

PREPARING COMMUNITIES FOR NEGOTIATIONS WITH INVESTORS SEEKING LANDS AND NATURAL RESOURCES



Across Africa, Asia and Latin America, investors are increasingly approaching rural communities seeking land for logging, mining, and agribusiness ventures. In the worst cases, investors go through government officials, who grant them concessions without consulting the local people. In the best cases, investors do meet with community members and request the land directly.

Deciding whether or not to share community land with an investor is one of the most important decisions that a community can make. Good investments can lead to authentic community development and prosperity. But bad investments may force a community into poverty, subject community members to human rights abuses, pollute local waters and soils, block access to sacred areas and livelihood access routes, and even result in communities completely losing their lands. Supporting communities to engage with potential investors from a place of empowerment can make significant differences in the ultimate outcomes of land protections efforts and help make sure that any investment that is approved by community members will lead to a thriving, healthy future.

WHY IS IT IMPORTANT TO TEACH COMMUNITIES BASIC NEGOTIATION TACTICS AND STRATEGIES?

Power and information imbalances. Even when investors conduct formal “consultations” and seek community consent to their proposed business ventures, such consultations are generally conducted in a context of significant power and information imbalances. During consultations, communities are often pressured by high-level government officials to consent to deals that they do not fully understand or desire. Communities may also feel that they have no choice but to approve a project that has already been endorsed by the government.¹ Yet the community may not be well-informed about the terms of the investment, any proposed infrastructure that will accompany the investment, or the investment’s potential damage to the environment. Information may be presented in language or format that communities do not understand, or sometimes information is kept secret unless a community demands it. As a result, community members may not have the necessary information to fully evaluate the advantages and disadvantages of a proposed investment.

1. In some countries, communities do not have a strong right to be consulted and give their approval before the government grants land to investors. In such contexts, facilitators can still help communities demand to be consulted and to ask for and receive benefits and rental payments.

Unjust Payments and Benefits to Communities. If a community does decide to share its land with an investor – or if the decision has already been made by government officials – the community may not know what to ask for in terms of rental payments and other benefits. Community members may not be aware of the rental market value of their land, the expected annual profits the investor will gain from the venture, the overall net worth of the investors’ company, and other information necessary to negotiating a contract that is beneficial to the community. Most of all, community members may not know how to quantify the value *they themselves* get from their common lands.² As a result, communities may agree to land contracts that include either no rental payments at all, or rental payments far below fair market value. The terms of the contracts may not include timelines for payment or promised benefits, adjustments for inflation over time, or a clear articulation of how the community can hold the investor accountable to timely and full payment.

No time to seek legal advice. Communities may be pressured to sign a contract without first seeking advice from trusted advisors. They may not even be left with a copy of the contract to review. It is important that communities are empowered to demand that they be given enough time to evaluate an investor’s proposal and fully understand any documents they will be asked to sign. Communities might also demand access to independent Environmental and Social Impact Assessments (ESIAs), as well as other resources that will help them make a fully informed decision.

HOW TO SUPPORT COMMUNITIES APPROACHED BY POTENTIAL INVESTORS

An investor may approach a community seeking land at any time; facilitators should prepare communities in advance (as part of the community land protection process), so that they understand their rights and know how to handle potential future investor requests. The following information is very basic; facilitators may want to look at the additional resources in the box at the end of this chapter for more information on how to best advise communities on how to interact with investors.

1. TEACH COMMUNITIES THEIR RIGHTS UNDER NATIONAL AND INTERNATIONAL LAWS.

Because laws are often complex and written in a way that is difficult for non-lawyers to understand, facilitators may want to create short, one- or two-page summaries of all laws that relate to communities land and natural resource rights and community-investor negotiations.

- **Relevant national laws.** Facilitators should begin by teaching communities about their basic land and natural resource rights, as enshrined in the national constitution and other relevant national laws. Many countries have laws that require investors to consult communities and seek their approval before launching an investment venture on community land. Facilitators can also identify protections for community rights in national contract law, investment law, environmental law, forest law, water law, and others. To ensure that communities understand national laws, facilitators can create very simple, short handouts that summarize what the laws say.
- **International laws.** Facilitators should also inform communities about their right to **“Free, Prior Informed Consent”** (FPIC). Under the *United Nations Declaration of the Rights of Indigenous Peoples*, indigenous communities have a right to FPIC.³ Other international legal instruments are increasingly advocating for community consultation before investments can proceed. For example, the Food and Agriculture Organization of the United Nations’ *Voluntary Guidelines for the Responsible Governance of Tenure* suggest that investors and governments consult with “all legitimate tenure rights holders” before making decisions or transactions that will impact their tenure security.⁴

- **Giving Free Prior Informed Consent real “teeth.”** Facilitators should take care to ensure that communities understand what FPIC really means: it goes beyond the right to be consulted and to approve an investment. “Free consent” includes the right to say “no.” It also means that any consent given should be given without coercion, intimidation or manipulation. “Prior consent” means that

2. The community land valuation exercise in the “Laying the Groundwork” phase of the community land protection process is designed to address this issue, and should be repeated or reviewed if and when an investor offers a low annual rental payment.

3. See Article 10: “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.

4. The Guidelines define consultation 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).

communities have the right to take their time deciding: the community should be given time to meet to discuss the proposed investment for as long as it needs to before making a decision – investors and government must respect local decision-making processes, and should not pressure a community to make a decision the same day that the investment proposal is explained to them. “Informed consent” 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, and any likely economic, social, cultural and environmental impacts and risks of the project.

- **Environmental, Social, and Human Rights Impact Assessments.** As part of being fully informed – and because it is their legal right in some countries – communities should request that potential investors fund an independent consulting firm or group of experts to undertake an Environmental Impact Assessment (EIA), and a Human Rights Impact Assessment (HRIA) or Social Impact Assessment (SIA). Environmental Impact Assessments evaluate the likely environmental consequences of a proposed project or investment, taking into account all beneficial and negative socio-economic, cultural and health impacts. Social Impact Assessments evaluate the likely social consequences of a proposed project or investment, while Human Rights Impact Assessments evaluate likely human rights consequences. Communities can use the findings of Impact Assessments to inform discussions with investors, and can appeal to the government or the judiciary to protect their rights if the assessments show that negative impacts are likely.
- **Regulations that structure government approval procedures.** Facilitators may also want to empower communities to understand government processes for approving investment projects, including required public hearings and other procedures that shape the conditions that governments place on investment projects.



WHAT STEPS SHOULD INVESTORS TAKE BEFORE ENGAGING WITH COMMUNITIES?

While laws and regulations are different in every country, national laws sometimes require that investors take the following actions when requesting land for investment. If the law does not require it, communities can still request that investors:

- Submit a “Letter of Intent” with project details to the government and community.
- Provide details about the land requested and what it will be used for.
- Provide details about the company’s annual profits and expected revenue to be generated by the investment.
- Hold a public hearing to meet with affected stakeholders to explain the proposed project and seek permission to use community land.
- Request in writing a survey of the land in question and share the results of any land surveys with the community.
- Pay for an independent, neutral and mutually-agreed contractor to undertake an Environmental and Social Impact Assessment (EIA) and a Social Impact Assessment (SIA) or Human Rights Impact Assessment (HRIA).
- Review the results of the impact assessments with the government and all potentially affected stakeholders.
- Revise the investment proposal to address any problems identified by the impact assessments and re-submit to the government and the community.
- Negotiate rental payment and benefits with community members.
- Upon agreement, work with the government, the community, and the community’s advocates to draft an enforceable, equitable lease contract.
- Sign the agreement, ensuring that the community is entering freely into the contract and understands all of the terms of the contractual agreement before signing.

2. PREPARE COMMUNITIES FOR FUTURE INTERACTIONS WITH INVESTORS DURING THE BY-LAWS DRAFTING PROCESS.

Communities should not wait for a company or investor to arrive before creating a plan about how to negotiate with them. As part of the community land protection by-laws drafting process, facilitators should help communities to think about:

- **Willingness to sell or lease community lands:** Is the community willing to lease or sell part of its land? Some communities may decide they will never sell or lease their land. Other communities may be excited to welcome external investment.
- **Private family lands:** If individual families own land privately within the community, can they sell or lease land to investors without consulting the community? Must families consider community-wide environmental, social or human rights impacts before making a deal with investors?
- **What types of companies are welcome?** All investors and businesses are different. A community might decide that while they would reject a logging company, they might welcome a small company producing coconut oil or fruit products. Communities should think about the kinds of investment activities that would help the community prosper, as well as the kinds of activities that would potentially harm a community and should be rejected.
- **How to decide?** How will the community as a whole make decisions about allowing companies or investors to use community lands? What percentage of community residents must agree? Will the decision be made by consensus (100% agreement), by super-majority vote (66%), or majority vote (51%)? Who gets to vote? All residents, including youth? Or only adults? Or only elders? (For more details, see the chapter on *The Content of the By-laws.*)
- **What land to share, or not share?** If the community is open to potentially sharing its lands, what specific pieces of community land might be appropriate to lease or sell to

potential investors? What land is not available for investors' use? Communities can use their maps and zoning plans to identify specific areas that would be appropriate for certain kinds of investment activities.

- **For how long?** If leasing the land, how long of a lease would be allowed? (5 years? 10 years? 25 years?)
- **Community representation:** Who will represent the community when meeting with companies and investors? Will community elders represent the community, or the Land Governance Council, or a group of youth, women and elders? Will the community set up a negotiating team to talk to companies and investors? How will the community make sure everyone's interests are represented by the negotiating team? What can the community negotiating team decide on their own and what must they bring back to the entire community to decide together?

3. PREPARE COMMUNITIES TO KNOW WHAT TO REQUEST IN EXCHANGE FOR USE OF THEIR LANDS.

Communities may not know what are fair benefits to ask for in exchange for their lands. As a result, they may ask for one-time benefits, like the construction of a school, road, cellphone tower, or clinic – yet fail to ask for the teachers, doctors, books, electricity and medicines that it takes to ensure those facilities are sustainable. Meanwhile, the costs of such one-time benefits are usually only a fraction of the value of the land. Facilitators should support communities to think critically about demanding rental payments that get closer to the value of their lands and will actually ensure that the community prospers as a result of the investment. Other factors to consider include:

- **Rental payments.** If the community wants annual or monthly rental payments, how will those funds be managed within the community? Who will decide how the funds will be used? The community should establish mechanisms to ensure transparent, participatory management of rental fees. (See the chapter on *Financial Management for Communities*.)
- **Infrastructure development.** If a community wants the investor to build a school, 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 do periodic maintenance on the structure? Facilitators should help the community think through these questions, both in advance of any investment requests and during any actual contract negotiations with a specific investor.

- **Jobs.** Investors often promise to create many jobs for community members, but then only hire a few community residents or hire a large number of residents and do not pay them well. Communities requesting that the investor 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, and as a result degrade the social fabric of the community.

Facilitators should support communities to make benefit payment decisions as a group, after much participatory discussion and debate. Ideally, the community's by-laws will support a community-wide decision-making process that will lay a strong foundation for negotiations with potential investors.

POSSIBLE BENEFITS TO DEMAND FROM INVESTMENT DEALS

1. Repeating payments such as monthly rental fees or a fixed share of the annual profits paid to the community.
2. Clinics, medicines, doctors and nurses.
3. Schools, books and teachers.
4. Electricity (electrical, wind or solar) to all homes in the community.
5. New/better roads and access to markets.
6. Telecommunications and internet infrastructures.
7. Jobs for a certain specific number of community members, including women, youth, disabled individuals and members of minority groups.
8. Shares in the company stock.
9. Anything else the community thinks best!

4. SET UP AN EARLY WARNING SYSTEM.

In Liberia, Namati's partner the *Sustainable Development Institute* (SDI) has had extraordinary success with its pilot "Early Warning System:" a simple, low cost system that allows communities to access legal and technical support when they are approached by investors – or when they suspect that investors are seeking their land. The system consists of:

- A dedicated Early Warning System phone number or hotline.
- A simple Excel database.
- A basic, low-literacy illustrated guide describing how communities protect their interests during interactions with companies and investors.⁵
- Staff members responsible for answering all calls to the Early Warning System hotline (as a small part of their overall responsibilities).

To launch the system, SDI published the guide, then raised awareness of the Early Warning System at community meetings and through posters, flyers, town hall meetings, and radio programs. The hotline number was published widely. Now, when a community is approached by an

investor, community members can call the hotline and speak directly to a specially-trained staff member. When a call comes in, the staff person does three things:

- Asks the community member a series of questions to better understand the situation (see list of questions below);
- Provides basic information about community rights and how to initially respond to the investment request (sign nothing, seek information, etc.); and
- Either sends copies of the guide to the community, or personally visits the community to distribute the guide and hold meetings to train the community how to respond to the investor's request.

Then, if needed, a staff person will either personally support the community through the negotiation process, or link them to a lawyer or other advocate who can do so.

To date, the Early Warning System has been used by dozens of communities across Liberia, and has successfully helped a number of them reject inequitable contracts. The hotline information is so well known that often SDI receives many calls from different members of the same community after an investor's visit.



5. For example, see: <https://namati.org/resources/community-guide-to-getting-a-fair-deal-from-companies-and-investors-2/>

QUESTIONS TO ASK *EARLY WARNING SYSTEM* HOTLINE CALLERS:

1. Community name and location
2. Name of Investor
3. Is the investor national, international, or both? (National, International, Both, Unknown)
4. Type of Investor (Mining, Agriculture, Timber, Pit sawing, Other)
5. Did the investor make a specific request for land? (Yes/No/Unknown)
6. If so, how much land? (hectares or acres)
7. When did the investor approach the community? (date)
8. Who did the investor approach in the community (names and positions)?
9. Who was representing the investor?
10. Did the investor come with a government official? (Yes/No/unknown)
11. Does the investor or investor's representative have a relationship or connection to the community? (Yes/No/Unknown)
12. If yes, please explain the connection: _____
13. Did the investor offer to pay or provide anything to the community? (Yes/No/Unknown)
14. If yes, what did the investor say s/he would provide or pay to the community?
15. Did the community ask for anything from the investor? (Yes/No/Unknown)
16. If yes, what did the community ask for? Was there agreement among the community members about what to ask for?
17. Has the investor held any community meetings? (Yes/No/Unknown)
18. If yes, how many community meetings?
19. Response given to the caller (advice offered? If yes, explain):
20. Follow-up actions by NGO (date of visit, action taken, advice given, provide detail):
21. Has this community been trained in basic investor negotiation skills? Yes/No
22. Has the community been trained in how to value their community's land? Yes/No
23. Other observations or notes. (How does the community perceive the investor? Has the investor bribed the community or community members? Does the investor have a history with the community? If so, explain.)

5. PREPARE COMMUNITIES TO RESPOND TO INVESTORS IN AN EMPOWERED MANNER.

Investors may arrive accompanied by government officials or other powerful people. The investor himself may be an elected official, local leader, or the relative of a powerful government official. Such individuals may intimidate community members into signing papers, or may demand to meet alone with community leaders, “behind closed doors.” They may say things to the community like “We already have government approval,” or “If you don’t accept our terms, we’ll just go to your neighbors and then your neighbors will get all the benefits of the investment, not you.” Or, the investor may be a community member or “son of the soil” who lives in the capital city or another country, and seeks a large piece of land to “bring development to his home community.” The investor may promise to bring jobs and benefits that the community urgently needs. In all instances, **the community should go very slowly, refuse to be intimidated, and seek the support of trusted advisers and legal counsel before signing any papers or agreeing to anything.**

There are a few things that facilitators should advise communities to do when an investor first arrives. These include:

- **Do not sign anything!** No matter who the investor is, facilitators should support communities to take time, carry out research on the investor and the proposed investment, and hold many meetings before agreeing to share land with an investor.
- **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 the 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. Facilitators should help communities demand that their leaders follow by-laws that require full community participation in investment decisions and call a large meeting of the entire community whenever an investor arrives to discuss the proposed investment. Everything should be done openly, in large community meetings.

- **Enforce by-laws that require full community participation in investment decisions.** If the by-laws are drafted before an investor arrives, the community should include in its by-laws a rule that land may only be approved for lease to investors when at least a “super-majority” (more than 66% of the community) agrees. When investors arrive, the community can point to its by-laws, and require that local leaders, the investor, and regional government officials abide by the approved by-laws.
- **Hold leaders accountable.** If leaders do make decisions about investors without consulting the community, the community should seek facilitators’ support to take action against these leaders. In some cases, communities have successfully convinced their leaders (by referring to the by-laws, and through public shaming tactics, etc.) to meet with the investors and cancel or void the deal.
- **Ask for copies of any papers that the investor has** – such as a pre-written lease agreement, the investors’ business plan, papers from the government, etc. If the investor has already signed some kind of contract with the government, communities should demand to see a copy of that document. If the investor will not leave a copy of this paperwork, the community should look for someone in the community who has a smartphone with a camera and take a photo of each page of the papers, then text the images to the facilitators’ phones.
- **Ask the investor specific questions about his/her plans and activities.** The community should ask questions that provide the following information:
 - What is the name of the company seeking land?
 - Is the company legally operating in the nation? Please show us papers that prove this.
 - What kind of investment is it? What are the planned activities that will take place on the land?
 - What land does the investor want to use for the investment?
 - How long a lease is the investor seeking? Or is the investor seeking to buy land?
 - What are the expected profits the investor is expecting to earn?
 - Why is the investor seeking this community’s specific land?

- What are the expected environmental and social impacts of the investment?
- What benefits will the investment bring to the community? How will the investment contribute to the community's prosperity and wellness?
- How does the investor intend to interact and communicate with the community? Will the investor be clear about all details of the investment? Will the investor listen to the community's interests and make an effort to promote the community's desired outcomes?)
- Getting a copy of the investors' annual report from the previous year (to see profits, losses, etc.)
- **Review the community's existing by-laws, zoning plan, and vision for the future.** Communities should have by-laws about the process for reviewing and deciding on investment deals, and may have identified areas of land that could be suitable for some investment activities. Facilitators may also ask the community questions such as: "Think back to your community vision – how else might the community use the land for local businesses and community-driven development?"

Then, after the investor leaves, the community should:

- **Call the Early Warning System hotline or a trusted organization or lawyer for support and advice.** Community members should report all information gathered, and send photos of all documents the investor shared.
- **Review its legal rights.**
- **Discuss the investor's request as a group.** The entire community should meet, including all community leaders, elders, women, youth, members of minority groups, and the Land Governance Council should meet to discuss the company/investor's plans, and hear community members' thoughts and feelings about the proposed investment.
- **Research the investor as much as possible.** The community and facilitators should do a bit of research on the investor as soon as possible. The research can include:
 - Asking relevant government officials if the company is legally operating in the country;
 - Finding out who the investor is; what the company already does in other places; where the money is coming from to finance the proposed investment, etc.;
 - Investigating the experiences of other communities where the investor is already working. How did things change in those communities once the company arrived and started doing business? What were the environmental or social impacts of the investor's business? How did the community benefit? Was the investor respectful?
 - Getting a copy of the investors' proposed business plan. Investors are often required to submit a business plan to the government; facilitators may be able to secure a copy of the business plan by asking the investor directly, or by asking relevant government officials to see a copy.

6. ENSURE THAT COMMUNITY MEMBERS UNDERSTAND THE VALUE OF THE REQUESTED LAND AND NATURAL RESOURCES.

The value of the land the investor is requesting can be calculated in a number of ways:

- **The value of the land to the community.** It may be useful to review or re-do the Community Land Valuation exercise when an investor arrives seeking land, to ensure that the community remembers the exercise and the results. (See the chapter on *Valuation of Community Land and Natural Resources*.)
- **The value of the land on the local market.** If possible, facilitators can conduct research on local land prices, or reach out to real estate agents, or government officials with expertise in the national land market to find information about land values.
- **The value of the land to the investor and projected annual profits** from the land. This information may be challenging to find – facilitators and community members can find this out by looking at the investor's business plan and any other information gathered about the company, and by asking trusted government officials or other businessmen or companies in similar industries for their advice.

7. PREPARE THE COMMUNITIES FOR NEGOTIATION.

If a community decides that it is interested in sharing some of its lands with an investor, the community should prepare for negotiations about the terms of the investment contract. Such preparation should include:

- **Demanding that an Environmental Impact Assessment is completed by impartial, neutral scientists, and that the results are communicated clearly to the community before negotiations begin.** Often, investors pay non-neutral, biased scientists to carry out Environmental, Social and Human Rights Impact Assessments, and as a result the scientists' reports tend to find that the project will have minimal negative impact. Communities should be ready to demand that assessments are completed by scientists or consulting firms chosen jointly by the community and the investor, and who have a proven track record of neutrality and high quality work. Facilitating organizations may need to research which scientists/consulting firms are truly neutral and highly professional.⁶ Communities can then use the findings of Impact Assessments to inform and strengthen their negotiations with investors.

Because Environmental Impact Assessments are usually very technical and full of scientific data, it may be hard for communities to understand what the reports are saying. Communities should request that the scientists or consulting firms preparing the Assessment create low-literacy, plain language summaries of various sections of the reports – particularly the sections on impact and “mitigation” (the actions the investor will be required to take to ensure that the business venture does not negatively impact the community).

- **Agreeing on a negotiation plan with the company.** To help slow down negotiations, a “negotiation plan” – detailing how many meetings must be held, and a timeline for these meetings – can be prepared, agreed on, and signed by all parties before negotiations start. The community may ask that there be more than one negotiation meeting, so that the community has time to consider the investor's offer and decide on its response/counter-offers. This will make it possible for the community to hold meetings to discuss on its own what the company has proposed, before agreeing to anything with the investor.

- **Establishing a committee to negotiate on the community's behalf, but invite all community members to witness the negotiations.** This committee may be the Land Governance Council, or it may be certain community members with good negotiating skills or certain special expertise. The committee should be diverse, and include men, women, youth and elders. The community should clearly set out how the negotiating committee will act – what it can and can't do or agree to. Even though the team may be doing the negotiating, the negotiations should be held in a large public meeting, which all community members may attend. The community should also invite individuals or groups with use and access rights to the land that may be affected by the investment.
- **Reviewing national and international laws that protect community land and environmental rights,** and have copies of the laws ready at the negotiations to show to the investor.
- **Reviewing the community's by-laws relevant to investment requests** and follow all agreed procedures.
- **Reviewing what the community is willing to provide to the investor, and on what terms.** (How many hectares, what areas of land within the community, for how many years, for what kinds of activities, etc.)
- **Reviewing the community's prepared list of requested rental payments, benefits, terms and conditions.**

8. PROVIDE SUPPORT DURING NEGOTIATION MEETINGS. THE COMMUNITY SHOULD NEVER UNDERTAKE NEGOTIATIONS WITHOUT LEGAL OR TECHNICAL SUPPORT.

Investors often arrive unannounced to conduct negotiations, knowing that if there is a scheduled negotiation session, the community will likely have an advocate there to help them protect their interests. When a negotiation is scheduled, investors may fail to appear at the agreed time and date, and then arrive the next day, when they know the community will not have support. In such instances, **the community must stand its ground and refuse to meet with the investor for a negotiation session without its advocates or lawyers present.** In addition to providing legal or technical information or advice, advocates can also help to ensure that the community:

6. The American Association for the Advancement of Science has a program, *On-call Scientists*, that matches scientists, engineers and health professionals with human rights organizations requiring technical, scientific expertise. Go to <http://www.aaas.org/page/ocs-about> to request help.

- **Documents all negotiation meetings.** The community should assign people to take very good notes of the negotiation meetings. Facilitators may also want to record or videotape the negotiations. The more forms of documentation of the meetings, the better. This can help create evidence of the discussion, should there be a future conflict that ends up in court.
- **Leaves nothing unclear, unexplained, or vague.** Facilitators should make sure that the investor has addressed all of the community's concerns and answered all questions during the negotiation process. Remind communities to ask any questions or clarifications that they want to – investors may use words or terms that the community does not understand.
- **Resists pressure to make quick decisions.** The negotiations can take as many meetings as the community feels are necessary. Facilitators may need to ensure the investor understands that the community should not be hurried into signing or concluding negotiations quickly. The investor should not incite community members to agitate for quick negotiations, or use government connections to pressure the community to move quickly. Facilitators will likely need to help communities assert their right to read and revise a proposed agreement a reasonable amount of times before it is finalized and signed.
- **Make sure that communities do not sign any contract – or anything in writing – until a lawyer working on the community's behalf has reviewed it** to make sure that it does not include any legal “tricks” that may weaken community rights. Do not trust the investors' lawyer to be looking out for the community's interests; the community needs its own lawyer to review the contract before they sign it. For free legal help for contract review, see the *Lawyers for Resource Justice* box, below. Facilitators might also seek the help of local lawyers who are members of Namati's Global Legal Empowerment Network.⁷

9. GET A GOOD, WRITTEN CONTRACT THAT IS ENFORCEABLE IN A COURT OF LAW.

Most importantly, facilitators should make sure that communities demand that the agreed outcomes of all community-investor negotiations are documented accurately and written up into a formal, enforceable contract. Communities are often denied the benefit of a formal, written legal contract, with clear terms and conditions, as would document an agreement between two companies or investors. As a result, investors' promises may have very little legal weight, and may not always be enforceable in a court or tribunal.

At the end of negotiations, facilitators should make sure that all the agreements are read aloud and confirmed by both parties. Then, facilitators should work with a lawyer to ensure that the agreed terms – nothing more, nothing less – are written up into a formal contract.

When drafting contracts with investors, communities should aim for:

- **Contracts of short duration (2-5 years) with the option to renew.** Shorter contracts create more opportunities to re-negotiate terms to align with evolving realities, such as currency inflation. Often, investors ask for 50+ year fixed contracts, which can trap communities in agreements that do not benefit them over the long term. If the investor will only accept longer contracts, communities should ask for scheduled time to review the terms of the contract to make sure that everyone is still satisfied with the terms and conditions.
- **Rental payments that adjust for inflation and currency devaluation.** Communities can take account for changes in currency value by describing rental payments in terms of a staple food item, like rice or corn. The price of this item will go up and down with the actual value of the currency, which will help communities ensure that they don't receive less and less value for their land over time.
- **Clear, direct statements about how the investor must leave the environment** – including making sure that the community waters are not polluted, that the soil remains fertile, and that community members can still hunt, fish, graze and gather traditional plant medicines as before the investor arrived.

7. <https://namati.org/network/members/>

- **Protections for rights of way and important access routes** to forests, waters, grazing lands and other areas where people earn their livelihoods (so that access to key natural resources is not blocked by the investment activities).
- **Use of infrastructure.** If the investor is building a road or bringing in electricity and other telecommunications benefits, the community should be granted access to and use of the infrastructure.
- **Contract provisions that allow the community to enforce the contract if the investor breaks agreements.** In contracts between companies, there are multiple provisions that provide a remedy if one side breaks the agreement.

Communities should ask for similar language in their contract so that if the investor fails to pay rental fees or does not provide the promised benefits, the community will have a way to enforce the terms of the contract or evict the investor.

- **Land will be returned to the community.** After the lease is over, the contract should state that the land will be returned to the community for its use. Even if the investor has made improvements to the land (built buildings, etc.), the community should be able to have use, management and decision-making power over the land when the term of the lease is over.



SUGGESTED CONTENTS OF A COMMUNITY-INVESTOR CONTRACT

- The exact amount of land that the investor will lease from the community, and its precise location;
- The exact activities that the investor will undertake on the land, including a specific list of what the investor can and cannot do;
- The duration of the lease (how long the contract is valid for);
- The length of time of the lease (5 years? 10? 20?), and how many times it can be renewed. If the lease can be renewed, how many times may it be renewed?
- Whether the contract will be reviewed and revised every few years (to ensure that the community and investor are happy with the terms of the contract) and how often the review and revision will happen;
- The rental payment to be received by the community;
- The specific benefits to be provided to the community, including the specific terms of the benefits (how big a school, made of what materials, how many books, etc.) the date by when the benefits must be provided;
- How the community will receive the payment (in cash, in a transfer to a community bank account, etc.);
- Available remedies if the investor breaks the agreement/breaches the contract;
- The process of conflict resolution if the community or the investor is unhappy with how things are going, or if one side breaks the contract: mediation or litigation? Termination of the contract?
- The process for claiming compensation for any “damages” suffered by the community as a result of the investment;
- Whether the land will revert to the community at the end of the contract lease.

LAWYERS FOR RESOURCE JUSTICE

Lawyers for Resource Justice connects national, regional and grassroots advocates and activists with high-level international lawyers who provide free legal support, advice and training around community-investor conflicts, negotiations and contracts. Local organizations work collaboratively with these international lawyers to help communities prevent or remedy damages from large-scale resource development projects. Many of the volunteer lawyers are experienced in transactional and corporate law, making them particularly useful for situations involving negotiations or engagement with corporate entities or international organizations (such as funding agencies).

Facilitators can ask Lawyers for Resource Justice for various kinds of help, including:

- Strategies for proactive engagement with governments or companies;
- Representation in community-investor negotiations;
- Investigation of investors’ compliance to national and international laws and standards;
- Guidance and identification of strategic actions;
- Training on unfamiliar areas of law or jurisdictions;
- Bringing cases to international tribunals; and others.

Facilitators may seek support from Lawyers for Resource Justice at: www.resourcejustice.org and support@resourcejustice.org

ADDITIONAL RESOURCES FOR PRACTITIONERS

Using a Biocultural Community Protocol (Chapter from *Biocultural Community Protocols: A Toolkit for Community Facilitators*) – Natural Justice

www.community-protocols.org/wp-content/uploads/2015/11/BCP-Toolkit-Part-III.pdf

The third part of this Natural Justice guidebook focuses on how communities can engage with external actors. It suggests a number of ways to raise awareness with communities and the broader public, engage in key decision-making processes, negotiate with external actors, and prevent and resolve conflict.

“A Community Guide to the International Finance Corporation’s Performance Standard 7 on Indigenous Peoples (PS7)” – Forest Peoples Programme

www.forestpeoples.org/topics/international-finance-corporation-ifc/publication/2010/community-guide-international-finance-

This guide — offered in English, French, and Spanish — tells community members what to do if a company is planning to develop projects on or near their customary lands, using a loan from the International Finance Corporation (IFC), the private sector part of the World Bank Group. The guide provides an outline of IFC’s rules and how to conduct good faith negotiation. The guide also explains people’s rights to be consulted fairly and honestly, to receive information about projects, to participate in them, and to refuse the project. The guide suggests how to tell the company and the IFC about people’s needs and concerns, and how to object to a proposed project.

Guide to Free Prior and Informed Consent – Oxfam

<http://resources.oxfam.org.au/filestore/originals/OAUs-GuideToFreePriorInformedConsent-0610.pdf>

This is a step-by-step guide about how to use the right to Free Prior and Informed Consent to help people to have a say about development projects, such as dams, mines and, logging and other large infrastructure projects, which affect them in some way. It is designed to assist organizations supporting communities affected by large-scale development projects. It includes a section as a resource to help communities understand their rights, with useful tips and information along with practical steps outlining the negotiation process. The guide also contains some “red flags” about what can go wrong and difficulties that communities may encounter.

IBA Community Toolkit: Negotiation and Implementation of Impact Benefit Agreements – The Walter and Duncan Gordon Foundation

www.ibacommunitytoolkit.ca/pdf/IBA_toolkit_March_2010_low_resolution.pdf

This very detailed toolkit provides general information on negotiation of impact and benefit agreements – agreements negotiated between companies and communities. It was written for Indigenous communities in Canada who are negotiating with mining companies, but the resources and strategies that it contains can be applied to many other contexts. The guide includes information on the types of agreements available to communities and companies, and what they mean, as well as understanding consent, understanding the project and its environmental implications, preparing for and conducting negotiations, and implementing agreements.