



RIB ASIA

Responsible and
Inclusive Business

CONFLICTS OVER LAND

A Role for Responsible and Inclusive Business



CSR ASIA

THE CONTEXT

Recent years have seen significant increases in land deals across Asia¹. In addition to pressure on land for investments in extractive resources, aquaculture, biofuels, infrastructure and real estate development, rising food prices and food price spikes have led to increasing demand for agricultural land to grow food for export. The rising demand has further fuelled land investments, speculation and sometimes illegal and unethical transfer of lands, small and large.

Highly skewed land ownership distributions and discrimination along lines of gender and ethnicity have limited economic opportunities for disadvantaged groups and, in addition, have led to social conflict and human rights abuses. However, the complexity of land rights issues and the fact that change is often fiercely resisted by vested interests, benefiting from the status quo, have historically frustrated many efforts to bring about policy change².

While commercial investment in land has the potential to contribute to economic development opportunities, it is often a major source of controversy and conflict over land tenure. The recent boom in large scale land acquisitions in Asia has benefited domestic elites as well as foreign investors. However, development opportunities have often been missed or even reversed where it has disadvantaged local communities and especially the poor, indigenous peoples, women and other vulnerable groups. Weak land governance systems, powerful elites in business and politics, cronyism, inequality and corruption create a permissive environment for practices where communities are evicted from land, customary land use rights are ignored, community land is sold as available or unused and compensation is inadequate. Poor, marginalised and vulnerable people and

communities lack the power to advance their interests and have little recourse or access to grievance mechanisms.

The parties to land deals often complete them in secret and concerns of local residents and smallholders who have lived off the land for generations are ignored. The opaque conditions, under which land can abruptly switch ownership, can displace poor people, destroy livelihoods, abuse human rights, impact food security and disrupt whole communities. Moreover, it is not only large scale land deals that impact poor people but smaller scale “land grabs” that have impacted the poor when their land is taken away or it becomes economically unviable to stay on the land.

Rather than leading to development opportunities from investment in land use, land grabs mean that livelihoods are lost, human rights violated, and poverty and exclusion perpetuated. In many of Asia’s land grab conflicts, companies have been complicit in practices that have deprived local communities of land use rights and human rights violations.

The private sector has a role to play in helping to protect the land rights of vulnerable and marginalised people and in ensuring that human rights associated with land tenure issues are not abused. Businesses can play an important part in protecting smallholders and communities along their value chains through more inclusive business practices. In so-doing they will benefit from a healthy and secure supply chain. By being part of the solution to strengthening land rights, businesses can be part of multi-stakeholder initiatives (MSIs) aimed at protecting the poor and vulnerable.

¹ <http://www.landmatrix.org/en/>

² World Bank: *Land Policy and Administration Report*



Photo credit: Chris Seward, 2011

The role of smallholders and fair practices in integrating small producers in value chains is a key focus for sustainable business practices in both agriculture and aquaculture where small producers often lose out to big business over land and resource rights. As part of a commitment to the protection of land rights for local communities, initiatives to make value chains more inclusive can help to give communities, local indigenous peoples and women a greater role in determining land use and changes in that use. Land and tenure rights are increasingly being addressed by MSIs such as the Round Table on Sustainable Palm Oil (RSPO) and others.

Responsible and inclusive business practices should therefore consider land rights, including sustainable natural resource use, efforts to counter land grabbing practices, the effective

management of business impacts on land and the risks associated with conflicts. Tackling these issues is often challenging, especially when unclear land titles lead to legal uncertainty and weak land governance systems are marred by corruption, cronyism, vested interests and the legacies of historical governance failures.

This briefing paper makes the case for proactive business engagement in respecting land rights and ensuring legal, fair and inclusive practices on land use, access to natural resources and equitable development opportunities. It outlines key challenges, provides an overview of existing instruments that can help companies address issues related to land, and points to practical entry points for improved business practices.



Photo credit: International Rivers, 2013

LAND RIGHTS AND RESPONSIBLE BUSINESS

The way land, forests, coastal resources and natural resources are governed and how rights to their use are allocated, pursued and protected is key to determining development outcomes in many parts of Asia. The complex interests and power relations that determine land rights, tenure, acquisition and the increasing pressure on natural resources from economic growth and development shape a challenging sustainability context.

Land is a critical factor for several sectors, including agriculture, aquaculture, extractives, infrastructure development, dams and special economic zones as well as for financial institutions involved in project financing. Land grabs and resulting conflicts over land use, tenure systems, human rights and livelihoods pose significant risks for investors and companies who use the land or source from affected land³. Key business risks include:

- Conflicts with communities leading to disruptions in supply
- Legal and regulatory risks, including claims for damages that can lead to investment insecurity
- Adverse media attention resulting from conflicts, environmental disruptions and negative impacts on communities
- Reputational damage when a business is seen as exploiting land rights and being complicit in human rights abuses
- Consumer boycotts from customers concerned about the abuse of land rights and associated human rights abuses
- Bribery and corruption risks associated with land rights and the transfer of land that can have both reputational and legal consequences if discovered
- An inability to hire skilled human resources when people are unwilling to work with companies that they perceive to be irresponsible.

³ For more information on research and recommendations on addressing land rights issues as well as additional reading, see: <http://www.oxfam.org/en/grow/policy/land-and-power>

In this context, responsible businesses will commit themselves to a ten-point plan around:

1. Understanding the local implications of land use decisions for local communities, especially poor and vulnerable people and any consequent potential human rights abuses
2. Engaging with stakeholders to understand their concerns and aspirations, ensuring that the vulnerable, and in particular indigenous peoples and women, have a voice
3. Identifying and addressing real and potential conflicts over land and tenure rights, community interests, traditional land use and livelihoods, poverty and exclusion
4. Putting in place a strategy and effective mechanisms to ensure the rights of communities affected by land deals and any grievances are addressed
5. Adhering to international best practice standards, including following the principle of free, prior and informed consent (FPIC)
6. Negotiating with stakeholders over the use of land, changes in land use and risk and benefit sharing arrangements
7. Supplementing and land use arrangements with community investment activities that ensure access to essential services, income and wealth creation for the community and access to technology
8. Disclosing activities and processes related to land and land use rights acquisition and the results of stakeholder negotiations, in a transparent way
9. Leveraging business influence and advocating the promotion of best practices with respect to land rights and associated human rights
10. Accepting and addressing responsibility for community concerns and violations of land and tenure rights along supply chains, including in the case of investors, providing finance to projects where issues related to land use may arise

Whilst some of the leading multinational companies have comprehensive programmes that do deal with these issues, in most countries, big gaps remain in preventing land grabs and their detrimental social and development impacts through the comprehensive use of appropriate instruments by the private sector.

Responsible businesses will align their practices with recognised principles for social responsibility to enable them to effectively contribute to sustainable development. Organisations will ensure accountability, transparency, ethical behaviour, respect for stakeholder interests, respect for the rule of law, respect for international norms of behaviour and respect for human rights⁴.

⁴ International Organization for Standardization (2010). *ISO 26000: 2010 Guidance on Social Responsibility*. Geneva: International Organization of Standardization, <http://www.iso.org/iso/iso26000>.

Adhering to these principles is a basic element of business commitments to legal, equitable, and inclusive land rights and use. It will help companies protect themselves from the destabilising consequences of land grabbing practices and associated risks and from being accused of complicity in human rights abuses. An intensified focus

on responsible business management and inclusive business practices supported by a maturing body of frameworks, guidance and tools for implementation, many of which include elements that can help address issues related to land, will be useful entry points for business to address land issues and contribute to stopping land grabs.

SMALL SCALE LAND GRABS: AN EXAMPLE FROM THE SHRIMP INDUSTRY

Many of the shrimp farms in Asia have been established in areas that did not previously have clear land and property rights. These coastal areas were legally claimed by the state but were inhabited by indigenous communities that, in some cases, had existed there for centuries. The prospect of building shrimp farms gave the land economic value that it had never been thought to possess, leading governments to sell it to investors. They then moved in to expropriate and enclose the land and dispossess communities⁵.

Historically, the development of shrimp ponds typically occurred on or close to the seashore. The former mangroves, wetlands and salt marshes were (and often still are) common property or state owned lands. Governments saw no immediate harm in providing ownership titles to those who wished to develop shrimp ponds. However, in doing so the traditional, subsistence, use of these lands was taken away from marginalised, rural poor people. People were displaced, communities up-rooted, land for cattle grazing and mangroves for seafood gathering and artisanal fisheries were closed off⁶.

Land ownership has also been manipulated through shrimp aquaculture development. Case studies from Bangladesh, Thailand and Vietnam reveal how opportunities for subsidies and soft loans available to the elite gave these people an opportunity to acquire land ownership in coastal areas⁷. As a result land prices went up and poor farming families were bought out or even forced out without an alternative means to make a living. Those rural poor who did own land could often not apply for publicly available credit facilities due to administrative difficulty in proving their land ownership.

⁵ *Food and Water Watch (2009), Suspicious Shrimp*

⁶ *Environmental Justice Foundation, Risky Business, 2003. Environmental Justice Foundation, Smash & Grab, 2004. de la Torre, Barnhizer (eds) The blues of a revolution. ISA Net/APEX, 2003. Lebel et al, Industrial Transformation and Shrimp Aquaculture in Thailand and Vietnam: Pathways to Ecological, Social, and Economic Sustainability? Ambio 31(4), 2002. Van Mulekom et al, Trade and export orientation of fisheries in Southeast Asia: under-priced export at the expense of domestic food security and local economies. Ocean & Coastal Development, 49, 2006*

⁷ *Environmental Justice Foundation, Risky Business, 2003. Lebel et al, Industrial Transformation and Shrimp Aquaculture in Thailand and Vietnam: Pathways to Ecological, Social, and Economic Sustainability? Ambio 31(4), 2002. Boromthanarat, Coastal zone management. In: Regional workshop on the environmental assessment and management of aquaculture development, TCP/RAS/2253, Bangkok, Thailand, FAO/NACA, 1995*

FREE, PRIOR AND INFORMED CONSENT (FPIC)

'Free, Prior and Informed Consent' (FPIC) has been widely accepted in many private sector policies associated with corporate social responsibility in sectors such as dam building, extractive industries, agriculture, aquaculture, forestry and plantations. FPIC implies informed, non-coercive negotiations between investors and companies and communities or indigenous peoples prior to projects being established and developed on their land. It is accepted as necessary to ensure a level playing field between communities and companies

and, where it results in negotiated agreements, provides companies with greater security and less risky investments.

FPIC establishes the basis on which equitable agreements between local communities and companies can be developed in ways that ensure that the legal or customary rights of local rights-holders and indigenous peoples are ensured and that they can negotiate on a fair basis to ensure they gain real benefits from proposed developments on their lands.

FREE implies no coercion, intimidation or manipulation

PRIOR implies consent has been sought sufficiently in advance of any authorisation or commencement of activities and respect of time requirements for the consultation, negotiation and consensus processes

INFORMED implies that information is provided that covers (at least) the following aspects:

- The nature, size, pace, duration, reversibility and scope of any proposed project
- The reason for or purpose of the project
- The location of areas that will be affected
- A preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits
- Personnel likely to be involved in the implementation of the project
- Procedures that the project may entail

CONSENT, consultation and participation are key elements of an effective process.

- Consultation must be undertaken in good faith
- The parties must establish a dialogue allowing them to identify appropriate and workable solutions with mutual respect, and full and equitable participation, with ample time to reach decisions
- The process will include the option of withholding consent
- Indigenous peoples and local communities must be able to participate through their own freely chosen representatives and customary or other institutions
- The participation of women, youth and children are important⁸

⁸ Adapted from UNPFII 2005 Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples: Document E/C.19/2005/3, submitted to the Fourth Session of the UN Permanent Forum on Indigenous Issues, 16th – 17th May.

Robust FPIC processes will require local communities and indigenous people to receive timely and meaningful information on planned investments, projects and land use changes before concessions are given and activities commence⁹. They will include participation and consultation on setting the terms for and conditions by which social, environmental and economic impact are to be addressed based on full disclosure of all material aspects of a proposed development, including nature, size, scope, personnel and

procedures, duration, purpose, risks and opportunities¹⁰.

Effective implementation of FPIC remains limited across Asia and will be an area for development through capacity building with all stakeholder groups, including regulators, companies and communities. The inclusion of FPIC as a key element in most multi-stakeholder initiatives (MSIs) offers entry points for engagement, capacity development and implementation¹¹.

LAND RIGHTS AND HUMAN RIGHTS

While there is no right to land codified in international human rights law, access to land is a fundamental for development and poverty reduction, often a precondition for access to various economic, social and cultural rights, and often linked to civil and political rights¹². The debate on land rights and the struggle against land grabs is therefore closely linked to the protection of human rights. Smallholders and communities will often suffer violations of various rights where the loss of land or land use changes result in loss of livelihoods.

The link between human rights, land rights and business is an important element of corporate responsibility because human rights impacts are often associated with business deals following land appropriation practices by governments that violate local use rights and undermine the human rights of local communities and traditional users of land. This includes direct investments as

well as project finance. A specific focus in this context is the right to food¹³ as well as the right to water, both of which can be affected by agri-business expansion and large scale land acquisition.

The UN Guiding Principles on Business and Human Rights, which implements the United Nations 'Protect, Respect and Remedy' Framework¹⁴ have received considerable attention in the region. They offer companies a tool to map their management approaches to human rights and to check that they have systems for due diligence in place. However, effective implementation of core elements such as having a human rights policy in place, undertaking human rights impact assessments, preventing, mitigating and addressing adverse human rights impacts and tracking and disclosing performance over time, remain slow. This is especially the case for regional and local companies across much of Asia.

⁹ Buxton A., & Wilson E. (2013). *FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects*. Rogers C. (Ed.). London: International Institute for Environment and Development. Retrieved from <http://pubs.iied.org/pdfs/16530IIED.pdf>

¹⁰ Hill C., Lillywhite S., & Simon M. (2010). *Guide to Free Prior and Informed Consent*. Victoria: Oxfam Australia. Retrieved from <http://resources.oxfam.org.au/pages/view.php?ref=528>

¹¹ RSPO. (2008). *Free, Prior and Informed Consent and Oil Palm Plantations: a guide for companies*. Retrieved from http://www.rspo.org/file/FPIC%20and%20the%20RSPO%20a%20guide%20for%20companies%20Oct%2008_cover.pdf

¹² Wickeri, E. and Kalhan, A. (2011), *Land Rights Issues in International Human Rights Law*, London: Institute for Business and Human Rights. Retrieved from http://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf

¹³ <http://www.srfood.org/en/land-rights>

¹⁴ United Nations (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Retrieved from http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

Improved business practices on land rights that provide affected people, especially minorities and vulnerable groups, with access to effective channels through which they can raise and remedy grievances will need to be driven by improved practices on human rights more generally. This includes careful due diligence to determine whether planned

or on-going activities could adversely affect local land and tenure rights or constitute a rights abuse by another party. This is especially important where past and ongoing governance failures create a legacy of rights violations and lack of access to recourse for those affected.

RESPONSIBLE GOVERNANCE OF TENURE AND HUMAN RIGHTS

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, were issued in 2012 by the Food and Agriculture Organization (FAO). Businesses are an explicit target of the Voluntary Guidelines and strengthening the capacity of the private sector one of their stated aims¹⁵. The guidelines seek to improve the governance of tenure of land and cover general principles and principles of implementation for responsible tenure governance, rights responsibilities and relevant frameworks. The Voluntary Guidelines cover:

- Legal recognition and allocation of tenure rights and duties
- Transfers and other changes to tenure rights and duties
- The administration of tenure
- Responses to climate change and emergencies.

For non-state actors, including businesses, the general principles of the Voluntary Guidelines include:

- The responsibility to respect human rights and legitimate tenure rights
- Due diligence to avoid infringing human rights and legitimate tenure rights
- Appropriate risk management systems to address adverse impacts on human rights and legitimate tenure rights
- The need for businesses to provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operation-level grievance mechanisms
- The need to identify and assess any actual or potential impacts on human rights and legitimate tenure rights
- Respect for customary rights of indigenous peoples
- Providing secure rights to women and other marginal groups
- Improved government capacity to manage land without corruption

HUMAN RIGHTS AND INDIGENOUS PEOPLES

Indigenous peoples are rights holders with collective rights over land, resources and knowledge. As such they have a distinct legal status and should be considered not only as vulnerable groups. They have rights to lands and resources which they have traditionally

owned, occupied, used or acquired. FPIC is therefore an important aspect of any engagement with indigenous peoples relating to land use or access to natural resources. In some countries, indigenous peoples are not recognised in the states in which they live and this results in a denial of their collective rights, in turn violating their human rights.

¹⁵ Food and Agriculture Organization of the United Nations (2012). *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forest in the Context of National Food Security*. Rome: Food and Agriculture Organization of the United Nations. Retrieved from <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

There is a widespread lack of recognition of the collective rights of indigenous peoples to their lands and resources. This threatens their very existence and can lead to serious conflicts. Moreover, indigenous people often lack the resources and capacity to engage in processes

regarding business practices and development projects. Consultation with indigenous peoples over land access and use should be done with extra care with strict adherence to FPIC principles, therefore.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

In 2007 the United Nations General Assembly adopted the Declaration, which clearly refers to the right of indigenous peoples to FPIC. There are a number of relevant sections of the Declaration that have direct implications for land rights and indigenous people, which can also guide business operations.

LANDS AND TERRITORIES:

- Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
- Indigenous peoples have the right to the lands and resources which they have traditionally owned, used or acquired. Indigenous peoples have the right to own, use, develop and control the lands and resources that they possess by reason of traditional ownership or other traditional occupation or use.

NO REMOVAL AND RIGHT TO RESTITUTION AND REDRESS:

- Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
- Indigenous peoples have the right to redress, by means that can include restitution or just, fair and equitable compensation, for the lands and resources which they have traditionally owned or used. Compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

REPRESENTATION:

- Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves, as well as to maintain and develop their own indigenous decision-making institutions.
- Indigenous peoples will be consulted through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing measures that may affect them.

CONSENT BASED ON CUSTOM:

- Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.
- Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and juridical systems, in accordance with international human rights standards.



Photo credit: Gates Foundation, 2010

GENDER, LAND RIGHTS AND NATURAL RESOURCE MANAGEMENT

There are good reasons for including gender aspects in land rights and in natural resource management. Women have valuable knowledge of the natural resources and of how to manage them and are essential partners in land management and associated development initiatives. In particular, indigenous women often have unique traditional knowledge of the natural resources within their local environment regarding habitat, conservation, management, use and processing. In some cases women's traditional knowledge of the

land is disappearing because of the introduction of modern resource management methods and technologies brought in by external agents that often do not take into consideration what indigenous women traditionally know and have done for ages¹⁶.

It is essential to achieve as much information as possible about women's connections to land and their knowledge and expertise associated with natural resource management practices in order to include their knowledge and practices proactively in any project intervention. The information can be obtained by starting to address the following issues:

1. Identify the key roles and responsibilities of women within the use and management of land and natural resources.
2. Identify the specific natural resources that are the areas of expertise of women.
3. Identify in which ways land and different natural resources are being used by both men and women, for subsistence purposes, for market economy purposes, as part of a bigger supply chain relationship and for cultural purposes.
4. Identify who (in terms of gender) benefits from the use of the natural resources and how the benefits are divided within the family and the community.
5. Identify the positive and negative consequences for women associated with the specific changes of land or natural resource use.
6. Identify the implications of these consequences for both men and women within the community.



Photo credit: UN Photo Kibae Park, 2011

INDIGENOUS WOMEN

When discussing land rights and access to natural resources an important voice that often goes unheard is that of indigenous women. They are often discriminated against both in land use planning processes and within their own communities where their views are excluded. Those involved in land use consultations and negotiations should make special efforts to include indigenous women.

Access to natural resources and traditional knowledge of resource use is of particular importance to women. If changes in land use

occur and resources taken away, diminishing livelihoods, then women become even more dependent on men, which further reduces women's social status. At the same time as the burden of child care remains, a lack of resources can severely impact food security for themselves and their families. As indigenous women are forced to seek alternative livelihoods, their vulnerability to exploitation and violence can increase.

Engaging with indigenous women can provide companies with a number of benefits and insights that can help with land use planning. These include:

- Identifying priorities for the development needs of communities
- Proposing management solutions for resources that are critical for sustainable livelihoods
- Enhancing the knowledge of agricultural practices, medicinal knowledge and healing practices
- Proposing alternative land use practices and incomes sources to reduce pressure on biodiversity
- Designing appropriate social services to meet the needs of indigenous communities

RESPONSIBLE AND INCLUSIVE BUSINESS PRACTICES

The scope, scale and urgency of the issues and successful advocacy campaigns from NGOs and other development partners have put land grabs¹⁷ clearly on the corporate agenda. But much remains to be done to raise awareness beyond the global players with comprehensive responsible and inclusive business practices in place and make the business case for regional companies and companies with less pressure from brand, reputation or investor due diligence concerns. The starting point for any approach to engaging with land rights will be FPIC and recognition of the important links between land rights and human rights (including gender).

Protecting land rights through a responsible land use strategy is smart business and can lead to improved land stewardship. Insecure rights to land, is one of the reasons for the next generation of farmers to move off the land. No farmer will commit to investing in productivity improvements if they are unsure about their right to land in a year's time. It is therefore important that businesses engage with land rights issues not only to protect vulnerable people's interests, but also to ensure the continuity of their own business.

DUE DILIGENCE

A careful assessment of social and environmental impacts needs to inform responsible land use and planning. Given the complex history and conflict propensity of land use and land rights, engagement and consultation are essential tools for any company where land is a key factor for the business. Meaningful and inclusive engagement processes are needed to build trust and address any grievances in a

fair, equitable and transparent manner. In complex contexts where land governance and tenure systems are unclear or disputed, comprehensive participatory mapping processes are needed to ensure rights are fairly established and upheld and conflicts with communities or complicity in land rights abuses and related risks avoided.

However, the quality, reliability and credibility of assessment practices as well as the diligent and consistent implementation of any resulting recommendations varies. Cases of biased or inaccurate assessment reports, corruption and poor follow up are widespread. Challenges include limited capacity to undertake assessments, as well as political will for effective enforcement, in both the private and public sectors.

Business will need to develop a clear understanding of the social and historical contexts, power relations, policy mechanisms and governance structures that determine land rights, acquisition, land use planning, tenure systems, and access to natural resources. Assessment of measurable impacts for both business and associated development objectives will be an important element of successful land use processes. Companies that recognise the strategic relevance of sustainable development for their long-term success and competitiveness will recognise the relevance of legal, responsible and equitable land use practices that respect human rights. They will seek effective mechanisms to manage their impacts, deal with associated challenges and devise strategies that effectively contribute to opportunities for inclusive business.

¹⁷ Examples include Oxfam's GROW campaign (<http://www.oxfam.org/en/grow/what-is-grow>) and "Behind the Brands" initiative (<http://www.behindthebrands.org/>)

IDENTIFYING CUSTOMARY LAND THROUGH PARTICIPATORY MAPPING

A crucial first step for companies seeking to use land is to ascertain which areas are subject to legal and customary rights. Whilst establishing legal title might be relatively straightforward, in many countries land titling systems do not register areas subject to the collective land rights of customary communities. It therefore falls on the company to find out which lands belong to local communities by direct and open communication with local people. One of the best ways of clarifying the extent of customary rights is through participatory mapping. Using a GPS, it is now relatively cheap, quick and simple to work with community members and map the boundaries of indigenous lands and the forms of customary land use.

One approach is to work with a joint of community representatives who will oversee community involvement in the mapping, accompanied by company observers. The team can then use the GPS devices to survey the boundaries of community lands and establish where there is overlap between these lands and the areas where the company is interested in establishing its operations.

Where two or more different community or ethnic groups use the land, both should be involved in the mapping – they both have rights. Elders will often be particularly knowledgeable about sites of historical or cultural importance. It is also important that women are involved in the mapping process because they use land and resources differently. Appropriate use of languages and forms of communications will be an important factor.

STAKEHOLDER ENGAGEMENT

Stakeholder engagement is an important element in the development of credible and effective approaches and instruments to address the role of business in responsible and inclusive land governance and equitable use of natural resources. It is important to understand the views and aspirations of different stakeholder groups associated with any land project. Access to local networks and local communities will be essential for meaningful stakeholder engagement and will require partnerships with development agencies and NGOs that can help companies build trust with local communities and smallholders.

Business will need to engage governments to promote responsible and inclusive practices in

land governance and leverage their influence. An advocacy role for business is especially needed on clear legal land titles and fair policies for resolution of conflict. The private sector will also need to be involved in international and national policy processes on development and to address key issues that perpetuate a permissive environment for land grabs.

In many industries, ongoing stakeholder engagement has led to the emergence of so-called “multi-stakeholder initiatives” (MSIs) where NGOs, development agencies, government, businesses and local communities participate in schemes that set social and environmental standards, monitor compliance, promote social and environmental disclosure and encourage stakeholder dialogue and social learning through mutual exchange of ideas and experiences.

MSIs will be an important complement to the traditional state-based regulation and standard-setting processes. They are generally characterised by multi-stakeholder governance structures and activities and mechanisms for enforcement of agreements, accountability structures, market leverage and are sometimes linked to certification of sustainable products. MSIs have emerged in response to governance gaps in which

regulatory, judicial, and economic and political systems have failed. In some areas, MSIs may become new modes of governance, changing the traditional roles and relationships between the state, private sector and other stakeholders. It is important to determine how to make best use of them in building a sustainable system for the protection of land rights and associated realisation of human rights.

ENGAGING WITH REPRESENTATIVE STAKEHOLDERS

FPIC means that communities or peoples should be represented by institutions of their own choosing. These institutions may be:

- the people's own community or customary institutions,
- institutions that have been imposed by the State but later accepted by the people,
- institutions set up by the people themselves to deal with outsiders.

The most important principle is that the people should themselves choose how they want to be represented. They do not have to accept the institutions chosen or imposed by others. Communities must be permitted to seek legal counsel if they so choose.

Community representation can be a complex matter when customary systems of decision-making have been only partially incorporated into local systems of administration. Companies must respect the choice of the government recognised village spokesman (and usually it will be men) are the only legitimate representatives for negotiations.

To avoid misunderstandings or entering into land agreements that do not secure the consensus of communities, which can end in conflict, companies should first work with communities in an open way to identify who the communities choose to represent them in negotiations.

TRANSPARENCY AND DISCLOSURE

Lack of transparency and accountability are key factors making land use planning and tenure systems prone to conflict. Improved corporate transparency and disclosure are therefore important elements of

improving business practices that promote accountability and support freer, fairer and more inclusive decision making on land use¹⁸. To date, transparency and disclosure on key issues associated with land is limited in Asia.

¹⁸ See also: Global Witness et al. (2012). *Dealing with Disclosure: Improving Transparency in Decision-making over Large-scale Land Acquisitions, Allocations and Investment*. London: Global Witness. Retrieved from http://www.globalwitness.org/sites/default/files/library/Dealing_with_disclosure_1.pdf

A review of sustainability reports of 13 mining companies, nine agri-businesses and eight electricity utility companies with major operations in Asia has shown that most make reference to relevant MSIs in the agriculture and aquaculture sectors, and more specifically the International Council on Mining and Metals (ICMM), the Extractive Industries Transparency Initiative (EITI)¹⁹, relevant Global Reporting Initiative Sector Supplements, IPIECA, API and OGP's Oil and gas industry guidance on voluntary sustainability reporting, the International Finance Corporation (IFC) Performance Standards and the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.

Some of the companies surveyed also have policies in place to assess social and environmental impacts, engage communities and other stakeholders, acknowledge the need for fair compensation, have grievance

mechanisms related to land issues and declare their commitment to respect human rights. However, few disclose information on comprehensive FPIC processes and outcomes, dispute settlements or the systems and safeguards they have in place to assess issues related to land governance, tenure security and the rights of local communities with regards to the locations where they operate or the partners they do business with²⁰.

Better transparency and disclosure on business practices associated with land are an important element to drive mechanisms to ensure more equitable decision-making and the protection of local rights associated with the acquisition of land concessions and the use of land and natural resources. Ensuring responsible impact assessment and management informed by a robust process of stakeholder engagement will be important in ensuring land rights are protected.

PROVIDING INFORMATION TO ALLOW FAIR PARTICIPATION AND INFORMED CONSENT

Before communities can make informed decisions about proposed developments on their land they need to understand the implications of development including:

- potential impacts and costs,
- potential benefits and gains,
- legal implications.

All relevant information should be provided:

- openly,
- in appropriate forms and languages,
- on transparent assessments of impacts,
- on proposed risk and benefit sharing for the community.

The results of assessments should be fully disclosed to ensure that communities are informed of the likely impacts and benefits of a development. They should

¹⁹ Extractive Industries Transparency Initiative (EITI), <http://eiti.org/eiti>

²⁰ Findings are based on research undertaken by CSR Asia in early 2014

also address the key concerns of the communities resulting from stakeholder engagement. Disclosure should include mitigation plans, benefit sharing arrangements and compensation provisions. Information should be provided about financial arrangements, profitability, pricing mechanisms, loans and debt repayments and associated risks.

Disclosure should include the legal status of the land including:

- the current use and status of the land,
- whether or not the rights of the local communities are officially recognised,
- the status of the land and the status of community rights during the lease and,
- the possible length of any land lease.

COMMUNITY NEGOTIATION PROCESSES

A key aspect of the negotiation with communities will be to ensure that representative institutions are given space, time and opportunity to freely consult and discuss their options among themselves and with other interested parties. Community representatives should be free to enter into negotiations with companies based on access to full information. It is important that companies respect local processes if they want to ensure that amicable and

consensus-based decisions are reached among the community. However, it should not be assumed that communities are homogeneous. It is possible that some people may agree to their lands being used while others may disagree.

Assuming that the community has been reassured by the information provided that the company that use of their land can bring benefits, the stage is thus set for negotiations. Detailed negotiations are likely to be needed on issues such as:

- lands, properties, crops, and resources are included in any agreement,
- protections put in place to protect community interests,
- details of which rights will be ceded and payments for the relinquishment of rights,
- other benefits afforded to the communities for cession of their lands through community investment initiatives,
- measures taken to mitigate identified impacts and what compensation is payable for any losses or damages,
- costs that might be incurred by smallholders,
- obligations from the company to ensure fair payment for smallholder's produce,
- fair pay and conditions for jobs,
- monitoring to be undertaken to ensure compliance,
- access to grievance procedures,
- arrangements to restore community rights at the end of the land use.

COMMUNITY INVESTMENT INITIATIVES

As well as providing for direct benefits for communities for access to their land, companies should have community investment strategies and inclusive and effective community engagement practices in place to ensure community investments

that proactively contribute to sustainable development objectives. It is widely accepted that businesses should have a relationship with the communities in which they operate. This relationship is likely to include community investments to contribute to local development. Typical community investment initiatives are likely to include:

ACCESS TO WATER AND NUTRITION Ensuring equitable access to community based water resources. Protecting and enhancing local water resources and their management. Identifying the nutritional needs of the community, with a particular emphasis on children and mothers.

EDUCATION Promoting and supporting education at all levels. Encouraging the enrollment of children in formal education. Contributing to the elimination of barriers to children obtaining education.

HEALTHCARE Promoting good health, contributing to access to medicines and vaccination and encouraging healthy lifestyles. Helping to raise awareness of major diseases and their prevention. Supporting access to health care services, clean water and appropriate sanitation.

EMPLOYMENT AND SKILLS DEVELOPMENT Considering the impact of sourcing on employment creation. Increasing the employment impacts of entering a community. Giving preference to local suppliers of products or services. Participating in local skills development programmes.

INCOME CREATION Contributing to inclusive business programmes that create income for smallholders. Initiating programmes that support local community members, especially women, in establishing businesses. Supporting entrepreneurs and providing access to knowhow and developing management skills.

TECHNOLOGY Contributing to the development of low cost social technologies that have a high social impact on poverty. Developing local knowledge and technologies. Engaging in partnerships to develop technology benefiting the local community, employing local people.

SOCIAL INVESTMENTS Making social investments in the community related to infrastructure development likely to promote social and economic development. Targeting areas where a company's core competencies can be used for capacity building in the community. Promoting social development projects that contribute to sustainable development.



Photo credit: World Bank, 2011

SHARING KNOWLEDGE AND EXPERIENCE

Businesses will need to share expertise with peers and development experts to better understand local contexts, community needs, key issues and viable models for inclusive business solutions based on a credible multi-stakeholder processes. Corporate peer platforms where challenges and lessons can be shared in a confidential way will be key to refining business strategies and viable business models that effectively address challenges and risks related to land as well as contribute to competitive business solutions for responsible and inclusive land use practices.

Approaches involving MSIs have often succeeded in establishing the space for knowledge sharing and learning from experiences (and mistakes). This allows stakeholders to discuss and take action on problems in which they all share. In particular, this can reflect a notion of shared

responsibility, more appropriate than unilateral action, to the complex nature of land rights issues. Through the process of engagement, MSIs have contributed to developing leadership from companies in a wide range of sectors. At the individual level, MSIs have helped to create and give outlet to a generation of so-called “boundary spanners” working with one foot inside their organisations and one foot outside, translating across stakeholders and working to gain the traction internally to make change²¹.

Growing uptake and implementation of a number of initiatives and instruments that support improved business practices with respect to land will be important inroad to addressing land rights and natural resource use issues. An important step will be to improve the professional capacity for implementation of existing tools and frameworks to tackle key issues related to conflict over land and land grabbing practices.

²¹ Peter Utting, *Improving the human rights performance of business through multi-stakeholder initiatives*, *Business and Human Rights*, 2007

LAND RIGHTS AND RESPONSIBLE FINANCE

Recent controversies about large-scale land acquisitions by foreign investors have put land rights issues and responsible investment on the global development agenda. It is important to consider how to improve land administration and investment so that the land rights and livelihoods of smallholders and other vulnerable groups are strengthened. Investors and financing institutions have the potential to play an important role in driving improved business practices with respect to respecting land rights and the promotion of effective policies and practices for due diligence, transparency, disclosure and inclusiveness.

There is increasing pressure on the financial institutions behind large scale land deals to implement stricter due diligence processes to assess actual and potential land rights impacts of investments, put in place mechanisms to address them, and track and disclose how impacts are managed. The aim is to make access to finance conditional on best practice in meaningfully assessing and addressing social and environmental impacts, meaningful and inclusive community engagement and FPIC.



A number of instruments focusing on responsible project finance and responsible investment exist. The Equator Principles offer a risk management framework for determining, assessing and managing social and environmental risks in project finance.

The recent revision includes additions on human rights due diligence, an emphasis on FPIC as well as reference to the UN Guiding Principles on Business and Human Rights. The impact in Asia is however limited since only five of the 78 financial institutions that have committed to the Equator Principles are from the region.



The IFC Performance Standards have had more traction in Asia, both in their application in projects that have gone through an IFC credit review process as well as for reference and guidance. Performance Standard Number 5 on “Land Acquisition and Involuntary Resettlement” provides guidance and implementation support on key issues including project design, community engagement, grievance mechanisms, compensation and benefits for displaced persons and resettlement and livelihood restoration planning and implementation.²²

An evolving approach to increasing sustainable private sector investment is to promote mutually beneficial partnerships between smallholders and investors that do not require large scale land acquisitions. Such partnerships can take the form of out-grower schemes, contract farming of joint share equity schemes, in which investors focus mainly on providing expertise and other support to improve access to markets. The success of such partnerships depends on the level of ownerships, governance and levels of risk and benefit sharing. Smallholders will often be prepared to

²² International Finance Corporation (2012). *Performance Standards on Environmental and Social Sustainability*. Retrieved from http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf



Photo credit: Simon Steinberger

negotiate with investors when they are properly consulted, well informed and see a real benefit. Any land relinquished is done on a temporary basis (e.g. through a lease) and should not be on the scale currently seem. Particular attention needs to be given to empowering smallholders and rural communities to engage on equal terms with outside investors. Establishing such mutually beneficial projects have some track record of success, particularly in Africa²³.

In order to more effectively leverage the financial sector in Asia to drive improved practices on respecting land rights and engaging communities, regional finance institutions will have to be more effectively engaged. This will be an important factor in addressing and eliminating land grabbing practices and working towards harnessing the rising value of land for sustainable development, poverty alleviation and food security.

²³ *Securing Land and Natural Resource Rights Through Business Partnerships Between Small-Scale Farmers and Outside Investors - Learning Note (2012)*, International Fund for Agricultural Development, Retrieved from <http://www.gln.net/index.php/resources/publications/publications-list/viewdownload/3-gln-documents/164-securing-land-and-natural-resource-rights-through-business-partnerships-between-small-scale-farmers-and-outside-investors-learning-note-eng-2012>

PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT THAT RESPECTS RIGHTS, LIVELIHOODS AND RESOURCES

The list of seven principles provides a useful check list for companies covering issues that need to be addressed to improve the responsibility and inclusiveness of business practices with regard to land²⁴.

1. Existing rights to land and associated natural resources are recognised and respected.
2. Investments do not jeopardise food security but rather strengthen it.
3. Processes relating to investment in agriculture are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment.
4. All those materially affected are consulted, and agreements from consultations are recorded and enforced.
5. Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value.
6. Investments generate desirable social and distributional impacts and do not increase vulnerability.
7. Environmental impacts of a project are quantified and measures taken to encourage sustainable resource use, while minimizing the risk/magnitude of negative impacts and mitigating them. provisions. Information should be provided about financial arrangements, profitability, pricing mechanisms, loans and debt repayments and associated risks.

DISCLOSURE SHOULD INCLUDE THE LEGAL STATUS OF THE LAND INCLUDING

- the current use and status of the land,
- whether or not the rights of the local communities are officially recognised,
- the status of the land and the status of community rights during the lease and,
- the possible length of any land lease.

CONCLUSIONS

Businesses committed to protecting land rights and natural resources will work with local people to ensure that land is used in a way that will encourage the sustainable use of natural resources, protect the environment, enhance human rights and ensure food security. In particular smallholders and small processors along a company's value chain need to be given opportunities to protect their

livelihoods and create additional incomes from the land. New inclusive business approaches to protecting smallholders, their land, knowledge and resources, will benefit investors, local peoples and the environment. Companies that use land and natural resources need to work with local communities to strengthen small businesses and boost the yields of small farms.

²⁴ *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources, 2010*, http://www.fao.org/fileadmin/templates/est/INTERNATIONAL-TRADE/FDIs/RAI_Principles_Synoptic.pdf

Key to engaging the private sector on lands rights issues will be to get them to realise that this is actually good for their business and will mitigate many of the risks associated with misuse of land. Companies committed to paying their part in the protection of land will recognise that land rights cannot be separated from broader human rights issues. They will follow principles associated with FPIC and emphasise the importance of stakeholder engagement, with a particular emphasis on vulnerable groups including women and

indigenous peoples. They will often be part of multi-stakeholder initiatives (MSIs), working in partnerships with a range of stakeholders.

Many “land grabs” are already completed and cannot be undone. But what companies and investors can do is engage, not evict, local communities, and invest in their future. The results will be not only to increase the prosperity for everyone who has a stake in the land, but also to ensure that the business itself has a sustainable future.

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