



Grassroots
Justice
Network



HOW TO ADDRESS THE CORPORATE- COMMUNITY ENGAGEMENT GAP

THE CASE FOR A POOLED FUND FOR
LEGAL AND TECHNICAL SUPPORT





“The key to human rights due diligence is the need to understand the perspective of potentially affected individuals and groups.”

- UN Office of the High Commissioner for Human Rights¹

- Photo Source: LEJ, A woman collects oysters from the tidal shallows in the estuary of the Aghanashini River, Karnataka State, India.

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Acknowledgements

Our thanks go to all of the civil society, corporate, investor, and rightsholder representatives who were willing to give their time and perspectives in consultations, roundtables and workshops regarding the development of a pooled funding mechanism over the past several years.

We are also grateful for the guidance and contributions from Ariel Meyerstein, US Bank; Ben Bowie, TMP Systems; Ruben Zandvliet, Shift; and Sam Szoke-Burke who each did extensive research and thinking about what a pooled fund could look like and how to rally support .

The document was drafted and researched by Shauna Curphey, Just Ground; Joanne Bauer, Rights CoLab; and Rebecca Iwerks, Namati. Contributions were made by Erin Kitchell, Samuel Ngei, Vivek Maru and Sonia Park from Namati and Silvana Zapata-Ramirez from Rights CoLab. Copy editing was provided by Raquel Thompson and Christine Clark, and the report was designed by Juliana Camargo with initial input from Kelvin Nyagancha.

Thank you to the Mott Foundation and Lorenzo M. Wakefield for the technical and financial support to have this initiative.

Cite as: Just Ground, Namati and Rights CoLab, Addressing the Corporate Engagement Gap: How to fund legal and technical support for communities impacted by land-based investments (2024).

This Governance Flash has been produced as part of ALIGN by IIED, however the views expressed do not necessarily reflect the official views or policies of ALIGN partners or the UK Government.



Executive Summary

Pooled funds for legal and technical support offer a promising means for businesses involved in land-based investments to reduce operational risks and negative social and environmental impacts by addressing the inherent resource imbalances between companies and communities.

Businesses that make land-based investments increasingly understand that they need to identify and manage the social and environmental impacts of their operations or face significant financial and reputational risks. From project delays to total shutdowns, there are well-documented costs when businesses do not prevent or mitigate the negative impacts of their activities. With corporate human rights standards fast becoming embedded into law and policy, companies also face the risk of civil liability for failing to undertake adequate human rights and environmental due diligence (HREDD).²

While there is growing consensus that robust engagement with affected communities is crucial for businesses to understand the potentially harmful impacts of

their operations – and to manage them without costly conflicts – businesses continue to struggle with this. Both companies and affected communities are frustrated that current engagement efforts are not working. Companies often don't engage affected communities directly, or rely on consultants who lack understanding of the local context and the community trust required to connect with communities. At the same time, communities often understand little about corporate language, timelines, and priorities and therefore often miss opportunities to engage. As a result, businesses don't have the information they need to successfully identify and prevent or mitigate negative social and environmental impacts – and violations, conflicts and project delays continue.

The key to achieving better results lies in recognizing that effective corporate-community engagement requires that affected communities have access to the independent legal and technical support necessary to deliberate, develop solutions, and engage on equal footing. When communities fully participate in decision making, companies gain better insight into local dynamics and improve their response to community concerns. The result is more informed negotiation and fairer deals, and a strengthened social license to operate.

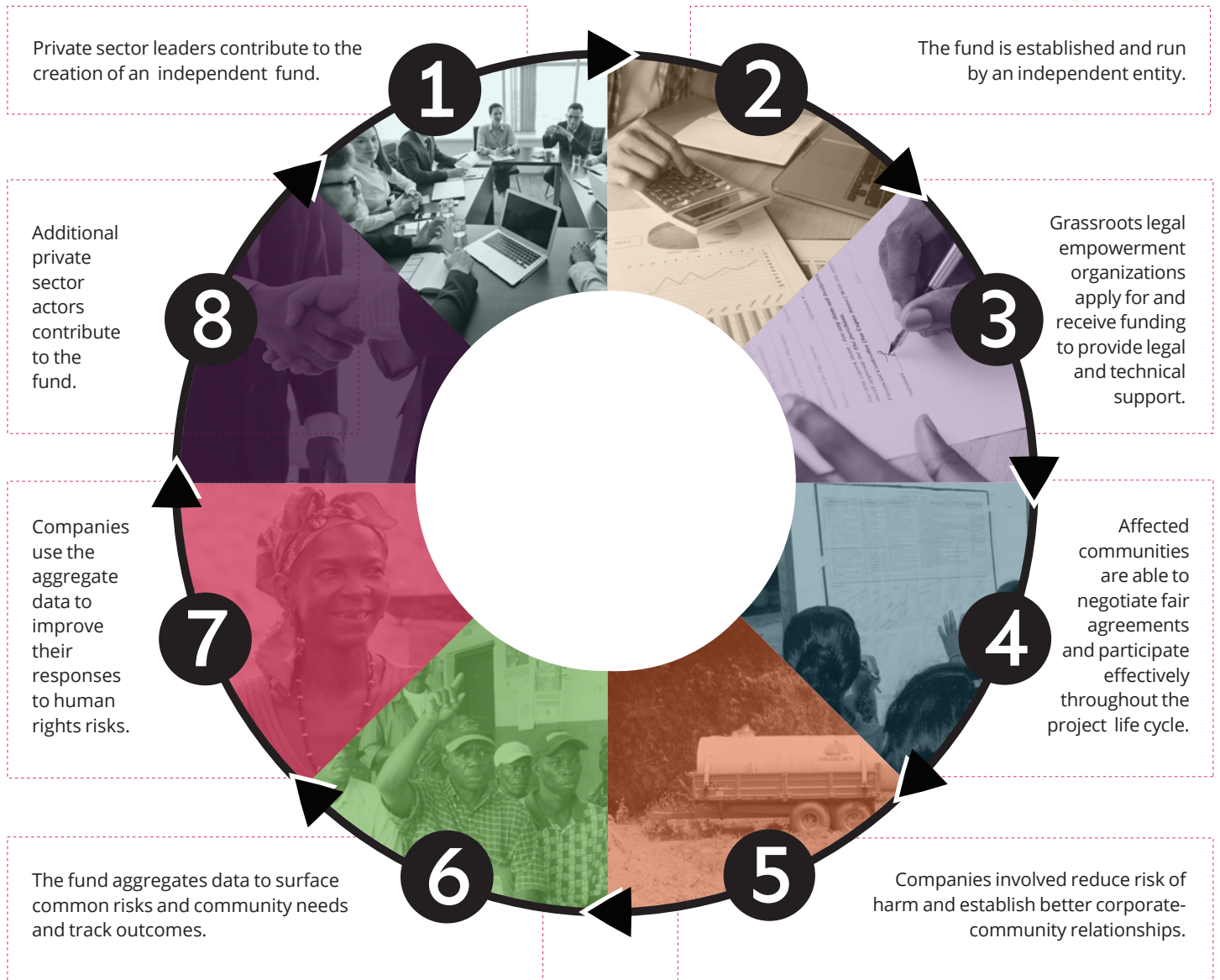
Grassroots organizations that have local credibility and expertise to provide independent legal and technical support to communities are hobbled by lack of funding. Funding must be independent from company influence to avoid actual or perceived conflicts of interest that jeopardize community trust. An independent grant-making facility for legal and technical support offers a way forward.

The idea of companies contributing to an independent fund for legal and technical support for project-affected communities has been explored in-depth over several years.³ Most recently, Rights CoLab and Just Ground joined with Namati to further develop this idea. Together, they have convened civil society and private sector actors to jointly discuss a potential way forward. This brief reflects the learning that has emerged.

Specifically, it explains:

- **The need** for private funding for community legal and technical support; and
- **The consensus** of the private sector and civil society advocates on the principles and design elements for an independent fund.

The Vision: Private Funding for Independent Community Legal and Technical Support During Land-Based Investments



Why a Fund for Legal and Technical Support?

Land-based investments present significant environmental and social challenges, which can lead to serious human rights risks and costly operational disruptions for business.⁴ An examination of over 360 projects that involved land tenure disputes found that 54% suffered materially significant impacts, and a third had a severe material impact, such as suspension of production, cancellation or large fines.⁵ Other research has demonstrated that land-related conflicts can lead to losses of 25% to nearly 300% of the net present value (NPV) of an investment.⁶

As corporate human rights standards become embedded into law and policy globally, companies face rising societal pressures to conduct effective HREDD.⁷ In particular, with the European Union's adoption of the Corporate Sustainability Due Diligence Directive, business enterprises have begun to improve their efforts to assess, prevent or mitigate their human rights risks to avoid civil liability.⁸

“We hire consultants to do stakeholder engagement – but the risks they identified often don’t match the risks identified by the communities.”

- Private sector participant in Namati's consultation

Companies rated poorly on Indigenous rights by private rating sources, such as Sustainalytics, were found to have **at least 3 times**, but as much as **66 times the rate** of incidence of halted operations, enforcement actions, or legal issues as those with good ratings.¹⁸

Research shows that by setting aside as **little as 2% of the initial project costs for social risk mitigation**, such as community engagement, impact assessments and the establishment of grievance mechanisms, investors can avoid losses due to delays and conflict that reduce the **net present value of the investment by 25% to 37% on average**.¹⁹

THE STATUS QUO IN LAND-BASED INVESTMENTS: AN IMPLEMENTATION GAP

The efforts of companies and investors involved in land-based investments to identify and manage human rights risks often fall short because of weaknesses in their community engagement.⁹ An assessment of 110 of the world's largest apparel and extractive companies found that 61% of companies have at least some part of an HRDD process in place, but only 27% disclosed evidence of engaging with rights holders during the process.¹⁰ Similarly, a wide gap remains between increasing recognition of Indigenous people's right to

Free Prior and Informed Consent (FPIC) and its implementation in actual practice.¹¹ Companies often continue to rely on contractual clauses, codes of conduct and audits to inform their HREDD process.¹² Yet a growing body of research demonstrates that, with few exceptions, these measures lack direct ties to affected communities, and often fail to detect or mitigate human rights risks.¹³

Even when companies seek to engage more directly with affected communities, their approaches are often unsuccessful because communities lack the legal and technical knowledge and skills to engage effectively.

Common barriers for communities to meaningfully engage include:

- Inadequate access to information;
- Lack of facilitation to aid community deliberation and collective decision making;
- Lack of support to negotiate disputes or access judicial or non-judicial pathways to remedy;
- Fear, risk and threats of reprisal;
- Lack of training in community-led impact assessment and monitoring.

In a survey of 800 project-affected people in eight countries, 66% indicated they would participate in activities to measure the value of their homes, land and resources that would be lost or destroyed if they had the opportunity; and 65% believed the project could have been changed to achieve the same goals without causing as much harm.²⁰

When companies hire consultants or lawyers to support communities in overcoming these barriers, there is often a perceived conflict

of interest because the providers are answerable to the company that pays for their services, not to the communities. This is a long-standing dilemma: According to Chris Jochnick, who has led several NGO land rights initiatives, “Those companies out to make good faith efforts to address complex challenges will lack for credible partners and intermediaries.”¹⁴

BRIDGING THE GAP: INDEPENDENT LEGAL AND TECHNICAL SUPPORT TO IMPROVE COMMUNITY ENGAGEMENT AND HREDD OUTCOMES

Independent legal and technical support for affected communities can markedly improve engagement and help companies and investors to identify and address human and environmental risks. With access to independent legal and technical support, communities can interact with land-based investment processes on a more equal footing throughout the lifecycle of the project, leading to greater awareness on both sides, a fairer deal, and a more secure social license to operate. Once initiated, projects benefit from communities

that are better equipped to monitor and engage throughout the project's lifecycle. Specifically, providing legal and technical support to communities can:

- Bridge the gap between disclosure and community use of information
- Facilitate community deliberation and inclusive decision making.
- Support pathways to dispute resolution and remedy.
- Reduce risks to human and environmental rights defenders.
- Facilitate real-time data gathering on the ground.
- Generate sector-level data on human rights risks and successful mitigation measures.

Each of these benefits is explained in greater detail below.

“If the [funding] facility can help get the voices of the community into the company that would be most useful for us. The main thing is helping community stakeholders or their representatives to reach us.”

- Global consumer goods company participant in Namati consultation

Addressing the gap between disclosure and community use of information.

Communities affected by land-based investments face multiple barriers in gaining access to and interpreting project-related documents and meetings. Even though many companies and countries have improved their disclosure practices in recent years, documents can be difficult for communities to obtain because of financial, internet, and language barriers.¹⁵ When communities are able to access project-related documents, they are often in highly technical language and formats that make it difficult to locate specific information. These barriers can also disproportionately affect women: Men are more likely than women to have access to the internet, means to travel, and the language necessary to navigate project-related documents.¹⁶

To overcome these barriers, communities need a trusted intermediary to help them obtain and make sense of project-related documents. Typically, this means acquiring documents and distilling and presenting key points from them in a way that helps communities understand what the proposed project would mean for them.¹⁷



CASE STUDY: LEGAL SUPPORT HELPS COMMUNITIES ON A CARBON PROJECT IN NORTHERN KENYA FIND A WAY FORWARD

In 2022, with the support of community paralegals trained by IMPACT and Namati, Mama Sofia and her pastoralist community secured the legal right to govern their customary land. From this experience, she knew that Kenya's Community Land Act requires any investor interested in a community's land to engage with the Community Land Management Committee (CLMC), a local land governance mechanism. The world's largest grassland carbon project operating on her land did not do this, however.

Mama Sofia, an elected member of her community's CLMC, and her peers from 26 other communities came together from across grasslands stretching more than 1.9 million hectares of land to demand transparency and accountability from the project. With the help of the paralegals, community representatives demanded access to essential project information, including gross revenue and how it would be allocated to communities. They spoke in one voice for a fairer agreement.

In response, the project company shared the project implementation document for the first time and agreed to negotiate a new agreement with communities. That negotiation is taking place now. If the communities succeed, they will set an important precedent for how a major carbon project can be made more fair. Along the way, these communities are building muscles of collective action that are crucial for confronting the challenges they face, including worsening patterns of drought.

- Photos Source: CLA, LEJ, Kenya, Africa.



Facilitating community deliberation and inclusive decision making

Within a community, people may have different priorities and points of view. And, due to power imbalances related to gender, age, or ethnic identities, it is often difficult for companies to understand the local dynamics.

Moreover, because they are operating on strict timelines, companies typically offer only a one-time opportunity for community involvement, which is insufficient for community deliberation.²¹ Additionally, companies must figure out whom to invite to consultations, and the selection itself can exacerbate community tensions and further marginalize certain groups.²² These shortcomings thwart meaningful engagement

and undermine FPIC, which requires that communities make informed decisions and engage in deliberations that include people beyond the formal leadership of a community.²³

Communities may require technical and legal support to develop consensus across community perspectives. This can include facilitation and training on how to respond to a land-based investment effectively, through methods such as mapping and agreeing on land tenure and natural resource access or prioritizing compensation terms internally before discussing them with a corporate actor. When communities can fully articulate their concerns and priorities, all parties better understand project impacts and are able to identify and address risks and manage conflicts.

- Photo Source: LEC, LEJ, Meeting on land rights of minority indigenous communities in East Africa (Kenya, Tanzania, Uganda). April 23, 24 2024 at Lukenya Getaway in Nairobi, Kenya.

- Photo Source: Team Convening, Kenya, Africa.



CASE STUDY: LEGAL EMPOWERMENT SUPPORT HELPS COMMUNITY IN SIERRA LEONE RESOLVE CONFLICT WITH PALM OIL COMPANY

In 2015, Natural Habitats Sierra Leone (NHSL), a Dutch palm oil company, acquired a concession of 30,700 hectares from a previous owner. When the company arrived in the Makpele chiefdom to clear the land, it was met with significant community resistance. The company discovered that the community's tribal chief had not only signed away the community's land without proper consent, but included its rivers and a national park in the concession as well.

After direct, good faith efforts at negotiation failed, NHSL embraced a multi-stakeholder approach organized by Solidaridad, with Namati providing independent assistance to the community by educating community members on their land rights and guiding them through participatory mapping, dispute resolution, and lease re-negotiation. The result was a revised concession in compliance with Sierra Leone's National Land Policy as well as the UN Food and Agriculture Organization's Voluntary Guidelines for Responsible Governance of Tenure of Land, Forest, and Fisheries, and Roundtable for Sustainable Palm Oil standards.²⁴

- Photos Source: LEJ, Sierra Leone, Africa.



Supporting pathways to dispute resolution and remedy

Legal support during negotiations and for grievance redress can help resolve disputes before they escalate into conflicts where communities take direct action in the form of protests, blockades, sabotage or similar tactics.

Most land-related conflicts are not about compensation, but rather arise over more difficult issues, such as displacement, environmental destruction, or resource shortages.²⁵ Research shows that communities believe projects can be changed to achieve the same goals without causing as much harm, but report that they are not consulted during the planning phase of project development.²⁶

Affected communities often need legal and technical support to surface and resolve potential conflicts at various stages in a project life cycle. For example, during an environmental impact assessment or other permitting or licensing process, communities need to know the deadlines and procedural rules for raising their concerns. Communities that want to negotiate benefit agreements with companies need legal assistance to draft proposed terms and review final contract language. They also need to know and be able to pursue their options when companies break contracts or do not abide by legal requirements or voluntary commitments. Those options can include direct negotiation with companies, administrative remedy through government agencies, mediation through non-judicial grievance mechanisms, or filing a lawsuit.



Reducing risks to human and environmental rights defenders

The risks of retribution for land and environmental justice defenders speaking up about projects impacting their community are high.²⁷ In a community-led survey of 800 project-affected people in eight countries, 78% reported that they do not feel safe to express their true opinions or ask questions.²⁸

Frontline defenders report that when they have access to legal and technical support, they are better able to find less risky pathways to advocate for land and environmental justice.²⁹ With the advice of legal practitioners, communities can better understand the relative risks of various options for addressing their concerns. Evidence from legal empowerment practitioners shows justice seekers who have access to legal support are able to find less confrontational pathways to remedy - such as administrative redress - that enable them to stay safe.³⁰

67% of the most commonly-used ESG indicators focus on company human rights policies and processes, rather than the results those policies and processes are actually achieving.³⁵

Facilitating data gathering on the ground and generating sector-level data on human rights risks and successful mitigation measures

When they undertake due diligence, companies tend to rely on third-party audit reports or their own field staff, and both sources often fall short in accurately capturing community concerns.³¹ Similarly, existing HREDD indicators used by ESG rating agencies do not measure “whether company practices work for affected stakeholders.”³² Companies and investors need better data on human rights risks, which go beyond whether company policies are in place and cover all salient human rights issues.

Communities are the best source of information on how to predict, prevent and mitigate negative impacts.³³ Therefore, community monitoring can improve companies’ HREDD and accordingly reduce risks. Community monitoring includes activities such as natural resource mapping, risk assessment, collection of information related to impacts, development of operation-level complaint mechanisms, and tracking the effectiveness of responses.³⁴



"The data most investors get now is not detailed or reliable enough to provide much insight into local issues."

- Global consumer goods company participant in Namati consultation



CASE STUDY: COMMUNITY MONITORING LEADS TO IMPROVED COMPANY-COMMUNITY DIALOGUE



A rubber plantation and mill, recently privatized, faced challenges with expanding its plantation area due to overlapping Indigenous communities practicing small-scale agriculture and other activities in what they considered their customary areas. Initial resistance from communities led to a dispute, with grievances multiplying and a national CSO launching a public campaign. The CSO set up an independent community monitoring project that deployed ruggedized phones to community monitors to use for data collection. With the help of the equipment and training from the CSO, the community was able to establish its own community monitoring system. This prompted a dialogue between the company and the community, and the company has expressed interest in developing a way for the CSO and communities to share the data. An external assessment estimated that most of the grievances could have been avoided if the company had better access to the community information beforehand.³⁶





Community monitoring requires support in: facilitating community decision making on whether to do monitoring; prioritizing elements to monitor; and training on data collection and reporting processes. It may also require knowledge sharing on the project's technical documents, such as impact assessments, or environmental monitoring, such as water quality. Costs of monitoring can include equipment, travel, internet access, and the community members' time.

The benefits to companies and investors are clear: more complete, accurate and timely information about project impacts on livelihoods and natural resource use, and on community tensions. Community monitoring can also improve relationships by providing regular opportunities for communication between



communities and companies and investors. In addition, a sense of community ownership over monitoring and remedial processes increases community satisfaction and trust in them.³⁷

Beyond project-level benefits, funding for legal and technical support can provide companies and investors with sector-level insights into the underlying causes of negative impacts and how to systematically address them. Through the sharing of aggregated data that points to lessons learned across different community grants, a funding facility can help companies better understand what works best for community engagement and grievance processes. In addition, information that grant recipients provide can shed light on trends in human rights risks in a particular sector or geography.

HREDD PHASE	KEY POINTS OF COMMUNITY INTERVENTION		
	CONCEPT AND DESIGN	FEASIBILITY STUDIES, PLANNING AND PRE-CONSTRUCTION	CONSTRUCTION - OPERATION - DOWNSIZING OR CLOSURE
IDENTIFYING AND ASSESSING RISKS AND IMPACTS	<ul style="list-style-type: none"> • Explain who will be affected, and how different groups may be affected differently. • Share their understanding of their rights and companies' responsibilities under the law. • Identify pre-existing and ongoing human rights issues and potential human rights risks. • Broaden and discuss the range of options available to eliminate, offset, or reduce potential adverse impacts. • Voice support for or opposition to different project options. 	<ul style="list-style-type: none"> • Consult on HRIA and ESIA's to identify impacts to be addressed, and monitored. • Identify baseline data and review proposed mitigation strategies. • Identify meaningful metrics for assessing impacts and effectiveness of mitigation measures. • Discuss plans for project closure, including site remediation and ongoing monitoring. 	<ul style="list-style-type: none"> • Monitor project impacts and the effectiveness of mitigation and remediation measures. • Collaborate to investigate complaints and identify appropriate actions to take.
INTEGRATING FINDINGS AND TAKING ACTION	<ul style="list-style-type: none"> • Provide input into how to incorporate community perspectives in testing the feasibility of various design and risk management options. • Inform how to apply information gathered to land acquisition, project design, health and safety planning, and financial and workforce planning. • Negotiate FPIC and incorporate terms in leases and community benefit agreements. • Collaborate on establishing remediation activities, grievance mechanisms and monitoring processes. 		<ul style="list-style-type: none"> • Provide input on how to improve remediation activities, grievance mechanisms and monitoring processes.
TRACKING PROGRESS AND SHARING HOW IMPACTS ARE ADDRESSED	<ul style="list-style-type: none"> • Provide information on preferred consultation methods (and if different for different groups). • Review and comment on project information, including potential impacts, alternatives and design options. • Review and comment on HRIA, EIA, land tenure-related information and other assessment reports. 		
		<ul style="list-style-type: none"> • Review changes to the project design or operation and explain potential impacts and mitigation measures. • Provide updated information on groups that will be impacted, and the expected impacts. • Communicate how the project is meeting its environmental and social commitments, including disclosure of community monitoring or other reports on mitigation and remediation. 	

BUSINESS RISK MANAGEMENT	HREDD PHASE
<p>Agreement and origination</p> <ul style="list-style-type: none"> • Secure a sustainable social license to operate. • Understand the concerns of the community. • Achieve strong and durable environmental protection. • Comply with international standards, including free, prior, and informed consent (FPIC). • Avoid delays, cost increases and other risks through trusted processes. 	<p>IDENTIFYING AND ASSESSING RISKS AND IMPACTS</p>
<p>Remedy and mediation</p> <ul style="list-style-type: none"> • Ensure that mechanisms are accessible and legitimate to communities. • Enable rapid and proportionate response to problems raised, helping to avoid escalation and over-formalization. • Reduce reputational and operational risks associated with disputes. • Develop better-adapted remediation packages. • Assess the effectiveness of existing grievance mechanisms. • Comply with international standards such as FPIC. 	<p>INTEGRATING FINDINGS AND TAKING ACTION</p>
<p>Monitoring and reporting</p> <ul style="list-style-type: none"> • Access independent data (relative to data coming from company-hired experts and corporate disclosures). • Achieve greater transparency and accountability while developing the foundation for regular dialogue with communities and strong legitimacy. 	<p>TRACKING PROGRESS AND SHARING HOW IMPACTS ARE ADDRESSED</p>

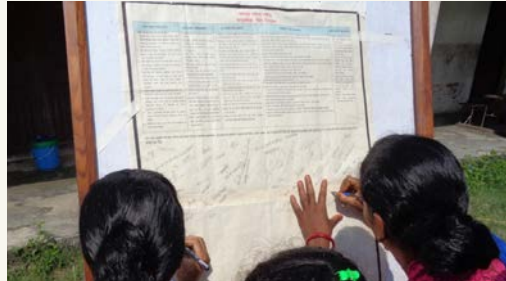


“There are some crowdfunding efforts for urgent support, but not enough to meet the growing needs.”

- Civil society participant in Namati consultation

FILLING THE FUNDING SHORTFALL: CONTRIBUTIONS TO INDEPENDENT LEGAL AND TECHNICAL SUPPORT

The grassroots organizations that have the necessary local credibility and expertise to provide independent legal and technical support to communities are under-resourced. At the same time, for communities to trust and accept support, the funding must be – and perceived to be – independent from company influence.



legal and technical support as a means of gaining access to credible organizations who are trusted intermediaries with affected communities.³⁸ When communities have the independent support they need to effectively engage, companies are better able to avoid human rights harms and the costly delays and shutdowns that result from them.³⁹ Private sector contributions to an independent grant-making facility offer a way to meet the needs of affected communities to prepare them to engage effectively by retaining trusted local legal and technical expertise of their choosing, without creating actual or perceived conflicts of interest that jeopardize community trust.

“Support for preventing possible harm is essential.”

- Civil society participant in Namati consultation

Companies involved in land-based investments have a strong interest in funding grassroots

In a 2021 survey of grassroots organizations that provide legal or technical support directly to communities, **78% reported that they faced operating cuts or closure due to lack of funds.**⁴⁰

Human rights funding represents **only 2% to 8%** of estimated total foundation grantmaking worldwide. Of that, only 11% goes to environmental and resource rights.⁴¹

How Would it Work?

PRINCIPLES AND DESIGN ELEMENTS FOR AN INDEPENDENT FUND

The idea of companies contributing to an independent fund for legal and technical support for project-affected communities has taken shape through research and consultations over many years.

Studies have developed the business case by quantifying the costs of company-community land conflicts as well as the cost and effectiveness of risk mitigation measures.⁴² Early work on private funding for community support included attempts by Peace Nexus to develop a pilot, which moved the idea forward.⁴³

In 2015, Namati successfully advocated for the government of Sierra Leone to implement a legal assistance fund as part of its national land policy. This fund built off the country's tradition of funding legal aid by creating a requirement for private sector contributions





to a fund for legal support when communities face land-based investments. Efforts to fully implement the fund in Sierra Leone were stalled by various political challenges.

In 2020-2022, Namati conducted consultations with hundreds of private sector, civil society, philanthropic, and government actors to identify a pathway to implement a pooled fund. The private sector consultation participants recognized the need for affected communities to have legal and technical support but found it difficult to respond directly without a perceived conflict of interest. For their part, community advocates voiced skepticism about a scenario of direct payments by the private sector. Both sides saw promise in the idea of an independent, pooled fund that would provide separation between funding sources and recipients showed promise.

In 2023, Rights CoLab and Just Ground joined with Namati to further test this idea in joint workshops with CSO and private sector representatives. Below we outline the fund's core principles and design elements that derive from the consultations and present a scenario for how a fund would work in practice.

- Photos Source: In May 2015, the Network organized a learning exchange on "Paralegal Program Development in the Philippines." It took place over four weeks and was hosted by the Alternative Law Groups based in Manila, Philippines, Southeast Asia.

CORE PRINCIPLES FOR FUNDING FOR LEGAL AND TECHNICAL SUPPORT

These core principles reflect the consensus that emerged from Namati's consultations on the fund idea, and were subsequently further defined at workshops Namati, Rights CoLab and Just Ground held with representatives of private sector and civil society organizations.

- Photo Source: LEJ, India.

A fisherman sets his nets at dawn on the Aghanashini River, Karnataka State, India. The Aghanashini River is one of the last entirely free-flowing rivers in the World. Its rich estuary environment supports the livelihoods of local communities who fish, harvest clams and oysters, and depend on its precious ecosystem in myriad ways. It also supports mangroves and a rich variety of wildlife.

Namati paralegals work with the Aghanashini community to establish a union of clam harvesters. Previously, clam harvesters were not recognised by authorities as fishermen and therefore unable to join any union. This resulted in clam harvesters not being eligible for government compensation schemes in the event of death or injury whilst working.



Responsive to Community Needs

In its design and operation, the fund must focus on the needs and priorities of communities directly impacted by investments. Communities will determine those priorities as well as the providers they will work with.



Rights-based

The fund must support and strengthen existing laws and international human rights standards and contributors must adhere to those standards and applicable national laws.



Inclusive

Engagement must be inclusive, taking into account barriers faced by women and youth as well as other marginalized groups.



Meaningful Engagement

Meaningful engagement requires that affected communities participate in investment-related processes on equal footing, with access to timely and relevant information and legal support.



Independent and Credible

The fund must have independent governance to ensure that the legal support provided to communities is free from the influence of fund contributors.



Community Agency

Communities that receive legal and technical support through the fund do not forfeit their right to grant or withhold their consent to a project or proposal. Free, Prior, and Informed Consent (FPIC) must be upheld at all times.



Accessible

The grantmaking process must be designed to maximize accessibility for communities, minimizing the burden on them.



Zero Tolerance for Reprisals

Any fund contributor must commit to having a zero-tolerance policy for reprisals against community members or supporters who engage in questions or debate about their investments.



Transparent and Accountable

Fund management must be transparent and accountable. It must provide for regular review, continuous learning, and improved outcomes both for communities impacted by projects and investors managing systemic risks.



A Cost of Responsible Business

Enterprises must treat financial contributions to fund community support not as philanthropy, but as a necessary part of conducting business responsibly, and must reflect this in their operating budgets.

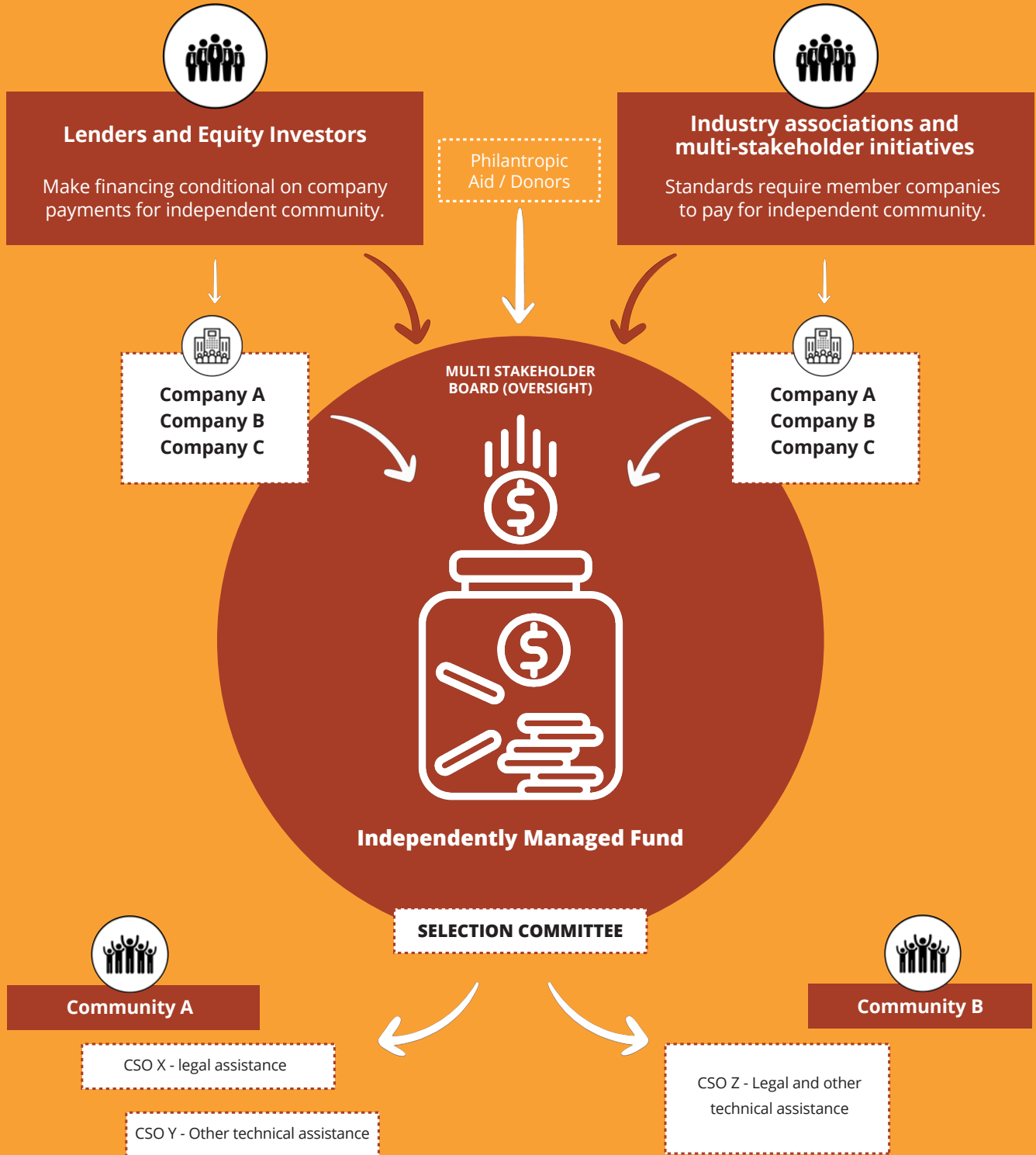
**"It's important to be flexible to
community needs, which can look very
different from instance to instance."**

- Civil society participant in Namati consultation



- Photo Source: LEC, Kenya, Africa.

Basket Fund for Community Legal and Technical Support



DESIGN IMPLICATIONS OF THESE PRINCIPLES

Financial Contributions to the Fund

- Investors and/or operating companies will be the primary financial contributors to the fund.
- The fund will pool financial contributions, delinking a specific fund contributor from a particular grant.
- Fund contributors will publicly endorse the fund's core principles, which articulate the broader norm changes needed to demonstrate respect for human rights during land-based investment processes.
- Fund contributors will inform the communities in which they are operating of the existence of the fund, either directly or through intermediaries.
- Fund contributors who fail to uphold their zero-tolerance policy for reprisals will be asked to leave the fund.

Governance

- Funding will be overseen by an independent committee composed of diverse representatives from civil society, including grassroots legal empowerment organizations, and other business and human rights experts.
- The committee's mandate will be to ensure that grant making responds to the needs of communities, which is necessary to meet the fund's objectives.
- Representatives from investors or operating companies will not sit on the committee.
- A process for selecting committee members will be agreed upon by fund contributors, civil society representatives, and other experts in the field.
- A small staff will be responsible for day-to-day operations. They will oversee the grantmaking process, and communicate with communities, civil society actors, the committee, and financial contributors.
- Selection panels, composed of local CSOs, academics, and other experts, will decide which grant requests to approve.

Grantmaking

- Grantmaking will respond to requests for support from grassroots legal empowerment organizations that focus on building the knowledge and agency of communities.
- Grant applicants will show a memorandum of understanding (MOU) with communities or an endorsement letter showing that the affected community wants legal and technical support.
- Grants will resource support to communities throughout the investment life cycle, including negotiations about whether a deal should happen and, if so, on what terms, and ongoing participation in the implementation and enforcement of those terms.
- Fund staff will work with community representatives and civil society stakeholders to develop clear and transparent criteria for allocating funds, assessing grant applications, and making funding decisions. These criteria will be accessible to all stakeholders.
- Grant recipients will be required to collect post-grant feedback from communities, which can be independently verified by fund staff. Communities will also be offered a channel through which to provide feedback directly to fund staff.
- Grants will be awarded to proposals that meet the fund criteria on a rolling basis until the funds are exhausted.
- Grant recipients must demonstrate the ability to reach marginalized or underserved communities.
- Fund staff, as needed, will help grant-seeking communities that have not identified support providers to find qualified organizations that possess a strong understanding of the community context and can meet their needs.



THE PRINCIPLES IN PRACTICE: HOW A POOLED FUND COULD WORK

The palm oil sector is ripe for a pooled fund. Typically, multiple enterprises are involved in a single plantation, which may have a strong interest in meaningful community engagement as a way to resolve a potential land dispute.

For example, let's say there is an African agri-company developing an abandoned palm oil plantation with financial backing from a development bank. Five years earlier a local company had cleared the land without having obtained the FPIC of the affected communities.

In this scenario, the agri-company might be a joint

- Photos Source: Lamin Mansarray climbs one of his palm trees to harvest the kernels which will be processed into palm oil, a cash crop of significant yearly value. Masethele, Bombali District, Sierra Leone. © 2013 Aubrey Wade. All rights reserved

venture in which a 30 percent stake is held by a Singapore-based trader that is a member of the Roundtable on Sustainable

Palm Oil, for example. The trader could supply international Fast Moving Consumer Goods (FMCG) companies, who in turn supply to retailers. The trader's major FMCG clients and retailers may be in scope of the CSDDD and have prioritized FPIC in their risk assessment. Additionally, the trader might recognize that the lack of FPIC in the project's legacy may create significant social unrest and reputational damage and communicate to the agri-company that community engagement is a top priority.

If a pooled fund were in place, the agri-company could make the community aware of its existence through a local CSO. With the help of the CSO, the

- Photos Source: Sierra Leone, Africa.



community would reach out to a grassroots service provider to seek support. The grassroots legal empowerment organization and the community would then sign a simple MOU reflecting that the community wants legal and technical support to engage in an FPIC process regarding their customary lands.

Either the community or the organization could review the grant criteria and apply for a grant from the fund. The grant selection panel would then review the application, approve the grant and disburse the funds to the frontline justice organization.

Under the terms of the grant, the grassroots legal empowerment organization would regularly collect post-grant feedback from communities, which can be independently verified by



fund staff. Fund staff would also inform the community about how to provide feedback to the fund directly.

As a result of the support, the community would be able to deliberate and form a position in discussions with the company, and the company and community either enter into a fair agreement or the company obtains a clear statement that the project should not go ahead. Assuming an agreement could be reached, the grassroots legal empowerment organization might help the community to establish a community-based monitoring process and a dispute resolution mechanism. If pre-agreed boundaries on land use are broken, the community could activate the defined dispute resolution process, preventing escalation or an entrenched dispute.

Next Steps: Building a Coalition to Launch a Pilot Fund

To make this concept a reality, the next step is to turn stakeholder interest into action by forming a coalition of private sector actors, including investors and operating companies, as well as CSOs, including grassroots legal empowerment organizations with experience supporting communities during land-based investments.

The coalition will work to identify the most promising scenario to pilot the concept where private sector demand and willingness to contribute to a funding facility are strong. In the meantime, we are continuing to keep our eyes open for examples and explore lessons learned as part of finding the right fit.

The coalition will co-design the governance and operation of the fund in accordance with the principles and design elements outlined in this brief. The pilot fund should cover the range of services communities need throughout the investment life cycle – from negotiations to grievance redress to project closure at the end of an investment.

For Further Reading

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Glossary of Terms

Free, Prior and Informed Consent (FPIC) - implies obtaining consent from Indigenous Peoples for any activities undertaken on their land. Free implies that there is no coercion, intimidation or manipulation. Prior implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities to allow time for indigenous consultation/consensus processes. Informed implies that the information provided covers a range of project aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail.⁴⁴

Indigenous Peoples - inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live.⁴⁵

Human Rights and Environmental Due Diligence (HREDD)- the process by which companies can efficiently identify, prevent, mitigate and account for the negative environmental and social impacts of their activities or those of their subsidiaries, subcontractors, and suppliers.⁴⁶

Land tenure - refers to the arrangements whereby people hold, access, use and manage land and natural resources, whether individually or collectively.⁴⁷

Net present value - the present value of the cash flows at the required rate of return of a project compared to the initial investment⁴⁸.

Endnotes

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