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Community-Investor Negotiation Guide 1: Preparing in Advance for Potential Investors

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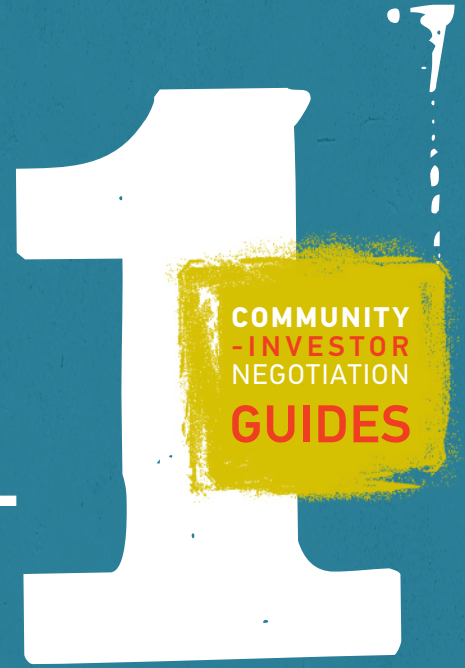
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PREPARING IN ADVANCE FOR POTENTIAL INVESTORS



GUIDE 1 For community members and advocates interacting with potential investors



PREPARING IN ADVANCE FOR POTENTIAL INVESTORS



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INTRODUCTION

WHAT IS THE PURPOSE OF THESE GUIDES?

An investor may approach a community seeking land and natural resources at any time. These guides provide recommendations for how advocates and community leaders can best support communities to prepare for, and, if they so wish, engage in empowered contract negotiations with investors seeking to use community lands and natural resources for their businesses.

This guide (**Guide 1**) explains how communities can prepare for interactions with potential investors, including making decisions about whether or not to negotiate. It can be used to help a community: (a) prepare *before* an investor arrives and (b) decide whether or not to enter into discussions or negotiations with an investor that has arrived. Guide 1 should be used *before* any negotiations start.

If a community decides to negotiate with a potential investor, **Guide 2** describes issues that can be included in a community-investor contract. It also explains what language should be avoided. It is designed to help communities negotiate a contract with an investor that is clear, fair, and equitable.

WHO ARE THESE GUIDES FOR?

These guides have two main audiences:

- ➔ Lawyers, paralegals, advocates, *animateurs*, and other professionals who help communities with legal issues related to the management and protection of their lands, natural resources, and human rights (individuals that these guides refer to as “**advocates**”); and
- ➔ Community leaders and community members seeking information to support their interactions with potential investors and who are working together with lawyers, paralegals, and other advocates. **However, communities should not use this guide in place of legal assistance.**

While these groups are the intended audience of these guides, **advocates and leaders should never negotiate and make investment-related decisions on their own.** Instead, they must ensure the meaningful participation—in every investment-related decision—by all community members, including women, youth, people with different livelihood strategies, and members of marginalized or minority groups.

WHY ARE THESE GUIDES NEEDED?

Deciding whether or not to allow an investor to use community lands and natural resources is one of the most important decisions a community can make. If an investment project is carried out in a respectful and inclusive way, it may help community members to achieve their goals. Those goals may include creating jobs and local economic opportunities. But investments come with risks. The investment projects may make the land that community members need for farming and other livelihood activities unavailable for some time. They may pollute local rivers, lakes, air, and soils. They may block access to sacred areas or water sources. They may even violate community members’ human rights. In some cases, investments may result in communities completely losing their lands.

It may be possible to reduce the risks related to investments if communities know their rights; understand the advantages, disadvantages, and the risks of investments; and are supported by advocates who help community members protect their interests. Preparing communities to engage with potential investors from a place of empowerment can improve contract negotiations and make it more likely that investments contribute to the community’s thriving, healthy future. An empowered community can demand that investors respect community interests, conserve the local environment, and support the community’s development, all on the community’s own terms.

These guides do not provide legal advice and they do not cover all the important legal issues. If the community decides to negotiate with an investor, it is best to have an independent lawyer look at a contract before the community signs it.

CONTEXT OF THESE GUIDES

Today, around the world, there is more and more competition for increasingly scarce lands and natural resources. In this context, community members should be prepared to interact with potential investors seeking community lands and natural resources. These investors may be local or national elites, government officials, or international investors. They may ask for a few hectares, or *thousands* of hectares. There are three main “moments” that communities may face in this context, each of which requires different skills and knowledge:

1. **Before an investor comes**, communities should make sure that their lands and natural resources are secure and protected, as well as governed by strong local land management rules and structures. Without secure land rights, communities may not be able to protect their lands from outside investors and as a result they will be in a weaker bargaining position when investors arrive. Participatory, accountable community land governance can help ensure that any future community–investor contracts benefit not only local leaders and elites but also women, youth, poorer families, and members of minority or marginalized groups.
2. **Around the time that a potential investor first visits a community seeking its lands and resources**, the investor may also be asking the government for permission to operate its business project. In many countries, investors must apply for and receive environmental licenses, business permits, and other types of authorizations from the government. These state approval processes can create opportunities for the community to influence the conditions that the government puts on the investment. For example, the community can ask the government to require strong environmental protections in any permits it issues to the investor.

In situations where the government (instead of the community) has the legal right to give the community’s lands to an investor, the community can urge the government to reject any investment that would harm the community’s interests. **Government**

approval and permitting processes can be important advocacy opportunities for people who do not have ownership rights to the land that the investor wants but whose lives and livelihoods will be affected by the investor’s project (for example, pastoralists, herders, and hunter-gatherers with historical use and access rights to the land).

In addition, when the government gives investors the right to use community lands through contracts between the government and the investor, **community members can try to influence the government–investor contract negotiations**. For example, community members can share their interests and concerns with the government before and during negotiations, and they should ask to send representatives to participate in the government–investor negotiations. Also, even in situations where the government has the legal right to give community lands to an investor, **the community should still try to negotiate its own contract directly with any potential investor** to ensure that the community benefits from—and is not harmed by—the investment.

3. **After an investor has been given the right to use the community’s lands and has begun project operations**, community members should monitor the investment and its impacts on the community. They should also monitor whether or not the investor is obeying the terms of the contract and national laws. When problems arise, community members can bring their concerns either directly to the investor and/or through government complaints processes and grievance mechanisms. If the investor refuses to address the problem(s), community members can seek help from government offices or local courts and put pressure on the investor through advocacy campaigns.

These three “moments” are all important opportunities for communities seeking to protect their interests. Communities should also work with advocates to **strengthen national legal protections for community land and natural resources rights**, both in general and in the context of investment. Improved laws and policies can better protect the community’s rights over the long term.

INTRODUCTION

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NATIONAL LAW IS IMPORTANT

Every country has its own particular laws about investments and community land rights. Advocates helping or representing communities must carefully research relevant national laws and apply those laws alongside this guide. Relevant national laws include laws that apply to contracts, investments, land rights, Indigenous peoples' rights, environmental protection, and specific types of projects.

HOW THIS GUIDE IS ORGANIZED

The first half of this guide describes how communities can proactively prepare for potential future investors. It explains what an investment might mean for the community, how to support community members to create a shared vision of their community's thriving future, how to understand the value of their lands to them, how to create rules for how their lands and natural resources should be managed, how decisions about their lands may be made (and by whom), and how to ensure participatory, fair, and inclusive community decision-making processes about potential investments.



If an investor has already arrived and it is necessary to make decisions quickly, these discussions can be done intensively, in the course of a week. This is not advised, however: a community should not be rushed to make such important decisions. The community should ask for enough time to fully research the investor and the proposed investment, understand the community's legal rights, and carefully decide what is best for the community.

The second half of this guide then explains what steps communities can take once they have been approached by a potential investor. It describes how a "community consultation" process should be conducted and details actions that community members can take when deciding whether to negotiate with the investor or reject the investment.

GLOSSARY OF TERMS

Annual profits or losses: How much money a company makes or loses, after the company has paid its expenses, over the period of a year. The details may be provided in a financial statement.

Clause: A section or paragraph in a contract.

Community: A group of individuals, families, and households who collectively live within or have strong historical ties to a specific territory with definable boundaries and who are governed by a shared set of either state or customary governance structures.

Company: An entity that engages in business. This guide deals with companies and investors that carry out natural resource projects—particularly agricultural or forestry projects—but it may be also be relevant in the case of companies that carry out mining projects. The terms “Company” and “Investor” are used interchangeably throughout the guide. See also the definition for “Investor.”

Contract: When two or more parties (people, communities, or organizations) promise to do something in exchange for a valuable benefit, this can form a contract, which is “legally binding.” Parties that enter into a contract have rights and obligations under the contract. Typically, the steps or process that must be followed in order for a contract to be valid are described in a country’s laws. Valid contracts will create “enforceable legal rights.”

Contract area: The area of land that the contract covers. Business activities may take place on this land.

Community–investor contract: A contract entered into by a community and a company or investor to agree to the terms on which a company may use the community’s lands and resources.

Enforceable legal rights: Rights that are recognized and protected by the law. In some places, enforceable legal rights explicitly include customary rights that arise out of customary law. Enforceable legal rights can also be created through a contract. All parties to the contract must respect these legal rights. If a party to the contract does not respect these rights, it can be ordered to do so by a court.

Environmental impact assessment (EIA): A study that predicts the possible environmental effects of a project. The EIA is usually presented as a report that must be approved by the government.

Freedom of Information request (FOI request): A formal request to the government to access information that is within the government’s possession. These applications are generally made in accordance with national freedom of information laws.

Grievance mechanism: A process for individual community members to communicate and seek remedies for complaints or grievances they have regarding the project’s negative impacts or the conduct of the company or its employees.

Human rights impact assessment: A study that analyzes the potential or actual human rights impacts of a project and provides recommendations to respond to those impacts.

Infrastructure: Physical structures and systems necessary for a business, city, or village to operate, such as buildings, roads, water piping or wells, communications towers, and electrical systems. Social infrastructure refers to structures and systems used for social services, such as schools and health clinics.

Investment activities: Activities that are carried out for an investment project with the intention of making a profit.

GLOSSARY OF TERMS

/ CONTINUED

Investment project: A project undertaken by a company or investor with the intention of making a profit.

Investor: A person or entity that puts money into businesses or investment projects. This guide deals with investors that carry out natural resource projects—particularly agricultural or forestry projects—but may also be relevant in the case of investors that carry out mining projects. The terms “Company” and “Investor” are used interchangeably throughout the guide. See also the definition for “**Company**.”

Lease: A contract in which one party transfers land or property to another party, or the use of that land and property, for a specific period of time, usually in return for periodic payments called “rent.”

License: Permission, generally provided by the government, to carry out a specific activity. Very similar to “**Permit**.”

Monitoring: To regularly check how a project is operating and its positive and negative effects. This can be done to see if the company is complying with the law or with a community-investor contract. Monitoring can include different types of research, including testing water or soil for pollution, interviewing community members about their experiences, or checking company paperwork to make sure the company is complying with certain obligations, such as sharing revenue. Monitoring can be done by the government, the community, the company, or other actors.

Negotiation: A negotiation involves two or more people or parties who come together with the goal of reaching an agreement. Each side presents what they want, which is discussed until a compromise is reached.

Party: A person, community, or organization that enters into a contract with other persons or organizations.

Permit: Permission, generally provided by the government, to carry out a specific activity. Very similar to “**License**.”

Profit-sharing: For the purposes of this guide, an arrangement in which the community receives a direct share of a company’s profits from the project. Profits are the money the company earns from the project minus how much the company has spent on the project.

Royalty: For the purpose of this guide, a royalty is a payment given to the community that is based on the amount of goods produced by the company’s project. The payment may be a percentage of the value of the goods produced (for example, 10% of the value of goods produced), or it may be a payment for every unit of good produced (for example, \$10 per ton of good produced).

Social impact assessment: A study that analyzes the potential and/or actual social impacts of a project, and that recommends measures to respond to those impacts.

Subsidiary: A company that is owned and controlled (in part or in full) by another company. For instance, a multinational company may establish and register a subsidiary company in the country where a project will take place, so that the subsidiary company can assume all rights and responsibilities relating to the project.

Supermajority vote: A vote in which two-thirds (66%) of the electorate vote in favor of the decision (in contrast to a simple majority vote, in which decisions can be made with only 51% of the vote in favor).

Tenure rights: Customary or formal legal rights to land and the natural resources on that land.

Term: The period of time during which a contract is operative (in effect). Sometimes this is called the “duration” of the contract.

a.

PREPARING IN ADVANCE FOR POTENTIAL INVESTORS

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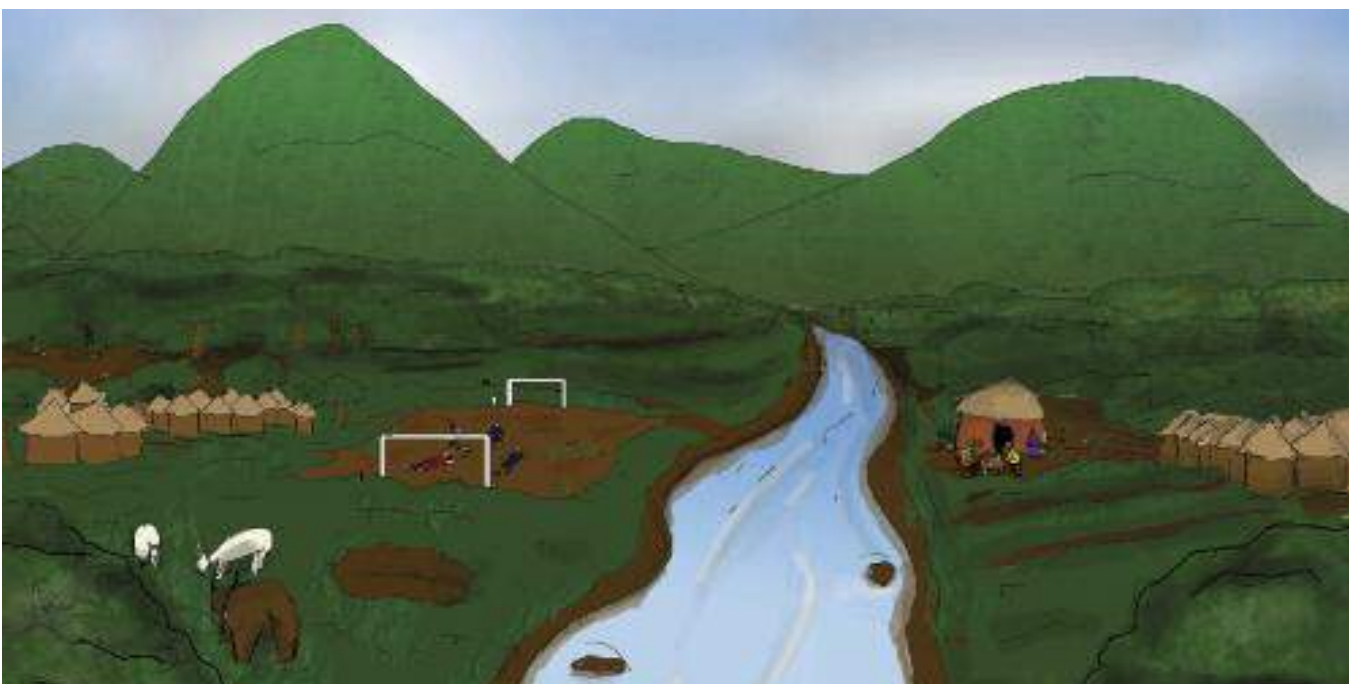
UNDERSTANDING WHY INVESTMENT IS HAPPENING AND WHAT IT MIGHT MEAN FOR THE COMMUNITY

Today, there are more and more people on the earth, and more and more demand for all the natural resources that people need to live, including land, water, food, building materials, fuel, and the minerals needed for technology. As a result, competition for these resources is rising, and companies, governments, and elites are rushing to claim and exploit these resources.

It is helpful for communities to understand the bigger picture of why investment, land speculation, and land grabbing is happening in their region in order to be able to respond appropriately to requests for their lands and natural resources. Advocates can support community members to sit together and discuss such questions as:

- ➔ What natural resources do we have that investors might want? Why are investors suddenly interested in our land?
- ➔ What has changed in recent years in our country that may have opened up our area to investors seeking lands and natural resources?
- ➔ What has changed, at the local or regional level, that may be making our community's land claims more vulnerable?
- ➔ Are there any new government infrastructure projects being planned for our area? Is there a new port, road, airport, or pipeline being built?
- ➔ Do district, county, or provincial land use plans zone our community for investment or future government infrastructure projects?
- ➔ Has there been a change in national politics that has opened up the country to foreign investment?
- ➔ Has our country emerged from civil conflict, and now foreign investors are trying to extract valuable natural resources that had previously been left alone because of violence and political instability?

Critical analysis of these wider trends—and how they will affect the community—will help community members and their advocates be better prepared for investors' requests for community lands and natural resources.



DEFINING “THE COMMUNITY,” ENSURING PARTICIPATION OF ALL COMMUNITY MEMBERS, AND STRENGTHENING COMMUNITY UNITY

WHAT IS A COMMUNITY, AND WHO IS CONSIDERED A “COMMUNITY MEMBER”?

A “community” may generally be defined as *“a group of individuals, families, and households who collectively live within, or have strong historical ties to, a specific territory with definable boundaries and who are governed by a shared set of either state or customary governance structures.”* Each community should define itself, by reference to its own specific cultural, political, legal, and territorial realities, as well as community members’ preferences.

It is not always easy to define who is part of the “community” and should therefore be involved in discussions and decisions about the use of community lands and resources. When possible, it is best to support communities to define themselves based on:

- Existing landscape-based, territorial boundaries or shared use and access rights;
- Existing locally respected customary governance structures (village, ward, town, etc.) associated with the specific area of land;
- Any other criteria that community members feel are important.

Existing landscape-based boundaries, use rights, and local governance structures often have changed over many generations to fit with the local social and environmental context. As long as such definitions do not cause exclusion, discrimination, or inequality, using locally accepted structures will make it easier to hold meetings, gather people together, and make decisions that all community members accept.

To ensure that the community’s boundaries and membership are properly defined, it is important that the community definition process **involve leaders and members of neighboring communities who have historical use and**

access rights over the lands in question, including pastoralists and nomadic peoples whose families have accessed the land for generations. It may be appropriate that people who do not live or make their livelihoods permanently within the “territory” but have something to lose if they are no longer able to access the land be considered community members for the purposes of deciding whether to accept or reject a potential investment.

Once a territorial definition of the community has been determined, **every single person living within the defined “territory” of the community—or with legitimate historical use rights—should be considered a community member,** with important ideas, concerns, and opinions. **This includes women, youth, practitioners of various livelihoods, and members of minority or marginalized groups.** In some places, local definitions of who is “a community member” have been exclusionary or discriminatory; communities should openly discuss why these definitions exist, the impacts of these definitions, and how to be less discriminatory to ensure that no one’s legitimate use and access rights to land are violated.

In some places, **when an investor comes seeking land that includes several villages or towns, the definition of “community” may expand to cover the total area of land requested by an investor.** This may be the case even if the people living in each village or town usually think of themselves as a separate “community.” In such situations, all the villages may benefit from gathering themselves into one “community” to make decisions together. Or, if the separate villages want to remain as separate “communities,” representatives from each community may want to meet as a group to discuss their action plans but negotiate with the investor separately on behalf of their specific villages or towns, which may have different interests, desires, and needs.

2.

ENSURING THE PARTICIPATION OF ALL COMMUNITY MEMBERS

Decision-making about investment must be open and include the participation of every member of the community. Leaders should not make these decisions on their own. Rather, all community members—including women, men, youth, elders, poorer community members, practitioners of different livelihoods, seasonal users, and members of ethnic or religious minority groups—should have the opportunity to participate in decision-making about the use and management of community lands and resources that will affect their economic, social, and cultural well-being. To ensure that traditionally marginalized groups are not excluded from discussions about community lands, communities can:

- Create a mobilization system that includes women mobilizers to mobilize local women, youth mobilizers to mobilize local youth, and ethnic or religious minority member mobilizers to ensure that people from those groups attend all relevant community meetings;

- Schedule meetings during times when women, youth, and members of minority groups are not busy with work and hold the meetings in places that can be easily accessed by all groups;
- Repeatedly emphasize the importance of including all voices in discussions and agree on ground rules for community meetings that ensure that members of all stakeholder groups can share their opinions and ideas; and
- Organize separate meetings for men, women, youth, and other groups to make sure that all voices are heard (as, for example, women may not feel comfortable speaking freely in front of men but may speak very freely in all-female meetings). After meeting separately, the groups can come back together to jointly report and discuss ideas and concerns.

Community consultations should include everyone who lives and works permanently within the geographic area and all seasonal users with historical access rights.

Unite as a community: one stick can be easily broken, but a bundle of sticks is difficult to break.



STRENGTHENING COMMUNITY UNITY

Community cohesion—the sense of togetherness and shared values between members of a community—is essential for peaceful and effective participatory decision-making related to land and natural resources. Yet communities are not homogenous—a community with 300 members may have 300 different viewpoints and interests! When a potential investor arrives, even very unified communities can become divided. Without community unity, it will be more challenging for community members to reach an agreement about whether or not to allow an investor to use community lands and natural resources.

When the community feels that it is a coherent group, decision-making about the use of community lands is likely to be more successful. Unity also helps to prevent investors from dividing the community, especially if the investor purposefully acts in bad faith to try to create or increase disagreement so as to “divide and conquer” a community.

A community may want to discuss in advance how the members will make sure that any “divide and conquer” tactics used by potential investors do not work. Community members can ask one another: “What can we do to make sure that outsiders cannot divide community opinion and create internal fighting?” Community members can brainstorm strategies to remain united during interactions with potential investors, and they can agree on a plan to address conflicting opinions. For example, communities might make rules that:

- ➔ Prohibit any community leader or small group of community members from meeting with investors alone/apart from the broader community, or
- ➔ Forbid leaders from making decisions about the community’s land and natural resources without consulting the full community and taking the decision as a group by either supermajority or consensus vote.

In addition, community members may proactively ask each group of stakeholders to describe why they would be for or against an investment request so as to get all of the opinions “out into the open” before an investor has even arrived, during a time when the community has the space to really understand each point of view and find compromises and solutions that address each group’s concerns and needs. It may also be useful to hold activities that foster collaboration, cooperation, dignity, and pride, such as cultural celebrations and ceremonies.



- ➔ Have you agreed, internally and with your neighbors, on your community boundaries? Do you have a map (even a sketch map) of your community boundaries?
- ➔ Who is included in your definition of “a community member?” Who is excluded? Are all people with legitimate, historical use and access rights included in this definition?
- ➔ How will you make sure all community members’ voices—including women, youth, and members of minority groups—are heard in decision-making about lands and natural resources?
- ➔ What will you do if an investor or his agents try to meet only with leaders to get rights to community lands and natural resources, or try to divide community opinion about a future investment?

3.

VISIONING THE COMMUNITY'S DESIRED FUTURE

Community members are best prepared to make decisions about - and negotiate with - potential investors when they have worked together to create their own vision for how they want their community to grow, develop, and prosper over time. A community vision (together with a land use plan) can help community members identify how they want their land and resources to be used, and then make decisions that support the achievement of that vision.

If a community has its own vision for how it will use its lands and natural resources to prosper and grow, it will be in a stronger bargaining position when an investor arrives promising “development” on the investor’s terms.

The following simple, three-hour visioning activity can help a community agree on a “future vision,” and then plan what steps it can take to achieve that vision.



Community members can decide how their community can best prosper and develop over time, according to their own priorities and goals.

COMMUNITY VISIONING EXERCISE

Who should be involved: Do not undertake a visioning process with only a few leaders or community representatives: at least 100–200 community members—or a very high percentage of the community’s households—should actively take part. Elders, youth, women, men, members of minority groups, and all other community stakeholders should be actively involved in the visioning activity. If the whole community contributes ideas to the vision, then the whole community will feel a sense of “ownership” and commitment to realizing the vision.

How to hear all voices: While it is better to undertake this activity in one large group, in some contexts women will not speak freely in front of men. In such situations it may be more effective to divide the community into two groups of men and women (keeping youth with elders). In that case, schedule time to reconvene in one large group, report back, and combine the men’s and women’s visions into one community-wide vision.



Telling the Origin Story

Many communities have stories about how the community was created. Discussing a community’s history can help people understand the importance of protecting their lands, natural resources, culture, language, and sense of identity. If time allows, invite community elders to tell the story of how the community was founded. This exercise helps root the community in its history and serves as a good starting point for the visioning process. The origin story can also help establish and prove the legitimacy of the community’s rights over the land and resources sought by the investor.

Step 1: Remembering the past. Ask community members to describe what their lands, natural resources, and community relations were like in the past (30 to 50 years ago) when today’s elders were children. Ask community members to share their memories with the group. Write down everything people say. Make sure to give everyone a turn to speak—elders tend to become very animated during these discussions, while young people may be prompted to share what their grandparents have told them about the past. Some questions to motivate discussion might include:

- ➔ How were community lands used and managed many years ago?
- ➔ What resources and materials did women, men, girls, and boys gather from the common land?
- ➔ How abundant were these natural resources? How long did it take to find and gather resources like firewood and natural roofing material?
- ➔ How did people live and work together within the community? How did men and women treat each other? How did neighbors treat one another?
- ➔ What cultural activities or festivals took place?
- ➔ How did the community make decisions about lands and natural resources? How were decisions and rules enforced? Did leaders manage the communal lands well?
- ➔ How did youth learn about customary ways?
- ➔ What did community members care about most? What were their priorities?

Step 2: Reflecting on the present. Ask community members to consider what their lands, natural resources, and community relations are like *today*. Some questions to motivate discussion might include:

- ➔ How are your community’s lands being used and managed now?

3.

- Has there been a change in the availability or abundance of resources that women, men, girls, and boys gather from the common lands? How long does it take to find and gather resources like firewood and natural roofing material?
- How do people live and work together within the community? How do men and women treat each other? How do neighbors treat one another?
- How does your community make decisions about lands and natural resources? How are decisions and rules enforced? Are leaders managing the communal land well?
- How do youth learn about your culture and customary ways?
- What do community members care about most? What are their priorities?
- Are you happy with the current situation? What is working well? What is not working well?
- Where will people get their food, building materials, water, medicine, and fuel?
- How will people interact and live together?
- How will people be making their livelihood?
- Will people be practicing customary cultures and traditions?
- How do you feel about your grandchildren living in this kind of situation?

When participants transition from remembering the past to envisioning the likely future, the general mood sometimes shifts from happy nostalgia to sorrow and fear. If people become upset, emphasize that while the current situation may seem bad, there is still a way to change things to ensure a prosperous, thriving future for their children and grandchildren. Concern for the likely future can be transformed into determination to actively protect community lands, resources, traditions, and culture.

Step 3: Envisioning the likely future. Next, ask community members what their lands and natural resources/community relations will be like 50 years from now, for their grandchildren, if things continue as they are today. Invite the participants to close their eyes to really “see” the vision in their minds. Give people some time to think about this—do not rush this step. Ask people to share what they saw as the likely future. Write down what people say. Some questions to motivate discussion might include:

- How available or abundant will your lands and natural resources be?
- How healthy will the local environment (rivers, soil, forests, mountains, etc.) be?

Step 4: Envisioning the desired future. Ask community members to close their eyes a second time, and dream about how they would like their community to be for their grandchildren in 30 or 50 years. Again, allow people a few minutes to think, and then ask people to share their visions. Write down everything people say on large pieces of paper. Some questions to motivate discussion might include:

- What does the community look like? What does the landscape look like? What is the quality of the water, soil, and air? What natural resources are available?
- How do people live and work together within the community? How do men and women treat each other? How did neighbors treat one another?
- How does the community make decisions about lands and natural resources? How are decisions and rules enforced?
- What kinds of infrastructure or public services exist in the community?



Allow moments of silence to be turning points

Sometimes, a community will fall into a serious silence in this moment. Let them sit in silence with this feeling for a few moments to let it sink in. This is a powerful moment in some communities and should be handled carefully and with compassion.

- What kinds of markets, cultural festivals, and events take place in your community? How do youth learn about customary ways?
- What kinds of livelihoods will people have? How is the community prospering?

To help communities craft a future vision that includes **potential future investment by community members or outsiders**, specific questions about investment might include:

- Are there businesses operating in your community? Who owns the businesses? What do those businesses do?
- What kinds of jobs do the businesses provide? Who are employed? What skills are they learning?
- Do these businesses pay taxes, rent, or a percentage of profits to the community?
- How have the businesses improved life in your community? What improvements to the community's infrastructure have they made?
- How have the businesses impacted the environment—the quality of water, air, and soil—and the abundance of natural resources like trees, wild animals, fish, and building materials?

Step 5. Making a plan for how community members will realize their future vision. End the exercise with clear “next steps.” Community members should brainstorm actions that they will take to start moving toward their vision, such as setting aside a reserve forest for their grandchildren's use, protecting springs and rivers, or planting trees.

Making an action plan can help a community to:

- **Agree on future priorities.** Communities are diverse; different stakeholders may have very different ideas about what is best for the community's future. A community planning process can help communities work through differences and arrive at productive compromises that ensure all groups' interests are represented in community development efforts.

- **Decide how to work toward its future vision.**

A well-crafted community action plan provides clear, practical, and achievable steps toward the realization of the community's vision. It also helps community members decide how to best allocate resources like land, time, money, and skills to achieve their vision and reach their goals.

- **Support good management of community lands and natural resources and protect the interests of future generations.**

Community action plans, like land use plans, can help communities make wise decisions about how to use their lands and natural resources fairly and sustainably.

- **Negotiate more powerfully with potential investors.**

A community action plan—linked with maps, land use plans and strong community rules for how investment decisions may be made—can make clear to investors and government officials that the community has its own priorities and vision for its future and that any external investments must support the community's goals and plan.

Some questions to motivate discussion might include:

- What are the top three priorities for action the community can take this year?
- What kinds of local projects can community members undertake now to start achieving your goals? What projects must be part of a longer-term plan?
- What actions can women take? What actions can men take? What actions can elders take? What actions can youth take?
- What allies or resources outside the community can you access for help? Are there government officials who might have local development funds you can access?

When the meeting is over, take photographs of all of the notes for record-keeping. The community might post the description of the final vision in a place where all community members can view it, so that the vision can serve as an ongoing reminder of the goals of protecting their community lands and resources.

4.

UNDERSTANDING THE VALUE THAT COMMUNITY LANDS AND RESOURCES PROVIDE TO COMMUNITY MEMBERS

Common lands like grazing areas, forests, and wetlands—as well as the natural resources contained within them—provide enormous value to communities. However, for community members accustomed to gathering household necessities like firewood, herbal medicines, and wild fruits and vegetables from these common areas for free, it can be hard to understand how much value they provide to every household in the community. If a community does not properly value its land and natural resources, the community members may be more likely to agree to lease its lands to investors for much less than the value they are currently getting from the land. In such a situation, community members may become poorer over time, rather than richer. Communities that know the value of their common lands may have more bargaining power with investors and be prepared to negotiate more effectively for a fair deal.

Advocates and leaders can support communities to do a one-time, three-hour exercise to roughly calculate the market cost of replacing the natural resources they currently hunt, gather, or otherwise collect from their community's common lands. This exercise creates a rough estimate of the amount of money it would take for each family to buy in the local market the natural resources critical to household survival, if the community leases its forests, grazing lands, or wetlands to an investor and can no longer access them for free.¹

This valuation exercise is best done in a large community meeting, attended by men, women, elders, youth, and people who practice a wide variety of livelihoods, including hunters, fisherfolk, and others who are intimately familiar with the community's natural resources. An advocate or community leader can guide community members to follow these steps:











1. First, community members brainstorm and “shout out” a list of all the natural resources that the community uses or gathers from its shared forests, grazing lands, wetlands, and waterways. After the full list is generated, *pick 8–10 of the most used resources* for the value calculations.
2. The community then estimates how much of each resource is used or gathered by one “average” family each week (use the unit that the resource is sold by at the local market, such as bundle/bushel/bunch basket, then calculate how many units of that resource a family uses per week or month).
3. Next, estimate how much one unit of each natural resource costs at the local market.
4. Then, calculate how much each family would have to spend at the local market to buy the needed amount of that natural resource each week, month, and year. (If the resource is used once a month, or once a year, skip the weekly calculation and fill in only the cost per month or year.)
5. Next, estimate how many families there are in the community, then multiply how much the one “average family” would spend by the *total number of families in the community*.
6. Finally, calculate the total cost the community would have to spend to buy these basic household necessities at the market, both in the national currency and in US dollars (the currency often used by investors).

The chart on the opposite page shows how to facilitate the activity. The first row has been filled out as an example. The chart should be drawn onto a large piece of paper so that community members can see and follow along with the basic math. Community members can use calculators on their phones to help the advocate facilitating the activity arrive at accurate calculations.

¹ It is important to note that this value is very different from both: 1) the value of the land and natural resources on the national land market and 2) the value of the land and natural resources to prospective tenants or buyers. Community members should seek support from advocates and experts who can research these other economic values as well.



(Participants decide which resources to list in the left column, but facilitators should be prepared to suggest these examples or other commonly used resources if they are not suggested by participants.)

Collected from common land and water areas by one “typical family”	Basic Unit (bundle, kilo, etc.)	Units used per week	Cost per unit	Cost per week	Cost per month (x4)	Cost per year (x12)
 Firewood	One bundle	7	\$1	\$7	\$28	\$336
 Water						
 Meat from hunting						
 Fish						
 Vegetable #1						
 Vegetable #2*						
 Herbal Medicine						
 Wild Fruit #1*						
 Wild Fruit #2						
 Thatch for homes						
Total cost of foods and resources for one “typical” family:						
* Add extra lines for more vegetables and wild fruits, honey, building materials, etc. – but make sure that the community is only calculating items gathered for household consumption.						
Total cost of foods and resources for one “typical” family (figure taken from above)	Total # of families in the community		Total cost of resources for entire community per year (local currency)			
X			=			

After completing these calculations, it is sometimes useful for community members to envision what their lives would be like if they no longer had access to their community lands. Advocates might ask:

→ If you did not have your community land, where would you get the firewood, building materials, wild fruits and vegetables, and other resources that your families depend upon?

- If you did not have your community land, how would you earn money to buy each item at the market?
- Since you now know the value of what you get from your community land, would you consider leasing these lands? If yes, what would be a fair price, given the value that your community is already receiving from these lands?

5.

ENSURING COMMUNITY MEMBERS' UNDERSTANDING OF THEIR RIGHTS OVER LANDS AND NATURAL RESOURCES

Laws are often complex and written in a way that is difficult for non-lawyers to understand. Advocates supporting communities may want to create easy-to-read, one-page summaries of national and internal laws that address community land and natural resource rights in the context of community–investor negotiations.² Such short legal summaries are best written simply and in the local language, in a way that community members can understand. Laminated copies of these legal summaries can then be left with community members for them to read, share, and refer to. Advocates and community members might also create and perform skits and songs that summarize national and international laws to help community members understand their core concepts and how and when to use them.

National laws that support community land and natural resources rights often include:

- ➔ **The national constitution**, which sets out all citizens' property rights, including the right to be compensated fairly when the state claims land for legitimate public purposes.
- ➔ **National environmental laws, forest laws, water laws, and land use planning laws.** These laws (and their accompanying regulations) often have protections for community land and natural resource rights.
- ➔ **National investment laws and regulations that structure government approval procedures for investments.** Communities should check that the investor has the right to operate legally in their country. Understanding the types of permits and licenses that the investor must secure from the

government can help communities check that their government has granted the investor all necessary permissions. Communities should make sure that they understand government processes for approving investment projects, including laws about required public hearings and community consultations. Communities that understand the various steps of the government's investment approval process can try to intervene to influence the conditions placed upon the investment, or to urge the government to reject a project that would harm their interests.

- ➔ **National laws or regulations that require environmental, social, and/or human rights "impact assessments."** Many countries have laws requiring that potential investors undertake an Environmental Impact Assessment (EIA), a Human Rights Impact Assessment (HRIA), and/or a Social Impact Assessment (SIA).³ Impact assessments usually contain recommendations for how to avoid or reduce any negative impacts of the proposed project on the local environment (including air, water, and soil quality), on the social health and well-being of the community, and on the human rights of community members. National laws usually allow that communities can request that these assessment findings are made public; communities can then use the findings to inform their negotiations with investors or appeal to the government or the judiciary to protect their rights if the assessments show that negative impacts are likely.

² Communities and their advocates may ask a local lawyer to write short summaries of national and international laws pro bono (for free). Alternatively, law students may be eager to write such summaries.

³ Sometimes EIAs and SIAs are carried out together and are called Environmental and Social Impact Assessments (ESIAs) or Social and Environmental Impact Assessments (SEIAs).



Learn and ask questions about your community's legal rights.

Many rights set out in national laws are backed up and reinforced by **international laws, conventions, and protocols** that national governments have signed on to. Communities can make use of these international laws to defend their rights if their own governments are threatening them.

THE UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES

ARTICLE 10 says: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." (See also Articles 11, 28, 29, and 32.)

Particularly important is communities' right to **"Free, Prior, and Informed Consent" (FPIC)**. For indigenous and tribal peoples, this is a right protected by international law.⁴ In addition, projects funded with loans from multilateral lending institutions like the World Bank, the Asian Development Bank, and the International Monetary Fund (IMF) require FPIC before the project/investment may proceed. FPIC must also be applied in some investment projects. For example, some certification bodies (like the Roundtable on Sustainable Palm Oil) require the Free, Prior, and Informed Consent of all local communities sharing their lands and natural resources with a palm oil investment. Some companies also require FPIC. Communities should seek legal help to find out whether a company's policies require securing a community's Free, Prior, and Informed Consent before the investment can proceed.

⁴ The right to Free, Prior informed Consent is protected in a number of conventions and declarations, including the *International Labor Organization Convention 169* and the *United Nations Declaration of the Rights of Indigenous Peoples*, and through interpretations of the *International Covenant on Civil and Political Rights* (ICCPR) and various regional treaties.

5.

Communities should carefully understand what FPIC really means: it goes beyond the right to be merely “consulted” before government officials approve an investment. Rather:

- **“Free”** means that consent should be given without coercion, intimidation, or manipulation.
- **“Prior”** means that communities have the right to take their time deciding: the community should be given enough time to meet to discuss the proposed investment before making a decision. Investors and government must respect local decision-making processes and should not pressure a community to make a decision quickly—and definitely not on the same day that the investment proposal is explained to them. **Communities can demand that they be given time to learn about and understand the investment before giving an answer.**

- **“Informed”** means that communities have the right to be fully informed about the investor’s plan, including the nature, size, purpose, and scope of the proposed venture, as well as any likely economic, social, cultural, or environmental impacts and risks of the project.
- **“Consent”** includes the right to say “no.”

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

- **ARTICLE 19** sets out that: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kind”
- **ARTICLE 25(A)** says: “Every citizen shall have the right and the opportunity . . . to take part in the conduct of public affairs . .



Under international law, community members have a legal right to be fully informed about the planned investment.

Under international law, individuals and communities also have a legal **right to information and participation** (see more on the right to information in section 9). The right to freedom of expression has been interpreted to mean that people have the right to seek information of public interest, and their governments must provide such information upon request. This information may include investment contracts and a project's impacts on the environment and public health. Individuals and communities also have a **right to participation** in public affairs; this can be interpreted to mean that people have the right to effectively influence public decision-making processes regarding investments that affect them.

Other international documents also advocate for community consultation before investments can proceed. For example, the nonbinding *Voluntary Guidelines on the Responsible Governance of Tenure* suggests that investors and governments consult with “all legitimate tenure rights holders” before making decisions or transactions that will affect their tenure security.

THE VOLUNTARY GUIDELINES FOR THE RESPONSIBLE GOVERNANCE OF TENURE DEFINES “CONSULTATION AND PARTICIPATION” 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.” (Paragraph 3B.6).

The international laws cited here are only a few examples of international laws that protect community rights. Community members and their advocates may want to seek advice from a lawyer or paralegal regarding additional international conventions that protect their rights in the context of investment.

GET
LEGAL
ADVICE

1. Under national law, what legal rights does our community have over our lands and natural resources?
2. Does our government have a record of respecting these rights?
3. Given national law, how much legal power do we as a community have to request that investors consult us and seek our permission to use our lands and natural resources?
4. Under national law, do we as a community have the right to say “no” to a potential investor? Do we have a strong right to Free, Prior, and Informed Consent (FPIC)?
5. Under national law, do we as a community have the right to demand rent and other benefits in exchange for the use of our lands and natural resources?
6. Do national laws or government–investor contracts define or limit what we can ask for?
7. What legal processes will the community be able to use to enforce any resulting contract, if necessary? (If such processes are not accessible, reliable, or fair, the benefits of having a good contract may be undone by the fact that the community might not be able to enforce the contract when the company does not comply.)

6.

IDENTIFYING COMMUNITY PRIORITIES, SUPPORTING COMMUNITY DECISION-MAKING, AND DRAFTING BYLAWS

Decisions about whether or not to share community lands and natural resources with investors should not be made quickly. **Communities should not wait for the arrival of an investor seeking lands and resources to start thinking about what is in the community's best interests or to create rules and a plan for how to interact with any investor who might arrive.**

When community members engage with potential investors after having thought carefully, as a group, about how best to ensure the community's thriving, healthy future, it is more likely that the ultimate outcome of all community-investor interactions will lead toward the community's desired future vision.



A clear land use plan can help a community grow sustainably.

DRAFTING AND ADOPTING BYLAWS: WRITING DOWN THE COMMUNITY'S AGREED PRIORITIES AND DECISION-MAKING PLAN

After discussing and debating the questions set out in this section, **community members should write down what they have agreed as a set of “rules” or “bylaws” that make their agreed decisions and procedures clear to all community members, leaders, government officials, and investors.**

Although it is best for a community to hold many meetings to discuss and debate its rules for how to interact with potential investors, the process can be shortened to a few days of discussion. A very quick rule-drafting process might include the following steps:

- ⇒ **Meeting 1:** The community, in a very large group, collectively brainstorms or “shouts out” all of their existing local rules and all rules followed in the past that have to do with *land and natural resource management* and *community decision-making*. Every single rule that is “shouted out” is written down onto big sheets of paper. **This is the 1st Draft of the bylaws.** (To ensure participation by all, the community could also be broken into small groups of men, women, and youth, who each make their own lists, and then the lists can be combined.)
- ⇒ **Meeting 2:** The community reviews the 1st Draft of the bylaws, adds new rules, deletes old rules that are no longer useful, and changes existing rules that must be updated to align with national laws. The rules should be reviewed by topic, one topic at a time. Such topics could include rules about water, rivers, springs, and lakes; rules about forests; rules about grazing lands; rules about paths, roads, and rights of way; rules about what decisions leaders can and cannot make on their own, and what decisions should be made by the entire community as a group; rules about what should happen when an investor comes seeking land (explained further below); rules about women’s rights, men’s rights, children’s rights, and the rights of members of minority groups, etc.

Discussions should continue until the community agrees that they have a complete 2nd Draft. Depending on how much time the community has, it may take one meeting, or many meetings over many weeks to complete the 2nd Draft. The process is best done slowly, to give community members time to think and reflect on what is best for their long-term interests. However, if an investor is coming soon, these discussions and decisions may need to be completed very quickly.

- ⇒ After the 2nd Draft of the bylaws is completed, it is then shared throughout the community, to make sure that all people agree, even those who could not attend the meetings to discuss the rules (or “bylaws”). An advocate, paralegal, or lawyer should review the rules to make sure that they do not contradict national law. After making any necessary changes to reflect all community members’ opinions and ideas and to make sure the rules do not go against the national constitution, the community now has a final draft, agreed by all. **This is the 3rd Draft of the bylaws.**
- ⇒ **Meeting 3:** Community members formally adopt these rules, or bylaws, in a formal vote by consensus (100% agreement) or supermajority vote (66% agreement). The vote should be documented with photos, videos, and community members’ signatures. Local government officials may be invited to witness the adoption of these rules and to formally sign or stamp the rules to give them greater “official weight.”

When potential investors and government officials arrive seeking land, the community can then give them a copy of the bylaws and require that local leaders, the investors, and regional government officials comply with the community’s agreed rules and their preferred consultation and approval process.

6.

Specific to potential future investment, a community's rules, or "bylaws," might cover the following topics:

IS EXTERNAL INVESTMENT WELCOME? IF YES, WHERE, AND ON WHAT TERMS AND CONDITIONS?

Communities should think in advance about whether or not they will allow an investor to use community lands, and on what conditions. Communities should hold meetings to discuss and decide:

- ➔ **How willing are community members to allow an investor to use community lands?** Some communities may decide they will never allow their land to be used by an investor, while other communities may welcome external investment. Community members may be divided. For instance, elders might not want to lease lands to investors, but youth might be happy to share community lands and resources in exchange for jobs and other opportunities. Community members should be supported to voice all opinions in open public debate, then critically engage with all stakeholders' interests to find solutions that best reflect all groups' ideas and desires.
- ➔ **What types of companies and activities would be welcome?** Investors and companies are different. A community might decide that while they would reject a logging company, they might welcome a small company producing manufactured goods like coconut oil or dried fruit that buys agricultural products from local farmers. Community members should think about the kinds of business activities that would help the community prosper and might be accepted, and the kinds of activities that might harm the community and should be rejected.
- ➔ **Which land could be used by an investor, and which land should remain in the control of the community?** If the community is open to potentially allowing a company to operate on its lands, which specific pieces of land might be appropriate to allow a company to use? What land is not available for a company to use? Communities should make land use plans that identify specific areas that could be appropriate for certain kinds of business activities.

- ➔ **For how long would the community be willing to share its lands with an investor?** If the community agrees to allow an investor to use some of its lands and natural resources, how long should the investor be allowed to use them for? (5 years? 10 years? 25 years?) While the investor will likely desire a very long contract period, communities can argue for contracts that last a shorter period of time. Shorter contracts mean that, if the investment is harming the community, the community will not have to wait as long until the project ends (or until it can negotiate a better contract, if the investor seeks to renew the contract). National laws may limit how long a contract of this kind can be.
- ➔ **What rules must any investors operating in the community follow?** If the community agrees to allow an investor to use some of its lands and natural resources, it may want to set clear rules about how the investor must operate, including not putting chemicals in local waters, not dumping waste or garbage within the community, using filters to ensure against air pollution, meeting quarterly with the community to discuss challenges or problems and find solutions, etc.

HOW WILL THE COMMUNITY MAKE DECISIONS ABOUT WHETHER OR NOT TO ALLOW THE INVESTOR TO USE COMMUNITY LANDS?

Before any investor has appeared, advocates and **community members should collectively establish or reinforce clear, transparent, streamlined community decision-making processes.** These discussions should address:

- ➔ **Who gets to decide?** Will all residents, including women, youth, and members of marginalized groups be given a chance to voice their opinions and be listened to? What will happen if a minority group strongly disagrees with the majority?
- ➔ **How will differences of opinion be resolved?** Will the community discuss the matter internally until compromises are reached, or seek out the help of advocates, spiritual leaders, customary leaders, or local government officials to answer key questions and mediate conflicts? What other strategies, traditional or modern, might be used? (See section 7 below).

- ➔ **How will the decision be made?** What percentage of community residents must agree? Will the decision be made by consensus (100% agreement), by supermajority vote (66%), or majority vote (51%)?
- ➔ **Leaders' accountability?** What process can the community follow if their leaders or certain elders/leaders agree to lease a large amount of land without community participation and approval?
- ➔ **Who is a neutral, well-respected person who can help the people involved in the conflict reach a peaceful agreement about how best to address an investor's request?** This may be a religious leader, an elder, a trusted government official, a trained mediator, a paralegal, or a representative from a community-based organization.
- ➔ **How will conflict between community members about whether or not or how to negotiate with potential investors be resolved?** What is the community's existing conflict resolution process—how are conflicts within the community currently resolved? Is this process sufficient, or should it be changed to address potential conflicts about external investment? What additional conflict resolution or dialogue strategies might be necessary?

It is strongly suggested that the community make a rule that says something like this: "At least [amount]% of community members must participate in decisions to lease community land to investors. Any contracts with investors signed only by elders or leaders without the full participation and agreement of at least [amount]% of the community shall be considered invalid by the community."

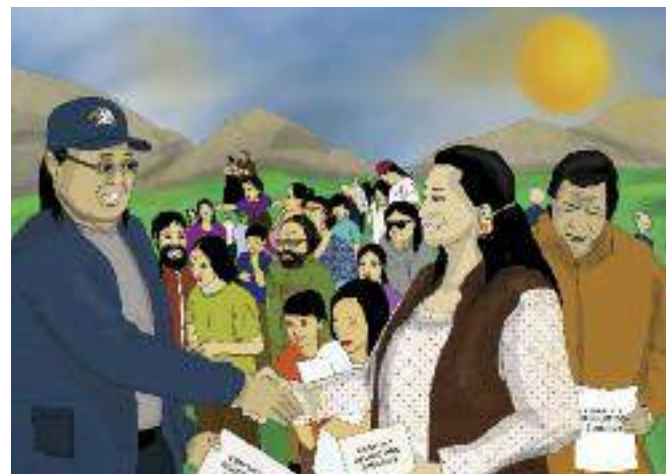
WHAT IS THE COMMUNITY'S STRATEGY FOR MANAGING INTERNAL COMMUNITY DISAGREEMENT AND CONFLICT?

New opportunities and offers coming from investors and/or the government are likely to be seen in different ways by different people in the community. For example, community members without land or with less fertile lands may be more eager than relatively wealthier community members about the prospect of the jobs that external investment might bring. This can create conflict inside the community, which will weaken the community's position when dealing with external investors and government officials. In anticipation of the very likely event of internal community conflict about how best to handle a potential investment project, the community should create—in advance—a conflict resolution plan to help manage disagreements.

If a community already has an effective system to address internal conflict, this system should be clarified and written down so the procedures are clear to everyone. Any additional steps or rules that might help manage conflicts specifically related to external investment should be agreed upon and added. While conflict resolution plans may vary between communities, the plan should at least address the following questions:

The community should be sure that it has a structured process to resolve internal conflicts among community members or different stakeholder groups and arrive at possible solutions to the problem. While everyone may not agree, it is possible to hear all opinions and find ways to compromise to ensure that all stakeholders' interests are protected. It is good to create a conflict resolution process that allows each side of the conflict to explain their positions, needs, interests, and beliefs in a way that everyone can clearly understand. It may be necessary to talk honestly and openly about any deeper, historical, class-based, ethnicity-based, or livelihood-based causes of the conflict. Some conflict resolution strategies include:

- ➔ **Holding community meetings to facilitate open dialogue.** This involves bringing together all those involved in a disagreement and creating an open,



A conflict resolution strategy will help community members resolve any conflicts or disagreements they have when deciding what is best for the community's development.

6.

public discussion. The purpose is to hear all of the stories and identify the roots of the problem, the harm done, and all relevant laws. Both customary/indigenous and formal/statutory laws can be discussed. A facilitator should moderate the discussion to ensure that everybody has an opportunity to speak and that all important details are addressed.

- **Asking trusted local leaders and government officials for help.** Respected leaders may be able to use their authority to help parties resolve difficult land conflicts.
- **Mediation.** Mediation is a structured process led by a neutral mediator. Mediators can be lawyers, paralegals, advocates, leaders, or trained, respected community members. The mediator's job is to remind the parties of the relevant laws, help the parties communicate, find common ground, and assist in identifying desired solutions. Mediation is generally appropriate if discussions have reached a standstill and people feel they need assistance from someone who is not part of the conflict. Mediation may be necessary in these situations: when people are becoming very emotional or making compromise difficult; when communication is not going well; there is serious disagreement over relevant facts and information; and there is a significant power imbalance between the people who are disagreeing. The mediator's goal should be to help reach a resolution that benefits both sides of the disagreement.

WHAT WILL THE COMMUNITY WILL ASK FOR IN EXCHANGE FOR USE OF ITS LANDS AND NATURAL RESOURCES?

Many countries' laws allow for communities to ask investors to provide benefits in exchange for the use of the community's lands and natural resources. Yet community members may not always understand the full range of "fair benefits" they may ask for in exchange for their lands. For example, communities may ask for one-time benefits like the construction of a school or clinic, but fail to ask for the teachers, doctors, books, electricity, and medicine that are needed to make sure that schools and clinics can operate successfully. Meanwhile, the costs of such one-time benefits are usually only a fraction of the value of the land provided to the investor.

Community members can be supported to consider demanding rental payments or profit-sharing arrangements that are closer to the actual value of their lands, to ensure that the community will indeed prosper as a result of the investment, keeping in mind that the benefits that a community negotiates to receive must be tailored to the specific reality and conditions of the investment.

POSSIBLE BENEFITS TO DEMAND FROM INVESTORS⁵

1. **Rental payments** or fees tied to the use of the land and natural resources.
2. **Royalties or a fixed share of the annual profits** paid to the community.
3. **Infrastructure** such as health clinics (including medicines, doctors, and nurses), schools (including books, teachers, and paper), a community meeting hall, roads, and boreholes.
4. **Electricity** (electrical, wind, or solar) and **telecommunications** infrastructure (phone and internet connectivity).
5. **Jobs and job training** for a specific number of community members, including women, youth, disabled individuals, and members of minority groups.
6. **Supply contracts with community members**, for example to buy food from community farmers to feed company workers.
7. Anything the community thinks will best help achieve its future vision!

⁵ For a full description of what benefits communities might request, and on what terms, see Guide 2, section 8.

It is not enough for the community to think only about what benefits it would ask for—the question of **how and when those benefits will be delivered** is also important. Depending on the kind of benefits the community plans to request, community members should also consider key questions, including:

➔ **Rental payments and profit sharing.**

- ➔ If the community wants to be paid for the investor's use of lands and resources, will the community be paid as a whole and use the funds for local projects, or will each family be given a small share of the total?
- ➔ If the money is paid to individual families, how will the community ensure that the money is not paid only to the male head of household, but is rather shared in such a way that all family members benefit?
- ➔ If the community as a whole is paid, who will decide how the funds will be used? How will those funds be managed?
- ➔ Where and how will the money be stored, and who will have access to the funds?
- ➔ How will the use of community funds be reported to community members?
- ➔ What protocols can be put into place to ensure that leaders do not corruptly use or manage the money?

➔ **Infrastructure development or social services.**

If a community wants the investor to build a school, hospital, road, or bridge, then the community should think in advance about the specifics of the request:

- ➔ Who will build it?
- ➔ Will there be an end date by when it must be built?
- ➔ Should it be built out of specific materials?
- ➔ Where should the building or infrastructure be located?
- ➔ What will the penalty be if the investor does not complete the infrastructure project?
- ➔ Will the investor be required to perform—or pay for—periodic maintenance on the structure?
- ➔ Who will pay the staff of a hospital, school, or other institution?

It is important to remember that **providing infrastructure and related services is usually the government's role**. It is usually not desirable for a company to step into the government's role of providing key infrastructure and services, because it may encourage the government to be even more absent in providing services to the community in the future. Also, once the company leaves an area (or maybe even while it is still there), it may be uncertain who will finance and maintain the infrastructure and service provision after the initial construction of the infrastructure.

➔ **Jobs.** Investors often promise to create many jobs for community members but end up only hiring a few community residents or only hiring community members for low-wage jobs, while recruiting managers from elsewhere. Communities requesting that investors create employment should be ready to ask for a fixed number of full-time and part-time jobs, a certain number of skilled jobs (such as management positions or office employment), specific salaries for each kind of job, and various benefits that might come with employment, such as job training. Communities should also require that a certain percentage of the workforce is hired from within the community; large numbers of male workers who come into the community from outside may bring alcoholism, gambling, sexual assault, and other negative influences with them. The community should think in advance about the specifics of the request:

- ➔ What percentage of the overall workforce must be hired from within the community?
- ➔ What percentage of management positions must be hired from the community?
- ➔ How often will workers be paid?
- ➔ Will community members be given skill-building and job-training support?
- ➔ What kinds of internal human resource grievance mechanisms and processes will be available to the community if workers are mistreated or unpaid, or if company workers mistreat community members?

b

ONCE AN INVESTOR ARRIVES SEEKING LAND

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Community engagement with a potential investor normally begins when a company—often accompanied by government officials—first visits the community to inform community members about the proposed investment project. **The community should immediately seek the advice of a paralegal or lawyer at this time.**

At worst, the investor and/or government official may simply inform the community about a project that has already been approved by national government officials. Or, the investors might arrive and meet only with a few select leaders, bribing or otherwise

pressuring them to give consent on behalf of their community. At best, the investor and/or government may begin an extended consultation and engagement process with the community; in such circumstances, the consultation process between the community and the investor will include meetings and opportunities for community members to request and review relevant information about the proposed project, voice their concerns, and influence decisions regarding the potential project. The remainder of this guide describes these processes.



DO NOT SIGN ANYTHING OR GIVE IMMEDIATE APPROVAL

When a community is approached by a potential investor and/or government officials seeking land, it should not give immediate verbal approval or sign anything. Even though the community may feel immense pressure to say “yes” to government officials, some of whom may be very powerful or feared individuals, the community should politely defer the decision to a later meeting, then immediately seek legal and technical help.

7.

UNDERSTANDING A COMMUNITY'S RIGHT TO BE CONSULTED

Before a project is designed and finalized, company representatives and/or government officials should meet with local community members to formally introduce the potential project, provide information, and learn about the community's concerns. **This meeting is often referred to as a "community consultation."** In some countries, formal consultation meetings are required by law. Or, as described above in section 5, international laws and/or lending agency policies may require that a community's "Free, Prior, and Informed Consent" (FPIC) is given; community consultations are a core component of FPIC.

Ideally, consultations create space for the community to influence fundamental elements of an investment project's design. In an ideal world, a "community consultation" does not occur during the investor's first

meeting with the community; rather, it should be *a series of meetings* that provide the community with the information necessary to fully understand the scope and aims of the investment.

Consultations should gather the whole community together to hear about the proposed investment project, and then give community members the opportunity to ask questions, review documents, and discuss the investment among themselves. After meeting with the investors and having the opportunity for internal community meetings that allow for private community discussion, community members may decide to agree to the investment as offered, reject the investment, or provide feedback about how the investment would need to be modified to be acceptable to them.



Never sign any papers right away. Enforce your community's right to Free, Prior, and Informed Consent.

Unfortunately, consultations are often characterized by very significant power imbalances: investors often arrive for the first time, accompanied by government officials who tell the community “that they are being consulted” and demand an immediate “yes.” Indeed, many investors and/or government officials may run “consultations” as opportunities to only *inform* the community that an investment is happening. Communities may feel that they have no choice but to approve a project that has already been approved by the government. The following factors may make any “consultation” invalid:

1. **Communities may face coercion through the use or threat of violence, criminalization, and false arrests by either the government or the investor and its agents.** The national military, the police, or hired “thugs” may be used to intimidate people, burn homes and property, and use violent tactics to silence community dissent or opposition. Such strategies may be used to get community consent or stop community members from asking for more information or demanding better contract terms. Investors may also act corruptly, either by bribing community leaders to sign consent forms, or pass around “attendance sheets” at meetings that they then claim represent community members’ consenting signatures. Such “consultations” may be used by the company and/or the government to give the false impression to external interests—for example, international standards certification bodies—that the communities have genuinely given consent.

GET
LEGAL
ADVICE

Do the laws of your country require the investor or government to consult with the community? What exactly is the investor required to do during a consultation? If there are no laws or standards to rely on, the community can still ask for or demand meaningful consultation and access to information from the company or government.

2. **Investors and government officials may not give community members enough information to fully evaluate the advantages and disadvantages of the proposed investment.** Communities may be pressured by government officials to agree to deals that they do not fully understand. The investor may not inform community members of key aspects of the investment, knowledge of which is necessary to properly negotiate a contract that is truly beneficial to the community. Examples of the key information that may be withheld are:

- The market value of the community’s lands and natural resources;
- The expected annual profits the investor will gain from the venture;
- The overall net worth of the company; and
- The expected impacts on the community’s waters, air, forests, and health.

Even when information is provided, it may not be communicated in a language that communities can understand. As a result, community members may not be properly informed about the proposed investment and its potential impacts on the community’s environment, economy, health, and wellness.

3. **Investors and government might also ask communities to sign vague or undetailed contracts** that do not include clear definitions of the boundaries of the land being granted or leased; timelines or concrete promises for payments or benefits; adjustments for inflation over time to rental payments; or a clear articulation of how the community can hold the investor accountable to timely and full payment of benefits, environmental protections, and other key terms of the contract.

For all these reasons and more, **a community should seek the presence and support of a paralegal, lawyer, trusted NGO advocate, or government official at the consultation and not sign or agree to anything until a formal negotiation process has ended.**

SEEKING LEGAL AND TECHNICAL SUPPORT WHEN ENGAGING WITH INVESTORS

Lawyers, environmental experts, economists, professionals with expertise in community development, human rights, financial analysis and/or investor negotiations, and other technical professionals can help address the information and power differences between communities and investors. They can also support more equitable and fair community–investor contracts. Such professionals can:

- ➔ Help communities understand their legal rights under national and international laws;
- ➔ Access and understand key technical information, including the investors' business plans and the results of an Environmental, Social, or Human Rights Impact Assessment;
- ➔ Determine the likely risks and benefits of a potential investment project;
- ➔ Review contract drafts and help finalizing a contract;
- ➔ Provide advice on complex legal issues;
- ➔ Facilitate participatory, inclusive consultations;
- ➔ Support the community during interactions with the investor; and
- ➔ Negotiate with investors from a place of knowledge and empowerment.

However, lawyers and scientists often charge high hourly or daily rates, and **payment for these professionals' time may be a challenge** for communities. Local advocates can help link the community to local, national, or international nongovernmental organizations (NGOs) or professional networks that may be able to offer *pro bono* (free) support to low-income clients and communities. **To reduce costs, local community members could be trained to be paralegals who work closely with a lawyer to provide legal information to the community, resolve disputes, and otherwise support the community's legal needs throughout all community–investor interactions.**⁶

Alternatively, the government, the investor, or another institution may offer to provide legal assistance or pay for the community to receive assistance. **In such instances, be careful!** If the government or the company ends up paying for a lawyer or expert to help the community, the community should:

- ➔ **Demand that the community choose the lawyer, even if the investor is paying his or her salary.** If the company is paying for the community's lawyer, a payment plan should be established to ensure the lawyer's continued payment is independent of the company's approval of his or her work. The money may be paid in advance into a neutral fund or account that is not controlled by the investor.
- ➔ **Be alert as to whether the lawyer or expert is providing advice that is actually in the company or government's interests.** Community members should make the decisions and set the goals that their lawyer or expert will help them to achieve.
- ➔ **Put the terms of the investor's or government's payment for the community's legal support in a Memorandum of Understanding (MOU)** that clearly sets out how much money will be paid, to whom, how the money can be used, and the community's rights (for instance, the rights to confidential advice, to select who provides the legal assistance, to decide whether or not it wishes to proceed to negotiate with the investor) and responsibilities. The MOU should say clearly that the money for legal help that the investor or the government has paid is *not* a payment in exchange for the community consent to the investment.

⁶ For a detailed guide on how to start up a paralegal program, see <https://namati.org/resources/developing-a-community-paralegal-program/>.

ENSURING THAT THE COMMUNITY IS MEANINGFULLY CONSULTED

Before beginning a consultation process, advocates should help community members identify whether they have the legal right under domestic law to reject the project. Factors that strengthen or weaken a community's right to reject a proposed project include:

- » **If the community legally owns its lands and natural resources** under national law, and the project concerns agricultural, forestry, or manufacturing investments. If the community owns its land, it may be entitled to simply decide not to lease its land to or enter into a contract with a potential investor.
- » **If the project is a mining project or concerns subsoil resources** that are solely under the government's control, then **the community may not have the right to reject the project** and may have to focus on negotiating a least negatively impactful deal.



Community leaders should never meet alone with potential investors. Meetings with investors should be open to all community members to attend and ask questions.

In either situation, advocates and community members can take various actions to ensure that a legitimate consultation does take place, such as:

1. **Refuse to give immediate consent and seek legal support.** If an investor asks the community to agree to something they do not understand or agree to or gives a contract to the community to simply sign, community members should tell the investor that they:
 - Do not yet consent to the investor's project;
 - Have the right to seek legal advice before signing anything or consenting; and
 - Are not yet ready to negotiate and need some more time and information before they are able to update the company on the community's position.



2. **Record every interaction with investors by video or in writing.** Most importantly, the community should write down, video record, or audio record (using a smart phone) every interaction with the investor and his representatives, even phone calls. Everything that the investor tells community members, and everything that is discussed between the community and the investor, should be written down *and* photographed to create both a paper and a digital record. The community should keep copies of any notes, letters, emails, or text messages that the community sends to or receives from the investor.⁷ These records can be used in legal proceedings as proof of the content of all relevant community–investor interactions.

3. **Identify legal requirements for consultation.**

Advocates can identify what the national law requires for a consultation, then support community members to remind the company and the government of the law's requirements and request that the law is properly implemented. If no such laws exist, advocates can look to the company's own internal policies, rules, and requirements, or to external standards that the company must follow, such as standards from certification schemes or standards required by banks that provide money to the company.

- For instance, if the company grows oil palm and is certified by the Roundtable on Sustainable Palm Oil (RSPO), then the community can demand more information about the proposed investment and that the company wait for their FPIC to be given, because the RSPO's *Principles and Criteria for the Production of Sustainable Palm Oil* requires companies to provide information (Principle 1) and to obtain the Free, Prior, and Informed Consent of the community (Principle 2.3).

Other certification schemes and finance-related standards have similar requirements. Advocates may need to seek assistance from a national or international NGO to discover which financial institutions are funding the project and what procedures those institutions' rules require.

⁷ Having a record will help confirm what was discussed and agreed upon. Keeping notes and documents, as reminders of promises made, can be especially helpful during the negotiation process. Such documentation may also be useful when conflicts or disagreements occur between the company and the community, or if the community later decides to take the company to court.

4. **Demand that an authentic consultation process is followed.** Advocates can help the community demand that the consultation occurs in line with best practices. This means demanding that consultations:
- Occur *before* the government authorizes the project development to proceed;
 - Take place at the earliest possible stage in the design and conception of the project;
 - Allow a community to provide **or withhold** its free, prior, and informed consent (FPIC);
 - Offer opportunities for the community to learn about the project and **influence decisions** about the project;
 - Be held in the community's native language;
 - Be conducted according to the community's rules and customs;
 - Provide opportunities for all community members, including women, youth, and members of marginalized groups to participate; and
 - Be properly funded (ideally independently) to enable the community to access legal and other technical assistance and to otherwise build their capacity to address likely power imbalances between the community and the company.



5. **Do not let community leaders approve deals without consulting the community.**

Investors and the government officials that support them often prefer to meet alone with a community leader or a group of leaders or male elders. It is much easier to persuade, intimidate, or bribe a few people than to get authentic approval from a whole community. Communities should take every effort possible to ensure that their leaders do not have private, secret meetings with investors. Advocates can help communities make local rules that require full community participation in investment decisions and mandate that leaders call a large meeting of the entire community whenever an investor arrives to discuss the proposed investment.

If leaders do make a decision about the investment without consulting the community, the community should seek advocates' support to take action against these leaders. In some cases, communities have successfully convinced their leaders (by referring to community's bylaws and through public shaming tactics, etc.) to meet with the investors and cancel the deal or require a full community consultation.

If the company proves to be unwilling to meaningfully consult the community, then the community and its advocates may choose to take action to attract attention to the situation, such as using the media to share its story, advocating directly to company shareholders, seeking help from influential national and international allies, pursuing support from trusted government officials, and other forms of direct action. In some cases, direct action should be taken only as a last resort, as communities have sometimes faced violent retaliation for publicizing their situation.

9.

REVIEWING ALL RELEVANT LEGAL, TECHNICAL, AND FINANCIAL INFORMATION ABOUT THE COMPANY AND THE PROPOSED INVESTMENT

To make an informed decision about how to respond to an incoming investor during the consultation process (and, if the community decides to negotiate with the investor, during the negotiation process as well), a community must be able to access and understand key information about the investor, the proposed project, and all of the project's potential positive and negative impacts. Having this information will put community members in a better place to decide whether or not to negotiate with the investor

and what demands they can make during negotiations. Community members should immediately seek the support of legal and technical experts who can help request the information, research the investment and the company's history, founders, directors, and funders, and explain what the documents (often purposefully written to be difficult to understand) say in a way that all community members can understand.



Meet together as a community to review all information about the potential investor and investment project before agreeing to share any community land.

1. As a start, communities and their advocates should **ask the investor a series of questions directly**. Such questions might include:

- What is the name of the company seeking land?
- Is the company legally operating in the country? (If yes, ask to see the papers proving government permission.)
- What kind of investment is planned? What activities are planned to take place on the land?
- What land does the investor want to use for the investment? Why did the investor or company choose this specific community land?
- How long of a lease is the investor seeking? Or is the investor seeking to buy the land?
- What are the profits the investor is expecting to earn?
- What are the expected environmental and social impacts of the investment?
- What benefits will the investment bring to the community?
- How will the investment affect community members' prosperity and wellness?
- How does the investor intend to interact and communicate with the community?

2. Communities should also ask the investor and the government to **provide copies of the following documents**:

- **Feasibility study:** National laws often require investors to carry out “feasibility studies” that investigate whether the proposed project is practical and likely to successfully make a profit or fulfill the planned outcomes. Community members can ask to review the feasibility study to help them understand whether the project is likely to fail or succeed; this information can help community members avoid negotiating and contracting with investors whose projects have a high risk of failing.
- **The investor's business plan:** Investors are often required to submit a business plan to the government before their investment project is approved. Such business plans should provide information about how the investor plans to develop the land, including a detailed work plan and timeline. The business plan should

have information about the investor's expected annual profits and/or expected profits over time (a few years at least). These details can help community members understand how the project may affect them and how much money the investor expects to make.

- **Permits and licenses:** Investors often have to get different permits or licenses from the government to carry out activities like accessing water or harvesting timber. Such permits and licenses require the investor to do (or not do) certain things on or near the community land. Communities should not take the investor's word that they have the government's permission to access land, water, or forests, and should demand to see copies of all necessary licenses or permits. If the investor refuses, community members can get this information from relevant government agencies; they may need to file a “Freedom of Information” application (described below) to do so.

- **The investor–state contract regarding the proposed project.** In some situations, a company must negotiate a contract with the government to carry out its planned investment. Community members and their advocates should request copies of any contract made between the government and the investor in order to see what contractual rights and obligations have already been created between the government and the investor. The content of the investor–state contract may limit or increase the community's bargaining power with the investor. For example, in countries where the state is the legal owner of the land to be used by an investor and the investor has already signed a contract with the government, a community may not be able to take part in investment decision-making processes. However, communities who may be affected by the investment should still be consulted and their concerns addressed.

In relation to community benefits, it is important to understand what is in the investor–state contract: the community may find out that the government–investor contract requires the investor to provide certain benefits to the community. This information can help the community hold the investor accountable to providing these benefits, give

community members an opportunity to specify the terms on which they would like to receive the benefits, and possibly allow them ask for additional benefits beyond those the investor was already contractually required to provide. Alternatively, the state–investor contract may include terms that significantly limit what protections the community may insist upon or the benefits it can ask for.

- **Environmental scoping reports and Impact Assessments (including Environmental, Social, and Human Rights Impact Assessments):** Environmental scoping reports are often carried out in the early stages of project planning, before a full impact assessment is conducted. Scoping reports give a brief assessment of the proposed project’s environmental risks and various recommendations for how to avoid or reduce potential negative impacts. It is good to review the scoping reports, as Impact Assessments might not be completed until after negotiations have started. Communities can postpone signing any contract until they have seen the results of all the Impact Assessments as well as the investor’s plan to mitigate the potential risks identified.
- **The investor’s reputation, track record, or performance on other projects:** Communities may want to request information about the investor’s other projects, including documents showing how those projects have performed over time. This information can help make clear how the company usually operates and whether it is committed to ensuring that its operations benefit communities, ensure community members’ human rights, and follow environmental laws.
- **Information about who is funding the potential investment.** Often companies are subsidiaries of larger “parent” companies with different names. Also, large investment projects often seek funding from a wide range of sources. Advocates can help communities to discover and “map” who has pledged money to pay for the potential investment, and who the “parent” company of the investor is. This information can help the community advocate for its interests in cases where the company acts in bad faith.

The information should be provided in an accessible format and in the local language, and ideally accompanied by images or videos that can help the community understand the information.

If information is withheld, the community and its advocates can make a FOI request to demand all information about the proposed investment. If the government or company withholds information about the investment from the community, advocates can help communities make a “freedom of information request” to demand that the government release the information. More than one hundred countries have passed Freedom of Information laws (FOI laws), which give the general public the right to demand access to data held by national governments. It may be necessary to seek the help of a lawyer who specializes in freedom of information requests to help determine what information the community is entitled to and how to access it.

Ask that **copies of all relevant documents be left with the community to read carefully, understand, and analyze.** If this is not possible, advocates or community members can take photos of each page of the documents with a smartphone and then send these photos to be printed for a close review. The community will likely need the help of lawyers, paralegals, and technical experts to understand what the documents say. Community members should request that they are given all the time they need, within reason, to review the details of a proposed investment.

Finally, to complement this documentation, **advocates and community leaders can research how similar investment projects have been carried out** (by the investor or other companies), and the impacts of those projects on local communities and the environment. Community members may want to contact other communities where the investor is already working to ask about their experiences with the investor and how their land, livelihoods, and other interests have been affected by the project. Community members may also ask to visit the company’s other projects to see for themselves how the proposed project will operate in practice.

COMPLETING THE CONSULTATION PROCESS: MAKING A DECISION ABOUT WHETHER TO REJECT THE INVESTMENT OR NEGOTIATE WITH THE INVESTOR

Once community members have reviewed all relevant information about the company and its proposed investment, they will need to hold community discussions and make a decision on whether or not to allow the company to carry out the project on community lands. When making this decision, community members should refer back to and think about:

- The **visioning and valuation exercises** and the resulting plan of action;
- The **community's rights** under national and international law;
- The **community's bylaws, including agreed decision-making processes and conflict resolution strategies**;
- The **insights and increased understanding** gained by reading the project's documents, researching the investor, and analyzing all likely positive and negative impacts.

Once the community is ready with a decision, it can call a final "consultation" meeting with the investor to give or withhold its consent to the project. At this meeting, which should be attended by all community



To help protect the community's interests, carefully document their informed consent to or rejection of the proposed investment on paper, and with photos and videos.

members, or as close to the whole community as possible, **the community and advocates should carefully document their informed consent (or rejection) on paper, with photographs, and with videos.** Carefully documenting the community's decision will help protect the community's interests and ensure against false claims that the community gave its free, prior, informed consent (when in fact the community withheld its consent).

Before the consultation ends, **community members should demand that they are given a copy of relevant documents;** very often communities are left with no paperwork at all. Copies of all paper documentation of the decision should be kept in the community, and a copy filed with appropriate local and national government offices.

IF THE COMMUNITY DECIDES *NOT* TO ALLOW THE INVESTOR TO ACCESS AND USE ITS LAND

If a community decides that it does not want the company to build an investment project on its lands, it may be entitled to simply decide not to lease its land to or enter into a contract with a potential investor. The community can do so by withholding its Free, Prior, and Informed Consent to the project, and it should document this lack of consent in writing. If the company and government refuse to accept the community's decision, advocates and lawyers can support the community to continue to oppose the project. In such instances, possible strategies can include:

→ **Engagement with due diligence processes:** Environmental Impact Assessments, due diligence proceedings, and other processes required by the government (or lenders financing the investment) sometimes provide opportunities for communities to raise their concerns or challenge findings, plans, and recommendations. Advocates can help the community find out what processes are taking place and make a plan for community members to take part in these processes and raise complaints or oppose the findings of relevant assessments.

→ **Engagement with non-judicial grievance mechanisms:** As discussed above, the community might be able to use rules and standards required by:

- **the company's own internal protocols;**
- **international certification schemes** like the Roundtable on Sustainable Palm Oil;
- **the lending institutions and banks** financing the project;
- the **insurance companies** insuring the project;
- **buyers** purchasing the company's products; and
- **other agencies and institutions** associated with the proposed project

to support its efforts to oppose the company's investment plan or forced land acquisition. Advocates can help community members find out which standards apply, whether there are grievance mechanisms or procedures attached to those standards, and what remedies might be available if the community files a complaint or engages with the grievance mechanisms. If there are available grievance mechanisms, the community may choose to file a complaint to potentially stop the project.⁸

→ **Advocacy campaigns:** Advocacy campaigns that explain the community's concerns to many different national and international actors can help raise awareness of community grievances and create pressure on the government and the company to address the community's interests. Community members can engage the media by telling their story to journalists, speaking on radio programs, writing editorials and letters to newspapers, and blogging about it on the internet. The community's campaign might also benefit from alliances with campaign-focused NGOs that can help share the community's situation with a national, regional, or global audience. The community can use the media not only to shed light on the company's bad-faith actions, but to publicly shame actors involved in the entire

⁸ There may be other grievance mechanisms available; for example, if an investor comes from a country that is a member of the Organisation for Economic Co-operation and Development (OECD), the community may be able to bring a complaint with an OECD National Contact Point in the investor's home country.

investment chain, including the banks providing finance to the company, the insurers who cover the company's operations, company shareholders who may be able to influence company decisions, and other stakeholders who may have some form of influence. This type of advocacy can help to increase pressure on the company to respond to the community's concerns.

→ **Lobbying campaigns:** Lobbying campaigns involve quieter outreach to the government, members of the company, and other relevant institutions and actors to try to convince them to take measures to support the community's position.

→ *At the local government level*, where government officials may be more open to listening to the needs and interests of their constituents, communities may ask the local government to pass legislation prohibiting or regulating certain businesses in their area. Depending on national law, such legislation can be tied to local governments' exercise of *judicial welfare clauses*, which government may pass to protect their constituencies from possibly harmful investments. Or, local government can also pass legislation to require investors to comply with a set of requirements in order for the company to get—and keep—a business permit from the local government units concerned.

→ *At the national government level*, communities may engage their representatives in the legislature to exercise their *oversight powers* and hold the executive branch (all administrative officials) accountable to following national laws that protect the environment and communities' rights.

→ **Strategic litigation:** The community may consult with a lawyer and choose to file a court case against the investor and all associated institutions and actors. A court case may be brought to:

- Strengthen or more explicitly recognize the community's land rights;
- Restore community use of land;

→ Formally recognize the community's right to FPIC; or

→ Challenge the legality of government decisions to grant permission to the company to carry out the project (including government decisions to grant permits and licenses, and to approve impact assessments and other reports and plans).

→ **Direct action:** Direct action can include protests, marches, picket lines, sit-ins, boycotts, and other forms of civil disobedience designed to publicize the community's grievances and, in some circumstances, to physically stop or delay company operations. For the community's safety, direct action efforts should remain nonviolent. Direct action efforts should only be taken as a last resort, as they may be considered illegal, and thus create significant risks for community members, including imprisonment, criminal charges, and harassment or violence by security forces.

For all potential strategies, community members should seek legal and technical help to ensure that they fully understand the potential consequences of their efforts to oppose the investment. Depending on the context, some strategies may create serious risks for community members. For example, speaking out against a project backed by powerful national elites may place community members' physical safety in jeopardy or create the risk of imprisonment.

IF THE COMMUNITY DOES DECIDE TO LET THE INVESTOR ACCESS AND USE ITS LAND

If the community decides to share its land with a potential investor, it will end the consultation process by indicating its willingness to negotiate the terms on which the investment will proceed. Importantly, entering into a negotiation process does not mean that the community: (1) has promised that a contract will be reached or (2) has given the investor permission to use community lands.

Because this is a new phase with new procedures, the community may need different or more experienced legal and technical support, as well as new funding and other resources necessary for a formal negotiation process.

WHAT IS NEGOTIATION?

Negotiation discussions involve two or more people or parties who come together with the goal of reaching an agreement about the exact terms of how they will work together, communicate, and exchange or share resources. In a negotiation process, the community and the investor each come to the table with their specific desired outcomes and discuss until they reach a compromise that both parties are happy with.

A community should not accept or decline an investor's offer as one complete contract that they must either "take or leave" as a whole. Rather, negotiated contracts will necessarily involve discussions and compromises involving dozens of separate issues, summarized in individual "clauses." During negotiations, the investor and the community make offers and counteroffers, with each party pushing for terms that will most benefit them and protect their interests.

For each clause of the contract, the community's negotiation team should not feel rushed to make a decision. Rather, the community's negotiation team should ask questions to make sure they fully understand what has been offered, then carefully analyze the offer and consult their lawyer, paralegal, or advocate before making a counteroffer or accepting the terms offered by the investor. This is why, going into a negotiation, community members must know what they want, including what they are willing to compromise on (for example, the exact monthly rent that will be paid to the community) and what they are not willing to compromise on (for example, protections that safeguard the community's sacred areas and clean water supply) (see Guide 2 to learn more about what should be considered when negotiating a contract).

PREPARING TO NEGOTIATE A COMMUNITY-INVESTOR CONTRACT

If a community decides to negotiate with the investor, community members and their advocates and lawyers should immediately begin preparing for the negotiations. Such preparations include creating a negotiating team and deciding how the negotiating team must report back to and consult with community members; agreeing with the investor on the format of the negotiations; and reviewing or determining the community's plans and priorities going into the negotiation. These efforts are described on the following pages.



If a community agrees to share its lands and natural resources with an investor, **communities should never sell their land**. A leasehold agreement will ensure that the land remains under the community's ownership and will be returned to the community after the investment ends.



Elect a diverse, respected group of community members to work with advocates to negotiate the contract with the potential investor.

ESTABLISHING A NEGOTIATION TEAM TO REPRESENT THE COMMUNITY AND CREATING A COMMUNICATION PLAN

The community should decide who will represent the community when meeting with company representatives. Above all, the community must put into place protections to ensure that no single person is authorized to act for and in behalf of the community, particularly to compromise, settle, enter into mediation, conciliation or arbitration, and sign pleadings filed in court. **To prevent against potential corruption and bribery, there should be at least three (preferably more) people who must together meet with the investor to represent the community's interests and sign any documents that will bind the community.** To choose the right people for the job, the community should hold a big meeting and discuss the following questions:

- Will community elders, elected leaders, or a special “negotiating team” of men, women, youth, and elders specially chosen for the role represent the community?
- How can the negotiating team be representative of all stakeholder groups in the community, so that the opinions of all members of the community can be considered?
- What qualities should team members have? (For example, intelligence, honesty, integrity, trustworthiness, calmness, courage, respectfulness, capacity to listen, etc.)
- What skills should team members have? (For example, good reading abilities, ability to speak the national language or the language of the investors, experience interacting with government officials, ability to navigate well in both the community's culture and the investor's culture, excellent ability to argue a point/good public speaking skills, etc.)

GET LEGAL ADVICE

If possible, it is best to have a trusted lawyer or paralegal either on the community's negotiating team or closely advising it.

The community should define the roles and responsibilities that each member of the negotiation team will have. In addition to ensuring that the views of women, youth, and members of minority groups are represented, the negotiating team should have members that can:

- Lead the negotiations on behalf of the community, firmly holding the community's best interests at heart even when the investor pushes back;
- Communicate and listen well;
- Take notes that capture on paper what is discussed and decided in all meetings with company officials;
- Confidently ask for clarification when something is unclear;
- Keep everyone on track, on time, and well organized;
- Facilitate meetings well, including helping to manage group dynamics and keeping the team unified; and
- Successfully carry out any other tasks that the community deems necessary to negotiating on its behalf.

To ensure that the negotiating team does remain accountable to the community, **the community should also clearly define how the negotiating team and the broader community will communicate**, including discussing, deciding, and the community should write down:

- How will the community make sure everyone's interests are represented by the negotiating team?
- What can the negotiating team decide on its own and what must the team bring back to the entire community to decide together?
- How often, and in what format, must the negotiation team update community members on the progress of negotiations and seek their input? (During the negotiation process, will there be daily or weekly meetings?)
- What decisions, during the course of negotiations, can the negotiation team make independently?
- What decisions require the consent and agreement of the whole community?

- Can the negotiating team go beyond the terms that the community has agreed are the upper and lower “bounds” of what it is willing to compromise on?

Such processes can be used by the broader community to hold the negotiating team accountable throughout the negotiation process.

Once the negotiating team is chosen, advocates can support its members in undertaking their responsibilities well by **providing capacity building trainings**. Such trainings could include:

- Reviewing and preparing for expected scenarios during the negotiation, including writing out clear talking points and organizing arguments to counter any of the investor’s demands that will likely harm the community;
- Doing role plays to simulate the negotiation process (with the negotiating team acting as themselves, and other community members or advocates playing the role of the investors);
- Preparing an opening statement that outlines the community’s objectives and concerns at the beginning of the negotiation;
- Making an action plan and timeline that covers all of the preparation necessary leading up to the negotiation, and assigning tasks and roles to make sure that all the necessary information is gathered, all necessary community meetings are held, and all critical logistics are taken care of; and
- Providing other training and skill-building exercises that can help prepare the negotiating team represent their community’s interests well.

AGREE ON THE PROCESS, LOCATION, TIME, AND LANGUAGE FOR THE NEGOTIATIONS

Before negotiations begin, the community’s leaders and/or the selected negotiation team should meet with the investor (and relevant government officials, if applicable) and agree on the rules for how the negotiations will go.

- **Who will be doing the negotiating on behalf of the parties** and how will they be identified? The community should introduce its negotiating team to the investor, and get the names and positions of the people who will represent the investor (likely the investors’ legal team).

- **How will the investor and the community communicate about logistics over the course of the negotiations?** Who from the community will be authorized to speak with the investor or his agents on issues of scheduling and other practical matters regarding the negotiation process, outside of the actual terms of the contract? If community members need to call the investor to communicate, what number should they call and whom should they speak with?

- **What is the timeline for the negotiations?** When will the negotiations begin? When must they be finished?

- **How many negotiation meetings will be held?** Community members should demand that there be more than one negotiation meeting, to allow the negotiation team to report back to the wider community how the negotiations are going, discuss what the company has proposed, do necessary research, and decide on the community’s responses or counteroffers.

- **Where will the negotiations take place?** The location of the negotiations can affect the power dynamics of the negotiations: if the meetings take place in the company’s offices in the capital, the community’s negotiating team on the community’s behalf may feel intimidated. Instead, negotiations should take place somewhere easily accessible to community members, in a space where they feel comfortable. It is best to agree on a neutral location, ideally within or near the community so community members can easily attend and watch.

- **What language will be the negotiations be conducted in?** Ideally, negotiations should be held in the community’s native language with interpreters on hand for the investor. If the investor demands that the meetings take place in English or the national language, make sure that: (1) the interpreters are fluent in both the language of the negotiations and the community’s local language and (2) they are able to interpret what is said in simple and clear language so that all community representatives present at the negotiation can understand.

Once agreed, **these matters should be written up in a negotiation plan** that can then be referred to throughout the negotiation process.

REVISIT THE COMMUNITY'S PRIORITIES, UNDERSTAND WHAT THE INVESTOR WANTS, AND PREPARE TO COMPROMISE

Before negotiations start, community members should review all of their previous preparation efforts (described in section 1, above), including:

- Reviewing the community's future vision and accompanying land use plan;
- Remembering how much value they themselves get from their common lands and natural resources;
- Reviewing the community's bylaws, including its plan to deal with internal disagreements or conflicts between community members that come up in the course of negotiations;
- Reviewing the findings of the impact assessments to make sure that all necessary protections are included in the contract; and
- Reviewing relevant national laws, including:
 - What national and international laws require the investor to do;
 - Whether or not the government has already signed a contract with the investor, and, if yes, the terms of that contract.

Most importantly, the community should **be prepared to insist on certain matters and to compromise on others**. What the community is willing to compromise on (by how much), and what is nonnegotiable, should be reviewed and explicitly set out, so that members of the negotiating team have a clear mandate.

The community should also ensure that they understand what the investor wants and why.

Community members should make sure that they understand what the investor's goals are, as this information will help the negotiating team understand what is possible during negotiations and will put them in a stronger position to negotiate. Investors may try to hide their interests and the outer limits of what they are willing to offer as payment or benefit for the land and natural resources they want. Community members and advocates should review the investor's documents to better understand its interests, motivations, and capacities and be ready to respond well to what the investor will try to push for.

Finally, the community should consider and plan for what will happen if the community and the investor do not reach an agreement.

If the community is not comfortable with the investor's offer and the investor is unwilling to compromise, the community may decide to end the negotiation process and reject the investment. However, the community must understand and consider the consequences of ending negotiations: if the community's consent is required under national law, then the project may not be allowed to proceed. However, if national law—or powerful national actors—would allow the investment to proceed even without the community's consent, then ending negotiations without a clear, written contract may put the community in a far worse position.

BEGINNING NEGOTIATIONS

If a community has agreed to share its lands and natural resources with a potential investor, then the process of negotiating a binding contract that is beneficial to both the community and the investor will begin. Communities going into negotiations should remain vigilant about power and information imbalances and, as much as possible, seek the support and counsel of paralegals, lawyers, technical experts, and other advocates. Efforts should be made to ensure that the contract is written in basic, simple language that is understandable to both community members (who must comply with the contract) and government officials (who may be called upon to enforce the terms of the contract).

Guide 2 provides guidance for communities preparing to negotiate and draft contracts with potential investors. It starts by describing what a contract is and by explaining the different types of contracts that communities and investors might sign. It then describes what may be included in a contract and provides suggestions and reminders on what communities should make sure to include in any contract they sign. To help communities decide what to advocate for in negotiated contracts, each section includes a list of questions that community members can answer as they prepare for and participate in negotiations.

In negotiations over the terms of the potential investment, remain vigilant about power and information imbalances, ask many questions, and insist that your questions are answered.



PREPARING
IN ADVANCE
FOR POTENTIAL
INVESTORS



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*"These much-needed guides fill an important gap: only if local communities are **empowered** can they make free, **informed** choices and develop **meaningful** partnerships with government and the private sector."*

- LORENZO COTULA, IIED

