Food and Agriculture Organization of the United Nations

GOVERNANCE OF TENURE
TECHNICAL GUIDE

7

Responsible governance of tenure: a technical guide for investors

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**

GOVERNANCE OF TENURE **TECHNICAL GUIDE** No. 7

Responsible governance of tenure: a technical guide for investors

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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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Foreword

Investment in agriculture is essential to reducing food insecurity and poverty. Since 2008, demand for agricultural land in developing countries has increased sharply. Land is considered to be an attractive asset. In social terms, investments in land have produced mixed results. Such investments have the potential to benefit local communities by giving small farmers greater access to capital, technology, knowledge and markets. They can also deliver macroeconomic benefits such as increased economic growth and agricultural production. However, these projects have often harmed local people by causing them to lose rights and access to their land and other natural resources, which has a negative effect on food security and rural livelihoods.

Most investment in agriculture in developing countries is in settings with weak governance of land tenure and where the prevalence of poverty is high. The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* ("the Guidelines"), which were unanimously endorsed by the United Nations (UN) Committee on World Food Security in May 2012, were created to help these and other countries improve their governance of tenure. The primary objective of the Guidelines is to reduce food insecurity and poverty.

While aimed at governments, the Guidelines also contain important provisions applicable to the private sector. There is particular focus on helping investors pursue their projects in ways that respect legitimate tenure rights and human rights. Increasingly, the Guidelines are viewed internationally as establishing a set of best practices for investment in land, forests and fisheries.

Those who plan and operate their investments in a way that is consistent with the Guidelines can reduce their investment risk and increase the likelihood of realizing a reasonable risk-adjusted return. Such investments are more likely to be successful if everyone – investor, local community and government – benefits. The Guidelines provide a framework for achieving this win-win-win scenario. This technical guide seeks to help investors apply the Guidelines in ways that will help them to play their part in achieving that result.

Acronyms

AATIF	Africa Agriculture Trade and Investment Fund
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFS	United Nations Committee on World Food Security
CSR	Corporate Social Responsibility
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
FAO	Food and Agriculture Organization of the United Nations
FPIC	free, prior and informed consent
ILO	International Labour Organization
NGO	non-governmental organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
PE	private equity
RSB	Roundtable on Sustainable Biomaterials
RSPO	Roundtable on Sustainable Palm Oil
ESIA	environmental and social impact assessment
UNCTAD	United Nations Conference on Trade and Development

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Executive summary

The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT; hereafter, "the Guidelines") were adopted by the United Nations (UN) Committee on World Food Security (CFS) to help all parties – governments, private sector actors and local communities – improve governance of tenure of land, fisheries and forests and, within that framework, achieve socially responsible and financially sustainable investments in land, fisheries and forests (FAO, 2012a). While primarily for governments, certain important provisions of the Guidelines are addressed to the private sector, in particular:

> *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. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights (par. 3.2).*

In keeping with the Guidelines, this technical guide focuses on issues of tenure; however, unlike the Guidelines, it restricts itself only to agricultural land. It does not discuss many other issues important to investment, such as raising capital, preparing business plans or hiring good local management. These considerations are beyond the scope of the Guidelines. Adhering to the recommendations contained herein should make it less likely that an investment will be faced with land-related claims and disputes, but readers should keep in mind that following this guide is not a guarantee that all risks or problems will be eliminated. The Guidelines are not part of a certification scheme.

A senior corporate executive has observed that agricultural land-based investments "which ignore the interests of local communities and the local landscapes are both morally wrong and commercially short-sighted"(Bowman, 2013). Such investments are more likely to be successful if everyone – investor, local community and government – benefits. The Guidelines provide a framework for achieving this win-win-win scenario; this technical guide is intended to help investors play their part in achieving that result.

Risk factors

For investors, a responsible investment in land begins with a preliminary risk assessment, including an evaluation of high-risk factors, followed by a more comprehensive due diligence process (Smaller *et al.,* 2014). If the results of the preliminary assessment and due diligence analysis are sufficiently positive, the process continues through the consultation, negotiation, agreement, operational and close-out phases. While the operational and close-out phases are certainly no less important, this guide deals primarily with the preliminary assessment, due

diligence, consultation, negotiation and agreement phases, as these are where the biggest tenure-related issues arise.

In the preliminary assessment phase, the presence of high-risk factors should prompt a responsible investor to decide **not to proceed** with the investment. Those factors are listed in Box 1.

BOX 1:
High-risk factors

- There are a significant number of existing or recent disputes or claims involving the land that cannot be resolved.
- The government originally acquired the land by expropriation, or the project requires expropriation to make it available for development, causing, in either case, local people to be evicted.
- The project design requires the large-scale transfer of land rights from local people, possibly resulting in many people being involuntarily or even voluntarily resettled.
- The locality where the project may be situated has significant corruption problems and corrupt activities have been observed in relation to the proposed project that cannot be mitigated effectively.
- There is an active, ongoing conflict in the project area.
- In weak land governance settings, the operator/direct investor has not and will not carry out:
  - participatory stakeholder mapping;
  - a comprehensive environmental and social impact assessment (ESIA), including land tenure, food security, human rights; or
  - an inclusive community consultation process.
- Where a ESIA has been done, it reveals:
  - negative impacts on food security that cannot be mitigated adequately;
  - infringements on human rights that cannot be avoided. Indigenous communities have not given their free, prior and informed consent (FPIC).
- Indigenous communities have not given their free, prior and informed consent (FPIC).
- The site has forests or is in an area of high conservation value that is likely to be destroyed or harmed by the project.

The preliminary review could also identify those risk factors that reveal fewer, or more limited, adverse environmental and social risks and/or impacts that can be mitigated or reversed.[1] An investor considering a project that has the somewhat less severe risk factors listed in Box 2 **should proceed with caution, carefully re-examine** any such project in the due diligence phase and search for ways to mitigate those risks. If that is not possible, the investor should not proceed with the investment.

[1] The Equator Principles (2013) contain a three-part risk analysis that categorizes risk from highest (Category A) to lowest (Category C). That analysis may be useful to some investors. See Principle 1.

BOX 2:
Medium-risk factors

- The project land area is very large and appears to exceed what can reasonably be put under production over the life of the project, thus raising concerns about speculative motives.
- The project is situated in a post-conflict setting.
- Human rights violations have been reported in the area.
- Indigenous peoples reside in or near the project site.
- The project will be situated in an area where land rights tend to be undocumented and/or governed by customary law, and the operator has yet to do participatory mapping to identify all legitimate rights holders.
- The communal land targeted by the investor is wrongly categorized as unused or uninhabited.
- The local community has not been involved in the project planning phase.
- Affected stakeholders have not yet been engaged in an effective, culturally-appropriate, gender-inclusive and transparent consultation process.
- Local communities that lack the capacity to represent themselves are not represented by competent advisors or advocates.
- An independent environmental and social impact assessment (ESIA) of the proposed project – including a gender-sensitive evaluation of potential impacts on land tenure, food security and human rights – has not been completed.
- The ESIA reveals the likelihood of significant negative effects on land rights, food security, human rights or the environment if the project is not revised.
- A comprehensive written agreement on the terms of any transfers of legitimate formal and customary land rights has not been completed.
- The project involves a relationship with a politically exposed person (often a senior political official or relative of such an official) who may be deemed to be more susceptible to bribery and corruption.

1

Introduction

1. Introduction

A. Background

Investments in agriculture have proven to be one of the most effective means of reducing poverty in rural areas of developing countries. Most of the world's poor live in such areas and depend on agriculture for their livelihoods. Substantial increases in agricultural production will be necessary to reduce poverty and food insecurity. Demand for food will also increase rapidly in fast-growing urban areas. This is one reason why demand for agricultural land in developing countries has increased sharply since 2008 (FAO, 2014a).

Agricultural investments can benefit the communities where the investments are made by giving small farmers greater access to capital, technology, knowledge and markets. Recipient countries can reap macroeconomic benefits such as increased incomes, economic growth, job creation, agricultural production and export earnings. On the other hand, because some agricultural land-based investments occur in countries with weak land rights and governance, they have at times caused many rural land users to lose rights and access to their land and other natural resources.

Land differs from other asset classes. In much of the world land is profoundly linked to livelihoods, culture, social structures and norms and, of course, to access to food, water and shelter. Land sometimes has great cultural significance to people who live on it. Responsible investors must understand how important land is to the people who may be affected by their investments and the ways in which different categories of rural-dwellers may be affected differently.

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT; hereafter, "the Guidelines") were developed and unanimously endorsed by the United Nations (UN) Committee on World Food Security (CFS) in May 2012 (FAO, 2012b). The primary objective of the Guidelines is to:

> *Improve governance of tenure of land, fisheries and forests. They seek to do so for the benefit of all, with an emphasis on vulnerable and marginalized people, with the goals of food security and progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection, and sustainable social and economic development (par. 1.1).*

While designed primarily for governments, certain key provisions of the Guidelines are addressed to non-governmental actors, including businesses and investors (par. 3.2). The Guidelines are recognized internationally as a set of best practices including for investment in land, forests and fisheries. (This guide deals only with agricultural investments).[2] Indeed, the guide views the Guidelines as minimum standards for responsible investment; thus, it also includes a number of recommendations that go beyond the Guidelines in the interests of further minimizing risk and safeguarding the rights of local communities.

It is important to note that this guide does not purport to provide investors with the ability to respond to all tenure-related issues they may encounter in any setting. Rather, it explains what the Guidelines mean and how they can help firms to understand and manage the substantial financial, legal, operational and reputational risks related to land tenure. The ultimate goal is to have investments that are socially beneficial and yield a reasonable risk-adjusted return.

B. Rationale

Acting in accordance with the Guidelines can help investors to better understand and manage the substantial financial, legal, operational and reputational risks inherent in investing in land-based assets in many developing countries. The Guidelines and complementary resources provide a great deal of insight and practical advice on how to cope with those risks and, thus, increase the likelihood of positive financial returns and benefits to local communities. The important links between land rights and human rights also mean that complying with the Guidelines will help to ensure that those rights are respected (OHCHR, 2014: Chapter 6). The reality is that the "rules" applicable to agricultural investments are changing. For decades, many countries have been plagued by weak land governance, caused by a lack of funding, human resource capacity and political will. The societal impact of this weakness has grown with increased demand for land. The multistakeholder adoption of the Guidelines is just one indication that governments, civil society, non-governmental organizations (NGOs), consumers, businesses and others are increasingly aware of the importance of secure land rights and improved governance as capacity building efforts begin to bear fruit. Those with rights to land in low-income countries – governments, local communities, individuals – are increasingly aware of the value of their land. Emerging market governments, supported by donor countries, are moving towards incorporating the Guidelines into their national legal frameworks. Thus, investors who want to succeed in those settings must understand the Guidelines.

[2] Although the Guidelines address both forests and fisheries, this guide focuses only on investments in agricultural land. A technical guide assists governments in managing agricultural investments, while another is directed at lawyers. Published guides address a range of key areas of the Guidelines' implementation, including fisheries, forests, gender and FPIC.

This is an evolving situation, similar to what has happened with other social issues such as human rights,[3] labour rights and environmental protections. Many developing country governments are changing the way they do business. For example, the African Union and others recently adopted the Guiding Principles on Large Scale Land Based Investments in Africa (2014). What constitutes responsible practices has changed and will likely continue to change. This should create a safer and more stable environment for investment in countries that incorporate the Guidelines into their land governance laws and practices. But it will also require investors to change and improve their practices as the bar is raised.

Many businesses are aware of this trend and have reacted accordingly. The business community participated in developing the Principles for Responsible Investment in Agriculture and Food Systems ("the Principles"), which explicitly incorporate the land tenure provisions of the Guidelines (Principle 5) and encourage financiers and businesses to operate in accordance with them (FAO, 2014c).

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

Multinationals, such as Nestlé, Coca-Cola, PepsiCo, Cargill, and others, have explicitly endorsed the Guidelines as they have come to understand the financial and reputational risks of irresponsible land tenure practices in their supply chains and the potential rewards from acting responsibly. There are also specific standards and certification processes that apply to commodities such as biomaterials, palm oil, sugar and others (RSB, 2013; RSPO, 2013).

[3] As reflected, in part, by the adoption of the UN Guiding Principles on Business and Human Rights unanimously endorsed by the UN Human Rights Council in 2011 (OHCHR, 2011).

Large institutional financial investors have committed to invest in accordance with the Guidance for Responsible Investment in Farmland, which includes respect for existing land rights (UNGC, 2014). The International Finance Corporation (IFC) has announced its commitment to the Principles to ensure that the agricultural projects it finances are carried out responsibly and sustainably. Many large banks and institutional lenders apply the IFC performance standards (sometimes via the Equator Principles for private lenders) to larger projects.

Investing responsibly can also enhance a project operator's "social license to operate" in the eyes of the community. A firm that invests in an operator with a social license can be seen as having obtained an analogous "social license to invest." Investors can earn such a "license" by adopting and implementing due diligence measures covering social and environmental risks in those companies or land-based projects in which they consider investing (Oxfam, 2014).

It is important to note that investing responsibly involves going far beyond traditional corporate social responsibility (CSR) practices. It is not enough to build a school or medical facility in a community where an investment will be made. Truly responsible investments do far more, as explained in this guide, and seek not only to avoid negative social and environmental impacts, but also to create mutually beneficial economic relationships with the affected communities.

All of this means that making potentially profitable land-related investments in developing countries often has high transaction costs. Conducting social and environmental impact assessments – which, as explained later in this guide, also evaluate impacts on land rights, food security and human rights – and consulting effectively with local communities, can be costly.

But the costs of getting it wrong can be even higher. If an investment displaces and impoverishes local people they are likely to find a way to undermine it. Recent research has begun to document just how expensive it can be if land rights-related conflicts arise in an investment. Costs can run into the millions of dollars in some of the more extreme cases (Munden Project, 2012).

Ultimately, it simply makes financial sense to invest responsibly: "In fact, the information advantage offered by understanding land tenure risk may well provide a competitive edge in selecting [emerging market economy] … investment targets. The key for investors is to ask questions and develop risk management processes" (Munden Project, 2013: 3). Based on the Guidelines, this guide provides advice on which questions to ask and what risk management practices to adopt.

C. Target audience

The primary target audiences of this technical guide are those organizations that provide capital or manage funds that are used for investing in and/or operating land-based assets. We refer to this group as "investors" throughout the guide. By contrast, an "operator" is the entity that is actually managing the project on the ground. (Some investors may also be operators). The recommendations contained herein apply equally to international and domestic investors. All can use it to navigate through the responsible investment and due diligence process.

While recognizing the critical role smallholders play in ensuring food security and improving livelihoods, the guide is aimed at larger enterprises with the potential for greater impact on tenure rights – both positive and negative – along with greater resources to invest in support of responsible practices.[4]

This guide is directed at the following categories of investors:

- **asset owners:** such as pension asset owners: pension funds, insurance companies, family offices, private investors, endowment funds and private foundations that have a discretionary mandate over the funds they manage. They can either invest directly in land- based assets or through asset managers.
- **land aggregators:** publicly listed companies whose core strategy is to invest in and manage land assets.
- **asset managers:** firms that manage assets on behalf of asset owners – they are often also responsible for acquiring or arranging financing for the asset. Such firms include private equity (PE) funds, hedge funds and other investment vehicles that have a PE-like structure.
- **state-owned companies or sovereign wealth funds:** they often seek to secure access to the underlying commodities for their home countries.
- **multinational companies:** large food and beverage companies and others that invest in land as part of their strategy to secure supply and to ensure traceability.
- **financial services sector:** includes commercial banks that provide financing to clients investing in farmland.
- **bilateral or multilateral development banks:** includes the IFC and the regional and national develop-ment banks.
- **commodity traders:** such firms may be exposed to land tenure risk to the extent that they provide trade finance and hedging instruments as part of their operations.

Indirect investors that are one or more steps removed from the underlying assets – perhaps because they are investing in a fund that, in turn, invests in land – can also use this guide as they evaluate and negotiate with a direct investor. The guide can help indirect investors make clear what they expect as a condition of making

[4] For an extensive discussion of smallholder agriculture, see HLPE, 2013.

the investment. For example, where the guide recommends that direct investors commission (or insist that the operator commission) an independent ESIA during the due diligence phase prior to the investment, an indirect investor will know to ask whether the entity in which it is considering making an investment has a policy that requires ESIAs with acceptable results.[5]

Others in the value chain, such as multinationals or commodity traders that buy agricultural products but do not invest in land, may find this technical guide useful, but it is not primarily addressed to them.

D. A word about scale

The recommendations contained in this guide can be applied to all land-based investments, regardless of size. As a practical matter, however, agricultural investments in developing countries vary widely in terms of land area and capital requirements. Investors considering and then investing in small projects often will not be able to afford the same level of due diligence and risk management activities as they can for larger investments. While projects involving millions of dollars probably should be implemented with the assistance of multiple experts, perhaps using an expensive process such as the one required by the IFC (2012), in small projects, the investor or operator may have to conduct the due diligence risk assessment with far less expert assistance and with reduced financial resources. Where appropriate, we highlight situations where flexibility can be accommodated and demonstrate how smaller projects can do what is necessary to invest responsibly even within a financially constrained setting. Often this approach involves working with local NGOs.

Nevertheless, all investors should be able to use this guide to inform their assessments and to manage their investments in agricultural land in emerging markets.

E. The role of government

The Guidelines recognize that governments play the most important role in recognizing and protecting tenure rights, food security, human rights and the environment. Governments also play a crucial role in regulating investments and investors. In many settings, the government is actually a party to the investment contract. In 2015, the Food and Agriculture Organization of the United Nations (FAO) produced a technical guide entitled *Safeguarding land tenure rights in the context of agricultural investment*. This guide provides advice to government officials responsible for investment promotion, approval and monitoring on how to carry out their duties in a manner consistent with the Guidelines. Investors may wish to consult this other guide to gain a better understanding of the role of government.

[5] Note that the Equator Principles apply only to those deals exceeding a certain amount of money.

Of course, the private sector cannot and should not take on the role of government. However, investors and businesses can support and, in some cases, supplement the activities of government where the government is unwilling or unable to carry out its investment oversight and land governance responsibilities effectively. This guide suggests ways that investors and operators can support and augment the government in a way that respects legitimate tenure rights and reduces investor risk. It also observes that, while investors must always comply with national and international law (par. 2.2), there will be circumstances where it will be necessary and prudent to go beyond the minimum required by law, as set forth in the Guidelines.

2

Tenure rights

How to use *icons*

High-risk factors

The presence of a number of high-risk factors should prompt a responsible investor to decide not to proceed with the investment.

Medium-risk factors

A responsible investor should carefully re-examine the project in the due diligence phase and search for ways to mitigate risks.

2. Tenure rights

A. What do the Guidelines say?

Under the Guidelines, businesses and investors "have a responsibility to respect … legitimate tenure rights" and "should act with due diligence to avoid infringing on the legitimate tenure rights of others." In order to do this, investors "should include appropriate risk management systems to prevent and address adverse impacts on … legitimate tenure rights." They, or the operators in which they invest, must "identify and assess any actual or potential impacts on … legitimate tenure rights in which they may be involved" (par. 3.2).

The Guidelines also state that "responsible investments should do no harm, safeguard against dispossession of legitimate tenure rights holders and environmental damage, and should respect human rights" (par. 12.4). Investors are advised that they "have the responsibility to respect national law and legislation and recognize and respect tenure rights of others and the rule of law" (par. 12.12).

An essential goal of the Guidelines is gender equality. All stakeholders, both public and private, are urged to ensure equal tenure rights for women and men. Governments are encouraged to "ensure the equal right of women and men to the enjoyment of all human rights" (3B4) and to "take measures to ensure that legal and policy frameworks provide adequate protection for women and that laws that recognize women's tenure rights are implemented and enforced" (par. 5.4; see also pars. 4.6, 7.1,7.4,9.6, 11.6). The Guidelines instruct parties to agricultural investment contracts to see to it that the "negotiation process should be non-discriminatory and gender sensitive" (par. 12.11).

Agricultural investments often have a substantially different and greater impact on women. Men are often in a better position to benefit from investments while women are more likely to be negatively affected. Those seeking a more comprehensive discussion of women's land tenure rights and the Guidelines should consult the FAO publication entitled *Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance of land tenure* (FAO, 2013). It includes detailed advice on ensuring that women's tenure rights are identified and respected.

B. What is the risk?

In order to understand the risks arising from adversely affecting legitimate tenure rights, it is best to begin with a definition of "tenure" as it relates to land. We then discuss which tenure rights are deemed to be "legitimate."

One oft-cited definition of land tenure is "the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land" (FAO, 2002). In essence, land tenure refers to rights and institutions that define and govern people's rights to use, control and transfer land.

At the risk of oversimplifying, land rights generally can be divided into two categories: (1) those that are formally defined in law (such as constitutions, national laws and regulations); and (2) informal or "customary" rights defined by custom which may not be formally recognized by the law, but are nonetheless socially recognized and applied. Land rights can be collectively or communally held. Most users of this guide will be familiar with formal land rights but may know little about informal or customary rights.

Customary land rights are usually practised by a self-identified, often subnational group based on the group's traditions. They are usually unwritten, may be unknown to outsiders and not recognized by formal law, although there are countries, such as Mozambique, where the statutory law officially recognizes customary law (Tanner and Bicchieri, 2014). Customary rights may even conflict with formal law. This is often the case with respect to women's land rights. In many parts of the world, especially in Africa, customary law defines most land rights. In many settings, the interaction of formal and customary systems causes confusion, tension and disputes with regard to rights and access to land. An investor ignores them at his or her peril.

Perhaps the most challenging scenarios are those where there are overlapping tenure rights to the same land. In many countries, for example, the state is the legal owner of land where communities, families and individuals may have longstanding customary rights of use. Both the state and the customary users have tenure rights that may be considered to be legitimate. Rights held by others, such as pastoralists, may be seasonal. In such cases, pastoral communities may have used a particular area for grazing their livestock during certain times of the year, for generations. They may not have any formal, documented property rights to that land, but their rights to use it may be accepted by the other communities in the area.

This raises the question of which land tenure rights are "legitimate"? The Guidelines make clear that such rights include formal rights and "legitimate customary tenure rights that are not protected by law" (par. 5.3). We understand, then, that both formal and customary land tenure rights can be legitimate, but which ones are legitimate (AFD, 2014: 18)? The Guidelines do not provide a definitive answer, but they do define the process for determining which tenure rights are legitimate (para 4.4). Without a lengthy, in-depth discussion of the issue, which is not possible in this guide, we can say that all tenure rights formally recognized in law, as well as customary or informal rights not formally recognized but seen as legitimate and practised by communities for a significant period of time, should be accepted as legitimate by investors as they carry out their due diligence and project development (FAO, 2015b).

Of course, "communities" are not a homogenous group; they include groups with different priorities, constraints and power. Some groups within communities may be culturally or socially marginalized, such as rural women or the particularly vulnerable. Efforts to identify and respect the tenure rights of communities must include particular attention to marginalized and vulnerable groups.

Views of "legitimacy" may be the subject of considerable debate between governments and communities, and within or between communities. For example, pastoral groups and settled farmers may disagree over the nature and extent of the tenure rights held by the pastoralists who are on the land for a few months of the year. Similarly, indigenous communities may challenge the legitimacy of rights claimed by migrant communities, at least in terms of the strength of those rights and what standing those communities should have in negotiations concerning an investment project, and in sharing benefits derived from the project.

The risk to investors associated with land tenure rights arises from the failure to adequately recognize, account for and respect those rights (USAID, 2015b: 9). In much of the world, accounting for local land rights is not as easy as it may seem to investors accustomed to developed-world land tenure and administration systems where virtually all land rights are governed by formal law and maintained in effective and transparent record-keeping systems. In many developing countries, it can be difficult to identify even formal rights because of weak land administration systems. Land cadastres or registries may be incomplete or non-existent. It can be far more difficult to identify customary rights. As a result, land-based investments often fail to take local land rights into account adequately (Munden Project, 2013: 10).

Those who are disaffected because they were not consulted and/or are harmed by the project can block it through protests or other tactics (USAID, 2015b: 9). Furthermore, local communities often react negatively to investments on what they consider to be their land. For example, one study of 39 large agricultural investments concluded that the most commonly cited negative impact of the projects involved land-related issues (Mirza *et al.,* 2014).

Investment scenarios involving mergers, acquisitions or "brownfield" projects, where the investor is taking over an ongoing operation, can be especially problematic. The investor may have incomplete information regarding how the land was originally acquired, the existing land conflicts, environmental degradation or violations of human rights. It may be difficult to ascertain whether the seller or local partner is involved in corruption or human rights infringements (see Chapters 5 and 6). As discussed in the next section, it is likely to be far more difficult for an investor or operator to mitigate pre-existing harm in a "brownfield" situation than to avoid harm that may arise in a "greenfield" scenario.

Failure to take steps to avoid this kind of land tenure risk can have very expensive consequences. In 2012, the Munden Project released a widely-read report that found that ignoring local land rights resulted in financial harm ranging from huge increases in operating expenses to costs arising from complete abandonment of the project (Munden Project, 2012: 3). The report reached three broad conclusions:

1. Far from being an "externality", land tenure can be a real threat to stable returns, and a factor that should be considered in any risk assessment of a land-dependent investment, including credit rating analysis and insurance provision.
2. The financial risks posed are multiple, ranging from slippage in construction times and unexpected cash flow loss due to suspensions, to expropriation of assets following the loss of insurance coverage. The escalation of risk can be extremely rapid and irreversible, implying that conventional approaches to understanding and mitigating risk need to be augmented to manage the issue.
3. The impact of these risks ranges from substantial to catastrophic for the firm or investor involved. Initial modelling suggests that a typical investment encountering land tenure problems may incur an order of magnitude increase in cost. Such a massive inflation in outlay would be sufficient to change decision-making, assuming awareness of the potential risk (Munden Project, 2012: 5).

The next section discusses how these very significant risks can be managed.

C. How can risk be managed and mitigated?

What can an investor do to reduce the land tenure risk of a project? There are three basic steps to be taken during the due diligence and project design phase: (1) identify and recognize all land rights; (2) assess potential impacts the project may have on those rights; and (3) modify the project to avoid harm or move on to another opportunity.

1. Recognizing rights

To respect legitimate tenure rights one must first ascertain who possesses those rights. Thus, the first step in a process of due diligence that seeks to ensure that the investment does not infringe on legitimate tenure rights is to ensure that all holders of both formal and customary land rights are identified and documented. This process must include determination of the nature and extent of the land and improvements thereon (RSB, 2013: 1).

An initial step in recognizing rights is to obtain a basic understanding of national formal and customary land tenure laws – including the extent to which the formal law accommodates the customary law – as well as the relevant government institutions, administrative processes, dispute-resolution mechanisms and practices (USAID, 2015b: 18; AFD, 2014: 18). Most investors should obtain expert assistance at this stage, although there are good sources available to provide a basic understanding of the land tenure situation in a particular country (USAID, 2015a).

The next step is to engage in a careful review of official land records and meet with government officials. The review should reveal how the government categorizes the land (public, private or customary), whether the land has some sort of protected status (such as for conservation or forest preservation) and, possibly, the extent to which people claim use rights for some or all of the year (RSB, 2013: 4).

Reviewing government records is necessary but, in most cases, insufficient. An on-site investigation must also be done, usually as part of a process of participatory stakeholder mapping in order to identify rights not disclosed in government records, including those who have or will enter into a contract for use of the land. Stakeholder mapping can help define the universe of possible rights-holders and those who should be involved in consultations throughout the process. Thus, it also lays the foundation for consultation, negotiation and ongoing engagement with the community if the project proceeds (see Chapter 3).

It is essential that the stakeholder mapping be done in a participatory manner that engages local people from the very beginning. The exercise should entail extensive interaction with all segments of the affected community, including women, youth, pastoralists and all other groups, particularly the most marginalized (USAID, 2015b: 33).

The assessment should not only identify who has rights, but the nature and extent of those rights and how the land is being used. The land may be under the control of indigenous people. In some cases, rights may be communal or overlapping. Some may hold temporary use rights, such as tenants farming on land owned by others; others may hold seasonal rights, such as pastoral communities who graze their livestock in the area on a seasonal basis. All must be identified.

Costs. While requirements will vary considerably from project to project, the cost of rights mapping can be reasonable. One study estimates the cost to be from US$0.15 to US$0.30 per hectare (Munden Project, 2013: 26), although it could cost considerably more. The process of identifying rights can and should be done in conjunction with other information gathering to save money and reduce the burden on the community. For example, depending on the project, this process could be done in the initial stages of the ESIA. Furthermore, new technologies such as the SOLA and Open Tenure systems developed by FAO are providing quicker and cheaper processes for inclusive community mapping (FAO, 2015a).

2. Assessing potential impacts on tenure rights

Needless to say, simply identifying legitimate land rights holders in the area of a proposed investment is not enough. It is equally important to assess the impact of the proposed transaction on those rights, to determine whether it may harm the rights holders (Vhugen, 2014: 22–23). The Guidelines call for "prior independent assessments of the potential positive and negative impacts of the project" (par. 12.10). The IFC (2012), the European Investment Bank (EIB, 2013) and other financiers require such assessments in most cases.[6]

[6] One study recommends that investors carry out or require a "local, data-driven risk assessment" (Munden Project, 2013: 21).

BOX 3:
Women's land rights

It is extremely important to identify women's tenure rights as part of the mapping process. In much of the developing world, women's ability to own, control and access land is significantly constrained. Women tend to hold far less agricultural land than men and their tenure rights are substantially less secure. Women find it more difficult to have a voice in land-related decision-making. Therefore, they might be hardest hit by the reduced availability of land both for farming and collection of non-timber forest products, as a result of land acquisition by private companies. Investments that undermine women's land rights can have a particularly negative impact on household food security and well-being.

There is widespread agreement that responsible investments in land should respect and possibly strengthen tenure rights held by women. For example, number 3 of the Principles states that responsible investments should foster gender equality and women's empowerment in several ways, including "advancing women's equal tenure rights" and access to land and resources by ensuring that they have the necessary tools and inputs and can participate effectively in community decision-making.

This land tenure impact assessment should be part of a broader ESIA that also evaluates impacts on food security and human rights; it need not be a separate exercise. The specific circumstances of a proposed investment, including the needs and capacity of the local community and the nature and size of the proposed investment, will dictate how and when this assessment should be carried out. It should be done during the due diligence phase before agreements are reached and the project proceeds, as options are limited after the contract is signed (AFD, 2014: 22).[7] The more important point is that the impact assessment is an essential part of managing risk associated with negative effects on local populations (Munden Project, 2013: 21–22). The assessment should be done by an independent expert to ensure that the result is objective and credible (Munden Project, 2013; 21–22). The land tenure impact assessment should identify all potential impacts on existing formal and informal land rights, including:

- How will the land be acquired and what is its transactional history, especially if it was once subject to government expropriation?
- Will the project cause people to be resettled, involuntarily or voluntarily?
- Will there be a broadly inclusive consultation process and who will be involved? (See the Consultation section)
- Who will be involved in the negotiations and, if the project is to proceed, who will sign the contract?
- What is the local legitimacy of the person or institution expected to agree to the transaction? If the government is the formal owner of the land, how will users of the land (who hold informal use rights, but not formal property rights to the land) participate in the process?
- Are there existing grievances over the land?
- Has there been conflict or even violence in relation to use and control of the land?
- Are there dwellings on the land that might suggest there might be occupants who could claim to have informal land rights?
- What will be the impact on informal or customary tenure rights and on tenure

[7] While it is best to do the ESIA before an agreement is signed, in theory, the ESIA could be done after signing the contract if it provides that the project will be cancelled in the event that the ESIA reveals substantial harm to land rights, food security, human rights or the environment (Smaller *et al.,* 2014: 25).

rights of indigenous peoples, women, youth and those with seasonal rights, such as pastoralists?

- How can any projected adverse impacts be mitigated (AFD, 2014: 61–62, 69)?

Understanding the impact is not easy as circumstances are often complicated, as described in this scenario from a recent study conducted by the United Nations Conference on Trade and Development (UNCTAD): another common source of conflict between investors and local communities was the use of, or perceived encroachment onto, land that was temporarily unused by the formal title holder. A common situation was that previous owners of the land (the government or earlier investors) had the formal title to the land, and right to its use, but left land unused. In the intervening period, people had moved onto the land, cleared it, and begun cultivation and thereby established informal rights to the land. When a new investor was granted a concession or acquired land, they sometimes discovered that their rights to the land are difficult to assert because communities are *in situ*. In some cases, people had been using the land for decades or generations before new investors arrived (Mirza *et al.* 2014: 36).

For investors, the absence of a land tenure impact assessment based on some sort of participatory mapping (whether or not as part of a broader ESIA), should be seen as a red flag suggesting the project may not be a suitable investment (See Box 4).

BOX 4:
Tenure rights risk factors

High Risk

- There are a significant number of existing or recent disputes or claims involving the land that cannot be resolved.
- This is more likely to be the case in an acquisition, merger or "brownfield" investment scenario, involving an ongoing operation (as opposed to a "greenfield" project where the land is either not being used commercially or is being used for other commercial purposes).
- Local people are evicted either because the government originally acquired the land by expropriation or the project requires expropriation of land to make it available for development.
- The project design requires the large-scale transfer of land rights from local people, possibly resulting in many people being involuntarily or even voluntarily resettled.
- The operator/direct investor has not and will not carry out:
  - participatory stakeholder mapping;
  - a land tenure impact assessment (possibly as part of a comprehensive ESIA); or
  - consultation processes with the community.

Medium Risk

- The project land area appears to exceed what can reasonably be put under production over the life of the project, thus raising concerns about speculative motives.
- The project will be situated in an area where land rights tend to be undocumented and/or governed by informal law and the operator has yet to do participatory mapping to identify all legit-imate rights holders.
- An independent ESIA of the proposed project, including an evaluation of potential impacts on land tenure, gender, food security and human rights has yet to be completed.
- The ESIA reveals the likelihood of significant negative effects on land rights, food security, gen-der, human rights or the environment if the project is not revised as recommended by the ESIA.

3. Modify the project to avoid harm

If the impact assessment reveals possible or actual negative effects on legitimate tenure rights, the project should be reconfigured to avoid the negative impacts (see Chapter 6). If that is not possible, the investor should not pursue the investment. This is in keeping with the Guidelines admonition to "do no harm" and "prevent and address adverse impacts on … legitimate tenure rights" (par. 3.2 and 12.4; see also the Principles, number 10).

The impact assessment should include specific mitigation measures that can be adopted if the project proceeds. Such measures could include:

- exploring alternative investment models that do not result in the transfer of land rights, such as partnerships with local land-rights holders and contracts with small-scale producers;
- utilizing a different land acquisition structure, such as a lease, over an outright acquisition. Even leases can be problematic if the duration is too long, or the scale is too large, so shorter terms should be considered, including appropriate inflation-related adjustments or periodic review clauses so that reasonable adjustments to lease rates and other provisions can be discussed;
- avoiding voluntary resettlement of people by considering other feasible alternatives. If voluntary resettlement cannot be avoided, those who agree to move should receive fair and prompt payment and have continued access to resources and alternative livelihoods;
- reducing the amount of land to be acquired for the project or changing its boundaries to reduce the land rights impact; and
- ensuring that community members continue to have secure access to some land for subsistence farming and other livelihood activities. As discussed more fully later, in all cases investors should avoid the eviction of local people, even with compensation. As a general rule, investors should avoid project models that involve the transfer of land rights from smallholders and other local people (Oxfam Australia, 2014: 53) or at least minimize the extent to which such transfers are necessary. The Guidelines encourage governments to:
  - "support investments by smallholders as well as public and private smallholder-sensitive investments" (par. 12.2);
  - promote "a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors" (par. 12.6); and
  - "encourage partnerships with local tenure rights holders" (par. 12.6).

Partnerships:

There are a variety of ways in which the operator can work in partnership with local farmers. One way is by contract farming, sometimes referred to as an "outgrower" or "nucleus hub" scheme. In such a scheme, the operator often acquires a small "nucleus"

farm, which is surrounded by a network of smallholders who sell their production to the operator. The operator provides technical support, inputs and, perhaps, credit to the local farmers (USAID, 2015c: 39).

Even such partnership arrangements can have a negative impact on local tenure rights. For example, if a project causes the smallholder farms to increase in value – perhaps because the parcels have become more productive or because a food crop has been replaced by a high-value cash crop – men may force women off parcels they have controlled for decades. This action undermines the legitimate tenure rights of those women so it may be necessary to include protections for women in the partnership scheme, particularly as women and marginalized groups with insecure access are more likely to lose access as land value increases. In all cases, of course, these schemes should be based on fair and transparent negotiations and contracts with farmers. A wealth of advice on responsible outgrower schemes is available and should be consulted by those contemplating such arrangements (FAO, 2012a).[8]

Another way to engage the local land-rights holders in the project is by providing them with an equity stake in the project. Equity stakes probably should be in addition to the price paid for the land in the form of either a purchase price or lease rental, as local rights holders are likely to need an income stream to replace the income or production they previously received from the land. Pure equity share arrangements, such as the "land-for-equity" models are risky as there is no guarantee that the project will be successful and may effectively sterilize the land for local users during the periods of non-operation or winding-up schemes. Even successful projects may not provide any tangible returns on investment for many years. Most local rights holders will not be able to wait, so it is important that they receive an income stream from the very beginning of the project.

It may also be appropriate to reduce the amount of land acquired for the project. There are many examples where investors have not used all of the land allocated, thereby creating conflict with the local community. The 2014 UNCTAD study found that operators were using less than 10 percent of the allocated land in one-fourth of the cases included in the study. There were a variety of reasons for this result, including the size and age of the project, inadequate financing or lack of proper due diligence in project evaluation and planning. Whatever the reason, the underuse of land has mostly negative consequences for all concerned (Mirza *et al.,* 2014: 36–38). It raises suspicions that the land was acquired primarily for speculative purposes. Some financiers, including the IFC, will not finance non-productive speculative investments (IFC, 2014). This problem can be avoided or minimized by ensuring that those engaged in planning the project have the expertise, including access to local knowledge, to determine the appropriate land size, and that this analysis is undertaken either in the preliminary assessment phase or very early in the due diligence process. Investors should certainly carefully evaluate the operator's business plans and ability to implement the project, and should consider the benefits of phasing the release of land based upon successful development of the initial parcel (Mirza *et al.,* 2014: 38).

[8] UNIDROIT, FAO and IFAD. 2015. UNIDROIT/FAO/IFAD Legal Guide on Contract Farming. Rome. http://www.fao.org/3/a-i4756e.pdf

Where land rights are transferred voluntarily (as discussed in the next chapter), investors should see to it that the land rights holders receive fair and prompt payment. The rights recognition process will have identified the parties that should be paid. Such parties include all whose rights, both formal and informal, are impacted, not just the formally recognized rights holders (USAID, 2015b: 36–37, 42).

Valuation and pricing:

Valuing land in many rural, low-income country settings can be very challenging. The prevailing international approach involves determining the fair market value of the land. This is often defined as the price a willing buyer will pay to a willing seller. Suffice it to say for the purposes of this guide that it can be very challenging to estimate fair market value in the absence of an active and transparent land market with accurate records of land transactions. All parties – investors, operators, communities and the government – may find it difficult to calculate the fair market value of rural land. Indeed, operators should be wary of offers from the government or communities that seem to be exceedingly low. A low price, especially when the package is linked to generous tax concessions, may be appealing at the outset of the project, but accepting it creates a risk in that the community and/or government may generate problems later when they realize they sold or leased their land for too little. This is particularly a concern where land is sold, and governments should be discouraged from such an approach. It is, however, also a serious potential problem in leasing where adequate arrangements for regular revisions are not included.[9]

Fair and adequate payment for all impacted parties is unlikely to be achieved by paying only what the government would be required to pay under national law, for example expropriation law (see below). As explained previously, the law may not recognize informal tenure rights or mandate payment for seasonal users or other overlapping rights holders. In addition, women often receive little or no payment as they may be users of the land but have tenuous tenure rights. For example, women may traditionally harvest non-timber forest products from a forested area that is included in an investment project. Investors must take care to ensure that the women are adequately paid for losing access to those products.[10]

Expropriation:

Perhaps the most serious adverse impact on tenure rights occurs when local rights holders are evicted, perhaps forcibly. Eviction will usually occur when the government uses its underlying ownership of land or its power of eminent domain (also referred to as expropriation) to take land to make it available for some public use or benefit.

[10] Several studies have documented that monetary compensation can be easily captured by men and local elites, with chiefs being the principal beneficiaries. See, for example, King and Bugri, 2013.

[11] There is a large body of literature on the subject of valuing land. See Tenga *et al.,* 2012.

By definition, expropriation means that the government has not obtained the consent of all affected people. This is especially problematic if those displaced are indigenous peoples entitled under international law to give or withhold their free, prior and informed consent (FPIC) (see Chapter 3). One objective of the IFC performance standards is to avoid forced eviction because of the strong likelihood of substantially negative impacts on those who are evicted (IFC, 2012, Standard 5). In general, the Guidelines do not expressly preclude expropriation. Governments following the Guidelines may take land for a "public purpose" but in doing so they should clearly define the concept of public purpose in order to allow for judicial review (par. 16.1). In addition, they "should respect all legitimate tenure right holders, especially vulnerable and marginalized groups, by acquiring the minimum resources necessary and promptly providing just compensation in accordance with national law"(par. 16.1). The Guidelines further advise governments to provide those whose tenure rights are taken by the government for a legitimate public purpose with "a fair valuation and prompt compensation in accordance with national law" (par. 16.3).

However, responsible investors seeking to minimize risk should avoid projects that require eviction and involuntary resettlement even if the eviction was legal under national law. Some investors, such as the Africa Agriculture Trade and Investment Fund (AATIF) have adopted just such a policy. Indeed, an important risk mitigation strategy is to avoid resettlement of any kind. Even voluntary resettlement presents many difficulties and is hard to carry out in a way that is satisfactory to those forced to move (Mirza *et al.,* 2014: 39–40).

While investors should avoid scenarios that require government expropriation, they can apply this compensation standard to their negotiations with rights holders who have agreed to transfer their rights to the investor or operator. In many cases, payments for the transfer of rights should consist of more than cash; alternative land and other non-cash payments can be crucially important to avoid harm. Moreover, "fair compensation" goes beyond the reasonable value of the land. It should also cover environmental and social harm and other losses such as the cost of resettlement and new housing, and changes to employment or livelihoods (FAO, 2008). But there is no "one size fits all" formula as each circumstance is different. Those being paid under agreements to transfer rights, or compensated where rights are expropriated, should be no worse off than they were before the project and, in practical terms, their situation should have improved.

Legacy issues:

Investors may face unique challenges if the land required for the project has ever resulted in the involuntary displacement of local people long before – perhaps many years before – the current investment was even contemplated. For example, people may have been forced to move off land acquired by the government through an expropriation process. The people may or may not have been adequately compensated. That land may have been transferred to

a third party some years later and henceforth made available to the project under consideration by the investor. There could be ongoing grievances stemming from the original government land taking. What should an investor do in such a situation? In such cases, investors should seriously reconsider the viability of the proposed investment (RSPO, 2013: Principle 2.3). It may be best not to proceed with the investment as the project may be so socially unacceptable as to be untenable (AFD, 2014: 37). At the very least, the investor might insist that the operator take steps to compensate or otherwise resolve these ongoing grievances as a condition of making the investment. Investors must begin by determining how the seller/lessor (which could be the government or a party to which the government transferred the land) acquired the land in the first place.

Identifying rights, assessing impacts and implementing mitigating measures go hand-in-hand with effective consultation with the communities where the project will be situated. This is the subject of the next chapter.

BOX 5:
Tenure rights risk management checklist

Agricultural investments can create value for all affected parties. But there is always the risk that these investments could harm those with legitimate tenure rights. In the most extreme cases, financial harm can run into millions of dollars. Legitimate tenure rights include both formal, documented rights and informal, usually undocumented, rights. Those with legitimate tenure often include people with seasonal or overlapping rights, such as those held by pastoralists. Particular attention should be paid to the rights of women.

- ✓ In the project design phase, consider project models that do not involve the transfer of land rights from smallholders and other local people, or at least minimize the extent to which such transfers are necessary. In all cases, avoid projects that require expropriation and eviction. An important risk-mitigation strategy is to avoid resettlement of all kinds, whether voluntary or involuntary.
- ✓ Identify and recognize all land rights:
  - consult with experts on national and local customs and practices relating to land;
  - meet with government officials and review government land records;
  - begin consultations with the community at a very early stage, ensuring women, youth and vulnerable groups are represented (see Chapter 3); and
  - carry out a participatory mapping exercise in which the community assists in identifying and mapping all local land rights holders and uses.
- ✓ During the due diligence process commission or require an independent ESIA to identify potential impacts the project may have on the tenure rights identified by participatory mapping, and on the environment, gender, food security and human rights (see Chapter 6). It should also recommend ways to mitigate adverse impacts.
- ✓ If the ESIA reveals possible or actual negative effects on legitimate tenure rights, attempt to reconfigure the project to avoid them. There are a variety of reconfiguration measures that may be suitable, depending on the circumstances, including:
  - exploring alternative investment models that do not result in the large-scale transfer of land rights, including partnerships with local land-rights holders and contracts with small-scale producers;
  - utilizing a different land acquisition structure, such as a lease with appropriate terms and conditions including periodic rent revisions instead of an outright acquisition, or a lease term that is shorter in duration;

- avoiding the resettlement of people by considering feasible alternatives, but if voluntary resettlement cannot be avoided, those resettled should be promptly and adequately paid and have continued access to resources and alternative livelihoods;
- reducing the amount of land to be acquired for the project, and/or modifying boundaries to minimize impact; and
- allowing community members to continue to use at least a part of the land for subsistence farming.

✓ If it proves impossible to avoid the negative impacts on local tenure rights, do not proceed further with the investment.

3

Consultation, participation and negotiation

How to use *icons*

High-risk factors

The presence of a number of high-risk factors should prompt a responsible investor to decide not to proceed with the investment.

Medium-risk factors

A responsible investor should carefully re-examine the project in the due diligence phase and search for ways to mitigate risks.

3. Consultation, participation and negotiation

A. What do the Guidelines say?

The Guidelines promote the widespread use of consultation with and participation by all those affected by a proposed investment. "Consultation and participation" is defined as:

> *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 (3B6).*

The Guidelines urge governments and other parties (including investors) to consult effectively with all stakeholders, including "indigenous peoples and other communities with customary tenure systems, smallholders and anyone else who could be affected" (par. 7.3).[11] Indigenous peoples are afforded particular attention given that investment projects affecting their land tenure rights require their FPIC before they may proceed (par. 9.9). Other communities are en-titled to consultation and participation (par. 12.7).

B. What is the risk?

Projects that do not include adequate consultation and participation processes are likely to incur substantially higher costs than those that do (Munden Project, 2014). This is because effective consultation is inextricably intertwined with the process of recognizing and avoiding harm to legitimate tenure rights, as previously discussed. It is also tied to avoiding harm to food security, the environment and human rights, as discussed in Chapter 6.

[11] See also *Guidelines,* par. 8.6 calling for consultation with "anyone who could be affected" by policies affecting tenure rights, and par. 9.9, providing for consultation with indigenous communities and other communities with customary tenure rights.

Without an adequate process of consultation, participation and negotiation it is difficult, if not impossible, to:

- accurately recognize legitimate tenure rights, especially customary rights;
- comprehensively and accurately assess the impacts of a proposed investment on tenure rights, food security, human rights and the environment;
- know whether all legitimate rights holders have participated in and consented to any necessary agreement transferring land rights; and
- lay an adequate foundation for a productive, ongoing relationship with the community during the life of the project (USAID, 2015b: 13–14).

Those who are disaffected because they were not consulted can delay or stop a project through protests or other tactics. Thus, investing in a robust consultation process makes financial sense despite the upfront cost of doing so. Such costs should be seen as a normal part of an effective due diligence analysis. And the cost of consultation is likely to be far less than expenses arising from delays caused by land rights conflicts that could have been avoided by effectively engaging with affected people (USAID, 2015b: 22, 27). In addition, projects for which some sort of "sustainability" certification is important are unlikely to be certified if they fail to consult effectively with all stakeholders over the life of the investment (RSPO, 2013: Principle 1.1, 2.3, 6.3; RSB, 2013: Criterion 2b).

BOX 6:
Consultation and negotiation risk factors

High Risk

- The operator will not carry out a culturally appropriate and inclusive participation and consultation process with all affected parties in the community.
- Indigenous communities have not given their free, prior and informed consent (FPIC).

Medium Risk

- The local community has not been involved in the project planning phase.
- Affected stakeholders have not yet been engaged in an effective, culturally-appropriate and transparent consultation process.
- All relevant information about the project has not yet been disclosed in the consultation.
- A comprehensive written agreement on the terms of any transfers of legitimate formal and informal land rights has not yet been completed.
- Indigenous communities reside on or near the project site.
- Consent has been obtained only from traditional authorities.

C. How can risk be managed and mitigated?

How does one carry out an effective consultation and negotiation process? In the context of the Guidelines, we describe here the basic approaches that should be utilized:

1. All affected parties in the community are sufficiently informed about the project and have an opportunity to represent their interests.
2. The process meaningfully includes all affected parties.
3. An agreement is supported by (or, at least, not opposed by) all or almost all affected parties. (Even the best project is likely to have some opposition.)

It is prudent to devote considerable time and resources to developing relationships with local communities in order to accomplish these goals (Munden Project, 2014: 3–4).

1. When to engage

Consultations should begin early in the due diligence and project planning process and continue throughout the development of the concept, the negotiation of the terms and the operation of the project. In most cases, consultation should be tied to the ESIA to involve the community in that exercise. To be meaningful, consultations should proceed at a pace that is comfortable for the community and begin long before the contract is concluded (AFD, 2014: 26). The operator should continue to engage with the community over the life of the project pursuant to a stakeholder consultation and engagement plan.

2. With whom to engage

The Guidelines call for consultation with and participation by all affected stakeholders (par. 9.7). The previous chapter discussed identification of those with legitimate tenure rights and the potential impact of a project on them. All such parties – not only those with formal rights – should be included in the consultation process (Smaller *et al.* 2014: 14). Thus, while every situation will differ, the list of affected parties identified in the recognition of rights and impact assessment phases should generally include the following segments of the community: national, regional and local authorities; respected local leaders (often traditional authorities); those holding formal title to land; those with customary or informal use rights to the land; women; youth; non-resident users such as pastoral groups; tenants; and the elderly (USAID, 2015b: 14, 21). Those planning to engage in discussions with local communities should first determine whether they need government approval to do so. Conducting truly inclusive consultations is difficult. In many settings there can be tension between maintaining respect for customary norms and institutions and being able to reach those who the mainstream community considers to be irrelevant. This is not to say

that the marginalized groups should be excluded; rather, we simply observe that including them can be very challenging but yet necessary, and therefore resources should be allocated for this task. There are many resources available that can provide helpful guidance (IFC, 2007). As a rule, consultations should not be limited to local/traditional leaders who may, in a sense, "represent" the broader community, but who also have their own interests and may use their leadership position for personal gain.

BOX 7:
Community engagement plans

Source: Smaller *et al.*, 2014: 14.

According to the UN Special Representative on Business and Human Rights, the consultation, participation and negotiation process should be set forth in a community engagement plan that the community has agreed to at the outset. Such a plan, which should be a "road map" for the agreement, detailing each step in the process, should include:

1. An inclusive plan with clear lines of responsibility and accountability;
2. Consultation with affected communities and individuals before the finalization of the contract;
3. Disclosure of information about the project and its impacts as part of meaningful community engagement;
4. Knowledge about the history of any previous engagement efforts carried out by either of the parties with the local community regarding the investment project; and
5. Community engagement plans aligned at a minimum to the requirements of domestic and international standards. For example, free prior informed consent or consultation with those potentially affected may be required.

3. How to consult

A consultation must take specific account of the interests of each group (AFD, 2014: 62). There are many strategies and techniques that can be used to achieve this result. The best approach will depend on the particular situation. But all consultations should be voluntary, honest, inclusive, ensure that women take part, and offer opportunities for meaningful feedback from those consulted. The approach should ensure that there is a clear, mutual understanding of what tenure is about. Other things to take into account are:

Location. The consultations should be convenient and accessible to all, which usually requires engaging directly with people where they live or work. This is key to ensuring women's participation.

Meetings should be well publicized. People need to know about the meetings so using different communication channels is important. Notices may need to be tailored to the locations, activities and restrictions placed on various groups. For example, in some settings women may not be able to leave the area near their homes so they may not see notices posted in central village locations or in the District Land Office.

Culturally appropriate. Consultations must be culturally appropriate, taking into account such factors as language, local decision-making customs and gender.

Different groups within the community, such as women and pastoral groups, may require different interactions in terms of style or timing (AFD, 2014: 26).[12]

Include all stakeholder groups. All affected groups must have the chance to participate meaningfully. To achieve this, it may be helpful to use one or more facilitators, such as local NGOs or CSOs, trusted by various groups within the community. It will be useful for some of the facilitators to be women.

Freedom from retribution. In some settings, individuals may be reluctant to express their opinions in the presence of traditional leaders, government, police or military officials for fear of retribution. It may be necessary to hold meetings outside of the presence of government officials and local authorities, and also to protect community members by having their opinions recorded anonymously.

Respect community decisions. If consultations are to be meaningful, the decisions of the community must be respected even if the outcome is not to the liking of the investor or operator.

Engage in multiple consultations over time. Generally, effective participation can only be achieved by a series of consultations that may extend over many months or even years. It is best to maintain an open door policy to facilitate ongoing communications even after the project is in operation.[13]

The content of the consultation should inform people of all relevant information concerning the project. As explained more fully in Chapter 5, investors should insist that operators disclose all essential information related to the project as part of the consultation process. This level of transparency should continue throughout the life of the project as continuous communication with local communities can help to ensure harmonious relationships and enable the community to monitor whether or not the project operator is complying with contractual commitments.

Of course, consultation sometimes leads to actual negotiations with tenure rights holders. Effective negotiation should utilize the same principles and practices as those that apply to consultation, including strategies to ensure that the voices of the most marginalized and vulnerable groups are heard. The process of identifying rights holders should make clear who has the au-thority to enter into transactions involving the right to use land. Frequently, local communities may not have tenure rights that require them to be parties to any contract related to the land transaction, but they are important stakeholders, nonetheless. If the project is to proceed smoothly, it is essential not only to consult with the broader community, but also to obtain their cooperation and consent. Communities must be recognized as parties to the agreement even if the formal law does not afford them that status.

In most cases, operators should enter into written agreements with the community that clearly set forth the expectations, rights and responsibilities of all parties. This should be done even where such an agreement is not necessary to transfer tenure rights, or otherwise, required by law. Such an agreement can build from the consultation plan previously described. Many communities will not have the expertise to negotiate effectively on their own behalf. It may be advisable for the investor or

[12] For an extensive discussion of strategies to include women see Knight *et. al.,* 2012.

[13] Most of the foregoing list is from USAID, 2015: 28-29.

operator to help the community gain access to competent legal representatives, if possible, through a legal aid programme or other arrangement where the investor does not directly compensate the person or party advising the community. (An operator could pay for community representation, but this may be seen as creating a conflict of interest if the representative has divided loyalties to the community and to whoever is paying the fee.) Where it is difficult or inappropriate for an operator to find and vet a lawyer or other representative for the community, locally credible NGOs often can assist.

4. Free, prior and informed consent (FPIC)

The Guidelines state that any investment affecting the land or resources of indigenous peoples should not proceed without the FPIC of those affected by the proposed project or investment. This gives indigenous communities a veto – the right to say no – to a project being implemented in their territory. This power may extend over the lifetime of the project if the nature or scope of the investment changes over time.

Much has been written about FPIC (FAO, 2014b) and a detailed discussion is beyond the scope of this paper. Indigenous people's right to FPIC is derived from the International Labour Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples. This guide draws on the description of FPIC in the guide entitled *Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* (FAO, 2014b):

> *[The] collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use (FAO, 2014b; 4).*

It is useful to look more closely at each of the four elements of FPIC, as outlined by FAO, 2014b:

Free. Those deciding whether to consent to a project should do so without "coercion, intimidation or manipulation".

Prior. Consent must be sought well before any authorization or the beginning of project activities. The timetable must allow sufficient time for culturally appropriate consultation and for completion of local decision-making processes.

Informed. People receive all relevant information about the project. The information provided must be "objective, accurate and presented in a manner or form that is understandable to" those receiving it.

Consent. The people have agreed to the activity that will take place on their land. The right to consent includes the right to say no to the project or to offer to consent only under certain conditions.

Here, again, an important factor is to know from whom to seek consent. The community should decide how it wishes to be represented and by whom. The decision will vary from place to place, depending on local customs. It may be necessary for investors to insist that operators make special efforts to ensure that the voices of women, labourers, the landless and others who may not be able to participate are heard. Ultimately, it is the local people, including actual land users and those customary owners who are most directly implicated by the proposed project, who must give or withhold consent (RSB, 2013: 13).

Moreover, FPIC is much more than a process that leads to a one-off decision. It is an iterative, continuous process requiring ongoing communication. For an extensive discussion of FPIC, consult the FAO guide entitled *Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* (FAO, 2014b).

The Guidelines (par. 9.9) explicitly call for FPIC only where indigenous peoples are involved, and call for the principles of consultation and participation to be applied in the case of other communities. Those principles are set out in par. 3B.6 as "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 most prudent risk management approach for investors is to take appropriate measures, whether as FPIC or an application of the principles of consultation and participation, in any situation where an investor requires land where there is a local population living and working.

Indeed, sometimes FPIC is required. For example, the Roundtable on Sustainable Biomaterials (RSB) requires FPIC in all cases as a condition of certification (Criterion 12b and 11–12). Similarly, the Roundtable on Sustainable Palm Oil (RSPO) requires FPIC where using land for palm oil will diminish the formal or informal rights of other users of the land (Principle 2.3). And some large multinational companies, including Coca Cola, PepsiCo and Nestlé, require FPIC in all land acquisitions within their supply chains even where indigenous peoples are not involved. Indeed, it can sometimes be difficult to determine whether a particular community is "indigenous." There is no globally agreed-upon definition of the concept. Different terms – aboriginals, hill tribes, first nations, etc. – are used in different countries (IFC, 2012: Performance standard 7, par. 4–5). In some countries, communities may see themselves as indigenous, but not be recognized as such by government authorities. The IFC (and large private banks applying the parallel Equator Principles) sometimes require their clients to hire experts to determine whether a particular group qualifies as indigenous (IFC, 2012: Performance standard 7, par. 7). It may well be in the best interests of investors and local communities alike to require FPIC in all cases and especially in smaller projects, to reap the long-term benefits from positive relationships with the local community and to avoid the ambiguity and resulting cost involved in determining whether a particular group is indigenous.

To sum up, investors who follow the Guidelines and decide only to fund projects that respect and do not harm legitimate tenure rights should insist upon a robust process of consultation and participation with all affected communities. They should give serious consideration to insisting that no project should proceed without the FPIC of all communities with legitimate tenure rights to the land.

BOX 8:
Consultation and negotiation checklist

Projects that do not include adequate consultation, participation and the approval of local people are likely to incur substantially higher costs than those that do because it is difficult, if not impossible, to identify and recognize tenure rights, assess impacts or develop a productive ongoing relationship with the local community. Consultation should be an inherent part of the ESIA.

- ✓ Consult with a local expert familiar with the customs and culture of the community with which the investor will engage.
- ✓ Create a community engagement plan to guide the process.
- ✓ Begin the consultation early in the project planning phase and continue throughout the due diligence phase, the negotiation of the terms and the operation of the project.
- ✓ Using the results of the participatory mapping exercise identified in Chapter 2, ensure that all affected stakeholders – not just those with formal land rights – are consulted.
- ✓ Design and plan the consultations to take account of the customs, culture, language, decision-making practices and interests of the group. They should be voluntary, inclusive, honest, collaborative, based on shared information and offer opportunities for meaningful feedback.
- ✓ Recognize that different groups within the community, such as women and pastoral groups, may require different interactions in terms of style, location or timing, and adopt measures to ensure that these groups can participate.
- ✓ Provide all relevant information to the community in culturally-appropriate formats.
- ✓ Engage in multiple consultation sessions over time and continue to do so over the life of the project.
- ✓ Create a record of any decisions made during the consultations.
- ✓ If the investment affects the land or resources of indigenous peoples, ensure that the project does not proceed without their free, prior and informed consent (FPIC). The right to consent includes the right to say no to the project, or to offer to consent only if certain conditions are met.
- ✓ Consider adopting a policy that requires FPIC in all cases in order to reap the long-term benefits of positive relationships with the local community.

4

Grievances and dispute resolution

How to use *icons*

High-risk factors

The presence of a number of high-risk factors should prompt a responsible investor to decide not to proceed with the investment.

Medium-risk factors

A responsible investor should carefully re-examine the project in the due diligence phase and search for ways to mitigate risks.

4. Grievances and dispute resolution

A. What do the Guidelines say?

The Guidelines recognize that governments have the primary responsibility for developing and operating mechanisms to resolve disputes over tenure rights. Governments are advised to:

> *…provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes (par. 3.1.4). Governments are told to provide "timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes" (par. 4.9 and 21.1).*

Such mechanisms should be "accessible to all, women and men, in terms of location, language and procedures" (par. 21.1).

The Guidelines also give the private sector a role to play:

> *Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights (par. 3.2).*

B. What is the risk?

Unresolved claims and grievances can undermine the investment or saddle it with additional costs associated with addressing the claims of those who believe they have been harmed. Claims that end up in court can cause substantial delay. A recent United Nations Conference on Trade and Development (UNCTAD) study of 39 large-scale agricultural investments found that grievances and disputes resulting from reduced access to land were the most commonly cited negative impacts of those investments (Mirza *et al.,* 2014: 25).

This risk derives from two related scenarios. One involves existing disputes over land or other resources that are or will be affected by the project. Investors might expect such disputes to be resolved by government institutions. As a practical matter, however, in many countries those with grievances face significant barriers to accessing justice, including the absence of reliable, accessible, speedy and impartial judicial processes (Munden Project, 2012: 7; OHCHR, 2011: 29–31). Such unresolved conflicts may place the project at risk even though the investor or operator had nothing to do with the dispute.

The second involves grievances or disputes that can also arise from the project itself. In such cases, the investor or operator will have a much more direct obligation to address the grievance or to find a way to resolve the dispute.

Both cases present substantial financial risks to investors. In some extreme cases, conflicts involving land have cost hundreds of millions of dollars per year in project stoppages in the mining and extractives sectors (Franks *et al.,* 2014). There can be little doubt that the potential for significant loss faces those involved in the agricultural sector, too.

Unresolved conflicts over land can also prevent agricultural projects from earning valuable certifications for sustainability or obtaining debt financing. Projects cannot be RSB-certified if there are unresolved disputes over the land on which the feedstock is grown or the biofuel produced (Principle 12.1). The RSPO contains a similar provision (Principle 2.2). And Principle 6 of the Equator Principles requires borrowers to establish grievance mechanisms under some circumstances.

C. How can risk be managed and mitigated?

While the Guidelines observe that governments should resolve disputes, in many countries the formal legal system does not function very well. It can take years or even decades for land-related cases to be resolved in court. Of course, private enterprises cannot establish processes that replace the formal justice system, but investors should expect operators to be prepared to work with the community to ensure that an appropriate grievance or dispute-resolution procedure is available to affected parties to supplement more formal processes. Doing so will do much to reduce the risks associated from the existence of tenure-related grievances. The UN Guiding Principles on Business and Human Rights explicitly call on businesses to "establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted" (Principle 29). Principle 9 contains similar provisions (FAO, 2014c).

In some circumstances, grievance mechanisms will be required. For example, as a condition of certification, the RSPO requires that there be "a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all affected parties" (RSPO, 2013: Principle 6.3).

What are the characteristics of effective grievance and dispute-resolution mechanisms? There is a substantial amount of material available that readers can consult for detailed guidance on the subject (See Good Practice Note, IFC, 2009). Investors or project operators should seek advice from experts and organizations with local expertise in designing a mechanism that is appropriate for a given setting. Generally speaking, such mechanisms should incorporate the features that are hallmarks of good consultation processes: they should be designed with the community, and be culturally appropriate and transparent. The mechanism should allow communities to present their grievances and concerns in a way that will allow prompt and fair resolution (Smaller *et al.,* 2014: 2). A neutral arbiter should have ultimate power to decide grievances that the parties cannot resolve through consultation and negotiation. Gender-sensitive NGOs trusted by the local community can assist with dispute resolution, especially in places where traditional processes tend to disadvantage women and marginalized groups.[14]

These mechanisms should arise from the extensive consultation process with the community. In this process, operators can learn how the community resolves grievances and engages in discussions leading to an agreement on an appropriate mechanism for that community and project.

Investors wishing to minimize their risk and act in accordance with the Guidelines should adopt and implement a policy requiring fair resolution of any disputes involving land or other issues, and employing a culturally sensitive grievance process agreed to by all stakeholders (Oxfam Australia, 2014: 53).

BOX 9:
Grievances and dispute resolution checklist

Unresolved claims and grievances can undermine the project or saddle it with additional costs associated with handling the claims of those who believe they have been harmed.

- ✓ Creation of an appropriate non-judicial grievance and dispute-resolution procedure should be one of the subjects discussed with the community in the consultation process. The community and the investor should define the procedure jointly.
- ✓ In many cases it may be necessary to consult with an expert for assistance in designing the process.
- ✓ As with effective consultation processes, the grievance mechanism should be compatible with the customs, culture, language, decision-making practices and interests of members of the community, including women.
- ✓ The mechanism should lead to prompt and fair resolution of grievances and disputes.

[14] For a comprehensive list of the hallmarks of effective non-judicial grievance mechanisms, see OHCHR, 2011: Principle 31.

5

Transparency and Corruption

How to use *icons*

High-risk factors

The presence of a number of high-risk factors should prompt a responsible investor to decide not to proceed with the investment.

Medium-risk factors

A responsible investor should carefully re-examine the project in the due diligence phase and search for ways to mitigate risks.

5. Transparency and Corruption

A. What do the Guidelines say?

In several sections, the Guidelines emphasize the importance of transparency and avoiding corruption on the part of all parties involved in or affected by investments in land. For example:

States should endeavour to prevent corruption, particularly through increasing transparency, holding decision-makers accountable and ensuring that impartial decisions are delivered promptly (par. 10.5). ”

States and other parties should ensure that information on market transactions and information on market values are transparent and widely publicized, subject to privacy restrictions (par. 11.4). ”

State 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 (par. 11.7). ”

All forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done transparently in line with relevant national sectoral policies and be consistent with the objectives of social and economic growth and sustainable human development focusing on smallholders (par. 12.3). ”

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 (par. 12.11). ”

Other sections promote transparency and urge stakeholders to avoid corruption in connection with expropriation and compensation, information on tenure rights, valuing such rights and dispute-resolution processes (par. 16.6, 17.5, 18.3, 18.5 and 21.5).

B. What is the risk?

Corruption and lack of transparency create substantial risks for investors. The two go hand-in-hand as corruption is likely to be more prevalent in settings that lack transparency. Unfortunately, there are transparency and corruption problems in many countries where agricultural investments have become increasingly common (Munden Project, 2013: 4).

Engaging in corrupt activities can expose operators and investors to criminal liability under a variety of national laws that have extraterritorial applicability. For instance, private investors can be subject to the United States Foreign Corrupt Practices Act as well as to the national laws of the many countries that have ratified the Organisation for Economic Cooperation and Development's (OECD's) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Moreover, corruption in relation to investments in land is harmful to all stakeholders in that it increases the cost of the investment as well as the potential for conflict (OECD, 1997: 35–36). It is a substantial risk factor that investors must take very seriously (AFD, 2014: 47).

The risk increases where government is primarily responsible for transferring land rights to investors because such transfers present a potential revenue stream to the officials involved. As a result, there may be little incentive to determine and record local claims to land or natural resources accurately as such records may make it more difficult for corrupt officials to exact bribes (Munden Project, 2013: 23). A related high-risk scenario arises when an investor enters into a partnership arrangement (which could take many legal forms, including corporations, joint ventures, or pure partnership structures) with a politically exposed person (often a senior political official or relative of such an official). Such individuals are deemed to be more susceptible to bribery and corruption.[15] In addition to facilitating corruption, lack of transparency increases the likelihood that the public, especially the local community, will oppose an investment. Lack of information can create uncertainty among the local population, which can lead to fear and significant opposition to proposed projects. A high level of transparency can have the opposite effect, as the more communities know, the more comfortable they are likely to be in accepting an investment (Mirza *et al.,* 2014: 12 and IFC Performance standard 1, par. 29).

BOX 10: **Transparency and corruption risk factors**

High Risk

- The locality where the project may be situated has significant corruption, and corrupt activities have been observed in relation to the proposed project.
- Joint venture partners or other local partners in the investment have been involved in corrupt activities.

Medium Risk

- Affected stakeholders have not yet been engaged in an effective, culturally-appropriate and transparent consultation process that includes disclosure of all relevant, non-proprietary information about the project.
- The local project partner or operator refuses to disclose non-proprietary information to stakeholders (including local communities).
- Application of the rule of law is weak in the country or region where the project is located.

[15] For a discussion of the risks of associating with politically exposed persons, see the Federal Financial Institutions Examination Council publication (undated).

Private sector representatives have expressed concerns over confidentiality and the costs arising from greater disclosure of project information. However, rather than hurting business, recent research shows that greater transparency is positively correlated with better financial performance (Wickeri and Kalhan, 2010: 54–55).

C. How can risk be managed and mitigated?

1. Corruption

To learn about the general level of corruption in a particular setting, investors can consult a variety of publicly available sources, such as the country rankings in Transparency International's Corruption Perceptions Index. Some investors may utilize such information as part of a broader effort to quantify the risk of a particular investment (Munden Project, 2103: 23–25). Another indication is the extent to which the country hosting the project has implemented the 2003 UN Convention Against Corruption.

Most investors will require advice from local experts to help them gain a sufficient understanding of the corruption challenges at the national and project levels (UNGC 2014). This may be especially so where traditional decision-making institutions – which can be very difficult for outsiders to understand and access – are prevalent. Such institutions are not immune to corruption. Local elites may control or have substantial influence over these bodies or individuals which can allow them to benefit illegally or unfairly from transfers of land rights (USAID, 2015b: 12). Such practices can harm others in the local community, especially women and those who may have little or no influence. The Guidelines implicitly recognize this risk in a provision that emphasizes preventing corruption in relation to tenure rights in indigenous communities and those where customary rights are prevalent (par. 9.12).

Investors should also adopt policies and processes that demonstrate "no-tolerance" for corruption at any time over the course of a project. They should insist that the operators or projects in which they invest do the same. Such policies should go hand in hand with similar provisions relating to transparency.

Many standards and certification schemes echo this advice, often making it mandatory. For example, as part of RSPO's requirement that companies commit to ethical business practices, those seeking certification are informed that company policy should prohibit all corruption, bribery and fraud (Principle 1.3).

Similarly, the institutional investors who have adopted the Farmland Principles commit themselves to adopting "high business and ethical standards" in their agricultural investments (Principle 4). They also insist on equally high standards from those who act on their behalf.

Policies are not enough, of course. Investors must have and insist upon the development and use of internal controls, including monitoring and compliance

programmes. Such internal controls and programmes should ensure that the company's records cannot be used to hide bribery or complicity in other corrupt activities (OECD, 2011: section VII, par.2).

2. Transparency

Investors can manage risks arising from lack of transparency by ensuring that all essential information related to the transaction is made available to the public. This could include some or all of the following: contracts; ESIAs; feasibility studies, the identity of the ultimate beneficial owner of a project or partner; and all other relevant information other than that which is truly confidential from a competitive standpoint. Perhaps it is obvious but being transparent is inextricably linked to the process of stakeholder engagement, consultation and to building solid relationships with the community.

The Guiding Principles on Large Scale Land Based Investments in Africa advise member governments to "require investors to disclose comprehensive project information in accessible form to parties affected by the investment" (African Union, 2014: Principle 4). The IFC requires clients to make the following information available to satisfy consultation and FPIC require-ments, as discussed in Chapter 3:

> *(i) the purpose, nature, and scale of the project; (ii) the duration of proposed project activities; (iii) any risks to and potential impacts on such communities and relevant mitigation measures; (iv) the envisaged stakeholder engagement process; and (v) the grievance mechanism.*[16]

Certain information related to the investment, such as business plans, market studies or commercially sensitive information, may remain confidential if revealing them would give an advantage to competitors.

But ongoing transparency and reasonably full disclosure throughout the life of the project will enable communities and government to monitor the project as it proceeds (Smaller *et al.,* 2014: 49). This is a crucial part of maintaining good relationships with affected stakeholders.[17] A prudent approach may be to adopt a presumption of disclosure, subject only to well-defined exceptions for information that would truly cause competitive harm if disclosed (EIB, 2015).

An issue of particular concern to investors and operators relates to whether investment contracts should be made public. There appears to be a broad consensus in favour of doing so (Smaller *et al.,* 2014: 53). Many, including the UN Special Representative on Business and Human Rights, the International Bar Association, the UN Special Rapporteur on the Right to Food and others support this position. RSPO requires publication of all project documents except those

[16] IFC Performance Standard 1, par. 29 describes the information that should be disclosed. See also RSPO, 2013: section 1.2.1. The AATIF imposes a similar requirement on p. 5, par. 16.

[17] Recognizing the importance of maintaining these relationships with stakeholders, the IFC Performance Standards require ongoing reporting, at least annually, to affected communities. See IFC Performance Standard 1, par. 36.

involving commercial confidentiality (Principle 1.2). A small number of countries, including Ecuador, Ethiopia, Liberia and Peru, require such disclosure by law, at least in some cases (Smaller *et al.,* 2014: 53).

Transparency is also served where investors and operators report annually on the tenure and human rights impacts of their investments. This report is often required by lenders (for example, in the case of the Equator Principles, Principle 8), other investors or even the investor's home country.[18] Direct investors in land should report regularly and indirect investors should insist that those in which they invest also do so. Reporting is consistent with provisions in the UN Guiding Principles on Business and Human Rights (OHCHR, 2011), which stipulate that companies should be prepared to communicate publicly on how they address adverse human rights impacts, and should formally report how they address any human rights impacts (Wickeri and Kalhan, 2010; 26). The IFC encourages its clients to publish reports on their environmental and social sustainability (IFC, 2012; Performance standard 1, par. 34).

Investors who educate themselves on the climate of corruption in countries where they may invest, adopt and implement corporate governance practices that enhance transparency and prohibit any involvement with corrupt practices, will go a long way towards effectively managing the risks corruption poses to investments in agricultural land.

BOX 11:
Transparency and corruption checklist

- ✓ Corruption in relation to investments in land is harmful to all stakeholders. Engaging in corrupt activities can also expose investors to criminal liability and substantially increase project costs.
- ✓ To manage the risk presented by corruption, investors should:
  - become informed about the overall climate of corruption in the country and locality where the investment will occur; and
  - adopt and comply with policies and processes that promote transparency and that demonstrate "no-tolerance" for corruption. They should insist that the operators or projects in which they invest do the same.
- ✓ No-tolerance corruption policies must be operationalized by the development and use of internal controls, including monitoring and compliance programmes. Transparency increases the likelihood that the public, especially the local community, will not oppose the investment. Lack of transparency can have the opposite effect.
- ✓ Being transparent should be an integral part of the process of stakeholder engagement, consultation and community relationship-building.
- ✓ Investors should see to it that all information related to the transaction is available to the public except that which is legitimately commercially sensitive.
- ✓ Contracts, especially those involving large tracts of land, should be made public; again, subject to legitimate confidentiality concerns.

[18] For example, Denmark requires Danish companies to report annually on their efforts to respect human rights and reduce their impact on the climate. See Government of Denmark, 2014: 6.

6

Food security, human rights and the environment and sustainability

How to use *icons*

High-risk factors

The presence of a number of high-risk factors should prompt a responsible investor to decide not to proceed with the investment.

Medium-risk factors

A responsible investor should carefully re-examine the project in the due diligence phase and search for ways to mitigate risks.

6. Food security, human rights and the environment and sustainability

The Guidelines address many issues that are important to investors, operators and the people living in the communities in which agricultural land-based investments are made. This chapter discusses the due diligence and risk management implications of three of those issues: food security, human rights and the environment.

A. Food security

1. What do the Guidelines say?

Ensuring food security for all is at the heart of the Guidelines. They seek to provide a pathway to "the overarching goal of achieving food security for all and to support the progressive reali-zation of the right to adequate food in the context of national food security" (Preface).

The Guidelines note that "responsible public and private investments are essential to improve food security" (par. 12.1), and that responsible investments should actively strive to improve food security (par. 12.4). There is a particular emphasis on the importance of supporting small-holder farmers because of the important role they play in ensuring food security in much of the world (par. 12.2). Investors are also told that their investments "should not contribute to food insecurity" (par. 12.12; Principle 1).

In addition article 11 of the International Covenant on Economic, Social and Cultural Rights recognizes a human right to adequate food. Investors violate this right at their peril.

2. What is the risk?

Well-designed agricultural investments can improve household food security, but poorly structured projects can have the opposite effect, especially if the project causes small farmers to lose land on which they have grown food for subsistence.

Impacts on food security can also occur when the project involves communal areas used seasonally by pastoral communities, or common property areas, such as forests where local people – often women – collect non-timber forest products such as nuts or fruit. Impacts can occur for any number of reasons, including: the introduction of new crops; substituting cash crops for food crops; restricting access to land, fisheries, forests or water; and food price increases caused by a shift towards exporting food (Smaller *et al.,* 2014; De Schutter, 2009: 3).

A land-based investment that threatens local access to food or water is very likely to provoke strong opposition that poses a major risk to the investment (Munden Project, 2012: 6–7). Moreover, investors growing food for export could face an export ban if the project (perhaps together with other projects) creates food security concerns. An investment can have a positive impact on access to food if it creates stable employment that pays adequate wages that can be used to buy food. But agricultural labour is often seasonal and, therefore, wages may not be sufficient to allow food purchases that fully replace the food obtained from subsistence farming on land that may have been transferred to the investment project (Mirza *et al.,* 2014: 27–28). This possibility can be especially harmful to women who are often heavily involved in producing food for the family. Even the most sustainable, responsible project can create both winners and losers.

3. How can risk be managed and mitigated?

Risks related to food security should be managed as part of the broader ESIA process that identifies impacts on local communities and ways to eliminate negative effects. If the impact is severe, the investment should not proceed (Smaller *et al.,* 2014: 16). The IFC now requires that a food security baseline assessment be available or undertaken in advance of any prospective investment when the project is in a food-insecure country (IFC, 2014). Agricultural investments should never harm food security. One strategy is to ensure that local farmers continue to have access to their subsistence parcels, or, if necessary, an equivalent alternative piece of land should be provided nearby in a way that avoids or minimizes disruption of the family. Another approach is to assess whether food produced and exported by the project has a negative effect on the price or availability of food in local markets (De Schutter, 2009: 8).

Responsible investors can go beyond "do no harm," especially in food insecure regions, by following the Guideline's call to improve food security (par. 12.4). Strategies could entail improved availability, access, stability of supply or utilization of food. Specific strategies include:

- setting aside land in or near the project site for growing food for local consumption (RSB, Criterion 6b);
- providing training and other technical assistance to local farmers on sustainable agriculture to improve productivity of their farms;
- increasing access to local markets;

- improving rural infrastructure to facilitate greater farmer access to markets;
- providing training to local communities on nutrition;
- making "value-added food by-products available to the local market" (RSB, Criterion 6b);
- utilizing outgrower schemes (see Chapter 2) or similar arrangements that leave land in the hands of local farmers and take advantage of the fact that small family farms are frequently more productive than large plantations, especially in more labour-intensive settings;[19]
- providing access to credit to local farmers.

Agricultural investments that "improve local food security by increasing productivity and serving local markets, while avoiding an increase in inequalities of incomes in rural areas" (De Schutter, 2009; 8–9) will be those that best manage food security-related risks.

BOX 12:
Food security checklist

Agricultural investments can negatively affect access to food of local populations, especially if the project causes them to lose land on which they have grown food for subsistence. This impact is likely to provoke strong opposition, thus posing a significant risk to the investment.

✓ Identifying and addressing risks related to food security should be included in the ESIA as part of the broader process of identifying impacts on local communities. The ESIA should include a plan to avoid or mitigate those impacts, if it possible to do so. If it is not possible, the investor should forego the investment.

✓ Responsible investors can go beyond "do no harm" and attempt to increase food security through strategies that can improve availability, access, stability of supply or utilization of food.

B. Human rights

1. What do the Guidelines say?

The Guidelines say that investors and businesses have a duty to respect and avoid infringing on human rights and to identify, assess and remedy any negative impacts they have on such rights (par. 3.2). A "responsible investment" is one that respects and does no harm to human rights (par. 12.4).

Generally speaking, human rights include civil, cultural, economic, political and social rights. While the Guidelines do not provide a comprehensive list of applicable human rights, the international conventions referenced include:

[19] De Schutter, 2009: 8–9. As previously highlighted, care must be taken to prevent adverse impacts on women who may lose the use of land that is perceived to have increased in value.

- The Universal Declaration on Human Rights (par. 1.1);
- The ILO Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries (par. 9.3);
- The Convention on Biological Diversity (par. 9.3);[20]
- The United Nations Declaration on the Rights of Indigenous Peoples (par. 9.3).
- Generally, the most important human rights framework applicable to investors is the UN Guiding Principles on Business and Human Rights referred to later in this section.

2. What is the risk?

The risk to investors if a project violates human rights arises in part from the possibility of legal or even criminal, liability:

> *As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime (OHCHR, 2011: 20).*

As with other specific subjects addressed in this guide, the local opposition that human rights violations will cause presents a significant financial risk. It is difficult to overstate the potential for financial disaster that may result if the rights of local people are violated, especially if this causes them to become impoverished, evicted or otherwise physically or financially harmed. Violating human rights will also prevent projects from being certified by some of the commodities roundtables (RSB, 2013: Principle 4). It is also important to remember that all human rights are indivisible, interrelated and interdependent and investors should not look at them independently one from the other.

While there is no universally recognized human right to land except for indigenous peoples under ILO Convention 169, access to land can be a fundamental element in the realization of the rights to adequate food and to housing. National law usually governs land issues. However, at least two important instruments of human rights law contain references to land: the International Covenant on Economic, Social and Cultural Rights (ICESCR), in relation to the right to adequate food; and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in relation to the rights of women in rural areas (UN Women, 1979).

While the UN Guiding Principles on Business and Human Rights do not recognize or incorporate a right to land, they do declare:

[20] While the Convention on Biological Diversity is not a human rights instrument, its provisions relating to indigenous peoples are particularly relevant to the Guidelines.

The responsibility of business enterprises to respect human rights refers to internationally-recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (14).

A detailed discussion of the link between land rights and human rights is beyond the scope of this guide.[21] Briefly, the International Bill of Rights consists of the Universal Declaration of Human Rights and two implementing treaties: the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR. The ICCPR covers "rights to enjoy physical and spiritual freedom, fair treatment, and to participate meaningfully in the political process" (Castan Centre for Human Rights Law *et al.,* 2008: X) as well as the freedoms of expression, association and assembly. Operators may find themselves inadvertently violating these rights if project protests are blocked and protestors are threatened, intimidated or arrested.

Rights protected by the ICESCR cover a range of employment rights as well as the freedom to enjoy and participate in cultural life, and the right to an adequate standard of living including housing and adequate food. Private enterprises have a responsibility to respect these rights (Castan Centre for Human Rights Law *et al.,* 2008: X).

To summarize, land acquisitions expose investors to significant risks of violating human rights, including the rights to food and adequate housing, especially in situations where governments take land and evict the inhabitants – with or without compensation – and then transfer it to investors. "Such acquisitions create substantial risks for investors who own the companies involved, because the protests and legal disputes they generate can cause substantial financial, reputational and legal harm to their interests" (IHRB, 40). Other risks involve litigation in regional human rights courts.

BOX 13:
Human rights risk factors

High Risk

- The ESIA finds negative impacts on human rights that cannot be adequately mitigated.

Medium Risk

- Human rights violations have been reported in the area.
- There is conflict or post-conflict instability near the project site.
- An independent ESIA of the proposed project that includes an evaluation of potential impacts on land tenure, gender, food security and human rights has yet to be completed.
- The ESIA reveals the likelihood of significant negative effects on human rights, but includes effective ways to mitigate those effects if properly implemented.

[21] For a more extensive analysis of land rights as a human right see Cotula, 2014 and Wickeri and Kalhan, 2010.

3. How can risk be managed and mitigated?

Risks arising from negative impacts on human rights can be managed as part of the broader due diligence approach discussed throughout this guide; that is, the ESIA should assess actual and potential impacts on human rights and set forth a plan to avoid or mitigate those impacts, if it is possible to do so. If it is not possible, the investment should be seen as highly risky and should be avoided (OHCHR, 2011: 18–21; USAID, 2015b: 17). Indeed, an investor would be wise to integrate human rights protections throughout its business and to insist that businesses in which it invests do the same. This process begins with adopting and publicly announcing internal policies reflecting the firm's commitment to upholding humanrights (OHCHR, 2011: 17).

It should carry over into the development and use of a human rights due diligence process that ensures that investments the firm makes do not infringe on human rights. The policy should also include continuous monitoring, documentation and, in many cases, public disclosure of the impact of the investment along with provisions for redressing unforeseen negative impacts that may occur over the life of the investment (OHCHR, 2011: 19–24). Investors should monitor and take seriously, by investigation and, if warranted, remedial actions, any reports by NGOs or others alleging human rights abuses by firms or projects in which they have invested.

Identifying, assessing, avoiding or remediating human rights violations is complex and difficult. In many cases investors will need to retain experts to assist in the process (OHCHR, 2011; USAID, 2015b: 6; UNGC, 2014).

It is also important to ensure that adequate grievance mechanisms are in place, as stated by the Guidelines (par. 3.2).

The Guiding Principles on Business and Human Rights state that businesses should have processes in place to remediate any adverse human rights impacts that they cause or contribute to, and should provide for or cooperate in the remediation of such impacts through legitimate processes in conjunction with operational-level grievance mechanisms of broader applicability (OHCHR, 2011: Principle 25 and p. 32; USAID, 2015b: 50–51). Such mechanisms are discussed in Chapter 4.

BOX 14:
Human rights checklist

The risk to investors if a project violates human rights arises, in part, from possible civil or criminal liability and, in part, from the local opposition such violations will cause. Land acquisitions expose investors and operators to significant risks of violating human rights.

- ✓ Risks arising from negative impacts on human rights should be managed as part of the ESIA, which should assess actual and potential human rights impacts and lead to a plan to avoid or mitigate those impacts, if it is possible to do so. If it is not possible, the investor should forego the investment.
- ✓ Investors should also integrate human rights protections throughout their business and insist that businesses in which they invest do the same.

C. Environment and sustainability

1. What do the Guidelines say?

According to the Guidelines, one of the characteristics of a responsible investment is that it does not harm the environment (par. 12.4 and 12.12). Governments are advised to "promote the sustainable use of land, fisheries and forests and conservation of the environment" (par. 11.2). The Guidelines recognize the important role that smallholders play in environmental resilience (par. 12.2), and they instruct governments to adopt tenure-related policies that address climate change and include all affected parties in consultations and implementation of climate change mitigation strategies and mechanisms (Section 23).

2. What is the risk?

There are two major risks to investors arising from potential harm to the environment. First, as discussed in relation to other topics in this guide, local communities, government, investors, customers and others may react to potential or actual environmental damage by taking actions that threaten the financial viability of the investment. Second, causing harm to the environment, or failing to abide by laws requiring environmental impact assessments, may subject operators and investors to civil or criminal liability. Thus, potential harm to the environment can create a material risk to the viability of the investment (Wickeri and Kalhan, 2010: 7).

The majority of developing countries require environmental impact assessments for projects in many economic sectors. However, enforcement of these laws and the quality of the assessments that have been conducted have sometimes been weak, and only a small percentage of assessments have been disclosed to the public (Smaller *et al.,* 2014: 25). Nevertheless, there is a broad international consensus on the importance of incorporating high environmental standards into agricultural investments (De Schutter, 2009: 9). Some investors and lenders insist on sustainable environmental practices as a condition for equity or debt financing. For example, the IFC, the EID and banks abiding by the Equator Principles have mandatory environmental compliance standards, including environmental impact assessments in many cases with appropriate mitigation actions based on the results of the assessments (IFC, 2012; EIB, 2013; Equator Principles, 2013). Moreover, environmental sustainability is a core component of the Guidance for Responsible Investment in Farmland (UNGC, 2014). Signatories agree to require that investment managers and operators conduct rigorous environmental impact assessments and adopt appropriate management and mitigation measures (Guideline 1).

Similarly, commodities certification roundtables usually require compliance with stringent environmental protection practices as one of the conditions for certification. For example, the RSPO mandates a long list of practices aimed at ensuring that certified projects do not harm the environment (Principles 4.2–4.6, 5.1–5.6).

Threats to local water supplies can be especially problematic: "Beyond the obvious social impact to affected communities, water issues pose a range of risks to business

– from higher costs to major business disruptions stemming from supply chain interruptions and a possible loss of license to operate" (Interfaith Center, 2012: 4–5). Needless to say, agricultural projects cannot survive without an adequate supply of water. Disputes with communities over water can cause costly project delays (Project Munden, 2013: 22). In addition, access to drinking water is a human right so investors whose projects interfere with that right expose themselves to the risks described in the section on human rights.[22]

Investors must also be wary of projects that impact forests, wetlands and areas of high conservation value. There are many examples of agricultural investment projects that have resulted in deforestation caused, in some cases, by illegal logging. Some studies have found that at least half of global deforestation is caused by commercial agriculture (Lawson, 2014).

In short, risks related to harm to the environment represent significant threats to the financial success of an investment.

BOX 15:
Environment and sustainability risk factor

High Risk

- The ESIA finds negative impacts on the environment that cannot be adequately mitigated.

Medium Risk

- The site has forests or is in an area of high conservation value.
- An independent ESIA that includes an evaluation of potential impacts on land tenure, food security and human rights of the proposed project has yet to be completed.
- The ESIA reveals the likelihood of significant negative effects on the environment, but includes ways to mitigate those effects if properly implemented.

3. How can risk be managed and mitigated?

Increasingly, investors are adopting robust environmental governance policies to address risk. Investors in agriculture recognize that the best approach to managing risks arising from harm to the environment is to maintain high environmental standards (Munden Project, 2014: 2). Maintenance of those standards involves the use of effective environmental impact assessments, whether or not required by law (Munden Project, 2013: 22). In most cases, such assessments should be part of the same broader process of community mapping, ESIAs, community consultations and negative impact mitigation discussed elsewhere in this guide.

Some countries lack comprehensive laws requiring sound environmental practices, and countries that do have such laws may not enforce them effectively. In some settings, too, laws that require ESIAs may not be applied to agricultural projects

[22] Some investor home countries, such as Germany, have established principles that take into account the human right to water. See German Federal Ministry for Economic Cooperation and Development (BMZ), 2012

(Smaller *et al.,* 2014: 5). In such cases, investors should insist operators do more than what is required by law.

An example of recent private sector action in response to the risks of being associated with destructive environmental activities is the "zero deforestation" commitments adopted by multinational companies such as Wilmar, Unilever, Cargill and Conagra. For example, Wilmar, the world's largest palm oil company, has pledged to eliminate from its supply chain all deforestation, development on peat and exploitation of local communities by the end of 2015 (Wilmar, 2013).

There are a wide range of guides and standards available to inform high quality environmental impact assessments. These include, but are certainly not limited to, the IFC environmental, health and safety guidelines, the RSB's Principles 7–11 and supporting guidelines, the World Bank Environmental Health and Safety Guidelines, part 1, the FAO Environmental and Social Management Guidelines and the Industry Sector Guidelines for plantation crops and annual crops.

The ultimate objective is to create and implement a plan to manage environmental risks as part of the larger ESIA mitigation plan. Best practices support making the ESIA and the resulting plan available to the public as discussed in the chapters on consultation and transparency (Wilmar, 2013). The result of the ESIA might also indicate that the project is untenable and should be avoided. Such an outcome is consistent with the admonition in the Guidelines that investments should do no harm to the environment.

BOX 16:
Environment and sustainability checklist

There are two significant risks to investors arising from potential harm to the environment. First, such harm will likely engender stakeholder opposition to the project. Second, causing harm to the environment, or failing to abide by laws requiring environmental impact assessments, may subject operators and investors to civil or criminal liability.

- ✓ Investors can best manage the risk by requiring effective environmental impact assessments as part of the ESIA before deciding to proceed with the project, whether or not such assessments are required by law.
- ✓ The ultimate result of an environmental impact assessment should be a plan to manage environmental risks. The plan should describe how the operator will prevent, minimize and mitigate the project's projected harmful environmental impacts.
- ✓ The results of the ESIA might indicate that the project is untenable and, therefore, the investment should not proceed.
- ✓ The ESIA should be conducted by an independent third party to ensure objectivity.

7

Important implementation challenges

How to use *icons*

High-risk factors

The presence of a number of high-risk factors should prompt a responsible investor to decide not to proceed with the investment.

Medium-risk factors

A responsible investor should carefully re-examine the project in the due diligence phase and search for ways to mitigate risks.

7. Important implementation challenges

As the preceding chapters demonstrate, responsible agricultural investments, while potentially beneficial for all concerned, are not easily achieved. This chapter addresses two particular implementation challenges – building local capacity and monitoring – and suggests strategies for addressing them.

A. Capacity building

1. What do the Guidelines say?

In a variety of sections, the Guidelines recognize the importance of helping local communities manage and optimize the impact of investments in land where they live. Governments are encouraged to provide support to "people so that they can enjoy their tenure rights and fulfil their duties" (par. 7.5) and to "ensure that competent bodies responsible for land, fisheries and forests have the human, physical, financial and other forms of capacity" (par. 8.10).

The Guidelines also urge all stakeholders to help communities utilizing customary tenure systems and indigenous communities to "increase the capacity of their members to participate fully in decision-making and governance of their tenure systems" (par. 9.2) and to provide legal and technical assistance to those communities so they can participate in the development of laws and policies affecting their tenure rights (par. 9.10). Governments are also encouraged "to provide technical and legal support to communities and participants" in efforts to obtain formal legal recognition of informal tenure rights (par. 10.3).

Notably, the Principles strongly urge investors to help build local capacity (Principles 2–4).

2. What is the risk?

Inadequate local capacity threatens agricultural projects in three ways. First, the many communities in the developing world that cannot effectively protect their tenure

rights and engage with operators may be less likely to support the project (Smaller *et al.,* 2014: 14). Second, local smallholders may not be able to provide an adequate supply of high quality farm products in places where the project relies in part on outgrower production. Third, communities may be unable to supply all of the trained workers required by the project.

3. How can risk be managed and mitigated?

Agricultural investments represent an opportunity to build capacity in communities to benefit the communities and the operator alike. Many communities need assistance in some or all three of the following areas: (1) understanding and protecting their tenure rights and more broadly engaging in effective community development planning and activities; (2) dealing effectively with the investment process and the project operator; and (3) participating in the project itself through partnership-type arrangements, such as outgrower schemes or direct employment. Investors can encourage operators to work directly with community members or with local civil society organizations to provide this assistance (AFD, 2014: 48).

Helping communities to protect their tenure rights and to engage in broader community development initiatives can be seen as the responsibility of government, as recognized by the Guidelines. But, in some cases, it may be in the interests of the investor also to support efforts to assist local communities. One strategy is to help informal land rights holders, or those whose customary tenure rights do not have legal recognition and protection, including women, to formalize their rights. The operating company can also take affirmative steps to help document local indigenous land rights (par.9.8). Doing so can build positive relationships with the rights holders, facilitate accurate tenure rights recognition and avoid conflicts over land rights in the future, all to the long-term benefit of the operator, investor and community.

Helping communities improve their ability to engage more effectively in the investment process is also good for investors. Knowledgeable communities will be in a better position to engage in community mapping, consultations, negotiations, resolution of grievances and ongoing interaction with the project operator. For example, the mapping process itself can be a way to build capacity if community members receive training and then meaningfully participate in the exercise (USAID, 2015b: 34). Or, an investor might see to it that the community has independent legal counsel or access to trained paralegals, as discussed in Chapter 3.

Investors also may be able to support efforts to assist local communities in creating village trusts, cooperatives or other bodies to manage the interests of the broader community in the transaction. If truly representative, they can provide an opportunity to enable vulnerable groups to participate more actively and to receive a more equitable share of any payment or compensation. They can also facilitate communication with the community (USAID, 2015b: 45).

In some cases, operating companies may be required to engage in capacity building as a condition of the sustainability certification. For example, RSB Criterion 5.b states: "In regions of poverty, special measures that benefit and encourage the participation

of women, youth, indigenous communities and the vulnerable in biofuel operations shall be designed and implemented." Progress requirement 5.b.2 reinforces that training is required to effect this requirement.

Implementation challenges

The third strategy for managing this risk is for the investor or operator to help train members of the community to participate in the project itself. One way of doing so is to provide support to smallholders, both women and men, who will be suppliers to the project as part of a process of continuous improvement. Helping smallholders who supply raw materials to the project to improve the quantity and quality of what they grow benefits both the farmer and the project (RSPO, 2013: Criterion 4.8; USAID, 2015b: 40).

Investors can also support employee training programmes and encourage operators to promote employees into management roles over the medium to long term as they gain skills and experience (Mirza et al., 2014: 24). The Guidance for Responsible Investment in Farmland suggests that investors should consider employee training as an implementing measure (UNGC, 2014). Training and hiring locally can also help to strengthen ties with the community.

Here, as with other topics addressed in this guide, investors should ensure that women are included in capacity-building programmes. RSPO Criterion 4D states that women should receive skills training, and that training to avoid gender discrimination should also be offered. Moreover, "efforts should be made to employ and train women and otherwise include women in beneficial contracting arrangements (such as supporting women farmers' organizations)" (USAID, 2015b: 19).

BOX 17:
Local capacity building checklist

Inadequate local capacity threatens agricultural projects in three ways: (1) communities that cannot effectively protect their tenure rights and engage with investors may be less likely to support the project; (2) local smallholders may be unable to supply the project with an adequate supply of high quality farm products where the project relies, in part, on outgrower production; and (3) communities may lack enough trained workers required by the project.

- ✓ Investors can provide technical and financial assistance to help communities improve their ability to engage more effectively in the investment. Knowledgeable communities will be in a better position to engage in community mapping, consultations, negotiations, resolution of grievances and ongoing interactions with the project.
- ✓ Investors should encourage operators to build the capacity of outgrowers by providing them with agricultural extension services, seeds and other inputs, irrigation or equipment so that they can produce higher quality crops at greater volumes.
- ✓ Investors can support employee training with an emphasis on moving such employees into management roles over the medium to long term as they gain skills and experience.

B. Monitoring

1. What do the Guidelines say?

The Guidelines stress the importance of monitoring the impact of large-scale investments affecting tenure rights. Governments have the primary responsibility for monitoring the overall impact of investments in their countries. But all parties have a responsibility to track the effect of particular projects.

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 (par. 12.14). This provision complements another section that calls for all parties, including businesses, to monitor the implementation of ethical standards to help prevent corruption (par. 6.8, 6.9 and 11.7 and the Principles, Number 10).

2. What is the risk?

As this technical guide reinforces, projects that harm the tenure and other rights of those living in the project area are more likely to result in financial loss. Thus, the failure to monitor effectively whether those managing the project are properly managing those impacts presents a substantial risk factor.

Inadequate monitoring procedures can lead to any number of negative outcomes, such as:

- ineffective communication with communities caused by failure to follow a community engagement plan;
- poor implementation of mitigation measures set forth in an ESIA such that the potential harm identified in the plan actually occurs;
- community opposition when operators fail to abide by agreements or provide promised community benefits (AFD, 2014: 28); and
- inability of the company to demonstrate to either internal or external audiences what they are doing to comply with the Guidelines and what impact those activities are having on the communities where they operate and on the financial performance of the relevant investments.

Unfortunately, lack of resources and other factors cause many governments to do a poor job of monitoring the impact of investments in agriculture, even where the law requires them to do so (Mirza, 2014: 13). While this is slowly changing as governments incorporate the Guidelines into their laws and regulatory procedures, investors should ensure that operators engage in their own monitoring programmes in partnership with communities as part of their broader risk-management approach.

3. How can risk be managed and mitigated?

The actions an investor can take to manage risk related to monitoring are much the same as the actions recommended elsewhere in this guide. First, monitoring should be one of the subjects that operators discuss with the community during the consultation process. It may be wise to form a committee to monitor the implementation and impact of the project over time. Members of the community – including representatives of local civil society organizations – can serve on the committee. Second, all contracts governing or relating to the project should contain clear provisions setting forth the promises and responsibilities of all parties to facilitate effective monitoring (AFD, 2014: 47). For example, the agreement might contain clauses detailing the extent and timing of benefits for the community and penalties for failure to comply. In some cases, the contracts may include a clause detailing who will be responsible for monitoring and how that will be done. Third, and in keeping with the chapter on transparency and corruption, the non-proprietary content of all contracts, ESIAs and other relevant documents should be made available to the community and to the wider public. Investors and operators can also report publicly on their progress in implementing the Guidelines. Doing so not only promotes transparency, but facilitates effective monitoring. Fourth, the ESIA itself should have a monitoring provision. This will make it more likely that measures to mitigate adverse impacts on tenure, gender, food security, human rights and the environment will be carried out as per the mitigation plan. In larger projects it may be advisable to engage a neutral third party to fill this monitoring role in order to ensure maximum objectivity (USAID, 2015b: 50). Finally, where governments do attempt to monitor the project, investors should cooperate with them by providing access to relevant information and the project site at reasonable times.

BOX 18:
Monitoring checklist

Effective monitoring of measures to mitigate the risks arising from adverse social and environmental impacts is itself an essential risk-management strategy.

- ✓ Discuss monitoring in the consultation process and include the community in project monitoring.
- ✓ Utilize contracts that clearly set forth all promises and responsibilities of all parties.
- ✓ Make contracts, ESIAs and all relevant information about the project available to the public.
- ✓ Include a specific monitoring provision in the ESIA mitigation plan.
- ✓ Cooperate with government monitoring.

Summary of key messages

This technical guide is intended to help investors act with due diligence to achieve socially responsible and financially sustainable investments in agricultural land. While even the best project may harm some interests and elicit criticism, investors who evaluate, structure, operate and monitor their investments in a way that is consistent with the Guidelines will increase the likelihood of achieving their goals. The key messages in this guide can be summarized as follows:

1. Investments in agricultural land can have a profound impact – both positive and negative – on the communities where the investments are located. In recent years, many projects have caused rural land users to lose rights and access to their land, water and other natural resources.

2. Although the Guidelines are aimed primarily at governments, they also address business enterprises. Operating in a manner consistent with the Guidelines can help investors manage the substantial financial, legal, operational and reputational risks associated with investing in agricultural land in most developing countries.

3. In the project design phase, operators should consider project models that do not involve the transfer of land rights from smallholders and other local people. In all cases, investors should avoid projects that require expropriation and eviction. An important risk mitigation strategy is to avoid resettlement of all kinds, whether voluntary or involuntary.

4. An investor should conduct a preliminary analysis of a prospective investment to look for high-risk factors that, in most cases, indicate that the investment is too risky.

5. The due diligence analysis of each prospective project should include:

   - participatory mapping of all land-rights holders, including formal, customary and informal rights; and
   - a comprehensive environmental and social impact assessment that identifies the potential impact on land rights, livelihoods, human rights, food security and the en-vironment, and describes where, when and how to mitigate negative impacts or indicate that the project is too risky to proceed.

6. Projects that do not include adequate, ongoing consultation and the approval of local people are likely to incur substantially higher costs than those that do. Without an adequate process of consultation and participation it is difficult, if not impossible, to identify and recognize tenure rights, assess impacts or to develop a productive ongoing relationship with the local community. Therefore, all projects should incorporate an inclusive and culturally appropriate consultation and participation process that leads to an effective agreement or even FPIC of affected stakeholders.

7. Investors should adopt and implement a policy requiring fair resolution of any disputes involving land or other issues, employing a culturally-sensitive grievance process agreed to by all stakeholders. It may be necessary to create a mechanism that supplements the formal legal dispute-resolution processes.

8. Investors should adopt and insist upon "no-tolerance" of corruption policies and maximum transparency policies that require disclosure of all project information that is not legitimately commercially sensitive.

9. Often it will be in the interest of investors to support efforts to build local capacity to respond to and participate in agricultural investments.

10. Effective monitoring of measures to mitigate the risks arising from adverse social and environmental impacts is itself an essential risk-management strategy.

This guide should be part of a process of continuous improvement. It is very important for investors and operators to be involved in establishing best practices and improving them over time, based on real-world experience. It is also in their interests to encourage governments to insist on compliance with the Guidelines and other measures of responsible investment as this will tend to provide a level playing field for all. Land-based investments in developing countries are more likely to be successful if everyone – investor, local community and government – benefit. The Guidelines provide a framework for achieving this win-win-win scenario; this technical guide seeks to help investors play their part in achieving that result.

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Investments in agriculture have proven to be one of the most effective means of reducing poverty in rural areas of developing countries. Acting in accordance with the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* can help investors better understand and manage the substantial financial, legal, operational and reputational risks inherent in investing in land-based assets. Those who plan and operate their investments in a way that is consistent with the Guidelines can reduce their investment risk and increase the likelihood of realizing a reasonable risk-adjusted return. Such investments are more likely to be successful if everyone – investor, local community and government – benefits. The Guidelines provide a framework for achieving this win-win-win sce-nario. This technical guide is intended to help investors act with due diligence to achieve social-ly responsible and financially sustainable investments in agricultural land.

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