

Respecting land rights and averting land disputes

This note provides guidance on how to ensure that agricultural investments respect existing land rights, both formal and informal, and thereby avert land disputes.

Failure to respect land rights—in particular country- or region-specific land tenure systems and history, including use by pastoralists—has negative consequences for communities and other stakeholders. It is also financially damaging for investors who shortcut due process and end up spending time and money dealing with land disputes.



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RESPONSIBLE AGRICULTURAL INVESTMENT (RAI)

KNOWLEDGE INTO ACTION NOTES

The **UNCTAD–World Bank *Knowledge Into Action Note Series*** is a compendium of practical, thematic guidance documents for use by governments, investors, and other stakeholders in the implementation of responsible agricultural investment principles. Background and a complete list of notes are in *Note 1: Introduction*.



WHAT DOES FIELD RESEARCH SHOW?

Reduced access to land by local communities is the main negative impact of investments. The most common source of conflict between an investor and local communities arises when governments grant formal rights to land to investors over local people who have been living on and/or using the land. Such conflicts arise when local people's rights to land have not been surveyed, demarcated, or formally registered. In addition, the rights of pastoralists are seldom recognized. Consequently, many investors spend significant time and resources dealing with land disputes that could and should have been identified through a proper preparatory process, including good communication and a land audit.

Undocumented rights pose challenges and risks to investors. Many land investments in developing countries occur where there may be current use of or claims on the land by resource-poor farmers, communities, or pastoralists, who rely on the land for their subsistence. Every country has its own tenure system, with different levels of formalization of land rights and their protection in law. However, traditional societies within countries often do not have formal, documented land rights that investors can easily confirm at arm's length. Land managed under customary law is usually allocated on the basis of physical features and relational conventions within the community. Such rights are often weakly protected by national law but upheld under local customary conventions. Investors who do not understand both statutory and customary tenure regimes at the local level, have not undertaken a due diligence audit of the range of use rights (instead relying on government records or unverified verbal reporting) are likely to encounter land disputes. Some of these disputes have long-term negative impacts on the investor's reputation and on community–investor relations. Investors that communicated well with local people and undertook proper land audits of use rights, although costing time and money, had fewer land disputes.

Postconflict situations. In postconflict situations, an even more careful assessment of land use rights was found to be critical. During conflicts people may temporarily abandon areas where they have a use right. Once peace and stability return, they may try to reassert their historic use rights but find that in the intervening years new rights may have arisen. Periods of absence may transcend generations, so a returning younger generation may not have a clear understanding of precisely where their parents' rights were located, further raising the risks of conflict and disputes, especially if the cadastral record system is incomplete. Legal ownership through a registered title deed may appear clear to the investor, but if the land has been left vacant for a period, surrounding communities and/or migrants from other areas may have acquired informal rights. In addition, the administrative vacuum created by conflict can allow local traditional authorities, or political or business elites to take advantage of an opportunity for rent seeking by selling rights that are not theirs to sell. A new investor is often expected to unravel these competing claims. In some cases, authorities have simply evicted people to “clear the land” for the investor, without a proper relocation or resettlement process (for guidance, see *Note 12: Relocation and resettlement*). Affected people may well perceive the investor as the source of their loss, which damages investor–community relations. In some cases, such situations have escalated into violence and intimidation, damage to property, and in one case, intimidation of workers to get them to stop work at the investment.

Lack of clear boundaries. A lack of proper cadastral survey diagrams, land registration, and/or clear demarcation of boundaries can blur the boundaries between community land rights holders and an investor. In some cases, neighboring farmers gradually encroached onto company land that was not actively cultivated. In others, investors expanded or installed irrigation or road infrastructure that encroached on community lands. To keep boundaries visible, it is important to use proper mapping and clear demarcation of boundaries with suitable beacons, traditional markers, fences, boundary hedges, and/or natural features (rivers, roads, and the like). In Liberia, the distinctive soap tree is traditionally used as a marker of a boundary point. It is therefore imperative to protect such landmarks where they exist and educate communities and investors about their use and function.

Existing disputes. Investors may be allocated land over which disputes persist either within the community or between communities and the government. An understanding of the land claims and disputes in the area must be part of an investor's pre-investment due diligence.

Walking the boundary. During boundary negotiations, if discussions are based only on maps, affected neighboring communities may not fully grasp the spatial extent of an area. It may be necessary to walk the boundary and/or set up beacons. In some cases, agreements based on maps have produced dissatisfaction in local communities after people realized what the boundary meant to them personally. The negotiation process may need to be iterative, in which communities are consulted after walking the boundary or after clear boundary markers are placed.

Temporary use as the investment develops. Early-stage investments require several years to fully develop all the land they acquire. Some investors adopt a policy of isolating these unused areas from any use by local communities, whereas others allow temporary use of them by local community members. The latter has associated risks that require careful consideration. Although well intentioned, such arrangements carry a risk of misunderstanding, particularly regarding the obligation to vacate the land in the future. One investor made a formal agreement with the local smallholder association to approve seasonal leases to members for use of such areas. These leases required smallholders to vacate the land after the crop was harvested. The investor agreed to buy the crop produced and provide extension support. In this case, some smallholders subsequently refused to vacate the land that the investor wanted to cultivate directly. Thus, such arrangements should be very clear and transparent and should be endorsed and monitored by the local government authorities.

Broad focus on the impact on land access. Land rights to be respected extend beyond rights to land for cultivation, to include rights of access to religious or cultural sites and to natural resources, in particular water. Other uses include collection of fuelwood, building materials (wood, thatch, clay), medicinal herbs, and wild fruits, as well as access for grazing, fishing and hunting. One investor negotiated with local livestock owners to provide access to postharvest crop residue for their cattle, under controlled supervision. Another identified areas that the local community used for cultural and spiritual purposes and placed them under conservation, allowing community access. Local communities' ability to use land may also be affected by the investor's agricultural practices, especially where chemicals are used. The impacts of these practices on neighboring land users are important to know, measure, and mitigate (see *Note 14: Environmental and social impact assessments*).

Cultural practices in formalizing agreements. Understanding cultural practices associated with conferring land rights is an important consideration for investors. Some communities traditionally hold a specific ceremony or function to celebrate or formalize agreements on boundaries and land use. These events are usually attended by community leaders and members, who may expect the investor to pay for event costs.

✓ ELEMENTS OF GOOD PRACTICE FOR INVESTORS

Research the context. Research and understand the country and the local formal and informal land tenure system. Consider the categorization of the land being targeted within the local context and what it implies for processes and protocols for land acquisition. Engagement of expertise in local land laws and/or land NGOs is recommended (box 1). Doing so often involves

taking measures above and beyond government requirements. Investors should consider applying international laws and best practices.

Engage with communities. Establish effective communication, transparency, and trust with communities early in the process, considering the use of partnerships with credible NGOs to achieve this (box 1). Provide enough information for the development of an understanding of the project and its implications as well as the land boundaries, so that members can consult with their peers and agree to a final decision. These efforts could involve meetings with a formal land committee of a local authority, with appropriate membership on the committee. Consulting with communities allows investors to better understand and respond to issues that arise from the interconnection between land and other natural resources (box 2). For further information, see *Note 15: Community engagement strategies*.

Establish free, prior, and informed consent of communities. “Free” refers to the absence of coercion, intimidation, inducement, or manipulation. “Prior” means seeking consent well in advance of commencing any activity. “Informed” means that communities are well advised on their rights, as well as the purpose, objectives, duration, reversibility, scope, and location, as well as potential economic and legal impacts on their land rights, social, and environmental impacts, and personnel likely to be involved in the project before deciding. Ensure that information is presented in a format that is understandable and relatable to communities and that time is allowed for understanding and questions prior to making a decision or giving consent. Agree on a memorandum of understanding with communities to ensure a good relationship and mutual benefits by outlining responsibilities and realistic commitments (see *Note 18: Community development agreements*).

Conduct land audits. Consider undertaking a land audit as part of the social impact assessment (see *Note 14: Environmental and social impact assessments*). Such an audit would include interviews with community members, establishing the history of the land and identifying any affected people; physically mapping the land (potentially using GPS technology and developing it into a land resource platform incorporating GIS technology for land use planning); mapping and quantifying land use by occupants; and documenting (with photos and videos) any crops and infrastructure on the land. This audit should identify periods of inactivity on the land, any past land disputes—with details of the dispute and parties involved, and any agreements (verbal and/or documented) related to past land disputes.

Undertake mitigation measures. Drawing on the social impact assessment, incorporate mitigation measures in the project design. Such measures might include limited controlled-access postharvest grazing for livestock owners; controlled access to conservation areas for harvesting of medicinal plants; provision of water access points; assistance to outgrowers; retention of natural areas for cultural use; and provision of support for food production on community members’ own lands. Investors should also consider specific mitigation measures when changes in access to land affect vulnerable groups, including women, youth, and marginalized communities.

Collaborate. Work together with local NGOs, and communities to assess the local structure for governance of land tenure (ownership, users, holders’ rights, gender influence, and so on), in addition to the tenure information available through land administration agencies. Consider broadening the collaboration to support the strengthening of communities’ tenure security (ancestral land demarcation, formal recognition of land rights, and issuance of titles and/or documented use rights).

Compensate fairly. When a reduction in land access requires compensation, quantify the extent and fair value of use rights and be prepared to pay compensation based on national and international guidance (for further information, see *Note 12: Relocation and resettlement*).

Be prepared to walk away. Be ready to amend desired boundaries or walk away from a deal if the risk of land

Box 1. Investor and NGO cooperation to address land rights issues

An investor partnered with an international land rights NGO to support local NGOs operating in three developing countries. The program is building local capacity in understanding land rights and developing local institutional capacity in land management. In addition, the capacity of company managers in dealing with boundary and grievance issues is being addressed, with a parallel process to identify conflict areas and strategies to address them.

This project is making use of an adapted version of the “Analytical Framework for Land-Based Investments in African Agriculture” (New Alliance 2015).

Source: UNCTAD and World Bank.

Box 2. Case study – Beyond land rights

Whereas conventionally land and its underlying rights have been essentially detached from other natural resources (that is, land can typically be traded without the natural resources on or under it), customary lands are managed in a much broader sense, recognizing their indivisibility from other natural resources. This difference in approach yields important implications for rights that investors must understand and consider. An investor’s activity can affect natural resources outside of its location, affecting the livelihoods of neighboring communities.

One investor had acquired an area surrounded by communal lands. To improve its productive potential, with a view to develop a farm, drains were dug to allow excess water to flow out of the parcels. As a result, the natural flow of water in the area changed, drying out small streams flowing through local communal lands and depriving the population of access to drinking water. The company built a well to account for the damage caused, but communities recognize an important difference. They now have to walk quite a distance to fetch water, when it used to be available much closer to their homes. A second direct impact from the development of the farm was a decrease in biodiversity, especially wildlife, which disrupted the ecosystems in the neighboring areas.

Source: UNCTAD-World Bank Survey of Responsible Agricultural Investment Database.

disputes is too high. In cases where the government has already “prepared” land parcels for investors, undertake a retrospective review of procedures to make certain that international standards were met.

Set up grievance mechanisms. Establish mechanisms (see *Note 19: Grievance redress mechanisms*) for receiving, assessing, and resolving land-related grievances that may arise during operations, and educate managers to understand the investor’s land-related guidelines and their impacts on operations.

✓ ELEMENTS OF GOOD PRACTICE FOR GOVERNMENTS

Review and develop a policy on land. It is essential to have in place a clear land policy, a legislated framework, and a regulatory and administrative environment catering to the various acceptable forms of land tenure, with appropriate legal recognition. Create a legal environment suitable for enforcing land rights, be they formal or informal, and ensure the legal process is easily accessible by remote or poor rights holders.

Develop a national cadastre. Create a cadastre system, categorizing the different tenure areas and identified “land bank” areas for investment, ensuring that the system is well maintained, regularly updated, and accessible.

Build capacity. Raise awareness among communities of the importance of tenure security and the process through which it can be achieved. Strengthen the administrative capacity and systems at local levels to record and formalize use rights, including a methodology to update land titles for inheritance and marriage.

Support free, prior, and informed consent. Recognize in law the necessity of obtaining free, prior, and informed consent from communities and smallholders who largely depend on land for their subsistence. Ensure the consent of local communities is obtained before authorizing the development of any activity that may affect their livelihoods.

Screen for impact on land rights. Consider an investment’s impact on rights and access to land including for marginalized groups in investment screening procedures (see *Note 6: Screening prospective investors*).

Establish mechanisms for concerns and grievances. Develop simple and efficient processes through which communities can easily and quickly raise concerns about land rights infringements and facilitate adequate legal support to resolve the issues. Work with NGOs to report any infringement on communal lands or adverse impacts on communal resources from outsiders.

Facilitate land titling. Make accessible to poor communities and marginalized groups the registration of their land rights. Facilitate the provision of communal and/or individual titles or rights as appropriate, given the policy and legislation.

REFERENCES AND RESOURCES

This Note is complementary to the literature and guidance documents to which many organizations have contributed, a selection of which is provided below. More resources are provided in *Note 2: Additional resources*.

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