmental and social standards. An investment approval process that is clear and transparent to all parties promotes increased volumes of investment and adherence to environmental and social governance standards. As discussed in section 2.1, there are many different types of investment and investment models, with different legal and regulatory requirements for impact assessments, monitoring and reporting, but all investments should respect tenure rights.

In recent years, disproportionate attention has been paid to international or foreign investors, given that domestic investments account for a much higher percentage of total land transfers in many countries (O'Brien, 2011; Deininger, Selod and Burns, 2012). However, where there are constraints on foreign ownership of land, foreign investors may seek domestic partners to evade these restrictions, and many countries have registration and investment approval processes that apply only to foreign investors. In addition, domestic investors are often not registered and/or do not face the same due diligence process regarding business plans as foreign investors face, making it much more difficult to safeguard tenure rights, monitor investments and direct them towards development objectives. Each State should determine the criteria and thresholds for requiring the registration of foreign and domestic investors, and should define the types of investment to which the processes and procedures described in this chapter should be applied.

It may be appropriate to vary requirements regarding the rigour or costs of the processes outlined in this chapter. For example, investment authorities may require that higher-risk investments conduct more rigorous impact assessments or report more frequently on activities. The processes and agreements described in this chapter are for agricultural investments that present higher risks for local stakeholders.

The stages of investment approval are: i) screening prospective investors through due diligence practices; ii) ensuring consultation and participation of all potentially affected stakeholders; iii) conducting ex-ante impact assessments; and iv) preparing contracts and agreements for approval by the relevant authorities and parties to the agreements.

4.1 Registration of intent to invest and due diligence

States should, with appropriate consultation and participation, provide transparent rules on the scale, scope and nature of allowable transactions in tenure rights and should define what constitutes large-scale land transactions in tenure rights in their national context.

The Guidelines, paragraph 12.5 (FAO, 2012c).

Registration of intent with the relevant government authority

It is important to register foreign and domestic investors in agriculture to ensure that tenure rights are safeguarded and to create a full picture of potential investors in all sectors, regions and timeframes. Investors should be required to register with the relevant government authority when their proposed investments are considered to pose a threat to legitimate tenure rights. The relevant authority may vary according to the type and scale of investment.

As noted in Chapter 3, even investments that do not threaten tenure rights may need to be reviewed and approved if, for example, they result in an investor crossing the threshold or ceiling for landownership or if the proposed change in land use triggers an environmental and social impact assessment.

The focus of this guide is on investments that may have negative effects on tenure rights. In many cases, potential investors visit areas of interest to determine where to invest and to meet local officials, customary authorities or even community members before they register their investment proposal with the relevant national authority. This practice can result in investors receiving incomplete or inaccurate information about laws, regulations and national priorities, while raising local expectations in terms of jobs, new infrastructure and other perceived benefits. Creating a centralized window and/or clearly defining the relevant national authorities reduces the possibility of miscommunication, corruption and disappointed expectations, while facilitating the transparent and fair communication of procedures and priorities by the government.

Screening of investors

Countries usually have rules governing the registration of a foreign or domestic investor as a company, which can provide the first window for screening investors.

A country's overall openness to investment is a function of its laws and regulations, including treaty commitments and investment promotion strategies and policies. As described in Chapter 2, States may be parties to international investment agreements or treaties that require them to maintain an open door for foreign investment. At the same time, international agreements and domestic laws may permit governments to restrict foreign investment in various ways, such as in specific sectors or matters such as agriculture or land; to impose performance requirements; and/or to apply screening criteria for government approval (Muchlinkski, 2007).

Outside international investment agreements, national statutory and constitutional law may restrict foreign landownership, partly because land issues are politically sensitive. For example, only Congolese majority-owned firms can hold land in the Democratic Republic of the Congo, and Argentina has set a quota on the percentage of agricultural land that can be foreign owned. However, restricting foreign ownership alone will not prevent conflicts over land tenure because: i) it pertains only to foreigners, neglecting the potentially negative effects of domestic land acquisitions; and ii) when registration and cadastral systems are not in place, it cannot address land tenure concerns because the ownership and size of land parcels cannot be tracked. In addition, to circumvent this type of restriction, foreign companies create domestic subsidiaries or use domestic agents to purchase land.

These issues are very important in helping to ensure responsible agricultural investment. According to the 2012 *World investment report* (UNCTAD, 2012) and a report published by the World Bank (Mirza *et al.*, 2014), most conflicts and most of the restrictions that governments have placed on investment over recent years have been related to land, environmental concerns and rural development objectives.

Rather than seeking to prevent certain types of investment, some countries have followed a "carrot" approach by offering greater incentives to investors who meet sustainability and performance criteria. Sustainability criteria, such as respecting biodiversity corridors and upholding indigenous peoples' rights, can also be used in screening investments for investment approval. Many countries have established such criteria for investments in agriculture, and some have even established a rating system to assess how different investments perform. Other countries have joined private certification systems or promote adherence to such systems in their investment promotion and approval activities. Each country needs to find the right balance for safeguarding tenure rights while promoting agricultural investment.

Minimum criteria for investors should be based on national law; where national law is weak the criteria should also include the protection of environmental, social and human rights. Criteria can address all aspects of agricultural production, prioritize specific crops, sectors or regions, or be directly related to development objectives such as local employment or women's empowerment. As demand from investors grows, more stringent criteria to promote enhanced innovation and development impact can be introduced. The criteria can also be incorporated into investment

agreements and contracts as the basis for investment approval (discussed later in this section). Criteria should be defined through consultation with relevant stakeholders.

For investments related to agricultural land, it is particularly important to consider issues such as the existence of local representatives of the company – to ensure proper management of investments – and disclosure of the purpose of the investments, to facilitate review and approval. At a minimum, the information listed in Box 10 should be requested as a starting point for dialogue and due diligence, and the registration of the investor's intent or interest should be made publicly available.

BOX 10:
Investor information for the approval process

- Certified copies of memoranda and articles of association.
- Location of the registered office in the country of domicile.
- List of directors of the company.
- Local representatives (if company is foreign owned).
- Type of agricultural production – crop, livestock, processing, etc. – proposed for investment.
- Previous experience of this type of investment.
- Overview of business plan – production model and alternatives, number of hectares, export versus domestic sales, timeline, etc.
- Ongoing/past agricultural activities.
- Involvement in any tenure rights disputes/violations and/or other environmental or social disputes/violations.
- Copy of most recent financial statements or, if company is new, copy of bank statement showing capital for investment.

Screening of investment proposals

Due diligence processes are conducted by many of the actors engaged in an investment process. The main motivation for due diligence is to learn as much as possible about a potential partner before entering into an agreement. Each actor will also have various additional objectives, which it is important to understand. For example, private investors conduct due diligence to analyse risks and weigh the costs and benefits of an investment to determine its viability; financial institutions focus on the likelihood of investors meeting the financing criteria and, increasingly, also on environmental and social criteria. Further guidance for private investors can be found in *Responsible land-based investment: a practical guide for the private sector* (USAID, 2014). A guide for investment professionals working in development finance can be found in the *Guide to due diligence of agribusiness projects that affect land and property rights* (AFD, 2014). This section provides guidance specifically for government authorities engaged in investment promotion and approval processes.

A starting point for government authorities conducting due diligence is the potential investor's registration with the relevant government authority of the intent to invest. At this stage, government authorities can start investigating the information provided by the potential investor to determine its veracity and whether the investor is likely to deliver on projections regarding the planned investment. In conducting

initial due diligence, the main information to ascertain varies depending on the type of investment being made, but information should generally be collected on the:

- reputation of the investor;
- transparency of the investor's operations and processes;
- readiness of the investor to make the investment – financial capacity, etc.;
- sophistication and experience of the investor – in agricultural investment, community engagement, etc.;
- the investment's alignment with and contribution to development priorities, including in meeting screening criteria.

This information on the investor should be readily available. However, one of the challenges in the initial stage of due diligence is that most information about the planned investment is based on projections and estimates. The investor alone may not be able to provide all of the necessary information, especially where there is high risk to tenure rights, when decisions regarding the location of the investment, risk mitigation measures, etc. should be made in consultation with local stakeholders. Due diligence related to tenure aspects at this initial stage should focus on identifying: i) any tenure right violations made by the investor in other contexts; and ii) the potential for the proposed investment to affect existing tenure systems, natural resources, and food security and nutrition. More detailed due diligence on all tenure-related aspects should be carried out during assessment of tenure, environmental, social and health impacts, when the type of investment calls for such assessment.

4.2 Consultation and participation

Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

The Guidelines, paragraph 3B6 (FAO, 2012c).

Consultation with and participation of the holders of legitimate tenure rights are core requirements for any responsible agricultural investment. The Guidelines stipulate active, free, effective, meaningful and informed participation and consultation. When indigenous peoples are involved, the Guidelines state that investments should be based on an effective and meaningful consultation with the indigenous peoples' own representative institutions to obtain their free, prior and informed consent (FPIC) under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for the particular positions and understanding of individual States. Some States apply the principle of FPIC as a good practice in dealings with all types of landowners and land users whose livelihoods, tenure rights and human rights could be affected

by the investment (FAO, 2014a). Many private companies have also declared that they will institute a policy of obtaining FPIC in all sourcing of products and in their own land transactions. Many private certification schemes require adherence to FPIC for all investors seeking certification.

One reason for obtaining FPIC in all cases is to foster stronger long-lasting positive relationships with local communities. Evidence suggests that obtaining the consent of communities regarding investment activities throughout the investment cycle is of paramount importance in determining both the long-term success of the investment and its potential for contributing to development objectives (Smaller *et al.,* 2014; Munden Project, 2012; Mirza *et al.,* 2014).

BOX 11:
Free, prior and informed consent
Source: FAO, 2014a.

Indigenous peoples – and increasingly local communities, more generally – must have the right to give or withhold their free, prior and informed consent (FPIC) to proposed developments that will affect them. This right is most clearly stated in the United Nations Declaration on the Rights of Indigenous Peoples, and several other international human rights instruments are frequently interpreted as requiring its recognition and protection. Both the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all Forms of Racial Discrimination protect peoples' right to self-determination. While these universally binding instruments do not explicitly mention the principle of FPIC, the United Nations' Human Rights Committee and Committee on Economic, Social and Cultural Rights have frequently interpreted the covenants as recognizing the right to give or withhold their FPIC as an expression of self-determination. The Committee on the Elimination of all Forms of Racial Discrimination has also emphasized the important of indigenous peoples' rights to lands and has repeatedly called on States to recognize and protect indigenous peoples' right to land and their FPIC right. The International Labour Organization's (ILO's) Convention No. 169 prohibits the removal and/or relocation of indigenous and tribal populations from their territories without their FPIC. The standard of "approval and involvement" in the Convention on Biological Diversity (CBD) has also been equated with the right to FPIC, and is affirmed in the CBD's *Akwé: Kon guidelines* (Secretariat of the CBD, 2004).

However, international law is much less clear about the land and resource rights of other people or groups who may not recognize themselves as "tribal" or "indigenous" but who gain access to lands and resources through customary law, traditional inheritance or other informal processes. When understood as an expression of the right of all peoples to self-determination, the principle of FPIC can best be interpreted as supporting the rights of all peoples who have a customary relationship with their land and natural resources. Jurisprudential interpretation by human rights bodies and the increasing inclusion of FPIC as a right of indigenous peoples and other local communities in the operational policies of international financial institutions and other non-State entities support this expanded reach of the right to FPIC. It can therefore be argued that all communities should have a meaningful role in making decisions about development projects that, directly, affect them, including the ability to decide not to proceed if they are not in favour of an investment.

Involving people in decision-making

Even in cases where FPIC is not applied there should be deliberative public engagement. "Deliberative public engagement is a distinctive approach to involving people in decision-making. It is different from other forms of engagement in that it is about giving participants time to consider and discuss an issue in depth before they come to a considered view" (National Consumer Council and Involve, 2008). In deliberative public engagement, a range of people who may be affected by an investment meet to gain information about the investment, discuss the potential repercussions in depth and work out solutions together. Effective deliberative public engagement is based on nine concepts. The process must:

- make a difference;
- be transparent;
- reflect integrity;

- be tailored to circumstances;
- involve the right number and types of people, including legitimate representatives of stakeholders;
- be socially and gender equitable;
- treat participants with respect;
- give priority to participants' discussions;
- be reviewed and evaluated to improve practice;
- ensure that participants are kept informed.

Engagement can only be effective if it takes place at the right point in the decision-making process: before and during the contract negotiations and throughout the life of the investment project. This may require changing organizational processes to incorporate results from public deliberations into decision-making. The common practice of holding a public hearing only at the end of a planning and negotiation process is inefficient as it can easily result in calls for a complete re-planning to take stakeholders' thoughts into account.

Involvement in decision-making can also be referred to as "stakeholder engagement", which is a set of processes for developing and sustaining relationships between project proponents and local stakeholders (Deng, 2012). Companies often have stakeholder engagement strategies to manage relationships with the individuals and groups who are affected by, or who may themselves influence, business activity. Government authorities should encourage local stakeholder participation in the design and implementation of investments, so that local stakeholders can (Deng, 2012):

- harness the productive capacity of their land without undermining livelihoods in the process;
- channel investment benefits towards local development priorities;
- promote the equitable distribution of investment benefits between investors and themselves, including within local communities.

It is important that stakeholder engagement and consultation do not become "box-checking" exercises for the investor or a one-directional flow of information with the investor merely informing stakeholders about its activities. A participatory consultation process is essential for understanding and discussing the land rights and land-use strategies of local stakeholders, and avoiding misunderstandings, such as where common resources are considered "unused" and are not safeguarded. There is substantial guidance on conducting consultation processes and engaging with stakeholders. Case studies indicate that consultation is more effective when it is undertaken directly by the investor – with support and guidance from the government – rather than by the government on behalf of the investor (Mirza *et al.,* 2014). Establishing direct communication between investors and local stakeholders provides the foundation for dialogue throughout the life of the investment, and helps to reduce misinterpretation or conflicting messages. Government authorities can foster this communication by guiding investors on the best ways of approaching stakeholders and/or facilitating direct contacts with stakeholders.

The Consultation Charter (Consultation Institute, 2005) provides seven principles of

best practice. Government authorities can use these principles to guide investors and determine whether they have conducted adequate consultation processes:

1. **Integrity** – the consultation has an honest intent.
2. **Visibility** – those most directly affected by plans and decisions are reasonably aware of the community involvement processes taking place.
3. **Accessibility** – it is relatively easy for potential participants to take part in consultations, including vulnerable or marginalized groups such as women and youth.
4. **Confidentiality and transparency** – commercial undertakings and private individuals can agree with public authorities that aspects of their discussions are confidential, as long as they satisfy a public interest test.
5. **Full disclosure** – both consultor and consultees must keep decisions open and must not conceal or withhold information that might be relevant to the dialogue.
6. **Fair interpretation** – this places a strict burden on consultors to analyse and interpret consultation output data objectively.
7. **Publication** – the processes and eventual outcome of the consultation are made easily accessible to all stakeholders, so that those taking part in community involvement activities can see what happened as a result of their participation. This is the practical application of the requirement for transparency.

Involving people in investment approval

Lack of adequate and timely consultation is the principal cause of disputes and misunderstanding between investors and local stakeholders. Numerous studies describe disputes arising when the State and an investor determine the location of an investment and enter into a lease agreement prior to discussing with local stakeholders (Liu, 2014; Oakland Institute, 2011; IFAD, 2009). When affected stakeholders are involved in decision-making and design of the investment together with the investor, the investor achieves a far stronger endorsement for planned operations. Incorporating consultation as a requirement for investment approval under national law helps to align investment promotion and approval with sustainable development objectives and reduce the risk to tenure rights.

The importance of involving local stakeholders calls for a means of ascertaining that the authorities engaged in investment promotion, approval and monitoring activities carry out adequate consultation and participation processes. Government authorities have a dual role in protecting the interests of local stakeholders by ensuring that investors respect local norms while they also guide the investors through what can be a complicated process. As part of this dual role, government authorities should clearly define how to conduct consultations and what type of information investors should submit regarding their consultations. Information that helps government authorities review investors' engagement with local stakeholders includes the consultation plan.

An effective consultation plan is key to ensuring the participation of all types of stakeholder, especially the most vulnerable or marginalized people. Plans should be prepared with inputs from local experts – government and non-government – on cultural norms, including whether these norms are discriminatory or exclusionary. Consultations should be facilitated jointly by the private investor and the relevant government authorities to ensure that: i) the government authorities are directly informed of stakeholders' views on the investment; and ii) the investor is guided through cultural and legal norms governing consultation. The consultation plan should propose a schedule for continuous stakeholder engagement and consultation – with meetings every three months, for example – which should then be discussed and agreed with communities.

Each consultation should be widely advertised through locally preferred media and should be conducted in the local language, and the national language, where appropriate. Each country should determine the minimum level of participation for considering that a consultation process is broadly representative of stakeholders. Criteria could include the proportion of the community's total population, gender balance and participation of marginalized groups, such as young, elderly and disabled people. All relevant information about the investment should be shared at each consultation. Depending on the stage and type of investment, the information provided prior to investment approval should include:

- the nature, size and duration of the investment;
- the objective of the investment;
- the locations/areas that will be affected by the investment, including indirectly;
- a preliminary assessment of the possible impacts, including risks and benefits;
- procedures and timeframe for developing the investment;
- government and investment personnel serving as focal points with communities.

Records of all consultations, including demographic information on participants, the major questions and concerns raised and any agreements reached, should be maintained by the relevant government authorities and made publicly available to investors and the wider public. Records that demonstrate how effective the consultations have been can include information on when and where consultations were publicized; the number and dates of consultations; proceedings of consultations; the languages and translators used; and a plan for continuing engagement, signed and agreed by participants.

BOX 12:
Access to legal representation and technical expertise

One of the greatest imbalances between local stakeholders and investors can be negotiating power and access to adequate legal representation. Stakeholders often lack not only legal but also technical expertise on crop values, property values, etc. In some cases, investors pay for the legal representation of the local stakeholders with whom they are negotiating. While usually well-intentioned, such arrangements raise concerns about conflict of interest and the legal representative's true client. In other cases, legal and technical assistance for local stakeholders is provided by civil society organizations, which may have fewer resources than private representatives.

Provision of legal aid in the criminal justice system is primarily the responsibility of the State, but many governments lack the resources or capacity to provide legal and technical assistance, and there may not even be enough lawyers to cover local demand (Smaller *et al.*, 2014; UNODC, 2011). The ratio of lawyers to population is extremely low in many developing countries, and non-lawyers – law students, paralegals and legal assistants – are used to provide legal services, particularly to rural populations. Legal aid can be funded from a mixture of sources, including NGOs, government, donors and private-sector investors, but should always be managed by a neutral institution. For example, Sierra Leone is exploring the possibility of establishing a stakeholder representation fund as part of the government's efforts to establish a functioning legal aid system. The fund would be partially financed through fees collected from private investors when they register for an impact assessment. Sierra Leone's Human Rights Commission and Legal Aid Board would provide oversight to ensure that the fund was allocated for community justice services, including legal advice, assistance and representation and community education in the negotiation process (Government of Sierra Leone, 2013; UNODC, 2011).

4.3 Impact assessments

When investments involving large-scale transactions of tenure rights, including acquisitions and partnership agreements, are being considered, States should strive to make provisions for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment. States should ensure that existing legitimate tenure rights and claims, including those of customary and informal tenure, are systematically and impartially identified, as well as the rights and livelihoods of other people also affected by the investment, such as small-scale producers. This process should be conducted through consultation with all affected parties consistent with the principles of consultation and participation of these Guidelines. States should ensure that existing legitimate tenure rights are not compromised by such investments.

The Guidelines, paragraph 12.10 (FAO, 2012c).

According to the Guidelines, investors should avoid negative impacts on human rights, legitimate tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment. Government authorities need to ensure that impact assessments are carried out prior to approving investment activities. Impact assessments provide a tool for assessing project proposals, and can also be used to negotiate changes in proposals, including the development of mitigation strategies, or even the cancellation of projects.

Many countries have legislation requiring environmental impact assessments, but there is less guidance on assessing social and other impacts (Smaller *et al.,* 2014; Wood, 2003). Legislation should establish what types of investment require impact assessments and the characteristics of the assessment to be carried out – the scope of the analysis, the independence of the review, etc. Where legislation does not exist, government authorities can design assessment criteria and processes based on international guidance, such as IFC's Environmental, Health and Safety Guidelines (IFC, no date) and the *Akwé: Kon Guidelines* (Secretariat of the CBD, 2004). As a rule, indigenous people and local stakeholders likely to be affected by a proposed investment should participate in the assessment.

Impact assessments should not be undertaken as a box-checking exercise, and the findings should be incorporated into the design of the investment. To ensure that the impact assessment fulfils its purpose of identifying potential negative and positive impacts of an investment to decide whether to proceed, it must be conducted before any final decisions are made and before any agreement is signed. The assessment's recommendations on how to prevent and mitigate risks and improve the overall impacts of the investment should be incorporated into investment agreements (see the subsection on Impact and benefit agreements in section 4.4).

Feasibility studies primarily assess the commercial viability and technical feasibility of carrying out an investment. Impact assessments complement feasibility studies by identifying the main social and environmental factors that could affect the overall viability of an investment. Conducting feasibility studies and participatory impact assessments is a highly specialized skill that requires competent professionals. Impact

assessments should always be carried out with third-party expertise to ensure that they are technically satisfactory and provide an independent opinion of risks and potential mitigation measures.

BOX 13:
Main causes of failed investments

- Flawed project design – ill-conceived financial plans, mistaken cost–revenue assumptions, wrong location, etc. In many cases, these flaws could have been identified before the investment started.
- Inadequate pre-investment consultations with government and local stakeholders, including when local stakeholder groups and communities lack the capacity to engage in consultation processes.
- Lack of meaningful environmental and social impact assessments prior to the investment.
- Failure to involve local stakeholders from the early stages of project design and planning, and failure to reach agreement on the distribution of risks and benefits.
- Poor management.
- Factors beyond the control of management, including civil unrest, market closure and unexpected changes in policies.

Government authorities engaged in investment promotion, approval and monitoring should have the technical and financial resources to review assessments and monitor impacts and mitigation measures. Policies and regulations for impact assessment should stipulate the penalties for non-compliance with requirements, such as withdrawal or suspension of permits. Adequate feasibility and impact assessments help define the potential success of an investment; research indicates that inadequate assessment of and response to potential risks is one of the primary causes of failure of agricultural investments. In recent reviews of agricultural investments, approximately 50 percent have been unprofitable and behind schedule, or have failed because of poor design (Mirza *et al.,* 2014; Tyler and Dixie, 2013).

Government authorities should use the information from viability and impact assessments to guide investors on improving investment design and to reduce the risk of approving poorly designed investments. The rest of this section provides a brief overview of the main areas that impact assessments should cover. Further guidance on feasibility planning and impact assessments can be found in the *The ISSD guide to negotiating investment contracts for farmland and water* (Smaller *et al.,* 2014).

BOX 14:
Essential components of an impact assessment

Source: Secretariat of the CBD, 2004.

- Notification of and public consultation on the proposed development by the investor.
- Identification of indigenous people and other local stakeholders likely to be affected by the proposed investment.
- Mechanisms for ensuring participation by indigenous and local stakeholders.
- An agreed process for recording the views and concerns of indigenous people and other local stakeholders whose interests are likely to be affected by the proposed investment.
- Identification of the human, financial, technical and legal resources needed to ensure effective participation of indigenous people and other local stakeholders throughout the impact assessment process.
- A management or monitoring plan, with contingency plans for mitigating possible adverse cultural, environmental and social impacts resulting from the proposed investment.
- Identification of actors with liability for redress, insurance and compensation.
- Agreements and action plans agreed between the potential investor and the affected indigenous people or other local stakeholders.
- A review and appeal process.

Impacts on tenure

The impact assessment should identify all legitimate tenure rights and their holders in the area covered by the planned investment, and should analyse the potential positive and negative impacts that the investment may have on these rights and right holders. The objective is to avoid any significant negative impacts by identifying tenure solutions and arrangements for the investor that do not harm existing right holders.

Participatory impact assessment draws on local knowledge of the environment, use patterns and potential conflicts, further reducing the risk of conflict. The information needed to assess impacts on tenure rights includes (USAID, 2015):

- documentation regarding tenure rights – land titles, tax records, maps, photos, etc.;
- boundaries of villages and communities in the area, and numbers of people who are landowners and land users;
- numbers of people using resources in the area, including temporary or seasonal users who may not reside nearby;
- tenure rights of each group of people;
- administrator(s) of land and resources in the area;
- the resources available and in use in the area;
- the cultural sites located in the area;
- the current activity on each parcel of land;
- conflicts or disputes – past and present;
- deliberative public engagement processes to identify the best tenure option;
- indicators for impact monitoring during and after project implementation (see Chapter 5).

Impacts on human rights

Assessments of the potential impacts on human rights can be an important tool for States, local authorities and stakeholders in negotiating an investment agreement and ensuring that any demands or concessions under the agreement comply with human rights obligations.

The Guidelines (paragraph 3.2) stipulate that investors and businesses have a duty to respect and avoid infringing human rights and to identify, assess and remedy any negative impacts that they have on such rights. This means that the government authorities engaged in investment promotion, approval and monitoring have a duty to ensure that investors respect human rights by requiring human rights due diligence (OHCHR, 2014; UN, 2011a). The issues to be taken into account when assessing potential human rights impacts include (IFC, 2010):

- the specific human rights context in which the investment is operating, in both the national and international legal frameworks;
- the proposed business activities and their relationships to risks to, and impacts on, human rights issues;

- explicit consideration of the rights of disadvantaged and/or vulnerable stakeholders;
- complicity with or acts of third parties that may be attributed to the investing company.

These issues are sometimes covered by the country's requirements for general environmental and social impact assessment. In all cases, however, it is important that human rights are assessed systematically and comprehensively. Rights that should be considered in assessing potential impacts are:

- civil and political rights, including the rights to life, to freedom from torture, to freedom from slavery, to privacy, to freedom from arbitrary detention, to a fair trial, to freedom of religion, to freedom of expression and assembly, and to freedom from discrimination (International Covenant on Civil and Political Rights – OHCHR, 1966a);
- economic, social and cultural rights, including employment rights and the rights to a fair wage, to safe and healthy working conditions, to form and join trade unions, to education, to an adequate standard of health, to an adequate standard of living including adequate food and housing, to participate in cultural life, and to freedom from discrimination (International Covenant on Economic, Social and Cultural Rights – OHCHR, 1966b).

BOX 15:
Steps in assessing potential impacts on human rights

1 **Screening**

The assessment should start with a preliminary analysis of which human rights are most likely to be affected and with respect to which population groups. This analysis includes reviewing the potential investor's policies, procedures and commitments, and the industry sector and the particular risks and challenges to human rights that it poses.

2 **Scoping**

The next step is to determine the questions to be addressed by the assessment and the methodology to be applied, including indicators and their use.

3 **Evidence gathering**

To determine the potential impacts as precisely as possible, this step should involve both quantitative – including economic modelling and regression analysis – and qualitative research, including consultations with right holders or their representatives, using participatory research methodologies where feasible.

4 **Analysis**

The potential impacts of the investment on human rights should be assessed, and ways of mitigating or avoiding impacts by altering the project design should be identified.

5 **Monitoring mechanisms**

Mechanisms should be established for monitoring impacts on human rights throughout the investment lifecycle, based on findings of the initial assessment of human rights impacts.

Social and livelihood impacts

It is important to ascertain the investment's potential impacts on social and cultural factors to assess its overall impact on livelihoods. The sustainable livelihoods guidance sheets developed by the United Kingdom's DFID (2001) provide a useful analytical framework for analysing five types of asset – human, social, natural, physical and financial capital – that are needed to support livelihoods. The approach is based on developing specific indicators for each area to be assessed (e.g. investment) and monitoring these indicators before, during and after project implementation.

A social impact assessment is "a process of evaluating the likely impacts, both beneficial and adverse, of a proposed development that may affect the rights, which have an economic, social, cultural, civic and political dimension, as well as the well-being, vitality and viability, of an affected community – that is, the quality of life of a community as measured in terms of various socio-economic indicators, such as income distribution, physical and social integrity and protection of individuals and communities, employment levels and standards of housing and accommodation, infrastructure, services" (Secretariat of the CBD, 2004). In several countries, social impact assessments are incorporated into formal planning and approval processes to categorize and assess how proposed developments may affect populations, groups and settlements. Social impacts are often assessed alongside environmental impacts, but do not yet receive as much attention as environmental impacts in formal planning systems.

Cultural impacts refer to how a proposed development affects the way of life of a particular group or community of people. They include the beneficial and adverse impacts on the values, belief systems, customary laws, language(s), customs, economy, relationships with the local environment and particular species, social organization and traditions of the affected community (Secretariat of the CBD, 2004).

Regardless of whether the assessment focuses on social, livelihood or cultural impacts, it is essential to assess the specific impacts on women and youth, as they are often the most vulnerable and marginalized population groups and will be affected differently from men and older adults.

Environmental impacts

IFC describes environmental impact assessments as a tool for decision-makers to identify potential environmental impacts of proposed projects, evaluate alternative approaches, and design and incorporate appropriate prevention, mitigation, management and monitoring measures. Assessments of potential environmental impacts are required by many international agreements and initiatives such as the CBD, the United Nations Convention to Combat Desertification, the Global Reporting Initiative, the Equator Principles, and the OECD Development Assistance Committee, and are being adopted into domestic legislation in more than 100 countries. The Global Reporting Initiative's Sustainability Reporting Guidelines contain the criteria for companies' reporting on economic, environmental and social performance, including consideration of human rights, local community impacts and gender (Secretariat of the CBD, 2004).

4.4 Approval authority and process

States should provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights. Such safeguards could include… regulating how transfers exceeding a certain scale should be approved, such as by parliamentary approval.

The Guidelines, paragraph 12.6 (FAO, 2012c).

Laws should require agreements for investments to clearly define the rights and duties of all parties to the agreement. Agreements for investments should comply with national legal frameworks and investment codes.

The Guidelines, paragraph 12.8 (FAO, 2012c).

Contracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations, and should seek that the agreements are documented and understood by all who are affected. The negotiation process should be non-discriminatory and gender sensitive.

The Guidelines, paragraph 12.11 (FAO, 2012c).

Investment approval processes and procedures vary widely by country and type of investment. Following registration, there may be dozens of approval steps for obtaining the necessary permits and licences. It is important that investors have clear information on these requirements and that all the investors in a specific country follow the same procedures. This guide discusses only the approval stages that are pertinent to land tenure and natural resource use; other processes such as immigration requirements, labour permits, trademarks and patents are not addressed. Much of the role of government authorities engaged in investment promotion, approval and monitoring is to shepherd investors through the approval process, remaining in contact with investors to address issues along the way and monitoring the processes to adjust them when they are inefficient or ineffective.

Historically, investment agreements or contracts between an investor and a State primarily established the rights of the investor without creating any obligations to the State or local stakeholders. Investment agreements have also often included stabilization clauses, which exempt the investor from any new or amended law enacted after the date of the investment agreement and may even allow the investor to request compensation if a new law has a negative effect on the investment. These clauses have most often been applied in developing countries where investors perceive high political risk. Restricting a government's ability to enact or amend legislation significantly limits its ability to address any problems that arise from investments. To protect governments' freedom to make policy decisions, safeguard tenure rights and ensure that investments contribute to sustainable development objectives, stabilization clauses requested by investors should be avoided (Shemberg, 2008).

There is growing interest in and guidance on aligning investment agreements with environmental and social objectives (Cotula, 2014; Smaller *et al.*, 2014; UNCTAD, 2012; Mann, 2008). As discussed in section 4.1, this alignment can begin at the registration phase by establishing screening criteria based on development objectives and the safeguarding of tenure rights. Development objectives should then be mainstreamed into all investment agreements with all parties at all stages of the investment approval process.

TABLE 5: **Example of an investment approval process**

	PHASE	OUTPUT	APPROVAL AUTHORITY
Consultation with stakeholders	Registration of investment intent	Registration number; registration certificate	Investment promotion authority; permit or titling authority
	Partnerships with local suppliers (e.g. smallholders)	Contracts or joint venture agreements	Parties to the agreements
	Impact assessments covering tenure, environmental, social and health impacts	Permit or licence	Environmental, social or health ministry/agency; local human rights authority
	Negotiation of land lease/ sale, including valuation and payments	Land lease/sale agreement	Ministry of Land; registrar of land titles; Ministry of Indigenous Affairs
	Negotiation of impacts and benefits, including valuation and payments	Impact and benefit agreement	Affected communities
	Government final review	Memorandum of understanding and agreement; investment agreement	Parliament; president; Ministry of Trade

Partnerships with local suppliers

As discussed throughout this guide, one way of reducing the transfer of tenure rights is through partnerships between investors and the existing holders of tenure rights to provide the inputs and services needed for production. These relationships can take many forms as discussed in section 2.2. However, all agreements or contracts must include: i) provisions to ensure fairness and transparency; ii) provisions for the sharing of revenues or net profits, stipulating how revenues or profits will be determined and how the shares of each party will be calculated and paid; and iii) clauses describing how the prices paid to farmers will be set, with price determination mechanisms that are equitable and easily understood. If management of the venture is to be shared, the contract must also clearly state: i) the powers of each party and how decisions are to be taken; ii) the authority of each party to inspect the books and records of the venture; and iii) any requirements on the investor to transfer expertise, engage in training or provide water or other resources to a partner or local smallholders. The government authorities engaged in investment promotion, approval and monitoring should ensure that legal services and advice are available to parties with less experience or expertise in contract negotiation. Agreements should be available in the language(s) of both contracting parties, and the partnership should be registered, with detailed investment information.

Impact assessments

As outlined in the previous section, most countries require agricultural investors to assess at least the environmental impacts of their proposed investments prior to issuing a licence. Increasingly, they also require assessment of impacts on tenure, social aspects, gender, health and food security. Depending on the country, the review of impact assessments, issuing of permits, monitoring of compliance and sanctioning of non-compliance are the responsibilities of one or more ministerial departments or external agencies. A single, comprehensive assessment may be sufficient, or different reviewing agencies may require several assessments of different types of impact. Many governments charge administration fees for reviewing impact assessments, which are often calculated based on the risk level of the potential investment. Where there is no supporting legislation, the government authorities reviewing impact assessments should, as a minimum, ensure that the investor incorporates findings from the impact assessment into the project design and/or identifies risk mitigating measures. The resulting management plan should cover the full duration of the investment, be made public and inform the impacts and benefits agreement signed with affected individuals.

Negotiation of land lease or sale

As discussed in previous sections, land leases or sales should involve wide consultation and be negotiated directly with landowners and users, not just with customary or national authorities. Government authorities also sometimes require phased leasing of land, depending on the size of the investment. For example, governments may request that investors seeking to lease more than 5 000 hectares of public land first demonstrate the viability of their investment model on 2 500 hectares, before granting leases for the remaining 50 percent. This type of arrangement is also often useful for the investor, who may have limited working capital at the outset of an agricultural operation and would not want to tie up working capital in land that will not be put to immediate use (Mirza *et al.,* 2014).

In all cases, both parties in consultations and negotiations should have legal representation and have access to impact assessments and information identifying all land users, land tenure regimes and land-use patterns. Payments for the land lease or sale should be negotiated and adapted to local circumstances to provide maximum benefit while maintaining or improving local livelihoods. The essential provisions to include in land lease agreements can be found in section 6.2 and in the International Institute for Sustainable Development's (IISD's) guide to negotiating investment contracts (Smaller *et al.,* 2014).

Payment for transfer of tenure rights

Payments for transferred tenure rights can take many forms and should be negotiated directly with the tenure right holders who will be affected by the transfer. Payment can be financial or non-monetary, providing goods, services or conditions that local tenure right holders determine to be of value. For example, an investor leasing land previously used for growing food could provide the affected farmers with access to alternative land for growing food nearby, along with technical support and low-cost inputs. Payment mechanisms should also take into account the cultural norms and capacity of those receiving the payments. In many rural communities, people have little experience of the long-term management of cash, and cash and/or banking accounts are sometimes not widely used. Payment for jointly owned or used land or resources can be very complicated and it is important to ensure that land users with legitimate tenure rights are included in negotiations and payment disbursements. Fair and transparent disbursement can be facilitated by establishing a neutral, trusted legal entity to handle all disbursements. Guidance on ensuring that women benefit from payments can be found in the technical guide on *Governing land for women and men* (FAO, 2013a).

Impact and benefit agreements

Impact and benefit agreements are a recent approach to ensuring corporate social responsibility (Morgera, 2015). They are more widely used for investments occurring on indigenous or traditional land, but can be applied to all types of investment that have impacts on tenure right holders. An impact and benefit agreement combines findings from the impact assessment regarding potential impacts and mitigation measures with benefits negotiated between local stakeholders and the investor. Benefits can include the provision of jobs, schools, health care, infrastructure or training. By combining both in one agreement, signed by investors and local stakeholders, the benefits can be selected to counter the impacts. As with land leases and sales, impact and benefit agreements should be negotiated with all potentially affected tenure right holders or their representatives.

Impact and benefit agreements that stipulate what an investor agrees to contribute to local stakeholders and how the investor will handle risks or negative impacts bring benefits to investors, local stakeholders and the government authorities in charge of monitoring impacts and designing policies. A common cause of disputes between an investor and a community is miscommunication or differing expectations of what the investor is committed to doing and when. When investors negotiate directly with local stakeholders about the impacts and benefits of their investments, they are less likely to face claims arising from the unrealistic expectations of local stakeholders. Discussing these issues before making an investment agreement also helps educate local stakeholders about which of their demands are feasible given that investments have to be economically viable. Impact and benefit agreements can also support monitoring and ongoing discussions on how to mitigate negative impacts and generate positive ones in line with stakeholders' objectives and the local context.

The agreements can include compensation agreements and mechanisms for any negative impacts. Compensation can be awarded to offset a difficulty, loss or injury

and should take into account both the present and future losses or impacts to affected individuals or communities. More information on what to include in impact and benefit agreements can be found in chapter 5, and more on grievance mechanisms is available in Section 5.4.

Government final approval

In many countries, rather than having a single comprehensive government approval or agreement document, investors have to collect a series of documents, licences, permits and agreements to operate legally in the country (UNCTAD, 2012). Each country should determine the final approval process that best suits its regulatory system and development priorities. Some countries have various approval processes depending on the size or type of the investment. At a minimum, all the agreements outlined in the previous subsections should be registered with the relevant government authority, to ensure transparency and monitoring. Some countries may also have explicit requirements that help to integrate their investment promotion, approval and monitoring efforts with sustainable development objectives.

BOX 16:
A participatory investment approval process for Ghana

In its Guidelines for considering large-scale land transactions for agricultural and other purposes (Lands Commission, 2012), Ghana's Lands Commission recommends the following approval process.

Stage 1 – Local hearing: To protect the interests of local communities and avoid elite capture while also safeguarding the interests of genuine investors, the investor should be required to finance a local hearing to inform the public on how much land is involved in the proposed investment, where the land is and the possible impacts on the local community. Participants in the hearing – including the district chief executive, traditional leaders and all current inhabitants and users of the land to be acquired, and representatives from mandated institutions such as the district planning office, the agricultural office, the environmental protection agency, the Lands Commission and the town and country planning officer – would provide their perspective on the proposal, with discussions and conclusions of the hearing being recorded (in writing and possibly also on video) and made available to all relevant parties.

Stage 2 – Certification/registration: The local Regional Lands commissioner should verify that there is majority agreement on accepting the proposal and granting the land (step 1), and should inspect the land to confirm the reports made at the local hearing. The commissioner should then recommend that the Regional Lands Commission (for land areas of less than 1 000 acres/406 hectares) or the National Lands Commission (for areas exceeding 1 000 acres/406 hectares) provides a certificate for stool/skin lands or a registration for family land, or renegotiates the terms of the proposal. The investor should also be required to carry out an environmental impact assessment to obtain a permit from the Environmental Protection Agency.

The Administration of Lands Act, which will be reviewed in a new Land Act, includes specific regulations on the duration of leaseholds and the maximum areas for agricultural production.

The Lands Commission has yet to discuss this proposed process with investors, local authorities and other stakeholders, even though it has started implementing it.

Tax incentives and performance requirements

Tax reductions for investors that meet certain criteria are widely used to promote investment and direct it towards sustainable development objectives. For example, tax incentives may be granted for investments in a particular sector or area of the country. However, incentives are also widely criticized as they reduce the revenue that the State could use to pay for public goods and services (Jenkins and Newell, 2013; James, 2009). Tax incentives should only be granted within the national legal framework and should not favour foreign over domestic investment (OECD, 2008). Tax incentives are sometimes offered only after investments have met specific performance criteria.

Performance requirements that are not linked to tax incentives can be a more neutral tool for aligning investment promotion with sustainable development objectives. The requirements can be part of national legislation or be included in agreements or contracts between the government and investors. They can serve economic, social, environmental and health objectives, but may be restricted by the terms of international trade or investment agreements. Voluntary performance requirements are growing in popularity. Rather than being necessary for investment approval or incentives, these can serve as performance indicators for reporting on and monitoring sustainability.

Key messages: Investment approval process

Investors should be required to register their investment proposals with the relevant authority – depending on the type of investment – for review of the potential impact of the investment on tenure rights.

A thorough due diligence process at the registration stage can help to avoid risks. At a minimum, the process should include information on any tenure rights violations committed by the investor in other contexts, and the potential impact of the investment on local tenure rights.

Active, free, effective, meaningful and informed participation and consultation should be facilitated throughout the investment approval process. If the proposed investment may affect the rights or access to resources of indigenous people, it is necessary to acquire the affected people's FPIC before making any investment decisions. Requiring the FPIC of all affected communities – regardless of whether they are indigenous – is emerging as a best practice.

Impact assessments should be carried out in line with international best practices, even when national regulations do not require them. All affected stakeholders should participate in the assessments.

Landowners and users should have access to adequate and independent legal representation throughout the investment approval process. Legal services could be funded from a tax or levy paid by investors if landowners and users cannot afford to pay the fees themselves (see Box 12).

Negotiation of all contracts and agreements with investors should involve the direct participation of local stakeholders, rather than only government and/or customary authorities. Agreements should include clear terms regarding monetary and non-monetary payments and stipulations for monitoring and addressing non-adherence.

5

Investment monitoring

5. Investment monitoring

States and affected parties should contribute to the effective monitoring of the implementation and impacts of agreements involving large-scale transactions in tenure rights, including acquisitions and partnership agreements. States should take corrective action where necessary to enforce agreements and protect tenure and other rights and provide mechanisms whereby aggrieved parties can request such action.

The Guidelines, paragraph 12.14 (FAO, 2012c).

It is essential to monitor and review investments throughout their lifecycle to ensure that all parties are honouring their commitments. Both national legislation and voluntary standards contain many examples of performance indicators for assessing sustainable agricultural production.

The overarching areas that need to be monitored to assess impacts on tenure rights are outlined in Box 17.

Monitoring is the only way for States to ensure that policies and strategies for promoting investment and safeguarding tenure rights deliver on their development objectives and achieve their stated goals. Through monitoring, government authorities can also assess the processes and procedures for promoting, approving and monitoring investments and redefine roles where necessary. Monitoring of individual investments should therefore be an iterative process aligned with the monitoring of investment policies.

BOX 17:
What needs to be monitored?

• Compliance with the contract: - payments to the State, the community and individuals, etc.; - investments in infrastructure; - creation of employment, etc. • Impacts on legitimate tenure rights and their holders.	• Impacts on human rights and their holders. • Impacts on livelihoods. • Environmental impacts. • Numbers of conflicts and disputes and numbers resolved. • Impacts disaggregated by gender, age, region, etc.

5.1 Performance indicators

Monitoring starts with identifying qualitative and quantitative indicators for each objective or desired outcome, and collecting baseline data related to each of these indicators. It is very important that monitoring starts at the project design stage as part of the process of defining the desired results of the investment. Performance indicators should be objective, science-based and measurable to ensure a "level playing field" for all investors and data that can be aggregated and compared across regions, conditions, etc. for analysis and subsequent decision-making. Indicators can be included in the regulatory framework that governs the monitoring activities of government authorities. For example, legislation regarding environmental and social impact assessments should include associated indicators. If such legislation does not exist, monitoring and reporting requirements should be included in investment agreements such as land leases and impact and benefit agreements. The indicators and associated reporting requirements must be clear enough to be legally enforceable.

A wide range of initiatives have developed key performance indicators for measuring the sustainability and responsibility of investments and investors in agriculture (FAO, 2013b; WWF, 2012; EBG Capital, 2012). Each government authority should determine the specific indicators and reporting framework that is most effective for its context, ensuring that both quantitative and qualitative indicators are employed where appropriate. Given the multidimensional nature of land tenure, a range of indicators is necessary to account for all impacts.

BOX 18:
Indicators for measuring the impact of investment projects on local people's tenure rights

Source: Adapted from Bending, 2010.

- Perceived level of tenure security and threats – improved, unchanged or worsened by project implementation.
- Increase of land disputes in the project area – number of land disputes per year. The types and causes of land disputes should also be analysed to identify any links between project activities and land disputes. For example, a land conflict may have been only indirectly caused by the project.
- Increase of evictions in the project area – number of evictions per year.
- Access to water – improved, unchanged or worsened by project implementation.
- Access to other natural resources – improved, unchanged or worsened by project implementation.
- Degree of landlessness – increased percentage of landless people in the project area.

5.2 Timeframe and roles

It is important to define the frequency of monitoring and reporting and the associated roles and responsibilities. For example, in many countries, the national human rights commission monitors impacts on human rights in all sectors and at all stages of an investment. It is important that there is a lead authority to coordinate monitoring activities and information flows and to ensure that a complete report is publicly available at a centralized location.

Monitoring activities and timeframes vary depending on the type and source of the information. For example, the first level of monitoring could be based on biannual self-reporting by the investor to the investment monitoring and/or related authority. This could be complemented by biannual community reporting or statements from civil society organizations. Areas where there are indications of non-compliance with investment agreements or potential conflict could be highlighted for annual auditing. Annual compliance auditing could include site visits by representatives of the relevant government authorities for the risk areas identified. The investor should be informed about the scope of the audit and the risk areas identified, and should work with stakeholders to identify risk mitigation measures and timeframes for addressing potential negative impacts.

TABLE 6: **Timeframes for monitoring and reporting**

TIMEFRAME	TYPE OF MONITORING/REPORTING	MONITOR/REPORTER
Biannually	Self-reporting	Investor
Biannually	Third-party reporting	Civil society organizations and human rights institutions
Annually	Physical audit/visit	Government authority

5.3 Monitoring methods

Baseline information for monitoring the impacts of an investment can be collected in a variety of ways and may already exist at the national level, including in household surveys or censuses. Where such information is not available or is incomplete, the information collected by the investor during the impact assessment can be a useful starting point for impact monitoring. This information can be combined or benchmarked with information from other monitoring efforts by civil society and/or the government.

Information can be collected through household surveys, site visits, additional interviews, literature reviews and desk analysis. UN-Habitat (2012) recommends a combination of quantitative and qualitative indicators and methods depending on the context and the area being analysed. Regardless of the method or methods adopted, it is essential that the people being interviewed or surveyed review the information collected to ensure the accuracy of the data and to prevent future discord over the reporting of impacts.

One way of facilitating objective monitoring and reporting is by defining the types of documentation that can be used to support findings related to specific performance indicators. Table 7 provides examples of the information that can provide evidence of compliance or an impact.

TABLE 7: **Documentation for monitoring and reporting**

ISSUE	INVESTOR'S CLAIM	DOCUMENTATION
Food security	Investor-sponsored subsistence plots provided for community food production	Maps and photos of current production with associated yields and numbers of participants
Compensation	Rental review carried out in accordance with terms of lease	Description of rent review process and records of transfers of adjusted payments
Contracts with local suppliers	Purchases of raw material from local outgrowers/smallholders	Copies of contracts Numbers of outgrowers involved and records of raw material deliveries
Consultation	Continuous consultation	Frequency of consultations Location of consultations Budget for consultations Numbers of attendees, disaggregated by age and gender
Community development	Contribution to community development objectives outlined in impact and benefit agreement	Records of expenditures on community development Photos of community development initiatives

5.4 Dispute resolution and accountability

States should provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes and should provide effective remedies and a right to appeal. Such remedies should be promptly enforced. States should make available to all mechanisms to avoid or resolve potential disputes at the preliminary stage, either within the implementing agency or externally. Dispute resolution services should be accessible to all, women and men, in terms of location, language and procedures.

The Guidelines, paragraph 21.1 (FAO, 2012c).

Disputes related to agricultural investments can be dealt with through a wide range of dispute-resolution channels at the village, municipal, provincial and national levels. It is important to have several culturally appropriate options available for responding to different needs, and sufficient capacity to deal with cases in a fair and

timely manner. It is most effective when not only State-based judicial processes – adjudication by courts at different levels, including specialized courts/tribunals – are available, but also State-based non-judicial processes such as mediation by land administration authorities, and non-State-based processes such as arbitration by customary dispute mechanisms, private, independent mediation, mediation by civil society organizations, and the grievance mechanisms of business enterprises. To ensure that grievance mechanisms are effective, competent and impartial, they should be legitimate, accessible, predictable, equitable, transparent, in accordance with internationally recognized human rights and a source of continuous learning. The United Nations *Guiding principles on business and human rights* explain these elements in more detail (UN, 2011a):

- Legitimate: The mechanism is likely to be trusted by the stakeholders who use it, and ensures accountability for the fair conduct of grievance processes.
- Accessible: The mechanism is known to all the stakeholders, including women and other marginalized groups, who use it, and those who may face particular barriers to access or receive adequate assistance.
- Predictable: The mechanism provides a clear and understandable procedure, with an indicative timeframe for each stage and clear processes, outcomes and means of monitoring implementation.
- Equitable: Aggrieved parties have reasonable access to sources of information, advice and expertise for engaging in a grievance process under fair, informed and respectful conditions.
- Transparent: The parties to a grievance are informed on progress in resolving the grievance, and have sufficient information about the mechanism's performance to be confident that it is effective in meeting needs.
- Rights-compatible: The mechanism's outcomes and remedies accord with internationally recognized human rights.
- A source of continuous learning: Lessons are identified for improving the mechanism and preventing future grievances and harm.
- Based on engagement and dialogue: Stakeholders, including women and other marginalized groups, who use the mechanism are consulted on its design and performance, and the mechanism focuses on dialogue as the means for addressing and resolving grievances.

Where the auditing discussed in section 5.3 reveals non-compliance or false claims, the party at fault should be held accountable and government authorities should impose sanctions. These conditions should be clearly included in the regulatory framework governing agricultural investment and tenure rights, and in investment agreements, and should be legally enforceable. The mechanism for lodging a complaint of non-compliance varies depending on whether the agreement is a land lease agreement, an impact and benefit agreement or an agreement with a local supplier. For example, sanctions for non-compliance with the management plan agreed in an impact and benefit agreement may lead to the relevant governing authority revoking or suspending the investor's permit. It is recommended that agreements signed directly between investors and local landowners and users outline the grievance and redress mechanisms, including related roles and timeframes. The

mechanisms should be developed together with local stakeholders as part of the consultation and negotiation process of the investment agreement, to ensure that they are understandable, accessible, transparent and culturally appropriate.

Government authorities involved in investment promotion, approval and monitoring can assist investors in formulating grievance mechanisms that:

- provide a focal point for official complaints;
- provide a clear, transparent and impartial process for registering and addressing grievances;
- engage multiple stakeholders, such as local community representatives, local/provincial authorities, NGOs and policy-makers, in problem solving;
- identify actions or initiatives that may enhance future dealings between parties;
- provide a platform where complaints can be addressed and disputes resolved.

Government authorities can review conflicts to decide whether grievances or complaints are legitimate and the actions to be taken to address them. Rules and guidelines should be established with the agreement of stakeholders, and qualified individuals should be selected for conflict mediation. Government authorities should include grievance mechanisms, numbers of complaints, and how complaints are addressed in their periodic reviews and audits of investors.

The Guidelines' recommendations to States on creating a framework for resolving disputes over tenure rights include (section 21):

- providing impartial and competent judicial and administrative bodies;
- establishing specialized tribunals or bodies to deal exclusively with disputes over tenure rights, and creating expert positions in the judicial authorities to deal with technical matters;
- providing alternative dispute-resolution mechanisms, especially at the local level;
- reviewing customary and other existing forms of dispute settlement to ensure that they provide fair, reliable, accessible, non-discriminatory and timely resolution of disputes over tenure rights;
- providing the right to appeal;
- preventing corruption in dispute resolution;
- extending legal assistance to vulnerable and marginalized people, to ensure that everybody has safe access to justice without discrimination.

Clear roles and responsibilities for addressing grievances should be established among the relevant authorities at the local, regional and national levels and should be publicly available. If the grievance mechanisms operated by the investor are not successful, it is important to provide clear guidance on whom to contact within the government and to ensure that the process is accessible even in very remote communities.

5.5 Investment assignment and closure

Investments may last 5 years or 50 years or more. They might start very small and progressively expand, but regardless of the specific situation, transparency and communication with stakeholders should continue throughout the life of the investment. The investment agreement should clearly stipulate a timeframe for using the land, what uses are permitted and how the land is to be returned to its owners if it remains unused (Smaller *et al.,* 2014; Mirza *et al.,* 2014). The agreement should also stipulate the condition in which the land should be returned at the end of the lease agreement.

The initial investors or owners of a project are often unable to make the investment profitable, and it can take two or three changes of ownership and new investment capital to establish a project (Tyler and Dixie, 2013). It is important that investment agreements include provisions for transferring rights, to maximize the investment's likelihood of succeeding rapidly while ensuring that all the agreements and commitments negotiated are honoured by new investors/owners.

Where investments are not proceeding within the terms of the agreement, clear termination clauses in the investment agreements are important in safeguarding tenure rights when the investment closes. For example, when an investor has been unable to scale up a project on all the land included in the original agreement, the investor will still be leasing the land and making payments to the landowners, but other benefits included in the agreement will not be being realized, and the land cannot be used for another productive use contributing to development objectives. Many termination clauses require the investor to return/forfeit "unused land" after a set period.

When a project ends, a final impact assessment should quantify positive and negative impacts within the terms of the agreement and define how to compensate for these impacts. The agreements signed during the investment approval process, particularly the land lease agreement and environmental permits, should indicate the procedures for closing an investment.

BOX 19: **Information to include in investment agreements**

- Who will have control of the land and the resources and infrastructure on it?
  - Landowners and users?
  - Government?
  - Investors?
- To what level does the land need to be rehabilitated to address the impacts of the investment? What procedures are to be followed?
- How long is the investor liable/responsible for any negative impacts that arise as a result of the investment?

Key messages: **Investment monitoring**

Monitoring is an ongoing process that starts with investment approval and lasts until investment closure.

Indicators for monitoring and the timeframe and roles for reporting should be clearly stipulated in investment agreements.

A wide variety of stakeholders have roles in monitoring, including the government, NGOs, communities and the investors themselves.

Monitoring should include compliance with contracts, impacts on tenure rights and their holders, and effectiveness of investment policies and regulations.

Monitoring of individual investments should be an iterative process alongside monitoring of the effectiveness of related policies.

6

Tools and additional resources

6. Tools and additional resources

6.1 Checklists for stakeholders

The following checklists cover the activities and responsibilities of the various stakeholders involved in investment promotion, approval and/or monitoring. Although the target audience of this guide is government authorities, many other stakeholders have specific roles along the investment cycle; government authorities need to understand these roles so they can work collaboratively in ensuring that agricultural investment is in line with the Guidelines.

Government authorities

Government authorities' general responsibilities

- **Recognize and respect** legitimate holders of tenure rights, and their rights.
- **Safeguard** legitimate tenure rights against threats.
- **Promote and facilitate** the enjoyment of legitimate tenure rights.
- **Provide** access to justice to deal with infringements.
- **Prevent** tenure disputes, conflicts and opportunities for corruption.

Creating an enabling environment

✓ Include multistakeholder engagement and consultation in the development of investment and agriculture strategies.

✓ Increase public participation in processes that influence access to and use of land – land-use planning, identification of community boundaries, land allocation, etc.

✓ Define investment objectives and develop a national strategy outlining the types of investment in agriculture that will contribute to development objectives.

- ✓ Allocate clear roles and responsibilities for tenure-related aspects of investment promotion, approval and monitoring among government authorities.
- ✓ Understand the risks and opportunities related to various business models and define a strategy for encouraging the adoption of business models that reduce or avoid large-scale transfers of land.
- ✓ Develop strategies for including smallholders through locally appropriate outgrower schemes, contract farming, joint ventures and other forms of collaborative production, including where local stakeholders can capture a larger portion of the value chain.
- ✓ Ensure that national policies on land and investment are consistent with each other and with other policies for rural development, food security, environment, etc.
- ✓ Ensure that investment treaties contribute to national food security policies and human rights obligations.
- ✓ Develop a comprehensive land policy that addresses national development goals and objectives, balancing the rights and interests of all users in acquiring social, environmental and economic benefits from land.
- ✓ Recognize existing legitimate, formal, informal, collective and customary tenure rights, including rights to possess and use land, and allocate secure and enforceable titles to individuals and communities.
- ✓ Establish equitable land tenure rights for women and men.
- ✓ Recognize the legitimacy of land tenure rights created by customary or other traditional practices.
- ✓ Prohibit the arbitrary deprivation of land tenure rights.
- ✓ Establish a system for documenting existing land tenure rights at low cost and through an administratively simple process that is accessible to all segments of the population.
- ✓ Establish policies and capabilities for appropriate land administration – recording, regulatory planning, valuation, etc. – to deal with these requirements.

Investment approval

Require disclosure of relevant information by the investor, and provide for consultation and participation of stakeholders.

- ✓ Provide transparent rules on the scale, scope and nature of permitted transactions in tenure rights and define the different scales of transactions appropriate to the national context, applying a participatory and inclusive process.
- ✓ Perform due diligence on investors' capacity to manage agricultural investments effectively by evaluating investment proposals and requiring proof of experience and finances.
- ✓ Measure investment proposals against specific criteria in areas relevant to the development strategy, such as food security, improved livelihoods of local communities and protection of ecosystem services.
- ✓ Foster meaningful participation, such as by requiring communities' FPIC to investment decisions.

- ✓ Recognize all existing legitimate land users and community rights. Structure agreements to respect and protect existing land tenure rights, including those not explicitly recognized under formal law.
- ✓ Clearly define requirements for independent assessment of the potential positive and negative impacts that a proposed investment could have on tenure rights and human rights; particularly, the right to food, livelihoods and the environment.
- ✓ Ensure that assessments are transparent and involve local stakeholders, and make results easily accessible to the public, including by translating them into local languages.
- ✓ Ensure that land tenure assessments systematically and impartially identify all the existing legitimate tenure rights and claims of people – women and men – potentially affected by the investment, including rights and claims under customary and informal tenure.
- ✓ Require the investor to disclose contractual information such as the size and location of the land, foreseen use, period of use and financial payments (rent, duties and taxes).

Investment monitoring

- ✓ Establish rules, including clear indicators and reporting formats, for monitoring the implementation and impacts of agreements involving transactions in tenure rights.
- ✓ Establish a fair and accessible system for resolving conflicts over land.
- ✓ Develop and implement mechanisms for the redress of complaints and support the right to challenge administrative decisions.
- ✓ Where necessary, take corrective action to enforce agreements and protect tenure and other rights, and provide mechanisms through which aggrieved parties can request such action.

Government authorities

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. Effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems. Where necessary, communities should be assisted to increase the capacity of their members to participate fully in decision-making and governance of their tenure systems. States and non-state actors should endeavour to prevent corruption with regard to tenure rights.

The Guidelines, extracts from sections 6 and 9 (FAO, 2012c).

Creating an enabling environment

- ✓ Act in the interest of the entire community – all men and women, young and old people, including temporary land users such as pastoralists with legitimate tenure rights over land in the area.
- ✓ Ensure that information obtained, including on rights and entitlements, is shared among all community members.
- ✓ Facilitate community engagement in participatory investment policy and development strategy processes.
- ✓ Seek information on rights under national and international law.
- ✓ Contribute to discussions on development strategy and policy.
- ✓ Provide feedback on investment models regarding what worked well and what did not.
- ✓ Investment approval
- ✓ Collaborate with the government and investors to ensure that a participatory consultation programme is embedded into investment planning and agreements, and that assistance is provided to increase the capacity of community members to participate fully in decision-making.
- ✓ Coordinate with investors to identify the likely impacts on existing land tenure rights and social and environmental conditions, taking into account secondary rights such as women's rights to collect fuelwood in the forests, and temporary/seasonal rights.
- ✓ Identify any benefits that the investment is likely to bring to the community or individuals, and advocate for benefits to be included in a written impact and benefit agreement.
- ✓ Manage the community's expectations regarding benefits from the investment, and determine what is realistic with the investor, establishing a timeframe and reporting mechanisms for progress on delivering benefits.
- ✓ Ensure that the community is recognized as an active party in the investment and that its rights and duties, benefits and responsibilities are clearly spelled out in the investment agreements and respected by all parties.
- ✓ Before agreeing to any investment, verify that all negotiated impacts and benefits, such as payments, hiring and training of local workers, and provision of health care, infrastructure, are clearly spelled out in the contract.
- ✓ Verify that the right to appeal is enshrined in the investment agreement and that there is a clear, simple, accessible and affordable mechanism that provides effective judicial remedies for negative impacts on tenure rights or on social, environmental and economic conditions.
- ✓ Request copies of all agreements in the local language and ask a third party

to verify that translations are correct and the terms recorded are those that were agreed.

Investment monitoring

- ✓ If an investment is planned in the area, petition the government and the investor to ensure that participatory consultation is included in the investment planning process.
- ✓ Request access to all relevant information on the planned investment.
- ✓ Identify the likely impacts, particularly on:
  - existing land tenure rights and access to other natural resources, especially water;
  - human rights and, particularly, local and national food security;
  - livelihoods;
  - the environment.
- ✓ Identify any benefits that the community or individuals are likely to obtain, and the benefits that the community would like the investor to deliver.
- ✓ Seek support from third parties such as legal advisers, management/business consultants, government agencies and civil society organizations in negotiations with investors, when needed.
- ✓ Participate with the government and the investor in establishing measurable criteria and a system for monitoring business activities and proposing solutions for adverse impacts.
- ✓ Ensure that all community members, including those who cannot read, have access to the agreement and understand what it includes.
- ✓ Collaborate with government authorities and investors on developing a system for monitoring and reporting on impacts.

Business enterprises, financial institutions and funds

Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others.

The Guidelines, General Principles (FAO, 2012c).

Creating an enabling environment

- ✓ Participate in discussions on and planning of investment policy and development strategy, and collaborate with government authorities in identifying how business enterprises can contribute to national development objectives.
- ✓ Understand the national laws, policies and cultural context for the investment.

Investment approval

- ✓ Identify, understand and respect all existing legitimate tenure rights and safeguard against dispossession of these.
- ✓ Identify production needs, including a realistic assessment of the amount of land needed. Ensure that the investment acquires land that is genuinely needed and will not sit idle while remaining inaccessible to local users.
- ✓ Make information on the planned investment available to local people as soon as possible, in languages and formats that are understandable to all affected groups. Be clear about objectives, potential impacts, risks and guaranteed benefits for the local population, such as revenues from local taxes and fees, royalties, trust funds, infrastructure and its maintenance, services or employment.
- ✓ Ensure that all documentation is available in the local language(s) and is accessible to local land users and other members of the community.
- ✓ Consult all potentially affected groups and other stakeholders, applying the principle of FPIC whenever possible. Start community consultations early in the approval process and continue throughout the project, particularly when new information is available.
- ✓ Ensure non-discrimination and respect the rights of disadvantaged groups, paying particular attention to women and youth who may have undocumented (secondary) rights over resources. Where culturally appropriate, consult women and youth at separate meetings and discuss the investment project in detail with them.
- ✓ Be aware of stakeholders with temporary rights who may not be present all year round, such as pastoralists with seasonal use rights to animal corridors, pastures and water sources based on customary tenure.
- ✓ Explore alternative business models based on partnerships with local men and women land users and that support local development and do not require the large-scale transfer of land rights.
- ✓ Document the participation of tenure right holders in negotiations and decision-making, and the effects that it had.
- ✓ Establish policies and processes that demonstrate the business enterprise's respect of human rights and legitimate tenure rights, such as policy commitments,

due diligence processes and systems for remediating adverse impacts on human rights and legitimate tenure rights.

- ✓ Even when not formally required by law, conduct independent assessments of the potential social and environmental impacts that planned investments could have on tenure rights, human rights, particularly the right to food, livelihoods and the environment.
- ✓ Ensure that assessments are transparent and involve local land users, with results made available to the public.
- ✓ Subject to legitimate concerns regarding confidentiality, disclose all contractual information on the size and location of the land area concerned, the purchase price/rent, the type of rights and duties transferred, and the duration of the contract for non-permanent transfers of tenure rights.

Investment monitoring

- ✓ Monitor social and environmental impacts, including impacts on human rights and legitimate tenure rights, throughout the project. Identify and address negative impacts immediately, in consultation with those who have been negatively affected and with the broader public.
- ✓ Collaborate with civil society organizations on monitoring the impacts and discussing recommendations for improvements.
- ✓ Engage with stakeholder groups on the design and performance of grievance mechanisms to ensure that they meet users' needs and will be used, and that there is mutual interest in ensuring their success.
- ✓ Provide public information on grievance mechanisms and ensure accessibility by charging no/low user costs, having no literacy requirements, using local language(s) and defining a location that both women and men can reach, etc.
- ✓ Identify the concerns of stakeholders who may be adversely affected by the investment as early as possible, to avoid escalation.
- ✓ Cooperate with local individuals and communities, and – where necessary – provide legitimate, accessible, predictable, equitable, transparent and rights-compatible non-judicial mechanisms for rectifying any adverse impacts on them, focusing on dialogue in addressing and resolving disputes.
- ✓ Ensure adjudication by a legitimate, independent third-party mechanism.
- ✓ Analyse trends, patterns and causes of complaints and identify systemic problems so that practices, procedures and/or policies can be adapted to prevent future harm.
- ✓ When adverse impacts on human rights and legitimate tenure rights have been reported, assess the effectiveness of the remedy/response using qualitative and quantitative indicators and feedback from internal and external sources, including affected stakeholders.

- ✓ Make monitoring reports/results publicly available, including communications on how negative impacts on human rights, legitimate tenure rights, livelihoods and the environment have been addressed.
- ✓ Document conflicts and the ways in which they have been settled, and make this information available to the public.

Civil society organizations

Creating an enabling environment

- ✓ Engage with communities, investors and government authorities in defining national investment policies and strategies for national development.
- ✓ Provide information on inclusive business models for government and investors, and facilitate partnerships with local stakeholders.
- ✓ Develop information material for communities on tenure rights and investment agreements.
- ✓ Gather and publish reliable information on existing agricultural investments in land.
- ✓ Support communities in defining community protocols for investor engagement.

Investment approval

- ✓ Provide technical and legal expertise throughout consultations and negotiation, approval and monitoring of investments.
- ✓ Advise investors and government authorities on how to make consultation and negotiation processes inclusive and accessible given the cultural norms/constraints of local communities.

Investment monitoring

- ✓ Monitor investments, track behaviour of investors and communities, and advocate for increased transparency where it is lacking, especially with respect to impacts on human rights, tenure rights, livelihoods and the environment.
- ✓ Work with local groups to inform, educate and support their claims to land and ensure that they have representation.

6.2 Model lease provisions

When land is leased it is important that the leases include specific information and agreement on major issues to avoid conflict later on. The following list covers provisions that should be included in lease agreements (see also Smaller *et al.,* 2014).

NECESSARY INFORMATION
Parties to the lease agreement, including guarantors.
Description of the area to be leased, including its total extent.
Duration of the lease – start and termination dates.
Terms for extension/renewal of the lease.
Purpose of the investment.
Time limit for development by the investor, and penalties for failure to develop.
Description of possessory rights, including limitations on the uses and activities that the investor may engage in.
Timing and form of lease payments, and interest accrual on late payments.
Frequency of rent revisions and method of calculating adjustments to the rent.
Compensation rates for crops, structures or other items on the land, and periods of compensation (e.g. on entry, annual, at exit).
Details of rehabilitation and resettlement plans for land users who do not hold legitimate tenure rights.
Contribution to or payment of the legal expenses of the community or holder(s) of legitimate tenure rights through an "arms length" fund.
Conditions under which the lessor can enter the property to inspect the investor's activities and monitor lease compliance.
Final court of litigation.
Dispute-resolution mechanisms.
Terms for renegotiation.
Assignment or transfer of the lease conditions, including stipulation of the condition in which land is to be returned and the liabilities for deterioration.

Source: Adapted from Welthungerhilfe, 2014.

Associated guidance

- Consider shorter leases with options for renewal, clarifying the conditions for renewing leases.
- Rents/prices should be at market value or calculated as a percentage of the turnover from the investment, subject to an appropriate defined base rent to discourage speculation and to maximize the benefits resulting from investments.
- In some jurisdictions, rents/revenues from land sales are apportioned among central government, local authorities and local communities so that benefits are more widely distributed and local government institutions can maintain adequate capacity.

6.3 Impact and benefit agreements

An impact and benefit agreement should stipulate how the investor will implement the recommendations resulting from impact assessments and the terms and conditions of the agreement with local stakeholders. It should include the following information.

Impacts

The third-party firm conducting the impact assessment

- Name
- Identity document/registration
- Legal representation
- Address
- Telephone number
- E-mail address

The project proposal

- Site area
- Nature of the project
- Time scale of operations

Baseline environmental, social and health conditions

- Topography and relief
- Climatic conditions
- Air quality
- Water and drainage
- Geology and soils
- Flora and fauna
- Landscape character and quality
- Human settlements and social characteristics:

- local language requirements;
- primary economic activities;
- project requirements for skilled and unskilled labour and services;
- demographics;
- nutrition (food security) statistics;
- literacy rates.

• Land use and tenure
• Land and natural resource requirements for project development

Potential impacts

A paragraph describing the environmental, social and health impacts that could arise during each phase of the planned activity for each of the topics described in the baseline.

A paragraph outlining plans on how to avoid, mitigate or compensate for adverse impacts in relation to each of the topics described in the baseline.

Programme of work

The preventive, mitigation and compensation measures proposed for managing impacts during each phase of the project should be summarized in a table.

PHASE	POTENTIAL IMPACT	PREVENTION	MITIGATION	COMPENSATION
Phase 1 Pilot	Nutrient runoff	Integrated management of plant nutrients	Cleaning of waterways	
Phase 1 Agricultural development				
Phase 1 Construction of processing plant				

Example

The programme of work also includes a summary of the investigations to be undertaken in relation to each area of potential impact.

Benefits

- A description of the participatory framework.
- A statement of the company's policy, procedures and institutional arrangements for implementing sustainable development opportunities in host communities.
- A local employment and procurement strategy that commits the enterprise to:
  - using local employment wherever practical during all stages of project development;
  - purchasing local materials and products wherever practical.
- A strategy outlining actions for improving the conditions of disadvantaged groups, including women and youth, within the host community.
- A community development programme that includes at least:
  - objectives;
  - milestones;
  - implementation timetables;
  - schedule of anticipated expenditures;
  - metrics by which to measure progress;
  - periodic reporting to the community, including of actual expenditures;
  - how the plan aligns with government priorities and activities, services and infrastructure provided to the affected communities;
  - how and when the plan will be reviewed and updated;
  - how the plan will be amended and ratified by the community;
  - any other content mutually agreed by the community and the enterprise.

Form of the agreement

- Investor's commitment to community development.
- Community's capacity to negotiate:
  - identification of the community's legal representation.
- Contents of the agreement:
  - goals and objectives;
  - duration of the agreement and suspension or termination;
  - the person(s), committee, trust, body or other entity managing the agreement;
  - the person(s), committee, trust, body or other entity representing the community;
  - the means for developing, maintaining and updating a registry of community members;
  - the means for representing the interests of women, youth and subcommunities in decision-making processes and implementation;
  - the means and consultation process for defining the roles and obligations in

sustainable development of the investor and the community;

- the roles and obligations of the enterprise in community development: planned activities in environmental, social, health and economic development;
- the roles and obligations of the community towards the investor;
- the roles and obligations of any other party to the agreement;
- the means for reviewing the agreement and how parties will be bound by the current agreement if any modifications sought by one party are not agreed to by the other party;
- the framework for consultations and monitoring between the investor and the community and the means by which the community can participate in the planning, implementation, management, measurement and monitoring of activities;
- communication mechanisms between parties;
- the language(s) to be used in reports, plans and other written materials required under the agreement;
- the means by which funds made available under the agreement are disbursed and for what purposes; the accounts that must be kept and by whom; and reporting and auditing requirements;
- the location where parties can consult the agreement;
- grievance and dispute-resolution mechanisms;
- reasons and procedures for declaring force majeure;
- coordination with other development assistance provided by the local or central planning authorities responsible for providing schools, medical centres, hospitals and other social infrastructure for local communities;
- transparency and annual reporting mechanisms;
- signatures of both parties.

6.4 International conventions and related guidance

- UN Charter (1945)
- Universal Declaration of Human Rights (1948) Article 17
- ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)
- International Covenant on Economic, Social and Cultural Rights (1966), and its Optional Protocol
- International Covenant on Civil and Political Rights (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979), and its Optional Protocol
- Convention on Biodiversity, particularly the Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites

and on lands and waters traditionally occupied or used by indigenous and local communities (2004)

- UN Declaration of the Rights of Indigenous People
- UN Conference on Environment and Development Agenda 21 (1992) Paragraph 3.8
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) Articles 6 and 7
- UN Economic Commission for Africa Framework and Guidelines on Land Policy in Africa (2010)
- UN Human Rights Council Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (A/HRC/19/59/Add.5) (2011)
- UN Human Rights Council Large-scale land acquisitions and leases: a set of minimum principles and measures to address the human rights challenge (A/HRC/13/33/Add.2) (2009)
- The Pinheiro Principles (2005)
- Guiding Principles on Business and Human Rights implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31) (2011)
- FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (2005)
- OECD Guidelines for Multinational Enterprises (1976, updated 2011)
- ISO Standard No. 26000 – Guidance on social responsibility (2010)
- IFC Performance Standards

Private-sector standards and principles

- Fair Trade Certified
- Forest Stewardship Council (FSC)
- Roundtable on Sustainable Biofuel (RSB)
- Roundtable on Sustainable Palm Oil (RSPO)
- Bonsucro

FAO's technical guides on the Voluntary Guidelines for Responsible Governance of Tenure

- *Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition (2014)*
- *Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance of land tenure (2013)*
- *Improving governance of forest tenure: a practical guide (2013)*
- *Implementing improved tenure governance in fisheries: a technical guide (2013)*

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Governance of tenure **technical guides**

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Food and Agriculture Organization of the United Nations

The Voluntary Guidelines on the Responsible Governance of Tenure for Land, Fisheries and Forests in the Context of National Food Security acknowledge that responsible investments by the public and private sectors are essential for improving food security, and call for investments that safeguard land users and owners against the dispossession of legitimate tenure rights.

This technical guide provides detailed guidance to government authorities engaged in the promotion, approval and monitoring of investments at all stages of the investment cycle on actions they can take to create an enabling environment for responsible and sustainable investments. In following this guidance governments will be more likely to achieve their economic development goals by maximising the shared benefits of both private and public investments and mitigating negative impacts.

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ISBN 978-92-5-108895-1

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I4998E/1/09.15