



Columbia Center
on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

INNOVATIVE FINANCING SOLUTIONS

**FOR COMMUNITY SUPPORT IN THE
CONTEXT OF LAND INVESTMENTS**

REPORT SUMMARY MARCH 2019

Communities affected by agricultural, forestry, and other resource investments urgently need increased funding for legal and technical support. Too many communities struggle to access the support they need to protect their interests, in large part because they cannot afford it. This is in stark contrast to companies, who can generally afford the legal and technical support needed for their investments. Inadequate support can weaken a community's ability to: prepare internally; influence due diligence and planning; consult and interact with a company about a proposed project; negotiate a contract with a company; monitor company operations; engage in dispute resolution; litigate and enforce relevant judgments; and ensure responsible project closure. As a result, communities around the world risk losing access to critical land and resources, suffering human rights violations, or missing opportunities to benefit from investments. The inability of communities to secure necessary support can also result in conflict and challenges that are damaging for companies, host governments, and other actors.

Although donors, support providers, and others have found ways to support communities directly and indirectly, their combined efforts can only extend so far. To fill the financing gap, promising new opportunities exist. But they require both catalytic and sustained efforts by a range of different actors, and present their own challenges, which must be carefully addressed. This document presents a call to action for different stakeholders to help communities secure the support they so crucially need.

FINANCING OPTIONS

In the context of investment, communities often require the services of CSOs, paralegals, organizers, non-legal experts, lawyers, or other actors. Yet for each investment-related process necessitating some form of community support, certain financing options may be better suited than others. Nonetheless, an approach that finances community support both before the project (preparation, consultation, negotiation) *and* afterwards (monitoring, dispute resolution, closure) reinforces and enhances the impact of any support given.

1. Government marshaling

Host governments seeking to foster productive, conflict-free investments and attract responsible companies can finance community support by collecting additional money from companies and other actors, using taxes, fees, and penalties. In designing those mechanisms, governments will need to balance the goal of generating revenue with what is politically feasible. Other options governments can pursue to finance

community legal support include collecting additional revenue from the legal profession, and using social impact bonds to marshal funding from impact investors.

2. Basket funds

By collecting money from multiple sources, basket funds can move beyond traditional philanthropic and aid donors to secure funding from companies and other actors. Basket funds offer the promise of securing funding from private sector actors while minimizing their actual or perceived influence over communities and support providers. This is done by securing multiple funding sources to “dilute” the influence of any single funding source, and having a third party entity administer and pay out money.

Contributing to a basket fund can help companies understand and incorporate community perspectives into the investment project's design, work towards obtaining the community's “social license to operate,” and avoid or resolve costly conflict. Aside from companies, other private sector actors may be motivated to participate in order to increase compliance with relevant performance standards or sustainability commitments. Donors may be interested in contributing to basket funds that complement and extend the reach of existing philanthropic efforts to finance community support, and that present strategies for achieving financial sustainability.

3. Impact investments

Impact investments, which seek to achieve both a positive impact and a financial return, could theoretically be used to finance a small subset of community support needs. Specifically, impact investments may feasibly finance support: for negotiating benefit agreements that are expected to generate significant revenue for communities; for litigation where the community is seeking a substantial damages award; or using social impact bonds, where the funding for community support is repaid by a government or other “outcome payer” if the support achieves a pre-defined goal.

4. Third party funding

Third party funders occasionally finance community support to litigate damages claims, such as for large-scale environmental pollution. Litigation funders usually finance the litigation costs in exchange for a financial interest in the outcome of the case. While funders may offer financial and strategic might to inexperienced community claimants, they also risk interfering with the lawyer-client relationship and influencing the litigation's conduct in ways that may not be in

the community's interests. Third party funding is less feasible and appropriate in contexts where legal frameworks are not adequately developed or where rule of law is weak.

5. Direct company funding

While companies may wish to directly finance community support in relation to specific company projects, such an approach should be considered with extreme caution. The community or its support provider may be unduly influenced by the knowledge that the company is financing the support. In addition, direct company funding cannot comprehensively increase community access to support.

6. Other solutions

Supplementary funding can be raised through crowd funding, earmarked profits from social enterprises, and community members themselves, either by paying affordable fees or providing in-kind services. Further, support providers can sometimes use contingency or uplift fees, meaning that they will only be paid if a successful outcome is achieved. In addition, fee shifting laws in some jurisdictions may entitle successful community claimants to have their support costs paid by the losing counter party.

OVERARCHING CONSIDERATIONS

Stakeholders seeking to develop a financing initiative must address a range of considerations. These include:

- **The amount of money needed.** An initiative's likely cost will be affected by community preferences and needs regarding support and the initiative's focus and scope. Data can be generated and used to understand likely needs and cost.
- **Efficiency, effectiveness, and sustainability.** Strategies are needed to reduce costs and to ensure an initiative's financial sustainability. Effectiveness can be improved by: matching financing options to specific support needs; managing political complexity and obstacles; addressing the political economy implications of making more funding available; and employing appropriate governance mechanisms.
- **Links between the initiative, communities, and support providers.** The logistics required to link money, communities, and support providers may be affected by whether or not local CSOs can act as a bridge between financing initiatives and communities; the options available where no relevant local CSO exists; and determinations about who should receive money from the financing initiative and pay each support provider.

RECOMMENDATIONS

In addition to current grant making efforts—which are and will remain crucial—**donors** should: help establish new financing initiatives, especially basket funds, given their potential to become self-sustaining; facilitate cooperation between different stakeholders; and continue to advance strategies for supporting the next generation of global south-based community support providers.

Host governments can establish initiatives to finance community support, including through the marshaling of additional revenue. Governments should sensitize companies about the importance of adequate community support, and establish appropriate legal frameworks to facilitate and regulate different financing initiatives.

Communities and the **CSOs** that support them can use the solutions and considerations in this summary and the longer report to guide concrete funding requests, demands, advocacy campaigns, and negotiation strategies. Those interested in promoting such opportunities should identify strategic moments to advance arguments and ideas for establishing expansive and robustly governed financing solutions.

Agribusiness, forestry, and other natural resource companies should finance basket funds that apply beyond individual projects, and should commit to contributing resources regularly, on a long-term basis.

Buyers, DFIs, private financiers, MSIs and other bodies with company members should consider contributing funding to basket funds and encourage or require companies within their spheres of influence to do so as well.

Impact investors and impact investment funds should continue to explore investing in community support, and ensure that any investments avoid onerous and unrealistic repayment obligations for communities.

Fee-charging **lawyers** working for communities should: investigate and pursue best practices with respect to contingency or uplift fees; explore ways to reduce costs, including by unbundling legal tasks; and consider accepting in-kind repayments or charging affordable user fees. For litigated matters, lawyers should ensure that any third party funding agreements protect the lawyer-client relationship and preserve community control over the litigation; lawyers should also consider applying to courts for advance funding of communities' costs before cases proceed or for fee shifting after cases have concluded.

OVERVIEW OF FINANCING SOLUTIONS

Financing solution	Funding source	Investment-related processes that could be covered	Main benefits and challenges
Government marshaling of funding from companies and other actors, through taxes, fees, and penalties levied on different investment-related activities, such as permit applications	Companies, other taxable entities	<ul style="list-style-type: none"> • Preparing internally before engaging with a company • Influencing due diligence and planning • Consultation and initial interactions with a company • Negotiating (or re-negotiating) a contract with a company • Monitoring and fact-finding • Dispute resolution • Litigation • Project closure and rehabilitation 	<p>BENEFITS</p> <ul style="list-style-type: none"> • Could help fulfill governments' human rights obligations and development commitments • Governments have power to tax and charge penalties <p>CHALLENGES</p> <ul style="list-style-type: none"> • Risk of misappropriation • Potentially hard to marshal enough money to meet support needs
Basket funds , operated by independent, trusted entities and funded by contributions from a range of actors	Companies, commodity buyers, DFIs, donors	<ul style="list-style-type: none"> • Preparing internally before engaging with a company • Influencing due diligence and planning • Consultation and initial interactions with a company • Negotiating (or re-negotiating) a contract with a company • Monitoring and fact-finding • Dispute resolution • Project closure and rehabilitation 	<p>BENEFITS</p> <ul style="list-style-type: none"> • Accesses new and relevant funding sources • Potential to access large amounts of money <p>CHALLENGES</p> <ul style="list-style-type: none"> • Will not work unless strong and innovative governance approaches to mitigate risk of undue influence by company or financial mismanagement by fund manager
Market-based impact investments , including those made as loans to communities, repayable with interest or at a premium	Impact investors (including donors)	<ul style="list-style-type: none"> • Negotiating (or re-negotiating) a contract with a company (provided it is likely to include significant sharing of revenues with the community) • Litigation (only damages claims where a large amount of money is sought) 	<p>BENEFITS</p> <ul style="list-style-type: none"> • Accesses new funding sources <p>CHALLENGES</p> <ul style="list-style-type: none"> • High transactional costs and data needs • Only applicable to communities seeking very large amounts of money from their counter-party or the underlying project
Social impact bonds , a form of impact investment where the money advanced to pay for community support is to be repaid by a government or other "outcome payer" if the support achieves a pre-defined goal	Governments, donors, and others willing to act as outcome payers	<ul style="list-style-type: none"> • Preparing internally before engaging with a company • Influencing due diligence and planning • Consultation and initial interactions with a company • Negotiating (or re-negotiating) a contract with a company • Monitoring and fact-finding • Dispute resolution • Litigation 	<p>BENEFITS</p> <ul style="list-style-type: none"> • Outcome payers only pay for successful initiatives <p>CHALLENGES</p> <ul style="list-style-type: none"> • Still requires public or donor funds to finance successful community support
Direct company funding of community support	Companies	<ul style="list-style-type: none"> • Project closure and rehabilitation • Preparing internally before engaging with a company • Influencing due diligence and planning • Consultation and initial interactions with a company • Negotiating (or re-negotiating) a contract with a company • Monitoring and fact-finding • Dispute resolution • Project closure and rehabilitation 	<p>BENEFITS</p> <ul style="list-style-type: none"> • Companies have proven willing to provide direct funding <p>CHALLENGES</p> <ul style="list-style-type: none"> • High risk of perceived or actual undue influence
Third party funding , usually of support costs for litigation, in exchange for a financial interest in the outcome of the support	Third party litigation funders	<ul style="list-style-type: none"> • Litigation (provided a sufficiently large amount of damages is sought) 	<p>BENEFITS</p> <ul style="list-style-type: none"> • Funders bring large-scale litigation experience and significant funding for support, which can help achieve "equality of arms" <p>CHALLENGES</p> <ul style="list-style-type: none"> • Power imbalances between funder and community • The need to generate a financial return limits applicability; some important litigation outcomes (seeking injunctions, judicial review, etc.) not applicable